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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85939425
Applicant	Smokey Mo's Bar-B-Q, LLC
Applied for Mark	THOSE WHO KNOW EAT AT SMOKEY MO'S
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re application of: Smokey Mo's Bar-B-Q, LLC

Serial No.: 85/939425

Filed: May 22, 2013

Mark: THOSE WHO KNOW EAT AT SMOKEY MO'S

International Class: 043

APPEAL BRIEF

United States Patent and Trademark Office

Trademark Trial and Appeal Board

P.O. Box 1451

Alexandria, VA 22313-1451

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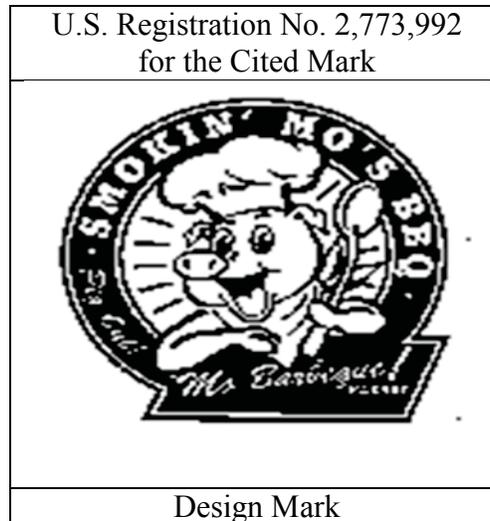
I. Introduction

Applicant submits this Appeal Brief in support of its Notice of Appeal filed with the Trademark Trial and Appeal Board (the “Board”) on September 22, 2014. Applicant appeals the Examining Attorney’s final refusal to register the trademark THOSE WHO KNOW EAT AT SMOKEY MO’S. As set forth below, Applicant respectfully submits that there is no likelihood of confusion with Applicant’s mark and U. S. Registration No. 2,773,992. Accordingly, Applicant requests that the Board reverse the Examining Attorney’s refusal to register Applicant’s mark.

II. Description of the Record

On May 22, 2013 Applicant Smokey Mo’s Bar-B-Q, LLC filed an application to register the mark THOSE WHO KNOW EAT AT SMOKEY MO’S on the Principal Register under Trademark Act Section 1(a) with a date of first use of January 1, 2009. The services under the mark are restaurant and catering services in International Class 043. Applicant is the owner of Registration No. 4,578,529 for the mark SMOKEY MO’S BBQ for sauces and rubs in International Class 030.

On September 12, 2013, the Examining Attorney mailed an office action refusing to register the mark under Trademark Act Section 2(d) alleging that Applicant’s mark, when used on or in connection with the identified services, so resembles the mark in U.S. Registration No. 2,773,992 (the “Cited Mark”) for the logo mark shown below that it is likely a potential consumer would be confused, mistaken or deceived as to the source of the goods and/or services.



On March 4, 2014, Applicant filed: (a) an additional statement that the name in the mark identifies an individual, Morris Melchor along with a declaration of consent from Mr. Melchor with his consent to register the mark; and (b) arguments in support of registration of the mark. On March 21, 2014, the Examining Attorney mailed a final office action continuing the refusal Trademark Act Section 2(d) based on likelihood of confusion with U.S. Registration No. 2,773,992.

On September 22, 2014, Applicant filed a notice of appeal of the final refusal to register its mark.

III. Statement of the Issues

The issue presented for appeal is whether Applicant's mark THOSE WHO KNOW EAT AT SMOKEY MO'S as applied to restaurant and catering services in International Class 043 should be refused registration on the Principal Register under Trademark Act Section 2 (d), 15 U.S.C. §1052(d) because of a likelihood of confusion with the Cited Mark (U. S. Registration No. 2,773,992) for the logo shown containing the

words “SMOKIN’ MO’S BBQ PIG OUT! ’MO BARBEQUE! PLEASE” for restaurant and catering services.

IV. Argument

The Examining Attorney has concluded that Applicant’s mark is confusingly similar to the Cited Mark. Applicant asserts there is no likelihood of confusion between Applicant’s mark and the Cited Mark because Applicant’s mark and the Cited Mark are: (1) substantially different in appearance; (2) substantially different in sound; and (3) substantially different in commercial impression.

Likelihood of confusion is determined on a case-by-case basis aided by the application of the factors set out in *In re E. I. DuPont DeNemours & Co.*, 476 F. 2d 1357, 1361, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973). *Lloyd’s Food Prods., Inc. v. Eli’s, Inc.*, 987 F.2d 766, 767, 25 U.S.P.Q. 2d 2027, 2028 (Fed. Cir. 1993). The factor that we consider concerns the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369 (Fed. Cir. 2005)

A. Likelihood of Confusion - Appearance

In this case, the Cited Mark is a design mark. The Cited Mark has stylized pig in the center of a circle holding an upright spoon with the pig extending forward out of the circle and surrounded in the circle by a series of dash marks (set in white space) that serve to emphasize and highlight the pig from its surroundings (collectively the “Pig Element”). The Pig Element is surrounded by a circular border containing words and punctuation, the circular border having an irregular shape at the bottom of the mark.



