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Mailed: September 9, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Anheuser-Busch, Incorporated
v.
M&M Sportswear Ltd. and Moshe Bouskila

Opposition No. 91159713
to Application No. 76498018
filed on March 18, 2003

Edward G. Wierzbicki, Daniel D. Frohling and Nathan J. Hole of Loeb & Loeb for Anheuser-Busch, Incorporated.

M&M Sportswear Ltd. and Moshe Bouskila, *Pro Se*.

Before Walters, Drost and Walsh, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Anheuser-Busch, Incorporated filed its opposition to the application of Moshe Bouskila to register the mark IF YOU DON'T BUD YOU AIN'T WISER for "live flowers, namely rose buds; dried flowers, namely rose buds," in International Class 31.[1]

[1] Application Serial No. 76498018, filed March 18, 2003, based upon an allegation of a bona fide intention to use the mark in commerce in

As grounds for opposition, opposer asserts that applicant's mark, when applied to applicant's goods so resembles opposer's previously used and registered famous BUDWEISER mark and family of famous BUD marks for beer and a wide variety of consumer products as to be likely to cause confusion, under Section 2(d) of the Trademark Act. Opposer also asserts a dilution claim, under Section 43(c) of the Trademark Act, alleging that since long prior to applicant's filing date, opposer's BUDWEISER mark and family of BUD marks have been famous in connection with beer.

Applicant, in its answer, denied the salient allegations of the claim and asserted as affirmative defenses lawful parody and first amendment freedom of speech. However, because applicant submitted neither evidence nor a brief, we find that these affirmative defenses have not been pursued herein and we have given them no consideration.

The Record

We note, first, that the parties entered into a protective order for submission of confidential documents and a stipulation to allow, by notice of reliance at trial, evidence submitted in connection with opposer's motion for summary judgment of March 30, 2006 (received by the Board on April 4, 2006). The record consists of the pleadings; the

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connection with the identified goods. This application was filed by and

file of the involved application; certified status and title copies of most of opposer's pleaded registrations; the declarations of Danny Scott, opposer's senior director-promotional products group, tours and gifts and merchandising, Randall Blackford, opposer's director-Budweiser Marketing, George Mantis, president of The Mantis Group, and Nathan J. Hole, opposer's counsel, all with exhibits, all made of record by opposer's notices of reliance. Opposer also submitted the testimony of Angela Ocasio, employed by opposer's counsel, and Gregory Ward, Ph.D., linguistics professor at Northwestern University at Evanston, both with exhibits. Only opposer filed a brief on the case.

Factual Findings

Opposer produces beer that is identified by the trademarks BUDWEISER, BUD, BUD LIGHT and several other "BUD-formative" marks. Opposer began using the mark BUDWEISER in connection with beer in 1876; opposer began using the mark BUD in connection with beer in 1939; and opposer began using the mark BUD LIGHT in connection with beer in 1982. (Blackford Decl. ¶¶2 & 3.) Opposer is the largest brewer and marketer of beer in the United States. (Blackford Decl. ¶2.) In 2004, opposer's beer sales were nearly $8 billion and its beer advertising was more than $500 million. (Id.,

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formerly owned by M&M Sportswear Ltd.

¶¶5 & 8.) BUDWEISER and BUD LIGHT have been the top two best selling beers in the United States since 1994. (Id., ¶6.) Opposer also markets a wide variety of consumer products, including novelties, apparel and home décor under its BUDWEISER and BUD-formative marks. (Scott Decl. ¶3.) Between 2001 and March 2006, opposer's consumer products identified by its BUDWEISER and BUD-formative marks totaled more than $300 million and it spent more than $24 million advertising and marketing these products. (Id., ¶¶7-8.) Additionally, opposer licensees the use of its BUDWEISER and BUD-formative marks in connection with flowers and floral arrangements, including the sale of flowers and cartons of opposer's beer together in gift packages. (Id., ¶¶3-6 and exh. A-J to Ocasio Dep.) Additionally, opposer has shown authorized use of its mark THIS BUD'S FOR YOU in connection with flowers since before the filing date of the application herein.

Opposer pleaded several registrations that it did not establish at trial and it submitted status and title copies of several registrations that were not pleaded.[2] These registrations have not been considered.

The following registrations were pleaded and established in this record:

[2] Registrations pleaded but not established are nos. 2501706, 1443856 and 1828494. Unpleaded registrations are nos. 3011229, 2550770, 3165347, 3029203, 72101,1825937, 3238415, 2010060, 2488727 and 1819549.

