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**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Paper No. 15  
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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 **Riviera Operating Company**

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Serial No. 75/421,961

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Stephen M. Sanville of Quirk & Tratos for Riviera Operating Company.

Howard Smiga, Trademark Examining Attorney, Law Office 102 (Thomas V. Shaw, Managing Attorney).

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Before Seeherman, Hohein and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Applicant, Riviera Operating Corporation, has appealed from the final refusal of the Trademark Examining Attorney to register the mark NICKEL TOWN for "casino services."<sup>1</sup>

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's services, so

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<sup>1</sup> Application Serial No. 75/421,961, filed January 22, 1998, alleging a date of first use and first use in commerce on December 23, 1997.

resembles the registered mark NICKEL CITY for "game arcades and amusement centers" as to be likely to cause confusion."<sup>2</sup>

When the refusal was made final, applicant appealed. Briefs have been filed,<sup>3</sup> but an oral hearing was not requested.

Here, as in any likelihood of confusion analysis, we look to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), giving particular attention to the factors most relevant to the case at hand, including the similarity of the marks and the relatedness of the goods or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976) and *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209 (TTAB 1999).

Applicant argues that the respective services are not "similar," noting that applicant does not offer arcade services under its mark and that registrant does not offer, and may not even be licensed to offer, casino services under its mark.

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<sup>2</sup> Registration No. 2,084,325; issued July 29, 1997.

<sup>3</sup> Applicant has attached three third-party registrations to its reply brief. Two of such registrations are for ALADDIN marks for casino services, owned by the same entity, and the other is for ALADDIN'S CASTLE for amusement center services, owned by a different entity. This evidence is untimely and has not been considered. See Trademark Rule 2.142(d). Even if we did consider the evidence, it would not affect our decision in this case. This is because we have no way of knowing what evidence (such as a consent agreement) was before the Examining Attorney who approved the application for amusement center services over the existing registrations for casino services and, in any event, we are not bound by that determination.

It is true that there are specific differences in the casino services offered by applicant and the arcade and amusement center services provided by registrant. However, it is not necessary that the services of the applicant and registrant be similar or competitive to support a finding of likelihood of confusion. It is sufficient if the respective services are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with, the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). We find that the respective services are related.

Both applicant and registrant provide entertainment facilities where people can play coin-operated electronic games.<sup>4</sup> Moreover, the eight third-party registrations submitted by the Examining Attorney show that the same mark has been registered for

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<sup>4</sup> However, we do not accept, in view of the lack of evidence therefor, the Examining Attorney's claim that the concept of an "amusement center" is broad enough to encompass casino services.

both casinos and for game arcades.<sup>5</sup> Although the third-party registrations are not evidence of use of the marks in commerce, the registrations have probative value to the extent that they suggest that the respective services are of a type which may emanate from the same source. See, e.g., *In re Albert Trostel & Sons Co.*, *supra* and *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988).

Whether applicant and registrant actually provide each other's services or whether registrant is even legally authorized to provide such services is not relevant. The question of likelihood of confusion is determined, instead, on the basis of the recitation of services set forth in the application and registration rather than on what any evidence may show as to the actual nature of the services. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). In fact, customers would not necessarily be aware of such legal prohibitions, or even if they were so aware, there is clearly no similar prohibition against applicant's providing arcade games or other types of non-gambling entertainment.

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<sup>5</sup> While applicant claims that these registrations "merely show that casino operators provide a variety of services," we note that they are all services which are typically associated with a casino. Applicant also maintains that "the entire inventory of services and items offered by a casino, like the entire inventory of products offered at a department store, are not necessarily related...." This analogy is flawed because the relevant consideration is not whether all the services provided by a casino, such as restaurant services and beauty salon services, are related to each other.

Applicant also argues that the services are marketed to different groups; that registrant markets its arcades as "family entertainment centers" whereas casinos in general are marketed to adults, and only adults can avail themselves of the services. While it is clear that applicant's casino services are restricted to the general adult population, there is no similar restriction in the registration as to channels of trade or classes of customers for registrant's services. We must therefore presume that registrant's arcades and amusement centers are open to all classes of customers including applicant's adult customers. See Canadian Imperial Bank of Commerce, *supra*. Even assuming registrant's arcade and amusement centers are family-oriented would not overcome this presumption. It is clear from the third-party registrations that parties may offer both casino and arcade services, perhaps for the very purpose of appealing to entire families. Thus, casinos and game arcades may be considered very compatible forms of entertainment.<sup>6</sup>

We turn then to the marks. Applicant argues that although each mark contains the "common and suggestive" word NICKEL, the marks are distinguishable by the terms TOWN and CITY. Applicant claims that "many users combine the term NICKEL with other terms"

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<sup>6</sup> Obviously, the arcade games would not be located in the same room as the casino games. However, the arcade could be located in close proximity to the casino, if not on the same floor with a separate entrance, then at least somewhere within the same entertainment facility.

to describe a quality or function of the services, namely the cost to play the games. Applicant has provided a list of such alleged "uses" in marks such as "Jazzy Nickels" and "Million Nickels," and notes, in particular, the combination of "Nickel" with different geographic terms in marks such as "Louisiana Nickels," "Mississippi Nickels" and "Nevada Nickels." Applicant claims that each of these terms is being used either in "the provision of casino services" or "by manufacturers of slot and video poker machines." Applicant maintains that these "uses" suggest that "consumers are not confused from use of the common term NICKEL even within the same industry." <sup>7</sup>

The word NICKEL is admittedly suggestive of both applicant's and registrant's services and we agree that the words TOWN and CITY in the respective marks are different in sound and appearance. However, marks must be viewed in their entirety and the common elements of the marks, even if highly suggestive, cannot be ignored in determining the overall commercial impression the mark conveys.

