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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Cascade Clear Water Co.

Serial No. 75/154,274

John O. Graybeal and Stephen M. Evans of Graybeal Jackson &
Haley for Cascade Clear Water Co.

Karen Marie Strzyz, Trademark Examining Attorney, Law
Office 111 (Craig Taylor, Managing Attorney)

Before Seeherman, Bucher and Rogers, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Cascade Clear Water Co. has applied, pursuant to the
provisions of Section 2(f) of the Trademark Act, 15 U.S.C.
1052(f), to register CASCADE CLEAR as a trademark for
"flavored and unflavored bottled drinking water."¹

Registration has been finally refused pursuant to Section

¹ Application Serial No. 75/154,274, filed August 22, 1996,
asserting first use and first use in commerce in February 1990.

2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark CASCADE MIST, previously registered for "bottled drinking water and bottled sparkling artesian water,"² that, as used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.³

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs; an oral hearing was not requested.⁴

² Registration No. 1,909,413, issued August 1, 1995.

³ Applicant makes the argument that it is seeking registration pursuant to Section 2(f), not Section 2(d). Applicant is advised that Section 2(d) of the Act does not provide a basis for registration, but is a basis for refusal of registration. That is, Section 2(d) provides that a mark may not be registered if it "so resembles a mark registered in the Patent and Trademark Office...as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive." Section 2(f) provides a basis for registration of a mark which has become distinctive of the applicant's goods in commerce. However, Section 2(f) does not provide a basis for registration of any mark which is prohibited registration by Section 2(d). Rather, Section 2(f) provides a basis for registration of a mark prohibited from registration by Sections 2(e)(1), 2(e)(2) and 2(e)(4).

The Section 2(f) claim of acquired distinctiveness was accepted by the Examining Attorney in response to the requirement for a disclaimer of the word CLEAR, which the Examining Attorney asserted to be merely descriptive of applicant's goods. A Section 2(f) claim is acceptable to overcome a disclaimer requirement based on the ground of mere descriptiveness.

⁴ In her brief the Examining Attorney states that applicant attached, with its brief, copies of 13 trademark registrations, and points out that the record in an application should be complete prior to the filing of an appeal. The Examining Attorney is advised that the applications submitted with applicant's brief were previously submitted by the Examining Attorney in the Office action denying applicant's request for

Our determination 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). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. **Federated Food, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

With respect to the goods, they are in part identical, with both applicant's identified goods and those in the cited registration including bottled drinking water. Moreover, neither identification includes limitations as to channels of trade or classes of consumers. Thus, we must consider them to be sold in identical channels of trade to the same classes of consumers, which would include the public at large.

We turn, then, to a consideration of the marks, keeping in mind 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**

reconsideration, and therefore are of record even without the Examining Attorney's treating them of record.

America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Applicant's mark is CASCADE CLEAR; the cited mark is CASCADE MIST. Applicant has pointed out that both it and the registrant are from Washington, which is where the Cascade Mountains are found. Applicant appears to argue that because of the geographic significance of CASCADE, it should not be considered the dominant part of the two marks, and that the elements CLEAR, in its mark, and MIST, in the cited mark, are sufficient to distinguish the two marks when they are considered in their entirety.⁵ The Examining Attorney, on the other hand, points out that "cascade" per se is not a merely geographic term, and in fact has the meaning of "a waterfall or a series of small waterfalls over steep rocks."⁶ In support of her position, she has made of record both the dictionary definition and a number of registrations for marks containing or consisting solely of the word CASCADE which were registered without a disclaimer of "Cascade," and without resort to Section 2(f). Further, she points out that CLEAR is descriptive of

⁵ We say that this appears to be applicant's position because it devotes part of its brief to the argument that its mark is not primarily geographical, although such an assertion has never been made by the Examining Attorney.

⁶ The American Heritage Dictionary of the English Language, 3d ed. © 1992.

drinking water. As a result, she contends that CASCADE is the dominant part of both marks.

