Case 5

The Battle of the Giants: When Is a Contract Not a Contract?

Kendall-Jackson Winery, Ltd. v. Branson and Wirtz Corporation dba Judge & Dolph, Ltd., 212 F.3d 995 (7th Cir. 2000)

Imagine that you have come into your inheritance or sold your stock options and can now live your dream of setting up a small artisanal winery in the Napa Valley, joining the dozens of others who have opened their doors in the last two decades. Wine has been your hobby for many years, and you know how to make a good product. You have a business plan, and your first goal is to get your product into local retail shops and restaurants. From there, as your inventory grows, you hope to sell in other metropolitan areas where wine enthusiasts live, such as New York City, Chicago, New Orleans, and Miami. But you learn very quickly that you cannot do that without having a distributor in each state where these cities are located who will be willing to take on the sale and marketing of your product. It is not just that using a distribution network is desirable for quick market entry; it is mandated by law in any state that has—as many do—a three-tier system for the sale and marketing of wine: the producer sells to the wholesaler, who in turn sells to the retailer. And the retailer sells to the consumer. So you find a distributor, and then your adventure really begins.

The business dealings between a distributor and a supplier in any industry are generally determined by the contract that they have in place. Until recently, in the wine industry, where distributors were mostly small, family-owned local businesses, many of these contracts were oral and depended to some extent on a good personal relationship between the parties. In more recent times, as both wine businesses and distributors have grown larger, the contracts are written and specify the payment terms, whether or not the distributor is entitled to an exclusive territory, and also under what circumstances the supplier can terminate the agreement. In some states,

these terms negotiated between the parties will govern. But in what are known as "-franchise states," the contract terms will be superseded by other rules.

This complicates the ability of a small winery to market its wines. The dynamics have shifted so that you are no longer dealing with a small, locally-owned distributor. Now it is more likely that your small winery must deal on uneven terms with large distributors who have significant control over the marketing decisions involving your wine, including whether to take it in the first place, how much promotion to afford it, and where to sell it. It is difficult enough for a new winery to gain entry into what has become a very crowded market if it is unable to find a distributor willing to invest the money into marketing its wines. But some states also have in place franchise laws[1] that create additional barriers to this market entry. Franchise laws and so-called exclusive dealing laws impose restrictions on the ability of a winery to use more than one distributor in a market and to terminate a contract where the distribution relationship has gone sour. Because of the obstacles to termination imposed by these laws, producers often find themselves locked into a seemingly never-ending contract once distribution begins. And because of the political power that the wholesalers industry wields in virtually every state, instead of softening these laws or eliminating them entirely, as the need for them arguably has ceased in light of changing market conditions, state legislatures frequently have bowed to the pressure of wholesalers' lobbying groups and have in recent years strengthened the restrictions in these laws.

A good example of this was the Illinois Wine and Spirits Industry Fair Dealing Act of 1999.[2] This statute made it unlawful for a supplier of alcoholic beverages, such as a winery, to cancel or substantially alter any distribution arrangement without good cause. "Good cause" was defined in a very restrictive way that would make most contracts virtually evergreen. A number of suppliers, including Kendall-Jackson Winery—a large California-based winery that had made so-called "fighting varietals" (inexpensive cork-finished varietal wines such as Chardonnay or Cabernet Sauvignon) popular in the 1980s—decided to terminate existing distributorships before the law took effect. Their goal was to give themselves a chance to bid out their distribution contracts and to put better pricing and other terms into place before being locked into disadvantageous long-term agreements in Illinois. But the statute went further: it also authorized the Illinois Liquor Control Commission to order suppliers to continue to use the same distributors, on the same terms and at the same prices, even if the existing contracts had permitted termination for convenience (without cause).[3]

As soon as the Act went into effect, several distributors asked the Commission to order suppliers to resume dealings under the old contracts that the suppliers had

attempted to terminate before the law took effect. On this request, the Commission issued orders directing the suppliers to reinstate their prior contracts with the distributors.

Three suppliers, Kendall-Jackson Winery, Jim Beam Brands, and Sutter Home Winery, sued in federal district court in Illinois, arguing that the Illinois Act violated the Contracts Clause of the U.S. Constitution.[4] That clause provides: "No State shall... pass any...Law impairing the Obligations of Contracts...." The suppliers argued that the Illinois Act unconstitutionally deprived them of significant rights, including the right to freely choose their distributors and to negotiate prices for services, which they had held under their prior contracts, before passage of the Illinois law. The district court issued a preliminary injunction against the Commission at the request of the suppliers, preventing the Commission's orders from taking effect, on the basis that the Illinois statute probably violated the Contracts Clause. The suppliers then dropped their old distributors, who appealed to the Seventh Circuit Court of Appeals. But the Commission did not appeal.

This created a problem for the distributors, because the injunction had been issued against the *Commission,* not against the *distributors*. For the distributors, this seemed to be a distinction without a difference because, they argued, they were the ones who were deprived of the benefits of the statute solely because the Commission hadn't bothered to appeal. They also claimed that the Act did not change Illinois law anyway, so the suppliers' contracts had not actually been altered, and thus there was no Contracts Clause problem. Under prior law, they maintained, it would have been unlawful to modify or terminate a liquor distribution agreement in the absence of good cause, because Illinois law imposes a general duty of good faith and fair dealing in all contracts.

That's too bad, the appellate court essentially told them. The court clearly was not impressed with the distributors' arguments. In fact, they seemed to be particularly pleased to take these same arguments and to turn them against the distributors. Well, the court said, if Illinois had such a general rule applicable to contracts, which they doubted, then the distributors should go ahead and file their own breach of contract actions against the suppliers in Illinois state court, instead of trying to intercede into the suppliers' case against the state. State court was where they belonged and that is where they should go, the court told them. If they were proved correct in a state court action, then they would not need the "protection" afforded to them by the unconstitutional Illinois law anyway.

"If the distributors are wrong, however," the Court continued, "then it is hard to avoid the district court's conclusion that [the Act] has serious Constitutional prob-

lems, because it dramatically reallocates rights under contracts that predate the legislation, and again the distributors do not have much to gain by this appeal."

In other words, they were the wrong people in the wrong court trying to defend the wrong law. And if they disagreed, they also could go to state court and obtain an order forcing the Commission to appeal the district court's injunction.

Vignette

The Rise of the Distribution Industry—Post-Prohibition

When you go into a store to buy a bottle of wine, as you scan over the selections on the shelves, you probably don't think about the logistical trail that the bottle took to get from the winery into the store. Particularly if you treat a bottle of wine like any other consumer item, such as a book or a dress, as you pay for the item at the cash register, you would not note any difference among them. But there is a difference. As a general rule, there are no regulations prohibiting dress manufacturers, for example, from selling at retail the clothing they make, or from opening up a chain of shops in which to place their own merchandise. And there is no regulation that prevents them from bypassing distributors entirely and selling their merchandise directly into retailers' establishments. But there is a wide range of regulations in many states that prevent producers of wine from selling their product at retail, except possibly from the winery premises. And other requirements prevent the producer from distributing its own product.

