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| <p>This Opinion is Not a Precedent of the TTAB</p> |
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Mailed: March 31, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Grill 505 LLC

Serial No. 85951305

Matthew H. Swyers of The Trademark Company,
for Grill 505 LLC.

John D. Dalier, Trademark Examining Attorney, Law Office 106,
Mary I. Sparrow, Managing Attorney.

Before Quinn, Taylor and Lykos,
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Grill 505 LLC (“Applicant”) seeks registration on the Principal Register of the mark BRUTOPIA BREWERY (in standard characters) for “Beer” in International Class 32; and “Pubs” in International Class 43.¹ The word BREWERY was voluntarily disclaimed at the time of filing the original application.

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

¹ Application Serial No. 85951305 was filed on June 5, 2013, based upon Applicant’s 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).

ground that Applicant's mark as used on or in connection with the identified goods and services is likely to cause confusion with the mark in Registration No. 3066029, BREWTOPIA, for "Providing beer events and beer festivals; and providing online information regarding the beer events and beer festivals" in International Class 41.²

Applicant appealed to this Board, and both Applicant and the Examining Attorney filed briefs. We affirm in part and reverse in part the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the 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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). 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, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks"). These factors, and any other relevant *du Pont* factors in the proceeding now before us, will be considered in this decision.

² Issued March 7, 2006, Section 8 Affidavit accepted, Section 15 Affidavit acknowledged. The Examining Attorney had also finally refused registration on the basis of Registration No. 4233907 for the mark BIG LICK BEERTOPIA (in standard character form) for "conducting entertainment exhibitions in the nature of beer festivals; entertainment in the nature of a festival primarily featuring live music, beer brewing competitions and also providing food and alcoholic beverages." The Examining Attorney, in his brief, withdrew the refusal based on this registration which is owned by a different Registrant.

We consider the first *du Pont* factor, the similarity or dissimilarity of the marks. In making our determination, we must compare the marks in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), quoting *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. “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) (citation omitted). While we must consider the marks in their entireties, it is entirely appropriate to accord greater importance to the more distinctive elements in the marks. See *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, as our principal reviewing court has observed, “[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of the mark.” See *id.*

Applicant, by its disclaimer of the word “Brewery” has conceded the descriptive nature of that term, which merely describes a feature of Applicant’s services. Accordingly, this term would not be looked to as source-identifying. Instead, it is the term BRUTOPIA that dominates Applicant’s mark, and is the part of the mark that consumers are likely to recall. The dominant term BRUTOPIA in Applicant’s mark

is substantially similar to the sole term in the cited mark BREWTOPIA in appearance, both beginning with the letters “BR” and ending with the letters “TOPIA.” The differences between them, i.e., the letters “EW” in Applicant’s mark and the letter “U” in Registrant’s mark may not be noticed due to their imbedded placement in both marks. As to sound, BRUTOPIA in Applicant’s mark and the cited mark BREWTOPIA are phonetic equivalents. Similarity in sound alone may be sufficient to support a finding that the marks are confusingly similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 2007). The record contains no information on the meaning of the two marks, but given their similarities, it is likely consumers will attribute the same meaning to both. One meaning, as the Examining Attorney suggests, may be that of “a place for beers.”

Because the term BREWTOPIA is Registrant’s entire mark and the visually similar and phonetically equivalent term BRUTOPIA forms the most significant and dominant portion of Applicant’s mark, we find the marks as a whole are similar in appearance, sound, connotation and commercial impression.

Indeed, Applicant, in its brief, “concede[d] the phonetic equivalence of BRUTOPIA versus BREWTOPIA” and, “[m]oreover, as the Applicant has disclaimed BREWERY apart from its mark as a whole, Applicant must concede the highly similar nature of the first cited trademark [BREWTOPIA] against its mark.”³ Applicant also specifically “conceded that this *du Pont* factor may favor a likelihood of confusion with BREWTOPIA.”

³ App. Br. p. 9, 4 TTABVue 10.

For the reason discussed above, the *du Pont* factor of the similarity/dissimilarity of the marks favors a finding of likelihood of confusion.

To the extent that Applicant is arguing that its mark should be registered because of the co-existence on the Register of the cited registration and Registration No. 4233097, initially cited as an additional bar to Applicant's registration of BRUTOPIA BREWERY, the Board is not bound by the prior decisions of examining attorneys in allowing marks for registration. It has been noted many times that each case must be decided on its own facts. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court."); *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987). We are obligated to assess the registrability of Applicant's mark on its own merits and not simply based on the existence of other registrations.

