THIS OPINION IS NOT A PRECEDENT OF THE TTAB

Mailed: November 4, 2016

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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*Tap It Brewing Co., LLC*

*v.*

*Tap or Nap LLC*

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Opposition No. 91208370

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David A. Juhnke of Sinsheimer Juhnke McIvor & Stroh, LLP
for Tap It Brewing Co., LLC.

Wendy Peterson of Not Just Patents LLC for Tap or Nap LLC.

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Before Quinn, Cataldo and Adlin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Tap or Nap LLC ("Applicant") seeks registration of TAP IT, in standard characters, for "Energy drinks, energy drinks with electrolytes, sports drink, non-alcoholic energy drinks, namely, energy shots, bottled water with vitamins sodas."[1]

[1] Application Serial No. 85288441, filed April 7, 2011 under Section 1(b) of the Trademark Act, based on Applicant's alleged bona fide intent to use the mark. Applicant's identification of goods originally included beer as well, but during prosecution Applicant amended the identification to delete beer.

In its notice of opposition, Tap It Brewing Co., LLC ("Opposer") alleges prior registration of an identical mark for "beer,"[2] and that use of Applicant's mark would be likely to cause confusion with Opposer's mark.[3] In its amended answer, Applicant admits that Opposer owns its pleaded registration, that Opposer has not abandoned its mark and that the parties' marks are identical, but otherwise denies the salient allegations in the notice of opposition. Applicant also counterclaims to cancel Opposer's pleaded registration on the ground of mere descriptiveness.[4] Opposer denies the salient allegations in the counterclaim.[5]

## The Record and Evidentiary Objections

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), the files of Applicant's involved application (subject to the opposition) and Opposer's pleaded registration (subject to Applicant's counterclaim). In addition, Opposer introduced the following trial evidence:

> Opposer's First Notice of Reliance on third-party registrations.[6] 47 TTABVue.

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[2] Registration No. 3986811, issued June 28, 2011.

[3] Opposer also alleged false suggestion of a connection but later withdrew this claim in its motion for summary judgment.

[4] Applicant also counterclaimed on other grounds, but it expressly declined to pursue its claim that Opposer "misused" the federal registration symbol and its other counterclaims were dismissed in the Board's order of July 31, 2015.

[5] Opposer's counter-counterclaim was dismissed as moot in the Board's order of July 31, 2015. Some of Opposer's "affirmative defenses" to Applicant's counterclaim are merely amplifications of Opposer's denials, and Opposer did not pursue the other, true affirmative defenses at trial, which are accordingly waived. *Miller v. Miller*, 105 USPQ2d 1615, 1616 n.3 (TTAB 2013); *Baroness Small Estates Inc. v. American Wine Trade Inc.*, 104 USPQ2d 1224, 1225 n.2 (TTAB 2012).

[6] Citations to the record reference TTABVue, the Board's online docketing system. Specifically, the number preceding "TTABVue" corresponds to the docket entry number(s),

Opposer's Second Notice of Reliance on Internet printouts. 48 TTABVue.

Opposer's Third Notice of Reliance on Internet printouts. 49 TTABVue.

Opposer's Fourth Notice of Reliance on Applicant's response to one of Opposer's Requests for Admission. 50 TTABVue.

Opposer's Fifth Notice of Reliance on Applicant's responses to some of Opposer's written discovery requests. 77 TTABVue.

Opposer's Sixth Notice of Reliance on dictionary definitions. 78 TTABVue.

Opposer's Seventh Notice of Reliance on Internet printouts. 79 TTABVue.

Opposer's Eighth Notice of Reliance on third-party registrations. 80 TTABVue.

Opposer's testimonial deposition of John Gordon, its founder, managing member and chief executive officer, and the exhibits thereto. 60 TTABVue.

Opposer's testimonial deposition of Miles Gordon, its operations director, and the exhibits thereto. 61-62 TTABVue.

Opposer's testimonial deposition of Katelyn Egger, its tap room events and tasting room and marketing manager, and the exhibits thereto. 63 TTABVue.

Opposer's testimonial deposition of its purported expert witness Mike Kallenberger, senior advisor in the Commercial Strategy Group of First Key Consulting, and the exhibits thereto. 64 TTABVue.

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and any number(s) following "TTABVue" refer to the page number(s) of the docket entry where the cited materials appear.

Applicant introduced the following trial evidence:

> Applicant's First Notice of Reliance on official records, Internet printouts, third-party registrations and Opposer's responses to some of Applicant's written discovery requests. 51-56 and 73-75 TTABVue.
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> Applicant's Second Notice of Reliance on Internet printouts, Opposer's responses to some of Applicant's written discovery requests and third-party registrations. 57-59 TTABVue.

Notwithstanding Applicant's argument to the contrary, Opposer's evidentiary objections were timely filed "before the opening of the next testimony period following that in which the [objected to] material was offered into the record." TBMP § 704.08(b) (2016). Nevertheless, Opposer's substantive objections and motions to strike are for the most part overruled, because Applicant cured the majority of the alleged defects.

However, to the extent Applicant's evidence consists of Internet printouts which do not bear the url and date of printing, that evidence is inadmissible and has been given no consideration. *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010). Furthermore, as Opposer points out, we consider Internet printouts and other materials introduced under a notice of reliance without supporting testimony only for what they show on their face, rather than the truth of the matters asserted therein. *Id.* at 1039.

