

This Opinion is Not a  
Precedent of the TTAB

Mailed: June 12, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Lavelle Industries, Inc.*

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Serial No. 87420189

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Joseph S. Heino and Erin E. Kaprelian of Davis & Kuelthau SC  
for Lavelle Industries, Inc.

Rachael Dickson, Trademark Examining Attorney, Law Office 125,  
Heather Biddulph, Managing Attorney.

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Before Taylor, Lykos and Adlin,  
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Lavelle Industries, Inc. (“Applicant”) seeks to register on the Principal Register the mark RUFF CHEWERS in standard characters (CHEWERS disclaimed) for “dog toys; pet toys” in International Class 28.<sup>1</sup>

The Trademark Examining Attorney refused registration of Applicant’s mark pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the registered mark on the Principal Register displayed below

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<sup>1</sup> Application Serial No. 87420189, filed April 21, 2017, 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.



for “beds for household pets” in International Class 20,<sup>2</sup> that, when used on or in connection with Applicant’s identified goods, it is likely to cause confusion or mistake or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration. The Trademark Examining Attorney maintained the refusal to register and denied the request for reconsideration. The appeal is fully briefed

For the reasons set forth below, we affirm the Section 2(d) refusal.

### **I. Applicable Law**

The Board bases its determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*du Pont*”). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In reaching its determination, the Board has considered and balanced all

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<sup>2</sup> Registration No. 4743137, issued on May 26, 2015, alleging March 2, 2014, as the date of first use anywhere and in commerce. The description of the marks is: “The mark consists of two words, ‘RUFF CHEW’ in white letters with the word ‘RUFF’ above the word ‘CHEW’; the background is brown and has a trapezoidal shape.” The colors brown and white are claimed as features of the mark.

relevant *du Pont* factors either argued or for which evidence was made of record. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (even within *du Pont* list, only factors that are “relevant and of record” need be considered).

#### **A. The Marks**

We commence with the first *du Pont* likelihood of confusion factor which involves an analysis of the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *See Palm Bay Imps., 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 577). “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) (quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (citing *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975)). Our analysis cannot be predicated on dissection of the involved marks. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). Rather, we are obliged to consider the marks in their entirety. *Id.* *See also Franklin Mint*

*Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). Nonetheless, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161.

Applicant argues that the stylized font, design element and color scheme in the cited mark cannot be ignored and distinguish the marks. We disagree based on the striking similarities between the literal portions of each mark. The sole distinction between ROUGH CHEW and ROUGH CHEWERS is the suffix “-ers” in the cited mark. Each mark projects a similar connotation of products that can withstand “rough” chewing by a pet.

As to the graphics in which the words in Registrant’s mark appear, we find that the presence of the common design element consisting of a brown rectangle enclosing the stylized wording ROUGH CHEW fails to mitigate the similar sound, appearance, and connotation of the marks. When a mark consists of a literal portion and a design portion, the literal portion is usually more likely to be impressed upon a purchaser’s memory and to be used in calling for the goods or services; therefore, the literal portion is normally accorded greater weight in determining whether marks are confusingly similar. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012); *In re Dakin’s Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999). *See*

also *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983); *In re Kysela Pere et Fils, Ltd.*, 98 USPQ2d 1261, 1267-68 (TTAB 2011). This is especially true here where the design feature in the cited mark merely serves as a carrier for the wording and does not include a distinctive element with strong source-identifying characteristics. See *In re Hughes Furniture Industries, Inc.*, 114 USPQ2d 1134, 1139 (TTAB 2015).

Applicant states that it does not intend to use its mark in a similar stylization. This argument is irrelevant because Applicant seeks to register its mark in standard characters. We must therefore assume that Applicant's mark could be presented in the same stylized font or manner as Registrant's mark. See *In re Viterra*, 101 USPQ2d at 1909; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (stating that "the argument concerning a difference in type style is not viable where one party asserts rights in no particular display").

Overall, Applicant's applied-for mark is similar in appearance, sound, connotation and commercial impression to the registered mark. The literal portions of the applied-for and cited marks are nearly identical in appearance, sound, connotation, and commercial impression; therefore, the addition of carrier design and stylization elements does not obviate the similarity of the marks in this case. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993). The first *du Pont* factor therefore weighs in favor of finding a likelihood of confusion.

