

This Opinion is Not a
Precedent of the TTAB

Mailed: October 3, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re High Water Brewing, Inc.
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Serial No. 85886282
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Candace L. Moon of The Craft Beer Attorney, APC,
for High Water Brewing, Inc.

Colleen Dombrow, Trademark Examining Attorney, Law Office 101,
Ronald Sussman, Managing Attorney.

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Before Bucher, Bergsman and Ritchie,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

High Water Brewing, Inc. (“Applicant”) seeks registration on the Principal Register of the mark **No Boundary IPA** (in standard characters) for beer in International Class 32.¹ Applicant disclaimed the exclusive right to use the term “IPA.”²

¹ Application Serial No. 85886282 was filed on March 26, 2013, based upon applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

² “IPA” is the abbreviation for “India Pale Ale.” Applicant argues that “... NO BOUNDARY IPA suggests to the consumer that the good is not the typical India Pale Ale (IPA), that this

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the registered mark **NO BOUNDARIES**, in standard character form, for wines, in Class 33, as to be likely to cause confusion.³

After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the 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 services. *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").

[is] an edge-pushing stylistically adventurous beer crafted for thrill-seeking IPA enthusiast."). India Pale Ale is "a golden ale with a strong flavor of hops and relatively high alcohol content, originally brewed in England for export to India." **THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE** (2014) attached to the Trademark Examining Attorney's Brief. The Board may take judicial notice of dictionary definitions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

³ Registration No. 4242366, issued November 13, 2012.

A. The similarity or dissimilarity of the marks in their entirety in terms of appearance, sound, connotation and commercial impression.

We turn first to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. In a particular case, “finding of similarity as to any one factor (sight, sound or meaning) alone ‘may be sufficient to support a holding that the marks are confusingly similar.’” *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) (citations omitted). *See also In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1987). In comparing the marks, we are mindful 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) (citation omitted). *See also San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Since the goods at issue are beer and wine, we are dealing with average consumers who drink beer and wine.

The marks **No Boundary IPA** and **NO BOUNDARIES** are similar in appearance, sound, connotation and commercial impression. In reaching this finding of fact, we have identified the term “No Boundary” as the dominant element of Applicant’s mark because the term “IPA” describes the product coming from the **No Boundary** source (*i.e.*, **No Boundary** brand IPA or India Pale Ale). It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), *quoting, In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1983) (“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”); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”).

While we have identified the term “No Boundary as the dominant part of Applicant’s mark **No Boundary IPA**, we are cognizant that the similarity or dissimilarity of the marks is determined based on the marks in their entireties. The analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *In re National Data Corp.*, 224 USPQ at 751. 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. As indicated above, we focus on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012). In this case, the term IPA has a descriptive, if not generic, meaning and, therefore, has little, if any, source indicating significance.

The significance of “No Boundary” as the dominant element of Applicant’s mark is reinforced by its location as the first part of the mark. *See Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t 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 Inc. v. Veuve Clicquot Ponsardin Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word).

Applicant’s use of the singular “No Boundary” and Registrant’s use of the plural “No Boundaries” has little bearing on our analysis. Case law holds that use of the plural form of a term “is almost totally insignificant in terms of the likelihood of confusion of purchasers.” *In re Pix of Am., Inc.*, 225 USPQ 691, 692 (TTAB 1985).

See also Weidner Publ'ns, LLC v. D&B Beauty Care Co., 109 USPQ2d 1347, 1355 (TTAB 2014) (“It is well established that trademarks and/or service marks consisting of the singular and plural forms of the same term are essentially the same mark.”).

Thus, the terms NO BOUNDARY and NO BOUNDARIES share the same meaning and commercial impression to the relevant consumer.

Applicant argues, in essence, that the term “No Boundary” or “No Boundaries” has been registered more than 30 times, albeit not for alcoholic products, and that, therefore, Applicant’s mark is sufficiently different from those registered marks to avoid confusion.⁴ However, Applicant’s third-party registrations for variations of NO BOUNDARY for various goods and services are of limited probative value because they do not cover the goods at issue. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) (the third-party registrations are of limited probative value because the goods identified in the registrations appear to be in fields which are far removed from the goods at issue). *See also Key Chemicals, Inc. v. Kelite Chemicals Corp.*, 464 F.2d 1040, 175 USPQ 99, 101 (CCPA 1972) (“Nor is our conclusion altered by the presence in the record of about 40 third-party registrations which embody the word ‘KEY.’ The great majority of those registered marks are for goods unrelated to those in issue, and there is no evidence that they are in continued use. We, therefore, can give them but little weight in the circumstances present here.”); *In re W.W. Henry Co.*, 82 USPQ2d 1213, 1215 (TTAB 2007).

⁴ Applicant’s Brief, pp. 3-4.

In view of the foregoing, we find that the marks are similar in their entireties in terms of appearance, sound, connotation and commercial impression such that this *du Pont* factor favors a finding of likelihood of confusion.

