

From: Pollack, Alison

Sent: 12/18/2015 2:29:18 PM

To: TTAB EFiling

CC:

Subject: U.S. TRADEMARK APPLICATION NO. 86430860 - JUDICAKES - 1090-03001 - EXAMINER BRIEF

Attachment Information:

Count: 1

Files: 86430860.doc

UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 86430860

MARK: JUDICAKES



CORRESPONDENT ADDRESS:

KYLE M GLOBERMAN

BRIENT GLOBERMAN LLC

1175 GRIMES BRIDGE ROAD SUITE 100

ROSWELL, GA 30075

GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: JUDICAKES L.L.C.

CORRESPONDENT'S REFERENCE/DOCKET NO:

1090-03001

CORRESPONDENT E-MAIL ADDRESS:

info@brientglobberman.com

EXAMINING ATTORNEY'S APPEAL BRIEF

I. INTRODUCTION

The applicant, JUDICAKES L.L.C., has appealed the trademark examining attorney's refusal to register the proposed mark, "JUDICAKES," on the ground that the mark for which registration is sought so resembles

the mark shown in U.S. Registration No. 3582876 as to be likely, when used on or in connection with the identified goods, to cause confusion, or to cause mistake, or to deceive, pursuant to Trademark Act Section 2(d), 15 U.S.C. §1052(d).

II. FACTS

On October 22, 2014, applicant, JUDICAKES L.L.C. (hereinafter “applicant”), applied for registration on the Principal Register for the proposed standard character mark, “JUDICAKES,” for “Baked goods” in International Class 030.

On November 3, 2014, applicant filed a preliminary amendment, which changed the ownership information.

In an Office action dated February 12, 2015, the trademark examining attorney refused registration on the Principal Register under Trademark Act section 2(d), 15 U.S.C. §1052(d) based on a likelihood of confusion, citing U.S. Registration No. 3582876 for the standard character mark “JUDY’S BREADSTICKS” for “bread, breadsticks, croutons, crackers, cookies, biscotti, and bakery goods” in International Class 030, U.S. Registration No. 2533954 for the design mark “JUDY’S HANDMADE THE OLD FASHION WAY” for “candy” in International Class 030, and U.S. Registration No. 3400138 for the design mark “JUDY’S CANDY COMPANY HANDMADE THE OLD-FASHIONED WAY” for “candy” in International Class 030. U.S. Registration Nos. 2533954 and 3400138 are owned by a single registrant. The trademark examining attorney attached evidence in the form of third-party registrations and Internet website evidence to demonstrate the relatedness of applicant’s and registrants’ goods. In addition, the trademark examining

attorney also required a consent statement, an amendment to the identification of goods, and entity clarification.

In a communication filed on April 14, 2015, applicant filed a preliminary amendment, which changed the ownership information.

In a communication filed on April 17, 2015, applicant contested the grounds for refusal and asserted therein that applicant's mark was not confusingly similar to the registered marks cited by the trademark examining attorney. In addition, applicant satisfied all other requirements.

After careful consideration of applicant's response, in an Office action dated May 1, 2015, the trademark examining attorney, not persuaded by applicant's arguments, made final the refusal to register with respect to U.S. Registration No. 3582876 under Trademark Act Section 2(d), 15 U.S.C. §1052(d).

Additional Internet evidence was attached to further demonstrate the relatedness of applicant's and registrant's goods. In addition, in light of applicant's response and upon further review of the application, the trademark examining attorney determined that U.S. Registration Nos. 2533954 and 3400138 were no longer a bar to registration.

On October 30, 2015, applicant filed a Notice of Appeal with the Trademark Trial and Appeal Board, and on October 30, 2015, applicant timely filed an appeal brief in support of registration.

For the reasons set forth below, the trademark examining attorney respectfully requests that the Trademark Trial and Appeal Board AFFIRM the refusal to register the proposed mark under Trademark Act Section 2(d), 15 U.S.C. §1052(d).

