

This Opinion is not a  
Precedent of the TTAB

Mailed: June 22, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Fetzer Vineyards*

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Serial No. 86789970

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George W. Lewis of Westerman, Hattori, Daniels & Adrian LLP,  
for Fetzer Vineyards.

Ahsen Khan, Trademark Examining Attorney, Law Office 113,  
Odette Bonnet, Managing Attorney.

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Before Wellington, Adlin and Heasley,  
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Fetzer Vineyards (“Applicant”) seeks registration of the standard character mark  
HOODWINKED on the Principal Register for wine in International Class 33.<sup>1</sup>

The Trademark Examining Attorney refused registration of Applicant’s mark  
under Section 2(d) of the Trademark Act based on a likelihood of confusion with the

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<sup>1</sup> Application Serial No. 86789970 was filed on October 16, 2015, based upon Applicant’s  
allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the  
Trademark Act.

registered standard character mark HOODWINKED on beer in International Class 32.<sup>2</sup>

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed and is now fully briefed. For the reasons discussed below, 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*, 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”). Varying weights may be assigned to each *du Pont* factor depending on the evidence presented. *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687-88 (Fed. Cir. 1993).

#### *The Identity of the Marks*

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<sup>2</sup> Registration No. 4675868 issued on January 20, 2015.

The marks are identical. This factor weighs heavily in favor of finding a likelihood of confusion. Furthermore, because the marks are identical, the degree of similarity between the goods that is required to support a finding of likelihood of confusion is reduced. *In re Shell Oil Co.*, 26 USPQ2d at 1689; *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002); and *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).

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

It is not necessary that the goods be similar or competitive in character to support a holding of likelihood of confusion; it is sufficient that the goods are related in some manner and/or that conditions and activities surrounding marketing of these goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same source. *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1722; *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010); *Schering Corporation v. Alza Corporation*, 207 USPQ 504, 507 (TTAB 1980); *Oxford Pendaflex Corporation v. Anixter Bros. Inc.*, 201 USPQ 851, 854 (TTAB 1978).

To show a relationship between Applicant's wine and Registrant's beer, the Examining Attorney submitted printouts from seventeen (17) different third-party websites advertising, or showing an establishment that offers, both beer and wine under the same mark [or trade name]; and he submitted eleven (11) third-party, use-

based registrations for marks that cover both beer and wine.<sup>3</sup> Some examples of use-based, third-party registration evidence include: CHARLEVILLE (Reg. No. 4694631); JESTER & JUDGE (Reg. No. 4832965); ROADIES (Reg. No. 4838384); IT TAKES A TEXAN (Reg. No. 34833373); REVER & DESIGN (Reg. No. 4887801) and PLANK WALKER (Reg. No. 4896450).<sup>4</sup>

Excerpts from some of the websites include:

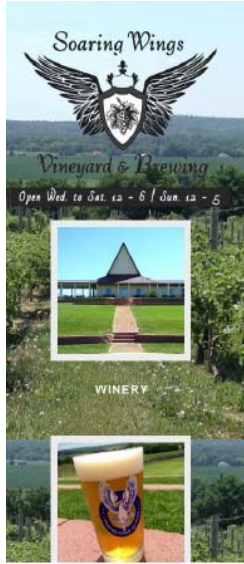


<sup>3</sup> Evidence attached to Office Actions issued on December 9, 2015; June 15, 2016; and January 5, 2017.

<sup>4</sup> The first three registrations were attached to Office Action dated December 9, 2015 and the latter three attached to Office Action dated June 15, 2016.

<sup>5</sup> Office Action issued on June 15, 2016. TSDR p. 5. All references to TSDR citations are to documents in Adobe Acrobat (.pdf) format.

<sup>6</sup> *Id.* at p. 11.



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Applicant takes issue with the relevance of this evidence, arguing that it “consists of several small family operations making artisanal beer and wine which in most cases are available only for onsite consumption, a registration issued under section 44(e), beer pubs, a registration issued to an individual who is likely only a mere distributor of foreign produced sake etc.”<sup>9</sup> Applicant also relies on the evidence that it attached to its responses and the request for reconsideration. Specifically, Applicant filed what it describes is “a strategy printout from the Corsearch database directed to registrations for the marks of the top ten beers sold in America – SAMUEL ADAMS, YUENGLING, GUINNESS, FAT TIRE, DOS EQUIS, STELLA ARTOIS,

<sup>7</sup> Office Action issued on December 9, 2015. TSDR p. 36.

