

Mailed:
June 22, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Pommery S.A.

Serial No. 78367268

Bruce D. George of Woodcock Washburn LLP for Pommery S.A.

Gene V.J. Maciol, Trademark Examining Attorney, Law Office
103 (Michael Hamilton, Managing Attorney).

CORRECTION

By the Board:

A copy of the attached decision was entered in the Board's electronic records with a mailing date of June 20, 2005, although the decision was actually mailed on June 20, 2006. As indicated on the attached copy, the decision is being re-mailed on June 22, 2006. The period for requesting reconsideration or filing an appeal will run from June 22, 2006.

**THIS DISPOSITION IS
NOT CITABLE AS
PRECEDENT OF THE TTAB**

Mailed:
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Bucher

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103 (Michael Hamilton, Managing Attorney).

Before Bucher, Grendel and Zervas, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Pommery Société Anonymé, a corporation of France, seeks
registration on the Principal Register of the mark

SUMMERTIME for goods identified in the application, as
amended, as follows:

"wines, namely wines having the label of
origin Champagne, and flavored sparkling
wines" in International Class 33.¹

This case is now before the Board on appeal from the
final refusal of the Trademark Examining Attorney to

¹ Application Serial No. 78367268 was filed on February 12,
2004 under Section 44(e) of the Act, 15 U.S.C. § 1126(e), based
upon applicant's ownership of French Reg. No. 1454052 that issued
on March 11, 1988.

register applicant's mark based upon Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). The Trademark Examining Attorney has found that applicant's mark, when used in connection with the identified goods, so resembles the mark **SUMMERTIME**, which is registered for "beer and ale" in Int. Class 32,² as to be likely to cause confusion, to cause mistake or to deceive.

Applicant and the Trademark Examining Attorney have fully briefed this appeal, but applicant did not request an oral hearing. We affirm the refusal to register.

Applicant argues that champagne and beer are quite different products, that substantial pricing differences exist between beer and premium wines like its champagne, and hence, that the discriminating nature of its sophisticated consumers prevents confusion.

By contrast, the Trademark Examining Attorney contends that the marks are identical, that the goods are closely related, and that these goods share the same channels of trade.

² Registration No. 2145755 issued to GIBC, Inc. on March 24, 1998, having claims of first use anywhere and first use in commerce at least as early as May 20, 1996; Section 8 affidavit accepted and Section 15 affidavit acknowledged. The word "Summer" is disclaimed apart from the mark as shown.

Preliminary matters

The Trademark Examining Attorney has objected to evidence applicant submitted with its appeal brief. With this attachment, applicant attempts to include web pages from www.wineaccess.com showing that a bottle of its champagne costs \$23.⁹⁹, as well as screen prints of Yahoo search results showing registrant's goods being sold in six-packs. In its reply brief, applicant then argued that it should be able to provide rebuttal evidence to a claim of the Examining Attorney,³ and hence submitted another web page showing that applicant's 187 ml split of Pommery POP sells for \$7.⁹⁹.⁴

The record in any application must be complete prior to appeal. 37 C.F.R. § 2.142(d); TMEP § 710.01(c); TBMP §§ 1207.01 *et seq.* See also Rexall Drug Co. v. Manhattan Drug Co., 284 F.2d 391, 128 USPQ 114 (CCPA 1960); and In re Psygnosis Ltd., 51 USPQ2d 1594 (TTAB 1999). Accordingly, we have not considered these tardy submissions.

³ " ... Applicant understands the prohibition against offering new evidence once an appeal has commenced; however, Examiner's claim is unfounded. To demonstrate this, Applicant attaches Exhibit A, showing the typical price for a single-serving size bottle of POP in the United States. At \$7.⁹⁹ per 200ml bottle, this hardly constitutes an inexpensive purchase"

Reply brief, pp. 3 - 4.

