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# UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

**U.S. APPLICATION SERIAL NO.** 85656671

**MARK:** 5 GOLDEN RINGS



**CORRESPONDENT ADDRESS:**

ARASH SAMADANI

SAMADANI LAW APC

2070 N TUSTIN AVE

SANTA ANA, CA 92705-7827

**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/trademarks/index.jsp>

**TTAB INFORMATION:**

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

**APPLICANT:** The Bruery, LLC

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

TB - 5 Golde

**CORRESPONDENT E-MAIL ADDRESS:**

as@samadanilaw.com

## **EXAMINING ATTORNEY'S APPEAL BRIEF**

### **INTRODUCTION**

The applicant, The Bruery, LLC, has appealed the trademark examining attorney's refusal to register the trademark 5 GOLDEN RINGS on the grounds that there is a likelihood of confusion with the registered marks GOLD RING and GOLD RING VINEYARDS plus design owned by Round Hill Cellars in U.S. Registration Nos. 3855037 and 4066541. Trademark Act Section 2(d), 15 U.S.C. §1052(d).

### **STATEMENT OF FACTS**

On June 20, 2012, the applicant filed an intent to use application seeking registration of the mark 5 GOLDEN RINGS in standard characters for "beer and malt liquor" in Class 032.

In the Office action dated October 11, 2012, the examining attorney refused registration of the applied-for mark under Section 2(d) of the Trademark Act because of a likelihood of confusion with the commonly owned registered marks GOLD RING for "wines" in Class 033 in U.S. Registration No. 3855037 and GOLD RING VINEYARDS plus design for "alcoholic beverages except beers" in Class 033 in U.S. Registration No. 4066541. The examining attorney provided Internet evidence from the websites of two retail liquor stores demonstrating that the goods at issue are related because wine and beer (including micro-brews and craft brews) are sold together under the same channels of trade. Additionally, within this Office action, the examining attorney issued a requirement for additional information about the nature and channels of trade for the applicant's goods.

Within its response dated April 11, 2013, the applicant argued against the likelihood of confusion refusal. Additionally, the applicant responded to and thereby satisfied the requirement for information indicating that the goods will be sold directly to consumers as well as in liquor stores and bars.

On May 2, 2013, the examining attorney accepted the information provided by the applicant in response to the requirement for information and made final the refusal to register the proposed mark under Trademark Act Section 2(d). The examining attorney submitted copies of twenty third-party U.S.

registrations for similar goods as those of the applicant and registrant in this case as well as Internet evidence from the websites of ten wineries and breweries and Internet evidence from an additional retail liquor store demonstrating that the goods at issue are closely related because (1) they are the type of alcoholic beverages that are commonly produced and provided by the same entity, (2) the relevant goods are marketed and sold or provided through the same channels of trade and used by the same class of consumers in the same field of use, and (3) the applicant's goods and the registrant's goods are similar or complementary in purpose or function, viz. alcoholic beverages.

On November 1, 2013, the applicant filed an amendment to allege use of the proposed mark. Additionally, on this date, the applicant filed a Notice of Appeal with the Trademark Trial and Appeal Board. On December 31, 2013, the applicant filed a request to extend the deadline to file an appeal brief which was approved by the Trademark Trial and Appeal Board on January 9, 2014. The applicant filed an Appeal Brief to the Trademark Trial and Appeal Board on February 14, 2014. On February 18, 2014, the application was forwarded to the examining attorney for a brief in accordance with Trademark Rule 2.142(b). However, on March 19, 2013, the Board vacated the February 18, 2014 order, suspended the appeal and remanded the application to the trademark examining attorney to examine the amendment to allege use submitted by the applicant. On April 9, 2014, the examining attorney accepted the applicant's amendment to allege use and on April, 24, 2014, the Board forwarded the application to the examining attorney for a brief.

### **OBJECTIONS**

As an initial matter, the examining attorney objects to the applicant's submitted definition and reference to additional website evidence, as such evidence was not properly made of record prior to appeal. Specifically, within its appeal brief, the applicant submitted for the first time a definition of "The

Twelve Days of Christmas” from Wikipedia

[http://en.wikipedia.org/wiki/The\\_Twelve\\_Days\\_Of\\_Christmas](http://en.wikipedia.org/wiki/The_Twelve_Days_Of_Christmas). In fact, the applicant failed to submit any evidence prior to the filing of its appeal.

