

This Opinion is Not a  
Precedent of the TTAB

Mailed: August 13, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re BCP Home Inc.*  
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Serial No. 87202411  
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Nicholas J. Tuccillo of Grogan, Tuccillo & Vanderleeden, LLP,  
for BCP Home Inc.

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

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Before Cataldo, Bergsman, and Kuczma,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

BCP Home Inc. (“Applicant”) seeks registration on the Principal Register of the mark FREESTYLE (standard characters) for “comforters, namely, comforters and comforter sets and comforter sets sold in a bag,” in Class 24.<sup>1</sup>

The Trademark 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

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<sup>1</sup> Application Serial No. 87202411 was filed on October 13, 2016, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce.

mark so resembles the registered mark FREESTYLE (standard characters) for “pillows,” in Class 20, as to be likely to cause confusion.<sup>2</sup>

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) (“*du Pont*”) cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *du Pont* factor that is relevant or for which there is evidence of record. See *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. See *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *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.”); 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

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<sup>2</sup> Registration No. 4280678, registered January 22, 2013.

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)).

A. The strength of the mark in the cited registration

Applicant argues that the mark in the cited registration (FREESTYLE) is weak and entitled to a narrow scope of protection because (i) “there exists literally hundreds of Registrations that utilize, alone or as the dominant portion of the mark, the term ‘FREESTYLE,’” (ii) there are nine third-party registrations, other than the cited registration incorporating the word “Freestyle” to identify goods in Class 20, and (iii) there are no other applications or registrations incorporating the word “Freestyle” to identify comforters.<sup>3</sup>

To support its argument, Applicant submitted the following evidence:

- A copy of the results from a search in the USPTO Trademark Electronic Search System for the word “Freestyle,” featuring the serial number, registration number, word mark, and whether the application or registration is “live” or “dead”;<sup>4</sup> and
- Copies of the nine third-party registrations incorporating the word “Freestyle” for goods in Class 20.<sup>5</sup>

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<sup>3</sup> Applicant’s Brief, pp. 4-5 (14 TTABVUE 6).

<sup>4</sup> June 29, 2017 Response to Office Action (TSDR 5-6). Citations to the TSDR database are to the downloadable .pdf format.

<sup>5</sup> January 2, 2018 Request for Reconsideration (13 TTABVUE 10-19).

We analyze the strength of the mark in the cited registration by determining the “the number and nature of similar marks in use on similar goods.” *du Pont*, 177 USPQ at 567. Because the search results from the USPTO Trademark Electronic Search System did not list the goods or services, the search results have limited probative value because we cannot determine whether they are related to the goods at issue. *See In re i.am.symbolic, LLC*, 123 USPQ2d at 1751 (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration); *Key Chem., Inc. v. Kelite Chem. Corp.*, 464 F.2d 1040, 175 USPQ 99, 101 (CCPA 1972) (“Nor is our conclusion altered by the presence in the record of about 40 third-party registrations which embody the word ‘KEY’. The great majority of those registered marks are for goods unrelated to those in issue, and there is no evidence that they are in continued use. We, therefore, can give them but little weight in the circumstances present here.”); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) (the third-party registrations are of limited probative value because the goods identified in the registrations appear to be in fields which are far removed from the goods at issue).

The description of goods in the nine third-party registrations incorporating the word “Freestyle” are not as close to Registrant’s pillows, as Applicant’s comforters and comforter sets. *See* the discussion below. For example, the closest description of goods is in Registration No. 5344539 for the mark COMFORT BASE FREESTYLE

for “adjustable bed assemblies, namely, bed frames, bed bases, and bed foundations.”<sup>6</sup> The remainder of the third-party registrations are for less closely related goods including furniture, mirrors, storage systems, picture frames, and shelving. *See In re Vroman Foods, Inc.*, 224 USPQ 242, 244 (TTAB 1984).

In this case, there is no evidence of third-party usage, there is only evidence of just a few third-party registrations of various probative value. The “existence of [third-party] registrations is not evidence of what happens in the market place or that customers are familiar with them.” *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973). Nevertheless, in determining the degree of weakness, if any, in the shared term, we must “adequately account for the apparent force of [third-party use and registration] evidence,” regardless of whether “specifics” pertaining to the extent and impact of such use have been proven. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ 1671, 1674-5 (Fed. Cir. 2015). “[E]xtensive evidence of third-party use and registrations is ‘powerful on its face,’ even where the specific extent and impact of the usage has not been established.” *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) (citing *Juice Generation v. GS Enters.*, 115 USPQ2d at 1674). However, unlike cases in which extensive evidence of third-party registration and use of similar marks was found to be “powerful on its face” inasmuch as “a considerable number of third parties[] use [of] similar marks was shown,” *Juice Generation v. GS*

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<sup>6</sup> 14 TTABVUE 11.

