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Tattinger v. Allbev: Has the London High Court Popped Its Cork?

Following interlocutory relief,1 the Chancery Division of the London High Court recently handed down a decision in an unfair competition case that is likely to have serious repercussions in the United Kingdom and the European Community (EC).2 The case involved a misrepresentation ("passing off") dispute between Tattinger, a well-known French champagne house3 and Allbev, an English beverage wholesaler.4 The originator and producer of the alleged infringing product called "Elderflower Champagne," Thorncroft Vineyards, also was named as a co-defendant.5 Tattinger claimed that Allbev was passing off its elderflower champagne as true champagne, and that the designation "champagne" was the exclusive property of the French champagne houses.6 Finding that the balance of convenience was on the side of the plaintiffs, the Chancery Court issued an injunction pending trial.7

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3 Tattinger is a famous producer of French champagne that exports much of its product to England. Id. Joining in Tattinger’s plea were two French trade groups, the Comité Interprofessionnell du Vin de Champagne (CIVC) and the Institut National des Appellations d’Origine (INAO). CIVC is a French corporation formed to defend the interests of producers of wines sold under the appellation d’origine champagne with the power to sue and be sued. INAO regulates the production of wines entitled under French law to use the appellations d’origine and also has the power to sue to defend the appellations. Id. As the literal translation suggests, the appellation d’origine or name of origin refers to a system used in France to register and legally control the labelling of wines. Only a wine produced from grapes grown in specified regions may use the name of the region, hence the familiar French phrase on imported wine labels: appellation contrôlée.
4 Allbev Limited is a producer and wholesaler of traditional non-alcoholic fruit drinks, alcoholic wines, and cordials organized under the laws of England. Id.
5 Thorncroft Vineyards is an English partnership marketing, distributing, and wholesaling Allbev’s products, including a product it developed and sold to Allbev called "Elderflower Champagne." Id.
6 Tattinger I, supra note 1, at 652.
7 Id. at 657–58. The balance of convenience in granting an injunction relates to the calculus of harms between the plaintiff and defendant. Id. at 650 (citing American Cynamid Co. v.
Surprisingly, at the trial, the court rejected the passing off claim. As one waggish journalist put it, the case pitted the "royalty versus the rabble" and "[t]he rabble won."8 In its previous English cases,9 the French champagne industry consistently had succeeded against competitors mislabeling alcoholic beverages,10 but Allbev’s elderflower champagne is a non-alcoholic drink made from flowers.11 The court held that although elderflower champagne was a misrepresentation calculated to deceive, its impact on the reputation of genuine French champagne would be minimal.12 In so ruling, the court denied the plaintiff’s common law claim in a thorough opinion, but gave short shrift to the plaintiff’s second claim of a violation of EC regulations.

This Comment suggests that Tattinger v. Allbev was decided wrongly on English common law grounds13 and inevitably invites suspicion that a sub rosa political agenda was at work. Part I commences with a review of the facts of the dispute and the prior judicial proceedings. Part II presents the reasoning used in the decision. Part III analyzes in detail the plaintiff’s grounds for relief and where the court erred in applying both precedent and public policy considerations. This Comment concludes that the decision is an unnecessarily narrow interpretation of English common law and a potentially serious disruptive force in English commerce. The teaching of Tattinger v. Allbev also comes at a most inopportune time as the EC strives to accomplish the delicate task of abolishing barriers to trade

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8 Erik Ipsen, A Court’s Pop at Bubbly U.K. Drink Can Be Champagne?, INT’L HERALD TRIB., Feb. 9, 1993, available in LEXIS, Nexis Library, Alleur File. The impact of the decision apparently was not lost on the French either. France Soir, a leading daily, ran a photo with the caption, "[t]he ashes of St. Joan of Arc are shaking, Napoleon is turning in his grave." Quotes of the Day, CHI. TRIB., Feb. 9, 1993, (News), at 2.


