

Hearing:  
April 23, 2009

**THIS OPINION  
IS NOT  
A PRECEDENT OF  
THE TTAB**

Mailed:  
August 6, 2009

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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AQFTM, Inc.  
v.  
Austinuts, Inc.

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Opposition Nos. 91166551 and 91166552

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Patricia S. Smart of Smart & Bostjancich for AQFTM, Inc.

Orlesia A. Tucker of Graves Dougherty Hearon & Moody for  
Austinuts, Inc.

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Before Walters, Bucher and Holtzman, Administrative  
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

AQFTM, Inc. filed its oppositions, now consolidated, to  
the applications of Austinuts, Inc. to register the marks  
AUSTINUTS and the design mark shown below for "nuts, namely,  
dry roasted nuts," in International Class 29.<sup>1</sup>



As grounds for opposition in each application, opposer asserts that applicant's mark, when applied to applicant's goods so resembles opposer's previously used and registered marks shown below for cookies and crackers as to be likely to cause confusion, under Section 2(d) of the Trademark Act.

**Registration No. 1266461**<sup>2</sup> [registered February 7, 1984; renewed]. The mark includes the word AUSTIN.

**Goods:** Crackers, Crackers with Cheese, Cheese Flavored Crackers, in International Class 30.

**Mark:**



**Registration No. 1935987** [registered November 14, 1995; renewed]. The mark includes the words "AUSTIN QUALITY". The registration includes a disclaimer of QUALITY apart from the mark as a whole.

**Goods:** Cookies and crackers, in International Class 30.

**Mark:**



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<sup>1</sup> Application Serial Nos. 76485325 and 76485326, respectively, both of which were filed January 27, 2003, based on use in commerce, alleging first use and use in commerce as of September 15, 1993.

<sup>2</sup> The registration as originally issued also specified goods in International Class 29, including "roasted peanuts." The goods in this class were subsequently deleted from the registration.

**Registration No. 2929502** [registered March 1, 2005].  
The mark includes a disclaimer of SINCE 1932 apart from the mark as a whole.

**Goods:** Cookies, in International Class 30.

**Mark:** AUSTIN SINCE 1932 SNACKERZ

**Registration No. 2931475** [registered March 8, 2005].

**Goods:** Cookies, in International Class 30

**Mark:** AUSTIN SNACKERZ

**Registration No. 3129236**<sup>3</sup> [registered August 15, 2006].  
The mark includes a disclaimer of SINCE 1932 apart from the mark as a whole.

**Goods:** Crackers, cracker sandwiches and cookies, in International Class 30.

**Mark:**



Applicant, in its answers, admitted opposer's ownership of the four pleaded registrations and otherwise denied the salient allegations of the claim.<sup>4</sup>

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<sup>3</sup> While this registration had not issued and, thus, was not pleaded in the notice of opposition, applicant has not objected to its introduction into evidence. Therefore, we consider the notice of opposition amended to include a claim of this registration and we have considered it to be properly of record.

<sup>4</sup> Applicant asserted acquiescence as an affirmative defense based on communications between applicant and opposer during the pendency of the applications. However this issue was clearly not tried as it was not raised by the parties. Therefore, we consider this affirmative defense to have been waived.

*Procedural Matters*

Both opposer and applicant have filed motions to strike, as well as registering objections to other evidence in their briefs.

Considering, first, applicant's motion to strike, applicant contends that the third-party registrations submitted by opposer under its rebuttal notice of reliance of April 22, 2008, constitute improper rebuttal and should be stricken. In the notice of reliance, opposer states that the registrations are submitted "to show that nuts and cookies and/or crackers are snack products that are sold by the same party under the same mark." The submission includes numerous third-party use-based registrations that include nuts and cookies and/or crackers. Applicant argues that the facts herein are essentially the same as the facts in *Wet Seal, Inc. v. FD Management, Inc.*, 82 USPQ2d 1629 (TTAB 2007), and that, because opposer's evidence pertains to whether the goods are related, it should have been presented as part of opposer's case-in-chief. Opposer contends that the cited case is factually inapposite; that opposer did offer evidence intended to show the relatedness of the goods during its case-in-chief; that, during its testimony period, applicant offered third-party registrations as evidence intended to establish that the

goods are not related; and that opposer's third-party registrations are proper rebuttal to applicant's evidence.

