

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: August 9, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

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In re Hutchinson and Stengl

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Serial No. 86809909
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H. Michael Drumm and Trent Rinebarger of Drumm Law LLC,
for Hutchinson and Stengl.

Howard B. Levine, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

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Before Taylor, Heasley, and Pologeorgis,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Hutchinson and Stengl (“Applicant”) seeks registration on the Principal Register of the mark CANNONBALL CREEK BREWING COMPANY GOLDEN, COLORADO and design, as displayed below, for “beer” in International Class 32:¹

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¹ Application Serial No. 86809909, filed on November 4, 2015, based on an allegation of use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming January 17, 2013 as both the date of first use and the date of first use of the mark in commerce.



The application includes the following description of the mark:

The mark consists of a shaded circle with a circular border; on the design is the stylized wording CANNONBALL CREEK below a tap and above waves; below the waves appears the stylized wording BREWING COMPANY GOLDEN, COLORADO.

The wording BREWING COMPANY GOLDEN, COLORADO has been disclaimed.

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 likelihood of confusion with the mark CANNONBALL DOUBLE IPA (in standard characters; DOUBLE IPA disclaimed) registered on the Principal Register for "ale; beer; brewed malt-based alcoholic beverage in the nature of beer" in International Class 32.²

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

² Registration No. 5207031; issued on May 23, 2017.

³ The TTABVue and Trademark Status and Document Retrieval ("TSDR") citations refer to the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .PDF version of the documents.

I. Preliminary Matter – Evidentiary Objection

We first turn to an evidentiary objection lodged by the Examining Attorney regarding evidence presented by Applicant for the first time with its appeal brief. Specifically, the Examining Attorney objects to a link to a web page provided at fn. 2 on p. 6 of Applicant’s brief, purportedly submitted to support Applicant’s argument concerning the commercial impression of its applied-for mark. We initially note that the mere listing of a link to a website does not make the material that might be found on the website of record. *See In re Planalytics Inc.*, 70 USPQ2d 1453, 1457 (TTAB 2004).

Moreover, 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 or other evidentiary material that are attached to or included with 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); *see also* Trademark Trial and Appeal Board Manual of Procedure (TBMP) §§ 1203.02(e) and 1207.01 (2019). 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 2.142(d). Applicant did not do so. Accordingly, the Examining Attorney’s evidentiary objection is sustained, and we give the website link identified in Applicant’s appeal brief no further consideration in our analysis.

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) (“*DuPont*”); *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 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.”).

A. Similarity of the Goods

We first turn to the comparison of the goods, the second *DuPont* factor. In making our determination regarding the relatedness of the goods, we must look to the goods as identified in Applicant’s application and the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”)); *see also In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011).

Here, Applicant’s goods and those set forth in the cited registration are identical inasmuch as they both identify beer. *See In re Bay State Brewing Co., Inc.*, 117

USPQ2d 1958, 1959 & n. 3 (TTAB 2016).

Thus, the second *DuPont* factor strongly favors a finding of likelihood of confusion.

B. Similarity of Trade Channels and Classes of Purchasers

Next we consider established, likely-to-continue channels of trade, the third *DuPont* factor. Because the identifications of Applicant's goods and Registrant's goods are identical and have no restrictions as to channels of trade or classes of customers, it is presumed that the trade channels and classes of purchasers are the same for these goods. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *In re Am. Cruise Lines, Inc.*, 128 USPQ2d 1157, 1158 (TTAB 2018).

Accordingly, the third *DuPont* factor also weighs in favor of finding a likelihood of confusion.

C. Similarity of the Marks

We finally address the first *DuPont* likelihood of confusion factor focusing on "the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression." *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). Similarity in any one of these elements may be sufficient to find the marks similar. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009); *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB

2007); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). In comparing the marks, we are mindful that where, as here, the goods are identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs. Inc., v. Triumph Learning, LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Prods. Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

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 owners. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (citing *Coach Servs. Inc.*, 101 USPQ2d at 1721).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); see also *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, different features may be

analyzed to determine whether the marks are similar. *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430 (TTAB 2013) (citing *Price Candy Co. v. Gold Medal Candy Corp.*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955)). In fact, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Nat'l Data*, 224 USPQ at 751.



