

This Opinion is Not a
Precedent of the TTAB

Mailed: August 28, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Saloon Promotions, Inc.

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Serial No. 90849904

S. Bradley Shipe of Shipe Dosik Law LLC, for Saloon Promotions, Inc.

Mackenzie Olson, Trademark Examining Attorney, Law Office 112,
Matthew Cuccias, Managing Attorney.

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Before Adlin, Johnson, and Myles,
Administrative Trademark Judges.

Opinion by Johnson, Administrative Trademark Judge:

Saloon Promotions, Inc. (“Applicant”) seeks registration on the Principal Register of the standard character mark UGLY DOG SALOON (“Applicant’s Mark”), for “Bar and restaurant services; catering services,” in International Class (“Class”) 43.¹

¹ Application Serial No. 90849904, filed on July 27, 2021 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on a date of first use anywhere and in commerce on May 19, 2014. Applicant disclaims the exclusive right to use “SALOON.”

Citations to the appeal record are to the publicly available documents in TTABVUE, the Board’s electronic docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 2014 TTAB LEXIS 17, at *6 n.6 (TTAB 2014). The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry, if applicable. Applicant’s Appeal Brief is located at 6 TTABVUE,

The Trademark 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 applied to the services identified in the application, so resembles the standard character registered mark UGLY DOG,² and the UGLY DOG composite mark shown below, both for, in relevant part, "alcoholic beverages, namely, distilled spirits; alcoholic cocktail mixes," in Class 33 (collectively, the "UGLY DOG mark" or "cited mark"), as to be likely to cause confusion.



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Applicant's Supplemental Brief is located at 13 TTABVUE, the Examining Attorney's Appeal Brief is located at 15 TTABVUE, and Applicant's Reply Brief is located at 16 TTABVUE.

All citations to prosecution history documents contained in the Trademark Status and Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents.

² Registration No. 5213796 ("UGLY DOG standard character registration"), owned by Ugly Dog Distillery, LLC, issued on May 30, 2017. A combined declaration under Sections 8 and 15 of the Trademark Act, 15 U.S.C. §§ 1058 and 1065, has been accepted and acknowledged. Classes 21 and 25 of the standard character UGLY DOG registration have not been cited against the applied-for mark.

³ Registration No. 5214141 ("UGLY DOG composite registration"), owned by Ugly Dog Distillery, LLC, issued on May 30, 2017. A combined declaration under Trademark Act Sections 8 and 15 has been accepted and acknowledged. The mark is described as follows: "The mark consists of the phrase 'UGLY DOG' in a stylized form. Below that is a profile of a picture of a dog. Color is not a feature of the mark."

When the refusal was made final, Applicant requested reconsideration and appealed. After the Examining Attorney denied the request for reconsideration, the appeal resumed. Then the Examining Attorney requested suspension of the appeal and remand of the application. Jurisdiction was restored to the Examining Attorney, and a Subsequent Final Office Action issued. Thereafter, the appeal resumed. It is fully briefed.

I. Evidentiary Issues

Before turning to the merits of the appeal, we address some evidentiary issues. Appended to Applicant's request for reconsideration is the 2021 Annual Report of the American Craft Spirits Association.⁴ The Examining Attorney objects to the inclusion of the annual report because a URL and access date are not shown on the report.⁵ Applicant urges the Board to consider the annual report because it "is not a webpage and does [sic] require the reference of a URL." (13 TTABVUE 5; 16 TTABVUE 3). Applicant further contends that the Board should consider the report because a link to the report (which Applicant alleges is still current) is embedded in its Supplemental Brief and Reply Brief, (13 TTABVUE 5, 16 TTABVUE 3), and "moves the Board to reopen the record to permit Applicant to introduce the URL" (16 TTABVUE 3).

To properly introduce Internet evidence into the record, a party must provide: (1) an image file or printout of the downloaded webpage, (2) the date the evidence was

⁴ See Request for Reconsideration after Final Action dated Jan. 6, 2023 at 19-25.

