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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Alimentos Naturales Sabroza, S.A. de C.V...

Serial No. 78262178

Albert B. Kimball, Jr. of Bracewell & Patterson, L.L.P.,
for Alimentos Naturales Sabroza, S.A. de C.V.

John M. Gartner, Trademark Examining Attorney, Law Office
102 (Thomas V. Shaw, Managing Attorney).

Before Seeherman, Quinn and Cataldo, Administrative
Trademark Judges.

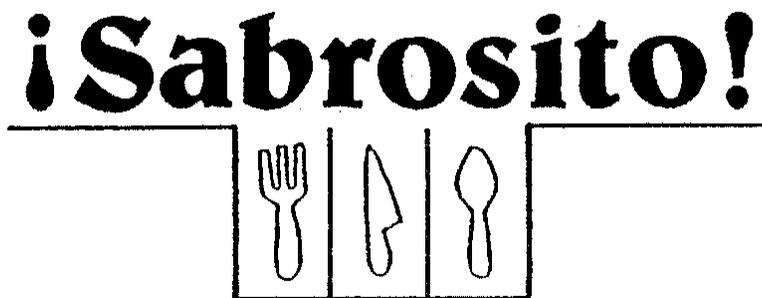
Opinion by Seeherman, Administrative Trademark Judge:

Alimentos Naturales Sabroza, S.A. de C.V., a Mexican corporation, filed an application to register the mark LA SABROZITA, in the stylized form shown below, for "picante sauces, taco sauce and salsa."¹ The letters in the mark are in the color red, and the color red is claimed as a feature of the mark. Applicant has supplied a statement that "the

foreign wording in the mark translates into English as the little one which is delicious."

La SabroZita

The Examining Attorney issued a final refusal of registration pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground of likelihood of confusion with the previously registered mark SABROSITO! and design, as shown below, for "rices, spices, soups, and sauces."² That registration includes the statement that "the English translation of the word 'SABROSITO' in the mark is 'a little more tasty.'"



¹ Application Serial No. 78262178, filed June 13, 2003, and asserting first use anywhere in 1994 and first use in commerce on February 28, 1995.

² Registration No. 1743287, issued December 29, 1992; Section 8 & 15 affidavits accepted and acknowledged; renewed.

This appeal followed. It has been fully briefed. An oral hearing was not requested.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (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. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn first to a consideration of the goods. The identification in the cited registration includes "sauces." Applicant's identified goods are also sauces, specifically picante sauces, taco sauce and salsa (the latter item being defined, according to the Wikipedia article submitted by applicant, as referring, in English-speaking countries, to "a (usually somewhat spicy) sauce from Spanish or Latin

American cuisines.”³ In its reply brief applicant has raised arguments that appear to try to limit the protection to be accorded to this registration, asserting that “the reference registration would not be allowed to issue at present with a broadly worded definition such as ‘sauces’ as a goods identifier,” and that “the harmful effect of the former practice of allowing such broad definition is manifest here.” Reply brief, p. 4. In point of fact, “sauces” is an acceptable identification of goods, see Trademark ID Manual. Moreover, if applicant believed that the registrant was not entitled to a registration for the identification “sauces” without any limitation, the proper procedure would have been to petition to partially cancel the registration, rather than to mount an impermissible collateral attack on it in this ex parte proceeding. Thus, in determining the issue of likelihood of confusion, we must give the identification of “sauces” in the cited registration full effect. Because the term “sauces” encompasses picante sauces, taco sauce and salsa, applicant’s goods must be considered legally identical to

³ We acknowledge that there is some controversy about the probative value of articles taken from Wikipedia. However, since applicant has submitted this reference even though it is counter to applicant’s position, and since the Examining Attorney has not disputed the accuracy of this particular listing, we have considered it.

the "sauces" identified in the cited registration. This du Pont factor of the similarity of the services favors a finding of likelihood of confusion.

When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). In considering the marks, we keep in mind the well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. In *re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant has essentially argued that such elements as the design portion and the exclamation points of the registrant's mark and the color red in its mark should be given greater weight than the word portions of each because the word portions are based on the Spanish word "sabroso." In its appeal brief applicant asserted that the word "sabroso" means "tasty" or "delicious," and that this word is descriptive of food products. In its reply brief

applicant had extended this argument to assert that "the word portion of both marks is a Spanish equivalent of a word meaning either TASTY or DELICIOUS." Reply brief, p. 2. However, the evidence does not support this latter point. Applicant has submitted a definition from an Internet language site that translates "sabroso" as, inter alia, "delicious, delightful, luscious, and tasty,"⁴ and another definition that translates "tasty" as "sabroso."⁵ However, there is no dictionary evidence that "sabrosito" or, for that matter, "sabrozita" have this particular meaning. Applicant has also submitted a copy of a third-party registration that has the translation statement, "The term 'SABROSITO' is a Spanish word which translates into English as 'very tasty.'"⁶ However, simply because a third party offered this statement, and the Trademark Attorney who examined that application accepted the statement, is not proof that this is a recognized meaning for the word.

