

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Mad Brewing Company

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Serial No. 88757335

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I. Edward Marquette of Kutak Rock LLP
for Mad Brewing Company.

Matthew Tully, Trademark Examining Attorney, Law Office 105,
Jennifer Williston, Managing Attorney.

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Before Greenbaum, Lynch, and Pologeorgis,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background

Mad Brewing Company (“Applicant”) seeks registration on the Principal Register of the mark QUIRK in standard characters for “beer, ale and lagers” in International

Class 32.¹ The Examining Attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with two registered marks of the same owner: QUIRK in standard characters for “hotel, restaurant and bar services” in International Class 43² and **QUIRK** for services including “hotel, restaurant and bar services” in International Class 43.³ After the final Office Action, Applicant appealed. The Board subsequently granted the Examining Attorney’s request for a remand to submit newly available evidence.⁴ This appeal resumed and is fully briefed.⁵ We affirm the refusal to register for the reasons set out below.

II. Evidentiary Matters

We first turn to some evidentiary matters. The Examining Attorney lodged an objection to a list of applications and registrations included with Applicant’s April 3, 2020 Response to Office Action,⁶ and he informed Applicant in the subsequent April 24, 2020 Office Action that submission of such a list does not make the underlying applications and registrations of record. Applicant failed during prosecution to

¹ Application Serial No. 88757335 was filed January 13, 2020, based on a declared intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

² Registration No. 5110260 issued December 27, 2016.

³ Registration No. 5395435 issued February 6, 2018. The description of the mark states, “The mark consists of the word ‘QUIRK’ with a stylized ‘Q’.” The registration also recites “art gallery services; online art gallery services” in International Class 35, which we need not rely on in this case.

⁴ 7 TTABVUE.

⁵ Applicant filed a Supplemental Brief after the remand that “supersede[d] all prior briefs.” 11 TTABVUE 3.

⁶ 13 TTABVUE 4-5.

properly introduce the underlying applications and registrations on which it wished to rely. We sustain the objection and have not considered the applications and registrations, and we do not find the mere list at all persuasive. *See In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018); *In re Promo Ink*, 78 USPQ2d 1301, 1303-04 (TTAB 2006) (“if applicants or examining attorneys would like to rely on third-party registrations for support of their position, they must submit a copy of those registrations. Simply providing a list of registrations is not sufficient”).

The Examining Attorney also objects to Applicant’s reliance in its briefs on materials not included in the record, and Applicant’s citation to URLs as a means of relying on the underlying content allegedly found at the URLs. We sustain the objection for several reasons.

First, Trademark Rule 2.142(d) provides that “[t]he record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.” 37 C.F.R. § 2.142(d). We decide the case based on the evidentiary record compiled during prosecution of the application, and do not consider new materials at the briefing stage. *See* 37 C.F.R. § 2.142(b)(3) (“Citation to evidence in briefs should be to the documents in the electronic application record by date, the name of the paper under which the evidence was submitted, and the page number in the electronic record”).

Second, “[p]roviding only the link without the material attached is not sufficient to introduce it into the record.” *In re Fantasia Distribution, Inc.*, 120 USPQ2d 1137, 1143, n.13 (TTAB 2016) (citing *In re Planalytics*, 70 USPQ2d 1453, 1458 (TTAB 2004)

(providing a link to a website does not suffice to put information in the record because of the transitory nature of the information available through the link)); *In re HSB Solomon Assoc. LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012) (“[T]he evanescent nature of web content makes it particularly important that a copy of the relevant material be submitted in the record”).

Applicant maintains that some of the documents for which it included URLs in its briefs are not relied on as evidence, but nonetheless should be considered because they formed part of the evidentiary record in other Board decisions. We disagree, and cannot rely on evidence from another proceeding. Each case must be decided on its own facts, based on the particular mark, the particular goods or services, and the particular record in each application. *See, e.g., Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973) (“Each case must be decided on its own facts and the differences are often subtle ones.”); *In re Jacques Bernier Inc.*, 1 USPQ2d 1924, 1925 (TTAB 1987) (“Each case must be resolved on its own facts.”).

