

This Opinion is Not a
Precedent of the TTAB

Mailed: September 22, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Atlas Brewing Company, LLC

v.

Atlas Brew Works LLC

Opposition No. 91210379

Lema A. Khorshid, Thomas Carroll and Perry Gattegno of Fuksa Khorshid, LLC,
for Atlas Brewing Company, LLC.

Maurine L. Knutsson, Helen Hill Minsker, Anna L. King and Evan M. Clark of
Banner & Witcoff, Ltd. for Atlas Brew Works LLC.

Before Seeherman, Bucher and Zervas,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Atlas Brew Works LLC (“Applicant”) is the owner of application Serial No. 85642549 filed on June 4, 2012, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), for the mark ATLAS in standard characters for “beer” in International Class 32.

In its First Amended Notice of Opposition,¹ Atlas Brewing Company, LLC (“Opposer”) alleges use analogous to trademark use of ATLAS BREWING COMPANY for selling, promoting and marketing beer prior to June 1, 2012.² Opposer claims (i) geographic descriptiveness of Applicant’s mark pursuant to Section 2(e)(2) of the Trademark Act, 15 U.S.C. § 1052(e)(2); (ii) likelihood of confusion between ATLAS and ATLAS BREWING COMPANY pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d); and (iii) lack of a *bona fide* intent to use Applicant’s mark at the time of the filing of its application pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Applicant denied Opposer’s salient allegations in its Answer to the Amended Notice of Opposition.

The parties have fully briefed the case.

The Record

On December 3, 2014, the parties filed a “Joint Motion for Entry of Evidence into the Record,” which stipulated that “all of the summary judgment evidence be treated as properly of record for purposes of final decision.”³ (On June 18, 2014, the

¹ Amended Notice of Opposition, ¶ 6, 7 TTABVUE 28. Citations in this opinion will be to the TTABVUE docket entry number and 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 material or testimony in the record that has not been designated confidential 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).

² Opposer incorrectly identifies the filing date of Applicant’s application as June 1, 2012. Amended Notice of Opposition ¶ 2, 7 TTABVUE 29.

³ 31 TTABVUE 1.

Board denied Opposer's motion for summary judgment on the grounds of no *bona fide* intent to use and geographic descriptiveness.⁴) The "Joint Motion" specifically identified (but is not limited to) (i) Opposer's motion for summary judgment; (ii) Applicant's brief in opposition to Opposer's motion for summary judgment; (iii) Opposer's reply brief in support of its summary judgment motion; and (iv) Applicant's confidential exhibits to the declaration of Justin Cox submitted in support of Applicant's opposition to Opposer's motion for summary judgment. The Board approved the "Joint Motion" on December 10, 2014.⁵

The parties also filed a stipulation on November 11, 2014, providing that various photographs (taken August 19, 2014) be stipulated into the evidentiary record.⁶ The Board approved the stipulation on November 26, 2014.⁷

Thus, in addition to Applicant's opposed application which is automatically of record pursuant to Trademark Rule 2.122(b), the evidence of record consists of:

- Opposer's Motion for Summary Judgment and related exhibits (7 TTABVUE);
- Opposer's Reply in Support of Opposer's Motion for Summary Judgment (12 TTABVUE);
- Opposer's Notice of Reliance submitting Opposer's Public Way Application to the City of Chicago and Public Way Permit granted by the City of Chicago (17 TTABVUE);
- the testimony deposition of John Saller, Opposer's full-time brewer, submitted by Opposer, and exhibits thereto (18 TTABVUE);

⁴ 13 TTABVUE 1.

⁵ 34 TTABVUE 1. Of course, the briefs themselves are not evidence of anything but constitute attorney argument.

⁶ 28 TTABVUE 1.

⁷ 29 TTABVUE 1.

- the testimony deposition of Dale Steven Soble, Opposer's managing member, submitted by Opposer, and exhibits thereto (19 TTABVUE);
- Applicant's Opposition to Opposer's Motion for Summary Judgment and related exhibits (9 TTABVUE), including the declaration of Justin Cox, Applicant's Chief Executive Officer;
- Photographs relating to Atlas Brewing Company taken August 19, 2014 (28 TTABVUE);
- Mr. Cox's testimony deposition submitted by Applicant, and related exhibits (32-33 TTABVUE); and
- Applicant's Notice of Reliance, including various responses by Opposer to: (i) Applicant's First Set of Interrogatories; (ii) Applicant's First Set of Admission Requests; and (iii) Applicant's Second Set of Admission Requests (35 TTABVUE).

Despite Opposer's contention⁸ to the contrary, Opposer's application Serial No. 85762603 for the mark ATLAS BREWING COMPANY is *not* in evidence. Opposer did not submit a copy of its application during its testimony period and the application is not automatically of record because it is not the subject of this proceeding. *Cf.* Trademark Rule 2.122(b).

