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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re LBI Brands, Inc.

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Serial No. 78295721

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Jeffrey M. Becker of Haynes and Boone, LLP for LBI Brands, Inc.

Tracy Whittaker-Brown, Trademark Examining Attorney, Law Office 111 (Craig D. Taylor, Managing Attorney).

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Before Hairston, Rogers and Kuhlke, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by LBI Brands, Inc. to register the mark SOY20 (in standard character form) for goods ultimately identified as "flavored drinking waters; [and] non-alcoholic tea-based beverages containing soy isoflavones."<sup>1</sup>

The trademark examining attorney has refused

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<sup>1</sup> Application Serial No. 78295721, filed September 3, 2003, alleging a bona fide intention to use the mark in commerce. Applicant subsequently filed an amendment to allege use asserting dates of first use as of December 15, 2003.

registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the previously registered marks shown below,

**FRUIT<sub>2</sub>O**

for "non alcoholic beverages, namely, non carbonated fruit juices, fruit drinks, fruit punches, fruit cocktails and fruit flavored drinking water"<sup>2</sup>; and

**FRUIT<sub>2</sub>O ICE**

for "fruit flavored non-dairy frozen confections"<sup>3</sup>, both owned by the same entity, as to be likely to cause confusion.

Applicant and the examining attorney have filed briefs, but an oral hearing was not requested.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative

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<sup>2</sup> Registration No. 2,419,817 issued January 9, 2001. The registration contains the statements that "The mark consists of the word 'FRUIT' and the subscript 2 and a letter 'O'. The mark is presented without any claim as to any special form."

<sup>3</sup> Registration No. 2,848,822 issued June 1, 2004. In this registration, the words FRUIT and ICE are disclaimed apart from the mark as shown.

facts in evidence that are relevant to the factors set forth in *In re E. I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Turning first to the goods, the examining attorney argues that applicant's flavored drinking waters and tea-based beverages containing soy isoflavones and registrant's non-alcoholic beverages and frozen confections are identical in part and otherwise closely related. According to the examining attorney, "[b]oth parties sell flavored drinking water", and "[t]he remaining goods are closely related in that they serve as substitutes for one another." (Examining Attorney's brief, unnumbered p. 8).

Applicant, on the other hand, argues that the goods are dissimilar. Applicant maintains that both its flavored drinking waters and tea-based beverages contain soy isoflavones and therefore are different from the

registrant's non-alcoholic fruit beverages and frozen confections which do not contain soy isoflavones. Further, applicant argues that its goods are not frozen and therefore are different from registrant's confections which are frozen.

It is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used or intended to be used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods

or services. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

We consider first the relationship between applicant's "flavored drinking waters" and the goods in cited Registration No. 2,419,817 - "non alcoholic beverages, namely, non carbonated fruit juices, fruit drinks, fruit punches, fruit cocktails and fruit flavored drinking water." We note that applicant's flavored drinking waters are broadly identified. In the absence of any limitations or restrictions, we must assume that applicant's flavored drinking waters include fruit flavored drinking waters, and therefore, such waters are legally identical to registrant's fruit flavored drinking water. In fact, the examining attorney has made of record a printout of applicant's homepage which states, in pertinent part, that "SOY20 is a refreshing blend of fruit-flavored water with a healthy dose of 20 mg of natural soy isoflavones."

The examining attorney also has attempted to establish that applicant's flavored drinking waters, on the one hand, and registrant's fruit juices, fruit drinks, fruit punches,

and fruit cocktails, on the other hand, are related. In this regard, the examining attorney made of record, inter alia, a printout from the homepage of a school district which contains a list of "healthy beverages" approved by the school district. Among the beverages included on the list are fruit punch, plain drinking water, and flavored water. Presumably, the examining attorney submitted this list to show that such beverages are substitutes. Further, the examining attorney made of record copies of third-party registrations for marks that cover flavored drinking waters, on the one hand, and fruit juices and/or fruit drinks, on the other hand. See *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) [Although third-party registrations "are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may have some probative value to the extent that they may serve to suggest that such goods or services are the type which may emanate from a single source"]. See also *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993).

