

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: March 19, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Cerveceria Primus, S.A. de C.V.
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Serial No. 87460794
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John M. Murphy of Arochi Marroquin & Lindner SC,
for Cerveceria Primus, S.A. de C.V.

Katherine S. Chang, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

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Before Goodman, Pologeorgis, and Coggins,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Cerveceria Primus, S.A. de C.V. (“Applicant”) seeks registration on the Principal Register of the stylized mark TEMPUS, as displayed below, for “beer” in International Class 32.¹

¹ Application Serial No. 87460794, filed on May 23, 2017, under Section 44(e) of the Trademark Act, 15 U.S.C. § 1126(e), based on Mexican Registration No. 1015280 issued on November 30, 2007. The application includes a translation statement which reads as follows: “The English translation of ‘tempus’ in the mark is ‘time.’” The colors white, black and dull gold are claimed as a feature of the mark.



The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the registered mark TEMPUS TWO (in standard characters) for "wines" in International Class 33.²

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed. We affirm the refusal to register.³

I. Preliminary Matter - Evidentiary Objections

We first turn to evidentiary objections lodged by both the Examining Attorney and Applicant. The Examining Attorney objects to the inclusion of the information found at the webpage link <https://www.uspto.gov/trademark/trademark-updates-and-announcements/recent-postings> that is referenced in footnotes 1 and 4 in Applicant's

² Registration No. 3188141, registered on December 19, 2006; renewed. The registration includes the following translation statement: "The English translation of the word TEMPUS in the mark is TIME."

³ The TTABVue and Trademark Status and Document Retrieval ("TSDR") citations refer to the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .PDF version of the documents.

Appeal Brief.⁴ The Examining Attorney argues that the inclusion of hyperlinks is not sufficient to introduce the underlying information into the record.⁵

We agree. Because Applicant did not attach any webpages from this website link prior to filing its appeal, merely providing a link to an Internet site cannot guarantee its authenticity because the nature of a web site is dynamic, not static. *See In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1195 n.21 (TTAB 2018) (“we do not consider websites for which only links are provided); *In re Olin Corp.*, 124 USPQ2d 1327, 1332 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.”); *In re HSB Solomon Assocs., LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012) (the Board will not utilize a link or reference to a website’s internet address to access the site to consider whatever content may appear therein); *In re Planalytics Inc.*, 70 USPQ2d 1453, 1458 (TTAB 2004) (links are not enough to make websites of record). Accordingly, inasmuch as the record in an application must be complete prior to appeal, *see* Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), and because Applicant did not submit the contents of the information found at the referenced hyperlink prior to filing its appeal, we sustain the Examining Attorney’s objection and will give no consideration to the webpage link or the contents of the webpage in our determination herein.

⁴ Examining Attorney’s Appeal Brief, p. 2; 13 TTABVUE 3.

⁵ *Id.*

Applicant objects to the additional evidence submitted by the Examining Attorney in her denial of Applicant's request for reconsideration.⁶ As background, on July 9, 2018, Applicant filed a combined request to remand its involved application to the Examining Attorney to consider additional evidence and for reconsideration of the Examining Attorney's final refusal to registration based on this additional evidence.⁷ By order dated August 1, 2018, the Board granted Applicant's request for remand.⁸ By the same order, the Board expressly stated "[i]f the refusal of registration is maintained, the examining attorney should issue an Office action to that effect, **which may include additional evidence.**" (emphasis added).⁹ The Board's August 1, 2018 order follows the Board's practice and procedure under these particular circumstances. Indeed, if a request to remand for additional evidence is granted, as is the case here, the nonrequesting party (the Examining Attorney, in this instance) may submit additional evidence in response to the evidence submitted with the request. *See In re Northland Aluminum Prods., Inc.*, 221 USPQ 1110, 1112 (TTAB 1984), *aff'd*, 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 1207.02 (2018). Accordingly, Applicant's objection to the additional evidence submitted by the Examining Attorney in her denial of Applicant's request for reconsideration is without merit and is accordingly overruled.

