

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

Mailed: December 21, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*DC Comics*

*v.*

*Joel L. Beling dba Supa Characters Pty Ltd.*

—  
Opposition No. 91205751  
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James D. Weinberger of Fross Zelnick Lehrman & Zissu PC,  
for DC Comics.

Joel L. Beling, pro se.

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Before Quinn, Mermelstein and Greenbaum,  
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Applicant, Joel L. Beling, filed an application for registration on the Principal Register of the mark SUPER DOGS (in standard characters, DOGS disclaimed), for a wide range of printed materials, clothing, toys, and entertainment services, in International Classes 16, 25, 28, and 41, respectively, including “comic books,” “story books,” “children’s and infant apparel,” “Halloween costumes,” “action figure toys,” “amusement park rides,” “arcade game machines,” “electronic toy vehicles,” “toy weapons,” “educational and entertainment services, namely, a continuing program

about super hero and other characters based on dogs accessible by radio, television, satellite, audio, video and computer networks,” and “entertainment services, namely, displaying a series of films.”<sup>1</sup> Many of the Class 16 goods and Class 41 services are identified specifically as “in the field of” or “featuring super hero and other characters based on dogs.”

Opposer, DC Comics, opposes registration of Applicant’s mark on the ground that, as used in connection with Applicant’s identified goods and services, the mark so resembles Opposer’s previously used and registered marks SUPERMAN, SUPERWOMAN, SUPERGIRL, KRYPTO THE SUPERDOG, and SUPER FRIENDS, as well as Opposer’s previously used mark DC SUPER HEROES<sup>2</sup>, for many of the same or related goods and services listed in Applicant’s application, as to be likely to cause confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). Opposer alleges that its marks are “famous marks for goods and services relating to publications and entertainment, and had become famous long before the earliest priority date upon which Applicant can rely.”<sup>3</sup> Opposer also asserts the ground of dilution under Sections 13(a) and 43(c) of the Lanham Act, 15 U.S.C. §§ 1063(a),

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<sup>1</sup> Application Serial No. 85325751 was filed on May 20, 2011, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), and under Trademark Act Section 44(e), 15 U.S.C. § 1126(e), based on Australian Registration Nos. 1416171, 1416178, and 1416180, all of which were issued on November 25, 2011, with a claim of priority under Trademark Act § 44(d), 15 U.S.C. § 1126(d), based on Australian Application Nos. 1416171, 1416178, and 1416180, all filed on March 24, 2011.

<sup>2</sup> Opposer only pleaded common law rights in the mark DC SUPER HEROES for “toys, videos, books and DVDs.” 1 TTABVUE 10-11, ¶ 3, fn.1. However, Opposer pleaded common law rights in and ownership of registrations for the other listed marks, which are set forth in more detail below.

<sup>3</sup> 1 TTABVUE 14, ¶ 17.

1125(c).<sup>4</sup> In his answer, Applicant admits that the goods and services he plans to offer under the SUPER DOGS mark are identical or related to the goods and services that Opposer offers under its pleaded marks, and that the goods and services will be sold to the same customers or types of customers.<sup>5</sup> Applicant denied all other salient allegations.

## I. Record

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of involved application Serial No. 85325751.

Opposer attached to its notice of opposition printouts from the USPTO Trademark Application and Registration Retrieval (TARR) database<sup>6</sup> consisting of a copy of each of its pleaded registrations, showing their current status and title.<sup>7</sup> The registrations are summarized as follows:

- Registration No. 2226026 for the mark SUPERMAN in stylized form,



, for “comic books” in International Class 16 issued on February 23, 1999;

- Registration No. 3061112 for KRYPTO THE SUPERDOG (in standard characters) for “Toys and playthings—namely, action figures and accessories therefor; plush toys” in International Class 28 issued on February 21, 2006;

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<sup>4</sup> 1 TTABVUE 14, ¶ 17.

<sup>5</sup> 1 TTABVUE 13, ¶ 14 (Notice of Opposition) and 5 TTABVUE 3, ¶ 14 (Answer).

<sup>6</sup> This system has since been merged with the Trademark Status and Document Retrieval System (TSDR).

