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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Ex Parte Appeal - Serial No.	88209633
Appellant	R.S. Lipman Brewing Company, LLC
Applied for mark	CHICKEN SCRATCH
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Signature	/Jennifer E. Hoekel/
Date	07/05/2023

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR REVIEW/NOTICE OF APPEAL

Notice is hereby given that the petitioner(s)/appellant(s) listed below hereby appeal(s) the below-noted case to the United States Court of Appeals for the Federal Circuit.

Originating Tribunal (*Name of Agency, Board, Commission, Office, Bureau, or Court whose decision is being appealed*): USPTO Trademark Trial and Appeal Board

Case number being appealed: Serial No. 88209633

Case title being appealed: In re R.S. Lipman Brewing Company, LLC

Date of final decision or order being appealed: 05/03/2023

Date decision or order was received: 05/03/2023

I have attached a copy of the decision or order being appealed.

List all Petitioners/Appellants (List each party filing this appeal. Do not use “et al.” or other abbreviations. Attach continuation pages if necessary.)

R.S. Lipman Brewing Company, LLC

Date: 07/05/2023

Signature: /s/ Jennifer E. Hoekel

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This Opinion is Not a
Precedent of the TTAB

Mailed: May 3, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re R.S. Lipman Brewing Company, LLC
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Serial No. 88209633
—————

Timothy L. Capria, Keaton H. Osborne and Alexandra C. Lynn of Bradley Arant
Boult Cummings, LLP,
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Sharon A. Meier, Trademark Examining Attorney, Law Office 112,
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Before Adlin, Coggins and Hudis,
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

R.S. Lipman Brewing Company, LLC (“Applicant”), by assignment from Little
Harpeth Brewing, LLC,¹ seeks registration on the Principal Register of the standard
character mark CHICKEN SCRATCH for “beer” in International Class 32.²

¹ Assignment dated October 9, 2020, recorded on October 19, 2020 at Reel 007080, Frame 0586.

² Application Serial No. 88209633 was filed on November 28, 2018, under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), based upon Little Harpeth’s claim of first use of the mark anywhere and first use in commerce since at least as early as March 20, 2014.

The Trademark Examining Attorney refused registration under Trademark Act Section 2(d), 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 identical standard character mark CHICKEN SCRATCH, registered on the Principal Register for "restaurant services" in International Class 43,³ as to be likely to cause confusion, mistake or deception.

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

I. Likelihood of Confusion: Applicable Law and Analysis

Trademark Act Section 2(d) prohibits the registration of a mark that:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

Our analysis is based on all of the probative evidence of record. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*" – noting the factors to be considered). In making our determination, we consider each *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). Varying weights may be

³ Registration No. 4812467 was issued on September 15, 2015. A Declaration of Continuing Use under Trademark Act Section 8, 15 U.S.C. § 1058, has been accepted; a Declaration of Incontestability under Trademark Act Section 15, 15 U.S.C. § 1065, has been acknowledged.

assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp., 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) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source and to protect trademark owners from damage caused by the registration of similar marks for related goods or services that are likely to cause confusion. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

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, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”). We discuss below these factors, and the other *DuPont* factors for which there is evidence and argument.

A. Similarity or Dissimilarity of the Marks

1. Strength of the cited CHICKEN SCRATCH Mark

Before we evaluate the similarity or dissimilarity of the marks, we first consider the strength of the cited CHICKEN SCRATCH mark of U.S. Registration No.

4812467 (the “467 Registration”). The strength of Registrant’s mark affects the scope of protection to which it is entitled. Thus, we consider the conceptual strength of Registrant’s mark, based on the nature of the mark itself, and its commercial strength, based on marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength ...”). The commercial strength of the mark also may be affected by the number and nature of third-party uses of similar marks for similar goods. *DuPont*, 177 USPQ at 567.

To begin, we must presume that Registrant’s CHICKEN SCRATCH mark is inherently distinctive because it issued on the Principal Register without a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f). *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006).