*Enters.*, 115 USPQ2d at 1674, Applicant has presented no evidence of third-party use, and at most, one third-party registration for an arguably related product that is not as close to Registrant's description of goods as Applicant's description of goods. This is a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant in both *Jack Wolfskin v. New Millennium Sports*, 116 USPQ2d at 1136, and *Juice Generation v. GS Enters.*, 115 USPQ2d at 1674. Accordingly, the number and nature of similar marks in use in connection with pillows and comforters is a neutral factor.

B. 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. *du Pont*, 177 USPQ at 567. The marks are identical and Applicant does not argue otherwise. As noted above, Applicant contends that because of the widespread use of the word "Freestyle," Registrant's mark is "narrowly constrained to encompass only the specific goods and services listed under the respective [registration]."<sup>7</sup> However, as discussed above, we find that Applicant's evidence does not support this contention.

In view of the foregoing, we find that the marks are similar in their entireties in terms of their appearance, sound, connotation and commercial impression. This favors finding a likelihood of confusion.

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<sup>7</sup> Applicant's Brief (14 TTABVUE 4-5).

C. The similarity or dissimilarity and nature of the goods and services.

Applicant is seeking to register its mark for “comforters, namely, comforters and comforter sets and comforter sets sold in a bag,”<sup>8</sup> and the description of goods in the registered mark is for “pillows.” To show that the goods are related, the Examining Attorney submitted copies of third-party registrations and websites displaying pillows and comforters sold under the same marks.

The Examining Attorney submitted copies of 10 third-party registrations for the goods listed in both the application and the cited registration.<sup>9</sup> 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 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). Representative registrations, with relevant portions of the identifications, are listed below.

<b>Mark</b>	<b>Reg. No.</b>	<b>Goods</b>
GELLED MICROFIBER	4476393	Pillows; comforters
CLASSIC TRENDS	4796257	Pillows; comforters

<sup>8</sup> A “comforter” includes quilts and duvets. *Dictionary.com* based on the Random House Unabridged Dictionary (2018). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *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); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

<sup>9</sup> June 30, 2017 Office Action (TSDR 136-162).

<b>Mark</b>	<b>Reg. No.</b>	<b>Goods</b>
SUPPORTDNA	5233070	Pillows; comforters
NATURAL HABITAT	5178189	Decorative 3D pillows; comforters
CC CHRISTELI	5159498	Pillows; comforters

The Examining Attorney also submitted numerous examples of third-party websites showing the same mark used to identify comforters, comforter sets and pillows. The following third-party websites are illustrative:

- RALPH LAUREN pillows and comforters advertised for sale on Macys.com;<sup>10</sup>
- MARTHA STEWART pillows and comforters advertised for sale on Macys.com;<sup>11</sup>
- CUDDLEDOWN pillows and comforters advertised for sale on cuddledown.com;<sup>12</sup>
- DOWN & FEATHER CO. pillows and comforters advertised for sale on downandfeathercompany.com;<sup>13</sup> and
- LAURA ASHLEY pillows and comforters advertised for sale on laurashleyusa.com.<sup>14</sup>

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<sup>10</sup> June 30, 2017 Office Action (TSDR 13-35).

<sup>11</sup> June 30, 2017 Office Action (TSDR 36-69).

<sup>12</sup> June 30, 2017 Office Action (TSDR 70-81).

<sup>13</sup> June 30, 2017 Office Action (TSDR 82-92).

<sup>14</sup> June 30, 2017 Office Action (TSDR 93-100).



Many third parties combine comforters and pillows in their comforter sets. For example,

- PACIFIC COAST ([pacificcoast.com](http://pacificcoast.com))

#### All In One Comforter Sets

We've made finishing your bedroom a breeze with our luxurious comforter sets. Pacific Coast comforter sets combine our most popular comforters, pillows and feather beds for your best night's sleep.<sup>15</sup>

- BED BATH & BEYOND ([bedbathandbeyond.com](http://bedbathandbeyond.com)) advertises its "bedding basics" as including, inter alia, bed pillows and comforters;<sup>16</sup>
- Homegoodsgalore.com

#### BEDROOM

Dress up your bedroom with beautiful comforters or a complete bed in a bag sets. ... Our bed in a bag sets complete any bedroom. These sets include a beautiful comforter, Bed Skirt, Pillow Shams and some bed in a bag sets offer matching decorative pillows.<sup>17</sup>

- Pillows.com

#### Malouf Bed-In-A-Bag

Malouf has created a line of pillows, sheets, and comforters made for support and luxury. Now you can receive all three in the new Malouf Bed-In-A Bag set. This will turn your entire bedding into a high quality bed made with the finest materials.<sup>18</sup>

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<sup>15</sup> June 30, 2017 Office Action (TSDR 111).

<sup>16</sup> June 30, 2017 Office Action (TSDR 169).

