

This Opinion is not a  
Precedent of the TTAB

Oral Hearing: July 26, 2017

Mailed: September 8, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Iron Hill Brewery, LLC*  
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Serial No. 86684857  
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Anthony M. Brichta of Buckley Brion McGuire & Morris LLP,  
for Iron Hill Brewery, LLC.

Dominic R. Fathy, Trademark Examining Attorney, Law Office 104,  
Dayna Browne, Managing Attorney.

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Before Kuhlke, Adlin and Lykos,  
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Iron Hill Brewery, LLC (“Applicant”) seeks registration on the Principal Register of the mark CRUSHER in standard characters for “beer,” in International Class 32.<sup>1</sup>

The Trademark Examining Attorney refused registration of Applicant’s mark 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 the identified goods, so resembles

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<sup>1</sup> Application Serial No. 86684857 was filed on July 7, 2015, under Section 1(a) of the Trademark Act, based upon Applicant’s allegation of first use and use in commerce on November 1, 2014.

the mark THE CRUSHER in standard characters registered on the Principal Register for “wines” in International Class 33,<sup>2</sup> as to be likely to cause confusion, mistake or deception.

When the refusal was made final, Applicant appealed and requested reconsideration. Upon the denial of the request for reconsideration, the appeal was resumed, briefs were filed and an oral hearing was held on July 26, 2017. We affirm the refusal to register.

### **Likelihood of Confusion**

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *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 Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). Even within the *du Pont* list, only factors that are “relevant and of record” need be considered. *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006). 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).

#### *Similarity/Dissimilarity of the Marks*

Under this factor, we compare Applicant’s mark CRUSHER and Registrant’s mark THE CRUSHER “in their entirety as to appearance, sound, connotation and

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<sup>2</sup> Registration No. 3606645, issued on April 14, 2009, Section 8&15 declaration accepted and acknowledged.

commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). 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). Further, the marks “must be considered ... in light of the fallibility of memory ....” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

The Examining Attorney contends that the marks are “essentially identical” and the addition of “THE” to Registrant’s mark “is not significant in terms of affecting the mark’s commercial impression [because] the term lacks source identifying significance.” 11 TTABVUE 5. We agree.

While Applicant relies on the principal that consumers are more inclined to focus on the first word, prefix or syllable in a mark, that principal is inapplicable in this case, because the first word in Registrant’s mark is merely the definite article “THE.”

In general, the addition of “THE” to a mark does not serve to distinguish it from another mark. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009) (WAVE and THE WAVE virtually identical marks). “When used before a noun, [‘The’] denotes a particular person or thing”; here, the word “The” simply emphasizes the word “CRUSHER,” which is identical to Applicant’s mark. *Id.* See also, *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 33-1534 (Fed. Cir. 1997) (affirming TTAB’s finding that “DELTA” is confusingly similar to THE DELTA CAFE).

Applicant also argues that THE CRUSHER “when utilized by [Registrant] conveys the commercial impression of a wine relating to ‘crushed’ grapes used in the winemaking process.” 9 TTABVUE 13. We consider the mark in the context of the registered goods, and to that extent the word “crusher” may suggest crushing grapes to make wine. However, we do not find this possible meaning for wine sufficient to distinguish the marks. Although the meaning to crush grapes does not extend to beer, the marks still share the general meaning of the word “crusher,” something that crushes, in connection with both wine and beer.

In addition, because Applicant’s and Registrant’s marks are in standard characters, they are not limited to any particular depiction. The rights associated with a mark in standard characters reside in the wording and not in any particular display. *In re RSI Sys., LLC*, 88 USPQ2d 1445, 1448 (TTAB 2008); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988); TMEP § 1207.01(c)(iii) (June 2017). We must consider Applicant’s and Registrant’s mark “regardless of font style, size, or color,” *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d

1253, 1258-59 (Fed. Cir. 2011), including iterations highlighting the common element CRUSHER and minimizing the word “THE” in Registrant’s mark.

Because the marks are nearly identical in sound, appearance, and commercial impression, and while there may be some differences in meaning, they continue to share the general meaning of the word “crusher,” this *du Pont* factor weighs heavily in favor of finding a likelihood of confusion.

*Similarity of the Goods/Channels of Trade/Consumers*

With regard to the goods, channels of trade and classes of consumers, we must make our determinations based on the goods as they are identified in the application and cited registration. *See In re Dixie Rests. Inc.*, 41 USPQ2d at 1534. *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “This factor considers whether ‘the consuming public may perceive [the respective goods of the parties] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 113 USPQ2d at 1086 (quoting *Hewlett Packard*, 62 USPQ2d at 1004). Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or offered by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both Applicant's goods and the goods listed

in the cited registrations. *In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores). The issue 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, 832 (TTAB 1984).

