

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

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bedgear LLC

Serial No. 87147150

Leo G. Lenna of Sorell, Lenna & Schmidt, LLP,
for Bedgear LLC.


Aretha C. Somerville, Trademark Examining Attorney, Law Office 107,
J. Leslie Bishop, Managing Attorney.

Before Mermelstein, Wolfson, and Coggins,
Administrative Trademark Judges.


Opinion by Wolfson, Administrative Trademark Judge:

Bedgear LLC (“Applicant”) seeks registration on the Principal Register of the mark **M**, in standard character format, for “mattresses, namely crib mattresses, mattress foundations and mattress toppers” in International Class 20.


The Examining Attorney refused registration of Applicant’s mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on three prior registrations:

- U.S. Registration No. 4985440 for the mark  for goods in International Classes 20, 24, and 25. The Examining Attorney cites “furniture” in Class 20 as “the relevant goods.”¹



- U.S. Registration No. 4955850 for the mark  for goods in International Classes 9, 20, and 22. The Examining Attorney cites “Couches; Easy-chairs; Furniture, mirrors, picture frames; Furniture, namely, sports bar and hospitality unit; Reclining chairs; Stools; Tables” in Class 20 as “the related goods.”²



- U.S. Registration No. 4674614 for the mark  for “furniture” in Class 20.³

After the Examining Attorney made the refusal final, Applicant filed a request for reconsideration, which was denied. Proceedings were resumed and both Applicant

¹ Examining Attorney’s Brief, 9 TTABVUE 1. Registered June 21, 2016. The description of the mark reads: The mark consists of a stylized letter ‘M.’ Color is not claimed as a feature of the mark.

² *Id.* Registered May 10, 2016. The description of the mark reads: The mark consists of the literal element ‘M.’ Color is not claimed as a feature of the mark.

³ *Id.* Registered January 20, 2015. The description of the mark reads: The mark consists of a white letter ‘M’ on a red background. The color white represents transparent areas and is not part of the mark.” The color red is claimed as a feature of the mark.

and the Examining Attorney filed a brief.⁴ For the reasons discussed herein, we affirm the refusal to register.

I. Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence that are 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) (“*DuPont*”); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). However, “[n]ot all of the [*DuPont*] factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1719 (Fed. Cir. 2012) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)). “In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services.” *In re Chatham Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004), cited in *Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, 5 (TTAB 2019); see also *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997). We consider each *DuPont* factor for which there is evidence and argument. See *In re Country*

⁴ On September 25, 2019, a letter of protest was accepted and reviewed. No further action was taken as a result. See TSDR Prosecution History for Serial No. 87147150 at <http://tsdr.uspto.gov/>. The TSDR (Trademark Status & Document Retrieval) database is available at www.uspto.gov by linking to the Trademarks tab, and clicking on “Check Application Status.”

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Oven, Inc., 2019 USPQ2d 443903, 2 (TTAB 2019); *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019).

A. Similarity of the Marks; Strength of the Registered Marks

We initially consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (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.” *In re i.am.symbolic*, 123 USPQ2d at 1748; *see also Coach Servs.*, 101 USPQ2d at 1721; *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, 6 (TTAB 2019); *In re Am. Cruise Lines, Inc.*, 128 USPQ2d 1157, 1160 (TTAB 2018).

Applicant’s mark is the letter **M** without regard to stylization; it has been filed as a standard character mark. Rights in standard character marks reside in the wording or other literal element and not in any particular display or rendition. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012); *In re Mighty Leaf Tea*, 94 USPQ2d at 1260; *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018). Applicant’s mark may be displayed in the same font style as any of the registered marks. Trademark Rule 2.52(a), 37 CFR 2.52(a) (mark composed of “words, letters, numbers, or any combination thereof” may be used in “any particular

font style, size, or color”). As their only literal element is the letter “M,” the marks in the cited registrations are considered to be legally identical to Applicant’s mark.

