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Mailed:
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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Volume Services America, Inc.

Serial No. 78313276

Karen A. Jeffers of Jeffers & Ireland, Professional
Corporation, for Volume Services America, Inc.

Richard F. White, Trademark Examining Attorney, Law Office
113 (Odette Bonnet, Managing Attorney).

Before Hairston, Bucher and Zervas, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Volume Services America, Inc. seeks registration on
the Principal Register of the following mark:



for services identified in the application as "concession stands, retail kiosks, roving vendor services featuring foods, beverages, souvenirs, novelties and/or sundries" in International Class 35.¹

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register this mark based upon Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). The Trademark Examining Attorney has found that applicant's mark, when used in connection with the recited services, so resembles the following mark:



¹ Application Serial No. 78313276 was filed on October 14, 2003 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce. An Amendment to Allege Use (AAU) was filed on March 21, 2005, claiming use anywhere and use in commerce at least as early as September 1, 2004, accompanied by a specimen, which is a photograph showing applicant's mark used in connection with a concession stand (*infra*, p. 16).

registered for "restaurant services" in International Class 42,² as to be likely to cause confusion, to cause mistake or to deceive.

Applicant and the Trademark Examining Attorney fully briefed the case, but applicant did not request an oral hearing. We affirm the refusal to register.

Applicant argues that: when these two marks are compared in their entireties, they simply are not that similar; because applicant has included its "Centerplate" house mark within its composite design, this removes any possibility that consumers would be confused as to the source of the services provided under the TOP DOG mark; the services provided by applicant and the markets in which those services are rendered are totally different from the restaurant services provided by registrant; the cited mark is not a strong mark as applied to restaurant services, and hence, is not entitled to a wide scope of protection; and finally, that any protection afforded to the cited registration has been eroded due to the encroachment of other similar marks and the lack of vigilance of its owner in policing its trademark rights.

² Registration No. 1792053 issued to Franchises Unlimited, Inc., on September 7, 1993, claiming first use anywhere and first use in commerce at least as early as March 1, 1991; Section 8 affidavit accepted; renewed. Registrant disclaimed the words FAST FOODS apart from the mark as shown.

By contrast, the Trademark Examining Attorney contends that: the dominant feature of both marks is the wording TOP DOG; the addition of applicant's house mark will increase the likelihood of confusion rather than distinguish the marks; applicant's services and registrant's services are closely related in that they both involve the sale of food; many fast-food and casual dining restaurants have made a common practice of establishing food stands and kiosks under their respective restaurant marks; the alleged limited geographical scope of registrant's two small restaurants is not a factor for consideration herein; applicant has not shown that the cited mark is weak; and finally, even if the cited mark is not entitled to a broad scope of protection, under the statute and trademark case law, it is still entitled to protection against registration by a subsequent user of a similar mark for closely related goods or services.

Likelihood of confusion analysis

Our determination under Section 2(d) is based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. 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 relationship of the goods or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

The marks

We turn first to the du Pont factor focusing on the similarity of the marks in their entirety. The Trademark Examining Attorney argues that the commercial impression created by applicant's mark is highly similar to that of the registered mark:

Registrant's mark:



Applicant's mark:



Of course, under actual market conditions, consumers generally do not have the luxury of making this kind of side-by-side comparison. Rather, the proper test in determining likelihood of confusion must be based on the similarity of the general overall commercial impressions

engendered by the involved marks. See Puma-Sportschuhfabriken Rudolf Dassler KG v. Roller Derby Skate Corporation, 206 USPQ 255 (TTAB 1980).

While we compare the marks in their entirety, our primary reviewing Court has held that in articulating reasons for reaching a conclusion on the question of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature or portion of a mark. That is, one feature of a mark may have more significance than another. See Sweats Fashions Inc. v. Pannill Knitting Co., 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); and In re National Data Corporation, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

When a mark such as applicant's consists of a word portion and a design portion, the word portion is more likely to be impressed upon a purchaser's memory. Therefore, the word portion is normally accorded greater weight in determining likelihood of confusion. In re Dakin's Miniatures Inc., 59 USPQ2d 1593, 1596 (TTAB 1999); In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987); and Amoco Oil Co. v. Amerco, Inc., 192 USPQ 729 (TTAB 1976).