10 The French had won 64 previous court battles in England and more than 20 in Spain, Australia, and the United States preventing wine makers from using the word ''champagne'' on the labels of products not from the Champagne region of France. John Hurst, UK: Surrey Champagne Wins Court Case For French Title, AUSTRALIAN FIN. REV., Feb. 10, 1993, available in LEXIS, Nexis Library, Alleur File.

11 Ipsen, supra note 8; see also note 32 infra.

12 Id.; Tattinger II, supra note 2, at 13.

13 See generally W.R. Cornish, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS Ch. 16 (2d ed. 1989).
within the community of Member States without invoking the sort of provincialism and nationalism that has bedeviled the national debates over the adoption of the Maastricht Treaty.14

I. DOUBLE TROUBLE, BOIL AND BUBBLE15

The dispute arose in early 1991 when Tattinger’s representatives in the United Kingdom became aware of Allbev’s launch of “Elderflower Champagne.”16 Two factors suggested that the product was passing itself off as true champagne and potentially deceiving the consuming public. First, the beverage was packaged in a seventy-five centiliter bottle, shaped almost identically to a standard champagne bottle.17 The bottle also used a mushroom-shaped cork secured with a wire cage, although not with the foil wrapper, strongly resembling the closure system typically used for champagne bottles.18 Second, the bottle’s label displayed the words “Thorncroft” and “Elderflower” in large letters, with “Champagne” appearing beneath in smaller letters.19 The words “The Natural Non-Alcoholic Sparkling Refreshment” appeared below this, in even smaller letters.20 The reverse label stated that the beverage was a “delightfully refreshing traditional drink” and listed the ingredients.21 Based on the striking resemblance to true champagne packaging and the appearance of the word champagne on the label, Tattinger approached both the English Wine Standards Board and the defen-

15 With apologies for misquotation to the Bard. WILLIAM SHAKESPEARE, MACBETH act III, sc. 2. The correction quotation is: Double, double toil and trouble/Fire burn and cauldron bubble.
16 Tattinger I, supra note 1, at 651. Thorncroft’s original product was Elderflower cordial, which it first marketed in 1984. Id. at 649. Sales literature for the cordial included recipes based on additives to the cordial, including “lemonade” (cordial with water added) and “champagne” (cordial with sparkling mineral water added). Id. In 1989, Thorncroft decided to market the “champagne” version premixed and bottled, and launched the “Elderflower Champagne” beverage in October 1991. Id. The product received a favorable review in the trade press and sales for a three-month period between November 1991 and January 1992 totaled 1,700 cases of the 75 centiliter bottle styled in the manner of true champagne. Id. at 649–50.
17 Id. at 650, 656.
18 Id.
19 Id. at 650.
20 Tattinger I, supra note 1, at 651.
21 Id.
dant to alter the label, but its efforts were rebuffed. Consequently, Tattinger and the French trade groups filed a motion for interlocutory relief in the London High Court, Chancery Division on February 17, 1992. Their claim was based on the common law tort of passing off and a violation of EC regulations.

The Chancery Court granted interlocutory relief, holding that a serious issue existed regarding dilution of Tattinger’s protected trade name and damage to their reputation and goodwill based on common law. The court observed that (1) deception, that is, a successful misrepresentation, was not essential to a successful passing off action but (2) that the plaintiff’s claim on the basis of EC Regulations was “tenuous.” Thus, the Chancery Division granted an injunction on April 15, 1992, requested findings to determine the cost of requiring Allbev to place new labels on its bottles, and directed that a speedy trial take place to determine the passing off claim.

