

This Opinion is Not a  
Precedent of the TTAB

Mailed: April 23, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re International Foodstuffs Co. LLC*  
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Serial No. 97444092  
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Nicholas D. Wells of Legends Law Group, PLLC, for International Foodstuffs Co.  
LLC.

Megan Hartnett, Trademark Examining Attorney, Law Office 123,  
Susan Hayash, Managing Attorney.  
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Before Larkin, Thurmon and Johnson, Administrative Trademark Judges.

Opinion by Thurmon, Administrative Trademark Judge:

International Foodstuffs Co. LLC (“Applicant”) seeks registration on the Principal Register of the mark CROKO, in standard characters, for “Chocolates and Chocolate Confectionery Products, namely, snack foods being chocolate, candy; Biscuits; cookies; Ketchup and Sauces being condiments; Ice Cream; Pasta,” in International Class 30.<sup>1</sup> The Examining Attorney finally refused registration under Section 2(d) of

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<sup>1</sup> Application Serial No. 97444092 was filed on June 6, 2022, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. See *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at \*2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers

the Trademark Act, 15 U.S.C. § 1052(d), finding a likelihood of confusion for some of the identified goods in the Application, based on the mark CROCO BERRY CRUNCH, registered in standard characters on the Principal Register, with the word “BERRY” disclaimed, for “breakfast cereals,” in International Class 30.<sup>2</sup> The Section 2(d) refusal applies only to the following goods: “Chocolates and Chocolate Confectionery Products, namely, snack foods being chocolate, candy; Biscuits; cookies,” while the remaining goods identified in the Application, namely “Ketchup and Sauces being condiments; Ice Cream; Pasta” are not subject to the refusal.<sup>3</sup>

Applicant and the Examining Attorney have filed briefs and this appeal is ready for final decision. We affirm the refusal to register.

### **I. Applicable Law**

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence

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following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant’s appeal brief appears at 4 TTABVUE and the Examining Attorney’s brief appears at 6 TTABVUE. Citations to the application record are to the downloadable .pdf version of the United States Patent and Trademark Office’s Trademark Status & Document Retrieval (“TSDR”) system.

<sup>2</sup> Reg. No. 6052745, issued May 12, 2020.

<sup>3</sup> 6 TTABVUE 7 (Examining Attorney Brief) (Noting that the refusal “does not bar registration for the goods ‘Ketchup and Sauces being condiments; Ice Cream; Pasta’ in Class 30.”).

and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). “Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). When analyzing these factors, the overriding concerns are not only to prevent buyer confusion as to the source of the goods or services, but also to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *Shell Oil*, 26 USPQ2d at 1688 (“the various evidentiary factors may play more or less weighty roles in any particular determination”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *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.”).

## **II. Likelihood of Confusion – Analysis**

### **A. Similarity of the Marks**

To evaluate the similarity of the marks, we consider the marks in their entireties as to appearance, sound, connotation and commercial impression. *See, e.g., Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (citing *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d per curiam*, 777 F. App’x 516 (Fed. Cir. 2019). *Accord, Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

“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 marks.” *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018).

Applicant argues, “[w]hen compared side-by-side, the marks are distinct. They are spelled differently, and Registrant’s mark contain multiple different words rather than Applicant’s single word.”<sup>4</sup> However, a side-by-side comparison is not the proper test, and Applicant’s arguments that the marks are “entirely distinct in terms of appearance, connotation, and overall commercial impression” are not supported by the record.<sup>5</sup>

With the guidelines recited above in mind, we begin with the cited mark CROCO BERRY CRUNCH. What parts of this mark are most likely to be remembered by consumers in forming their general impression of it? What parts of the mark are most distinctive, and thus, most likely to relied upon as source identifiers? These are the questions we need to resolve to determine how consumers react to and remember the cited mark.

