

THIS OPINION IS NOT A
PRECEDENT OF THE
T.T.A.B.

Mailed: September 17, 2009

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Cott Beverages Inc.
v.
Travis Ryan Barbieri

Opposition No. 91181911
to application Serial No. 77124976
filed on January 16, 2008

Mary Pat Weyback of Drinker Biddle & Reath LLP for Cott
Beverages Inc.

Travis Ryan Barbieri, *pro se*

Before Seeherman, Quinn and Kuhlke, Administrative Trademark
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, Travis Ryan Barbieri, seeks registration of
the mark shown below for goods identified in the
application as "soft drinks flavored with tea," in
International Class 32.



His application, which is based on an asserted intention to use the mark, contains the following descriptions:

The mark consists of (from left to right) the capitalized letters "CO" followed by the lowercase, subscript letters "tea". The arrangement of the letters is a play on the formula for carbon dioxide, used to represent the product: a carbonated iced tea.

Color is not claimed as a feature of the mark.

Opposer, Cott Beverages Inc., opposes registration of applicant's mark on the grounds that, as applied to the applicant's goods, applicant's mark so resembles opposer's six previously used and registered marks as to be likely to cause confusion, to cause mistake, or to deceive under Trademark Act Section 2(d), 15 U.S.C. §1052(d).

Applicant filed an answer by which he admitted to not using his mark in commerce in the United States, but otherwise denied the remaining salient allegations.

The Record

The evidence of record consists of the pleadings herein; the file of the opposed application; opposer's notice of reliance on its six pleaded registrations, which show that the registrations are subsisting and owned by opposer; and opposer's testimony deposition, with exhibits, of John W. Scandrett, director of marketing and category management for Cott Beverages Inc. Applicant did not take any testimony or file a notice of reliance. Opposer's

objections to applicant's use of excerpts from applicant's various discovery responses and opposer's website, first referenced in the body of applicant's brief, are sustained. See Trademark Rules 2.120(j)(3)(i), 2.120(j)(5), 2.121 and 2.122.

STANDING/PRIORITY

Opposer's pleaded registrations, which are of record, are summarized as follows:

Registration No. 3346151 for the standard character mark COTT for "teas" in International Class 30, issued on November 27, 2007;

Registration No. 749859 for the typed mark COTT for "maltless beverages sold as soft drinks; syrups and concentrates for use in the manufacture of carbonated and uncarbonated soft drinks" in International Class 32, issued on May 21, 1963, renewed on April 2, 2003;

Registration No. 1507436 for the typed mark IT'S COTT TO BE GOOD! for "soft drinks, syrups and concentrates for use in the manufacture of carbonated and noncarbonated soft drinks" in International Class 32, issued on October 4, 1988, renewed on September 3, 2008;

Registration No. 540457 for the mark shown below



for "nonalcoholic maltless beverages sold as soft drinks" in International Class 32, issued on April 3, 1951, renewed on December 17, 2001;

Registration No. 679364 for the mark shown below

Cott

for "concentrates used in the manufacture of soft drinks" in International Class 32, issued on May 26, 1959, renewed on February 28, 2009;¹ and

Registration No. 3004801 for the mark shown below



for "non-alcoholic beverages, namely, soft drinks" in International Class 32, issued on October 4, 2005.

Because opposer has made its pleaded registrations of record and has shown that the registrations are valid and subsisting and owned by opposer, opposer has established its standing to oppose registration of applicant's mark, and that priority is not in issue. *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). See also *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

¹Section 8 affidavit accepted. Further, review of the Office's automated records subsequent to opposer's submission of a status and title copy of the registration during its testimony period reveals that the registration has been renewed for a third time,

LIKLIHOOD OF CONFUSION

Our likelihood of confusion determination under Section 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Opposer presented evidence and argument on the factors of the similarity of the marks, relatedness of the goods, similarities of trade channels, conditions under which and buyers to whom sales are made, fame of the prior mark, number of similar marks in use on similar goods, and the variety of goods on which a mark is used. Applicant limited his arguments to the factors of the similarity of the marks and relatedness of the goods.

For our determination of likelihood of confusion in the opposition, we focus our analysis on Reg. No. 749859 for the typed mark COTT for "maltless beverages sold as soft drinks" since that mark and goods are the closest to applicant's

and that ownership is currently in opposer's name. *Time Warner*

mark and goods. If there is no likelihood of confusion with respect to that registration, there would be no likelihood with respect to opposer's other pleaded registrations. Conversely, if we were to find likelihood of confusion with respect to the registration, there would be no need for us to consider the issue of likelihood of confusion with respect to the other registrations.

Fame and Relative Strength of Opposer's Mark

We begin with the factor of fame because, when fame is present, it "plays a 'dominant' role in the process of balancing the *du Pont* factors." *Recot Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000); *see also Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

Opposer argues that its "COTT mark is a well-known, famous mark, entitled to broad protection." (Page 12, Opposer's brief). In support of this assertion, opposer submitted the testimony of one witness, John Scandrett, its director of marketing. Mr. Scandrett testified that the COTT mark has been in use for many years by opposer's predecessors in interest and by opposer. Scandrett Test. pp. 7, 8. Opposer, itself, began marketing COTT cola in

Entertainment Co. v. Jones, 65 USPQ2d 1650 (TTAB 2002).

2003. Scandrett Test. p. 8. Over one million cases of beverages with the COTT brand have been sold yearly over the last three years. Scandrett Test. p. 20. Cott Beverages Inc. is the fourth largest supplier of non-alcoholic beverages in the United States and sells goods to many large retail outlets in the United States such as Wal-Mart, Target, Safeway, and Publix. Scandrett Test. pp. 5, 6.

