

This Opinion is not a
Precedent of the TTAB

Mailed: May 14, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Boyd Gaming Corporation
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Serial No. 97838771
—

Daniel H. Bliss of Howard & Howard Attorneys PLLC,
for Boyd Gaming Corporation.

Catherine Lee, Trademark Examining Attorney, Law Office 110,
Chris Pedersen, Managing Attorney.

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Before Goodman, Heasley and Brock,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Boyd Gaming Corporation (“Applicant”) seeks registration on the Principal Register of the mark STADIUM SPORTS BAR & GRILL (in standard characters, SPORTS BAR & GRILL disclaimed) for “Bar and restaurant services inside of a casino” in International Class 43.¹

¹ Application Serial No. 97838771 was filed on March 14, 2023 based upon Applicant’s claim of first use anywhere and use in commerce since at least July 1, 2013, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

Page references to the application record are to the online database of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal

The Trademark Examining Attorney has refused registration of Applicant's mark 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 the mark

("EAT - DRINK - SPORTS - GAMES" disclaimed) for "Bar services; Bar services featuring draft beers, bottled beers, wine, cocktails, and mixed drinks" in International Class 43.²

When the refusal was made final, Applicant appealed and requested reconsideration.³ After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We reverse the refusal to register.

are to the Board's TTABVUE docket system. Applicant's brief is at 6 TTABVUE; the reply brief is at 9 TTABVUE; the Examining Attorney's brief is at 8 TTABVUE.

As part of an internal Board pilot program, the citation form in this opinion is in a form provided in the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03(a) (2024). For decisions of the Board, this order employs citation to the Lexis database. This decision also cites to the Federal Reporter.

² Registration No. 6383903 issued June 15, 2021. The description of the mark states: "The mark consists of text presenting the word 'STADIUM' in stylized font in which the 'S' is stylized like lines on a playing field and the 'U' is created by a silhouetted beer bottle, all above a line with cutouts for the wording 'EAT - DRINK - SPORTS - GAMES.' Color is not claimed as a feature of the mark." Although the description of the mark and the disclaimer use hyphens between the wording EAT DRNK SPORTS GAMES, the actual punctuation in the drawing is an interpunct or centered dot between this wording.

³ The Examining Attorney initially refused registration under Section 2(d) based on two registrations, but withdrew those refusals in a March 20, 2024 final office action on a disclaimer requirement. The Examining Attorney provided dictionary definitions for "sports bar" and "grill" in connection with this requirement. December 13, 2023 Office Action at

I. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, or to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019); *In re Country Oven, Inc.*, 2019 TTAB LEXIS 381, at *2 (TTAB 2019).

In every Section 2(d) case, two key factors are the similarity or dissimilarity of the marks and the goods or services. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (quoting *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) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and

TSDR 22-24. On May 9, 2024, on reconsideration, Applicant provided the disclaimer while also traversing this requirement. The disclaimer was accepted on May 10, 2024. Then, on May 16, 2024, the Examining Attorney issued a non-final action reinstating the Section 2(d) refusal based on one of the earlier cited registrations, and issuing a final office action on the Section 2(d) refusal on August 30, 2024.

services] and differences in the marks.”). These factors, and others, are discussed below.

A. Similarity of the Services

The second *DuPont* factor considers “[t]he similarity or dissimilarity and nature of the goods [or services] as described in an application or registration.” *DuPont*, 476 F.2d at 1361.

In determining the similarity or dissimilarity of the services, we must focus on the services as they are identified in the involved application and the cited registration. *See In re i.am.symbolic, llc*, 866 F.3d at 1327; *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Houston Comp. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990). It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of services within a particular class in the application or registration. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981).

To reiterate, Applicant’s services are “Bar and restaurant services inside of a casino” and Registrant’s services are “Bar services; Bar services featuring draft beers, bottled beers, wine, cocktails, and mixed drinks.”