⁶ Applicant's Appeal Brief p. 6 n.5, 11 TTABVUE 7.

⁷ Applicant's Request for Remand and Reconsideration, 4-7 TTABVUE.

⁸ 8 TTABVUE.

⁹ *Id.*

II. 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); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *du Pont* factor that is relevant and all evidence and arguments of record. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

A. Strength/Weakness of Cited TEMPUS TWO mark

We first address the *du Pont* factors that concern the strength of the cited mark. The fifth *du Pont* factor, the fame of the prior mark,¹⁰ and the sixth *du Pont* factor,

¹⁰ The Federal Circuit has reiterated that “[w]hile dilution fame is an either/or proposition—fame either does or does not exist—likelihood of confusion fame varies along a spectrum from very strong to very weak.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (quoting *Palm Bay Imps., Inc. v. Veuve*

the number and nature of similar marks in use for similar goods or services, *du Pont*, 177 USPQ at 567, may be considered in tandem to determine the strength of the cited mark and the scope of protection to which it is entitled. *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017). “In determining strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition.” *Bell's Brewery*, 125 USPQ2d at 1345 (citing *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014)); *see also In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”).

In an *ex parte* appeal such as this, the owner of the cited registration is not a party, and the Examining Attorney is under no obligation to demonstrate the exposure or recognition of the cited mark in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). For that reason, “in an *ex parte* analysis of the *du Pont* factors for determining likelihood of confusion ..., the ‘fame of the mark’ [fifth] factor is normally treated as neutral when no evidence as to fame has been provided.” TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) § 1207.01(d)(ix) (Oct. 2018). Thus, because there is no evidence of record regarding the fame of the cited mark, the fifth *du Pont* factor is neutral.

Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005) (internal quotation omitted).

The sixth *du Pont* factor requires us to consider the number and nature of similar marks in use on similar goods. *du Pont*, 177 USPQ at 567; *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016). Applicant contends that the cited mark TEMPUS TWO is comprised of a weak, commonly used element and that consumers will look to the other features in Applicant's mark to differentiate the marks in appearance, sound, meaning and commercial impression. Specifically, Applicant maintains that the designation TEMPUS is diluted when used in association with goods similar to those identified in the cited registration. To demonstrate such weakness, Applicant has submitted the following evidence purportedly showing third-party uses of the wording TEMPUS as a source indicator for wines:

- Tempus Cellars, a winery in the state of Washington, is selling wine under its TEMPUS CELLARS house mark;¹¹
- Aldo Luis Biondollilo & Asociados, S.A., an Argentine winery doing business as Finca El Retorno, is selling wines in the United States under the marks TEMPUS and TEMPUS ALBA.¹²
- Almodi, a Spanish winery doing business as Altavins, is selling wine in the United States under the mark TEMPUS;¹³ and
- Urla Şarapçılık, a Turkish winery, is selling wine under the mark TEMPUS. Urla has at least one distributor in the United States.¹⁴

¹¹ Applicant's September 27, 2017 Response to Office Action, Exh. 3; TSDR pp. 29-40.

¹² *Id.*, Exh. 2; TSDR pp. 13-28.

¹³ *Id.*, Exh. 4; TSDR pp. 41-42; Applicant's July 9, 2018 Request for Reconsideration Exh. 9, 5 TTABVUE 55-91.


¹⁴ *Id.*, Exh. 10; 5 TTABVUE 99-104. Applicant also submitted Internet evidence showing use of the mark TEMPUS FUGIT SPIRITS for a line of liqueurs by an entity known as Tempus Fugit LLC. *Id.*, 5 TTABVUE. This third-party use evidence, however, does not demonstrate any weakness of the term TEMPUS when used in association with wine and, therefore, has limited probative value in our analysis regarding the commercial strength of the cited mark.

