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Subject: U.S. TRADEMARK APPLICATION NO. 76711077 - COW CREEK - N/A - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 76711077 **MARK:** COW CREEK	
CORRESPONDENT ADDRESS: JUSTIN M WELCH BLAZIER CHRISTENSEN BIGELOW & VIRR PC 221 W SIXTH ST STE 2000 AUSTIN, TX 78701-3433	**GENERAL TRADEMARK INFORMATION:** http://www.uspto.gov/trademarks/index.jsp **TTAB INFORMATION:** http://www.uspto.gov/trademarks/process/appeal/index.jsp
APPLICANT: BWBC, Inc.	
CORRESPONDENT'S REFERENCE/DOCKET NO: N/A **CORRESPONDENT E-MAIL ADDRESS:**	

EXAMINING ATTORNEY'S APPEAL BRIEF

The Applicant has appealed the Trademark Examining Attorney's refusal to register the trademark COW CREEK in standard characters on the ground that it is likely to cause confusion with Registration Nos. 4529978 and 4529979 under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d).

FACTS

On March 30, 2012, BWBC, Inc. applied to register the trademark COW CREEK, in standard characters, for beer in International Class 32.[1] The Examining Attorney initially suspended the application pending the disposition of Application Serial Nos. 85448076 and 85448127 for the marks BULL CREEK BREWING, in standard characters, and BULL CREEK BREWING and design, respectively. Both applications identify "beer, craft beer, and ales" in the identification of goods. After the pending applications registered, the Examining Attorney issued a refusal under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), for likelihood of confusion with Registration Nos. 4529978 and 4529979.[2] Following Applicant's response, the Examining Attorney issued a Final Refusal under Section 2(d). On October 23, 2014, Applicant appealed the refusal. The appeal now follows.

ARGUMENT

The Proposed Mark COW CREEK is Likely to Cause Confusion with the Registered Marks.

In a likelihood of confusion analysis, the two main considerations are the similarity of the marks and the relatedness of the goods or services. *Syndicat Des Proprietaires Viticulteurs De Chateauneuf-Du-Pape v. Pasquier Des Vignes*, 107 USPQ2d 1930, 1938 (TTAB 2013) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (C.C.P.A. 1976)); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); *see* TMEP §1207.01. In this case, Applicant's identification of goods consists of "beer". The goods in the cited registrations comprise "beer, craft beer, and ales." In view of the fact that the goods are identical and there are no limitations in the record regarding the class of purchasers or the channels of trade, the primary issue in this case is the similarity of the marks.

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[1] Application Serial No. 76711077, filed on March 30, 2012, based upon use of the mark in commerce under Trademark Act Section 1(a), 15 U.S.C. 1051(b).

[2] Registration Nos. 4529978 and 4529979 registered on May 13, 2014.

A. The Marks Are Highly Similar in Meaning and Commercial Impression.

In a likelihood of confusion determination, marks are compared for similarities in appearance, sound, connotation, and commercial impression. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (*quoting In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (C.C.P.A. 1973)); TMEP §1207.01(b)-(b)(v). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). Further, although the marks are compared in their entireties, disclaimed matter that is descriptive of or generic for a party's goods or services is typically less significant or less dominant when comparing the marks. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997).

The applied-for mark is COW CREEK in standard characters. The registered marks consist of BULL CREEK BREWING, in standard characters, and BULL CREEK BREWING and design. The term "BREWING" is highly descriptive, if not generic, for beer, and has been disclaimed in the registrations.[3] Each mark contains the strong, arbitrary term "CREEK." In support of the overall similarities in the connotation and commercial impression of the marks, the Examining Attorney provided the definition of "bull". A bull may be defined as "an adult male cow."[4] The Examining Attorney also provided several definitions of "cow" which include the following: "*Informal*: a domestic bovine of either sex and any age"[5]; "a domesticated bovine of either sex or any age"[6]; "a domestic bovine animal, whether a steer, bull, cow, or calf" [7]; and "a domestic bovine animal regardless of sex or age."[8] Applicant also provided a definition

