

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: April 22, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Vermont Juvenile Furniture Manufacturing, Inc.*  
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Application Serial No. 88400594  
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John J. O'Malley of Volpe and Koenig, P.C.,  
for Vermont Juvenile Furniture Manufacturing, Inc.

Betty Chang, Trademark Examining Attorney, Law Office 115,  
Daniel Brody, Managing Attorney.

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Before Kuhlke, Bergsman and Lebow,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Vermont Juvenile Furniture Manufacturing, Inc (“Applicant”) seeks registration on the Principal Register of the mark PAWTY, in standard characters, for an “enclosure made of fabric for house-training pets, specifically designed to cover animal litter boxes, disposable pet pads and artificial or real grass patches,” in

International Class 21.<sup>1</sup>

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<sup>1</sup> Application Serial No. 88400594 was filed on April 24, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1052(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as February 18, 2018.

The Examining Attorney refused to register Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the mark LUCKY'S PAWTY and design, reproduced below, for "plastic bags for disposing of pet waste," in International Class 16, as to be likely to cause confusion.<sup>2</sup>



The description of the mark in the registration reads as follows:

Color is not claimed as a feature of the mark. The mark consists of the head of a French bulldog puppy wearing a party hat with polka dots on it, inside a circle. The circle has the words "Lucky's Pawty" along the bottom.

Applicant, in its Reply Brief<sup>3</sup> and a Request for Remand,<sup>4</sup> amended the description of goods to comply with the Examining Attorney's requirement that Applicant amend the description of goods to read as noted above. The Examining Attorney accepted the amendment, maintained the final refusal to register under Section 2(d) of the Trademark Act, and forwarded the application to the Board to resume the proceeding.<sup>5</sup>

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<sup>2</sup> Registration No. 5632539 registered December 18, 2018.

<sup>3</sup> Applicant's Reply Brief, p. 2 (16 TTABVUE 3).

<sup>4</sup> November 18, 2021 Request for Remand (15 TTABVUE 2-3).

<sup>5</sup> December 9, 2021 Office Action.

Citations to the record refer to the Trademark Status and Document Retrieval (TSDR) system by page number in the downloadable .pdf format. Citations to briefs refer to TTABVUE, the Board's online docket system.

We base our determination under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”), *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “In discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at \*3 (Fed. Cir. 2020) (citing *Dixie Rests.*, 41 USPQ2d at 1533).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). “Two key factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because 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.” *In re Embiid*, 2021 USPQ2d 577, at \*10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). See also *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004).

I. The similarity or dissimilarity of the marks.

We turn first to the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); accord *Krim-Ko Corp. v. Coca-Cola Bottling 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.”) (citation omitted).

In comparing the marks, we are mindful that “[t]he 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.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)). We also keep in mind that “[s]imilarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)).

As noted above, Applicant is seeking to register the mark PAWTY, in standard characters, and the cited mark is LUCKY’S PAWTY and design reproduced below:



“In the case of marks, such as [Registrant’s], consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods.” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). *See also CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)). That is because “[t]he word portion of a word and design mark ‘likely will appear alone when used in text and will be spoken when requested by consumers.’” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d at 1184 (quoting *Viterra*, 101 USPQ2d at 1911).

There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Viterra*, 101 USPQ2d at 1908; *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

The name “Lucky” in the mark LUCKY’S PAWTY and design refers to the name of the French bulldog depicted in the drawing. The word “Pawty” is an intentional misspelling of both the word “Potty” and the word “Party.” “Pawty” is a double entendre referring to “party” because Lucky is wearing a party hat and referring to “potty” because the mark is used in connection with pet waste bags. “Potty,” of course is “a seat of reduced size fitting over a toilet seat, for use by a small child.” Dictionary.com based on THE RANDOM HOUSE UNABRIDGED DICTIONARY (2022) (accessed April 14, 2022).<sup>6</sup>

