

This Opinion is Not a
Precedent of the TTAB

Mailed: September 24, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Limestone Branch Distillery, LLC

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Serial No. 87217664

Michelle Alvey of Husch Blackwell LLP, for Limestone Branch Distillery, LLC

Jeri Fickes, Trademark Examining Attorney, Law Office 107,
J. Leslie Bishop, Managing Attorney.

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Before Adlin, Lynch, and Dunn,
Administrative Trademark Judges.

Opinion by Dunn, Administrative Trademark Judge:

Limestone Branch Distillery, LLC (“Applicant”) filed an application pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), seeking registration of the mark LIMESTONE BRANCH DISTILLERY (in standard character form, DISTILLERY disclaimed) on the Principal Register for “distributorship services in the field of alcoholic beverages” (application Serial No. 87217664 filed October 27, 2016). The Trademark Examining Attorney refused registration of Applicant’s mark under Sections 1 and 45 of the Trademark Act, 15 U.S.C. §§ 1051 and 1127, , on the ground that Applicant failed to provide a specimen which shows the mark in use in

commerce in connection with alcohol beverage distributorship services. Applicant appealed and filed a request for reconsideration which was denied, following which Applicant and the Examining Attorney filed briefs.

I. Applicant's Specimens

Applicant's original specimen consists of "printouts from Applicant's website showing the mark as used in connection with the listed services." October 27, 2016 Application, TSDR 1-3.¹ The original specimen is depicted below:

¹ The Trademark Status and Document Retrieval (TSDR) and TTABVUE citations refer to the two locations on the USPTO website where the appeal record can be found, namely the Trademark database for the involved application and the Board's electronic docket. All citations to the TSDR database are to the downloadable .pdf version of the documents.

Buy - Limestone Branch Distillery

a

WHERE TO BUY

Locate the store nearest you

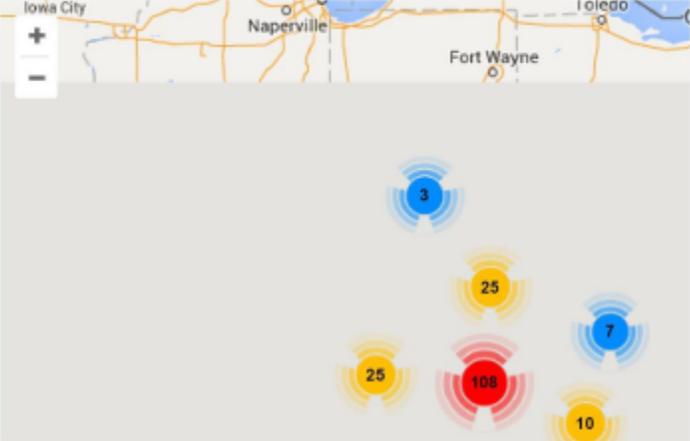
Your location

Search radius Results

**LIMESTONE BRANCH
DISTILLERY**
1280 VETERANS
MEMORIAL HIGHWAY
LEBANON KY 40033
United States

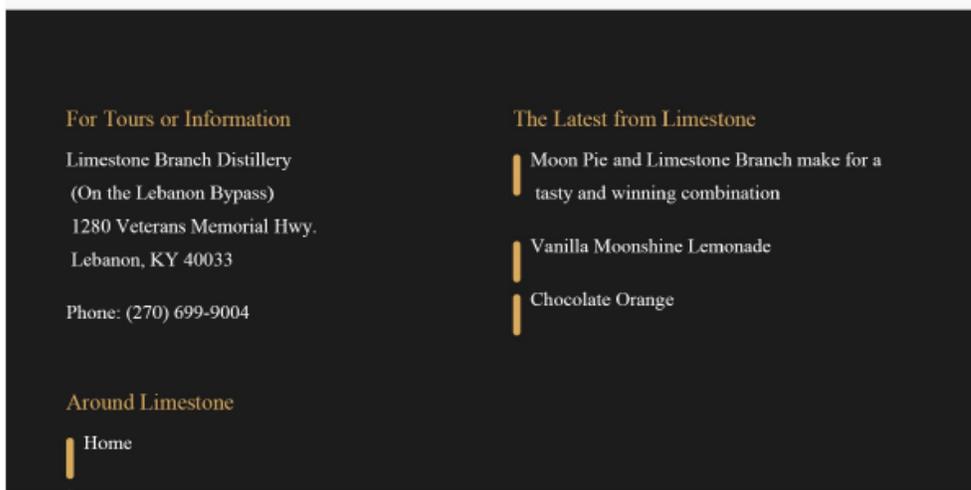
0 mi
[Directions](#)

