

This Opinion is not a
Precedent of the TTAB

Mailed: August 6, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Fiddlehead Brewing Company, LLC
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Serial No. 86924382
—

Sharon J. Merritt of Merritt & Merritt,
for Fiddlehead Brewing Company, LLC.

Julie Thomas Veppumthara, Trademark Examining Attorney, Law Office 107,
J. Leslie Bishop, Managing Attorney.

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Before Ritchie, Kuczma and Hightower,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Fiddlehead Brewing Company, LLC (“Applicant”) seeks registration on the
Principal Register of the mark MASTERMIND (in standard characters) for

Beer in International Class 32.¹

¹ Application Serial No. 86924382 was filed on March 1, 2016, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). On December 20, 2016, Applicant filed an Amendment to Allege Use claiming first use anywhere and first use in commerce since at least as early as April 19, 2012.

The Trademark Examining Attorney refused registration of Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), citing Registration No. 4048476 for the mark MASTERMIND VODKA registered for "spirits," as a bar to registration.²

After the Examining Attorney made the refusal final, Applicant appealed to this Board. For the reasons set forth below, the refusal to register is affirmed.

I. Evidentiary Issue

Before proceeding to the merits of this appeal, we address an evidentiary matter. Applicant submitted exhibits with its Appeal Brief comprising third-party registrations,³ promotional materials and search results from the internet, and other promotional materials. The Examining Attorney has objected to the admission of such evidence. Inasmuch as these exhibits (as further explained in footnote 3) were not previously submitted and therefore the inclusion of them with Applicant's appeal brief is untimely, the exhibits have not been considered. The record in an application should be completed prior to filing of an appeal. *See* Trademark Rule 2.142(d), 37

² Issued November 1, 2011; §§ 8 & 15 combined Declaration accepted and acknowledged.

³ The copy of Registration No. 4952583 for the mark THE MASTERMIND'S METHOD that was attached to Applicant's Brief is not admissible. However, the TESS printout for that Registration submitted with the December 21, 2016 Response to Office Action, TSDR 17, is in the record so that registration is considered. Applicant also submitted copies of Registration No. 5287290 issued on September 12, 2017, for the mark ROYAL IRISH and Registration No. 5290289, issued on September 19, 2017, for the mark MASTERMIND COFFEE, with its Appeal Brief.

Page references herein to the application record refer to the downloadable .pdf version of the United States Patent and Trademark Office (USPTO) Trademark Status & Document Retrieval (TSDR) system. References to the briefs refer to the Board's TTABVue docket system.

C.F.R. § 2.142(d); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) §§ 1203.02(e) and 1207.01 (2018); TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) § 710.01(c) (Oct. 2017). If evidence that was previously unavailable comes to Applicant’s attention after the appeal is filed, the proper procedure is to submit a request to the Board to suspend the appeal and remand the application for further examination. *See* MISCELLANEOUS CHANGES TO TRADEMARK TRIAL AND APPEAL BOARD RULES, 81 Fed. Reg. 69950, 69968 (Oct. 7, 2016) (“The Office is further amending § 2.142(d) for clarity, including by specifying that an appellant or examining attorney who desires to introduce additional evidence after an appeal is filed should submit a request to the Board to suspend the appeal and remand the application for further examination.”); *see also In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1244 n.4 (TTAB 2010) (registration that issued after notice of appeal and submitted with appeal brief not considered, applicant could have filed a request for remand).

II. Likelihood of Confusion

Our determination under § 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). Not all of the *du Pont* factors are relevant to every case, and only factors of significance to the particular mark need be considered. *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010). Therefore,

we focus our analysis on those factors for which we have evidence or that have been argued by Applicant and the Examining Attorney: similarity of the marks and the relatedness of the goods. *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017); *Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1560 (Fed. Cir. 2001) (the Board may focus its analysis on dispositive factors, such as similarity of the marks and relatedness of the goods).

A. Similarity of the Marks

In any likelihood of confusion determination, the marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *du Pont*, 177 USPQ at 567; *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). Similarity in any one of these elements may be sufficient to find the marks confusingly similar. *In re 1st USA Realty Professionals, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988).

