

This Opinion is not a
Precedent of the TTAB

Mailed: May 26, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re P&P Imports LLC
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Serial No. 88915014
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Siamak S. Hefazi Esq., for P&P Imports LLC.

Pauline Ha, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

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Before Shaw, Goodman and Johnson,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

P&P Imports LLC (“Applicant”) seeks registration on the Principal Register of the mark BREWSKI (in standard characters) for “Equipment sold as a unit for playing drinking games comprised of an apparatus for holding multiple cups” in International Class 28.¹

¹ Application Serial No. 88915014 was filed on May 13, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of January 29, 2019 as its first use anywhere date and April 15, 2020 as its first use in commerce date.

Page references to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal

The Trademark Examining Attorney refused registration of Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on likelihood of confusion with the registered mark BREWSKI BROTHERS (in standard characters, "brothers" disclaimed) for the following goods: "Sport balls" in International Class 28.² The Examining Attorney also refused registration for failure to comply with an identification requirement relating to goods in International Class 21.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed. After the case was fully briefed, Applicant sought remand to delete the Class 21 goods. The case was remanded to the Examining Attorney who accepted the amendment and withdrew the requirement for an amended Class 21 identification. The Examining Attorney maintained the Section 2(d) refusal and the appeal resumed without the need for additional briefing.

We affirm the refusal to register.

I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary issue.

The Examining Attorney has objected to Exhibits A and B attached to Applicant's brief, consisting of plain copies of third-party registrations and Amazon web pages showing results of a search for "sports balls."

refer to the Board's TTABVUE docket system. Applicant's brief is at 6 TTABVUE and the reply brief at 9 TTABVUE; the Examining Attorney's brief is at 8 TTABVUE.

² Registration No. 5549894 issued August 28, 2018.

Some of these third-party registrations (SOLO athletic gear (Reg. No. 5003715), SOLO cups (Reg. No. 0922120), WILSON sport balls (Reg. No. 3548830), DONNA WILSON cups (Reg. No. 5778983), PING PONG balls (Reg. No. 0294408) and PING mugs (Reg. No. 2909187)) were listed in Applicant's December 3, 2020 Response to Office Action. The other registrations (third-party BREWSKI or BREWSKI composite registrations) were listed in Applicant's June 28, 2021 Request for Reconsideration.

Applicant argues that the Examining Attorney waived the objection to the registrations listed in the December 3, 2020 Response to Office Action. 9 TTABVUE 3, 6 TTABVUE 19-21.

We agree that the Examining Attorney waived the objection by failing to raise it in the December 28, 2020 Office Action. Therefore, we consider the list for whatever probative value it may have. *In re Dist. of Columbia*, 101 USPQ2d 1588, 1592 n.5 (TTAB 2012). However, the Examining Attorney did object to the list of BREWSKI and BREWSKI composite registrations provided by Applicant on reconsideration, and advised Applicant of the proper procedures for submitting third-party registrations. December 28, 2020 Office Action at TSDR 1. *See In re Jump Designs, LLC*, 80 USPQ2d 1370, 1372 (TTAB 2006) (submission of list of registrations insufficient to make the registrations of record). Therefore, we find no waiver as to this particular list. Thus, the list of BREWSKI and BREWSKI composite registrations has not been considered.

In addition, the Examining Attorney's objection to the submission of copies of third-party registrations and Amazon website evidence attached to the brief is

sustained. *See* Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d) (The evidentiary record in an application should be complete prior to the filing of an ex parte appeal to the Board.).

Applicant could have made the copies of the third-party registrations and Amazon website evidence properly of record with its request for remand but failed to do so. Thus, the copies of third-party registrations and website evidence are untimely. *See In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018) (evidence “submitted with Applicant’s appeal brief that Applicant did not previously submit during prosecution is untimely and will not be considered.”), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); *In re Nationwide Indus. Inc.*, 6 USPQ2d 1882, 1884 n.5 (TTAB 1988) (third-party registration evidence untimely because it was filed with the appeal brief and was not the subject of a request for remand). Therefore, we have not considered the copies of registrations and Amazon web pages attached to Applicant’s brief.

II. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or to deceive. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which

there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

In every Section 2(d) case, two key factors are the similarity or dissimilarity of the marks and the goods or services. *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.”). These factors and others are discussed below.

A. Strength of the mark

We address Applicant’s argument that the cited mark is weak.

The cited mark issued on the Principal Register with a disclaimer of “brothers” and without a showing of acquired distinctiveness in part under Section 2(f) of the Trademark Act as to the term BREWSKI. Word marks that are arbitrary, fanciful, or suggestive are “held to be inherently distinctive.” *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000); *In re Highlights for Children, Inc.*, 118 USPQ2d 1268, 1275 (TTAB 2016) (there is no inherent or acquired distinctiveness in a disclaimed term in a registered mark). We find that BREWSKI, the slang term for beer, is suggestive of goods used in connection with beer.³

³ Brewski is “slang for beer.” MERRIAM-WEBSTER DICTIONARY, (<https://www.merriam-webster.com/dictionary/brewski>) (accessed May 19, 2022). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *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).

If a term is commonly registered or used for similar goods or services, third-party “[u]se evidence may reflect commercial weakness, while third-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness.” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) (citing *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976) (even if “there is no evidence of actual use” of third-party registrations, such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”). During prosecution, Applicant submitted no evidence of third party use to show commercial weakness.

Applicant argues that the granting of BREWSKI formative registrations by the Office for a variety of goods supports “granting its application”⁴ as it shows that similar marks issued when the goods are dissimilar or highly dissimilar. 6 TTABVUE 15-17; 9 TTABVUE 8.

However, as already explained, we have not considered the list of BREWSKI or BREWSKI composite registrations or copies of these third-party registrations attached to Applicant’s brief. In any event, the existence of various BREWSKI marks co-existing on the Principal Register provides no basis for finding that BREWSKI and BREWSKI BROTHERS can coexist without confusion. Thus, even in a situation

⁴ Applicant mentions nine registrations, that range from food and beer to clothing, and specifically discusses two of these registrations that cover food goods. 6 TTABVUE 15-16 and nn.2. and 3. While we have not considered the list of BREWSKI and BREWSKI composite registrations, we note that registrations for goods different from a registrant’s are generally not persuasive as to whether a mark is conceptually weak. *Cf. In re Ox-Yoke Originals, Inc.*, 222 USPQ 352, 354 (TTAB 1983) (in connection with a descriptiveness refusal of the mark GI, the Board found registrations incorporating the letters “G” and “I” for a variety of goods different from Applicant’s goods not persuasive).

where prior registrations have some characteristics similar to an applicant's, the USPTO's allowance of such prior registrations does not bind the Board because each case must be decided on its own merits. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

B. Similarity or Dissimilarity of the Marks

We now turn to the first *DuPont* factor, which requires us to determine the similarity or dissimilarity of the marks when viewed in their entireties in terms of appearance, sound, connotation and overall commercial impression. *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's*, 126 USPQ2d at 1746 (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

Under the first *DuPont* factor, "[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." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). Moreover, the emphasis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1645 (TTAB 2009), (citing *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975)). Disclaimed matter is typically less significant or less dominant when comparing marks. *See Citigroup Inc. v. Capital*

City Bank Grp. Inc., 637 F.3d 1344, 98 USPQ2d 1253, 1257 (Fed. Cir. 2011) (when a mark consists of two or more words, some of which are disclaimed, the word not disclaimed is generally regarded as the dominant or critical term).

Applicant's mark is BREWSKI and Registrant's mark is BREWSKI BROTHERS ("brothers" disclaimed). Both marks are in standard characters and are not limited to any particular font, size, style, or color. *See Citigroup*, 98 USPQ2d at 1256 (citing Trademark Rule 2.52, 37 C.F.R. § 2.52).