Applicant defines the “central issue” in this case as “whether there is a de facto rule that wine and beer are the same for the purposes of trademark registration.” 13 TTABVUE 2. Very succinctly, there is not, and the Examining Attorney agrees. 11 TTABVUE 10 (“It is agreed there is no per se rule that alcoholic beverages are related.”).

However, “even when goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source.” *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). Here, the record includes 14 third-party use-based registrations that include wine and beer under a single mark.<sup>3</sup> A few examples are set forth below:

Registration No. 3522339 for the mark WORK TRUCK for “beer” and “wine.”<sup>4</sup>

Registration No. 3994422 for the mark SWEET JESUS for “beer” and “wine.”<sup>5</sup>

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<sup>3</sup> October 23, 2015 Office Action at 4-47. The Examining Attorney submitted 17 third-party registrations; however, we have not considered the cancelled registrations or the registration for beer and “barleywine ale” in class 32.

<sup>4</sup> *Id.* at 7

<sup>5</sup> *Id.* at 9.

Registration No. 3099373 for the mark SHILLINGBRIDGE for “beer” and “wine.”<sup>6</sup>

Registration No. 3975642 for the mark EWING YOUNG for “beer” and “wine.”<sup>7</sup>

Registration No. 4136155 for the mark SALTY DOG for “beer” and “wine.”<sup>8</sup>

Registration No. 4133934 for the mark O’HARA’S for “beer” and “wine.”<sup>9</sup>

Registration No. 4464912 for the mark LAND RUN for “beer” and “wines.”<sup>10</sup>

Although such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have some probative value to the extent that they serve to suggest that the goods and services listed therein are of a kind which may emanate from a single source under a single mark. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

In addition, the Examining Attorney submitted webpages from five different companies around the country that offer both beer and wine under the same mark. A few examples are set forth below:<sup>11</sup>

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<sup>6</sup> *Id.* at 22.

<sup>7</sup> *Id.* at 24.

<sup>8</sup> *Id.* at 32.

<sup>9</sup> *Id.* at 38.

<sup>10</sup> *Id.* at 46.

<sup>11</sup> *Id.* at 48-57.



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(Missouri)



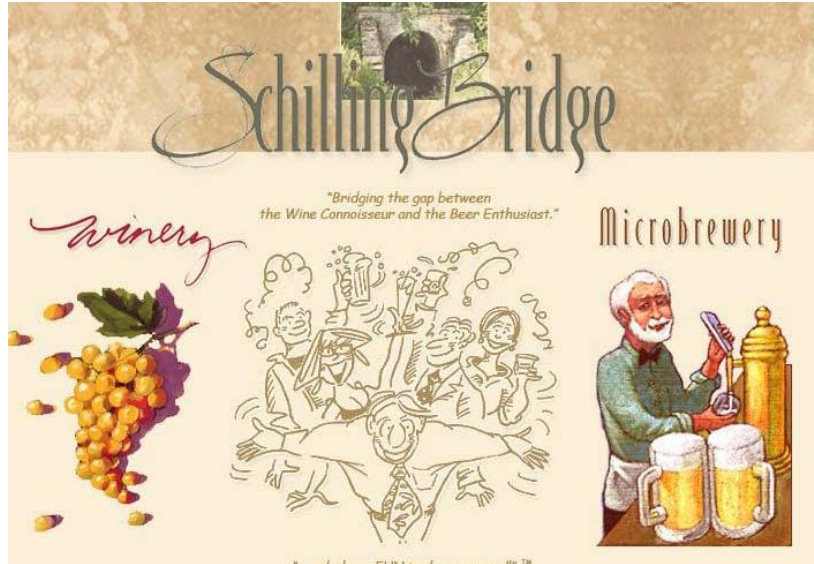
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Such evidence has been found to support a finding that wine and beer are related. *In re Kysela Pere et Files Ltd.*, 98 USPQ2d 1261 (TTAB 2011); *In re Uinta Brewing Company*, Ser. No. 86333439 (June 29, 2016) (non-precedential). In fact, this Board has found beer and wine related on a number of occasions. *See e.g. Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816 (TTAB 2015) (WINEBUD for wine confusingly similar to BUD for beer); *In re Kysela Pere et Files Ltd.*, 98 USPQ2d 1261 (HB for wine confusingly similar to HB and design for beer); *In re Sailerbrau Franz*

