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July 7, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Rick D. Hutchinson, dba Hutchinson Winery

Serial No. 78594227

Michael E. Dergosits and Malcolm B. Wittenberg of Dergosits & Noah LLP for Rick D. Hutchinson, dba Hutchinson Winery.

David Yontef, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Seeherman, Hohein and Cataldo, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Rick D. Hutchinson, dba Hutchinson Winery, has appealed from the final refusal of the Trademark Examining Attorney to register SEVEN SISTERS NAKED EYE as a trademark for wine.¹ Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on

¹ Application Serial No. 78594227, filed December 19, 2005, based on Section 1(b) of the Trademark Act (intent to use).

the ground that applicant's mark so resembles the mark SEVEN SISTERS and design, shown below, previously registered for restaurant services,² that, if used on applicant's goods, it is likely to cause confusion or mistake or to deceive.



Applicant and the Examining Attorney have filed appeal briefs. Applicant did not request an oral hearing.

In support of his position that confusion is likely, the Examining Attorney relies heavily on *In re Opus One Inc.*, 60 UPSQ2d 1812 (TTAB 2001), while applicant attempts to distinguish the present situation from the facts in that case. Accordingly, in our analysis of the issue of likelihood of confusion, we will concentrate our remarks on

² Registration No. 2682979, issued February 4, 2003.

Opus One, but considering as well the evidence that is relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) (the du Pont factors). 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).

In Opus One, the Board found that applicant's mark OPUS ONE for restaurant services was likely to cause confusion with the registered mark OPUS ONE for wine. In discussing the du Pont factor of the relatedness of the goods and services, the Board stated that the requisite relationship "must consist of 'something more' than the fact that registrant uses the mark on a food or beverage item (wine) and applicant uses the mark in connection with restaurant services." Id. at 1815. In Opus One, the Board found that "something more" to derive from the nature of the commercial relationship between wine and restaurant services and in the arbitrary, strong nature of the

registrant's mark. In this case, too, we find that these elements are present.

As stated in Opus One, "it is undisputed that restaurants commonly serve wines by the bottle, and that patrons of a restaurant are exposed to both the restaurant's service mark and to the trademarks by which the wines are labeled and by which they are listed on the restaurant's wine list." Id. To that extent, applicant's wines and the registrant's restaurant services clearly are complementary goods and services. In Opus One, the Board also pointed out that the complementary relationship is evident in the well-known expression "wine and dine."

The Examining Attorney has also provided "something more" by the submission of third-party registrations and excerpts of articles taken from the NEXIS database. The third-party registrations show that several entities have registered a single mark for both wine and restaurant services. See, for example, Registration No. 1998084 for PLUMPJACK; Registration No. 2550450 for VILLAGES OF/DE FRANCE and design; Registration No. 2338760 for CULINARY ADVENTURES and design; Registration No. 276857 for BIN 36; and Registration No. 2865101 for FIREBIRDS and design. Third-party registrations which individually cover a number of different items and which are based on use in commerce

serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

The excerpts of articles taken from the NEXIS database reference a practice in the restaurant industry to offer private-label wines.³ The following excerpts refer to this practice:

Restaurant industry has long marketed private label wine; now private label is expanding to beer, sake, soda and water.

"Wall Street Journal Abstracts,"
July 8, 2004

...Private Label came from a friend in New York—a restaurateur who had seen plenty of eateries with their own private-label brands of wine.

"Orlando Sentinel," June 26, 1991

A growing number of Puget Sound restaurants are partnering with

³ The NEXIS evidence consists of excerpts of articles in which the term "private label" appears with either "wine" or "wine and restaurant." We must confess that in some instances, because of the truncated nature of the phrases in which these key words appear, we were not always able to tell exactly what the articles said vis-à-vis the private labeling of wine. For example, while the excerpt may contain a reference to private labeling of wines, it is not clear whether the mark used for the wine is the same as the restaurant name. We have given no probative value to those articles. Similarly, some of the articles indicate that restaurants private label their wines, but the wine mark is different from the name of the restaurant. See, for example, the article in the February 2002 issue of "Chain Leader": "Olive Garden's private label wine, Principato.... Again, we have not given any probative weight to these articles. Nor have we given weight to wire service reports or those articles appearing in foreign newspapers because there is no indication as to whether these articles would have been seen by consumers in the United States.

wineries and distributors to create their own wines. For restaurants, a private-label wine carries a certain prestige as well as a potential for big markups.

