

THIS OPINION IS  
NOT A PRECEDENT OF  
THE TTAB

Mailed: September 28, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Del Campo Y Asociados, S.A. de C.V.

Serial No. 76633971

David B. Kirschstein of Kirschstein, Ottinger, Israel & Schiffmiller, P.C. for Del Campo Y Asociados, S.A. de C.V.

Paula B. Mays, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney).

Before Hairston, Holtzman and Kuhlke, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Del Campo Y Asociados, S.A. de C.V. (applicant) to register the mark shown below for goods ultimately identified as "organic fresh round tomatoes" in Class 31.<sup>1</sup>

<sup>1</sup> Serial No. 76633971, filed March 11, 2005, based on an allegation of a bona fide intention to use the mark in commerce.



The phrase "DEL CAMPO" is translated in the application as "from the fields."

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the mark DEL CAMPO (typed form) registered on the Principal Register for "canned goods, namely vegetables, hearts of palm, and tropical fruits" in Class 29 and "tropical fruit nectars" in Class 32, as to be likely to cause confusion.<sup>2</sup> The term "DEL CAMPO" is translated in the registration as "from the fields."

When the refusal was made final, applicant appealed. Briefs have been filed.

As a preliminary matter, we note that the examining attorney states in her final action, and applicant states in its appeal brief, that the word ORGANICS has been disclaimed. However, we can find no such disclaimer in the record. Nevertheless, since applicant has, in effect, agreed to disclaim the word, and since, as will be discussed later in this decision, ORGANICS is generic

---

<sup>2</sup> Registration No. 1960775; issued March 5, 1996; affidavits under 8 and 15 accepted and acknowledged.

Serial No. 76633971

for the identified goods and a disclaimer of that word is appropriate, the disclaimer of ORGANICS will be entered in the application.

We turn then to the merits of this case. 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 likelihood of confusion issue. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, however, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We consider first the goods, keeping in mind that the question of likelihood of confusion is determined on the basis of the identification of goods as set forth in the application and registration, without limitations or restrictions that are not reflected therein. See Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1788 (Fed. Cir. 1990).

Applicant argues, pointing to the definition of "tomato" in The American Heritage Dictionary of the English Language,<sup>3</sup> that

---

<sup>3</sup> Although applicant did not supply a copy of the entry from the dictionary, we take judicial notice that "tomato" is defined in that

Serial No. 76633971

tomatoes are fruits, not vegetables, and further, that canned products, including canned vegetables, are different from fresh produce, such as fresh tomatoes.

To begin with, the question is not whether purchasers can differentiate the goods, but rather whether purchasers are likely to confuse the source of the goods. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Thus, goods need not be similar or competitive in nature to support a finding of likelihood of confusion. *Id.* It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, if similar marks are used thereon, give rise to the mistaken belief that they emanate from or are associated with, the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Furthermore, the entry for "tomato" in The Columbia Encyclopedia (2004)<sup>4</sup> makes it clear that a tomato is, in fact, considered both a fruit and a vegetable:

---

dictionary as "1a. A widely cultivated South American plant (*Lycopersicon esculentum*) having edible, fleshy, usually red fruit. b. The fruit of this plant." From the website [credoreference.com](http://credoreference.com). The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002).

<sup>4</sup> From the website [credoreference.com](http://credoreference.com). We take judicial notice of this reference.

...[The tomato] was reintroduced to the United States as a food plant c.1800 and now ranks third among our **vegetable crops**. It is very popular as a **salad vegetable**, yet three quarters of the crop is processed into juice, canned tomatoes, soups, catsup, and tomato pastes. It is the most widely used **canned vegetable**. ... Technically the tomato is a fruit, although it is commonly considered a vegetable because of its uses. .... (Emphasis added.)

