

This Opinion is not a  
Precedent of the TTAB

Mailed: January 24, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Halo Leather Limited*  
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Serial No. 86530941  
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William J. Seiter of Seiter Legal Studio,  
for Halo Leather Limited.

Keri-Marie Cantone, Trademark Examining Attorney, Law Office 104,  
Dayna Browne, Managing Attorney.

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Before Bergsman, Goodman and Larkin,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Halo Leather Limited (“Applicant”) seeks registration on the Principal Register of  
the mark AQUAPEL and design, shown below,



for the goods set forth below:

Leather and imitations of leather and goods made of these materials and not included in other classes, namely, animal skins, animal hides, trunks and travelling bags; umbrellas; parasols; walking sticks, whips, harnesses and saddlery, suitcases, gym bags and holdalls, wallets and purses, handbags, traveling bag sets; valises, luggage, briefcases, leather key holders in the nature of a key case, in Class 18; and

Furniture; mirrors; beds; chairs; wood bedsteads, benches; non-metal bins; cabinets; chests for toys; chests of drawers; chests, not of metal; coat stands; counters, namely, tables; crates; cupboards; curtain rails; curtain hooks; curtain rings; deckchairs; desks; drafting tables; dressing tables; foot stools; picture frames; magazine racks; shelves and metal and non-metal shelving; mattresses; office furniture; pillows; sideboards; sofas; ottomans; armchairs; statues of wood; statuettes of wood, plaster or plastic; stools; table tops; tables; trestle tables; tea trolleys; work benches; kitchen furniture, namely, kitchen cabinets; cushions; storage racks; all of the foregoing featuring leather or imitation leather, and none of the foregoing including or featuring bed blankets, comforters, curtain fabric, curtains of textile, mattress covers, mattress pads, shower curtains, table linen, textile fabrics for home and commercial interiors or textile place mats, in Class 20.<sup>1</sup>

In the application, Applicant described its mark as follows:

The mark consists of the term "AQUAPEL" in stylized letters appearing below a bull's skull with horns, all on a background depicting beads of water repelled from a flat surface.

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 that

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<sup>1</sup> Application Serial No. 86530941 was filed on February 11, 2015, 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.

Applicant's mark so resembles the registered mark AQUAPEL (standard character form) for "bed blankets; comforters; curtain fabric; curtains of textile; mattress covers; mattress pads; shower curtains; table linen; textile fabrics for home and commercial interiors; textile fabrics for the manufacture of clothing; textile place mats," in Class 24, as to be likely to cause confusion.<sup>2</sup> With respect to Applicant's Class 18 description of goods, the refusal to register is limited to "leather and imitations of leather and goods made of these materials and not included in other classes, namely, animal skins, animal hides."<sup>3</sup>

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

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 Ind., 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 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); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB

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<sup>2</sup> Registration No. 4230659, issued October 23, 2012.

<sup>3</sup> A Trademark Examining Attorney may issue a refusal that applies only to certain goods or services. *See* TMEP § 718.02(a) (January 2017).

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 and/or services. *See In re Chatam Int’l Inc.*, 380 F.2d 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*, 116 USPQ2d 1406, 1409 (TTAB 2015).

A. The similarity or dissimilarity of the marks.

We turn first 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. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, “two marks may be found to be confusingly similar if there are sufficient similarities in terms of sound *or* visual appearance *or* connotation.” *Kabushiki Kaisha Hattori Seiko v. Satellite Int’l, Ltd.*, 29 USPQ2d 1317, 1318 (TTAB 1991), *aff’d mem.*, 979 F.2d 216 (Fed. Cir. 1992) (citation omitted); *see also Eveready Battery Co. v. Green Planet Inc.*, 91 USPQ2d 1511, 1519 (TTAB 2009) (quoting *Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”)).

“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); *see also San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Since the goods at issue include furniture, bedding, shower curtains, table linens, place mats, and textile fabrics for home interiors without any restrictions as to channels of trade, classes of consumers, or price points, the average customer is an ordinary consumer.

