

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed:
August 2, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

Dr. Bruce S. Schlafly
v.
The Saint Louis Brewery, LLC
—

Opposition No. 91207224
—

Phyllis Schlafly
v.
The Saint Louis Brewery, LLC
—

Opposition No. 91207225
—

CONSOLIDATED PROCEEDINGS¹

Andrew Schlafly, Esq. for Dr. Bruce S. Schlafly and Phyllis Schlafly.

Mark R. Sowers of The Sowers Law Firm LLC for The Saint Louis Brewery, LLC

—
Before Kuhlke, Masiello, and Heasley, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

¹ In this decision, citations refer to the record in Opposition No. 91207224, unless otherwise noted.

The Saint Louis Brewery, LLC (“Applicant”) filed an application to register the mark SCHLAFLY in standard character form for the following goods:

Beer, ale and lager; Beer, ale and porter; Beer, ale, lager, stout and porter; Beers; Black beer; Brewed malt-based alcoholic beverage in the nature of a beer; Coffee-flavored beer, in International Class 32.²

In the application, as originally filed, Applicant requested registration under Trademark Act Section 2(f), 15 U.S.C. § 1052(f), and entered the following verified statement: “The mark has become distinctive of the goods/services through the applicant's substantially exclusive and continuous use in commerce that the U.S. Congress may lawfully regulate for at least the five years immediately before the date of this statement.” Applicant also claimed ownership of the following two registrations:

<u>Reg. No.</u>	<u>Mark</u>	<u>Goods/Services</u>
1769049		Beer; namely, lager, ale, stout and porter. Restaurant and pub operations. Registered May 4, 1993.

² Application Serial No. 85482562, filed on November 29, 2011 under Trademark Act § 1(a), 15 U.S.C. § 1051(a), stating a date of first use and first use in commerce of January 15, 1998.

2857492		Beer. Registered June 29, 2004.
---------	---	--

Dr. Bruce S. Schlafly and Phyllis Schlafly (together, “Opposers”) filed separate notices of opposition to registration of the mark, both on the ground that it is primarily merely a surname under Section 2(e)(4) of the Trademark Act, 15 U.S.C. § 1052(e)(4), and has not acquired distinctiveness under Section 2(f). By an order of September 25, 2013, the Board, *sua sponte*, consolidated the two proceedings and allowed them to be presented on the same record and briefs.³

In each case, Applicant denied the salient allegations, but admitted that it does not geographically limit its use of the mark “and does not disclaim rights concerning other goods and services.”⁴ Defendant asserted the affirmative defenses of failure to state a claim; laches, acquiescence, and estoppel; and the defense that the issuance of the requested registration “would cause no added injury to [Opposers]” because of the existence of Applicant’s two previously issued registrations. Applicant did not pursue the defense of failure to state a claim, and that defense has accordingly been waived. The case has been fully briefed.

³ Even though the two proceedings have been consolidated, each proceeding maintains its own character and we decide each one on its own merits. TBMP § 511 (2016).

⁴ Answer ¶ 15, 14 TTABVUE 3.

I. The record.

The record includes the pleadings and, by operation of Trademark Rule 2.122, 37 C.F.R. § 2.122, the application file for the opposed mark. The record also includes the following testimony and evidence:

A. Opposer's evidence.

1. Testimony deposition of Dr. Bruce S. Schlafly, dated January 28, 2015. 36 TTABVUE (cited herein as "B. Schlafly").
2. Opposers' notice of reliance on organizational documents of Applicant. 37 TTABVUE.
3. Opposers' rebuttal notice of reliance on printed publications. 46 TTABVUE.

B. Applicant's evidence.

1. Testimony deposition of Thomas F. Schlafly, Applicant's cofounder and co-chairman, dated September 14, 2015, and exhibits thereto. 48 TTABVUE 2-107 ("T. Schlafly").
2. Testimony deposition of Daniel Kopman, Applicant's cofounder and co-chairman, dated September 14, 2015, and exhibits thereto. 48 TTABVUE 108-347 (confidential pages and exhibit at 49 TTABVUE) ("Kopman").
3. Applicant's notice of reliance on press notices and excerpts from the discovery deposition of Dr. Bruce S. Schlafly. 45 TTABVUE.

