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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Sparta Beverage LLC

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Serial No. 85578578

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Sam Hope for Sparta Beverage LLC.

Juhi Kaveeshvar Patel, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

Before Zervas, Shaw and Masiello, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Sparta Beverage LLC (“Applicant”) seeks registration on the Principal Register



of the mark for “Beer, ale, lager, stout and porter; Beers; Brewed malt-based alcoholic beverage in the nature of a beer; Non-alcoholic beer” in International Class 32.¹

¹ Application Serial No. 85578578 was filed on March 23, 2012, claiming a bona fide intent to use the mark in commerce pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The application includes the following description of the mark: “The mark consists of two swords with characteristic design cross-crossed, above it a drawing or photo

The Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), having determined that Applicant's mark is likely to cause confusion or mistake or to deceive in view of Registration No.



4100600² for the mark

for the following International Class 41

services:

ENTERTAINMENT SERVICES in the nature of on-going special variety, news, live music and comedy show series featuring recap, details and exhibitions of creative or skillful animation of talent shows and its participants in non-downloadable multimedia presentations for broadcast, on television, cable, satellite, the internet, mobile web, cell phones, smartphones and other handheld wireless devices; entertainment services in the nature of animation competitions and exhibitions broadcast via a global communication network, namely, television, online and mobile handheld devices.

During the course of prosecution, Applicant filed several proposed amendments to its drawing depicting the applied-for mark:

of a front facing Spartan soldier helmet and wording 'SPARTAN' on top, all super-imposed on what appears to be a shield."

² Registered February 21, 2012. The description of the mark states, "The mark consists of a circular shield, with a superimposed pair of crossed swords, a superimposed helmet modified to look like armor within a second circular design, with the word 'SPARTANS' on the shield above the helmet and between the swords."

<i>Date of Submission</i>	<i>Proposed Mark</i>
October 7, 2012	
April 7, 2013	
March 12, 2013	

The Examining Attorney refused to accept any of the proposed amendments to the drawing, citing Trademark Rule 2.72, 37 C.F.R. §2.72, and maintaining they are all material alterations of the applied-for mark.

After the refusals were made final, Applicant filed an appeal and multiple requests for reconsideration. The Examining Attorney denied each of the requests for reconsideration and the appeal was resumed. The appeal is fully briefed.

Likelihood of Confusion

Our determination under Trademark Act Section 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177

USPQ 563 (CCPA 1973); *see also Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see also In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014).

We first consider the similarity or dissimilarity of the goods and services. In determining whether the goods and services are related, it is not necessary that the goods and services of the parties be similar or competitive in character to support a holding of likelihood of confusion; it is sufficient for such purposes that a party claiming damage establish that the goods and services are related in some manner and/or that conditions and activities surrounding marketing of these goods and services are such that they would or could be encountered by same persons under circumstances that could, because of similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same source. *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399. 1410 (TTAB 2010); *Schering Corp. v. Alza Corp.*, 207 USPQ 504, 507 (TTAB 1980).

It is settled that the question of likelihood of confusion must be determined based on an analysis of the goods and services recited in Applicant’s application vis-

à-vis the services recited in the cited registration and we cannot read limitations into those goods or services. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Press Inc.*, 281 F.3d 1261, 62 USPQ 2d 1001 (Fed. Cir. 2002); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990).

In order to show a relationship between the respective goods and services, the Examining Attorney has made of record several use-based third-party registrations to show that entities have registered their marks for goods of the type listed in Applicant's application and services of the type listed in the cited registration. Although third-party registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, third-party registrations may have probative value to the extent that they serve to suggest that the goods and services listed therein are of a kind that may emanate from a single source. *In re Infinity Broad. Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). The following are set forth in the Examining Attorney's Brief and hence presumably are the most relevant:

- Registration No. 4026291 "FEATHER FALLS CASINO BREWING COMPANY" and Design for "beer" and "entertainment in the nature of live shows and performances by actors, comedians, vocalists, musicians, bands and other performing artists";
- Registration No. 3918086 "HEINEKEN INSPIRE" for "beer" and "entertainment services in the nature of live concerts featuring music";

- Registration No. 2791447 “LEINIE LODGE” for “beer” and “entertainment services, namely, sponsoring musical concerts; tourist entertainment services, namely providing and maintaining an information and guide center for a brewery”;
- Registration No. 3131210 “AMSTERJAM” for “beer” and “entertainment services in the nature of live entertainment festivals featuring live music”; and
- Registration No. 3278189 “AMERICAN HOMEBREW CONTEST” for “ale; beer” and “entertainment services, namely, conducting contests.”

