

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Harborside Beverage Group LLC

Serial No. 78626361

John R. Crossan of Chapman and Cutler LLP for Harborside Beverage Group LLC.

Jill C. Alt, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before Hohein, Hairston and Grendel, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

On May 10, 2005, Harborside Beverage Group LLC applied to register the mark HARBORSIDE LAGER in standard character form for "lager."¹

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, as

¹ Serial No. 78626361; alleging a date of first use anywhere and a date of first use in commerce of November 30, 2003. The word LAGER has been disclaimed apart from the mark as shown.

applied to applicant's goods, so resembles the mark HARBORSIDE, previously registered for "fruit drinks,"² as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, applicant filed this appeal. Applicant and the examining attorney have filed briefs. We reverse the refusal to register.

Before turning to the substantive issue in this appeal, we must address a procedural objection by the examining attorney. With its appeal brief, applicant attached two printouts from the USPTO's TESS database. The first printout is a listing of applied-for and registered marks that purportedly cover lager or beer but not fruit drinks; the second printout is a listing of applied-for and registered marks that purportedly cover fruit drinks but not beer or lager. The examining attorney has objected to the exhibits as untimely. The examining attorney's objection is well taken. Trademark Rule 2.142(d) provides that the record in an appeal should be complete prior to the filing of the appeal brief. The exhibits submitted by applicant with its brief are clearly untimely. Moreover, a TESS printout of listings of third-party registrations and

² Registration No. 2263293, issued July 20, 1999; Sections 8 and 15 affidavit accepted and acknowledged, respectively.

applications is not the proper way to make such registrations and applications of record. See *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974). Thus, we have not considered these exhibits.

We turn then to the issue of likelihood of confusion herein. Our determination of this issue 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 also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

With respect to the marks, the examining attorney argues that they are highly similar, and that applicant has simply taken the registrant's mark and added the generic term LAGER. Applicant, on the other hand, argues that the additional word LAGER in its mark creates a mark which is different from the registrant's mark in appearance, pronunciation, connotation, and commercial impression.

With respect to the marks, we must determine whether applicant's mark and registrant's mark, when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. Although the marks must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Furthermore, 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 terms of their commercial impression that confusion as to the source of the goods and/or services 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. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

In this case, both marks contain the same word HARBORSIDE. Applicant has added the generic word "lager." Because the word LAGER is generic for applicant's goods, consumers will view the word HARBORSIDE as the source-

indicating portion of the mark. In other words, consumers are unlikely to rely on the term LAGER in distinguishing a lager product. Accordingly, it is entirely appropriate to treat the HARBORSIDE portion of applicant's mark as the dominant element. The dissimilarities between the marks which results from the presence of the term LAGER in applicant's mark and the absence of that term in the cited mark, do not serve to distinguish the marks. We find, therefore, that these marks are similar in sound, appearance, meaning and commercial impression.

This brings us to the goods. It is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used or intended to be used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

In order to show a relationship between lager and fruit drinks, the examining attorney has made of record sixteen third-party registrations which indicate that entities have registered their marks both for lager and fruit juices. See *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) [Although third-party registrations, which are based on use in commerce, "are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may have some probative value to the extent that they may serve to suggest that such goods or services are the type which may emanate from a single source"]. See also *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

There is a problem with this evidence, however, in that all but four of the registrations issued under Section 44 of the Trademark Act, that is, based upon ownership of foreign registrations, rather than being based upon use in commerce. Contrary to the examining attorney's contention, such registrations are incompetent to establish, in and of themselves, that lager and fruit drinks may emanate from, or be otherwise associated with, a single source, much less that purchasers in this country have become accustomed to seeing both types of products emanate from a single source

under a single mark. See *In re Albert Trostel & Sons Co.*, supra; and *In re Mucky Duck Mustard Co. Inc.*, supra.

The four remaining use-based third-party registrations are not sufficient to convince us that, when applicant's mark is used on lager and registrant's mark is used on fruit drinks, there is a likelihood of confusion. Lager and fruit drinks are not typically complementary goods, and they are different in nature. Moreover, there is no per se rule that alcoholic and non-alcoholic beverages are related products. *In re Modern Development Co.*, 225 USPQ 695 (TTAB 1985). Thus, we are unable to conclude on this record that lager and fruit drinks are related goods.

In reaching our decision, we have not relied upon applicant's arguments that the trade channels and purchasers for the respective goods are different, and that the purchasers of its lager are sophisticated. As the examining attorney correctly noted, the involved identifications of goods do not include any limitations. Accordingly, we must presume that the identifications encompass all goods of the type described, and that the identified goods move in all channels of trade and to all classes of purchasers that would be normal for such goods. *In re Elbaum*, 211 USPQ 639 (TTAB 1981). In other words, applicant's and registrant's goods may travel in some of

the same channels of trade (e.g., grocery stores and convenience stores) and be purchased by some of the same classes of purchasers (e.g., ordinary consumers over the minimum drinking age).

We conclude that notwithstanding the similarity of the marks, and the overlapping trade channels and purchasers, the examining attorney has not presented sufficient evidence to establish that the goods are so related that confusion is likely to result from the contemporaneous use of the marks on the respective goods.

Decision: The refusal to register under Section 2(d) is reversed.