

This Opinion is not a  
Precedent of the TTAB

Mailed: September 29, 2017

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**  
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*In re Benchmark Brewing LLC*  
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Serial No. 86586142  
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Candace L. Moon of The Craft Beer Attorney APC,  
for Benchmark Brewing LLC.

Sanjeev K. Vohra, Trademark Examining Attorney, Law Office 110,  
Chris A. F. Pedersen, Managing Attorney.

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Before Cataldo, Adlin and Heasley,  
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, Benchmark Brewing LLC, seeks registration on the Principal Register of the mark BENCHMARK BREWING COMPANY (in standard characters, with “BREWING COMPANY” disclaimed) for “taproom services” in International Class 43.<sup>1</sup>

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<sup>1</sup>Application Serial No. 86586142 was filed on April 2, 2015, based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as June 25, 2013. The application originally also sought to register the mark for “beer” in International Class 32. At Applicant’s request, the Class 32 goods were divided out into Application Serial No. 86979691, which proceeded to publication. 37 CFR § 2.87; TMEP § 1110.09 (April 2017). 10 TTABVUE.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Lanham Act on the ground that it so resembles the

registered mark  (stylized, with "RESTAURANTS" disclaimed) for "restaurant services" in International Class 43 as to be likely to cause confusion or mistake, or to deceive.<sup>2</sup> 15 U.S.C. § 1052(d).

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

## I. Analysis

We base our determination of likelihood of confusion under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*") cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, \_\_\_U.S. \_\_\_, 113 USPQ2d 2045, 2049 (2015); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

Applying the *DuPont* factors, we bear in mind the fundamental principles underlying the Lanham Act in general and Section 2(d) in particular, which are "to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers." *Park 'N Fly, Inc. v. Dollar*

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<sup>2</sup> Registration No. 4121059 issued on April 3, 2012. According to the registration, "The mark consists of the word 'BENCHMARK' with stylized letter 'C' as the last letter, with the wording 'RESTAURANTS BY MARC MURPHY' underneath 'BENCHMARK.'"

*Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985) quoted in *Matal v. Tam*, \_\_\_ U.S. \_\_\_, 122 USPQ2d 1757, 1762 (2017); see also *DuPont*, 177 USPQ at 566.

We have considered each relevant *DuPont* factor for which there is evidence or argument, and have treated the other factors as neutral. See *M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (factors “may play more or less weighty roles in any particular determination”).

Two key considerations are the similarities between the marks and the similarities between the services. See *In re I.AM.Symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

#### **A. Comparison of the Marks**

Under the first *DuPont* factor, we consider the similarity or dissimilarity of Applicant’s and Registrant’s marks in their entirety, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot*

*Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). In a particular case, “two marks may be found to be confusingly similar if there are sufficient similarities in terms of sound *or* visual appearance *or* connotation.” *Kabushiki Kaisha Hattori Seiko v. Satellite Int’l, Ltd.*, 29 USPQ2d 1317, 1318 (TTAB 1991), *aff’d mem.*, 979 F.2d 216 (Fed. Cir. 1992) *quoted in In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016).

Here, as the Examining Attorney points out, the applied-for mark begins with the term BENCHMARK, while the registered mark begins with “the phonetically identical BENCHMARC, which only differs by a single letter at the end of the term.”<sup>3</sup> Applicant responds that the marks are nevertheless dissimilar in sight and sound, because while BENCHMARK in the applied-for mark is in standard characters, BENCHMARC in the registered mark is stylized, with a distinctive letter “C”. Moreover, Applicant’s mark ends with the term “BREWING COMPANY,” so the mark comprises three words, 23 letters, and seven syllables. By contrast, Registrant’s

mark, , ends with “RESTAURANTS BY MARC MURPHY,” totaling five words, 32 letters, and nine syllables.<sup>4</sup> Applicant concludes that “[t]he additional terms coupled with the distinctive “C” in Registrant’s mark differentiate the marks.”<sup>5</sup>

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<sup>3</sup> Examining Attorney’s brief, 12 TTABVUE 5.

