

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

Mailed: December 14, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re mnmco llc

Serial No. 78622540

Doyle B. Johnson, Reed Smith, LLP, for applicant.

Megan K. Whitney, Trademark Examining Attorney, Law Office
113 (Odette Bonnet, Managing Attorney).

**Before Holtzman, Rogers, and Mermelstein, Administrative
Trademark Judges.**

Opinion by Mermelstein, Administrative Trademark Judge:

mnmco llc filed an application to register the mark
LETTÜS (in standard characters) on the Principal Register
for "retail grocery stores" and "restaurant services," in
International Classes 35 and 43, respectively.¹

The examining attorney 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 mark **LETTUCE** (typed mark), previously registered for

¹ Filed May 4, 2005, alleging a bona fide intent to use the mark
in commerce.

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"restaurant services"² that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive. Applicant has appealed. Both applicant and the examining attorney have filed briefs.

We affirm in part and reverse in part.

Legal Standard

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 likelihood of confusion. 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); *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 [or services] and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA

² Registration No. 1672175, issued January 14, 1992, to Lettuce Entertain You Enterprises, Inc. Filings pursuant to Trademark Act §§ 8, 9, and 15, accepted, granted, and acknowledged, respectively.

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1976); *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999), and cases cited therein.

International Class 35

As noted, the subject application includes services in International Class 35 (retail grocery stores) and International Class 43 (restaurant services). Throughout examination and appeal, no mention has been made of applicant's International Class 35 services in connection with the refusal to register.³ Although the refusal was not specifically limited to International Class 43, the examining attorney has consistently referred to applicant's services as "restaurant services," or as "identical" to the prior registrant's services, which are also "restaurant services." This is clearly a reference to the Class 43 services, and not those in Class 35. The examining attorney proffered no evidence or argument as to the relationship between "retail grocery stores" and "restaurant services." Likewise, applicant makes no mention of the statutory refusal in connection with its Class 35 services. Although it is not clear whether the refusal to register and this appeal were intended to apply to applicant's International Class 35 services, they remain in the application, and

³ The examining attorney did require amendment of the Class 35 recitation of services from the originally-recited "grocery services." Applicant's subsequent amendment to "retail grocery services" was accepted.

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applicant has paid the appropriate appeal fee for two classes. Accordingly, we consider the refusal and appeal to apply to both classes.

Because the examining attorney has presented no evidence or argument with respect to refusal of applicant's "retail grocery stores," the refusal to register is reversed as to those services. Although we find the marks substantially similar, *see infra*, we will not presume a connection between applicant's Class 35 services and the prior registrant's "restaurant services," in the absence of evidence to support this contention.

International Class 43

**Comparison of the Respective Services, Trade Channels,
and Classes of Customers**

Applicant's recited "restaurant services" are identical to the services in the prior registration. Moreover, because the services are identical and contain no restrictions, we must consider the respective channels of trade and classes of customers to also be identical. *In Re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In Re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). These factors strongly support the refusal to register.

Comparison Of The Marks

We next consider whether applicant's mark LETTÜS and the registered mark LETTUCE, when viewed in their entirety, are similar in terms of appearance, sound, connotation and commercial impression. In comparing the marks, we are mindful that where, as here, the services are identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the services. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Real Estate One, Inc. v. Real Estate 100 Enterprises Corporation*, 212 USPQ 957, 959 (TTAB 1981); *ECI Div. of E-Systems, Inc. v. Environmental Communications Inc.*, 207 USPQ 443, 449 (TTAB 1980). The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but whether the marks are sufficiently similar in 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).

Applicant argues that the marks here differ in appearance, sound, meaning, and commercial impression. As

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to sound, applicant points out that its mark ends in "-ÜS," while the mark in the prior registration ends in "-UCE." According to applicant, the prior mark is pronounced "let' tus," while the mark in the subject application would be pronounced "let toos'," with the accent on the second syllable. By contrast, the examining attorney argues that the marks are phonetic equivalents, and could be pronounced the same way.

