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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Al C. Copeland

Serial No. 78516620

Len R. Brignac of King Leblanc & Bland, P.L.L.C. for
Al C. Copeland.

Doritt Carroll, Trademark Examining Attorney, Law Office
116 (Michael E. Baird, Managing Attorney).

Before Seeherman, Bucher and Zervas, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Al C. Copeland seeks registration on the Principal
Register of the mark **SWEET FIRE AND ICE** (*in standard
character format*) for "restaurant and bar services" in
International Class 43.¹

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

¹ Application Serial No. 78516620 was filed on November 14,
2004 based upon applicant's allegation of a *bona fide* intention
to use the mark in commerce.

Act, 15 U.S.C. §1052(d). The Trademark Examining Attorney has found that applicant's mark, when used in connection with the identified services, so resembles the following two marks owned by the same registrant:

FIRE + ICE

for "restaurant services" in International Class 42;² and



for "restaurant services" in International Class 42.³

AN IMPROVISATIONAL GRILL

as to be likely to cause confusion, to cause mistake or to deceive.

The Trademark Examining Attorney and applicant have filed briefs in the case. We affirm the refusal to register.

In arguing for registrability, applicant contends that the respective marks do not sound alike and that their connotations and commercial impressions are distinct, i.e.,

² Registration No. 2243520 issued to RoundGrille, Inc. on May 4, 1999 claiming first use anywhere and first use in commerce at least as early as August 30, 1997; Section 8 affidavit (six-year) accepted and Section 15 affidavit acknowledged.

³ Registration No. 2755544 issued to RoundGrille, Inc. on August 26, 2003 claiming first use anywhere and first use in commerce at least as early as August 30, 1997. The word "Grill" is disclaimed apart from the mark as shown.

that the cited marks "prominently include '+' between FIRE and ICE whereas Applicant's mark is distinguished by the inclusion of the first word 'SWEET' and does not include '+'". Applicant's brief, p. 3 As to other relevant factors, applicant points out that applicant and registrant are operating in different geographical areas, that patrons of "higher end restaurants tend to be sophisticated" (*Id.* at p. 5) and that consumers encounter "a wide array of restaurants bearing the mark FIRE, the mark ICE, or combinations thereof." *Id.* at p. 6

By contrast, the Trademark Examining Attorney contends that all of these marks are dominated by the expression "fire and ice"; that inasmuch as registrant owns a federal trademark registration and applicant is applying for one, applicant's and registrant's historical roots in New Orleans and Massachusetts respectively are irrelevant for our purposes; that there is no support in the record that potential purchasers of these restaurant services are sophisticated; and that there is no evidence that the cited marks are weak in any way.

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 and/or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

The Services

We turn first to the du Pont factor focusing on the relationship of the services as described in the application and in the cited registrations. We start by noting that both applicant and registrant offer or will offer restaurant services. Therefore, the services are legally identical. See In re Dixie Restaurants, 105 F.3d 1405, 1406, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997)

[likelihood of confusion between The Delta Café for services identified as "restaurant services specializing in

Southern-style cuisine" and DELTA for "hotel, motel and restaurant services": "likelihood of confusion must be determined based on an analysis of the mark as applied to the ... services recited in applicant's application vis-a-



vis the ... services recited in [the] ... registration[s], rather than what the evidence shows the ... services to be.”]

In fact, applicant does not contest this point, and this du Pont factor weighs in favor of a finding of likelihood of confusion.

Channels of Trade

Turning to the du Pont factors dealing with the similarity or dissimilarity of established, likely-to-continue trade channels, we must presume that applicant’s services and registrant’s services will move through all of the normal channels of trade to all of the usual consumers of services of the type recited. See Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987).

Because applicant’s recitation includes restaurant services, and those are the services recited in the cited registration, the channels of trade must be deemed to be the same. Hence, this du Pont factor favors a finding of likelihood of confusion.

We note applicant’s contention that the trade channels are different inasmuch as applicant operates in Metairie, Louisiana, while the registrant operates in New England and in California. However, inasmuch as applicant seeks a

registration that is nationwide in scope, and the registrant's registration entitles it to operate anywhere in the United States, it is irrelevant under the third du Pont factor that the parties may presently operate in different geographic locations. Cf. Trademark Rule 2.133(c), 37 C.F.R. § 2.133(c) ["Geographic limitations will be considered and determined by the Trademark Trial and Appeal Board only in the context of a concurrent use proceeding"].

