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Paper No. 25
TJQ

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Trustees of the Baldwin Family Trust
v.
Isosceles, Inc.

Cancellation No. 28,922

Leo F. Costello for Trustees of the Baldwin Family Trust.
Ben W. Pridgeon and Colleen Ross for Isosceles, Inc.

Before Cissel, Hanak and Quinn, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

The Trustees of the Baldwin Family Trust ("petitioner")
filed a petition to cancel a registration owned by
Isosceles, Inc. ("respondent") for the mark ISOSCELES for
"brewed alcoholic beverages, namely, beer."¹ As grounds for
cancellation under Section 2(d) of the Trademark Act,
petitioner alleged that respondent's mark, when applied to
respondent's goods, so resembles petitioner's previously
used mark ISOSCELES for wine as to be likely to cause
confusion.

¹ Registration No. 2,211,683, issued December 15, 1998.

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Respondent, in its answer, denied the salient allegations of the petition for cancellation.

The record consists of the pleadings; the file of the involved registration; trial testimony, with related exhibits, taken by petitioner; and respondent's responses, including documents, to certain interrogatories introduced by way of petitioner's notice of reliance. Respondent did not take any testimony or offer any other evidence. Only petitioner filed a final brief on the case.

Petitioner, according to the testimony of Justin Baldwin, is a revocable trust (Mr. Baldwin and his wife are the co-trustees) that owns and operates Justin Vineyards and Winery in the Paso Robles wine region of California. Petitioner sells its wines at its winery tasting room and through wholesalers which in turn sell the wine to retailers throughout the United States and abroad. Off-premise retailers include supermarkets, package liquor stores, wine shops, state-licensed alcoholic beverage outlets, and on-premise sellers include restaurants, bars, clubs and sporting venues. Mr. Baldwin estimated sales at \$5-10 million since 1992, with annual promotional expenditures of around \$250,000. Petitioner's ISOSCELES wine has been well received over the years, winning almost 60 awards during 1992-1996. Unsolicited articles and reviews about petitioner's ISOSCELES wine have appeared in such

publications as The Wine Advocate ("Justin Vineyards and Winery is quickly taking its place among the top producers of California red wines") and The Wine Spectator (which ranked in sixth place petitioner's 1997 vintage in the publication's "Top 100 Wines of 2000").

What little we know about respondent's use of its mark is learned from its responses to the interrogatories relied upon by petitioner. Respondent indicated that it was securing distributors in 1997 and gave no sales figures for that year. Respondent supplied two invoices for intrastate sales of beer in 1998. For the year 1999, respondent stated that this cancellation proceeding caused respondent to put its business on hold and that in 2000 there were no sales.

We first turn to the issue of priority of use. In the absence of testimony or other evidence, the filing date of the involved registration is the earliest date upon which respondent could rely, that is, February 11, 1997. See: *Lone Star Mfg. Co., Inc. v. Bill Beasley, Inc.*, 498 F.2d 906, 182 USPQ 368, 369 (CCPA 1974). We hasten to add, however, that the only uses supported by any evidence did not occur until 1998, and these two uses were intrastate sales within Ohio.²

² Petitioner asserts, for the first time in its brief (p. 22), that the failure to use the mark in commerce prior to the filing of the underlying application renders the involved registration void. This allegation was not pleaded in the petition for

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Insofar as petitioner's first use is concerned, petitioner took the testimony of Mr. Baldwin, as noted above, as well as the testimony of James Faber, an officer of the San Francisco Wine Exchange, which is the national wine grower agent for petitioner, and Howard Walkup, owner of Walkup Drayage and Warehouse Company, which has taken orders from the Wine Exchange for petitioner's wine and shipped the wine per their instructions.

The testimony and exhibits chronicle petitioner's continuous use of its mark ISOSCELES in connection with wine dating from 1992 to the present. In sum, the record clearly supports a finding of priority of use in petitioner's favor.

We now turn to the merits of the likelihood of confusion claim. Our determination under Section 2(d) of the Act is based on an analysis of all of the 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). In any likelihood of confusion analysis, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

cancellation and, thus, we have given no consideration to this claim.

The parties' marks are identical. Further, they are arbitrary as applied to alcoholic beverages, and there is no evidence of any third-party uses or registrations of the same or similar marks in the field.³

Due to the identity between the marks, if there is a viable relationship between the parties' goods, a likelihood of confusion exists. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ["even when goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source"].

We next turn to a comparison of the goods. Beer and wine, although specifically different, are both alcoholic beverages. Both are marketed in the same channels of trade (e.g., liquor stores, restaurants, bars, supermarkets) to the same classes of ordinary purchasers.⁴ There is no evidence to suggest that prospective purchasers of beer would not overlap with purchasers of wine. Rather, it is common knowledge that the same people buy, drink and serve both beer and wine. While there is no doubt that purchasers are not likely to confuse beer with wine, likelihood of

³ We take judicial notice of the dictionary definition of the term "isosceles": "of a triangle: having two equal sides." Webster's Third New International Dictionary (unabridged ed. 1993).

⁴ The channels of trade would also include wholesale distributors and petitioner has established that some of their distributors buy and sell both beer and wine. In fact, one of petitioner's distributors is named "Beer Imports."

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confusion involves more than the mistaken purchase of one product (beer) instead of another (wine). It involves likelihood of confusion as to source or sponsorship of the respective products. See, e.g.: In re Rexel Inc., 223 USPQ 830, 831 (TTAB 1984). Here, the involved marks are identical and purchasers would assume that the source of the beer and wine is the same. In this connection, the commercial relationship between certain alcoholic beverages has been recognized before. See: Schieffelin & Co. v. The Molson Companies Ltd., 9 USPQ2d 2069 (TTAB 1989) [malt liquor, beer and ale v. brandy]; Monarch Wine Co. v. Hood River Distillers, Inc., 196 USPQ 855 (TTAB 1977) [Scotch whiskey, rum, brandy and vodka v. wines and champagne]; In re AGE Bodegas Unidas S.A., 192 USPQ 326 (TTAB 1976) [wines v. whiskey]; Krantz Brewing Corp. v. Kelly Importing Co. Inc., 96 USPQ 219 (PO ChExam 1953) [beer v. wine]; and Fruit Industries, Ltd. v. Ph. Schneider Brewing Co., 46 USPQ 487 (Com. Pats. 1940) [beer v. wine].

Given the identity between the marks and the relatedness of the goods, we have no doubts about finding likelihood of confusion in this case. However, in the event that there would be any doubts, such would be resolved in favor of petitioner as the prior user. Kenner Parker Toys Inc. v. Rose Art Industries Inc., 963 F.2d 350, 22 USPQ2d 1453, 1458 (Fed. Cir. 1992).

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Decision: The petition for cancellation is granted, and Registration No. 2,211,683 will be canceled in due course.