II. ALLBEV COMES UP SMELLING OF ROSES (OR AT LEAST ELDERBERRIES)

At the trial for passing off and unfair competition, the plaintiffs claimed that Allbev should be enjoined from utilizing the word champagne on their labels. They claimed the designation was “distinctive exclusively” of a wine produced in the Champagne Region of France and a valuable reputation and goodwill attached to their exclusive nomenclature. The plaintiffs argued that the issue was settled law and pointed to the English precedent which had established that “Champagne” only can refer to products produced in

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22 Id. at 651.
23 Id. at 649. The plaintiff claimed relief under article 15(5) of the EC regulation 823/87, which provides that “[t]he following may be used for the description and presentation of a beverage other than a wine or grape must only if there is no risk of confusion as to the nature, origin or source and composition of such beverage . . . a traditional specific term referred to in paragraph 2.” Council Regulation 823/87, art. 15(5), 1987 O.J. (L 84) 65. The word “Champagne” is included in paragraph 2. Id. art. 15(2). The regulation basically prohibits the use of specified designations pre-dating the EC, where such unauthorized uses by second-comers could lead to public confusion.
24 Tattinger I, supra note 1, at 656. The major precedent for passing off actions involving champagne is the seminal case of J. Bollinger v. The Costa Brava Wine Co., [1961] 1 All E.R. 561 (Ch.D). In that case, the court held that only wines from the Champagne region of France could be sold in England using the designation “champagne.” Id. at 564.
25 Tattinger I, supra note 1, at 656.
26 Id. at 657.
27 Tattinger II, supra note 2, at 3.
France. In their view, notwithstanding the precedents, calling a concoction of elderflowers “champagne” was a contradiction in terms and therefore violated even a commune reading of passing off law.

Moreover, the plaintiffs produced compelling evidence that the product would confuse a significant segment of consumers, especially those who purchase champagne only rarely as a celebratory drink. They also argued the likelihood of confusion would be even greater, given that the packaging dress of the elderflower container, a champagne-shaped green glass bottle with a wired cork, was nearly identical to true champagne dress. Furthermore, the plaintiffs argued that the price and nonalcoholic nature did not distinguish the elderflower product sufficiently because other champagnes and sparkling wines sell in the £2–3 range, and nonalcoholic wines are common nowadays.

The defendants countered that the elderflower champagne labels would mislead no one because the labels clearly indicated that the product was nonalcoholic and produced in Great Britain. Additionally, “elderflower champagne” is but one of a number of traditional “hedgerow” beverages that have been known to the English

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28 Id. at 5; see J. Bollinger v. The Costa Brava Wine Co., [1961] 1 All E.R. at 564.
29 Tattinger II, supra note 2, at 4. The label of the product listed the ingredients as “carbonated Hampshire spring water, cane sugar, fresh elderflowers, lemons, citric acid.” Id. Champagne, on the other hand, is produced by vintage grapes with naturally-occurring carbonation as a result of fermentation. Tattinger’s counsel, Nicholas Bragge, was quoted as saying that the fundamental issue involved was that using the words “elderflower champagne” on the label was untruthful, because it failed to describe the contents accurately. UK: Legal Battle Over “Elderflower Champagne” Name Continues, Reuter Texeline, Apr. 11, 1992, available in LEXIS, Nexis Library, Alleur File [hereinafter Legal Battle].
30 Tattinger II, supra note 2, at 5. The plaintiff’s argument attempted to counter the common sense defense to consumer confusion that the buying public is sufficiently sophisticated to distinguish between products with similar or even identical designations. Using this logic, no harm to the public or to the first user’s goodwill or sales would occur. See J. Bollinger v. The Costa Brava Wine Co., [1961] 1 All E.R. at 566–68.
31 Tattinger II, supra note 2, at 5.
32 Id. at 5–6. Alcoholic wines based on apples, blueberries and other fruits are marketed commercially at present.
33 Id. at 7. There was an allusion in an earlier passing off case that English courts might differentiate between grape-based beverages and those made from other fruits. See HP Bulmer Ltd v. J. Bollinger SA. [1974] 2 All E.R. 1226, 1231 (C.A. 1974). Neither party in this case advanced the distinction, however, and the court’s remarks thus must be interpreted as dicta.
34 Id. at 6–7; see also Legal Battle, supra note 29.
35 “Hedgerow” refers to common herbs and other flowers that grow uncultivated in the hedgerows of England. The court acknowledged by implication an English rural tradition of brewing potions and concoctions, in the manner of dandelion wine, from such plants. Tattinger II, supra note 2, at 10, 14.
public since the turn of the century. The defendants argued that their intention was not to tarnish or profit from the reputation of French champagnes, but to revive a healthy, nonalcoholic beverage with a long tradition in England, albeit not as a commercial product but more like a home remedy. Defendants claimed they were aware of the potential for confusion and took extensive steps to prevent this problem by clearly labelling the product as nonalcoholic and elderflower-based, as well as omitting the standard foil wrapper over the wire cage that appears on true champagne bottles.

