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

Paper No. 7

GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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In re **Pizza Capri L.L.C.**  
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Serial No. 75/817,473  
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**Keith A. Vogt** of **Niro, Scavone, Haller & Niro** for **Pizza Capri L.L.C.**

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(**Thomas G. Howell**, Managing Attorney).  
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Before **Quinn, Hohein** and **Holtzman**, Administrative Trademark Judges.

Opinion by **Hohein**, Administrative Trademark Judge:

**Pizza Capri L.L.C.** has filed an application to register the mark "VIVALDI" for "restaurant services."<sup>1</sup>

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

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<sup>1</sup> Ser. No. 75/817,473, filed on October 7, 1998, which is based on an allegation of a bona fide intention to use such mark in commerce.

resembles the mark "VIVALDI," which is registered to one registrant for "ham"<sup>2</sup> and to another registrant for "wines"<sup>3</sup> and "candy, biscuits, and confectionery products, namely, chocolate-coated biscuits,"<sup>4</sup> as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We reverse the refusal to register.

The determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). 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 of the goods and/or services

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<sup>2</sup> Reg. No. 1,642,182, issued on April 23, 1991, which is based on ownership of French Reg. No. 1,110,995, dated October 20, 1989; affidavit §8 accepted.

<sup>3</sup> Reg. No. 1,970,489, issued on April 23, 1996, which sets forth a date of first use anywhere of August 24, 1994 and a date of first use in commerce of November 10, 1995.

<sup>4</sup> Reg. No. 2,173,586, issued on July 14, 1998, which sets forth a date of first use anywhere and in commerce of May 1997.

and the similarity or dissimilarity of the marks.<sup>5</sup> However, inasmuch as the marks at issue in this appeal are identical in all respects, the focus of our inquiry is on the similarity or dissimilarity of the respective services and goods.

Turning, therefore, to consideration thereof, it is well settled that that the issue of likelihood of confusion must be determined on the basis of the services and goods as they are set forth in the involved application and each of the cited registrations. See, e.g., CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Thus, where the services and goods in the application at issue and in the cited registrations are broadly described as to their nature and type, it is presumed in each instance that in scope the application and registrations encompass not only all services and goods of the nature and type described therein, but that the recited services are rendered and the identified goods move in all channels of trade which would be normal for such services and goods and that they would be purchased by all

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<sup>5</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 goods [and/or services] and differences in the marks."

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potential buyers thereof. See, e.g., In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

Applicant, contrary to the above, contends with respect to its restaurant services that:

Applicant's restaurant is a fine dining establishment featuring Italian food that is located in Oak Park, Illinois[,] a suburb of Chicago. It competes with other fine dining establishments and its customers typically spend over fifty dollars on dinner. In other words, it is not a fast-food establishment -- it is an establishment that serves discriminating customers with discriminating tastes. These consumers would be able to tell -- without confusion -- that Applicant's use of the term VIVALDI is completely different from the marks used on ham and wine [and candy, biscuits, and confectionery products, namely, chocolate-coated biscuits].

However, as the Examining Attorney correctly points out in his

brief, inasmuch as "the application describes the services broadly and there are no limitations as to their nature, type, channels of trade or classes of purchasers, it is presumed that the application encompasses all services of the type described, that they move in all normal channels of trade, and that they are available to all potential customers," citing *In re Elbaum*, supra. Accordingly, applicant's restaurant services, for purposes of whether there is a likelihood of confusion, must be regarded as encompassing "fast-food" as well as "fine dining" establishments.

Applicant, although notably without citation to relevant authority, is nonetheless on firmer ground in arguing essentially that there is no *per se* rule that all food products and restaurant services are related for purposes of determining whether contemporaneous use of the marks respectively associated therewith is likely to cause confusion. According to applicant:

If wines and candy[, biscuits, and confectionery products, namely, chocolate-coated biscuits] are sufficiently distinct from ham to permit registration of the mark VIVALDI to two different owners, certainly the same mark covering the [restaurant] service of preparing food is sufficiently distinct to support registration. The presence of the various marks using the term VIVALDI indicates that the scope of coverage afforded to this common term used with food related services and products

should not be as broad in this case as in other cases.

Consequently, ... it should be found that confusion is unlikely in this instance  
....

Our principal reviewing court has held, in *Jacobs v. International Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982), that "[t]o establish likelihood of confusion a party must show something more than that similar or even identical marks are used for food products and for restaurant services." Here, the Examining Attorney, in support of his position, states in his brief that "[e]nclosed with the Final Office action were copies of twenty-nine current [third-party] registrations showing entities offering and using the same mark on or in connection with these [same] types of goods and services [as are at issue in this appeal]." The Examining Attorney maintains that "[t]his evidence shows that entities routinely provide ham, wines, candy, biscuits, chocolate-covered biscuits, and other confectionery products and have restaurant services for such items all under the same marks."

It is well established, in this regard, that while third-party registrations which are based upon use of the subject marks in commerce are not evidence that the different marks shown therein are actually in use by the owners thereof

or that the public is familiar with them,<sup>6</sup> they nevertheless have some probative value to the extent that they serve to suggest that the services and goods listed therein are of the kinds which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993) and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 (TTAB 1988) at n. 6. In the present case, however, a careful reading of the use-based third-party registrations made of record by the Examining Attorney reveals that there are only three such registrations which involve marks that are registered for both "restaurant services" and "wine(s)"; that there likewise are but three such registrations which cover marks that are registered for both "restaurant services" and "candy" or "candies"; that there are just two such registrations which pertain to marks that are registered for both "restaurant services" and "biscuits"; and that there are no such registrations which set forth marks that are registered for both "restaurant services" and "ham." Such evidence can scarcely be considered sufficient to establish the "something more" required by the court in *Jacobs*, supra, and the Examining Attorney has not offered any other evidence with respect thereto. Compare In re Azteca Restaurant

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<sup>6</sup> See, e.g., *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) and *In re Hub Distributing, Inc.*, 218 USPQ 284, 285-86 (TTAB 1983).

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Enterprises Inc., 50 USPQ2d 1209, 1211 (TTAB 1999). The evidence is thus either inadequate or simply lacking insofar as demonstrating that applicant's restaurant services, on the one hand, and one registrant's ham and the other registrant's wines, candy and biscuits, including chocolate-covered biscuits, on the other hand, are so closely related in a commercial sense that the contemporaneous use of the mark "VIVALDI" in connection therewith would be likely to cause confusion as to the origin or affiliation of such services and goods.

**Decision:** The refusal under Section 2(d) is reversed.