

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed:  
November 14, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Joseph Tsiyoni d/b/a Shairon Int'l Trade*

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Serial No. 85737891

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Joseph Tsiyoni, *pro se*.

Robin Mittler, Trademark Examining Attorney, Law Office 117 (Brett J. Golden,  
Managing Attorney).

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Before Grendel, Greenbaum and Adlin, Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Joseph Tsiyoni d/b/a Shairon Int'l Trade (“applicant”) filed, on September 25, 2012, an application to register on the Principal Register the standard character mark PRIDER for goods ultimately identified as “Motor standing scooters, Motorized personal mobility scooters, personal mobility device namely standing motor scooters for multi purposes, for persons who can stand and drive” in International Class 12.<sup>1</sup>

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<sup>1</sup> Asserting February 10, 2009, as the date of first use, and September 21, 2012, as the date of first use in commerce.

The examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to applicant's goods, so resembles the following previously registered standard character marks, all owned by Pride Mobility Products Corporation, as to be likely to cause confusion:

PRIDE for "electrically powered scooter vehicles for use by elderly, infirm or disabled persons" in International Class 12;<sup>2</sup>

PRIDE MOBILITY PRODUCTS (the words "Mobility Products" disclaimed) for "lift chairs for use primarily by elderly, disabled and infirm persons, electrically powered scooter vehicles, powerchairs and wheelchairs for use primarily by elderly, disabled and infirm persons" in International Class 12;<sup>3</sup>

PRIDE for "electrically driven mid-wheel drive powered wheelchairs" in International Class 12;<sup>4</sup>

PRIDE--THE FIRST NAME IN SCOOTERS for "Electrically powered scooter vehicles for use primarily by elderly, disabled and infirm persons" in International Class 12;<sup>5</sup>

PRIDE for "Pre-recorded audio visual playback media, namely, compact discs, digital video discs and video tapes encoded with promotional and instructional information concerning sales, service, maintenance and/or use of electrically powered scooter vehicles, power chairs, wheelchairs, lift chairs and accessories for the same, all such vehicles and chairs being for use by elderly, infirmed, handicapped and/or disabled persons" in International Class 9;<sup>6</sup> and

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<sup>2</sup> Reg. No. 1790294. Renewed.

<sup>3</sup> Reg. No. 2476247. Renewed.

<sup>4</sup> Reg. No. 2484480. Renewed.

<sup>5</sup> Reg. No. 2942281. Section 8 & 15 combined declaration accepted and acknowledged.

<sup>6</sup> Reg. No. 2996410. Section 8 & 15 combined declaration accepted and acknowledged.

PRIDE for “Electrical, mechanical and hydraulic lifts for personal mobility vehicles, personal mobility vehicle accessories, and equipment, including repair and replacement parts therefor; ramps for use in loading and unloading personal mobility vehicles onto and off of automobiles, vans and trucks” in International Class 12;<sup>7</sup>

This appeal ensued following applicant’s unsuccessful request for reconsideration.

Before we turn to the merits of the case, we must address two preliminary issues. First, the examining attorney's objection to late-filed evidence is sustained. Trademark Rule 2.142(d). The exhibits attached to applicant's brief comprise more than 150 pages, much (and possibly all) of which appears to be included in the approximately 190 pages that applicant attached to his response to the first Office action and/or the approximately 225 pages that applicant attached to his request for reconsideration. “The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed.” 37 C.F.R. § 2.142(d). See *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1990-91 (TTAB 2011). The applicant has the responsibility to make sure that the record is complete prior to filing a notice of appeal. *In re Van Valkenburgh*, 97 USPQ2d 1757, 1768 n.32, 1769 (TTAB 2011). Rather than engaging in a time-consuming comparison of the attachments to the brief and the previously-filed material, we have only considered the previously-filed material, because even if some of the attachments to applicant’s brief were not previously filed, they are late, and cannot be considered.

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<sup>7</sup> Reg. No. 4219174, issued October 2, 2012.

Second, the examining attorney raised a “conduct-based objection” directed to applicant’s inclusion, on the first and last pages of his brief, of a cartoon figure seated in a wheelchair with his middle finger extended upwards and a partial verbal bubble containing symbols usually associated with expletives. Applicant labels the graphic a “wheelchair representing registrant.” We agree with the examining attorney that applicant should not have included this unseemly graphic in his brief. We therefore sustain the objection to the extent that we remind applicant that the Board expects all parties, whether represented by counsel or proceeding *pro se*, “to conduct their business with decorum and courtesy.” 37 C.F.R. § 2.192. However, we will not require applicant to submit a substitute brief without the graphic because the inclusion or exclusion of the graphic has no effect on our decision on the merits.

We now turn to the merits of this proceeding. When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Co., 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 or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We begin by considering the similarity between the respective goods, channels of trade and classes of purchasers. It is sufficient to find goods to be

similar where the circumstances surrounding their marketing are such that they would be encountered by the same potential purchasers under circumstances that would give rise to the mistaken belief that they originate from the same source. *Online Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000). The issue is not whether the goods will be confused with each other, but rather whether the public will be confused as to their source. *Safety-Kleen Corp. v. Dresser Indus. Inc.*, 518 F.2d 1399, 186 USPQ 476, 480 (CCPA 1975). Finally, we base our evaluation on the goods as they are identified in the application and cited registrations. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

The “electrically powered scooter vehicles<sup>8</sup> for use by elderly, infirm or disabled persons” identified in cited Reg. No. 1790294 (for PRIDE), and the “electrically powered scooter vehicles” with the intended users listed in a slightly different order, identified in cited Reg. Nos. 2476247 (for PRIDE MOBILITY PRODUCTS) and 2942281 (for PRIDE-THE FIRST NAME IN SCOOTERS), encompass the “motor standing scooters,” “motorized personal mobility scooters,” and “personal mobility device namely standing motor scooters for multi purposes, for persons who can stand and drive” identified in the involved application. Because