The Chancery Court relied on the teaching of Erven Warnink v. Townend & Sons in analyzing the legal requirements for proving a passing off action. In a widely-quoted passage, Lord Diplock defined the necessary elements for an unfair competition action by passing off as follows:

1. a misrepresentation
2. made by a trader in the course of trade
3. to prospective customers of his or ultimate consumers of goods or services supplied by him,
4. which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and
5. which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so.

Under these guidelines, the court held that Allbev's use of the word champagne did constitute a misrepresentation, because the label

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36 Id. at 7.
37 The interlocutory court paraphrased Allbev's summation of the efficacy of their precautions as "not even a moron in a hurry" would confuse their product with champagne. Tattinger I, supra note 1, at 653.
38 Id.
39 Tattinger II, supra note 2, at 8; Erven Warnink v. Townend & Sons, [1979] 2 All E.R. 927 (H.L.). This case involved a passing off action by the producers of Advocaat, a well-known concoction of eggs and spirits, against interlopers selling egg flip, a concoction of eggs and sherry, under the same name. Id. at 929. The landmark case of Bollinger v. The Costa Brava Wine Co. extended the law of passing off to include actions against unfair competition, by recognizing the value of a trader's property right in the goodwill associated with his name. [1961] 1 All E.R. at 563.
40 Literally, because he fears or apprehends. A bill in equity filed by a party fearing a future probable harm to his rights or interests. BLACK'S LAW DICTIONARY 1247 (6th ed. 1990).
41 Erven Warnink v. Townend & Sons, [1979] 2 All E.R. at 932–33; see also CORNISH, supra note 13, at 404.
declared that the contents of the bottle were champagne. The court also stated it had "no difficulty" in finding that elements (2) and (3), sales in the course of trade to prospective customers, were satisfied.

The rub came, in the court's reasoning, whether the misrepresentation was calculated to injure the goodwill or business of the champagne producers and did in fact cause, or was likely to cause, injury. In determining whether the misrepresentation was "calculated to injure" the court applied the settled rule that intent to cause injury is not necessary in a passing off action. In this case, following this reasoning, the primary consideration was whether an actual, substantial injury would occur as a result of the misrepresentation.

Applying the facts of this case, the court considered whether the misrepresentation was a reasonably foreseeable consequence or would cause actual damage. The court admitted that a risk of confusion existed between the goods of the two parties, but determined that it was unrealistic to assume any likelihood of confusion between their businesses. The rule, as expressed in Erven Warnink v. Townend & Sons, was whether the plaintiff "has suffered, or is really likely to suffer, substantial damage to his property in the goodwill by reason of the defendants selling goods which are falsely described by the trade name to which the goodwill is attached." Because no evidence as to substantial economic damage was available, or even realistic to expect, the question devolved to the effect...
on the plaintiff's reputation and goodwill.\footnote{51} The interlocutory court had suggested a potential damages action based on dilution of the worldwide reputation of genuine champagne.\footnote{52} The Chancery Court, however, glossed over the dilution issue, determining that the effect on the plaintiff's reputation "will in my view be nil or minimal."\footnote{53} The court found dispositive the fact that only a small section of the public would ever purchase elderflower champagne, and that there was no indication that Allbev intended to enlarge their operation.\footnote{54}