In *Wet Seal*, opposer submitted third-party registrations on rebuttal to show a relationship between clothing and cosmetics, contending that the evidence was intended to rebut applicant's witness's statements refusing to concede on cross-examination that the goods are related. The Board stated the following in granting the motion to strike:

The motion to strike is well taken. This rebuttal evidence was not submitted for the proper purpose of denying, explaining or discrediting applicant's case but instead was clearly an attempt by opposer to strengthen its case-in-chief. See *The Ritz Hotel Limited v. Ritz Closet Seat Corp.*, 17USPQ2d 1466 (TTAB 1990). The burden is on opposer, in the first instance, to come forward during its own testimony period with proof of the essential elements of its claim, one element of which is the relatedness of the parties' goods. Opposer should not have even assumed that applicant would call its own witness, let alone that the witness, if called, would make an admission favorable to opposer's case.

(82 USPQ2d at 1632.)

While the facts in this case are not identical to the facts in *Wet Seal*, we agree with applicant that opposer's evidence of third-party registrations is improper on rebuttal in this case and should have been submitted as part of opposer's case-in-chief. There is no question that opposer did address the issue of the relatedness of the goods during its case-in-chief. As one of the primary

factors in determining likelihood of confusion, it is reasonable that, as in this case, both parties would present evidence and testimony on this issue unless it was admitted. There is also no reason why this evidence could not have also been submitted by opposer during its case-in-chief and it would have been relevant and appropriate. Opposer has not adequately explained how its rebuttal evidence is more than mere supplementation of its record.

During its testimony period, applicant submitted copies of six third-party registrations for the express purpose of "demonstrating that other third-parties have registered marks containing the term 'AUSTIN' used in connection with food products." [Applicant's notice of reliance of February 28, 2008.] Opposer is mistaken if it is arguing that, in view of applicant's submission of third-party registrations, opposer is entitled, on rebuttal, to also submit third-party registrations. The third-party registrations submitted by applicant were submitted in connection with the issue of the strength or weakness of the mark AUSTIN, not in connection with the relatedness of the goods.

Therefore, we conclude that opposer's third-party registrations are not proper rebuttal and this evidence has not been considered in reaching our decision.

Considering, next, opposer's motion to strike, opposer contends that the transcript of the Ilai testimony

deposition submitted by applicant is contrary to the agreement of the parties and should be stricken. Opposer contends that the parties and the court reporter entered into a stipulation, which opposer submitted, and which states in relevant part:

In the transcription of the [Ilai] deposition, the Court Reporter transcribed the deposition references to applicant's name and trademark as "Austinuts" from the context of the use of the terminology, and not as an intended reference to the phonetic pronunciation used by a speaker during the deposition. The use of the term "Austinuts was made in response to a speaker's use of terminology pronounced as "Austin" "nuts" with varying amounts of pause between those words.

Opposer contends that applicant agreed to submission of an amended transcript of the deposition in which, on at least pages 61-63, the word "Austinuts" would be replaced with "Austin-nuts (phonetic)"; and that applicant sent to opposer the transcript so modified, but submitted a different version of the Ilai deposition transcript to the Board.<sup>5</sup>

Mr. Ilai's pronunciation of applicant's mark and the court reporter's transcription of the same is of little probative value in determining whether the marks are dissimilar or similar. Thus, the parties have wasted valuable Board time and resources, to say nothing of the

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<sup>5</sup> Applicant objects to the exhibits submitted by opposer in connection with its motion to strike on the ground of relevance and that the exhibits should have been submitted during opposer's testimony period. The exhibits are relevant to the motion and, as such, are proper and need not have been submitted during opposer's testimony period. Except for Exhibit A as noted herein, these documents have been considered only for the purpose of deciding opposer's motion to strike.

parties' resources, in arguing about the manner in which the court reporter transcribed Mr. Ilai's pronunciation of applicant's mark. Nonetheless, opposer, applicant and the court reporter entered into the noted stipulation, which is of record, and applicant, in fact, served on opposer a transcript of the Ilai deposition in a form consistent with the stipulation.

It is clearly inappropriate for applicant to submit a transcript of the Ilai deposition to the Board that is different from the one served on opposer. The fact, as argued by applicant, that it was concerned about opposer's arguments in connection with Mr. Ilai's pronunciation of applicant's mark based on the stipulated transcript is a matter for discussion in the parties' briefs, not for applicant's unilateral changes to the stipulated transcript. Therefore, the Ilai deposition transcript submitted by applicant on August 4, 2008 is stricken, except for the exhibits thereto. The Board has considered, instead, the Ilai deposition transcript sent to opposer and accompanying opposer's motion to be the operative transcript, along with the Ilai deposition exhibits submitted by applicant.

