

This Opinion Is Not a
Precedent of the TTAB

Mailed: April 13, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Dwayne A. Roscoe

Serial No. 87047156

Kenneth L. Green of Averill & Green,
for Dwayne A. Roscoe.

Stefan M. Oehrlein, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

Before Lykos, Hightower, and Coggins,
Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

Applicant Dwayne A. Roscoe seeks to register on the Principal Register the mark KRANKY KOOKYS, in standard characters and with “COOKIES” disclaimed, for “individually baked cookies decorated with icing showing an image of a frowning face, sold individually” in International Class 30.¹

¹ Application Serial No. 87047156 was filed May 23, 2016, pursuant to Trademark Act Section 1(a), 15 U.S.C. § 1051(a), based on Applicant’s allegation of first at least as early as October 10, 2008, and use in commerce at least as early as November 3, 2008.

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the goods identified in the application, so resembles the mark KRANKY, previously registered on the Principal Register in standard characters for "chocolate covered corn flakes" in International Class 30, as to be likely to cause confusion, to cause mistake, or to deceive.²

After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors 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, however, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper 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.").

² Registration No. 2158772, issued May 19, 1998; renewed.

A. Similarity of the Marks

We first address the *du Pont* likelihood of confusion factor assessing “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. 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) (quoting *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)).

Because the similarity of the marks is determined based on the marks in their entirety, our analysis is not predicated on dissecting the marks into their various components. *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1353 (TTAB 2015).

On the other hand, in articulating reasons for reaching a conclusion on the issue of confusion, 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.

In re Nat’l Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012).

Applicant’s mark KRANKY KOOKYS begins identically to the cited mark KRANKY, followed by KOOKYS. As we have often said, the lead element in a mark

has a position of prominence; it is likely to be noticed and remembered by consumers and so to play a dominant role in the mark. *See, e.g., Palm Bay*, 73 USPQ2d at 1692 (stating that VEUVE is a prominent feature of the mark VEUVE CLICQUOT because it is the first word in the mark); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (stating that consumers will first notice the identical lead word on encountering the marks); *In re Integrated Embedded*, 120 USPQ2d 1504, 1513 (TTAB 2016) (stating that dominance of BARR in the mark BARR GROUP is reinforced by its location as the first word in the mark).

Because it is the first and more distinctive element in Applicant's mark, we find KRANKY to be the dominant portion of that mark. While there is no rule that likelihood of confusion automatically applies where one mark encompasses another, in this case, the fact that the entire cited mark constitutes the dominant portion of Applicant's mark increases the similarity between the two. *See, e.g., Wella Corp. v. Cal. Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT marks substantially similar to prior mark CONCEPT); *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558 (CCPA 1972) (WEST POINT PEPPERELL and griffin design likely to cause confusion with WEST POINT); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (VANTAGE TITAN confusingly similar to registered mark TITAN); *In re Riddle*, 225 USPQ 630, 632 (TTAB 1985) (RICHARD PETTY'S ACCU TUNE for automotive service centers confusingly similar to ACCU-TUNE for automotive testing equipment).

The trailing word in Applicant's mark, KOOKYS, is an alternative spelling for the generic and disclaimed term "COOKIES." Applicant acknowledges that KOOKYS is descriptive of his goods, but argues: "While it is accurate that 'KOOKYS' is descriptive, it remains true that 'KOOKYS' is also a highly colored term which draws the attention of a particular group of consumers, and the intentional miss-spelling [sic] further draws attention to 'KOOKYS'." Appeal Brief at 11, 4 TTABVUE 12.

Despite its descriptive nature, we agree that consumers are likely to give some weight to the term KOOKYS because of its alternative spelling and its alliteration with KRANKY. Applicant's mark thus is distinguished somewhat from the cited mark in appearance, sound, and connotation. Considered as a whole, however, we find that Applicant's mark KRANKY KOOKYS makes an overall commercial impression very similar to Registrant's mark KRANKY. The first *du Pont* factor thus weighs in favor of a finding that confusion is likely.

B. Similarity of the Goods

We next consider the second *du Pont* factor, the similarity of the goods. The test is not, as Applicant argues, whether consumers would be likely to confuse the goods, but rather whether they would be likely to be confused as to their source. *See* Appeal Brief at 14, 4 TTABVUE 15; *In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012). Therefore, to support a finding of likelihood of confusion, it is not necessary that the goods be identical or even competitive. It is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source

or that there is an association or connection between the sources. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

The Examining Attorney submitted evidence demonstrating that cereal and packaged cookies are goods of a type that may emanate from the same source under the same mark, including the following:

- ANNIE'S chocolate cereal and cookies;³
- NATURE'S PATH chocolate cereal and cookies;⁴
- Girl Scouts THIN MINTS chocolate cereal and cookies;⁵
- BARBARA'S Snackimals chocolate cereal and cookies;⁶ and
- KASHI cereal flakes and cookies.⁷

Based on this evidence, we find that the goods identified in the application and cited registration are related. In our likelihood of confusion analysis, the second *du Pont* factor also supports a finding that confusion is likely.

