

This Opinion is not a  
Precedent of the TTAB

Mailed: January 31, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Adrenalin Technologies, LLC*  
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Serial No. 90303848  
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Rob L. Phillips of FisherBroyles, LLP,  
for Adrenalin Technologies, LLC.

Alina Morris, Trademark Examining Attorney, Law Office 117,  
Cynthia Tripi, Managing Attorney.

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Before Goodman, Heasley and Elgin,  
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Adrenalin Technologies, LLC (“Applicant”) seeks registration on the Principal Register of the mark NIFTY FIFTIES (in standard characters) for “Entertainment services in the nature of an amusement park attraction, namely, a themed area” in International Class 41.<sup>1</sup>

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<sup>1</sup> Application Serial No. 90303848 was filed on November 6, 2020, based on an allegation of a bona fide intention to use the mark in commerce.

Citations to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. Citations to the briefs on appeal refer to the

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), because Applicant's mark is likely to be confused with the following Principal Register marks, owned by the same Registrant:

Registration No. 1487979<sup>2</sup> for the stylized mark



and Registration No. 3218372<sup>3</sup> for the mark NIFTY FIFTY'S FRESHXPRESS (typed drawing), both for "restaurant and carry out food services."<sup>4</sup>

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

#### I. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, or to cause mistake, or to

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Board's TTABVUE docket system. Applicant's brief is at 4 TTABVUE and its reply brief is at 7 TTABVUE. The Examining Attorney's brief is at 6 TTABVUE.

<sup>2</sup> Issued May 10, 1988, second renewal.

<sup>3</sup> Issued March 13, 2007, first renewal.

<sup>4</sup> In 2002, when the Nice Agreement was amended to add three new service classes (Classes 43, 44, and 45), Class 42 was restructured and restaurant services were moved to Class 43. Registration No. 1487979 identifies the services in Class 42; Registration No. 3218372 identifies the services in Class 43. A mark depicted as a typed drawing is the legal equivalent of a standard character mark. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012).

deceive. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *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). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mtg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002); *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 or services] and differences in the marks.”); *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at \*3 (TTAB 2019) (“two key considerations are the similarities between the marks and the similarities between the goods and services”). Here, the Examining Attorney and Applicant discuss only these *DuPont* factors.

For purposes of our likelihood of confusion analysis, we focus on Registration No. 1487979, as it is closest to Applicant’s mark. If confusion is likely with this mark, there is no need for us to consider the likelihood of confusion with the other cited mark, while if there is no likelihood of confusion between Applicant’s mark and



, then there would be no likelihood of confusion with the other cited mark.

#### A. Similarity or Dissimilarity of the Marks

We turn to the first *DuPont* factor, the similarity or dissimilarity of the marks in their entireties 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, 1692 (Fed. Cir. 2005). Our analysis of Applicant's mark and the cited mark cannot be predicated on dissecting the marks into their various components; the decision must be based on the entire marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant's mark is NIFTY FIFTIES (in standard characters) and Registrant's



mark is the stylized mark .

Applicant's mark is in standard characters, which means that the mark can be depicted in any font style, size, or color. Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a). Applicant's mark could therefore be displayed in a stylization identical or similar to Registrant's mark. *See Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (“[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display. By presenting its mark merely in a typed drawing, a difference cannot legally be asserted by that party.”); *In*

*re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) (“[T]he rights associated with a standard character mark reside in the wording per se and not in any particular font style, size, or color.”) (citation omitted).

The terms NIFTY FIFTIES and NIFTY FIFTY’S in each mark are very similar in appearance, differing only by Applicant’s use of the plural term and Registrant’s use of the possessive form for “fifty.” Applicant argues that those differences (plural vs. possessive) distinguish the marks’ appearance. Applicant’s Appeal Brief, 4 TTABVUE 5; Applicant’s Reply Brief, 7 TTABVUE 3.