<sup>4</sup> Applicant’s brief pp. 4-5, 9 TTABVUE 5-6.

<sup>5</sup> Applicant’s brief p. 4, 9 TTABVUE 5.

We agree with the Examining Attorney that the marks are similar. Consumers are generally inclined to focus on the first word of a mark. *See Palm Bay Imports*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word); *Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”) *cited in In re Mr. Recipe, LLC*, 118 USPQ2d at 1090.

In this case, the first word of Applicant’s mark, BENCHMARK, is virtually identical to the first, most prominent word in Registrant’s mark, BENCHMARC. Consumers would pronounce the terms identically in calling for the services. *See In re Omaha Nat. Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987) (affirming the Board’s finding that FirsTier is the phonetic equivalent of “first tier”) *cited in Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016) (MINI MELTS identical in sound to MINIMELTS and MINI-MELTS); *RE/MAX of America, Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964 (TTAB 1980) (REMACS and RE/MAX indistinguishable in sound). The stylization of Registrant’s mark also makes little difference, for Applicant seeks registration of its mark in standard characters, and could display its mark (and enjoy the benefits of registration) in any font style, size, or color, including one similar to Registrant’s. *See In re Well Living Lab Inc.*, 122

USPQ2d 1777, 1778n.1 (TTAB 2017); *In re I.Am.Symbolic*, 123 USPQ2d at 1748 (“[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display. By presenting its mark merely in a typed drawing, a *difference* cannot legally be asserted by that party.”) (quoting *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983)). In sight and sound, the first, most prominent and dominant components of the marks are virtually identical.

[I]f the dominant portion of both marks is the same, then confusion may be likely notwithstanding peripheral differences.” *In re Denisi*, 225 USPQ 624, 624 (TTAB 1985). The peripheral differences to which Applicant alludes fail to distinguish the marks. The last two words of its applied-for mark, “BREWING COMPANY,” are disclaimed and obviously descriptive or generic, just as “RESTAURANTS” is disclaimed and obviously descriptive or generic in the cited registration. These at best descriptive terms are less significant than the dominant first words in creating the marks’ commercial impressions, and are entitled to far less weight in a likelihood of confusion analysis. *See In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d

1531, 1533-34 (Fed. Cir. 1997). The marks' gross differences in number of words, syllables, and letters thus fail to meaningfully distinguish them.

Applicant maintains that the marks have distinct connotations. BENCHMARK means "a standard or point of reference against which things may be compared or assessed."<sup>6</sup> Coupled with the words BREWING COMPANY, which "evokes a sense of connection with alcohol or alcohol related services, specifically beer centric goods and services,"<sup>7</sup> Applicant argues, its mark leaves the commercial impression of setting the standard for taproom services.<sup>8</sup> Witness its substitute specimen:



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<sup>6</sup> Applicant's brief p. 6, 9 TTABVUE 7, *citing* OxfordDictionaries.com 4/7/2016, as well as Merriam-Webster.com 4/7/2016 ("Benchmark": "something that serves as a standard by which others may be measured or judged"), Dictionary.com ("Benchmark": "a standard of excellence, achievement, etc., against which similar things must be measured or judged"), April 19, 2016 Response to Office Action pp. 17, 21, 25. (All citations to the TSDR are to the pdf version.)

<sup>7</sup> Applicant's brief pp. 5-6, 9 TTABVUE 6-7. Applicant additionally argues that its beer-centric services are accentuated by "a distinctive, simplistic design" it uses with its mark. Applicant's brief p. 6, 9 TTABVUE 7. But since the applied-for mark is in standard characters, with no design elements, this argument is immaterial, and will be given no further consideration.

<sup>8</sup> *Id.*

<sup>9</sup> April 19, 2016 Response to Office Action p. 15.

In contrast, Applicant argues, Registrant's mark is a play on the name of Registrant's renowned head chef, Marc Murphy:<sup>10</sup>



## MEET MARC MURPHY

Part worldly epicure, part laid-back surfer, Marc Murphy fell in love with French and Italian cuisine during a childhood spent living throughout Europe. He went on to work in some of the most highly esteemed kitchens in the world from Paris to Monte Carlo and today is one of New York's most celebrated chefs.

