

This Opinion is not a
Precedent of the TTAB

Mailed: September 9, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re James Bay Distillers, Ltd.

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Serial No. 88510595

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H. Michael Drumm of Drumm Law LLC for James Bay Distillers, Ltd.

Harini Ganesh, Trademark Examining Attorney, Law Office 122,
Kevin Mittler, Managing Attorney.

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Before Wolfson, Shaw and Kuczma,
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

James Bay Distillers, Ltd. (“Applicant”) seeks registration on the Principal Register of the mark GALLOPING GOOSE, in standard characters, for “Distilled spirits,” in International Class 33.¹

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when used in connection with the

¹ Application Serial No. 88510595, filed on July 11, 2019, is based on Applicant’s allegation of a bona fide intent to use the mark in commerce, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

identified goods, so resembles the mark GALLOPING GOSE, also in standard characters, for “Beer,” in International Class 32, as to be likely to cause confusion, mistake or deception.²

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

I. Likelihood of confusion

Our determination under Section 2(d) of the Trademark Act is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. See, e.g., *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. See *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc.*

² Registration No. 5201664, issued May 9, 2107. GOSE is disclaimed apart from the mark as shown.

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 and differences in the marks.”); *see also 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 . . . on dispositive factors, such as similarity of the marks and relatedness of the goods’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)). We address each factor in turn.

A. The similarity or dissimilarity of the marks in their entireties in terms of appearance, sound, connotation and commercial impression

We first consider 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 Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); *accord Krim-Ko Corp. v. Coca-Cola Bottling 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.”) (citation omitted).

Our analysis must be on the recollection of the average alcoholic beverage purchaser who normally retains a general, rather than specific, impression of trademarks. Although we consider the marks in their entireties, “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular

feature of a mark. . . .” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant’s mark is GALLOPING GOOSE in standard characters. The cited mark is GALLOPING GOSE, also in standard characters. Both marks begin with the identical word GALLOPING, followed by GOOSE or GOSE, which are similar in appearance. The location of the term GALLOPING as the beginning of both marks reinforces the importance of the term. “[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.” *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). *See also In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding “the identity of the marks’ two initial words is particularly significant because consumers typically notice those words first”); *Palm Bay*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label). Thus, when considered in their entireties, both marks are similar in appearance.

Applicant points out that GOSE is a “type of beer named after the German town of Goslar along the river Gose, where the beer originated”³ and that it “is pronounced with two syllables, with the s making a “z” sound.”⁴ It is well settled that there is no “correct” pronunciation of a mark because it is difficult to predict how the public will pronounce a particular mark. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905,

³ Applicant’s Br., p. 4, 11 TTABVUE 7.

⁴ *Id.*

1912 (Fed. Cir. 2012). Accordingly, any slight difference in pronunciation between GALLOPING GOOSE and GALLOPING GOSE do not outweigh the overall significant similarities in the appearance of the marks.

Regarding commercial impression, Applicant argues that its mark “has a different meaning and connotation than the registered mark.”⁵ Applicant points out that its mark, GALLOPING GOOSE, “stems from a series of railcars derived from automobiles that operated [in Colorado] from the 1930’s to the 1950s”⁶ and “has nothing to do with gose beer.”⁷ In contrast, the Examining Attorney argues, that “the term “GOSE” in the registrant’s mark does not convey a different commercial impression from “GOOSE” because when compared as a whole, GALLOPING GOSE appears to be making a pun of the applicant’s mark, GALLOPING GOOSE.”⁸

Given the paucity of evidence relating to the likely overall commercial impression suggested by either mark, we fail to see how “GALLOPING GOSE appears to be making a pun of the applicant’s mark, GALLOPING GOOSE,” as suggested by the Examining Attorney. Rather, we agree with Applicant that the marks have somewhat different meanings and connotations, albeit only when closely scrutinized by consumers who are knowledgeable about both German beers and U.S. railroad history. Nevertheless, given that similarity in appearance alone may be sufficient to find the marks confusingly similar, *Davia*, 110 USPQ2d at 1812, any perceived

⁵ Applicant’s Br., p. 4, 11 TTABVUE 7.

⁶ *Id.*

⁷ *Id.*

⁸ Examining Attorney’s Br., 13 TTABVUE 7.

difference in connotation or commercial impression does not outweigh the strong similarity in appearance.

In sum, we find that when the marks are considered in their entirety, they are similar in appearance, and somewhat similar in sound. This *DuPont* factor weighs in favor of a finding of likelihood of confusion.

B. The nature and similarity or dissimilarity of the goods, the established, likely-to-continue trade channels, and the classes of purchasers.