We have considered Applicant's Google image search results, which do not implicate the concerns with textual search summaries. *Cf. Miller v. Miller*, 105 USPQ2d at 1617-18 and *Calypso Technology Inc. v. Calypso Capital Management LP*,

100 USPQ2d 1213, 1219 (TTAB 2011). In addition, Applicant sufficiently set forth the relevance of its evidence, which is in any event obvious given the single remaining claim and single remaining counterclaim in this proceeding.

**Applicant's Descriptiveness Counterclaim**[7]

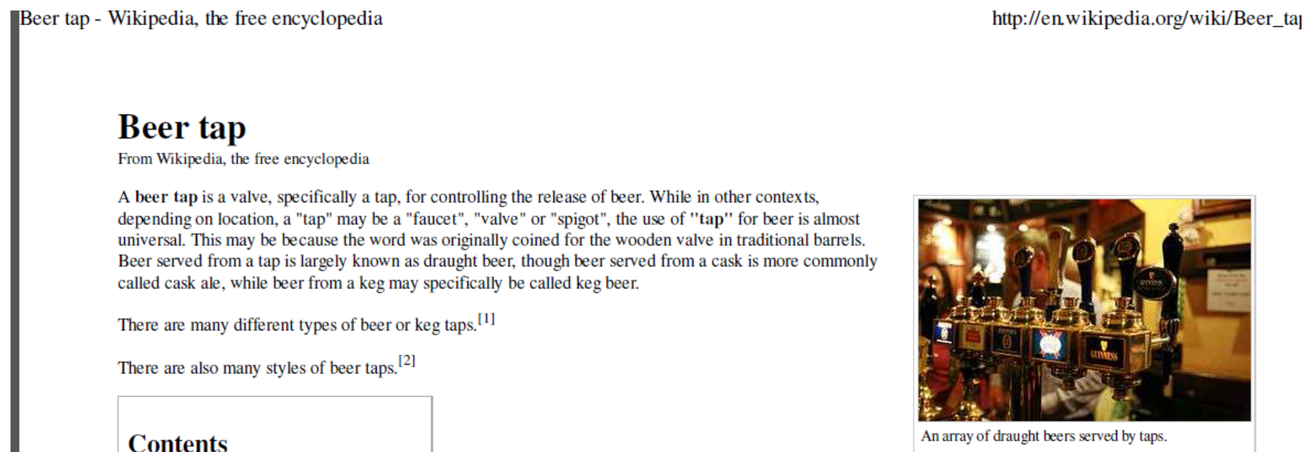
"Because a trademark owner's certificate of registration is 'prima facie evidence of the validity of the registration,'" the petitioner seeking cancellation of the registration, in this case Applicant by way of its counterclaim, bears the burden of proof, and must establish its grounds for cancellation by a preponderance of the evidence. *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989); *see also*, *On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1476 (Fed. Cir. 2000); *7-11 Sales, Inc. v. Perma, S.A.*, 225 USPQ 170 (TTAB 1984).

A mark is deemed to be merely descriptive, within the meaning of Section 2(e)(1), if it immediately conveys knowledge of a quality, feature, function, characteristic or purpose of the goods for which it is used. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (quoting *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); and *In re Abcor Development*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A mark need not immediately convey an idea of each and

[7] Applicant has standing to seek cancellation of Opposer's pleaded registration because it is the defendant in the opposition (in which Opposer relies on its registration). *Bd. Of Regents, Univ. of Tex. Sys. v. S. Ill. Miners, LLC*, 110 USPQ2d 1182, 1196-97 (TTAB 2014).

every specific feature of the goods in order to be considered merely descriptive; rather, it is sufficient that the mark describes one significant attribute, function or property of the goods. *In re Chamber of Commerce of the United States of America*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338 (TTAB 1973).

Applicant relies on the following Wikipedia entry for "beer tap," which includes a depiction of "draught beers served by taps":



Beer tap - Wikipedia, the free encyclopedia http://en.wikipedia.org/wiki/Beer_ta

**Beer tap**

From Wikipedia, the free encyclopedia

A **beer tap** is a valve, specifically a tap, for controlling the release of beer. While in other contexts, depending on location, a "tap" may be a "faucet", "valve" or "spigot", the use of "**tap**" for beer is almost universal. This may be because the word was originally coined for the wooden valve in traditional barrels. Beer served from a tap is largely known as draught beer, though beer served from a cask is more commonly called cask ale, while beer from a keg may specifically be called keg beer.

There are many different types of beer or keg taps.[1]

There are also many styles of beer taps.[2]

**Contents**

An array of draught beers served by taps.

55 TTABVue 19. This evidence establishes that in the context of beer, a "tap" is a valve "for controlling the release of beer." *Id.*

Applicant also relies on other evidence that "tap" refers to the device that controls the flow of and transfers beer from kegs, or the process of drawing beer from kegs. Examples where "tap" is used as a verb include the following:

> a portion of an online article entitled "Build a Kegerator"[8] states "Sankey kegs are the ones we all remember from college, the same kind that countless college guys stood around while shouting instructions at one another on how

[8] A kegerator stores kegs, preserves the beer inside the kegs and allows it to be served cold. 52 TTABVue 3-20.

