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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re The Coca-Cola Company

Serial No. 78449413

Larry H. Tronco of King & Spalding LLP for The Coca-Cola Company.

Michael Webster, Trademark Examining Attorney, Law Office
102 (Thomas V. Shaw, Managing Attorney).

Before Quinn, Mermelstein and Bergsman, Administrative
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

The Coca-Company filed an intent-to-use application (Serial No. 78449413) for the mark SPRITE QUENCH, in standard character form, for "beverages, namely, drinking waters, flavored waters, mineral and aerated waters; and other non-alcoholic beverages, namely, soft drinks, energy drinks and sports drinks; fruit drinks and juices; syrups, concentrates and powders for making beverages, namely, flavored waters, mineral and aerated waters, soft drinks, energy drinks, sports drinks, fruit drinks and juices."

Applicant claimed ownership of the following registrations:

1. Registration No. 0704043 for the mark SPRITE for "nonalcoholic, maltless soft drinks and preparations for making same-namely, fruit flavored drinks, root beer and ginger ale";
2. Registration No. 1927996 for the mark SPRITE and design for "soft drinks, syrups and concentrates used for making same"; and,
3. Registration No. 2109200 for the mark SPRITE for "non-alcoholic beverages, namely, soft drinks, syrups, concentrates and other preparations used for making soft drinks."

The Examining Attorney issued a final refusal under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the marks set forth below as to be likely to cause confusion:

1. Marks owned by Quench Co., LLC (hereinafter "the Quench marks").¹

- A. QUENCH and design set forth below for "carbonated citrus-flavored soft drink and

¹ Quench Co., LLC is the owner of record pursuant to an assignment recorded in the U.S. Patent and Trademark Office on April 5, 2006 (reel 3283, frame 0106).

the concentrate from which the same is
made";²



B. QUENCH (stylized) set forth below for
"carbonated citrus-flavored soft drink and
the concentrate from which the same is
made";³

QUENCH

C. QUENCH and design set forth below for
"grapefruit and lemon flavored soft drinks
and concentrates for making the same";⁴

² Registration No. 0555788, issued March 1, 1952; Sections 8 and 15 affidavits accepted and acknowledged; third renewal.

³ Registration No. 0555789, issued March 11, 1952; Sections 8 and 15 affidavits accepted and acknowledged; third renewal.

⁴ Registration No. 0746272, issued March 5, 1963; Sections 8 and 15 affidavits accepted and acknowledged; second renewal.



D. DIET QUENCH and design set forth below for
"soft drinks";⁵ and,



E. DIET QUENCH (typed drawing) for "soft
drinks."⁶

2. Mark owned by Kitchen Resource, L.L.C. - QWENCH
(typed drawing) for "soft drink."⁷

The Examining Attorney contends that SPRITE QUENCH is
likely to cause confusion with the QUENCH marks and QWENCH
for the following reasons:

⁵ Registration No. 1745989, issued January 12, 1993; Section 8
and 15 affidavits accepted and acknowledged; renewed. Registrant
disclaimed the exclusive right to use the word "Diet."

⁶ Registration No. 1741580, issued December 22, 1992; Section 8
and 15 affidavits accepted and acknowledged; renewed. Registrant
disclaimed the exclusive right to use the word "Diet."

⁷ Registration No. 2619047, issued September 10, 2002.

1. The marks are all used in connection with soft drinks, and therefore they will be sold to the same consumers;
2. The marks are confusingly similar because they share the word "Quench";
3. Applicant's addition of the word "Sprite" to the word "Quench" does not distinguish applicant's mark from the Quench marks and QWENCH because consumers are likely to believe that the Quench marks and QWENCH originate from the same source as SPRITE QUENCH; and,
4. Even if the word "quench" is a highly suggestive term and, therefore, is a weak mark, weak marks are still entitled to protection against the same or similar marks for the same or closely related goods.