We find that the dominant features of both marks are the two words, TOP DOG. As to the cited mark, the wording FAST FOODS is descriptive of the recited restaurant services (and has been disclaimed). Hence, these words have minimal significance as a source identifier. While applicant makes much of the presence of the wording, "A Centerplate Brand," on its composite mark, this wording appears in such small lettering that many consumers may well overlook it.

As to sound, these two words, TOP DOG, would be used in calling for both applicant's and registrant's services. As to connotation, both marks convey the same laudatory suggestion of being "the leader," or "the best." Alternatively, in the context of applicant's and registrant's services, the marks may suggest the availability of hot dogs.

As to appearance, both place the word "Top" directly above the word "Dog." However, applicant argues that its mark "contains a unique and prominent design element" clearly missing from registrant's mark. We find that applicant's addition of this design element and the slight stylization in the lettering of registrant's mark cannot serve to distinguish the marks or obviate the likelihood of confusion.

In response to applicant's claim that the addition of its house mark ("A Centerplate Brand,") will obviate a likelihood of confusion, the Trademark Examining Attorney argues as follows:

[W]here marks are otherwise virtually the same, the addition of a house mark is more likely to add to the likelihood of confusion than to distinguish the marks. Key West Fragrance & Cosmetic Factory, Inc. v. Mennen Co., 216 USPQ 168 (TTAB 1982). It is likely not only that the two products sold under these marks would be attributed to the same source but also that purchasers would mistakenly assume that both were products of applicant by virtue of its use of A CENTERPLATE BRAND with the shared wording TOP DOG. See In re Dennison Mfg. Co., 229 USPQ 141, 144 (TTAB 1986), citing Menendez v. Holt, 128 US 514 (1888) ["It is a general rule that the addition of extra matter such as a house mark or trade name to one of two otherwise confusingly similar marks will not serve to avoid a likelihood of confusion between them."]; A.T. Cross Co., v. Jonathan Bradley Pens, Inc., 470 F.2d 689, 176 USPQ 15 (2nd Cir. 1972); W.E. Bassett Co. v. Revlon, Inc., 435 F.2d 656, 168 USPQ 1 (2nd Cir 1970); Hat Corp. of America v. John B. Stetson Co., 223 F.2d 485, 106 USPQ 200 (CCPA 1955); Hammermill Paper Co. v. Gulf States Paper Corp., 337 F.2d 662, 143 USPQ 237 (CCPA 1964).

We agree with the Trademark Examining Attorney that this Centerplate tagline, if seen, increases the likelihood of confusion. Given the highly similar commercial impressions created by these marks, customers who are acquainted with applicant's composite mark, including those

aware of applicant's tagline, "A Centerplate Brand," for concession stands, retail kiosks and roving vendor services featuring foods and beverages, would be likely to believe, upon encountering registrant's similar TOP DOG mark for its restaurant services, that such services emanate from, or are sponsored by or associated in some way, with, TOP DOG, "A Centerplate Brand." Should applicant's use of this designation for its services become widespread, the confusion that might arise could well be that of "reverse confusion." As explained by our principal reviewing Court:

The trademark law not only protects the consumer from likelihood of confusion as to commercial sources and relationships, but also protects the registrant and senior user from adverse commercial impact due to use of a similar mark by a newcomer. The term "reverse confusion" has been used to describe the situation where a significantly larger or prominent newcomer "saturates the market" with a trademark confusingly similar to that of a smaller, senior registrant for related goods or services. ...

The junior user does not seek to benefit from the goodwill of the senior user; however, the senior user may experience diminution or even loss of its mark's identity and goodwill due to extensive use of a confusingly similar mark by the junior user.

