

This Opinion is Not a
Precedent of the TTAB

Mailed: May 11, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

In re Lord Lion Winery LLC

Serial No. 87808799

Michael G. Atkins of Atkins Intellectual Property, PLLC
for Lord Lion Winery LLC.

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Before Kuczma, Adlin and Larkin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Lord Lion Winery LLC seeks registration of LORD LION WINERY (in standard characters, WINERY disclaimed) for “wine.”¹ The 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 so resembles the registered mark LORD LYON (in standard characters) for “beer”² that use of Applicant’s mark in connection with Applicant’s goods is likely to cause confusion. After the refusal became final,

¹ Application Serial No. 87808799, filed February 23, 2018 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an alleged bona fide intent to use the mark in commerce.

² Registration No. 5452499, issued April 24, 2018.

Applicant appealed and filed a request for reconsideration which was denied. The appeal is fully briefed.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *du Pont* factor about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). 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. The Marks

We must consider the marks “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). Notwithstanding Applicant’s vigorous arguments to the contrary, “[s]imilarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d

1742, 1746 (TTAB 2018), *aff'd* 777 F. Appx. 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

1. Sound

Obviously, the marks sound almost identical, because LORD LION and LORD LYON would be pronounced the same. We have not ignored the trailing term WINERY in Applicant's mark, but it is relatively insignificant in our analysis because LORD LION comes first. *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"); *see also, Palm Bay Imports*, 73 USPQ2d at 1692; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Furthermore, WINERY is descriptive of (if not generic for) Applicant's wine, and disclaimed, and thus entitled to less weight than the mark's distinctive first term, LORD LION. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'") (quoting *In re Nat'l Data*, 224 USPQ at 752); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (BINION'S, not disclaimed word ROADHOUSE, is dominant element of BINION'S ROADHOUSE); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often "less significant in creating the mark's commercial impression").

As the Examining Attorney points out, the marks' close similarity in sound is particularly important here, because wine and beer are often offered and requested orally, such as in a bar or restaurant. *See In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016) ("Beer is often ordered by name, in a bar or restaurant, or from a menu, where only the name of the beer will be used"). Moreover, when this happens, servers or customers are at least as likely to refer to one of Applicant's specific wines as LORD LION, which sounds identical to LORD LYON, as they are to refer to a specific wine as LORD LION WINERY, which in many contexts would be stilted and unnecessary. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1188 (TTAB 2018) (recognizing consumers' "propensity to shorten marks when ordering them orally" and finding that consumers "may order Registrant's wine, especially if purchased by the glass, under the designation LAROQUE alone" rather than the full mark CHATEAU LAROQUE). As the Examining Attorney also points out, similarity in sound alone may be enough to establish that the marks are confusingly similar. *In re 1st USA Realty Prof., Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). In any event, the marks' similarities do not end here.

2. Appearance

The marks also look quite similar, because there is only one letter's difference between the cited mark and the dominant, distinctive portion of Applicant's mark. We assume that some consumers will not notice this minor difference, especially when we keep in mind that "[t]he 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) (quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)).

Again, while the descriptive or generic and trailing term WINERY in Applicant’s mark is another difference in how the marks look, it is merely a minor one because WINERY is not distinctive. *Aquitaine Wine*, 126 USPQ2d at 1185 (the word CHATEAU in CHATEAU LAROQUE “merely describes a location where wine is produced and has been disclaimed”). Consumers will perceive the source of Applicant’s goods as LORD LION and the source of Registrant’s goods as LORD LYON, terms which appear almost identical.

3. Meaning

Applicant points out that “Lyon” is “unmistakably a surname,” and claims that “most consumers would associate [it] with Scotland,” perhaps specifically with “the Court of Lord Lyon,” a “standing court in Scotland that regulates coats of arms and heraldry” there. By contrast, “lion” means “the apex predator whose natural habitat is almost exclusively the grasslands and savannahs of Africa.” 10 TTABVUE 4. We do not quarrel with Applicant’s point that “lion” and “Lyon” may convey different meanings.

Here, however, this difference in meaning is only part of the story. In fact, the Examining Attorney has established that “Lion” may also be a surname in the United States. September 9, 2019 Denial of Request for Reconsideration TSDR 172-173. And as the Examining Attorney points out, when LION is preceded by LORD, as it is in

Applicant's mark, it "invokes the commercial impression of a person, not an animal as the applicant suggests."

We therefore conclude that while some consumers may take a different meaning from Applicant's mark than from Registrant's mark, others would perceive the marks as conveying a similar meaning in that they both refer to a "lord" and the two lords have similar names. Some consumers, especially those hearing the marks or not perceiving their slight difference in appearance, would believe the marks have the exact same meaning.