Standing

Standing is an essential element of Opposer's case which, if not established, will defeat Opposer's claim. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). An opposer must have "a 'real interest' in the outcome of a proceeding in order to have standing." *Richie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). The evidence of record shows that Opposer uses the trade name and trademark ATLAS BREWING COMPANY in

⁸ See Applicant's Brief at 5, 37 TTABVUE 6.

connection with the manufacture and sale of beer. This is sufficient to demonstrate that Opposer has a real interest in this proceeding and, therefore, has standing.⁹

No Intent to Use

Opposer did not discuss in its main brief its claim that Applicant did not have a *bona fide* intent to use the mark ATLAS in commerce. We therefore find that Opposer has waived this claim.

Geographic Descriptiveness

Section 2(e)(2) of the Trademark Act prohibits registration on the Principal Register of a mark that is primarily geographically descriptive of the goods or services named in the application. The test for determining whether a term is primarily geographically descriptive is whether:

1. the primary significance of the mark is a generally known geographic location; and
2. purchasers would be likely to believe that the goods or services originate in the geographic place identified in the mark.

⁹ In order for a plaintiff to prevail on a claim of likelihood of confusion based on its ownership of common law rights in a mark, the mark must be distinctive, inherently or otherwise, and plaintiff must show priority of use. *See Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981).

In this case, Opposer maintains that Applicant's ATLAS mark is geographically descriptive. Applicant, however, has not alleged that Opposer's ATLAS BREWING COMPANY mark is geographically descriptive. (A geographic composite mark, composed of geographic matter coupled with additional wording, may be considered geographically descriptive if the primary significance of the composite is geographic. *See In re Save Venice New York Inc.*, 259 F.3d 1346, 59 USPQ2d 1778 (Fed. Cir. 2001).) Because Applicant has not questioned the distinctiveness of ATLAS BREWING COMPANY, and we know of no circumstances in the case which would have put Opposer on notice of this defense, we find ATLAS BREWING COMPANY to be distinctive. *See The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). *See also Shalom Children's Wear Inc. v. In-Wear A/S*, 26 USPQ2d 1516 (TTAB 1993).

In re Nantucket, Inc., 677 F.2d 95, 213 USPQ 889, 891 (CCPA 1982). *See also In re Societe Generales des Eaux Minerales de Vittel S.A.*, 824 F.2d 957, 3 USPQ2d 1450, 1452 (Fed. Cir. 1987) (“a *prima facie* case of unregistrability cannot be made out simply by evidence showing that the mark sought to be registered is the name of a place generally known to the public; it is also necessary to show that the public would make a goods/place association, i.e., believe that the goods for which the mark is sought to be registered originate in that place.”); *In re Hollywood Lawyers Online*, 110 USPQ2d 1852 (TTAB 2014). If the goods do in fact originate from the place named in the mark, the requisite goods/place association can be presumed. *See In re Handler Fenton Westerns, Inc.*, 214 USPQ 848 (TTAB 1982).

The purchasing public in this case consists of the average American beer consumer. *See In re Brouwerij Nacional Balashi NV*, 80 USPQ2d 1820, 1829 (TTAB 2006) (“We concur that in dealing with the supposed reactions of a segment of the American public, in this case the average American beer consumer”) Because Applicant’s identification of goods is not geographically restricted, the purchasing public is not limited to consumers of beer in Washington, DC, as Opposer maintains at p. 28 of its Brief (“the D.C. public is the only relevant public for such an inquiry, because Applicant markets and sells its products ‘exclusively’ within D.C.”).¹⁰

Opposer maintains that “Atlas” identifies a geographic area in Washington, D.C.

For support, Opposer relies on the following evidence:

¹⁰ 37 TTABVUE 29. We note that the record shows that Applicant currently sells its products only in Washington, DC. However, the application is based on intent-to-use, and therefore there is no requirement that Applicant sell its goods in interstate commerce at this time.

- Mr. Cox's deposition testimony:

Q. And is the H Street neighborhood known by any other names?

A. Yes

Q. What other names is it known by?

A. Near Northeast, Capitol Hill East, SoFlo, the Atlas District.

Q. So "Atlas District" is a term to refer to that neighborhood?

A. Yes.

Q. Does it surprise you that people are referring to H Street Northeast as Atlas District?

A. No.

Q. Why not?

A. I mean, it's a term that people use.

Q. Do a lot of people come into your brewery?

A. Yes.

Q. How many people come into your brewery on a weekly basis?

A. Depends on the week, but I'd say somewhere around 500 people come through.

Q. Do those people ever -- do they ever ask you about your name with respect to the geographic area known as the Atlas District?

A. They do.¹¹

- Applicant's response to Opposer's Interrogatory No. 7:

Interrogatory Request No.7:

Describe in detail the process in which Applicant created and/or chose Applicant's Mark, including when it was created, the reasons for its creation, and the person(s) involved in its creation.

