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THE TTAB

Mailed: March 28, 2008

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Sergio Abramof

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Serial No. 78798777

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W. Edward Crooks of Hahn Loeser & Parks, LLP for Sergio Abramof.

Susan Kastriner Lawrence, Trademark Examining Attorney, Law Office 116 (Michael W. Baird, Managing Attorney).

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Before Holtzman, Walsh and Cataldo, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Sergio Abramof (applicant) to register the mark **SERGIO'S** in standard character form for services identified as "restaurant and bar services; restaurant services; restaurants" in Class 43.[1]

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[1] Serial No. 78798777, filed January 25, 2006, based on an allegation of first use and first use in commerce on November 30, 1994.

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's services, so resembles the mark shown below for "restaurant services" in Class 42, as to be likely to cause confusion.[2]

When the refusal was made final, applicant appealed. Briefs have been filed.

Our determination 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 likelihood of confusion issue. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, however, 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 Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

[2] Issued January 15, 2002; Sections 8 and 15 affidavits accepted and acknowledged.

The services in the application and cited registration are identical to the extent that they both identify restaurants and restaurant services. Contrary to applicant's apparent contention, the fact that the classification of the services differs in the application and registration is legally irrelevant. Classification is an administrative matter for the convenience of the Office, and it has no effect on the scope of registrant's rights in the mark.

Because the services are identical, and there are no limitations in the application or registration, we must assume that the channels of trade and classes of purchasers for the restaurant services are identical. See Interstate Brands Corp. v. McKee Foods Corp., 53 USPQ2d 1910 (TTAB 2000); and In re Smith & Mehaffey, 31 USPQ2d 1531 (TTAB 1994).

We turn next to the marks, keeping in mind that when marks would appear on identical services, the degree of similarity between the marks necessary to support a finding of likelihood of confusion declines. Century 21 Real Estate v. Century Life, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Applicant contends that the marks are distinguishable, arguing that registrant's mark "provides an immediate and distinct impression of a Mexican food establishment"; that SUPER SERGIO'S "utilizes alliteration to provide a very unique sound and connotation--as that of a superhero"; and that registrant's

mark contains distinctive design elements that are not present in applicant's mark. Applicant concludes that as a result of the "dominant design elements in combination with the alliterative and meaningful word combination, the two marks create vastly different overall impressions."

In determining the similarity or dissimilarity of the marks we must consider the marks in their entireties in terms of sound, appearance, meaning and commercial impression. While marks must be considered in their entireties, it is well settled that "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided 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).

When we compare applicant's mark SERGIO'S with registrant's mark SUPER SERGIO'S and design in their entireties, giving appropriate weight to the features thereof, we find that the similarities in the marks outweigh their differences.

The marks are very similar in sound. Applicant's entire mark is the term SERGIO'S. The identical word SERGIO'S is a significant part of the phrase SUPER SERGIO'S. SUPER is a laudatory term which, rather than distinguishing the sound, is more likely to simply suggest another restaurant owned by registrant, one that perhaps is even bigger and better than the

original.[3] The alliteration of SUPER SERGIO'S might make it easier to remember the phrase, but it would not prevent registrant's patrons from assuming that there is some connection between the two restaurants.

There are differences between the marks in appearance. At the same time, however, SERGIO'S remains a visually significant component of registrant's mark. The word SERGIO'S is separated from SUPER by the design element, and the large, bold lettering of SERGIO'S creates a visual separation of that word from the design.