II. Opposers' evidentiary objections.

Opposers object, in a very general and imprecise way, to "the admissibility of Applicant's evidence relating to secondary meaning on the grounds that it is hearsay ..."⁵ Opposers' objection is too sweeping. It is true that third-party statements that may be relevant to the question of secondary meaning (such as the text of press

⁵ Opposer's brief at 6, 51 TTABVUE 7.

notices relating to Applicant) almost always include assertions that, under the hearsay rule, should not be taken for the truth of the matter asserted. However, the fact that Applicant's business has been noticed in the press can be discerned on the face of such evidence, without regard to whether the assertions are true or false, and such evidence is clearly relevant to the question of secondary meaning. The Board is capable of reading such evidence for what it shows on its face, without taking hearsay statements to be true.

III. Applicant's evidentiary objections.

Applicant has filed a statement of objections (56 TTABVUE) in which it objects to the Opposers' second notice of reliance (46 TTABVUE) on the following grounds:

First, Applicant contends that the evidence constitutes improper rebuttal because it is submitted in order to prove "Opposers' case-in-chief, namely, that Applicant's SCHLAFLY trademark is primarily merely a surname" and not "for the purpose of denying, explaining or discrediting Applicant's case..."⁶ Applicant, during its testimony period, submitted evidence intended to demonstrate the rareness of the surname SCHLAFLY. *See* Exhibits W and X of Applicant's notice of reliance.⁷ Much of the evidence in Opposers' second notice of reliance is intended to show that the name SCHLAFLY has been exposed to widespread publicity; this is a type of evidence that is relevant to counterbalance evidence of rareness, *see In re Gregory*, 70 USPQ2d

⁶ 56 TTABVUE 3.

⁷ 45 TTABVUE 104-119.

1792 (TTAB 2004),⁸ and may be relevant to the ability of Applicant's mark to acquire distinctiveness. Accordingly, it is not improper to submit the evidence in Exhibits A through O, Q, R, and T through V in rebuttal for this purpose. Opposers' Exhibits W and X are relevant to rebut Applicant's showing of acquired distinctiveness, and are not improper rebuttal for this purpose.

Exhibits P, S, and Z to Opposers' second notice of reliance go to the issue of Opposers' standing, which should properly have been established during their case-in-chief. However, during Applicant's testimony period Applicant adduced evidence suggesting that Opposer Bruce Schlafly could not demonstrate any reasonable belief that he would be damaged by registration of Applicant's mark. *See* Applicant's notice of reliance, Exhibit T, excerpt of discovery deposition of Bruce Schlafly.⁹ Exhibit P of Opposers' second notice of reliance is not improper when offered as rebuttal of this showing, inasmuch as it attempts to rehabilitate the witness's testimony. On the other hand, we find Exhibits S and Z to be improper rebuttal because they merely attempt to buttress aspects of Opposers' showing of standing that had never been controverted by Applicant.

Applicant has objected to Opposers' second notice of reliance on grounds of relevance. We agree that Exhibit Y lacks relevance to matters at issue in this proceeding.

⁸ “[Rogan] may be rare when viewed in terms of frequency of use as a surname in the general population, but not at all rare when viewed as a name repeated in the media and in terms of public perception.” 70 USPQ2d 1795.

⁹ 45 TTABVUE 87-92.

With respect to Applicant's objection to the evidence on grounds that it is hearsay, speculative, lacking foundation, and immaterial, we respond, as we did to Opposers, that we do not read this kind of evidence for the truth of the matter asserted in it but consider it for what it shows on its face.

Accordingly, we have considered Opposers' second notice of reliance with the exception of Exhibits S, Y and Z.

IV. Standing.

As a threshold matter, each of Opposers must prove his or her standing in order to be heard on the claims they have brought. *See, e.g., Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 187 (CCPA 1982). To do so, Opposers must, respectively, prove that they have a "real interest" in the proceedings and a "reasonable" basis for their belief of damage. *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *see also Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021 (Fed. Cir. 1987). To prove a "real interest" in this case, each Opposer must show that he or she has a "direct and personal stake" in the outcome and is more than a "mere intermeddler." *See Ritchie v. Simpson*, 50 USPQ2d at 1026. Applicant argues vigorously that Opposers have failed to prove their standing.¹⁰ Indeed, the evidence of standing is very scarce in this record.