> to **tap it** ('Nah bro, you've gotta turn it topwise … no, topwise!');"
>
> an ARS Technica message board posting entitled "ARS Beer Drinkers: Learn me about kegerators" includes this question: "By the way, how fast will a keg go flat once you **tap it**?);
>
> the "Buyers Guide: Kegerator FAQ" on "compactappliance.com" states "It's best to let the keg sit for an hour or so before you **tap it**;"
>
> a kegerator listing on "overstock.com" includes a product description which states "Add one of a variety of keg sizes into the refrigerated storage cabinet, **tap it** and call your friends for an instant party;" and
>
> a response to the question "How long does beer last in a kegerator" on "quora.com" states "As long as you do not **tap it**, and the brewery maintains proper cleanliness, the beer will not 'go bad,' but the flavor and aroma will change over time."

52 TTABVue 4, 5, 9, 12, 15 (emphasis added). Similarly, companies which sell beer in kegs explain "keg tapping procedures" to their customers, answer questions such as "how do I tap a keg?" and express excitement about new offerings by indicating they "are a bit anxious to finally tap it and taste the result." 53 TTABVue 36, 41. Beer retailers which offer kegs of beer will often require deposits for the "tap" device used to draw beer from the keg. *See e.g.* 79 TTABVue 81. Sometimes, hammers are used to "tap" a keg, and Opposer sometimes uses its mark with a logo depicting a hand holding a hammer. 55 TTABVue 3-7; 54 TTABVue 26-27; 61 TTABVue 46.

Applicant introduced evidence of "tap" also being used as a noun or otherwise. For example, an article about a "beer dispenser" is entitled "SYNEK Draft System Brings Tap-Fresh Beer To The Kitchen." 53 TTABVue 48. Opposer concedes that "some

customers may refer to beer as being 'on tap,'" and that in its Tap Room "draft beer is dispensed through a tap." 54 TTABVue 10-11, 14. An article about "craft" beer states "From a restaurateur's standpoint there are seemingly unlimited options out there in regards of what to offer via tap and bottle." 57 TTABVue 10.

The term TAP is also used as part of trademarks. For example, Sturman BG developed a product "to maintain and dispense carbonated beverages" which is called TAP-A-DRAFT. 79 TTABVue 87.

Applicant introduced third-party registrations in which the term "tap" is disclaimed for beer-related products and services, as follows:

>
> 
> , with "FRESH FOODS," "BEER" and "FINE CRAFTED BEER ON TAP" disclaimed, Reg. No. 4323292, for "beer."
>
>
> 
> , with "DRAUGHT," "CRAFT BEERS," "ON TAP" and "TO GO" disclaimed, Reg. No. 4303958, for "retail store services featuring beer."
>
> JUST TAP'D, in standard characters, with "TAPPED" disclaimed, Reg. No. 4803219, for "growlers for draft beer being jugs, sold empty; drinking glasses" and "retail store services featuring beer and wine sold in various sized containers and in bottles … beer making equipment and supplies …."
>
> QUICK TAP CRAFT BEER, in standard characters, with "TAP CRAFT BEER" disclaimed, Reg. No. 4545067, for "retail store services featuring beer."

TAP BOARDS, in standard characters, with "TAP" disclaimed, Reg. No. 3691996, for "wood handles for beer taps."

TAP HUNTER, in standard characters, with "TAP" disclaimed, Reg. No. 3787133, for "computer application software for mobile phones" and "providing a searchable website featuring the goods and services of other vendors, namely, providing a searchable website that helps consumer (sic) search for their favorite craft beer on tap via a global computer network."

TAP WAGON, in standard characters, with "TAP" disclaimed, Reg. No. 4640708, for "bar services featuring beer … taproom services featuring beer provided at customer directed premises."

TAPLISTER, in standard characters, with "TAP" disclaimed, Supplemental Register Registration No. 4273638, for "computer application software … namely, software for search engine providing crowd-sourced data about locations, breweries and beers."

THE COMMUNITY TAP, in standard characters, with "TAP" disclaimed, Supplemental Register Reg. No. 4068867, for "retail store services featuring beer, wine, refillable growlers and bottles …."

TRI TAP, in typed form, with "TAP" disclaimed, Reg. No. 1150783, for "beer barrel tapping equipment, comprising metal dispensing heads …."

TRUE TEXAS BREWS ON TAP, in standard characters, with "TEXAS BREWS ON TAP" disclaimed, Reg. No. 4444983, for "… retail store services featuring fill-on demand beer growlers and beverage containers; retail store services featuring beer taps from which customers can have a beer growler filled for consumption off the premises."

TAP THAT, in standard characters, with "TAP" disclaimed, Reg. No. 3925255, for "refrigerator rental" and "rental of bar equipment; rental of drink dispensing machines."

