

This Opinion is not a
Precedent of the TTAB

Mailed: November 18, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Bovis Foods, LLC.
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Serial No. 86286415
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Erik M. Pelton of Erik M. Pelton & Associates PLLC,
for Bovis Foods, LLC.

Gina M. Fink, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

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Before Kuhlke, Taylor and Adlin,
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Bovis Foods, LLC (“Applicant”) seeks registration on the Principal Register of the mark LEFTY’S in standard characters for “restaurant and bar services,” in International Class 43.¹

The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that

¹ Application Serial No. 86286415 was filed on May 20, 2014, under Section 1(a) of the Trademark Act, based upon Applicant’s allegation of a first use and first use in commerce date of 1958.

Applicant's mark, when used in connection with the identified services, so resembles the mark LEFTY'S in standard characters registered on the Principal Register for "Bar and restaurant services; [Cafe and restaurant services;] Cafeteria and restaurant services; Carry-out restaurants; [Fast food and non-stop restaurant services;] Restaurant; Restaurant and bar services; [Restaurant and cafe services;] Restaurant and catering services; Restaurant services; Restaurant services featuring sandwiches; Restaurant services, including sit-down service of food and take-out restaurant services; Restaurant, bar and catering services; Restaurants; Restaurants featuring home delivery; Self service restaurants; Take-out restaurant services; Serving food and drinks; Serving of food and drink/beverages; Catering for the provision of food and beverages; Catering of food and drinks; Fast-food restaurants; Fast-food restaurants and snackbars; Food preparation services; [Mobile cafe services for providing food and drink;] Preparation of food and beverages; Providing of food and drink; Provision of food and drink in restaurants [; Rental of food service equipment]" in International Class 43,² as to be likely to cause confusion, mistake or deception.

When the refusal was made final, Applicant appealed and requested remand for consideration of additional evidence. The Board granted the request and remanded the application to the Examining Attorney for consideration of Applicant's additional evidence. Upon consideration of that evidence, the Examining Attorney maintained

² Registration No. 3779930, issued on April 27, 2010. The services in brackets have been deleted from the registration.

the refusal, the Board resumed the appeal, and briefs were filed. We affirm the refusal to register.

Likelihood of Confusion

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *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 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 or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors and others are discussed below. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944 (Fed. Cir. 2006) (even within the *du Pont* list, only factors that are “relevant and of record” need be considered).

Similarity/Dissimilarity of the Marks

We compare marks “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567).

Applicant’s and Registrant’s marks, LEFTYS in standard characters, are identical “in their entirety as to appearance, sound, connotation and commercial impression.”

Similarity of the Services/Channels of Trade/Consumers

With regard to the services, channels of trade and classes of consumers, we must make our determinations under these factors based on the services as they are identified in the application and registration. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “This factor considers whether ‘the consuming public may perceive [the respective goods and services of the parties] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 113 USPQ2d at 1086 (quoting *Hewlett Packard*, 62 USPQ2d at 1004).

Applicant’s “restaurant and bar services” are identical to Registrant’s “restaurant and bar services.”

As to the channels of trade and classes of consumers, because the services are identical we must presume that Applicant’s and Registrant’s services are offered through the same channels of trade to the same classes of purchasers. *Hewlett-Packard Co. v. Packard Press, Inc.*, 62 USPQ2d at 1005 (“absent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers.”) *See also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2014) (Board entitled to rely on this legal presumption).

At this point in the analysis we have identical marks, identical services and identical channels of trade; this is clearly a strong case to find likelihood of confusion.

Other Factors

Applicant argues, however, that the refusal should be reversed because (1) Applicant's use of the mark predates Registrant's use by more than 30 years, and (2) the marks have co-existed with no confusion for more than 25 years. App. Br., 10 TTABVUE 5. More specifically, Applicant points to its use of the LEFTY'S mark for restaurant and bar services for "nearly 60 years" and its registrations for LEFTY O'DOUL'S for restaurant and bar services, hot dogs, and mustard; LEFTYS BLOODY MARY MIX for non-alcoholic cocktail mix; and LEFTY'S for non-alcoholic cocktail mixes, and energy drinks, and asserts that it "has continued to reinforce the source identifying capacity and significance of the marks mark [sic] through exploitation of the LEFTY'S and LEFTY O'DOUL'S marks for highly related services and has created a mark with a strong commercial impression." App. Br., 10 TTABVUE 9.

