

This Opinion is Not a  
Precedent of the TTAB

Mailed: September 29, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Cooper Moon Coffee LLC*

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Serial No. 88064160

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Tyler B. Droste of Gutwein Law,  
for Cooper Moon Coffee LLC

Dezmona J. Mizelle-Howard, Trademark Examining Attorney, Law Office 110,  
Chris A.F. Pedersen, Managing Attorney.

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Before Bergsman, Wellington, and Dunn,  
Administrative Trademark Judges.

Opinion by Dunn, Administrative Trademark Judge:

Cooper Moon Coffee LLC (Applicant) seeks registration on the Principal Register of the mark BEAN BLOSSOM (in standard characters) for “coffee, but not including alcoholic beverages” in International Class 30.<sup>1</sup> The application includes a disclaimer of BEAN.

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<sup>1</sup> Application Serial No. 88064160 was filed on August 3, 2018, 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).

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the goods identified in the application, so resembles the registered mark BEANBLOSSOM (in standard characters) for "hard cider" in International Class 33,<sup>2</sup> on the Principal Register as to be likely to cause confusion, to cause mistake, or to deceive.

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 note that new evidence was attached Applicant's appeal brief. The record in the application should be complete prior to the filing of an appeal. Trademark Rule 2.142(d). However, because the Examining Attorney did not object to consideration of the new evidence, but addressed its merits in her brief, we will do the same. Trademark Trial and Appeal Board Manual of Procedure (TBMP) §1203.02(e) (2018).

We affirm the refusal to register.

#### **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, mistake, or deception. 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

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<sup>2</sup> Registration No. 4006126 issued August 2, 2011, Section 8 accepted.

confusion factors set forth in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *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 or services. *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. We must consider each relevant *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

#### **A. Similarity or Dissimilarity of the Marks**

The first *DuPont* factor requires consideration of "[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression." *DuPont*, 177 USPQ at 567. *See also Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). Applicant's standard character mark BEAN BLOSSOM and Registrant's standard character mark BEANBLOSSOM differ only in the absence or presence of a space. This is not a difference which generally affects the commercial impression of otherwise identical marks. *See Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1025 (TTAB 2009) ("the spaces that respondent places between the words [DESIGNED TO SELL] do not create a distinct commercial impression from petitioner's presentation of his mark as one word [DESIGNED2SELL]"); *Seaguard Corp. v. Seaward Int'l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) ("[T]he marks

'SEAGUARD' and 'SEA GUARD' are, in contemplation of law, identical [internal citation omitted]."); *In re Best W. Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) ("There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical"); *Stock Pot, Inc., v. Stockpot Rest., Inc.*, 220 USPQ 52, 52 (TTAB 1983), ("There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar."), *aff'd*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984).

We are not persuaded by Applicant's argument that the space between the terms BEAN and BLOSSOM in its mark creates a different cadence than when BEANBLOSSOM is shown as one word.<sup>3</sup> Both marks are comprised of ordinary words with a recognizable pronunciation, and Applicant offers no explanation why they would be pronounced differently. We also note that both marks appear in standard characters. This ability to employ any font, size, style, or color when using the mark could result in use of displays which increase or emphasize the similarities between the marks. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1814 (TTAB 2014). For example, Registrant may display its mark as follows: **BeanBlossom**.

The Examining Attorney also contends that the term BEAN BLOSSOM, whether written as one or two terms, is arbitrary as applied to either coffee or hard cider, and rare, seen only in Applicant's and Registrant's two marks on the entire Federal

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<sup>3</sup> 7 TTABVUE 12.

Register.<sup>4</sup> *In re Opus One Inc.*, 60 USPQ2d 1812, 1814 (TTAB 2001) (“the evidence of record pertaining to ‘the number and nature of similar marks in use on similar goods’ is insufficient to support any conclusion other than that registrant’s OPUS ONE mark for wine is a strong mark which is entitled to a broad scope of protection.”).

