

**THIS OPINION  
IS NOT A PRECEDENT OF  
THE TTAB**

Mailed: September 16, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Atronic International GmbH

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Serial No. 76304439

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Horst M. Kasper, Esq. for Atronic International GmbH.

Christopher L. Buongiorno, Trademark Examining Attorney, Law  
Office 102 (Karen M. Strzyz, Managing Attorney).

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Before Walters, Bucher and Rogers, Administrative Trademark  
Judges.

Opinion by Walters, Administrative Trademark Judge:

Atronic International GmbH has filed an application to register the standard character mark FIESTA FRUITS on the Principal Register for, as amended, "gaming equipment, namely, gaming machines featuring slot machines (sic) type games via video display; electronic slot machines to be sold exclusively by a sales branch agency in the United States of

the applicant directly to casino operators," in International Class 9.<sup>1</sup>

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 previously registered marks shown below that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.<sup>2</sup>

**Mark: FIESTA** (standard character)

**Reg. No. 2,661,120** [registered December 17, 2002]:

**Services:** "casino services, providing facilities for non-gaming video arcade games, providing amusement centers and arcades, and entertainment services in the nature of arranging, conducting, and providing facilities for special events," in International Class 41.

**Reg. No. 2,234,239** [registered Mach 23, 1999, Section 8 & 15 affidavits accepted and acknowledged, respectively]:

**Services:** "casino services," in International Class 41.

**Mark:**



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<sup>1</sup> Serial No. 76304439, filed August 15, 2001, based on a claim of priority, under Section 44(d), of July 23, 2001. The foreign application matured into European Community Trademark Registration No. 2310266 and the application is based thereon under Section 44(e). The application is also based on an allegation of a bona fide intention to use the mark in commerce, under Section 1(b).

<sup>2</sup> All of the cited registrations are owned by Station Casinos, Inc.

**Reg. No. 2,647,768** [registered November 12, 2002]:  
**Services:** "casino services, providing facilities for non-gaming video arcade games, providing amusement centers and arcades, and entertainment services in the nature of arranging, conducting, and providing facilities for special events," in International Class 41.

**Reg. No. 2,825,399** [registered March 23, 2004]:  
**Services:** "entertainment services, namely, providing a website featuring information on entertainment, namely, casinos and gaming," in International Class 41.

Applicant has appealed. Both applicant and the examining attorney have filed briefs. We affirm 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 Fondee 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*

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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.

We turn, first, to a determination of whether applicant's mark and the registered marks, when viewed in their entireties, 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. Furthermore, although the marks at issue 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).

The examining attorney contends that FIESTA is the dominant portion of applicant's mark because it is the first word in the mark and FRUITS is "very suggestive," stating that "slot machines are sometimes referred to as 'fruit machines' and contain pictures of fruit printed on the reels of the machines" (brief at unnumbered p. 4); and that

applicant has merely taken registrant's word mark in its entirety and added very suggestive matter, which is insufficient to distinguish the marks.

In support of this contention, the examining attorney has submitted a lengthy excerpt from the online encyclopedia, *Wikipedia*, for "slot machines" that includes a section about slot machines in the United Kingdom, where, it states, slot machines are sometimes referred to as "fruit machines."<sup>3</sup>

Applicant contends that "fruits" is not descriptive or even suggestive in connection with slot machines; and argues that "fruit machine" is an outdated designation no longer in use and that the examining attorney's evidence about the use of the term "fruit machine" does not indicate consumer recognition in the United States because it pertains to the United Kingdom. Applicant contends that FRUITS is the root of applicant's mark and it is modified by FIESTA, thus, FRUITS is the dominant term and this term is arbitrary in connection with the identified goods. Applicant also argues that the connotations of the marks differ because registrant's FIESTA "is descriptive of the festive holiday

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<sup>3</sup> While anyone may amend and add to *Wikipedia* entries and, as such, we are somewhat skeptical of accepting this entry for the truth of the statements contained therein, the British usage of "fruit machines" is confirmed by another excerpt submitted by the examining attorney from [www.jackpots.com](http://www.jackpots.com).

furnished by casino services" (Reply Brief, p. 6); whereas, applicant's FIESTA FRUITS refers to fruits.

We agree with applicant that the evidence does not support a finding that either "fruit" or "fruit machine" is a common term for a slot machine in the United States. It is also clear from the evidence submitted by the examining attorney in connection with the respective goods and services that some slot machines today depict fruits, but there are also many slot machines that feature games with a variety of themes and images. Thus, while "fruits" may be somewhat suggestive of an image depicted in some slot machines, we do not find that this renders "fiesta" the dominant term in applicant's mark. Rather, we find that FIESTA FRUITS is a unitary mark, particularly in view of the initial "f" in each word, with neither word dominant. Nonetheless, when we compare applicant's mark, FIESTA FRUITS, to the registered word mark FIESTA, we note, as did the examining attorney, that applicant's mark consists of the registered mark in its entirety with the addition of the word "fruits." We do not agree with applicant that the connotation of FIESTA in the registered mark is different from that of "fiesta" in applicant's mark, FIESTA FRUITS, simply because of the additional word "fruits." We take judicial notice of the definition of "fiesta" in *Merriam-Webster's Collegiate Dictionary* (11<sup>th</sup> ed. 2003) as a

"festival." As such, consumers are likely to understand "fiesta" in connection with either casino services or slot machines as suggesting festivities and entertainment; and consumers are likely to understand FIESTA FRUITS in connection with slot machines as suggesting one aspect of these festivities and entertainment, i.e., that the game may feature images of fruits.

