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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sunshine Grille LLC

Serial No. 78804792

Morton J. Rosenberg of Rosenberg, Klein & Lee for Sunshine Grille LLC.

Ameeta Jordan, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Drost, Zervas and Kuhlke, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Sunshine Grille LLC ("applicant") has appealed from the final refusal of the trademark examining attorney to register the mark



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on the Principal Register for "restaurant services" in International Class 43. Applicant seeks registration of its mark under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), has disclaimed the term GRILLE and has entered the following description of the mark:

The mark consists of the stylized words "SUNSHINE GRILLE" in the color yellow over an orange circular contour having yellow arcuate ray like projections extending radially from the orange circular contour. The color orange, appears in the center of the sun, the color yellow appears in the ray-like projections of the sun and in the stylized wording "SUNSHINE GRILLE" and the color black appears in the bordering of the lettering "SUNSHINE GRILLE", the shadowing of the wording "SUNSHINE GRILLE", the border of the ray-like projections, the border of the sun's orange center."

The examining attorney has refused registration pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the following previously registered mark (Registration No. 1714533, issued September 8, 1992, renewed November 2, 2002) for "restaurant services" in International Class 42 as to be likely to cause confusion or mistake, or to deceive:



The registration record states that registrant's mark is lined for the colors red, blue and yellow.

After the refusal was made final, applicant filed an appeal. Both applicant and the examining attorney have filed briefs. Upon careful consideration of applicant's and the examining attorney's arguments and the evidence of record, we conclude that applicant's mark is likely to be confused with the cited mark and affirm the refusal to register.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., 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*

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Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

The Services

The application and the registration recite identical services, namely, restaurant services. The *du Pont* factor regarding the similarity of the services hence is resolved in favor of finding a likelihood of confusion.

The Marks

Turning then to a consideration of the marks, we must determine whether applicant's mark and registrant's mark, when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). Although the marks must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Furthermore, 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 commercial

impressions that confusion as to the source of the goods or services 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). Finally, when marks appear on identical services, as it the case here, the degree of similarity necessary to support a conclusion of likelihood of confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 824, 23 USPQ2d 1698 (Fed. Cir. 1992).

Turning first to registrant's mark, applicant maintains that there are three words in registrant's mark, SUN, SHINE and CAFÉ rather than two words, SUNSHINE and CAFÉ. We disagree. While the second letter "S" in SUNSHINE is in capital letters, there is no space between SUN and SHINE in registrant's mark. Also, "sunshine" is an English language word. See entry from *The American Heritage Dictionary of the English Language* (4th ed. 2000) submitted by the examining attorney with her brief, taken from bartleby.com.¹ In any event, the presence or absence

¹ We take judicial notice of this definition. 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*

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of a space is not a significant difference. See *Stockpot, Inc. v. Stock Pot Restaurant, Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff'd*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) ("There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical"); and *In re Best Western Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) ("There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical").

SUNSHINE is the dominant portion of registrant's mark. SUNSHINE is featured prominently in the mark, appearing in large lettering spanning the width of the mark. Also, it is part of the wording in registrant's mark; the wording in a composite mark rather than the design element of the mark, 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 is generally

Imports Co., Inc., 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

accorded greater weight because the wording would be used to request or recommend the goods or services. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

Further, the depiction of the sun in the middle of the mark is much smaller than the word SUNSHINE, is not particularly distinctive and merely serves to reinforce the meaning of SUNSHINE. The depiction of the sun does not significantly add to or change the commercial impression created by SUNSHINE. As far as the term CAFÉ, it is a merely descriptive or generic term for registrant's services and is in substantially smaller lettering than SUNSHINE. While CAFÉ is not ignored, the fact is, that consumers are more likely to rely on the nondescriptive portion of the mark, that is, the words SUNSHINE, as an indication of source. See *In re National Data Corp.*, *supra* at 751 ("That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark").

SUNSHINE is also the dominant portion of applicant's mark. SUNSHINE appears above GRILLE and GRILLE is a descriptive term, which applicant has acknowledged by its disclaimer thereof. The depiction of the sun serves as a background element to the wording in applicant's mark and, like the sun in registrant's mark, merely reinforces the

meaning conveyed by the word SUNSHINE. Also, as we have noted above, the wording rather than the design in a mark is more likely to have a greater impact on purchasers and be remembered by them.

When we compare applicant's mark to registrant's mark in their entireties, giving appropriate weight to the features thereof, we find that applicant's mark is highly similar in sound, connotation and overall commercial impression to registrant's mark due to the prominent shared term SUNSHINE appearing in both marks, followed by the descriptive or generic term for an eating establishment. Any differences in the marks - most notably in terms of appearance - are far outweighed by the similarities in the marks. We therefore resolve the *du Pont* factor regarding the similarity of the marks against applicant.

Strength of Registrant's Marks

In support of its contention that the term SUNSHINE is weak in connection with restaurant services, applicant has noted that the examining attorney initially refused registration in view of two additional registrations, namely Registration Nos. 2371913 and 2407514, both for the marks SUNSHINE (in typed form) for "fermented malt beverages, namely, ale" and for various foods and drinks, respectively. Applicant also introduced into the record

approximately fifteen registrations including the words SUNSHINE or SUN.

Third-party registrations are not evidence that the marks shown therein are in use, or that the public is familiar with them. *In re 1st USA Realty Professionals Inc.*, 84 USPQ2d 1581 (TTAB 2007). Also, most of the registrations have limited probative value because they are not for restaurant services or services related to restaurant services. The registration for SUNDECK for services including "restaurant and lounge services" also has limited probative value because SUNDECK has a very different commercial impression from SUNSHINE. Thus, applicant has not persuaded us that the term SUNSHINE is a weak term in connection with restaurant services, and we accord registrant's mark the normal scope of protection afforded to registered marks.

Sophistication of Purchasers

Under the heading "Sophistication of the Consumer," applicant has argued that "Appellant's services ... are directed to restaurant services which is easily distinguishable by even the most naïve of consumers based on Appellant's mark." While applicant's argument is not clear, applicant is advised that "restaurant services" encompass services provided in casual dining establishments

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to members of the general public. Therefore, we do not attribute any particular sophistication to purchasers of applicant's or registrant's services.

Conclusion

Upon consideration of the relevant *du Pont* factors discussed above, as well as the evidence of record and the arguments of the examining attorney and applicant, we conclude that when purchasers who are familiar with registrant's mark for restaurant services encounter applicant's similar mark for identical services, they are likely to be confused.

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