In further support of its contention that the designation TEMPUS is diluted or weak when used in association with wines, Applicant submitted the following three active third-party registrations for marks including the term TEMPUS:¹⁵



- Registration No. 4370351 for the mark TEMPUS ALBA for “sparkling wines; wines”;
- Registration No. 3745071 for the mark TEMPUS FUGIT SPIRITS (in standard characters; SPIRITS disclaimed) for “distilled spirits”; and



- Registration No. 3713196 for the mark  (SPIRITS disclaimed) for “potable spirits” in International Class 33 and “import and export services featuring wine; wholesale distributorships featuring wine” in International Class 35.

The Federal Circuit has stated that evidence of the extensive registration and use of a term by others can be “powerful” evidence of weakness. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). As noted, under the sixth *du Pont* factor, the Board must consider evidence of “[t]he number and nature of similar marks in use on similar goods.” *du Pont*, 177 USPQ at 567. The type of strength (or its inverse, weakness) addressed by the sixth *du Pont* factor is

Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co., 908 F.3d 1315, 128 USPQ2d 1686, 1693-94 (Fed. Cir. 2018).

¹⁵ *See* Applicant’s April 6, 2018 Request for Reconsideration, Exhibit A; TSDR, pp. 9-12; Registration No. 4473421, issued on January 28, 2014.

sometimes referred to as market or commercial strength. This is the degree of association in the mind of the consumer of the branded goods or services with the source of the goods or services based on the exclusivity (and sometimes renown) of the mark in the relevant market. *See In re Chippendales USA Inc.*, 96 USPQ2d at 1686; *Couch/Braunsdorf Affinity, Inc.*, 110 USPQ2d at 1476; *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1898-1900 (TTAB 2006).

With regard to Applicant's third-party use evidence, we conclude that four third parties have adopted and use the term "TEMPUS," alone or with other wording, as a source indicator for wine. However, this evidence is insufficient (and certainly does not rise to the level of "powerful" evidence) to show widespread use of the term to establish that Registrant's mark is weak in relation to wine, or that the public is so familiar with marks containing the word TEMPUS that they will rely on other portions of the marks to distinguish them. By comparison, in *Juice Generation*, there were at least twenty-six relevant third-party uses or registrations of record, *see* 115 USPQ2d at 1672 n.1, and in *Jack Wolfskin*, there were at least fourteen, *see* 116 USPQ2d at 1136 n.2. In addition, there is no information as to how extensive the four third-party uses are or the extent of public exposure to any advertising of these wines under such marks.

We next turn to Applicant's third-party registration evidence. With regard to



Registration No. 4370351 for the mark TEMPUS ALBA, we note that this registration is based on Section 44 of the Trademark Act with no claim of use in commerce. This registration, therefore, does not demonstrate exposure of the mark to U.S. consumers

and accordingly has no probative value to show that the term TEMPUS is weak when used in association with “wine.” See *In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). With regard to the remaining two third-party registrations, we initially note that both of these registrations are owned by the same registrant and contain a statement that the foreign wording in the mark (i.e., TEMPUS FUGIT) translates into English as “time flies.” We further note that one of the registrations is for “distilled spirits,” not wine. “Spirits” is defined as “an alcoholic beverage, especially distilled liquor.”¹⁶ It is common knowledge that wine is not distilled, it is fermented.¹⁷ Accordingly, this particular registration has limited probative value in showing that the term TEMPUS is weak when used in conjunction with wine. The other registration is for “potable spirits,” as well as import and export services and wholesale distributorship services for wine. Even assuming that wine and spirits or wine and the import/export services for wine and the wholesale distributorship of wine are related goods and services, submission of two registrations for marks owned by a single source is hardly sufficient to show common use or registration of the word TEMPUS for wine. Furthermore, as a general proposition, use-based third-party

¹⁶ www.thefreedictionary.com from the AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th edition). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010).

¹⁷ “Wine” is defined as “the alcoholic **fermented** juice of fresh grapes used as a beverage.” (www.merriam-webster.com) (emphasis added).

registrations alone are not evidence that the marks shown therein are in use, or that the public is familiar with them. *Conde Naste Publ'ns, Inc. v. Miss Quality, Inc.*, 507 F.2d 1404, 184 USPQ 422, 424-25 (CCPA 1975); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1110 (TTAB 2007). Thus, merely because a single entity owns two registrations containing the term TEMPUS does not mean the public could distinguish the two marks at issue here.