Applicant contends that the Examining Attorney erred in its analysis of the similarity of the marks by failing to consider Registrant's mark as a whole. 6 TTABVUE 13-14. Applicant argues that the Examining Attorney ignores the alliteration in Registrant's mark, also arguing that the term "brothers" is the dominant term and entitled to more weight because it is not descriptive of Registrant's goods. 6 TTABVUE 14, 18. Applicant submits that "brothers" in Registrant's mark does not refer to a familial entity since Registrant is a corporation, and the Examining Attorney has not established that "brothers" in Registrant's mark is reflective of a corporate business entity. 9 TTABVUE 19. Applicant clarifies in its reply that its position is not that a corporation cannot be composed of brothers but that the Office has not established that this specific corporation (Registrant) is composed of brothers. 9 TTABVUE 5-6. Applicant also points out that "brewski" in Registrant's mark is used as an adjective, while "brewski" in Applicant's mark is used as a noun. 6 TTABVUE 14. Applicant submits that the marks have different

commercial impressions, especially since “brothers” is not a descriptive term. 6
TTABVUE 18, 9 TTABVUE 4.

We find that BREWSKI is the dominant term in Registrant’s mark due to the disclaimed term BROTHERS, which acts as a familial entity designation. The addition of BROTHERS does not serve to distinguish the mark, and has no source indicating significance. *See* Trademark Manual Examining Procedure Section 1213.03(d) (July 2021) (requiring disclaimers of term for the familial business structure of an entity). *See, e.g., In re Taylor & Francis [Publishers] Inc.*, 55 USPQ2d 1213, 1215 (TTAB 2000) (“PRESS” as applied to printing or publishing establishment, “is in the nature of a generic entity designation which is incapable of serving a source-indicating function”). BREWSKI, as the first word in Registrant’s mark is most likely to be impressed upon the mind of the purchaser and to later be remembered. *See Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[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.”).

Although Applicant argues that BROTHERS is the dominant term in Registrant’s mark, we are not persuaded. There is nothing unique or arbitrary about the use of the term BROTHERS in the mark, and Applicant does not point to any other possible meaning of the term BROTHERS in the context of the mark as a whole or in view of the goods. Prospective purchasers viewing the mark in connection with the identified goods will perceive the term BROTHERS as indicating the familial status of a business entity. It is simply immaterial that Registrant’s legal status is actually a

corporation, and given the disclaimer of BROTHERS, the Examining Attorney correctly afforded more weight to the term BREWSKI.

We find that Applicant's and Registrant's marks clearly share similarity in sound, appearance, meaning and commercial impression. They both contain the term BREWSKI which is the only word in Applicant's mark and the first word in Registrant's mark. The additional word BROTHERS in Registrant's mark, a designation indicating familial status of an entity, does not significantly change the appearance, pronunciation, meaning, or commercial impression of Registrant's mark. *See e.g., In re Patent & Trademark Servs. Inc.*, 49 USPQ2d 1537, 1539-40 (TTAB 1998) (“[T]he term ‘Inc.’ in applicant’s mark does not serve to identify the source of applicant’s services but rather merely indicates the type of entity which performs the services, and thus has no service mark significance.”). Also, there is no evidence that consumers would focus on the cadence or the alliteration in Registrant's mark such that the repetition of the letters “BR” would alter the commercial impression created by the mark and diminish the similarity between Applicant and Registrant's mark.

Considering the marks in their entireties, we find that the marks are overall very similar. This *DuPont* factor weighs in favor of a finding of likelihood of confusion.

C. Similarity or Dissimilarity of the Goods

We next consider the second *DuPont* factor, “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *DuPont*, 177 USPQ at 567. *See also Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-63 (Fed. Cir. 2014).

The goods or services need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that the goods [or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). See also *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

Goods that are neither used together nor related to one another in kind may still “be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis.” *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1356 (Fed. Cir. 2004) (quoting *Recot*, 54 USPQ2d at 1898 (comparing FRITO-LAY for snack foods to FIDO LAY for dog treats)). “The issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods.” *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012). See also *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1738-39 (TTAB 2018) (citations omitted) (the standard is not confusion as to products or whether “consumers are able to distinguish Applicant’s goods from the goods in the cited registration” but whether consumers are able to distinguish the source of the goods).