Similarity of the Goods and Services

We now consider the second *du Pont* factor, the similarity or dissimilarity of the goods and services. It is well-established that the goods and services need not be similar or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods and services are related in some manner, and/or that the conditions and activities surrounding the marketing thereof are such that they would or could be encountered by the same persons under circumstances that could, because of the

similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); *In re International Telephone & Telephone Corp.*, 197 USPQ 910, 911 (TTAB 1978). The issue, of course, is not whether purchasers would confuse the goods and services, but rather whether there is a likelihood of confusion as to the source thereof. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

Further, where the goods and services in an application or cited registration are broadly described, such that there are no restrictions as to trade channels and purchasers, it is presumed that the identification of goods and services encompasses not only all goods and services of the nature and type described therein, but that the identified goods and services are provided in all channels of trade which would be normal therefor, and that they would be purchased by all potential customers thereof. *See, e.g., In re Elbaum*, 211 USPQ 639 (TTAB 1981).

With these principles in mind, we compare Applicant's "beer" and "pubs" with Registrant's "providing beer events and beer festivals; and providing online information regarding the beer events and beer festivals."

The Examining Attorney maintains that "[b]eer, beer and craft beer pub services and craft beer festival services are complementary to one another."⁴ He goes on to explain that "[c]raft beer, like that of the applicant, is often served and sold by

⁴ Br. unnumbered pp. 7-8, 6 TTABVue 8-9. We note that neither Applicant's nor Registrant's identification limits their respective goods and services to use on or in connection with "craft" beers. Contrary to the Examining Attorney's contention, this language narrows the identifications.

festival or pub service providers at beer festivals and events.”⁵ The Examining Attorney has supported his position with web pages from the websites of the Valley Forge Beer Festival,⁶ AzBeer.com⁷ and the DC Craft Beer Festival – Spring Seasons,⁸ shown below in full or excerpted (highlighting added by the Examining Attorney).



⁵ *Id.*

⁶ <http://www.azbeer.com>, attached to the final Office action dated June 2, 2014.

⁷ <http://www.valleyforgebeerfest.com/>, attached to the final Office action dated June 2, 2014.

⁸ <http://craftbeerfestdc.com/>, attached to the final Office action dated June 2, 2014.