Response:

... Applicant responds that it originally intended to use the term VOLSTEAD with its beer. On May 9, 2012, Applicant received an Office Action in its U.S. trademark application for "Volstead Beer Works" citing a likelihood of confusion refusal. Accordingly, in late May, 2012 Applicant's Chief Executive Officer, Justin Cox, began considering the mark ATLAS as an alternative. *This was because the "Atlas District" is the name of the commercial strip neighborhood in the District of Columbia*

¹¹ Cox Dep. at 72, 75-76, 32 TTABVUE 75, 78-79.

near the intended location of the brewery. Moreover, the name was determined to go well with the logo designed by Applicant's designer, Alan Guidera, for the previous mark and a preliminary sketch of the tap handle by Mr. Guidera was found to make a strong impression. Applicant's Chief Executive Officer also concluded that the initials of the intended brewery name, Atlas Beer Works, "ABW" would be useful for promotional purposes. (Emphasis added.)¹²

- An email from Mr. Cox dated June 5, 2012, stating:

Hello all,

I wanted to pass along an update on our progress with Volstead. First thing is we've run into a trademark issue with the name Volstead Beer Works. House Spirits distillery in Portland, OR applied to register a trademark for "Volstead" in the distilled spirits category about two months before we applied to register in the beer category. That does not necessarily preclude our using that name, but it does cloudy the water in terms of our chance of parsing the trademark details out in court. Rather than run that risk, we reached out to the CEO of House Spirits in hopes of reaching an agreement allowing us to use the name without litigation. I spoke to him in person briefly yesterday, he plans to get back to me in the next couple of days after talking with his lawyers. ... I am not hopeful we will be able to use the name Volstead.

After racking our brains through hundreds of alternatives, we landed on Atlas Beer Works. *The Atlas District is the name of the commercial strip neighborhood in DC that we will be near.* I think the name goes well with our current logo and my designer sent the attached preliminary sketch of a tap handle that makes a strong impression. We think the name is simple, strong, and memorable. And the initials ABW will be useful in swag, etc. Would love to hear your thoughts.¹³ (Emphasis added.)

- The Atlas Theater webpage on the H Street Northeast corridor, authenticated by Mr. Cox at p.74 of his deposition, stating, "Today, this neighborhood is known as the Atlas District."¹⁴

¹² 32 TTABVUE 220.

¹³ Cox Dep. Exh. 10, 32 TTABVUE 266.

¹⁴ Cox Dep. Exh. 31, 32 TTABVUE 745.

- A webpage from “Atlas District D.C.,” authenticated by Mr. Cox at p. 75 of his deposition, stating, “atlasdistrictdc.com is a convenient online resource with information regarding businesses and events on H Street Northeast, also known as Atlas District.”¹⁵
- A webpage from yelp.com, authenticated by Mr. Cox at p. 78 of his deposition, containing a business listing for “Browsing H Street Corridor/Atlas District/Near Northeast, Washington, DC.”¹⁶
- A map showing driving directions from Applicant’s brewery to “H Street Corridor” or “atlas district dc.”¹⁷

Applicant maintains that “[a]lthough the “Atlas District” is a nickname that has been used to describe the H Street area in Washington, D.C., Opposer has failed to show that a significant portion of purchasers would, upon seeing ATLAS in connection with Applicant’s beer, conclude that it was a place name and that the beer came from there, which it in fact does not.”¹⁸ In addition, Applicant states that Opposer’s evidence does not establish that the geographic meaning of Atlas is generally known”; and that Opposer’s evidence demonstrates that “Atlas District” is only one of a few designations for the geographic area better known as “H Street District,” “H Street Northeast,” “H Street Corridor,” or simply as “H Street.”¹⁹ Applicant points to a District of Columbia publication, the *Washington, D.C.*

¹⁵ Cox Dep. Exh. 32, 32 TTABVUE 743.

¹⁶ Cox Dep. Exh. 33, 32 TTABVUE 746.

¹⁷ Cox Dep. Exh. 34, 32 TTABVUE 748.

¹⁸ Applicant’s Brief at 19, 38 TTABVUE 25.

¹⁹ Applicant’s Brief at 22, 38 TTABVUE 28. Cox Decl. ¶ 29; 9 TTABVUE 30.

To the extent that Opposer contends that Atlas is a nickname for “H Street,” it should be noted that a geographic nickname is treated the same as the actual name of the geographic location, if it is likely to be perceived as such by the purchasing public. *See In re Spirits of New Merced, LLC*, 85 USPQ2d 1614 (TTAB 2007) (“Yosemite,” a well-recognized and frequently used shorthand reference to Yosemite National Park and the Yosemite region in general conveys a readily recognizable geographic significance).

Economic Partnership's D.C. Neighborhood Profiles 2013, which designates the neighborhood simply as "H Street."²⁰ Applicant offers a different meaning for the term "Atlas" based on the dictionary definition taken from the online version of *Merriam-Webster's Dictionary* accessed at merriam-webster.com/dictionary/atlas on March 15, 2014; "a book of maps," and "a Titan who for his part in the Titans' revolt against the gods is forced by Zeus to support the heavens on his shoulders."²¹ (The dictionary does not identify "Atlas" as a district in Washington, D.C.) Applicant points to Mr. Cox's declaration filed in opposition to Opposer's summary judgment motion, which states in relevant part:

12. [While] "racking our brains" for a new name, "... we landed on Atlas Beer Works. The Atlas District is the name of the commercial strip neighborhood in DC that we will be near. I think the name goes well with our current logo and my designer sent the attached preliminary sketch of a tap handle that makes a strong impression. We think the name is simple, strong and memorable. And the initials ABW will be useful in swag, etc." At the time I sent this email, Applicant had not yet signed a lease for its brewery, so we did not know the exact location for it. However, we expected it would be somewhere in North East Washington, which included the commercial district known as the Atlas District, among others.