When the Twenty-first Amendment repealed Prohibition in 1933, rather than permit the production and sale of alcoholic beverages to become unregulated, and fearful of the criminal elements (in the form of organized crime)

that had entered the alcoholic beverage industry during Prohibition, most states adopted some form of system to regulate the business. The most favored of these was the so-called "three-tier" system of producers, wholesalers (distributors), and retailers. Under this system, in its most rigid form, no owner in one tier can invest in another. This prohibition, for example, prevents a winery from owning an off-premises retail liquor shop. One of the consequences of the three-tier system was the investment of power into the liquor distribution industry. To this day, to place their product into retail shops and restaurants in many states, wineries depend on the efforts of distributors licensed in those various states. Most wine sales in the United States go through wholesalers before reaching the ultimate consumer, and the top five distribution companies in the United States represent 43 percent of total wine and spirit sales, according to the Wine Institute, a California winery owner lobbying group.[1]

As an additional layer in some states are so-called "franchise laws." These laws were put in place at the end of Prohibition to ensure that a strong legal distributorship network would develop (to replace the illegal network that grew up during Prohibition under the auspices of organized crime). The original and stated purpose of franchise laws was to protect liquor distributors, who were frequently "mom and pop" operations, from capricious and unfair treatment by the then large and powerful beverage manufacturers, such as distillers and brewers, and to make these start-up companies whole from the significant economic hardship that could result from the termination of a distribution contract before its natural expiration. Because distributors make significant upfront investments into the acquisition of inventory and in marketing the alcoholic beverages of a particular producer, these costs are not recouped if the relationship is prematurely terminated. As adopted in many three-tier states, franchise laws restrict the ability of wineries and distributors to freely negotiate the terms of their business dealings. The rights and responsibilities of the parties are imposed under the law and override any contrary provisions that the parties may agree to. In keeping with the goals of these laws, in a franchise state, for example, the business relationship between the winery and the distributor frequently cannot be terminated except for "good cause," and then only if certain conditions are met.

In recent years, however, as the distribution industry has consolidated, the potential hardships against which franchise and exclusive territory laws were enacted are less evident, and in fact it is often the small wine producer who faces hardship. There are simply too few wholesalers with whom producers can work.[2] The dynamics have shifted so that it is now more likely that small, fami-

ly-owned wineries must deal on uneven terms with large distribution corporations that enjoy significant market clout, and that, to add insult to injury, enjoy statutory protection. And in recent years, lobbying groups for the distribution industry have been able to strengthen franchise laws and to ensure the continued viability of the three-tier network. For example, after the U.S. Supreme Court decision in *Granholm v. Heald* [3]—which wine industry representatives hoped would open the doors to allow wineries to make Internet sales and to direct-ship not just to retailers and restaurants but also to consumers' homes—the wholesalers' industry has been able, in several states, to influence legislation that actually rolled back the ability of wineries to direct-ship. For example, after a 2005 court decision in Virginia that prevented in-state wineries from shipping to retailers and restaurants, thus limiting those wineries' ability to bypass distributors, wholesalers blocked legislation that would have opened up direct shipment by any winery, whether in-state or out-of-state.[4]

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1. MFK Research Report on Economic Impact of California Wine 2006 (Update January 2007), sponsored by the Wine Institute, p. 14, *available at* http://www.wineinstitute.org/files/mfk_ca_econ_reporto6_0.pdf.

2. In 1984, there were over 1,600 licensed wine distributors in the United States. From 1990 to 2000, the number of wine wholesalers and distributors had declined by more than 50% as a result of consolidation in the industry. MFK Research Report at 14.

3. *See* Case 9.

4. Virginia repealed its statute prohibiting direct sales to Virginia consumers in 2003. A law was finally passed in 2008 (effective April 17, 2008) that sets up a low-cost, state-subsidized distribution company—the Virginia Winery Distribution Company—to act as a wholesaler on behalf of small in-state wineries, to allow them a means to get their product back into restaurants and retail shops.

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1. *See* Vignette: "The Rise of the Distribution Industry—Post-Prohibition."
2. 815 ILL. LIQUOR CONTROL STATS. (ILCS) 725/1–725/99.
3. 815 ILCS 725/35 (c)(2).
4. U.S. CONST. Art. I, Sec. 10(1).

Case 6

Blood Is Not Thicker than Wine—The Gallo Family Feud

E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280 (9th Cir. 1992)[1]

The saga of the court battle between the Gallo brothers is a tale worthy of a television miniseries. As the court itself stated, the lawsuit arose out of "a tortuous family history apparently involving sibling rivalry on a grand scale." It is the story of two closely knit older brothers and a younger one who, depending on whose side was doing the telling, either tried to take unfair advantage of the name his older brothers had worked for over 30 years to make famous or was cheated out of his inheritance while he was under their guardianship as a young boy. The story is clouded in mystery, partly because the family understandably did not wish to publicize some of the less salubrious facts, especially those surrounding their father's possibly criminal activities during Prohibition (bootlegging) and their parents' untimely deaths, and partly because the facts do not fully correspond with the history created by Ernest and Julio Gallo, the older brothers, to explain the founding of their winery. As told, this family legend is a classic rags-to-riches story of two orphaned brothers, left destitute during the Great Depression after the sudden deaths of their parents, who taught themselves how to make wine by reading a University of California pamphlet in the basement of their local library, and founded a small winery with their only assets in the world: $900, and $5,000 in borrowed funds.[2] This winery grew to become the biggest and one of the most profitable wineries in the United States, the E. & J. Gallo Winery.

From the facts that were brought out in the lawsuit between the winery on the one side and the younger brother on the other, the story is much more complicated and perhaps darker. Ernest and Julio Gallo, owners of the E. & J. Gallo Winery, sued their younger brother, Joseph Gallo, for trademark infringement because he was using the famous "Gallo" name on cheeses. Joseph's version of events was different. He claimed that he had worked hard as a young man in the winery business that had

been started by their parents before their deaths, and his brothers cheated him out of his rightful inheritance while he was still a minor and they were his legal guardians. Then, to further humiliate him, they sued him when he set himself up in a different line of business (dairy farming) and tried to market cheese—not wine—under his own name, Joseph Gallo.

Ernest, Julio, and Joseph Gallo, Jr. were the sons of Joseph Gallo, Sr. and his wife, Susie, who had emigrated to California from Italy in the early 1900s. Ernest was born in 1909, Julio in 1910, and Joseph almost 10 years later in 1919. The Gallo parents ran a boarding house and a saloon near Modesto, California, serving bulk wine that they kept in kegs in their basement. There was no evidence that they made their own wine, although the kegs were imprinted with the word "GALLO." During Prohibition, they invested in vineyards and grew grapes that they shipped east for the home wine-making market. According to the court record, Joseph Gallo had a "brush with the law" due to involvement in bootlegging. He was never arrested, however.

The older Gallo brothers—Ernest and Julio—became involved in the family grape-shipping business in the 1920s. Shortly before Repeal, at the start of the Great Depression, the grape market crashed, prices dropped precipitously, and the family finances were ruined. On June 21, 1933, according to the case history, Joseph Sr. shot his wife, Susie, and then killed himself.[3] Susie left a holographic will leaving one-third of her estate, which consisted of stock and other property, to each of her three sons. Joseph Sr. left no will. The accountings of the parents' estates listed all their assets but showed no wine business, although it did name the E. & J. Gallo Winery as a creditor of the estate. This was a partnership that Ernest Gallo listed on his reports to the probate court as having been formed between the two brothers after their parents' deaths. He obtained a court order authorizing him to carry on the family business of "raising grapes and other crops."[4] Prohibition ended December 5, 1933, and on that day the E. & J. Gallo Winery began shipping wine out of California in barrels marked "GALLO."[5]

In December 1933, after Repeal, the E. & J. Gallo Winery made its first shipments of Gallo-branded wine.

Ernest and Julio became the legal guardians of Joseph Jr., who was 12 years old at the time of their parents' deaths. According to the court, they were not as meticulous as they could have been at keeping accurate paperwork and making accountings. In 1936, they obtained a court order authorizing them to sell shares of stock

that Joseph had inherited from his mother, but they then lent the proceeds from the sale to the winery without the court's authorization. In 1941, after Joseph became an adult, he engaged a lawyer and filed an action against his brothers for their misuse of those shares of stock for the investment into the winery business. The court awarded him $20,000 in settlement.

From their small start in 1933, Ernest and Julio grew their winery business, first selling wine in barrels and tank cars to wholesalers who bottled it under their own trademarks, and then later bottling the wine themselves, using the "GALLO" trademark. Joseph worked as a boy in the winery business, but when he became an adult, he started his own business as a cattle rancher and farmer. In the meantime, the E. & J. Gallo Winery continued to grow and prosper. In 1942, it obtained its first registered trademark using the word "GALLO." By the early 1960s, Ernest and Julio had established distribution of wine sold under the GALLO brand in all major U.S. markets.

