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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Star Catcher LLC

Serial Nos. 97759143, 98032414, 98032430, 98032440 & 98032445

Edward F. Maluf and John C. Heinbockel, of Seyfarth Shaw LLP,
for Star Catcher LLC.

Susan Leslie DuBois, Trademark Examining Attorney, Law Office 111,
Chris Doninger, Managing Attorney.

Before Allard, Casagrande, and Stanley, Administrative Trademark Judges.

Opinion by Casagrande, Administrative Trademark Judge:

Star Catcher LLC (“Applicant”) seeks registration on the Principal Register of the following marks, all consisting of or including the term SHYFT:

- SHYFT (in standard characters) for “beer,” in International Class 32 and “Flavored malt-based alcoholic beverages, excluding beers,” in International Class 33;¹

¹ Application Ser. No. 97759143 (the “ ’143 Application” or “standard character Application”) was filed on January 18, 2023, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s statement that it has a bona fide intent to use the mark in commerce.

- **Shyft** for “beer,” in International Class 32;²
- **Shyft** for “Flavored malt-based alcoholic beverages, excluding beers” in International Class 33;³
- **Shyft**
flavor shifting cocktail for “beer,” in International Class 32;⁴ and
- **Shyft**
flavor shifting cocktail for “Flavored malt-based alcoholic beverages, excluding beers” in International Class 33.⁵

All five applications were assigned to the same Trademark Examining Attorney and proceeded essentially in parallel. All were refused under Section 2(d) of the

² Application Ser. No. 98032440 (the “’440 Application”) was filed on June 7, 2023, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s statement that it has a bona fide intent to use the mark in commerce. Applicant describes the mark as “consist[ing] of a stylized version of the word ‘SHYFT.’” Color is not claimed as a part of the mark.

³ Application Serial No. 98032445 (the “’445 Application”) was filed on June 7, 2023, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s statement that it has a bona fide intention to use the mark in commerce. Applicant describes the mark as “consist[ing] of a stylized version of the word ‘SHYFT.’” Color is not claimed as a part of the mark.

⁴ Application Serial No. 98032430 (the “’430 Application”) was filed on June 7, 2023, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s statement that it has a bona fide intention to use the mark in commerce. Applicant describes the mark as “consist[ing] of a stylized version of the word ‘SHYFT’ in large font atop the phrase ‘flavor shifting cocktail’ in smaller font.” Color is not claimed as a part of the mark. During prosecution, Applicant disclaimed exclusive rights in the phrase “flavor shifting cocktail” except as part of the mark as depicted.

⁵ Application Serial No. 98032414 (the “’414 Application”) was filed on June 7, 2023, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s statement that it has a bona fide intention to use the mark in commerce. Applicant describes the mark as “consist[ing] of a stylized version of the word ‘SHYFT’ in large font atop the phrase ‘flavor shifting cocktail’ in smaller font.” Color is not claimed as a part of the mark. During prosecution, Applicant disclaimed exclusive rights in the phrase “flavor shifting cocktail” except as part of the mark as depicted.

Trademark Act, 15 U.S.C. § 1052(d), due to likelihood of confusion with the standard-character mark SHIFT, which is registered on the Principal Register for “wine” in International Class 33.⁶

After the Examining Attorney made the refusals final,⁷ Applicant appealed⁸ and requested reconsideration.⁹ The Board suspended the appeals and remanded to the Examining Attorney to consider the reconsideration requests.¹⁰ After the Examining Attorney denied reconsideration,¹¹ the appeals resumed.¹² Applicant filed briefs,¹³ as did the Examining Attorney.¹⁴ Applicant filed reply briefs.¹⁵ The appeals are now ready for decision. For the reasons explained below, we affirm all five refusals.

Before we jump into substance, we note that the issues raised by the five appeals are very similar. All of the applications were refused on the same, single ground. The evidence in the prosecution records is largely the same, with a few differences between the beer cases and the “Flavored malt-based alcoholic beverages, excluding

⁶ Reg. No. 6124577 issued on Aug. 11, 2020.

