

This Opinion is Not a
Precedent of the TTAB

Mailed: October 4, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

———
Trademark Trial and Appeal Board

———
In re Livewire Drinks, Inc.

———
Serial No. 88795611

———
Hamutal G. Lieberman of Helbraun & Levey LLP,
for Livewire Drinks, Inc.

Jesse Nelman, Trademark Examining Attorney, Law Office 129,
Pamela Y. Willis, Managing Attorney.

———
Before Zervas, Adlin and Bradley,
Administrative Trademark Judges.

Opinion by Bradley, Administrative Trademark Judge:

Livewire Drinks, Inc. (“Applicant”) applied to register the standard-character mark LIVEWIRE on the Principal Register for “Alcoholic beverages, not including beer” in International Class 33.¹

¹ Application Serial No. 88795611 was filed on February 13, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming first use anywhere and first use in commerce on February 10, 2020. The application also initially included “non-alcoholic beverages” in International Class 33 based on Applicant’s bona fide intent to use the mark in commerce

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark is likely to cause confusion with two marks, both registered on the Principal Register to Pepsico, Inc.:

MOUNTAIN DEW LIVEWIRE (in standard characters) for "soft drinks, and syrups and concentrates for making the same" in International Class 32;² and

MTN DEW LIVE WIRE (in standard characters) for "Soft drinks; Syrups used in the preparation of soft drinks" in International Class 32.³

After the Examining Attorney issued the final refusal, Applicant appealed and requested reconsideration.⁴ The Examining Attorney denied the request for reconsideration, and Applicant and the Examining Attorney filed briefs.⁵ We affirm the refusal to register.

I. Likelihood of Confusion

Our determination under Section 2(d) of the Trademark Act involves an analysis of all of the probative evidence of record that is relevant to the factors bearing on a

with these goods under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). Applicant deleted the Class 33 goods in its November 2, 2020 Response to Office Action.

Citations in this opinion to the briefs and other materials in the appeal docket refer to TTABVUE, the Board's online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, Opp. No. 91216455, 2020 TTAB LEXIS 199, at *4 n.1 (TTAB 2020). Page references to the application file refer to the online database of the USPTO's Trademark Status & Document Retrieval ("TSDR") system. All citations to documents contained in the TSDR database are to the downloaded .pdf versions of the documents.

² Registration No. 2803790, registered on January 6, 2004, and has been maintained.

³ Registration No. 6315467, registered on April 6, 2021.

⁴ 1 TTABVUE.

⁵ 8 TTABVUE; 12 TTABVUE; 13 TTABVUE.

likelihood of confusion. *See In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”); *see also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005).⁶

We must consider “each *DuPont* factor for which there is evidence and argument.” *Spireon, Inc. v. Flex LTD*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) (citing *In re Guild Mortg. Co.*, 912 F.3d 1376, 1380 (Fed. Cir. 2019)). “Not all of the *DuPont* factors are necessarily relevant or of equal weight in a given case, and any one of the factors may control a particular case.” *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1362 (Fed. Cir. 2022) (internal quotation marks omitted). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (“likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods’”) (alteration in the original) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65 (Fed. Cir. 2002)). These and other factors are discussed below.

We focus our likelihood of confusion analysis on the standard-character mark MOUNTAIN DEW LIVEWIRE in cited Registration No. 2803790 which, as outlined

⁶ As part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases, citations in this opinion are in a form provided in the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion cites to the Lexis legal database. Practitioners should also adhere to the practice set forth in TBMP § 101.03.

above, covers soft drinks, and syrups and concentrates for making the same. Because we find confusion likely based on the mark and goods in this registration, we need not consider the likelihood of confusion between Applicant's mark and the mark in Registration No. 6315467. *See In re Max Cap. Grp. Ltd.*, Ser. No. 77186166, 2010 TTAB LEXIS 1, at *4-5 (TTAB 2010).

A. Strength or Weakness of the Registrant's Mark

Because it affects the scope of protection to which Registrant's mark is entitled, we first address the strength or weakness of the cited mark. Applicant contends that the "LIVEWIRE" component of Registrant's cited mark is weak because it co-exists with similar third-party marks used on similar goods in the market.⁷ "A mark's strength is measured both by its conceptual strength ... and its marketplace strength ...". *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010). In determining the strength of the cited mark, we consider inherent strength, based on the nature of the mark itself. *In re FCA US LLC*, Ser. No. 85650654, 2018 TTAB LEXIS 116, at *36-37 (TTAB 2018). We also consider whether the mark has commercial weakness in the marketplace, if there is evidence in the record. *DuPont*, 476 F.2d at 1361 (The sixth *DuPont* factor considers "the number and nature of similar marks in use on similar goods.").

⁷ 8 TTABVUE 21; *see also* 12 TTABVUE 6-7.

On conceptual strength, Applicant made of record a number of third-party registrations incorporating the term “livewire” or “live wire.”⁸ See *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015) (citation omitted). (“Third party registrations are relevant to prove that some segment of the composite marks which both contesting parties use has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.”). However, Applicant does not reference or discuss these registrations in its briefs. We find the third-party registrations are not probative because they cover goods unrelated to Registrant’s goods.⁹ See *In re Thor Tech, Inc.*, Ser. No. 78634024, 2009 TTAB LEXIS 253, at *19 (TTAB 2009) (“third-party registrations are of limited probative value because the goods identified in the registrations appear to be in fields which are far removed from [the parties’] trailers and recreational vehicles”); *TAO Licensing, LLC v. Bender Consulting Ltd.*, Can. No. 92057132, 2017 TTAB LEXIS 437, at *51 (TTAB 2017) (third-party registrations in unrelated fields “have no bearing on the strength of the term in the context relevant to this case”).

The Examining Attorney provided dictionary definitions of “live wire” including: “an alert, active, or aggressive person;” “an energetic and unpredictable person;” “a

⁸ March 17, 2023 Response to Office Action at 21-77, 83-87, 100-120, 123-159, 162-176, 179-181.

