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## RECENT DECISIONS OF THE TTBA IN THE BEVERAGE INDUSTRY

This past year, there were some non-precedential decisions of the Trademark Trial and Appeal Board (TTAB) that have dealt with the growing market of artisanal alcoholic beverages. As a specific business market, it has enjoyed a boom during these otherwise harsh economic times.<sup>1</sup>

In *re High Water Brewing, Inc.*<sup>2</sup> the TTAB affirmed the examining attorney's refusal to register High Water Brewing's mark "No Boundary IPA", presented for beer in International Class 32, on the ground that the mark closely resembled the registered mark "No Boundaries" for wines in Class 33 and thus it was likely to cause confusion under Section 2(d) of the Lanham Act.<sup>3</sup> The TTAB based their determination on the factors relevant to the issue of likelihood of confusion set forth in *In re E. I. DuPont de Nemours & Co.*<sup>4</sup>, focusing on the key considerations of the similarity between the marks and the similarity between the services.<sup>5</sup> According to the TTAB, the finding of similarity as to any one factor (sight, sound or meaning) can alone be sufficient to warrant a finding that the marks are confusingly similar.<sup>6</sup> Further, it stated that in considering the similarity of the marks the proper test is not a side-by-side comparison but instead whether the marks are similar enough in terms of their commercial impression that persons who encounter the mark would likely assume that there is a connection between the parties.<sup>7</sup>

In finding that the terms No Boundary IPA and No Boundaries share the same meaning and commercial impression to the relevant consumer, the TTAB considered that while the marks had to be considered as a whole, the dominant element of the marks was the term "No Boundary."<sup>8</sup> The TTAB also stated that the term "IPA" in High Water Brewing's mark was descriptive, if not generic and had little source identifying significance. Similarly, the board mentioned that the difference of one mark being singular and the other being plural had little bearing on their analysis.<sup>9</sup> After dismissing High Water's argument regarding third party registrations of similar marks for non alcohol-related products, the TTAB found that the marks are similar in terms of appearance, sound, connotation and commercial impression and

found a likelihood of confusion and went on to discuss the second factor, the similarity or dissimilarity and nature of the goods.

In another beer and wine related case, The Bruery, LLC,<sup>10</sup> applicant sought to register the mark “5 Golden Rings” for beer; malt liquor in International Class 32. The examining attorney refused registration under Section 2(d) of the Lanham Act<sup>11</sup> on the grounds that the applicant’s mark was likely to cause confusion with two already registered marks: “Gold Ring” on International Class 33 for Wines and “Gold Ring Vineyards” in the same class for alcoholic beverages except beer.

As with the *High Water Brewing* case, the TTAB focused their analysis on the factors set forth by *DuPont*. To support its analysis, the TTAB cited Coach Servs. Inc. v. Triumph Learning LLC<sup>12</sup>, and stated that the question was whether the marks are sufficiently similar in terms of their commercial impression so that persons would likely assume a connection between the parties. The TTAB was further unconvinced by applicant’s argument that “5 Golden Rings” was intrinsically associated with Christmas and therefore it engenders an entirely different commercial impression from the registered marks. According to the board, both marks are comprised by the word “gold” and a variation, “golden” and the word “ring” or “rings”. According to the TTAB, the literal portions of said marks are similar in sound, appearance, connotation and meaning, and therefore it found that applying the first *DuPont* factor pointed to a likelihood of confusion.

Turning to the respective goods as identified in the corresponding application and registration, the TTAB dismissed applicant’s argument that while the goods are somewhat related in the minds of consumers, they wouldn’t be easily confused because they are a craft brewery selling beer and malt liquors, while the registrant sells wine and other alcoholic beverages excluding beer. Pointing to applicant’s incorrect analysis of the second *DuPont* factor, the TTAB stated that the respective goods need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.”<sup>13</sup> According to the TTAB, the issue is not whether purchasers would confuse the goods, but whether there is a likelihood of confusion as to the source of the goods.<sup>14</sup>

