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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re El Galan, Inc.

Serial No. 86961428

Frank Herrera of H New Media Law,
for El Galan, Inc.

Clare Cahill, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.

Before Taylor, Pologeorgis and Larkin,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

El Galan, Inc. (“Applicant”) seeks registration on the Principal Register of the mark TERNURA (in standard characters) for “cigars” in International Class 34.¹

The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of

¹Application Serial No. 86961428, filed on April 1, 2016, based on an allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The application includes the following translation of the mark: The English translation of the word “TERNURA” in the mark is “KINDNESS.”

likelihood of confusion with the registered mark TERNURA (also in standard characters) for “liquor; tequila; vodka; wines” in International Class 33.²

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed. We affirm the refusal to register.³

I. Preliminary Matter – Evidentiary Objection

We initially turn to an evidentiary objection lodged by the Examining Attorney regarding evidence presented by Applicant for the first time with its appeal brief. The Examining Attorney objects to various search results from Yahoo, Bing, and Google,⁴ as well as the submission of a screenshot from the Alcohol and Tobacco Tax and Trade Bureau website, an Alcohol and Tobacco Tax and Trade Bureau Certificate of Label Approval/Exemption form, and an image of Registrant’s specimen of use attached as exhibits to Applicant’s appeal brief.

It is well-settled that the record in an *ex parte* proceeding should be complete prior to appeal. Trademark Rule 2.142(d); 37 CFR § 2.142(d). Exhibits that are attached to a brief but not made of record during examination are untimely, and will not be considered. *See In re Fitch IBCA, Inc.*, 64 USPQ2d 1058, 1059 n.2 (TTAB 2002);

² Registration No. 4994298, issued on July 5, 2016. The registration includes the following translation of the mark: The English translation of the word “TERNURA” in the mark is “TENDERNESS.”

³ Unless otherwise specified, all TTABVUE and Trademark Status and Document Retrieval (“TSDR”) citations reference the docket and electronic file database for Application Serial No. 86961428. All citations to the TSDR database are to the PDF version of the documents.

⁴ We note that Applicant submitted Google search results with its Request for Reconsideration. *See* Applicant’s June 28, 2017 Request for Reconsideration. These search results, however, differ from those that were submitted with its appeal brief.

see also TBMP §§ 1203.02(e) and 1207.01 (June 2017). To the extent Applicant wished to introduce additional evidence after its appeal had been filed, Applicant should have filed a written request with the Board to suspend the appeal and remand the application for further examination pursuant to Trademark Rule 2.124(d). Applicant did not do so. Accordingly, we give this evidence submitted for the first time with the appeal brief no further consideration in our analysis. In view thereof, the Examining Attorney's evidentiary objection is sustained.⁵

II. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the

⁵ We additionally note that embedded in the body of its appeal brief, Applicant provides a list of hyperlinks to various websites purportedly to establish its renown in the cigar industry. *See* Applicant's Appeal Brief, p. 13, 7 TTABVUE 14. The Examining Attorney did not object to these lists and, therefore, we deem any objection to this evidence waived. *See* TBMP § 1207.03 and cases cited therein. Notwithstanding, such a listing of website links has no probative value, and the mere listing of a link to a website does not make the material that might be found on that website of record. *See In re Planalytics Inc.*, 70 USPQ2d 1453, 1457 (TTAB 2004); *see also In re King Koil Licensing Co.*, 79 USPQ2d 1048, 1050 (TTAB 2006) (in the *ex parte* context, web site links "do little to show the context within which a term is used on the web page that could be accessed by the link."). Accordingly, we have given no further consideration to these website hyperlinks in our analysis.

cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

A. Similarities of the Marks

Regarding the first *du Pont* factor, the similarity of the marks, we note that the the marks are identical, standard character marks. The identity of the marks “weighs heavily” in support of finding a likelihood of confusion. *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984). And because the marks are identical, the degree of similarity between the goods that is required to support a finding of likelihood of confusion is reduced. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *Time Warner Ent’mt Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002); and *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).