<sup>7</sup> Section 8 and 15 combined declarations have been accepted and acknowledged in all pleaded registrations, and with the exception of Registration No. 3784483 for SUPERWOMAN, all have been renewed.

- Registration No. 3018682 for KRYPTO THE SUPERDOG (in standard characters) for “Entertainment in the nature of distribution and display of live-action, comedy, drama and animated motion picture theatrical films; entertainment via electronic global communications network in the nature of live-action, comedy, drama and animated programs” in International Class 41 issued on November 22, 2005;
- Registration No. 1180088 for SUPER FRIENDS (in typed form) for “comic magazines; napkins; party invitations; chalk boards; paper party loot bags and paper trick or treat bags; paper table covers and placemats; paper party goods-namely, centerpieces and decorative hangings in the nature of posters made of paper” in International Class 21 issued on December 1, 1981, second renewal;
- Registration No. 2861443 for SUPER FRIENDS (in typed form) for “Audio video discs, and digital versatile discs featuring music, comedy, drama, action, adventure, and/or animation” in International Class 9 issued on July 6, 2004;
- Registration No. 3784483 for SUPERWOMAN (in standard characters) for “action figures and accessories therefor” in International Class 28 issued on May 4, 2010;
- Registration No. 3023091 for SUPERGIRL (in standard characters) for “Athletic bags, backpacks, book bags, duffel bags, gym bags, tote bags, coin purses, knapsacks; umbrellas; wallets” in International Class 18 issued on December 6, 2005; and
- Registration No. 2943882 for SUPERGIRL (in standard characters) for “Clothing for men, women and children – namely, shirts, t-shirts, sweatshirts, jogging suits, trousers, pants, shorts, tank tops, rainwear, skirts, blouses, dresses, jackets, coats, hats, caps, sunvisors, belts, sleepwear, pajamas, lingerie, underwear, boots, shoes, sneakers, sandals, booties, swimwear and masquerade and Halloween costumes and masks sold in connection therewith” in International Class 25 issued on April 26, 2005.

Opposer submitted under notice of reliance additional copies of its pleaded registrations from the TSDR database showing their current status and title,<sup>8</sup> and

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<sup>8</sup> 71 TTABVUE.

377 exhibits comprising printed publications and Internet materials including numerous published comic book covers, books, newspaper articles, fan websites, and social media pages purportedly to show “the history, development, notoriety, strength, and fame of the Superman, Krypto the Superdog, Supergirl, Superwoman, and Super Friends characters and Opposer’s SUPER-formative marks.”<sup>9</sup>

In addition, Opposer submitted the testimony of Michael Gibbs, Senior Vice President of Licensing and Business Development for Warner Bros. Consumer Products Inc., Opposer’s exclusive licensing agent,<sup>10</sup> with 27 exhibits regarding Opposer’s pleaded marks, including various licenses, style guides, brand awareness reports, and product images.<sup>11</sup>

Applicant did not submit any testimony or other evidence, and only Opposer filed a brief on the case. Nonetheless, Opposer, as plaintiff in this proceeding, must prove its standing and its claims by a preponderance of the evidence. *See Cervecería Centroamericana, S.A. v. Cervecería India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989).

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<sup>9</sup> 67 TTABVUE 2, 69 TTABVUE 2 and 73 TTABVUE 2 (printed publications), 68 TTABVUE 2 (Internet documents), and generally 67-70 and 72-77 TTABVUE. Opposer extensively relies on documents printed from the Internet pursuant to *Safer Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031, 1038 (TTAB 2010). Such documents are admissible only to show what has been printed, not the truth of the matter printed thereon. *Id.* at 1040. For example, *The New York Times* articles reporting box office receipts is evidence that *The New York Times* published specific box office receipts on certain dates, not that those were the actual box office receipts.

Opposer did not allege that the pleaded marks comprise a “family of marks,” nor did Opposer define the term “Opposer’s SUPER-formative marks.” We construe the undefined term to identify the six pleaded marks.

<sup>10</sup> 78 TTABVUE 20 (Gibbs Test.)

<sup>11</sup> 78-79 TTABVUE (confidential version located at 80 TTABVUE).

