

Mailed:
May 30, 2007

This Decision is Not a
Precedent of the TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re ML Management, Inc.

Serial No. 76564139

Ira C. Edell of Edell, Shapiro & Finnan, LLC for ML Management, Inc.

Ronald L. Fairbanks, Trademark Examining Attorney, Law Office 117 (Loretta C. Beck, Managing Attorney).

Before Grendel, Rogers and Bergsman,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Applicant ML Management, Inc. seeks registration of the mark MAMMA LUCIA for "restaurant, catering and carry out services featuring prepared and ready to eat Italian cuisine; and bar services." Basing its application on claimed use of the mark in commerce, applicant alleges first use and first use in commerce as of 1976. Applicant seeks registration of the mark in standard character form, formerly referred to by the Office as "typed form."

The examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in view of the prior registration of MAMA LUCIA in typed form for "meatballs" (Registration no. 1667749). The cited registration issued December 10, 1991 and recites first use of the mark and first use in commerce since October 1987; and the registration was renewed in January 2002.

This appeal followed the examining attorney's issuance of a final refusal of registration. After applicant filed its brief, the examining attorney sought and obtained a remand to introduce new evidence, specifically, an advertising circular promoting the goods of the cited registration. Applicant responded to the Office action introducing that new evidence and the Board previously stated that such response would be considered a supplemental appeal brief. The examining attorney also has filed a brief.

We analyze the issue of likelihood of confusion using the factors that were articulated by a predecessor of our primary reviewing court, the Court of Customs and Patent Appeals, in the case of In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003).

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and services] and differences in the marks").

In this case, we compare applicant's mark MAMMA LUCIA and the MAMA LUCIA mark in the cited registration by considering similarity, or differences, in the appearance, sound, connotations and overall commercial impressions of the marks. In re Coors Brewing Co., 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003) Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983).

We find the marks virtually identical. The single letter difference in appearance might easily be overlooked by consumers. See Interlego AG v. Abrams/Gentile Entertainment Inc., 63 USPQ2d 1862, 1863 (TTAB 2002) ("many adults would not notice [the] very minor difference in the two marks" LEGO and MEGO). The repeated letter does not change the identical sounds of the marks, identical connotations of a mother named Lucia, and the identical

overall commercial impressions that this mother is the source of, or inspiration for, the respective foods of registrant and applicant's restaurants and carryout services. See In re Total Quality Group Inc., 51 USPQ2d 1474, 1476 (TTAB 1999) (STRATEGYN and STRATEGEN "marks engender virtually identical commercial impressions, both suggesting the idea of a strategy"). See also Maids to Order of Ohio Inc. v. Maid-to-Order Inc., 78 USPQ2d 1899, 1909 (TTAB 2006) ("when considered in their entirety, the marks MAIDS TO ORDER and MAID TO ORDER project essentially the same commercial impression").

We do not find persuasive applicant's argument that there is no likelihood of confusion because the respective marks generally would be encountered by consumers only on signs, menus, in advertisements, in short only in visual media that would readily reveal the difference in the marks, i.e., the additional M in applicant's mark. Brief, p. 7. First, there is no limit on the ways in which the marks may be used and radio advertising is certainly possible for these goods and services. In addition, word of mouth recommendations for the goods or services would not provide individuals receiving such recommendations any opportunity to become aware of the slight difference in the marks. See In re Dixie Restaurants Inc., 105 F.3d 1405, 41

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USPQ2d 1531, 1534 (Fed. Cir. 1997) (restaurants are often recommended by word of mouth); In re Appetito Provisions Co. Inc., 3 USPQ2d 1553 (TTAB 1987) ("propensity of persons to try restaurants based on word-of-mouth recommendations" noted in case finding likelihood of confusion between APPETITO and design for Italian sausage, on the one hand, and the marks A APPETITO'S and A APPETITO'S INC. and sandwich design for restaurant services, on the other). Second, and more important, even when the marks are presented in visual fashion, the only difference is a repeated letter that appears in the middle of one of the two common words. This difference will be even more readily overlooked by consumers than the different leading letters in the Interlego case (i.e., the LEGO "L" and the MEGO "M").

Because the involved marks are virtually identical, this "weighs heavily against applicant." In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984). In such circumstances, contemporaneous use of the marks can lead to the assumption that there is a common source or sponsorship "even when [the] goods or services are not competitive or intrinsically related." In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). Thus, when

marks are so close, it is only necessary that there be a viable relationship between the goods or services in order to support a holding of likelihood of confusion. In re Concordia International Forwarding Corp., 222 USPQ 355 (TTAB 1983). While mindful of these principles, we also are mindful of decisions that have squarely dealt with the question of the relationship of restaurant services and food or beverage items.

"[T]he fact that restaurants serve food and beverages is not enough to render food and beverages related to restaurant services for purposes of determining the likelihood of confusion." Coors, supra, 68 USPQ2d at 1063, citing Jacobs v. International Multifoods Corp., 668 F.2d 1234, 212 USPQ 641 (CCPA 1982). Rather, "*Jacobs* provides that '[t]o establish likelihood of confusion a party must show *something more* than that similar or even identical marks are used for food products and for restaurant services.' *Id.* (emphasis added)." Coors, supra, 68 USPQ2d at 1063.

The examining attorney has attempted to establish the relatedness of the involved goods and services in two ways. First, the examining attorney has entered in the record various third-party registrations showing registration of a single mark for both restaurant services and meatballs or

foods containing meatballs (e.g., meatball subs or sandwiches). Office action Feb. 8, 2005. Second, the examining attorney argues that the "something more" nexus is met in this case because of the relationship of registrant's meatballs and applicant's Italian restaurants that feature meatballs per se on their menus. Brief, unnumbered pp. 10-11.