⁷ See May 15, 2024, Final Office Action (all five prosecution files).

⁸ See 1 TTABVUE (all five appeal files). References to the briefs and appeal record cite to the Board’s TTABVUE electronic docket system. The number preceding “TTABVUE” represents the docket number assigned to the cited filing in TTABVUE and any number immediately following “TTABVUE” identifies the specifically-cited page(s), if any.

⁹ See Nov. 14, 2024, Reconsideration Request (all five prosecution files).

¹⁰ See 2 TTABVUE (all five appeal files).

¹¹ See 4 TTABVUE (all five appeal files).

¹² See 5 TTABVUE (all five appeal files).

¹³ See 6 TTABVUE (all five appeal files).

¹⁴ See 8 TTABVUE (all five appeal files).

¹⁵ See 9 TTABVUE (all five appeal files).

beers” cases. The briefs are largely the same, except that the briefs involving the non-standard character marks have a few sentences on the effect of the stylization and, in two appeals, about the additional wording appearing in those marks. Accordingly, although the appeals have not been formally consolidated, we address all five appeals in this single opinion. *See, e.g., In re Pohl-Boskamp GmbH*, No. 85007428, 2013 WL 1234849, at *1 (TTAB 2013). As in *In re Consumer Protection Firm*, No. 87445801, 2021 WL 825503 (TTAB 2021), “each proceeding retains its separate character and will result in the entry of a separate judgment for each appealed application; a copy of this decision shall be placed in each proceeding file.” *Id.* at *1-2; *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1214 (2025). Citations to the briefs and the record are to the prosecution and appeal file involving the standard-character ’143 Application, unless otherwise noted.

I. Section 2(d) refusals generally

Section 2(d) of the Trademark Act prohibits registration of a mark that “so resembles a mark registered in the Patent and Trademark Office ... 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.” 15 U.S.C. § 1052(d). We determine whether confusion is likely by analyzing all probative facts in evidence relevant to the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (providing a nonexclusive list of 13 factors potentially relevant to likelihood of confusion). *See, e.g., In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023). We then weigh together findings we have made on relevant likelihood-of-confusion factors to

determine if, on balance, they indicate that confusion is likely. *See, e.g., Charger Ventures*, 64 F.4th at 1381; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1319 (Fed. Cir. 2003).

Although “the various evidentiary factors may play more or less weighty roles in any particular determination,” *In re Shell Oil Co.*, 992 F.2d 1204, 1206 (Fed. Cir. 1993), the comparison of the marks and goods are usually key factors. *See, e.g., Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed. Cir. 2002); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976); *In re Max Cap. Grp. Ltd.*, No. 77186166, 2010 WL 22358, at *1 (TTAB 2010).

II. Analysis of the Section 2(d) refusals

A. Comparison of the marks

The first likelihood-of-confusion factor is “[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *du Pont*, 476 F.2d at 1361. “Similarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014) (citation omitted). “The proper test is ... 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.” *In re i.am.symbolic, LLC*, 866 F.3d 1315, 1323 (Fed. Cir. 2017) (citation omitted); *see also Phillips Petroleum Co. v. Knox Indus. Corp.*, 277 F.2d 945, 947 (CCPA 1960) (“This issue is whether the marks are confusingly similar, not whether they are identical.”) (citation omitted).

“Marks are compared along the axes of their ‘appearance, sound, connotation and commercial impression.’” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1340 (Fed. Cir. 2015) (citation omitted); *accord i.am.symbolic*, 866 F.3d at 1324. But we do not compare them side-by-side, as though in a laboratory. Rather, we keep in mind that consumers must depend on their recall of marks they’ve seen before and that their memories are fallible. *See, e.g., St. Helena Hosp.*, 774 F.3d at 751; *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (CCPA 1981); *see also Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 324 (CCPA 1967) (“a customer, having read an advertisement for ‘LILLI ANN’, might reasonably assume that she had found the advertised goods when she found them with the trademark ‘THE LILLY’”).