Considering the registered design mark, the word FIESTA appears prominently in bold stylized letters over a background design that reinforces the connotation of FIESTA as a festival, i.e., the design appears to be a stylization suggesting fireworks, streamers and confetti. Clearly, the word FIESTA is the dominant portion of this mark. Moreover, it is the wording FIESTA that would be used by consumers referring to registrant's services. Thus, the wording would make a greater impression on consumers and is the portion that is more likely to be remembered as the dominant and source-signifying portion of the registered mark. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593 (TTAB 2001) ("words are normally accorded greater weight because they would be used by purchasers to request the goods"). See also, e.g., *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (1987).

We find that applicant's mark is more similar to the registered marks than dissimilar and applicant's mark is sufficiently similar to both the registered word mark and

design mark that, if used in connection with similar goods and/or services, confusion as to source or sponsorship would be likely.

Turning to consider the goods and 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 registrations, 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 Computers 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 and services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods and 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 party's goods or services. *In re*

*Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein; and *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002).

The examining attorney contends that applicant's goods could be found at registrant's casinos; that the limitation to the identification of goods does not "restrict the flow of the goods through commerce after purchases have been made at the distributor level," noting that these goods may be available post-sale through a single distributor (brief, p. 7)<sup>4</sup>; that registrant's casino services contain no limitations; that selling slot machines is within registrant's normal zone of expansion; and that the end users of the respective goods and services will be the same.

In support of these contentions, the examining attorney submitted excerpts from applicant's website and from what is alleged to be registrant's website; copies of at least six third-party registrations for marks including, in the identifications of goods and services, both slot machines and casino or gaming services; excerpts from the website Harrahs.com of a webpage entitled "slot finder," which purports to help the user find specifically-named slot machine games at various casinos, i.e., the slot player may either search by the name of the casino, name of the slot

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<sup>4</sup> This particular contention by the examining attorney is unavailing because the identification of goods is restricted to sales directly to casino operators.

machine, denomination or slot type; and excerpts from the websites of numerous casinos advertising various slot machine games at their casino locations. The examining attorney also submitted excerpts from slotVegas.com, a website offering for sale used and reconditioned slot machines "purchased from casinos throughout the United States," and the web page includes buttons for "casino buyers only" and "home users."

Applicant contends that casinos are not in the business of selling slot machines; rather, casino activity is focused on entertainment. Applicant states that its goods "are not sold to consumers, but to casino operators ..." (brief p. 6); that once gaming equipment is installed, it is unlikely that the equipment will be sold again; and that the respective goods and services are in different trade channels to different purchasers.

The cited registrations nos. 2661120, 2234239 and 2647768 recite, essentially, casino services; and cited registration no. 2825399 recites, essentially, services consisting of a website that provides information about casinos and gaming. The goods identified in the application are essentially slot machines. It is very clear in this record that casino services include slot machine gaming. The third-party registrations reciting both casino services

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and slot machines, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, have some probative value to the extent that they serve to suggest that such goods or services are of a type which may emanate from a single source.<sup>5</sup> See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988). Therefore, we find that applicant's goods are clearly related to both registrant's casino services and its website providing information about such services.

The more difficult question concerns the channels of trade and classes of purchasers of the respective goods and services. Because the recitation of services in the cited registrations is not limited, we presume that these services would be offered in all ordinary trade channels for these services and to all normal classes of purchasers. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992). Thus, we presume that registrant's services are rendered to the general public. However, applicant has limited its trade channels and class of purchasers to sales of its gaming equipment in the United States "exclusively by a sales branch agency ... of

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<sup>5</sup> The examining attorney also submitted a copy of a registration owned by applicant, registration no. 1862274, for a sun design mark for both casino services and slot machines. As with the third-party registrations, while this is not evidence of use, it is an additional registration that suggests such goods or services are of a type which may emanate from a single source.

the applicant directly to casino operators." We also presume that these machines are relatively expensive; and that casino operators purchasing slot machines are likely to exercise care and particularity in purchasing such machines. The end user of the slot machine is the same general consumer that is found in registrant's casinos. In fact, this consumer is likely to be playing applicant's slot machine in a casino. However, the evidence of subsequent sales of slot machines to general consumers, who may purchase them for home use is minimal and not established in this record. Therefore, we conclude that the channels of trade and classes of purchasers for applicant's goods and registrant's services are different and distinguished by the fact that the purchasers of applicant's goods are sophisticated professionals likely to exercise care in the purchase of gaming equipment for their casinos.

While applicant's goods would be marketed specifically to casino operators, the application includes applicant's averment that the mark FIESTA FRUITS is intended to be used on the goods. Accordingly, the Board must consider whether casino patrons who may be exposed to registrant's mark would, if exposed to applicant's mark on gaming machines, be mistaken or confused or deceived. Casino patrons would likely conclude that the casino services of registrant and

the machines of applicant have a common source or are otherwise related.

Therefore, when we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, including those arguments not specifically addressed herein, we conclude that despite the differences in the trade channels and classes of purchasers, in view of the similarities in the commercial impressions of applicant's mark and registrant's marks, their contemporaneous use on the related goods and services involved in this case is likely to cause confusion as to the source or sponsorship of such goods and services.

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