The marks are similar because they both include the term AQUAPEL. They are different because Applicant’s mark includes a design element. However, in the case of marks consisting of words and a design, the words are normally accorded greater weight because the words are likely to make an impression upon purchasers, would be remembered by them, and would be used by them to request the goods. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908, 1911 (Fed. Cir. 2012) (citing

*CBS Inc. v. Morrow*, 708 F. 2d 1579, 218 USPQ 198, 200 (Fed. Cir 1983)); *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

The term "Aquapel" is an arbitrary term without any meaning when used in connection with the goods at issue. Therefore, Registrant's AQUAPEL is an inherently strong mark entitled to a broad scope of protection or exclusivity of use. In this regard, we note that there are ten AQUAPEL registrations owned by four different entities, including three by Registrant. The other seven registrations are for goods far removed from the goods at issue in this appeal.<sup>4</sup> *See 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); *SBS Products Inc. v. Sterling Plastic & Rubber Products Inc.*, 8 USPQ2d 1147, 1149 n.6 (TTAB 1988) ("[E]ven if evidence of such third-party use were submitted, it would be of no aid to respondent herein where the third-party usage was for goods unrelated to either petitioner's skin care products or respondent's stuffing box sealant").

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<sup>4</sup> December 29, 2015 Office Action, pp. 78-105.

While there is no explicit rule that we must find that the marks are similar where the Applicant's mark incorporates Registrant's entire mark, under the circumstances described above (*i.e.*, the term at issue is arbitrary and identical in both marks), the fact that Registrant's mark is subsumed by Applicant's mark increases the similarity between the two. *See, e.g., Coca-Cola Bottling Co. of Memphis, Tennessee, Inc. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (applicant's mark BENGAL LANCER for club soda, quinine water and ginger ale is likely to cause confusion with BENGAL for gin); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (applicant's mark VANTAGE TITAN for medical magnetic resonance imaging diagnostic apparatus confusingly similar to TITAN for medical ultrasound diagnostic apparatus); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (applicant's mark MACHO COMBOS for food items confusingly similar to MACHO for restaurant entrees).

We find that the marks are similar in terms of their appearance, sound, connotation and commercial impression.

B. The similarity or dissimilarity and nature of the goods.

1. Class 18 - animal skins and animal hides.

The Trademark Examining Attorney submitted excerpts from four websites showing the website owners advertising the sale of animal skins and hides, bedding, fabrics, and place mats under a single mark. The third-party websites include the following:

- Home Decor International CowHides website (cowhidesinternational.com);<sup>5</sup>
- Cowhide Western Furniture (cowhidewesternfurniture.com);<sup>6</sup>
- Lakota Cove (lakotacove.com);<sup>7</sup> and
- Arhaus (arhaus.com).<sup>8</sup>

The Home Decor International CowHides website is illustrative.

Home Decor International specializes in Cowhide, Cowhides, Cowhide Rug, and Cowhide Rugs. We have a vast selection from which to choose. You're certainly to find exactly what you're looking for!

Home Decor International has a "Luxurious Rustic Bedding & Accessories" webpage, shown below, featuring comforters, bed skirts, pillow shams and draperies.

**Luxurious Rustic Bedding & Accessories**

Nature's peace and harmony move into your indoor sanctuary with the colors, designs, and feel of our bedding and fine accessories. Timeless designs and comfort provide enjoyment that spans the years. You'll love the natural fiber blends in the fabrics, many of which are available for making coordinating draperies and other decor items. Faux furs and richly woven materials head the line-up of all that is available to you.

The pictures below represent bedding sets that typically include a comforter, a bed skirt, two pillow shams, an 18x18 inch pillow, and a neck roll pillow. Different sets, however, may vary with what is included.

In addition to bedding and accessories, check out our full line of cowhide, cowhides, cowhide rugs and cowhide rug products.

 <p>Tahoe</p>	 <p>Wilderness Ridge</p>	 <p>Laredo</p>
 <p>Barbwire</p>	 <p>Pine Cones</p>	 <p>Pink Paisley</p>

<sup>5</sup> May 28, 2015 Office Action.

<sup>6</sup> May 28, 2015 Office Action.

<sup>7</sup> May 28, 2015 Office Action.

<sup>8</sup> December 29, 2015 Office Action.

Home Decor International advertises the sale of cowhide place mats, pillows. Finally, it advertises the sale of custom made cowhide ottomans that are related to textile fabrics for home and commercial interiors.

The Trademark Examining Attorney also submitted three third-party, use-based registrations for animal skins and hides, place mats, bed blankets, mattress pads, linens and fabrics. 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). The registrations, with relevant portions of the identifications, are listed below.