4. Commercial Impression

Both marks refer to a "lord." While some consumers may understand the marks as referring to different "lords," the marks are sufficiently similar that many consumers are likely to be confused as to the source of the alcoholic beverages sold under the marks. In drawing this conclusion, we have kept in mind: (1) "the fallibility of memory over a period of time;" (2) that the "average" purchaser "normally retains a general rather than a specific impression of trademarks;" and (3) that Applicant's and Registrant's marks both identify a "lord" named lion/lyon. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). *See also In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) ("marks must be considered in light of the fallibility of memory") (citation, internal quotation marks, and ellipsis omitted).

5. The Marks Are Similar In Their Entireties

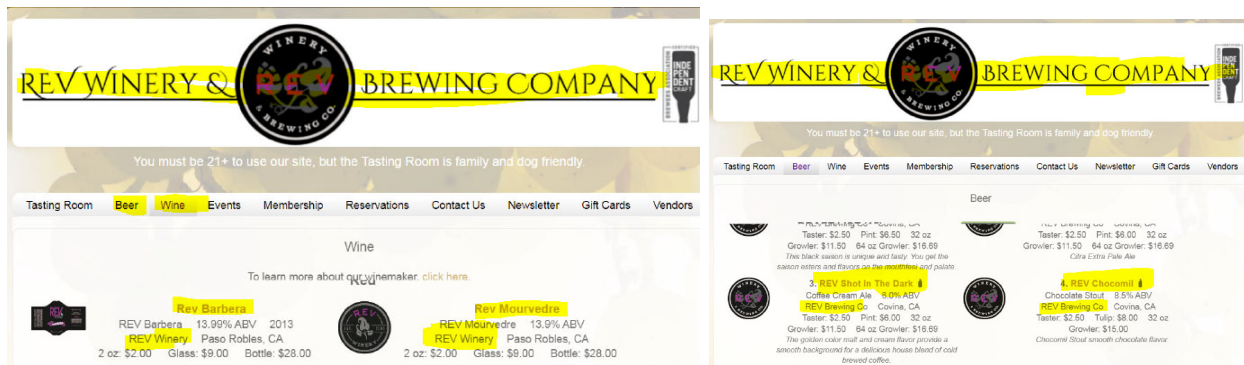
Overall the marks are quite similar. To the extent they convey different meanings or commercial impressions, these differences could only be understood by those

viewing the marks closely and carefully. They may quickly forget the distinction. Many other consumers, especially those hearing the marks, or viewing them in passing, may not perceive the differences at all. This factor therefore weighs in favor of finding a likelihood of confusion.

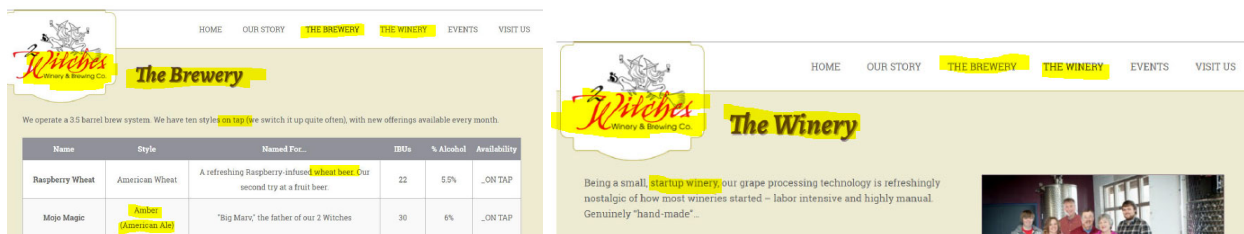
B. The Goods, Channels of Trade and Classes of Consumers

The goods need not be identical or even competitive in order to find a likelihood of confusion. Rather, the question is whether the goods are marketed in a manner that “could give rise to the mistaken belief that [the] goods emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 227 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (“Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services.”); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“even 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”); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1109 (2007).

Here, the Examining Attorney has established through Internet printouts that a number of third parties use the same mark for wine on the one hand and beer on the other. For example, Rev Winery & Brewing Company uses REV for both beer and wine:



Witches Winery and Brewing Co. does the same:










June 13, 2018 Office Action TSDR 7, 10, 14-15. Similarly, in 2012 Copp Winery became Copp Winery and Brewery, and it now offers both wine and beer under its revised trade name, while Crown Valley, Mackinaw Trail, Spring Gate, Schram Vineyards Winery & Brewery and Westbend Winery & Brewery each operate a winery and a brewery under their respective names. January 22, 2019 Office Action TSDR 68-83, 93-101; September 9, 2019 Denial of Request for Reconsideration TSDR 162-63, 168-69.

