

**This Opinion Is Not a  
Precedent Of The TTAB**

Mailed: October 22, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Tezio LLC*

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Serial No. 85769474

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L Jeremy Craft of Craft Chu PLLC for Tezio LLC.

Samuel R. Paquin, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

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Before Taylor, Ritchie, and Shaw, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Tezio LLC (“Applicant”) filed an application to register the mark LOLA,<sup>1</sup> in standard character format, for goods identified as “plastic containers for organizing and storing cosmetics” in International Class 21. The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so

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<sup>1</sup> Serial No. 85769474, filed November 1, 2012, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use the mark in commerce.

resembles the mark, CHARLIE AND LOLA, and design,<sup>2</sup> as shown below, for, as relevant, “containers for household and kitchen use,” in International Class 21, that when used on or in connection with Applicant’s identified goods, Applicant’s mark is likely to cause confusion or mistake or to deceive.



Upon final refusal of registration, Applicant filed a timely appeal. Both Applicant and the Examining Attorney filed briefs.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also, In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (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.

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<sup>2</sup> Registration No. 3818392, issued July 13, 2010. The cited registration identifies other goods in this class and in others. However, these were the goods cited by the Examining Attorney as relevant for an analysis of Section 2(d) likelihood of confusion.

*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 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.

The Goods and Channels of Trade, and Classes of Consumers

We first consider the similarities and dissimilarities of the goods at issue in the application and the cited registration. The cited registration identifies “containers for household and kitchen use,” whereas the application identifies “plastic containers for organizing and storing cosmetics,” which is a subset thereof, since Applicant’s goods include those that are a type of “container for household use,” *i.e.*, a plastic container that is used to organize and store cosmetics. We recognize that plastic cosmetics containers may also be used outside of a “household,” for example by a store. That said, we must read the identifications of goods to include all reasonable formulations. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“[t]he authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.” [citations omitted]); *In re Thor Tech*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”).

Therefore, based on a plain reading of the identifications, there is clear overlap, and the goods are in part identical. Applicant makes much of the information it put in the record of registrant's "Charlie and Lola" as a series directed to children. The cited goods, however, are not limited to those directed to children, and, as stated, we must read the identification of goods as it is, not as Applicant says it may be used in the marketplace.

Because the goods described in the application and the cited registration are in part identical, we must presume that the channels of trade and classes of purchasers are the same. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers"). Additionally, there is nothing in the recital of goods in either the cited registration or the application that limits either Registrant's or Applicant's channels of trade. *See In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992) (because there are no limitations as to channels of trade or classes of purchasers in either the application or the cited registration, it is presumed that the registration and the application move in all channels of trade normal for those services, and that the services are available to all classes of purchasers for the listed services). Accordingly, we find that these *du Pont* factors weigh heavily in favor of finding a likelihood of consumer confusion.

#### The Marks

Preliminarily, we note that when the goods at issue are legally identical, the degree of similarity between the marks which is required to support a finding of

likelihood of confusion is less than if the goods were not identical. *In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012), citing *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

In comparing the marks, we are mindful that the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Applicant's mark consists solely of the term "LOLA." The mark in the cited registration consists of the literal term "CHARLIE AND LOLA" in stylized letters, surrounded by four patterned hearts. The name "LOLA" is prominent in the mark, as the second of two featured names. Applicant points out that we have said "it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered." *Presto Products, Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988); *see also Palm Bay Imports*, 73 USPQ2d at 1692. That is of course not always the case, however. *See, for example In re U.S. Shoe*

*Corp.*, 229 USPQ 707 (TTAB 1985) (finding CAREER IMAGE likely to be confused with mark CREST CAREER IMAGES). Here, where the literal portion of registrant's mark consists of two given names, it is likely that both names will be impressed upon consumers and they will assume that Applicant's LOLA mark is an added product in Registrant's CHARLIE AND LOLA, and design line of products.

The design in the cited registration does not significantly affect the commercial impression of the mark in the cited registration. As has often been said, it is typically the words that consumers will use to call for or refer to goods or services. *In re Viterra Inc.*, 101 USPQ2d at 1911, *citing CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983). Although the hearts may reflect a cutesy or child-like commercial impression, the design is smaller than the literal elements and simply frames the wording. Moreover, since Applicant has a standard character mark, there is nothing to stop Applicant from displaying its mark in a similar font. When viewed as a whole, the marks are similar, and have a similar commercial impression.

Accordingly, we find this first *du Pont* factor too, to weigh in favor of finding a likelihood of confusion.

### Conclusion

Considering all of the arguments and evidence of record as they pertain to the *du Pont* factors as discussed, we find that the identified "plastic containers for organizing and storing cosmetics" in the application is in part identical to the "containers for household and kitchen use," in the cited registration, and will be likely be sold through the same channels of trade to the same classes of purchasers. We further find that the marks, when viewed in their entirety, are similar, and have similar commercial impressions.

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Accordingly, we find a likelihood of confusion between Applicant's mark and the mark in the cited registration.

Decision: The Section 2(d) refusal to register is affirmed.