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THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Kellogg Company

v.

Toucan Golf, Inc.

Opposition No. 102,734
to application Serial No. 74/611,345
filed on December 15, 1994

Jeffrey H. Kaufman of Oblon Spivak McClelland Maier &
Neustadt, P.C. for Kellogg Company

Toucan Golf, Inc., pro se.

Before Simms, Seeherman and Wendel, Administrative Trademark
Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Kellogg Company has opposed the application of Toucan
Golf, Inc. to register TOUCAN GOLD as a trademark for golf
clubs and putters.¹ As grounds for opposition, opposer has

¹ Application Serial No. 74/611,345, filed December 15, 1994 and
asserting a bona fide intention to use the mark in commerce.

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alleged that since prior to applicant's filing date, opposer has used trademarks "comprising the word 'toucan'" in connection with food products and ancillary promotional items; that it owns and relies on registrations for various marks consisting of a design of a toucan and for the words TOUCAN SAM for cereal or cereal-derived food products; that it relies on its common law use of toucan marks on ancillary promotional items, including golf ball markers; and that applicant's use of TOUCAN GOLD on its identified goods is likely to cause confusion or mistake or to deceive. Opposer has also asserted that "the *bona fides* of Applicant's intent-to-use is [sic] not apparent from materials of record in the subject application, and Opposer therefore challenges same."

In its answer applicant has admitted opposer's ownership of its five pleaded registrations, and that these registrations are valid and subsisting, and denied the remaining salient allegations of the notice of opposition.

Both opposer and applicant filed briefs. Opposer filed what it styled as a "reply at final hearing," in which it asserts that there are no facts of record to substantiate the claims and argument made in applicant's brief, and points out that the brief is not signed and does not bear a certificate of service. Opposer asks that applicant's brief be given no consideration. To the extent that opposer

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objects to applicant's brief on the basis that it does not satisfy certain procedural formalities, the objection is denied. Although the brief does not contain all the elements of a certificate of service, as set forth in Trademark Rule 2.119(a), it does indicate that a copy was sent to opposer. Further, opposer has not asserted that it did not receive applicant's brief, or that it was in any way prejudiced by the fact that it did not bear a certificate of service. Similarly, there is no apparent prejudice from the fact that the brief is unsigned. Therefore, applicant's brief has been considered, although any argument which is not factually supported by the record is necessarily of little value.

The record includes the pleadings; the file of the opposed application; and the testimony, with exhibits, of opposer's witnesses Mark Childs and William Nielsen. Opposer has also submitted, under a notice of reliance, applicant's responses to certain of opposer's interrogatories and requests for admission; portions of the discovery deposition of Peter Boyko, applicant's chief executive officer; certain printed publications; and certified status and title copies of opposer's five pleaded registrations, as well as Registration No. 1,979,527.²

² Registration No. 1,979,527 issued on June 11, 1996, and the notice of opposition was filed on July 29, 1996. Because of the short time between the issuance of the registration and the

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The marks and goods of these registrations are shown below:

Cereal breakfast foods³

Cereal-derived food
product to be used as a
breakfast food, snack
food or ingredient for
making food⁴

TOUCAN SAM

Cereal-derived food
product to be used as a
breakfast food snack food
or ingredient for making
food⁵

filing of the opposition it is possible that opposer's outside counsel was unaware that the registration had issued at the time it prepared the opposition papers. In that case, it would have been the better practice to have amended the notice of opposition when counsel became aware of the registration. However, because the registration was introduced during the discovery deposition of applicant's witness and was made of record during opposer's testimony period (and because applicant did not object thereto), we deem the pleadings to have been amended pursuant to FRCP Rule 15(b) to include this registration.

³ Registration No. 775,496, issued August 18, 1964; renewed.

⁴ Registration No. 1,270,940, issued March 20, 1984; Section 8 affidavit accepted; Section 15 affidavit received.

⁵ Registration No. 1,343,023, issued June 18, 1985; Section 8 affidavit accepted; Section 15 affidavit received.

Processed cereal to be used as a breakfast cereal, snack food or primary component in combination with other foods⁶

Processed cereal to be used as a breakfast food, snack food or ingredient for making food⁷

clothing, namely t-shirts, sweatshirts, nightshirts, pajamas and caps⁸

Applicant, which was not represented by counsel, has not submitted any evidence, nor did it appear at the testimony depositions of opposer's witnesses or at the oral hearing.

