

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: December 18, 2009

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Bell's Brewery, Inc.
v.
Bell Hill Vineyards, LLC

Opposition No. 91177980
to application Serial No. 76662206
filed on June 27, 2006

Sarah M. Robertson of Dorsey & Whitney LLP for Bell's
Brewery, Inc.

Bell Hill Vineyards, Inc. pro se.

Before Kuhlke, Walsh and Ritchie, Administrative Trademark
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, Bell Hill Vineyards, seeks registration of
the mark BELL HILL in standard characters for goods
identified in the application as "packaged wine" in
International Class 33.¹

¹ Serial No. 76662206, filed June 27, 2006. The application is
based on an allegation of a bona fide intention to use the mark
in commerce under Section 1(b) of the Trademark Act, 15 U.S.C.
§1115(b).

Opposer, Bell's Brewery, Inc., opposed registration of applicant's mark on the following grounds: (1) that, as used in connection with applicant's goods, the mark so



resembles opposer's registered mark in connection with "beer, including porter and ale, stout and malt liquor," as to be likely to cause confusion, to cause mistake, or to deceive under Trademark Act Section 2(d), 15 U.S.C. §1052(d); (2) BELL HILL is primarily geographically descriptive of the location at which the goods will be produced under Trademark Act Section 2(e)(2), 15 U.S.C. 1052(e); and (3) applicant, in prosecuting its application, committed fraud on the U. S. Patent and Trademark Office in claiming that BELL HILL had no geographic significance.

By its amended answer applicant denied the salient allegations.²

EVIDENTIARY ISSUES

As a preliminary matter, opposer objects to the testimony of applicant's witness, David A. Lose, on the bases that: (1) "as a former paid employee of Bell Hill, Lose cannot be considered to be an independent expert"; and

² In addition, applicant, under the caption "Affirmative Defenses" made both amplifications of its denials and pleaded the affirmative defense of unclean hands. However, inasmuch as applicant did not address this defense in its brief it is waived and we give it no consideration.

(2) "the subject matter of Lose's 'expert' testimony is irrelevant to the trademark issues raised in this case." Br. p. 29. Applicant responds that the "extent of Mr. Lose's relationship with Bell Hill was a minor consulting job in early 2006 in advising what type of Federal and State licenses to pursue [and he] had nothing to do with selection of the name BELL HILL or label approval with the Department of Treasury, ATTB." Br. p. 33. In addition, applicant argues that his testimony is "relevant to the factual issue of the relationship of geographic brand names and the bottle contents of wine products [and] a purchaser's belief as to the geographic origin of the wine bearing the mark BELL HILL." Br p. 34.

First, an expert witness's bias goes to the weight and not the admissibility of the testimony. *DiCarlo v. Keller Ladders, Inc.*, 211 F.3d 465, 468 (8th Cir. 2000). See also 29 Fed. Prac. & Proc. Evid. §6266 (1st ed.). We find that under the circumstances Mr. Lose is not unduly biased and the objection is overruled on that basis. However, the Board has reviewed the testimony in conjunction with the objections based on relevancy and accorded it appropriate probative value.

EVIDENCE OF RECORD

The evidence of record consists of the pleadings herein; the file of the opposed application; opposer's

status and title copy of its Registration No. 2749090 for the mark BELL's and design, submitted under testimony; opposer's notice of reliance on various printed publications; opposer's testimony deposition, with exhibits, of Larry Bell, opposer's founder and owner; applicant's testimony depositions, with exhibits, of Julia Martelli, applicant's owner and manager, and David A. Lose, a winery and brewery records consultant presented as an expert witness; applicant's notices of reliance on Larry Bell's discovery deposition, certain other discovery responses, and official records;³ and opposer's rebuttal notice of reliance on various official records and discovery responses.

PRIORITY/STANDING

Because opposer has made its pleaded registration of record and has shown that the registration is valid and subsisting and owned by opposer, opposer has established its standing to oppose registration of applicant's mark and its priority is not in issue. See *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Accordingly, we turn to the first claim under Section 2(d) and the issue of likelihood of confusion.

³ The requests for production of documents and responses are not properly of record and have not been considered. Trademark Rule 2.120(j)(3)(ii); TBMP §704 (2d ed. rev. 2004).

