

**This Opinion is Not a
Precedent of the TTAB**

Mailed: July 15, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Three Spirits Brewery LLC

Serial No. 86175819

Jeffrey J. Schwartz of Schwartz Law Firm PC
for Three Spirits Brewery, LLC.

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Before Wellington, Ritchie, and Lykos,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Three Spirits Brewery LLC (“Applicant”) seeks registration on the Principal Register of the mark HOPPER’S DELIGHT in standard character format for “beer” in International Class 32.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark on the ground of a likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in view of the following three registered marks:

¹ Application Serial No. 86175819 was filed on January 27, 2014, based on an intent to use the mark in commerce, under Section 1(b) of the Trademark Act.

- HOPPERS (in typed characters)²
for “beer and ale” in International Class 32;³



- for “beer and ale” in International Class 32;⁴ and
- DELIGHT (in typed characters)
for “alcoholic malt beverages – namely, beer” in International Class 32.⁵

The first two registrations are owned by a single entity.

After a final refusal was issued, Applicant filed a request for reconsideration that was denied by the Examining Attorney. Applicant then appealed and the refusal has been briefed by Applicant and the Examining Attorney.

For the following reasons, we affirm the likelihood of confusion refusal.

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are

² Effective November 2, 2003, Trademark Rule 2.52, 37 C.F.R. § 2.52, was amended to replace the term “typed” drawing with “standard character” drawing. A mark depicted as a typed drawing is the legal equivalent of a standard character mark. *See In re Brack*, 114 USPQ2d 1338, 1339 n.2 (TTAB 2015).

³ Reg. No. 2143533 issued on March 10, 1998, renewed.

⁴ Reg. No. 2099536 issued on September 23, 1997, renewed.

⁵ Reg. No. 1136375 issued on May 27, 1980, renewed.

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 (CCPA 1976). *See also, In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Similarity of the Goods, Trade Channels and Classes of Purchasers

We turn first to the *du Pont* factor involving the relatedness of goods and quickly discern that the respective goods are identical inasmuch as they all include beer.

Because Applicant's goods are as compared to each cited registration are either identical or identical in part, *i.e.*, all are for "beer," we must presume that the channels of trade 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) (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); *see also 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); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011).

Accordingly, the factors involving the similarity of the goods and trade channels weigh in favor of finding a likelihood of confusion.

Similarity of the Marks

We now compare the two marks in their entireties and, in doing so, look to their appearance, sound, connotation and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). We keep in mind that the test is not whether the marks can be distinguished when subjected to a side-by-side comparison; “[i]nstead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the consequent lack of perfect recall, whether confusion as to source or sponsorship is likely.” *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991); *see also, Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). Finally, in assessing the similarity or dissimilarity of the marks, we keep in mind that when marks appear on identical goods, as they do here, the degree of similarity 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, 1700 (Fed. Cir. 1992).

i. Applicant’s Alleged Parody Involving the Song “Rapper’s Delight”

Before we make comparisons of the marks, we address a key argument made by Applicant. That is, Applicant argues that its mark HOPPER’S DELIGHT is a parody of a well-known song called “Rapper’s Delight” and “the effect of the parody is to create a distinction in the viewer’s mind between [the song and the mark]” and that this “forms a unique and highly memorable commercial impression.” Brief, p. 7.

Although Applicant introduced a printout from the Wikipedia entry for the referenced song which indicates that the song has some popularity in the U.S.,⁶ there is no evidence that consumers will necessarily associate Applicant's mark with the song or perceive the intended play of words on the song. Applicant's mark is unlike, for example, WRAPPER'S DELIGHT for wrapping paper goods where one could conclude an obvious association is not only intended but being made.

