

THIS DECISION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 9, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Thomas Konicki

Serial No. 78867416

Forrest L. Collins, Esq. for Thomas Konicki.

Steven M. Perez, Trademark Examining Attorney, Law Office
101, Ronald R. Sussman, Managing Attorney.

**Before Zervas, Cataldo, and Mermelstein, Administrative
Trademark Judges.**

Opinion by Mermelstein, Administrative Trademark Judge:

Thomas Konkcik seeks registration of the mark ANGIE'S
PIZZA (in standard characters) for "pizza delivery," in
International Class 39.¹

Registration has been finally refused pursuant to
Trademark Act § 2(d), 15 U.S.C. § 1052(d), on the ground
that applicant's mark so resembles the marks LITTLE ANGIE'S²

¹ Filed August 10, 2006, based on the allegation of first use and
use in commerce as of October 1, 1976. Applicant submitted a
disclaimer of "PIZZA" apart from the mark as shown.

² Registration No. 1920522, issued September 19, 1995. Post-
registration filings pursuant to Trademark Act §§ 8, 9, and 15
accepted, granted and acknowledged.

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and ANGIE'S CANTINA AND GRILL,³ both for "restaurant and bar services, and carry-out restaurant services" in International Class 42, as to be likely, if used in connection with the identified services, to cause confusion, to cause mistake, or to deceive. Trademark Act § 2(d); 15 U.S.C. § 1052(d). Both registrations are owned by the same entity.

Applicant and the examining attorney filed briefs. After careful consideration of the record, we affirm.

I. Applicable Law

Our determination under Trademark Act § 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 Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Rests. 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

³ Registration No. 2613327, issued August 27, 2002. "CANTINA AND GRILL" disclaimed.

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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 1976); and *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

II. Discussion

A. Evidentiary Objection

The examining attorney objects to an exhibit attached to applicant's brief, namely, a list of third-party registrations, on the grounds that the list had not been timely submitted and that such a list is not sufficient to make the listed registrations of record. Ex. Att. Br. at 2-3. Applicant submitted the list in an apparent attempt to show that the term ANGIE or ANGIE'S is weak. App. Br. at 11.

The examining attorney's objection is sustained, and we have given no consideration to applicant's list or the listed registrations. "The record in the application should be complete prior to the filing of an appeal. The ... Board will ordinarily not consider additional evidence filed after the appeal...." Trademark Rule 2.142(d). Furthermore, "the Board does not take judicial notice of registrations that reside in the Patent Office, and ... the

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submission of a list of registrations is insufficient to make them of record." *In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974).

B. The Similarity Or Dissimilarity of the Marks in Their Entireties as to Appearance, Sound, Connotation and Commercial Impression.

In a likelihood of confusion analysis, we compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay*, 73 USPQ2d at 1692. While we must consider the marks in their entireties, it is entirely appropriate to accord greater importance to the more distinctive elements in the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). As has often been stated, the first word of a compound mark is often more likely to make a stronger impact on consumers and the way they remember the mark. *E.g. Wet Seal Inc. v. FD Mgmt. Inc.*, 82 USPQ2d 1629, 1639 (TTAB 2007). Further, descriptive terms in a mark are weak and are generally entitled to lesser weight in distinguishing similar marks. *In re Equitable Bancorporation*, 229 USPQ 709, 711 (TTAB 1986).

As noted, applicant's mark is ANGIE'S PIZZA in standard characters,⁴ while the marks in the cited prior

⁴ Applicant contends that its mark consists of four parts: "the given name Angie in its possessive form; the disclaimed language

registrations are ANGIE'S CANTINA AND GRILL and LITTLE ANGIE'S. We find that the dominant portion of all three marks is the identical term, "ANGIE'S." We note in this regard that "ANGIE'S" is the first word of both applicant's mark and the mark in the '327 Registration. Moreover, the term "PIZZA" in applicant's mark and "CANTINA AND GRILL" in the '327 Registration are descriptive of the identified services, and have been disclaimed as such. As for the mark in the '522 Registration, LITTLE ANGIE'S, we note that the term "LITTLE" modifies the term "ANGIE'S," and is therefore of subordinate emphasis to the latter term.

While there are clearly differences between applicant's mark and each of the cited prior registrations, they nonetheless share the identical dominant and distinctive term, "ANGIE'S." Considered in their entireties, we find these marks to be substantially

Pizza in the same font as the given name Angie, a chef tossing a pizza, and the language 'Since 1955' in a smaller font." App. Br. at 6. Applicant is incorrect as a matter of law. The mark in an application is defined by the drawing of the mark, not the applicant's specimens of use. Trademark Rule 2.52. In this case, applicant has applied to register the mark ANGIE'S PIZZA, in standard character form, *i.e.*, without regard to any particular font, size, or color, and without any design element. Although it is apparent from applicant's specimens that it uses its mark with the chef design and additional wording, applicant may apply to register any portion of its mark which creates a distinct and separate impression. But having chosen to apply for registration of only the words ANGIE'S PIZZA, without any additional elements, applicant cannot now contend that matter extraneous to the applied-for mark distinguishes it from the cited registration.

similar, a fact which supports the examining attorney's refusal of registration.

C. The Similarity Or Dissimilarity And Nature Of The Services

Applicant identifies its services as "pizza delivery," while the services in both cited registrations are recited as "restaurant and bar services, and carry-out restaurant services." Applicant notes the obvious differences in the services, noting that customers "will certainly recognize the distinction between a pizza delivery service and a public house that sells food." App. Br. at 8.

Applicant's argument misses the point. The issue is not whether purchasers of the registrant's services will confuse such services with applicant's. Rather, the question is whether - when used in connection with similar marks - the services are related in such a way that potential purchasers will believe that they share a common source or sponsorship. *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1476-77 (TTAB 1999).

As the examining attorney argues, the pizza delivery services are clearly related to bar and restaurant and carry-out restaurant services. Many restaurants - particularly including pizza restaurants - also provide delivery services. The examining attorney has submitted

eleven trademark registrations covering restaurant services on the one hand, and pizza delivery services on the other. Third-party registrations which individually cover a number of different items and which are based on use in commerce may serve to suggest that the listed goods are of a type that may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988), *aff'd* (unpublished) No. 88-1444 (Fed. Cir. Nov. 14, 1988).

Applicant further argues that its services are unrelated to those of the cited registrant because the registrant does not serve or deliver pizza.

Applicant's argument is misplaced. In determining registrability, we must limit our consideration to the services as set out in the application and in the cited registration. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Regardless of the actual services or the consumers to whom they are rendered, we may not read limitations into the services as recited. *Octocom Systems Inc. v. Houston Computers Services Inc.*, 16 USPQ2d 1783, 1786-87 (Fed. Cir. 1990). In this case, the cited registrant's restaurant and carry-out services are not limited to any particular type of food or menu. Accordingly, we must construe the cited registration to encompass all of the usual types of

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restaurants and carry-out services, including pizza restaurants and pizza take-out services.

We thus agree with the examining attorney that the registrant's services are closely related to the applicant's. This factor likewise favors refusal of registration.

III. Conclusion

After careful consideration of the relevant evidence and argument, we conclude that use of applicant's mark on or in connection with the identified services would pose a likelihood of confusion with the mark in the cited prior registration.

Decision: The refusal to register under Trademark Act § 2(d) is accordingly affirmed.