Independently of the Gallo wine business, in the 1940s, another company, "Gallo Salame"—not related to the Gallo family—began producing salami and other prepared meat products, which were sold at wholesale to delicatessens. In 1959, Gallo Salame began selling its products directly to consumers and in the 1970s added a cheese and salami combination pack to its product line. In 1970, it obtained a registered trademark for these products under the name "GALLO," and the E. & J. Gallo Winery sued Gallo Salame for trademark infringement and dilution. The case settled in 1983 with Gallo Salame assigning its trademark to the winery, and the winery licensing back to Gallo Salame the right to use the mark "GALLO SALAME" on its meat and related products.

Meanwhile, Joseph Gallo's cattle and farming operations also prospered. In his ventures, he used his name, "Joseph Gallo," as a trade name. He also purchased a vineyard and sold grapes (including, apparently, to the E. & J. Gallo Winery) under the trade name "Joseph Gallo Vineyards." In 1955 he established the Gallo Cattle Company, a partnership that raised and sold dairy cattle. In the late 1970s, the Gallo Cattle Company established a dairy, and in 1983 it entered the cheese business. It initially sold the cheese at wholesale in large blocks that were then cut down, packaged, and sold under various marks. But by 1984, Joseph had begun selling packages of cheese in retail markets, labeled with a trademark consisting of his name, "JOSEPH GALLO," and accompanied by a bucolic scene of dairy cows and a barn.

When his brothers learned that he was selling this cheese in retail markets, they sent him a letter advising him that he was infringing on the winery's trademarks. They also advised Gallo Salame Company, which insisted that the winery either stop Joseph from using the name "GALLO" on his cheeses or have him sign a licensing agreement for the use of the name (with a likely sharing of royalty payments between

the winery and Gallo Salame). The brothers were unable to come to terms, and on April 17, 1986, the winery sued Gallo Cattle Company as well as Joseph Gallo for trademark infringement and dilution.

Joseph was personally affronted by this suit. There were two flames that fed his anger. First, he believed that his brothers were trying to prevent him from using his own name—a name to which he felt just as entitled as they—on his own products. Second, news articles recounted his frustration at not having shared fully in the success of the winery, which he believed to have been a venture first envisioned and perhaps founded by his father, Joseph Sr.[6]

Joseph countersued. He asserted that his parents had founded the winery as early as 1909 and had continued operations, albeit clandestinely, throughout Prohibition. He claimed also that Ernest and Julio had breached their fiduciary duty to him, and engaged in deceit and fraud, in their conduct of his guardianship. The proceedings were held in Modesto, California, the home of the E. & J. Gallo Winery. Joseph's lawyers failed to get the trial venue moved to a more neutral location. The winery moved to dismiss Joseph's counterclaims and won. And the court also issued an injunction, permanently barring Joseph from using the "GALLO" mark on retail cheese packages or on any advertising for the cheese. Joseph moved for a new trial on the basis that the trial judge had once been a partner in the local law firm that had represented the winery in its trademark suit against Gallo Salame. The judge ruled that this challenge came too late. Joseph then appealed to the Ninth Circuit Court of Appeals. The appellate court affirmed the lower court's decisions, both rejecting Joseph's countersuit for fraud and breach of fiduciary duty and barring Joseph from using the "GALLO" mark on his cheese.

In considering Joseph's claim that he had been cheated out of his inheritance, Joseph had presented only circumstantial evidence that the winery was part of the Gallo parents' estate. For example, Joseph Sr. had expressed publicly an intent to start a winery after Repeal; Ernest and Julio used grapes from their father's vineyard to make their wine; they sold the wine under the same "GALLO" trademark that their parents had put on the barrels of wine that they kept in the basement of their saloon before Prohibition; and, perhaps most important, Ernest and Julio had represented in several trademark applications (to demonstrate first and continuous use) that the winery was a continuation of their father's business and that the "GALLO" mark had been used initially by Joseph Sr. on wine since the early 1900s.[7]

But the appellate court did not want to delve into what it considered to be ancient history. All this had happened so long ago that the trial court judge simply had had no way of telling what was truth and what was not, and the appellate court agreed that it was better not to revisit that issue. In addition, Joseph had received a $20,000

payment in settlement of his earlier action against his brothers for misuse of the stock he had inherited from his mother, and he had not presented "smoking gun" facts sufficient to raise a likelihood of winning on a fraud claim. (Although, if Joseph's claims were true and his brothers had hidden the winery assets in their accountings to the probate court, $20,000—which was for something entirely different: using stock gains to finance the winery—would seem a small payment for deprivation of an asset that ultimately became a multimillion-dollar business.) But Joseph's claims were not deemed strong enough to allow him to move forward, and he was not given his chance to present his evidence at a trial.

On the other hand, the court found without a doubt that Joseph's use of his name on retail packages of cheese infringed on the winery's trademarks and constituted unfair competition under the Lanham Trademark Act,[8] even though Joseph had raised several arguments against the injunction that he had thought persuasive.

First, courts generally are reluctant to prevent a person from using his own name as a trademark, especially where that person had made no attempt to confuse the public. Moreover, Joseph argued that the GALLO mark was not a strong or distinctive mark because it was also Ernest's and Julio's personal name. The court disagreed. While acknowledging that trademark law gives greater protection to marks that are distinctive and that personal names are not inherently distinctive, they can nevertheless be treated as strong marks when they have acquired *secondary* meaning—that is, in the consumer's mind, the mark becomes associated with a particular source. The court found the "GALLO" mark to be one that had acquired such a secondary meaning because of its "widespread national public recognition," as well as the winery's long-term efforts to advertise, promote, and protect its mark.

Second, Joseph had argued that even if the "GALLO" brand had acquired secondary meaning, that meaning was related to wine and related products, but not cheese. Accordingly, protection should not be extended to other product fields where the winery had no activity and where there was no likelihood of consumer confusion. He maintained that there was an insufficient connection between *wine* and *cheese*. However, the court refused to accept this argument, finding that wine and cheese are "complimentary products frequently served together in wine and cheese tasting parties." The court also recognized that Gallo Salame Company, which had a license to sell salami and other meat products under the "GALLO" name, sold salami and cheese in a combination pack. There was, therefore, a *likelihood* of consumer confusion, even if the winery had not presented evidence of actual confusion.

Furthermore, the court found that Joseph was, in fact, culpable of engaging in unfair competition by trying to capitalize on the fame of his brothers' winery. The winery had presented evidence that when Joseph had first entered the cheese busi-

ness, selling wholesale, his brothers had warned him that they would not want him to use the Gallo name on the products if he sold them at retail. When he decided to enter the retail market, a consultant advised him that the products tested more favorably for consumer recognition when he used his surname, "Gallo," on the packages. It was after receiving that advice that Joseph had decided to add his name, Joseph Gallo, to the label. This was sufficient for the court to find against Joseph.

In the end, Joseph Gallo did not suffer irreparable financial harm from the court's judgment. Although he could no longer use GALLO or JOSEPH GALLO as trademarks for the retail sale of cheese, he was permitted to continue to use JOSEPH GALLO as a trademark on wholesale packages of cheese, and he was allowed to use "Gallo Cattle Co." and "Joseph Gallo Farms" as trade names. The injunction was silent as to products other than cheese. Joseph changed the name on his retail cheeses to "JOSEPH'S" and the products continued to sell. However, in terms of a personal toll, the court's judgment devastated the younger Gallo brother. He was humiliated. He was not able to forget that his brothers had delivered this final blow, depriving him of the free use of his own family name and suing him, publicly accusing him of unfair competition. By all accounts, he did not speak to his brothers again, and all three died without any public demonstration of repairing the rift in the family bond that this bitter lawsuit caused.[9]

Vignette

The Judgment of Paris and One Case That Settled in an "Accord"

Stag's Leap Wine Cellars versus Stags' Leap Winery

On the east side of the Napa Valley is an outcrop of cliffs known as "Stags Leap." According to the legend of the Wappo tribe, hunters were pursuing a mighty stag through the eastern hills, drawing him closer and closer to the cliffs, where they hoped to take him. But rather than allow itself to be trapped, the stag rushed forward toward the edge of the cliff and leaped in the air, reaching the other side and vanishing. The place was memorialized as "Stags Leap."

