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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nikolaos Mastorogiannakis

Serial No. 77858375

Adam J. Bruno of Bay State IP, LLC for Nikolaos Mastorogiannakis.

Janet H. Lee, Trademark Examining Attorney, Law Office 102 (Karen M. Strzyz, Managing Attorney).

Before Quinn, Holtzman and Mermelstein, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Nikolaos Mastorogiannakis (applicant) has appealed from the trademark examining attorney's final refusal to register on the Principal Register the standard character mark MY BIG FAT GREEK WINE for "wine" in Class 33.¹ GREEK WINE is disclaimed.²

The examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's

¹ Application Serial No. 77858375, filed October 27, 2009, alleging a bona fide intention to use the mark in commerce.

² The examining attorney's final requirement for a disclaimer is deemed satisfied inasmuch as applicant provided the disclaimer in his reply brief. Accordingly, the appeal on this issue is moot.

mark, when applied to applicant's goods, so resembles the registered mark shown below for "restaurant services" in Class 43 as to be likely to cause confusion.³ GREEK RESTAURANT is disclaimed.



The appeal has been fully briefed.

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, 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).

We turn first to the marks. In determining the similarity or dissimilarity of marks, we must consider the marks in their entirety in terms of sound, appearance, meaning and commercial impression. See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1691

³ Registration No. 3202521; issued January 3, 2007.

(Fed. Cir. 2005). Although the marks must be considered in their entirety, it is well settled that one portion of a mark may be more significant than another, and it is not improper to give more weight to this more significant portion 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).

Applicant's mark MY BIG FAT GREEK WINE incorporates registrant's mark MY BIG FAT GREEK RESTAURANT, virtually in its entirety. In fact, except for the last word in each mark, WINE and RESTAURANT, the two expressions are identical. Contrary to applicant's contention, these words have little effect in distinguishing source. First, the words WINE and RESTAURANT are generic for the respective goods and services and, along with the word GREEK, have been disclaimed. Consumers would not rely on the terms GREEK RESTAURANT and GREEK WINE to distinguish one such restaurant or wine from another. Rather, they would look to the other words in the marks to identify and distinguish source, and those words, MY BIG FAT followed by the word GREEK, are identical in both marks. See *National Data Corp.*, 224 USPQ at 752 ("a descriptive component of a mark may be given little weight"). See also *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (finding the mark JOSE GASPAR GOLD "nearly identical" to the mark GASPAR ALE once the commercial significance of the descriptive and non-dominant terms JOSE, GOLD

and ALE are properly discounted). Furthermore, in relation to the respective goods and services the terms GREEK WINE and GREEK RESTAURANT have complementary meanings and commercial impressions (as discussed more fully, *infra*), with applicant's mark suggesting a drink item, i.e., Greek wine, that would likely be served in a Greek restaurant.

Nor is the stylization of registrant's mark a significant difference between the marks. Because applicant's mark is in standard characters, we must consider that the mark could be presented in the very same display and stylized format as registrant uses, thereby rendering the marks virtually identical in appearance. See *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-11 (Fed. Cir. 2012); *Citigroup v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (standard character or typed drawings "are not limited to any particular presentation."); *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (SQUIRT SQUAD for "floating water toys" confusingly similar to SQUIRT with "distinctive lettering on a dark medallion" for balloons; "By presenting its mark merely in a typed drawing, a *difference* [in type style] cannot legally be asserted by that party. Thus, apart from the background, the displays must be considered the same.") (Emphasis in original.)

Because the marks in significant part are the same or must be deemed the same, the marks as a whole are substantially identical in sound, appearance, meaning and commercial impression.

In addition, registrant's mark by its nature is strong and distinctive. Applicant has submitted no evidence or argument that MY BIG FAT GREEK RESTAURANT is a familiar expression, or derives from one, or that it has been commonly used by others for similar goods or services. Indeed, there is no evidence that anyone other than registrant has used or registered a similar mark. Registrant's mark appears to be an unusual expression to use for a restaurant service and, at least on this record, it must be regarded as unique in that field. This is a factor which increases the likelihood of confusion. See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992) ("The paucity of service marks containing 'Century' in businesses similar to insurance suggests that CENTURY 21 is indeed a unique mark for insurance services. factor...magnifies the likelihood of confusion."). Accordingly, we find that registrant's mark is entitled to a broad scope of protection.

The near identity of the marks, and the unique nature of registrant's mark are factors that together strongly favor a finding of likelihood of confusion.

