THIS DISPOSITION IS
NOT CITABLE AS PRECEDENT
OF THE TTAB

Mailed: May 9, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

South Beach Beverage Company, Inc.

v.

Stephen M. Schwartz

Opposition No. 91121457
to application Serial No. 74556860
filed on August 3, 1994

Edmund J. Ferdinand, III of Grimes & Battersby, LLP for South Beach Beverage Company, Inc.

Ava K. Doppelt of Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A. for Stephen M. Schwartz.

Before Seeherman, Quinn and Chapman, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

South Beach Beverage Company, Inc. (a Connecticut corporation)[1] has opposed the application of Stephen M.

[1] The opposition was originally filed by The South Beach Beverage Company, LLC (a Connecticut limited liability corporation). During the course of this proceeding opposer filed a motion to substitute South Beach Beverage Company, Inc. as the party plaintiff, which was granted by the Board in an April 29, 2004 order. Further, the record shows that opposer, South Beach Beverage Company, Inc., was acquired by PepsiCo in January 2001;

Schwartz (a United States citizen) to register on the Principal Register the mark shown below

for “sparkling wine” in International Class 33. The application is based on applicant’s claimed date of first use and first use in commerce of April 1, 1994. The words “sparkling wine” are disclaimed. The application includes the following description of the mark: “The mark consists of the word ‘SoBe’ with five five[-]pointed stars in an arc beginning from the word [sic] ‘S’ and ending above the ‘B.’”

Opposer asserts as grounds for opposition that since January 5, 1997, it and its predecessor have “manufactured, advertised and sold a line of soft drinks, iced teas, fruit drinks and other non-carbonated and carbonated beverages” under the marks SOUTH BEACH and SOBE; that opposer owns “various federal registrations and pending applications…including” Registration Nos. 2153152, 2256688, 2345815, and 2175195 and application Serial Nos. 74370615,

---

and that it is now a division of PepsiCo. References to opposer will include South Beach Beverage Company, Inc., The South Beach Beverage Company, LLC, and South Beach Beverage Company, Inc. as a division of PepsiCo.

75937834, 75937835, and 76143944; that there is no issue of priority in view of the prior filing dates of three of opposer’s pleaded registrations; and that applicant’s mark, when used on his goods, so resembles opposer’s previously used and registered marks, as to be likely to cause confusion, mistake, or deception.

In his answer applicant denied the salient allegations of the notice of opposition.

The Record

The record consists of the pleadings; the file of applicant’s application; the testimony, with exhibits, of Michael Joyce, opposer’s director of integrated marketing; the testimony, with exhibits, of Peter Maric, publications editor and law clerk at opposer’s attorney’s law firm; opposer’s four notices of reliance; the parties’ stipulation consisting of two paragraphs and a one-page attached document; and the testimony, with exhibits, of applicant, Stephen M. Schwartz.

Both parties filed briefs on the case. Neither party requested an oral hearing.

Preliminarily, we will determine the evidentiary matters. Opposer moved to strike (1) applicant’s Exhibit Nos. 21-23 (invoices from 1999) “and all testimony related thereto” on the ground of unfair surprise because they were not produced during discovery; (2) applicant’s Exhibit Nos.

7-8 (draft advertisements) to the extent applicant relies on them to prove use of his mark on the ground of relevance; (3) applicant's Exhibit No. 4 ("New Package Plan") to the extent applicant relies on it to prove use of his mark on the grounds of relevance and that it was prepared in the context of settlement negotiations; and (4) portions of the testimony of Stephen Schwartz at pages 12 (leading question), 23 (hearsay), and 25-26 (hearsay), based on the objections made at the deposition.

Applicant argues generally that "Opposer's objections to Applicant's evidence have no factual basis." Brief, p. 31. Applicant specifically argues that he has explained that his lack of evidence and missing documents relate to his brother, Barry Schwartz, being responsible for the sales records, and his brother died in 1999; that applicant has not purposefully withheld evidence; that the "New Package Plan" was prepared to show future sales projections for the reintroduction of the wine with a new label under sales agreements with distributors, and it was only coincidentally used in negotiations with opposer; that applicant has provided all evidence that was available in his business records; and that the objected-to portions of his evidence and testimony should not be stricken.

