

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

September 18, 2002
Paper No. 9
GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Krinos Foods, Inc.**

Serial No. 76/047,170

Robert A. Giacovas of Lazare, Potter, Giacovas & Kranjac LLP for
Krinos Foods, Inc.

Michelle R. O'Lear, Trademark Examining Attorney, Law Office 111
(Kevin R. Peska, Managing Attorney).

Before **Hohein, Bucher and Bottorff**, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Krinos Foods, Inc. has filed an application to
register the mark "TWISTIES" for "tubular rolled-wafer cookies
containing a cream-based filling, but excluding corn base or
cheese flavored products."¹

Registration has been finally refused under Section
2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground

¹ Ser. No. 76/047,170, filed on May 15, 2000, which is based on an
allegation of a bona fide intent to use such term in commerce.

TWISTEES

that applicant's mark, when applied to its goods, so resembles the mark "TWISTEES" and design, which is registered, as illustrated below,

for a "deep fried, baked, roasted or toasted cheese flavored corn meal product in puffed form,"² as to be likely to cause confusion, or mistake or to deceive.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

The determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of

² Reg. No. 541,921, issued on May 8, 1950, which sets forth a date of first use anywhere of January 27, 1948 and a date of first use in commerce of January 31, 1948; third renewal.

confusion analysis, two key considerations are the similarity of the goods and the similarity of the marks.³

Turning first to consideration of the respective goods, applicant acknowledges that the Examining Attorney relies, in part, upon excerpts made of record from a search of the "NEXIS" database which show that "consumers are likely to view cookies and corn-products as snack foods." Applicant argues, however, that "cookies and corn-based products are distinct and different types of foods." Cookies, applicant maintains, are sugar-based dessert items which are typically consumed after a meal and with such complementary beverages as milk, coffee or tea. By contrast, applicant asserts that corn-based products,⁴ such as registrant's "corn chips or corn puffs, generally are consumed as a party snack or pre-meal or in-between meal treat" and that, because those goods are "salt-based product[s]," they are usually consumed with such complementary drinks as "soda, beer or other types of alcoholic beverages."

³ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."

⁴ Applicant, we note, admitted in its response to the initial Office action that, as identified in the cited registration, registrant's goods would "[c]learly" include "some form of corn 'chip' or 'cheese puff.'"

In addition, while applicant concedes that its goods and those of registrant "typically are sold in grocery markets and convenience stores," applicant contends that "it is unlikely that they would be found together in a same aisle or on a same shelf." Instead, applicant insists that its goods, which it characterizes as "Viennese Wafer cookies[,] are likely to be found among other types of cookies, cakes and confectioneries," while registrant's "corn-based products[,] such as corn chips and corn puffs, typically are located among other salt-based food products, such as potato chips, pretzels, peanuts and the like." Lastly, as to the third-party registrations of record which the Examining Attorney also relies upon to demonstrate the closely related nature of the goods involved in this appeal, applicant "submits that most encompass unusually broad categories of goods that are classified in the same International Class, but in reality are not remotely related to one another." Applicant concludes, therefore, that "the third-party registrations cited by the Examining Attorney represent an exception rather than a norm and should not govern this matter."

We concur with the Examining Attorney, however, that the evidence of record is sufficient to establish that the goods at issue--although specifically different--are nonetheless closely related snack foods which, if sold under the same or

similar marks, would result in a likelihood of confusion as to the source or sponsorship of such goods. As the Examining Attorney correctly notes, it is well settled that goods need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. Instead, it is sufficient that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978) and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