LIKELIHOOD OF CONFUSION

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

Opposer's pleaded registration is for the mark BELL'S in stylized form with a design element. This registration issued on August 12, 2003 for goods identified as "beer, including porter and ale, stout and malt liquor" in International Class 32.⁴ Opposer presented evidence and argument on the factors of the similarity of the marks, the

⁴ Opposer also included its pleaded application Serial No. 77243262, filed July 31, 2007, for the mark BELL'S in standard character form for "wines" stating that it "filed that application based upon a natural expansion of the use of its BELL'S Trademark into a related class of goods and a bona fide intent to use the mark in commerce." Amended Pleading ¶ 2. Inasmuch as the filing date of this application is after applicant's filing date of June 27, 2006 and opposer has not pleaded or proven prior use of this standard character mark with wine, we only consider it for the stated purpose in the pleading, namely, to lend support for opposer's position that wine is a natural extension of beer. Moreover, opposer did not plead common law rights based on use of the word BELL'S by itself. Although there are some examples in the record of labels where BELL'S appears apart from the design element in the registration, the testimony does not provide information as to when those particular labels and packaging were used. In addition, based on the record opposer changed its name to Bell's in 2005. Bell Test. p. 28. However, opposer did not plead trade name use. In view of these deficiencies in the record and pleading, we restrict our analysis to opposer's registered mark BELL'S and design.

relatedness of the goods, channels of trade, classes of purchasers and the strength of its mark.

We begin with the factor of the strength of opposer's mark because it "plays a dominant role in cases featuring a famous or strong mark [and] [f]amous or strong marks enjoy a wide latitude of legal protection." *Kenner Parker Toys Inc. v. Rose Art Industries Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). See also *Recot Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000). "[T]he fame of a mark may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident." *Bose Corp. v. QSC Audio Products, Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002).

Opposer has used the mark on beer since at least 1985 and its gross revenues have risen steadily.⁵ The brand is promoted in stores, print advertisements, on opposer's website, in press releases to beer publications and in local events for new releases of beer products. Various beer-related associations and organizations have ranked BELL'S beer among the highest rated beers in the United States and worldwide. BELL'S beers have been referenced in articles published in various print media, including "Denver Rocky

⁵ The exact figures were submitted under seal.

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Mountain News," the "Chicago Tribune" and "The New York Times." While BELL'S beer is not available nationwide, its current distribution includes several states.

We acknowledge the record shows a devoted following for BELL'S beer products and BELL'S has received high reviews from organizations that review beer products. However, the record evidence does not show such extensive public exposure to rise to the level of strength such that it plays a dominant role in the determination. *Lacoste Alligator S.A. v. Maxoly Inc.*, 91 USPQ2d 1594, 1597 (TTAB 2009) ("Because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it"); *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901 (TTAB 2007).

This brings us then to our consideration of the similarities between opposer's and applicant's goods, channels of trade and classes of purchasers. We must make our determinations under these factors based on the goods as they are recited in the application and registration, respectively. 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

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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 sales of the goods are directed."); and *In re Elbaum*, 211 USPQ 636 (TTAB 1981).

Applicant's goods, as identified, are "packaged wine" in International Class 33 and opposer's goods, as identified, are "beer, including porter and ale, stout and malt liquor" in International Class 32.

Opposer argues that wine and beer are related goods and submitted under testimony excerpts from third-party websites showing wine and beer offered under the same mark. See *Bell Test.* pp. 55, 57 Exh. No. 30.

We find that beer and wine are somewhat related and the record shows at least some consumer exposure to wine and beer being marketed under the same mark. However, this record does not establish that it is common practice for these goods to emanate from the same source.⁶

Given the lack of restrictions in the identifications of goods, we must presume that the parties' goods travel through all ordinary trade channels, which would include for

⁶ While opposer cites to prior decisions where beer and wine have been found to be related, it is incumbent on opposer to establish this fact based on the evidence presented in its case.

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both liquor stores, grocery stores, bars and restaurants. Hewlett-Packard Co. v. Packard Press Inc., 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and Octocom, 16 USPQ2d at 1783. Similarly, these goods would be offered to the same consumers.

Applicant's arguments centered on the differences between its and opposer's actual channels of trade ignore well established case law requiring that the comparison of the goods is based on how the identifications read in the involved application and opposer's registration.

Applicant argues that the goods are of some quality and the purchasers of the parties' respective wine and beer would be sophisticated. We reiterate that the identifications have no such restrictions and we must consider the lowest level of sophistication for these goods. Therefore, the overlap in class of customers for the goods, as identified, includes the general public in addition to the more sophisticated connoisseur of craft beers and wine. Thus, as to the general public, while these are not impulse transactions, the sophistication of the consumer is not very high. With regard to the more discerning wine and beer consumers, while we may infer a higher level of scrutiny in their purchasing, there is not sufficient evidence of record upon which to make a determination that this factor would outweigh the other du Pont factors. Moreover, even

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sophisticated buyers are not immune from confusion. In re Decombe, 9 USPQ2d 1812 (TTAB 1988).

