

This Opinion is Not a
Precedent of the TTAB

Mailed: November 9, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Tiny Boxwood's Holdings, LLC
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Serial No. 90263427
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Terrell R. Miller of Foley & Lardner LLP,
for Tiny Boxwood's Holdings, LLC.

Salvatore J. Angotti, Trademark Examining Attorney, Law Office 108,
Kathryn E. Coward, Managing Attorney.

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Before Taylor, Larkin and Hudis,
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Tiny Boxwood's Holdings, LLC ("Applicant") seeks registration on the Principal Register, of the standard character mark TINYS MILK & COOKIES ("Milk & Cookies" disclaimed) for:

Bakery products, namely, candy bars, cereal bars, breads, croissants, donuts, muffins, rolls and scones; Coffee, espresso, latte and tea; Cookies; Kits comprised of ingredients for making cookies and rolls comprising flour, sugar and chocolate chips; Frozen cookie dough; Ice cream; Puddings; Sandwiches, in International Class 30; and

Café and restaurant services; Coffeeshop, in International Class 43.¹

The Trademark Examining Attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the goods and services identified in the Application, so resembles the standard character mark TINY'S TINY PIES ("Tiny Pies" disclaimed) for "pies" in International Class 30,² registered on the Principal Register, as to be likely to cause confusion, mistake or deception.

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

I. Likelihood of Confusion

Trademark Act Section 2(d) prohibits the registration of a mark that:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

Our analysis is based on all of the probative evidence of record that is relevant to the determination of the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*,

¹ Application Serial No. 90263427 was filed on October 19, 2020 under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), based upon Applicant's claim of first use of the mark anywhere and first use of the mark in commerce since at least as early as November 30, 2016. The Application includes a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f).

² Registration No. 4251163 was issued on November 12, 2012; Trademark Act Section 8 Declaration of Use accepted, Trademark Act Section 15 Declaration of Incontestability acknowledged.

476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*” – noting the factors to be considered). In making our determination, we consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source and to protect trademark owners from damage caused by the registration of similar marks for related goods or services that are likely to cause confusion. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See 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.”). We

discuss below these factors, and the other *DuPont* factors for which there is evidence and argument.

A. Strength of the Cited Mark

Before we evaluate the similarity or dissimilarity of the respective marks, we first consider the strength of the cited TINY'S TINY PIES mark because the strength of Registrant's mark affects the scope of protection to which it is entitled. We consider the conceptual strength of Registrant's mark, based on the nature of the mark itself, and its commercial strength, based on marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength"). The commercial strength of the mark also is affected by the number and nature of third-party uses of similar marks for similar goods. *DuPont*, 177 USPQ at 567.

1. Conceptual Strength

The sixth *DuPont* factor allows Applicant to contract the scope of protection for the cited TINY'S TINY PIES mark by adducing evidence of "[t]he number and nature of similar marks in use on similar goods." *Id.* (cited in *Sock It To Me, Inc. v. Fan*, 2020 USPQ2d 10611, at *8 (TTAB 2020)). Third-party registrations "may bear on conceptual weakness if a term is commonly registered for similar goods or services." *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017).

Applicant argues that "[t]he terms "TINY" and "TINY'S" are commonly used in trademarks[.]" and thus "the [c]ited [m]ark [TINY'S TINY PIES] does not have a

broad enough scope of protection to prevent registration of a non-identical mark [TINYS MILK & COOKIES].”³ In support of this argument, Applicant points to and made of record the results of a search it conducted on the USPTO’s Trademark Electronic Search System (“TESS”) “illustrating nine hundred ninety-five (995) live applications/registrations including the terms TINY and TINY’S.”⁴ The Examining Attorney notes, however, that “the mere submission of a list of registrations ... does not make such registrations part of the record. ... To make third party registrations part of the record, an applicant must submit copies of the registrations, or the complete electronic equivalent from the USPTO’s automated systems, prior to appeal.”⁵ The Examining Attorney’s observation is well taken.

We decline to consider Applicant’s list of “applications/registrations including the terms TINY and TINY’S” for a number of reasons. To begin, the representative list (among the 995 returned from Applicant’s TESS search results) of “applications/registrations” that Applicant provided solely comprises pending applications. Third-party applications are evidence only of the fact that they have been filed, *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *26 (TTAB

³ Applicant’s Brief, 6 TTABVUE 10; Applicant’s Reply Brief, 9 TTABVUE 7. Page references herein to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the TSDR Case Viewer. References to the briefs on appeal refer to the Board’s TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

⁴ Applicant’s Brief, 6 TTABVUE 10; Applicant’s Reply Brief, 9 TTABVUE 7; Request for Reconsideration of January 10, 2022 at TSDR 24-26.

