

This Opinion Is Not a
Precedent of the TTAB

Mailed: April 26, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Surly Brewing Company
v.
Christopher Olshan
—

Opposition No. 91230831
—

Bradley J. Walz and Timothy D. Sitzmann of Winthrop & Weinstine, P.A.,
for Surly Brewing Company.

Elaine D. Papas of the Law Office of Elaine D. Papas,
for Christopher Olshan.

—
Before Bergsman, Wolfson and Kuczma, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Christopher Olshan (Applicant) filed an application on the Principal Register for the mark SURLY PENGUIN and design, shown below, for “alcoholic beverages except beer,” in Class 33.¹

¹ Application Serial No. 86893521, filed February 1, 2016, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s bona fide intent to use the mark in commerce.



The description of the mark in the application reads as follows:

The mark consists of top half of a black and white penguin with gold eyebrows and beak with arms crossed and with a red circle with “Surly Penguin” written in black inside the circle, and gold sunburst rays.

The color(s) black, white, gold, and red is/are claimed as a feature of the mark.

Surly Brewing Company (Opposer) filed a Notice of Opposition against the registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles Opposer’s registered SURLY marks for beer, and for bar and restaurant services, as to be likely to cause confusion. Specifically, Opposer alleged ownership of, inter alia, the registered marks listed below:

1. Registration No. 4675141 for the mark SURLY (in standard character form) for “beer,” in Class 32;² and
2. Registration No. 476868 for the mark SURLY (in standard character form) for “bar and restaurant services; providing pavilion facilities for concerts and other functions,” in Class 43.³

² Registered January 30, 2015.

³ Registered June 30, 2015.

Applicant, in his Answer, denied the salient allegations in the Notice of Opposition.

I. Evidentiary Issues

A. Internet evidence

Applicant, in his Notice of Reliance, introduced as Exhibit B images of bottles of spirits, wine, and beer purportedly from the Internet.⁴ Following the excerpts from the Internet webpages, Applicant presented the URLs for the webpages stating that the webpages were printed on June 30, 2017.⁵

Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2), provides that a copy of the relevant portion of a webpage may be introduced into evidence through a notice of reliance provided that the propounding party includes the URL (source) and the date the webpages were accessed.

(2) Internet materials may be admitted into evidence under a notice of reliance in accordance with paragraph (g) of this section, in the same manner as a printed publication in general circulation, so long as the date the internet materials were accessed and their source (e.g., URL) are provided.

Trademark Rule 2.122(e)(2).⁶

⁴ 32 TTABVUE 7-23.

⁵ 32 TTABVUE 24-26.

⁶ The amendment to Trademark Rule 2.122(e)(2) permitting the introduction of webpages through a notice of reliance was effective January 14, 2017. This amendment codified the Board's holding in *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010) permitting the introduction of a document obtained from the Internet if it identifies its date of publication or date that it was accessed and printed, and its source (e.g., the URL).

Opposer objects to Applicant's Notice of Reliance on the grounds that the images introduced by Applicant (i) "do not constitute printed publications from the internet," (ii) Applicant "has not provided the required URLs to introduce images under *Safer*," (iii) "Applicant did not even provide URLs for at least eleven of the images," and (iv) "there are many other URLs that revert to 'page not found' or do not display the image provided by Applicant in the Notice of Reliance."⁷

As noted above, Trademark Rule 2.122(e)(2) provides that "Internet materials may be introduced under notice of reliance." The rule does not limit Internet materials to printed publications.

Internet documents that may be introduced by notice of reliance include websites, advertising, business publications, annual reports, and studies or reports prepared for or by a party or non-party, as long as they can be obtained through the Internet as publicly available documents. This expands the types of documents that can be introduced by notice of reliance beyond printed publications in general circulation, and means that some Internet documents, such as annual reports that are publicly available, can be made of record by notice of reliance when paper versions of the annual reports are not acceptable as printed publications.

TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 704.08(b) (2018).

While it is preferable and the better practice for the URL and date to appear on the webpage itself, in an ex parte setting, the Board has accepted webpages where the Examining Attorney or applicant has provided the URL and date in an Office

⁷ Opposer's Objection to Applicant's Evidence, p. 3 (36 TTABVUE 39).

Action or response to an Office Action. *See In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1586 (TTAB 2018) (quoting *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1246 n.6 (TTAB 2010)). Accordingly, it is not fatal to the admissibility of an Internet document if it fails to display the URL or date it was printed, if that information is otherwise clearly provided.

However, Applicant omitted the URLs for the Domaine wine images,⁸ the Don Pedro Brandy image,⁹ the Don Cornelius Beer image,¹⁰ the Mad Jack Apple Lager image,¹¹ the Ogden's Fire Whiskey image,¹² the Fire God Jalapeno Liqueur image,¹³ the Red Heart Rum image,¹⁴ and the Red Flag Vodka image.¹⁵ Accordingly, Opposer's objection is sustained with respect to the Internet evidence regarding those products.

Although Applicant provided a URL and access date for information from the Blue Feather Vodka website, Applicant stated that the "website expired 1/23/2018."¹⁶ Because the website was not available at the time of trial, Opposer's objection is sustained with respect to the Internet evidence regarding this product.

⁸ 32 TTABVUE 14-15 and 24-26.

⁹ 32 TTABVUE 13 and 25.

¹⁰ 32 TTABVUE 13 and 25. Also, we note that Applicant stated that the Don Cornelius Beer is no longer brewed. *Id.* at 32. Because this product is no longer available, the Internet evidence would have had little, if any, probative value.

¹¹ 32 TTABVUE 18 and 25.

¹² 32 TTABVUE 19 and 26.

¹³ 32 TTABVUE 20 and 26.

¹⁴ 32 TTABVUE 21 and 26.

¹⁵ 32 TTABVUE 21 and 26.

¹⁶ 32 TTABVUE 8 and 24.