28. As explained in the June 5, 2012, email to investors (Ex. B to Opposer's Summary Judgment Motion), the selection of the ATLAS name also was desirable because it fit well with our marketing plan. We expected that our brewery would be near the Atlas District in the District of Columbia. However, the proximity of the Atlas District was not the sole basis for selecting ATLAS, as was explained both in the June 5 email to investors and in my Affidavit before the USPTO (Exhibits Band F to Opposer's Summary Judgment Motion). Indeed, at the time we selected the ATLAS name, we had not yet signed a lease for our premises. As it turned out, after negotiations for two different

²⁰ Applicant's summary judgment brief, Exh. D, 9 TTABVUE 103.

²¹ Applicant's summary judgment brief, Exh. B, 9 TTABVUE 95.

leases in the NoMa neighborhood fell through, we eventually located our brewery in the Ivy City Neighborhood in DC, which is near the Atlas District, but not within the Atlas District.

29. Although the Atlas District is a neighborhood in the District of Columbia, I do not believe that the name Atlas District is generally known. In fact, it is not even the most common name for that neighborhood, which is more commonly known as “H Street District,” “H Street Northeast”, “H Street Corridor”, or simply “H Street”.

30. I am personally familiar with the types of businesses located in the Atlas District. The Atlas District was named after the Atlas Theater, and as evidenced by Exhibits H and I to Opposer’s Summary Judgment Motion, it is known as an “Arts and Entertainment” district. To the best of my knowledge, the Atlas District is not particularly known for beer, nor are purchasers likely to believe that Applicant’s beer originates from the Atlas District.

31. Applicant’s goods, namely, beer, do not originate from the neighborhood in DC known as both the Atlas District and the H Street District.²²

Further, Applicant explains its “admissions” as follows:

Applicant did identify proximity to the Atlas District as a factor to Applicant’s investors, however, in that same email Applicant’s CEO explained that ATLAS fit with the existing logo, was simple and strong, and the letters ABW would be useful in marketing efforts.²³

Opposer’s Section 2(e)(2) claim can be disposed of by a determination of whether Applicant’s mark sought to be registered primarily denotes a geographic place, namely, the so-called Atlas District in Washington, D.C. *See In re International Taste Inc.*, 53 USPQ2d 1604, 1605 (TTAB 2000). The record does not establish that the primary meaning of ATLAS is the geographic location. First, the term has more well-known meanings, as reflected in the dictionary evidence, i.e., a “book of maps” or a “titan,” rather than the district in Washington, D.C. Second, the probative

²² Applicant’s summary judgment brief, Exh. B, 9 TTABVUE 27, 29-30.

²³ Applicant’s Brief at 21, 38 TTABVUE 27.

value of the theater and district website evidence which identity “Atlas District” as the name of an area in Washington, D.C. is reduced because (i) the websites refer to the geographic area as “Atlas District” rather than simply “Atlas,” (ii) there is no evidence tending to show how widely the webpages have been viewed by the beer consuming public, and (iii) they belong to businesses within the geographic location rather than from sources beyond or unrelated to the geographic location. Further, the one government publication in the record, *Washington, D.C., Economic Partnership’s D.C. Neighborhood Profiles 2013*, does not identify the area as Atlas, but as “H Street.” At best, it appears from the evidence that the district is an up-and-coming area which is in the process of developing the name “Atlas District” because the area is centered on a vintage 1950 movie theater with the name “Atlas.”

Mr. Cox, Applicant’s CEO, has acknowledged that there is an area called the Atlas District, and that depending on the week, somewhere around 500 people come through Applicant’s establishment and ask about Atlas “with respect to the geographic area known as the Atlas District.” He referred to the Atlas District in his declaration and Applicant referred to the district in its answer to Interrogatory No. 7. However, the testimony did not shed any light on the question as to whether average American beer consumers know of the geographic area, or whether they would understand ATLAS, without the word DISTRICT, to refer to that location. Also, Mr. Saller, who is a professional brewer, did not identify the Atlas District of Washington, D.C. when he testified as follows regarding the selection of “Atlas” by Opposer:

Q. So other than the historical brewery known as Atlas [founded in Chicago, during the prohibition period], was there any other inspiration for the name to your knowledge?

A. Yeah, well, we liked that it has references both to Greek mythology and to the, you know, atlas like maps and also Chicago.²⁴

Thus, when we consider the evidence as a whole, we are not persuaded that “Atlas” identifies a geographic location known to the average American beer consumer. Rather, we find that this geographic location is minor and obscure, and as such it is not a generally known geographic location. In *In re Societe Generale des Eaux Minerales de Vittel S.A.*, 3 USPQ2d at 1452, our primary reviewing court stated:

There can be no doubt that the PTO has established that Vittel is in fact the name of a small town in the Voges mountain region of France where there is a resort with mineral springs - a spa - where the water is bottled and thence distributed somewhere, but how many people in this country know that? Certainly Vittel is remote and we deem the evidence produced by the PTO insufficient to show that it is not obscure. We think the evidence is inadequate to show that the bulk of cosmetics purchasers, or even a significant portion of them, would upon seeing the word Vittel on a bottle of skin lotion or the like, conclude that it is a place name and that the lotion came from there, rather than simply a trademark or trade name of a manufacturer like Chanel, Bourgois, or Vuitton.

