

This Opinion is Not a  
Precedent of the TTAB

Mailed: June 8, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*Patrón Spirits International AG*  
*v.*  
*Conyngham Brewing Company*

—  
Opposition No. 91226939 to  
Application Serial No. 86765751

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Jessica Bromall Sparkman and Bernard R. Gans of Jeffer Mangels Butler &  
Mitchell LLP for Patrón Spirits International AG.

Lee Ann Palubinsky for Conyngham Brewing Company.

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Before Bergsman, Wellington, and Heasley,  
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Conyngham Brewing Company (“Applicant”) seeks registration on the Principal Register of the mark PIRATE PISS, in standard characters, for “beer, ale and lager” in International Class 32.<sup>1</sup> Patrón Spirits International AG (“Opposer”) opposes

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<sup>1</sup> Application Serial No. 86765751, filed September 23, 2015, alleging May 1, 2015 as the date of first use and use in commerce.

registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), asserting a likelihood of confusion with its previously-registered, standard-character marks PYRAT and PYRAT RUM (RUM disclaimed) for, respectively, “distilled spirits” and “rum” in International Class 33.<sup>2</sup> We dismiss the opposition.

### I. Evidentiary Record

The record comprises the pleadings and, without any action by the parties, the file of the involved application. Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1).

Opposer filed a notice of reliance submitting, inter alia, the following materials:<sup>3</sup>

- Copies of its pleaded registrations from the UPSTO electronic database (TESS) showing the current status and title (owner);
- Copies of 6 third-party, use-based live registrations from the UPSTO electronic database (TESS);<sup>4</sup>
- Internet printouts from various websites regarding the meaning of the term “Pyrat” and various alternate spellings for the word “pirate”;
- Internet printouts from various websites, including articles and awards, involving the mark PYRAT; and
- Internet printouts from various websites purportedly showing “sales information” for Opposer’s goods for purposes of demonstrating the strength of Opposer’s PYRAT mark.

Applicant filed a notice of reliance submitting, inter alia, the following materials:<sup>5</sup>

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<sup>2</sup> Registration No. 2727996 (PYRAT), issued June 17, 2003; renewed. Registration No. 2058075 (PYRAT RUM), issued April 29, 1997; renewed.

<sup>3</sup> 5 TTABVUE.

<sup>4</sup> In total, Opposer submitted 13 live third-party registrations. However, seven of these are based on a foreign registration and do not have use-in-commerce dates – the probative value ramifications of this are discussed infra.

<sup>5</sup> 6 TTABVUE.

- Copies of three live, third-party registrations for marks with the term “pirate” or a similar term in the marks – namely, BLIND PIRATE and EMBRACE YOUR INNER PIRATE and PIRAAT;
- Internet printouts from various websites, including the USPTO’s ID manual involving Classes 32 and 33 goods;
- Internet printouts from the Wikipedia website involving “distilled beverages,” “rum,” and “beer”;
- Printouts from various websites involving beer;
- Printouts from various websites involving the definitions of the terms “pirate,” “pyrat,” and “piracy”; and
- Printouts from the Board’s TTABVUE database regarding Board proceedings involving the term PYRAT.

## II. Standing and Priority

Standing is a threshold issue that must be proven by the plaintiff in every *inter partes* case. See *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); see also, e.g., *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1344 (TTAB 2017). Opposer’s standing to oppose registration of Applicant’s mark is established by its pleaded registrations, which the record shows to be valid and subsisting, and owned by Opposer. See, e.g., *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, because Opposer’s pleaded registrations are of record and Applicant did not counterclaim to cancel either one, priority is not an issue with respect to the goods covered by Opposer’s registrations, namely distilled spirits and rum. *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)).

### III. Likelihood of Confusion

Our determination under Section 2(d) requires an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*du Pont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (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.”). Opposer, as plaintiff, bears the burden of proving its claim of likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848.

#### A. Relatedness of the Goods

We first consider the second *DuPont* factor, the similarity or dissimilarity of the parties' goods.

