

**This Opinion is Not a
Precedent of the TTAB**

Mailed: December 8, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Battat Incorporated

Serial No. 85856116

Andrew S. Langsam of Pryor Cashman, LLP,
for Battat Incorporated

Kelly F. Boulton, Trademark Examining Attorney, Law Office 102,
Mitchell Front, Managing Attorney.

Before Bergsman, Greenbaum, and Gorowitz,
Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

Battat Incorporated (“Applicant”) seeks registration on the Principal Register
of the mark SNUG BUGS (in standard characters) for

Hard plastic and mechanically connectible toy animals for
toddlers and infants in International Class 28.¹

The word “BUGS” has been disclaimed.

The Trademark Examining Attorney has refused registration of Applicant’s
mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) on the ground

¹ Application Serial No. 85856116 was filed on February 21, 2013, based upon Applicant’s
claim of first use anywhere and use in commerce since at least as early as July 31, 2010.

that Applicant's mark so resembles the registered marks SNUGGLE BUGZZZ (in



standard characters)² and ³ for “plush toys, soft sculpture toys, stuffed and plush toys” in International Class 28 that, as used in connection with Applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

I. 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 (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 and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also, In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

² Registration No. 3999438, issued July 19, 2011.

³ Registration No. 3999439, issued July 19, 2011.

A. Comparison of the Goods.

We start our analysis with the second *du Pont* factor and look at the relationship between the goods at issue. When determining the relationship between the goods,

[t]he 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 sales of the goods are directed.

Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Applicant's goods are identified as: "hard plastic and mechanically connectible toy animals for toddlers and infants." The goods in the cited registrations (Registrant's Goods) are identified as: "plush toys, soft sculpture toys, stuffed and plush toys."

All of the goods at issue are toys. While Applicant restricts the intended users of its toys to "toddlers and infants," Registrant's goods are not so limited and could include "plush toys, soft sculpture toys, stuffed and plush toys" for toddlers and infants. Applicant contends these goods are "distinct" and "distinguishable." However, it is not necessary for the goods to be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). The respective goods need only be "related in some manner and/or the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods] emanate

from the same source.” *Coach Services, Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722, (Fed. Cir. 2012), *quoting 7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007).

The Examining Attorney made of record ten use-based third-party registrations showing that both Applicant’s and Registrant’s types of goods are offered under a single mark by others.⁴ The registrations listed below are representative:

- Reg. No. 4280367 – AH-TOO-KEE
Goods include: children’s multiple activity toys; soft sculpture plush toys; toy figures, parts and accessories therefor; and toy animals;
- Reg. No. 4299233 – GENETIPETZ
Goods: plush toys and toy animals;
- Reg. No. 4345592 – ANIMAL ADVENTURE
Goods include: bath toys; bathtub toys; infant toys; plush toys; stuffed and plush toys; stuffed toy animals; toy animals; and toy figures; and
- Reg. No. 4301294 – YABBER
Goods include: baby multiple activity toys; children’s educational toys for developing fine motor, cognitive, counting, number, letter, spelling, shape, memory, and sorting skills; plush toys; stuffed dolls and animals.

Although such third-party registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless may have probative value to the extent they are based on use in commerce, they may serve to suggest that the goods and services identified therein are of a kind

⁴ Office Action dated June 10, 2013.

which may emanate from a single source under a single mark., i.e., that the same entity may provide plush toys and other types of toys, e.g., infant development toys, plastic character toys, toy animals, bathtub toys, infant toys, baby multiple activity toys, and children's educational toys for developing fine motor, cognitive, counting, number, letter, spelling, shape, memory, and sorting skills. *See In re RiseSmart Inc.*, 104 USPQ2d 1931, 1934-1935 (TTAB 2012); *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); and *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

The Examining Attorney also made of record a number of Internet web pages, including the following five pages, suggesting that both Applicant's and Registrant's goods are offered under a single mark by others:⁵

- FisherPrice LAUGH & LEARN - "Nighttime Sis" plush pal and "Singin' Scoops" plastic stacking toys – (www.fisher-price.com);
- FisherPrice THOMAS & FRIENDS – "Rolling Railway Plush James" plush engine and "Thomas' Wash Down Delivery" plastic engine, cargo car and cargo – (www.fisher-price.com);
- Hasbro – MY LITTLE PONY – plush figures and plastic figures - (www.hasbro.com);
- Disney Shop – "BABY EINSTEIN OCTOPLUSH" plush octopus toy and "BABY EINSTEIN BENDY BALL" plastic ball with various shaped cutouts – available online at Toys R Us (www.toysrus.com); and
- LeapFrog – "LEAPFROG SHAPES & SHARING PICNIC BASKET" hard plastic picnic basket with plastic food, dishes and utensils, and "LEAPFROG

⁵ Office Action dated December 24, 2013.

MY PUPPY PAL VIOLET” plush toy – available online at Toys R Us (www.toysrus.com).

Based upon this evidence, we find that Applicant’s goods (hard plastic and mechanically connectible toy animals for toddlers and infants) are closely related to Registrant’s goods (plush toys, soft sculpture toys, stuffed and plush toys). Accordingly, the second *du Pont* factor favors a finding of likelihood of confusion.

B. Channels of Trade.

The Internet web pages made of record by the Examining Attorney establish that the goods at issue are sold in the same channels of trade, through on-line sites for toy manufactures or toy stores, and in toy stores. As such, the third *du Pont* factor favors a finding of likelihood of confusion.

