

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

Mailed: October 27, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Reubens Brews LLC

Serial No. 86066711

H. Michael Drumm of Drumm Law LLC,
for Reuben's Brews LLC.

Maureen Dall Lott, Trademark Examining Attorney, Law Office 105,
Susan Hayash, Managing Attorney.

Before Quinn, Wellington and Masiello,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Reubens Brews LLC ("Applicant") filed an application to register on the
Principal Register the mark shown below



("BREWS" disclaimed) for "beer" in International Class 32.¹

¹ Application Serial No. 86066711, filed on September 17, 2013 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging first use anywhere on November 10, 2010 and

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used in connection with Applicant's goods, so resembles the previously registered mark shown below

The image shows the word "Reuben's" written in a casual, handwritten style using black ink. The letters are connected, and the overall appearance is that of a signature or a quick note.

for "alcoholic beverages, namely, wine" in International Class 33,² as to be likely to cause confusion.

When the refusal was made final, Applicant appealed and requested reconsideration. Upon denial of the request for reconsideration, proceedings in the appeal were resumed, and Applicant and the examining attorney filed briefs.

Applicant concedes that the marks sound the same, at least in part, but argues that the marks are sufficiently distinct due to differences in spelling, connotation, appearance and the fact that Applicant's mark indicates that the mark is for beer, not wine. To this latter point Applicant emphasizes the differences between beer and wine. Applicant submitted third-party registrations; a dictionary definition; an excerpt from Wikipedia; excerpts of third-party websites; and a trademark search report.

first use in commerce on August 5, 2012. The application includes the following statements: "The mark consists of the stylized wording 'reuben's' above the design of barley, with the stylized wording 'brews' at the bottom. The name(s), portrait(s), and/or signature(s) shown in the mark identifies the owner's son, whose consent to register is made of record."

² Registration No. 3249525, issued June 5, 2007; combined Sections 8 and 15 affidavit accepted and acknowledged.

The examining attorney maintains that the marks and goods are similar, and that the goods move in the same trade channels to the same classes of purchasers. The examining attorney introduced dictionary definitions; third-party registrations; and excerpts of the websites of Applicant and of third parties.

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 likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

As to the second *du Pont* factor involving the similarity of the goods, “it is not necessary that the products of the parties be similar or even competitive to support a finding of likelihood of confusion.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012), citing *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007). Instead, likelihood of confusion can be found “if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Id.* The issue here, of course, 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 making our determination regarding the relatedness of the goods,

we must look to the goods as 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, 1162 (Fed. Cir. 2014), quoting *Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011).

There is no *per se* rule mandating that all alcoholic beverages be deemed similar goods. Each case must be decided on its own facts. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). The evidentiary record shows that beer and wine are different in nature, ingredients and method of production.³ However, this Board has found beer and wine related on a number of occasions. *See Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816 (TTAB 2015); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261 (TTAB 2011); *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719 (TTAB 1992); *In re Gebr. Eckel GMBH*, 196 USPQ 198 (TTAB 1976) (mem.); *Krantz Brewing Corp. v. Henry Kelly Importing & Distrib. Co. Inc.*, 96 USPQ 219 (Exm'r in Ch. 1953); *Fruit Indus., Ltd. v. Ph. Schneider Brewing Co.*, 46 USPQ 487 (Comm'r Pats. 1940). Moreover, beer has been held related to other alcoholic beverages by both this Board and our reviewing courts. *E.g.*, *In re Chatam Int'l*, 380 F.3d 1340, 71 USPQ2d 1944, 1947-48 (Fed. Cir. 2004) (“Indeed, the goods [tequila and beer or ale] often emanate from the same source because ‘both are alcoholic beverages that are marketed in many of the same channels of

³ The examining attorney is correct, however, in responding to one of Applicant’s arguments by stating that the different classification of beer and wine does not establish that the goods are unrelated. The determination concerning the classification of the goods is a purely administrative act that is “wholly irrelevant” to the likelihood of confusion issue. *Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993).

trade to many of the same consumers.”), quoting *In re Majestic Distilling*, 315 F.3d 1311, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003) (malt liquor related to tequila given the identity of trade channels despite the fact that “malt liquor is a brewed product, whereas tequila is distilled”). In fact, Applicant has not cited any precedential decision holding beer and wine unrelated for purposes of a likelihood of confusion analysis, and we are not aware of any. While each case must be decided on its own record, these decisions make clear that beer and wine (among other alcoholic beverages) certainly can be, and frequently are, found to be related.

