

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: September 24, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*The Bruery, LLC*

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Serial No. 85656671

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for The Bruery, LLC.

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Before Quinn, Wolfson and Lykos,  
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

The Bruery, LLC (“Applicant”) seeks to register the mark **5 GOLDEN RINGS** (in standard character format) on the Principal Register for “Beer; Malt liquor” in International Class 32.<sup>1</sup>

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<sup>1</sup> Application Serial No. 85656671, filed June 20, 2012 pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). Concurrent with the instant appeal, Applicant amended its filing basis to Trademark Act Section 1(a), 15 U.S.C. § 1051(a), and filed an acceptable allegation of use.

Applicant has appealed the Trademark Examining Attorney's final refusal to register the mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that Applicant's applied-for mark so resembles the following two registered marks owned by Round Hill Cellars ("Registrant") that, when used on or in connection with Applicant's identified goods, it is likely to cause confusion or mistake or to deceive:

- Registration No. 3855037 for the mark **GOLD RING** on the Principal Register in standard character format for "wines" in International Class 33;<sup>2</sup> and
- Registration No. 4066541 for the mark **GOLD RING VINEYARDS** and design (displayed below) on the Principal Register for "Alcoholic beverages except beer" in International Class 33, with **VINEYARDS** disclaimed. The description of the mark is as follows: "The mark consists of a circle within which are rays emanating from a smaller circle, beneath which are the stylized words "GOLD RING VINEYARDS" appearing perpendicular to the circle design."<sup>3</sup>



For the reasons explained below, we affirm the refusal to register.

### *I. Evidentiary Objection*

Before addressing the substance of this appeal, we will consider first the Examining Attorney's objection to Applicant's submission of the entry for "The

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<sup>2</sup> Registered September 28, 2010, alleging July 30, 2010 as the date of first use anywhere and in commerce.

<sup>3</sup> Registered December 6, 2011, alleging July 30, 2010 as the date of first use anywhere and in commerce. Color is not claimed as a feature of the mark.

Twelve Days of Christmas” obtained from the online resource *Wikipedia* with its appeal brief as untimely. Trademark Rule 2.142(d) provides in relevant part that “[t]he record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed.” Insofar as the Examining Attorney has timely interposed an objection to Applicant’s late-filed evidence with her brief, the objection is sustained, and the evidence submitted concurrently with Applicant’s appeal brief has been given no consideration. *See e.g., In re Fiat Group Marketing & Corporate Communications S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014) (examining attorney’s objection to applicant’s submission of registrations with appeal brief sustained).<sup>4</sup>

## *II. Section 2(d) Refusal*

We now consider the substantive refusal before us focusing on Registration No. 3855037 for the standard character mark **GOLD RING** for “wine.” This is because when that mark is considered vis-à-vis the applied-for mark **5 GOLDEN RINGS** for “Beer; Malt liquor,” it is that mark that is most likely to support a finding of likelihood of confusion. In other words, if confusion is likely between these marks, there is no need for us to consider the likelihood of confusion with Registration No. 4066541 for the mark **GOLD RING VINEYARDS** and design, and if there is no

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<sup>4</sup> The Board does not take judicial notice of entries from *Wikipedia*. To do so would deprive the nonoffering party of the opportunity to rebut the evidence by submitting other evidence that may call into question the accuracy of the particular *Wikipedia* entry. *Cf. In re Cook Medical Technologies LLC*, 105 USPQ2d 1377, 1382 n.2 (TTAB 2012) (evidence obtained from *Wikipedia* considered because examining attorney had opportunity to rebut the evidence).

likelihood of confusion between Applicant's mark and the registered mark **GOLD RING**, then there would be no likelihood of confusion with Registrant's other cited registration. *See, e.g., In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

We base our determination under Section 2(d) on 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) (“*du Pont*”). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors and the other relevant *du Pont* factors are discussed below.

#### A. Comparison of the Marks

We consider the first *du Pont* likelihood of confusion factor regarding the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668

F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). Our analysis cannot be predicated on dissection of Applicant's and Registrant's marks. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Rather, we are obliged to consider each mark in its entirety. *Id.* See also *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 23, 234 (CCPA 1981) ("It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion"). However, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 224 USPQ at 751.

Applicant devotes much of its appeal brief arguing because the phrase "five golden rings" is "so intrinsically associated with Christmas that it is difficult to read it without elongating vowels" (Applicant's Brief, p. 1), it engenders an entirely different commercial impression from the cited mark. As Applicant maintains, the Examining Attorney "ignores the starkly different commercial impression of 5 GOLDEN RINGS – a reference to a classic Christmas song, and that of GOLD RING ... – presumably a reference to luxury, exclusivity and/or excellence." *Id.* at 3. In addition, Applicant argues that the Examining Attorney has improperly dissected the mark by failing to consider the number "5," the first element of Applicant's mark.

Applicant's arguments are unconvincing and unsupported by the record. During *ex parte* prosecution, Applicant submitted no evidence to support its position. Moreover, as noted above, Applicant's submission of evidence with its brief is untimely and has not been considered.

