

This Opinion is not a
Precedent of the TTAB

Mailed: March 26, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re C&D Brewing Ventures, Inc.

Serial No. 88935220

David V. Radack of Eckert Seamans Cherin & Mellott, LLC
for C&D Brewing Ventures, Inc.

Rebecca Ruiz, Trademark Examining Attorney, Law Office 113,
Myriah Habeeb, Managing Attorney.

Before Rogers, Chief Administrative Trademark Judge, and
Goodman and Cohen, Administrative Trademark Judges.

Opinion by Cohen, Administrative Trademark Judge:

Applicant, C&D Brewing Ventures, Inc., seeks registration on the Principal Register of the mark OTTO'S in standard characters for "soda pops" in International Class 32.¹

¹ Application Serial No. 88935220 was filed on May 27, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a) and claiming a date of first use anywhere and in commerce of February 2014.

Citations to the prosecution file refer to the USPTO's Trademark Status & Document Retrieval ("TSDR") system and identify the documents by title, date, and page in the downloadable .pdf version. Citations to the briefs and other materials in the appeal record refer to the Board's TTABVue online docket system.

As part of an internal Board pilot citation program on possibly broadening acceptable forms of legal citation in Board cases, this decision varies from the citation form recommended in

The Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's proposed mark, as used in connection with these goods, so resembles the standard character mark OTTO'S OATMEAL STOUT² (OATMEAL STOUT disclaimed) on the Principal Register for "beer" in International Class 32, as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant appealed.³ The appeal has been fully briefed. For the reasons explained below, we affirm the refusal to register.

I. Evidentiary Issues

Applicant filed a first request for reconsideration of the January 8, 2023 Final Office Action on April 6, 2023, along with a request to extend the time to respond to the Final Office Action for three months. The extension provided Applicant additional time to file a notice of appeal, should its request for reconsideration be denied, which it was on May 1, 2023.⁴ Applicant then filed its notice of appeal on May 18, 2023

the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2023). This decision cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board and the Director, this decision includes the proceeding numbers and employs citations to the WESTLAW (WL) database. Until further notice, however, practitioners should continue to adhere to the practice set forth in TBMP § 101.03.

² Registration No. 2990576, issued on the Principal Register on August 30, 2005 and renewed on September 24, 2015..

³ The Application, originally assigned to Examining Attorney John Billings of Law Office 113, was reassigned to Examining Attorney Rebecca Ruiz during the appeal.

⁴ April 6, 2023 Request for Reconsideration at TSDR 1-630; May 1, 2023 Request for Reconsideration Denied at TSDR 1-8.

wherein it indicated that a request for reconsideration was filed.⁵ Although a second request for reconsideration was noticed by Applicant, no request, evidence or argument in relation to the Final Office Action or denial of the first request for reconsideration was ever filed. It is unclear whether Applicant intended to file a “second” request for reconsideration or was merely attempting to confirm via the ESTTA notice of appeal form that such a request, i.e., the first request, had been filed. However, because the notice of appeal included a statement that a request for reconsideration had been filed, this appeal was automatically instituted and suspended, with the application returned to the Examining Attorney for consideration of the purported request for reconsideration. TBMP § 1204.

The Examining Attorney on June 27, 2023 issued a denial of reconsideration and attached additional evidence denying the purported second request for reconsideration.⁶ Under the circumstances, we have not considered the Examining Attorney’s second denial of reconsideration and attached new evidence, namely, ten third-party registrations and two third-party websites. *See generally* TMEP § 715.03.

With its appeal brief Applicant seeks to submit, for the first time, dictionary definitions of “soda pop” and “soft drink.”⁷ The evidentiary record in an application should be complete prior to the filing of an ex parte appeal to the Board. Trademark

⁵ 1 TTABVUE.

⁶ 4 TTABVUE.

