

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Leachco, Inc.

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Serial No. 86791850

Mary M. Lee of Mary M. Lee, P.C.,
for Leachco, Inc.

Robert Andrew Cohen, Trademark Examining Attorney, Law Office 103,
Michael Hamilton, Managing Attorney.

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Before Lykos, Hightower, and Larkin,
Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

Applicant Leachco, Inc. seeks registration on the Principal Register of the mark CRITTERZZZ, in standard characters, for “child sized body pillows” in International Class 20.¹

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

¹ Application Serial No. 86791850 was filed on October 19, 2015, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a *bona fide* intention to use the mark in commerce.

to the goods identified in the application, so resembles the mark CUTIE CRITTERS in standard characters, previously registered on the Principal Register for the following goods in International Class 20:

Household items, namely, cushions, pillows, pillow sets primarily comprising a pillow with an attached blanket, pillow and blanket sets primarily comprising pillows²

as to be likely to cause confusion, to cause mistake, or to deceive.

After the Examining Attorney made the refusal final, Applicant requested reconsideration and appealed to this Board. After reconsideration was denied, the appeal resumed and is fully briefed.

We reverse the refusal to register.

Our determination under Section 2(d) is based on an analysis of all 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.*, 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 or services. *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.”).

² Registration No. 4276638, issued January 15, 2013.

Any of the *du Pont* factors may play a dominant role in our analysis, and in some cases, a single factor is dispositive. *Kellogg Co. v. Pack'em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991). We find this to be such a case.

We acknowledge that the respective goods are overlapping and legally identical in part. Registrant's identified goods include "pillows," while Applicant's identified goods are "child sized body pillows." Registrant's "pillows" encompasses Applicant's more narrowly identified goods. *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 Registrant's identified goods and Applicant's goods 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.

Nonetheless, it is the first *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," *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567), that we find to be dispositive in this case.

Although Applicant's mark, CRITTERZZZ, shares the formative CRITTER with the cited mark, CUTIE CRITTERS, we find that the marks differ in significant ways that diminish the likelihood of confusion between them.

First, Registrant's mark begins with the separate and additional term CUTIE. As we often have said, the lead element in a mark has a position of prominence; it is likely to be noticed by consumers and so to play a dominant role in the mark. *See, e.g., Palm Bay*, 73 USPQ2d at 1692 (stating that VEUVE is a prominent part of the mark VEUVE CLICQUOT because it is the first word in the mark); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (stating that consumers will first notice the identical lead word on encountering the marks); *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (noting that "it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"). Consumers also may notice that CUTIE is linked to CRITTERS because both begin with the same hard "c" sound. *See, e.g., Hunt Control Sys. Inc. v. Koninklijke Philips Elecs. N.V.*, 98 USPQ2d 1558, 1568 (TTAB 2011) (pointing out that "the alliteration employed in applicant's mark may assist consumers' perception of the mark as a combination of both terms rather than just focusing on one"). The lead term CUTIE thus distinguishes the cited mark from Applicant's mark visually, aurally, and in meaning.

Second, Applicant's mark ends with ZZZ, while the cited mark ends in the plural S. The Examining Attorney argues that CRITTERS and CRITTERZZZ are phonetic equivalents because the letters S and Z are phonetically interchangeable. Examining

Attorney's Brief, 13 TTABVUE 6. We cannot predict how the public will pronounce a particular mark. *See Viterra*, 101 USPQ2d at 1912. In this case, however, the sound ZZZ may be elongated compared to S or Z alone.³

We also find it likely that consumers will differentiate the marks visually by the triple letter ZZZ. We take judicial notice that ZZZ is “used to represent the sound of a person snoring.”⁴ Applicant introduced evidence that ZZZ is used colloquially to connote sleep,⁵ rendering the formative suggestive in association with the identified goods. Even if consumers do pronounce CRITTERS and CRITTERZZZ identically, only the latter conveys a suggestion of sleep both visually and in meaning.

³ We agree with the Examining Attorney that “Applicant’s evidence in this matter fails to support any specified pronunciation.” Examining Attorney’s Brief, 13 TTABVUE 7. Applicant submitted a definition of ZZZ from the Cambridge English Dictionary indicating that its pronunciation in both the United Kingdom and the United States is /z:/. Request for Reconsideration, 4 TTABVUE 23-28. As the Examining Attorney notes, however, this evidence is from a British dictionary, which we may accord little or no weight in analyzing words in the United States. *See In re Manwin/RK Collateral Trust*, 111 USPQ2d 1311, 1313 n.18 (TTAB 2014); *In re Future Ads LLC*, 103 USPQ2d 1571, 1572 n.2 (TTAB 2012). In any event, because there is no “correct” pronunciation of a mark, consideration of this evidence would not affect the outcome.

