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PRECEDENT OF THE TTAB

Mailed:
8 September 2008
AD

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Robert C. Juliano

Serial No. 78357694

Stephan P. Gribok of Duane Morris LLP for Robert C.
Juliano.

Amos T. Matthews, Trademark Examining Attorney, Law Office
117 (Loretta C. Beck, Managing Attorney).

Before Walters, Drost, and Zervas, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On January 26, 2004, applicant Robert C. Juliano filed
an intent-to-use application to register the mark LLOYD'S
COFFEE HOUSE in standard character form on the Principal
Register for services currently identified as "coffee shop
services, namely, serving high-end gourmet coffee, teas and
other non-alcoholic beverages, doughnuts, pastries and
other light snacks in an atmosphere of social and community

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exchange" in Class 43. Serial No. 78357694. Applicant has disclaimed the term "Coffee House."

The examining attorney has refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) because of a prior registration for the mark LLOYD'S (in typed or standard character form) for restaurant services.¹

When the refusal was made final, applicant filed several requests for reconsideration and this appeal.

The examining attorney argues that the services are very similar and that "applicant has incorporated the mark in the cited registration and added a generic designation which could not be registered. The mere addition of a generic designation to LLOYD'S is not sufficient to overcome a likelihood of confusion." Brief at unnumbered pp. 5 and 8.

Applicant maintains that "LLOYD'S is a weak mark for restaurants, just as STEVE'S was in *Steve's Ice Cream v. Steve's Famous Hot Dogs*, 3 USPQ2d 1477, 1478 (TTAB 1987)." Reply Brief at 2. In addition, applicant also argues that

¹ Registration No. 1121210, issued June 26, 1979. Renewed.

"coffee-houses and Registrant's restaurant are distinctly different categories of establishment." Reply Brief at 4.²

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003); and *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We begin by addressing whether the marks are similar. "The first *DuPont* factor requires examination of 'the similarity or dissimilarity of the marks in their

² In his Reply Brief (p.2, n.1), applicant has referred to an "online search engine, onelook.com, of electronic dictionaries" regarding the term Lloyd as a given name. We normally do not take judicial notice of online dictionaries that are submitted for the first time on appeal. *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999). Inasmuch as the record should be complete prior to appeal, we will not consider this particular evidence. 37 CFR § 2.142(d).

entireties as to appearance, sound, connotation and commercial impression.'" *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). In this case, the marks are LLOYD'S and LLOYD'S COFFEE HOUSE. Both marks are shown in typed or standard form so there is no difference in the stylization of the marks. LLOYD'S is either the initial or only term in the marks. Therefore, the only difference in the marks is applicant's addition of the words "Coffee House" to registrant's mark LLOYD'S.

While applicant has additional words in its mark, he has disclaimed all the words that are not identical to registrant's mark, "Coffee House." Disclaimed matter is often "less significant in creating the mark's commercial impression." *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001). See also *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) ("With respect to ALE, the Board noted that the term is generic and that the registrant disclaimed it in its registration. Because ALE has nominal commercial significance, the Board properly accorded the term less weight in assessing the similarity of the marks under DuPont. As a generic term, ALE simply delineates a class

of goods"). "A coffeehouse, coffee shop, or café shares some of the characteristics of a bar, and some of the characteristics of a restaurant. As the name suggests, coffeehouses focus on providing coffee and tea as well as light snacks. Other foods range from baked goods to soups and sandwiches, other casual meals, and light desserts." Final Office Action, www.wikipedia.org. Inasmuch as applicant's coffee shop services would serve high-end gourmet coffee, teas and other non-alcoholic beverages, doughnuts, pastries and light snacks, it is defined by the term "coffee house" and applicant appropriately disclaimed this generic term. While we do not ignore the term "Coffee House," we do not find that it would have much significance in distinguishing applicant's and registrant's marks. *M2 Software Inc. v. M2 Communications Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1948-49 (Fed. Cir. 2006) ("When comparing the similarity of marks, a disclaimed term, here 'COMMUNICATIONS,' may be given little weight, but it may not be ignored"). In *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997), the Federal Circuit agreed that the marks DELTA CAFE ("cafe" disclaimed) and DELTA were similar. The addition of a design and the term "cafe" was not sufficient "to create a different commercial impression." *Id.* at 1534.