Opposer sells cereal products. In 1963 it introduced a cereal under the trademark FROOT LOOPS. Since its introduction, the packaging for this cereal has featured a cartoon-like picture of a toucan. Through the years the

⁶ Registration No. 1,840,746, issued June 21, 1994. The drawing of the mark is lined for the colors green, orange, light blue, dark blue, red and pink, and such colors are claimed to be a feature of the mark.

⁷ Registration No. 1,876,803, issued January 31, 1995.

⁸ Registration No. 1,979,527, issued June 11, 1996.

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toucan has changed slightly; for example, the original packaging shows the toucan with a closed beak, and later versions depict it with an open "mouth" or outspread wings.

Opposer refers to its toucan as TOUCAN SAM, and several of the packages which opposer has introduced as exhibits bear this name. For example, exhibit No. 3, which depicts packaging from June 1964, refers to a TOUCAN SAM stuffed toy which is offered as a promotional item. This toy is a stuffed animal representation of the toucan design on the package. Exhibit 7, which depicts a FROOT LOOPS package from 1972, features a "TOUCAN SAM 'Ring Toss' game," and the game itself uses a 7-inch tall figure of the toucan.

Mark Childs, who is opposer's Director of Kit Driven Equities, testified that, based on studies of children's name recall, children refer to the toucan design equally as "Toucan" and "Toucan Sam." A 1996 study prepared by an advertising agency on the "star power" of various character and celebrity names showed that of 600 people who were shown the visual image of Toucan Sam, 57% were aware of the character.

Opposer's FROOT LOOPS cereal is available in grocery stores, "manufacturer" stores like K-Mart and Target, club stores, institutions and schools. The primary consumers of the cereal are children and teens (60%); the remaining 40% are adults over 18.

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Opposer advertises its FROOT LOOPS cereal nationally on television, and in ads with coupons which are part of a coupon-filled insert placed in Sunday newspapers. Opposer also has a web page which includes the FROOT LOOPS brand and the Toucan Sam character.

Opposer's FROOT LOOPS cereal has enjoyed significant sales. In the five-year period from 1988 through 1992, net sales in the United States were over \$759 million, while for a similar period from 1993 through 1997 (the figures for the last 4 months being estimated), net sales were over \$1 billion. Advertising and promotional expenses amounted to \$204 million in the earlier period, and \$358 million in the latter.

Opposer, in addition to its cereal products, is involved in a licensing/merchandising program. William Nielsen, the Director of Promotion, Development & Licensing for opposer's subsidiary Kellogg USA, testified regarding opposer's use of the "TOUCAN SAM mark." In reviewing this testimony, we note that Mr. Nielsen did not make a distinction between the design mark that is referred to as Toucan Sam, and the word mark TOUCAN SAM which opposer has registered. Based upon the exhibits which were submitted during Mr. Nielsen's testimony, though, it appears to us that in general he is referring to the design of the toucan, rather than the word mark TOUCAN SAM.

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Mr. Nielsen testified that opposer has licensed the "TOUCAN SAM mark" for, inter alia, golf balls, caps, t-shirts, toy miniature cars, watches, coffee mugs, plates, spoons and squirt bottles. A catalog which bears an issue date of January 1994 offers merchandise featuring opposer's various marks and characters, including representations of TONY THE TIGER for, inter alia, golf shirts, golf balls, golf headcovers, caps, baseballs and squeeze bottles; KELLOGG'S for, inter alia, golf umbrellas, golf balls, a "golf package" with tees, ball markers and a divot fixer, and golf towels; and the Toucan Sam design (shown in Registration No. 1,270,940) for golf balls, t-shirts, soft magnets and lapel pins. Mr. Nielsen testified that the items bearing the Toucan Sam design were available to the public through the catalog.

Mr. Nielsen also testified that similar catalogs were in use at least as of 1989 (when he joined the company), although he did not testify as to the specific goods which were offered in those catalogs, or the marks they bore. Another catalog, bearing a copyright date of 1995, which was introduced in late 1994 or early 1995, offers additional merchandise, including a KELLOGG'S trademarked mountain bike, golf putter and golf bag (which, in addition to the KELLOGG'S mark, bears a Tony the Tiger design). The Toucan

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Sam design mark appears, *inter alia*, on one of the golf balls shown in this catalog.

