

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: July 21, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Miguel Torres, S.A.

v.

Will Cody Whipple

—
Opposition No. 91244503
—

J. Scott Gerien and Joy L. Durand of Dickenson, Peatman & Fogarty,
for Miguel Torres, S.A.

Jerry M. Snyder of the Law Office of Jerry M. Snyder,
for Will Cody Whipple.

—
Before Wolfson, Heasley, and English,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Will Cody Whipple (“Applicant”) seeks registration on the Principal Register of the mark 10 TORR DISTILLING AND BREWING COMPANY (in standard characters, with “DISTILLING AND BREWING COMPANY” disclaimed) for “beer” in International Class 32 and “distilled spirits” in International Class 33.¹

¹ Application Serial No. 87780256 was filed on Feb. 1, 2018, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere since at least as early as June 1, 2017 and first use in commerce since at least as early as January 1, 2018.

Miguel Torres, S.A. (“Opposer”) filed a Notice of Opposition against registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) claiming ownership of the registered standard character mark TORRES 10 for “brandy” in International Class 33.² Applicant, in his Answer, denied the salient allegations of the Notice of Opposition.³

We sustain the opposition.

I. Standing and Priority

“Any person who believes that he would be damaged by the registration of a mark upon the principal register” may file a notice of opposition stating the grounds therefor. Trademark Act § 13, 15 U.S.C. § 1063(a). To establish standing in an opposition proceeding, an opposer must show a ‘real interest’ in the proceeding and a ‘reasonable basis’ for its belief of damage. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). A claim of likelihood of confusion that is not wholly without merit may be sufficient to establish a reasonable basis for a belief that one is damaged. *DeVivo v. Ortiz*, 2020 USPQ2d 10153, *2 (TTAB 2020); *Executive Coach Builders, Inc. v. SPV Coach Co., Inc.*, 123 USPQ2d 1175, 1179 (TTAB 2017) (citing *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982)).

Here, Opposer’s pleaded registration of the mark TORRES 10, made of record in its notice of reliance,⁴ establishes its standing. *Cunningham v. Laser Golf Corp.*, 222

² 1 TTABVUE; Reg. No. 2267401, issued August 3, 1999; renewed.

³ 4 TTABVUE.

⁴ Opposer’s notice of reliance, ex. A, 6 TTABVUE 19-29.

F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1820 (TTAB 2015) (“In light of its pleaded ground of likelihood of confusion, Opposer’s submission of its trademark registrations adequately establish its interest in this proceeding and a reasonable basis for its belief that damage would result from registration of Applicant’s mark.”).

Furthermore, because Opposer’s pleaded registration is of record, priority is not at issue with respect to the registered mark and goods covered by that registration. *Anheuser-Busch v. Innvopak*, 115 USPQ2d at 1820 (citing *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)).

II. The Record

The record consists of the pleadings and the file of opposed Application Serial No. 87780256, *see* Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), as well as the following:

A. Opposer’s Evidence

- Declaration of Joy L. Durand, Esq. with exhibits;⁵
- Declaration of Michael La Terrière, Spirits Global Director for Opposer, with exhibits;⁶
- Opposer’s notice of reliance, containing inter alia third-party registrations identifying both beer and distilled spirits, including brandy; printouts from Applicant’s website and Instagram.com website; third-party Internet printouts showing the same mark used to identify beer and distilled spirits; Internet printouts of entities describing themselves as “brewstilleries”; Internet printouts showing Opposer’s and Applicant’s goods offered through the same or similar retail outlets.⁷

⁵ 5 TTABVUE 2-27.

⁶ 5 TTABVUE 28-32.

⁷ 6-8 TTABVUE.

B. Applicant's Evidence

- Declaration of Applicant Will Cody Whipple, with exhibits.⁸

III. Applicable Law

Trademark Act Section 2(d) bars registration of a mark that “so resembles a mark registered in the Patent and Trademark Office ... as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive. . . .” 15 U.S.C. § 1052(d) *quoted in Anheuser-Busch v. Innvopak*, 115 USPQ2d at 1820.

