

**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 Tangled Roots Beverage Company LLC*  
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Serial No. 88685983  
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Adam J. Fromm of Clark Hill PLC,  
for Tangled Roots Beverage Company LLC.

Jesse Nelman, Trademark Examining Attorney, Law Office 129,  
Pam Willis, Managing Attorney.

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Before Greenbaum, Lynch and Hudis,  
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Tangled Roots Beverage Company LLC (“Applicant”) seeks registration on the Principal Register of the mark DEVIL’S PAINT BOX IPA and Design, displayed as



for “beer,” in International Class 32.<sup>1</sup>

<sup>1</sup> Application Serial No. 88685983 was filed on November 8, 2019, based upon Applicant’s claim of first use anywhere and first use in commerce since at least as early as September 30, 2017, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). The application includes the following description of the mark: “The mark consists of the literal elements

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, when used on the identified goods, so resembles the registered mark PAINTBOX (in standard characters) for "alcoholic beverages except beers" in International Class 33 as to be likely to cause confusion, mistake or deception.<sup>2</sup>

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

#### I. Applicable Law – Likelihood of Confusion

Our determination under Trademark Act Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as "*DuPont* factors"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We 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); *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 [du Pont] factors for which there is record evidence but 'may focus . . . on dispositive factors, such as similarity of the

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'DEVIL'S PAINT BOX IPA' and a side profile illustration of a devil's head surrounded by a circle." ("Devil's head silhouette"). Color is not claimed as a feature of the mark. IPA is disclaimed.

<sup>2</sup> Registration No. 86656058 issued on February 5, 2019.

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

A. Relatedness of the Goods and Channels of Trade

With regard to the goods and channels of trade, we must make our determinations under these factors 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); *In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); see also *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014).

As an initial point, Applicant is correct that there is no *per se* rule that all alcoholic beverages are related (App. Br., 6 TTABVUE 12); rather, we look to the record to make that determination.<sup>3</sup> Here, the Examining Attorney submitted printouts from

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<sup>3</sup> We note, however, that 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., *Chatam Int’l*, 71 USPQ2d at 1947-48 (“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

five third-party commercial websites, including three combination brewery/distilleries (Bent Brewstillery, Brickway Brewery & Distillery, and Dogfish Head) and two breweries (Ellison Brewery & Spirits and New Holland Brewing Co.), showing in each instance use of the third-party's house mark on labels for various beer and spirits.<sup>4</sup> This evidence is probative of the relatedness of the goods because it demonstrates that consumers are likely to be exposed to beer and spirits offered for sale by the same source under the same mark. *See, e.g., In re C.H. Hanson Co.*, 115 USPQ2d 1351, 1355-56 (TTAB 2015); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009).

On this record, we find that Applicant's "beer" is sufficiently related to Registrant's "alcoholic beverages except beers," that when sold under a similar mark, confusion is likely.

As for channels of trade, absent "specific limitations," which are not present in these 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;

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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).

<sup>4</sup> The printouts from Bent Brewstillery ([www.bentbrewstillery.com](http://www.bentbrewstillery.com)) and Brickway Brewery & Distillery ([www.drinkbrickway.com](http://www.drinkbrickway.com)) are attached to the February 12, 2020 Office Action, at TSDR 4-16 and 17-27, respectively. The printouts from Dogfish Head ([www.dogfish.com](http://www.dogfish.com)), Ellison Brewery + Spirits (<http://ellisonbrewing.com>), and New Holland Brewing Co. ([www.newhollandbrew.com](http://www.newhollandbrew.com)) are attached to the August 28, 2020 Final Office Action, at TSDR 2-12, 13-19, and 20-32, respectively.

*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 include breweries and combination brewery/distilleries. The relevant class of consumers for the identified goods also is the same, i.e., 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”); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). The relatedness evidence from the five commercial websites listed above confirms that “beer” travels in some of the same channels of trade and is offered to the same classes of consumer as “alcoholic beverages except beer.” See *In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012).

The second and third *DuPont* factors favor a likelihood of confusion.

B. The similarity or dissimilarity of the marks

Despite the similarity in the identified goods and their trade channels, we find that confusion is not likely because of the crucial differences between the marks. In comparing the marks, “[t]he 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)). While we must consider the marks in their entirety, see *Palm Bay Imps.*

*Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), it is entirely appropriate to accord greater importance to the more distinctive elements in the marks. See *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).



