

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

Mailed:  
January 7, 2011

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Orenda International, LLC

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Serial No. 77639103

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Alex R. Sluzas of Paul and Paul for Orenda International, LLC.

Fred Carl III, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

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Before Seeherman, Walsh and Taylor, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Orenda International, LLC has appealed from the final refusal of the Trademark Examining Attorney to register CHOKI, in standard character format, for goods identified, as amended, as "candy, namely confections prepared from chocolate and aronia berries, containing no fillers, waxes,

or artificial ingredients, and marketed by direct sales.”<sup>1</sup> Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant’s mark so resembles the marks CHOKI (in typed form) for powdered chocolate drink mix<sup>2</sup> and CHOKIS (in standard character format) for cookies,<sup>3</sup> registered by two different entities, that, as used on applicant’s goods, it is likely to cause confusion or mistake or to deceive.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). Applicant, citing language in a trademark infringement case from the Second Circuit,<sup>4</sup> asserts that the standard for refusing registration under Section 2(d) is the “probability” of confusion. However, in determining registrability, the language of the statute and of the case law followed by the Board and its primary reviewing court,

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<sup>1</sup> Application Serial No. 77639103, filed December 23, 2008, based on an asserted first use and first use in commerce of November 29, 2008.

<sup>2</sup> Registration No. 2312585, issued January 25, 2000; Section 8 & 15 affidavits accepted and acknowledged; renewed.

<sup>3</sup> Registration No. 3601353, issued April 7, 2009.

the Court of Appeals for the Federal Circuit, and its predecessor, the Court of Customs and Patent Appeals, is *likelihood* of confusion. Therefore, to the extent that applicant suggests that the Office's burden is more onerous than showing likelihood of confusion, that is not correct.<sup>5</sup>

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

With respect to the marks, applicant does not dispute that its mark and the mark which is the subject of Registration No. 2312585 are identical. Neither the registrant nor applicant have provided translations of the mark, or otherwise indicated that CHOKI is a recognized word. Therefore, applicant's mark and registrant's mark, in addition to being identical in appearance and sound, is

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<sup>4</sup> *Estee Lauder, Inc. v. The Gap, Inc.*, 108 F.3d 1503, 42 USPQ2d 1228 (2d Cir. 1997).

<sup>5</sup> Of course, we agree that *likelihood* requires a showing of more than a mere theoretical possibility of confusion. See *Witco Chem. Co. v. Whitfield Chem. Co.*, 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969) ("We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.").

identical in connotation (or lack thereof) and in commercial impression. As for the cited mark CHOKIS for cookies, applicant has not argued that the minor difference between this mark and applicant's mark (additional letter "S") is sufficient to distinguish the marks; on the contrary, applicant has presented no argument regarding the marks, and has apparently conceded that they are similar ("despite the similarity of the marks," brief, p.3). In any event, we find that the marks are highly similar in appearance, pronunciation, connotation (or lack thereof) and commercial impression.

We turn next to a consideration of the goods, keeping in mind that it is not necessary that the goods or services of applicant and the registrant be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods or services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. See *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). Moreover, the greater the degree of similarity between the applicant's mark and the cited registered mark, the lesser

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the degree of similarity between the applicant's goods or services and the registrant's goods or services that is required to support a finding of likelihood of confusion, and that where the applicant's mark is identical to the registrant's mark, there need be only a viable relationship between the respective goods or services in order to find that a likelihood of confusion exists. In re Opus One Inc., 60 USPQ2d 1812, 1815 (TTAB 2001).