Applicant's goods are "Equipment sold as a unit for playing drinking games comprised of an apparatus for holding multiple cups" and Registrant's goods are "sport balls."

The Examining Attorney argues that the evidence of record establishes that the same entity commonly manufactures, produces, or provides drinking game equipment and sport balls and markets the goods under the same mark. 8 TTABVUE 10; December 28, 2020 Office Action at TSDR 2-27 and the July 28, 2021 Denial of Reconsideration at TSDR 2-11.

Applicant submits that Applicant's and Registrant's goods are significantly dissimilar. 6 TTABVUE 6. Applicant argues that the scope of Registrant's goods are "all types of sport balls" which would be "used for sports where a ball is essential," but not drinking games. 6 TTABVUE 12. Applicant states that its goods are a connected drinking apparatus with cups, for use in connection with drinking games, which allows the users to drink in unison. 6 TTABVUE 12. Applicant states that "no ball of any kind can be used with Applicant's goods" nor are balls sold or marketed with Applicant's goods. 6 TTABVUE 12. Applicant submits that "drinking ware including an apparatus for holding multiple cups is unrelated as indisputably distinct from sports balls" and weighs against a finding of likelihood of confusion. 6 TTABVUE 12. Applicant also argues that the Examining Attorney did not meet her burden of proof to establish relatedness, improperly relying on extrinsic third-party evidence

and expansion of trade arguments, rather than looking to the identification of goods.⁵
6 TTABVUE 10-11.

To support relatedness, the Examining Attorney submitted third-party website evidence from Sports Ridge (sportsridge.com), Bed Bath and Beyond (bedbathandbeyond.com), Big Lots (biglots.com), Rock Bottom Golf (rockbottomgolf.com), Seasons Dollar and Party Superstore (seasonsofamerica.com), Uncommon Goods, (uncommongoods.com), True Brands (truebrands.com), Assholes Live Forever (lindafinegold.com), Academy (academy.com), Lowes (lowes.com), Macy's (macys.com), Bar Products.com (barproducts.com), BPong, (bpong.com), Get Pong (getpong.com), Party City (partycity.com), Pong University.com (ponguniversity.com), Top End Sports (topendsports.com), Spencers (spencersonline.com), Uber Pong (uberpong.com), and Amazon (amazon.com). June 29, 2020 Office Action at TSDR 5, 7-16; December 28, 2020 Office Action at TSDR 2-27; and July 28, 2021 Denial of Reconsideration at TSDR 2-11.

Although Applicant criticizes the Examining Attorney's website evidence, evidence of relatedness may include Internet web pages showing that goods are advertised together or sold by the same manufacturer or dealer. *See, e.g., In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (crediting relatedness evidence that third parties use the same mark for the goods and services

⁵ Applicant also argues that the Examining Attorney is required to provide evidence of relatedness that predates its application filing date. 6 TTABVUE 10 n.1. However, we know of no such restriction on the Examining Attorney's submission of third-party evidence. It is well settled that registrability must be determined at the time registration is sought. *See In re Thunderbird Prods. Corp.*, 406 F.2d 1389, 160 USPQ 730, 732 (CCPA 1969).

at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard, Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”); *In re Davia*, 110 USPQ2d at 1817 (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores); *In re Sela Prods., LLC*, 107 USPQ2d 1580, 1586 (TTAB 2013) (finding cable connectors and adapters and surge protectors related based on evidence showing goods of the same type offered by the same companies, under a single mark, and advertised as being used together).

As Applicant acknowledges, Registrant’s identified “sport balls” can include “all types of sports balls.” 6 TTABVUE 12. Therefore, the broad definition for “sport balls” would include table tennis or ping pong balls, used for table tennis or ping pong games.⁶ The Examining Attorney’s evidence shows that ping pong balls can be used for a variety games, including drinking “pong” games. True Brands offers ping pong balls for “beer pong, ping pong, or any other fun game you can think of.” July 28, 2021 Denial of Reconsideration at TSDR 3. Sports Ridge offers Juvele ping pong balls