⁵ 15 TTABVUE 2; *see also* Subsequent Final Office Action dated Oct. 30, 2023 at 7.

downloaded or accessed, and (3) the complete URL address of the webpage. *See In re I-Coat Co., LLC*, 2018 TTAB LEXIS 171, at *6-7 (TTAB 2018) (applying the requirements of *Safer, Inc. v. OMS Invs. Inc.*, 2010 TTAB LEXIS 51, at *22-23 (TTAB 2010) to ex parte appeals);⁶ *see generally* TBMP § 1208.03; TRADEMARK MANUAL OF EXAMINING PROCEDURE § 710.01(b) (May 2024). Providing only a URL, hyperlink, or deep link to Internet materials in a brief, for example, is insufficient to make such materials of record. *See, e.g., In re Olin Corp.*, 2017 TTAB LEXIS 337, at *15 n.15 (TTAB 2017) (“Because the information displayed at a link’s Internet address can be changed or deleted, merely providing a link to a website is insufficient to make information from that site of record.”); *accord In re HSB Solomon Assocs., LLC*, 2012 TTAB LEXIS 79, at *9 (TTAB 2012); *Safer*, 2010 TTAB LEXIS 51, at *23 (noting that because of the “transitory nature of the Internet,” websites referenced only by links may later be modified or deleted). And we deny Applicant’s embedded motion to remand the application to the Examining Attorney to “introduce the URL,” inasmuch as the request is now untimely and there is no good cause for it. Applicant should have requested, under Trademark Rule 2.142(d)(1), 37 C.F.R. § 2.142(d)(1), suspension of the proceedings before briefing and remand. *In re Ox Paperboard, LLC*, 2020 TTAB LEXIS 266, at *3-6 (TTAB 2020) (discussing procedural best practices to obviate a refusal and demonstrate good cause); *In re Adlon Brand GmbH & Co.*,

⁶ The citation form in this opinion is in a form provided in the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only 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, this opinion employs citation to the Lexis database unless noted otherwise. Practitioners should also adhere to the guidance set forth in TBMP § 101.03.

2016 TTAB LEXIS 526, at *30 (TTAB 2016) (applicant’s request for remand, included in applicant’s brief, was denied; proper procedure “was to file with the Board, after the filing of the appeal but before briefing, a request for remand with a showing of good cause.”) (citing TBMP §§ 1207.02, 1209.04).

Finally, Applicant contends that “the report itself is not a webpage and does not require the reference of a URL.” (13 TTABVUE 5). The embedded link in Applicant’s Supplemental and Reply briefs leads to the “Annual Report” subpage of the American Craft Spirits Association. The subpage embeds a link to the 2021 Annual Report, which appears to be a downloadable Adobe Acrobat (or “.PDF”) document with its own deep link URL. Applicant could have submitted the annual report with the deep link URL and access date, for example, via screen captures or “screenshots” of pages from the report. However, Applicant has proffered absolutely nothing but attorney argument in support of its contention that the report is “not a webpage,” or is available via other, non-electronic, means. “Attorney argument is no substitute for evidence.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005)).

We sustain the Examining Attorney’s objection and give no consideration to the 2021 Annual Report of the American Craft Spirits Association.

II. Likelihood of Confusion

To determine whether there is a likelihood of confusion between the marks under Section 2(d), we analyze the evidence and arguments under the *DuPont* factors. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”). We

consider each *DuPont* factor for which there is evidence and argument, *In re Guild Mortg. Co.*, 912 F.3d 1376, 1378-79 (Fed. Cir. 2019), but “[n]ot all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 998 (Fed. Cir. 2020). “Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 1199 (CCPA 1973). Two key considerations are the similarities between the marks and the relatedness of the goods and services. *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164 (Fed. Cir. 2002).

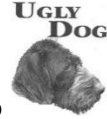
We consider Applicant’s and the Examining Attorney’s arguments, the applicable law, and evidence of record. The likelihood of confusion factors the Applicant and Examining Attorney discuss are the similarity or dissimilarity of Applicant’s UGLY DOG SALOON mark and the cited UGLY DOG marks, the relatedness of the goods and services for the respective marks, the strength of the cited UGLY DOG marks, and the trade channels for the respective goods and services. We discuss these factors below.

A. Focus on Registration Number 5213796

We focus our likelihood of confusion analysis on the cited standard character mark, UGLY DOG, for, in relevant part, “alcoholic beverages, namely, distilled spirits; alcoholic cocktail mixes” in Class 33, because it is subsumed by Applicant’s Mark, which also is in standard characters. If we find a likelihood of confusion as to the UGLY DOG standard character mark, we need not find it as to the UGLY DOG



composite mark, . Conversely, if we do not find a likelihood of confusion as to



the Registrant's standard character mark, we would not find it as to . *See, e.g., In re Max Cap. Grp. Ltd.*, 2010 TTAB LEXIS 1, at *4-5 (TTAB 2010) (likelihood of confusion analysis confined to most similar cited mark).

For the reasons discussed below, we affirm the refusal to register.

B. The Strength of the Cited Mark

Evidence of third-party use typically is relevant to the sixth *DuPont* factor, “the number and nature of similar marks in use on similar goods.” 476 F.2d at 1361. This type of evidence pertains to the commercial strength of the mark. “Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Id.* (quoting *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1373 (Fed. Cir. 2005) (citations omitted)). In contrast, evidence of third-party registrations “may bear on conceptual weakness if a term is commonly registered for similar goods or services.” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 2017 TTAB LEXIS 437, at *47 (TTAB 2017) (citation omitted).