Applicant's statements concerning his brother's involvement in applicant's business, his brother's death in

December 1999, and applicant’s failure to immediately remove the business records from his brother’s home after the death provide a plausible explanation for the lack of certain evidence and a reason why some 1999 invoices were found later. Opposer’s motion to strike applicant’s Exhibit Nos. 21-23 and applicant’s testimony related thereto is denied.

Inasmuch as applicant explained that his Exhibit No. 4 was not prepared in the context of settlement negotiations, opposer’s motion to strike that exhibit is also denied.

The remainder of opposer’s motion to strike (applicant’s Exhibit Nos. 7-8 and certain testimony by applicant Schwartz dep., pp. 12, 23 and 25-26) is denied as these objections relate more to the probative value of the evidence than to the admissibility thereof.

In sum, opposer’s motion to strike is denied. All evidence submitted by the parties has been considered for whatever appropriate probative value it may have.

<u>The Parties</u>

South Beach Beverage Company, Inc., through its predecessor in interest, first used the mark SOUTH BEACH on a non-alcoholic beverage in 1995, but as it did not “take off,” in 1996 opposer changed the mark to SOBE and first used it on a black tea beverage. Due to the success thereof, opposer introduced additional tea flavors and a fruit juice line. Opposer now offers over 30 different ready-to-drink beverages. Opposer is continuously expanding its lines of beverages (e.g., diet, energy, children's) and opposer has licensed the mark SOBE for use in connection with chewing gum and chocolate bars. Opposer distributes and sells a wide variety of merchandise (e.g., hats, t-shirts, mouse pads, stickers, golf bags and balls, frozen desserts, sports bottles, pillows, pens, tattoos, snowboards, skateboards) bearing the SOBE mark.

Applicant is an individual citizen living in Florida. After working in the beverage industry for many years (e.g., Seagram's), he, his brother Barry Schwartz and his friend, Stephen Mittleman, developed an idea for sparkling wine containing edible gold flakes. After investigating the possibilities, they located a winery in Chile; decided on the mark "SoBé Sparkling Wine" after the South Beach area of Miami, Florida; obtained all the necessary licenses; and filed on August 3, 1994, an application claiming first use on April 1, 1994. (According to the testimony of Stephen Schwartz, his first sale was in November 1994. Dep., pp. 68-71.) Sometime between 1996 and 1999 the Chilean winery supplying applicant's sparkling wine ceased operations and from 1999 to 2001 applicant tried to find an alternative supplier from France; more recently he has sought a supplier from California or New York. According to Mr. Schwartz he has identified a new supplier and stands ready to re-enter the sparkling wine market as soon as this trademark dispute is resolved.

Standing

Applicant argued in his brief (pp. 30-31) that opposer has not proven likelihood of confusion; that without likelihood of confusion, there is no harm to opposer; and that therefore opposer lacks standing.

Applicant's view of standing is mistaken. After explaining that a plaintiff must prove standing and a ground, our primary reviewing Court, the Court of Appeals for the Federal Circuit, explained standing as follows in Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000): "Standing is the more liberal of the two elements and requires only that the party seeking cancellation [or opposing registration] believe that it is likely to be damaged by the registration." See Section 13 of the Trademark Act, 15 U.S.C. §1063; and Golden Gate Salami Co. v. Gulf States Paper Corp., 332 F.2d 184, 141 USPQ 661 (CCPA 1964). Thus, opposer need only prove a good faith belief that it is likely to be damaged by the registration if it issued. See also, 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §20:46 (4th ed. 2001).

