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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Elite Confectionery Ltd.

Serial No. 76534929

Howard Natter of Natter & Natter for Elite Confectionery Ltd.

David Elton, Trademark Examining Attorney, Law Office 106
(Mary Sparrow, Managing Attorney).

Before Hairston, Drost and Walsh, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Elite Confectionery Ltd. to register the mark MAX BRENNER for "restaurant, bar, cafeteria and café services."¹

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 the

¹ Serial No. 76534929, filed on August 6, 2003, which is based on a bona fide intention to use the mark in commerce. The application contains the statement that "The name appearing in the mark does not identify a particular living individual."

identified services, so resembles the mark BRENNER'S which is registered for "restaurant services,"² as to be likely to cause confusion, mistake or deception.

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

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, 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). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

At the outset, we note that applicant does not dispute that its services are identical in part (restaurant services) and otherwise closely related to the services in

² Registration No. 1,677,971 issued March 3, 1992, under the provisions of Section 2(f) of the Trademark Act; renewed.

the registrant's registration. Moreover, applicant and registrant are offering the kinds of services which would be sold to the same class of consumers, namely, the general public, through the same channels of trade. Thus, if applicant's and registrant's services are offered for sale under the same or similar marks, confusion as to their source or sponsorship is likely to occur.

Thus, we focus our attention, as have applicant and the examining attorney, on the respective marks. The examining attorney argues that the marks are very similar and that applicant has simply added the given name MAX to BRENNER.

Applicant, in urging reversal of the refusal to register, argues that in contrast to the cited mark, applicant's mark "identifies a particular individual, whether real or fictitious by first name and last name" (brief at 3); that the surname "Brenner" is commonly used in the restaurant field, and therefore, consumers will distinguish the marks on other elements that exist in the marks; that applicant owns Registration No. 2,818,167 for the mark MAX BRENNER for chocolate products and that consumers familiar with the registered mark for such products will assume that MAX BRENNER restaurant, bar, cafeteria and café services originate from the same source.

With respect to the marks, we must determine whether applicant's mark and registrant's mark, when compared in their entireties are similar or dissimilar, in terms of sound, appearance, connotation and commercial impression. Although the marks must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Furthermore, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

The cited registrant's mark is BRENNER'S. Applicant's mark contains the same surname BRENNER to which applicant has added the given name MAX. Due to the shared term BRENNER, applicant's and registrant's marks have consequent

similarities in appearance, sound, meaning and commercial impression. The fact that registrant's mark uses the possessive form BRENNER'S and applicant's mark includes the given name MAX does not distinguish the marks. Our principal reviewing court, the Court of Appeals for the Federal Circuit, addressed a similar case when an applicant sought to register the mark JOSE GASPAS GOLD for tequila and registration was refused in view of the previously registered mark GASPAS ALE for beer and ale. In re Chatham International Incorporated, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004). The Court held that "[w]ith respect to JOSE, the Board correctly observed that the term simply reinforces the impression that GASPAS is an individual's name. Thus, in accord with considerable case law, the JOSE term does not alter the commercial impression of the mark." Chatham, 71 USPQ2d at 1946. We find, therefore, that applicant's mark MAX BRENNER and registrant's mark BRENNER'S, when compared in their entireties in terms of appearance, sound, meaning and commercial impression are very similar.

Applicant asserts that the name "Brenner" is so widely used in the restaurant field that the commonality of the term is an insufficient basis upon which to find that the marks are confusingly similar. In support of its

contention, applicant submitted copies of nine third-party registrations for marks that contain the term "Brenner." It is well settled, however, that third-party registrations are entitled to little weight on the question of likelihood of confusion. See, e.g., *In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983). Such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them. See, e.g., *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973). Moreover, we note that only one of the third-party registrations covers restaurant services or services which are even arguably related thereto. The third-party registrations, therefore, do not establish that the name "Brenner" is a weak element of marks for restaurant services.

Applicant also submitted printouts of the homepages of nine restaurants with the name "Brenner." However, this evidence does not compel a different result. With respect to third-party use, we recognize that evidence of widespread and significant use by third parties of marks containing elements in common with the cited mark can serve to demonstrate that confusion is unlikely to occur. This is because the presence in marks of common elements extensively used by others, unrelated as to source, may

cause purchasers not to rely upon such elements as source indicators, but to look to other elements as a means of distinguishing the source of the goods and/or services. In this case, the printouts of the homepages submitted by applicant are not sufficient evidence to show that the public has had widespread exposure to "Brenner" marks or trade names. We do not have evidence here of the extent of these third parties' use and it appears that the restaurants are local in nature. See *Carl Karcher Enterprises Inc. v. Stars Restaurants Corp.*, 35 USPQ2d 1125 (TTAB 1995). In view thereof, we cannot conclude that there is such significant third-party use of "Brenner" marks or trade names that consumers are likely to make a distinction between applicant's mark and registrant's mark if these marks were used in connection with identical and closely related services.

Finally, applicant argues that it owns a registration for the mark MAX BRENNER for chocolate products and that consumers familiar with this mark for such products will assume that MAX BRENNER restaurant, bar, cafeteria and café services originate from the same source. Applicant's argument is not well taken. We cannot assume that a substantial portion of the patrons of applicant's services will be familiar with applicant's MAX BRENNER chocolate

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products such that the potential for confusion is de
minimis.

We conclude that consumers familiar with registrant's
restaurant services offered under the mark BRENNER'S would
be likely to believe, upon encountering applicant's mark
MAX BRENNER for restaurant, bar, cafeteria and café
services, that the services originated from or are somehow
associated with or sponsored by the same source.

Decision: The refusal to register is affirmed.