

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: March 1, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Spirits of the USA LLC*

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Serial No. 90460529

Spirits of the USA LLC, pro se.

Gayne G. Zimmerman, Trademark Examining Attorney, Law Office 120,  
David Miller, Managing Attorney.

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Before Shaw, Lynch, and Coggins,  
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Spirits of the USA LLC (“Applicant”) seeks registration on the Principal Register of the mark SWEET GEORGIA BROWN (in standard characters) for “liquor” in International Class 33.<sup>1</sup>

The Trademark 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, as applied to liquor, so resembles the typed mark SWEET GEORGIA BROWNS for “candy” in

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<sup>1</sup> Application Serial No. 90460529 was filed on January 12, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

International Class 30,<sup>2</sup> on the Principal Register as to be likely to cause confusion, to cause mistake, or to deceive. When the refusal was made final, Applicant requested reconsideration. After the Examining Attorney denied the request for reconsideration, Applicant appealed to this Board. We affirm the refusal to register.

### I. Preliminary Issues

Applicant's brief, 5 TTABVUE,<sup>3</sup> does not comply with Trademark Rule 2.126(a)(1), 37 C.F.R. § 2.126(a)(1), which requires that all submissions to the Board be double spaced. *See* Trademark Rule 2.124(b)(2), 37 C.F.R. § 2.124(b)(2) (requiring ex parte appeal briefs to comply with Rule 2.126). *See also* TRADEMARK TRAIL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1203.01 (2021). However, the four-page brief would clearly fall within the applicable page limit had it been properly formatted, and we exercise our discretion to accept it. *See In re Univ. of Miami*, 123 USPQ2d 1075, 1077 n.2 (TTAB 2017).

The Examining Attorney objects to images of “[A]pplicant’s liquor products” and “[R]egistrant’s candy label” embedded in Applicant’s appeal brief because they were “not previously submitted” or otherwise “made of record” prior to this appeal. 7 TTABVUE 3. Because the embedded images in the text of Applicant’s brief constitute evidence and they were not previously submitted, the Examining

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<sup>2</sup> Registration No. 2079964, issued July 15, 1997; renewed. A typed mark is the legal equivalent of a standard character mark. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012).

<sup>3</sup> Citations to the briefs in the appeal record refer to the TTABVUE docket system. Citations to the prosecution record refer to the .pdf version of the TSDR system. *See In re Integra Biosciences Corp.*, 2022 USPQ2d 93, \*7 (TTAB 2022).

Attorney's objection is sustained, and the images will not be considered.<sup>4</sup> Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d) ("The 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."); *see also*, TBMP § 1207.01.

The Examining Attorney also objects to the inclusion of and citation to the web address [www.purdys.com](http://www.purdys.com) in Applicant's brief as a means of relying on the underlying content allegedly found at the website. 7 TTABVUE 4 (objection), 5 TTABVUE 3 (website). We sustain the objection. It is well settled that "[p]roviding only the link without the material attached is not sufficient to introduce it into the record." TBMP § 1208.03. *See also*, *In re ADCO Indus. – Tech., L.P.*, 2020 USPQ2d 53786, at \*2 (TTAB 2020) (web addresses or hyperlinks are insufficient to make the underlying webpages of record); *In re HSB Solomon Assocs. 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 . . .").

## II. Likelihood of Confusion

Section 2(d) of the Trademark Act provides that a proposed mark, for which application has been made, may be refused registration if it "[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the

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<sup>4</sup> Consideration of these images would not change our decision in any event. We have considered the other images of Applicant's label and Registrant's boxed goods which were made of record with the June 29, 2021 Request for Reconsideration, at TSDR 4-5.

applicant, to cause confusion, or to cause mistake, or to deceive . . . .” 15 U.S.C. § 1052(d).

