

This Opinion is Not a
Precedent of the TTAB

Mailed: June 24, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Twin Restaurant IP LLC
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Serial No. 85934428
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Elisabeth A. Evert of Hitchcock Evert LLP,
for Twin Restaurant IP LLC.

Esther Queen, Trademark Examining Attorney, Law Office 111,
Robert L. Lorenzo, Managing Attorney.

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Before Bucher, Lykos and Greenbaum,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Twin Restaurant IP LLC (“Applicant”) seeks registration on the Principal Register of the mark **KNOTTY BRUNETTE** in standard character format for “Beer, ale and lager” in International Class 32.¹

Registration was refused under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that Applicant’s applied-for mark so resembles

¹ Application Serial No. 85934428, filed May 16, 2013, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). The application alleges July 1, 2009, as the date of first use anywhere and in commerce.

the registered mark **NUTTY BREWNETTE** for “beer” in International Class 32 that, when used on or in connection with Applicant’s identified goods, it is likely to cause confusion or mistake or to deceive.²

When the refusal was made final, Applicant appealed and requested reconsideration. After the Trademark Examining Attorney denied the Request for Reconsideration, the appeal was resumed.

I. Evidentiary Objection

Before addressing the substance of this appeal, we will consider first the Examining Attorney’s objection to Applicant’s submission of the evidence contained in Exhibits Nos. 1-8, 10, and 12-13 with its appeal brief as untimely.³ With the exception of Exhibit No. 7, none of these exhibits previously were of record. Trademark Rule 2.142(d) provides in relevant part that “[t]he record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed.”

With regard to Exhibit Nos. 1-6, 8, 10, and 12-13, insofar as the Examining Attorney has timely interposed an objection to Applicant’s late-filed evidence with its brief, the objection is sustained, and we have given this evidence no

² Registration No. 3344183, registered November 27, 2007, alleging December 1997 as the date of first use anywhere and in commerce; Sections 8 and 15 affidavits accepted and acknowledged.

³ Ex. No. 1 consists of a news article about Applicant’s restaurants; Exs. Nos. 2-8 consist of TSDR printouts of trademark registrations and applications owned by Applicant; Ex. No. 10 consists of a menu from Applicant’s Twin Peaks restaurant establishment; and Exs. Nos. 12-13 consist of web site excerpts concerning Registrant’s NUTTY BREWNETTE branded beer.

consideration. *See e.g., In re Fiat Group Marketing & Corporate Communications S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014) (examining attorney's objection to applicant's submission of registrations with appeal brief sustained); *In re Genitope Corp.*, 78 USPQ2d 1819 n.3 (TTAB 2006) (materials from applicant's website submitted for first time with examining attorney's brief not considered). However, inasmuch as Exhibit No. 7 consists of a printout from the USPTO Trademark Status and Document Retrieval ("TSDR") database showing the status and docketing history of the application which is the subject of this appeal, it is automatically of record, and therefore the objection is overruled as to that exhibit.

II. Likelihood of Confusion

We now turn to the substantive refusal before us. We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*du Pont*"). *See also, In re Majestic Distilling Company, Inc.*, 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 (CCPA 1976). These factors, and the other relevant *du Pont* factors, are discussed below.

We turn first to the goods. It is undisputed, and Applicant concedes, that both the application and registration include "beer." *See Stone Lion Capital Partners, LP*

v. Lion Capital LLP, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Applicant argues that because its **KNOTTY BRUNETTE** beer will only be purchased in Applicant's Twin Peaks restaurant establishments, which feature "sexy wait staff" (Applicant's Brief, 7 TTABVue 8), consumers will understand the mark to be a homophone for "naughty brunette." In support thereof, Applicant submitted an excerpt from its website promoting its restaurant chain as "the ultimate man cave" with "friendly and attentive Twin Peaks Girls, offering their signature 'Girl Next Door' charisma and playful personalities." Office Action Response dated March 5, 2014. However, because the goods are identical in part, we must presume that these goods travel in the same channels of trade to the same classes of consumers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). In other words, we must assume that both Applicant's and Registrant's beers are sold not only in the same typical trade channels such as grocery stores and liquor stores, but also in all restaurants and bars, not just those owned by Applicant. Thus, the second and third *du Pont* factors weigh in favor of finding a likelihood of confusion.

That being said, a single *du Pont* factor may be dispositive, and when we compare the marks, we find that to be the case here. *See Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991). The first *du Pont* likelihood of confusion factor involves an analysis of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and

commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012).

The Examining Attorney, relying on the proposition that similarity in sound alone may be sufficient to support a finding that the marks are confusingly similar, contends that the marks **KNOTTY BRUNETTE** and **NUTTY BREWNETTE** essentially are phonetic equivalents. *See e.g., In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). Applicant concedes that the terms **BRUNETTE** and **BREWNETTE** are likely to be pronounced identically and we do not disagree. Applicant however maintains that words “knotty” and “nutty” when correctly pronounced are readily distinguishable to the ear of a speaker of English in the United States. We agree, insofar as the short vowel sound for the letter “o” is pronounced differently than the short vowel sound for the letter “u.” As a result, the marks have slight differences in sound. Nonetheless, while the marks have phonetic distinctions when pronounced correctly, because “there is no correct pronunciation of a mark” and because “it is impossible to predict how the public will pronounce a particular mark,” we must assume that the marks could be pronounced in the same manner by consumers. *See Embarcadero Techs., Inc. v. RStudio, Inc.*, 105 USPQ2d

1825, 1835 (TTAB 2013) (quoting *In re Viterra Inc.*, 671 F.3d 1358, 1367, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012)); *In re The Belgrade Shoe Co.*, 411 F.2d 1352, 1353, 162 USPQ 227, 227 (CCPA 1969).

