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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Subs Unlimited, Inc.
v.
Wild Wings n' Things, LLC

Cancellation No. 92045919

Subs Unlimited, Inc., pro se.

Scott T. Kannady of Brown & Kannady, LLC for Wild Wings n' Things, LLC.

Before Quinn, Holtzman and Rogers, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Petitioner, Subs Unlimited, Inc., filed a petition to cancel a registration on the Principal Register owned by Wild Wings n' Things, LLC (respondent) for the mark WILD WINGS'N THINGS (in standard character form) for "fast food restaurants" in Class 43.[1]

As its ground for cancellation, petitioner asserts priority and likelihood of confusion under Section 2(d) of the Trademark Act. Petitioner alleges that respondent's mark when applied to

[1] Registration No. 3088792, issued May 2, 2006.

respondent's services so resembles petitioner's previously used and registered marks, which consist of or include BUFFALO WINGS-N-THINGS, in connection with restaurant services and food products as to be likely to cause confusion. Petitioner has claimed ownership of the following registrations on the Principal Register:

> Registration No. 2935759 for the mark BUFFALO WINGS-N-THINGS for "restaurants, restaurants featuring home delivery" in Class 43, registered under Section 2(f) of the Trademark Act; and
>
> Registration No. 1882663 for the mark shown below for "restaurant services featuring home delivery" in Class 42.

Respondent filed an amended answer denying the salient allegations in the petition.[2] In addition, respondent filed counterclaims to cancel Registration No. 2935759 for the mark BUFFALO WINGS-N-THINGS for "restaurants, restaurants featuring home delivery."[3] Respondent alleges that the BUFFALO WINGS

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[2] Respondent's "affirmative defense" that the petition must be dismissed for failure of petitioner to sign the petition is meritless. The petition was filed electronically through ESTTA with a proper electronic signature on the signature block of the form in accordance with Trademark Rule 2.193(c)(1)(iii)(A). A separate signature is not required on the attachment to the ESTTA form.

[3] The registration issued on March 25, 2005. We note petitioner's argument in its brief that the mark is "part of an incontestable composite word mark and design" in its Registration No. 1882663. However, because the registration consists only in part of that wording, we do not consider the counterclaims to constitute a

portion of the mark is generic for chicken wings sold in restaurants, and that "the overall mark is merely descriptive of a generic term that identifies a spicy chicken wing product and other presumably chicken parts that are served as food products in the restaurants identified by the mark." We construe these allegations as a claim that the mark as a whole is merely descriptive of the services.[4] Respondent further alleges that the mark does not function as a service mark.

Petitioner filed an answer to the counterclaims denying the allegations therein.

Evidentiary Matters

By operation of Trademark Rule 2.122, the record includes the pleadings; the file of respondent's involved registration; and the file of petitioner's registration which is the subject of the counterclaims.

Neither party introduced any testimony or other evidence during their respective testimony periods. However, both parties filed briefs, and both parties included evidence with their briefs. Petitioner attached printouts of the involved registrations, which was unnecessary as these registrations

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collateral attack on the registration. See Sweats Fashions Inc. v. Pannill Knitting Co. Inc., 833 F.2d 1560, 4 USPQ2d 1793, 1796 (Fed. Cir. 1987) ("The registration affords prima facie rights in the marks as a whole, not in any component. Thus, a showing of descriptiveness or genericness of part of a mark does not constitute an attack on the registration.")

[4] See discussion, infra, regarding the assertion of a descriptiveness claim against a registration issued under Section 2(f) of the Trademark Act.

automatically form part of the record. Petitioner also attached a plain copy of its unchallenged Registration No. 1882663 along with printouts of Office records indicating that the registration is renewed; and copies of documents which were apparently exchanged by the parties during discovery. Respondent, for its part, attached petitioner's answers to respondent's interrogatories; and also refers, in its brief, to an entry for "Buffalo wings" purportedly from the website wikipedia.org without providing a copy of the entry.

It is inappropriate to submit evidence in this manner. As stated in TBMP §704.05(b) (2d ed. rev. 2004), "Exhibits and other evidentiary materials attached to a party's brief on the case can be given no consideration unless they were properly made of record during the time for taking testimony." See also Trademark Rule 2.123(l). With the exception of the parties' involved registrations, none of this evidence is properly of record. However, since neither party has objected to the materials submitted by the other and, moreover, each party, in turn, introduced their evidence in the same improper manner, we will treat all the evidence as if stipulated into the record.

We turn next to petitioner's uncontested motion to strike respondent's counterclaim reply brief as untimely.[5] Respondent's reply brief, which was due on June 28, 2008, was not filed until

[5] The Board issued an order on August 19, 2008 deferring consideration of this motion until final decision.

July 1, 2008. While the Board has the discretion to consider late-filed briefs, in this case, we decline to do so. Respondent's reply brief, which consists entirely of arguments directed to the issue of likelihood of confusion, serves as a reply brief on petitioner's claim, rather than on respondent's counterclaims. There is no provision in the rules for filing a reply brief by a party in the position of defendant. The motion to strike is accordingly granted.