<sup>8</sup> *Id.* at p. 23.

<sup>9</sup> 9 TTABVUE 5. Applicant is correct that, with the first Office Action, the Examining Attorney attached a single third-party registration issued to a foreign entity and without any interstate commerce use dates asserted; however, the registration was not listed in the Examining Attorney’s brief and is not included in the eleven third-party registrations mentioned *supra*.

HEINEKEN, CORONA and ST. PAULI GIRL.”<sup>10</sup> Applicant argues in its brief that the search “disclosed one registration for the mark STELLA ARTIOS for wine that issued under Section 66(a). Another registration for this mark included a beer and wine festival, but did not cover wine *per se*. This data shows that with a single exception, none of the other registrations included beer and wine.”<sup>11</sup>

With its request for reconsideration, Applicant attached materials that it described as follows:

Attached is a printout of a search of breweries from the official state of Virginia Tourist website. Of all of the results only a single Brewery, 2 WITCHES WINERY & BREWING CO. referenced the operation of a winery. This party described a nano-brewery that only sells beer by the glass or growler. According to the attached downloaded page from their website, 2Witches Winery& Brewing Co. is the first to co-located [sic] (under one roof) a winery and brewery in Virginia.<sup>12</sup>

Upon review of the entire record, we conclude that there is a relationship between beer and wine. While we do not necessarily agree with the Examining Attorney’s assessment that the evidence shows that beer and wine are “closely related,”<sup>13</sup> we find that there are enough examples of beer and wine being offered under the same trademark or trade name that the goods are related. Aside from it being common knowledge that they are alcoholic beverages and often consumed with meals, the evidence shows that they are sometimes marketed together in the same trade

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<sup>10</sup> Id. at 9. Referenced evidence is attached to Applicant’s response dated May 27, 2016. TSDR pp. 31-32.

<sup>11</sup> *Id.*

<sup>12</sup> 4 TTABVUE 1.

<sup>13</sup> 11 TTABVUE 5-6.

channels. For example, the Schram Vineyards Winery & Brewery website shows how a single entity may cater to both the “wine and beer lover” by offering “hand-crafted wines, as well as a rotating selection of craft-beer recipes in one location,” and that “by marrying country and city, wine and beer – Schram brings vineyard wine and craft beer drinkers together in Minnesota at last!”<sup>14</sup> The third-party registrations further show that beer and wine may emanate from the same source under a single mark. See *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). We would be remiss if we did not also point out that, although this case must be decided on its own merits and record, the Board has previously found 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). Finally, with respect to Applicant’s evidence, even if we agreed that it establishes that the 10 most popular beers do not share trademarks with wine, this would not be sufficient by itself to establish that beer and wine are unrelated generally. Indeed, Applicant’s evidence has little probative value even if it establishes what Applicant claims it does.<sup>15</sup>

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<sup>14</sup> Office Action issued on January 5, 2017. TSDR p. 15-17.

<sup>15</sup> Particularly, with respect to Applicant’s Corsearch database evidence was not accompanied by a declaration or affidavit giving some context to the search, *i.e.*, the scope of the database, and Applicant did provide copies of the resulting registrations or evidence to support the conclusory sentences it makes in its brief (See, *e.g.*, “This search disclosed one registration for the mark STELLA ARTIOS for wine that issued under Section 66(a) and included a laundry list of goods. Another registration for the STELLA ARTIOS mark included a beer and wine festival, but did not cover wine *per se.*” at 12 TTABVUE 4). Applicant’s assertion as to the top ten selling beers in the United States also lacks evidentiary support. Even if we were to accept as common knowledge the popularity of the beer brands mentioned by

*Conclusion*

Given that Applicant seeks to register the exact same arbitrary term, HOODWINKED, for related goods which travel in some of the same channels of trade, confusion is likely and registration must be refused under Section 2(d) of the Act.

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

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Applicant, their share of the market remains unknown and it is also common knowledge that there are numerous additional beer brands.