

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

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Bucher

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re Poppies International NV

Serial No. 78519947

Mark P. Vrla of Jenner & Block LLP for Poppies International  
NV.

Robin M. Mittler, Trademark Examining Attorney, Law Office  
117 (Loretta C. Beck, Managing Attorney).

Before Seeherman, Bucher and Zervas, Administrative  
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Poppies International NV seeks registration on the  
Principal Register of the following mark:



for goods identified in the application as "bakery goods, pastries, cookies, cakes, biscuits, éclairs, cream puffs, donuts, waffles, frozen desserts and confections" in International Class 30.<sup>1</sup>

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register applicant's mark based upon Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). The Trademark Examining Attorney asserts that applicant's mark, when used in connection with the identified goods, so resembles the mark **POPPIES** (*in standard character format*), which is registered for "bakery products; namely, bread, bagels, pastry and bialys" in International Class 30 and "retail bakery shop, restaurant and catering services" in Class 42,<sup>2</sup> as to be likely to cause confusion, to cause mistake or to deceive.

Applicant and the Trademark Examining Attorney submitted briefs. We affirm the refusal to register.

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<sup>1</sup> Application Serial No. 78519947 was filed by Poppies International NV, a Belgian corporation, on November 19, 2004 based upon applicant's allegation of first use anywhere and first use in commerce at least as early as August 31, 1990.

<sup>2</sup> Registration No. 2018578 issued to Rachael, Inc., DBA Poppies Restaurant and Delicatessen, on November 26, 1996; renewed.

In arguing for registrability, applicant contends that its mark is not confusingly similar to the cited mark; that applicant and registrant rely upon different trade channels; and that despite almost fifteen years of contemporaneous use, there have been no reported instances of actual confusion between applicant's and registrant's marks.

By contrast, the Trademark Examining Attorney contends that the marks are similar in sound, appearance, connotation and commercial impression; that the goods and services are in part identical and otherwise closely related; and that the lack of evidence of actual confusion does not preclude a finding that confusion is likely.

Our determination under Section 2(d) is based upon 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 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relationship of the goods and/or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

**Goods**

We turn first to the *du Pont* factor focusing on the relationship of the goods and services herein. In this context, while the cited registration includes goods and services, we concentrate herein on registrant's identified goods in International Class 30. As pointed out by the Trademark Examining Attorney, applicant's "pastries" are legally identical to registrant's "bakery products; namely ... pastry ...." Applicant's "bakery goods" would appear to be broad enough to encompass registrant's "bakery products; namely, bread, bagels, pastry and bialys."

Moreover, the Trademark Examining Attorney has made of record third-party registrations demonstrating that goods as identified in applicant's application and registrant's registration come from the same source. These registrations, summarized below, have probative value to the extent that they serve to suggest that the goods listed therein are of a kind that may emanate from a single source. *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-1218 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 at n.6 (TTAB 1988).

**PASTRY ART**

for "pastries, cookies, cakes, breads" in International Class 30;<sup>3</sup>



for "bagels, bread, ... pastries, donuts, ..." in International Class 30;<sup>4</sup>



for, *inter alia*, "... bread, ... cakes, cookies, ... pastries ..." in International Class 30;<sup>5</sup>

**Boulangerie  
Pierre &  
Pâtisserie**

for "bread, cakes and cookies" in International Class 30;<sup>6</sup>

<sup>3</sup> Registration No. 3062164 issued on February 28, 2006. No claim is made to the word "Pastry" apart from the mark as shown.

<sup>4</sup> Registration No. 3119620 issued on July 25, 2006. No claim is made to the exclusive right to use the words "bagels" and "New York's best bagels" apart from the mark as shown.

<sup>5</sup> Registration No. 3162684 issued on October 24, 2006.

<sup>6</sup> Registration No. 3170988 issued on November 14, 2006. No claim is made to the exclusive right to use the words "Boulangerie" and "Patisserie" apart from the mark as shown.



