

What's Kühler Than Kühl? No Likelihood of Confusion

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Addressing unfair competition claims under the Lanham Act, the US Court of Appeals for the Tenth Circuit concluded that no reasonable juror would confuse an alcohol distributor's use of the word "kühl" with use of a similar mark by a clothing company. *Alfwear, Inc. v. Mast-Jägermeister US, Inc.*, Case No. 21-4029 (Fed. Cir. Sept. 7, 2023) (**Holmes**, Kelly, Carson, JJ.)

Alfwear has used the mark KÜHL on its outdoor apparel line since 1993 and has registered the mark in connection with apparel, wine and beer. Mast-Jägermeister US (MJUS), a German herbal liqueur distributor, began incorporating "kühl" into its advertisements on billboards, commercials and digital advertising in phrases such as "kühl as ice" and "drink it ice kühl." In response, Alfwear filed suit against MJUS, asserting trademark infringement and unfair competition. The district court granted MJUS's motion for summary judgment, finding that there was no likelihood of confusion because all but one factor for assessing likelihood of confusion supported MJUS. Alfwear appealed.

Alfwear argued that the district court erred by not concluding that MJUS's use of the word "kühl" was likely to cause confusion with Alfwear's use of the essentially the same word. To determine whether a likelihood of confusion exists, the following factors must be considered:

- The degree of similarity between the marks
- The intent of the alleged infringer in adopting its mark
- Evidence of actual confusion
- Similarity of products and manner of marketing
- The degree of care likely to be exercised by purchasers
- The strength or weakness of the marks.

The Tenth Circuit found that the two marks were not similar in sound, meaning or appearance, and that MJUS only used “kühl” in association with other MJUS marks. The Court explained that Alfwear often depicts the KÜHL mark alongside a logo of a shield-type shape containing a stylized, snow-covered mountain peak in the colors brown, black and white against a bright blue sky. In contrast, MJUS uses the word “kühl” in phrases such as “kühl shots” or “kühl as ice,” on top of a black or green background and accompanied by a combination of either the mark JÄGERMEISTER, the Jägermeister logo or images of a Jägermeister bottle.

The Tenth Circuit also found that MJUS did not intend to copy Alfwear’s mark, explaining that MJUS was not aware of Alfwear’s trademark when designing the new advertising campaign, and noting that when MJUS became aware of the trademark, MJUS intended to avoid infringement by not placing the mark on its apparel or liquor products. The Court also determined that there was insufficient evidence of actual confusion. Alfwear presented anecdotal evidence from Alfwear executives who had heard about confusion from individuals and survey evidence that demonstrated consumers experienced an approximately 30% chance of confusion. The Court found that the anecdotal evidence was *de minimis* and found that the survey was not designed properly because the products were not shown to survey participants as they would appear in the marketplace and used leading questions. The Court also found that the two products were not similar, consumers exercised a higher degree of care when purchasing Alfwear’s expensive apparel products as opposed to

MJUS's alcohol products, and the KÜHL mark was not commercially strong as it did not draw a connection in the mind of the consumer from the mark to the product. Thus, the Court affirmed the district court's finding of summary judgment.

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