III. 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 “*DuPont* 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 and services. *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 services] and differences in the marks.”). We discuss below these and other relevant factors. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

A. The Strength of the Cited Mark

We first address the strength of the cited marks. Applicant argues that the cited QUIRK mark “is not all that distinctive.”⁷ First, the cited marks are registered on the Principal Register without a Section 2(f) claim, and therefore are entitled to all Section 7(b) presumptions, including that the marks are inherently distinctive. *See Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006). Second, Applicant did not introduce evidence into the record to show conceptual or commercial weakness from third-party use or registration, and instead relies on mere assertions of the existence of other applications and registrations, and on alleged third-party usage in books and websites that are not part of the record. “Attorney argument is no substitute for evidence.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)). We therefore reject the unsupported

⁷ 11 TTABVUE 10 (Applicant’s Supplemental Brief).

arguments, and accord the cited registrations the ordinary scope of protection to which they are entitled.

B. Similarity of the Marks

The first *DuPont* factor requires consideration of “[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *DuPont*, 177 USPQ at 567. *See also Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). Applicant’s standard character mark QUIRK and Registrant’s standard character mark QUIRK are identical. We also consider Applicant’s mark legally identical to the cited stylized mark because Applicant’s standard character mark could appear in exactly the same font as in the cited mark. *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011) (registrant “entitled to depictions of the standard character mark regardless of font style, size, or color”).

This *DuPont* factor strongly favors finding a likelihood of confusion.

C. The Goods and Services

As to the goods and services, we must determine whether their degree of relatedness rises to such a level that consumers would mistakenly believe the respective goods and services emanate from the same source. In considering the second *DuPont* factor, where identical marks are involved, as is the case here, the degree of similarity between the goods and services that is required to support a finding of likelihood of confusion declines. *In re Shell Oil Co.*, 992 F.2d 1204, 26

USPQ2d 1687, 1689 (Fed. Cir. 1993) (“even when the goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source”).

With identical marks it is only necessary that there be a “viable relationship between the goods [or services]” to support a finding of likelihood of confusion. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009) (“it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such, that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods.”). There is no per se rule that certain goods and services are related. *Lloyd’s Food Products, Inc. v. Eli’s, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2030 (Fed. Cir. 1993).

In analyzing the second *DuPont* factor, we look to the identifications in the application and cited registrations. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any good encompassed by the identification in a particular class in the application. *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff’d*, 123 USPQ2d 1744 (Fed. Cir. 2017); *Tuxedo Monopoly, Inc. v. General Mills Fun Grp*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

Applicant identifies “beer, ale and lagers,” while the cited registrations recite “hotel, restaurant and bar services.” We focus on Registrant’s bar services in the recited registrations as the most relevant for our relatedness analysis. The record includes definitions of Applicant’s goods as alcoholic drinks,⁸ and relevant definitions of “bar” in the cited registrations as “[a]n establishment where alcohol and sometimes other refreshments are served” and “[a] room in a restaurant or hotel in which alcohol is served.”⁹

Applicant attempts to sweep the bar services in with restaurant services, arguing that we should apply the precedent requiring “something more” to establish relatedness. Applicant points to *In re Coors Brewing Co.*, which held that “to establish likelihood of confusion a party must show something more than that similar or even identical marks are used for food products and for restaurant services.” *In re Coors Brewing*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003) (citation omitted); *see also In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1087 (Fed. Cir. 2014) (explaining the need to show “‘something more’ than the mere fact that the goods and services are ‘used together’” in situations where the relatedness of the goods and services is obscure or not generally recognized). However, in view of the definitions that make clear that bar services such as Registrant’s focus on serving alcoholic beverages such as Applicant’s beer, we find an inherent relationship between beer and bars, so there is no need to support the relatedness of such goods

⁸ April 24, 2020 Office Action; TDSR pp. 78-87 (lexico.com, sourced by Oxford).