<sup>17</sup> June 30, 2017 Office Action (TSDR 186).

<sup>18</sup> June 30, 2017 Office Action (TSDR 199).

Finally, even when companies are advertising the sale of comforters, photographs of the products include pillows. For example,

- Macys.com<sup>19</sup>



Lauren Ralph Lauren  
Blackwatch Lightweight  
Reversible Down  
Alternative Comforters





\$280.00 - 360.00

Free ship at \$49

- Cuddledown.com<sup>20</sup>

**COMFORTERS** Home > [Comforters](#)

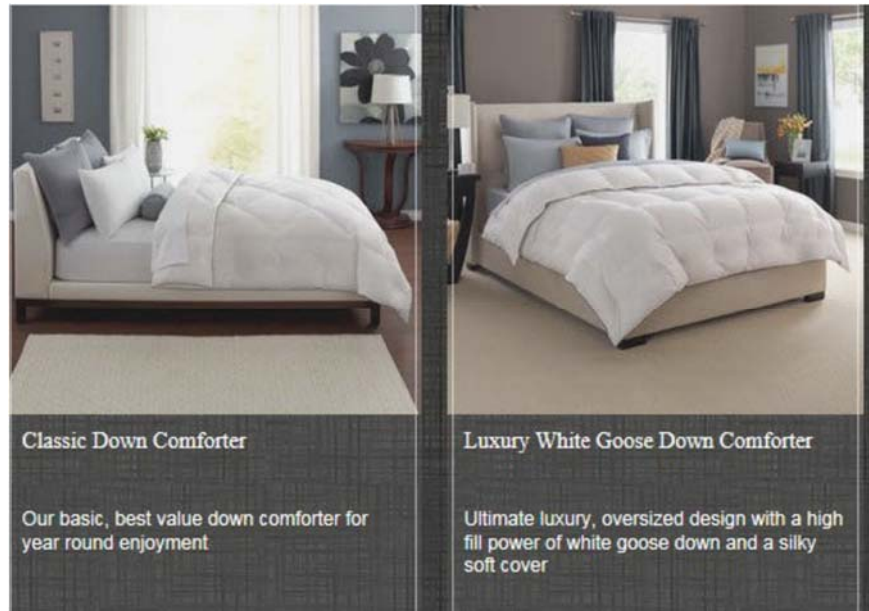
Sort by:  Show:  Page 1 of 1 (30 Products) [Prev](#) **1** [Next](#)

			
Synthetic Fill Primary Comforter	600 Fill Power Primary Down Comforter	700 Fill Power Temperature Regulating Down Comforter	Colored Sateen Synthetic Fill Comforter
<b>\$139.00 to \$259.00</b>	<b>\$169.00 to \$509.00</b>	<b>\$289.00 to \$599.00</b>	<b>Was: \$199.00 to \$349.00</b> <b>Now: \$159.00 to \$279.00</b>

<sup>19</sup> June 30, 2017 Office Action (TSDR 29).

<sup>20</sup> June 30, 2017 Office Action (TSDR 74).

- Pacific Coast (pacificcoast.com)<sup>21</sup>



In view of the foregoing, we find that the goods are related.

- D. Established, likely-to-continue channels of trade and purchasers to whom sales are made.

The above-noted evidence establishes that pillows and comforters and comforter sets are encountered by the same consumers in the same marketing milieu and, therefore, supports finding that those products are offered to the same consumers. Further, the evidence shows that pillows, comforters and comforter sets are offered together for sale by the same entities. For example, retailers such as Macy's,<sup>22</sup> Bed

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<sup>21</sup> June 30, 2017 Office Action (TSDR 104).

<sup>22</sup> June 30, 2017 Office Action (TSDR 13-63).

Bath & Beyond,<sup>23</sup> HomeGoodsGalore.com,<sup>24</sup> Pillows.com,<sup>25</sup> The Company Store,<sup>26</sup> and All Modern<sup>27</sup> advertise the sale of pillows, comforters, and comforter sets together. Accordingly, those products are offered for sale in some of the same channels of trade to the same consumers.

E. Analyzing the factors.

Because the marks are identical, the goods are related and the goods are offered in the channels of trade to the same classes of consumers, we find that Applicant's mark FREESTYLE for "comforters, namely, comforters and comforter sets and comforter sets sold in a bag" is likely to cause confusion with the registered mark FREESTYLE for pillows.

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

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<sup>23</sup> June 30, 2017 Office Action (TSDR 163-180).

<sup>24</sup> June 30, 2017 Office Action (TSDR 186-198).

<sup>25</sup> June 30, 2017 Office Action (TSDR 199-211).

<sup>26</sup> June 30, 2017 Office Action (TSDR 241-246).

<sup>27</sup> June 30, 2017 Office Action (TSDR 299-349).