These are very slight distinctions that are easily overlooked by customers; the addition of an apostrophe and possessive form used in Registrant’s mark has little significance in distinguishing the marks. *See Southwestern Mgmt., Inc. v. Ocinoled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (“No meaningful distinction arises from the possessive form of Applicant’s mark.”); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (noting that “[t]he absence of the possessive form in applicant’s mark ... has little, if any, significance for consumers in distinguishing it from the cited mark”). Likewise, the singular or plural form of the term “fifty” does not amount to a material difference. *In re Belgrade Shoe Co.*, 411 F.2d 1352, 162 USPQ 227, 227 (CCPA 1969) (“[I]n sound, the appellant’s mark differs from the registered mark primarily in that the former is the plural form of the latter, which we feel does not amount to a material difference in a trademark sense”); *see also In re Pix of Am., Inc.*, 225 USPQ 691, 692 (TTAB 1985) (singular and plural forms “almost totally insignificant in terms of the

likelihood of confusion of purchasers.”). Therefore, we find the marks similar in appearance.

As to similarity or dissimilarity in sound, NIFTY FIFTIES and NIFTY FIFTY'S would be pronounced the same; they are phonetic equivalents. *U.S. Shoe Corp. v. Chapman*, 229 USPQ 74, 75 (TTAB 1985) (COBBLERS and COBBLER'S are phonetic equivalents). Applicant does not dispute this similarity. Applicant's Reply Brief, 7 TTABVUE 3. We find the marks similar in sound.

As to connotation and commercial impression, Applicant argues that “fifties” suggests the nostalgic time period of the 1950s while “fifty's” connotes ownership as if the name of a person “rather than decade in time.” Applicant's Appeal Brief, 4 TTABVUE 5-6, Applicant's Reply Brief, 7 TTABVUE 3. Applicant submits that “consumers will associate Applicant's Mark NIFTY FIFTIES with a specific time period (i.e., the 1950s) and would not do so with the Cited Registrations.” Applicant's Reply Brief, 7 TTABVUE 3. However, we find that both NIFTY FIFTIES and NIFTY FIFTY'S convey the same connotation and commercial impression of a reference to the 1950s time period or the nostalgic feel of the 1950s.

We find that Applicant's and Registrant's marks are similar in sound, appearance, meaning and commercial impression. The first *DuPont* factor favors a finding of likelihood of confusion.

#### B. Similarity or Dissimilarity of the Services

We turn next to the second *DuPont* factor, where we assess the similarity or dissimilarity of Applicant's and Registrant's services. *DuPont*, 177 USPQ 567. In

determining the relatedness of Applicant's and Registrant's services, we must focus on the services as they are identified in the involved application and cited registration. *See Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Applicant's services are "Entertainment services in the nature of an amusement park attraction, namely, a themed area." Registrant's services are "restaurant and carry out food services."

As to relatedness, the Examining Attorney provides webpages from amusement park websites showing theme park services and restaurant services offered at the various locations in the theme parks. These include:

- Busch Garden
- Knotts Berry Farm
- Disneyland
- Seaworld
- Legoland
- Hersheypark
- Cedar Park
- Wild Waves

April 13, 2021 Office action at TSDR 8-51; February 21, 2023 Office action at TSDR 4-14.

Internet evidence may be probative of relatedness. *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355-56 (TTAB 2015) (relatedness found where internet evidence demonstrated goods commonly emanated from the same source under a single mark); *see also, e.g., Hewlett-Packard*, 62 USPQ2d at 1004 (evidence that "a single company sells the goods and services of both parties, if presented, is relevant to the relatedness

analysis”); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009) (third-party evidence showing applicant’s and registrant’s goods manufactured and sold by a single source bolstered finding of relatedness).

The Examining Attorney also submitted third-party registrations to show relatedness of amusement park services and restaurant food services:

Registration No.	Mark	Services
1730178	FIESTA TEXAS	amusement park services; restaurant services
4208636	EXPERIENCE LIFE	amusement park types rides; restaurant services
4534340	VACATION LIKE YOU MEAN IT	amusement part services; restaurant services
5039871	KNOEBELS	amusement park services; restaurant services
5880338	GRAND TEXAS	amusement park services; restaurant services
6322378	SEAWORLD	amusement park and theme park services; restaurant services
4918244	THE SWEETEST PLACE ON EARTH	amusement park services; restaurant services
3656707	KNOTT’S BERRY FARM	amusement park services; restaurant services
6827914	ROCK N AIR	amusement park services; restaurant services

April 13, 2021 Office action at TSDR 15-32.

Third-party registrations have some probative value to the extent they may serve to suggest that services are of a type that emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, n.6 (TTAB 1988).