Likewise, when Applicant uses PAWTY in connection with an enclosure for house training pets, it means and engenders the commercial impression of a potty. *See Coach Servs.*, 101 USPQ2d at 1721-22 (in assessing the connotation and commercial impression of a mark, it is appropriate to consider the nature of the goods); *TBC Corp. v. Holsa*, 126 F.3d 1470, 44 USPQ2d 1315, 1316 (Fed. Cir. 1997) (court discounted “distinct connotation” of GRAND SLAM in relation to bridge, baseball,

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<sup>6</sup> The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

golf and tennis as irrelevant and noted that “with respect to automobile tires GRAND SLAM is wholly arbitrary.”); *Viacom Int’l Inc. v. Komm*, 46 USPQ2d 1233, 1238 (TTAB 1998) (the word “mouse” has different meanings when applied to a computer peripheral and a cartoon superhero); *Bost Bakery, Inc. v. Roland Indus., Inc.*, USPQ 799, 801-801 (TTAB 1982) (“Hearth” highly suggestive as applied to bread but “Heritage” largely arbitrary as applied to such goods).<sup>7</sup>

While there is no explicit rule that we must find the marks similar, where, as here, the marks have similar meanings and engender similar commercial impressions, the fact that Registrant’s encompasses the entirety of Applicant’s mark increases the similarity between the two.<sup>8</sup> *See In re Mighty Leaf Tea*, 601 USPQ2d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (applicant’s mark ML is similar to opposer’s mark ML MARK LEES both for personal care and skin products); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406, 407 (CCPA 1967) (THE LILLY as a mark for women’s dresses is similar to LILLI ANN for women’s apparel including dresses); *Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651, 1660 (TTAB 2014) (applicant’s mark PRECISION is similar to opposer’s mark PRECISION DISTRIBUTION CONTROL); *In re U.S. Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985) (CAREER IMAGE for women’s clothing stores and women’s clothing likely to cause

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<sup>7</sup> Applicant’s argument that the cited mark LUCKY’S PAWTY and design “creates the idea that the mark indicates a party for a specifically identified pet named Lucky whereas Applicant’s mark indicates a toilet area for a dog fails to consider the goods on which the marks are used.” Applicant’s Brief, pp. 7-8 (12 TTABVUE 8-9). As discussed above, when we analyze the mark and the goods, Registrant’s double entendre is clear.

<sup>8</sup> Thus, we do not rely solely on the fact that the marks share the term “Pawty” in finding them similar. Applicant’s Brief, p. 6 (12 TTABVUE 7).

confusion with CREST CAREER IMAGES for uniforms including items of women's clothing).

Applicant contends that “a partial overlap between marks does not automatically result in a likelihood of confusion. ... Even slight differences can distinguish two marks.”<sup>9</sup> However, in this case, the word “Pawty,” is an arbitrary term that is inherently strong and, therefore, entitled to a broad scope of protection. *See Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004) (defining an arbitrary mark as a “known word used in an unexpected or uncommon way” and observing that such marks are typically strong). *See also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (arbitrary terms are conceptually strong trademarks); *In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1479 (TTAB 2007) (completely unique and arbitrary, if not coined, nature of mark in relation to goods entitles the registered mark to a broad scope of protection).

Consumers encountering both marks may perceive the LUCKY'S PAWTY and design mark in the cited registration as a variant mark of Applicant's denoting a product line extension into other dog-related products (i.e., “plastic bags for disposing of pet waste”). *See, e.g., Schieffelin & Co. v. Molson Cos., Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) (“Those consumers who do recognize the differences in the marks may believe that applicant's mark is a variation of opposer's mark that opposer has adopted for use on a different product.”); *cf. In re Toshiba Med. Sys. Corp.*, 91 USPQ2d

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<sup>9</sup> Applicant's Brief, p. 5 (12 TTABVUE 6).



