THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed:
August 7, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

_____

Trademark Trial and Appeal Board

_____

Miller Products Company

v.

Bomba Energia Getrankevertriebes GmbH

_____

Opposition No. 91159224
to application Serial No. 75932797
filed on March 1, 2000

Opposition No. 91165241
to application Serial No. 75437843
filed on February 20, 1998

_____

Marta S. Levine, David R. Cross and Lauri A. Rollings of Quarles & Brady LLP for Miller Products Company

Eugene R. Sawall and Gary A. Essmann of Andrus, Sceales, Starke & Sawall for Bomba Energia Getrankevertriebes GmbH

_____

Before Seeherman, Walters and Mermelstein, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

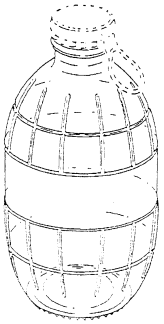
Miller Products Company (hereafter "opposer")[1] has opposed two applications filed by Bomba Energia

---

[1] The opposition to Application Serial No. 75932797 was initially filed by Miller Brewing Company. On August 10, 2004, the Board granted opposer's motion to substitute, opposer having

Getrankevertriebes GmbH (hereafter "applicant").

Application Serial No. 75932797 (hereafter "Bottle per se mark" is for the bottle design, shown below, for "beer; mineral water, carbonated water; and other alcohol-free beverages, namely, fruit juice beverages, fruit flavored soft drinks, sport drinks, sport drinks with electrolytes; concentrates, syrups and fruit juice beverages, fruit flavored soft drinks, sport drinks, sport drinks with electrolytes; concentrates, syrups and powders for the preparation of soft drinks, and all the aforesaid with the addition of mineral aggregates and vitamins" in Class 32.[2]



The application contains the following description of the mark:

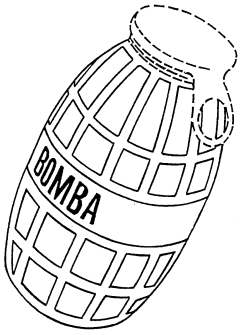
---

stated that on June 1, 2004 all title and interest in the trademarks owned by Miller Brewing Company were transferred to Miller Products Company. On May 17, 2005 the opposition to Application Serial No. 75437843 was filed by Miller Brewing Company and Miller Products Company. The opposition proceedings were subsequently consolidated on September 27, 2005, and Miller Products Company has been treated as the opposer since that date.

[2] Filed March 1, 2000, and currently based on Section 44(e) of the Trademark Act. The application also claims a right of priority under Section 44(d), giving it a priority date of September 13, 1999.

> The mark is a transparent bottle in the general shape of a barrel consisting of a central continuous substantially flat encircling middle portion with the upper and lower portions being similarly configured with intersecting [sic] the raised portions defining a like-rectangular portion above and below the raised portion.

The second application, No. 75437843, (hereafter "Bottle with BOMBA mark") is for the mark shown below for "nonalcoholic beverages, namely, mineral water, carbonated water; and other alcohol-free beverages, namely, fruit juice beverages, fruit flavored soft drinks, sport drinks, sport drinks with electrolytes; fruit juice beverages, fruit flavored soft drinks, sport drinks, sport drinks with electrolytes; concentrates, syrups and powders for the preparation of soft drinks, and all the aforesaid with the addition of mineral aggregates and vitamins" in Class 32.[3]



Applicant has submitted the following description of its mark:

[3] Filed February 20, 1998, based on Section 1(b) of the Trademark Act (intent-to-use).

> The mark consists of the three-dimensional configuration of a beverage container in the form of a barrel-shaped hand grenade, the beverage container has a center band that contains the stylized wording "BOMBA". The pull top is not a feature of the proposed mark.

