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August 12, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Juice of New York

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Serial No. 85908633

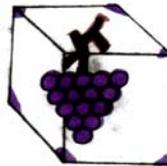
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Juice of New York *pro se* by its principal Leon M. Kornegay.

Diane Collopy, Trademark Examining Attorney, Law Office 107 (J. Leslie Bishop,
Managing Attorney).

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

Opinion by Masiello, Administrative Trademark Judge:

Juice of New York (“Applicant”) filed an application to register on the Principal
Register the mark set forth below:



J·U·ICE

The original description of the mark in the application describes the design element
of the mark as “a designed grapevine & grapes inside of a ice cube [*sic*] or a block of

ice ...” Applicant ultimately amended the mark to the form set forth below, which is the mark at issue in this appeal:



Applicant has disclaimed the exclusive right to use INC apart from the mark as shown. The colors green, gold and blue are claimed as a feature of the mark. The application states, “The mark consists of green grapes, gold stem, blue 3 dimensional box with the words ‘Juice Inc’ under it.” Applicant seeks registration of the mark for “flavored bottle water, flavored enhanced water, flavored water, purified bottled drinking water, bottled artesian water, drinking water with vitamins, distilled drinking water,” in International Class 32.¹

The Trademark Examining Attorney refused registration 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 registered mark set for forth below as to be likely to cause confusion or mistake or to deceive.

¹ Application Serial No. 85908633, filed April 18, 2013. The statutory basis of the application as amended is Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).



The cited mark is registered for “Soft drinks,” in International Class 32.² The registration states that “The mark consists of an ice cube with a fruit embedded therein.” Color is not a feature of the mark.

When the refusal was made final, Applicant filed numerous amendments and several requests for reconsideration, which the Examining Attorney denied. Applicant also appealed to this Board. After Applicant filed its appeal brief, the Examining Attorney requested that the application be remanded to her. On remand, several interactions between Applicant and the Examining Attorney placed the application in its current condition. Thereafter, the Examining Attorney filed her 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 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). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

² Reg. No. 4472527, issued January 21, 2014.

1. The marks.

We first consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). “The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks omitted). Moreover, marks must be considered in light of the fallibility of memory. *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014).

The two marks are similar in appearance in a number of ways. The registered mark represents a berry encased in an ice cube. Applicant’s mark represents a bunch of grapes superimposed on a blue cube that represents an ice cube. As noted above, Applicant described the cube in an earlier version of its mark as representing an ice cube, a statement that has significance as a “fact[] illuminative of shade and tone in the total picture” in our analysis of the mark’s commercial impression. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015). The fact that both marks represent a cube of ice juxtaposed with a form of fruit is a substantial point of similarity. Further, the numerous circular grapes in Applicant’s mark resemble the many round lobes of the berry in Registrant’s mark.

That Applicant's mark is rendered in color is not a distinguishing feature, because the cited mark is registered without any claim to a particular color and might be used in colors that resemble those of Applicant's mark. *Cf. In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1910 (Fed. Cir. 2012). The presence of the wording JUICE INC in Applicant's mark is a point of difference in the respective appearances of the two marks, as is the less realistic style of Applicant's mark.

In sound, we note that Registrant's mark has no sound. The sound of the words JUICE INC in Applicant's mark is a point of difference.

In meaning, the cited mark conveys the concept of a berry encased within a cube of ice. Applicant's mark is a fanciful representation of grapes juxtaposed with a similarly fanciful representation of a cube of ice. The unusual idea of a combination of fruit with a cube of ice in both marks is a substantial degree of similarity in terms of meaning. The fact that Applicant's mark is more abstract in depiction does not alter this connotation. The concept of juice is expressed literally in Applicant's mark, and not in the cited mark. However, we view this as a very weak point of distinction in meaning between the two marks, inasmuch as both marks are for use in connection with goods that may be flavored with juice; and because the idea of juice from fruit is at least suggested by the representation of fruit in Registrant's mark.

