

This Opinion is not a  
Precedent of the TTAB

Mailed: October 7, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Sammy Snacks, Inc.*

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Serial No. 86384029

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Dale R. Jensen, Esq.  
for Sammy Snacks, Inc.

Tara L. Bhupathi, Trademark Examining Attorney, Law Office 102,  
Mitchell Front, Managing Attorney.

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Before Kuhlke, Ritchie and Lykos,  
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

On September 3, 2014, Sammy Snacks, Inc. (“Applicant”) filed an application to register on the Principal Register the mark **A Modern Ancestral Diet** in standard characters for “cat food; cat treats; dog food; dog treats; pet food; pet treats” in International Class 31.<sup>1</sup> The application includes a disclaimer of the word “Diet” apart from the mark as shown as well as a claim of ownership of Registration No.

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<sup>1</sup> Application Serial No. 86384029, filed under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging October 1, 2012 as the date of first use anywhere and in commerce.

4359319 for the mark on the Principal Register displayed below for the same goods as identified in the application.<sup>2</sup>

*Ancestry*

The Trademark Examining Attorney refused registration of Applicant's mark 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 **THE ANCESTRAL DIET MEETS MODERN NUTRITION** also in standard characters for "pet food" in International Class 31,<sup>3</sup> that, when used on or in connection with Applicant's identified goods, it is likely to cause confusion or mistake or to deceive. The registration likewise includes a disclaimer of the word "DIET."

Applicant has appealed the final refusal to register the mark. The appeal is fully briefed. For the reasons set forth below, we affirm the Section 2(d) refusal.

***Likelihood of Confusion Analysis***

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

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<sup>2</sup> Registered on June 25, 2013. Color is not claimed as a feature of the mark.

<sup>3</sup> Registration No. 3722281, registered on December 8, 2009 on the Principal Register, alleging April 30, 2007 as the date of first use anywhere and in commerce; Sections 8 and 15 affidavits accepted and acknowledged.

considerations are the similarities between the marks and the similarities between the goods and/or services. *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). These factors and others are discussed below. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944 (Fed. Cir. 2006) (even within *du Pont* list, only factors that are “relevant and of record” need be considered).

### ***The Goods and Channels of Trade***

We commence our analysis with a comparison of the goods identified in Applicant's application vis-à-vis the goods identified in the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). At the outset we note that both Applicant's identification of goods and the identification of goods in the cited registration include the exact term “pet food,” and that Applicant's identification includes additional derivatives thereof, such as “cat food” and “dog food.”<sup>4</sup> As such, the goods are in part identical.

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<sup>4</sup> The Examining Attorney made of record the following dictionary definitions of “cat” and “dog” obtained from the online American language version of the MacMillan Dictionary at [www.macmillandictionary.com/american](http://www.macmillandictionary.com/american), which show, in relevant part, that they are often kept as pets.

**Cat**

1. an animal with soft fur, a long thin tail and whiskers, that people keep as a pet or for catching mice. ...

**Dog**

1. an animal kept as a pet, for guarding buildings, or for hunting. ...

Because the identifications of goods in the application and registration are in part identical and unrestricted as to trade channels, we must also presume that Applicant's and Registrant's identical products travel in the same ordinary trade and distribution channels and will be marketed to the same potential consumers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011). The record shows that the ordinary trade channels for pet food are retail stores as well as pet food manufacturer web sites. See excerpts from the third-party web sites The Honest Kitchen ([www.thehonestkitchen.com](http://www.thehonestkitchen.com)), Halo Purely for Pets ([www.halopets.com](http://www.halopets.com)) and Canidae Natural Pet Food Company ([www.canidae.com](http://www.canidae.com)) submitted with Office Action dated December 14, 2015; TSDR pp. 13-17.

Accordingly, the second and third *du Pont* factors, the relatedness of the goods as described in the application and registration and similarity of established, likely to continue trade channels, both weigh in favor of finding a likelihood of confusion.

### *The Marks*

Keeping in mind that where the goods are identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines (see *Bridgestone Americas Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 1337, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012)), we now turn to 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 Fondée En 1772*, 396 F.3d 1369, 73 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). That being said, our analysis cannot be predicated on dissection of the involved marks. *Stone Lion*, 110 USPQ2d at 1161. 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.”). Nonetheless, 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. *Stone Lion*, 110 USPQ2d at 1161.

Applicant argues that the marks are dissimilar in appearance, sound and commercial impression because Registrant’s mark includes the additional words “the”, “meets” and “nutrition.” In addition, Applicant points to the distinctions in the order of the words “modern”, “ancestral”, and “diet” and number of syllables. Applicant maintains that whereas Registrant’s mark conveys the impression that an ancestral diet has been modified to have the characteristics of “modern nutrition,” Applicant’s mark conveys the impression that its current or more “modern” product has traits of an “ancestral diet.”