We base our determination of likelihood of confusion under Section 2(d) on an analysis of all of the probative facts of record under the applicable *DuPont* factors. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). As we apply the *DuPont* factors, we bear in mind the fundamental principles underlying the Trademark Act in general and Section 2(d) in particular, which are “to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers.” *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985), *quoted in Matal v. Tam*, 582 U.S. ___, 122 USPQ2d 1757, 1762 (2017); *see also DuPont*, 177 USPQ at 566.

In making our determination, we have considered each pertinent *DuPont* factor. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019); *see Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed.

⁸ 9 TTABVUE.

Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”)).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). “In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services.” *Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, *5 (TTAB 2019) (citing *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004)).

A. Relatedness of the Goods and Channels of Trade

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration...,” and the third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). A proper comparison of the goods “considers whether ‘the consuming public may perceive [the respective goods ... of the parties] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)).

Again, Opposer's goods are "brandy" in Class 33, and Applicant's goods are "beer" in Class 32 and "distilled spirits" in Class 33. Applicant argues that "the two marks are used in connection with different, albeit related products."⁹ He continues: "The 'Torres 10' mark is applied exclusively to brandy, while the '10 Torr Distilling and Brewing' mark applies to beer and distilled spirits. The 10 Torr mark has not been applied to Brandy, and Applicant has no plans to make brandy."¹⁰

We find, however, that the parties' goods are legally identical in part, and otherwise related. To begin with, Applicant's broadly worded identification of "distilled spirits" encompasses Opposer's more narrowly worded "brandy." *Schieffelin & Co. v. The Molson Cos. Ltd.*, 9 USPQ2d 2069, 2071 (TTAB 1989) ("Cognac brandy is a distilled spirit made from the wine of grapes, aged in oak barrels and then blended with wine of different ages."). The Code of Federal Regulations defines "brandy" as "an alcoholic distillate from the fermented juice, mash, or wine of fruit, or from the residue thereof," 27 C.F.R. § 5.22, and classifies brandy as a type of distilled spirit: "*Distilled spirits*. Ethyl alcohol, hydrated oxide of ethyl, spirits of wine, whisky, rum, **brandy**, gin, and other distilled spirits, including all dilutions and mixtures thereof, for nonindustrial use." 27 C.F.R. § 5.11 (emphasis added).

Furthermore, Opposer, in its brief, proffers the definition of "distilled spirit" provided in the Encyclopedia Britannica:

Distilled spirit, also called distilled liquor, alcoholic beverage (such as **brandy**, whisky, rum, or arrack) that is obtained by distillation from wine

⁹ Applicant's brief, 11 TTABVUE 23 (capitalization omitted).

¹⁰ Applicant's brief, 11 TTABVUE 23 citing Whipple Decl. ¶ 2, 9 TTABVUE 3.

or other fermented fruit or plant juice or from a starchy material (such as various grains) that has first been brewed.¹¹

Although Opposer did not make this definition of record during its testimony period, we take judicial notice of it.¹² Since Opposer's Class 33 goods, "brandy," are encompassed by Applicant's Class 33 goods, "distilled spirits," we find the parties' Class 33 goods legally identical *See, e.g., In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 722-23 (CCPA 1968) (applicant's and registrant's identified iron and steel products legally identical); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) ("Applicant's broadly worded identification of 'furniture' necessarily encompasses Registrant's narrowly identified 'residential and commercial furniture.'").

We further find that Applicant's Class 32 goods, "beer" are related to distilled spirits such as Opposer's "brandy." In similar situations, the Federal Circuit and the Board have found beer and distilled spirits, including brandy, related. For example, in *Schieffelin v. Molson*, 9 USPQ2d 2069, Schieffelin opposed Molson's application to register a mark for malt liquor, beer, and ale on the ground of confusing similarity to its mark for Cognac brandy. *Id.* at 2070. The Board sustained the opposition, noting that "A typical consumer of alcoholic beverages may drink more than one type of beverage and may shop for different alcoholic beverages in the same liquor store.