However, in contrast with the *High Water Brewing* case, the board went on to discuss both the third and fourth *DuPont* factors. In examining the channels of trade, the board found that the goods would travel in all channels of trade appropriate for such goods, such as liquor

stores and online retailers and thus found a likelihood of confusion regarding the similarity of the trade channels for the products. As to the fourth factor, the applicant argued that consumers for fine wines and craft beers were highly educated and therefore able to discern between different brand names. The board rejected said argument and stated that while some of the consumers might be savvy and careful, they must assume that the purchasers include casual consumers and that even if prospective purchasers are sophisticated and knowledgeable it does not necessarily mean that they would be immune from source confusion.<sup>15</sup>

In a slightly different case, In re The Wine Group LLC<sup>16</sup>, the TTAB examined the refusal to register “The Happy Grape” as a mark for wine in International Class 33, as the examining attorney denied registration and a subsequent reconsideration under Section 2(d) of the Trademark Act<sup>17</sup> on the grounds of likelihood of confusion with a mark registered for wine bars in International Class 43 that consists of the words “The Happy Grape” alongside a design of a smiling grape.

In discussing the first *DuPont* factor, the board expressed that “the focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks.”<sup>18</sup> Similar to the analysis in the aforementioned cases, the board goes on to mention the importance of considering the entirety of the marks rather than dissecting the marks into their various components, but that there is ultimately nothing improper in stating that more or less weight has been given to a specific feature of a mark provided that the ultimate decision rests on a consideration of the marks as a whole.<sup>19</sup> But, although the analysis of the case follows mostly the same line as *High Water* and *Bruery* cases, there is a distinction to be made since in this case the registered mark features prominent design aspects in conjunction with the words “The Happy Grape”. According to the TTAB, when marks consist of words and a design, the words are given greater weight because consumers would use the words to request the goods or services.<sup>20</sup> Furthermore, the board stated that according to the doctrine of legal equivalents, a pictorial representation and its literal equivalent are likely to impress the same mental image on purchasers.<sup>21</sup>

As for the second *DuPont* factor, the board reiterated that it is not necessary that the goods or services be identical in order to support a finding of likelihood of confusion. It is enough that the goods and services are related in such a manner or that their marketing is such that they could or would be encountered by the same persons in situations that, because of the

similarity between the marks, would give rise to the belief that they originate from the same source or that there is a connection between the sources of the goods and services.<sup>22</sup>

Regarding the similarity of the goods and/or services, the applicant argued that the examining attorney had not proven that its goods (wine) were related to the registrant's services (wine bars) and that the record did not establish that consumers are likely to believe that wines emanate from wine bars.<sup>23</sup> After considering said argument, the board found that the goods and services were related, since the specific *subject* of registrant's services (wine bars) is the same as the applicant's *goods* (wines), citing a group of cases in which registration was denied to applicants whose goods or services had a similar relationship to registrant's goods or services as the case at hand.<sup>24</sup> The TTAB further found that since neither the application nor the registration contains geographic restrictions or limitations regarding channels of trade or classes of purchasers, the board must presume that the goods and services will move in all ordinary channels of trade and are available to all classes of purchasers.

Although related in subject matter, In re Ren Acquisition, Inc.<sup>25</sup> differs from the previously discussed cases because the analysis of the TTAB centers on the distinctiveness of the applicant's mark rather than the likelihood of confusion. Ren Acquisition sought registration of the mark "Blends" in International Class 35 for marketing, advertising and promoting the sale of wine. However, the examining attorney refused registration under Section 2(e)(1) of the Lanham Act<sup>26</sup> on the ground that Blends and Blends, Inc. were merely descriptive because the word "blends" refers to a wine composed of two or more grape varieties and therefore the mark "blends" merely describes the product being marketed, advertised and promoted.