⁷ 6 TTABVUE 13; 7 TTABVUE. In its briefing, Applicant refers to its goods as soda pops, soft drinks and sodas or considers them the same. *See* 6 TTABVUE 13 (“Applicant submits that soft drinks and soda pops are equivalent goods and are synonyms”); April 6, 2023 Request for Reconsideration at TSDR 3 (“soda pops (and highly related ‘soft drinks’ and ‘soda’)”). In this opinion, we refer to soda pops and soft drinks generally as “soda.”

Rule 2.142(d), 37 C.F.R. 2.142(d); see *In re Midwest Gaming & Entm't LLC*, Serial No. 85111552, 2013 WL 1442237, at *2 n.3 (TTAB 2013) (new evidence submitted with brief is “untimely and therefore not part of the record for this case”).

Notwithstanding, we may take judicial notice of dictionary definitions retrieved from online sources when the definitions themselves are derived from dictionaries that exist in printed form. See *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988); *In re Cordua Rests. LP*, Serial No. 85214191, 2014 WL 1390504, at *2 n.4 (TTAB 2014) *aff'd* 823 F.3d 594 (Fed. Cir. 2016). We thus take judicial notice of the definitions, submitted by Applicant, for “soda pop,” which is defined as “a beverage consisting of soda water, flavoring, and a sweet syrup”⁸ and for “soft drink” which is defined as “a usually carbonated nonalcoholic beverage especially: soda pop.”⁹

II. Likelihood of Confusion

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”). See *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003). “Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1319 (Fed. Cir. 2018) (citing *DuPont*,

⁸ MERRIAM-WEBSTER.COM, 7 TTABVUE 9.

⁹ MERRIAM-WEBSTER.COM, 7 TTABVUE 4.

476 F.2d at 1361).

We consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019). “Not all of the *DuPont* factors are necessarily relevant or of equal weight in a given case, and any one of the factors may control a particular case. ... Only the *DuPont* factors of significance to the particular mark need be considered in the likelihood of confusion analysis.” *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1362 (Fed. Cir. 2022) (internal citation and punctuation omitted).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See In re Charger Ventures LLC*, 64 F.4th 1375, 1381 (Fed. Cir. 2023) (“The Board is required to consider each factor for which it has evidence, but it can focus its analysis on dispositive factors.”); *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 1355 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 1206 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 1322 (Fed. Cir. 2017); *Ricardo Media Inc. v. Inventive Software, LLC*, Opposition No. 91235063, 2019 WL 3956987, at *9 (TTAB 2019).

A. Similarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant’s and Registrant’s marks in their entirety, taking into account their

appearance, sound, connotation and commercial impression. *DuPont*, 476 F.2d at 1361. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, Serial No. 87075988, 2018 WL 2734893, at *5 (TTAB 2018), *aff’d* 777 Fed. Appx. 516 (Fed. Cir. 2019) (quoting *In re Davia*, Serial No. 85497617, 2014 WL 2531200, at *2 (TTAB 2014)).

“The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *i.am.symbolic*, 866 F.3d at 1323 (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012) (internal quotation marks omitted)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, Serial Nos. 78814088 and 78814106, 2016 WL 3915987, at *5 (TTAB 2016); *In re Mr. Recipe, LLC*, Serial Nos. 86040643 and 86040656, 2016 WL 1380730, at *6 (TTAB 2016).

“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.” *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (CCPA 1981); *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985). However, “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, provided the ultimate conclusion rests on consideration of the marks in their entirety.” *Nat’l Data*, 753 F.2d at 1058; *see*

Coach Servs., 668 F.3d at 1368 (“It is well-established that it is improper to dissect a mark, and that marks must be viewed in their entirety. In some circumstances, however, one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark.”) (citations omitted).

Applicant contends that its proposed mark is distinct from the mark in the cited registration because “OTTO’S OATMEAL STOUT, has a connotation connected to beer with the inclusion of OATMEAL STOUT,”¹⁰ a connotation Applicant’s proposed mark does not have; and that even though OATMEAL STOUT is disclaimed, consumers will view the full mark as OTTO’S OATMEAL STOUT since consumers are not aware of disclaimers.¹¹ These arguments are unavailing.