The record in an application should be complete prior to the filing of an appeal. 37 C.F.R. §2.142(d); TBMP §§1203.02(e), 1207.01; TMEP §710.01(c). Because applicant’s new evidence was untimely submitted during an appeal, the trademark examining attorney objects to this evidence and requests that the Board disregard it. *See In re Fiat Grp. Mktg. & Corp. Commc’ns S.p.A*, 109 USPQ2d 1593, 1596 (TTAB 2014); *In re Pedersen*, 109 USPQ2d 1185, 1188 (TTAB 2013); TBMP §§1203.02(e), 1207.01; TMEP §710.01(c).

### **ISSUE**

The sole issue on appeal is whether, under Section 2(d), there is a likelihood of confusion between the applicant’s mark 5 GOLDEN RINGS in standard characters for “beer and malt liquor” and U.S. Registration No. 3855037 GOLD RING in standard characters for “wines” and U.S. Registration No. 4066541 GOLD RING VINEYARDS plus design for “alcoholic beverages except beers.”

### **ARGUMENT**

**THE APPLICANT’S MARK IS CONFUSINGLY SIMILAR TO THE REGISTRANT’S MARKS AND THE GOODS ARE CLOSELY RELATED SUCH THAT A LIKELIHOOD OF CONFUSION EXISTS UNDER SECTION 2(d) OF THE TRADEMARK ACT.**

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the goods and/or services of the applicant and registrant. *See* 15 U.S.C. §1052(d). A determination of

likelihood of confusion under Section 2(d) is made on a case-by case basis and the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) aid in this determination. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1349, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (citing *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1085, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000)). Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d at 1355, 98 USPQ2d at 1260; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see *In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity and nature of the goods, and similarity of the trade channels of the goods. See *In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999); TMEP §§1207.01 *et seq.*

#### **A. 5 GOLDEN RINGS is Confusingly Similar to GOLD RING and GOLD RING VINEYARDS plus design**

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973)); TMEP §1207.01(b)-(b)(v). Similarity in any one of these elements may be sufficient to find the marks confusingly similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); see *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); TMEP §1207.01(b).

The applicant's mark is 5 GOLDEN RINGS. The registrant's marks are GOLD RING and GOLD RING VINEYARDS plus design. First, the applicant's mark is similar in appearance and commercial impression to the registrant's marks because the marks all contain a form of the similar term GOLD RING. Marks

may be confusingly similar in appearance where similar terms or phrases or similar parts of terms or phrases appear in the compared marks and create a similar overall commercial impression. See *Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689, 690-91 (TTAB 1986), *aff'd sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1495, 1 USPQ2d 1813, 1817 (Fed. Cir. 1987) (finding COMMCASH and COMMUNICASH confusingly similar); *In re Corning Glass Works*, 229 USPQ 65, 66 (TTAB 1985) (finding CONFIRM and CONFIRMCELLS confusingly similar); *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983) (finding MILTRON and MILLTRONICS confusingly similar); TMEP §1207.01(b)(ii)-(iii). The dictionary evidence of record demonstrates that the terms "golden" and "gold" both refer to something "made or consisting of gold" and "of the color gold." [See Dictionary Definitions attached to Examining Attorney's Final Office Action dated May 2, 2013, pgs. 2-6.]

Additionally, the plural form "rings" in the applicant's mark and the singular form "ring" in the registered marks are essentially the same. An applied-for mark that is the singular or plural form of a registered mark is essentially identical in sound, appearance, meaning, and commercial impression, and thus the marks are confusingly similar. *Weider Publ'ns, LLC v. D & D Beauty Care Co.*, 109 USPQ2d 1347, 1355 (TTAB 2014) (finding the singular and plural forms of SHAPE to be essentially the same mark) (citing *Wilson v. Delaunay*, 245 F.2d 877, 878, 114 USPQ 339, 341 (C.C.P.A. 1957) (finding no material difference between the singular and plural forms of ZOMBIE such that the marks were considered the same mark); *In re Pix of Am., Inc.*, 225 USPQ 691, 692 (TTAB 1985) (noting that the pluralization of NEWPORT is "almost totally insignificant" in terms of likelihood of confusion among purchasers); *In re Sarjanian*, 136 USPQ 307, 308 (TTAB 1962) (finding no material difference between the singular and plural forms of RED DEVIL)). Thus, use of the similar terms GOLDEN RINGS in the applicant's mark and GOLD RING in the registrant's marks conveys the same overall commercial impression of a ring made or consisting of gold or a ring gold in color.

