

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

alinnehan

Mailed: October 21, 2008

Opposition No. 91174718

C& N Corporation d/b/a Door
Peninsula Winery

v.

Illinois River Winery, Inc.

**Before Walters, Zervas, and Mermelstein,
Administrative Trademark Judges.**

Illinois River Winery, Inc. ("applicant") seeks to register the mark HALLOWINE¹ for "wine" in International Class 33. Articshield, Inc. ("opposer") has opposed registration based on its alleged prior use of the same mark, HALLOWINE,² for the same goods and its claim that a likelihood of confusion exists between the marks.

This case now comes up for consideration of opposer's motion (filed June 12, 2008) for summary judgment in its favor on the grounds of priority and likelihood of confusion and opposer's motion (also filed June 12, 2008) for

¹ Application Serial No. 78841086, filed March 20, 2006, alleging April 15, 2005 as a date of first use and August 20, 2005 as a date of first use in commerce.

² Opposer is the owner of Serial No. 77030,299, filed October 26, 2006, alleging July 1, 1998 as a date of first use and first use in commerce. The application has been suspended pending the disposition of applicant's application.

discovery sanctions pursuant to Trademark Rule 2.120(g)(1).
The motions are fully briefed.

Motion for Summary Judgment

We first turn to opposer's motion for summary judgment. In support of its motion, opposer argues that there are no genuine issues of material fact with respect to priority and likelihood of confusion. Specifically, opposer contends that it has used the HALLOWINE mark since at least 1998 and has extensively advertised the mark since that time; that it has sold significant amounts of wine under the HALLOWINE mark since 1998; and that its date of first use precedes applicant's first date of use which occurred in 2005. Moreover, opposer argues that the involved marks are identical in appearance, sound, meaning, and commercial impression and that the involved goods are the same and are sold in the same channels of trade to the same class of purchasers.

As evidentiary support, opposer has submitted the following: (1) Applicant's Supplemental Answers to Opposer's First Requests for Admissions; (2) an invoice demonstrating the sale of wine under the HALLOWINE mark in July of 1998; (3) Applicant's Second Supplemental Answers to Opposer's Second Set of Written Interrogatories (Nos. 20 and 22); (4) a copy of the Notice of Opposition; (5) a copy of applicant's Answer; (6) Applicant's Supplemental Answer to

Opposition No. 91174718

Opposer's First Set of Written Interrogatories (Nos. 1-19); (7) Opposer's Response to Applicant's First Set of Interrogatories and First Set of Requests for Production of Documents and Things; (8) Applicant's Second Supplemental Answer to Opposer's First Request for Admissions (Nos. 17-18); (9) an excerpt from applicant's website depicting the sale of wine under the HALLOWINE mark; and (10) the declaration of Robert Pollman, opposer's Chief Operating Officer and Secretary.

In response to the motion, applicant argues that opposer has failed to prove that it has priority in the mark HALLOWINE; that opposer has failed to show that it has continuously used the mark HALLOWINE for wine since at least 1998 so as to establish its priority in the mark; and opposer has failed to prove that consumer confusion, deception, or mistake is likely. In particular, applicant maintains that its goods are "specialized and of high quality" and that consumers of such goods are careful, discriminating, and sophisticated purchasers who are unlikely to be confused in the purchase of the parties' respective goods.

In evidentiary support of its position, applicant has submitted the affidavit of its president, Gregory Kane.

In reply to its motion, opposer maintains that it has priority in the subject mark; that it has continuously used

the mark HALLOWINE for wine since at least 1997; and that applicant's use of the mark is likely to cause consumer confusion, deception, or mistake because the marks are the same, the goods are the same, and the channels of trade are the same; and that the purchase of a "\$10 or \$13 bottle of wine tends to be more of an impulse purchase by consumers rather than a careful deliberate purchase" so confusion is likely to occur.

In further evidentiary support of its position, opposer has submitted the following: (1) the declaration of Christopher M. Scherer, counsel for opposer; (2) Applicant's Second Supplemental Answers to Opposer's Second Set of Written Interrogatories (Nos. 20 and 22); (3) Applicant's Answer to Opposer's First Request for Admissions; (4) a representative sampling of invoices, orders, and shipping documents demonstrating the sale of wine under the HALLOWINE from 1998 to the present.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(c). A party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to summary judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Sweats*

Fashions Inc. v. Pannill Knitting Co. Inc., 4 USPQ2d 1793 (Fed. Cir. 1987). When the moving party's motion is supported by evidence sufficient to indicate that there is no genuine issue of material fact, and that the moving party is entitled to judgment, the burden shifts to the nonmoving party to demonstrate the existence of specific genuinely-disputed facts that must be resolved at trial.