Although separate notices of opposition were filed by opposer, essentially they contain the same allegations, namely, that opposer is engaged in the business of distributing and selling beer; that opposer and applicant are competitors in the business of brewing and marketing beverages; that since prior to the priority dates of applicant's applications and prior to any use by applicant of its marks, opposer has used a barrel-shaped bottle in connection with the marketing of its MICKEY'S brand beer; that opposer owns a registration for this bottle configuration; and that applicant's bottle designs so resemble opposer's bottle configuration as to be likely, when used in connection with applicant's goods, to cause confusion or mistake or to deceive. Opposer also requested, in its notice of opposition to Application Serial No. 75437843, that the opposition proceeding be consolidated with the previously brought opposition to Application Serial No. 75932797.

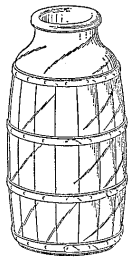
Applicant filed answers to the notices of opposition, and in its answer in Opposition No. 91165241 admitted that opposer is in the business of distributing and selling beer;

that Miller Products Company is the owner of trademarks used in connection with the distribution and sale of beer and licenses these trademarks to Miller Brewing Company; and that opposer and applicant are competitors in the business of brewing and marketing beverages. Applicant otherwise denied the salient allegations in both notices of opposition.

Pursuant to opposer's uncontested motion for consolidation, the Board consolidated these opposition proceedings on September 27, 2005.

The record consists of the pleadings; the files of the opposed applications; the testimony deposition, with exhibits, of David F. Dixon, a marketing director at Miller Brewing Company; and a copy of opposer's pleaded registration, No. 947679, for the bottle configuration shown below, for beer, submitted by opposer under a notice of reliance. This status and title copy shows that the registration is currently existing and that it is owned by Miller Products Company.[4]

[4] Registration issued November 21, 1972; Section 8 & 15 affidavits accepted and acknowledged. It is noted that the status and title copy of the registration states that there was a first renewal for a term of ten years from November 21, 2002. In point of fact, Office records, including a copy of the renewal certificate submitted as part of the status and title copy, show that a first renewal, for a term of ten years, occurred on November 21, 1992, and that the second renewal term began on November 21, 2002.



The registration bears the following description of the mark:

> The mark consists of the configuration of the bottle which is used as a container for the goods.

Applicant did not submit any evidence. Both parties filed appeal briefs, and opposer filed a reply brief. Applicant had originally requested an oral hearing, but subsequently withdrew that request; no oral hearing was held.

The only evidence we have relates to opposer and its use of its mark. The record shows that opposer uses a somewhat updated version of its registered bottle configuration for its MICKEY'S brand of beer, which is one of opposer's economy brands. It obtained this brand, including the bottle configuration, from Stroh's in 1999; that company in turn obtained it from the Heileman Brewing Company when it purchased that company in 1995 or 1996. Because of the importance of the bottle configuration, opposer, and its predecessor Stroh's, have used a depiction of the bottle configuration even on its cans of MICKEY'S beer since 1997. Sales of MICKEY'S beer have amounted to

approximately half a million barrels, or seven million cases, per year for the last ten years. Seventy-five to eighty percent of these sales are in the trademarked bottles. Opposer promotes its beer through stickers, posters, and case stackers that are used as point-of-sale displays.

Although opposer itself does not do so, many consumers refer to the bottle configuration as "the grenade, the "hand grenade" or the "green grenade." Opposer has made of record pages from various websites showing such references. These websites appear to carry personal opinions of ordinary people, and most are very casual in nature. For example, a webpage entitled "The Opinionated Beer Page," www.tobp.com, contains a review of Mickey's Fine Malt liquor from someone called Steve, which says that "it came in a 24 oz. 'silo,' not the 'Green Grenade' that we all knew and loved from our college days." The website Epinions.com, reviewing Mickey's Fine Malt Liquor, has the statement, "Mickeys has an incredibly smooth taste, whether it's out of a grenade, a 40, or even a 24 oz. Tallboy can, it's still undeniably smooth." A review of Mickey's Snack Bar by Sean states that "As for the drinks menu, the beer selection consists primarily of 'low-brow domestics' (according to The Official Chicago Bar Guide 2001), but does at least feature Mickey's Big Mouth. For those of you not sophisticated enough to

