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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Tequila Cuervo La Rojena S.A. de C.V.
v.
David Kent Axtell

Opposition No. 91188596

Marie-Anne Mastrovito of Abelman, Frayne & Schwab for Tequila Cuervo La Rojena S.A. de C.V.

Michael N. Cohen of the Law Office of Michael N. Cohen, P.C. for David Kent Axtell.

Before Bucher, Holtzman and Ritchie, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Applicant, David Kent Axtell, has filed an application to register the mark shown below on the Principal Register for "non-alcoholic cocktail mixes" in Class 32.¹



¹ Serial No. 77461179; filed April 29, 2008, based on an allegation of a bona fide intention to use the mark in commerce. The application

Opposer filed a notice of opposition against the application on the ground that the mark is merely descriptive of applicant's goods. Opposer alleges that it is a manufacturer and seller of tequila, prepared alcoholic and non-alcoholic cocktail and margarita mixes. Opposer pleaded ownership of a number of registrations for such goods, and attached printouts from the Office's TARR database of some of the registrations to its pleading. Opposer asserts that registration of applicant's mark would impair opposer's rights to use the term descriptively in connection with its own products.

Applicant filed an answer admitting that opposer is the owner of the pleaded registrations and otherwise denying the remaining salient allegations in the opposition.²

The record includes the pleadings, the TARR printouts of opposer's pleaded registrations which accompanied the notice of opposition, and the file of the involved application. See Trademark Rule 2.122(a) and (d)(1). In addition, opposer filed a notice of reliance on applicant's discovery responses, various printed publications, including properly identified documents obtained from the Internet, printouts of third-party registrations, and TARR printouts of all of its pleaded

includes a statement that "Color is not claimed as a feature of the mark."

² Applicant's affirmative defenses which include assertions of "estoppel" and "unclean hands" were neither tried by the parties nor argued by applicant and, therefore, will be given no consideration.

registrations.³ Applicant did not submit any testimony or other evidence in its own behalf. Only opposer filed a brief.

We turn first to the issue of standing. Standing is a threshold requirement that must be established by a plaintiff in every case. The purpose of the standing requirement is to prevent mere intermeddlers from initiating proceedings. Thus, to meet this requirement, a plaintiff need only show that it has a real interest in the outcome of the proceeding. See *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999).

Opposer's interest in this case is established by the TARR printouts of its pleaded registrations showing that the registrations are valid and subsisting and owned by opposer. The registrations, which include Reg. No. 3321903 for the mark JOSE CUERVO GOLDEN MARGARITA (Golden Margarita disclaimed) for "prepared alcoholic cocktails containing tequila"⁴ and Reg. No. 1404313 for the mark JOSE CUERVO for "nonalcoholic margarita mix,"⁵ demonstrate that opposer is engaged in the sale of the same or related goods as those identified in the involved application. As a competitor of applicant, opposer has standing, or a real interest, in challenging applicant's right to register

³ To the extent these printouts overlap with those attached to opposer's pleading, the submission is duplicative.

⁴ Issued October 23, 2007.

⁵ Issued August 5, 1986; renewed.

its mark on the ground that the mark is merely descriptive of the goods. See *Eastman Kodak Co. v. Bell & Howell Document Management Products Co.*, 23 USPQ2d 1878, 1879 (TTAB 1992) (where the ground is mere descriptiveness, "the plaintiff may establish its standing by...proving that it is engaged in the manufacture or sale of the same or related products."), *aff'd* 994 F.2d 1569, 26 USPQ2d 1912 (Fed. Cir. 1993).

We turn then to the question of whether the stylized mark AGAVERITA for "non-alcoholic cocktail mixes" is merely descriptive. Opposer argues that the word AGAVE is an ingredient in the cocktails intended to be made from applicant's cocktail mixes; that RITA is a recognized short form of margarita and is the generic name of the type of cocktails intended to be made with applicant's cocktail mixes; and that the combined term AGAVERITA does nothing more than describe the goods. Opposer also notes applicant's admission (in response to interrogatory no. 1) that applicant's non-alcoholic cocktail mixes are intended to be used as a margarita mix with tequila.

A term is merely descriptive within the meaning of Section 2(e)(1) if it immediately conveys knowledge of an ingredient, quality, characteristic, function, feature, purpose or use of the goods or services with which it is used. In *re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). The question of whether a particular term is merely descriptive must be determined not in the abstract or on the basis of guesswork, but in relation to the

goods or services for which registration is sought, the context in which the term is used, and the possible significance that the term is likely to have to the average purchaser as he encounters the goods or services in the marketplace. See *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986).

We consider first the meaning of the individual words AGAVE and RITA in the mark to determine whether their combination results in a term which immediately conveys information regarding applicant's "non-alcoholic cocktail mixes." See *In re Hester Industries, Inc.*, 230 USPQ 797, 798 n.5 (TTAB 1986) ("It is perfectly acceptable to separate a compound mark and discuss the implications of each part thereof...provided that the ultimate determination is made on the basis of the mark in its entirety.").

To begin with, we note that applicant's goods, identified as non-alcoholic cocktail mixes, are broad enough to include, and admittedly include, mixes used to make the type of cocktail known as a "margarita." The standard "margarita" is a tequila-based cocktail generally described as "A cocktail consisting of tequila, triple sec, and freshly squeezed lemon juice, with the rim of the glass coated with coarse salt." See, e.g., *The Complete Beverage Dictionary* (Second Edition 1996).

Opposer has submitted articles from a variety of general circulation newspapers showing that a margarita is frequently

referred to by the shorthand name "rita."⁶ Examples of these articles are excerpted below.

