

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: April 15, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Princeton Pi Holdings, LLC*  
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Serial No. 88962401  
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Arnold Braun of Genesis Biotechnology Group, LLC,  
for Princeton Pi Holdings, LLC.

John Mitchell, Trademark Examining Attorney, Law Office 125,  
Heather Biddulph, Managing Attorney.

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Before Zervas, Goodman, and Allard,  
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:

Princeton Pi Holdings, LLC (“Applicant”) seeks registration on the Principal  
Register of the mark shown below:



for services ultimately described as “Restaurant services namely Pizza”, in International Class 43.<sup>1</sup> Applicant’s mark is described as follows: “The mark consists of the word ‘PROOF’ wherein the letter ‘P’ consists of a circle with an arrow pointing up inscribed inside the circle; the arrow ending inside the circle; emerging tangentially from the circle on the left side is a line which connects to another line forming a right triangle inside the circle having an angle opposite the 90 degree inscribed; the letters ‘ROOF’ are to the left of the letter ‘P’.”

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as used in connection with the services indicated above, so resembles the mark PROOF, in standard characters, for “Restaurant and bar services and catering services,” in International Class 43,<sup>2</sup> as to be likely to cause confusion.

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<sup>1</sup> Application Serial No. 88962401 was filed on June 12, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

In its appeal brief, Applicant states that the Examining Attorney issued a final Office action rejecting this amendment. Applicant’s brief, p. 2 (6 TTABVUE 3). This is not correct. The Examining Attorney entered the amendment; however, the amendment was deemed insufficient to obviate the refusal, so the refusal was maintained. Jan. 13, 2021 Final Office Action at TSDR 2.

Page references herein to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018). References to the briefs on appeal refer to the Board’s TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

<sup>2</sup> Registration No. 3289974; Section 8 and 15 declarations accepted; renewed.

After the refusal was made final, Applicant appealed and requested reconsideration. The Examining Attorney denied the request for reconsideration,<sup>3</sup> and the appeal was resumed. The appeal is fully briefed. We affirm the refusal to register.

## **I. Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all 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*”); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor for which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weight may be assigned to each *DuPont* factor depending on the evidence presented. *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *In re Chatam Int’l*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The

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<sup>3</sup> August 23, 2021 Denial of Request for Reconsideration at TSDR 2-3.

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 [or services].’) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

#### **A. Similarity of the Services**

With regard to the similarity of the services, we must make our determination based on the services as identified in Applicant’s application and the cited registration. See *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comp. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods [or services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods [or services], the particular channels of trade or the class of purchasers to which sales of goods [or services] are directed.”).

Applicant’s services are identified as “Restaurant services namely Pizza,” which we understand to mean restaurant services, wherein the restaurant features pizza. Similarly, the services of the involved registration are “Restaurant and bar services and catering services”. We find that Applicant’s services and the services of the involved registration are legally identical on their face because the registrant’s “restaurant ... services” encompass all types of restaurants, including Applicant’s restaurant featuring pizza. See e.g., *In re Country Oven, Inc.*, 2019 USPQ2d 443903,

\*4 (TTAB 2019) (quoting *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (“[w]here the identification of services is broad, the Board ‘presume[s] that the services encompass all services of the type identified”)); *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1413-14 (TTAB 2018) (where the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein).

Applicant argues that its services and the services of the involved registration are “not identical [or] related.”<sup>4</sup> Applicant argues that its restaurant serves just pizza, does not serve alcohol,<sup>5</sup> and does not offer any catering services.<sup>6</sup> In contrast, Applicant argues, registrant “is a bar restaurant serving alcoholic beverages at a sit down restaurant.”<sup>7</sup> Applicant maintains that the Examining Attorney applied too broad a brush when considering the involved identifications of services and that the refusal is based on the mere fact that Applicant and registrant “are related because they both serve food.”<sup>8</sup>

We disagree. Applicant’s arguments based on “real world” conditions, such as whether alcohol is served or catering services are rendered, has no impact on our decision - as mentioned above, we must decide this case relying on the identifications of the services in the involved application and the cited registration. *Stone Lion*, 110

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<sup>4</sup> Applicant’s brief, pp. 13-14 (6 TTABVUE 14-15).

<sup>5</sup> *Id.* at 1 (6 TTABVUE 2).

<sup>6</sup> *Id.* at 1, 14 (6 TTABVUE 2, 15).

