

This Opinion Is Not a
Precedent of the TTAB

Mailed: February 19, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Cracker Box Fireworks, LLC
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Application Serial No. 88276676
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for Cracker Box Fireworks, LLC.

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Before Bergsman, Heasley and Johnson, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Cracker Box Fireworks, LLC (Applicant) seeks registration on the Principal Register of the mark THE CRACKER BOX CARAMEL POP, in standard characters, for “popcorn; caramel popcorn,” in Class 30.¹ Applicant disclaims the exclusive right to use the word “Caramel.”

¹ Application Serial No. 88276676, filed January 25, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming September 2010 as its date of first use of its mark anywhere and October 2010 as its date of first use of its mark in commerce.

The Examining Attorney refused to register 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 KARAMEL POP, in standard characters, for "popcorn," in Class 30, as to be likely to cause confusion.² According to the registration, "the English translation of 'KARAMEL' is 'CARAMEL'". Registrant disclaimed the exclusive right to use the word "Karamel."

We base our determination under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont 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). "Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)); see also *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."). "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). In any

² Registration No. 5046698, registered September 20, 2016.

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.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.”); *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 and nature of the goods.

Applicant seeks to register its mark for “popcorn; caramel popcorn” and the goods identified in the cited registration are “popcorn.” Therefore, the goods are in part identical. Under this *DuPont* factor, the Examining Attorney need not prove, and we need not find, similarity as to each product listed in the description of goods. It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of goods in a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff'd* 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (“it is sufficient for finding a likelihood of

confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.”).

II. Established, likely-to-continue channels of trade and classes of consumers.

Because the goods described in the application and the cited registration are in part identical, we presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (identical goods are presumed to travel in same channels of trade to same class of purchasers), *cited in Cai v. Diamond Hong*, 127 USPQ2d at 1801 (“With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and “presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods....”).

III. The conditions under which sales are made.

In many instances, consumers who purchase popcorn and caramel popcorn include ordinary consumers who may buy inexpensive popcorn and caramel popcorn on impulse. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014) (recognizing Board precedent requiring consideration of the “least sophisticated consumer in the class”). *See also In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (finding that not all purchasers of wine may be discriminating; while some may have preferred brands, “there are just as likely to be purchasers who delight in trying new taste treats.”).

IV. The similarity of the marks.

We now turn to the *DuPont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *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) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)); 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). In comparing the marks, we are mindful that where, as here, the goods are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). “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.” *Cai v. Diamond Hong*, 127 USPQ2d at 1801 (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)). 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). In this case, because the goods at issue are popcorn and caramel popcorn, the average customer is an ordinary consumer.

The registered mark KARAMEL POP used in connection with popcorn is highly suggestive because it intimates that Registrant uses the mark to identify caramel popcorn. Under such circumstances, we find that Applicant's mark and Registrant's mark are dissimilar rather than similar when viewed in their entireties. The marks are obviously similar in part because they both consist of or include the term "KARAMEL POP" or "CARAMEL POP."

Just as obviously, the marks are different in their entireties because Applicant's mark includes and begins with THE CRACKER BOX, which consumers will perceive as Applicant's house mark. In terms of overall commercial impression, we find that although the term KARAMEL POP is the entirety of the commercial impression created by Registrant's mark, in Applicant's mark it contributes relatively less to the commercial impression than does the house mark THE CRACKER BOX. This is because the term KARAMEL POP (and CARAMEL POP) is highly suggestive as applied to popcorn and as it appears in both marks, especially in Applicant's mark.

The Board has held that additional distinctive elements, such as house marks, may avoid likely confusion where the matter common to the marks is so suggestive or weak that any source-indicating value it has is overwhelmed by the addition of an arbitrary, distinctive element. *See, e.g., Rocket Trademarks Pty Ltd. v Phard S.p.A.*, 98 USPQ2d 1066, 1076 (TTAB 2011)(ZU ELEMENTS (stylized) is not similar to

ELEMENTS in connection with identical clothing goods due, in part, to suggestiveness of term “elements”); *Knight Textile Corp. v. Jones Inv. Co., Inc.*, 75 USPQ2d 1313, 1315 (TTAB 2005) (NORTON McNAUGHTON ESSENTIALS is not similar to the suggestive term ESSENTIALS, both for clothing); *MarCon Ltd. v Avon Prods. Inc.*, 4 USPQ2d 1474, 1476 (TTAB 1987) (applicant’s addition of its house mark AVON to suggestive term SILKEN is sufficient to distinguish its AVON SILKEN SOAP from opposer’s SILK for hair and skin care products); *In re Shawnee Milling Co.*, 225 USPQ 747, 748-49 (TTAB 1985) (GOLDEN CRUST is not similar to ADOLPH’S GOLD’N CRUST because “Golden Crust” and its phonetic equivalent “Gold’n Crust” are highly suggestive).

In *New England Fish Co. v. Hervin Co.*, 511 F.2d 562, 184 USPQ 817 (CCPA 1975), the Court stated as follows:

... there is no arbitrary rule of law that if two product marks are confusingly similar, likelihood of confusion is not removed by use of a company or housemark in association with the product mark. Rather, each case requires a consideration of the effect of the entire mark including any term in addition to that which closely resembles the opposing mark. *Rockwood Chocolate Co. v. Hoffman Candy Co.*, 54 CCPA 1061, 372 F.2d 552, [152 USPQ 599] (1967).

Id. at 819.

In this appeal, there are no significant differences between the product mark portions of the marks at issue – CARAMEL POP vs. KARAMEL POP. However, we find that KARAMEL POP is a highly suggestive term as applied to popcorn and, that under our case law, Applicant’s addition of its house mark suffices to distinguish the

two marks when viewed in their entireties. We find that THE CRACKER BOX CARMEL POP is not similar to KARAMEL POP.

V. Conclusion

We find that the *DuPont* factor regarding the dissimilarity of the marks outweighs the other *DuPont* factors that would favor a finding of likelihood of confusion, namely, the in part identical nature of the goods, trade channels, and purchasers. *See 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. ... ‘each [of the thirteen elements] may from case to case play a dominant role.”). Accordingly, we find that Applicant’s mark THE CRACKER BOX CARMEL POP for “popcorn; caramel popcorn” is not likely to cause confusion with KARAMEL POP for “popcorn.”

Decision: The refusal to register Applicant’s mark THE CRACKER BOX CARMEL POP is reversed.