## **B. The Goods**

Next we compare the goods identified in Applicant's application vis-à-vis the goods identified in the cited registration, the second *du Pont* factor. See *Stone Lion*, 110 USPQ2d at 1161; *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). See also *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). It is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our analysis. The respective goods need only be "related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the services] emanate from the same source." *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). See also *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991). Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant goods/services are used together, used by the same purchasers or offered under the same mark; advertisements showing that the relevant goods/services are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both applicant's goods/services and the goods/services listed in the cited registration. See, e.g., *In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were

likely to purchase the products at the same time and in the same stores). The issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

Applicant's goods are identified as "dog toys; pet toys;" Registrant's goods are listed as "beds for household pets." These products may be used together for pets who take their toys to bed, making them by their very nature complementary products. In addition, the Examining Attorney's evidence obtained from online retailers shows that both Applicant's and Registrant's goods are sold under the same mark. For example, Amazon.com offers beds for household pets and pet toys bearing the mark PETER'S; Petco.com offers beds and toys for household pets bearing the mark CHUCKIT! as well as beds for household pets and dog toys from the brands Petco, Heritage Pets, Star Wars, and Seaside Summer. See July 25, 2017 Office Action, TSDR p. 9-15 and January 19, 2018 Office Action, TSDR p. 6-11, 15-16. This evidence demonstrates that it is not uncommon for manufacturers to both make and offer for sale pet toys and pet beds, often under the same marks. Consumers may expect to find both Applicant's and Registrant's goods emanating from a common source.

Thus, the record shows that the goods identified in the application and registration are complementary and otherwise related products. As such, the second *du Pont* factor also weighs in favor of finding a likelihood of confusion.

### **C. Trade Channels**

Next we consider established, likely-to-continue channels of trade, the third *du Pont* factor. Because the identifications in the application and cited registration have no restrictions on channels of trade, we must presume that the goods travel in all channels of trade appropriate for such goods, which the record shows include direct business to consumer (“B2C”) manufacturer operated web sites specializing in pet care and animal products. *See In re Viterra*, 101 USPQ2d at 1908 (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 62 USPQ2d at 1005). We can also presume based on common knowledge that brick-and-mortar pet stores would also offer Applicant’s and Registrant’s goods. In addition, both parties’ goods may be encountered by the same prospective consumers, which includes members of the general public who own a pet such as a dog and are seeking chew toys and a place for their dog to sleep.

As such, the third *du Pont* factor regarding the similarity or dissimilarity of established, likely to continue trade channels also favors a finding of likelihood of confusion.

### **D. Conditions of Sale**

Next we consider the conditions under which the goods are likely to be purchased, e.g., whether on impulse or after careful consideration, as well as the degree, if any, of sophistication of the consumers, the fourth *du Pont* factor. Purchaser sophistication or degree of care may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay*, 73 USPQ2d at 1695.

Applicant argues that the goods offered under its mark and the cited mark are not impulse purchases and that purchasers exercise a high degree of care. As Applicant contends, millennials care deeply about their pets and consider them “starter children,” making these consumers are “very discriminating and discerning purchasers[sic] of pet products.” Applicant’s Brief, 7 TTABVUE 7-8.

The fact that millennials, or for that matter any age demographic, care deeply about their pets does not mean that they are immune from source confusion, or that they exercise a high degree of care in purchasing pet *toys*, which are often interchangeable and have a limited lifespan. Because neither Applicant’s nor Registrant’s identification limits the goods to a particular price point, we must treat the goods as including both inexpensive as well as high-end products. The record shows that, at a minimum, at least some of the involved goods are sold at a relatively low price point. For example, the Chuckit! Travel Dog Bed retails for \$19.39 and the Ultra Ball Dog Toy for \$7.99-\$8.95. July 25, 2017 Office Action, TSDR p. 13-14. At these relatively low prices, prospective consumers are more likely to make impulse purchases. “When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.” *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984). Thus, the *du Pont* factor of the conditions of sale also weighs in favor of a finding of likelihood of confusion.

