

A Bloody Competition Over Lizzie Borden's Legacy

US Ghost Adventures, LLC v. Miss Lizzie's Coffee LLC, No. 23-2000, 2024 WL 4799288 (1st Cir. Nov. 15, 2024)

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On November 15, 2024, the U.S. Court of Appeals for the First Circuit affirmed the denial of a preliminary injunction, whacking the historic Lizzie Borden House's ability to prevent its next-door neighbor, Miss Lizzie's Coffee LLC ("Miss Lizzie's"), from using the "Lizzie Borden" name and distinctive hatchet logo. Despite there being actual confusion as to whether the Lizzie Borden House is associated with Miss Lizzie's, the First Circuit found that to be insufficient because the source of consumer confusion was not from the similarity of the disputed marks.



US Ghost Adventures, LLC ("Ghost Adventures") operates ghost tours at the Lizzie Borden Bed & Breakfast and has registered trademarks for the "Lizzie Borden" name and a hatchet logo. On September 18, 2023, Ghost Adventures sued Miss Lizzie's for trademark infringement and unfair competition. Ghost Adventures moved for a preliminary injunction to stop Miss Lizzie's, which is located next door to the Lizzie Borden Bed & Breakfast, from using a storefront signage display with the words "Miss Lizzie's Coffee" between a cup of coffee and stylized hatchets. Ghost Adventures argued that the signage used by Miss Lizzie's was similar to its registered mark, the parties' markets (i.e. "hospitality services") were the same, and there was actual customer confusion as to whether the two businesses were associated with each other. The district court denied the preliminary injunction because Ghost Adventures had not demonstrated a likelihood of success on the merits. Ghost Adventures appealed.

On appeal, the First Circuit found that the marks used by Miss Lizzie's and Ghost Adventures to be facially dissimilar because Ghost Adventures used a realistic hatchet logo while Miss Lizzie's had a whimsical, spewing blood version. Additionally, the First Circuit found that the parties offered distinct goods and services to different consumers. Ghost Adventures provided "sophisticated" tourists with ticketed ghost tours and merchandise, whereas Miss Lizzie's offered public coffee and snacks. Finally, the First Circuit noted that while actual consumer confusion was present, as explained below, it was not relevant here. Therefore, the First Circuit affirmed the denial of the preliminary injunction.

With respect to consumer confusion, the First Circuit explained that consumer confusion due to non-trademarked business similarities does not constitute infringement. Here, the First Circuit discounted the consumer confusion because the confusion was not caused by the use of the marks. Instead, the consumer confusion was due to non-trademark factors such as both businesses being on a historical site and being in close proximity to each other. Miss Lizzie's storefront also had an explicit disclaimer of any relationship with Ghost Adventures. Ghost Adventures could not use its historically related "Lizzie Borden" mark to prevent other hospitality businesses from setting up shop in the vicinity.

Consumer confusion is often the lynchpin of trademark infringement. This case serves as a cautionary tale that the source of consumer confusion must stem from the mark itself and not from other factors such as proximity of a business or targeting the same customers. It is something that businesses operating near famous attractions or that involve trending pop culture themes should keep in mind when marketing their business.