

This Opinion is Not a
Precedent of the TTAB

Mailed: November 15, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Constellation Brands U.S. Operations, Inc.

v.

LeVecke Corporation

Opposition No. 91223426

Stephen L. Baker and John M. Rannells of Baker and Rannells, PA for
Constellation Brands U.S. Operations, Inc.

Ben T. Lila of Mandour & Associates, APC for
LeVecke Corporation.

Before Cataldo, Lykos and Lynch,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

LeVecke Corporation (“Applicant”) seeks registration on the Principal Register of the mark DUBOIS in standard characters for “distilled spirits” in International Class 33 (the “Application”).¹

¹ Application Serial No. 86452583, filed on November 12, 2014, based on Applicant’s allegation of use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

Constellation Brands U.S. Operations, Inc. (“Opposer”) opposes registration of the mark based on alleged likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) with its registered mark CLOS DU BOIS in standard characters for “wine” in International Class 33.²

I. Evidentiary Record

We first address Opposer’s motion to strike the following evidence:

- Exhibit 1 to the declaration testimony of Joseph LeVecke, Applicant’s President, consisting of Applicant’s sales information, to the extent it relates to sales of goods other than peach schnapps, on the ground that based on Applicant’s prior discovery responses, Applicant must be limited to reliance on sales information about DUBOIS peach schnapps under the actual confusion *du Pont* factors.
- Exhibit 2 to the LeVecke declaration, consisting of a printout from a USPTO database purportedly showing “the history of all proceedings before the Trademark Trial and Appeals [sic] Board involving Applicant,” on the ground that “the list itself is insufficient to place into evidence the actual proceedings or the decisions of the TTAB concerning the same.”³

² Registration Number 1265231 issued January 24, 1981, based on alleged use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a); a combined Section 8 and Section 15 affidavit has been accepted and acknowledged. Although Opposer pleaded an additional registration in its Notice of Opposition, Opposer did not introduce it into evidence and does not rely on it at trial.

³ 49 TTABVUE 34 (Opposer’s Brief).

- Exhibits 3 and 4 to the LeVecke declaration, consisting of a printout from the USPTO TESS database purportedly listing “all of the trademark applications and registrations filed by and/or owned by Applicant” as of April 21, 2017,⁴ on the ground that they are irrelevant and “are improper and lack any evidentiary value” given the lack of copies of the applications and registrations with status and title information.⁵

Applicant did not respond to the motion to strike or otherwise address the evidentiary objections.

Because Exhibit 1 consists of business records authenticated by Mr. LeVecke and Exhibits 2, 3, and 4 are USPTO official online records, we find them admissible. Opposer’s arguments regarding relevance, what the exhibits can be used to prove, and their probative value will be taken into consideration, as appropriate, when we weigh the evidence. *See U.S. Playing Card Co. v. Harbro, LLC*, 81 USPQ2d 1537, 1540 (TTAB 2006) (“the Board is capable of assessing the proper evidentiary weight to be accorded the testimony and evidence, taking into account the imperfections surrounding the admissibility of such testimony and evidence. Thus, we have considered the evidence, keeping in mind the objections, and have accorded whatever probative value the testimony and evidence merits.”).

⁴ 46 TTABVUE 10-13.

⁵ 49 TTABVUE

The record includes the pleadings and, pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the Application.⁶ Opposer also introduced the following evidence:

- A copy of Opposer's pleaded U.S. Trademark Registration No. 1265231 showing current status and title from the USPTO's TESS and TSDR databases;⁷
- Applicant's response to Opposer's Document Request No. 20;⁸
- The declaration testimony of Lisa Beth Pyrczak, Opposer's Director of Marketing, with exhibits;⁹
- Applicant's response to Opposer's Interrogatory Nos. 1 and 3;¹⁰
- Dictionary entries from *Webster's Encyclopedic Unabridged Dictionary of the English Language* and *The Concise Oxford French Dictionary*;¹¹
- A *Google Translate* translation of "clos du bois";¹²
- United States Census Bureau records relating to the surname Dubois;¹³
- Google search results for "Dubois" and "Du Bois."¹⁴

⁶ Applicant unnecessarily submitted a copy of the file history of the application as Exhibit 5 to the declaration of Joseph Levecke, 46 TTABVUE 14-54.