know, Mickey's Big Mouths is a fine malt liquor beverage served in small green, grenade-like glass bottles that often explode like grenades when hurled against a wall afterwards." www.chicagobarproject.com. An online article in The Kansas State Collegian, www.kstatecollegian.com, on the author's favorite drinks, says, in connection with Mickeys, "The smaller bottles are great, too, but watch out because their hand grenade style bottle makes it really tempting to throw one or two after you've thrown back one or two." A posting at http://granturismox.net/forum states that "me and my big bro chugged 2.40's each of mickey's hand grenades (these were obviously not the 'hand grenade' size) before arriving at the game."

The evidence of opposer's ownership of the bottle configuration registration, as well as the testimony of its witness about the similarity of applicant's bottle and the likelihood of confusion, establish opposer's standing. Further, in view of opposer's registration, priority is not in issue. King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). In any event, opposer's witness testified that opposer has used the bottle configuration since at least 1997, which is earlier than the 1998 and 1999 filing dates/priority filing dates of applicant's applications.

Thus, we turn to the issue of likelihood of confusion. 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, 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).

Opposer has identified five du Pont factors that are relevant to this present case: similarity or dissimilarity of the marks; similarity or dissimilarity of the goods; similarity or dissimilarity of trade channels; conditions under which and buyers to whom sales are made; and the fame of the prior mark. We note that applicant, in its brief, has addressed only the factors of similarity of appearance and the degree of care customers would take when purchasing the products.

We first consider the opposition proceeding against applicant's Bottle per se mark. This application includes, in its identification, "beer." This is the identical item

for which opposer's bottle configuration is registered. Thus, these goods are legally identical and therefore must be deemed to travel through the same channels of trade and be sold to the same classes of consumers. The du Pont factors of the similarity of the goods and channels of trade favor opposer.

We turn next to a consideration of the marks, noting that, when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines. Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Here, the marks themselves are extremely similar. Both are, of course, configurations of bottles, and both suggest a barrel shape, with both vertical and horizontal lines. Both also have a somewhat convex bulge in the middle. Although some differences can be discerned when the marks are compared on a side-by-side basis, that is not the proper test. Under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. Dassler KG v. Roller Derby Skate Corporation, 206 USPQ 255 (TTAB 1980). We also note that there is no evidence of third-party uses of similar bottle configurations, such that we can say that consumers would be used to noting small

differences between bottles and viewing such differences as distinguishing features.

Applicant argues that the marks are distinguishable because opposer's beer has always been marketed in a green bottle, while applicant's bottle configuration, as set forth in the description of the mark in the application, is "a transparent bottle." We agree that this difference would merit consideration if opposer were relying solely on its common law rights in the bottle configuration (and we discuss this point, infra, in connection with the Bottle with BOMBA mark), but opposer's registration does not limit its rights to a green bottle configuration. Rather, the protection granted by opposer's registration must be deemed to extend to a bottle design that is clear and/or transparent.

Accordingly, we find that the marks are similar, and that this du Pont factor favors opposer.

Because we have relied, in determining that the marks are similar, on opposer's registration and the rights inherent in that registration, we have not given any effect to the evidence of the strength of opposer's mark based on its use and advertising, since that evidence relates to opposer's use of a green-colored bottle.

We next consider the last du Pont factor that the parties consider relevant, that of the conditions of

purchase and the buyers to whom sales are made. There is no dispute that beer is a consumer item that is purchased by the public at large. Applicant has also conceded that the purchasers of the goods may be impulse buyers. ("Opposers have characterized the purchasers of the goods as impulse buyers. While this may be true to some degree…." Brief, p. 4). Applicant contends, however, that even someone making an impulse purchase will not completely ignore the packaging or the name displayed on that packaging. To the extent that applicant is asserting that additional information will appear on packaging or labels for the beer, that argument is unpersuasive. Given that opposer has made its registration of record, we must determine the issue of likelihood of confusion based on the mark shown in its registration and the mark for which applicant seeks registration. To the extent that applicant is referring to the word BOMBA which appears on the bottle configuration in its companion application, that word in not part of the mark at issue in Application Serial No. 75932797. Thus, if applicant were to obtain a registration for its applied-for mark, it would be entitled to use it without any word mark.

