

This Opinion Is Not a
Precedent of the TTAB

Hearing: August 25, 2020

Mailed: August 31, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

—————
Trademark Trial and Appeal Board
—————

Campari Mexico, S.A. de C.V.

v.

Grant Toland, Alexander Prenta and Russ Bennett

—————
Opposition No. 91250805
—————

Joel R. Feldman of Greenberg Traurig LLP for Campari Mexico, S.A. de C.V.

Sandy Lipkin of Law Offices of Sandy Lipkin for Grant Toland, Alexander Prenta and Russ Bennett.

—————
Before Peter, Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office, and Cataldo and English, Administrative Trademark Judges.¹

Opinion by Cataldo, Administrative Trademark Judge:

Applicants, Grant Toland, Alexander Prenta and Russ Bennett, applied for registration on the Principal Register of the mark EIDOLON, in standard characters,

¹ “The Trademark Trial and Appeal Board shall include the Director, Deputy Director of the United States Patent and Trademark Office, the Commissioner for Patents, the Commissioner for Trademarks, and administrative trademark judges....” Trademark Act § 17(b), 15 U.S.C. § 1067(b).

identifying “beer,” in International Class 32 and “spirits, excluding distilled blue agave liquor and mezcal; wine,” in International Class 33.²

Opposer, Campari Mexico, S.A. de C.V., has opposed registration of Applicants’ mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of priority and likelihood of confusion³ with its registered mark ESPOLON, issued on the Principal Register in standard characters, identifying “alcoholic beverages except beers,” in International Class 33. The registration includes the following translation statement: “The English translation of ‘ESPOLON’ in the mark is ‘spur.’”⁴

Applicants, in their answer, made the following admissions:

- Opposer is the owner of its pleaded Registration No. 3955741, and that registration is valid and subsisting and owned by Opposer;⁵

² Application Serial No. 88361857 was filed on March 28, 2019 pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), as to both classes of goods, based upon Applicants’ claim of a bona fide intent to use the mark in commerce. The identification of Class 33 goods was amended in accordance with the parties’ January 28, 2020 stipulation, discussed below.

³ 1 TTABVUE.

Citations in this decision are to the TTABVUE docket entry number and, where applicable, the electronic page number where the document or testimony appears. Because the Board primarily uses TTABVUE in reviewing evidence, the Board prefers that citations to non-confidential parts of the record include the TTABVUE docket entry number and the TTABVUE page number. For material or testimony that has been designated confidential and which does not appear on TTABVUE, the TTABVUE docket entry number where such material or testimony is located should be included in any citation. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

⁴ Reg. No. 3955741 issued on May 3, 2011. Section 8 affidavit accepted; Section 15 affidavit acknowledged. (Section 9 reminder mailed May 3, 2020). 1 TTABVUE 8-11.

⁵ 4 TTABVUE 2-3.

- Opposer’s rights in its ESPOLON mark predate the filing date of Applicants’ involved application;⁶ and
- The goods identified in International Class 33 of Applicants’ involved application “i.e., spirits; wine, overlap with or are closely related” to the goods identified in Opposer’s pleaded registration.⁷

Applicants otherwise denied the salient allegations in the notice of opposition.⁸

The parties agreed to conduct this proceeding via Accelerated Case Resolution (ACR)⁹ and, pursuant thereto, filed procedural stipulations, a stipulation of undisputed facts, and the above-noted stipulation to amend the identification of Class 33 goods in the involved application.¹⁰ We note that regardless of an ACR stipulation,

⁶ 4 TTABVUE 4.

⁷ 4 TTABVUE 4.

⁸ 4 TTABVUE 2-6. Applicants attached a definition of “eidolon” and screenshots from Opposer’s website as exhibits to their Answer to the Notice of Opposition. With the exception of a registration pleaded by an opposer in an opposition or a petitioner in a petition to cancel, an exhibit to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached unless identified and introduced in evidence as an exhibit during the period for taking testimony. Trademark Rule 2.122(c), 37 C.F.R. § 2.122(c); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) (2020) §317. Accordingly, these exhibits are not part of the record. We note, in any event, that the parties timely submitted substantially similar evidence during their assigned testimony periods.

⁹ ACR can take a number of different forms, including the procedure adopted here, which is akin to summary judgment but allows the parties to receive a prompt determination of the claims and defenses in their case without the uncertainty and delay typically presented by standard summary judgment practice. To take advantage of ACR, the parties must stipulate that, in lieu of trial, the Board can resolve any material issues of fact. (9 TTABVUE 3.) *Chanel, Inc. v. Makarczyk*, 106 USPQ2d 1774, 1776 (TTAB 2013). After the briefs are filed, the Board will expedite final determination of the case endeavoring to issue a final decision on the merits within fifty days following the completion of briefing and an oral hearing, if any. *Id.* *See also* TBMP §§ 528.05(a)(2) and 705.

¹⁰ 9 TTABVUE. We commend the parties for utilizing ACR and the efficiencies available thereunder. *See* TBMP §§ 528 and 705, and authorities cited therein.