The Examining Attorney contends that the internet evidence shows that “the same entities that provide amusement park attractions also provide restaurant and carry out food service.” Examining Attorney Appeal Brief 6 TTABVUE at 7. The Examining Attorney argues that the third-party registration “evidence shows that the services listed therein, namely amusement park attractions and restaurant services, are of a kind that may emanate from a single source under a single mark.” *Id.* The Examining Attorney submits that Applicant’s and Registrant’s services are “closely related, complementary, and provided by the same sources.” *Id.* at 6.

Applicant argues that the evidence provided by the Examining Attorney does not support relatedness. Applicant submits that this evidence shows that

it is the amusement park operator (e.g., Legoland or Knott’s Berry Farm) that is the single source. That is Legoland as the name of the amusement park is the single source providing the rides, food and attractions to the guests. ...in this instance, the Applicant is not seeking to protect the name of an amusement park but rather a themed area (Nifty Fifties) within an amusement park. Any restaurants or food-related services would be, like Legoland, provided by the overall theme park – not by the themed area Nifty Fifties. For example, the restaurants, including those in the various themed areas of Disneyland, as the rides and other attractions, emanate from a single source – Disneyland – not from a particular themed area (e.g., Frontierland) within Disneyland. Moreover, as the cited evidence shows, restaurants in amusement parks have their own brand (not that of any themed area) and thus any likelihood of confusion would be associated with the overall park (e.g., Legoland) not the themed area. In simplest terms, while a customer may believe a restaurant in a themed area of an amusement park is sourced by the amusement park (e.g., Legoland), the same customer is not likely to believe the restaurant is sourced by a particular themed area within the amusement park.

Applicant’s Appeal Brief, 4 TTABVUE 7.

The Examining Attorney responds that

Applicant's services, as identified in the application, are akin to the examples set forth in the evidence, all within an amusement park providing services under one source. For example, in the evidence attached to the Office action of April 13, 2021, the descriptions of the amusement park themed areas also advertise dining, e.g. Disneyland: "Tomorrowland: Blast off with space-age attractions, Character encounters, **dining**, and other goodies" (emphasis added) (TSDR Pg. 22) "Frontierland: Blaze new fun trails like a real pioneer--explore attractions, entertainment, shopping, **dining**, and more!" (emphasis added) (TSDR Pg. 22), Knott's Berry Farm: Old West Ghost Town (themed area), Ghost Town Grub (restaurant), and Ghost Town Grill (restaurant) (emphasis added) (TSDR Pgs. 38, 51). As shown in the evidence attached to the final Office action of February 21, 2023, themed areas can also serve as the name of a restaurant or dining area, such as at Hersheypark, e.g., Chocolatetown (final Action TSDR Pgs. 37-38). As such, customers are likely to believe that the dining, themed area, and amusement park services are provided by the same source.

Examining Attorney's Appeal Brief 6 TTABVUE 8.

We find that the third-party registrations and the internet evidence support a finding of relatedness. The evidence shows that amusement theme park services and restaurant services are related and complementary, as it is common to offer restaurant food services at a theme park. Although Applicant is correct that restaurants within theme parks are generally advertised under a different name from that of the theme park, or may be named after a themed area in the park (e.g. Old West Ghost Town), or a character (e.g., Clarabelle), or may be operated by a franchise (e.g., Johnny Rockets), this does not mean Applicant's and Registrant's services are unrelated.

Although the internet evidence shows that amusement park services and restaurant services may bear a different mark, the evidence nonetheless shows that consumers are accustomed to encountering amusement park services and restaurant services in the same venue and that they are offered together. *See Hewlett-Packard*, 62 USPQ2d at 1004 (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”).

In particular, the internet evidence establishes that restaurant services and amusement park services, including the operating of a themed area within an amusement park, are offered together, to the same consumers who are members of the general public. The internet evidence also shows that amusement park services advertise and emphasize the ability to dine in the theme park and in particular locations within the park. In addition, the third-party registration evidence helps show that amusement park services and restaurant services may emanate from a common source under a single mark. We find the record reflects the complementary nature of amusement park services and restaurant services in that consumers encounter the amusement park services and restaurant services together.

In sum, we find that amusement park services are related to restaurant services and complementary. The second *DuPont* factor weighs in favor of a finding of likelihood of confusion.

## II. Conclusion

We find the first and second *DuPont* factors weigh in favor of a likelihood of confusion in that the marks are similar and the services are related. Given these similarities, a likelihood of confusion exists.

**Decision:** The refusal to register Applicant's mark NIFTY FIFTIES is affirmed.