The goods need not be identical or even competitive in order to find a likelihood of confusion. Rather, the question is whether the goods are marketed in a manner that “could give rise to the mistaken belief that [the] goods emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 227 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (“Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services.”).

“There is no per se rule that holds that all alcoholic beverages are related.” *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (citing *G. H. Mumm & Cie v. Desnoes & Geddes Ltd.*, 917 F.2d 1292, 16 USPQ2d 1635 (Fed. Cir. 1990) and *Nat’l Distillers and Chem. Corp. v. William Grant & Sons, Inc.*, 505 F.2d 719, 184 USPQ 34 (CCPA 1974)). Rather, it has been noted many times that each case is decided on its own facts, and each mark stands on its own merits. *See AMF Inc. v.*

Am. Leisure Prods., Inc., 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *In re Binion*, 93 USPQ2d 1531, 1536 (TTAB 2009).

Applicant's goods are "distilled spirits." Registrant's goods are "beer." The Examining Attorney has introduced the following excerpts from third-party websites showing that some breweries also produce and, in some cases, serve, distilled spirits, all under the same house mark:⁹

- Brickway: drinkbrickway.com, offering Brickway-branded beer and distilled spirits.
- Malibu: maliburumdrinks.com, offering Malibu-branded rum and beer.
- Square One Brewery and Distillery: squareonebrewery.com, offering its products made in their brewery and distillery, namely, beer and hand-crafted spirits.
- Bent Brewstillery: bentbrewstillery.com, offering Bent Brewstillery-branded beer and gin.
- The Depot: thedepotreno.com, offering its beers and spirits made at a craft brewery and distillery.
- Dogfish Head: dogfish.com, offering Dogfish Head-branded beers and rum, gin, and other distilled spirits, all offered in a tasting room.

⁹ October 7, 2019 Office Action, TSDR p. 4-7; April 29, 2020 Office Action, TSDR p. 2-13; November 24, 2020 Reconsideration Letter, TSDR p. 2-15.

- Ellison Brewery + Spirits: ellisonbrewing.com, offering its various beers and essential spirits, including whiskey, vodka, gin and rum, offered in Ellison's brewpub.
- Lexington Brewing & Distilling Co.: lexingtonbrewingco.com, offering its different types of beers and spirits, including bourbon, gin, and whiskey, at its brewery and distillery.
- New Holland Brewing: newhollandbrew.com, offering a variety of beer along with spirits such as bourbon, gin, vodka, and rum.
- Ranger Creek Brewing & Distilling: drinkrangercreek.com, stating that its "Brewstillery" provides "handcrafted beer and whiskey made with lots of love, attention, and Texas attitude."
- Maplewood: maplewoodbrew.com, offering its gin and malt whiskey distilled spirits, and a flagship line of beers.
- McMenamins: www.mcmenamins.com, offering its various handcrafted spirits such as brandy, whiskey, gin, and rum, along with standard ales made in its brewery.
- Rogue: www.rogue.com, offering its distilled spirits and beer products, stating that "our world class spirits are crafted from ingredients grown on Rogue Farms . . . distilled in 550-gallon copper Vendome still" and that it "brews a variety of ales and lagers" at their world headquarters.
- Round Barn: roundbarn.com, offering its spirits such as gin, bourbon, whiskey, agave, and various types of beers and ales.

- Southern Tier Distilling Co.: southerntierdistilling.com, offering its whiskey and vodka spirits, and Southern Tier Brewing Co.: stbcbeer.com, discussing its brewed stout.
- Two Brothers: twobrothersbrewing.com, offering its Amaro liqueur and artisan citrus vodka, and year-round beers.

We find the foregoing evidence of record demonstrates that it is not uncommon for beer and distilled spirits to be produced by a single establishment, and offered under the same mark to customers, including some products which are available for tasting onsite. These excerpts support a finding that beer and distilled spirits are different but related products that consumers encounter emanating from the same source and under the same mark. *See Hewlett-Packard*, 62 USPQ2d at 1004 (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to the relatedness analysis[.]”).

Citing *Jacobs v Int’l Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982), Applicant argues that “[w]hen presented with a potential overlap between a product and food services, in order to “establish the likelihood of confusion [the Office] must show something more than that similar or even identical marks are used for food products and for restaurant services.”¹⁰ We disagree that *Jacobs* is relevant authority in this case inasmuch as the goods at issue do not include “restaurant services,” as in *Jacobs*. Where, as here, the goods in question are well known or otherwise generally recognized as having a common source of origin, the burden of

¹⁰ Applicant’s Br., p. 10, 11 TTABVUE 13.

establishing relatedness is easier to satisfy. *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082 (Fed. Cir. 2014). Thus, “something more” is not required to establish that the goods are related for purposes of Section 2(d). Rather, is it enough that the goods “be related in the mind of the consuming public.” *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods”).

