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THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Gastroceuticals, LLC

Serial No. 77527093

Max Moskowitz and Sean P. McMahon of Ostrolenk Faber LLP
for Gastroceuticals, LLC.¹

Natalie Polzer², Trademark Examining Attorney, Law Office
108 (Andrew Lawrence, Managing Attorney).

Before Hairston, Kuhlke and Taylor, Administrative
Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Gastroceuticals, LLC has filed an application to
register on the Principal Register the mark ROOBI (in
standard character form) for goods ultimately identified as
"drinking water enhanced with antioxidants" in
International Class 32.³

¹ Applicant was represented by other counsel prior to its filing
of the request for reconsideration.

² A different examining attorney represented the Office prior to
briefing.

³ Serial No. 77527093, filed July 21, 2008, and alleging a bona
fide intention to use the mark in commerce.

Registration has been refused on the ground that there is a likelihood of confusion with the mark in U.S.

Registration No. 3415865, RUBY (in standard characters), for "Energy drinks, Non-alcoholic beverages containing fruit juices" in International Class 32.⁴

When the refusal was made final, applicant appealed and requested reconsideration. The examining attorney denied the request for reconsideration on September 21, 2009 and this appeal resumed on October 5, 2009. Both applicant and the examining attorney filed briefs. We reverse.

Before we begin our likelihood of confusion analysis, we must discuss an evidentiary matter. The examining attorney has objected to a printout of search results retrieved from the Trademark Electronic Search System (TESS), and made of record with applicant's request for reconsideration, on the ground that the mere submission of a list of registrations does not make such registrations a part of the record.⁵ Applicant responded to the objection, arguing that the search report was obtained from the U.S.

⁴ Issued April 22, 2008.

⁵ The printout is of a list of 100 live registrations that were obtained by the search strategy ((bottled)ADJ(water)) [GS] and (live) [LD] and 'RD>"18000101.'" The printout also indicated that 692 records satisfied the query.

Patent and Trademark Office (USPTO) website and not a private company, and introduced not to make the listed third-party registrations of record but to demonstrate the "sheer number" of marks that the USPTO has registered for bottled water.

We will consider the printout properly of record for that limited purpose, and overrule the examining attorney's objection to that extent. We hasten to point out that the report is of little to no probative value. As applicant notes, the TESS printout indicates 692 records were found that satisfy its search query. However, the report merely shows that "bottled water" is a recited term in the goods/services description of the found records. We can not ascertain how the term "bottled water" is used in those identifications, including those of the 100 registrations listed on the report.⁶ As such, and contrary to applicant's contention, the report does not necessarily identify registrations of marks for "bottled water," per se.

Turning now to the merits of the appeal, our determination of the issue of likelihood of confusion is

⁶ To elaborate, the term "bottled water" may only describe a component of the identified goods and services, e.g., as part of a survival kit, goods distributed by a distribution service or sold in wholesale or retail stores.

based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We first consider the *du Pont* factor of the relatedness of the goods. It is settled that the question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods recited in the cited registration. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ 2d 1715 (TTAB 1991). Further, it is a general rule that the goods do not have to be identical or directly competitive to support a finding that there is a likelihood of confusion. It is sufficient if the respective goods are related in some manner and/or

that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used in connection therewith, give rise to the mistaken belief that they emanate from or are associated with a single source. In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785 (TTAB 1993); In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

In this case we compare applicant's drinking water enhanced with antioxidants with registrant's "energy drinks; non-alcoholic beverages containing fruit juice." Applicant argues that "[b]ecause Registrant sells energy drinks and fruit juices used as a cocktail mixer, whereas applicant sells drinking water with natural antioxidants, with no added flavor, the goods are not sufficiently related to cause confusion in the crowded field of RUBY marks for beverages." Br. p. 10.

Applicant also essentially maintains that the goods are functionally different; energy drinks consumed to increase mental alertness and physical performance and water, including water enhanced with antioxidants, consumed to restore one's water levels or to quench one's thirst.⁷

⁷ Applicant's Request for Reconsideration, Exh. F, G, and K.