Applicant argues that the marks convey different commercial impressions in relation to the involved goods because they travel in different trade channels and use different types of packaging.⁶ Applicant’s arguments are unpersuasive. As explained *infra*, the evidentiary record demonstrates that Applicant’s cigars and Registrant’s alcoholic beverages travel in similar channels of trade. Nor are we persuaded by Applicant's argument that we must look to the product packaging or other extrinsic evidence of the manner in which Applicant’s mark and the cited mark are used in the marketplace to determine the similarities between the marks. Rather, for purposes of our Section 2(d) analysis, we must compare the marks as they appear in the cited

⁶ Applicant’s Appeal Brief, pp. 5-9, 7 TTABVUE 6-10.

registration and application. *Shell Oil Co.*, 26 USPQ2d at 1690 n.4 (“Although Shell argues that its use of RIGHT-A-WAY would be in association with other Shell trademarks, the proposed registration is not so limited. Registrability is determined based on the description in the application, and restrictions on how the mark is used will not be inferred.”). Notwithstanding, while cigars and alcoholic beverages may be packaged differently, consumers may nonetheless be confused as to the source of the goods when their packages bear the identical trademark.

Applicant also argues that even marks that are identical in sound or appearance may create sufficiently different commercial impressions when applied to the parties’ respective goods or services so that there is no likelihood of confusion.⁷ In support of its argument, Applicant cites the following cases:

In re Sears, Roebuck & Co., 2 USPQ2d 1312, 1314 (TTAB 1987) (holding CROSS-OVER for bras and CROSSOVER for ladies’ sportswear not likely to cause confusion, noting that the term “CROSS-OVER” was suggestive of the construction of applicant’s bras, whereas “CROSSOVER,” as applied to registrant’s goods, was “likely to be perceived by purchasers either as an entirely arbitrary designation, or as being suggestive of sportswear which “crosses over” the line between informal and more formal wear . . . or the line between two seasons”);

In re British Bulldog, Ltd., 224 USPQ 854, 856 (TTAB 1984) (holding PLAYERS for men’s underwear and PLAYERS for shoes not likely to cause confusion, agreeing with applicant’s argument that the term “PLAYERS” implies a fit, style, color, and durability suitable for outdoor activities when applied to shoes, but “implies something else, primarily indoors in nature” when applied to men’s underwear); and

In re Sydel Lingerie Co., 197 USPQ 629, 630 (TTAB 1977) (holding BOTTOMS UP for ladies’ and children’s underwear and BOTTOMS UP for men’s clothing not likely to cause confusion, noting that the wording connotes the drinking phrase “Drink Up” when applied to men’s

⁷ *Id.*, pp. 6-7, 7 TTABVUE 7-8.

clothing, but does not have this connotation when applied to ladies' and children's underwear).

Unlike the circumstances in the cases cited by Applicant, the mark TERNURA or the English translations thereof, i.e., kindness or tenderness, do not impart a distinct meaning when applied to cigars or alcoholic beverages; instead, consumers would perceive them as arbitrary terms as applied to the parties' respective goods. Accordingly, the cited cases are inapposite to our analysis of the similarities of the marks in this appeal.

The marks at issue are identical in sound, appearance, connotation and commercial impression. In view thereof, we find that the first *du Pont* factor weighs strongly in favor of finding a likelihood of confusion.

B. Similarity of the Goods

The next step in our analysis is a comparison of the goods identified in Applicant's application vis-à-vis the goods identified in the cited registration, the second *du Pont* factor. See *Stone Lion Capital Partner, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); see also *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.2d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). It is settled that it is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. The respective goods need only be "related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that goods emanate from the same source." *Coach Servs. Inc.*

v. Triumph Learning LLC, 668 F.3d 1356, 1010 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *see also Martin's Famous Pastry Shoppe*, 223 USPQ at 1290; *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or offered by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both Applicant's goods and the goods identified in the cited registration. *In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave sweetener related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores). Even when goods are not intrinsically related, the use of identical marks can lead to the assumption that there is a common source. *Shell Oil Co.*, 26 USPQ2d at 1689. In this regard, the issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984).