While the design is visually prominent in registrant's mark, we disagree that it is the "dominant" element of the mark as applicant claims. It is the word portion of the mark, SUPER SERGIO'S, rather than the design element in the mark, that is more likely to have a greater impact on purchasers and be remembered by them. See CBS, Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) ("in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed"). The word portion of a composite word and design mark

[3] We take judicial notice of the definition of "super" in The American Heritage® Dictionary of the English Language (2007) (from the website www.credoreference.com) as meaning, "***1.***Very large, great, or extreme...; and "***2.***Excellent; first-rate: *a super party.*" (Italics in original.) The Board may take judicial notice of dictionaries, including online dictionaries, which exist in printed format. See In re CyberFinancial.Net Inc., 65 USPQ2d 1789, 1791 n.3 (TTAB 2002).

is generally accorded greater weight, particularly in the case of restaurants, because restaurants are often recommended by word of mouth and referred to orally. See In re Dixie Restaurants Inc., 105 F3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997).

Furthermore, applicant is seeking registration of the mark in standard character form. This means that applicant is free to present his mark in a variety of forms and styles, including the same, bold, slightly curved style of lettering as registrant uses, thereby increasing the visual similarity between the marks.[4] See, e.g., Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1847-48 (Fed. Cir. 2000) (typed drawings are not limited to any particular rendition of the mark); and Phillips Petroleum v. C.J. Webb, 442 F.2d 1376, 170 USPQ 35 (CCPA 1971).

The term SERGIO'S is also significant in conveying the meaning and commercial impression of registrant's mark. As the examining attorney notes, both marks create the impression of a restaurant owned or operated by a person named "Sergio." We disagree with applicant that "SUPER SERGIO'S" conveys the meaning and commercial impression of a "superhero." The mark is not SUPER SERGIO but rather SUPER SERGIO'S, in possessive form. The term SUPER in this context is more likely to convey something

[4] Contrary to the examining attorney's contention, however, rights in the term SERGIO'S would not extend to include protection for that word combined with other wording or design elements. See Fossil Inc. v. Fossil Group, 49 USPQ2d 1451 (TTAB 1998) and In re Pollio Dairy Products Corp., Inc., 8 USPQ2d 2012 (TTAB 1988).

about the restaurant itself, rather than a characteristic of "Sergio" or his persona.

Moreover, the design element in registrant's mark, which consists of a caricature of a man wearing a sombrero and a serape over his shoulder, may add to, but does not significantly change, the commercial impression created by SERGIO'S alone. The design merely reinforces the meaning and commercial impression as a reference to a person or character named "Sergio." To the extent that registrant's mark, as applicant claims, creates the impression of "a Mexican food establishment," this does not distinguish the marks. Applicant's recitation is broadly worded as "restaurant services," and it could include a restaurant featuring Mexican food.

Applicant argues, for the first time in his brief, that there are 38 third-party registrations that include the word "SERGIO" or "SERGIO'S." Applicant did not identify the registration numbers, the marks, or any information about the goods and services and, in any event, as the examining attorney correctly notes, applicant's reference to such registrations is untimely under Trademark Rule 2.142(d). Accordingly, this du Pont factor does not favor applicant.

Applicant appears to argue that the absence of evidence of fame of the registrant’s mark should be treated as a factor in applicant’s favor. However, because this is an ex parte

proceeding, we would not expect the examining attorney to submit evidence of fame of the cited mark. This du Pont factor, as is normally the case in ex parte proceedings, must be treated as neutral.

Applicant's arguments concerning purchaser sophistication and the absence of actual confusion are unsupported and unpersuasive. The potential customers of restaurants include ordinary members of the general public who are not necessarily sophisticated and who may not necessarily exercise more than ordinary care in selecting a restaurant. Accordingly, this du Pont factor does not weigh in applicant's favor.

Nor does the asserted absence of evidence of actual confusion weigh in favor of applicant. We have no information regarding the nature or extent of applicant's and registrant's use or whether a meaningful opportunity for actual confusion ever existed. See Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768 (TTAB 1992). Thus, we consider this factor to be neutral. See Blue Man Productions Inc. v. Tarmann, 75 USPQ2d 1811 (TTAB 2005).

In view of the foregoing, and because similar marks are used in connection with identical services, we find that confusion is likely.

**Decision:** The refusal to register under Section 2(d) of the Trademark Act is affirmed.