

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

Mailed: February 29, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Goody Industria De Alimentos LTD

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Serial No. 78770730

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Morton Rosenberg of Rosenberg, Klein & Lee for Goody  
Industria De Alimentos LTD.

Sally Shih, Trademark Examining Attorney, Law Office 106  
(Mary I. Sparrow, Managing Attorney).

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Before Walters, Grendel and Kuhlke, Administrative Trademark  
Judges.

Opinion by Walters, Administrative Trademark Judge:

Goody Industria De Alimentos LTD has filed an  
application to register the mark shown below on the  
Principal Register for "fruit pulp juices; fruit drinks;  
fruit juices; nectar; soft drinks; fruit flavored soft  
drinks; fruit flavored beverages," in International Class  
32.<sup>1</sup> The application includes the following description of  
the mark: "the mark consists of the highly stylized word

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<sup>1</sup> Serial No. 78770730, filed December 10, 2005, based on an allegation  
of a bona fide intention to use the mark in commerce.

'GOODY' with three tear drop contours above the second letter 'O.'



The examining attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark GOODY, previously registered for "fresh citrus fruits," in International Class 31,<sup>2</sup> that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the examining attorney have filed briefs.<sup>3</sup> We affirm the refusal to register.

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

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<sup>2</sup> Registration No. 0535954 issued January 9, 1951. The mark was renewed for a period of ten years on January 9, 2001; Section 15 affidavit acknowledged. The registration includes a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f).

<sup>3</sup> The examining attorney objected to third-party registrations submitted by applicant with its brief. It appears that these same registrations were submitted by applicant in a timely manner with its response of December 12, 2006, and these exhibits have been considered. To the extent that the brief includes exhibits that were not previously submitted, such exhibits have not been considered because they are untimely. The record must be complete prior to appeal. See, 37 CFR 2.142(d); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994).

confusion issue. See *In re E. I. du Pont de Nemours and 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).

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); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

We turn, first, to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. While the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). We

note, further, 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 terms of their overall commercial impressions that confusion as to the source of the goods or services 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. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant contends that the shared term GOODY is inherently weak and entitled to only a limited scope of protection; that the design aspect of its mark distinguishes it from the registered mark; that the tear drop design element suggests liquid drinks, applicant's identified goods; and that the examining attorney has improperly dissected its mark. In support of its position that the marks are weak, applicant submitted copies of ten third-party registrations for various marks including "GOOD" as a root for a variety of food items.<sup>4</sup>

However, we agree with the examining attorney and find that the marks are substantially similar. While the registered mark GOODY may be a weak mark, it is registered

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<sup>4</sup> Two additional submissions include an abandoned application and a cancelled registration, neither of which are of any probative value.

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under Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f), on the ground that it has acquired distinctiveness, and, even weak marks are entitled to protection.

Both marks before us include the identical word GOODY, although applicant's mark includes a design element. The two marks are identical in sound, as the word GOODY will be used by prospective purchasers in asking for applicant's goods and, thus, is likely make a greater impression on purchasers. *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 (1987).

Applicant's design consists of stylized lettering with three small "tear drops" above the second letter "O." We find the design element to be a relatively minor aspect of the appearance and overall commercial impression of applicant's mark. The teardrop design is very small and, even though it may connote liquid to prospective purchasers, this connotation is as likely to relate to the juice of registrant's citrus fruit as it is to applicant's drinks. Similarly, we do not find the stylized lettering in applicant's mark to be a distinguishing factor. The registered mark appears in standard character format and,

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thus, registrant could conceivably display its mark in any lettering style, including that of the word GOODY in applicant's 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). We find applicant's argument that the examining attorney "ignored" the stylized lettering and design elements of its mark to be 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).

Therefore, we conclude that the word GOODY is the dominant feature of applicant's mark, which is identical to registrant's mark in its entirety; and that the design elements are insufficient to distinguish it from the registered mark.

We reach this conclusion as to the similarities of the marks despite applicant's third-party registration evidence. The marks and/or the goods identified in these third-party registrations are different from the marks and goods herein and we do not draw any conclusion regarding the issue of likelihood of confusion between applicant's mark and the mark in the cited registration, as applied to the respective

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goods, from the co-existence on the register of the noted third-party registrations. *See, In re National Novice Hockey League, Inc.*, 222 USPQ 638, 642 (TTAB 1984).

Moreover, we must decide each case on its own facts and we cannot be bound by prior decisions of the USPTO in registering a mark. *In re Nett Designs Inc.*, 57 USPQ2d 1564 (Fed. Cir. 2001).

Turning to consider the goods involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). *See also, Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991).

Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks

used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein; and *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002).

The examining attorney contends that the respective goods are closely related, stating that the products are inexpensive goods subject to impulse purchases and consumed on a daily basis; that they are likely to be sold in the same stores and travel through the same trade channels. In support of her position, the examining attorney submitted copies of three third-party registrations which include both applicant's and registrant's goods in the same registration.<sup>5</sup>

Applicant contends that the respective products, fresh citrus fruits and soft drinks, are "entirely separate and disparate fields" (brief, p. 15); that, even if sold in the same stores, they would be sold in entirely different departments; and "there is absolutely no foundation for suggesting that the buying public would confuse a soft drink with 'fresh fruit'" (id.).

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<sup>5</sup> The examining attorney submitted a total of ten registrations. However, seven of these registrations are not based on use in commerce and, thus, are of no probative value and have not been considered.

We begin by noting that the question is not whether prospective customers will confuse the goods themselves, but whether prospective purchasers are likely to believe that fresh citrus fruits and applicant's juices and soft drinks identified by confusingly similar marks could come from the same source. Applicant's fruit pulp juices, fruit drinks, fruit juices, nectar, fruit flavored soft drinks and fruit flavored beverages, in particular, encompass citrus-flavored drinks. The examining attorney has not given us a great deal of evidence, but she has submitted several third-party registrations including both fruit and fruit drinks and soft drinks registered under the same mark. While third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, they may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).

We find this evidence sufficient to conclude that the respective goods are related. Moreover, a significant

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ingredient in some of applicant's various fruit drinks would be registrant's fresh citrus fruits. In fact, it is likely that consumers purchase fresh citrus fruits to make their own juice at home. We add that, given the nature of these food and drink items, both applicant's and registrant's goods are likely to be purchased by members of the general public and they are likely to purchase these goods in at least some of the same stores.

We have considered the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, including those arguments not specifically addressed herein, and we conclude that in view of the substantial similarity in the commercial impressions of applicant's GOODY design mark and registrant's mark, GOODY, their contemporaneous use on the related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

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