The Examining Attorney submitted Internet evidence demonstrating that third parties produce and offer for sale both cigars and alcoholic beverages under the same mark:⁸

⁸ February 1, 2017 Office Action, TSDR p. 6-20.

- www.thomsponcigar.com and www.patrontequila.com showing that Patron produces and offers for sale cigars and tequila under the same mark;
- an undated article from the website www.cigar-coop.com entitled “Cigar Review: Señor Rio Añejo Toro,” discussing how the company Jalisco International Imports produces tequila and cigars under the same trademark;
- www.vineyard48wine.com showing that Vineyard 48 produces and offers for sale cigars and wine under the same mark;
- www.hscigars.com showing that Hammer + Sickle produces and offers for sale cigars and vodka under the same mark;
- www.bellaterraranch.com showing that Bellaterra Ranch produces and offers for sale cigars and wine under the same mark; and
- www.schradercellars.com showing that Shrader produces and offers for sale cigars and wine under the same mark.

The Examining Attorney also argues that the parties’ respective goods are related because they are complementary products that are marketed together for simultaneous consumption.⁹ To support her argument, the Examining Attorney submitted the following evidence:¹⁰

- An undated article from the website www.cigars4dummies.com entitled “Tequila and Cigars.” The first two paragraphs of the article read as follows:

What comes to your mind at first when hearing the word tequila? Acapulco beach, bright sun and bronzed girls ;) on a warm evening at the terrace in a Mexican restaurant with a beautiful lady next to you? A hot and passionate Latino dance in a crowded place should also come to mine while drinking or just mentioning tequila.

Some of us also imagine a glass of fine tequila with a good cigar though until quite recently this pairing seemed weird to the majority of aficionados. Cognac, whisky, wine – these are the drinks that created themselves a solid reputation while matching

⁹ Examiner’s Statement, pp. 7-8, 9 TTABVUE 8-9.

¹⁰ February 1, 2017 Office Action, TSDR pp. 21-44.

with cigars and tequila was not included in this list. And now when this noble beverage takes part in our cigar society, let's enumerate its types.

- An undated article from the website www.cigarworld.com entitled "How to Pair Cigars and Drinks";
- An article from the website www.jrcigars.com dated June 22, 2015 and entitled "Pairing Drinks with Cigars." The article explains the best ways to pair cigars with wine, beer, rum, and spirits;
- An article from the website www.cigarafficionado.com dated December 23, 2015 and entitled "Pairing the Top Five Cigars of 2015 with Spirits";
- An undated article from the website www.stogiereview.com entitled "Pairing Wine and Cigars: An Intermediate Guide";
- An article from the website www.cigarcity.com dated May 11, 2015 entitled "Pairing Wine with Cigars";
- An article from the website www.liquor.com dated February 3, 2010 entitled "Cigar Bar." The article begins with the following statement: "There are a few things that go together better than a stiff drink and a cigar." The article suggests cigar pairings with particular types of scotch, rum, cognac and cocktails.

Evidence of complementary use, as presented here, is relevant in determining whether the goods are related for purposes of likelihood of confusion. *Martin's Famous Pastry Shoppe*, 223 USPQ at 1290; *In re Vienna Sausage Mfg. Co.*, 230 USPQ 799 (TTAB 1986) (applicant's sausages are complementary to registrant's cheese since they are frequently used together as sandwich ingredients, or as cold cuts, or as hors d'oeuvres and may very well be purchased in the same store); *see also Polo Fashions, Inc. v. La Loren, Inc.*, 224 USPQ 509, 511 (TTAB 1984) (applicant's bath sponges are complementary in nature to the personal products sold by opposers and, therefore, "these respective products would go hand in hand and would be sold to the same customers through the same marketing channels"). Likewise, in this case, the

evidence presented by the Examining Attorney establishes that cigars and the several alcoholic beverages identified in the cited registration are consumed together (*e.g.*, articles recommending various alcoholic beverage and cigar pairings). When those facts are considered in conjunction with the arbitrary nature of the mark TERNURA, we find that Applicant's cigars and Registrant's alcoholic beverages will be encountered by the same consumers under circumstances that could, because of the identity of the marks, give rise to the mistaken belief that both products originate from the same source.