Looking at Applicant's mark **DEVIL'S PAINT BOX IPA** as a whole, the literal terms DEVIL'S and IPA, which appear in a large bold font along two edges of a generally quadrangular shape, stand out as the most visually prominent elements, conveying the strongest commercial impression. The devil's head silhouette also is visually striking due to its relatively large size and its placement in the upper right corner of Applicant's mark, and it reinforces the memorability of the literal term DEVIL'S. By contrast, the term PAINT BOX is far less noticeable, due to its relatively thinner, fainter font, and its placement between the literal terms DEVIL'S and IPA, and the devil's head silhouette design.

We also find DEVIL'S prominent because, when consumers read in the customary direction of left-to-right, DEVIL'S comes first. As the first part of the mark when it is read or spoken, DEVIL'S is most noticeable. *Detroit Athletic Co.*, 128 USPQ2d at 1049 (finding "[t]he identity of the marks' two initial words is particularly significant because consumers typically notice those words first"); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (first part of a mark "is most likely to be impressed upon the mind of a purchaser and remembered."). In this case, the addition of the possessive DEVIL'S before PAINT BOX creates a very different

connotation and commercial impression than PAINTBOX alone. While the latter merely connotes an art supply, the former conjures up an image of Satan painting, reinforced by the design in Applicant's mark, thus differentiating the commercial impression of the marks. *See, e.g., Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1356-57 (Fed. Cir. 2004) (THE RITZ KIDS not confusingly similar to RITZ; the addition of "KIDS" serves to distinguish the marks); *In re P. Ferrero & C.S.p.A.*, 479 F.2d 1395, 178 USPQ 167, 169 (CCPA 1973) (TIC TAC TOE creates a different impression than TIC TAC).

While the incorporation of the entirety of one mark in another often increases the similarity between the marks, *see, e.g., Wella Corp. v. Cal. Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (finding CALIFORNIA CONCEPT and surfer design substantially similar to prior mark CONCEPT), we do not find that to be the case here.<sup>5</sup> Rather, when we consider the marks in their entireties, we find that the differences between Applicant's mark and Registrant's mark are substantial, and certainly sufficient to distinguish them. *See Nat'l Data Corp.*, 224 USPQ at 750-51 ("The basic principle in determining confusion between marks is that the marks must be compared in their entireties.... It follows from that principle that likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark."); *see also Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New*

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<sup>5</sup> There is no material difference between the terms PAINTBOX and PAINT BOX. *See, e.g., Seaguard Corp. v. Seaward Int'l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) ("[T]he marks 'SEAGUARD' and 'SEA GUARD' are, in contemplation of law, identical [internal citation omitted].").

*Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134-35 (Fed. Cir. 2015).

“No mechanical rule determines likelihood of confusion, and each case requires weighing of the facts and circumstances of the particular mark.” *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010). Here, Applicant’s mark and Registrant’s mark are so different that even when they are used on related goods, confusion is unlikely.

The *DuPont* factor of the similarity or dissimilarity of the marks therefore weighs heavily against likelihood of confusion. Moreover, we find this factor to be dispositive, in that even with the other relevant *DuPont* factors weighing in favor of finding likelihood of confusion, the dissimilarities of the marks simply outweigh the other factors. See *Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 119 USPQ2d 1286, 1290 (Fed. Cir. 2016) (“a single *du Pont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks”); *Odom’s Tenn. Pride Sausage, Inc. v. FF Acquisition, LLC*, 600 F.3d 1343, 93 USPQ2d 2030, 2032 (Fed. Cir. 2010) (“[E]ven if all other relevant *DuPont* factors were considered in [opposer’s] favor, as the board stated, the dissimilarity of the marks was a sufficient basis to conclude that no confusion was likely.”); *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1460 (Fed. Cir. 1998) (“[O]ne *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the mark.”); *Kellogg Co. v. Pack’em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142,



1144-45 (Fed. Cir. 1991) (“We know of no reason why, in a particular case, a single *duPont* factor may not be dispositive,” holding that “substantial and undisputed differences” between two competing marks justified a conclusion of no likelihood of confusion); *Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 9 USPQ2d 1736, 1739 (Fed. Cir. 1989) (agreeing with the Board that the “more important fact for resolving the issue of likelihood of confusion in this case is the dissimilarity in commercial impression between the marks”).

## II. Conclusion

Having considered all the evidence and arguments bearing on the relevant *DuPont* factors, we find that although the goods are related and move through some of the same channels of trade to the same classes of purchasers, confusion is not likely due to the substantial and significant differences between the marks.



**Decision:** The refusal to register Applicant’s mark **DEVIL'S PAINT BOX IPA** under Section 2(d) is reversed.