"Puget Sound Business Journal,"
March 19, 2004

He bottles private-label wines for 26 restaurants now....

"The Seattle Times," August 14, 2002

There are also several excerpts of articles taken from the NEXIS data base which report that certain specific restaurants use the same marks, or a variation on their restaurant marks, for their private-label wines. See, for example (emphasis added):

Review of **Le Cafe Miche**:

The restaurant also has contracted with two California wineries to bottle private-label varietal wines under the name **Cafe Miche Estates**.

"Albuquerque Tribune," August 15, 2005

Harris Ranch Restaurant has always served its own beef.... It joined the private-label **Harris Ranch Restaurant Reserve** wines a California winery produces for the restaurant. Private-label wine, like the house-branded beef, is part of what makes Harris Ranch special....

"Restaurants and "Institutions,"
April 1, 2005

Bistro 110 ushers in the holiday season.... ...along with the restaurant's private label wines, **Bistro Blanc** and **Bistro Rouge**.

"Chicago Sun-Times," December 10, 2003

"The French wines would be coming out under the label of **Maxim's**. This was the private-label brand of wines being served at the world-renowned Paris restaurant, **Maxim's**."

"Rochester Democrat and Chronicle,"
February 21, 2002

...owners of **Dexter's of Winter Park**, unveiled the first wines in their private-label program. The wines will be served as the house wine at the restaurant and will be sold in the adjacent wine shop. That's right, now you can serve **Dexter's** cabernet sauvignon....

"Orlando Sentinel," December 16, 1994

In addition, in Opus One, the Board quoted the following statement from an article that was of record in that appeal: "A private label wine means both prestige and profit for the restaurant offering it. Moreover, the bottle has souvenir value." This same statement appears in the article from the February 24, 1992 issue of "Newsday" that is in the present record. We agree with the comment made in Opus One that the "souvenir value" of the bottle would derive from the appearance of the restaurant's name on the label.

As the Board stated in Opus One, supra at 1816:

These articles inform their readers, who may include potential purchasers of wine and of restaurant services, that a restaurant may in fact have a private label wine named after itself. Being aware of that possibility, purchasers are more likely to assume, upon

encountering a wine and a restaurant bearing the same mark, that the wine is the restaurant's private label wine or that some other source connection between the wine and the restaurant exists, and they are less likely to assume that it is a mere coincidence that the restaurant and the wine use the same mark.

We believe that this evidence of a commercial relationship between wine and restaurant services is sufficient to demonstrate the "something more" required to establish the relatedness of the goods and services. However, in Opus One the Board also pointed to a second element, namely, the strong and arbitrary nature of the registrant's mark and, therefore, the broader scope of protection to which it is entitled. That element is present in this case as well. SEVEN SISTERS is an arbitrary term for restaurant services, and there is no evidence of third-party use of this mark.⁴ Applicant has pointed out that "Seven Sisters" is a reference to the Pleiades of Greek mythology, and is also the term used to identify a group of women's colleges, and therefore asserts

⁴ Applicant stated during the prosecution of the applicant that a third-party registration, No. 2246263, for SEVEN SISTERS for sweet cider, had coexisted at one time with the cited registration. A third-party registration, as noted above, is not evidence that a mark is in use. Nor can we assume, from a single registration, that SEVEN SISTERS has a meaning in the beverage or food service industry.

that the term is not arbitrary.⁵ Applicant has apparently confused "arbitrary" with "invented." It is not required that a term have no meaning whatsoever in order to be considered a strong mark; an arbitrary mark, that is, one having no meaning with respect to the relevant goods or services, is also strong. In this connection, we point out that the word "opus," in OPUS ONE, has a meaning, it is just a meaning that has no connection to wine.⁶ The meaning of SEVEN SISTERS as the Pleiades of Greek myth or a group of women's colleges is certainly arbitrary for restaurant services or, for that matter, wine. Thus, as in Opus One, we have "something more" in terms of the strength of the registrant's mark.

Applicant attempts to distinguish the present case from Opus One because, in that case, the registrant's wine was offered by the applicant therein at its restaurant.

⁵ Applicant also states that "navigating through Google using 'seven sisters' as a researched [sic] phrase results in a myriad of citations." Brief, p. 3. Although applicant submitted evidence regarding the Greek mythology and women's college meanings of "seven sisters," it did not make of record any Google search summary or other results. Accordingly, we have given no consideration to this unsupported statement about undetailed uses.