⁴ Dictionary.com Unabridged, based on the Random House Dictionary (2017). From dictionary.com/browse/zzz?s=t (last visited July 21, 2017). The Board may take judicial notice of definitions from dictionaries, including online dictionaries that exist in printed format or have regular fixed editions. *E.g.*, *C.H. Hanson*, 116 USPQ2d at 1355 n.10.

⁵ Request for Reconsideration, Exhibits A and B, 4 TTABVUE 12-94. Applicant’s evidence includes Internet printouts and third-party registrations for marks incorporating ZZZ for pillows and other sleep-related goods and services. Such registrations may be relevant to show that a segment of a mark has a normally understood and well-recognized descriptive or suggestive meaning. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 982 (2016).

Considered in their entireties, we find that CUTIE CRITTERS and CRITTERZZZ differ in sight, sound, meaning, and overall commercial impression to an extent that the first *du Pont* factor weighs against a finding that confusion is likely.

Finally, we agree with the Examining Attorney that the third-party registrations Applicant submitted relating to CRITTER-formative marks for goods unrelated to pillows are not relevant in our analysis of the sixth *du Pont* factor, “[t]he number and nature of similar marks in use on *similar* goods.” *Id.*, 177 USPQ at 567 (emphasis added); *see also* Examining Attorney’s Brief, 13 TTABVUE 14-15.

We have carefully considered all of the arguments and the evidence of record, including any not specifically discussed herein, as they pertain to the relevant likelihood of confusion factors. To the extent that any other *du Pont* factors for which no evidence was presented by Applicant or the Examining Attorney may nonetheless be applicable, we treat them as neutral.

On the facts before us, we find that the dissimilarity of the marks in appearance, meaning, and commercial impression is so great as to outweigh the other *du Pont* factors. For that reason, we find the first *du Pont* factor to be pivotal, and the Trademark Examining Attorney’s Section 2(d) refusal is reversed.

Decision: The refusal to register Applicant’s mark is reversed.

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Opinion by Larkin, Administrative Trademark Judge, dissenting:

I respectfully dissent. For the reasons discussed below, I believe that the majority incorrectly concludes that the “dissimilarity of the marks in appearance, meaning

and commercial impression is so great as to outweigh the other *du Pont* factors,” op. at 6, which the majority acknowledges support a finding of a likelihood of confusion.

The majority correctly finds that “the respective goods are overlapping and legally identical in part.”¹ *Id.* at 3. The finding that the goods are identical directly bears upon a proper analysis of the similarity of marks factor because “where, as here, the goods are identical, ‘the degree of similarity necessary to support a conclusion of likely confusion declines.’” *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992)). The majority never addresses this principle, presumably because it finds the marks to be so dissimilar that confusion is unlikely under any standard for similarity, but the marks are sufficiently similar under the standard discussed in *Viterra* to make confusion likely.

The majority acknowledges that “Applicant’s mark, CRITTERZZZ, shares the formative CRITTER with the cited mark, CUTIE CRITTERS,” op. at 4, but finds that the marks differ significantly for three reasons. “First, Registrant’s mark begins with the separate and additional term CUTIE.” *Id.* Citing cases holding that the first portion of a mark is often its dominant portion, the majority finds that the “lead term CUTIE thus distinguishes the cited mark from Applicant’s mark visually, aurally, and in meaning.” *Id.* The general principle in the cases cited by the majority—that it

¹ The majority also correctly concludes that “[b]ecause Registrant’s identified goods and Applicant’s goods are in part legally identical . . . we must presume that the channels of trade and classes of purchasers are the same for those goods,” op. at 3, and that as a result, “the second and third *du Pont* factors support a finding that confusion is likely.” *Id.*

is “often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered,” *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988)—is inapplicable to Registrant’s mark because CRITTERS, not CUTIE, is its dominant portion. *Id.*

As used in Registrant’s mark, CUTIE is an adjective that, according to Applicant, connotes “cute creatures or animals” when it modifies the noun CRITTERS.² 11 TTABVUE 8. As such, CUTIE is not the part of Registrant’s “mark which is most likely to be impressed upon the mind of a purchaser and remembered,” *id.*, even though it is the first part of the mark.³ That dominant portion of Registrant’s mark is CRITTERS. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (finding that Board properly found that LION was the dominant portion of applicant’s STONE LION CAPITAL mark and that Board properly “accord[ed] little weight to the adjective ‘STONE,’ on the ground that it ‘did

² The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in a printed format or have regular fixed editions. *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355 n.10 (TTAB 2015). “Cute,” the word connoted by “cutie,” is defined as “attractive or pretty especially in a childish, youthful, or delicate way.” *Merriam-Webster Online Dictionary* (merriam-webster.com, accessed on July 26, 2017).

