

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

*Decision mailed:  
June 6, 2007  
GDH/gdh*

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

Swig, Inc.  
v.  
M-Squared Enterprises, LLC

Opposition No. 91125584 to application Serial No. 76320738  
filed on October 4, 2001

William B. Nash of Jack Walker, L.L.P. for Swig, Inc.

Larry Moskowitz of M-Squared Enterprises, LLC for M-Squared  
Enterprises, LLC.

Before Hohein, Holtzman and Taylor, Administrative Trademark  
Judges.

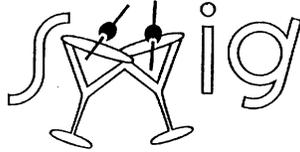
Opinion by Hohein, Administrative Trademark Judge:

M-Squared Enterprises, LLC has filed an application to  
register the mark "SWIG BARTINI" in standard character form on  
the Principal Register for "restaurant and bar services" in  
International Class 42.<sup>1</sup>

Swig, Inc. has opposed registration, alleging in its  
notice of opposition that, among other things, opposer "and its

<sup>1</sup> Ser. No. 76320738, filed on October 4, 2001, which is based on an  
allegation of a date of first use anywhere of August 1, 2000 and a  
date of first use in commerce of February 1, 2001.

predecessors in title have long prior to August 1, 2000 ... continuously been using the mark SWIG & Design to identify Opposer's cocktail lounge services"; that opposer is the owner of a federal registration for the mark "SWIG" and design, as shown below,



on the Principal Register for "cocktail lounge services" in International Class 42;<sup>2</sup> that, "by virtue of an assignment from its predecessor in title," opposer is also the owner of a federal registration for the mark "SWIG SODA" and design, as reproduced below,



on the Principal Register for "carbonated soft drinks" in International Class 32;<sup>3</sup> that opposer "and its predecessors in title have sold carbonated soft drinks under the mark SWIG SODA before Applicant started using its proposed registration"; and that "Applicant's mark SWIG BARTINI is confusingly similar to

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<sup>2</sup> Reg. No. 2,243,360, issued on May 4, 1999, which alleges a date of first use anywhere and in commerce of May 26, 1997; combined affidavit §§8 and 15.

<sup>3</sup> Reg. No. 1,839,570, issued on June 14, 1994, which alleges a date of first use anywhere and in commerce of April 1, 1991; renewed. The word "SODA" is disclaimed.

Opposer's registered mark SWIG for the same identical services and the [Opposer's registered] mark SWIG SODA for carbonated soft drinks that would be sold in an establishment similar to that of Applicant."

Applicant, in its answer, has denied the essential allegations of the notice of opposition.

The record consists of the pleadings; the file of applicant's involved application; and, as opposer's case-in-chief, both the trial deposition, with exhibits, of its president, Christopher Erck, and a notice of reliance on its discovery depositions, with exhibits, of the two members of applicant, Larry Moskowitz and Shannon Miller,<sup>4</sup> who among other things are also the president and secretary, respectively, of applicant's parent holding company, XRX Entertainment Holding Group, Inc.<sup>5</sup> Only opposer has submitted a brief.

Inasmuch as it is clear that, on their face, opposer's "cocktail lounge services" are identical in part to applicant's "restaurant and bar services," and since the record contains no evidence to show that opposer's "carbonated soft drinks" are commercially or otherwise related in the minds of consumers to applicant's services, the principal focus of our inquiry in this proceeding is on the issues of which party has priority of use of

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<sup>4</sup> It is noted, however, that page 45 of Mr. Miller's discovery deposition is missing from opposer's notice of reliance and apparently was not submitted therewith.

<sup>5</sup> According to opposer, the discovery depositions are "relevant to show the timeline of Applicant's mark including adoption, first use, and notice of prior users."

its respective "SWIG" and design and "SWIG BARTINI" marks<sup>6</sup> and, if priority lies with opposer, whether there is a likelihood of confusion from the contemporaneous use by opposer of its "SWIG" and design mark for its cocktail lounge services and applicant's use of its "SWIG BARTINI" mark for its legally identical bar services.