Action on three of opposer's pending applications for the marks SOBE (Serial Nos. 75937834 and 75937835) and SOBE

ICE (Serial No. 76011389) for a wide variety of goods and services has been suspended based on applicant's prior filed application involved herein, and the Examining Attorney has advised opposer that if applicant's application matures into a registration it may be cited against opposer's applications under Section 2(d) of the Trademark Act. See opposer's notice of reliance IV. Thus, opposer demonstrated its standing to bring this opposition. See Lipton Industries, Inc. v. Ralston Purina Co., 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982); Linville v. Rivard, 41 USPQ2d 1731, 1734 (TTAB 1996), aff'd at 133 F.3d 1446, 45 USPQ2d 1374 (Fed. Cir. 1998); and Rail-Trak Construction Co., Inc. v. Railtrack, Inc., 218 USPQ 567, 571 (TTAB 1983).

In addition, opposer properly made of record status and title copies of three of its four pleaded registrations, specifically, Registration No. 2153152 for the mark SOBE for "tea" in International Class 30 and "juice drinks containing water" in International Class 32;[2] Registration No. 2345815 for the mark SOBE for "frozen dairy products, namely, ice

[2] Registration No. 2153152 issued April 21, 1998. The Board hereby takes judicial notice that the USPTO accepted a Section 8 affidavit and acknowledged a Section 15 affidavit filed for this registration. When a registration owned by a party has been properly made of record in an inter partes case, and there are changes in the status of the registration between the time it was made of record and the time the case is decided, the Board will take judicial notice of, and rely upon, the current status of the registration as shown by the records of the United States Patent and Trademark Office. See TBMP §704.03(b)(1)(A) (2d ed. rev 2004), and the cases cited therein. (footnote continued)

cream; coffee; concentrates and solids for the preparation of beverages, namely, coffee and tea; candies; cakes and pastries" in International Class 30 and "concentrates and solids for the preparation of juice drinks containing water, sports nutritional drinks" in International Class 32;[3] and Registration No. 2256688 for the mark SOBE for "packaged tea drinks, namely, tea, iced tea, tea flavored with fruit, herbal tea and herbal food beverages" in International Class 30 and "packaged fruit juice drinks and packaged sports drinks, all containing water" in International Class 32.[4]

Opposer has clearly established its standing in this case.

Priority

In view of opposer's ownership of valid and subsisting registrations for its SOBE mark, as detailed above, the issue of priority does not arise in this opposition proceeding.[5] See King Candy Co. v. Eunice King's Kitchen,

---

However, opposer's request in its reply brief (p. 4) that the Board take judicial notice that this registration is now incontestable is denied. The USPTO's acknowledgment of a Section 15 affidavit is a ministerial act, not a legal adjudication. Moreover, Section 15 incontestability relates to use of a mark, not the registration thereof. Cf. Section 14 of the Trademark Act.

[3] Registration No. 2345815 issued April 25, 2000.

[4] Registration No. 2256688 issued June 29, 1999.

[5] Applicant did not counterclaim to cancel any of opposer's pleaded registrations.

Inasmuch as the issue of priority does not arise due to opposer's ownership of valid and subsisting registrations, and because applicant did not file a counterclaim to cancel opposer's registrations, we do not consider opposer's alternative argument that it has priority because applicant abandoned his rights in

Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974); Massey Junior College, Inc. v. Fashion Institute of Technology, 492 F.2d 1399, 181 USPQ 272, at footnote 6 (CCPA 1972); and Carl Karcher Enterprises, Inc. v. Stars Restaurants Corp., 35 USPQ2d 1125 (TTAB 1995).

Likelihood of Confusion

We turn now to consideration of the issue of likelihood of confusion. Our determination of likelihood of confusion is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion.[6] In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). Based

---

his involved mark for sparkling wines by failing to use the mark for the period 1997 – 2001. See opposer's brief, pp. 23-24, and opposer's reply brief, pp. 4-5.

