

Federal Circuit Finds Sua Sponte is Not a Good Vintage

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Legal decisions, like fine wine, should be balanced. The Federal Circuit recently corked [a non-precedential TTAB decision](#) that ECHO D'ANGÉLUS was not confusingly similar to ECHO DE LYNCH BAGES, where both were used for wine, because the TTAB relied on a concept that no party to the case had argued.

In deciding the opposition, the TTAB's analysis initially followed standard *DuPont* factors to find the goods were similar and sold through the same channels of trade, favoring Chateau Lynch-Bages ("Opposer"). The Board also found ECHO somewhat diluted based upon Chateau Angelus S.A.'s ("Applicant") evidence of thirteen third-party registrations for ECHO-formative marks covering wine and other alcoholic beverages, which favored Applicant. The Board then made the pour decision to consider the non-ECHO portions of the marks as house marks, which neither party had argued. The Board

based the house mark finding on Applicant owning four registrations that included ANGÉLUS and Opposer using LYNCH BAGES in its letterhead.

A “house mark” serves a different function than a trademark. Rather than identifying the source of a particular good or service – the function of a trademark – a house mark identifies a company that provides a wide range of goods or services. House mark registrations list the goods or services as a “full line of _____,” thus conferring broader rights than a typical trademark registration. To obtain these broader rights, an applicant must provide evidence that the mark functions as an identifier for an entire line of goods in addition to evidence that the mark is used in commerce for the mark to register.

The Board raised the house mark concept in its discussion of each mark’s meaning. It found that Opposer’s mark meant “echo of Lynch Bages,” conjuring the fact that Opposer used the mark for a second wine offered by the vintner. Applicant’s mark was found to mean “echo of Angélu,” evoking a reverberation of Applicant’s other wines. Had the Board bottled its decision there, relying on consumer confusion being unlikely given the disparate meanings of each mark, the Federal Circuit may have agreed. Instead, the Board proceeded to analyze the case in the context of infringement precedents involving house marks. The Board concluded that “ECHO” combined with each party’s house mark created a unitary expression with a significantly different commercial impression, making confusion unlikely.

On appeal, the Federal Circuit found that while the Board may have had its Rieslings for such *sua sponte* reasoning, the result was not supported by substantial evidence. Not only had neither party argued that its mark included a house mark, but the Board’s independent investigation did not support such a finding. The Board had cited no precedence for finding that four registrations or use on letterhead were sufficient to evidence that a mark is a house mark. Notably, it is unlikely the USPTO would grant a house mark registration based on such sparse evidence. Moreover, the Federal Circuit indicated the house mark analysis was unnecessary and the Board probably could have found confusion unlikely based on traditional weighing of the *DuPont* factors.

The Federal Circuit’s decision to remand the case is curious. The court could have relied on the Board’s finding that the marks were “visually and aurally different” to uphold the general finding of no likely confusion and admonished the Board for decanting the house mark concept as inappropriate. As is, the consequence is likely little more than a rewrite with the same outcome, particularly given the court’s clear indication that it does not believe confusion is likely. Nonetheless, the Board’s overall approach in this proceeding signals it is willing to find confusion unlikely where marks incorporate house marks, even if the house mark portions are not registered as such. Where such arguments are appropriate, parties should take care to provide sufficient evidence to support finding that a mark serves as a house mark.