

FREEHILLS
PATENT ATTORNEYS

PATENTS TRADE MARKS DESIGNS

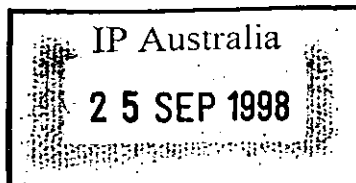
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25 September 1998



Our ref SMS:JPB 40073478
Phone 03 9288 1013
Page 1 of 41

Mr John Braybrooks
IP Australia
Fax 02 6293 2278
Phone 02 6293 7444

Pin no. 42336
Checked by *B*

Dear Sir

Trade Mark Application No. 704779 for colour ORANGE in classes 31 and 33 in the name of Veuve Clicquot Ponsardin

I enclose under cover of this facsimile our response to your report No. 8.

As you will see from my letter, we have obtained a number of further Statutory Declarations in support of the Applicant's position. Four of these Statutory Declarations have either not yet been executed or have been signed but not yet witnessed because the Declarants have not yet been able to find a convenient time to do so. However, each of these declarants has confirmed that they will execute the Statutory Declaration in the same form in which it is presented to you. I anticipate that the Statutory Declarations will be received by me during the following week, and I will forward them to you in due course. However, I am mindful of the impending deadline which is why I have sent this information to you by facsimile at this time.

If you have any further queries or if you wish to discuss this matter further, please do not hesitate to contact me.

Yours sincerely

S. Stern

Steve Stern

Enc

FREEHILLS
PATENT ATTORNEYS

PATENTS TRADE MARKS DESIGNS

25 September 1998

Our ref SMS:JPB 40073478
Phone 03 9288 1604
Doc no MELCD\98257006.9

The Registrar of Trade Marks
IP Australia
Level 6
565 Bourke Street
MELBOURNE VIC 3000

Attention: Mr John Braybrooks

Dear Sir

**Australian Trade Mark Application No. 704779 for COLOUR ORANGE
in classes 32 and 33 in the name of Veuve Clicquot Ponsardin**

We refer to our previous correspondence in respect of this application.

We have now had the opportunity to review your latest report and respond as follows:

Responding to your Report No. 8

We note that you are prepared to allow the registration of the Applicant's colour ORANGE trade mark only when used on the label of a bottle of champagne. With respect, we consider that this specification is unduly limited and that the evidence already filed justifies the acceptance for registration of this trade mark in respect of all wines and not champagnes only. Notwithstanding this view, we have obtained further evidence as to the distinctiveness of the Applicant's colour ORANGE trade mark in respect of all wines which we will discuss below after addressing specific issues raised by your report.

"No Convincing Evidence" of Distinctiveness

We note the statement in your Report No. 8:

"As the Applicant has only used the trade mark extensively in respect of champagnes, I do not believe that the acceptance can be justified for a wider specification. In this regard I note that although some of the declarants make claims as to the trade mark's ability to distinguish not

only champagne but all wines there is no convincing evidence to support this."

With respect, we find it difficult to accept that there are any reasons why the evidence of wine experts and other persons with considerable experience within the wine trade as to the distinctiveness of the Applicant's colour ORANGE trade mark amongst all wines is not "convincing". As regards the onus of proof in relation to evidence provided to establish distinctiveness in fact under section 41(6) of the Trade Marks Act 1995, we refer you to the recent decision of *Blount Inc v the Registrar of Trade Marks*.

— OREGON

In that case, it was held that, in meeting a section 41(6) objection, the evidence of use which is put before the Registrar by the Applicant need only establish the fact of distinctiveness on the balance of probabilities. Furthermore, it was held that such evidence is to be evaluated in the light of any evidence tending to the contrary effect and having regard to evidence which the applicant might reasonably be expected to obtain in the circumstances.

