

This Opinion Is Not a  
Precedent of the TTAB

Mailed: August 25, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Hop Daddy LLC*  
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Serial No. 88175921  
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Hop Daddy LLC, pro se.

Nancy L. Clarke, Trademark Examining Attorney, Law Office 102,  
Mitchell Front, Managing Attorney.

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Before Wellington, Lykos and Lebow,  
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:



Applicant, Hop Daddy LLC, seeks registration on the Principal Register of the mark SALTY BULL BREWING and design shown here for “Restaurant and bar services; Taproom services; Taproom services featuring beer brewed on premises,” in International Class 43.<sup>1</sup>

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<sup>1</sup> Application Serial No. 88175921 was filed on October 31, 2018 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce.

Applicant disclaimed the exclusive right to use “BREWING” apart from the mark as shown. Color is not claimed as a feature of the mark. The description of the mark reads as follows:

The mark consists of the words “SALTY BULL BREWING” in stylized form with a design. The wording “SALTY BULL” is over a design of a fish inside a double circle, with ocean in the background and a boat in the distance. There are leaves on the lower left and right portions of the double circle encircling [sic] the fish. The word "BREWING" is below this design.

Applicant appeals from the Trademark Examining Attorney’s final refusal to register under Trademark Act § 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when used in connection with the identified services, so resembles the mark TORO SALAO, in standard characters, registered on the Principal Register for “Restaurant services, including sit-down service of food and take-out restaurant services” in International Class 43.<sup>2</sup> The appeal is fully briefed.<sup>3</sup>

We reverse the refusal to register.

## **I. Evidentiary Issue**

The Examining Attorney objects to new evidence submitted by Applicant for the first time with its appeal brief, which she argues is untimely and should be disregarded, specifically: (1) a screen shot from the Google Translate database regarding the word “salao,” and (2) an excerpt from a website (Real Academia

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<sup>2</sup> Registration No. 5150833, issued February 28, 2017.

<sup>3</sup> Applicant’s briefs do not comply with Trademark Rule 2.126(a) because they are single-spaced. Nevertheless, since it appears that the briefs would fall within the Rule’s page limits if double-spaced, we have exercised our discretion to consider them. *See Univ. of Miami*, 123 USPQ2d 1075, 1077 n.2 (TTAB 2017).

Española) concerning the word “salao.”<sup>4</sup>

In reply, Applicant argues that it “previously presented Google Translate evidence ... within the initial response to the Examining Attorney’s Office Action. The Google Translate evidence is NOT new evidence.”<sup>5</sup>

Applicant’s argument with respect to the Google evidence is well-taken because we find that it was already submitted with Applicant’s response to the Examining Attorney’s first office action.<sup>6</sup> We therefore overrule the Examining Attorney’s objection to the Google evidence.

As to the Real Academia Española website excerpt, Applicant argues that because

the Examining Attorney continues to ignore the fact that there is no Spanish word ‘Salao’ which translations [sic] into the English word, “Salty” ... and since the translation simply does not exist, It is thus necessary to add clarity by supplementing additional evidence to the Appeals Board to further prove the Examining Attorney’s error and lack of accepting factual evidence which destroys the Examining Attorney’s primary argument for refusal of the mark.<sup>7</sup>

Applicant’s argument regarding this evidence is not well-taken. It is well-settled that the record in an ex parte proceeding should be complete prior to appeal. Trademark Rule 2.142(d), 37 C.F.R. § 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

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<sup>4</sup> 6 TTABVUE 3.

<sup>5</sup> 7 TTABVUE 2.

<sup>6</sup> June 26, 2019 Response to Office Action, TSDR 17.

<sup>7</sup> 7 TTABVUE 6.

MANUAL OF PROCEDURE (TBMP) § 1203.02(e) (June 2020). Applicant's contention that the additional evidence was necessary because the Examining Attorney ignored its argument is unavailing, as the Board's rules governing the admissibility of evidence are not dependent on a party's subjective belief that its arguments during prosecution should have been accepted.<sup>8</sup> Accordingly, the Examining Attorney's objection to this evidence is sustained and we give it no further consideration in our analysis.

## II. Applicable Law

The fundamental purpose of Trademark Act § 2(d) is to prevent confusion as to source, and to protect registrants from damage caused by registration of confusingly similar marks. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985). Our analysis is based on all of the probative evidence of record. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"). In making our determination, we consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) ("[T]he various evidentiary factors may play more or less weighty roles in any particular

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<sup>8</sup> If 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), 37 C.F.R. § 2.142(d). Applicant did not do so.

determination”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *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.”). We discuss the relevant *DuPont* factors below.

