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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Lidl Stiftung & Co. KG

Serial No. 76297319

Wendy S. Harvey of Osha & May L.L.P. for Lidl Stiftung & Co. KG.

Susan Leslie DuBois, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney).

Before Simms, Chapman and Holtzman, Administrative Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Lidl Stiftung & Co. KG (applicant), a German corporation, has appealed from the final refusal of the Trademark Examining Attorney to register the mark STEAKCOUNTRY for "meat, frozen meat; meat products namely roast, burgers, minced meat beef, meatballs, meat salad, also deep frozen; prepared meals consisting primarily of meat with the addition of vegetable, farinaceous pastes, potatoes, and/or rice," in Class 29; and "prepared meals

Serial No. 76297319

consisting essentially of vegetables, farinaceous pastes, potatoes and/or rice; with the addition of meat and also deep frozen," in Class 30.¹

The Examining Attorney has refused registration under Section 2(d) of the Act, 15 USC §1052(d), on the basis of two registrations owned by Posh Foods, L.L.C. for the mark STEAKOUNTRY in typed form as well as in stylized lettering, both for restaurant services (Registration No. 2,332,533, issued March 21, 2000; and Registration No. 2,338,356, issued April 4, 2000). Applicant and the Examining Attorney have submitted briefs, but no oral hearing was requested.²

The Examining Attorney argues that confusion of the marks is likely because the only difference in the marks is that applicant's mark contains an additional "C", but that the marks are otherwise very similar in commercial impression and identical in pronunciation. The Examining Attorney argues that consumers will likely not notice the minor difference in the marks, and that, in any event, the average purchaser normally retains a general, rather than a specific, impression of a trademark. Also, the Examining

¹ Application Serial No. 76297319, filed August 9, 2001, based on Section 44(e) of the Act, on German Registration No. 396 07 363, issued April 29, 1996.

² Exhibits submitted with applicant's brief for the first time are excluded as untimely. See Trademark Rule 2.142(d).

Serial No. 76297319

Attorney argues that the goods and services of applicant and registrant are related. In support of the refusal, the Examining Attorney has submitted numerous third-party registrations for such marks as MASSA for grilled sandwiches, prepared entrees and restaurant services (Reg. No. 2,533,825, issued Jan. 29, 2002); GRANDMA LEE'S BAKERY & RESTAURANT and design for such goods as soups, salads, meat, fish, poultry, vegetable and pasta entrees, as well as restaurant services including carry-out services (Reg. No. 2,422,446, issued Jan. 23, 2001); ROBERTO'S for Mexican entrees and restaurant services (Reg. No. 1,826,505, issued March 15, 1994, renewed); AMERICAN CAFÉ for such goods as sandwiches and pasta, meat, seafood, poultry and vegetable entrees as well as restaurant services (Reg. No. 1,329,876, issued April 9, 1985, Section 8 accepted); Island Grill and design for meat, fish, poultry and cooked vegetables as well as restaurant services including carry-out services (Reg. No. 2,585,892, issued June 25, 2002); and Friendly's (stylized) for such prepared foods as meat, fish and poultry as well as restaurant and carry-out services (Reg. No. 1,595,593, issued May 8, 1990, renewed). While the Examining Attorney concedes that there is no per se rule concerning finding likelihood of confusion in cases involving similar marks for food items and for restaurant

services, the Examining Attorney contends that it is reasonable for purchasers to expect both food products and restaurant services to emanate from a single entity. In this regard, the Examining Attorney contends that it would not be uncommon for restaurants to market their menu items under the same mark as the restaurant. Also, restaurant diners will undoubtedly purchase food products such as meat products in grocery stores. Furthermore, because the identification of registrant's restaurant services is not limited, one may presume that those restaurant services include all normal items of food that are featured in restaurants. The Examining Attorney also argues that purchasers of applicant's food items and registrant's restaurant services would be ordinary members of the general public, and that these goods and services may be relatively inexpensive. Accordingly, the Examining Attorney maintains that purchasers familiar with registrant's STEAKCOUNTRY restaurant services would assume that STEAKCOUNTRY prepared food products are frozen or prepackaged food items from the same source as the restaurant services. The Examining Attorney also asks us to resolve any doubt in favor of the prior registrant.

The Examining Attorney has cited such cases as *In re Appetito Provisions Co., Inc.*, 3 USPQ2d 1553 (TTAB

Serial No. 76297319

1987)(involving Italian sausages and restaurant services) and *In re Best Western Family Steak House, Inc.*, 222 USPQ 827 (TTAB 1987)(involving frankfurters and bologna and restaurant services).