⁴ < <http://www.finewinehouse.com/index.asp?PageAction=VIEWPROD&ProdID=6874> >

Analysis: Likelihood of Confusion

Our determination under Section 2(d) is based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relationship of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

The marks

We turn first to the du Pont factor focusing on the similarity of the marks in their entirety. The Trademark Examining Attorney argues that applicant's mark is the same as the registered mark in appearance, sound, connotation and commercial impression. Applicant does not argue this point. Hence, we agree with the Trademark Examining Attorney that the marks are identical in every respect.

Strength of cited mark: renown and distinctiveness

As to the strength of the cited mark, although there is no evidence in this record as to the renown of the cited mark, we must assume it is inherently distinctive and hence should be afforded a wide ambit of protection. See Palm Bay

Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

As to the du Pont factor focusing on the number and nature of similar marks in use on similar goods, we find no evidence in the record suggesting that this is a weak mark as applied to registrant's goods.⁵ Hence, these du Pont factors all favor the position taken by the Trademark Examining Attorney.

The goods

Accordingly, we turn to the relationship of the goods as described in the application and cited registration. As noted above, the marks are identical in every respect. With both registrant and applicant using the identical designation, "the relationship between the goods on which the parties use their marks need not be as great or as close as in the situation where the marks are not identical or strikingly similar." Amcor, Inc. v. Amcor Industries, Inc., 210 USPQ 70, 78 (TTAB 1981). See also In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ["[E]ven when goods or services are not competitive or intrinsically related, the use of identical marks can lead

⁵ Although applicant included with one of its submissions a listing of third-party registrations covering alcoholic beverages whose marks included the word "summer," copies of these registrations were never made of record.

to an assumption that there is a common source."].

Undeniably, at some very basic level, there is a relationship between these goods inasmuch as beer and sparkling wine are both alcoholic beverages whose bubbles are derived from brewer's yeast.

In order to support a holding of likelihood of confusion, it is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. See In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

We agree with applicant that our analysis must focus on the way the goods are encountered in the marketplace by typical consumers and whether consumers will be confused as to the source of the products. See 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, § 23:58 (4th ed. 2004) [tribunals must "attempt to recreate the conditions under which prospective purchasers make their choices" in order to make a "realistic" evaluation of likelihood of confusion].

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. Hence, we consider how these respective goods are encountered in the marketplace by typical consumers. The Trademark Examining Attorney has made of record the following registrations:



for *inter alia* "beer; mineral and aerated water; soft drinks; fruit drinks; fruit juices; syrups for making soft drinks and fruit drinks" in International Class 32; and "alcoholic beverages, namely, bourbon, whiskey, vodka, gin, tequila, rum, brandy, cognac; liqueurs; wine, wine coolers; **champagne and sparkling wine**" in International Class 33;⁶

ОЧАКОВО

for "beer, mineral water, aerated water; non-alcoholic aerated fruit beverages, namely, fruit flavored soft drinks" in International Class 32 and "wine and prepared low-alcoholic cocktails" in International Class 33;⁷

WINE IS IT

for "on-line retail store, telephone order services, mail order services and retail store services featuring wine, beer and spirits to be sold to consumers who are of legal age and in states that allow the shipment of wine and alcoholic beverages; gift packages, beverages, wine, liquor, cordials, liqueurs and champagne, candy, cigars, foods, flowers, crystal, gift certificates, gourmet foods and cooking utensils, office, house, catering supplies, jewelry.

⁶ Registration No. 2776133 issued to IFE S.r.l., an Italian corporation, on October 21, 2003, claiming dates of first use and first use in commerce at least as early as the year 2000. The registration states that the English translation of ESPERYA is "ancient Italy."

