

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Graybeard Distillery, Inc.
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Serial No. 88182246
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Kelli A. Ovies of Womble Bond Dickinson (US) LLP, for Graybeard Distillery, Inc.

Sang Min (Sean) Lee, Trademark Examining Attorney, Law Office 111,
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Before Cataldo, Pologeorgis, and Johnson,
Administrative Trademark Judges.

Opinion by Johnson, Administrative Trademark Judge:

Graybeard Distillery, Inc. (“Applicant”) seeks registration on the Principal Register of the BEDLAM VODKA and design (“Applicant’s Mark”) shown below for “Vodka,” in International Class 33.¹

¹ Application Serial No. 88182246, filed on November 5, 2018 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and first use in commerce since at least as early as April 17, 2017. The mark is described as follows: “The mark consists of a two-headed bird with its wings outstretched and one head turned to the left and the other turned to the right, with the stylized word ‘BEDLAM’ across the wings and the stylized word ‘VODKA’ across the tail.” Color is not claimed as a feature of the mark. Applicant disclaims the exclusive right to use the word “VODKA.”



The Trademark Examining Attorney 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, as applied to the goods identified in the application, so resembles the registered mark BEDLAM!² and design (“Registered Mark” or “Registrant’s Mark”) shown below for “Beer,” in International Class 32, 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 resumed. The appeal has been fully briefed.³ We affirm the refusal to register.

² Registration No. 3940643 issued on April 5, 2011 and was renewed on July 1, 2021. The mark is described as follows: “The mark consists of the head of an orange bear with an orange crown and the orange word ‘BEDLAM!’ all outlined in yellow.” The colors orange and yellow are claimed as a feature of the mark.

³ Page references to the application record are to the United States Patent and Trademark Office’s (“USPTO” or “Office”) Trademark Status & Document Retrieval (TSDR) system. Citations in this opinion to the briefs and other docket entries refer to TTABVUE, the Board’s online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and

I. Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based 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 (CCPA 1973); *see also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905 (Fed. Cir. 2012); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). “In discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir. 2020) (citing *Dixie Rests.*, 41 USPQ2d at 1533).

There is no mechanical test for determining likelihood of confusion and “each case must be decided on its own facts.” *DuPont*, 177 USPQ at 567. However, in any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods or services. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus

any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

... on dispositive factors, such as similarity of the marks and relatedness of the goods.”) (citation omitted).

A. Relatedness of the Goods and Channels of Trade

With respect to the second *DuPont* factor, the relatedness of the goods, and the third *DuPont* factor, the similarity or dissimilarity of established, likely to continue channels of trade, we must make our determinations based on the goods as they are identified in the application and the cited registration. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Dixie Rests.*, 41 USPQ2d at 1534.

Applicant is correct that there is no *per se* rule that all alcoholic beverages are related (Applicant’s Brief, 10 TTABVUE 13); rather, we look to the record to make that determination.⁴ Here, to demonstrate relatedness of the goods, the Examining Attorney submitted printouts from twelve websites showing ten third-party producers offering both vodka and beer, not infrequently at combination

⁴ We note, however, that when supported by the evidence of record, the U.S. Court of Appeals for the Federal Circuit and this Board repeatedly have held various alcoholic beverages to be related. *See, e.g., In re Chatam Int’l*, 380 F.3d 1340, 71 USPQ2d 1944, 1947-48 (Fed. Cir. 2004) (“Indeed, the goods [tequila and beer or ale] often emanate from the same source because ‘both are alcoholic beverages that are marketed in many of the same channels of trade to many of the same consumers.’”) (quoting *Majestic Distilling*, 65 USPQ2d at 1204); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261 (TTAB 2011) (wine related to beer); *Somerset Distilling Inc. v. Speymalt Whiskey Distribs. Ltd.*, 14 USPQ2d 1539 (TTAB 1989) (Scotch whiskey, gin and vodka all closely related); *Bureau Nat’l Interprofessionnel Du Cognac v. Int’l Better Drinks Corp.*, 6 USPQ2d 1610 (TTAB 1988) (cola flavored liqueur related to brandy); *Monarch Wine Co., Inc., v. Hood River Distillers, Inc.*, 196 USPQ 855 (TTAB 1977) (whiskey related to wine).