Nonetheless, here we find critical the obvious distinctions between the marks in appearance, connotation and commercial impression. The primary connotation of Registrant's mark **NUTTY BREWNETTE** is the flavor of Registrant's beer. Registrant's mark commences with the adjective "nutty" meaning "tasting or smelling like nuts" or "containing nuts."⁴ Registrant's website describes its beer as having "a flavor profile that is sweet with 'nutty' notes." The record further shows that "nutty" is a commonly-used adjective to describe certain brown ales. *See* excerpt for "Brown Ale" from *Wikipedia* (Applicant's Request for Reconsideration dated October 1, 2014). In lieu of the correct spelling of "brunette" which denotes a female with brown or black hair, the second component of Registrant's mark contains the letter string "b" "r" "e" "w," calling immediately to mind the word "brew," a synonym for beer. "Brew" is defined as "a drink (such as beer or ale) that is made by brewing." Thus the words taken together project the connotation of a "nutty brew" or nutty flavored beer. Because Registrant's identification of goods is unrestricted, it is sufficiently broad to cover all types of beer, including those nutty in flavor or containing nuts.

⁴ The Board takes judicial notice of the definition of "nutty" from the online version of *Merriam-Webster Dictionary* at www.merriam-webster.com, as well as the definitions for the words "brunette," "brew," "nutty" and "naughty" as discussed below. *See In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013) (Board may take judicial notice of online dictionaries that exist in print format or have regular fixed editions).

The mark is also a double entendre for “nutty brunette” to denote a dark-haired female with a “nutty” or “silly, strange, or foolish” personality. The unique spelling of “brunette” as “brewnette” when used in connection with beer results in a clever play on words. That being said, the appearance and primary connotation and commercial impression of the mark projects a nutty flavored type of beer.

By contrast, Applicant’s mark **KNOTTY BRUNETTE** combines the traditional spelling of “brunette” with the word “knotty,” a homophone for “naughty.” In this context, the adjective “naughty” conveys the meaning of “relating to or suggesting sex in usually a playful way.” Due to its spelling, Applicant’s mark is more likely to project the connotation of a “naughty brunette,” that is to say, a dark-haired woman displaying a playful type of sexiness. Moreover, both the adjectives “knotty” as well as its homophone “naughty” are entirely devoid of any connotation of nut or nut-like flavoring. Thus, the marks have their own unique humorous play on words that project separate meanings and distinct commercial impressions. As a result, when confronted with both marks, prospective consumers are unlikely to assume that Applicant’s and Registrant’s respective goods originate from the same source.

Any of the *du Pont* factors may play a dominant role. *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. In fact, in some cases, a single factor may be dispositive. *Kellogg Co. v. Pack’em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991). In the present *ex parte* appeal, the record evidence shows that the dissimilarity of the marks in appearance, meaning and commercial impression are so great as to outweigh the other *du Pont* factors, discussed above. For that reason,

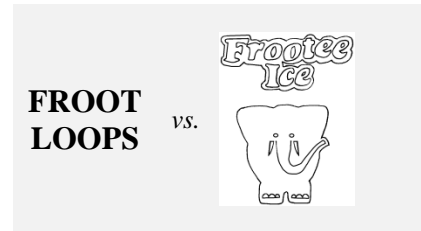
we find the first *du Pont* factor to be pivotal, and the Trademark Examining Attorney's Section 2(d) refusal is reversed.

Decision: The Section 2(d) refusal to register Applicant's mark is reversed.

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Opinion by Bucher, Administrative Trademark Judge, dissenting:

I respectfully disagree with my esteemed colleagues, and would readily affirm this § 2(d) refusal. Yes, in some cases, a single *du Pont* factor may be dispositive – even in the rarified context of granting a motion for summary judgment. *Kellogg*



Co. v. Pack'em, 21 USPQ2d at 1145. Despite the majority's language such as “obvious distinctions” (majority opinion at 6), “dissimilarity ... so great as to outweigh the other *du Pont* factors” (*Id.* at 7) and “the first *du Pont* factor [being] pivotal” (*Id.* at 8), I find that this is *not* such a case.

Conversely, as argued by the Trademark Examining Attorney, similarity in sound alone may be sufficient to support a finding that the marks are confusingly similar. Indeed, the majority concedes that these two marks “could be pronounced in the same manner by consumers” (*Id.* at 5). Inside a noisy bar, as the night wears on, and the bartender and patron trade verbal exchanges of \ 'nä-tē\, \ 'nə-tē\ or \ 'no-tē\ 'nä-tē\ uttered next to \brü-'net\, any aural differences in the short vowel sounds of only the first of these four syllables will likely not be readily distinguishable – and especially to southern ears.

In addition to the similarities in sound, arguably these respective marks also have a similar connotation when used in connection with beer. Provided the consumer perceives miniscule differences in sound, the majority then assumes that despite having an imperfect recollection of trademarks, the average bar patron will retain fine connotations from one tavern visit to the next. Yet the majority acknowledges similar sounding marks, each having one or even several double entendres! Let's see, was that dark-haired female of several weeks ago an extremely difficult personality ("knotty"), strange ("nutty"), or playfully sexy ("naughty"). Or if the brew has an earthy flavor profile – in a wild, Euell Gibbons kind of way – was it due to the (knotty) bark or nuts?

Moreover, in the context of the overall commercial impressions of the marks, the majority fails to note that with legally identical goods, as we have herein, the degree of similarity between the marks necessary to support a finding of likely confusion *declines*. *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007).



And finally, to the extent that any jurist finds this to be a close case, in the event of a § 2(d) tie, the win belongs to Registrant – represented in this *ex parte* case by the position of the Trademark Examining Attorney.