As evidence that the goods are related, the examining attorney submitted approximately 20 excerpts of third-party websites showing that beer and wine can emanate from the same source, usually a combination winery/microbrewery, often under the same mark. These include the following: Charleville Winery & Microbrewery offering “hand-crafted wines and microbrewed beers” (charlevillevineyard.com); Von Jakob Winery & Brewery (vonjakobvineyard.com); Schilling Bridge Winery & Microbrewery (schillingbridgewinery.com); Valley Vineyards Winery & Brewery (valleyvineyards.com); Corcoran Brewery & Winery (corcoranbrewing.com); Three Brothers Wineries and Estates – “Three unique wineries and a microbrewery, all on one estate” (3brotherswinery.com); Fenton Winery & Brewery (fentonbrewery.com); Village Vintner & Brewery (thevillagevintner.com); Old North State Winery & Brewery (oldnorthstatewinery.com); Dewey Cannon Winery & Brewery

(deweycannonwinery.com); and Round Barn winery-distillery-brewery (roundbarnwinery.com). (Office actions, 12/29/13 and 2/6/15).

The record also includes copies of approximately 25 third-party registrations that individually cover both beer and wine. (Office actions, 12/29/13 and 2/6/15). The registrations include the following: Reg. No. 3522339 for WORK TRUCK; Reg. No. 4380436 for KIGEN; Reg. No. 3994422 for SWEET JESUS; and Reg. No. 4136155 for SALTY DOG. “Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source.” *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d*, 864 F.2d 149 (Fed. Cir. 1988). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

Also of record is an article captioned “Beer-Wine Hybrids: Two Worlds Collide”:

Although beer-wine hybrids aren’t exactly new, the concept is rapidly becoming a big trend in craft beer ... A couple dozen breweries all over the country are experimenting with wine barrel-aging. Some breweries are even using wine yeast strains in fermentation. An even smaller group are [sic] brewing with wine must – freshly pressed grape juice that includes the skin, seeds and stem. Fruity, oaky and complex – wine-inspired beers artfully combine the best of both beverage worlds. (www.craftbeer.com).

The examining attorney’s evidence shows that it is not unheard of for beer and wine to be produced and sold by a single source under the same mark. Although the

evidence is probative, it is not overwhelming. In response, Applicant submitted evidence showing that at the end of 2013 there were an estimated 7,762 wineries (winesandvines.com) and 2,822 breweries (brewersassociation.org) in the United States. (Request for Reconsideration, 1/16/15, Exs. A and B). We find that Applicant's evidence somewhat diminishes the probative value of the examining attorney's evidence, and that there is merit to Applicant's argument that "while there may be a few instances where wine and beer are both created at the same location [as shown by the examining attorney's evidence], the frequency is statistically insignificant when, collectively, over 10,500 wineries and breweries exist throughout in [sic] the United States." (Brief, 15 TTABVUE 13-14).

After weighing the evidence bearing on this *du Pont* factor, we find that although beer and wine are specifically distinct alcoholic beverages, the record establishes that there is some degree of relationship between beer and wine. This factor favors a finding of a likelihood of confusion.

As to trade channels and customers, absent any explicit restriction in the application or cited registration, we must presume that beer and wine travel through all normal channels of trade for these types of goods, and we must consider them to be offered and sold to all of the usual customers for such goods. *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1722; *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981), citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958). The examining attorney submitted excerpts of third-party retailers offering both beer and wine. To state the obvious, beer and

wine are routinely sold in the same trade channels (*e.g.*, liquor stores, convenience stores, bars, and the like) to the same general classes of purchasers, including ordinary consumers; indeed, Applicant does not argue to the contrary. *See Schieffelin & Co. v. Molson Companies Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) (“[a] typical consumer of alcoholic beverages may drink more than one type of beverage and may shop for different alcoholic beverages in the same liquor store. Moreover, a person may serve more than one kind of alcoholic beverage before or during a meal or at a party.”).

Thus, the record establishes an overlap in trade channels and customers for beer and wine. The overlap weighs in favor of a finding of a likelihood of confusion.

