

**THIS OPINION
IS NOT A PRECEDENT OF
THE TTAB**

Hearing: December 19, 2007

Mailed: April 11, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Acorn Alegria Winery
v.
Sweely Holdings, LLC
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Opposition No. 91168790
to Application Nos. 78497110, 78497114 and 78497107
—————

Gregory N. Owen of Owen, Wickersham & Erickson for Acorn Alegria Winery.

Jonathan F. Ariano of Osborn Maledon for Sweely Holdings, LLC.

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Before Walters, Grendel and Wellington, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Acorn Alegria Winery filed its opposition to the applications of Sweely Holdings, LLC to register the marks ACORN HILL ESTATE,¹ ACORN HILL VINEYARDS² and ACORN HILL

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¹ Application Serial No. 778497110, filed October 8, 2004, based upon an allegation of a bona fide intention to use the mark in commerce in connection with the identified goods. The application includes a disclaimer of ESTATE apart from the mark as a whole.

WINERY³ for "wine and potable spirits," in International Class 33.

As grounds for opposition, opposer asserts that applicant's mark, when applied to applicant's goods so resembles opposer's previously used and registered mark ACORN for "wine"⁴ and the previously used trade name ACORN WINERY as to be likely to cause confusion, under Section 2(d) of the Trademark Act.

Applicant, in its answer, denied the salient allegations of the claim.

The Record

The record consists of the pleadings; the file of the involved applications; a certified status and title copy of Registration No. 2061738, opposer's pleaded registration, and certified status and title copies of Registration Nos. 3158120 and 3180315, owned by applicant, and various specified responses and supplemental responses by applicant to opposer's interrogatories, all made of record by the parties' notices of reliance. The record also includes the

² Application Serial No. 78497114, filed October 8, 2004, based upon an allegation of a bona fide intention to use the mark in commerce in connection with the identified goods. The application includes a disclaimer of VINEYARDS apart from the mark as a whole.

³ Application Serial No. 78497107, filed October 8, 2004, based upon an allegation of a bona fide intention to use the mark in commerce in connection with the identified goods. The application includes a disclaimer of WINERY apart from the mark as a whole.

⁴ Registration No. 2061738, issued May 13, 1997, in International Class 33. Renewed for a period of ten years as of May 13, 2007; Section 15 affidavit filed and acknowledged.

discovery and testimony depositions of William Nachbaur, opposer's president, and the testimony deposition of Jess Sweely, applicant's president, with accompanying exhibits. Both parties filed briefs on the case.

We address, preliminarily, applicant's motion to exclude as hearsay pp. 65:25 to 66:25 of the Nachbaur testimony deposition. Applicant also moves for exclusion of section II.F of opposer's main brief, alleging that it relies on this testimony. In the referenced pages, opposer's witness, Mr. Nachbaur, recounts his experience at a local wine supply provider and his conversation with an employee there.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Courts have responded to the hearsay objection in varying ways. See generally, *J.T. McCarthy, McCarthy on Trademarks and Unfair Competition*, § 23:15 (4th ed. 2008). Applicant's objection is overruled, and we have considered this portion of Mr. Nachbaur's testimony in the present case, as well as the referenced portion of opposer's brief. This testimony is not hearsay for it is accepted not for the truth of the statements made by the employee to Mr. Nachbaur, or the reasons therefor, but rather for the fact that the statements referred to in his testimony were, in fact, made to him. See *Toys "R" Us, Inc. v. Lamps R Us*, 219 USPQ 340,

346 (TTAB 1983); and *Finance Co. of America Corp.*, 205 USPQ 1016, 1035 (TTAB 1979). Although the testimony is admissible, the probative value is discussed *infra*.

Factual Findings

Opposer is a small vineyard and winery located in Sonoma County, California, and owned and operated by William Nachbaur and his wife. The operation consists of 31 acres, of which 26 acres are planted with grapes, and a building that includes the Nachbaur home, the Acorn Winery retail outlet and tasting room, and the winery. The winery is open to the public by appointment and during events. Opposer usually makes about 200 cases of wine on-site annually and the rest of its wine is made for it at other wineries. Opposer plants a number of different types of grapes and makes several different varietals, including cabernet franc, sangiovese and zinfandel, among others.

Opposer harvests about 100 tons of grapes annually and sells about 50% of its grape yield to other wineries to use in making their own wines. These wineries will include, on their bottle labels, a reference to opposer as the source of the grapes.

Opposer's first wine with an ACORN label was a 1994 sangiovese, which was available for sale in 1996. Opposer's first interstate sale was in 1996 to an individual in Washington State. Opposer's winery became profitable in

2004 and, its gross annual revenue for 2005 was almost \$600,000, representing sales of 2500 cases of wine. Opposer's sales and revenues have increased each year since 2004. Fifty percent of opposer's sales are directly to consumers who visit the winery and/or place orders by phone from throughout the United States. Opposer sells one third of its wine through five distributors located in New Hampshire, New York, Washington D.C., Texas and Japan. Opposer also sells its wine to retailers and restaurants in California.

