

Mailed:

**THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT  
OF THE TTAB**

August 3, 2004  
Paper No. 9  
GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Cinema Ride, Inc.**

Serial No. 76398622

**Howard N. Flaxman** of Welch & Flaxman, LLC for **Cinema Ride, Inc.**

**Marc Leipziz**, Trademark Examining Attorney, Law Office 115 (Tomas V. Vlcek, Managing Attorney).

Before **Simms, Hohein and Walters**, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

**Cinema Ride, Inc.** has filed an application to register the mark "DINNERS2NITE" for the services of "arranging dinner reservations for others."<sup>1</sup>

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its services, so resembles the mark "DININGTONIGHT.COM," which is registered for the services of "making on-line restaurant reservations for others and providing information about restaurants on-line by means of a global

<sup>1</sup> Ser. No. 76398622, filed on April 19, 2002, which is based on an allegation of a bona fide intention to use the mark in commerce.

computer network,"<sup>2</sup> as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity in the goods or services at issue and the similarity or dissimilarity of the respective marks in their entireties.<sup>3</sup> Nevertheless, inasmuch as applicant concedes in its brief that the respective marks "are used on similar services that will likely be provided in the same channels of trade," and since it is plain that the services at issue are identical in part in that registrant's "making on-line restaurant reservations for others" includes applicant's "arranging dinner reservations for others," the principal focus of our inquiry is on the similarity or dissimilarity of the marks at issue.

---

<sup>2</sup> Reg. No. 2,377,278, issued on August 15, 2000, which sets forth a date of first use anywhere and in commerce of March 10, 1999.

<sup>3</sup> The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks."

Turning, therefore, to the similarity or dissimilarity of the respective marks, applicant argues in its brief that registrant's "DININGTONIGHT.COM" mark "differs substantially in sound, appearance and meaning" in relation to applicant's "DINNERS2NITE" mark. Applicant contends, in particular, that "the words 'dining' and 'dinners' are spelled differently, sound differently and look very different when presented in written form," including the "double 'n' and 'ers'" in the term "dinners" which "is not found in [the word] 'dining'." Applicant also insists that its mark "utilizes the distinctive combination of the number '2' in conjunction with the term 'nite' so as to form the sound '2nite'." While such sound and the word "tonight" in registrant's mark "may sound alike," applicant insists that "they do not provide the same appearance when written or viewed in written form."

Moreover, when the respective marks are considered in their entirety, applicant asserts that "a consumer would not be confused" because the "spoken forms of the marks present very different sounds and impressions." Applicant, in this regard, specifically points out that:

Again, "dinners" and "dining" sound very different. One is plural, while the other is singular. One employs a short "i" sound, while the other employs a long "i" sound. One is a noun, while the other is a verb. One refers to a meal itself, while the other refers to the act of eating a meal. All in all, consumers will readily appreciate the distinction between "dinners" and "dining" when the terms are spoken in conjunction with the marks at issue. As to "dot com", Applicant's mark includes no such terms and the addition of these terms further

distinguishes the present mark from the mark of the '278 registration.

As to the appearance of the respective marks, applicant urges that "the distinction is even more pronounced," reiterating that 'dinners' and 'dining' look different, and are in fact very different words as discussed above," while "'2nite' and 'tonight' ... also appear very different in written form as discussed above in detail." Applicant concludes, therefore, that "when studied carefully, the marks at issue are very different in appearance, sound and meaning."

In addition, applicant asserts that "the conditions under which, and the purchasers to whom, the sales will be made ... indicate [that] the marks at issue will not be confused." According to applicant, "consumers are generally sophisticated when spending discretionary income on dining and will certainly appreciate the distinction between a 'dot com' service provider and the reservation services provided in accordance with Applicant's mark." Neither applicant's nor registrant's services, applicant contends, "are intended to be utilized in an impulsive manner," inasmuch as for most consumers, "making reservations is more often than not a time consuming and highly thought out process." Thus, applicant insists, because consumers "taking advantage of either Applicant's or Registrant's services would carefully consider the source of the services to optimize their restaurant going experience," no likelihood of confusion exists.

