

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

Mailed:
August 17, 2012

United States Patent and Trademark Office
Trademark Trial and Appeal Board

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In re Totis Of Texas, LLC
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Serial No. 85067330
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Stewart L. Gitler of Welsh Flaxman & Gitler LLC for Totis Of Texas, LLC.

Maureen Dall Lott, Trademark Examining Attorney, Law Office 117 (J. Brett Golden, Managing Attorney).

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Before Bucher, Holtzman and Shaw, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Totis Of Texas, LLC seeks registration on the Principal Register of the mark **TOP-TOP'S** (*in standard character format*) for “corn chips” in International Class 30.¹

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 goods, so resembles the mark in the following three regis-

¹ Application Serial No. 85067330 was filed by Fritos Totis S.A. de C.V., a Mexican corporation, on June 21, 2010, based upon applicant’s claim of use anywhere and use in commerce since at least as early as May 21, 2010, and under Section 44(e) of the Act, based upon applicant’s Mexican Registration No. 1034015. The records of the Assignment Branch of the United States Patent and Trademark Office show that the U.S. application was then assigned to individuals named Gonzalez Torres and Habram Marcelo, Mexican citizens, on December 1, 2011 (Reel 4699/Frame 0663), and was later assigned to Totis Of Texas, LLC, a Texas Limited Liability Company, on May 15, 2012 (Reel 4791/Frame 0254).

trations, all owned by Tops Markets, LLC, as to be likely to cause confusion, to cause mistake or to deceive:

TOPS	for, <i>inter alia</i> , “ ... potato chips” in Class 29; ²
TOPS	for, <i>inter alia</i> , “ ... crackers ... ” in Class 30; ³ and
TOPS	for, <i>inter alia</i> , “cheese and cracker combinations ... ” in International Class 29. ⁴

When the refusal was made final, applicant appealed. The issues have been fully briefed. We affirm the refusal to register.

Our determination under Section 2(d) is based upon an analysis of all of the probative 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, however, two key considerations are the similarities or dissimilarities between the marks and the relationship between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

I. Goods/Trade Channels/Purchasers

We turn first to the relationship of the goods. In order to show the relatedness of the goods, the Trademark Examining Attorney submitted for the

² Registration No. 1433101 issued on March 17, 1987; renewed.

³ Registration No. 2856078 issued on June 22, 2004; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

⁴ Registration No. 3001996 issued on September 27, 2005; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

record copies of third-party registrations of various manufacturers and merchants, which she argues have probative value to the extent that they serve to suggest that the relevant goods listed therein (e.g., corn chips and tortilla chips versus potato chips, crackers and cheese crackers) are of a kind that may emanate from a single source. See *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *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 at n.6 (TTAB 1988):

shacktime

for, *inter alia*, “... potato chips, corn chips, pretzels; cracker and cookie sandwiches, containing fillings such as cheese ...” in International Classes 29 and 30;⁵

Good foods for good times

for “snack foods-namely, potato chips, taco chips, tortilla chips, corn chips, fried pork and tostado chips” in International Class 29;⁶

BARREL O’ FUN

for, *inter alia*, “potato chips, taco chips, nacho chips, corn chips and processed nuts” in International Class 29;⁷

Evans

for, *inter alia*, “pork rind pellets, potato chips, pork rinds, corn chips, and tortilla chips” in International Class 29;⁸

⁵ Registration No. 0930102 issued on February 28, 1972; second renewal.

⁶ Registration No. 1198111 issued on June 15, 1982; renewed.

⁷ Registration No. 1242227 issued on June 14, 1983; renewed.

⁸ Registration No. 1261053 issued on December 13, 1983; renewed.



for, *inter alia*, “potato chips, corn chips, tortilla chips, beef jerky, pork skins, smoked meat sticks and processed peanuts” in International Class 29;
“... crackers with flavored fillings ...” in International Class 30;⁹

WISE

for, *inter alia*, “snacks, namely, potato chips, ... in International Class 29;
“snacks, namely, ... tortilla chips, popped popcorn, corn chips, cheese snack crackers, ...” in International Class 30;¹⁰

**CLASSIC
SNACKS**

for, *inter alia*, “... potato chips ...” in International Class 29;
“... snacks and snack mixes consisting primarily of popcorn, pretzels, baked biscuits, crackers, ...” in International Class 30;¹¹

**WORLD
GOURMET**

for, *inter alia*, “... potato chips ...” in International Class 29;
“crackers; cookies; corn chips; tortilla chips ...” in International Class 30;¹²

**SNYDER OF
BERLIN**

for, *inter alia*, “plain potato chips, flavored potato chips, plain kettle style potato chips, flavored kettle style potato chips, ... in International Class 29;
“... corn chips, tortilla chips, cheese curl extruded corn snack, ... snack mix consisting primarily of crackers and pretzels” in International Class 30;¹³



for “snack foods, namely, corn chips, crackers, cracker and cheese combinations, popped popcorn, pretzels, puffed corn snacks, tortilla chips; snack mixes consisting primarily of the aforesaid goods” in International Class 30;¹⁴

⁹ Registration No. 1344829 issued on June 25, 1985; renewed.