Given that each of the declarants has considerable experience of the wine trade in Australia and the opinions of the wine buying public throughout Australia, and that they are unanimous that the Applicant's colour ORANGE trade mark is distinctive amongst all wines, we submit that it is more probable than not that the Applicant's colour ORANGE trade mark is distinctive amongst all wines. You have not referred us to any evidence which may tend to the contrary effect. Consequently, we submit that there is no reason why this evidence does not meet the required onus of proof.

WINE TRADE
appli claim
d32+33
good

Furthermore, we submit that the evidence presented is at least (if not more) than could reasonably be expected to be obtained in the circumstances. Indeed, we submit that there is no better evidence that could be presented to show the distinctiveness of the Veuve Clicquot Orange in respect of all wines save for proof that the trade mark is famous.

Further Evidence

In order to emphasise the distinctiveness of the Applicant's colour ORANGE trade mark in respect of all wines and not just champagnes, we have obtained seven further Statutory Declarations from persons with considerable experience in the wine retail trade throughout Australia. We have filed three Statutory Declarations from New South Wales, two from South Australia and one each from Queensland and Western Australia. These declarants have an average of 15 years experience each in the wine retail trade in Australia and are, consequently, very well placed to provide evidence as to the opinions of the Australian wine buying public in relation to wines available in Australia. Indeed, we submit that such evidence is, in the circumstances, more convincing than market survey type evidence because it provides an historical perspective on the recognition of this trade mark focused specifically on the relevant group of the public, whereas a market survey will only provide a snapshot of one particular period of time.

In order to assist you in your consideration of this matter, we have isolated the particular passages of the additional Statutory Declarations presented on behalf of the applicant which we believe specifically demonstrate that the public identifies Veuve Clicquot Orange with the applicant.

(A)

Statutory Declaration of Graham Pearson

Paragraph 4

champagne
 "...I am familiar with the particular orange colour used by Veuve Clicquot to distinguish its product. It is a very distinctive colour"

Paragraph 5

champagne
 "... The Veuve Clicquot Orange is distinctive of Veuve Clicquot's products amongst all wines...If I was looking for a bottle of Veuve Clicquot non-vintage champagne in a bottle shop, for example, the Veuve Clicquot Orange would lead me straight to it"

Paragraph 6

"... I believe regular wine buyers also recognise the distinctive Veuve Clicquot Orange colour and associate it exclusively with the Applicant."

Statutory Declaration of Michael William Grant

Paragraph 5

"...I can think of no other wine that uses the same orange colour. Indeed, if I saw another sparkling wine or Champagne, and to a lesser extent a still wine using the Veuve Clicquot Orange, my first thought would be that it was one of the Veuve Clicquot products. If it was not, then I would regard the use of the Veuve Clicquot Orange as an attempt to "rip off" Veuve Clicquot and take advantage of its goodwill and reputation."

Paragraph 6

"...I consider that members of the wine buying public also recognise the Veuve-Clicquot Orange colour as being distinctive of Venue-Clicquot in the context of sparkling wines or Champagne, and to a lesser extent still wine. Veuve Clicquot Orange colour is the most distinctive colour used on any Champagne or sparkling wine label and, as such, "sticks out" from all other wines."

champagne

Statutory Declaration of Ian Cook

Paragraph 6

"Through my experience, from many conversations I have had with wine purchasers and comments made to me by members of the public, I believe that members of the wine buying public also recognise the Veuve Clicquot Orange Colour as being distinctive of the Applicant in the context of all wines and champagne in particular."

Statutory Declaration of David Giacomin

Paragraph 6

"If I saw the Veuve Clicquot Orange bottle of wine in a wine shop, I would recognise that colour and instantly associate it with the Applicant."

SM

Paragraph 7

"... I believe that members of the wine buying public also recognise the Veuve Clicquot Orange colour as being distinctive of the Applicant amongst all wines."

Statutory Declaration of Martin Baily

Paragraph 6

"I believe that, as a result of its extensive use by Veuve Clicquot, the Veuve Clicquot Orange is unique and distinctive of Veuve Clicquot and its products in the context of all wines."