We turn then to a consideration of the marks. With respect to the involved marks, we examine the similarities and dissimilarities of the marks in their appearance, sound, meaning, and commercial impression. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of the goods offered under the respective marks is likely to result.

As noted above, we make our comparison based on the BELL'S and design mark in opposer's pleaded registration. However, given the dominance of the word BELL'S in that registration, consideration of the word BELL'S in standard characters would not alter the outcome of this decision.

Opposer's basic position is that the marks share the word BELL. While it is true that applicant's mark begins with this word, which can serve to increase similarity, see Palm Bay Imports, 73 USPQ2d at 1689, in this case we read applicant's mark as a unitary phrase BELL HILL which has the connotation and commercial impression of a place. This is very different from opposer's mark that evokes bells when

viewed in concert with its design element or simply a last name when viewing the word element by itself, as the dominant element in opposer's mark. We find the overall connotation and commercial impressions quite different and sufficient to outweigh any similarities in appearance or sound based on the common element BELL.

Because the marks are so different, the du Pont factor of the dissimilarities of the marks outweighs the other relevant du Pont factors discussed above. In view thereof, we conclude that there is no likelihood of confusion between applicant's mark BELL HILL and opposer's mark BELL'S and design. See *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single du Pont factor may not be dispositive"). See also, *In re E.I. du Pont de Nemours & Co.*, USPQ at 567 ("[E]ach [of the thirteen elements] may from case to case play a dominant role").

In view of the above, opposer has not proven its claim of likelihood of confusion under Section 2(d) of the Trademark Act.

PRIMARILY GEOGRAPHICALLY DESCRIPTIVE

We next consider opposer's claim under Section 2(e)(2) of the Trademark Act. The test for determining whether a term is primarily geographically descriptive is whether (1) the term in the mark sought to be registered is the name of

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a place known generally to the public, and (2) the public would make a goods/place association, that is, believe that the goods or services for which the mark is sought to be registered originate in that place. See *In re Societe Generale des Eaux Minerals de Vittel S.A.*, 824 F.2d 957, 3 USPQ2d 1450 (Fed. Cir. 1987) (hereinafter *Vittel*); *In re JT Tobacconists*, 59 USPQ2d 1080 (TTAB 2001); *University Book Store v. University of Wisconsin Board of Regents*, 33 USPQ2d 1385 (TTAB 1994); and *In re California Pizza Kitchen, Inc.*, 10 USPQ2d 1704 (TTAB 1988). If the goods do in fact emanate from the place named in the mark, the goods/place association can be presumed. *In re Carolina Apparel*, 48 USPQ2d 1542 (TTAB 1998). One exception to that presumption is if "the place named in the mark is so obscure or remote that purchasers would fail to recognize the term as indicating the geographical source of the goods." *Vittel*, 3 USPQ2d at 1451. The determination of the goods/place association is made not in the abstract, but rather in connection with the goods or services with which the mark is used and from the perspective of the relevant public for those goods. See *In re MCO Properties Inc.*, 38 USPQ2d 1154 (TTAB 1995) (*FOUNTAIN HILLS* geographically descriptive where relevant public for applicant's service of developing real estate includes people considering purchasing real property in Fountain Hills, Arizona).

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The evidence establishes that there is a road named Bell Hill and applicant derived the mark from this road. See Martelli Test. p. 13 ("Q. And why did you pick Bell Hill? A. It was a name of a road that we turn off to get to our vineyard and it was something that the local people were familiar with.") Beyond that there is not sufficient evidence to establish that Bell Hill designates a specific geographic region or location other than this local road. The handful of references in marketing materials or menus provided by opposer are not sufficient to establish that Bell Hill is the geographic designation of a specific region or location.⁷

In contrast, applicant's evidence shows that there is no such geographic designation in their area listed in the Geographic Names Information Systems, a database maintained by the U.S. Board on Geographic Names, within the U.S. Geological Survey in the Department of the Interior.⁸

Martelli Test. Exh. 3; App. Second Not. Rel. Exh. 2.

