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**THIS DISPOSITION
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Paper No.
TEH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Emmpak Foods, Inc.**

Serial No. 75/746,428
Serial No. 75/746,610
Serial No. 75/746,810
Serial No. 75/746,827
Serial No. 75/746,873
Serial No. 75/746,886

Jan Scott Pierce of Weiss, Berzowski, Brady & Donahue LLP for
Emmpak Foods, Inc.

Tanya L. Amos, Trademark Examining Attorney, Law Office 101
(Jerry L. Price, Managing Attorney).

Before Simms, Bottorff and Holtzman, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Emmpak Foods, Inc. has filed applications to register the
marks shown below for "processed meats."

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and 75/746,886

Serial No. 75/746,610;¹



Serial No. 75/746,827;² the word "CLASSIC" has been disclaimed;

EMMBER CLASSIC

Serial No. 75/746,873;³ the words "FOODS INC." have been disclaimed;



and Serial No. 75/746,886;⁴ the word "FOODS" has been disclaimed.

EMMBER FOODS

Applicant has also filed applications to register the marks shown below for "fully cooked protein entrees."

¹ Filed July 9, 1999; alleging dates of first use on September 1, 1998.

² Filed July 7, 1999; alleging dates of first use on July 1, 1996.

³ Filed July 7, 1999; alleging dates of first use on August 3, 1998.

⁴ Filed July 7, 1999; alleging dates of first use on August 3, 1998.

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Serial No. 75/746,810;⁵ the words HEAT AND SERVE have been
disclaimed;

EMMBER HEAT & SERVE

and Serial No. 75/746,428;⁶ the words HEAT AND SERVE have been
disclaimed.



In each application, applicant has claimed ownership of
Registration No. 1,146,249 for the mark shown below (EMMBER
BRANDS and design) for "beef products-namely, processed and
frozen beef products to be sold to restaurants, distributors and
institutions." The registration includes a disclaimer of
"BRANDS." ⁷



⁵ Filed July 9, 1999; alleging dates of first use on September 1, 1998.

⁶ Filed July 9, 1999; alleging dates of first use on September 1, 1998.

⁷ Issued January 20, 1981; combined affidavit under Sections 8 and 15
accepted and acknowledged, respectively.

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The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act in each application on the ground that applicant's mark so resembles the mark in Registration No. 966,558, shown below for "precooked browned pork sausage patties and links sold to restaurant chains, institutions and wholesalers"⁸ as to be likely to cause confusion.⁹



When the refusal in each case was made final, applicant appealed. Briefs have been filed. An oral hearing was not requested. Because the issues in these six applications are substantially the same, the appeals have been consolidated and are being treated in a single decision.

In any likelihood of confusion analysis, we look to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476

⁸ Issued October 2, 1990; combined Sections 8 and 15 accepted and acknowledged, respectively. The registration indicates that the drawing is lined to represent the color red.

⁹ Registration was initially also refused in view of Registration No. 749,962 for the mark EMBER-SMOKED (in stylized form) for bacon (the bracketed goods in the registration, i.e., "smoked ham, and smoked and fully cooked hams, sold as whole hams or half hams" are considered deleted from the registration). That refusal was subsequently withdrawn.

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F.2d 1357, 177 USPQ 563 (CCPA 1973), giving particular attention to the factors most relevant to the case at hand, including the similarity of the marks and the relatedness of the goods or services.

Turning first to the goods, registrant's "precooked browned pork sausage patties and links" are fully encompassed by applicant's broadly described "processed meats." Thus, the respective goods must be considered legally identical, directly competitive products. Moreover, applicant's "protein entrees," which would include entrees consisting of meat, would also encompass registrant's precooked sausage patties and links. In view of the directly competitive and otherwise closely related nature of the respective goods, and the absence of any restrictions in the involved application, applicant's goods must be deemed to travel in the same channels of trade and to be purchased by the same customers as those of registrant.

Applicant admits that the goods are closely related (see, e.g., applicant's reply brief, p. 8 in application Serial No. 75/746,810) but maintains that the differences in the marks, the sophistication of the purchasers, and the absence of actual confusion, likelihood of confusion does not exist.

