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THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB 8/24/98

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Coors Brewing Company

Serial No. 74/574,985

Sabrina Crowley Stavish of Sheridan Ross for applicant.

Montia O. Givens, Trademark Examining Attorney, Law Office
101 (R. Ellsworth Williams, Managing Attorney).

Before Simms, Quinn and Walters, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

Coors Brewing Company has filed a trademark application
to register the mark BLUE MOON for "beer."¹

The Trademark Examining Attorney has finally refused
registration under Section 2(d) of the Trademark Act, 15
U.S.C. 1052(d), on the ground that applicant's mark so
resembles the mark shown below, previously registered for

¹ Serial No. 74/574,985, in International Class 32, filed September 19,
1994, based on an allegation of a bona fide intention to use the mark in
commerce. On September 22, 1995, applicant submitted its amendment to

"restaurant services,"² that, when used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs and an oral hearing was held. We affirm the refusal to register.

In the analysis of likelihood of confusion in this case, two key considerations are the similarities between the marks and the similarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). Turning, first, to the goods, we note that the Examining Attorney submitted a substantial amount of evidence in support of her position that applicant's goods and registrant's services are related because brewpubs are restaurants that serve beer brewed on the premises, and restaurants without on-site breweries often purchase private label beer from third-party microbreweries; and that such beers often are identified by

allege use and specimens, alleging dates of first use and first use in commerce as of August 15, 1995.

² Registration No. 1,770,568 issued May 11, 1993, to Happy Bread & Fenster, Inc., in International Class 42.

the restaurant/ brewpub trademark. The record includes an excerpt from the *Encyclopedia of Beer* (undated) describing a "brewpub" as "a small brewery serving most of its beer on the premises, often through an associated restaurant or taproom" and indicating that "brewpubs usually incorporate a restaurant [and] are the fastest-growing segment of the burgeoning United States microbrewery movement."

Additionally, the Examining Attorney submitted excerpts of articles retrieved from the LEXIS/NEXIS database indicating that the term "brewpub" is used to describe a restaurant that produces its own beer and serves it on-site.³ A number of excerpts indicate, also, that microbreweries are providing private label beers to restaurants. Although several of these articles indicate that, in specific instances, the private label beer is identified by a trademark that differs from the service mark identifying the restaurant, there is also evidence that some private label beers are identified by the same name identifying the restaurant.⁴

³ In view of this evidence, we find that applicant's argument that "a brewpub is not a type of restaurant, but a place where beer is brewed and sold to the public to drink on the premises" is not well-taken. While a brewpub is a place where beer is brewed and served on the premises, it is also usually a restaurant or a facility incorporating a restaurant.

⁴ A number of excerpts submitted pertain to retail grocers selling food products identified by restaurant chain trademarks. We do not find these examples to be particularly probative of the extent to which restaurant services and beer may be related.

The Examining Attorney submitted numerous third-party registrations for marks including restaurant and brewpub services in the identification of goods; and approximately six registrations for marks that include restaurant services and beer in the identification of goods.

Applicant contends that food products and restaurant services are not *per se* related and, in particular, that beer and restaurant services are not related. Applicant submitted a copy of the specimen from the cited registration file, a restaurant menu, and argues that registrant is a Mexican restaurant whereas applicant is a large nationally known brewing company and, thus, consumers are unlikely to believe either that a Mexican restaurant is brewing its own beer or that a major brewer provides restaurant services. While we agree that no *per se* relationship exists between the identified goods and services, applicant's additional contentions are not well-taken. In determining registrability, "the question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in [the] registration, rather than what the evidence shows the goods and/or services to be." Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). In this case, applicant's goods and

registrant's services are broadly identified and contain no limitations. In arguing that registrant's restaurant services are actually limited to Mexican restaurants, applicant is essentially arguing that the registrant's identification of services should be limited, which is a collateral attack upon the validity of the cited registration. See, Section 18 of the Trademark Act, 15 U.S.C. 1068; and *Eurostar v. "Euro-star" Reitmoden GmbH & Co. KG*, 34 USPQ2d 1266 (TTAB 1994). A collateral attack on the validity of a cited registration is not appropriately raised in an *ex parte* proceeding and should be addressed before the PTO in a cancellation proceeding. See, *In re Calgon Corp.*, 435 F.2d 596, 168 USPQ 278, 280 (CCPA 1971) [applicant's allegation of priority of use in *ex parte* proceeding is inappropriate collateral attack on validity of cited registration]; *In re Peebles, Inc.*, 23 USPQ2d 1795, 1797 n.5 (TTAB 1992) [applicant's contention that cited registration is merely descriptive is inappropriate in *ex parte* proceeding as it constitutes a collateral attack on validity of cited registration].

