

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB                      MAY 18, 99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Costas Spiliadis

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Serial No. 75/264,504

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Michael A. Cornman of Schweitzer, Cornman, Gross & Bondell  
LLP for Costas Spiliadis.

Michael C. Mason, Trademark Examining Attorney, Law Office  
104 (Sidney Moskowitz, Managing Attorney).

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Before Hanak, Quinn and Walters, Administrative Trademark  
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Costas Spiliadis (applicant) seeks to register  
ESTIATORIO MILOS and fish design in the form shown below  
for "restaurant services." The intent-to-use application  
was filed on March 26, 1997.

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The Examining Attorney refused registration pursuant to Section 2(d) of the Lanham Trademark Act on the basis that applicant's mark, as applied to applicant's services, is likely to cause confusion with the mark MILO'S (below), previously registered for "restaurant services" (Registration No. 1,178,661).

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing.

In any likelihood of confusion analysis, two key considerations are the similarity of the marks and the similarity of the goods or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry 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.").

In this case, the services (restaurant services) are absolutely identical.

Turning to a consideration of the marks, we note at the outset that if the services are identical, "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, 877, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Obviously, the most prominent word in the applicant's mark is MILOS. Not only is this word depicted in decidedly larger lettering, but in addition, it is the only arbitrary word in applicant's mark. The word ESTIATORIO not only appear in much smaller lettering, but in addition, this word is generic for restaurant services, and quite properly has been disclaimed, as applicant acknowledges.

(Applicant's brief page 4). ESTIATORIO is a Greek word meaning restaurant. (Applicant's reply brief page 1).

Thus, when considered in its entirety, the most dominant portion of the applicant's mark is the word MILOS, and this word is virtually identical to registrant's mark MILO'S. In finding that the word MILOS is the dominant portion of the applicant's mark, we are not ignoring the

fish design or the very subordinate, generic word ESTIATORIO. However, because restaurants are often recommended by word of mouth and referred to orally, it is not improper to give more weight to the word portion of applicant's mark and less weight to the design portion. Moreover, it is not impermissible to give more weight to the arbitrary word portion of the applicant's mark (MILOS) and less weight to the generic word. Stated somewhat differently, we believe that customers will refer to applicant's restaurant as MILOS. Indeed, applicant's own evidence shows that applicant's restaurant is repeatedly referred to as simply MILOS. See Exhibit C made of record by applicant.

This practice of recommending restaurants by word of mouth and referring to them orally has been often recognized by our primary reviewing Court. See In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 1570, 218 USPQ 390, 395 (Fed. Cir. 1983).

Indeed, the case of Dixie Restaurants is quite instructive in that the Court found that applicant's mark THE DELTA CAFE and design (below) for restaurant services was confusingly similar to the mark DELTA for hotel, motel and restaurant services.

In so doing, the Court in Dixie Restaurants noted that "neither the design element nor the generic term 'cafe' offers sufficient distinctiveness to create a different commercial impression." 41 USPQ2d at 1534. Obviously, the fish design in applicant's mark is of somewhat limited consequence in that it indicates that applicant's restaurant specializes in seafood. A review of applicant's menu (Exhibit B) reveals that the vast majority of items are seafood.

In short, we find that applicant's mark and registrant's mark are similar enough such that when they are used on identical restaurant services, there exists a likelihood of confusion. In making this determination, we have considered two additional arguments raised by applicant.

First, applicant argues at pages 3 and 4 of its brief that "MILO'S is the possessive of MILO, no more and no less. MILOS is an entirely different word with an entirely

different meaning and with an entirely different pronunciation, notwithstanding that the letters making up each are the same. ...MILOS is, in fact, the name of a Greek Island."

While there is no dispute that there is a Greek island named Milos (or Milo), there is absolutely no evidence that this small Greek island is known to American consumers. To the very substantial portion of American consumers unfamiliar with this Greek island, registrant's mark and the most prominent portion of applicant's mark (MILOS) would both be perceived as first names. Moreover, to that very small portion of American consumers familiar with the Greek island, said consumers could well overlook the apostrophe in the registered mark and assume that it, like applicant's mark, refers to the Greek island.

As for applicant's argument that MILO'S and MILOS have "entirely different pronunciations," we simply disagree. Again, to the vast majority of American's unfamiliar with the Greek island of Milos (or Milo), both MILOS and MILO'S would be pronounced in the identical manner. In any event, it is well recognized that except for very common English words, "there is no correct no pronunciation of a trademark." In re Belgrade Shoe, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969).

Second, applicant relies upon a business yellow pages search of both MILO'S and MILOS which "turned up 97 hits ... of which ... 17 were clearly for food or restaurant services." (Applicant's brief pages 5 and 6). Applicant then goes on to allege that "the scores of different MILO'S establishments ... indicate the extreme weakness of the mark of the cited registration." (Applicant's brief page 7). In this regard, applicant cites the case of In re Broadway Chicken, 38 USPQ2d 1559 (TTAB 1996).

There are two problems with applicant's argument. First, the "80 hits" for businesses unrelated to restaurants are of virtually no probative value in establishing that MILO'S or MILOS is an extremely weak mark. As has been stated before, "the relevant inquiry examines the number and nature of similar marks used for [similar] services." Century 21 Real Estate, 23 USPQ2d at 1701.

As for the 17 hits which applicant contends are "clearly for food or restaurant services" (applicant's brief page 6), we simply note that said number is far short of the "more than 575 entities whose names contain the term BROADWAY and which offer restaurant services and/or related services or goods." Broadway Chicken, 38 USPQ2d at 1562. Indeed, applicant's own evidence proves just the opposite

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point, namely, that MILO'S or MILOS is a very uncommon term in the restaurant and food service business. If there are only 17 such establishments using this name or mark in a country of over 250 million residents, then this means that the mark MILO'S or MILOS is used but once for every 15 million residents of this country.

Decision: The refusal to register is affirmed.

E. W. Hanak

T. J. Quinn

C. E. Walters  
Administrative Trademark  
Judges, Trademark Trial  
and Appeal Board