PEACH BUZZ:

Not a beer drinker? Then walk two blocks to Sharky's Cantina, where \$8 will buy you an Obama-rita - a king-sized, bright-orange margarita mixed with mandarin orange juice, pineapple, triple sec and tequila.

New York Daily News (August 24, 2009)

Morin's serves up satisfaction for all tastes:

I can sing the praises of both the Morin's "Rita" (\$5.50) - its version of a margarita, that was a powerful mix of tequila, Cointreau, lime juice, sour mix and "a splash of cranberry juice"...

Providence Journal Bulletin (RI) (August 20, 2009)

Short Pumps Mexican Food Treat:

Margaritas, including my Fuzzy Rita (Cuervo Gold, peach schnapps, orange liqueur), range in size from 17 ounces (\$6.95) to the designate-a-driver 37 ounces (\$12.95).

Richmond Times Dispatch (VA) (October 18, 2007)

BAR BITES:

Signature drink: Cocktails are on the sweet side, such as the Red Rita (\$8), a margarita swirled with blood-red grenadine.

San Francisco Chronicle (CA) (November 9, 2006)

A Little Piece of Heaven:

For a more casual environment, and less expensive meal, check out Sammy Hagar's bar, Cabo Wabo. Its specialty is loud music and Wabo-rita, the bar's signature margarita.

Decatur Daily (August 13, 2006)

Opposer has also submitted a number of third-party registrations showing that marks containing the suffix "RITA" are frequently registered for alcoholic and/or non-alcoholic beverages, including "margaritas." For example, RUMBARITA is

⁶ Obtained from the Dialog database.

registered for "alcoholic beverages, namely, margaritas containing tequila..." (Reg. No. 3545850); and the mark SNUFFERITA is registered for "alcoholic beverage, namely, margarita prepared for consumption in restaurants" (Reg. No. 3516273). The record also includes many examples of "rita" used in the names of recipes for making tequila-based drinks, including T-Rita (idrink.com); Cabo Waborita and Cool Mint Rita (texascooking.com); and Pina Rita (drinkswap.com).

We turn then to the meaning of AGAVE. Based on dictionary entries made of record by opposer, the term "agave" is defined as follows:

A huge plant, indigenous to Mexico, with large leaves and prickly, needle-like thorns, resembling cactus. The agave, which belongs to the botanical family *Amaryllidaceae*, is used in the making of tequila and mezcal. ...
The Complete Beverage Dictionary (Second Edition 1996)

Cactus plant and source of pulque, from which tequila is distilled. Species cultivated in Mexico for this purpose are *Agave Tequiliana* and *Agave Tequiliana* Weber.
The Wordsworth Dictionary of Drink (1996)

"Tequila" is defined, in turn, in *Webster's New World Dictionary of the American Language* (supra) as, inter alia, a "Mexican agave":

1. a strong alcoholic liquor of Mexico, distilled from pulque or mescal. 2. a Mexican agave (*Agave tequilana*) that is a source of tequila.

To provide some context for the meaning of AGAVE, we note an article from the website Texas Cooking (texascooking.com)

entitled Tasting Away In Margaritaville referring to "agave" as a form of tequila:

As consumers become more interested in "boutique" or specialty tequilas like 100 percent agave, it becomes more important to consider what goes into that margarita.

The website also includes a recipe for a "Cabo Waborita" margarita calling for "2oz. Sammy Hagar's Cabo Wabo tequila," which is described as "100 percent weber blue agave."

The evidence clearly shows that RITA is a shorthand name for a margarita, and that the term is a commonly used and understood to refer to a margarita. It is also clear that "tequila" is a principal ingredient of a margarita cocktail. As for the term AGAVE, we find that the evidence, while not overwhelming, is sufficient to show that "agave" refers to a form of tequila or the type of plant from which tequila is derived. Thus, we find that the combined term AGAVERITA describes a margarita cocktail made with an agave form of tequila.

Because AGAVERITA is descriptive of the cocktail, it is merely descriptive of the purpose or function of applicant's mixes used to make the cocktail, that is, an agave-based margarita cocktail. It is well settled that terms that describe a significant purpose or function of the goods may be merely descriptive of the goods under Section 2(e)(1). See, e.g., *In re W. A. Sheaffer Pen Co.*, 158 F.2d 390, 72 USPQ 129 (CCPA 1946) (FINE LINE descriptive of mechanical pencils that can produce a "fine line"); *In re Wallyball, Inc.*, 222 USPQ 87 (TTAB 1984)

(WALLYBALL descriptive of sports clothing used for playing game of wallyball); In re National Presto Industries, Inc., 197 USPQ 188 (TTAB 1977) (BURGER descriptive of a function of applicant's cooking utensils); and In re Orleans Wines, Ltd., 196 USPQ 516 (TTAB 1977) (BREADSPRED merely descriptive of function or use of jams and jellies to be spread on bread or are as a spread for bread).

We recognize that the mark is not the wording AGAVERITA, alone, but the wording presented in a stylized display. However, we have no evidence or argument that the display of this mark creates an impression on consumers separate and apart from the impression made by the words themselves, such that, even assuming the wording is descriptive, the mark as a whole would be registrable with a disclaimer of the descriptive words. See In re American Academy of Facial Plastic and Reconstructive Surgery, 64 USPQ2d 1748, 1753 (TTAB 2002). Moreover, we do not find the display sufficiently distinctive to render the mark registrable as a whole.

Decision: The opposition is sustained, and registration to applicant is refused.