Opposer, as the party in the position of plaintiff in this proceeding, bears the burden of proof, requiring Opposer to prove its case by a preponderance of the evidence. *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015) (“The party opposing registration bears the burden of proof, see §2.116(b), and if that burden cannot be met, the opposed mark must be registered, see 15 U.S.C. §1063(b).”); *Centroamericana, S.A. v. Cervecería India, Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1311 (Fed. Cir. 1989) (plaintiff’s burden is to establish the case by a preponderance of the evidence). In accordance with their stipulation, both parties filed ACR briefs, and Opposer filed a rebuttal ACR brief. The parties submitted their ACR evidence five days prior to their respective briefs in accordance with their stipulation.¹¹ In addition, the parties presented arguments before this panel of the TTAB in an oral hearing held on August 25, 2020.

I. The Record and ACR Stipulation

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Applicants’ application file. Opposer submitted with its Notice of Opposition a copy of its pleaded Reg. No. 3955741, retrieved from the USPTO’s Trademark Status & Document Retrieval (TSDR).¹²

In addition, Opposer submitted the following ACR evidence:

¹¹ 9 TTABVUE 4.

¹² 1 TTABVUE 8-11. Opposer submitted a copy of its pleaded registration with its Notice of Opposition. An opposer or petitioner may introduce a pleaded registration into the record by attaching to its pleading a copy thereof obtained from the USPTO’s electronic database records. Trademark Rule 2.122(d), 37 C.F.R. § 2.122(d). *See also* TBMP §§ 317, 704.03(b)(1)(A) and 704.05(a) (2020) and authorities cited therein.

- Screenshots from Opposer's Espolon website discussing the history, commercial impression, trade channels and marketing of its ESPOLON-branded tequila (Exhibits 1-6).¹³
- Screenshots from Opposer's Campari Group website discussing the background and history of Opposer's ESPOLON-branded tequila as well as a press kit therefor (Exhibits 7-8).¹⁴
- Screenshots from Opposer's Twitter, Facebook and YouTube pages showing the marketing, commercial impression, consumer recognition and commercial strength of its ESPOLON-branded tequila (Exhibits 9-11).¹⁵
- Screenshots from third-party websites discussing consumer recognition and commercial strength of Opposer's ESPOLON-branded tequila (Exhibits 12-15).¹⁶
- Screenshots from Applicants' Facebook page showing the nature of Applicants' goods (Exhibit 16).¹⁷
- Screenshots from third-party websites displaying the parties' marks (Exhibits 17-18).¹⁸
- Screenshots from third-party websites displaying goods similar to those offered by the parties and their trade channels (Exhibits 19-27).¹⁹
- Copies of articles from the Westlaw searchable database discussing media coverage, background and history of Opposer's ESPOLON-branded tequila and the nature of the parties' goods (Exhibits 28-39).²⁰

Applicants submitted the following evidence:

- Printed copies of coexisting third-party registrations owned by different entities for GLEN-formative marks identifying scotch, whisky, and other

¹³ 12 TTABVUE 9-39.

¹⁴ 12 TTABVUE 40-45.

¹⁵ 12 TTABVUE 46-64.

¹⁶ 12 TTABVUE 65-94.

¹⁷ 12 TTABVUE 95-106.

¹⁸ 12 TTABVUE 107-112.

¹⁹ 12 TTABVUE 113-157.

²⁰ 12 TTABVUE 158-194.

alcoholic beverages, retrieved from the USPTO's Trademark Electronic Search System (TESS) (Exhibits 1-9).²¹

Opposer submitted the following rebuttal evidence:

- Screenshots from third-party websites discussing the meaning of “glen” as it pertains to scotch and whisky (Exhibits 40-41).²²
- Screenshots from online dictionaries and other reference works showing the meaning of the terms “eidolon” and “epsilon” and the proper pronunciation of those terms (Exhibits 42-47, 52).²³
- Screenshots from third-party websites discussing the symbolism of roosters, particularly in Mexican culture (Exhibits 48-51).²⁴

We will refer below to the facts enumerated in the parties' “Stipulation of Undisputed Facts”²⁵ as they pertain to the issues under consideration herein.

II. Entitlement to a Statutory Cause of Action²⁶

To establish entitlement to a statutory cause of action under Section 13 of the Trademark Act, 15 U.S.C. § 1053, a plaintiff must demonstrate a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at *3 (Fed. Cir. 2020);

²¹ 14 TTABVUE 6-25.

²² 16 TTABVUE 7-32, 48-52.

²³ 16 TTABVUE 13-32.

²⁴ 16 TTABVUE 33-47.

²⁵ 9 TTABVUE 5-12.

²⁶ Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of “standing.” Mindful of the Supreme Court's direction in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014), we now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable.

see also Empresa Cubana Del Tabaco v. Gen. Cigar Co., 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

Opposer's entitlement to a statutory cause of action in this proceeding is established by its live pleaded registration, which the record shows to be valid and subsisting, and owned by Opposer.²⁷ *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Otter Prods. LLC v. BaseOneLabs LLC*, 105 USPQ2d 1252, 1254 (TTAB 2012). In addition, the parties stipulated to the facts underlying Opposer's entitlement to a statutory cause of action.²⁸

III. Priority

Because Opposer's pleaded registration is of record, priority is not an issue with respect to Opposer's mark for the goods identified in that registration. *Penguin Books Ltd. v. Eberhard*, 48 USPQ2d 1280, 1286 (TTAB 1998) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)). The parties further stipulated to the facts underlying Opposer's priority of use.²⁹

IV. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood

²⁷ 1 TTABVUE 8-11.