A Vine Pair article entitled “Grape and Grain: Nine Winemakers That Are Also Brewing Craft Beer” recognizes this as a trend. Most of the nine winemakers listed are not cited above, thus adding to the total number of wineries/breweries included in the Examining Attorney’s evidence. The article indicates that increasingly “lines are being crossed, and so too are loyalties to any one beverage.” These trends are

“breeding bi-curious imbibers and producers alike,” leading to “the budding popularity of the hybrid brewery-winery. Across the country, winemakers are becoming brewers, and brewers turning into vintners.” January 22, 2019 Office Action TSDR 102-109.

The Examining Attorney also relies on a large number of use-based third-party registrations showing that the same marks are registered in connection with beer on the one hand and wine on the other, as follows:

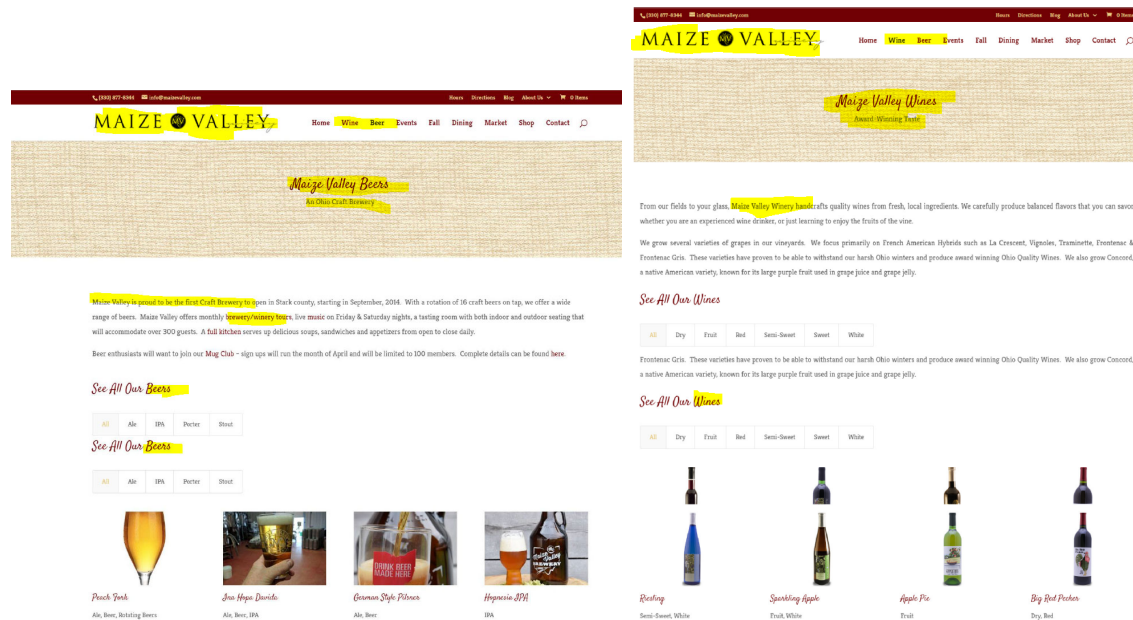
FEASTY Reg. No. 4978590	IT TAKES A TEXAN Reg. No. 4833373	 Reg. No. 4887801	GOLDEN GRIZZLY Reg. No. 5037342
TROPHY ROOM Reg. No. 5604011	 Reg. No. 5096461	LOGIS DE LA FONT Reg. No. 5007153	TULASI Reg. No. 5116240
A CRAFTED EXPERIENCE Reg. No. 5159453	TERP Reg. No. 5166429	 Reg. No. 5326773	UBC Reg. No. 5381909
 Reg. No. 5227784	DELICIOUS RED HARD APPLE CIDER Reg. No. 5225052	SPRING GATE Reg. No. 5301317	CHEERS BEACHES Reg. No. 5551925
 Reg. No. 5531596	SCHILLINGBRIDGE Reg. No. 5480757	LAKE LIFE Reg. No. 5603137	SMALL LIKE Reg. No. 5565879

 Reg. No. 4951746	GRIMALDI'S COAL BRICK-OVEN PIZZERIA Reg. No. 4984116	BEAT CULTURE Reg. No. 5662013	ALCHEMΛ Reg. No. 5760516
 Reg. No. 5733907			

Id. at 8-67; September 9, 2019 Denial of Request for Reconsideration TSDR 7-136. “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.” *See In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1998).

This evidence establishes that beer and wine are related. It is also consistent with the records developed in other cases. *See, e.g., Anheuser-Busch, LLC v. Innovopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1826-27 (TTAB 2015) (citing cases in which “this Board has found beer and wine related on a number of occasions ... the parties have not cited any precedential decision holding beer and wine unrelated for purposes of a likelihood of confusion analysis”).