Comparing the marks, the word “Mastermind” is contained in both Applicant’s mark MASTERMIND and Registrant’s mark MASTERMIND VODKA, resulting in marks that are similar in appearance and sound.

Inasmuch as the word VODKA in Registrant’s mark is descriptive and has been disclaimed, the dominant element of each mark is the identical term “Mastermind.” *See In re Viterra Inc.*, 101 USPQ2d at 1908 (the court may place more weight on a dominant portion of a mark, for example if another feature of the mark is descriptive or generic standing alone, however, the ultimate conclusion nonetheless must rest on

consideration of the marks in total); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (“DELTA,” not the disclaimed generic term “CAFE,” is the dominant portion of the mark THE DELTA CAFE); *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (“[T]here 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.”). The difference in the marks due to the inclusion of the descriptive word “VODKA” following “MASTERMIND” in Registrant’s mark, is not sufficient to distinguish the marks. Because Applicant’s mark consists of the same wording as that found in the beginning of the registered mark and does not contain additional wording that distinguishes it from Registrant’s mark, the marks look and sound alike, and the commercial impression of the marks is very similar.

The issue of likelihood of confusion must be judged on the basis of the facts and context of each case presented to the Board. This is particularly so in this case in view of the fact that consumers are generally more inclined to focus on the first word in any trademark or service mark, which in this case is identical. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *see also Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of mark which is most likely to be impressed upon the mind of a purchaser and remembered” when making purchasing decisions).

Thus, overall, we find that when considered as a whole, Applicant's mark and the cited mark are similar in appearance, sound, meaning and commercial impression.

B. Third-party Registrations

Applicant points to Registration No. 4952583⁴ for the mark THE MASTERMIND'S METHOD for distilled spirits, including vodka, arguing that it is a mark that "could easily be construed by consumers as a brand extension for Registrant's MASTERMIND VODKA in that both marks contain the word MASTERMIND and are registered for spirits" If the registered mark THE MASTERMIND'S METHOD can coexist with Registrant's MASTERMIND VODKA mark, both for spirits, including vodka, Applicant maintains that MASTERMIND VODKA for spirits which prominently displays the word VODKA, and Applicant's mark MASTERMIND for beer, can also coexist.⁵

Under the sixth *du Pont* factor, "extensive evidence of third-party use and registrations is 'powerful on its face,' even where the specific extent and impact of the usage has not been established." *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334,

⁴ Registration No. 4952583 for the mark THE MASTERMIND'S METHOD for distilled spirits; whiskey; rum; gin; vodka; liqueurs; alcoholic cordials; brandy; prepared alcoholic cocktails; alcoholic beverages with flavors, produced from grain, sugar, and brewed malt bases, excluding beer; wines; wine-based drinks; distillates of wine, namely, brandy and cognac; malt distillates, namely, whiskey, scotch, rum, gin, vodka; alcoholic fruit distillates, namely, brandy, cognac, alcoholic fruit extracts, fruit wine, alcoholic beverages of fruit; alcoholic vegetable, herb and plant distillates, namely, vodka, rum and wine. See December 21, 2016 Response to Office Action, TSDR 17.

⁵ Applicant's Ex Parte Appeal Brief p. 6 (4 TTABVUE 7).

115 USPQ2d 1671, 1674 (Fed. Cir. 2015)). Here, however, there is evidence of only one other registration, besides the cited Registration, for marks containing the term “Mastermind” for alcoholic beverages. Thus, the third-party registration for the mark THE MASTERMIND’S METHOD has little probative value, especially in the absence of evidence that the mark is in use on a commercial scale or that the public has become familiar with it. *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016). *See also Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the USPTO); *In re Hub Distributing, Inc.*, 218 USPQ 284, 285 (TTAB 1983) (“[T]hird party registrations in this Office, absent evidence of actual use of the marks [that are the] subject[s] of the third-party registrations, ... are entitled to little weight on the question of likelihood of confusion.”).

