

This Opinion is Not a
Precedent of the TTAB

Mailed: December 19, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Cobblestone Brands Ltd

Serial No. 97453097

Keith A. Weltsch of Scully, Scott, Murphy & Presser, P.C.,
for Cobblestone Brands Ltd.

Mark Hill, Trademark Examining Attorney, Law Office 129,
Pamela Y. Willis, Managing Attorney.

Before Lykos, Coggins, and Stanley,
Administrative Trademark Judges.

Opinion by Stanley, Administrative Trademark Judge:

Cobblestone Brands Ltd (“Applicant”) seeks to register on the Principal Register



the composite mark  (“AMERICAN GIN” disclaimed) for “gin” in

International Class 33.¹

¹ Application Serial No. 97453097 was filed on June 10, 2022, under Sections 1(b) and 44(d) of the Trademark Act, 15 U.S.C. §§ 1051(b) and 1126(d), based on Applicant’s allegation of a bona fide intention to use the mark in commerce and claiming a priority date of June 8, 2022, based on the filing date of Applicant’s European Union application. During prosecution,

Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the following registrations, both owned by Four Corners Brewing Company LLC ("Registrant"), that it is likely to cause confusion or mistake or to deceive:



- Registration No. 4343406 for the composite mark ("BREWING CO" and "DALLAS TX" disclaimed) for "beer; beer wort; beer, ale and lager; beer, ale and porter; beer, ale, lager, stout and porter; beer, ale, lager, stout, porter, shandy; beers; black beer; brewed malt-based alcoholic beverage in the nature of a beer; flavored beers; ginger beer; malt beer; malt liquor; pale beer; porter" in International Class 32;² and
- Registration No. 5550869 for the standard-character mark FOUR CORNERS for "beer" in International Class 32.³

Applicant perfected the Section 44(d) filing basis to Trademark Act Section 44(e), 15 U.S.C. § 1126(e), based on European Union Registration No. 018713859, issued November 3, 2022. See July 11, 2023 Response to Office Action. The application contains the following description of the mark: "The mark consists of two straight intersecting bars underscored by the bolded stylized wording 'FOUR CORNERS' further underscored by the stylized wording 'AMERICAN GIN' underscored by a star."

Citations to the prosecution file are to the USPTO's Trademark Status & Document Retrieval ("TSDR") system in .pdf format. Citations to the appeal record are to TTABVue, the Board's online docketing system. See, e.g., *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

² Issued May 28, 2013, on the Principal Register; renewed. The registration includes the following description of the mark: "The mark consists of a rooster perched on an arrow graphic. The body of the rooster is black, the neck and head of the rooster is yellow-orange, and the comb and wattle are red. Within the black arrow are the words 'FOUR CORNERS' in white. Below the arrow are 'BREWING CO', a five[-]pointed star design, and 'DALLAS TX', all in black. All letters appearing in the mark are capitalized."

³ Issued August 28, 2018, on the Principal Register. A Combined Declaration of Use and Incontestability under Sections 8 and 15 of the Trademark Act was filed on August 9, 2024, but the Combined Declaration has not yet been accepted or acknowledged.

Following issuance of the final refusal, Applicant timely filed a notice of appeal. Applicant and the Examining Attorney filed briefs. For the reasons explained below, we reverse the refusal to register.

I. Judicial Notice

The Examining Attorney has submitted with his brief dictionary definitions from the online version of THE MERRIAM-WEBSTER DICTIONARY for the word “malt liquor” and the online version of THE AMERICAN HERITAGE DICTIONARY for the words “beer,” “tequila,” and “gin,” and he requests that we take judicial notice of them.⁴ Because dictionary definitions are subject matter of which the Board may take judicial notice, we grant this request. *See In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013) (taking judicial notice of dictionary definitions attached to the examining attorney’s brief).

II. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits the registration of a mark that:

[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 applicant, to cause confusion, or to cause mistake, or to deceive.