Furthermore, the Examining Attorney has established that beer and wine move in the same channels of trade to the same consumers. For example, Maize Valley operates a brewery and a winery, which obviously sells both beer and wine:



June 13, 2018 Office Action TSDR 7, 10-13. Nashoba Winery, Round Barn, Backyard Barn Winery & Microbrewery, Bulldog Beer & Wine, Corkscrew, Donimion Wine and Beer, Fenton Winery & Brewery and Lighthouse Beer & Wine also sell both wine and beer. January 22, 2019 Office Action TSDR 85-92; September 9, 2019 Denial of Request for Reconsideration TSDR 138-141, 144-148, 153. In addition, there are at least several wine and beer festivals where wine and beer are served. September 9, 2019 Denial of Request for Reconsideration TSDR 142-43, 149-152. This evidence is of course also supported by the evidence cited above concerning the relationship between the goods.

Thus the record also establishes that wine and beer travel in the same channels of trade to the same classes of consumers. *See also Anheuser-Busch*, 115 USPQ2d at

1827 (“it is clear that beer and other alcoholic beverages (including wine) are sold to consumers in many of the same channels of trade, including retail outlets such as liquor stores, supermarkets, convenience stores, restaurants, and bars ...”). These factors therefore also weigh in favor of finding a likelihood of confusion.

Applicant’s attacks on the Examining Attorney’s evidence are unpersuasive. Applicant claims that “it is unusual for wine and beer to be produced by the same source under the same mark.” It bases this argument on the fact that the Examining Attorney only introduced 32 third-party registrations for marks covering both beer and wine, even though there are allegedly 51,716 registrations in Class 33 (which covers wine). July 16, 2019 Request for Reconsideration TSDR 6-8. Applicant’s position is closely analogous to one we have previously rejected for reasons which are also applicable here:

[t]here is no requirement for goods to be found related that all or even a majority of the sources of one product must also be sources of the other product. Therefore, evidence showing only that the source of one product may not be the source of another product does not aid applicant in its attempt to rebut the evidence of the examining attorney. Second, the mere fact that some goods are not included in a registration's identification of goods does not establish that the owner of the mark has not registered the mark for those goods in another registration since, for example, the registrant may have begun using the mark on those goods at a later date. Third, the law recognizes that trademark owners have different marks that are used as a house mark, a mark for a line of products, and a mark for specific items. It is, therefore, to be expected that many registrations for marks would not cover all of a party's goods and services.

In re G.B.. Tile and Stone, Inc., 92 USPQ2d 1366, 1370 (TTAB 2009). Of course, even if Applicant's evidence accurately reflects the state of the register, it may reveal nothing more than the repeated and consistent refusal of applications covering beer based on existing registrations of similar marks for wine. The 32 registrations made of record by the Examining Attorney support the finding that the goods are related.

Similarly, Applicant relies on evidence that there are more than 8,702 wineries in the United States, and claims that the Examining Attorney's evidence of "only" 29 wineries/breweries establishes that only a small percentage of wineries produce both wine and beer. December 11, 2018 Office Action response TSDR Office 115, 119; 10 TTABVUE 7. We find that the relatively voluminous evidence of third-party use of the same marks for both wine and beer is enough to establish a relationship between the goods, even if only a relatively small percentage of wineries also produce beer and a relatively small percentage of breweries also produce wine. Moreover, the Vine Pair article calls Applicant's conclusion into question, as it suggests that breweries/wineries are not at all uncommon and are in fact an increasing trend. The Examining Attorney's evidence establishes that the practice is common enough that those familiar with LORD LION beer may assume that LORD LYON wine comes from the same source.

Next, Applicant relies on 13 "pairs" of registrations for identical or similar marks owned by different owners, in which one mark is registered for beer and the other for wine. December 11, 2018 Office Action response TSDR 138-215. Applicant argues that "[i]n registering these marks, the USPTO necessarily determined that even

identical trademarks can peacefully coexist for both wine and beer.” 10 TTABVUE 8. Again, Applicant’s evidence does not support its argument. Proving that marks coexisted on the Register “does not prove that they coexisted during that time without confusion in the marketplace.” *In re Thomas*, 79 USPQ2d 1021, 1028 (TTAB 2006). Furthermore, we do not know whether there are licenses or coexistence agreements, much less the terms thereof, which could explain the coexistence of these registrations. Ultimately, “neither the Trademark Examining Attorney nor the Board is bound to approve for registration an Applicant’s mark based solely upon the registration of other assertedly similar marks for other goods or services having unique evidentiary records.” *In re Datapipe, Inc.*, 111 USPQ2d 1330, 1336 (TTAB 2014); *see also In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“The Board must decide each case on its own merit Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”).

II. Conclusion

The marks are similar, the goods related and the channels of trade and classes of consumers overlap. There is therefore a likelihood of confusion.

Decision: The refusal to register Applicant’s mark under Section 2(d) of the Trademark Act is affirmed.