¹⁰ Registration No. 2325068 issued on March 7, 2000; renewed.

¹¹ Registration No. 3048916 issued on January 24, 2006; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

¹² Registration No. 3195082 issued on January 2, 2007.

¹³ Registration No. 3232333 issued on April 24, 2007.

¹⁴ Registration No. 3247957 issued on May 29, 2007.

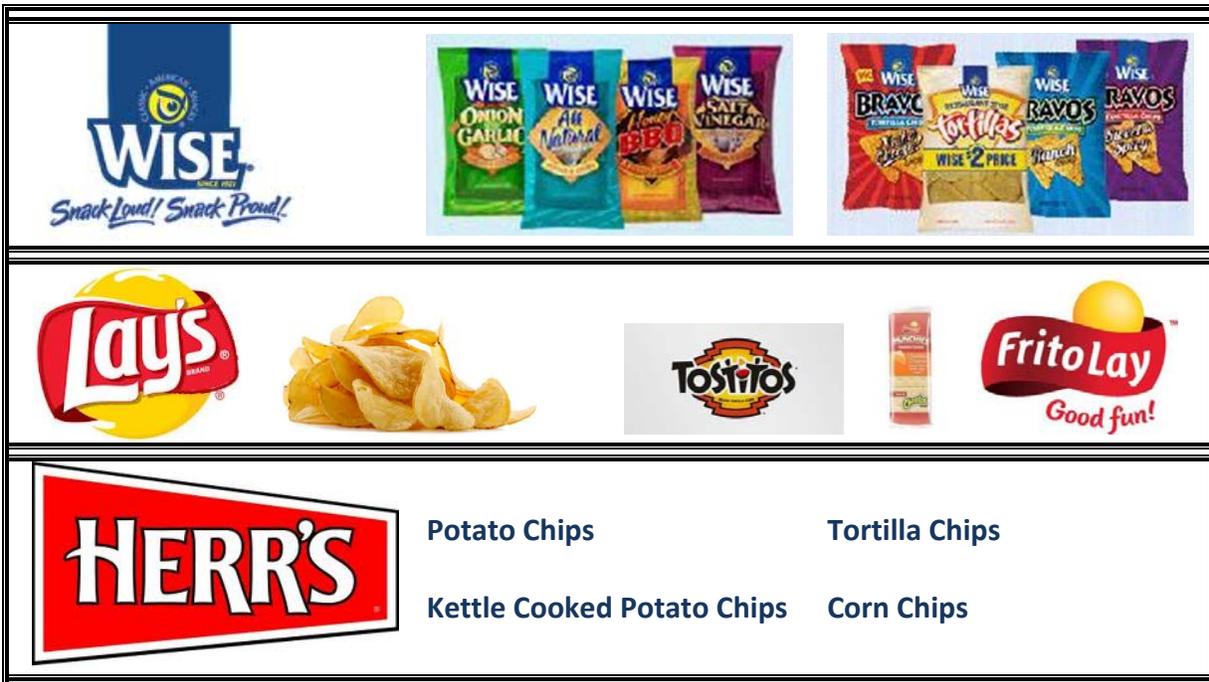


for, *inter alia*, “salty snacks, namely, potato chips, barbeque flavored potato chips, sea salt and vinegar flavored potato chips, ... cheese sticks; pizza flavored potato sticks, pizza flavored potato chips, pizza flavored cheese, ...” in International Class 29;
 “... nacho cheese tortilla chips, baked blue corn tortilla chips, corn chips; ... crackers, namely, original, ranch, cheddar and white cheddar flavored crackers; cracker combinations, namely, cheese-filled and peanut butter filled sandwich crackers ...” in International Class 30;¹⁵

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for, *inter alia*, “potato chips, ... chips made of cassava” in International Class 29; and
 “... crackers, ... corn chips” in International Class 30.¹⁶

The Trademark Examining Attorney also demonstrated from the Internet that snack manufacturers who sell corn chips and tortilla chips also sell potato chips, crackers and cheese crackers:



¹⁵ Registration No. 3415917 issued on April 22, 2008.

