

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB 8/7/00

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Astra Foods, Inc.

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Serial No. 75/265,675

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Stephen G. Stanton for Astra Foods, Inc.

Tracy Whittaker-Brown, Trademark Examining Attorney, Law  
Office 111 (Craig Taylor, Managing Attorney).

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Before Walters, Wendel and McLeod, Administrative Trademark  
Judges.

Opinion by Wendel, Administrative Trademark Judge:

Astra Foods, Inc. has filed an application to register  
the mark SOUTH STREET BRAND for "high quality meat for  
steak sandwiches."<sup>1</sup>

Registration has been finally refused under Section  
2(d) of the Trademark Act, on the ground of likelihood of  
confusion with the mark SOUTH STREET, which is registered

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<sup>1</sup> Serial No. 75/265,675, filed March 28, 1997, claiming first use  
dates of April 1992. A disclaimer has been made of the word  
BRAND.

for cheese.<sup>2</sup> Applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested.<sup>3</sup>

We make our determination of likelihood of confusion on the basis of those of the *du Pont* factors<sup>4</sup> which are relevant under the circumstances at hand. Two key considerations in our analysis are the similarity or dissimilarity of the respective marks and the similarity or dissimilarity of the goods in connection with which the marks are being used. See *In re Azteca Restaurant*

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<sup>2</sup> Registration No. 1,583,814, issued February 20, 1990. Section 8 & 15 affidavits accepted and acknowledged, respectively.

<sup>3</sup> Applicant argues in its reply brief that the Examining Attorney's brief was not timely filed and accordingly should not be made of record or considered in this appeal. Applicant maintains that under Trademark Rule 2.142(b) the Examining Attorney's brief was due sixty days after applicant's brief was received by the Office, namely, sixty days after September 29, 1999. Following this reasoning, the Examining Attorney's brief would have been due November 29, 1999. The brief was not mailed to applicant until December 6, 1999.

Applicant's interpretation of Trademark Rule 2.142(b) is not correct. The rule states that "the examiner shall, within sixty days after the brief of the appellant is sent to the examiner file with the Trademark Trial and Appeal Board a written brief..." The brief is sent to the examiner by the Board after the appellant's brief is received at the Board and associated with the application file. The sixty day period begins to run when the Board sends the application file containing the appellant's brief back to the Examining Attorney, not when the brief is received in the Office or is sent to the Board. See TMEP § 1501.02. In the present case, there is a Board order dated October 6, 1999 in the file returning the case to the Examining Attorney for her brief. Accordingly, the Examining Attorney's brief filed (and mailed to applicant) on December 6, 1999 was timely (December 5, 1999 being a Sunday) and has been given full consideration.

<sup>4</sup> *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

**Ser No.** 75/265,675

Enterprises, Inc., 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

Looking to the marks, we agree with the Examining Attorney that the dominant portion of applicant's mark is SOUTH STREET. While it is true that marks must be considered in their entireties in determining likelihood of confusion, it is also well established that there is nothing improper in giving more or less weight to a particular portion of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Moreover, although disclaimed matter cannot be ignored, the fact remains that purchasers are more likely to rely on the non-descriptive portion of the mark as the indication of source. See *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993).

Although applicant argues that the additional term BRAND in its mark creates a difference in appearance, sound, and connotation, we find any differences resulting from the presence of this term, which are only in appearance and sound, to be insignificant in comparison with the high degree of similarity in connotation and resultant commercial impression of the two marks. As pointed out by the Examining Attorney, the term BRAND merely serves as a indication that this is a product or

part of a product line identified by the SOUTH STREET mark.<sup>5</sup> Its role in the mark itself is minimal. Thus, we find the overall commercial impressions created by the two marks to be virtually the same. Applicant's further argument that its specimen clearly states the source of the goods is irrelevant to the issue before us; applicant is seeking registration of the mark SOUTH STREET BRAND, without any obligation to use the mark in conjunction with an additional indication of source.

Turning to the goods, we agree with the Examining Attorney that applicant's meat for steak sandwiches and registrant's cheese are complementary food items, and as such, the use of similar marks thereon would be likely to cause confusion. Even though the meat and cheese products involved may be distinctly different in type, as argued by applicant, the complementary nature of the products and the frequent use of the products together is a relevant factor in the determination of likelihood of confusion. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984). Applicant itself has

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<sup>5</sup> The Examining Attorney has made of record the following dictionary definitions:

- brand           a. A trademark or distinctive name identifying a product or a manufacturer.  
                  b. A product line so identified: *a popular brand of soap.*

acknowledged that its product may be "combined with some cheeses to create, for example, a cheese steak sandwich." We find the circumstances here very similar to those in *In re Vienna Sausage Manufacturing Co.*, 230 USPQ 799 (TTAB 1986), wherein the Board held sausage and cheese to be related food products in view of their frequent use together not only in the preparation of main dishes, but also as sandwich ingredients.

In addition, the Examining Attorney has made of record several third-party registrations showing that the same entities have registered a single mark for both meats and cheese. Although these registrations are admittedly not evidence of actual use of the marks in commerce, they are adequate to suggest that these are types of food products which may emanate from the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988). Thus, when highly similar marks are used on these two food products, purchasers may well assume a common source.

Applicant places great weight in the fact that its meat products are sold only through wholesale channels of trade to sophisticated store owners for use in restaurants, whereas registrant's goods are allegedly sold through retail channels of trade. There are no limitations,

however, in either the application or the registration as to the channels of trade, and thus it must be presumed that the goods of both would travel in all the normal channels of trade for goods of this type. See Kangol Ltd. v. KangaROOS U.S.A. Inc., 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992) and the cases cited therein. Accordingly, we must make our determination of the likelihood of confusion on the assumption that the food products of both would be encountered by the same potential purchasers in the same retail outlets, such as supermarkets and the like. Not only would these items be purchased in the same retail outlets but also they might very well be purchased at the same time for use together in the preparation of sandwiches. Applicant's arguments with respect to sophisticated purchasers or use of its products only in a restaurant such that the public would never see applicant's mark are to no avail.

Finally, applicant argues that we must take into consideration the lack of any evidence of actual confusion since applicant began using its mark in 1992 and the five declarations by wholesale purchasers which applicant has made of record supporting this lack of actual confusion.

In the first place, there has been no opportunity to hear from the registrant on this point and, accordingly, applicant's assertions of no confusion can only be given limited probative weight. See *In re National Novice Hockey League, Inc.*, 222 USPQ 638 (TTAB 1984). Furthermore, the declarations are limited to the wholesale level of sales, whereas the application is not so restricted. We have no evidence with respect to the lack of actual confusion on the retail level.

Accordingly, upon consideration of the relevant *du Pont* factors, and, particularly, the high degree of similarity of the respective marks and the related nature of the food products upon which these marks are being used, we find confusion likely.

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

C. E. Walters

H. R. Wendel

L. K. McLeod

Administrative Trademark Judges,  
Trademark Trial and Appeal Board

**Ser No.** 75/265,675