As the Examining Attorney observes, both marks lead with the identical and dominant word OTTO’S.¹² The marks’ “lead words are their dominant portion and are likely to make the greatest impression on consumers.” *In re Detroit Athl. Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018); *see also In re Dare Foods Inc.*, Serial No. 88758625, 2022 WL 970319, at *6 (TTAB 2022). OTTO’S is not only the dominant portion of Registrant’s mark because it appears first but also because it has a stronger source-identifying significance than the other elements of Registrant’s mark.

While the addition of the disclaimed OATMEAL STOUT may differentiate the registered mark from Applicant’s proposed mark in sound when fully articulated or

¹⁰ 6 TTABVUE 8.

¹¹ *Id.*

¹² 9 TTABVUE 4.

in appearance, it does not alleviate confusion. *Charger Ventures*, 64 F.4th at 1382 (citing *Detroit Athl.*, 903 F.3d at 1304-05). OATMEAL STOUT is disclaimed and thus, an admission of descriptiveness by Registrant. See *In re Zuma Array Ltd.*, Serial No. 79288888, 2022 WL 3282655, at *7 (TTAB 2022) (“Applicant ‘disclaimed exclusive rights in the term ‘Smart,’ thus conceding that ‘smart’ is merely descriptive of electronic sensor modules.”) (citing *In re Six Continents Ltd.*, Serial Nos. 88430142 and 88430162, 2022 WL 407385, at *8 (TTAB 2022) (disclaimer of the word SUITES in mark ATWELL SUITES “is a concession that ‘Suites’ is not inherently distinctive”). Disclaimed matter that is descriptive of a party’s goods is typically less significant or less dominant when comparing marks. *Detroit Athl.*, 903 F.3d at 1305.

Applicant correctly points out that consumers are unaware of disclaimers and we must therefore, consider the entirety of the registered mark including the disclaimed terms. However, as noted, “there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.” *Nat’l Data*, 753 F.2d at 1058. The non-source identifying nature of OATMEAL STOUT and the disclaimer thereof constitutes a rational reason for giving the terms less weight in our analysis. See *Detroit Athl.*, 903 F.3d at 1305. Consumers will focus more on the OTTO’S portion of Registrant’s mark as the source-indicator for the goods in the Registrations, as opposed to the non-source identifying and disclaimed OATMEAL STOUT.¹³

¹³ The nature of Registrant’s goods also means that there will be circumstances when the goods may be called for by the shortened, OTTO’S, as in a restaurant or bar. See *In re Bay*

Although the terms OATMEAL STOUT in Registrant's mark may convey the meaning and commercial impression of a type of beer, as argued by Applicant,¹⁴ at the same time, Applicant's mark does not necessarily convey a different meaning or impression from the Registration. Consumers familiar with Registrant's mark, OTTO'S OATMEAL STOUT, who encounter Applicant's mark, OTTO'S, could perceive OTTO'S as indicating that the brewers of OTTO'S OATMEAL STOUT have added a non-alcoholic beverage to their product line. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 1346 (Fed. Cir. 2010).

Further, the term OTTO'S is the entirety of the mark shown in the Application and is subsumed in its entirety by the OTTO'S OATMEAL STOUT mark. While there is no explicit rule that we must find marks similar where one mark incorporates the entirety of another mark, the fact that it does typically increases the similarity between the two. *See, e.g., China Healthways Inst. Inc. v. Wang*, 491 F.3d 1337, 1340 (Fed. Cir. 2007) (applicant's mark CHI PLUS is similar to opposer's mark CHI both for electric massagers); *Coca-Cola Bottling Co. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 557-58 (CCPA 1975) (applicant's mark BENGAL LANCER for club soda, quinine water and ginger ale is similar to BENGAL for gin); *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 201 (CCPA 1972) (WEST POINT PEPPERELL

State Brewing Co., Serial No. 85826258, 2016 WL 1045677, at *3 (TTAB 2016) ("Beer is often ordered by name, in a bar or restaurant, or from a menu, where only the name of the beer will be used (in this case, [OTTO'S]). Many consumers ordering these goods from a bartender or waiter/waitress will not have the opportunity to see a label when they order the product. Further, if the beer is served in a glass because it is a draft beer from a keg, the consumer may never see a label.").