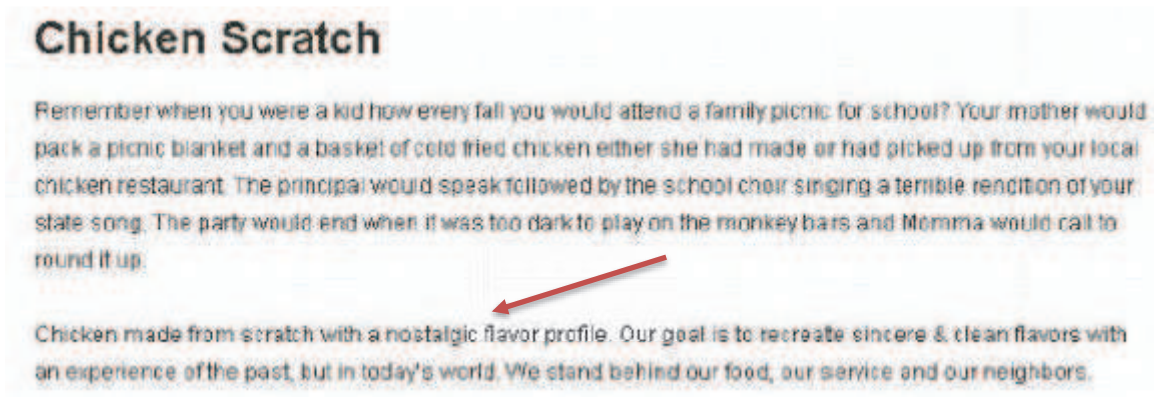
a. Conceptual Strength

Generally, “the strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak.” *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003). To determine its conceptual strength, we first consider the denotation of CHICKEN SCRATCH. Neither Applicant nor the Examining Attorney made of record any dictionary definitions of this term during prosecution. However, three different dictionaries define “Chicken Scratch” as “cramped or illegible handwriting.”⁴ Based on this definition, when CHICKEN

⁴ Definitions of “Chicken Scratch” from THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (<https://www.ahdictionary.com/word/search.html?q=chicken%20scratch>),

SCRATCH is used in connection with “restaurant services” it is an arbitrary term because it does not describe, nor suggest, any quality or characteristic of those goods. *Alberto-Culver Co. v. Helene Curtis Indus., Inc.*, 167 USPQ 365, 370 (TTAB 1970); see also *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 189 USPQ 759, 766 n.12 (2d Cir. 1976) (“When ... a common word ... is applied in an unfamiliar way, the use is called arbitrary.”).

However, Applicant cites the following passage from Registrant’s website, arguing that the term is weak because Registrant serves “chicken made from scratch”:⁵



VOCABULARY.COM (<https://www.vocabulary.com/dictionary/chicken%20scratch>), and FREE DICTIONARY (<http://www.freedictionary.org/?Query=chicken%20scratch>), all last visited May 1, 2023. 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). The Board also may take judicial notice of readily verifiable, widely-known references available via the Internet although not available in print. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

⁵ Applicant’s Reply Brief, 11 TTABVUE 4. Page references herein to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. References to the briefs on appeal refer to the Board’s TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

⁶ Capture from Registrant’s website, Office Action Response of August 27, 2019, at TSDR 12; Office Action Response of March 19, 2020, at TSDR 19; and Request for Reconsideration of October 13, 2020, at TSDR 10. This is all the same evidence, the probative value of which

From this one passage taken from Registrant’s website, Applicant argues “that Registrant deliberately chose the ... [CHICKEN SCRATCH] mark to describe that its restaurant offers chicken dishes made from scratch.”⁷ Therefore, says Applicant, Registrant’s mark “is a descriptive or, at best, [a] highly suggestive mark because it conveys information regarding an ingredient, quality, characteristic, purpose, and/or feature of Registrant’s restaurant services[,]” citing *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012).⁸

We disagree. “CHICKEN SCRATCH” (bad handwriting) has a different connotation and commercial impression than chicken “made from scratch” (meaning “to use only the most basic ingredients, with nothing premade”).⁹ In any event, under Trademark Act Section 7(b), 15 U.S.C. § 1057(b), Registrant’s CHICKEN SCRATCH mark is presumed to be at least suggestive, and thus not merely descriptive, for restaurant services. *In re Fiesta Palms, LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) (when mark is registered on the Principal Register, “we must assume that it is at least suggestive”).

Generally, “if a mark requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods [or services], then the mark is suggestive.”

does not increase with repetition; it needlessly increases the size of the record, and makes review of the record more difficult. See *In re Six Continents Ltd.*, 2022 USPQ2d 135, at *3 (TTAB 2022).

⁷ Applicant’s Reply Brief, 11 TTABVUE 4.

⁸ *Id.* at 4-5.

⁹ Definition of “made from scratch” taken from MERRIAM-WEBSTER online (<https://www.merriam-webster.com/words-at-play/from-scratch-word-history-origin>, last visited May 1, 2023)

In re MBNA Am. Bank, N.A., 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003). A highly suggestive mark or term is one that is relatively weak as a source identifier in connection with the services for which it is used. *See Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *7 (T.T.A.B. 2019) (“[T]he term ‘Road’ is highly suggestive of ... [Respondent’s] goods[,]” which are tires). By this definition, CHICKEN SCRATCH as a whole is not highly suggestive for “restaurant services,” as Applicant contends.