## II. Background

Opposer publishes comic books and, through licenses, has produced movies and television shows about the iconic comic book superhero character Superman and many other characters such as Krypto the Superdog, Superboy, Supergirl, and Superwoman, who live in his fictional world.<sup>12</sup> The comic books, movies and television shows have been sold and distributed throughout the United States. Opposer updates the Superman character and the characters who inhabit his world, and their stories, to keep them current.<sup>13</sup>

Opposer introduced Superman in the 1930s as a comic hero with special powers.<sup>14</sup> Superman was born on the planet Krypton. Superman's parents sent him to Earth in a spaceship shortly before Krypton was destroyed. On Earth, Superman has extraordinary speed, strength, and hearing, as well as x-ray vision and the ability to fly, and he "represents the very best in humanity."<sup>15</sup>

Opposer introduced Krypto the Superdog in comics in the 1950s as Superman and Superboy's pet dog with similar superhero powers of speed, strength, agility, flight, and x-ray vision.<sup>16</sup> Krypto the Superdog has appeared in all the media in which

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<sup>12</sup> 78 TTABVUE 27-31; 69 TTABVUE 246 (Opp. Exh. 55).

<sup>13</sup> 67 TTABVUE 191 (Opp. Exh. 14); 67 TTABVUE 411 (Opp. Exh. 15); 67 TTABVUE 609 (Opp. Exh. 16); 67 TTABVUE 627 (Opp. Exh. 17); 73 TTABVUE and 74 TTABVUE (Opp. Exh. 19); 75 TTABVUE (Opp. Exh. 20); 76 TTABVUE and 77 TTABVUE 2-278 (Opp. Exh. 21); 77 TTABVUE 279 (Opp. Exh. 22); 69 TTABVUE 246 (Opp. Exh. 55).

<sup>14</sup> 78 TTABVUE 32.

<sup>15</sup> 67 TTABVUE 609, 623-624 (Opp. Exh. 16).

<sup>16</sup> 78 TTABVUE 29-33; 67 TTABVUE 609, 620 (Opp. Exh. 16).

Superman appears, and he starred in his own animated television show in the mid-2000s.<sup>17</sup>

The record is replete with documentary evidence showing that SUPERMAN is an iconic American comic book, television, and movie superhero, and a famous mark for comic books and movies with an extensive licensing program.

Superman first appeared in *Action Comics No. 1* in 1938,<sup>18</sup> and was so popular that he became the star of an eponymous comic book series in 1939.<sup>19</sup> According to BRITANNICA ONLINE ENCYCLOPEDIA, Superman's "massive commercial success was responsible for creating the costumed superhero genre, which has been a mainstay for the comic book industry ever since," and Superman is an "iconic comic-based propert[y and one] of the most enduring and recognizable characters in the 20<sup>th</sup> and 21<sup>st</sup> century popular culture."<sup>20</sup> Comic books featuring Superman are among the most highly valued collectors' items. For example, in 2010, the Associated Press reported a record-setting \$1.5 million sale for an issue of *Action Comics No. 1*,<sup>21</sup> and *Entertainment Weekly* magazine reported in 2013 that a "near-mint edition" of *Action Comics #1* "now sells for more than \$2 million."<sup>22</sup> The trade magazine *Daily Variety* reported that Opposer re-launched many of its titles in 2011, and that within the first

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<sup>17</sup> 78 TTABVUE 32-33.

<sup>18</sup> 67 TTABVUE 609, 623 (Opp. Exh. 16).

<sup>19</sup> 75 TTABVUE 2 (Opp. Exh. 20).

<sup>20</sup> 69 TTABVUE 246 (Opp. Exh. 55).

<sup>21</sup> 70 TTABVUE 1074 (Opp. Exh. 325).

