

THIS DECISION IS NOT A
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Torn & Glasser, Inc.

Serial No. 78967139
Filed: September 5, 2006

Christine Meis McAuliffe, Holme Roberts & Owen LLP for Torn & Glasser, Inc.

Kevon L. Chisolm, Trademark Examining Attorney, Law Office
103, Michael Hamilton, Managing Attorney.

**Before Holtzman, Mermelstein, and Bergsman, Administrative
Trademark Judges.**

Opinion by Mermelstein, Administrative Trademark Judge:

Applicant seeks registration of the mark ISLAND TROPICAL (in standard characters) for "fruit-based snack food; snack mix consisting primarily of processed fruits, processed nuts and/or raisins."¹

The examining attorney has refused registration, having determined that registration of applicant's mark would lead to a likelihood of confusion in view of the prior

¹ Based on an allegation of first use and use in commerce as of August 1, 2000. In response to the Examining Attorney's requirement for a disclaimer of TROPICAL, applicant submitted a claim of acquired distinctiveness as to the word TROPICAL, pursuant to Trademark Act § 2(f). The examining attorney

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registration of the mark TROPICAL ISLAND BLAST (in standard characters) for "fruit based snack food, namely, dried fruit mix,"² pursuant to Trademark Act § 2(d); 15 U.S.C.

§ 1052(d). Applicant appeals from the examining attorney's final refusal.

We affirm.

I. Applicable Law

Our determination under Trademark Act § 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. See *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); see also *Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d

accepted applicant's § 2(f) claim and withdrew the requirement for a disclaimer.

² Registration No. 3382922, issued February 12, 2008.

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1098, 192 USPQ 24, 29 (CCPA 1976); *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

II. Preliminary Matters

The Examining Attorney objected to consideration of the nine exhibits attached to applicant's main brief as untimely.³ Ex. Att. Br. at 3. The Examining Attorney's objection is overruled with respect to Exhibits 1-8, because this matter had all been submitted prior to appeal or in connection with applicant's request for reconsideration. Exhibit 9, however, was not previously submitted, and will not be considered.⁴ Trademark Rule 2.142(d) ("The record in the application should be complete prior to the filing of an appeal."). "[W]e will not consider evidence that has been submitted for the first time with applicant's brief." *In re wTe Corp.*, 87 USPQ2d 1536, 1537 n.2 (TTAB 2008).

In addition, applicant attached to its reply brief a list of purported registrations comprising the words

³ We have remarked previously on the futility of attaching evidence to Board briefs. *Syngenta Crop Protection Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1116 (TTAB 2009) (attachments to briefs will usually be ignored because they are generally either untimely new evidence or unnecessary copies of previously-submitted evidence). This is just as true in the *ex parte* context as it was in *Syngenta*.

⁴ Exhibit 9 is an unsigned copy of a draft consent agreement between applicant and the cited registrant. But even if it were considered, an unsigned agreement is of no probative value.

"tropical," "island," or "blast." This information will not be considered because it was neither previously submitted during examination, nor did the examining attorney have an opportunity to respond to it.⁵

III. Discussion

A. Similarity of the Goods; Channels of Trade and Class of Consumers

Applicant's goods are identified as "fruit-based snack food; snack mix consisting primarily of processed fruits, processed nuts and/or raisins." The goods in the cited registration are "fruit based snack food, namely, dried fruit mix." Applicant's "fruit-based snack food" clearly encompasses the cited registrant's "fruit based snack food, namely, dried fruit mix," and to that extent, the identified goods are legally identical. Moreover, applicant's more narrowly-identified "snack mix consisting primarily of processed fruits, processed nuts and/or raisins," appears to be highly similar, if not legally identical, to the registrant's goods.

⁵ In addition to being untimely, applicant's list of registrations is not sufficient to make the listed registrations of record. *In re Duofold, Inc.*, 184 USPQ 638, 640 (TTAB 1974). But even if considered at face value, a list of registrations without the corresponding goods is of little use in a likelihood of confusion analysis. *Nat'l Fidelity Life Ins. v. Nat'l Ins. Trust*, 199 USPQ 691, 694 n.5 (TTAB 1978) (list of registrations without goods and services and other relevant information "has no probative value").

Applicant does not specifically address the similarity of the goods in its brief, although the issue appears to be subsumed in its argument regarding its consumers and channels of trade. App. Br. at 6-7. Applicant argues that

Registrant and Applicant's *actual* consumer base and channels of trade in which the goods move are completely different. Registrant sells "80 calorie" "snack fruits" ... for individual consumer or family consumption. Applicant sells its product in bulk, to large consumers, such as corporate entities, restaurants, schools, or other retail establishments.