⁹ The varied goods covered by the third-party registrations include medical instruments, racquet strings, cables for use with guitars, computer software, fireworks, and electric power tools. March 17, 2023 Response to Office Action at 21, 27, 43, 69, 83, 105.

vivacious, alert or energetic person;” and “lively and energetic.”¹⁰ We agree with the Examining Attorney that these definition support that the word “LIVEWIRE” will convey to consumers that Applicant’s and Registrant’s beverages will render consumers more alert, energetic, and/or lively.¹¹ Accordingly, we find that that the “LIVEWIRE” portion of Registrant’s mark is suggestive and thus inherently distinctive. *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1340 (Fed. Cir. 2004) (citation omitted) (“suggestive mark is one for which a consumer must use imagination or any type of multistage reasoning to understand the mark’s significance”).

As for commercial strength, we consider any evidence of third-party marketplace use in the record. *FCA US LLC*, 2018 TTAB LEXIS 116, at *37-39. However, such third-party uses must be “similar marks in use on *similar goods*.” *Omaha Steaks Int’l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1324 (Fed. Cir. 2018) (emphasis in original; citation omitted). Applicant provided evidence of two third parties in the United States who use the term “live wire” or “livewire” in connection with beer.¹² However, Applicant has not provided any evidence demonstrating that “beer” is

¹⁰ May 5, 2020 Office Action at 7; July 1, 2022 Final Office Action at 6, 9, 11.

¹¹ 12 TTABVUE 5.

¹² March 8, 2024 Request for Reconsideration at 27-28. The third use referenced by Applicant, Electric Bear Livewire, is listed in the Rate Beer screenshot as located in Bath, England (*id.* at 29), and accordingly we do not find it probative of the strength of Registrant’s mark in the United States. *See Rocket Trademarks Pty Ltd. v. Phard S.P.A.*, Opp. No. 91172486, 2011 TTAB LEXIS 39, at *16 (TTAB 2011) (agreeing that “evidence of [third-party] use of the term ELEMENT outside the United States has little to no relevance with regard to the issue of how the term is perceived by American consumers”).

similar to Registrant's soft drinks or syrups.¹³ Additionally, two third-party uses fall well short of "ubiquitous" or "considerable" third-party use of a term we expect to see in order to demonstrate commercial weakness. *See i.am.symbolic*, 866 F.3d at 1329 ("Symbolic's evidence of [three] third-party use[s] of I AM for the same or similar goods falls short of the 'ubiquitous' or 'considerable' use of the mark components present in its cited cases.")

Accordingly, we find that Applicant has not demonstrated that Registrant's mark is commercially weak, and we find that Registrant's mark is entitled to "the normal scope of protection to which inherently distinctive marks are entitled." *Bell's Brewery, Inc. v. Innovation Brewing*, Opp. No. 91215896, 2017 TTAB LEXIS 452, at *20 (TTAB 2017). As such, this factor is neutral in the likelihood of confusion analysis.

B. Similarity of the Marks

Under this factor we consider "[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression." *In re Detroit Ath. Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018) (citing *DuPont*, 476 F.2d at 1361). "The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties." *i.am.symbolic*, 866 F.3d at 1323 (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012)). "Similarity in any one

¹³ Because Applicant's identification of goods explicitly states "not including beer," we do not consider "beer" in the two third-party registrations to be relevant in determining strength.

of the[] elements [of appearance, sound, connotation and commercial impression] may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, Ser. No. 87075988, 2018 TTAB LEXIS 170, at *13 (TTAB 2018) (quoting *In re Davia*, Ser. No. 85497617, 2014 TTAB LEXIS 214, at *4 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019). Additionally, the marks “must be considered ... in light of the fallibility of memory” *In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014) (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Bay State Brewing Co.*, Ser. No. 85826258, 2016 TTAB LEXIS 46, at *6 (TTAB 2016) (citation omitted).

Both Applicant and the Examining Attorney acknowledge that “MOUNTAIN DEW” is a house mark.¹⁴ Generally, deletion of a house mark, like Applicant has done here, does not avoid a likelihood of confusion. *See In re United States Shoe Corp.*, Ser. No. 73446404, 1985 TTAB LEXIS 23, at *6 (TTAB 1985) (applicant’s mark CAREER IMAGE similar to registrant’s CREST CAREER IMAGES where applicant deleted house mark and the remaining “words in applicant’s marks are virtually the same as the words making up one element of registrant’s mark”); *In re Dennison Mfg. Co.*, Ser. No. 73295924, 1986 TTAB LEXIS 135, at *10-11 (TTAB 1986) (applicant’s mark GLUE STIC confusingly similar to registrant’s UHU GLU STIC; inclusion of house

¹⁴ 8 TTABVUE 13-14 (noting the “strong brand presence of Registrant’s Mountain Dew brand”), 17-18; 12 TTABVUE 5; 13 TTABVUE 6-8. The record supports MOUNTAIN DEW is used as a house mark including a registration for MOUNTAIN DEW VOLTAGE, and use of MOUNTAIN DEW BAJA BLAST. March 8, 2024 Request for Reconsideration at 44; December 8, 2023 Subsequent Final Office Action at 159.

mark “UHU” in registrant’s mark “is not sufficient to preclude likelihood of confusion from arising as a result of the contemporaneous use of applicant’s and registrant’s marks in connection with their closely related goods”). *See also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 1207.01(b)(iii) and cases cited therein. Given the shared identical term “livewire,” Applicant’s mark LIVEWIRE looks and sounds similar to Registrant’s mark MOUNTAIN DEW LIVEWIRE. *See United States Shoe Corp.*, 1985 TTAB LEXIS 23, at *7 (Applicant “has adopted as its mark almost the same thing as the ‘CAREER IMAGES’ portion of registrant’s mark. It is because of the similarities between ‘CAREER IMAGE’ and ‘CAREER IMAGES’ that the marks have similar sounds, appearances and connotations.”).¹⁵

We agree with the Examining Attorney that Applicant’s mark LIVEWIRE is likely to be viewed as a shortened version of Registrant’s MOUNTAIN DEW LIVEWIRE. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 1347-48 (Fed. Cir. 2010) (applicant’s mark ML likely to be perceived as a shortened form of registrant’s mark ML MARK LEES (stylized); “presence of an additional term in the mark does not necessarily eliminate the likelihood of confusion if some terms are identical”). Applicant contends that the Examining Attorney “has not provided any evidence showing Registrant using the words LIVEWIRE or LIVE WIRE independently.”¹⁶ While this is not determinative,

¹⁵ Applicant also contends that Applicant and Registrant use their marks in different stylized forms. (8 TTABVUE 15.) However, the parties’ marks are all standard character marks which do not claim rights to “any particular font style, size, or color.” Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a). For both Applicant’s and Registrant’s marks, their respective rights “reside in the wording and not in any particular display.” *In re Mr. Recipe, LLC*, Ser. No. 86040643, 2016 TTAB LEXIS 80, at *21 (TTAB 2016) (citing *Viterra*, 671 F.3d at 1363-66).