<sup>22</sup> 67 TTABVUE 627, 631 (Opp. Exh. 17).

six weeks, Opposer sold more than 150,000 issues of *Superman #1* and more than 250,000 issues of *Justice League #1*, which features Superman.<sup>23</sup>

Superman appeared in multiple comic strips from 1939 to 1966, and again in the 1970s and 1980s,<sup>24</sup> and numerous graphic novels (e.g., *Superman: Earth One*; *Blackest Night: Black Lantern Corps, Vol. 1*; *Time Masters: Vanishing Point*; *Superman: The Black Ring*; and *Final Crisis, Superman: Whatever happened to the Man of Tomorrow?*).<sup>25</sup> Each of the graphic novels appeared on *The New York Times*' Graphic Books weekly bestseller lists, including several titles that appeared on the same weekly list.<sup>26</sup> *The New York Times* also recommended *Superman: Earth One* in its 2010 "Holiday Gift Guide."<sup>27</sup>

Opposer produced six movies featuring Superman from 1978-2013, which collectively have generated impressive box office revenue (in the hundreds of millions) in the U.S.<sup>28</sup> This revenue includes nearly \$300 million from the 2013 release of *Man of Steel*, Opposer most recent movie featuring Superman, and more than \$200 from the 2006 release of *Superman Returns*.<sup>29</sup> A January 10, 2013 article in *The Los*

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<sup>23</sup> 70 TTABVUE 129 (Opp. Exh. 82). For context, this magazine reports that "bestselling books typically move about 100,000 copies."

<sup>24</sup> 76 TTABVUE and 77 TTABVUE (Opp. Exh. 21); 70 TTABVUE 609 (Opp. Exh. 205).

<sup>25</sup> For example, 70 TTABVUE 162 (Opp. Exh. 91); 70 TTABVUE 187 (Opp. Exh. 98); 70 TTABVUE 202 (Opp. Exh. 102); 70 TTABVUE 210 (Opp. Exh. 105); 70 TTABVUE 814 (Opp. Exh. 249). For a complete list of the numerous exhibits, see 90 TTABVUE 22-23.

<sup>26</sup> For example, 70 TTABVUE 1027 (Opp. Exh. 310); 70 TTABVUE 1045 (Opp. Exh. 316); 70 TTABVUE 1056 (Opp. Exh. 319). For a complete list of the exhibits, see 90 TTABVUE 23.

<sup>27</sup> 70 TTABVUE 1061 (Opp. Exh. 321).

<sup>28</sup> 78 TTABVUE 35-38.

<sup>29</sup> 78 TTABVUE 37-38.



*Angeles Times* entitled “Warner wins appeal in Superman case against co-creator’s daughter” reports that “Superman has generated more than \$500 million at the domestic box office with five films and billions more from television series such as ‘Smallville,’ toys, games and comic books.”<sup>30</sup> The success of the Superman movies has given rise to television series such as *The Adventures of Superman*,<sup>31</sup> *Super Friends*,<sup>32</sup> *Superboy*,<sup>33</sup> *Lois & Clark*,<sup>34</sup> *Smallville*,<sup>35</sup> *Krypto the Superdog*,<sup>36</sup> and *Supergirl*,<sup>37</sup> and several “made for video” *Super Friends* series featuring Superman.<sup>38</sup>

Leading newspapers and magazines have been covering Superman prominently for decades.<sup>39</sup> Further, as Opposer states in its brief, “the lexicon associated with Superman pervades our culture so completely that explicit reference to Superman is not required to evoke the character. Mere mention of lines associated with Superman suffice.”<sup>40</sup> The record includes numerous examples of ledes and headlines, such as

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<sup>30</sup> 72 TTABVUE 3 (Opp. Exh. 56). This article was published before the 2013 release of *Man of Steel*.

<sup>31</sup> 67 TTABVUE 627 (Opp. Exh. 17).

<sup>32</sup> 70 TTABVUE 609 (Opp. Exh. 205).

<sup>33</sup> 67 TTABVUE 627 (Opp. Exh. 17).

<sup>34</sup> 67 TTABVUE 627 (Opp. Exh. 17).

<sup>35</sup> 67 TTABVUE 627 (Opp. Exh. 17), 70 TTABVUE 49 (Opp. Exh. 63); 70 TTABVUE 62 (Opp. Exh. 65), 78 TTABVUE 32.

<sup>36</sup> 78 TTABVUE 33, 39.

<sup>37</sup> 78 TTABVUE 36.

