

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

Mailed: November 20, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Malkon
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Serial No. 86572090
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Gene Bolmarich of the Law Offices of Gene Bolmarich,
for Tanya Malkon.

Meredith Maresca, Trademark Examining Attorney, Law Office 109,
Michael H. Kazazian, Managing Attorney.

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Before Taylor, Bergsman and Kuczma,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Tanya Malkon (“Applicant”) seeks registration on the Principal Register of the
mark BAGWAGZZZ (in standard characters) for

Beds for household pets; Portable beds for pets, in
International Class 20.¹

The Trademark Examining Attorney has refused registration of Applicant’s
mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the

¹ Application Serial No. 86572090 was filed on March 21, 2015, based upon Applicant’s
allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the
Trademark Act.

ground that Applicant's mark so resembles the registered mark THE WAG BAG, in typed drawing form, for "portable pet beds," in Class 20, as to be likely to cause confusion.²

After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *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 considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

A. *The similarity or dissimilarity and nature of the goods.*

Applicant is seeking to register its mark for "beds for household pets" and "portable beds for pets" and the description of goods in the cited registration is "portable beds for pets." The goods are in part identical. Under this *du Pont* factor, the Trademark Examining Attorney need not prove, and we need not find, similarity as to each and every product listed in the description of goods. It is

² Registration No. 1671769, registered January 14, 1994; second renewal. Registrant disclaimed the exclusive right to use the word "bag."

sufficient for a refusal based on likelihood of confusion that relatedness is established for any product encompassed by the description of goods in a particular class. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014); *General Mills Inc. v. Fage Dairy Processing Industry SA*, 100 USPQ2d 1584, 1588 n.1 (TTAB 2011), *judgment set aside on other grounds*, 2014 WL 343267 (TTAB Jan. 22, 2014); *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1397 (TTAB 2007).

B. Established, likely-to-continue channels of trade.

Because the goods described in the application and the cited registration are in part identical, we must presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *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); *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011).

C. The similarity or dissimilarity of the marks.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound,

connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, “two marks may be found to be confusingly similar if there are sufficient similarities in terms of sound *or* visual appearance *or* connotation.” *Kabushiki Kaisha Hattori Seiko v. Satellite Int’l, Ltd.*, 29 USPQ2d 1317, 1318 (TTAB 1991), *aff’d mem.*, 979 F.2d 216 (Fed. Cir. 1992) (citation omitted). *See also Eveready Battery Co. v. Green Planet Inc.*, 91 USPQ2d 1511, 1519 (TTAB 2009) (citing *Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”)).

In analyzing the marks, we are mindful that where, as here, the goods are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods/services. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

“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*, 101 USPQ2d at 1721. *See also San Fernando Electric Mfg. Co. v. JFD Electronics Components*

Corp., 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd mem.*, 972 F.2d 1353 (Fed. Cir. 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). As indicated above, the average customer is pet owner and, therefore, an ordinary consumer.

Applicant's mark is BAGWAGZZZ and the registered mark is THE WAG BAG. Registrant's use of "the" at the beginning of THE WAG BAG does not affect or otherwise diminish the overall similarity or dissimilarity between the marks. *See In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009) (finding WAVE and THE WAVE "virtually identical" marks; "[t]he addition of the word 'The' at the beginning of the registered mark does not have any trademark significance."); *In re Narwood Prods. Inc.*, 223 USPQ 1034, 1034 (TTAB 1984) (finding THE MUSIC MAKERS and MUSIC-MAKERS "virtually identical" marks; the inclusion of the definite article "the" is "insignificant in determining likelihood of confusion").

Further, although Applicant's mark is presented without any spaces, consumers are likely to view and verbalize BAGWAGZZZ as BAG WAGS, based on normal English pronunciation. Thus, the presence or absence of a space between the terms is an inconsequential difference that even if noticed or remembered by consumers would not serve to distinguish these marks. *See, e.g., Giersch v. Scripps Networks*

Inc., 90 USPQ2d 1020, 1025 (TTAB 2009) (finding that DESIGNED TO SELL does not create a distinct commercial impression from DESIGNED2SELL); *Seaguard Corp. v. Seaward International, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (SEA GUARD and SEAGUARD are “essentially identical”); *In re Best Western Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (“there can be little doubt that the marks [BEEFMASTER for restaurant services and BEEF MASTER for frankfurters and bologna] are practically identical and indeed applicant has not argued otherwise.”).

Even though the words “Bag” and Wag” are transposed in the respective marks, they look and sound similar because they both are comprised of the same and/or similar and phonetically equivalent words. They also sound alike because the words “Bag” and “Wag” rhyme.