The circular border attached to the irregular shaped bottom contains the words:

SMOKIN' MO's BBQ *Pig Out!*

The irregular shaped bottom contains the words '*Mo Barbecue!*' above the word PLEASE.

In contrast with the Cited Mark, Applicant's mark is a word mark only, not a design mark. Here, the similarity between Applicant's mark and the Cited Mark is that they share the terms MO and BBQ. They also share a variation of the term smoke (Smokin' vs Smokey). However, in contrast to the Cited Mark and its design elements, Applicant's mark consists of the phrase:

"THOSE WHO KNOW EAT AT SMOKEY MO'S"

While the Examining Attorney states that the dominant elements in the respective marks are the terms SMOKEY MO'S and SMOKIN' MO's, Applicant respectfully disagrees. The dominant feature of the Cited Mark is the Pig Element since it is the largest part of the mark and extends outward from the center of the design mark set off by the dash marks and white space stylized pig in the center of a circle and coming forward out of the circle. The size of the Pig Element relative to the rest of the design mark and the dash mark and white space set offs from the rest of the mark draws a viewer's attention to such Pig Element. Further emphasizing the Pig Element are the italicized

words “Pig Out” that are found to the left of the pig’s face in the circular border surrounding the Pig Element. The pig also appears significantly larger and very prominently in the center of the mark with the smaller sized text. The Pig Element visually dominates the Cited Mark and is consequently the element that will most likely be impressed in the minds of consumers. *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066 (TTAB 2011).

In addition to having no Pig Element, Applicant’s mark also contains different words that are not included in the Cited Mark and the term “Smokey Mo’s” in Applicant’s Mark is found after the words “Those Who Know”.

For the reasons set forth above and despite sharing two common terms, the parties' marks overall are dissimilar due to the dominant role of the Pig Element in the Cited Mark and the differences in wording of the rest of the marks. *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066 (TTAB 2011).

B. Likelihood of Confusion - Sound

Applicant moreover asserts that the marks are also dissimilar in sound. As to sound, Applicant’s mark will clearly be pronounced differently from the Cited Mark as it begins with and contains different words. *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066 (TTAB 2011). Therefore, despite sharing two common terms, because the respective marks contain different words, Applicant’s mark and the Cited mark do not sound the same.

C. Likelihood of Confusion - Commercial Impression

To assess likelihood of confusion between two marks, they must be considered in their entireties and in their commercial settings. *See Opryland USA Inc. v. Great Am.*

Music Show, Inc., 970 F.2d 847, 851, 23 U.S.P.Q.2d 1471, 1473 (Fed. Cir. 1992) (“When it is the entirety of the marks that is perceived by the public, it is the entirety of the marks that must be compared.”). The question is not whether people will confuse the marks, but whether the marks will confuse people into believing that the goods and/or services they identify come from the same source. *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 201, 175 USPQ 558, 558-59 (C.C.P.A. 1972); TMEP §1207.01(b). For that reason, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. See *Recot, Inc. v. M.C. Becton*, 214 F.2d 1322, 1329-30, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Visual Info. Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179, 189 (TTAB 1980). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537, 540-41 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); TMEP §1207.01(b). Additions or deletions to marks may be sufficient to avoid a likelihood of confusion if the marks in their entireties convey significantly different commercial impressions. Here, because the marks contain different terms and differ in appearance, they create different overall commercial impressions. The Cited Mark with its Pig Element and wording are used in such close relationship to one another as to form a single unitary mark and thereby project a single commercial impression and thought. *New England Fish Co. v. Hervin Co.*, 179 USPQ 743 (TTAB 1973), *aff’d*, 511 F.2d 562, 184 USPQ 817 (C.C.P.A. 1975). Even though the marks contain the terms SMOKEY MO’s and SMOKIN’ MO’s respectively, the different prominent elements, the differences between Applicant’s word

mark and the Cited Mark's design element including the Pig Element and words which create a single unitary mark, and the differences in the words of the respective marks result in the marks conveying significantly different commercial impressions.

V. Conclusion

In summary, when the marks are properly compared in their entirety, the marks differ in appearance, sound and commercial impression. For the above reasons, there is no likelihood of confusion between Applicant's mark and the Cited Mark. Based on the foregoing, Applicant respectfully requests that the Board reverse the refusal to register the mark under Trademark Act Section 2(d).

Respectfully submitted,

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