Finally, we consider the respective objections of the parties to other evidence. Opposer objects to exhibit 18 (AT&T telephone directory white pages for Greater Austin) to the deposition of Mr. Ilai on the ground of lack of

foundation, relevance and hearsay; and to applicant's third-party registrations (for the mark AUSTIN BLUES for meat products; and for the marks AUSTIN GRILL and SOUTH AUSTIN GRILL for restaurant services) on the ground of relevance. Opposer's objections are denied and the evidence has been considered for whatever probative value it may have.

*The Record*

The record in this consolidated proceeding consists in part of the pleadings and the files of the involved applications. Opposer made of record by notices of reliance certified status and title copies of its pleaded registrations; various specified responses by applicant to opposer's interrogatories and requests for admissions; and submitted the testimony deposition by opposer of David Rhoades, brand manager of marketing for opposer's parent, along with accompanying exhibits.

Applicant made of record by notice of reliance third-party registrations and various specified responses by opposer to applicant's interrogatories and requests for admissions; and the deposition, as discussed above, of Doron Ilai, applicant's vice president, with accompanying exhibits. Both parties filed briefs on the cases.

*Factual Findings*

Opposer began its business in 1932 in Baltimore, Maryland. It was subsequently acquired by Keebler and it is

now a wholly-owned subsidiary of Kellogg Corporation.

Opposer manufactures and sells cookies and crackers as snack foods. For example, under its marks, it sells packages of sandwich crackers identified as "toasty peanut butter," "peanut butter and jelly," "cheese on cheese" and "wheat and cheddar," and it is continually bringing new varieties of its crackers to market. Opposer sells its goods to the general public through mass retailers such as Wal-Mart and Kmart, grocery stores such as Stop and Shop, club stores such as Costco, via the Internet at [www.Amazon.com](http://www.Amazon.com), and through vending machines and convenience stores. A multi-pack of its crackers/cookies costs less than one dollar retail; and a single pack costs about fifty cents. Opposer does not use its marks in connection with nuts and it does not sell nuts; however, some of its goods have nuts as an ingredient.

Opposer promotes its goods primarily through in-store displays and on its own website; and it conducts packaging promotions with, for example, NASCAR. Opposer's goods are inexpensive items consumed as snacks throughout the day. While opposer's sales figures are confidential, suffice it to say that its overall sales are substantial. Opposer experiences greater brand loyalty than its closest competitor, Lance, and its goods have significant household penetration.

Applicant is a relatively small family-owned and operated business in the greater Austin, Texas, area. Applicant has a dry-roasting facility for the nuts it purchases. Applicant packages its nuts under its marks herein for sale in its retail store in Austin, Texas, on its website, and in grocery stores, liquor stores, hotels, resorts, cafes and country clubs. Applicant also sells its nuts, unmarked, wholesale in bulk from its roasting facility.

In its retail store and on its website, applicant offers various third-party "gourmet" food items that are identified by third-party trademarks, including cookies and crackers. Applicant itself sells gift baskets that include its nuts identified by applicant's marks and third-party goods identified by different marks. The baskets are not separately identified by any mark.

Applicant's sales of its nuts have grown each year since its inception and applicant has enjoyed increasing and significant annual sales for a relatively small regional company. Applicant advertises its nuts through direct solicitation, in local and state publications aimed at the general public, such as *Texas Monthly*, at community events, via its website, and in trade magazines and at trade shows.

Applicant admits that some of its gift baskets include nuts and cookies and/or crackers; but that only the nuts are

identified by applicant's marks. [Admission no. 1.]

Applicant also admits that nuts may be an impulse purchase.

[Id.]

Applicant's evidence establishes that Austin is the capital city of Texas; and that there are numerous businesses listed in the Austin metropolitan area AT&T White Pages telephone book with the term AUSTIN in their business names.

Neither party is aware of any actual confusion and there is no evidence of any intent on applicant's part to trade on opposer's good will. The record includes six third-party registrations owned by two different entities for the marks AUSTIN BLUES, variously, for beef, pork, poultry and sausage; and AUSTIN GRILL and SOUTH AUSTIN GRILL for restaurant services.

*Analysis*

*Standing*

Because opposer has properly made its pleaded registrations of record, we find that opposer has established its standing to oppose registration of applicant's marks. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

*Priority*

In view of opposer's ownership of valid and subsisting registrations, there is no issue regarding opposer's priority. *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Thus, the only issue to decide herein is likelihood of confusion.

*Likelihood of Confusion*

Our determination of likelihood of confusion under Section 2(d) must be based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). Opposer must establish that there is a likelihood of confusion by a preponderance of the evidence. 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 1098, 192 USPQ 24, 29 (CCPA 1976). See also

*In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein. The relevant *du Pont* factors in the proceeding now before us are discussed below.