<sup>7</sup> *Id.* at 14 (6 TTABVUE 15).

<sup>8</sup> *Id.* at 15 (6 TTABVUE 16).

USPQ2d at 1162 (“It was proper, however, for the Board to focus on the application and registrations rather than on real-world conditions ...”). This is so, regardless of what the record may reveal as to the particular nature of Applicant’s services. *Id.*

Applicant argues that “[t]he case law doesn’t allow the Examining Attorney to claim food services as the basis of related services between the Parties. This argument is too broad in scope and the case law rejects it.”<sup>9</sup> This argument mischaracterizes the basis of the refusal and ignores the recitations of services. The Examining Attorney does not base the refusal solely on the fact that both parties offer food at their restaurants, but rather on the identification of services, which are legally identical.

Applicant’s reliance on *In re Iris Data Servs., Inc.*, Serial No. 86455558 (TTAB 2017) (not a precedent) is inapposite, as the case is neither binding nor persuasive. *Iris Data Servs.* found the applicant’s and registrant’s marks similar in sight, sound, meaning and commercial impression. The Board found no likelihood of confusion because applicant’s “[l]itigation support services provided exclusively to law firms, namely, conducting electronic legal discovery in the nature of reviewing emails and other electronically stored information that could be relevant evidence in a lawsuit” was unrelated to registrant’s “legal services.”

In addition, the evidence in *Iris Data Servs.* was insufficient to support the examining attorney’s argument that the services were legally identical. *Id.* at 8. Specifically, the Board found that the dictionary definitions proffered by the

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<sup>9</sup> *Id.* at 14 (6 TTABVUE 15).

examining attorney did not establish that applicant's identified services were within registrant's identified services. *Id.* Thus, *Iris Data Servs.* is inapposite – here both Applicant and registrant's involved identifications are easily understood and clear on their face.

In sum, we find that Applicant's services are encompassed within registrant's services and hence are legally identical. Thus, the second *DuPont* factor strongly favors a finding of likelihood of confusion.

### **B. Similarity of Trade Channels and Classes of Purchasers**

Next, we consider the *DuPont* factors relating to established, likely-to-continue channels of trade and classes of purchasers to whom sales are made. Because Applicant's and registrant's services are legally identical, and lack restrictions or limitations as to their nature, channels of trade, or classes of purchasers, we must presume that these services travel through the same channels of trade and are offered to the same or overlapping classes of purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion). Consequently, Applicant's argument that its consumers "reside in a different segment and class" and are pizza eaters, compared to registrant's customers who seek sit-down dinners served with alcohol,<sup>10</sup> has no bearing on our finding as we may not read restrictions into the identifications based on arguments or evidence. *In re Embiid*, 2021 USPQ2d 577, at \*28 (TTAB 2021) ("[W]e may not import restrictions into the identification[s] based

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<sup>10</sup> *Id.* at 17 (6 TTABVUE 18).

on alleged real world conditions of the sort argued by Applicant, or consider extrinsic evidence regarding Applicant and Registrant themselves.”) (internal citations omitted).

Because the Applicant’s and registrant’s trade channels and classes of purchasers are presumed to be the same, the *DuPont* factors regarding the similarity of the channels of trade and classes of customers weigh heavily in favor of likelihood of confusion.

### **C. Strength or Weakness of the Cited Mark**

Because the strength or weakness of the cited mark informs our comparison of the marks, we first address Applicant’s arguments that the cited mark is weak and entitled to a narrow scope of enforcement. Applicant challenges the cited mark’s conceptual strength and argues that it is commercially weak due to the high number of third-party users of the same or similar marks. We discuss each argument in turn.

#### **i. Conceptual Strength of the Cited Mark**

In determining the conceptual strength of the cited mark, we consider its inherent strength, based on the nature of the mark itself. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“[a] mark’s strength is measured [in part] by its conceptual strength (distinctiveness)”); *Top Tobacco, L.P. v. N. Atl. Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing in part its inherent strength).

The cited mark issued on the Principal Register without a showing of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f).

Therefore, we assume that it is inherently distinctive and at least suggestive. *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) (when mark is registered on the Principal Register, “we must assume that it is at least suggestive”). Nonetheless, we may find that a presumptively distinctive registered mark “is nevertheless weak as a source indicator” in the course of a *DuPont* analysis. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517-18 (TTAB 2016).