The circumstances of this case are similar to those in *John Walker & Sons Ltd. v. Tampa Cigar Co.*, 124 F. Supp. 254, 103 USPQ 21 (S.D. Fla. 1954), *aff'd* 222 F.2d 460, 105 USPQ 351 (5th Cir. 1955), in which the court found a likelihood of confusion and enjoined defendant from using the mark JOHNNIE WALKER for cigars in view of plaintiff's mark JOHNNIE WALKER for whiskey:

Whiskey and cigars are closely related in distribution and use. Hotels, restaurants and bars supply cigars as well as whiskey to their guests and customers. People frequently smoke cigars while drinking whiskey. Pictures of Johnnie Walker smoking a cigar have been used in advertisements of JOHNNIE WALKER whiskey. Ashtrays and books of matches with the JOHNNY WALKER name and picture on them have been used to advertise JOHNNIE WALKER whiskey.

103 USPQ at 22.

Likewise, in *Geo. A. Nickel Co. v. Stephano Bros.*, 155 USPQ 744 (TTAB 1967), the Board sustained an opposition brought by the owner of the mark CASCADE for whiskey against an application to register CASCADE for cigarettes even though the record did not demonstrate that Opposer's mark was famous.

But regardless of precedents, we entertain considerable doubt on the basis of the present record that the mark “CASCADE” can be used for both whisky and cigarettes without causing confusion or mistake or deception, and such doubts as we have in the matter must be resolved in favor of opposer, the prior user.

155 USPQ at 745.

Applicant contends, however, that it is well settled that tobacco and alcohol are not “related” unless the prior registered mark is well-known or famous and an applicant has chosen its mark to exploit registrant’s mark.¹¹ In support of its argument, Applicant cites our primary reviewing court’s predecessor’s decision in *Schenley Distillers, Inc. v. Gen. Cigar*, 427 F.2d 783, 166 USPQ 142, 143 (CCPA 1970). Applicant argues that because Registrant’s TURNURA mark is not well-known or famous and that it is clearly not marketed in a way to gain recognition, confusion is not likely notwithstanding the identity of the parties’ marks.¹²

¹¹ Applicant’s Appeal Brief, p. 3, 7 TTABVUE 4.

Applicant also questions whether Registrant’s mark remains in use as any liquor, wine, tequila or vodka requires a Certificate of Label Approval (“COLA”) to sell such goods in U.S. interstate commerce, and a search of the Alcohol and Tobacco Tax and Trade Bureau (TTB) database does not show that Registrant has a current valid COLA under its name nor the name of its registered mark. *Id.* at pp. 3-4, 7 TTABVUE 4-5. Applicant’s argument is an impermissible collateral attack on the cited TERNURA registration. An abandonment or nonuse challenge would be appropriate in a cancellation proceeding, but it is not appropriate or permissible in this *ex parte* proceeding. *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997) (“Dixie’s argument that DELTA is not actually used in connection with restaurant services amounts to a thinly-veiled collateral attack on the validity of the registration ... the present *ex parte* proceeding is not the proper forum for such a challenge.”); *Cosmetically Yours, Inc. v. Clairol Inc.*, 424 F.2d 1385, 165 USPQ 515, 517 (CCPA 1970) (“[I]n the absence of a counterclaim for cancellation under section 14 of the Act (15 U.S.C. 1064), it is not open to an applicant to prove abandonment of the opposer’s registered mark; and appellant’s argument (upon which it now stakes its appeal) that opposer no longer uses the registered mark ‘Come Alive’ must be disregarded.”).

