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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Cool Tropics

Serial No. 76691918

Myron Amer of Myron Amer, P.C., for Cool Tropics.

Janice Kim, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

Before Holtzman, Wellington and Ritchie, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Cool Tropics (applicant) has appealed from the final refusal of the trademark examining attorney to register the standard character mark RIPS for goods ultimately identified as "fruit juice, and not including alcoholic beverages" in Class 32.¹

¹ Serial No. 76691918, filed August 8, 2008. We note that applicant did not reference a statutory basis for filing the application and that the USPTO's TARR database indicates that "no filing basis has been claimed." However, we believe it is sufficiently clear that applicant is seeking registration based on use of the mark in commerce under Section 1(a) of the Trademark Act. Applicant avers in the application that it "has adopted, and is using" the mark and the application was accompanied by a specimen of use. The problem is that applicant did

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The examining attorney has refused registration under Section 2(d) of the Trademark Act on the basis of Registration No. 3764328 for mark RIPS in standard characters for "liquor and liqueur beverages, namely, frozen ready-to drink [sic] alcoholic beverages of fruit" in Class 33.²

Both applicant and the examining attorney have filed briefs, and applicant filed a reply brief.

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 likelihood of confusion issue. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, however, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Applicant's mark RIPS is identical to the mark RIPS in the cited registration.³ The fact that the respective marks are

not provide dates of use for the mark as required by Trademark Rule 2.32 and 2.34(a)(1), and the examining attorney never addressed this deficiency. Accordingly, if applicant should ultimately prevail in an appeal from this appeal, the application will be remanded to the examining attorney to make the requirement for verified dates of use and also to ensure that the USPTO records are corrected to reflect the filing basis.

² Issued March 23, 2010.

³ Applicant, for the first time with its reply brief, submitted a copy of the packaging specimen from the registration file in an attempt to show that the marks differ in connotation. This evidence is untimely

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identical "weighs heavily against applicant." In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

We turn then to a consideration of the goods, and a determination of whether the respective goods are sufficiently related and/or the circumstances surrounding the marketing of the goods are such that purchasers encountering them would, in view of the similarity of the marks, mistakenly believe that the goods emanate from the same source. See Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590 (TTAB 1978); In re International Telephone & Telegraph Corp., 197 USPQ 910 (TTAB 1978).

In making this determination, we keep in mind that where the marks are identical, as they are here, it is only necessary that there be a viable relationship between the goods in order to support a holding of likelihood of confusion. See In re Concordia International Forwarding Corp., 222 USPQ 355 (TTAB 1983).

In this case, however, there is more than a viable relationship between the respective goods. Applicant's "fruit juice" and registrant's "frozen ready-to-drink alcoholic

and will not be considered. See Trademark Rule 2.142(d). Nor will we consider applicant's unsupported arguments which are based on this untimely evidence. In any event, the connotation of RIPS is the same in both marks.

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beverages of fruit" are, on their face, inherently related, complementary goods.

The identifications alone are sufficient to demonstrate the relatedness of these goods. Moreover, the complementary nature of these products is also shown by the Wikipedia entry for "Drink Mixer" submitted by the examining attorney, which states that fruit juices are common additions to alcoholic beverages. The examining attorney also submitted a number of use-based, third-party registrations each covering non-alcoholic fruit beverages such as juice, on the one hand, and alcoholic beverages, including those that contain mixers such as fruit juice or fruit drinks, on the other. A few such examples are shown below.

Reg. No. 3066213 (AMERICAN BULL and design) lists "fruit-flavored drinks" as well as "alcoholic beverages, namely, ... fruit flavored,...drinks containing vodka";

Reg. No. 3451773 (THE CHALMATION) lists "non-alcoholic beverages, namely, fruit cocktails" as well as well as "prepared alcoholic cocktails";

Reg. No. 3457878 (CLAIR DE FRANCE FRENCH DELIGHTS and design) lists "fruit juices" as well as "alcoholic beverages of fruit, ... liqueurs...";

Reg. No. 3737972 (VIP ALL ACCESS) lists "fruit juices" as well as "alcoholic beverages of fruit" and "alcoholic fruit cocktail drinks";

Reg. No. 3057119 (design mark) lists "fruit juices" as well as "prepared alcoholic cocktails containing fruit";

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Reg. No. 3115035 (PRIMER) lists "fruit juices and fruit drinks" as well as "alcoholic punch, prepared alcoholic cocktail, vodka..."; and

Reg. No. 3505261 (MOJITO LIBRE) lists "flavored non-alcoholic beverages containing fruit juice" as well as "prepared alcoholic cocktails."

Although third-party registrations are not evidence that the marks shown therein are in commercial use or that the public is familiar with them, they nevertheless have some probative value to the extent that they serve to suggest that the goods listed therein may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

Applicant's exclusion of alcoholic beverages in its identification of goods does nothing to avoid a likelihood of confusion. The question is not whether applicant in fact provides alcoholic beverages under the mark RIPS. The question is whether consumers who encounter both products bearing the identical mark will believe that the products emanate from a single source. In view of the complementary nature of the products, we find that they will.

Applicant argues that alcoholic beverages and non-alcoholic beverages are marketed to different purchasers in different channels of trade, noting the age restrictions as well as other legal limitations placed on the sale of alcoholic beverages to the public.

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These arguments are not persuasive. To begin with, absent any restriction in the application or registration, we must presume that the goods move through all the normal trade channels and that they are sold to all the usual purchasers. See *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990). The adult purchasers who would be the customers for registrant's alcoholic beverages would also be prospective purchasers of applicant's fruit juice.

There are no restrictions to the channels of trade, and the products may well be sold in at least some of the same stores. Moreover, the fact that the goods may be sold in different channels of trade is not significant where the goods "may end up in the same purchaser's hands under conditions where that purchaser might logically suppose they had a common origin." *Luzier Inc. v. Marlyn Chemical Co., Inc.*, 442 F.2d 973, 169 USPQ 797, 799 (CCPA 1971). Because of the complementary nature of fruit juice and frozen alcoholic beverages of fruit, such conditions exist. Furthermore, the two products may not even be purchased at the same time. Consumers who had previously purchased registrant's RIPS frozen alcoholic beverages with fruit, upon encountering applicant's fruit juice under the identical mark RIPS, regardless of where they purchased it, would naturally assume because of the products' complementary nature, that they come from or are associated with the same source.

We also point out that fruit juice and alcoholic beverages are ordinary consumer goods that are, or can be, relatively inexpensive and purchased casually and on impulse. The purchasers of these relatively low cost, frequently replaceable, products are likely to be less careful in their purchasing decisions, and therefore more prone to confusion. See Specialty Brands, Inc., 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984); and In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

In view of the foregoing, and because identical marks are used in connection with closely related goods, we find that confusion is likely.

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.⁴

⁴ As noted previously, if applicant should ultimately prevail in an appeal from this decision, the application will be remanded to the examining attorney for appropriate amendment in accordance with our earlier discussion.