Applicant also submits thirteen⁶ pairings of third-party registrations for similar marks for beer and other alcoholic goods in support of its argument that “various alcoholic beverages now are permitted simultaneous registration, especially when, as

⁶ Additionally, Applicant submitted five pairs of registrations where one of the pairings was cancelled: OBSIDIENNE Reg. No. 3226585; HOOK & LADDER BREWING COMPANY #2 Reg. Nos. 3391421, 3323513; HOOK & LADDER LIGHTER Reg. No. 3528320; SUMMIT Reg. Nos. 3628871, 1212654, 1010030; and RUBENS Reg. No. 3249525. These pairs have not been considered since the cancelled third-party registrations cannot be used for this purpose. *See Sunnen Prods. Co. v. Sunex Int’l Inc.*, 1 USPQ2d 1744, 1747 (TTAB 1987). Additionally, one other pair of registrations submitted, i.e., Registration Nos. 4828425 and 5105573, are owned by the same owner and therefore, has not been considered. *See* December 21, 2016 Response to Office Action at 15-16, 20-22, 25-29, 45, 70, 80.

in the instant application, the marks are distinguished by the addition of the generic term for one of the products . . . ,”⁷ i.e., MASTERMIND and MASTERMIND VODKA.

The third-party registration pairings are entitled to little weight on the issue of confusing similarity because the registrations are “not evidence that the registered marks are actually in use or that the public is familiar with them.” *In re Midwest Gaming & Entm’t LLC* , 106 USPQ2d 1163, 1167 n.5 (TTAB 2013) (citing *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)); see TMEP §1207.01(d)(iii). Accordingly, they have little, if any, probative value under the sixth *du Pont* factor. *In re Opus One Inc.*, 60 USPQ2d 1812, 1814 (TTAB 2001) (citing *Olde Tyme Foods Inc. v. Roundy’s Inc.* 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992)). Moreover, whatever probative value there is to Applicant’s list of third-party registrations is weighed in conjunction with the evidence submitted by the

⁷ The pairings considered are as follows: RENDEZVOUS Reg. No. 3530340 (distilled spirits) and RENDEZVOUS PORTER Reg. No. 3889537 (beer); BLACKOUT Reg. No. 2602789 (schnapps) and BLACKOUT STOUT Reg. No. 4111389 (beer); JUSTICE VODKA Reg. No. 4700836 (liquor beverages, namely, vodka, gin, whiskey, rum, brandy) and JUSTICE Reg. No. 3713775 (wine); DURANGO Reg. No. 2087333 (distilled spirits, namely, prepared alcoholic cocktails and liqueurs) and DURANGO BREWING COMPANY Reg. No. 2870750 (beer); EPIPHANY PALE Reg. Nos. 3873558 (beer) and EPIPHANY Reg. No. 2497018; HOP ODYSSEY Reg. No. 4627043 (beer) and ODYSSEY Reg. No. 2344297 (wine); HOURGLASS ALE Reg. No. 3661738 (beer) and HOURGLASS Reg. No. 2764766 (wine); SLEEPING DOG WINES Reg. No. 3152948 (table wine) and SLEEPING DOG STOUT Reg. No. 3233978 (beers and ales); EPICENTER Reg. No. 3624142 (wine) and EPICENTER AMBER Reg. No. 4327599 (beer); BLACK DIAMOND Reg. No. 2005818 (wine) and BLACK DIAMOND BREWING COMPANY Reg. Nos 4743712, 4743087, 2094096 (beer); FLYING FISH Reg. No. 3080190 (wine) and FLYING FISH BREWING CO. Reg. Nos 2571547; 2058080 (beer); WAR HORSE Reg. No. 4011703 (wines) and WAR HORSE BREWING COMPANY Reg. No. 3726553 (beer); and RED OAK VINEYARD Reg. No. 3181683 (fruit wine) and RED OAK Reg. No. 1870761 (beer). December 21, 2016 Response to Office Action at 15, 18-19, 30-33, 35-40, 41-42, 43-44, 48-53, 54-55, 56-57, 60-61, 62-63, 64-65, 66-67, 68-69, 72-73, 74-75, 78-79. While we have considered these pairs of registrations, we do not know whether any of them are subject to consent agreements.

