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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Gold Crust Baking Company

Serial Nos. 85678105 and 85691267

Andrew C. Aitken for Gold Crust Baking Company.

Janet Lee, Trademark Examining Attorney, Law Office 102 (Mitchell Front,
Managing Attorney).

Before Quinn, Ritchie and Wolfson,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Gold Crust Baking Company (“Applicant”) filed applications to register the
mark GOLD CRUST BAKING COMPANY (in standard characters) (“BAKING
COMPANY” disclaimed),¹ and the mark shown below



¹ Application Serial No. 85678105, filed July 16, 2012 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging first use anywhere and first use in commerce on March 1, 2000.

Application Serial Nos. 85678105 and 85691267

(“BAKING COMPANY, INC.” disclaimed).² The identification of goods in each application reads “bakery goods, namely, bread and buns” in International Class 30.

The Trademark Examining Attorney refused registration in each application under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that each of Applicant’s marks, when used in connection with Applicant’s goods, so resembles the previously registered mark shown below



(“CARIBBEAN BAKERY & GRILL” disclaimed) for “restaurant services featuring Caribbean style foods” in International Class 43,³ as to be likely to cause confusion.

When the Trademark Examining Attorney issued a final refusal, Applicant appealed and requested reconsideration. The Examining Attorney denied the request for reconsideration, and the appeal resumed. The Board, on April 4, 2014, granted the Examining Attorney’s request to consolidate the appeals, and we will decide the appeals in this single opinion.

² Application Serial No. 85691267, filed July 31, 2012 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging first use anywhere and first use in commerce on March 1, 2000. The application includes the following description of the mark: “The mark consists of the words Gold Crust Baking Company, Inc. with the words Baking Company, Inc. within a banner and stalks of wheat above and below the banner.”

³ Registration No. 2994753, issued September 13, 2005; Sections 8 and 15 combined declaration accepted and acknowledged. The registration indicates that Registrant owns Registration Nos. 2007993; 2651784; and others.

Applicant argues that the marks, and the goods and services offered thereunder, are different. Applicant also contends that the cited mark is lacking in distinctiveness and, therefore, is entitled to only a narrow scope of protection. Further, Applicant relies upon the absence of any instances of actual confusion between the marks. Applicant introduced the declaration of its attorney, accompanied by excerpts of third-party websites, as well as copies of third-party registrations.

The Examining Attorney maintains that the marks are similar, and that the goods and services are related. In support of the refusals, the Examining Attorney introduced dictionary definitions,⁴ third-party registrations, and excerpts from third-party websites.

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). In any likelihood of confusion analysis, however, 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).

⁴ These definitions include ones attached to the Examining Attorney's brief, and of which the Examining Attorney requested the Board to take judicial notice. 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). *See In re Thomas White Int'l Ltd.*, 106 USPQ2d 1158, 1160 n.1 (TTAB 2013).

We first turn to consider the second *du Pont* factor regarding the similarity/dissimilarity between the goods and services. It is well settled that the goods and services of the parties need not be identical or competitive, or even be offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods and services of applicant and registrant are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods and 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 source. *See Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). Contrary to the gist of one of Applicant's arguments, the issue here is not whether purchasers would confuse the goods and services, but rather whether there is a likelihood of confusion as to the source of these goods and services. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); and *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

While likelihood of confusion has often been found where similar marks are used in connection with both food or beverage products and restaurant services, there is no *per se* rule to this effect. *See Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 768, 25 USPQ2d 2027, 2030 (Fed. Cir. 1993). Thus, the relatedness of such goods and services may not be assumed and the evidence of record must show "something more" than that similar or even identical marks are used for food

products and for restaurant services. *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003) (quoting *Jacobs v. Int’l Multifoods Corp.*, 668 F.2d 1234, 1236, 212 USPQ 641, 642 (CCPA 1982)). *See also In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). *See generally* TMEP § 1207.01(a)(ii)(A) (2014).