And while we compare the marks in their entirety, *Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 1380 (Fed. Cir. 2016), our primary reviewing court has been consistent and clear that there’s nothing wrong with assessing the individual features of a multi-word or multi-element mark to determine which aspects contribute more to the overall commercial impression so long as, in the end, we ultimately assess the marks as wholes. *See, e.g., In re Detroit Athl. Co.*, 903 F.3d 1297, 1305 (Fed. Cir. 2018); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012).

Here, the registered mark is SHIFT in standard characters. While Applicant argues that four of its marks are in a stylized typeface,¹⁶ it is well settled that a stylized typeface isn’t a materially relevant distinction when the registered mark to

¹⁶ *See, e.g.*, 6 TTABVUE 13 (414 appeal file).

which the stylized mark is being compared is in standard characters. That's because standard character word marks are unlimited by typeface, and so cover all possible typefaces in which they could appear. *See, e.g., Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 1349 (Fed. Cir. 2011); *Majestic Distilling*, 315 F.3d at 1315; *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 1041 (Fed. Cir. 1983); *see also Weider Publ'ns, LLC v. D&D Beauty Care Co.*, No. 91199352, 2014 WL 343269, at *9 (TTAB 2014) (standard character mark "might be used in any stylized display or color scheme, including one that is similar or identical to any lettering style" in the compared mark) (citations omitted).

Applicant argues that the terms SHYFT and SHIFT have different connotations because Applicant's SHYFT, due to the fact that it's misspelled with a "Y," connotes "flavor-shifting qualities," but the registered (correctly-spelled) SHIFT mark evokes the shifting of a car's transmission.¹⁷ First, Applicant points to no evidence that the substituted "Y" will have this effect on consumer perception. Rather, we think that SHYFT is an easily-recognized misspelling of SHIFT. *See, e.g., Contour Chair-Lounge Co. v. Englander Co.*, 324 F.2d 186, 189 (CCPA 1963) (after finding that "'Contur' [is] but a slight misspelling of 'Contour,' with identical pronunciation and meaning", Court held that confusion was likely as between CONTURFOAM for mattresses and box springs and CONTOUR for chairs); *Nat'l Mineral Co. v. Norwich Pharmacal Co.*, 183 F.2d 119, 120 (CCPA 1950) ("That the marks are similar in sound is beyond question. 'Swav' is the pronunciation of 'suave', as shown by the dictionaries. That



¹⁷ *See, e.g.*, 6 TTABVUE 13 (414 appeal file).

the marks are alike in meaning we think is clear, both indicating smoothness, sleekness and good grooming. Therefore, as far as the similarity between the marks is concerned, we deem that in sound and meaning they are not, in a trade-mark registration sense, legally distinguishable.”); *Caterpillar Tractor Co. v. Katrak Vehicle Co.*, No. 91050516, 1971 WL 16600, at *3 (TTAB 1971) (consumers of tractors would perceive the suffix -TRAC as short for “tractors” and would view the suffix -TRAK the same). Second, the cited registration is for wine. Applicant points to no evidence that consumers exposed to the term SHIFT on a bottle of wine will think of cars. As to beverages, SHYFT or SHIFT either mean nothing (i.e., they are arbitrary or coined terms) or, if there were evidence that consumers are attuned to the notion of “flavor shifting” in beverages (we see none), then both spellings of the word would connote that. Either way, however, there’s no distinction in any meaning or connotation between Applicant’s SHYFT marks and the cited SHIFT mark.