As the third-party registrations show, CASCADE, which has a well-recognized non-geographic meaning, is not considered to be a primarily geographically descriptive term. If consumers regard the word CASCADE in the marks as meaning a waterfall or series of waterfalls, this term would be viewed as the dominant part of both marks. Even applicant has acknowledged that "the modifiers 'CLEAR' and 'MIST'... themselves are not perhaps sufficiently distinctive to be of trademark significance..." Brief, p. 5. The marks are similar in appearance and pronunciation, both beginning with the identical word CASCADE. Moreover, the marks as a whole have a similar connotation, since both "mist" and "clear," as used in connection with the goods, refer to water. In this connection, "mist" is defined, inter alia, as "a mass of fine droplets of water in the atmosphere near or in contact with the earth"; "water vapor condensed on and clouding the appearance of a surface"; and "fine drops of a liquid, such as water..., sprayed into the air."⁷ "Clear," when used in connection with bottled water, describes the product, too, which is why, before applicant

⁷ The American Heritage Dictionary of the English Language, 3d ed. © 1992.

sought registration under Section 2(f), the Examining Attorney had required a disclaimer of this descriptive term.

Thus, CASCADE MIST and CASCADE CLEAR, used as trademarks for bottled water, both suggest that the water comes from a cascade.

Even assuming, *arguendo*, that the word CASCADE is regarded as a geographic reference to the Cascade Mountains, (and consumers outside the states of Washington and Oregon may very well not be aware of this reference), the marks CASCADE MIST and CASCADE CLEAR still convey similar commercial impressions. The word CASCADE in both marks has the same suggestive connotation of the Cascade Mountains while, as stated above, the additional words MIST and CLEAR, in marks used for bottled water, have the connotation of water. In addition to the similarities in appearance and sound resulting from the inclusion of the same initial word, both marks, taken as a whole, have the connotation of water from the Cascade Mountains.

Again, even assuming that the word CASCADE has a geographic suggestiveness as used in the two marks, suggestive marks are entitled to protection.⁸ Applicant's

⁸ To the extent that applicant is asserting that the term CASCADE is in general a weak mark because it has been the subject

mark CASCADE CLEAR is so similar to CASCADE MIST that, when used on identical goods, confusion is likely. We would also point out that the goods at issue, bottled water, are bought by ordinary purchasers, and that, because these goods are inexpensive, they will be bought without a great deal of thought.

Applicant has argued that there has been a long period of concurrent use of its mark and the cited mark without actual confusion. The registration claims a date of first use of September 1994, while applicant claims use since February 1990. Four years of concurrent use as of the time that examination ended, or four and one half years as of the time applicant filed its brief, is an insufficient period of concurrent use for us to conclude, from the lack of evidence of actual confusion, that confusion is not likely to occur. Moreover, we have not had an opportunity to hear from the registrant as to its experience vis-à-vis instances of confusion.

of many third-party registrations, we note that these registrations are, in general, for very different goods than those of applicant and the registrant, e.g., pet beds, clothing, stoves, patio doors. The only third-party registration for goods closely related to applicant's and the registrant's is CASCADE PRIDE for soft drinks; however, applicant's and the registrant's goods are closer to each other (in part identical!) than they are to soft drinks, and the connotations of applicant's and the registrant's marks are also more similar, since the additional element PRIDE in the third-party mark has no connotation of water.

Finally, applicant points out that it is the senior user of the mark, and that doubt should therefore be resolved in its favor. We reiterate that we have no doubt in this matter.⁹ For the reasons given above, we find that applicant's mark CASCADE CLEAR, used in connection with flavored and unflavored bottled drinking water, is likely to cause confusion with CASCADE MIST, used for bottled drinking water and bottled sparkling artesian water.

Decision: The refusal of registration is affirmed.

E. J. Seeherman

D. E. Bucher

G. F. Rogers
Administrative Trademark Judges
Trademark Trial and Appeal Board

⁹ Obviously, if applicant is, in fact, the senior user, it has the right to bring a cancellation action on the ground of priority and likelihood of confusion, provided that the cited registration is less than five years old. However, our determination of likelihood of confusion in this appeal must be based on the register as it currently exists, and the cited, previously registered mark remains a bar, under Section 2(d), to the registration of applicant's mark.