CHASERS



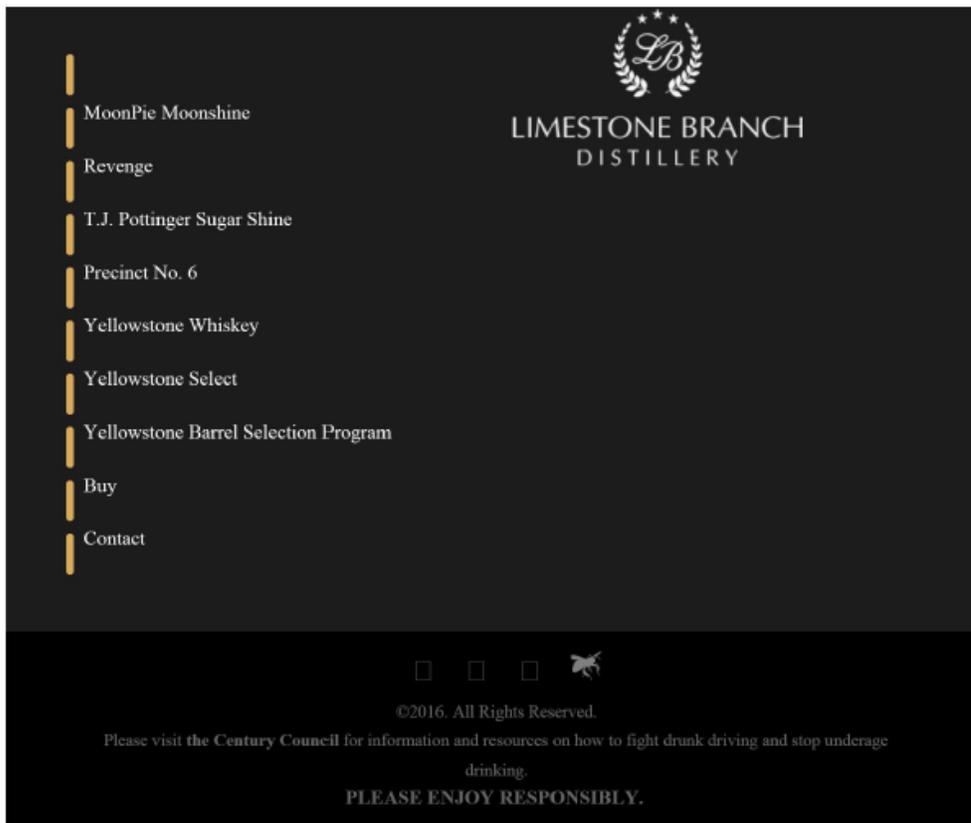
The map displays several store locations with concentric circles indicating search radii. A red circle with '108' is the largest, followed by a yellow circle with '25', a blue circle with '3', a blue circle with '7', and a yellow circle with '10'. The map includes labels for Iowa City, Naperville, Fort Wayne, and Toledo.

<http://limestonebranch.com/buy>[5/5/2016 10:42:32 AM]



<http://limestonebranch.com/buy>[5/5/2016 10:42:32 AM]

Buy - Limestone Branch Distillery



Applicant's Original Specimen

In response to the refusal that the original specimen failed to show the mark with “distributorship services in the field of alcoholic beverages”, Applicant submitted the substitute specimen depicted below “demonstrating Applicant's offering of services to third parties in connection with the mark” August 11, 2017 Response, TSDR 1-2.

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1280 VETERANS MEMORIAL HWY
LEBANON, KY 40033

Order No: **336921-0**
Cust PO No: PO000040488

Sold To: 25110
LUXCO STL
5050 KEMPER AVENUE
ST. LOUIS, MO 63139-1106

Sales Order Acknowledgement

Date Entered: 2/2/2017
Date Sched Ship: 1/26/2017
Carrier: Common Carrier
FOB: Origin - PP and Add
Terms: NET 30

Ship To: 1
LUXCO - N. BROADWAY
6301 NORTH BROADWAY
ST. LOUIS, MO 63147

Ship Instr:

Total Cases: 760.00
Total Weight: 14,645.20
Total Sales:
Total Lines: 1

Emailed To:
:

Location: KTY-MN-1

Item No / Cust Part No. / NABCA - Description	Weight	UOM	Ordered	Unit Price	Amount
1 58686-LBD / / C-MINOR CASE STRAIGHT RYE 90 PROOF 750ML 6-IN (LBD)	14,645.20	CS	760.0		

SubTotal: _____

Tax: US\$0.00

Freight: US\$0.00

Order Total: _____

Applicant's Substitute Specimen



Enlargement from Applicant's Substitute Specimen

II. Request in the Alternative For Remand Denied

In its reply brief (10 TTABVUE 8), Applicant contends that “the Examining Attorney has clarified for the first time on appeal that she now agrees Applicant can offer distributorship services in connection with Applicant’s own products,” and so, if the Board agrees that the original and substitute specimens fail to show use with Applicant’s services, the Board should grant remand to allow Applicant to submit new specimens.

We disagree that any aspect of the refusal was raised for the first time on appeal, and find that Applicant had multiple opportunities to address the refusal. Accordingly, the request in the alternative for remand is denied.

