

Hearing: 8/8/02  
July 18, 2002

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF  
THE TTAB

Paper No. 11  
DEB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Stonestreet, LLC

Serial No. 75/821,755

James P. Martin of Shartsis Friese & Ginsburg LLP for  
Stonestreet, LLC.

Robert L. Lorenzo, Trademark Examining Attorney, Law  
Office 111 (Kevin Peska, Acting Managing Attorney).

Before Cissel, Bucher and Holtzman, Administrative  
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Stonestreet, LLC sought to register the mark BUCKEYE  
on the Principal Register as used with "wines" in  
International Class 33.<sup>1</sup>

This case is now before the Board on appeal from the  
final refusal to register based upon Section 2(d) of the  
Trademark Act, 15 U.S.C. §1052(d). The Trademark  
Examining Attorney has held that applicant's mark, as used  
in connection with wines, so resembles the trademark shown  
below:



registered for "beer" in International Class 32,<sup>2</sup> as to be likely to cause confusion, to cause mistake or to deceive.

Responsive to the refusal to register, applicant argued: that there are substantial differences between its mark and the cited mark; that the term BUCKEYE is commonly used as a source indicator, and, hence, is a relatively weak mark; and, that wine and beer are not closely related goods.

On the other hand, the Trademark Examining Attorney argues that applicant's mark is highly similar to the

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<sup>1</sup> Application Serial No. 75/821,755, filed on October 13, 1999, based upon applicant's allegation of use in interstate commerce since at least as early as April 17, 1997.

<sup>2</sup> Reg. No. 691,791, issued on January 19, 1960; Second renewal on August 30, 2000. The drawing is lined for the colors red and gold, and the words "Sparkling Dry" are disclaimed apart from the mark as shown. The assignment records of the United States Patent and Trademark Office (at Reel 2011, Frame 0367) reflect the most recent transfer of this property from Miller

cited mark; that BUCKEYE is not a weak mark as applied to alcoholic beverages; and, that wine and beer are closely related items.

Both applicant and the Trademark Examining Attorney have fully briefed the case, and at applicant's request, an oral hearing was held before the Board on July 18, 2002.

We affirm the refusal to register.

In the course of rendering this decision, we have followed the guidance of In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973). This case sets forth the factors that should be considered, if relevant, in determining likelihood of confusion.

Turning first to the similarities/dissimilarities in the marks, we note the argument in favor of similarity made by the Trademark Examining Attorney, as follows:

... [B]oth the applicant's mark and the registrant's mark are highly similar in appearance since both marks share the same dominant term, namely, "BUCKEYE." The applicant's argument that its mark is different from the registered mark because the registered mark contains the additional wording "SPARKLING DRY" and the design element is not persuasive. The examining attorney asserts that disclaimed matter is

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Brewing Company to Consolidated Biscuit Company as of December 1999, recorded with the USPTO in January 2000.

less significant or less dominant in creating a commercial impression. Thus, the dominant feature of the two marks at issue is the same, namely the term "BUCKEYE."

We agree with the Trademark Examining Attorney that the shared term BUCKEYE is the dominant feature of registrant's mark, the term appears to be inherently distinctive for alcoholic beverages, and nothing that applicant has submitted for the record demonstrates otherwise. To the extent applicant has properly made of record a number of third-party registrations containing the word BUCKEYE, the use of this mark on cereal, soup mixes or potato chips, for example, does not compel the conclusion that the mark is commonplace for alcoholic beverages.

Moreover, the words "Sparkling Dry" on registrant's beer label may well create for some a suggestion of sparkling wines, reinforcing the connotation of BUCKEYE in connection with applicant's wines.

Applicant has applied for a registration showing the mark in typed form, while registrant's composite mark is a red rectangle with gold circles surrounding literal and design features. However, the red background and gold circles of registrant's composite mark are carrier devices for the source-indicating and descriptive matter contained

therein. The images of barley suggest the brewing process while the descriptive words, "Sparkling Dry," are appropriately disclaimed. Visually, the word BUCKEYE dominates registrant's beer label, and is the only distinctive source-indicating material in this composite mark capable of being spoken when asking for registrant's product. Hence, in spite of apparent differences in appearance [the mark BUCKEYE alone differs from a representation of an entire beer label -- even one where the word BUCKEYE clearly overshadows the other subordinate matter placed on the label] and obvious differences in sound [BUCKEYE SPARKLING DRY, when spoken in full, adds three more syllables to the spoken mark than is the case when enunciating the word BUCKEYE alone], we find that these marks retain strong visual and aural similarities.

Accordingly, when comparing these two marks by applying the traditional sight/sound/meaning trilogy, we find that both marks create similar overall commercial impressions.

