

This Opinion is not a
Precedent of the TTAB

Mailed: July 27, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Puzzle Brewing Company

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Serial No. 86263566

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Daniel Maffeo, Esq. for Puzzle Brewing Company.

Patty Evanko, Trademark Examining Attorney, Law Office 119,
Brett J. Golden, Managing Attorney.

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Before Seeherman, Wolfson and Kuczma,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Puzzle Brewing Company (“Applicant”) seeks registration on the Principal Register of the mark PUZZLE BREWING COMPANY (in standard characters) for

Beer in International Class 32.¹

¹ Application Serial No. 86263566 was filed on April 25, 2014, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). No claim is made to the exclusive right to use BREWING COMPANY apart from the mark as shown.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), citing the following registration:

Registration No. 2196017

Mark: THE PUZZLE (typed format)

For: Wine in International Class 33.²

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. For the reasons set forth below, the refusal to register is affirmed.

I. Evidentiary Issue

Before proceeding to the merits of this appeal, we address an evidentiary matter. Applicant submitted exhibits with its Appeal Brief comprising data in various graphs and tables, articles from the Internet, and references to 45 pairs of allegedly registered marks. The Examining Attorney has objected to the admission of such evidence. Inasmuch as these exhibits were not previously submitted and therefore the inclusion of them with Applicant's appeal brief is untimely, the exhibits have not been considered. *See* Trademark Rule 2.142(d); 37 CFR § 2.142(d); TBMP §§ 1203.02(e), 1207.01 (June 2015); TMEP § 710.01(c).

² Issued on October 13, 1998; renewed. In 2003, Trademark Rule 2.52(a) was amended to refer to "typed" drawings as "standard character" drawings. *See* Trademark Rule 2.52(a); 37 C.F.R. § 2.52(a); TMEP § 807.03(i) (July 2015). A mark in typed format is the legal equivalent of a standard character mark.

However, we have considered the printout from Applicant's website, which was previously submitted with Applicant's response to the first Office Action.

II. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *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, 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, 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.").

A. Similarity of the Goods

While Applicant acknowledges that various alcoholic beverages have been found related for the purposes of likelihood of confusion, it argues that the Board is not bound by past precedential decisions that find goods related when it is now presented with a different factual record.³ Applicant urges the Board to rule in its favor in view of the evidence it presents which "was not before the Board in any past decision finding likelihood of confusion between beer and wine."⁴ However, for

³ App. Brf. 4 TTABVUE 3.

⁴ App. Brf. 4 TTABVUE 3-4.

the reasons set forth above, much of the evidence on which Applicant relies was not timely submitted and is therefore disregarded.

Applicant's goods are beer and registrant's goods are wine. Various alcoholic beverages have been shown to be related goods under § 2(d), including wine and beer. See *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1948 (Fed. Cir. 2004) (tequila and beer or ale are inexpensive commodities that consumers would be unlikely to distinguish by manufacturer); *In re Majestic Distilling Co.*, 65 USPQ2d at 1203 (malt liquor and tequila are similar by virtue of fact that both are alcoholic beverages marketed in many of the same channels of trade to many of the same consumers); *In re Kysela Pere et Fils, Ltd.*, 98 USPQ2d 1261 (TTAB 2011) (holding wine and beer related because "consumers have been exposed to the concept that wineries also make and sell beer"); *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (wine and beer found to be related goods based on third-party registrations).

That beer and wine are classified in different International Classes does not matter. It is well settled that the fact that the USPTO classifies goods in different classes does not establish that the goods are unrelated under § 2(d). The determination concerning the proper classification of goods is a purely administrative determination unrelated to the determination of likelihood of confusion. *In re Omega SA*, 494 F.3d 1362, 83 USPQ2d 1541, 1543 (Fed. Cir. 2007); *Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993).

It is the Examining Attorney's burden to "provide evidence showing that the goods and services are related to support a finding of likelihood of confusion." *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (finding USPTO failed to establish that wine and vodka are related; there is no per se rule that holds all alcoholic beverages are related).

The evidence of the relatedness of beer and wine submitted by the Examining Attorney includes third-party registrations showing that beer and wine emanate from a single source under a single mark, Internet evidence showing that beer and wine can emanate from the same source, and articles showing the popularity of hybrid alcoholic beverages containing both beer and wine.