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”), *cited*

⁴ Examining Attorney’s Br., 6 TTABVUE 11, 14-17.

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. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). When analyzing these factors, the overriding concerns are not only to prevent buyer confusion as to the source of the goods, but also to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *Shell Oil*, 26 USPQ2d at 1688 (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”). “Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). 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, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); see also *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative

effect of differences in the essential characteristics of the goods and differences in the marks.”). These factors, and others, are discussed below.

A. The Marks


We commence by considering the first *DuPont* factor, which involves an analysis of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (citing *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d per curiam*, 777 F. App’x 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

“Similarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)). The proper test regarding similarity “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.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d


1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks and 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., Inc.*, 117 USPQ2d 1958, 1960 (TTAB 2016) (citing *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd per curiam*, 972 F.2d 1353 (Fed. Cir. 1992)); *see also In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009). Here, the average purchasers are adult members of the general public seeking beer or gin.

Our analysis cannot be predicated on dissecting the marks into their various components; that is, our finding must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). “No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone.” *In re Electrolyte Labs. Inc.*, 929 F.2d 645, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990) (citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 184 USPQ 35 (CCPA 1974)). Nonetheless, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014).



With these principles in mind, we compare Applicant's mark  with



the cited mark .⁵ Applicant argues that its mark and the cited composite word-and-design mark are dissimilar because “there are a host of distinctions between the two marks,” including that: (1) the design elements of the marks are “the largest and most prominent elements of the two marks[;]” and (2) the Examining Attorney “dismiss[ed]” the disclaimed terms (“AMERICAN GIN” in Applicant’s mark and “BREWING CO” and “DALLAS TX” in the cited registration), giving them little or no consideration.⁶

⁵ As noted *supra* at n.3, the Combined Declaration of Use and Incontestability under Sections 8 and 15 of the Trademark Act that has been filed in connection with Registration No. 5550869 for the standard-character mark FOUR CORNERS has not been accepted or acknowledged. As such, we focus our analysis on the composite word-and-design mark subject to Registration No. 4343406. If we find that the similarity of marks between Applicant’s mark and the mark subject to Registration No. 4343406 favors a likelihood of confusion, then we would likewise find that the similarity of marks between Applicant’s mark and the standard-character FOUR CORNERS mark subject to Registration No. 5550869 favors a likelihood of confusion. *Cf. In re Max Cap. Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010) (“Because the design element in the cited MAX and design mark arguably contains an additional point of difference with applicant’s mark, we confine our analysis to the issue of likelihood of confusion between applicant’s mark and the cited registration for MAX in typed drawing form.”).

⁶ Applicant’s Br., 4 TTABVUE 14-15.

We do not find Applicant's arguments persuasive. We initially find that the phrase FOUR CORNERS is the dominant portion of both Applicant's mark and the cited mark. Where both words and a design comprise a mark, the words are normally accorded greater weight because they are more likely to make an impression upon purchasers, would be remembered by them, and would be used by them to call for or discuss the goods. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) (citing *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) ("in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed")); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018).

Furthermore, the additional wording "AMERICAN GIN" in Applicant's mark and "BREWING CO" and "DALLAS TX" in the cited mark are generic or geographically descriptive and have been disclaimed. As such, these terms are entitled to less weight in our determination. *See Chatam Int'l*, 71 USPQ2d at 1946 (descriptive terms are properly given less weight). Also, the disclaimed wording in both Applicant's mark and the cited mark are visually less noticeable, with the disclaimed wording in both marks appearing in a smaller font relative to the phrase FOUR CORNERS.

Regarding the design elements, the differences are noticeable, with Applicant's mark including the image of intersecting bars and the cited mark including the image of a rooster. However, as just stated, it will be the words rather than colors or designs in the marks that will be used to call for and discuss Applicant's and Registrant's goods. Additionally, because the dominant literal elements of the marks are identical,

and their designs do not alter the meaning of the dominant words, the marks' connotations and commercial impressions are similar.