[6] Opposer argues (brief, p. 25) that the relevant du Pont factors in this case are the similarities of the parties' marks; the fame of opposer's mark; the "competitive proximity of the parties' goods and trade channels"; the lack of sophistication of purchasers; the absence of third-party use of similar marks on similar goods; and the extent to which opposer has prevented unauthorized third-party use.

Applicant argues (brief, p. 13) that it "believes this Board should consider all of the factors of *DuPont* as relevant to this Board's decision."

Our primary reviewing Court has held that only those du Pont factors shown to be material or relevant in the particular case and which have evidence submitted thereon are to be considered. We shall discuss each of the relevant and material du Pont factors on which there is evidence herein.

on the record before us in this case, we find that confusion is likely.

We turn first to a consideration of the parties' marks. It is well settled that marks must be considered in their entireties as to the similarities and dissimilarities thereof. However, our primary reviewing Court has held that in articulating reasons for reaching a conclusion on the question of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature or portion of a mark. That is, one feature of a mark may have more significance than another. See Cunningham v. Laser Golf Corp., supra; Sweats Fashions Inc. v. Pannill Knitting Co., 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); and In re National Data Corporation, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

The word "SoBé" is the dominant portion of applicant's mark. The words "sparkling wine," being the generic name of the product, lack trademark significance. Because there is no "correct" pronunciation of a trademark, someone who has heard applicant's mark and sees opposer's SOBE mark may well pronounce the words the same. See In re Belgrade Shoe, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969); Interlego v. Abrams/Gentile Entertainment Inc., 63 USPQ2d 1862 (TTAB 2002); and In re Lamson Oil Co., 6 USPQ2d 1041 (TTAB 1987).

To the extent that consumers may understand SOBE or "SoBé" to refer to the South Beach area of Miami, Florida, they have the same connotation. People not aware of this meaning will see both words as the same arbitrary term.

In terms of the appearance of the marks, applicant's arguments regarding each specific difference between the mark shown in its application and opposer's mark as used on its products (including lower and upper case letters, lizard designs, a diamond within the letter "O") are not persuasive. In determining registrability, we consider the mark as it appears in applicant's drawing and the mark as registered by opposer.

The design (the square outline and the five stars) and the stylized lettering of the words in applicant's mark, do not offer sufficient differences to create a separate and distinct commercial impression. See In re Dixie Restaurants Inc., supra. It is the word portion, and specifically the term "SoBé," not the design in applicant's mark, that would be used to call for applicant's sparkling wines.

Moreover, the differences in the marks may not be recalled by purchasers seeing the marks at separate times. The emphasis in determining likelihood of confusion is not on a side-by-side comparison of the marks, but rather must be on the recollection of the average purchaser, who normally retains a general rather than a specific impression of the many trademarks encountered; that is, the purchaser's fallibility of memory over a period of time must be kept in mind. See Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and Spoons Restaurants Inc. v. Morrison Inc., 23 USPQ2d 1735 (TTAB 1991), aff'd unpub'd (Fed. Cir., June 5, 1992).

When considered in their entireties, we find that the respective marks are similar in sound, appearance, connotation and overall commercial impression. See In re Azteca Restaurant Enterprises Inc., 50 USPQ2d 1209 (TTAB 1999).

Turning to the du Pont factor of the fame of opposer's mark, opposer has established that its mark SOBE is very strong and well known in the field of tea and fruit juice drinks. Opposer's sales of its SOBE products are substantial, with sales of $247.5 million in 2001 and $225 million in 2003.[7] Opposer experienced tremendous success and exponential growth of the SOBE products from its launch in 1996.

