

## iPHONE vs. DRIPHONE

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Apple recently opposed registration of the trade mark DRIPHONE for a range of phone accessories. *Hayden Crowther v. Apple Inc.*, [2013] NZIPOTM 48 (Dec. 16, 2013).

Mr. Hayden Crowther had filed a trade mark application for DRIPHONE, to cover “waterproof electronics cases, including cases for mobile phones,” in Class 9. Apple Inc. opposed on the basis of its well-known iPHONE trade marks and its family of “i”-prefixed trade marks. Apple viewed DRIPHONE as an obvious play on its iPHONE brand and argued that the similarity of the two marks would cause consumers to believe the applicant’s waterproof mobile phone cases were made, licensed or endorsed by Apple.

The Assistant Commissioner found that the applicant’s phone cases and Apple’s phones were complementary goods and would likely be sold in the same types of shops within the same departments. The Assistant Commissioner also found there was “an implicit reference” in DRIPHONE to iPHONE and that the reference was a likely factor that influenced the applicant in selecting DRIPHONE as a trade mark.

However, the Assistant Commissioner also considered that consumers would view the applicant’s mark as comprising a DRI prefix and a PHONE suffix, so the mark would be read as DRI-PHONE, not DR-IPHONE. “DRI” would be immediately recognized by consumers as an obvious misspelling of “dry,” a word visually and phonetically different from the “i” prefix in iPHONE, and this finding was determinative.

That is, despite finding an implicit reference to the opponent’s iPHONE mark and that the iPHONE mark had likely been a factor influencing the applicant’s choice of DRIPHONE as a brand for his products, the Assistant Commissioner determined that those factors were not sufficient to create a mistaken impression of business connection between the two marks. This aspect of the decision is consistent with established principles that intention typically is irrelevant in trade mark matters in New Zealand.

However, it is interesting to consider whether the opposition would have been decided differently had the applicant wished to register the mark for mobile phones.

Also, the decision confirms that merely causing a consumer to think of another mark is not enough to prevent use or registration. Rather, a consumer needs to be taken further, so as to be likely to believe there is a business connection between the two marks.

Apple has filed an appeal. The appeal hearing is scheduled for August 2014.

*This article was written by John Glengarry (partner) and Ella Franklin (solicitor) for the International Trademark Association INTA bulletin (April 1, 2014 Vol. 69 No. 7).*

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