We are unconvinced by Applicant’s argument that the marks have different connotations because “Registrant’s Mark for BEANBLOSSUM primarily refers to geographic landmarks and areas that are proximate to the owner’s facilities.”<sup>5</sup> The registered mark is presumed to be inherently distinctive because it is registered on the Principal Register. *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) cited in *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517 (TTAB 2016). Collateral attacks on the registration are improper and given no consideration. *In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).<sup>6</sup>

We find that the registered mark BEANBLOSSOM is a strong mark entitled to a normal scope of protection; that Applicant’s use of a space in the mark BEAN

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<sup>4</sup> 9 TTABVUE 7; October 12, 2018 search summary.

<sup>5</sup> 7 TTABVUE 13.

<sup>6</sup> Moreover, the scant record evidence that there is a place named Beanblossom, Indiana falls short of demonstrating that the primary significance of the term BEANBLOSSOM to the public that purchases hard cider is to name a geographic location. Applicant submitted an undated page from Registrant’s website advertising its BEANBLOSSOM hard cider named for a “little unincorporated town” where residents “spectacularly create, in a time honored way, hard cider –carefully, beautifully, passionately ... Beanblossom style” and pages from Google maps showing that Registrant is located within 10 miles of Beanblossom Bottoms Nature Preserve and Beanblossom Creek. April 17, 2019 Response, TSDR 16-18. Applicant also submitted an undated Wikipedia entry confirming that there is a Beanblossom Creek, and an undated online article from Sycamore Land Trust, announcing that Beanblossom Bottoms was designated a Wetlands of Distinction. *Id.* at TSDR 10-13. The three references to BEANBLOSSOM as a geographic place make clear that it is, at most, an obscure geographic place.

BLOSSOM is a de minimis change; and that the marks are essentially identical. When compared in their entireties, the marks create the same visual and aural impression, have the same connotation, and so create the identical commercial impression.

This *DuPont* factor favors finding a likelihood of confusion.

**B. Similarity or Dissimilarity of the Goods, Trade Channels, Classes of Consumers, and Sales Conditions**

We next consider the second, third, and fourth *DuPont* factors, the similarity or dissimilarity of the services and established, likely-to-continue trade channels as identified in the application and the cited registration, and the conditions under which and buyers to whom sales are made.

In considering the second *DuPont* factor, we note that where almost identical marks are involved, as is the case here, the degree of similarity between the goods that is required to support a finding of likelihood of confusion declines. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) (“even when the goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source”). With nearly identical marks it is only necessary that there be a “viable relationship between the goods” to support a finding of likelihood of confusion. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009) (“it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such, that they would be encountered by the same persons in situations that would give rise, because of the marks, to a

mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods.”).

We make our determination regarding the similarities between Applicant’s goods and the registered goods based on how they are identified in the application and registration. *Octocom Sys. Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). While Applicant’s “coffee” and Registrant’s “hard cider” identify beverages, merely co-existing under the same broad category is insufficient to establish the necessary relationship between the goods. *In re W.W. Henry Co.*, 82 USPQ2d 1213, 1215 (TTAB 2007) (“to demonstrate that goods are related, it is not sufficient that a particular term may be found which may broadly describe the goods”); *see also, Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1310 (Fed. Cir. 2002) (stating, in dicta, that “a broad general market category is not a generally reliable test of relatedness of products”).

We acknowledge Applicant’s detailed Wikipedia articles which describe the different nature of the beverages.<sup>7</sup> More specifically, we note that hard cider is an alcoholic beverage, that alcoholic beverages include ethanol, one of the world’s most widely used drugs, and acts as a depressant; while coffee has high concentrations of caffeine, which is the world’s most widely consumed psychoactive drug, and acts as a stimulant.<sup>8</sup> We note that the articles submitted by Applicant also indicate that

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<sup>7</sup> 7 TTABVUE 34-57; April 17, 2019 Response, TSDR 27-31.

<sup>8</sup> 7 TTABVUE 34, 38.

alcoholic drinks are limited to use by adults by law, while coffee with its elevated caffeine content is only limited to use by adults by the recommendation of the American Academy of Pediatrics.<sup>9</sup> Both alcoholic beverages and coffee have historically been the subject of legal and religious restriction.<sup>10</sup> In comparison to all beverages, many of which do not include drugs, we find the fact that hard cider and coffee are beverages which include drugs creates a relationship between them which supports a finding of likelihood of confusion.

