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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re B.C Beverage Company (UK) Limited

Serial No. 79010540

Jonathan M. Pierce of Conley Rose, P.C. for B.C Beverage Company (UK) Limited.

David Taylor, Trademark Examining Attorney, Law Office 112 (Angela Wilson, Managing Attorney).

Before Hohein, Walsh and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

B.C Beverage Company (UK) Limited filed application Serial No. 79010540 on April 11, 2005, based on Section 66 of the Lanham Act, 15 U.S.C. §1141f, seeking to register the mark B.C COLA, in standard character format, for goods ultimately identified as "colas" in Class 32. Applicant disclaimed the exclusive right to use the word "cola." Registration was refused under Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d), on the ground that the mark B.C COLA for colas so resembles the mark BC for "canned blend

of fruit juices" in Registration No. 641,841, issued on February 19, 1957 (third renewal), as to be likely to cause confusion. When the refusal was made final, applicant appealed. The appeal has been fully briefed. For the reasons set forth below, the refusal to register is affirmed.

Our determination of likelihood of confusion under Section 2(d) of the Lanham Act is based on an analysis of all the 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, 567 (CCPA 1973). The only evidence of record are copies of thirteen (13) use-based trademark registrations for marks used to identify and distinguish both colas and fruit juices owned by seven (7) different entities.[1]

In its brief, applicant submitted the results of four (4) searches it conducted in the Trademark Office search system. The examining attorney objected to applicant's

[1] The examining attorney submitted ten (10) additional third-party registrations filed under Sections 44 or 66 of the Lanham Act. However, third-party registrations that issued under Sections 44 or 66 of the Lanham Act, without any use in commerce, have very little, if any, persuasive value in suggesting that the products at issue may emanate from a single source. *In re Albert Trostel & Sons Co.,* 29 USPQ2d 1783, 1786 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.,* 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). Accordingly, we have not considered those registrations in reaching our decision.

search results on the ground that such evidence was not timely filed. "The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed. After an appeal is filed, if the appellant or the examiner desires to introduce additional evidence, the appellant or the examiner may request the Board to suspend the appeal and to remand the application for further examination." Trademark Rule 2.142(d), 37 CFR §2.142(d). Applicant did not request time to submit additional evidence.

Evidence submitted after an appeal normally will not be given any consideration. TBMP §1207.01 (2nd ed. rev. 2004) and the cases cited therein. Accordingly, the examining attorney's objection is sustained and the four searches submitted with applicant's brief will be given no further consideration.[2]

[2] It is pointed out that "[d]uring the period between a final action and expiration of the time for filing an appeal, the applicant may request the examiner to reconsider the final action." Trademark Rule 2.64(b), 37 CFR §2.64(b). Evidence submitted with a request for reconsideration will be considered timely filed without the need to request additional time to submit evidence. TBMP §1207.04 (2nd ed. rev. 2004). Applicant, however, did not file a request for reconsideration.

We turn now to the following relevant factors bearing on the issue of likelihood of confusion.

A. Similarity or dissimilarity and nature of the goods.

It is well settled that it is not necessary that the goods of the applicant and registrant be similar or even competitive to support a finding of likelihood of confusion. Likelihood of confusion may be found if the goods are related in some manner and/or if the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under conditions that could give rise to the mistaken belief that they emanate from the same source. *In re Pollio Dairy Products Corp.,* 8 USPQ2d 2012, 2015 (TTAB 1988); *Seaguard Corp. v. Seaward International, Inc.,* 223 USPQ 48, 51 (TTAB 1984).

The examining attorney, as noted above, submitted thirteen (13) use-based registrations in which the description of goods include both colas and fruit juices. These registrations have probative value to the extent that they serve to suggest that colas and fruit juices may emanate from the same source. *In re Infinity Broadcasting Corp.,* 60 USPQ2d 1214, 1217-1218 (TTAB 2001); *In re Albert Trostel & Sons Co., supra; In re Muck Duck Mustard Co., Inc., supra*. The fact that third parties have adopted and

registered marks for colas and fruit juices is probative of the fact that those products are related and may emanate from a single source.[3]

In view of the foregoing, we find that the similarity and nature of the goods favors a finding of likelihood of confusion.

B. The similarity or dissimilarity of the marks.

We now turn to the *du Pont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. *In re E. I. du Pont de Nemours & Co., supra.* 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 overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.,* 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.,* 23 USPQ2d 1835, 1741 (TTAB 1991), *aff'd unpublished,* No.

[3] This Board and its principal reviewing court have consistently found that soda and fruit juices are related products. *In re Great Lakes Canning, Inc.,* 227 USPQ 483 (TTAB 1985); *Coca-Cola Bottling Co. v. Krim-Ko Corp.,* 148 USPQ 396 (TTAB 1965), *aff'd in part,* 390 F.2d 728, 156 USPQ 523 (CCPA 1968); and *Seven-Up Co. v. Tropicana Products, Inc.,* 142 USPQ 384 (TTAB 1964), *aff'd,* 356 F.2d 567, 148 USPQ 604 (CCPA 1966).