Applicant argues that the services are different because it has restricted its services to being offered in a casino. 6 TTABVUE 15. However, Registrant’s broadly worded “bar services” encompasses Applicant’s more narrowly identified bar services inside of a casino. *In re Hughes Furniture Indus.*, 2015 TTAB LEXIS 65, at *10 (TTAB 2015) (“broadly worded identification of ‘furniture’ necessarily encompasses

Registrant's narrowly identified 'residential and commercial furniture.'"). Applicant's identified services are thus legally identical in part to Registrant's identified bar services.

The second *DuPont* factor weighs in favor of likelihood of confusion.

B. Trade Channels

We consider the "similarity or dissimilarity of established, likely-to-continue trade channels." *DuPont*, 476 F.2d at 1361. We also consider the classes of consumers for Applicant's and Registrant's services, *id.* which is the general adult public.

Generally, where Applicant's and Registrant's services are legally identical, we presume the trade channels and classes of consumers are the same. *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

Applicant argues "there is no similarity between the respective established likely-to-continue trade channels of Applicant and the registrant." 6 TTABVUE 5; 9 TTABVUE 5. Applicant submits that Registrant "has an interest in providing bar services ... in a bar" while Applicant is a company that has an "interest in providing bar and restaurant services inside of a casino." 6 TTABVUE 5.

Although Applicant has limited its bar services trade channel to "inside of a casino," this restriction identifies the location where the services are offered, but does not distinguish the nature of the bar services, their marketing, or the relevant consumers in a meaningful way. There are no restrictions as to trade channels for

Registrant's services; therefore, Registrant's services could also be offered in a casino and to consumers who visit casinos.

We find the trade channel limitation "inside of a casino" is not sufficient to distinguish the in-part legally identical services so as to avoid a likelihood of confusion. *See e.g., In re i.am.symbolic, llc*, 866 F.3d at 1323 (substantial evidence supported the Board's finding that an identification restricting the goods to those "associated with William Adams, professionally known as 'will.i.am,'" imposed no meaningful limitation on the nature of the goods or the trade channels or classes of purchasers of the goods where the cited registrations do not contain an express limitation).

The *Dupont* factors relating to trade channels and classes of consumers weighs in favor of likelihood of confusion.

C. Third Party Uses and Third-Party Registrations

The sixth *DuPont* factor, "[t]he number and nature of similar marks in use on similar goods," *DuPont*, 476 F.2d at 1361, "is a measure of the extent to which other marks weaken the assessed mark." *Spireon Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) (citing *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1373 (Fed. Cir. 2005)). There are two types of strength: conceptual and commercial.⁴ *Id.* (citing *In re Chippendales USA, Inc.*, 622

⁴ As is normally the case in ex parte proceedings, the fifth *DuPont* factor is neutral. *See In re Thomas*, 2006 TTAB LEXIS 135, at *18 n.11 (TTAB 2006).

F.3d 1346, 1353-54 (Fed. Cir. 2010)). The strength of the cited mark affects the scope of protection to which a mark is entitled.

Evidence of third-party use bears on the strength or weakness of a mark. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1338 (Fed. Cir. 2015) (citing *Palm Bay Imps.*, 396 F.3d at 1373). “[T]he purpose of a defendant introducing third-party uses 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.” *Palm Bay Imps.*, 396 F.3d at 1373. Evidence of third-party registrations for marks “on similar goods [or services] can bear on a mark’s conceptual strength.” *Spireon*, 71 F.4th 1363 (citing *Juice Generation*, 794 F.3d at 1339).

Because Registrant’s mark is registered on the Principal Register without a claim of acquired distinctiveness, we find that it is inherently distinctive, and at least suggestive of the identified services, although its strength is somewhat limited by the disclaimed matter (EAT • DRINK • SPORTS • GAMES) in the mark. See *New Era Cap Co. v. Pro Era, LLC*, 2020 TTAB LEXIS 199, at *29 (TTAB 2020) (“Opposer’s mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act.”); *Sock It to Me v. Fan*, 2020 TTAB LEXIS 201, at *30-31 (TTAB 2020) (“the mark, taken as a whole, is inherently distinctive, although its strength is somewhat limited by its first word, SOCK, which is generic for socks”). We may evaluate the potential weakness of a registered mark in the course of a *DuPont*

analysis. *In re Fat Boys Water Sports LLC*, 2016 TTAB LEXIS 150, at *23 (TTAB 2016).