According to the record, opposer was incorporated in 1996 and has had no predecessors, parents or subsidiaries. Opposer first opened a cocktail lounge and restaurant on the Riverwalk in San Antonio, Texas under the service mark "SWIG" and design (as previously illustrated) in May 1997. Opposer started operating a second venue for its cocktail lounge and restaurant services under such mark in Memphis, Tennessee in December 2003. By an assignment recorded on September 24, 1998, opposer also acquired trademark rights to the mark "SWIG SODA" and design (as previously reproduced) for carbonated soft drinks, but there is no evidence that opposer has actually used and/or is using such mark. Opposer, in addition, has filed an application on November 14, 2003 to register the mark "SWIG" for restaurant and cocktail lounge services, which has been assigned Ser. No. 76559301.

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<sup>6</sup> Contrary to the assertion in opposer's brief that "[t]here is no issue as to priority," opposer failed to make either of its pleaded registrations properly of record. Specifically, rather than, for instance, introducing certified copies of its pleaded registrations showing that the registrations are subsisting and are owned by opposer, which would have eliminated the issue of priority, *see, e.g.,* King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974), opposer offered only plain copies, which were more than a year old, of its pleaded registrations, thereby failing to establish both the current status of and title to such registrations. *See* TBMP §704.03(b)(1)(A) (2d ed. rev. 2004).

Since the opening of its San Antonio location, opposer has done monthly advertising of its cocktail lounge and restaurant services. For example, as shown by a page from Key Magazine which appeared during the year 2000, its "Swig Martini Bar" has been listed under the heading "MARTINI/CIGAR BAR" as "San Antonio's premier martini and cigar bar" "featuring Martinis, Hors d'oeuvres and fine Cigars" while a separate ad prominently displays its "SWIG" and design mark. (Erck dep. Ex. 8.) According to Mr. Erck, "[w]e started advertising in Key Magazine in 1997 when we opened." (Erck dep. at 7.) Similarly, another ad which ran in Enjoy Magazine around December 2000 refers to opposer's "SWIG MARTINI BAR," with the word "SWIG" being displayed as the mark "SWIG" and design, and advertises "Martini Time. With a twist." (Erck dep. Ex. 11.) Opposer, since the opening of its San Antonio location, has also promoted its services by using its "SWIG" and design mark on matchbooks for its patrons and has advertised on the Internet since "probably as early as '99, 2000." (Erck dep. at 8.) Opposer has had several domain names including swig.cc, swigmartini.com, swigsanantonio.com and, more recently, swigmemphis. In its advertising on the Internet, such as the following excerpt from citysearch.com, opposer has referred to itself simply as "Swig": (emphasis in original):

It's Martini time at **Swig**, San Antonio's premier Martini bar, located in the South Bank on the San Antonio Riverwalk. **Swig** is a full-service 1940-s style contemporary bar featuring Martinis and live jazz nightly. Where the classic American cocktail meets its contemporaries...Where Cary Grant meets Uma

Thurman. Your visit to **Swig** promises to be an affair to remember.

(Erck dep. Ex. 23.)

Applicant, on the other hand, is a wholly owned subsidiary of XRX Entertainment Holding Group, Inc. and is composed of its two members, Larry Moskowitz and Shannon Miller. Applicant operates a bar and restaurant under the service mark "SWIG BARTINI," which is sometimes referred to as "SWIG" for short. Contrary to the dates of first use claimed in its application, which were verified by Mr. Moskowitz,<sup>7</sup> applicant first opened for business in Weston, Florida as "an upscale restaurant/nightclub," with three bars, in "October of 2001." (Moskowitz dep. at 26 and 16, respectively.) According to Mr. Moskowitz, the idea behind applicant's establishment was that it would be a "martini bar slash restaurant," that is, a "bar with some element of dining." (Id. at 31.) While, in particular, applicant held the "grand opening" of its "SWIG BARTINI" bar and restaurant on October 3, 2001, such was actually a "private party" for the investors in its parent holding company. (Id. at 55.) Applicant did not have "an opening to the general public" of its "SWIG BARTINI" bar and restaurant until October 4, 2001. (Id.)