The record includes four third-party marks registered for use in connection with the same or similar goods as those of both Applicant and Registrant in this case<sup>11</sup>

Registered Mark	Pertinent Registered Goods
Reg. No. 5381909 UBC	Coffee, hard cider
Reg. No. 5713627 UNICORN FUEL	Alcoholic coffee-based beverage, hard cider
Reg. No. 4522852 Design mark comprised of Chinese characters	Coffee, hard cider
Reg. No. 86487055 GURKHATISE	Coffee, hard cider

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<sup>9</sup> 7 TTABVUE 34, 42, 52.

<sup>10</sup> 7 TTABVUE 34, 56, 57

<sup>11</sup> October 17, 2018 Office Action, TSDR 196, 205; April 9, 2019 Office Action, TSDR 20, 29-30.

While we list “coffee-based” beverages, because there is no evidence showing that “coffee-flavored” beverages include coffee (as opposed to artificial flavorings), we do not include registrations which list only beverages with coffee flavoring, and we do not include more than one registration from the same owner.



“Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source.” *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d*, 864 F.2d 149 (Fed. Cir. 1988) (unpublished table decision). *Accord In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1737 (TTAB 2018); *In re Sela Prods., LLC*, 107 USPQ2d 1580, 1586 (TTAB 2013); *In re G.B.I. Tile and Stone*, 92 USPQ2d 1366, 1369 (TTAB 2009); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993).

The record also includes articles from third party websites showing that coffee may be a component of hard cider:

The nitrocan carbonation (which has made big inroads in the beer world) should result in a smooth, velvety pour; Schilling says the coffee cider "pours like a stout," which we definitely want to see with our own eyes. Nitro-carbonated cold brew coffee itself has been A Thing for the past few years-cans are available from Cuvee Coffee' and Stumptown--but this is certainly the first nitro can of coffee cider we've seen, and its yet another example of cider borrowing from the beer playbook.

*Brace yourselves, the first cold-brew coffee nitro hard cider is coming*, DRAFTMAG.COM, December 2, 2019<sup>12</sup>

I was very excited to have the Coffee cider from Stem since earlier that year I had a Coffee cider from Number 6 Cider in Seattle, Washington. My company only hired me two months before that trip but that's when it occurred to me the possibilities of ciders. When we did our flight, we also had Stem's Coffee Cider which I remember asking my friends "can I finish that?"

*Hard Cider with Coffee (Batch 2) by Stem Ciders*, CIDERSAM.COM, August 14, 2017<sup>13</sup>

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<sup>12</sup> December 2, 2019 Office Action, TSDR 27.

<sup>13</sup> *Id.* at TSDR 32.

Although maybe best to save for later in the day (no judgment if not) coffee-infused ciders provide a caffeine kick and are hitting the market from a handful of fearless fermenters, each carrying a unique form, from a nitrogenated can to cold-brew-steeped sippers ...

*5 coffee-infused ciders to Put a Pep in Your Step*, CIDERCRAFTMAG.COM, September 26, 2016<sup>14</sup>

Applicant contends that “pairs of substantially identical marks for [Applicant’s goods] and for [the cited goods] on the Federal Trademark Register strongly suggested to the Board that businesses in these two industries believe that their respective goods are distinct enough that confusion between even identical marks is unlikely.”<sup>15</sup> However, Applicant did not submit pairs of registrations for the goods at issue (coffee and hard cider), but pairs of registrations for coffee and beer.<sup>16</sup> *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1637 (TTAB 2009) (“The third-party registrations do not support applicant's contention for two reasons. First, none of the registrations are for trailers per se.”). Because none of the pairs of registrations involve goods identical to those listed in both the subject application and the cited registration, we find the evidence irrelevant.

Neither the application nor the cited registration include any restrictions as to channels of trade, classes of purchasers, or conditions of sale. *In re Detroit Athletic Co.*, 128 USPQ2d at 1052 (“The third *DuPont* factor—like the second factor—must be evaluated with an eye toward the channels specified in the application and

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<sup>14</sup> *Id.* at TSDR 23-24.