In contrast, a mark or term may be characterized as somewhat suggestive when it conveys some connotation as to the qualities or characteristics of the services. *See Orange Bang, Inc. v. Olé Mexican Foods, Inc.*, 116 USPQ2d 1102, 1119 (TTAB 2015) (“Plaintiff[s] ... mark OLÉ ... is only somewhat suggestive of the goods [beverages], conveying a slight laudatory connotation that these are goods that one would cheer for.”); *In re Big Wrangler Steak House, Inc.*, 230 USPQ 634, 636 (TTAB 1986) (“[S]teer head designs are somewhat suggestive of restaurants specializing in steak or other types of beef”).

Even if “chicken” arguably could be characterized as somewhat suggestive of Registrant’s restaurant services, this does not mean that CHICKEN SCRATCH as a whole is so weak as to be limited in its scope of protection. *See In re Carnation Co.*, 196 USPQ 716, 718 (TTAB 1977) (“The fact that the term ‘partner’ [in Applicant’s POTATO PARTNER mark] may be somewhat suggestive [for food topping] does not necessarily mean that a mark comprised in whole or in part of such term is a ‘weak’ mark entitled to but a limited scope of protection.”).

As a whole, CHICKEN SCRATCH is stronger as a source identifier for restaurant services than Applicant argues. While CHICKEN SCRATCH calls to mind chickens (by use of the word “chicken”), as noted above it also is a recognized term on its own with a separate meaning (bad handwriting). It takes a long stretch of a consumer’s imagination to say that CHICKEN SCRATCH calls to mind or suggests chicken entrees made from scratch. Thus as a whole CHICKEN SCRATCH has some suggestion of “chicken” because this term is contained within the mark, but inclusion of the term “scratch” in the mark makes it less suggestive of restaurant services. “A mark that is only somewhat suggestive is entitled to greater protection than a more highly suggestive mark.” *In re Thomas*, 79 USPQ2d 1021, 1027 n.12 (TTAB 2006); *see also, In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) (“the fact that a mark may be somewhat suggestive does not mean that it is a ‘weak’ mark entitled to a limited scope of protection”)

Applicant also argues that CHICKEN SCRATCH is conceptually weak based on “the existence of U.S. Registration No. 5,747,177 for CHICKEN SCRATCH (the ’177 Registration) for ‘Distilled spirits, excluding those sold in restaurants.’”¹⁰ According to Applicant, “at least two CHICKEN SCRATCH marks have been able to co-exist—one for alcoholic beverages on the one hand and one for restaurant services on the other—without consumer confusion. Accordingly, the [c]ited [CHICKEN SCRATCH] [m]ark is not entitled to broad protection”¹¹ We disagree that the existence of the

¹⁰ Applicant’s Reply Brief, 11 TTABVUE 3.

¹¹ Applicant’s Reply Brief, 11 TTABVUE 3-4. The CHICKEN SCRATCH mark and ’177 Registration therefor were cited against Applicant’s CHICKEN SCRATCH Application as a

third-party CHICKEN SCRATCH mark and '177 Registration therefor weaken the scope of the cited CHICKEN SCRATCH mark of the '467 Registration to the extent applicant professes.

Third-party registrations “may bear on conceptual weakness if a term is commonly registered for similar goods or services.” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017). However, unlike cases in which extensive evidence of third-party use and registration was found to be “powerful on its face” inasmuch as “extensive evidence of third-party use and registrations” was shown, *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015), this record presents only one registration, well short of the volume of evidence found convincing in *Juice Generation* and *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).

We therefore find that CHICKEN SCRATCH is an not a conceptually weak mark when used in connection with Registrant’s identified restaurant services. We therefore give this mark the normal scope of protection afforded a registered mark.

b. Commercial Strength

Third-party use evidence may be introduced “to show that customers have become so conditioned by a plethora of ... similar marks that customers have been educated

ground for refusal under Trademark Act Section 2(d). Office Action of September 19, 2019, at TSDR 3-5, 9-10. After Applicant made of record a consent to use, registration and co-existence from the owner of the '177 Registration, Request for Reconsideration of October 13, 2020, at TSDR 52-53, the Examining Attorney ultimately withdrew this reference as a ground for refusal. Office Action of June 19, 2021, at TSDR 4.

to distinguish between different [such] marks on the bases of minute distinctions.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693 (Fed. Cir. 2018) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005)). Third-party uses may bear on the commercial weakness of a mark, *Tao Licensing*, 125 USPQ2d at 1057, and may be “relevant to show that [such] a ... relatively weak [mark is] entitled to only a narrow scope of protection.” *Omaha Steaks*, 128 USPQ2d at 1693 (quoting *Palm Bay Imps.*, 73 USPQ2d at 1694).