The nonmoving party may not rest on the mere allegations of its pleadings and assertions of counsel, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine issue of material fact for trial. In general, to establish the existence of disputed facts requiring trial, the nonmoving party "must point to an evidentiary conflict created on the record at least by a counterstatement of facts set forth in detail in an affidavit by a knowledgeable affiant." *Octocom Systems Inc. v. Houston Computer Services Inc.*, 16 USPQ2d 1783, 1786 (Fed. Cir. 1990), citing *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 221 USPQ 561, 564 (Fed. Cir. 1984). A dispute as to a material fact is genuine only if a reasonable fact finder viewing the entire record could resolve the dispute in favor of the nonmoving party. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992). If the nonmoving party fails to make a sufficient showing on an essential element of its

case with respect to which it would have the burden of proof at trial, judgment as a matter of law may be entered in favor of the moving party. See Fed. R. Civ. P. 56(c), *Celotex Corp.*, 477 U.S. at 322-323. Finally, in deciding a motion for summary judgment, the Board must view the evidence in the light most favorable to the nonmovant, and must draw all reasonable inferences from underlying facts in favor of the nonmovant. *Id.*

After a careful review of the record in this case, as discussed below, we find that there is no genuine issue of material fact and that opposer is entitled to judgment as a matter of law.

Standing

As a preliminary matter, we find that opposer has standing to maintain this proceeding. We note that applicant has not challenged opposer's standing to oppose the involved application. Also, as discussed in more detail *infra*, we find that the evidence of opposer's prior use of its HALLOWINE mark and the fact that applicant's involved mark was cited as a potential bar under Section 2(d) to registration of opposer's mark as set forth in opposer's pending application are sufficient to establish opposer's standing to bring this case. As such, no genuine issue of material fact exists on the issue of standing.

Likelihood of Confusion

Turning then to the issue of likelihood of confusion, we are guided by the factors set forth in the case of *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). 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. 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. *See Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). In this instance, therefore, we focus our analysis on the dispositive factors, namely, the appearance of the marks, the related nature of the goods, and the similarity of trade channels. *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1338, 57 USPQ2d 1557, 1559-1560 (Fed. Cir. 2001).

There is no genuine issue of material fact that the marks at issue are similar. Indeed, they are identical marks. There is also no genuine issue as to the similarity of the goods. These too are identical. We note that applicant has admitted both of these allegations in its

answer to the notice of opposition.³ Lastly, the record indicates that the parties' goods travel in similar channels of trade. Applicant's argument regarding the alleged sophistication of purchasers of its product is not supported by any evidence and as such is unpersuasive. In the absence of any limitations in the parties' identifications of goods, we must presume that the goods move through all reasonable trade channels for such goods to all usual classes of consumers for such goods. *Schieffelin & Co. v. Molson Companies Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989); *Morton-Norwich Products, Inc. v. N. Siperstein, Inc.*, 222 USPQ 735, 736 (TTAB 1984); and *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Accordingly, we presume that the parties' wines are sold in the same trade channels to the same classes of purchasers. The purchasers would include ordinary ones who would exercise nothing more than ordinary care when buying wine. Even assuming that some purchasers may be sophisticated and a bit more discerning in buying wine, this does not necessarily mean that they are sophisticated or knowledgeable in trademarks or immune from source confusion. See *In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing *Carlisle Chemical Works*,

³ We further note that applicant now states in its response brief that it disputes the assertions that the marks and the goods are identical. However, applicant fails to provide reasons for its position and we see no reasons for concluding otherwise.

Opposition No. 91174718

Inc. v. Hardman & Holden Ltd., 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ["Human memories even of discriminating purchasers...are not infallible."]. See also *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988).

In sum, applicant has failed to disclose any evidence that points to the existence of a genuine issue of material fact on the issue of likelihood of confusion.

Priority of Use

We turn next to the issue of whether there is a genuine issue of material fact regarding opposer's asserted priority of use. To establish priority on a likelihood of confusion claim brought under Trademark Act Section 2(d), a party must prove that, vis-a-vis the other party, it owns "a mark or trade name previously used in the United States . . . and not abandoned" Trademark Act Section 2, 15 U.S.C. Section 1052.

There is no genuine issue of material fact as to opposer's priority of use of its mark. Opposer proved that it first used its mark in July 1998. To establish this date, opposer submitted the declaration of Robert Pollman, its Chief Operating Office and Secretary, who attests to the advertising expenditures and sales volume of opposer for its goods under the HALLOWINE mark for each year from 1998 to 2007. Opposer has also submitted numerous copies of invoices, orders, and shipping records showing sales of its

goods under the HALLOWINE mark from July 1998 to the present. Thus, Mr. Pollman's declaration, coupled with the documentary evidence submitted with opposer's briefs, are sufficient to establish opposer's date of first use in 1998 and the continuity of such use.

Applicant, on the other hand, states in its answer to the notice of opposition that it did not commence using its mark in interstate commerce until at least as earlier as August 20, 2005, as indicated in its subject application. Moreover, in response to opposer's Requests for Admissions Nos. 17-18, applicant admits that it did not even sell wine prior to July, 2003.

Accordingly, opposer is entitled to a finding in its favor on the issue of priority.

Conclusion

We have found no genuine issues of material fact regarding opposer's priority of use or the likelihood of confusion between the marks. Accordingly, opposer's motion for summary judgment is hereby granted. Judgment is hereby entered against applicant, the opposition is sustained, and registration to applicant is refused.

In view thereof, opposer's motion for sanctions under Trademark Rule 2.120(g) is moot.