Further, we note that flavored drinking waters and fruit juices, fruit drinks, fruit punches, fruit cocktails and fruit flavored drinking water would be sold in the same channels of trade such as grocery stores, convenience stores and mass merchandisers to the same classes of purchasers, including the general public. Under the facts of this case, we conclude that flavored drinking waters are identical and otherwise related to fruit juices, fruit drinks, fruit punches, fruit cocktails and fruit flavored drinking water.<sup>4</sup>

We next consider the relationship between applicant's "flavored drinking waters" and "non-alcoholic tea-based beverages containing soy isoflavones" and the goods in cited Registration No. 2,848,822 - "fruit flavored non-dairy frozen confections." The examining attorney has pointed to no specific evidence in the record to support her position that these types of goods are related. Moreover, our review of the record herein shows only a single third-party registration that covers these types of goods. This single registration is insufficient to

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<sup>4</sup> In view of our findings with respect to applicant's flavored drinking waters and registrant's beverages, we need not discuss whether applicant's tea-based beverages, in particular, and registrant's beverages are related. See, e.g., *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981) and *Shunk Mfg. Co. v. Tarrant Mfg. Co.*, 318 F.2d 328, 137 USPQ 881 (CCPA 1963).

establish that flavored drinking waters and/or tea-based beverages, on the one hand, and frozen confections, on the other hand, are related goods. While we recognize that these types of goods are also sold in grocery stores, convenience stores and mass merchandisers to the general public, flavored drinking waters and tea-based beverages are different in nature from frozen confections. In sum, on this record, we are unable to conclude that they are related goods.

This brings us to a consideration of the marks. With respect to the marks, we must determine whether applicant's mark and registrant's marks, when compared in their entireties are similar or dissimilar, in terms of sound, appearance, connotation and commercial impression.

The examining attorney argues that applicant's mark SOY2O and each of the cited marks,

**FRUIT<sub>2</sub>O**

and

**FRUIT<sub>2</sub>O ICE**

are highly similar in sound, appearance, meaning and commercial impression because they are comprised of the

name of an ingredient, followed by "20" (pronounced "two-oh"). Further, the examining attorney argues that because the word ICE in one of the cited marks is descriptive, it is entitled to little weight in our likelihood of confusion analysis.

Applicant argues that its mark and each of the cited marks create different commercial impressions and that marks containing the term "20" for beverages are weak marks which are entitled to only a limited scope of protection.

Although applicant's mark and the cited marks have the element "20" in common, we agree with applicant that its mark and each of the cited marks convey different commercial impressions. We find the examining attorney's analysis to be too formulaic, i.e., all three marks comprise the name of an ingredient and "20." The different words FRUIT and SOY give the marks a different appearance and pronunciation. Further, the marks have different connotations. Applicant's mark SOY20 suggests a beverage which contains soy. Registrant's mark FRUIT20 suggests a fruit flavored beverage and registrant's mark FRUIT20ICE suggests a fruit flavored frozen confection. Thus, when applicant's and registrant's marks are compared in their entireties, they convey different commercial impressions. In reaching this conclusion, we have considered applicant's

argument that marks containing the term "20" are weak marks which are therefore entitled to only a limited scope of protection. Specifically, applicant maintains that the term "20", as applied to beverages, is so frequently used in marks for such goods that no one party may claim exclusive rights to "20" used on beverages. In support of its contention, applicant submitted copies of eight third-party registrations for marks for beverages which contain the designation "20". Although third-party registrations are not evidence of use of the marks therein, they are probative to the extent that they may show the meaning of a mark or a portion of a mark in the same way that dictionaries can. *Mead Johnson & Company v. Peter Eckes*, 195 USPQ 187 (TTAB 1977). The fact that the term "20" appears in a number of registered marks for beverages indicates that this term has a particular significance in the beverage field, and is not an arbitrary term. In this case, the various registrations of marks containing the designation "20" indicate that the term was chosen by the trademark owners as a shorthand reference to "H2O" to convey that their beverages consist of or contain water. Thus, we agree with applicant that registrant's marks are not entitled to a broad scope of protection. In view of the highly suggestive significance of "20", consumers are

not likely to believe that the marks involved herein indicate a single source simply because of the presence of this element in each mark.

In sum, we find that the term "20" is highly suggestive of beverages which consist of or contain water, and that registrant's marks are not entitled to a broad scope of protection. Further, we conclude that applicant's mark SOY20 projects a different commercial impression from each of registrant's marks. Thus, notwithstanding that applicant's flavored drinking waters and registrant's fruit flavored beverages are identical and otherwise related, there is no likelihood of confusion. Further, with respect to applicant's flavored drinking waters and tea-based beverages and registrant's fruit flavored non-dairy frozen confections, we find that in view of the cumulative differences in these goods and the marks, there is no likelihood of confusion.

**Decision:** The refusals to register on the ground of likelihood of confusion with the cited registrations are reversed.