TRADEMARK	GOODS	REGISTRATION NO.
BUDWEISER	beer	64125
BUDWEISER	Beer	922481
BUDWEISER	Beer	952277
BUD	Beer	666367
BUD MAN	Beer	999817
BUD LIGHT	Beer	1261873
THIS BUD'S FOR YOU	Beer	1332479
BUD BOWL	Beer	1567443
BUD LIGHT	Flying discs, golf bags, et. al.	1694621
BUD LIGHT	Key chains	1681774
BUD LIGHT	Clocks & watches	1569580
BUD	Caps, hats, sweat shirts, et. al.	1401344
THIS BUD'S FOR YOU	Shirts, et. al.	1632431
BUD BOWL	Hats and shirts	1632099
BUDWEISER	Radios, telephone receivers & sunglasses	1402016
BUD LIGHT	Bags sold empty for equipment, waste pouches, wallets et. al.	1699080
BUD LIGHT	Towels	1684487
BUD MAN	Drinking vessels	2531846

Opposer conducted a consumer survey with results showing that 63% of respondents, who were purchasers or

likely purchasers of roses, believed that roses identified by the mark IF YOU DON'T BUD YOU AIN'T WISER were sponsored by opposer. (See declaration of George Mantis and exhibits thereto.) Opposer also submitted the deposition of Dr. Gregory Ward, its linguistics expert. Dr. Ward conducted a linguistics analysis of the marks BUDWEISER and IF YOU DON'T BUD YOU AIN'T WISER and concluded that the "salient" elements of applicant's mark are BUD and WISER and that anyone competent in English and familiar with the brand BUDWEISER would strongly and immediately associate these "salient" terms in applicant's mark with the BUDWEISER brand.

Regarding applicant, the record establishes only that applicant has not produced any packaging, sold any goods or conducted any marketing under the applied-for mark; and that applicant knew of opposer's use of its BUDWEISER mark when it adopted the applied-for mark.

Analysis

Because opposer has properly made most of its pleaded registrations of record, we find that opposer has established its standing to oppose registration of applicant's mark. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

Priority and Likelihood of Confusion

Because most of opposer's pleaded registrations are of record, Section 2(d) priority is not an issue in this case as to the marks and goods covered by said registrations. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our determination of likelihood of confusion under Section 2(d) must be based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E.I. du Pont de Nemours & Co.,* 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *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).

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). *See also In re Azteca Restaurant Enterprises, Inc.,* 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

We find, first, that opposer has clearly established that its BUDWEISER and BUD marks are famous in connection with beer.[3] The fame of opposer's marks plays a "dominant role in the process of balancing the DuPont factors." *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1327, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000). *See Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002).

Considering, first, the goods involved herein, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein; and *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002).

[3] It is unnecessary to determine whether, on this record, opposer has established a family of marks. "Simply using a series of similar marks does not of itself establish the existence of a family." *J & J Snackfoods Corp. v. McDonald's Corp.*, 932 F.2d 1360, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991). In order to prove a family of marks, opposer must show that it promotes its marks together. *Id.*

Opposer has demonstrated the authorized use by florists of its BUDWEISER and BUD marks in connection with flowers, for example, on vases for flower arrangements; authorized sales of cartons of its beer with flowers in gift packages; and authorized use of its mark THIS BUD'S FOR YOU in connection with flowers. Consistent with the fame of opposer's marks, which entitles it to a broad scope of protection, and the evidence of actual use of opposer's marks in connection with flowers, we find that the respective goods are sufficiently similar that, if identified by confusingly similar marks, confusion as to source or sponsorship is likely. This *du Pont* factor weighs in opposer's favor.

Regarding the class of purchasers and conditions of sale, it is clear that both opposer's beer and many consumer products, including its licensed use on flowers, identified by its marks and applicant's live and dried roses are offered to the general consumer and these items are not of a category of expense that will result in a great deal of care being exercised in purchasing these goods. Similarly, the channels of trade for the respective goods are, if not the same, overlapping in that the respective products will be available in the same customary retail establishments for such goods.

Therefore, these *du Pont* factors also weigh in opposer's favor.

Turning to the marks, we note that while we must base our determination on a comparison of the marks in their entireties, we are guided, equally, by the well established principle that, in articulating reasons for reaching a conclusion on the issue of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." *In re National Data Corp.,* 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Although there are specific differences between the marks, "a purchaser is less likely to *perceive* differences from a famous mark." *B.V.D. Licensing v. Body Action Design*, 846 F.2d 727, 730, 6 USPQ2d 1719, 1722 (Fed. Cir. 1988) (Nies, J., dissenting)(emphasis in original), and quoted with approval in *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.,* 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir 1992).

In view of the fame of opposer's marks and the evidence regarding consumer perceptions of applicant's mark, we find that consumers viewing applicant's mark, IF YOU DON'T BUD YOU AIN'T WISER, are likely to perceive the BUD and WISER portions of the mark as dominant and as a reference to opposer's BUDWEISER mark. Therefore, we conclude that the

marks are sufficiently similar that confusion as to source or sponsorship is likely. Thus, this *du Pont* factor also weighs in opposer's favor.

When we consider the record and the relevant likelihood of confusion factors, and all of opposer's arguments relating thereto, including those arguments not specifically addressed herein, we conclude that the relevant *du Pont* factors discussed herein weigh conclusively in favor of our finding that the contemporaneous use of applicant's mark and opposer's famous marks on the goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

Dilution

In view of our conclusion on the issues of priority and likelihood of confusion, it is unnecessary to consider opposer's claim of dilution.

Decision: The opposition is sustained.