Paragraph 7

"I believe that members of the wine buying public also recognise the Veuve Clicquot Orange colour as being distinctive of Veuve Clicquot in the context of all wines. Furthermore, I believe that if members of the wine buying public were to see the Veuve Clicquot Orange on a bottle of wine, sparkling wine or Champagne, they would associate the use of that colour with Veuve Clicquot."

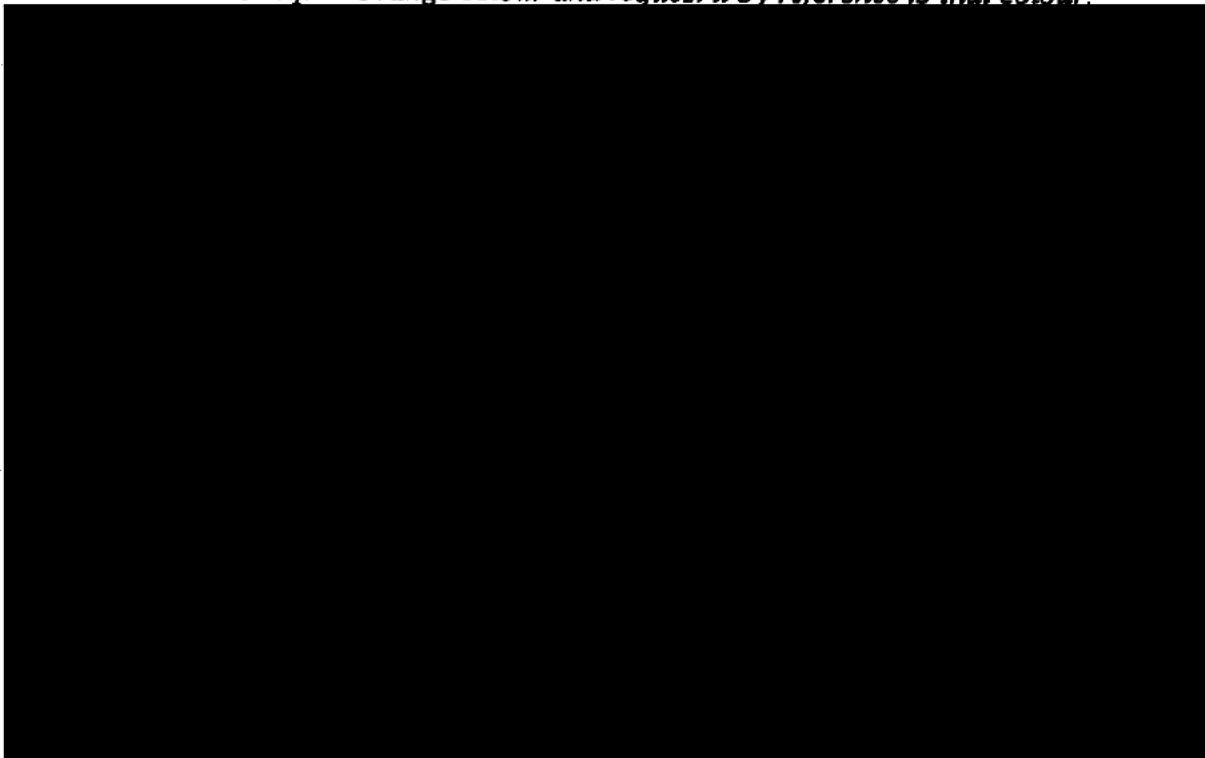
Statutory Declaration of Graham Moss

Paragraph 5

"I believe that by virtue of the Applicant's extensive use of the Veuve Clicquot Orange, it has become distinctive of Veuve Clicquot's products amongst all wines, sparkling wines and champagnes."

Paragraph 6

"...I am aware that regular wine buyers also recognise and associate the Veuve Clicquot Orange exclusively with the Veuve Clicquot. For example, many retail customers recognise the Applicant's product simply by the Veuve Clicquot Orange colour and request it by reference to that colour."

