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Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bushwood Productions, Inc.

Serial No. 98492454

Sean S. Wooden of Katten Muchin Rosenman LLP
for Bushwood Productions, Inc.

Justine N. Burke, Trademark Examining Attorney, Law Office 121,
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Before Heasley, Dunn, and Thurmon,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, Bushwood Productions, Inc., seeks registration on the Principal Register of the mark BREAKFAST BALLER (in standard characters) for “distilled spirits” in International Class 33.¹

¹ Application Serial No. 98492454 was filed on April 10, 2024, based on a declared intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system and identify the documents by title, date, and page in the downloadable .pdf version. Citations to the briefs and other materials in the appeal record refer to the Board’s TTABVUE online docket system.

The Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with these goods, so resembles the registered mark BREAKFAST BALL BLOODY MARY (in standard characters, with "BLOODY MARY" disclaimed) for "alcoholic beverages, except beer" in International Class 33, as to be likely to cause confusion, to cause mistake, or to deceive.²

When the refusal was made final, Applicant appealed. We affirm the refusal to register.

I. Likelihood of Confusion

Section 2(d) of the Trademark Act provides that a mark may be refused registration if it:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive....

15 U.S.C. § 1052(d).

To determine whether there is a likelihood of confusion between marks under Section 2(d), we analyze the evidence and arguments under the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (the "DuPont factors") cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 144 (2015). "The likelihood of confusion analysis considers all *DuPont* factors for which there is evidence of record but 'may focus . . . on dispositive factors, such as similarity of the

² Registration No. 7512088, issued on the Principal Register on September 24, 2024.

marks and relatedness of the goods.’ *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265 (Fed. Cir. 2002) (alteration in original) (quoting *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336 (Fed. Cir. 2001)).” *Sunkist Growers, Inc. v. Intrastate Dist., Inc.*, 144 F.4th 1376, 1379 (Fed. Cir. 2025). In this case, the briefs address the first three *DuPont* factors.

A. Relatedness of the Goods and Channels of Trade

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration...,” and the third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 476 F.2d at 1361.

We compare the goods as they are identified in the Application and the cited Registration. *In re i.am.symbolic, llc*, 866 F.3d 1315, 1325 (Fed. Cir. 2017) (“In reviewing the second factor, ‘we consider the applicant’s goods as set forth in its application, and the [registrant’s] goods as set forth in its registration.’” (quoting *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 1382 (Fed. Cir. 2006))). The Registration identifies “alcoholic beverages, except beer.” Reading this identification broadly, to encompass “all the goods of the nature and type described therein,” *see In re Solid State Design Inc.*, No. 87269041, 2018 WL 287909, *6 (TTAB 2018) (quoting *In re Jump Designs, LLC*, No. 76393986, 2006 WL 1968602, *5 (TTAB 2006)), we find that it encompasses Applicant’s more narrowly identified “distilled spirits.” Therefore, as the Examining Attorney correctly notes,³ the respective goods are

³ Examining Attorney’s brief, 6 TTABVUE 4.

legally identical. *In re Hughes Furniture Indus.*, No. 85627379, 2015 WL 1734918, *3 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture’”), *quoted in Double Coin Holdings, Ltd. v. Tru Dev.*, No. 92063808, 2019 WL 4877349, *7 (TTAB 2019). Applicant does not dispute the legal identity of the identified goods.⁴

Under the third *DuPont* factor, legally identical goods are presumed to travel through the same channels of trade to the same classes of customers—purchasers of alcoholic beverages. *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 754 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *In re Smith & Mehaffey*, No. 74213737, 1994 WL 417267, *1 (TTAB 1994) (“Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers”), *quoted in In re FabFitFun, Inc.*, No. 86847381, 2018 WL 4043156, *2 (TTAB 2018).

The second and third *DuPont* factors thus weigh heavily in favor of finding a likelihood of confusion.

B. Similarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant’s and Registrant’s marks in their entirety, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 476 F.2d at

⁴ Applicant’s brief, 4 TTABVUE 5.

1361. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, No. 87075988, 2018 WL 2734893, *5 (TTAB 2018) *aff’d* 777 Fed. Appx. 516 (Fed. Cir. 2019) (citing *In re Davia*, No. 85497617, 2014 WL 2531200, *2 (TTAB 2014)). Again, Applicant’s mark is BREAKFAST BALLER and Registrant’s mark is BREAKFAST BALL BLOODY MARY.

