

**THIS OPINION IS
NOT A PRECEDENT
OF THE TTAB**

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PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Crazy Pet, LLC
v.
Pet Crazy, Inc.

Opposition No. 91164687
to application Serial No. 76484963
filed on January 21, 2003

Crystal A. Russell of Law Offices of Crystal A. Russell,
P.C. for Crazy Pet, LLC.

William E. Noonan, Law Office of William E. Noonan for Pet
Crazy, Inc.

Before Quinn, Hairston and Walters, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

Crazy Pet, LLC has opposed the application of Pet
Crazy, Inc. to register PET CRAZY and design as shown below,

PET CRAZY 

as a mark for services ultimately identified as "pet sitting services."¹

Opposer has alleged that it sells and distributes products in the pet industry; that it currently has in place marketing and licensing programs for pet care products and pet caricatures in the United States and abroad; that such pet care products and pet caricatures have been featured in publications and television programs and have been sold by major pet suppliers and pet service providers; and that registration of applicant's mark for the identified services is likely to cause confusion with opposer's previously used and registered marks as follows:

1. Registration No. 2084047, issued July 29, 1997 (Section 8 affidavit accepted; Section 15 affidavit received), which is of the mark CRAZY PET (in standard character form; PET is disclaimed) for "shampoos, conditioners, and grooming sprays for pets" in Class 3;
2. Registration No. 2838255, issued May 4, 2004, which is of the mark CRAZY PET (in standard character form) for "picture frames" in Class 20;
3. Registration No. 2850534, issued June 8, 2004, which is of the mark CRAZY PET (in standard character form) for "clocks" in Class 14; and

¹ Application Serial No. 76484963, filed January 21, 2003, which is based on an allegation of a date of first use anywhere and in commerce on January 2001. The word PET has been disclaimed apart from the mark as shown.

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4. Registration No. 3000128 issued September 27, 2005, which is of the mark CRAZY PETS (in standard character form) for "CD's, DVD's, video tapes featuring cartoon characters, and animated motion picture films featuring cartoon characters" in Class 9; and "advertising slogan and cartoon character licensing; product merchandising" in Class 35.

Applicant has answered the notice of opposition by denying the salient allegations thereof.

The Record

The record includes the pleadings and the file of the involved application. As its case in chief, opposer submitted the affidavits² (with exhibits) of its president, Tony DeVos and director of licensing, Howard Finelt; and a notice of reliance on certified copies of its four pleaded registrations and nine additional registrations it owns, and applicant's responses to opposer's interrogatories and requests for admissions. Applicant submitted the affidavit of its president Helena Picariello.³ In its case on rebuttal, opposer submitted an additional affidavit of its president, Mr. DeVos. The parties have fully briefed the case.

² Pursuant to a stipulation filed January 12, 2006, the parties have agreed to the submission of affidavit testimony under Trademark Rule 2.123(b).

³ The Board, in an order issued March 5, 2007, denied applicant's motion to reopen its testimony period to submit additional evidence. Thus, we have not considered the evidence accompanying applicant's motion in reaching our decision herein.

Preliminary matter

In addition to arguing the issue of likelihood of confusion in its brief, opposer also argues that applicant did not use the applied-for mark in January 2001, the date of first use claimed in the application. Further, opposer argues that applicant has not used the applied-for mark in connection with the services identified in the application, i.e., pet sitting services.

In response, applicant maintains that opposer is attempting to raise issues which were not pleaded in the notice of opposition, and that opposer should not be allowed to raise such issues at this stage of the proceeding.

We agree with applicant that the above issues were not raised in the notice of opposition. Fed. R. Civ. P. 15(b) provides, in pertinent part, that when issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. It is clear that the issues of whether applicant used the applied-for mark as of the date claimed and whether such mark has been used in connection with the identified services were not tried by the express consent of the parties. Moreover, our review of the record convinces us that these issues were not tried by the implied consent of the parties as contemplated by Fed. R. Civ. P. 15(b). The evidence allegedly bearing on these

issues consists of applicant's Articles of Incorporation and applicant's Internet homepage.

We cannot say that applicant was fairly apprised that opposer intended to rely on this evidence in support of the above unpleaded issues. Not only would it result in undue prejudice to applicant to allow amendment at this late juncture of the proceeding, but such an amendment would serve no purpose.

Opposer argues that applicant was not incorporated until October 1, 2001 and thus could not have used the applied-for mark in January 2001, the date of first use claimed in the application. However, as discussed infra, applicant's president, Ms. Picariello, has stated that she first used the applied-for mark as a sole proprietor as early as January 2001. Applicant is entitled to rely on its predecessor's earlier use.