¹² *Id.*

In *Schenley*, the Court rejected appellant's contention that it has been recognized as a principle that the use of the same mark on tobacco and alcoholic beverage products results in likelihood of confusion. In particular, the Court stated that "[i]t is much less likely, in the absence of a famous name or trademark evincing a common origin, that a consumer would expect that a liquor producer would employ the same name on goods even more diverse than different types of alcoholic beverage." *Id.* The Court also stated that "[g]iven the industry practice, we think that the ordinary consumer would not be conditioned to expect the same mark to be used on such unrelated products as cigars and tequila." *Id.* at 144.

We initially note that Applicant's argument that the absence of fame of the Registrant's mark should be treated as a factor in Applicant's favor is untenable in an *ex parte* proceeding. The prior mark's fame is generally considered only in the context of *inter partes* proceedings because, "in *ex parte* proceedings, the examining attorney is not expected to submit evidence regarding the fame of the cited mark." TMEP § 1207.01(d)(ix) (Oct. 2017). And, in an *ex parte* analysis of the *du Pont* factors for determining likelihood of confusion, the "fame of the mark" factor is normally treated as neutral when no evidence as to fame has been provided. *See In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1086-88 (TTAB 2016); *see also In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009) (noting that the absence of evidence as to the fame of the registered mark "is not particularly significant in the context of an *ex parte* proceeding").

Nonetheless, we note that the evidence of record suggests that alcohol industry practice has evolved since the issuance of the *Schenley* decision approximately 48 years ago to the extent that in the current marketplace it is not an uncommon industry practice for distillers and vintners, and not just those with “a famous name or trademark,” *Schenley*, 166 USPQ at 143, to produce and offer both cigars and alcoholic beverages under the same mark. Moreover, the evidence demonstrates that cigars and alcoholic beverages are complementary goods in terms of use. Accordingly, the evidence shows that in today’s marketplace consumers are accustomed to cigars and alcohol being sold by the same entity under the same trademark for complementary use.

To be clear, we are not finding that cigars and alcoholic beverages in general are related based upon some abstract similarity between alcohol and tobacco. The record in this case establishes that cigars and alcoholic beverages are not only produced and offered for sale by third parties under the identical mark, but they are also complementary products that are marketed together for simultaneous consumption. As such, when both products are offered under the identical, arbitrary trademark, consumers are likely to believe that the goods originate from the same source. Accordingly, the second *du Pont* factor favors a finding of likelihood of confusion.

C. Similarities in Trade Channels and Classes of Purchasers

Next we consider established, likely-to-continue channels of trade, the third *du Pont* factor. Because the identifications in the application and registration for the marks have no restrictions on channels of trade, we must presume that the goods travel in all channels of trade appropriate for such goods, and to all the usual

customers of them. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981) (citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958)).

The Examining Attorney submitted the following Internet evidence to demonstrate that cigars and various alcoholic beverages, including wine, tequila and vodka, are sold through the same channels of trade and purchased by the same classes of purchasers:¹³

- A screenshot from the retailer The Grob Shop's website (www.grobshopsanibel.com) located in Sanibel, Florida that demonstrates that it sells both alcoholic beverages and cigars;
- Screenshots from the retailer Sherlock's website (www.kennesawwineliquorbeer.com) located in Kennesaw, Georgia demonstrating that it is a purveyor of both alcoholic beverages and cigars;
- A screenshot from the retailer Kona Wine Market (www.konawinemarket.com) showing that it sells wine, beer, spirits and cigars;
- Screenshots from Filo Liquor's website (www.filoliquors.com), a cigar shop and craft beer retailer located in Abilene, Texas, showing that it sells a wide variety of liquor, as well as cigars;
- Screenshots from Cork Liquor's website (www.corkliquor.com), a liquor store with locations in Columbus, Greensburg, and Shelbyville, Indiana, demonstrating that it sells beer, wine, spirits and cigars;
- Screenshots from TownCrier Spirits and Tobacco's website (www.thetowncrier.net), touting that it provides that highest quality of wine, beer, and spirits and has the largest selection of cigars; and
- Screenshots from North Boulder Liquor's website (www.northboulderliquor.com), a liquor store located in Boulder, Colorado that sells wine, craft beers, spirits and cigars.