In support of its argument that its rum and Applicant's beer are related, Opposer submitted copies of 13 live, third-party registrations for marks covering both beer and rum. However, of these, only six are use-based registrations. Only use-based

registrations are probative to the extent that they are being used to show that goods covered by the registrations are the type of goods that may emanate from a common source under a single mark. The other seven non-use based registrations are irrelevant to our analysis because they issued based solely on ownership of foreign registrations without any claim of use in commerce in the U.S.<sup>6</sup> *See Calypso Tech., Inc. v. Calypso Capital Mgmt., LP*, 100 USPQ2d 1213, 1221 (TTAB 2011); *In re Princeton Tectonics, Inc.*, 95 USPQ2d 1509, 1511 (TTAB 2010); and *In re 1st USA Realty Prof'ls Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007) (third-party registrations not based on use in commerce have no probative value in showing the relatedness of the goods or services). Opposer also relies on prior decisions by the Board and the Court of Appeals for the Federal Circuit, our primary reviewing court, in which beer and other alcoholic beverages have been found to be related.

Opposer's submission of the six relevant third-party registrations is not very convincing for purposes of showing that beer and rum are sufficiently related that consumers expect them to emanate from the same source. While there is no threshold number, six relevant registrations is a relatively small number given the number of breweries and beer brands in the U.S.<sup>7</sup> Moreover, the probative value of these registrations is limited; for example, they are not evidence that the marks have actually been used in the U.S. or even that consumers are aware of the registrants

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<sup>6</sup> We further note that none of these third-party registrants have filed declarations of continued use under Section 8 of the Trademark Act, 15 U.S.C. § 1058.

<sup>7</sup> According to the website Craft Beer .Com ([www.craftbeer.com](http://www.craftbeer.com)), "the U.S. now has more beer ... brands (20,000+) to choose from than any other market in the world" and "more than 5,000 breweries are responsible for the beer brands available in the U.S....." 6 TTABVUE 58.

using the same mark on beer and rum. To be clear, there is insufficient evidence of third parties using the same mark in connection with beer and rum, or evidence that a maker of rum also actually produces beer.

As to Opposer's reliance on previous decisions, "[t]here is no per se rule that holds that all alcoholic beverages are related." *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009). Even though beer and other alcoholic beverages have been found related in other cases, we must decide the outcome of this proceeding based on its own facts and evidence. In *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816 (TTAB 2015), the Board acknowledged that "beer and wine (among other alcoholic beverages) certainly can be, and frequently are, found to be related," but stated in the same sentence that "each case must be decided on its own record." *Id.* at 1827. Put simply, Opposer cannot evade its burden to prove relatedness by bootstrapping upon previous factual findings made in other decisions on different records.

This is not to say that we can entirely ignore previous holdings involving the relatedness of various types of alcoholic beverages. However, we note that Opposer's evidence pales in comparison to the records in many of the decisions where beer was found to be related to other alcoholic beverages. *See, e.g., In re Kyselá Pere et Fils Ltd.*, 98 USPQ2d 1261, 1265-66 (TTAB 2011) (relying on some 20 third-party registrations listing wine and beer and webpages showing that companies make and sell both types of goods, finding: "The third-party registration evidence and the website evidence together amply demonstrate the relatedness of beer and wine, and show that

consumers, if they encountered both goods sold under confusingly similar marks, are likely to believe that they emanate from the same source.”). Moreover, we must also take into consideration other differentiating circumstances, such as the nature of the marks themselves or other factors present in the previous decisions; for example, marks that are identical or highly similar may reduce the degree of relatedness of the goods needed to support a likelihood of confusion. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) (“even when goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source”). As discussed *infra*, we do not find the marks involved in this proceeding to be so highly similar that Opposer’s burden is lessened with respect to showing the relatedness of the involved goods.

In sum, based on this record, beer and rum have not been shown to be sufficiently related goods in order for us to weigh the second *DuPont* factor in support of a finding that confusion is likely.