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Applicant contends:

[T]he first term of Registrant's mark includes Murphy's name, **BENCHMARC**. The mark is Murphy centric. Further, the inclusion [of] Marc Murphy's name twice, once in the first term and again at the end of the mark, in addition to the stylizing of Registrant's mark makes it so that Murphy's name acts as a house mark.

It follows that Registrant's commercial impression resonates with celebrity chef, Marc Murphy.<sup>12</sup>

We are not persuaded. Both marks use a form of the term "BENCHMARK" (in Registrant's case, its phonetic equivalent) in the same sense, to mean setting "a

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<sup>10</sup> Applicant's brief p. 6, 9 TTABVUE 7.

<sup>11</sup> Registrant's website BenchMarc-Events.com 1/6/2016, Jan. 11, 2016 Response to Office Action p. 33.

<sup>12</sup> Applicant's brief p. 6, 9 TTABVUE 7.

standard by which others may be measured or judged,”<sup>13</sup> whether for taproom or restaurant services. There is no evidence that the term in Registrant’s mark only calls to mind Registrant’s chef; to the contrary, as Applicant itself concedes, it is a “play” on the name of Registrant’s chef, *i.e.* it has a double meaning, one of which is identical to the meaning of Applicant’s mark. *See In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (“Here, the record only reflects one definition for the phrase ‘take ten.’”). Furthermore, Registrant’s use of its chef’s name does not dispel the likelihood of confusion. As the Examining Attorney notes, “consumer confusion could arise because the public, perhaps knowing that Marc Murphy is the proprietor of a restaurant named BENCHMARC, would presume that a brewing company with the same or similar name would also have been created by or belong to him.”<sup>14</sup> “[C]areful purchasers who do notice the difference in the marks will not necessarily conclude that there are different sources for the [services], but will see the marks as variations of each other, pointing to a single source.” *In re Hitachi High-Technologies Corp.*, 109 USPQ2d 1769, 1774 (TTAB 2014).

“The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *In re I.AM.Symbolic, LLC*, 123 USPQ2d at 1748 (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed.

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<sup>13</sup> Merriam-Webster.com 4/7/2016 April 19, 2016 Response to Office Action p. 17.

<sup>14</sup> Examining Attorney’s brief, 12 TTABVUE 7.

Cir. 2012)). Consumers may not necessarily encounter the marks in proximity and must rely upon their recollections to compare them. *In re Integrated Embedded*, 120 USPQ2d 1504, 1513 (TTAB 2016). “[W]e recognize that purchasers have fallible memories.” *In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014).

Comparing the marks in their entireties, taking into account their appearance, sound, connotation and commercial impression, we find that the first *DuPont* factor weighs in favor of finding a likelihood of confusion.

### **B. Comparison of the Services**

The second *DuPont* factor concerns “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration....” *DuPont*, 177 USPQ 567. “This factor considers whether ‘the consuming public may perceive [the respective goods or services] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 113 USPQ2d at 1086 (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)).

A “taproom” is a bar or barroom.<sup>15</sup> To demonstrate that taproom services are related to restaurant services, the Examining Attorney submitted a score of third-party, use-based registrations, each of which has a different owner and identifies both

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<sup>15</sup> AMERICAN HERITAGE DICTIONARY, AHDictionary.com. The Board may take judicial notice of definitions from dictionaries, including online dictionaries that exist in printed format or have regular fixed editions. *E.g.*, *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014) *aff'd* 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); TBMP § 1208.04 (June 2017). The Board also may notice dictionary definitions *sua sponte*. See *University of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

services offered under a single mark.<sup>16</sup> Representative registrations, with relevant portions of the identifications, include:

<b>Mark</b>	<b>Reg. No.</b>	<b>Relevant Services</b>
PUG RYAN'S	4886632	Bar and restaurant services; brewpub services; taproom services featuring beer brewed on premises.
URGE GASTROPUB	4855079	Bar and restaurant services; pubs; taproom services featuring craft beer, draft beer, and bottled beer.
NORTH MOUNTAIN BREWING	4873512	Bar and restaurant services; taproom services; taproom services featuring craft beer and beer brewed on premises.
ASLAN BREWING CO.	4888879	Restaurant services; taproom services featuring craft beer brewed on premise.
HOPLABS BREWING	4837819	Restaurant services, including sit-down service of food and take-out restaurant services; taproom services featuring our own brewed beer and pub food.