App. Br. at 6 (emphasis added).

The problem with applicant's argument is that this proceeding concerns applicant's right to registration of a trademark, not applicant's actual trademark use.⁶ Because the scope of the registration applicant seeks is defined by its application (and not by its actual use) it is the application (and not actual use) that we must look to in determining applicant's right to register:

The 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 sales of the goods are directed.

Octocom Syst. Inc. v. Houston Computers Svcs. Inc., 918

⁶ The cases cited in support of applicant's argument all concern infringement, not registration, and are thus inapposite here.

F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Likewise, in considering the scope of the cited registration, we look to the registration itself, and not to extrinsic evidence about the registrant's actual goods, customers, or channels of trade. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981), *citing Kalart Co., Inc. v. Camera-Mart, Inc.*, 119 USPQ 139 (CCPA 1958).⁷ Consequently, the goods set out in the cited registration are clearly not limited to those sold in "'80 calorie' [packets] for

⁷ Applicant complains that in support of the proposition that "registrability hinges on a comparison of Applicant's goods as described in the application with the goods described on the face of the registration," the "Examining Attorney cites only to precedent from over 25 years ago..." Reply Br. at 7 (emphasis in original). We assure applicant that the cases cited by the Examining Attorney (and those cited herein) are still good law, and that the stated principle remains a fundamental tenet of trademark registration practice. See e.g., *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009); see generally, TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") § 1207.01(a)(iii) (6th ed., rev. 2 2010).

In re W.W. Henry Co., 82 USPQ2d 1213 (TTAB 2007), cited by applicant, is not to the contrary. In *Henry*, the Board found that the applicant's goods and those of the cited registrant were not closely related after an analysis of their respective goods *as written in the application and the cited registration*. *Id.* at 1214-15. While in *Henry* we considered applicant's extrinsic evidence to understand the nature of the identified goods, see *In re Trackmobile, Inc.* 15 USPQ2d 1152, 1154 (TTAB 1990), the Board did not consider evidence of the applicant's or registrant's actual use to narrow the scope of the identified goods, their usual channels of trade, or their prospective purchasers, as applicant urges us to do here. See *Trackmobile* at 1153 ("It is clear that in determining the issue of likelihood of confusion in ex parte cases, this Board must compare applicant's goods *as set forth in its application* with the goods *as set forth in the cited registration*."). And unlike the case in *Henry* and *Trackmobile*, we do not need to resort to extrinsic evidence to understand the

individual ... or family consumption," nor are applicant's goods limited to those sold "in bulk, to large consumers." See Reply Br. at 7. Those limitations are not to be found in either the application on appeal or in the cited registration. Contrary to applicant's argument, the identification of applicant's goods and that in the cited registration must be given their ordinary meaning, without any extraneous limitations based on applicant's or the cited registrant's actual business practices.

Further, in the absence of explicit limitations, we must consider both the applicant's and the registrant's consumers and channels of trade to include all of the normal consumers and channels of trade for goods of the type identified. It follows, then, that if the goods are (at least in part) legally identical, then the consumers and channels of trade must likewise be considered (at least in part) legally identical. *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

nature, usual channels of trade, or potential consumers for the goods at issue in this case.

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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").

To be perfectly clear, we do not base our finding on trade channels on the mere fact that both applicant's and registrant's goods are available on the Internet. See App. Br. at 6. We agree with applicant that this is of little, if any, significance. "[T]he mere fact that goods and services may both be advertised and offered through the Internet is not a sufficient basis to find that they are sold through the same channels of trade. The Internet is such a pervasive medium that virtually everything is advertised and sold through the Internet." *Parfums de Coeur Ltd. v. Lazarus*, 83 USPQ2d 1012, 1021 (TTAB 2007). But in this case, neither applicant's nor registrant's channels of trade are limited to the Internet - or to any other particular channel of trade. Both must therefore be construed to also include all other channels through which such goods normally travel; and since the goods are identical, those channels of trade must likewise be considered to be identical, at least in part.

Applicant and the cited registrant share identical and closely related goods, as well as overlapping customers and channels of trade. These factors all favor a finding of a likelihood of confusion.

B. The Similarity or Dissimilarity of the Marks in Their Entireties

In a likelihood of confusion analysis, we compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay*, 73 USPQ2d at 1692. "[T]he 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 offered under the respective marks is likely to result." *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1727 (TTAB 2008). In comparing the marks, we keep in mind that "[w]hen marks would appear on virtually identical goods..., as is the case here, the degree of similarity necessary to support a conclusion of likely confusion declines." *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010), citing *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Applicant contends that the marks create significantly different commercial impressions, arguing that "the difference in appearance of the two marks would be easily recognizable," that the registrant's "mark consists of the dominant term BLAST at the end," that the marks sound different, and that the marks differ in meaning.⁸ App. Br. at 3-4.

