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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Silver Cinemas Acquisition Co.
dba Landmark Theatres

Serial No. 76592693

Jill M. Pietrini of Manatt, Phelps & Phillips for Silver
Cinemas Acquisition Co.

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Office 104 (Chris Doninger, Managing Attorney).

Before Walters, Bucher and Zervas, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

Silver Cinemas Acquisition Co. has filed an application to register the standard character mark LANDMARK THEATRES on the Principal Register for "entertainment services in the nature of motion picture theaters; providing theater listings; providing information and reviews concerning previews and reviews of films, the film industry, film festivals, actors, producers, directors, contests, prizes, motion picture guilds and organizations, television

programs, video and audio streaming, and motion picture studios," in International Class 41.¹ The application includes a disclaimer of THEATRES apart from the mark as a whole.

The examining attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the standard character mark LANDMARK ENTERTAINMENT GROUP² and the design mark shown below,³ previously registered for "production of films and television programs," and "design and development of themes and concepts in the entertainment industry," that, if used on or in connection with applicant's services, it would be likely to cause confusion or mistake or to deceive.

¹ Serial No. 76593693, filed May 17, 2004, based on use of the mark in commerce, alleging first use and use in commerce as of December 31, 1993.

² Registration No. 1622956 issued November 13, 1990, to Landmark Entertainment Group Corporation and now owned by Markland Entertainment, LLC, in International Classes 41 and 42, respectively. The registration includes a disclaimer of ENTERTAINMENT GROUP apart from the mark as a whole. [Renewed; Section 15 affidavit filed and acknowledged.]

³ Registration No. 1620462 issued October 30, 1990, to Landmark Entertainment Group Corporation and now owned by Markland Entertainment, LLC, in International Classes 41 and 42, respectively. The registration includes a disclaimer of ENTERTAINMENT GROUP apart from the mark as a whole and the following statement: the lining in the drawing is a feature of the mark and does not indicate color. [Renewed; Section 15 affidavit filed and acknowledged.]



Applicant has appealed. Both applicant and the examining attorney have filed briefs. We reverse the refusal to register.

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 E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re*

Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

The examining attorney contends that confusion is likely in this case because the marks are substantially similar, arguing that LANDMARK is the dominant portion of all of the marks and that the respective services are closely related. The examining attorney asserts, further, that there are no limitations in the identification of services in either cited registration as to trade channels or classes of purchasers; and that applicant's assertions of a lack of actual confusion over a number of years is unavailing in this ex parte context. In support of its position regarding the relationship between applicant's and registrant's services, the examining attorney submitted copies of two third-party registrations, shown below:

Registration no. 2803267
Owner: Schwan's IP LLC
Mark: RED BARON FLIGHT CLUB
Services:
Entertainment services in the nature of an amusement park ride featuring flight simulators; motion picture film production; movie theaters (in International Class 41)

Registration no. 2899567
Owner: Hollywood Studios
Mark: HOLLYWOOD STUDIOS
Services:
Entertainment in the nature of on-going television programs and visual and audio performances in the field of documentary, news shows, comedy, live and pre-recorded musicals and concerts; educational and variety programming broadcast over television, satellite, audio, and video media; theater productions; dinner theaters; production of

television shows and theatrical production/stage plays; providing a web site featuring musical performances, musical videos, related film clips, photographs, and other multimedia materials; live, televised and movie appearances by a professional entertainer; Fan clubs; Motion picture film production; Motion picture theaters; Movie studios; Movie theaters; Music production services; Music publishing services; Production and distribution of motion pictures; Production of cable television programs; Production of closed caption television programs; Production of radio and television programs; Production of television commercials; Production of video discs for others; Production of video cassettes; Programming educational and religious programs on a global computer network; Radio entertainment production and services, namely radio programs featuring performances by a radio personality, motivational speaker, or celebrity guest; Record master production; Record production; Recording studios; Recreational services in the nature of theme parks; Script writing services; Song writing services; Sound recording studios; Television production; Television program syndication; Theatrical and musical floor shows provided at discothèques and nightclubs; Cinema studios; Cinema theaters; Distribution of television programming to cable television systems (in International Class 41).

