

This Opinion is not a
Precedent of the TTAB

Mailed: December 14, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Perry Textiles Inc.

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Serial No. 86360156

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Matthew H. Swyers of The Trademark Company, PLLC
for Perry Textiles Inc.

Tarah Hardy Ludlow, Trademark Examining Attorney, Law Office 110,
Chris A. F. Pedersen, Managing Attorney.

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Before Mermelstein, Taylor and Lykos,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Perry Textiles Inc. (“Applicant”) seeks to register on the Principal Register the mark **COLDTOUCH** in standard characters for “pillows, bed toppers” in International Class 20 and “mattress pads” in International Class 24.¹

The Trademark Examining Attorney refused registration of Applicant’s mark as to both classes under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the registered mark

¹ Application Serial No. 86360156, filed August 7, 2014, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a *bona fide* intent to use the mark in commerce. During *ex parte* prosecution, Applicant deleted “mattresses” from the identification of goods.

COOL TOUCH also in standard characters for “mattresses” in International Class 20,² that, when used on or 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. The appeal is now briefed. For the reasons set forth below, we affirm the Section 2(d) refusal as to both classes of goods.

I. Applicable Law

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*du Pont*”). See also *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods. See *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

A. The Marks

We commence with the first *du Pont* likelihood of confusion factor which involves an analysis of the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73

² Registration No. 3540103, issued on December 2, 2008 on the Principal Register; Sections 8 and 15 affidavit and declaration acknowledged and accepted.

USPQ2d 1689 (Fed. Cir. 2005). “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Binion*, 93 USPQ2d 1531 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Our analysis cannot be predicated on dissection of the involved marks. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). Rather, we are obliged to consider the marks in their entirety. *Id.* See also *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”).

Applicant argues that its applied-for mark **COLDTOUCH** “creates a commercial impression of its products being refrigerated or actually cold to the touch” whereas the cited mark **COOL TOUCH** “creates a commercial impression of merely being cold when one feels the product.”³ Applicant further maintains that the word “cold” is understood to be more extreme in temperature than “cool”, and that “cool” has

³ Applicant’s Brief, p. 10; 4 TTABVUE 11.

other meanings such as “fashionable, trendy or chic,” and points to the obvious difference in spelling and sound of the two words.⁴ In addition, Applicant maintains that the shared term “touch” is descriptive, and therefore less important in creating a commercial impression.

Applicant’s arguments are unconvincing. While the adjectives “cold” and “cool” in Applicant’s and Registrant’s marks may sound and look different, they begin with the same hard consonant letter “c” sound and are very close in meaning. The word “cool” is defined as “cold (but pleasant).”⁵ The slight difference in meaning is minimized by the subsequent, identical noun TOUCH. When considered as a whole, both marks imply that their products are cold or “cold (but pleasant)” to the touch. This is especially true, given the nature of both Applicant’s and Registrant’s goods. Thus, although Applicant’s and Registrant’s marks may have some recognizable differences in sight and sound, there are striking similarities in connotation, and, ultimately, overall commercial impression. *See, e.g., In re M. Serman & Co., Inc.*, 223 USPQ 52 (TTAB 1984) (holding CITY WOMAN for ladies’ blouses, and CITY GIRL for female clothing, likely to cause confusion); *Gastown, Inc., of Del. v. Gas City, Ltd.*, 187 USPQ 760 (TTAB 1975) (holding GAS CITY (“GAS” disclaimed) for gasoline, and GASTOWN for gasoline, diesel fuel, kerosene, and vehicle supply and maintenance services, likely to cause confusion); *Watercare Corp. v. Midwesco-Enterprise, Inc.*, 171 USPQ 696 (TTAB 1971) (holding AQUA-CARE (stylized, with

⁴ Id. at 10; 4 TTABVUE 11.

⁵ MacMillan Dictionary (www.macmillandictionary.com/dictionary/american/cool) submitted with the April 25, 2015 Office Action.

and without design) and WATERCARE (stylized), both for water-conditioning products, likely to cause confusion).The first *du Pont* factor therefore weighs in favor of finding a likelihood of confusion.