#### B. Trade Channels for the Goods

We presume that because Opposer’s rum and Applicant’s beer are described in the respective registration and application without any trade channel restrictions, their respective goods travel through all usual channels of trade for the goods. *See In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *see also Cunningham*, 55 USPQ2d at 1846 (affirming Board finding that where the identification is unrestricted, “we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods”).

Opposer did not submit any evidence to show that its rum may travel in the same trade channels as Applicant's beer. Rather, Opposer relies on common knowledge that both beer and rum may be purchased in liquor stores or ordered in certain restaurants and bars. We agree that this is common knowledge and further note that the goods are sold to the same general class of consumers -- adult drinkers of alcoholic beverages. Thus, while we do not have evidence showing that beer and rum are marketed in any specific manner that gives rise to confusion, the aforementioned factual circumstances do favor a finding of a likelihood of confusion, and we weigh the third *du Pont* factor accordingly.

C. Alleged Weakness of PIRATE and Alleged Strength of Opposer's Mark

Applicant has attempted to show that the term PIRATE is weak, at least in the context of beer, but only introduced three live, third-party registrations for marks containing this term (or a similar term) for beer. As discussed *supra*, third-party registrations are not evidence that the marks are in use or that the consuming public is even aware of them. Three registrations, without evidence of actual use of these marks or any other third-party marks containing the term PIRATE, do not approach the type and amount of evidence that has been held to be convincing or powerful for purposes of demonstrating a term's weakness. *See, e.g., Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1673-74 (Fed. Cir. 2015). The term PIRATE has not been shown to be weak in connection with beer or rum.



Opposer argues that its PYRAT mark is “well known, rendering confusion more likely.”<sup>8</sup> Opposer specifically relies on materials it submitted under the notice of reliance that include awards, advertisements, recipes mentioning Pyrat rum, online retail stores featuring Pyrat rum for sale, etc. The problem, however, is that these materials are not accompanied by testimony, either by declaration or deposition, and we can only rely on these materials for what they show on their face. *See Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1467 n.30 (TTAB 2014) (Internet webpage evidence admissible only to show what has been printed and not for the truth of what has been printed), *accord WeaponX Perf. Prods. Ltd v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1040 (TTAB 2018). Thus, for example, the Internet printout from “Liquor News” column from a duty-free magazine contains a statement that “Pryat (sic) Rum increases sales by 31% in global duty free”<sup>9</sup> – but without corroborating testimony, this statement cannot be construed as an assessment of increased sales. The lack of testimony accompanying these materials also creates issues with putting some of the evidence into context. For example, Internet printout lists “The Fifty Best” aged rums and Pyrat is listed;<sup>10</sup> while this shows Pyrat rum is regarded by one website as one of the fifty best aged rums, the level of consumer exposure to this website is unknown. Although Opposer’s rum is mentioned by brand name in recipes and various online journals, we cannot

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<sup>8</sup> 7 TTABVUE 17.

<sup>9</sup> 5 TTABVUE 261-263.

<sup>10</sup> *Id.* at 294-305. We further note that the actual sales and advertising figures with regard to Opposer’s rum being sold under the Pyrat mark are unknown.

find the mark possesses a degree of renown that would entitle it to a wider scope of protection.

Accordingly, we find the fifth *du Pont* factor (fame of prior mark) and sixth factor (number and nature of similar marks in use on similar goods) to be neutral in our likelihood of confusion analysis.

#### D. Similarity of the Marks

With respect to the first *du Pont* factor, comparison of the marks, we consider them “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). We remain mindful that “marks ‘must be considered . . . in light of the fallibility of memory’ and ‘not on the basis of side-by-side comparison.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977)). Here, where the goods are beer, ale, lager, and spirits, the average purchaser is an ordinary consumer. Also, we focus on Opposer’s mark, PYRAT, inasmuch as it does not contain the additional term RUM and thus is closer to Applicant’s mark PIRATE PISS.