As to the first point, it is settled that third-party registrations based on use of the respective marks in commerce and which cover various goods or services may serve to suggest that the listed goods and services are of a type which consumers may expect to emanate from a single source. In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209, 1211 (TTAB 1999); In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1469 (TTAB 1988), aff'd in unpublished opinion No. 88-1444 (Fed. Cir. November 14, 1988). In the case at hand, the examining attorney introduced use-based registrations for six marks, each of which is registered for restaurant services and specific food items. Four of these are for marks which readily reveal that the restaurant services feature Italian food: A S FINE FOODS SINCE 1948 and design [including a map of Italy among the design elements]; GINO'S PIZZA EXPRESS; GINO'S PIZZA AND SPAGHETTI HOUSE; and PRIMA PIZZA. The registrations for

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each of these four marks also cover Italian food items. Two of the six registrations, specifically, the A S FINE FOODS SINCE 1948 and GUDTFOOD registrations, list not only restaurant services but also meatballs as a discrete item.

As for the "something more" nexus required by the Jacobs and Coors decisions and discussed in Azteca and other Board decisions, applicant asserts that the nexus can be established by showing the cited mark to be famous, as in Jacobs, or the unique nature of the involved marks, as in Mucky Duck, or that a registrant's mark covers food items of a type served in an applicant's restaurant, as in Azteca. However, applicant asserts that none of these factors is present in the current appeal. We disagree and find persuasive the examining attorney's contention that the something more requirement is satisfied in this case.

Applicant is correct that there is nothing in the record to establish that the mark in the cited registration is famous and, therefore, the fame of the registered mark cannot be the source of the something more nexus in this case. Applicant's contention, however, that there is nothing unique about the mark in the cited registration is without any evidentiary support. Applicant contends that a search on the GOOGLE search engine for "Mama Lucia" retrieved 3,450 "hits" but only 46 pertained to the

registrant. The contention has no support whatsoever in the record. Applicant did not make copies of even the search query or search results of record, not to mention the web pages purportedly retrieved by the search. See In re Bayer Aktiengesellschaft, No. 06-1279, slip op. at 9-10, (Fed. Cir. May 24, 2007) (search engine search results alone have little probative value). Nor are there any third-party registrations of MAMA LUCIA, MAMMA LUCIA or any other similar spelling, of record. Cf. Coors, supra, 68 USPQ2d 1062-63 (although it did not result in a finding of weakness of the cited mark, applicant presented evidence of third-party marks, registered or in use, that the Board considered). In short, there is nothing to show that the cited mark is weak and entitled to only a narrow scope of protection. In the absence of evidence to the contrary, we must consider the registered mark distinctive and unique.

More importantly, while applicant contends that this case is unlike Azteca, we find the comparison apt. In that case, the Board noted "a review of applicant's menu shows that applicant serves a variety of Mexican fare, including tacos, tortillas and salsa (that is, the very items listed in the cited registrations)." Azteca, 50 USPQ2d at 1211. Here, a review of applicant's menu shows that applicant serves meatballs, the goods of the cited registration, not

only as an element of certain entrees, but also as a separately available item.

Applicant has acknowledged that the something more requirement could be met by a showing that the cited mark is unique or that the goods covered by the cited mark are a type of cuisine that would be sold in applicant's restaurant. Both factors are present here. We are not persuaded that we should find to the contrary because of applicant's argument that the meatballs in the cited registration could be "Swedish, French, Italian, Spanish, Asian, Mexican, Barbecue, etc.," because even this argument acknowledges they could be Italian. In fact, registrant does market Italian meatballs, as shown by the newspaper advertisement made of record by the examining attorney.¹ Nor do we find significant applicant's argument that its meatballs would only be served cooked and ready to eat,

¹ Applicant asserted that the advertisement does not establish that the advertised MAMA LUCIA Italian meatballs are from registrant. However, as the examining attorney noted in the brief on appeal, the picture of the package in the ad shows the MAMA LUCIA mark displayed in the same style of lettering and color as on images of registrant's goods appearing on applicant's web site. Further, in the same box in the grocery store circular featuring the ad for meatballs is an inset box advertising another product shown on registrant's website. Thus, we have no doubt that the advertisement is for registrant's meatballs. We hasten to add, however, that even without this advertisement, Italian meatballs would be encompassed by registrant's identification of goods and we would still find a likelihood of confusion even if the advertisement were not in the record.

whether served in one of applicant's restaurants or for carry out, while registrant's meatballs would need to be cooked or heated after purchase.

Applicant's only remaining arguments that there is no likelihood of confusion focus on the different channels of trade for restaurant services and food items and the asserted lack of actual confusion. Brief, pp. 7 & 8. We do not find either argument to aid applicant's position. There can be no doubt that the same class of purchasers is at issue, i.e., purchasers of Italian food, whether in applicant's restaurants or in stores that would sell registrant's meatballs. The divergence of channels of trade actually contributes to a likelihood of confusion because there would be no opportunity for consumers to compare the marks on registrant's packaging with, for example, applicant's menu. Given the fallibility of memory, a diner having eaten in one of applicant's restaurants, subsequently confronted with registrant's goods while shopping in a supermarket would be hard-pressed to note that registrant's mark employed one less letter "M" than applicant's mark. As for the asserted absence of instances of actual confusion, it has been frequently noted that the absence of significant evidence of actual confusion does not mean that there is no likelihood of

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confusion. See Majestic, 65 USPQ2d at 1205 ("The lack of evidence of actual confusion carries little weight"). See also Giant Food, 218 USPQ at 396. Moreover, in an ex parte proceeding, "uncorroborated statements of no known instances of actual confusion are of little evidentiary value." Majestic, 65 USPQ2d at 1205.

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