Opposer Bruce Schlafly has established his standing by testifying that his surname is Schlafly, that he uses this name in his medical practice, and that, with respect to

¹⁰ Applicant's brief at 14-16, 55 TTABVUE 22-23.

his medical practice, alcoholic beverages have “[a] negative connotation due to complications with it,” such as “drunk driving [and] intoxication leading to injuries.”¹¹

We find this testimony sufficient to establish a reasonable belief of damage.

The proof of Opposer Phyllis Schlafly’s standing is less robust. She pleaded that she has used the name Schlafly in the issuance of newsletters, radio commentaries, and books; that the consumption of alcohol is considered immoral by many of her subscribers; and that Applicant’s registration of the mark could be harmful to her conservative activities.¹² None of this was proven.¹³ However, on cross-examination Applicant’s principal stated that he had been asked if Phyllis Schlafly had any involvement in his business.¹⁴ Inasmuch as Phyllis Schlafly could reasonably wish to avoid any perceived association with Applicant’s business, we find this testimony sufficient to support her reasonable belief of damage.

Standing and the merits of a claim are “distinct inquiries,” and “[o]nce standing is established, the opposer is entitled to rely on any of the grounds set forth in ... the Lanham Act which negate applicant’s right to its subject registration.” *Jewelers Vigilance Committee*, 2 USPQ2d at 2023-4.

¹¹ B. Schlafly 15:8-14, 36 TTABVUE 16.

¹² Notice of opposition, ¶¶ 13-15, 19-20, 1 TTABVUE 5-6 in Opposition No. 91207225.

¹³ *Ritchie v. Simpson*, 50 USPQ2d at 1027-8, suggests that merely bearing the surname SCHLAFLY might suffice to demonstrate a reasonable belief of damage:

For standing purposes, the reasonableness of an opposer's basis for his belief of damage may be shown in several ways. For instance, if an opposer alleges that he possesses a trait or characteristic that is clearly and directly implicated by the proposed trademark, the requisite level of “reasonableness” may be shown.

¹⁴ T. Schlafly 54:15-21, 48 TTABVUE 55.

V. Opposers' claim.

We now address Opposers' claim that Applicant's mark is primarily merely a surname and is unregistrable because it has not acquired distinctiveness. We need not address whether Applicant's mark actually *is* primarily merely a surname because, even if it is, the Trademark Act explicitly provides that such a mark may be registered if it has acquired distinctiveness. Section 2(f), 15 U.S.C. § 1052(f) ("Except as expressly excluded in subsections (a), (b), (c), (d), (e)(3), and (e)(5) of this section, nothing herein shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce."). We determine whether Applicant's mark has acquired distinctiveness based on the entire record, keeping in mind that Applicant has the "ultimate burden of persuasion" as to acquired distinctiveness, which it must meet by a preponderance of the evidence. *See Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988).

Acquired distinctiveness is generally understood to mean "a mental association in buyers' minds between the alleged mark and a single source of the product." 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 15:5 (4th ed. June 2016 update). "It is only necessary that a 'substantial part' of the buying class make such an association." *Id.* §15:45. The Trademark Act is silent as to the quantum of evidence that is necessary to establish acquired distinctiveness, except for the provision of Section 2(f) that states, "The Director *may* accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant's goods

in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made.” 15 U.S.C. § 1052(f) (emphasis added). Applicant, when it first filed its application, submitted a verified statement to this effect. In response to Opposers’ challenge, Applicant has made of record a substantial amount of evidence regarding its business operations under the mark SCHLAFLY.