⁷ Registration No. 2632776 issued to Moskovskiy Pivo-Bezalkogolnyi Kombinat Ochakovo Close Corporation, a corporation of the Russian Federation, on October 8, 2002, claiming dates of first use anywhere at least as early as December 31, 1994 and first use in commerce at least as early as January 16, 2001.

cosmetics, golf related goods, vehicles and parts therefor, and clothing" in International Class 35.⁸

UETA

for "**retail store services featuring duty free goods**, namely, fragrances, cosmetics, and bath and body products, namely perfumes, colognes, facial treatments, makeup, lotions, powders, oils, soaps, deodorants, and hair, nail and skincare products; tobacco products, including but not limited to cigarettes (both imported and domestic), cigars, pipes, pipe tobacco, chewing tobacco, and smokers' articles, namely, lighters, matches, cigar utensils, namely, humidors, clippers, cigar cases and ashtrays; alcoholic beverages, namely, liquors (imported and domestic), mixers, beer, wine, champagne, liqueurs, and pre-mixed liquor drinks; food, confection and beverage products, namely chips, cookies, assorted nuts, chocolates, hard candy, chewing gum, assorted snack seeds, soft drinks, juices, water, hydration drinks and energy drinks; gourmet and specialty packaged food products, including but not limited to smoked fish, caviar, mussels, sardines and eel; apparel accessories, namely, belts, scarves, ties, hats and gloves; fashion eyewear, sunglasses and athletic-oriented eyewear; purses and handbags; small leather goods, namely, wallets and briefcases; watches and clocks; jewelry; writing instruments; crystal gift items; novelty gifts and souvenirs, namely, plush toys, playing cards, magic tricks, key chains, drinking mugs, postcards, t-shirts and sweatshirts; electronics, cameras, calculators, computers, batteries and music; and travel-related products, namely, luggage, backpacks, duffel bags, shoulder bags, waist packs, money belts, toiletry kits, locks, tags, straps, converters and inflight comfort items" in International Class 35.⁹

Under the best of circumstances, federal registrations do not show actual use in the marketplace. Moreover, in the instant case, the record contains a dearth of evidence of valid and subsisting registrations where the mark is

⁸ Reg. No. 2798160 issued on December 23, 2003 based upon a claim of use anywhere and use in commerce at least as early as October 2000. The word "Wine" is disclaimed apart from the mark as shown.

⁹ Registration No. 2843687 issued to Ueta, Inc., a Panamanian company, on May 18, 2004, claiming use anywhere and use in commerce at least as early as 1987.

registered for both beer and sparkling wine. In the first case above, an Italian firm has registered its mark for beer and sparkling wines, although this registration covers five classes broadly listing dozens of items of foods and beverages. The second registration, owned by a Russian firm, covers beer and wine. Two other third-party registrations involve service mark owners who both sell a wide array of goods, extending well beyond alcoholic beverages (including a Panamanian firm specializing in all kinds of duty-free goods). We find that yet other third-party registrations introduced into the record by the Trademark Examining Attorney for non-alcoholic beverages¹⁰ or registrations having sparkling wines but owned by foreign entities and registered in the United States under Section 44 of the Act¹¹ have no probative value on the questions before us herein.

¹⁰ Reg. No. 1478938, LADY VELVET for "non-alcoholic beverages and mixes, namely, non-alcoholic, wines, sparkling wines, beer and cocktail mixes, and bottled water" in International Class 32; Reg. No. 2678918 for MARCHE DU MONDE for "beer, lager, ale, malt liquor, non-alcoholic beer and wine, soft drinks, still and sparkling fruit and vegetable juices, fruit and vegetable concentrates, concentrated syrups or powders used in the preparation of non-alcoholic beverages, drinking water, and flavored drinking water" in International Class 32, and Reg. No. 2712774 covering the same goods for the special form mark shown herein.

MARCHÉ DU MONDE

¹¹ Reg. No. 2839585, AROSA issued under Section 44(e) of the Act.

Assuming that the Trademark Examining Attorney has put forward his best evidence of third-party registrations, we would have to conclude, in the absence of any showing to the contrary, that U.S. manufacturers typically avoid the common branding of beer and sparkling wine. However, that is not the end of our inquiry under this du Pont factor.