Furthermore, the Court held that inasmuch as DELTA was the dominant term in both marks, the "identity of the dominant portion of Dixie's mark and the registered mark is especially important in the restaurant industry 'because restaurants are often recommended by word of mouth and referred to orally, [so] it is the word portion of applicant's mark which is more likely to be impressed on the consumer's memory.'" *Id.* at 1534, quoting, *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983). Similarly, the term LLOYD'S is likely to be the term that customers remember when they refer to applicant's and registrant's establishments.

Applicant argues that "LLOYD'S for restaurants is a highly suggestive and diluted mark;" that "it is a given name;" and that there "is little doubt that customers would understand a restaurant under LLOYD'S name (in Alabama or elsewhere) carries the name of its owner/founder." Reply Brief at 2.³ While we have not considered applicant's evidence regarding the popularity of "Lloyd" as a given name, we do take judicial notice of the fact that "Lloyd" is a given name (as well as a surname). *See The Random*

³ We note that "Lloyd's" is identified as the name of an early restaurant or coffee house in England. *See* www.answers.com (restaurant) and www.wikipedia.com (coffee house).

House Dictionary of the English Language (unabridged) (2d ed. 1987).⁴

Applicant has submitted the following evidence to support its argument that the "purchasing public is able to distinguish between these businesses based on a small distinctions among the marks." Reply Brief at 3. Some of this evidence includes a list of seven common law trademarks.⁵ Three are for restaurant equipment or similar companies (Lloyd's Restaurant Equipment, Lloyd's Refrigeration & Air Conditioning, Gruner Prussner & Lloyd). Two are for fairly different marks (Sal & Lloyd's Pizza Place and Jay & Lloyd's Kosher Deli & Family Restaurant). Applicant has also included internet evidence that there are Lloyd's Restaurants in Sutton, West Virginia; Chicago, Illinois; Middlefield, Connecticut; Newport News, Virginia; Marshalltown, Iowa; and Garwood, New Jersey. There are two other pages that identify restaurants in Running Springs (California?) and "Penn Yan." The last two entries are so abbreviated that they are entitled to little weight.

⁴ *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁵ Applicant has included some information from a trademark search report to which the examining attorney has not objected. However, the information is equivocal at best. For example, one entry is identified as "Registration No. 9795" and it is listed as "Not Renewed" and "Status Date Dec. 8, 1997."

Accord In re Bayer Aktiengesellschaft, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) ("Search engine results – which provide little context to discern how a term is actually used on the webpage that can be accessed through the search result link – may be insufficient to determine the nature of the use of a term or the relevance of the search results to registration considerations"). *See also In re Remacle*, 66 USPQ2d 1222, 1223 n.2 (TTAB 2002) ("The examining attorney's print-out of the results of an Internet search by the Yahoo search engine are of little probative value, largely because insufficient text is available to determine the nature of the information and, thus, its relevance").

When we view applicant's evidence, it does not persuade us that the mark LLOYD'S is such a weak term that the addition of the term "Coffee House" would distinguish the marks. While extensive evidence of third-party use in some cases has been a factor in the board's determination that there was no likelihood of confusion, the evidence in those cases was much more significant. *See, e.g., Steve's Ice Cream*, 3 USPQ2d at 1479 (Applicant submitted "a survey regarding the use of 'STEVE'S' and derivatives like 'STEVE,' 'STEVEN,' 'STEPHEN,' and so forth, used as all or part of trade names for restaurants and food stores

throughout the United States. Starting with a computer listing of such businesses taken from the electronic classified phone directories offered by Dialogue Information Services, he called a representative sampling and verified that they did business under these names. A total of 226 businesses, 137 restaurants and 89 food stores, was listed"). Here, applicant's evidence is even less significant than the evidence of third-party use that we did not find persuasive in *Carl Karcher Enterprises Inc. v. Stars Restaurants Corp.*, 35 USPQ2d 1125, 1131 (TTAB 1995): Applicant "has not furnished any evidence regarding the extent of use of the marks by these third parties. The geographic locations of these restaurants, in many instances, are relatively obscure. Moreover, the pictures of these restaurants tend to indicate that the operations are small and local in nature." While we conclude that the term LLOYD'S is not necessarily a strong term, we cannot find that it is a "diluted mark" as applicant argues.

Therefore, when we compare the marks, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of the mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entireties." *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed.