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[3] See the definition of "brewery" from THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, Fifth Edition; Final Action, Oct. 22, 2014, p. 19.
[4] MACMILLAN AMERICAN DICTIONARY (online); See Office Action, Sept. 8, 2014, p. 7.
[5] Dictionary.com based on RANDOM HOUSE DICTIONARY, (2012); Suspension Action, July 13, 2012, p. 8.
[6] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, Fifth Edition; Final Action, Oct. 22, 2014, p. 9.
[7] COLLINS AMERICAN ENGLISH DICTIONARY (online); Final Action, Oct. 22, 2014, p. 11.
[8] MERRIAM-WEBSTER (online); Final Action, Oct. 22, 2014, p. 13; *see also*, Applicant's Response, Sept. 22, 2014, p. 14 and Appeal Brief, p. 6, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, 2nd definition.

of "bull" [9] which directs the reader to compare it with the definition of "cow."[10] Therefore, when comparing the marks for *similarities* under the first *du Pont* factor, the wording COW CREEK and BULL CREEK are highly similar in connotation and commercial impression because they both signify a creek named for a bovine. Based on the foregoing definitions, the general commercial impression of "cow" would include any domestic bovine regardless of gender.[11]

Applicant argues that "most people associate 'cow' and 'bull' with separate genders" because the first numbered entry in each of the definitions of record identifies a cow as a female bovine, whereas the Examining Attorney's references are the second and third numbered definitions.[12] There is no basis for this conclusion. Applicant's own evidence from Webster's Dictionary states that "the order of senses is historical." Based on this reference, Applicant incorrectly infers that "the most understood definition is listed first."[13] Additionally, the informal context is more likely to occur in the minds of consumers when used in an informal conversation, such as when purchasing a beer at a bar. [14]

Even if the gender specific definitions of "cow" were the only definition in the record, the refusal of the applied-for mark under Section 2(d) would still be supported. Contrary to Applicant's opening statement in its brief, the Examining Attorney's primary argument is that, overall, the terms "cow *creek*" and "bull *creek*" are *highly similar*. Whether the terms "cow" and "bull" are interchangeable is irrelevant. Both marks identify a creek named for a similar type of bovine. The definitions were provided to show how highly *similar* the terms are. Applicant's arguments focus solely on the gender

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[9] Applicant's Response, July 30, 2012, p. 19.
[10] "Compare" means "to consider or describe as similar, equal or analogous, liken." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, Fifth Edition; Final Action, Oct. 22, 2014, p. 3.
[11] The "word history" of "cow" in WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY states, "Everyone knows that *cow* and *beef* refer to the same animal or at least to the male and female of the same species . . ."; Final Action, Oct. 22, 2014, Exhibit 4, p. 16.
[12] Appeal Brief, p. 7.
[13] *Id*. at 8.
[14] See the description of an "*informal*" definition attached as Exhibit 2 to Final Action, Oct. 22, 2014, p. 5. The informal discourse may be "more likely to occur in conversation than the formal prose." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY.

differences between "cow" and "bull" without any reference to the fact that the connotation of each of the marks is that of a creek named for a type of bovine.

Additionally, Applicant's argument that there can be no likelihood of confusion in this case because "bull" is a subset of "cow" and "*the terms are not interchangeable or synonymous*"[15] is directly contrary to well-established Trademark Law. The cases cited by Applicant do not create a litmus test for word marks that are interchangeable or subsets of each other.[16] "There is no litmus rule which can provide a ready guide to all cases." *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (C.C.P.A. 1973). The determination of likelihood of confusion is a "subjective evaluation" in which prior decisions are of little value. *Star Watch Case Co. v. Junghans, A. G.*, 267 F.2d 950, 122 U.S.P.Q. 370 (C.C.P.A. 1959). In *Kenner Park Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992), the Court of Appeals found PLAY-DOH and FUN DOUGH to be confusingly similar in part due to the "very similar impression" of "play" and "fun" even though the terms are not synonymous or interchangeable. *See also*, *Bose Corp. v. QSC Audio Products, Inc.*, 296 F.2d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002) (Court of Appeals found ACOUSTIC WAVE and POWER WAVE convey *similar* meaning); *General Foods Corp. v. General Mills, Inc*., 167 U.S.P.Q. 638 (TTAB 1970) (ARISE and AWAKE found confusingly similar); *H. Sichel Sohne, GmbH v. Michel Monzain Selected Wines, Inc.*, 202 U.S.P.Q. 62 (TTAB 1979) (BLUE NUN and BLUE ANGEL found similar for wines); *H. Sichel Sohne, GmbH v. John Gross & Co.*, 204 U.S.P.Q. 257 (TTAB 1979) (BLUE NUN and BLUE CHAPEL similar for wines); *Downtowner Corp. v. Uptowner Inns, Inc.*, 178 U.S.P.Q. 105 (TTAB 1973), aff'd without op., 508 F.2d 847, 183 U.S.P.Q. 427 (C.C.P.A. 1974) (DOWNTOWNER and UPTOWNER found similar for hotels); *Procter & Gamble Co. v. Clairol, Inc*., 162 U.S.P.Q. 637 (TTAB 1969) (FACE TO FACE similar to CHEEK TO CHEEK for skin creams); *Andrew Jergens Co. v. Sween Corp.*, 229 U.S.P.Q. 394 (TTAB 1986) (GENTLE TOUCH for deodorant similar