Opposer's advertising expenditures for 2001 and 2003 are $17 million and $19 million, respectively. Opposer's methods of advertising include the following: (i) radio

[7] Michael Joyce testified that the sales figures were about 90% U.S. sales and "10% if not less" are sales outside the U.S. (Dep., p. 28.) The numbers set forth above are 90% of the sales figures Mr. Joyce testified to.

advertising since 1999, now done through 120 stations in the top 35 markets (by population); (ii) television advertising on network and cable channels (NBC, MTV, ESPN, Comedy Central); (iii) print ads in consumer magazines such as "Rolling Stone," "Maxim," "ESPN Magazine" and "Snowboarder" and in trade magazines such as "Convenience Store News," Beverage Aisle" and "Supermarket News"; (iv) outdoor and billboard advertisements; (v) opposer's "Love Bus Tour" which is on the road for 10 months of the year stopping at retailers and at various events; (vi) sponsorships of events such as the Gravity Games (e.g., skateboarding, motocross) since 2001, which draws over 200,000 people and is televised on NBC, and the U.S. Open Snowboarding Championships which draws 30,000 people and is also broadcast on NBC; (vii) sponsorship of a BMX motocross team, as well as of individual athletes such as Travis Pastrana (motocross), Andy McDonald (skateboarding), Biker Sherlock (skateboarding), Kier Dillon (snowboarding) and John Daly (golf); (viii) partnering with Microsoft Corporation on the launch of Microsoft's X Box gaming system, and with "Mad Magazine" on a promotion of one of opposer's new beverage products, and on the re-release of the movie "Animal House" with opposer's coupons inside the DVDs; and (ix) hiring an ad agency that handles opposer's product placement in movies (e.g., “American Pie II”) and television shows (e.g., “Friends”).

Opposer has received extensive media coverage, as shown by the several media stories dating from 1997 to 2003, most of which are from printed publications available to the general public such as “The Chicago Tribune,” “The St. Petersburg Times,” “The New York Times,” “USA Today,” “Forbes” and “Business Week,” with a few articles appearing in the trade publications “Beverage Spectrum” and “Beverage Industry Magazine.”

Opposer receives over 10 million hits per month on its website, and it has a database of over 250,000 people with whom opposer communicates about matters such as new products and brand updates.

Opposer has won several packaging awards for its goods (e.g., Clear Choice Award for a particular glass conatiner, Beverage Institute Silver Award, Beverage Spectrum Award).

While opposer also asserts that in 2003 it was the leader in the category of healthy refreshment beverages (with approximately 15 different brands in that category such as SNAPPLE, ARIZONA and NANTUCKET NECTARS), being the number one selling brand in convenience stores and gas stations and the number two selling brand in supermarkets and grocery stores, the parameters of the IRI and Nielsen studies on which this assertion is based were not made of record. Further, the field "healthy refreshment beverages" (as characterized by opposer) is ambiguous and presumably narrow.

Fame is relative, and even with opposer's substantial sales and advertising figures for two non-consecutive years, media coverage, etc., we conclude that opposer has not demonstrated that its SOBE mark has attained the level of "fame" within the meaning of the du Pont factors, as such marks as COCA-COLA or FRITO-LAY. See Sports Authority Michigan Inc. v. PC Authority Inc., 63 USPQ2d 1782, 1796 (TTAB 2002).

However, we find that opposer's mark SOBE is clearly well known and a strong mark entitled to a broad scope of protection. This factor favors opposer.

This increases the likelihood that consumers will believe that applicant's goods emanate from or are sponsored by opposer. As the Court stated in Kenner Parker Toys Inc. v. Rose Art Industries Inc. 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992):

> A strong mark, on the other hand, casts a long shadow which competitors must avoid. See e.g., Nina Ricci, 889 F.2d at 1074.
> Thus, the Lanham Act's tolerance for similarity between competing marks varies inversely with the fame of the prior mark. As a mark's fame increases, the Act's tolerance for similarities in competing marks falls.

The next du Pont factor is the similarity or dissimilarity in the nature of the parties' goods, as identified in the application, and in opposer's proven registrations. It is well settled that goods need not be identical or even competitive to support a finding of likelihood of confusion, it being sufficient instead that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would likely be encountered by the same persons under circumstances that could give rise to the mistaken belief that they emanate from or are associated with the same source. See In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); In re Opus One Inc., 60 USPQ2d 1812 (TTAB 2001); and Chemical New York Corp. v. Conmar Form Systems Inc., 1 USPQ2d 1139 (TTAB 1986).