This mark is used with “breakfast cereal” and the word “BERRY” is disclaimed. We take this disclaimer as evidence that the cereal has a berry flavor or berries of some sort. The following word in the mark, “CRUNCH,” is not disclaimed, but when used with the disclaimed “BERRY,” these two words work together to describe a berry-flavored and crunchy breakfast cereal.<sup>6</sup> These observations show that the final

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> “Crunch,” as a noun, means, among other things, “the quality of being crunchy: the tendency to make a crunching sound when chewed or pressed.” MERRIAM-WEBSTER DICTIONARY (2024) (<https://www.merriam-webster.com/dictionary/crunch>) (last visited April 18, 2024). *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013) (The Board may take judicial notice of dictionary definitions, including definitions in online dictionaries which exist in printed format or that have regular fixed editions.).

two words of the cited mark “BERRY CRUNCH” are likely non-distinctive elements that tell consumers something about the breakfast cereal itself, rather than about its source.

Our analysis leads to the conclusion that “CROCO,” the first word of the cited mark, is clearly the dominant element. We have found in other contexts that the first element of a mark is often dominant, and that is true here. *See, e.g., Presto Prods., Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”).

In addition to its position of prominence in the mark, the CROCO element is the only distinctive part of the mark. In contrast to the descriptive nature of the “BERRY CRUNCH” part of the mark, there is no apparent meaning of the word CROCO, as used with a breakfast cereal. Being an arbitrary term, and used as the first element of the mark, CROCO is the key source-identifying element of the cited mark. While a consumer might recall buying a “BERRY CRUNCH” cereal, that information alone may not help the consumer distinguish the source of one berry crunch cereal product from another. For these reasons, we give greater weight to the CROCO element of the cited mark in our comparison of the marks in their entireties.

Applicant’s mark, CROKO, is visually similar to CROCO, the dominant element of the cited mark. When a consumer familiar with the CROCO BERRY CRUNCH mark for breakfast cereals views, separately, cookies or chocolate candy bearing the CROKO mark, the likely mental connection will be to the CROCO mark, which is

quite similar in appearance to CROKO. It is in this way that these marks are visually similar. In a side-by-side comparison, the marks are distinguishable visually, but the “marks must be considered . . . in light of the fallibility of memory’ and ‘not on the basis of side-by-side comparison.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977)). And in the mind of a typical consumer with a general rather than specific impression of the cited mark, the more likely comparison will be CROCO and CROKO.

As to sound, there is no “correct” pronunciation of a mark such as CROCO that is not a recognized word in the English language, *see, e.g., StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1651 (Fed. Cir. 2014), so we consider all reasonable possibilities for its pronunciation. *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 n.19 (TTAB 2014). Here, the dominant CROCO element of the cited mark may be pronounced in a manner that makes it identical in sound to Applicant’s CROKO mark. CROCO could be pronounced with a hard “c” (i.e., a “c” that sounds like a “k”) at both the start of the word and at the start of the second syllable of the word, as in the word “crocodile,” or it could be pronounced using a soft “c” (i.e., a “c” that sounds like an “s”) at the start of the second syllable.<sup>7</sup> Having considered the possible pronunciations of CROCO, its pronunciation in a manner that

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<sup>7</sup> *See, e.g.,* Final Office Action dated May 9, 2023, at 69-72 (providing a pronunciation guide to the hard and soft “c” uses).

makes it phonetically identical to CROKO supports a finding of likely confusion between the marks. *See Krim- Ko Corp.*, 156 USPQ at 526

We note, too, that Applicant acknowledged “the phonetic similarity between Applicant’s mark and the first word in Registrant’s mark,” while arguing that the marks, in their entirety, are not similar.<sup>8</sup> This argument is effectively an admission that the CROCO element of the cited mark is pronounced in the manner we described above. If not, there would be no “phonetic similarity.” Applicant’s argument, therefore, confirms that its mark may sound identical to the dominant CROCO element of the cited mark.

While we find the marks are similar in appearance and sound, we lack evidence concerning the meanings of these marks or the commercial impressions they create. The CROCO element of the cited mark appears to be an undefined, arbitrary term, as does the entire CROKO mark of Applicant. We have no meanings to compare and we have no evidence of use of either mark in the record, which limits our ability to determine what sort of connotation the marks will create. That does not mean the marks will have different meanings or that the marks will create different commercial impressions. We simply lack an evidentiary basis to say anything more about these aspects of our typical similarity analysis.<sup>9</sup>

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<sup>8</sup> 4 TTABVUE 4.

