

THIS DECISION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Paper No. 12

Mailed: September 9, 2002

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Deeb Management Ltd.

Serial Nos. 76/011,687 and 76/014,993

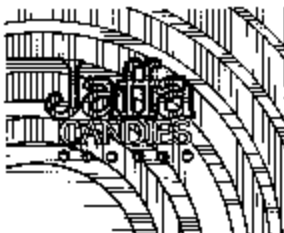
Allen J. Hoover of Wood, Phillips, Katz, Clark & Mortimer
for applicant.

Elizabeth A. Hughitt, Trademark Examining Attorney, Law
Office 111 (Kevin R. Peska, Managing Attorney).

Before Quinn, Hairston and Bottorff, Administrative
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Applications have been filed by Deeb Management Ltd.,
doing business as Jaffa Candies, to register the marks
JAFFA and



Ser No. 76/011,687 and 76/014,993

for "candy; cookies; pastries; and packages containing candy and toys."¹

The Trademark Examining Attorney has refused registration in both applications under Section 2(d) of the Trademark Act on the grounds that applicant's marks, when applied to applicant's goods, so resemble the previously registered mark JAFFAS for "biscuits; confectionary, namely candies, chocolates, and frozen confectionary"² as to likely to cause confusion.

When the refusals were made final, applicant appealed. Applicant and the Examining Attorney have filed briefs. An oral hearing was not requested. Because of the essentially identical issues involved in these appeals, the Board shall decide them in one opinion.

Applicant acknowledges that JAFFA and JAFFAS "may be similar in appearance, when read quickly, and in sound,

¹ Application Serial No. 76/011,687, filed March 28, 2000, asserting dates of first use of 1992, and application Serial No. 76/014,993, filed March 31, 2000, asserting dates of first use of 1996, respectively. Application Serial No. 76/014,993 includes a disclaimer of the word "Candies" and the following statement: "The drawing is lined for the colors, namely, yellow, light blue, dark blue, and red, as well as white where no lines appear, light blue being indicated by more widely spaced lines and dark blue being indicated by less widely spaced lines. The trademark is characterized by the word JAFFA in stylized, colored letters, the word CANDIES in stylized, colored letters, and six small, colored circles, against a background comprised of curved lines, around a colored core."

² Registration No. 1,895,218, issued May 23, 1995; combined Sections 8 and 15 affidavit filed.

Ser No. 76/011,687 and 76/014,993

when pronounced quickly," but contends that the involved marks "differ greatly in connotation and in commercial impression." (brief, p. 2) In this connection, applicant asserts that JAFFA creates a commercial impression alluding to the city Jaffa in the Middle East, different from the cited mark JAFFAS (for which applicant does not offer a meaning). Applicant also asserts that there is no evidence that either the cited mark is famous or that there has been any actual confusion between the marks.

The Examining Attorney maintains that the marks are similar, pointing out, in particular, that JAFFA and JAFFAS differ by only the final letter "s" in registrant's mark. As to the goods, the Examining Attorney states that they are identical in part, and are otherwise closely related. In this connection, the Examining Attorney has relied upon twelve third-party registrations based on use showing that a single entity has registered the same mark for goods of the types sold by applicant and registrant. The Examining Attorney also addresses applicant's arguments regarding fame and the lack of actual confusion, but is not persuaded.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion

Ser No. 76/011,687 and 76/014,993

issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

As to the similarity between the goods, applicant's brief, not surprisingly, is entirely silent. The goods in the applications and the cited registration are legally identical, at least in part, insofar as candy is listed in all three.³ Further, applicant's "cookies" and "pastries" and "packages containing candy and toys" are otherwise closely related to registrant's "biscuits, candies, chocolate, and frozen confectionery." See: In re Vroman Foods, Inc., 224 USPQ 242 (TTAB 1984); In re Shoemaker's Candies, Inc., 222 USPQ 326 (TTAB 1984); In re E. J. Brach & Sons, 144 USPQ 153 (TTAB 1964); and In re Suzanne's Frozen Foods, 125 USPQ 307 (TTAB 1960). It is presumed that all of these goods move in the same channels of trade

³ We also accept the Examining Attorney's invitation to take judicial notice of the dictionary listing showing "chocolate" defined as a type of candy.