With respect to Opposer's objection that "there are many other URLs that revert to 'page not found' or do not display the image provided by Applicant in the Notice of Reliance," Opposer, in its objections to Applicant's evidence, provided a footnote listing five websites.¹⁷ Providing only a website address or hyperlink to Internet materials is insufficient to make such materials of record. *Cf. In re Olin Corp.*, 124 USPQ2d 1327, 1332 n.15 (TTAB 2017); *In re Powermat Inc.*, 105 USPQ2d 1789, 1791 (TTAB 2013); *In re HSB Solomon Assocs. LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012). Because of the transitory nature of Internet postings, websites referenced only by address or hyperlinks may be modified or deleted at a later date without notification. *See Safer Inc.*, 94 USPQ2d 1039. Thus, information identified only by website address or hyperlink is not subject to verification by the adverse party to corroborate or refute. *See In re HSB Solomon Assocs. LLC*, 102 USPQ2d at 12. Accordingly, to be of record, Opposer must have introduced a copy of the webpage showing that Applicant's purported evidence is not available.

Opposer's objection to Applicant's Internet evidence that purportedly could not be found is overruled.

B. Labels

Applicant, in his notice of reliance, introduced as Exhibit 4 Applicant's label and Opposer's label.¹⁸ Opposer objects to Applicant's Exhibit 4 on the ground that "to the extent these labels constituted printed publications," they do not include the source,

¹⁷ Opposer's Objection to Applicant's Evidence, p. 3 n.1 (36 TTABVUE 39).

¹⁸ 32 TTABVUE 35.

date, or other identifying or authenticating information.”¹⁹ Labels are not the type of evidence that may be introduced through a notice of reliance as they are not printed publications, such as books or periodicals, and they are not Internet materials. Trademark Rule 2.122(e)(1) and (2), 37 C.F.R. §§ 2.122(e)(1) and (2); *see also Hiraga v. Arena*, 90 USPQ2d 1102, 1104 (TTAB 2009) (invoices and annual catalogs are not admissible through a notice of reliance); *Life Zone Inc. v. Middleman Grp. Inc.*, 87 USPQ2d 1953, 1956-59 (TTAB 2008) (brochures, periodic newsletters, materials used in seminars and conferences showing topics of discussion, recently created marketing materials, materials used in radio ads and interviews are not admissible through a notice of reliance); *L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1886, n.6 (TTAB 2008) (letters and emails are not admissible through a notice of reliance); *Original Appalachian Artworks Inc. v. Streeter*, 3 USPQ2d 1717, 1717 n.3 (TTAB 1987) (printed advertisement not identified with the specificity required to be considered a printed publication); *Glamorene Prods. Corp. v. Earl Grissmer Co.*, 203 USPQ 1090, 1092 n.5 (TTAB 1979) (private promotional literature is not presumed to be publicly available within the meaning of the rule). Accordingly, Opposer’s objection to the labels is sustained.

C. Exhibit attached to Applicant’s brief

Applicant attached an exhibit to its brief. Exhibits to briefs are unnecessary and discouraged. *See Life Zone Inc. v. Middleman Grp. Inc.*, 87 USPQ2d at 1955 (“while exhibits to briefs are not explicitly prohibited by the Trademark Rules, the Board will

¹⁹ Opposer’s Objection to Applicant’s Evidence, p. 4 (36 TTABVUE 40).

usually ignore them, because they comprise either untimely evidence or unnecessary copies of timely evidence”); *ITC Entertainment Grp. Ltd. v. Nintendo of Am. Inc.*, 45 USPQ2d 2021, 2022-23 (TTAB 1998) (filing duplicative submissions is a waste of time and resources, and is a burden on the Board). We do not consider any exhibit attached to Applicant’s brief unless it has been properly introduced during Applicant’s testimony period.

II. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Applicant’s application file. The parties introduced the following testimony and evidence.

A. Opposer’s testimony and evidence

1. Testimony declaration of Omar Ansari, Opposer’s founder and Chief Executive Officer;²⁰
2. Notice of reliance on the following items:
 - a. Copies of Opposer’s pleaded registrations printed from the USPTO electronic database showing the current status of and title to the registrations;²¹
 - b. Applicant’s responses to Opposer’s interrogatory Nos. 1, 9 and 12;²²

²⁰ 28 TTABVUE. The portions of the Ansari Testimony Declaration designated confidential are posted at 29 TTABVUE which allows access only by the Board.

²¹ 34 TTABVUE 26-53.

²² 34 TTABVUE 55-61.

- c. A copy of Opposer's website;²³
- d. A copy of a search from the USPTO electronic database;²⁴
- e. Copies of articles from websites purportedly to show that breweries are distilling spirits;²⁵
- f. Copies of articles from websites purportedly to show that distillers of spirits collaborate with brewers to create products incorporating both manufacturing techniques;²⁶
- g. Copies of third-party registrations for spirits and restaurant or bar services;²⁷
- h. Copies of third-party registrations for both beer and spirits;²⁸
- i. Excerpts from websites regarding 50 entities that purportedly produce spirits and beer under the same marks;²⁹
- j. Articles from websites purportedly regarding spirits that may be considered beer;³⁰

²³ 34 TTABVUE 63-123.

²⁴ 34 TTABVUE 125.

²⁵ 34 TTABVUE 127-250.

²⁶ 34 TTABVUE 252-412.

²⁷ 34 TTABVUE 412-467.

²⁸ 34 TTABVUE 469-673.

²⁹ 30 TTABVUE 3-330.

³⁰ 30 TTABVUE 332-357.

- k. Articles from websites purportedly regarding cocktails consisting of beer and spirits;³¹
 - l. Articles from websites purportedly regarding beer and spirits that are sold in a similar manner;³²
 - m. Copies of websites advertising the sale of beer and spirits;³³
 - n. Excerpts from Applicant's Facebook page;³⁴
 - o. Excerpts from RateBeer.com;³⁵
 - p. Excerpts from the Untapped and Homebrewers' Association websites regarding Opposer;³⁶
 - q. Articles from websites regarding Opposer;³⁷
 - r. Excerpts from Opposer's website purportedly offering items other than beer for sale;³⁸ and
 - s. Excerpts from articles from printed publications purportedly regarding the size of the beer market;³⁹ and
3. Rebuttal notice of reliance on the following items:

³¹ 30 TTABVUE 359-422.

