

**THIS OPINION IS NOT A
PRECEDENT OF
THE T.T.A.B.**

Hearing: April 19, 2011 Mailed: November 16, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Midwestern Pet Foods, Inc.

Serial No. 77327252

Timothy D. Pecsénye of Blank Rome LLP for Midwestern Pet Foods, Inc.

Priscilla Milton, Trademark Examining Attorney, Law Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Holtzman, Cataldo and Wolfson,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

An application was filed by Midwestern Pet Foods, Inc. to register in standard characters on the Principal Register the mark KITTY NIBBLES for "cat treats" in International Class 31.¹

¹ Application Serial No. 77327252 was filed on November 12, 2007, based upon applicant's assertion of its bona fide intent to use the mark in commerce on the goods. In response to a requirement by the examining attorney, applicant disclaimed KITTY apart from the mark as shown.

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, as used on or in connection with its goods, so resembles the mark shown below, previously registered on the Principal Register for "cat food and cat treats" in International Class 31,² as to be likely to cause confusion.



When the refusal was made final, applicant appealed. Applicant and the examining attorney filed main briefs on the issue under appeal and applicant filed a reply brief. In addition, applicant and the examining attorney presented arguments before the Board in an oral hearing held on April 19, 2011.³

Timeliness of Examining Attorney's Brief

In its reply brief, applicant argues that

...Applicant's Brief was mailed to the Examining Attorney April 2, 2010. While no brief was filed within the sixty day time period, on June 28, 2010, the Board re-sent Applicant's Brief allowing

² Registration No. 3418325 issued on April 29, 2008 with a disclaimer of KITTEN apart from the mark as shown. Color is not claimed as a feature of the mark.

³ Applicant's resubmission, at the Board's invitation, of evidence consisting of Exhibit 3 to its request for reconsideration of the final refusal is noted.

the Examining Attorney an additional sixty days to file a brief explaining only that the earlier brief was not received by the Examining Attorney. The June 28, 2010 notice does not state that Applicant's Brief was not mailed, which it presumably was, only that it was brought to the Board's Attention that it was not received. Further, the Examining attorney does not explain why her Brief was late filed when it was ultimately submitted August 19, 2010. Certainly Applicant would not be allowed extra time to submit a filing simply by claiming a filing, presumably mailed, was not received. As such, Applicant respectfully requests that the Board exclude the Examining Attorney's Brief as no adequate explanation has been provided to explain the late filing.

A review of the relevant procedural history of the instant appeal is helpful in determining applicant's request:

- the Board issued a paralegal order on January 22, 2010, allowing applicant 60 days in which to submit its brief on appeal;
- applicant submitted its main brief on appeal on March 23, 2010;
- the Board issued a paralegal order on April 2, 2010 forwarding the electronic record of the application file to the examining attorney and allowing the examining attorney 60 days within which to submit her brief on appeal;
- the Board issued a subsequent paralegal order on June 28, 2010 noting that, due to an inadvertence, the examining attorney did not receive a copy of applicant's March 23, 2010 appeal brief and allowed

- the examining attorney an additional sixty days in which to submit her brief on appeal;
- the examining attorney submitted her brief on August 19, 2010.

Thus, it is clear that in the June 28, 2010 order, the Board reset the examining attorney's time in which to submit her brief on appeal. While the June 28, 2010 order does not discuss the nature of the inadvertence resulting in the examining attorney's non-receipt of applicant's brief, neither does the order require the examining attorney to provide an explanation therefor. In short, the Board simply reset the examining attorney's time in which to submit her brief without requiring a showing of good cause therefor. In accordance with Trademark Rule 2.142(b), the examining attorney timely submitted her brief on August 19, 2010, within the 60 day time period as reset. In view thereof, applicant's request to strike the examining attorney's brief on appeal is denied.

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth 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, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key, though not exclusive, considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 27 (CCPA 1976). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

The Goods

We first compare applicant's goods with those of registrant. In making our determination under the second *du Pont* factor, we look to the goods as identified in the involved application and cited registration. *See Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."). *See also Paula Payne*

Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.").

In this case, applicant's goods are "cat treats" and registrant's goods are "cat food and cat treats." Thus, registrant's goods encompass and otherwise are identical in part to applicant's goods. In addition, we find that registrant's "cat food" would appear on its face to be related to "cat treats" inasmuch as both are commonly purchased by cat owners and fed to their pet cats. We further note that applicant does not argue that the goods are unrelated.

Channels of Trade

When identical goods are recited in an application and registration with no limitations as to their channels of trade or classes of consumers, such channels of trade and classes of consumers must be considered to be legally identical. *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through

the same channels of trade."); and *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers.").

In the present case, registrant's goods encompass those of applicant and neither identification recites any limitations regarding the trade channels therefor. Accordingly, the trade channels are presumed to be identical, and applicant does not argue otherwise.

We turn then to our consideration of the marks at issue, noting initially that, "[w]hen marks would appear on virtually identical ... [goods or] services, the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992), cert. denied, 506 U.S. 1034 (1994). See also *ECI Division of E-Systems, Inc. v. Environmental Communications Inc.*, 207 USPQ 443, 449 (TTAB 1980).

The Marks

Under the first *du Pont* factor, we must determine whether applicant's mark and registrant's mark are similar or dissimilar when viewed in their entirety in terms of appearance, sound, connotation and overall commercial

impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). We note initially that the test under the first *du Pont* factor 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 goods or 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 *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). We further note that under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. See *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255, 259 (TTAB 1980).