¹⁴ 6 TTABVUE 8.

and griffin design for fabrics is similar to WEST POINT for woolen piece goods). Additionally, if a portion of both marks is the same, then the marks may be confusingly similar notwithstanding some differences. *See, e.g., Charger Ventures*, 64 F.4th at 1382 (“an additional word or component may technically differentiate a mark but do little to alleviate confusion”); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1266 (Fed. Cir. 2002) (similar commercial impression even though applicant’s mark PACKARD TECHNOLOGIES, with “TECHNOLOGIES” disclaimed, does not incorporate every feature of opposer’s HEWLETT PACKARD marks); *Double Coin Holdings, Ltd. v. Tru Dev.*, Cancellation No. 92063808, 2019 WL 4877349, at *8 (TTAB 2019) (“likelihood of confusion often has been found where the entirety of one mark is incorporated within another.”) (quoting *Hunter Indus., Inc. v. Toro Co.*, Opposition No. 91203612, 2014 WL 1649332, at *11 (TTAB 2014)).

Applicant further argues that “in the context of the marketing environment in which the mark of the Cited Registration is found, OTTO’S OATMEAL STOUT indicates that OTTO’S may be the name of a dog rather than a person”;¹⁵ and that Registrant’s beer is “sold under the house mark III Dachshunds Brewing ... which has a picture of a dachshund” leading a consumer to assume that OTTO’S is the name of the dog.¹⁶

Contrary to Applicant’s arguments, “the likelihood of confusion issue before us involves the marks as shown in [the] registration certificate and Applicant’s

¹⁵ 6 TTABVUE 9.

¹⁶ *Id.*

application.” *Mini Melts v. Reckitt Benckiser*, 2016 WL 3915987, at *6 (a house mark did not constitute part of the marks sought to be registered); *see also In re Shell Oil Co.*, 992 F.2d at 1207 n.4 (disregarding the applicant’s argument that its use of the house mark SHELL with the mark at issue would weigh against confusion); *In re Aquitaine Wine USA, LLC*, Serial No. 86928469, 2018 WL 1620989, at *5 (TTAB 2018) (“the *Viterra* court addressed only the fact that applicant’s standard character mark could be depicted in the stylized fashion of the *literal* portion of registrant’s design mark; the court did not extend the finding to the background ‘splatter’ dot design of the registrant’s mark.”) (citing *In re Viterra Inc.*, 671 F.3d 1358, 1365 n.4 (Fed. Cir. 2012)). Neither a house mark nor a design feature is part of the Registration or Application. We, therefore, are not persuaded that OTTO’S has a different meaning when used by either Registrant or Applicant.

Based upon the above analysis, when comparing the marks overall, they are similar in sound, meaning, connotation and commercial impression.¹⁷ On the whole, the first *DuPont* factor weighs in favor of finding a likelihood of confusion. *See Double Coin Holdings*, 2019 WL 4877349, at *9.

B. Relatedness of the Goods, Channels of Trade, and Classes of Customers

We consider the “similarity or dissimilarity and nature of the goods or services as

¹⁷ Although we have pointed to the identical dominant portions of the marks, we acknowledge the fundamental rule that the marks must be considered in their entirety. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1371 (Fed. Cir. 2015); *Massey Junior Coll., Inc. v. Fashion Inst. of Tech.*, 492 F.2d 1399, 1402 (CCPA 1974). We note the specific differences between the marks in their entirety, but these differences are outweighed by the similarities of the marks.

described in an application or registration”; “[t]he similarity or dissimilarity of established, likely-to-continue trade channels”; and the classes of consumers to which the goods are marketed. *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1320 (Fed. Cir. 2014) (quoting *DuPont*, 476 F.2d at 1361).

