

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

Mailed: March 30, 2004
Paper No. 93
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

35 Food Corporation
v.
L.F.I. Incorporated

Cancellation No. 92019494

Stephen L. Baker and John M. Rannells of Baker & Rannells PA
for 35 Food Corporation.

Stephen B. Goldman of Lerner, David, Littenberg, Krumholz &
Mentlik, LLP for LFI Incorporated.

Before Quinn, Hairston and Bucher, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

35 Food Corporation has filed a petition to cancel
Registration No. 1,510,308 owned by L.F.I. Incorporated for
the mark ANTONIO for "imported cheeses, canned tomatoes,
canned pepper strips, [and] canned mushrooms."¹

As grounds for cancellation, petitioner asserts that it

¹ The registration issued on October 25, 1988. It was cancelled
May 1, 1995 under the provisions of Section 8 of the Trademark
Act for failure to file an affidavit of use. Petitioner has
elected to go forward with the case to obtain a determination on
the merits. The Board notes that the petition to cancel was

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filed in 1990 and a number of consented motions to extend/suspend have been granted.

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is the owner of the mark ANTONIO'S and variations thereof as a trademark and trade name as applied to Italian style food products; that it has applied to register the mark ANTONIO'S for Italian style food products; that it anticipates that its application will be refused in view of Registration No. 1,510,308; and that respondent's mark ANTONIO, when applied to respondent's goods, so resembles petitioner's previously used trademark and trade name ANTONIO'S as to be likely to cause confusion.

Respondent, in its answer, denied the salient allegations of the petition for cancellation.

The record consists of the pleadings; the file of the involved registration; trial testimony taken by petitioner, with related exhibits; and two notices of reliance filed by petitioner on third-party registrations and recipes from cookbooks to show the relatedness of the involved goods. Respondent did not take testimony or submit any other evidence. Only petitioner filed a brief. An oral hearing was not requested.

Stephen Winant, petitioner's current secretary/treasurer, testified that he joined petitioner in 1982 and at that time petitioner was using the mark ANTONIO'S on Italian style food products such as pastas and sauces. The ANTONIO'S mark is applied to packages containing petitioner's goods. Petitioner sells its goods

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at wholesale to gourmet shops, Italian delis, pizzerias, restaurants, caterers and food distributors. Petitioner's aggregate sales of food products from 1998-2002 were approximately \$6.44 million. From June 1996 to July 2001 petitioner also operated a retail store under the name "Antonio's Pasta & Deli" where it sold its own products as well as third-party food products.

We note that the Board, in an order issued August 9, 2001, granted petitioner's partial summary judgment motion on the issue of priority of use. Thus, the sole issue to be determined is whether there is a likelihood of confusion as to the source of the goods.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Considering first the marks, it is apparent that petitioner's mark ANTONIO'S is simply the possessive form of respondent's mark ANTONIO. As such, the marks are virtually

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identical in terms of sound, appearance, meaning and overall commercial impression.

Considering next the goods, the Board has stated in the past that if the marks are the same or almost so, it is only necessary that there be a viable relationship between the goods or services in order to support a holding of likelihood of confusion. In re Concordia International Forwarding Corp., 222 USPQ 355 (TTAB 1983). Moreover, it is well settled that the goods of the parties need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods or services are related in some manner, or that the circumstances surrounding their marketing are such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods or services. In re Melville Corp., 18 USPQ2d 1385 (TTAB 1991); In re International Telephone & Telegraph Corp., 197 USPQ2d 910 (TTAB 1978).

In this case, we find that petitioner's pastas and sauces and respondent's imported chesses, canned tomatoes, canned pepper strips, and canned mushrooms are complementary food products. These kinds of products are sold in the same

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channels of trade, namely grocery stores, delis and gourmet stores. Further, the products are sold to the same class of purchasers, namely ordinary consumers. In this regard, petitioner has made of record copies of third-party registrations of marks which include in their respective identifications of goods both the types of goods petitioner sells and the types of goods identified in respondent's registration. Although these registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, they nevertheless are probative evidence to the extent that they suggest that the goods identified therein are of a type which may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988).

Further, petitioner has made of record recipes from Guiliano Hazan, *The Classic Pasta Cookbook* (1993) and Samuel Chamberlain, *The New Complete Book of Pasta* (1985) which show that petitioner's and respondent's types of goods are used as ingredients in the same recipes. For example, in *The Classic Pasta Cookbook*, the recipe for "Penne All'Arrabbiata" (Penne with Spicy Tomato Sauce) includes pasta, canned tomatoes, and grated pecorino romano cheese. In *The New Complete Book of Pasta*, the recipe for "Capellini

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Con Funghini (Fine Vermicelli with Small Mushrooms) includes pasta, mushrooms, red pepper strips, tomatoes, and grated parmesan cheese.

An additional factor which favors a finding of likelihood of confusion in this case is that the kinds of products involved herein are relatively inexpensive and, therefore, would be the subject of impulse purchases.

In view of the foregoing, we conclude that consumers familiar with petitioner's pasta and sauces sold under petitioner's mark ANTONIO'S would be likely to believe, upon encountering respondent's mark ANTONIO for imported cheeses, canned tomatoes, canned pepper strips, and canned mushrooms, that the goods originated with or are somehow associated with or sponsored by the same entity.

Decision: The petition to cancel is granted such that judgment is hereby entered against respondent.