¹⁶ 8 TTABVUE 15.

we note that the record does contain textual references to “Livewire” alone in connection with Registrant’s goods.¹⁷ Additionally, the evidence shows that “LiveWire” is a particular orange flavor of MOUNTAIN DEW soft drink,¹⁸ which demonstrates that consumers are likely to use “LiveWire” alone to reference the particular flavor of MOUNTAIN DEW they seek. *See In re Champion Int’l Corp.*, 1977 TTAB LEXIS 62, at *6-7 (TTAB 1977) (because “HAMMERMILL’ is the registrant’s house mark . . . persons seeking to order the product sold under the particular mark in question would recognize its function as a part of the composite mark and utilize the term ‘CHECK-MATE’ . . . to refer to these goods”). This could be particularly confusing in a restaurant setting, where a customer refers to Registrant’s soft drink using the shortened form (to be distinguished from Registrant’s other MOUNTAIN DEW beverages). *See In re Aquitaine Wine USA, LLC*, Ser. No. 86928469, 2018 TTAB LEXIS 108, at *20 (TTAB 2018) (“consumers often have a propensity to shorten marks when ordering them orally . . .”). The consumer may receive an alcoholic beverage and not a soft drink.

Applicant argues that the “substantial brand recognition” and fame of MOUNTAIN DEW distinguishes the marks and weighs against a likelihood of

¹⁷ *See, e.g.*, March 8, 2024 Request for Reconsideration at 36 (containing an entry for “LiveWire” from mountaindew.fandom.com/wiki/LiveWire); December 8, 2023 Subsequent Final Refusal at 14.

¹⁸ March 17, 2023 Response to Office Action at 185 (“MTN DEW® LIVE WIRE™ All the great taste and exhilaration of MTN DEW® sparked with orange.”); March 8, 2024 Request for Reconsideration at 36 (“LiveWire is a Mountain Dew flavor released in stores in the summertime in 2003, 2004, and then 2005 for a limited time in the United States[,] . . . [and] eventually making LiveWire a permanent flavor after its 2005 limited-time run.”).

confusion.¹⁹ Applicant also contends that MOUNTAIN DEW is the dominant portion of Registrant's mark due to its fame and also because "MOUNTAIN DEW" are the first words in Registrant's marks.²⁰ We agree that the record contains some evidence that MOUNTAIN DEW is recognized by consumers.²¹ However, any fame weighs in favor of, not against, a likelihood of confusion. *See Kenner Parker Toys, Inc. v. Rose Art Indus.*, 963 F.2d 350, 353-54 (Fed. Cir. 1992) (fame of a mark does not "cut[] both ways" in the analysis of the likelihood of confusion); *L'Oreal S.A. v. Marcon*, Opp. No. 91184456, 2012 TTAB LEXIS 77, at *14 (TTAB 2012) ("fame of a registered or previously used mark can never support a junior party; this *DuPont* factor can only support the senior party"). This is because "a mark with extensive public recognition and renown deserves and receives more legal protection than an obscure or weak mark." *Kenner Parker Toys*, 963 F.2d at 353. Applicant also argues that MOUNTAIN

¹⁹ 8 TTABVUE 12-14.

²⁰ 8 TTABVUE 13-14, 20-21; 13 TTABVUE 8-10. While the first term in a mark may be dominant, that is not always the case. *See Tao Licensing*, 2017 TTAB LEXIS 437, at *56 ("there is no mechanical test to select a dominant element"). We do not find any term dominant in Registrant's mark.

²¹ Applicant's evidence includes an excerpt from an article in the business section of Mirror Review Blog titled, "Top 10 Soft drink Brands in 2023." (March 8, 2024 Request for Reconsideration at 40-41.) The article ranks PepsiCo as the number two brand and identifies "Mountain Dew" as one of "Pepsico's famous brands". (*Id.*) It also reports that "PepsiCo operates in over 200 countries, . . . generating more than USD \$1 billion in sales . . . [and] hold[s] a market share of approximately 48%." (*Id.* at 41.) Applicant also provided an article from statista.com titled, "Most well-known soft drink brands in the United States 2023," reporting the results of a survey conducted by Statista Consumer Insights in July to August 2023. (March 8, 2024 Request for Reconsideration at 47-48.) The survey found that Mountain Dew had 93% brand awareness. (*Id.* at 48.) "[B]rand awareness was surveyed employing the concept of aided brand recognition, showing respondents both the brand's logo and the written brand name." (*Id.* at 47.) The online survey included 1,249 respondents at the ages of 18 to 64. (*Id.* at 48.) *See, e.g., Bose Corp. v. QSC Audio Prods.*, 293 F.3d 1367, 1371, 1375-76 (Fed. Cir. 2002) (discussing evidence of fame).

DEW is famous only for “soft drinks, not alcohol,”²² but its point is not valid - “the effect of such fame is that customers are more likely to presume an association with [Registrant] whenever the same or similar mark is used on *other* products.” *L’Oreal*, 2012 TTAB LEXIS 77, at *14. *See also Specialty Brands, Inc. v. Coffee Bean Distribs.*, 748 F.2d 669, 675 (Fed. Cir. 1984) (“fame of a trademark may affect the likelihood purchasers will be confused inasmuch as less care may be taken in purchasing a product under a famous name”). Here, the “other products” include alcohol excluding beer.

