To:	Three Spirits Brewery, LLC (jjs@schwartz-iplaw.com)
Subject:	U.S. TRADEMARK APPLICATION NO. 86175819 - HOPPER'S DELIGHT - 636/6 - EXAMINER BRIEF
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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 86175819

MARK: HOPPER'S DELIGHT

86175819

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GENERAL TRADEMARK INFORMATIC

http://www.uspto.gov/trademarks/index.jsp

TTAB INFORMATION:

http://www.uspto.gov/trademarks/process/appeal/i

APPLICANT: Three Spirits Brewery, LLC

CORRESPONDENT'S REFERENCE/DOCKET NO :

636/6

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EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant, Three Spirits Brewery, LLC has appealed the Trademark examining attorney's final refusal to register its mark under Section 2(d) of the Trademark Act of 1946 (as amended), 15 U.S.C. Section 2(d). Registration was refused because applicant's mark, when used on or in connection with the identified goods, so resembles the marks in U.S. Registration Nos. 1136375, 2099536 and 2143533, as to likely cause confusion, to cause mistake, or to deceive. TMEP §1207.

It is respectfully requested that this refusal to register be affirmed.

FACTS

On January 27, 2014, the present application was filed to register the mark HOPPER'S DELIGHT for goods identified as beer, in Class 32.

On May 1, 2014, registration was refused under Section 2(d) of the Trademark Act of 1946 (as amended), 15 U.S.C. Section 2(d) based on a likelihood of confusion between applicant's mark and the marks in U.S. Registration No. 1136375 for DELIGHT for goods identified as alcoholic malt

beverages, namely, beer, in Class 32; U.S. Registration No. 2099536 for HOPPERS and design for goods identified as beer and ale, in Class 32; and U.S. Registration No. 2143533 for HOPPERS for goods identified as beer and ale, in Class 32.[1]

On May 28, 2014, applicant presented argument in favor of registration. After considering the arguments that had been advanced by applicant in support of registration, the examining attorney issued a final refusal on June 17, 2014. In said office action, the 2(d) refusal issued in the initial office action was maintained.

On September 12, 2014, applicant filed a request for reconsideration. Inasmuch as no new facts or reasons were presented that were significant and/or compelling with regard to the likelihood of confusion, the examining attorney denied applicant's request for reconsideration on September 22, 2014. This appeal resulted from this decision.

ISSUE ON APPEAL

The issue on appeal is whether applicant's mark is likely to cause confusion with U.S. Registration Nos. 1136375, 2099536 and 2143533.

LIKELIHOOD OF CONFUSION

ARGUMENT

I. *General Rules of Analysis for Section 2(d) Cases*

Section 2(d) of the Trademark Act bars registration of a mark if it "…consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office … as to be likely, when applied to the goods of the applicant, to cause confusion…." 15 U.S.C. Section 1052(d). The duty of a court is to weigh "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). The "…ultimate question … is whether the marks as applied to the respective goods so resemble each other that there is a reasonable likelihood of confusion as to source."

Paula Payne Products Co. v. Johnson Publishing Co., Inc., 177 USPQ 76, 77 (CCPA 1973). Any doubt that may arise on the question of likelihood of confusion must be resolved in favor of the prior registrant and against the applicant who has a legal duty to select a mark that is totally dissimilar to marks already being used. *Burroughs Wellcome Co. v. Warner-Lambert Co.*, 203 USPQ 191 (TTAB 1979). *See In re Whittaker Corporation*, 200 USPQ 54 (TTAB 1978).

II. *Comparison of Marks*

A. General Rules for Comparison of Marks

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the goods of the applicant and registrant. *See* 15 U.S.C. §1052(d). A determination of likelihood of confusion under Section 2(d) is made on a case-by case basis and the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) aid in this determination. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1349, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (citing *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1085, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000)). Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d at 1355, 98 USPQ2d at 1260; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); *see In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567.

In any likelihood of confusion determination, two key considerations are similarity of the marks and similarity or relatedness of the goods. *Syndicat Des Proprietaires Viticulteurs De Chateauneuf-Du-Pape v. Pasquier DesVignes*, 107 USPQ2d 1930, 1938 (TTAB 2013) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976)); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); *see* TMEP §1207.01. That is, the marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973)); TMEP §1207.01(b)-

(b)(v). Additionally, the goods are compared to determine whether they are similar or commercially related or travel in the same trade channels. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369-71, 101 USPQ2d 1713, 1722-23 (Fed. Cir. 2012); *Herbko Int'l, Inc. v. Kappa Books, Inc.* , 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1381 (Fed. Cir. 2002); TMEP §1207.01, (a)(vi).

B. The Marks are Highly Similar

For a visual comparison, the wording of the marks at issue are set forth below:

HOPPER'S DELIGHT Applicant's mark

DELIGHT Registrant's mark

HOPPERS Registrant's marks

Marks must be compared in their entireties and should not be dissected; however, a trademark examining attorney may weigh the individual components of a mark to determine its overall commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1322, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (quoting *In re Nat'l Data Corp.* , 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985) ("[I]n articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.")).

When comparing marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014); TMEP §1207.01(b). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049, (TTAB 2014); *L'Oreal S.A. v. Marcon* , 102 USPQ2d 1434, 1438 (TTAB 2012); TMEP §1207.01(b).

Where the goods of an applicant and registrant are identical or virtually identical, the degree of

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