The court's reasoning suggested that the parties were not, and probably would not ever be, in serious competition with each other.\footnote{55} Thus, actual damage became the crucial issue, because the court held that the law of passing off generally does not contemplate damage to another's business (lost sales) or goodwill (dilution or tarnishment), even where a calculated misrepresentation occurs, if the two parties are competing in widely divergent markets.\footnote{56}

III. WHERE THE COURT'S REASONING FIZZLED

The English common law of passing off protects the goodwill between a producer and the consuming public that the trademark reasoning. The Champagne Region of France produced more than 278 million bottles last year. James Langton, Focus The King of Wines, SUNDAY TELEGRAPH, Feb. 14, 1993, at 15. Allbev produced approximately 100,000 bottles of elderflower champagne. See infra text accompanying note 80. Of course, reasonable persons might differ whether some fraction of £235,000 (1992 sales at £2.35 per bottle, Tattinger I, supra note 1, at 653), is substantial to the French Champagne makers. The rebuttal to those who would find the damage insubstantial is that England is the largest export market for champagne in Europe. Hurst, supra note 10, at 12. Thus, allowing even a small measure of harm now is analogous to the very small crack in the dam that left unrepaired eventually releases a torrent.

\footnote{51} Tattinger II, supra note 2, at 13–14.
\footnote{52} Tattinger I, supra note 1, at 655.
\footnote{53} Tattinger II, supra note 2, at 13.
\footnote{54} Id. at 14.
\footnote{55} Id. at 13.
\footnote{56} Id. But see Erven Warnink v. Townend & Sons, [1979] 2 All E.R. at 932 (citing AG Spaulding & Bros v. AW Gamage Ltd, [1915] 32 R.P.C. 273 (H.L.), a case that extended the law of passing off to include unfair competition by misrepresenting inferior goods as those from a source of superior goods). See also Cornish, supra note 13, at 421–22. Thus, "Cadillac Dog Food" cannot harm the sales of Cadillac automobiles directly. The tarnishment branch of passing off law, which provides a remedy for indirect damage done to goodwill and reputation, only extends the trademark holder's protection a limited degree, however, especially if a court is convinced that no consumers will be buffalocked into thinking that the two products are the same. See generally id. at 415–15, 416; see also Mead Data Central, Inc. v. Toyota Motor Sales, U.S.A., Inc., 875 F.2d 1026 (2d Cir. 1989) (markets in which Lexis software and Lexus cars sold so divergent that no possibility of consumer confusion or tarnishment).
The interest protected is no longer merely the trader's property in a distinctive name, but also the goodwill associated with the name. Contrary to the court's reasoning, however, the "substantial stake" referred to in Erven Warnink v. Townend & Sons relates more to the tarnishment and dilution of a distinctive mark such as champagne, than to any quantifiable economic injury. This reasoning is the basis for the legal principle that no showing of intent to damage is required in the law of passing off.

In addition, the settled grounds for passing off law stated by Lord Diplock in Erven Warnink v. Townend & Sons also reflect this reasoning by requiring a "misrepresentation . . . which causes actual damage to the business or goodwill of the trader . . . or will probably do so." It is notable that Lord Diplock found no need to mention the extent of the damage or to modify the concept with an adjective such as "substantial." Thus, it is curious that the court found it necessary—from a legal standpoint—to add the word substantial. Lord Diplock had recognized the damage from passing off could consist merely of tarnishing the reputation, an injury which is inherently difficult to substantiate in quantifiable terms. It is equally interesting that the Chancery Court required such a high evidentiary level for the probability of damage factor.