On the other hand, applicant contends that its mark SPRITE QUENCH is not likely to cause confusion with the Quench marks and QWENCH because the word "sprite" is the dominant portion of applicant's mark (as opposed to the word "quench" in registrants' marks) and the word "quench" is highly suggestive, and therefore a weak mark, when used in connection with soft drinks. In support of its argument that "sprite" is the dominant element of its mark,

applicant claims that SPRITE is a famous mark. However, it did not submit any evidence to support the fame of the SPRITE mark. While the Examining Attorney did not challenge applicant's claim that SPRITE is a famous mark in either the September 6, 2005 or the April 3, 2006 Office Actions, and may have conceded that SPRITE is famous, we do not believe applicant has made a sufficient showing of fame.⁸ First, "[i]n view of the extreme deference that is accorded to a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, we think that it is the duty of a plaintiff [in this case an applicant] asserting that its mark is famous to clearly prove it." *Blue Man Productions, Inc. v. Tarmann*, 75 USPQ2d 1811, 1819 (TTAB 2005). Second, fame is not an "either or" proposition. It varies along a spectrum. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée*

⁸ In the September 6, 2005 Trademark Office Action, the Examining Attorney appeared to concede the fame of applicant's SPRITE trademark ("Therefore, because applicant has merely added its 'famous' house mark to (sic) registered mark QUENCH, which is the dominant portion of the marks in question, there will be a likelihood of confusion as to the source of the goods"). Earlier in that Office Action, the Examining Attorney seemingly dismissed the relevance of fame vis-à-vis applicant's attempt to distinguish SPRITE QUENCH from the Quench marks and QWENCH ("the mark SPRITE is one of applicant's house marks, famous or not"). In the April 3, 2006 Office Action, the Examining Attorney referenced applicant's mark as being famous ("applicant's famous mark SPRITE gives the impression of a house mark").

En 1772, 396 F.3d 1369, 75 UPSQ2d 1689, 1694 (Fed. Cir. 2005), *citing In re Coors Brewing Co.*, 343 F.3d 1340, 68 UPSQ2d 1059, 1063 (Fed. Cir. 2003). In view of the lack of evidence regarding the fame of applicant's SPRITE trademark, we will not consider it to be famous for purposes of our likelihood of confusion analysis.

Applicant submitted the following evidence to support its argument that the word "quench" is a weak term:

1. Dictionary definitions of "Quench" which means, "to slake, satisfy, or allay (thirst, desires, passion, etc.)";⁹

2. Third-party registrations of marks consisting in part of the word "quench" for beverages. The third-party registrations are set forth below:

Mark	Reg. No.	Goods
SUNQUENCH	2216023	Syrups and concentrates for making soft drinks
QUENCH HUNGER	2390245	Bottled drinking water
DESERT QUENCH	2264803	Bottled drinking water
QUENCH YOUR THIRST FOR LIFE	2565560	Bottled water
CANINE QUENCH	2504998	Pet beverages

⁹ Random House Webster's Unabridged Dictionary, p. 1584 (2nd ed.). See also Webster's Third New International Dictionary of the English Language: Unabridged, p. 1863. Both dictionary definitions were attached to the August 16, 2005 Response to the Trademark Office Action.

Mark	Reg. No.	Goods
QUENCH YOUR SOUL	2564059	Drinking water
QUENCH-IT	2282814	Bottled drinking water
QUENCH HOLLYWOOD MIRACLE DIET WATER	29227442	Nutritionally fortified drink mix for use as a meal replacement
QUENCH IT WITH A BRISK	2979426	Tea

3. A CCH Corsearch trademark report listing 53 state trademark registrations incorporating the word "quench" or "quencher" for beverages;¹⁰ and,

4. Copies of approximately 156 news and magazine articles obtained from the LexisNexis database to show "that the term QUENCH is used extensively by numerous third

¹⁰ The CCH Corsearch trademark report is problematical. First, trademark registrations are not evidence that the marks are in use, that the public is aware of, or familiar with, the marks, or that the marks have made an impact in the field. As such, the third-party, state registrations have little probative value in determining whether the mark at issue is entitled to registration. See *Red Carpet Corp. v. Johnstown American Enterprises Inc.*, 7 USPQ2d 1404, 1406 (TTAB 1988). To the extent that the state registrations, like federal registrations, can be used in the manner of a dictionary to show the meaning of a word, the state registrations may have some probative value. However, the submission of a list of registrations or a copy of a search report is not proper evidence of third-party registrations. To make registrations of record, soft copies of the registrations or the electronic equivalent thereof (*i.e.*, printouts or electronic copies of the registrations taken from the electronic search records of the USPTO) must be submitted. *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368 (TTAB 1998); *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 n.3 (TTAB 1994); *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992); *In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983). Accordingly, we have not given the CCH Corsearch report any consideration in our decision.

parties as a suggestive or merely descriptive term for beverages."¹¹ The most relevant articles demonstrate the use of the word "quench" in a manner consistent with its dictionary definition. A representative sample of those articles include the following excerpts:

Quench time is that beverage really good for you? An expert rates popular choices. *The Dallas Morning News* (March 1, 2005).

