

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Conga Foods Pty Ltd.
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Serial No. 86261786
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Terrence J. McAllister of Ohlandt, Greeley, Ruggiero & Perle, L.L.P.,
for Conga Foods Pty Ltd.

Emily K. Carlsen, Trademark Examining Attorney, Law Office 103,
Michael Hamilton, Managing Attorney.

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Before Quinn, Shaw and Adlin,
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Conga Foods Pty Ltd. (“Applicant”) seeks registration on the Principal Register of
the mark MORO and design, in the following form:



for “olive oil,” in International Class 29.¹ The description of the mark states: “The mark consists of the stylized word MORO with a crest above and an olive branch below.” Color is not claimed as a feature of the mark.

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when used on the identified goods, so resembles the mark MORO,² in standard characters, and the mark:



both for “restaurant and catering services,” in International Class 43, as to be likely to cause confusion, mistake or deception. The cited marks are owned by the same entity.

When the refusal was made final, Applicant appealed and requested reconsideration. The Examining Attorney denied the request for reconsideration, and the appeal was resumed. The case is fully briefed. We reverse the refusal to register.

¹ Application Serial No. 86261786 was filed under Section 44(e) of the Trademark Act, 15 U.S.C. § 11126(e), based on Australian Registration No. 635935.

² Registration No. 4387776, issued August 20, 2013.

³ Registration No. 4406075, issued September 24, 2013. Registrant has disclaimed the term “restaurant.” The registration includes the following description of the mark: “The mark consists of the stylized wording ‘MORO’ in the color black above the stylized wording ‘RESTAURANT’ in the color black. Above the wording is a stylized orange in the color orange.”

Analysis

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the goods and/or services, and the similarities between the marks. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). The *du Pont* factors about which there is evidence or argument are the similarity of the marks, the similarity of the goods and services, and the number and nature of similar marks in use in connection with similar goods and services.

A. The similarity or dissimilarity of the marks in their entireties in terms of appearance, sound, connotation and commercial impression.

First, we consider the similarity of the marks. In comparing the marks we must consider their appearance, sound, connotation and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The emphasis of our analysis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. Although we consider the mark as a whole, “in articulating reasons for reaching a conclusion on the issue 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. . . .” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

We focus our likelihood of confusion analysis on the cited MORO mark in standard characters inasmuch as this mark is the most similar to Applicant’s mark. If we find that there is a likelihood of confusion with this MORO mark, there is no need for us to consider the likelihood of confusion with the other cited MORO mark. Conversely, if we find there is no likelihood of confusion with the standard character mark, we would find no likelihood of confusion with the other MORO mark as it includes other distinguishing features. *See In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

We find the marks are highly similar because Applicant has incorporated the entirety of Registrant’s word mark, MORO, adding to it only the crest and olive branch designs. The marks, therefore, are identical in sound because the word portion of Applicant’s mark and the entirety of Registrant’s mark are the same.

Applicant argues that “[t]he respective marks are so different in overall appearance that they each convey very different commercial impressions despite the fact that they share the common word ‘MORO.’”⁴ We disagree. In appearance, the cited mark is depicted in standard characters and, therefore, may appear in any typeface including one similar to Applicant’s. *See Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011) (“[T]he

⁴ Applicant’s Br. at 20.

registrant is entitled to depictions of the standard character mark regardless of font style, size, or color.”).

Additionally, the design elements of Applicant’s mark are not enough to prevent likely confusion. To the contrary, it is settled that where, as here, a mark is comprised of a word and a design, the word is normally accorded greater weight, because consumers are likely to remember and use the word to request the goods and/or services. *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (holding that “if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services” and “because applicant’s mark shares with registrant’s mark that element responsible for creating its overall commercial impression, the marks are confusingly similar”); *see also In re Viterra Inc.*, 671 F.2d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012) (“[T]he verbal portion of a word and design mark likely will be the dominant portion.”).

In sum, when we consider the marks in their entirety, we find them to be similar in terms of appearance, sound, connotation and commercial impression. This *du Pont* factor weighs in favor of a finding of a likelihood of confusion.

B. The nature and similarity or dissimilarity of the goods and services.

We next consider the similarity of the respective goods and services. Applicant’s goods are “olive oil” and Registrant’s services are “restaurant and catering services.”

It is not necessary that the goods and services be identical or competitive, or even that they move in the same channels of trade, to support a finding of likelihood of

confusion. Rather, it is sufficient that the goods and services are related in some manner, or that the circumstances surrounding their marketing are such that they would or could be encountered by the same persons in situations that would give rise, because of the similarity of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods and services. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

While likelihood of confusion has often been found where similar marks are used in connection with both food or beverage products and restaurant services, there is no *per se* rule to this effect. *See Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 768, 25 USPQ2d 2027, 2030 (Fed. Cir. 1993). Thus, the relatedness of such goods and services may not be assumed and the evidence of record must show “something more” than that similar or even identical marks are used for food products and for restaurant services. *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003) (quoting *Jacobs v. Int'l Multifoods Corp.*, 668 F.2d 1234, 1236, 212 USPQ 641, 642 (CCPA 1982)). *See also In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011).