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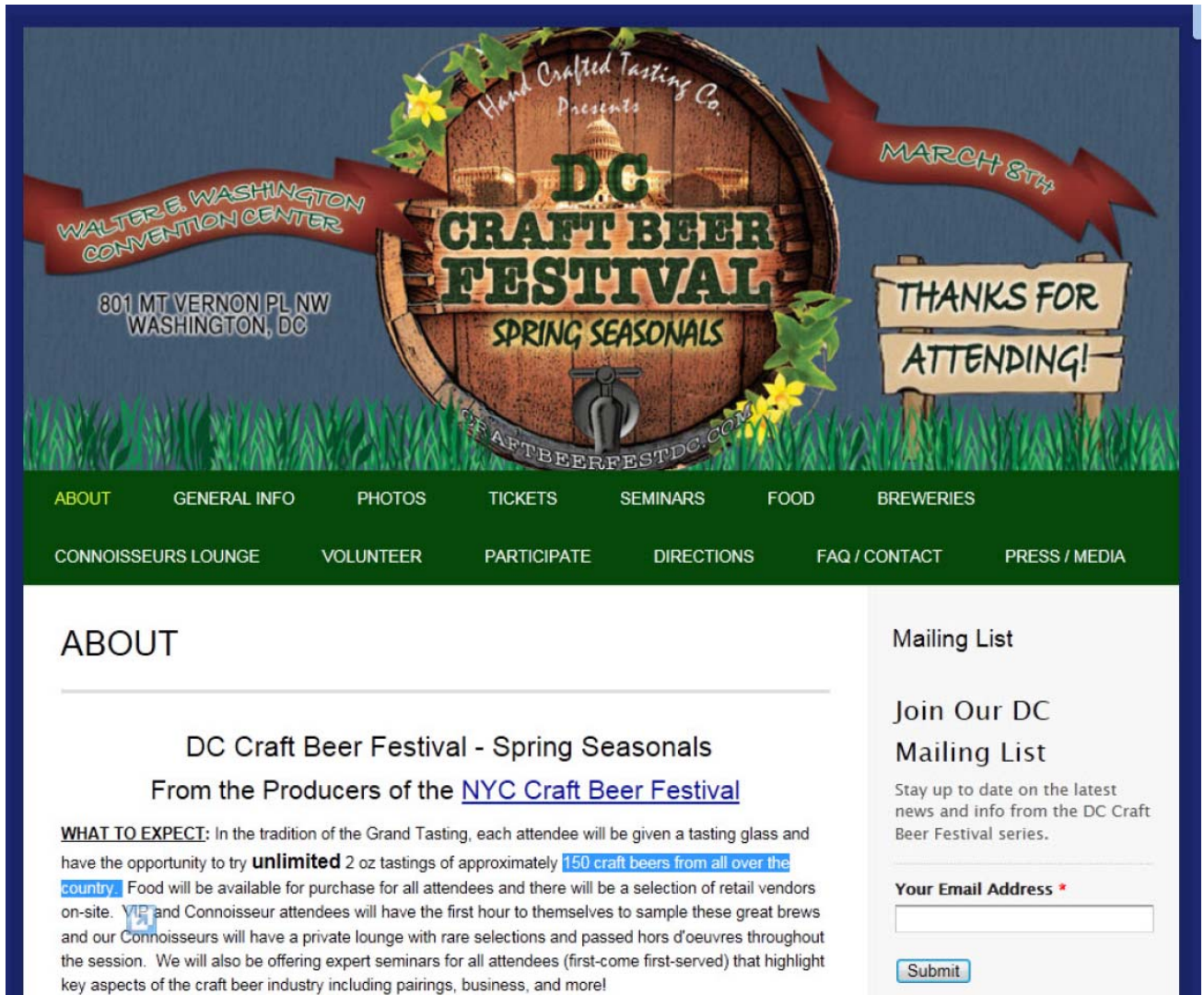
Welcome to the home of three amazing Arizona beer tasting festivals: the Spring celebration on the lake shore in **Tempe**, the cool, shady pines of **Flagstaff**, and the baseball stadium atmosphere of **Tucson** - each a destination for true beer enthusiasts everywhere.

Although each of the beer festivals is distinctive in its own right each event offers a comprehensive brew tasting experience and great Arizona weather! Many local breweries come to each city with seasonal recipes and breweries from all over the southwest are showcased alongside of national and international varieties giving you the advantage of sampling the widest variety of beers. This means that you will discover new beers as well as enjoy many of your favorite libations and no matter which time of year you attend - spring, summer or fall you can enjoy craft beers from microbreweries and brewpubs, music, entertainment, and an assortment of food.

Each of the beer tasting festivals is a locally-organized fund raising event for Sun Sounds of Arizona. Every penny of the proceeds benefits the local reading and information service for people who are blind or otherwise print-disabled, Sun Sounds of Arizona. For this reason all ticket sales are final and non-refundable.

Please note:
Attendees must be 21 or older to attend.
Events are held rain or shine, no rain checks.
No children or animals (except service dogs) allowed in the festival area.
Absolutely no exceptions!

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We find, on the face of the respective identifications, that Applicant's beer is complementary to Registrant's providing beer events and beer festivals; and providing online information regarding the beer events and beer festivals services. We find so because Applicant's beer could be sampled or purchased at Registrant's festivals, or could be the subject matter of Registrant's information regarding beer festivals. This finding is bolstered by the Internet evidence of record which shows that the principal subject matter of beer festivals is a wide variety of beers. We thus find Applicant's goods and Registrant's services commercially related that, when

identified by substantially similar marks, i.e., BRUTOPIA BREWERY and BREWTOPIA, confusion as to source is likely.