C. Consumer Sophistication

Applicant contends that, as food items for human consumption, both his goods and Registrant's will be purchased with care, arguing: "The goods here are not apt to be purchased impulsively. . . . Because the Applicant's goods are a dessert, and Registrant's goods are a breakfast cereal, it is virtually impossible for an impulse purchase to occur." Appeal Brief at 15, 4 TTABVue 16.

³ April 7, 2017 Final Office Action at TSDR 2-6 (from annies.com).

⁴ *Id.* at TSDR 14-18 (from naturespath.com).

⁵ *Id.* at TSDR 9-13 (from target.com and girlscouts.org).

⁶ September 14, 2016 Office Action at TSDR 13-15 (from barbaras.com).

⁷ *Id.* at TSDR 8-10 (from kashi.com).

We disagree. We find that cookies sold individually, the type of goods identified in the application, are highly likely to be purchased on impulse. As the Examining Attorney notes, Applicant's specimen supports this finding, showing Applicant's goods displayed on an apparent checkout counter, near candy and lottery tickets:



In addition, although there is no evidence concerning the retail price of Applicant's cookies, all third-party cereals for which a price is displayed in the record cost less than \$5 per box. We find that an inexpensive, sweetened cereal such as chocolate-covered corn flakes also is likely to be purchased on impulse.

Applicant relies on *Stouffer Corp. v. Health Valley Nat. Foods Inc.*, 1 USPQ2d 1900 (TTAB 1986), *aff'd mem.*, 831 F.2d 306 (Fed. Cir. 1987), a case readily distinguishable from the facts here. In *Stouffer*, the Board applied an ordinary rather than a lesser standard of purchasing care, considering that the goods involved were calorie-controlled frozen prepared entrees. “[E]ven in the hustle and bustle atmosphere of a supermarket, diet-conscious purchasers of these prepared entrees are a special class of purchasers who may be expected, at least, to examine the front of the packages in order to determine what kind of entree is contained therein and its caloric content.” *Id.*, 1 USPQ2d at 1902. Here, in contrast, there is no evidence that purchasers of

cookies and corn flakes constitute a special class of purchasers who select these goods with particular care. The fourth *du Pont* factor is neutral.

D. Applicant's Coexistence with Registrant

Finally, we address Applicant's arguments concerning his previous ownership of Registration No. 3680852 for KRANKY KOOKYS for "bakery goods" and his concurrent use and registration with the cited mark. Appeal Brief at 15, 4 TTABVUE 16. Applicant states that his registration issued in 2009 and was cancelled April 15, 2016 due to his oversight. *Id.* Applicant argues that his expired registration coexisted with the cited registration without confusion, and that: "In the absence of new trademark legislation from Congress, Applicant should be able to reasonably expect the new application to be held to the same threshold as the expired Registration." Reply Brief at 3, 7 TTABVUE 4.

Applicant's prior ownership of an expired registration does not warrant reversal when the *du Pont* factors weigh in favor of finding a likelihood of confusion. *See, e.g., In re Binion*, 93 USPQ2d 1531, 1536 (TTAB 2009); *In re Davey Prods. Pty. Ltd.*, 92 USPQ2d 1198, 1206 (TTAB 2009). Nor does the decision to allow Applicant's previous registration control here. *See, e.g., In re Omega SA*, 494 F.3d 1362, 83 USPQ2d 1541, 1544 (Fed. Cir. 2007). Rather, the Board must decide each case on its own facts and record. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *see also In re Rodale Inc.*, 80 USPQ2d 1696, 1700 (TTAB 2006) ("Although consistency in examination is a goal of the Office, the decisions of previous Trademark Examining Attorneys are not binding on us, and we must decide each case based on the evidence presented in the record before us.").

Applicant's argument that its mark and Registrant's have coexisted without evidence of consumer confusion, which pertains to the eighth *du Pont* factor, is similarly unpersuasive. Reply Brief at 3, 7 TTABVue 4. In the *ex parte* context, lack of evidence of actual confusion carries little weight. *Majestic Distilling*, 65 USPQ2d at 1205; *Integrated Embedded*, 120 USPQ2d at 1515.

II. Conclusion

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, as they pertain to the relevant *du Pont* likelihood of confusion factors. To the extent that any other *du Pont* factors for which no evidence was presented by Applicant or the Examining Attorney may nonetheless be applicable, we treat them as neutral.

We have found that Applicant's mark is similar to the cited mark; that the goods identified in the subject application and cited registration are related; that consumers of the respective goods will exercise no more than an ordinary standard of care when making their buying decisions; and that Applicant's expired registration and coexistence with the cited mark do not warrant reversal. On this record, we find that Applicant's mark KRANKY KOOKYS is likely to cause confusion with the mark KRANKY in cited Registration No. 2158772 when used in association with the identified goods.

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