³² 31 TTABVUE 3-50.

³³ 31 TTABVUE 52-111.

³⁴ 31 TTABVUE 113-115.

³⁵ 31 TTABVUE 117-195.

³⁶ 31 TTABVUE 197-230.

³⁷ 31 TTABVUE 232-280.

³⁸ 31 TTABVUE 282-302.

³⁹ 31 TTABVUE 304-310.

- a. Excerpt from Opposer’s website purportedly advertising the sale of an alcoholic beverage;⁴⁰
- b. Excerpt from third-party website purportedly about Opposer’s beer-wine crossover;⁴¹ and
- c. Printout from the USPTO electronic database showing that Registration No. 3208791 relied on by Applicant has been cancelled.⁴²

B. Applicant’s testimony and evidence

1. Notice of reliance on copies of third-party websites for spirits and beers with purportedly similar marks (discussed in the Evidentiary Issues section);⁴³
2. Notice of reliance on USPTO electronic database search results for marks containing the word “Surly”;⁴⁴
3. Notice of reliance on documents purportedly from Cancellation No. 92056815;⁴⁵ and
4. Applicant’s testimony declaration.⁴⁶

III. Standing

Standing is a threshold issue in every inter partes case. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014);

⁴⁰ 33 TTABVUE 6-11.

⁴¹ 33 TTABVUE 13-14.

⁴² 33 TTABVUE 16.

⁴³ 32 TTABVUE 8-26.

⁴⁴ 32 TTABVUE 37-51.

⁴⁵ 32 TTABVUE 53-61.

⁴⁶ 32 TTABVUE 62-75.

John W. Carson Found. v. Toilets.com Inc., 94 USPQ2d 1942, 1945 (TTAB 2010). To establish standing in an opposition or cancellation proceeding, a plaintiff must prove that it has “both a ‘real interest’ in the proceedings as well as a ‘reasonable’ basis for its belief of damage.” See *Empresa Cubana*, 111 USPQ2d at 1062; *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (TTAB 1982).

Opposer has established its standing for its likelihood of confusion claim by properly introducing into evidence its pleaded registrations.⁴⁷ See, e.g., *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (plaintiff’s two prior registrations suffice to establish plaintiff’s direct commercial interest and its standing); *N.Y. Yankees P’ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1501 (TTAB 2015).

IV. Priority

Because Opposer’s pleaded registrations are of record, priority in the opposition proceeding is not at issue with respect to the goods and services identified therein. *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (citing *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)). The *King Candy Co.* court explained that Section 2(d) of the Trademark Act prevents the registration of a mark that is likely to cause confusion with a registered mark. Because Applicant did not file a counterclaim to cancel Opposer’s pleaded registrations, and because Applicant may not attack the validity

⁴⁷ 34 TTABVUE 26-53.

of Opposer's pleaded registrations without filing a counterclaim or petition to cancel, Trademark Rule 2.106(b)(3)(i) and (ii), 37 C.F.R. §§ 2.106(b)(3)(i) and (ii), priority is not at issue with respect to the marks involved in this opposition.

Nevertheless, Applicant argues that he has priority because he filed his application on February 1, 2016 and sold his first bottle of spirits on August 6, 2016.⁴⁸ However, six of Opposer's eight pleaded registrations, including the two registrations noted above, issued prior to February 1, 2016, the earliest date on which Applicant relies.

V. Likelihood of confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*du Pont*") cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015); 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 or for which there is evidence 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."). "[E]ach case must be decided on its

⁴⁸ Applicant's Brief, p. 7 (37 TTABVUE 10); Applicant's Testimony Decl. ¶3 (32 TTABVUE 63).

own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973) (internal citations removed). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *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.”); *see also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

- A. Strength of Opposer’s mark SURLY, including the number and nature of similar marks in use on similar goods and in connection with similar services.

In determining the strength of a mark, we consider both its inherent strength based on the nature of the mark itself and its commercial strength, based on the marketplace recognition value of the mark. *See 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).”); *Top Tobacco, L.P. v. North Atlantic Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v.*

Republic of Tea Inc., 80 USPQ2d 1881, 1899 (TTAB 2006); MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:83 (5th ed. 2019) (“The first enquiry focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another’s use.”). Market strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d at 1899. In other words, it is similar to acquired distinctiveness. For purposes of analysis of likelihood of confusion, a mark’s renown may “var[y] 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) (internal quotations omitted).

The word “Surly” used in connection with beer or “bar and restaurant services; providing pavilion facilities for concerts and other functions” is an arbitrary term because it does not describe, nor suggest, any quality or characteristic of those goods or services. *See Alberto-Culver Co. v. Helene Curtis Indus., Inc.*, 167 USPQ 365, 370 (TTAB 1970).

The fact that a word or term may be found in a dictionary does not indicate that the word is lacking in trademark significance unless the dictionary meaning of the word is descriptive of the goods in connection with which it is used. That is, the capability of a dictionary word to function as a trademark must be determined by the simple expedient of exploring what meaning, if any, does it possess as applied to a particular product. In this regard, it must be recognized that while a word may have a meaning or descriptive significance as applied to one product, it may

not have such a significance as applied to a different product. Insofar as “COMMAND” is concerned, although it may in a round about manner possess some suggestive characteristics of hair care products, it is, in essence, an arbitrary mark as applied to such goods.

Id. Accordingly, Opposer’s mark SURLY, when used in connection with beer and “bar and restaurant services; providing pavilion facilities for concerts and other functions,” is inherently strong.