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 they emanate from the same source” or are sponsored or endorsed by the same entity. *Coach Servs.*, 668 F.3d at 1369 (quoting *7-Eleven Inc. v. Wechsler*, Opposition No. 91117739, 2007 WL 1431084, at *6 (TTAB 2007)); *Majestic Distilling Co.*, 315 F.3d at 1316; *see also Hewlett-Packard*, 281 F.3d at 1267 (“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.”).

In support of the argument that beer and soda are related, the Examining Attorney makes of record nine third-party websites¹⁸ that offer both beer and soda under the same or very similar marks and an Internet article discussing multiple entities that offer both beer and soda. *See In re Ox Paperboard, LLC*, Serial No. 87847482, 2020 WL 4530517, at *6 (TTAB 2020) (evidence of relatedness may include inter alia news articles and evidence from computer databases showing how the goods and services are provided together). For example:

¹⁸ As noted, the Examining Attorney attempted to make of record an additional ten third party websites with the June 27, 2023 Request for Reconsideration Denial which we have not considered.

- Motor City Brewing Works offers a variety of beers and sodas under the MOTOR CITY BREWING WORKS mark;¹⁹
- Stone Arch Brewpub offers various types of beers (e.g., Six Grain Ale, Honey Wheat, Scottish Style Ale, Vanilla Stout and Apricot Wheat) under the Stone Arch Brewpub mark as well as pints, howler and growler fills of soda and bottled sodas (e.g., root beer, vanilla cream and ginger beer) that are “[h]andcrafted in house, Stone Arch Brews its own line of gourmet sodas”;²⁰
- Stevens Point Brewery advertises curbside pickup for its bottled beers and sodas all utilizing the POINT mark;²¹
- Sprecher Brewery offers various beers and sodas under the SPRECHER mark;²²
- Saint Arnold offers various beers and sodas under the SAINT ARNOLD mark;²³
- Gray Brewing Co. offers soft drinks (e.g., root beer and cream soda) and beers (e.g., Irish style ale, Oatmeal Stout) under the GRAY BREWING CO. mark;²⁴ and
- An article from PASTEMAGAZINE.COM entitled “7 Breweries That Make Craft Soda” reads “Coke and Pepsi are out; small batch, craft soda is in. ... And breweries are getting in on the action. Here are seven beer makers that also make tasty soda”²⁵ and then lists and pictures sodas from beer breweries Oskar Blues, Abita Brewing Company, Sprecher Brewing, Grand Teton Brewing, Republic Brewing Company, Saint Arnold Brewing Company, and Red Hare.

¹⁹ August 28, 2020 Office Action at TSDR 15.

²⁰ January 8, 2023 Final Office Action at TSDR 2-4.

²¹ *Id.* at 5-6.

²² *Id.* at 8-9.

²³ May 1, 2023 Request for Reconsideration Denied at TSDR 4-5.

²⁴ *Id.* at 6-7.

²⁵ January 8, 2023 Final Office Action at TSDR 11.

The Examining Attorney also refers to ten third-party use-based registrations for both beer and soda under the same mark, including (bold emphasis added):

- CRAFTY RADLER (Registration No. 5881233) for “**beers**; craft beers, flavored-beers; beer-based cocktails; mixed drinks containing beer, namely, radlers; **soda pops**”;²⁶
- NOBLE FUNK BREWING CO and design (Registration No. 6889978) for “unfermented beverages, namely, ginger beer and non-alcoholic craft **soda**; non-alcoholic cider; fermented beverages, namely, **beer**”;²⁷
- IPSWICH (Registration No. 6264192) for “**beer**; root beer; **soda pops**; soft drinks, namely, **sodas**”;²⁸
- LEDGEWATER (Registration No. 2714557) for “**beer, soda pop, and mineral water**”;²⁹
- HELIO BASIN BREWING CO (Registration No. 5177835) for “beverages, namely, **beer and soda pop**”;³⁰
- MAUNK-SUCK (Registration No. 6687583) for “**beer, soda pops**”;³¹ and
- ELECTRO EIGHT (Registration No. 6816084) for “**beer; ... soda pops; soda water; ... beer-based cocktails; ... coffee-flavored beer; ... soda beverages flavoured with tea; ... soft drinks; soft drinks, namely, sodas ...** .”³²

²⁶ *Id.* at 12.

