

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451**

Faint

Mailed: February 24, 2009

Opposition No. 91183753

Heaven Hill Distilleries,
Inc.

v.

Diallo Yassinn Patrice

**Before Quinn, Drost and Mermelstein,
Administrative Trademark Judges.**

By the Board:

Applicant seeks to register the mark HYPNOTIZER in standard character form for "Alcoholic beverage produced from a brewed malt base with natural flavors, Alcoholic beverages of fruit, Alcoholic fruit extracts, Alcoholic malt coolers, Alcoholic punch, Cachaca, Cognac, Distilled Spirits, Fruit wine, Gin, Hard cider, Natural sparkling wines, Prepared alcoholic cocktail, Prepared wine cocktails, Rum, Sparkling fruit wine, Sparkling grape wine, Sparkling wines, Tequila, Vodka, Whiskey, Wine coolers, wines" in International Class 33.¹ Opposer claims ownership of registrations for the mark HPNOTIQ in typed form for "liqueur" in Class 33,² and a design

¹ Application Serial No. 77266196, filed August 28, 2007, based on an allegation of an intent to use the mark in commerce.

² Registration No. 2642855, registered October 29, 2002 with dates of first use anywhere and first use in commerce of September 2001.

mark for HPNOTIQ HQOPN for "liqueur" in Class 33³ that were in use prior to applicant's filing date. As grounds for the opposition opposer asserts priority and likelihood of confusion, and dilution.

Opposer has moved for summary judgment on its priority and likelihood of confusion claim. Opposer argues that it has priority of use, as established by its registrations, while applicant's earliest constructive use date is its filing date of August 28, 2007. Opposer claims that the goods are identical alcoholic beverages that would move in the same channels of trade and to the same classes of purchasers. Opposer argues that the marks are similar since the first two syllables of the respective marks are pronounced identically as "HIPNO," creating an aural similarity that is especially important in light of the fact that alcoholic beverages are frequently ordered in bars and clubs through an oral request. Opposer relies on *Beck & Co. v. Package Distributors of America, Inc.*, 198 USPQ 573 (TTAB 1978) where the Board noted that "similarity in sound alone can lead to likelihood of confusion, particularly where the goods involved may be purchased by verbal order." *Id.* at 576. Opposer contends that the goods represented by its and applicant's marks are low cost

³ Registration No. 2822475, registered March 16, 2004 with dates of first use anywhere and first use in commerce of September 2001. A claim of distinctiveness under Trademark Act § 2(f) is of record. Opposer also claims ownership of two other registrations in typed form for Registration No. 2834130 for "clothing, namely shirts" in Class 25, and Registration No. 2834133 for "candles" in Class 4 and "beverage glassware" in Class 21.

items for which a purchaser would exercise minimal care in selecting the items. As evidence to support its contentions opposer has submitted an affidavit from Justin Ames, its Senior Brand Manager, with attached exhibits showing sales, advertising and publicity for the mark; and an affidavit of Matthew Williams, opposer's counsel, detailing the litigation history of the parties over applicant's prior French registration, his international registration under the Madrid Protocol and his prior United States application.

In response to the motion for summary judgment, applicant disputes that the goods are identical, arguing that his proposed goods are not liqueurs,⁴ and that his HYPNOTIZER mark is "completely different in terms of products, mark, packaging, size, price." (Applicant's response at 6). Applicant contends that opposer's mark is not a famous mark, and thus the cases cited by opposer are not applicable to this case. Applicant characterizes opposer's arguments as recognizing the different spellings and differences in phonetic pronunciation of the two marks, and thus consumers will not be confused. Applicant relies on the findings of the trademark examining attorney that "the Office Records have been search [sic] and no similar registered or pending mark has been found that would bar registration." (*Id.* at 7). Applicant points out that opposer's letter of protest regarding applicant's pending application was

⁴ Applicant also submitted an exhibit showing a picture of a soda bottle displaying the mark for use on a sparkling water drink. This exhibit was not supported with an affidavit or declaration as required by Fed. R. Civ. P. 56(e), and has been given no consideration.

denied, and argues that this is further evidence that there is no likelihood of confusion as to the marks. Applicant also argues that the findings of the French court are irrelevant to decisions in a United States tribunal.

In reply opposer argues that applicant quotes opposer's summary judgment brief out of context to argue that the marks and goods are different.⁵

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of demonstrating the absence of any genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987). A factual dispute is genuine, if, on the evidence of record, a reasonable finder of fact could resolve the matter in favor of the non-moving party. See *Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992), and *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). The evidence must be viewed in a light most favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. See *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d

⁵ Applicant's surreply, filed January 15, 2009, has been given no consideration. Trademark Rule 2.127. See also, *No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1553 (TTAB 2000).

766, 25 USPQ2d 2027 (Fed. Cir. 1993), and *Opryland USA*, 23 USPQ2d at 1472.

Upon careful consideration of the arguments and evidence presented by the parties, and drawing all inferences in favor of applicant as the non-movant, we find that opposer has not demonstrated the absence of a genuine issue of material fact for trial. The marks HIPNOTIZER and HPNOTIQ can be viewed as having different meanings and providing different commercial impressions. See *Lloyd's*, 25 USPQ2d at 2030 (noting no per se rule where similar marks are used for related goods); *Old Tyme Foods*, 22 USPQ2d at 1545 (finding similar, but not identical marks, can convey different connotations and commercial impressions).

Thus, we find there are genuine issues of fact at least with respect to whether the marks are confusingly similar.⁶

In view thereof, the motion for summary judgment is denied, and dates are reset as follows:⁷

Expert Disclosures Due	3/31/2009
Discovery Closes	4/30/2009
Plaintiff's Pretrial Disclosures	6/14/2009
Plaintiff's 30-day Trial Period Ends	7/29/2009
Defendant's Pretrial Disclosures	8/13/2009
Defendant's 30-day Trial Period Ends	9/27/2009
Plaintiff's Rebuttal Disclosures	10/12/2009
Plaintiff's 15-day Rebuttal Period Ends	11/11/2009

⁶ The fact that we have identified and discussed only one genuine issue of material fact as a sufficient basis for denying the motion for summary judgment should not be construed as necessarily the only issue that remains for trial.

⁷ Our decision on summary judgment is interlocutory in nature. Appeal may be taken within two months after the entry of final

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

decision in this case. See *Copelands' Enterprises Inc. v. CNV, Inc.*, 887 F.2d 1065, 12 USPQ2d 1562, 1564-65 (Fed. Cir. 1989).