In discussing the applicable law, the board stated that a term is merely descriptive if it immediately conveys knowledge of a quality, feature, function or characteristic of the goods or services for which it is used.<sup>27</sup> The TTAB further stated that the question is not whether someone presented with only the mark could guess the services listed in the identification of services but rather that whether someone that knows what the services are will understand the mark to convey information about them.<sup>28</sup> The board then had to determine whether the relevant customers for wine marketing, advertising and promoting services would perceive the word "blends". The TTAB focused on the word "Blends" because business entity names such as "Inc." have no trademark significance and no source indication capacity.<sup>29</sup> According to the TTAB, it was evidenced that the term "Blends" identifies wine made from two or more

varieties of grapes and it should remain available to other companies offering similar services.<sup>30</sup> The applicant further argued that when used in connection to marketing, advertising or promoting, the term “blends” could refer to many things and not just wine, however, the board quickly reject said argument, stating that the determination of whether a mark is merely descriptive is not considered in the abstract, but in connection with the services at hand.

Another wine related case, *In re Santini Fine Wines, Inc.*,<sup>31</sup> featured a wine maker seeking registration for the mark “Leonessa” in International Class 33 for Wine. The examining attorney refused registration due to its close resemblance to registered mark “Lioness Cellars”, in the same category for “bottles of wine, namely wine sold in bottles.” The TTAB based its analysis on the two main DuPont factors. Regarding the similarity of the goods, the board stated that the goods as described in the application and registration were identical and thus, it must presume that the channels of trade and classes of purchasers would also be the same.<sup>32</sup>

Further, when analyzing the similarity of the marks in their entirety, the board reiterated that in certain cases a finding of similarity regarding one of the factors, be it sight, sound or meaning, might be sufficient to support a holding of confusing similarity.<sup>33</sup>

On a slightly different note, *In re DNA Consulting, LLC*<sup>34</sup> deals with an applicant seeking registration for the mark “The Celebrity Sour” for “alcoholic beverages, namely, pre-mixed alcoholic cocktails” in International Class 33, with the word “sour” being disclaimed at the request of the examining attorney. Registration was refused, however, on the ground that said mark closely resembles registered mark “Celebrity Cellars” (cellars disclaimed), in International Class 33 for “wine” and was likely to cause confusion.

In examining the similarity of the marks, the TTAB reiterated the standard or test regarding the comparison of the marks found in *Coach* and in applying said test, found that the “Celebrity Sour” mark was substantially similar to the “Celebrity Cellars” registered mark. In analyzing the marks, the board determined that the dominant term in both marks was definitely the word “Celebrity” and that because both the words “sour” and “cellar” in the respective marks were used descriptively, the board found that they were substantially similar in sound, appearance, connotation and commercial impression. The board eventually concluded that with substantially similar marks used on similar goods in overlapping channels of trade, there would likely be confusion as to the source of the applicant’s goods.

