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Mailed:  
February 24, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Savisa (Pty) Ltd.

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Serial No. 78154196

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Arlen L. Olsen of Schmeiser, Olsen & Watts for Savisa (Pty) Ltd.

Andrea D. Saunders, Trademark Examining Attorney, Law Office 108 (David Shallant, Managing Attorney).

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Before Seeherman, Chapman and Drost, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Savisa (Pty) Ltd., a corporation of the Republic of South Africa, has appealed from the final refusal of the Trademark Examining Attorney to register SONOP for "alcoholic beverages, namely, wines, distilled spirits and liqueurs."<sup>1</sup> Applicant has stated that "the foreign wording

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<sup>1</sup> Application Serial No. 78154196, filed August 14, 2002, and asserting a bona fide intention to use the mark in commerce.

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in the mark translates into English as SUNRISE."

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the mark SUNRISE, previously registered for "wine,"<sup>2</sup> that, if used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

The appeal has been fully briefed. Applicant did not request an oral hearing.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

As a preliminary matter, we note that in its brief applicant points to the du Pont factor of the market interface between applicant and the owner of a prior mark, and discusses the effect of a consent. However, applicant has not provided a consent. Applicant had, on September 30, 2003, advised the Examining Attorney that it was

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<sup>2</sup> Registration No. 2134554, issued February 3, 1998; Section 8 affidavit accepted; Section 15 affidavit received.

"currently entering into negotiations" with the owner of the cited registration, and requested that examination of the application be suspended. The Examining Attorney denied this request because it was against Office policy to suspend proceedings for this reason prior to the issuance of a final Office action. After filing its notice of appeal, applicant did not ask that the Board suspend action in the appeal proceeding so that applicant could pursue its negotiations. (Negotiating for a consent agreement will normally constitute good cause for requesting an extension of time to file an appeal brief.) Instead, applicant merely stated, at page 11 of its 12-page brief, that it was "currently exchanging documents requisite to the consent to register," and that it was placing the Board "on notice that a consent to registration agreement may be submitted during the course of the present appellate proceedings." That statement was obviously not a request for suspension, and as it was made within the body of the brief, it was not sufficient to advise the Board that obtaining a consent was being contemplated. It is further noted that applicant did not mention any negotiations in its reply brief, which was filed on December 13, 2004. In any event, applicant had more than a year from the date it advised it was seeking a consent agreement (and almost two years from the mailing

date of the Office action refusing registration based on the registrant's registration) to obtain a consent agreement, and was not able to do so.

Turning to the other du Pont factors, in any likelihood of confusion analysis two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Here, the goods are, in part, identical. The cited registration is for wine, and wine is one of the goods identified in applicant's application. Because the goods are legally identical, they are presumed to travel in the same channels of trade and be sold to the same classes of consumers. These factors, thus, favor a finding of likelihood of confusion.

When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Here, applicant's mark is SONOP, which applicant has stated translates into English as SUNRISE. SUNRISE is the cited mark. Under the

doctrine of foreign equivalents, in which foreign words from common languages are translated into English to determine their degree of confusing similarity to English word marks, see *In re Ness & Co.*, 18 USPQ2d 1815 (TTAB 1991), the marks are identical in meaning. See also, 3 J.T. McCarthy, McCarthy on Trademarks and Unfair Competition, §23.36 (4<sup>th</sup> ed. 2001).

We note that, in its brief, applicant makes the statement that "where a mark has a foreign equivalent translation it is well-established that the test for determining a likelihood of consumer confusion is 'whether there is any likelihood that an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question.'" p. 3. Applicant cites *Mushroom Makers, Inc. v. R.G. Barry Corp.*, 580 F.2d 44, 199 USPQ 65 (2d Cir. 1978). The internal quoted language is accurately taken from that decision, but the case did not involve the doctrine of foreign equivalents in any respect; rather, that case involved the marks MUSHROOM and MUSHROOMS.

Unlike many of the cases involving a consideration of the doctrine of foreign equivalents in which the Courts and the Board have found that the foreign word and the English word are not direct translations, in this case applicant

does not dispute that the meaning of the marks is identical. Cf. *In re Sarkli, Ltd.*, 721 F.2d 353, 220 USPQ 111 (Fed. Cir. 1983). Instead, applicant argues that, because SONOP is a word in Afrikaans, an appreciable number of American consumers would not be familiar with the translation of SONOP as SUNRISE.