[15] Appeal Brief, pp. 14-17.
[16] The citation of *Hat Corporation of America v. John B. Stetson Company*, 223 F.2d 485, 106 USPQ 200 (C.C.P.A. 1955) on page 15 of Applicant's brief is incorrectly identified as having been decided in 1995. *See also*, TBMP 1203.02(f) (2014) regarding citation to The United States Patent Quarterly (USPQ) if the case has appeared therein.

to KIND TOUCH for skin cleansers); *Proctor & Gamble Co. v. Conway*, 419 F.2d 1332, 164 USPQ 301 (C.C.P.A. 1970) (MISTER CLEAN similar to MISTER STAIN); *Bill Rivers Trailers, Inc. v. Thermo King Corp.*, 478 F.2d 1243, 177 USPQ 764 (C.C.P.A. 1973) (THERMO KING and ZERO KING for transport refrigeration equipment found confusingly similar).

In view of the evidence in the record, the connotation of the terms "cow" and "bull" are highly similar. When both terms are used in combination with the arbitrary term "creek", they create marks which, overall, provide highly similar connotations and commercial impressions.

B. Consumers are Likely to be Confused by the Marks Because the Average Consumer of Beer Retains a General Commercial Impression of Trademarks.

In evaluating the similarities between the marks, the analysis should focus on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); *see* TMEP §1207.01(b). For this reason, conflicting composite marks should be compared by looking at them as a whole, rather than breaking them up and analyzing only a single feature of the marks. *See In re National Data Corp*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("Likelihood of confusion cannot be predicated on dissection of the mark, that is, on only part of a mark.").

In this case, the average purchaser is the average consumer of beer and ales. Beer is a low cost, every-day "impulse" product that is purchased casually and usually costs around $3 to $6 for a single beer at a bar or restaurant. "Generally, casual purchasers of low-cost, every day consumer items exercise less care in their purchasing decisions and are more likely to be confused as to the source of the goods." *In re Davia*, 110 USPQ2d 1810, 1818 (TTAB 2014) (citing *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984)). Courts have found consumers of

low-cost alcoholic beverages to be unsophisticated purchasers. *See*, e.g., *E. & J. Gallo Winery v. Consorzio Del Gallo Nero*, 782 F. Supp. 457, 20 U.S.P.Q.2d 1579, 1584 (N.D. Cal. 1991) (Court found wine consumers to be unsophisticated impulse buyers whose lack of sophistication significantly enhances likelihood of confusion and creates an "easy mark" for a trademark infringer); *Russell v. Caesar,* 62 U.S.P.Q.2d 1125, 1130, 2001 WL 1835165 (N.D. Cal. 2001) (purchasers of 14.99/bottle of wine are unsophisticated).

In comparing the marks, Applicant has dissected the marks and analyzed minute details of only the first term in the mark. Applicant's arguments and evidence focus solely on the anatomical differences between the male and female bovine.[17] In view of the fact that the average consumers of Applicant's and Registrant's inexpensive goods are unsophisticated purchasers making purchasing decisions in an *informal* setting, they are likely to retain only a general, cursory impression of the marks. The general commercial impression of each of the marks in this case is of a creek named for a bovine. Unsophisticated consumers of low cost beer are highly unlikely to dissect the marks and consider in detail the specific differences between the bovine genders.

C. Consumers are Likely to Believe that the Goods Originate from the Same Source.

In a likelihood of confusion analysis, the issue is not whether the marks themselves will be confused, but whether there is a likelihood of confusion as to the source or sponsorship of the goods or services because of the marks used thereon. *See Paula Payne Prods. Co. v. Johnson's Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (C.C.P.A 1973) ("[T]he question is not whether people will confuse the marks, but rather whether the marks will confuse people into believing that the goods they identify emanate from the same source."); *see also*, *Hilson Research Inc. v. Soc'y for Human Res. Mgmt.*, 27 USPQ2d 1423, 1429 (TTAB 1993) ("Although confusion, mistake or deception about source or origin is the usual issue posed

[17] *See* Appeal Brief, pp. 5-7, 9.

under Section 2(d), any confusion made likely by a junior user's mark is cause for refusal; likelihood of confusion encompasses confusion of sponsorship, affiliation or connection.").

