

In Choosing a Beverage Trademark, Consider Existing Marks for Related Products

By [William M. Borchard](#)

Recent cases have highlighted the difficulty of adopting trademarks for beverages or related products when similar marks exist for other beverages.

RELATEDNESS FOUND

1. Beer / Vodka

An application to register VOLKS PILS was refused for **beer** because of a prior registration of VOLK for **vodka**. On appeal, the TTAB affirmed. The Examining Attorney had submitted evidence that beer and vodka under a common mark commonly come from a single entity, and though different and not interchangeable, are nonetheless related, and in the absence of any limitation as to price, are inexpensive items bought on impulse. *In re Marshall Brewing Co. LLC, Serial No. 87019347 (T.T.A.B. April 9, 2018)*. The applicant thereafter abandoned this application.

An application to register MASTERMIND was refused for **beer** because of a prior registration of MASTERMIND VODKA for **spirits**. On appeal, the TTAB affirmed. The applicant referred to a number of co-existing third party alcoholic beverage registrations, including a registration of MASTERMIND'S METHODS for spirits, including vodka. These registrations were given little probative weight, since there was no evidence of actual use of the marks or the public's familiarity with them. This evidence was outweighed by the Examining Attorney's submission of websites of numerous businesses owning a brewery and a distillery, and an article reporting that beer breweries increasingly are distilling craft spirits. *In re Fiddlehead Brewing Co., LLC, Serial No. 86924382 (T.T.A.B. August 6, 2018)*. The applicant thereafter abandoned this application.

2. Beer/ Vodka

An application to register HUSKY was refused for **beer** because of a prior registration of HUSKY for **vodka**. On appeal, the TTAB affirmed. It noted that in recent years the traditional demarcation between brewers and distillers no longer existed, with a growing trend of craft brewers and distillers to sell products directly to consumers in their own tasting rooms, stores and restaurants, even though most states mandated the sale of beer and vodka in non-overlapping trade channels. *In re Alaskan Brewing & Bottling Co., Application No. 87142867 (T.T.A.B. September 25, 2018)*.

3. Beer / Wine

Applications to register DEAD BIRD BREWING COMPANY (with “Brewing Company” disclaimed), and the design of an upside down dead bird, were refused for **beer** because of the prior registered mark DEADBIRD for **wines**. On appeal, the proceedings were consolidated and the TTAB affirmed. It found the word marks to be virtually identical, and the design was the legal equivalent of the words “dead bird.” As to the relatedness of the products, it acknowledged that there is no *per se* rule that all alcoholic beverages are related, and although the Trademark Office should strive for consistency, each proceeding must be decided based on its own facts and evidence. On balance, the TTAB found that people offer beer and wine under a single mark and these goods are marketed together to the same consumers. ***In re Dead Bird Brewing, LLC, Serial Nos. 87140389 & 87140417 (T.T.A.B. June 13, 2018).*** The applicant thereafter abandoned these applications.



4. Spirits / Wine (related)

Applications to register BEAR CREEK DISTILLERY in standard lettering and in design form (with “Distillery” disclaimed in both applications), were refused for **spirits** because of the prior registration of BEAR CREEK for **wines**. On appeal, the proceedings were consolidated and the TTAB affirmed. The Examining Attorney had submitted nearly 100 use-based third-party registrations as evidence that a single mark identified both products and webpages, and that third parties operate both wineries and distilleries. Consumers would expect the goods to emanate from the same source if they had confusingly similar marks. There were no channels of trade or class of purchaser limitations, so the TTAB found that they were the same. ***In re Bear Creek Distillery, LLLP, Serial Nos. 87026602 & 87026770 (T.T.A.B. May 1, 2018).*** The applicant thereafter abandoned these applications.



5. Cigars / Alcoholic Beverages

An application to register TENURA was refused for **cigars** because of a prior registration of the identical mark for **alcoholic beverages**. On appeal, the Trademark Trial and Appeal Board affirmed. It rejected the applicant’s arguments that the respective goods travelled in different trade channels, used different packaging and would not be confused because the registered mark was not well-known. Instead, the TTAB was persuaded that the identical marks were likely to be confused when used for complementary products sometimes consumed together. ***In re El Galan, Inc., Serial No. 86961428 (T.T.A.B. February 1, 2018).*** The applicant thereafter abandoned this application.

RELATEDNESS NOT FOUND

Notwithstanding the foregoing decisions, some cases have permitted similar marks to be registered for different beverages.

1. Beer / Rum

An application to register PIRATE PISS for **beer** was opposed by the registrant of PYRAT RUM for **rum**. The TTAB was not convinced by Opposer’s evidentiary submission, and dismissed the opposition. It found that six third-party use-based registrations for marks covering both beer

and rum from the same sources was a relatively small number given the number of breweries and beer brands in the U.S. It also found that this evidence paled in comparison to evidence introduced in prior decisions finding beer to be related to other alcoholic beverages, although the TTAB acknowledged that the goods probably travel in the same trade channels. The alleged fame of Opposer's mark was not sufficiently put into evidence with corroborating testimony. And the marks had different connotations—the registered mark PYRAT being an archaic spelling of “pirate” for which there is a strong association to rum, whereas the mark PIRATE PISS for beer would likely be understood as a humorous, self-deprecating description of the beer or just as an arbitrary vulgar expression. ***Patrón Spirits International AG v. Conyngham Brewing Co., Opposition No. 91226939 (T.T.A.B June 8, 2018).***

2. Beer / Fruit Juices

An application to register SUPERPOWER for **beer** was opposed by the registrant of ANTIOXIDANT SUPERPOWER (with ANTIOXIDANT disclaimed) for **fruit juices**. The TTAB dismissed the opposition. While the goods were inexpensive and Opposer's mark was commercially strong, the TTAB found that the marks were only somewhat similar overall and had different connotations--SUPERPOWER alone connoted an entity whereas ANTIOXIDANT SUPERPOWER connoted organic substances possessing greater than normal power. Most significantly, the TTAB held that Opposer had failed to present evidence that fruit juices were sufficiently related to beer. Notwithstanding that both products might move in at least one common channel of trade (convenience stores), and that certain beers are flavored with fruit juice, the evidence failed to prove that consumers were likely to believe that fruit juice and beer emanated from a common source. ***The Wonderful Co. LLC v. Comrade Brewing Co., LLC, Opposition No. 91230877 (T.T.A.B. August 2, 2018).***

TAKEAWAYS

- In general, the more similar the marks, the less related the products must be for registration to be refused.
- A finding of relatedness often will depend on evidence that third parties have registered—and more importantly have used—the same mark on both products, and that the products are consumed together, travel in the same channels of trade, have the same class of purchasers or convey similar commercial impressions.
- Some cases have permitted similar marks to be registered for different beverages when evidence had not been introduced to support an allegation that the beverages are related and come from the same source.
- Outcomes are hard to predict in these cases, but a finding of relatedness is more likely:
 - when the marks are similar, and,
 - most importantly, when the party claiming relatedness goes to the trouble and expense of providing evidence of relatedness.