

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB 1/13/00

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Royal Crown Company, Inc.  
v.  
Total Body Research & Development Ltd.

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Opposition No. 103,014  
to application Serial No. 74/676,665  
filed on May 15, 1995

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Parker H. Bagley of Baker & Botts, LLP for Royal Crown  
Company, Inc.

Charles T. Brodsky for Total Body Research & Development  
Ltd.

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Before Seeherman, Hanak and Holtzman, Administrative  
Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge:

Total Body Research & Development Ltd. (applicant)  
seeks to register in typed drawing form DIET RIGHT SYSTEMS  
for "food supplements containing minerals, vitamins, and  
proteins." The intent-to-use application was filed on May  
15, 1995.

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Royal Crown Company, Inc. (opposer) filed a notice of opposition alleging that long prior to 1995 it made continuous use of the mark DIET RITE in connection with soft drinks (including dietetic soft drinks). Continuing, opposer alleged that "applicant's mark is deceptively similar to opposer's mark so as to cause confusion and lead to deception as to the sponsorship of applicant's goods rendered under applicant's mark." (Notice of opposition paragraph 6).

Applicant filed an answer which denied the pertinent allegations of the notice of opposition, including in particular those contained in paragraph 6.

The record in this case consists of the testimony deposition (with exhibits) of Jeffrey H. Spencer, opposer's senior vice-president of marketing. Applicant made of record no evidence.

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

Opposer has established that priority of use rests in its favor in that it has made continuous use of the mark DIET RITE in connection with dietetic soft drinks since at least 1983. (Spencer deposition page 17).

In any likelihood of confusion analysis, two key considerations are the similarities of the marks and the similarities of the goods. Federated Foods, Inc. v. Fort

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Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)

("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 marks, we note that applicant has essentially taken the entirety of opposer's mark DIET RITE; altered the spelling of the second word; and added the word SYSTEMS thereto. The word SYSTEMS has very limited source identifying significance, and it has been quite properly disclaimed by the applicant. It is well established "that one may not appropriate the entire mark of another and avoid a likelihood of confusion by the addition thereto of ... subordinate matter." Bellbrook Dairies v. Hawthorn-Melody Dairy, 253 F.2d 431, 117 USPQ 213, 214 (CCPA 1958). We find that this legal proposition likewise applies to a situation, as is the case here, when one appropriates the entire mark of another and alters it ever so slightly by changing the spelling of RITE to RIGHT.

Moreover, it must be kept in mind that applicant seeks to register DIET RIGHT SYSTEMS in typed drawing form. This means that applicant's mark is "not limited to the mark depicted in any special form." Phillips Petroleum v. C.J. Webb, 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971). If applicant were to obtain a typed drawing registration of

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DIET RIGHT SYSTEMS, it would obtain the benefits of federal registration and yet be able to depict its mark with the DIET RIGHT portion in large lettering on one line and the SYSTEMS portion in much smaller lettering on a second line. When so depicted, applicant's mark would, in terms of visual appearance, be extremely similar to opposer's mark.

Moreover, no matter how depicted, applicant's mark is extremely similar to opposer's mark in terms of pronunciation and connotation in that both marks consist of or begin with the two words DIET RIGHT/RITE.

Turning to a consideration of the goods, it should be noted at the outset that when the marks are extremely similar, as is the case here, the degree of similarity of the goods necessary to support a finding of likelihood of confusion declines. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993).

Since at least 1983, opposer has promoted its DIET RITE dietetic soft drinks as healthy beverages containing no sodium, no caffeine and no calories. It has extensively advertised its DIET RITE dietetic soft drinks in health magazines such as American Health Magazine for Women and Walking. Moreover, it has advertised its DIET RITE dietetic soft drinks on television in connection with exercise (workout) shows. In addition, opposer has marketed its DIET RITE dietetic soft drinks by offering to consumers who

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purchase said soft drinks coupons entitling the consumers to discounts on vitamin tablets. In short, opposer's DIET RITE dietetic soft drinks are marketed not only to consumers interested in losing weight or maintaining their weight, but also to consumers who are interested in enjoying a healthy lifestyle.

As previously noted, applicant made of record no evidence. In addition, there is nothing to indicate that applicant has yet to begun use of its mark DIET RIGHT SYSTEMS in connection with food supplements containing minerals, vitamins and proteins. However, just from the description of applicant's goods in the application, it is clear that said food supplements would also appeal to consumers interested in a healthy lifestyle as well as consumers who, while dieting, wish to make certain that they get an adequate supply of minerals, vitamins and proteins. In short, applicant's goods and opposer's dietetic soft drinks are extremely similar in that they are both dietetic products which appeal to the same types of consumers. A consumer interested in losing weight may well choose to drink DIET RITE dietetic soft drinks and at the same time take DIET RIGHT SYSTEMS food supplements containing minerals, vitamins and proteins in order to make certain that they get an adequate supply of these essential nutrients while dieting. Moreover, given the fact that

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opposer has promoted its DIET RITE dietetic soft drinks by offering discount coupons for the purchase of vitamins tablets, it is quite plausible that a consumer familiar with DIET RITE dietetic soft drinks would, upon seeing DIET RIGHT SYSTEMS food supplements containing vitamins, assume that the latter product was sponsored by, endorsed by or otherwise affiliated with the makers of DIET RITE dietetic soft drinks.

Of course, to the extent there exists any doubt on the issue of likelihood of confusion, said doubt must be resolved in favor of opposer as the prior user.

Decision: The opposition is sustained.

E. J. Seeherman

E. W. Hanak

T. E. Holtzman  
Administrative Trademark  
Judges, Trademark Trial and  
Appeal