B. The similarity or dissimilarity and nature of the goods.

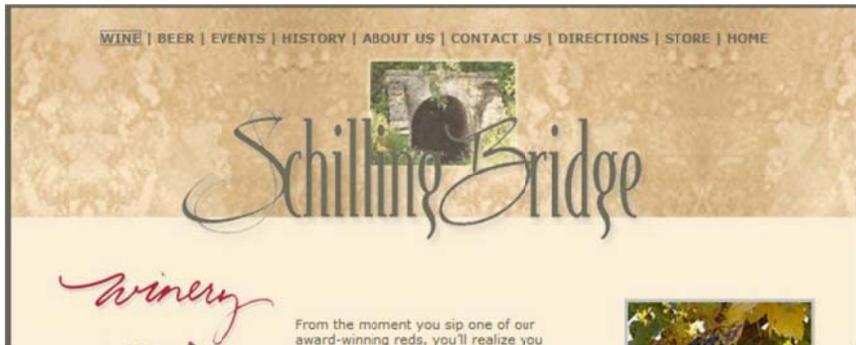
The Trademark Examining Attorney has submitted numerous use-based, third-party registrations for products listed in both the application and registration at issue. Third-party registrations which individually cover a number of different goods that are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods are of a type which may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86; *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). The registrations listed below are representative.⁵

Mark	Reg. No.	Goods
SWEET JESUS	3994422	Beer; wine
UNCLE SAM	3396347	<i>inter alia</i> , Beer; wine
Yo No Care	3771079	<i>inter alia</i> , Beer; wine
SCHILLINGBRIDGE	3099373	Beer; wine
EWING YOUNG	3975642	<i>inter alia</i> , Beer; wine

In addition, the Trademark Examining Attorney submitted excerpts from websites showing the same entities selling beer and wine under the same mark. The following examples are representative:

⁵ We have not included the entire description of goods for each registration. We have listed only the goods at issue in this appeal

1. Schilling Bridge website (schillingbridgewinery.com).⁶



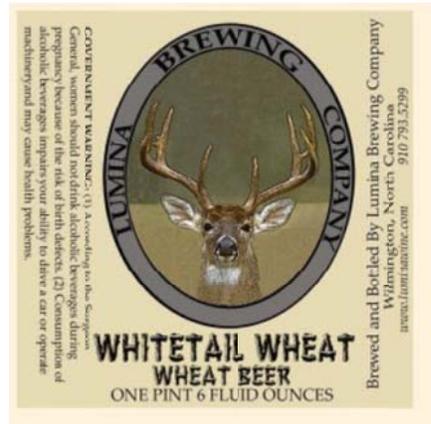
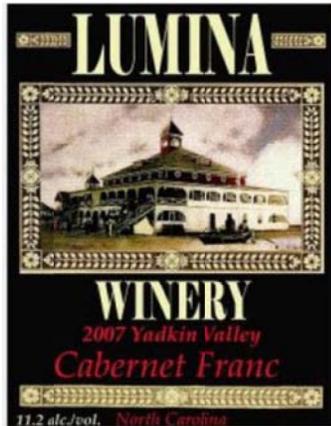
2. Village Vintner website (thevillagevintner.com).⁷



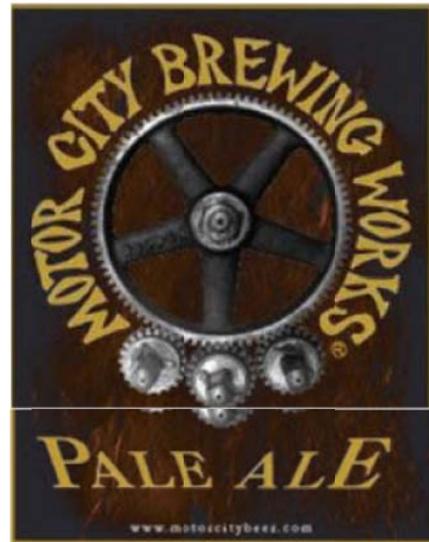
⁶ July 10, 2013 Office action.

⁷ *Id.*

3. Lumina Winery & Brewery (luminawine.com).⁸



3. Motor City Brewing Works (motorcitybeer.com).⁹



Applicant argues that although beer and wine are often purchased at the same places, “it is an extreme rarity that beer and wine ever emanate or are sponsored by the same source. It is the exceptional case for a winery to also be a brewery or for a brewery to also be a winery.”¹⁰ To support this argument, Applicant asserts that

⁸ *Id.*

⁹ January 30, 2014 Office action.

¹⁰ Applicant’s Brief, p. 5.

although there are 7,498 wineries in the United States and as many as 2,538 breweries, it is unable to determine how many brewery-wineries exist.¹¹ There are several problems with Applicant's argument. First, there is no actual proof to support these statements in the record.¹² Second, we have only counsel's statement that "it is an extreme rarity that beer and wine ever emanate or are sponsored by the same source." Putting aside whether a declaration from outside counsel could ever qualify as acceptable proof of these sort of facts,¹³ we have no foundational information about counsel's investigation of, or understanding of, Applicant's or Registrant's business, that would put her in a position to make statements regarding the marketing of the products at issue, which in this case is essential to our analysis of the registrability of the mark. *See In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006 (TTAB 2014) and the cases cited therein. Finally, Applicant's arguments are contradicted by the direct evidence submitted by the Trademark Examining Attorney.

In view of the foregoing, we find that beer and wine are related products and that this *du Pont* factor favors finding a likelihood of confusion.

¹¹ *Id.*

¹² Although Applicant states that the number of wineries and breweries is set forth in Exhibits 1 and 2 attached to the brief, those exhibits were not made of record. Even if Applicant had submitted the exhibits, the evidence would have been untimely because the record in the application should be complete prior to the filing of an appeal. Trademark Rule 2.141(d).

¹³ *Cf. In re DeBaun*, 687 F.2d 459, 214 USPQ 933, 934 & n.4 (CCPA 1982) ("we need not evaluate the weight to be given to the attorney's declaration with respect to statements more appropriately made by appellant"); *In re Nat'l Distiller & Chem. Corp.*, 297 F.2d 941, 132 USPQ 271, 274 (CCPA 1962).

C. Balancing the factors.

Because the marks are similar and the goods are related, we find that Applicant's mark **NO BOUNDARIES IPA** for "beer" is likely to cause confusion with the registered mark **NO BOUNDARY** for "wine."

Decision: The refusal to register Applicant's mark is affirmed.