²⁸ 9 TTABVUE 5.

²⁹ 9 TTABVUE 5.

of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) cited in *B&B Hardware*, 113 USPQ2d at 2049; see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor that is relevant or for which there is evidence of record. See *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). “[E]ach case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973) (internal citations removed).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. See *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); see also *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. The nature and similarity or dissimilarity of the goods, the established, likely-to-continue trade channels, and the classes of purchasers.

We now consider the second and third *DuPont* factors, the similarity or dissimilarity of the parties' goods and the parties' established, likely-to-continue trade channels.

The second *DuPont* factor concerns the "similarity or dissimilarity and nature of the goods or services as described in an application or registration," *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Opposer's goods in its pleaded registration are identified as "alcoholic beverages except beers." Applicants' Class 33 goods are identified as "spirits, excluding distilled blue agave liquor and mescal; wine." As identified, the parties' goods are legally identical inasmuch as Opposer's broadly identified "alcoholic beverages" subsume and encompass Applicants' more narrowly identified "spirits" that specifically exclude "blue agave liquor and mescal" and Applicants' "wine," which is also an alcoholic beverage. As noted above, in their answer to the notice of opposition Applicants "acknowledge that the class 33 goods identified in their application, i.e., spirits; wine, overlap with or are closely related to [Opposer's] ESPOLON-branded goods, namely alcohol beverages."³⁰ Further, the parties have stipulated that

³⁰ 4 TTABVUE 4.

“Applicants’ amended identification of goods in U.S. Application Serial No. 88361857, ‘spirits, excluding distilled blue agave liquor and mescal,’ overlaps with Opposer’s identification of goods in U.S. Trademark Reg. No. 3955741, ‘alcoholic beverages except beers.’”³¹

Notwithstanding the admission in their answer and the parties’ stipulation, Applicants argue in their brief:

Opposer’s registrations are for alcoholic beverages, except beers. Applicants’ goods are for [sic] beer, wine and spirits, excluding distilled blue agave liquor and mezcal. All of the evidence provided shows that while Opposer has registrations for alcoholic beverages, except beers, there is no evidence of the mark in use for anything but tequila, which is associated with Mexico and is specifically excluded by Applicants’ amendment to the goods.³²

Applicants’ argument is unpersuasive. With respect to the similarity of the parties’ goods, we must compare the goods identified in the opposed application to those identified in Opposer’s pleaded registration. *Hewlett-Packard Co. v. Packard Press, Inc.*, 62 USPQ2d at 1004. Applicants’ argument seeks to impose limitations upon Opposer’s goods that are not reflected in their identification, and cannot be entertained absent a counterclaim to cancel or restrict Opposer’s pleaded registration. *See* Trademark Rule 2.106(b)(3), 37 C.F.R. § 2.106(b)(3). *See also* TBMP § 313.01 and authorities cited therein. In the event Applicants believed Opposer’s identification of goods was overly broad, their remedy lie in a counterclaim to modify the pleaded registration to limit the recited goods. Trademark Act § 18, 15 U.S.C.

³¹ 9 TTABVE 8.

³² Applicant’s brief; 15 TTABVUE 10.

§ 1068; Trademark Rule 2.111(b), 37 C.F.R. § 2.111(b). *See also* TBMP § 309.03(d) and authorities cited therein. Inasmuch as Applicants did not counterclaim to cancel or restrict Opposer's pleaded registration, their arguments seeking to limit Opposer's goods will be given no further consideration.

Based upon the face of their identification, confirmed by the admission in Applicants' answer and the parties' stipulation, we find that Applicants' Class 33 goods are legally identical to the goods identified in Opposer's pleaded registration.

With regard to Applicants' goods identified in Class 32, namely, "beer" we are not concerned that Opposer's goods specifically exclude beer. *See Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1827 (TTAB 2015) ("[B]ecause Applicant's goods explicitly exclude beer, its goods and Opposer's do not actually overlap."). To support a finding of likelihood of confusion, it is not necessary that the goods be identical or even competitive. The goods need only be "related in some manner or ... the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source." *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). The "question is whether, under all the circumstances, consumers encountering the goods sold under these marks would mistakenly believe that they share or are affiliated with or sponsored by a common source." *Anheuser-Busch, LLC*, 115 USPQ2d at 1827.

Opposer introduced into the record screenshots from the following beverage retailers engaged in the online and retail store distribution and delivery of various beers, wines and spirits, including tequila and mescal:

- drizly.com – providing home delivery of wine, beer, including under that heading hard seltzer and hard cider, and spirits, including Opposer’s tequila;³³ and
- totalwine.com – offering through its website and physical store locations retail distribution of beer, wine and spirits, including Opposer’s tequila.³⁴

This evidence demonstrates that at least these third parties offer both beer and the alcoholic beverages identified in Opposer’s pleaded registration under a common house mark. In addition, Applicants discuss the production of various alcoholic beverages on their Facebook page, explaining how the same ingredients can be used to create wine, spirits and beer:

Yesterday we mentioned a necessary mash in order to take grain and produce a wash with fermentable sugars. Grain is used in making grain alcohol and whiskey, but there are many other sugar sources. Here we have some caramelized sugar and molasses for a stout, but the same ingredients can be used to create a rum wash. Fruit would be used to create wines that when distilled become brandy. Potatoes have been used to make vodka...the combinations are endless.³⁵

Applicants also provide on their social media page educational posts on various distilled spirits and reviews of beers.³⁶ Further evidence in the form of articles from

³³ 12 TTABVUE 113-139.