Although we recognize that there are differences between the marks when viewed on a side-by-side basis, when compared in their entirety we find them more similar than dissimilar in appearance, sound, meaning, and commercial impression due to presence of the identical dominant phrase FOUR CORNERS in both marks.

Accordingly, the first *DuPont* factor weighs in favor of finding a likelihood of confusion.

B. The Goods

We turn now to a comparison of the goods as they are identified in the involved application and cited Registration No. 4343406, the second *DuPont* factor. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018); *Stone Lion Cap. Partners*, 110 USPQ2d at 1161; *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *see also B&B Hardware*, 113 USPQ2d at 2049 (recognizing that an “applicant’s right to register must be made on the basis of the goods described in the application”). The goods need not be identical or even competitive to find a likelihood of confusion. *Online Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods] emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting

7-Eleven Inc. v. Wechsler, 83 USPQ2d 1715, 1724 (TTAB 2007)). In addition, the Examining Attorney need not prove, and we need not find, similarity as to each good listed in the application. “It is sufficient for finding a 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.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)).

Evidence of relatedness might include news articles and/or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both an applicant’s goods (or similar goods) and the goods listed in the cited registration (or similar goods). *See, e.g., Davia*, 110 USPQ2d at 1817 (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores).

Here, the Examining Attorney relies on a smattering of third-party Internet evidence to support the proposition that the same entity commonly produces the relevant goods and markets the goods under the same mark thereby making the goods related.⁷ More specifically, the Examining Attorney relies on the following:

⁷ January 23, 2024 Final Office Action, TSDR 8-13. *See also* April 12, 2023 Non-Final Office Action, TSDR 12-17.

- Screenshots from www.ellisonbrewing.com showing that beer and gin are sold under the same ELLISON mark;⁸
- Screenshots from www.drinkbrickway.com showing that beer and gin are sold under the same BRICKWAY mark;⁹ and
- Screenshots from www.bentbrewstillery.com showing that beer and gin are



sold under the same house mark, along with sub-brand names for the respective beer and gin products.¹⁰

Applicant argues that the Examining Attorney's Internet evidence is unpersuasive because, inter alia: (1) "there is no per se rule that different alcoholic beverages are related[;]"¹¹ (2) the case law cited by the Examining Attorney does not support that "beer" and "gin" are related;¹² and (3) the Examining Attorney's "mere three examples" of beer and gin emanating from the same source "do[] not establish that consumers are used to seeing brewers and distilleries **commonly** offer beer and gin under the[] same brand name."¹³

The Examining Attorney bears the burden of supporting the likelihood of confusion refusal with sufficient evidence, and this is particularly so when it comes to establishing a relationship between goods. *See, e.g., In re Shipp*, 4 USPQ2d 1174, 1176 (TTAB 1987) ("If it is customary or expected that [the goods and services at issue

⁸ April 12, 2023 Non-Final Office Action, TSDR 12-13.

⁹ *Id.* at 14-15.

¹⁰ *Id.* at 17; January 23, 2024 Final Office Action, TSDR 11.

¹¹ Applicant's Br., 4 TTABVUE 5.

¹² *Id.* at 5-8.

¹³ *Id.* at 10-11 (emphasis in original).

are related under normal trade practices] ..., it would be the Examining Attorney's burden to show these trade practices and in the absence of evidence on this matter, we conclude that the goods and services are not so related that confusion would be likely."); *In re Planprint Co.*, 229 USPQ 621, 624 (TTAB 1986) (When "the Office's burden to demonstrate that confusion is likely has not been met ..., the mark is approved for publication ..."). Here, the Examining Attorney has not satisfied this burden.

