

This Opinion is Not a
Precedent of the TTAB

Mailed: January 27, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Allan

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Serial No. 86513371

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Gene Bolmarcich, Esq. for Thomas D. Allan.

Joan Blazich, Trademark Examining Attorney, Law Office 122,
John Lincoski, Managing Attorney.

—
Before Taylor, Adlin and Masiello,
Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Thomas D. Allan (“Applicant”) seeks registration of FATE, in standard characters, for “wine.”¹ The Examining Attorney refused registration under Section 2(d) of the Act on the ground that Applicant’s mark so resembles the registered mark FATE BREWING COMPANY, in standard characters (BREWING COMPANY disclaimed), for “beer,”² that use of Applicant’s mark in connection with Applicant’s goods is likely

¹ Application Serial No. 86513371, filed January 24, 2015 under Section 1(a) of the Trademark Act.

² Registration No. 4340049, issued May 21, 2013.

to cause confusion or mistake or to deceive. After the refusal became final, Applicant appealed and Applicant and the Examining Attorney filed briefs.

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.”).

Here, the marks are similar “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports 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). Indeed, Applicant’s mark FATE is identical to the dominant portion of the cited mark, for two reasons. First, the term BREWING COMPANY in Registrant’s mark is merely descriptive and disclaimed. *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*

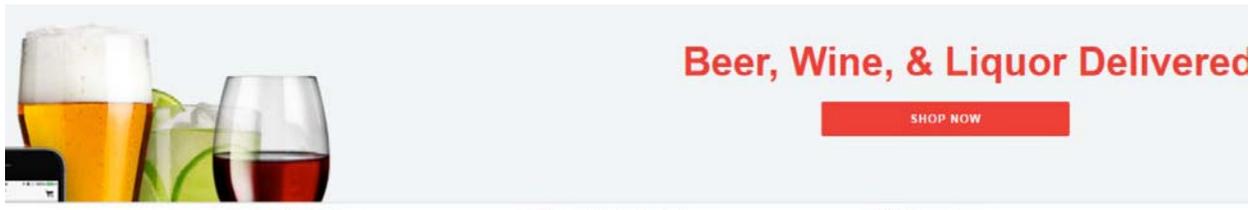
Rests., Inc., 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (BINION'S, not disclaimed word ROADHOUSE, is dominant element of BINION'S ROADHOUSE); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often "less significant in creating the mark's commercial impression"). Second, the shared term FATE appears first in Registrant's mark. *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 America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

We recognize that while the marks look and sound similar due to the shared, first, distinctive and source-identifying term FATE, their commercial impressions are somewhat different. The cited mark immediately conveys that Registrant offers brewed products, which are generally beverages, such as coffee, tea or beer (but not wine). By contrast, Applicant's mark is wholly arbitrary, conveying no information regarding the nature of the goods, with the result being that consumers would understand that Registrant offers brewed beverages or related services, but would not understand the nature of Applicant's goods. The wording BREWING COMPANY in Registrant's mark also constitutes a visual and aural difference between the marks. However, both marks are in standard characters, meaning that they could be displayed in similar styles, and Registrant could emphasize FATE over the nondistinctive BREWING COMPANY.

We find that the similarities between the marks outweigh the differences. This is especially so because the shared term is arbitrary, there is no evidence that the term is used by any other source of alcoholic beverages and the additional wording in Registrant's mark is descriptive, disclaimed and weak. In short, this factor weighs in favor of finding a likelihood of confusion.

The Examining Attorney failed to introduce any evidence that beer and wine are related. However, it is common knowledge that beer and wine are both alcoholic beverages, and the Board has previously found, albeit on different records, that beer and wine are related. *See e.g., Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816 (TTAB 2015) and *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261 (TTAB 2011). On balance, however, in the absence of any evidence in *this* record of a relationship between the goods, this factor standing alone does not support a finding of likelihood of confusion.

As for channels of trade, the Examining Attorney has established that they overlap. The following evidentiary examples show beer and wine being offered not only on the same websites, but also on the same specific pages of certain websites:



Beer, Wine, & Liquor Delivered

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1-Hour Delivery

Largest Online Selection

No Price Markups

POPULAR ITEMS

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Jagermeister
Starting at \$23.00

SHOP



Apothic Red Blend
Starting at \$11.50

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Starting at \$23.99

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Coors Light
Starting at \$9.99

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Southern Comfort
Starting at \$7.30

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Lagunita IPA
Starting at \$10.50

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La Marca Prosecco
Starting at \$15.00

SHOP

http://www.supervinewarehouse.com/ 05/05/2015 11:55:00 PM

Engrave your Bottle of Double Cross Vodka

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grapes relatively early (21-22.5 Brix). The Riesling ... more
Price: ~~\$11.99~~ **\$9.99** Save \$2.00 (17%) [add to cart](#)

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Craft Beers & World Beers

Angry Orchard Iceman
Inspired by the traditional ice ciders of Quebec, Angry Orchard Iceman combines crisp apples with ... more
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A wonderfully complex nose of leather and sweet spices with a touch of very ripe ... more
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Free Shipping

Mas de Libian Vin de Petanque 2012
Beautiful garnet color. A greedy nose with aromas of blackberries and blueberries gently spicy. The ... more
Price: ~~\$13.99~~ **\$11.99** Save \$2.00 (14%) [add to cart](#)

Hess Select Chardonnay 2013
To be honest, we think we're on to something with our Hess Select Chardonnay, and ... more
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enthusiast who is ready for a more ... more
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Marques de Riscal Rosé 2013
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Office Actions of May 5, 2015, July 29, 2016 (printouts from “drizly.com,” “liquormart.com” and “superwinewarehouse.com”). Thus, consumers can be expected to encounter Applicant’s and Registrant’s goods in the same retail outlets, because some stores offer various types of alcoholic beverages, including beer and wine, under the same roof. This factor weighs in favor of finding a likelihood of confusion.

This case is in many ways analogous to *Majestic Distilling*, which involved a refusal to register RED BULL for tequila based on a prior registration of RED BULL for malt liquor. Specifically, both cases involve similar marks (in *Majestic Distilling* they were identical) and evidence of overlapping channels of trade, but in neither case did the Office present direct evidence that the goods are related. In *Majestic*

Distilling, the applicant argued that this was not enough to find a likelihood of confusion, but our primary reviewing court disagreed:

The PTO responds, and we agree, that malt liquor and tequila are similar by virtue of the fact that both are alcoholic beverages that are marketed in many of the same channels of trade to many of the same consumers. 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. The *DuPont* factors require us to consider only "trade channels," which may be, but are by no means necessarily, synonymous with manufacturing channels. In this case, Majestic has not demonstrated that consumers distinguish alcoholic beverages by manufacturer rather than brand name. Because substantial evidence supports the Board's conclusions that malt liquor and tequila are similar goods and are sold in many of the same established and likely-to-continue trade channels, we conclude that the second and third *DuPont* factors, respectively, weigh against Majestic, as well as the first.

Majestic Distilling, 65 USPQ2d at 1204.

Here, we likewise find that confusion is likely. The marks are similar, Registrant's is conceptually strong and there is no evidence of commercial weakness; the goods are similar in nature because they are alcoholic beverages offered through the same trade channels to the same classes of customers. Like the Court, we find these combined factors to be more significant than the absence of evidence showing beer and wine emanating from a single manufacturer under the same mark. Overall, we find that confusion as to the source of Applicant's goods is likely.

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