92-1086 (Fed. Cir. June 5, 1992). In making this determination, we must consider the recollection of the average purchaser, who normally retains only a general, rather than a specific, impression of the marks. *Sealed Air Corp. v. Scott Paper Co.,* 190 USPQ 106, 108 (TTAB 1975).

While marks must be compared in their entireties, it is not improper to accord more or less weight to a particular feature of a mark. *In re National Data Corp.,* 753 F.2d 1056, 24 USPQ2d 749, 751 (Fed. Cir. 1983). That a particular feature of a mark is descriptive with respect to the products at issue justifies giving less weight to that portion of the mark. *Id.* In the application at issue, the word "cola" is a generic term for colas and the exclusive right to use "cola" has been disclaimed. Because "cola" is a generic term, it will not be regarded as the dominant portion of the mark B.C COLA and it will generally be given less source-signifying weight than the arbitrary letter combination B.C. Thus, we are not persuaded that the word "cola" offers sufficient overall distinctiveness to create a different commercial impression between the marks BC and B.C COLA.

Moreover, the significance of the letters B.C in applicant's mark B.C COLA is reinforced by their location

as the first part of the mark, especially in light of the generic (and, therefore, non-source identifying) significance of the word "cola." *Presto Products Inc. v. Nice-Pak Products, Inc.,* 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered"). *See also Palm Bay Imports Inc. v. Vueve Clicquot Ponsardin,* 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005)("Vueve" is the most prominent part of the mark VUEVE CLICQUOT because "vueve" is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America,* 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992)(upon encountering the marks, consumers must first notice the identical lead word). The presence of the letters "BC" or "B.C" as the first part of the respective marks renders the marks similar because the common term is arbitrary.

Arbitrary letter combinations such as BC and B.C generally have been found to be similar because it is difficult for consumers to distinguish similar letters. *Crystal Corp. v. Manhattan Chemical Mfg. Co.,* 75 F.2d 506, 25 USPQ 5, 6 (CCPA 1935) ("We think that it is well known that it is more difficult to remember a series of arbitrarily arranged letters than it is to remember

figures, syllables, words, or phrases. The difficulty of remembering such lettered marks makes confusion between such marks, when similar, more likely"). *See also, Weiss Associates Inc. v. HRL Associates Inc.,* 902 F.2d 1546, 14 USPQ2d 1840, 1841 (Fed. Cir. 1990) ("Because it is hard to distinguish between these letters, the mark TMM is confusing with TMS"); *Edison Brothers Stores v. Brutting E.B. Sports-International,* 230 USPQ 530, 533 (TTAB 1986) (EB and EBS for shoes is likely to cause confusion because "confusion is more likely between arbitrarily arranged letters than between other types of marks").

In comparing the two marks, we note that the registrant's mark incorporates the entirety of applicant's mark. Likelihood of confusion is often found where the entirety of one mark is incorporated within another. *In re Denisi,* 225 USPQ 624, 626 (TTAB 1985) (PERRY'S PIZZA for restaurant services specializing in pizza and PERRY'S for restaurant and bar services); *Johnson Publishing Co. v. International Development Ltd., supra* (EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner); and *In re Sought Bend Toy Manufacturing Co., Inc.,* 218 USPQ 479, 480 (TTAB 1983) (LIL' LADY BUGGY for toy doll carriages and LITTLE LADY for doll clothing). In this case, the addition of the generic term "cola" to the arbitrary letters "BC"

may lead consumers to believe that B.C COLA is a variation or new product from registrant.[4] *Johnson Publishing Co. v. International Development Ltd.,* 221 USPQ 155, 156 (TTAB 1982)("the presence of the additional term 'DRUM' in applicant's mark would for many customers, serve only to suggest that this may be a new or special line of variation within opposer's 'EBONY' and 'EBONE' cosmetic groups").

Moreover, the initial letters "B" and "C" in applicant's mark B.C COLA are phonetically identical to the registered mark BC, and it is further apparent that these marks have the same meaning because they are an arbitrary combination. The period between the letters "B" and "C" in applicant's mark is inconsequential in a comparison of the sound, appearance, meaning, and commercial impression of the two marks. Accordingly, the similarity or dissimilarity of the marks is a factor that favors finding that there is a likelihood of confusion.

C. Balancing of the factors.

We find that because of the similarity of the marks and the similarity of the goods, there is a likelihood of confusion between applicant's mark B.C COLA for use in

[4] Accordingly, we are not persuaded by applicant's argument that consumers would expect manufacturers to consistently use descriptive terms such as "cola" or "fruit juice" as a part of their marks. Applicant's Brief, p. 4.

connection with colas and registrant's mark BC for a canned blend of fruit juices.

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