This Opinion Is Not a Precedent of the TTAB

Mailed: July 16, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Canopy Growth Corporation by assignment from JJ206, LLC[1]

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Serial Nos. 86475885 & 86475899[2]

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for Canopy Growth Corporation.

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Before Ritchie, Lynch, and Larkin,
Administrative Trademark Judges.

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[1] After briefing on these appeals was completed, an assignment of the entire interest and goodwill in the applications from JJ206, LLC to Canopy Growth Corporation was recorded with the USPTO at Reel/Frame 6625/0081.

[2] Because the cases have common questions of fact and of law, and the relevant portions of the records are largely identical, the appeals are hereby consolidated. *See, e.g., In re Anderson*, 101 USPQ2d 1912, 1915 (TTAB 2012) (The Board *sua sponte* consolidated two appeals). The TTABVUE citations herein include in parentheses the serial number of the case to which the citation pertains.

Opinion by Lynch, Administrative Trademark Judge:

Canopy Growth Corporation ("Applicant"), by assignment from JJ206, LLC, seeks registration on the Principal Register of the mark JUJU RX in standard characters, with RX disclaimed, for "smokeless cannabis vaporizing apparatus, namely, oral vaporizers for smoking purposes; vaporizing cannabis delivery device, namely, oral vaporizers for smoking purposes," in International Class 34.

Applicant also seeks registration on the Principal Register of the mark JUJU HYBRID in standard characters, with HYBRID disclaimed, for "oral smokeless cannabis vaporizing apparatus for smoking purposes; oral vaporizing cannabis delivery device for smoking purposes," in International Class 34.[3]

The Examining Attorney in each case has refused registration based upon the absence of a bona fide intent to use the mark in lawful commerce under Sections 1 and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1127. Applicant appealed and requested reconsideration in both cases, which the Examining Attorneys denied. The appeals were suspended for some time,[4] but resumed and now are fully briefed.[5] We affirm the refusals to register, which arise from the Examining Attorneys' contentions

[3] Application Serial Nos. 86475885 and 86475899 both were filed December 9, 2014 based upon an intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

[4] 16 TTABVUE (Serial No. 86475885); 12 TTABVUE (Serial No. 86475899).

[5] Applicant's briefs are single-spaced, in contravention of Trademark Rule 2.126(a)(1), 37 C.F.R. § 2.126(1)(1). While we have considered the briefs in this instance, Applicant is apprised that it is discretionary whether the Board disregards or accepts any improper filings.

that the identified goods constitute unlawful drug paraphernalia under the federal Controlled Substances Act ("CSA").

Applicant's arguments in these cases mirror the unsuccessful arguments its predecessor made in the appeals of other applications identifying essentially the same goods, for which we affirmed unlawfulness refusals. *In re JJ206, LLC,* 120 USPQ2d 1568 (TTAB 2016); *see also In re JJ206, LLC,* 2016 LEXIS 527 (Serial No. 86532274) (TTAB 2016) (non-precedential). As explained in the precedential decision, in an intent-to-use application, "where the identified goods are illegal under the federal Controlled Substances Act (CSA), the applicant cannot use its mark in lawful commerce, and 'it is a legal impossibility' for the applicant to have the requisite bona fide intent to use the mark." *JJ206*, 120 USPQ2d at 1569 (quoting *John W. Carson Found. v. Toilets.com, Inc.*, 94 USPQ2d 1942 (TTAB 2010) ("Because the permanent injunction enjoins applicant from making the use required to obtain its federal trademark registration, as a matter of law, applicant cannot make lawful use of its mark in commerce")).

In these cases, as in the earlier ones, Applicant has explicitly identified its goods as vaporizers for cannabis[6] or marijuana. The CSA makes it unlawful to sell, offer for sale, or use any facility of interstate commerce to transport drug paraphernalia, defined as "any equipment, product, or material of any kind which is primarily

[6] "Cannabis" refers to "any of the preparations (as marijuana or hashish) or chemicals (as THC) that are derived from the hemp and are psychoactive." (www.merriam-webster.com). 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), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under [the CSA]." 21 U.S.C. § 863; *see also JJ206,* 120 USPQ2d at 1569; *In re Brown*, 119 USPQ2d 1350, 1352 n.10 (TTAB 2016). The CSA identifies marijuana as a controlled substance that is unlawful to possess. 21 U.S.C. § 812(a) & (c) (identifying "Marihuana," by its alternate spelling, as a controlled substance); 21 U.S.C. §§ 841 & 844 (placing prohibitions on the possession of controlled substances). The CSA defines marijuana (or "marihuana") as "all parts of the plant Cannabis sativa L., whether growing or not; . . . the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin," but for certain exceptions not relevant to Applicant's goods. 21 U.S.C. § 802(16). Based on this definition and the evidence of record, we find that Applicant's references to "cannabis" in its identifications are to marijuana, as defined in the CSA. Thus, equipment primarily intended or designed for use in ingesting, inhaling, or otherwise introducing cannabis or marijuana into the human body constitutes unlawful drug paraphernalia under the CSA.