Applicant's and Registrant's marks are comprised, either in whole or in part, of the word "gold" or a variation thereof – "golden" - and the word "ring" or plural thereof – "rings." Grammatically, the words "golden" and "gold" as they appear in Applicant's and Registrant's marks function as adjectives modifying the noun "ring" or "rings." See entries for "gold" and "golden" from *Ransom House Unabridged Dictionary* (1997) at dictionary.infoplease.com, Attorney's Final Office Action dated May 2, 2013. As such, the literal portions of each mark are similar not only in sound and appearance but also in connotation and meaning. When we consider the marks as a whole, the addition of the number "5" to Applicant's mark, and plural version of "rings" are insufficient to outweigh these similarities.

For the foregoing reasons, we agree with the Examining Attorney that Applicant's and Registrant's marks are similar in appearance, sound, connotation and commercial impression. This first *du Pont* factor weighs in favor of finding a likelihood of confusion.

B. *The Goods*

Next we compare Applicant's and Registrant's respective goods as they are identified in the application and the cited registration. See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir.

2014); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also, Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). Applicant argues that the goods while “somewhat related in the minds of consumers” would not be easily confused because Applicant is a craft brewery selling beer and malt liquor whereas Registrant sells wine and other alcoholic beverages excluding beer. Applicant’s Brief, p. 5.

Applicant’s argument reflects a misunderstanding of the second *du Pont* factor analysis. The respective goods 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.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). *See also On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984). The issue here is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). In addition, while Applicant contends that its products are limited to craft beer, this is not reflected in the identification which broadly delineates Applicant’s goods as “beer” and “malt liquor.”

To show that the involved goods are related, the Examining Attorney submitted numerous copies of use-based third-party registrations showing that the same entity has registered a single mark for identifying both “beer,” as identified in the application, and “wine” or “wines” as identified in the cited registration. These include, among others, Registrations Nos. 3099373, 3875505, 3934483, 3962914, 3975642, 3994422, 4136155, and 4220113. *See* May 2, 2013 Final Office Action. Copies of use-based, third-party registrations may serve to suggest that the goods are of a type which may emanate from a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993).

The Examining Attorney also submitted Internet evidence showing numerous third parties producing and offering for sale beer and/or malt liquor and wine. Note the following examples:

- Excerpt from <http://thevillagevintner.com> showing hand-crafted wine, beer and malt liquors offered under the same name VILLAGE VINTNER.
- Excerpt from [www.schillingbridgewinery.com](http://www.schillingbridgewinery.com) showing beer and wine offered under the same name SCHILLINGBRIDGE.
- Excerpt from [www.hometowncellars.com](http://www.hometowncellars.com) showing the same entity, Hometown Cellars, producing both craft beer and wine.

*See* May 2, 2013 Final Office Action. As the aforementioned evidence demonstrates, it is not uncommon for craft/microbreweries to also produce wine, and sometimes under the same house mark. This constitutes further evidence that consumers may expect to find both Applicant’s and Registrant’s goods as identified in the involved application and cited registration **GOLD RING** as emanating from a common



source, and as such, the goods are closely related. Thus, the second *du Pont* factor also weighs in favor of finding a likelihood of confusion.

*C. Trade Channels*

Next we consider established, likely-to-continue channels of trade, the third *du Pont* factor. Because the identifications in the application and registration for the mark **GOLD RING** have no restrictions on channels of trade, we must presume that the goods travel in all channels of trade appropriate for such goods, which the record shows include liquor stores and online retailers. *See 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)). *See also* October 11, 2012 Office Action excerpt from “Spec’s Texas Superstore” at [www.speconline.com](http://www.speconline.com). and May 2, 2013 Final Office Action excerpt from Goody Goody Liquor’s Inc. at [www.goodygoody.com](http://www.goodygoody.com). As such, the third *du Pont* factor regarding the similarity or dissimilarity of established, likely to continue trade channels also favors a finding of likelihood of confusion.

*D. Conditions of Purchase*

We now turn to the fourth *du Pont* factor, the conditions under which and buyers to whom sales are made, i.e., “impulse” vs. careful, sophisticated purchasing. Applicant contends that fine wines and craft beers “are rarely impulse purchases” and that the consumers of such items are highly educated, and therefore able to discern different brand names. Applicant’s Brief, p. 5.

While some of the prospective consumers of Applicant's and Registrant's goods may indeed be highly educated and relatively knowledgeable about and exercise some degree of care in their purchasing decisions, this does not mean that all customers for the goods as identified in the application and cited registration are knowledgeable and careful. Because these items, as identified, may be inexpensive and purchased by the public at large, we must assume that the purchasers include casual consumers purchasing relatively inexpensive items. Indeed, the record shows bottles of wine and six-packs of beer offered for sale for less than \$10.00. *See* October 11, 2012 Office Action "Spec's Texas Superstore" as advertised at [www.specsonline.com](http://www.specsonline.com). That being said, even assuming that the prospective purchasers are sophisticated and knowledgeable about alcoholic beverages it does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *See, e.g., Stone Lion Capital Partners*, 110 USPQ2d at 1163. This fourth *du Pont* factor is therefore neutral.

To the extent that there are any other relevant *du Pont* factors, we treat them as neutral.

In summary we have carefully considered all of the evidence of record pertaining to the *du Pont* likelihood of confusion factors, as well as Applicant's arguments with respect thereto. On this particular record before us, we find that the Examining Attorney has carried the Office's burden of showing a likelihood of confusion between Applicant's mark **5 GOLDEN RINGS** and the mark shown in Registration No. 3855037.

**Decision:** The Section 2(d) refusal to register Applicant's mark is affirmed.