

This Opinion is Not a
Precedent of the TTAB

Mailed: February 20, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Panache LLC
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Serial No. 87182253
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Tye Biasco of Patterson Thuente Pedersen, P.A.,
for Panache LLC.

Kelley L. Wells, Trademark Examining Attorney, Law Office 118,
Michael W. Baird, Managing Attorney.

—
Before Zervas, Bergsman and Heasley,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Panache LLC (“Applicant”) seeks registration on the Principal Register of the mark PANACHE (in standard characters) for, *inter alia*, “apple butter; apple purée; processed apples,” in Class 29.¹

¹ Application Serial No. 87182253 was filed on September 24, 2016, in Classes 29, 30, 32 and 33. The Trademark Examining Attorney limited the refusal to register Applicant’s mark to the goods in Class 29. Applicant filed to register its mark in Class 29 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere on October 15, 2015 and first use in commerce on November 9, 2015.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the registered mark MANGO MANGO MANGO PRESERVES A PANACHE PARTY PRESERVE and design for "fruit preserves," in Class 29, as to be likely to cause confusion.² Registrant's mark is reproduced below:



The registration includes the following description of the mark:

The color(s) orange, green and black is/are claimed as a feature of the mark. The mark consists of the words "mango mango" in orange lettering with the "o" in the first mango depicted as a stylized orange-colored mango with a green leaf and outlined in black. An orange bar displayed immediately below contains the words "Mango Preserves" "A Panache PARTY Preserve" all in black lettering with a vertical black bar between the words "Preserves" and "A".

Registrant disclaimed the exclusive right to use the terms "Mango" and "Mango Preserves."

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We reverse the refusal to register.

² Registration No. 4550628, registered on June 17, 2014.

Our determination under Section 2(d) is based on an analysis of all of the 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) (“*du Pont*”) (cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015)); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *du Pont* factor that is relevant or for which there is evidence of record. *See M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). 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 Chatam Int’l Inc.*, 380 F.2d 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.”); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

I. The similarity or dissimilarity of the goods and established, likely-to-continue channels of trade.

As noted above, Applicant is seeking to register its mark for apple butter, apple purée, and processed apples, and the goods in the cited registration are fruit preserves.

“Preserves” are defined, *inter alia*, as “food made with fruit preserved in sugar, such as jam or marmalade.”³ “Jam” is “a preserve of whole fruit, slightly crushed, boiled with sugar.”⁴ “Marmalade” is “a jellylike preserve in which small pieces of fruit and fruit rind, as of oranges or lemons, are suspended.”⁵

“Apple butter” is defined as “a thick brown spread made by cooking apples sugar and spices usually in cider.”⁶

“Puree” is defined as “a paste or thick liquid suspension usually made from cooked food ground finely.”⁷

Applicant’s use of the term “processed apples” is broad enough to encompass Registrant’s “fruit preserves” because fruit includes apples, and preserves are

³ Oxford Living Dictionaries (oxforddictionaries.com) attached to the April 13, 2017 Office Action (TSDR 6). References to the TSDR database are to the .pdf version.

⁴ Dictionary.com based on the Random House Dictionary (2018). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010).

⁵ Dictionary.com based on the Random House Dictionary.

⁶ Merriam-Webster Online Dictionary (merriam-webster.com) attached to the April 13, 2017 Office Action (TSDR 10-11).

⁷ Merriam-Webster Online Dictionary (merriam-webster.com) attached to the April 13, 2017 Office Action (TSDR 17-18).

processed fruit. *See In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”). In addition, since apple butter is a spread and preserves, including jam and marmalade, commonly are used as spreads, apple butter and fruit preserves are related products.

The Trademark Examining Attorney submitted excerpts from McCutcheon’s Apple Products, Inc. (shop.mccutcheons.com),⁸ King Arthur Flour Company (kingarthurflour.com) advertising Blake Hill Preserves,⁹ Dickinson’s (dickinsonsfamily.com),¹⁰ and Dillman Farm (dillmanfarm.com)¹¹ websites showing that the same entities sell apple butter and preserves under the same mark.

The above-noted websites also provide online sales of their products. Thus, Applicant’s apple butter, apple purée, and processed apples and Registrant’s fruit preserves are offered in at least one similar channel of trade.

Applicant did not address the similarity or dissimilarity of the goods or channels of trade in its brief.

We find the goods are in part identical and that they are offered in the same channels of trade.

⁸ April 13, 2017 Office Action (TSDR 28-31).

⁹ April 13, 2017 Office Action (TSDR 34-35).

¹⁰ April 13, 2017 Office Action (TSDR 36-43).

¹¹ April 13, 2017 Office Action (TSDR 44-48).

II. The similarity or dissimilarity of the marks.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *du Pont*, 177 USPQ at 567. “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).

