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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Cousins Submarines, Inc.

Serial No. 78757943

Andrew S. McConnell and Adam L. Brookman, of Boyle, Fredrickson, S.C. for Cousins Submarines, Inc.

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Before Zervas, Kuhlke and Mermelstein, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

On November 21, 2005, Cousins Submarines, Inc. filed an application (Serial No. 78757943) to register the mark SERIOUS SUBS (in standard character form) on the Principal Register for goods ultimately identified as, "submarine sandwiches" in International Class 30. Applicant has asserted a claim of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15

U.S.C. § 1051(b). Applicant has entered a disclaimer of the term SUBS.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of (i) Registration No. 3060452 for the mark THE SERIOUS (in standard character form), and (ii) Registration No. 3060453 for the mark THE SEMI-SERIOUS (in standard character form), both registrations for "sandwich for consumption on or off the premises" in International Class 30. Further, both registrations issued on February 21, 2006 to Cheeburger Cheeburger Restaurants, Inc.

Applicant has appealed the final refusal of its application. Both applicant and the examining attorney have filed briefs. As discussed below, the refusal to register is affirmed.

Our determination of the examining attorney's refusal to register the mark under Section 2(d) of the Trademark Act is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the

similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Considering first the *du Pont* factor regarding the similarity or dissimilarity of applicant's and registrant's goods, applicant has stated that it does "not dispute that the goods recited by Applicant in the application and those recited by registrant in the cited registrations are similar." Brief at p. 8. Indeed, the goods are legally identical, inasmuch as a "sub" or submarine sandwich is a type of sandwich. Thus, we resolve the *du Pont* factor regarding the similarity or dissimilarity of the goods against applicant.

With regard to the trade channels of the goods, applicant has stated that it "does not dispute that there is at least a degree of similarity between the potential trade channels for the goods recited in the application and in the cited registrations." *Id.* Because there are no limitations in the identifications, we must presume that the "registration[s] encompasses all goods of the nature and type described, [and] that the identified goods move in all channels of trade that would be normal for such goods,"

In re Elbaum, 211 USPQ 639, 640 (TTAB 1981), and that applicant's goods would move in the same trade channels as registrant's goods and be sold in the same outlets as registrant's goods. We also find that applicant's and registrant's sandwiches would be sold to the same purchasers, i.e., members of the general public. The *du Pont* factors regarding trade channels and classes of consumers are also resolved against applicant.

As far as the conditions of purchase, applicant argues that "all the goods in issue would … be sold in dedicated restaurants"; and that the likelihood of confusion is minimized "because consumers are making the choice to eat at or obtain food from a particular establishment rather than merely encountering the particular goods in a setting in which impulse buys are likely to occur." Brief at p. 9. This argument is without merit because neither applicant's nor registrant's identifications of goods limit sales of sandwiches to particular establishments and we cannot read such a limitation into the identifications of goods. Rather, we must consider the cited registrant's and applicant's goods as they are described in the registrations and application. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Systems Inc. v. Houston Computer*

Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). Both applicant's and registrant's identifications are broad enough to encompass sandwiches prepared elsewhere and sold at, e.g., convenience stores or truck stops, and not only at "dedicated restaurants." Further, because the goods are low cost items which are subject to purchase on impulse, we resolve the *du Pont* factor regarding the conditions of purchase against applicant.

We next turn to the *du Pont* factor regarding the number and nature of similar marks used in connection with similar goods. Applicant has submitted numerous registrations and webpages containing marks including the word SERIOUS in connection with a variety of goods and services, including pizza, restaurants, coffee, cookies, sauces and hamburgers; and contends that "there are a plethora of SERIOUS marks on the register for related goods and services that all co-exist with the cited registrations and were not given any weight in the likelihood of confusion analysis by the Examining Attorney." *Id.* at p. 12.

The examining attorney maintains that the registration evidence is unpersuasive "because not a single cited registration utilizing the term SERIOUS is for use on sandwiches"; and that the registrations, many of which

relate to restaurant services, "may suggest that the term SERIOUS is weak for restaurant services but not for the goods listed in the present application." Brief at p. 4. As for the Internet evidence, the examining attorney maintains that at least some of the marks are "confusingly similar to the registered marks cited against the Applicant … [and some] of these marks use the term SERIOUS as part of a slogan or phrase … thus conveying a different commercial impression."