Applicant refers to third-party use and registration evidence for STADIUM-formative uses or marks, arguing that the term “STADIUM” is relatively weak and entitled to only a narrow scope of protection. 6 TTABVUE 10; 9 TTABVUE 4.

The nine third-party uses of STADIUM-formative marks or trade names, all combined with descriptive or generic wording, are as follows:⁵

- STADIUM DELI & LIQUOR, (Ann Arbor, MI)⁶ deli and liquor store;
- STADIUM GRILL (Mattoon, IL)⁷ restaurant, bar and lounge;
- STADIUM TAKEOUT (Madison, WI)⁸ takeout restaurant;
- THE STADIUM RESTAURANT, (New Port Richey, FL)⁹ restaurant;
- THE STADIUM BAR HARBOR (Bar Harbor, ME)¹⁰ restaurant;
- STADIUM PIZZA (Wildomar, Temecula, and Lake Elsinore, California)¹¹ pizza, brewery;
- STADIUM ON WHEELS (Indianapolis, IN)¹² food truck;
- STADIUM66 SPORTS BAR (Albuquerque, NM)¹³ sports bar;
- STADIUM CLUB (Orlando, FL)¹⁴ food and drink (alcoholic beverages).

⁵ The Examining Attorney also provided evidence of restaurants that offer bar services, showing the relatedness of bar services and restaurant services. December 23, 2023 Office Action at TSDR 15-20. We find all these STADIUM-formative uses relevant.

⁶ August 16, 2024 Response to Office Action at TSDR 11.

⁷ *Id.* at 9.

⁸ *Id.* at 12.

⁹ *Id.* at TSDR 15.

¹⁰ *Id.* at 13.

¹¹ November 27, 2024 Request for Reconsideration at TSDR 14.

¹² *Id.* at 18.

¹³ *Id.* at 19.

¹⁴ *Id.* at 21. Applicant also submitted the pending trademark application for this mark.

This third-party use evidences commercial weakness of the term STADIUM. *See, e.g., Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 2020 TTAB LEXIS 269, at *55 (TTAB 2020) (six local Brooklyn-formative named establishments' use of the term "Brooklyn" in connection with beer sales have significant probative value as to commercial weakness), *aff'd in relevant part; rev'd in part, vacated in part on other grounds*, 17 F.4th 129 (Fed. Cir. 2021); *In re FabFitFun*, 2018 TTAB LEXIS 297, at *15 (TTAB 2018) (ten third-party use examples of "SMOKIN' HOT formatives," along with a dictionary definition, deemed evidence that the mark was "somewhat weak"); *Tao Licensing LLC v. Bender Consulting Ltd.*, 2017 TTAB LEXIS 437, at *47-49 (TTAB 2017) (considering United States third-party use (webpages) of "TAO-formative names" in connection with restaurant services and alcoholic beverages as evidence of commercial weakness of TAO under the sixth *DuPont* factor).

Applicant also refers to third-party registrations and applications for STADIUM-formative marks in support of its argument that STADIUM is a weak term in the bar and restaurant industry.¹⁵ 6 TTABVUE 10.

As indicated, third-party registrations bear on conceptual weakness. *See e.g., Plus Prods. v. Nat. Organics, Inc.*, 1979 TTAB LEXIS 85, at *20-21 (TTAB 1979) (numerous PLUS marks for vitamins on the trademark register reflect the Office's belief, trademark owners' belief, and plaintiff's belief that PLUS marks can be

¹⁵ March 11, 2024 Response to Office Action at TSDR 24-31, 35-37, 39-46. The applications are Stadium Club and design, Acrisure Stadium, and Paycor Stadium and design. We note, however, that electronic TSDR printouts of applications filed in the Office are not evidence of anything except that the applications were filed on a certain date. *In re Mr. Recipe, LLC*, 2016 TTAB LEXIS 80, at *16 (TTAB 2016).

registered side by side for vitamins without confusion, provided there are minimal differences between the marks); *Jerrold Elecs. Corp. v. Magnavox Co.*, 1978 TTAB LEXIS 65, at *21 (TTAB 1978) (third-party registrations “reflect a belief, at least by the registrants, who would be most concerned about avoiding confusion and mistake, that various ‘STAR’ marks can coexist provided that there is a difference.”).

