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January 18, 2006
GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sidie

Serial No. 78297602

Linda A. Tancs of Norris, McLaughlin & Marcus for Robert J. Sidie.

Sharon A. Meier, Trademark Examining Attorney, Law Office 112
(Janice O'Lear, Managing Attorney).

Before Hohein, Hairston and Walsh, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Robert J. Sidie, a United States citizen, has filed an application to register on the Principal Register the mark "CRYSTAL AIRWAYS" in standard character form for "transportation of passengers and goods by air" in International Class 39.¹

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 his services, so resembles the mark "KRYSTAL," which is registered on the Principal Register in

¹ Ser. No. 78297602, filed on September 8, 2003, which is based on an allegation of a bona fide intention to use the mark in commerce; the word "AIRWAYS" is disclaimed.

standard character form for "air transportation services; storage of aircraft in the nature of rental of hanger space; [and] delivery of goods by truck" in International Class 39,² 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 services or goods at issue and the similarity or dissimilarity of the respective marks in their entireties.³

Turning first to consideration of the respective services, applicant asserts in his brief that, among other things, "registrant's mark is associated with hanger space" and that, as indicated in an article which he made of record from the

² Reg. No. 2,305,146, issued on January 4, 2000, which sets forth a date of first use anywhere of 1977 and a date of first use in commerce of 1997.

³ 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 [services or] goods and differences in the marks." 192 USPQ at 29.

Internet, registrant's services are "associated with an FBO (fixed based operations) facility." Specifically, according to applicant, "[f]ixed based operators provide airport-related services such as aircraft fueling, line service, passenger facilities and flight planning." By contrast, applicant contends that his mark "is to be associated with the transportation of passengers and/or goods by air" and "is not associated with FBO facility operations." Applicant urges, in view thereof, that the respective services are not commercially or otherwise related, and thus there is no likelihood of confusion, inasmuch as such services would not in fact be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source.⁴

The Examining Attorney, on the other hand, accurately observes in her brief that it is well settled that the issue of likelihood of confusion must be determined on the basis of the services as they are respectively set forth in the particular application and the cited registration, and not in light of what such services are asserted to actually be. See, e.g., Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16

⁴ Applicant also notes in his brief that, in his response to the initial Office action, he "brought to the attention of the Examiner information available to the general public indicating that registrant sold its aviation business to a third party to focus on its 'core restaurant business.'" Applicant asserts that, "[a]s a result, registrant has constructively abandoned its mark." Such an argument, however, as the Examining Attorney correctly points out in her brief, constitutes an improper collateral attack on the validity of the cited registration and hence will not be further considered. See, e.g., In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997), *citing* Cosmetically Yours, Inc. v. Clairol Inc., 424 F.2d 1385, 165 USPQ 515, 517 (CCPA 1970) and In re Calgon Corp. 435 F.2d 596, 168 USPQ 278, 280 (CCPA 1971).

USPQ2d 1783, 1787 (Fed. Cir. 1990); Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987); CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Thus, as she further correctly notes, where the services in the application at issue and in the cited registration are broadly described as to their nature and type, such that there is an absence of any restriction as to the channels of trade and no limitation as to the classes of purchasers, it is presumed that in scope the identification of services encompasses not only all services of the nature and type described therein, but that the identified services are provided in all channels of trade which would be normal therefor, and that they would be purchased by all potential buyers thereof. See, e.g., In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

Here, as the Examining Attorney properly points out, applicant's and registrant's "air transportation services ... are identical" in pertinent part inasmuch as applicant's services are identified as "transportation of passengers and goods by air " while registrant's services, which are set forth as including "air transportation services," necessarily encompasses the transportation by air of passengers and goods.⁵ The customers

⁵ It is noted that because it also is well settled that a refusal under Section 2(d) is proper if there is a likelihood of confusion involving the services listed in the application and any of the services identified in the cited registration, it is unnecessary to rule as to whether the other services set forth in the cited registration are so

and channels of trade for the respective services are consequently deemed to be the same, irrespective of what applicant intends to do or what registrant actually does.

