

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: May 15, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re August Storck KG*  
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Serial No. 79119647  
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Joseph F. Schmidt of Taft Stettinius & Hollister LLP,  
for August Storck KG

Ahsen Khan, Trademark Examining Attorney, Law Office 113,  
Odette Bonnet, Managing Attorney.

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Before Bucher, Greenbaum and Gorowitz,  
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

August Storck KG (“Applicant”) seeks registration on the Principal Register of the mark **2good** (in standard characters) for

Chocolate candy, namely, chocolate candy bars in  
International Class 30.<sup>1</sup>

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when used on its identified goods, so resemble the registered

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<sup>1</sup> Application Serial No. 79119647 was filed on November 1, 2012, based upon a request for extension of protection under Section 66(a) of the Trademark Act, 15 U.S.C. § 1142(f).



mark  for various goods including “chocolate” in International Class 30 as to be likely to cause confusion, mistake or deception.<sup>2</sup>

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed.<sup>3</sup> We affirm the refusal to register.

### I. Applicable Law

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 Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905 (Fed. Cir. 2012); and *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of

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<sup>2</sup> Registration No. 4235722 registered on November 6, 2012, and includes the following description of the mark: “The mark consists of the vertical wording ‘TOOGOOD’ encased in a single line square.” The registration also includes various goods in International Class 29, none of which were cited as a bar to Applicant’s application.

<sup>3</sup> Applicant’s briefs have been filed in single space. Applicant is advised that briefs must be double spaced. *See* Trademark Rule 2.126(a)(1) and Trademark Rule 2.142(b)(2). We also note that Applicant attached to its appeal brief two exhibits comprising approximately 20 pages of evidence. We generally do not consider evidence attached to appeal briefs. However, we will consider this evidence because Applicant already made it of record with the Request for Reconsideration. It was not necessary for Applicant to resubmit such material. *See* TBMP §§ 1203.02(e) and 1207.04 (2014).

differences in the essential characteristics of the goods and differences in the marks.”). We consider each of the factors as to which Applicant or the Examining Attorney presented arguments or evidence. The others, we consider to be neutral.

A. Relatedness of the Goods, Channels of Trade and Conditions of Purchase

We begin with the *du Pont* factors of the relatedness of the goods, channels of trade and conditions of purchase. We base our evaluation on the goods as they are identified in the application and registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

In this case, the “chocolate” identified in the registration is legally identical to the “chocolate candy, namely, chocolate candy bars” identified in the application. *See In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006), *citing In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981) (unrestricted and broad identifications are presumed to encompass all goods of the type described). Indeed, “chocolate” is defined as “a candy made or covered with chocolate.”<sup>4</sup> In the context of likelihood of confusion, it is sufficient if likelihood of confusion is found with respect to use of the mark on any item that comes within the description of goods in the application or

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<sup>4</sup> The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). We take judicial notice of the above definition of “chocolate” from <merriam-webster.com>.

registration. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1398 (TTAB 2007). Further, because Registrant's identification of goods is not restricted as to channels of trade or classes of purchasers, the goods identified in the registration must be deemed to travel in the all channels of trade normal for such goods, such as grocery stores and candy shops, and be sold to the all classes of purchasers, including ordinary consumers who enjoy eating chocolate. *Viterra*, 101 USPQ2d at 1908 (absent restrictions in an application or registration, the identified goods are "presumed to travel in the same channels of trade to the same class of purchasers."), quoting *Hewlett-Packard*, 62 USPQ2d at 1001. See also *Stone Lion*, 110 USPQ2d at 1161; *In re Linkvest*, 24 USPQ2d 1716, 1716 (TTAB 1992). In other words, there is nothing to prevent Applicant from offering for sale its chocolate candy bars through the same trade channels and to the same purchasers who buy Registrant's chocolate, and vice-versa. See *In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012).

Applicant argues that the goods are different in that Applicant has limited its goods to "chocolate candy, namely, chocolate candy bars," and the goods of Applicant and Registrant would be sold in different sections of stores. However, Applicant has not explained how the "chocolate" identified in the registration differs from the "chocolate candy, namely, chocolate candy bars" identified in the application, and given the dictionary definition of the word "chocolate," we see no legally cognizable difference. Moreover, because we must focus on the identification of goods set forth

in the application and registration, rather than on “real-world conditions,” Applicant’s argument regarding the physical location of the respective goods at the point of sale is unavailing. *See Stone Lion*, 110 USPQ2d at 1162; *Octocom*, 16 USPQ2d at 1787.