As to the purchasers, applicant argues that the restriction in registrant's identification of goods to restaurant chains, institutions and wholesalers means that there is "only one common

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channel of trade" and that the only common purchasers are highly sophisticated.

The Examining Attorney maintains, however, that applicant has provided no evidence that restaurant chains, institutions and wholesalers "contain sophisticated consumers of expensive goods" or that processed meats are expensive or "complicated" goods. The Examining Attorney contends that these products are found "in wholesale club stores along with other uncomplicated and inexpensive goods," that the identified purchasers include small "mom and pop" entities that would not necessarily be purchasing large or expensive quantities of the goods on a regular basis, and that, in any event, even sophisticated purchasers are not immune from source confusion.

It is clear that the only overlapping customers for the respective products are restaurants, institutions and wholesalers. It is reasonable to assume that these purchasers are more sophisticated than ordinary consumers. While such purchasers might include "mom and pop" operations, there is no indication that such customers would be less sophisticated in their purchasing decisions than other commercial buyers and, in any event, there is no evidence that such purchasers are the typical customers for registrant's goods. Moreover, there is nothing in the record to indicate that the purchase of these products in commercial quantities would be inexpensive.

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Nevertheless, as the Examining Attorney points out, even sophisticated purchasers are not necessarily immune from source confusion. This case is distinguishable from *Electronic Design & Sales, Inc., v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992) where the respective purchasers were deemed to be "substantially different" (*supra* at 1393) and where the parties' respective goods and services on which the marks were used were deemed to be "different" (*supra* at 1393). In the present case we have identical purchasers buying directly competitive products. Under these circumstances, and where the marks are similar, it has generally been held that purchaser sophistication would not serve to preclude the likelihood of confusion. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990); *Towers v. Advent Software Inc.*, 17 USPQ2d 1471 (TTAB 1989) *aff'd*, 913 F.2d 942, 16 USPQ2d 1039 (Fed. Cir. 1990); *Formica Corporation v. Saturn Plastics & Engineering Co.*, 185 USPQ 251 (TTAB 1975); *General Electric Company v. Raychem Corporation*, 184 USPQ 766 (TTAB 1974); and *In re Elco Corporation*, 180 USPQ 155 (TTAB 1973). The mere fact that one is knowledgeable in a particular field does not mean that the individual is also skilled in distinguishing between two similar trademarks in the field. See *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993).

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Thus we turn our attention to the marks, keeping in mind that when marks would appear on identical or closely related goods, the degree of similarity between the marks necessary to support a finding of likelihood of confusion declines. *Century 21 Real Estate v. Century Life*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

It is the Examining Attorney's position that each of applicant's marks is similar to registrant's mark in terms of sound, meaning and commercial impression. The Examining Attorney argues that the word EMBER in the cited mark is the phonetic equivalent of EMMBER in each of applicant's marks and that those terms are the dominant words in the respective marks.¹⁰ The Examining Attorney has included a dictionary definition of "farm" and argues based thereon that the word FARM and the design of the farm in registrant's mark are suggestive of the origin of registrant's goods. The Examining Attorney maintains that there

¹⁰ However, the Examining Attorney's statement that applicant "may add a design feature to its mark in a similar manner to that of the registrant" is incorrect. A typed drawing allows protection for all reasonable manners of presentation. See *Phillips Petroleum Co. v. C. J. Webb, Inc.*, 442 F.2d 1376, 170 USPQ 35 (CCPA 1971) and *INB National Bank v. Metrohost Inc.*, 22 USPQ2d 1585, 1588 (TTAB 1992). This is so because rights in the typed word reside in the word itself not in any particular display of the term. Thus, rights in the term would not be extended to include protection for that word combined with, for example, other words or a design element. See *Fossil Inc. v. Fossil Group*, 49 USPQ2d 1451 (TTAB 1998) and *In re Pollio Dairy Products Corp., Inc.*, 8 USPQ2d 2012 (TTAB 1988). Consequently, it would not be reasonable to assume that applicant's mark would be presented with the design element appearing in registrant's mark.