If the court had applied Lord Diplock's formulation of the law precisely, it would have been expressed as follows:

(1) The labeling of the elderflower beverage as champagne was a misrepresentation;

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57 See Cornish, supra note 13, at 402. Because a trademark is merely symbolic and has no intrinsic value standing alone, the value of a trademark from a legal perspective depends on the goodwill associated with the trademark. Thus, a registered trademark never employed has no goodwill or commercial value, other than the cost of developing the concept and artwork. It follows then, that damages against a party infringing on a registered but unused trademark would be de minimis. Id. at 402.
59 Cornish, supra note 13, at 421.
60 In other words, when a valid, recognized trade name is infringed, especially by use in a similar market niche, the law assumes damage to goodwill. This assumption should hold, whether that damage manifests itself as a tarnishment of the original party's goodwill or in quantifiable lost sales. See generally id. at 402.
62 Id. (emphasis added).
64 Id. at 937; see also Cornish, supra note 13, at 417.
65 See Tattinger II, supra note 2, at 12-13.
(2) that was made by Allbev in the course of trading by placing the bottles on store shelves;
(3) thereby available to prospective customers of sparkling beverages;
(4) which was calculated or reasonably foreseeable to induce consumers to purchase the elderflower beverage in lieu of genuine champagne because of the similarity of packaging and labelling;
(5) and which misrepresentation caused or would be likely to cause actual damage to Tattinger by decreasing and diverting sales (business damage) or tarnishing the reputation of champagne (damage to goodwill) in the minds of unsophisticated buyers who purchased the elderflower beverage thinking it was champagne and were disappointed. Notwithstanding the variety possible when interpreting a previous judge's "black letter" rule, common sense and practical knowledge of the commercial world certainly would seem to suggest a more realistic interpretation of the rights underlying Lord Diplock's formulation of the law.

It may be realistic that few consumers seeking a healthy, nonalcoholic beverage would purchase champagne instead of elderflower champagne. It even may be realistic that unsophisticated consumers infrequently seeking a celebratory beverage would not purchase elderflower champagne instead of true champagne, due to the price differential, label disclaimer, and minor packaging differences such as the lack of a foil wrapper. The evidence, however, showed that both products share the same shelf space and several sparkling wine producers now were marketing nonalcoholic versions. In addition, the distinction the court tacitly draws between the plaintiff's business (alcoholic beverages) and the defendant's business (health foods) is patently unrealistic. Modern day marketing and changing consumer preferences have blurred this distinction, and the evidence substantiates the crossover marketing of such products. Thus, the exception granted from similar names used by enterprises in widely divergent lines of business simply is not appropriate here.

Moreover, it is clear that at least an occasional consumer will be deceived as to the source and contents of the elderflower product, given the almost universal public recognition of the name champagne, if not the precise taste and other distinguishing characteristics. The court admits that the low price of "elderflower champagne" would be insufficient to dispel potential deception for a

66 Id. at 5.
67 See id.
68 See supra note 56.
"simple unworldly man." The court's reliance on a lack of a substantial number of consumers being deceived, however, seems unrealistic and certainly time-bound. The court overlooked Lord Diplock's recognition that damage could arise from deception of "prospective customers or consumers" and that such damage merely must be actual, not necessarily substantial. Whether many, some, or any consumers will be duped into buying a product they did not desire originally is not the only consideration, however.

More importantly, the reasoning of the court ignores the well-established principle that consumer confusion is not the sole basis for a passing off action. The value being protected is the trading reputation of the producer, not merely the dollar value of diverted sales. Why should a trader have the legal right to label its product falsely, as Allbev admittedly did, and escape liability merely because a "substantial" segment of the public may or may not be confused? In this case, the tarnishment or blurring of the venerable name champagne is the crucial issue, not public confusion or deception.

As Lord Diplock pointed out, "a geographical limitation [implicit in the trade name] may make it easier . . . to establish that the plaintiff's own business will suffer more than minimal damage to its goodwill by the defendant's misrepresenting his product as being of that type." The appellation d'origine champagne used by more than fifteen thousand vintners in France is controlled closely through the legal enforcement powers granted to the Comite Interprofessionnell du Vin de Champagne (CIVC) and the Institut National des Appellations d'Origine (INAO) by French law. Through numerous successful legal actions in Europe and on other continents, it has been well-established that these organizations and the individual vintners have a valuable property and goodwill that deserves protection.