⁷ 35 TTABVUE (Opposer's First Notice of Reliance). 37 C.F.R. § 2.122(d)(1).

⁸ 36 TTABVUE (Opposer's Second Notice of Reliance).

⁹ 39 TTABVUE. 37 C.F.R. § 2.123(a)(1).

¹⁰ 47 TTABVUE (Opposer's Third Notice of Reliance).

¹¹ 48 TTABVUE 5-14 (Opposer's Fourth Notice of Reliance).

¹² *Id.* at 15 (translate.google.com).

¹³ *Id.* at 15-21.

¹⁴ *Id.* at 22-25 (google.com).

Applicant introduced the following evidence:

- The declaration testimony of Joseph LeVecke, Applicant's President.¹⁵

II. Standing

Opposer must prove standing by showing a real interest in the outcome of the proceeding and a reasonable basis for believing that it would suffer damage if the mark is registered. *See* 15 U.S.C. § 1063; *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1401 (2015). A “real interest” is a “direct and personal stake” in the outcome of the proceeding. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1026 (Fed. Cir. 1999). Opposer's pleaded registration for a mark similar to Applicant's, a copy of which is of record showing status and title, establishes its standing. *See Coach Serv. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727-28 (Fed. Cir. 2012).

III. Section 2(d) Claim

A. Priority

To prevail on a likelihood of confusion claim brought under Section 2(d), Opposer must first prove that it owns “a mark registered in the Patent and Trademark Office or a mark or trade name previously used in the United States . . . and not abandoned” 15 U.S.C. § 1052(d). Opposer's valid and subsisting registration establishes its

¹⁵ 45 TTABVUE (confidential version) & 46 TTABVUE (public version).

Section 2(d) priority as to the registered mark and the identified goods. *See Coach Serv.*, 101 USPQ2d at 1727-28. Applicant does not contest Opposer's priority.

B. Likelihood of Confusion

The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*du Pont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “Not all of the *du Pont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010). A likelihood of confusion analysis often focuses on the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks”). Opposer bears the burden of proving its claim of likelihood of confusion by a preponderance of the evidence. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000).

1. Relatedness of the Goods

As to the goods, we must determine whether their degree of relatedness rises to such a level that consumers would mistakenly believe the parties' goods emanate from the same source. *Coach Servs.*, 101 USPQ2d at 1722. They need not be

“competitive or intrinsically related” to find a likelihood of confusion. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1737 (Fed. Cir. 2017). Our comparison of the goods must be based on the identification in the Application, “distilled spirits” and Opposer’s identified goods, “wine.” See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computers Serv. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). This principle negates Applicant’s arguments that rest on its alleged actual narrower goods – peach schnapps – rather than the Application’s broader identification of distilled spirits.

To show the relatedness of wine and spirits, Opposer relies on marketplace evidence of wine and spirits sold under the same mark, third-party registrations that include both types of goods, and testimony by Opposer’s Director of Marketing, with corroborating exhibits.

The record includes the evidence of consumer exposure to wines and spirits being offered under the same mark, including:

- ED HARDY wines and ED HARDY vodka;¹⁶
- ROTH wines and ROTH California vodka;¹⁷
- CHARBAY wines and CHARBAY vodka;¹⁸
- KOENIG VINEYARDS wine and KOENIG DISTILLERY vodka;¹⁹

¹⁶ 39 TTABVUE 518-519 (edhardywines.com & thewhiskeyexchange.com).

¹⁷ *Id.* at 523-524 (rothwinery.com & bevmo.com).

¹⁸ *Id.* at 525-526 (charbaywinery.com & charbay.com).

¹⁹ *Id.* at 527-528 (koenigvineyards.com & koenigdistillery.com).

- THE EMPIRE WINERY AND DISTILLERY wines, vodka, and grappa;²⁰ and
- KOBLEVO wines and KOBLEVO cognacs, described as “Cognacs from the leader of the wine market for Ukraine”.²¹

Opposer also introduced a large number – well over 200 – use-based third-party registrations that identify both wine and distilled spirits under the same mark.²² “The use-based, third-party registrations . . . also have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark.” *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013); *see also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

Ms. Pyrczak testified that wine and spirits are competitive products and “are often combined in mixed drinks.”²³ To bolster this claim, she provided screenshots from Opposer’s “Clos Cocktails” webpages, featuring recipes for “Clos Margarita,” containing wine as well as triple sec liqueur, the “Apple Sidecar with Clos Pinot Grigio” containing wine and Cognac, the “Poison Pomme” made with wine and sour apple liqueur, the “Autumn Sangria” containing wine and Brandy, the “Citrus Spritz” containing wine and Tequila, and the “Clos Dew Drop” made with wine and gin.²⁴

²⁰ *Id.* at 529-530 (hudsonfla.com/empire).