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<sup>7</sup> Applicant included this list (from an unidentified source) with its response to the first Office action. The Examining Attorney did not object to this evidence or even acknowledge it in her final refusal. We note that the application was reassigned to another Examining Attorney to write the appeal brief and that an objection to the form of the evidence was raised for the first time therein. In addition, the Examining Attorney acknowledged that the marks are the subjects of third-party applications and registrations. However, since the previous Examining Attorney did not raise the objection during the prosecution of the application, applicant was effectively deprived of the opportunity to cure any such deficiency before the time of appeal. Thus, the objection to the evidence must be deemed to be waived, and we have considered the evidence as properly of record for whatever probative value it may have.

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In re National Data Corp., 753 F.2d 1056, 1060, 224 USPQ 749, 752 (Fed. Cir. 1985). When considered in this manner, we find that the marks NICKEL TOWN and NICKEL CITY are substantially similar in overall meaning and commercial impression. The Examining Attorney has submitted listings from dictionaries defining "city" as a "[a] town of significant size and importance" and referring to an "informal" definition of "town" as "[a] city:," with the example, "New York is a big town."<sup>8</sup> (Emphasis in original). We take judicial notice of another dictionary which defines "town" as "a large densely populated urban area: CITY."<sup>9</sup> This evidence shows that CITY and TOWN convey the same general, even interchangeable, meanings. Thus, when the words CITY and TOWN are each preceded by the word NICKEL, both marks project a substantially similar overall image, especially in relation to the entertainment facilities applicant and registrant provide, of a particular (albeit

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<sup>8</sup> *The American Heritage Dictionary of the English Language*, 3<sup>rd</sup> ed. 1992.

<sup>9</sup> *Webster's New Collegiate Dictionary*, 1979. The Board may properly take judicial notice of dictionary definitions. See, e.g., *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

fictitious) geographic place for those services.<sup>10</sup> See, e.g., *Gastown Inc. of Delaware v. Gas City, Ltd.*, 187 USPQ 760 (TTAB 1975). In view of the substantially similar meanings conveyed by these marks, we believe that the differences in sound and appearance are not sufficient to avoid confusion.

Contrary to applicant's claim, and as we noted earlier, the third-party registrations and applications are not evidence of the use of any of the marks therein. Third-party registrations can be used in the manner of a dictionary definition to show that a term contained therein has a suggestive or commonly understood meaning in a particular field. See *Conde Nast Publications Inc. v. Miss Quality, Inc.*, 180 USPQ 149 (TTAB 1973), *aff'd*, 184 USPQ 422 (CCPA 1975). The suggestive meaning of NICKEL in this case, even without the third-party registrations, is clear and undisputed. Even if applicant had properly established use of those marks, they would not be persuasive on the question of likelihood of confusion between these marks. None of the marks in applicant's list has the same format (where NICKEL is followed by a geographic term) or

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<sup>10</sup> Applicant's reliance on *Sure-Fit Products Company v. Saltzson Drapery Company*, 254 F.2d 158, 117 USPQ 295 (CCPA 1958) is misplaced. Each case must be determined on its own facts, and the facts in that case are distinguishable. The Court in that case did find that the marks SURE-FIT and RITE-FIT, although similar in meaning, were so distinct in sound and appearance as to overcome such similarity in meaning. However, in reaching its decision, the Court was "most strongly influenced" by the finding that SURE-FIT and RITE-FIT "are the weakest possible type of mark." *Supra* at 296. That is clearly not the case here.

conveys the same commercial impression as the marks in this case, NICKEL TOWN and NICKEL CITY.<sup>11</sup>

We must also remember that the average purchaser is not infallible in his recollection of trademarks and often retains only a general overall impression of marks that he may previously have seen in the marketplace. In re Mucky Duck Mustard Co. Inc., supra. The differences in these marks are so slight that they are not likely to be noted or remembered by purchasers. This is particularly true when we consider that the customers of arcades and casinos, and particularly nickel slots, are ordinary adult members of the general public who, for the most part, are not necessarily sophisticated and who, especially considering the inexpensive nature of these games, would therefore not be expected to exercise a high degree of care and thus would be more prone to confusion.

Finally, to the extent that there is any doubt on the issue of likelihood of confusion, it is settled that such doubt must be resolved in favor of the prior registrant. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

Decision: The refusal to register is affirmed.

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<sup>11</sup> This case is distinguishable from In re Broadway Chicken Inc., 38 USPQ2d 1559 (TTAB 1996), on which applicant relies. In that case, the Board was persuaded that there was no likelihood of confusion by applicant's evidence of widespread third-party use of the term "Broadway" in the particular field. As noted above, there is no evidence of use, let alone widespread use, of NICKEL in the relevant field in this case.