Applicant contends that the mark of the cited registration has diminished source-identifying significance because the term PROOF is “commonly used with Registrant’s relevant field (‘bar and restaurant’ [services]).”<sup>11</sup> In support of its position, Applicant cites to the dictionary definition of the term “proof” and requests that we take judicial notice of it, which we grant.<sup>12</sup> Applicant argues that the dictionary definition evidence shows that one definition of PROOF is “of standard

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<sup>11</sup> *Id.* at 3 (6 TTABVUE 4). See also Applicant’s brief, p. 1, 11 (6 TTABVUE 2, 12) (“third parties’ use of the term ‘Proof’ all within the relevant field of restaurants and bars”).

While the discussion about the similarity of the Applicant’s and registrant’s services above is limited to the identifications of services, which necessarily focuses on “restaurant services”, the record shows that “restaurant services” and “bar services” are related. Specifically, Applicant made of record evidence consisting of printouts from five (5) websites showing that “restaurant services” and “bar services” are commonly offered under the same mark. Exhibits 6, 7, 11, 17 and 22 attached to the July 1, 2021 Request for Reconsideration (“Req. Recon.”) at TSDR 72-82, 101-06, 134-43, and 170-76. Additionally, the Examining Attorney made of record third-party website evidence sufficient to establish that the more narrowly defined “pizza restaurant services” and “bar services” are commonly offered under the same mark and are thus related. Jan. 13, 2021 Final Office Action at TSDR 5-21. Consequently, we find that “restaurant services” and “bar services” are related. See *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009).

<sup>12</sup> Applicant’s brief, p. 7 (6 TTABVUE 8). As the Examining Attorney makes no objection and as dictionary definitions can be the proper subject of judicial notice, we grant Applicant’s request. See *In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1767-68 (TTAB 2016) (Board may take judicial notice of online dictionary definitions also available in printed form).

strength or quality or alcoholic content”<sup>13</sup> which, Applicant argues, shows PROOF is commonly used with bar and restaurant services<sup>14</sup> and descriptive thereof.<sup>15</sup>

Second, Applicant made of record four (4) third-party registrations for marks incorporating the term PROOF, asserting that this evidence shows the term “has a normally understood and recognized descriptive or suggestive meaning,” rendering the term weak.<sup>16</sup> The Examining Attorney seeks to discredit the probative value of this third-party registration evidence, arguing that the registrations are irrelevant as they either cover dissimilar marks and/or are registered for unrelated services. The registration evidence and the Examining Attorney’s arguments were summarized by the Examining Attorney in a chart, which we reproduce below:<sup>17</sup>

<u>Mark</u>	<u>Cl. 43 Services</u>	<u>Remarks</u>
PROOF A BAR + INCUBATOR (Reg. No. 6173529)	Providing shared kitchen facilities for temporary use	These services are completely different from restaurant and bar services.
NAVY PROOF FOOD & SPIRITS (Reg. No. 6190478)	Restaurant services; bar services	NAVY PROOF is distinguishable because of the historical connotation it creates. Presumably, “navy-proof” means the level of alcoholic strength of the rum rations given to sailors by the British Navy as set out in their regulations.
PROOFREAD (Reg. No. 5932298)	Bar services; bar services featuring food and drinks	The term PROOFREAD is a distinct word with a completely different meaning from any of the definitions of PROOF.
THE PROOF OF GOOD COFFEE (Reg. No. 5582300)	Coffee-house and snack-bar services	The services are not bar or restaurants; in addition, the longer phrase is unitary and/or a pun on the “proof of God” and

<sup>13</sup> MERRIAM-WEBSTER dictionary excerpt attached to the July 1, 2021 Req. Recon. at TSDR 27.

<sup>14</sup> Applicant’s brief, p. 1, 3 (6 TTABVUE 2, 4).

<sup>15</sup> *Id.* at 8 (6 TTABVUE 9); July 1 2021 Req. Recon., p. 3 at TSDR 14.

<sup>16</sup> Applicant’s brief, p. 10 (6 TTABVUE 11).