On May 24, 1976, a blind tasting took place in Paris, with a panel of judges made up exclusively of French wine experts, matching California wines against top French wines. No one doubted the outcome. The entire purpose of the tasting was simply to introduce some of the new wines coming out of California to the broader wine world and to see how they would fare compared to the best-known French wines. Of course, everyone knew that French wines would dominate.[1] Just a few years before in 1970, at a dinner I had attended in Bordeaux, an American friend from South Carolina had summed up the opinion that not only the French but also many Americans held of California wines at the time, when she declaimed that "*les vins californiens sont dégoûtants*" (California wines are disgusting). Her Bordeaux hosts, of course, nodded their heads in agreement, even though none of them had ever tasted a good California wine and were merely relying on past reputation and their own admittedly biased opinions. At the time, I assumed that she was probably right, although I had no point of comparison.

After comparing several California Chardonnays against French wines made from the Chardonnay grape (from the Burgundy region of France) and California Cabernet Sauvignons against first and other classified-growth red Bordeaux wines, the nine French judges surprised everyone—not least themselves—by ranking the California wines higher than the French. Among the whites, California's Chateau Montelena Chardonnay was ranked the highest, Chalone Vineyard's came in third, and Spring Mountain Vineyard fourth. When the reds were evaluated, the 1973 Stag's Leap Wine Cellars S.L.V. Cabernet Sauvignon—the winery's first vintage produced with grapes from vines that were barely three years old—was judged the best. Bordeaux's Château Mouton-Rothschild was second, and Château Haut-Brion was third.[2] The only journalist at the tasting was a *Time* magazine correspondent who was a surprise witness to history in the making. He sent in his report and the impact was immediate.[3] This news fundamentally transformed how California wines were viewed worldwide.

How had this happened? How had wines that had been disparaged just a few years before, and in effect for the past 100 years, and produced by novice winemakers out of grapes grown on new vines, managed to win in a competition against the best of the best Bordeaux and Burgundy wines?

Stag's Leap Wine Cellars was a new and relatively unknown winery even in the Napa Valley until that famous 1976 Paris tasting. It had been founded just a few years before by Warren Winiarski, a former political science lecturer from the University of Chicago, who had apprenticed at several of Napa Valley's premier vineyards, including the Robert Mondavi Winery. In 1970, he acquired a small vineyard on the east side of the Napa Valley, in the Stags Leap area, and began producing his own wines.[4]

Below the cliffs in the little valley another winery, called Stags' Leap Winery, is located. A winery had originally been situated in the same location in the 1890s, whose owner, Horace Chase, also operated a hotel under the "Stags' Leap" name. The property fell into disrepair on Chase's death and the winery had long since ceased operations when it was purchased in the 1970s by Carl Doumani, who rebuilt it and began producing a rich Syrah wine under the Stags' Leap label.

After 1976, when his 1973 Cabernet Sauvignon had achieved world fame by outscoring the famous Bordeaux reds, Winiarski determined that the fame of his wine depended on the name—Stag's Leap. So he sued Carl Doumani for trademark infringement, claiming first use of the Stag's Leap name, and Doumani countersued, claiming that the use of the name in the 1870s by Horace Chase gave him first rights.[5] The case dragged on for almost a decade.

Although everyone agreed that there was a likelihood of (and in fact there was) consumer confusion between the two identically-named wineries, the judge in the case was not able to find that either party had the right to use the name to the exclusion of the other. In a Solomonic decision, which the two men memorialized in an "apostrophic" settlement agreement, both wineries agreed to keep their names, but with the apostrophes in different places: Winiarski's Stag's Leap Wine Cellars had the right to put the apostrophe before the "s" and Doumani's Stags' Leap Winery had the right to put the apostrophe after the "s." After the settlement, the two men, who had been bitter enemies for almost 10 years, shook hands, took their families on a vacation together, and jointly released a 1985 Cabernet Sauvignon wine—a 50-50 blend from each winery—that they called "Accord."[6]

Shortly after this historic settlement, Napa wine growers pushed the federal government to adopt a Stags Leap District appellation, and Winiarski and Doumani found themselves this time on the same side opposing the proposal, which they argued would dilute both of their trademarks. They lost, and now the words "Stags Leap District" can appear on any wine made from grapes grown in the region where, according to legend, a mighty stag once saved himself from certain death.[7]

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1. GEORGE M. TABER, JUDGMENT OF PARIS: CALIFORNIA VS. FRANCE AND THE H ISTORIC 1976 PARIS TASTING THAT REVOLUTIONIZED WINE 2 (Scribner 2005).

2. A list of the wines and rankings of the 1976 tasting is available at the Stag's Leap Wine Cellars official website, http://www.cask23.com/1976tasting.htm.

3. George Taber, the author of JUDGMENT OF PARIS, was that TIME magazine correspondent. *See* JUDGMENT OF PARIS, Prologue, at 1-3.

4. Stag's Leap Wine Cellars official website: http://www.cask23.com/founders-vision.htm.

5. Frank J. Prial, *Wine Talk*, THE NEW YORK TIMES, Feb. 9, 1994, http://query.nytimes.com/gst/fullpage.html?res=9EODEFDD1438F93AA.

6. Thom Elkjer, *Lovable Rogue: Carl Doumani has an Uncanny Knack for Getting Into Just the Right Amount of Trouble*, SAN FRANCISCO CHRONICLE, Apr. 7, 2005, http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/04/07/W1GOPC.

7. See Vignette: "Wine Labels—Appellation of Origin."

1. Disclaimer: the author was a director in the law firm that represented Joseph Gallo and the Gallo Cattle Company before the district court in Modesto in the defense of the trademark infringement lawsuit and the counterclaim. She had no involvement in the litigation, and the description of the dispute and the case is based solely on the facts as described in the case and public newspaper and other published accounts.

2. W. Blake Gray and Steve Rubinstein, *Winemaker Ernest Gallo dies at age 97*, S AN FRANCISCO CHRONICLE, Tues., March 6, 2007, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/03/06/MNG2POGHIR13.DTL

3. *See*, Frank J. Prial, *Wine Talk: A Feud and A Book Unplug the Cork on the Gallo Empire*, THE NEW YORK TIMES, April 14, 1993, http://query/nytimes.com/gst/fullpage.html?res=9FOCE7D91F3AF937A25757COA965958260.

4. It is worth noting that if the Gallo parents had operated a winery during Prohibition, as Joseph later claimed, it would likely not have been shown as such on the list of assets of the estate but disguised as something else, because making wine without a permit for medicinal or sacramental wine would have been a clandestine, illegal activity and there is no evidence that either Joseph Sr. or Susie Gallo had such a permit.