<sup>9</sup> The similarity in appearance and sound suggests the marks may create a similar commercial impression. We have no evidence to show otherwise, but given our separate findings on the similarity of appearance and sound, it would add little to our analysis to say these findings mean the commercial impressions are also similar.



“Similarity is not a binary factor but is a matter of degree.” *KME Ger. GmbH v. Zhe Jiang Hailiang Co.*, 2023 USPQ2d 1136, at \*8 (TTAB 2023) (quoting *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (internal quotation omitted)). To summarize, the marks are similar in appearance and sound, but we make no findings concerning similarity in meaning. There are differences in these marks, but we find the similarities, particularly when the marks are spoken, are more likely to impact consumer perception and recollection than the differences. As noted above, similarity in any means of comparison may be sufficient to find that marks are similar, and, on balance, the CROCO BERRY CRUNCH and CROKO marks are more similar than dissimilar, so the first *DuPont* factor weighs in favor of likelihood of confusion.

### **B. Similarity of the Goods**

Our evaluation of the second *DuPont* factor is based on the goods identified in the Application and the cited Registration. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). A likelihood of confusion may be found if any goods recited in the identification of goods in a particular class in an application are related to any of the goods identified in a cited registration. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *see also Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at \*6 (TTAB 2019); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015). In addition, the goods need only be sufficiently related that a

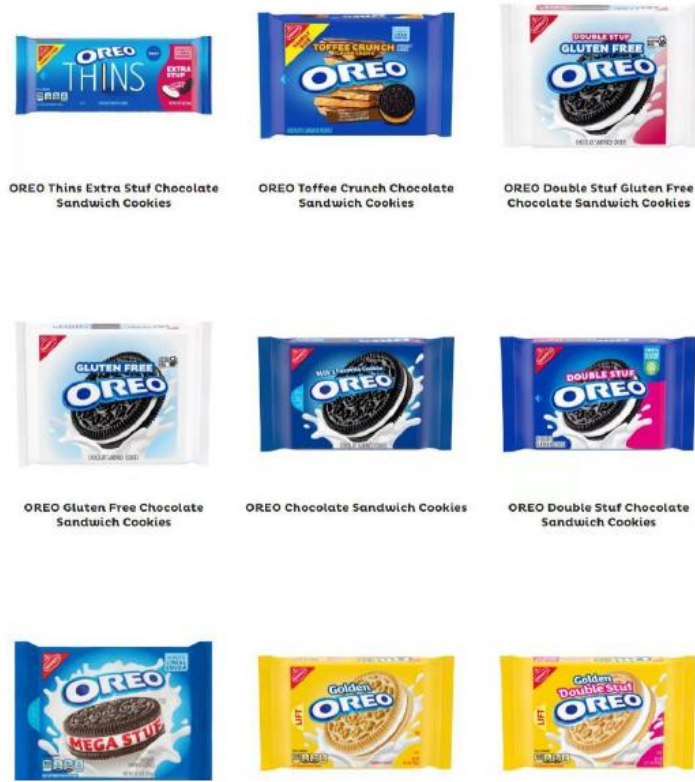
consumer would be likely to assume, upon encountering the goods marketed under the marks at issue, that the goods originate from, are sponsored or authorized by, or are otherwise connected to the same source. *See Black & Decker Corp. v. Emerson Elec. Co.*, 84 USPQ2d 1482, 1492 (TTAB 2007).

The cited Registration identifies “breakfast cereals” in International Class 30, while the following goods identified in the Application are subject to this refusal: “Chocolates and Chocolate Confectionery Products, namely, snack foods being chocolate, candy; Biscuits; cookies” in International Class 30. The goods are different, but, as noted above, the question is whether there is something about the goods that would lead consumers to believe they originate from the same source when sold under the same or similar marks.