Finally, applicant maintains that another "highly relevant" *du Pont* factor is the number and nature of similar

marks in use on similar goods and services. Applicant asserts that, as shown by the copies of six third-party registrations attached for the first time to its brief,<sup>4</sup> "the terms 'dining' or 'dinner' and 'tonight'" are "present in an exceptional number of registered marks (two of which appear twice), namely: "DINE OUT TONIGHT CLUB"; "DINNER TONIGHT"; "DRESS UP DINNER TONIGHT"; and "DINNER TONIGHT" and design. "The fact that various marks use a similar combination of terms," applicant argues, "is evidence as to how dilute the terms are in the area of food related goods and services" and that the cited mark "DININGTONIGHT.COM" is entitled to only a narrow scope of protection which should not include a denial of registration to applicant's "DINNERS2NITE" mark.

The Examining Attorney, on the other hand, while acknowledging that the marks at issue are not identical and that the differences referred to by applicant are apparent on the basis of a side-by-side comparison, correctly points out in his brief that the proper test for determining likelihood of confusion is not whether the respective marks are distinguishable on such a basis, but whether they create basically the same overall commercial impression. The reason therefor is that a side-by-side comparison is ordinarily not the way that customers will be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks

---

<sup>4</sup> While such evidence is untimely under Trademark Rule 2.142(d), the Examining Attorney has not only offered no objection thereto on such ground, but has discussed the registrations in his brief. Accordingly, we have treated the third-party registrations as being of record herein. See *In re Nuclear Research Corp.*, 16 USPQ2d 1316, 1317 n. 2 (TTAB 1990).

which must determine, due to the fallibility of memory and the concomitant lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is thus on the recollection of the average purchaser, who normally retains only a general rather than a specific impression of marks. See, e.g., Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973); Envirotech Corp. v. Solaron Corp., 211 USPQ 724, 733 (TTAB 1981); and Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975). In addition, the Examining Attorney also correctly notes that when marks would appear in connection with virtually identical goods or services, the degree of similarity between the marks necessary to support a conclusion of a likelihood of confusion declines. See, e.g., Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1994).

With the foregoing principles in mind, we agree with the Examining Attorney that, when considered in their entirety, the marks "DINNERS2NITE" and "DININGTONIGHT.COM" are so substantially similar in sound, appearance and commercial impression that, when used in connection with the same or closely related services, confusion as to source or sponsorship would be likely to occur. Plainly, the component terms "2NITE" in applicant's mark and "TONIGHT" in registrant's mark are phonetic equivalents and share the same meaning or connotation. While the initial terms "DINING" and "DINNERS" are not the same, they are sufficiently similar in sound and appearance, such that the

differences therein are not likely to be fully recognized by consumers looking to quickly secure a service to arrange or make dinner reservations. Moreover, as the Examining Attorney observes, the record discloses that such terms are quite similar in connotation, since The American Heritage Dictionary of the English Language (3rd ed. 1992) defines "dining" as "[t]o have dinner." In view thereof, we agree with the Examining Attorney that when terms as similar in sound, appearance and meaning as "DINNERS" and "DINING" are respectively combined with the basically identical terms "2NITE" and "TONIGHT" to create the expressions "DINNERS2NITE" and "DININGTONIGHT," the "overall commercial impression of the respective marks is highly similar," notwithstanding that registrant's mark also includes the ".COM" suffix.

Specifically, as to applicant's contention that the inclusion of the ".COM" suffix in registrant's "DININGTONIGHT.COM" mark serves to adequately distinguish it from applicant's "DINNERS2NITE" mark, the Examining Attorney correctly points out in his brief that:<sup>5</sup>

It is well settled that top-level domains (TLDs), such as ".com", are generic locators for Internet website addresses and have no meaningful source identifying significance.

---

<sup>5</sup> We note, in addition, that our principal reviewing court has indicated that in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entirety." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, according to the court, "[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark ...." Id.

*See CCBM.com Inc. v. c-call.com Inc.*, 73 F.Supp.2d 106, 53 USPQ2d 1132, 1136 (D. Mass. 1999) ("[the] '.com' ... suffix is not a relevant part of the mark, because '.com' is a generic locator for domain names of web sites dedicated to commercial use"); [and] *Brookfield Communications Inc. v. West Coast Entertain. Corp.*, 174 F.3d 1036, 50 USPQ2d 1545[, 1559] (9<sup>th</sup> Cir. 1999) (MOVIEBUFF.COM found to be essentially identical to MOVIEBUFF) .... Thus the TLD appearing in registrant's mark would be less significant in creating a commercial impression in the minds of consumers, and should be given little, if any, weight in comparing the respective marks.