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- <sup>1</sup> Perlberg, Steven. “The Craft Beer Boom Added \$34 Billion to the Economy Last Year”, Business Insider, Dec. 24, 2013. <http://www.businessinsider.com/craft-beer-boom-added-34-billion-2013-12>, retrieved Nov. 03, 2014.
- <sup>2</sup> 2014 WL 5282254 (Trademark Tr. & App. Bd.)
- <sup>3</sup> 15 U.S.C. § 1052(d).
- <sup>4</sup> 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). The factors are: (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression; (2) the similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use; (3) the similarity or dissimilarity of established, likely-to-continue trade channels; and (4) the conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing.
- <sup>5</sup> High Water Brewing, *supra*, citing In re E. I. DuPont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973)
- <sup>6</sup> *Id.*, citing In re White Swan Ltd., 8 USPQ2d 1534, 1535 (TTAB 1988).
- <sup>7</sup> *Id.*, citing Coach Servs. Inc. v. Triumph Learning LLC, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012).
- <sup>8</sup> *Id.*, citing Stone Lion Capital Partners, LP v. Lion Capital LLP, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) and In re National Data Corp., 224 USPQ at 751.
- <sup>9</sup> High Water Brewing, *supra*, citing In re Pix of Am., Inc., 225 USPQ 691, 692 (TTAB 1985).
- <sup>10</sup> 2014 WL 5035512 (Trademark Tr. & App. Bd.)
- <sup>11</sup> 15 U.S.C. § 1052(d).
- <sup>12</sup> 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012).
- <sup>13</sup> Bruery, LLC, *supra*, quoting Coach Servs. Inc. v. Triumph Learning LLC, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012).
- <sup>14</sup> *Id.*, citing L’Oreal S.A. v. Marcon, 102 USPQ2d 1434, 1439 (TTAB 2012).
- <sup>15</sup> *Id.*, citing Stone Lion Capital Partners, 110 USPQ2d at 1163.
- <sup>16</sup> 2014 WL 5282255 (Trademark Tr. & App. Bd.)
- <sup>17</sup> 15 U.S.C. § 1052(d).
- <sup>18</sup> Wine Group, *supra*, citing Joel Gott Wines LLC v. Rehoboth Von Gott Inc., 107 USPQ2d 1424, 1430 (TTAB 2013).
- <sup>19</sup> *Id.*, citing In re Nat’l Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); and Franklin Mint Corp. v. Master Mfg. Co., 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981).
- <sup>20</sup> *Id.*, citing M.C.I. Foods Inc. v. Bunte, 96 USPQ2d 1544, 1551 (TTAB 2010).
- <sup>21</sup> *Id.*, citing Izod, Ltd. V. Zip Hosiery Co., 405 F.2d 575, 160 USPQ 202 (CCPA 1969).
- <sup>22</sup> *Id.*, citing Coach Servs., Inc., 101 USPQ2d at 1721; and In re Thor Tech Inc., 90 USPQ2d 1634, 1635 (TTAB 2009).
- <sup>23</sup> *Id.*, citing Reply Brief at 8.
- <sup>24</sup> In re Golden Griddle Pancake House Ltd., 17 USPQ2d 1074, 1074 (TTAB 1990) (affirming refusal of an application to register GOLDEN GRIDDLE PANCAKE HOUSE for restaurant services due to a likelihood of confusion with GOLDEN GRIDDLE for table syrup, finding an “undeniable connection” between the goods and services); also In re Accelerate s.a.l., 101 USPQ2d 2047, 2050-51 (TTAB 2012) (holding COLOMBIANO COFFEE HOUSE for providing food and drink likely to cause confusion with registered certification mark COLOMBIANO for coffee); In re Azteca Rest. Enters. Inc., 50 USPQ2d 1209, 1212-13 (TTAB 1999) (concluding that “consumers would be likely to mistakenly believe that registrant’s Mexican food products sold under the mark AZTECA and applicant’s restaurant services rendered under the mark AZTECA MEXICAN RESTAURANT originated with or are somehow associated with or sponsored by the same entity”).
- <sup>25</sup> 2014 WL 5282253 (Trademark Tr. & App. Bd.)
- <sup>26</sup> 15 U.S.C. § 1052 (e)(1).
- <sup>27</sup> Ren Acquisition, *supra*, citing In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987).
- <sup>28</sup> 2014 WL 5282253, citing In re Tower Tech, Inc., 64 USPQ2d 1314, 1316-1317 (TTAB 2002); In re Patent & Trademark Services Inc., 49 USPQ2d 1537, 1539 (TTAB 1998); In re Home Builders Association of Greenville, 18 USPQ2d 1313, 1317 (TTAB 1990); In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985).
- <sup>29</sup> 2014 WL 5282253, citing In re Cell Therapeutics, Inc., 67 USPQ2d 1795, 1796 (TTAB 2003) and In re Packaging Specialists, Inc., 221 USPQ 917, 919 (TTAB 1984).
- <sup>30</sup> Ren Acquisition, *supra*, citing In re Pencils, Inc., 9 USPQ2d 1410, 1411 (TTAB 1988).
- <sup>31</sup> Serial No. 85592838 (October 29, 2014)
- <sup>32</sup> In re Santini Fine Wines, Inc., Serial No. 85592838, citing In re Yawata Iron & Steel Co., 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968).
- <sup>33</sup> In re White Swan Ltd., 8 USPQ2d 1534, 1535 (TTAB 1988).
- <sup>34</sup> Serial No. 85574196 (Trademark Tr. & App. Bd.)