¹¹ Opposer's brief, 10 TTABVUE 14, citing Britannica.com 3/16/2020 (emphasis added).

¹² The Board may take judicial notice of information in encyclopedias. *B.V.D. Licensing Corp. v. Body Action Design Inc.*, 846 F.2d 727, 6 USPQ2d 1719, 1721 (Fed. Cir. 1988); *In re Weiss Watch Co.*, 123 USPQ2d 1200, 1205 n. 12 (TTAB 2017).

Moreover, a person may serve more than one kind of alcoholic beverage before or during a meal or at a party.” *Id.* at 2073.

Beer has been held related to other distilled spirits, as well:

Moreover, beer has been held related to other alcoholic beverages by both this Board and our reviewing courts. *E.g., In re Chatam Int’l*, 71 USPQ2d at 1947-48 (Fed. Cir. 2004) (“Indeed, the goods [tequila and beer or ale] often emanate from the same source because ‘both are alcoholic beverages that are marketed in many of the same channels of trade to many of the same consumers.’”) (quoting *Majestic Distilling*, 65 USPQ2d at 1204 (malt liquor related to tequila given the identity of trade channels despite the fact that “malt liquor is a brewed product, whereas tequila is distilled”)).

Anheuser-Busch v. Innvopak, 115 USPQ2d at 1826. As the Board made clear, “In comparing the parties’ goods, the issue to be determined . . . is not whether the goods of plaintiff and defendant are likely to be confused but rather whether there is a likelihood that purchasers will be misled into the belief that they emanate from a common source.” *Id.* at 1825 (internal punctuation and citation omitted).

To show that beer and brandy may emanate from a common source, Opposer has submitted over two dozen use-based third-party registrations showing beer and distilled spirits offered under a single mark by a single entity. Although only a few identify beer and brandy—e.g., HARRY’S (stylized), Reg. No. 5044231, TULASI, Reg. No. 5116260, and MR. JOFF (stylized), Reg. No. 5235485—the rest identify beer and distilled spirits, which, as we have seen, encompass brandy.¹³ These registrations “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

¹³ Opposer’s brief, 10 TTABVUE 15; notice of reliance ex. B, 6 TTABVUE 30-110.

2013) (citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) *aff'd*, 864 F.2d 149 (Fed. Cir. 1988)). *See also In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1264 (TTAB 2011); *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (third-party registrations showing differing types of alcohol beverages from same source under same mark).

Opposer adds Internet printouts from over a dozen producers around the country—producers such as Dogfish Head, Ranger Creek Brewing and Distilling, and Square One Brewing and Distilling—that offer beer and distilled spirits under the same mark.¹⁴ Three more producers identify themselves as “brewstilleries.”¹⁵ *See Hewlett-Packard v. Packard Press*, 62 USPQ2d at 1004 (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to the relatedness analysis”). Applicant (true to the disclaimed wording “DISTILLING AND BREWING COMPANY”) is only one of a number of producers offering both distilled spirits and beer.¹⁶ These goods are related products that consumers can encounter emanating from the same source, under the same marks. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69 (TTAB 2009).

Applicant does not refute any of this third-party evidence, and has, as noted, referred to the parties’ products as “related.”¹⁷ Since the parties’ Class 33 goods,

¹⁴ Opposer’s brief, 10 TTABVUE 16; notice of reliance exs. C, F-R, 6 TTABVUE 111-119, 122-163.

¹⁵ Notice of reliance exs. S-U, 7 TTABVUE 121.

¹⁶ Notice of reliance exs. D-E; 6 TTABVUE 120-148.