Our determination under Section 2(d) involves an analysis of all probative facts in evidence that are relevant to the factors bearing on the 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, referred to as “*DuPont* factors”) *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

Varying weights may be assigned to the various *DuPont* factors depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1260 (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 determination.”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks (the first *DuPont* factor) and the similarity of the goods (the second *DuPont* factor). *See In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004). Applicant addresses these two key factors as well as the third and fourth *DuPont* factors.<sup>5</sup>

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<sup>5</sup> Applicant bolds and underlines the ninth, eleventh, and twelfth *DuPont* factors where it lists all thirteen factors in its appeal brief. 5 TTABVue 4-5. Because there is no argument

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source and to protect registrants from damage caused by registration of confusingly similar marks. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

A. Similarity or Dissimilarity of the Marks

We begin with the first *DuPont* factor which considers the “similarities or dissimilarities of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *In re Detroit Athletic Co.*, 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.” *Inn at St. John’s*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

Applicant’s mark is SWEET GEORGIA BROWN, and Registrant’s mark is SWEET GEORGIA BROWNS. The Examining Attorney argues that Applicant’s mark “is merely the singular form of the cited mark” and that in such a situation “the singular . . . form of a registered mark is essentially identical in sound, appearance,

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or record evidence directed to these factors, they are neutral in our analysis. *See In re Embiid*, 2021 USPQ2d 577, \*10 n.26 (TTAB 2021).

meaning, and commercial impression.” 7 TTABVUE 6. Applicant appears to concede in its brief that the marks are “[b]asically . . . the same,”<sup>6</sup> and we agree.

For consumers who perceive Applicant’s mark as a singular form of SWEET GEORGIA BROWNS, the distinction is not sufficient to prevent likely confusion. *See In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1637 (Fed. Cir. 2016); *Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957); *In re Pix of Am., Inc.*, 225 USPQ 691, 692 (TTAB 1985); *In re Sarjanian*, 136 USPQ 307, 308 (TTAB 1962). Similarly, for consumers who might perceive the registered mark as a possessive form of Applicant’s SWEET GEORGIA BROWN mark, that too does not suffice to distinguish the marks. *See In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009); *In re Curtice-Burns, Inc.*, 231 USPQ 990, 992 (TTAB 1986); *Winn’s Stores, Inc. v. Hi-Lo, Inc.*, 203 USPQ 140, 143 (TTAB 1979).

The singular/plural distinction is insignificant in the comparison in this case, as SWEET GEORGIA BROWN and SWEET GEORGIA BROWNS look and sound almost the same, and have the same connotation and commercial impression. *See Wilson v. Delaunay*, 114 USPQ at 341 (“[T]here is no material difference, in a trademark sense, between the singular and plural forms of the word ‘Zombie’ and they will therefore be regarded here as the same mark.”); *Swiss Grill Ltd. v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2011 n.17 (TTAB 2015) (singular and plural of SWISS

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<sup>6</sup> While apparently conceding the first *DuPont* factor, Applicant focuses instead on the second and third factors, which we analyze below. *See* 5 TTABVUE 2 (“Basically, the Marks might be the same, but we are in totally different industries with totally different market avenues therefore we ask that you dismiss the argument of Confusion in the marketplace and allow the mark as submitted.”).

GRILL deemed “virtually identical”); *Weider Publ’ns, LLC v. D & D Beauty Care Co.*, 109 USPQ2d 1347, 1355 (TTAB 2014) (SHAPE and SHAPES deemed essentially the same mark). This finding is bolstered by the principle that “marks must be considered in light of the fallibility of memory and not on the basis of side-by-side comparison.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014). “[T]he average customer, who retains a general rather than specific impression of the marks,” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018), might not notice the minimal difference of a single “S” at the end of the third word, and likely would recollect SWEET GEORGIA BROWN and SWEET GEORGIA BROWNS as the same mark.

Addressing Applicant’s apparent argument that current, actual use of the respective marks on Applicant’s labels and Registrant’s boxes obviates confusion, the Examining Attorney notes that both marks are in standard characters and may be displayed in any font, style, or typeface. *See* 7 TTABVUE 6-7. Given that both marks are in standard characters, we must consider that they can be displayed in the same font style, size, and color. *See* Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a). “[W]e do not consider how Applicant and Registrant actually use their marks in the marketplace, but rather how they appear in the registration and the application.” *In re Aquitaine Wine USA*, 126 USPQ2d at 1186.