There is no evidence in the record regarding the organization and integration of the beer and sparkling wine industries. We have no reason to conclude that the average retail consumer of alcoholic beverages, upon seeing an identical mark on beer and sparkling wine, would automatically assume differences in source based upon particular insights into how the beer and sparkling wine businesses are organized/integrated or based upon specific knowledge of the manufacturing differences between beer and sparkling wine.

In the context of the marketing conditions of these goods and the circumstances under which they would be encountered, the Trademark Examining Attorney had included the following three websites in the evidence of record.

- ① The homepage of **BevMo! - Beverages and More:**

BevMo!

[SHOPPING CART](#) [MY CLUBBEV](#) [CUSTOMER SERVICE](#) [SIGN ON](#)

Home Wine Spirits Beer & More! Gifts Wine Clubs Tastings Stores

Welcome Customer! You have **1** item(s) in your Shopping Cart. [Where we can ship](#) [Track an Order](#) [FAQ](#)

Search

EARN A 5% REWARD!
CLUBBEV MEMBERS

Pickup Your Order in 1 Hour!

My current choice is:

WINE

Cabernet Sauvignon
 Champagne/Sparkling
 Chardonnay
 Dessert
 Gewurztraminer
 Merlot
 Other Reds
 Other Whites
 Pinot Noir
 Riesling
 Rose/Blush
 Sauvignon Blanc
 Syrah/Shiraz
 Zinfandel

Argentina
 Australia
 Chile
 France
 Germany
 Italy
 New Zealand
 Spain

SPIRITS

Bourbon
 Brandy
 Gin
 Liqueur
 Prepared Cocktails
 Rum
 Scotch Whisky
 Other Whiskies
 Tequila
 Vodka

BEER

Big Breweries
 Cider
 Craft Beer
 Imports
 Malt Beverages

GIFTS

Accessories
 Beer Gifts
 Liqueur Gifts
 Wine & Champagne
 Wine Baskets & Tools

& MORE!

Bananas
 Cigars
 Coffee & Tea
 Glassware
 Gourmet Food
 Mixes
 National Soda
 Old Time Soda
 Snacks
 Water & Ice

CLUBS!
 see all clubs

SO MANY WINES,
SO LITTLE TIME...

The BevMo! 5% wine sale won't last forever. Expect the more popular wines to sell quickly. So hurry in!

Prices already reduced online so when you buy 2 bottles the 2nd is a nickel

PINOT NOIR

Great Pinot Noir selections!
Smooth & Seductive this is the red wine of choice for those who want to experience it all!

PREMIUM SPIRITS

Serve your guests the best of the best!
From Armagnac to Premium Tequilas, these are the best spirits at great buys.

HOT BRANDS UNDER \$10!

It has to be good, but it can't break the bank! our experts pick the best brands under ten bucks for your party!

90+ POINT WINES!

The highest-rated wines from all the experts!
Up to \$10, \$10 to \$20 \$20 to \$30, \$30 to \$50 Over \$50

25% OFF MIKASA

Great-looking, functional glassware turns a party into an affair!

IRISH WHISKEY

Choose from over 50 Irish Whiskies!

GREAT BEER DEALS

Good deals on a variety of your favorite brands of beers!

GOT ENERGY?

We've got several Energy Drinks to choose from!

PREMIUM VODKA!

From our selection of over 150 vodkas, here's a short list of the best of the best!

MARGARITAVILLE!

Just take a sip of Margaritaville!
Where is Margaritaville?