³⁴ 12 TTABVUE 140-149.

³⁵ 12 TTABVUE 105.

³⁶ 12 TTABVUE 95-106.

general circulation publications list reviews of drinking establishments, some of which offer cocktails made of beer and distilled spirits, including “the Raspberry Tootsie Pop (a stout with a splash of raspberry framboise), ensuring 11.5 ounces of goodness for just \$5-6.”³⁷ These articles also suggest and review drinking establishments offering beer and wine as well as distilled spirits.³⁸

We find, however, that the record evidence is tenuous with regard to establishing the relatedness of Opposer’s alcoholic beverages and Applicant’s beer. Clearly, there are distinctions between these alcoholic beverages. Opposer places great reliance upon decisional law from this tribunal and our reviewing courts finding beer related to other alcoholic beverages. *See, e.g., In re Chatam Int’l*, 71 USPQ2d at 1947-48 (finding tequila and beer related); *In re Majestic Distilling Co.*, 65 USPQ2d 1201, 1207 (Fed. Cir. 2003) (“The Board found, on the basis of substantial evidence...that malt liquor and tequila are related as alcoholic goods sold through the same trade channels to many of the same consumers...”); *Anheuser-Busch*, 115 USPQ2d at 1827-28 (testimony and substantial evidence of record, led the Board to “conclude in this case that beer and other alcoholic beverages, including wine, are related, and that their purchasers and channels of trade overlap.”). Those decisions clearly were grounded in the evidentiary records presented therein, which appear to be more extensive than the record in the case presently before us. Certainly there is no per se rule that different types of alcoholic beverages are related, and reliance upon prior

³⁷ 12 TTABVUE 173.

³⁸ 12 TTABVUE 108, 183.

decisional law is not a substitute for presenting an evidentiary record to support the relatedness of beer and alcoholic beverages.

The evidentiary showing in this case falls somewhat short of establishing that consumers are likely to believe that beer and other alcoholic beverages emanate from a common source. Accordingly, we find that Opposer has failed to establish that Applicants' Class 32 goods are related to Opposer's goods. As discussed above, Applicants' Class 33 goods are legally identical to Opposer's goods.

The third *DuPont* factor concerns "[t]he similarity or dissimilarity of established, likely-to-continue trade channels." *Stone Lion*, 110 USPQ2d at 1161 (quoting *DuPont*, 177 USPQ at 567). At a minimum, the "spirits, excluding distilled blue agave liquor and mescal" identified in the involved application and the "alcoholic beverages except beer" identified in Opposer's pleaded registration are legally identical. We must therefore presume that the channels of trade and classes of purchasers for these goods are the same. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018); *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same).

With regard to Applicants' "beer," both parties may use social media and the Internet to advertise or provide their goods. However, this alone is not sufficient to find that the trade channels overlap in a manner that creates a likelihood of

confusion. *See In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1087 (Fed. Cir. 2014) (“Advertising on the Internet is ubiquitous and ‘proves little, if anything, about the likelihood that consumers will confuse similar marks used on such goods or services.’”). As to the classes of consumers, there may be some degree of overlap to the extent consumers of beer are also consumers of alcoholic beverages. While we may assume that certain of Applicants’ customers will at some point purchase or drink alcoholic beverages other than beer, and that certain of Opposer’s customers will at some point purchase or drink beer, this is not a basis upon which to find that the channels of trade or classes of consumers are necessarily the same. *Coach Servs.*, 101 USPQ2d at 1723.

In view thereof, the *DuPont* factors regarding the legal identity of the Class 33 goods, channels of trade, and classes of purchasers strongly favor a finding of a likelihood of confusion. The *DuPont* factors regarding the relatedness of Applicants’ Class 32 goods to Opposer’s goods, channels of trade and classes of consumers favors a finding of no likelihood of confusion.

B. The strength of Opposer’s ESPOLON mark.

In determining the strength of a mark, we consider both its inherent or conceptual strength based on the nature of the mark itself and its commercial strength, based on the marketplace recognition value of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning.)”); *Top Tobacco, L.P. v. North Atlantic Operating Co.*,

Inc., 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006). Market strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Id.* For purposes of analysis of likelihood of confusion, a mark's renown "varies along a spectrum from very strong to very weak." *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (internal quotations omitted). The proper standard is the mark's "renown within a specific product market," *id.*, and "is determined from the viewpoint of consumers of like products," *id.* at 1735, and not from the viewpoint of the general public.

1. Inherent or Conceptual Strength of ESPOLON

"In order to determine the conceptual strength of the cited mark, we evaluate its intrinsic nature, that is, where it lies along the generic-descriptive-suggestive-arbitrary (or fanciful) continuum of words." *In re Davia*, 110 USPQ2d 1810, 1815 (TTAB 2014).

