

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: July 28, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*Get Cozy Holdings LLC*

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Serial No. 88644497

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Anthony Tacconi of Goodman Allen Donnelly,  
for Get Cozy Holdings LLC.

Brittany Colton, Trademark Examining Attorney, Law Office 127,  
Mark Pilaro, Managing Attorney.

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Before Bergsman, Lynch and Lebow,  
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Get Cozy Holdings LLC, applied to register the mark BUBBLES & BREWS (“BREWS” disclaimed), in standard characters, on the Principal Register for “bar services in the nature of providing a mobile bar without a bartender; mobile bar services; mobile bar rentals; mobile bar services for providing drinks,” in International Class 43.<sup>1</sup>

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<sup>1</sup> Application Serial No. 88644497 (“the Application”) was filed on October 7, 2019 based on a declared intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). Applicant also applied to register the mark for services recited in Class 17.

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the mark BEER AND BUBBLES (“BEER” disclaimed), in standard characters, on the Principal Register for “catering services” in International Class 43.<sup>2</sup>

When the refusal was made final, Applicant filed an appeal to this Board. The appeal is fully briefed. We affirm the refusal.

### I. Applicable Law

The fundamental purpose of Trademark Act Section 2(d) is to prevent confusion as to source, and to protect registrants from damage caused by registration of marks likely to cause confusion. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985). Our analysis is based on all of the probative evidence of record. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”). In making our determination, we consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular

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However, during the prosecution of the application, Applicant requested that the Office divide the Class 35 services into a separate application not at issue in this appeal.

<sup>2</sup> Reg. No. 5717881 (“the Registration”) issued on April 2, 2019.

determination”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (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 services] and differences in the marks.”).

A. Comparison of the Services

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *DuPont*, 177 USPQ at 567. “[L]ikelihood of confusion can be found ‘if the respective [services] are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

To establish relatedness of the Application’s mobile bar services and the Registration’s catering services, the Examining Attorney made of record Internet evidence from several third-party websites that provide both kinds of services, including:

- Twist Cocktails<sup>3</sup> – “Catering in Bend, Oregon and beyond. The best mobile bars and bartending service for your special event”; “Central Oregon’s Catering with a Twist”; “We specialize in the bar, the bartenders and the cocktails.”
- Tap Truck<sup>4</sup> – “Tap Truck provides cocktail and beverage catering for locations across California, Arizona, North Carolina, and the Northeast. ... We can design your menu for the perfect bar catering experience.”
- Fillhardt Artisan Bartending & Catering<sup>5</sup> – “Bar Services for Your Event,” “Portable bars in different styles to match your event décor,” “Full-service catering.”
- Mobile Caterer<sup>6</sup> – “Mobile Bartender”; “We started offer with our bar before we expanded to Catering, and we’re still specialists. Whether the bar supplements a catering package, or even if the bar is all you’re interested in, we will accommodate your desires to the letter.”

“Catering” is “the activity of providing food and drink for a large number of people, for example at weddings and parties,”<sup>7</sup> and these websites demonstrate that catering and bar services, including mobile bar services, are related and potentially overlapping. Applicant does not dispute that the services identified in the Application and Registration are overlapping.

The second *DuPont* factor weighs in favor of finding likelihood of confusion.

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<sup>3</sup> January 21, 2020 Office Action, TSDR 11-12 (twistcocktails.com).

<sup>4</sup> *Id.* at 13 (taptrucksd.com).

<sup>5</sup> October 13, 2020 Final Office Action, TSDR 6-7 (fillhardt.com).

<sup>6</sup> *Id.* at 8 (mobilecaterernow.com).

<sup>7</sup> We take judicial notice of this definition from Collins Dictionary, accessed on July 23, 2021: <https://www.collinsdictionary.com/dictionary/english/catering>. The Board may take judicial 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).

A. The Strength of the Registered Mark

The sixth *DuPont* factor allows an applicant to contract the scope of protection accorded to a registered mark by adducing evidence of “[t]he number and nature of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567.