We turn first to applicant's evidence of actual use. Applicant has made of record over twenty web pages showing use of marks containing the term SERIOUS. Many of the third-party marks are for restaurant services, and specifically for casual dining establishments from which a customer may purchase common food items such as a sandwich, a hamburger or a pizza for take-out or for consumption on the premises. Because such establishments are places where sandwiches and foods competitive with sandwiches such as pizza are sold, we reject the examining attorney's contention that the underlying goods or services are unrelated to sandwiches. We have also considered the webpage from "Serious Bread!" bakery, because the webpage states the bakery "specialize[s] in everyday breads, such as … sandwich breads." We have not, however, considered

the Ruth's Chris Steak House webpage or the webpages that refer to Ruth's Chris Steak House, because Ruth's Chris Steak House is not described as a casual dining establishment where a sandwich may be purchased.[1] We also have not considered the web page for "The Serious Cookie Company," which offers cookies for sale, or the ivu.org webpage which does not show use of a related mark, but only contains a restaurant review for a "Ruby Tuesday" restaurant, stating that "Their Description" is "Awesome Food. Serious Salad Bar."

The remaining webpages do not persuade us that SERIOUS is widely used in connection with sandwiches and foods related to sandwiches, or in establishments where such food can be purchased. First, many of the webpages are for restaurants and they identify only one location for the restaurant. Such webpages thus only evidence limited local use of the marks contained therein. Also, the quantity of this evidence is small and fails to persuade us that the registered marks are so weak that we should allow the registration of applicant's mark. Compare, e.g., *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1562 (TTAB 1996) ("The search of company names in the American Business

[1] The excerpt for Ruth's Chris Steak House in poweredby.10best.com states, "Ruth's Chris is also known for

Directory found more than 575 entities whose names contain the term BROADWAY and which offer restaurant services and/or related services or goods.”). As for the third-party registrations,[2] we note that the relevant consideration is whether the marks are in use in commerce, and third-party registrations are not evidence of use of the marks therein. See *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973). Thus, the *du Pont* factor regarding the number and nature of similar marks used in connection with similar goods is neutral.

We next consider the *du Pont* factor regarding the similarity or dissimilarity of the marks in their entireties. Our focus is on whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). We do not consider whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar that

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great service, an extensive wine list, and an atmosphere of comfortable elegance. Reservations recommended.”

[2] We do not consider applicant's submission of application Serial No. 77077790 for FAIRLY SERIOUS for “restaurant services,” even though applicant has indicated in its brief that the mark has now registered. The record does not contain a copy of the

confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Also, we are guided by the well-established principle that although the marks must be considered in their entireties, there is nothing improper, under appropriate circumstances, in giving more or less weight to a particular portion of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Considering first applicant's mark, we give more weight to the term SERIOUS and find it to be the dominant term in the mark because consumers would view SUBS as a generic term, identifying the goods. In so finding, we consider the mark as a whole, as we must, and reject applicant's argument that the marks are different because of the alliteration contained in its mark. The alliteration is not particularly unusual or distinctive and does not trump the immediate impression that SUBS merely identifies the goods.

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registration record, and an application is only evidence that an application has been filed.

SERIOUS is also the dominant part of both of registrant's marks. The Board has recognized in the past that the designation THE is a term of reference which could not serve as an indication of origin. *In re G. D. Searle*, 143 USPQ 220 (TTAB 1964), *aff'd*, 149 USPQ 619 (CCPA 1966). This holds true with respect to THE in THE SERIOUS - THE merely functions as a term of reference. As for the term "serious," it is defined in relevant part in *Merriam-Webster's Online Dictionary* as "excessive or impressive in quality, quantity, extent, or degree <*serious* stereo equipment> <making *serious* money>."[3] The connotation and commercial impression of SERIOUS SUBS and THE SERIOUS is the same, with both suggesting the impressive quantity of the sandwich. Turning to registrant's SEMI-SERIOUS mark, we note that "semi" is defined in relevant part in *Merriam-Webster's Online Dictionary* as "partial." Consumers, in considering registrant's goods, would perceive SEMI in registrant's mark as identifying the size of registrant's sandwich and not as a reference to humor. See the menu submitted with applicant's request for reconsideration

[3] From the website Merriam-webster.com. The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002). See also *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

showing THE SERIOUS as a cheeseburger weighing ten ounces and THE SEMI-SERIOUS as a cheeseburger weighing seven ounces. SERIOUS hence functions as the primary source indicator in both marks, suggesting the impressive quantity of the sandwiches, with SEMI in registrant's mark indicating that the size of registrant's sandwich is not as large as other sandwiches offered by registrant. The meaning and commercial impression of SEMI-SEROUS and SEIOUS SUBS are hence similar. Additionally, because the dominant term in applicant's mark is identical to the dominant term in both of registrant's marks, we find that the marks are similar in sound and appearance. Thus, the *du Pont* factor regarding the similarity or dissimilarity of the marks is resolved in against applicant.

In considering the foregoing, we find that applicant's mark SERIOUS SUBS, for "submarine sandwiches," is likely to be confused with registrant's marks THE SERIOUS and SEMI-SERIOUS, both for "sandwich for consumption on or off the premises." To the extent that any of the points argued by applicant cast doubt on our ultimate conclusion on the issue of likelihood of confusion, we resolve that doubt, as we must, in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed.

Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The Section 2(d) refusal based on both of the cited registrations is affirmed.