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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re D'Andrea Family Limited Partnership

Serial No. 78/082,130

Gregg R. Zegarelli of Zegarelli Technology &
Entrepreneurial Ventures Law Group for D'Andrea Family
Limited Partnership.

Matthew C. Kline, Trademark Examining Attorney, Law Office
(K. Margaret Le, Managing Attorney).

Before Simms, Cissel and Drost, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On August 31, 2001, applicant, a partnership organized
and existing under the laws of the Commonwealth of
Pennsylvania, filed the above-identified application to
register the mark APOLLO RIDGE on the Principal Register
for "wine," in Class 33. The basis for filing the
application was applicant's assertion that it possessed a

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bona fide intention to use the mark in commerce in connection with this product.

The Examining Attorney refused registration under Section 2(d) of the Lanham Act, 15 U.S.C. Section 1052(d), on the ground that the mark applicant seeks to register, APOLLO RIDGE, so resembles the mark APOLLO, which has already been registered¹ for wine, that if applicant were to use the mark it seeks to register in connection with the identical goods, confusion would be likely.

Applicant responded to the refusal to register with argument that confusion would not be likely, and attempted to amend the application to disclaim the terms "Apollo" and "Ridge" apart from the mark as shown.

The Examining Attorney was not persuaded by applicant's argument, and in his second Office Action, he made the refusal to register under Section 2(d) of the Act final. Additionally, he noted that applicant's request to disclaim both components of its mark was non-responsive and unacceptable, in that an applicant may not disclaim the entire mark it seeks to register.

¹ Reg. No. 1,626,226, issued on the Principal Register on Dec. 4, 1990 to Barcamerica International Corp. U.S.A. d/b/a Apollo Winery & Vineyards Corp.; assigned to Gino Barca as trustee of the Barcamerica International U.S.A. Trust; affidavit under Section 8 accepted; renewed.

Applicant timely filed a Notice of Appeal, along with its appeal brief. Attached to applicant's brief was a copy of what applicant asserted is a document showing that the Bureau of Alcohol, Tobacco and Firearms (BATF) had approved applicant to use the "brand name" APOLLO RIDGE on its wine. At the end of applicant's brief, applicant proposed, as an "alternative request," that if this additional evidence were considered to exceed "the scope of evidence, or was not,(sic) provided to the examiner, and if such information is necessary or appropriate to use in the review, then applicant hereby requests, pursuant to 37 C.F.R. Section 2.142 (d), to remand the application to the Examiner for further examination."

The Examining Attorney filed his appeal brief, objecting to the Board's consideration of the additional evidence appended to applicant's brief. Applicant filed a reply brief, arguing that it had requested suspension and remand for consideration of this evidence if the Examining Attorney determined that its submission was not proper.

Applicant did not request an oral hearing before the Board. Accordingly, we have resolved this appeal based on the written arguments and the record presented on appeal.

We have not considered the evidence applicant submitted with its brief. The record closes with the

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filing of the Notice of Appeal, and additional evidence may only be made of record after that with permission of the Board as a result of a request under Rule 2.142(d). Ordinarily, the Board does not grant such requests if the additional evidence sought to be made of record was available for timely submission prior to the appeal.

In the case at hand, the Notice of Appeal was filed on December 3, 2002. On its face, the evidence applicant sought to introduce with its brief indicates that four of applicant's APOLLO RIDGE labels were approved in 2001 and three were approved in January of 2002, so all of this information could have been timely submitted long before the appeal was filed. Accordingly, applicant's request for suspension and remand for consideration of this evidence is denied.

We hasten to note that in any event, this Board would not be bound by the decisions by the BATF to approve labeling anyway, so even if applicant had timely introduced evidence showing that that agency had approved the use of the mark in question on applicant's wine labels, the Patent and Trademark Office would not be bound by that evidence to reverse the refusal to register in this case. Whatever considerations led the BATF to issue the Certificates of Label Approval, the issue before that agency was not

registrability of APOLLO RIDGE as a trademark for wine on the Principal Register under Section 2(d) of the Lanham Act, which is the issue for our resolution in this appeal.