Applicant further asserts in its brief, however, that the related *du Pont* factor of the conditions under which and buyers to whom sales of the services at issue are made, that is, "impulse" purchasers versus those who are careful and sophisticated in their purchasing decisions, is a factor which mitigates any likelihood of confusion. According to applicant, "the target purchasers of the respective services are, by the nature of the services, sophisticated and discerning purchasers." Applicant insists, in view thereof, that such customers "would likely exercise care in selecting their merchant and are not likely to rely on impulse but rather on recommendations and/or referrals based on a predetermined and specific need." Nonetheless, even assuming that such is the case, the Examining Attorney correctly observes in her brief that the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. See, e.g., *Wincharger Corp. v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962); *In re Decombe*, 9 USPQ 1812, 1814-15 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983); and TMEP §1207.01(d)(vii). Clearly, the more

related to those listed in the application that, if rendered under the same or similar marks, confusion would be likely. See, e.g., *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) and *Shunk Mfg. Co. v. Tarrant Mfg. Co.*, 318 F.2d 328, 137 USPQ 881, 883 (CCPA 1963).

similar the marks at issue, the more likely confusion becomes even for discriminating and sophisticated customers. Thus, if applicant's and registrant's air transportation services of passengers and goods were to be rendered under the same or substantially similar marks, confusion as to the source or sponsorship thereof would be likely to occur, notwithstanding the deliberation which knowledgeable and sophisticated consumers would be expected to exercise in selecting such services.

Turning, therefore, to consideration of the marks at issue, we note as a preliminary matter that as stated by our principal reviewing court in *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1994), "[w]hen marks would appear on virtually identical ... services, the degree of similarity necessary to support a conclusion of likely confusion declines." Applicant argues in his brief, however, that the marks "CRYSTAL AIRWAYS" and "KRYSTAL" "contain only a common phonetic element" (underlining in original) and do not otherwise "look the same or sound alike." In particular, although an amendment to allege use has not been submitted, applicant insists that, "[i]n fact, Applicant uses its mark in script font, rendered in blue ink," which serves to differentiate his mark from that of the registrant and prevent any likelihood of confusion.⁶

⁶ Applicant additionally contends in his brief that the marks at issue herein are weak, and hence entitled to only a narrow scope of protection, by asserting in support thereof that "a recent search of the PTO online database reveals 135 records of 'KRYSTAL' and variations thereof" and that "the same database reveals over 2,650

We agree with the Examining Attorney, however, that confusion is likely. As she properly notes in her brief, a side-by-side comparison of the respective marks is not the proper test to be used in determining the issue of likelihood of confusion inasmuch as it is not the ordinary way that customers will be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks 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 accordingly on the recollection of the average purchaser, who normally retains 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);

records of 'CRYSTAL' and variations thereof." Applicant maintains that "[s]uch extensive third party use of marks which contain the word 'krystal' or a phonetic equivalent clearly demonstrates that either mark is an extremely weak mark" and that, consequently, "the prevalence of such marks suggests that consumers are capable of distinguishing amongst the marks, thus mitigating any likelihood of confusion." Nonetheless, as the Examining Attorney accurately points out in her brief, applicant "did not make this search or any other evidence [properly] of record" and, therefore, "has not provided any copies of third-party registrations as evidence that the terms CRYSTAL and/or KRYSTAL are weak in connection with the type[s] of services specified in the applicant's and registrant's recitation[s] of services." Thus, there is not only no evidence to support applicant's assertions, but according to the Examining Attorney, "the registrant's mark is not weak" inasmuch as the cited registration "for the term KRYSTAL is the only registration for air transportation services." Moreover, even if applicant had made of record copies of the third-party registrations upon which he wishes to rely, it is well established that such registrations do not demonstrate use of the marks which are the subjects thereof in the marketplace or that the consuming public is familiar with the use of those marks and has learned to distinguish between them. See, e.g., *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973); and *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (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).

