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Paper No. 7
Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re David Lucas

Serial No. 76/308,467

Basil B. Travis for David Lucas.

Wanda Kay Price, Trademark Examining Attorney, Law Office
111 (Craig Taylor, Managing Attorney).

Before Cissel, Hairston and Bottorff, Administrative
Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark NOVA VINEYARD (in typed form) for "wine."¹
Applicant has disclaimed VINEYARD apart from the mark as
shown.

¹ Application Serial No. 76/308,467, filed September 4, 2001.
The application is based on intent to use under Trademark Act
Section 1(b), 15 U.S.C. §1051(b).

The Trademark Examining Attorney has refused registration on the ground that applicant's mark, as applied to applicant's goods, so resembles the mark NOVA, previously registered for "vodka,"² as to be likely to cause confusion, to cause mistake, or to deceive. See Trademark Act Section 2(d), 15 U.S.C. §1052(d).

When the refusal was made final, applicant filed this appeal. Applicant and the Trademark Examining Attorney have filed main briefs.³ Applicant did not file a reply brief, nor did applicant request an oral hearing. We affirm the refusal to register.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods

² Registration No. 1,536,647, issued April 25, 1989. Affidavits under §§8 and 15 accepted and acknowledged.

³ We grant the Trademark Examining Attorney's request for acceptance of her untimely-filed brief, in view of the circumstances stated in the request.

and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We turn first to a determination, under the second *du Pont* evidentiary factor, of the similarity or dissimilarity of applicant's and registrant's respective goods. It is not necessary that the respective goods or services be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods or services are related in some manner, or that the circumstances surrounding their marketing are such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods or services. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ2d 910 (TTAB 1978).

We find that applicant's "wine" and registrant's "vodka" are sufficiently related that confusion is likely to result if the goods are marketed under similar marks.

The Trademark Examining Attorney has made of record twenty-three third-party registrations in which "wine" and "vodka" are both included in the identification of goods. Although these registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, they nevertheless are probative evidence to the extent that they suggest that the goods or services identified therein are of a type which may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988). We find that this evidence suffices to establish that wine and vodka are related goods, for purposes of the second *du Pont* evidentiary factor. We note as well that the Board previously has specifically held that wine and vodka are related goods. See *Monarch Wine Co Inc. v. Hood River Distillers, Inc.*, 196 USPQ 855 (TTAB 1977). Cf. *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003)(malt liquor and tequila are related goods).

We next find, under the third *du Pont* factor, that wine and vodka are marketed in the same trade channels and to the same classes of purchasers. Neither applicant's nor registrant's identification of goods includes any

restrictions or limitations as to trade channels or classes of purchasers, and we accordingly presume that applicant's and registrant's goods are marketed in all normal trade channels for such goods (including liquor stores and other beverage retailers) and to all normal classes of purchasers for such goods (including ordinary consumers). See *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

Finally, we turn to a determination of whether applicant's mark and opposer's mark, when compared in their entireties in terms of appearance, sound and connotation, are similar or dissimilar in their overall commercial impressions. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant

feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Applying these principles in the present case, we find that applicant's mark NOVA VINEYARD is confusingly similar to the cited registered mark NOVA. Given the merely descriptive significance of the term VINEYARD, we find that NOVA is the dominant feature in the commercial impression created by applicant's mark, i.e., the feature of applicant's mark which is most likely to be perceived and recalled by purchasers as a source indicator. Indeed, in view of the fact that applicant's goods are identified as "wine," the word VINEYARD in applicant's mark is somewhat superfluous in terms of its contribution to the commercial impression created by applicant's mark. Thus, although we do not disregard the word VINEYARD in applicant's mark, we find that it is entitled to less weight in our comparison of the marks. See *In re National Data Corp.*, *supra*. The dissimilarities between the marks which result from the presence of the term VINEYARD in applicant's mark (and the absence of that term from the cited registered mark) simply do not suffice to overcome the overall similarity between the marks which results from the presence in both marks of the arbitrary term NOVA.

The record shows that vodka and wine are types of goods which may emanate from a single source under a single mark. See discussion *supra*. In view thereof, and in view of the arbitrary nature of the term NOVA as applied to these goods, we find that purchasers are likely to assume that a single entity produces both NOVA vodka and NOVA VINEYARD wine. Purchasers are likely to understand that the presence or absence of the term VINEYARD from the respective marks is a result of the difference in the goods themselves, i.e., that the entity which produces NOVA brand alcoholic beverages would use the generic term VINEYARD in the mark for its wine, but not in the mark for its vodka. Conversely, we find that purchasers are not likely to assume, merely from the presence of the generic term VINEYARD in the mark for wine and despite the presence in both marks of the arbitrary term NOVA, that NOVA brand vodka and NOVA VINEYARD brand wine originate from different sources.

In summary, we find that applicant's mark NOVA VINEYARD and registrant's mark NOVA are similar rather than dissimilar when considered in their entireties; applicant has taken registrant's mark whole and simply added the merely descriptive term VINEYARD. We further find that wine and vodka are related goods which are marketed in the

same trade channels to the same classes of purchasers. Based on these findings, we conclude that confusion is likely, and that registration of applicant's mark is barred by Trademark Act Section 2(d). See *In re Majestic Distilling Company, Inc.*, *supra*.⁴

Decision: The refusal to register is affirmed.

⁴ In the last section of its brief, applicant quotes the statutory definition of "trademark" and contends that its mark "complies" with that definition because it "identifies and distinguishes the source of his wine as NOVA VINEYARD while NOVA for vodka does not but is merely a product name." To the extent that applicant, by this argument, is contending that the cited registered mark is not a "trademark" within the statutory definition of that term because it does not identify "source" but instead is "merely a product name," we reject the argument as unpersuasive on its merits and because it constitutes an attack on the validity of the cited registration which is not permissible in this *ex parte* proceeding.