Counterclaims to Cancel Registration No. 2935759

Respondent's conclusory and unsupported statement in its brief that petitioner's mark BUFFALO WINGS-N-THINGS fails to function as a service mark is clearly insufficient to carry respondent's burden of proof on that claim. Moreover, it is clear from petitioner's evidence, a photograph of a menu prominently displaying BUFFALO WINGS-N-THINGS as the name of the restaurant, that the term does, in fact, function as a service mark.

We turn to the counterclaim on the ground that petitioner's mark is merely descriptive of restaurant services. The mark in this case is registered with a claim of acquired distinctiveness under Section 2(f).[6] But, regardless of whether or not a mark

[6] Petitioner's underlying application was originally filed with a claim of acquired distinctiveness based on several prior registrations, including Registration No. 1882663. The application was subsequently amended to delete reliance on all registrations except Registration No. 1882663, and to add a claim of acquired distinctiveness based on a declaration of five-years' substantially exclusive and continuous use of the mark in commerce.

is registered under Section 2(f), the plaintiff (in this instance the counterclaim plaintiff) still has the same initial burden of establishing a prima facie case of descriptiveness, and the fact of registration pursuant to Section 2(f) is only some evidence of descriptiveness. See Omnicom Inc. v. Open Systems Inc., 19 USPQ2d 1876, 1878 (TTAB 1989) citing Yamaha International Corp. v. Hoshina Gakki Co. Ltd., 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988). If that burden is met, and the mark is established prima facie to be merely descriptive, the plaintiff must then establish that the defendant's 2(f) evidence, in this case the evidence submitted with petitioner's underlying application, is insufficient to show that the mark has acquired distinctiveness. See Yamaha International Corp., supra.

We first address descriptiveness. A term is merely descriptive within the meaning of Section 2(e)(1) of the Trademark Act if it forthwith conveys an immediate idea of a quality, characteristic, function, feature, purpose or use of the services with which it is used. See In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); and In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). Moreover, the immediate idea must be conveyed forthwith with a "degree of particularity." See Goodyear Tire & Rubber Co. v. Continental General Tire Inc., 70 USPQ2d 1067, 1069 (TTAB 2003); and In re Entenmann's Inc., 15 USPQ2d 1750, 1751 (TTAB 1990), aff'd 90-1495 (Fed. Cir. 1991).

The Wikipedia entry relied on by respondent suggests that the term BUFFALO WINGS is highly descriptive, if not generic, for a food product served in a restaurant. However, respondent has not shown that the N-THINGS portion of the mark is descriptive, or that the mark is descriptive as a whole. The term N-THINGS, in the context of restaurant services, broadly suggests a number of food or drink items offered in a restaurant, but yet it describes no one product or other attribute of the restaurant service with any degree of particularity.[7] Furthermore, respondent's contention that the term "THINGS" is "extensively" used by others in the field, is unsupported. In fact, the record is devoid of any evidence of third-party use.

We find that respondent has not met its burden of proving that the mark is merely descriptive. As respondent has not established that the mark is merely descriptive, we need not reach the question of whether petitioner's evidence is sufficient to show that the mark has acquired distinctiveness.

Respondent's counterclaims for cancellation are denied.

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[7] We take judicial notice of the definition of "thing" as meaning, "an unspecified object." Compact Oxford English dictionary of Current English (Third Edition) (from the website askoxford.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).

Petition to cancel

As noted, the ground for the petition to cancel is priority and likelihood of confusion. In our analysis we will focus on the registration of petitioner that is closest to the respondent's registration, namely, Registration No. 2935759 for the mark BUFFALO WINGS-N-THINGS for "restaurants, restaurants featuring home delivery."

Petitioner's pleaded registration for this mark is automatically of record as a result of the counterclaims, but the counterclaims have now been denied. Thus, petitioner, as the owner of a valid and subsisting registration of record, has standing to bring the petition. Moreover, the registration is entitled to all the presumptions flowing from Section 7(b) of the Trademark Act, including the presumption that the mark is distinctive.

PRIORITY

In a cancellation proceeding, where both parties own registrations, a petitioner asserting a claim under Section 2(d) must prove priority of use. See Brewski Beer Co. v. Brewski Brothers, Inc., 47 USPQ2d 1281 (TTAB 1998) and cases cited therein. Petitioner may rely on its registration as proof that the mark was in use as of the filing date of the underlying application. See J. C. Hall Company v. Hallmark Cards, Incorporated, 340 F.2d 960, 144 USPQ 435, 437 (CCPA 1965) ("The presumption of use emanating from the fact of registration

relates back to the filing date of the application on which the registration is predicated.").

The filing date of petitioner's underlying application is August 21, 2003. This date is prior to the December 22, 2004 filing date of respondent's underlying application, which in view of the absence of evidence of any earlier use, is the earliest date of use on which respondent may rely. Thus, petitioner is entitled to its priority.