Given their overall resemblance in appearance, sound, connotation, and commercial impression, we find Applicant’s mark and the cited mark are highly

similar – indeed, almost identical. Thus, the first *DuPont* factor weighs heavily in favor of a likelihood of confusion.

B. Similarity or Dissimilarity of the Goods and Channels of Trade

The second *DuPont* factor “considers ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,’” while the third *DuPont* factor considers “the similarity or dissimilarity of established, likely-to-continue trade channels.” *Detroit Athletic Co.*, 128 USPQ2d at 1051 (quoting *DuPont*, 177 USPQ at 567). We must make our determinations under these factors based on the goods as they are identified in the application and cited registration. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”)); *see also In re Info. Builders Inc.*, 2020 USPQ2d 10444, \*2 (TTAB 2020).

It is sufficient that the respective goods are related in some manner, or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Coach Servs. v. Triumph Learning*, 101 USPQ2d



at 1722; *Hilson Research, Inc. v. Soc’y for Human Res. Mgmt.*, 27 USPQ2d 1423, 1432 (TTAB 1993). The issue is not whether consumers would confuse Applicant’s goods with Registrant’s goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984).

As indicated above, Applicant’s goods are “liquor,” and Registrant’s goods are “candy.” Applicant argues that the nature of the goods is different and the channels of trade differ, contending that its liquor is produced and bottled in a distillery licensed by the state of Georgia while Registrant’s goods are produced in Canada without any ingredients from Georgia, and that its liquor “can only be sold in licensed package stores and restaurants” while Registrant’s candy “is only available online from Canada” via Registrant’s web site. 5 TTABVUE 2, 3. Succinctly, Applicant argues that the respective goods “are in totally different industries with totally different market avenues.” 5 TTABVUE 2.

Although Applicant attempts to limit the content, origin, and channel of trade of Registrant’s goods, there are no such limitations in Registrant’s identification, and we give that identification its full sweep. *See, e.g., Stone Lion*, 110 USPQ2d at 1162 (Board must “give full sweep” to an identification of goods regardless of registrant’s actual business); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638-39 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods. . . . [And, b]ecause there are no limitations as to channels of trade or classes of purchasers in the registration, it is presumed that the registrant’s

[goods] move in all channels of trade normal for those products, and that they are available to all classes of purchasers for the listed goods.”).

In support of the refusal the Examining Attorney introduced internet webpage printouts demonstrating that “liquor and candy are regularly produced by the same companies, under the same marks, and offered for sale in the same channels of trade,” and that “the goods are often used in combination such as with candy flavored liquor, liquor-filled candies, or candied liqueurs.” 7 TTABVUE 7. A sampler of the evidence demonstrates:<sup>7</sup> Jack Daniel’s offers whiskey and chocolate candy; Jim Beam offers bourbon and fudge candy; Godiva offers chocolate liqueur and chocolate candy; Johnnie Walker offers whiskey and dark chocolate candy; Baileys offers Irish cream liqueur, chocolate candy, and fudge caramels; Evan Williams offers bourbon and pecan brittle; Captain Morgan offers rum and chocolate bars; and Rémy Martin offers cognac and chocolate bars. The evidence further demonstrates that candy may contain liquor and indeed be a feature of the candy product. For example, Anthon Berg makes bottle-shaped dark chocolates that “are filled with authentic single malt scotch syrup and wrapped in metallic foils” to resemble actual liquor bottles, Turin makes tequila-filled chocolates, and Panda makes chocolate candies with vodka filling.<sup>8</sup> Buffalo Trace makes chocolate-coated bourbon balls featuring its own

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<sup>7</sup> May 20, 2021 Office Action TSDR 5-7 (Jack Daniel’s), 7-9 (Jim Beam), 10-12 (Godiva); June 29, 2021 Office Action TSDR 5-6 (Johnnie Walker), 10 & 25-26 (Baileys), 16-18 (Evan Williams), 28-30 (Captain Morgan), 29-30 (Rémy Martin).