¹⁷ Applicant’s brief, 11 TTABVUE 23.

distilled spirits and brandy, are legally identical, we presume that they flow through the same channels of trade—such as liquor stores, alcohol sections of grocery and convenience stores, bars and restaurants—to the same classes of consumers: ordinary adult purchasers of alcoholic beverages. *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017) (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this presumption)); *Monarch Wine Co., Inc. v. Hood River Dist., Inc.*, 196 USPQ 855, 857 (TTAB 1977) (whisky, vodka, rum, brandy, wine and champagne travel in same channels of trade).

And since Applicant's remaining goods, beer, are admittedly and demonstrably related to Opposer's, we must assume that they travel in all normal channels of trade for alcoholic beverages, *Schieffelin v. Molson*, 9 USPQ2d at 2073 (brandy and beer), and we must consider them to be offered and sold to all of the usual customers for such goods. *Anheuser-Busch, LLC v. Innvopak*, 115 USPQ2d at 1825-26. Even though brandy and beer would tend to be displayed on different shelves in a store, "[a] typical consumer of alcoholic beverages may drink more than one type of beverage and may shop for different alcoholic beverages in the same liquor store." *Schieffelin v. Molson*, 9 USPQ2d at 2073.

In fact, Mr. Terrière, Opposer's Spirits Global Director, avers that "Opposer's TORRES 10 brandy is sold through all outlets where alcoholic beverages are sold in the United States including retail outlets, such as liquor stores and supermarkets."¹⁸

¹⁸ Terriere decl. ¶ 6, 5 TTABVUE 29.

There are numerous retail outlets offering distilled spirits and beer.¹⁹ Numerous retail outlets offer Opposer's TORRES 10 brandy as well as beer.²⁰ One such outlet, Total Wine, offers Opposer's TORRES 10 brandy and Applicant's 10 TORR beer.²¹ And given the absence of restrictions in the Application and Registration, more than just retail outlets could sell both parties' products, as for example, wholesale distributors or independent vendors. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these ... items could be offered and sold to the same classes of purchasers through the same channels of trade.").

In sum, we find that the parties' goods are legally identical or otherwise closely related, and flow through the same or overlapping channels of trade to the same classes of consumers. For these reasons, the second and third *DuPont* factors weigh in favor of finding a likelihood of confusion.

B. Comparison of the Marks

We next consider the similarity or dissimilarity of the parties' marks. Applicant argues, "The board should recognize that the tremendous emphasis that [Opposer] Miguel Torres places on its 'related goods' argument for what it is: a piece of rhetorical

¹⁹ Notice of reliance exs. BBB-EEE retail outlets offering beer and distilled spirits; 8 TTABVUE 346-416.

²⁰ Notice of reliance exs. WW-AAA, retail outlets offering beer and brandy; 8 TTABVUE 272-345.

²¹ Notice of reliance ex. OO, TotalWine.com, 8 TTABVUE 137-158.

legerdemain to distract the board from the simple fact that the ‘10 Torr Distilling and Brewing’ mark is substantially different in overall commercial impression from the ‘10 Torres’ mark.”²²

The *DuPont* factors are interrelated, though. “Because the goods are legally identical in part and otherwise highly related, ‘the degree of similarity between the marks necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods.’” *In re Medline Indus., Inc.*, 2020 USPQ2d 10237, *8 (TTAB 2020) (quoting *In re Bay State Brewing Co., Inc.*, 117 USPQ2d 1958, 1960 (TTAB 2016), and citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)).

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant’s and Opposer’s marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion v. Lion Capital*, 110 USPQ2d at 1160; *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) *aff’d* 777 Fed. Appx. 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

Sight

²² Applicant’s brief, 11 TTABVUE 23.