*Sailer*, 23 USPQ2d 1719 (TTAB 1992) (CHRISTOPHER COLUMBUS for beer confusing similar to CRISTOBAL COLON and design for wine); *In re Gebr. Eckel GMBH*, 196 USPQ 198 (TTAB 1976) (mem.) (THE STUDENTPRINCE for wines confusingly similar to STUDENT PRINCE for beer); *Krantz Brewing Corp. v. Henry Kelly Importing & Distrib. Co. Inc.*, 96 USPQ 219 (Exm’r in Ch. 1953) (Patent Office Examiner in Chief 1953) (Old Dutch for wine likely to cause confusion with Old Dutch for beer); *Fruit Indus., Ltd. v. Ph. Schneider Brewing Co.*, 46 USPQ 487 (Comm’r Pats. 1940) (La Fiesta for beer likely to cause confusion with La Fiesta for wine). *See also 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 trade to many of the same consumers.’”) (quoting *In re Majestic Distilling*, 65 USPQ2d at 1204 (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 support of its position that these goods are not related and that confusion is unlikely, Applicant quotes a passage from *In re Coors Brewing* that is dicta, simply referring to a refusal that had been reversed below by the Board and was not before the Court. *In re Coors Brewing, Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1061 (Fed. Cir. 2003). In any event, the marks in that case had “significant differences” and the term BLUE MOON was “not a particularly strong mark” for restaurant, food and beverages in light of the evidence of third-party use. *Id.* at 1062-3. Applicant also relies on several unpublished cases, but in each the refusals under Section 2(d) were

reversed based on the dissimilarity of the marks. The goods, wine and beer, were in fact found to be related, however. For example, in *In re Reubens Brews LLC*, Ser. No. 86066711 (October 2015) (non-precedential), the Board found “that there is some degree of relationship between beer and wine [and] [t]his factor favors a finding of a likelihood of confusion.” *Id.* at 7. In *In re S.P.H. – Gerard Bertrand*, Ser. No. 86075352 (September 28, 2015) (non-precedential), the Board found that “the evidence shows that while there is some degree of relationship between beer and wine, it is not strong. Nevertheless, we find that this factor slightly favors a finding of a likelihood of confusion.” *Id.* at 4-5. Finally, in *In re Wine B&B Co.*, Ser. No. 85125544 (February 6, 2013) (non-precedential), the Board did not analyze the similarity of the goods, other than to state it would favor finding a likelihood of confusion.

The Board has previously addressed Applicant’s argument that an entity producing both beer and wine is the exception and not the rule. First, the fact that the Examining Attorney submitted approximately 14 probative third-party registrations listing beer and wine does not mean that they are the only registrations that include these goods (and some of the cases cited above indicate that they are not). There is no requirement for the examining attorney to submit all the evidence that supports his position. *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d at 1265. Moreover, this evidence is further supported by the website evidence. Second “[t]he fact that small producers of the type shown by the Examining Attorney’s internet evidence may represent only a small segment of the entire wine or beer market does not, in our view, reduce the potential for trademark confusion from ‘likelihood’ to a

mere possibility, especially where the marks at issue are identical and distinctive. Where identical marks are involved, the degree of similarity between the parties' goods that is required to support a finding of likelihood of confusion declines." *In re Uinta Brewing*, Ser. No. 86333439 at 6 (citing *In re Shell Oil Co.*, 26 USPQ2d at 1688-89). Here, the marks are nearly identical.

Applicant also argues that the Examining Attorney did not produce evidence to establish how representative his examples are of the industry as a whole. We find the evidence sufficient to show a relationship between wine and beer and Applicant did not submit relevant evidence to rebut that showing, including evidence of "context." In view thereof, we find that wine and beer are sufficiently related such that use under such similar marks is likely to cause confusion.

Moreover, because there are no limitations as to channels of trade or classes of purchasers in the application or cited registration, we must consider all ordinary channels of trade and consumers for these types of goods. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012). Applicant's arguments that (1) Applicant is not a winery and operates as a brewery and "brewpub" on the east coast, (2) Applicant's house mark is used on all products, and (3) Registrant does not produce beers and only makes wine in California, are irrelevant. Their respective actual uses and marketing, i.e., restrictions to use, are not reflected in the application or cited registration. Applicant misapprehends the law on this point. The statement in *In re Reubens Brews LLC*, that "the circumstances surrounding their marketing are such that they could give rise to the mistaken belief

that they emanate from the same source,” means the ordinary circumstances and marketing for goods of those types, not the specific circumstances and marketing for Applicant’s and Registrant’s specific goods. *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1722 (citing *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). The record shows wine and beer offered on the same webpage of third-party websites and these are common alcoholic beverages that would be sold in liquor stores (and grocery stores depending on the state).<sup>12</sup> As such, the trade channels are identical.

In view thereof, these *du Pont* factors also favor a finding of likelihood of confusion.

### **Balancing of Factors**

In conclusion, because the marks are very similar, the goods are related, and the channels of trade and consumers overlap, we find that confusion is likely between Applicant’s mark CRUSHER for “beer” and Registrant’s mark THE CRUSHER for “wines.”

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

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<sup>12</sup> Applicant’s arguments pertaining to the liquor laws of one state (Pennsylvania) are not persuasive because Applicant is seeking a nationwide federal trademark registration.