

First Circuit: Lizzie Borden Themed Coffee Shop Serves Different Goods to Different Consumers from Guests at Lizzie Borden Bed and Breakfast

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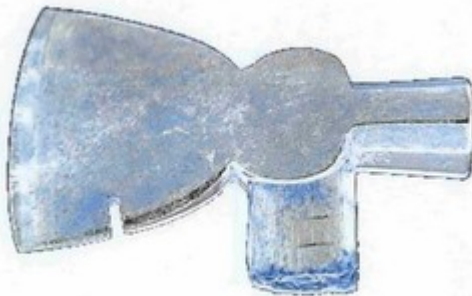


How many years must pass before a grisly murder can support a marketing effort?

Apparently, something less than the 132 years since Lizzie Borden's father and stepmother were axe murdered in Fall River, Massachusetts. (Yes, the passive voice is intentional—a jury acquitted prime suspect Lizzie, and the murders remain unsolved.)

Fall River is city of about 100,000 people that abuts the Rhode Island state line. It was once home to numerous textile mills and now hosts a collection of World War II-era naval vessels at Battleship Cove. Portions of the music video for Aerosmith's 1993 hit Cryin' (perhaps NSFW, if your boss won't appreciate 90s-era rock's visual themes) were filmed in Fall River. The city's top attraction, however, is the 1800s-era house that was the scene of the double murder.

Today, US Ghost Adventures, LLC owns the Lizzie Borden House and offers ghost tours; overnight stays; and a collection of tasteful merchandise, like the "Bloody Axe in Head Play Headband." Ghost Adventures owns several federal trademark registrations, including U.S. Trademark Reg. Nos. 2,070,882, for the word mark LIZZIE BORDEN and 4,397,555, for a hatchet logo, both for restaurant and hotel services. The hatchet logo features a notch along the bottom edge and, unlike the "bloody axe" merch, is not bloody. The Lizzie Borden House has operated as a tourist attraction since the 1990s, and Ghost Adventures' federal registrations are incontestable.



In 2023, Miss Lizzie's Coffee LLC opened a coffee shop in the building adjacent to the Lizzie Borden House. A small grass strip and driveway separate the two buildings, which

face a courthouse across the street (although not the courthouse where the jury weighed Lizzie's fate). Miss Lizzie's Coffee calls itself "The Most Haunted Coffee Shop in the World!" The original sign for Miss Lizzie's Coffee featured letters made to look written with blood, and a stylized hatchet spewing blood. ([Miss Lizzie's Coffee's website](#) now reflects a sign with a coffee cup set against an appetizing blood splatter background.)

Ghost Adventures was not thrilled with its new neighbor and sued the coffee shop shortly after it opened. Ghost Adventures alleged that several visitors, and at least one city official, incorrectly assumed that the coffee shop was related to Ghost Adventures' business. Ghost Adventures asserted, among other things, trademark infringement under the U.S. Lanham Act and sought an injunction against Miss Lizzie's Coffee. The U.S. District Court for the District of Massachusetts denied the injunction request, and Ghost Adventures appealed to the U.S. Court of Appeals for the First Circuit.

The First Circuit affirmed the district court's decision, agreeing that Ghost Adventures had not shown a sufficient likelihood of confusion to support its claim. Similar to courts around the country, the First Circuit applies an eight-factor likelihood-of-confusion test, which requires courts to weigh: "(1) the similarity of the marks; (2) the similarity of the goods; (3) the relationship between the parties' channels of trade; (4) the relationship between the parties' advertising; (5) the classes of prospective purchasers; (6) evidence of actual confusion; (7) the defendant's intent in adopting its mark; and (8) the strength of the plaintiff's mark." Here, the court concluded that the marks were not similar, given that the trademarked hatchet has a "spotless," notched blade, while Miss Lizzie's hatchet is not notched, spews blood, and has a handle. The court observed that "Miss Lizzie's" is incidentally similar to LIZZIE BORDEN, but noted that Ghost Adventures had not shown that its mark had displaced the story of Lizzie Borden in the minds of consumers—that is, there was no evidence that a consumer who hears of LIZZIE BORDEN thinks of the business instead of the murder.

The court then weighed the market similarity factors, that is "the similarity of the parties' goods, the relationship between their channels of trade, the relationship between their advertising, and the classes of prospective purchasers." Ghost Adventures sought to portray both businesses as sharing the category of "hospitality services," but the court rejected this characterization as merely a "broad economic sector," insufficient to support likely confusion. The court found the businesses were better characterized as serving different groups—Ghost Adventures targets "sophisticated tourists who purchase tickets in advance and travel to Fall River to visit the historical site of the Lizzie Borden House, whereas Miss Lizzie's attracts passersby hoping for a caffeine kick or a bite to eat."

Although both businesses rely on the Lizzie Borden story, confusion due to proximity or common reference to historical lore was not the type of confusion that Ghost Adventures was entitled to prevent. As the district court explained, "Ghost Adventures has not demonstrated that its mark bears the strength which might give it the 'secondary meaning' reach that, for example, 'Sam Adams Beer' might claim regarding the historical figure Sam Adams." As such, Ghost Adventures could not use its LIZZIE BORDEN mark to prevent other hospitality businesses from opening in the vicinity of the crime and

marketing themselves by using the Lizzie Borden story.

The court also rejected Ghost Adventures' reliance on consumer confusion evidence. The court decided there was insufficient evidence that any confusion was caused by an infringing mark, as opposed to confusion due to nontrademarked similarities between businesses or products. As the court explained, "if two outdoor Saturday farmers' markets opened on the same block, causing wandering shoppers to think that they were affiliated, their proximity and similar business models, without more, would not be suggestive of trademark infringement."

This tussle over the use of the Lizzie Borden legacy shows the limits businesses face when they seek to market off historical sites and events. Had Lizzie Borden been the product of Ghost Adventures' imagination and the Lizzie Borden House devoid of historical significance, there would be little doubt that Miss Lizzie's Coffee would be deemed an infringer. But someone did "whack" Borden's father and stepmother, although perhaps not 40-41 times, and her story became infamous. Given that historical reality, a business seeking to build its brand would need that brand to eclipse the story itself to demonstrate the strength needed for trademark enforcement.

Until then, Ghost Adventures' tours, hospitality, and merchandise may have to coexist with Miss Lizzie's food and beverage, each invoking Fall River's most notorious resident. For their part, the two businesses don't quite seem ready to bury the hatchet—they filed papers in the district court on December 20, 2024, stating their intent to proceed with discovery in the litigation. Should they continue, Massachusetts may end up the scene of the most famous trial involving Lizzie Borden since 1892.