¹³ July 15, 2017 Office Action, TSDR 7-18.

Regardless of the channels of trade actually utilized by Applicant¹⁴ and Registrant, the evidence of record demonstrates the both alcoholic beverages and cigars can be purchased in liquor stores or other online marketplace retailers which feature spirits and wines, as well as cigars. As such, the third *du Pont* factor regarding the similarity or dissimilarity of established, likely to continue trade channels also favors a finding of likelihood of confusion.

We also note that alcoholic beverages and cigars are general consumer products sold to adult members of the general public and, based on the record, are complementary products that are marketed together for simultaneous consumption. As such, the classes of purchasers of Applicant's goods and Registrant's goods are identical, or overlap significantly.

D. Sophistication of Consumers

We next turn to the fourth *du Pont* factor, the conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing. Applicant urges us to consider consumer sophistication as a factor. However, Applicant has submitted no evidence that either its consumers or those of Registrant

¹⁴ Applicant argues that its TERNURA cigar is a premium cigar and is not sold at any retail store, chain store, gas station or restaurant. Applicant's Appeal Brief, p. 10, 7 TTABVUE 11. However, neither Applicant's goods, as identified in the involved application, nor Registrant's goods, as identified in the cited registration, are limited or restricted as to the quality or type of the goods, trade channels, fields of use, classes of purchasers, or price points. As noted above, we must therefore presume that these goods are marketed in all normal trade channels and to all normal classes of purchasers for such goods. *See In re Elbaum, supra*. Similarly, we must presume that Applicant's "cigars" and Registrant's alcoholic beverages encompass all types of the goods described, including both expensive and inexpensive. *See, e.g., In re Bercut-Vandervoort & Co., 229 USPQ 763 (TTAB 1986)* ("wine" includes all types and price points).

would be sophisticated. While some of the prospective consumers of Applicant's and Registrant's goods may indeed be highly educated and relatively knowledgeable about and exercise some degree of care in their purchasing decisions, this does not mean that all customers for the goods as identified in the application and cited registration are knowledgeable and careful. Because these items, as identified, may be relatively inexpensive and purchased by the public at large, we must assume that the purchasers include casual consumers purchasing relatively inexpensive items. *See Bercut-Vandervoort & Co., supra.* That being said, even assuming that the prospective purchasers are sophisticated and knowledgeable about alcoholic beverages or cigars it does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion, and we must assess the likelihood of confusion from the standpoint of the least sophisticated consumer. *See, e.g., Stone Lion Capital Partners*, 110 USPQ2d at 1163. This fourth *du Pont* factor is therefore neutral.

E. Nature and Extent of Any Actual Confusion

Applicant points to the absence of evidence of actual confusion, the seventh *du Pont* factor, as weighing in its favor. A showing of actual confusion would of course be highly probative of a likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight. *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965). The issue before us is the likelihood of confusion, not actual confusion. *Herbko Int'l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (actual confusion not required). Further, any suggestion that there has been no actual confusion between

the marks based on the coexistence of Applicant's mark and the cited registration is entitled to little probative value in the context of an *ex parte* appeal. *In re Majestic Distilling Co., Inc.*, 65 USPQ2d at 1205; *see also In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984).

Therefore, this *du Pont* factor is neutral.

III. Conclusion

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. We find that the marks at issue are identical and that Applicant's identified goods are related and complementary to Registrant's goods, and that they move in the same or overlapping trade channels and are offered to the same or similar classes of purchasers. We accordingly conclude that Applicant's mark, as used in connection with the goods identified in the application, so resembles the cited mark as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act.

Decision: The refusal to register Applicant's TERNURA mark under Section 2(d) of the Trademark Act is affirmed.