See also, In re Bavaria St. Pauli Brauerei AG, 222 USPQ 926, 927-28 (TTAB 1984) (“JEVER” and design for “beer” produced in the German town of Jever has an obscure geographical meaning and is not primarily geographically descriptive); *In re*



²⁴ Saller Dep. at 10-11, 18 TTABVUE 6.

Brauerei Aying Franz Inselkammer KG, 217 USPQ 73, 75 (TTAB 1983) (“AYINGER,” in an application to register the mark “AYINGER BIER” (“BIER” disclaimed) for “beer” produced in the German town of Aying, has a minor, remote or obscure geographical significance and not is primarily geographically descriptive, because “the geographic significance of a name is lost on the public because of obscurity, there too, the usage becomes arbitrary.”).

Accordingly, because Opposer has failed to prove the first prong of the test for geographic descriptiveness, the opposition on this ground is dismissed.

Likelihood of Confusion

There are two elements to proving the ground of likelihood of confusion, priority and likelihood of confusion.

Priority

To establish priority, an opposer must show it has proprietary rights. *Herbko International, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002).²⁵ See also, *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 1320, 209 USPQ 40, 43 (CCPA 1981). These proprietary rights may arise from a prior registration, prior trademark use, prior use as a trade name, or prior use analogous to trademark use. *Id.* Opposer claims prior rights in the trademark ATLAS BREWING COMPANY by virtue of use analogous to trademark use. “[A]nalogous use’ can succeed ... only where the analogous use is of such a nature and extent as to create public identification of the target term with the opposer's

²⁵ Opposer characterizes *Herbko* as a non-precedential decision. Applicant’s Reply Brief at 12, 39 TTABVUE 13. This is not correct.

product or service.” *T.A.B. Systems v. PacTel Teletrac*, 77 F.3d 1373, 37 USPQ2d 1879, 1881 (Fed. Cir. 1996). The Federal Circuit has required that evidence of such analogous use enable the factfinder to infer that “a substantial share of the consuming public had been reached,” and that such use “must have a substantial impact on the purchasing public.” *Id.* at 1882. In *Liquacon Corp. v. Browning-Ferris Industries, Inc.*, 203 USPQ 305, 309 (TTAB 1979), the Board discussed analogous use:

[T]he use of a mark necessary to bestow a proprietary right therein need not be a technical trademark or service mark use, but must be an “open and notorious” use reaching purchasers or prospective purchasers of the goods or services for which the mark is employed; and the fact that a party first conceived the mark and discussed it and/or used it within an organization or with persons outside of the organization, other than potential customers, in anticipation of and in preparation for a subsequent use in trade does not constitute an “open” use and therefore is insufficient to establish priority of use as of the time of these activities.

Here, Applicant has not submitted evidence of use prior to the June 4, 2012 filing date of its intent-to-use application. Therefore, the earliest date on which Applicant may rely is the June 4, 2012 filing date of its application. *Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 USPQ2d 1134, 1140 (TTAB 2013) (“for when an application or registration is of record, the party may rely on the filing date of the application for registration, i.e., its constructive use date”); *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1119 (TTAB 2009) (“applicant may rely without further proof upon the filing date of its application as a ‘constructive use’ date for purposes of priority”). We must therefore determine whether Opposer can establish proprietary rights in its pleaded mark before that date.

Opposer asserts that it has made use analogous to trademark use. According to Opposer, it “engaged in three types of use that all accrue trademark rights in the ATLAS mark: government/regulatory approval, pre-sales commercial activity that was necessary in the ordinary course of its particular industry, and pre-sales marketing and public relations – most notably through social media.”²⁶ It also argues in its Reply Brief that its signage establish rights in its mark.²⁷ Each is discussed below.

Government/Regulatory Approvals

Opposer cites to state, municipal and federal licensing and permit applications, such as the application it filed for formation of an Illinois limited liability company, Atlas Brewing Company, LLC, on May 26, 2011;²⁸ an assumed name application on April 6, 2012, with the Illinois Secretary of State for “Atlas/Seven Ten”;²⁹ a Public Way Grant application under the name ATLAS from the City of Chicago’s Department of Zoning;³⁰ and a U.S. Department of Treasury Federal Tax and Trade Bureau application on April 2, 2012.³¹

The formation of a limited liability entity using the term ATLAS is not sufficient. *See Liqwacon* 203 USPQ at 309, 316 (“while prior use of a trade name may be sufficient to give rise to superior rights in a mark, the mere act of

²⁶ Opposer’s Brief at 19, 37 TTABVUE 20.

²⁷ Applicant’s Reply Brief at 12 – 13, 38 TTABVUE 18-19.

²⁸ Soble Dep. Exh. 5, 19 TTABVUE 59.

²⁹ Soble Dep. Exh. 14, 19 TTABVUE 99.

³⁰ Soble Dep. Exh. 20, 19 TTABVUE 109.