Opposer uses "Alegria Vineyards" to identify its vineyards and "Acorn Winery" to identify its winery and sales operation. These designations appear on its promotional and informational literature and the "Alegria Vineyards" designation also appears on opposer's wine labels. Opposer uses the mark ACORN prominently on all of its wine labels, followed by the particular varietal name, for example, "Heritage Vines Zinfandel," "Axiom Syrah" and "1998 Dolcetto" (Nachbaur testimony deposition, Exh. 27).

In 2005, opposer spent just under \$60,000 on marketing its winery and its wines and opposer promotes its wines by several different means. Opposer belongs to several organizations, including the Family Winemakers of California, the Russian River Valley Wine Growers and Zinfandel Advocates and Producers. These organizations

sponsor competitions and events, including tastings, that are open, variously, to the trade and the public. Opposer has won numerous awards for its wines. Opposer participates in approximately ten trade shows and offsite events/tastings for the public annually, including outside of California in New Hampshire. Opposer also sends its wines to restaurants and reviewers and has been favorably reviewed in a number of publications, including *The Wall Street Journal*, the *San Francisco Chronicle* and the *Miami Herald*, and wine/food magazines such as *Santé* and *The Wine Enthusiast*. Opposer has printed materials consisting of technical sheets for each of its wines, which it gives to retailers as shelf-talkers and includes with each bottle it sells. Opposer also has a website and an email newsletter that it distributes to all customers and visitors to its winery.

Applicant, Sweely Holdings, LLC, is a family-owned investment company that holds real estate investments, stocks and bonds, and is a majority partner in Acorn Hill Winery and Vineyard. Jess Sweely, who testified on behalf of applicant, is its managing director. Mr. Sweely states that Acorn Hill Farm, Inc., of which Mr. Sweely's wife is the sole stockholder, has owned the Acorn Hill Farm equestrian business since 1991; and that the Sweelys have operated Acorn Hill Farm in the Charlottesville, Virginia, area since the mid-1970's. Acorn Hill Farm raises, sells,

trains and shows horses, and currently owns approximately 150 horses for these purposes. Applicant owns two federal registrations for the mark ACORN HILL FARM for "horse farms; horse breeding and stud services," in International Class 44 (registration no. 3180315), and for "horse training, entertainment in the nature of equestrian competitions," in International Class 41 (registration no. 3158120).

In a separate location in the same general area as Acorn Hill Farm, applicant owns a 300 acre parcel of land where it has begun planting vineyards, having planted 20 acres two years ago and 12 acres last year. Applicant has also constructed a cross-country course for its horses on 75 acres of this parcel and is in the process of building on this parcel a 26,000 square foot wine production facility and a 16,000 square foot tasting, banquet and gift facility. Applicant plans to produce approximately 2000 cases of wine from the vineyard's 2006 harvest and will sell this wine when its tasting, banquet and gift facility opens. The horse facilities on this parcel will be visible from the wine facilities and vice versa.

At the time of trial, applicant had not yet begun advertising or selling its wines; although, applicant has done some preliminary marketing of its winery in Virginia. In November 2005, applicant had registered two domain names, i.e., acornhillwinery.com and acornhillvineyard.com; and

applicant had recently joined the Monticello Trail, an organization promoting local wineries. In choosing marks for its wines and vineyard, Mr. Sweely indicated that applicant hopes to trade off the good will associated with its equestrian business.

Analysis

Because opposer has properly made its pleaded registration of record, we find that opposer has established its standing to oppose registration of applicant's marks. *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). Moreover, because opposer's pleaded registration is of record, Section 2(d) priority is not an issue in this case as to the mark and goods covered by said registration. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Further, opposer has established use of its trade name, Acorn Winery, since at least 1996.

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 Fondée 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.

Before considering the goods and the marks, we note applicant's emphasis in both its evidence and brief on its thirty-two years in the equestrian business and its continuous use of its registered ACORN HILL FARM mark in connection therewith, contending that it has developed considerable fame throughout the United States and internationally. Applicant characterizes its new wine business as "an expansion," noting its use of a horse design on its proposed wine label, and stating its intention to hold equestrian events at the cross-country course on the same land parcel as the vineyards to concurrently promote its winery. Applicant's evidence about Acorn Hill Farm,

Inc.'s equestrian business is relevant only insofar as that business relates to applicant's wine business. However, we find that there is no relationship between these two businesses. The fact that applicant has equestrian facilities on the same parcel of land as its vineyard and winery provides, at most, a potential marketing tool for applicant to expose its equestrian business clients to its winery. To the extent that applicant is arguing that the goods are different or the marks are distinguishable because, unlike opposer, applicant's winery is operated by a business that also offers equestrian services, applicant's arguments are unsupported by fact or law.

Turning, now, to the goods involved in this case, we must consider the goods as identified in opposer's registration and in the involved applications. See *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.") See also *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ

76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.") There is no question that the goods of the parties, i.e., "wine," are identical. This *du Pont* factor weighs strongly against applicant.