Applicant argues that his mark, 10 TORR DISTILLING AND BREWING COMPANY, considered in its entirety (including the disclaimed part, DISTILLING AND BREWING COMPANY), creates a significantly different visual impression from Opposer's mark, TORRES 10.²³ Moreover, he argues, the parties present their marks differently in commerce: Opposer adopting a “tastefully restrained font” and Applicant adopting “a highly stylized font which includes exaggerated serifs and proportions that border on the whimsical.”²⁴

However, “[b]ecause both marks are presented in typed or standard character form, each could be used in any typeface, color, or size, including the same stylization actually used or intended to be used by the other party, or one that minimizes the differences or emphasizes the similarities between the marks.” *Anheuser-Busch v. Innvopak*, 115 USPQ2d at 1822. As Opposer notes, Applicant could display his mark like this:

10 TORR
Distilling and Brewing Company ²⁵

Applicant has done exactly this, as evidenced by his website, 10TORR.com:

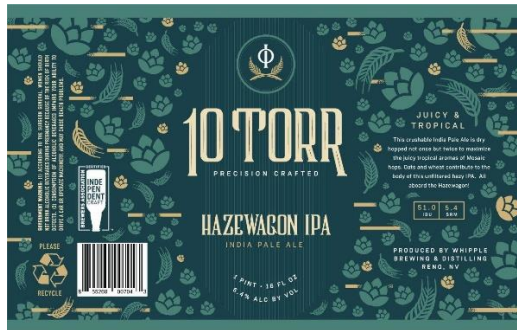
²³ Applicant's brief, 11 TTABVUE 15, 19-20.

²⁴ Applicant's brief, 11 TTABVUE 19-20.

²⁵ Opposer's brief, 10 TTABVUE 25.



...and his specimen of use in commerce, from the application file:



As Opposer correctly notes, 10 TORR forms the dominant feature of Applicant’s mark. The number and word appear first in the mark, attracting consumers’ attention. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (“The identity of the marks’ initial two words is particularly significant because consumers typically notice those words first.”). And as shown above, they can

²⁶ Applicant’s website, 10torr.com, Opposer’s notice of reliance, ex. D, 6 TTABVUE 123.

be prominently displayed in bold stylized letters, emphasizing the similarity to Opposer's TORRES 10 mark.

The disclaimed wording in Applicant's mark is less significant, as it is generic. *See, e.g., In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (affirming Board finding that "DELTA," not the disclaimed generic term "CAFE," is the dominant portion of the mark THE DELTA CAFE); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (finding that "BINION'S," not the disclaimed descriptive wording "ROADHOUSE," is the dominant portion of the mark BINION'S ROADHOUSE). It is settled that "one feature of a mark may make a greater impression on the public's awareness than another portion, and thus for rational reasons, we may consider that dominant portion to be more significant than another." *TiVo Brands LLC v. Tivoli, LLC*, 129 USPQ2d 1097, 1116 (TTAB 2019) (citing *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)).

Hence, the two standard character marks are visually similar.

Sound

Applicant suggests that:

The phrase "10 Torr," when stated, consists of two stressed syllables in quick, staccato succession. In contrast, when "Torres 10" is stated, the phrase of three syllables in an alternating rhythm of stressed and unstressed syllables. As anyone who has read Shakespeare knows, the rhythmic effect of this pattern of emphasis is not trivial; the mere sound of the phrase "10 Torr," even ignoring the meaning of that phrase, differs substantially from the phrase "Torres 10."²⁷

²⁷ Applicant's brief, 11 TTABVUE 18.

As Opposer correctly notes, however, alcoholic beverages are frequently furnished by the glass in bars and restaurants, where consumers order them orally without seeing the bottle labels. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1185-86 (TTAB 2018) (quoting *In re Bay State Brewing*, 117 USPQ2d at 1961 (when ordering from a bartender or restaurant server, “many consumers ... will not have the opportunity to see a label.”)). These settings can be noisy at times. *See Guinness United Distillers & Vintners B.V. v. Anheuser-Busch, Inc.*, 64 USPQ2d 1039, 1044 (S.D.N.Y. 2002) (noting “the often chaotic conditions under which alcoholic beverages are purchased in bars....”). Consequently, “minor differences in the sound of these marks may go undetected by consumers and, therefore, would not be sufficient to distinguish the marks.” *In re Viterra*, 101 USPQ2d at 1912.