Applicant argues that “each mark is packaged, advertised, or sold in conjunction with the company name/house mark.”⁵ Not only has Applicant failed to produce any record evidence substantiating this assertion, it is axiomatic that marks must be considered as they appear on the drawing page of the application for the resulting registration, and not how they may be presented in the marketplace. “Registrability is determined based on the description in the application, and restrictions on how the mark is used will not be inferred.” *In re Shell Oil Co.*, 992 F.2d 1204, 1207 n.4 (Fed. Cir. 1993); *see also i.am.symbolic*, 123 USPQ2d at 1749 (“The correct inquiry requires comparison of the applied-for mark....”); *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 674 (Fed. Cir. 1984) (“Ordinarily, for a word mark we do not look to the trade dress, which can be changed at any time.”) (citations omitted); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 648 F.2d 1335, 1337 (CCPA 1981) (explaining that design features not inherent or specifically stated in the application are irrelevant).

Applicant argues that the letter “M” is inherently weak and vague.⁶ The fifth *DuPont* factor considers the fame, or strength, of the registered marks. *DuPont*, 177 USPQ 567. Generally, single letter marks may be considered inherently weak if the letter is recognizable as an abbreviation for a descriptive or generic term. Single letter

⁵ 7 TTABVUE 3.

⁶ Applicant’s Appeal Brief, 7 TTABVUE 3.

marks may also be shown to be commercially weak due to widespread public use of the same or similar marks for similar goods. *See, e.g., In re Buty-Wave Products Co.*, 198 USPQ 104 (TTAB 1978) (E descriptive of vitamin E ingredient); J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 7:11 and 11:32 (5th ed.); *cf. Michelin Tire Corp. v. Gen. Tire & Rubber Co.*, 202 USPQ 294 (TTAB 1979) (“X” for tires held strong mark for tires). Applicant has not submitted any evidence that would show that the letter “M” has a descriptive or generic connotation for the goods identified in the registrations, or that it is commercially diluted. Thus, the marks in the registrations are not subject to a lesser scope of protection as being weak but are each entitled to a normal scope of protection.

Under *DuPont* factor six, “the number and nature of similar marks in use on similar goods,” *DuPont*, 177 USPQ 567, Applicant argues that the cited marks “have co-existed together in the marketplace for a considerable time.”⁷ Again, no evidence of marketplace use of any of the cited marks has been submitted. Nor has Applicant submitted evidence of any other use of “M” marks. Even considering that, initially, 11 registrations were cited against Applicant’s application, the marks of these registrations are stylized versions of the letter M, in various typography; none except the mark M CUSHION for “cushions and pillows” are in standard character format.⁸

⁷ 7 TTABVUE 2.

⁸ Reg. No. 4927942 for the mark M CUSHION registered March 29, 2016. *See* April 27, 2017 Office Action at TSDR 21. This registration is distinguishable on the basis of the additional word “cushion” in the mark; despite its being disclaimed, the mark must still be regarded as a whole. *See All Eng. Lawn Tennis Club (Wimbledon) v. Creations Aromatiques, Inc.*, 220 USPQ 1069, 1071 (TTAB 1983) (“[W]e must consider the marks as a whole including disclaimed matter when determining the question of likelihood of confusion.”); *In re Jane P.*

Moreover, none of the cited registrations are for mattresses, and those that cover arguably related goods such as cushions and pillows are (again with the exception of M CUSHION) owned by universities and a candy company, which sell such items as ancillary merchandise. As for M CUSHION, a single mark for which no use in the marketplace has been shown is woefully insufficient to show that Applicant's mark may coexist with the other registrations. *Cf. Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGaA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 n.2 (Fed. Cir. 2015) (at least 14 third-party registrations and uses of paw print marks); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1673 n.1 (Fed. Cir. 2015) (approximately 26 third-party registrations and uses of marks containing the words "Peace" and "Love").

The first, fifth and sixth *DuPont* factors favor a finding of likelihood of confusion.

B. Relatedness of the Goods

The second *DuPont* factor requires us to determine the similarity or dissimilarity of the goods as identified in Applicant's application and the cited registrations. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-1162 (Fed. Cir. 2014) ("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"); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783,

Semans, 193 USPQ 727, 728 (TTAB 1976) ("[T]he fact that a term has been disclaimed does not mean that, ipso facto, it does not properly form a part of a composite mark and hence is not a factor in creating the commercial impression of the mark, as a whole.").