Ser No. 76/011,687 and 76/014,993

and are purchased by the same classes of purchasers. In re Elbaum, 211 USPQ 639 (TTAB 1981). Moreover, these goods are likely to be relatively inexpensive and susceptible to impulse purchases. In re Shoemaker's Candies, Inc., supra.

We next turn to consider the marks, keeping in mind that if the goods are identical, as they are here, at least in part, "the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). We further have kept in mind the fallibility of human memory, and that average purchasers are likely to have only general rather than specific recollections of trademarks encountered in the marketplace.

With respect to the typed marks, applicant's mark JAFFA differs from registrant's mark JAFFAS by only a final letter "s" in registrant's mark. The marks, therefore, are substantially similar in sound and appearance. As to meaning, we recognize that "Jaffa" is the name of a city in the Middle East.⁴ It is far from certain, however, that any appreciable number of consumers will even know this. We

⁴ In this connection, we take judicial notice, pursuant to applicant's request, of the listing for "Jaffa" in The Random House Dictionary of the English Language (2d ed. unabridged 1987): "a former seaport in W Israel, part of Tel Aviv-Jaffa since 1950: ancient Biblical town."

Ser No. 76/011,687 and 76/014,993

find it reasonable, as the Examining Attorney suggests, that the marks will be perceived as having the same connotation, with the marks viewed simply as the singular/plural versions of the same term. See: *In re Pix of America, Inc.*, 225 USPQ 691 (TTAB 1985) [NEWPORT and NEWPORTS for clothing held confusingly similar].

With respect to a comparison of applicant's JAFFA CANDIES and design mark with registrant's mark, we have considered the marks in their entirety. Nevertheless, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entirety." *In re National Data Corp.*, 753 F.3d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For example, "that a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark..." *Id.* at 751.

Here, in the case of applicant's mark JAFFA CANDIES and design, the disclaimed word "CANDIES" clearly is generic for the candy items sold by applicant. Thus, insofar as the literal portion of the mark is concerned,

Ser No. 76/011,687 and 76/014,993

the dominant portion is the word "JAFFA." See: In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997). As discussed above, JAFFA and JAFFAS are similar in sound, appearance and meaning. Further, while we have considered the design portion of applicant's mark in comparing the whole mark with registrant's mark, the "JAFFA" portion of the mark is the most significant feature of the mark, as it is more likely to be impressed upon a consumer's memory and to be used in calling for the goods. In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987).

In reaching our decision, we have taken into account the third-party registrations submitted by the Examining Attorney. The registrations show the same marks registered by the same entity for both types of goods listed in the involved applications and registration. Although these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nevertheless have probative value to the extent that they serve to suggest that the goods identified therein are of a kind that may emanate from a single source. See: Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993); and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988).

Ser No. 76/011,687 and 76/014,993

Applicant's other arguments are unavailing. The absence of evidence bearing on the fame of the cited mark or on actual confusion does not compel a different result for the reasons set forth by the Examining Attorney. Given the ex parte nature of this proceeding, registrant does not have an opportunity to be heard on these points. Further, it is not necessary to show actual confusion in establishing likelihood of confusion. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983); and *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991). In any event, given the relatively inexpensive nature of confectionery goods in general, we wonder if purchasers would even be aware of their confusion, and if they were, whether they would take the trouble to inform either of the trademark owners.

We conclude that consumers would be likely to mistakenly believe that registrant's biscuits, candies, chocolates and frozen confectionery sold under the mark JAFFAS and applicant's candy, cookies, pastries and packages containing candy and toys sold under the marks JAFFA and JAFFA CANDIES and design originated with or are somehow associated with or sponsored by the same entity.

Decision: The refusals to register are affirmed.