Other than the cited UGLY DOG registration, the record is devoid of any uses⁷ of, or registrations containing, “ugly dog” for “alcoholic beverages.” As a result, we find

⁷ There is no evidence of record pertaining to commercial strength.

UGLY DOG, when used in connection with “alcoholic beverages, namely, distilled spirits; alcoholic cocktail mixes,” is an arbitrary, inherently distinctive mark. Arbitrary marks are inherently or conceptually strong. *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1340 (Fed. Cir. 2004) (defining an arbitrary mark as a “known word used in an unexpected or uncommon way” and observing that such marks are typically strong); *Palm Bay Imps.*, 396 F.3d at 1372 (arbitrary terms are conceptually strong trademarks). The registration of this mark on the Principal Register without a showing of acquired distinctiveness under Section 2(f) of the Trademark Act further evidences that it is inherently distinctive.

Inasmuch as the UGLY DOG mark is arbitrary, it is entitled to a broad scope of protection.

C. The Similarity or Dissimilarity and Nature of the Goods and Services.

Since the services at issue in this appeal are “Bar and restaurant services; catering services” and the goods at issue are “alcoholic beverages, namely, distilled spirits; alcoholic cocktail mixes,” Applicant argues that the Examining Attorney is required, and has failed, to show “something more,” evidence-wise, than just marks that are used for both “bar and restaurant services” and alcoholic beverages. *See In re Coors Brewing Co.*, 343 F.3d 1340, 1345 (Fed. Cir. 2003) (quoting *Jacobs v. Int’l Multifoods Corp.*, 668 F.2d 1234, 1236 (CCPA 1982)).

In *In re Coors*, a decision about the relatedness of restaurant services and beer, the Federal Circuit elucidated why it is necessary to show “something more” in order to prove that beer and restaurant services are related:

In light of the requirement that “something more” be shown to establish the relatedness of food and restaurant products for purposes of demonstrating a likelihood of confusion, the Board’s finding that beer and restaurant services are related is not supported by substantial evidence.

...

And although the Board had before it a few registrations for both restaurant services and beer, the very small number of such dual use registrations does nothing to counter Coors’ showing that only a very small percentage of restaurants actually brew their own beer or sell house brands of beer; instead the small number of such registrations suggests that it is quite uncommon for restaurants and beer to share the same trademark. ... Thus, the evidence before the Board indicates not that there is a substantial overlap ... but rather that the degree of overlap between the sources of restaurant services and the sources of beer is *de minimis*.

...

The evidence of overlap between beer and restaurant services is so limited that to uphold the Board’s finding of relatedness would effectively overturn the requirement of *Jacobs* that a finding of relatedness between food and restaurant services requires “something more” than the fact that restaurants serve food.

It is not unusual for restaurants to be identified with particular food or beverage items that are produced by the same entity that provides the restaurant services or are sold by the same entity under a private label. Thus, for example, some restaurants sell their own private label ice cream, while others sell their own private label coffee. But that does not mean that any time a brand of ice cream or coffee has a trademark that is similar to the registered trademark of some restaurant, consumers are likely to assume that the coffee or ice cream is associated with that restaurant. The *Jacobs* case stands for the contrary proposition, and in light of the very large number of restaurants in this country and the great variety in the names associated with those restaurants, the potential

consequences of adopting such a principle would be to limit dramatically the number of marks that could be used by producers of foods and beverages.

343 F.3d at 1346 (*italics in original*).

In other words, there is no *per se* rule that certain goods are related, such as restaurant services and food and beverages. *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 768 (Fed. Cir. 1993) (citing *Jacobs*, 668 F.2d at 1236). However, the Board has found the “something more” requirement to be met when, for example, an applicant’s mark clearly demonstrates its restaurant specializes in the registrant’s type of goods, *see, e.g., In re Accelerate s.a.l.*, 2012 TTAB LEXIS 43, at *8-12 (TTAB 2012) (COLOMBIANO and COLOMBIAN, both meaning “from Columbia,” a country known for its coffee beans; applicant’s “providing food and drink” services found related to registrant’s “coffee”), or when the cited mark is particularly strong. *See, e.g., In re Mucky Duck Mustard Co.*, 1988 TTAB LEXIS 11, at *5-7 (TTAB 1988) (no evidence of registrations of marks containing the term “Mucky Duck” for mustard, restaurant services, or any other goods or services; marks at issue were substantially similar, and registrant’s mark for restaurant services was “particularly unique,” “memorable,” and “strong” in nature); *see also In re Opus One, Inc.*, 2001 TTAB LEXIS 707, at *4-5 (TTAB 2001) (“something more” found where registrant’s OPUS ONE mark was “strong and arbitrary” and entitled to a broad scope of protection; registrant’s OPUS ONE wine was sold in applicant’s restaurant as well).