brewery/distilleries. Some producers offer both vodka and beer under the same mark or house mark (Crown Valley, Dogfish, Rogue, Two Brothers, Brickway, and Round Barn), and some producers offer both vodka and beer, but under different marks (Square One, Grand River, McMenamins, and New Holland).⁵

Applicant asserts that vodka and beer are not related on this record because the Examining Attorney proffered evidence of only ten producers that offer both vodka and beer out of more than 7,000 breweries and 424 vodka distilleries in the United States as of 2018. 10 TTABVUE 14. Applicant further asserts that confusion is unlikely inasmuch as such producers display “a consistent design element and/or their word mark in a consistent manner of stylization” on product packaging, and the design elements of the composite marks at issue here are distinct. Applicant’s Reply Brief, 13 TTABVUE 2. However, we find the Examining Attorney’s evidence to be probative of the relatedness of the goods; consumers are likely to be exposed to beer and vodka offered for sale by the same source under the same house or word mark, *see, e.g., In re C.H. Hanson Co.*, 115 USPQ2d 1351, 1355-56 (TTAB 2015); *In re Davey*

⁵ The printouts from Square One (squareonebrewery.com), Crown Valley (crownvalleybrewery.com), and Grand River (grandriverbrewery.com) are attached to the February 9, 2019 Office Action, TSDR pp. 8-10, 11-14, and 15-21, respectively. The printouts from Dogfish (dogfish.com), Rogue (rogue.com), and Two Brothers (twobrothersbrewing.com) are attached to the September 25, 2020 Office Action, TSDR pp. 4-10, 11-18, and 19-39, respectively. The printouts from Brickway (drinkbrickway.com), McMenamins (mcmenamins.com), New Holland (newhollandbrew.com), and Round Barn (roundbarn.com) are attached to the April 13, 2021 Denial of Applicant’s Request for Reconsideration, TSDR pp. 5-9, 10-16, 17-23, and 24-38, respectively.

Prods. Pty Ltd., 92 USPQ2d 1198, 1203 (TTAB 2009), or in the alternative, by the same source with packaging featuring inconsistent design elements.⁶

Finally, consumers who are familiar with Registrant's Mark for "beer" and who then encounter Applicant's Mark for "vodka" may think Applicant's vodka is a product line extension of Registrant's beer. *See, e.g., Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, *7 (TTAB 2019) ("ROAD WARRIOR looks, sounds, and conveys the impression of being a line extension of WARRIOR"); *Joel Gott Wines LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1433 (TTAB 2013) ("Purchasers of opposer's GOTT and JOEL GOTT wines are likely to assume that applicant's goods, sold under the mark GOTT LIGHT and design, are merely a line extension of goods emanating from opposer"); *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069, 2073 (TTAB 1989) ("Those consumers who do recognize the differences in the [BRADOR and BRAS D'OR] marks may believe that applicant's mark is a variation of opposer's mark that opposer has adopted for use on a different product.").

As to channels of trade, absent "specific limitations," which are not present in the parties' respective identifications, we must assume that the identified goods move through all normal and usual channels of trade for such goods and that they are available to all normal potential purchasers of the goods. *i.am.symbolic*, 123 USPQ2d at 1750; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983). The trade channels for the goods identified in the application and registration would

⁶ *See* February 9, 2019 Office Action, TSDR pp. 8-10 (Square One) and 15-21(Grand River); April 13, 2021 Denial of Applicant's Request for Reconsideration, TSDR pp. 10-16 (McMenamins) and 17-23 (New Holland).

include breweries and combination brewery/vodka distilleries, as well as liquor stores and other retail establishments which sell both vodka and beer.

The relevant class of consumers for the identified goods also is the same, i.e., adult members of the general public. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, “we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods”); *see also In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Even though there is no evidence of record that Registrant offers vodka under its BEDLAM! composite design mark, the relatedness evidence from the twelve commercial websites of record confirms that “vodka” travels in some of the same channels of trade and is offered to the same classes of consumers as “beer.” *See In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012). Thus, the second and third *DuPont* factors favor a finding of likelihood of confusion.

