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ejs

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Tone Products, Inc.

Serial No. 75/894,470

John W. Chestnut of Greer, Burns & Crain, Ltd. for Tone Products, Inc.

Darlene D. Bullock, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney)

Before Seeherman, Hohein and Hairston, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Tone Products, Inc. has appealed from the final refusal of the Trademark Examining Attorney to register PIT BOSS as a trademark for "steak sauce and barbecue sauce."¹ Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark PIT BOSS, previously

¹ Application Serial No. 75/894,470, filed January 12, 2000, and asserting first use and first use in commerce on April 26, 1999.

Ser No. 75/894,470

registered for "restaurant and pub services,"² as to be likely, when used on applicant's goods, to cause confusion or mistake or to deceive.

The appeal has been fully briefed; applicant did not request an oral hearing.

We affirm the refusal of registration.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in **In re E. I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the marks, they are identical. Applicant argues that the cited mark, PIT BOSS, is entitled to a limited scope of protection because the word PIT refers to a barbecue pit and the word BOSS is laudatory. We disagree. The mark PIT BOSS is a catchy, noticeable mark because it has a double entendre--the suggestion that it is the "boss" or best product for barbecue (pit)

² Registration No. 1,421,555, issued December 16, 1986; Section 8 affidavit accepted; Section 15 affidavit received.

cooking, and the common dictionary meaning of "pit boss" as "an employee who supervises the gambling in a casino."³

Moreover, there is no evidence that third parties are using such a mark, or a similar mark, for similar goods or services. Thus, we consider the registrant's mark to be a strong mark, and entitled to a broad scope of protection.

The fact that applicant's mark is identical to the cited mark "weighs heavily against applicant." **In re Martin's Famous Pastry Shoppe, Inc.**, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984). When the marks in question are identical, their contemporaneous use can lead to the assumption that there is a common source "even when [the] goods or services are not competitive or intrinsically related." **In re Shell Oil Co.**, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). Thus, when marks are identical, it is only necessary that there be a viable relationship between the goods or services in order to support a holding of likelihood of confusion. **In re**

³ The American Heritage Dictionary of the English Language, 3d ed. © 1992. The Board takes judicial notice of this definition, which the Examining Attorney submitted with her appeal brief. The Board may take judicial notice of dictionary definitions. **University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.**, 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Ser No. 75/894,470

Concordia International Forwarding Corp., 222 USPQ 355
(TTAB 1983).

In this case, the Examining Attorney has shown that the goods and services are intrinsically related. The Examining Attorney has made of record numerous third-party registrations showing that entities have registered their marks for both restaurant services and sauces, including barbecue sauce. See, for example, Registration No. 1,766,098 for WILBER'S for barbecue sauce and restaurant services; Registration No. 1,716,133 for ROCKLANDS for barbecue sauce and catering and restaurant services; Registration No. 1,393,421 for STUBBY'S BBQ for bar-b-que sauce and restaurant and catering services; Registration No. 2,395,642 for COWBOY STEAKS for meats, sauces and restaurant services; Registration No. 2,285,540 for DOWN 'N DIRY BAR B Q for prepared sauces, seasonings and marinades, and restaurant and catering services; and Registration No. 1,764,732 for COTTON-EYED JOE'S for seasonings for meat, meat tenderizers, barbecue sauce, picante sauce and restaurant services.

Third-party registrations which individually cover a number of different items and services and which are based on use in commerce, as are the above-noted registrations, serve to suggest that the listed goods and/or services are

of a type which may emanate from a single source. See **In re Albert Trostel & Sons Co.**, 29 USPQ2d 1783 (TTAB 1993).

Applicant's contends, in response to the evidence of the third-party registrations, that "many multiple class registrations include unrelated goods from distinctly different classes." Brief, p. 2. That may be true in the abstract, such as when a large company or department store registers its house mark for all of the different items it sells. However, in this case the vast majority of the third-party registrations submitted by the Examining Attorney, including those we have listed above, are primarily for sauces and restaurant services.

It is also common knowledge that many restaurants bottle their own formulations of sauces and sell them under the same mark as the restaurant.

Applicant asserts that there is no per se rule that foods items and restaurant services are related. We agree. However, the Examining Attorney's position is not based on reliance on a so-called per se rule. Rather, the Examining Attorney has submitted evidence to show the relatedness of applicant's goods and the services in the cited registration.

The Examining Attorney has also cited a number of cases in which food items and restaurant services have been

Ser No. 75/894,470

found to be related. We will not discuss each of the cases here, but will merely comment that in general we do not find applicant's attempts to distinguish the cases to be persuasive. In particular, applicant appears to take the position that there must be evidence that the registrant itself sells the goods that are identified in applicant's application, namely steak sauce and barbecue sauce. Suffice it to say that this is not correct. It is sufficient if the Office shows that steak sauce and barbecue sauce are items which can emanate from the same source as restaurant services. The Office has adequately done so in this case.

Decision: The refusal of registration is affirmed.