“Something more” has also been found where the shared term AZTECA made the marks at issue in-part identical; the registrant’s “salsa,” “taco,” and “tortilla” were the type of Mexican food items sold in the applicant’s Mexican restaurants;

circumstances surrounding the marketing of the goods and services were similar; dictionary definitions of the registrant's "salsa," "taco," and "tortilla" referenced "Mexican cookery"; the record included ten use-based third-party registrations of marks which were registered for restaurant services, on one hand, and food items, on the other; five of the ten registrations submitted covered both restaurant services and Mexican food items; and where the applicant was selling, on its menu, hot sauce under the AZTECA mark. *In re Azteca Rest. Enters. Inc.*, 1999 TTAB LEXIS 29, at *3-8 (TTAB 1997). This evidence, collectively, indicated to the Board that "Mexican food items are often principal items or entrees served by restaurants, certainly by Mexican restaurants. The average consumer, therefore, would be likely to view Mexican food items and Mexican restaurant services as emanating from or sponsored by the same source if such goods and services are sold under the same or substantially similar marks." *Id.* at *8.

Similarly, a "clear relationship" between the goods and services has been found where applicant's in-part identical GOLDEN GRIDDLE PANCAKE HOUSE mark was for "restaurant services" and the cited GOLDEN GRIDDLE mark was registered for "table syrup"; there was "an undeniable connection between the goods of the registrant and the services of applicant"; the record included evidence that restaurants frequently package certain of their products for retail sale; and where third-party marks were registered for restaurant services as well as a variety of goods, all under the same mark. *In re Golden Griddle Pancake House Ltd.*, 1990 TTAB LEXIS 48, at *2 (TTAB 1990). Upon consideration of the *In re Golden Griddle* record,

the Board concluded that “if the particular [table syrup] identified by registrant were to be sold under a mark which is the same as or similar to that which applicant uses to identify its [restaurant] services, confusion as to source would occur.” *Id.*

Here, Applicant’s Mark is for “Bar and restaurant services; catering services” and the cited marks are registered for, in relevant part, “alcoholic beverages, namely, distilled spirits; alcoholic cocktail mixes.” In addition to the inherent strength of Registrant’s UGLY DOG marks, to satisfy the “something more” requirement, the Examining Attorney submitted 20 valid and subsisting registrations to demonstrate that the same entity has registered a single mark for catering, bar, or restaurant services, as well as alcoholic beverages, distilled spirits, or alcoholic cocktail mixes.⁸ Although these third-party registrations are not evidence that the marks therein are in use or that the public is familiar with them, they may have some probative value to the extent that they serve to suggest that the listed goods and services are of a type

⁸ See Final Office Action dated July 11, 2022 (Reg. No. 6241028, SMACKEDT; Reg. No. 6661639, BOMB CITY); Subsequent Final Office Action dated Oct. 30, 2023 (Reg. Nos.: 5506652, PLUMPJACK; 4778964, BARCADE; 5882905, ROMEO’S GIN; 5315597, GERVASI VINEYARD; 6142582, S STORYHOUSE SPIRITS WE ARE ALL STORYTELLERS (composite mark); 3004512 (Polynesian shield and two oars design mark); 4984790, KACHKA; 4130821, THE DISTILLERY; 6778747, YBAR, LLC MOBILE BARTENDER (composite mark); 6914533, GET THE PARTY STARTED; 6117534, MAMACITA’S; 6274290, QR (composite mark); 6431405, RASTA RITA; 7064145, OLENTANGY RIVER BREWING COMPANY; 5471418, WIGGLE WAGON (composite mark); 6853359, BARDEGA; 6008580, BOX OFFICE BREWERY; 6032002, ENO TECA (composite mark)).

We have not considered cancelled Registration No. 5159453, since “a cancelled registration is not entitled to any of the statutory presumptions of Section 7(b) of the Trademark Act.” *A&H Sportswear Co. v. Yedor*, 2019 TTAB LEXIS 75, at *15 n.4 (TTAB 2019). Registration No. 5856450 issued under Section 44(e), 15 U.S.C. § 1126(e), in Class 43, which includes “restaurants; bar services” and “catering of food and drink.” Consequently, that registration is of limited probative value. *In re Albert Trostel & Sons Co.*, 1993 TTAB LEXIS 36, at *7-8 (TTAB 1983).

which may emanate from the same source. *In re Albert Trostel & Sons*, 1993 TTAB LEXIS 36, at *7 (citing *In re Mucky Duck Mustard*, 1988 TTAB LEXIS 11).

