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Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Chang*

Serial No. 87503270

Taylor J. Howard of the Law Offices of Yohan Lee,  
for Byung Ha Chang.

Brian Pino, Trademark Examining Attorney, Law Office 114,  
Laurie Kaufman, Managing Attorney.

Before Ritchie, Adlin, and Pologeorgis,  
Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Byung Ha Chang (“Applicant”) seeks registration on the Principal Register of the mark IZAKAYA KOPAN RAMEN (and design), as shown below, for “Restaurant services,” in International Class 43.<sup>1</sup>

<sup>1</sup> Serial No. 87503270, filed on June 23, 2017, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on alleged dates of first use and use in commerce on May 26, 2017. The application includes the following translation statement: The English translation of “IZAKAYA” in the mark is “GASTROPUB.”



Pursuant to a requirement by the Examining Attorney, Applicant disclaimed the terms "IZAKAYA" AND "RAMEN." The mark includes the following description:

The mark consists of a bowl with a pair of chopsticks with the wording "IZAKAYA KOPAN RAMEN" on the bottom of the bowl. Color is not claimed as a feature of the mark.

The Examining Attorney refused registration of Applicant's applied-for mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a prior registration for KOPAN, in standard character form, for the following services in International Class 43:

Kids cafe services; Canteen services; Snack bar services; Shaved ice with fruit shop services in the nature of a restaurant; Fruit cafes; **Restaurant services**; Buffet restaurants; Salad bars in the nature of restaurants; Western style restaurants; Providing of food and drink; Ice cream shop services in the nature of a restaurant; Cafes; Carry out restaurant services; Fast-food restaurant services

When the refusal was made final, Applicant filed a request for reconsideration and an appeal. When the request for reconsideration was denied, the appeal was resumed. Both Applicant and the Examining Attorney filed briefs. For the reasons discussed herein, we affirm the Section 2(d) refusal to register.

## I. Likelihood of Confusion

Our determination under Section 2(d) of the Trademark Act is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *see also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see also In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014). “Not all of the [*du Pont*] factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1719 (Fed. Cir. 2012) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)). We consider the *du Pont* factors for which there is argument or evidence.

### A. The Services, Trade Channels and Purchasers

We consider first the relationship between the respective services as identified in the application and the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (goods as identified in involved application and cited registration compared). Both the

application and the cited registration identify “restaurant services,” and thus the services are identical. Applicant argues that Applicant’s and Registrant’s restaurants are “dramatically different in the style of food they offer and the atmosphere that they offer.” 7 TTABVUE 9. It is axiomatic, however, that because the restrictions asserted by Applicant are not listed in either the application or in the cited registration, we may not consider these alleged differences. *See Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.” (citations omitted)). The services are identical.

As for the channels of trade, when as here, the respective identifications of goods or services are identical, the identified goods or services are presumed to travel in the same channels of trade to the same class of purchasers. *In re Viterra, Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); (“[A]bsent 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.”). Thus, Applicant’s argument and evidence of marketplace use is not persuasive. We must presume the trade channels and classes of purchasers are the same for Applicant’s and Registrant’s restaurant services.

We find that these factors weigh heavily in favor of finding a likelihood of confusion.

#### B. Strength of the Cited Mark

With the March 26, 2018 Response to Office Action, Applicant responded to an information requirement regarding the “significance” of KOPAN as follows:

KOPAN appearing in the mark has no significance nor is it a term of art in the relevant trade or industry or as used in connection with the goods or services listed in the application, or any geographical significance.

Regarding any possible translation of “KOPAN,” Applicant stated as follows:

KOPAN does not have a relevant translation in Korean, however according to Google translate, this is a Korean word that translates to “splinter” in English (see attached PDF). There is no Chinese or Japanese translation for the word Kopan.

Applicant included with the response a printout of Google translate, showing a translation of “KOPAN” as “splinter.” Neither the application nor the cited registration contains a translation statement for “KOPAN.”

On brief, Applicant argued that “it has recently come to light that KOPAN as used in the mark is a fanciful term that combines the words Korea and Japan.” 7 TTABVue 4. The Examining Attorney objected to this new argument. Applicant did not cite any record evidence to support this argument, and we do not consider it. We further note that Applicant’s argument that “KOPAN” is “fanciful” does nothing to change our conclusion. To the extent that Applicant is actually arguing that the term is suggestive, it is nevertheless inherently distinctive and entitled to protection against confusingly similar marks. *See generally Two Pesos Inc. v. Taco Cabana Inc.*,

505 U.S. 763, 23 USPQ2d 1081, 1083 (1992) (suggestive, arbitrary and fanciful marks are deemed inherently distinctive).

### C. The Marks

We next compare the marks in their entireties in appearance, sound, connotation and commercial impression. *Palm Bay Imps.*, 73 USPQ2d at 1692. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721. Under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255, 259 (TTAB 1980). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Assoc. of the U.S. Army*, 85 USPQ2d 1264, 1268 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Here, the average purchaser includes any consumer of restaurant services.

The mark in the cited registration consists solely of the term KOPAN in standard character form. This term is incorporated in Applicant's mark, with the nondistinctive literal terms "IZAKAYA" and "RAMEN," along with a design of a bowl



with chopsticks, . Applicant disclaimed the descriptive terms “IZAKAYA” and “RAMEN.” With the March 26, 2018 Response to Office Action, Applicant stated that “The English translation of Izakaya in the mark is Gastropub.” Applicant further conceded on brief that “Applicant’s mark IZAKAYA KOPAN RAMEN is descriptive as to ‘izakaya,’ meaning gastropub in Japanese, and ‘ramen,’ describing one of the food items on the menu, both of which have been disclaimed pursuant to offices actions.” 7 TTABVUE 5.

While a mark must be considered as a whole, it is well-settled that disclaimed, generic or descriptive matter may have less significance in likelihood of confusion determinations. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *In re Dixie Rests. Inc.*, 41 USPQ2d at 1533-34; *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”).

Furthermore, while we recognize that Applicant’s mark has a design element, it is the wording by which consumers will call for or refer to the respective services. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012) (quoting *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983)). Applicant’s design of what appears to be a ramen “bowl,” with a “pair of chopsticks” further

emphasizes the literal element of Applicant's mark. Since the mark in the cited registration is registered in standard character form, there is no specific limitation as to Registrant's display of the word "KOPAN," which could be presented in the same size, font and color as in Applicant's mark. *See Viterra*, 101 USPQ2d at 1910-11.

To the extent "KOPAN" may have a suggestive meaning, both marks have the same connotation and commercial impression of offering Asian cuisine. To the extent consumers may understand the term "KOPAN" as completely fanciful, Applicant's mark may be perceived as an extension of Registrant's restaurant services. Where, as here, the marks appear on services that are identical, the degree of similarity between the marks necessary to support a finding of likely confusion declines. *Bridgestone Ams. Tire Operations LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). We find that the marks are sufficiently similar in sight and sound, and especially so in connotation and commercial impression, for confusion to arise when the marks are used for identical services. The first *du Pont* factor also favors finding a likelihood of confusion.

## II. Conclusion

After considering all of the arguments and evidence of record as they pertain to the relevant *du Pont* factors, we find that the services are identical, and presume that they would travel through the same channels of trade to some of the same general consumers. The mark in the cited registration is inherently distinctive, and we find

that the marks as a whole are similar in sight and sound and especially in connotation and commercial impression.

Accordingly, we find a likelihood of confusion exists between Applicant's applied-



for mark and the cited mark KOPAN for the identified services.

**Decision:** The Section 2(d) refusal to register Applicant's mark is affirmed.