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<sup>7</sup> Other than the first time which applicant came up with the mark, Mr. Moskowitz indicated that he had no idea as to the basis for the date of first use anywhere claimed in applicant's application, testifying that "I don't know how we came up with August 1, 2000." (Moskowitz dep. at 50.) Similarly, as to the claimed date of first use in commerce of February 1, 2001, Mr. Moskowitz, who is an attorney but admitted that he is "not a trademark attorney," testified with respect to such date that "it's certainly not accurate" inasmuch as "we don't do any interstate commerce." (Id. at 51.)

Likewise, as testified to by Mr. Miller, the focus of applicant's "SWIG BARTINI" concept was to market it principally as a martini bar by using "a name that said drink, socialize, enjoy." (Miller dep. at 14.) Confirming that the dates of first use claimed in applicant's application are inaccurate,<sup>8</sup> Mr. Miller characterized the opening of applicant's Weston, Florida bar and restaurant on October 3, 2001 as "a media party" and "a big giveaway party," and noted that it was not until October 4, 2001 that applicant actually first sold anything to the general public. (Id. at 52.)

Applicant advertises and promotes its services on its SwigBartini.com website, on the radio, and in print media such as newspapers and direct mail fliers. In 2002, for instance, applicant spent over \$150,000 in advertising and promoting its "SWIG BARTINI" restaurant and bar. However, other than its website, applicant has not advertised its "SWIG BARTINI" bar and restaurant outside of Dade and Broward counties in Florida. Applicant, moreover, is aware of only one incident of actual confusion with opposer's business. Specifically, Mr. Moskowitz testified that:

The only incident that I know of, and I would not suggest that it was confusion by a customer, ... was somehow relayed to me through a mutual friend, ... but apparently someone had asked someone that knows me whether or not we were looking for individuals to either be bartenders or

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<sup>8</sup> In particular, as to applicant's claimed date of first use of its mark anywhere of August 1, 2000, he stated that "I don't really know what you mean by first used" and that the claimed date of first use of the mark in commerce of February 1, 2001 was not accurate because "we were not in business at that time." (Miller dep. at 25.)

waiters .... And that person, in an attempt to contact us, or me, went on the Internet and found your client's Internet Website, and that -- he contacted your client. That's the only incident that I know of where someone has suggested to me or asked me whether or not I had any interest in a place in San Antonio. ....

(Moskowitz dep. at 74.) Likewise, Mr. Miller testified with respect to such incident that:

Early on we had a gentleman come in and fill out an application and he had gone on-line to look up Swig Bartini and he came up with the San Antonio Website and called and asked is that related to you, who it was. That was the only incident that I can recall.

(Miller dep. at 42.)

Furthermore, although admitting that he had visited San Antonio, Texas prior to applicant's opening of its "SWIG BARTINI" restaurant and bar, Mr. Miller denied having any knowledge of opposer's "SWIG" bar or cocktail lounge at such time. However, he admitted to subsequently visiting opposer's Riverwalk location in San Antonio during 2002 and testified that, by comparison, applicant's business "is significantly different in that we have a full service menu component, food component, which doesn't exist in the San Antonio property." (Id. at 53.) He also noted that applicant's facility has a dance floor while opposer's "venue is considerably smaller" and lacks a dance floor. (Id.) The chief similarities, he observed, are that both establishments "serve martinis and from time to time have live entertainment." (Id.) Opposer's place, he added, "was more jazz driven," while applicant's is "a little more pop involved." (Id.) Moreover, he indicated that, as to "the distinction between the concepts

themselves, we are more upscale in terms of our presentation and product as a whole," with a "high end market," and "are dance oriented," unlike opposer's business. (Id.)