Applicant further argues that:

Applicant's bar and restaurant has coexisted with the cited bar and restaurant for more than twenty-five years without incident in the marketplace. Despite Applicant's success at attracting customers from around the world and sale of goods in multiple states, there has never been any allegation of confusion made in the marketplace or by either party. Multiple registrations of Applicant and registrant featuring LEFTY'S have coexisted for more than five years on the register without incident. Applicant has registered the mark LEFTY'S for additional related goods with no objection from registrant. There is no reason to believe that registration of Applicant's LEFTY'S mark here will upheave the status quo. The field of bars and restaurants is very crowded, and there are countless

examples of bars and restaurants coexisting both in the marketplace and on the register with shared terms and similar constructions. There have even been other LEFTY'S marks on the register for restaurant services and food goods (now cancelled) during large portions of the marks' coexistence and there are other LEFTY'S applications currently pending. The crowded nature of the restaurant and bar field and the resulting coexistence of similar marks affects the way marks in the field convey consumer impressions, the relative strengths of the marks as source identifiers, and conditions under which consumers purchase the goods, the market interface between the marks and goods, and the likelihood and extent of consumer confusion as to source of these services. Consumers are able to see beyond individual terms because the market has conditioned them to do so.

App. Br., 10 TTABVUE 11.

Priority of use is not relevant in the context of an *ex parte* appeal. Priority is relevant in the context of an *inter partes* proceeding. Applicant could have petitioned to cancel the cited registration, issued on April 27, 2010, based on its priority after it received the September 8, 2014 Office Action or the March 23, 2015 Final Office Action but chose not to do so. Alternatively, Applicant could have amended its application to one for concurrent use.

Concurrent and overlapping use is relevant in the context of the *du Pont* factor "the length of time during and conditions under which there has been concurrent use without evidence of actual confusion." Unlike the channels of trade factor which presumes all possible, not just actual, channels of trade encompassed by the application and registration, the actual channels of trade are relevant to an analysis regarding actual confusion in order to determine if there have been meaningful opportunities for confusion to occur. We cannot know to what extent Registrant's

customers, presumably in Maryland, have traveled to San Francisco and seen or eaten at Applicant's restaurant, and vice versa, therefore the record does not conclusively establish meaningful opportunities for confusion. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000).

Even assuming Applicant's restaurant is known to those who have not travelled to San Francisco or eaten there due to its length of use for restaurant services and certain goods, and its connection with the baseball player Lefty O'Doul, the fact that Applicant is not aware of actual confusion does not mean there has not been nor does it foreclose the likelihood of confusion. A showing of actual confusion would of course be highly probative, if not conclusive, of a likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight. *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965).

The uncorroborated statement that there are no known instances of actual confusion based on the coexistence of Applicant's and Registrant's marks is of little or no evidentiary value in this *ex parte* proceeding. *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003). Moreover, in the context of an *ex parte* proceeding a registrant "has no chance to be heard from (at least in the absence of a consent agreement, which applicant has not submitted in this case)." *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984). The issue before us is likelihood of confusion, not actual confusion. *Herbko Int'l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (actual confusion not

required). In short, the coexistence of these identical marks on separate coasts for the identical services does not support nationwide registration and protection for both.

Regarding the argument that the restaurant field is crowded with LEFTY marks, the record shows Applicant and Registrant using and registering marks with the common term LEFTY'S, but Applicant's registered mark for restaurant services (along with hot dogs and mustard) has distinguishing features, namely, the additional surname O'DOULS. Applicant's LEFTY'S registrations for non-alcoholic cocktail mixes and energy drinks, even if considered related to restaurants, do not remove likelihood of confusion between identical marks for identical services which is this case. Even if there were sufficient evidence to find the field of restaurants that incorporate the term LEFTY'S in their marks crowded, and that the use and registration of LEFTY'S for goods adds to the crowded field, there must be some distinguishing element in the applied-for and registered marks or the goods and services by which consumers may distinguish them. Here, everything is identical.

Balancing of Factors

In conclusion, because the marks are identical, the services are identical, and the channels of trade and consumers are presumed to overlap, we find that confusion is likely between Applicant's and Registrant's LEFTY'S marks for "restaurant and bar services."

Decision: The refusal to register Applicant's mark is affirmed.