The Examining Attorney also submitted printed pages from 28 third-party Internet websites showing that the same entity offers “bar and restaurant services” or catering services under a mark, and manufactures, produces, or offers for sale distilled spirits under that same mark.⁹ Moreover, the Examining Attorney submitted reviews of distilleries offering bar and restaurant services, and specifically, alcoholic beverages (referred to as “restaurant-distilleries”), under the same mark from publications such as *Whisky Advocate*, *Liquor.com*, *VinePair*, *FSR*, *Restaurant Development + Design*, *Revue*, and *The Lane Report*.¹⁰

In rebuttal, Applicant argues that the Examining Attorney fails to give sufficient weight to its evidence of record. Applicant’s principal argument is that, considering the holding of *In re Coors*, the facts and evidence here require us to find “it is very **uncommon** for a restaurant to offer distilled spirits under a common mark.” (6 TTABVUE 10; *see also* 16 TTABVUE 6) (emphasis in original). In support of its

⁹ *See* Nonfinal Office Action dated Apr. 27, 2022 at 11-19 (Lula Restaurant and Distillery, Iron Shoe Distillery, Lockwood Distilling Co.); Final Office Action dated July 11, 2022 at 7-11 (Social Still, Blue Spirits Distilling), 13-23 (Shine Distillery & Grill, Madison County Distillery, Pacific Coast Spirits, Western Reserve Distillers, Valentine Distilling); Request for Reconsideration After Final Action Denied dated June 22, 2023 at 6-47 (Breckenridge Distillery Restaurant, McMenamins Restaurants, Pubs & Bars, The Dells Distillery, Mason Dixon Distillery, Watershed Distillery, Eight Settlers Distillery, Barren’s Distillery + Restaurant, Portuguese Bend Distilling, Middle West Spirits, Founding Farmers & Distillers, Founding Spirits), 64-75 (J. Rieger & Co., Napa Valley Distillery, Young Hearts Distilling); Subsequent Final Office Action dated Oct. 30, 2023 at 10-35 (catering services and distilled spirits: Madison County Distillery, Blue Spirits Distilling, Founding Farmers & Distillers, Portuguese Bend Distilling, McMenamins, Michigan Moonshine, As Above So Below, Firefly Distillery, St. Johnsbury Distillery).

¹⁰ *See* Request for Reconsideration After Final Action Denied dated June 22, 2023 at 84-126.

argument, Applicant proffered 18 valid and subsisting registrations, owned by different entities, that identify some of Registrant's goods *or* Applicant's services, but do not identify Registrant's goods *and* Applicant's services.¹¹ We note that "[e]ach case is decided on its own facts, and each mark stands on its own merits." *In re USA Warriors Ice Hockey Program*, 2017 TTAB LEXIS 143, at *10 n.10 (TTAB 2017) (quoting *In re Boulevard Ent.*, 334 F.3d 1336, 1343 (Fed. Cir. 2003)). Applicant also proffered screenshots of eight webpages displaying actual use of four pairs of similar marks.¹² The screenshots do not display Applicant's services and Registrant's goods being offered under the same mark at the same webpage. However, this evidence is just minimally probative because only parts of the webpages are displayed; the relevant portions of them, for example, the Powderhorn Mountain Resort Dining

¹¹ See Response to Office Action dated May 6, 2022 at 12-27 (Reg. Nos: 3573119, ONWARD (stylized); 4870591, ONWARD; 2838473, 99; 60477667, 99; 2990433, OCCIDENTAL (composite mark); 4610162, OCCIDENTAL; 4028817, (composite mark); 6079654, FF (stylized); 4027832, DRAKE'S (stylized); 6037505, DRAKE'S (stylized); 4386279, POWDERHORN; 5356289, POWDERHORN; 5069117, SCOFFLAW; 5521951, SCOFFLAW; 3700945, HULA HUT; 5840100, HULA HUT); Request for Reconsideration after Final Action dated Jan. 6, 2023 at 16-17 (Reg. Nos. 3328375, TITO'S HANDMADE VODKA; 5536208, TITO'S BURRITOS).