³ The non-distinctive nature of the word CUTIE distinguishes it from the first words in the marks in the cases cited by the majority. In *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005), the Federal Circuit found that the word VEUVE in the VEUVE CLIQUOT mark was “an arbitrary term as applied to champagne and sparkling wine, and thus conceptually strong as a trademark.” In *Century 21, supra* 23 USPQ2d at 1700, the Federal Circuit found that the word CENTURY was the dominant portion of the applicant’s mark “CENTURY LIFE OF AMERICA due to the applicant’s disclaimer of the rest of its mark,” as well as the dominant portion of the opposer’s marks CENTURY 21, CENTURYNET, and CENTURY WRITE, which all contained non-distinctive suffix elements. In *Presto Prods.*, 9 USPQ2d at 1897, the prefix KID was the only distinctive portion of the marks KID STUFF and KID WIPES for pre-moistened disposable towelettes.

not distinguish the marks in the context of the parties' services.""). The word CUTIE in Registrant's mark must be considered when comparing the marks in their entireties, but the dominant portion CRITTERS is very similar in appearance, sound, connotation, and commercial impression to Applicant's entire mark CRITTERZZZ.

The majority's second basis for finding that the marks differ so significantly is that "Applicant's mark ends with ZZZ, while the cited mark ends in the plural S." Op. at 4. The majority first states that "[w]e cannot predict how the public will pronounce a particular mark," op. at 5 (citing *Viterra*, 101 USPQ2d at 1912), but then proceeds to predict that in Applicant's mark "the sound ZZZ may be elongated compared to S or Z alone." *Id.* I have no quarrel with the majority's prediction as to how CRITTERZZZ, whose root is the word "critter," may be pronounced because the principle that there is no correct way to pronounce a mark does not apply to a mark consisting of a common English word like critter.⁴ *Research in Motion Ltd. v. Defining Presence Mktg. Grp. Inc.*, 102 USPQ2d 1187, 1193 (TTAB 2012). At the same time, however, the majority does not dispute that the letters S and Z are phonetically interchangeable, as the Examining Attorney argues, 13 TTABVUE 6, and their phonetic equivalence causes the word CRITTERS within Registrant's mark and Applicant's mark CRITTERZZZ to be pronounced similarly. Even if CRITTERZZZ were pronounced with an elongated Z sound, as the majority predicts, "to the extent any minor difference in pronunciation existed [I am] not persuaded that 'any such

⁴ "Critter" is defined as a "living creature; an animal." *Oxford Living Dictionaries* (English) (en.oxforddictionaries.com, accessed on July 26, 2017).

difference would even be noticed by prospective purchasers when they hear the marks.” *Viterra*, 101 USPQ2d at 1912 (quotation omitted) (affirming Board’s finding that any minor differences in pronunciation of the mark XCEED, and the word X-SEED within a composite word-and-design mark, would not be sufficient to distinguish the marks). Because the letters “S” and “Z” at the end of the marks are phonetic equivalents, the dominant word CRITTERS in Registrant’s mark and Applicant’s mark CRITTERZZZ will likely be pronounced very similarly, rendering the marks, in their entireties, similar in sound.

Third, the majority “find[s] it likely that consumers will differentiate the marks visually by the triple letter ZZZ,” which the majority finds is used to represent the sound of a person snoring and to connote sleep. Op. at 5. The majority claims that “[e]ven if consumers do pronounce CRITTERS and CRITERZZZ identically, only the latter conveys a suggestion of sleep both visually and in meaning.” *Id.* I agree that the letters “ZZZ” may connote sleep in addition to functioning to pluralize CRITTER, but a connotation of sleep is hardly unusual or unexpected in the context of “child sized body pillows,” which the record shows are used for sleeping. June 12, 2016 Office Action at 11. Any connotation of sleep in Applicant’s mark is insufficient to distinguish the marks in meaning because both marks primarily connote animals due to the presence in both of a form of the plural of the word CRITTER.

With respect to the sixth *du Pont* factor regarding the nature and number of similar marks in use on similar goods, the majority properly finds “that the third-party registrations Applicant submitted relating to CRITTER-formative marks for

goods unrelated to pillows are not relevant to our analysis” Op. at 6. The record is also devoid of evidence of third-party use of CRITTER-formative mark for pillows.⁵ This indicates that the distinctiveness of Registrant’s CUTIE CRITTERS mark for pillows has not been diluted, and that consumers of pillows have not been exposed to CRITTER-formative marks other than Registrant’s. *See Mini-Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1473 (TTAB 2016) (third-party uses can show the weakness of a mark and that consumers can distinguish between marks on the basis of minute differences). This further supports a finding of a likelihood of confusion.

In assessing the similarity of CUTIE CRITTERS and CRITTERZZZ, 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). “The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks.” *C.H. Hanson*, 116 USPQ2d at 1353. Under these tests, and for the reasons discussed above, the marks are sufficiently similar for confusion to be likely when they are used for identical goods sold through identical channels of trade to identical customers, and I would accordingly affirm the refusal to register.

⁵ The record contains a registration of CRITTER PILLER for “pillows, namely novelty pillows having features of different animals,” 4 TTABVUE 139, but there is no evidence in the record of use of the registered mark.