We observe that the Board has found the “something more” requirement to be met where the applicant’s mark made clear that its restaurant specialized in registrant’s type of goods, *In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2050-51 (TTAB 2012) (COLOMBIANO COFFEE HOUSE, for providing food and drink, likely to cause confusion with the registered certification mark COLOMBIAN, for coffee, given the inclusion of COFFEE HOUSE in applicant’s mark, third-party registrations covering both restaurant or café services and coffee beverages, and because coffee houses specialize in coffee beverages), *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) (AZTECA MEXICAN RESTAURANT for restaurant services confusingly similar to AZTECA for Mexican food items), *In re Golden Griddle Pancake House Ltd.*, 17 USPQ2d 1074 (TTAB 1990) (GOLDEN GRIDDLE PANCAKE HOUSE for restaurant services confusingly similar to GOLDEN GRIDDLE for table syrup); where the record showed that registrant’s wines were actually sold in applicant’s restaurant, *In re Opus One Inc.*, 60 USPQ2d 1812 (TTAB 2001) (OPUS ONE for wine confusingly similar to OPUS ONE for restaurant services); or where the mark was found to be “a very unique, strong mark,” *In re Mucky Duck Mustard Co. Inc.*, 6USPQ2d 1467, 1469 (TTAB

1988) (MUCKY DUCK for mustard confusingly similar to MUCKY DUCK for restaurant services). *Cf. In re Giovanni Food Co.*, 97 USPQ2d at 1992.

The Examining Attorney submitted an excerpt of a website stating the following:

Comprised of more than 7,000 islands, not all inhabited, a common bond found among the populated countries of the Caribbean is bread ... there is no single type of bread that binds the various islands. Breads that are baked, fried, spicy and some – even poisonous if not prepared correctly – can all be found in the Caribbean.”
(ehow.com)

The Examining Attorney also furnished 10 third-party registrations showing that the same entity has registered a single mark for both restaurant services and bakery goods. (Denial of Request for Reconsideration, 12/14/13). Further, the record includes excerpts of 20 third-party websites for restaurants (15 of which appear to feature Caribbean-style cuisine) showing that they, along with cafes, bistros and the like, all list breads and other baked products among their offerings, sold through an on-site bakery. (Office actions, 11/8/12 and 5/22/13). Likewise, an excerpt of Registrant’s website shows that Registrant sells breads at its restaurant and bakery.

Applicant countered with the declaration of Andrew Aitken, Applicant’s attorney in this case. In pertinent part, Mr. Aitken’s searches of the USPTO electronic database reveal the following results: 31,449 live registrations and applications for restaurant services; 704 of these records also list bread in the identification. Mr. Aitken thus concludes that live registrations and applications

that cover both restaurant services and bread reflect only 2.2% of the total number for restaurants. Drawing from these numbers, Applicant contends that most restaurants do not separately brand breads or buns that may be served at these establishments. Applicant concludes that it is uncommon for restaurants to offer both bread and their restaurant services under the same trademark.

The Federal Circuit had occasion to review similar third-party evidence in the case of *In re Coors Brewing Co.*, 68 USPQ2d at 1063. The Federal Circuit found as follows:

In light of the requirement that “something more” be shown to establish the relatedness of food and restaurant products for purposes of demonstrating a likelihood of confusion, the Board’s finding that beer and restaurant services are related is not supported by substantial evidence.... While there was evidence that some restaurants sell private label beer, that evidence did not suggest that such restaurants are numerous.... Thus, the evidence before the Board indicates not that there is a substantial overlap between restaurant services and beer with respect to source, but rather that the degree of overlap between the sources of restaurant services and the sources of beer is de minimis The evidence of overlap between beer and restaurant services is so limited that to uphold the Board’s finding of relatedness would effectively overturn the requirement of *Jacobs* that a finding of relatedness between food and restaurant services requires “something more” than the fact that restaurants serve food....