Options for eating healthy from vending machines or convenience store . . . Quench a thirst. *Chattanooga Times Free Press* (February 9, 2004).

Stumbling along the trail of invention . . . Plus: bottled dill-pickle juice marketed as a sports drink (tagline: "Quench the craving!"). *The Seattle Times* (September 16, 2004).

¹¹ Applicant's March 6, 2006 Request for Reconsideration, p. 6. While there are many relevant articles, the sheer number of irrelevant articles demonstrates a lack of care and discrimination on the part of applicant. For example: (i) applicant's evidentiary submission included numerous articles from foreign publications (e.g., 1, 4, 5, 9, 13, 15, 17, 22, 23, etc.) without any explanation how these articles would come to the attention of U.S. consumers; (ii) there were business articles regarding Quench, Inc., a Canadian corporation, without any reference as to why such articles were included or why they were relevant; and, (iii) there were 16 articles about the Quench marks of the registrant's predecessor-in-interest. While such a lack of attention to detail may serve applicant well in other forums, it does not help applicant or the Board. We have neither the resources, nor inclination, to cull through a database dump such as this. To the extent that applicant submitted the search as evidence of common law, third-party use of the word "quench" in connection with beverages (Applicant's Brief, p. 11), we found 11 third-party uses, but no information indicating whether the products were currently being sold, the extent of such sales, or the extent to which consumers were familiar with those products. Accordingly, the purported common law, third-party use shown in the LexisNexis articles has very little probative value.

The quench clinch; drink up, keep water flowing. *Richmond Times Dispatch* (June 30, 2004).

Nestle Quick on plans to quench; milk drinks could replace banned soda at Lausd. *The Daily News of Los Angeles* (March 28, 2003).

Quench any attack of the munchies and expand your culinary horizons by sampling these fanciful snacks in the Sawtelle area. *Los Angeles Times* (August 22, 2002).

Quench your summer thirst; recipes for drinks on Web feature Champagne, Godiva Liqueur. *Capital Times* (July 13, 2001).

Best drinks to quench a desert thirst. *Phoenix New Times* (September 18, 1997).

The goods listed in the application and both registrants' descriptions of goods are, in part, identical. The fact that applicant and both registrants have listed soft drinks in their description of goods,¹² supports a finding of likelihood confusion. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the description of goods in the application). Furthermore since the goods are, in part, identical, we

¹² Applicant's mark and the Quench marks also include concentrates for use in making soft drinks.

must presume that the channels of trade and purchasers would be the same. *Genesco Inc. v. Maartz*, 66 UPSQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchaser through the same channels of trade"); *In re Smith and Mehaffey*, 31 UPSQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers"). The question of likelihood of confusion, therefore, must necessarily turn on whether applicant's mark SPRITE QUENCH is confusingly similar to the Quench marks and QWENCH.

The basic issue presented in this appeal is whether applicant's composite SPRITE QUENCH mark is similar/dissimilar when compared with the Quench marks and QWENCH. We find that the marks are more dissimilar than similar when viewed in their entirety in terms of appearance, sound, connotation, and overall commercial impression. The marks are obviously similar to the extent that they all include the word "quench" or a variation thereof. Just as obviously, the marks are dissimilar in

terms of appearance, sound, and meaning to the extent that applicant's mark, but not the registrants' marks, includes and begins with the word "sprite." In terms of overall commercial impression, we find that although the word "quench" is the dominant element in the registrants' marks, in applicant's mark it contributes relatively less to the commercial impression than applicant's arbitrary SPRITE portion of the mark. This is because the word "quench," when used in connection with beverages, is highly suggestive. See *In re National Data Corporation*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (a descriptive term carries less weight in a comparison of the marks). Therefore, there are inherent limitations on the registrants' rights to protect the use of the word "quench" in connection with beverages.

Contrary to the Examining Attorney's argument, there is no *per se* rule that the addition of a house mark is more likely to add to the likelihood of confusion than to distinguish the marks.