<sup>38</sup> 78 TTABVUE 39-40; 78 TTABVUE 85 (Dep. Exh. 1-A).

<sup>39</sup> 70 TTABVUE (Opp. Exh. 57-377, consisting of representative samples of unsolicited press coverage of the Superman character and Opposer’s SUPERMAN and other pleaded marks).

<sup>40</sup> 90 TTABVUE 31.

“Leaping over tall buildings in a single bound is old hat in the comic book industry,”<sup>41</sup> “Seventy-three years ago this month, a brawny figure in blue with a flowing red cape and the ability to leap tall buildings in a single bound arrived in American pop culture,”<sup>42</sup> “Posting comics via Facebook or Twitter seems faster than a speeding bullet, but DC Comics is going back to its Silver and Bronze Age ways, returning readers’ letters to the pages of its comic books,”<sup>43</sup> and “Look! Up on the wall! It’s a painting! Of that strange visitor from another planet who came to Earth – well, you know how that goes.”<sup>44</sup>

According to Mr. Gibbs, SUPERMAN is one of Opposer’s top brands, with strong consumer awareness among children and young adults.<sup>45</sup> Opposer’s internal marketing studies show that in 2000-20005, consumer recognition of the SUPERMAN mark ranges from 84 to 90, which means that 84-90% of the survey group is familiar with Superman.<sup>46</sup> Mr. Gibbs explained that “the average of 89 to 90 is a very strong familiarity score.”<sup>47</sup>

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<sup>41</sup> 70 TTABVUE 354, 356 (Opp. Exh. 142) (*Chicago Tribune*).

<sup>42</sup> 70 TTABVUE 902, 905 (Opp. Exh. 274) (*Los Angeles Times*).

<sup>43</sup> 70 TTABVUE 1030, 1031 (Opp. Exh. 311) (Associated Press)

<sup>44</sup> 70 TTABVUE 1135, 1136 (Opp. Exh. 343) (*The New York Times*)

<sup>45</sup> 78 TTABVUE 31.

<sup>46</sup> 78 TTABVUE 69-74; (Dep. Exh. 17-25). It appears that Opposer has deemed confidential Deposition Exhibits 17-25, which contain the relevant consumer familiarity scores for Opposer’s SUPERMAN and other pleaded marks, as those exhibits are completely redacted in TTABVUE entry 78. As far as we are aware, Opposer did not indicate during Mr. Gibbs testimony or elsewhere that these exhibits are confidential, and Opposer did not submit unredacted copies, marked “confidential,” for us to review. Accordingly, we are unable to confirm that these documents pertain to the other pleaded marks, or the level of consumer familiarity the documents might demonstrate.

<sup>47</sup> 78 TTABVUE 74.

Opposer has licensed SUPERMAN and its other pleaded marks to over 200 licensees for use on over one million different products, including all kind of toys and clothing items (including those types identified in the involved application), and has done so for many years.<sup>48</sup> As Mr. Gibbs testified, Opposer has licensed the Superman Property

across the majority, if not all relevant product categories: From apparel, such as t-shirts and outerwear, athletic wear, footwear; to the toy category, with construction sets with Lego or action figures with Mattel; or costumes, sporting equipment. We also have publishing that we do in terms of kid targeted publishing, like coloring books. Those types of things. And then also stationery, bedding, general home-type products. So pretty much any category that we feel is appropriate, we've licensed over time at some point.<sup>49 50</sup>

Opposer maintains quality control over all licensed users, and polices non-authorized uses of Superman and the indicia and characters related to him.<sup>51</sup> From 2005 through 2011, consumers spent a truly impressive amount of money on merchandise bearing Opposer's SUPERMAN and other pleaded marks, and Opposer received significant licensing revenue from those sales during that period.<sup>52</sup>

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<sup>48</sup> 78 TTABVUE 41-42.

<sup>49</sup> 78 TTABVUE 40.