Applicant’s witnesses testified that Applicant first began to market beer and operate a brewpub under marks that included the term SCHLAFLY in 1991 and has done so continuously ever since.¹⁵ Initially, due to strictures of state law, Applicant was allowed to sell its beer only through its own restaurant.¹⁶ Applicant first sold beer in marked bottles in 1996 (the beer having been bottled, under contract, by a third party) and opened its own bottling plant in 2003.¹⁷ Applicant subsequently contracted with a canning plant in Wisconsin to put its beer in cans and arranged for additional bottling of its beer by contractors in Coralville, Iowa and Nashville, Tennessee.¹⁸ Applicant’s witness testified that it now sells beer, through approximately 30 wholesalers, in Missouri, Iowa, Kansas, Arkansas, Mississippi, Tennessee, Kentucky, Illinois, Indiana, Ohio, Virginia, Maryland, Delaware, New Jersey, New York, and the District of Columbia.¹⁹ In these 16 markets, wholesalers

¹⁵ T. Schlafly 7:20-25; 8:3; 9:2; Kopman 10:9-15, 48 TTABVUE 8-10, 117.

¹⁶ T. Schlafly 9:12-10:3, 48 TTABVUE 10-11.

¹⁷ T. Schlafly 14:14-15:3; 20:3-4, 48 TTABVUE 15-16, 21.

¹⁸ *Id.* at 20-3-4, 48 TTABVUE 21.

¹⁹ T. Schlafly 26:9-11, 14-18, 21-24; Kopman 22:13-20, 23:12, 48 TTABVUE 27, 129, 130.

place the beer in bars and restaurants for on-premises consumption (including chains such as Buffalo Wild Wings, Applebee's and Chili's) and in retail stores including Wal-Mart, Sam's Club, Costco, Whole Foods, Trader Joe's, Target, Wegman's, CVS, Walgreens, Kroger, and local stores.²⁰ Applicant's beer is also sold at sporting events in Busch Stadium, Scottrade Center, St. Louis U. Stadium, and Edwards Jones Dome, all in St. Louis; and in the Yum! Center in Louisville, Kentucky.²¹ Applicant currently operates two brew pubs itself, and licenses the operation of two more by others.²²

Applicant's witnesses stated that in a given year Applicant can produce over 60 different styles of beer, although it would package only about 30 of those in bottles and cans.²³ Examples of such types of beer discussed in the record include pale ale, summer lager, pumpkin ale, American IPA, raspberry Hefeweizen, coffee stout, oatmeal stout, Kölsch, and barrel aged imperial stout. With respect to the marking of such types of beer, Applicant's witness stated, "It was always branded with the Schlafly brand name, and in probably 99 percent of the cases that was followed by the generic style of the beer."²⁴

Applicant's witness testified as to the quantities of Applicant's product sold through distributors in the form of kegs, bottles, and cans in each year from 2009 through

²⁰ T. Schlafly 27:6-8; 42:13-19; Kopman 53:12-25, 48 TTABVUE 28, 43, 160.

²¹ T. Schlafly 45:7-14; Kopman 54:23-55:5, 48 TTABVUE 46, 161-2.

²² Kopman 102:19-20, 48 TTABVUE 209.

²³ T. Schlafly 16:11; Kopman 16:4-5, 48 TTABVUE 17, 123.

²⁴ T. Schlafly 18:9-11, 48 TTABVUE 19.

2014.²⁵ (The figures discussed would not include sales made directly by Applicant from its own restaurants and bottling locations.) According to Applicant's witness, in each of 2013 and 2014 Applicant sold the equivalent of more than 12 million 12-oz. servings of beer in bottles or cans, and over 5 million 12-oz. servings in draft form. The witness estimated that the sales for 2009-2014 represented about 75 million consumer impressions.²⁶ Applicant also submitted a detailed report of the sales of its beer by wholesalers, indicating that between January and September, 2015, wholesalers placed the product with 10,937 individual accounts.²⁷

Applicant has made of record examples of the display of its SCHLAFly marks on bottles, cans, six-packs, boxes, tap handles, delivery trucks and in-store displays.²⁸ Applicant submitted examples of its print advertisements²⁹ and billboard advertisements.³⁰ A report of a three-year campaign of radio, outdoor, and print advertising in 2012-2014 indicates impressions in the many millions.³¹ Company representatives attend at least 500 promotional events per year³² and the company annually distributes "over a million" items of collateral, such as key chains, coasters,

²⁵ Kopman 34-41 and Ex. 15, 48 TTABVUE 141-148, 252.