### **E. Strength of the Cited Mark**

We will now consider the number and nature of similar marks in use on similar goods and the commercial strength of the mark, the sixth *du Pont* factor. In an *ex parte* appeal, “[t]he purpose of [an applicant] introducing third-party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different such marks on the bases of minute distinctions.” *Palm Bay*, 73 USPQ2d at 1694. *See also 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); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015) (internal citations omitted). “[T]he strength of a mark is not a binary factor” and “varies along a spectrum from very strong to very weak.” *Juice Generation*, 115 USPQ2d at 1675-76 (internal citations omitted). “The weaker [the Registrant’s] mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Id.* at 1676 (internal citations omitted). *See also Palm Bay*, 73 USPQ2d at 1693 (“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”). “In determining the strength of a mark, we consider both its inherent strength based on the nature of the mark itself and its commercial strength, based on the marketplace recognition value of the mark.” *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011) (citing *Tea Board of*

*India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) and *McCarthy on Trademarks and Unfair Competition* § 11:83 (4th ed. 2011) (“The first enquiry focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another’s use.”)).

Applicant maintains that the common element in both marks – the word “rough” and the word “chew” or variations thereof – are commercially and conceptually weak as applied to pet products. In support thereof, Applicant has made of record search results for the term “ruff chew bed” from the Google search engine. Applicant highlights the following third-party marks mentioned in the search result summary: ORIGINAL TOUGH BED; DURA-RUFF DOG BED; PET MEGARUFFSA BEDS; RUFF N’ TUFF CHEW RESISTANT PET BED; MEGARUFFS TOUGH CHEW RESISTANT BEDS FOR DOGS; ORIGINAL TUFF DOG BED COVER; RUFF N’ TOUGH PET BED; DOG BEDS RUFF LIFE; and RUFF N’ TUMBLE. *See* December 21, 2017 Response to Office Action, pp. 8-10.

As a general proposition, “[a] search result summary from a search engine, such as Yahoo! or Google, which shows use of a phrase as key words by the search engine, is of limited probative value.” TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) (2018) § 1208.03 and cases cited in Note 7. *Compare In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) (“Search engine results—which provide little context to discern how a term is actually used on the web page that can be accessed through the search result link—may be insufficient

to determine the nature of the use of a term or the relevance of the search results to registration considerations”). However, if, as in this case, the search result summary has sufficient information to understand the context of usage, it is entitled to probative weight. *See In re Hotels.com L.P.*, 87 USPQ2d 1100, 1105 n.7 (TTAB 2008), *aff’d*, 573 F.3d 1300, 91 USPQ2d 1532 (Fed. Cir. 2009). While many of these marks include the term “RUFF,” the phonetic equivalent of the word “ROUGH,” and some include the word “CHEW,” none consist of the words “rough” or the phonetic equivalent thereof directly preceding the word “chew” or a variation thereof (such as “chewer” or “chewing”). Thus, this evidence has some limited probative value in showing that the term “RUFF” is weak in connection with pet beds.

Applicant also submitted the following Principal Register third-party registrations<sup>3</sup> purportedly to show that the terms “rough” and “chew” are relatively weak in connection with dog and pet toys:

Reg. No. 4004754 for the mark RUFF-TEX on the Principal Register for “Games, toys, and playthings, namely, pet toys, stuffed toys, squeeze toys” in International Class 20;

Reg. No. 3622548 for the mark RUFFWEAR on the Principal Register for “dog toys” in International Class 20;

Reg. No. 4243045 for the mark RUFFHIDES on the Principal Register for “dog toys in the nature of non-digestible chew bones” in International Class 20;

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<sup>3</sup> We have not considered any applications or cancelled registrations. Third-party applications, as opposed to registrations, have no probative value other than as evidence that the applications were filed. *See In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016); *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002). Expired or cancelled third-party registrations generally are evidence only of the fact that the registrations issued. *See In re Brown-Forman Corp.*, 81 USPQ2d 1284, 1286 n.3 (TTAB 2006).

Reg. No. 4533751 for the mark RUFFWOOD on the Principal Register for “chew toys for dogs” in International Class 20;

Reg. No. 4667594 for the mark CHEW & DESIGN on the Principal Register for “dog toys” in International Class 20;

Reg. No. 5032993 for the mark PLAY ‘N CHEW on the Principal Register for “pet toys” in International Class 20; and

Reg. No. 4559166 for the mark FETCH & CHEW on the Principal Register for “dog toys” in International Class 20.