<sup>17</sup> Examining Attorney’s brief (8 TTABVUE 15).

		therefore it does not show weakness of the term PROOF which is not separable.
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We agree with the Examining Attorney that this evidence is not probative. In the matter of PROOF A BAR + INCUBATOR, there is no evidence that the services of “providing shared kitchen facilities for temporary use” are related to “restaurant and bar services.” *Omaha Steaks Int’l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”). As for the remaining marks in the chart, NAVY PROOF FOOD & SPIRITS, PROOFREAD and THE PROOF OF GOOD COFFEE each are different in sight, sound, and meaning and make a different commercial impression from the cited mark. Consequently, this evidence is not probative of the strength of the cited mark.

Based on the foregoing dictionary definition evidence, we find that PROOF is slightly suggestive of restaurant and bar services because it evokes the alcohol content of alcoholic drinks.

**ii. Purported Commercial Weakness Due to the Number and Nature of Similar Marks in Use on Similar Goods/Services**

Applicant argues that the mark of the cited registration is entitled to a narrow scope of protection because it exists in a crowded field.<sup>18</sup> Applicant made of record evidence of twenty-two (22) third-party uses of PROOF and PROOF-formative marks, asserting that “all but one” are “in the relevant field of Registrant,” i.e., restaurant

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<sup>18</sup> Applicant’s brief, p. 8-10 (6 TTABVue 9-11).

and bar services.<sup>19</sup> Applicant maintains that this evidence shows that consumers have been exposed to a sufficiently high number of PROOF and/or PROOF-formative marks such that small or minute differences are sufficient to distinguish between them.<sup>20</sup> Consequently, Applicant argues, consumers will look to other elements, such as Applicant’s design,<sup>21</sup> to differentiate between the marks and avoid a likelihood of confusion.<sup>22</sup>

The Examining Attorney disagrees, arguing that (1) some of Applicant’s evidence is not for closely related goods/services; (2) Applicant refers to PROOF BREAD as a restaurant when it appears to be a grocery store; and (3) the restaurant PROOF ON MAIN is owned by the registrant and is the subject of a separate registration.<sup>23</sup>

After a review of the website evidence, we find the following nine (9) third-party uses to be probative on the issue of commercial weakness of the cited mark for restaurant and bar services:

Plaintiff’s Exhibit No.	Mark	Goods/Services
3	PROOF	Bar services
6	PROOF	Restaurant and bar services
7	PROOF	Restaurant and bar services
10	PROOF PIZZA	Restaurant services featuring pizza
11	PROOF	Restaurant and bar services
17	4C 80 PROOF	Restaurant and bar services
19	PROOF	Bar services
20	PROOF	Restaurant services, i.e., deli

<sup>19</sup> Applicant’s brief, p. 3 (6 TTABVUE 4).

<sup>20</sup> *Id.* at 8 (6 TTABVUE 9).

<sup>21</sup> *Id.* at 7 (6 TTABVUE 8).

<sup>22</sup> *Id.* at 7 (6 TTABVUE 8).

<sup>23</sup> Examining Attorney’s brief (8 TTABVUE 15-16).

22	PROOF & PROVISION	Restaurant and bar services
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Other evidence made of record by Applicant has limited probative value. For example, Applicant submitted third-party use of PROOF and PROOF-formative marks with the following goods/services: restaurant incubator services;<sup>24</sup> artisan bread;<sup>25</sup> artisan distillers;<sup>26</sup> ice cream containing alcohol;<sup>27</sup> alcoholic drinks;<sup>28</sup> liquor stores;<sup>29</sup> and math games.<sup>30</sup> However, there is no evidence that these goods/services are related to restaurant and bar services, therefore, these third-party uses have limited probative value. *See Omaha Steaks*, 128 USPQ2d at 1693-94 (“[T]he controlling inquiry [under the sixth *DuPont* factor] is the extent of third-party marks in use on “similar” goods or services.”).

Additionally, Exhibit 16, which is a printout from the website at [www.proofcleveland.com](http://www.proofcleveland.com), shows the term “proof” in the text but the printouts do not show the term functioning as an indicator of source.<sup>31</sup> As for PROOF ON MAIN,<sup>32</sup> this mark appears to be owned by registrant, as evidenced by other registration

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<sup>24</sup> Exhibit 5 to the July 1, 2021 Req. Recon. at TSDR 71.

<sup>25</sup> Exhibit 8 at TSDR 83-91.

<sup>26</sup> Exhibit 9 at TSDR 92-95.

<sup>27</sup> Exhibit 14 at TSDR 121-25.

<sup>28</sup> Exhibit 21 at TSDR 169.