²¹ *Id.* at 531-532 (koblevo.ua).

²² 39 TTABVUE 120-517.

²³ 39 TTABVUE 7.

²⁴ *Id.* at 69-75 (closdubois.com).

While Applicant correctly points out that wine and spirits cannot be considered related merely because they are both alcoholic beverages, the record shows more than that. We have evidence of consumer exposure to wine and spirits emanating from the same sources under the same marks, corroborated by a large volume of registration evidence showing that these goods may emanate from a single source under a single mark, as well as evidence that the products compete in the marketplace and are used together. Applying the test whether consumers likely would believe the goods may come from the same source or sponsor, we find the record persuasive to show the relatedness of wine and distilled spirits.

This finding is consistent with prior precedent. Although there is no per se rule that all alcoholic beverages are related, *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009), the Federal Circuit Court of Appeals and the Board repeatedly have found that different types of alcoholic beverages, including wine and distilled spirits, are related goods for purposes of a Trademark Act Section 2(d) analysis. *See Monarch Wine Co. v. Hood River Distillers, Inc.*, 196 USPQ 855, 857 (TTAB 1977) (finding distilled spirits related to wine and champagne); *In re AGE Bodegas Unidas, S.A.*, 192 USPQ 326, 326 (TTAB 1976) (finding wine related to whiskey); *See also In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1947-48 (Fed. Cir. 2004) (holding JOSE GASPAR GOLD for tequila likely to be confused with GASPAR'S ALE for beer and ale); *In re Kysela Pere et Fils, Ltd.*, 98 USPQ2d 1261, 1265 (TTAB 2011) (finding beer related to wine); *In re Majestic Distilling Co.*, 65 USPQ2d at 1207 (holding RED BULL for tequila likely to be confused with RED

BULL for malt liquor); *In re Salierbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (holding CHRISTOPHER COLUMBUS for beer likely to be confused with CRISTOBAL COLON & design for sweet wine); *Somerset Distilling Inc. v. Speymalt Whisky Distribs. Ltd.*, 14 USPQ2d 1539, 1542 (TTAB 1989) (holding JAS. GORDON and design for scotch whiskey likely to be confused with GORDON'S for distilled gin and vodka); *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069, 2073 (TTAB 1989) (holding BRADOR for malt liquor, beer and ale likely to be confused with BRAS D'OR for brandy); *Bureau Nat'l Interprofessionel Du Cognac v. Int'l Better Drinks Corp.*, 6 USPQ2d 1610, 1617 (TTAB 1988) (holding COLAGNAC for cola liqueur likely to be confused with certification mark COGNAC for brandy); *Rosenblum v. George Willsher & Co.*, 161 USPQ 492, 492-93 (TTAB 1969) (holding RED BULL for scotch whiskey likely to be confused with TORO ROJO for rum). The record in this case supports such a finding.

This factor weighs in favor of likely confusion.

2. Trade Channels and Classes of Consumers

The *du Pont* factor on trade channels and classes of consumers also must be assessed according to the identifications of the respective goods in the Application and pleaded registration, not on extrinsic evidence of actual use. *See, e.g., Coach Servs.*, 101 USPQ2d at 1722; *Octocom*, 16 USPQ2d at 1787. “[I]n the absence of specific limitations,” which we do not have in these identifications, we must assume that the identified goods move through all normal and usual channels of trade for such goods and to all normal potential purchasers. *In re i.am.symbolic llc*, 866 F.3d

1315, 123 USPQ2d 1744, 1750 (Fed. Cir. 2017); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983).