²⁷ *Id.* at 13.

²⁸ *Id.* at 14.

²⁹ *Id.* at 15.

³⁰ *Id.* at 16.

³¹ *Id.* at 17.

³² *Id.* at 19.

Applicant disputes this evidence, arguing that some of the examples are “less probative ... because house marks for a wide range of goods do not necessarily show that the various goods listed are related.”³³

While a house mark that is registered for a wide range of goods may be less probative in terms of showing the various goods listed are related, here, the goods listed in the registrations or displayed on the websites in the Examining Attorney’s evidence involve quite narrow listings, for the most part, various beverages only and not a wide range of goods. *See In re Mucky Duck Mustard Co.*, Serial No. 73603019, 1988 WL 252484, at *3 n.6 (TTAB 1988) (registrations issued to Saks & Company and Knott’s Berry Farm, owners of a large department store and an amusement center, where a wide variety of goods and services are sold found less probative). Also, while Applicant characterizes the marks in the third-party registrations as “house marks,” thereby suggesting that there are different product marks used on the alcoholic and non-alcoholic products of the respective registrants, Applicant has not established use of product marks.

As such, the Examining Attorney’s third-party evidence demonstrates that several third-party entities offer beer and soda under the same or very similar marks suggesting that consumers are accustomed to seeing a single mark associated with a source that sells both beer and soda. *See Detroit Athl.*, 903 F.3d at 1306-07 (crediting relatedness evidence showing that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to

³³ 6 TTABVUE 11.

seeing a single mark associated with a source that sells both”); *In re Davey Prods. Pty Ltd.*, Serial No. 77029776, 2009 WL 2420527, at *5 (TTAB 2009) (use-based third-party registrations have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark); *In re Albert Trostel & Sons Co.*, Serial No. 74186695, 1993 WL 596274, at *3 (TTAB 1993) (same). These third-party websites and registrations support the Examining Attorney’s argument that there is a relationship between beer and soda. *See, e.g., Hewlett-Packard Co.*, 281 F.3d at 1267 (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”).

Applicant further argues that it “has put forth 83 pairs of registrations that contain identical or nearly identical marks where one in the pair is registered for beer and the other for soda pop/soft drinks (from distinct owners). The Examining Attorney has 19 third-party registrations and 11 third-party websites and one news article,”³⁴ suggesting the Examining Attorney’s evidence is less probative due to the lower number of third-party examples found. Applicant continues that “[w]hile a small number of breweries may also sell soda pops or soft drinks, the evidence suggests that soda pops are instead the types of goods that are typically sold under the same mark ... by distinct owners”;³⁵ and that the “evidence overwhelmingly

³⁴ 10 TTABVUE 7-8; *see* April 6, 2023 Request for Reconsideration at TSDR 42-630.

³⁵ 6 TTABVUE 12.

suggests that the respective industries have agreed that soda pop/soft drinks and beer are not related.”³⁶

Applicant compares this appeal to *In re Thor Tech, Inc.*, Serial No. 85667188, 2015 WL 496133, (TTAB 2015) wherein the Board found that the applicant’s evidence of third-party registrations for the same or very similar marks owned by different entities for “automobiles, trucks or sport utility vehicles on the one hand and recreational vehicles, travel trailers, and/or motor homes on the other,” *id.* at *3, rebutted the “relevant, two third-party registrations made of record by the Trademark Examining Attorney,” *id.* at *4. The Board explained, based in part on this evidence, that it could not conclude that consumers would assume a common source for the goods. *Id.*

We have carefully considered the eighty-three pairs of third-party registrations advanced by Applicant. The effect of the pairs of third-party registrations is lessened by the fact that more than fifty of the pairs includes one mark with additional wording, design or stylization features that is absent in the other mark which sufficiently distinguishes the marks, and which may have affected their registrability in the viewpoint of the Office at the time of application. Also, there is no supporting evidence of any use of any of the marks that comprise the pairs. Unlike in *Thor Tech*, the record here does not support a finding that consumers are aware that the involved goods are offered by unrelated entities under the same or similar marks. There is also an absence of proof, such as by declaration or submission of copies of the relevant file

³⁶ *Id.* at 13.

histories, that no licenses or coexistence agreements are in place between any of the paired registrants; or that they do not coexist because of limited geographic areas of actual use known to the owners of the involved registrations.