In this case, applicant's mark, KITTY NIBBLES, is similar to the registered mark shown below



in that they contain the highly similar terms KITTY versus KITTEN and the identical term NIBBLES. The examining attorney made of record the following definition of KITTY: "a cat, especially a kitten."⁴ As a result, we find that the word portion of registrant's mark, i.e. KITTEN LI'L NIBBLES, is highly similar to applicant's mark, KITTY NIBBLES, in appearance, sound and meaning.

Further, the design of a kitten or cat holding what appear to be cat treats in its paws, while visually prominent, is hardly the dominant feature of registrant's mark. The kitten design is somewhat smaller than the wording KITTEN LI'L NIBBLES in registrant's mark, and the wording and design are positioned next to each other such that the words appear to the left of the design. Such positioning of the kitten appears to visually reinforce the wording KITTEN LI'L NIBBLES. Indeed, it is very difficult to view the design without also viewing the words comprising the mark.

We find, therefore, that the wording KITTEN LI'L NIBBLES is the most visually prominent portion of registrant's mark, and accordingly it is entitled to more weight in our analysis. It is a well-established principle

⁴ The American Heritage Dictionary of the English Language (2000) retrieved from www.bartelby.com.

that, 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 conclusion rests on a consideration of the marks in their entireties. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Further, when a mark comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). The presence of the kitten design in registrant's mark, particularly inasmuch as it is positioned next to and overlapping the words KITTEN LI'L NIBBLES, is insufficient to create a commercial impression that is separate from that of applicant's KITTY NIBBLES mark.

We are not persuaded by applicant's argument that its mark connotes small snacks, or nibbles, for cats while registrant's mark connotes a character called Kitten Li'l. In that regard, we note that registrant's mark may likewise connote small, or "Li'l" nibbles. Applicant further has introduced evidence that registrant's advertisements and packaging for its goods under its mark refer to a character

named Kitten Li'l. Nonetheless, our determination of the similarities or dissimilarities between the marks is based upon the applied-for and registered marks themselves, not evidence of the context in which the marks are used. As a result, such evidence fails to support its rather speculative contention regarding the manner in which consumers will perceive registrant's mark in connection with its recited goods.

Based upon the above analysis, we find that when the marks KITTY NIBBLES and KITTEN LI'L NIBBLES and design are viewed in their entirety, the similarities in appearance, sound, connotation and commercial impression outweigh the differences. See *Palm Bay Imports, Inc. v. Veuve Clicquot, supra*.

Strength of the Registered Mark

In making our finding, we have considered applicant's evidence and argument that both KITTEN and NIBBLES are weak in the field of cat food and cat treats. In support of this argument, applicant submitted nine live third-party registrations containing the term NIBBLE or a derivation thereof.⁵ Registrations are not evidence of use of the

⁵ Two of the submitted registrations are cancelled. A cancelled registration is not evidence of anything except that it issued. See TBMP §704.03(b) (3d ed. 2011) and cases cited therein. See also *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650 (TTAB 2002). Any benefits conferred by the registration, including the

marks shown therein; thus, they are not proof that consumers are familiar with such marks so as to be accustomed to the existence of the same or similar marks in the marketplace. See *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); *AMF Inc. v. Am. Leisure Products, Inc.*, 474 F.2d 1407, 177 USPQ 268 (CCPA 1973); and *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982). However, these registrations, similar to a dictionary definition, may be used to demonstrate that a particular term has some significance in an industry. *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006) (“[T]hird-party registrations can be used in the manner of a dictionary definition to illustrate how a term is perceived in the trade or industry”). See also *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987) (“[T]hird party registrations are of use only if they tend to demonstrate that a mark or a portion thereof is suggestive or descriptive of certain goods and hence is entitled to a narrow scope of protection”).

evidentiary presumptions afforded by Section 7(b) of the Trademark Act were lost when the registration expired. See, e.g., *Anderson, Clayton & Co. v. Krier*, 478 F.2d 1246, 178 USPQ 46 (CCPA 1973).

Applicant also submitted evidence in the form of web pages from 8 different third-party websites in which various pet products identified in part by the term NIBBLES are displayed. However, the probative value of this evidence also is limited because applicant presented no evidence concerning the extent to which these third-party designations are used in commerce. For example, it is not known how frequently these websites are viewed or how broad the consumer base is for these goods. As a result, this record simply does not establish that NIBBLES has been severely diluted in the field of cat treats. *See Broadway Chicken, Inc.*, 38 USPQ2d 1559 (TTAB 1996) (BROADWAY weak for restaurant services based on evidence that *hundreds* of restaurants and eating establishments use that word). Thus, while it is clear that the term KITTEN is descriptive and NIBBLES is suggestive of the goods in registrant's mark, applicant's evidence does not establish that there is widespread use of similar marks for cat treats or cat food such that registrant's marks is weak and entitled to only a narrow scope of protection.

In any event, even if we were to find, based on applicant's evidence, that registrant's mark is weak and entitled to a narrow scope of protection, the scope is still broad enough to prevent the registration of a highly

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similar mark for identical or closely related goods. See *In re Farah Mfg. Co., Inc.*, 435 F.2d 594, 168 USPQ 277, 278 (CCPA 1971).

Summary

We have carefully considered the arguments and evidence submitted by applicant and the examining attorney, including all evidence not specifically discussed in this decision. In view thereof, we conclude that consumers familiar with registrant's goods sold under its above-referenced mark would be likely to believe, upon encountering applicant's goods rendered under its mark that the goods originated with or are associated with or sponsored by the same entity.

Decision: The refusal of registration is affirmed.