The catalogs are available to the general public. Specifically, they are sent out by opposer's Consumer Affairs department to any consumers who call and indicate they are interested in obtaining opposer's licensed items. The catalogs are also used "with our customers for promotional programs where they need to get these types of items." Nielsen, p. 11. Although opposer has not made clear whether these customers are distributors or retail stores, it is obvious that Mr. Nielsen is not referring to the general public. In addition, opposer's sales people use the catalog to order gifts for opposer's employees, and families and friends of employees order licensed merchandise through the catalogs.

Besides selling licensed items through its catalogs, opposer has, since 1987, sold its products through a store, Classic Logos, which is located in a mall in Battle Creek, Michigan, the city where opposer has its headquarters. The items sold in the store feature all of opposer's characters, including Toucan Sam, and the items which are sold include t-shirts, mugs, pens, caps and sweatshirts.

Opposer also uses its licensed goods in merchandising programs with the trade by which a customer could buy, for example, a Toucan Sam t-shirt if he bought a box of cereal.

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Many of these types of promotions occur each year, and have for many years. Trade programs also include a "store inside a store type of setup," in which a store will sell Kellogg merchandise.

In 1996 opposer ran a one-hour TV program on QVC, a national cable television channel which sells products via television to viewers in their homes. The program featured "Kellogg licensed merchandise," including "a number of different items which includes again TOUCAN SAM as well as TONY and CORNELIUS and DIG'EM and t-shirts and caps and mugs and various things like that." Nielsen, p. 23.

Opposer also sponsors a car in the NASCAR circuit of races, and at the tracks there are big trailers which carry "a considerable amount of Kellogg licensed merchandise in conjunction with our car." Nielsen, p. 23. Mr. Nielsen testified that in 1998 (the year after his testimony was taken), opposer planned to feature Toucan Sam on a NASCAR car.

Finally, Mr. Nielsen testified that in general opposer's golf-related products are "very popular with the trades," p. 27, and for charitable events. In particular, he said that when opposer sponsors golf outings it always gives out "Kellogg golf balls," p. 27, and that they are the most popular item opposer provides. He did not furnish any information, however, as to when, where or how many golf

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outings opposer had sponsored, nor did he indicate the specific marks appearing on the golfing products.

Applicant was incorporated in the summer of 1994. It sells promotional golf-related products, such as bag tags, divot repair tools, putters, golf clubs and ball markers.

In July or August of 1994 applicant's CEO, Peter Boyko, decided to use the name TOUCAN GOLD for golf clubs and putters, and filed an intent-to-use application for this mark on December 15, 1994. Applicant has had 1800 clubs (forming 100 sets with 13 clubs in a set, plus 500 lob wedges) made for it with the words TOUCAN GOLD engraved on the club heads. Applicant intends to sell its TOUCAN GOLD golf sets for \$1500, and the individual lob wedge club for \$100 to \$150. Applicant also was planning to make other sets of clubs, which it might call TOUCAN SILVER or TOUCAN RED.

Applicant's TOUCAN GOLD clubs are intended to be used as a promotional product, sold to a corporate account that might have a golf tournament or want to give something away to charity. The clubs could also be offered by a company as an incentive to its customers, e.g., "buy so many cases of beer and you get a free set of clubs." Boyko, p. 49. Applicant's sales target is a company's decision maker, executive, or premium buyer. In both 1995 and 1996 applicant exhibited its TOUCAN GOLD golf clubs in four

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"premium" trade shows, two in the United States and two in Canada. Companies which want to provide premiums as customer incentives, such as a bank which offers a free product to anyone opening a new CD account, would attend such trade shows.

Apart from the trade shows, applicant has not yet advertised its golf clubs, nor has it created any advertising or promotional material. Applicant explained that it decided not to prepare any literature because of the present opposition.

As a preliminary matter, we point out that, although opposer alleged in its notice of opposition that applicant did not have a bona fide intention to use its mark at the time it filed its application, opposer has not argued this issue in its brief. Accordingly, we deem opposer to have waived this claim. We would also add that the evidence which is of record supports the position that applicant did have the requisite intent.

Additionally, we note that opposer has asserted throughout its brief that it owns a family of TOUCAN marks. Opposer never made such an allegation in its pleading, nor do we regard this assertion to have been tried. Accordingly, we have given no consideration to opposer's claim of a family of marks.

The issue before us, therefore, is whether applicant's intended use of TOUCAN GOLD for golf clubs and putters is likely to cause confusion with opposer's Toucan design and TOUCAN SAM marks.