Turning first to the issue of priority of use, the record demonstrates that opposer has used its "SWIG" and design mark in connection with cocktail lounge services since at least as early as May 1997 while applicant did not commence use of its "SWIG BARTINI" mark with respect to its restaurant and bar services until at least October 4, 2001. It is clear, therefore, that priority of use lies with opposer. Accordingly, we turn to the issue of likelihood of confusion.

Determination of the issue of likelihood of confusion is based upon consideration of all of the pertinent factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), for which there is evidence in the record. See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003); and *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). However, as indicated in *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity in the services or goods at issue and the similarity or dissimilarity of the respective marks in their entireties.<sup>9</sup> Here, inasmuch as it is plain that, as indicated

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<sup>9</sup> The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the [services or] goods and differences in the marks." 192 USPQ at 29.

earlier, opposer's cocktail lounge services are identical in part to applicant's restaurant and bar services in that both parties essentially are operating one or more "martini bars," the dispositive consideration is the similarity or dissimilarity of the respective marks in their entireties.

As opposer points out in its brief, our principal reviewing court has indicated that "[w]hen marks would appear on virtually identical ... services, the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1994). As also noted by opposer, it is generally the case that if a mark is composed of both a word and design elements, it is usually the word portion which is the dominant element, since such would be used by prospective consumers to call for or otherwise refer to the associated services. *See, e.g.,* *Ceccato v. Manifattura Lane Gaetano Marzotto & Figli S.p.A.*, 32 USPQ2d 1192, 1197 (TTAB 1994); and *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987). In a similar vein, opposer further correctly observes that in general the dominant word in a mark is often the first word thereof inasmuch as such is the portion that consumers are most likely to remember. *See, e.g.,* *Century 21 Real Estate Corp. v. Century Life of America*, *supra*; and *Presto Products, Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). Moreover, as opposer additionally points out, while it is well settled that the marks at issue must be considered in their

entireties, our principal reviewing court has indicated that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applying the above principles, we agree with opposer that, as argued in its brief, the marks at issue in this proceeding are "substantially similar" in overall sound, appearance, connotation and commercial impression due to the presence in each of the word "SWIG." Although the cocktail or martini glasses which comprise the letter "W" in opposer's "SWIG" and design mark certainly form a prominent portion of such mark, they do not impede or otherwise inhibit the ready perception of the word "SWIG" as the dominant element therein, since it is the term which would be used by patrons of opposer's cocktail lounge services in calling for and referring to its services. The word "SWIG" also forms the dominant portion of applicant's "SWIG BARTINI" mark inasmuch as it not only constitutes the first portion of applicant's mark but the term "BARTINI" clearly is highly suggestive of a bar which features martinis. Overall, the dominant or principally distinguishing element of both opposer's "SWIG" and design mark and applicant's "SWIG BARTINI" mark is the word "SWIG," which the record also shows is a shorthand reference to each party's mark. That the marks at issue, when considered

in their entirety, consequently are confusingly similar is bolstered by the instance of actual confusion which is of record. While, as the testimony reveals, such confusion was not that of a patron of either opposer's "SWIG" and design cocktail lounge or applicant's "SWIG BARTINI" bar and restaurant but instead involved a prospective employee, the incident nonetheless confirms that members of the adult general public, who would constitute the class of patrons for martini bar services, would be likely to find such marks to be so substantially similar as to be confusing.

We accordingly conclude that patrons and prospective customers for martini bar services, who are familiar or acquainted with opposer's "SWIG" and design mark for its cocktail lounge services, would be likely to believe, upon encountering applicant's substantially similar "SWIG BARTINI" mark for its bar and restaurant services, that such essentially identical services emanate from or are sponsored by the same source.

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