Additionally, any brand recognition of Mountain Dew, far from distinguishing the marks’ commercial impression, would make it more likely that consumers will associate Applicant’s mark LIVEWIRE with Registrant’s mark. *See In re Riddle*, Ser. No. 73377365, 1985 TTAB LEXIS 126, at *5-6 (TTAB 1985) (fame of Richard Petty did not distinguish the marks as “those who encounter both [registrant’s] ‘ACCUTUNE’ [goods] and . . . the service[s] . . . offered under applicant’s mark [RICHARD PETTY’S ACCUTUNE] would likely believe that Richard Petty endorsed or was in some way associated with both the goods and the services, in that both marks contain the designation ‘ACCUTUNE’”).

Overall, considering the recollection of average purchasers, we conclude that the marks are similar in appearance, sound, meaning and commercial impression such that this *DuPont* factor weighs in favor of a likelihood of confusion.

²² 8 TTABVUE 20.

C. Similarity of the Goods

Under the second factor, we analyze the “similarity or dissimilarity and nature of the goods” considering “the applicant’s goods as set forth in its application, and the [registrant’s] goods as set forth in its registration.” *i.am.symbolic*, 866 F.3d at 1325 (alteration in the original) (quoting *M2 Software, Inc. v. M2 Communs., Inc.*, 450 F.3d 1378, 1382 (Fed. Cir. 2006)). The goods need not be identical or even competitive in order to find a likelihood of confusion. Rather, the question is whether the goods are marketed in a manner that “could give rise to the mistaken belief that [the goods] emanate from the same source.” *Coach Servs.*, 668 F.3d at 1369 (quoting *7-Eleven Inc. v. Wechsler*, Opp. No. 91117739, 2007 TTAB LEXIS 58, at *28-29 (TTAB 2007)). See also *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) (“Even if the goods . . . in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods.”). “[I]t is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.” *In re Aquamar, Inc.*, Ser. No. 85861533, 2015 TTAB LEXIS 178, at *9 n.5 (TTAB 2015) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981)).

The involved application identifies “alcoholic beverages, not including beer.” Registrant’s identification of goods is “soft drinks, and syrups and concentrates for making the same.” Since some “soft drinks” are called “soda” we use the terms

interchangeably in this discussion.²³ The Examining Attorney’s complementary and third-party use evidence discussed below establishes that Applicant’s alcoholic beverages (not including beer) and Registrant’s soft drinks are related.

1. Complementary Use

“[C]omplementary use has long been recognized as a relevant consideration in determining a likelihood of confusion.” *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567 (Fed. Cir. 1984) (recognizing that “‘bread’ and ‘cheese’ are often used in combination”). Where goods are “commonly used together . . . [such] conjoint use is a fact proper to be considered.” *Davia*, 2014 TTAB LEXIS 214, at *15 (citation omitted).

The Examining Attorney provided articles discussing mixed drinks made with alcohol and soda and suggested recipes for the same including:

- “Soda and Spirit Combos That Make Simple Cocktail Substitutes” (posted on thrillist.com) featuring “a bunch of two ingredient drinks”;²⁴
- “26 Soda Cocktails To Prove That Soda Can Be Sophisticated Too” (posted on foodforet.com) explaining that “[s]oda isn’t just an easy mixer to go with a spirit. You can also use the ingredient to create soda cocktails.”;²⁵ and
- “10 Types of Soda and What Spirits They Pair Best With” (posted on www.mashed.com) stating that “[s]oft drinks also serve a place behind any

²³ THE AMERICAN HERITAGE DICTIONARY defines “soft drink” as “[a] nonalcoholic, flavored, carbonated beverage, usually commercially prepared and sold in bottles or cans” and states that it is “also called regionally . . . soda.” (<https://www.ahdictionary.com>, accessed October 1, 2024). The Board may take judicial notice of dictionary evidence, *In re Cordua Rests. LP*, Ser. No. 85214191, 2014 TTAB LEXIS 94, at *6 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594 (Fed. Cir. 2016), including from online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, Ser. No. 75788830, 2006 TTAB LEXIS 136, at *6-9 (TTAB 2006).

²⁴ December 8, 2023 Subsequent Final Office Action at 96-102.

²⁵ December 8, 2023 Subsequent Final Office Action at 108-132.

regular bar. Soda is the ultimate universal mixer used to make spirits more palatable.”²⁶

See Davia, 2014 TTAB LEXIS 214, at *18 (“recipes submitted by the examining attorney show that pepper sauce and agave nectar are complementary since . . . where the combination of sweet and hot flavors is common, pepper sauce and agave nectar are frequently blended together for flavor”); *In re Ox Paperboard, LLC*, Ser. No. 87847482, 2020 TTAB LEXIS 266, at *15 (TTAB 2020) (“Evidence of relatedness may include news articles . . . showing that the relevant goods are used together or used by the same purchasers”). Additionally, some companies specifically market their soda as pairing well with alcohol,²⁷ and some ready-to-drink canned cocktails combine soft drinks and alcohol such as Jack Daniel’s & Coca-Cola.²⁸

Applicant argues that its “product is a ‘ready to drink’ alcoholic cocktail” that “*eliminates* the need for a consumer . . . to purchase the soft drink to be used together as the product stands alone”²⁹ and “is served in a container in its pre-mixed, complete form.”³⁰ So as Applicant describes its goods they could include Registrant’s (i.e, an alcoholic cocktail containing a soft drink). But we must consider Applicant’s goods as

²⁶ December 8, 2023 Subsequent Final Office Action at 154-164.

²⁷ May 22, 2023 Office action at 21 (Cherry Republic suggests using its Cherry Lime soda pop to “[m]ake a Fizzy Cherry Lime Margarita”), 32 (Fever Tree states that its ginger ale soda is “[p]erfectly balanced to enhance the flavor notes of the finest whiskies, bourbons and rums”), 41, 42, 44 (Portland Soda Works bottles their soda with labels stating “cocktail and soda syrups”); July 1, 2022 Final Office Action at 32 (Cutwater Spirits advertises its ginger beer soda as a “premium cocktail mixer”); December 8, 2023 Subsequent Final Office Action at 78 (Reed’s states that its ginger beer soda is “[p]erfect straight-up or mixed”).