Here, as support for her contention that the respective goods are closely related snack foods, the Examining Attorney observes that the record contains copies of approximately 40 use-based third-party registrations of marks which are registered for, *inter alia*, "cookies," on the one hand, and "puffed corn snacks," "puffed corn-based snacks," "cheese flavored puffed corn snacks" and/or "corn chips," on the other. While such registrations are admittedly not evidence that the different marks shown therein are in use or that the public is familiar with them, they nevertheless have some

probative value to the extent that they serve to suggest that the goods listed therein are of the kinds which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993) and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 (TTAB 1988) at n. 6. Moreover, while many of the third-party registrations are indeed for house marks and thus include a broad listing of additional food items in International Class 30, roughly 25% of the third-party registrations specifically preface such snack items as "cookies" and "cheese flavored puffed corn snacks" with the language "snack foods, namely," or "snacks, namely," thereby explicitly indicating the category to which such goods are regarded as belonging. However, irrespective of such limitations, it is plain from the third-party registrations that producers and/or sellers of snack foods frequently adopt the same mark for more than one kind of snack product. Consumers, therefore, would expect such products to emanate from the same source regardless of whether the snack food is sweet like cookies or salty like corn puffs and corn chips.

Furthermore, as noted previously, the Examining Attorney also relies upon excerpts made of record from a search of the "NEXIS" database which refer to "cookies," "corn puffs" and "corn chips" as types of "snack foods" or "snacks." With but two exceptions, in which "corn puffs" are mentioned as being

"salty snacks," the Examining Attorney is correct in observing that the numerous "NEXIS" excerpts "all refer to" cookies, corn puffs and corn chips "without distinguishing between the fact that some of these items are sweet and some ... are salty." In any event, we concur with the Examining Attorney that "[a] consumer purchasing snack foods is just as likely to buy a salty snack as a sweet snack, and the same consumer may in fact purchase both types of goods, given that snack foods are inexpensive and easy to obtain."

Nevertheless, based apparently upon the limitation, added by applicant in response to the refusal to register, to restrict the identification of its goods so as to exclude tubular rolled-wafer cookies containing a cream-based filling" which have either a "corn base or cheese flavored products," applicant argues that confusion is not likely with registrant's "TWISTEES" and design mark because:

It should further be noted that Applicant's TWISTIES mark is used on a specific type of cookie only, namely, Viennese Wafers. Viennese Wafers generally are considered to be a more sophisticated type of cookie that are purchased and consumed by adults as opposed to children. Again, they are consumed as a compliment [sic] to a cup of coffee or tea. A Viennese Wafer is in a league of its own when compared to more generic types of cookies such as chocolate chip or butter cookies, which traditionally are consumed by children.

Applicant urges, in view thereof, that consumers interested in its goods and those desiring registrant's products "form two ... distinct and separate target groups," with consumers of the former being sophisticated and discriminating purchasers such as mature adults, while buyers of the latter are most likely to be children and young adults.

We agree with the Examining Attorney, however, that no meaningful distinction may be drawn between the classes of purchasers of applicant's and registrant's snack food products. In particular, we concur with the Examining Attorney that, as to applicant's Viennese Wafer cookies, "[t]here is no evidence to suggest that the purchasers of these goods are any more sophisticated than purchasers of other food items," such as those marketed by registrant, and that "[t]herefore, it must be presumed that the purchasers of these goods are likely to be ordinary [or] average consumers." Moreover, there is nothing intrinsic in the nature of the respective goods to suggest that the classes of purchasers for applicant's goods would not be identical to or at least significantly overlap with those who buy registrant's products. Both applicant's and registrant's goods, furthermore, are inexpensive items which frequently would be subject to impulse purchase and the lesser care typically exercised in connection therewith. Thus, notwithstanding the limitation in the identification of applicant's goods to exclude

cream-filled tubular rolled-wafer cookies with a "corn base or cheese flavored products," contemporaneous use of the same or similar marks in connection with the closely related snack foods involved herein would clearly result in a likelihood of confusion.

Turning, therefore, to consideration of the respective marks, applicant contends that because they "are distinct in appearance and commercial impression," confusion is not likely. Applicant observes, in particular, that its mark "is one word and is spelled T-W-I-S-T-**I-E-S**," while registrant's mark "is spelled differently, T-W-I-S-T-**E-E-S**, and is comprised of two ... words." Applicant also notes that registrant's mark "is in [a] stylized form which is significant and quite distinct in appearance."