<sup>8</sup> June 29, 2021 Office Action TSDR 32 (“Anthon Berg Dark Chocolate Scotch Bottles”), 23 (“Turin Jose Cuervo Tequila Liquor Filled Chocolates: 20-Piece Tube”), and 35 (“Panda Vodka Chocolate Candies With Vodka Filling 290g”).

bourbon blended with nougat, and advertises the candies as “[t]he perfect way to finish any tasting of Buffalo Trace products.”<sup>9</sup>

Similarly, the Examining Attorney introduced internet webpage printouts demonstrating that there are many “candy-flavored liquor products and liquor-flavored candy products that consumers regularly encounter in the market place, including through the same retailers such as Total Wine and More, Go Puff.com, and through the retail stores of various liquor brands like Ole Smoky, Godiva, Bailey’s [sic], and Buffalo Trace.” 7 TTABVUE 9. A taste of the evidence reveals:<sup>10</sup> Laphroaig single malt whisky fudge, Cointreau liquor-filled chocolate bar, Smirnoff caramel-flavor vodka, Kahlua salted caramel liqueur, Van Meer’s white chocolate liqueur, and margarita-flavored lollipops; as well as Total Wine & More, Buffalo Trace Distillery, and Gopuff, all selling liquor and candy.

We find the internet excerpts are sufficient to establish that Applicant’s “liquor” and Registrant’s “candy” are related in that they are of a type that commonly originate from the same source under the same mark, are used by the same consumers, and serve complementary purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009) (third-party internet evidence supports a finding that goods can be manufactured and sold by a single source). This is particularly true for marks as similar as SWEET GEORGIA BROWN and SWEET GEORGIA

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<sup>9</sup> *Id.* at 14 (“Buffalo Trace Bourbon Balls 1/2 pound box (Curbside Pick-up)”).

<sup>10</sup> May 20, 2021 Office Action TSDR 10 (Laphroaig); June 29, 2021 Office Action TSDR 7 (Cointreau), 11 (Smirnoff), 13 (Kahlua & Van Meer’s), 33 (margarita lollipop), as well as 5-13 & 22 (totalwine.com), 14-16 (buffalotracedistillery.com), 31-33 (gopuff.com).

BROWNS. *See, e.g., In re Thor Tech*, 90 USPQ2d at 1636 (“[T]he greater the degree of similarity between the applicant’s mark and the registered mark, the lesser the degree of similarity between the applicant’s goods and registrant’s goods that is required to support a finding of likelihood of confusion.”). The internet evidence demonstrating that the goods are related also supports a finding that the goods move in at least some of the same channels of trade and are sold to the same classes of consumers.

The second and third *DuPont* factors also weigh in favor of a likelihood of confusion.

C. Conditions under which and Buyers to whom Sales are Made

Concerning the fourth factor, which involves “[t]he conditions under which and buyers to whom sales are made, i.e., impulse vs. careful, sophisticated purchasing,” *DuPont*, 177 USPQ at 567, Applicant contends that its goods “can only be sold to persons above the age of 21” who “must show proof of age when purchasing the product.” 5 TTABVUE 4. Applicant submitted no supporting evidence, but its argument is grounded in part in the fact that alcoholic beverages are intended for sale only to adults, while candy products are not. There is no evidence, however, that consumers of Registrant’s goods and Applicant’s goods are otherwise limited beyond the general adult population that consumes alcohol. The record does not support any elevated degree of care in purchasing liquor or candy. Accordingly, we find the fourth *DuPont* factor neutral.

D. Summary

We have found that the marks are highly similar in appearance, sound, connotation, and commercial impression; and the goods are related because they commonly emanate from the same source under the same mark, are sold in overlapping channels of trade, and are used by the same consumers who are simply members of the general adult population who consume liquor. The first, second, and third *DuPont* factors favor a finding of likelihood of confusion; and the fourth *DuPont* factor is neutral. On balance, confusion is likely.

III. Decision

The refusal to register Applicant's mark SWEET GEORGIA BROWN is affirmed.