#### **A. Similarity or Dissimilarity of the Services and Trade Channels**

We begin our analysis with the second and third *DuPont* factors. The second *DuPont* factor considers the “similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *In re Detroit Athletic Co.*, 903 F.3d 1296, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *DuPont*, 476 F.2d at 1361), and the third *DuPont* factor considers the “similarity or dissimilarity of established, likely-to-continue trade channels.” *Id.* at 1052. It is “not necessary that the goods [or services] be identical or even competitive to support a finding of a likelihood of confusion.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven, Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). “[L]ikelihood of confusion can be found ‘if the respective goods [or services] are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Id.*

Moreover, we need not find similarity as to each and every service listed in an applicant's identification of services. It is sufficient for a finding of likelihood of confusion that relatedness is established for any item encompassed by the identification of services in a particular class in the application. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in the application); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, \*6 (TTAB 2019); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126, n.5 (TTAB 2015).

Applicant's and Registrant's services are overlapping and identical in part: Applicant's services includes "restaurant services," which encompasses Registrant's "restaurant services, including sit-down service of food and take-out restaurant services." The Examining Attorney also made of record copies of fifteen third-party registrations and webpages from three websites to show that Applicant's separately identified bar and taproom services are often provided by entities that provide restaurant services under the same mark.<sup>9</sup> Applicant does not dispute that the services are related.

The fact that the respective services are identical in part means that we must also assume that the relevant purchasers and channels of trade are identical to the same extent. *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1244 (TTAB 2010) (citing *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005

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<sup>9</sup> February 19, 2019 Office Action, TSDR 18-61, 67-98.

(Fed. Cir. 2002) (“[B]ecause the services are legally identical, they must be presumed to travel in the same channels of trade and be rendered or offered to the same class of consumers.”). *See also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

The evidence of record establishes that Applicant’s and Registrant’s services are overlapping and identical in part, and they travel in the same trade channels to the same or overlapping classes of purchasers. Accordingly, the second and third *DuPont* factors strongly support a finding of a likelihood of confusion.

#### **B. Similarity or Dissimilarity of the Marks**

The first *DuPont* factor considers the “similarities or dissimilarities of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *In re Detroit Athletic Co.*, 128 USPQ2d at 1047 (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014), *aff’d mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019)).

The test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the services offered under the respective marks is likely to result. *See Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d

1797, 1801 (Fed. Cir. 2018) (citing *Coach Servs.*, 101 USPQ2d at 1721). Our focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Neutrogena Corp. v. Bristol-Myers Co.*, 410 F.2d 1391, 161 USPQ 687, 688 (CCPA 1969) (many consumers “may have but dim recollections from having previously seen or heard one or the other of the involved marks.”). In making our determination, we keep in mind that the more closely related the goods are, the more “the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

Applicant’s SALTY BULL BREWING and design mark is different from Registrant’s TORO SALAO mark in appearance and sound, but equivalency in meaning or connotation can outweigh the differences in marks. *In re Aquamar, Inc.*, 115 USPQ2d at 1127-28; *In re Perez*, 21 USPQ2d 1075, 1077 (TTAB 1991). The Examining Attorney relies on the doctrine of foreign equivalents to assert that the marks are confusingly similar in meaning and connotation because TORO SALAO is Spanish for SALTY BULL.<sup>10</sup>

Under the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine similarity of connotation with English word marks. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005). The rule, however, is

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<sup>10</sup> 6 TTABVue 5-6.

