

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

Mailed: August 26, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Fredman Bros. Furniture Company, Inc.
—

Serial No. 87567505
—

David H. Chervitz, Esq.,
for Fredman Bros. Furniture Company, Inc.

Andrea Cornwell, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

—

Before Greenbaum, Heasley and Coggins,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Fredman Bros. Furniture Company, Inc. (“Applicant”) seeks registration on the
Principal Register of the mark TEMPTEC (in standard characters) for

Mattresses, mattress protector covers, pillows, and pillow
protector covers, in International Class 20.¹

¹ Application Serial No. 87567505 was filed on August 14, 2017, based upon Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b) of the Trademark Act.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used in connection with the identified goods, so resembles the mark TEMPTEXX (in standard characters), registered on the Principal Register for "mattress topper" in International Class 20,² as to be likely to cause confusion, mistake or deception.

After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

I. Evidentiary Issue

The Examining Attorney attached to her brief new evidence from THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 2016), retrieved from the CREDO Reference website, showing definitions and phonetic notations for five words ("mitt," "staff," "bless," "buzz" and "ball") that end in identical double consonants. She asks the Board to take judicial notice of this evidence, and refers to it in her brief as support for her argument that "consumers are accustomed to assigning a single sound to adjacent identical consonants, particularly at the ends of words." 8 TTABVUE 5. Applicant objects to this request, arguing that because the Examining Attorney did not submit the evidence during the course of examination, it is untimely and prejudicial. 9 TTABVUE 5-6.

The Board may take judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial

² Registration No. 4866488 issued on December 8, 2015.

jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). This includes dictionary definitions, including definitions in online dictionaries that exist in printed format or that have fixed regular editions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

A dictionary entry usually consists of both a definition and the recommended pronunciation of the searched term. Applicant has not explained how our consideration of the pronunciation of the above-listed five words results in prejudice to it, and we otherwise see no reason to deviate from our usual practice by taking judicial notice of the definitions of the words but not their recommended pronunciations. *See In re Patent & Trademark Servs. Inc.*, 49 USPQ2d 1537, 1537 (TTAB 1998) (well settled that dictionary listings consist of matter that the Board may judicially notice); *Trak Inc. v. Traq Inc.*, 212 USPQ 846, 850 (TTAB 1981) (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (New College ed. 1976), the Board took judicial notice of the fact that the letter “q” in the English language is always pronounced “k.”).

Accordingly, we overrule Applicant’s objection, and will consider the dictionary entries for the words “mitt,” “staff,” “bless,” “buzz” and “ball” in their entirety. Nonetheless, we observe that our consideration of the entries is not outcome

determinative. Indeed, the way those five words are pronounced has little probative value as none of them end in a double “xx,” as does the cited registered mark.

II. Applicable Law

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. *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.”); *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)). We have considered each *du Pont* factor that is relevant and 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) (even within *du Pont* list, only factors that are “relevant and of record” need be considered).

A. Similarity or Dissimilarity of the Marks

We compare Applicant's mark TEMPTEC and the cited registered mark TEMPTEXX, both in standard characters, "in their entireties as to appearance, sound, connotation and commercial impression." *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1048 (Fed. Cir. 2018) (quoting *du Pont*, 177 USPQ at 567); *see also Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (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." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quotation omitted).

The marks are identical in construction, beginning with the same term "TEMP," and ending with the similar terms "TEC" and "TEXX." The difference of the final consonant in the marks, which appears at the end of a shared five-letter string, has little effect on the appearance of the marks, and is unlikely to be noticed by prospective purchasers, especially if the marks are viewed at different times. *See Weiss Assoc., Inc. v. HRL Assoc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1841 (Fed. Cir. 1990) ("It is especially hard to distinguish between TMS and TMM when the marks differ only by the last letter.").

The marks are also very similar in pronunciation, as both comprise two syllables, each of which begin with the letter "t"; they differ slightly, if at all, in the sound of

the last syllable. Purchasers may easily confuse the “tec” sound of Applicant’s mark with the “texx” sound of the cited registered mark, particularly because “texx” may sound like the plural of “tec.” Thus, considered in their entirety, the marks look and sound alike.

The marks also convey similar meanings. We doubt whether purchasers would perceive any significantly different meanings in the marks based on the difference in spelling between “-TEC” and “-TEXX.” Rather, it is likely that purchasers would view both marks as suggesting the same general idea, namely, that the mattress toppers identified in the application and the mattresses, mattress protector covers, pillows and pillow protector covers identified in the cited registration are made of textiles (or with technology) that help sleepers maintain a comfortable body temperature.

We are not persuaded by Applicant’s arguments to the contrary. In particular, there is no reason to believe consumers would think that the “-TEXX” portion of the cited registered mark connotes Texas because, at a minimum, there is no evidence in the record that Texas is known for, or has any association with, the products identified in the cited registration. Also, although there is no “correct” pronunciation of a mark, *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012), there no reason to believe that consumers would pronounce the cited registered mark as “TempTeks” rather than as “TempTex,” and Applicant submitted no evidence to support this theory.

When viewed in their entireties, the marks are highly similar in appearance and sound, and identical in connotation and commercial impression. This *du Pont* factor weighs heavily in favor of a likelihood of confusion.