In support of this position, applicant submitted an excerpt from TheFreeDictionary.com which provides a table called "Primary Language at Home (2000)" and which lists each language, followed by their percentage. Afrikaans is listed under the category of "Other West Germanic languages," with the percentage of "0.096%." Applicant asserts, based on this information, that Afrikaans is "a language spoken by less than 0.1% of Americans. We believe that applicant has misinterpreted this table. It shows percentages of "Primary Language at Home." This reflects the language that is spoken as the primary language in peoples' homes; this is not the same as percentages of Americans who know a particular language. Thus, people may speak English at home, but may still have studied another language at school. Or people who have emigrated to the United States from another country, or have lived abroad, or whose parents or relatives are from another country, may be familiar with, or even fluent in, a

foreign language, but may still speak English as the primary language in their homes. In this connection we note that, with the exception of Spanish, there is no other language listed in the table that reaches the level of even one percent. For example, Italian is listed as the primary language at home for 0.384% of Americans, although in *In re Ithaca Industries, Inc.*, 230 USPQ 702, 704-05 (TTAB 1986) the Board stated that "it does not require any authority to conclude that Italian is a common, major language in the world and is spoken by many people in the United States." Similarly, Japanese is listed with a percentage of "0.182%," but in *Matsushita Electric Industrial Co. v. National Steel Constr. Co.*, 442 F.2d 1383, 170 USPQ 98 (CCPA 1971), the doctrine of foreign equivalents was applied to the Japanese equivalent of NATIONAL in Katakana characters. The percentage given for "Other West Germanic languages" is higher than the percentages of people whose primary language at home is, for example, Armenian, Hebrew, Yiddish, Scandinavian languages, Thai and Hungarian.

The Board has previously found, at least implicitly, that words in Afrikaans can fall under the doctrine of foreign equivalents. *Consolidated Cigar Corporation v. Rembrandt Tobacco Corporation (Overseas) Limited*, 176 USPQ 159 (TTAB 1972) involved the issue of whether OUDE MEESTER,

which in Afrikaans translates as "Old Master," was likely to cause confusion with DUTCH MASTERS. Although the Board found that confusion was not likely, it accepted that the OUDE MEESTER was the equivalent of OLD MASTER, and that it should be viewed as such for the purpose of comparing the marks.

Moreover, the information of record in the present appeal confirms this view. The Examining Attorney has submitted a report from the USPTO translator for "German & the principal Germanic languages: Norwegian, Danish, Swedish, Dutch and Afrikaans." He states that Afrikaans is a well-established language, recognized by all of the advanced and developed nations, and is a form of old Dutch. It "is a European language, and that is why it is familiar in the USA." It is also one of the principal Germanic languages, spoken by more than 20 million people. It is taught in the schools in the Republic of South Africa, and all road signs there are in Afrikaans as well as English. The translator also states that SONOP is the same in Afrikaans as "sonsopgang," which became "zonsopgang" in Dutch. The word is composed of "SON" which means "SUN" and a shortened form of OPGANG (AUSGANG in German). With his report the translator has provided materials taken from the

Internet (WebSearch) which state that Afrikaans is one of the official languages of South Africa.

The World Almanac and Book of Facts, 2004,<sup>3</sup> of which we take judicial notice,<sup>4</sup> states that six million people speak the language, with significant numbers in ten countries. The overall number compares with the number of people who speak Finnish, Catalan and Slovak, and is larger than the number of people who speak Hebrew, Danish, Sicilian and Yiddish. Facts about the World's Languages: An Encyclopedia of the World's Major Languages, Past and Present,<sup>5</sup> of which we also take judicial notice, states that "Afrikaans is the home language of 6.2 million people in South Africa (out of a total population of about 44 million people). Afrikaans is spoken as a second or third language by an indeterminate but very large number of Black South Africans (who speak Bantu languages), Asians, and English-speaking Whites. Afrikaans is the first language of about 152,000 speakers in Namibia. ...it remains the dominant lingua franca of Namibia's total population of about 1.6 million." p. 4.