Here, however, Applicant did not make of record any third-party uses of marks identical or similar to Registrant’s CHICKEN SCRATCH mark for similar goods “to show that [the CHICKEN SCRATCH] ... mark is relatively weak and entitled to only a narrow scope of protection.” *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1674 (TTAB 2018). We therefore find that the commercial strength of Registrant’s CHICKEN SCRATCH mark is a neutral factor on this appeal.

Furthermore, in an ex parte appeal such as this one, the owner of the cited registration is not a party, and the Examining Attorney was under no obligation to demonstrate consumers’ exposure to or recognition of the cited mark in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). So, the mark’s commercial strength, as usual, is treated as neutral. TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01(d)(ix) (2022).

**c. Strength of the cited CHICKEN SCRATCH Mark:
Summary**

In view of our findings above regarding conceptual and commercial strength, we thus afford Registrant's CHICKEN SCRATCH mark the typical scope of protection afforded a mark registered on the Principal Register pursuant to Trademark Act Section 7(b), 15 U.S.C. § 1057(b).

2. Comparison of the CHICKEN SCRATCH Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrant's marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1048 (Fed. Cir. 2018). Because Applicant's standard character CHICKEN SCRATCH mark and Registrant's standard character CHICKEN SCRATCH mark are identical,¹² both are likely to engender the same connotation and overall commercial impression when considered in connection with Applicant's and Registrant's respective goods. *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015), *aff'd*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).

Notwithstanding that Applicant's and Registrant's marks are identical, Applicant argues that, "when viewed in the context of the parties' respective goods and services, Registrant's Mark and Applicant's Mark have sufficiently different commercial

¹² Without belaboring the point, in its brief Applicant concedes "the [CHICKEN SCRATCH] marks are identical" and "share their literal elements". Applicant's Brief, 7 TTABVUE 11, 12.

impressions such that confusion is unlikely.”¹³ Specifically, Applicant contends that “Registrant’s ... CHICKEN SCRATCH [mark] is for restaurant services and, thus, conveys a strong commercial impression of a restaurant focused primarily on ‘chicken’ entrees made from ‘scratch.’”¹⁴ On the other hand, says Applicant:

Applicant’s Mark is a purposeful play on the ingredients used to brew Applicant’s pilsner beer—corn, barley, and grains—all commonly consumed by chickens. Indeed, chicken feed (or as it is more colloquially known, “chicken scratch”) generally consists of a mixture of corn, barley, and various grains. Therefore, Applicant’s Mark is a playful reference to actual “chicken scratch” and, thus, evokes commonality of some of the ingredients of Applicant’s beer and chicken feed). Registrant’s Mark has no such commercial impression.¹⁵

As we noted above in our discussion of the conceptual strength of Registrant’s mark, Applicant did not provide sufficient evidence that CHICKEN SCRATCH for restaurant services has the equivalent connotation to “chicken made from scratch” in the minds of consumers. Applicant provided no evidence regarding the above-argued commercial impression of CHICKEN SCRATCH to consumers when used in connection with Applicant’s goods (beer). Counsel’s arguments are not evidence, and we will not rely on them. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005) (“Attorney argument is no substitute for evidence.”)).

Even were we to accept Applicant’s arguments, we are left with (according to Applicant) Registrant’s CHICKEN SCRATCH mark being associated with chicken

¹³ Applicant’s Brief, 7 TTABVUE 10.

¹⁴ *Id.*

¹⁵ *Id.* at 10-11.

dishes and Applicant's CHICKEN SCRATCH mark being associated with the commonality of the ingredients of Applicant's beer and chicken feed. Thus, even according to Applicant, the respective marks have similar (or at least related) commercial impressions given their connection to "chicken."

Accordingly, the first *DuPont* factor regarding the similarity between the marks weighs strongly in favor of a finding of likelihood of confusion.

B. The Similarity or Dissimilarity of the Respective Goods and Channels of Trade

The second *DuPont* factor concerns the "similarity or dissimilarity and nature of the goods or services as described in an application or registration ...," and the third *DuPont* factor concerns the "similarity or dissimilarity of established, likely-to-continue trade channels." *DuPont*, 177 USPQ at 567; *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014).