First, we note that priority is not in issue with respect to opposer's use of Toucan designs for cereal, cereal-based snack food, and clothing, and TOUCAN SAM for a cereal-derived snack food, in view of opposer's registrations which are of record. **King Candy Company v. Eunice King's Kitchen, Inc.**, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Apart from the registration of the Toucan design for clothing, however, opposer does not own registrations for the collateral merchandise items on which it uses its marks. Accordingly, opposer's rights in its marks for these products are based on common law.

We must say that the evidence opposer has provided with respect to the use of the Toucan designs or the words TOUCAN SAM on collateral merchandise is rather vague. Mr. Nielsen's testimony about such usage was in very general terms, and did not provide any concrete information about sales or the extent of opposer's advertising, such as the number of catalogs which had been distributed. Opposer's failure to provide definite information with respect to sales of opposer's golf balls bearing the Toucan design is particularly disturbing, since in its brief opposer's

discussion of the similarity-of-the-goods factor rests solely on the relatedness between golf balls and golf clubs. Detailed testimony regarding sales of golf balls bearing the Toucan design prior to applicant's filing date would have had far more probative value than a "yes" response to "And would the items featured on that page [of the Kellogg's merchandise catalog] generally be available to the public through this catalog?" Nielsen, p. 12.

Nonetheless, we find that Mr. Nielsen's testimony, coupled with the exhibits of record, shows that the catalog represented in Exhibit 30 was available to the general public prior to the filing date of applicant's intent-to-use application, and that the inclusion in this catalog of golf balls bearing the design of a toucan (the same mark which is the subject of Registration No. 1,270,940), is sufficient to establish that, at the very least, opposer made use analogous to trademark use by advertising and offering such items for sale. Accordingly, opposer has established prior common law rights in the Toucan design mark for golf balls sold in this particular channel of trade, i.e., opposer's own merchandise catalog, distributed to members of the public who specifically call opposer to request such merchandise.

This brings us to the issue of likelihood of confusion. Opposer's argument seems to be based on formulaic

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pronouncements: opposer's marks are famous and famous marks are entitled to a wide latitude of protection; the parties' marks are substantially identical because TOUCAN is the dominant part of applicant's mark, which is the verbal equivalent of opposer's famous marks; and golf clubs and golf balls have an inherent relationship.

Upon closer examination, we find there are several problems with the steps upon which opposer bases its conclusion of likelihood of confusion.

First, we find that opposer's Toucan design marks are famous for cereal. As indicated previously, opposer has prominently displayed the design of a toucan on its FROOT LOOPS cereal since 1963, and the cereal has enjoyed extensive sales as well as advertising. Moreover, the Toucan design has been emphasized with various promotions offered on the cereal boxes, such as the ring toss game in the form of a toucan, and a stuffed toucan animal. We recognize that the Toucan design has changed through the years, and that opposer's registrations show different versions of the toucan, but despite the variations in pose and color, the commercial impression of the designs is that they depict a single cartoon-like toucan.

However, we cannot agree with opposer that the word mark TOUCAN SAM is famous for cereal. Although the design of a Toucan appears to have been used on all of opposer's

packaging and advertising for its cereal, it is clear from the evidence of record that the word mark TOUCAN SAM does not appear on many of the cereal boxes or on the print advertising.⁹ Consequently, we cannot treat the sales and advertising figures opposer provided for its FROOT LOOPS cereal as representing sales and advertising with respect to the TOUCAN SAM word mark. Opposer has not provided any sales or advertising figures from which we can ascertain the number of cereal packages or the amount of advertising which does bear the word mark.

We also take exception to the implications of opposer's position that its Toucan design marks are famous. Opposer appears to take the view that if a mark is deemed to be famous, it is famous for everything. That, however, would amount to saying that the owner of a famous mark has a mark in gross, and that is clearly not true. A mark is used in connection with particular goods or services, and becomes famous because of that use. Thus, while we have found that the Toucan design marks are famous for cereal, there is no evidence in the record that they are famous for any item other than cereal, such as golf balls. Thus, although the fame of a mark plays a dominant role in determining likelihood of confusion, **Kenner Parker Toys Inc. v. Rose Art**

⁹ Opposer did not make of record videotapes of its television commercials so we cannot ascertain whether the word mark was used in those advertisements.

Industries, Inc., 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992), it is not the only factor that should be considered.