The submission of only three examples of beer and gin emanating from the same source is unconvincing for purposes of showing that beer and gin are sufficiently related such that consumers expect them to emanate from the same source. While there is no threshold number, three examples are a relatively small amount given the number of breweries and distilleries in the United States and the Internet resources for research easily available on the subject to examining attorneys.¹⁴ Although not required for a finding of relatedness, we note that the Examining Attorney did not submit any third-party registrations that cover goods from both Applicant's application and the cited registration,¹⁵ nor did he submit news articles (e.g., from the Nexis® database or the Internet) that demonstrate breweries also distill gin. To

¹⁴ July 11, 2023 Response to Office Action, TSDR 18 (February 2022 Treasury Department Report, titled "Competition in the Markets for Beer, Wine, and Spirits," states that there are over 6,400 operating breweries in the United States and more than 1,900 distilleries).

¹⁵ As a general proposition, third-party registrations that cover goods from both the cited registration and an applicant's application are relevant to show that the goods are of a type that may emanate from a single source under one mark. *See, e.g., Detroit Athletic*, 128 USPQ2d at 1051; *Hewlett-Packard*, 62 USPQ2d at 1004; *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001).

be clear, on the record before us, there is simply insufficient evidence of third parties using the same mark in connection with beer and gin, or evidence that a maker of gin also actually produces beer, or that the goods are complementary.

The Examining Attorney also relies on several prior decisions where the U.S. Court of Appeals for the Federal Circuit or the Board has found various alcoholic beverages related.¹⁶ *See, e.g., Chatam Int'l*, 71 USPQ2d 1944 (holding GASPAR'S ALE for beer and ale likely to be confused with JOSE GASPAR GOLD for tequila); *Majestic Distilling*, 65 USPQ2d 1201 (holding RED BULL for tequila likely to be confused with RED BULL for malt liquor); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261 (TTAB 2011) (holding HB for wine likely to be confused with HB and design for beer); *Somerset Distilling, Inc. v. Speymalt Whiskey Distribs. Ltd.*, 14 USPQ2d 1539 (TTAB 1989) (holding JAS. GORDON and design for scotch whiskey likely to be confused with GORDON'S for distilled gin and vodka); *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069 (TTAB 1989) (holding BRAS D'OR for brandy likely to be confused with BRADOR for beer); *Bureau Nat'l Interprofessionnel Du Cognac v. Int'l Better Drinks Corp.*, 6 USPQ2d 1610 (TTAB 1988) (holding COLAGNAC for cola flavored liqueur likely to be confused with certification mark COGNAC for brandy). The Examining Attorney's reliance on previous decisions, however, does not make up for the paucity of evidence.

"There is no per se rule that holds that all alcoholic beverages are related." *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009). Even though beer

¹⁶ Examining Attorney's Br., 6 TTABVUE 9-11.

and other alcoholic beverages have been found related in other cases, we must decide the outcome of this proceeding based on its own facts and evidence. In *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816 (TTAB 2015), the Board acknowledged that “beer and wine (among other alcoholic beverages) certainly can be, and frequently are, found to be related,” but stated in the same sentence that “each case must be decided on its own record.” *Id.* at 1827. Put simply, the Examining Attorney cannot evade the burden to prove relatedness by bootstrapping upon previous factual findings made in other decisions on different records. *See, e.g., White Rock Distilleries*, 92 USPQ2d at 1285 (the Board found that the Office had failed to establish that wine and vodka infused with caffeine are related goods because there was no evidence that vodka and wine emanate from a single source under a single mark or that such goods are complementary products that would be bought and used together).

This is not to say that we can entirely ignore previous holdings involving the relatedness of various types of alcoholic beverages. However, we note that the Examining Attorney’s evidence pales in comparison to the records in many of the decisions where beer was found to be related to other alcoholic beverages. *See, e.g., Kysela Pere et Fils*, 98 USPQ2d at 1265-66 (relying on some 20 third-party registrations listing wine and beer and webpages showing that companies make and sell both types of goods, finding: “The third-party registration evidence and the website evidence together amply demonstrate the relatedness of beer and wine, and

show that consumers, if they encountered both goods sold under confusingly similar marks, are likely to believe that they emanate from the same source.”).

In sum, based on the particular record in this appeal, beer and gin have not been shown to be related or complementary goods in order for us to weigh the second *DuPont* factor in support of a finding that confusion is likely. Perhaps on a more developed record, we would find otherwise. Accordingly, the second *DuPont* factor weighs against a finding of likelihood of confusion.

C. The Established, Likely-to-Continue Trade Channels

We next consider the established, likely-to-continue channels of trade, the third *DuPont* factor. *See Detroit Athletic*, 128 USPQ2d at 1052 (citing *DuPont*, 177 USPQ at 567). As with the second *DuPont* factor, we look to the identification of goods. *See B&B Hardware*, 113 USPQ2d at 2049 (explaining that “if an application does not delimit any specific trade channels of distribution, no limitation will be applied”) (cleaned up). Neither Applicant nor Registrant limit their trade channels in their respective identifications. In the absence of limitations as to channels of trade in the identifications of goods in the involved application and cited registration, the presumption is that Applicant’s and Registrant’s goods move in all trade channels normal for such goods. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991). We therefore look to the record to discern what constitutes normal or typical trade channels for “beer” and “gin.”

The Examining Attorney relies on the same evidence mentioned above (i.e., the three Internet examples and prior decisions involving alcoholic beverages) to support

his argument that the relevant goods are provided through overlapping trade channels.¹⁷

Applicant, on the other hand, points to an alcohol market competition report issued by the U.S. Treasury Department, to support its argument that beer and gin are marketed, distributed, and sold in different trade channels.¹⁸ For example, Applicant contends that “[b]eer is likely to be sold in a grocery store or convenience store, whereas gin is not allowed to be sold in such settings” and “[w]ine and spirits are often distributed by the same companies, while beer distributors are usually limited to beer.”¹⁹

On the very thin record before us, we cannot find that the trade channels overlap. The Treasury Report, which is instructive on trade channels, identifies various rules and regulations that apply to the manufacture, distribution, and sale of beer, wine, and spirits.²⁰ The rules and regulations differ based on the type of alcoholic beverage produced, distributed, and sold, and the rules and regulations may differ depending on the state where the production, distribution, and/sale of alcoholic beverage is

¹⁷ Examining Attorney’s Br., 6 TTABVUE 8-12.

¹⁸ Applicant’s Br., 4 TTABVUE 8-10. On July 9, 2021, President Biden issued Executive Order 14036, “Promoting Competition in the American Economy.” The goal of the Executive Order is to reduce the trend of corporate consolidation, increase competition, and deliver concrete benefits to America’s consumers, workers, and small businesses. The U.S Treasury Department issued a report titled “Competition in the Markets for Beer, Wine, and Spirits” (hereafter referred to as the “Treasury Report”) in response to the executive order. *See* July 11, 2023 Response to Office Action, TSDR 16-79.

¹⁹ *Id.* at 9-10 (citing Treasury Report, attached to July 11, 2023 Response to Office Action, TSDR 39).

²⁰ Treasury Report, attached to July 11, 2023 Response to Office Action, TSDR 26-44.

made.²¹ For example, only certain types of stores may sell beer but not also sell distilled spirits or vice versa. Conversely, the Treasury Report also explains how “patterns of consolidation in production, distribution, or retail beer, wine, and spirits markets” have created “threats to competition and barriers to new entrants.”²² Although the consolidation of production, distribution, and/or sale in the beer, wine, and spirits markets suggests that there may be some overlap in trade channels, we cannot make such a finding on this record. While both Applicant’s and Registrant’s goods are alcoholic beverages, the Examining Attorney’s quantitatively and qualitatively sparse evidence fails to show that the trade channels overlap.

Accordingly, on this thin record, the third *DuPont* factor is neutral.