With respect to the commercial strength of Opposer’s SURLY mark, Opposer introduced the following evidence:

1. In the summer of 2007, Beer Advocate magazine named Opposer’s brewery “the Best Brewery in America” and Opposer’s SURLY DARKNESS as the best American beer in the world.⁴⁹ Opposer’s trade name is Surly Brewing Co.;⁵⁰
2. Each year since 2007, the RateBeer.com website has ranked Opposer’s brewery as one of the Top 100 Breweries in the world;⁵¹
3. “As of March 29, 2018, the website RateBeer listed 10 of Surly’s beers as receiving a perfect score of 100 for the beer’s style category, another 12 beers with a near-perfect style score of 99, and another 33 beers with a style score of 90 – 97.”⁵²

⁴⁹ Ansari Testimony Decl. ¶8 (28 TTABVUE 4). In 2007, RateBeer.com ranked SURLY STOUT as the number one stout and SURLY BENDER as the number three American Brown Ale. 31 TTABVUE 150. Since 2007, RateBeer.com has ranked several of Opposer’s beers very high. 31 TTABVUE 150-181.

⁵⁰ *Id.* at ¶1 and Exhibits A, B, C, and F (28 TTABVUE 2, 16, 19, 22, and 37-73).

⁵¹ *Id.* at ¶43 (28 TTABVUE 11); *see also* 31 TTABVUE 117-147.

⁵² *Id.*

4. In 2014, Orbitz.com, the travel publication website, ranked Opposer's SURLY DARKNESS as "one of the 10 Most Travelled-For Beers in America";⁵³
5. Opposer has received multiple medals from the Great American Beer Festival, including a Gold Medal for its SURLY DARKNESS beer in 2016, a bronze medal for SURLY PENTAGRAM in 2013, a bronze medal for SURLY BENDER in 2009, and a gold medal for SURLY BENDER in 2007;⁵⁴
6. Opposer's flagship beer, SURLY FURIOUS, has been ranked as one of the best IPA's in the United States by the Homebrewers Association and Ratebeer.com;⁵⁵
7. Opposer's brewery and restaurant has been featured on the Food Network's show DINERS, DRIVE-INS & DIVES, it was named as one of 2015's "10 Most Exciting Places to Eat in America" by FOOD AND WINE magazine, and ESQUIRE magazine named SURLY CYNICALE as one of the "Best Canned Beers to Drink Now" in a February 2012 article;⁵⁶
8. In 2011, Opposer encouraged its customers and fans to contact their state legislators in Minnesota to pass legislation permitting breweries to operate taprooms at their production facilities. The proposed legislation became known as the "Surly Bill" and was passed on May 24, 2011;⁵⁷

⁵³ *Id.* at ¶9 (28 TTABVUE 4); *see also* 31 TTABVUE 244.

⁵⁴ *Id.* at ¶44 (28 TTABVUE 12).

⁵⁵ *Id.* at ¶44 (28 TTABVUE 12).

⁵⁶ *Id.* at ¶45 (28 TTABVUE 12).

⁵⁷ *Id.* at ¶¶10-11 (28 TTABVUE 4-5).

9. SURLY beer is distributed in Minnesota, Wisconsin, Iowa, Illinois, North and South Dakota, Colorado and Nebraska;⁵⁸
10. Opposer has promoted its SURLY beers at festivals, conferences, and tastings throughout the United States, including Pennsylvania, Washington D.C., Arizona, and Texas;⁵⁹
11. Opposer's sales have been substantial and they are growing;⁶⁰
12. Likewise, Opposer's advertising expenditures have been substantial and they are increasing;⁶¹
13. "Because of the importance and consumer recognition of the SURLY® brand, [Opposer] made a conscious decision to frequently use a similar naming pattern for many of [Opposer's] beers. Specifically, the naming pattern is "SURLY" plus another word. Examples of these beers include SURLY FURIOUS, SURLY TODD THE AXE MAN, SURLY DAMIEN, SURLY GOSE, SURLY VIKING, SURLY PENTAGRAM, SURLY SMOKE, SURLY ABRASIVE, SURLY XTRA-CITRA, SURLY CYNICALE, SURLY

⁵⁸ *Id.* at ¶16 (28 TTABVUE 5).

⁵⁹ *Id.* at ¶17 (28 TTABVUE 6).

⁶⁰ *Id.* at ¶19 (29 TTABVUE 6). Because Opposer has designated its sales as confidential, we refer to its sales figures in general terms. Nevertheless, Opposer's sales pale in comparison to the sales by the major brewers such as Anheuser-Busch (Budweiser, Bud Light, Beck's, Stella Artois, etc.), MillerCoors (Miller, Coors, Blue Moon, etc.), and Boston Beer Co. 31 TTABVUE 304-310. According to IBISWorld Industry Report 31212 Breweries in the United States (IBISWORLD.com) (June 2016), The Boston Beer Co. is "one of the most well-known brewers of craft beers in the United States" with an estimated market share of 2.9% based on revenues of approximately \$1.1 billion. 31 TTABVUE 309.

⁶¹ *Id.* at ¶20 (29 TTABVUE 6-7). Because Opposer has designated its advertising expenditures as confidential, we refer to its advertising figures in general terms.

OVERRATED!, SURLY SCHADENFREUDE, SURLY DARKNESS, and others.”⁶²

We find that Opposer’s mark SURLY is commercially strong.

Finally, Applicant introduced 14 SURLY registrations purporting to show that SURLY is a weak mark.⁶³ Four of the registrations are owned by Opposer.⁶⁴ Nine of the registrations are for products far removed from the goods and services at issue and, therefore, are not probative.⁶⁵ See *In re i.am.symbolic, LLC*, 123 USPQ2d at 1751 (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration); *Key Chem., Inc. v. Kelite Chem. Corp.*, 464 F.2d 1040, 175 USPQ 99, 101 (CCPA 1972) (“Nor is our conclusion altered by the presence in the record of about 40 third-party registrations which embody the word ‘KEY’. The great majority of those registered marks are for goods unrelated to those in issue, and there is no evidence that they are in continued use. We, therefore, can give them but little weight in the circumstances present here.”); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) (the third-party registrations are of limited probative value because the goods identified in the registrations appear to be in fields which are far removed from the goods at issue).

⁶² *Id.* at ¶21 (28 TTABVUE 7).

⁶³ 32 TTABVUE 38-51.

⁶⁴ 32 TTABVUE 48-51.

⁶⁵ 32 TTABVUE 39-47.