The Examining Attorney has made of record a meaningful number of registrations showing that various entities have registered a single mark for both goods, *i.e.*, wine and beer.⁵ Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. *See In re Kysela Pere et Fils Ltd.*, 98 USPQ2d at 1264; *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).⁶ Applicant acknowledges that "third-party registration data is often employed to determine if two goods are confusingly

⁵ August 14, 2014 Office Action. Applicant's argument that the Examining Attorney failed to provide any evidence of third-party registrations that identify both "beer" and "wine" as goods is in error. App. Brf. 4 TTABVUE 4.

⁶ The exhibit attached to Applicant's brief showing 45 pairs of third-party registrations (and the Tables in its brief), offered to rebut the third-party registrations offered by the Examining Attorney, was not considered because, as previously stated, it was not properly made of record.

similar,” and that “[t]he number of registrations necessary to show that two goods are related varies based on the circumstances.”⁷

The third-party registration evidence demonstrates there are entities that are the source of both wine and beer.⁸ Applicant argues that the number of entities that include wine and beer in their registrations is a very small percentage of the total number of registrations for wine alone or beer alone. As noted, Applicant did not timely make of record any of the evidence on which it bases this argument. In any event, there is no requirement that either Applicant or registrant also be the source of the other’s goods before the goods can be held to be related. *See Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). Indeed, goods can be related even if there is no evidence that any entity, much less the applicant or the registrant, is the source of both applicant’s and registrant’s goods. *In re Majestic Distilling Co.*, 65 USPQ2d at 1204 (“Although the PTO apparently found no evidence of any manufacturer who both brews malt liquor and distills tequila, Majestic has not shown that the PTO’s lack of evidence in that regard is relevant. Unless consumers are aware of the fact, if it is one, that no brewer also manufactures distilled spirits, that fact is not dispositive”).

⁷ App. Brf. 4 TTABVUE 4.

⁸ Applicant acknowledged an awareness of the existence of a “handful” of registrations that identify both beer and wine in their identification of goods. App. Brf. 4 TTABVUE 4. It then attempted to diagram data corresponding to the number of registrations for wine or for, beer separately, as compared to those registrations covering both wine and beer. However, the registrations on which Applicant bases its argument, as well as the diagram on p. 5 of its brief, are based on evidence which was never properly made of record. Accordingly, we have given these arguments no consideration.

Our finding that wine and beer are related does not rest solely on the third-party registrations submitted by the Examining Attorney. Additionally, the Examining Attorney introduced “representative Internet evidence” of third parties that operate combined vineyards and breweries and/or companies that produce both wine and beer, which shows that these businesses are located throughout the country, including in Illinois, Michigan, Minnesota, Missouri, Nebraska and Ohio.⁹ This evidence is sufficient to show that consumers have been exposed to the concept that a single entity can be the source of both wine and beer, even wine and beer sold under the same names such as Motor City Brewing Works and Schilling Bridge.

Applicant’s argument that terms such as “brewer,” “brewery” and “brewing” are never associated with wine-making is not supported by the evidence. In addition to the evidence of breweries offering both wine and beer, the Examining Attorney also submitted evidence of breweries that sell “beer-wine hybrids.” In particular, the record includes online articles and blogs discussing beer-wine hybrids, identifying companies that produce them.¹⁰ Thus, the evidence shows the same names being used in connection with wine and beer, and also with beer-wine hybrid products.

⁹ See August 14, 2014 Office Action, Vine Park pp. 16-17; Motor City Brewing Works pp. 66-73; September 17, 2014 Final Office Action, Charleville Vineyard Winery & Microbrewery p. 8-9; Von Jakob Winery & Brewery p. 10-12; Schilling Bridge Winery & Microbrewery p.13-15; Valley Vineyards Winery.Brewery p. 16-17.

¹⁰ See online articles regarding beer-wine hybrids attached to September 17, 2014 Final Office Action: <http://www.craftbeer.com/craft-beer-muses/beer-wine-hybrids-two-worlds-collide> Beer-Wine Hybrids: Two Worlds Collide p. 18-25; <http://www.ontaponline.com/2013/11/01/beer-wine-hybrids> p. 26-29; <http://www.winemag.com/October-2013/Its-Miller-Vine/> 5 New Beer-Wine Hybrids Grape-infused beers are here, and honestly, many are damn good. Here’s why you need to stop rolling your eyes and try a few of these wine brews. p. 30-34; <http://www.dogfish.com/community/blogfish/members/justin-williams/the-most-ambitious-hybrid-of-beer-and-wine-in-thousands-of-years.htm> p. 35-36 The most

To support a finding of likelihood of confusion, goods need only be “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.” *Coach Services, 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)). The question is not whether consumers would expect to order beer at a winery, but whether wine and beer are so related that consumers would expect these goods to emanate from the same source if they were sold under the same or confusingly similar marks. The issue is not the number of stand-alone wineries and breweries that exist as compared to how many businesses produce both wine and beer, but whether consumers would be familiar with the fact that there are combination wineries and breweries, or companies that produce both types of goods, such that they would assume a connection between the two products.