Examining Attorney, introduced to show that beer and spirits are offered by a single source under the same mark, discussed more fully *infra*. *Cf. In re Thor Tech, Inc.*, 113 USPQ2d 1546, 1548 (TTAB 2015) (fifty sets of co-existing third-party registrations submitted by applicant were considered by Board as evidence weighing against similarity of goods).

Additionally, prior decisions and actions of other examining attorneys in registering other marks have little evidentiary value and are not binding upon the USPTO or the Trademark Trial and Appeal Board. *In re Midwest Gaming & Entm't*, 106 USPQ2d at 1165 n.3 (citing *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)); TMEP §1207.01(d)(vi). It has been noted many times that each case is decided on its own facts, and each mark stands on its own merits. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *In re Binion*, 93 USPQ2d 1531, 1536 (TTAB 2009).

Thus, the third-party registration evidence is neutral.

C. Similarity of the Goods, Trade Channels and Classes of Consumers

We turn next to the *du Pont* factor involving the similarity or dissimilarity of Applicant's beer to the spirits in the cited Registration. The nature, scope and similarity of the goods must be determined based on the identification of goods listed in the application and cited registration, not what the evidence shows the goods to be. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-62 (Fed. Cir. 2014); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997).

The goods or services need not be identical or directly competitive to find a likelihood of confusion. As a general matter, they need only to be related in some manner or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods or services come from a common source. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000).

The fact that the USPTO classifies Applicant's beer in Class 32 and Registrant's spirits in Class 33 does not establish that those goods are unrelated under § 2(d). *See* TMEP §1207.01(d)(v). The determination concerning the proper classification of goods or services is a purely administrative determination unrelated to the determination of likelihood of confusion. *In re Omega SA*, 494 F.3d 1362, 83 USPQ2d 1541, 1543 (Fed. Cir. 2007); *Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993).

Moreover, the greater the degree of similarity between Applicant's mark and the registered mark, the lesser the degree of similarity between Applicant's goods and Registrant's goods that is required to support a finding of likelihood of confusion. *In re Thor Tech Inc.*, 90 USPQ2d at 1634, 1636 (TTAB 2009); *In re Opus One, Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001); *In re Concordia Int'l Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

The Examining Attorney contends there is a likelihood of confusion because beer and spirits may be produced by the same entity and sold under the same trademarks.⁸ In support, the Examining Attorney submits copies of portions of the websites of numerous businesses owning a brewery and a distillery, offering both beer and spirits: New Holland Brewing,⁹ Square One Brewery and Distillery,¹⁰ Alltech Brewing & Distilling Co.,¹¹ Ballast Point,¹² Dogfish Head Craft Brewed Ales,¹³ Deluxe Brewing Co.,¹⁴ Winter Park Distilling and the Bear & Peacock Brewery,¹⁵ Brickway

⁸ Examining Attorney's Appeal Brief (6 TTABVue 7-8).

⁹ New Holland Artisan Spirits: "Our philosophy remains true; we are dedicated to discovering artful nuances while delivering unique and interesting spirits in their most tasteful form." <<http://newhollandbrew.com/our-spirits/>> 06/23/2016, June 23, 2016 Office Action, TSDR 16-17, additional product from New Holland at <<http://newhollandbrew.com>> at TSDR 27-28.

¹⁰ Square One Brewery and Distillery: "Spirits of St. Louis is the brand name of Square One Brewery's Distilled Spirits line. ... With an endless palette from which to create spirits, like in the brewery, we add a little twist to create unique flavors. ..." <<http://www.squareonebrewery.com/spirits-of-st-louis/>> 06/23/2016, June 23, 2016 Office Action, TSDR 18-20.

¹¹ Alltech Brewing & Distilling Co.: featuring various ale, stout, IPA, bourbon and rye by Alltech Lexington Brewing and Distilling Co. <<http://www.kentuckyale.com/products/?age-verified=0e569d0a6f>> 06/23/2016, June 23, 2016 Office Action, TSDR 21-22.

¹² Ballast Point: From the Brewery ... From the Distillery Ballast Point Brewing & Spirits (offering vodka, rum, gin & whiskey) <<http://www.ballastpoint.com/>> 06/23/2016, June 23, 2016 Office Action, TSDR 23-24.