Applicant's mark is ISLAND TROPICAL, while the cited registrant's mark is TROPICAL ISLAND BLAST. The similarities between the marks are readily apparent; both comprise the same two first words ("ISLAND" and "TROPICAL"). It is also clear that the marks are not identical - the first two words in the marks are

⁸ As to the difference in meaning, applicant urges that its

ISLAND TROPICAL is one of the two TROPICAL marks in Applicant's family of TROPICAL products. ... Thus, instead of using "tropical" as a descriptor of "island," resulting in the commonly recognized place, "tropical island," ISLAND is used as a descriptor of Applicant's co-existing TROPICAL brand of fruit snacks, resulting in a variation of TROPICAL.

App. Br. at 4.

The evidence does not support applicant's assertion of a family of TROPICAL marks. But even if it did, the family of marks doctrine is of no use to an applicant seeking to overcome a § 2(d) refusal. *In re Cynosure Inc.*, 90 USPQ2d 1644, 1645-46 (TTAB 2009) (citing *In re Lar Mor Int'l, Inc.*, 221 USPQ 180 (TTAB 1983); *In re Ald, Inc.*, 148 USPQ 520, 521 (TTAB 1965) ("the fact that applicant may possess a 'family' of marks ... is of no particular significance"); *In re U.S. Plywood-Champion Papers, Inc.*, 175 USPQ 445, 446 (TTAB 1972)). See also *Hornblower & Weeks Inc. v. Hornblower & Weeks Inc.*, 60 USPQ2d 1733, 1736-37

transposed, and the registrant's mark includes the final word "BLAST," which applicant considers to be the dominant part of the cited registrant's mark. App. Br. at 5; Reply Br. at 6.

We do not agree with applicant that the term "BLAST" dominates the cited registrant's mark. First, it is often the case that the last part of a mark is less influential in forming a commercial impression than the first part. 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.").

Second, it seems to us that the term "BLAST" is somewhat suggestive as used in this context. In this regard, we note the following definition of "BLAST":

blast

- n

9. *slang* (US) a very enjoyable or thrilling experience: *the party was a blast*

COLLINS ENGLISH DICTIONARY - COMPLETE & UNABRIDGED (10th ed.) (online at dictionary.reference.com (Oct. 18, 2010)).⁹ The term

(TTAB 2001) (the "family of marks argument can be used offensively as a sword but not defensively as a shield").

⁹ 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

"BLAST" in the registrant's mark thus appears to be used as an intensifier, suggesting that consumption of registrant's goods is "a very enjoyable or thrilling experience."

The appropriate perspective for considering marks under Trademark Act § 2(d) is not that of a side-by-side comparison. *Puma-Sportschuhfabriken Rudolf Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255, 259 (TTAB 1980) (under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections). Further, as we have held before, the transposition of terms is not always sufficient to distinguish the resulting marks. See *In re Wine Society of America Inc.*, 12 USPQ2d 1139, 1142 (TTAB 1989); *In re Nationwide Industries Inc.*, 6 USPQ2d 1882 (TTAB 1988) ("the reversal in one mark of the essential elements of another mark may serve as a basis for a finding of no likelihood of confusion only if the transposed marks create distinctly different commercial impressions" (citations omitted)).

format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

While we readily acknowledge that the cited definition is not the first listed sense of the word, it is nonetheless the definition that most clearly applies to the identified goods. We think it highly unlikely that a potential consumer of "dried fruit mix" would associate the term "BLAST" in the registrant's mark with, for instance, a physical "explosion," or "a sudden loud sound."

Applicant attempts to distinguish its ISLAND TROPICAL mark from the TROPICAL ISLAND portion of the registrant's mark. The terms may have a slightly different connotation - TROPICAL ISLAND suggests a product from (or having some connection with) a tropical island, while ISLAND TROPICAL implies a product with a "tropical" characteristic¹⁰ coming from an island. But we think this is a very fine distinction at best, and that the likely commercial impressions of the mark are essentially the same. This is particularly so in light of the goods at issue here, which are likely to be purchased without extensive consideration.