1. Similarity of the Goods and Services

In making our determination regarding the similarity of the goods and services, we must look to the goods as identified in the appealed CHICKEN SCRATCH Application and the identified services in the cited CHICKEN SCRATCH Registration. *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("[T]he 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. Co. 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 [or services].”).

“It is sufficient that the respective goods [and services] are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods [and services] are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer.” *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). Moreover, “because the marks [here] are identical, the degree of similarity between the goods or services required for confusion to be likely declines.” *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *11 (TTAB 2020) (citing *Orange Bang, Inc. v. Olé Mexican Foods, Inc.*, 116 USPQ2d 1102, 1117 (TTAB 2015)).

For the reader’s convenience, we repeat here Applicant’s goods, which are “beer,” and Registrant’s services, which are “restaurant services.” Relying heavily on *In re Coors*, 68 USPQ2d at 1063, Applicant argues:

the relatedness of beverage products and restaurant services “may not be assumed.” (citation omitted) The mere “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.” (citation omitted). Instead, to establish likelihood of confusion, “the evidence of record must show ‘something more’ than that similar or even identical marks are used for [beverage] products and for restaurant services.” (citations omitted).¹⁶

¹⁶ Applicant’s Brief, 7 TTABVUE 12-13.

Because of the importance Applicant and the Examining Attorney place upon *In re Coors* to the resolution of this appeal,¹⁷ we set out below its findings and holding at length:

[T]he 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. Instead ..., to establish likelihood of confusion a party must show **something more** than that similar or even identical marks are used for food products and for restaurant services

* * *

In light of the requirement that “something more” be shown to establish the relatedness of food and restaurant products for purposes of demonstrating a likelihood of confusion, the Board’s finding that beer and restaurant services are related is not supported by substantial evidence. While the evidence produced by the examining attorney shows that some restaurants brew or serve their own private label beer, that evidence does not support the Board’s conclusion that consumers are likely to conclude that beer and restaurant services with similar marks emanate from the same source. Coors introduced evidence that there are about 1,450 brewpubs, microbreweries, and regional specialty breweries in the United States, while there are approximately 815,000 restaurants. There was no contrary evidence introduced on those points. That means that even if all brewpubs, microbreweries, and regional specialty breweries featured restaurant services, those establishments would constitute only about 18 one-hundredths of one percent of all restaurants, or fewer than one in 500. While there was evidence that some restaurants sell private label beer, that evidence did not suggest that such restaurants are numerous. And although the Board had before it a few registrations for both restaurant services and beer, the very small number of such dual use registrations does nothing to counter Coors’ showing that only a very small percentage of restaurants actually brew their own beer or sell house brands of beer; instead, the small number of such registrations suggests that it is quite uncommon for restaurants and beer to share the same trademark. Thus, the evidence before the Board indicates not that there is a substantial overlap between restaurant services and beer with respect to source, but rather that the degree of overlap between the sources of restaurant services

¹⁷ Arguments regarding the applicability of *In re Coors*: Applicant’s Brief, 7 TTABVUE 12-18; Examining Attorney’s Brief, 10 TTABVUE 8-10; Applicant’s Reply Brief, 11 TTABVUE 5-6.

and the sources of beer is **de minimis**. We therefore disagree with the Board's legal conclusion that Coors' beer and the registrant's restaurant services are sufficiently related to support a finding of a likelihood of confusion.

In re Coors, 68 USPQ2d at 1063-64 (internal citations and quote marks omitted, emphasis original).

Applicant and the Examining Attorney also point to the same precedential decisions, all decided before *In re Coors*, in which “something more” was established so as to demonstrate certain alcoholic beverages or food products were related to restaurant services for purposes of analyzing whether confusion was likely — with Applicant seeking to distinguish them and the Examining Attorney seeking to rely upon them:¹⁸

- *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001) (holding use of OPUS ONE for both wine and restaurant services was likely to cause confusion, where the evidence of record indicated that OPUS ONE was a strong and arbitrary mark, that it was common in the industry for restaurants to offer and sell private label wines named after the restaurant, and that the registrant's wines were served at applicant's restaurant).
- *In re Azteca Restaurant Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999) (holding use of AZTECA MEXICAN RESTAURANT for restaurant services and AZTECA (with and without a design) for Mexican food items was likely to cause confusion, where the AZTECA MEXICAN RESTAURANT mark itself indicated that the relevant restaurant services featured Mexican food and the evidence showed that the goods at issue are often principal items of entrees served by Mexican restaurants).
- *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988) (holding use of applied-for mark, MUCKY DUCK and duck design, for mustard, and registered mark, THE MUCKY DUCK and duck design, for restaurant services, likely to cause confusion, given that applicant's mark was highly similar to registrant's “unique and memorable” mark, that “mustard is ... a condiment which is commonly utilized in restaurants by their patrons,” and

¹⁸ Applicant's Brief, 7 TTABVUE 18-19; Examining Attorney's Brief, 10 TTABVUE 8.

that “restaurants sometimes market their house specialties, including items such as salad dressings, through retail outlets”).