III. ISSUE

The sole issue on appeal is whether applicant's proposed mark "JUDICAKES," when used in connection with "Baked goods, namely, pound cakes" in International Class 030, so resembles registrant's mark "JUDY'S BREADSTICKS" for "bread, breadsticks, croutons, crackers, cookies, biscotti, and bakery goods" in International Class 030, that it is likely to cause confusion, or to cause mistake, or to deceive and thus should be refused registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d).

IV. ARGUMENT

APPLICANT'S AND REGISTRANT'S MARKS ARE HIGHLY SIMILAR IN SOUND, APPEARANCE, CONNOTATION AND COMMERCIAL IMPRESSION AND THE GOODS ARE CLOSELY RELATED SUCH THAT A LIKELIHOOD OF CONFUSION, MISTAKE, OR DECEPTION EXISTS UNDER TRADEMARK ACT SECTION 2(d), 15 U.S.C. §1052(d).

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the goods of the applicant and registrant. See 15 U.S.C. §1052(d). A determination of likelihood of confusion under Section 2(d) is made on a case-by case basis and the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) aid in this determination. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1349, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (citing *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1085, 56 USPQ2d 1471,

1474 (Fed. Cir. 2000)). Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record.

Citigroup Inc. v. Capital City Bank Grp., Inc., 637 F.3d at 1355, 98 USPQ2d at 1260; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see *In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity and nature of the goods, and similarity of the trade channels of the goods. See *In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999); TMEP §§1207.01 *et seq.*

The overriding concern is not only to prevent buyer confusion as to the source of the goods, but 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, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); see *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

(A) APPLICANT'S AND REGISTRANT'S MARKS ARE HIGHLY SIMILAR IN SOUND, APPEARANCE, CONNOTATION AND COMMERCIAL IMPRESSION SUCH THAT A LIKELIHOOD OF CONFUSION, MISTAKE, OR DECEPTION EXISTS UNDER TRADEMARK ACT SECTION 2(d), 15 U.S.C. §1052(d).

In a likelihood of confusion determination, the marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)); TMEP §1207.01(b).

When comparing marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014); TMEP §1207.01(b). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049, (TTAB 2014); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); TMEP §1207.01(b).

In this case, the trademark examining attorney maintains that applicant’s mark, JUDICAKES, is highly similar in sound, appearance, meaning and overall commercial impression to registrant’s mark, JUDY’S BREADSTICKS.

Applicant argues that the marks differ in appearance because applicant's mark is a single word and registrant's mark contains two words. In addition, applicant argues that applicant's mark consists of nine letters while the cited mark consists of 16 letters and one character. This argument is not persuasive. Consumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark. See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *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" when making purchasing decisions). Thus, consumers are more likely to focus on the first syllable or word in the marks, which is identical or nearly identical, rather than the difference in length or additional space.

Applicant argues that registrant's mark contains the possessive word, JUDY'S and applicant's mark contains the non-possessive word JUDI. This argument is not persuasive. The ending of the registered mark includes an apostrophe and letter "s." This additional matter has little, if any, trademark significance and does not otherwise affect the overall similarity of the marks in terms of commercial impression. See *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (noting that "[t]he absence of the possessive form in applicant's mark . . . has little, if any, significance for consumers in distinguishing it from the cited mark"); *In re Curtice-Burns, Inc.*, 231 USPQ 990, 992 (TTAB 1986) (finding the marks MCKENZIE'S and MCKENZIE "virtually identical in commercial impression"); *Winn's Stores, Inc. v. Hi-Lo, Inc.*, 203 USPQ 140, 143 (TTAB 1979) (noting that "little if any trademark significance can be attributed to the apostrophe and the letter 's' in opposer's mark"). In this case, the first word in both marks conveys the same commercial impression, a female given name, JUDY or JUDI.