It is here, under the first *DuPont* factor, that Applicant takes a stand, arguing that the dissimilarity of the marks precludes confusion even if the goods are legally identical.⁵ Applicant argues that “the differences in appearance, sound, connotation and overall commercial impression outweigh the sole point of similarity, *i.e.*, the presence of BREAKFAST in the respective marks, followed by BALL in the Cited Mark and BALLER in Applicant’s Mark.”⁶ Specifically, in terms of sight and sound, Applicant contends that “Applicant’s BREAKFAST BALLER mark is an alliterative, two-word phrase with four syllables” that “does not include or connote BLOODY MARY (or any other specific beverage), an integral component of the commercial impression of the Cited Mark.”⁷ Applicant contends, moreover, that BREAKFAST BALL and BREAKFAST BALLER are distinguishable in connotation and commercial impression, as a “BALLER” is distinct from a “BALL”: “The term ‘baller’ is not particularly tied to ‘ball’ or limited to persons that are proficient with balls. For

⁵ Applicant’s brief, 4 TTABVUE 5.

⁶ *Id.*, 4 TTABVUE 3.

⁷ *Id.*, 4 TTABVUE 3.

example, the first definition of ‘baller’ on Dictionary.com is ‘successful person who has or earns a lot of money and lives a lavish, flashy, or extravagant lifestyle.’”⁸

We note, however, that Applicant’s mark, BREAKFAST BALLER, completely encompasses the first two words of Registrant’s mark, BREAKFAST BALL. The marks’ first words, “BREAKFAST,” are identical. And the only difference between “BALL” and “BALLER” is “-ER,” “a person or thing that performs the action.”⁹ Dictionaries define the term “BALLER” not only as a successful person with a lavish lifestyle, but also as “someone who is proficient at playing ball, especially basketball,”¹⁰ and more generally “an athlete who plays a sport that involves the use of a ball.”¹¹ As such, the wording BREAKFAST BALLER comprising Applicant’s mark merely connotes the idea of an athlete who plays a sport using a ball, while the registrant’s mark connotes the idea of the ball that is used.

“The [virtual] identity of the marks’ initial two words is particularly significant because consumers typically notice those words first.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018). The cited registered mark’s dominant feature,

⁸ Applicant’s brief, 4 TTABVUE 3; Dictionary.com, April 15, 2025 Response to Office Action at 15.

Applicant’s brief refers to a song entitled “Wanna Be a Baller” in order to show consumer perception of the word “BALLER.” 4 TTABVUE 3. The Examining Attorney objects that evidence of this song’s title and lyrics was not introduced during prosecution, and that this reference to the song should therefore be disregarded. 6 TTABVUE 2. We base our opinion on the evidence of record, Trademark Rule 2.142(d); 37 C.F.R. § 2.142(d), not attorney’s assertions in the briefs, *In re Weiss*, 2024 WL 3617597, *2 (TTAB 2024), but hasten to add that consideration of this song title would not change the outcome of this appeal.

⁹ OxfordLearnersDictionaries.com, May 14, 2024 Office Action at 7-8.

¹⁰ Dictionary.com, April 15, 2025 Response to Office Action at 15.

¹¹ Merriam-Webster.com, April 15, 2025 Response to Office Action at 19.

BREAKFAST BALL, is just as alliterative as BREAKFAST BALLER. And the difference in the marks' number of words and syllables is likely to go unnoticed. *See In re Sela Prods., LLC*, No. 77629624, 2013 WL 2951800, *4 (TTAB 2013) (“We agree that the marks have a different number of words and syllables However, these distinctions between the marks that applicant points out do not serve to distinguish them.”); *In re John Scarne Games, Inc.*, 1959 WL 5901, *1 (TTAB 1959) (“Purchasers ... do not engage in trademark syllable counting — they are governed by general impressions made by appearance or sound, or both.”). “The proper focus is on the recollection of the average consumer, who retains a general rather than specific impression of the marks.” *FabFitFun*, 2018 WL 4043156, at *5. We find that purchasers encountering the marks are likely to recall BREAKFAST BALLER and BREAKFAST BALL, which are confusingly similar in sight and sound.