Cir. 1985). Under the facts of this case, we conclude that the marks LLOYD'S and LLOYD'S COFFEE HOUSE are similar in sound, appearance, meaning, and commercial impression. The dominant and/or only part of the marks is identical. Applicant's additional term merely identifies a specific type of eating establishment and it does not significantly change the sound, appearance, meaning, or commercial impression of the marks. See, e.g., *Dixie Restaurants*, 41 USPQ2d at 1534 (more weight given to common dominant word DELTA).

Next, we must consider whether the services of applicant and registrant are related. Registrant's services are restaurant services and applicant's are coffee shop services serving high-end gourmet coffee, teas and other non-alcoholic beverages, doughnuts, pastries and other light snacks in an atmosphere of social and community exchange. For goods or services to be related, they do not need to be identical or even competitive. It "has often been said that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under

circumstances which could give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each [party's] goods or services." *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991). See also *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002). We also do not read limitations into the identification of services. *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"). Therefore, applicant's argument that his "coffee-houses will be a kind of a coffee shop similar to the one where characters in a popular TV sitcom *Friends* ('Central Perk') used to gather or a coffee shop where Dr. Frasier Crane (Kelsey Grammer) would meet with his brother or his assistant Roz for an espresso (or take his date out) in another popular TV series *Frasier*" (Reply brief at 5) is not persuasive.

In this case, registrant's services are identified simply and broadly as "restaurant services." We must

assume that registrant's restaurant services could include serving "high-end gourmet coffee, teas and other non-alcoholic beverages, doughnuts, pastries and other light snacks" in addition to whatever other items may be on its menu. See *Dixie Restaurants*, 41 USPQ2d at 1534 (Restaurant services and restaurant services specializing in Southern-style cuisine are identical).

We also have considered the fact that applicant has added the phrase "in an atmosphere of social and community exchange" to its identification of goods. However, it is not clear how this term would distinguish the services. Restaurants, as public eating establishments, would also be places of social and community exchange. Therefore, even if there was a significant distinction between restaurants and coffee houses, to the extent that both types of services would include serving high-end gourmet coffee, teas and other non-alcoholic beverages, doughnuts, pastries and other light snacks in an atmosphere of social and community exchange, there is a basic overlap of these specifically-identified services.

Furthermore, the examining attorney has included some evidence to show that restaurant services and coffee shop services are related. These registrations suggest that the services are related because they show a mark registered by

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common entity for both services. See *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (Although third-party registrations are "not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may nonetheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source"). See also *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993).

2230505 - restaurant services, coffee shop services and food preparation services

3052781 - restaurant services, coffee shop services, bar services

2869200 - restaurant services; coffee shop services

Other evidence suggests a close relationship between coffee shops and restaurants. See www.littleriverroasting.com ("Little River - Spartanburg's Coffee Shop and Lunch restaurant"); <http://newyork.citysearch.com> (Teresa's Coffee Shop & Restaurant); and <http://hawaii.diningchannel.com> (Doty's Coffee Shop & Restaurant).

Applicant argues that "[c]offee-houses and restaurants are distinctly different establishments. A coffee-house is a type of coffee service entity that focuses on providing coffee and tea, light snacks and serves as a center of

social interaction. By contrast, restaurants are establishments that serve food and beverages (often alcoholic)." Reply Brief at 4 (footnote omitted). However, even under applicant's arguments, as we indicated earlier, nothing precludes a "restaurant," which applicant defines broadly, as serving "food and beverages" from serving, and even specializing in serving, coffee, tea, and light snacks or from serving as a center of social interaction. Indeed, the term "restaurant" includes "an establishment that services prepared food and beverages to be consumed on the premises. The term covers a multiplicity of venues and a diversity of styles of culture." Denial of First Request for Reconsideration, www.wikipedia.com. Restaurants can specialize in serving coffee, various food items, and entertainment. See Second Request for Reconsideration, www.alternativeground.com ("Whitehall's Alternative Coffee Shop and Restaurant: Specialty Coffee - Fresh Food - Live Music") and www.joffreyrestaurant.com (Joffrey's Coffee Co. & Restaurant offers the finest hand-roasted coffees and fresh food served daily... [F]eatured works by local artists, and live entertainment (coming soon), add up to an environment that's conducive to cool and more than just a convenient

pit stop").⁶ Other evidence suggests that the distinction between restaurants and even coffee houses is not very sharp. For example, Deux Gros Nez describes itself as "Nevada's first full-blow coffee house... Join us for a great meal." www.deuxgrosnex.com. See Denial of First Request for Reconsideration, www.answers.com - (Restaurant - "a place where meals are served to the public"). See also *The American Heritage Student Dictionary* (1998) (Coffee House - "A restaurant where coffee and other refreshments are served") and *Webster's II New Riverside University Dictionary* (1984) (Coffee House - "A place serving coffee and other refreshments to customers").⁷