In addition, the Examining Attorney submitted printouts of several web pages to demonstrate that a single entity offers the same goods and services under the same mark, as those set forth in the application and registration.

We have carefully reviewed the Examining Attorney’s registration and website evidence and find that none of it concerns the services set forth in the cited registration. The cited registration recites not the live music shows reflected in most of the Examining Attorney’s registration and website evidence,³ but entertainment that is “in non-downloadable multimedia presentations for broadcast, on television, cable, satellite, the Internet, mobile web, cell phones, smartphones and other handheld wireless devices.” Moreover, Registrant’s series “recap[s], details and exhibit[s] ... creative or skillful animation of talent shows and its participants.” The

³ See, e.g., www.bruisecruisefestival.com/about/ stating, “Bruise Cruise is a three-day tropical rock extravaganza. ... Bands on Board will include ... King Khan & The Shrines, The Soft Pack, The Dirtbombs ...”; and www.theannapoliscraftbeerandmusicfestival.com stating, “The Annapolis Craft Beer and Music Festival is the premier event in the state’s capital where you can combine the best of all worlds: sample beer from regional and national craft breweries --- listen to music all day long --- enjoy fine cuisine --- make a purchase at The Shops Village. ... Listen to live music on two stages; smooth jazz, island music; rock and roll; classics; R & B; country; and more.” November 8, 2012 Office Action.

evidence set forth by the Examining Attorney does not pertain to the services described in the cited registration.

Inasmuch as the evidence set forth by the Examining Attorney does not establish a relationship between the goods and services, even if the marks are substantially identical, as they are, the Examining Attorney has not carried her burden of establishing a prima facie case of likelihood of confusion. The refusal to register Applicant's mark under Section 2(d) of the Trademark Act is reversed.

Material Alteration of Mark

Trademark Rule 2.72(b)(2), 37 C.F.R. § 2.72(b)(2), provides that in an application based on a bona fide intention to use a mark in commerce under Section 1(b) of the Act, an applicant may amend the drawing of the mark if “[t]he proposed amendment does not materially alter the mark. The Office will determine whether a proposed amendment materially alters a mark by comparing the proposed amendment with the description or drawing of the mark filed with the original application.”

The test for determining whether a proposed amendment is a material alteration has been articulated as follows:

The modified mark must contain what is the essence of the original mark, and the new form must create the impression of being essentially the same mark. The general test of whether an alteration is material is whether the mark would have to be republished after the alteration in order to fairly present the mark for purposes of opposition. If one mark is sufficiently different from another mark as to require republication, it would be tantamount to a new mark appropriate for a new application.

In re Hacot-Colombier, 105 F.3d 616, 620, 41 USPQ2d 1523, 1526 (Fed. Cir. 1997), quoting *Visa Int'l Service Ass'n v. Life-Code Systems, Inc.*, 220 USPQ 740, 743-44 (TTAB 1983). Also, as has often been stated, the addition of any element that would require a further search generally will constitute a material alteration. *In re Pierce Foods Corp.*, 230 USPQ 307 (TTAB 1986). The crucial questions are whether the proposed amendment retains “the essence of the original mark” and whether it creates “the impression of being essentially the same mark.” *In re Who? Vision Systems, Inc.*, 57 USPQ2d 1211, 1218 (TTAB 2000). That is, “the new and old forms of the mark must create essentially the same commercial impression.” *Id.*, quoting *In re Nationwide Industries Inc.*, 6 USPQ2d 1882, 1885 (TTAB 1988). *See also In Re Guitar Straps Online*, 103 USPQ2d 1745 (TTAB 2012).

With the above in mind and after careful consideration, we find that each of the three different attempts by Applicant to amend the proposed mark, as originally filed, constitutes a material alteration by altering the original mark to diminish the prominence of the helmet and enhance the prominence of the crosses swords. In addition, in the case of the first amended mark the proposed mark changes the background from a circular design to a shield design. These features create a new commercial impression different from that of the mark in the original drawing page that would necessarily involve a new search by the Examining Attorney to determine if there is a conflict with any registration or prior-filed application with a similar configuration.

Accordingly, each of Applicant's attempts to amend the drawing would result in material alterations to the proposed mark, as originally filed, and thus are prohibited under Trademark Rule 2.72.

Decision: The refusal to register Applicant's mark under Section 2(d) of the Trademark Act is reversed and the Examining Attorney's refusal to enter the proposed drawing amendments is affirmed. The application will proceed in due course to publication. The mark which is the subject of this application is the mark depicted in the drawing page filed with the original trademark application.