²⁸ December 8, 2023 Subsequent Final Office Action at 74 (displaying canned “Jack Daniel’s Old No. 7 Brand Tennessee Whiskey mixed with Coca-Cola”).

²⁹ 8 TTABVUE 17 (emphasis in original).

³⁰ 13 TTABVUE 10.

identified in its application which are “alcoholic beverages, not including beer,” not premixed or “ready to drink” canned cocktails. *See Detroit Ath.*, 903 F.3d at 1307 (emphasis in original) (“relevant inquiry in an ex parte proceeding focuses on the goods . . . described in the application and registration, and not on real-world conditions”). In any event, the Examining Attorney’s evidence demonstrates that Applicant’s alcoholic beverages (not including beer) and Registrant’s soft drinks are complementary ingredients for an alcoholic drink.

2. Third-Party Use

Evidence of relatedness may also include “advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer.” *Ox Paperboard*, 2020 TTAB LEXIS 266, at *15. *See also Hewlett-Packard Co.*, 281 F.3d at 1267 (evidence that “a single company sells the goods . . . of both parties, . . . is relevant to a relatedness analysis”). The Examining Attorney provided third-party uses demonstrating soda or soft drinks and alcoholic beverages offered for sale under the same mark, including:

- Appalachian Brewing Co. offering Appalachian craft soda and Appalachian craft spirits (whiskey, rum, gin, vodka);³¹
- Motor City Brewing Works offering Motor City Brewing Works craft soda, hard cider, and wine;³²
- Cutwater Spirits offering Cutwater Mixers ginger beer soda as well as Cutwater whiskey, mezcal, vodka, and rum;³³

³¹ May 5, 2020 Office Action at 19-21.

³² May 5, 2020 Office Action at 23, 25-26.

³³ July 1, 2022 Final Office Action at 32, 36-39.

- Rogue Ales & Spirits offering Rogue soda and Rogue whiskey, vodka and gin;³⁴
- Abita Brewing Company offering Abita soda, Abita hard lemonade and hard iced tea, and Crafted Abita! canned cocktails;³⁵
- Cherry Republic, Inc. offering Cherry Republic soda and wine;³⁶
- Saint Arnold Brewing Company offering Saint Arnold soda and hard cider;³⁷
- F.X. Matt Brewing Co. offering Saranac 1888 soft drinks and Saranac spiked seltzers;³⁸
- The Coca-Cola Company offering Fresca sparkling soda water and Fresca Mixed canned cocktails;³⁹ and
- Reed's Inc. offering Reed's ginger ale and ginger beer soda as well as Reed's hard ginger ale and Reed's canned classic mule cocktail and Reed's canned stormy mule cocktail.⁴⁰

Additionally, Registrant itself offers soft drinks and alcoholic beverages under the same mark.⁴¹ The evidence of complementary and third-party uses establishes that there is a commercial relationship between Applicant's and Registrant's goods. *See, e.g., Detroit Ath.*, 903 F.3d at 1306-07 (third-party evidence demonstrated "consumers are accustomed to seeing a single mark associated with a source that sells both" the goods of the applicant and cited registrant); *In re Anderson*, Ser. No. 76511652, 2012 TTAB LEXIS 42, at *28-29 (TTAB 2012) (third-party Internet excerpts demonstrated

³⁴ July 1, 2022 Final Office Action at 51, 53.

³⁵ May 22, 2023 Office Action at 7, 10, 12-13, 17-19.

³⁶ May 22, 2023 Office Action at 20-29.

³⁷ May 22, 2023 Office Action at 47-52.

³⁸ May 22, 2023 Office Action at 60-62, 65-67, 57-58.

³⁹ December 8, 2023 Subsequent Final Office Action at 42-55.

⁴⁰ December 8, 2023 Subsequent Final Office Action at 77-95.

⁴¹ March 17, 2023 Response to Office Action at 185; December 8, 2023 Subsequent Final Office Action at 36, 9-20; March 8, 2024 Request for Reconsideration at 17-21.

consumers expect to find both the applicant's and cited registrant's goods "emanating from a common source").

Applicant's criticisms of the Examining Attorney's evidence and arguments are not persuasive. First, Applicant asserts that "the goods are specifically categorized in different classes (032 and 033) because they are not similar enough to be considered in the same class."⁴² However, "[c]lassification is solely for the convenience of Patent and Trademark Office administration, and is wholly irrelevant to the issue of registrability." *Detroit Ath.*, 903 F.3d at 1307 (internal quotations and citations omitted); *NFL v. Jasper Alliance Corp.*, Opp. No. 91077966, 1990 TTAB LEXIS 37, at *10 n.5 (TTAB 1990) ("The classification system was established for the convenience of the Office rather than to indicate that goods . . . in different classes indicates that they are not related"). Second, Applicant argues that even though "some companies have created both soft drinks and alcoholic products" does not mean the goods are related.⁴³ The opposite is true - this fact demonstrates that there is a commercial relationship between such goods. Third, Applicant argues that "[t]here is no per se rule that holds that all beverages are related."⁴⁴ But the Examining Attorney did not apply any such per se rule even if one existed, which it does not; rather he provided evidence (discussed above) demonstrating that Applicant's alcoholic beverages, not including beer and Registrant's soft drinks are related. Fourth, Applicant points to

⁴² 8 TTABVUE 16.

⁴³ 8 TTABVUE 16.

⁴⁴ 8 TTABVUE 16.

the co-existence of Registrant's marks with third-party marks covering alcoholic beverages.⁴⁵ But, third-party Registration No. 3577696 for the mark LIVE WIRE for "wines" is cancelled⁴⁶ and thus is "only evidence that the registration[] issued, and [is] not evidence of use of the registered mark[] at any time." *Kemi Organics, LLC v. Gupta*, Can. No. 92065613, 2018 TTAB LEXIS 149, at *17 (TTAB 2018); *In re Kysela Pere et Fils, Ltd.*, Ser. No. 77686637, 2011 TTAB LEXIS 70, at *7 (TTAB 2011) ("dead' or cancelled registrations have no probative value at all"). And the registrations for MTN DEW CODE RED and CODE RED, and MOUNTAIN DEW VOLTAGE and VOLTAGE VODKA, are not persuasive because "prior decisions and actions of other trademark examining attorneys in registering other marks are not binding upon the USPTO or the Board." *In re Dolce Vita Footwear, Inc.*, Ser. No. 88554717, 2021 TTAB LEXIS 121, at *2 n. 6 (TTAB 2021); *In re Wal-Mart Stores, Inc.*, Ser. No. 86261962, 2019 TTAB LEXIS 1, at *42 (TTAB 2019) ("Our primary reviewing court has long and consistently warned against making factual findings in cases based on allowances by individual examining attorneys in prior cases.").