<sup>50</sup> Mr. Gibbs refers to Superman and the characters who live in his universe collectively as the "Superman Property." 78 TTABVUE 26 ("Q: And there is more than one character within the Superman Property? A: Yes."); 80 TTABVUE 1, 10 ("Schedule A" to the confidential representation agreement between DC Comics and Warner Bros. Consumer Products Inc., dated January 1, 2006, listing several "fictional names and cartoon characters" including SUPERMAN, as the "Property," and specifically stating that the "Property" includes "those associated characters appearing in connection therewith."). The characters include all of the characters associated with Opposer's pleaded marks, and others.

<sup>51</sup> 78 TTABVUE 79-80.

<sup>52</sup> 78 TTABVUE 45-46; 80 TTABVUE 12 (confidential Dep. Exh. 12). We discuss these figures using only general terms, as Opposer has deemed the figures confidential.

### III. Standing

Because Opposer's pleaded registrations are of record, are valid and subsisting, and are owned by Opposer, Opposer's standing to oppose registration of Applicant's mark is established and its priority is not in issue as to the goods and services listed therein. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); and *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). As noted above, Applicant presented no testimony or other evidence, and therefore has not established any earlier use of his mark. Moreover, during the parties' discovery conference (in which the Board participated), Applicant stipulated that Opposer has priority.<sup>53</sup>

We turn now to the issue of likelihood of confusion under Section 2(d).

### IV. Likelihood of Confusion

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative 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

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<sup>53</sup> 14 TTABVue 3.

services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (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.”).

We provided background information above concerning the fame of the Superman character, and the fame of SUPERMAN as a mark for comic books and movies, to better set the stage for our ensuing likelihood of confusion analysis. However, we primarily focus below on the common law and standard character mark KRYPTO THE SUPERDOG in Reg. Nos. 3061112 and 3018682 for various goods and services including comic books, clothing, toys, and an animated television series featuring superhero dogs, because when considered vis-à-vis the mark and goods identified in the application, it is most likely to support a finding of likelihood of confusion. *See, e.g., In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

We now consider the likelihood of confusion factors about which Opposer introduced evidence, and treat the remaining factors as neutral.

A. Comparison of the Goods and Services, Channels of Trade, and Conditions of Sale

We first consider the goods and services, channels of trade, and conditions of sale. In his answer, Applicant admits that the goods and services identified in the application are identical or otherwise related to those that Opposer sells under the pleaded marks, which include KRYPTO THE SUPERDOG, and that they will be sold

to the same customers.<sup>54</sup> Moreover, to the extent the application specifies that the identified publications and entertainment productions feature or are based on super hero characters who are dogs, the subject matter is identical to Opposer's KRYPTO THE SUPERDOG identified publications and television programs. Accordingly, we find that the goods and services identified in the application are identical to and otherwise closely related to the goods and services identified in the pleaded registrations and by Opposer's common law marks, including KRYPTO THE SUPERDOG, and that the channels of trade and classes of purchasers are the same. These factors weigh heavily in favor of a finding of likelihood of confusion.

There is no evidence regarding purchaser care or sophistication. However, Opposer asserts that consumers of its identified goods and services are members of the general public, and the identified goods and services are relatively inexpensive. We have no reason to question this assertion, and find it equally applicable to the goods and services identified in the application (which, as discussed above, are identical or closely related to those of Opposer). "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, 1326, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000). Therefore, the *du Pont* factor of the conditions of sale also weighs in favor of a finding of a likelihood of confusion.

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<sup>54</sup> 1 TTABVUE 13, ¶ 14; 5 TTABVUE 3, ¶ 14.

B. Comparison of the Marks

We next turn to the *du Pont* factor of the similarities and dissimilarities between Applicant's mark SUPER DOGS and Opposer's pleaded marks, SUPERMAN, KRYPTO THE SUPERDOG, SUPERGIRL, SUPERWOMAN, SUPER FRIENDS, and DC SUPER HEROES. We analyze "the marks in their entirety as to appearance, sound, connotation and commercial impression." *In re Viterra*, 671, F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *du Pont*, 177 USPQ at 567). *See also Palm Bay*, 73 USPQ2d at 1691. Further, "[t]he 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*, 82 USPQ2d at 1905). 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 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

In comparing the marks, we are mindful that where, as here, Opposer's and Applicant's identified goods and services are identical, the degree of similarity between the marks necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods and services. *Coach Servs.*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d

874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014).