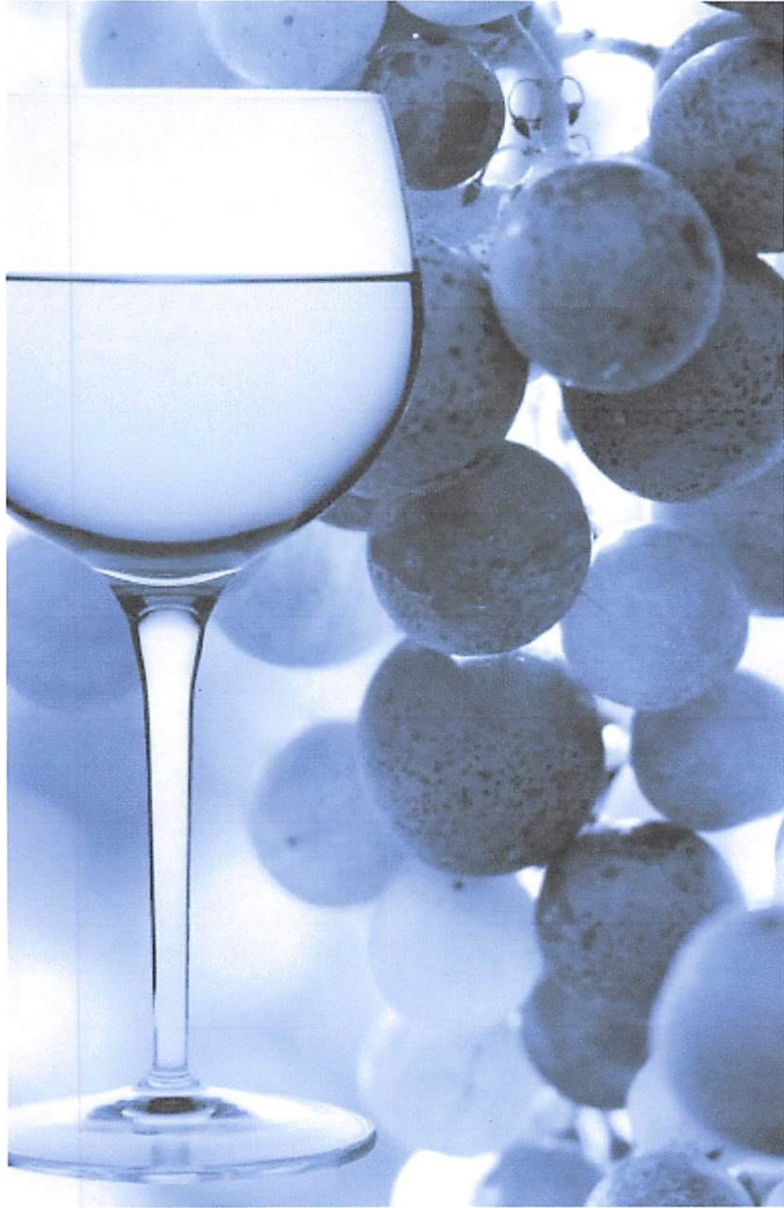
5. Tony Lima and Norma Schroder, *Ernest Gallo, 1909-2007: A Life in Wine*, J OURNAL OF WINE ECONOMICS, Vol. 2 No. 2, Fall 2007, 115, http://www.wine-economics.org/journal/content/volume2/number2/FullTexts/wineeconomics_Lima.pdf.

6. *See, e.g.*, Frank J. Prial, *Wine Talk: A Feud and A Book Unplug the Cork on the Gallo Empire*, THE NEW YORK TIMES, April 14, 1993, http://query/nytimes.com/gst/fullpage.html?res=9FOCE7D913AF937A25757COA965958260; *see also*, Valerie J. Nelson, *Joseph Gallo, 87: California Dairy Magnate Lost Legal Fight with his Winemaker Brothers*, LOS ANGELES TIMES, page B-6, Feb. 22, 2007, http://articles/latimes.com/2007/feb/22/local/me-gallo22, and Andrew Gumbel, *The Curse of the House of Gallo*, THE INDEPENDENT (Food and Drink), Sat., March 3, 2007, http://www.independent.co.uk/life-style/food-and-drink/features/the-curse-of-the-house-of-gallo-438587.html.

7. Andrew Gumbel, *The Curse of the House of Gallo*, THE INDEPENDENT (Food and Drink), Sat., March 3, 2007, http://www.independent.co.uk/life-style/food-and-drink/features/the-curse-of-the-house-of-gallo-438587.html.

8. 15 U.S.C. §§1125 et seq. *See* Vignette: "Trademark Law in Brief."

9. Michael J. de la Merced, *Joseph E. Gallo, 87, Brother Who Left Wine for Cheese, Dies*, THE NEW YORK TIMES, Feb. 23, 2007, http://www.nytimes.com/2007/02/23/business/23gallo.html.



Case 7

Imitation Is the Most Sincere Form of Flattery—Gallo Turns a New Leaf

Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery, dba Turning Leaf Vineyards, 150 F.3d 1042 (9th Cir. 1998)

By the late 1990s, the United States wine industry had changed dramatically. In earlier days the wine market had been dominated by low-budget bulk wine producers, with a few renowned wineries such as the Robert Mondavi Winery or Stag's Leap Wine Cellars producing high-end product at the other end of the spectrum. By the 1990s, the market had segmented into at least four levels: a low end, dominated by the bulk wines sold by the E. & J. Gallo Winery; a very high end, dominated by exclusive producers such as Harlan Estate, crafting selected varietals and priced accordingly; in a middle-high range, quality wines such as those produced at Stag's Leap Wine Cellars; and in a new middle-low range, cork-finished wines, with some aging, priced moderately at between $10 and $20 per bottle.[1]

In 1982, Jess Jackson, a San Francisco attorney, founded the Kendall-Jackson Winery, with a goal of producing quality wine at affordable prices.

These latter so-called "fighting varietals," led by Kendall-Jackson Winery, appealed to a wide range of newly minted wine buffs, had achieved market dominance in a short time, and had taken market share from the lower-priced generic jug wines for which the GALLO brand was famous. These moderately priced wines competed in a crowded category with not just domestic wines but also inexpensive imports from Argentina, Chile, and Australia, which had created a glut of wines in that price range in the market. Because of the proliferation of so many wines in such a

short time, it became increasingly difficult for one producer to develop an original and distinctive brand that would catch consumers' eyes and enable them to distinguish one wine from another.

One of the more successful wineries to achieve brand recognition in this market was Kendall-Jackson Winery. Kendall-Jackson prided itself on the quality of its wines for the price and had spent widely in advancing its popular brand, "Vintner's Reserve," as a premium wine that was also affordable. Since the first vintages were put on the market in 1983, Kendall-Jackson's Vintner's Reserve wine had gained a significant market share in the fighting varietal category. By the 1990s, according to court filings, its Vintner's Reserve Chardonnay was the number one–selling Chardonnay wine in the United States. The labels for Kendall-Jackson's Vintner's Reserve wines were easily recognized, featuring a downward-pointing grape-leaf design in varied shades of green, orange, yellow, red, and brown. Across the leaf design ran a wide banner reading "KENDALL-JACKSON." Kendall-Jackson's Vintner's Reserve wine was sold in a recognizable bottle—either a Burgundy-style bottle (for the Chardonnay) or a Bordeaux-style bottle (for its Merlot), with a rounded flange and a visible cork with printed leaves on it, a brown or burgundy neck label with gold lines on the top and bottom, and an off-white label also featuring a multicolored leaf design.

The E. & J. Gallo Winery was at the time the largest wine producer in the world, but it had a reputation in the lower-priced wine category, as a maker of non-premium "jug" wine. As the court noted, while Kendall-Jackson was a leader in the mid-priced varietal wine market, the market for the lower-priced non-varietals had been declining. In 1992, Gallo had commenced market research to determine the best way to take advantage of changes in the wine industry and to enter the premium wine market. It then began the process for establishing its own premium winery, to be located at its vineyard properties in Sonoma County, in Northern California.[2] As part of this market research, according to facts brought out in the case, Gallo studied Kendall-Jackson's success. Through this research, Gallo began to understand that its trademark, "GALLO," was associated with inexpensive jug wine. It also learned that consumers associate a grape-leaf design on a wine bottle with a premium-quality wine.

In 1995, Gallo introduced a line of premium wines produced largely from its Sonoma County vineyards that did not use the Gallo name and that featured a grape-leaf design. It labeled this wine "Turning Leaf." The wines sold under this label were similar to Kendall-Jackson's Vintner's Reserve wines. They consisted of varietals such as Chardonnay and Merlot, cork finished and priced less than $15 per bottle. They came in either a Burgundy-style or Bordeaux-style bottle and featured a rounded

flange, a visible cork with printed leaves, a brown or burgundy neck label with gold lines on the top and bottom, and with a prominent downward-pointing leaf design in various shades of green, yellow, orange, red, and brown.