Opposer also argues that because applicant, at its Internet homepage, lists "pet sitting" after "pet grooming," pet sitting is merely incidental to pet grooming and not a separate service. However, the order in which applicant's activities are listed on its homepage is not determinative of whether applicant's pet sitting activities constitute a service within the Trademark Act.

In view of the foregoing, we find that opposer's attempt to raise the above issues is untimely and not well

taken. Thus, the only ground for consideration is the pleaded ground of likelihood of confusion.

Factual findings

Opposer's business involves marketing a variety of pet products including pet grooming products and aids such as hair dryers, combs, brushes, shampoos, and conditioners; pet treats; leashes; collars; toys and novelty items. Opposer's products are sold to consumers through stores such as PetCo, PetSmart and Wal-Mart and small specialty pet stores. Opposer first used the CRAZY PET mark in connection with shampoos, conditioners and grooming aids on or around July 15, 1996. Opposer currently has several national and international licensees who manufacture and distribute products under its CRAZY PET mark. Opposer also has published children's books, a cartoon strip, and produced a cartoon feature DVD under the mark CRAZY PETS. Opposer's annual retail sales have grown from \$1 million in 1997 to \$18 million in 2005.

Opposer has advertised its products in national newspapers and trade magazines, and retailers have featured opposer's products in their newspaper inserts, in-store advertisements and end cap promotions. Opposer attends approximately ten trade shows each year. Since 1996 opposer has spent more than \$8,000,000 in advertising and promoting its CRAZY PET goods and services. In addition opposer's

business has been the subject of a number of articles in newspapers and magazines.

Applicant's president, Ms. Picariello, began using the applied-for mark as a sole proprietor as early as January 2001 in connection with "pet sitting services and related pet grooming." (Affidavit, p. 2). She incorporated the business around October 1, 2001. The applied-for mark has been used continuously since January 2001. Applicant's business is primarily a pet sitting service which is operated at a single storefront location in Cape Coral, Florida. In addition to the pet sitting services, Ms. Picariello personally grooms most of the pets she cares for. Applicant has sold a small number of pet products at its store, but all such products are manufactured by third parties and bear the marks of the third parties.

Priority

Inasmuch as certified copies of opposer's pleaded registrations are of record, there is no issue with respect to opposer's priority, as to the registered marks and the goods and services identified therein. *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative

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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). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We first consider the similarity/dissimilarity of the marks. We must determine whether applicant's mark and registrant's mark, when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. Although the marks must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Furthermore, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their

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commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant's mark consists of the words CRAZY PET and a fanciful dog design. It is appropriate to accord greater weight to the word portion of applicant's mark because it would be used by purchasers in requesting the services and it will therefore make a greater impression on them. In re *Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). In addition, the fanciful dog design depicted in applicant's mark merely reinforces the word "PET."

Comparing first applicant's mark PET CRAZY and design and opposer's mark CRAZY PET, it is obvious that the dominant portion of applicant's mark, i.e., the words PET CRAZY, is essentially a transposition of opposer's mark. As noted by the Board in *In re Sybron Corporation*, 165 USPQ 410 (TTAB 1970), the fact that two marks are composed of reverse combinations of the same elements is not necessarily conclusive on the issue of likelihood of confusion since registration may be permitted if the transposed marks create distinctly different commercial impressions.

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Here, the words in the marks are identical, and thus, in reverse order are very similar in sound. The marks are also similar in appearance. Registrant's mark, presented in typed form, could reasonably be displayed in the same style of lettering as used by applicant, thereby increasing the visual similarity of the two marks.

We recognize that the marks have somewhat different connotations. Applicant's mark PET CRAZY and design suggests a person who is crazy about pets whereas opposer's mark CRAZY PET suggests a pet that is crazy. Nonetheless, in view of the marks' similarities in sound and appearance due to the shared words "pet" and "crazy," we find that the marks have substantially similar commercial impressions. In reaching this finding, we have taken into consideration that this is not a case where the marks of the parties are likely to be encountered by purchasers on a side-by-side basis, and that the average person is not infallible in his recollection of marks and may well transpose the elements of a mark in his mind. For essentially the same reasons, we find that applicant's PET CRAZY and design mark is highly similar to opposer's CRAZY PETS mark in sound, appearance, and commercial impression.