At the outset because Registrant’s mark is registered for catering services, we must presume that it is inherently distinctive, i.e., that it is at worst suggestive of those goods. 15 U.S.C. § 1057(b) (registration is “prima facie evidence of the validity of the registered mark”); *In re Fiesta Palms, LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) (when mark is registered on the Principal Register, “we must assume that it is at least suggestive”).

Applicant asserts that the Registration “exists within a crowded field of similar registrations,” and that “the similarities between the existing registrations of third-parties which incorporate similar components make it abundantly clear that consumers are able to differentiate between different marks, and the respective sources of goods and services, based upon minimal or minor differences in their commercial impressions.”<sup>8</sup> In support, Applicant relies on evidence of the following third-party registrations that include the words BUBBLE, BEER and/or BREW, or some formative thereof for restaurant and bar services or purportedly related goods:<sup>9</sup>

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<sup>8</sup> 4 TTABVUE 9 (Applicant’s Brief).

<sup>9</sup> July 21, 2021 Response to Office Action, TSDR 12-26. Applicant also provide evidence of one third-party registration that is cancelled, *id.* at 21, and identified two pending applications, one of which is abandoned, *id.* at 10, and none of which are probative. Cancelled registrations are not evidence of anything except that they issued, *In re Brown-Forman Corp.*, 81 USPQ2d 1284, 1286 n.3 (TTAB 2006). Pending applications are evidence of anything except that they were filed. *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1193 n.8 (TTAB 2007); here

<b>Mark</b>	<b>Services</b>	<b>Reg. No.</b>
BALLS & BREWS	Bar and restaurant services	Reg. No. 4157808
BARK AND BREW	Inter alia, restaurant and bar services	Reg. No. 5797053
BOARD & BREW	Inter alia, serving food and drinks	Reg. No. 5443521
BUBBLE HEAD BREWERY	Microbrewery services	Reg. No. 4816928
BUBBLES	Water and sodas	Reg. No. 4367990
BUBBLES and Design <sup>10</sup>	Beers, mineral and aerated waters, and other beverages	Reg. No. 4578962
BUBBLES (stylized)	Wines	Reg. No. 5515937
BÜBLE BIER	Beer	Reg. No. 5841698
BUNS & BREWS	Restaurant and bar services	Reg. No. 6004437
NAPA BEACH BUBBLES BAR	Bar, cocktail, restaurant, and wine bar services	Reg. No. 5921992
BEND & BREWS	Yoga instruction on-site at breweries with an optional beer tasting	Reg. No. 4722746
BALANCE & BREWS	Providing fitness instructions in the field of yoga culminating in beer and brewery experiences	Reg. No. 4900884

The Examining Attorney argues that “these registrations fail to demonstrate that the relevant wording is dilute [sic] because the marks in the third-party registrations

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the applications are not even of record because merely identifying them does not make them of record.

<sup>10</sup> The Examining Attorney objects to the admissibility of this registration because Applicant did not provide submit a copy of the registration or its electronic equivalent prior to appeal. 6 TTABVUE 6. However, Applicant did identify the registration in its July 21, 2020 office action response, thus indicating it intended to rely on the registration, but the Examining Attorney did not object to that evidence in her subsequent office action. We therefore consider the objection waived. *See In re Houston*, 101 USPQ2d 1534, 1536 (TTAB 2012) (finding that the examining attorney's failure to advise applicant of the insufficiency of the list of registrations when it was proffered during examination constituted a waiver of any objection to consideration of that list); *In re 1st USA Realty Prof'ls*, 84 USPQ2d 1581, 1583 (TTAB 2007) (allowing evidence of a list of third-party registrations because the examining attorney did not advise applicant of the insufficiency of the list while there was still time to correct the mistake).

are fundamentally different from the marks at issue.”<sup>11</sup> In particular, she argues that “none of the third-party registrations contain the wording ‘BUBBLES’ plus the wording “BREWS” or “BEER”. .... [T]he only registered mark that contains the wording similar to applicant’s mark is the cited mark, which underscores that there is a likelihood of confusion.”<sup>12</sup> Additionally, she argues that they “are not persuasive because each registration includes additional wording that creates different commercial impressions from the other third-party registrations as well as from applicant’s mark and registrant’s mark,” and “some of the registrations are for goods or services that are predominantly different from or unrelated to applicant’s mobile bar services.”<sup>13</sup>