Applicant's mark is . The cited mark is CANNONBALL DOUBLE IPA in standard characters. The marks are similar in appearance and sound to the extent that they both include the word CANNONBALL as the first literal element or first element. The Board has often held that it is the first part of a mark which is most likely to be impressed upon the mind of the consumer and remembered. *See e.g., Presto Prod. Inc. v. Nice-Pak Prod., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). However, that general rule is not applicable here. In this case, the word CANNONBALL is likely to be read in conjunction with the word CREEK, that word being visually the largest element in Applicant's mark.

Although Applicant's mark includes a noticeable design element, "the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed." *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGaA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015) (citing *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)). Greater weight is often given to the wording because it is the wording that purchasers

would use to refer to or request the goods or services. *See, e.g., In re Viterra, Inc.*, 101 USPQ2d at 1911. We also find the wording BREWING COMPANY GOLDEN, COLORADO in Applicant's mark is less significant given the fact that the wording is descriptive and/or generic of Applicant's identified goods, and has been appropriately disclaimed by Applicant. *See, e.g., In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) ("DELTA," not the disclaimed generic term "CAFE," is the dominant portion of the mark THE DELTA CAFE). Similarly, the wording DOUBLE IPA in the cited mark is less significant because of its descriptive nature and the fact this wording has also been disclaimed.

In view of the foregoing, we find that the dominant portion of Applicant's mark is the wording CANNONBALL CREEK and that the dominant element of the cited mark is the term CANNONBALL.

In terms of connotation and commercial impression, however, we find that dominant portions of the marks at issue to be quite dissimilar. The circumstances of this case are very similar, if not identical, to those in *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459 (Fed. Cir. 1998). In that case, the Federal Circuit affirmed the Board's holding that the second word in applicant's mark CRYSTAL CREEK served to create a totally different commercial impression from the one created by opposer's mark CRISTAL when the marks were contemporaneously used on wine.

In the present case as in *Champagne Louis*, the dominant portion of Applicant's mark consists of two words, with the first word being identical to the dominant

element of the cited mark. Put quite simply, we find that the presence of the word CREEK in Applicant's mark, like the presence of CREEK in the applicant's mark in *Champagne Louis*, causes the mark to be dissimilar from the cited mark in meaning and overall commercial impression.

The word "cannonball" is defined as "a usually round solid missile made for firing from a cannon."⁴ The term "creek" is defined as "a natural stream of water normally smaller than and often a tributary to a river."⁵ When viewing the wording CANNONBALL CREEK in its entirety, the wording evokes or conveys the name of a particular waterway or stream. This meaning and commercial impression is reinforced by not only the "wave" design appearing below the wording in Applicant's mark, but also the fact that the term CREEK appears in larger font than the term CANNONBALL. In contrast, the term CANNONBALL in the cited mark, standing alone, conveys the impression of a projectile or missile fired from a cannon.

Accordingly, we find that the dissimilarities in the connotation and commercial impression between the dominant elements of Applicant's and Registrant's marks outweigh their similarities.⁶ As such, we find that the first *DuPont* factor does not

⁴ www.merriam-webster.com (accessed August 8, 2019). The Board may take judicial notice of dictionary definitions, *see 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 regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

⁵ www.merriam-webster.com (accessed August 8, 2019).

⁶ Applicant submitted what purports to be a label for Registrant's beer displaying the cited mark to support its argument that the marks at issue are dissimilar. *See* Applicant's August 14, 2018 Request for Reconsideration, Exh. B, TSDR p. 14. In our likelihood of confusion analysis, however, "we do not consider how Applicant and Registrant actually use their marks in the marketplace, but rather how they appear in the registration and the application.

favor a finding that confusion is likely.

III. Conclusion

We have considered all of the arguments and evidence of record and all relevant *DuPont* factors. We conclude that while Applicant's and Registrant's goods are identical and, therefore, are presumed to travel in the same trade channels and offered to the same consumers, and although Applicant's mark and the cited mark share some similarities, the differences in connotation and commercial impression between the marks outweigh their similarities and are therefore sufficient to distinguish the marks so that confusion between the marks is not likely. *See Kellogg Co. v. Pack'em Ent., Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (citing *DuPont*, 177 USPQ at 567) (stating that "[w]e know of no reason why, in a particular case, a single [*DuPont*] factor may not be dispositive.").

Decision: The refusal to register Applicant's



mark under Section 2(d)

of the Trademark Act is reversed.

We must compare the marks as they appear in the drawings, and not on any labels that may had additional wording or information." *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1729 (Fed. Cir. 2017)). Accordingly, we have given no consideration to the label submitted by Applicant in our determination herein.