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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Restaurant Advisory Services, Inc.
v.
Restaurant Accounting Services, Inc.

Cancellation No. 92051403

Robert C. Pfeilsticker, Jr. for Restaurant Advisory Services,
Inc.

Timothy J. Meagher of Hamilton Brook Smith & Reynolds for
Restaurant Accounting Services, Inc.

Before Quinn, Bucher and Cataldo,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Restaurant Accounting Services, Inc. ("respondent") owns a
registration of the mark RAS (in standard characters) for
"accounting services" in International Class 35.¹

Restaurant Advisory Services, Inc. ("petitioner") filed a
petition to cancel the registration under Section 2(d) of the
Trademark Act, 15 U.S.C. § 1052(d), on the ground that

¹ Registration No. 3634863, issued June 9, 2009. The registration sets forth
dates of first use of July 31, 2006.

respondent's mark, when used in connection with respondent's services, so resembles petitioner's previously used and registered mark RAS (in standard characters) for "consulting services to the restaurant and hospitality industries"² in International Class 42 as to be likely to cause confusion.

Respondent, in its answer, denied the salient allegation of likelihood of confusion.

The record consists of the pleadings; a copy of the registration sought to be cancelled; trial testimony, with related exhibits, taken by petitioner; a status and title copy of petitioner's pleaded registration, a copy of an email between the parties' attorneys, excerpts from printed publications, and respondent's responses to petitioner's interrogatories, all introduced by way of petitioner's notices of reliance.³ Respondent neither took testimony nor offered any other evidence. Only petitioner filed a brief on the case.

Ronald Gorodesky, petitioner's president and sole shareholder, testified that petitioner is engaged in consulting services in the areas of financial and operations development to the restaurant and hospitality industries. The services have been continually marketed and sold under the mark RAS since 1992; over sixty percent of respondent's services involve

² Registration No. 1894471, issued May 16, 1995; renewed.

³ The email correspondence is not proper subject matter for a notice of reliance. See Trademark Rule 2.122(e). Respondent did not object to this introduction, however, and so we have considered the evidence.

accounting and financial advice. (p. 15). Mr. Gorodesky has authored articles in trade magazines directed to the restaurant and hospitality industries; one of the articles is titled "Restaurant Accounting: For Profit's Sake, Inventory Your Food Cost." Petitioner's services are marketed through trade journals, as well as magazines, print advertising and the Internet.

Petitioner has established its standing to cancel respondent's registration. In particular, petitioner has properly made its pleaded registration of the mark RAS of record and, further, has shown that it is not a mere intermeddler. Petitioner's use and registration of its mark RAS establish that petitioner has standing. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

Petitioner likewise has established priority of use. Respondent did not take testimony or offer any other evidence. In this situation, the earliest date upon which respondent can rely is the filing date of the application which matured into its registration. *See Brewski Beer Co. v. Brewski Brothers Inc.*, 47 USPQ2d 1281, 1284 (TTAB 1998). The filing date of application Serial No. 77607451 that matured into Registration

No. 3634863 is November 5, 2008. Petitioner proved prior and continuous use of its mark RAS dating back to 1992, that is, long prior to respondent's earliest priority date. Accordingly, petitioner has shown its priority of use in connection with consulting services to the restaurant and hospitality industries.

We now turn to the only issue that remains for decision, namely likelihood of confusion. Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Petitioner must establish that there is a likelihood of confusion by a preponderance of the evidence. In any likelihood of confusion analysis, however, 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). These factors, and the other relevant evidence in the proceeding now before us, are discussed below.

With respect to the first *du Pont* factor, we must consider the marks in their entirety as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports,*

Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

The marks RAS, both in standard characters, are identical in every respect. This factor weighs heavily in petitioner's favor.

In comparing the services, we initially note that where identical marks are involved, as is the case here, the degree of similarity between the parties' services that is required to support a finding of likelihood of confusion declines. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688-1689 (Fed. Cir. 1993); *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650 (TTAB 2002); and *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001). It is only necessary that there be a viable relationship between the two to support a finding of likelihood of confusion. *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). The issue here, of course, is not whether purchasers would confuse the services, but rather whether there is a likelihood of confusion as to the source of these services. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

We make our determination regarding the similarities between the parties' services, channels of trade and classes of purchasers based on the services as they are identified in the respective registrations. *Octocom Systems Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787

(Fed. Cir. 1990). Petitioner's "consulting services" are described broadly enough to include providing advice in the areas of accounting and other financial matters to the restaurant and hospitality industries. Further, respondent's services are identified as "accounting services." This recitation encompasses accounting services for restaurants and, indeed, the evidence establishes that respondent's services are, in fact, rendered to restaurants. Mr. Gorodesky testified that the parties do the exact same things as part of their described services, such as identifying costs and advising on cash flow.

Accordingly, the services are closely related, and this factor weighs in petitioner's favor.

The recitations of services do not include any limitations as to trade channels and purchasers, and so we must presume that they move in all channels of trade normal for these services, and that they are available to all classes of purchasers for the described services. See *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); and *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992). Thus, the services would move through the identical trade channels, such as through websites on the Internet, and, as noted above, both parties render their services to restaurants. These similarities weigh in petitioner's favor.

Based on the above, we find that there is a likelihood of confusion between the marks.

There are other facts which buttress our conclusion in this case. Respondent, upon discovery of petitioner's mark, sent a cease and desist letter to petitioner. (Gorodesky dep., p. 16-17, ex. P-9). In the letter, respondent alleged that petitioner's mark is confusingly similar to respondent's mark, and that use of petitioner's mark constitutes an infringement of respondent's registered and common law rights. In addition to cessation of use, respondent also demanded that petitioner withdraw any trademark applications and/or cancel any registrations it owned for the mark RAS. Although certainly not dispositive of the present case, we have considered respondent's prior statements as illuminative of shade and tone in the total picture of likelihood of confusion, but nothing more than that. See *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151 (CCPA 1978); and *Anthony's Pizza & Pasta International, Inc. v. Anthony's Pizza Holding Co.*, 95 USPQ2d 1271, 1281 (TTAB 2009).

Finally, we note that respondent, subsequent to service of the petition for cancellation on it, discontinued use of its registered RAS mark, opting instead for a new logo that uses its full company name. In an email to petitioner's counsel on April 7, 2011 (just prior to trial), respondent's counsel wrote the

following: "My client has completed its phase over to its new logo which uses its full company name....As a result, my client will be taking no further action on the matter or on the Cancellation proceeding. I have been instructed to take no further action and I am not authorized to consent to any action or filing."

We conclude that purchasers familiar with petitioner's consulting services to the restaurant and hospitality industries rendered under the mark RAS would be likely to mistakenly believe, upon encountering respondent's identical mark RAS for accounting services, that the services originated from or are associated with or sponsored by the same entity.

Decision: The petition for cancellation is granted, and Registration No. 3634863 will be cancelled in due course.