⁹ *Id.* at 91.

and services with a showing of “something more.” *Cf. Coors Brewing*, 68 USPQ2d at 1064 (stating that a mark for a brewpub “would clearly be related” to a mark for beer).¹⁰

Inherent relatedness often exists when the services in question include or focus on the sale of the particular goods in question. *See In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988) (“applicant’s ‘general merchandise store services’ would include the sale of furniture and the evidence introduced by the applicant in voluminous quantity makes it clear--though its arguments attempt to play down the fact--that it does in fact sell furniture. What else it sells is irrelevant; there is overlap.”); *In re Country Oven, Inc.*, 2019 USPQ2d 443903 (TTAB 2019) (Applicant’s COUNTRY OVEN for bread buns was likely to cause confusion with the cited registration for COUNTRY OVEN for retail bakery shops. “[T]he relevant line of case law holds that confusion may be likely to occur from the use of the same or similar marks for goods, on the one hand, and for services involving those goods, on the other.”); *In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2050 (TTAB 2012) (“applicant’s broadly worded ‘providing food and drink’ could encompass a coffee house ... [so that] applicant’s services, as recited, are sufficiently related to [Registrant’s] coffee”).

¹⁰ Even if “something more” were necessary, the standard would be met in this case. The cited marks are arbitrary and inherently distinctive, *In re Opus One Inc.*, 60 USPQ2d 1812, 1813-15 (TTAB 2001), the record includes evidence that Registrant “uses its [QUIRK] mark to promote alcoholic beverages,” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1060 (TTAB 2017), and the record reflects “an overlapping customer base” and identical marks, *Shell Oil*, 26 USPQ2d 1687 and *Coors Brewing*, 68 USPQ2d at 1064.

In addition to the inherent relationship between beer and bar services, the record includes evidence of consumer exposure to beer and bar services emanating from the same source under the same mark. In reviewing the evidence, we take judicial notice that a “pub,” like a bar, is “an establishment where alcoholic beverages are sold and consumed,” such that we consider them synonymous.¹¹ The record includes definitions of a “taproom” as “[a] bar or barroom” and “[a] room in which alcoholic drinks, especially beer, are available on tap; a bar in a hotel or inn,” such that taprooms also are synonymous with bar services.¹² Examples from the record where beer and bar services are promoted under the same mark include:

The Dogfish Head website invites visitors to its pub and promotes its beer under the same DOGFISH HEAD mark;¹³

The website for Rogue promotes its beer and its Rogue Ales Public House pub, where the “35 taps at the pub still pour Rogue brews...,” so that both beer and bar services are offered under the ROGUE mark;¹⁴

The Omme Gang Brewery website advertises its OMMEGANG beer and its Café Ommegang, offering patrons “a stool at the bar”;¹⁵

¹¹ Merriam-webster.com, entry for “pub,” accessed June 14, 2021. 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).

¹² TSDR April 24, 2020 Office Action at 219-24.

¹³ TSDR March 5, 2020 Office Action at 26-29 (dogfish.com).

¹⁴ *Id.* at 30-37 (rogue.com).

¹⁵ TSDR April 24, 2020 Office Action at 94-109 (ommegang.com).

The Lagunitas website promotes beer and taprooms, all under the same LAGUNITAS mark;¹⁶

The Firestone Walker Brewing Company website promotes beer and taproom services, all under the FIRESTONE WALKER mark;¹⁷

The website of Terrapin Taproom promotes both beers and bar services under the same TERRAPIN mark;¹⁸

The Motor City website promotes its taproom and various beers under the MOTOR CITY BREWING WORKS mark.¹⁹

This evidence demonstrates that consumers encounter beer under the same mark as bar services, and that beer makers often have their own bars. *See In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (crediting relatedness evidence that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”). Also, the Examining Attorney introduced evidence that Registrant’s QUIRK Hotel includes a lobby bar that features a “Quirk Spritz” cocktail as well as bottles of “Quirk Label Red or White.”²⁰ While this

¹⁶ *Id.* at 136-54 (lagunitas.com).

¹⁷ *Id.* at 155-73 (firestonebeer.com).

¹⁸ *Id.* at 174-88 (terrapinbeer.com).

¹⁹ TSDR March 5, 2020 Office Action at 52-58 (motorcitybeer.com).

²⁰ TSDR December 5, 2020 Office Action at 2 (destinationhotels.com/quirk).

evidence does not show beer and bar services under the same mark, it shows other alcoholic beverages and bar services under the same mark.

