

This Opinion is not a
Precedent of the TTAB

Mailed: September 17, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Mystic Mountain Distillery LLC
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Serial No. 87014045
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Ellen Reilly of Reilly Intellectual Property Law Firm,
for Mystic Mountain Distillery LLC.

Ronald McMorrow, Trademark Examining Attorney, Law Office 118,
Michael W. Baird, Managing Attorney.

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Before Bergsman, Goodman and Pologeorgis,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Mystic Mountain Distillery LLC (“Applicant”) seeks registration on the Principal Register of the mark shown below for “Whiskey” in International Class 33.¹

¹ Application Serial No. 87014045 was filed on April 26, 2016, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). “WHISKEY, HANDCRAFTED AND SMALL BATCH” is disclaimed. The description of the mark is as follows: “The mark consists of a circle made with rope, within which is a smiling skull wearing a cowboy hat. There is an outward facing pistol on each side of the skull, underneath the rim of the cowboy hat, and a banner on the bottom portion of the circle containing the words “BRAD LEE SCHROEDER.” Above the circle are the stylized words “MYSTIC MOUNTAIN” above the stylized words “OUTLAW WHISKEY,” and below the circle are the stylized words “HANDCRAFTED” above the stylized words “SMALL BATCH,” which are separated by a longhorn cattle skull.” The



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 so resembles the registered mark OUTLAW (in standard characters) for "alcoholic beverages" in International Class 33 as to be likely to cause confusion, mistake or deceive.²

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

name(s), portrait(s), and/or signature(s) shown in the mark identifies Brad Lee Schroeder, whose consent(s) to register is made of record. Color is not claimed as a feature of the mark.

Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVue docket system.

² Registration No. 3221418 issued March 27, 2007; renewed.

I. Evidentiary Issue

Both Applicant and the Examining Attorney attached evidence to their briefs. Applicant submitted copies of the certificate of registrations of third-party registrations, which had previously been submitted with its request for reconsideration in the form of TSDR printouts. Applicant also submitted copies of two certificate of registrations it owns which had also had been submitted on reconsideration in the same form. The Examining Attorney submitted a dictionary definition from Merriam-Webster dictionary (merriam-webster.com) for “whiskey” requesting that the Board take judicial notice.

In its brief, Applicant also refers to eight third-party uses of “outlaw” in connection with whiskey and eight third-party uses of “outlaw” in connection with other alcoholic beverages. The Examining Attorney has neither objected to the list nor addressed it.

Trademark Rule 2.142(d) provides that the application record should be complete prior to the filing of an appeal. The third-party certificates of registration and copies of Applicant’s certificates of registration are not new evidence and may be relied on by Applicant.³ The dictionary definition submitted by the Examining Attorney is the type of evidence of which the Board may take judicial notice, and therefore we consider it.⁴ *In re Nieves & Nieves LLC*, 113 USPQ2d 1639, 1642 (TTAB 2015). As to

³ November 21, 2016 Response to Office Action at TSDR 2-15; January 2, 2019 Request for Reconsideration at TSDR 2-21 and 5 TTABVUE.

⁴ The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *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); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

the list of actual uses of “outlaw” for whiskey and alcoholic beverages in Applicant’s brief, Applicant has the responsibility to make sure that the record is complete prior to filing a notice of appeal. *In re Van Valkenburgh*, 97 USPQ2d 1757, 1768 n. 32, 1769 (TTAB 2011). Accordingly, we have given no consideration to this information.

II. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors, and the other relevant *DuPont* factors now before us, are discussed below. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”)); *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.”).

A. Similarity or Dissimilarity of the Goods and Channels of Trade/Classes of Purchasers

We turn first to the *DuPont* factor regarding the similarities or dissimilarities between the respective goods as identified in the application and the cited registration. *See Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”). *See also Paula Payne Prods. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.”).

Applicant’s goods are “whiskey” and Registrant’s goods are “alcoholic beverages.” The definition of “whiskey,” as provided by the Examining Attorney, is “: a strong alcoholic drink made from a grain (such as rye, corn, or barley).”⁵ We take judicial notice that an “alcoholic beverage” is “any fermented liquor, such as wine, beer, or distilled spirit, that contains ethyl alcohol, or ethanol (CH₃CH₂OH), as an intoxicating agent.” ... [and a] distilled beverage, includes such liquors as whiskey, gin, vodka, rum, brandy, and liqueurs, or cordials.”⁶

⁵ 9 TTABVUE 10 (www.merriam-webster.com).