It can also be seen from this evidence that fresh tomatoes are frequently processed into canned tomatoes. These are not different goods; they are simply different forms of the same food products. Registrant's "canned vegetables" which, as identified, are not limited to any particular type of vegetable, must be deemed to include canned organic tomatoes. See, e.g., Packard Press Inc. v. Hewlett-Packard Co., 227 F.3d 1352 56 USPQ2d 1351, 1355 (Fed. Cir. 2000) ("Packard's registration broadly describes electronic data processing, and contains no restrictions limiting the services to electronic transmission of data to provide commercial printing services."). We find that applicant's fresh organic tomatoes and registrant's canned version of the identical products are very closely related goods.<sup>5</sup>

---

<sup>5</sup> The arguments by applicant and the examining attorney concerning the normal areas of expansion for registrant are not relevant. As the Board observed in *In re 1st USA Realty Professionals, Inc.* \_\_\_USPQ2d\_\_\_, Serial No. 78553715 (TTAB August 7, 2007), "the concept of expansion of trade is generally addressed in the context of the issue of priority in an inter partes proceeding." Priority of use is not an issue in an ex parte proceeding. See *In re Calgon Corporation*, 435 F.2d 596, 168 USPQ 278, 280 (CCPA 1971). As explained in *1st USA*, the doctrine, in an ex parte context, essentially requires application of the traditional related goods and services analysis.

There is no question that the respective food products would be sold in the same channels of trade, such as grocery stores. Furthermore, the fact that fresh tomatoes and canned vegetables, as applicant points out, may be found in different sections of the grocery store is not significant since the two products can be purchased in the same stores, by the same purchasers, often at the same time, during the same shopping trip. Furthermore, these products are inexpensive, frequently replaceable food items that are likely to be purchased on impulse. It has often been stated that purchasers of such products are held to a lesser standard of purchasing care and, thus, are more likely to be confused as to the source of the goods. See *Specialty Brands, Inc.*, 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984). It is clear that purchasers would be likely to be confused as to the source of these products if they are offered under similar marks.

We turn then to the marks. In determining the similarity or dissimilarity of marks, we must consider the marks in their entireties in terms of sound, appearance, meaning and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). While marks must be compared in their entireties, one feature of a mark may have more significance than another, and in such a case there

Serial No. 76633971

is nothing improper in giving greater weight to the dominant feature. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

When we compare applicant's mark DEL CAMPO ORGANICS and design with registrant's mark DEL CAMPO in their entireties, giving appropriate weight to the features thereof, we find that the differences in the marks are far outweighed by their similarities.

The phrase DEL CAMPO is registrant's entire mark. The identical phrase DEL CAMPO is the dominant portion of applicant's mark. Although applicant's mark also includes the word ORGANICS, that word is given little weight in our comparison of the marks because it is generic for the goods and of no significance as an indication of source.<sup>6</sup> See *In re National Data Corp.*, supra at 751 ("That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark."). Furthermore, it is the wording DEL CAMPO, rather than the design element in applicant's mark, that is more likely to

---

<sup>6</sup> Applicant's identification of goods expressly states that the tomatoes are "organic." In addition, we take judicial notice of the dictionary definition of "organic" as meaning "of, marked by, or involving the use of fertilizers or pesticides that are strictly of animal or vegetable origin: *organic vegetables; an organic farm.*" (Italics in original.) The American Heritage Dictionary of the English Language, supra. The examining attorney submitted a definition of "organic" with her appeal brief; however, it is not clear whether that dictionary exists in printed format.

Serial No. 76633971

have a greater impact on purchasers and be remembered by them.<sup>7</sup> See *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) ("in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed."). The word portion of a composite word and design mark is generally accorded greater weight because it is used to call for and refer to the goods. See, e.g., *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531 (Fed. Cir. 1997). See also *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

Because the term DEL CAMPO, which is registrant's entire mark, and DEL CAMPO, the dominant portion of applicant's mark are identical, the marks are similar in sound. See *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983) ("Another factor weighing heavily in our decision is that the dominant portion of both parties' marks sounds the same when spoken.").

---

<sup>7</sup> Applicant's reliance on *In re Electrolyte Labs, Inc.*, 929 F.2d 645, 16 USPQ2d 1239 (Fed. Cir. 1990) is misplaced. That case involved composite marks featuring letters which, as the Court noted, can be close to design marks and therefore may or may not be vocalized. Here, we are dealing with a composite mark that features a clearly identifiable and pronounceable word. Another case cited by applicant, *Omaha National Bank v. Citibank (South Dakota), N.A.*, 633 F.Supp. 231, 229 USPQ 51 (D. Neb. 1986), is similarly unpersuasive. The court made no finding as to the similarity or dissimilarity of the word portions of the marks in that case and, in any event, that case does not compel a finding that the design in this case is sufficient to distinguish the marks.