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 Web Site design and hosting by [VistaSite, Inc.](#)

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12 << <http://www.bevmo.com/productlist.asp?area=home> >>

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② A web page from a cyber-enterprise in New Bern, NC ("Balloons Galore and Gift Expressions Online") found on a website devoted to a wide range of goods and services, including "gifts, gourmet foods, gift baskets, decorating service, wedding party planning and collectibles":



	<p>We can put together a basket for a special moment for two or ten! You choose the theme and we do the rest...</p> <p>Just a small gathering? Make cocktail hour fun with our selection of Cheese trays, coasters, snacks and a bottle of wine...</p> <p>North Carolina's wines: The Biltmore Estate, René Barbier Vineyard, Barton & Guestier Vineyard, Stone Haven Vineyard, and Meridian Vineyard...or</p> <p>Champagnes: Cuvée Dom Pérignon, Cuvée 2000 Chandon, Asti Spumante, Moët & Chandon, Taittinger, Freixenet, Korbel...</p>
	<p>We also have imported beer from: Italy, Ireland, Venezuela, Mexico, Germany... again, you pick the occasion and we'll supply the fun!</p>

Balloons Galore and Gift Expressions *on-line*

- [Home] [Collectibles, Lighthouses, Dept. 56, Margaret Fashions, Dreamicles...] [Fine Linens & Luxury Baths]
- [Order Form] [Seasonal Decorating] [Convention & Party Decorating Services] [Unique Gifts]
- [North Carolina Gourmet Foods, Southern Delicacies, Wine & Beer] [Gift Baskets, Gift Bags & More, too]
- [Wedding Gifts, Fun & Traditional]



③ “Wine, Champagne, Liquors, Beer & Spirits” web page of a web site for travelers to French-speaking countries:



Wine, Champagne, Liquors, Beer and Spirits

- **AOC Wine Classifications**
 - Institut National des Appellations d'Origine [INAO]
 - There are 34 Wines with the **AOC** classification
 - Another brief description of the AOC
- **Beer**
- **Champagne and the Region of Champagne**
 - French Champagne Associations links to the origins, practical information, vintage champagnes, champagne links to all the Houses of Champagne.
 - The Region of Champagne-Ardennes
 - Veuve Clicquot Champagne
 - Tours of great estates in Champagne & customized trips
- **Liquors & Other spirits**
- **Wine & Champagne Links**
 - Wines-France is the official French wines guide to discover the wines of France, their varieties, history and the regions they come from.
 - Lorentz wine growers [Language: English & French]
 - Terroir de France the French Wine Guide good information site, Regional information and everything you need to know about wine.
 - Wineries in Alsace [Language: English] A list of wineries
 - Wines by country of origin
 - Wines of the Loire Valley by kind of wine.
 - Wine sites by region. A click on map gives the wines and wineries for that area.
 - The wines of the Cahors area of the Département of Lot, Region of Midi-Pyrenees
 - Wine tours [Language: English] in Alsace and other French wine regions
- **Wine & Champagne Sites**
 - Prime Wines and specialty products just Click Here
 - Wine.com online wine and information
 - Wine Messenger and wines from France
 - Wine Share with the wine grower and you
- **Wine Clubs & Associations**
 - The Comite Interprofessionnel du Vin de Champagne
 - Vin & Santé Clubs by Departments [amateurs de vins] French only
 - Amateur Wine Tasting Clubs around France
- **Wine Degrees, Wine Schools**
 - Get your MBA in Wine
- **Wine Descriptions**
- **Wine Links**
- **Wines of the French Regions**
- **Wine On-line Magazines [French]**
- **Wine Tasting Terms**
- **Wine Tours**
- **Wine Purchasing Clubs**

Only "BevMo! - Beverages and More," the first listed website, has significant probative value. This appears to be a cyberspace equivalent of the traditional brick-and-mortar liquor and wine store. The product list enumerates categories of beverages such as beer, spirits and wine, the latter of which includes champagne and sparkling wine. Depending upon the rules of the jurisdiction, this comports with the range of retail choices consumers will be faced with in wine and liquor stores.