<sup>29</sup> Exhibit 23 at TSDR 177-79.

<sup>30</sup> Exhibit 13 at TSDR 115-20.

<sup>31</sup> Exhibit 16 at TSDR 129-33.

<sup>32</sup> Exhibit 4 at TSDR 62-70.

evidence that the Examining Attorney made of record.<sup>33</sup> Finally, Applicant made of record website printouts showing the mark OVER PROOF, but these same printouts denote that the bar is “temporarily” closed, so the mark is not in use.<sup>34</sup> For the foregoing reasons, this evidence has little or no probative.<sup>35</sup>

Taken together, Applicant has made of record nine (9) third-party uses of PROOF or PROOF-formative marks for restaurant and/or bar services. While Applicant has not presented specific evidence concerning the extent and impact of these uses, it nevertheless presented evidence of these marks being used on the internet to advertise restaurant and/or bar services. “Evidence of third-party use of similar marks on similar [services] is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005) (citation omitted). Internet printouts, such as those offered by Applicant, “on their face, show that the public may have been exposed to those internet websites and therefore may be aware of the advertisements contained therein.” *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1072 (TTAB 2011). “While the Federal Circuit has held that ‘extensive evidence of third-party use and registrations is powerful on its face, even

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<sup>33</sup> August 23, 2021 Denial of Request for Reconsideration at TSDR 30-31.

<sup>34</sup> Exhibit 18 to the July 1, 2021 Req. Recon. at TSDR 144-47.

<sup>35</sup> Additionally, Applicant made of record (1) a printout from heavenlyhilldistillery.com website (Exhibit 12 at TSDR 107-14), and (2) a printout from the website www.abc.virginia.gov website (Exhibit 15 at TSDR 126-28), each showing a photograph of a bottle of bourbon whiskey wherein the terms “barrel proof” appear on a label at the bottom of the bottle but in a manner such that the term “proof” does not function as an indicator of source. Because the term “proof” is not used as an indicator of source, this evidence is of limited probative value on the issue of commercial weakness.

where the specific extent and impact of the usage has not been established,’ see *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (emphasis added) (citing *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)), we believe that the record of third-party use in this case reflects a more modest amount of evidence than that found convincing in *Jack Wolfskin* and *Juice Generation* wherein ‘a considerable number of third parties’ use [of] similar marks was shown.” *In re FabFitFun*, 127 USQP2d at 1674 (quotation omitted). Despite Applicant’s arguments that the present case is similar to both *Juice Generation* and *Jack Wolfskin*, we find the evidence of weakness here is not as persuasive as that in either of those cases.

Consequently, we find on the totality of this record that the evidence discussed above establishes that the term PROOF is somewhat commercially weak as a source indicator for restaurant and bar services. *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1674 (finding that 10 third-party uses and a dictionary definition of the involved term supported a finding “that the shared phrase SMOKIN’ (SMOKING) HOT is somewhat weak”) (quoting *Juice Generation*, 115 USPQ2d at 1674).

Considering the evidence on whole, we find that registrant’s mark is slightly conceptually weak and somewhat commercially weak due to evidence of third-party use with restaurant and/or bar services. On balance, this weighs against finding likelihood of confusion.

#### **D. Similarity of the Marks**

We next consider the first *DuPont* factor regarding the similarity or dissimilarity of the marks, keeping in mind that where, as here, the services are legally identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between them. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Marks are compared for similarities or dissimilarities in sight, sound, connotation and commercial impression. *Palm Bay Imps.*, 73 USPQ2d at 1691 (quoting *DuPont*, 177 USPQ at 567). “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) (citing *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)). “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.” *Coach Servs.*, 101 USPQ2d at 1721 (quotation omitted).

“In the case of a composite mark containing both words and a design, ‘the verbal portion of the mark is the one most likely to indicate the origin of the goods [or services] to which it is affixed.’” *Viterra*, 101 USPQ2d at 1908 (quoting *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)); *see also In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018). “The verbal portion of a word

and design mark ‘likely will appear alone when used in text and will be spoken when requested by consumers,’” *id.* (quoting *Viterra*, 101 USPQ2d at 1911), and it “is normally accorded greater weight because it would be used by purchasers to request the goods [or services].” *Id.* (quoting *L.C. Licensing, Inc. v. Berman*, 86 USPQ2d 1883, 1887 (TTAB 2008)). We find that consumers would read and speak Applicant’s mark as the word PROOF and would use that word when referring to Applicant’s restaurant and recommending it to others. As a result, the literal element of Applicant’s mark – PROOF – is thus the dominant element of its mark.