¹² See Request for Reconsideration after Final Action dated Jan. 6, 2023 at 13-15, 18 (displaying use of the following pairs: POWDERHORN rye vodka and POWDERHORN Mountain Resort; SCOFFLAW old tom gin and SCOFFLAW Brewing Co.; HULA HUT spirits and HULA HUT restaurant; TITO'S HANDMADE VODKA, and TITO'S BURRITOS marks). We note that the evidence at page 13, displaying the POWDERHORN marks, does not include a URL or access date. The Examining Attorney did not object to the inclusion of this evidence in the record, so we have considered it. See, e.g., *Genesco Inc. v. Martz*, 2003 TTAB LEXIS 123, at *20-21 (TTAB 2003) (printed materials construed as having been offered under Trademark Rule 2.122(e), 37 C.F.R. § 2.122(e), and deemed to be of record despite lack of information as to publication date and source, because applicant did not object to the materials, and instead treated them as of record).

page, the HulaHut.com menu page, and the Tito's Burritos & Wings menu page, are not included in the record or are not fully displayed.

To bolster its argument that it is uncommon for restaurant services and distilled spirits to emanate from the same source, Applicant proffered a partial screen capture of an Internet article showing 660,936 restaurants operating in the United States as of 2021, which is over three years ago.¹³ In its brief, Applicant cites a January 2017 article, proffered by the **Examining Attorney**, stating that there are 1,315 “craft distillers”¹⁴ in the United States.¹⁵ Applicant did not proffer evidence of the number of restaurants in the United States in 2017, and the admissible evidence of record

¹³ Request for Reconsideration after Final Action dated Jan. 6, 2023 at 26 (Sky Ariella, *Statistics [2022]: How Many Restaurants Are In The US*, ZIPPIA (Sept. 26, 2022), <https://zippia.com/advice/restaurant-industry-statistics/>). For reasons previously discussed, we have not considered any evidence from the 2021 Annual Report of the American Craft Spirits Association. *See supra* Part I.

¹⁴ A “craft distillery” is a subset of a “distillery.” A “distillery” is “a person or company that makes strong alcoholic drinks by the process of distilling.” CAMBRIDGE DICTIONARY (US) (2024) (<https://dictionary.cambridge.org/us/dictionary/english/distiller>) (last accessed Aug. 22, 2024). “Craft” is defined as “relating to food or drinks made using traditional methods by small companies, or companies and people that do this.” *Id.* (<https://dictionary.cambridge.org/us/dictionary/english/craft>) (last accessed Aug. 22, 2024). The Board may take judicial notice of dictionary definitions, including definitions from online dictionaries which exist in printed format or have fixed regular editions. *In re Cordua Rests. LP*, 2014 TTAB LEXIS 94, at *6 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594 (Fed. Cir. 2016).

“Craft distilleries are typically small, independent operations that produce limited quantities of spirits. They often use traditional methods and locally sourced ingredients to create unique and artisanal products. On the other hand, commercial distilleries are larger-scale operations that produce mass-market spirits using modern techniques and often source their ingredients from various locations.” *Craft vs. Commercial Distilleries: Your Ultimate Guide To Kentucky's Distilleries*, BOURBONTOWN TOURS, <https://bourbontowntours.com/craft-vs-commercial-kentucky-distilleries-tour-guide/> (last accessed Aug. 22, 2024).

¹⁵ 16 TTABVUE 6; *see* Request For Reconsideration After Final Action Denied dated June 22, 2023 at 116 (Thomas Henry Strenk, *Trend: The Boom in Restaurant-Distilleries*, RESTAURANT DEVELOPMENT + DESIGN, Jan. 17, 2017, <https://rddmag.com/design/1093-the-boom-in-restaurant-distilleries>).

does not include the number of **distilleries**, generally, in the United States for 2021 or any other year. We therefore find that Applicant’s “uncommon” argument is not supported by the evidence of record, and is without merit.

Finally, Applicant notes that confusion is unlikely because the goods of the cited registrations are in Class 33, whereas its goods are in Class 43. (6 TTABVUE 7-8). But the classification of goods and services has no bearing on the question of likelihood of confusion. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1307 (Fed. Cir. 2018). Rather, it is the manner in which the applicant and/or registrant have identified their goods or services that is controlling. *See Nat’l Football League v. Jasper All. Corp.*, 16 USPQ2d 1212, 1216 & n.5 (TTAB 1990).