1787 (Fed. Cir. 1990); *Hewlett-Packard Co.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). The goods need not be identical or even competitive in order to support a finding of likelihood of confusion. See *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). Rather, it is enough that they are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used or intended to be used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of the parties' goods or services. *Coach Servs.*, 101 USPQ2d at 1722; *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

Applicant's goods are "mattresses, namely crib mattresses, mattress foundations and mattress toppers." The Examining Attorney argues that Applicant's goods are related to "all of the registrants[] furniture and bedding goods. A mattress foundation is merely part of a bed that supports a mattress. These items are typically sold together in the same establishments."⁹ In support, the Examining Attorney submitted pages from three websites, a guide entitled "Box Springs, Foundations and Platform Beds: Which one is Right For Me?"¹⁰ which discusses the pros and cons of using a box spring, platform bed, or foundation with one's mattress; a website from the "Memory

⁹ January 9, 2018 Final Office Action.

¹⁰ <https://www.mattress-guides.net>; *Id.* at TSDR 2-11.

Foam Doctor” presenting information about pairing a memory foam mattress with a foundation, box spring, or platform bed;¹¹ and advertising from “Sleep Organics” for OMI-branded pillows, mattress toppers, mattress pads, mattresses, blankets and sheets.¹²

The Examining Attorney concludes that the evidence “defines mattresses” and that the evidence shows mattresses “being describes [sic] with or as items of furniture.”¹³ We disagree. The websites discuss foundations, box springs, platforms and mattresses as separate products; there is no mention in the record evidence of “furniture,” and it does not support the conclusion that mattresses are considered to be items of furniture.¹⁴ On the other hand, we take judicial notice that Webster’s dictionary defines “furniture” as “movable articles used in readying an area (such as a room or patio) for occupancy or use,”¹⁵ which encompasses mattresses.

We agree with the Examining Attorney that the evidence shows that to the extent mattresses, box springs, foundations for beds and platform beds may all be considered

¹¹ “Best Foundation for Memory Foam Mattress of 2018,” <http://www.memoryfoamdoctor.com>; *Id.* at TSDR 12-21.

¹² *Id.* at <http://www.sleep-organics.com>, TSDR 22-37.

¹³ Examining Attorney’s Brief, 9 TTABVUE 3.

¹⁴ The Sleep Organics website does not even show any goods that could be described as furniture except a mattress; however, the website does not so describe them as furniture. None of the other goods shown in that website are listed in the identification of goods of Registrants’ marks.

¹⁵ At <https://www.merriam-webster.com>. The Board may take judicial notice of definitions from dictionaries, including online dictionaries that exist in printed format. *E.g.*, *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018).

“furniture,” that Applicant’s crib mattresses and mattress foundations are related to Registrants’ furniture.

We find the second *DuPont* factor favors a finding of likelihood of confusion.

C. Trade Channels; Classes of Consumers

The third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567; *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1161. This factor examines likely channels of distribution of the goods and their prospective purchasers.

The Examining Attorney contends that the websites show that mattresses and furniture “are commonly sold in the same establishments.” However, the two online articles simply provide information about pairing a mattress with a foundation and do not describe any channels of trade or classes of consumers for any of the goods. The Sleep Organics website offers mattresses and bedding accessories, but no other furniture.

The third *DuPont* factor is neutral.

II. Summary

Where, as here, Applicant’s mark is essentially identical to Registrants’ marks, it is necessary only that there be a viable relationship between the goods to support a finding of likelihood of confusion. *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015); *In re Iolo Techs. LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010). Applicant’s “M” mark, not being stylized, could be used in any of the three font styles or colors of

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the registered marks. As for the goods, Applicant's mattresses and mattress foundations are encompassed by the broad description of "furniture" in the Registrants' identifications of goods, making them legally identical. Accordingly, we find that Applicant's "M" mark, when used on "mattresses, namely crib mattresses, mattress foundations and mattress toppers," is likely to be confused with the registered "M" marks for "furniture."

Decision: Registration to Applicant is refused under Trademark Act Section 2(d).