Moreover, as the Examining Attorney correctly observes, the wording BREAKFAST BALL is the dominant portion of Registrant's mark because it is the only distinctive, source-identifying wording.¹² The disclaimed wording BLOODY MARY is the generic name of a drink encompassed by Registrant's identified “alcoholic beverages, except beer.”¹³ As such, it sounds like one of many drinks that could be offered under Registrant's distinctive BREAKFAST BALL wording. “While the Board must consider the disclaimed term, an additional word or component may

¹² Examining Attorney's brief, 6 TTABVUE 6.

¹³ A bloody mary is “[a] cocktail usually made of vodka, tomato juice, and seasonings” AHDictionary.com, May 14, 2024 Office Action at 11.

technically differentiate a mark but do little to alleviate confusion.” *In re Charger Ventures LLC*, 64 F.4th 1375, 1382 (Fed. Cir. 2023). So even though we compare the marks in their entirety, “it may be appropriate, in certain circumstances, to consider that, ‘one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark.’ *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012).” *Bureau Nat’l. Interprofessionnel du Cognac v. Cologne & Cognac Entm’t.*, 110 F. 4th 1356, 1369-70 (Fed. Cir. 2024).

“The commercial impression of a trademark is the meaning or idea it conveys or the mental reaction it evokes, including the information it conveys with respect to source.” *Bertini v. Apple, Inc.*, 63 F.4th 1373, 1377 (Fed. Cir. 2023) (internal punctuation omitted). “[T]he significance of a mark must be determined not in the abstract, but rather in relation to the goods or services to which it is applied, and the context in which it is used, because that is how the mark is encountered by purchasers.” *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 1988 WL 252340, *3 (TTAB 1988). In this case, where the respective goods are legally identical alcoholic beverages, purchasers would tend to encounter both in the same channels of trade, such as liquor stores. Purchasers could easily infer that “BREAKFAST BALLER” connotes the person performing a “BREAKFAST BALL.” “With regard to meaning or connotation, there is nothing in the record to suggest that [BREAKFAST BALL(ER)] has one meaning when used with Applicant's goods and a second and different meaning when used with the goods identified in the cited registration.” *In re Dare*

Foods Inc., No. 88758625, 2022 WL 970319, *6 (TTAB 2022) (quoting *In re Embiid*, No. 88202890, 2021 WL 2285576, * 9 (TTAB 2021)).¹⁴

In sum, when the marks are considered in their entirety, their appearance, sound, connotation, and commercial impression are quite similar in the context of the legally identical goods. And because “the parties’ goods are closely related, a lesser degree of similarity between the marks may be sufficient to give rise to a likelihood of confusion.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012).” *Sunkist Growers*, 144 F.4th 1376, at 1379. We accordingly find that the first *DuPont* factor weighs in favor of finding a likelihood of confusion.

II. Conclusion

For the foregoing reasons, we find that the dispositive *DuPont* factors, similarity of the marks and relatedness of the goods, as well as the channels of trade and classes of consumers, weigh in favor of finding a likelihood of confusion under Section 2(d). 15 U.S.C. § 1052(d).

Decision: The refusal to register Applicant’s mark is affirmed.

¹⁴ Applicant suggests that a subset of alcoholic beverage purchasers, namely golfers, would recognize “BREAKFAST BALL” as a reference to a mulligan, or do-over shot, taken from the first tee on an early morning round of golf. Applicant’s brief, 4 TTABVUE 4; April 15, 2025 Response to Office Action at 5; see [BreakfastBalls.golf/whats-a-breakfast-ball](https://www.breakfastballs.golf/whats-a-breakfast-ball), April 15, 2025 Response to Office Action at 9; Urban Dictionary, April 15, 2025 Response to Office Action at 9-10. The Examining Attorney acknowledges this interpretation. Examining Attorney’s brief, 6 TTABVUE 6; Oct 23, 2024 Office Action at 7. But neither the subject Application nor the cited Registration places limitations on the class of customers, which, we have noted, encompasses all purchasers of alcoholic beverages, not just golfers. See *In re Greenwood*, No. 87168719, 2020 WL 7074687, *5 (TTAB 2020) (relevant consumers are members of the general public, not music aficionados). And the same analysis applies: In golf, as in other sports, purchasers could easily infer that “BREAKFAST BALLER” connotes the person performing a “BREAKFAST BALL.”