<sup>15</sup> 7 TTABVUE 17.

<sup>16</sup> 7 TTABVUE 99-121.

registration, not those as they exist in the real world.”); *Octocom Sys., Inc. v. Hous. Comput. 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.”). The record includes evidence that both hard cider and coffee overlap in appealing to Millennial consumers, to those interested in locally-sourced beverages or the environmental impact of beverages:

While a variety of communication and marketing methods is always best practice, survey results indicate the majority (48 percent) of consumers are gaining knowledge about hard cider via festivals and only 28 percent via social media. While creating marketing information keep in mind the strong trend in cider to follow the craft beer industry with 41 percent of cider consumers most frequently choosing beer when drinking an alcoholic beverage. This trend also holds true to consumer preference for a local, apple based product following the craft beer trend, which places emphasis on ingredient quality and a tie to the agricultural roots of the product.

*Hard Cider Consumer and Producer Trends*, WINE & CRAFT BEVERAGE NEWS (April 22, 2016)<sup>17</sup>

Some numbers are, however, irrefutably positive. Four percent of legal drinkers cite cider as their boozy beverage of choice, compared to 1% a decade ago. Cider controls .4% of the alcoholic beverage category – a small but mighty number when you consider that it started at .06% a decade and a half ago. Eight hundred cideries operate in the United States today, more than double the number three years ago, and many are making major capital investments and expanding to new markets like, in the case of Oregon’s Reverend Nat’s Hard Cider, Europe. Baby Boomers and Millennials each drink about 1/3 of the cider consumed, with men and women drinking about the same.

*Hard Cider Sales Slip*, FORBES, February 28, 2018<sup>18</sup>

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<sup>17</sup> April 17, 2019 Response, TSDR 20-24.

<sup>18</sup> *Id.* at TSDR 25.

Between 2008 and 2016, past day consumption of gourmet coffee beverages soared from 13% to 36% among 10-24 year olds, and from 19% to 41% for those 25-39.

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Against this backdrop, for the first time in [National Coffee Distributing Trends] NCDT history, the prevalence of drip coffee brewers among past day consumers declined to only half of all coffee drinkers.

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As many marketers have realized, Millennials, whose purchasing power is growing (with about \$200 billion in purchasing power each year) are conscientious shoppers, and want to feel good about where they spend money. They prefer to support companies that reflect their own values on an organizational level, and products and services which add value to their lives. According to 2015 research from Nielsen, 66% of surveyed consumers say they will pay more for products and services that come from companies that are committed to positive social and environmental impact, up from approximately half from the previous year.

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Younger audiences are generally more open to experimenting with new beverages or preparation methods. This is reflected by the addition of three new beverages in the 2016 NCDT: the flat white, cold brew, and nitrogen-infused.

*What Are We Drinking? Understanding Coffee Consumption Trends*, NATIONAL COFFEE, March 19, 2016<sup>19</sup>

*See In re Country Oven, Inc.*, 2019 USPQ2d 443903, \*4-5 (TTAB 2019) (“Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods and services are used together or used by the same purchasers; advertisements showing that the relevant goods and services are advertised together or sold by the same manufacturer or dealer; or copies of use-based registrations of the same mark for both the applicant’s services and the goods listed in the cited registration.”).

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<sup>19</sup> 7 TTABVUE 70-73.

In view of the evidence that hard cider and coffee both include drugs and are best consumed by adults, that hard cider can include coffee and is registered under the same mark as coffee, that a segment of consumers for both products focus their purchasing decisions on locally-sourced beverages or the environmental impact of beverages, and because they share overlapping channels of trade and consumers, we find that these *DuPont* factors also weigh in favor of finding a likelihood of confusion.

### C. Conclusion

In conclusion, we have considered all of the arguments and evidence of record, and all relevant *DuPont* factors. Insofar as each of the *DuPont* factors discussed above all weigh in favor of finding a likelihood of confusion, we conclude that confusion is likely to occur between Applicant's marks BEAN BLOSSOM in standard characters for its coffee and Registrant's mark BEANBLOSSOM in standard characters for its hard cider.

## II. Decision

The refusal to register Applicant's mark is affirmed.