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69 Tattinger II, supra note 2, at 12.
70 In the first place, the parties certainly would differ as to what number of deceived consumers is significant. Second, few persons would disagree that if a less than substantial number are deceived today, as Allbev's business grows, at some point the number of deceived consumers inevitably will become substantial by any manner of counting.
72 CORNISH, supra note 13, at 404.
73 Id.
75 See supra note 3.
76 Tattinger II, supra note 2; see generally J. Bollinger v. The Costa Brava Wine Co., [1961] 1 All E.R. 561; Erven Warnink v. Townend & Sons, [1979] 2 All E.R. 927. The vigorous defense of their trade name in the past, as well as the immediate initiation of its action against Allbev, indicates that the French champagne houses believe they have a valuable asset to
Commercial enterprises and ultimately the legal systems of most countries have long recognized the injury arising from an assumed connection between the original trade name and a newcomer applying that name to a different product. The Chancery Court's whittling away of England's once strong stance against passing off is not only unfortunate for the French champagne houses, but also for other traders who have heretofore relied on English legal principles of unfair competition in a tumultuous marketplace. The decision only can lead to increased uncertainty and future shenanigans by unscrupulous traders testing the now muddied waters of English commerce.

The teaching of Tattinger v. Allbev, as well as the similarly-decided case of Stringfellow v. McCain Foods (GB) Ltd only can engender additional erosion of trade name holders' rights, if these cases are not limited to their facts or overruled. If not, the newly weakened law will have a serious impact on manufacturers whose products are counterfeited frequently. Many questions, once thought safely abed, inevitably will arise. Does English unfair competition law fail to protect well-known names from tarnishment by allowing their use in related commercial contexts? Must plaintiffs show not only specific numbers of deceived consumers, but furthermore substantial numbers of lost consumers or sales? If so, what is the de minimis threshold beyond which an action will lie? It appears after Tattinger v. Allbev that the answers to these questions are "yes," "yes" and

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77 See generally Cornish, supra note 13, at 10.

78 Id.

79 The court's decision appears myopic in only considering the damage to Tattinger. As Lord Diplock mentioned, the size of the class of traders entitled to protection of a trade name is significant. Erven Warnink v. Townend & Sons, [1979] 2 All E.R. at 936-37.

80 Stringfellow v. McCain Foods (GB) Ltd, [1984] R.P.C. 501 (C.A. June 26, 1984). This case involved a dispute between a nightclub and a producer of potato chips, both using the name Stringfellow. The nightclub had registered and used the name Stringfellow first. The court held that even if viewers of television commercials advertising the potato chips associated the product with the nightclub, the nightclub would suffer no "substantial damage." Id. at 25. The nightclub had advanced two theories of potential damage. Id. at 26. First, that persons would be less likely to choose the nightclub for special promotions. Second, that confusion based on the names might lessen the nightclub's future chances to exploit its name for merchandising. Applying the heightened "substantial damages" doctrine, see supra text accompanying notes 61-62, the court found neither injury likely or substantial. Id. at 29.
"depends," which places a much greater burden of proof on the plaintiff.

In addition, the implicit loosening of the not-in-competition exception to passing off \(^{81}\) threatens to swallow the rule. Street peddlers selling knock-off Rolex watches, for example, theoretically could escape passing off actions. They clearly are not marketing their goods in the same outlets as the manufacturer of genuine Rolexes; anyone should know that you cannot buy a $10,000 Rolex for $40; and no one will forego buying a genuine Rolex simply because they can buy a knock-off. As the hypothetical indicates, after Tattinger v. Allbev, decisions can turn all too easily on slight variations in facts, rather than a predictable rule of law.

CONCLUSION: HAS THE BUBBLY GONE FLAT?