As to the marks in the ’414 and ’430 Applications, Applicant highlights the additional, disclaimed language “flavor shifting cocktail” as an additional point of distinction.¹⁸ But we think this descriptive phrase, displayed in a much smaller typeface after the first term SHYFT, plays little role in the overall commercial impression of this version of Applicant’s mark. Consumers tend to notice and retain first words more readily than terms that follow, *see, e.g., Detroit Athl.*, 903 F.3d at 1303; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 876 (Fed. Cir. 1992), a principle here amplified by the descriptive nature of these terms, which

¹⁸ *See, e.g.*, 6 TTABVUE 14 (’414 appeal file).

generally play little role in creating the commercial impression of a mark. *See, e.g., Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1266 (Fed. Cir. 2002); *Century 21*, 970 F.2d at 876; *Am. Throwing Co. v. Famous Bathrobe Co.*, 250 F.2d 377, 381 (CCPA 1957).¹⁹ Diminishing even further the possible source-identifying significance of the disclaimed phrase is the fact that it appears in such a small-sized typeface. *See, e.g., In re Coors Brewing Co.*, 343 F.3d 1340, 1344 (Fed. Cir. 2003) (where the “Blue Moon Brewing Co.” appeared “at the bottom of the mark in significantly smaller font, it was reasonable for the Board to find that those words do not significantly contribute to distinguishing the two marks”); *Phillips Petroleum Co. v. C.J. Webb, Inc.*, 442 F.2d 1376, 1378 (CCPA 1971) (diminishing the weight given to allegedly distinguishing terms that were “so small as to be very likely to escape the purchaser’s eye”). And, as noted above, there’s no evidence that beverage consumers attuned to “flavor shifting” would not make the same connection with SHIFT.

In sum, Applicant’s SHYFT and  marks are nearly identical to the standard character SHIFT mark in the cited registration. With only a small additional difference, Applicant’s  marks fare little better and still are highly similar to the mark in the cited registration.

¹⁹ Though Applicant calls the disclaimed phrase suggestive, suggestive phrases are registrable and need not be disclaimed. By disclaiming rights in the phrase apart from the mark as a whole, Applicant “effectively admitted the merely descriptive nature” of the phrase. *Quaker State Oil Ref. Corp. v. Quaker Oil Corp.*, 453 F.2d 1296, 1299 (CCPA 1972).

B. Comparison of the goods

The second likelihood-of-confusion factor assesses “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *du Pont*, 476 F.2d at 1361. This factor “considers whether the consuming public may perceive the respective goods and services of the parties as related enough to cause confusion about the source or origin of the goods and services.” *Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 1117 (Fed. Cir. 2024) (cleaned up; citation omitted); *see also Dan Robbins & Assocs., Inc. v. Questor Corp.*, 599 F.2d 1009, 1013 (CCPA 1979) (“The marks need not be used on directly competing goods, any relation likely to lead purchasers into assuming a common source being sufficient.”) (citation omitted). “The relevant inquiry considers if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1363 (Fed. Cir. 2022) (cleaned up; citation omitted).

The Examining Attorney argues that the record shows that consumers will perceive beer and wine as related goods, pointing to evidence of sources offering both wine and beer under the same mark.²⁰ These include excerpts from the websites of Old House Vineyards²¹ and Mountain View Vineyards,²² as well as articles featuring

²⁰ *See, e.g.*, 8 TTABVUE 6-8.

²¹ *See* Oct. 24, 2023, Nonfinal Office Action, at TSDR 7-9.

²² *See id.* at TSDR 11-13.

several more examples of hybrid winery/breweries.²³ *See, e.g., Hewlett-Packard*, 281 F.3d at 1267 (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”). In addition, the Examining Attorney placed in the record several third-party registrations covering both wine and beer.²⁴ *See, e.g., In re Country Oven, Inc.*, No. 87354443, 2019 WL 6170483, at *5 (TTAB 2019) (“As a general proposition, third-party registrations that cover goods and services from both the cited registration and an Applicant's application are relevant to show that the goods and services are of a type that may emanate from a single source under one mark.”) (citations omitted).

Applicant does not address this factor in its briefs concerning the beer applications (the '143, '440 & '430 Applications). We find that beer and wine are related goods.

The Examining Attorney also asserts that “Flavored malt-based alcoholic beverages, excluding beers” and wine are related,²⁵ similarly citing articles describing their relatedness²⁶ and third-party registrations that cover both products.²⁷

Applicant does not address this factor in the two briefs concerning the applications

²³ *See id.* at TSDR 17-22, 66-82, 83-86, 92-107.

²⁴ *See id.* at TSDR 24-25, 29-30, 37-38, 41-42, 48-49, 50-51, 52-53, 56-57, 60-61, 62-63.

²⁵ *See, e.g.*, 8 TTABVUE 6-8 ('445 appeal file).

²⁶ *See, e.g.*, Dec. 14, 2024, Denial of Reconsideration, 4 TTABVUE 57-78 (describing a drink made by mixing a malt-based beverage with wine); 81 (same). *See, e.g., In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567 (Fed. Cir. 1984) (complementary use relevant to relatedness); *Indep. Grocers' All. Distrib. Co. v. Potter-McCune Co.*, 404 F.2d 622, 624 (CCPA 1968) (same).

²⁷ *See, e.g.*, Oct. 24, 2023, Nonfinal Office Action, at TSDR 25-27, 43-45, 52-53, 54-55, 64-65; Dec. 14, 2024, Denial of Reconsideration, 4 TTABVUE 21-22, 23-25, 28-29, 31, 33-34, 35-36, 37-38, 40-41.

listing “Flavored malt-based alcoholic beverages, excluding beers” (the ’445 & ’414 Applications).

We find that wine and “Flavored malt-based alcoholic beverages, excluding beers” are related.

In all five cases, this factor weighs in favor of a conclusion that confusion is likely.

C. Comparison of the channels of trade and the classes of the relevant customers

We next consider “[t]he similarity or dissimilarity of established, likely-to-continue trade channels” as well as “[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *du Pont*, 476 F.2d at 1361. Where an application or registration is unrestricted, the identified goods are “presumed to be sold in all normal trade channels to all the normal classes of purchasers.” *Id.* (citation omitted).

The Examining Attorney argues that the record supports that wine is sold through the same trade channels and to the same classes of customers as both beer and “Flavored malt-based alcoholic beverages, excluding beers.”²⁸ Indeed, the record reflects that several liquor retailers sell both wine and beer.²⁹ Ditto for wine and “Flavored malt-based alcoholic beverages, excluding beers.”³⁰ Applicant’s briefs do

²⁸ See, e.g., 8 TTABVUE 8 (’143 appeal file); 8 TTABVUE 7 (’440 appeal file (beer)); 8 TTABVUE 8 (’445 appeal file (“Flavored malt-based alcoholic beverages, excluding beers.”)).

²⁹ See, e.g., Dec. 14, 2024, Denial of Reconsideration, 4 TTABVUE 90-92, 143-45 (Five Eight Liquors), 109-12, 152-53 (Barmy Wines & Liquors), 131-36, 155-59 (Binny’s Beverage Depot), 100-03, 146-50 (Total Wine), 119-23, 161-66 (Bank’s).

³⁰ See, e.g., *id.* at 87--91 (Five Eight Liquors), 93-104 (Total Wine), 105-11 (Barmy Wines & Liquors), 113-23 (Bank’s), 125-34 (Binny’s Beverage Depot), 137-42 (Tower).

not address, let alone contest, that the trade channels and classes of customers overlap. In all five cases, these two factors support a conclusion that confusion is likely.

D. The number and nature of similar marks in use on similar goods

In our final weighing of the factors, the “similarity of the marks” factor will support a conclusion that confusion is likely. The only question is how heavily. Usually, a finding of highly-similar marks is said to weigh strongly or heavily in the final weighing. *See, e.g., Naterra*, 92 F.4th at 1119. But the relevant factors sometimes interact with one another. A factor that sometimes comes into play and, when supported, impacts the weight given to the similarity of the marks, is *du Pont*’s sixth factor: “[t]he number and nature of similar marks in use on similar goods.” 476 F.2d at 1361.

Under the sixth factor, an applicant may submit evidence of third parties’ registration and/or use of similar marks to show the weakness of the registered mark in two ways: conceptually and commercially. “Evidence of third-party use may reflect commercial weakness, while third-party registration evidence ... may bear on conceptual weakness if a term is commonly registered for similar goods or services.” *In re FCA US LLC*, No. 85650654, 2018 WL 1756431, at *13 (TTAB 2018) (citation omitted), *aff’d mem.*, 778 F. App’x 962 (Fed. Cir. 2019).

“The purpose of introducing evidence of third-party use is to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different such marks on the bases of minute

distinctions.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1324 (Fed. Cir. 2018) (emphasis added; cleaned up; citations omitted). In such cases, frequent third-party use indicates that a mark’s relative weakness entitles it to a narrower scope of protection than we otherwise would afford it. *Id.* Generally, for third-party use evidence to have a pivotal impact on the likelihood-of-confusion analysis, there must be a “plethora” of relevant third-party marks or, stated differently, they must be “ubiquitous” or “considerable” in number. *i.am.symbolic*, 866 F.3d at 1329 (citations omitted).

To have the effect of allowing us to make inferences about consumers’ ability to differentiate similar marks as to the products at issue, the third-party marks must be at least as similar to the mark in the cited registration as the applicant’s mark. *See, e.g., In re Mighty Leaf Tea*, 601 F.3d 1342, 1347 (Fed. Cir. 2010); *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 675 (Fed. Cir. 1984). Otherwise, we can’t infer that the applicant’s mark fits within the encroachment zone (for lack of a better term) staked out by the third-party uses. Similarly, the goods covered by the third-party uses should be within the universe defined by the goods identified in the application at issue and the cited registration. *See, e.g., Omaha Steaks*, 908 F.3d at 1324-25; *Nat’l Cable Television Ass’n, Inc. v. Am. Cinema Eds., Inc.*, 937 F.2d 1572, 1579 (Fed. Cir. 1991). If the use is outside that market, we can’t infer anything about the consumers within the market defined by the products at issue in the case before us.

Applicant focuses the bulk of its argument on this factor. During prosecution, Applicant submitted a number of examples of third-party uses:

3rd-party mark	Goods	Record
THE SHIFT	wine	Nov. 11, 2024, Request for Reconsideration, at TSDR 30 ³¹
REDSHIFT	wine	<i>Id.</i> at 10
RED SHIFT	beer	<i>Id.</i> at 47
RED SHIFT	beer	<i>Id.</i> at 31
RED SHIFT IPA	beer	<i>Id.</i> at 48
RED SHIFT IPA	beer	<i>Id.</i> at 46
SHIFTING LENS	wine	<i>Id.</i> at 16
SHIFTED VISIONS	beer	<i>Id.</i> at 40
SHIFTED PERSPECTIVE	beer	<i>Id.</i> at 36
SPEED SHIFT DISTILLERY	rum	<i>Id.</i> at 45
DOWN SHIFT	wine	<i>Id.</i> at 19
DOWNSHIFT BREWING COMPANY	beer	<i>Id.</i> at 29
DOWNSHIFT	cannabis-infused sparkling water	<i>Id.</i> at 11-12
SHIFTY SPIRITED	sodas and seltzers	<i>Id.</i> at 44
SWING SHIFT	beer	<i>Id.</i> at 13
SHIFT TRADE	beer	<i>Id.</i> at 35
GRAVEYARD SHIFT	beer	<i>Id.</i> at 20
GRAVEYARD SHIFT	beer	<i>Id.</i> at 58
GRAVEYARD SHIFT	beer	<i>Id.</i> at 24
THE NIGHT SHIFT	beer	<i>Id.</i> at 57
TECTONIC SHIFT	beer	<i>Id.</i> at 49
TECTONIC SHIFT	beer	<i>Id.</i> at 53

Three of these are irrelevant because they concern goods outside the relevant market (rum, cannabis-infused sparkling water, and sodas/sparkling water). *See, e.g., Omaha Steaks*, 908 F.3d at 1325; *Nat'l Cable Television*, 937 F.2d at 1579. Several

³¹ In its requests for reconsideration in the other four cases, Applicant submitted identical third-party use evidence.

others are for marks further away than Applicant's from the mark in the cited registration. Applicant's marks consist of, or begin with, the word SHYFT. The cited registration is SHIFT. But several marks begin with terms other than "shift" (RED SHIFT, REDSHIFT, SPEED SHIFT DISTILLERY, DOWN SHIFT, DOWNSHIFT, DOWNSHIFT BREWING COMPANY, SWING SHIFT, GRAVEYARD SHIFT, THE NIGHT SHIFT, and TECTONIC SHIFT). That places these marks further away than Applicant's marks from the cited registration.

And several of these are composite marks where the term "shift" (or a variation of the term) interacts with another term to create several unique connotations (SHIFTING LENS, SHIFTED VISIONS, SHIFTED PERSPECTIVE, DOWN SHIFT or DOWNSHIFT, SWING SHIFT, GRAVEYARD SHIFT, THE NIGHT SHIFT, TECTONIC SHIFT). Collectively, these differences from Applicant's mark and the mark in the cited registration detract from the weight we assign the third-party evidence within the wine-and-beer space. As to these goods, third-party use of the term "shift" in various multi-word marks might indicate only a limited degree of commercial weakness. And this evidence is even less convincing as between the market defined by wine and Applicant's "Flavored malt-based alcoholic beverages, excluding beers." Indeed, we see no third-party uses of the term as to "Flavored malt-based alcoholic beverages, excluding beers." Still, we will not totally discount this evidence on the issue of commercial weakness.

Applicant also introduced evidence of third-party registrations containing the term "shift." As mentioned, third-party registrations containing an element that is

common to the compared marks can show that that element is conceptually weak. *See, e.g., FCA US LLC*, 2018 WL 1756431, at *13; *see also Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1363 (Fed. Cir. 2023) (such evidence can show that the shared element “has a normally understood and well-recognized descriptive or suggestive meaning” (citations omitted). Here, because the mark in the cited registration issued on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), we must presume it inherently distinctive for wine. Trademark Act Section 7(b), 15 U.S.C. § 1057(b); *see also Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 17 F.4th 129, 146 (Fed. Cir. 2021); *Tea Bd. of India v. Republic of Tea, Inc.*, No. 91118587, 2006 WL 2460188, at *21 (TTAB 2006). Indeed, Applicant does not tell us what descriptive meaning it thinks the mark in the cited registration has as to wine. Moreover, while an applicant may try to show that a registered mark cited against it is weak, such arguments have a statutory limit. Beyond Section 7(b)’s presumption of distinctiveness and validity, even “weak” marks on the Principal Register are still to be protected from likelihood of confusion. As the Court said in *Conde Nast Publ’ns, Inc. v. Miss Quality, Inc.*, 507 F.2d 1404 (CCPA 1975):

Although this court has often referred to the ‘scope of protection,’ ‘degree of protection,’ and ‘latitude of protection’ to be accorded marks—‘limited’ in the case of ‘weak’ marks and ‘broad’ or ‘wide’ in the case of ‘strong’ marks, it has, nevertheless, made it clear that the decisive question is whether there is a likelihood of confusion, mistake, or deception for purposes of 15 U.S.C. § 1052(d). Therefore, if there is such likelihood, that ends the matter whether appellant’s mark be termed ‘weak’ or ‘strong.’

Id. at 1406.

