

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed:
November 26, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Jay at Play International Hong Kong Limited

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Serial Nos. 76709622 and 76709776¹

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Ezra Sutton for Jay at Play International Hong Kong Limited.

Evin L. Kozak, Trademark Examining Attorney, Law Office 116 (Michael W. Baird,
Managing Attorney).

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Before Grendel, Greenbaum and Hightower, Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Applicant, Jay at Play International Hong Kong Limited, seeks registration
on the Principal Register of the standard character marks CUDDLEUP FRIENDS²

¹ The July 10, 2013 Board order granted the Examining Attorney's motion to consolidate these appeals. Accordingly, we issue our determination as to each in a single decision.

² Application Serial No. 76709622, filed on November 2, 2011, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). This application also includes "bedding accessories, namely, comforters, sheets, pillowcases, curtains, and towels" in International Class 24, which are not the subject of the instant appeal.

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and CUDDLEUPPET³ for goods ultimately identified in each application as “plush stuffed animals integrally attached to blankets” in International Class 28.

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant’s mark, when used in connection with its identified goods, so resembles the registered mark CUDDLE-UPS⁴ (in standard characters) for goods identified as “plush toys, namely, soft cushioned animal figures” in International Class 28, as to be likely to cause confusion, mistake or deception. This appeal ensued following applicant’s unsuccessful requests for reconsideration in each application.

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976); and *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209 (TTAB 1999).

We turn first to the relatedness of the goods. We make our determination regarding the similarity of the goods, channels of trade and classes of purchasers based on the goods as they are identified in the application and registration,

³ Application Serial No. 76709776, filed November 18, 2011, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

⁴ Registration No. 2398410, issued October 24, 2000. Renewed.

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respectively. *Octocom Systems Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

In this case, the goods identified in the applications and cited registration are animal-shaped plush toys. While applicant has restricted its goods to “plush stuffed animals integrally attached to blankets,” the goods in the cited registration are broadly described as “plush toys, namely, soft cushioned animal figures,” and are presumed to include “soft cushioned animal figures” that are “integrally attached to blankets.” Unrestricted and broad identifications are presumed to encompass all goods of the type described. *See In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (*citing In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). As such, the goods identified in the applications and registration are legally identical. Further, because the identifications of goods in the applications and registration are unrestricted as to channels of trade and classes of purchasers, it is presumed that the goods travel in all normal channels of trade, for example, toy stores, and target the same class of consumers, namely, children and their parents, relatives and friends. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (absent restrictions in an application and/or registration, the identified goods are “presumed to travel in the same channels of trade to the same class of purchasers”) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)).

Applicant argues without support that the goods associated with each mark have a different focus and purpose because registrant's goods "are essentially cushions or pillows for children to sit on or 'cuddle up' to in the shape or form of animals," while applicant's goods "are not cushions or pillows for children to sit on or 'cuddle up' to." App. Br., p. 3. However, nothing in the record suggests, and there is no reason to believe, that children would not "sit on or 'cuddle up' to" the "plush stuffed animals" identified in the applications merely because they are "integrally attached to a blanket." On the contrary, applicant's Exhibit A shows that the applied-for goods are essentially soft cushioned animal figures, like those identified in the cited registration, that are attached to a blanket.⁵

In view of the above, we find that the goods are legally identical, travel in the same channels of trade, and are sold to the same classes of purchasers.

We next consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. In comparing the marks we are mindful that where the marks would appear on legally identical goods, as they do here, the degree of similarity necessary to support a conclusion of likely confusion declines. *Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010).

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 the ultimate

⁵ March 6, 2013 Request for Reconsideration in each application.

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conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Further, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See In re Association of the United States Army*, 85 USPQ2d 1264, 1269 (TTAB 2007); and *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

In the instant case, the marks share the identical first word CUDDLE, followed by the identical term UP, in singular and plural form, respectively. There is no material difference between singular and plural forms of the same term. *See, e.g., In re Belgrade Shoe*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969). Likewise, the presence or absence of a hyphen or a space does not distinguish applicant's marks from the cited registration in any meaningful way.