⁷ For example, opposer introduced a webpage from a third-party winery that includes the following description of its vineyard: "The vineyard is located on the Bell Hill bench of Lake County just south of Kelseyville." Martelli Test. Exh. M2. Applicant testified that it is not aware of a place called "Bell Hill Bench" and points to the third party's label which shows the wine as coming from the "Kelseyville Bench." App. Second Not. Rel. Exh. 1. Moreover, even if there were such a place called "Bell Hill Bench" by the locals this would be simply too remote of a geographic reference to bar registration under Section 2(e)(2).

⁸ Applicant's arguments that BELL HILL is not a recognized appellation or viticultural area are not relevant. In cases involving claims of mere descriptiveness under Section 2(e)(1) of

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We find that BELL HILL as the name of a road (or even the local reference to a topographical rise) is so obscure or remote that purchasers of applicant's wine would typically fail to recognize the term as indicating the geographical source of applicant's goods. In re Brouwerij Nacional Balashi NV, 80 USPQ2d 1820 (TTAB 2006).

These facts are distinguished from those in Fountain Hills. Fountain Hills involved real estate services for the town of Fountain Hills which were directed to prospective purchasers of real estate in Fountain Hills. The involved geographic designation was the name of a town not an insignificant road. Further, the real estate services pertained specifically to the town and all potential purchasers would be aware of the significance of the geographic designation. Here, the wine can be sold nationwide and although some local purchasers buying the wine may know of the local road Bell Hill, that is not enough to make it geographically significant and transform it from being an obscure or remote reference. See Vittel,

the Trademark Act, "[t]he fact that the term 'coastal' is not an appellation or a viticultural area ... does not raise a genuine issue of material fact with respect to the issue of mere descriptiveness inasmuch as opposer need only prove that applicant's proposed mark describes a feature, quality, purpose, characteristic, etc. of the goods." Callaway Vineyard & Winery v. Endsley Capital Group Inc., 63 USPQ2d 1919, 1923 (TTAB 2002). Similarly, for primarily geographically descriptive claims, an opposer need only prove that the place named is known generally to the public and the public would make a goods/place association.

supra. In view thereof, opposer has not proven its claim of primarily geographically descriptive under Section 2(e)(2) of the Trademark Act.

FRAUD

Fraud in the procurement of a registration occurs when an applicant knowingly makes a false, material misrepresentation with the intent to deceive the U. S. Patent and Trademark Office (USPTO). In re Bose Corp., 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009); Entbridge Inc. v. Excelerate Energy LP, 92 USPQ2d 137 (TTAB 2009). The evidence of deceptive intent must be clear and convincing and there is no fraud if a false misrepresentation is occasioned by an honest misunderstanding or inadvertence without a willful intent to deceive. Id.

In view of our findings as to the remoteness of the geographic reference of Bell Hill, applicant did not commit fraud when it represented to the USPTO that Bell Hill did not have a geographic significance. Moreover, opposer did not present evidence of applicant's intent to deceive. In view thereof, opposer has not proven its claim of fraud.

Finally, opposer asserts that "Bell Hill's defense of this case is colored by Bell Hill's lack of candor about the geographic meaning of BELL HILL and the extent to which it has consulted with an attorney in this case." Reply Br. p. 8. Presumably, opposer is presenting this argument to

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attack applicant's credibility at trial. In short, we find nothing in the record to undermine applicant's credibility. For example, opposer asserts that despite the fact that applicant "admits that BELL HILL is the name of a lane and a low topographical rise close to Bell Hill's vineyard" applicant made contrary assertions in its brief that there is no feature named Bell Hill and in its responses to opposer's requests for admissions 10 and 11 denied that Bell Hill is the name of street." Reply Br. p. 8. Applicant denied and admitted the following requests for admission:

10. Bell Hill in the Bell Hill Designation refers to a street, landmark or other geographic feature in or around which Applicant produces the goods specified in the Application. Denied.

11. Bell Hill describes the area in or around which Applicant produces the goods specified in the Application. Denied.

13. Bell Hill is the name of a road in Kelseyville, Lake County, California. Admitted.

Request No. 10 can be read to imbue all options with the designation "geographic feature" which applicant denies. Applicant without hesitation admits the more narrowly defined request that it is the name of a road. This simply reveals applicant's position in this proceeding that Bell Hill does not have geographic significance. In addition, while the grapes are grown in a vineyard near Bell Hill road, the production of applicant's goods, wine, occurs at a winery that is not located on Bell Hill road.

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Decision: The opposition is dismissed on all claims.