

This Opinion is not a  
Precedent of the TTAB

Mailed: September 21, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Worldwide, Inc.*  
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Serial No. 87278085  
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Nathan P. Koenig of the Bay Area Technology Law Group PC,  
for Worldwide, Inc.

Krystina Osgood, Trademark Examining Attorney, Law Office 121,  
Kevin Mittler, Managing Attorney.

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Before Quinn, Bergsman, and Shaw,  
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Worldwise, Inc. (“Applicant”) seeks registration on the Principal Register of the mark HYPERNIP, in standard characters, for “Pet Toys Containing Catnip,” in International Class 28 and “Catnip,” in International Class 31.<sup>1</sup>

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when used on the identified goods, so resembles the marks shown below, apparently owned by the same entity:

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<sup>1</sup> Application Serial No. 87278085, filed on December 22, 2016 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.



- **HYPERDOG** for “dog toy, namely a device used to throw a ball for a dog to retrieve,” in International Class 28;<sup>2</sup> and
- **HYPER PET** in standard characters, for “Animal harnesses; Collars for pets; Leads for animals; Leashes for animals; Pet products in the nature of a restraining device, namely, tie-out stakes and tie-out chains,” International Class 18 and “Pet toys,” in International Class 28.<sup>3</sup>

When the refusal was made final, Applicant appealed. We affirm the refusal to register.

### **Evidentiary Objection**

Applicant filed a supplemental brief<sup>4</sup> with eight attachments comprising 23 pages of new evidentiary material. The Examining Attorney objects and asks us to disregard any of this evidence on the ground that it is untimely.

Trademark Rule 2.142(d) provides that the record in an application should be complete prior to appeal. In view of the untimely submission of the exhibits with Applicant’s brief, the exhibits are not part of the appeal record, and they have not

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<sup>2</sup> Reg. No. 2826628, issued March 24, 2004; renewed.

<sup>3</sup> Reg. No. 5054420, issued February 26, 2016.

<sup>4</sup> Trademark Rule 2.142(b)(2) sets forth the allowable page limits for an applicant’s brief and reply brief and provides that “Unless authorized by the Board, no further briefs are permitted.” Inasmuch as the Examining Attorney has objected only to the evidence filed with the Supplemental Brief, and not to the brief itself, we have considered Applicant’s arguments contained therein.

been considered in making our decision. *In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1767 (TTAB 2016); TBMP § 1203.02(e) (June 2017). See TBMP § 1207.01.

### **Analysis**

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence 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 goods and the similarities between the marks. 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.”).

We focus our analysis on Registration No. 5054420 for the mark HYPER PET. This mark and the associated goods are more similar to Applicant’s mark and goods than the other cited mark. If we do not find a likelihood of confusion with this registered mark and its goods, then there would be no likelihood of confusion with the marks in the other registration. See *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

#### ***A. The similarity of the goods, channels of trade, and classes of purchasers***

First, we consider the similarity of the respective goods, channels of trade, and classes of purchasers. It is not necessary that the goods be identical or competitive, or even that they move in the same channels of trade, to support a finding of

likelihood of confusion. Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such that they would or could be encountered by the same persons in situations that would give rise, because of the similarity of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009). Evidence of relatedness may include evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; or advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer. *See, e.g., In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014).

Regarding Applicant's and Registrant's "pet toys," in International Class 28, we find these goods to be in part legally identical because Registrant's broadly worded "Pet toys" encompasses Applicant's more narrowly worded "Pet Toys Containing Catnip." *See In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) ("Applicant's broadly worded identification of 'furniture' necessarily encompasses Registrant's narrowly identified 'residential and commercial furniture.>"). Because Applicant's and Registrant's pet toys are in part legally identical, moreover, we must presume that the channels of trade and classes of purchasers are the same for those goods. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1518-19 (TTAB 2016); *see also In re Viterra Inc.*, 671 F.3d 1358, 101

USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion). Thus, the second and third *du Pont* factors support a finding that confusion is likely as to Applicant's pet toys.

Applicant nevertheless argues that its goods and Registrant's goods are unrelated because they are directed to different consumers: "Dog owners would have absolutely no interest in a catnip-containing pet toy or catnip itself nor would a cat owner have any interest in a dog toy. . . ." <sup>5</sup> This argument is unavailing. It is well settled that registrability must be determined based on the identification of goods as set forth in the application. *See Octocom Sys, Inc. v. Houston Computers Servs. 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 [and registration] 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."). Inasmuch as there are no limitations regarding the types of pet toys sold by Registrant, we must assume they encompass all types, including toys for cats, and travel in all channels of trades, to all likely consumers for these goods.