With respect to conditions of sale, while there are certainly many expensive wines — and at least some expensive beers — neither beverage is inherently expensive. And, although the selection of beer and wine is sometimes subject to careful purchasing decisions, such products can — especially at low price points — be an impulse purchase, making it more likely that a hurried customer would assume a connection between the source of such products sold under similar trademarks. *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000). (“When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.”). *See Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984). Thus, this *du Pont* factor favors a finding of a likelihood of confusion.

With respect to the first *du Pont* factor dealing with the similarity of the marks, we must compare the marks in their entirety as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), quoting *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. “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*, 101 USPQ2d at 1721 (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Although marks must be considered in their entirety, it is settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (“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 consideration of the marks in their entirety. Indeed, this type of analysis appears to be unavoidable.”).

Where both words and a design comprise the mark as in the case of Applicant's mark, the words are normally accorded greater weight because the words are likely to make an impression upon purchasers, would be remembered by them, and would be used by them to request the goods and/or services. *In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012) ("the verbal portion of a word and design mark likely will be the dominant portion. ... This makes sense given that the literal component of brand names likely will appear alone when used in text and will be spoken when requested by consumers."); *see also Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); *Giant Food, Inc. v. Nation's Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). Thus, we find that Applicant's mark is dominated by the literal portion REUBEN'S BREWS. Insofar as the term "BREWS" in the mark is concerned, the singular term "brew" is defined, in pertinent part, as "beer or ale." (*Random House Unabridged Dictionary* (1997)). This generic term "BREWS" has been disclaimed apart from the mark. In view of the generic nature of this disclaimed term, this portion of the mark plays little source-indicating function in this mark. *See, e.g., In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997). However, we note that, as presented in the mark, BREWS is substantially larger in size than the other elements of the mark and is presented in a relatively distinctive style of lettering. These graphic elements of the mark do contribute to the overall commercial impression of the mark.

Even though the wording of Applicant's logo mark is similar in part to the literal portion of Registrant's mark, in comparing the marks we cannot overlook the prominent design portion of Applicant's mark, most specifically the presence of a barley stalk (barley being a key ingredient in beer) that serves to reinforce the term BREWS. Further, the REUBEN'S and RUBENS portions are depicted in very different styles of lettering. In sum, the marks, when considered in their entireties, are visually very different.

Insofar as sound is concerned, the REUBEN'S portion of Applicant's mark is identical in sound to Registrant's mark RUBENS, while the additional word BREWS in Applicant's mark creates a phonetic distinction.

As to meaning, the term REUBEN is defined as "a son of Jacob and the traditional eponymous ancestor of one of the tribes of Israel; a grilled sandwich of corned beef, Swiss cheese, and sauerkraut usually on rye bread." (m-w.com). RUBENS, on the other hand, is the surname of the Flemish painter Peter Paul Rubens (1577-1640), a prominent artist of the Baroque style or period. (*Random House Dictionary* 2015).⁴ Indeed, Registrant's wine labels bearing the registered mark also display reproductions of Baroque-style paintings, thus suggesting that consumers are already familiar with the painter and will make this association. *See Specialty Brands v. Coffee Bean Distribs., Inc.*, 223 USPQ at 1284 (trade dress may provide evidence of whether a word mark projects a confusingly similar commercial impression). We find that the marks convey different meanings, one being a given

⁴ We take judicial notice of this definition. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); *In re Thomas White Int'l Ltd.*, 106 USPQ2d 1158, 1160 n.1 (TTAB 2013).

name and the other being the surname of a noteworthy artist. We also note that the word BREWS in Applicant's mark has a meaning that one would not expect to find associated with Registrant's goods, wine.

Due to these differences, the marks, when considered in their entirety, engender different overall commercial impressions. We find that, on balance, the differences between the marks in appearance, meaning and commercial impression outweigh the similarity in sound. This finding is buttressed by Applicant's argument that there are several cases in which two different entities have registered, for beer and wine respectively, highly similar marks that are distinguished only by the addition of a descriptive/generic term (just as in the present case Applicant's mark includes the term BREWS for beer). In this connection, Applicant made the following live third-party registrations of record.⁵ (Request for Reconsideration, 1/16/15, Ex. E).

