

THIS DISPOSITION IS NOT
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OF THE TTAB

Mailed: March 31, 2004
Paper No. 10
RFC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re H. D. King, Inc.

Serial No. 76320516

David M. Carter of Carter Schnedler & Monteith, P.A., for
H. D. King, Inc.

Steven R. Fine, Examining Attorney, Law Office 107 (Chris
A.F. Pedersen, Managing Attorney).

Before Cissel, Seeherman and Quinn, Administrative
Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On October 2, 2001, applicant, a North Carolina
corporation, filed the above-identified application to
register the mark shown below



on the Principal Register for "restaurant services," in Class 42. The application was based on applicant's claim of use of the mark in connection with these services in interstate commerce since November of 1981.

In addition to raising several informalities, the Examining Attorney refused registration under Section 2(d) of the Lanham Act, 15 U.S.C. Section 1052(d), on the ground that applicant's mark, as used in connection with restaurant services, so resembles the mark shown below,



which is registered¹ for "fast food restaurant services," in Class 42, that confusion is likely.

¹ Reg. No. 1,707,362 issued on the Principal Register to Joe & Nemo of Boston, Inc. on August 11, 1992; Section 8 affidavit received; renewed. The registration includes a disclaimer of the term "hot dog."

Responsive to the first Office Action, applicant amended the application to disclaim the exclusive right to use the term "HOT DOG" apart from the mark as shown and argued that the refusal to register under Section 2(d) was not well taken. Applicant contended that the words "the Hot Dog Kings" in the cited registered mark constitute a laudatory term which indicates that the restaurant is the king of or the top seller of hot dogs. Applicant took the position that as such, that part of the cited registered mark, the only element in common with applicant's mark, is weak in trademark significance and should be accorded a narrow scope of protection.

Applicant submitted a list of seven third-party registrations and two third-party applications for marks which it claimed include the assertedly weak phrase. Applicant argued that these applications and registrations establish that "HOT DOG KING(s)" is weak in source-identifying significance and should therefore be accorded a narrow scope of protection.

Ordinarily, the submission of such a list would not be considered as evidence of the existence of the registrations listed therein, but because the Examining Attorney responded to the list as if it were such evidence, the Board has considered it as well.

Applicant maintained that in view of the established weakness of the term "HOT DOG KING(s)" and the overall differences between its mark and the cited registered mark, when each is considered in its entirety, confusion is not likely.

The Examining Attorney was not persuaded by applicant's arguments, and in his second Office Action, he made the refusal to register under Section 2(d) of the Act final.

Applicant timely filed a Notice of Appeal. Both applicant and the Examining Attorney filed appeal briefs and applicant filed a reply brief, but applicant did not request an oral hearing before the Board.

In the case of *In re E.I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), the predecessor to our primary reviewing court set out the factors to be considered in determining whether confusion is likely. Chief among these factors are the similarities between the marks as to appearance, pronunciation, meaning and commercial impression, and the similarity of the goods or services, as they are set forth in the application and the registration, respectively.

Based on careful consideration of the record and the written arguments before us in this appeal, we hold that

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confusion is unlikely because these marks, when considered in their entireties, create different commercial impressions.

Although the services recited in the registration and the application overlap, the marks are quite different. We must consider the marks in their entireties, but it is nonetheless reasonable to recognize the fact that some components of the marks, for one reason or another, have more source-identifying significance than the other components. *Techtronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915,189 USPQ 693 (CCPA 1976); *In re El Torrito Restaurants Inc.*, 90 USPQ2d 2002 (TTAB 1988). The likely recollection of the average purchaser of the respective goods or services is what must be considered in resolving the issue of likelihood of confusion. *Spoon's Restaurants, Inc. v. Morrison, Inc.*, 23 USPQ2d 1735 (TTAB 1981), *aff'd*, No. 92-1086 (Fed. Cir. June 5, 1982); *In re Steury Corp.*, 189 USPQ 353 (TTAB 1975).

Application of these principles to the facts presented by the instant case leads us to conclude that applicant's mark does not resemble the cited registered mark enough for confusion to be likely. The dominant element of the mark applicant seeks to register is clearly the word portion, "the hot dog King." The graphic representation of a

personified hot dog holding a crown only reiterates or amplifies these words. On the other hand, the most prominent element of the cited registered mark is the names "Joe & Nemo." The notation "Since 1905" and the laudatory phrase "The Hot Dog Kings" appear in much smaller lettering between the two crown designs. When customers recall the cited mark and use it to refer to or to recommend registrant's restaurant services, they are likely to call the restaurant "Joe & Nemo's," rather than "The Hot Dog Kings." We simply do not think that patrons of registrant's restaurant are likely to remember "The Hot Dog Kings" portion of the mark, any more than they will remember the notation above it, "Since 1905." We base this conclusion on the laudatory, suggestive nature of "The Hot Dog Kings" and on the less prominent way the phrase is presented in the registered mark.

In summary, given the relatively small effect the suggestive, laudatory phrase "The Hot Dog Kings" has in creating the commercial impression for the registered mark, confusion with applicant's mark is unlikely.

Decision: The refusal to register under Section 2(d) of the Act is reversed.