⁶ We take judicial notice that “table tennis” is “: a game resembling tennis that is played on a tabletop with wooden paddles and a small hollow plastic ball” and that “ping pong” is defined as “used for table tennis” or “: something resembling a game of table tennis.” Merriam-Webster Dictionary, merriam-webster.com <https://www.merriam-webster.com/dictionary/ping-pong>; <https://www.merriam-webster.com/dictionary/table%20tennis> (both accessed May 19, 2022).

described as “Gold Ping Pong Balls, Plastic Golden Table Tennis Ball, Drinking Game Accessories.” December 28, 2020 Office Action at TSDR 22. Sports Ridge offers Kaptin ping pong balls described as “Plastic Beer Pong Balls, Table Tennis Ball, Beer Pong Tables, Ping Pong Balls, Games” that are “Great for ... Carnival Games” and “Suitable for pong games.” December 28, 2020 Office Action at TSDR 25. Pong University.com offers ping pong balls with various designs, identifying some of them as “sports balls.” June 29, 2020 Office Action at TSDR 13.

According to the Wikipedia article submitted by the Examining Attorney, beer pong requires a table, plastic cups and ping pong balls. June 29, 2020 Office Action at TSDR 6.⁷ The record shows ping pong balls sold separately as accessories to the drinking game beer pong, and balls used for other drinking games (e.g., golf). June 29, 2020 Office Action at TSDR 4, 10, 13, 14, 16; and December 28, 2020 Office Action at TSDR 19. The record also shows that beer pong drinking games are often sold as a set and include ping pong balls. *See e.g.*, December 28, 2020 Office Action at TSDR 23; June 29, 2020 Office Action at TSDR 7, 12; and July 28, 2021 Denial of Reconsideration at TSDR 4, 8, 10.

We find the third-party website evidence is sufficient to demonstrate relatedness. The website evidence shows retailers displaying or offering beer pong drinking games, drinking games that do not use ping pong balls, and drinking game beer pong accessories, such as ping pong balls and cups on the same web page. For example,

⁷ The record shows that regulation size beer pong tables can also be used for any type of “table game.” December 28, 2020 Office Action at TSDR 20.

under a search for “drinking game,” Sports Ridge shows, on one web page, in addition to beer pong drinking games, Juvale Beer Pong Balls (ping pong balls), the Shot Glass Roulette Drinking Game and The Drunk Party (adult drinking game). December 28, 2020 Office Action at TSDR 19. Spencers offers a beer pong table, and on the same page under a listing of “More cool stuff,” provides photographs of ping pong balls, “grab a piece beer tower game,” and “hammer shot [drinking] game.” June 29, 2020 Office Action at TSDR 14. There is also evidence in the record of use (by Registrant) of the same mark for “beer pong balls” and a roulette drinking game. December 28, 2020 Office Action at TSDR 2.

Sport balls such as ping pong balls may be used in connection with the drinking game beer pong. Although Applicant’s goods are a drinking apparatus used in connection with a drinking game that does not require ping pong balls, the evidence shows that consumers may encounter ping pong balls sold in connection with drinking games. Consumers are likely to encounter and purchase these goods in the same stores, and these goods may be displayed or sold near each other under the game category, which may include party games, drinking games, or outdoor leisure games and activities, or they may be sold in the party goods and party accessories category of a store or online store. Consumers could very well purchase these items at the same time in order to offer a variety of games, including drinking games, for a party. *Cf. In re Sela Prods.*, 107 USPQ2d at 1587 (purchasers are likely to encounter both surge protectors, and wall mounts and brackets, during the course of purchasing a television, audio or home theater system).

Accordingly, we find the goods are related.

D. Similarity or Dissimilarity of the Trade Channels

We next turn to the third *DuPont* factor, which requires us to consider “the similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567. We compare the trade channels for the goods as identified in the involved application and cited registration. *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Both Applicant’s and Registrant’s identification of goods are unrestricted. Therefore, the goods move in all normal channels of trade for those goods. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming the Board’s 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 Examining Attorney argues that the website evidence shows that the goods are used by the same consumers in the same fields and the trade channels overlap.