The remaining registration, Registration No. 3208791 for the mark SURLY WENCH PUB for bar services⁶⁶ was cancelled effective September 15, 2017.⁶⁷ A cancelled or expired registration has no probative value other than to show that it once issued and it is not entitled to any of the statutory presumptions of Section 7(b) of the Trademark Act. *See Action Temp. Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) (“a cancelled registration does not provide constructive notice of anything.”); *In Re Ginc UK Ltd.*, 90 USPQ2d 1472, 1480 (TTAB 2007); *Sunnen Prods. Co. v. Sunex Int’l Inc.*, 1 USPQ2d 1744, 1747 (TTAB 1987).

Considering the record as a whole, including evidence pertaining to both inherent and commercial strength, we find that Opposer’s mark SURLY is appropriately placed on the “strong” side of the “spectrum from very strong to very weak.” *Joseph Phelps Vineyards*, 122 USPQ2d at 1734 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)); *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1059 (TTAB 2017) (“The commercial strength of Petitioner’s TAO mark outweighs any conceptual weakness.”). Accordingly, Opposer’s SURLY trademark is entitled to a broad scope of protection.

B. The similarity or dissimilarity of the marks in their entirety in terms of appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *du Pont*, 177 USPQ at 567. “Similarity in any one of

⁶⁶ 32 TTABVUE 38.

⁶⁷ 33 TTABVUE 16.

these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); accord *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

“The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); see also *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *San Fernando Elec. Mfg. Co. v. JFD Elec. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. 1992). 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). Because the goods at issue are beer and alcoholic beverages except beer, as well as bar and restaurant services, the average customer is an ordinary consumer.

Applicant is seeking to register the mark SURLY PENGUIN and design. Where, as here, Applicant’s mark consists of words and a design, the words are normally

accorded greater weight because the words are likely to make a greater impression upon purchasers, would be remembered by them, and would be used by them to request the goods. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 982 (2016); *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (citing *CBS Inc. v. Morrow*, 708 F. 2d 1579, 218 USPQ 198, 200 (Fed. Cir 1983)). There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *See In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *Viterra*, 101 USPQ2d at 1908.

While there is no explicit rule that marks are automatically similar where the junior mark (SURLY PENGUIN and design) contains Opposer's entire mark (SURLY), where, as here, Opposer's SURLY mark is both inherently and commercially strong and, therefore, entitled to a broad scope of protection, the fact that Opposer's mark is subsumed by Applicant's mark increases the similarity between them. *See, e.g., China Healthways Inst. Inc. v. Xiaoming Wang*, 491 F.3d 1337, 83 USPQ2d 1123, 1125 (Fed. Cir. 2007) (applicant's mark CHI PLUS is similar to opposer's mark CHI both for electric massagers); *Coca-Cola Bottling Co. of Memphis, Tenn., Inc. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (applicant's mark BENGAL LANCER for club soda, quinine water and ginger ale is likely to cause confusion with BENGAL for gin); *In re Toshiba Med.*

Sys. Corp., 91 USPQ2d 1266, 1271 (TTAB 2009) (applicant’s mark VANTAGE TITAN for medical magnetic resonance imaging diagnostic apparatus is similar to TITAN for medical ultrasound diagnostic apparatus); *Broadcasting Network Inc. v. ABS-CBN Int’l*, 84 USPQ2d 1560, 1568 (TTAB 2007) (respondent’s mark ABS-CBN is similar to petitioner’s mark CBN both for television broadcasting services); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (applicant’s mark MACHO COMBOS for food items is similar to MACHO for restaurant entrees).

The marks are similar in appearance and sound because they share the word SURLY. SURLY is defined as “churlishly rude or bad-tempered” or “unfriendly or hostile; menacingly irritable.”⁶⁸ Applicant testified that he uses the word “Surly” to express the mood of the penguin found on the logo with a scowling countenance.⁶⁹ Likewise, Opposer’s label, properly introduced by Opposer, features a scowling man.⁷⁰ Thus, the connotation and commercial impression engendered by the marks are similar. Consumers familiar with Opposer’s SURLY marks may view the SURLY PENGUIN mark as a new mark identifying a line of SURLY spirits.

We find that the marks are similar in appearance, sound, connotation and commercial impression.

⁶⁸ Dictionary.com/browse/surly# based on the RANDOM HOUSE UNABRIDGED DICTIONARY (2019). 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); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

⁶⁹ Applicant’s Testimony Decl. ¶23 (32 TTABVUE 73).

⁷⁰ Opposer’s Notice of Reliance 34 Exhibit 12 (TTABVUE 63).

C. The similarity or dissimilarity of the goods.

Applicant is seeking to register its mark SURLY PENGUIN and design for “alcoholic beverages except beer.” Opposer is the owner of the SURLY trademark for “beer” and for “bar and restaurant services; providing pavilion facilities for concerts and other functions.” Alcoholic beverages include “whiskey, gin, vodka, or any other intoxicating liquor.”⁷¹ We must consider the goods and services as they are described in the application and registration. *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. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”).

1. Beer and alcoholic beverages except beer

Omar Ansari testified that craft beer brewers are also distilling spirits.

Based on my personal experience both as a brewer and a purchaser of alcoholic beverages, I have always been aware of some companies that sell both beer and alcoholic beverages other than beer. However, I have noticed a significant increase in this trend over the last decade, coinciding with the craft beer boom. A number of breweries have expanded their product line to include non-beer alcoholic beverages under the same brand as their beer. For example, breweries such as New Holland, Ballast

⁷¹ Dictionary.com/browse/alcoholic?s=t based on the RANDOM HOUSE UNABRIDGED DICTIONARY (2019).