CUDDLEUP is the dominant element of applicant's marks, not only because it appears first in the marks (*Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), quoting *du Pont*, 177 USPQ at 567), but also because it has stronger source-identifying potential than the other elements of the marks. In this regard, the examining attorney submitted printouts from the Zoobies, Orbeez, FAO Schwarz,

Nick Shop and Wuggle Pets websites to show that the word “pet” in the singular or plural form commonly appears on animal-shaped plush toys marketed to children.⁶ Similarly, the examining attorney submitted printouts from the Thomas & Friends, Figit Friends, Tonka Chuck & Friends, Fisher-Price, Lego and FurReal Friends websites to show common use of the word “friends” on products marketed to children.⁷ The third-party websites show that consumers are accustomed to viewing the words PET (in its singular and plural form) and FRIENDS in connection with children’s toys, and that PET and FRIENDS are weak, and not entirely arbitrary, in this field. The addition of the weak terms FRIENDS and PET to the dominant term CUDDLEUP in applicant’s marks does not make applicant’s marks dissimilar from the cited registered mark CUDDLE-UPS. As such, the general appearance of the marks is substantially similar.

In terms of how each mark may be spoken, it has often been stated that there is no “correct” pronunciation of trademarks and that consumers may even pronounce a mark differently from that intended by the owner of the mark. *See, e.g., Viterra*, 101 USPQ2d at 1912, and *Centraz Indus. Inc. v. Spartan Chem. Co.*, 77 USPQ2d 1698, 1701 (TTAB 2006). Applicant suggests that CUDDLEUPPET is a combination of the terms CUDDLE and UPPET.⁸ However, applicant has not offered any meaning for the suffix “uppet,” and, because CUDDLE, UP and PET are

⁶ September 5, 2012 Office action, Serial No. 76709776.

⁷ September 4, 2012 Office action, Serial No. 76709622.

⁸ Applicant does not suggest, and we do not find, that CUDDLEUP FRIENDS would be pronounced as anything other than a combination of the words “cuddle,” “up” and “friends.”

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actual words, consumers are likely to perceive and pronounce CUDDLEUPPET as a combination of the words “cuddle,” “up” and “pet.” Moreover, the above-mentioned evidence from Zoobies, Orbeez, FAO Schwarz, Nick Shop and Wuggle Pets shows that animal-shaped plush toys marketed to children commonly include the word PET in its singular or plural form. Consumers therefore are more likely to interpret CUDDLEUPPET as incorporating a reference to the word PET than to the “made up arbitrary word UPPET.”⁹ (App. Br., p. 4).

We further find that the marks have identical connotations, and that they create the same commercial impression. To the extent that “cuddle up” is suggestive of something to or with which a child can “cuddle up,” this term has the same meaning with respect to the plush animal-shaped toys associated with all three marks. In this regard, even if we were to agree with applicant that CUDDLEUP FRIENDS connotes “friends ‘cuddling up,’”¹⁰ applicant has not argued, and we do not find, that such connotation differs in any meaningful way from our stated connotation.

In view of the foregoing, we find that, when applicant's mark and registrant's mark are compared in their entirety, they are sufficiently similar in appearance, sound, connotation and commercial impression that, if used in connection with related services, confusion would be likely to occur. As such, this *du Pont* factor favors a finding of likelihood of confusion.

⁹ App. Br., p. 4, Serial No. 76709776.

¹⁰ App. Br., p. 11, Serial No. 76709622.

The next factor we consider is that of third-party use. As applicant points out, evidence of third-party use can be used to show that a registrant's mark is weak and thus entitled to a limited scope of protection. To this end, applicant submitted copies of ten active third-party registrations that include the words CUDDLE, CUDDLES or KUDDLES for plush toys, plush stuffed animals, and dolls, owned by nine different entities.¹¹ Third-party registrations cannot assist applicant in registering a mark that is likely to cause confusion with a registered mark. *See AMF Incorporated v. American Leisure Products, Inc.*, 177 USPQ 268 (CCPA 1973). The third-party registrations are of limited value as they are not evidence of use of the marks in commerce or that the public is familiar with them. *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 at n. 6 (TTAB 1988). Moreover, unlike the marks in the applications and cited registration, none of the registrations incorporates the words UP or UPS. Accordingly, while the evidence might show that the term CUDDLE is weak on its face in the children's toy market, there is no evidence that the term CUDDLE UP, or variations thereof, also is weak. *See, e.g., Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313 (TTAB 2005) (ESSENTIALS is weak on its face for clothing), and *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066 (TTAB 2011) (ELEMENTS weak on its face for clothing).

¹¹ March 6, 2013 Request for Reconsideration in each application.

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When we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, including those arguments not specifically addressed herein, we conclude that in view of the substantial similarity in the appearance, sound and commercial impressions of applicant's marks CUDDLEUP FRIENDS and CUDDLEUPPET, and registrant's mark, CUDDLE-UPS, their contemporaneous use on the legally identical goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The refusal under Section 2(d) of the Act is affirmed in each application.

Application 76709622 will go forward solely as to the goods identified in International Class 24.