Finally, although neither party has addressed this, we note that opposer's witness was asked about any instances of actual confusion, and testified that he was not aware of any. However, because there is no evidence that applicant's

mark has even been used in the United States, we can draw no conclusion about the likelihood of confusion from the lack of evidence of actual confusion. Therefore, this du Pont factor is neutral.

Because all relevant du Pont factors are either neutral or favor a finding of likelihood of confusion, opposer's opposition to Application Serial No. 75932797 for the Bottle per se mark is sustained.

As for the opposition to the Bottle with BOMBA mark, again, applicant has argued only that the marks are different and that even impulse purchasers will be able to distinguish the marks. Considering first the du Pont factor of the similarity of the goods, applicant's identification is for non-alcoholic beverages, and specifically lists such types of beverages as carbonated water and fruit flavored soft drinks. Opposer uses and has registered its mark for beer. Although there are differences between beer and non-alcoholic beverages, both are, of course, beverages. In addition, opposer's witness testified that both opposer and other beer companies sell soft drinks as well as beer. For example, opposer's "Henry Weinhard's brand has a whole line of soft drinks, root beer, orange." Test, p. 20. There is also testimony about other companies that, for example, make both beer and root beer. Opposer's witness testified that if a confusingly similar bottle configuration were used for

a non-alcoholic beverage, consumers would assume that it was a line extension of opposer's MICKEY'S mark, or was a non-alcoholic drink from the makers of MICKEY'S. Although there is no evidence that beer companies offer both beer and soft drinks under the same mark, the fact that they offer both types of goods supports a finding that the goods are related. Moreover, applicant has not contended that the goods are not related. Accordingly, we treat this du Pont factor as favoring opposer.

As far as the factor of trade channels, opposer's witness testified that many of the distributors of opposer's MICKEY'S beer sell other beverages, including soft drinks. Again, applicant has not contested this, and we therefore treat this factor as favoring opposer.

This brings us to the factor of the similarity or dissimilarity of the marks. As we stated in our discussion of the Bottle per se mark, the configurations of opposer's and applicant's mark are very similar. However, applicant's Bottle with BOMBA mark also includes the word BOMBA. Opposer's witness testified that because this word would be perceived as the word "bomb," and the popular nickname given to opposer's bottle configuration is "the grenade," consumers would not distinguish the marks based on the presence of this word. We note that, according to the application file, BOMBA has no meaning, but is derived from

the German word for "bombastic." Response filed June 11, 1999. However, because BOMBA sounds and looks like the word "bomb," and because most people are unlikely to view "bomba" as the beginning letters of the German word "bombastitch," we agree with opposer that many consumers would view BOMBA in applicant's mark as a reference to "bomb." Further, because both "bomb" and "grenade" are words for weapons, and applicant itself describes its bottle configuration as being in the shape of a "hand grenade," BOMBA is likely to suggest a connection with opposer's "grenade" bottle mark. Moreover, it is a well-established rule that the addition of a trade name or house mark to one of two otherwise confusingly similar marks will not avoid the likelihood of confusion. See In re C. F. Hathaway Co., 190 USPQ 343 (TTAB 1976). In fact, where the marks are otherwise virtually the same, the addition of a house mark is more likely to add to the likelihood of confusion than to aid to distinguish the marks. Key West Fragrance & Cosmetic Factory, Inc. v. Mennen Co., 216 USPQ 168 (TTAB 1982).