The primary focus in our analysis of the marks is whether the transposition of the root words “Bag” and Wag” is sufficient to distinguish the marks. Where the primary difference between marks is the transposition of the elements that compose the marks, and where this transposition does not change the overall commercial impression, there may be a likelihood of confusion. *See, e.g., In re Wine Soc’y of Am. Inc.*, 12 USPQ2d 1139, 1142 (TTAB 1989) (holding THE WINE SOCIETY OF AMERICA and design for wine club membership services including the supplying of printed materials, and AMERICAN WINE SOCIETY 1967 and design for newsletters, bulletins, and journals, likely to cause confusion); *In re Nationwide Indus., Inc.*, 6 USPQ2d 1882, 1884 (TTAB 1988) (holding RUST BUSTER (with

“RUST” disclaimed) for rust-penetrating spray lubricant, and BUST RUST for penetrating oil, likely to cause confusion); *In re Gen. Tire & Rubber Co.*, 213 USPQ 870, 871 (TTAB 1982) (holding SPRINT STEEL RADIAL (with “STEEL” and “RADIAL” disclaimed) for pneumatic tires, and RADIAL SPRINT (with “RADIAL” disclaimed) for radial tires, likely to cause confusion). However, if the transposed mark creates a distinctly different commercial impression, then confusion is not likely. *See, e.g., In re Best Prods. Co.*, 231 USPQ 988, 989-90 (TTAB 1986) (holding BEST JEWELRY and design (with “JEWELRY” disclaimed) for retail jewelry store services, and JEWELERS’ BEST for bracelets, not likely to cause confusion).

The above-noted *Best Prods. Co.* case, on which Applicant relies, involved goods on the one hand and services on the other, rather than in part identical goods as is the case here. Indeed, the Board specifically relied on the fact that goods and services are different in saying that “no reasonable person would mistakenly find a product in the course of looking for a service; neither is the reverse possible.” *Id.* at 989. The Board also pointed out that when marks comprise “reverse combinations of the same elements, the primary concern is that ordinary prospective purchasers, not being infallible in their ability to recall trade designations, may transpose the elements in their minds and, as a result, mistakenly purchase the wrong products or engage the wrong services.” *Id.*

In the present case, we find that the marks convey the same connotation and commercial impression, and that the reversal of the word elements is not sufficient to distinguish them. The marks both convey the commercial impression that a bean

bag bed will please your dog and make its tail wag.³ In fact, in her July 3, 2015 Response, Applicant explained that BAGWAGZZZ “emphasizes the fact that a dog would be so comfortable as to sleep or at least be restful when in the product.”

Applicant points out in her brief that BAGWAGZZZ and THE WAG BAG are coined terms with no inherent meaning.⁴ Because of the consumers’ fallible recall, reversal of the root words in the marks at issue will not avoid a likelihood of confusion where, as here, the commercial impressions engendered by the marks are the same.

Applicant also contends that “the letters ‘ZZZ’ in its [sic] mark make a dominant commercial impression in the marks as a whole and is likely to be the part of the marks that consumers will focus on and remember, because it is the most distinctive aspect of the mark.”⁵ We disagree. We find it more probable that consumers will focus on the term BAGWAG and perceive the letters “ZZZ” to be a stylized pluralization of BAGWAG. The letters “ZZZ” also further the commercial impression of a bed product because they are slang for sleep.⁶ In this regard, we note that the Examining Attorney submitted an excerpt from WAGBAGZZZ, a

³ In her June 30, 2015 and July 3, 2015 Office Actions, the Examining Attorney submitted excerpts from third-party websites advertising the sale of bean bag pet beds to show that bean bag beds are commonly sold as pet beds.

⁴ 4 TTABVUE 4.

⁵ 4 TTABVUE 5.

⁶ “Z’s” are defined as “sleep (often used with grab, catch, etc.).” *Dictionary.com* derived from **THE RANDOM HOUSE DICTIONARY** (2015). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

third-party website, advertising the sale of pet duvets.⁷ The mark is displayed below:



This website, although not conclusive as to how Applicant may display her mark or whether the letters “ZZZ” are a dominant feature of Applicant’s mark, is probative of how a competitor with a similar mark perceives the importance of the letters “ZZZ” in its mark and has chosen to display its mark.

Thus, although the marks have certain differences, when we compare them in their entireties we find that on the whole they are similar in appearance, sound, connotation and commercial impression, and that the reversal of the elements in the marks, and the additional letters “Z” in Applicant’s mark, are not sufficient to distinguish them when used on in part identical goods. This *du Pont* factor favors a finding of likelihood of confusion.

D. Balancing the factors.

Because the marks are similar, the goods are in part identical and we must presume that those goods move in the same channels of trade, we find that Applicant’s mark BAGWAGZZZ for “beds for household pets; portable beds for pets” is likely to cause confusion with the registered mark WAGBAGS for “portable beds for pets.”

⁷ June 30, 2015 Office Action.

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