See December 21, 2017 Response to Office Action, pp. 11-33. Active third-party registrations may be relevant to show that a mark or a portion of a mark is descriptive or suggestive. See, e.g., *Jack Wolfskin, supra*; *Juice Generation*, 115 USPQ2d at 1674-75; *In re Hartz Hotel Servs., Inc.*, 102 USPQ2d 1150, 1153-54 (TTAB 2012); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Dayco Products-Eagle Motive Inc.*, 9 USPQ2d 1910, 1911-12 (TTAB 1988); *Plus Prods. v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983). Properly used in this limited manner, third-party registrations are similar to dictionaries showing how language is generally used. See, e.g., *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976); *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987); *United Foods Inc. v. J.R. Simplot Co.*, 4 USPQ2d 1172, 1174 (TTAB 1987). While each of the registered marks include either the phonetic equivalent of the term “rough” or the word “chew,” none include both terms.

Nonetheless, we can surmise that “rough,” “chew” and “chewer” are conceptually weak when used in connection with the identified goods. Even weak marks are entitled to protection against registration of similar marks for complementary and

otherwise related goods. *In re Max Capital Group*, 93 USPQ2d 1243, 1246 (TTAB 2010). *See also In re Colonial Stores*, 216 USPQ 793, 795 (TTAB 1982). This factor weighs against finding a likelihood of confusion.

#### **F. Other Factors**

The thirteenth and final *du Pont* factor pertains to “any other established fact probative of the effect of use.” *du Pont*, 177 USPQ at 567.

Applicant contends that based on its Internet search, it does not appear that Registrant’s mark is currently used in commerce. Applicant’s Brief, 7 TTABVUE 4. A trademark registration on the Principal Register is prima facie evidence of the validity of the registration and the registrant’s exclusive right to use the mark in commerce in connection with the specified goods. *See* 15 U.S.C. § 1057(b). Applicant’s assertion constitutes an improper collateral attack on the cited registration and is irrelevant during ex parte prosecution. *See In re Dixie Rests.*, 105 F.3d 1405, 1408, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997); *In re Peebles Inc.*, 23 USPQ2d 1795, 1797 n.5 (TTAB 1992).

Applicant also argues that because the USPTO permitted the following pairs of marks (PUPILOVE v. PUPPE LOVE & DESIGN; BARKSBAR v. BARK BARS; PAWRENT v. PAWRENT & DESIGN; USA-K9 v. USA K9 & DESIGN), all for either dog or pet products or services, to coexist on the Principal Register, Applicant’s mark should be entitled to registration over the cited mark. In support thereof, Applicant relies solely on copies of each registered mark obtained from the USPTO database. *See* July 19, 2018 Request for Reconsideration pp. 10-25. We are unable to determine,

however, from the face of the registration certificates the context under which these third-party registrations were permitted. *See In re Nett Designs, Inc.*, 263 F.3d 1339, 57 USPQ2d 1564, (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Design’s application, the PTO’s allowance of such registrations does not bind the Board or this court.”). For this reason, Applicant’s evidence is of limited utility.

This factor is therefore neutral.

## **II. Conclusion – Balancing the *du Pont* Factors**

As explained above, the sixth *du Pont* factor disfavors a likelihood of confusion because the terms “rough” and “chew” appear to be inherently weak in connection with pet toys and beds. Nonetheless, the remaining factors analyzed above (the similarity of the marks, relatedness of the goods, established, likely-to-continue channels of trade and purchasing conditions) each weigh in favor of finding a likelihood of confusion.

Balancing the *du Pont* factors, we find that confusion is likely between Applicant’s applied-for mark and the mark in the cited registration. “[L]ikelihood of confusion is to be avoided, as much between ‘weak’ marks as between ‘strong’ marks, or as between a ‘weak’ and ‘strong’ mark.” *Anthony’s Pizza & Pasta Int’l, Inc. v. Anthony’s Pizza Holding Co., Inc.*, 95 USPQ2d 1271, 1283 (TTAB 2009) (quoting *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974)), *aff’d*, 415 F. App’x 222 (Fed. Cir. 2010).

*Decision:* The Section 2(d) refusal is affirmed.