52 TTABVue 22-56; 56 TTABVue 3-20.

Furthermore, Applicant points out that a large number of breweries, bars and restaurants that offer beer include the word “tap” in their names. For example, some brewery names appear to use “tap” to identify or suggest the keg apparatus, such as “4th Tap Brewing Cooperative,” “Cedar Grove Brewery and Tap, LLC,” “Coal Creek Tap,” “The Open Tap Brewpub & Eatery,” “Tap and Screw Brewery,” “Taps Fish House and Brewery,” “The Tap Beer Company” and “Twain’s Billiards and Tap,” while others use “tap” to identify a place where beer is served, such as “Abbey Ridge Brewery & Tap Room,” “Atwater in the Park Biergarten and Tap House,” “The Brew Kettle, Taproom and Smokehouse” and “Virginia City Brewery and Taphouse.” 53 TTABVue 6-10.

In addition, TAP (and variations thereof) is currently used as a mark for other beer-related services. For example, Tap That Draft Beer Services, the owner of Registration No. 3925255, promotes its “Tap That Tap Room,” and its website indicates which beers are currently “on tap” in its Tap Room. 56 TTABVue 6-14. I’d Tap That, LLC, the owner of Registration No. 4640708, uses the slogan TAP INTO THE FUN! and depicts its TAP WAGON trailers which “feature 6 beer taps and electric refrigeration”:

Our 5'x8' trailers feature 6 beer taps and electric refrigeration easily supplied from a standard home outlet, or we can provide a generator for remote locations.

We work closely with major beer distributors as well as local breweries. The trailer is delivered with beer already cold and ready for you & your guests to tap int

56 TTABVue 18-20.

For its part, Opposer points out that TAP and TAP IT are used not only in connection with beer served from kegs, but also in connection with other beverages served from kegs or similar containers, or beverage-related services. For example, THE RUBY TAP is a "self-serve wine bar," which serves 32 wines "available by wine machine," with a "handful" of other wines "on tap." 79 TTABVue 10-12. Similarly, an article in WineIndustryInsight states that "Wine on Tap is back," and that "on-premise operators are installing dedicated, quality draft wine systems to serve their customers wine-by-the-glass and carafe from this reusable, well proven bulk format." *Id.* at 13-14. There are a number of products, including "tapping equipment," offered to those intending to serve "wine on tap." *Id.* at 15-22. Other types of alcoholic beverages, including margaritas and other cocktails are also offered "on tap." *Id.* at 24-37. However, it is not only alcoholic beverages, but also soft drinks, coffee, tea, water and other beverages which are offered "on tap." *Id.* at 39-80, 96. In fact, the term TAP is also used in connection with "tapping" sap from trees for the purpose of making maple syrup, including by Tap My Trees, which claims to be "the #1 supplier of maple sugaring supplies for the hobbyist." 79 TTABVue 89-94.

Furthermore, TAP IT (and variations thereof) is used by third-parties in other contexts. For example, an app called TAP-IT is intended to keep users "in touch with friends, relatives, parents and children, letting them know where you are and alerting them if you need assistance," and claims to be "putting you one tap away from your friends and family." 79 TTABVue 98-100. There is also a TAPIT software system focused on call accounting and reporting, as well as TAP-IT tapping fluid, *Id.* at 102-105. Opposer also points out that TAP IT and variations thereof is registered for a wide variety of products, including "expansion-type anchors and mechanical, non-electric fasteners" (Reg. No. 731040); "kits composed primarily of agents to prime mice for ascites production and a de-lipidizing reagent" (Reg. No. 2201910); "reusable metal water bottles sold empty" (Reg. No. 3772252); "computer software applications for mobile phones for finding locations with access to drinking water" and "providing a database of locations with access to drinking water" (Reg. No. 3736120); "computer hardware for integrating a computer and a touch panel display surface in order to allow the user to access and control any computer application displayed on the display surface by pressing on its touch-sensitive surface for interactive learning stations" (Reg. No. 3829772); "hats; jackets; shorts; sweaters; sweatshirts; t-shirts; tank tops" (Reg. No. 4129516); and "advertising and marketing services provided by means of indirect methods of marketing communications …" (Reg. No. 4148896); *Id.* at 7-21.

According to the Urban Dictionary, "tap it" has meanings unrelated to beverages. It can be used "to proclaim that you would get with someone," as a greeting, to

indicate that something is "awesome," to refer "to when two objects come in contact with one another" or to express "surprise, excitement and awe." 117-119.

While Opposer has established that "tap it" has multiple meanings, that does not mean that its mark is not descriptive. In fact, "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002). In this case, consumers who know that Opposer offers beer would likely associate the mark TAP IT with a beer tap, and more specifically with tapping a keg of beer and thereby serving the beer. Therefore, the non-beer meanings of TAP and TAP IT are not enough to establish that Opposer's mark is inherently distinctive.

On the other hand, Opposer's evidence that "tap" is used in connection with a variety of beverages, including non-alcoholic beverages, supports Opposer's argument that "tap" and "tap it" refer to kegs and serving beverages (not necessarily beer) from kegs, rather than beer specifically. In fact, there is no evidence that anyone refers to beer as "tap," much less as "tap it," or that consumers would perceive "tap," much less "tap it," as conveying knowledge of a quality, feature, function, characteristic or purpose of Opposer's beer. At most they would perceive the mark as suggesting that the beer may come from a keg.