As to conceptual strength, there is no evidence of record that TEMPUS has any non-source identifying meaning with respect to wine. Moreover, Applicant offers no comment regarding any inherent weakness of the cited TEMPUS TWO mark in its brief. As such, we find the designation inherently distinctive.

In sum, we find that although Applicant has submitted a very modest amount of third-party uses of marks containing the term TEMPUS for wine and third-party registrations of marks owned by the same registrant that include the term TEMPUS for distilled or potable spirits, this evidence is not sufficient to demonstrate that Registrant's mark is commercially weak in relation to wine. Moreover, there is no evidence of record concerning the inherent weakness of the term TEMPUS or TEMPUS TWO for wine. In view thereof, Registrant's TEMPUS TWO mark is entitled to at least a normal scope of protection afforded an inherently distinctive or arbitrary mark. The sixth *du Pont* factor regarding the number and nature of similar marks in use on similar goods is therefore neutral in our analysis.

B. Similarity of the Marks

We turn next to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *du Pont*, 177 USPQ at 567. Similarity in any one of these elements may be sufficient to find the marks similar. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009); *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d at 1586; *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 [owners].” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks omitted). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Applicant’s mark is *Tempus*. The cited mark is TEMPUS TWO in standard characters. We observe that Applicant’s and Registrant’s marks are comprised, either in whole or in part, of the arbitrary term “TEMPUS.” Moreover, the entirety of the literal portion of Applicant’s mark is encompassed within the cited mark; in such

cases, confusing similarity has often been found. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (ML similar to ML MARK LEES); *Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL and BENGAL LANCER and design found to be similar); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406, 407 (CCPA 1967) (THE LILLY similar to LILLI ANN); *In re U.S. Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985) (CAREER IMAGE similar to CREST CAREER IMAGES). In addition, the term TEMPUS (which comprises the entire literal portion of Applicant's mark) is the first element in Registrant's mark. Consumers are also generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark. *See Palm Bay Imps.*, 73 USPQ2d at 1692; *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered" when making purchasing decisions). Furthermore, the inclusion of the term "TWO" in the cited mark is not sufficient to distinguish the marks at issue. The record includes a definition of the phrase "TWO" which is defined as "being the second."¹⁸ As such, consumers are likely to believe that Applicant's TEMPUS goods are the first in a product line and that the goods offered under Registrant's TEMPUS TWO mark are the second product in the same line or constitute a new line of goods. It is therefore likely that the goods sold under Registrant's and Applicant's marks would be attributed to the same source by consumers. Accordingly, we find that the dominant

¹⁸ May 3, 2018 Office Action; TSDR p. 7 (www.merriam-webster.com).

portion of the cited mark is the arbitrary term “TEMPUS” which is identical to the literal portion of Applicant’s mark in sound, connotation and commercial impression.¹⁹

Moreover, while Applicant’s mark appears in a particular stylization, this is also insufficient to distinguish the marks. The cited mark is a standard character mark, and marks appearing in standard character form may be displayed in any stylization, font, color and size, including the identical stylization of Applicant’s mark, because the rights reside in the wording and not in any particular display or rendition. *See Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (“‘Standard character’ or ‘typed’ registrations are federal mark registrations that make no claim to any particular font style, color, or size of display and, thus, are not limited to any particular presentation.”); *see also Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (“[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display. By presenting its mark merely in a typed drawing, a *difference* cannot legally be asserted by that party.”). Thus, because the font style of the cited mark may be displayed in the identical manner as Applicant’s mark, the stylization of Applicant’s mark is insufficient to distinguish the respective marks.