B. The Similarity or Dissimilarity of the Marks

Next, we consider the *DuPont* factor relating to the similarity of the marks. In comparing the marks we must consider their appearance, sound, connotation and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Similarity as to any one of these factors may be sufficient to support a finding that the marks are confusingly similar. *See Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”); *In re Inn at St. John’s, LLC*, 126 USPQ2d

1742, 1746 (TTAB 2018) (“Similarity in any one of these elements may be sufficient to find the marks confusingly similar.”) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. Sept. 13, 2019).

“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.” *i.am.symbolic*, 123 USPQ2d at 1748 (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)).

The emphasis of our analysis must also focus on the recollection of the average purchaser, who normally retains a general, rather than specific, impression of trademarks. We remain mindful that “marks must be considered in light of the fallibility of memory and not on the basis of side-by-side comparison.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014). As discussed above, the average customer is an adult member of the general public. *See Stone Lion Capital Partners*, 110 USPQ2d 1163-64 (recognizing Board precedent requiring consideration of the “least sophisticated consumer in the class”).

Furthermore, when evaluating a composite mark consisting of words and a design, the literal elements are normally accorded greater weight because they are likely to make a greater impression upon purchasers, be remembered by them, and be used by them to refer to or request the goods and/or services. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *Viterra*, 101 USPQ2d at 1908). So even though we evaluate the similarities between Applicant’s Mark and the Registrant’s

Mark by considering them in their entirety, we consider the literal elements of the marks to be the dominant features, and accord greater weight to such portions, even if some words have been disclaimed.⁷ See *Viterra*, 101 USPQ2d at 1911 (“[T]he dominant portion of a composite word and design mark is the literal portion, even where the literal portion has been disclaimed.”) (citing *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ2d 390, 395 (Fed. Cir. 1983)). There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *Viterra*, 101 USPQ2d 1908; *Nat’l Data*, 224 USPQ at 751.


Applicant cites several fact-specific cases to support its contention that the marks as a whole are dissimilar in sound, appearance, connotation, and commercial impression. 10 TTABVUE 7-12; 13 TTABVUE 2-10. Applicant argues that the commercial impressions of the marks are readily distinguishable, primarily due to their design elements: Registrant’s “snarling” orange and yellow bear’s head design with “large, pointy teeth,” “fanciful horns,” and a crown is dominant, catching the viewer’s eye, while the sole literal element, “BEDLAM!” is much smaller than the bear’s head. 10 TTABVUE 12. Applicant further argues the marks are different in

⁷ It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations. See *Detroit Athletic*, 128 USPQ2d at 1050 (citing *Dixie Rests.*, 41 USPQ2d at 1533-34); *Cunningham*, 55 USPQ2d at 1846 (“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 Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”).

sound and appearance due to their respective design elements, the inclusion of the word “VODKA” in Applicant’s Mark, and the exclamation point in the literal element of the Registered Mark. Lastly, Applicant argues that “BEDLAM!” with the exclamation point should be spoken with force and emphasis, further distinguishing it from “BEDLAM,” featured without an exclamation point. 10 TTABVUE 12.


As to Applicant’s reliance on prior Federal Circuit and Board decisions, it is well established that each case must be assessed and decided on its own facts and record; the U.S. Patent and Trademark Office’s allowance of prior registrations is not binding on the Board, regardless of what past actions may have been taken by the Office. *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“The Board must decide each case on its own merits.”).



Considering Applicant’s Mark  , as a whole, the word “BEDLAM,” which appears in large, stylized capital letters across the wingspan of the two-headed bird, and the word “VODKA,” which is disclaimed, appears less prominently in squeezed capital letters across the bird’s tail. “BEDLAM” stands out as the most visually prominent literal element, conveying the strongest commercial impression. As noted above, “BEDLAM” is the part of the mark consumers will remember and use to call for the products.