Connotation

Here the parties diverge the most. Opposer argues that “TORRES” carries the same connotation as “TORR” because one definition of the singular Spanish word “torre” is “tower,” and “Torr” is a boy’s name of Anglo-Saxon origin meaning “tower.”²⁸

As Applicant points out, this reasoning “depends upon the notion that a purchaser of brandy, distilled spirits, and beer will have a very specific knowledge of the meaning of baby names, and will apply that knowledge of baby names in the context of purchasing alcohol.” And as Opposer’s own evidence shows:

a total of 13 babies born with the name ‘Torr’ based on social security records— 6 in 1965 and 7 in 1971. As such, it is apparent that Torr is hardly in widespread use as a name—and therefore, it is unlikely that an average consumer of beer or distilled spirits would even associate the word

²⁸ Declaration of Joy L. Durand, exs. 1-4, citing Google Translate, BabyNamesYay.com, sheknows.com, and thebump.com; 5 TTABVUE 6-23.

‘Torr’ with a first name, much less know that the name Torr is derived from the word ‘Tower.’²⁹

Instead, Applicant suggests, we should look to the dictionary definition of “torr,” which is “a unit of pressure, being the pressure necessary to support a column of mercury one millimeter high at 0°C and standard gravity, equal to 1333.2 microbars,” named after Evangelista Torricelli, the 17th Century Italian scientist who designed the mercury barometer. “Torr” is appropriate, Applicant states, because his distilled spirits are vacuum distilled.³⁰

Opposer objects to Applicant’s definition of “torr” on the ground that it is unsupported by a dictionary definition, and is therefore hearsay.³¹ However, the record includes the file of the opposed Application, *see* 37 C.F.R. § 2.122(b), and that file includes the following definition of “torr”:

a unit of pressure, being the pressure necessary to support a column of mercury one millimeter high at 0C and standard gravity, equal to 1333.2 microbars.

Origin of torr

First recorded in 1945-50; named after E Torricelli³²

Applicant, a chemical engineer, got it right. The objection is overruled.

The problem with both parties’ positions is that they expect too much of their customers. The relevant public here consists of ordinary adult purchasers of alcoholic beverages. There is no evidence of record to demonstrate that these purchasers will

²⁹ Applicant’s brief, 11 TTABVUE 12-13.

³⁰ Applicant’s brief, 11 TTABVUE 13-14; Whipple declaration ¶¶ 3, 8, 9 TTABVUE 3-4.

³¹ Opposer’s brief, 10 TTABVUE 11.

³² July 7, 2018 Office Action at TSDR 5-6, Dictionary com, based on the Random House Unabridged Dictionary, 2018.

be familiar with recondite references to barometric pressure, or that they will associate a rare baby name with its Anglo-Saxon origin, or that they will stop to translate the singular of the Spanish “TORRES.” See *In re Tia Maria, Inc.*, 188 USPQ 524 (TTAB 1975) (unlikely that persons would translate TIA MARIA to AUNT MARY). Rather, we must look to the likely consumer perception of the marks in connection with the identified goods—in this case, legally identical or highly related alcoholic beverages. See *UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868, 1886 (TTAB 2011).

Commercial Impression

The relevant consumers are not likely to grasp the etymology of the respective marks, but they are likely to notice that the dominant, distinctive parts of the marks, TORRES 10 and 10 TORR, are similar in sight and sound, and yield a very similar commercial impression.