With respect to the marks, opposer has, as noted above, applied a very formulaic approach. Opposer asserts that TOUCAN is the dominant part of both applicant's mark TOUCAN GOLD and opposer's marks TOUCAN SAM and the Toucan designs, and therefore essentially ignores the presence of the word GOLD in applicant's mark and SAM in opposer's. We disagree with that position.

In opposer's mark TOUCAN SAM, each element of the mark has a trademark value; neither the word TOUCAN nor the word SAM as used in opposer's mark creates a dominant impression. As for applicant's mark, there is no evidence that the term "gold" has a suggestive significance as used with golf products, nor has opposer made of record any third-party registrations from which such a conclusion can be drawn. Applicant's CEO testified that the word GOLD was chosen for the mark because the golf clubs have a gold circle design on them.¹⁰ We cannot conclude from the evidence of record that

¹⁰ We note that in applicant's brief it states that gold is recognized as the top prize in Olympic and other sporting events, and that the term was intended to identify the highest rank of its product. However, there is no support for this statement in the record, and opposer specifically requested that applicant's brief be given no consideration. Therefore, we cannot regard opposer as having stipulated these statements into the record. Moreover, even if we were to view the word GOLD as a sporting allusion to first prize, that would not be sufficient for us to find that the word GOLD, as used in applicant's mark, is so

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the word GOLD in applicant's mark is weak or has minor trademark significance. As with opposer's TOUCAN SAM mark, TOUCAN GOLD must be considered a unitary term, with both elements having an impact on consumers.

When TOUCAN SAM and TOUCAN GOLD are compared in their entireties, they convey different commercial impressions. TOUCAN SAM connotes a name; TOUCAN GOLD does not. Because of the juxtaposition of the words in applicant's mark, with the word GOLD following TOUCAN, TOUCAN appears in the manner of an adjective modifying GOLD, and results in a commercial impression which is different from that of a toucan bird.

Further, because TOUCAN GOLD creates a different impression from the word TOUCAN per se, we cannot find under the case law that applicant's mark is the equivalent of opposer's design marks of a cartoon-like, anthropomorphic bird. Cf. **Squirrel Brand Co. v. Green Gables Inv. Co.**, 223 USPQ 154 (TTAB 1984). We would also point out that in none of opposer's Toucan design marks is its toucan shown in gold.

This brings us to a consideration of the parties' goods. In discussing this factor, opposer refers only to opposer's golf-related products and argues that the goods

highly suggestive of golf clubs and putters that TOUCAN must be considered the dominant part of the mark.

are complementary with applicant's goods.¹¹ However, the only evidence of record regarding opposer's toucan marks (either the designs or the words TOUCAN SAM) in connection with golf-related goods is common law use of the Toucan design shown in Registration No. 1,270,940 placed on golf balls. To the extent that opposer is relying solely on its common law rights in the Toucan design for golf balls to prove likelihood of confusion vis-à-vis applicant's use of TOUCAN GOLD on golf clubs and putters, that claim must fail.

Opposer has provided evidence of its prior use of the Toucan design on golf balls sold only through in its own catalog which is devoted solely to opposer's trademarked merchandise, and that catalog is distributed only to those members of the general public who would directly telephone opposer seeking trademarked merchandise. Opposer's common law rights in the Toucan design mark for golf balls are thus limited to that very narrow and specialized channel of trade. Opposer has failed to prove that the consumers who would contact opposer directly in their desire to obtain merchandise bearing opposer's trademarks are likely to be confused if they encountered golf clubs and putters sold in

¹¹ We note that opposer characterizes applicant as marketing and selling "clubs, putters, bag tags, divot repair tools, putters [sic], golf clubs [sic] and ball markers." Brief, p. 16. While it is true that applicant markets all of these goods, the only goods for which applicant has applied to use the mark TOUCAN GOLD, and the only goods on which applicant has testified it intends to use this mark, are golf clubs and golf putters. Applicant uses a different mark on the other golf-related items.

a different channel of trade, particularly when the marks involved are not the same.

Mr. Nielsen also testified that the 1994 collateral merchandise catalog which included the golf balls with the toucan design is "used with our customers for promotional programs where they need to get these types of items. And it's used by our sales people for gifts by our employees, and families of our employees and friends of employees to order Kellogg licensed merchandise." P. 11. Again, we find this testimony to be extremely vague. At most, it indicates that the catalog was distributed to employees or those closely associated with opposer, and perhaps to distributors or retail stores. All of these customers would be knowledgeable enough about opposer and its merchandising efforts to realize, if they did encounter applicant's golf clubs and putters sold under the mark TOUCAN GOLD, that such goods were not associated with opposer.