Petitioner's Director of Marketing testified that wine and spirits are competing products, directed to the same "adult beverage consumer,"²⁵ and Applicant did not offer evidence to rebut this testimony. Ms. Pyrczak also testified that wine and distilled spirits are "sold in the same stores, both are served in bars and restaurants ..., both are offered and served by consumers at home for personal use and for entertaining, and wine and spirits are often combined in mixed drinks."²⁶ This testimony is corroborated by the numerous examples in the record of wines and spirits advertised in the same magazines, such as *Bon Appetit*,²⁷ *Wine Spectator*,²⁸ *Food & Wine*,²⁹ *Wine Enthusiast*,³⁰ *Delicious*,³¹ *Wine Country Living*,³² and *Cigar Aficionado*.³³ These magazines, including those with names indicating they target readers with an interest in wines, reflect that the advertisers apparently consider the readers to be prospective purchasers not only of wine, but also of distilled spirits.

²⁵ 39 TTABVUE 7 (Pyrczak declaration). Because it constitutes hearsay, the IRI study attached as an exhibit to Ms. Pyrczak's declaration cannot be considered for the truth of the matters asserted therein, so we decline Petitioner's invitation to rely on it to establish the "cross-purchasing habits in the beverage alcohol consumer category." 49 TTABVUE 22 (Petitioner's Brief).

²⁶ *Id.* at

²⁷ 39 TTABVUE 81-83, 114-116.

²⁸ *Id.* at 84-91, 107-110.

²⁹ *Id.* at 92-97.

³⁰ *Id.* at 98-100.

³¹ *Id.* at 101-103.

³² *Id.* at 104-106.

³³ *Id.* at 111-113.

Applicant's contentions about differing trade channels rely on improperly limiting its goods to peach schnapps and the alleged manner it actually distributes schnapps in the marketplace, as well as on unsupported assertions about the differences in trade channels and retail conditions between wine and schnapps.³⁴ However, we look to the unrestricted identifications of goods in the Application and registration, and we do not limit the trade channels based on extrinsic evidence of how these particular marks are allegedly actually used. *See Stone Lion Capital Partners*, 110 USPQ2d at 1162; *Paula Payne Prods. Co. v. Johnson Publ'g Co., Inc.*, 473 F.2d 901, 177 USPQ 76, 77-78 (CCPA 1973) (Board must "give full sweep" to an identification of goods regardless of registrant's actual business). Thus, Applicant's arguments are unavailing.

We find that Opposer's wine and Applicant's distilled spirits move in overlapping trade channels to overlapping classes of consumers. The third *du Pont* factor weighs in favor of likely confusion.

3. The Strength of Opposer's Mark

Opposer argues under the fifth *du Pont* factor that its CLOS DU BOIS mark should be deemed famous. The strength of a mark rests on the extent to which "a significant portion of the relevant consuming public . . . recognizes the mark as a source indicator." *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (citing *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694

³⁴ 50 TTABVue 15-16 (Applicant's Brief).

(Fed. Cir. 2005)). This factor involves assessing the mark “along a spectrum from very strong to very weak.” *Id.* (internal citations omitted). A very strong mark receives a wider latitude of legal protection in the likelihood of confusion analysis. *See Palm Bay Imps.*, 73 USPQ2d at 1694 (strong marks “enjoy wide latitude of legal protection” and are “more attractive as targets for would-be copyists”). Strength may be measured indirectly by the volume of sales and advertising expenditures in connection with the goods sold under the mark, and other factors such as length of time of use of the mark; widespread critical assessments; notice by independent sources of the goods identified by the marks; and the general reputation of the goods. *Weider Publ’ns, LLC v. D & D Beauty Care Co.*, 109 USPQ2d 1347, 1354 (TTAB 2014), *appeal dismissed per stipulation*, No. 2014-1461 (Fed. Cir. Oct. 10, 2014).

To show the strength of the CLOS DU BOIS mark, Opposer relies on testimony as to:

- its continuous use of the mark since 1976;³⁵
- the breadth of its trade channels in retail wine and liquor stores, grocery stores, big box stores, as well as restaurants and bars;³⁶
- \$156 million per year wholesale revenue and 1.6 million cases of wine sold under the mark per year for the last five fiscal years,³⁷ as well as market share information that in 2016, CLOS DU BOIS was the #16 largest brand by dollar

³⁵ 39 TTABVUE 3-4 (Pyrzack declaration).

³⁶ *Id.* at 4.

