The “TiPSY” Winery:

Brooklyn, New York, is a vibrant cultural gathering point for modern day artisans, food and drink enthusiasts, and fashion-forward “hipsters” that push the boundaries of mainstream American culture. In 2010, two Brooklyn natives, Alan Edwards and Dixie Brown, opened the first-ever winery in Brooklyn and branded it with the mark “TiPSY.” Edwards and Brown both believe that simplicity and purity are the most important elements of a successful business, so they decided that their winery would only produce and sell one product, a Merlot-Chardonnay blend that they call “TiPSY wine.” The wine is only available for purchase at the winery itself, either by-the-glass at the tasting room or by-the-case at the winery store.

The TiPSY logo is simple. It consists of black Times New Roman font with the mark “TiPSY” written in the following style:

TiPSY

The bottle design for TiPSY wine is also simple. The logo appears on the front against a solid-color background. The background color varies by vintage year. So far, Edwards and Brown have used white, orange, red, brown, green, blue, yellow, and pink background colors. Edwards and Brown have not spent any money advertising their wine, but word of mouth is strong in Brooklyn and the winery has been a tremendous success. Hundreds of thousands of customers flock there every year to drink in the tasting room and buy wine to take home. Online and print tourism guides routinely rank the winery as one of Brooklyn’s top-10 must-visit bars, and the winery sells approximately 300,000 cases of wine per year.

The “TIPSy” T-Shirt Company:

In 2015, two other Brooklyn natives, Monty Simpson and Tate Jagger, decided to start a t-shirt company in Brooklyn. Simpson and Jagger got drunk one night and started thinking of names for their new company. At one point Simpson exclaimed, “Well, I’m seriously tipsy right now, so let’s call it ‘Tipsy!”’ The name stuck, and in 2016, Simpson and Jagger launched the company and branded it with the mark “TIPSy.” Neither Simpson nor Jagger had ever been to the TiPSY winery before, but they both had heard about it and they had several friends who talked about going there regularly. Simpson and Jagger are generally beer drinkers, but they have tried TiPSY wine a few times and have occasionally seen TiPSY wine bottles at their friends’ houses.

Simpson and Jagger are both minimalists at heart, and as a result, their t-shirts do not have any fancy designs on them. The t-shirts have solid color backgrounds (options of white, black, blue, or
gray) with the mark “TIPSy” in black Times New Roman font on the front of the shirt in the following style:

**TIPSy**

The TIPSy t-shirts are made only with the finest cotton, and they have quickly become popular as customers routinely think they are the softest t-shirts they have ever owned. Simpson and Jagger believe that the internet is bad for society, so they only sell their t-shirts in TIPSy stores in Brooklyn. They opened their first store in 2016, their second in 2017, and they are currently planning to open one more store in 2019. So far, they have sold 150,000 TIPSy t-shirts. In addition to t-shirts, Simpson and Jagger are planning to start selling socks, hats, and sunglasses under the TIPSy brand next year.

**Questions:**

**Group A:** You represent Edwards and Brown, who are joint owners of the TiPSY winery. Edwards and Brown ask you the following questions:

A. Should they sue the TIPSy t-shirt company for trademark infringement?
B. If they decide to sue, what are their best arguments that the t-shirt company’s use of the mark “TIPSy” creates a likelihood of confusion with the TiPSY winery and wine?
C. Which of the Second Circuit’s eight likelihood of confusion factors do you think are the most important in this case?
D. How might you go about collecting evidence that the relevant potential and/or actual customers are in fact confused and/or are likely to be confused?
E. If the t-shirt company agrees to include a disclaimer on their t-shirt tags that reads “The TIPSy t-shirt company is separate from and is not in any way related to the TiPSY winery,” would that alleviate any potential concerns about confusion?
F. What additional facts would you like to know in order to answer these questions?

**Group B:** You represent Simpson and Jagger, who are joint owners of the TIPSy t-shirt company. Simpson and Jagger ask you the following questions:

A. If the TiPSY winery sues them for trademark infringement, should they agree to change their mark?
B. If they decide not to change their mark, what are their best arguments that their use of the mark “TIPSy” does not create a likelihood of confusion with the TiPSY winery and wine?
C. Which of the Second Circuit’s eight likelihood of confusion factors do you think are the most important in this case?
D. How might you go about collecting evidence that the relevant potential and/or actual customers are not in fact confused and/or are not likely to be confused?
E. If they agree to include a disclaimer on their t-shirt tags that reads “The TIPSy t-shirt company is a separate company from and is not in any way related to the TiPSY winery,” would that alleviate any potential concerns about consumer confusion?
F. What additional facts would you like to know in order to answer these questions?
Second Circuit’s Eight Likelihood of Confusion Factors

“Where the products are different, the prior owner’s chance of success is a function of many variables:

[1] the strength of his mark,
[2] the degree of similarity between the two marks
[3] the proximity of the products
[4] the likelihood that the prior owner will bridge the gap
[5] actual confusion,
[6] and the reciprocal of defendant’s good faith in adopting its own mark,
[7] the quality of defendant’s product,
[8] and the sophistication of the buyers.”