Applicant, on the other hand, argues that confusion is unlikely because "STEAK" is a weak and commonly used word in connection with a wide variety of goods and services, and that purchasers are not likely to believe that all products which use this word in the mark come from the same source. Applicant also points to the minor differences in the marks as being sufficient to avoid likelihood of confusion. Applicant also argues that its goods and registrant's services are distinct and are offered in different channels of trade because applicant sells its prepackaged food products only in its own discount retail food stores whereas, according to information from the Internet, registrant offers only all-you-can-eat buffet restaurant services. These goods and services, applicant argues, are not marketed in such a way that they would be encountered by the same purchaser. Applicant contends that the third-party registrations are not significant because they do not relate to all-you-can-eat buffet restaurant services on the one hand and discount retail prepackaged food products on the other. Applicant also contends that

Serial No. 76297319

the percentage of restaurants that also offer their products in grocery stores is relatively small and insignificant, and that there is no evidence in this case that registrant is likely to bridge the gap and offer the food it serves in the retail or discount retail food market. Applicant also notes that some of the third-party registrations involve fast food or "express-type" restaurant services.

In sum, applicant argues that the ordinary, prudent purchaser will not mistakenly assume that applicant's STEAKCOUNTRY goods originate with registrant's STEAKCOUNTRY restaurant.

Our determination of likelihood of confusion under Section 2(d) of the Act 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. See *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Two key considerations are the marks and the goods or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by [Section] 2(d) goes to the cumulative

Serial No. 76297319

effect of differences in the essential characteristics of the goods and differences in the marks.").

With respect to the marks STEAKCOUNTRY and STEAKCOUNTRY, we agree with the Examining Attorney that those marks are substantially identical in sound, appearance and meaning or connotation. Although we can take judicial notice that "steak" may be a relatively commonly used term in the food and restaurant business, the marks here include the equally, if not more prominent, word "KOUNTRY" or "COUNTRY." If these nearly identical marks were used in connection with related goods and services, confusion would be likely.

Concerning applicant's meat products and prepared meals and registrant's restaurant services, as the Examining Attorney has argued, we must analyze this case on the basis of the goods and services set forth in applicant's application and in registrant's registrations. Because there are no limitations in the respective application and registrations relating to the channels of trade or classes of purchasers, we must presume that applicant's goods and registrant's services encompass all goods and services of the type described, and that they move in all normal channels of trade to all potential customers. See *Canadian Imperial Bank of Commerce v. Wells*

Serial No. 76297319

Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); and *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). We do not analyze this case, therefore, on the basis of the fact that registrant may offer only all-you-can-eat restaurant services and that applicant sells its food products only through its own discount food stores.

The third-party registrations suggest that the same source may offer goods similar to applicant's as well as restaurant services under the same mark. See *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1218 (TTAB 2001); and *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). While the third-party registrations do not specifically indicate that the listed food products are also sold in grocery stores and supermarkets as well as in the restaurants, we do agree with the Examining Attorney's argument that the public has become at least somewhat accustomed to seeing the same mark used in connection with restaurants and in connection with those same restaurants' food products sold in grocery stores and supermarkets. The fact that the Examining Attorney has not offered any evidence that this particular registrant is likely to "bridge the gap" and begin selling its entrees or prepared meals in supermarkets is not critical to the outcome of this case. Such evidence would be very difficult for the

Serial No. 76297319

Examining Attorney to produce in any ex parte case. See *In re Pacer Technology*, 338 F.3d 1348, 67 USPQ2d 1629 (Fed. Cir. 2003) and cases cited therein.

We also observe that applicant's food products and registrant's restaurant services are relatively inexpensive goods and services which are purchased by the general public. To the extent that these goods and services are not purchased with much care, this factor also favors a finding of likelihood of confusion, especially in view of the near identity of the marks.

Finally, any doubt with respect to the issue of likelihood of confusion must be resolved in favor of the prior user and registrant. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Accordingly, we conclude that consumers aware of registrant's STEAKCOUNTRY restaurant services who then encounter applicant's STEAKCOUNTRY meat products and prepared meals in food and grocery stores are likely to believe that applicant's food products emanate from or are otherwise sponsored or produced by the same source that provides the STEAKCOUNTRY restaurant services.

Serial No. 76297319

Decision: The refusal of registration under Section 2(d) is affirmed.