Applicant has not cited any precedential decision holding beer and wine unrelated for purposes of a likelihood of confusion analysis. While each case must be decided on its own record, the decisions make clear that beer and wine (among other alcoholic beverages) certainly can be, and frequently are, found to be related. After considering the evidence of record, we find that the goods of Applicant and registrant, though different, are nonetheless related.

ambitious hybrid of beer and wine in thousands of years; <http://www.drinkinginamerica.com/the-beerwine-hybrid-our-two-cents/> p. 37-39; <http://www.bonappetit.com/drinks/beer/article/the-newest-beer-on-tap-is-wine> The Newest Beer on Tap ... is Wine p. 41-44.

Applicant notes that registrant's goods are high end wine "priced at over \$70 per bottle (with later vintages costing above \$90 per bottle) making it a product purchased by a select handful of well informed consumers."¹¹ However, the question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods recited in Applicant's application and the cited registration, rather than on what the evidence shows the goods and/or services to be. *See In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Because there are no restrictions in the descriptions of goods in either Applicant's application or registrant's registration, the identified goods are considered to include wine and beer at all price points, including inexpensive wine, and to move in all the normal and usual channels of trade and methods of distribution to all potential purchasers. *Octocom Systems, Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Thus, both Applicant's "beer" and the "wine" identified in the cited registration would be sold in some of the same channels of trade, such as liquor stores, and to the same classes of purchasers, including the general public.

B. Similarity of the Marks

Marks are compared for similarity or dissimilarity in their entirety as to appearance, sound, meaning and commercial impression. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973).

¹¹ September 4, 2014 Response to Office Action, p. 6 of 9.

The word “Puzzle” contained in both Applicant’s and registrant’s marks results in marks that, when compared in their entireties, are similar in appearance and sound. 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 Canadian Imperial Bank of Commerce v. Wells Fargo Bank, National Association*, 1 USPQ2d at 1817 (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).

In articulating reasons for reaching a conclusion on the issue of likelihood 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, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In this case, the dominant portion of Applicant’s mark PUZZLE BREWING COMPANY is the word “Puzzle.” The words “Brewing Company” in Applicant’s mark are descriptive and have been disclaimed and, therefore, are less significant in creating a commercial impression. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re National Data Corp.*, 224 USPQ at 751.

The word “Puzzle” also is the dominant portion of registrant’s mark THE PUZZLE because the definitive article “the” at the beginning of the mark is not

distinctive and adds no source-indicating significance to the mark as a whole. *See In re Thor Tech*, 90 USPQ2d 1634, 1635 (TTAB 2009) (addition of the word “the” at the beginning of the registered mark does not have any trademark significance); *In re The Place Inc.*, 76 USPQ2d 1467, 1468 (TTAB 2005) (the definite article THE and the generic term BAR are not distinctive terms, and add no source-indicating significance to the mark as a whole); *In re Narwood Products Inc.*, 223 USPQ 1034, 1034 (TTAB 1984) (finding THE MUSIC MAKERS and MUSIC-MAKERS “virtually identical” marks; the inclusion of the definite article “the” is “insignificant in determining likelihood of confusion”). Thus, the inclusion of the word “THE” at the beginning of registrant’s mark does not generally affect or otherwise diminish the overall similarity between the marks.

Applicant argues that the words “BREWING COMPANY” in its mark provides significant length, syllables and an additional word resulting in a distinct look and feel of the mark, which distinguishes it from registrant’s mark THE PUZZLE.¹² According to Applicant, the term BREWING COMPANY provides a different suggestion than that of the cited mark which suggests “that the wine good is a quandary or mystery.” On the other hand, Applicant asserts, its PUZZLE BREWING COMPANY mark “suggests a lighthearted game-oriented beer producer.”¹³ Finding no basis for such contentions by Applicant, we are not persuaded by Applicant’s argument that the marks THE PUZZLE and PUZZLE BREWING COMPANY convey “different suggestion[s].” In both marks, the

¹² App. Brf. 4 TTABVUE 13.