³⁷ *Id.* at 5.

sales for “still table wines in all categories,” and in its “Ultra Premium Segment”/“Super Premium Glass Segment” of wine, it was the #6 largest brand, and that in 2013, CLOS DU BOIS was the #12 largest brand by dollar sales for “still table wines in all categories,” and in its “Ultra Premium Segment” of wine, it had an 8.1% dollar share (#2 largest brand by dollar sales) of the market and a 9% unit share;³⁸

- advertising and promotional expenditures for the last five years, averaging \$44.7 million per year for CLOS DU BOIS wines;³⁹ and
- recognition, such as being named the top “Super Premium” wine by the Pittsburgh Tribune-Review and in the top five California wineries by Yahoo! Voices.⁴⁰

Applicant criticizes the evidentiary showing on the ground that: Opposer did not introduce “the quantity of sales bearing its mark” – which Opposer did – or “evidence that [Opposer’s] advertising expenditures have made any impact on consumer perception;”⁴¹ and accolades from wine magazines are hearsay and do not show that CLOS DU BOIS “is widely recognized and well-known amongst consumers.”

³⁸ *Id.* at 6-7.

³⁹ *Id.* at 6.

⁴⁰ *Id.* at 5 (testimony), 48-49 (voices.yahoo.com), 52-53 (questia.com). Ms. Pyrczak’s declaration includes as an exhibit pages from Opposer’s website touting other awards and accolades, but she did not testify to them, and while we consider the webpages for what they show on their face, we do not consider them for the underlying truth of matters asserted on the webpages.

⁴¹ 50 TTABVUE 18 (Applicant’s Brief).

Opposer's evidence of commercial strength in the form of lengthy use, high sales volume and revenue under the mark, significant market share, substantial advertising expenditures, and some recognition, shows widespread consumer exposure to Opposer's mark and reflects some degree of renown. Applicant's criticism about the lack of direct evidence of consumer recognition or perception overlooks that indirect evidence may serve as appropriate proof of strength. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1308 (Fed. Cir. 2002). Overall, we find Opposer's mark to be relatively commercially strong, weighing in favor of a likelihood of confusion. However, even if we were to find the mark to be of average strength, our ultimate ruling on the likelihood of confusion claim on this record would remain the same.

4. Similarity of the Marks

With respect to the marks, we must compare them "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imps.*, 73 USPQ2d at 1691 (quoting *du Pont*, 177 USPQ at 567). We inquire "not whether the marks can be distinguished when subjected to a side-by-side comparison, but whether they are sufficiently similar in their overall commercial impression" that source confusion is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). In fact, "marks 'must be considered . . . in light of the fallibility of memory' and 'not on the basis of side-by-side comparison.'" *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (citation omitted). We also bear in mind our finding that Opposer's mark qualifies as a relatively strong mark, entitled to a broader scope of protection. *See*

Kenner Parker Toys, Inc. v. Rose Art Ind., Inc., 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992) (“The Lanham Act’s tolerance for similarity between competing marks varies inversely with the fame of the prior mark”).

In the marks CLOS DU BOIS and DUBOIS, we find that the shared wording DU BOIS/DUBOIS, which is nearly identical except for the space, creates a significant visual resemblance between the two marks and renders them phonetically similar, important considerations in the analysis for consumers “calling for” the goods. *See Viterra* 101 USPQ2d at 1911. While the additional word CLOS in the registered mark creates some difference, overall these marks look and sound similar, and consumers familiar with Opposer’s commercially strong mark could perceive Applicant’s mark as a modification of Opposer’s. Also, as discussed below, French-speaking consumers who might translate CLOS as “enclosed vineyard” would view it as at least highly suggestive of wine,⁴² making it unlikely they would focus on it to distinguish source, thereby diminishing its significance in the comparison of marks. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat’l Data Corp.*, 753 F.2d 1056, 1060, 224 USPQ 749, 752 (Fed. Cir. 1985).

We turn next to connotation and commercial impression. As background on the wording in Opposer’s mark, its pleaded registration translates CLOS DU BOIS from French into English as “walled vineyards of the woods.”⁴³ There is corroborating translation evidence in the record. *The Concise Oxford French Dictionary* translates

⁴² 39 TTABVUE 53 (questia.com “Clos Du Bois Produces America’s Top ‘Super Premium’”); *see also* 48 TTABVUE 10 (*The Concise Oxford French Dictionary* 2nd ed.).