... the registered mark in this case is simply for restaurant services in general, and the Board’s conclusion that restaurant services and beer are related is based on the fact that a tiny percentage of all restaurants also serve as a source of beer, which is a very weak evidentiary basis for a finding of relatedness.

Id. at 1063-64. Thus, the Court makes clear that the relatedness of restaurant services and food items is not to be assumed and that evidence sufficient to meet the “something more” standard is necessary.

In the present case, we find that Applicant’s attempt to diminish the probative value of the Examining Attorney’s evidence through a mathematical analysis falls short. Most of the official records listed in the TESS printout are applications, rather than registrations. As often observed, applications are evidence only of the fact that the applications were filed and nothing else. *See, e.g., Glamorene Prods. Corp. v. Earl Grissmer Co., Inc.*, 203 USPQ 1090, 1092 n.5 (TTAB 1979). Here, as required by *Coors*, the Examining Attorney has satisfied the “something more” standard of showing a relationship between Applicant’s bakery goods and Registrant’s restaurant services for purposes of the likelihood of confusion analysis. The third-party registrations and websites show that it is not unusual for restaurants to also sell bread under the same mark. In addition to this third-party evidence, the record includes a website that highlights the prominence of different types of bread in Caribbean cuisine. In point of fact, as shown by the record, Registrant itself offers both its restaurant services and bakery goods under its mark. In this regard, it is significant to note that Registrant’s mark includes the term “BAKERY,” indicating that it offers baked goods under the registered mark.

In view of the above, the record establishes that Applicant’s bakery goods and Registrant’s restaurant services are sufficiently related so that if offered under similar marks confusion would be likely to occur among purchasers.

With respect to the *du Pont* factor of the similarity/dissimilarity between the marks, we must compare the marks 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 Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), quoting *In re E. I. du Pont de Nemours & Co.*, 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) (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014).

It is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (“There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety. Indeed, this type of analysis appears to be unavoidable.”).

With respect to Applicant's marks, the wording "BAKERY COMPANY" and "BAKING COMPANY, INC." has been disclaimed in the respective marks. In view of the generic/highly descriptive nature of this disclaimed wording, this portion of each mark plays no source-indicating function in either mark. *See, e.g., In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) ("DELTA," not the disclaimed generic term "CAFE," is the dominant portion of the mark THE DELTA CAFE).

In Applicant's standard character mark, the dominant portion and source-identifying wording is "GOLD CRUST." Purchasers in general are inclined to focus on the first word or portion in a trademark; in Applicant's mark, GOLD CRUST is the first portion. *Presto Products, Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is likely to be impressed upon the mind of a purchaser and remembered"). *See Palm Bay Imports, Inc.*, 73 USPQ2d at 1692.

With respect to Applicant's design mark, where both words and a design comprise the mark (as in both Applicant's and Registrant's marks), then the words are normally accorded greater weight because the words are likely to make an impression upon purchasers, would be remembered by them, and would be used by them to request the goods and/or services. *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) ("in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed"); *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*,

107 USPQ2d 1424, 1430-31 (TTAB 2013); *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987). *See also Giant Food, Inc. v. Nation's Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). Accordingly, Applicant's design mark is dominated by the wording "GOLD CRUST BAKING COMPANY, INC.," which in turn is dominated by, as indicated above, "GOLD CRUST."

Likewise, Registrant's design mark is dominated by the literal portion, GOLDEN KRUST CARIBBEAN BAKERY AND GRILL. Because the wording CARIBBEAN BAKERY AND GRILL is highly descriptive/generic, it has been disclaimed and plays little to no source-identifying function in the mark. Further, the wording GOLDEN KRUST is depicted in significantly larger size, and above the other wording. Therefore, in turn the literal portion of Registrant's mark is dominated by the words GOLDEN KRUST.

The dominant portion, GOLD CRUST, of each of Applicant's marks is highly similar to the dominant portion, GOLDEN KRUST, of Registrant's mark. We recognize, however, that the marks must be considered in their entireties, including design features and disclaimed wording.