Point, Rogue, Dogfish Head, Anchor and others have all opened distilleries under the same brand name as the company's beer.⁷²

Mr. Ansari's testimony is corroborated by excerpts from websites of 50 third-party entities that produce beer and other alcoholic beverages under the same marks,⁷³ and 21 news articles regarding breweries that have expanded their operations to include spirits, wine or cider.⁷⁴ The excerpts from the following third-party producers of beer and other alcoholic beverages are representative:

1. Dogfish Head craft beers and ales⁷⁵ and Dogfish Head rum, gin, and vodka;⁷⁶
2. Rogue ales and lagers⁷⁷ and Rogue whiskey and gin;⁷⁸ and
3. Anchor Steam Beer⁷⁹ and Anchor Old Tom Gin.⁸⁰

The excerpts from the following articles regarding breweries that have expanded their operations to include spirits, wine or cider are representative:

1. QZ.com

Breweries are cranking out distilled spirits like it's going out of style – and it isn't (February 22, 2016)

Never ones to stop innovating, more and more brewers are capitalizing on brand interest, making use of surplus raw

⁷² Ansari Testimony Decl. ¶29 (28 TTABVUE 8).

⁷³ 30 TTABVUE 3-330.

⁷⁴ 34 TTABVUE 127-320.

⁷⁵ 30 TTABVUE 3-6.

⁷⁶ 30 TTABVUE 8.

⁷⁷ 30 TTABVUE 10-17.

⁷⁸ 30 TTABVUE 19-21.

⁷⁹ 30 TTABVUE 23.

⁸⁰ 30 TTABVUE 25.

materials, and scratching a persistent creative itch by distilling craft spirits – and it’s no passing fad.

In fact, Anchor Brewing Co. of San Francisco, CA, has been distilling since as far back as 1993. ...

Joseph describes Maytag’s progression from interest in beer to rye whisky as “natural,” concluding that, “if you’re in the beer world, and you enjoy real flavorful beers, then you might have some interest in whiskey.”⁸¹

2. BeerAdvocate.com

Distilling Like a Brewer (April 2012)

There might be a major expansion going on at the Ballast Point Brewing & Spirits warehouse in San Diego, Calif., but head brewer Yuseff Cherney is still dedicated to his craft – or, should we say crafts. In addition, to being the company’s head brewer ... Cherney is also Ballast Point’s head distiller, ...

Distilling wasn’t a huge leap from brewing; the two processes require much of the same equipment and chemistry knowledge. Because every type of hard liquor starts off as some sort of fermented sugar, brewers who spend their days turning malted barley into beer are that much closer to making distilled beverages. All that’s needed is the still itself. ...

Today, out of the roughly 235 craft distilleries in America, 18 are operated by craft breweries, according to a forthcoming white paper on the subject by Michel Kinstlick, co-owner of Coppersea Distilling in New York – and that number is expected to rise as these once-mutually exclusive industries slowly recognize just how much they have in common.⁸²

⁸¹ 34 TTABVUE 127-128.

⁸² 34 TTABVUE 135-136.

3. Fortune.com

Now, top craft brewers are selling their own liquor (August 15, 2015)

Craft Brewer Dogfish Head has made its reputation by coming up with beers that burst through traditional expectations. So, in hindsight, it's not surprising that when the brewer launched its spirits division 13 years ago, it blazed new paths – using ingredients like local honey in its rum and hops in its gin. ...

While beer remains the star of the show for craft brewers, several operations, including many well-known names, are also dabbling in the up and coming field of craft distilling.
...

Brewers note that there's at least a dotted line between brewing beer and distilling spirits. The beer and whiskey making process are related (beer is the base for whiskey, notes Brett Joyce, president Rogue Brewing) – but the similarity ends there. ...

“Having a great name in the brewing industry definitely helps push the name of the spirits to the forefront – and we've had a lot of comments when were [sic] about to release a product from people who say ‘if this spirit is anything like the beer that Ballast Point makes, I'm going to purchase it,’” says Cherney.⁸³

Opposer also introduced copies of 48 sets of third-party registrations for spirits, wine or cider and beer. Third-party registrations based on use in commerce that individually cover a number of different goods and services may have probative value to the extent that they serve to suggest that the listed goods and services are of a type that may emanate from the same source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*,

⁸³ 34 TTABVUE 140-141

6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd mem.* 864 F.2d 149 (Fed. Cir. 1988). Representative registrations, owned by the same third party (named in the marks), with relevant portions of the identifications, are listed below.⁸⁴

MARK	Registration No.	Goods and Services
DOGFISH HEAD	4164234	Beers
DOGFISH HEAD	4164232	Alcoholic beverages except beers
ROGUE	3773029	Beer
ROGUE	5372403	Hard cider
ROGUE	3814477	Distilled spirits
ANCHOR	1559186	Beer, porter, ale
ANCHOR DISTILLING	1982777	Distilled spirits made of grains, fruits, or other fermentable materials
NEW HOLLAND BREWING	4095799	Beer
NEW HOLLAND ARTISAN SPIRITS	4111584	Distilled spirits
BENT BREWSTILLERY	4731969	Beer; liquor

Mr. Ansari also testified that brewers are mixing their craft beer with wine and spirits to blend hybrids.

In the beer industry, many breweries, including [Opposer], utilize distilled spirits or related products in the production of beer, whether as an ingredient or as part of the brewing process, such as aging a beer in a barrel used for a particular type of distilled spirit, or a particular brand of distilled spirit.⁸⁵

* * *

I have personal knowledge of many breweries that have collaborated with distilleries to create a distilled spirit from a particular beer. These collaborations have become a trend in the industry, allowing breweries and distilleries to capitalize on the name recognition of beer brands to help

⁸⁴ 34 TTABVUE 469-673.

⁸⁵ Ansari Testimony Decl. ¶30 (28 TTABVUE 8).

sell other types of alcoholic beverages. One local distillery, Tattersall Distillery, has been working with other local breweries and cideries to create whiskeys, liqueurs, and other distilled spirits from beer or cider.⁸⁶

Mr. Ansari's testimony is corroborated by 26 news articles regarding hybrid beverages that are made with a combination of beer and spirits, wine, or cider.⁸⁷ The excerpts from the following articles are representative:

1. The Wall Street Journal (wsj.com)

Beer and Wine in the Same Glass? It's Actually Delicious (July 20, 2017)

Summer is about wild combinations: sandals with a suit, books on the beach. 'Tis the season of ice cubes in your wine glass and iced tea in your lemonade – and now, in your beer glass, a new breed of hybrid news. These cross-genre blends of beer, wine, booze and soda bring playful irreverence to summer refreshment.