<b>MARK</b>	<b>REG. NO.</b>	<b>GOODS</b>
NATUREHOME	4481343	Furniture, coat racks, stools, beds, side tables, leather and imitation leather and goods made of these materials, namely, animal skins and hides, place mats, draperies, bed blankets, mattress pads
LA DOUTE	3420318	Animal skins and hides, bed blankets, table linen not made of paper
FRISBEE	4046202	Animal skins and hides, hand-held mirrors, furniture, chairs and stools, tables, stools, inflatable pillows, bed blankets

Applicant argues, in essence, that Trademark Examining Attorney has failed to submit evidence sufficient to show that the goods are related.<sup>9</sup> We disagree. The

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<sup>9</sup> Applicant's Brief, pp. 8-10 (12 TTABVUE 12-14).

above-noted evidence establishes that consumers, particularly consumers familiar with animal skins and hides, will perceive similar marks used in connection with animal skins and hides, bed blankets, comforters, curtain fabrics, mattress covers and pads, textile fabrics for home and commercial interiors, and place mats as identifying goods emanating from a single source inasmuch as the products are advertised as having been made from animal skins or hides.

## 2. Class 20 – furniture

The four third-party websites noted above also advertise the sale of furniture as well as bedding, fabrics, and place mats under a single mark. The Trademark Examining Attorney also submitted excerpts from the third-party websites listed below showing the use of a single mark to identify furniture, bedding, fabrics, and place mats.

- The Company Store (thecompanystore.com);<sup>10</sup>
- Pottery Barn (potterybarn.com);<sup>11</sup>
- Williams-Sonoma (Williams-sonoma.com);<sup>12</sup>
- Surefit (surfit.net);<sup>13</sup>
- Serena & Lily (serenaandlily.com);<sup>14</sup> and

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<sup>10</sup> May 28, 2015 Office Action.

<sup>11</sup> May 28, 2015 Office Action.

<sup>12</sup> May 28, 2015 Office Action.

<sup>13</sup> May 28, 2015 Office Action.

<sup>14</sup> December 29, 2015 Office Action.

- Crate & Barrel (crateandbarrel.com).<sup>15</sup>

In addition to the three third-party registrations listed above, the Trademark Examining Attorney submitted the additional seven registrations listed below for furniture and bedding, fabrics, and place mats.

MARK	REG. NO.	GOODS
WATER-WOOD-SKY	3606760	Shelf furniture, desks, foot stools, bedding, namely, blankets, comforters, mattress covers, mattress pads, shower curtains, textile table linens, table placemats
THE WORLD EFFECT	4146949	Bathroom and shaving mirrors, beds, benches, chairs, cupboards, office furniture, stools, bed blankets, comforters, curtain fabric, place mats not of paper, table linen
HOME	4286447	Furniture, drapery rings, curtain hooks, curtain rings, pillows, mattress pads, blankets, curtains, place mats
CINDY CRAWFORD STYLE	4246383	Beds, mirrors, stools, pillows, clip rings for curtains, placemats, bed blankets
HÔTEL DE CRILLON	3732854	Furniture, pillows, hand held mirrors and wall mirrors, bed blankets, shower curtains, place mats, curtains
BILTMORE	3690732	Mirrors, pillows, mattresses, cabinets, comforters, blankets
RESTORATION HARDWARE	4188893	Beds, chairs, sofas, cabinets, pillows, mirrors, ottomans, curtains, bed blankets, comforters

<sup>15</sup> July 27, 2016 Office Action (6-10 TTABVUE).

This evidence establishes that consumers will perceive similar marks used in connection with furniture, bed blankets, comforters, curtain fabrics, mattress covers and pads, and place mats, as identifying goods that emanate from a single source.

C. Established, likely-to-continue channels of trade.

The third-party websites show that at the products at issue are sold online and through “brick and mortar” locations for those retailers.<sup>16</sup> To that extent, the channels of trade are the same.

D. Balancing the factors.

Because the marks are similar, the goods are related, and some of the channels of trade are the same, we find that Applicant’s mark AQUAPEL and design for animal skins and hides, in Class 18, and the goods listed Class 20, is likely to cause confusion with the registered mark AQUAPEL (standard characters) for “bed blankets; comforters; curtain fabric; curtains of textile; mattress covers; mattress pads; shower curtains; table linen; textile fabrics for home and commercial interiors; textile fabrics for the manufacture of clothing; textile place mats.”

**Decision:** The refusal to register Applicant’s mark AQUAPEL and design is affirmed.

Applicant’s application for the mark AQUAPEL and design for “leather and imitations of leather and goods made of these materials and not included in other classes, namely, trunks and travelling bags; umbrellas; parasols; walking sticks, whips, harnesses and saddlery, suitcases, gym bags and holdalls, wallets and purses,

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<sup>16</sup> The websites have links to store locations.

handbags, traveling bag sets; valises, luggage, briefcases, leather key holders in the nature of a key case, in Class 18, will proceed to publication in due course.