**JEAN PHILIPPE**  
**PATISSERIE**

for "bagels, bakery goods, ... cakes, ... cookies, crepes, éclairs, ... frozen custards, frozen yogurt, gelato, ice cream, iced cakes, ... pastries ..." in International Class 30;<sup>7</sup>



for, *inter alia*, "... cakes, ... bread, cookies ..." in International Class 30;<sup>8</sup>



for, *inter alia*, "... cookies, pastries and bread, ..." in International Class 30;<sup>9</sup>

**CITY BREW**

for "bread, ... cakes, cookies, ... pastries, ... bagels ..." in International Class 30;<sup>10</sup>

<sup>7</sup> Registration No. 3171284 issued on November 14, 2006. No claim is made to the exclusive right to use the word "Patisserie" apart from the mark as shown.

<sup>8</sup> Registration No. 3173478 issued on November 21, 2006.

<sup>9</sup> Registration No. 3175302 issued on November 21, 2006. No claim is made to the exclusive right to use the word "Coffee" apart from the mark as shown.

<sup>10</sup> Registration No. 3176319 issued on November 28, 2006. No claim is made to the exclusive right to use the word "Brew" apart from the mark as shown.

<b>Goldie's</b>	for "... bakery goods, ... biscuits, bread, butter biscuits, ... cakes, ... donuts, éclairs, frozen breads, ... fruit cakes, ice-cream cakes, onion or cheese biscuits, ... savory and salted biscuits, sponge cakes, [and] whole meal bread" in International Class 30; <sup>11</sup>
<b>THE WISDOM OF WHOLE GRAINS</b>	for "bread, ... bagels, fresh and frozen waffles, cookies ..." in International Class 30; <sup>12</sup> and
<b>BERTRAND</b>	for "frozen breads ... sweet cookies, pastry" in International Class 30. <sup>13</sup>

Accordingly, from these registrations, we conclude that many of applicant's other enumerated goods are related to registrant's "bread, bagels, pastry and bialys." The Trademark Examining Attorney also submitted pages from a number of websites showing that bread, bagels, bakery goods, pastries and desserts are sold by the same entities:

- o The George Weston Bakeries, Inc., home page indicates that it produces, *inter alia*, cakes, cookies, donuts and bread. < [www.gwbakeries.com](http://www.gwbakeries.com) >
- o The Manhattan Bread & Bagel website shows that it offers bagels and breads as well as pastries, cakes and cookies. < [www.manhattanbread.com](http://www.manhattanbread.com) >
- o The Dunkin' Donuts website indicates that it offers bagels and other bakery items as well as donuts. < [www.dunkindonuts.com](http://www.dunkindonuts.com) >

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<sup>11</sup> Registration No. 3177126 issued on November 28, 2006.

<sup>12</sup> Registration No. 3178246 issued on November 28, 2006. No claim is made to the exclusive right to use the words "Whole Grains" apart from the mark as shown.

<sup>13</sup> Registration No. 3185567 issued on December 19, 2006.

Applicant provides no rebuttal to the Trademark Examining Attorney's evidence that these identified products are closely related.

**Channels of trade**

Turning to the *du Pont* factors dealing with the similarity or dissimilarity of established, likely-to-continue trade channels, we must presume that applicant's goods and registrant's goods will move through all of the normal channels of trade to all of the usual consumers of goods of the type recited. See *Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Because applicant's identification of goods includes bakery goods and pastries, and the cited registration includes bread, bagels and pastry, the channels of trade must be deemed to be the same. Hence, this *du Pont* factor favors a finding of likelihood of confusion.

We note applicant's contention that the respective trade channels are, in actuality, quite different. Applicant sells its products primarily through large retail grocery store chains and warehouse club stores. By contrast, according to applicant, registrant sells its recited products exclusively through a delicatessen in Delray

Beach, Florida, and has no plans to expand its operations beyond this single site location. However, there are several problems with this argument.

First, although applicant points to evidence that applicant and registrant employ distinct channels of trade, we cannot resort to such extrinsic evidence in order to restrict registrant's goods and services. See, e.g., *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) [evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration].

Second, inasmuch as applicant seeks a registration that is nationwide in scope, and the registrant's registration entitles it to operate anywhere in the United States, it is irrelevant under the third *du Pont* factor that the parties may presently operate in different geographic locations.

*Cf.* Trademark Rule 2.133(c), 37 C.F.R. § 2.133(c)

["Geographic limitations will be considered and determined by the Trademark Trial and Appeal Board only in the context of a concurrent use proceeding"].