Accordingly, the second *DuPont* favors finding a likelihood of confusion.

D. Channels of Trade and Classes of Purchasers

Under this factor we examine the similarity or dissimilarity of the trade channels in which, and the classes of purchasers to whom, the parties' respective goods are marketed. *DuPont*, 476 F.2d at 1361; *Stone Lion Cap. Partners, L.P. v. Lion Cap.*

⁴⁵ 8 TTABVUE 17-18.

⁴⁶ March 8, 2024 Request for Reconsideration at 42.

LLP, 746 F.3d 1317, 1322-23 (Fed. Cir. 2014). We must base our analysis on the identifications in the involved application and cited registration. *Stone Lion Cap. Partners*, 746 F.3d at 1323; *Detroit Ath.*, 903 F.3d at 1308 (factor “must be evaluated with an eye toward the channels specified in the application and registration”).

Here, the Examining Attorney erred in asserting that merely because the non-identical goods at issue lack restrictions, they therefore are deemed to travel in the same trade channels to the same class of purchasers.⁴⁷ This presumption applies only where goods are legally identical. *See, e.g., In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (where the goods at issue were identical, the Board was “entitled to rely on th[e] legal presumption” that the trade channels and consumers also were identical); *In re Info. Builders Inc.*, Ser. No. 87753964, 2020 TTAB LEXIS 20, at *11-12 (TTAB 2020) (where parties “goods . . . are legally identical in part, we must presume that these goods . . . travel through the same channels of trade and are offered or rendered to the same or overlapping classes of purchasers”). Where, as here, the goods are **not** identical, we may presume only that they travel in whatever trade channels are normal for each type of product. *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1361 (Fed. Cir. 2000) (“When the registration does not contain limitations describing a particular channel of trade or class of customer, the goods . . . are assumed to travel in all normal channels of trade.”).

⁴⁷ 12 TTABVUE 12.

Nonetheless, the evidence of record shows that both soft drinks and alcoholic beverages are offered for sale in restaurants,⁴⁸ bars,⁴⁹ grocery retailers,⁵⁰ gas stations and convenience stores,⁵¹ and on some beverage company websites.⁵² *See also Kysela Pere et Fils*, 2011 TTAB LEXIS 70, at *16 (“common knowledge that [wine] can be purchased in liquor stores and, in some cases, supermarkets and other retail outlets”). Moreover, as explained above, soft and hard drinks are sometimes promoted for use together, to the same consumers of “mixed” drinks.

Applicant “does not deny that both its products and Registrants’ products have the same channels of trade.”⁵³ However, Applicant argues that Registrant’s soft drinks and Applicant’s alcoholic beverages are kept separate and distinct within trade channels and would not be found next to each other on the same store shelf or merchandized next to each other.⁵⁴ But Applicant’s assertions are “unsupported by sworn statements or other evidence, and [a]ttorney argument is no substitute for evidence.” *In re OEP Enters.*, Ser. No. 87345596, 2019 TTAB LEXIS 278, at *46 (TTAB 2019) (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir.

⁴⁸ December 8, 2023 Subsequent Final Office Action at 21-22.

⁴⁹ December 8, 2023 Subsequent Final Office Action at 155-157, 164.

⁵⁰ December 8, 2023 Subsequent Final Office Action at 36, 139, 155.

⁵¹ December 8, 2023 Subsequent Final Office Action at 38, 155.

⁵² July 1, 2022 Final Office Action at 51, 53 (featuring “buy it” links); May 22, 2023 Office Action at 21-23, 27-28 (featuring “add to cart” buttons).

⁵³ 8 TTABVUE 19.

⁵⁴ 8 TTABVUE 19-20.

2018) (internal quotation omitted)). In any event, as explained, the record belies Applicant's argument.

With regards to consumers, both Applicant's and Registrant's products are "general consumer goods that are sold to adult members of the general public." *Kysela Pere et Fils*, 2011 TTAB LEXIS 70, at *16 ("there is no dispute that beer and wine are general consumer goods that are sold to adult members of the general public"). While the nature of Applicant's alcoholic beverages means that potential purchasers are limited to those of legal drinking age in the general population, there is still overlap in consumers between both Applicant's and Registrant's goods for those who are of legal drinking age and consume both alcoholic beverages and soft drinks.

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

E. Purchaser Care

The fourth *DuPont* factor considers the "conditions under which and buyers to whom sales are made, i.e. 'impulse' v. careful, sophisticated purchasing." *DuPont*, 476 F.2d at 1361. Because there are no limitations on price point or consumer type in either the application or the cited registrations, we must presume that the alcoholic beverages in the application, and the soft drinks in the cited registration, are sold at all price points and to consumers of legal drinking age that consume alcohol. As such, Applicant's and Registrant's customers may include ordinary adult consumers purchasing alcohol and/or soft drinks at grocery stores, supermarkets, liquor stores, drug stores, etc., as well as more discerning adult customers purchasing alcohol at

higher-end specialty shops. However, we must base our decision on “the least sophisticated potential purchasers.” *Stone Lion Cap. Partners*, 746 F.3d at 1325.