We recognize that in comparing the marks, we must consider Applicant’s and Registrant’s marks in their entirety. Thus, we have taken into account all of the

¹⁹ As noted supra, both Applicant and Registrant provide the identical English translation of the term TEMPUS, i.e., the English word “time.”

differences in appearance, sound, meaning and commercial impression between them, including the stylization of Applicant's mark, as well as inclusion of the term TWO in Registrant's mark. We nonetheless find that despite these differences, given the similarities between the marks due to the shared, dominant and arbitrary term TEMPUS, the marks are similar in appearance, pronunciation, and connotation and engender very similar overall commercial impressions.

Accordingly, the first *du Pont* factor favors a finding of likelihood of confusion.

C. Similarity of the Goods

The next step in our analysis is a comparison of the goods identified in Applicant's application vis-à-vis the goods identified in the cited registration, the second *du Pont* factor. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *see also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). It is settled that it is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. The respective goods need only be "related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that goods emanate from the same source." *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *see also In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or offered by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both Applicant's goods and the goods listed in the cited registration. *In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores). The issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L'Oreal S.A.*, 102 USPQ2d at 1439; *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984).

The Examining Attorney made of record 24 live third-party, use-based registrations identifying both beer (i.e., Applicant's goods) and wine (i.e., Registrant's goods).²⁰ Although such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have some 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. *See In re*

²⁰ May 3, 2018 Office Action; TSDR pp. 8-13, 17-77. The Examining Attorney also submitted a copy of Registration No. 4367607 for the mark WIDOW JANE. *Id.*, TSDR pp. 14-16. Although wine and beer were recited in the identification of goods in this registration at the time it was issued, these goods have since been deleted from the identification. Accordingly, this particular registration has little to no probative value in our analysis.

Albert Trostel & Sons Co., 29 USPQ2d 1785-86; and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

Additionally, the Examining Attorney submitted Internet evidence consisting of screenshots of numerous third-party websites purportedly showing 21 third parties offering for sale both beer and wine under the same mark.²¹

Applicant attempts to discredit the Examining Attorney's third-party registration and Internet evidence. With regard to the third-party registration evidence, Applicant argues that it has little probative value because of a program initiated by the Office that examines whether registered marks for which Section 8 and 71 affidavits have been filed are currently being used on all the goods or services identified in these registrations.²² Applicant's argument is unavailing. While it is true that the Office has commenced such a program, there is no evidence of record that any of the beer or wine goods identified in the third-party registrations submitted by the Examining Attorney have been deleted as a result of the program. See "Changes in Requirements for Affidavits or Declarations of Use, Continued Use, or Excusable Nonuse in Trademark Cases," 82 Fed. Reg. 6259, 6262 (Jan. 19, 2017). Accordingly, Applicant's argument is merely speculative in nature and does not diminish the prima facie validity of the third-party registration evidence submitted by the Examining Attorney.

²¹ *Id.*; TSDR pp. 88-113; August 22, 2018 Denial of Request for Reconsideration, 9 TTABVUE 7-22.

²² Applicant's Appeal Brief, pp. 5-6; 11 TTABVUE 6-7.

Applicant also provides a lengthy discussion of the Alcohol and Tobacco Tax and Trade Bureau's ("TTB") procedures regarding labeling of alcoholic beverages.²³ In an attempt to demonstrate that all but one the marks subject to the third-party registrations submitted by the Examining Attorney are not actually in use in commerce for both beer and wine, Applicant submitted, inter alia, evidence purportedly demonstrating that the registrants of these registrations have not obtained Certificates of Label Approval ("COLA") from the TTB for both types of alcoholic beverages.²⁴ Applicant's submission of this extrinsic evidence constitutes an impermissible attempt to limit the scope of the identification of goods recited in the third-party registrations submitted by the Examining Attorney. *Cf. In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997). The problem with this type of argument is that the comparison of the goods in our likelihood of confusion analysis must be based on the goods **as identified in the third-party registrations**, and not on evidence of actual use of the marks by third-party registrants. A trademark registration on the Principal Register is prima facie evidence of the validity of the registration and the registrant's exclusive right to use the mark in commerce in connection with **all the specified goods**. 15 U.S.C. § 1057(b). While it is true that a prima facie presumption of validity may be rebutted, *see Dan Robbins & Assocs., Inc. v. Questor Corp.*, 599 F.2d 1009, 202 USPQ 100, 105 (CCPA 1979), the present ex parte proceeding is not the proper forum for such a

²³ *Id.* at pp. 6-8; 11 TTABVUE 7-9.

