

**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 Figaro Coffee Company, Inc.

Serial No. 78857540

Gregory C. Smith of Garvey Smith Nehrbass & North, L.L.C.  
for Figaro Coffee Company, Inc.

John M. Wilke, Trademark Examining Attorney, Law Office 104  
(Chris Doninger, Managing Attorney).

Before Seeherman, Bucher and Kuhlke, Administrative  
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Figaro Coffee Company, Inc. seeks registration on the  
Principal Register of the following mark:



for goods and services identified in the application as,

"coffee, tea, cocoa, sugar, rice, tapioca,  
sago, artificial coffee and flour;  
preparations made from cereals, bread,

pastry and confectionery, namely, cereal based snack bars; flavored ices, honey and treacle; condiments, namely, yeast, baking powder, salt, mustard, vinegar; sauces, spices; ice" in International Class 30; and

"serving food and drinks; restaurant and cafe services" in International Class 43.<sup>1</sup>

This case is now before the board on appeal from the final refusal of the Trademark Examining Attorney to register this designation based upon Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). The Trademark Examining Attorney has found that applicant's mark, if used in connection with the identified goods and services, so resembles the following three marks, all owned by the same party:

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**FIGARO'S** for "restaurant and take out services" in International Class 42;<sup>2</sup>

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<sup>1</sup> Application Serial No. 76632896 was filed on April 10, 2006 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce. No claim is made to the words "Coffee Company" apart from the mark as shown. Applicant has provided the following description of the mark: "The words 'Figaro Coffee Company' and the cup, saucer and spoon are black on a coffee-colored oval shaped background, having a black border, with the word 'Figaro' written in script as streaming above the coffee cup, and the words 'Coffee Company' written in black letters along the lower edge of the coffee-colored oval." The colors brown and black are claimed as a feature of the mark.

<sup>2</sup> Registration No. 2086079 issued on August 5, 1997; renewed.

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**FIGARO'S** for "baked and unbaked freshly prepared pizza and breadsticks; unbaked freshly prepared calzone, lasagna and garlic bread" in International Class 30;<sup>3</sup> and

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**FIGARO** for "chocolate; non-chocolate confectionery, namely, marshmallows, candy, chewing gum, honey, flavored ices, and sweetened pretzels" in International Class 30;<sup>4</sup>

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as to be likely to cause confusion, to cause mistake or to deceive.

The Trademark Examining Attorney and applicant have filed briefs in the case. We affirm the refusal to register.

In arguing for registrability, applicant contends that the word "Figaro" is not the dominant feature of its mark, and that its mark has a different commercial impression from registrant's marks; and that registrant's listing of food items is quite limited and would appear to be sold only through registrant's own Italian restaurant.

By contrast, the Trademark Examining Attorney contends that the word "Figaro" is clearly the most dominant feature of applicant's mark in terms of creating a commercial impression in the minds of consumers; and that the goods

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<sup>3</sup> Registration No. 2433573 issued on March 6, 2001; Section 8 affidavit (six-year) accepted and Section 15 affidavit acknowledged.

<sup>4</sup> Registration No. 2850038 issued on June 8, 2004.

and services of applicant and registrant are closely-related and even overlapping.

### **Likelihood of Confusion**

We turn then to a consideration of the issue of likelihood of confusion. Our determination of likelihood of confusion is based upon our analysis of all of the probative facts in evidence that are relevant to the factors bearing on this issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In this case, applicant and the Trademark Examining Attorney have focused exclusively on the two key considerations in any likelihood of confusion analysis, namely, the similarities between the marks and the relationship between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

### **The Marks**

We turn first to the *du Pont* factor focusing on the similarity or dissimilarity of the marks in their

entireties as to appearance, sound, connotation and commercial impression. See *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

The analysis is not whether the marks can be distinguished when compared side-by-side. Rather, we must determine whether the marks are sufficiently similar that there is a likelihood of confusion as to source and, in making this determination, we must consider the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Further, while it is correct that we must view the mark in its entirety, *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992), it is also well settled that "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of the mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable." *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 750-51 (Fed. Cir. 1985).

As was noted by the Trademark Examining Attorney, although applicant's composite mark is contained within an oval background and features the image of a coffee cup and spoon, the literal portions are generally the dominant and most significant features of marks because consumers will call for the goods or services in the marketplace by that portion. *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). We consider that principle to be applicable to this case, and we give greater weight to the wording rather than to the design elements and stylization in applicant's mark.

Additionally, the word "Figaro" in applicant's composite mark dominates over the disclaimed words "COFFEE COMPANY." The



dominant portion of applicant's mark, FIGARO, is identical to registrant's mark, FIGARO, and virtually identical to registrant's FIGARO'S mark. The disclaimed words "Coffee Company" in applicant's mark, and the possessive form in one variation of registrant's mark (FIGARO'S), are not differences sufficient to distinguish the marks.

In view thereof, we find that applicant's mark is quite similar in connotation and commercial impression when

compared with registrant's cited marks, such that it overcomes any dissimilarity in sound and appearance between applicant's mark and registrant's marks. Thus, with regard to the first *du Pont* factor, we find that the marks are similar, favoring a finding of likelihood of confusion.

### **The Goods and Services**

We turn then to a consideration of the goods and services identified in the application and the cited registrations.

In order to affirm a refusal, it is only necessary that we find likelihood of confusion with respect to at least one item in each class of applicant's goods or services. See *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) ["[L]ikelihood of confusion must be found if the public, being familiar with [opposer's] use of MONOPOLY for board games and seeing the mark on any item that comes within the description of goods set forth by appellant in its application ..."]. Accordingly, we note that "honey" and "flavored ices" in applicant's application are identical to the "honey" and "flavored ices" identified in the '038 Registration, and "restaurant services" recited in applicant's application is identical to the "restaurant

services" recited in the '079 Registration. Further, applicant's "bread" must be considered, at the very least, closely related to the "baked and unbaked freshly prepared breadsticks" and "unbaked freshly prepared garlic bread" identified in the '573 Registration. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Thus, with regard to this critical *du Pont* factor, we find that the goods and services are in part identical or closely related, also favoring a finding of likelihood of confusion.

Additionally, although applicant argues that registrant's goods appear to be sold only through registrant's own Italian restaurant, we must consider the cited registrant's goods as they are described in the registration, and we cannot read limitations, for example, into the "honey" and "flavored ices" listed therein. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). If the cited registration describes goods and services broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the registration

encompasses all goods and services of the type described, that they move in all channels of trade normal for these goods and services, and that they are available to all classes of purchasers for the described goods and services. *See In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992).

Further, even if we treat registrant's baked and unbaked freshly prepared breadsticks and unbaked freshly prepared garlic bread as being sold only from restaurant premises, consumers encountering bread in supermarkets that is sold under applicant's very similar mark are likely to believe that the registrant has expanded its sales to supermarkets.

### ***Conclusion***

In summary, we find that applicant's goods and services are in part identical to registrant's goods and services, and that the marks are confusingly similar.

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