The *du Pont* factors of the similarity of the goods, channels of trade and the conditions of purchase favor a finding of likelihood of confusion.

#### B. Comparison of the Marks

We next compare the marks **2good** and  “in their entirety as to appearance, sound, connotation and commercial impression” to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), *quoting du Pont*, 177 USPQ at 567. “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

In comparing the marks, we are mindful that where, as here, the goods include legally identical items, the degree of similarity necessary to find likelihood of

confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs.*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

It is the Examining Attorney's position that the dominant portion of Registrant's mark is the wording TOOGOOD, which is phonetically equivalent to the entirety of Applicant's mark **2good**, resulting in two marks that create similar commercial impressions.

Applicant acknowledges that the marks are phonetic equivalents, but argues that this is irrelevant because Applicant's and Registrant's goods are normally selected from shelves at retail locations or online, rather than by verbal request. As support for this proposition, Applicant relies on *La Maur, Inc. v. Revlon, Inc.*, 245 F.Supp. 839, 146 USPQ 654, 655 (D. Minn. 1965) ("Similarities in appearance, meaning or sound in the marks are of course important considerations. Any similarity in pronunciation, that is, that the marks are sound-alikes, is, however, minimized when, as here, the product is often purchased in a self-service cosmetics department and not by request to a sales clerk."). We distinguish *La Maur* because it presents different facts from the facts before us, in large part because it is an action for infringement and not an *ex parte* appeal, and it includes evidence of how the marks actually were used in commerce.

We find that, as Applicant and the Examining Attorney agree, Applicant's mark **2good** and Registrant's mark are phonetically identical, and therefore likely to be pronounced the same way. It is well established that in a particular case, "two

marks may be found to be confusingly similar if there are sufficient similarities in terms of sound *or* visual appearance *or* connotation.” *Kabushiki Kaisha Hattori Seiko v. Satellite Int’l, Ltd.*, 29 USPQ2d 1317, 1318 (TTAB 1991), *aff’d mem.*, 979 F.2d 216 (Fed. Cir. 1992) (emphasis in the original; citation omitted). However, as discussed below, Applicant’s and Registrant’s marks also are similar in appearance, meaning and commercial impression.

Applicant argues that the marks are visually dissimilar due to the arrangement of letters in Registrant’s mark in a vertical, rather than horizontal, row, the use of different fonts, and the substitution of the numeral “2” in Applicant’s mark for the word “too” (or “two”). Applicant further contends that this substitution changes the connotation of the marks because the numeral “2” is an actual number and relates to a pair, while the word “too,” when combined with the word “good” in Registrant’s mark, appears to describe Registrant’s goods in a laudatory fashion. We do not find these arguments persuasive.

Although Applicant refers to its mark as stylized, Applicant states in its application that the mark is in standard characters. As such, Applicant’s mark is not limited to any particular depiction. *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (the rights associated with a mark in standard characters reside in the wording and not in any particular display); *In re RSI Systems, LLC*, 88 USPQ2d 1445, 1448 (TTAB 2008); *In re Pollio Dairy Products Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988). Thus, Applicant’s mark also could appear on a vertical axis, and in a similar (or identical) font as Registrant’s mark.

We also recognize the common substitution of certain words with phonetically equivalent numerals such as “too” and “2,” or “for” and “4” (as in “2 good 2 be 4gotten”) in diverse arenas such as graffiti, vanity license plates, texting, and email. Applicant’s replacement of the word “too” with the numeral “2” is a minor difference which consumers are not likely to notice or remember. Slight differences in marks do not normally create dissimilar marks. *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) (“Moreover, although there are certain differences between the marks [CAYNA and CANA] in appearance, namely, the inclusion of the letter ‘Y’ and the design feature in applicant’s mark, there are also obvious similarities between them. Considering the similarities between the marks in sound and appearance, and taking into account the normal fallibility of human memory over a period of time (a factor that becomes important if a purchaser encounters one of these products and some weeks, months, or even years later comes across the other), we believe that the marks create substantially similar commercial impressions.”). When coupled with the identical word “good,” “too” and “2” result in marks whose overall appearance is more similar than different.