To demonstrate that applicant's identified candy and the powdered chocolate drink mix identified in Registration No. 2312585 are related, the examining attorney has submitted a number of third-party registrations, including Reg. No. 1754093 for WESTERN FAMILY for, inter alia, chocolate flavored drink mix and candy; Reg. No. 2843468 for KAO for, inter alia, chocolate drink mix and candy, Reg. No. 3002670 for HEALTH BY CHOCOLATE for, inter alia, chocolate bars, novelty chocolate candies and cocoa drink mix; Reg. No. 3298945 for STARBUCKS COFFEE for, inter alia, powdered hot chocolate mix, powdered hot cocoa mix, and candy, namely, chocolates, chocolate bars and chocolate-covered fruits; and Reg. No. 3167015 for COCOA BEACH COFFEE COMPANY for, inter alia, chocolate, chocolate bars, chocolate candies, candy with cocoa, cocoa mixes. Third-party registrations which individually cover a number of

different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993). In addition, the examining attorney has submitted evidence from websites showing that Ghirardelli sells hot cocoa mix and chocolate bars under the mark GHIRARDELLI, [www.ghirardelli.com](http://www.ghirardelli.com), and that Nestle sells hot cocoa mix and candy under the marks NESTLE and BUTTERFINGER, [www.nestleusa.com](http://www.nestleusa.com).

Applicant responds to this evidence by contending that much of the evidence linking applicant's goods to chocolate drink mixes originates from "national brand manufacturers." Applicant's position is that "consumers might expect a company such as Nestle to sell a great variety of chocolate related products, [but] that expectation originates and is associated with the national brand character of the source, and would not extend to sources of chocolate candy in general." Reply brief, p. 1. We are not persuaded by this argument. The third-party registrations, which are owned by such companies as Western Family Foods, Inc.; Gau Jih Food Co., Ltd.; Health by Chocolate, LLC and Cocoa Beach Coffee Company, show that a variety of companies sell both chocolate drink mixes and candy under a single mark.

Applicant has also attempted to differentiate its goods from those of the registrant by characterizing its own goods as being "a specially formulated, high quality food product ...[for] consumers who want to take advantage of the apparent health benefits of consuming products with high antioxidant content" brief, p. 3, while the registrant's goods are an "inexpensive chocolate-flavored drink mix ...for consumption by children" *id.*, "who are not likely to consider the health benefits of the product, nor are their parents, in providing a sugary liquid confection to their offspring." Reply brief, p. 1. Applicant relies on materials from its own website and that of the registrant in support of this claim.

The problem with applicant's position is that it ignores the well-established principle that "[l]ikelihood of confusion must be determined based on an analysis of the mark as applied to the ... services recited in applicant's application vis-à-vis the ... services recited in [a] ... registration, rather than what the evidence shows the ... services to be.'" *In re Dixie Restaurants Inc.*, 41 USPQ2d at 1534, quoting *Canadian Imperial Bank v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1493, 1 USPQ2d 1813, 1815 (Fed.Cir. 1987). Under this principle, we must assume that both applicant's and the registrant's goods include all the

goods encompassed by the identification, e.g., applicant's goods can include inexpensive candy sold to children who want a sugary concoction, and the registrant's goods can include an expensive product that is purchased by people seeking the health benefits of chocolate. Thus, based on the identifications of the goods, the purchasers of the goods must be considered the same.

Similarly, because as identified applicant's goods can include candy purchased on impulse by the general public, the du Pont factor of the conditions of purchase favors a finding of likelihood of confusion.

Thus, the factors of the similarity of the marks, the relatedness of the goods and the conditions of purchase all favor a finding of likelihood of confusion. Applicant argues that these factors are outweighed by the factor of the channels of trade. It is applicant's position that because its goods are "marketed by direct sales," as reflected in its identification, the channels of trade for its goods are different from those of the registrant's identified powdered chocolate drink mix. Much of applicant's arguments have gone to whether it is correct to assume that direct sales marketing is an appropriate channel of trade for powdered chocolate drink mix, with applicant responding to the examining attorney's reliance



on the statement of the Direct Selling Association that "[v]irtually every consumer product or service can be purchased through direct selling."<sup>6</sup> Applicant claims that this is "hyperbole ('virtually') in the text of a trade association's website promoting direct sales." Reply brief, p. 1.

