UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 76/537780

APPLICANT: Brown Cow West Corporation

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MARK: BROWN COW

CORRESPONDENT'S REFERENCE/DOCKET NO: B0022/2000

CORRESPONDENT EMAIL ADDRESS:

Please provide in all correspondence:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address..

Serial Number 76/537780

Case Status
The Office has reassigned this application to the undersigned trademark examining attorney.

Applicant is requesting reconsideration of a final refusal dated October 29, 2004.

Applicant's amendment to the identification of goods is acceptable, and made of record.

The trademark examining attorney has carefully reviewed the request for reconsideration and is not persuaded by applicant's arguments. No new issue has been raised and no new compelling evidence has been presented with regard to the point(s) at issue in the final action. TMEP §715.03(a). Accordingly, applicant's request for reconsideration is denied and the refusal for likelihood of confusion with the marks in U.S. Registration Nos. 2036725 and 0294715 is **continued**. 37 C.F.R. §2.64(b); TMEP §715.04.

The application file will be returned to the Trademark Trial and Appeal Board for resumption of the appeal.

Refusal: Likelihood of Confusion
Registration of the proposed mark was refused because of a likelihood of confusion with the marks in U.S. Registration Nos. 2036725 and 0294715. Trademark Act Section 2(d), 15 U.S.C. §1052(d); TMEP §§1207.01 *et seq.*

A likelihood of confusion determination requires a two-part analysis. First the marks are compared for similarities in appearance, sound, connotation and commercial impression. *In re E. I. DuPont de*

Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Second, the goods or services are compared to determine whether they are similar or related or whether the activities surrounding their marketing are such that confusion as to origin is likely. *In re August Storck KG,* 218 USPQ 823 (TTAB 1983); *In re Int'l Tel. and Tel. Corp.*, 197 USPQ 910 (TTAB 1978); *Guardian Prods. Co., v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); TMEP §§1207.01 *et seq.*

Trademark Act Section 2(d) bars registration where an applied-for mark so resembles a registered mark that it is likely, when applied to the goods and/or services, to cause confusion, mistake or to deceive the potential consumer as to the source of the goods and/or services. TMEP §1207.01. The Court in *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973), listed the principal factors to consider in determining whether there is a likelihood of confusion. Among these factors are the similarity of the marks as to appearance, sound, meaning and commercial impression, and the relatedness of the goods and/or services. The overriding concern is to prevent buyer confusion as to the source of the goods and/or services. *Miss Universe, Inc. v. Miss Teen U.S.A., Inc.*, 209 USPQ 698 (N.D. Ga. 1980). Therefore, any doubt as to the existence of a likelihood of confusion must be resolved in favor of the registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); *Lone Star Mfg. Co. v. Bill Beasley, Inc.*, 498 F.2d 906, 182 USPQ 368 (C.C.P.A. 1974).

When a mark consists of a word portion and a design portion, the word portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods or services. Therefore, the word portion is controlling in determining likelihood of confusion. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987); *Amoco Oil Co. v. Amerco, Inc.*, 192 USPQ 729 (TTAB 1976); TMEP §1207.01(c)(ii).

Registration of a mark in typed or standard character form means that the mark may be displayed in any lettering style. 37 C.F.R. §2.52(a). The rights associated with a mark in typed or standard character form reside in the wording itself, and registrant is free to adopt any style of lettering, including lettering identical to that used by applicant. Therefore, applicant's presentation of its mark in special form will not avoid likelihood of confusion with a mark that is registered in typed or standard character form because the marks presumably could be used in the same manner of display. *See In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012 (TTAB 1988); *Sunnen Prods. Co. v. Sunex Int'l Inc.*, 1 USPQ2d 1744, 1747 (TTAB 1987); *In re Hester Indus., Inc.*, 231 USPQ 881, 882, n.6 (TTAB 1986); *United Rum Merchants, Ltd. V. Fregal, Inc.*, 216 USPQ 217 (TTAB 1982); *Frances Denney, Inc. v. Vive Parfums, Ltd.*, 190 USPQ 302 (TTAB 1976); *See also* TMEP §1207.01(c)(iii).

The goods and/or services of the parties need not be identical or directly competitive to find a likelihood of confusion. Instead, they need only be related in some manner, or the conditions surrounding their marketing be such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods and/or services come from a common source. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984); *Guardian Prods. Co., Inc. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); *In re Int'l Tel. & Tel. Corp.*, 197 USPQ 910 (TTAB 1978); TMEP §1207.01(a)(i).