²⁶ *Id.* at 40:18, 48 TTABVUE 147.

²⁷ *Id.* at 48-49 and Ex. 18, 48 TTABVUE 155-6, 260-282.

²⁸ *Id.*, Exs. 7-14, 28, and 30, 48 TTABVUE 244-251, 292, 294.

²⁹ *Id.*, Exs. 20-24, 48 TTABVUE 284-288.

³⁰ *Id.*, Exs. 32-34, 48 TTABVUE 296-298.

³¹ *Id.*, Ex. 35, 48 TTABVUE 299.

³² *Id.* at 66:12, 48 TTABVUE 173.

Opposition Nos. 91207224 and 91207225

and stickers.³³ A company memo detailing purchases in 2013 of collateral for distribution to consumers and retailers shows over a million coasters, half a million plastic cups, hundreds of neon signs, store racks and coolers, and thousands each of logo glassware, case cards for grocery stores, can koozies, tap handles, tap handle pucks, keychains, and stickers.³⁴

Applicant's witness testified as to Applicant's annual revenues and annual advertising expenditures with respect its beer for the years 1999 through mid-2015.³⁵ The revenues show steady annual increases and as between 1999 and 2014 almost a ten-fold increase. The revenues and advertising expenditures are substantial for a small-to-medium enterprise.

At the 2010 World Beer Cup competition, Applicant's Schlafly Kölsch Ale was awarded a gold medal in the category of "German-Style Kölsch/Köln-Style Kölsch."³⁶ In 2007, in the United States Beer Tasting Championship, Applicant's Schlafly Reserve Barrel Aged Imperial Stout was named Best of the Midwest in the Imperial Stout Category.³⁷ Applicant has also won state fair awards.³⁸ In 2011 and 2012, Applicant was listed by The Brewers Association among the "Top 50 Breweries" based

³³ *Id.* at 67:15, 48 TTABVUE 174.

³⁴ *Id.*, Ex. 31, 48 TTABVUE 295. As the evidence and testimony show, the tap handles are marked SCHLAFLY, and the tap handle "pucks" are marked with the descriptive name of the type of beer, such as Kölsch or IPA. *See id.*, Ex. 30, 48 TTABVUE 294.

³⁵ *Id.* at 57, 60, and Ex. 19 (confidential filing at 49 TTABVUE).

³⁶ T. Schlafly 28:25-29:2 and Ex. 3; Kopman Dep. 100-101, 48 TTABVUE 29-30, 98-99, 207-8.

³⁷ Kopman 100 and Ex. 50, 48 TTABVUE 207, 339.

³⁸ *Id.* at 101:18-21, 48 TTABVUE 208.

on beer sales volume.³⁹ At the time of trial, Applicant's witness estimated that Applicant's ranking among American-owned breweries, by volume, was "about 65 out of 4,000."⁴⁰

Applicant's witness testified that, although Applicant's actual name is The Saint Louis Brewery, LLC, its sales people in the field identify themselves as being from "Schlafly Beer."⁴¹ "So even when we get checks from wholesalers, just Schlafly Beer. Even if you tell them to write the check, they'll still write Schlafly Beer."⁴² This observation is confirmed by third-party references to Applicant in the record:

Few though, have provided as much national exposure as the Siemens commercial about The St. Louis Brewery (Schlafly Beer).⁴³

Schlafly's remarkable ability to increase production by 50 percent in less than two years was a story that we simply had to tell...⁴⁴

"If you think it's too early for Pumpkin Ale, don't go get some," Schlafly Beer in St. Louis posted on its website in August.⁴⁵

Schlafly Beer ... Schlafly's special release Irish-Style Extra Stout. ... the group of 15-20 visitors that congregates each morning meets with three of Schlafly's brewers for 90

³⁹ *Id.* Exs. 16 and 17, 48 TTABVUE 253-259.

⁴⁰ T. Schlafly 73:1, 48 TTABVUE 74.

⁴¹ Kopman 21:14-15, 21-25; 14:1, 48 TTABVUE 128, 121.

⁴² *Id.* 14:6-9, 48 TTABVUE 121.

