

This Opinion is Not a
Precedent of the TTAB

Mailed: January 27, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Twin Restaurant IP, LLC

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Serial No. 86525176

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Elisabeth A. Evert of Hitchcock Evert LLP
for Twin Restaurant IP, LLC.

Marynelle W. Wilson, Trademark Examining Attorney, Law Office 113,
Odette Bonnet, Managing Attorney.

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Before Ritchie, Lynch and Pologeorgis,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

Twin Restaurant IP, LLC (“Applicant”) seeks registration on the Principal Register of the mark DROPDEAD REDHEAD in standard characters for “Beer, ale and lager” in International Class 32.¹

¹ Application Serial No. 86525176 was filed February 5, 2015 based on an intent to use under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). Applicant later filed an amendment to allege use, claiming first use anywhere and in commerce in April 2015.

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the registered mark DROP DEAD BLONDE in standard characters for “Ales” in International Class 32.²

After the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration. On remand, the Examining Attorney denied the request for reconsideration. The appeal resumed and has been fully briefed. We affirm the refusal to register.

I. Evidentiary Matter

In its Initial Brief, Applicant attached certain exhibits that were not from the evidentiary record created during the prosecution of the application, consisting of an article about Applicant, Applicant’s restaurant menu, and several registrations for other marks owned by Applicant. The Examining Attorney objects to the new evidence, Exhibits 1-6 and 15-16 of the brief, as outside the record and untimely. In its Reply Brief, Applicant offers no justification for the untimely evidence, and instead merely contends that “[t]he Board is not required to disregard additional evidence.”³ Applicant cites “37 C.F.R. § 2.12(d)” for this proposition, but § 2.12 has been reserved and contains no regulatory content. We presume Applicant intended to cite 37 C.F.R. § 2.142(d), which provides that “The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the

² Registration No. 4128716 issued April 17, 2012.

³ 10 TTABVUE 2 (Applicant’s Reply Brief).

filing of a notice of appeal.” Thus, the rule does not support Applicant’s belated submission of evidence.

As noted above, the evidentiary record should be complete prior to filing an *ex parte* appeal to the Board. 37 C.F.R. § 2.142(d). Therefore, exhibits attached to a brief that were not submitted during prosecution of the application generally are disregarded as untimely. *In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1767 (TTAB 2016); *In re Hollywood Lawyers Online*, 110 USPQ2d 1852, 1856-57 (TTAB 2014) (refusing to consider new evidence attached to the brief); *see also* Trademark Board Manual of Procedure § 1203.02(e) (January 2017). In view thereof, we sustain the Examining Attorney’s objections to Exhibits 1-6 and 15-16 of Applicant’s Initial Brief.

In the alternative to seeking consideration of the materials attached to the brief, Applicant requests that this case be suspended and remanded to allow Applicant to submit this same evidence for consideration by the Examining Attorney. This case already has been remanded to the Examining Attorney once for the consideration of Applicant’s request for reconsideration. Applicant gives no reason why the evidence at issue was not available at that time. *In re Central Sprinkler Co.*, 49 USPQ2d 1194, 1195 n.2 (TTAB 1998), (“Although in its brief applicant suggested a suspension and remand to allow the Examining Attorney to consider the additional registrations, it is clear that this evidence could have been submitted much earlier in the prosecution”). We find no cause to further delay this appeal, and so Applicant’s request for suspension and remand is denied.

Accordingly, we have not considered Exhibits 1-6 and 15-16 of Applicant's Initial Brief.

II. Likelihood of Confusion

The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*du Pont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods. *See In re Chatam Int'l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944 (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 address these and other relevant *du Pont* factors below.

A. The Goods, Trade Channels, and Classes of Consumers

The subject application identifies “Beer, ale and lager,” while the cited registration identifies “Ales.” They explicitly overlap as to the identification of ale. Furthermore, Applicant’s “Beer” encompasses ale, which is a type of beer.⁴ Thus, the goods are identical in part. Turning to the trade channels, because Applicant’s identified goods

⁴ May 18, 2015 Office Action at 4 (ahdictionary.com) (American Heritage Dictionary entry for “ale” as “[a] usually full-bodied beer that has been fermented at a relatively warm temperature.”)

and those in the cited registration are unrestricted, and because they overlap, we presume that both Applicant's and Registrant's goods move in the same normal channels of trade for ales and that they are available to the same classes of ordinary consumers. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, "we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods"); *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion); *American Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011). Thus, the second and third *du Pont* factors strongly weigh in favor of a finding of likely confusion.

B. Similarity of the Marks

Turning to the comparison of the applied-for and cited marks, we consider them "in their entirety as to 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, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). The test assesses 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 goods offered under the respective marks is likely to result. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101

USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Edom Laboratories Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

Applicant's proposed mark is DROPDEAD REDHEAD in standard characters, and the mark in the cited registration is DROP DEAD BLONDE, also in standard characters. Both marks share the same first term, DROPDEAD or DROP DEAD, defined, in relevant context, as "very attractive or impressive."⁵ The second term in each mark refers to a person with a particular hair color and also refers to or suggests a type of ale. A "redhead" typically refers to "a person having red hair,"⁶ while a "blonde" can refer to "a person having blond hair." In the beer context, "blonde"/"blond" and "red" both refer to types of ale.⁷ According to the Examining Attorney, the marks create the same double entendre as a reference both to an attractive woman and a type of ale. Applicant denies that "redhead" has any connotation as a type of beer, and therefore argues that the commercial impressions of the marks differ. According to Applicant, because "blonde" is an ale, consumers would give the word little consideration in the registered mark. By contrast, Applicant contends that "redhead" is not a type of beer, such that consumers would accord "great weight" to the term in Applicant's mark.⁸

⁵ December 11, 2015 Office Action at 13 (merriam-webster.com).