⁶ "A creative work; especially, a musical composition. Used with a number to designate the order of a composer's works." The American Heritage Dictionary of the English Language, © 1970. The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Here, applicant's application is based on an intention to use his mark, and we have no evidence that applicant is using his mark at all. Moreover, while the chances for confusion are clearly increased if wine bearing the name of a restaurant is actually served in that restaurant, the relatedness of wine and restaurant services is not dependent on such evidence. Applicant also points to the fact that in the Opus One case the applicant therein had a relationship with the owner of the cited registration for wine. Facts regarding such a relationship were discussed in connection with the du Pont factor of market interface and the Opus One applicant's arguments regarding laches and estoppel, arguments that the Board considered applicable to the question of whether the registrant might believe that confusion was not likely. While such an interface does not occur in the present situation, the lack of evidence of conduct by the registrant indicating acceptance of applicant's mark does not help applicant's position. This distinction between the fact situations in Opus One and the present case has no bearing on whether the Examining Attorney has demonstrated the relatedness between wine and restaurant services.

Applicant has raised the concern that if we find that "in no instance can 'wine' and restaurant services' coexist

with similar marks," "registered marks for food products, generally, would bar service marks for restaurant services and vice-versa." Brief, p. 4. However, as Opus One made clear, and as we have followed in this decision, the determination that wine and restaurant services are related is not based solely on the fact that wine is a food product, and that food products are served in restaurants. Rather, as in Opus One, we find that, in view of the strong arbitrary nature of the registered mark, and the commercial relationship between wine and restaurant services as demonstrated by the record, wine and restaurant services are related goods and services. This du Pont factor, therefore, favors a finding of likelihood of confusion.

As is readily apparent from the preceding discussion, the goods and services are also offered in the same channels of trade, and to the same classes of consumers. In this connection, the consumers for wine and restaurant services are the public at large, not sophisticated purchasers. Nor would they necessarily exercise more than an ordinary degree of care in making a purchase of wine, or in choosing a restaurant. It is common knowledge that both wine and restaurants run the gamut in cost, and that both can be inexpensive. These du Pont factors, too, favor a finding of likelihood of confusion.

This brings us to a consideration of the marks. Unlike Opus One, the marks here are not identical. Applicant's mark is SEVEN SISTERS NAKED EYE; the registered mark is SEVEN SISTERS and design. However, we do not find these differences to be sufficient to distinguish the marks. It is the word portion of the cited mark that is dominant. If a mark comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services. In re Appetito Provisions Co., 3 USPQ2d 1553, 1554 (TTAB 1987). Further, to the extent that the design portion conveys an impression, the seven figures merely reinforce the meaning of the word portion. As for applicant's mark, because of the manner that the words are combined, the words NAKED EYE convey a separate thought from SEVEN SISTERS. Consumers familiar with the registrant's SEVEN SISTERS restaurant, upon seeing the mark SEVEN SISTERS NAKED EYE on wine, are likely to regard the SEVEN SISTERS portion of the mark in the manner of a house mark, with NAKED EYE being seen in the nature of a product mark. Because SEVEN SISTERS is identical in both marks, and because NAKED EYE creates the impression of a separate portion of the mark, both marks convey similar commercial impressions. As a result, consumers are likely to assume

that SEVEN SISTERS NAKED EYE wine emanates from or has a common source affiliation or sponsorship with the SEVEN SISTERS restaurant. Accordingly, we find that the du Pont factor of the similarity of the marks favors a finding of likelihood of confusion.

Neither applicant nor the Examining Attorney has discussed any of the remaining du Pont factors. We will say, briefly, that none seems to be applicable, as we have no evidence with respect to them. We note in particular that the factors regarding actual confusion or the lack thereof do not come into play because there is no evidence that applicant has begun using his mark.

Finally, we note applicant's assertion that "any doubt as to whether the mark is confusingly similar to one which is registered should be resolved in favor of the ex parte applicant." Brief, p. 4. This is a misstatement of the law. It is a well-established principle that doubt on the issue of likelihood of confusion must be resolved in favor of the registrant and prior user. In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973). Although we have no doubt in this case, any such doubt would have been resolved in favor of a finding of likelihood of confusion.

Decision: The refusal of registration is affirmed.