Next, the addition of the number 5 in the applicant's mark does not obviate the similarity of the marks. Adding a term to a registered mark generally does not obviate the similarity between the compared marks, nor does it overcome a likelihood of confusion under Section 2(d). See *Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 557, 188 USPQ 105, 106 (C.C.P.A. 1975) (finding BENGAL and BENGAL LANCER and design confusingly similar); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1269 (TTAB 2009) (finding TITAN and VANTAGE TITAN confusingly similar); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (finding MACHO and MACHO COMBOS confusingly similar); TMEP §1207.01(b)(iii). Similarly, in this case, the addition of the number 5 to a highly similar version of the registered mark GOLD RING does not obviate the similarity of the marks.

Although the registered mark GOLD RING VINEYARDS plus design also contains the term VINEYARDS, this term is disclaimed and therefore less significant under a Section 2(d) analysis. Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. See *In re Viterro Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). Disclaimed matter that is descriptive of or generic for an applicant's goods and/or services is typically less significant or less dominant when comparing marks. See *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d at 1060, 224 USPQ at 752 ; TMEP §1207.01(b)(viii), (c)(ii).

Additionally, although the registered mark GOLD RING VINEYARDS contains a design element, this portion of the mark is less significant under a Section 2(d) analysis. For a composite mark containing both words and a design, the word portion may be more likely to be impressed upon a purchaser's memory and to be used when requesting the goods and/or services. *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1431 (TTAB 2013) (citing *In re Dakin's Miniatures, Inc.*, 59 USPQ2d

1593, 1596 (TTAB 1999)); TMEP §1207.01(c)(ii); see *In re Vittera Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908, 1911 (Fed. Cir. 2012) (citing *CBS Inc. v. Morrow*, 708 F. 2d 1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir 1983)). Thus, although such marks must be compared in their entirety, the word portion is often considered the dominant feature and is accorded greater weight in determining whether marks are confusingly similar, even where the word portion has been disclaimed. *In re Vittera Inc.*, 671 F.3d at 1366, 101 USPQ2d at 1911 (Fed. Cir. 2012) (citing *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1570-71, 218 USPQ2d 390, 395 (Fed. Cir. 1983)).

The applicant argues that the marks at issue are dissimilar because the applicant's mark includes the number 5, the term "golden" versus the term "gold," and the term "rings" versus the term "ring." [See Applicant's Brief pg. 3, TTABVue pg. 4.] These arguments are not persuasive. First, as stated above, adding a term to a registered mark generally does not obviate the similarity between the compared marks, nor does it overcome a likelihood of confusion under Section 2(d). Here, the addition of the number 5 to a form of the registered mark GOLD RING does not obviate the similarity between the marks.

Next, as stated above, use of the term "golden" in the applicant's mark and the term "gold" in the registrant's marks does not change the commercial impression of the marks. The dictionary evidence of record demonstrates that the terms "golden" and "gold" both mean "made or consisting of gold" and "of the color gold." [See Dictionary Definitions attached to Examining Attorney's Final Office Action dated May 2, 2013, pgs. 2-6.] Additionally, use of the plural form "rings" in the applicant's mark and the singular form "ring" in the registrant's marks does not change the commercial impression of the marks. As stated above, an applied-for mark that is the singular or plural form of a registered mark is essentially identical in sound, appearance, meaning, and commercial impression, and thus the marks are confusingly similar. Here, there is no material difference between the singular and plural form of the

term “ring.” Thus, the wording GOLDEN RINGS in the applicant’s mark and GOLD RING in the registrant’s marks is similar in sound, appearance, meaning and commercial impression.

Next, the applicant argues that the marks, as a whole, differ in commercial impression because 5 GOLDEN RINGS refers to a classic Christmas song whereas GOLD RING and GOLD RING VINEYARDS refer to luxury, exclusivity and/or excellence. [See Applicant’s Brief pg. 3, TTABVUE pg. 4.] The applicant’s argument is not persuasive.

First, the applicant failed to provide any evidence to support the claim that GOLD RING implies luxury, exclusivity and/or excellence. Secondly, as objected to above, the applicant’s submission of evidence defining “The Twelve Days of Christmas” is untimely and should be disregarded. Thus, the applicant’s argument that the marks differ in commercial impression is unsupported.

Rather, the evidence of record provided by the examining attorney supports the determination that use of the highly similar terms GOLDEN RINGS and GOLD RING in the marks at issue convey the same overall commercial impression of gold rings. [See Dictionary Definitions attached to Examining Attorney’s Final Office Action dated May 2, 2013, pgs. 2-6.] Although marks must be compared in their entireties and should not be dissected, a trademark examining attorney may weigh the individual components of a mark to determine its overall commercial impression. *In re Chatam Int’l Inc.*, 380 F.3d 1340, 1342, 71 USPQ2d 1944, 1946-47 (Fed. Cir. 2004); *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985) (“[I]n articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark . . . .”); *In re Kysela Pere et Fils, Ltd.*, 98 USPQ2d 1261, 1267 (TTAB 2011).