In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1688, 1690 (Fed. Cir. 1987). Yet applicant argues, based on its research, that registrant has only two fast food restaurants located in small towns in the foothills of

western North Carolina. If we accept this allegedly limited geographical reach of registrant's restaurant services as fact, registrant's size does appear to pale in comparison with applicant, who touts its forty years of managing food and beverage concessions at high-volume sports, entertainment and convention venues. Applicant's headquarters are also located in a neighboring state to registrant's restaurants. Accordingly, we find that reverse confusion with applicant's mark becomes highly likely as to the mark in the cited registration.

Thus, although there are some differences in the marks, we find that the marks are similar in their entireties as to appearance, sound, connotation and commercial impression.

The services

As noted earlier, applicant's services are recited as "concession stands, retail kiosks, roving vendor services featuring foods, beverages, souvenirs, novelties and/or sundries," while registrant's services are recited as "restaurant services."

The Trademark Examining Attorney has placed into the record third-party registrations as well as Internet evidence showing that food stands, kiosks and restaurants

are commonly marketed under the same service marks. The third-party registrations include the following examples:

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| CHARLIE CHIANG'S | for "concession stands featuring Asian cuisine and restaurant franchising" in International Class 35; and "catering and restaurant services" in Int. Class 43; ³ |
| SCORE AMORE | for "concession stand services featuring food" in International Class 35; and "restaurant services" in Int. Class 43; ⁴ |
| FRESH ATTRACTIONS | for "restaurant services and concession stands featuring food and beverages" in International Class 42; ⁵ |
| BIG BOY | for "restaurants; catering; concession stands featuring food and souvenirs" in International Class 42; ⁶ |
| WAFFLE WORLD | for "restaurant services and retail food services; namely, distribution of food products through restaurants, kiosks, portable and mobile locations" in Int.Cl. 42; ⁷ |
|  | for "concession stand and roving vendor services featuring foods, beverages, souvenirs, novelties and/or sundries" in International Class 35;" and "catering, food preparation, contract food services and providing foods, beverages, souvenirs, novelties and/or sundries in cafeterias, carry-out restaurants, restaurants, bars, and lounges," in International Class 42. ⁸ |

³ Reg. No. 2866170, issued to Charlie Chiang's, Inc. on July 27, 2004.

⁴ Reg. No. 2774857 issued to Levy (IP) Limited Partnership Levy GP Corporation on October 21, 2003.

⁵ Reg. No. 2438641 issued to HMSHost Corporation on March 27, 2001.

⁶ Reg. No. 1823393 issued to Elias Brothers Restaurants, Inc. on February 22, 1994, Section 8 affidavit accepted, Section 15 affidavit acknowledged; renewed.

⁷ Reg. No. 2307642 issued to Waffle World Ltd. on January 11, 2000, Section 8 affidavit accepted, Section 15 affidavit acknowledged.

⁸ Reg. No. 2433973 issued to Volume Services America Holding, Inc. on March 6, 2001. This registration is actually owned by applicant.

GO GOURMET! for "concession stands, retail kiosks and roving vendor services featuring foods, beverages, souvenirs, novelties and/or sundries" in International Class 35; and for "catering, food preparation, contract food services in cafeterias, sports stadiums, arenas, convention centers, carryout restaurants, restaurants, bars and lounges" in International Class 43.⁹

As argued by the Trademark Examining Attorney, these third-party registrations have probative value to the extent that they serve to suggest that the services listed therein are of a kind that may emanate from a single source. See *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-1218 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 at n.6 (TTAB 1988).

The Trademark Examining Attorney's Internet evidence shows that national restaurant chains such as Carl's Jr., KFC, Pizza Hut, Domino's Pizza and Taco Bell, often complement their traditional restaurants with kiosks and stands, and that they often place these smaller outlets within large recreational venues such as sports stadiums. An article from *Recreation Management Magazine* submitted by the Trademark Examining Attorney with one of the Office actions asserts that managers of athletic stadiums and

⁹ Reg. No. 2914967 issued to Volume Services America Holding, Inc. on December 28, 2004. This registration too is owned by applicant.

other recreation facilities can increase the profitability of the venue's food services operations by adding "name brand" snack bars and "full fledged" restaurants to their mix of concessions. While applicant concedes that the Trademark Examining Attorney has provided specific instances where restaurant services are marketed under the same service mark as concession services, applicant disagrees with his conclusion that these services are "commonly marketed" under the same service marks.

