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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re V & R Pizzeria, Inc.

Serial No. 74/520,422

Thomas M. Galgano of Galgano & Burke for V & R Pizzeria,
Inc.

Charles L. Jenkins, Trademark Examining Attorney, Law Office
105 (Thomas Howell, Managing Attorney).

Before Quinn, Hohein and Hairston, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

This is an appeal from the Trademark Examining
Attorney's final refusal to register the mark set forth
below,

Dante
Famiglia



PIZZA and PASTA

for pizzeria restaurant services including carryout services.¹ Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its services, so resembles the registered mark DANTES for restaurant and cocktail lounge services² as to be likely to cause confusion.

Both applicant and the Trademark Examining Attorney have filed briefs and were present at the oral hearing.

Turning first to a consideration of the services, applicant argues that its restaurant services which feature pizza and soda are very different from registrant's higher priced restaurant services which feature American/Fondue cuisine. However, for purposes of our analysis of likelihood of confusion, we must compare the services as they are identified in the application and the cited registration. Registrant's services are broadly defined in its registration and we must assume that such services encompass all types of restaurant services including pizzeria restaurant services. In re Elbaum, 211 USPQ 639, 640 (TTAB 1981). Thus, the services of applicant and registrant, for purposes of our likelihood of confusion

¹ Application Serial No. 74/520,422 filed May 6, 1994 claiming a date of first use and a date of first use in commerce of January 1, 1994. Applicant has disclaimed "FAMIGLIA PIZZA AND PASTA" apart from the mark as shown.

² Registration No. 1,976,707 issued November 1, 1977; Sections 8 & 15 affidavit filed.

determination, are legally identical. Further, the services are assumed to travel in the same channels of trade and to be bought by the same purchasers, namely the general public.

Turning next to a consideration of the marks, we begin our analysis of whether confusion is likely by keeping in mind two propositions set forth by the Court of Appeals for the Federal Circuit. First, "when marks would appear on virtually identical goods or services, the degree of similarity 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). Second, 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 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).

In comparing registrant's mark DANTES with applicant's mark DANTE FAMIGLIA PIZZA AND PASTA and design, we find the commercial impressions engendered by the marks to be sufficiently similar that, when the marks are used in connection with the identified services, consumers are likely to be confused. In the present case, applicant's

mark is clearly dominated by the word DANTE which is substantially similar to registrant's mark DANTES. Applicant has disclaimed exclusive rights to use FAMIGLIA PIZZA AND PASTA, thereby acknowledging the descriptiveness of these terms. The design of the gondola on a canal is subordinate and less likely to be remembered by consumers. The word DANTE would be used by purchasers in referring to applicant's pizzeria restaurant and carryout services. In re Appetito Provisions Co., 3 USPQ2d 1553, 1554 (TTAB 1987). See In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997) [THE DELTA CAFE and design for restaurant services is likely to cause confusion with DELTA for hotel, motel, and restaurant services].

Applicant, however, contends that marks consisting of or containing the word DANTE are weak marks which are therefore entitled to only a limited scope of protection. Specifically, applicant maintains that the term DANTE is so frequently used in marks for restaurant services that no one party may claim exclusive rights to DANTE used in connection with such services. In support of its position, applicant submitted with its appeal brief copies of third-party federal registrations; a search report of state registrations; two search reports of company names from the Dunn & Bradstreet and CORESEARCH databases; and yellow page and white page business directory listings. Under Trademark

Rule 2.142(d), evidence submitted for the first time with a brief on appeal is normally considered by the Board to be untimely and is usually given no consideration. In view thereof, and because the Examining Attorney properly objected to the third-party federal registrations and the search report of state registrations, we have not considered these materials in reaching our decision. However, the Examining Attorney did not object to the search reports of company names and the yellow and white page business listings. Thus, we have considered these materials. The Dunn & Bradstreet and CORESEARCH search reports revealed approximately 100 entities providing restaurant services, bar services and related services under names containing DANTE; and the yellow and white pages excerpts revealed approximately 20 listings for restaurants containing DANTE in their names.

These materials, however, are of limited probative value. Search reports are not evidence of use, and the telephone listings, while evidence of service mark use, do not establish when the marks listed therein were first used or the extent of their use. Here, notwithstanding any alleged weakness in the word DANTE, applicant's mark is still substantially similar in commercial impression to the cited mark and the parties' services are legally identical.

Finally, applicant argues in its reply brief that an investigation into registrant's use of the cited mark reveals that registrant does not currently use DANTES per se, but instead uses DANTES DOWN THE HATCH. Although applicant has submitted with its reply brief various materials in support of this argument, as noted previously, evidence submitted for the first time with a brief on appeal is normally considered by the Board to be untimely and usually given no consideration. At the oral hearing, the Examining Attorney properly objected to this evidence as untimely. Thus, we have not considered this evidence. More importantly, however, it is irrelevant to our determination of likelihood of confusion that registrant may use the words DOWN THE HATCH in association with DANTES. We must compare the parties' marks as they are set forth in the application and cited registration, and not as how they may be actually used. See e.g., *Blue Cross and Blue Shield Association v. Harvard Community Health Plan, Inc.*, 17 USPQ2d 1075 (TTAB 1990) and *Aloe Creme Laboratories, Inc. v. Helena Rubinstein, Inc.*, 188 USPQ 515 (TTAB 1975).

In sum, we conclude that consumers familiar with registrant's mark DANTES for restaurant and cocktail lounge services would be likely to believe, upon encountering applicant's mark DANTE FAMIGLIA PIZZA AND PASTA and design for pizzeria restaurant services including carryout

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services, that the services originated with or were somehow associated with or sponsored by the same entity.

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.

T. J. Quinn

G. D. Hohein

P. T. Hairston
Administrative Trademark
Judges, Trademark Trial and
Appeal Board