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April 3, 2003

This Disposition is Not
Citable as Precedent of
the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re International Market Brands, Inc.

Serial No. 75/716,333

Raymond A. Kurz of Hogan & Hartson L.L.P. for International
Market Brands, Inc.

Linda M. King, Trademark Examining Attorney, Law Office 101
(Jerry Price, Managing Attorney).

Before Seeherman, Bucher and Rogers,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Applicant, by an application filed May 20, 1999, seeks
registration of the mark COUNTRY KETTLE for goods
ultimately identified as "frozen soups, canned soups, and
frozen entrees consisting primarily of meat, chicken, fish
or vegetables sold to institutional buyers," in
International Class 29, and "frozen entrees consisting
primarily of pasta or rice sold to institutional buyers,"

in International Class 30.¹ The application claims the mark was first used and was first used in commerce in 1992, in regard to each class of goods.

The examining attorney has refused registration in view of the prior registration of the mark THE COUNTRY KETTLE for "restaurant services," in International Class 42.² When the refusal of registration was made final, applicant appealed. Ultimately, briefs were filed and applicant and the examining attorney presented oral arguments. We reverse the refusal of registration.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See In re Majestic Distilling Co., Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); In re E.I. du Pont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563

¹ The examining attorney accepted certain amendments to the identification, including the addition of the trade channel restriction in each class, in September 2001. The identification of goods for class 29 was further amended through an examiner's amendment entered, with leave of the Board, subsequent to briefing and argument of this appeal, to reflect the intent of the applicant and examining attorney when the earlier amendments were entered. However, even after entry of the post-hearing amendment, the information on this application in the Office's computerized database did not reflect entry of the trade channel restriction for class 30. The Board has made the necessary change to Office records.

² Registration No. 1,004,063, issued February 4, 1975, for 20-year term; registration renewed for additional 10-year term.

(CCPA 1973). Often, two key considerations are the marks and the goods or services, and "means of distribution and sale" are of "peripheral" interest. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). In this case, however, because one of the involved marks is utilized for services and the other for goods with limited, specific distribution, we find no likelihood of confusion despite the virtual identity of the involved marks.

Applicant, in fact, does not argue that the marks differ in any significant way. Certainly, the presence of the word THE in the registered mark and its absence from applicant's mark does not prevent the marks from being considered virtually identical. While applicant does not dispute that the marks are virtually identical, applicant does argue that the mark in the cited registration should be accorded a very limited scope of protection, even for restaurant services and before considering the registrant's presumptive rights to expand use of its mark, because of a plethora of marks for restaurant services that use the term COUNTRY. In addition, applicant notes that, in the field into which the owner of the cited registrant should, presumptively, be entitled to expand use of its mark, there already are a number of KETTLE marks.

To support these arguments, applicant has introduced copies of printouts of information, retrieved from the Office's databases, for approximately 50 use-based registrations wherein a mark registered for restaurant services includes the term COUNTRY. [Applicant's complete submission also includes various marks that, because of their particular connotations, we have discounted and do not include in this count of 50, e.g., marks including the term COUNTRY CLUB.] More than 20 of the 50 of which we take note use COUNTRY as their first word [or immediately after THE], for example: THE COUNTRY GRILL, COUNTRY KITCHEN, COUNTRY OVEN, COUNTRY FISH FRY, COUNTRY CROSSING BUFFET AND BAKERY, COUNTRY STAR, COUNTRY WAFFLES, COUNTRY PRIDE, COUNTRY FIXIN'S, COUNTRY MARKET RESTAURANT & BUFFET, COUNTRY PANCAKE HOUSE AND RESTAURANT, COUNTRY ROADHOUSE BUFFET & GRILL, and COUNTRY PUB.³ As for marks featuring the term KETTLE for food products, the field into which the cited registrant presumably would be able to expand, the record reveals issuance of registrations for COUNTRY KETTLE FUDGE, KETTLE MADE, KETTLE-TIME, KETTLE FRESH, KETTLE CUISINE SOUP, and KETTLE CREATIONS.

³ Applicant also notes the registration of certain "KETTLE" marks for restaurant services, but these are more limited in number.

The submitted third-party registrations are probative of the fact that, in this case, COUNTRY is a term that has had appeal for those in the restaurant field, and KETTLE is a term that has had appeal for those marketing food products, so that these terms may be viewed as being not particularly distinctive in their fields. Bost Bakery, Inc. v. Roland Industries, Inc., 216 USPQ 799, 801 n.6 (TTAB 1982). Thus, the mark in the cited registration is entitled to a more limited scope of protection than an arbitrary mark.