Purchasers of “relatively inexpensive, comestible goods subject to frequent replacement . . . have been held to a lesser standard of purchasing care.” *Specialty Brands*, 748 F.2d at 672. Applicant advertises on its website that its beverages “give[] you perfect taste every time, and starts at just \$4/serving.”⁵⁵ Other evidence shows various alcoholic beverages offered at a range of prices including \$8.00 for a four pack of hard seltzer,⁵⁶ and \$16-\$18 for a bottle of wine.⁵⁷ The Examining Attorney introduced evidence showing a bottle of soda priced at \$1.25,⁵⁸ and what appears to be 6-packs of bottled soda offered at \$19.50.⁵⁹ Accordingly, goods of the type identified in Applicant’s and Registrant’s identifications of goods are both relatively inexpensive and consumers are likely to use a lesser standard of care in making purchasing decisions. *See Martin’s Famous Pastry Shoppe*, 748 F.2d at 1567 (“Bread and cheese are staple, relatively inexpensive comestibles, subject to frequent replacement. Purchasers of such products have long been held to a lesser standard of purchasing care.”); *Aquitaine Wine*, 2018 TTAB LEXIS 108, at *29 (“Wine purchasers are not necessarily sophisticated or careful in making their purchasing decisions.”).

⁵⁵ March 8, 2024 Request for Reconsideration at 34.

⁵⁶ May 22, 2023 Office Action at 68.

⁵⁷ May 22, 2023 Office Action at 27, 29.

⁵⁸ July 1, 2022 Final Office Action at 25.

⁵⁹ May 22, 2023 Office Action at 20, 24.

Applicant argues that it “markets its product as a premium good” and “[a]s such, the purchaser of Applicant’s goods can be presumed to be in the market for a premium alcoholic item for consumption and to have a reasonably focused need for canned or bottled cocktails.”⁶⁰ We are not persuaded by Applicant’s argument. There is no such restriction to either “premium” alcoholic beverages, or even to canned cocktails in Applicant’s identification of goods, and Registrant’s goods also do not contain any price or quality limitations. *See Stawski v. Lawson*, Con. Use No. 94002621, 2018 TTAB LEXIS 438, at *60-61 (TTAB 2018) (“since there is no restriction in the subject applications and registration as to price or quality, there is no reason to infer that the consumers or purchasers of these alcoholic beverages will be particularly discriminating or careful in distinguishing [a]pplicant’s wine from [r]egistrant’s”).

We thus find the *DuPont* factor regarding purchaser care is neutral.

F. Concurrent Use and Absence of Confusion

The seventh *DuPont* factor examines the “nature and extent of any actual confusion,” while the eighth *DuPont* factor considers the “length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 476 F.2d at 1361.

We first consider any evidence of concurrent use. Under the eighth *DuPont* factor, unlike some other factors, we must “look at **actual market conditions**, to the extent there is evidence of such conditions of record.” *In re Guild Mortg. Co.*, Ser. No.

⁶⁰ 8 TTABVUE 19.

86709944, 2020 TTAB LEXIS 17, at *19 (TTAB 2020) (emphasis in the original). “Generally, this factor is not that important in ex parte cases unless the applicant provides us with contextual evidence that allows us to meaningfully assess the length of time and degree to which the applicant’s and registrant’s commercial activities would have provided an opportunity for confusion to have manifested itself if it were likely.” *In re Embiid*, Ser. No. 88202890, 2021 TTAB LEXIS 168, at *53-54 (TTAB 2021).

Here, Applicant asserts only that it has been using its mark LIVEWIRE in connection with ready-to-drink cocktails since February 2020.⁶¹ Applicant does not provide any other context about the actual market conditions for its goods such as the geographic scope of its where its products are available, the extent of its sales, or any information about its marketing activities. However, the evidence Applicant submitted regarding Registrant on the issue of fame provides some context for Registrant’s use including nationwide sales. Given the reach of Registrant’s goods, and the overlapping trade channels and consumers, there has been some overlap in the markets for Applicant’s and Registrant’s goods. But, the at most four years of contemporaneous use, without any context or evidence regarding Applicant’s use is insufficient for us to conclude that there has been any meaningful concurrent use. *See KME Ger. GmbH v. Zhejiang Hailiang Co.*, Opp. No. 91267675, 2023 TTAB LEXIS 379, at *54 (TTAB 2023) (record “does not support a finding that there has been a reasonable period of time and opportunity for confusion to have occurred”

⁶¹ 8 TTABVUE 18-19.

where “parties have only used their respective marks contemporaneously in the United States with their respective goods ... for, at most, three years (most of which occurred during the worldwide COVID pandemic)”.⁶²

Applicant asserts that there have not been any reports of actual confusion and that the parties’ “marks have coexisted in harmony without an iota of confusion.”⁶³ However, such “uncorroborated statements of no known instances of actual confusion are of little evidentiary value.” *In re Majestic Distilling Co.*, 315 F.3d 1311, 1317 (Fed. Cir. 2003); *In re Opus One, Inc.*, Ser. No. 75722593, 2001 TTAB LEXIS 707, at *19 (TTAB 2001) (“fact that an applicant in an ex parte case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis”). Additionally, in the ex parte context, “there has been no opportunity to hear from Registrant about whether it is aware of any reported instances of confusion.”⁶⁴ *In re Guild Mortg.*, 2020 TTAB LEXIS 17, at *23. Finally, “[t]he lack of evidence of actual confusion carries little weight, especially in an ex parte context.” *Majestic Distilling*, 315 F.3d at 1317 (citation omitted).

⁶² As the one press article Applicant placed into the record observes, “Launched on the auspicious date of March 3, 2020, Live Wire has had to overcome its share of first-year hurdles, including a pandemic lockdown and a flurry of unexpected materials shortages such as CO2, cardboard and aluminum.” (March 8, 2024 Request for Reconsideration at 24.) Accordingly, Applicant’s exposure may have been extremely limited, and without evidence in the record regarding the scope of Applicant’s use, it is not possible to determine if there has been any meaningful concurrent use.

⁶³ 8 TTABVUE 18-19.

⁶⁴ Applicant submits that it is “dispositive, that the Examining Attorney has failed to provide any evidence of actual confusion in the marketplace.” (8 TTABVUE 19.) However, Applicant provides no explanation for how the Examining Attorney could find evidence of actual confusion which, if it existed, is most likely to have been reported to the parties themselves.

Accordingly, we find that the seventh and eighth *DuPont* factors are neutral.