Conditions of Sale

The prospective purchasers for the involved restaurant services are members of the general public. Applicant argues that confusion between these respective restaurant marks is unlikely given the relative sophistication of the consumers who patronize high-end restaurants. However, as noted above, we must determine the question of likelihood of confusion on the basis of the services as they are identified in the application and the cited registrations. As identified, neither applicant's services nor the registrant's are restricted to high-end restaurant services. To the extent that these services are not purchased with much care, this factor also favors a finding of likelihood of confusion. Moreover, because of the

similarity of the marks, as discussed *infra*, even diners who frequent only upscale restaurants are likely to be confused into believing restaurant services offered under these respective marks emanate from or are associated with or sponsored by the same source.

Similarity of the marks

We turn then to the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. See *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). We note at the outset that when the services are legally identical, as is the case here, "the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." *Dixie Restaurants*, 41 USPQ2d at 1534, quoting *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

The question here is whether the marks overall are similar. The test is not whether the marks can be distinguished in a side-by-side comparison. Further, "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, 751 (Fed. Cir. 1985).

Applicant has essentially appropriated the literal portion of the registrant's mark FIRE + ICE and added the word SWEET to it. The fact that the registrant's mark contains a plus symbol rather than the word "and" is of no consequence. A plus symbol is such a commonly-recognized symbol for the word "and" that consumers are not likely to register this difference as a distinction between the marks. Certainly it will have no effect on how the term is spoken. With respect to the cited mark FIRE + ICE: AN IMPROVISATIONAL GRILL and design, because of the manner in which the words "An Improvisational Grill" are depicted - in relatively small letters under the design - they will be viewed as informational matter. Consequently, it is the words "FIRE and ICE" that consumers will regard as the name of the restaurant, and by which they will refer to it. As for the background design element in the '544 registration, this design merely serves to emphasize the words "Fire" and "Ice" in the mark, and does not distinguish applicant's and registrant's marks. Moreover, as noted by our reviewing court, in Giant Food, Inc. v Nation's Foodservice, Inc.,

710 F.2d 1565, 1570, 218 USPQ 390, 395 (Fed. Cir. 1983), "restaurants are often recommended by word of mouth and referred to orally." For the foregoing reasons, we consider the words FIRE + ICE to be the dominant element of registrant's mark, and the portion deserving of greater weight in the likelihood of confusion analysis. The differences between applicant's mark and the cited mark - arising from the use of a plus sign, a background design, and the informational words "An Improvisational Grill" in the registrant's mark - are insufficient to distinguish the marks. Applicant also argues that its mark is distinguished from both of the cited marks by the inclusion of the first word "Sweet." However, this word is likely to be viewed as a modifier of FIRE AND ICE that does not change the meaning of the term FIRE AND ICE, but merely suggests, in view of its current slang meaning, a positive attribute of the restaurant.

In view of the foregoing, and while differences admittedly exist between the respective marks, when considered in their entirety, applicant's mark **SWEET FIRE AND ICE** is substantially similar to the cited marks **FIRE + ICE** and **FIRE + ICE: AN IMPROVISATIONAL GRILL** and design.



Accordingly, even if consumers should note the differences in these marks, they are likely to consider that the marks are simply variations of each other, rather than to believe that the marks indicate different sources of the services.

The number and nature of similar marks in use on similar services

We also point out that, based upon the record before us, we must consider registrant's **FIRE + ICE** to be a strong mark. Although applicant makes the general statement that it is aware of other registered and pending marks having the words "FIRE" and/or "ICE," it has not properly made any third-party registrations of record.⁴ Thus, there is no evidence of third-party use or registration of "Fire and Ice" marks.

Conclusion

Weighing all the relevant du Pont factors, as discussed above, we find that applicant's use of **SWEET FIRE**

⁴ We hasten to add that even if properly made of record, they would not have changed the result herein as none of these alleged third-party service marks involved marks as similar to registrant's marks as is applicant's mark. Moreover, third-party registrations are not evidence that the marks shown therein are in use, or that the public is familiar with them - they are probative only in the manner of dictionary definitions, to show that a term has a meaning or significance in a particular industry.

AND ICE for restaurant services is likely to cause confusion with the cited registrations.

Decision: The refusal to register this mark based upon Section 2(d) of the Lanham Act is hereby affirmed.