“Where the primary difference between marks is the transposition of the elements that compose the marks, and where this transposition does not change the overall commercial impression, there may be a likelihood of confusion.”³³ TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 1207.01(b)(vii) (Oct. 2018); see, e.g., , *In re Wine Society of Am. Inc.*, 12 USPQ2d 1139, 1142 (TTAB 1989) (holding THE WINE SOCIETY OF AMERICA and design for “wine club membership services inclusion the supplying of printed materials” likely to be confused with AMERICAN WINE SOCIETY 1967 and design, registered for a newsletter, bulletin and journal of

³³ Opposer’s brief, 10 TTABVUE 21-22.

interest to members of the registrant). Applicant contends that “the order in which the number ‘10’ and the words ‘Torres’ or ‘Torr’ are placed makes a striking difference because the order dramatically changes the meaning of the phrase.”³⁴ Applicant continues, “In English usage, a variation on the order of a phrase that includes a number and a word changes the meaning and connotation of a phrase significantly.”³⁵

In this case, however, the transposition from TORRES 10 to 10 TORR is not so striking. “The appropriate emphasis is on the recollection of the average customer, who normally retains a general rather than a specific impression of trademarks....” *In re Bay State Brewing*, 117 USPQ2d at 1960. As Opposer observes, consumers who are familiar with Opposer’s mark, and later see Applicant’s goods on the shelf or hear the brand name in a bar are likely to assume that Applicant’s mark is merely a variation or shortened version of Opposer’s mark.³⁶ See *In re Mighty Leaf Tea*, 94 USPQ2d at 1260 (citing *United States Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985)). “Those consumers who do recognize the differences in the marks may believe that applicant’s mark is a variation of opposer’s mark that opposer has adopted for use on a different product.” *Schieffelin v. Molson*, 9 USPQ2d at 2073.

The sight, sound, and overall commercial impression of the marks are much more similar than dissimilar, and the first *DuPont* factor weighs in favor of finding a likelihood of confusion.

³⁴ Applicant’s brief, 11 TTABVUE 15.

³⁵ Applicant’s brief, 11 TTABVUE 16.

³⁶ Opposer’s brief, 10 TTABVUE 25.

C. Strength of Opposer's Mark

The fifth *DuPont* factor is “[t]he fame of the prior mark (sales, advertising, length of use).” *DuPont*, 177 USPQ at 567. In determining strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength, based on marketplace recognition. *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.”)

Addressing the conceptual strength of Opposer’s TORRES 10 mark, Applicant argues that “Torres” is the Torres family name, which, as a surname, had to acquire distinctiveness, and even after registration, is accorded a minimal level of protection.³⁷ However, a “mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods.” *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006). *See also In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517 (TTAB 2016). Opposer’s registration does not contain a Section 2(f) claim of acquired distinctiveness, and is thus deemed inherently distinctive for its identified goods, brandy.

The commercial 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,

³⁷ Applicant’s brief, 11 TTABVUE 21.

122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (citing *Palm Bay Imps., v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1694). This is not “an all-or-nothing factor,” but instead involves assessing the mark “along a spectrum from very strong to very weak” *Id.* (internal citations omitted). Commercial 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 the 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].” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1056 (TTAB 2017).

Opposer states:

Opposer has been producing its TORRES 10 brandy since 1946 and it is the most widely sold Spanish brandy in the world. ... Since 2014, Opposer has sold over 65,000 cases of TORRES 10 brandy in the U.S. market for a total sales value of over 3.4 million Euro. Opposer has also spent in excess of 475,000 Euro promoting and advertising the TORRES 10 brandy in the U.S. during such period.³⁸

Applicant parses this evidence, however, and points out that “without evidence to contextualize these numbers, they do not provide any real evidence of the strength of the ‘Torres 10’ mark. What share of the total United States brandy market does this represent?”³⁹ Applicant answers this question by doing the math:

Miguel Torres has shown that on average since 2014, it has sold approximately 11,000 cases of brandy annually in the United States (65,000 cases divided by 6 years). ... Miguel Torres’ own evidence shows

³⁸ Opposer’s brief, 10 TTABVUE 24, citing *La Terrière Decl.* ¶¶2-5, Exh. 5, 5 TTABVUE 28-29.