Applicant's mark SUPER DOGS and Opposer's marks SUPERMAN, KRYPTO THE SUPERDOG, SUPERWOMAN, SUPERGIRL, SUPER FRIENDS and DC SUPER HEROES are highly similar in appearance and sound. All of these marks share the superlative SUPER followed by a short, generic term identifying the particular characters (e.g., MAN, WOMAN, PETS, DOG), with or without a space or hyphen. The presence or absence of a hyphen or a space does not distinguish Applicant's marks from Opposer's marks in any meaningful way. *See, e.g., Nahshin v. Prod. Source Int'l LLC*, 107 USPQ2d 1257, 1258 n.2 (TTAB 2013) ("the presence or absence of a hyphen is insignificant to our ultimate decision."); *Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1712 (TTAB 2010) (hyphen did not distinguish MAGNUM from MAG-NUM).

As to the individual marks, as noted above, Applicant's mark is most similar to Opposer's mark KRYPTO THE SUPERDOG. This is so because Applicant's mark consists of the final term in Opposer's mark in its plural form. There is no material difference between singular and plural forms of the same term. *See, e.g., In re Belgrade Shoe*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969); *Weider Publ'ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1355 (TTAB 2014), *appeal dismissed per stipulation*, No. 14-1461 (Fed. Cir. Oct. 10, 2014); *In re Strategic Partners Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012) ("the difference between the singular form



ANYWEAR depicted in the applied-for mark and the plural form ANYWEARS in applicant's existing registration is not meaningful.”).

Likelihood of confusion often has been found where Opposer’s mark incorporates Applicant’s mark. *See, e.g., In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (applicant’s mark ML is similar to registrant’s mark ML MARK LEES); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406, 407 (CCPA 1967) (THE LILLY as a mark for women's dresses is likely to be confused with LILLI ANN for women’s apparel including dresses); *In re United States Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985) (CAREER IMAGE for women’s clothing stores and women’s clothing likely to cause confusion with CREST CAREER IMAGES for uniforms including items of women's clothing). *In United States Shoe*, the Board observed that “Applicant's mark would appear to prospective purchasers to be a shortened form of registrant's mark.” 229 USPQ at 709. This reasoning is equally applicable here.

We further find that Opposer’s pleaded marks SUPERMAN, KRYPTO THE SUPERDOG, SUPERBOY, SUPERGIRL, SUPER PETS, and DC SUPER HEROES, are significantly similar to Applicant’s mark SUPER DOGS because they all follow the same linguistic pattern. This linguistic similarity reinforces the connection between Applicant’s mark SUPER DOGS and Opposer’s pleaded marks. Moreover, the record establishes that the public is well aware that Superman has a dog named Krypto the Superdog. Consequently, purchasers would be likely to assume that Applicant’s mark SUPER DOGS is yet another variant of Opposer’s pleaded marks.

The first *du Pont* factor thus weighs in favor of finding a likelihood of confusion.

### C. Strength of Krypto the Superdog

Opposer devoted several pages in its brief outlining the record evidence concerning Krypto the Superdog as a character and as a mark. As noted above, Opposer introduced Krypto the Superdog in the 1950s<sup>55</sup> as the pet of the young Superman on his home planet of Krypton. Krypto the Superdog followed his master to Earth several years after Superman arrived. Krypto the Superdog is a superhero cartoon dog with many of the same superpowers as Superman, including extraordinary strength and speed, as well as x-ray vision.<sup>56</sup> Krypto the Superdog has appeared on more than 24 comic book covers featuring Superman and Superboy,<sup>57</sup> and in his own animated television series entitled *Krypto the Superdog*, which ran from 2005-2006,<sup>58</sup> and which was released on DVD.<sup>59</sup> According to the storyline, Krypto the Superdog is now a fully-grown dog who is adopted by a new owner, and the new owner “helps him in his new role as the hero of animals everywhere . . . . Krypto the Superdog! ‘Ruff, ruff, and away!’”<sup>60</sup> The series featured Krypto the Superdog as a member of a nine-animal team of pets with special abilities (e.g., powerful mental abilities, stretchable tail),

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<sup>55</sup> 78 TTABVUE 29, 32; 67 TTABVUE 34 (Opp. Exh. 3).