The Chancery Court’s decision is not one to dismiss lightly, as Allbev’s elderflower champagne has become a best-seller, with over 100,000 bottles sold in 1992.\(^{82}\) Beyond the real potential for substantial damage to the producers of genuine champagne in terms of lost sales through consumer deception, the decision also ignores the significant likelihood that the goodwill built up over the centuries and associated with the name champagne will be tarnished or blurred. Reports in the press indicate that other non-French producers of sparkling wines are considering whether to test the limits of the decision by importing products under similar names that previously had been barred.\(^{83}\) By chilling the law of unfair competition and passing off in England, the damage the decision may do to the orderliness of the English market probably will not be limited to champagne.

The decision also inevitably suggests a *sub rosa* political agenda at work. Allbev’s victory was hailed widely in England, which has been involved in several commercial disputes with France since France made objections to an EC-US bilateral trade agreement.\(^{84}\) The decision also comes at a time when Member States are already wary of the cessation of national autonomy, as the recent Danish rejection

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\(^{82}\) Hurst, *supra* note 10.

\(^{83}\) Since the ruling, several U.S. champagne makers are reported to be considering changing their labels, because they are currently prohibited from selling their products in Europe as "champagne." Lucy Howard & Gregory Cerio, *Move Over, Dandelion Wine*, NEWSWEEK, Feb. 22, 1993, at 8.

\(^{84}\) Hurst, *supra* note 10.
of the Maastricht Treaty indicates.85 On this level, the decision can be interpreted as sending a message to the EC that its objectives of open borders and free movement of goods are not unlimited. By allowing the defendants to prevail because elderflower champagne is a “traditional” beverage that is unlikely to cause “substantial damage” to the French Champagne Houses, it is difficult not to consider the case as a blatant example of protectionism.86 After the court’s decision, Guy Woodall, co-owner of Thorncroft Vineyards, was quoted as saying that “the spirit of Agincourt lives on,” referring to England’s crushing defeat of the French armies in 1415.87 The French plaintiffs plan to appeal the decision and are investigating whether the practice violates EC laws.88 The outcome of the appeal could have more impact on the future of the EC than Agincourt ever had on Anglo-French relations.

The case of Tattenger v. Allbev will not end with the Chancery Court’s ruling. The French plaintiffs have insisted they will appeal to the European Court of Justice (ECJ). It is improbable, indeed almost unthinkable, that such an appeal will fail.89 With earnings from sales of French champagne nearing £10 billion per year,90 it is unlikely that practical politics and EC economics will allow the ECJ to rule against the French.91

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85 See generally CORNISH, supra note 13.
86 Significantly, England is the largest export market for French champagne. See Ipsen, supra note 8.
87 Id. English journalists echoed Woodall’s perspective. “[A]ctions like this are pathetic. We’re not talking about a . . . drink that a half-witted teetotaler would confuse with champagne . . . what is likely to be truly damaging to Tattenger . . . is the ridicule heaped upon them for this ill-conceived attempt to use a sledgehammer to crack a nut.” Oz Clarke, Food and Drink; Too Many Grapes Spoil the Flavour, DAILY TELEGRAPH, Feb. 20, 1993, at 11.
88 Ipsen, supra note 8.
89 Commenting on the Chancery Court’s decision, a senior European Commission official predicted that the the European Court of Justice (ECJ) “almost surely” would decide that Allbev and Thorncroft were violating EC law. French to Appeal Against Champagne Judgment, PRESS ASS’N NEWSFILE, Feb. 10, 1993, available in LEXIS, Nexis Library, Alleur File; see also Boris Johnson & Tim Witcher, Cordial Threatens Entente, DAILY TELEGRAPH, Feb. 10, 1993, at 2 (quoting EC agricultural officials who believe that elderflower champagne infringes on the appellations controlees).
90 Langton, supra note 50, at 15.
91 The procedural aspects of the appeal are somewhat unclear, however. In HP Bulmer Ltd v. J. Bollinger SA, the court reasoned that only the House of Lords was required to refer questions of EC law to the ECJ. [1974] 2 All E.R. at 1232-33. No lower English court was bound to do so. Id. at 1235. Thus, the ECJ might require the plaintiffs to exhaust their appeals in England, by pleading to the House of Lords, before accepting the suit.