These third-party registrations based on use in commerce have probative value to the extent that they serve to show that the services are of a type that may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786

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<sup>16</sup> Jan. 30, 2016 Office Action pp. 7-63.

(TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

Reinforcing this evidence, the Examining Attorney submitted website pages from three third parties offering restaurant services and taproom services under the same marks or trade names:<sup>17</sup>

- **Sierra Nevada** (“Western North Carolina is known for its love of food and passion for great craft beer. At our Mills River Taproom and Restaurant you’ll find an abundance of both.”)



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<sup>17</sup> Jan. 30, 2016 Office Action pp. 64-73.

<sup>18</sup> SierraNevada.com 1/30/2016, Jan. 30, 2016 Office Action p. 64.

- **Liberty Taproom and Grill**



- **Boondocks Brewing Tap Room and Restaurant**



<sup>19</sup> LibertyTaproom.com 1/30/2016 Jan. 30, 2016 Office Action p. 69.

<sup>20</sup> BoondocksBeer.com 1/30/2016, Jan. 30, 2016 Office Action p. 71.

These websites demonstrate that taproom and restaurant services are marketed and sold together under the same marks and names. *See Hewlett-Packard*, 62 USPQ2d at 1004 (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to the relatedness analysis”); *In re Integrated Embedded*, 120 USPQ2d at 1514-15.

Applicant protests that these examples are the exception, not the rule: “Not all taprooms offer restaurant services. Not all restaurants offer taproom services.”<sup>21</sup> “Something more” is required to show the relatedness of the services, it argues, and that “something more” is absent: “There are different regulations for the two types of entities. ... A taproom does not necessarily have a kitchen.”<sup>22</sup>

The “something more” requirement to which Applicant alludes calls to mind *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003), which held *inter alia* that “the fact that restaurants serve food and beverages is not enough to render food and beverages related to restaurant services for purposes of determining the likelihood of confusion.” *Id.* at 1063; *see also In re St. Helena Hosp.*, 113 USPQ2d at 1087. As Applicant readily concedes, however, the subject of this appeal is not “beer” (a good that was divided out and made the subject of a separate application)<sup>23</sup> but “taproom services,” which may be compared with “restaurant services” without the necessity of demonstrating “something more.”

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<sup>21</sup> Applicant’s brief p. 10, 9 TTABVUE 11.

<sup>22</sup> Applicant’s brief p. 9, 9 TTABVUE 10.

<sup>23</sup> *See* n. 1.

In fact, it is not necessary that Applicant's and Registrant's services be similar or competitive to support a holding of likelihood of confusion; it is sufficient that the services are related in some manner and/or that conditions and activities surrounding their marketing are such that they would or could be encountered by the same persons under circumstances that could, because of similarities between the marks used, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1722; *In re Binion*, 93 USPQ2d 1531, 1534-35 (TTAB 2009). In any event, as Registrant's website illustrates, its restaurant services include barroom services with beer on tap:



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and alcoholic beverages offered with food:

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<sup>24</sup> Benchmarc-Events.com 1/6/2016, Jan. 11, 2016 Response to Office Action p. 37.



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And as the third-party registrations and websites show, consumers are accustomed to encountering taproom services offered with restaurant services. For these reasons, we find that the second *DuPont* factor also weighs in favor of finding a likelihood of confusion.