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<sup>3</sup> McGeeveran, W ., editorial dir., © 2004.

<sup>4</sup> The Board may take judicial notice of standard reference works. Sprague Electric Co. v. Electrical Utilities Co., 209 USPQ 88 (TTAB 1980).

<sup>5</sup> Garry, J. and Rubino, C., eds., © 2001.

Because Afrikaans is taught in the schools, it is reasonable to conclude that, although not their primary language, most English-speaking South Africans would be familiar with the Afrikaans language, and would be able to translate a relatively simple word such as SONOP as SUNRISE. Further, those English speakers who are familiar with Dutch are likely to be able to understand that SONOP means SUNRISE.

As a modern language of a very large country, as well as a major language of five other countries, we do not view Afrikaans as obscure. People from the Republic of South Africa are likely to emigrate to or visit the United States, and obviously the English-speaking people from that country would not encounter a language barrier here. In discussing a reason for the doctrine of foreign equivalents, in the context of descriptive or generic terms, the Second Circuit said that it rests on the assumption that "there are (or someday will be) customers in the United States who speak that foreign language. Because of the diversity of the population of the United States, coupled with temporary visitors, all of whom are part of the United States marketplace, commerce in the United States utilizes innumerable foreign languages."

Otokayama Co. v. Wine of Japan Import Inc., 175 F.3d 266, 50 USPQ2d 1626, 1629 (2d Cir. 1999).

Accordingly, because Afrikaans is a modern language which is not obscure, and because there is no dispute that SONOP means SUNRISE, we find that the doctrine of foreign equivalents applies, and that the marks should be considered the same in meaning. It is because of this identical meaning that the du Pont factor of the similarity of the marks favors a finding of likelihood of confusion. As an additional point, however, we note that there is some phonetic similarity between the marks as well, with the initial syllable in each mark being pronounced the same. Moreover, the cited mark SUNRISE is an arbitrary mark for wine, and there is no evidence of any third-party use of this or similar words for the goods at issue. Accordingly, this factor also favors a finding of likelihood of confusion.

Applicant argues that the du Pont factor of "conditions under which and buyers to whom sales of applicant's goods are made" preclude confusion. It is applicant's contention that its goods "are purchased by sophisticated consumers who purchase the goods only after making a careful selection. Consumers purchasing either Appellant's goods or wine in general are particularly

concerned with product quality and readily recognize differentiations between competing brands." Brief, p. 8. Among these concerns, according to applicant, is the geographic location where the wine is made.

The problem with applicant's argument is that its goods, and those of the registrant, are identified solely as "wine." There is no limitation in the identifications as to the price or the type of customers or the channels of trade. Thus, we must deem applicant's and the registrant's goods to be sold through all channels of trade that are appropriate for the sale of wine, and to all appropriate classes of customers. Wine is bought by the general public. Some purchasers may well be sophisticated consumers who purchase wine only after making a careful selection. However, wine purchasers may also be people without a great knowledge of wine, who simply want a bottle to accompany a meal, or buy jug wine for a party or to make punch, or would like to bring a bottle of wine as a hostess gift. For such consumers, wine may very well be an impulse purchase, made without a great deal of thought or deliberation, and without regard to the geographic origin of the wine.

Applicant has argued that the wine reviews it has submitted indicate that wine originating from Sonop Wine

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Farm is known for its quality. Excerpt for one excerpt, all of the reviews made of record by applicant are from foreign websites: the United Kingdom, the Netherlands (in Dutch) and the Cocos Islands (in German). Even those people who are familiar with applicant's SONOP wine from its sales or promotional efforts abroad and know that it is made in South Africa are likely to believe, upon encountering the mark SUNRISE on identical goods in the United States, that applicant is using the English translation of its mark in marketing its wine in the United States. Or such consumers may believe that applicant has adopted the English version of its SONOP mark for wines it makes in the United States. In either event, consumers are likely to believe that there is a connection or sponsorship between the maker of SONOP wine and SUNRISE wine.

Finally, to the extent that there is any doubt on the issue of likelihood of confusion, we follow the well-established principle that such doubt must be resolved in favor of the registrant and prior user. In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Decision: The refusal of registration is affirmed.