

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: November 4, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Health Fusion Brands, Inc.
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Serial No. 85491698
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Molly B. Markley of Young Basile Hanlon & MacFarlane, P.C. for Health Fusion Brands, Inc.

Howard Smiga, Trademark Examining Attorney, Law Office 102 (Mitchell Front, Managing Attorney).

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Before Seeherman, Taylor, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Health Fusion Brands, Inc. filed an application to register on the Principal Register the trademark set forth below for “clothing, namely shirts,” in International Class 25.¹

The logo for RIP TIDE features the word "RIP" in a bold, sans-serif font, followed by a stylized silhouette of a surfer riding a wave, and then the word "TIDE" in the same bold, sans-serif font. The entire logo is enclosed in a thin rectangular border.

¹ Application Serial No. 85491698, filed under Trademark Act § 1(a), 15 U.S.C. § 1051(a), on December 9, 2011, with a claim of first use and first use in commerce of August 2009. “The mark consists of the word RIPTIDE with a surfer in place of the ‘T.’” Color is not claimed as a feature of the mark.

The application also identified a variety of beverages in International Class 32, which are not the subject of this appeal.

The trademark examining attorney refused registration as to the goods in Class 25 under § 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, as used in connection with applicant's goods, so resembles the two registered marks identified below as to cause confusion, to cause mistake, or to deceive:

RIPTIDE

Registered for: Men's, women's and children's apparel, namely, shorts, shirts, jackets and footwear.²



Registered for: Clothing, namely, shirts, T-shirts, polo shirts, jerseys, uniforms, shorts, boxer shorts, tops, crop tops, tank tops, halter tops, sweat shirts, sweat pants, warm-up suits, track suits, fleece vests, pullovers, jackets, caps, hats, visors, headbands, headwear, gloves, mittens, rainwear, footwear, and sneakers.³

The two cited registrations are owned by different owners. The examining attorney expressly limited the refusal to the goods in Class 25, such that the refusal does not affect the identified goods in Class 32. When the refusal was made final, applicant filed a request for reconsideration, which was denied. This appeal ensued. Applicant and the examining attorney have filed briefs.

² Reg. No. 3378004, issued on February 5, 2008.

³ Reg. No. 3353749, issued on December 11, 2007. The design represents "a shark's open mouth." Color is not claimed as a feature of the mark.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion as set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). Two key considerations are the similarities between the marks and the similarities between the goods and services at issue. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We will address first the refusal based on Registration No. 3378004, discussing all *du Pont* factors as to which applicant and the examining attorney have presented evidence or arguments.

1. The goods; customers; trade channels.

Addressing first the goods of applicant and registrant, we find that applicant's goods are legally identical, in that "shirts" are identified in the application and in the cited registration. Accordingly, the *du Pont* factor of the similarity or dissimilarity of the goods favors a finding of likelihood of confusion.

As applicant's goods are legally identical to those of registrant, we must presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). Accordingly, the *du Pont* factor relating to classes of customers and relevant trade channels favors a finding of likelihood of confusion.

2. The marks.

We next consider the similarity or dissimilarity of the marks at issue in terms of their appearance, sound, meaning, and overall commercial impression. In comparing the marks, we are mindful that where, as here, the goods are identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

Initially, applicant notes that the two registrations that have been cited against applicant belong to two different owners. Applicant argues that “the Trademark Office’s allowance of the mark, RIPTIDE, in U.S. Registration No. 3,378,004 and the mark LA RIPTIDE in U.S. Registration No. 3,353,749 indicates that there is room in the marketplace for more than one RIPTIDE mark used [i]n connection with clothing.”⁴ We disagree. The application files of the two cited registrations are not of record. Accordingly, we have no evidence before us that would explain the rationale whereby the later registration was allowed to issue. Facts different from those before us now may have been before the involved examining attorney (such as, for example, a consent provided by the earlier registrant). Accordingly, the coexistence of the two cited registrations cannot be

⁴ Applicant’s brief at 4.

interpreted as applicant suggests. The Office's registration of such marks does not bind the Board in deciding this appeal. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

We consider each mark in its entirety. However, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided that our ultimate conclusion rests upon a comparison of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). The cited mark is RIPTIDE in standard characters. Applicant's mark is essentially the word RIPTIDE, with the figure of a surfer substituted for the letter "T." Despite this design element, consumers will immediately recognize the mark as being the word RIPTIDE. Thus, the two marks are identical in sound and meaning.

They are also very similar in appearance. Applicant contends that the design portion of its mark is sufficient to distinguish applicant's mark from the cited mark.⁵ We are not persuaded. The cited mark is registered in standard character form, and the rights associated with it are not limited to any particular display. *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011). Accordingly, the cited mark might be displayed in lettering styles similar to those appearing in applicant's mark, including styles with a letter T that is larger than the other lettering or otherwise altered or emphasized. Further, because consumers will refer to the mark as RIPTIDE and use this word in

⁵ *Id.* at 5.

requesting the product, the design element deserves less weight in our likelihood of confusion analysis. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999) (“In the case of marks which consist of words and a design, the words are normally accorded greater weight because they would be used by purchasers to request the goods”); *In re Appetito Provisions Co.*, 2 USPQ2d 1553, 1554 (TTAB 1987). We find the design element of applicant’s mark is not sufficient to distinguish it from the registered mark. Rather, we find that the marks are similar in appearance and convey highly similar commercial impressions. This *du Pont* factor favors a finding of likelihood of confusion.