In considering the similarity in sound, we must consider applicant's mark as it is likely to be pronounced, not as it is intended by applicant to be pronounced. Trademark proprietors have little influence on how their customers pronounce marks. See *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) ("it is well established that there is no such thing as a 'correct' pronunciation of a trademark.")

We agree with the examining attorney that many potential customers would likely pronounce applicant's mark the same as the prior registrant's, *i.e.*, like the familiar word "lettuce." The "-TUS" portion of applicant's mark would likely be articulated the same as the "-TUCE" portion of "lettuce." Although applicant's mark includes a non-standard character, applicant does not explain how this is likely to affect the pronunciation of the mark and why this

would be so,⁴ nor does applicant explain why it believes that its customers would accent the second syllable. But even if some customers adopt applicant's proposed pronunciation, it would still be quite similar in sound to "lettuce." In ordinary conversation, even "let' tus" and "let toos'" would likely be viewed as a small variation on the same word.

Applicant also argues that the two marks "differ significantly" in appearance. Applicant's Br. at 2. While the marks are clearly not identical, we find them to be quite similar in appearance. Both begin with the letters LETT-. The next letters in the respective marks, "U" and "Ü", are visually nearly identical. The only significant difference in appearance is that applicant's mark ends in "-S," while the cited registrant's mark ends in "-CE." But because English speakers are accustomed to reading from left to right, it is logical to assume that the beginning of a word is most likely to have the strongest impression. In any event, we find that this is the case here.⁵

⁴ Diacritical marks such as those over the letter "U" in applicant's mark are not commonly used in English. It is not at all clear whether potential consumers would pronounce the letter as a German umlaut, see MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, 1282 (10th ed. 1998), as a diaeresis, see *id.* at 319, or in some other way. Since many consumers are unlikely to be aware of any "appropriate" pronunciation (if indeed there is one), it seems quite likely that the diacritical mark as used here would be ignored in vocalizing applicant's mark.

⁵ The examining attorney notes that the prior registration is for a typed mark, while applicant here has applied for registration

Finally, although there is no evidence that "lettüs" is a properly-spelled word, its visual and aural similarity to the word "lettuce" would likely result in the same commercial impression among potential customers. In so finding, we note that the mark - as used in connection with restaurant services - is suggestive of a restaurant with a vegetarian- or salad-oriented menu, which is the same connotation likely to be given to the prior registrant's mark.

Accordingly, we find that the marks are identical (or nearly so) in sound, and quite similar in both visual presentation and overall commercial impression. This factor strongly supports the refusal to register.

Conclusion

As noted, applicant's services are identical to those identified in the cited registration, and the channels of trade and classes of purchasers are likewise identical.

of a standard character mark. Whereas earlier applications for registration "without claim to any particular font style, size, or color" were referred to as "typed" marks, after November 3, 2003, such marks are said to be in "standard characters." See TMEP § 807.03(i). At the same time, the list of characters permitted in such marks was expanded, allowing use of characters like "Ü," which were not allowed prior to November 2003.

Although registration of a typed or standard character mark generally covers use of the mark in any stylization, we cannot agree with the examining attorney's suggestion that the cited registration must be construed to encompass the same special character as used in applicant's mark. Because the prior policy did not permit the use of "Ü" in a typed mark, we will not construe opposer's typed mark to encompass a character which it could not have included at the time of registration.

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When the relevant services are identical, a lesser degree of similarity of the marks is necessary to support a finding of likelihood of confusion. *ECI Div. of E-Systems, Inc. v. Envtl. Communications Inc.*, 207 USPQ 443, 449 (TTAB 1980).

We conclude that, in view of the substantial similarity of applicant's mark and that of the registrant, their contemporaneous use in connection with restaurant services is likely to cause confusion as to the source or sponsorship of such services.

Decision: The refusal under Section 2(d) of the Act is REVERSED with respect to International Class 35 and AFFIRMED with respect to International Class 43.