*JS*



Summary

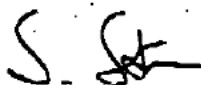
We have now provided the Trade Marks Office with a total of 19 Statutory Declarations in this matter. Every single one of these Statutory Declarations gives evidence of the distinctiveness of the Applicant's colour ORANGE trade mark in the context of all wines and not just champagne. Thirteen of these declarations are made by people with considerable experience in the Australian wine industry. Indeed, these 13 declarants have, between them, a total of 227 years worth of professional experience in dealing with the wine buying public in Australia! Furthermore, these declarants have a very wide range of experience which covers all of Australia.

In summary, we submit that this evidence overwhelmingly shows that the Applicant's colour ORANGE trade mark is distinctive in the context of all wines and not just champagnes and consequently, we submit that this trade mark application should be accepted for a specification which includes all wines.

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We look forward to receiving notice of your decision in this matter. If you have any further queries, please do not hesitate to contact us.

Yours faithfully
FREEHILLS PATENT ATTORNEYS



Stephen Stern

AUSTRALIA
Trade Marks Act 1995

IN THE MATTER of Australian
Trade Mark Application No. 704779
in the name of **VEUVE CLICQUOT**
PONSARDIN

- and -

IN THE MATTER of the
examiner's objection thereto

STATUTORY DECLARATION

MICHAEL WILLIAM GRANT, of 24 Railway Street, Cottesloe, Western Australia, 6011

DO SOLEMNLY AND SINCERELY DECLARE as follows:

- 1 I make this Declaration from my own knowledge.
- 2 I have been involved with wine both as a wine lover and as a participant in the wine industry in Australia for about 30 years. I have worked in the retail wine trade in Australia for the past 18 years. I am currently a working partner of Grant & Knowles - The Wine Specialists at both Cottesloe Cellars and Mt Claremont Cellars, an independent fine wine retailer in Western Australia.
- 3 Through my experience within the wine industry, which includes dealing extensively with importers and distributors in the wholesale wine trade and with members of the public on the retail side of the trade, I have become familiar with the general opinions of the public in relation to wines available in Australia.
- 4 Through my experience within the wine industry and as a consumer myself, I have become familiar with most of the wines available on the Australian retail market, including the products of the Applicant, Veuve Clicquot.
- 5 I am very familiar with the particular orange colour which is used by Veuve Clicquot to distinguish its products (the Veuve Clicquot Orange). I am familiar with the Veuve Clicquot Orange colour from its use on Veuve Clicquot's non-vintage Champagne referred to as their "Orange Label Champagne" as well as on outer case packaging and on promotional materials for Veuve Clicquot. I believe that as a result of its extensive use by

Veuve Clicquot, the Veuve Clicquot Orange is unique and distinctive of Veuve Clicquot and its products in the context of sparkling wines or Champagne and to a lesser extent still wines. I can think of no other wine that uses the same orange colour. Indeed, if I saw another sparkling wine or Champagne, and to a lesser extent a still wine, using the Veuve Clicquot Orange, my first thought would be that it was one of the Veuve Clicquot products. If it was not, then I would regard the use of the Veuve Clicquot Orange as an attempt to "rip off" Veuve Clicquot and take advantage of its goodwill and reputation.

- 6 In my experience of dealing with the wine buying public and through many conversations and comments made to me in wine retail shops, I consider that members of the wine buying public also recognise the Veuve Clicquot Orange colour as being distinctive of Veuve Clicquot in the context of sparkling wines or Champagne, and to a lesser extent still wine. Veuve Clicquot Orange colour is the most distinctive colour used on any Champagne or sparkling wine label and, as such, "sticks out" from all other wines.
- 7 Furthermore, if members of the wine buying public were to see the Veuve Clicquot Orange on a bottle of sparkling wine or Champagne, and to a lesser extent a still wine, I believe that they would associate the use of that colour with Veuve Clicquot.

AND I MAKE THIS STATUTORY DECLARATION believing the same to be true and correct in every particular.

DECLARED by the said
MICHAEL WILLIAM GRANT
 at in the State of
 Western Australia this day of
 1998

Before me: