

This Opinion is not a
Precedent of the TTAB

Mailed: September 20, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Stella & Chewy's LLC

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Serial No. 88916952

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Glenn A. Gundersen, of Dechert LLP,
for Stella & Chewy's LLC.

Carolyn R. Detmer, Trademark Examining Attorney, Law Office 127,
Mark Pilaro, Managing Attorney.

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Before Kuhlke, Shaw and Johnson,
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Stella & Chewy's LLC ("Applicant") seeks registration on the Principal Register of the standard character mark CRAV'N BAC'N BITES for "edible pet treats," in International Class 31.¹

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

¹ Application Serial No. 88916952 was filed on May 14, 2020, 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. BACON BITES is disclaimed.

likelihood of confusion with the previously-registered mark CRAVIN' CHICKEN DINNER, also in standard characters, for "Pet food; Pet treats," in International Class 31.²

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

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence 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). We must consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the goods and the similarities between the marks. *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.").

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800

² Registration No. 5650243, issued January 8, 2019. CHICKEN DINNER is disclaimed.

(Fed. Cir. 2018) (not all of the *DuPont* factors are relevant to every case, only factors of significance to the particular mark need be considered); *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) (“[T]he factors have differing weights”); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

A. The nature and similarity or dissimilarity of the goods, the established, likely-to-continue trade channels, and the classes of purchasers.

We begin with the similarity of the respective goods. Applicant’s and Registrant’s goods are, in part, legally identical inasmuch as both include “pet treats.” Registrant’s broadly-worded “pet treats” presumably encompasses all types of pet treats, including applicant’s more narrowly-worded “edible pet treats.” See *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of goods necessarily encompasses Registrant’s narrowly identified goods”).

Applicant argues that “[c]onsumers will not encounter the two parties’ products together in the marketplace”³ because its goods are bacon treats for dogs whereas the cited mark is used on chicken dinners for cats. Applicant also argues that its goods are “dry treats” whereas the cited mark is used on “wet food.”⁴ According to Applicant these differences distinguish the goods because pet food “consumers typically narrow their shopping choices by searching [online] for particular types of pet foods and

³ Applicant’s Br., p. 2, 6 TTABVUE 4.

⁴ *Id.*

flavors, and that a CHICKEN DINNER-branded wet cat food product will not appear in the search for a shopper looking for a BAC'N BITES dry dog treat – particularly where the two product names do not share even a single identical term.” These arguments are unpersuasive for a number of reasons.

First, even if factually accurate, Applicant’s argument that the goods are different is inapposite. It is long settled that likelihood of confusion is determined on the basis of the goods as they are identified in the application and registration at issue. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *see also Octocom Sys. Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that 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 regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”). Applicant’s goods as set forth in the Application are legally identical to Registrant’s goods. Thus, whether Applicant’s actual goods are wet or dry, or for cats or dogs, is immaterial.

Second, the fact that an online pet food search results may not return both of the respective goods is not dispositive. Because the goods are legally identical and without restriction, we must presume that pet treats are sold through all normal trade channels for these goods, including brick-and-mortar pet stores and supermarkets. *See In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1632 (TTAB 2018) (ordinary channels of trade include brick and mortar stores and are not restricted to

online websites). As such, a prospective consumer's search for pet treats in a brick and mortar store would not be constrained by online algorithms and the goods could appear side by side.

Lastly, although the marks contain references to bacon and chicken, consumers could simply view these primary ingredients simply as different flavors from a single source because pet food comes in a variety of flavors and ingredients. Thus, the primary flavor or ingredient could play less of a role in production selection than Applicant suggests. Moreover, neither Applicant's goods nor Registrant's goods are limited to a single ingredient. Applicant's goods include beef as well as bacon,⁵ and Registrant's goods include a variety of vegetables as well as chicken.⁶ Given this variety of flavors and ingredients, consumers may not distinguish the goods based on their primary ingredients.

There are no restrictions as to trade channels or target consumers in the application or cited registration, and Applicant's and Registrant's goods are legally identical. Accordingly, we must presume that the goods travel in the same channels of trade to the same consumers. *See Cai*, 127 USPQ2d at 1801; *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers).

The *DuPont* factors regarding the similarity of the goods, channels of trade, and classes of purchasers strongly favor a finding of a likelihood of confusion.

⁵ August 14, 2020 Office Action, TSDR p. 5.

⁶ March 10, 2021 Response to Office Action, TSDR p. 7.