With respect to the meanings and commercial impressions of the marks, we agree with Applicant’s argument that TOOGOOD, the literal portion of Registrant’s mark, means “excessively good.” However, Applicant’s mark **2good**, which is a simple misspelling of “too good,” has the same meaning and commercial impression as Registrant’s mark.

As discussed above, when we consider the marks, we do so based on the average purchaser retaining a general rather than specific impression of a mark. *See Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air*, 190 USPQ at 108. Here, because the goods include identical items, the marks are phonetically identical, share the meaning “excessively good” and are similar in overall appearance, we find on balance that the similarities in the marks outweigh their differences. *Viterra*, 101 USPQ at 1912. As such, the *du Pont* factor of the similarity of the marks also favors a finding of likelihood of confusion.

### C. Third-Party Uses

The next factor we consider is that of third-party use. As Applicant points out, evidence of third-party use can be used to show that a registrant’s mark is weak and thus entitled to a limited scope of protection. To this end, Applicant submitted with its Request for Reconsideration printouts of eight websites that include the wording “TOO GOOD” for diverse products, such as recipes for “Too Good Beef Biryani” and “Too Good Baked Chicken,” an article reporting the recall of “Richard’s Too Good BBQ Sauce” due to a risk of botulism, and dips and specialty mixes from “Too Good Gourmet.” However, most of this evidence does not show use of the wording TOO GOOD on or in connection with chocolate or chocolate-based products. The only exception is a printout for “Whey Too Good Brownie Mix” from the Netrittion.com website. In addition to being the sole example of use of the wording “Too Good” with a chocolate product, “Whey Too Good” is an obvious play on the larger phrase “way too good,” and does not render Registrant’s mark weak.

Applicant also submitted with the Request for Reconsideration copies of 17 third-party registrations which, according to Applicant, incorporate the term “too good” used in relation to food and food related products. Of these, only five are active.<sup>5</sup> In addition to being limited in number, unlike the marks in the application and cited registration, none of the five third-party registrations consist of the terms TOO GOOD or 2GOOD alone or with a minimal design element, or appear to relate directly to chocolate or chocolate products.<sup>6</sup> Further, the five registrations have little weight in determining the strength of a mark because they do not establish that the registered marks identified therein are in actual use in the marketplace or that consumers are accustomed to seeing them. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (CCPA 1973); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009).

This evidence of third-party use is not sufficient to establish that the mark in the cited registration is weak. However, even if we were to consider Registrant’s mark weak, even weak marks receive protection against likely confusion where the

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<sup>5</sup> We do not consider the 12 cancelled registrations submitted by Applicant. A cancelled registration is not entitled to any of the presumptions of Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b). *See, e.g., in re Hunter Publishing Co.*, 204 USPQ 957, 963 (TTAB 1979) (cancellation “destroys the Section [7(b)] presumptions and makes the question of registrability ‘a new ball game’ which must be predicated on current thought.”).

<sup>6</sup> The third-party registrations are for the following marks and goods or services: TOO GOOD TO BE FOOD for “online journal, namely, a blog featuring information in the field of nutrition”; 2GOOD2B ... GLUTEN FREE for “gluten-free bakery goods and gluten-free bakery desserts” and “restaurant, café and catering services, all providing gluten-free foods”; 2GOOD2B for “bakery goods and bakery desserts” and “restaurant, café and catering services”; TWO TOO GOOD! For “retail store services featuring popcorn and on-line retail store services featuring popcorn”; and TOOGOOD ESTATE and Design for “apparel for men, women and children, namely, belts, blazers, hats, jackets, pants, shirts, shoes, shorts, sweaters, sweatshirts, tank tops and ties” and “wine.” The marks 2GOOD2B ... GLUTEN FREE and 2GOOD2B are owned by one registrant.

goods include identical items and the marks are similar. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 183 USPQ 108, 109 (CCPA 1974). We consider this *du Pont* factor neutral.

## II. Conclusion

In conclusion, because the marks are phonetically identical and are similar in overall appearance, the goods include legally identical items, and the channels of trade and consumers are the same or overlapping, confusion is likely between

Applicant's mark **2good** and the mark  in the cited registration.

**Decision:** The refusal to register Applicant's mark **2good** is affirmed.