B. Similarity of the Goods and Channels of Trade

Under the second and third *du Pont* factors, we base our evaluation on the goods as they are identified in the application and cited registration. See *Detroit Athletic*, 128 USPQ2d at 1052; *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997).

1. Similarity of the Goods

The second *du Pont* factor “considers whether the consuming public may perceive [the respective [goods] of the parties] as related enough to cause confusion about the source or origin of the ... [goods].” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quotation omitted). The goods in the application are identified as mattresses, mattress protector covers, pillows, and pillow protector covers, and the goods in the cited registration are identified as mattress toppers.

Applicant argues that the goods are “dissimilar,” noting that “Applicant has amended the identification of goods to remove ‘mattress protector toppers.’” App. Br., 4 TTABVue 13. We acknowledge that the goods identified in the application and cited registration no longer include legally identical products. However, identity is not required to support a finding of likelihood of confusion. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (“[I]t is not necessary that the products of the parties be similar or even competitive to

support a finding of likelihood of confusion.”) (quotation omitted); *see also On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000) (the services [or goods] need not be identical or even competitive to find a likelihood of confusion). Rather, “likelihood of confusion can be found if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quotation omitted). The issue is whether there is a likelihood of confusion as to the source of the goods, not whether purchasers would confuse the goods. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

By definition, mattress toppers are specifically intended for use on top of, and together with, mattresses. Mattress toppers and mattresses therefore are closely related, complementary items. *See In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (“Such complementary use has long been recognized as a relevant consideration in determining a likelihood of confusion.”); *Mag Instrument, Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, (TTAB 2010) (stating that, by definition, flashlight bulbs and flashlights are complementary).

The Examining Attorney also submitted printouts from ten third-party commercial websites demonstrating that a single entity is likely to offer for sale under the same mark mattress toppers and mattresses, mattress protector covers, pillows, or pillow protector covers. For example:

- www.jcpenny.com offers mattress toppers, mattresses and pillows under the BEAUTYREST mark;
- www.avocadomattress.com offers mattress toppers, mattresses, mattress protector covers, and pillows featuring pillow protector covers under the AVOCADO mark;
- www.intellibed.com offers mattress toppers, mattresses and pillows under the INTELLIbed mark;
- www.lucidmattress.com offers mattress toppers, mattress protector covers and mattresses under the LUCID mark;
- www.shopmarriot.com offers mattress toppers, mattresses, pillows and pillow protector covers under the MARRIOTT mark;
- www.plushbeds.com offers mattress toppers, mattresses, mattress protector covers and pillows under the PLUSH BEDS mark; and
- www.tuftandneedle.com offers mattress toppers, mattresses, mattress protector covers and pillows under the TUFT & NEEDLE mark.³

This evidence is probative of the relatedness of the goods because it demonstrates consumer exposure to the same source using the same mark for goods like those identified in the registration and application. *See, e.g., In re C.H. Hanson Co.*, 115 USPQ2d 1351, 1355-56 (TTAB 2015); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009).

³ The JCPenny/Beautyrest evidence is attached to the November 20, 2017 Office Action, TSDR pp. 54-56. The other evidence is attached to the June 8, 2018 Office Action, TSDR pp. 6-8, 17-57. References to the application file are to the downloadable .pdf version.

Based upon the identifications of goods in the application and registration, and the evidence of record, we find that consumers would believe that the goods identified in the application are closely related to the goods identified in the registration, and that they may emanate from a common source when sold under similar marks.

2. Channels of Trade

“[I]n the absence of specific limitations,” which we do not have in these identifications, we must assume that the identified goods move through all normal and usual channels of trade for such goods and to all normal potential purchasers. *i.am.symbolic*, 123 USPQ2d at 1750; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983). The trade channels for the goods identified in the application and registration would include physical and online sellers of mattress toppers, mattresses, mattress protector covers, pillows and pillow protector covers, such as JCPenny, Avocado and Tuft & Needle, discussed above. The relevant class of consumers for the identified goods also is the same, i.e., members of the general public. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, “we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods”); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). The relatedness evidence from the commercial websites listed above confirms that mattress toppers travel in the same channels of trade and are offered to the same classes of consumer as mattresses, mattress protector covers, pillows and pillow protector covers. *See In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012).

These *du Pont* factors also weigh heavily in favor of likely confusion.

C. Purchasing Conditions

Under the fourth *du Pont* factor, we consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *du Pont*, 177 USPQ at 567. Applicant argues, without evidence, that consumers would “take their time” when purchasing the goods at issue because “a third of a person’s life is spent sleeping.” App. Br., 4 TTABVUE 13.

The products identified in the application and registration are ubiquitous and likely will be bought by purchasers who will exercise different degrees of care during the purchasing process. We are bound to consider the least sophisticated consumer in the class. See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014) (recognizing Board precedent requiring consideration of the “least sophisticated consumer in the class”).

Absent evidence to support the degree of care that the relevant consumers will use when purchasing the products at issue, this *du Pont* factor is neutral.

III. Conclusion

Having considered all the evidence and arguments bearing on the relevant *du Pont* factors, we conclude that the overall similarity of the marks for complementary and otherwise closely related products that move in some of the same channels of trade to the same classes of purchasers renders confusion likely.

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