⁶ ENCYCLOPÆDIA BRITANNICA. Encyclopædia Britannica Online (entry last updated May 27, 2019). The Board may take judicial notice of information from encyclopedias. *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1087 n.3 (TTAB 2016) (judicial notice taken from encyclopedia).

We give no weight to Applicant's arguments that Applicant's and Registrant's goods are "different and noncompetitive" and that "the mere fact that Applicant's goods and Registrant's goods fall under the broad category of 'alcohol' is too tenuous a connection upon which to base a finding that they are sufficiently related for purposes of likelihood of confusion."⁷

Unrestricted and broad identifications are presumed to encompass all goods of the type described. *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1413 (TTAB 2018) (quoting *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006)). Registrant's broadly identified "alcoholic beverages" encompass Applicant's more specifically identified "whiskey." Therefore the goods are, at least, identical in part. *See e.g., In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) ("Applicant's broadly worded identification of 'furniture' necessarily encompasses Registrant's narrowly identified 'residential and commercial furniture.'"); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007) (petitioner's "restaurant services" encompass respondent's "restaurant services featuring bagels as a main entrée").

Because the goods are in part identical and unrestricted as to trade channels, we must also presume that Applicant's and Registrant's identical products travel in the same ordinary trade and distribution channels and will be marketed to the same potential consumers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (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

⁷ 7 TTABVUE 19-20.

determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same).

These *DuPont* factors strongly weigh in favor of likelihood of confusion.

B. Strength or Weakness of the Registered Mark

The sixth *DuPont* factor requires us to consider the number and nature of similar marks in use on similar goods or services. *DuPont*, 177 USPQ at 567. In this regard, the Federal Circuit has stated that evidence of the extensive registration and use of a term by others can be “powerful” evidence of weakness. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015).

Applicant submits that “outlaw” is a weak term and is frequently used in classes 32 and 33 and that “consumers have been educated to distinguish between different marks on the basis of minute distinctions.”⁸ As evidence that “outlaw” is a weak term, Applicant points to third-party uses, listed in its brief, of “outlaw” for whiskey and alcoholic beverages, and third-party registrations, submitted during examination, that contain the term “outlaw”.

As we already indicated, we do not consider the listed uses of “outlaw” in the brief in connection with whiskey and alcohol. For ease of reference, we have reproduced

⁸ 7 TTABVUE 19.

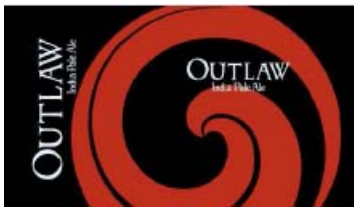
below the chart incorporated into Applicant’s brief showing the third-party registrations and one application that were submitted by Applicant during examination as evidence of weakness of the term “outlaw” in connection with alcoholic beverages.

REG. NO. or APP. NO.	MARK
3953359	GHOST HORSE OUTLAW - Wine; spirits IC 33. Registration cancelled 12/8/2017 because registrant did not file an acceptable declaration under Section 8.
4500369	JESSE JAMES AMERICA'S OUTLAW BOURBON WHISKEY - Liquor; IC 33.
4483527	 <p>(OUTLAW INDIA PALE ALE OUTLAW INDIA PALE ALE) - Ale; IC 32.</p>
4446549	JESSE JAMES AMERICA'S OUTLAW BEER - Beer; IC 32.
4348776	ALES FOR OUTLAWS - beers, ales; IC 32.
4748282	OUTLAW - Energy drinks; IC 32.
4780130	SHERIFF HENRY PLUMMER'S OUTLAW BREWING - Beer; IC 32.
87799105	BAND OF OUTLAWS - Alcoholic beverages, except beer; IC 33. Application filed February 15, 2018 -Notice of Allowance issued.