Opposer's ESPOLON mark in its pleaded registration is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act. *Tea Bd. of India*, 80 USPQ2d at 1889. Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), provides that a certificate of registration on the Principal Register shall be prima facie evidence of the validity of the registration, of Opposer's ownership of the mark and its exclusive right to use the mark in connection with the goods identified in the certificate.

Inasmuch as Applicants have not counterclaimed to cancel Opposer's pleaded registration, the validity of Opposer's registration remains unchallenged.

The ESPOLON mark appears to be arbitrary as applied to Opposer's goods. The parties have stipulated as follows:³⁹

“Espolón” is a Spanish word that does not appear in English-language dictionaries and translates to “spur” in English;

A “spur” is a pointed, rigid growth on the inner leg of a rooster; and

Opposer incorporates images of roosters in its branding for ESPOLON-branded tequila.

There is no evidence of record to support a finding that ESPOLON or its translation as the spur on the inner leg of a rooster has a particular significance in connection with alcoholic beverages. Further, there is no record evidence of the extent to which consumers of Opposer's goods are aware of the meaning of ESPOLON, notwithstanding Opposer's utilization of rooster imagery in its branding.⁴⁰

In addition, “evidence of third-party registrations [for the same or similar goods or services] is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ ... that is, some segment that is common to both parties' marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millenium Sports, S.L.U.*, 797

³⁹ 9 TTABVUE 12.

⁴⁰ We note, in that regard, that while Opposer may utilize roosters and other imagery in connection with the branding, packaging and advertisements for its goods, Opposer's pleaded mark consists solely of the term ESPOLON in standard characters without any imagery or other wording or designs.

F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (the extent of third-party use or registrations may indicate that a term carries a suggestive or descriptive connotation and is weak for that reason)); *see also In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1735 (TTAB 2018) (third-party registrations can be used to demonstrate that a term may have a commonly accepted meaning); *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1173 (TTAB 2011) (third-party registrations indicate term CLASSIC has suggestive meaning as applied to tobacco products).

The parties have stipulated as follows:

EIDOLON and ESPOLON are the only live applied-for or registered marks in International Classes 32 or 33 beginning with the letter E and ending with the letters OLON.⁴¹

Applicant introduced copies of nine third-party registrations owned by different entities, printed from the USPTO's TESS database for GLEN-formative marks applied to scotch, whiskey and a variety of other alcoholic beverages.⁴² These registrations tend to show that third parties have registered marks including the term GLEN for various alcoholic beverages. None of these third-party registrations contain the term ESPOLON. Further, there is no evidence that GLEN and ESPOLON share a common meaning. To the contrary, evidence of record establishes that GLEN

⁴¹ 9 TTABVUE 6.

⁴² 14 TTABVUE 6-25.

is a Gaelic term meaning “valley.”⁴³ As a result, these terms are quite dissimilar and Applicants’ evidence has very limited, if any, probative value in our consideration of the strength of Opposer’s ESPOLON mark. *Cf. In re Thor Tech Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) (third-party registrations relating to goods different from and unrelated to the goods at issue “cannot be indicative of descriptive or suggestive connotations”).

On this record, we find Opposer’s inherently distinctive ESPOLON mark to be arbitrary as applied to the goods identified thereby.

2. Commercial Strength of Opposer’s ESPOLON Mark

Commercial strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Bd. of India*, 80 USPQ2d at 1899. We consider the extent of commercial strength or weakness in the marketplace under the fifth and sixth *DuPont* factors, “fame of the prior mark (sales, advertising, length of use)” and “the number and nature of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567. The fifth *DuPont* factor (fame) examines the extent to which the public perceives the mark as indicating a single source of origin. Conversely, the sixth factor, “the number and nature of similar marks in use on similar goods,” mitigates against a mark’s potential recognition by considering whether, because of widespread third-party use of similar marks in the marketplace, “customers have been educated to distinguish between different such marks on the bases of minute distinctions.” *Palm*

⁴³ 16 TTABVUE 6-12.

Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005).

Commercial strength may be measured “by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident.” *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014). It is considered from the perspective of “the class of customers and potential customers” of the relevant goods, in this case purchasers and potential purchasers of alcoholic beverages. *Palm Bay*, 73 USPQ2d at 1695 (The relevant consuming public consists of the “class of customers and potential customers of a product or service, not the general public”); *see also Joseph Phelps*, 122 USPQ2d at 1734 (focusing on “the class of customers and potential customers of a product or service, and not the general public.”).

The parties have stipulated to the facts underlying the following:⁴⁴

A third party has obtained certificate of label approvals (COLAs) for EPSILON branded wines;

Opposer’s ESPOLON-branded tequilas have won Gold, Silver and Bronze medals at various spirits competitions;

Opposer’s ESPOLON-branded tequila is commercially successful; and

Opposer’s ESPOLON brand is commercially strong and entitled to a broad scope of protection.

Opposer further introduced evidence of its presence on social media and consumer-generated reviews of its ESPOLON tequila on YouTube⁴⁵ as well as articles

⁴⁴ 9 TTABVUE 6-9.