²⁴ Applicant's Request for Reconsideration, 5 TTABVUE 144-153, 185-189, 257-260, 287-293, and 306-309; 6 TTABVUE 34-36, 128-129, 146-148, and 187-189.

challenge.²⁵ Consequently, we have given no consideration to the extrinsic evidence based on the COLA searches conducted by Applicant.

With regard to the Examining Attorney's third-party use Internet evidence, Applicant argues that many of the third-party uses do not demonstrate use of the same mark for both beer and wine.²⁶ Again, Applicant relies on, inter alia, extrinsic evidence purportedly showing that these third-parties have not obtained the requisite COLA labeling approval to offer both wine and beer in U.S. commerce.²⁷ While this evidence may demonstrate that some of the third-party business establishments have not obtained the requisite COLA labeling for both beer and wine, consumers of beer and wine are not privy to such COLA determinations and, therefore, it would not affect their understanding that beer and wine are provided by a single source, particularly since customers have been exposed to websites that show single entities offering both beer and wine under the same mark.

Notwithstanding the foregoing, and after a careful review of the Examining Attorney's third-party use Internet evidence, we agree with Applicant to the extent that many of the third-party websites do not demonstrate the sale of both beer and

²⁵ Applicant's arguments based on facts surrounding the third-party registrants' actual use is more properly made in the context of an infringement action than in a Board proceeding determining registrability. *See* TBMP § 102.01.

²⁶ Applicant's Appeal Brief; 11 TTABVUE 12.

²⁷ *Id.* Applicant also argues that the Internet evidence consisting of screenshots from the websites of the retailers Gilly's, Capital Beer and Wine, Lighthouse, the Virginia Department of Beer and Wine, Dominion, Ingles, Atkins Farm, Sprouts, and Jungle Jim's also does not demonstrate that these businesses sell beer and wine under the same mark. Applicant's Appeal Brief, p. 11; 11 TTABVUE 12. The Examining Attorney, however, submitted screenshots of these third-party retailer websites not to show that a single entity offers both beer and wine under the same mark, but rather to demonstrate the similar or identical trade channels in which beer and wine travel. Examining Attorney's Brief, 13 TTABVUE 8-9.

wine under the same mark. Specifically, approximately half of the third-party websites do not show use of the same mark as a source indicator for both beer and wine. For example, the screenshots submitted from the websites www.gardengrovebrewing.com, www.wagnerbrewing.com, and www.schnelbywinery.com show that these business establishments offer beer and wine under different marks. Nevertheless, the remaining half of the websites do demonstrate that these establishments offer beer and wine under the same mark.

Applicant also argues that an extremely small percentage of microbreweries or nanobreweries sell both beer and wine under the same mark.²⁸ In support of its argument, Applicant submitted evidence demonstrating that six of the third-party businesses identified by the Examining Attorney which purportedly sell both beer and wine under the same mark are approximately 0.1% of the microbreweries in the United States, and the total production of all microbreweries is less than 2.9% of all beer production in the U.S.²⁹ In light of this evidence, Applicant maintains that “[t]he fact that these six businesses sell beer and wine under the same mark does not show that consumers would expect TEMPUS beer and TEMPUS TWO wine to come from the same source. If anything, these businesses are exceptions that prove the rule.”³⁰

While this evidence appears to show that only a small percentage of U.S. microbreweries sell both beer and wine under the same mark, the evidence is far from

²⁸ Applicant’s Appeal Brief, p. 12; 11 TTABVUE 13.