Applicant argues that applicant's second word is CAKES and registrant's second word is BREADSTICKS. This argument is not persuasive. Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. See *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). Matter that is descriptive of or generic for a party's goods is typically less significant or less dominant in relation to other wording in a mark. See *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1824-25 (TTAB 2015) (citing *In re Chatam Int'l Inc.*, 380 F.3d 1340, 1342-43, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004)). In the present case, the previously attached evidence shows that the wording CAKES in the applied-for mark and BREADSTICKS in the registered mark is merely descriptive of or generic for applicant's and the registrant's goods, which include pound cakes and breadsticks. Thus, this wording is less significant in terms of affecting the mark's commercial impression, and renders the wording JUDI and JUDY'S the more dominant element of the marks.

Applicant argues that marks must be compared in their entireties, and the use of identical, even dominant words in common does not automatically mean the two marks are similar. This argument is not persuasive. Marks must be compared in their entireties and should not be dissected; however, a trademark examining attorney may weigh the individual components of a mark to determine its overall commercial impression. See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1322, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) ("[Regarding the issue of confusion,] there is nothing improper in stating that . . . 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 entireties.") (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985))). In this case, the trademark examining

attorney properly weighed the individual components of the marks because the previously attached Internet evidence demonstrates that the wording CAKES and BREADSTICKS is generic for applicant's and registrant's goods, which renders the first term dominant. In addition, JUDY's and JUDI both convey the same meaning, which is a female given name. Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. *See In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). Greater weight is often given to this dominant feature when determining whether marks are confusingly similar. *See In re Nat'l Data Corp.*, 753 F.2d at 1058, 224 USPQ at 751.

Applicant argues that JUDICAKES differs in sound from JUDY'S BREADSTICKS. Specifically, applicant argues that JUDICAKES is read much quicker and without a pause. This argument is not persuasive. There is no correct pronunciation of a mark because it is impossible to predict how the public will pronounce a particular mark. *See Embarcadero Techs., Inc. v. RStudio, Inc.*, 105 USPQ2d 1825, 1835 (TTAB 2013) (quoting *In re Viterra Inc.*, 671 F.3d 1358, 1367, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012); *In re The Belgrade Shoe Co.*, 411 F.2d 1352, 1353, 162 USPQ 227, 227 (C.C.P.A. 1969)); TMEP §1207.01(b)(iv). The marks in question could clearly be pronounced the same; such similarity in sound alone may be sufficient to support a finding that the marks are confusingly similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *see In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); TMEP §1207.01(b)(iv). In addition, both marks contain the wording JUD plus a vowel sound followed by generic words for applicant's and registrant's bakery goods.

Applicant argues that the marks differ in connotation and commercial impression because the registrant's mark implies that breadsticks belong to Judy or were made by Judy and applicant's mark creates a new word for the product and does not show possession of the product. This argument is not persuasive. Both marks have a similar look and structure because they are comprised of two parts with the first part being the nearly identical word JUDY'S or JUDI and the second part evoking similar meanings for consumers in relation to the goods. The previously attached evidence shows that applicant's additional wording, CAKES, and registrant's additional wording, BREADSTICKS, are not sufficient to prevent confusion between the marks because the wording is generic for applicant's and registrant's baked goods, which are breadsticks and pound cakes. Furthermore, although these additional terms do not sound or look alike, the previously attached evidence shows that the words convey the same overall meaning, which are types of bakery goods. Consumer confusion has been held likely for marks that do not physically sound or look alike but that convey the same idea, stimulate the same mental reaction, or may have the same overall meaning. *Proctor & Gamble Co. v. Conway*, 419 F.2d 1332, 1336, 164 USPQ 301, 304 (C.C.P.A. 1970) (holding MISTER STAIN likely to be confused with MR. CLEAN on competing cleaning products); see *In re M. Serman & Co.*, 223 USPQ 52, 53 (TTAB 1984) (holding CITY WOMAN for ladies' blouses likely to be confused with CITY GIRL for a variety of female clothing); *H. Sichel Sohne, GmbH v. John Gross & Co.*, 204 USPQ 257, 260-61 (TTAB 1979) (holding BLUE NUN for wines likely to be confused with BLUE CHAPEL for the same goods); *Ralston Purina Co. v. Old Ranchers Canning Co.*, 199 USPQ 125, 128 (TTAB 1978) (holding TUNA O' THE FARM for canned chicken likely to be confused with CHICKEN OF THE SEA for canned tuna); *Downtowner Corp. v. Uptowner Inns, Inc.*, 178 USPQ 105, 109 (TTAB 1973) (holding UPTOWNER for motor inn and restaurant services likely to be confused with DOWNTOWNER for the same services); TMEP §1207.01(b).