Based on this record, it is not clear whether opposer has a large share of the non-alcoholic beverage market or a small share. For instance, no evidence was submitted to show how its sales figures compare to the three largest shareholders of the non-alcoholic beverage market, or to the brands of beverages sold by those companies. Opposer also did not provide any evidence of advertising expenditures. Additionally, while there is evidence of record that shows opposer sold COTT branded beverages in the United States for some time, it appears from the record that opposer did not enter the U.S. market in any substantial way until 2003. Scandrett Test. pp. 8, 9.

Raw numbers of sales alone may be misleading and must be placed in some context in determining the fame of a mark. *Morgan Creek Productions, Inc. v. Foria International, Inc.*, 91 USPQ2d 1134 (TTAB 2009). On this record, while opposer's COTT marks appear to be strong based on opposer's evidence of use and the lack of evidence that would indicate the mark

is not strong, such as any use of similar marks by third parties, we find that opposer has not met its burden to show that it owns a famous mark. *Lacoste Alligator S.A. v. Maxoly Inc.*, 91 USPQ2d 1594, 1597 (TTAB 2009) ("Because of the extreme deference that we accord 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, it is the duty of the party asserting that its mark is famous to clearly prove it."); *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901 (TTAB 2007). In view thereof, the strength of opposer's registered marks of record does not reach the level of playing "a 'dominant' role in the process of balancing the *du Pont* factors." *Recot*, 54 USPQ2d at 1897.

Relatedness of the Goods

We make the determination of the relatedness of the goods based on the parties' identification of goods as they are recited in the registration and application. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Because opposer's goods are broadly identified as "maltless beverages sold as soft drinks," we must presume that the scope of the identification includes all types of soft drinks that do not contain malt, including applicant's "soft drinks flavored with tea" and, thus, the goods are legally identical. *Id.*

See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991).

In addition, the record establishes that opposer has used the mark COTT for tea beverages since prior to the filing of applicant's application. This factor weighs in favor of a finding of likelihood of confusion.

Channels of Trade, Class of Purchasers and Conditions of Sales


With regard to the channels of trade and classes of purchasers, inasmuch as the goods are legally identical, absent restrictions in the identifications as to trade channels and purchasers, we must presume that the parties' goods would be sold in the same channels of trade and to the same relevant purchasers, including ordinary consumers, under the same conditions of sale. See *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom*, 16 USPQ2d 1783. In view thereof, the parties' channels of trade and classes of purchasers must be deemed to be the same. As to the conditions of sales, these goods are general consumer items that are inexpensive and subject to impulse purchases. In view

thereof, these factors weigh in favor of a likelihood of confusion.

Variety of Goods

The record shows that opposer uses the COTT brand for soft drinks having a variety of flavors. See Scandrett exhibits A-C, G-H, J-N and I. Although its products are confined to soft drinks, consumers would not find it surprising if opposer were to use its mark for soft drinks flavored with tea, particularly since opposer already uses its mark for teas and for soft drinks. This factor weighs in favor of a finding of likelihood of confusion. *Nike Inc. v. WNBA Enterprises LLC*, 85 USPQ2d 1187, 1195 (TTAB 2007) ("The fact that opposer applies its marks to a variety of sports products makes it more likely that purchasers, aware of opposer's use of the mark on a variety of sports products, when seeing a similar mark used in connection with backpacks, duffel bags and other sports bags, are likely to believe that these products are also being produced or sponsored by opposer").

Similarities of the Marks

We now turn to consideration of the first *du Pont* factor, i.e., whether applicant's mark,  and opposer's COTT mark are sufficiently similar in terms of their overall appearance, sound and commercial impression

that confusion as to the source of the goods offered under the respective marks is likely to result.

Opposer argued the marks are visually, aurally and connotatively similar. Opposer also argued there is no correct way to pronounce a trademark. Applicant argued his mark is a play on the molecule CO₂ (as in carbon dioxide) since his goods are carbonated.

We find that applicant's mark is substantially different in appearance, sound, connotation and commercial impression from opposer's mark. Opposer's mark is COTT, while applicant's mark depicts CO in large letters, with the word tea, the flavor and major ingredient of the goods, written in smaller letters below it. The effect of this depiction is that CO appears to be the source-indicating portion of the mark, with tea indicating the contents of the drink. As for pronunciation, while it is true that there is no correct pronunciation of a mark, the manner in which applicant's mark is depicted suggests that consumers would refer to it as CO or possibly as the individual letters "C-O," followed by the word TEA. Contrary to opposer's argument, there is no basis for us to conclude that consumers would pronounce applicant's mark "as COT-TEA, the phonetic equivalent of "COTT Tea." (Page 7, opposer's brief.) As to connotation, opposer's mark does not evoke any particular meaning other than possibly a surname. In

contrast, applicant's mark, because of the way it is depicted, emphasizes the CO portion, thereby suggesting the connotation of perhaps an abbreviation for "company," or of the initials C.O., plus the word "tea" to describe the flavor of the soft drinks. Further, given the presentation and the type of goods with which it is used, namely carbonated beverages, many consumers may understand the mark to be a play on the chemical formula for carbon dioxide, CO₂. Thus, the overall commercial impression of the marks is distinctly different and any similarities in appearance, based on the presence of the letters C, O and T, are vastly outweighed by the dissimilarities in the marks.

Because the marks are so different, the *du Pont* factor of the dissimilarities of the marks outweighs the other relevant *du Pont* factors discussed above. In view thereof, we conclude that there is no likelihood of confusion between applicant's mark CO tea and design and opposer's mark COTT. *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 elements] may from case to case play a dominant role"). In view of this finding, there is also no likelihood of confusion between

applicant's mark and the other, more different, marks in each of opposer's pleaded registrations.

Decision: The opposition is dismissed.