⁴⁵ 12 TTABVUE 55-56, 59-63.

retrieved from the Westlaw database from third-party publications such as *Palm Beach Post*, *Chicago Tribune* and *Houston Chronicle* discussing Opposer's ESPOLON-branded tequila.⁴⁶

On this record, Opposer's ESPOLON mark is subject to a single third-party use of an arguably related mark, EPSILON, in connection with wine. However, the record is silent with regard to the extent to which EPSILON-branded wines are marketed in the United States. The evidence of media exposure, industry recognition and marketing efforts for alcoholic beverages under Opposer's ESPOLON mark point to a degree of commercial recognition and popularity of its ESPOLON-branded tequila.

As discussed above, Opposer's ESPOLON mark is inherently distinctive, and appears to be arbitrary in connection with the goods identified thereby. Opposer has achieved some commercial success and media recognition for its goods under the ESPOLON mark and Applicants have stipulated to the underlying facts that "Opposer's ESPOLON brand is commercially strong and entitled to a broad scope of protection." Considering both inherent and commercial strength, we find Opposer's ESPOLON mark, as applied to alcoholic beverages, is a strong mark and entitled to a broad scope of protection on the spectrum of "very strong to very weak." *Joseph Phelps*, 122 USPQ2d at 1734 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)); *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1059 (TTAB 2017) ("The commercial strength of Petitioner's TAO mark outweighs any conceptual weakness" found to exist in that case).

⁴⁶ 12 TTABVUE 158-194.

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

We now turn to the *DuPont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d at 1812; accord *Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted). “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong*, 127 USPQ2d at 1801 (quoting *Coach Servs.*, 101 USPQ2d at 1721).

Opposer’s mark is ESPOLON in standard characters. Applicants’ mark is EIDOLON in standard characters. With regard to appearance, the parties have stipulated as follows:⁴⁷

EIDOLON and ESPOLON are each seven letters;

EIDOLON and ESPOLON begin with the letter E; and

EIDOLON and ESPOLON each end with the letters OLON.

The marks are similar in appearance in that each contains the same number of letters, begins with the letter “E” and ends with “OLON.” They differ to the extent

⁴⁷ 9 TTABVUE 6.

that Applicants' mark begins with "EID" and Opposer's begins with "ESP." The marks otherwise are similar in structure, consisting of three syllables with identical letters at the beginning and identical strings of letters at the end.

With regard to sound, the parties have stipulated as follows:⁴⁸

"ESPOLÓN" is correctly pronounced "ehs-poh-LOHN";

"ESPOLON" is commonly pronounced "EHS-poh-luhn" in the United States; and

"EIDOLON" is pronounced "ai-DOH-luhn."

As noted above, each mark consists of three syllables and the final syllable is nearly identical when spoken. The first two syllables are somewhat different in sound. Nonetheless, there is no "correct" pronunciation for a trademark. *In re Teradata Corp.*, 223 USPQ 361, 362 (TTAB 1984) ("as we have said many times, there is no 'correct' pronunciation of a trademark"). Consumers may not pronounce either mark as intended, even if they recognize it as a known word.

Turning to meaning, the parties have stipulated as follows:⁴⁹

"Espolón" is a Spanish word that does not appear in English-language dictionaries and translates to "spur" in English.

A "spur" is a pointed, rigid growth on the inner leg of a rooster; and

"Eidolon" is a word with a Greek origin appearing in English-language dictionaries meaning "an image or representation of an idea; an idealized person or thing; a specter, phantom, ghost, or elusive entity."⁵⁰

⁴⁸ 9 TTABVUE 12.

⁴⁹ 9 TTABVUE 12.

⁵⁰ *See also* Opposer's rebuttal evidence; 15 TTABVUE 13-28.

Opposer argues

Here, neither of the marks at issue are common English words – “eidolon” is an obscure now-English word derived from Greek literature and “espolòn” is a Spanish word.⁵¹

The words “espolòn” and “eidolon” are so obscure to English speakers that their translation and definition, respectively, will not be commonly known. Accordingly, the disparate meanings of “espolòn” and “eidolon” will not mitigate the confusion caused by overlapping sight, sound, and commercial impression.⁵²

Applicants agree that “both marks are not English word[s] and are therefore not immediately likely to be translated in the minds of English speakers.”⁵³ The parties agree that to the extent the meaning of the marks are known to consumers, they are dissimilar.⁵⁴

We also agree. The record is silent regarding the extent to which ESPOLON is a widely recognized word in Spanish.⁵⁵ More importantly, we must consider the consumers for both parties’ goods to be consumers of alcoholic beverages in the United States, including English speakers who have no knowledge of Spanish. Similarly, there is no evidence regarding the extent to which consumers of the parties’ goods will recognize EIDOLON as a known word with a recognized meaning. Thus, we cannot ascertain whether the relevant consumers will recognize the dissimilar terms comprising these marks as words or view them as coined terms.

⁵¹ 13 TTABVUE 6.

⁵² 13 TTABVUE 7.

⁵³ 15 TTABVUE 9.

⁵⁴ 13 TTABVUE 7; 15 TTABVUE 9.

⁵⁵ As noted above, the parties have stipulated that Espolón is not an English-language term. 9 TTABVUE 12.

We further note that the parties have stipulated to Opposer's ownership of three design marks featuring images of skeletons and/or roosters, as well as its use of four approved labels incorporating these images.⁵⁶ The following example, consisting of a label approved for use by Opposer for its goods under the ESPOLON mark, is illustrative.



