

THIS OPINION IS NOT
A
PRECEDENT OF THE
TTAB

Mailed:
May 19, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re BWBC, Inc.

Serial No. 76711077

Justin M. Welch of Blazier, Christensen, Bigelow & Virr PC for BWBC, Inc.

Michael Webster, Trademark Examining Attorney, Law Office 102 (Mitchell Front, Managing Attorney).

Before Zervas, Ritchie and Gorowitz, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

BWBC, Inc. (“Applicant”) seeks registration on the Principal Register of the mark COW CREEK (in standard character form) for “beer” in International Class 32.¹

The Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), having determined that Applicant’s mark is likely to cause confusion or mistake or to deceive in view of (i) Registration

¹ Application Serial No. 76711077 was filed on March 30, 2012, pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming first use and first use in commerce on February 22, 2012.

Serial No. 76711077

No. 4529978 for the mark BULL CREEK BREWING (in standard character form)



and (ii) Registration No. 4529979² for the mark  (“Bull Creek Brewing and Design”),³ both for “beer, craft beer, and ales” in International Class 32. Both registrations are owned by Bull Creek Brewing LLC.

When the refusal was made final, Applicant filed an appeal. The appeal is fully briefed. We affirm the refusal to register.

Applicable Law

Our determination under Trademark Act § 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. See *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); see also *Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In considering the evidence of record on these factors, we keep in mind that “[t]he 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.” *Federated Foods, Inc. v.*

² Registered May 13, 2014.

³ Registered May 13, 2014. The description of the mark states, “The mark consists of the literal elements ‘BULL CREEK BREWING’ wherein there is an image of Longhorn cattle head inside the oval, cattle horns separated by words ‘BULL CREEK’ and the word ‘BREWING’ written below the head as shown in the mark.”

Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see also In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014).

Similarity of the Goods, Channels of Trade and Classes of Consumers

The goods (beer) are identical in part. We therefore must presume that the channels of trade and classes of purchasers are the same. *See In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011). *See also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion). The classes of consumers for beer include adults in the general beer-drinking population.

Purchaser Care and Consumer Sophistication

The Examining Attorney argues that beer is a low cost every-day impulse product that is purchased casually; and that courts have found consumers of low-cost alcoholic beverages to be unsophisticated purchasers.⁴ Indeed, when products such as beer are low priced and subject to impulse buying without careful consideration,⁵ the risk of likelihood of confusion increases because purchasers are held to a lesser standard of purchasing care. *See Recot, Inc. v. M.C. Becton*, 214 F.3d

⁴ Examining Attorney's Brief at unnumbered pp. 8-9.

⁵ See September 22, 2014 Response, ex. I ("The price for the ... two pack will probably be around \$7").

1332, 54 USPQ2d 1894 (Fed. Cir. 2000). This factor, too, weighs in favor of a finding of likelihood of confusion.

Similarity or Dissimilarity of the Marks

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). *See also San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA

1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion”). However, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, “there is nothing wrong in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on a consideration of the marks in their entirety.” *In re National Data Corp.*, 224 USPQ at 751.

In addition, our primary reviewing Court has stated “[w]hen 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 America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). In this case, because the goods are identical in part, “the degree of similarity necessary to support a conclusion of likely confusion declines.”

With these principles in mind, we turn to the Applicant’s mark and registrant’s word mark. Both marks contain the term CREEK as their second terms. The cited mark also contains the word BREWING, which is a highly descriptive, if not generic, term for beer and which has been disclaimed in the cited registrations. Merely descriptive and generic terms are accorded less weight in forming the commercial impression of a mark, *see Motion Picture Assoc. of America, Inc. v. Respect Sportswear, Inc.*, 83 USPQ2d 1555, 1561 (TTAB 2007) (RATED R SPORTSWEAR for clothing confusingly similar to RATED R mark for film ratings), thus the term BREWING does not distinguish the marks.

The meaning of COW and BULL are the subject of much discussion in Applicant's and the Examining Attorney's briefs. We therefore review the evidence that exists in the record regarding the meaning of these terms:

Definition of "cow"

Dictionary.com

1. the mature female of a bovine animal, especially of the genus *Bos* ...
3. *Informal*: a domestic bovine of either sex and any age;⁶

The American Heritage Dictionary

1. The mature female of cattle of the genus *Bos*. ...
3. A domesticated bovine of either sex or any age;⁷

Collins American English Dictionary

1. the mature female of domestic cattle (genus *Bos*), valued for its milk ...
3. (*US & Western US*) a domestic bovine animal, whether a steer, bull, cow, or calf;⁸ and

Webster's Ninth New Collegiate Dictionary

1. a : the mature female of cattle (genus *Bos*)
- 2 : a domestic bovine animal regardless of sex or age.⁹

Webster's Ninth New Collegiate Dictionary

⁶ Dictionary.com based on *Random House Dictionary*, (2012), July 13, 2012 Suspension Notice at 8.

⁷ *The American Heritage Dictionary of the English Language* (5th ed.), Oct. 22, 2014 Final Office Action at 9.

⁸ *Collins American English Dictionary* (online), Oct. 22, 2014 Final Office Action at 11.

⁹ *Merriam-Webster* (online), Oct. 22, 2014 Final Office Action at 13.