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is no evidence to indicate that EMBER is weak and entitled to a narrow scope of protection.

Applicant, on the other hand, contends that the Examining Attorney has improperly dissected the marks, and that when considered in their entirety, the differences in "content, design and spelling" distinguish the marks. Applicant argues that the marks create different commercial impressions; that EMMBER FARMS suggests "an equestrian breeding operation," but that applicant's mark "creates a totally different impression." Applicant maintains that its mark is distinguished by the spelling of EMMBER, the inclusion of additional wording and/or bold design features in the marks, or the absence of a design as contrasted with "the design-rich EMBER FARMS mark...." Continuing, applicant contends that the words EMBER and EMMBER are not the dominant portions of the marks essentially because the term EMBER in registrant's mark is a common word, frequently registered in the same or related fields. Applicant concludes that EMBER is weak and highly suggestive and that, therefore, when the marks are considered in their entirety, "even minor differences in the mark[s] will negate any confusion caused by

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the common word."¹¹ Applicant also argues that variations of EMBER have been registered for meat products not only in the registration for EMBER FARMS and design but the earlier-cited registration EMBER-SMOKED for bacon.¹² (See footnote 8, *supra*).

While marks must be compared in their entireties, there is nothing improper in giving more weight to certain features of the marks as being more dominant or otherwise significant. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir.

¹¹ Applicant, for the first time in its brief, referred to a list of third-party registrations for EMBER and variations thereof in support of its claim that registrant's mark is weak. The Examining Attorney objected to this evidence on grounds that the evidence is untimely and because, in any event, mere lists of registrations are not sufficient to make them of record. Applicant then filed a request for remand to allow the electronic copies of the registrations to be introduced. The Board ruled on this request in three of the involved applications, denying the remand request on the ground that the evidence is untimely. The request for remand is now also denied as untimely in applications Serial Nos. 75/746,873, 75/746,428, and 75/746,827 for the reasons set forth in the Board's prior orders. Therefore, none of this evidence will be considered in our decision herein and any argument based on the existence of these registrations will be given no consideration. Even if the third-party registrations were properly of record, they would not be persuasive since, aside from the cited, owned or cancelled registrations also included with applicant's submission, none of the registrations is for the same goods as those herein. In any event, third-party registrations are not evidence that the marks therein are in use or that purchasers are aware of them.

¹² Applicant relies on statements made by registrant during prosecution of its underlying application to support applicant's position that the design is the dominant portion of registrant's mark. These statements were made in response to the Examining Attorney's refusal to register the EMBER FARMS mark based on the existence of the then-registered mark "EMBERDALE." Applicant has also pointed to the specimens of use in the registration file for EMBER FARMS to show that the registered mark, as actually used, is not similar to applicant's marks. First, the likelihood of confusion is based on the mark set forth in the registration, not as allegedly used by registrant, and further, statements made by registrant to overcome a refusal based on an entirely different mark have no bearing on this case.

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1985). When the marks in this case are considered as a whole, giving appropriate weight to the features thereof, we find that each of applicant's marks is similar in sound, and in overall meaning and commercial impression, to registrant's mark.

The dominant portion of the marks is the wording EMBER FARMS in registrant's mark and the word EMMBER in applicant's marks. The misspelling of EMBER with two "M"s is visually insignificant and is certainly not sufficient to distinguish one mark from another or to change the commercial impressions the marks convey. The two words EMBER and EMMBER are still pronounced the same and still convey the same meaning. Moreover, the disclaimed wording in applicant's respective marks, i.e., FOOD, CLASSIC, FOODS INC., and HEAT AND SERVE, while not ignored in the analysis, is, in each case, at least merely descriptive of applicant's goods and therefore less significant in creating the marks' commercial impressions.¹³ See *In re National Data Corp.*, *supra.*, and, e.g., *Hilson Research Inc. v. Society for Human Resource Management*, *supra.*

In addition, design elements such as the farmhouse appearing in registrant's mark and the diamond and/or triangle designs in two of applicant's marks are less important than the word portions of those marks in creating an impression. See *In re*

¹³ We note, for example, that the word CLASSIC has a laudatory significance in relation to applicant's goods.