¹³ Dogfish Head Craft Brewed Ales (offering Brews & Spirits) <<http://www.dogfish.com/>> 06/23/2016, June 23, 2016 Office Action, TSDR 25-26.

¹⁴ Deluxe Brewing: "Deluxe Brewing and Sinister Distilling is proud to be Albany's first brewstillery. A production brewery and distillery located along the Wilamette River, in the Borden Building." <<http://www.sinsiterdeluxe.com>> 06/23/2016, June 23, 2016 Office Action, TSDR 29-31.

¹⁵ Orlando Weekly <<http://www.orlandoweekly.com/orlando/thirsty-topher-is-up-and-running-at-its-new-location-a-brewstillery-is-coming-to-north-orange-avenue>>06/23/2016 "Winter Park Distilling and the Bear & Peacock Brewery will open a 'brewstillery' on North Orange Avenue near the Ravenous Pig early next year." June 23, 2016 Office Action, TSDR 32-33.

Brewery & Distillery,¹⁶ Grand River Brewery¹⁷, Little Toad Creek Brewery & Distillery¹⁸, Rogue¹⁹ and Round Barn Winery Distillery Brewery.²⁰

Additionally, the electronic article submitted by the Examining Attorney reports that beer breweries increasingly are distilling craft spirits:

Breweries are cranking out distilled spirits like it's going out of style—and it isn't

February 22, 2016

Never ones to stop innovating, more and more beer brewers are capitalizing on brand interest, making use of surplus raw materials, and scratching a persistent creative itch by distilling craft spirits—and it's no passing fad.

In fact, Anchor Brewing Co. of San Francisco, CA, has been distilling since as far back as 1993. ...

Neither Dogfish nor Anchor got into distilling because beer sales were dwindling—quite the contrary. Breweries only tend to branch out when business is strong. As beer continues to boom, other breweries have begun distilling, too: Michigan's New Holland Brewing got into the game in 2005, followed by Oregon's Rogue Ales in 2006. And although it took brewing veteran Ballast Point Brewing Company of San Diego, CA, until 2008 to get into spirits, its recent explosive growth . . .

¹⁶ Brickway Brewery & Distillery: offering Brickway beer, vodka, gin, whisky and brandy. June 13, 2017 Final Office Action, TSDR 7 -11.

¹⁷ Grand River Brewery: including Grand River Distillery producing hand-crafted whiskey, vodka, gin and rum. June 13, 2017 Final Office Action, TSDR 12-20.

¹⁸ Little Toad Creek Brewery & Distillery Specializing in Small-batch Craft Beer & Spirits: vodka, rum, whiskey and a variety of liqueurs. June 13, 2017 Final Office Action, TSDR 21-22.

¹⁹ Rogue: beer and spirits including Rogue Farms vodka. June 13, 2017 Final Office Action, TSDR 23-28.

²⁰ Round Barn Winery Distillery Brewery: selling beer and vodka, rum, agave, gin and whiskey. June 13, 2017 Final Office Action, TSDR 29-35.

<<http://qz.com/614769/breweries-are-cranking-out-distilled-spirits-like-its-going-out-of-style-and-its-isnt/>>
06/23/2016²¹

Based on the evidence submitted, beer and spirits are produced and sold by the same entities and are commonly sold under the same marks.

Applicant cites *In re Coors Brewing Co.*, 2002 WL 1766343 (TTAB 2002), *rev'd and remanded*, 343 F.3d 1340, 68 USPQ2d 1059, 1061 (Fed. Cir. 2003), contending that in that case “the Board concluded, and the Federal Circuit agreed, that even though beer and wine are sometimes sold by the same party under the same mark, the two beverages are not sufficiently related that the contemporaneous use of similar marks on the two products is likely to cause confusion as to source.”²² However, in *Coors Brewing*, the issue of the relatedness of beer and wine was not before the Federal Circuit. The Federal Circuit merely acknowledged the Board’s decision below observing “The Board concluded that even though beer and wine are sometimes sold by the same party under the same mark, the two beverages are not sufficiently related that the contemporaneous use of similar marks on the two products is likely to cause confusion as to source.” 68 USPQ2d at 1061. A year after its decision in *Coors Brewing*, in *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1947-48 (Fed. Cir. 2004), the Federal Circuit found that:

substantial evidence supports the Board’s finding of a close relationship between tequila and beer or ale. Indeed, the goods emanate from the same source because “both are alcoholic beverages that are marketed in many of the same channels of trade to many of the same consumers.” *Majestic*

²¹ June 23, 2016 Office Action, TSDR 7-15.