In this case, both parties provide beer under their respective marks. Consumers are likely to believe that the goods provided under the COW CREEK mark originate from the same source as, or are somehow connected to, the goods provided under the BULL CREEK BREWERY mark. For example, a consumer who encounters the COW CREEK mark used in connection with an ale or lighter beer is likely to believe that a beer under the BULL CREEK BREWERY mark identifies a stout or heavier beer from the same source because the marks create a highly similar commercial impression.

Additionally, in a case such as this where the goods of the Applicant and Registrant are identical, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as in the case of diverse goods or services. *See United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014) (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992)); TMEP §1207.01(b). Moreover, any doubt regarding likelihood of confusion must be resolved in favor of the Registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

In view of the fact that the goods of the parties are identical, the marks are highly similar in connotation and commercial impression, and the average purchaser of the goods in unsophisticated, consumers are likely to believe the goods of the parties emanate from the same source.

D. <u>Applicant's Evidence is not Relevant to the Issue</u>.

Applicant has provided several articles as evidence in support of its contention that the average beer consumer will distinguish the terms "cow" and "bull". First, Applicant cites an article from the

Huffington Post featuring a beer named "Bull Testicle Beer".[18] The relevance of this article is unclear because it provides no evidence of the difference between the terms "cow" and "bull". Applicant draws conclusions about the brewer's reasons for naming the beer based on inferences and speculation. Because no logical conclusions can be drawn from the article regarding consumers' perceptions of the marks at issue, the article should be given no weight.

Applicant has also submitted "geographic evidence" in the nature of maps and articles featuring two creeks named "Bull Creek" and "Cow Creek" located only a few miles from each other in Montana.[19] Based on this evidence, Applicant speculates that if the impression created by the terms "cow" and "bull" are nearly identical "then those naming the creeks would have chosen different names in order to avoid confusion about which creek was which."[20] This conclusion is no more supported by the evidence than if the Examining Attorney concluded that the fact that Cow Creek and Bull Creek originate from the same river is evidence that consumers are likely to believe that goods under Cow Creek and Bull Creek marks originate from the same source. Regardless, the Examining Attorney submitted evidence consisting of a map displaying two major cities with the same name located 3.5 miles apart to rebut Applicant's unsupported conclusions.[21] Inasmuch as there is no evidence that likelihood of confusion, or the first *du Pont* factor in particular, is a consideration when naming creeks, this evidence should also be given no weight.

Applicant has also provided evidence in the nature of screenshots from the website www.cattle-exchange.com[22] and a website from the LSU School of Veterinary Medicine featuring an article about Bull Breeding.[23] Both exhibits are irrelevant to the refusal because they are clearly not directed to the

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[18] Appeal Brief, pp. 9-10; Response, Sept. 22, 2014, pp. 20-21.
[19] Response, July 30, 2012, pp. 6-17.
[20] Appeal Brief, pp. 10-11.
[21] See Google® map of Kansas City, KS and Kansas City, MO at Final Action, Oct. 22, 2014, Exhibit 4, p. 18.
[22] Response, Sept. 22, 2014, pp. 15-19.
[23] Response, July 30, 2014 pp. 20-34.

average beer consumer who, under the relevant law, is unsophisticated. The websites are specifically directed to those in the cattle industry with a particular knowledge of cows and bulls. Although these consumers may also consume beer, the evidence is clearly not directed to the demographic of the average consumer of a five dollar beer who is not likely to dissect the mark and consider anatomical differences between cows and bulls at the point of sale. Consequently, this evidence should also be given no weight.

In view of the above, Applicant has not submitted any evidence that is relevant to the issue and would obviate the refusal of the mark under Section 2(d) of the Trademark Act.

CONCLUSION

The applied-for mark COW CREEK is so highly similar to the marks BULL CREEK BREWING and BULL CREEK BREWING and design that, when used on identical goods, consumers are likely to believe that the goods emanate from the same source. Accordingly, for the foregoing reasons, the refusal to register the mark under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), should be affirmed.

Respectfully submitted,

/Michael Webster/

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