The examining attorney conversely maintains that applicant's drinking water is closely related to the registrant's energy drinks and fruit juice drinks because they are similar in nature, are the type of beverages that commonly emanate from a single source, and are marketed and sold together within the beverage industry. The examining attorney has supported this position with printouts of seven third-party registrations for marks used in connection with the goods of the type identified in both the application and the cited registration, i.e., energy drinks or fruit drinks vis-à-vis drinking water and/or antioxidant drinks as well as one for antioxidant drinks, including fruit juices.⁸ Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. In re Albert Trostel & Sons Co., *supra*.

The registrations are as follows:

Registration No. 3229753 for, inter alia,
drinking water and energy drinks;

⁸ We consider the broadly worded "drinking water" listed in the referenced registrations to include drinking water enhanced with antioxidants.

Registration No. 3532485 for inter alia, drinking water, energy drinks and non-alcoholic beverages containing fruit juice;

Registration No. 3420462 for, inter alia, energy drinks and drinking water, lithia water and mineral water;

Registration No. 3420521 for, inter alia, non-alcoholic beverages, namely, fruit flavored beverages and fruit juices and drinking water;

Registration No. 3438203 for, inter alia, energy drinks and bottled water;

Registration No. 3390462 for, inter alia, drinking water and energy drinks;

Registration No. 3417172 for, inter alia, liquid anti-oxidant drinks derived from and containing hibiscus extracts and plant extracts and non-alcoholic beverages containing fruit juice; and

Registration No. 3135476 for, inter alia, liquid dietary supplement with antioxidant properties containing pomegranate juice, pear juice and mangosteen.

The examining attorney has also introduced various internet evidence to support her position that the goods are related, including:

- 1) a press release from Advanced Beverage Technologies Corporation ("ABT") indicating its intent to compete in the energy drink and bottled water markets;⁹

⁹ [www.prlog.org/10065334-abt-to-compete....](http://www.prlog.org/10065334-abt-to-compete...)

- 2) an excerpt from the website www.coffeeforless.com showing the sale of energy drinks and fortified water together on various pages of the website;
- 3) pages from the website of HYDRIVE Energy describing the product HYDRIVE X as one that includes antioxidants - Triple Berry is loaded with 6 powerful antioxidants ... Antioxidants are substances that protect against the effects of free radicals...;¹⁰ and
- 4) pages from the website of the SNAPPLE brand showing the brand used on antioxidant water drinks and fruit juices.¹¹

Despite some evidence that registrant's energy drinks and fruit beverages and applicant's antioxidant enhanced drinking water may serve different functions, the record clearly demonstrates that the bottled water and energy drink markets overlap, that single entities sell in both markets, that consumers will see the same marks used on both antioxidant supplements and juice drinks and that energy drinks and fortified waters are sold in close proximity to each other. The record also shows that energy

¹⁰ <http://www.hydriveenergy.com/flavors.cfm?productid=1011>.

¹¹ <http://www.snapple.com>.

drinks can include antioxidants. Under these circumstances, we find the goods related for purposes of our likelihood of confusion analysis.¹²

Further, in the absence of any limitations in the application and the cited registration as to channels of trade and classes of purchasers, we must presume that the respective goods travel in all the usual trade channels for such goods, including supermarkets, and to all usual classes of consumers for such goods, including ordinary consumers. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

In view thereof, the *du Pont* factors of relatedness of the goods, classes of purchasers and channels of trade favor a finding of likelihood of confusion.

We turn next to the first *du Pont* factor, i.e., a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently

¹² In reaching our decision with respect to the relatedness of the goods, we have not relied on the evidence submitted by the examining attorney consisting of web pages from the REDBULL website, as they are not probative of the relationship between drinking water and energy drinks.

similar in terms of their overall commercial impression that confusion as to the source of the goods and services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

In comparing applicant's ROOBI mark and the cited RUBY mark, we find them markedly different in appearance. Although both marks are comprised of a single term having the letters "R" and "B" in common, the three letters unique to each mark create terms which are visually distinct from one another.

As regards the connotation of the marks, because registrant's RUBY mark may be viewed as a novel spelling of the term "ruby," its use on or in connection with beverages containing fruit juices, imparts an image of the intense color of ruby red fruit. Indeed, as stated on registrant's website at www.ruby.com, registrant's product takes its name from the "deep, rich flavor and color of the ruby blood orange."¹³ Applicant's mark, on the other hand,

¹³ Applicant's Response [March 3, 2009], Exh. B and Applicant's Request for Reconsideration, Exh. A.

does not convey such a connotation because it is unlikely to be recognized as a novel spelling of "ruby." And, even if so recognized, it would not have the same meaning in relation to applicant's drinking water - a substance which is usually clear in color. ROOBI appears, on this record, to be arbitrary in relation to applicant's identified goods.