When comparing marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to

the source of the goods and/or services offered under applicant's and registrant's marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *Edom Labs., Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012); TMEP §1207.01(b). The focus is on the recollection of the average purchaser, who normally retains a general rather than specific impression of trademarks. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); TMEP §1207.01(b). Thus, despite any reference to a holiday song the applicant's mark may convey, the visual and audible similarities of 5 GOLDEN RINGS, GOLD RING and GOLD RING VINEYARDS evoke a similar overall commercial impression of gold rings such to give rise to source confusion.

As argued above, the applicant's mark 5 GOLDEN RINGS and the registrant's marks GOLD RING and GOLD RING VINEYARDS plus design are confusingly similar in sound, appearance, meaning and commercial impression. The marks all feature forms of the similar term GOLD RING which create the same overall commercial impression.

#### **B. Beer and Malt Liquor are Closely Related to Wines and Alcoholic Beverages**

The goods and/or services of the parties need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”); TMEP §1207.01(a)(i).

The respective goods and/or services need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*,

668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *Gen. Mills Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1597 (TTAB 2011); TMEP §1207.01(a)(i). Here, the applicant's beer and malt liquor are closely related to the registrant's wines and alcoholic beverages because the goods are similar in nature and these types of alcoholic beverages commonly emanate from the same source, and are marketed and sold together under the same channels of trade.

#### *Similar in Nature*

The applicant's goods and the registrant's goods are similar in nature because they are all alcoholic beverages. Various alcoholic beverages have been shown to be related goods for purposes of a Trademark Act Section 2(d) analysis. *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (holding GASPAR'S ALE for beer and ale likely to be confused with JOSE GASPAR GOLD for tequila); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003) (holding RED BULL for tequila likely to be confused with RED BULL for malt liquor); *In re Salierbrau Franz Sailer*, 23 USPQ2d 1719 (TTAB 1992) (holding CHRISTOPHER COLUMBUS for beer likely to be confused with CRISTOBAL COLON & design for sweet wine); *Somerset Distilling, Inc. v. Speymalt Whiskey Distribs. Ltd.*, 14 USPQ2d 1539 (TTAB 1989) (holding JAS. GORDON and design for scotch whiskey likely to be confused with GORDON'S for distilled gin and vodka); *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069 (TTAB 1989) (holding BRAS D'OR for brandy likely to be confused with BRADOR for beer); *Bureau Nat'l Interprofessionnel Du Cognac v. Int'l Better Drinks Corp.*, 6 USPQ2d 1610 (TTAB 1988) (holding trademark COLAGNAC for cola flavored liqueur likely to be confused with certification mark COGNAC for brandy).

The applicant argues that although the applicant's "beer and malt liquor" are likely somewhat related to the registrant's "wine" and "alcoholic beverages not including beer" because the goods are alcoholic

beverages, they are not related to the extent that they are easily confused. [See Applicant's Brief pg. 5, TTABVUE pg. 6.] This argument is not persuasive.

The fact that the goods of the parties differ is not controlling in determining likelihood of confusion. The issue is not likelihood of confusion between particular goods, but likelihood of confusion as to the source or sponsorship of those goods. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1316, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003); *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); TMEP §1207.01. As argued below, the evidence of record demonstrates that a likelihood of confusion as to the source of the goods at issue exists.

#### *Goods that May Emanate from a Single Source*

The Internet evidence from ten different wineries and breweries located across the United States provided by the examining attorney and of record demonstrates that the same entity commonly manufactures/produces/provides the relevant goods and markets the goods under the same mark. [See Web Sites attached to Examining Attorney's Final Office Action dated May 2, 2013, pgs. 61-156.] Therefore, applicant's and registrant's goods are considered related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009). Evidence obtained from the Internet may be used to support a determination under Trademark Act Section 2(d) that goods are related. *See, e.g., In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1371 (TTAB 2009); *In re Paper Doll Promotions, Inc.*, 84 USPQ2d 1660, 1668 (TTAB 2007).

Additionally, copies of twenty third-party registrations for similar goods as those of the applicant and registrant provided by the examining attorney and of record demonstrate that beer, malt liquor beverages, wine and other alcoholic beverages are the type that may emanate from a single source. [See U.S. Registrations attached to Examining Attorney's Final Office Action dated May 2, 2013, pgs. 9-

60.] Third-party marks registered for use in connection with the same or similar as those of both applicant and registrant in this case show that the goods listed therein, namely beer, malt liquor, wine and other alcoholic beverages, are of a kind that may emanate from a single source under a single mark. *See In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); TMEP §1207.01(d)(iii).