Applicant argues that sport balls are sold in sporting goods stores and by athletic equipment distributors while Applicant’s goods would be sold by drinkware distributors, and in novelty party supply stores and alcohol and beverage markets. 6 TTABVUE 14, 15. As a result, Applicant submits that there is no trade channel overlap.

The website evidence shows that sport balls, which would include ping pong balls, may be marketed not only in sporting goods stores or websites but also in stores and

on websites that offer games, including leisure games, outdoor games, and drinking games. The website evidence also shows that drinking games and accessories may be offered in party stores and stores that offer party goods and accessories, and that table tennis or ping pong balls, in particular, may be offered in these same stores for use with party games, which may include drinking games.

Therefore, we find there is some overlap in trade channels.

E. Conditions of Sale

The fourth *DuPont* factor considers the “conditions under which and buyers to whom sales are made.” *DuPont*, 177 USPQ at 567. Given their nature, the goods would be marketed to general consumers who play drinking games, or play sports requiring sport balls, or play other games that utilize sport balls.

Applicant argues that consumers of Registrant’s goods are sophisticated as they would be highly familiar with the sport of their choice, shop at specialized athletic and sporting goods stores, and be familiar with the specific sport ball needed for their sport. 6 TTABVUE 17. Applicant submits that these consumers can readily differentiate between sport balls for playing their sport and “a wholly unrelated apparatus for holding multiple cups.” 6 TTABVUE 17. Applicant argues that relevant consumers can distinguish between the marks for the goods. 6 TTABVUE 17.

However, attorney argument is not evidence. *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, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)). Applicant has not presented any evidence that the consumers of sport balls will necessarily have

a particular level of sophistication, or that the goods are necessarily of a particular price range as to indicate a likelihood of elevated purchaser care. As there is no evidence in the record relating to consumer purchasing decisions of sport balls or apparatus for drinking games, we must make our determination based on the least sophisticated consumer, which here includes ordinary purchasers of sport balls and drinking apparatus. *Stone Lion*, 110 USPQ2d at 1163 (affirming that TTAB properly considered all potential investors for recited services, which included sophisticated investors, but that precedent requires consumer care for likelihood-of-confusion decision to be based “on the least sophisticated potential purchasers”).

Applicant references its list of registrations of other marks that co-exist on the register, (SOLO/SOLO, WILSON/DONNA WILSON, PING PONG/PING) as evidence of the sophistication of sporting goods consumers. However, the co-existence of these third-party party registrations is not evidence of the marks’ use, or that sporting goods consumers are sophisticated and are able to distinguish similar marks in the marketplace for different goods. *See Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1622 (TTAB 1989) (third-party registrations are not evidence of use of the marks nor are they proof that consumers are familiar with them so as to be accustomed to the existence of similar marks in the marketplace.). Therefore, this list of third-party registrations is of little persuasive value.

We find this *DuPont* factor neutral.

F. The Nature and Extent of Actual Confusion

The seventh *DuPont* factor is “the nature and extent of any actual confusion,” and the eighth *DuPont* factor is “the length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 177 USPQ at 567.

Applicant argues that there is no evidence of any actual confusion and (at the time of briefing) there has been concurrent use for seventeen months. The fact that an applicant in an ex parte case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis, inasmuch as the Board in such cases generally has no way to know whether the registrant likewise is unaware of any instances of actual confusion, nor is it usually possible to determine that there has been any significant opportunity for actual confusion to have occurred. *See, e.g., In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003). (“The lack of evidence of actual confusion carries little weight, [citation omitted], especially in an ex parte context.”); *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992) (the absence of any instances of actual confusion can be a meaningful factor only where the record indicates that, for a significant period of time, an applicant’s sales and advertising activities have been so appreciable and continuous).

In any event, it is well-established that actual confusion is not required for a finding of likelihood of confusion. *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990).

We find these *DuPont* factors are neutral.

III. Conclusion

We find confusion likely. The marks are similar, the goods related, and the trade channels overlap. The other *DuPont* factors are neutral.

Decision: The refusal to register Applicant's mark, BREWSKI, is affirmed.