Opposer argues

Three of these labels depict Guadalupe and Rosarita [figures from Mexican folklore] as idealized persons representing the ideals of bravery, sacrifice, and independence. All four of these labels depict Ramón the Rooster as an idealized animal representing the ideal of national pride. Accordingly, this commercial impression of Campari Mexico's [ESPOLON] brand overwhelmingly overlaps with both "an image or representation of an idea" and "and idealized person or thing."⁵⁷

In fact, Campari Mexico's social media has fully embraced death, including ghosts, as a prevailing theme. Accordingly, this commercial impression of Campari Mexico's [ESPOLON] brand unquestionably overlaps the death imagery of "specter[s], phantom[s], ghost[s], or elusive entit[ies]."⁵⁸

⁵⁶ 9 TTABVUE 9-12.

⁵⁷ 13 TTABVUE 8.

⁵⁸ 13 TTABVUE 9.

Opposer's marketing materials, similar in appearance and theme to the label displayed above, convey images of skeletons, roosters and Day of the Dead imagery.⁵⁹

In response, Applicants argue:

Opposer's general marketplace impression uses Day of the Dead Imagery that is associated with Mexico where tequila originates and where roosters are a common thematic presence, as are cowboys. While Day of the Dead celebrations are associated with Mexican culture and involve the celebration of passed-on ancestors, i.e., spirits, it is a stretch that this sort of spirit is what springs to mind with the definition of phantoms and spirits which connotes [sic] more of a mirage than a passed-on ancestor. As such, the meaning of the two marks are markedly distinct.⁶⁰

In reply, Opposer argues:

Although ESPOLON *means* rooster spur, roosters are strongly associated with the spiritual world. For example, in Chinese folklore, roosters are said to be able to exorcise evil spirits. Likewise, in Christian tradition, the rooster is a symbol of Christ, in particular light and resurrection. And in Mexico, there are many superstitions surrounding roosters, including that a black rooster is an omen of death. It follows, therefore, that the *commercial impression* of roosters (and their distinctive spurs) significantly overlaps with the commercial impression of ghosts and phantoms.⁶¹

Opposer's evidence further supports the significance of roosters in Mexican and other cultures.⁶²

While trade dress may provide evidence regarding the commercial impression engendered by the mark, "distinction in trade dress cannot weigh against likelihood of confusion with respect to the registration of a simple word mark... The reason is

⁵⁹ 12 TTABVUE 9-39; 48-57.

⁶⁰ 15 TTABVUE 10.

⁶¹ 17 TTABVUE 7.

⁶² 16 TTABVUE 33-47.

that such dress might well be changed at any time; only the word mark itself is to be registered.” *Kimberly Clark Corp. v. H. Douglas Enters., Ltd.*, 774 F.2d 1144, 1147, 227 USPQ 541, 543 (Fed. Cir. 1985). *See also Vornado, Inc. v. Breuer Elec. Mfg. Co.*, 390 F.2d 724, 156 USPQ 340, 343 (CCPA 1968). Further, it is not clear whether consumers in the United States, particularly those who do not speak Spanish or are unfamiliar with Mexican history or folklore, will perceive the intended meaning of Opposer’s ESPOLON mark, even on Opposer’s labels. “[W]e must look to the likely consumer perception of the mark in connection with the identified goods, rather than applicant’s [or opposer’s] intended connotation.” *UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868, 1886 (TTAB 2011). We find that the meaning of the marks ESPOLON and EIDOLON are somewhat different, even taking into account Opposer’s trade dress.

Nonetheless, similarity in any one of the elements of sound, appearance, meaning, or commercial impression is sufficient to support a determination of likelihood of confusion. *See Krim-Ko Corp. v. Coca-Cola*, 156 USPQ at 526 (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion”); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) (“In appropriate cases, a finding of similarity as to any one factor (sight, sound or meaning) alone ‘may be sufficient to support a holding that the marks are confusingly similar’”) (citations omitted)). Therefore, even if the marks had different meanings, it would not necessarily mean there was no likelihood of confusion.

The parties' marks are more similar than dissimilar in appearance and sound, somewhat different in connotation and, overall, convey commercial impressions that are more similar than dissimilar. In view thereof, the *DuPont* factor regarding the similarity of the marks favors a finding of a likelihood of confusion.

D. Conditions under which sales are made, that is, “impulse” vs. careful, sophisticated purchasing.

This *DuPont* factor examines the conditions under which, and to whom, sales are made. Purchaser sophistication may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect.

Applicants argue in their brief:

Applicants intend to make high-end products that are to be sold to discriminating purveyors of alcohol and as such, the goods are to be marketed to connoisseurs who will be made aware of the pronunciation and meaning of the word. Due to these conditions, there is no likelihood of confusion likely in the eyes off [sic] the mark to which Applicants' goods will be offered.⁶³

Applicants' arguments are unpersuasive. As identified, the parties' alcoholic beverages or spirits, beer and wine are not limited in any manner as to their purchasers, conditions of sale or price. We therefore must presume that both parties' potables are available at all price points to all consumers, including ordinary consumers who may purchase alcohol on impulse or otherwise not exercise a great deal of care in their purchasing decisions, in addition to more discerning purchasers. *See Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351,

⁶³ 15 TTABVUE 11.