Applicant points to the existence of several third-party registrations for other marks (e.g., TROPICAL BLAST for blended fruit drinks) which coexist with the cited registration, and several (e.g., ISLAND OASIS, SMOOTHIES ISLAND OASIS, and SMOOTHIE ISLAND) which coexist with each other, and concludes that the examining attorney's "argument ... appears contrary to Trademark Office precedent in how it views similarity in appearance of marks as relevant to refusals for likelihood of confusion." App. Br. at 4-5.

¹⁰ In this regard, we note that applicant submitted a claim of acquired distinctiveness with respect to "TROPICAL" in light of the examining attorney's evidence tending to show that the term is descriptive of foods featuring tropical fruit or tropical fruit flavors.

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To the contrary, our task is to determine whether there is a likelihood of confusion between applicant's mark and the mark in the registration cited by the examining attorney as a bar to registration. We need not justify or explain the registration of other marks (for other goods or services) which are not before us. The decisions of examining attorneys in approving such marks for registration are not "precedent" which the Board must follow. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("[T]he Board ... must assess each mark on the record of public perception submitted with the application. Accordingly, this court finds little persuasive value in the registrations that [applicant] submitted to the examiner or in the list of registered marks [applicant] attempted to submit to the Board."). Indeed, even if the registration of some or all of the third party marks might be characterized as error - a conclusion we need not and do not reach - "such errors do not bind the USPTO to improperly register Applicant's mark[]." *In re Shinnecock Smoke Shop*, 571 F.2d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (citing *In re Boulevard Entm't*, 334 F.3d 1336, 67 USPQ2d 1475, 1480 (Fed. Cir. 2003)).

Finally, we note applicant's argument that confusion is unlikely because both it and the cited registrant "display their house marks in conjunction with their [applied-for and registered] marks."¹¹ Reply Br. at 4. It is well-settled that this is an irrelevant consideration. Neither applicant's nor registrant's house mark is included in its application or registration, and neither applicant nor the cited registrant is required to use its house mark along with its applied-for or registered mark. "In determining the applicant's right to registration, only the mark as set forth in the application may be considered; whether or not the mark is used with an associated house mark is not controlling. Therefore the likelihood of confusion must be determined by a comparison of the marks themselves." *Frances Denney v. Elizabeth Arden Sales Corp.*, 263 F.2d 347, 120 USPQ 480, 481 (CCPA 1959) (citations omitted); *In re Microsoft Corp.*, 68 USPQ2d 1195, 1198-99 (TTAB 2003); *Interstate Brands Corp. v. McKee Foods*

¹¹ Applicant supports this conclusion by pointing to the specimens submitted by both it and the cited registrant. While a specimen may be one example of how an applicant is using its mark in commerce at the time the specimen is submitted, we must instead look to the drawing in the registration or application to determine what is registered or sought to be registered. The purpose of a specimen is to demonstrate that an applicant is using the applied-for mark in commerce as a trademark. See *Century 21 Real Estate Corp. v. Century Life of Am.*, 10 USPQ2d 2034, 2035 (TTAB 1989). But the mark which is covered by a

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Corp., 53 USPQ2d 1910, 1914-15 (TTAB 2000). We cannot distinguish the marks on the basis of matter that does not appear in either of them.¹²

Although applicant's mark is not identical to that in the cited registration, we find that the differences between them are outweighed by their similarities. The marks begin with the same two words and share very similar commercial impressions. Although the mark in the cited registration includes an additional term, that term appears at the end of the mark and is somewhat suggestive of the goods. As a result, it is unlikely to provide a significant distinction between them. To the extent that consumers notice the term BLAST in the cited registrant's mark (or its absence in applicant's), or otherwise distinguish the marks, they are likely to assume that the associated products are variations originating from the same source. *In re West Point-Pepperell, Inc.*, 468 F.2d

registration is not limited to the particular display or trade dress depicted on the specimens of record.

¹² *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282 (TTAB 2009), cited by applicant, is inapposite. In that case we held that "it would not be reasonable to assume that applicant's ... mark would be presented with the design element *appearing in registrant's mark.*" *Id.* at 1284 (emphasis added). As is clear from the quotation, in *White Rock*, we distinguished the marks on the basis of a design element which was a part of the registrant's mark but not that of the applicant. By contrast, the allegedly distinguishing matter in this case (applicant's and registrant's respective house marks) is not part of *either* mark as registered or applied for.

200, 175 USPQ 558, 559 (CCPA 1972) ("The issue under § 2(d) is not whether people will confuse the marks but whether the marks will confuse people." (citation omitted)). This factor supports the refusal to register.

