

9/20/01

**THIS DISPOSITION
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Paper No. 18
TJQ

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Hungry Howie's Pizza & Subs, Inc.

v.

Neil Diamond

Opposition No. 111,879
to application Serial No. 75/267,017
filed on **March 31, 1997**

Julie A. Greenberg of Gifford, Krass, Groh, Sprinkle,
Anderson & Citkowski for Hungry Howie's Pizza & Subs,
Inc.

Donna A. Tobin of Cooper & Dunham for Neil Diamond

Before Cissel, **Quinn and Hohein**, Administrative Trademark
Judges.

Opinion by **Quinn**, Administrative Trademark Judge:

An application has been filed by Neil Diamond to
register the mark FRUZZATTI for "gelato; ice cream;
frozen yogurt; sandwiches; pizza; salads, namely, pasta,
macaroni and rice salads."¹

¹ Application Serial No. 75/267,017, filed March 31, 1997, based
on an allegation of a bona fide intention to use the mark in
commerce. In response to the Examining Attorney's inquiry
during examination of the application, applicant indicated that

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Registration has been opposed by Hungry Howie's Pizza & Subs, Inc. under Section 2(d) of the Trademark Act on the ground that applicant's mark, if used in connection with applicant's goods, would so resemble opposer's previously used and registered mark FRUZZA for pies² as to be likely to cause confusion.

Applicant, in his answer, denied the salient allegations of likelihood of confusion.

The record consists of the pleadings; the file of the involved application; a certified copy of opposer's pleaded registration that accompanied the amended notice of opposition; the testimony, with related exhibits, of Robert Cuffaro, opposer's director of franchise development; and applicant's responses to opposer's interrogatories, introduced by way of opposer's notice of reliance.³ Applicant neither took testimony nor introduced any other evidence. Only opposer filed a brief on the case. Opposer requested an oral hearing, but after learning that applicant would not appear, waived the hearing.

the mark has no meaning or significance other than as a trademark.

² Registration No. 1,773,791, issued May 25, 1993. See discussion, infra.

³ The other items accompanying opposer's notice of reliance were stricken by the Board's order dated March 3, 2001. These items, of course, have not been considered in reaching our decision.

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With respect to the issue of priority, opposer submitted, as noted above, a certified copy of its pleaded registration. A check of Office records shows, however, that the registration was cancelled on December 29, 2000 as a result of opposer's failure to file a Section 8 affidavit. When a Federal registration owned by a party has been properly made of record in an inter partes proceeding, and there are changes in the status of the registration between the time it was made of record and the time the case is decided, the Board, in deciding the case, will take judicial notice of, and rely upon, the current status of the registration, as shown by the records of the Office. *Royal Hawaiian Perfumes, Ltd. v. Diamond Head Products of Hawaii, Inc.*, 204 USPQ 144 (TTAB 1979). See also, *TBMP* §703.02.

Inasmuch as the pleaded registration is no longer subsisting, opposer must rely on whatever common law rights it has in its mark. Thus, we turn to Mr. Cuffaro's testimony and related exhibits. Mr. Cuffaro testified that opposer began its use of the mark FRUZZA in 1991. The mark is used in connection with a dessert item served at opposer's 30 restaurants located in 19 states. More specifically, the dessert item is an oven-baked fruit pie (apple, cherry or peach) that is in the

shape of a pizza. Mr. Cuffaro described it as "mainly just a dessert item that's served on a pizza shell; it looks like a pizza; it's actually round like a pizza."
(dep., p. 6)

Mr. Cuffaro's testimony establishes opposer's use of the mark FRUZZA prior to the earliest date upon which applicant can rely, which in this case is the filing date of the involved application. Lone Star Manufacturing Co., Inc. v. Bill Beasley, Inc., 498 F.2d 906, 182 USPQ 368 (CCPA 1974) and Columbia Steel Tank Co. v. Union Tank & Supply Co., 277 F.2d 192, 125 USPQ 406 (CCPA 1960).

We next turn to consider the merits of opposer's likelihood of confusion claim. Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Insofar as the parties' goods are concerned, we start with the premise that they need not be identical or

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even competitive to support a holding of likelihood of confusion. It is sufficient that the goods are so related or that conditions surrounding their marketing are such that they would be encountered by the same persons who, because of the relatedness of the goods and the similarities between the marks, would believe mistakenly that the goods originate from or are in some way associated with the same producer. *Hercules Inc. v. National Starch and Chemical Corp.*, 223 USPQ 1244, 1247 (TTAB 1984).

Opposer's and applicant's goods are related in a general sense in that they can be classified broadly as "food products." In finding that the goods are related, we recognize that there is no per se rule in likelihood of confusion cases involving foods that all food products are related. *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 153 (CCPA 1978). More specifically here, however, opposer's pies are related to applicant's gelato, ice cream and frozen yogurt in that all are "sweets" that are served as desserts. Moreover, it is common knowledge that frozen

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confections such as ice cream are often served as a complementary item to pie ("pie a la mode")⁴.

Further as to the goods, the dessert items are likely to move through the same or similar channels of trade (e.g., restaurants) to the same classes of purchasers. Also, the goods are relatively inexpensive and are the subjects of impulse purchases. See: *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 [when both products are relatively inexpensive, comestible goods subject to frequent replacement, purchasers of such products have been held to a lesser standard of purchasing care].

With respect to the marks, opposer's FRUZZA and applicant's FRUZZATTI are similar in appearance. The first six letters in applicant's mark are identical to the entirety of opposer's mark, with the only difference being the addition of the letters "TTI" in applicant's mark. The marks are also similar in sound, both having an Italian ring.

As to meaning, Mr. Cuffaro testified that opposer's mark is "kind of [a] play on the word pizza using fruit

⁴ In this connection, we take judicial notice of the dictionary definition of the term "a la mode": "topped or accompanied by a serving of ice cream--used of an individual portion of dessert (as a pie)." *Webster's Third New International Dictionary* (unabridged ed. 1993).

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combined." (dep., p. 7) Both marks are somewhat suggestive of "fruit," and both marks, as noted above, have an Italian feel. Notwithstanding this similar suggestiveness, the record is devoid of evidence of any third-party uses or registrations of similar marks in the food industry.

In sum, the general overall commercial impressions engendered by the marks FRUZZA and FRUZZATTI are substantially similar. It is the general overall commercial impression engendered by the marks that must determine, due to the fallibility of memory and the consequent lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is thus on the recollection of the average purchaser, who normally retains a general, rather than a specific, impression of trademarks. In re United States Distributors, Inc., 229 USPQ 237, 239 (TTAB 1986). The contemporaneous use of the respective marks in connection with such closely related food products as applicant's gelato, ice cream and frozen yogurt and opposer's fruit pies sold in its restaurants is accordingly likely to cause confusion as to the source or sponsorship thereof.

To the extent, however, that there may be any doubt on our finding of likelihood of confusion, we resolve

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that doubt, as we must, in favor of the prior user.

Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d
1565, 218 USPQ 390, 395 (Fed. Cir. 1983).

Decision: The opposition is sustained, and
registration to applicant is refused.