1. : the mature female of cattle (genus *Bos*) or of any animal the male of which is called bull (as the moose) 2 : a domestic bovine animal regardless of sex or age¹⁰

Definition of “bull”

Webster’s New Collegiate Dictionary

The male of any bovine species, or of certain other animals, as the elk, moose, elephant, or whale. Cf. cow.¹¹

Macmillan Dictionary

1. An adult male of the cattle family

An adult male cow¹²

Cambridge Dictionaries Online

a male cow, or the male of particular animals such as the elephant or the whale¹³

The Examining Attorney concludes from this evidence:

[T]he wording COW CREEK and BULL CREEK are highly similar in connotation and commercial impression because they both signify a creek named for a bovine. Based on the foregoing definitions, the general commercial impression of “cow” would include any domestic bovine regardless of gender.¹⁴

Applicant points out that there are different definitions for the term “cow” in the dictionaries, and that the order that the definitions appear in the dictionaries control. Specifically, Applicant notes that the primary definitions indicate that “cow” is the female animal; and it is not until the third definition that any of them

¹⁰ *Webster’s Ninth New Collegiate Dictionary*, September 22, 2014 Response, ex. G at 14.

¹¹ *Webster’s New Collegiate Dictionary*, July 30, 2012 Response, ex. D at 18.

¹² *Macmillan Dictionary*, Macmillan Publishers Limited 2009-2014, September 8, 2014 Office Action at 7.

¹³ *Cambridge Dictionaries Online*, September 8, 2014 Office Action at 10.

¹⁴ Examining Attorney Brief at unnumbered p. 12.

include the gender neutral definition. Some definitions in the record do not have the gender neutral definition at all. In addition, Applicant points to its evidence from Wikipedia explaining the purpose of the numbering (“Some dictionaries include each separate meaning in the order of most common usage while others list definitions in historical order, with the oldest usage first.”) and from *Webster’s Dictionary* explaining that the order of definitions within an entry is historical. According to Applicant “[r]egardless of methodology, the most understood definition is listed first – *i.e.* it is either the ‘most common usage,’ the one used in the English language the longest and therefore most well[-]known, or both.” As to the designation of “*informal*” for a definition, Applicant maintains that the Examining Attorney has not provided evidentiary support that the average consumer of beer would recognize this definition, and that such a conclusion is “contrary” to Applicant’s evidence.¹⁵

Applicant also mentions other evidence it has introduced into the record to support its position that the meaning and commercial impression of “cow” and “bull” and hence, the marks, are different and that the public will distinguish the two:

- an article from the *Huffington Post*¹⁶ reporting that Wynkoop Brewery is making “Bull Testicle Beer” (not “Cow Testicle Beer”) which incorporates bull testicles as an ingredient. According to Applicant, this “is evidence of how the ‘average purchaser of beer’ defines the two terms.”¹⁷
- a Wikipedia article¹⁸ stating “[j]ust downstream from the mouth of Cow Creek is the mouth of Bull Creek,” along with a screen shot of

¹⁵ Applicant's Brief at 7-8.

¹⁶ Sept. 18, 2018 Response, ex. I.

¹⁷ Applicant's Brief at 9.

¹⁸ Wikipedia article at 7-8, ex. B to July 27, 2012 Response.

the two rivers from Google Earth showing them 11 miles apart. According to Applicant, “cows and bulls are sufficiently different words that people would not confuse the two and think the two creeks were the same. They will similarly not confuse the two beers.”¹⁹

- screenshots from the website www.cattle-exchange.com. According to Applicant, not once are “cows” referred to as gender neutral.²⁰

- screenshots of a website from LSU’s veterinary school demonstrating use of the terms “cow” and “bull” based on gender, and not in the “informal” sense.

After careful consideration of the arguments and evidence, we find that the marks considered as a whole are more similar than different. Several definitions in the record provide that “cow” is used to refer to both male and female bovines. Whether it is the first or third meaning in the dictionary is not of great concern; what matters is what the public understands the meaning to be in a particular context. We are not troubled by the fact that some of these definitions label this definition as “informal”; such a designation does not mean that the definition is rare, or not applied today. In addition, the definitions of “bull,” e.g., “an adult male cow” or “male cow,” support the contention that “cow” is used to refer to both male and female bovines. Applicant’s conclusions regarding the meanings and commercial impressions of “bull” and “cow” based on its evidence in the record are largely based on inferences, and certainly are not as persuasive of the multiple and consistent definitions of “cow” taken from authoritative dictionaries.

In sum, we find that the meanings of the marks are similar, with the term “cow” encompassing a male bovine, and both marks having the arbitrary term “creek” as

¹⁹ Applicant's Brief at 11.

²⁰ Sept. 18, 2014 Response, ex. 8.

their second term. The commercial impression of the marks are also similar, both referring to a creek named after a bovine.²¹

Turning now to Applicant's mark and the Bull Creek Brewing and Design mark, the wording in this composite mark, and especially the wording BULL CREEK, is the dominant portion of the mark, which will make the greatest impression on consumers. *See Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) ("The words dominate the design feature."); *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586-87 (TTAB 2007) ("If a mark comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services."). Moreover, the design component of registrant's mark is essentially the face of a bull, which reinforces the term BULL in registrant's mark. The addition of the words "BREWING" to Applicant's design mark is not sufficient to avoid a likelihood of confusion. It is well-settled that adding highly descriptive or generic matter to another's mark will not avoid a likelihood of confusion. *See Motion Picture Assoc. of America, Inc. v. Respect Sportswear, Inc.*, 83 USPQ2d at 1561. For the reasons discussed above regarding the similarity of the wording in the marks, we find Applicant's mark and registrant's combination word and design mark to be similar in meaning and commercial impression.

²¹ As noted, the term BREWING is a highly descriptive or generic term. It hence does little in distinguishing the marks.

Conclusion

We have found that the goods are identical in part and that the trade channels and classes of consumers are identical. We have also found the marks to be similar in commercial impression and meaning. We therefore find that Applicant's mark COW CREEK for "beer" is likely to be confused with registrant's cited marks, BULL CREEK BREWING and BULL CREEK BREWING and Design, for "beer, craft beer and ales."

Decision: The refusal to register Applicant's mark under Section 2(d) of the Trademark Act is affirmed.