As the identification of registrant's services makes clear, its "making on-line restaurant reservations for others and providing information about restaurants on-line" are rendered "by means of a global computer network." The ".COM" suffix in registrant's mark plainly is descriptive of such services, and accordingly is entitled to essentially no weight, since it immediately conveys the use of a global computer network in connection with registrant's services. See, e.g., *In re Oppedahl & Larson LLP*, 71 USPQ2d 1370, 1374 (Fed. Cir. 2004). In view thereof, the sound, appearance, connotation and commercial impression of registrant's "DININGTONIGHT.COM" mark is basically unchanged by the inclusion therein of the top level domain name ".COM," inasmuch as such a name does not have service mark significance or source indicating capability. See, e.g., *555-1212.com Inc. v. Communication House International Inc.*, 157 F. Supp. 2d 1084, 59 USPQ2d 1453, 1457-59 (N.D. Cal. 2001); *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1792 (TTAB 2002); *In re Martin Container Inc.*, 65 USPQ2d 1058, 1060 (TTAB 2002); and 1 J. McCarthy, McCarthy on Trademarks & Unfair Competition §7:17.1 (4th ed.

2002) at 7-28.1 ["a top level domain ['(TLD)'] indicator [such as '.com'] has no source indicating significance and cannot serve any trademark [or service mark] purpose"; that is, "the TLD '.com' functions in the world of cyberspace much like the generic indicators 'Inc.,' 'Co.,' or 'Ltd.' placed after the name of a company"].

However, notwithstanding that the overall commercial impression engendered by applicant's "DINNERS2NITE" mark is substantially similar to that projected by registrant's "DININGTONIGHT.COM" mark, applicant maintains, as noted previously, that the wording of the respective marks is weak, and thus unlikely to cause confusion, as assertedly shown by the six third-party registrations which it has submitted in support of such proposition. We concur with the Examining Attorney that, as stated in his brief, "the registrations submitted by applicant do not even establish the relative weakness of the terms DINING and TONIGHT in connection with [dinner or restaurant] reservation services. As the Examining Attorney accurately points out:

[F]our of the six registrations submitted by applicant are owned by the same registrant (Raley's Corporation). In addition, these four registrations are for goods or services unrelated to applicant's (and [the cited] registrant's) dinner reservation services. Further, applicant's reliance on [another registration for] the "DINE OUT TONIGHT CLUB" mark is misplaced given that the registration involves the distribution of discount coupons of a variety of entertainment events rather than securing dinner reservations. Finally, applicant has attached a registration for completely unrelated goods, namely, stuffing mix, for the unitary expression DRESS UP DINNER TONIGHT. Clearly, the inclusion of these third-party registrations is unpersuasive evidence that the combination of

the terms DINNER and TONIGHT is at all weak in relation to the arranging of dinner reservations for others. ....

Lastly, and contrary to applicant's assertion that confusion is unlikely because "consumers are generally sophisticated when spending discretionary income on dining" and would exercise a high degree of care in selecting dinner or restaurant reservation services inasmuch as "making reservations is more often than not a time consuming and highly thought out process," we agree with the Examining Attorney that the costs of making dining "reservations must be considered relatively small financial expenditures." Nothing in the record, moreover, suggests otherwise. Consequently, and while not necessarily an impulsive decision, it is still the case that selecting a dinner or restaurant reservation service would not involve such a high degree of cost and/or sophistication as to require more care or deliberation than would the ordinary act of simply contacting a dining establishment directly to make dinner reservations.

We accordingly conclude that consumers who are familiar or acquainted with registrant's "DININGTONIGHT.COM" mark for its services of "making on-line restaurant reservations for others and providing information about restaurants by means of a global computer network" would be likely to believe, upon encountering applicant's substantially similar "DINNERS2NITE" mark for its services of "arranging dinner reservations for others," that such identical in part and otherwise similar services emanate from, or are sponsored by or affiliated with, the same source.

**Decision:** The refusal under Section 2(d) is affirmed.