C. Comparison of the Marks.

We look next at the first *du Pont* factor, the similarity or dissimilarity of the marks at issue. Applicant’s mark is SNUG BUGS in standard characters and Registrant’s marks are SNUGGLE BUGZZZ in standard characters and



Because the design element in one of the cited marks arguably contains an additional point of difference with Applicant's mark, we confine our analysis to the issue of likelihood of confusion between Applicant's mark and the cited registration for the mark in standard character form. That is, if confusion is likely between those marks, there is no need for us to consider the likelihood of confusion with the

cited registration for the mark with design elements, while if there is no likelihood of confusion between Applicant's mark and the cited mark in standard characters, then there would be no likelihood of confusion with the mark with design elements. *See, e.g., In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

We consider the similarity between the mark SNUG BUGS in standard characters and the mark SNUGGLE BUGZZZ in standard characters, and will compare them “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), *quoting du Pont*, 177 USPQ at 567. Further, in evaluating the similarities between marks, the emphasis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1645 (TTAB 2009), *citing Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Since the goods at issue are toys, the average purchaser is an ordinary consumer.

In terms of how the marks are spoken, it is settled that there is no correct pronunciation of a trademark. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012). However, in this case, the words in both marks are fairly common and do not lend themselves to different pronunciations. For example, “SNUG” is pronounced “SNUHG” and “SNUGGLE” is pronounced “SNUHG-UH L.”

There is no other way to pronounce these words, both of which contain the identical term “SNUG.”⁶

As to the terms “BUGS” and “BUGZZZ,” Applicant contends, without any supporting evidence, that these terms are “orally presented differently.” Appeal Brief, pp. 5-6, 4 TTABVUE at 6-7. However, “BUGS” and “BUGZZZ” both are pronounced “BUHGZ.” As with “SNUG” and “SNUGGLE,” there is no other way to pronounce “BUGS” or “BUGZZZ.” Accordingly, we find that the terms “BUGS” and “BUGZZZ” are phonetic equivalents.

The appearance of the marks is also similar. Both marks start with the prefix “SNUG” and end with “BUGS” or its phonetic equivalent “BUGZZZ.” The differences are the addition of the letters “GLE” after “SNUG” and the alternate spelling of the word “bugs” as “BUGZZZ” in the registered mark, which we find to be minimal. Although the differences may be noticed if the marks appear next to each other,

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 their entireties that confusion as to the source of the goods offered under the respective marks is likely to result. The purchaser's fallibility of memory over a period of time must be kept in mind.

Edom Laboratories Inc. v. Lichter, 102 USPQ2d 1546, 1551 (TTAB 2012) (internal citations omitted). Accordingly, we find that the marks are similar in appearance.

⁶ We take judicial notice of the pronunciation of “SNUG” and “SNUGGLE” from Dictionary.com. *snug*. Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://dictionary.reference.com/browse/snug> (accessed: November 26, 2014) and *snuggle*. Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://dictionary.reference.com/browse/snuggle> (accessed: November 26, 2014).

We further find that the marks have identical connotations, and that they create the same commercial impression. “Snug” and “snuggle” are variations of the same word. In fact, the dictionary entry for “snuggle” states that it is a “[f]requentative of SNUG.”⁷ Further, the phonetically equivalent suffixes “BUGS” and “BUGZZZ” are identical in meaning. To the extent that SNUGGLE BUGZZZ is suggestive of “bedtime, sleeping, and cuddling, as a child may do with a ‘stuffed and plush toy’” (Appeal Brief p. 5, 4 TTABVUE at 6), “SNUG BUGS” is equally suggestive. Similarly, to the extent “SNUG BUGS” connotes “multiple bugs that are held tightly together to one another” (*id.*), “SNUGGLE BUGZZZ” has the same connotation with respect to the various toys identified in the application and registration.

Accordingly, we agree with the Examining Attorney 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 on related goods, confusion would be likely to occur. As such, the first *du Pont* factor favors a finding of likelihood of confusion.

D. Number and Nature of Similar Marks in Use on Similar Goods.

Applicant also argues that “there are a number of other [r]egistrations which utilize the same or similar elements ... which tends to show the dilute nature of the

⁷ Exhibit to Office Action dated June 10, 2013 from *The American Heritage Dictionary of the English Language* on-line, <http://www.ahdictionary.com/word/search.html?q=snug> (accessed June 10, 2013).

common portions ...” Appeal Brief, p. 6, 4 TTABVUE at 7. In support of this argument, Applicant made of record four registrations for marks containing the term SNUG (AS SUNG AS A BOOK IN A BUG) or SNUGGLE (SNUGGLEBUDDY, SNUGGLEBUMS, and SNUGGANIMALS), all of which are for toys consisting of or including “plush toys.” Third-party registrations are generally entitled to little weight in determining the strength of a mark because they are not evidence that the mark is in actual use in the marketplace or that consumers have been exposed to the mark. *See Fort Howard Paper Co. v. Kimberly-Clark Corp.*, 221 USPQ 732 (TTAB 1984); and *In re Hub Distributing Inc.*, 218 USPQ 284 (TTAB 1983). Moreover, the co-existence of four registrations does not establish that the terms “SNUG” and “SNUGGLE” are diluted, even though those terms (and variations thereof) may be suggestive of features of toys. Since only one of the third-party registrations includes both the words “Snug” and “Bugs,” the combination of the SNUG prefix with a suffix containing the word BUG is clearly not diluted. Accordingly, we find the sixth *du Pont* factor to be neutral.

E. Conclusion

Having considered all the evidence and argument on the relevant *du Pont* factors, whether specifically discussed herein or not, we find that Applicant’s use of the mark SNUG BUGS in standard characters for “hard plastic and mechanically connectible toy animals for toddlers and infants” is likely to cause confusion with Registrant’s mark SNUGGLE BUGZZZ for “plush toys, soft sculpture toys, stuffed and plush toys.”

Decision: The refusal to register Applicant's mark SNUG BUGS is affirmed.