However, as the Examining Attorney correctly points out, the proper test for confusing similarity is not whether the respective marks are distinguishable on the basis of a side-by-side comparison inasmuch as such is not ordinarily the way that customers will be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the concomitant lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is accordingly on the recollection of the

average purchaser, who normally retains a general rather than a specific impression of marks. See, e.g., *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973); *Envirotech Corp. v. Solaron Corp.*, 211 USPQ 724, 733 (TTAB 1981); and *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

In this case, we agree with the Examining Attorney that notwithstanding the slight differences in spelling and number of terms, the marks at issue are phonetic equivalents and, as such, "are pronounced exactly the same." See, e.g., *Dreamwerks Production Group Inc. v. SKG Studio*, 142 F.3d 1127, 46 USPQ2d 1561, 1564 (9th Cir. 1998) [finding "perfect similarity of sound, since [the marks] 'Dreamwerks' and 'DreamWorks' are pronounced the same way"] and *In re Research & Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) [finding "little room in which to debate the similarity between [the marks] ROPELOCK and ROPELOK in appearance and sound"]. Additionally, with respect to applicant's argument that applicant's and registrant's marks are distinct in appearance due to the stylized display of the latter, the Examining Attorney correctly observes that, as stated in *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (*italics in original*):

[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display. By presenting its mark merely in a typed drawing, a *difference* cannot legally be asserted by that party. Thus, ... the displays must be considered the same.

Here, applicant's "TWISTIES" mark is in typed form.

It consequently may be displayed in any reasonable format, including the same boldly slanted lettering as that utilized by registrant in its mark. See, e.g., INB National Bank v. Metrohost Inc., 22 USPQ2d 1585, 1588 (TTAB 1992), citing Phillips Petroleum Co. v. C. J. Webb, Inc. 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971). Thus, except for the larger size of the second letter "T" in registrant's mark, which creates the impression that its mark is comprised of two terms rather than one, applicant's mark must be regarded as identical in sound and substantially similar in appearance to registrant's mark. Both marks also possess the identical connotation, when used in connection with the respective goods, that such products are twisted in the shapes thereof and, overall, the marks project substantially the same commercial impression.

We conclude, in view thereof, that when considered in their entirety, applicant's "TWISTIES" mark is so substantially identical to registrant's "TWISTEES" and design mark that their contemporaneous use in connection with closely related snack foods would be likely to cause confusion as to the

origin or affiliation of such goods. Applicant asserts as its final contention, however, that despite the absence of an amendment to allege use, its "product is presently in production and has, in fact, been distributed in the United States from September 2000." Applicant further argues that it "has used its TWISTIES mark on its tubular rolled-wafer cookies containing a cream-based filling for nearly two ... years without any objection or complaints" from registrant and that "the TWISTIES and TwisTees marks have been in concurrent use for nearly two ... years without any instances of actual confusion that Applicant is aware of among consumers."

Applicant's contentions, we note, are simply arguments by its counsel and are not supported by any affidavit or declaration by anyone associated with applicant who has firsthand knowledge of the alleged facts. Thus, as the Examining Attorney accurately observes, "there is ... no evidence of record as to the nature and extent of the ... use of the respective marks, and more importantly, there is no opportunity to hear from the registrant on this point." In any event, even if we were to take counsel's arguments as true statements of fact, suffice it to say that while the absence of any instances of actual confusion over a significant period of time is of course a *du Pont* factor which is indicative of no likelihood of confusion, it is a meaningful factor only where

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the evidentiary record demonstrates appreciable and continuous use by applicant of its mark in the same markets as those served by registrant under its marks. See, e.g., Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768, 1774 (TTAB 1992). In particular, there must be evidence showing that there has been an opportunity for incidents of actual confusion to occur. See, e.g., Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000). Here, as indicated above, the Examining Attorney is correct that there is simply no evidence in the record, such as information concerning details of the nature and extent of the sales and marketing activities of applicant and registrant under their respective marks, from which it could be concluded that the asserted absence of any instances of actual confusion is indeed a mitigating factor. Compare In re General Motors Corp., 23 USPQ2d 1465, 1470-71 (TTAB 1992).

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