By contrast, the word “VODKA” is far less noticeable, due to its smaller, squeezed font, and its placement on the tail, far below the bird’s wings.



Turning to the Registered Mark , as a whole, the word “BEDLAM!” which appears in large, stylized capital letters below the head of a bear, is positioned in such a way so as to draw the eye first to the word and then to the bear’s head design element. The “L” in “BEDLAM!” is connected to the bear’s head, serving to draw the viewer’s eye from the horizontal line segment of the “L,” up through the vertical line segment, and then to the bear’s head.

We acknowledge that there are differences in sound and appearance between the marks due to the additional word “VODKA” in Applicant’s Mark as well as different design elements in the marks. However, we find that the design portions of the marks are subordinate to the words in the respective marks. As noted above, greater weight is often given to the wording because it is the wording that purchasers use to refer to or request the goods or services. *See Viterra*, 101 USPQ2d at 1911. Specifically, the marks share a significant visual and phonetic similarity because of the common element, “BEDLAM,” which forms the dominant portion of each mark.

The difference in punctuation between the literal element of Applicant’s Mark, BEDLAM, and the literal element of Registrant’s Mark, BEDLAM!, is not enough to distinguish the marks. *See St. Helena Hosp.*, 113 USPQ2d at 1085 (TAKETEN and TAKE 10! engender similar commercial impressions despite addition of exclamation point); *Bond v. Taylor*, 119 USPQ2d 1049, 1056 (TTAB 2016) (BLACK MEN ROCK confusingly similar to BLACK GIRLS ROCK!); *cf. Mag Instrument Inc. v. Brinkmann*

Corp., 96 USPQ2d 1701, 1712 (TTAB 2010) (hyphen does not distinguish MAG-NUM from MAGNUM), *aff'd mem.*, ___ Fed. App'x ___, 2011 WL 5400095 (Fed. Cir. 2011); *In re Promo Ink*, 78 USPQ2d 1301, 1305 (TTAB 2006) (finding proposed mark merely descriptive Board stated punctuation mark in PARTY AT A DISCOUNT! does not significantly change the commercial impression of the mark); *In re Burlington Indus., Inc.*, 196 USPQ 718, 719 (TTAB 1979) (“[A]n exclamation point does not serve to identify the source of the goods.”).

In addition, “BEDLAM” has no recognized meaning as applied to vodka or beer, but it is defined as “a place or situation of noisy uproar and confusion,”⁸ creating a shared, distinctive meaning among Applicant’s and Registrant’s goods. Thus, BEDLAM is an arbitrary term entitled to broad scope of protection. *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004) (defining an arbitrary mark as a “known word used in an unexpected or uncommon way” and observing that such marks are typically strong); *see also Palm Bay Imps.*, 73 USPQ2d at 1692 (arbitrary terms are conceptually strong trademarks).

Together the garish red-orange color scheme, the bear’s razor-sharp teeth, and the exclamation point in Registrant’s Mark are reinforced by the definition, but as previously discussed, the shared literal word “BEDLAM” outweighs the different design elements, thereby resulting in a similar commercial impression. So we find it likely that prospective purchasers familiar with Registrant’s Mark for beer

⁸ Sep. 25, 2020 Office Action, TSDR p. 2.



mistakenly would understand that Applicant's vodka comes from a distillery connected with Registrant.

On balance, the basic similarity between the marks, which results from the presence of the prominent word "BEDLAM" in both, outweighs the dissimilarity which results from the addition of the generic term "vodka" in Applicant's Mark and the designs of both marks. Considering the marks in their entireties, they are sufficiently similar that the first *DuPont* factor weighs in favor of a likelihood of confusion finding.


II. Conclusion

Having considered all of the arguments and evidence relating to the relevant likelihood of confusion factors, we find that confusion is likely between Applicant's



Mark,  , and the Registered Mark,  , given the similarities between the literal portions of the marks, the relatedness of the goods, and the overlap in classes of purchasers and trade channels. We acknowledge that both marks have distinctive design elements, but those design elements are not enough to overcome a likelihood of confusion.



Decision: The Section 2(d) refusal to register Applicant's Mark,  , is affirmed.