Collectively, what these Board decisions teach us is that “[e]ach case must be decided on its own facts and the differences are often subtle ones.” *Jacobs v. Int’l Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982) (quoting *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973)).

However, as a matter of general guidance, we are reminded that there is no per se rule that food or beverage products and restaurant services are related. *Lloyd’s Food Prods., Inc. v. Eli’s, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2030 (Fed. Cir. 1993) (no per se rule about confusion, where similar marks are used in connection with restaurant services and food products); *see also In re Giovanni Food Co., Inc.*, 97 USPQ2d 1990, 1992 (TTAB 2011) (“[R]elatedness of food services and food items is not to be assumed[,] and ... evidence sufficient to meet the ‘something more’ standard is necessary.”) (citing *In re Coors*, 68 USPQ2d at 1063 (Fed. Cir. 2003)).

The Examining Attorney further cites to and discusses a considerable number of non-precedential Board decisions to “harmonize the nuances” of the *In re Coors* something-more standard, based on the records presented in each of those appeals.¹⁹ “[T]he Board discourages the citation to non-precedential opinions.” *DC Comics v. Cellular Nerd LLC*, 2022 USPQ2d 1249, at *7 (TTAB 2022). We generally decline to discuss non-precedential decisions at length, if at all. *See In re Datapipe, Inc.*, 111

¹⁹ Examining Attorney’s Brief citing and discussing non-precedential Board decisions, 10 TTABVUE 10-14.

USPQ2d 1330, 1337 (TTAB 2014). Thus, “[c]iting non[-]precedential cases should be done judiciously and rarely.” *DC Comics*, 2022 USPQ2d 1249, at *9.

Since *In re Coors* is the most factually analogous, and (importantly) binding, decision governing our resolution of this appeal, we compare the record discussed by the U.S. Court of Appeals for the Federal Circuit in that case to the record now before us. Although the registered and applied-for marks in *In re Coors* shared the term “BLUE MOON,” the Federal Circuit noted additional wording in the applicant’s mark as well as significant differences in the design and coloring elements between the two marks. Thus “the [Board’s] finding of similarity ... [was] a less important factor in establishing a likelihood of confusion than it would be if the two marks had been identical in design or nearly indistinguishable to a casual observer.” *In re Coors*, 68 USPQ2d at 1062. In contrast, the CHICKEN SCRATCH marks before us are identical, lessening the degree of similarity between the goods and services required for confusion to be likely. *DeVivo*, 2020 USPQ2d 10153, at *11.

In *In re Coors*, the term “Blue Moon” had been used on numerous occasions for restaurant services and also been used in numerous registered marks for food and beverages. Thus, the registered BLUE MOON mark “[could not] be regarded as a particularly strong mark that is entitled to broad protection.” *In re Coors*, 68 USPQ2d at 1063. Here, as noted above, the registered CHICKEN SCRATCH mark is not a conceptually weak mark when used in connection with Registrant’s identified services, and Applicant did not provide sufficient evidence to weaken its scope of protection.

Evidence as to the relatedness of goods and services 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 goods and the services listed in the cited registration. *In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014).

In *In re Coors*, the applicant presented evidence regarding the relatively small number of breweries in the United States selling beer and rendering restaurant services under the same mark, as compared to the number of United States restaurants as a whole at the time. *In re Coors*, 68 USPQ2d at 1063. Notably, *In re Coors* was decided 20 years ago, and in the present appeal no such comparative evidence was made of record. All that Applicant provided was a website page from the Brewers Association ("BA"),²⁰ a trade association for small and independent United States brewers, stating that, as of June 2019, BA counted 7,480 active small and independent operating U.S. breweries.

With the lack of comparative (brewery/restaurant vs. general restaurant) evidence as a backdrop to this appeal, the Examining Attorney made of record 21 active, non-duplicative, third-party, use-based registrations identifying beer and restaurant

²⁰ Brewers Association webpage, Office Action Response of March 19, 2020, at TSDR 21; duplicate evidence as Request for Reconsideration of October 13, 2020, at TSDR 51. This evidence, moreover, does not assist Applicant. At the BA webpage, it says: "The majority of growth [in craft brewer production in the past few years] continues to come from microbreweries, taprooms, and **brewpubs**, whereas the distribution landscape remains more challenging for regional craft brewers." (Emphasis added).

services in the identification of goods and services.²¹ In *In re Coors*, “the Board had before it [only] a few registrations for both restaurant services and beer ...” *Id.* at 1063. Although active third-party registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value to the extent that they serve to suggest that the goods and services listed therein are of a kind that may emanate from a single source under a single mark. See *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013).