The chart indicates that “Ghost Horse Outlaw” has been cancelled and that “Band of Outlaws” is an application. A cancelled registration is not evidence of anything except that it issued, and a pending application is evidence only that the application was filed on a certain date. *See In re Mr. Recipe, LLC*, 118 USPQ2d at 1089; *In re Brown-Forman Corp.*, 81 USPQ2d 1284, 1286 n.3 (TTAB 2006). As to the OUTLAW

registration for energy drinks, other than stating that there are many “outlaw” marks for goods in classes 32 and 33, Applicant has not explained how energy drinks are related to whiskey and alcoholic beverages. We do not find this registration probative. *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration).

The remaining five registrations are the most relevant: SHERIFF HENRY PLUMMER’S OUTLAW BREWING for “beer”; ALES FOR OUTLAWS for “beers,



ales”; (Outlaw India Pale Ale, Outlaw India Pale Ale) for ale; JESSE JAMES AMERICA’S OUTLAW BOURBON WHISKEY for liquor, JESSE JAMES AMERICA’S OUTLAW BEER for beer. We find the three registrations that relate to a historical figure or a notable individual, Henry Plummer and Jesse James,⁹ create different commercial impressions than the cited mark. As to the two remaining third-party, registrations, this evidence falls well short of the “voluminous” and “extensive” evidence presented in *Jack Wolfskin*, 116 USPQ2d at 1136 (at least fourteen relevant third-party uses or registrations of record), or of that in *Juice*

⁹ Although Jesse James appears to evoke the historical figure, the Examining Attorney submits that Jesse James refers to a “specific famous individual” while the Applicant submits that “Jesse James” refers to Jesse James Dupree a country western singer, a living individual whose consent is or record, as listed on the registrations. 9 TTABVUE 6; 10 TTABVUE 3; 7 TTABVUE 30-33.

Generation, 115 USPQ2d at 1673 n.1 (at least twenty-six relevant third-party uses or registrations of record).

We find this *DuPont* factor neutral.

C. Similarity or Dissimilarity of the Marks

We now consider the similarities or dissimilarities of the marks. We must compare the marks in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1690 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs. Inc. v. Triumph Learning, LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted).

It is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark when considering the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (“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 consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable.”).

Where both words and a design comprise the mark (as in Applicant's mark), then the words are normally accorded greater weight because the words are likely to make an impression upon purchasers, would be remembered by them, and would be used by them to request the goods and/or services. *In re Viterra Inc.*, 101 USPQ2d at 1908 (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")). When trademarks would appear on virtually identical goods or services, as is the case here, the degree of similarity necessary to support a conclusion of likely confusion declines. *See Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992).



Applicant's mark is and Registrant's mark is OUTLAW in standard characters. The obvious similarity between Applicant's and Registrant's mark is the identical term OUTLAW, which is similar in sound, appearance, connotation and commercial impression. Likelihood of confusion is often found where the entirety of one mark is incorporated within another. *See e.g., In re*

Denisi, 225 USPQ 624, 626 (TTAB 1985) (PERRY'S PIZZA for restaurant services specializing in pizza and PERRY'S for restaurant and bar services); *Johnson Publishing Co. v. International Development Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner). The question here is whether the other elements in Applicant's mark sufficiently serve to distinguish it from the cited mark.

Applicant argues that the Examining Attorney has ignored the additional features in Applicant's mark including the prominent design, which has been previously registered,¹⁰ and according to Applicant, is the dominant portion of its applied-for mark.¹¹ Applicant also points out that it has a registration that contains the term MYSTIC MOUNTAIN (for MYSTIC MOUNTAIN DISTILLERY for alcohol and spirit distillery services, which Applicant deems is "a brand identifier")¹² and that the addition of these two registered marks as well as the additional terms in the applied-for mark are sufficient to distinguish Applicant's mark from the cited mark.¹³

Although the design features in Applicant's mark are prominently displayed, we find the literal portion of the mark, namely MYSTIC MOUNTAIN, OUTLAW WHISKEY, BRAD LEE SCHROEDER, and HANDCRAFTED SMALL BATCH, is entitled to greater weight. While Applicant argues that the accompanying design "ties

¹⁰ The registered design mark, Registration No. 5041243, includes the term BRAD LEE SCHROEDER. January 2, 2019 Request for Reconsideration at TSDR 20.