Most of the third-party registrations upon which Applicant relies which include disclaimers of the word "tap" are not for beer itself, but rather for beer-related

products or services, such as retail stores offering beer, including retail stores which dispense beer into customers' growlers, presumably from a keg or similar vessel. Others are for goods and services more directly related to kegs and tapping kegs, such as "wood handles for beer taps," "providing a searchable website that helps [a] consumer search for their favorite craft beer on tap," "beer barrel tapping equipment," refrigerator and drink dispensing machine rental and beer trucks which dispense beer. There is only one third-party registration of record in which the term "tap" is disclaimed for beer itself, but in that registration, the disclaimed term is not "TAP" alone but rather "FINE CRAFTED BEER ON TAP," which is obviously descriptive of a type of beer and how it is stored and delivered. In short, in the context of Opposer's goods, the evidence makes clear that "on tap" refers to beer stored in and accessed from kegs.

Neither the word TAP nor the full composite term TAP IT which comprises Opposer's mark immediately conveys anything about Opposer's beer itself. At most, TAP and TAP IT convey a vessel which contains Opposer's goods, and from which Opposer's goods may be served, but they do so much less directly and immediately than the term "on tap" disclaimed in Registration No. 4323292, which is one way sellers and consumers refer to beer in kegs. Because there is no evidence that sellers, consumers or others refer to beer as "tap" or "tap it," multi-stage reasoning would be required for consumers to associate the keg or other vessel conveyed by TAP or TAP IT with Opposer's beer itself. *See In re Majestic Distilling Co., Inc.*, 420 F.2d 386, 164 USPQ 386 (CCPA 1970). In *Majestic Distilling*, the predecessor to our primary

reviewing court found CHARRED KEG suggestive rather than descriptive for whiskey, even though a dictionary definition of and federal regulation concerning one type of whiskey specifically stated that it is "aged in … charred oak containers."

While Applicant's evidence reveals that a number of establishments which produce or serve beer have names which include the word TAP, this does not establish that TAP, much less TAP IT, is descriptive for beer. In fact, in some of these names TAP appears to suggest serving beer from a keg, or is used as part of a composite term meaning brewery, brewpub, bar or the equivalent, such as "tap room" or "taphouse." If the term "tap" in these names (for establishments which serve beer) was merely descriptive of beer, there would presumably be no need to also include terms such as "brewery," "beer" or "biergarten" in the names, such as in "Cedar Grove Brewery and Tap," "The Open Tap Brewpub & Eatery," "The Tap Beer Company" or "Atwater in the Park Biergarten and Tap House."

In short, the record establishes that consumers who know that Opposer offers beer may very well associate the mark TAP IT with a beer tap, or with tapping a keg. That does not render the mark merely descriptive for beer, however. Instead, we find that the mark is suggestive, because of the indirect connection between a beer tap or tapping a keg on the one hand and the beer itself on the other. *See e.g.*, *Bose Corp. v. International Jensen Inc.*, 963 F.2d 1517, 22 USPQ2d 1704 (Fed. Cir. 1992). In *Bose*, the Court found ACOUSTIC RESEARCH with ACOUSTIC disclaimed[9] to be

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[9] Applicant's argument, presented for the first time in its Trial Brief, that Opposer should be required to disclaim TAP apart from the mark as shown, is untimely and unpleaded and will therefore be given no consideration. *Demon International LC v. Lynch*, 86 USPQ2d 1058, 1060 n.5 (TTAB 2008) ("To the extent opposer intended this allegation in its brief as a claim

suggestive rather than merely descriptive for speaker units and turntables for phonographs, even though the applicant's advertising stated that its products were the result of acoustic research. Specifically, "[t]he words 'acoustic research' describe the engineering *activity* that preceded the development of speaker units and turntables for phonographs. The mark ACOUSTIC RESEARCH does not describe a feature of the *goods* produced by [applicant]." *Id.* at 1706 (emphasis in original); *see also In re Majestic Distilling*, 164 USPQ at 386 and *Audio Fidelity, Inc. v. London Records, Inc.*, 332 F.2d 577, 141 USPQ 792 (CCPA 1964) (finding AUDIO FIDELITY suggestive rather than merely descriptive of mechanically grooved phonograph records, stating that the mark "means sound faithfulness and as used in connection with phonograph records suggests that the sounds produced by the records very accurately represent the sounds recorded. The trademark is not merely descriptive of phonograph records."). Similarly, we found PHONE FORWARD with PHONE disclaimed for automatic telephone call diverters to be suggestive rather than merely descriptive, in part because the mark "requires a modicum of imagination or thought before one is able to determine the nature of applicant's product. That is to say because there is no evidence that purchasers or users refer to applicant's devices as 'phone forwards' or that the words 'phone forward' are used, otherwise, in a descriptive sense by the trade or by customers, we believe that a multistage reasoning

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that applicant's mark is not entitled to registration in the absence of a disclaimer, we have not considered it because such matter was not pleaded in the notice of opposition."). In any event, a disclaimer does not remove the disclaimed matter from the mark, and would not assist Applicant in defending Opposer's likelihood of confusion claim in this case.

process … is necessary in order to ascertain the nature or function of applicant's goods." *BellSouth Corp. v. Planum Technology Corp.*, 14 USPQ2d 1555, 1556 (TTAB 1988); *see also Entex Industries, Inc. v. Milton Bradley Co.*, 213 USPQ 1116 (TTAB 1982) (finding SIMON for equipment sold as a unit for playing an electronic type parlor game, specifically a "Simon Says"-type game, suggestive rather than merely descriptive).