B. The number and nature of similar marks for similar goods

Before reaching the degree of similarity of the marks, we address Applicant's evidence and argument under the sixth *DuPont* factor, "[t]he number and nature of similar marks in use on similar goods," *DuPont*, 177 USPQ at 567, as this may impact the scope of protection accorded the cited registration. The Federal Circuit has held that evidence of the extensive registration and use of similar marks by others in the field can be powerful evidence of a mark's weakness. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. 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, 1674 (Fed. Cir. 2015).

Of course, because Registrant's mark is registered, it is presumptively valid and distinctive for the identified goods. Trademark Act Sections 7(b) and 33(a), 15 U.S.C. §§ 1057(b) and 1115(a); *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007). Nonetheless, we may acknowledge the weakness of a registered mark in the course of a *DuPont* analysis. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517-18 (TTAB 2016).

Applicant argues that the cited mark is entitled to a narrower scope of protection because "the term CRAVE or CRAVING or a phonetic equivalent is quite common in the pet food space."⁷ Applicant introduced copies of thirteen registrations or

⁷ Applicant's Br., p. 4, 6 TTABVUE 6.

applications for CRAVE formative marks used in connection with pet food and pet treats.⁸ The following registrations representing seven different brands are relevant:⁹

- Registration Nos. 4091207 and 5570727 for the mark CRAVE, in both standard characters and stylized form, for “pet food” in International Class 31.
- Registration No. 6149062 for the mark SMART CRAVERS, in standard characters, for “animal feed; edible pet treats” in International Class 31.
- Registration No. 5485420 for the mark K-9 KRAVING, in standard characters (K-9 disclaimed), for “dog food and edible dog treats” in International Class 31, and Registration No. 5436576 for the mark K-9 KRAVING ALL LIFE STAGES DOG FOOD and design (DOG FOOD, K-9, and ALL LIFE STAGES disclaimed), for “dog food” in International Class 31.
- Registration No. 5009403 for the mark HEALTHY CRAVINGS, in standard characters (HEALTHY disclaimed), for “animal foodstuffs; pet food; pet treats” in International Class 31.

⁸ August 18, 2020 Response to Office Action, TSDR pp. 4-51.

⁹ We have not considered cancelled registrations or pending applications. Cancelled registrations are not evidence of anything except that they issued, *In re Brown-Forman Corp.*, 81 USPQ2d 1284, 1286 n.3 (TTAB 2006). Pending applications are not evidence of anything except that they were filed. *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1193 n.8 (TTAB 2007).

- Registration No. 5209794 for the mark BLUE KITTY CRAVINGS, in standard characters (KITTY disclaimed), for “cat food; cat treats” in International Class 31.
- Registration No. 4852682 for the mark CRAVEABLES!, in standard characters, for “Pet food for small animals” in International Class 31.
- Registration No. 4419475 for the mark GRAVY CRAVERS, in standard characters (GRAVY disclaimed), for “dog food” in International Class 31.
- Registration No. 4091207 for the mark WAG TANTRUM CRAVE. DINE. WAG. and design for “Human grade prepared dog food” in International Class 31.

Applicant submitted evidence of use, from an online pet supply web site, for four of the marks listed above, namely, CRAVE, SMART CRAVERS, HEALTHY CRAVINGS, and BLUE KITTY CRAVINGS. Applicant also submitted evidence of use for the following four additional CRAVE formative marks, used on pet food and pet treats.¹⁰

- SAVORY CRAVINGS
- CANINE CRAVERS
- CAT CRAVES
- K9 KRAVES

Although Applicant has not presented specific evidence concerning the extent and impact of any use of these marks, the evidence shows CRAVE formatives being

¹⁰ March 10, 2021 Request for Reconsideration, TSDR pp. 19-35.

registered or used for the pet food and pet treats identified in the cited registration. *Cf. In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1675 (TTAB 2018) (evidence of both third-party registration and use established that the shared term in the marks at issue is suggestive of the goods and commercially weak).

“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.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005) (citation omitted). We believe, however, that the record of third-party use and registration in this case reflects a more modest amount of evidence than that found convincing in *Jack Wolfskin* and *Juice Generation* wherein “a considerable number of third parties’ use [of] similar marks was shown.” *Id.* In addition, some of the third-party registrations and other uses consist of different CRAVE formative terms, either alone or with other terms that are wholly unlike the other terms in the cited mark or Applicant’s mark. That is, different CRAVE formatives have been used by the third parties, including, CRAVE, CRAVES, CRAVERS, CRAVINGS, KRAVES, and CRAVEABLES. None of the third-party marks include the same colloquial or non-standard speech form of CRAVING appearing in the marks at issue, i.e., CRAV’N or CRAVIN’. And none of the third party examples combine the same additional wording, i.e., BAC’N BITES or CHICKEN DINNER or present the same structure beginning with the word CRAV’N or CRAVIN’ followed by additional wording. In other words, compared with all the listed CRAVE formative marks, Applicant’s mark

and the cited mark are the most similar. Ultimately, we do not believe the evidence of weakness here is as persuasive as that in either *Juice Generation* or *Jack Wolfskin*.