In resolving this issue, we must follow the guidance of our primary reviewing court, whose predecessor set forth the factors to consider in determining whether confusion is likely within the meaning of the Lanham Act in the case of *In re E.I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Chief among these factors are the similarity of the marks as to appearance, pronunciation, meaning and commercial impression and the similarity of the goods.

"When marks would appear on virtually identical goods or services, the degree of similarity between 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 6098, 1700 (Fed. Cir. 1992). In that applicant specifies the goods with which it intends to use the mark as "wine," and the goods named in the cited registration are the same, the degree of similarity between the marks necessary to support a conclusion that confusion would be likely is less than would be the case if the goods were not identical.

When applicant's mark is compared to the cited registered mark, the marks easily meet this level of similarity because they create similar commercial impressions. As the Examining Attorney points out, the test for likelihood of confusion is not whether the marks can be distinguished when subjected to side-by-side comparison, but rather whether they create similar overall commercial impressions. *Visual Information Institute, Inc., v. Vicon industries, Inc.*, 209 USPQ 179 (TTAB 1980). We must look to the likely recollection of the average purchasers of the goods in question here, who do not necessarily have perfect recall, and who normally would retain a general, rather than a specific, impression of a trademark. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). In that wine is a product frequently purchased by ordinary consumers, such purchasers, if familiar with registrant's APOLLO wine, would be likely, upon being presented with wine bearing applicant's APOLLO RIDGE mark, to assume that the same source is responsible for both.

Contrary to applicant's argument, the addition of the word RIDGE to the registered mark is insufficient to provide a basis upon which consumers are likely to distinguish between these two marks. As the courts and the

Board have held many times, the mere addition of a term to a registered trademark does not necessarily overcome the likelihood of confusion. See: Coca-Cola Bottling Co. v. Joseph E. Seagram & Sons, Inc., 526 F.2d 556, 188 USPQ 105 (CCPA 1975); and Lilly Pulitzer, Inc. v. Lilli Ann Corp., 376 F.2d 324, 153 USPQ 406 (CCPA 1967). Applicant argues that the mark it seeks to register creates a very different commercial impression from the one engendered by the cited registered mark because the addition of the word RIDGE results in the connotation of its mark being that of a geographical place, whereas the registered mark conveys the impression of a Greek god or a good looking man.

Thoughtful reflection upon these two marks might result in some prospective purchasers developing this kind of an understanding, but in view of the fact that wine is an ordinary consumer product which is not necessarily purchased with great care or deliberation by particularly sophisticated purchasers (although applicant, without any evidentiary support, maintains to the contrary), this record does not establish that a significant portion of such purchasers would be likely to distinguish between these marks on this basis. Instead, it is more likely that no particular deliberation or analysis would necessarily be employed when these products are purchased, and that the

ordinary people who shop for wine would be likely to assume, mistakenly, that the same source is responsible for both APOLLO wine and APOLLO RIDGE wine, perhaps because of the mistaken impression that APOLLO RIDGE wine is a particular line of wines produced by the makers of the APOLLO wines with which they may be familiar. When the marks are compared in their entireties, they create very similar commercial impressions.

Applicant contends that it is "a matter of record" that "the Assistant Commissioner has, through a high-level volume of registrations, deemed that the term 'apollo' is not fanciful or unique,"... but rather "is highly diluted and has been registered in many cases." This argument is unsupported by any evidence properly made of record in this application.

We have no doubt that in view of the cited registered mark, confusion would be likely if applicant were to use the mark it seeks to register in connection with wine. Even if we did have doubt, however, it is well settled that any such doubt would have to be resolved in favor of the registrant and prior user, and against the applicant, who, as the second comer, has a duty to select a mark which is not likely to cause confusion with a mark already in use by a competitor in the same commercial field. In re Hyper

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Shoppes, (Ohio), Inc., 837 F.2d 643, 6 USPQ2d 1025 (Fed. Cir. 1988).

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