Beer	Wine
EPIPHANY ALE Reg. No. 3873558	EPIPHANY Reg. No. 2497018
HOURLASS ALE Reg. No. 3661738	HOURLASS Reg. No. 2764766
CABIN FEVER ALE Reg. No. 3180241	CABIN FEVER Reg. No. 3850067
SCHNEIDER WEISSE Reg. No. 3421671	SCHNEIDER Reg. No. 2427705
BLACK EYE ALE Reg. No. 2667078	BLACK EYE ZIN Reg. No. 3363470

⁵ In two other examples cited by Applicant, one of the registrations has been cancelled. For this reason, we did not consider these other two sets of registrations in making our decision.

CLASSIC DARK Reg. No. 1883835	CLASSIC CAB & design Reg. No. 3650313
THE ROCKY MOUNTAIN LEGEND Reg. No. 1671293	ROCKY MOUNTAIN VINEYARDS Reg. No. 2233621
HOP ODYSSEY Reg. No. 4627043	ODYSSEY Reg. No. 2344297
BARREL BOTTLE Reg. No. 0995937	BARREL BLEND Reg. No. 3332980

In view of the above, the first *du Pont* factor weighs in favor of Applicant's position that there is no likelihood of confusion between the marks.

This brings us to the thirteenth *du Pont* factor relating to "any other established fact probative of the effect of use." Indeed, as stated earlier, each case must be decided on its own specific set of facts, and we are not bound by the actions of prior examining attorneys. Applicant highlights the fact that the USPTO has registered identical or substantially similar marks, one for beer and the other for wine, that are owned by separate entities. The following live third-party registrations are of record.⁶ (Request for Reconsideration, 1/16/15, Ex. E).

Beer	Wine
BLIND FAITH Reg. No. 2011128	BLIND FAITH Reg. No. 2859391
BLUE MOON Reg. No. 3119888	BLUE MOON Reg. No. 2224435
ALAMO Reg. No. 2196136	ALAMOS 2783556

⁶ In three other examples cited by Applicant, one of the registrations has been cancelled. For this reason, we did not consider these other three sets of registrations in making our decision.

BIG KAHUNA Reg. No. 3671520	THE BIG KAHUNA Reg. No. 3463202
STEELHEAD Reg. No. 2950860	STEELHEAD RUN Reg. No. 1400616
ALCHEMY Reg. No. 4077587	ALCHEMY Reg. No. 4031173
BLACK WIDOW Reg. No. 4368199	BLACK WIDOW Reg. No. 3965682
DUCK DUCK GOOSE Reg. No. 4361528	DUCK DUCK GOOSE Reg. No. 3710203
FATHOM Reg. No. 4071615	FATHOM Reg. No. 3119923

We have considered this evidence in making our decision. We are not privy, of course, to the registration files and, thus, to the possibility that there exists a consent agreement between any of the sets of registrants. We also appreciate the examining attorney’s response that some of the registrations are older and, thus, “may not necessarily reflect the overlap of beer and wine in *today’s* alcoholic beverage industry.” (emphasis in original) (Brief, 17 TTABVUE 17). Nevertheless, some of the sets of registrations are of relatively recent vintage, and this evidence is illustrative of the fact that the Office has in the recent past taken inconsistent positions when it comes to likelihood of confusion between marks for beer and wine, which is the issue in the present appeal. *Cf. In re Waverly Inc.*, 27 USPQ2d 1620, 1623 (TTAB 1993) (“While superficially it may be easy to dismiss these registrations, as we often do, on the basis that the records of those registrations are not before us and that each case must be decided on its own merits, it certainly

does appear that the Office has in the past taken a different position with respect to marks of the nature of applicant's. Suffice it to say that Office practice has resulted in inconsistent treatment of [proposed marks] which are very similar in nature to applicant's.”).

We conclude that, despite the evidentiary record showing some degree of relationship between the alcoholic beverages beer and wine, the cumulative and specific differences between the marks and the goods sold thereunder are sufficient that confusion, while possible, is not likely to occur among purchasers. *See Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 21 USPQ2d at 1391 (Fed. Cir. 1992), citing *Witco Chemical Co. v. Whitfield Chemical Co., Inc.*, 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969), *aff'g* 153 USPQ 412 (TTAB 1967) (“We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.”). So as to be clear, we find that the overall differences between the marks in their entireties tip the scales in favor of a finding of no likelihood of confusion. *See Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991). *See also In re White Rock Distilleries Inc.*, 92 USPQ2d 1282 (TTAB 2009).

Decision: The refusal to register is reversed.