With regard to sound, we agree with the examining attorney and acknowledge that inasmuch as there is no correct way to pronounce a trademark, applicant's mark and the cited mark are phonetic equivalents and, thus, may sound alike. We also acknowledge that under certain circumstances, similarity in sound alone may suffice to support a finding of likelihood of confusion. See, e.g., *Centraz Industries Inc. v. Spartan Chemical Co. Inc.*, 77 USPQ2d 1698, 1701 (TTAB 2006) (acknowledging that "there is no correct pronunciation of a trademark" and finding ISHINE (stylized) likely to be confused with ICE SHINE, both for floor-finishing preparations); *In re Great Lakes Canning, Inc.*, 227 USPQ 483 (TTAB 1985) (CAYNA (stylized) for soft drinks held likely to be confused with CANA for, *inter alia*, canned and frozen fruit and vegetable juices); and *In re Energy Telecommunications & Electrical Ass'n*, 222 USPQ 350 (TTAB 1983) (ENTELEC and design for association

services in the telecommunication and energy industries held likely to be confused with INTELECT for conducting expositions for the electrical industry). In this case, however, such similarity in sound alone does not support a finding of likelihood of confusion. The differences in appearance and connotation simply outweigh any similarity in sound, resulting in marks that create distinctly different commercial impressions.

Accordingly, the *du Pont* factor of the similarity/dissimilarity of the marks favors applicant.

In reaching our determination that applicant's mark is dissimilar from the cited mark, we have not relied on applicant's argument that given the prevalence of marks incorporating RUBY for fruit juices, the cited mark should be given only a narrow scope of protection. In support of this position, applicant made of record seven third-party registrations. While third-party registrations may be used to demonstrate that a portion of a mark is suggestive or descriptive, they are not evidence that the marks shown therein are in use or that the public is aware of them. See *AMF Incorporated v. American Leisure Products, Inc.*, 177 USPQ 268, 269 (CCPA 1973) ("little weight is to be given such registrations in evaluating whether there is likelihood of confusion."). Moreover, our review of such

registrations reveals that three of them (Registration Nos. 2664686, 2743109 and 2214712) have been cancelled. The four remaining registrations are for marks with additional literal elements (RUBY MUSHROOM, RUBY-TANGERINE, RUBY KIST AND ROYAL RUBY RED ("Ruby Red disclaimed). Four registrations simply do not persuade us that marks including the term "Ruby(y)" are entitled to limited protection.

Similarly, we have not based our finding that the marks are dissimilar on applicant's argument that the cited mark is weak because the word "Ruby" is descriptive of a characteristic of registrant's goods.¹⁴ Such an argument constitutes a collateral attack on the cited registration. During an ex parte appeal, an applicant will not be heard on matters that constitute a collateral attack on the cited registration. Dixie Restaurant's Inc., 41 USPQ2d at 1534.

Last, we make clear that our finding of no likelihood of confusion is not based on applicant's assertion that the purchasers of its drinking water enhanced with antioxidants are sophisticated and discriminating. We find, on this record, that applicant's water product is an inexpensive

¹⁴ Applicant's argument includes its contention that "the additional letter "y" [in registrant's mark] does not diminish the descriptive significance of the cited mark." Br. p. 17.

ordinary consumer item which will be purchased by ordinary consumers exercising no more than ordinary care.

In conclusion, having carefully considered all of the evidence and arguments, including the ones not discussed here, we find that confusion is unlikely to result from the contemporaneous use of registrant's RUBY mark and applicant's ROOBI mark, even though the marks are used on somewhat related products that move in the same trade channels and are sold to ordinary consumers. We conclude so because the dissimilarity of the marks simply outweighs the evidence as to the other factors. See *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single *du Pont* factor may not be dispositive"). See also, *In re E.I. du Pont de Nemours & Co.*, 177 USPQ at 567 ("each [of the thirteen factors] may from case to case play a dominant role").

Decision: The refusal of registration under Section 2(d) of the Trademark Act is reversed.