In *In re Coors*, “the examining attorney cited evidence that brewpubs, which brew and serve their own beer, often provide restaurant services, and that some restaurants serve their own private label beer[.]” *In re Coors*, 68 USPQ2d at 1061, which, in view of the record as whole, the Federal Circuit characterized as relatively small in number and thus *de minimis*. *Id.* at 1063-64. In the present appeal, the Examining Attorney made of record 18 websites of third-party restaurants that serve their own beer under the same mark as their restaurant establishment; either by way of on-premise brewing or under private label production – such as BJ’s Restaurant Brewhouse, Capitol City Brewing Company, Dogfish Head Brewings & Eats, Square One Brewery, Caisal Beer & Spirits Co., OHSO Brewery + Distillery, Gordon Biersch

²¹ Third-party registrations, Office Action of September 19, 2019, at TSDR 14-22, 26-28; Office Action of April 14, 2020, at TSDR 7-9, 13-15, 21-23, 27-32; Office Action of June 19, 2021, at TSDR 10-27, 31-48. We did not consider any third-party registrations the Examining Attorney made of record more than once, nor did we consider any cancelled third-party registrations. A cancelled or expired registration is not evidence of any presently existing rights in the mark shown or that the registrant ever used the mark. *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *4 n.5 (TTAB 2023).

Brewery Restaurant, Three Notch'd Brewing Company, Bube's Brewery, and others.²²

In *In re Coors*, “the Board cited articles showing that brewpubs, which brew their own beer, often feature restaurant services as well.” *In re Coors*, 68 USPQ2d at 1063. The Federal Circuit did not individually discuss this evidence at length. In the present appeal, the Examining Attorney made of record nine articles and a book discussing “brewpubs” as a subclass of breweries that sell their own beer and render restaurant services on the same premises, under the same name.²³ For example:

- An article in ALL ABOUT BEER magazine discusses breweries that have added restaurants and banquet halls to their operations.
- An article in VINPAIR, titled “8 Of The Best Restaurants At Great American Craft Breweries” describes a “number of craft breweries serving up delicious eats” that “can satisfy both your thirst *and* your hunger.” The article lists eight breweries that operate on-site restaurant services.
- An article in CRAFTBEER.COM, titled “Beer & Food,” discusses the “increasing number of brewery restaurants across the country [that] are stepping up their kitchen game and offering unexpected-and expectedly good-cuisine options for pairing with their craft beers.”
- An article in MBS MINI BREWERY SYSTEM, titled “M.B.S. Restaurant Breweries,” says that “[r]estaurant breweries by M.B.S. can be delivered in several different combinations of technology. ... The brewing set makes a heart of every brewery, and it is particularly true as far as for [sic] restaurant mini-breweries. The brewing set, displayed in a visible spot for customers, makes half of the marketing of each successful restaurant brewery.”

²² Third-party beer-restaurant websites: Office Action of February 27, 2019, at TSDR 9-20; Office Action of September 19, 2019, at TSDR 29-97; Office Action of April 14, 2020, at TSDR 79-110; Office Action of November 10, 2020, at TSDR 60-97; Office Action of June 19, 2021, at TSDR 90-95, 108-19. We did not consider any third-party websites the Examining Attorney made of record more than once, nor did we consider any third-party websites for which insufficient pages were made of record to discern the beer-restaurant services relationship.

²³ Articles and book: Office Action of April 14, 2020, at TSDR 121-26; Office Action of June 19, 2021, at TSDR 49-89, 96-107.

