

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Groovalicious Inc.

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Serial No. 78795824

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Groovalicious Inc. (Peter Solomita, President), pro se.

Kimberly Frye, Trademark Examining Attorney, Law Office 113  
(Odette Bonnet, Managing Attorney).

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Before Hairston, Zervas and Walsh, Administrative Trademark  
Judges.

Opinion by Hairston, Administrative Trademark Judge:

Groovalicious Inc. has filed an application to  
register the mark shown below for brownies and cookies in  
International Class 30.<sup>1</sup>

**Little Buddy**  
**BISCUIT COMPANY**

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<sup>1</sup> Serial No. 78795824, filed January 20, 2006, alleging dates of  
first use of June 29, 2005.

The words BISCUIT COMPANY are disclaimed apart from the mark as shown.

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to applicant's goods, so resembles the mark LI'L BUDDIES (typed form), which is registered for cookies in International Class 30,<sup>2</sup> as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed. Applicant and the examining attorney have filed briefs.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

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<sup>2</sup> Registration No. 2312065, issued January 25, 2001; affidavits under Sections 8 and 15 accepted and acknowledged.

Considering first the goods, we note that they are identical in part. The cited registration covers cookies which are legally identical to the cookies in applicant's application. Further, the brownies identified in applicant's application are closely related to registrant's cookies.

Applicant, however, maintains that the channels of trade for the respective goods differ so significantly that there is no likelihood of confusion. Specifically, applicant contends that:

Applicant's goods are available at coffee shops, restaurants and similar establishments in the New York area and via delivery or mail from its location in Brooklyn. The registrant, Joe Corbi's Wholesale Pizza, Inc. ("Registrant"), on the other hand offers its goods to various charitable and community organizations for fundraising efforts. (Brief at 5).

In support of its argument, applicant submitted a printout of the registrant's website.

It is well settled that the issue of likelihood of confusion is determined on the basis of the goods as identified in applicant's application and the cited registration, regardless of what the record may reveal as to the particular nature of those goods, their actual channels of trade, or the classes of purchasers to which they are in fact directed and sold. See, e.g., Octocom

Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Further, where the goods in an application and/or cited registration are broadly described, such that there are no restrictions as to trade channels and purchasers, it is presumed that the identification of goods encompasses not only all goods of the nature and type described therein, but that the identified goods are provided in all channels of trade which would be normal therefor, and that they would be purchased by all potential customers thereof. See, e.g., In re Elbaum, 211 USPQ 639 (TTAB 1981).

Here, the identifications of goods in applicant's application and the cited registration contain no limitations as to channels of trade and methods of distribution. In view thereof, we must presume that applicant's brownies and cookies and registrant's cookies are marketed in all the usual channels of trade for goods of this type (e.g., bakeries, grocery stores, and convenience stores) to the same class of purchasers,

namely, ordinary consumers.

Furthermore, the products involved herein 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).

Under the circumstances, it is clear that if such goods are marketed under the same or similar marks, confusion as to the source or sponsorship thereof would be likely to occur.

We turn then to a consideration of the marks. We must determine whether applicant's mark and registrant's mark, when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. Although the marks 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, 751 (Fed. Cir. 1985) ["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, 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 commercial impression that confusion as to the source of the goods and/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). Finally, "when marks would 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 864, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

When we compare applicant's mark LITTLE BUDDY BISCUIT COMPANY with registrant's mark LI'L BUDDIES in their entirety, we find that the marks are similar in sound, appearance, connotation and commercial impression.

The term LI'L BUDDIES is registrant's entire mark. The highly similar term LITTLE BUDDY is the dominant portion of applicant's mark. Although applicant's mark includes the words BISCUIT COMPANY, these words are given little weight in our comparison of the marks because they merely describe applicant's type of business and are of no trademark significance. Because the term LI'L BUDDIES is registrant's entire mark and LITTLE BUDDY, the dominant portion of applicant's mark are substantially similar, the marks are similar in sound.

The marks are also similar in appearance. In the present case, the descriptive words BISCUIT COMPANY are smaller in font size and appear below the dominant feature of applicant's mark, namely LITTLE BUDDY. Also, because registrant's mark LI'L BUDDIES is in typed form, it may be displayed in any reasonable manner, including the same stylized lettering as used by applicant for the term LITTLE BUDDY in its mark. See, e.g., Phillips Petroleum Co. v. C.J. Webb, Inc., 442 F.2d 1376, 170 USPQ 35 (CCPA 1971).

Further, the marks convey a similar meaning and commercial impression in relation to the respective goods. Registrant's mark consists of the term LI'L, which is an informal version of the word LITTLE in applicant's mark, and BUDDIES which is plural for the word BUDDY in

applicant's mark. Although applicant's mark includes the words BISCUIT COMPANY, they do not significantly change the meaning or commercial impression of applicant's mark.

Several additional arguments made by applicant require comment.

Applicant has submitted copies of third-party registrations of pairs of marks for various goods, e.g., BUDDIE and design for canned vegetables and BUDDY'S for frozen breakfasts, sandwiches and frozen meals made of pasta or rice. Applicant argues that the marks involved in this case are not as similar to each other as the pairs of marks in these registrations, and its mark should therefore be allowed to register. These third-party registrations do not compel a different result herein. It is well settled that each case must be determined on its own merits. See, e.g., *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001).<sup>3</sup>

Applicant argues that at registrant's website, registrant's "primary brand seems to be JOE CORBI," and this makes confusion between the involved marks unlikely. (1/5/07 Response at 5). Even if registrant uses JOE CORBI

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<sup>3</sup> Also, we observe that in many of the examples, the goods of the respective registrants are not identical/closely related, and in other examples there are additional design elements or wording that further distinguishes the marks.

along with the mark LI'L BUDDIES on its goods, this can have no bearing on our likelihood of confusion determination because the cited registration covers LI'L BUDDIES alone. See Dow Corning Corp. v. The Doric Corp. 192 USPQ 106 n.4 (TTAB 1976) and cases cited therein.

Finally, applicant asserts that it and the registrant have used their marks concurrently for two years without any instances of actual confusion, and this shows that confusion is not likely to occur. We are not persuaded by this argument. Applicant has not provided any evidence as to the extent of its use, nor is there any evidence as to registrant's use, such that we can determine whether there has been a meaningful opportunity for confusion to occur. "Uncorroborated statements of no known instances of actual confusion are of little evidentiary value... The lack of actual confusion carries little weight ... especially in an ex parte context." *Majestic Distilling*, supra, 65 USPQ2d at 1205.

In view of the foregoing, we conclude that consumers who are familiar with registrant's mark LI'L BUDDIES for cookies would be likely to believe, upon encountering applicant's mark LITTLE BUDDY BISCUIT COMPANY for cookies and brownies, that such identical and otherwise closely

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related goods emanate from, or are sponsored by or associated with, the same source.

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