### **Conditions of sale**

Whether the sale is consummated in a grocery store, a bakery, a deli, or other retail establishments that sell bread, bagels, pastries and other bakery products, the items listed in applicant's and registrant's respective identifications of goods involve relatively low cost purchases made without a high degree of care. In fact, because of the very nature of these items, they may well be bought on impulse. Hence, this *du Pont* factor favors the position of the Trademark Examining Attorney that there would be a likelihood of confusion herein.

### **The Marks**

The critical *du Pont* factor that the Trademark Examining Attorney and applicant discuss at length in their briefs involves the similarities or dissimilarities in the appearance, sound, connotation and commercial impression of the respective marks. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

We note, in discussing this factor, that the Court of Appeals for the Federal Circuit has held that when marks appear on "virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely

confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

Under actual market conditions, consumers generally do not have the luxury of making side-by-side comparisons. The proper test in determining likelihood of confusion is not a side-by-side comparison of the marks, but rather, the decision must be based on the similarity of the general overall commercial impressions engendered by the involved marks. *See Puma-Sportschuhfabriken Rudolf Dassler KG v. Roller Derby Skate Corporation*, 206 USPQ 255 (TTAB 1980).

Registrant's mark is simply the word **POPPIES** shown in standard character format. Applicant describes its special form mark as follows: "the words POPPIES MEESTER BAKKER POPELIER MAITRE PATISSIER within an oval, with a rectangular portion extending from the oval and a poppy flower above the word 'POPPIES.'"



Applicant is correct in noting that allegedly conflicting marks must be compared in their entirety under any Section 2(d) analysis. Nevertheless, one feature of a mark may be recognized as more significant in creating a commercial impression. Greater weight is given to that

dominant feature in determining whether there is a likelihood of confusion. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985) [marks THE CASH MANAGEMENT EXCHANGE and CASH MANAGEMENT ACCOUNT have very similar overall commercial impressions; "Cash Management" is the dominant feature of both marks]; and *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1987) [J M COLLECTABLES and JM ORIGINALS are confusingly similar].

Applicant points out that its mark has six words. However, the Trademark Examining Attorney notes that applicant has disclaimed the descriptive terms "Meester Bakker" and "Maitre Patissier," both of which translate as "master pastry chef." Although disclaimed, descriptive wording within a mark certainly cannot be ignored, the non-disclaimed portion of the mark may be more significant in creating a commercial impression. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997); [likelihood of confusion between DELTA and The Delta Café (at right)];



*In re National Data Corporation*, 224 USPQ at 752; and *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002) [HEWLETT PACKARD confusingly similar to PACKARD TECHNOLOGIES].

Accordingly, when considering marks for purposes of a likelihood of confusion determination under Section 2(d) of the Trademark Act, it is appropriate for us to find that disclaimed matter such as "Meester Bakker" and "Maitre Patisserie" is entitled to lesser weight.

Moreover, when a mark consists of words and designs, the word portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods or services. Therefore, the word portion is normally accorded greater weight in determining likelihood of confusion. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987) [Mark having the word "Appetito" in block letters, prominently

displayed between broad geometric stripes as applied to Italian sausages, likely to cause confusion with "Appetito's" printed in small script letters across a large capitalized letter



versus



and

"A" and "Appetito's Inc."  
with a large capitalized  
letter "A" and the design  
of a sandwich, for  
restaurant services].



Our primary reviewing court has also found that the words, rather than the design features of the respective logos, will create a greater impression on customers. *Giant Food, Inc. v. Nation's Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983) [the difference design of the GIANT hamburger mark does not serve to avoid confusion with the four claimed marks of Giant Food]:



GIANT  
FOOD



SUPER  
GIANT

As to the image of a poppy, if prospective consumers even notice this small design, it will merely serve to reinforce the dominant literal portion of the mark, "Poppies." While applicant argues that the "medallion and ribbon design" within applicant's mark contributes to its distinct commercial impression, we view these common geometric backgrounds (an oval and a rectangle) as carrier devices without source-indicating significance. *Seabrook Foods, Inc., v. Bar-Well Foods Ltd.*, 568 F.2d 1342, 196 USPQ

289 (CCPA 1977); *Guess? Inc. v. Nationwide Time Inc.*,  
16 USPQ2d 1804 (TTAB 1990); and *In re Anton/Bauer Inc.*,  
7 USPQ2d 1380 (TTAB 1988).