²² Applicant’s Ex Parte Appeal Brief at p. 7 (4 TTABVUE 8).

Distilling, 315 F.3d [1311,] at 1316 [65 USPQ2d 1201 (Fed. Cir. 2003)] (holding that malt liquor and tequila sold under the same mark would cause a likelihood of confusion). In this case, as in *Majestic Distilling*, the Board correctly determined that tequila and beer or ale are inexpensive commodities that consumers would be unlikely to distinguish by manufacturer. *Id.* at 1316-17.

Additionally, the Board more recently observed in *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1827-28 (TTAB 2015) that “beer and other alcoholic beverages (including wine) are sold to consumers in many of the same channels of trade, including retail outlets such as liquor stores, supermarkets, convenience stores, restaurants, and bars” and based on the evidence in that case concluded that “beer and other alcoholic beverages including wine, are related, and that their purchasers and channels of trade overlap.”

Accordingly, each case must be decided on its own record. *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (“There is no per se rule that holds that all alcoholic beverages are related.”). Nonetheless, beer and wine, as well as other alcoholic beverages, certainly can be, and frequently are, found to be related. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (GASPAR’S ALE for beer and ale likely to be confused with JOSE GASPAR GOLD for tequila); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003) (RED BULL for tequila likely to be confused with RED BULL for malt liquor); *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816 (TTAB 2015) (WINEBUD for wines and alcoholic beverages except beers likely to be confused with BUD for beer); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261 (TTAB 2011) (HB for wine likely to cause confusion with HB and design marks for beer); *In re Sailerbrau*

Franz Sailer, 23 USPQ2d 1719 (TTAB 1992) (CHRISTOPHER COLOMBUS for beer likely to be confused with CRISTOBAL COLON for wine); *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069 (TTAB 1989) (BRAS D'OR for brandy likely to be confused with BRADOR for beer); *Bureau Nat'l Interprofessionnel Du Cognac v. Int'l Better Drinks Corp.*, 6 USPQ2d 1610 (TTAB 1988) (COLAGNAC for cola flavored liqueur likely to be confused with certification mark COGNAC for brandy); *see also Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424 (TTAB 2013) (stylized GOTT LIGHT and design for water confusingly similar to GOTT and JOEL GOTT for wine). The record evidence in this case establishes that the identified goods are related.

Applicant also contends “under the state laws of all 50 states, alcoholic beverages must be sold through the so-called ‘three tier’ system, that is from the licensed producer/manufacturer, to a licensed wholesale distributor then to a licensed retail outlet from which consumers purchase the products.” Thus, “the production, distribution and sale of both Registrant’s and Applicant’s products are highly regulated at the federal, state and local levels.”²³ Even assuming Applicant’s and Registrant’s goods are distributed through the highly regulated “three tier system,” they are ultimately offered for sale to end-consumers. Therefore, both Applicant’s “beer” and the “spirits” identified in the cited registration would be sold in some of the same channels of trade, and to the same classes of purchasers, including the general public. Finally, we note that to the extent we consider the third-party registration pairs submitted by Applicant under the *du Pont* factor of the similarity

²³ Applicant’s Ex Parte Appeal Brief p. 4 (4 TTABVUE 5).

of the goods, such evidence is outweighed by the similarity shown by the evidence submitted by the Examining Attorney. *Cf. In re Thor Tech, Inc.*, 113 USPQ2d at 1549 (applicant's fifty sets of co-existing third-party registrations were weighed against only two registrations submitted by examining attorney showing similarity of goods).

Accordingly, the goods of Applicant and Registrant, though different, are nonetheless related, traveling in the same trade channels to the same classes of purchasers.