D. Actual Confusion

Applicant makes much of the fact that "[d]espite over three years of simultaneous use, Applicant is not aware of a single instance of actual confusion between Applicant's mark and Registrant's mark." App. Br. at 7; Reply Br. at 8. But as noted by the Examining Attorney, Ex. Att. Br. at 5, this argument is misplaced:

[A]pplicant's assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an *ex parte* proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and the registrant has no chance to be heard from.... Moreover, the test under Section 2(d) is not actual confusion but likelihood of confusion.

In re Kangaroos U.S.A., 223 USPQ 1025, 1026-1027 (TTAB 1984) (citations omitted); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) ("The lack of evidence of actual confusion carries little weight, especially in an *ex parte* context." (citation omitted)).

Here, applicant admits to a relatively short period (three years) of concurrent use, the record does not indicate the volume or geographical scope of either applicant's use or that of the cited registrant, and the record is silent as to any knowledge of actual confusion that may be possessed by the registrant.¹³ On this record, we are unable to conclude that the lack of evidence of actual confusion has any significance at all. *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1202 (TTAB 2007). We accordingly consider this factor neutral in our analysis.

E. Potential Consent Agreement

Applicant complains that it is seeking the cited registrant's consent to registration of the subject mark, and that "at a minimum, the Examining Attorney should have suspended the disposition of this application for a sufficient period of time to allow that [sic] affected parties to complete negotiations and execute a consent to register...." Reply Br. at 8. No such agreement has been

¹³ Even under more compelling circumstances, evidence of actual confusion is notoriously difficult to come by, and reliance on the lack of such evidence is questionable. Purchaser confusion most often comes to light through customer complaints. But if both products are of reasonable quality, confused customers are unlikely to complain. And even when customers are disappointed, purchasers will often simply stop purchasing the item rather than take the time to complain.

submitted.¹⁴

While an *agreement* by the cited registrant consenting to applicant's registration would indeed be entitled to "great weight," e.g., *In re Four Seasons Hotels Ltd.*, 987 F.2d 1565, 26 USPQ2d 1071, 1072 (Fed. Cir. 1993); *Bongrain Int'l (Am.) Corp. v. Delice De France, Inc.*, 811 F.2d 1479, 1485, 1 USPQ2d 1775, 1778 (Fed. Cir. 1987), it does not appear on this record that applicant and the prior registrant have reached any agreement. Moreover, the Examining Attorney clearly did not err in failing to suspend action while applicant attempted to secure such consent.¹⁵ "As a general rule, the USPTO will not suspend an application to give an applicant time to secure a consent agreement." TMEP § 716.02. Applicant cites no

¹⁴ Applicant submitted an unsigned draft of a consent agreement between it and the cited registrant as an exhibit to its opening brief. However, we have not considered this exhibit as it was untimely submitted. See *supra* n.3, and accompanying text. But even if it were timely, we would give this document no substantive weight in our likelihood of confusion analysis, because it does not evidence the registrant's consent.

¹⁵ We address here only the examining attorney's "failure" to request suspension of this matter following applicant's appeal. The Board does not exercise supervisory authority over examining attorneys; issues raised during prosecution of an application which do not result in a final requirement or refusal, see Trademark Rule 2.141(a), are not within the jurisdiction of the Board. Relief from a refusal to suspend an application during examination is available - if at all - by way of a timely petition to the Director. See, e.g., Trademark Rule 2.146(a)(3).

reason why the "general rule" should not apply in this case, and we see none.¹⁶

III. Conclusion

We have carefully considered the entire record and the arguments of applicant and the examining attorney. To the extent we have any doubt as to our conclusion, we must resolve such doubt in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

We conclude, in light of the identical and closely related goods at issue, the similar marks, and the overlapping customers and channels of trade, that use of applicant's mark on or in connection with the identified goods is likely to cause confusion with the mark in the cited prior registration.

¹⁶ Applicant argues that it has priority of use over the registrant. If so, applicant might possibly have grounds to seek cancellation of the cited registration (although we express no opinion on the merits of such a claim), and doing so prior to our decision would likely have been good cause for suspension of action on the application or appeal. TMEP § 716.02(a) (suspension of application); TRADEMARK BOARD MANUAL OF PROCEDURE ("TBMP") § 1213 (2d ed. rev. 2004) (suspension of appeal). But applicant has not sought cancellation, and the USPTO's policy is clear that suspension will generally not be granted for mere negotiations with a cited registrant. (Nor will we grant such a suspension after issuance of a final decision. *In re Vycom Elec. Ltd.*, 21 USPQ2d 1799, 1800 (Comm'r 1986)).

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Decision: The refusal to register under Trademark Act § 2(d) is accordingly affirmed.

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