To determine the conceptual strength of the cited mark, we evaluate its intrinsic nature, that is, where it lies along the generic-descriptive-suggestive-arbitrary-fanciful continuum of words. *See generally, Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 210-211 (2000); *In re MBNA Am. Bank, N.A.*, 340 F.3d 1328, 1332 (Fed. Cir. 2003) (citing *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992)).

We take judicial notice of the dictionary definition for “stadium.”¹⁶ *See In re Guild Mortg.*, 2020 TTAB LEXIS 17, at *6 (TTAB 2020) (in connection with analyzing conceptual weakness, taking judicial notice of the dictionary definition of the word GUILD). “Stadium” is defined as “a large usually roofless building with tiers of seats for spectators at sports events.”¹⁷ Stadium is highly suggestive of bars and restaurants located near a sports stadium, or bars and restaurants offering stadium style food, or bars and restaurants offering sports viewing (of sports occurring at stadiums).¹⁸

¹⁶ The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed form or regular fixed editions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 1982 TTAB LEXIS 146, at *7 (TTAB 1982), *aff’d*, 703 F.2d 1372 (Fed. Cir. 1983); *In re Red Bull GmbH*, 2006 TTAB LEXIS 136, at *7 (TTAB 2006).

¹⁷ MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, accessed May 8, 2025).

¹⁸ *See e.g.*, August 16, 2024 Response to Office Action at TSDR 9, 15; November 27, 2024 Request for Reconsideration at TSDR 14, 18, 19, 21. A “sports bar” is defined as “a bar

Applicant submitted nine third-party registrations (some of which Applicant identified above also as third-party uses):

- STADIUM PIZZA,¹⁹ for restaurants;
- STADIUM ON WHEELS,²⁰ for inter alia mobile café or mobile truck services for providing food and drink;
- STADIUM66,²¹ for restaurant services; bar and lounge cocktail services;
- ALLEGIANT STADIUM,²² for inter alia restaurant and bar services;
- ALLEGIANT STADIUM SPORTS · TABLE · TAP,²³ for restaurant and bar services;
- CHICAGO STADIUM,²⁴ for restaurant services;
- LAGASSE'S STADIUM,²⁵ for restaurant and bar services;
- NRG STADIUM,²⁶ for inter alia restaurant and bar services;
- SOFI STADIUM,²⁷ for inter alia restaurant, bar and catering services;

We find that STADIUM carries a highly suggestive connotation in the restaurant and bar industry for restaurants or bars that feature sporting events or are located

catering to sports fans and typically containing several televisions and other sports memorabilia.” December 13, 2023 Office Action at TSDR 21 (Merriam-Webster Dictionary).

¹⁹ Reg. No. 7332003, August 16, 2024 Response to Office Action at TSDR 3. Actual use listed above and provided in the November 27, 2024 Request for Reconsideration at TSDR 14. Applicant also submitted this mark as a pending application in the March 11, 2024 Response to Office Action at TSDR 22.

²⁰ Reg. No. 7112413, March 11, 2024 Response to Office Action at TSDR 39. Actual use listed above and provided in the November 27, 2024 Request for Reconsideration at TSDR 18.

²¹ Reg. No. 6901552, March 11, 2024 Response to Office Action at TSDR 40. Actual use listed above and provided in the November 27, 2024 Request for Reconsideration at TSDR 19.

²² Reg. No. 6252015, March 11, 2024 Response to Office Action at TSDR 41; this registrant owns an additional Allegiant-formative registration also listed by Applicant. *See* note 23.