### **C. Channels of Trade**

Under the third *DuPont* factor, which concerns “the similarity or dissimilarity of established, likely-to-continue trade channels,” *DuPont*, 177 USPQ 567, Applicant argues that “Applicant’s services are marketed ... only to adults over the age of 21, the legal drinking age in the U.S. Registrant’s services are marketed to the general public, children and adults alike. Applicant’s services are geared toward craft beer drinkers. Registrant’s services are geared specifically toward the high end, ‘foodie’ crowd, based on head chef Marc Murphy’s celebrity status.”<sup>26</sup>

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<sup>25</sup> Benchmarc-Events.com 1/6/2016, Jan. 11, 2016 Response to Office Action p. 36.

<sup>26</sup> Applicant’s brief p. 12, 9 TTABVUE 13. Applicant adds, “There are restrictions for taprooms, taverns and pubs, where people under the age of 21 are not allowed onto the

However, “It is settled that in making our determination, we must look to the services as identified in the application vis-à-vis those recited in the cited registration.” *In re Integrated Embedded*, 120 USPQ2d at 1514 (citing *Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)). “Parties that choose to recite services in their trademark application that exceed their actual services will be held to the broader scope of the application.” *Stone Lion*, 110 USPQ2d at 1163. Where there are no meaningful limitations in the identification of services in either the application or the cited registration, we must presume that the services move through all the usual channels of trade and are offered to all normal potential purchasers. *In re I.AM.Symbolic*, 123 USPQ2d at 1750.

Here, neither Applicant’s “taproom services” nor Registrant’s “restaurant services” include any limitations to “craft beer drinkers” or “foodies.” While we assume that Applicant’s taproom services, by their very nature, are limited to adults, that does not meaningfully differentiate the classes of purchasers, for even though restaurants serve children, the relevant purchasing public, which chooses and purchases those services, is generally adult. Hence, the relevant class of customers for Applicant’s and Registrant’s services is generally the same: ordinary adult purchasers of food and/or drink served on the premises. Accordingly, the third *DuPont* factor also favors finding a likelihood of confusion.

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premises in some states. ... On the other hand, it is public knowledge that restaurants are open to, and marketed to, all ages.” *Id.* at p. 9, 9 TTABVue 10.

#### **D. Sophistication of the Customers**

The fourth *DuPont* factor addresses the conditions under which and buyers to whom sales are made, i.e., “impulse” versus careful, sophisticated purchasing. *DuPont*, 177 USPQ 567.

Under this factor, Applicant essentially restates the arguments it made earlier under the second and third *DuPont* factors: (1) that a consumer seeking out a taproom is looking for a brewery, not a full meal; and (2) that taprooms serve only adults, while restaurants serve all ages.<sup>27</sup> From these premises it infers that consumers are sophisticated and able to distinguish the sources of the services.

However, Applicant’s arguments have more to do with the respective services and channels of trade than with the customers’ sophistication or care. As we have noted, the services are related, the channels of trade overlap, and the relevant class of customers for Applicant’s and Registrant’s services is generally the same. There is no evidence that the relevant class of customers for those services is generally sophisticated or careful. As the Examining Attorney points out, the standard of care is that of the least sophisticated potential purchaser. *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1039 (TTAB 2016) (citing *Stone Lion*, 110 USPQ2d at 1163). And since there is no restriction in either the subject application or cited registration as to price or quality, there is no reason to infer that these consumers will be particularly careful. See *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 765 (TTAB 1986).

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<sup>27</sup> Applicant’s brief p. 13, 9 TTABVUE 14.

For these reasons, the fourth *DuPont* factor is neutral.

## **II. Conclusion**

Having carefully considered all of the arguments and evidence of record, including those we have not mentioned, as well as all relevant *DuPont* factors, we find that Applicant's and Registrant's marks, taken in their entireties, are similar in appearance, sound, connotation and commercial impression; their services are related, and are available in the same channels of trade to the same class of customers; and there is no evidence that the relevant consumers are sophisticated or careful. Accordingly, we find that there is a likelihood of confusion under Section 2(d).

**Decision:** The refusal to register Applicant's mark BENCHMARK BREWING COMPANY in International Class 43 is affirmed.