G. Other Factors

Applicant briefly touches on several other factors which we summarily address below, but all are neutral and/or irrelevant.

1. Variety of Goods on Which a Mark is Used

Applicant asserts that it uses the mark LIVEWIRE on a variety of alcoholic goods, but the evidence it references on its website only features canned cocktails in several flavors.⁶⁵ *Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 TTAB LEXIS 228, at *75 (TTAB 2022) (party's uses of its mark in the record "are insufficient to persuade us that [it] has used its marks on an extended variety of goods"). Additionally, "given the relatedness of the parties' identified goods, we find it unnecessary to rely on this factor." *Iron Balls Int'l Ltd. v. Bull Creek Brewing, LLC*, Can. No. 92079099, 2024 TTAB LEXIS 205, at *67 (TTAB 2024) (citation omitted); *KME Ger. GmbH*, 2023 TTAB LEXIS 379, at *55 (where parties' goods were identical or closely related "there is no need to rely on this factor which, in essence, is used to show relatedness of the goods"). We therefore find this *DuPont* factor to be neutral with respect to a finding of likelihood of confusion.

⁶⁵ 8 TTABVUE 21; March 8, 2024 Request for Reconsideration at 30-33. Applicant also states that its products have been featured in various press and media channels, but it has only made one of those articles of record, and has not otherwise explained how this is relevant to the variety of goods factor. *See* March 8, 2024 Request for Reconsideration at 34 (screenshot from Applicant's website lists sources where its products have been "seen in," but only the Forbes article is in the record (*id.* at 22-25)).

2. Market Interface

Applicant states that there “has been no market interface between the Applicant and the Registrant,” but then notes that “the parties have briefly discussed a co-existence agreement.”⁶⁶ However, the evidence shows only that Applicant responded to a cease and desist letter from Registrant with an email in which Applicant provided “steps we have taken to address your concerns.”⁶⁷ Applicant stated in the email that it was “open to any other reasonable steps you may suggest that would support our mutual goals,” but the record does not reflect any additional correspondence between the parties.⁶⁸ We therefore find this factor neutral.

3. Applicant’s Right to Exclude Others

Applicant argues that it has a right to exclude others from using LIVEWIRE based on its common law use since 2020 and that it is the first to use the mark nationally for alcoholic beverages.⁶⁹ However, mere assertion of common law use for four years is insufficient, especially in the absence of any advertising or sales information, and Applicant does not cite any evidence in support of its first to use claim. See *In re Davey Prods. Pty*, Ser. No. 77029776, 2009 TTAB LEXIS 524, at *25 (TTAB 2009) (“[A]pplicant’s mere assertion of common-law use of its mark for ten years in itself [does not] suffice to establish that applicant has any significant right to exclude others from use of the mark.”); *DeVivo v. Ortiz*, Opp. No. 91242863, 2020 TTAB

⁶⁶ 8 TTABVUE 21

⁶⁷ March 17, 2023 Response to Office Action at 182-183, 192-93.

⁶⁸ March 17, 2023 Response to Office Action at 192.

⁶⁹ 8 TTABVUE 21.

LEXIS 15, at *46 (TTAB 2020) (factor is neutral where party “has not provided any significant information about the advertising and sales of [its] goods ... offered under [its] mark”). There also is no evidence of any successful enforcement activity by Applicant. *See Monster Energy Co. v. Chun Hua Lo*, Opp. No. 91225050, 2023 TTAB LEXIS 14, at *67 (TTAB 2023) (“the factor may consider any successful trademark enforcement activity in which the applicant has engaged ...”). Applicant’s remaining argument regarding the notoriety of its mark is also unpersuasive.⁷⁰ We find this factor neutral in this case.

4. Priority of Use

Under the final *DuPont* factor, “[a]ny other established fact probative of the effect of use”, *DuPont*, 476 F.2d at 1361, Applicant argues that it has priority of use for the mark LIVEWIRE in connection with alcoholic beverages since Registrant until recently solely used its mark in connection with non-alcoholic beverages.⁷¹ However, we have already found that Registrant’s soft drinks are related to Applicant’s alcoholic beverages. So, Applicant’s alleged priority with respect to alcoholic beverages is of no import. Moreover, the issue of priority is not relevant in an ex parte appeal where the refusal of registration is based on the existence of the cited

⁷⁰ Applicant asserts that its products “have attained a substantial amount of press and awards.” (8 TTABVUE 22.) However, Applicant does not include any citations to evidence supporting this statement and hence it is merely attorney argument. *See Cai*, 901 F.3d at 1371 (citation omitted) (“Attorney argument is no substitute for evidence.”). From our review, the record only contains evidence of awards from two beverage competitions, and as noted previously a reference to publications Applicant’s products have been “seen in”, but it only submitted one of the articles. (March 8, 2024 Request for Reconsideration at 22-25, 31-32, 34-35.) We did not see any evidence of Applicant’s goods being included on “best-of lists,” or being featured on the menus at any resorts. (*See* 8 TTABVUE 22.)

⁷¹ 8 TTABVUE 22-23.

registration (“a mark registered in the Patent and Trademark Office”) and not on priority of use. 15 U.S.C. § 1052(d). See *In re Calgon Corp.*, 435 F.2d 596, 598 (CCPA 1971) (citation and quotation omitted) (“the question of priority of use is not germane to applicant’s right to register in this ex parte proceeding”); *In re Wilson*, Ser. No. 75285881, 2001 TTAB LEXIS 53, at *14 n. 9 (TTAB 2001) (“Priority is not an issue in this case, nor in any other ex parte Section 2(d) refusal.”).

II. Conclusion

After reviewing the evidence of record, and the arguments relating thereto, we find that confusion is likely. Applicant’s and Registrant’s marks are similar, the goods are related, and the trade channels and purchasers are overlapping, all of which weighs strongly in favor of a likelihood of confusion. Registrant’s mark is entitled to a normal scope of protection, and purchaser care, concurrent use and actual confusion are all neutral. The remaining factors that Applicant briefly addresses do not alter the finding that confusion is likely because they are neutral or irrelevant.

Decision: The refusal to register under Section 2(d) is affirmed.