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AUG. 18 ,99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Jamba Juice Company**

Serial No. 75/148,350

Jayne A. Peeters of Arter & Hadden LLP for Juice Club, Inc.

Geoffrey A. Fosdick, Trademark Examining Attorney, Law
Office **101** (Chris Wells, Managing Attorney).

Before **Cissel**, Seeherman and Walters, Administrative
Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On August 12, 1995, applicant's predecessor, Juice
Club, Inc., applied to register the mark "ORANGE ZINGER" on
the Principal Register for "fruit and vegetable juices," in
International Class 32. The application was based on
applicant's claim of first use and first use in interstate
commerce on September 28, 1995.

The Examining Attorney refused registration under
Section 2(d) of the Act, holding that applicant's mark, as

applied to the goods set forth in the application, so resembles five registered trademarks, all of which are owned by Celestial Seasonings Inc., that confusion is likely. The registered marks include the identical mark, "ORANGE ZINGER",¹ as well as the marks "RED ZINGER";² "LEMON ZINGER";³ "ZINGER";⁴ and "WILD BERRY ZINGER."⁵ The goods are listed in each registration as "herb tea." Registrations for the marks "ORANGE MANGO ZINGER";⁶ and "RASPBERRY ZINGER,"⁷ both for "tea," and both also owned by Celestial Seasonings Inc., were also mentioned in the first Office Action, but were not cited as bars to registration.

In support of the refusal to register, the Examining Attorney provided copies of five third-party registrations wherein the marks are registered for both fruit juices and

¹ Registration No. 1,481,773 issued on the Principal Register on March 22, 1988. The descriptive word "orange" was disclaimed; combined affidavit under Sections 8 and 15 received and accepted.

² Reg. No. 1,390,146 issued on the Principal Register on April 15, 1986. The descriptive word "red" was disclaimed; combined affidavit under Sections 8 and 15 received and accepted.

³ Registration No. 1,390,142 issued on the Principal Register on April 15, 1986. The descriptive word "lemon" was disclaimed; combined affidavit Under Sections 8 and 15 received and accepted.

⁴ Registration No. 1,515,651 issued on the Principal Register on Dec. 6, 1988; combined affidavit under Sections 8 and 15 was received and accepted.

⁵ Registration No. 1,834,824 issued on the Principal Register on May 3, 1994. The descriptive term "wild berry" was disclaimed.

⁶ Registration No. 1,948,634 issued on the Principal Register on Jan. 16, 1996. The descriptive term "orange mango" was disclaimed.

⁷ Registration No. 1,942,603 issued on the Principal Register on December 19, 1995. The descriptive word "raspberry" was disclaimed.

tea. Three of these registrations are based on use in commerce.

The Examining Attorney also required applicant to disclaim the word "ORANGE" apart from the mark as shown.

Applicant responded to the first Office Action by disclaiming the word "ORANGE," and arguing that no confusion is likely with respect to the cited registered trademarks. Applicant argued that the goods in the cited registrations are unrelated to, and uncompetitive with, the goods set forth in the application. Attached to applicant's response were copies of newswire articles referring to the fact that the registrant manufactures and markets pre-packaged tea.

The Examining Attorney considered applicant's arguments, but was not persuaded, and the refusal to register under Section 2(d) of the Act was continued and made final.

Applicant timely filed a Notice of Appeal, and both applicant and the Examining Attorney filed briefs. Applicant did not request an oral hearing, so the Board has resolved this appeal based on the written record before us.

Careful consideration of these materials leads us to conclude that confusion is likely in this case.

The Examining Attorney does not disagree with applicant concerning the test to be applied in determining whether confusion is likely. The predecessor to our principal reviewing court set forth that test in *In re E. I. Du Pont deNemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). As in many cases involving this issue, in the instant case key elements of the test are the similarity of the marks and whether the products with which applicant uses its mark are commercially related to the goods set forth in the cited registrations.

In this case the marks are, as noted above, in part identical. Applicant's mark is "ORANGE ZINGER," with the descriptive word "ZINGER" disclaimed, and one of the cited registered marks are the same. Additionally, each of the other four cited registered marks is either the word "ZINGER" by itself or the word "ZINGER" combined with different descriptive, disclaimed words. The word "ZINGER" is clearly the dominant component of each of these marks. Applicant's mark is similar to each of the registered marks because of this fact. These marks all create similar commercial impressions.

We turn, then, to the relationship of the goods set forth in the application with the goods specified in the cited registrations. The relationship between the goods

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does not need to be as close when both parties are using the same mark. *Ancor, Inc. V. Ancor Industries, Inc.*, 210 USPQ 70 (TTAB 1981). The issue here is not, as applicant argues, whether the differences between tea and fruit juices are clearly recognizable by consumers, or whether consumers would confuse the products. *Monarch Wine Co. v. Hood River Distillers, Inc.*, 196 USPQ 855 (TTAB 1977). The goods do not need to be the same, or even competitive, in order for confusion to be likely. In re *International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978). The issue is whether these goods are related in such a way that the use of the same or very similar marks on these products would lead prospective purchasers to conclude that they come from the same source.

We agree with the Examining Attorney that this record establishes consumers have a basis upon which to expect fruit juices and herb tea to emanate from a single source. The third-party use-based registrations submitted by the Examining Attorney show this. See In re *Albert Trostel & Sons, Inc.*, 29 USPQ2d 1783 (TTAB 1993), wherein this Board stated, at p. 176, that "... third-party registrations which individually cover a number of different items and which are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed

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goods and/or services are of a type which may emanate from a single source." The Board cited *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988), and the cases cited therein as support for this proposition.

Applicant's argument that the goods are not related is not persuasive. Applicant contends that its products are "freshly made fruit and vegetable juices" which are "sold at retail in specialty juices and smoothie stores" operated by applicant. Applicant goes on to explain that its drinks are made fresh and sold in sealed cups or containers, whereas the registrant's tea is sold in packaged bags containing dried tea leaves which are placed in water to make a tea drink.

We have no basis to contest applicant's contentions regarding these facts, but we are obligated to resolve the issue of likelihood of confusion based on the goods as they are identified in the application and respective registrations, without limitations or restrictions not reflected in the language therein. *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Because of the way the goods are identified simply as "herb tea" and "fruit and vegetable juices" in the cited registrations and application, respectively, we must assume that applicant's goods are sold through all appropriate channels of trade for fruit

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and vegetable juices, including the supermarkets in which herbal tea can be sold.

Any doubt as to whether confusion is likely would necessarily have to be resolved in favor of the registrant, and against the applicant, who had a legal duty to select a mark which is not similar to the marks already in use on related goods. *Burroughs Wellcome Co. v. Warner-Lambert Co.*, 201 USPQ 191 (TTAB 1979).

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

R. F. Cissel

E. J. Seeherman

C. E. Walters
Administrative Trademark Judges,
Trademark Trial & Appeal Board

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