Applicant’s mark contains a stylized letter “P” while the mark of the cited registration is a standard character mark. As the Examining Attorney points out, the registered mark is depicted in standard characters without claim to any particular font, size, or design. *See* Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a). As such, it could hypothetically be used with the same letter stylization as Applicant’s applied-for mark.

As to connotation and commercial impression, Applicant argues that, when considered in light of the dictionary definition of “proof”, its geometric design causes the mark PROOF to connote mathematical concepts of “proof” used in geometry, which will resonate with its target consumer.<sup>36</sup> Applicant also argues that, in contrast, registrant’s mark refers to the strength of an alcoholic spirit due to its use

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<sup>36</sup> Applicant’s brief, p. 5 (6 TTABVUE 6).

with restaurant and bar services.<sup>37</sup> Unlike registrant, Applicant argues, nothing in its design connotes alcohol so its commercial impression is completely different.<sup>38</sup>

The Examining Attorney argues that, because the marks' literal elements are the same, the marks convey the same connotations and that "[t]hese connotations include the idea of using evidence and logic to establish the validity of a statement or principle."<sup>39</sup>

Applicant argues that its mark connotes a mathematical proof due to the design element, and in support of its position, it points to the dictionary definition of the term "proof", meaning "evidence that compels acceptance by the mind of a truth or fact."<sup>40</sup> Applicant continues, arguing that "[t]his definition shows Applicant's design of its mark as a mathematical proof."<sup>41</sup>

As to connotation, we find that because the shared literal element is the same and the services are legally identical, Applicant's and registrant's marks could have the same connotation. *In re i.am.symbolic*, 123 USPQ2d 1744 (Fed. Cir. 2017) (affirming Board decision holding standard-character mark I AM likely to cause confusion with registered I AM marks and rejecting applicant's argument that restriction limiting the goods to those "associated with William Adams, professionally known as 'will.i.am,'" changed the meaning or overall commercial impression of the mark). *Cf.*

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<sup>37</sup> *Id.* at 2-3 (6 TTABVUE 3-4).

<sup>38</sup> *Id.* at 5-6 (6 TTABVUE 6-7).

<sup>39</sup> Examining Attorney's brief (8 TTABVUE 5).

<sup>40</sup> Applicant's brief, p. 3 (6 TTABVUE 4).

<sup>41</sup> *Id.* at 3 (6 TTABVUE 4).

*In re British Bulldog, Ltd.*, 224 USPQ 854, 856 (TTAB 1984) (holding PLAYERS for men’s underwear and PLAYERS for shoes not likely to cause confusion, agreeing with applicant’s argument that the term “PLAYERS” implies a fit, style, color, and durability suitable for outdoor activities when applied to shoes, but “implies something else, primarily indoors in nature” when applied to men’s underwear).

In sum, the Applicant’s mark and the registrant’s mark sound the same and, because registrant’s mark is registered in standard character format, it may appear in any lettering style, even one such as Applicant’s. Further, we find that the shared literal element and the fact that it is pronounced the same in Applicant’s and registrant’s marks is entitled to great weight. *Eveready Battery Co., Inc. v. Green Planet, Inc.*, 91 USPQ2d 1511, 1517 (TTAB 2009) (“It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood 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 a consideration of the marks in their entireties.”). Because the literal element of each mark is the same and the services are legally identical, Applicant’s and registrant’s marks could have the same connotation.

Overall, we find that the marks are highly similar. Thus, the first *DuPont* factor weighs in favor of a finding of likelihood of confusion.

## II. Conclusion

After considering Applicant’s and the Examining Attorney’s arguments and the evidence of record, we find that the services are legally identical, and presume the

channels of trade and classes of consumers to be the same. The marks are highly similar. While the mark of the involved registration is slightly suggestive and somewhat commercially weak, it is well settled that even a weak mark is entitled to protection under Section 2(d) against the registration by a subsequent user of a similar mark for identical or even closely related services. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1401, 182 USPQ 108, 109 (CCPA 1974); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010). We find that confusion is likely.

### **III. Decision**

The refusal to register Applicant's mark is affirmed.