Therefore, Applicant's identified goods fall within the definition of illegal drug paraphernalia under the CSA. The identifications of goods make clear that Applicant's devices are designed and intended for the introduction of marijuana or cannabis into the human body. Applicant has not disputed this fact, and has acknowledged that its goods are "optimized for sale to state-licensed and regulated

cannabis industry retailers or operators."[7] Instead, just as in *JJ206,* Applicant relies on state marijuana laws to claim that its intended use is lawful, but as explained in *Brown*, 119 USPQ2d at 1351 and in *JJ206,* 120 USPQ2d at 1571, the federal CSA is conclusive on the lawfulness issue for purposes of obtaining a federal trademark registration.

In its Briefs, Applicant attempts to draw parallels to "other oral vaporizing apparatuses, like e-cigarettes,"[8] but the identification of goods makes clear that its devices differ because the goods, as identified in the applications, are in violation of the CSA. Applicant also analogizes its applications to several third-party registrations[9] for goods or services that Applicant characterizes as "in support of or marketed to the [marijuana industry]," and claims that its "goods should be treated no differently."[10] Most of these same registrations previously were distinguished in *JJ206, LLC*, 120 USPQ2d at 1570 & n.12 as failing to present analogous lawfulness issues under the CSA. Regardless, each application must be considered on its own record to determine eligibility to register. *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016); *see also In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some prior registrations had some

[7] 4 TTABVUE 11 (Applicant's Request for Reconsideration, Serial No. 86475885); 4 TTABVUE 9 (Applicant's Request for Reconsideration, Serial No. 86475899).

[8] 11 TTABVUE 5 (Applicant's Brief, Serial No. 86475885); 7 TTABVUE 5 (Applicant's Brief, Serial No. 86475899).

[9] 4 TTABVUE 52-58 (Serial No. 86475885); 4 TTABVUE 38-45 (Serial No. 86475899).

[10] 11 TTABVUE 5-6 (Applicant's Brief, Serial No. 86475885); 7 TTABVUE 5-6 (Applicant's Brief, Serial No. 86475899).

characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court.").

In *JJ206,* 120 USPQ2d at 1571, we also rejected the argument Applicant again raises in these cases, that because the jurisdictions where it does business "comply with federal directives such as the *Cole Memo*,"[11] its goods should be considered lawful. The *Cole Memo* refers to a 2013 U.S. Department of Justice memorandum to United States Attorneys that addressed the enactment of medical marijuana laws in certain states, affirmed the illegality of marijuana under the CSA, and set out federal "enforcement priorities" "to guide the Department's enforcement of the CSA against marijuana-related conduct."[12] As stated in *JJ206,* "the memorandum does not and cannot override the CSA, and in fact, explicitly underscores that 'marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime.'" *Id.* (footnotes omitted). Regardless, we also take judicial notice of the rescission of the *Cole Memo* as of January 4, 2018, by a U.S. Department of Justice

[11] 11 TTABVUE 6 (Applicant's Brief, Serial No. 86475885); 7 TTABVUE 6 (Applicant's Brief, Serial No. 86475899).

[12] 4 TTABVUE 27-30 (Applicant's Request for Reconsideration, Serial No. 86475885); 4 TTABVUE 13-16 (Applicant's Request for Reconsideration, Serial No. 86475899) (*Cole Memo*). The memo urged federal enforcement efforts to focus on goals including preventing distribution of marijuana to minors, preventing violence and firearm use in marijuana-related activities, and "[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states." *Id.* at 13; 4 TTABVUE 27 (Applicant's Request for Reconsideration, Serial No. 86475885).

memorandum to United States Attorneys,[13] mooting any of Applicant's arguments based on the *Cole Memo* enforcement prioritization.

Finally, Applicant reiterates policy arguments that in *JJ206* we deemed "beyond our jurisdiction over issues of trademark registrability and that are, in any event, already settled within the existing statutory framework of, and interplay between, the Trademark Act and the CSA." *Id.* Ultimately, Applicant's various policy contentions "fail[] to recognize that lawful use of a mark in commerce is a prerequisite to federal registration, [*Gray v. Daffy Dan's Bargaintown*, 823 F.2d 522, 3 USPQ2d 1306, 1308 (Fed. Cir. 1987)], and that Congress has made the sale of marijuana paraphernalia illegal under federal law. We cannot simply disregard the requirement of lawful use or intended lawful use in commerce under the Trademark Act, or Congress's determination as to what uses are illegal. . . ." *JJ206,* 120 USPQ2d at 1572.

In conclusion, because Applicant's identified goods constitute illegal drug paraphernalia under the CSA, intended use of the applied-for marks on these goods is unlawful, and cannot serve as the basis for federal registration.

Decision: The refusals to register Applicant's marks under Sections 1 and 45 the Trademark Act, 15 U.S.C. §§ 1051, 1127, are affirmed in both applications.

[13] https://www.justice.gov/opa/press-release/file/1022196/download ("previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately," including specific reference to the *Cole Memo*).