Applicant contends that confusion is unlikely because the marks have coexisted in the same geographic area for thirteen years. In this regard, applicant states that registrant is amenable to signing a written coexistence agreement; however, applicant submitted a copy of such an agreement signed only by applicant. Applicant asserts that the marks are not similar due to the other terminology in the respective marks and the design element in one of the cited marks, arguing that this matter is no less dominant than the term LANDMARK in each mark and that the additional

terminology creates different commercial impressions in that applicant's mark "conveys to consumers the impression of an actual theatre, perhaps a theatre that is an historical 'landmark,'" whereas, the literal portion of registrant's marks "imparts the impression of an entertainment conglomerate that produces entertainment and works with those in the entertainment business" (brief, p. 7).

Applicant contends that the identified movie theater services and film and TV production services are quite different services that are marketed in entirely different trade channels to different purchasers. Applicant states the following (brief, p. 9):

Applicant's consumers consist of the general public who attend theatres to watch movies. ... Accordingly, applicant's services are marketed directly to movie-going consumers. On the other hand, the services under the cited marks are production services and services that involve overall creating and developing themes and concepts in the entertainment industry, and as such are directed to professionals in the entertainment industry, and are not marketed directly to consumers.

We turn, first, to a determination of whether applicant's mark and the registered mark, when viewed in their entirety, are similar in terms of appearance, sound, connotation and commercial impression. 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 overall commercial

impressions that confusion as to the source of the goods 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). Furthermore, although the marks at issue must be considered in their entirety, 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).

Under this analysis, we agree with the examining attorney that the marks are substantially similar in commercial impression. LANDMARK is clearly the dominant portion of each mark. While we do not discount the THEATRES portion of applicant's mark or the ENTERTAINMENT GROUP portion of registrant's marks, both phrases are admittedly merely descriptive and are likely to be perceived as describing different services offered by a company named LANDMARK. We are not persuaded that, as argued by applicant, the term LANDMARK has a different connotation in the context of the respective services. While LANDMARK may have multiple connotations, such connotations are equally

applicable to both marks. We also find the design element of the mark in cited registration no. 1620462 to consist primarily of a font design that does not detract from the dominance of LANDMARK in the mark and, in fact, emphasizes that dominance by portraying the LANDMARK portion in significantly larger and bolder lettering. Thus, we find that the overall commercial impression of applicant's mark is sufficiently similar to that of each of the cited registered marks that, if used in connection with the same, related or similar services, confusion as to source is likely.

Turning to consider the services involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991).

Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough

that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, 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.

With respect to the services, we agree with applicant that the examining attorney has not established a relationship between the respective services that would justify a conclusion that confusion is likely. The examining attorney has submitted only two third-party registrations, one of which includes a "kitchen-sink" listing of services and is of little probative value. The services recited in the other third-party registration indicate that the listed movie theater services may be in the nature of the simulator used as the amusement park "ride" and, thus, this registration is not entirely relevant to the facts in this case. Moreover, we agree with applicant that, from this record, it would appear that the services are quite different and, further, are offered to different purchasers through entirely different trade channels. The general consumer is likely to be the

purchaser of applicant's services, whereas professionals in the entertainment industry are the likely customers of the services in the cited registrations. The examining attorney has given us no basis upon which to find otherwise.

Therefore, we conclude that, despite the substantial similarity in the commercial impressions of applicant's mark, LANDMARK THEATRES, and registrant's marks, LANDMARK ENTERTAINMENT GROUP in design and standard character formats, the examining attorney has not established that their contemporaneous use on the services involved in this case is likely to cause confusion as to the source or sponsorship of such services.

We note that our decision is not based upon either applicant's submission of a purported consent signed only by applicant or its claim of a lack of actual confusion over a number of years. This latter factor is of little probative value where we have little evidence pertaining to the nature and extent of the use by applicant and registrant. Moreover, the test under Section 2(d) is not actual confusion but likelihood of confusion. See, *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984); and *In re General Motors Corp.*, 23 USPQ2d 1465 (TTAB 1992).

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