In reply, “Applicant does not dispute the various points made by the Examiner concerning the overall value of the cited third-party registrations,” but contends that “the majority of these registrations are for goods or services which are substantially related to or overlapping with Applicant’s identified services.”<sup>14</sup> According to Applicant, “the fact that such references include additional wording does not change Applicant’s contention that there are only minor differences in the commercial impressions of these registered marks.”<sup>15</sup>

As the Federal Circuit has stated, “evidence of third-party use of similar marks

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<sup>11</sup> 6 TTABVUE 7 (Examining Attorney’s Brief).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> 7 TTABVUE 4 (Applicant’s Reply Brief).

<sup>15</sup> *Id.* at 4-5.

on similar [services] ‘can show that customers have been educated to distinguish between different marks on the basis of minute distinctions.’” *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, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (emphasis added)). However, third-party registrations cannot show that Registrant’s mark coexists with a “crowded field” of other similar marks in the marketplace “because third-party registrations standing alone, are not evidence that the registered marks are in use on a commercial scale, let alone that consumers have become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences.” *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) (citing *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973); and *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982)). Nor can they be used to justify the registration of another confusingly similar mark. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987). *See also Plus Prods. v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983) (“[T]hird party registrations relied on by applicant cannot justify the registration of another confusingly similar mark”).

Third-party registrations can be “relevant evidence of the inherent or conceptual strength of a mark or term because they are probative of how terms are used in connection with the goods or services identified in the registrations.” *Id.* at 1745-46.

However, most of the marks in the third-party registrations cited by Applicant, including BALLS & BREWS, BARK AND BREW, BUNS & BREWS, BEND & BREWS, BALANCE & BREWS, and BÜBLE BIER (foreign wording translating to “boy beer”), are not probative because they do not include the shared word BUBBLES.

The third-party registration for BUBLE HEAD BREWERY is not probative because “bubble head” has a different connotation than “bubbles.” Nor are the three BUBBLES registrations for beers, wines, and/or waters probative in the absence of evidence showing those goods to be related to the “catering services” recited in the Registration. *See Omaha Steaks Int’l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (disregarding third-party registrations for goods in other classes where the proffering party “has neither introduced evidence, nor provided adequate explanation to support a determination that the existence of I AM marks for goods in other classes, ... support a finding that registrants’ marks are weak with respect to the goods identified in their registrations”). We are left with one remaining third-party registration for the mark NAPA BEACH BUBBLES BAR for “bar, cocktail, restaurant, and wine bar services,” and no accompanying use evidence.

Applicant’s evidence falls short of “the large quantum of evidence of ... third-party registrations that was held to be significant in both *Jack Wolfskin ...* and *Juice Generation....*” *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018),

aff'd mem., 777 F. App'x 516 (Fed. Cir. 2019) (finding four registrations of varying probative value, not sufficient to show weakness of the term 5IVE).

We find that Registrant's mark is entitled to no less than the average scope of protection accorded to any inherently distinctive mark.

#### B. Comparison of the Marks

The first *DuPont* factor considers the “similarities or dissimilarities of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *In re Detroit Athl.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John's*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d at 1812), *aff'd mem.*, 777 Fed. App'x. 516 (Fed. Cir. 2019).

The test is 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. *Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (citing *Coach Servs., Inc.*, 101 USPQ2d at 1721). Our focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of service marks. *See Neutrogena Corp. v. Bristol-Myers Co.*, 410 F.2d 1391, 161 USPQ 687, 688 (CCPA 1969) (many consumers “may have but dim recollections from having previously seen or heard one or the other of the involved marks.”); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB

2014). Because the services at issue are mobile bar services and catering services, the average purchaser is an ordinary consumer planning a party, reception, or similar event.