Applicant's goods are identified as "sparkling wine" and opposer's identified goods include "tea," "juice drinks containing water," "packaged tea drinks, namely, tea, iced tea, tea flavored with fruit, herbal tea and herbal food beverages" and "packaged fruit juice drinks and packaged sports drinks, all containing water."

Both parties sell beverages. Although applicant's product is alcoholic and opposer's products are not, opposer has submitted evidence showing that several companies manufacture and sell both alcoholic and non-alcoholic beverages, sometimes under the same or similar marks. Specifically, the evidence shows that the following companies market both alcoholic and non-alcoholic beverages: (i) Anheuser-Busch offers beer and its “180 Energy Drink” (Maric dep., Exhibit Nos. 110-113); (ii) Seagram’s offers gin, wine coolers and ginger ale (Maric dep., Exhibit Nos. 116-118); and (iii) Hansen’s offers sodas, juices and an energy drink with vodka and malt liquor (Maric dep., Exhibit Nos. 114-115). (See also, opposer’s notice of reliance II on third-party registrations owned by Anheuser-Busch, Seagram’s, and Hansen’s for marks separately covering alcoholic and non-alcoholic beverages.)

In addition, opposer has submitted evidence that both alcoholic and non-alcoholic beverages are advertised in the same magazines (e.g., “Rolling Stone” and “Beverage Aisle” -- Joyce dep., Exhibit Nos. 48 and 95); and that they are both offered for sale in the same places (e.g., supermarkets; bevmo.com, missionliquors.com -- Maric dep., Exhibit Nos. 107 and 109).

Decisions of this Board and a predecessor Court to our current primary reviewing Court have made clear that in appropriate factual contexts, alcoholic beverages and non-alcoholic beverages may be so related as to be likely to cause confusion when similar marks are used thereon. See

Pink Lady Corp. v. L.N. Renault & Sons, Inc., 265 F.2d 951, 121 USPQ 465 (CCPA 1959)(PINK LADY and design for wines held confusingly similar to PINK LADY for, inter alia, fruit juices for food purposes and packaged grapefruit juices for beverage purposes); In re Modern Development Co., 225 USPQ 695 (TTAB 1985)(THE CANTEEN in stylized lettering for wine in cans held confusingly similar to CANTEEN in stylized lettering for, inter alia, ginger ale and root beer); and In re Jakob Demmer KG, 219 USPQ 1199 (TTAB 1983)(GOLDEN HARVEST and design for wines held confusingly similar to GOLDEN HARVEST in stylized lettering for apple cider).

We find that these goods are related products within the meaning of the Trademark Act. See Hewlett-Packard Company v. Packard Press, Inc., 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)("even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services"); and Recot Inc. v. M.C. Becton, 214 F.3d 1332, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000)("even if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis.").

Applicant urges that the goods are not sold in the same trade channels, as opposer sells to the general public primarily through supermarkets, convenience stores and mass market retailers, whereas applicant, as required by law, sells only to distributors who in turn sell to retailers such as wine and liquor stores, bars, clubs, hotels and restaurants. However, applicant's response to opposer's interrogatory No. 10(b), regarding where applicant's product was offered for sale, stated that his distributors serviced "wine and liquor stores, supermarkets, bars, clubs, hotels and restaurant's." (Schwartz dep., Exhibit No. 27.) In his brief (p. 20) applicant acknowledges that "supermarkets, which sell wine, appear to be the only common channel of trade between the two parties' products." Thus, we find that the goods may travel in the same channels of trade. We are not persuaded by applicant's arguments that some states do not permit the sale of wine outside of state-owned retail liquor stores, or that, although opposer sells its products at bars and restaurants (e.g., "Hard Rock Café," through 56 locations in the United States), "there is very little overlap."