We think that applicant has missed the point, and therefore we need not get into an extended discussion of whether direct sales marketing is an appropriate channel of trade for the registrant's goods, although we see no intrinsic reason why powdered chocolate mix cannot be marketed in this fashion. However, even if we were to assume that the registrant's goods are sold in supermarkets and other retail stores and through the Internet, but not through direct sales, the purchasers of applicant's and the registrant's products, as those goods are identified, would be the same. That is, the same people who would buy products through direct sales such as door-to-door selling or house parties also shop in retail stores and through the Internet, where they would encounter the registrant's goods. Because the same mark is used for both products, and these products, as the evidence demonstrates, can

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<sup>6</sup> [www.dsa.org](http://www.dsa.org). Papers submitted by applicant at an earlier point in prosecution state that applicant is a pending member of

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emanate from a single source, consumers are likely to believe that they come from the same source. Whether their confusion is reverse confusion, with their believing that the CHOKI powdered chocolate drink mix that they see in a supermarket is a product of the same company that sells CHOKI candy marketed through direct sales, or that the CHOKI candy offered to them through direct sales is from the same source as the CHOKI powdered chocolate drink mix they are familiar with from retail stores, the result is the same. Applicant's use of its mark for its identified goods is likely to cause confusion with Registration No. 2312585 for CHOKI for powdered chocolate drink mix.

As for the issue of likelihood of confusion with respect to Registration No. 3601353 for CHOKIS for cookies, again the examining attorney has submitted third-party registrations showing the relatedness of these goods and candy. See, for example, Reg. No. 3707081 for a design mark owned by Peninsula International for, inter alia, chocolate, chocolate bars, chocolate candies, candy and cookies; Reg. No. 3607644 for TUMBADOR for, inter alia, chocolate, candy and cookies; Reg. No. 3545078 for PIZZAL for, inter alia, candy and cookies; Reg. No. 3538923 for

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the DSA and abides by the DSA Code of Ethics.

CUPCAKES MAKE PEOPLE HAPPY for, inter alia, cookies, chocolate bars and candy bars; and Reg. No. 3367142 for ANN'S HOUSE for, inter alia, chocolate candies, chocolate, candy, candy bars and cookies. The examining attorney also submitted webpages showing MEIJI used as a trademark for both candy and chocolate cream filled biscuits, and for MAUNA LOA cookies, chocolate and candy bars.

For the same reasons that we have found applicant's goods and powdered chocolate drink mix to be related, to be sold to the same classes of purchasers, and to be the subject of impulse purchase, we find that the du Pont factors of the relatedness of the goods, classes of purchasers and conditions of purchase to favor a finding of likelihood of confusion with respect to Registration No. 3601353. Applicant raised the same arguments with respect to this registration, and we find them similarly unpersuasive.

As for the channels of trade, applicant has argued that, because of their perishable nature, cookies are unlikely to be marketed directly. Brief, p. 6. Applicant forgets, however, that the registrant's identified "cookies" can include, in addition to fresh cookies that would be sold in a bakery, packaged cookies that would be found on supermarket shelves. Moreover, orders can be

taken for cookies through door-to-door or house party marketing, and the cookies delivered at a later date.<sup>7</sup>

However, as with the powdered chocolate drink mix, even if we accept that the registrant's cookies are not marketed through direct sales, this does not avoid the likelihood of confusion. Although in some situations separate channels of trade can result in a finding of no likelihood of confusion, that normally occurs when the consumers for the products are different, so that one set of consumers would not be aware of the products sold to the other set. But because applicant's goods, as identified, can be sold to ordinary consumers, members of the general public who also shop in retail stores such as supermarkets, they are likely to encounter the registrant's cookies even if they are sold in a different channel of trade.

Decision: The refusals of registration based on Registration Nos. 2312585 and 3601353 are affirmed.

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<sup>7</sup> Although we do not base our opinion on this, Girl Scout cookies are sold in this manner, and such sales have occurred for so many years and the practice is such a part of American culture that it is a fact of which we can take judicial notice.