- A book titled “On Tap: A Field Guide to North American Brewpubs and Craft Breweries, Including Restaurant Breweries, Cottage Breweries, and Brewery Inns,” on sale at Amazon.com, is described by one reviewer as “exactly the right thing to have if you travel and often find yourself looking for the best local brewpub. ... I’ve used this book now in something like ten North American cities and have found it to be immensely helpful, providing directions as well as an indication of what the place is like, what hours and foods to expect, and of course, what the beer's like.”
- An article in WASHINGTONIAN magazine, titled “9 DC-Area Breweries Where You Can Also Get a Good Meal,” is a review of nine Washington, D.C. area breweries that operate on-site restaurant services.
- The website of the Brewers Association defines a “brewpub” as “[a] restaurant-brewery that sells 25 percent or more of its beer on-site and operates significant food services. The beer is brewed primarily for sale in the restaurant and bar, and is often dispensed directly from the brewery’s storage tanks. Where allowed by law, brewpubs often sell beer to-go and/or distribute to off-site accounts.”
- An article in REONOMY.COM, titled “Craft Beers Brewing up a storm for Commercial Real Estate Opportunities,” referring to the same definition of “brewpub” as mentioned on the Brewers Association website, notes “the rising popularity of the craft beer industry represent[ing] an opportunity for property owners of both warehouses and retail spaces to repurpose their buildings into brewery plants. ... New brewery development deals for second hand retail space has included traditional restaurant/bars.”
- An article in BevSpot, titled “How to Start a Brewpub: 3 Things to Consider,” notes that “[b]rewpubs grew by double-digits in 2017, up 15% from 2016.”

Thus, the evidence provided in the present appeal shows a much closer relationship between beer and restaurant services as compared to the record described by the Federal Circuit 20 years ago in *In re Coors*. We find that the third-party registration, use and publications (articles and book) evidence provided by the Examining Attorney during prosecution shows “something more” than the fact that identical marks are used for beer and for restaurant services. Indeed the present record shows considerable growth of the “brewpub” market segment within the craft beer industry. This evidence reveals that today consumers are exposed to beer and

restaurant services marketed and sold under the same mark, and thus would likely assume that such goods and services originate from the same source.

Under the second *DuPont* factor, we find the Examining Attorney provided sufficient evidence to show the relatedness of Applicant's goods and Registrant's services, which also weighs in favor of a finding that confusion is likely.

2. Overlapping Channels of Trade and Potential Consumers

The third *DuPont* factor “considers [t]he similarity or dissimilarity of established, likely-to-continue trade channels.” *In re Detroit Athletic*, 128 USPQ2d at 1052 (quoting *DuPont*, 177 USPQ at 567). The trade channels factor considers the modalities and means (e.g., print, media, store aisles or shelves, or online) by which the respective services are marketed, see *In re Majestic Distilling*, 315 F.3d 1311, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003), sold or distributed in relative proximity, see *Kangol Ltd. v. Kangaroos U.S.A., Inc.*, 974 F.2d 161, 23 USPQ2d 1945, 1946 (Fed. Cir. 1992).

Neither the CHICKEN SCRATCH Application on appeal nor the cited CHICKEN SCRATCH registration contains any restrictions on the channels of trade or classes of purchasers for the identified goods or services. “In the absence of meaningful limitations in either the application or the cited registration[], [we may] ... properly presume[] that the goods [and services] travel through all usual channels of trade and are offered to all normal potential purchasers.” *In re i.am.symbolic*, 123 USPQ2d at 1750.

Captures of the brewpub websites made of record by the Examining Attorney demonstrate that Applicant's type of goods (beer) and Registrant's type of services (restaurant services) travel in overlapping trade channels, and are promoted for sale to the same general class of consumers. The third *DuPont* factor, related and overlapping trade channels and potential consumers, weighs in favor of a finding that confusion is likely.

II. Conclusion: Balancing the Likelihood of Confusion Factors

Balancing the *DuPont* factors for which there has been evidence and argument, *In re Charger Ventures LLC*, ___ F.4th ___, 2023 USPQ2d 451, at *7 (Fed. Cir. 2023), as a result of our findings regarding conceptual and commercial strength of Registrant's CHICKEN SCRATCH mark, we afford it the typical scope of protection given a mark registered on the Principal Register. Applicant's CHICKEN SCRATCH mark and the cited CHICKEN SCRATCH mark are identical, which weighs strongly in favor of a finding of likelihood of confusion.

The Examining Attorney's evidence shows "something more" than that beer is sold in restaurants, and thus Applicant's goods and Registrant's services are related, travel in overlapping trade channels, and are offered to overlapping target consumers. With the relatively recent growth of the "brewpub" market segment, consumers would expect that beer and restaurant services marketed and sold under the same mark would originate from the same source.

We therefore find and conclude that Applicant's CHICKEN SCRATCH mark, used in connection with Applicant's identified goods, so closely resembles the registered

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CHICKEN SCRATCH mark for the identified services as to be likely to cause confusion, mistake or deception in derogation of Trademark Act Section 2(d).

Decision

The refusal to register Applicant's CHICKEN SCRATCH mark is affirmed.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 2023 I caused a true and correct copy of the foregoing to be filed electronically via CM/ECF and served via courier through in-person delivery upon the following:

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United States Patent and Trademark Office
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