1357 (Fed. Cir. 2000) (must focus on identifications, regardless of any actual marketplace evidence of “the particular channels of trade, or the class of purchasers to which sales of the goods or services are directed”); *In re Bay State Brewing Co., Inc.*, 117 USPQ2d 1958, 1960 (TTAB 2016); *see also Stone Lion*, 110 USPQ2d at 1163-64 (recognizing Board precedent requiring consideration of the “least sophisticated consumer in the class”).

In addition, we must presume that the parties’ goods include beer, wine and alcoholic beverages or spirits available at modest prices that may be subject to casual purchase.⁶⁴ “When 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) (citations omitted). The conditions of sale and nature of the prospective consumers therefore favor finding a likelihood of confusion.

E. Actual confusion

The seventh *DuPont* factor is the “nature and extent of any actual confusion, while the eighth *DuPont* factor considers the “length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 177 USPQ at 567.

⁶⁴ Evidence of record indicates that, at time of trial, Opposer’s tequilas are available at \$22-\$26 per bottle. 12 TTABVUE 92, 116, 147. Applicants’ goods are not yet available for purchase. The record also includes evidence of alcoholic beverages for sale at relatively low price points, e.g. wine for \$4.89, vodka and vermouth for \$ 9.99, tequila for \$10.99, rum for \$8.99 and beer for \$5. 12 TTABVUE 115, 125-126, 130-131 and 135-139.

In its decision on remand from the Federal Circuit's decision in *In re Guild Mortg. Co.*, 129 USPQ2d 1160, the Board recently held that the eighth *DuPont* factor "requires us to look at actual market conditions, to the extent there is evidence of such conditions of record." *In re Guild Mortg.*, 2020 USPQ2d 10279, *15 (TTAB 2020). Evidence of actual confusion "is too important to be established by means of an inference, unsupported by corroborating evidence." *Toys "R" Us, Inc. v. Lamps R Us*, 219 USPQ 340, 346 (TTAB 1983). We note, however, that in the present case, the parties have stipulated that Applicants have not used their applied-for EIDOLON mark in commerce for any goods.⁶⁵

Thus, the extent to which there has been an opportunity for actual confusion to occur, if any, appears to be highly limited. *DuPont*, 177 USPQ at 567. Accordingly, the seventh and eighth *DuPont* factors are neutral.⁶⁶

F. Applicants' intent in adopting their mark.

Under the thirteenth *DuPont* factor, evidence of an applicant's bad faith adoption of its mark is relevant to our likelihood of confusion analysis. *Edom Labs., Inc. v. Lichter*, 102 USPQ2d 1546, 1553 (TTAB 2012); *L.C. Licensing Inc. v. Cary Berman*, 86 USPQ2d 1883, 1891 (TTAB 2008) (bad faith is strong evidence that confusion is likely, as such an inference is drawn from the imitator's expectation of confusion). Establishing bad faith requires a showing, by a preponderance of the evidence, that

⁶⁵ 9 TTABVUE 5.

⁶⁶ We note nonetheless that the test under Section 2(d) is not actual confusion but likelihood of confusion. It is not necessary to show instances of actual confusion to establish likelihood of confusion. *Herbko Int'l. v. Kappa Books*, 64 USPQ2d at 1380; *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1843 (Fed. Cir. 1990).

the applicant intentionally sought to trade on the goodwill or reputation associated with an opposer's mark. *See J & J Snack Foods Corp. v. McDonald's Corp.*, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991) ("Whether there is evidence of intent to trade on the goodwill of another is a factor to be considered, but the absence of such evidence does not avoid a ruling of likelihood of confusion."); *Tea Bd. of India*, 80 USPQ2d at 1902.

The parties have stipulated that "Applicants were not aware of ESPOLON tequila at the time they filed" their application for the mark at issue herein.⁶⁷ There otherwise is no evidence of record that Applicants adopted their EIDOLON mark in bad faith.

Accordingly, this *DuPont* factor is neutral.

G. Summary

Because the marks are similar, the goods are legally identical in Class 33 and must be presumed to be offered in the same channels of trade to the same classes of consumers and may be subject to impulse purchase, we find that the applied-for mark used in connection with Applicants' recited Class 33 goods is likely to cause confusion with Opposer's previously used and registered mark. We find on this record that Opposer's ESPOLON mark is entitled to a broad scope of protection. We further note that, "[w]hen marks would appear on virtually identical ... [goods or] services, the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." *See Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d

⁶⁷ 9 TTABVUE 12.

874, 23 USPQ2d 1698 (Fed. Cir. 1992). *See also ECI Div. of E-Sys., Inc. v. Environmental Commc'ns Inc.*, 207 USPQ 443, 449 (TTAB 1980).

However, because the evidence of record falls short of establishing that the goods in Opposer's pleaded registration are related to Applicants' goods identified in Class 32, we find that consumers are not likely to experience confusion as to the source of those goods, notwithstanding the similarities between the marks. *See, e.g., Kellogg Co. v. Pack' em Enters., Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd* 951 F.3d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

Decision: The notice of opposition is sustained on the ground of priority and likelihood of confusion and registration to Applicants of their involved application is refused as to the goods in International Class 33. The notice of opposition is dismissed as to the goods in International Class 32.