We do accept, however, that both applicant's mark and the registered mark are derived from the Spanish word "sabroso," and that this word means "tasty." We further note that the owner of the cited registration has

⁴ Ultralingua.net.

⁵ Allwords.com.

⁶ Registration No. 2561494.

translated "sabrosito" as "a little more tasty," and that applicant has translated "sabrozita" as "the little one which is delicious." Accordingly, we consider the words "sabrosito" and "sabrozita" as highly suggestive, indicating but not describing that the goods are tasty.

While the word portion of the registered mark is highly suggestive (as is applicant's mark), we still consider it to be the dominant portion of the mark, and deserving of greater weight when applicant's mark and the registrant's mark are compared in their entirety. Although the registered mark contains a design element, it is by the word SABROSITO that consumers will refer to and call for the goods. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987) (if a mark comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services.) Moreover, the design portion, comprising a fork, knife and spoon, is not as visually prominent, and it is also highly suggestive of food products. Thus, it does not make a strong commercial impression. Nor do the exclamation points used in the Spanish manner at the beginning and the end of the word SABROSITO.

Applicant has made the point that its mark is shown in red, and that the cited mark makes no claim to color. However, as the Examining Attorney has pointed out, this means only that the registration is not limited to the color red, and the registrant's mark may be displayed in any color, including red. Applicant argues that the red in its mark, as used for its products, conveys the suggestion that its goods are spicy, and that such a connotation would not be conveyed if the registered mark were displayed in red. However, since the registrant's identification covers "sauces" per se, the registrant could use its mark for picante sauce and other spicy sauces, in which case registrant's mark with red lettering would have the same suggestion.

We also note that the marks use somewhat different stylized lettering. However, the stylizations are not so unique or unusual that consumers are likely to note them, or to distinguish the marks because of them. All in all, while a close examination shows that there are differences in the appearances of the marks, consumers do not necessarily have the luxury of making side-by-side comparisons between marks under actual marketing conditions, and must rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate*

Corporation, 206 USPQ 255 (TTAB 1980). We find that the marks are similar in appearance.

The marks are also very close in pronunciation. Applicant does not argue otherwise. As for connotation, again, for those who speak or understand Spanish, both marks convey the same suggestion of "tasty," while for those who do not speak Spanish, the marks will have no connotation. In this connection, we reject applicant's argument that "the suffix 'SITO' in the word SABROSITO would be perceived by the average consumer in this country as being similar to the English word 'sit,' which would give the connotation of an elaborate sit-down meal." Brief, p. 6. We do not believe that consumers would parse out the letters "S-I-T" in the mark to view them as the word "sit," any more than we think consumers would parse out the letters "Z-I-T" in the suffix portion of applicant's mark to reach the conclusion that applicant's goods cause pimples. Nor do we accept applicant's argument that the presence of the fork, knife and spoon design in the registered mark gives that mark the connotation of haute cuisine. These utensils are used to eat many different foods, including food that would be prepared or eaten with picante sauce and taco sauce.

We find that the marks have similar connotations and convey similar commercial impressions. The du Pont factor of the similarity of the marks favors a finding of likelihood of confusion.

We agree with applicant that the registered mark, because of its highly suggestive connotation, is not entitled to a broad scope of protection, but even a limited scope of protection extends to the use of such a similar mark as applicant's stylized LA SABROZITA for identical goods.

The only other du Pont factor that has been discussed by applicant and the Examining Attorney is the length of time during and conditions under which there has been concurrent use without evidence of actual confusion. Applicant has asserted first use of its mark in commerce on February 28, 1995, and points out that the cited registration claims use since 1989. Applicant also asserts that "as far as Applicant is aware, there has been no confusion indicated by Applicant's customers." Brief, p. 9. Applicant concludes from this either that the marks are not confusingly similar, the trade channels for the goods are different, or that there has been minimal usage of the registered mark. While different trade channels or minimal usage might explain why there have been no

instances of actual confusion, we may not conclude from either of these possibilities that confusion is not likely. We can conclude that confusion is not likely only if there has been sufficient contemporaneous use of the marks such that there has been an opportunity for confusion to arise. Here, we have no evidence as to the extent of advertising or sales of either applicant's or the registrant's goods. We also point out that the cited registration contains no limitations on trade channels, and therefore the registrant would have the right to offer its goods in all channels of trade appropriate for the goods, including future channels that would be the same as those in which applicant sells its goods. Moreover, we do not know what the registrant's experience has been in terms of instances of actual confusion. Thus, we must treat this du Pont factor as neutral.

Applicant and the Examining Attorney have not discussed any of the remaining du Pont factors. We think that the factor of the conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing, is also relevant. Picante sauces, taco sauce and salsa are rather inexpensive items that may be purchased on impulse. As such, this factor, too, favors a finding of likelihood of confusion. With

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respect to the remaining du Pont factors, to the extent that any are applicable, they must be considered to be neutral.

After considering all of the relevant du Pont factors, we find that the use of applicant's mark LA SABROZITA in stylized form for picante sauces, taco sauce and salsa is likely to cause confusion with the registered mark SABROSITO! and design for, inter alia, sauces.

Decision: The refusal of registration is affirmed.