When Applicant's mark in standard characters is compared to Registrant's mark, we find the marks to be similar in sound and appearance. As to appearance, because Applicant's mark is presented in standard characters, Applicant is not limited to any particular depiction of its mark. Thus, Applicant would be entitled to all depictions of its standard character mark regardless of the font style, size, or color; Applicant's mark could at any time in the future be displayed in a manner

similar to Registrant's mark, that is, the words displayed in the same font style and size. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-10 (Fed. Cir. 2012); *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011).⁵ The marks also convey similar suggestive meanings (*see* discussion, *infra*), and engender similar commercial impressions.

We reach a different result, however, when comparing Applicant's design mark to Registrant's design mark. Notwithstanding the similarities in the dominant portions as discussed above, the design features of the marks are sufficient to give the marks different appearances, resulting in marks that engender different commercial impressions. These differences outweigh the similarities between the marks.

With respect to the marks' meanings, Mr. Aitken, as revealed by his declaration, conducted an electronic search of the USPTO registration records showing that the term "GOLDEN" is commonly used as part of registered trademarks in the food and restaurant field (41 registrations for restaurants and 138 registrations for food products). Applicant submitted copies of the registrations covering restaurant services. As for these third-party registrations, they are not evidence that the marks are in use, or that the public is familiar with them. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

The registrations can, however, be used in the manner of a dictionary, to show that a term has a significance in a particular industry. *Tektronix, Inc. v.*

⁵ Each application stands on its own. Thus, even though Applicant also is seeking to register its design mark, a registration in standard characters would not limit Applicant to depicting the mark as shown in application Serial No. 85691267.

Daktronics, Inc., 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976) (third-party registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”); *In re Sela Prods., LLC*, 107 USPQ2d 1580, 1588 (TTAB 2013). In furtherance of this point, the record includes dictionary definitions. The term “gold” means, in relevant part, “a light olive-brown to dark yellow, or a moderate, strong to vivid yellow; having the color of gold.” The term “golden” means “having the color of gold or a yellow color suggestive of gold.” The term “crust” is defined as “the hard outer portion or surface area of bread; a pastry shell, as of a pie or tart.” (<ahdictionary.com>). Thus, the wording GOLD CRUST or GOLDEN KRUST in the respective marks is highly suggestive, with both marks suggesting that any bakery item sold under the marks will have a “gold(en) crust” desired by consumers.

In sum, on the similarity between the marks, we find that Applicant’s mark in standard characters is similar to Registrant’s mark; but find that the differences between Applicant’s design mark and Registrant’s mark are sufficient to avoid a likelihood of confusion, especially given the highly suggestive nature of the marks. *See In re Hamilton Bank*, 222 USPQ 174, 179 (TTAB 1984) (where the word portion of a mark is suggestive or descriptive, the presence of a design may be a more significant factor in a comparison of the marks for purposes of likelihood of confusion).

We have considered the sixth *du Pont* factor, namely “the number and nature of similar marks in use on similar goods.” The principle behind this factor is that if

a certain term appears in many marks that are owned by separate entities and that are used for similar goods, consumers will look to other elements in the marks to distinguish them. In this connection, Mr. Aitken's declaration is accompanied by excerpts of thirteen third-party websites of restaurants that utilize "GOLD CRUST" or "GOLDEN CRUST" in their names. The examples are as follows:

Golden Crust Pizza & Grill, Jackson Heights, NY (Exhibit 1);
Golden Crust Café, Plantation, FL (Exhibit 2);
Golden Crust Tap, Albany Park, IL (Exhibit 3);
Golden Crust Pizza, Hutton, TX (Exhibit 4);
Golden Crust, Philadelphia, PA (Exhibit 5);
Golden Crust Pizza, Providence and North Providence, RI (Exhibit 6);
Golden Crust Italian Pizzeria, Chicago, IL (Exhibit 7);
Golden Crust Bakery, Mentor, OH (Exhibit 8);
Golden Crust Pizza, Jersey Shore, PA (Exhibit 9);
Gold Crust Pizza, Hillsboro, OR (Exhibit 10);
Gold Crust Pizza, Red Lion, PA (Exhibit 11);
Golden Crust Pizza III, Philadelphia, PA (Exhibit 12); and
Golden Crust Pizza II, Cheltenham, PA (Exhibit 13).