⁴³ "Schlafly Beer Featured in National Seimens' [*sic*] Ad," <craftbeer.com>, Kopman Ex. 46, 48 TTABVUE 334.

⁴⁴ "National Ad to Feature Schlafly Bottleworks," <brewbound.com>, Kopman Ex. 47, 48 TTABVUE 335.

⁴⁵ Applicant's notice of reliance, Ex. C, 45 TTABVUE 22-25.

minutes of education ... Schlafly plans to up the ante in 2015 ... ⁴⁶

Schlafly Brewing's Tasmanian IPA Review ... If Schlafly can get a year-round source of hops, this beer deserves year-round availability.⁴⁷

... Schlafly's seasonal offering is by far the sweetest on the list.⁴⁸

Schlafly barrel sales jump 18% ... Privately held Schlafly produces beer at Schlafly Bottleworks ... ⁴⁹

See also Kopman Ex. 6, in which Dan Kopman is listed as being with "Schlafly Beer/The Saint Louis Brewery."⁵⁰

The record also includes numerous press notices showing that Applicant's beer has been discussed in a wide variety of publications, including USA Today, The Washington Post, The Wall Street Journal, Playboy, Mens Journal, The Atlantic, Esquire.com, Time.com, Nypost.com, and Bloomberg.com.⁵¹ Examples of the manner in which Applicant's product is identified follow:

Schlafly is no schnauzer when it comes to full-bodied beers ... You can buy Schlafly in bottles all over Illinois and Missouri, and it's available in kegs at the brewery.⁵²

Until a couple of months ago, Anheuser-Busch InBev NV's namesake baseball park allowed Schlafly draft beer to be sold at just one concession stand. ... a season-ticket holder at the St. Louis Rams' Edward Jones Dome, where Schlafly

⁴⁶ *Id.*, Ex. D, 45 TTABVUE 26-28.

⁴⁷ *Id.*, Ex. E, 45 TTABVUE 29-31.

⁴⁸ *Id.* Ex. L, 45 TTABVUE 55-57.

⁴⁹ *Id.*, Ex. M, 45 TTABVUE 58-59.

⁵⁰ 48 TTABVUE 242.

⁵¹ 45 TTABVUE.

⁵² Applicant's notice of reliance, Ex. R, 45 TTABVUE 76.

debuted for football fans this season. ... Delaware North Cos. ... noticed the growing interest in Schlaflys and decided to give them a try. ... “Schlafly is a local flavor that has become more and more mainstream.” ... “All I want is one more Schlafly.”⁵³

...a 60% stake in Saint Louis Brewery Inc., maker of Schlafly beer.⁵⁴

“We did reach a consensus on the worst of the lot, the Schlafly.”⁵⁵

“Not that such things concern its competition at Schlafly. For more than 20 years, Schlafly has been producing its craft concoctions ... Schlafly fans came in and crushed their competition with a surge of votes ... It’s not a powerful pale ale at 5.9%, but neither are the Schlafly beers on the taps during Cardinals games ...”⁵⁶

We find that the evidence of record sufficiently establishes that Applicant’s mark SCHLAFLY has acquired distinctiveness with respect to Applicant’s goods. Over a period of almost 25 years Applicant has conducted its business in such a way as to establish an association between the name SCHLAFLY and its beer; and the evidence shows that a segment of the public has taken note of Applicant’s goods under its mark and would view the designation SCHLAFLY as an indicator of the source thereof.

The fact that Opposers and third parties bearing the surname SCHLAFLY may have been active in far disparate fields of endeavor (medicine, politics, baseball, law, banking, social advocacy, teleprompters)⁵⁷ is unlikely to have interfered with the

⁵³ *Id.*, Ex. P, 45 TTABVUE 65-69.

⁵⁴ *Id.*, Ex. H, 45 TTABVUE 41.

⁵⁵ *Id.*, Ex. G, 45 TTABVUE 38.

⁵⁶ *Id.*, Ex. A, 45 TTABVUE 12.

⁵⁷ *See* Opposers’ brief at 10-11, 51 TTABVUE 11-12.

ability of Applicant to build an association between its business and its mark in the field of beer. No evidence of record demonstrates any such impact on Applicant's market.