The Examining Attorney argues that Applicant's mark BUBBLES & BREWS is similar to the registered mark BEER AND BUBBLES because they share the same overall meaning and commercial impression.<sup>16</sup> In particular, they share the identical word BUBBLES; "the essentially identical wording 'AND'/'&'; and "BEER" or "BREW"—which is defined as "a brewed beverage (such as beer)"<sup>17</sup>—and is another word for "Beer."<sup>18</sup>

We agree that the connotations and commercial impressions engendered by the marks are quite similar. The ampersand ("&") in the Application is equivalent to the word "AND" in the Registration,<sup>19</sup> and "BREWS" in the Application is a synonym of the word "BEERS" in the Registration. While the terms appear in reverse order, BUBBLES & BREWS and BEER AND BUBBLES convey same overall connotation and commercial impression. *See, e.g., In re Wine Soc'y of Am. Inc.*, 12 USPQ2d 1139, 1142 (TTAB 1989) (affirming refusal to register THE WINE SOCIETY OF AMERICA and Design based on registration of AMERICAN WINE SOCIETY 1967 and Design, finding that "the transposition of words does not change the overall commercial

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<sup>16</sup> 6 TTABVUE 10 (Examining Attorney's Brief).

<sup>17</sup> Definition from Merriam-Webster dictionary, January 21, 2020 Office Action, TSDR 8.

<sup>18</sup> 6 TTABVUE 10 (Examining Attorney's Brief)

<sup>19</sup> Merriam-Webster dictionary (<https://www.merriam-webster.com/dictionary/ampersand>), accessed on July 26, 2021.

impression”); *Bank of Am. Nat’l Trust and Sav. Ass’n v. The Am. Nat’l Bank of St. Joseph*, 201 USPQ 842, 845 (TTAB 1978) (“the words ‘BANKAMERICA’ and ‘BANK OF AMERICA’, on the one hand, and ‘AMERIBANC’, on the other, convey the same meaning and create substantially similar commercial impressions”); *In re Nationwide Indus. Inc.*, 6 USPQ2d 1882, 1884 (TTAB 1988) (holding RUST BUSTER (with “RUST” disclaimed) for a rust-penetrating spray lubricant likely to be confused with BUST RUST for a penetrating oil).

Quoting the Board’s decision in *Bank of Am. Nat’l Trust, and Sav. Ass’n*, 201 USPQ at 845, Applicant asserts that “even if the components of the marks were simply reversed, this ‘is not necessarily conclusive on the issue of likelihood of confusion since registration may be permitted if the transposed marks create distinctly different commercial impressions.’”<sup>20</sup> As a “prime example,” Applicant points to the coexistence of third party registrations for the marks BEND & BREW and BALANCE & BREWS, both for yoga instruction with beer tasting services.<sup>21</sup>

Applicant’s argument is unpersuasive because we find that BUBBLES & BREWS and BEER AND BUBBLES provide similar commercial impressions, not distinctly different ones as Applicant contends. Applicant’s analogy to the yoga/beer registrations is unpersuasive. Unlike BEER vs. BREWS, BEND and BALANCE have different meanings. Moreover, it is well settled that each case must be decided on its own facts and the Board is not bound by prior decisions involving different records.

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<sup>20</sup> 4 TTABVUE 9 (Applicant’s Brief).

<sup>21</sup> Reg. Nos. 4900884 and 4722746 (July 21, 2021 Response to Office Action, TSDR 12, 16).

*See In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). The “differences [in cases] are often subtle ones.” *Indus. Nucleonic's Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

We find the marks more similar than dissimilar. The first *DuPont* factor thus weighs in favor of finding likelihood of confusion.

## **II. Conclusion**

Having considered all evidence and arguments bearing on the relevant *DuPont* factors, we conclude that Applicant’s BUBBLES & BREWS for “bar services in the nature of providing a mobile bar without a bartender; mobile bar services; mobile bar rentals; [and] mobile bar services for providing drink,” in Class 43, is likely to cause confusion with the mark BEER AND BUBBLES in the Registration for “catering services” in International Class 43.

**Decision:** The refusal to register is affirmed under Section 2(d) of the Trademark Act. 15 U.S.C. § 1052(d).