⁵ Examining Attorney’s Brief, 8 TTABVUE 5.

2022) (“Applicant’s proofs that we totally disregard include a significant number of pending ... trademark applications ...”) (citing *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1270 n.8 (TTAB 2009)), and have no other probative value, *Interpayment Servs. Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003). Moreover, since “[t]he Trademark Examining Attorney ... correctly objected to [A]pplicant’s mere listing of [applications and] registrations for the above-referenced marks, which clearly have not been made of record [and without reciting the goods or services for which the marks were applied for or registered,]” *In re Hoefflin*, 97 USPQ2d 1174, 1173 (TTAB 2010), for this reason alone we decline to consider them.

2. Commercial Strength

In an *ex parte* appeal, the owner of the cited registration is not a party, and the Examining Attorney is under no obligation to demonstrate exposure to or recognition of the cited mark in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). For that reason, “this factor is usually treated as neutral in such proceedings.” TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) § 1207.01(d)(ix) (2022). On the other hand, “[e]vidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1674 (TTAB 2018) (quoting *Palm Bay Imps., Inc. v. Veuve Cliquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005)). Applicant did not provide any such evidence during prosecution.

In the absence of adequate proof to the contrary, Registrant’s TINY’S TINY PIES mark is considered inherently distinctive as evidenced by its registration on the

Principal Register without a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f). *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006). In this ex parte appeal, because there is no evidence of record regarding the commercial recognition of the cited TINY'S TINY PIES mark, or evidence of similar marks in use by third parties for baked goods, the commercial strength of Registrant's mark is a neutral factor, as is the fifth *DuPont* factor.

B. The Similarity or Dissimilarity of the Respective Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrant's marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1048 (Fed. Cir. 2018); *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014). "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), *aff'd mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

"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." *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1357, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks omitted)). The focus is on the recollection of the average purchaser – here a potential consumer

of bakery goods or restaurant services – who normally retains a general rather than a specific impression of trademarks. *In re Assoc. of the U.S. Army*, 85 USPQ2d 1264, 1268 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); *see also In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (“marks must be considered in light of the fallibility of memory and not on the basis of side-by-side comparison”) (cleaned up, citation omitted).

So long as we “analyze[] the marks as a whole[, i]t is not improper for the Board to determine that, ‘for rational reasons,’ ... [we] give ‘more or less weight ... to a particular feature of the mark[s]’ provided that ... [our] ultimate conclusion regarding ... likelihood of confusion ‘rests on [a] consideration of the marks in their entirety.’” *Quiktrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 2021 USPQ2d 35, *2-3 (Fed. Cir. 2021) (citing *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1354 (Fed. Cir. 2000) and *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)).

Although we must consider the marks in their entirety, we find the term TINY’S to be the dominant portion of Registrant’s TINY’S TINY PIES mark and the term TINYS to be the dominant portion of Applicant’s TINYS MILK & COOKIES mark. This is primarily because TINY’S and TINYS are the first terms in each mark. *See Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). The term TINY’S, as the first and dominant portion of Registrant’s TINY’S TINY PIES mark, and the equivalent term TINYS as the first

and dominant portion of Applicant's TINYS MILK & COOKIES mark, are the "term[s] most likely to be remembered by consumers" and "used in calling for the ... [goods or services]" or in otherwise referring to Registrant and Applicant. *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009).

Applicant argues that the presence of the apostrophe in TINY'S, and the absence of the apostrophe in TINYS, is a point of distinction between the TINY'S TINY PIES and TINYS MILK & COOKIES marks.⁶ We disagree. The presence or absence of the apostrophe in each mark is insignificant and does not alter the identical sound, and similar meaning or overall similar commercial impression of the compared terms. *See Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, 1914 (TTAB 2000) ("The [parties'] marks are ... similar in appearance, in that both contain a repeating sequence of a consonant and an 'O', followed by an 's' which is visually separated from the repeating sequences, in the case of HOHOs by the smaller size of the letter, and in the case of YO-YO'S, by the apostrophe."); *Winn's Stores, Inc. v. Hi-Lo, Inc.*, 203 USPQ 140, 143-44 (TTAB 1979) ("[Notwithstanding] Applicant's ... conten[tion] that confusion in trade is unlikely since the respective marks are dissimilar [because, inter alia, in Applicant's mark] ... the word 'WIN' is never used ... with an apostrophe 's' ('s) to identify [A]pplicant's stores ... consumers who are familiar with [O]pposer's use over the years of ... [the] term 'WINN'S' would upon encountering [A]pplicant's retail variety store services under the name 'WIN-WAY DOLLAR STORE' be likely to assume that they were owned or controlled by opposer.").