Thus, although we acknowledge that opposer's Toucan design marks are famous for cereal, the other factors in this case, such as the differences in the marks and the channels of trade for the goods, outweigh the fame of the mark for goods which are very different from golf clubs and putters. Further, golf clubs and putters are not inexpensive items and, because golf is not generally a child's game, they are likely to be purchased by adults.

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Accordingly, some degree of care will be exercised in purchasing these items.

Although opposer has not specifically argued this point, we think it appropriate to consider the fact that golf putters can be used as promotional or collateral merchandise items by various companies, including a cereal company like opposer. Indeed, the evidence shows that opposer does use the marks KELLOGG'S and TONY THE TIGER on golf putters which it offers for sale as collateral merchandise. Moreover, applicant itself is in the business of providing promotional items to companies, and has indicated that it will market its putters under the trademark TOUCAN GOLF as a vehicle on which companies can put their logos.

Based on this record, though, we cannot find that consumers, knowing that companies like opposer have their marks placed on golf putters, would assume that golf putters bearing the mark TOUCAN GOLD are sponsored by opposer. Opposer has not provided any specific testimony with respect to the offering to the public of putters other than the information indicated above with respect to the distribution of its catalogs. Otherwise, opposer has presented some rather general testimony about the offering of its trademarked items, e.g., at trailers set up at NASCAR races; at "store within a store" set-ups; through a one-hour QVC

television program originating at its headquarters. Opposer has presented few details about these activities, but it appears that the trademarked merchandise is set apart in a specific area devoted solely to opposer's products.¹²

Because opposer's collateral products are advertised and sold in such an environment, and because of the differences between opposer's marks TOUCAN SAM and the Toucan Designs and applicant's mark TOUCAN GOLD, consumers are not likely to believe that applicant's TOUCAN GOLD golf clubs and putters are associated with opposer. Further, any consumer who is familiar enough with the use of marks on collateral items, such that they would recognize that a cereal company could be associated with golf clubs and putters, would also be familiar with the fact that collateral merchandise would carry the identical mark that is used on the primary product. See **Viacom International, Inc. v. Kermit Komm et al**, 46 USPQ2d 1233 (TTAB 1998) (in finding no likelihood of confusion between MY-T-MOUSE and design and MIGHTY MOUSE, the Board stated, "Because merchandising marks are exploited for their connection to the exploited property, consumers would not expect that applicants' goods bearing the mark MY-T-MOUSE with an abstract mouse design emanate from or are sponsored by opposer.")

¹² If, in fact, opposer's collateral products are displayed in close proximity to similar products of other companies, it was incumbent on opposer to provide evidence of this.

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TOUCAN GOLD is clearly not the same as the design of a toucan that appears on opposer's cereal box and on its golf balls, nor is it the same as the character name TOUCAN SAM. Thus, anyone who is aware of opposer's marks and thus could be confused by the use of such marks on collateral products would be equally aware of the differences between TOUCAN GOLD and opposer's Toucan design marks, and know that opposer would not use such a mark on collateral merchandise.

Opposer has also argued that the parties' trade channels overlap because both intend that their products will be distributed "either as premium incentive items to the general public or to company executives as performance incentives." brief, p.16. As a preliminary matter, we note that opposer has not provided any evidence that golf putters displaying any of its trademarks are distributed in either of these ways. Further, there is a distinction between premium incentive items distributed to the general public and performance incentives provided to company executives. Company executives to whom applicant may market its goods to be used as performance incentives, or retailers or distributors who receive such incentives, must be regarded as sophisticated in the ways of the trade. They would immediately realize, if applicant were to attempt to sell them its TOUCAN GOLD golf clubs for their own use as

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promotional items, or if they were in turn given TOUCAN GOLD golf clubs by a company using the clubs as incentives, that applicant and its clubs are not associated with opposer.