In the final analysis, clearly, the dominant and most distinctive element of applicant's mark is the word "Poppies." It is located in the very center of the oval, is made more prominent with shadowing features, and is significantly larger than any of the other wording.

Applicant argues that several features in its composite suggest a sophisticated, European style of baking. For example, applicant points to the various European languages appearing within the mark - the wording "Meester Bakker" (Dutch or Flemish) and "Maitre Patisserie" (French) - as well as the poppy flower design portion of applicant's mark, which applicant argues evokes associations with European war veterans (a well-known poem, "*In Flanders Fields the Poppies Blow*" by John McRae, commemorates a World War I battlefield and the poppy flowers that grow there).

However, even if we were to accept these associations as readily apparent to the average consumer in the United States, we agree with the Trademark Examining Attorney that we must presume that registrant's POPPIES mark, identical to the dominant portion of applicant's mark, could well create these same connotations and commercial impressions.

Furthermore, even if prospective consumers of bakery products were to notice some of the differences applicant points out between applicant's mark and the registered mark, the consumers could still reasonably assume, due to the overall similarities in commercial impressions created by the respective marks, that applicant's goods constitute a new product line from the same source as the goods sold under the POPPIES mark with which they are acquainted, or simply that it is a variation of the established POPPIES mark. See *SMS, Inc. v. Byn-Mar Inc.*, 228 USPQ 219, 220 (TTAB 1985) [applicant's marks ALSO ANDREA and ANDREA SPORT were "likely to evoke an association by consumers with opposer's preexisting mark [ANDREA SIMONE] for its established line of clothing.").

In sum, peripheral differences between the marks as to sound and appearance notwithstanding, we find that the marks are quite similar when compared in their entireties as to connotation and commercial impression. *In re Chatam International Inc.*, 380 F.3d 1340, 1343, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) ["Viewed in their entireties with non-dominant features appropriately discounted, the marks [GASPAR'S ALE for beer and ale and JOSE GASPAR GOLD for tequila] become nearly identical"]; *Hewlett-Packard Co. v. Packard Press Inc.*, 62 USPQ2d at 1004; *In re El Torito Restaurants*

*Inc.*, 9 USPQ2d 2002 (TTAB 1988) [MACHO COMBOS for food items and MACHO for sandwich is likely to cause confusion].

In making our determination on this critical *du Pont* factor, we find that the dominant portion of applicant's mark is identical to registrant's mark, and the additional wording and designs in applicant's mark alter neither its connotation nor commercial impression.

### **Period of contemporaneous use without actual confusion**

Finally, we turn to the *du Pont* factor dealing with the length of time during and conditions under which there has been concurrent use without evidence of actual confusion. Applicant argues that coexistence over a period of fifteen years provides strong evidence that confusion is not likely to occur in the future. As to whether there has been sufficient opportunity for confusion to occur, the record contains no indication of the level of sales or advertising by applicant. The absence of any instances of actual confusion is a meaningful factor only where the record indicates that, for a significant period of time, an applicant's sales and advertising activities have been so appreciable and continuous that, if confusion were likely to happen, any actual incidents thereof would be expected to have occurred and would have come to the attention of one or

both of these trademark owners. We also noted earlier that applicant claims that registrant is using its mark in a limited geographic area. This fact may explain the lack of evidence of actual confusion. However, in our determination of likelihood of confusion, we have to consider the registrant's goods to be unrestricted geographically and to be sold in all appropriate channels of trade for the goods.

All of these enumerated factors materially reduce the probative value of applicant's argument regarding asserted lack of actual confusion. Therefore, applicant's claim that no instances of actual confusion have been brought to applicant's attention is not indicative of an absence of a likelihood of confusion. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992).

In any event, we are mindful of the fact that the test under Section 2(d) of the Act is likelihood of confusion, not actual confusion.

### **Conclusion: Likelihood of Confusion**

In conclusion, the *du Pont* factors favoring a finding of likelihood of confusion include the fact that the goods are identical or otherwise closely related; these are inexpensive, impulse items purchased with a lowered standard of care; we must presume that the respective goods will move

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through the same channels of trade; and we find that the marks are quite similar due to the fact that the dominant portion of applicant's mark is identical to registrant's mark.

*Decision:* The refusal to register this mark based upon Section 2(d) of the Lanham Act is hereby affirmed.