Turning next to the relationship of the goods, applicant and the Trademark Examining Attorney have reached quite different conclusions on this factor as well. Applicant argues as follows:

Other than the fact that beer and wine are both alcoholic beverages, the two goods have few, if any, similarities. Substantial pricing differences exist between beer and wine. Beer and wine also differ in odor, taste, color and alcohol content. Wine is typically sold by the bottle and beer is sold in differently shaped bottles or in cans, typically in packages of six. Wine and beer are labeled in very different ways and marketed to different consumers. The goods are also advertised and promote separately...

The Examining Attorney's conclusions [that beer and wine are closely related] ... should not be considered by the Board because beer manufacturers do not typically produce wine and wine manufacturers do not typically produce beer. To Applicant's knowledge, no wine and beer from the same manufacturer are sold under the same mark. Consumers are not likely to associate a mark used on wine with a similar mark used on beer.

We do agree with applicant's contention that there is no evidence in this record establishing that beer and wine originating from a single source are actually sold under the same mark. In the absence of such a showing, applicant asks us to find that the average consumer is not likely to make an association between a mark used on wine with the same (or a similar) mark used on beer. However, the alleged practice of manufacturers avoiding the common branding of beer and wine is not the end of our inquiry under this du Pont factor.

Although federal registrations do not show use in the marketplace, the Trademark Examining Attorney has submitted for the record a number of valid and subsisting third-party registrations where the marks are indeed registered for both beer and wine. He corroborates this conclusion by citing to reported cases such as In re Sailerbrau Franz Sailer, 23 USPQ2d 1719 (TTAB 1992), wherein we held as follows:

Contrary to applicant's argument, both beer and wine may be found in the same outlets, whether they be liquor stores or supermarkets. We do not agree with applicant that purchasers are necessarily discriminating. While some may have preferred brands, there are just as likely to be purchasers who delight in trying new taste treats. Furthermore, these are not expensive items requiring one to exercise careful thought and/or expertise in their purchase. More often than not they are shelf items which are purchased on a somewhat casual basis. That beer and wine may emanate from the same source is illustrated by the registration copies, put into the record by the Examining Attorney, which show that a number of companies have registered their marks for both beer and wine.

23 USPQ2d at 1720.

Applicant counters with, *inter alia*, a case from our reviewing Court that it argues compels the opposite conclusion:

It is true that both beer and wine, including champagne, are frequently sold

through the same channels of distribution. It is also true that substantial pricing differences normally exist and actually exist in this case between champagne and beer. Mumm markets its product as a premium good: the purchaser of Mumm champagne can be presumed to be in the market for an upscale item for consumption and to have a reasonably focused need. Desnoes does not market its product as a premium good. These differences weigh against a holding of a likelihood of confusion.

G.H. Mumm & Cie v. Desnoes & Geddes Ltd., 917 F.2d 1292, 1295, 16 USPQ2d 1635, (Fed. Cir. 1990).

From this latter quotation, it is clear that the record in the Mumm case demonstrated MUMM brand champagne to be a premium sparkling wine marketed by one of France's top quality champagne producers. In the instant case, the record does show that applicant's wines marketed under the BUCKEYE label have won awards and have received some critical acclaim. However, as in the Sailerbrau case cited by the Trademark Examining Attorney, the current record does not establish applicant's wines as upscale, expensive and targeted to the most discriminating of consumers. Neither identification of goods is limited as to channels of trade or quality of products, so applicant's distinctions are irrelevant. Thus, we conclude that registrant's beer and applicant's wines are

both inexpensive and are both targeted to casual, non-discriminating purchasers.

Undeniably, beer and wine are both alcoholic beverages. Applicant concedes that they are sometimes marketed through the same channels of trade (e.g., liquor stores and other retail outlets devoted to alcoholic beverages, or supermarkets having entire sections devoted to beer and wine). Because the costs for an inexpensive bottle of table wine and a six-pack of beer are quite similar, wine and beer are alternative alcoholic beverages for some consumers.

As applicant has insisted, we clearly eschew any *per se* rule that all alcoholic beverages are automatically related for purposes of determining likelihood of confusion under this du Pont factor. They are not. On the other hand, based upon the instant record, we find that a close relationship exists between registrant's beer and applicant's wines.

Similarly, as noted in the above discussion, we find that these goods often move in the same channels of trade to the same class of ordinary consumers.

As to the du Pont factor dealing with the length of time during and conditions under which there has been concurrent use without evidence of actual confusion, the

Trademark Examining Attorney is correct that the test under Section 2(d) of the Act is *likelihood* of confusion, not *actual* confusion. While applicant points to "four years of contemporaneous use of these two marks without any actual confusion," we have no evidence that these respective marks have been used contemporaneously in the same geographical area. It is therefore not at all surprising that no instances of actual confusion have been reported to applicant between 1997 and 2000. Under these circumstances, the absence of actual confusion is not probative of whether there would be a likelihood of confusion in the event these marks were to be used contemporaneously on these respective alcoholic beverages within the same geographical area.

To summarize, we find the marks of registrant and of applicant to be similar in overall commercial impression, and we find that beer and wine are related products sharing the same channels of trade.

Decision: The refusal to register is affirmed.