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**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Cadbury Limited

Serial No. 75/194,563

Albert Robin of Robin, Blecker & Daley for Cadbury Limited.

Asmat A. Khan, Trademark Examining Attorney, Law Office 104
(Sidney I. Moskowitz, Managing Attorney).

Before Simms, Cissel and Seeherman, Administrative
Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Cadbury Limited (applicant), a United Kingdom limited liability company, has appealed from the final refusal of the Trademark Examining Attorney to register the mark YOWIE for chocolate, chocolates and candy.¹ The Examining Attorney has refused registration under Section 2(d) of the Act, 15 U.S.C. §1052(d), on the basis of Registration Number 2,154,413, issued May 5, 1998, for the mark YOWIE

¹ Application Serial Number 75/194,563, filed November 7, 1996, based upon applicant's allegation of a bona fide intention to use the mark in commerce.

for freezable and frozen confections. Applicant and the Examining Attorney have submitted briefs and an oral argument was held at which only applicant's attorney appeared.

We affirm.

Applicant argues that, although the respective marks are identical, one may look at examples of actual use of the marks in order to visualize in what other forms a mark might appear. In this connection, applicant has submitted examples of use of applicant's as well as registrant's mark, showing the mark YOWIE in different forms. Applicant also argues that, while the goods are identified as chocolate, chocolates and candy on the one hand and freezable and frozen confections on the other, applicant's goods in reality are chocolate animals wrapped in foil while registrant's products are in fact frozen fruit sticks. These goods, according to applicant, are specifically different. Moreover, and in response to copies of third-party registrations covering both frozen confections on the one hand and candy on the other, applicant argues that there is nothing in the record showing the extent of use of these registered marks or that consumers are accustomed to buying chocolate candy and frozen confections from the same source. Finally,

applicant points out that there is no per se rule that merely because food products are sold in the same grocery stores, confusion is automatically likely.

We agree with the Examining Attorney, however, that confusion is likely in this case. Here, applicant is seeking to register the identical, arbitrary mark that is shown in the cited registration. Both marks are in typed form and do not show the mark in any particular display. Neither the method of registrant's or applicant's actual use nor our analysis can be restricted to consideration only of the manner of actual use. *See Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983).

Also, the Examining Attorney correctly observes that, if the marks are identical, the relationship between the goods need not be so close in order to support a finding of likelihood of confusion.

With respect to the goods, the issue of likelihood of confusion must be determined on the basis of the identification of goods set forth in the application and in the cited registration. *See Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990), *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed.

Cir. 1987) and *Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, 473 F.2d 901, 177 USP Q76 (CCPA 1973). Viewed in this light, and not with respect to the specific types of chocolate or frozen confection applicant would have us look at, there can be no doubt but that frozen confections² and applicant's chocolate, chocolates and candy are closely related goods which may well be sold in the same stores to the general public. As the Examining Attorney has noted, a frozen confection could include chocolate, such as a chocolate ice cream bar, or could have a chocolate coating or chocolate topping. In this regard, the copies of the third-party registrations made of record by the Examining Attorney covering such goods as frozen confections and ice cream, on the one hand, as well as candy and chocolates on the other, show that the same mark has been registered for these goods. These registrations suggest that the respective goods are of a type that may emanate from a single source. See *In re Mucky Duck Mustard Company*, 6 USPQ2d, 1467, 1470 n.6 (TTAB 1988). See also *Suchard Holding Societe Anonyme v. H.L. Milkis Company*, 168 USPQ 793 (TTAB 1970) ("We also find that frozen confections and ingredients therefor, and chocolate are low priced

² The American Heritage Dictionary Of The English Language (1992) defines "confection" as "a sweet preparation, such as candy."

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items, sold in the same stores to the same class of purchasers and hence their sale under the same or similar marks is likely to cause purchasers to assume that they stem from a common source.") The facts that these food items are of relatively low cost and may well be purchased on impulse by the same purchasers are also factors in support of a determination of likelihood of confusion.

We conclude that purchasers, aware of registrant's YOWIE freezable and frozen confections, who then encounter the identical mark YOWIE in connection with chocolate, chocolates and candy, would be likely to believe that these goods all come from the same source or are sponsored or endorsed by the same source.

Decision: The refusal of registration is affirmed.