²⁹ Applicant’s Request for Reconsideration; 7 TTABVUE

³⁰ Applicant’s Appeal Brief, p. 12; 11 TTABVUE 13.

conclusive that only a small percentage of all breweries (large and small) sell both beer and wine under the same mark in U.S. commerce. This evidence also does not rebut the Examining Attorney's evidence that demonstrates that wineries also sell beer under the same mark. In other words, Applicant did not submit any evidence to show that only a minimal amount of wineries sell both wine and beer under the same mark in the United States. Further, the identification of goods for the subject application does not limit Applicant's "beer" to beer produced by a microbrewery.

Finally, in a further attempt to demonstrate that beer and wine are not related goods, Applicant submitted pairs of third-party registrations for allegedly similar marks owned by different registrants, the first in the pair identifying beer and the other identifying wine. Applicant submits that these third-party registrations show that the Office is willing to approve an application for registration for wine despite the existence of an earlier registration of the same or similar mark for beer and vice versa because they are unrelated goods.³¹ For example, Applicant submitted the following pairs of third-party registrations owned by different registrants:

- The marks MILLER HIGH LIFE and MILLER LITE are registered to MillerCoors LLC. Millstone Spirits Group LLC owns a registration for the mark MELKY MILLER, covering "alcoholic beverages except beers;"
- The marks CORONA EXTRA and CORONA LIGHT are registered to Cervecería Modelo de México, S. de R.L. de C.V. Miguel Torres, S.A. owns registrations for the marks CORONA and GRAN CORONA, in standard characters and in composite form, for wine;

³¹ Applicant's Appeal Brief p. 12-13; 11 TTABVUE 13-14; Applicant's Request for Reconsideration; 7 TTABVUE

- The mark STELLA ARTOIS is registered to Anheuser-Busch In Bev S.A. Other companies have registered marks containing the word STELLA for wine; and
- The mark STEEL RESERVE is registered to MillerCoors LLC. Unrelated companies have registered marks containing STEEL or STEELE for wine.

We find Applicant's argument unavailing. The nontrivial amount of countervailing third-party registrations submitted by the Examining Attorney which identify both beer and wine as listed goods serves to suggest that wine and beer are related goods since they are types of alcoholic beverages which may emanate from a single source under a single mark. Moreover, the fact the third-party registrations submitted by Applicant coexist on the Principal Register does not demonstrate that the respective goods are unrelated. Here, the sets of registered marks submitted by Applicant, when viewed in tandem, are clearly not identical. The fact that they may share a single term does not, in and of itself, demonstrate that the marks are similar. Because the marks that are subject to the sets of registrations submitted by Applicant are not identical, and we do not know the history of the registrations or the commercial relationships between the pairs of parties, we find that these registrations do not demonstrate that Applicant's and Registrant's goods are unrelated. For these reasons, we give little weight to Applicant's arguments.

In any event, prior decisions and actions of other trademark examining attorneys in registering other marks have little evidentiary value and are not binding upon the USPTO or the Board. TMEP § 1207.01(d)(vi); *see In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017). Each case is decided on its

own facts, and each mark stands on its own merits. *Id.* at 1793 n.10 (quoting *In re Boulevard Entm't*, 334 F.3d 1336, 1343, 67 USPQ2d 1475, 1480 (Fed. Cir. 2003)).

Although approximately half of the Internet third-party use evidence submitted by the Examining attorney does not support her contention that beer and wine are offered under the same mark, we nonetheless find the remaining nontrivial amount of Internet evidence lends support to a conclusion that “beer” and “wine” are related goods because the websites show that consumers have been exposed to the concept that wineries also sell beer or, alternatively, breweries also sell wine, under an identical designation. Moreover, the third-party registration evidence in this case is sufficient to demonstrate the relatedness of “beer” and “wines”. *See In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (wine and beer found related goods based on third-party registrations); *see also Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1826-27 (TTAB 2015). The third-party registration evidence and the probative Internet evidence together amply demonstrate the relatedness of beer and wine, and show that consumers, if they encountered both goods sold under similar marks (as is the case here), are likely to believe that they emanate from the same source.