[T]here is no arbitrary rule of law that if two product marks are confusingly similar, likelihood of confusion is not removed by the use of a company or housemark in association with the product mark. Rather, each case requires a consideration of the effect of the entire mark including any

term in addition to that which closely resembles the opposing mark.

New England Fish Co. v. Hervin Co., 511 F.2d 562, 184 USPQ 817, 819 (CCPA 1975). See also *Rockwood Chocolate Co., Inc. v. Hoffman Candy Co.*, 372 F.2d 552, 152 USPQ 599, 601-602 (CCPA 1967) (there is no arbitrary rule of law that if two products are confusingly similar, the addition of a house mark to one of the two otherwise similar marks will not distinguish them because each case requires consideration of the marks in their entireties including any term added to the purported product mark).

Generally, when a mark of one party completely encompasses that of another on related or identical goods there will be likelihood of confusion, particularly where the matter added to one of the marks is descriptive or highly suggestive. However, where the common portions of the marks are descriptive or highly suggestive, there may not be a likelihood of confusion. *Industrial Adhesive Company v. Borden, Inc.*, 218 USPQ 945, 951 (TTAB 1983).

It is settled that, unlike the case of arbitrary or unique designations, suggestive or highly suggestive terms, because of their obvious connotation and possible frequent employment in a particular trade as part of trade designations, have been considered to fall within the category of "weak" marks, and the scope of protection afforded these marks have been so

limited as to permit the use and/or registration of the same mark for different goods or a composite mark comprising this term plus other matter, whether such matter be equally suggestive or even descriptive, for the same or similar goods.

Standard Brands, Inc. v. Peters, 191 USPQ 168, 172 (TTAB 1975). See also, *Central Soya Co., Inc. v. North American Plant Breeders*, 212 USPQ 37, 48 (TTAB 1981); *In re Champion International Corp.*, 196 UPSQ 48, 49 (TTAB 1977).

In our view, based on the dictionary definitions, third-party registrations, and LexisNexis articles, the word "quench" is a highly suggestive term when applied to beverages because it suggests the purpose of the beverages (i.e., to satisfy one's thirst). The third-party registrations corroborate the dictionary definitions because they show the meaning of a mark in the same way that dictionaries are used. *Techtronix, Inc. v. Daktronics, Inc.*, 543 F.2d 915, 189 USPQ 693, 694-695 (CCPA 1976), *aff'g* 187 USPQ 588 (TTAB 1975).

The third-party registrations are . . . competent to establish that a portion common to the marks involved in a proceeding has a normally understood and well-known meaning; that this has been recognized by the Patent and Trademark Office by registering marks containing such a common feature for the same or closely related goods where the remaining portions of the marks are sufficient to distinguish the mark as a

whole; and that therefore the inclusion of [the common element] in each mark may be an insufficient basis upon which to predicate a holding of likelihood of confusing similarity.

Red Carpet Corp. v. Johnstown American Enterprises Inc., supra.

The LexisNexis articles likewise show that "quench" is commonly used to describe satisfying one's thirst.

Based on this evidence, we find that consumers will be able to distinguish among the various "Quench" marks by looking to other elements of the marks. In the case *sub judice*, that other element is applicant's arbitrary mark SPRITE because consumers will attribute the dictionary definition to the meaning of the word "quench" when it is applied to beverages such as SPRITE QUENCH. Accordingly, the addition of applicant's arbitrary SPRITE mark to the highly suggestive word "quench" distinguishes the marks when they are viewed in their entirety. Apparently, the U.S. Patent and Trademark Office agrees in light of the nine (9) third-party "Quench" marks for beverages made of record by applicant and the cited Quench marks and QWENCH mark, all registered for soft drinks by the those two entities.

Having considered all the evidence of record, we conclude that confusion is not likely to occur from the

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contemporaneous use of SPRITE QUENCH, the Quench marks, and QWENCH, even where the marks are used on identical products because the dissimilarity of the marks outweighs the similarity of the goods, channels of trade, and classes of purchasers. See *Kellogg Co. v. Pack-Em Enterprises Inc.*, 14 UPSQ2d 1545, 1550 (TTAB 1889), *aff'd*, 951 F.2d 330, 221 UPSQ2d 1142 (Fed. Cir. 1991) (the dissimilarity of the marks outweighed all of the other likelihood of confusion factors).

Decision: The refusal to register is reversed.