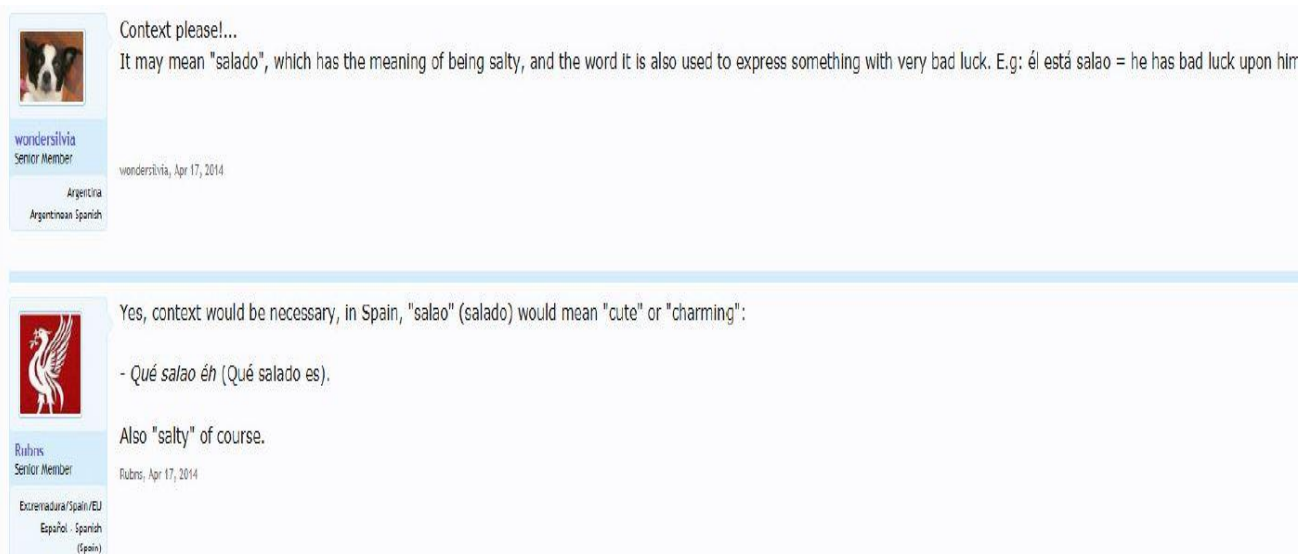
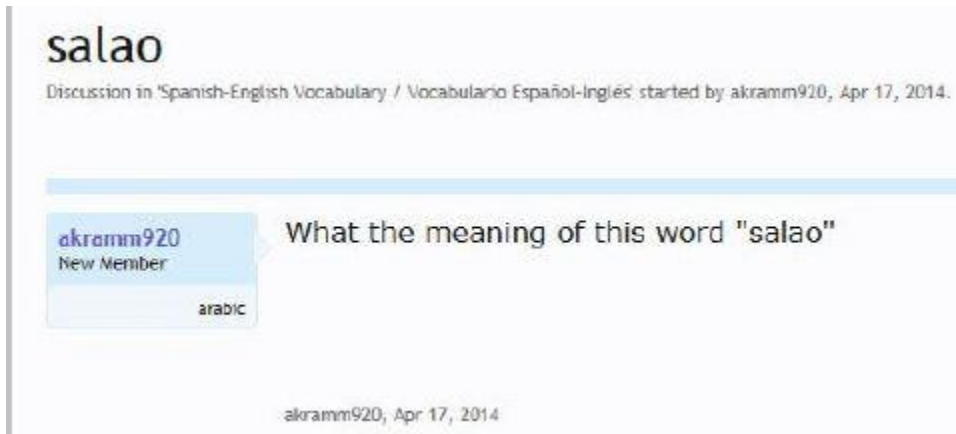


not absolute and should be viewed merely as a guideline. *Id.* The doctrine should be applied only when: (1) the relevant English translation is direct and literal and there is no contradictory evidence establishing another relevant meaning, *In re Sadoru Grp., Ltd.*, 105 USPQ2d 1484, 1485 (TTAB 2012), and (2) “it is likely that the ordinary American purchaser would ‘stop and translate [the word] into its English equivalent.’” *Palm Bay*, 73 USPQ2d at 1696 (quoting *In re Pan Tex Hotel Corp.*, 190 USPQ 109, 110 (TTAB 1976)). The “ordinary American purchaser” includes “all American purchasers, including those proficient in a non-English language who would ordinarily be expected to translate words into English.” *In re Spirits Int’l N.V.*, 563 F.3d 1347, 90 USPQ2d 1489, 1492 (Fed. Cir. 2009).

To support her argument that the terms SALTY BULL and TORO SALAO have the same meaning under the doctrine of foreign equivalents, the Examining Attorney provided a webpage from Wordreference.com’s online language dictionary showing that “toro” translates from Spanish into English as “bull”:

The screenshot shows the WordReference.com dictionary entry for the Spanish word "toro". At the top, the word "toro" is displayed in a large font, followed by a speaker icon and the text "ESCUCHAR" and "MÉXICO". Below this, there are links for "Spanish definition", "Spanish synonyms", "Gramática", "Conjugación [ES]", "Conjugator [EN]", "in context", and "images". The entry lists "Inflexiones de 'toro' (nm): mpi: toros". There are three tabs: "WordReference" (selected), "Collins", and "WR Reverse (24)". Below the tabs, it says "WordReference English-Spanish Dictionary © 2019:". The main section is titled "Principal Translations" and is divided into two columns: "Spanish" and "English". Under "Spanish", it lists "toro nm" and "(Bos laurus)". Under "English", it lists "bull n". Below the English translation, there is a bilingual example sentence: "Trajeron un toro a la vaquería para fecundar a las vacas lecheras." and "They brought a bull to the cowshed farm to impregnate the dairy cows."