Regarding Applicant's "Catnip," in International Class 31, and Registrant's "Pet toys," the Examining Attorney argues that the goods "are related in that they are frequently sold in the same marketplace under a common source. Thus, consumers would encounter the above mentioned goods in the same trade channels and upon

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<sup>5</sup> Applicant's Br., p. 3, 4 TTABVUE 4.

seeing or hearing very similar marks identifying those goods, would experience confusion as to source.”<sup>6</sup> In support, the Examining Attorney attached a number of internet excerpts which show, *inter alia*, that catnip is often sold alongside or in association with pet toys. The following examples are most relevant:

- The website of DOCTORS FOSTER AND SMITH, offering pet toys containing catnip, catnip sold separately, and catnip sold with toys, all under the same mark;<sup>7</sup>
- The website of Petco, an online retail store offering catnip and pet toys containing catnip;<sup>8</sup>
- The website of Petmate, an online retail store offering the “Petmate Catnip Cruiser,” a refillable catnip dispensing toy;<sup>9</sup>
- The website of Petstages, an online retail store offering catnip with the suggestion to “sprinkle on well-loved toys and other objects to enhance play.”<sup>10</sup> Also offered are pet toys containing catnip and the “Petstages Catnip Chaser Cat Toy,” a refillable catnip dispensing toy;<sup>11</sup> and
- The website of Ethical Products Inc., an online retail store offering a “jute and feather sack” and plush cat toys filled with catnip;<sup>12</sup>

We find the evidence submitted by the Examining Attorney to be sufficient to demonstrate that catnip and pet toys are related because they are offered by the same manufacturer under the same mark, or offered in the same channels of trade by pet product retailers. Where catnip is sold or marketed separately from pet toys, it is

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<sup>6</sup> Examining Attorney’s Br., p. 11, 8 TTABVUE 11.

<sup>7</sup> Examining Attorney’s Office Action of March 15, 2017, TSDR pp. 8-9.

<sup>8</sup> *Id.* at 15-16.

<sup>9</sup> *Id.* at 17.

<sup>10</sup> *Id.* at 19.

<sup>11</sup> *Id.* at 20 and 22.

<sup>12</sup> Examining Attorney’s Office Action of April 20, 2017, TSDR pp. 21-22.

nevertheless complementary because it is often intended for use with pet toys. In view thereof, we find the goods to be related and the channels of trade and classes of consumers to be overlapping.

These *du Pont* factors favor a finding of a likelihood of confusion.

***B. The similarity or dissimilarity of the marks in their entirety in terms of appearance, sound, connotation and commercial impression***

Next, we consider the similarity of the marks. In comparing the marks we must consider their appearance, sound, connotation and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The emphasis of our analysis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. Although we consider the mark as a whole, “in articulating reasons for reaching a conclusion on the issue 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. . . .” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant’s mark consists of the term HYPERNIP in standard characters. Registrant’s mark consists of the terms HYPER PET, also in standard characters. We find that the dominant portion of both marks is the term HYPER. It is the first word of each of the marks and is more likely to be impressed upon consumers. *See Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered” when making purchasing decisions). As noted by

Applicant, HYPER is suggestive of pets that are “active” or “energetic.”<sup>13</sup> The terms NIP and PET are less dominant because they are descriptive of the respective goods. NIP is a shortened version of catnip, and PET has been disclaimed. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (‘DELTA, not the disclaimed generic term CAFE, is the dominant portion of the mark THE DELTA CAFE); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (BINION’S, not the disclaimed descriptive wording ROADHOUSE, is the dominant portion of the mark BINION’S ROADHOUSE).

When we consider the marks in their entireties, as we must, in terms of sound, the marks are similar because they both begin with HYPER and have the same number of syllables, In terms of connotation and commercial impression, both marks suggest an association with “active” or “energetic” pets.

Applicant argues that the marks “are easily distinguishable as they create different consumer impressions and are used by different and unrelated members of the pet community.”<sup>14</sup> We disagree. As discussed *supra*, Applicant’s and Registrant’s goods are in part legally identical, thus there is no support for Applicant’s contention that the goods will be “used by different and unrelated members of the pet community.”<sup>15</sup>

Applicant further argues that HYPER is weak and suggests different meanings when used on the respective goods:

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<sup>13</sup> Applicant’s Br., p. 3, 4 TTABVUE 4.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

Hyper is a weak descriptive term defining something which is “active” or “energetic.” We assume that Hyper Pet chose this descriptive term to suggest to consumers that its products were intended for dogs which were, in fact, “active” or “energetic” or which would be involved in activities which are so described. Applicant coined HYPERNIP to describe products containing catnip which results in “active” or “energetic” feline play.<sup>16</sup>

These arguments are unpersuasive. HYPER is not weak or descriptive; it does not convey knowledge of any “quality, feature, function, or characteristic of the goods . . . with which it is used.” *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007). Instead, HYPER is suggestive because “imagination, thought, or perception is required to reach a conclusion on the nature of the goods.” *In re Qwik-Print Copy Shops, Inc.*, 616 F.2d 523, 205 USPQ 505, 507 (CCPA 1980). Moreover, given that the goods are in part legally identical, we see no reason to limit Registrant’s “pet toys” to products intended for dogs. Thus, Applicant’s argument that the marks suggest different meanings when used on the respective goods is equally unpersuasive.

This *du Pont* factor weighs in favor of a finding of a likelihood of confusion.

### ***C. Conclusion***

Having considered all the evidence and arguments on the relevant *du Pont* factors, we conclude that there is a likelihood of confusion between Applicant’s mark, HYPERNIP, for “Pet Toys Containing Catnip” and “Catnip,” and Registrant’s mark, HYPER PET and design, for, *inter alia*, “Pet toys.”

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<sup>16</sup> *Id.*

***Decision:*** The refusal to register Applicant's mark under Section 2(d) of the Trademark Act is affirmed.