The counterclaim is dismissed.

## **Opposer's Likelihood of Confusion Claim**

Because we have dismissed Applicant's counterclaim, Opposer is entitled to rely on its pleaded Registration.

### Standing and Priority

Opposer's pleaded registration[10] establishes Opposer's standing. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). And priority is not at issue with respect to the goods identified in the registration. *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

[10] Applicant's argument that Opposer's registration is not of record is incorrect. As stated, it is automatically of record by virtue of Applicant's counterclaim. Trademark Rule 2.122(b). In any event, Applicant's reliance on *Hard Rock Café International (USA) Inc. v. Elsea*, 56 USPQ2d 1504, 1511 (TTAB 2000) is entirely misplaced, because in that case the status and title copies of the registrations were prepared years prior to the filing of the notice of opposition. Here, the printout of Opposer's registration showing its status and title is dated the very same day Opposer filed its notice of opposition and attached thereto. Moreover, Applicant admitted in its April 16, 2013 amended answer and counterclaim that Opposer owns its pleaded registration and that as of April 16, 2013 the registration was valid.

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, 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 (CCPA 1976). Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848. We consider the likelihood of confusion factors about which the parties introduced evidence or presented argument, and treat the remaining factors as neutral.

*The Marks*

The marks are identical. This factor not only weighs heavily in favor of a finding of likelihood of confusion, but also reduces the degree of similarity between the goods that is required to support a finding of likelihood of confusion. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002); and *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).[11]

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[11] Applicant attempts to make much of Opposer's use of TAP IT BREWING CO. These usages are essentially irrelevant here, both because Opposer relies on its registration for TAP IT alone, and because BREWING CO. is generic for beer, such that TAP IT is the source identifier for Opposer's goods.

*The Goods and Channels of Trade*

As Opposer points out, the involved application itself seems to have revealed a relationship between the parties' goods, as Applicant originally sought registration of its mark for not only energy and sports drinks, bottled water and soda, but "beer" as well. *See Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1786 (Fed. Cir. 1990) (finding a relationship between the applicant's "modems" and the opposer's "computer programs," finding that the relationship between the goods "is shown," in part, "by [applicant's] original application, which indicates [applicant] itself used the mark OCTOCOM for both modems and computer programs").

Opposer has introduced additional evidence that beer is related to Applicant's goods. Specifically, Opposer relies on a number of third-party use-based registrations showing that a single mark has been registered for beer or beer-related products and services on the one hand and energy or sports drinks, or soda, on the other, including the following:

> 3 STARS BREWING COMPANY in standard characters (Reg. No. 4580389) is registered for "beer; ale; lager" on the one hand and "concentrates, syrups and powders for making sports drinks …" on the other.
>
> LOST RHINO BREWING COMPANY in standard characters (Reg. No. 4147496) is registered for "beer" on the one hand and "soft drinks, namely, sodas" on the other.
>
> CROWN VALLEY BREWING in standard characters (Reg. No. 4654857) is registered for "beer" on the one hand and "soft drinks, namely, sodas" on the other.

SUSTAINABLE BEVERAGE TECHNOLOGIES in standard characters (Reg. No. 4762148) is registered on the Supplemental Register for "alcohol-free beers; beer; beer making kit; beer, ale and lager; beer, ale and porter; beer, ale lager, stout and porter; beer, ale, lager, stout, porter, shandy" on the one hand and "soda pops; soda water; soft drinks, namely, sodas" on the other.

PAT'S BACKCOUNTRY in standard characters (Reg. No. 4115220) is registered for "beer; beer wort; beer, ale and lager; beer, ale and porter; beer, ale, lager, stout and porter; beer, ale, lager, stout, porter, shandy" on the one and "concentrates, syrups or powders used in the preparation of soft drinks," "seltzer water; soda pops; soda water; soft drinks" on the other.

ILLUMINATI in standard characters (Reg. No. 4717142) is registered for "beer; ale; lager" on the one hand and "fruit drinks and fruit juices; mineral and aerated waters and other non-alcoholic drinks, namely, carbonated beverages, cider" on the other.

(Reg. No. 4584896) is registered for "beer; beer, ale, lager, stout and porter" on the one hand and "soft drinks, namely, sodas" on the other.

GSP CRAFT BREWING in standard characters ("Reg. No. 4518925) is registered for "beers and soft drinks, namely, sodas."

(Reg. No. 4316201) is registered for "beer; beer, ale lager, stout, porter, shandy" on the one hand and "soda water; soft drinks, namely, sodas" on the other.

(Reg. No. 4420511) is registered for "beer and soda."

DuBe Hemp in standard characters (Reg. No. 4429132) is registered for "beers" on the one hand and "energy drinks" on the other.

INGREDIENTS OF CHAMPIONS in standard characters (Reg. No. 4672011) is registered for "beverages, namely, beer and sports drinks."

(Reg. No. 4433961) is registered for "beer, malt beer, wheat beer, porter, ale, stout and lager" on the one hand and "concentrates and powders used in the preparation of energy drinks and fruit-flavored beverages" and "concentrates, syrups or powders used in the preparation of sports and energy drinks; energy drinks; non alcoholic beverages, namely, energy drink …" on the other.