However, we find no basis on this record for concluding that Applicant's pubs and Registrant's provision of beer events and beer festivals, and provision of online information regarding the beer events and beer festivals, are related in some viable fashion and/or that they are marketed or promoted under circumstances and conditions that could bring them to the attention of the same purchasers or prospective purchasers under circumstances that could cause such purchasers reasonably to assume, because of substantial similarity of the respective marks, that the particular services share a common origin or sponsorship. First, the respective services, as identified, are different. Moreover, the single web page cited by the Examining Attorney in support of the relatedness of the services is unpersuasive. The fact that breweries⁹ showcase their beer at beer events and festivals simply does not demonstrate that consumers who frequent both pubs and beer events and beer festivals will mistakenly believe that both types of services

⁹ In any event as defined in *The American Heritage Dictionary of the English Language* (5th ed. 2014), pubs and breweries appear to perform different functions. We take judicial notice of the definition of "pub," defined as "[a] place of business serving beer or other alcoholic drinks and often basic meals," <https://www.ahdictionary.com/word/search.html?q=pub>, and "brewery" defined as "[a] place where beer is brewed, especially commercially." <https://www.ahdictionary.com/word/search.html?q=brewery>. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

emanate from a common source, or otherwise are commercially related, even when the respective services are offered under similar marks.¹⁰

Relying on the Affidavit of Umberto Sorbo,¹¹ Applicant argues that its goods differ significantly from the services of the cited mark because its goods are only artisan craft beers local to the state of Rhode Island whereas Registrant's services are not used in connection with a brewery. Instead, Registrant's mark is used exclusively in connection with providing evaluations on certain types of beer, as well as providing information on beer events and hosting beer events. As stated, the respective goods and services need not be identical. They need only be related in such a manner that confusion as to the source of the respective goods and services ensues. To the extent that Applicant also is attempting to distinguish its goods and services from the services of Registrant by geographical limitations, we point out that geographical distinctions are only considered within the context of a concurrent use proceeding. And, in any event, Registrant's cited registration, and Applicant's application for that matter, contain no such geographical limitations.

Further, in the absence of any limitations in the identifications as to channels of trade and classes of purchasers in the application and cited registration, we must presume that the respective goods and services will be purchased in the usual

¹⁰ We hasten to point out that, on a different and more complete record, we might arrive at a different result on the likelihood of confusion between the marks when used in connection with the identified services.

¹¹ Attachment to Applicant's response to the first Office action, dated March 10, 2014. Mr. Sorbo is described in the affidavit as a resident of Florida who has become familiar with the goods and services offered under the BRUTOPIA BREWERY mark in the course and scope of his work.

channels of trade for those goods and services and by the usual classes of purchasers for those goods and services, including ordinary consumers looking to purchase and/or sample beer. Thus, at a minimum, the classes of purchasers overlap. *In re Elbaum, supra.*

Sophistication of Purchasers

Last, Applicant argues that its craft beer and pub services offered under the BRUTOPIA BREWERY mark are designed to attract a very specific consumer (i.e., people seeking to enjoy local craft beer, available at between \$3.50 and \$5.50 a pint, and fresh local food at market prices in a friendly pub setting) whereas Registrant's BREWTOPIA mark is used to attract those seeking information on beer festivals, specifically the "Classic City Brest Fest," the ticket price to which is \$39.99 plus a processing fee. As such, Applicant urges, the average purchaser of the respective goods and services would exercise "a high level of sophistication," thereby minimizing any likelihood of confusion.

First, as identified, Applicant's beer is not limited to local craft beer sold only in a pub setting, and is relatively inexpensive, being priced between \$3.50 and \$5.50 a pint. The record also is devoid of any information regarding a consumer's selection process for attending beer festivals, but the consumers will include ordinary purchasers seeking to taste a variety of beers, who will exercise no more than ordinary care. However, even assuming arguendo that the respective goods and services will be purchased by consumers who will exercise some degree of care in their purchasing decisions, even careful purchasers can be confused as to source

under circumstances where substantially similar marks are used on closely related goods and services. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970).

In conclusion, after careful consideration of the evidence of record and the arguments, we find that purchasers familiar with Registrant's providing of beer events and beer festivals; and providing online information regarding the beer events and beer festivals under the BREWTOPIA mark would likely believe, upon encountering Applicant's mark BRUTOPIA BREWERY for beer, that the goods and services originate from or are associated with or sponsored by the same source. However, notwithstanding the similarity of the marks, the record fails to demonstrate that there is a likelihood of confusion from the contemporaneous use by Applicant of the BRUTOPIA BREWERY mark in connection with pubs and the use by Registrant of the mark BREWTOPIA for providing beer events and beer festivals; and providing online information regarding the beer events and beer festivals.

Decision: The refusal to register Applicant's mark BRUTOPIA BREWERY pursuant to Section 2(d) of the Act is affirmed as to "beer" identified in International Class 32, and reversed as to "pubs" identified in International Class 43.

The application will proceed to publication solely as it regards the Class 43 services.