Applicant also relies on *In re Coors Brewing Co.*, 343 F.3d 1059, 68 USPQ2d 1059 (Fed. Cir. 2003) where the Court of Appeals for the Federal Circuit held that the marks BLUE MOON with different designs for beer and restaurant services were not confusingly similar. We point out that this case involves the question of whether restaurant services and coffee shop services are related. The issue

⁶ Applicant has objected to the use of cached pages that "may reference images which are no longer available." Brief at 16. It is certainly possible that a webpage may have changed after it was printed or stored, but that fact does not mean that we should give these pages "little consideration, if not disregard them completely." *Id.* We note that these pages were retrieved in April 2007 and they have a copyright notice date of 2007. There is nothing inherently unreliable about these particular pages.

⁷ We take judicial notice of these definitions.

in *Coors Brewing* involved the application of the test for whether food items and restaurant services are related. *Jacobs v. International Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982) ("To establish likelihood of confusion a party must show something more than that similar or even identical marks are used for food products and for restaurant services"). Here, the evidence supports the conclusion that applicant's services are closely related, if not overlapping, with registrant's broadly identified restaurant services.

We also add that the channels of trade and purchasers of applicant's and registrant's services are likely to be similar. Both services include serving high-end gourmet coffee, teas and other non-alcoholic beverages, doughnuts, pastries and other light snacks. Therefore, these services could be encountered by the same purchasers who were looking for establishments that serve prepared food of this type. See *Starbucks U.S. Brands LLC v. Ruben*, 78 USPQ2d 1741, 1751 (TTAB 2006). Applicant's evidence itself shows entities identified as "Tsunami Coffee House" and "Lloyd's Restaurant & Bar" listed together under "California Open Mikes."

We also do not assume that there are any geographical distinctions between the uses of the marks on the

identified services. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 393 (Fed. Cir. 1983) ("Section 7(b) of the Trademark Act of 1946, 15 U.S.C. §1057(b), creates a presumption that the registrant has the exclusive right to use its mark throughout the United States. Therefore, the geographical distance between the present locations of the respective businesses of the two parties has little relevance in this case"); *Amcor, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70, 73 (TTAB 1981) ("[T]he possible geographical separation between the parties, although the evidence does show an overlap on occasion, is of no significance in this proceeding because applicant is seeking territorially unrestricted registrations for its marks and, if granted, the presumptions afforded the registrations under Section 7(b) include a presumption of use or the right to use the registered marks throughout the United States").

Therefore, we do not have to assume that a "high-end coffee house in a large urban area would assume that a restaurant in Alabama decided to franchise its name nationally..."

Reply Brief at 1 (parenthetical omitted).

Finally, we are also aware of the case of *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993) apparently involving the same registration

that the examining attorney cited in this case. In the *Lloyd's* case, the Federal Circuit reversed the board's grant of summary judgment in favor of petitioner (registrant in this case). The issue in that case involved a *Jacobs* issue of whether food items were related to restaurant services. The Court concluded that the board drew "impermissible inferences from the evidence against the nonmovant" and reversed the grant of summary judgment. *Lloyd's*, 25 USPQ2d at 2029. The *Lloyd's* case does not support a conclusion that there is no likelihood of confusion in this case, which does not involve a motion for summary judgment or the relatedness of food items and restaurant services.

When we compare the marks LLOYD'S for restaurant services and LLOYD'S COFFEE HOUSE for coffee shop services, namely, serving high-end gourmet coffee, teas and other non-alcoholic beverages, doughnuts, pastries and other light snacks in an atmosphere of social and community exchange, we find that the marks are very similar, with the only the difference being the disclaimed term COFFEE HOUSE in applicant's mark. Customers are likely to believe that applicant's coffee shop services are simply another similar service sponsored by or associated with registrant. As such, confusion is likely here. We add that, to the extent

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we had any doubt, we have resolved it in registrant's favor. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988). See also *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1948 (Fed. Cir. 2004).

Decision: The examining attorney's refusal to register applicant's mark LLOYD'S COFFEE HOUSE for its identified services on the ground that it is likely to cause confusion with the registered mark LLOYD'S for restaurant services under Section 2(d) of the Trademark Act is affirmed.