*The Goods*

Opposer contends that the goods are related, noting the fact that opposer's predecessor-in-interest originally registered its marks in connection with nuts, cookies and crackers, and the fact that some of opposer's products contain nuts as an ingredient.

Applicant discusses the specific differences between nuts and cookies and crackers, although the parties do not dispute that the goods are not the same. Applicant also emphasizes that its nuts are of high quality and that it sells its nuts primarily through its gourmet specialty store, noting, however, that it also sells its nuts to grocery stores, cafes, liquor stores, country clubs and hotels. Applicant argues that, as such, its nuts are distinct from opposer's snack foods, which are sold through grocery stores, convenience stores, vending machines and club stores.

It is well established that the goods of the parties need not be similar or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the

respective goods of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods 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. See *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). The issue, of course, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of the goods and/or services. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). The question of likelihood of confusion must be determined based on an analysis of the goods as recited in applicant's application vis-à-vis the goods identified in opposer's pleaded registration(s). *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992).

We take judicial notice of the definition in *Webster's New World Collegiate Dictionary* (2005) of "snack" as "a small quantity of food; light meal or refreshment taken between regular meals." It is clear that both applicant's nuts and opposer's cookies and various crackers are snack foods. While this is insufficient alone to conclude that

the goods are related, we find ample evidence, particularly in light of the fact that applicant's own gift baskets contain, among other items, nuts, cookies and crackers. Thus, applicant's own evidence indicates that these items are sold together. The fact that applicant's baskets contain cookies and crackers identified by different marks does not change the implication that opposer's goods could also be sold in such gift baskets. The fact that applicant considers its identified goods to be gourmet items and its baskets to contain gourmet items, and it considers opposer's goods to be at the opposite end of the spectrum, is immaterial. Neither party's identifications of goods is so limited.

Thus, we conclude that the goods of the parties are sufficiently related that, if identified by confusingly similar marks, confusion as to source is likely. This *du Pont* factor weighs in favor of opposer.

*Trade Channels, Purchasers and Purchasing Care*

Both opposer's and applicant's identifications of goods are broadly worded, without any limitations as to channels of trade or classes of purchasers. We must presume that the goods of the applicant and opposer are sold in all of the normal channels of trade to all of the usual purchasers for goods and services of the type identified. *See Canadian Imperial Bank v. Wells Fargo*, 811 F.2d 1490, 1 USPQ2d 1813

(Fed. Cir. 1987). Thus, while applicant considers its product a gourmet item sold only to discerning purchasers, the identification of goods is not so limited.

As indicated above, opposer's cookies and crackers and applicant's nuts may travel mostly in different trade channels, but, as the record establishes, there is some overlap, at least in connection with grocery stores. Moreover, the parties' goods end up in the hands of the same consumers. In other words, the class of purchasers is identical, namely ordinary consumers. The record contains no evidence that such consumers would exercise more than only ordinary care when purchasing nuts, crackers or cookies. Additionally these are not expensive items.

The *du Pont* factors of the trade channels, purchasers and purchasing care all weigh in favor of opposer.

#### *The Marks*

With respect to the involved marks, we examine the similarities and dissimilarities of the marks in their appearance, sound, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1692. The 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 their entireties that confusion as to the source of the goods offered under the respective marks is likely to

result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Additionally, while the marks must be considered in their entirety, "there is nothing improper in stating that, for rational reasons, 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 entirety." *In re National Data Corp.*, 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Opposer's design marks consist of the highly stylized word AUSTIN, with disclaimed merely descriptive language in smaller letters below the word AUSTIN, and with various forms of a picture of a mill nestled above the word AUSTIN. First, we note that the word AUSTIN is likely to be used by purchasers to call for opposer's goods. Thus, this wording would make a greater impression on purchasers and is the portion that is more likely to be remembered as the dominant and source-signifying portion of the registered mark. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593 (TTAB 2001) ("words are normally accorded greater weight because they would be used by purchasers to request the goods"). See also, e.g., *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

Clearly, the word AUSTIN is the dominant portion of these composite word and design marks.

Opposer also owns and established herein two registrations for word marks, AUSTIN SINCE 1932 SNACKERZ and AUSTIN SNACKERZ. In the first-noted word mark, SINCE 1932 is disclaimed and is merely descriptive wording that is of less significance in the overall commercial impression of the mark. While SNACKERZ is a made-up word, it is an obvious play on the word "snack," which is highly suggestive, if not merely descriptive, of the nature of opposer's goods. Thus, we find that SNACKERZ is secondary to the first word in each mark, AUSTIN, which we find to be the dominant term.