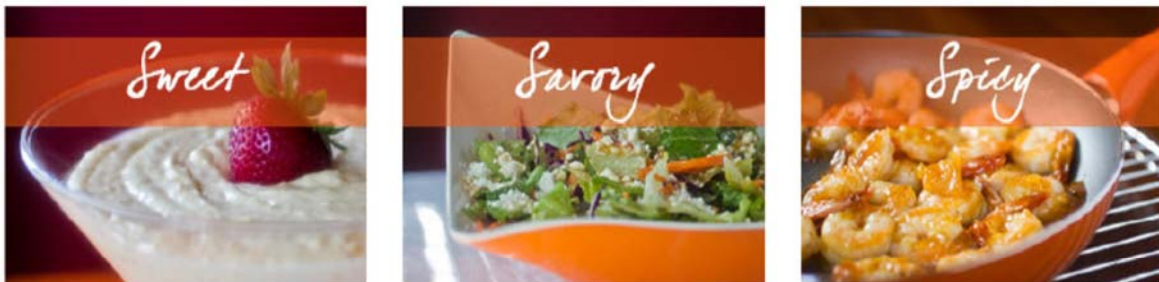
In comparing the marks, we are mindful that “[t]he proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quotation omitted); see also *San Fernando Elec. Mfg. Co. v. JFD Elec. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Because the goods at issue -- apple butter, apple purée, processed apples, and fruit preserves -- all are spreads that any person could use for bread or toast, the average customer for these products is an ordinary consumer.

Applicant's mark PANACHE is not similar to Registrant's mark MANGO MANGO MANGO PRESERVES A PANACHE PARTY PRESERVE and design because the term "MANGO MANGO" with a mango design is the dominant element of Registrant's mark. They are by far the largest elements of Registrant's mark and most likely to catch consumers' eyes. As such, they are that part of the mark consumers use to call for Registrant's preserves. It stretches credulity that consumers would refer to Registrant's preserves as "A Panache Party Preserve" or "panache". There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *See In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

"Mango Preserves" is name of the product and, therefore, has little or no source indicating function. It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'") (quoting *In re Nat'l Data Corp.*, 224 USPQ at 752)); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997).

The term "A Panache Party Preserve" is an advertising tagline informing consumers that Registrant's MANGO MANGO preserves are high quality products.

The word “Panache” is defined as “a grand or flamboyant manner; verve; style; flair: *The actor who would play Cyrano must have panache.*”¹² The Trademark Examining Attorney argues that “Panache” is the dominant part of Registrant’s mark because the phrase “A Panache Party Preserve” “gives the general impression of being a house mark.”¹³ However, the Trademark Examining Attorney submitted an excerpt from Registrant’s website that offers no support for the Examining Attorney’s contention because Registrant refers to itself as MANGO MANGO, not as a “Panache” company. The excerpt from Registrant’s website is reproduced below:¹⁴



About Mango Mango

'Mango Mango' can be enjoyed without having to worry about eating a host of unpronounceable ingredients, artificial flavors, artificial colors, or preservatives. Instead 'Mango Mango' comes from a very simple all natural/gluten free recipe with four ingredients: Mango Fruit, Pure Cane Sugar, Vanilla Extract, and Fresh Lime Juice. That means no 'extra' or 'thickeners' like corn syrup, pectin, gelatin, or carrageenan. We fill the jars with as much mango as possible. With more mango in each jar, you get a more flavorful and rich preserve. It's Mangolicious!

Another excerpt from Registrant’s website is reproduced below and it shows Registrant using “Panache” to convey its dictionary meaning as part of an advertising tagline rather than as a source indicator in and of itself:¹⁵

¹² Dictionary.com based on the Random House Dictionary (2018).

¹³ Trademark Examining Attorney’s Brief (9 TTABVUE 3-4).

¹⁴ April 13, 2017 Office Action (TSDR 50).

¹⁵ July 13, 2017 Office Action (TSDR 49).



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The commercial impression conveyed by Registrant's website is that Registrant's preserves are so delicious and versatile that they are a party in a jar. Thus, the advertising tagline in Registrant's mark, "A Panache Party Preserve," creates the commercial impression that Registrant's preserves have flair or style. In other words,.

The facts in this appeal are similar to the facts in *In re Covalinski*, 113 USPQ2d 1166, 1168 (TTAB 2014) and *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282 (TTAB 2009). In *Covalinski*, the USPTO refused to register the mark REDNECK RACEGIRL and design for clothing on the ground that it was likely to cause confusion with the registered mark RACEGIRL (standard characters) for clothing. The mark REDNECK RACEGIRL and design is reproduced below:



The Board found that the commercial impression of REDNECK RACEGIRL and design was “dominated by its design features, particularly the double-letter RR configuration” which distinguished the two marks. 113 USPQ2d at 1169.

In *White Rock*, the USPTO refused to register VOLTA (standard characters) for “energy vodka infused with caffeine” on the ground that it was likely to cause confusion with the registered mark TERZA VOLTA and design for “wines.” The registered mark TERZA VOLTA and design is reproduced below:



The Board found that the prominent design feature and the term TERZA distinguished the registered mark from Applicant’s mark VOLTA. 92 USPQ2d at 1284. Here, as there, the prominent use of MANGO MANGO and the mango design distinguish the marks.

We find that the marks are not similar.

III. Balancing the factors.

Even though the goods are in part identical and are offered in the same channels of trade, Applicant's mark is so different from the registered mark that even when used on closely related goods, confusion is not likely. The first *du Pont* factor, the differences between the marks, outweighs the other factors. *See Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1460-61 (Fed. Cir. 1998) (Federal Circuit affirmed Board finding of no likelihood of confusion between mark CRYSTAL CREEK for wine and marks CRISTAL for wine and CRISTAL CHAMPAGNE for champagne, where Board relied solely on dissimilarity of marks); *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single *du Pont* factor may not be dispositive"). In view thereof, we find that Applicant's mark PANACHE for "apple butter; apple purée; processed apples" is not likely to cause confusion with the registered mark MANGO MANGO MANGO PRESERVES A PANACHE PARTY PRESERVE and design for "fruit preserves."

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