³⁹ Applicant’s brief, 11 TTABVUE 21.

that its share of the United States brandy market is miniscule. An April [25], 2017 New York Times article reports that ‘Brandy has become a quiet giant of the liquor industry. More than 13 million cases were sold domestically in 2016.’ ... Thus, Miguel Torres’ own evidence shows that it accounts for just .084% of the United States brandy market – less th[an] one tenth of one percent. But another way, approximately 1 in ever[y] 1,181 cases of brandy sold in the United States in 2016 bears the ‘Torres 10’ mark. Applicant submits that this does not provide evidence of the strength of the ‘Torres 10’ mark.⁴⁰

“Market share is but one way of contextualizing ad expenditures or sales figures.”

Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co., 908 F.3d 1315, 128 USPQ2d 1686, 1690 (Fed. Cir. 2018). This context could be supplied by other means, such as detailing Opposer’s advertising, promotion, marketing, and market recognition of goods bearing its TORRES 10 mark. *Id.* But the record in this case does not provide convincing evidence of market strength, despite Opposer’s long use of its mark, either in the context of brandy or in the wider context of distilled liquors. Opposer shows that the alcoholic beverage industry has recognized the quality of its TORRES 10 brandy,⁴¹ but fails to translate this evidence into recognition by the relevant public of ordinary alcoholic beverage consumers.

Considering the record in its entirety as to strength, including the inherent distinctiveness of Opposer’s registered mark, we accord Opposer’s mark a normal degree of strength as to its identified goods in the likelihood of confusion analysis.

D. Actual Confusion

Under the seventh and eighth *DuPont* factors, we consider the nature and extent

⁴⁰ Applicant’s brief, 11 TTABVUE 22. Exhibit AA to Opposer’s notice of reliance, 7 TTABVUE 165.

⁴¹ Opposer’s brief, 10 TTABVUE 25, citing *La Terrière Decl.* ¶8 (referring, inter alia, to awards at the San Francisco World Spirits Competition), 5 TTABVUE 29.

of any actual confusion, in light of the length of time and conditions under which there has been contemporaneous use of the parties' subject marks. *DuPont*, 177 USPQ at 567.

Applicant contends, "While Miguel Torres has provided extensive evidence to show that the subject products are related, it has made no effort at all to show that any actual confusion has occurred. Miguel Torres has not shown that its sales have been affected in the slightest since 10 Torr Distilling and Brewing products went on the market in 2017."⁴²

As the Board has noted before, however:

With all due respect[] to applicant's argument, suffice it to say, that in order to sustain an opposition, actual confusion need not be shown. The Board need find only a likelihood of confusion, and the absence of actual confusion does not preclude a conclusion that confusion is likely. Furthermore, evidence of actual confusion is neither easy to come by nor necessary to show that likelihood of confusion exists....

Monarch Wine v. Hood River Distillers, 196 USPQ at 857.

This especially holds true here, where the parties' marks have coexisted for only a few years, presenting few opportunities for actual consumer confusion. *See Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1039-40 (TTAB 2016) ("the marks have been in contemporaneous use for only a short time, since 2013. Thus, the opportunity for actual confusion to have occurred in the marketplace is minimal."); *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (where the respective marks coexisted in the marketplace for at least nine years, absence of actual confusion nonetheless deemed "of little probative

⁴² Applicant's brief, 11 TTABVUE 24.

value” because of the absence of a significant opportunity for such confusion to occur, given “the minimal scope of applicant’s actual use of her mark in the marketplace”).

Consequently, we find the seventh and eighth *DuPont* factors neutral.

IV. Conclusion

For the above reasons, we find that there is a likelihood of confusion between Applicant’s and Opposer’s mark under Section 2(d) of the Trademark Act. 15 U.S.C. § 1052(d).

Decision: The opposition to registration of the mark 10 TORR DISTILLING AND BREWING COMPANY is sustained on the ground of likelihood of confusion under Section 2(d), and registration to Applicant is refused as to both Classes.