Ultimately, without evidence that consumers will actually understand Applicant's mark as a play on or parody of the song, we do not find that a separate commercial impression is being made that associates the mark with the song. Thus, for purposes of comparing the marks, we do not view any intended parody or play on words as assisting for purposes of distinguishing the marks.⁷

ii. HOPPER'S DELIGHT v. HOPPERS (typed and stylized with design)

With respect to the registered HOPPERS marks, both in typeset and stylized with a border design, Applicant is essentially incorporating this term in its entirety into the applied-for mark. The apostrophe before the "s" in Applicant's mark is unlikely to be noticed by consumers and does not change the pronunciation; even if

⁶ According to Wikipedia (www.wikipedia.org), the song "Rapper's Delight" was recorded in 1979 by the American hip hop trio The Sugarhill Gang and is "generally considered to be the song that first popularized hip hop in the United States and around the world." The song is "ranked # 251 on the Rolling Stone magazine's list of The 500 Greatest Songs of All Time," among other mentions. Printout of Wikipedia entry attached to Applicant's response (filed on May 28, 2014) to the first Office Action.

⁷ Applicant is not claiming 'parody as a defense' as contemplated and discussed in *N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497 (TTAB 2015). Notably, this is an *ex parte* proceeding and the cited registered mark is not the object of Applicant's intended parody. Thus we do not speak herein on the issue of parody as a defense.

noticed, it merely indicates the possessive form of HOPPER and would have little effect in countering the overall similarity of the marks. *See 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”); *In re Curtice-Burns, Inc.*, 231 USPQ 990, 992 (TTAB 1986) (finding the marks MCKENZIE'S and MCKENZIE “virtually identical in commercial impression”); *Winn's Stores, Inc. v. Hi-Lo, Inc.*, 203 USPQ 140, 143 (TTAB 1979) (noting that “little if any trademark significance can be attributed to the apostrophe and the letter ‘s’ in opposer's mark”).

As to the meaning of the marks, the word “hopper” may either mean “one that hops” or “a usually funnel-shaped receptacle for delivering material (as grain or coal).”⁸ In the context of the goods, the word “hop” (or “hops”) also has some significance to the extent that it is an ingredient for beer.⁹ Here, it is possible for any of these meanings both Applicant’s and the Registrant’s marks have very similar commercial impressions based on regardless of how this term is understood. “Hoppers” or “Hopper’s” may conjure a person hopping or a reference to an ingredient of the goods.

⁸ *Merriam-Webster.com*. 2011. <http://www.merriam-webster.com>. The Board may take notice of dictionary definitions, *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).

⁹ “Hops” defined as plural form for “the ripe dried pistillate catkins of a hop used especially to impart a bitter flavor to malt liquors.” *Id.*

Finally, we do not ignore the fact that the marks differ due to Applicant's addition of the term DELIGHT. However, this addition changes little to the similarity in the marks' overall commercial impression. DELIGHT is a laudatory word that suggests a degree of satisfaction one would presumably have after drinking the beer. In other words, one already familiar with HOPPERS beer may mistakenly believe that HOPPER'S DELIGHT is just a reference to the same beer with an added expression of enjoyment.

In sum, the marks are similar in sight, sound, connotation and commercial impression.

iii. HOPPER'S DELIGHT v. DELIGHT

Again, Applicant seeks to adopt a mark that incorporates a registered mark, DELIGHT, in its entirety. Here, although the registered mark is laudatory and suggestive of a positive quality of the goods, there is no evidence that DELIGHT lacks distinctiveness or is otherwise weak or diluted in the field of beer. Even assuming, arguendo, we were to find that DELIGHT is not a particularly strong mark, we have long held that a likelihood of confusion is to be avoided as much between "weak" marks as between "strong" marks, and as between "'weak" and "strong" marks. See *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA, 1974); *In re Industrial Expositions, Inc.*, 194 USPQ 456, 459 (TTAB 1977).

We must also consider the possibility that consumers already familiar with the DELIGHT mark on beer who then encounter Applicant's HOPPER'S DELIGHT

beer may mistakenly believe that both beers emanate from a common source. For example, because the term HOPPER'S may conjure hops, an ingredient of beer, consumers may believe HOPPER'S DELIGHT is simply the "hoppier" version of registrant's DELIGHT beer.

Conclusion

Because Applicant's HOPPER'S DELIGHT mark is similar to the Registrants' marks HOPPERS (in both standard characters and stylized lettering) and DELIGHT, its concurrent use on identical goods, namely, beer, is likely to cause confusion as to source, given they will be offered in the same trade channels and sold to the same purchasers.

Decision: The likelihood of confusion refusal to register Applicant's mark is affirmed.