However, the balance of the Trademark Examining Attorney's evidence as to common channels of trade is of little value. As to foreign-based websites, for example, while the article applicant submitted from Vineyard & Winery Management (March/April 2003) discusses Internet marketing of premium champagne and sparkling wine generally, and quotes George Randall of www.internetwines.com (Fairview Heights, IL), we find that specific marketing arrays displayed on foreign websites have limited probative value when one is dealing with the alcoholic beverages inasmuch as few U.S. consumers will look abroad for wine purchases.¹⁵

Nonetheless, the Trademark Examining Attorney argues that we should treat his submitted evidence (e.g., third-party registrations and web pages) as a demonstration that

¹⁵ For example, www.VintageRoots.Co.UK

beer and sparkling wine are related. He also argues that this finding would comport with the results of In re Sailerbrau Franz Sailer, 23 USPQ2d 1719 (TTAB 1992)

[Confusion likely between CHRISTOPHER COLUMBUS for beer and CRISTOBAL COLON for sweet wine], 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.

We agree with the Trademark Examining Attorney, in concluding Sailerbrau is significant, because the Board found that beer and wine may be found in the same retail outlets, that these beverages are inexpensive and that, hence, these consumers are not discriminating and would not have to exercise careful thought or expertise.

By contrast, applicant argues that unlike "sweet" or "still" table wines, its "dry or semisweet" sparkling wines are marketed and priced differently, appealing to a more

discriminating class of consumers. Applicant argues that inasmuch as the applicant in Sailerbrau did not contend that its still wines were premium products sold at a premium price, the instant case is not analogous to Sailerbrau.

In its appeal brief and again in its reply brief, applicant counters with, *inter alia*, a case from our reviewing Court that it argues compels the opposite conclusion from that of Sailerbrau, namely G.H. Mumm & Cie v. Desnoes & Geddes Ltd., 917 F2d 129, 216 USPQ2d 1635 (Fed. Cir. 1990). While this cited case also states unequivocally that "both beer and wine, including champagne, are frequently sold through the same channels of distribution," the Court goes on to find in the Mumm case as follows:

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.

Mumm, 16 USPQ2d at 1638.

On balance, we find that beer and sparkling wine are related products and this factor favors the position taken by the Trademark Examining Attorney.

The similarity of established, likely-to-continue channels of trade

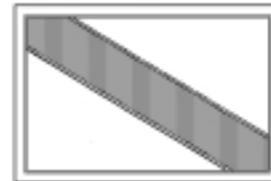
Our primary reviewing Court has noted that different kinds of alcoholic beverages move through the same channels of trade to the same classes of ordinary consumers. In addition to the observations about the same trade channels for beer and champagne that the Federal Circuit made above in Mumm, it has also found on several occasions that spirits such as tequila and beer were found to be inexpensive, closely-related commodities marketed through the same channels of trade to many of the same consumers. In re Chatam International Inc., 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); and In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). This record supports that conclusion, and applicant does not deny that beer and sparkling wine are both sometimes marketed through the same trade channels (e.g., Internet websites, liquor stores and other retail outlets devoted to alcoholic beverages, or supermarkets having entire sections devoted to beer and wine, including sparkling wine). Accordingly, we find that beer and sparkling wines move through overlapping channels of trade.

Mumm: determinative precedent?

Applicant argues that the record and the holding in the Mumm case should control the outcome herein. We disagree.

Initially, we find that the Mumm case is easily distinguished on its facts. As noted earlier, two key considerations in any likelihood of confusion case are the relationship of the goods *and the similarities between the marks*. Unlike the marks in the current case, the marks in Mumm were not identical. Mumm's

registered mark is of a diagonal red stripe or ribbon extending from the upper



left corner of its label to the lower right corner.



Desnoes' mark extends from the lower left of its label to the upper right, and is overlaid with the words RED STRIPE.