Experimenting with wild yeasts and natural fermentation, brewers have found common ground with winemakers. Once the staff at Texas's Jester King Brewery saw neighboring Hill Country wineries using the same natural-fermentation tricks they did – barrels, open tanks, local microbes – borrowing fruit from them seems a logical next step.

Jester King SPON Albariño & Blanc du Bois is a Belgian-style lambic [sic] beer refermented with wine grapes.⁸⁸

2. Food and Wine (foodandwine.com)

Our New Favorite Booze Trend Brings Beer and Wine Together in Category-Defying Hybrids (March 13, 2018)

⁸⁶ Ansari Testimony Decl. ¶32 (28 TTABVUE 9).

⁸⁷ 34 TTABVUE 322-412.

⁸⁸ 34 TTABVUE 322.

Brewers and winemakers are reaching across the (liquor store) aisle to achieve that “trifecta of hazy cider, funky beer and natural wine that’s so popular now.”

On a recent visit to the Finger Lakes, I came across Wagner Valley Brewing Company, a Lodi, New York-based craft brewery that shares a campus with the award-winning Wagner Vineyards Estate Winery. They were pouring a fuschia-hued Berliner Weisse called Skin Deep, brewed with Cabernet Franc grape skins from their neighbor’s rosé. The first sip was surprising – complex yet crushable, its lively sour bite balanced with a delicate white wine fruitiness. It was like Shania Twain of beer, a crossover that managed to elevate, not muddle.

Luckily from anyone as interested in this hybrid brew as I was, Wagner Valley Brewing Company is not alone in its unorthodox pours. Wineries and breweries across the country – from major players to upstarts – are experimenting with franken-beverages with great success. And blurring the line between wine and beer isn’t just a delicious endeavor; it represents a more innovative, creative future where both producers and consumers are free to reach across the (liquor store) aisle.⁸⁹

3. Bloomberg.com

These Beer-Wine Hybrids Are a Delicious Boon to Indecisive Drinkers

It’s like that time you played King’s Cup in college, but, you know, intentional. (February 26, 2018)

“It takes a lot of beer to make great wine.”

Or so the old winemaking chestnut goes. These days, the inverse is becoming true, with wine making inroads into beer recipes themselves. (As adjuncts go, wine grapes are less strange than Lucky Charms, lobster, and actual paper money ...).

“The profile of the beer will usually be tailored to match the qualities of [grape varieties] involved,” says Brian

⁸⁹ 34 TTABVUE 326.

Strumke, who founded Stillwater Artisanal Ales in 2010 with a mission to brew beer unique enough to compete with wine at the dinner table. “The mash bill, yeast strains, whether we oak age or dry hop – it’s all dependent upon the things we’re combining.”

For Stillwater a pinot noir beer was the perfect candidate for oak-aging, while riesling and sauvignon blanc beers ended up getting dry-hopped.⁹⁰

To counter Opposer’s evidence, Applicant introduced examples of marks with similar features owned by different entities for beer and alcoholic beverages except beer. The third-party evidence is listed below:

1. BLUE MOON ale and BLUE ICE vodka;⁹¹
2. Don De Dieu Beer and Don Agustin Tequila, Don Weber Tequila, Don Julio Tequila, and Don Eduardo Tequila;⁹²
3. Angry Scotch Ale, Angry Boy Brown Ale, and Angry Orchard Cider;⁹³
4. Mad Elf Beer and Mad River Whiskey;⁹⁴
5. Fireball Whiskey, Fire Whiskey/Liqueur by Jack Daniels, and Fire Rock Pale Ale;⁹⁵ and
6. Red Bush Whiskey, Red Label Scotch, Red Stag Bourbon, Red Stripe Lager, Red Horse Beer, and Rock Bottom Red Ale;⁹⁶

⁹⁰ 34 TTABVUE 334-335.

⁹¹ 32 TTABVUE 9. We do not consider Applicant’s evidence of BLUE CURACAO because BLUE CURACAO appears to be a type of liqueur rather than a brand.

⁹² 32 TTABVUE 10-13.

⁹³ 32 TTABVUE 16-17.

⁹⁴ 32 TTABVUE 18.

⁹⁵ 32 TTABVUE 19-20.

⁹⁶ 32 TTABVUE 21-23.

The fact that Applicant was able to find and introduce examples of spirits and beer produced by different entities that share a common term as part of their marks does not rebut Opposer's evidence showing other entities using the same marks to identify their beer and spirits. While Applicant's evidence shows that there are some beers and spirits, offered by separate entities, that share a common term as part of their marks, it does not prove that spirits and beer are not related. *Cf. In re G.B.I. Tile and Stone, Inc.*, 92 USPQ2d 1366, 1370 (TTAB 2009) ("The fact that applicant was able to find and submit for the record these registrations of marks for individual items does not rebut the examining attorney's evidence showing the existence of numerous third-party registrations using the same marks on a variety of items, including applicant's and registrant's goods.").

Moreover, some of the marks that share a common term are not similar when considered in their entireties. For example, BLUE MOON and BLUE ICE are not similar, MAD ELF BEER and MAD RIVER WHISKEY are not similar, FIREBALL WHISKEY and FIRE WHISKEY are not similar to FIRE ROCK PALE ALE, and RED BUSH WHISKEY, RED LABEL SCOTCH, RED STAG BOURBON are not similar to RED STRIPE LAGER, RED HORSE BEER or ROCK BOTTOM RED ALE.

We find that the testimony and evidence regarding the similarity or dissimilarity of the goods is sufficient to demonstrate that beer and alcoholic beverages except beer are related products.

