

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB 1/19/99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Latrobe Brewing Company L.L.C.

v.

Prairie Rock Brewing Company

Opposition No. 105,401
to application Serial No. 74/717,364
filed on August 18, 1995

Paul Grandinetti of Cammarata & Grandinetti for Latrobe
Brewing Company L.L.C.

Douglas B. White for Prairie Rock Brewing Company.

Before Cissel, Hanak and Bucher, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Prairie Rock Brewing Company (applicant) seeks
registration of ROCK 'N RED for, beer and ale. The
application was filed on August 18, 1995 with a claimed
first use date of June 1, 1995.

On March 5, 1997 Latrobe Brewing Company L.L.C.
(opposer) filed a notice of opposition alleging, among other

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things, that prior to June 1995, it used the following marks for beer: ROLLING ROCK; ROCK; ROCK LIGHT; and ROCK BOCK. Furthermore, opposer alleged that applicant's mark ROCK 'N RED so resembles opposer's marks so as to be likely to cause confusion, mistake and deception.

Applicant filed an answer which denied the pertinent allegations of the notice of opposition.

The record in this case includes the testimony deposition with exhibits of Bradley A. Hittle (opposer's director of marketing). In addition, opposer properly made of record certified status and title copies of its registrations for the following marks (each depicted in typed capital letters) for beer: (1) ROLLING ROCK, Registration No. 1,215,134 (beer and ale); (2) ROCK, Registration No. 1,941,428; (3) ROCK LIGHT, Registration No. 1,941,933; and (4) ROCK BOCK, Registration No. 2,024,207. Applicant made of record no evidence.

Opposer filed brief. Applicant did not. Neither party requested a hearing.

At the outset, we note that priority is not an issue in this proceeding because opposer has properly made of record its typed drawing registrations of ROLLING ROCK, ROCK, ROCK LIGHT and ROCK BOCK. King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 118 (CCPA 1974). Moreover, the record demonstrates that long prior to 1995,

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opposer has made continuous use of all four of its marks. Indeed, opposer's ROLLING ROCK mark has been used in connection with beer since the 1930's, and opposer's ROCK mark has been used by consumers as a shortened form of ROLLING ROCK since at least the 1950's.

Turning to the only real issue in this proceeding, we note that in any likelihood of confusion analysis, two key considerations are the similarities of the goods and the similarities of the marks. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1978) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

Considering first the goods, we note that the goods of opposer's typed drawing registration for ROLLING ROCK and applicant's application for ROCK 'N RED are absolutely identical -- namely, beer and ale. In addition, the goods recited in opposer's typed drawing registration for ROCK, ROCK LIGHT and ROCK BOCK and applicant's application for ROCK 'N RED are in part identical -- namely, beer.

Turning to a consideration of the marks, we note at the outset that "when marks would appear on virtually identical goods or services, the degree of similarity [of the marks] 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). With this proposition in mind, we find that applicant's mark ROCK 'N RED is confusingly similar to, at a minimum, opposer's marks ROCK, ROCK LIGHT and ROCK BOCK. As applied to beer and ale, opposer's mark ROCK is totally arbitrary. Applicant has adopted opposer's arbitrary mark ROCK in its entirety and merely added thereto the connector 'N and, as applied to beer and ale, the descriptive word RED. With regard to this latter point, we have the uncontradicted testimony of Mr. Hittle who stated that as applied to beer and ale, or "red" not only describes the color of the beer and ale, but it also describes their "flavor characteristics." (Hittle deposition pages 18-19). Indeed, Mr. Hittle went on to note that opposer's ROCK BOCK beer is "reddish in color." (Hittle deposition page 19).

It need hardly be said "that one may not appropriate the entire mark of another and avoid a likelihood of confusion by the addition thereto of descriptive or otherwise subordinate matter." Bellbrook Dairies v. Hawthorn-Melody Farms Dairy, 253 F.2d 431, 432, 117 USPQ 213, 214 (CCPA 1958). We find that consumers familiar with opposer's ROCK, ROCK LIGHT and ROCK BOCK beers would, upon encountering ROCK 'N RED beer or ale would assume that said beer or ale is red in color and/or possess certain flavor

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characteristics, and that it comes from the same source as the other ROCK beers.

Moreover, it must be kept in mind that opposer's four registrations and applicant's application all feature the marks depicted in typed drawing form. This means that opposer's rights in its various ROCK marks and applicant's potential rights in its ROCK 'N RED mark are "not limited to the mark[s] depicted in any special form[s]." Phillip's Petroleum v. C.J. Webb, 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971). Accordingly, in any likelihood of confusion analysis, "the Board must consider all reasonable manners in which [the marks] could be depicted, in particular, the Board should give special consideration to the manners in which applicant [and opposer have] actually depicted" their marks. INB National Bank v. Metrohost Inc., 22 USPQ2d 1585, 1588 (TTAB 1992).

If applicant were to obtain a registration depicting its mark ROCK 'N RED in typed drawing form, then applicant would obtain rights to a wide array of depictions of this mark including, simply by way of example, featuring the word ROCK in large lettering on one line and the 'N RED portion of the mark in smaller lettering on second line. Indeed, if we look to the specimen of use which applicant submitted with its application (reproduced below), it is noted that the ROCK 'N portion of applicant's mark and the RED portion

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of applicant's mark are indeed separated by a rather large circle containing a design.

If applicant were to modify the above label somewhat so as to move the 'N portion of its mark to precede the RED portion of its mark and were further to enlarge the ROCK portion of its mark, then the result would be such that applicant's mark so extremely similar to opposer's ROCK marks that confusion would not merely be likely, but would be almost inevitable. In this regard, it should be remembered that because opposer's registrations of ROCK LIGHT and ROCK BOCK are in typed drawing form, opposer is quite free to depict these marks with the ROCK portion in large lettering on one line and the LIGHT and BOCK portions in smaller lettering on a second line. Moreover, opposer's registration of ROCK per se in typed drawing form is not restricted to any particular type of beer. Thus, opposer is

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free to depict its mark ROCK on one part of its label and to depict various generic or descriptive terminology on another part of the label. Indeed, in actual practice, opposer has done precisely this, as is shown by opposer's exhibits 2, 3 and 5 which are reproduced below.

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Decision: The opposition is sustained.

R. F. Cissel

E. W. Hanak

D. E. Bucher