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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Javier's, Inc.

Serial No. 78734301

Wesley M. Lang of Clayton, Howarth & Cannon, P.C. for
Javier's, Inc.

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(Craig D. Taylor, Managing Attorney)

Before Holtzman, Bergsman and Ritchie de Larena,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Javier's, Inc. filed a use-based application for the
mark JAVIER'S, in standard character format, for restaurant
services (Serial No. 78734301). Applicant claimed first
use anywhere and first use in commerce at least as early as
October 25, 1995.

The trademark examining attorney finally refused
registration under Section 2(d) of the Trademark Act of
1946, 15 U.S.C. §1052(d), on the ground that applicant's
mark JAVIER'S for restaurant services is likely to cause

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confusion with the mark JAVIER ASENSIO, in typed drawing form, for wines and liquors.¹

Our determination of likelihood of confusion under Section 2(d) is based on 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, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks").

A. The similarity or dissimilarity and nature of the goods and services.

Applicant is seeking to register its mark JAVIER'S for restaurant services, and the registrant's mark JAVIER

¹ Registration No. 2807193, issued January 20, 2004. Registrant claimed July 15, 2003 as its dates of first use anywhere and first use in commerce.

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ASENSIO is registered for wines and liquors. There is no *per se* rule that confusion is likely from the use of similar or identical marks for food or beverage items and restaurant services: "something more" is required to support a finding of likelihood of confusion. *Jacobs v. International Multifoods Corporation*, 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"); *In re Opus One Inc.*, 60 USPQ2d 1812, 1813 (TTAB 2001); *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209, 1210 (TTAB 1999).

In order to prove that restaurant services and wines are related, the examining attorney submitted excerpts from five stories retrieved from the LexisNexis database containing the words "restaurant" and "wine."² The stories provide the following information:

Chenoweth will speak on various subjects including food, wine, restaurants and service.
Newark Advocate, March 31, 2004

² One story was from a newspaper in Sydney, Australia. Because Sydney, Australia is outside of the United States and because the examining attorney did not provide any explanation why U.S. consumers would be aware of the contents of a foreign newspaper, we have not given this story any consideration.

But a byproduct of these ballot
measures, which will allow beer and
wine restaurant service . . .

Dallas Observer, January 1, 2004

Icicle Inn Associates approved for a
change of trade name on a
spirits/beer/wine restaurant service
bar liquor license and private label
wine off-premises liquor license.
Wenatchee Business Journal, February 1,
2002

. . . a food, wine and travel writer,
is host for this show devoted to
teaching the principles of good taste
in food, wine and restaurant service.

Orlando Sentinel, January 30, 1977

The one-day seminars began in 1990 to
help restaurant service personnel
become more professional in their wine
and restaurant service.

The Post and Courier, February 21, 1996

It is undisputed that restaurants serve wine, beer,
and liquor, and that applicant, in fact, serves beer,
tequila, and brandy. However, it does not necessarily
follow that consumers expect that restaurant services and
wines and liquors to emanate from a single source. There
is no evidence in the record that any one business renders
restaurant services and makes wines and liquors under the
same mark. The above-noted stories have little, if any,
probative value as to whether consumers believe that the
use of the same or similar marks in connection with wines
and liquors, on the one hand, and restaurant services, on

the other, emanate from a single source. The stories are not about restaurant services and their bill of fare. The only relevant information we can glean from the stories is that restaurants serve wine, liquor and beer, but not that they are necessarily sold under the same marks. Without evidence that a single source renders restaurant services and provides wines and liquors under the same mark, we cannot assume that purchasers would expect that those goods and services emanate from a common source.

While in the past, the Board has held that the use of the same or similar marks in connection with restaurant services and beer, wine, and liquor are likely to cause confusion, those cases have involved more comprehensive records. See *In re Opus One Inc.*, 60 USPQ2d at 1815-1816 (identical, arbitrary, strong marks; consumers exposed to both the restaurant service mark and to the trademarks with which the wines are labeled; applicant's restaurant sells registrant's wine; and evidence of private label wines named for restaurants); *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d at 1211 (dictionary definitions of food items identified as Mexican food; third-party registrations listing both food items and restaurant services; applicant's menu lists food items identified in the cited registration; applicant's menu

advertises retail sale of food product); *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1555 (TTAB 1987) (package of frozen soup bearing the mark STOUFFER'S and an excerpt from the District of Columbia's Yellow Pages listing the mark STOUFFER'S CONCOURSE HOTEL as a restaurant; two excerpts from stories regarding Benihana and its restaurant services and sale of frozen foods under that mark).

In view of the foregoing, the examining attorney has failed to meet her burden of showing that the applicant's restaurant services and registrant's wines and liquors are similar or related. We hasten to point out, however, that on a different and more complete record, we might arrive at a different conclusion regarding the similarity or dissimilarity and nature of the goods and services.

B. The similarity of the marks in their entirety in terms of appearance, sound, meaning, and connotation.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 9 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6

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USPQ2d 1041, 1042 (TTAB 1988). In comparing the marks, we are mindful that the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

In terms of appearance and sound, we find that the marks are similar to the extent that applicant's mark consists of the given name JAVIER'S and the cited registration is the full name JAVIER ASENSIO. However, we find that the marks otherwise look and sound different because JAVIER'S is a given name and JAVIER ASENSIO is a full name. In fact, Javier is a fairly common name in the

United States. In 2006, Javier was the 162nd most popular name.³ Accordingly, on balance, we find that the visual and aural differences resulting from the applicant's mark as a common, given name and the registered mark as a full name outweigh the similarities in appearance and sound resulting from the presence of the name "Javier" in the two marks.

We likewise find that the two marks, when viewed in their entireties, are dissimilar in terms of connotation and overall commercial impression. Because the mark JAVIER ASENSIO is a full name, consumers give greater weight to the surname portion (*i.e.*, Asensio) to distinguish the marks just as they do people. *Helene Curtis Industries, Inc. v. Carew Products, Inc.*, 124 USPQ 429, 430 (TTAB 1960) (consumers are accustomed to distinguishing between people with similar given names by looking to their surnames, and therefore they would rely on the full name in identifying and distinguishing the goods of the parties). *See also Mary Kay Cosmetics, Inc. v. Societe Anonyme Laboratoire Rene Guinot*, 217 USPQ 975, 976 (TTAB 1981) (MARY COHR and MARY

³ We take judicial notice of this information obtained from the United States Social Security Administration (www.ssa.gov/OACT/babynames). *In re Spirits International N.V.*, ___ USPQ2d ___ (TTAB 2008). *See also U.S. v. Bailey*, 97 F.3d 982, 985 (7th Cir. 1996) (judicial notice taken of facts from Census Bureau's Statistical Abstract of the United States); *Knox v. Butler*, 884 F.2d 849, 852 n.7 (5th Cir. 1989) (judicial notice taken of census data).

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KAY for cosmetics engender different commercial impressions); *Miller Brewing Co. v. Premier Beverages, Inc.*, 210 USPQ 43, 48 (TTAB 1981) (OL' BOB MILLER is readily distinguishable from MILLER'S in every material respect and creates a commercial impression that is distinctive in its own right and would not be equated with or suggest MILLER alone).

In view of the foregoing, we find that applicant's mark and the cited registration are dissimilar when viewed in their entirety.

C. Balancing the factors.

In view of the cumulative differences in the marks and the goods and service offered thereunder, we find that applicant's mark JAVIER'S for restaurant services is not likely to cause confusion with the mark JAVIER ASENSIO for wines and liquors.

Decision: The refusal to register is reversed.