The evidence suggests that consumers of pet food and pet treats look to the particular CRAVE formative component of marks containing the term to identify and distinguish source, and likely look to the other parts of the marks as well. With this caveat in mind, we find that CRAVE formative marks are somewhat weak in that they suggest the desirability to pets of the goods at issue.

On the other hand, it has “often been emphasized that even weak marks are entitled to protection against confusion.” *Hunt Control Sys. Inc. v. Koninklijke Philips Elecs. N.V.*, 98 USPQ2d 1558, 1567-68 (TTAB 2011) (quoting *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974)); *In re Max Cap. Grp Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010) (“[E]ven suggestive or weak marks are entitled to protection from the use of a very similar mark for legally identical services [or goods]”).

We do not believe that, on this record, the relative strength of the cited mark in its entirety weighs significantly one way or the other. It is composed of a somewhat weak CRAVE formative, but not one that appears to be used by others, and it combines that formative with other matter, albeit disclaimed matter. Nevertheless, the relative weakness of the component CRAVE formative common to both marks weighs somewhat in favor of a finding of no likelihood of confusion.

C. The similarity or dissimilarity of the marks in their entireties in terms of appearance, sound, connotation and commercial impression.

We next consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay*, 73 USPQ2d at 1692. The proper test regarding similarity “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*, 127 USPQ2d at 1801 (quoting *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks and citation omitted)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

The identical nature of Applicant’s and Registrant’s goods reduces the degree of similarity between the marks that is necessary for confusion to be likely. *See, e.g., Viterra*, 101 USPQ2d at 1912; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010).

Applicant’s mark is CRAV’N BAC’N BITES. The registered mark is CRAVIN’ CHICKEN DINNER. The Examining Attorney argues that “CRAV’N and CRAVIN’ are the dominant terms in both marks both because they are the first term in each mark and because they are the only non-descriptive wording in each mark.”¹¹ Thus,

¹¹ Examining Attorney’s Br., 8 TTABVUE 7.

according to the Examining Attorney, “the slight difference created by the different descriptive wording is not sufficiently significant to outweigh the similarity of the dominant terms in each mark.”¹² Applicant, relying on the weakness of CRAVE formative marks in general, argues that “Applicant’s mark is more than different enough for consumers to clearly distinguish it from the cited mark and not experience any source confusion.”¹³

We agree with the Examining Attorney that the CRAV’N and CRAVIN’ portions of the marks are the most dominant because they come first in the marks, and because the remaining matter is descriptive and disclaimed. “[I]t 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). *See also In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”).

We disagree with Applicant that CRAVE formative marks are so weak, that the differences in the marks at issue are sufficient to distinguish them. As the Examining Attorney argues, “only applicant’s mark and the registered mark have shortened versions of CRAVING ending after the N. . . . This creates a further similarity

¹² *Id.*

¹³ Applicant’s Br., p. 1, 6 TTABVUE 3.

between these two marks specifically that does not exist between applicant's mark and any of the other registered marks."¹⁴

When we consider the marks in their entireties, we find they are similar in connotation and commercial impression in that both marks suggest a pet treat for which the pet has a "cravin." Applicant's and Registrant's use of the colloquial or non-standard speech form of CRAVING (CRAV'N or CRAVIN') creates a particularly strong similarity between the marks, and distinguishes them from the other CRAVE formative marks. Given the similar connotations of CRAVIN' and CRAV'N, consumers familiar with Registrant's mark would likely think that Applicant's goods were simply a different flavor.

We find that the marks are similar in connotation and commercial impression. This *DuPont* factor also favors a finding of likelihood of confusion.

D. Conclusion

We find that Applicant's goods are legally identical to Registrant's goods; the channels of trade and classes of consumers are the same; and Applicant's mark is similar to the cited mark in connotation and commercial impression. Despite some weakness in CRAVE formative marks, this weakness is outweighed by the other factors, and by the fact that none of the other CRAVE formative marks comprise the same colloquial spelling. We conclude that there is a likelihood of confusion between Applicant's mark, CRAV'N BAC'N BITES, and the cited mark, CRAVIN' CHICKEN DINNERS, for the respective goods.

¹⁴ Examining Attorney's Br., 8 TTABVUE 8.

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