¹¹ 7 TTABVUE 15.

¹² Registration No. 5040978, January 2, 2019 Request for Reconsideration at TSDR 18; 10 TTABVUE 2.

¹³ 7 TTABVUE 16; 10 TTABVUE 2.

in the theme of Mystic Mountain,”¹⁴ we view the design features as simply reinforcing the OUTLAW portion of Applicant’s mark. We also find that Applicant’s ownership of other marks that somewhat resemble its applied-for mark is not relevant to the specific likelihood of confusion issue involving the registered mark OUTLAW. Here, neither of Applicant’s prior registrations include the term OUTLAW, which is the point of similarity here between Applicant’s mark and Registrant’s mark.

Further, with respect to the literal portion of Applicant’s mark, we give less weight to the generic or descriptive words WHISKEY and HANDCRAFTED SMALL BATCH (informing consumers of the type of alcoholic beverage and that it has been distilled in small batch) that have been properly disclaimed. *In re Chatam Int’l. Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004); and *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009). We find that this generic or descriptive matter has less significance in creating the mark’s overall commercial impression and therefore is entitled to less weight in our likelihood of confusion determination. *See 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 likelihood of confusion.’”) (quoting *In re Nat’l Data*, 224 USPQ at 752).

Thus, the distinctive literal portions of Applicant’s mark are MYSTIC MOUNTAIN, BRAD LEE SCHROEDER and OUTLAW. We consider out of these terms that OUTLAW is the most dominant, given that it is the wording that is most

¹⁴ 10 TTABVUE 2.

prominently displayed, MYSTIC MOUNTAIN is a house mark, and is displayed in smaller type, and BRAD LEE SCHROEDER, in even smaller type, appears to identify a person that is endorsing or is in some way associated with Applicant's product.¹⁵

Under our case law, the presence of a house mark,¹⁶ trade name, or surname, generally will not suffice to distinguish two otherwise similar product marks, unless there are recognizable differences in the shared product marks, or unless the shared product mark is descriptive or highly suggestive as applied to the parties' goods and/or services. *Compare In re Fiesta Palms LLC*, 85 USPQ2d 1360 (TTAB 2007) (confusion not avoided by applicant's addition of house mark CLUB PALMS to shared product mark MVP in absence of evidence that MVP is highly suggestive of casino services), *with Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313 (TTAB 2005) (confusion avoided by applicant's addition of house mark NORTON McNAUGHTON to shared product mark ESSENTIALS where evidence (dictionary definition, twenty-three third-party registrations of ESSENTIALS for clothing) established that ESSENTIALS is highly suggestive for clothing).

We find that neither of the exceptions to the house mark rule is applicable.

Here, the product marks in question are Registrant's mark OUTLAW and Applicant's mark OUTLAW WHISKEY HANDCRAFTED SMALL BATCH and the

¹⁵ We consider BRAD LEE SCHROEDER to be analogous to a designer name or other notable individual and find it appropriate to consider this term under the case law relating to house marks, trade names and surnames.

¹⁶ "A mark could be considered a house mark if the evidence shows that it serves as a mark for a number of an entity's products even if the diversity of products would not be so great that the company would be able to use the term 'house mark' in its identification of goods." *In re Royal BodyCare Inc.*, 83 USPQ2d 1564, 1568 (TTAB 2007).

accompanying design. First, the dominant portion of Applicant's mark is OUTLAW which will be accorded more weight in determining the similarity of the marks. As discussed above, the design simply reinforces the term OUTLAW, and the disclaimed terms WHISKEY and HANDCRAFTED SMALL BATCH are entitled to less weight. *Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1846; *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987). As such, we find the conflicting product marks to be highly similar.

Second, we find on this record that OUTLAW is not so highly suggestive or otherwise weak in the marketplace that the presence of the house mark MYSTIC MOUNTAIN or the addition of the name BRAD LEE SCHROEDER in Applicant's mark suffices to avoid confusion. Unlike the situation in *Knight Textile*, where the record included dictionary evidence and twenty-three third-party registrations which established that ESSENTIALS was highly suggestive as applied to clothing, there is no such dictionary evidence, and the third-party registration evidence, as discussed above, is minimal. Also, there is no third-party evidence of use in the record to show that OUTLAW is a weak term in the marketplace. Therefore, Applicant has failed to show the term OUTLAW is so commonly used or registered in the relevant field that the addition of MYSTIC MOUNTAIN and BRAD LEE SCHROEDER would be sufficient to render the marks as a whole distinguishable. Thus, the second exception is also not applicable here.