We turn then to a comparison of the goods and services. It is true, as applicant states, that applicant's wine and registrant's restaurant services are distinctly different goods and services. However, the question is not whether purchasers can differentiate the goods and services themselves but rather whether purchasers are likely to confuse their source. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Thus, it is not necessary that the respective goods and services be similar or even competitive to support a finding of likelihood of confusion. It is sufficient if the goods and services are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

In making this determination, we keep in mind that "relatedness" is a matter of degree. See *In re Shell Oil*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). That is, the greater the degree of similarity between the marks, the lesser the degree of similarity between the goods or services that is required to support a finding of likelihood of confusion. See *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB

1983). Where the marks are nearly identical, as they are in this case, there need be only a viable relationship between the respective goods and services in order to find that a likelihood of confusion exists. *Id.*

At the same time, however, we recognize that there is no per se rule which requires a finding that confusion is likely whenever food or beverage products and restaurant services are offered under similar marks. See *Jacobs v. International Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982). Rather, in order to establish likelihood of confusion, "a party must show *something more* than that similar or even identical marks are used for food products and for restaurant services." *Id.* (Emphasis added.) See also *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003).

To support her contention that "something more" exists in this case, the examining attorney submitted 20 use-based, third-party registrations showing that, in each instance, a single entity has adopted the same mark for both wines and restaurant services.⁴ These include Reg. No. 1998084 for the mark PLUMPJACK; Reg. No. 3474535 for the mark A COW JUMPED OVER THE MOON GOURMET CAFÉ & EPICERIE (and design); Reg. No. 3643141 for the mark CETRELLA; Reg. No. 3744430 for the mark VIA DEI MILLE

⁴ Office actions dated February 1, 2010 and November 23, 2010.

(and design); Reg. No. 3819774 for the mark CARIBBEAN COOKER; and Reg. No. 2768057 for the mark BIN 36. The third-party registrations, although not evidence that the marks shown therein are in use or that the public is familiar with them, nevertheless have probative value to the extent that they serve to suggest that the goods listed therein may emanate from a single source. See *Albert Trostel & Sons Co.*, 29 USPQ2d at 1786.

The examining attorney also submitted printouts from the websites of 14 wineries showing that wines are offered under the same or similar marks as restaurants located at the wineries.⁵

The following are examples:

The Vineyards Restaurant offers "incomparable food and drink" and special "Vintner's Dinners" along with The Vineyards private label "Signature Wine."
thevineyards.org

Knapp Vineyard Restaurant offers "the perfect opportunity to enjoy mouth-watering eclectic cuisine" and to "savor your favorite meals with our Chef's wine pairing from Knapp's vast array of award winning wines."
knappwine.com

Kiepersol Estates Restaurant offers "fine dining" with "the finest foods available" and serves Kiepersol private label "world renowned wines to complement your meal."
kiepersol.com

The South Coast Winery Restaurant offers "menus that have received rave reviews," and a "select group of varietals" under the South Coast Winery label along with "an extensive wine list, showcasing vintages

⁵ Id.

from South Coast" to "complement these dishes."
southcoastwinery.com

The Magnanini Winery & Restaurant offers "a six course dinner, Northern Italian cuisine" as well as Magnanini labeled wines and suggested wine and food pairings.
magwine.com

The Restaurant at Ponte features "Our award-winning outdoor restaurant" along with "a full selection" of Ponte labeled wines "ready to pair with each dish."
pontewinery.com

Bully Hill Restaurant located at Bully Hill Vineyards offers "one of the finest places to dine in the Finger Lakes Region" with suggested wine and food pairings and an array of Bully Hill labeled wines.
bullyhill.com

We cannot find based on the website evidence that wine is the type of product that a restaurant, as opposed to a winery, might package for retail sale, or that restaurants typically, or ever, package wine for sale under their own marks. It is possible that purchasers may assume some other source connection exists between the wine and restaurant. For example, they may assume that the winery which produces the wine has some source or sponsorship connection with the restaurant. However, there is no evidence that registrant's restaurant is associated with a winery or that patrons of restaurants in general would associate those restaurants with wineries.

Nevertheless, there is no dispute, and the website evidence shows that restaurants commonly serve wine, which may also be served by the bottle, and that therefore, patrons of a restaurant

are exposed to both the mark of the restaurant and the mark on the wine label or on the wine list. The evidence also shows that wine is a complement to the meal served by a restaurant and that restaurants may suggest pairings of wine according to the food that is served because of their complementary qualities. Thus, wine and restaurant services clearly are complementary goods and services which may be encountered together by the same purchasers. See *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001) (OPUS ONE for wine confusingly similar to OPUS ONE for restaurant services).