Insofar as these third-party uses are concerned, they are relatively few in number, and we do not find the evidence to be compelling. The probative weight also is limited given the absence of any corroborating facts bearing on the extent of these uses. That is to say, there are no specifics regarding the extent of sales or promotional efforts surrounding the third-party marks and, thus, what impact, if any, these uses have made in the minds of the purchasing public is unclear. Accordingly, we are unable to find that customers have become conditioned to recognize that other entities use "Gold Crust" or "Golden Crust" marks for similar services. *See Anthony's Pizza & Pasta Int'l, Inc. v. Anthonys Pizza Holding Co.*, 95

USPQ2d 1271, 1276-78 (TTAB 2009), *aff'd*, 415 Fed. Appx. 222 (Fed. Cir. 2010); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1112 (TTAB 2007); *Carl Karcher Enterprises Inc. v. Stars Restaurant Corp.*, 35 USPQ2d 1125, 1130-31 (TTAB 1995). *Cf. In re Hartz Hotel Services Inc.*, 102 USPQ2d 1150 (TTAB 2012) (marks comprising term “Grand Hotel” for hotels accorded narrow scope of protection in view of numerous third-party uses of GRAND HOTEL for hotel services); *In re Broadway Chicken, Inc.*, 38 USPQ2d 1559, 1565 (TTAB 1996) (evidence of third-party use of the term “Broadway” for restaurant services was so common that consumers would look to the other elements of applicant's mark BROADWAY CHICKEN to distinguish the source of the goods from BROADWAY PIZZA and BROADWAY BAR & PIZZA).

With respect to the eighth *du Pont* factor, Applicant states, on information and belief, that there has been no actual confusion between either of its marks and Registrant's mark. It is not necessary to show actual confusion in order to establish likelihood of confusion. *See Weiss Associates Inc. v. HRL Associates Inc.* 902 F.2d 1546, 223 USPQ 1025 (Fed. Cir. 1990). Applicant's assertion, particularly in this *ex parte* proceeding, is entitled to little weight. *See In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) (“uncorroborated statements of no known instances of actual confusion are of little evidentiary value”). *See also In re Bisset-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that testimony of applicant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there

was no likelihood of confusion); *In re Binion*, 93 USPQ2d 1531, 1536 (TTAB 2009); *In re 1st USA Realty Professionals Inc.*, 84 USPQ2d 1581, 1588 (TTAB 2007); *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984). In any event, the record is devoid of evidence relating to the extent of use of Applicant's and Registrants' marks that would enable us to determine whether there have been meaningful opportunities for instances of actual confusion to have occurred in the marketplace. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000). Accordingly, the *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use of the marks without evidence of actual confusion is considered neutral.

We have carefully considered all of the evidence made of record pertaining to the issue of likelihood of confusion, as well as all of the arguments related thereto, including any evidence and arguments not specifically discussed in this opinion. We conclude that purchasers familiar with Registrant's "restaurant services featuring Caribbean style foods" rendered under the mark GOLDEN KRUST CARIBBEAN BAKERY AND GRILL and design would be likely to mistakenly believe, upon encountering Applicant's mark GOLD CRUST BAKING COMPANY in standard characters for "bakery goods, namely, bread and buns," that the goods and services originated from or are associated with or sponsored by the same entity. We also conclude that the differences between Applicant's design mark and Registrant's design mark are sufficient to avoid likelihood of confusion.

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Decision: The refusal to register application Serial No. 85678105 (standard character mark) is affirmed; the refusal to register application Serial No. 85691267 (design mark) is reversed.