We next turn to a comparison of the goods and services of the parties. We start with the premise that goods or services need not be identical or even competitive in order

to support a finding of likelihood of confusion. Rather, it is enough that goods or services 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 each parties' goods or services. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

In this case, we find that opposer's pet shampoos and conditioners, in particular, are sufficiently related to applicant's pet sitting services that when offered under the highly similar marks in this case, confusion is likely. Applicant's pet sitting services essentially involve caring for pets. Opposer's shampoos and conditioners are used in caring for pets' grooming needs. With respect to the channels of trade, while there is no evidence that pet shampoos and conditioners and pet sitting services are generally offered in the same channels of trade, we nonetheless note that applicant itself offers pet grooming services and some pet products in addition to its pet sitting services. Also, opposer's pet shampoos and conditioners and applicant's pet sitting services are

offered to the same class of purchasers, namely, pet owners. We have no basis to conclude that pet owners would exercise anything more than ordinary care in selecting these goods and services.

A related factor in this case is the variety of goods on which opposer's CRAZY PET and CRAZY PETS marks are used. The evidence of record demonstrates that opposer and its licensees use the CRAZY PET mark on pet stain and odor removers, pet dental products, pet treats, pet toys, pet leashes, pet grooming kits, pet hair dryers, novelty clocks and picture frames; and the CRAZY PETS mark on children's books, a cartoon strip, and a cartoon feature DVD. Use of a mark on a wide variety of products reflects and enhances the mark's strength. Opposer and its licensees' use of the CRAZY PET and CRAZY PETS marks in connection with a diverse line of pet products and collateral products makes it more likely that consumers will mistakenly believe that PET CRAZY and design pet sitting services originate from or are associated with or sponsored by the same source. The licensing of commercial trademarks for use on "collateral products which are unrelated in nature to the goods or services on which the marks are normally used, has become a common practice in recent years. See *General Mills Fun Group, Inc. v. Tuxedo Monopoly, Inc.* 204 USPQ 396, 400 (TTAB 1979) [where we stated that such use is a matter of common

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knowledge and "has become a part of everyday life which we cannot ignore", *affirmed* 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) [where the Court of Customs and Patent Appeals noted that "'collateral product' product use is a matter of textbook discussion (see J. Gilson, *Trademark Protection and Practice*, Section 5.05 [10] (1980) and frequent commentary (see Grimes and Battersby, *The Protection of Merchandising Properties*, 69 T.M. Rep. 431 (1979) and references cited therein)"]. See also: J. Thomas McCarthy, *Important Trends in Trademark and Unfair Competition Law During the Decade of the 1970s*, 71 T.M. Rep. 93, 125 (1981) where the author, in his discussion of legal developments during the 1970's, referred to "the increased licensing of commercial trademarks for use on 'collateral products' such as tee-shirts and wearing apparel"] and Robert Denicola, *Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols*, 75 T.M. Rep. 41 (1985). See also: *The Black and Decker Mfg. Co. v. Big Yank Corp.*, 23 USPQ 484 (TTAB 1986); *Harley Davidson Motor Co. v. Pierce Foods Corp.*, 231 USPQ 857 (TTAB 1986); *Cadence Industries Corp. v. Kerr*, 225 USPQ 331 (TTAB 1985); *Bridgestone Tire Co. v. Bridgestone Trading Co.*, 221 USPQ 1012 (TTAB 1984); *Broadway Catering Corp. v. Carla Inc.*, 215 USPQ 462 (TTAB 1982); *Hurst Performance, Inc. v. Torsten Hallman Racing, Inc.*, 207 USPQ 671 (TTAB 1980); *Amica Mutual*

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Insurance Co. v. R.H. Cosmetics Corp., 204 USPQ 155 (TTAB 1979); and "21" Club, Inc. v. Popular Merchandise Co., Inc., 139 USPQ 127 (TTAB 1963); *affirmed* 343 F.2d 1011, 145 USPQ 203 (CCPA 1963). See generally: 3 J.T. McCarthy, McCarthy on Trademarks and Unfair Competition Section 24:9.50 (4th ed. 2006).

Finally, according to applicant, it has not encountered any instances of consumer confusion over a period of five years. However, because applicant operates a single storefront in Florida and there is no information concerning the number of applicant's customers, it is not clear that there has been any meaningful opportunity for confusion to occur in the marketplace. In any event, the test is likelihood of confusion, not actual confusion. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990); and *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984).

In view of the foregoing, we find that the parties' respective goods and services are sufficiently related that when offered under the highly similar marks in this case, confusion as to source, sponsorship or affiliation is likely. To the extent that we have any doubt, we resolve it as we must, in favor of opposer as the prior user and registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Pneumatiques*,

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Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487
F.2d 918, 179 USPQ 729 (CCPA 1973).

Decision: The opposition is sustained.