In comparing PYRAT to PIRATE PISS, we initially note that Opposer has submitted evidence showing that the term “Pyrat” (or “pyrate” or “pyracy”) is an

archaic alternative spelling (or variations thereof), of “pirate.”<sup>11</sup> While perhaps not common in contemporary use, “Pyrat” or “Pyrate” can be used in place of “pirate” in a nostalgic manner to suggest a time when naval piracy was more common.<sup>12</sup>

Opposer’s PYRAT mark will likely be understood as “pirate,” albeit in an archaic spelling that will perhaps connote the golden age of piracy. In that case, consumers are also likely to pronounce it in the same or similar way that “pirate” is pronounced. The involved marks share a visual similarity in that PYRAT and PIRATE are not so different.

The marks differ, however, with respect to their connotations and commercial impressions. Opposer’s mark simply conjures a feeling of nostalgia for “pirates” or “piracy,” and this is certainly enhanced in the context of the goods, inasmuch as there is a strong association between rum and pirates.<sup>13</sup> Applicant’s mark, PIRATE PISS,

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<sup>11</sup> 5 TTABVUE 61-250. As explained in one of the materials, “Pirate or Pyrates? What gives?! Nothing really. Today, the words ‘Pirate’ or ‘Piracy’ are spelled with an ‘I.’ In the Golden Age of Piracy, spelling was a haphazard kind of thing, and the word was often spelled with a ‘y.’ So there was a time when the word Pirate was spelled Pyrate, Pirate, Pyrat, or Pirat. I use pyrates, just for the whimsy and feel of it.” 5 TTABVUE 91.

<sup>12</sup> See, e.g., advertisement for “NOLA PYRATE WEEK” (an affair in New Orleans, Louisiana). *Id.* at 81-84.

<sup>13</sup> The long storied association between pirates and rum is a matter of common knowledge of which the Board can take judicial notice. See Fed. R. Evid. 201(b)(1); *Wella Corp. v. California Concept Corp.*, 192 USPQ 158 (TTAB 1976), *rev’d on other grounds*, 558 F.2d 1019, 194 USPQ 419, 422 n.5 (CCPA 1977) (fact of common knowledge appropriate for judicial notice); *In re Thermo LabSystems Inc.*, 85 USPQ2d 1285, 1291 (TTAB 2007) (common knowledge that places are often named after individuals). This is also corroborated and explained via materials in the record, e.g., “Rum’s association with piracy began with British privateers trading on the valuable commodity. As some of the privateers became pirates and buccaneers, their fondness for rum remained, the association between the two only being strengthened by literary works such as Robert Louis Stevenson’s *Treasure Island*.” 6 TTABVUE 41 ([www.wikipedia.com](http://www.wikipedia.com)).

on the other hand, conjures the vulgar image of urine from a pirate.<sup>14</sup> In the context of Applicant's beer, and for better or worse, the mark will likely be understood as a humorous, self-deprecating description of a quality or strength of the beer or simply just as an arbitrary vulgar expression. Nevertheless, the strong image and commercial impression of Applicant's mark, PIRATE PISS, distinguishes it from Opposer's PYRAT mark.

Considering the marks in their entireties, there are some similarities in appearance and sound, but the unique connotation and strong commercial impression of Applicant's mark helps distinguish it from Opposer's mark. Accordingly, this factor weighs against a finding of likely confusion.

#### E. Conclusion

Upon consideration of the entire record and the parties' arguments, we conclude that confusion is not likely. Particularly, we find that Applicant's mark PIRATE PISS and Opposer's mark PYRAT (or PYRAT RUM) are sufficiently distinguishable from one another that, when used on beer and rum, respectively, there would be no likelihood of confusion as to the source of the goods. We make this finding bearing in mind that the record is weak with regard to showing a relationship between beer and rum, but also that it is common knowledge that the involved goods may be purchased

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<sup>14</sup> The Board may take judicial notice of dictionary definitions. *See 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) and *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006) (taking notice of online dictionaries that exist in printed format or regular fixed editions). We take judicial notice of the following dictionary definition:

Piss: (usually vulgar) : urine. MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, accessed on June 8, 2018)

from the same retail stores, namely liquor stores, and marketed to the same broad class of consumers, namely, adult drinkers of alcoholic beverages.

**Decision:** The opposition is dismissed.