AUSTIN is the name of the capital city in Texas; however, there is no suggestion in the record of any material connection between the word AUSTIN and opposer's goods. The record shows that a number of businesses are listed in the Austin area phone directory with the word AUSTIN in their names, but this does not establish that AUSTIN is primarily geographically descriptive and, hence, weak in connection with opposer's identified goods.

Opposer did not argue that its mark is a famous mark and the record does not support such a finding. However, the record does show use of its AUSTIN marks in various forms in connection with cookies and crackers since at least

1984 (the earliest registration date in this record), and substantial sales, advertising and market saturation. Therefore, we find that opposer's AUSTIN marks are very strong, if not well known, in connection with cookies and crackers.

Additionally, the record includes two third-party entities with registrations of marks that include the word AUSTIN. However, not only is this an exceedingly small number of registrations from which to draw any conclusions about the strength or weakness of the term AUSTIN in general, but the third-party registrations are not evidence of use and the goods and services listed in those registrations are quite different from the goods herein.

Turning to applicant's marks, one application is for the word mark AUSTINUTS and the other application is for a design mark consisting of the word AUSTINUTS in slightly stylized lettering within an outline that applicant describes as a roasting peanut. The design essentially outlines the word AUSTINUTS and to the extent that the design would be perceived by purchasers as a roasting peanut, it merely describes applicant's goods and reinforces the descriptive nature of the "nuts" portion of the mark.

It is well established that there is no correct pronunciation of a trademark when the trademark is not a recognized word. *In re Teradata Corporation*, 223 USPQ 361,

362 (TTAB 1984) ("as we have said many times, there is no 'correct' pronunciation of a trademark"). The parties have argued a great deal about the pronunciation of applicant's mark, and applicant characterizes its mark AUSTINUTS as a made-up word; however, it is clearly a telescoped form of the two words AUSTIN and NUTS and is likely to be so perceived and pronounced by purchasers. It is essentially insignificant whether purchasers pronounce the words distinctly as "Austin Nuts" or slur the double letter "N" to enunciate a single word, "Austinuts." In this regard, the "nuts" portion of the marks is generic in connection with applicant's identified goods and the "Austin" portion is dominant within the telescoped word.

Comparing the marks, we note that both parties' marks are dominated by the word AUSTIN and the record establishes that opposer's AUSTIN marks are very strong in connection with cookies and crackers. It is also clear that the marks have differences, for example the difference in the stylized lettering and designs, the addition of different merely descriptive wording, and the telescoping of applicant's term AUSTINUTS.

As discussed above, the design elements in the respective design marks are of lesser significance than the word portions. Nor do we find the stylization of either party's marks to be distinguishing factors. Applicant seeks

to register a mark in standard character format and, thus, applicant could conceivably display its mark in any lettering style, including that of the word AUSTIN in opposer's composite word and design marks. And since opposer also owns registered marks in standard character format, opposer could conceivably display its standard character marks in any lettering style, including that of the word AUSTINUTS in applicant's design mark. 37 C.F.R. § 2.52(a); *In re Pollio Dairy Products Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988) (when registering mark in block letters, registrant remains free to change the display of its mark at any time). Consequently, applicant's argument that opposer "ignored" the stylization of applicant's mark is unpersuasive. See e.g., *Sunnen Products Co. v. Sunex Int'l Inc.*, 1 USPQ2d 1744 (TTAB 1987) (styling of letters is irrelevant to the issue of confusion where applicant seeks to register mark without any special form of lettering or design).

Thus, although the marks have differences, when we compare them in their entirety we find that on the whole they are similar in appearance, connotation and commercial impression, and that the telescoping of the words "Austin" and "nuts", and the design elements in both parties' design marks, are not sufficient to distinguish them when used on related goods. We remind applicant that the 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 their entirety that confusion as to the source of the goods offered under the respective marks is likely to result.

This *du Pont* factor weighs in favor of opposer.

*Conclusion*

We find that the *du Pont* factors weigh in favor of a finding of likelihood of confusion in connection with both applications.

We conclude that consumers familiar with opposer's cookies and various crackers sold under its AUSTIN marks would be likely to believe, upon encountering applicant's AUSTINUTS marks for nuts, that the goods originate from or are associated with or sponsored by the same entity.

*Decision:* The oppositions are sustained on the ground of likelihood of confusion, and registration to applicant is refused in each application.