³¹ Soble Dep., Exh 11, 19 TTABVUE 95.

incorporation, in itself, does not establish such priority of use.”). The other filings cited by Opposer are also insufficient; to confer trademark rights, the uses must be “‘open and notorious’ use[s] ... calculated to come to the attention of customers and prospective customers for the corporation’s present or prospective offerings.” *Id.* Governmental filings are not “calculated to come to the attention of customers and prospective customers for the corporation’s present or prospective offerings.” *Id.*

Commercial Activity

Opposer relies on the following:

- November 16, 2011
“Atlas Brewing Company” signed a contract with, and made a first payment to, Premier Stainless Systems for the purchase of stainless steel brewing tanks, heaters, pumps, valves and other specialized beer-making equipment.³² On the same date, “Atlas Brewing” made its first installment payment to Premier.³³
- January 1, 2012
Atlas Brewing Company LLC entered into a Management and Licensing Agreement with Lucky Strike Corp. in connection with the operation of a restaurant and to serve beer under Lucky Strike’s preexisting City of Chicago liquor license.³⁴
- February and March of 2012
Opposer engaged and worked with a beer branding specialist.³⁵
- April 11, 2012
“Atlas Brewery” contracted with Contract Industries, Inc., a furniture vendor, to provide booths, benches and tables to Opposer’s brewery.³⁶

³² Soble Dep. Exh. 6, 19 TTABVUE 62.

³³ Soble Dep. Exh. 7, 19 TTABVUE 70.

³⁴ Soble Dep. 24-25, 19 TTABVUE 13; Soble Dep. Exh. 8, 19 TTABVUE 75.

³⁵ Saller Dep., 9, 18 TTABVUE 6; Soble Dep. Exh. 10, 19 TTABVUE 87.

³⁶ Soble Dep. Exh. 18, 19 TTABVUE 107.

- April 27, 2012

“Atlas Brewery” executed a contract with Best Neon Sign Company to create exterior signage.³⁷ Additionally, Barker Nestor, an architecture firm retained by Opposer for construction of components of Opposer’s facility, submitted an invoice to Mr. Soble for the project identified as “Atlas Brewery.”³⁸

- May 7, 2012

Mr. Saller, on Atlas Brewing Company’s behalf, communicated in writing with the Cook County Farm Bureau about selling brewing byproduct to farmers.³⁹

- May 31, 2012

North Community Bank issued a statement to “Atlas Brewing Company LLC” and Heartland Payment Systems issued a “Merchant Statement” to “Atlas Seven Ten.”⁴⁰

Inasmuch as these communications and agreements are not “open and notorious’ use[s] ... calculated to come to the attention of customers and prospective customers for the corporation’s present or prospective offerings,” they are not sufficient to establish Opposer’s priority rights. *See Liqwacon* 203 USPQ at 316. *See also Computer Food Stores Inc. v. Corner Store Franchises, Inc.*, 176 USPQ 535, 539 (TTAB 1973) (“These [private conversations, letters, and negotiations with architects, builders, and prospective venders of equipment for use in a contemplated store] were more or less internal or organizational activities which would not generally be known by the general public and there is nothing to suggest that an effort was made in this direction during this period.”).

³⁷ Soble Dep. Exh. 20, 19 TTABVUE 109.

³⁸ Soble Dep. Exh. 22, 19 TTABVUE 115. The invoice notes previous payments on July 20, 2011, and August 26, 2011, as well as Opposer’s alterations to building plans on February 8, 2012.

³⁹ Saller Dep. Exh. 3, 18 TTABVUE 34.

⁴⁰ Soble Dep. Exh. 22 and 24, 19 TTABVUE 115 and 122-127.

Marketing Efforts

Opposer points to the following marketing efforts to secure rights in ATLAS:

- April 30, 2012
Opposer launched its Twitter page.⁴¹
- May 14, 2012
Opposer launched a Facebook page.⁴²
- May 22, 2012
Opposer entered into an agreement with Rewards Network, a daily deals operation with national reach which provides members with rewards such as miles and points.⁴³

We are not persuaded that these marketing efforts created an association in the minds of the purchasing public between Opposer's mark and its goods and that they reasonably had a substantial impact on the purchasing public before Applicant's June 4, 2012 filing date. *See Herbko International*, 64 USPQ2d at 1378. The act of joining Twitter on April 30, 2012, or Facebook on May 14, 2012, does not by itself establish use analogous to trademark use. *Cf. Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 50 USPQ2d 1545, 1556 (9th Cir. 1999) (registration of a domain name does not by itself constitute use for purposes of establishing priority of use). Prior to June 4, 2012, Opposer sent a total of ten Tweets (i.e., postings on Twitter), some of them re-Tweets, which generally concern beer but not necessarily beer brewed by Opposer,⁴⁴ and there is no evidence concerning consumer exposure to the Tweets or to Opposer's Facebook page. Most of

⁴¹ Saller Dep. 49, 18 TTABVUE 24, Saller Exh. 1, 18 TTABVUE 34-32.

⁴² Saller Dep. 26, 18 TTABVUE 13-14, Saller Exh. 2, 18 TTABVUE 33.

⁴³ Soble Dep. 27, 19 TTABVUE 14, Soble Exh. 9, 19 TTABVUE 71-74 .