1266, 1271 (VANTAGE TITAN “more likely to be considered another product from the previously anonymous source of TITAN medical diagnostic apparatus, namely, medical ultrasound devices”).<sup>10</sup>

Although we have pointed to the identical dominant portion of the marks, we acknowledge the fundamental rule that we must consider the marks in their entireties. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015); *Massey Junior Coll., Inc. v. Fashion Inst. of Tech.*, 492 F.2d 1399, 1402, 181 USPQ 272, 273-74 (CCPA 1974). We note the specific differences pointed out by Applicant.<sup>11</sup> These differences, however, are outweighed by the strength and similarity of the term PAWTY in the marks. Thus, when comparing the marks overall, they are similar in sound, connotation and commercial impression. This *DuPont* factor weighs in favor of finding a likelihood of confusion.

## II. The similarity or dissimilarity and nature of the goods.

Applicant is seeking to register its mark PAWTY for enclosures for covering to cover animal litter boxes, disposable pet pads and artificial or real grass patches and the cited mark is registered for plastic pet waste bags. To show the goods are related, the Examining Attorney submitted third-party registrations for goods listed in both

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<sup>10</sup> Thus, we disagree with Applicant’s contention that the addition of the name “Lucky’s” in Registrant’s mark LUCKY’S PAWTY and design distinguishes it from Applicant’s mark PAWTY. Applicant’s Brief, p. 9 (12 TTABVUE 10).

<sup>11</sup> Applicant’s Brief, pp. 8-9 (12 TTABVUE 9-10).

the application and the cited registration and webpages from third-party retailers showing use of the same marks on both products.

Third-party registrations based on use in commerce that individually cover a number of different goods may have probative value to the extent that they serve to suggest that the listed goods are of a type that may emanate from the same source. *In re Country Oven, Inc.*, 2019 USPQ2d 443903, \*8 (TTAB 2019); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd mem.* 864 F.2d 149 (Fed. Cir. 1988). The registrations, with relevant portions of the identifications, are listed below.<sup>12</sup>

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<sup>12</sup> January 27, 2021 Denial of Request for Reconsideration (TSDR 11-65).

The Examining Attorney states:

The evidence of record establishes that the same entity commonly provides plastic bags for disposing of pet waster [sic] (identified in the registration) and a variety of goods for use in collecting pet waste, *i.e.*, litter boxes, litter box covers (identified in the application), litter box filler, litter box liner, litter mat, house-training pads, pet waste bag dispenser, dog diapers, dog waste scoops under the same mark. Thus, applicant's and registrant's goods are considered related for likelihood of confusion purposes.

*Id.* at TSDR 3-4.

With respect to the third-party registrations, specifically, the Examining Attorney stated they are "registered for use in connection with plastic bags for disposing of pet waste and other goods used in caring for pets, including those for collecting pet waste and otherwise." *Id.* at TSDR 5. However, Applicant is seeking to register its mark for enclosures for covering litter boxes disposable pet pads and artificial or real grass patches for house training pets, not plastic bags for disposing pet waste or other goods used in caring for pets, including those for collecting pet waste and otherwise. Therefore, with the exception of the four registrations listed in the table for litter boxes and the device for holding house breaking pads, we did not consider the other third-party registrations because their descriptions of goods were not similar enough to an enclosure used for house training a pet.

Mark	Reg. No.	Goods
PRETTY LITTER	6108125	Cat box liners in the form of plastic bags; Cat litter boxes
TUCKER MURPHY PET	6053786	Plastic disposable bags for disposing of pet waste; Pet litter boxes
SIMPLE SOLUTION	6014302	Plastic bags for disposing of pet waste; A device for holding housebreaking pads for pets securely to the floor
SNUFFLEMART	6202255	Plastic bags for disposing of pet waste; Pet litter boxes

The Examining Attorney submitted third-party uses of the same mark for the relevant goods set forth below:

- FRISCO pet waste bags and FRISCO litter boxes, including covered litter boxes;<sup>13</sup>
- SO PHRESH pet waste bags and SO PHRESH enclosed litter boxes;<sup>14</sup>
- Nature’s Miracle Silver Oval Hooded Litter Box and Nature’s Miracle pet waste bags;<sup>15</sup> and
- Arm & Hammer Covered Cat Litter Box and Arm & Hammer pet waste bags.<sup>16</sup>

Applicant argues that its products are enclosures for covering litter boxes, disposable pet pads and artificial or real grass and those products serve a different purpose and are used in a different manner than bags for pet waste.<sup>17</sup> However, the issue here is not whether purchasers would confuse the parties’ goods, but rather whether there is a likelihood of confusion as to the source of these goods. *See Recot*

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<sup>13</sup> July 3, 2019 Office Action (TSDR 13 and 15-16).