Here, Applicant introduced evidence of the following third-party registrations:

3rd-party registered mark	Goods	Record cite
SHIFT HAPPENS (Reg. No. 6218092)	beer	Apr. 23, 2024, Response to Nonfinal Office Action, at TSDR 11-13 ³²
2ND SHIFT BREWING (Reg. No. 5158906)	beer	<i>Id.</i> at 14-16
DOUBLE SHIFT BREWING COMPANY (Reg. No. 4956568)	beer	<i>Id.</i> at 17-20
POST SHIFT (Reg. No. 5443380)	beer	<i>Id.</i> at 21-25
DAY SHIFT (Reg. No. 6266985)	beer	<i>Id.</i> at 26-29
NIGHT SHIFT (Reg. No. 4231087); NIGHT SHIFT BREWING (Reg. No. 6564436) (same registrant)	beer	<i>Id.</i> at 30-37
NIGHT SHIFT BREWING (Reg. No. 7049456) (same registrant as previous)	Prepared alcoholic cocktail	<i>Id.</i> at 38-41
PHAZE SHIFT (Reg. No. 6863888)	beer	<i>Id.</i> at 42-44
SHIFT TRADE (Reg. No. 6772336)	beer	<i>Id.</i> at 45-47
REDSHIFT (Reg. No. 5303496)	Alcoholic beverages, except beer	<i>Id.</i> at 48-51

As with Applicant’s third-party use evidence, we find this evidence underwhelming. First, none of these marks are as close to the mark in the cited registration as Applicant’s marks. Second, several of them are unitary marks where the meaning of “shift” has a specific connotation (different from Applicant’s asserted “flavor-shifting” meaning) due to its interaction with other terms in the marks (most seemingly reflecting a work “shift” at an hourly-wage job). We just don’t see how this

³² In its requests for reconsideration in the other four cases, Applicant submitted identical third-party registration evidence.


evidence shows any discernible degree of conceptual weakness of the cited registered mark SHIFT for wine.


In sum, while we do not find any degree of conceptual weakness in the registered mark, the slight level of commercial weakness shown by Applicant's third-party use evidence will go on Applicant's side of the ledger, to be weighed with the other factors in the final weighing.

E. Weighing the findings on the relevant factors together

Having made findings on each of the relevant likelihood-of-confusion factors, our final step is to assess these findings together to determine if, on balance, confusion is likely as to the mark. *See, e.g., Charger Ventures*, 64 F.4th at 1384.

"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." *Federated Foods*, 544 F.2d at 1103; *see also Max Cap. Grp.*, 2010 WL 22358, at *1 ("In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services.") (citations

omitted). In these cases, Applicant's SHYFT (standard characters) and  (stylized) marks are nearly identical to SHIFT and, with only its tiny-sized,

disclaimed, descriptive phrase "flavor-shifting cocktail," Applicant's  mark fares little better and still is highly similar to the mark in the cited registration. Both types of beverages in the applications are related to wine. Thus, the two core factors here weigh in favor of a conclusion that confusion is likely.

Adding to the first two factors, the trade channels and classes of consumers for the respective beverages overlap.

The only factor counting in Applicant's favor is the sixth factor. As noted, Applicant has placed great emphasis on this factor. Applicant has introduced evidence of many beers that have "SHIFT" in their names. Most, however, are further away from the registered SHIFT mark than Applicant's marks, and that significantly reduces their probative value in showing that consumers will similarly be able to distinguish Applicant's relatively closer mark. We therefore do not think its proof of weakness is up to the task of counteracting the collective weight of the first four factors, all of which weigh decisively in favor of a conclusion that confusion is likely. If the first four factors did not so clearly support a conclusion that confusion is likely, a marginal showing of weakness like the one here hypothetically could tip the balance. But this is not such a case. The similarity of the marks here is just too great, and consumers perceive these goods as related. These are usually the most critical factors, and we see nothing indicating that they should not warrant their usual weight here. The classes of customers and trade channels overlap as well. In these circumstances and on this record, the slight weakness Applicant has shown in the term "shift" is nowhere near able to carry the day.

On balance, we have no difficulty in concluding that confusion is likely.

Decision: All five refusals to register Applicant's marks are affirmed.