She also provided a page from the same website purportedly showing that “the adjective salao” translates from Spanish into English as “salty”:<sup>11</sup>



As shown by the above excerpts, this “translation” evidence is not actually a dictionary definition, but rather more in the nature of a blog, where someone asked the meaning of “salao” and two bloggers responded. One opined that “it may mean ‘salado,’ which has the meaning of being salty, and said it is also used to express something with bad luck; the other also said that “in Spain, ‘salao’ (salado) would

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<sup>11</sup> February 19, 2019 Office Action, TSDR 65-66.

mean ‘cute’ or ‘charming’; ... also ‘salty’ of course.” Both indicated that context was necessary to determine meaning.

Applicant does not dispute that “[t]here is a clear definition and translation of the term ‘toro’ into the English word ‘bull.’”<sup>12</sup> However, Applicant does dispute the Examining Attorney’s definition of SALAO, which Applicant contends has “has no translation into English” from Spanish.<sup>13</sup> Applicant refers to the Examining Attorney’s webpage evidence on the meaning of that word as

obscure internet blogs where the term Salao is discussed in a chat-like forum. After close examination of these referenced blogs, one can quickly determine that the discussion of the term “Salao” within the forum is in fact vague and not as definitive as the examining attorney has made them out to be. In fact, the individuals within the blog discuss how they are not truly sure whether a translation of the term “Salao” is definitively meant to be “salty”.<sup>14</sup>

As noted earlier, the doctrine of equivalents should be applied only when the relevant English translation is direct and literal and there is no contradictory evidence establishing another relevant meaning. *In re Sadoru Grp., Ltd.*, 105 USPQ2d at 1485. Here, there is no clear single translation and connotation provided for the term SALAO; the evidence consists solely of two anonymous blog postings providing differing opinions on its potential meaning depending on context.

Although “we have routinely applied the doctrine of foreign equivalents to Spanish language marks,” *see, e.g., In re Aquamar*, 115 USPQ2d at 1127, the absence of any

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<sup>12</sup> 4 TTABVUE 2.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Id.* at 2.

actual dictionary translation from a recognized source for this common language raises some doubt as to whether “salty” is a direct and literal translation of SALAO. Moreover, according to the Cambridge and Collins dictionaries, the direct translation of “salty” from English to Spanish and vice-versa is “salado.”<sup>15</sup>

Based on the foregoing, we find the evidence of record insufficient to establish that “salao” is a direct and literal translation of “salty,” which renders the doctrine of foreign equivalents inapplicable to our analysis. Accordingly, we need not address *Palm Bay’s* second factor regarding whether it is likely that the ordinary American purchaser would ‘stop and translate’ that word into its English equivalent. We find that the marks are dissimilar in connotation.

Because the marks are very different in overall appearance, sound, connotation, and commercial impression, the first *DuPont* factor strongly supports a finding of no likelihood of confusion.

### III. Conclusion



We find no likelihood of confusion between Applicant’s mark SALTY BULL BREWERY and design mark and Registrant’s standard character mark TORO SALAO. Notwithstanding that the services are legally identical in part, and the channels of trade and

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<sup>15</sup> <https://dictionary.cambridge.org/dictionary/english-spanish/salty>;  
<https://dictionary.cambridge.org/dictionary/spanish-english/salado>;  
<https://www.collinsdictionary.com/us/dictionary/english-spanish/salty>;  
<https://www.collinsdictionary.com/us/dictionary/spanish-english/salado>.

The Board may take judicial notice of definitions from dictionaries, including online dictionaries that exist in printed format. *In re Cordua Rests.* LP, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

purchasers are the same, we conclude that the marks are too dissimilar overall to warrant a finding of likelihood of confusion and that the first *DuPont* factor, accordingly, is dispositive in this case. *Kellogg Co. v. Pack'em Enters.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) (“We know of no reason why, in a particular case, a single du Pont factor may not be dispositive. ... ‘each [of the thirteen factors] may from case to case play a dominant role.’”). Because the marks are completely different in appearance and sound, and there is no reliable evidence showing that they have the same meaning or connotation, we find that the relevant consumers are not likely to assume that a source connection exists between Applicant’s and Registrant’s services provided under their respective marks.

***Decision:*** The refusal to register is reversed.