D. Purchasing Conditions

We turn now to the conditions under which the goods are likely to be purchased, e.g., whether on impulse or after careful consideration, as well as the degree, if any, of sophistication of the consumers, the fourth *DuPont* factor. A heightened degree of care when making a purchasing decision may tend to minimize likelihood of confusion. *See, e.g., In re N.A.D., Inc.*, 754 F.2d 996, 224 USPQ 969, 971 (Fed. Cir. 1985) (because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED). Conversely, impulse

²¹ *Id.*

²² *Id.* at 17. *See also id.* at 18-20, 40-48.

purchases of inexpensive items may tend to have the opposite effect. *Palm Bay*, 73 USPQ2d at 1695.

Applicant argues that its gin is priced at \$43.99 per bottle and sold to discerning purchasers seeking upscale gin, while a six-pack of Registrant's beer sells for less than \$12, and therefore Applicant targets different consumers than Registrant.²³

Beer and gin are general consumer items that are purchased by the (adult) general public. Although Applicant emphasizes the retail price difference between Applicant's and Registrant's specific goods, we must consider the goods as identified in the application and the cited registration to include all price points, including those at the low end of the range. These less expensive items will not necessarily be purchased with any degree of care, or with knowledge by sophisticated or discerning purchasers. The relevant classes of consumers for both Applicant's and Registrant's goods include connoisseurs as well as ordinary adult consumers of legal age who consume inexpensive alcoholic beverages, or purchase different types of alcoholic beverages as gifts or to stock a bar at home. *See Somerset Distilling*, 14 USPQ2d at 1542 ("While we realize that certain purchasers of alcoholic beverages may be aficionados and know not only 'their brands' but which companies make which trademarked products, we also realize that other consumers may not be as knowledgeable, and may purchase Scotch whisky, gin or vodka as gifts, or to stock a bar for their guests."). There is simply no evidence that purchasers of beer or gin products are sophisticated and make purchasing decisions through careful consideration.

²³ Applicant's Br., 4 TTABVue 9.

Because there is insufficient evidence in the record for us to find that the fourth *DuPont* factor weighs against finding a likelihood of confusion, we deem this *DuPont* factor neutral.

III. Conclusion – Balancing the *DuPont* Factors

We have carefully considered all of the evidence made of record, as well as all of the arguments related thereto.

The final step in analyzing likelihood of confusion is to weigh the *DuPont* factors for which there is evidence and argument; “explain the results of that weighing;” and “the weight [we] assigned to the relevant factors.” *In re Charger Ventures LLC*, 65 F.4th 1375, 2023 USPQ2d 451, at *7 (Fed. Cir. 2023). “No mechanical rule determines likelihood of confusion, and each case requires weighing of the facts and circumstances of the particular mark.” *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010). *See also Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 2024 USPQ2d 293, at *2 (Fed. Cir. 2024).

In particular cases, the dissimilarity of the goods may be dispositive. *See, e.g., M2 Software, Inc. v. M2 Commc’ns., Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (“The board placed the greatest weight on its findings that the goods in question were not related and that the channels of trade and purchasers are different. Because of the dominant role these factors play in this case, we find no error in the weight the board accorded them.”); *Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001) (“While it must consider each [*DuPont*] factor for which it has evidence, the Board may focus its analysis on dispositive

factors, such as similarity of the marks and relatedness of the goods.”); *N. Face Apparel Corp. v. Sanyang Indus. Co., Ltd.*, 116 USPQ2d 1217, 1233 (TTAB 2015) (“The difference in the goods and services is dispositive on the issue of likelihood of confusion.”).

Here, the record lacks sufficient evidence to demonstrate that Applicant’s and Registrant’s goods are related, meaning that the critical second *DuPont* factor weighs against finding a likelihood of confusion. On the record before us, the third and fourth *DuPont* factors are neutral. Despite the similarity of marks favoring a likelihood of confusion under the first *DuPont* factor, we conclude that confusion is unlikely because the goods have not been shown to be related. In other words, the second factor outweighs the first factor and is dispositive. Again, we reiterate that on a more developed evidentiary record, our conclusion may have been different.

Decision: The refusal to register Applicant’s mark under Section 2(d) of the Trademark Act is reversed.