Applicant argues the marks differ in connotation because applicant's mark is a new word and consumers must make a mental leap to understand applicant's mark. This argument is not persuasive. Marks may be confusingly similar in appearance where similar terms or phrases or similar parts of terms or phrases appear in the compared marks and create a similar overall commercial impression. *See Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689, 690-91 (TTAB 1986), *aff'd sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1495, 1 USPQ2d 1813, 1817 (Fed. Cir. 1987) (finding COMMCASH and COMMUNICASH confusingly similar); *In re Corning Glass Works*, 229 USPQ 65, 66 (TTAB 1985) (finding CONFIRM and CONFIRMCELLS confusingly similar); *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983) (finding MILTRON and MILLTRONICS confusingly similar); TMEP §1207.01(b)(ii)-(iii). In this case, both marks consist of the first word being the female given name JUDI or JUDY and the second word being a bakery product.

Applicant rejects the examining attorney's reliance on *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009), because the cited mark in that case consisted of two words and the applied-for mark consisted of one word, which is distinguished from the present facts. This argument is not persuasive. The examining attorney relied on *In re Binion* because the registrant's mark contained additional wording, but the court focused on the first word in the mark since the second was descriptive. *Id.* Furthermore, in *Winn's Stores, Inc. v. Hi-Lo, Inc.*, 203 USPQ 140, 143 (TTAB 1979), the applicant's mark featured additional descriptive wording. In this case, the previously attached Internet evidence demonstrates that the wording CAKES and BREADSTICKS is generic for applicant's and registrant's goods, which renders JUDI and JUDY'S the dominant elements of the marks.

(B) APPLICANT'S AND REGISTRANT'S GOODS ARE CLOSELY RELATED SUCH THAT A LIKELIHOOD OF CONFUSION, MISTAKE, OR DECEPTION EXISTS UNDER TRADEMARK ACT SECTION 2(d), 15 U.S.C. §1052(d).

In this case, the applicant's goods are "Baked goods, namely, pound cakes" in International Class 030 and the registrant's goods are "bread, breadsticks, croutons, crackers, cookies, biscotti, and bakery goods" in International Class 030. The trademark examining attorney maintains that the goods are closely related. In the previous Office actions, the trademark examining attorney attached third-party registrations and Internet website evidence, which showed the relatedness of applicant's goods to registrant's goods.

Applicant argues that the registrant's goods are marketed as a vegan health food product line and applicant's goods are marketed as "warm, home-style, yummy desserts" containing eggs, which are not vegan. This argument is not persuasive. With respect to applicant's and registrant's goods, the question of likelihood of confusion is determined based on the description of the goods stated in the application and registration at issue, not on extrinsic evidence of actual use. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1323, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)). In this case, registrant's broadly identified bakery goods include applicant's baked goods, namely, pound cakes. In addition, registrant's identification of goods is not limited to vegan goods.

Applicant argues that registrant's goods include breadsticks, croutons, cookies, biscotti and other bakery goods and applicant's goods are baked goods, namely pound cakes, which are not made from bread or bread products. This argument is not persuasive. Absent restrictions in an application and/or

registration, the identified goods are “presumed to travel in the same channels of trade to the same class of purchasers.” *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). Additionally, unrestricted and broad identifications are presumed to encompass all goods of the type described. See *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

In this case, the identifications set forth in the application and registration have no restrictions as to nature, type, channels of trade, or classes of purchasers. Therefore, it is presumed that these goods travel in all normal channels of trade, and are available to the same class of purchasers. Further, the registration uses broad wording to describe the goods and this wording is presumed to encompass all goods of the type described, including those in applicant’s more narrow identification. Specifically, registrant’s bakery goods may encompass applicant’s pound cakes.