However, based upon all of the evidence in this record, we find that applicant's recited services are closely related to registrant's services. In addition to the obvious fact that both restaurant services and concession services involve the sale of prepared foods to members of the general public, the Trademark Examining Attorney has demonstrated that it is not unusual for fast-food and casual dining restaurants to operate food stands and kiosks under the same marks used to promote their restaurants. Conversely, from several other subsisting registrations owned by applicant (see VOLUME SERVICES AMERICA and GO GOURMET!, *supra*), it is clear applicant itself is also in the restaurant business. On its website, applicant touts its ability as a concessionaire to partner

with local restaurants and chefs in the area around any of its sports facilities.

Channels of trade

In looking at the similarity or dissimilarity of established, likely-to-continue trade channels, in the absence of any limitations, we must presume that registrant and applicant offer their respective services in all the normal channels of trade to all the usual classes of purchasers, namely to ordinary consumers, including those consumers seeking food in low cost restaurants. Registrant may indeed offer restaurant services to diners in two small communities in North Carolina, while applicant offers food and beverages at smaller outlets like roving vendor and concession stands and retail kiosks. However, other than suggestions about the relative size of the establishments drawn from the plain meanings of the words in the respective identifications of goods, there are no limitations as to channels of trade. Presumably one of applicant's roving vendor stands could be located right next door to one of registrant's restaurants, competing directly with registrant for its dining customers. In this situation, there clearly is an overlap in the channels of trade.

As argued by the Trademark Examining Attorney:

... the geographical extent of applicant's and registrant's activities is not a proper factor for consideration here. In re Shell Oil Co., [992 F.2d 1204] 26 USPQ2d 1687, 1689-90 (Fed. Cir. 1993); In re Infinity Broadcasting Corp. of Dallas, 60 USPQ2d 1214 (TTAB 2001); In re Appetito Provisions Co. Inc., 3 USPQ2d 1553, 1554 n.4 (TTAB 1987).

Under Section 7(b) of the Trademark Act, the cited registration enjoys a presumption of an exclusive right to nationwide use of the registered mark regardless of its actual extent of use. Trademark Act Section 7(b), 15 U.S.C. §1057(b). See Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 1568, 218 USPQ 390, 393 (Fed. Cir. 1983); and Amcor, Inc. v. Amcor Indus., Inc., 210 USPQ 70, 77 (TTAB 1981). Moreover, applicant is also seeking a geographically-unrestricted registration. Hence, applicant's discussion of the alleged limited geographical scope of registrant's activities is not relevant to our likelihood of confusion determination herein.

Similar marks in use on similar goods or services, and the extent to which applicant has a right to exclude others from use of its mark

Turning to the du Pont factors focusing on the number and nature of similar marks in use on similar goods or services and the extent to which registrant has a right to exclude others from use of its mark on its services,

applicant argues that the cited registration is not entitled to a wide scope of protection.

To the extent TOP DOG may be seen as laudatory (e.g., the best, a leader), when viewed on the spectrum of distinctiveness, it is clearly not an arbitrary mark. Moreover, applicant argues that the word "Dog" in registrant's mark could suggest that hot dogs may be one of the items sold at a Top Dog Fast Foods restaurant. By the same token, we find that applicant's TOP DOG mark¹⁰ would seem to suggest the availability of hot dogs even more

forcefully - especially as seen on the specimens of record where the TOP DOG mark identifies a food concession stand "featuring" Hebrew National brand ¼ pound hot dogs.



Applicant argues that a search of the Principal Register reveals four other active registrations for the mark TOP DOG, one of which is a registration for "sports bar, grill and dance club services" [Reg. No. 2578144]:

¹⁰ We note that the composite image or logos shown in this specimen of record differs in several ways from the mark shown in the drawing. Here, the words TOP and DOG are in a straight line rather than being on top of each other, and this presentation does not have a large pictorial image of a hot dog and bun behind the words TOP DOG as is shown in the drawing of record.