The absence of "customer surveys and testimony of individual consumers" in support of Applicant⁵⁸ does not render a finding of acquired distinctiveness inappropriate. There is so much evidence of Applicant's activity in the marketplace over two decades, with substantial sales to large numbers of customers and attendant notice in the press, that we cannot escape the conclusion that Applicant's mark and goods have developed market recognition among a segment of the relevant public.

The argument that "it is the entire phrase 'Schlafly Beer,' not the applied-for mark SCHLAFLY that is used in reference to Applicant's goods"⁵⁹ is not persuasive. Neither is the argument that "Applicant has virtually always used SCHLAFLY in conjunction with other words and symbols, and those uses cannot justify its attempt to obtain a trademark in SCHLAFLY alone."⁶⁰ In the phrase SCHLAFLY BEER the only meaningful indicator of source is the name SCHLAFLY. The evidence showing the actual use of Applicant's mark shows that the term SCHLAFLY is almost always strongly emphasized and it is rarely combined with anything other than descriptive wording. The fact that graphic designs may have been used together with a word mark (a universal practice) does not render registration of the word mark in standard

⁵⁸ *See id.* at 16, 51 TTABVUE 17.

⁵⁹ *Id.* at 17, 51 TTABVUE 18.

⁶⁰ Opposer's rebuttal brief at 12, 59 TTABVUE 13.

character form unavailable. Nothing in the evidence suggests to us that typical customers would fail to perceive SCHLAFLY as the source-indicating matter on Applicant's labels, packaging, and advertisements. In any event, the record evidence discussed above directly shows public recognition of SCHLAFLY, alone, as a reference to Applicant's product.

The fact that Applicant's goods are not currently marketed throughout the entire United States,⁶¹ but only in 15 states and the District of Columbia, does not render registration of the mark inappropriate. The Trademark Act does not require that an applicant demonstrate nationwide common law rights in its mark; only that it have used the mark in commerce that is regulable by the United States Congress. 15 U.S.C. §§ 1051(a), 1127. Acquired distinctiveness may be demonstrated by showing market recognition of a mark among a substantial segment of the relevant public; nationwide renown is not required. Opposers' attempt to argue that the number of Applicant's customers is only a small percentage of the entire United States population⁶² is not on point. Protectable business goodwill can exist even where market share is small. Similarly, Opposers' suggestion that Applicant's advertising budget is negligible because it "is only about 1/10,000th of Anheuser-Busch InBev's advertising expenditures in the United States"⁶³ sets the bar for the protection of the laws far too

⁶¹ *See id.* at 5 59 TTABVUE 6.

⁶² *Id.* at 12-13, 59 TTABVUE 13-14.

⁶³ *Id.* at 14 and fn.2, 59 TTABVUE 15. (The Anheuser Busch statistics referenced in Opposers' fn.2 are not of record.)

high. We have found Applicant's marketing efforts and advertising expenditures to be commercially meaningful and to have resulted in meaningful commercial success.

Some of Opposers' arguments suggest that the recognition of Applicant's mark should be quantitatively compared to the recognition of the surname of Opposer Phyllis Schlafly.⁶⁴ The statute calls for no such popularity contest. Section 2(f) only requires a demonstration that the mark has become distinctive of the goods. The competing renown of Phyllis Schlafly would be relevant only insofar as it interfered with the development of such acquired distinctiveness. Inasmuch as there is no evidence of market proximity between Applicant and the activities of Phyllis Schlafly, there is no reason to believe that those activities have interfered with the ability of customers to associate Applicant's mark with Applicant's goods.

Applicant has shown that it has established, over more than two decades, a substantial business and has vigorously promoted its beer under the mark SCHLAFLY in such a way as to have created, among its customers, an association between its mark and its goods. We find, therefore, that Applicant's mark SCHLAFLY has become distinctive of Applicant's goods within the meaning of Section 2(f) and is accordingly entitled to registration on the Principal Register.

Decision: The oppositions are dismissed.

⁶⁴ *Id.* at 15, 59 TTABVUE 16 (“[Applicant’s media reports] hardly rise to the level of the widespread media coverage of Opposer Phyllis Schlafly across all demographics ...”)