Moreover, the record in *Thor Tech* differs substantially from the record in this appeal. The record in *Thor Tech* (1) included only two third-party registrations to show a relationship between the involved goods which were rebutted by dozens of sets of third-party registrations for the same or similar marks registered for the cited registrant's goods on the one hand and the applicant's goods on the other, owned by different entities; (2) did not establish overlapping channels of trade, and (3) established that the applicant's and registrant's goods were expensive. That is in contrast to the Examining Attorney's evidence of twenty third-party registrations, Internet use and articles (as well as the overlap in trade channels and customers, discussed below) in this appeal, which we find, under the circumstances of this case, is sufficient to establish a relationship between beer and soda. The contrast with *Thor Tech* is further shown through beer and soda being frequently served in the same establishments and sold in the same retail outlets, and at much lower price points than automobiles, trucks, sport utility and recreational vehicles and motor homes.

Indeed, the fact that the Examining Attorney did not submit more third-party examples does not detract from the fact that this evidence reveals that beer and soda are often offered by the same party under the same mark. The Court of Appeals for the Federal Circuit and Trademark Trial and Appeal Board have long recognized that "the PTO is an agency of limited resources" for obtaining evidence when examining applications for registration; the practicalities of these limited resources are routinely

taken into account when reviewing a trademark examining attorney's action. *In re Pacer Tech.*, 338 F.3d 1348, 1352 (Fed. Cir. 2003) (citations omitted); *see also In re Loew's Theatres, Inc.*, 769 F.2d 764, 768 (Fed. Cir. 1985).

In short, the Examining Attorney's third-party evidence is sufficient to establish that beer and soda are of a type that commonly originate from the same source under the same mark. In view of the shared identical lead term OTTO'S, in addition to the relatedness of the goods, the consuming public is likely to find the respective goods as coming from the same source.

While we contemplate the similarity or dissimilarity of the respective goods, we also consider the third *DuPont* factor, which "considers '[t]he similarity or dissimilarity of established, likely-to-continue trade channels.'" *Detroit Athl.*, 903 F.3d at 1303.

Applicant attempts to distinguish its consumers and channels of trade by arguing that Registrant's beer is a type of beverage "restricted and only available to those over 21, and in trade channels where the sale of beer is specifically licensed."³⁷

Because the goods are related and Applicant's identification of goods contains no limitations, Applicant's goods are presumed to move in all ordinary channels of trade which would include Registrant's channels of trade and would be available to all classes of purchasers, including those of Registrant. *See Stone Lion Cap. Partners*, 746 F.3d at 1323; *Coach Servs.*, 668 F.3d at 1369 (absent limitation "goods are presumed to travel in all normal channels . . . for the relevant goods."). The asserted

³⁷ 6 TTABVUE 10-11.

limitations of channels of trade for Registrant's goods does not mean that Applicant's goods would not also be available in the same channels of trade as Registrant's goods.

Based on the foregoing, we find that the respective goods are related, channels of trade and classes of customers overlap, and the second and third *DuPont* factors weigh in favor of a likelihood of confusion.

III. Conclusion

Having considered all evidence and argument bearing on the relevant *DuPont* factors, we find that the similarity of the marks, the relatedness of the respective goods, and overlap in channels of trade and classes of customers weigh in favor of finding a likelihood of confusion.

Decision: The refusal to register Applicant's proposed mark is affirmed under Section 2(d). 15 U.S.C. § 1052(d).