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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Gila River Gaming Enterprises, Inc.

Serial No. 76699882

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Before Holtzman, Bergsman and Ritchie,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Gila River Gaming Enterprises ("applicant") filed an application on the Principal Register for the mark AIRIA, in standard character form, for "night clubs," in Class 41.

The examining attorney 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, when used in connection with "night clubs," so resembles the registered mark AREA, in standard character form, for

"night clubs," in Class 41, as to be likely to cause confusion.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 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 between the marks and the similarities between the goods and/or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

A. The similarity or dissimilarity and nature of the services described in the application and registration and likely-to-continue trade channels and classes of consumers.

Both parties use their marks to identify "night clubs." Because the services are identical, we must

¹ Registration No. 3525909, issued October 28, 2008. The examining attorney also cited Registration No. 3605997 for the mark AREA and design for "night clubs" owned by the same registrant. We focus our analysis on registrant's mark in standard character form because if we do not find likelihood of confusion with respect to the marks as presented in standard character form, we would not find a likelihood of confusion with a mark for the same words with the addition of a design element. See *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

presume that they are sold in the same channels of trade and to the same classes of consumers.

B. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties 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.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1987). 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 services 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 USPQ2d 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). Since the services at issue are night clubs, we are dealing with average consumers.

We also note that where, as here, the services are identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the services. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

While a mark has no correct pronunciation, especially a coined term, applicant's mark AIRIA is likely to be pronounced as "area." Applicant argues, to the contrary, that "the most likely phonetic vocalization is thoroughly distinct from AREA, and will instead be pronounced: 'a:-i:-ri:-ə,' with the stress on the second syllable."² Even assuming that to be true, the two marks are, at a minimum,

² Applicant's Brief, p. 6.

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similar in sound. Imperfectly pronounced, the two marks can be extremely similar in terms of sound.

The marks are similar in appearance:

AREA vs. AIRIA

In light of the phonetic similarity of the marks and the identity of the services, the visual differences in the marks AREA and AIRIA do not create dissimilar marks. *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) ("Moreover, although there are certain differences between the [marks' CAYNA and CANA] appearance, namely, the inclusion of the letter 'Y' and the design feature in applicant's mark, there are also obvious similarities between them. Considering the similarities between the marks in sound and appearance, and taking into account the normal fallibility of human memory over a period of time (a factor that becomes important if a purchaser encounters one of these products and some weeks, months, or even years later comes across the other), we believe that the marks create substantially similar commercial impressions"). See also *United States Mineral Products Co. v. GAF Corp.*, 197 USPQ 301, 306 (TTAB 1977) ("'AFCO' and 'CAFCO,' which differ only as to the letter 'C' in USM's mark, are substantially similar in appearance and sound") and *In re Bear Brand Hosiery Co.*, 194 USPQ 444, 445 (TTAB 1977) ("The

mark of the applicant, 'KIKS' and the cited mark 'KIKI' differ only in the terminal letter of each mark. While differing in sound, the marks are similar in appearance and have a somewhat similar connotation").

Applicant contends that the examining attorney's analysis of the visual similarity of the marks is illogical. The examining attorney argued in her Final Office action that the marks are visually and aurally similar because they both start with the letter "A, contain the letter "R" as the second or third letter, and end with similar sound vowels "IA" or "EA." In response, applicant argues that under the examining attorney's logic, the mark AREA is visually similar to ARTESIA, ARMENIA, ABRACADBRA, etc.³ The similarity between those terms and registrant's mark is not at issue. Applicant's argument is not persuasive because it attempts to misdirect our attention from the similarity of the marks at issue: AREA and AIRIA.

To the extent that applicant's mark is pronounced as "area," consumers are likely to think of the word "area" which means "any particular extent of space or surface ... a geographical region; tract: ... any section reserved for a

³ Applicant's Brief, pp. 10-11.

specific function.”⁴ Because the marks are used in connection with “night clubs,” the marks engender the commercial impression of a “section reserved for a specific function” (*i.e.*, dancing and entertainment). In other words, the place where the action is happening or the place to be. Thus, the marks will have a similar meaning and engender similar commercial impressions. To the extent applicant’s mark may be pronounced “a:-i:’-ri:-ə,” the commercial impression would not necessarily be different.

In view of the foregoing, we find that the similarities of the marks outweigh the differences in appearance, sound, meaning and commercial impression.

C. The conditions under which and buyers to whom sales are made, *i.e.*, “impulse” vs. careful, sophisticated purchasing.

Applicant argues that “[t]he relevant audience in this instance - people who enjoy going to nightclubs - are sufficiently sophisticated that any likelihood of confusion remains highly remote.”⁵

The “area” [sic] mark is used to identify services offered by a nightclub in Hollywood/Los Angeles, California. The “AIRIA” mark is used to identify services offered by a

⁴ The Random House Dictionary of the English Language (Unabridged), p. 110 (2nd ed. 1987). The Board may take judicial notice of dictionary evidence. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁵ Applicant’s Reply Brief, p. 4.

nightclub in Chandler, Arizona. The average consumer in this instance - clubgoers - are not likely to confuse services offered by a nightclub located in the heart of the Los Angeles "party" scene on La Cienega Boulevard with the services offered by a nightclub located inside a casino located on the Gila River Indian Community Reservation in Chandler, Arizona. They are not likely to confuse the services offered by a nightclub that is "open and airy" and popular with "Hollywood heavyweights" and "celebrities" with those offered by a "high-energy" nightclub having "glimmering lights," "pumping rock remixes and "fresh hip-hop mash-ups." In short, they are sufficiently sophisticated to discern the difference between the services offered between the "area" [sic] nightclub and the "AIRIA" nightclub such that there is simply no likelihood of confusion."⁶

First, applicant's comparison of its geographic trading areas in Chandler, Arizona with registrant's geographic trading area in Los Angeles, California is irrelevant. Because registrant's and applicant's description of services are geographically unrestricted, we may not limit our consideration of the question of likelihood of confusion to the existing trading areas of the registrant and applicant. We must decide the issue of likelihood of confusion as if applicant's mark and registrant's mark were in use throughout the entire United

⁶ Applicant's Reply Brief, p. 5.

States. *In re Integrity Mutual Insurance Company, Inc.*,
216 USPQ 895, 896 (TTAB 1982)

Second, applicant argues that "clubgoers" are sophisticated and presumably exercise a high degree of care regarding the clubs they attend. However, this is attorney argument without any evidentiary support. Moreover, this argument presumes that "clubgoers" are regular attendees and it fails to take into account consumers who go "clubbing" on a less frequent basis (e.g., people who frequent nightclubs on special occasions such as anniversaries, birthdays, holidays, etc.).

Because of the lack of evidentiary support, we find that this *du Pont* factor is neutral.

D. The fame of registrant's mark.

Applicant argues that the examining attorney has not analyzed the fame of registrant's mark and, therefore, this factor favors applicant. Because this is an *ex parte* proceeding, we do not expect the examining attorney to submit evidence of fame of the cited mark. This *du Pont* factor is treated as neutral. See *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006).

Balancing the factors.

Because the marks are similar and the services are identical and are presumed to move in the same channels of

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trade and are presumed to be sold to the same classes of consumers, we find that applicant's mark AREA, for "night clubs," so resembles the mark AIRIA, for "night clubs," as to be likely to cause confusion.

Decision: The refusal to register is affirmed.