⁴³ 35 TTABVUE 4.

the noun form of “clos” as “enclosure, orchard, paddock, vineyard.”⁴⁴ It translates “du” (by reference to “de” in combination with the article “le”) with a lengthy list of possibilities, including “(possession, belonging) of, from, in, belonging to; forming part of; *la maison de Colette*, Colette’s house.”⁴⁵ It translates “bois” as “wood, timber, firewood...” or “wood, grove, copse.”⁴⁶ A Google Translate entry for the entire phrase “clos du bois” translates it as “closed wood.”⁴⁷

The Application, however, includes no translation of DUBOIS, because the Examining Attorney treated it as primarily merely a surname, and Applicant agreed by providing a claim of acquired distinctiveness to overcome the surname refusal.⁴⁸ Online data from the 2010 U.S. Census lists “Dubois” as the 1,539th most common surname in the U.S.⁴⁹ The “Dubois Family History” page from the ancestry.com website describes the “Dubois Name Meaning” as “topographic name for someone who lived in a wood, from the fused preposition and definite article du ‘from the’ + French bois ‘wood.’”⁵⁰ *Webster’s Encyclopedic Unabridged Dictionary of the English Language* includes entries for “Du Bois” and “Dubois,” both as the surnames of particular individuals – William Edward Burghardt Du Bois (W.E.B. Du Bois), and Eugene

⁴⁴ 48 TTABVUE 10 (*The Concise Oxford French Dictionary* 2nd ed.).

⁴⁵ *Id.* at 11-12.

⁴⁶ *Id.* at 13.

⁴⁷ *Id.* at 14 (translate.google.com).

⁴⁸ April 27, 2015 Response to Office Action at 1.

⁴⁹ 48 TTABVUE 15-18 (census.gov).

⁵⁰ 39 TTABVUE 79 (ancestry.com).

Dubois, respectively.⁵¹ The record also includes screenshots of Google search results for “Dubois” and “Du Bois,”⁵² in which most of the hits for both concern W.E.B. Du Bois.

In its Brief, Opposer takes the position that CLOS DU BOIS can mean either “(1) ‘An enclosure/orchard/vineyard of the wood’ or (2) where DU BOIS is perceived in its surname sense, ‘Enclosure/orchard/vineyard belonging to DUBOIS[.]’”⁵³ Opposer points out that the surname derived from the French for “of the wood,” and argues that whether the term is translated or viewed merely as a surname, the meaning is the same in both marks.

We agree with Opposer that consumers who do speak French would translate its mark either as vineyard of the wood, or the vineyard of a person or family with the surname Du Bois.⁵⁴ Non-French-speaking consumers encountering Opposer’s mark

⁵¹ 48 TTABVUE 5-7 (*Webster’s Encyclopedic Unabridged Dictionary of the English Language*, © 2001).

⁵² *Id.* at 22-25 (google.com).

⁵³ 49 TTABVUE 18 (Opposer’s Brief).

⁵⁴ Although both parties refer to translations of French wording in one or both marks, neither party argued or provided other evidence relating to the doctrine of foreign equivalents. “Under the doctrine of foreign equivalents, foreign words from common, modern languages are translated into English to determine ... similarity of connotation in order to ascertain confusing similarity with English word marks.” *Palm Bay Imps.*, 73 USPQ2d at 1696; *In re Thomas*, 79 USPQ2d 1021, 1024 (TTAB 2006). However, the doctrine is not an absolute rule, and “should be applied only when it is likely that “the ordinary American purchaser would ‘stop and translate [the mark] into its English equivalent.’” *Palm Bay Imps.*, 73 USPQ2d at 1696 (quoting *In re Pan Tex Hotel Corp.*, 190 USPQ 109, 110 (TTAB 1976)). Arguably, the doctrine would apply here only if Opposer’s mark were treated as a French language mark while Applicant’s were treated as an English language mark. *See id.* (French considered a common modern language); *Thomas*, 79 USPQ2d at 1024 (“French is a common foreign language spoken by an appreciable segment of the population. Indeed, applicant’s own evidence shows that of the foreign languages with the greatest number of speakers in the United States, French is ranked second only to Spanish.”). As discussed above, we find the

likely would recognize DU BOIS as a surname, given the evidence that it is reasonably common and that well-known individuals such as W.E.B. Du Bois bore the surname. Those same non-French-speaking consumers also likely would view Applicant's mark as a surname, while French-speaking U.S. consumers may do the same, or may translate it as "of the wood." We note that Applicant's mark contains no space between "du" and "bois," which would be found in the French for "of the wood." For French-speaking consumers viewing Applicant's mark, this could make them more inclined to view DUBOIS as a surname, but on the other hand, the lack of space could be viewed as telescoping of the words, and has no effect on the pronunciation heard or spoken by consumers. Thus, although each mark has two possible connotations, the reference in both marks either to an almost-identical surname or to the French wording for "of the wood" renders the connotation of Applicant's mark similar to Opposer's. We find that many consumers would understand the marks to have a similar meaning and impression, with Opposer's mark varying somewhat because it includes the suggestive reference to a vineyard. Overall, the two marks convey a similar import and impression.