¹³ September 4, 2014 Response to Office Action, p. 4 of 9.

identical term “PUZZLE” has the same connotation. Addition of the terms “BREWING COMPANY” and “THE” to “PUZZLE” does not alter the connotation of “PUZZLE.”

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 terms of their overall commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *United Global Media Group, Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012).

Applicant’s argument that the Examining Attorney improperly dissected the marks and ignored the additional elements of the marks is without merit. The overall impression of the marks is similar because the dominant element of each mark is the identical term “Puzzle.”¹⁴ The differences due to the inclusion of “THE”

¹⁴ Applicant argues (4 TTABVUE 13) that many tribunals analyze word marks structurally in terms of format and position, number and similarity of the letters, syllables or words comprising the marks, citing *Kimberly-Clark Corp. v. H. Douglas Enterprises, Ltd.*, 774 F.2d 1144, 227 USPQ 541, 542 (Fed. Cir. 1985). *Kimberly-Clark* does not contain any discussion relating to structural analysis of word marks, other than the well-settled comparison of the sound of the marks, which the Court noted rhyme in that case. However, no discussion was made regarding position, number and similarity of the letters or words comprising the mark. Furthermore, the instant case is distinguishable from that case because the marks at issue here contain the identical term “Puzzle” while the marks in *Kimberly-Clark* contained no identical wording. Additionally, the fame of the registered

preceding “PUZZLE” in Registrant’s mark, and the descriptive wording “BREWING COMPANY” following “PUZZLE” in Applicant’s mark, are not sufficient to distinguish the marks. Overall, the marks are similar in appearance, sound, meaning and commercial impression.

Applicant notes that other marks containing the word “Puzzle” were registered for wine after the registration date of the cited registration. Even if the marks MONKEY PUZZLE, PUZZLE TREE and RED PUZZLE identified in Applicant’s brief¹⁵ were registered or approved for registration after Registrant’s mark was registered, each of those marks contains additional non-descriptive language which results in marks that create different commercial impressions from Applicant’s mark. Moreover, prior decisions of other trademark examining attorneys in allowing other marks have little evidentiary value and are not binding upon the USPTO or the Board. *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *In re Midwest Gaming & Entertainment LLC*, 106 USPQ2d 1163, 1165 n. 3 (TTAB 2013).

mark was a major factor in that case, which ruled that “there is no excuse for even approaching the well-known trademark of a competitor.” *Id.*

¹⁵ App. Brf. 4 TTABVUE 13. Applicant initially identified the registration numbers and application serial number for these marks in its Response to the first Office Action. While Applicant did not submit copies of the registrations or application, the Examining Attorney did not advise Applicant that merely identifying the third-party registration numbers and the application serial number was not sufficient to make them of record. Instead, the Examining Attorney addressed them without objection in the September 17, 2014 Final Office Action. In view of the foregoing, the Examining Attorney waived her right to object to this evidence, and her objection is overruled. The information regarding the registrations and application submitted by Applicant is considered for whatever probative value it has. *See In re Kysela Pere et Fils Ltd.*, 98 USPQ2d at 1264 n.6; *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010).

Applicant argues that the BREWING COMPANY portion of its mark is not suggestive of wine products and even has a meaning that is entirely at odds with the wine-making process. Just because “Brewing Company” is not descriptive of wine does not mean that Applicant’s and Registrant’s marks have different commercial impressions and are not similar. Consumers who are familiar with THE PUZZLE for wine would assume, upon encountering PUZZLE BREWING COMPANY for beer, that the same producer of THE PUZZLE wine had adopted a variation of its mark for the sale of beer.

C. Conclusion

Applicant’s and registrant’s marks both contain the identical word “PUZZLE.” The “The” in registrant’s mark is non-distinctive and “Brewing Company” in Applicant’s mark is descriptive. Thus, when considering the marks in their entireties, they are similar in appearance, pronunciation and connotation, and have a similar overall commercial impression. The marks are used for beer and wine which are related products that are purchased by members of the general public. Given the close similarity of the PUZZLE BREWING COMPANY and THE PUZZLE marks used on beer and wine respectively, we find a likelihood of confusion.

Decision: The refusal to register Applicant’s mark PUZZLE BREWING COMPANY is affirmed.