2. Alcoholic beverages except beer and restaurant or bar services

To show that alcoholic beverages except beer and restaurant or bar services are related, Opposer introduced copies of 48 third-party registrations for both the goods and services at issue. Representative registrations, with relevant portions of the identifications, are listed below.⁹⁷

MARK	Registration No.	Goods and Services
TOM'S TOWN DISTILLING CO	4928115	Distilled spirits; restaurant and bar services
SHAWNEE BLUFF	5445926	Wine; restaurant services
LOCKHORN CIDER	4720784	Alcoholic beverages except beer; bar services featuring hard cider and wine
MOTOR CITY BREWING WORKS and design	4387348	Wine; liquor; restaurant and bar services
A CRAFTED EXPERIENCE	5159453	Distilled spirits; wine; restaurant and bar services

The Federal Circuit has held that there is a requirement that “something more” be shown to establish the relatedness of food or beverages and restaurant services for purposes of demonstrating a likelihood of confusion. *See Coors Brewing*, 68 USPQ2d at 1063. In *Coors Brewing*, the Federal Circuit explained why more evidence than just showing restaurants sell beer is required to prove that those goods and services are related:

It is not unusual for restaurants to be identified with particular food or beverage items that are produced by the same entity that provides the restaurant services or are sold by the same entity under a private label. Thus, for example, some restaurants sell their own private label ice cream, while others sell their own private label coffee. But

⁹⁷ 34 TTABVUE 414-467.

that does not mean that any time a brand of ice cream or coffee has a trademark that is similar to the registered trademark of some restaurant, consumers are likely to assume that the coffee or ice cream is associated with that restaurant. The *Jacobs* case [*Jacobs v. Int'l Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641 (CCPA 1982)] stands for the contrary proposition, and in light of the very large number of restaurants in this country and the great variety in the names associated with those restaurants, the potential consequences of adopting such a principle would be to limit dramatically the number of marks that could be used by producers of foods and beverages.

Coors Brewing, 68 USPQ2d at 1063. In other words, there is no per se rule that certain goods (e.g., foods) and services (e.g., bar and restaurant services) are related. *Lloyd's Food Products, Inc. v. Eli's, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2030 (Fed. Cir. 1993) (no per se rule about confusion, where similar marks are used in connection with restaurant services and food products).

The Federal Circuit recognizes that the diversity and expansion of businesses in a modern economy is not, in and of itself, sufficient to support an inference that purchasers are apt to believe that disparate products or services emanate from the same source. *See also In re American Olean Tile Co.*, 1 USPQ2d 1823, 1826 (TTAB 1986). The Board has found the “something more” requirement to be met under the following circumstances:

1. Applicant's mark made clear that its restaurant specialized in registrant's type of goods. *See In re Golden Griddle Pancake House Ltd.*, 17 USPQ2d 1074 (TTAB 1990) (GOLDEN GRIDDLE PANCAKE HOUSE for restaurant services confusingly similar to GOLDEN GRIDDLE for table syrup); *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) (AZTECA

MEXICAN RESTAURANT for restaurant services confusingly similar to AZTECA for Mexican food items);

2. The record showed that registrant's wines were actually sold in applicant's restaurant. *See In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001) ("the record in this case reveals that registrant's OPUS ONE wine is offered and served by applicant at its OPUS ONE restaurant"); and
3. Registrant's mark was found to be "a very unique, strong mark." *See In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988) ("the Examining Attorney has indicated that he has been unable to find, in the records of the Patent and Trademark Office, any registration, other than the cited registration, for a mark containing the expression 'Mucky Duck,'" nor has applicant offered any evidence of third-party use of marks containing the expression).

In this case, the "something more" requirement is met because Opposer's SURLY mark is inherently and commercially strong. Therefore, Opposer's evidence is sufficient to demonstrate that its SURLY restaurant and bar services are related to alcoholic beverages except beer.⁹⁸

⁹⁸ We need not consider whether each of Opposer's identified services is related to Applicant's alcoholic beverages except beer for purposes of a *du Pont* analysis, it is sufficient if likelihood of confusion is found with respect to use of an applicant's mark in connection with any product or service in a particular International Class. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1398 (TTAB 2007).

D. Established, likely-to-continue channels of trade and classes of consumers.

Because there are no limitations as to channels of trade or classes of purchasers in the description of goods in the application or pleaded registrations, it is presumed that the parties' goods and services move in all channels of trade normal for those goods and services, and that they are available to all classes of purchasers for those goods and services. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); *Paula Payne Prods. Co. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

Opposer's beer is sold in bars, restaurants, liquor stores, convenience stores, other retail stores, and at special events.⁹⁹ Applicant's SURLY PENGUIN alcoholic beverages are sold in bars, restaurants, liquor stores, festivals and direct to consumer sales.¹⁰⁰

Opposer's prospective beer purchasers include a variety of consumers, including consumers that do not have significant knowledge or experience with craft beer.¹⁰¹ Likewise, because Applicant's description of goods does not include any restrictions or limitations as to channels of trade or classes of consumers, Applicant's prospective purchasers of alcoholic beverages include a variety of consumers, including consumers that do not have significant knowledge or experience with distilled spirits. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, , 110 USPQ2d at 1163-64

⁹⁹ Ansari Testimony Decl. ¶23 (28 TTABVUE 7).

¹⁰⁰ Applicant's Testimony Decl. ¶18 (32 TTABVUE 69).

¹⁰¹ *Id.* at ¶26 (28 TTABVUE 8).

(recognizing Board precedent requiring consideration of the “least sophisticated consumer in the class”); *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (finding that all purchasers of wine may not be discriminating because while some may have preferred brands, “there are just as likely to be purchasers who delight in trying new taste treats.”) *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

We find that Opposer’s beer and Applicant’s alcoholic beverages are offered in some of the same channels of trade to some of the same classes of consumers.

E. Summary

Because Opposer’s SURLY mark is inherently and commercially strong and, therefore, entitled to a broad scope of protection, the parties marks are similar, the parties’ goods and services are related, and the parties’ goods and services are offered in some of the same channels of trade and to some of the same classes of consumers, we find that Applicant’s mark SURLY PENGUIN and design for “alcoholic beverages except beer” is likely to cause confusion with Opposer’s registered mark SURLY for “beer” and “bar and restaurant services; providing pavilion facilities for concerts and other functions.”

Decision: The opposition is sustained and registration to Applicant is refused.