Although the marks, considered in their entirety, have a number of differences, we find that those differences are outweighed by the surprising similarity inherent in the unusual juxtaposition of an item of fruit with a cube of ice; and that, overall,

Applicant's mark creates the commercial impression of being a rough or rudimentary depiction or imitation of Registrant's more realistically rendered mark. Accordingly, the *du Pont* factor of the similarity or dissimilarity of the marks weighs in favor of a finding of likelihood of confusion.

2. The goods.

We next consider the similarity or dissimilarity of the goods as identified in the application and the cited registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-1162 (Fed. Cir. 2014); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Octocom Syst. Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). It is not necessary that the products of the parties be similar or even competitive to support a finding of likelihood of confusion. *Coach Services Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1722. Rather, likelihood of confusion may be found if the respective products are related in some manner or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source. *Id.*

Applicant's goods are, in brief, drinking water, flavored waters, and water with vitamins. Registrant's goods are "soft drinks." We must presume that the goods identified in the application and the cited registration encompass all goods of the nature and type identified. *See Octocom Syst. Inc. v. Houston Computers Svcs. Inc.*, 16 USPQ2d at 1787; *Paula Payne Products Company v. Johnson Publishing*

Company, Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973); *In re Jump Designs*, 80 USPQ2d 1370, 1374 (TTAB 2006). We note the following dictionary definitions:³

Soft drink – a beverage that is not alcoholic or intoxicating and is usually carbonated, as root beer or ginger ale.

RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987), p. 1814.

Soft – containing no alcohol – used of beverages <washing down hot dogs with ~ drinks>.

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993), p. 2165.

On the basis of these definitions, we conclude that carbonated flavored waters are encompassed within the scope of “soft drinks.” Accordingly, Applicant’s goods are, in part, identical to the goods in the cited registration.

The Examining Attorney has also made of record excerpts of two websites showing that flavored sparkling water, “kiwi watermelon cooler” and “sparkling cucumber limeade” are offered under the LaCROIX trademark;⁴ and that sparkling water, lemonade, and iced teas are offered under the SPARKLING ICE trademark.⁵ Such evidence of a single business offering both water and soft drinks under the same mark shows that the goods are commercially related and that consumers would readily believe that both types of goods might emanate from a single source.

Because some of the goods at issue are legally identical, we must presume that those goods of Applicant and Registrant move in the same channels of trade and are

³ The Board may take judicial notice of dictionary definitions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁴ Office Action of September 25, 2015 at 17, 19.

⁵ *Id.* at 23.

offered to the same classes of consumers. *See In re Viterra Inc.*, 101 USPQ2d at 1908 (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *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).

For the reasons stated, we find that the *du Pont* factors of the similarity or dissimilarity of the goods, trade channels, and the customers to whom sales are made weigh in favor of a finding of likelihood of confusion.

3. Other arguments.

Applicant argues that “The mark does not conflict with any other registered trademarks that was filed prior to my application and ... I should not loose [sic] the right for my trademark to someone who has applied after my trademark application date with a copy and or modifications of my original mark.”⁶ Applicant is mistaken as to the order in which the subject applications were filed: Applicant filed its application on April 18, 2013, *after* the March 14, 2013 filing of the application underlying the cited registration. Thus, procedurally Registrant’s application had precedence over that of Applicant.

Applicant also argues that it owns the copyright in the mark that it seeks to register.⁷ This argument is unavailing. The ownership of a copyright in a graphic

⁶ Applicant’s brief, 7 TTABVUE 4.

⁷ *Id.*, 7 TTABVUE 7.

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design is legally separate from the right to register that design as a trademark. Thus, Applicant's claimed copyright does not affect our decision in this matter.

4. Conclusion.

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, pertaining to all relevant *du Pont* factors. On the present record, we find that Applicant's mark so resembles the cited mark as to be likely, when used in connection with Applicant's goods, to cause confusion as to the source of Applicant's goods.

Decision: The refusal to register is affirmed.