In 1977, the Gallo family began acquiring land in Sonoma County and began producing wines there in the early 1990s; Gallo of Sonoma was officially established in 1993, when its first wines were released.

Even if it believed that imitation is the most sincere form of flattery, Kendall-Jackson did not feel honored. And it was not amused. Six months after Gallo introduced its "Turning Leaf" wines, Kendall-Jackson sued in federal district court for the Northern District of California for trademark infringement, trade dress infringement, trademark dilution, and trade dress dilution under the Lanham Act.[3] It also made unfair competition claims under California state law. The main thrust of its complaint was that Gallo had used a grape-leaf design and otherwise imitated Kendall-Jackson's trade dress for the purpose of deceiving consumers and "passing off" its wines for those that had been popularized by Kendall-Jackson. Kendall-Jackson also claimed that Gallo used wine bottles that mimicked the overall appearance of Kendall-Jackson's Vintner's Reserve bottles. The lower court disagreed, however, and ruled against Kendall-Jackson on all counts. Kendall-Jackson appealed.

To prove its trademark infringement case, Kendall-Jackson had to demonstrate that its mark was distinctive and also that Gallo's use of the Turning Leaf mark created a likelihood of confusion. Therefore, the analysis turned on the same question as had been before the court in 1910, in the *Italian Swiss Colony* case:[4] was Kendall-Jackson's mark unique, and was it strong enough to merit protection? In other words, was the grape-leaf design on the Vintner's Reserve bottles so distinctive that a consumer would be unable to distinguish a bottle of Kendall-Jackson's Chardonnay from that produced by Gallo under the Turning Leaf label?

The district court had found that the grape-leaf design, separated from Kendall-Jackson's name printed on the banner across the front, was not sufficiently distinctive, because no consumer would associate a fall-colored leaf design as a symbol for Kendall-Jackson without the name of the winery on the banner. The appellate court agreed with this conclusion. The design, in its view, was merely suggestive of how wine is made: a grape leaf comes from a grapevine, which has grapes from which wine is produced. The court noted that "wine bottlers other than Kendall-Jackson have long used grape leaves to decorate their bottles." Thus, it ruled that grape-leaf

designs had become generic symbols for wine and were not protectable as trademarks. Because the grape leaf is used widely in the industry, it no longer has the power to differentiate one brand of wine from another.

The court did note that a particular producer's grape leaf might be so distinctive as to warrant protection from copying. However, Kendall-Jackson's design was not that one. Its major distinctive feature was the separation in the middle where the winery name was printed, and Gallo had not imitated that feature. Moreover, even though Gallo's leaf resembled Kendall-Jackson's, it was not exactly the same; its leaf folded and turned at an angle rather than pointing straight down.

Kendall-Jackson also lost on its trade dress claim. For this claim to be valid, Kendall-Jackson had to prove that the features on its wine bottles—the cork, flange, and neck label features—were non-functional and distinctive. This requirement is designed to ensure that trademark law, whose purpose is to protect a company's reputation and to prevent consumer confusion, is not used to enable a business to control a useful product feature in an anticompetitive manner. Unfortunately for Kendall-Jackson, the court found that, like its trademark, these features on its bottles were not distinctive. Moreover, in the court's view, Gallo had presented sufficient evidence to show that the combination of an exposed cork, rounded flange, and neck label create a "California look," which consumers now look for in a California wine. If the court were to allow Kendall-Jackson exclusive use of these features, the court worried, then other California wine producers would be at a competitive disadvantage. Further, this "California look" only tells consumers that the wine they are buying is from California. It would not tell them that the wine is produced by Kendall-Jackson.

Outside of its trademark claims, Kendall-Jackson also argued that Gallo's efforts to imitate its labels and the design of its bottles amounted to unfair competition. Gallo had conducted market studies before launching its "Turning Leaf" brand. Kendall-Jackson argued that Gallo had studied its success, identified the components of Kendall-Jackson's design that had contributed to that success, and then deliberately imitated exactly those features. And Kendall-Jackson claimed further that Gallo had gone so far as to negotiate with retailers the placement for its Turning Leaf wines next to Kendall-Jackson's Vintner's Reserve wines on the store shelf. All this, Kendall-Jackson argued, was for the purpose of taking advantage of, and profiting from, Kendall-Jackson's own substantial efforts at promoting its wines, and piggy-backing off its success. This behavior, the company concluded, was exactly what unfair competition laws were created to deter.

The court did not necessarily disagree with Kendall-Jackson on this argument. But this was an "equitable claim"—that is, Kendall-Jackson was asserting that Gallo had acted in a way that was not fair, and the person making an equitable claim has

to have acted in a fair way itself. The court did not believe that Kendall-Jackson had been entirely candid when it gathered its evidence for its lawsuit against Gallo. In fact, Gallo had demonstrated that, just before bringing its case in 1996, Kendall-Jackson had apparently changed its own label for its Vintner's Reserve wines to make it more closely resemble the label that Gallo used on its Turning Leaf wines. Was the company trying to gain some benefit from Gallo's apparent success with these new wines, or was it trying to build a stronger case for itself, or was it some of both? Evidence also was produced that Kendall-Jackson may have used Gallo's trade secrets (its confidential marketing studies) obtained from a former Gallo director of marketing when gathering its evidence for the case.

As a postscript to this case, in 1999 Gallo took Kendall-Jackson to state court in California for malicious prosecution.[5] Gallo asserted that Kendall-Jackson had filed its trademark and unfair competition suit against Gallo for the sole and improper purpose of harassing Gallo and to prevent a new competitor from gaining entry into the already crowded category of competitively priced varietal wines.

Kendall-Jackson defended against the suit using the ancient legal doctrine of "unclean hands." This doctrine was first propounded by the Courts in Equity in medieval England: a person bringing an action for equitable relief will be denied a remedy if he or she has acted unethically or in bad faith. Kendall-Jackson asserted that Gallo had engaged in improper behavior directed at Kendall-Jackson in the marketing of Turning Leaf wines. The state court agreed with this contention. Gallo representatives had used so-called "piggyback" adjacencies to put the lower-priced Gallo products next to Kendall-Jackson, the higher-priced category leader. Gallo employees allegedly had moved other branded wines from their place next to Kendall-Jackson products in stores and replaced them with Turning Leaf wines. If true, for an employee of a winery to move another winery's products in a store could have been a violation of both federal and state regulations. Kendall-Jackson also claimed that Gallo may have provided free labor to retailers in exchange for favorable product placement; in some locations, it accused Gallo employees of removing Kendall-Jackson wines entirely from their placement on shelves and of wearing retailer badges while stocking wines, even though they were not employed by the stores.

The court concluded that Gallo's marketing strategies targeting Kendall-Jackson's market share had contributed to Kendall-Jackson's decision to pursue an infringement action against Gallo. And even though Kendall-Jackson had not been able to prove its case in federal court, Gallo's own behavior, which the court judged to be unfair, would have justified Kendall-Jackson's motives for bringing the suit. Accordingly, in this action, the court could not find Kendall-Jackson's motives to be unjustified or malicious, and Gallo lost this round.

Vignette

Trademark Law in Brief

Trademark disputes in the wine industry are not new, as the *Italian Swiss Colony* case described in Case 1 illustrates. One of a modern winery's most valuable assets is the name under which it sells its wine, whether that is Mondavi, Stag's Leap, or Gallo. If the winery sells its product into interstate or international markets, that name may be protectable as a trademark under federal law, the laws of the countries where the wine is sold, and international treaties. Prior to the passage of the first trademark laws in the United States (the Trademark Act of 1881, followed by the Trademark Act of 1905), trademarks received common law protection (that is, the law was handed down through precedents in court decisions). Today, trademarks in the United States are protected under the Lanham Act (the Trademark Act of 1946), as amended.[1] Under the Lanham Act, a "trademark" is a word, symbol, or device used to identify a producer's goods or services sold. "Trade dress" is the entire selling image of a product, including its packaging. The purpose of trademark law is to prevent consumer confusion as to the source of the product, and also to prevent unfair competition.