III. Applicable Law

Under Section 45 of the Trademark Act, 15 U.S.C. § 1127, a service mark is used in commerce “when it is used or displayed in the sale or advertising of services.” The specimen must show the mark used in a manner that creates in the minds of potential consumers a direct association between the mark and the services. *In re Universal*

Oil Prods. Co., 476 F.2d 653, 655, 177 USPQ 456, 457 (CCPA 1973) ("The minimum requirement is some direct association between the offer of services and the mark sought to be registered therefor."); *see also In re Adver. & Mktg. Dev., Inc.*, 821 F.2d 614, 620, 2 USPQ2d 2010, 2014 (Fed. Cir. 1987) ("The 'direct association' test does not create an additional or more stringent requirement for registration; it is implicit in the statutory definition of 'a mark used * * * to identify and distinguish the services of one person * * * from the services of others and to indicate the source of the services.'"). "The ultimate question here is this: whether purchasers would perceive [Applicant's] mark[] to identify [the services listed in the application]." *In re JobDiva, Inc.*, 843 F.3d 836, 121 USPQ2d 1122, 1126 (Fed. Cir. 2016).

Because industry use may vary or evolve, an applicant may supplement its specimen with an explanation or evidence of industry custom which makes clear why purchasers would perceive the mark on the specimen as identifying the service. *See In re JobDiva, Inc.*, 121 USPQ2d at 1125 ("JobDiva's CEO had testified that JobDiva's software actually performs personnel placement and recruitment services."); *In re Pitney Bowes, Inc.*, 125 USPQ2d 1417, 1419 (TTAB 2018) ("While the Examining Attorney reasonably found the specimen unclear as to whether Applicant, rather than a third party, provides the services, Applicant's explanation of the specimen and how Applicant provides the outsourced mailing services referenced on the specimen resolved the ambiguity"). Of course, an explanation cannot excuse failure to use the mark in connection with the identified services, and must be consistent with what the specimen itself shows. *Id.*; *see also In re The Cardio Group, LLC*, 2019 USPQ2d

227232 (TTAB 2019) (“Applicant's explanation fails to clarify that the specimens show Applicant rendering a retail store service of any type or persuade us that there is an association between THE CARDIO GROUP and design and retail store services.”).

IV. Analysis

Applicant is a distillery and produces alcoholic beverages. We accept Applicant’s evidence, which the Examining Attorney does not dispute, that in the alcoholic beverage industry, there is a three-tier system of producer, distributor, and retailer, and producers may not sell directly to retailers.

Here, we address whether, as the statute requires, Applicant uses its mark “in the sale or advertising of services.” As set forth above, Applicant described its first specimen for the mark LIMESTONE BRANCH DISTILLERY for distributorship services in the field of alcoholic beverages as its “website showing the mark as used in connection with the listed services.” The specimen displays the mark LIMESTONE BRANCH DISTILLERY and design elements at the top of the page, features “Where to Buy” with a search engine and map to locate stores selling Applicant’s goods, and at the bottom of the page includes Applicant’s address, links to other pages on the website, and articles from Applicant’s blog. There is no reference to distributorship services whatsoever. The website specimen shows a distillery whose product is available from retail stores.

Applicant described its sales order substitute specimen as “demonstrating Applicant's offering of services to third parties in connection with the mark.” The

substitute specimen titled "Sales Order Acknowledgement" displays the mark LIMESTONE BRANCH DISTILLERY as part of the letterhead and includes details of an order from a third party for rye. Again, there is no reference to distributorship services performed by Applicant, or for that matter anyone. The sales order specimen merely records a sale by Applicant of its own goods.

As set forth above, an applicant may supplement its specimen with an explanation or evidence which makes clear why purchasers would perceive the mark on the specimen as identifying the service. Applicant's explanations in its brief (which reiterate what was argued to the Examining Attorney), its supporting evidence, and the record as a whole do not show any association of the mark with alcoholic beverage distributorship services. More specifically, while Applicant contends that it offers valuable services in arranging transportation, and supplying distillate, and providing documentation for its alcoholic beverages, Applicant has not proven that these activities are the registrable activities of a distributor (as opposed to producer engaging in ordinary activities to sell its goods). In fact, Applicant's General Manager, who provided an affidavit explaining Applicant's business, does not even aver that Applicant is a distributor or offers distributorship services. Rather, he states that in the context of the three-tier system of alcohol distribution, Applicant is a producer who sells its product to distributors, who then sell to retailers. Thus, if anything, this

evidence further supports the unacceptability of the specimens to show use of the mark in connection with the recited distributorship services.

V. Decision

The refusal to register Applicant's mark LIMESTONE BRANCH DISTILLERY for "distributorship services in the field of alcoholic beverages" under Sections 1 and 45 of the Trademark Act for failure to submit an acceptable specimen of use is affirmed.