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OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re HBI International

Serial No. 78234429

Christine Q. McLeod of Beusse Brownlee Wolter Mora & Maire
for HBI International.

Tarah Hardy Ludlow, Trademark Examining Attorney, Law
Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Quinn, Grendel and Zervas, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by HBI International to
register the mark ROLLIES for "cigarettes, cigarette
tobacco, and cigarette rolling papers."¹

The Trademark Examining Attorney refused registration
under Section 2(d) of the Trademark Act on the ground that
applicant's mark, when used in connection with applicant's
goods, so resembles the previously registered mark ROLY for

¹ Application Serial No. 78234429, filed April 6, 2003, alleging
first use anywhere and first use in commerce on April 1, 1999.

"tobacco, namely cigars"² as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.³

Applicant argues that the marks are "readily distinguishable" in sound, appearance and meaning. Applicant contends that "it is well known and understood that 'ROLY' is a nickname for Rolando" and that "registrant's goods are cigars which are known to belong to Rolando Reyes, Sr. undoubtedly where the trademark ROLY was derived." Thus, applicant urges, "the consuming public understands ROLY to refer to the cigars of Rolando Reyes, Sr." (Appeal Brief, p. 1). Applicant contrasts this with its mark, which applicant contends is fanciful. Applicant also contends that the goods are different, and that sophisticated cigar purchasers, who are necessarily careful

² Registration No. 2298134, issued December 7, 1999; Section 8 and 15 affidavits accepted and acknowledged, respectively.

³ Applicant, in September 2004, informed the Board that registrant consented to the use and registration of applicant's mark, and that it was obtaining a letter of consent. Proceedings in the appeal remained suspended pursuant to a series of Board orders. As late as November 2005 when applicant filed its appeal brief, applicant indicated that it "is still currently seeking a letter of consent from registrant." Inasmuch as applicant failed to file any consent from registrant by March 2006, proceedings were resumed and the file was forwarded to the examining attorney for her brief. As of the mailing date of this decision, there is no consent of record.

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and discriminating in their purchases of tobacco products, will not be confused by the involved marks.

The examining attorney maintains that the marks are similar in that both marks begin with "ROL-" and applicant's mark ROLLIES looks and sounds like the plural form of registrant's mark ROLY. The examining attorney also contends that the goods are related, and travel in the same trade channels to the same classes of purchasers. In support of the refusal, the examining attorney submitted copies of eight use-based third-party registrations, retrieved from the USPTO's X-Search database, listing goods of the type identified in applicant's application and the cited registration.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also: *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See

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also: In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

With respect to the goods, it is not necessary that the respective goods be identical or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originated from the same producer. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991).

Applicant's cigarettes and cigars are clearly related, both being tobacco products. The goods travel in the same trade channels (e.g., drug stores, smoker shops, and the like), and are purchased by the same classes of purchasers, including ordinary consumers. Lest there be any doubt on the relatedness between cigars and cigarettes, the examining attorney introduced use-based third-party registrations listing both cigarettes and cigars. Third-party registrations, which individually cover different items and which are based on use in commerce, serve to

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suggest that the listed goods are of a type that may emanate from a single source.⁴ 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 assertions relating to the sophistication of purchasers and their careful decision when it comes to buying cigars are not supported by any evidence of record. Moreover, in the absence of any limitations in the respective identifications of goods, we must assume that potential buyers of cigarettes and cigars include ordinary consumers (exercising nothing more than ordinary care). However, even assuming that some purchasers may be sophisticated and a bit more discerning in buying tobacco products, this does not necessarily mean that they are sophisticated or knowledgeable in trademarks or immune from source confusion. See In re Research Trading Corp., 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd., 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ["Human memories even of discriminating purchasers...are not infallible."]. See also In re Decombe, 9 USPQ2d 1812 (TTAB 1988).

⁴ In this connection, we also note, in passing, that applicant's identification of goods in the application as originally filed included "cigars." In response to the Section 2(d) refusal, applicant deleted "cigars" from its identification of goods.

We next turn to consider the marks. In determining the similarity or dissimilarity of the marks, we must compare the marks in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Although the marks ROLY and ROLLIES have specific differences, there are also similarities. As to appearance, both begin with the same three letters, "ROL-." As to sound, as pointed out by the examining attorney, there is no correct pronunciation of a trademark. Thus, it cannot be said with any degree of certainty that the presence of a double "L" versus a single "L" in the respective marks will result in a noticeably different

sound when the marks are spoken. In re Great Lakes Canning, Inc., 227 USPQ 483 (TTAB 1985).

The thrust of applicant's attempt to differentiate the marks centers on meaning. That is, on the one hand, "Roly" is a well known and commonly understood nickname for "Rolando," and consumers will recognize registrant's mark ROLY as referring to the cigars of Rolando Reyes, Sr., whereas applicant's mark, on the other hand, is fanciful.

We recognize the possibility that consumers may ascribe different meanings to the marks. However, the record is devoid of any evidence to establish either that a "Rolando Reyes, Sr." is connected with registrant's cigars or that consumers would recognize "ROLY" as a nickname for him. Moreover, while applicant maintains that its mark is fanciful, we suspect that consumers will view it as suggestive of a rolled tobacco product. In this connection, consumers may view ROLLIES as the plural form or a variation of ROLY. See *Wilson v. Delauney*, 245 F.2d 877, 114 USPQ 339 (CCPA 1957); and *In re Pix of America, Inc.*, 225 USPQ 691 (TTAB 1985).

In sum, the similarities between the marks ROLY and ROLLIES in terms of sound, appearance, meaning and commercial impression outweigh the differences. The marks are sufficiently similar that, when used in connection with

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such closely related goods as cigarettes and cigars, consumers are likely to believe that the goods originate with or are associated with or sponsored by the same entity.

Decision: The refusal to register is affirmed.