⁶ May 18, 2015 Office Action at 6 (Merriam-webster.com).

⁷ *Id.* at 14, 16 (beeradvocate.com); December 11, 2015 Office Action at 3-6 (beeradvocate.com); July 6, 2016 Office Action at 2-3 (oxforddictionaries.com); June 13, 2016 Request for Reconsideration at 2-4 (brewersassociation.org).

⁸ 7 TTABVUE 8 (Applicant's Brief).

We find that both the registered mark and Applicant's mark create a very similar commercial impression. Applicant concedes that evidence it introduced of use of the mark in the cited registration shows a blonde-haired woman on the label of the beer.⁹ From this, along with other evidence of record, we infer that in addition to perceiving the BLONDE portion of the registered mark as a type of beer, consumers also would perceive it as a reference to a blonde-haired woman. As to Applicant's claim that the REDHEAD portion of its mark would not be perceived as a beer reference, along with the evidence that "red" is a type of ale (the type shown in Applicant's specimen),¹⁰ the Examining Attorney also introduced third-party evidence of the highly suggestive use of "redhead" in connection with red beers. For example, Firemans Brew brand offers under its mark beers designated "Blonde Beer," "Brunette Beer," and "Redhead Ale."¹¹ Mayday Brewery offers a "Boro Blonde" and an "Angry Redhead" beer.¹² A website post promotes "Towne Park Beer – Towne Blonde, Redhead & Brunette."¹³ An article on BrewUnited, a forum for homebrewers of beer, discusses the next three beers that the author intends to brew as a "brunette," "redhead – an Irish red ale," and a "blonde."¹⁴ We find this evidence sufficient to show that in the context of beer, "redhead" is at least highly suggestive of red ale. Therefore, we find that both marks

⁹ 7 TTABVUE 9 (Applicant's Brief); *see also* June 13, 2016 Request for Reconsideration at 63, 65 (pointbeer.com). Similarly, Applicant's specimen shows a red-colored ale with a label depicting an attractive red-haired woman. June 13, 2016 Specimen at 1.

¹⁰ June 13, 2016 Specimen at 1.

¹¹ December 11, 2015 Office Action at 5 (drinkhacker.com).

¹² *Id.* at 7-8 (maydaybrewery.com).

¹³ *Id.* at 12 (mybeerbuzz.blogspot.com).

¹⁴ *Id.* at 11 (brewunited.com).

create a highly similar commercial impression using the shared term DROPDEAD/DROP DEAD along with a term that describes or strongly suggests a type of ale and also refers to a woman of a certain hair color. *See In re M. Serman & Co.*, 223 USPQ 52, 53 (TTAB 1984) (likely confusion between CITY WOMAN and CITY GIRL); *Ralston Purina Co. v. Old Ranchers Canning Co.*, 199 USPQ 125, 128 (TTAB 1978) (likely confusion between TUNA O' THE FARM and CHICKEN OF THE SEA).

While we acknowledge that the marks differ in referring to different types of ale and different hair colors, as the first and stronger part of both marks, the shared term DROPDEAD/DROP DEAD dominates, and is “most likely to be impressed upon the mind of a purchaser and remembered.” *Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). This creates a similarity in the look and sound of the marks. Also, the third-party evidence shows examples of a single source with beers designated “blonde” and “redhead” under the same mark. This tends to show that consumers familiar with the cited mark likely would assume that Applicant’s DROPDEAD REDHEAD comes from Registrant. Finally, where, as here, marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir.1992).

Ultimately, considering the marks in their entireties, we find them similar in appearance, sound, connotation and commercial impression.

C. Thirteenth *du Pont* Factor

Under the thirteenth *du Pont* factor, which provides for consideration of other established facts probative of the effect of use, Applicant argues, without pointing to evidentiary or legal support, that because federal beer labeling rules require it to use TWIN PEAKS BREWING with its proposed mark and require Registrant to use POINT with its registered mark, confusion is unlikely. Even if, *arguendo*, Applicant had supported its contention with evidence or legal authority, “it is almost axiomatic that the use of another mark on applicant’s labels is insufficient to obviate a likelihood of confusion when the marks in issue closely resemble one another.” *PepsiCo, Inc. v. Stanley W. Ferguson, Inc.*, 154 USPQ 456, 457 (TTAB 1967). We decline to consider the potential use with other marks in the analysis, as we must focus on the applied-for and cited marks. “When neither the applied-for mark nor a cited registered mark includes a house mark, determination of likelihood of confusion must be based on the specific marks at issue.” *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, 1914-15 (TTAB 2000); *see also In re Helene Curtis Indus., Inc.*, 363 F.2d 936, 150 USPQ 668 (CCPA 1966) (“The fact that applicant and registrant might use their house marks in connection with their product marks is of no moment herein”).

Conclusion

We have considered all of the arguments and evidence of record and all relevant *du Pont* factors. The overall similarity of the marks for overlapping goods that move

in the same channels of trade to the same classes of customers renders confusion likely.

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