As for the general public, opposer has provided very little evidence as to how members of the public at large are given collateral merchandise as a premium or incentive item. Mr. Nielsen testified that licensed merchandise is used by customers for promotional programs, but he did not provide any details of such programs. The evidence that we do have is that opposer has long engaged in offering promotional premiums with opposer's cereal packages, e.g., games in exchange for cereal box tops, or has offered the collateral products as in-store purchases with the cereal, e.g., buy a box of cereal and purchase a t-shirt, too. There is no evidence that opposer, or any company, has ever offered to the general public golf clubs or putters or even golf balls as a premium or purchase in connection with boxes of cereal, e.g., where one could send in box tops to obtain a golf club or putter, nor is there evidence that opposer or any company has made available in stores golf clubs or putters or golf balls for sale if one purchases boxes of cereal or, for that matter, any product. In any case, because of the manner in which opposer makes available its free or incentive promotional items, they are so closely tied to opposer's cereal that consumers would not associate golf clubs and

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putters not provided in this manner, and sold under the mark TOUCAN GOLD, with opposer.

In the Recitation of Facts section of its brief opposer mentions that in one instance applicant's advertising materials depict "the corporate logo of QUAKER OATS, a direct competitor," on a putter. p. 7. We would point out that the putter involved is not a TOUCAN GOLD putter; rather, it is sold under a different trademark of applicant. Opposer does not further discuss how confusion is likely to result even if applicant were to apply other companies' logos to its TOUCAN GOLD golf clubs and putters, and we think it inappropriate to try to devise speculative scenarios which could possibly lead to confusion. What we must determine in this proceeding is likelihood of confusion, not vague possibilities of confusion. Based on the record before us, with the very limited information about how promotional or incentive items are distributed, it appears that any golf clubs and putters emanating from applicant and bearing another company's logo would be distributed only to those who are sophisticated and knowledgeable about such promotions. Such persons would not only be very aware that primary marks are featured on a collateral product, but would realize that TOUCAN GOLD appears on applicant's clubs and putters as a manufacturer's

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mark, and that the manufacturer is not connected with the company using the club or putter as an incentive item.

Opposer also suggests that applicant may have adopted the mark TOUCAN GOLD in bad faith. Applicant's CEO admitted that he had seen opposer's toucan design on cereal boxes, and had probably seen opposer's FROOT LOOPS cereal at both opposer's headquarters, which he had visited in an attempt to sell opposer promotional merchandise, and on store shelves. Applicant also uses the design of a toucan on his stationery. The fact that applicant's CEO knew of opposer's toucan design mark for cereal does not prove that applicant adopted the mark TOUCAN GOLD for golf clubs and golf putters as an attempt to trade on opposer's famous mark. Applicant's CEO has explained that he chose the mark TOUCAN GOLD because bird terms are used in the sport of golf, e.g., a "birdie" and an "eagle." In view of the differences in the marks, and the differences in the goods, we simply cannot regard applicant as having adopted TOUCAN GOLD in bad faith.¹³

¹³ Opposer also points to applicant's use of a fanciful colored toucan bird in its promotional documents. Applicant does use such a design in a promotional brochure, but this brochure is for products sold under the mark TOUCAN GOLF. As opposer has noted, applicant does not have any promotional materials for its TOUCAN GOLD products. We make no comment on whether applicant's use of TOUCAN GOLF and the toucan design is likely to cause confusion or whether, if applicant were to use the fanciful toucan design with TOUCAN GOLD, confusion could result. Our determination must be based on the mark for which registration is sought, considering any evidence as to how that mark is used. See **Saks & Company v. Snack Food Association**, 12 USPQ2d 1833 (TTAB 1989) (opposer's

Upon careful consideration of all the relevant duPont factors we find that opposer has failed to prove, by a preponderance of the evidence, that applicant's use of TOUCAN GOLD for golf clubs and golf putters is likely to cause confusion with opposer's marks TOUCAN SAM and various Toucan designs, used for cereal, clothing and various collateral items of merchandise.

Decision: The opposition is dismissed.

R. L. Simms

E. J. Seeherman

H. R. Wendel
Administrative Trademark Judges
Trademark Trial and Appeal Board

argument that mark for association services might be likely to cause confusion if members were to use mark on goods to indicate membership in applicant is irrelevant; determination in opposition proceedings must be based on a consideration of the identified services, and not whether confusion is likely in connection with activities for which no application has been made.) Further, we cannot speculate on the commercial impression conveyed by applicant's mark if it were used with a particular trade dress, when there is no evidence that the mark is, in fact, used with such trade dress. Cf. **Specialty Brands, Inc. v. Coffee Bean Distribs.**, 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984).