⁴⁴ Saller Dep. 49-52, 18 TTABVUE 24-25.

the Facebook postings do not concern beer, and all are dated after Applicant filed its application. Further, there is no testimony regarding when members of the Rewards Network started seeing Opposer's name or the actual exposure Opposer received through the Rewards Network. Moreover, because the Rewards Network concerns restaurant services, not beer or brewing, it is unlikely that potential consumers would have associated ATLAS BREWING COMPANY with Opposer's ATLAS brand beer through the Rewards Network activity.

Signage

Opposer erected two signs depicting the mark sometime in May 2012, at 2747 Lincoln Avenue, characterized as a busy street in Chicago.⁴⁵ One sign is on the face of the building and is eight to ten feet long, and the other sign extends outwards from the building and is three feet by four feet in size. Opposer placed the order for the signs on April 27, 2012, and received a permit from the City of Chicago to erect the signs on May 3, 2012.⁴⁶ The record does not specify on what date Opposer erected the signs.

The record reflects the following facts regarding Opposer's business(es) at 2747 Lincoln Avenue:

1. Opposer has a restaurant and a brewery, and is under common ownership with an entity that owns and operates a bowling alley next door named Seven Ten Lounge.
2. Prior to May 4, 2012, the restaurant, the brewery and the bowling alley were under construction. The restaurant and the bowling alley

⁴⁵ Soble Dep. at 42-43, 19 TTABVUE 21-22 ("There is a lot of traffic on Lincoln. It's a highly-traveled street."). Exh. A to Joint Motion (filed November 11, 2014), 28 TTABVUE 5.

⁴⁶ Soble Dep. at 62, 68, 19 TTABVUE 30-31, 33. Soble Dep. Exh. 21, 19 TTABVUE 114.

opened for business on May 4, 2012,⁴⁷ and Opposer first offered restaurant and bar services under the ATLAS BREWING COMPANY mark on May 4, 2012.⁴⁸

3. The sign for the bowling alley, “Seven Ten Lounge,” is “[a] little further down the street” from the ATLAS BREWING COMPANY sign and the facades of the two business have different appearances.⁴⁹ The facilities have separate entrances, and the ATLAS BREWING COMPANY sign which extends from the building is “above the restaurant entrance” and the “Seven Ten” sign is above the entrance to the bowling alley.⁵⁰
4. Opposer’s brewery is located in the same location as its restaurant. (“Q. So is the brewery located in the same location as the brew pub restaurant? A. Yeah. Yeah. You see it when you are sitting, eating your dinner, the glass walls. You see the stainless steel tanks. It’s part of the atmosphere for sure.”).⁵¹
5. Applicant received its brewing equipment on April 23, 2012.⁵²
6. Sales of Opposer’s ATLAS BREWING COMPANY beer did not commence until July 19, 2012, after Opposer received its license from U.S. Department of Treasury Federal Tax and Trade Bureau.⁵³

The record before us does not persuade us that Opposer’s signage had a substantial impact on the purchasing public prior to June 4, 2012, when Opposer filed its trademark application. First, Opposer’s evidence does not reflect the date

⁴⁷ Saller Dep. at 21-22, 18 TTABVUE 11-12. See also Saller Exh. 1, 18 TTABVUE 31, a Twitter post dated May 4, 2012, where Opposer tweeted “Not brewing yet but the bowling alley reopens tonight”

⁴⁸ Opposer’s response to Int. Nos. 1-3, Exh. A, Applicant’s Notice of Reliance, 35 TTABVUE 19.

⁴⁹ Saller Dep. at 46, 18 TTABVUE 23.

⁵⁰ Saller Dep. at 46, 18 TTABVUE 23.

⁵¹ Saller Dep. at 15, 18 TTABVUE 8-9.

⁵² Saller Dep. at 17, 18 TTABVUE 9-10.

⁵³ Soble Dep. at 88, 19 TTABVUE 42-43; Saller Dep. at 56-57, 18 TTABVUE 27-28; Opposer’s Response to Int. Nos. 1-3, Applicant’s notice of reliance Exh. A, 35 TTABVUE 19. See also Opposer’s Resp. to Req. for Admissions No. 28, Exh. E to Applicant’s Notice of Reliance, 35 TTABVUE 55.

Opposer installed its signs. The record only indicates that Opposer installed its signs in May 2012; it is therefore possible that Opposer's signs went up as late as May 31, 2012, just four days before Applicant filed its intent-to-use application. Second, even if Opposer erected the signs in early May 2012, the signs appear in front of what would be viewed as a restaurant or bar, and therefore passersby would not be aware that the signs were identifying a product, i.e., beer. Thus, to the extent Opposer argues that the signage in front of its premises created a substantial impact among members of the consuming public of a connection between its mark ATLAS BREWING COMPANY and its beer, either by the signage alone or in combination with its other efforts prior to June 4, 2012, we are not persuaded.