<sup>14</sup> *Id.* at TSDR 21 and 23.

<sup>15</sup> July 7, 2020 Office Action (TSDR 10-12).

<sup>16</sup> *Id.* at TSDR 15-19.

<sup>17</sup> Applicant’s Brief, p. 11 (12 TTABVUE 12).

*Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”); *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1737 (TTAB 2018) (“the test is not whether consumers would be likely to confuse these goods, but rather whether they would be likely to be confused as to their source.”); *In re Cook Med. Tech. LLC*, 105 USPQ2d 1377, 1380 (TTAB 2012).

Applicant argues that although the Examining Attorney submitted evidence that some entities provide both similar goods, that is not evidence of what occurs in the marketplace.<sup>18</sup> We disagree. The third-party webpages displaying advertisements for the relevant products are from Chewy.com, Amazon.com, Walmart.com, and Petco.com and those websites are evidence of what occurs in the marketplace.

Finally, Applicant argues that “it is not enough to show that there is a relationship between the goods simply because there are some entities that provide both goods.”<sup>19</sup> However, third-party webpage evidence showing the same mark used for both products is probative to demonstrate that the goods are related. *See, e.g., In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (relatedness supported by evidence that third parties sell both types of goods under same mark, showing that “consumers are accustomed to seeing a single mark associated with a source that sells both.”); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261,

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<sup>18</sup> Applicant’s Brief, p. 11 (12 TTABVUE 12).

<sup>19</sup> Applicant’s Brief, p. 11 (12 TTABVUE 12).

62 USPQ2d 1001, 1005 (Fed. Cir. 2002) (evidence that consumers encounter one mark designating a single source for the services of both parties supports a finding that the services are related); *In re Embiid*, 2021 USPQ2d 577, at \*22-23 (citing *Ox Paperboard*, 2020 USPQ2d 10878, at \*5; and *Hewlett-Packard*, 62 USPQ2d at 1004); *In re Integrated Embedded*, 120 USPQ2d 1504, 1514-15 (TTAB 2016) (websites made of record by examining attorney “demonstrate[d] that services of the type offered by both Applicant . . . and Registrant are marketed and sold together online under the same marks” and “[s]uch evidence is sufficient to find that the services at issue are related.”); *In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012) (Internet excerpts from “several third-party car dealerships offering ‘tires’ for sale on their websites” was “evidence that consumers expect to find both ‘tires,’ . . . “and ‘automobiles’ . . . emanating from a common source.”); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009) (accepting website evidence to show relatedness of the goods).


We find that the goods are related and, therefore, this factor weighs in favor of finding a likelihood of confusion.

III. Established, likely-to-continue channels of trade and classes of consumers.

The third-party webpages advertising both covered litter boxes and pet waste bags from Chewy.com, Amazon.com, Walmart.com, and Petco.com establish that the goods are offered in the same channels of trade. Moreover, it is logical that pet owners would be the class of consumer interested in pet waste bags and enclosures for litter boxes, disposable pet pads, and artificial or real grass.

#### IV. Conclusion

Because the marks are similar, the goods are related, and the goods are offered in the same channels of trade to the same class of consumers, we find that Applicant's mark PAWTY for an "enclosure made of fabric for house-training pets, specifically designed to cover animal litter boxes, disposable pet pads and artificial or real grass

patches" is likely to cause confusion with the registered mark  for "plastic bags for disposing of pet waste."

**Decision:** We affirm the Section 2(d) refusal to register Applicant's mark.