Applicant argues that the Examining Attorney’s evidence is insufficient because the majority of brewers do not produce distilled spirits:

[T]here are currently more than 7,000 breweries in the United States. . . . A couple of examples of breweries that also sell distilled spirits is statistically insignificant and fails to show that the goods are related in such a way as to lead to the likelihood of consumer confusion.¹¹

This argument is unpersuasive. “There is no requirement for goods to be found related that all or even a majority of the sources of one product must also be sources of the other product.” *In re G.B.I. Tile and Stone Inc.*, 92 USPQ2d 1366, 1370 (TTAB 2009). “Indeed, goods can be related even if there is *no evidence that any entity*, much less the applicant or registrant, is the source of both applicant’s and registrant’s goods.” *Id.* at 1371 (citing *Majestic Distilling*, 65 USPQ2d at 1204 (“Majestic has not shown that the PTO’s lack of evidence [of a manufacturer who both brews malt liquor and distills tequila] is relevant. Unless consumers are aware of the fact, if it is one, that no brewer also manufactures distilled spirits, that fact is not dispositive.”)).

¹¹ Applicant’s Br., p. 10, 11 TTABVUE 13.

Thus, the fact that many breweries do not distill spirits does not overcome the fact that some breweries do distill spirits, and sell their spirits under the same house mark as their beer. Here, the record shows that consumers are exposed to establishments that produce and sell both distilled spirits and beer under the same mark.

Applicant argues that the respective goods are not related and points to a number of third-party registrations for different marks purporting to show that “[t]he USPTO has allowed for co-existent registration in many cases for beer and distilled spirits which are identical or virtually indistinguishable from another.”¹² The thirty-three sets of third-party registrations introduced by Applicant include registrations owned by different entities in which the identifications of goods include various distilled spirits on the one hand and “beer” on the other hand. The following fifteen registrations are relevant:¹³

Marks for Spirits	Marks for Beer
White Birch (BIRCH disclaimed) Registration No. 3659495	White Birch Brewing (BREWING disclaimed) Registration No. 3967306
Alpine Blu Registration No. 3266457	Alpine Registration No. 3942821
Cristall Registration No. 2336937	Cristal Registration No. 2135330

¹² *Id.*

¹³ April 6, 2020 Response to Office Action, TSDR pp. 15-80. We have not considered cancelled registrations. A cancelled registration is only evidence that the registration issued and it does not carry any of the legal presumptions under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b). *In re Info. Builders, Inc.*, 2020 USPQ2d 10444, at *6 n.19 (TTAB 2020). In addition, one set of registrations is commonly owned. Rabbit Hole, Registration No. 4813586, and Rabbit Hole Brewing, Registration No. 4809845, are both owned by Rabbit Hole Spirits, LLC.

Marks for Spirits	Marks for Beer
Premium Vodka and design (PREMIUM VODKA disclaimed) (Supplemental Register) Registration No. 3199893	Premium Beer and design (PREMIUM BEER disclaimed) Registration No. 3241198
Polar Ice Registration No. 1538376	Polar and design Registration No. 1035093
Ocean Vodka (VODKA disclaimed) Registration No. 3266003	Oceanic and design Registration No. 3398353
Skorppio Registration No. 3957164	Scorpion Registration No. 2788115
Primicia Registration No. 3596560	Primo and design Registration No. 3727213
President Platinum Registration No. 3525886	Presidente and design Registration No. 1686632
Hangar 1 Registration No. 3991066	Hangar 24 Registration No. 3722062
Boker Registration No. 3894514	Boxer Registration No. 3851987
El Amo Registration No. 3326272	Alamo Registration No. 2196136
Ultimat Registration No. 3535807	Ultra Registration No. 3114367
Vodka With Attitude (VODKA disclaimed) Registration No. 3006289	Brewed With Attitude Registration No. 1729716
Americana and design Registration No. 3454378	American (registered under Section 2(f)) Registration No. 643376

An applicant may submit third-party registrations for the same or similar marks registered to different owners for the respective goods to show that the listed goods are of a type that may emanate from different sources. *See In re Thor Tech, Inc.*, 90 USPQ2d 1634, 16 (TTAB 2009) (“[A]pplicant has submitted copies of 13 sets of registrations for the same or similar marks for different types of trailers owned by different entities arguing, in essence, that the third-party registrations serve to

suggest that the listed goods are of a type which may emanate from different sources.”).