⁶ Applicant's Brief, 6 TTABVUE 9; Applicant's Reply Brief, 9 TTABVUE 4.

While we do not disregard them, the significance of the follow-on descriptive and disclaimed phrases TINY PIES and MILK & COOKIES after the dominant terms in each mark is diminished because consumers are not inclined to rely on descriptive or generic terms to indicate source. *In re Nat'l Data*, 224 USPQ at 752. The disclaimed phrase: (1) TINY PIES is the generic name for a sub-category of Registrant's goods, and (2) MILK & COOKIES includes the generic name for one of Applicant's goods and also describes the types of goods sold in connection with Applicant's services. As such, neither phrase is source-identifying. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“[T]he descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.”) (cleaned up); *see also In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (“DELTA,” not the disclaimed generic term “CAFE,” was the dominant portion of the mark THE DELTA CAFE).

Applicant further argues that:

Applicant's Mark “TINY'S MILK & COOKIES” is not confusingly similar to “TINY'S TINY PIES” because Applicant's Mark is a **four-word** term containing **six** syllables, and the Cited Mark is a **three-word** mark containing **five** syllables. Further, Applicant's Mark and the Cited Mark have different last syllable[s]. Therefore, Applicant's Mark and the Cited Mark contain different words that produce different cadences and sounds.⁷

However, a determination of likelihood of confusion is not made on a purely mechanical basis, counting the number of words, syllables or even letters that

⁷ Applicant's Brief, 6 TTABVUE 8 (emphasis in original); Applicant's Reply Brief, 9 TTABVUE 4 (same).

are similar or different. *See In re John Scarne Games, Inc.*, 120 USPQ 315, 316 (TTAB 1959) (“Purchasers of game boards do not engage in trademark syllable counting[;] they are governed by general impressions made by appearance or sound, or both.”). Rather, “in articulating reasons for reaching a conclusion on the issue of likelihood of confusion ..., for rational reasons[] more or less weight ... [is] given to ... particular feature[s] of ... [the] marks ... [on the way toward coming to] the ultimate conclusion [that] rests on a consideration of the marks in their entirety.” *In re Nat’l Data*, 224 USPQ at 751.

Comparing the marks as a whole, purchasers with a general rather than specific impression of Registrant’s TINY’S TINY PIES mark for food items are likely to assume, when they separately encounter Applicant’s mark TINYS MILK & COOKIES for baked goods and restaurant services, that those goods and services are merely line extensions emanating from Registrant. *See Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1433 (TTAB 2013) (“Purchasers of opposer’s GOTT and JOEL GOTT wines are likely to assume that applicant’s goods, sold under the mark GOTT LIGHT and design, are merely a line extension of goods emanating from opposer.”). The first *DuPont* factor supports a finding that confusion is likely.

C. The Similarity or Dissimilarity of the Respective Goods and Services, Channels of Trade and Potential Consumers

We now turn to the comparison of the goods and services at issue, the second *DuPont* factor. *DuPont*, 177 USPQ at 567. In making our determination regarding the similarity of the goods and services, we must look to the goods and services as

identified in the appealed TINYS MILK & COOKIES Application and the cited TINYS TINY PIES Registration. *See Stone Lion*, 110 USPQ2d at 1162 (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“[T]he question of registrability of an applicant’s mark must be decided on the basis of the identification of goods [or services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods [or services], the particular channels of trade or the class of purchasers to which the sales of goods are directed.”)); *see also Paula Payne Prods. Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods [or services]”).

Moreover, the respective goods and services need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). It further is unnecessary for the Examining Attorney to demonstrate that all of the goods and services in the Application are related to those in the cited registration; it is sufficient if Applicant’s mark for any of its identified goods and services is likely to cause confusion with the Registrant’s mark for its identified goods. *See Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes

within the identification of goods or services in each class of goods or services in the application). “It is sufficient that the respective goods [or services] are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods [or services] are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same ... [source].” *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).

During prosecution, the Examining Attorney provided the following third-party evidence showing that the goods and services identified in the application and the goods identified in the registration are commonly provided by the same companies:

- The Pie Factory (piesflorida.com) sells a variety of baked goods, including pies and bars, and offers café services featuring such goods. [March 30, 2021 Office Action at TSDR 8].
- Bread and Cie (breadandcie.com) sells a variety of baked goods, including pies, and offers café services featuring such goods. [March 30, 2021 Office Action at TSDR 9].
- Livin the Pie Life (livinthepielife.com) sells a variety of baked goods, including pies and scones, and offers café services featuring such goods. [March 30, 2021 Office Action at TSDR 10].
- Sherry Lynn’s Bake Shop at Buckland’s Farm Market (bucklandfarmmarket.com) sells a variety of baked goods, including pies and breads. A picnic area is provided for on-site dining. [July 22, 2021 Office Action at TSDR 5].
- Firehook Bakery (firehook.com) sells a variety of baked goods, including pies, and cookies. [July 22, 2021 Office Action at TSDR 6].
- Eat ’n Park (eatnpark.com) sells a variety of baked goods, including pies and cookies, and offers on-site dining services featuring such goods. [July 22, 2021 Office Action at TSDR 7].
- The Blue Stove (thebluestove.com) sells a variety of baked goods, including pies and muffins, and offers restaurant services serving coffee and other baked goods. [March 09, 2022 Denial of Request for Reconsideration at TSDR 5].

- Little Pie Company (littlepiecompany.com) sells a variety of baked goods, including pies and muffins, and offers restaurant services featuring such goods. [March 09, 2022 Denial of Request for Reconsideration at TSDR 6].
- Sweetie Pies on Main (sweetiepiesonmain.com) sells a variety of baked goods, including pies and bread, and offers café services selling coffee and other similar goods. [March 09, 2022 Denial of Request for Reconsideration at TSDR 7].
- Bread Furst (breadfurst.com) sells a variety of baked goods, including pies and bread. [March 09, 2022 Denial of Request for Reconsideration at TSDR 8].

Evidence that “a single company sells the goods and services of ... [Applicant and Registrant], if presented, is relevant to the relatedness analysis.” *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). This is the type of evidence the Examining Attorney provided.

Applicant argues that its goods and services, and Registrant’s goods, are not related because: (1) “Applicant provides its goods to its customers through its restaurants and cafés, and through its company websites”; (2) “[t]he [c]ited [m]ark [TINY’S TINY PIES] [p]ies’ are sold to retail and wholesale customers through its shops and through its company website”; (3) “[t]he [c]ited [m]ark does not appear to be for Applicant’s goods in Int’l Class No. 30.”⁸ Applicant’s arguments are without merit.

Neither the cited TINY’S TINY PIES Registration nor the TINYS MILK & COOKIES Application contains any restrictions on the types of goods or services, or the channels of trade or classes of purchasers. The involved goods and services therefore presumptively include all goods and services of the type identified, and we

⁸ Applicant’s Brief, 6 TTABVUE 11-12; Applicant’s Reply Brief, 9 TTABVUE 8-9.

must deem them to move in all relevant trade channels, including Applicant's trade channels, to all consumers that purchase such goods and services through those channels of trade. *See, e.g., In re Detroit Athletic*, 128 USPQ2d at 1052 (“the registration does not set forth any restrictions on use and therefore cannot be narrowed by ... [evidence] that the applicant's use is, in fact, restricted to a particular class of purchasers”) (citation omitted).

The third *DuPont* factor considers “the similarity or dissimilarity of established, likely-to-continue trade channels.” *In re Detroit Athletic*, 128 USPQ2d at 1051 (quoting *DuPont*, 177 USPQ at 567). Once again, Applicant argues that its trade channels and potential customers are disparate from those of the Registrant because the respective goods and services are offered through separate brick-and-mortar and online locations.⁹ As discussed above, because the identification of goods and services in the Application and the identification of goods in the Registration do not include any restrictions or limitations as to trade channels or potential customers, we presume the respective goods and services are or would be marketed in all normal trade channels and customers for such goods and services. *See, e.g., Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1373, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant's description of goods.”).

⁹ Applicant's Brief, 6 TTABVUE 12, Applicant's Reply Brief, 9 TTABVUE 9-10.

We find Applicant's goods and services and Registrant's goods are related. We also find the channels of trade and potential consumers for Applicant's goods and services and Registrant's goods to be related. The second and third *DuPont* factors support a finding that confusion is likely.

D. Likelihood of Confusion: Summary and Conclusions

In the absence of adequate proof to the contrary, Registrant's TINY'S TINY PIES mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness. In this ex parte appeal, the commercial strength of Registrant's mark is a neutral factor. The respective marks, TINYS MILK & COOKIES and TINY'S TINY PIES, are more similar than they are different.

The Examining Attorney provided sufficient evidence that the respective goods and services are related. The identification of goods and services in the Application and the identification of goods in the Registration do not include any restrictions or limitations as to trade channels or customers. We thus presume the respective goods and services are or would be marketed in all normal trade channels and to all potential customers for such goods and services.

We thus find that confusion between Applicant's TINYS MILK & COOKIES mark and goods and services, and Registrant's TINY'S TINY PIES mark and goods, is likely.

Decision:

The refusal to register Applicant's mark TINYS MILK & COOKIES mark under Trademark Act Section 2(d) is affirmed.