Furthermore, Plaintiff Mumm's claimed mark did not contain any literal elements, comprising only a background device (although the Board did find that this device had acquired distinctiveness). Moreover, amid questions of inequitable conduct in the litigation, the Federal Circuit noted that while the drawing of the mark in Mumm's registration was merely a diagonal red stripe, Desnoes had raised questions about whether the Cordon Rouge Champagne specimen showing a blank red stripe should not have shown

the stripe with Mumm's marks superimposed on it as actually used in the marketplace. Accordingly, the Mumm holding that there was no likelihood of confusion surrounding the contemporaneous use of these respective marks was based not just on the commercial relationship of beer and sparkling wine, but also on the dissimilarity of the marks.

Unlike the applicant in the instant case, Mumm clearly demonstrated that its Cordon Rouge is one of France's premium Champagnes. From the quotation above, it is clear that the Federal Circuit agreed that substantial pricing differences actually existed between Mumm's upscale, premium Cordon Rouge Champagne and Desnoes' Red Stripe beer, weighing against a likelihood of confusion on the du Pont factor of the relationship of the goods.

By contrast, the instant record does not establish that applicant's sparkling wines are expensive or targeted to the most discriminating of consumers. Although the word "Champagne" does appear in applicant's identification of goods, there is nothing inherent in the designation "sparkling wine" that limits the products to expensive, high-quality products. Inasmuch as the record herein does not support a conclusion that applicant's goods are expensive items, and because applicant's identification of goods is not limited as to channels of trade or quality of

products, we find that the distinctions discussed in Mumm have not been established herein.

The conditions under which and buyers to whom sales are made

As to the du Pont factor focusing on the conditions under which and buyers to whom sales are made, applicant argues that consumers of its premium wines are careful, sophisticated purchasers. While arguing that beer and ale are common commodities in the United States, applicant maintains that sparkling wine and champagne are not common commodities, citing to a timely submitted article about the relatively low volume of U.S. sales of champagne and sparkling wines, especially when compared with European countries, and particularly France.¹⁶

However, this article also draws a sharp distinction among European champagnes and sparkling wines between the "basic non-vintage blends" and the "luxury labels." This latter category of "prestige cuvées of *grand marque* houses" included Don Perignon, Louis Roederer Cristal cuvée and Taittinger Blanc de Blanc. By contrast, applicant and its products were not only absent from this section, but were featured in the immediately previous section of the article entitled "*Pommery: Straddling the Marketing Spectrum.*" In addition to the fact that applicant is offering inexpensive

¹⁶ Vineyard & Winery Management, pp. 70-71 (March/April 2003).

splits of POP sparkling wine to the "young nightclub set," the article states that " ... Pommery is developing non-vintage blends to complement specific seasons, with appropriate color labeling. 'Summertime' is a *blanc de blanc* with a light pastel label ..." Even without knowing the exact retail cost of a split of POP (knowledge that one gains from applicant's tardy submission), the earlier record suggests that the cost of applicant's small splits of sparkling wine targeted to young party-goers, is not prohibitively expensive. If we were to accept the detailed cost calculations contained within applicant's arguments in its briefs, a six-pack of registrant's beer costs more than a split of applicant's flavored sparkling wine. Hence, we find that the costs for an inexpensive bottle of sparkling wine and a six-pack of beer are quite similar. Although beer and sparkling wine may well differ in odor, taste, color and alcohol content, the record does not support the conclusion that there are substantial pricing differences between beer, on the one hand, and the basic non-vintage blends of sparkling wine, on the other hand. Hence, for some consumers, flavored sparkling wine such as that marketed by applicant, and beer as marketed by registrant, are alternative alcoholic beverages.

Conclusion

In conclusion, we find that these respective alcoholic beverages move through the same channels of trade, and that registrant's beer and applicant's sparkling wines are both available to casual, nondiscriminating purchasers. While this particular record is not especially strong in showing these common retail channels of trade, given that we have identical marks, and inasmuch as we must resolve any doubt in favor of registrant, we find there will be a likelihood of confusion in this case.

Decision: The refusal to register this mark based upon Section 2(d) of the Lanham Act is hereby affirmed.