¹⁶ Registration No. 3707176 issued on November 3, 2009.



Based on this evidence, we find that these respective goods are closely related, and this *du Pont* factor favors the position of the Trademark Examining Attorney herein.

II. Similarities of the marks

As to the respective marks, applicant argues that “[the mark in the] cited registrations, **TOPS** ... is distinctly different in its appearance and connotation from Applicant's trademark, **TOP-TOP'S**, which comprises two distinct words that are combined in a fanciful fashion to roll off one's tongue as an alliteration.

They are visually and phonetically different marks. The visual appearance of the marks alone eliminates the possibility of confusion in the marketplace.”

By contrast, the Trademark Examining Attorney points out that both marks are presented in standard character format. The registered mark, in its entirety, **TOPS**, is nearly identical to the word “TOP’S” in applicant’s mark (the latter contains an apostrophe).

As noted by the Trademark Examining Attorney, an apostrophe has little, if any, trademark significance and does not otherwise affect the overall similarity of the words in terms of their respective commercial impressions. *See In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (noting that “[t]he absence of the possessive form in applicant’s mark ... has little, if any, significance for consumers in distinguishing it from the cited mark”); *In re Curtice-Burns, Inc.*, 231 USPQ 990, 992 (TTAB 1986) (finding the marks **McKENZIE’S** and **McKENZIE** “virtually identical in commercial impression”); *Winn’s Stores, Inc. v. Hi-Lo, Inc.*, 203 USPQ 140, 143 (TTAB 1979) (noting that “little if any trademark significance can be attributed to the apostrophe and the letters in opposer’s mark”).

Applicant has merely added the designation “Top-” in front of a registered mark. Generally, adding a new word to a cited mark does not obviate the similarity between the marks nor does it overcome a likelihood of confusion under Trademark Act Section 2(d). *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (**GASPAR’S ALE** and **JOSE GASPAR GOLD**); *Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 188

USPQ 105 (CCPA 1975) (**BENGAL** and **BENGAL LANCER**); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (CCPA 1967) (**THE LILLY** and **LILLI ANN**); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266 (TTAB 2009) (**TITAN** and **VANTAGE TITAN**); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002 (TTAB 1988) (**MACHO** and **MACHO COMBOS**); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (**CONFIRM** and **CONFIRMCELLS**); *In re U.S. Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (**CAREER IMAGE** and **CREST CAREER IMAGES**); *In re Riddle*, 225 USPQ 630 (TTAB 1985) (**ACCUTUNE** and **RICHARD PETTY'S ACCU TUNE**).

Additionally, as argued by the Trademark Examining Attorney, the term that applicant added to its mark is the singular form of registrant's entire mark. Applicant's mark and registrant's mark are, therefore, quite similar with each being comprised *only* of variations on the term "tops."

As a result, we find that these respective marks are similar as to sound, appearance, connotation and commercial impression.

III. Number and Nature of similar marks

As to the number and nature of similar marks allegedly in use on related goods, applicant argues that there is no likelihood of confusion, because marks containing the term "top" or "tops" are diluted. In support of this position, applicant submitted within its response of March 25, 2011, a table listing "over 300 U.S. Trademark registrations and applications all that co-exist for goods in International Classes 29, 30 and 31 (food classes)." In the

final action of April 14, 2011, the Trademark Examining Attorney responded to this table by noting that “[b]ecause the registration and application information has not been made of record, the registrations and applications cannot be reviewed.” Then, subsequent to filing its appeal, in further support of this argument, applicant refers in its brief to copies of at least sixteen specific third-party registrations attached to its appeal brief having marks containing the term “top” or “tops.” In her brief, the Trademark Examining Attorney objected to these late-filed copies of registrations, and we agree they cannot be considered because they are untimely.¹⁷

In conclusion, we find that the goods herein are closely related, that the marks are quite similar, and there is no evidence of record supporting a finding that the cited mark is commercially weak, and hence, that there is a likelihood of confusion herein.

Decision: The refusal to register under Section 2(d) of the Act is hereby affirmed.

¹⁷ We hasten to add that even if we had considered these registrations, it would not change the result herein. Many of the registered marks referred to by applicant have very distinct commercial impressions. Multiple registrations are owned by the same party. Finally, many of the registrations referred to by applicant are for goods unrelated to the snack foods found in the application and registrations at issue herein (e.g., candy and frozen confections, breakfast cereal, coffee beans and silicone baking molds).