Moreover, the Examining Attorney is also correct that while the marks at issue must be considered in their entirety, including any descriptive matter therein, 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., supra at 751. For instance, according to the court, "that a particular feature is ... generic with respect to the involved ... services is one commonly accepted rationale for giving less weight to a portion of a mark" Id.

With the above principles in mind, we concur with the Examining Attorney that, when considered in their entirety, the marks at issue are substantially similar in sound, appearance, connotation and commercial impression. Specifically, given that the word "AIRWAYS" in applicant's "CRYSTAL AIRWAYS" mark is generic in relation to his services of the "transportation of passengers and goods by air," it is plain that the dominant and source distinguishing portion of applicant's mark, as asserted by the Examining Attorney, is the word "CRYSTAL," which is the phonetic equivalent of registrant's "KRYSTAL" mark. Thus, as the Examining Attorney persuasively points out:

The fact that the Applicant's mark contains the word AIRWAYS is not significant. Consumers, and even those in the airline industry themselves, often refer to air transportation companies both with and without the generic term(s) AIRWAYS or AIRLINE[S]. For example, JETBLUE AIRWAYS is often just referred to as JETBLUE; UNITED AIRLINES is often referred to as just UNITED; AMERICAN AIRLINES is often called just AMERICAN; and AIRTRAN AIRWAYS is called just AIRTRAN. Adding the generic term AIRWAYS to the phonetically equivalent [term] CRYSTAL ... does little or nothing to avoid confusion ... [with the registrant's mark KRYSTAL].

In addition, because the terms "CRYSTAL" and "KRYSTAL" are, as applicant concedes, phonetic equivalents, we agree with the Examining Attorney that "the mere substitution of the letter 'C' for the 'K' in KRYSTAL will not avoid a likelihood of confusion."

Furthermore, with respect to applicant's assertion that he uses his mark "in script font, rendered in blue ink," the Examining Attorney correctly observes that:

It is ... important to note that both the applicant and the registrant have presented their marks in typed [or standard character] form. If a mark (in either an application or a registration) is presented in typed form, the owner is not limited to any particular depiction and can combine the wording with design elements. A party who presents a typed drawing cannot assert differences in typestyle. *Squirtco v. Tomy Corp.*, [697 F.2d 1038,] 216 USPQ 937 (Fed. Cir. 1983)

Thus, for purposes of determining similarity, both applicant's mark and registrant's mark must be regarded as suitable for display in the same stylized manners, including the blue script font assertedly used by applicant. See, e.g., *Phillips Petroleum Co. v. C. J. Webb, Inc.* 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971) [a mark in typed or standard character form is not limited

to the depiction thereof in any special form]; and *INB National Bank v. Metrohost Inc.*, 22 USPQ2d 1585, 1588 (TTAB 1992) ["[a]s the *Phillips Petroleum* case makes clear, when [an] applicant seeks a typed or block letter registration of its word mark, then the Board must consider all reasonable manners in which ... [the word mark] could be depicted"]. Applicant's mark and registrant's mark consequently must be considered identical in their manner of display, and the addition of the generic term "AIRWAYS" to applicant's mark does not, for the reason previously indicated, serve to sufficiently distinguish such mark in appearance from registrant's mark.

Finally, it is apparent that the term "KRYSTAL," which constitutes registrant's mark, is an obvious misspelling or alternative form of the dominant term "CRYSTAL" in applicant's "CRYSTAL AIRWAYS" mark. As such, the terms are identical in meaning and, in view thereof, the respective marks are thus substantially similar in connotation. Overall, given the above noted similarities in sound, appearance and connotation, the marks at issue, when used in connection with air transportation services, engender a substantially similar, if not virtually identical, commercial impression.

We accordingly conclude that customers and prospective consumers who are familiar or acquainted with registrant's mark "KRYSTAL" for "air transportation services" would be likely to believe, upon encountering applicant's substantially similar "CRYSTAL AIRWAYS" mark for the services of "transportation of passengers and goods by air," that such identical services

Ser. No. 78297602

emanate from, or are sponsored by or associated with, the same source.

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