A determination of whether there is a likelihood of confusion is made solely on the basis of the goods and/or services identified in the application and registration, without limitations or restrictions that are not reflected therein. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999). If the cited registration describes the goods and/or services broadly and there are no limitations as to their nature, type, channels of trade or classes of purchasers, then it is presumed that the registration encompasses all

goods and/or services of the type described, that they move in all normal channels of trade, and that they are available to all potential customers. *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992); *In re Elbaum*, 211 USPQ 639 (TTAB 1981); TMEP §1207.01(a)(iii).

Any doubt regarding a likelihood of confusion is resolved in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); TMEP §§1207.01(d)(i).

The applicant has applied to register the mark BROWN COW for the goods (as amended) or yogurt and yogurt beverages, not including frozen yogurt or frozen confections. The marks BROWN COW in standard character form and BROWN COW in stylized writing with a design of a cow's head in each letter "O", are already registered to DTMC, Inc. under U.S. Registration Nos. 2036725 and 0294715, respectively, for the goods frozen confections.
As previously noted, applicant's proposed mark is identical in sound, appearance, and meaning to the mark in U.S. Registration No. 2036725. Applicant's proposed mark is highly similar in sound, appearance, and meaning to the mark in U.S. Registration No. 0294715. Particularly, applicant's standard character mark could be written in the same stylized writing as the registrant's. Thus the marks in this case are identical, and highly similar, respectively, in sound, appearance, and meaning.
The goods in this case are highly related. The goods are all dairy products. In the prior office actions, several registrations were provided showing that yogurt and frozen confections come from the same source and move in the same channels of trade. Several websites are now attached showing that dairy companies make both cultured yogurt and frozen confections. Applicant attempts to distinguish cultured yogurt from frozen yogurt, and exclude registrations with "frozen yogurt" and "frozen confections" as proper channels of trade evidence. Even if these registrations are excluded, the remaining registrations and web sites from dairy companies show that in normal channels of trade, yogurt and frozen confections often come from the same source. In fact, Applicant's evidence of the registrant's use of the mark shows the registrant selling both cultured yogurt and frozen confections. Further, applicant's restriction to the identification excluding frozen yogurt does not affect the normal consumer's perception that dairy products come from a common source.
Applicant additionally argues that applicant's yogurt purchasers are sophisticated purchasers. Where the relevant consumer is comprised of both professionals and the general public, the standard of care when purchasing the goods is equal to that of the least sophisticated purchaser in the class. *Alfacell Corp. v. Anticancer Inc.*, 71 USPQ2d 1301, 1304 (TTAB 2004) (as stated in *KOS Pharmaceuticals Inc., v. Andrx Corp.*, 369 F.3d 700, 70 USPQ2d 1874 (3d Cir. 2004), and citing *Checkpoint Sys., Inc., v. Check Point Software Techs., Inc.*, 269 F.3d 270, 285, 60 USPQ2d 1609, 1617-1618 (3d Cir. 2001)). Though applicant describes its "target" consumer as health conscious, the general consumer also buys yogurt, and is thus the relevant consumer.

Lastly, applicant argues that the registrant actually applies the mark as a branded flavor name, used in conjunction with a house mark. The registration, however, does not limit the mark to a flavor of frozen confections. As noted above, a determination of likelihood of confusion is made solely on the basis of the goods and/or services identified in the application and registration, without limitations or restrictions that are not reflected therein. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999). Thus, applicant's argument is not relevant, and cannot overcome the refusal.

On balance, because the marks are either identical or highly similar in appearance, sound, and meaning, and the goods are highly related, confusion is likely. Thus, applicant's mark must be refused.

For the foregoing reasons, the request for reconsideration is **denied**.

NOTICE: FEE CHANGE

Effective January 31, 2005 and pursuant to the Consolidated Appropriations Act, 2005, Pub. L. 108-447, the following are the fees that will be charged for filing a trademark application:

(1) $325 per international class if filed electronically using the Trademark Electronic Application System (TEAS); or

(2) $375 per international class if filed on paper

These fees will be charged not only when a new application is filed, but also when payments are made to add classes to an existing application. If such payments are submitted with a TEAS response, the fee will be $325 per class, and if such payments are made with a paper response, the fee will be $375 per class.

The new fee requirements will apply to any fees filed on or after January 31, 2005.

NOTICE: TRADEMARK OPERATION RELOCATION

The Trademark Operation has relocated to Alexandria, Virginia. Effective October 4, 2004, all Trademark-related paper mail (except documents sent to the Assignment Services Division for recordation, certain documents filed under the Madrid Protocol, and requests for copies of trademark documents) must be sent to:

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Applicants, attorneys and other Trademark customers are strongly encouraged to correspond with the USPTO online via the Trademark Electronic Application System (TEAS), at http://www.uspto.gov/teas/index.html.

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