

Response to Office Action for Serial Number: 88287209

The examining attorney stated that there is similarity between this mark of Ruby (Application Number: 88287209) and U.S. Registration Nos. 5424151 (STAR RUBY), 5072778 (RUBY & DESIGN), 5072777 (RUBY & DESIGN), 5072774 (RUBY), 4298136 (RUBY CUVEE) and 3263807 (RUBY CUVEE). The first of these registered marks is classified as a beer, while the others are classified as wines or sparkling wines. As such, the first mark will be discussed in Section A, while the remaining marks will be discussed in Section A. Applicant respectfully disagrees with the Examiner's analysis and submits the following in support of a finding of no likelihood of confusion.

A. Ruby and Star Ruby Are Not Confusingly Similar.

The Examining Attorney indicated that because the applicant's mark and registrant's mark Star Ruby both contain the identical word Ruby, the marks are confusingly similar. Applicant respectfully disagrees with this assertion due to the differences of the two marks.

Marks must be compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317 (Fed. Cir. 2014). However, these marks must be compared so as to not exclude differences. *In re Nat'l Data Corp.*, 753 F.2d 1056 (Fed. Cir. 1985). While the marks do contain both contain the word "Ruby," there are sufficient differences so as to indicate that the marks are not confusingly similar.

First, consumers are more likely to focus the first word in any trademark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). As the registrant's mark contains two words, consumers would indeed be more likely to focus on the word "Star." The predominant feature or consumer focus of the Registrant's mark is Star, the Applicant's mark features the predominant feature of Ruby. Thus, consumers are not likely to confuse the marks.

Further, the marks have a different visual appearance. Ruby and Star Ruby immediately strikes a visual difference. This difference is immediately apparent, regardless of the whether the mark is used as words or as part of a design mark. Also, the marks have a clearly different sound. There are multiple words and syllables in applicant's mark, whereas registrants' marks contain a single word and syllable.

Additionally, the marks create different connotations. This distinction is noted in the geological differences between star rubies and rubies. Star rubies often contain fibers that, when light reflects, create a star like shape. A similar connotation cannot be ascribed to the term Ruby used alone. Rubies, on the other hand, are clean and bright gemstone.

Finally, "the proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that [consumers] who encounter the marks would be likely to assume a connection between the parties." *Cai v. Diamond Hong, Inc.*, ___ F.3d ___, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach*

Servs., Inc. v. Triumph Learning LLC, 668 F.3d 1356, 1368, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)); TMEP §1207.01(b). The marks here create different commercial impressions. This is due to the fact that Star Rubies and Rubies are different objects. While star rubies are rubies, they have distinctive features. Applicant believes an average consumer will be able to distinguish these marks without issue.

Therefore, the appearance, connotation, and commercial impression between Star Ruby and Ruby are not confusingly similar.

B. Consumers are sophisticated and can distinguish between wine makers and beers.

Consumers of craft beer are highly educated and sophisticated about the products that they seek to consume and are, therefore, easily able to distinguish between the registered and applicant's mark. This applies 5072778 (RUBY & DESIGN), 5072777 (RUBY & DESIGN), 5072774 (RUBY), 4298136 (RUBY CUVEE), all of which are wines. *See*, John Long et al., *Craft Beer Consumers' Lifestyles and Perceptions of Locality*, 2 INT'L J. OF HOSPITALITY BEVERAGE MGMT. (2018). It is noteworthy, that where the purchasers consist of both professionals and the public, the standard of care for purchasing the goods is that of the least sophisticated potential purchaser. *In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) (citing *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d. at 1325, 110 USPQ2d at 1163). However, the general public demographics of the consumers of the beer here tend to be millennials who are often highly educated and pride themselves on their knowledge of the industry. Long, et al., *supra*. Surveys have shown “[craft beer] demographic group possesses high disposable income with the education and life position to be comfortable in expressing discrimination and to demand their preferences.” Justin P. Weinberg & O. Joseph Balthazor Jr., *Stop Letting Wine Crash the Wedding: Craft Beer Consumers Are Sophisticated Buyers*, 8 CYBARIS®, AN INTELL. PROP. L. REV. (2017). *citing* Douglas W. Murray & Martin A. O’Neill, *Craft Beer: penetrating a niche market*, 114 BRITISH FOOD J. 899, 903 (2012). Thus, the average and even least sophisticated consumers are able to distinguish between brands and between wine and beer manufacturers, even though a wine maker may have a brewery component.

Further, consumers in this industry are becoming more brand aware and brand loyal. Justin Kendall, *Power Hour: Nielsen Shares 2019 Craft Beer Consumer Insights*, 2019 BREWBOUND (2019), <https://www.brewbound.com/news/power-hour-nielsen-shares-2019-craft-beer-consumer-insights>. The consumers are familiar with the products and are able distinguish whether a particular beer is made by a brewery/brand or if the mark is unassociated with another company. Consumers often are primarily interested in pursuing local beer that will make the consumers feel as though they are part of the community. *See Id.*; *See also*, Long, et al., *supra*. (“...Locality of production can be the main purchasing factor...”); *6 Characteristics of Millennial Beer Drinkers You Need to Know*, 2015 BREWER'S ASS'N (2015). (“‘Locally Made’ continues to gain importance to craft beer millennials.”) Thus, consumers are likely to have conducted more research to familiarize themselves with the local breweries and beers and are, therefore, unlikely to confuse the goods and services with wines. Further, applicant's mark “Ruby” is not a brewery; however, consumers are likely to either be loyal to the brewery or to have conducted research to know that this is a type of beer that the consumer will enjoy

consuming. Therefore, the likelihood of confusion is further reduced by the education, sophistication, and brand loyalty of the consumers.

Conclusion

For the above reasons, the Examining Attorney should reconsider the refusal of registration under Section 2(d). The mere possibility that relevant consumers might relate the two different marks does not meet the statutorily established test of likelihood of confusion. Accordingly, Applicant requests that the applied-for mark proceed to publication.