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Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987). Under actual marketing conditions, the public does not necessarily have the opportunity to make side-by-side comparisons of marks and it is the wording which is most likely to be remembered by the relevant public when seeing either registrant's or applicant's marks. See *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255 (TTAB 1980). Moreover, the farmhouse design merely reinforces the commercial impression conveyed by the words EMBER FARMS in registrant's mark.

In addition, it is not likely that purchasers of registrant's food products would associate the word FARMS with applicant's rather unappetizing image of a horse breeding facility. The meaning and commercial impression of a mark must be determined in relation to the goods for which registration is sought. When considered in this context, it is clear that purchasers are more likely to associate the word FARMS with a place for raising livestock and selling products related thereto.

Moreover, there is no persuasive evidence in the record to support applicant's claim that the word EMBER in registrant's mark is weak and entitled to only a narrow scope of protection. As indicated earlier, the third-party registrations listed in applicant's brief are not properly of record. The only third-party registration arguably of record is for the mark EMBER-SMOKED (stylized) for bacon, the other registration initially

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cited by the Examining Attorney. However, while EMBER-SMOKED has a highly suggestive dictionary meaning in relation to the goods in that registration, neither EMBER FARMS nor EMMBER alone conveys that same suggestive meaning and, in fact, seems arbitrary in relation to the identified goods. Thus, there are far greater differences between EMBER-SMOKED and applicant's marks than there are between applicant's marks and the cited registration.

We find that even sophisticated purchasers, upon viewing applicant's marks in connection with identical or closely related goods, are likely to assume that applicant's EMMBER food products come from EMBER FARMS or that there is at least some relationship between the two companies.

Applicant's claim that there has been no actual confusion between the marks does not convince us otherwise. Specifically, applicant asserts that there have been no instances of actual confusion in the marketplace despite concurrent use by the applicant (and its predecessors) and the registrant of their respective EMMBER and EMBER marks since 1977. In support of this claim, applicant has submitted the declaration of its vice-president, George Lang, who states that he is not aware of any instance of actual confusion between these marks and that applicant has never been contacted by registrant regarding any alleged actual confusion.

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While the absence of actual confusion is a factor indicative of no likelihood of confusion, it is a meaningful only where the record demonstrates appreciable and continuous use by applicant of its marks in the same markets as those served by registrant under its mark. See, e.g., *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768 (TTAB 1992). While we have applicant's statement of use of its marks, we have no information as to its sales or advertising expenditures, or geographic areas served by applicant. Moreover, there is no evidence of any use of the registered mark, let alone information relating to the extent of such use. Cf. *In re General Motors Corp.*, 23 USPQ2d 1465 (TTAB 1992).

Nor does the fact that registrant's EMBER FARMS mark and applicant's EMMBER BRAND and design mark coexist on the register prove that they coexist in the marketplace.¹⁴ Again, the relevant

¹⁴ In addition, we note that according to Office records, a Section 9 renewal of applicant's EMMBER BRAND registration has not been filed, although the last day for filing the renewal was July 20, 2001. Nevertheless, for purposes of this decision, we are assuming that the registration is valid and subsisting. Moreover, the refusal to register does not constitute a collateral attack on applicant's incontestable registration. The Section 7(b) presumptions accorded a registration afford prima facie rights in the mark shown therein as a whole, not in any individual component, and even then, only for the goods or services for which the mark is registered. See, e.g., *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987) and *In re Loew's Theatres, Inc.*, 769 F.2d 764, 226 USPQ 865 (Fed. Cir. 1985). In this case, none of the marks applicant now seeks to register is the same mark as the mark previously registered by applicant. Furthermore, the goods identified in these applications are not the same, that is, the identified goods are broader than those covered by the prior registration.

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consideration is whether, and the extent to which, both marks are in use for related goods and, as we said earlier, a registration (unless relied on by the owner) is not evidence of use of the mark therein.

Decision: The refusal to register is affirmed.