

**THIS DISPOSITION
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2/09/01

Paper No.

RFC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Giant Eagle, Inc.

Serial No. 75/451,317

David V. Radack of Eckert Seamans Cherin & Mellott, LLC for
Giant Eagle, Inc.

Ingrid C. Eulin, Trademark Examining Attorney, Law Office
111 (Craig Taylor, Managing Attorney).

Before **Cissel**, Bucher and Rogers, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On March 16, 1998, applicant filed the above-
referenced application to register the mark "RIVER CITY
CHICKEN" on the Principal Register for "supermarket
services, namely, a supermarket department providing
prepared chicken," in Class 35. The application was based
on applicant's claim of use of the mark in connection with
these services rendered in interstate commerce since March
of 1995.

The Examining Attorney, in addition to raising several informalities including requiring applicant to disclaim the descriptive word "CHICKEN" apart from the mark as shown, refused registration under Section 2(d) of the Lanham Act. The Examining Attorney held that applicant's mark, "RIVER CITY CHICKEN," as used in connection with the services of a supermarket department providing prepared chicken, so resembles the mark "RIVER CITY," which is registered¹ for "wholesale distributorship featuring meat and fish products," that confusion is likely.

Applicant disclaimed the exclusive right to use "CHICKEN" apart from the mark as shown, but presented arguments to the Examining Attorney on the issue of likelihood of confusion with the cited registered mark. The Examining Attorney, however, was not persuaded, and the refusal to register was made final in the second Office Action. Submitted with that action were a number of third-party registrations wherein the services set forth include both wholesale food distributorship services and retail store services featuring the same products to which the distributorship services relate. Several of these

¹ Reg. No. 2,056,687 issued on the Principal Register to River City Meat & Foods, Inc. on July 10, 1995. The registration claims first use and first use in commerce in December of 1993.

registrations specify both distributorship services and retail store services featuring poultry, meats and fish, or different combinations of these three products. Also included with the final refusal to register were excerpts retrieved from the Nexis® database of newspaper and magazine articles. This evidence makes it clear that some food wholesalers also operate their own retail supermarkets.

Applicant responded to the final refusal to register with a timely Notice of Appeal. Both applicant and the Examining Attorney filed briefs,² but applicant did not request an oral hearing before the Board.

² The Examining Attorney properly objected to the additional evidence submitted with applicant's appeal brief, so we have not considered this evidence. Under Trademark Rule 2.142(d), the record should be complete prior to filing the Notice of Appeal. The Board has discretion under the rule to allow the record to be supplemented after that time, but this discretion is not exercised in circumstances such as this, where applicant has not provided any explanation as to why the evidence could not have been submitted timely. Moreover, even if we were to consider the late-filed evidence, our conclusion that confusion is likely would not change. Without evidence of the extent of use and promotion of the marks applicant asserts are registered, we would have no basis upon which to conclude that the consumers are so familiar with them that they regard "RIVER CITY" as weak in source-identifying significance and therefore look to other elements in such marks to distinguish among them. Additionally, none of the goods and services specified in these registrations are sufficiently related to the services set forth in this application or in the cited registration, so the registrations would not establish weakness in "RIVER CITY" in connection with the services at issue in this appeal.

Based on careful consideration of the record and the arguments before us, we hold that the refusal to register under Section 2(d) the Act is well taken.

Our primary reviewing court set forth the factors to be considered in determining whether confusion is likely in *In re duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Chief among these factors are the similarity of the marks in their entireties as to appearance, sound, meaning and commercial impression and the similarity of the goods or services in question. The focus is on the recollection of the average purchaser, who normally retains a general, rather than specific, impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537 (TTAB 1979).

While we cannot ignore disclaimed words in analyzing marks to resolve the issue of likelihood of confusion, we must recognize that some elements or features of particular marks have more source-identifying significance than others do. *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976). Disclaimed, descriptive matter is typically less significant than the other elements in a particular trademark.

Consideration of these principals with regard to the facts presented by the case at hand leads us to conclude

that the dominant portion of the mark applicant seeks to register is "RIVER CITY," which is, of course, the cited registered mark in its entirety. Because both marks are dominated by the same term, the commercial impressions they create are very similar.

Applicant argues that the registered mark and the dominant portion of applicant's mark is weak in trademark significance because "River City" is a term frequently used in the Pittsburgh region. This argument is unsupported by any evidence properly of record in this appeal.³

We thus turn to the relationship between the services specified in the application and those set forth in the cited registration. The materials submitted by the Examining Attorney establish a clear relationship between these services. The third-party registrations and the excerpted articles show that consumers have a basis upon which to assume that the use of the similar marks in connection with both food distribution services and retail supermarket services indicates that the services emanate

³ In addition, we note that applicant is not seeking a concurrent use registration restricted to the Pittsburgh region, based on use in that region. Instead, applicant seeks an unrestricted registration. Thus, even if we were to accept applicant's argument regarding the strength of the term "RIVER CITY" in the Pittsburgh region, this would not establish weakness in the rest of the country.

from a single source. Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993).

Applicant's argument that confusion is not likely because the mark it seeks to register is only used in conjunction with applicant's name, "GIANT EAGLE," is not well taken. Applicant is not seeking to register a combination of its mark and its name, but rather only the mark which is shown in the drawing which was submitted with the application. That mark, "RIVER CITY CHICKEN," is the only mark which we can consider in determining whether confusion is likely with the cited registered mark. Applicant is free to use its mark with or without any other words or designs, but in resolving this appeal, it would be improper for us to consider wording which is not shown on the drawing submitted with the application.

In a similar sense, we are not persuaded by applicant's argument that confusion is not likely because a consumer would have to be familiar with applicant's supermarket in order to see the mark and purchase the prepared foods sold in them, and such consumers will therefore know that applicant is not a wholesale supplier of similar goods. This is all speculation. We have no way of knowing what level of understanding its customers have of applicant's business structure and activities, but the

record does show that consumers have a basis for believing that wholesale distributors of food products also operate supermarkets featuring those products, and that they would expect both services to be provided under the same marks.

In summary, confusion is likely because when they are considered in their entirety, the marks create very similar commercial impressions, and the services set forth in the application are clearly related to the services specified in the cited registration.

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

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