3. Use of mark as an indicator of secondary source.

Applicant argues that it uses the designation RIPTIDE on clothing as an indicator of secondary source. Applicant contends that its word mark RIPTIDE is well known as a trademark for applicant’s beverage products; that applicant has used the word mark RIPTIDE on beverages since at least March, 2003; and that applicant owns a U.S. registration of the mark RIPTIDE in standard character form for beverages (Reg. No. 2875637).⁶ Because of this asserted public association between the RIPTIDE word mark and applicant’s beverages, applicant contends:

[W]hen purchasers view Applicant’s distinctive logo tied in with the mark RIPTIDE on clothing, purchasers will understand that the mark is a secondary source indicator of Applicant. The mark does not tell the purchasing public the source of the shirt manufacturer, but rather

⁶ *Id.* at 4. Applicant does not make the same claim of long-term use with respect to the design mark for which applicant now seeks registration. The use of that mark, according to applicant’s brief at 4, commenced in 2009.

that the owner of RIPTIDE beverages has sponsored the use on the shirt.⁷

Applicant argues, in essence, that its word mark RIPTIDE has acquired such market recognition in the field of beverages that, as used on shirts, it would be perceived as pointing to applicant. Such an argument is normally made in the context of claiming acquired distinctiveness, *e.g.*, that the recognition of an applicant's trademark for certain goods carries over when the applicant uses that mark for other goods. We decline to apply that principle in this case, with a refusal based on likelihood of confusion, because such market recognition, if it exists, does not reduce the obvious similarity between applicant's mark and the mark that has been cited against it; nor does it alter the fact that both marks are for use on identical goods (*i.e.*, shirts). Even if consumers associated the word and design mark, when used on shirts, with applicant's mark for beverages, they might then view registrant's mark as a variation of applicant's mark, and suffer reverse confusion. Accordingly, the market recognition argued by applicant does not obviate the likelihood of confusion.⁸

4. Long-term contemporaneous use.

Applicant argues that its mark and the cited mark have been used in connection with clothing for over five years with no known confusion in the

⁷ *Id.* at 3.

⁸ We also point out that applicant has not submitted any evidence that the mark that applicant seeks to register enjoys the market recognition that applicant claims. The record contains only an insubstantial amount of evidence to show the extent of market recognition of applicant's mark, consisting only of a few pages from applicant's website showing images of marked beverage products and four "testimonials."

marketplace.⁹ However, the record is devoid of probative evidence relating to the extent of use of applicant's and registrant's marks and, thus, whether there have been meaningful opportunities for actual confusion to have occurred in the marketplace. For this reason, applicant's statements of no known instances of actual confusion are entitled to little weight. *See In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984) (claim of no actual confusion "is of little probative value in an *ex parte* proceeding ... where we have no evidence pertaining to the nature and extent of the use by applicant and registrant ... and the registrant has no chance to be heard from ..."). Accordingly, the *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion is considered neutral.

5. Applicant's prior rights in the RIPTIDE mark.

Applicant notes that it is the owner of U.S. registrations of the mark RIPTIDE (Reg. No. 2875637) and the mark RIPTIDE SPLIT (Reg. No. 3481165), both in standard character form.¹⁰ Applicant also states that it has used the mark RIPTIDE for approximately ten years, from a date prior to the registration of the cited mark.¹¹ Applicant's claimed registrations relate not to clothing, but to beverages, and do not establish any rights of applicant in connection with clothing. Moreover, any suggestion that applicant has rights superior to those of the registrant cannot be entertained in this *ex parte* proceeding. The examining

⁹ Applicant's brief at 6.

¹⁰ TESS records made of record with applicant's response of September 20, 2012.

¹¹ Applicant's brief at 4.

attorney's refusal is based on the fact that the cited mark is registered, not that it was earlier used. See Trademark Act § 2(d), 15 U.S.C. § 1052(d); *In re Calgon Corporation*, 435 F.2d 596, 168 USPQ 278, 280 (CCPA 1971). Accordingly, these arguments do not affect our analysis.

6. Conclusion.

Having considered all of the evidence and arguments of record and all relevant *du Pont* factors, including those not specifically discussed herein, we find that applicant's mark, as applied to applicant's goods in Class 25, so closely resembles the cited mark RIPTIDE (in standard character form) as to be likely to cause confusion, mistake or deception as to the source of applicant's goods. Inasmuch as registration must be refused on the basis of this finding, we need not address whether there is a likelihood of confusion with respect to the cited mark LA RIPTIDE and design (Registration No. 3353749).

Decision: The refusal to register is affirmed on the basis of Registration No. 3378004. The goods in International Class 25 will be deleted from the application and the application will proceed to publication for opposition with respect to the goods in Class 32 only in due course.