In the United States, the first user of any trademark is protected from any subsequent use of a mark that looks like or is confusingly similar to the protected mark in connection with similar goods and services, or any likely area of expansion. To be afforded federal protection under the Lanham Act, in addition to whatever common law protections are available, a trademark must be registered with the U.S. Patent and Trademark Office and bear the symbol "®." Trademark rights are exclusive to the holder of the mark, and the trademark cannot

be used without the consent of the holder under a license. A trademark license is an agreement under which the trademark owner, the "licensor," allows another, the "licensee," to use the trademark for specific products and usually in a specific geographic territory. To protect the goodwill of the licensor, the license generally includes provisions dealing with quality control and providing the licensor with monitoring rights. Trademark rights are afforded to the owner as long as the trademark is used in commerce. If the owner of a trademark does not use the mark for an extended period of time, fails to protest the unauthorized use of the mark by others, or lets others use the mark without adequate supervision, then federal law considers the mark abandoned.

Trademark infringement occurs when another violates the exclusive rights of the trademark holder in connection with similar goods or services where the violation is likely to cause consumer confusion. Consumer confusion occurs if the consumer believes that the products or services originated from the trademark owner. Where the respective marks or products or services are not identical, the focus of the assessment will be on the *likelihood* of confusion with respect to the actual or potential consumers of the trademark owner's goods or services, and not on whether the holders of the competing marks are actually competitors.

Trademark law offers greater protection to marks that are "strong"—that is, distinctive or unique. A weak mark, on the other hand, is one that is merely generic, such as a geographical place name, and this would not receive the same level of protection as a strong mark. Marks that are merely generic cannot be protected. Descriptive marks or marks based on a name can only be pro-

tected if they have become associated with a specific product manufacturer in the public's mind—that is, if they have acquired a secondary meaning.

A trademark becomes diluted when it ceases to signify a single source; its links to the owner of the mark have become blurred or diminished by unauthorized use. An example of how dilution works is the etymology of the word "zipper." This common noun is now used for any fastener with parallel rows of "teeth" that are interlocked by a sliding tab. However, "Zipper" was originally registered in 1925 as a B.F. Goodrich trademark for overshoes with fasteners and at the time was a unique word. Unfortunately for Goodrich, very quickly the name became popularly used to refer to any fastener, not just for boots, and therefore lost its uniqueness and its trademark protection for most uses. Goodrich sued in an effort to protect its trademark, but federal trademark law at the time did not afford owners the ability to prevent uses which, even though not directly competitive, would dilute a mark. This was changed under amendments to the Lanham Act in 1996. Under these amendments, the owner of a famous mark can stop another person's commercial use of a mark or trade name if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark. There is no specific definition of "famous," but it relates to factors such as how distinctive the mark is or has become, how long it has been used in connection with the goods or services with which it is used, how much advertising and publicity surrounds the mark, how widely the mark is used, to what degree the mark is recognized, and how similar is it to other marks.[2]

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1. 5 U.S.C. §§ 1125 *et seq.*
2. 15 U.S.C.A. § 1125(c).

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1. Robert C. Eyler, *The International Competitiveness of the California Wine Industry*, Sonoma State University, Department of Economics, Rohnert Park, CA, http://www.libweb.sonoma.edu/regional/faculty/eyler/eyler.html.

2. Id Robert C. Eyler, *The International Competitiveness of the California Wine Industry*, Sonoma State University, Department of Economics, Rohnert Park, CA, http://www.libweb.sonoma.edu/regional/faculty/eyler/eyler.html.

3. 15 U.S.C. §§1125 et seq., *see*, Vignette: "Trademark Law in Brief."

4. Italian Swiss Colony v. Italian Vineyard Company, 158 Cal. 252 (1910); *see* Case 1.

5. E. & J. Gallo Winery v. Kendall-Jackson Winery, Ltd ., 76 Cal App. 4th 970 (5th Dist. 1999).

Case 8

The Changing Napa Valley—A Sleepy Outpost Becomes an International Destination

Scruby v. Vintage Grapevine, Inc., 37 Cal. App. 4th 697 (1st Dist. 1995)

At the same time as the Napa Valley became a center for fine-wine production in the 1980s and 1990s, and an incredibly popular destination for tourists to the San Francisco Bay Area, it also was attracting new residents from the Bay Area who were seeking sites for second or retirement homes. This has caused significant congestion along the State Highway 29 corridor (St. Helena Highway), the main artery between towns in the lower valley, such as Napa and Yountville, and those farther north, such as St. Helena and Calistoga. For along this road is located some of the most prime vineyard and winery real estate in the entire valley, including several of the older, well-established wineries, such as the Charles Krug Winery and the Robert Mondavi Winery, as well as newer wineries established at the end of the twentieth century, including Cosentino Winery, which claims to be the first stop on the highway as you enter Yountville.[1] The onslaught of tourists has provoked controversy and disputes among the affected parties: new homeowners from the Bay Area seeking to enhance and maintain their property values; old-time residents nostalgic for the days when the valley was a sleepy community; and wineries and vineyards, which need the road and access to it to conduct their agricultural business.

John and Giovanna Scruby had acquired an acre of land in Yountville along Highway 29 before the most recent onslaught of development. They built a single-family residence on their parcel. In 1990, Vintage Grapevine, Inc. acquired the lots next door to the Scruby home, comprising approximately 3.5 acres, on which they constructed the Cosentino Winery and planted vineyards. The Scrubys' property was landlocked, and access was provided by means of an easement over the winery's property to Highway 29. This easement was non-exclusive, 52 feet in width, for road and utility purposes. The easement initially had been created in the 1960s in connection with a planned residential subdivision that never was completed. This easement remained in place when the Scrubys acquired their land and built their home, and was unchanged when Grapevine later acquired the remaining land. Because the property had not been subdivided, the easement area was far larger than necessary for access to a single parcel, and most of the easement area had never been used as a road.

From the time the winery first opened its doors, a conflict brewed between the two property owners. In connection with its winery and vineyard operations, Grapevine had located some water tanks and had planted grapevines inside the 52-foot easement area that the Scrubys had been using to access their property. A paved road was built, but it was shared among the Scrubys and their visitors, the winery operators, and the visitors to the winery's tasting room. The Scrubys objected to this increased activity on their road and complained that vehicles coming to and leaving the winery tasting room parking lot impeded their access. Eventually they took matters into their own hands and paved over another part of the 52-foot easement area on Grapevine's land just a few feet from the winery's driveway, and installed a new road to provide direct access to their residence from Highway 29. This new road did not meet design criteria approved by Napa County and the California State Department of Transportation (CDOT), which had been imposed because of traffic congestion along the Highway 29 corridor. Both agencies had insisted when Grapevine's winery was approved that having a single access at that location was critical to en-

sure the public safety. Accordingly, because the Scrubys' new road was located across Grapevine's land, the county threatened to revoke Grapevine's use permit for the operation of the winery.

In 1993 the Scrubys sued Grapevine, seeking to force the winery to remove its grapevines and water tanks from their easement area. They also wanted the winery to correct a drainage problem that created ponding on their side of the common road. Grapevine cross-complained against the Scrubys, asking the court to keep the Scrubys from interfering with its use of the property and to order the Scrubys to remove their new road and to restore Grapevine's property.

The trial court ruled against the Scrubys and they appealed.

The question before the appellate court was what rights the Scrubys held under the easement. They argued that the easement area could only be used for access, even though it was much wider than necessary for such purpose. They also maintained that the correct interpretation of the easement language would allow them the exclusive use of the *entire* easement area, which meant the right to use every inch of their 52-foot-wide easement for road purposes and for nothing else. Moreover, under this interpretation, Grapevine would be obliged to ensure unimpeded access at all times (even if this meant limiting the use of its own vehicles in the easement area and the number of tourist vehicles coming into the tasting room parking). The court disagreed.