Furthermore, the previously attached Internet evidence consists of websites demonstrating the relatedness of applicant’s goods to registrant’s goods. This evidence establishes that the same entity commonly produces the relevant goods and markets the goods under the same mark. Therefore, applicant’s and registrant’s goods are considered related for likelihood of confusion purposes. See, e.g., *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009). The previously attached Internet evidence consists of bakeries showing the following marks applied to applicant’s and registrant’s goods. This evidence includes the following:

- (1) CARLO'S BAKE SHOP
- (2) ELI ZABAR
- (3) RIVER STREET SWEETS
- (4) HAM'N GOODYS
- (5) PIECE OF CAKE
- (6) GOOD CAKES AND BAKES
- (7) DAPHNES BAKERY
- (8) SEVAN FOODS
- (9) DI MARE PASTRY

Evidence obtained from the Internet may be used to support a determination under Section 2(d) that goods are related. *See, e.g., In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1371 (TTAB 2009); *In re Paper Doll Promotions, Inc.*, 84 USPQ2d 1660, 1668 (TTAB 2007). The Internet has become integral to daily life in the United States, with Census Bureau data showing approximately three-quarters of American households used the Internet in 2013 to engage in personal communications, to obtain news, information, and entertainment, and to do banking and shopping. *See In re Nieves & Nieves LLC*, 113 USPQ2d 1639, 1642 (TTAB 2015) (taking judicial notice of the following two official government publications: (1) Thom File & Camille Ryan, U.S. Census Bureau, Am. Cmty. Survey Reports ACS-28, *Computer & Internet Use in the United States: 2013* (2014), available at <http://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-28.pdf>, and (2) The Nat'l Telecomms. & Info. Admin. & Econ. & Statistics Admin., *Exploring the Digital Nation: America's Emerging Online Experience* (2013), available at http://www.ntia.doc.gov/files/ntia/publications/exploring_the_digital_nation_-_americas_emerging_online_experience.pdf). Thus, the widespread use of the Internet in the United States suggests that Internet evidence may be probative of public perception in trademark examination.

Applicant argues that applicant's and registrant's goods travel in different trade channels because registrant's goods are for vegans. This argument is not persuasive. The presumption under Trademark

Act Section 7(b), 15 U.S.C. §1057(b), is that the registrant is the owner of the mark and that use of the mark extends to all goods identified in the registration. The presumption also implies that the registrant operates in all normal channels of trade and reaches all classes of purchasers of the identified goods. *In re Melville Corp.*, 18 USPQ2d 1386, 1389 (TTAB 1991); *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1899 (TTAB 1989); *RE/MAX of Am., Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964-65 (TTAB 1980); see TMEP §1207.01(a)(iii).

Finally, applicant argues that purchasers of registrant's goods are discerning because they are vegan. This argument is not persuasive. The fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. TMEP §1207.01(d)(vii); see, e.g., *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d. 1317, 1325, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014); *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011).

V. CONCLUSION

Applicant's and registrant's marks are highly similar in sound, appearance, connotation and commercial impression and the goods are closely related such that a likelihood of confusion, mistake, or deception exists. Therefore, for the foregoing reasons, the trademark examining attorney respectfully requests that the Trademark Trial and Appeal Board AFFIRM the refusal to register the proposed mark under Trademark Act Section 2(d), 15 U.S.C. §1052(d).

Respectfully submitted,

/Alison F. Pollack/

Alison F. Pollack

Trademark Examining Attorney

Law Office 106

571-272-4592

alison.pollack@uspto.gov

Mary I. Sparrow

Managing Attorney

Law Office 106