²³ Reg. No. 7355997, August 16, 2024 Response to Office Action at TSDR 6. Applicant also submitted this mark as a pending application in the March 11, 2024 Response to Office Action at TSDR 23. This registration is owned by the same registrant as the registration listed in note 22.

²⁴ Reg. No. 2840581, August 16, 2024 Response to Office Action at TSDR 5.

²⁵ Reg. No. 3852249, March 11, 2024 Response to Office Action at TSDR 42.

²⁶ Reg. No. 4752766, March 11, 2024 Response to Office Action at TSDR 43.

²⁷ Reg. No. 6925323, March 11, 2024 Response to Office Action at TSDR 45.

near or in a stadium, and the third-party evidence is sufficient to establish conceptual weakness and the highly suggestive nature of the term STADIUM in connection with bar and restaurant services.

In sum, the term STADIUM is conceptually and commercially weak when used in connection with bar and restaurant services, such that consumers are educated to look for minute distinctions in STADIUM-formative marks in the marketplace. “Where a party uses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights.” *Sure-Fit Prods. Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 160 (CCPA 1958); *see also Juice Generation*, 794 F.3d at 1338 (“The weaker [a registrant’s] mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.”).

The sixth *DuPont* factor weighs against likelihood of confusion.

D. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imps.*, 396 F.3d at 1371 (citing *DuPont*, 476 F.2d at 1361). Similarity in any one of these elements may be sufficient to find the marks confusingly similar. *In re Davia*, 2014 TTAB LEXIS 214, at *4 (TTAB 2014).

The similarity or dissimilarity of the marks is determined based on the marks in their entireties; the analysis cannot be predicated on dissecting the marks into their various components. *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985). On

the other hand, different features may be analyzed to determine whether the marks are similar. *Id.* There is nothing improper in giving more or less weight to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *Id.* While disclaimed terms and design elements may be given less weight, they may not be ignored.²⁸ See *M2 Software Inc. v. M2 Communs., Inc.*, 450 F.3d 1378, 1384 (Fed. Cir. 2006) (“When comparing the similarity of marks, a disclaimed term, here ‘COMMUNICATIONS,’ may be given little weight, but it may not be ignored.”).

Applicant’s mark is STADIUM SPORTS BAR & GRILL. Registrant’s mark is



The Examining Attorney’s position is that STADIUM, the first term in each mark and the most visually prominent term in Registrant’s mark, is more dominant and significant in creating the commercial impression in each mark, and the disclaimed matter in each mark and the design elements in Registrant’s mark are subordinate. 8 TTABVUE 4-6.

Generally, adding subordinate or descriptive matter to a term identical to one in a cited registration does little to obviate a finding of similarity. See e.g., *In re Detroit*

²⁸ See *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581-82 (Fed. Cir. 1983) (generally, the literal portions of a word and design mark are the dominant and most significant features of marks because consumers will call for the goods or services in the marketplace by that portion); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407 (Fed. Cir. 1997) (dominant portion of THE DELTA CAFÉ and design mark is DELTA as the generic term CAFÉ has been disclaimed).

Athl. Co., 903 F.3d 1297, 1303 & 1304 (Fed. Cir. 2018) (DETROIT ATHLETIC CO. for sports apparel retail services and DETROIT ATHLETIC CLUB for clothing are confusingly similar; disclaimed matter in each mark does not distinguish the marks or change the overall commercial impression). “However, an exception to the general rule is often found when, inter alia, the matter shared by the two marks is merely descriptive or commonly used or registered.” *Henry I. Siegel Co. v. M & R Int’l Mfg. Co.*, 1987 TTAB LEXIS 41, at *23 (TTAB 1987). *See e.g., In re Bed & Breakfast Registry*, 791 F.2d 157, 159 (Fed. Cir. 1986) (“The record shows that a large number of marks embodying the words ‘bed and breakfast’ are used for similar reservation services, a factor that weighs in favor of the conclusion that BED & BREAKFAST REGISTRY and BED & BREAKFAST INTERNATIONAL are not rendered confusingly similar merely because they share the words ‘bed and breakfast.’”). “[U]nlike a situation involving an arbitrary or fanciful mark, the addition of other matter to a laudatory or suggestive word may be enough to distinguish it from another mark.” *In re Hartz Hotel Servs.*, 2012 TTAB LEXIS 75, at *11-12 (TTAB 2012). Therefore, when the common element shared by the marks is weak, even additional highly suggestive or descriptive matter may be sufficient to distinguish an Applicant’s mark from a cited mark. *In re Hunke & Jochheim*, 1975 TTAB LEXIS 13, at *4-5 (TTAB 1975).