Applicant states that the wine business is largely regional in nature, noting opposer operates a small regional winery with limited wine production and that its wine is promoted and distributed primarily in California; whereas, applicant is located in Virginia and intends to promote and sell its wine primarily in the mid-Atlantic region. Thus, applicant contends, essentially, that the trade channels and purchasers are different. This argument is not well taken. The parties' goods are identical and the identifications of goods contain no limitations. The channels of trade and classes of purchasers are identical. See *Canadian Imperial Bank v. Wells Fargo*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Further, opposer has a federal registration, which is national in scope.

Applicant argues that the consumers of wine are more sophisticated and careful than average consumers, and that the region from which a wine originates is an important focus for wine purchasers. Applicant also contends that the varietals from these different regions are largely different. The record contains no evidence to support

applicant's contentions about the significance of the region in the purchasing decision or the growing regions of certain grape varieties. Nor is this argument well taken. First, neither the goods nor the marks involved contain any limitations to wines produced from certain varieties grown in certain regions. Second, there are no limitations in the identifications of goods to a certain class of purchasers, thus, the class of purchasers encompasses all usual consumers of wine, which includes purchasers of all levels of sophistication. See *Canadian Imperial, supra*.

Considering, now, the marks involved herein, we note that where marks appear on identical goods, the degree of similarity of the marks necessary to support a conclusion of likelihood of confusion decreases. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). Moreover, 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).

Opposer contends that applicant has incorporated opposer's mark, ACORN, into its marks in its entirety; that ACORN is the first and dominant portion of applicant's marks and, thus, consumers are likely to shorten applicant's marks to ACORN in calling for the goods; that ACORN is an arbitrary term in connection with wine; that ACORN is a strong mark for opposer because, on this record, there are no other uses of ACORN in connection with wine; and that opposer's ACORN mark is famous. Opposer also contends that HILL is a weak term in connection with wine because land formations such as "hill" and "mountain" are commonly used in vineyard and winery names; that the additional terms, ESTATE, VINEYARDS and WINERY, respectively, in applicant's marks are merely descriptive; and, thus, that the additional terms in applicant's mark do not serve to distinguish applicant's marks from opposer's mark.

Applicant contends that the marks are dissimilar, stating that opposer's mark consists of only one word, while each of its marks consists of three words; and that the commercial impressions of the marks are "starkly dissimilar." Applicant states the following:

Opposer's mark contains the word "Acorn" standing alone. This solitary noun evokes thoughts of the small fruit of an oak tree and, in common vernacular, is used as a metaphor to truthfully describe the size of a person or an object. ... By contrast, Acorn Hill is a whimsical reference to a Knoll, mount, mound and/or topographical prominence. Grammatically, the addition of the

noun "Hill" converts the word Acorn from a noun (as in opposer's mark) to an adjective. ... The addition of the prominent noun, "Hill," directs the reader's imagination to an idyllic rolling landscape or scenic hillside." (Brief, p. 9-10.)

Considering applicant's marks, we find that the respective terms ESTATE, VINEYARDS and WINERY in applicant's marks are unquestionably merely descriptive in connection with wine and, thus, of little significance in determining the commercial impressions of applicant's marks. We find the remaining portion of each of applicant's marks, ACORN HILL, to be a unitary term connoting a place covered in acorns due to the presence of many oak trees. However, our analysis does not end here. We agree with opposer that ACORN is an arbitrary term in connection with wines and it is a strong mark, evidenced by the lack of third-party registrations or uses in this record. Opposer's mark also suggests oak trees and, thus, a bucolic setting. It is obvious that vineyards may have hills and, thus, both parties' marks are likely to evoke similar scenes in the minds of consumers. In view of the strength of opposer's mark⁵ and the similar connotations, we find that the similarities between the parties' marks far outweigh their dissimilarities. Thus, we find that this factor also favors opposer.

Applicant cites *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459 (Fed. Cir. 1998), in which the Court upheld the Board's finding of no likelihood of confusion between CRYSTAL CREEK and CRISTAL and CRISTAL CHAMPAGNE, both for wines, because of the dissimilarities of the marks, in particular, their different connotations. In the underlying decision, the Board stated that "while [CRISTAL] suggested the clarity of the wine within the bottle or the glass of which the bottle itself was made, [CRYSTAL CREEK] suggests a very clear (and hence probably remote from civilization) creek or stream." The case before us is distinguishable on its facts as we find the connotations of the marks to be substantially similar.

Opposer contends that actual confusion has occurred even though applicant has not started selling wine to the public under its marks. Opposer's evidence of an isolated incident with a supplier is not significant; however, because applicant has not begun advertising and sales of its wines, significant actual confusion is unlikely at this time. Therefore, this *du Pont* factor is essentially neutral.

When we consider the record and the relevant likelihood of confusion factors, and all of the parties' arguments

⁵ While opposer argues that its mark is famous, this allegation is not supported by evidence in the record, nor is it necessary to our determination.

relating thereto, including those arguments not specifically addressed herein, we conclude that in view of the similarity in the commercial impressions of opposer's mark, ACORN, and applicant's marks, ACORN ESTATE, ACORN VINEYARDS and ACORN WINERY, their contemporaneous use on the identical goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The opposition is sustained.