TOP DOG

for "wieners" in International Class 29.¹¹



for "canned dog food" in International Class 31;¹²

TOP DOG

for "address books, address labels, photograph albums, scrapbook albums, announcement cards, autograph books, baby books, grocery bags, party bags, paper bags, sandwich bags, bank checks, paper banners, book covers, children's activity books, coloring books, memorandum books, notebooks, science fiction books, paper boxes, calendars, greeting cards, playing cards, caricatures, cartoons, disposable diapers, diaries, easels, gift wrap, paper bows, newsletters in the specific fields of comedy and music, writing pads, sketch pads, scratch pads, pencil cases, pencils, picture books, pictures, postcards, posters, cartoon prints, pictorial prints, drawing rulers, paper table cloths, paper napkins, and trading cards featuring cartoon characters, namely a group of singing dogs" in International Class 16.¹³

¹¹ Reg. No. 0796054 issued to Sigman Meat Company, Inc., on September 14, 1965 based on registrant's claim of use at least as early as May 19, 1963; renewed. This registration had initially also been cited against applicant by the Trademark Examining Attorney but was later withdrawn during the course of prosecution.

¹² Reg. No. 1150000 issued to Western Family Foods, Inc. on March 31, 1981 based on registrant's allegations of use at least as early as June 1974; Section 8 affidavit accepted, Section 15 affidavit acknowledged; renewed.

¹³ Reg. No. 2072187 issued to Craig Huxley on June 17, 1997 based on registrant's use in commerce since at least as early as November 1994; Section 8 affidavit accepted, Section 15 affidavit acknowledged.

TOP DOG

for "sports bar, grill and dance club services" in International Class 42.¹⁴

As argued by the Trademark Examining Attorney, two of these registrations are not probative inasmuch as they cover unrelated goods (e.g., dog food, and paper products featuring images of singing dogs). Applicant finds it particularly significant that this latest intervening registration, covering sports bar and grill services, issued after the cited registration issued, while also acknowledging that generally third-party registrations have little probative value in this context. Applicant concludes, nonetheless, that these multiple, third-party registrations - when combined with the other du Pont factors it scores in its favor - are an indication that the cited mark is entitled to a narrow scope of protection. Furthermore, applicant argues that in addition to previous decisions by other Trademark Examining Attorneys, registrant has ostensibly acquiesced in the co-existence of a number of quite similar registrations, causing a serious "erosion" of protection for the cited registration.

Of course, while the United States Patent and Trademark Office (USPTO) strives for consistency, each case

¹⁴ Reg. No. 2578144, issued to Top Dog America's Bar & Grill, Inc. on June 11, 2002 based on registrant's use in commerce since at least as early as June 22, 1999

must be decided on its own facts and record. We are not privy to the records in the files of the intervening registered marks. Furthermore, even if faced with these records, previous decisions by Trademark Examining Attorneys in approving other marks are without evidentiary value and are not binding on the USPTO or on this Board. In re Sunmarks Inc., 32 USPQ2d 1470 (TTAB 1994); and In re National Novice Hockey League, Inc., 222 USPQ 638, 641 (TTAB 1984). Moreover, even weak marks are entitled to protection against registration by a subsequent user of a confusingly similar mark for closely-related services. See Hollister Incorporated v. Ident A Pet, Inc., 193 USPQ 439 (TTAB 1976).

Likelihood of Confusion conclusions

In conclusion, we find that the marks are confusingly similar, that the services are closely related, that there could be an overlap in the channels of trade, and that in spite of several TOP DOG third-party registrations, it is most consistent with the statute and past cases to accord the cited registration the scope of protection to which it is entitled, and find in this *ex parte* appeal that the cited registration serves as a bar to applicant's TOP DOG mark under Section 2(d) of the Lanham Act.

Decision: The Trademark Examining Attorney's refusal to register the instant mark based upon a likelihood of confusion in connection with the cited registration, under Section 2(d) of the Lanham Act, is hereby affirmed.