Applicant’s mark and Registrant’s mark are sufficiently dissimilar to avoid likelihood of confusion. As we have already found, STADIUM is highly suggestive, commonly used in the bar and restaurant industry, and commercially weak.

Therefore, the scope of protection to which the cited registration is entitled is more limited. Considering the marks in their entireties and in view of the weakness of the cited mark, we find the addition of the terms SPORTS BAR & GRILL in Applicant's mark and the design elements and additional terms EAT • DRINK • SPORTS • GAMES in Registrant's mark are sufficient to render the marks distinguishable and dissimilar, even if used on legally identical services. *See In re Hartz Hotel Svcs.*, 2012 TTAB LEXIS 75, at *11-12 (GRAND HOTELS NYC not confusingly similar with GRAND HOTEL for hotel services; numerous third-party uses of GRAND HOTEL marks for hotel services show that consumers distinguish between these marks even though the only distinguishing element is a geographically descriptive term).

The first *DuPont* factor weighs against likelihood of confusion.

E. No Actual Confusion

Applicant argues that there is no evidence of actual confusion and this favors Applicant. 6 TTABVUE 17. However, there is no evidence in the record regarding 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. This assertion is mere attorney argument which “is no substitute for evidence.” *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005).

This *DuPont* factor is neutral. *Cf. Turdin v. Trilobite, Ltd.*, 2014 TTAB LEXIS 17, at *31 (TTAB 2014) (finding the fourth *DuPont* factor neutral where “there is argument in the briefs on the *du Pont* factor ... but no evidentiary support for the arguments”).

F. Extent of Potential Confusion

The twelfth factor considers “[t]he extent of potential confusion, i.e., whether de minimis or substantial.” *DuPont*, 476 F.2d at 1361.

In connection with this factor, Applicant argues that confusion is de minimis because “[t]he registrant does not provide bar and restaurant services inside of a casino, but merely provides a bar with bar services featuring draft beers, bottled beers, wine, cocktails, and mixed drinks in a non-casino setting.” 6 TTABVue 6; 9 TTABVue 6. This argument merely repeats Applicant’s arguments relating to trade channels and similarity of the services, which have been duly considered.

This *DuPont* factor is neutral.

G. Other Cases

Applicant refers to Federal Circuit Court of Appeals and Court of Custom and Patent Appeal cases involving different marks and different goods, as supportive of no likelihood of confusion.

However, prior decisions in trademark cases are of little help in deciding cases involving different marks and different facts. “[E]ach case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 1199 (CCPA 1973); *see also Polaroid Corp. v. Richard Mfg. Co.*, 341 F.2d 150, 152, (CCPA 1965) (“Prior decisions in trademark cases, where the issue is a likelihood of confusion, furnish meager assistance in the resolution of that issue. Each case must be decided on the basis of the factual situation thereby presented.”).

II. Conclusion

Our evaluation of the relevant *DuPont* factors indicates, on the one hand, that the services are legally identical and move through the same trade channels. These factors make confusion more likely. On the other hand, Registrant's mark is conceptually and commercially weak, significantly limiting the scope of protection to which it is entitled; given its weakness, the marks at issue here, though somewhat similar, are not similar enough to render confusion likely in the marketplace. The remaining *DuPont* factors (no actual confusion and extent of potential confusion) are neutral.

Overall, we find the weakness of Registrant's mark weighs most heavily in this case. Balancing the factors, there is not enough similarity between these marks, given the specific facts before us, to make confusion likely.

Decision: The Section 2(d) refusal to register Applicant's mark STADIUM SPORTS BAR & GRILL is reversed.