Accordingly, we find the general rule controlling in the present situation, i.e., Applicant's addition of its house mark MYSTIC MOUNTAIN and the addition of

BRAD LEE SCHROEDER to the product mark OUTLAW WHISKEY HANDCRAFTED SMALL BATCH and design is not sufficient to avoid a likelihood of confusion.

In focusing on the dominant portion of Applicant's mark, we recognize, of course, that the marks ultimately must be compared in their entirety, including the additional wording and the design in Applicant's mark. However, when this comparison is made, we find that the marks are similar, albeit not identical, in sound, appearance and meaning. Because of the similarities between the marks in their entirety, the marks engender similar overall commercial impressions. *See, e.g., Bd. of Regents v. So. Illin. Miners, LLC*, 110 USPQ2d at 1189 (composite mark SOUTHERN ILLINOIS MINERS with design of a stylized coal miner holding a baseball bat found to engender the same commercial impression as MINERS for related goods); *In re Computer Systems Center Inc.*, 5 USPQ2d 1378, 1381 (TTAB 1987) (holding CSC ADVANCED BUSINESS SYSTEMS and CSC likely to cause confusion for related goods, noting that "the inclusion of 'ADVANCED BUSINESS SYSTEMS' as a feature of applicant's mark is not likely to help customers ... distinguish the source of each party's service."). Overall, we find that Applicant's and Registrant's marks are sufficiently similar that when used on goods that are identical in part would likely cause confusion. In view of the above, we find the first *DuPont* factor weighs in favor of a finding of likelihood of confusion.

D. Conditions of Sale

We turn finally to the fourth *DuPont* factor, under which we consider evidence pertaining to the “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567.

Applicant submits that “[c]onsumers of alcohol are particular in their choices, especially whiskey. Purchasers of premium alcoholic beverages tend to exercise a high degree of sophistication and care when making their purchasing decisions.”¹⁷ However, Applicant has failed to submit evidence to support this contention. *See In re Iolo Technologies LLC*, 95 USPQ2d 1498, 1501 (TTAB 2010) (“Applicant urges us to consider consumer sophistication as a factor. However, applicant has submitted no evidence that either its consumers or those of registrant would be sophisticated.”).

Neither Applicant’s nor Registrant’s goods are restricted to any particular price point or consumer. When the goods are unrestricted, it is assumed that they are sold to all purchasers, including those purchasers exercising only ordinary care, and at all price points. *Bongrain Int’l (Am.) Corp. v. Moquet Ltd.*, 230 USPQ 626, 628 (TTAB 1986) (“wines” in goods identification “include wines of all types and price ranges” sold through “all of the customary channels of trade for wine, including supermarkets, grocery stores, and gourmet shops” to “all potential purchasers thereof, including not only wine connoisseurs but also unsophisticated purchasers”). “We must therefore presume that [Registrant’s] and Applicant’s [goods] are offered to both sophisticated and unsophisticated consumers, and that their purchasing decisions ... range from

¹⁷ 10 TTABVUE 3.

thoughtful to hasty,” *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1039 (TTAB 2016), and we do not limit “our consideration of this factor to the more sophisticated purchasers within the classes of potential customers.” *Bd. of Regents v. So. Illin. Miners, LLC*, 110 USPQ2d at 1193. We must, in fact, consider the degree of care that would be exercised by the least sophisticated consumer. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (precedent requires consumer care for likelihood-of-confusion decision to be based “on the least sophisticated potential purchasers”). As stated, there is no evidence that the least sophisticated potential purchasers of whiskey exercise particular care in purchasing the goods. Accordingly, we find this *DuPont* factor is neutral.

III. Conclusion

We have considered all of the arguments and evidence of record, and all relevant *DuPont* factors. When we balance the *DuPont* factors, we conclude that confusion is likely to occur between Applicant’s mark and Registrant’s mark.



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