LIKELIHOOD OF CONFUSION

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

Services/Trade channels/Conditions of sale

We must consider the services as they are described in the registrations, rather than in light of what the services may actually be. See Hewlett-Packard Co. v. Packard Press Inc., 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and Octocom Systems Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). If the services are described broadly,

and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the registrations encompass all services of the type described, that they move in all channels of trade normal for these services, and that they are available to all classes of purchasers for the described services. See Hewlett-Packard Co., supra; and In re Linkvest S.A., 24 USPQ2d 1716 (TTAB 1992).

Based on the description of services in each of the registrations, the parties' services are legally identical. Petitioner's services, identified in part as "restaurants" are broad enough to include different types of restaurants including respondent's fast food restaurants.

Because the services are identical, and there are no limitations in the registrations, the channels of trade and classes of purchasers for the parties' restaurant services also are presumed to be identical. See Interstate Brands Corp. v. McKee Foods Corp., 53 USPQ2d 1910 (TTAB 2000); and In re Smith & Mehaffey, 31 USPQ2d 1531 (TTAB 1994).

Respondent's arguments concerning purchaser sophistication 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.

Furthermore, it is not relevant, as respondent claims, that the parties’ restaurants may be located in different geographic

regions. Neither registration is geographically restricted, and the registrations therefore must be presumed to be nationwide in scope, and we therefore must presume that the parties could be providing restaurant services in the same areas.

The marks

We turn next to a comparison of respondent's mark WILD WINGS'N THINGS and petitioner's mark BUFFALO WINGS-N-THINGS, 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).

We must also consider that the test under this *du Pont* factor 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 impressions that confusion as to the source of the 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).

Respondent argues that while the dominant part of petitioner's mark is the generic term BUFFALO WINGS, the dominant part of respondent's mark is the term WILD WINGS, "which is not

descriptive of the food product, but is arbitrary and fanciful." Respondent further argues that the shared elements of the marks, "WINGS N THINGS," are weak in that they are highly suggestive "of the food products that are featured in [the parties'] restaurants" and are "extensively used by others."

We find that the marks WILD WINGS'N THINGS and BUFFALO WINGS-N-THINGS, when compared in their entireties, are similar in sound, appearance, meaning and commercial impression.

The shared phrase "WINGS'N THINGS" or "WINGS-N-THINGS" is aurally and visually a significant component of each mark. The two phrases are identical in sound, with the same rhyming cadence, and they are virtually identical in appearance. The slight difference in appearance due to the hyphens in petitioner's mark and the apostrophe in respondent's mark, are insignificant details that are not likely to be noticed or remembered by consumers when seeing these marks at separate times on identical services. See, e.g., In re General Electric Co., 180 USPQ 542, 544 (TTAB 1973) (BRAND REX confusingly similar to RE-X "Notwithstanding the hyphen in applicant's mark").

The phrase "WINGS N THINGS" is also significant in conveying the meaning and commercial impression of the marks. The words WILD and BUFFALO are obviously different, but they have related meanings in that they both modify the phrase "WINGS N THINGS" and they either suggest or describe a type or style of chicken wings. Thus, the marks as a whole WILD WINGS'N THINGS and BUFFALO WINGS-

N-THINGS connote the same, or variations of the same, goods, and they convey a substantially similar image and overall commercial impression.

While respondent did not prove that BUFFALO WINGS-N_THINGS is descriptive, we recognize that the mark is at least highly suggestive of the services. However, that suggestive meaning is the same in both marks. Furthermore, there is no evidence that the term is commonly used or registered for its suggestive meaning in the field. In any event, we certainly cannot find, based on this record, that the scope of protection accorded petitioner's mark should not extend to respondent's highly similar mark for identical services. Purchasers who are familiar with petitioner's BUFFALO WINGS-N-THINGS restaurant would be likely to believe, upon encountering respondent's highly similar mark WILD WINGS'N THINGS also for restaurants, that such services originated with or are in some way associated with or sponsored by petitioner.

Absence of actual confusion

Contrary to respondent's contention, the absence of evidence of actual confusion does not weigh in respondent's favor. Respondent acknowledges that the parties' restaurants are located in different geographic regions. The record shows that petitioner's restaurants are located in Maine, and that respondent's restaurants are located in Colorado, Nevada and Utah. Thus, we are not persuaded that a meaningful opportunity

for actual confusion has ever existed. See Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768 (TTAB 1992). Under the circumstances, we consider this factor to be neutral. See Blue Man Productions Inc. v. Tarmann, 75 USPQ2d 1811 (TTAB 2005).[8]

Conclusion

Because highly similar marks are used in connection with identical services, presumptively offered to the same consumers through the same channels of trade, a likelihood of confusion exists.[9]

Decision: The petition to cancel is granted, and Registration No. 3088792 will be cancelled in due course. The counterclaims for cancellation are denied.

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[8] It is not inconsistent for the Board to read the involved identifications in a way that presumes the services to be offered in the same area, yet to focus on areas of actual use when assessing the probative weight to be accorded to the absence of actual confusion. Such analysis is required by applicable precedent.

[9] The fact that respondent, in selecting its mark, may not have intended to create confusion is not relevant to the question of whether the marks are in fact likely to cause confusion.