Based on the Internet and third-party registration evidence of record submitted by the Examining Attorney, we conclude that Applicant’s and Registrant’s goods are related and are the types of goods that have been offered under a single mark by a single entity such that, when identified by similar marks, as is the case here, confusion as to source is likely. *Cf. In re Shell Oil Co.*, 922 F.2d 1204, 26 USPQ2d

1687, 1689 (Fed. Cir. 1993) (“[E]ven when goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source.”).

This finding is consistent with prior precedent. Although there is no per se rule that all alcoholic beverages are related, *see In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009), the Board has previously found, albeit on different records, that beer and wine are related goods for purposes of a Trademark Act Section 2(d) analysis. *See In re Kysela Pere et Fils, Ltd.*, 98 USPQ2d 1261, 1265 (TTAB 2011) (finding beer related to wine); *In re Salierbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (holding CHRISTOPHER COLUMBUS for beer likely to be confused with CRISTOBAL COLON & design for sweet wine). The record in this case also supports such a finding.

Thus, the second *du Pont* factor favors a finding of likelihood of confusion.

D. Similarities in Trade Channels and Classes of Purchasers

Next we consider established, likely-to-continue channels of trade, the third *du Pont* factor. Because there are no limitations as to channels of trade or classes of purchasers in either the application or cited registration, we must presume that the goods identified in Applicant’s application and the cited registration travel through all normal and usual trade channels for such goods. *Stone Lion Capital*, 110 USPQ2d at 1161; *see also Coach Servs.*, 101 USPQ2d at 1723 (absent limitation “goods are presumed to travel in all normal channels ... for the relevant goods”).

The Examining Attorney submitted Internet evidence demonstrating that beer and wine travel in the same channels of trade.³² For example, the Examining Attorney submitted screenshots from the websites of numerous retail stores that show that these retail establishments sell both beer and wine, i.e., Norm's Beer and Wine, Gilly's Craft Beer & Fine Wine, Tully's Beer & Wine, Mac's Beer and Wine Midtown Liquor, Capital Beer & Wine, Lighthouse Beer and Wine, Department of Beer and Wine, and Dominion Beer and Wine.³³ Furthermore, regardless of the channels of trade actually utilized by Applicant and Registrant, it is common knowledge that the normal trade channels for both beer and wine are liquor stores, online retailers, bars and restaurants, as well as certain supermarkets. *In re Kysela Pere et Fils, Ltd.*, 98 USPQ2d at 1267 ("It is also common knowledge that [beer and wine] can be purchased in liquor stores and, in some cases, supermarkets and other retail outlets."). In view thereof, we find that the trade channels for Applicant's and Registrant's goods are overlapping, if not the same.

Moreover, as noted, the goods of Applicant and Registrant ("beer" and "wine," respectively) are identified without limitation as to classes of purchasers. Accordingly, we must consider all potential consumers for such goods which would include any adult member of the general public who drinks wine or beer or purchases

³² August 23, 2017 Office Action; TSDR pp. 7-12; May 3, 2018 Office Action; TSDR pp. 78-87.

³³ August 23, 2017 Office Action; TSDR pp. 7-10; May 3, 2018 Office Action; TSDR pp. 79-83.

them for others. Therefore, the classes of consumers for Applicant's and Registrant's goods are also overlapping, if not identical.

Thus, the third *du Pont* factor also weighs in favor of finding a likelihood of confusion.

E. Balancing the Factors

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. Because we have found that the marks are similar in appearance, sound, connotation and commercial impression; that Applicant's goods are related to Registrant's goods and move in the same channels of trade to the same or overlapping classes of purchasers; and because Applicant has not demonstrated that Registrant's mark is so weak as to allow the registration of Applicant's mark, we conclude that Applicant's mark, as used in connection with the goods identified in the application, so resembles the cited mark for the identified goods as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act.

Decision: The refusal to register Applicant's *Tempus* mark under Section 2(d) of the Trademark Act is affirmed.