Applicant concedes that some restaurants serve beer; that there are brewpubs which brew their own beer and serve food; and that brewpubs are currently popular. However, applicant argues that consumers expect beer to be brewed by a brewery and do not expect a restaurant to be the source of

beer served in that restaurant. In support of this contention, applicant submitted copies of third-party registrations of several substantially identical marks owned by different parties for, respectively, beer and restaurant services. Regarding the Examining Attorney's evidence of registrations identifying both beer and restaurant services, applicant states, simply, that "this is not typical." Applicant makes several additional statements of purported fact which are not persuasive as these statements are unsupported by any evidence in this record.⁵

In this case, we find that the Examining Attorney has established that there is a class of restaurants, commonly known as "brewpubs," which brew and serve their own beer on the premises; that a number of restaurants order and serve private label beers; and that a number of marks are registered for both restaurant and brewpub services and for restaurant services and beer. We acknowledge that the record in this case also establishes that not all private label beers are identified by the same name as the restaurant serving that beer; and that several registrations exist for substantially identical marks apparently owned by

⁵ For example, applicant states that "since the advent of brewpubs, there are many more marks used in connection with beer [and] as a result, it is likely that beer products and restaurant services more frequently use the same name, even though they are not from a common source"; that "brewpubs do not name the beers they produce by the same name as the brewpub, but sell numerous varieties of beers which have different and changing names"; and that "there are many more restaurants in the United States than brewpubs, and it is much more typical for a restaurant not to be a brewpub" (emphasis in original).

third-parties for, respectively, beer and restaurant services. However, we conclude that sufficient evidence exists in this record to warrant our conclusion that registrant's restaurant services and applicant's beer are likely to be seen by the same persons under circumstances which could give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

Turning our consideration to the marks, the Examining Attorney contends that applicant's mark is identical to the word portion of registrant's mark; and that the word portion of registrant's mark is dominant as the design of a moon simply reinforces the word portion of the mark.

Applicant argues, on the other hand, that the design element of registrant's mark is the central and largest portion of the mark; that, as such, it is at least equal in significance to the word portion of registrant's mark; and that, therefore applicant's mark is sufficiently distinguished from registrant's mark. Applicant contends, further, that in view of third-party registrations and uses, BLUE MOON is a weak mark in connection with restaurant

services and food products. In connection with this latter contention, applicant submitted evidence in the nature of two third-party registrations owned by the same party for cheese products and one third-party registration for food flavorings; listings of variations of BLUE MOON in the yellow pages of numerous phone directories from around the United States under the heading "restaurants"; listings from a *Dunn & Bradstreet* database of company/business names indicating variations of BLUE MOON under the principal and secondary categories of "eating places" and/or "drinking places"; and a Thomson and Thomson search report.

We do not agree with the Examining Attorney's argument that such evidence is an improper collateral attack on the validity of the cited registration. Certainly, even if applicant established that BLUE MOON is a weak mark, weak marks are entitled to registration and protection. Looking at the specific evidence submitted by applicant, we find that, in view of the significant differences between the goods and services involved in this case and the goods recited in the three third-party registrations for BLUE MOON, these registrations are not particularly probative of the strength or weakness of registrant's mark as it relates to restaurant services.

Considering the other evidence submitted by applicant in support of its contention that BLUE MOON is a weak mark

in connection with restaurant services, we note that the Examining Attorney has voiced objections to the acceptability of this evidence. However, even if we were to consider all of applicant's evidence acceptable to show third-party uses of BLUE MOON in connection with restaurant services, we find the nature and extent of this evidence insufficient to warrant a conclusion that BLUE MOON is a weak mark in connection with restaurant services. Listings of marks and business names, alone, do not reveal the extent of the use made by the listed third-party businesses; some of the businesses may never have gotten off the ground, or may have gone out of business; some of the businesses may be small enterprises, in remote locations, that have affected only a minuscule portion of the general purchasing public for restaurant services; and at least some, if not all, of the listings may be registrant's. See, *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1565 (TTAB 1996); and *Carl Karcher Enterprises Inc. v. Stars Restaurants Corp.*, 35 USPQ2d 1125, 1131 (TTAB 1995).

The significance of applicant's evidence must be considered in the context of the entire record.⁶ In the

⁶ We note, for example, that in *In re Broadway Chicken Inc.*, *supra*, the Board found the sheer magnitude of telephone directory listings and *Dunn & Bradstreet* entries indicative of widespread third-party use of the dominant portion, BROADWAY, of the cited registered marks, BROADWAY PIZZA and BROADWAY BAR AND PIZZA. However, in reversing the refusal to register BROADWAY CHICKEN for substantially the same services, the Board

case before us, applicant's mark is identical to the word portion of registrant's mark and there is no indication in the record that BLUE MOON is other than an arbitrary term in connection with either beer or restaurant services. We find these factors would greatly outweigh applicant's evidence of third-party use such that applicant's mark and registrant's mark are not distinguishable merely by the additional design element in registrant's mark. Rather, we find that the overall commercial impressions of applicant's and registrant's marks are substantially similar.

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, BLUE MOON, and registrant's mark, BLUE MOON and design, their contemporaneous use on the goods and services involved in this case is likely to cause confusion as to the source or sponsorship of such goods and services.

If we had any doubt concerning our conclusion that confusion is likely, we would be obligated to resolve such doubt in favor of the registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed Cir. 1988).

made it clear that this evidence was not conclusive. Rather, the Board found no likelihood of confusion in view of the differences in the marks and the geographic significance of the term BROADWAY, as well as in consideration of applicant's evidence of widespread third-party use of BROADWAY in connection with both related and unrelated goods and services. On the other hand, in *Carl Karcher Enterprises Inc. v. Stars Restaurants Corp.*, in finding a likelihood of confusion between the parties' marks in connection with restaurant services, the Board considered applicant's evidence of third-party use balanced by opposer's evidence of its marks' considerable notoriety. Thus, in that case, the Board found the evidence of third-party use to be of limited probative value in support of applicant's position.

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

R. L. Simms

T. J. Quinn

C. E. Walters
Administrative Trademark Judges,
Trademark Trial and Appeal Board