THE PARTY STARTS HERE in standard characters (Reg. No. 4577168) is registered for "beers" on the one hand and "energy drinks" on the other.

GO N'SYDE in standard characters (Reg. No. 4539077) is registered for "beer, ale and lager" on the one hand and "energy drinks" on the other.

47 TTABVue 9-39. "Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source." *See In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467,

1470 n.6 (TTAB 1998); *see also In re Davey Prods. Pty. Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009).

Opposer also relies on Internet printouts which show on their face that:

> Radler, a "mix of fruit soda and beer," is considered by some "a really hot beverage right now," and several breweries in the Washington DC area are reported as offering the beverage. 48 TTABVue 7.
>
> Lost Rhino Brewing Company claims to offer a variety of beers, as well as root beer. *Id.* at 14.
>
> Crown Valley Brewery claims to offer various types of beer on the one hand and root beer on the other. *Id.* at 21.
>
> Pat's Backcountry Beverages claims to offer various types of beer and various types of soda under the mark PAT'S. *Id.*at 28-36.
>
> Sprecher claims to offer various types of beer and various types of soda. *Id.* at 38-46.
>
> Republic Brewing Company claims to offer various types of beer and various types of soda. *Id.* at 48-55.
>
> Warped Wing Brewing Company claims to offer beer, root beer and a Radler. *Id.* at 57-63.
>
> Raleigh Brewing Company claims to offer beer, Kombucha and sodas. *Id.* at 65-66.

In addition, an October 14, 2015 article in the Wall Street Journal entitled "Not So Soft Drink: Brewers Add Booze to Root Beer" indicates that Sam Adams, Miller and other breweries are offering or planning to soon offer "hard" sodas, such as an alcoholic version of root beer. *Id.* at 70-74. Similarly, an article in Fortune entitled "Root beer is the next big thing in craft beer" states "Not Your Father's Root Beer is a huge hit this year and may be more than just a fad." *Id.* at 76-79.

In fact, Opposer itself sells third-party bottled water, bottled soda and energy drinks in its tap room. 60 TTABVue 16; 61 TTABVue 14-15; 63 TTABVue 8. Opposer has also considered, and had meetings with a soda company to discuss, offering its own energy and sports drinks and sodas. Opposer's currently beer-focused personnel, facilities and equipment could fairly easily transition into also offering these types of "soft" beverages. 60 TTABVue 11-12, 23-24; 61 TTABVue 11-12.

Opposer further points out that a number of cocktail recipes include as ingredients beer on the one hand and sports or energy drinks or soda on the other. 49 TTABVue 8-37. This also supports a finding that the parties' goods are related. *See In re Davia*, 110 USPQ2d 1810, 1816 (TTAB 2014) (pepper sauce and agave nectar); *In re Vienna Sausage Manufacturing Co.*, 230 USPQ 799, 799-800 (TTAB 1986) (sausage and cheese).

We have no difficulty finding the goods related on this record. A relatively large number of third parties have registered or used the same marks for beer on the one hand and sports, energy or soft drinks on the other, and Applicant intended to use its mark for these goods as reflected in its original identification of goods. Moreover, several large and "craft" brewers appear to have expanded or, like Opposer, hope to expand their operations to offer soda, so much so that business publications have identified the practice as a trend. The evidence also reveals that Applicant's and Opposer's goods are complementary, as they are sometimes combined to make cocktails. This factor also weighs in favor of finding a likelihood of confusion.

As for channels of trade, Opposer sells its beer from kegs in its own tap room, and distributes bottles of beer through grocery and liquor stores and bars and restaurants. 60 TTABVue 9-10, 49-50; 61 TTABVue 12, 20-21 and 68-269. Opposer's distributors also distribute sports and energy drinks, which are offered by the same types of retailers that offer Opposer's beer. 60 TTABVue 12; 61 TTABVue 12. Opposer's beer has been promoted next to popular energy drinks:

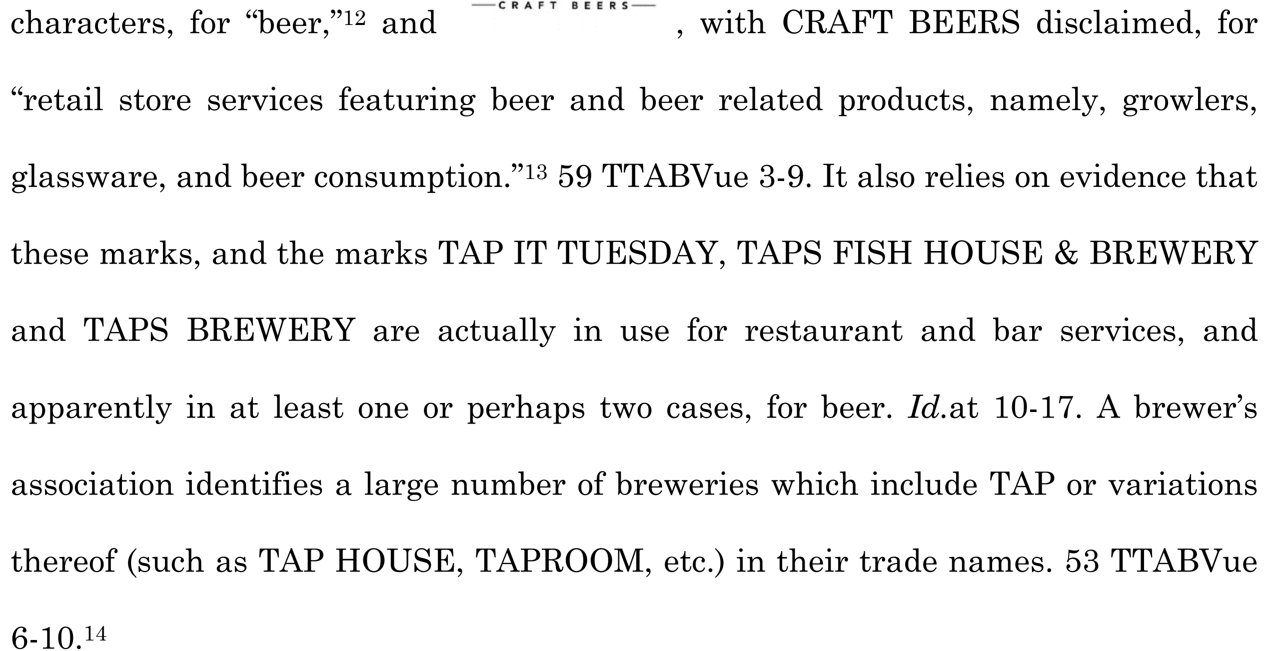
60 TTABVue 29, 89.

While there is no evidence that Applicant is offering any goods under its mark, its identification of goods is unlimited with respect to channels of trade. We must therefore presume that Applicant's sports, energy and soft drinks could be offered through grocery and liquor stores and bars and restaurants, perhaps even the same ones that offer Opposer's beer. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Citigroup Inc.*, 98 USPQ2d at 1261; *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). This factor also weighs in favor of a finding of likelihood of confusion.

*The Strength of Opposer's Mark*

Applicant relies on evidence, such as that discussed above in connection with Applicant's counterclaim, that TAP is commercially weak when used for beer-related products and services. It relies on third-party registrations of TAPS, in standard characters, for "beer,"[12] and

, with CRAFT BEERS disclaimed, for "retail store services featuring beer and beer related products, namely, growlers, glassware, and beer consumption."[13] 59 TTABVue 3-9. It also relies on evidence that these marks, and the marks TAP IT TUESDAY, TAPS FISH HOUSE & BREWERY and TAPS BREWERY are actually in use for restaurant and bar services, and apparently in at least one or perhaps two cases, for beer. *Id.*at 10-17. A brewer's association identifies a large number of breweries which include TAP or variations thereof (such as TAP HOUSE, TAPROOM, etc.) in their trade names. 53 TTABVue 6-10.[14]



On the other hand, Opposer has grown every year since it began operating in 2010. 60 TTABvue 7; 61 TTABVue 7; 62 TTABVue 6-12. It advertises on radio and billboards on major highways, and sponsors mixed martial arts events, music festivals and race car drivers. 60 TTABVue 22-23, 26-27, 29-30, 85-88; 61 TTABVue

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[12] Registration No. 4551766.

[13] Registration No. 4496050.

[14] There is no evidence that these trade names are used in connection with beer, such as on bottles or kegs, or even that the relevant public is exposed to the listed trade names, as a source identifier or otherwise.

22-29, 272-273. Its beer has won awards in competitions between hundreds of beers. *Id.* at 32-33; 61 TTABVue 31, 274. Events in its taproom can draw hundreds, and it "pours," or serves beer, and promotes itself, at various festivals. 63 TTABVue 11, 14.

Considering the record as a whole, we find that Opposer's mark is conceptually and commercially weak. As discussed above, because "tap" and "tap it" call to mind kegs and serving beer from kegs, the mark is suggestive, and not entitled to as broad a scope of protection as a more arbitrary mark. Furthermore, because a number of bars and restaurants which serve beer use TAP or TAPS in their trade names or service marks, and it appears that a number of breweries may also use variations of TAP in their trade names or service marks, and one or perhaps two breweries appear to use TAPS for beer, Opposer's mark is commercially weak.

However, while Opposer's mark is weak, "the evidence does not show that it is entitled to such a narrow scope of protection as to permit registration of a confusingly similar mark for related" goods. *In re Integrated Embedded*, __ USPQ2d ___, Application Serial No. 86140341 (TTAB Sept. 27, 2016). *See also King Candy,* 182 USPQ at 109 ("The likelihood of confusion is to be avoided, as much between 'weak' marks as between 'strong' marks, or as between a 'weak' and a 'strong' mark."); *Top Tobacco LP v. North Atlantic Operating Co.*, 101 USPQ2d 1163, 1173 (TTAB 2011). Furthermore, there is no evidence of third-party use of Opposer's mark in its entirety, TAP IT, for beer. This factor weighs slightly against a finding of likelihood of confusion.

*Balancing the Likelihood of Confusion Factors*

While Opposer's mark is weak, confusion is nonetheless likely because the parties use identical marks on related beverages which travel in the same channels of trade.

**Decision:** Applicant's counterclaim is dismissed. The opposition is sustained and registration of Applicant's mark is refused.