We turn now to an additional argument raised by Opposer, i.e., that there are special circumstances which apply because regulatory approval is required prior to being able to sell beer; and that the beer industry is similar to the pharmaceutical industry, where trademark rights may attach prior to the actual sales of goods, and government approvals are needed prior to actual sales to the general public.⁵⁴ Opposer cites to *G.D. Searle & Co. v. Nutrapharm, Inc.*, No. 98-6890 (S.D.N.Y. Oct. 29, 1999) (shipping a drug to a clinical investigator for use in clinical trials during the Food and Drug Administration's approval process was sufficient use to constitute trademark use), and explains:⁵⁵

[W]hen the special circumstances of governmental approval apply, such as the TTB's required approval prior to sales of a beer as applied for under a given name, the preliminary use of the name that the

⁵⁴ Opposer's Brief at 17-19, 37 TTABVUE 18-20.

⁵⁵ Opposer's Brief at 17-19, 37 TTABVUE 18-20.

license applicant makes is absolutely sufficient to establish trademark rights in that name. ... Opposer was not permitted to sell its beer prior to TTB approval, nor did it do so. However, the [*Dyneer Corp. v. Automotive Products plc*, 37 USPQ2d 1251 (TTAB 1995)] rule explicitly permits trademark rights to accrue before a mark owner has the capacity to produce its goods, so long as the use it has already made is use analogous to trademark use. Opposer has made of record its continuous use of the ATLAS mark for regulatory purposes prior to any such use by Applicant.⁵⁶

Applicant's reliance on practices within the pharmaceutical industry and *Searle* are not apt because they deal with actual sales of a product bearing a trademark during clinical testing prior to introduction into the marketplace, not use analogous to trademark use. In the pharmaceutical industry, sales may be made to clinical investigators during the process of obtaining regulatory approval. In the beer industry, there is no similar regulatory scheme wherein pre-approval sales or transfers of beverages are made prior to obtaining governmental approval. This situation is no different from situations involving products for which governmental approval is *not* required and where trademark rights may attach through use analogous to trademark use.

We have, as we must, looked at the totality of the evidence and "pieces" of the "puzzle" in their entirety. *West Fla. Seafood v. Jet Restaurants*, 31 F.3d 1122, 31 USPQ2d 1660, 163 (Fed. Cir. 1994) ("However, whether a particular piece of evidence by itself establishes prior use is not necessarily dispositive as to whether a party has established prior use by a preponderance. Rather one should look at the

⁵⁶ Applicant's Brief at 18-19, 38 TTABVUE 24-25.

In *Dyneer*, the Board stated, "[C]ontrary to opposer's assertion, when use analogous to trademark use is involved, the user need not necessarily have a capacity to produce goods for sale under the involved mark at the time of the analogous use." *Dyneer*, 37 USPQ2d at 1255.

evidence as a whole, as if each piece of evidence were part of a puzzle which, when fitted together, establishes prior use.”). We find that Opposer has not established that its activities prior to June 4, 2012, created an association in the minds of the purchasing public between its mark and goods which had a substantial impact on the purchasing public. *Herbko International*, 64 USPQ2d at 1378. Thus, based on this record, Opposer did not prove that it is the owner of prior proprietary rights in ATLAS BREWNG COMPANY. Therefore, Opposer cannot, as a matter of law, prevail in its claim under Trademark Act § 2(d).

Likelihood of Confusion

The issue of priority is dispositive on Opposer’s claim. However, in order to render a decision on all the issues, we turn to the merits of Opposer’s likelihood of confusion claim.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he 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.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

There is little doubt that there is a likelihood of confusion. First, the parties’ goods are identical. This not only weighs heavily in favor of a finding of likelihood of

confusion, but also reduces the degree of similarity of the marks necessary to find a likelihood of confusion. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Second, the parties' marks are highly similar, the only difference being that Opposer's mark includes the term BREWING COMPANY, which describes Opposer's business and is merely descriptive or even generic.⁵⁷ This minor distinction is not enough to prevent confusion when the parties' marks are used on identical goods. Descriptive words are entitled to less weight in our analysis of the similarity of the parties' marks. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.") (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (BINION'S, not disclaimed word ROADHOUSE, is dominant element of BINION'S ROADHOUSE); *In re Code Consultants, Inc.*, 60

⁵⁷ We take judicial notice of the definitions of "brew" ("to prepare (as beer or ale) by steeping, boiling, and fermentation or by infusion and fermentation") and "company" ("a chartered commercial organization") from the online version of *Merriam-Webster Dictionary*, accessed on August 9, 2015 at <http://www.merriam-webster.com/dictionary/brew> and at <http://www.merriam-webster.com/dictionary/company>. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”). Furthermore, the first term in Opposer’ mark is identical to the entirety of Applicant’s mark. “[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.” *Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). *See also Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 23 USPQ2d at 1700 (upon encountering the marks, consumers will first notice the identical lead word).

Thus, the relevant *du Pont* factors favor a finding of likelihood of confusion. Applicant does not dispute this; it has not argued that any of the *du Pont* factors favor Applicant, but rather has argued that “[e]ven if one accepts that the marks are similar, such that confusion between Applicant’s mark and Opposer’s marks is likely, the issue is moot here because Opposer is not the senior user.”⁵⁸

In view of Opposer’s failure to prove that it has prior proprietary rights in ATLAS BREWING COMPANY, its claim of likelihood of confusion is dismissed.

Decision: The opposition is dismissed as to all grounds.

⁵⁸ Applicant’s Brief at 19, 38 TTABVUE 25.