After consideration of the admissible evidence of record, we find, similar to *In re Azteca Rest. Enters.* and *In re Golden Griddle*, that collectively, the evidence of record here meets the “something more” requirement. In addition to the cited UGLY DOG registrations being arbitrary and inherently strong, as discussed above, the Examining Attorney submitted 20 third-party use-based registrations showing Registrant’s goods and Applicant’s services registered under the same mark. The Examining Attorney also submitted printed pages from 28 distinct third-party Internet websites showing the same entity offering Registrant’s goods and Applicant’s services at the websites, supporting our finding that the goods and services are complementary. And although the record lacks evidence that Registrant’s distilled spirits are offered at Applicant’s restaurant, evidence of such a commercial relationship, while probative, is not necessarily required to find

“something more.” *In re Hutchinson*, 2006 TTAB LEXIS 236, at *10-12 (TTAB 2006) (non-precedential).¹⁶ We find that confusion as to source would be likely if Registrant’s alcoholic beverages were to be sold at Applicant’s restaurants; the magazine articles submitted by the Examining Attorney, mentioned above, support a finding that there is a viable commercial relationship between alcoholic beverages and restaurant services, and that they can be — and often are — offered under the same mark. *Cf. In re Opus One*, 2001 TTAB LEXIS 707, at *9-16 (discussing NEXIS evidence of record pertaining to private label wines served in restaurants, both using the same mark). Moreover, Applicant’s Mark contains the word “saloon,” which is defined as “a place where alcoholic drinks are sold and drunk; a tavern,”¹⁷ while alcoholic beverages are offered by Registrant under its mark. *Cf. In re Azteca Rest. Enters.*, 1999 TTAB LEXIS 29, at *6. And Applicant’s specimen of record, which is the “dine-in menu” for its UGLY DOG SALOON, lists “Adult Beverages: Ask about cocktails + frozen drinks to-go” as a menu item.¹⁸ *Cf. id.* at *7.

In contrast, Applicant’s rebuttal evidence, discussed above, pales in comparison and cannot be compared to the *In re Coors* record. Each case is decided on its own facts and record, and on balance, the evidence here supports a finding of a not insignificant overlap between Registrant’s goods and Applicant’s services with

¹⁶ Non-precedential decisions are not binding on the Board, but we may cite to and consider them for whatever persuasive value they may have. *In re Fiat Grp. Mktg. & Corp. Commc’ns. S.p.A.*, 2014 TTAB LEXIS 29, at *10 n.6 (TTAB 2014).

¹⁷ Final Office Action dated July 11, 2022 at 12 (AMERICAN HERITAGE DICTIONARY definition).

¹⁸ Specimen dated July 27, 2021 at 3.

respect to source. Thus, the second *DuPont* factor weighs in favor of finding a likelihood of confusion.

D. Trade Channels

Next, we address Applicant's assertion that its services and Registrant's goods "may fall under the same general product or services category but operate in distinct niches." (6 TTABVUE 9). In support of its assertion, Applicant cites one Federal district court case and one unpublished Federal circuit court case that we do not consider as persuasive authority. (*See id.*). "While parties may cite relevant cases from any jurisdiction, the Board relies primarily on precedent from the U.S. Court of Appeals for the Federal Circuit ('Federal Circuit'), not only because the Federal Circuit is the Board's primary reviewing court, but also because its cases address registration issues more specifically." TBMP § 801.03. *See also Grand Canyon W. Ranch LLC v. Hualapai Tribe*, 2008 TTAB LEXIS 33, at *18 n.2 (TTAB 2008) (parties cited 9th Circuit authority extensively, but Board relied on precedent from Federal Circuit); TBMP § 101.03.

More importantly, Applicant's argument is without merit because under the third *DuPont* factor, "the similarity or dissimilarity of established, likely-to-continue trade channels," 476 F.2d at 1361, we must base our likelihood of confusion determination on the goods and services as they are identified in the cited registrations and application at issue, respectively. *In re Elbaum*, 1981 TTAB LEXIS 68, at *2-3 (TTAB 1981). The identifications in the application and cited registration are not restricted as to nature, type, channels of trade, classes of purchasers, or "distinct

niches.” We cannot consider asserted marketplace realities not reflected in the identifications, or extrinsic evidence of actual use. *In re Detroit Athletic*, 903 F.3d at 1052 (citing *In re i.am.symbolic, LLC*, 866 F.3d 1315, 1325 (Fed. Cir. 2017)); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 948 (Fed. Cir. 2000); *Octocom Sys. v. Hous. Comput. Servs.*, 918 F.2d 937, 943 (Fed. Cir. 1990). This *DuPont* factor also weighs in favor of a finding of likelihood of confusion.

E. The Similarity or Dissimilarity of the Marks

Lastly, we address the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 2018 TTAB LEXIS 170, at *13 (TTAB 2018) (quoting *In re Davia*, 2014 TTAB LEXIS 214, at *4 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); accord *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 732 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted). “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.” *Cai*, 901 F.3d at 1373.

Because similarity is determined based on the marks in their entireties, our analysis is not predicated on dissecting the marks into their various components. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1321 (Fed. Cir. 2014).