Turning to the goods and services, the examining attorney argues that she must consider not just the cited registrant's restaurant services but also any goods or services within the registrant's normal fields of expansion. She continues her argument by asserting that marketing of individual food items in the [grocery or retail] marketplace "is a relatively new trade channel expansion" for restaurants. Further, the examining attorney argues, "restaurants are marketing frozen versions of the foods available through their restaurant services. Consequently, the frozen food market is now a normal trade channel for restaurants, led by well known restaurants like T.G.I. Friday's and California Pizza Kitchen." In support of her argument, the examining attorney has introduced

numerous copies of printouts from the Office's database of information on registered marks, including registrations of the two entities specifically mentioned in her argument.⁴

Of the many printouts included with the final, the vast majority cover marks utilized for both restaurant services and various food items that appear to be "take out" options for diners. Many of these registrations specifically designate the food items as "for consumption on or off the premises" or as "carry out" items. Of the registrations for both prepared foods and restaurant services, the registration for CITIZEN CAKE covers restaurant services and various packaged or frozen food items; another, for a design mark, covers certain "cook-ready entrees" and "refrigerated and canned soups" as well as restaurant services; and a third covers various frozen Filipino food items as well as "restaurants carry out services, catering and retail food store services specializing in Filipino foods." The only registration that mentions prepared and processed food items for, inter alia, institutional use, does not cover restaurant services.

⁴ The printouts of information regarding registrations of T.G.I. Friday's and of California Pizza Kitchen were made of record with the examining attorney's action denying applicant's request for reconsideration. All other printouts were made of record in support of the final refusal.

The examining attorney asserts that marketing of frozen foods is a relatively new channel of trade for restaurants.⁵ Given the relatively small number of registrations in which a mark has been registered for both restaurant services and frozen food items, we agree with applicant that the record certainly does not reveal this to be an established trade channel for restaurants. Thus, we cannot conclude, on this record, that restaurants generally expand by adding a complementary frozen food product line to their core restaurant service. More importantly, there is nothing in the record to support the contention that restaurants that have branched into marketing of frozen versions of their menu items have gone so far as to market such frozen or canned food items to institutional consumers.

Neither applicant nor the examining attorney has put anything into the record regarding the nature of institutional buyers of canned or frozen food items. We

⁵ Of course, it is, if anything, a channel of trade not for their restaurant services, but for food items served in their restaurants. Thus, while the examining attorney discusses the expansion as a "channel of trade," it is essentially an expansion into a product line that complements a service business, not merely a new channel of marketing for the service.

take judicial notice⁶ of the following dictionary

definitions:

institutional *adj.* ...4. characterized by the blandness, drabness, uniformity, and lack of individualized attention attributed to large institutions that serve many people: *institutional food.*

Random House Webster's Unabridged Dictionary 988 (1998 2nd ed.)

institutional cook A cook who generally works with large quantities of prepackaged or prepared foods for a captive market such as a school or prison.

Webster's New World Dictionary of Culinary Arts 231 (2001 2nd ed.)

The examining attorney argues that "applicant presumes that restaurants do not market goods to institutional buyers" but that the record shows otherwise and, moreover, "the legal presumption is that restaurants are free to market to institutional buyers, such as schools, hospitals, and hotels." Whether applicant is engaging in presumption or basing its argument on its own experience in the field of marketing food items to institutional purchasers is a question we need not answer. We do, however, note our disagreement with the examining attorney's conclusion that the record shows that restaurants market food items to

⁶ University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); Marcal Paper Mills, Inc. v. American Can Co., 212 USPQ 852 (TTAB 1981).

institutional purchasers. As explained above, at most, the record reveals that some entities both run restaurants and sell frozen food, with no indication that such sales are to institutional purchasers, as opposed to restaurant patrons or grocery shoppers who may have eaten at or otherwise have become aware of the type of fare served at certain restaurants. Moreover, we disagree with the examining attorney's conclusion that the rules regarding construction of identifications of goods or services in applications and registrations are also to be applied to perceived areas of natural expansion. In other words, even if marketing of frozen food items is considered to be a field into which a restaurant may expand as a complement to its restaurant service, we do not believe the case law requires us to presume that such expansion will be as extensive as to include marketing to institutional purchasers.

In sum, then, in our likelihood of confusion analysis, we consider the question whether institutional purchasers, who, of course, may also be restaurant patrons, would be confused or deceived by use of the same mark for a restaurant and for institutional frozen or canned food items.⁷ We agree with applicant that such purchasers, who

⁷ Ordinary members of the public who patronize restaurants and purchase frozen food items at retail do not comprise the relevant

necessarily purchase large amounts of food, would at least be sophisticated or knowledgeable about the sources of frozen or canned food items they purchase, and have general knowledge of the food service industry greater than that of the public at large. The record does not, in any way, support a conclusion that institutional food operations purchase food in bulk from restaurants or that restaurants distribute the same food items they serve in their dining rooms to institutional food operations. Thus, they are not likely to assume that frozen food sold under the mark COUNTRY KETTLE and available to them as institutional purchasers would emanate from the same source as THE COUNTRY KETTLE restaurant services.

Decision: The refusal of registration under Section 2(d) of the Lanham Act is reversed.

population for our likelihood of confusion analysis, as such individuals would never encounter applicant's products. Rather, for our purposes, the relevant public consists of those who work as institutional food purchasers.