Serial No. 76633971

The marks are also similar in appearance. The word ORGANICS appears in somewhat larger lettering than DEL CAMPO, and applicant argues that its "prominence" in the mark should be considered. However, that word is generic and, in any event, the difference in size is not that substantial. DEL CAMPO, although smaller than ORGANICS, is still a visually significant part of the mark. The design element in applicant's mark, which applicant describes as a tomato vine, is not sufficient to distinguish one mark from the other. As we noted, it is the literal portion of a mark, rather than the design component, which is more likely to be recalled by purchasers, and this design is not so significant that it detracts from the visual impact of DEL CAMPO.

Further, the marks convey a similar, if not the same, meaning and commercial impression in relation to the respective goods. The phrase, DEL CAMPO which is translated as "from the fields" in both marks suggests the fresh quality of the food products. The design of the tomato vine in applicant's mark reinforces this image. Moreover, the word ORGANICS does not change the commercial impression of DEL CAMPO, alone. The term simply informs applicant's customers that this is an "organic" product.

Applicant argues that the registered mark DEL CAMPO "is used frequently in trademarks for food" and that the term is therefore

entitled to a limited scope of protection. In support of this contention, applicant has submitted nine third-party registrations for marks that consist of or include the phrase DEL CAMPO or some variation of that phrase.<sup>8</sup>

Contrary to applicant's contention, third-party registrations are not evidence of use, and merely because other marks containing the term exist on the register does not mean the public could distinguish the two marks at issue here. Further, while third-party registrations may be given some weight to show a mark's meaning in same way that dictionaries are used, the registrations in this case are unpersuasive.<sup>9</sup> For the most part, the registrations are for dissimilar marks and/or marks which create commercial impressions that differ from the commercial impression of the cited mark. For example: Reg. No. 3211598 for the mark CAMPO DEL DRAGO for wine, translated as "field of the dragon"; Reg. No. 2828551 for the mark CASA DE CAMPO for wine, translated as "house of the village"; and Reg. No. 2829791 for

---

<sup>8</sup> Applicant also submitted two third-party applications. However, applications are not probative of anything except that they were filed on a certain date. We note that several of the third-party registrations were submitted by applicant for the first time with its appeal brief. However, because the examining attorney did not object to the timeliness of this evidence, we have considered these registrations as properly of record.

<sup>9</sup> Unlike *Puma-Sportschuhfabriken Rudolf Dassler K.G. v. Superga S.p.A.*, 210 USPQ 316 (TTAB 1980) and *General Mills Inc. v. Health Valley Foods*, 24 USPQ2d 1270 (TTAB 1992) on which applicant relies, there is no evidence in this record of third-party use of DEL CAMPO, let alone evidence of widespread use.

Serial No. 76633971

the mark DE MI CAMPO for processed herbs, translated as "from my fields." Arguably relevant registrations are Reg. No. 3011669 for the mark DEL CAMPO for seasonings, translated as "from the fields"; Reg. No. 2361025 for the mark DEL CAMPO for cheese, translated as "in the field" or "of the field"; and Reg. No. 2978839 for the mark SABOR DEL CAMPO for dry beans, peas and lentils, translated as "taste of the field." However, the existence of a few registrations is insufficient to show that DEL CAMPO has been frequently registered for its suggestive meaning or that it would have a readily understood meaning to consumers.

Nevertheless, even without the third-party registrations, it is apparent that DEL CAMPO is somewhat suggestive of registrant's goods, and therefore not entitled to the broadest scope of protection. However, the mark is at least entitled to protection from registration of applicant's very similar mark for closely related goods. See *In re Colonial Stores, Inc.*, 216 USPQ 793 (TTAB 1992). See also *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974) (likelihood of confusion is to be avoided as much between weak marks as between strong marks).

In view of the foregoing, and because highly similar marks are used in connection with closely related goods, we find that confusion is likely.

Serial No. 76633971

**Decision:** The refusal to register under Section 2(d) of the Trademark Act is affirmed.