The connection between applicant's wine and registrant's restaurant services, in particular, is evident from the marks themselves. It is clear from applicant's mark MY BIG FAT GREEK WINE that its identified "wine" will include Greek wine. Registrant's mark MY BIG FAT GREEK RESTAURANT makes it clear that its restaurant features Greek food, and this would include Greek wine as a complementary item. In this regard, we note an article from Bloomberg Businessweek (businessweek.com) reporting that "between 60% and 75% of Greek wine sold in the U.S. is through restaurants."⁶ ("Greek Wine, from Yuck to Yum"; September 30, 2005.) The author states that he sampled "a flock of Greek

⁶ Office action dated November 23, 2010. This evidence was submitted by the examining attorney to support her requirement for a disclaimer of "Greek Wine"; however, as the evidence is properly of record, it may be considered for all purposes.

wines...accompanying some excellent Greek-inspired dishes," identifying, for example, Boutari wine as "a good match with lamb and a Greek salad full of olives"; Megapanos wine as "a dry white and all-purpose wine for most Greek seafood dishes"; and Minos as a wine which "stands up to salty Greek cheeses." Thus, it is common for wine – especially Greek wine – to be served in restaurants – including Greek restaurants. Furthermore, in view of the complementary nature of Greek wine and the service of Greek food, purchasers would logically assume that there is some source connection between such goods and services if they are offered under the same or substantially the same marks.

The Board has found the "something more" requirement of *Jacobs* to be met where it is shown by the marks and/or other evidence that applicant and registrant specialize in the same cuisine. See *In re Golden Griddle Pancake House Ltd.*, 17 USPQ2d 1074, 1074 (TTAB 1990) (GOLDEN GRIDDLE PANCAKE HOUSE for restaurant services confusingly similar to GOLDEN GRIDDLE for table syrup; "Applicant's mark makes it clear that its restaurant serves pancakes and, no doubt, pancake (or table) syrup, as well. There is an undeniable connection between the goods of the registrant and the services of applicant."). See also *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209, 1211 (TTAB 1999) (AZTECA MEXICAN RESTAURANT for restaurant services confusingly similar to AZTECA for partially prepared Mexican

foods, namely tortillas; "Applicant's mark itself makes it clear that its restaurant serves Mexican food" and applicant's menu "shows that applicant serves a variety of Mexican fare" including "the very items listed in the cited registrations.").

The requisite "something more" has also been found where the registered mark is "particularly unique." In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1469 (TTAB 1988), aff'd (not precedential), 864 F.2d 149 (Fed. Cir. 1988) (MUCKY DUCK for mustard confusingly similar to MUCKY DUCK for restaurant services). That factor is present here, as well. As we have found, the marks in this case are not only substantially identical, but, on this record, registrant's mark must be regarded as unique for restaurant services.

In view of the foregoing evidence, we find that the "something more" requirement of *Jacobs* has been demonstrated by nature of the relationship between wine and restaurant services in general, the "undeniable connection" between applicant's wine and registrant's restaurant services in particular, and, based on this record, the strong and unique nature of registrant's mark which entitles the mark to a broad scope of protection.

Accordingly, we find that applicant's wine and registrant's restaurant services are at least viably related goods and services, and that this *du Pont* factor favors a finding of likelihood of confusion.

As to the channels of trade and classes of purchasers, because there are no restrictions in either the application or the cited registration, we must presume that applicant's wine and registrant's restaurant services move in all the normal channels of trade for those goods and services and that they are available to all potential purchasers. See *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). The evidence shows, as indicated above, that wine by the bottle can be sold in restaurants, and to that extent the trade channels for wine and restaurant services may overlap. But regardless of whether or not wine and restaurant services are sold in the same channels of trade, they would be encountered by the same classes of purchasers. All of the prospective purchasers of applicant's wines would be prospective purchasers of registrant's restaurant services, as well.

Applicant contends that the goods and services will never be encountered together, arguing registrant operates its restaurant services in only ten stores in Arizona, whereas applicant's wine is produced in Massachusetts and that "[a] person buying a bottle of wine in [Massachusetts] will not think that it is purchasing wine from a restaurant that is in Arizona." Brief, pp. 7-8. This argument is unsupported, and in any event, unpersuasive. As we noted, there are no restrictions, geographic or otherwise, in

the application and registration, and they must therefore be presumed to be nationwide in scope. Accordingly, we must presume that applicant's wine and registrant's restaurant services could be provided in the same geographic areas. See *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 393 (Fed. Cir. 1983) ("Section 7(b) of the Trademark Act of 1946, 15 U.S.C. § 1057(b), creates a presumption that the registrant has the exclusive right to use its mark throughout the United States. Therefore, the geographical distance between the present locations of the respective businesses of the two parties has little relevance in this case.").

The *du Pont* factors involving channels of trade and classes of purchasers favor a finding of likelihood of confusion.

In view of the foregoing, and because substantially identical marks are used on related goods and services, we find that a likelihood of confusion exists.

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