Applicant has relied on three cases brought pursuant to Section 43(a) of the Trademark Act to support its contention that the inclusion of the word mark BOMBA on its bottle will avoid confusion. We find these cases, all of which involved the issue of unfair competition, to be distinguishable. For example, Braun, Inc. v. Dynamics Corp.

of America, 975 F.2d 815, 24 USPQ2d 1121 (Fed. Cir. 1992) involved the issue of trade dress infringement of the packaging for the parties' products, and the Court considered all aspects of the parties' cartons, saying that

> Braun identifies its product as a "hand blender" in horizontal red letters directly below the brand name "Braun" and the product named "Multipractic" in plain black lettering. The name Braun also appears in stylized black lettering on the white background at the bottom of the carton. In contrast, Waring refers to its product by its registered trademark "Blendor" preceded by the words "Hand Held" in vertical white lettering on a grey stripe of the front panel that is bordered by a red stripe. Its Waring name appears in logo form in white letters on a red rectangle. All of Waring's products, including its Juice Extractor and Vortex Blendor, share this trade dress, which Waring has used since 1985, that is one full year before the introduction of Braun's blender.

24 USPQ at 1131-32.

Thus, the plaintiff in that case did not have a trademark in the packaging separate from the house mark and product mark that appeared on the packaging, unlike the bottle configuration which is a registered trademark of opposer's. Rather, both parties were using house marks and product marks on their cartons. Further, the Court never considered that the plaintiff's packaging without the BRAUN or MULTIPRACTIC trademark could be inherently distinctive.

Even if we accept that the decisions cited by applicant can be said to support the position that the addition of a company's trade name to the packaging or trade dress of goods can serve to avoid confusion, the decisions are inapposite here. A major factor here, not present in those cases, is the similarity in connotation between the word that appears on applicant's bottle configuration, BOMBA, and the popular nickname for opposer's bottle configuration, the "grenade" or the "green grenade." Thus, the word BOMBA is not a distinguishing element, but would be viewed as relating to the opposer's bottle shape.

This nickname obviously is based not only on the shape, but the color, of opposer's bottle, so we must consider applicant's argument that the difference in color between the bottles, with opposer's being green and the applicant's being transparent, will avoid confusion. Although applicant's application does not limit its bottle to clear glass, it does describe it as being transparent, so if it is not clear, it must be of a pale color. For purposes of this discussion, we will treat the glass as being clear.

We agree with applicant that consumers will readily perceive the differences between a bottle that is green, and one that is clear. However, the question is not whether the bottle configuration marks can be told apart, but whether they will be perceived as indicating goods emanating from a

single source. In this case, given that there is no evidence of third parties that use similar bottle configurations, we think that consumers who are familiar with opposer's green "grenade" bottle for beer, and see non-alcoholic beverages sold in applicant's similar clear glass bottle, are likely to believe that these goods all emanate from the same source, and that opposer is using a clear version of its bottle for its non-alcoholic beverages. In other words, the clear color of the bottle will be seen as differentiating the goods, rather than the source of the goods.

Because of this, we are not persuaded by applicant's argument that impulse buyers will not be confused because they will note the coloring of the bottles and the name BOMBA on applicant's bottle.

Accordingly, we find that applicant's Bottle with BOMBA mark is likely to cause confusion with opposer's bottle configuration. In reaching this conclusion, we have not treated opposer's mark as famous or extremely strong. Although the bottle shape has clearly achieved some recognition as indicating the source of opposer's beer, and there are no third-party uses of similar bottle marks, the evidence regarding opposer's use and promotion is rather limited. For example, opposer has not provided any evidence about the degree of its advertising or promotion of the

mark, such as its advertising expenditures. Nor has opposer provided evidence about the geographic extent of its sales, or given any context for its sales figures, so that we could determine whether its sales are significant in the product category of beer. Thus, we have accorded the bottle configuration only the normal scope of protection for an inherently distinctive mark. However, even without evidence of fame, opposer is entitled to judgment based on the other du Pont factors discussed by the parties, all of which favor a finding of likelihood of confusion.

Decision: The oppositions are sustained.