The applicant argues that they are not aware of any producers of both beers and wines. [See Applicant's Brief pg. 5, TTABVUE pg. 6.] This argument is not persuasive.

As stated above, the Internet evidence of record demonstrates not only that beer and wine may be produced by the same entity, but also that winery/brewery entities featuring craft beers or micro-brewed beers as well as wine are common within the alcoholic beverages industry. [See Web Pages attached to Examining Attorney's Final Office Action dated May 2, 2013, pgs. 61-156.] For example, the evidence from <http://thevillagevintner.com> shows an entity providing hand-crafted wine, beer and malt liquors such as ales under the same name VILLAGE VINTNER. [*Id.* at pgs. 94-106.] Additionally, evidence from [www.schillingbridgewinery.com](http://www.schillingbridgewinery.com) shows a brew house of a winery / microbrewery producing beer, ales and wine under the name SCHILLINGBRIDGE. [*Id.* at pgs. 61-71.] Thirdly, evidence from [www.hometowncellars.com](http://www.hometowncellars.com) shows that craft beer and red and white wines are produced by HOMETOWN CELLARS winery and brewery. [*Id.* at pgs. 132-135.] In this case, the applicant specifically indicated that it is a "craft brewery." [See Applicant's Brief pg. 2, TTABVUE pg. 3.] All of the website evidence of record from third-party alcoholic beverage producers supports the finding that craft/microbreweries are also the entities producing wine. [See Web Sites attached to Examining Attorney's Final Office Action dated May 2, 2013, pgs. 61-156.] Thus, the applicant's goods and the registrant's goods are the type of alcoholic beverages produced and provided by the same source.

*Marketed and Sold Together within the Alcoholic Beverage Industry*

The applicant's beer and malt liquor and the registrant's wines and alcoholic beverages may be marketed and sold together within the same channels of trade. The Internet evidence from retail liquor stores in the United States provided by the examining attorney and of record demonstrates that the relevant goods are sold or provided through the same trade channels and used by the same classes of consumers in the same fields of use. [See Web Sites attached to Examining Attorney's Initial Office Action dated October 11, 2012, pgs. 7-16, and Final Office Action dated May 2, 2013, pgs. 157-165.] Therefore, applicant's and registrant's goods are considered related for likelihood of confusion purposes. See, e.g., *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).

Additionally, the applicant indicated that the applied-for goods will be sold in liquor stores. [See Applicant's Response to Office Action dated April 11, 2013.] In fact, the applicant stated that the trade channels for the applicant's goods and registrant's goods, while not the same, are likely similar and/or related. [See Applicant's Appeal Brief pg. 5, TTABVUE pg. 6.]

Absent restrictions in an application and/or registration, the identified goods and/or services are "presumed to travel in the same channels of trade to the same class of purchasers." *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). Additionally, unrestricted and broad identifications are presumed to encompass all goods and/or services of the type described. See *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). In this case, neither the application nor registrations contain any limitations regarding trade channels for the goods and therefore it is assumed

that registrant's and applicant's goods are sold everywhere that is normal for such items, i.e., liquor stores.

Next, the applicant argues that consumers of the applicant's goods and the registrant's goods are sophisticated. [See Applicant's Brief pg. 5, TTABVue pg. 6.] This argument is not persuasive. First, the applicant provided no evidence to support this claim. Secondly, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. TMEP §1207.01(d)(vii); see, e.g., *Stone Lion Capital Partners, LP v. Lion Capital LLP*, \_\_\_ F.3d \_\_\_, \_\_\_, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014); *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011).

As argued above, the applicant's beer and malt liquor are closely related to the registrant's wines and alcoholic beverages because these goods are similar in nature, the type of alcoholic beverages that commonly emanate from a single source and are the types of alcoholic beverages that are marketed and sold together at retail liquor stores.

Finally, the overriding concern is not only to prevent buyer confusion as to the source of the goods and/or services, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. See *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); see *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

## **CONCLUSION**

The marks of the applicant and registrant are confusingly similar and the goods of the parties are closely related. For the foregoing reasons, the refusal to register on the basis of Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), for the reason that there is a likelihood of confusion with the marks in the commonly owned U.S. Registration Nos. 3855037 and 4066541, should be affirmed.

Respectfully submitted,

/Natalie Polzer/

Trademark Examining Attorney

Law Office 108

Phone: (571) 272-4103

natalie.polzer@uspto.gov (not for formal responses)

Andrew Lawrence

Managing Attorney

Law Office 108