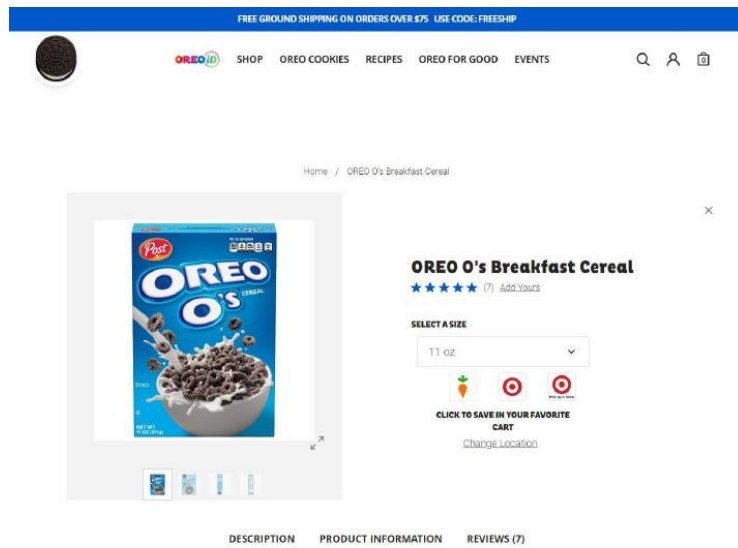
The Examining Attorney submitted evidence showing that several brands are used with both breakfast cereals, on the one hand, and cookies, candies, or snack bars, on the other.<sup>10</sup> For example, there is evidence showing the OREO mark used with both cookies and breakfast cereal, as shown below.

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<sup>10</sup> Office Action dated Mar. 23, 2023, at 9-68; Final Office Action dated May 9, 2023, at 8-61.



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<sup>11</sup> Office Action dated March 23, 2023, at 55.

<sup>12</sup> *Id.* at 51.

This evidence shows the mark used on cookies (i.e., goods identified in the Application) and breakfast cereal (i.e., goods identified in the cited Registration). There is other evidence showing the KETO FRIENDLY mark is also used with both breakfast cereal and snack bars.<sup>13</sup> Other evidence in the record shows the marks CADIA, BACKPACKER'S PANTRY, and HILLSIDE LANE FARM are used with both breakfast cereals and cookies or snack bars.<sup>14</sup>

Applicant does not challenge this evidence. Indeed, Applicant acknowledges that the record includes “evidence from third parties that the same entity commonly manufactures or produces Registrant’s and Applicant’s goods and thus the goods are related for likelihood of confusion purposes.”<sup>15</sup> Despite the record evidence, and the fact that Applicant submitted no evidence, Applicant concludes that “the goods simply are not related.”<sup>16</sup> We cannot, however, ignore the record and enter findings “simply” because Applicant says so. Attorney argument only goes so far. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018); *Martahus v. Video Duplication Servs. Inc.*, 3 F.3d 417, 27 USPQ2d 1846, 1849 (Fed. Cir. 1993) (“[M]ere attorney arguments unsubstantiated by record evidence are suspect at best.”).

The evidence shows that the goods are related in a way that would lead consumers to believe some of Applicant’s goods come from the same source as Registrant’s goods.

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<sup>13</sup> *Id.* at 36 (breakfast cereal), 47-48 (snack bars).

<sup>14</sup> *Id.* at 24-34 (Cadia), 39-45 (Backpacker’s Pantry), 59-68 (Hillside Lane Farm).

<sup>15</sup> 4 TTABVUE 6.

<sup>16</sup> *Id.*

The second *DuPont* factor, therefore, weighs in favor of a finding of likelihood of confusion.

### **III. Conclusion: Weighing the Factors**

The marks are similar and the goods are related. The first two *DuPont* factors push the scale decidedly toward a likelihood of confusion. No other factors were addressed by Applicant or the Examining Attorney. Confusion is likely.

**Decision:** The Section 2(d) refusal is **affirmed** as to the following goods: “Chocolates and Chocolate Confectionery Products, namely, snack foods being chocolate, candy; Biscuits; cookies.” Those goods shall be stricken from the Application. Consequently, the Application shall proceed to publication with the following goods: “Ketchup and Sauces being condiments; Ice Cream; Pasta.”