The Board has found the “something more” requirement to be met in several different instances. It has been found where the mark for restaurant services made clear that the restaurant specialized in the identified type of food goods. *In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2050-51 (TTAB 2012) (COLOMBIANO COFFEE

HOUSE for providing food and drink confusingly similar to COLOMBIAN for coffee); *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999) (AZTECA MEXICAN RESTAURANT for restaurant services confusingly similar to AZTECA for Mexican food items), and *In re Golden Griddle Pancake House Ltd.*, 17 USPQ2d 1074 (TTAB 1990) (GOLDEN GRIDDLE PANCAKE HOUSE for restaurant services confusingly similar to GOLDEN GRIDDLE for table syrup). It has been found where the record showed, *inter alia*, that registrant's wines were actually sold in applicant's restaurant. *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001) (OPUS ONE for wine confusingly similar to OPUS ONE for restaurant services). And it has been found where the mark was "a very unique, strong mark." *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1469 (TTAB 1988) (MUCKY DUCK for mustard confusingly similar to MUCKY DUCK for restaurant services).

In support of the refusal, the Examining Attorney submitted: 20 third-party registrations showing that the same entity has registered a single mark for both restaurant services and edible oils such as olive oil; 12 third-party web sites showing that a number of restaurants also sell olive oil and other condiments; 7 articles from third-party websites discussing restaurant merchandising trends, including selling sauces, condiments, and olive oils; and copies of Registrant's menus.

Applicant argues that much of the third-party evidence is irrelevant. Applicant first argues that five of the third-party registrations are irrelevant because the same restaurants are found in the third-party website evidence. Applicant next argues that eight of the third-party registrations are irrelevant because they identify the goods

under the broad term, “edible oils,” instead of Applicant’s specific term, “olive oil.” Lastly, Applicant argues that several of the third-party registrations are irrelevant because they are for “house marks” covering a wide range of goods.

Contrary to Applicant’s argument, we find that all of the Examining Attorney’s evidence is relevant. The fact that evidence of a third-party’s use may be referenced in more than one piece of evidence does not make it irrelevant, rather, each piece of evidence corroborates the other. Similarly, the use of the broad term “edible oils” instead of the specific term “olive oil” does not make the evidence “irrelevant” inasmuch as a broadly written identification of goods must be construed to include all goods encompassed by such broad terms. *In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). Finally, we disagree that any of the third-party registrations are irrelevant simply because they are for “house marks.” All of the third-party registrations are limited to closely-related food products and restaurant or catering services. None of the registrations cover such a broad array of goods and services so as to be irrelevant, as Applicant suggests. *See generally*, the Trademark Manual of Examining Procedure (TMEP) section on house marks, § 1402.3(b) (Oct. 2015).

At the same time, however, we do not find that the Examining Attorney’s evidence shows consumers would be likely to believe that the goods and services originate from the same source or that there is an association or connection between the sources of the goods and services. *Coach Servs.*, USPQ2d at 1721.

As an initial matter, Registrant's mark provides no indication that it specializes in olive oil as a food type. In several of the cases cited, *supra*, the fact that a mark suggested a common food type was a factor in finding a likelihood of confusion. *In re Accelerate s.a.l.*, 101 USPQ2d at 2049 (“[T]he commercial impression and connotation of the mark COLOMBIANO COFFEE HOUSE in connection with ‘providing food and drink’ services is that Colombian coffee will be served.”); *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d at 1212 (“The marks convey essentially the same commercial impression . . . suggesting Mexican food.”); *In re Golden Griddle Pancake House Ltd.*, 17 USPQ2d at 1074 (“Applicant’s mark makes it clear that its restaurant serves pancakes and, no doubt, pancake (or table) syrup, as well.”). Here, there is no such suggestion in any of the marks.

The Examining Attorney also argues that the evidence shows “something more” because Registrant’s cuisine focuses on olive oil:

[R]egistrant offers restaurant services of the type or in line with the third-party restauranteurs that comprise the third-party website evidence and third-party registration evidence; that is, registrant offers restaurant services that utilize olive oil as an ingredient consistent with its Mediterranean style of food, to include noting olive oil and/or flavored oil as a highlighted ingredient of its menu and using it as an accompaniment to its bread service.⁵

We do not find this argument persuasive. That olive oil may be an ingredient in some of the items on Registrant’s menu is not enough by itself, under *Coors Brewing, supra*, to persuade us that a likelihood of confusion exists. That is, use of a term

⁵ Examining Attorney’s Br. at 15.

referring to an *ingredient* in some dishes does not carry the same weight as use of a term referring to an entire food type, such as Mexican food, or to a complete product, such as pancakes or coffee. Even assuming, arguendo, that Applicant's food is Mediterranean in style and uses olive oil extensively, we do not find that that prospective consumers would make the leap to associate olive oil with Registrant's restaurant and catering services. The result might be different if Registrant specialized in olive-based cuisine.

Regarding whether "something more" is found in the strength of the marks, neither the Trademark Examining Attorney nor Applicant made of record any information as to the meaning of the shared term MORO. It has the look and feel of a surname but it also may be a Spanish translation of the word "moor."⁶ Regardless, we do not find Registrant's mark to be a "very unique, strong mark" or sufficiently "unique and memorable" so as to cast the same long shadow as a mark such as MUCKY DUCK. *Mucky Duck Mustard*, 6 USPQ2d at 1469 (The "unique and memorable nature of registrant's mark" supported finding a likelihood of confusion.).

Lastly, we have no evidence that Registrant sells Applicant's goods in its restaurants or via its catering services. *Opus One Inc.*, 60 USPQ2d at 1815.

Accordingly, we find the evidence does not sufficiently demonstrate that there is "something more" about Applicant's olive oil and Registrant's restaurant and catering

⁶ <http://translation.babylon-software.com/spanish/to-english/moro/>. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions.

services such that consumers are likely to believe that they originate from a common source.

C. Conclusion

Because there is not sufficient evidence to meet the “something more” requirement of *Jacobs*, we determine that the Office has not met its burden of proving likelihood of confusion

Decision: The refusal to register Applicant’s mark under Section 2(d) of the Lanham Act is reversed.