B. The Goods

The next step in our analysis is a comparison of the goods identified in Applicant's application vis-à-vis the goods identified in the cited registration, the second *du Pont* factor. See *Stone Lion*, 110 USPQ2d at 1161; *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). See also *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). It is settled that it is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. That is, the issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. See *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). The respective goods need only be "related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the services] emanate from the same source." *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). See also *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991). Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant goods/services are

used together or used by the same purchasers; advertisements showing that the relevant goods/services are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both applicant's goods/services and the goods/services listed in the cited registration. *See, e.g., In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores).

Applicant concedes in its brief that Applicant's and Registrant's goods are similar. Indeed, from the identifications themselves, we can conclude that Applicant's and Registrant's goods are used together and therefore constitute complementary products. In addition, with regard to both Applicant's International Class 20 goods identified as "pillows, bed toppers" and International Class 24 goods of "mattress pads," the Examining Attorney made of record several third-party, used-based registrations identifying one or more of Applicant's enumerated items and Registrant's "mattresses." By way of illustration, note the following:⁶

Registration No. 4350186 for the stylized mark **THERAPEDIC** and design for "furniture, namely, sofas, loveseats, chairs, ottomans, sofa beds, and futons; mattresses, box springs, mattress toppers, pillows" in International Class 20 and "mattress pads" in International Class 24;

Registration No. 4539591 for the mark **WE MAKE IT ADJUSTABLE. YOU MAKE IT YOURS.** for "Bed pillows; Bedroom furniture; Beds, mattresses, pillows and bolsters; Furniture; Head supporting pillows; Mattress cushions; Mattress foundations; Mattress toppers; Mattresses; Neck-supporting pillows; Pillows" in International Class 20 and "Bed covers; Bed linen; Bed

⁶ See April 25, 2015 and May 9, 2015 Office Actions.

pads; Bed sheets; Bed skirts; Bed spreads; Curtains; Fitted bed sheets; Flat bed sheets; Mattress covers; Mattress pads; Pillow cases; Pillow covers; Pillow shams; Sheet sets; Towels” in International Class 24;

Registration No. 4317518 for the mark **CLIMATE CONTROL SLEEP FOR YOU AND ME** for “Furniture, beds, mattresses, mattresses that heat and cool, mattress frames, mattress foundations, box springs, mattress toppers, and pillows” in International Class 20 and “Mattress covers, mattress pads, and pillow covers” in International Class 24;

Registration No. 4602243 for the mark **THE MOST TRUSTED BRAND IN HEALTH AND SAFETY** for “Box springs; Mattress toppers; Mattresses; Pillows; Mattress foundations” in International Class 20 and “Bed sheets; Mattress covers; Mattress pads; Sheet sets; Baby bedding, namely, fitted crib sheets and diaper changing pad covers not of paper” in International Class 24; and

Registration No. 4665948 for the stylized mark **BEDGEAR** and design for “Mattresses, mattress toppers, pillows, and sleeping bags” in International Class 20 and “Mattress covers, mattress protectors, mattress pads, pillow covers, pillow protectors, crib mattress protectors, bed sheets, bed blankets, comforters and duvets” in International Class 24.

(Emphasis added). As a general proposition, although use-based third-party registrations alone 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 may serve to suggest that the goods are of a kind that emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *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 n.6 (TTAB 1988).

In view of the evidence of record, we find that the goods identified in the application and registration are related and complimentary in nature. As such, the second *du Pont* factor also weighs in favor of finding a likelihood of confusion.

II. Conclusion

After considering all of the evidence of record and arguments pertaining to the *du Pont* likelihood of confusion factors, both the first and second *du Pont* factors discussed above favor a finding of likelihood of confusion. We treat as neutral any *du Pont* factors for which there is no evidence or argument of record. We therefore find that there is a likelihood of confusion between Applicant's mark **COLDTOUCH** "pillows, bed toppers" in International Class 20 and "mattress pads" in International Class 24, and Registrant's mark **COOL TOUCH** for "mattresses" in International Class 20.

Decision: The Section 2(d) refusal to register Applicant's mark as to both International Classes 20 and 24 is affirmed.