We are not convinced that the word pattern in each mark is so dissimilar that consumers would readily distinguish the marks on this basis. Rather, both marks engender highly similar meanings and commercial impressions. Each mark incorporates the adjective “ancestral” as a modifier to the noun “diet.” Indeed, the phrase “ancestral diet” appears as the dominant portion of each mark. While the word “modern” precedes this phrase in Applicant’s mark, the fact that that this same word appears later in Registrant’s mark as a modifier of the word “nutrition” actually serves to heighten, not lessen, their similarity. Both “diet” and “nutrition”

have similar meanings when considered in the context of the goods, namely food or nourishment for pets. Note the following dictionary definitions:

**nutrition** *noun*

The process of providing or obtaining the food necessary for health and growth. ....

Food; nourishment.<sup>5</sup>

**diet** *noun*

The kinds of food that a person, animal or community habitually eats.<sup>6</sup>

Hence both marks convey the meaning that Applicant's and Registrant's pet food products incorporate elements of an ancestral diet but modernly engineered to meet the desired nutritional and health needs of today's pet. We therefore find that the marks are similar in connotation and commercial impression. Accordingly, the first *du Pont* factor also weighs in favor of finding a likelihood of confusion.

***The Number and Nature of Similar Marks in Use on Similar Goods***

We will now consider the number and nature of similar marks in use on similar goods, the sixth *du Pont* factor. In an *ex parte* appeal, "[t]he purpose of [an applicant] introducing third-party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated

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<sup>5</sup> Source: Oxford Dictionaries (online version – U.S. English) at [www.oxforddictionaries.com/us/definition/american\\_english](http://www.oxforddictionaries.com/us/definition/american_english). See Office Action dated December 14, 2015; TSDR, p. 10.

<sup>6</sup> We take judicial notice of the word "diet" from the online version of the Oxford Dictionaries (U.S. English). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010).

to distinguish between different such marks on the bases of minute distinctions.” *Palm Bay*, 73 USPQ2d at 1694. “[T]he strength of a mark is not a binary factor” and “varies along a spectrum from very strong to very weak.” *Juice Generation, Inc. v. GS Enters. LLC*, \_\_ F.3d \_\_, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015) (internal citations omitted). “The weaker [the Registrant’s] mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Id.* at 1676 (internal citations omitted).

Applicant argues that the registered mark **THE ANCESTRAL DIET MEETS MODERN NUTRITION** is diluted and weak in connection with pet food due to the existence of two registered marks for similar goods, namely, Registration No. 3524525 for the mark **ANCESTRAL MODEL DIET** for “dog and cat food” and Applicant’s own previously registered mark **ANCESTRY** in stylized form noted above. The third-party registration for the mark **ANCESTRAL MODEL DIET** has been cancelled for failure to file a Section 8 affidavit. That leaves us with Applicant’s previously registered mark **ANCESTRY** in stylized form, which, to state the obvious, is not a third-party registration. And even if it were owned by a third party, we cannot find based solely on the existence of this distinct, single word mark that Registrant’s mark as a whole is descriptive or suggestive to such an extent that it deserves less protection. We therefore deem this *du Pont* factor neutral.<sup>7</sup>

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<sup>7</sup> Applicant argues that its prior registration for the stylized mark **ANCESTRY** should be used as evidence in favor of registration. We do not find this argument convincing. Applicant’s previously registered mark is not a legal equivalent. *Cf. In re Allegiance Staffing*, 115 USPQ2d 1319, 1324 (TTAB 2015).

***Fame of the Prior Mark***

We now turn to the fifth *du Pont* factor, the fame of the cited mark, as argued by Applicant. Applicant erroneously states that because the record is devoid of fame of the registered mark, this *du Pont* factor weighs in favor of finding no likelihood of confusion. The absence of such evidence has minimal significance in an *ex parte* appeal. See *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006). We therefore agree with the Examining Attorney that this factor is neutral.

***Actual Confusion and Contemporaneous Use***

Applicant points to contemporaneous use of its mark for over two years with Registrant's mark and the absence of evidence of actual confusion. A showing of actual confusion would of course be highly probative, if not conclusive, of a likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight. *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965). The issue before us is the likelihood of confusion, not actual confusion. *Herbko Int'l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (actual confusion not required). Further, any suggestion that there has been no actual confusion between the marks based on the coexistence of Applicant's mark and the cited registration is entitled to little probative value in the context of an *ex parte* appeal. *In re Majestic Distilling Co., Inc.*, 65 USPQ2d at 1205. Accordingly, the seventh and eighth *du Pont* factors are also neutral.

***Conclusion***

In the present case, the first, second and third *du Pont* factors each favor a finding of likelihood of confusion. The other *du Pont* factors are neutral.

After considering all of the evidence properly of record and arguments pertaining to the *du Pont* likelihood of confusion factors, we find that there is a likelihood of confusion between Applicant's applied-for and Registrant's registered mark as to Applicant's goods.

*Decision:* The Section 2(d) refusal to register Applicant's mark is affirmed.