D. Sophistication of Purchasers

Applicant maintains that both its products and Registrant's products are sold to sophisticated consumers. According to Applicant, "[n]either of these products are mass-market, inexpensive products of their type." Referencing portions of Applicant's and Registrant's websites,²⁴ Applicant contends that both its products and Registrant's products are "specialty, hand-crafted, artisanal products sold to sophisticated consumers who can easily distinguish the source of a hand-crafted beer from an artisanal vodka. ... These are expensive products of their type sold to a sophisticated consumer specifically seeking out products precisely because of their novelty and hand-crafted nature."²⁵ Applicant concludes that "... the only question remaining is whether a[n] artisanal-*brewed* alcoholic product could be produced from the same source as an artisanal *distilled* alcoholic product and sold under a mark

²⁴ Although Applicant did not submit copies of Applicant's and Registrant's websites, portions of the websites were quoted in Applicant's December 21, 2016 Response to Office Action. Inasmuch as the Examining Attorney made no objection, we have considered it.

²⁵ December 21, 2016 Response to Office Action at 13-14.

displaying a word element in common.”²⁶ While conceding that Applicant’s and Registrant’s goods are both alcoholic beverages, Applicant argues that they are sought out by “connoisseurs” who are “specialized purchasers [who] know exactly what company has produced the chosen vodka or beer. It is inconceivable that they could become confused as to source.”²⁷

However, we make our determination based on the goods as they are identified in the application and registration. *See Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 110 USPQ2d at 1162 (“It was proper, however, for the Board to focus on the application and registrations rather than on real world conditions, because ‘the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application’” (quoting *Octocom Sys., Inc. v. Hous. Comp. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990))). Because there are no restrictions in the identification of goods in either Applicant’s application or Registrant’s registration, the identified goods are considered to include beer and spirits (including vodka) at all price points, and to move in all the normal and usual channels of trade and methods of distribution to all potential purchasers. *Coach Servs. Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1722; *Octocom Systems, Inc. v. Houston Computers Services, Inc.*, 16 USPQ2d at 1787.

There is no evidence that purchasers of beer or other alcoholic products are sophisticated or careful in making their purchasing decisions and where, as here, the

²⁶ Applicant’s Ex Parte Appeal Brief p. 7 (4 TTABVUE 8).

²⁷ Applicant’s Ex Parte Appeal Brief p. 7-8 (4 TTABVUE 8-9).

goods of both Applicant and Registrant are identified without any limitations as to trade channels, classes of consumers or conditions of sale, we must presume that Applicant's and Registrant's goods encompass inexpensive or moderately-priced beer and spirits. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1195 (TTAB 2018); *In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001); *In re Bercut-Vandervoort & Co.*, 229 USPQ2d 763 (TTAB 1986) (rejecting the applicant's arguments regarding the high cost and quality of its wine and the sophistication of its purchasers, where application identified goods merely as "wine"). Moreover, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993) (indicating that "even sophisticated purchasers can be confused by very similar marks"); *Top Tobacco, LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011); *In re Total Quality Grp., Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999).

In view of the absence of evidence, this factor is neutral.

E. Absence of Actual Confusion

Applicant argues that the parties have coexisted for almost six years without any reported instance of confusion.²⁸ The test under § 2(d), however, is whether there is a likelihood of confusion. Applicant's assertion that it is unaware of any actual confusion resulting from the contemporaneous use of its mark and Registrant's mark

²⁸ Applicant's Ex Parte Appeal Brief p. 9 (4 TTABVUE 10).

“is of little probative value in an ex parte proceeding . . . where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and registrant has no chance to be heard from (at least in the absence of a consent agreement, which applicant has not submitted in this case).” *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984). Moreover, it is not necessary to show actual confusion to establish a likelihood of confusion. *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (citing *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983)). Therefore, this factor is neutral.

III. Conclusion

Based on the close similarity of the marks and the relatedness of the goods of Applicant and Registrant, we find that purchasers familiar with Registrant’s spirits offered under the mark MASTERMIND VODKA would be likely to mistakenly believe, upon encountering Applicant’s mark MASTERMIND for beer, that the goods originate from or are associated with or sponsored by the same entity.

Decision: The refusal to register Applicant’s mark MASTERMIND under § 2(d) is affirmed.