Applicant tries to distinguish the third-party evidence from the relatedness analysis in this case by alleging that Ommegang and Firestone Walker “ARE NOT RESTAURANTS; THEY ARE TAPROOMS.”²¹ We find Applicant’s criticism flawed in two respects. First, as a factual matter, we disagree with Applicant’s characterization. The Ommegang website evidence refers to its “café,” and indicates that “Great Beer Deserves Great Food,” offering patrons “a seat in the dining room.”²² And the Firestone Walker website refers to its establishment as a “Restaurant.”²³ Second, as a legal matter, we give the cited registrations’ identifications their full sweep, so that the “bar services” include all types of such services, and therefore cannot be distinguished from “taprooms.” See *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”). Applicant improperly seeks to narrow the scope of the cited registrations based on alleged marketplace realities – “Registrant here is a hotel with a bar and a restaurant, incidental services to the establishment’s main business.”²⁴ “The authority is legion that the question of registrability must be decided on the basis of the identification of goods [and services] ... regardless of what the record may

²¹ 14 TTABVUE 6 (Applicant’s Reply Brief) (emphasis in original).

²² TSDR April 24, 2020 Office Action at 101 (ommegang.com).

²³ *Id.* at 157 (firestonebeer.com).

²⁴ 14 TTABVUE 7 (Applicant’s Reply Brief).

reveal as to the particular nature of [a registrant's] goods [and services], the particular channels of trade or the class of purchasers to which sales of the goods [and services] are directed.” *Octocom Syst.*, 16 USPQ2d at 1787.

The Examining Attorney also submitted additional relatedness evidence, in the form of a sizable number of use-based third-party registrations that identify beer and bar services under the same mark.²⁵ These registrations further suggest that the relevant goods and services may emanate from the same source. *See Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013) (“The use-based, third-party registrations . . . also have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark.”); *see also In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

Applicant argues against the relatedness of the goods and services by asserting that “brewers, vinters, and distillers (with highly restricted exceptions) CANNOT own or control bars or restaurants where alcohol is sold at retail.”²⁶ However, the only evidence cited by Applicant in support is a “white paper” with a 2015 copyright date by NABCA Research stating that it should be considered a “working document[.]”²⁷ In addition, even if we look past the potentially dated nature of the paper and consider

²⁵ TSDR April 24, 2020 Office Action at 7-50.

²⁶ 11 TTABVUE 19 (Applicant’s Supplemental Brief) (emphasis in original).

²⁷ April 3, 2020 Response to Office Action at 20.

its statements about the so-called three-tier system of alcoholic beverage manufacturers, wholesalers, and retailers, the paper acknowledges that this applies only to “most state models,”²⁸ indicating that this system does not apply throughout the United States. Therefore, we do not find Applicant’s unrelatedness arguments and evidence persuasive on this point.

Overall, the record amply supports the relatedness of bar services and beer. Considering the non-precedential cases cited by Applicant for whatever probative value they may have, we find them distinguishable. *See In re Constr. Research & Tech. GmbH*, 122 USPQ2d 1583, 1585 n.6 (TTAB 2017) (“Board decisions which are not designated as precedent are not binding on the Board, but may be cited and considered for whatever persuasive value they may hold”) (citations omitted). In particular, none of the cases Applicant points to involved bar services such as those in the cited registrations.

Based on the record as a whole, we find the beer and the bar services in the cited registrations related. The evidence shows that “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. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012). This factor favors likely confusion.

²⁸ *Id.* at 21.

D. Trade Channels and Classes of Consumers

The *DuPont* factor regarding channels of trade and classes of consumers must be assessed according to the identifications of the respective goods and services in the application and registrations at issue. *See, e.g., Coach Servs.*, 101 USPQ2d at 1722; *Octocom*, 16 USPQ2d at 1787. We must assume that the identified goods and services move through all normal and usual channels of trade and methods of distribution for such goods and services. *In re i.am.symbolic llc*, 866 USPQ2d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983). The third-party Internet evidence set out above reflects that beer and bar services are promoted together, often through the same websites, and the goods and services reach the same classes of consumers. Indeed, the evidence of record indicates that bars sell their own beers. This factor weighs in favor of likely confusion.

E. Conclusion

The overall identity and legal identity of the marks for related goods and services that move in channels of trade reaching the same classes of customers renders confusion likely.

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