Particularly in view of the strength of Opposer's mark, we deem Applicant's mark similar in appearance, sound, connotation and commercial impression to Opposer's mark, weighing in favor of likely confusion.

French-speaking consumers who would translate Opposer's mark may be almost as likely to translate Applicant's mark as well.

5. Purchasing Conditions

Applicant argues, without citing to any evidence in the record, that the relevant consumer is “sophisticated,” “acutely aware and knowledgeable of the different regions of wine country,” and “classy.”⁵⁵ Meanwhile, again without citing to evidence, Applicant improperly narrows its goods to “peach schnapps” to argue that its consumers are unsophisticated, less wealthy “partiers.”⁵⁶ However, in this context, “it is the identification of goods that controls, not what extrinsic evidence may show about the specific nature of the goods.” *In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1165 (TTAB 2013).

Neither Opposer’s nor Applicant’s identifications of wine and spirits is restricted. Neither is limited as to price or type. The record reflects that wine has varying price points, including the \$11-\$14.99 per bottle price range for Opposer’s.⁵⁷ Thus, we find that these products could be subject to impulse buying. *See In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016). There is no basis in the record to find that ordinary consumers purchasing wine and spirits, including that at the lower price points encompassed by the parties’ unrestricted identifications of goods, would exercise a high degree of care. Rather, “[w]hen products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.” *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Specialty*

⁵⁵ 50 TTABVUE 16 (Applicant’s Brief).

⁵⁶ *Id.*

⁵⁷ 39 TTABVUE 6 (Pyrzczak declaration).

Brands, Inc. v. Coffee Bean Distributors, Inc., 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984).

6. Actual Confusion

Applicant argues that the lack of reported incidents of actual confusion in 17 alleged years of overlapping use weighs against likely confusion. Mr. LeVecke testified that “Applicant has never witnessed any actual confusion between its DUBOIS trademark and any trademark of Opposer Constellation Brands U.S. Operations, Inc.”⁵⁸ Opposer, however, points to Applicant’s confidential sales records, characterizing the sales as minimal, and argues that there has been little opportunity for actual confusion.

Although the Application includes a first use allegation of August 7, 2001, the only evidence Applicant introduced of such use and its extent covers January 1, 2012 through mid-2016.⁵⁹ We therefore consider that timeframe for which we have evidence to assess the potential for actual confusion. In accordance with Opposer’s objection and motion to strike parts of Applicant’s sales records, we consider only the peach schnapps sales, because in this context, Applicant must be bound by its prior interrogatory responses acknowledging that peach schnapps was the only product Applicant marketed or intended to market under the mark in the Application.⁶⁰ The volume of sales, while more than minimal, is not very substantial either. We also take into account Applicant’s statement that it had no responsive documents to a request

⁵⁸ 45 TTABVUE 4 (confidential).

⁵⁹ *Id.*

⁶⁰ *See* 47 TTABVUE (Opposer’s Third Notice of Reliance).

for promotional materials using the mark,⁶¹ from which we infer a lack of promotion of the mark during the relevant timeframe. In view of the limited timeframe and the nature and extent of Applicant's use on the record before us, we find this factor neutral. Proof of actual confusion is not necessary to establish likelihood of confusion. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983).

IV. Conclusion

We conclude that the similarity of Applicant's mark to Opposer's strong mark, used on related goods that travel in overlapping trade channels to overlapping classes of ordinary consumers, results in a likelihood of confusion. As the newcomer, Applicant "has the duty of avoiding confusion, and is charged with the obligation of doing so." *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1691 (Fed. Cir. 1993).

Decision: The opposition is sustained.

⁶¹ See 36 TTABVUE 5 (Opposer's Second Notice of Reliance).