Applicant’s third-party-registration pairings of allegedly similar marks for distilled spirits and beer demonstrate a number of shortcomings. First, the third-party registrations are of limited probative value because, in most cases, the marks are not the same, or differ in sound, connotation and commercial impression. Many of the marks share only a single common word, whose strength is unknown, combined with designs or other descriptive wording. One mark is registered on the Supplemental Register, one under Section 2(f), and others disclaim the shared wording, which indicates weakness of the shared term. Because we have no evidence regarding the strength of the common words in these marks, it is impossible to gauge the relatedness of the respective goods. Simply put, we cannot conclude from these registrations that the respective goods in this case are not related because the pairs of third-party marks are simply too dissimilar or of unknown strength.

Second, the third-party registrations are entitled to little weight on the issue of confusing similarity because the registrations are “not evidence that the registered marks are actually in use or that the public is familiar with them.” *In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1167 n.5 (TTAB 2013) (citing *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)).

Third, although each case is decided on its own facts, both this Board and our reviewing court have held that beer is related to other alcoholic beverages. *See, e.g., Chatam Int’l*, 71 USPQ2d 1944 (Fed. Cir. 2004) (holding GASPAR’S ALE for beer and

ale likely to be confused with JOSE GASPAR GOLD for tequila); *Majestic Distilling*, 65 USPQ2d 1201 (holding RED BULL for tequila likely to be confused with RED BULL for malt liquor); *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069 (TTAB 1989) (holding BRAS D'OR for brandy likely to be confused with BRADOR for beer).

Lastly, prior decisions and actions of other examining attorneys in registering other marks have little evidentiary value and are not binding upon the USPTO or this Board. *Midwest Gaming*, 106 USPQ2d at 1165 n.3 (citing *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)).

Applicant also points out that the respective goods are in different classes. The fact that the USPTO classifies registrant's beer in Class 32 and Applicant's spirits in Class 33 does not establish that those goods are unrelated under Section 2(d). The determination concerning the proper classification of goods or services is a purely administrative determination unrelated to the determination of likelihood of confusion. *See In re Omega SA*, 494 F.3d 1362, 83 USPQ2d 1541, 1543 (Fed. Cir. 2007); *Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993); TRADEMARK MANUAL OF EXAMINING PROCEDURE section 1207.01(d)(v) (July 2021).

Considering the channels of trade and classes of purchasers, in the absence of any express limitations in the application or registration, we must presume that distilled spirits and beer travel through all normal channels of trade and are offered and sold to all of the usual customers for such goods, namely ordinary adult consumers of alcoholic beverages. These channels include liquor stores, bars and restaurants, and

(depending on the jurisdiction) supermarkets and convenience stores. *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016); *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1825-26 (TTAB 2015) (“[B]eer and other alcoholic beverages . . . are sold to consumers in many of the same channels of trade, including retail outlets such as liquor stores, supermarkets, convenience stores, restaurants, and bars.”). As shown by some of the web page excerpts cited above, distilled spirits and beer also are sold alongside each other in tasting rooms. Accordingly, we find that the goods of Applicant and registrant, though different, are nonetheless related, traveling in the same trade channels to the same classes of purchasers.

The *DuPont* factors regarding the nature and similarity or dissimilarity of the goods, the established, likely-to-continue trade channels, and the classes of purchasers weigh in favor of a finding of likelihood of confusion.

C. Other arguments

Citing to the website of the Alcohol and Tobacco Tax and Trade Bureau, Applicant argues that “registrant’s goods have apparently never been distributed. According to the TTB’s registry of Certification/Exemption of Label/Bottle Approvals (COLA), there has not been a label approval for ‘Galloping Gose’ during registrant’s claimed dates of use of the mark.”¹⁴ This argument is an improper collateral attack on the cited registration and may not be made during ex parte prosecution. *See In re Dixie Rests.*, 105 F.3d 1405, 1408, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997) (applicant’s

¹⁴ Applicant’s Br., p. 11, 11 TTABVUE 14.

“argument that DELTA is not actually used in connection with restaurant services amounts to a thinly-veiled collateral attack on the validity of the registration”); *In re Peebles Inc.*, 23 USPQ2d 1795, 1797 n.5 (TTAB 1992) (“[A]n attack on the validity of registrant’s registration . . . is not permitted in an ex parte appeal proceeding.”). A trademark registration on the Principal Register is prima facie evidence of the validity of the registration and the registrant’s exclusive right to use the mark in commerce in connection with the specified goods. 15 U.S.C. § 1057(b).

D. Balancing the factors

We have carefully considered all of the evidence and arguments of record relevant to the pertinent *DuPont* likelihood of confusion factors. Given the similarity of the marks, the relatedness of the goods and their channels of trade, and classes of consumers, we find that the Office has met its burden in showing a likelihood of confusion between Applicant’s mark and the cited mark.

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