"An easement is a restricted right to specific, limited, definable use or activity upon another's property, which right must be *less* than the right of ownership," the court ruled. In other words, the Scrubys did not own the land where the easement was located, just the right to pass over the land to access their own property. The court noted that the owner of an easement had to take care to use his or her rights "in such a way as to impose *as slight a burden as possible*" [emphasis added] on the property of the person granting the easement." Thus, the court concluded that the extent of the Scrubys' right to use Grapevine's land was limited—only to come and go over the land to and from their own property in as unobtrusive a manner as possible.

The Scrubys had maintained that Grapevine had encroached on their free access by using it for agricultural equipment, the planting of grapevines, and other winery-related activities that involved more than access. Before the winery had been located there, the easement area had been unimpeded, and the Scrubys wanted it to remain so. But the court pointed out that the Scrubys' use was *non-exclusive*. In other words, the idea of encroachment would be meaningful only if the entire easement area had been granted to the Scrubys for their sole and exclusive use. But that was not the case.

They held their rights in conjunction with others and, accordingly, had to share. And as long as Grapevine did not unreasonably interfere with the Scrubys' access, it could do what it pleased with its property.

On the other hand, by installing their own road across the easement area, the Scrubys had both damaged Grapevine's property (by ripping out valuable grapevines) and had put Grapevine's use permit at risk. The court noted that although the Scrubys had the right to do what was reasonably necessary to repair and maintain the existing road to ensure their own access, they did not have the right to substantially alter the area, including relocating the road or installing an entirely new road, which they had done, without Grapevine's consent.

Due to the safety concerns expressed by the DOT and adjoining owners when the permit for the Cosentino Winery was issued, Napa County had expressly conditioned its approvals to require a single entrance to and from Highway 29 onto Grapevine's property for both the Scrubys' and the winery's use. The Scrubys had been given an opportunity to object to this arrangement at the public hearings, but apparently had not done so. Whether or not they had opposed it, once the use permit was in place, they could not unilaterally take measures, such as creating a second opening onto Highway 29, that would be in violation of that permit, thus putting the winery's continued operation in jeopardy. They were ordered to remove the new paved road and to restore the Grapevine property at their expense.

It is easy to understand how a conflict like this can arise. The Napa Valley had been a relatively calm place to live before the onslaught of tourism to the area. At the time the easement was created in 1966, the land that would eventually be sold to Grapevine was vacant and no longer in use for agricultural purposes. When the Scrubys bought their land, Highway 29 was busier, but there had been relatively little development in the Yountville area where the property was located. The more popular wineries that drew weekend visitors, such as the Robert Mondavi Winery or the Louis Martini Winery, were located farther north, nearer to Oakville and St. Helena. One can imagine that the Scrubys had lived quietly for many years before Grapevine bought the adjoining land and completely transformed their bucolic neighborhood. By the 1990s, however, the popularity of the entire valley had pushed winery development south and had completely overwhelmed Highway 29 (as the only true artery through the valley from north to south), especially in the summer and fall, and on weekends throughout the year, creating constant congestion, with cars entering and leaving winery tasting room parking lots. Traffic was even more dangerous in the late afternoon, when drivers who had tasted more than one glass of wine were less inhibited and willing to take more chances. When the permits for the Cosentino Winery were issued, one can imagine that the Scrubys could not have foretold the impact of

sharing a road with a winery tasting room until they had actually experienced it.[2] It is easy to imagine their sense of frustration and loss to find themselves now living, essentially, in the middle of a winery tasting area. But they had to follow the rules laid out by the county, and choosing to build their own road may have seemed like an easy enough solution to their problem, but it turned out to be a very bad and costly idea.

Vignette

What is "*Terroir*"? What Is an Appellation? Why Napa?

A wine drinker can go to a shop in New York City or Philadelphia or Miami and purchase a bottle of wine from California's Napa Valley. But the experience of tasting it after purchase does not match up to the magic, the vibrancy of tasting the same wine in the region, in the cellar, where the wine was made. This by itself explains why so many tourists to California make the drive up to the Napa Valley, to join the procession of other wine tasters along Highway 29, the St. Helena Highway, although the beauty of the place itself, the hills on either side of the road, the frequent light fog that tops those hills, creating a soft and delicate light, all spell romance and mystery, to enhance the ambience. Then there is the association of the wine with its own place, the scent of the cellar, dark and earthy, and the enthusiasm of those pouring the wine. This, in a nutshell, gives body to the total experience of "*terroir*" in a good wine.

What is *terroir*? Loosely defined, it is French for "soil." But it is so much more than that. It is not just the character of the soil (chalky, gravelly, sandy) in which the vines are planted, but rather the totality of factors that tell the taster that the wine was produced in that place from grapes that were grown there. It

includes the altitude of the vineyard, for example, and its position relative to the sun—wines made from the same varietal grown on the east-facing side of the hills of the Napa Valley are reputed to be different from those grown on the west-facing hills. Sometimes wine producers in the United States substitute the term "microclimate" for *terroir* to describe the various areas within the Napa Valley. This probably derives also from the French word "*climat*," which in the Burgundy region of France is more commonly used than *terroir* to account for the many distinguishing factors in a vineyard area, such as soil, drainage, the bearing of the sun, and the slope of the vineyard. Burgundians are amused that California winemakers from time to time have taken cuttings of Pinot Noir grapevines from vineyards in Burgundy, smuggled them into California, and planted them in the Napa Valley and other regions in an effort to create a vineyard that would produce a wine capable of standing up to those wines produced from the ancient vineyards of the Côte d'Or in eastern France. They know that the " *climat*" of Northern California is not that of Burgundy, and that the wine produced might be very good, but it would never be a true wine of the Burgundy region. For those who understand wine and its production know that very different wines can result from neighboring vineyards—or even plots within the same vineyard.

In the United States, instead of using "*terroir*" and "*climat*," wine specialists commonly refer to "microclimates." This word encompasses those various factors that result in the complexity of a good wine. In California, the consideration of microclimate has evolved into a system of classification that accounts for the variety of temperatures at which grapes may be grown within the state and even within the Napa Valley. There are five established climate regions in California. The coolest (Climate Region I) is similar to the Champagne or Côte d'Or regions of France and can be found as far south as the Santa Cruz mountains and as far north as Mendocino County, but also includes areas of Napa. Pinot Noir grapes grow well in this climate region. Climate Region II is similar to France's Bordeaux region and also is found in parts of Napa. Cabernet Sauvignon, Chardonnay, and Merlot grapes grow well in these areas. Climate Region III is warmer, equivalent to France's Rhone region, and also includes parts of Napa. The Carignan grape grows well here. Climate Region IV is similar to Southern Spain and includes regions south of the Napa Valley, including Sacramento and Yolo counties. And the hottest region, Climate Region V, which is similar to North Africa, is far to the South of the Napa Valley, in the San Joaquin Valley. It stands to reason, then, that a wine blended from grapes grown in the much hotter San Joaquin Valley or the Lodi region would be different in character from a wine made entirely from grapes grown in the Napa Valley. According to testimony that was presented in the *Bronco Wine Company* case, [1] the Napa Valley is an area where unique conditions exist to create wines of exceptional quality of various varieties, because of the presence of so many microclimates within one relatively small area. Globally, few regions have comparable growing conditions, and that makes the Napa Valley a very special place that people want to experience firsthand.[2] Hence the traffic congestion on Highway 29. It is unlikely that this corridor will ever be the bucolic country road that it was only 30 years ago.

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1. Bronco Wine Company v. Jolly, 129 Cal. App. 4th 989 (3rd Dist. 2005), Case 11.

2. Bronco Wine Co. v. Jolly, 129 Cal. App. 4th 989 (3d Dist. 2005), at n.12.

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1. Cosentino Winery official website, http://www.cosentinowinery.com/cosentino/page/tasting-rooms.jsp.

2. According to the Cosentino Winery's website, it is open seven days per week, from 10:00 a.m. until 5:00 p.m. http://www.cosentinowinery.com/cosentino/page/tasting-rooms.jsp.