Neither applicant's nor opposer's identifications of goods are limited in any way as to trade channels. Moreover, the record is clear that there are at least some overlapping channels of trade, specifically, supermarkets and bars/restaurants. This factor favors opposer.

Regarding the purchasers and the conditions of sale, again there are no restrictions in the parties' respective identifications of goods with respect thereto. Therefore, applicant's argument that he sells his sparkling wine only to "sophisticated" licensed distributors who in turn may sell only to licensed retailers, is not relevant. Even though applicant may be required by law to sell only to licensed distributors, the ultimate potential purchasers of applicant's sparkling wine are those members of the general public who are over 21 years old. Thus, the classes of purchasers or ultimate purchasers of the parties' goods overlap.

Regarding the care purchasers would use in buying these goods, there is insufficient evidence to support applicant's argument that the ultimate consumers of his alcoholic beverage would be "more likely to ask for recommendations" before purchasing wine or sparkling wine. Purchasers of applicant's sparkling wine, even if unsophisticated, as applicant asserts, may well purchase wine without help from a sales person, particularly if the purchase is made in a supermarket. The fact that, as acknowledged by applicant, his ultimate customers may be unsophisticated, only increases the likelihood of confusion. Moreover, opposer's tea and fruit juice beverages sell for about $1.00 to $2.50, and applicant's sparkling wine beverage sells for as low as $10.00 per bottle. These are inexpensive goods that may be purchased on impulse without the purchaser exercising any particular care in making the purchasing decision. This factor favors opposer.

Applicant concedes that there is no evidence of third-party use or registration of the mark SOBE for similar goods. In view thereof, applicant's argument (without evidence in support thereof) that the term SOBE "has been applied to everything from furniture design to clothing to hair care products" (applicant's brief, p. 25) is not persuasive. While opposer bears the burden of proof in establishing its claim of priority and likelihood of confusion, opposer is under no obligation to submit evidence on du Pont factors which might favor applicant. If applicant wanted evidence on this factor to be of record in the case, he was free to present such evidence at trial in defense of opposer's claim. Applicant did not do so.

Neither party is aware of any instances of actual confusion. However, as applicant's use has, at best, been minimal for several years, there has been no meaningful opportunity for actual confusion to occur. Thus, the absence of actual confusion is not surprising, and this du Pont factor is neutral. In any event, the test is not actual confusion, but likelihood of confusion. See Weiss Associates Inc. v. HRL Associates Inc., 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990); and In re Azteca Restaurant Enterprises Inc., supra.

Another du Pont factor to be considered in the case now before us is "the variety of goods on which a mark is or is not used (house mark, 'family' mark, product mark)." In re E. I. du Pont de Nemours & Co., supra. Opposer has registered the mark SOBE for teas and fruit juice drinks, herbal food beverages, coffee, ice cream, candies, cakes, pastries and concentrates and solids for the preparation of tea, coffee and juice drinks. In addition, opposer sells and distributes as promotional items a variety of general consumer products, including hats, shorts, T-shirts, snowboards, golf bags, golf balls, mouse pads, water bottles, and guitars. Further, the record is clear that opposer licenses use of its mark on gum and chocolate bars. Purchasers aware of the variety of opposer's goods sold under the mark SOBE may well assume that opposer is now offering sparkling wine under the mark SOBE. See Uncle Ben's Inc. v. Stubenberg International Inc., 47 USPQ2d 1310, 1313 (TTAB 1998).

In balancing the du Pont factors and giving each factor involved herein the appropriate weight, because of the similarity of the parties' marks; the strength of opposer's mark; the relatedness of the parties' goods, as identified; the same or overlapping trade channels; the same or overlapping classes of purchasers; the inexpensive nature of these goods and resulting "impulse" purchasing; and the variety of goods on which opposer uses its mark; we find that there is a likelihood that the purchasing public would be confused by applicant's use of his "SoBé Sparkling Wine" and design mark for his goods.

Decision: The opposition is sustained and registration to applicant is refused.