<sup>56</sup> 67 TTABVUE 609 (Opp. Exh. 16).

<sup>57</sup> 67 TTABVUE 14 (Opp. Exh. 2); 67 TTABVUE 34 (Opp. Exh. 3).

<sup>58</sup> 78 TTABVUE 32-33.

<sup>59</sup> 78 TTABVUE 85 (Dep. Exh. 1-A).

<sup>60</sup> 78 TTABVUE 121 (Dep. Exh. 11).

collectively known as the SUPER-PETS.<sup>61</sup> From November 2006 to April 2007, Opposer published a comic book named *Krypto the Superdog* based on the series.<sup>62</sup> Krypto the Superdog also was a member the DC SUPER FRIENDS,<sup>63</sup> a team of heroes, and he was featured in the children's book series entitled DC SUPER-PETS, including on the front and back covers.<sup>64</sup>

Opposer has licensed the KRYPTO THE SUPERDOG mark on a variety of merchandise, including toys, games, shirts, and hats,<sup>65</sup> and Opposer has sold books under the KRYPTO THE SUPERDOG mark, prominently featuring the character Krypto the Superdog.<sup>66</sup> Opposer earned appreciable revenue from sales of KRYPTO THE SUPERDOG products over a four year period from 2005 to 2008.<sup>67</sup> The record also includes evidence of a popular website devoted to fanfiction based on Krypto the Superdog<sup>68</sup> and other websites devoted to Krypto the Superdog fan clubs.<sup>69</sup>

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<sup>61</sup> 78 TTABVUE 121 (Dep. Exh. 11).

<sup>62</sup> 67 TTABVUE 7 (Opp. Exh. 1).

<sup>63</sup> 78 TTABVUE 260 (Dep. Exh. 13).

<sup>64</sup> 67 TTABVUE 177 (Opp. Exh. 12).

<sup>65</sup> 78 TTABVUE 40-42; 78 TTABVUE 340 (Dep. Exh. 16); 79 TTABVUE 3 (Dep. Exh. 26) (Opposer reproduced relevant thumbnails in its brief at 90 TTABVUE 17-18).

<sup>66</sup> 79 TTABVUE 566 (Dep. Exh. 27) (Opposer reproduced relevant thumbnails in its brief at 90 TTABVUE 16-17).

<sup>67</sup> These figures are confidential, and therefore are only generally referenced.

<sup>68</sup> 69 TTABVUE 106 (Opp. Exh. 35).

<sup>69</sup> 69 TTABVUE 109 (Opp. Exh. 36); 69 TTABVUE 114 (Opp. Exh. 37); 69 TTABVUE 116 (Opp. Exh. 38); 69 TTABVUE 119 (Opp. Exh. 39); 69 TTABVUE 180 (Opp. Exh. 44).

Based on the record evidence, we find that KRYPTO THE SUPERDOG is a somewhat strong mark for collateral merchandise such as clothing and toys. This factor weighs slightly in favor of a finding of likelihood of confusion.

V. Conclusion

We conclude, after considering all evidence and arguments bearing on the relevant *du Pont* factors, including the evidence and arguments that we have not specifically discussed herein, that Applicant's mark SUPER DOGS, as used on the goods and services identified in the application, so resembles Opposer's pleaded registrations and common law marks SUPERMAN, SUPERWOMAN, SUPERGIRL, KRYPTO THE SUPERDOG, SUPER FRIENDS, and DC SUPER HEROES,<sup>70</sup> as used on the identical or closely related goods and services identified in the registrations, as to be likely to cause confusion, mistake, or deception. In view thereof, Opposer has proved its claim under Section 2(d) of the Trademark Act.

**Decision:** The opposition is sustained and registration to Applicant is refused in each class.<sup>71</sup>

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<sup>70</sup> As previously notes, Opposer only claims common law rights in the mark DC SUPER HEROES.

<sup>71</sup> Accordingly, we need not and do not reach the merits of Opposer's dilution claim.