Nevertheless, “there is nothing improper in stating that . . . 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.” *Id.* at 1322 (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 1059 (Fed. Cir. 1985)). “That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark” *In re Nat’l Data*, 753 F.2d at 1058.

Further, the marks “must be considered . . . in light of the fallibility of memory . . . and not on the basis of side-by-side comparison.” *In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014) (cleaned up) (citation omitted). We focus on the recollection of the average consumer; here, an ordinary adult consumer who normally retains a general rather than a specific impression of trademarks, frequents bars and restaurants, and who consumes alcoholic beverages, namely, distilled spirits and alcoholic cocktail mixes. *Id.*

In appearance, the marks are identical in-part. Applicant’s Mark begins with “UGLY DOG.” We often consider the first part of a mark to be the dominant element because it is “most likely to be impressed upon the mind of a purchaser and remembered” *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 1988 TTAB LEXIS 60, at *8 (TTAB 1988). We do so here as well, particularly because “SALOON,” which has been disclaimed in Applicant’s Mark, is descriptive of, if not generic for, Applicant’s “Bar and restaurant services; catering services,” given that a “saloon” is defined as “a

place where alcoholic drinks are sold and drunk; a tavern.”¹⁹ See *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406-07 (Fed. Cir. 1997) (affirming Board’s finding that “DELTA”– not the disclaimed generic term “CAFE”– is the dominant portion of the mark THE DELTA CAFE). In addition, Applicant’s Mark subsumes the cited standard character UGLY DOG mark in its entirety. Under these circumstances, “[w]hile there is no explicit rule that marks are automatically similar ... [l]ikelihood of confusion has often been found where the entirety of one mark is incorporated within another.” *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 TTAB LEXIS 347, at *20 (TTAB 2019) (quoting *Hunter Indus., Inc. v. Toro Co.*, 2014 TTAB LEXIS 105, at *33 (TTAB 2014)).

The cited standard character mark and the dominant portion of Applicant’s Mark are also identical in sound: “UGLY DOG” is how consumers, given their tendency to shorten marks, are likely to refer to them. *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 1571 (Fed. Cir. 1983) (“Although the record does not indicate that applicant’s business is commonly referred to as ‘Giant,’ it does indicate that people have called it by that name, omitting the word ‘Hamburgers.’ Thus, in a conversation between two consumers in opposer’s area about a place of business called ‘Giant,’ there likely would be confusion about which ‘Giant’ they were talking about.”); see also *Big M Inc. v. U.S. Shoe Co.*, 1985 TTAB LEXIS 8, at *10-11 (TTAB 1985) (“we cannot ignore the propensity of consumers to often shorten trademarks”).

¹⁹ Final Office Action dated July 11, 2022 at 12 (AMERICAN HERITAGE DICTIONARY definition).

As to connotation or meaning, in the absence of evidence to the contrary, we find that “UGLY DOG” conveys the same meaning in Applicant’s Mark and the cited mark.

Finally, we address Applicant’s argument — which is without merit — that confusion is unlikely because the alcoholic beverages offered under the cited registrations are “required to bear a federally approved label that must, among other things, convey the location where the particular product was bottled,” and must “clearly identify their source” in order to “help customers to easily discern the source of those spirits and reduce any likelihood of confusion.” (6 TTABVUE 11; 16 TTABVUE 7; *see also* 13 TTABVUE 6-7). Applicant does not cite a law or regulation in support of its argument.

Even if the Registrant is required to bear such a label on its goods, the alleged geographical extent of its uses are irrelevant, inasmuch as the cited registrations are not geographically limited.²⁰ Without specified geographic limitations in its registrations, the Registrant enjoys the presumptive exclusive right to nationwide use of the registered marks under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), regardless of the owner’s actual extent of use. *Giant Food*, 710 F.2d at 1568.

In sum, since the marks are nearly identical in appearance, would be pronounced similarly, and are presumed to have the same meaning, we find that the overall commercial impression of the marks is the same. This *DuPont* factor weighs heavily in favor of a finding of likelihood of confusion.

²⁰ We also note that Applicant seeks a geographically unrestricted registration for its services.

III. Conclusion

The marks at issue are in-part identical and share the same overall commercial impression; the cited registrations are arbitrary in nature, conceptually strong, and entitled to a broad scope of protection; the Office's evidence, collectively, supports a finding of "something more"; and the goods and services flow through the same channels of trade. In view thereof, we conclude that registration of Applicant's Mark, UGLY DOG SALOON, is likely to cause confusion, under Trademark Act Section 2(d), with the cited registrations for the UGLY DOG marks.

Decision: The refusal to register Application Number 90849904 is affirmed.