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<sup>8</sup> “Vehicle” is defined as “a machine that is used to carry people or goods from one place to another.” Merriam-Webster Online Dictionary, retrieved from merriam-webster.com/dictionary/vehicle. The Board may take judicial notice of dictionary definitions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

applicant does not specify the users of his “motor standing scooters” or “motorized personal mobility scooters,” and broadly identifies “persons who can stand and drive” as the intended users of his “personal mobility device namely standing motor scooters for multi purposes,” his goods, as identified, encompass scooters for elderly, disabled, and infirm individuals. The identifications of goods in the cited registrations do not exclude “persons who can stand and drive,” and we cannot read such a limitation into registrant’s identification of goods. While some elderly, disabled and infirm individuals undoubtedly cannot stand and drive, others surely are able to do so. Thus, as to those registrations, the goods are legally identical.

Moreover, with regard to the remaining registrations for PRIDE, we find that registrant's wheelchairs, lifts and ramps, and recorded information about these products, have similar or related functions and purposes as applicant’s scooters. All of these items are designed to assist people with mobility limitations. In addition, the examining attorney submitted approximately ten use-based, third-party registrations showing, in each instance, that the same mark has been registered to different owners for both applicant's and registrant's types of products.<sup>9</sup> These third-party registrations, while not evidence of use of the marks therein, may serve to suggest that the goods are of a type which may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). See, e.g., Reg. No. 3145417 (motorized and non-motorized mobility scooters, electric mobility scooters, wheelchairs and electric wheelchairs); Reg. No. 3352455 (accessibility devices, namely, wheelchair lifts, mobility scooter lifts, power

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<sup>9</sup> January 30, 2013 Office action.

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wheelchair lifts, power operated stairlifts and vertical platform lifts; and personal mobility devices, namely, manual wheelchairs, power wheelchairs and motorized, self-propelled, wheeled personal mobility devices, namely, scooters); Reg. No. 3467981 (personal mobility vehicles, namely, motorized scooters, and manual and motorized wheelchairs for elderly, disabled, infirm and handicapped individuals; lifts attached to vehicles for lifting scooters and manual and motorized wheelchairs into or onto automobiles or other vehicles); Reg. No. 4166720 (chair lifts, wheelchairs, motorized personal mobility scooters, power transfer seats for vehicles to provide easier ingress and egress from a vehicle for disabled of mobility impaired people); Reg. No. 3972407 (power and manual wheelchairs, motorized scooters, and chair lifts).

As further evidence of the relationship between applicant's and registrant's goods, the examining attorney submitted printouts from third-party websites that offer various types of mobility aids, including several types of scooters and/or wheelchairs, lifts and ramps, under the same mark. See, e.g., webpages for United Seating & Mobility <unitedseating.com>, Mrs. Mobility <mrsmobility.com> and Hoveround <hoveround.com>.<sup>10</sup>

Further, because the identifications in the application and cited registrations contain no limitations as to channels of trade, we must presume that they move in all channels of trade normal for those goods. *In re Viterra, Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012), quoting *Hewlett-Packard Co.*, 62 USPQ2d at 1005. Because the goods are mobility and accessibility devices, the goods are

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<sup>10</sup> January 30, 2013 Office action.

presumed to be sold through medical equipment suppliers. Further, as discussed above, as identified in the application and cited registrations, the intended classes of consumers for applicant's and registrant's goods overlap, and would include those with mobility impairments. In addition, the third-party registrations and websites of record, including those mentioned above, demonstrate that applicant's scooters and registrant's wheelchairs, lifts and ramps are of a type that in fact move in the same channels of trade, and would be encountered by the same classes of consumers.

Accordingly, we find that applicant's and registrant's goods are legally identical or otherwise related accessibility and mobility devices, and that they are offered in the same channels of trade to the same potential customers.

We turn then to the *du Pont* factor of the similarity of the marks, *i.e.*, whether applicant's mark PRIDER and registrant's marks PRIDE, PRIDE MOBILITY PRODUCTS and PRIDE-THE FIRST NAME IN SCOOTERS are similar or dissimilar when compared in their entirety in terms of appearance, sound, connotation and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), *quoting du Pont*, 177 USPQ at 567. The test, under the first *du Pont* factor, 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 overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. Further, in making our



determination, we keep in mind that where, as here, the goods are legally identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines.<sup>11</sup> *Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010).

Applicant's mark PRIDER is highly similar in appearance and sound to registrant's mark PRIDE, the mark in four of the cited registrations, differing only by the final letter "R" in applicant's mark. Slight differences in marks do not normally create dissimilar marks. *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) ("Moreover, although there are certain differences between the [marks' CAYNA and CANA] appearance, namely, the inclusion of the letter 'Y' and the design feature in applicant's mark, there are also obvious similarities between them. Considering the similarities between the marks in sound and appearance, and taking into account the normal fallibility of human memory over a period of time (a factor that becomes important if a purchaser encounters one of these products and some weeks, months, or even years later comes across the other), we believe that the marks create substantially similar commercial impressions."). *See also United States Mineral Products Co. v. GAF Corp.*, 197 USPQ 301, 306 (TTAB 1977) ("'AFCO' and 'CAFCO,' which differ only as to the letter 'C' in USM's mark, are substantially similar in appearance and sound") and *In re Bear Brand Hosiery*

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<sup>11</sup> As discussed above, the goods identified in Reg. Nos. 1790294, 2476247 and 2942281, for PRIDE, PRIDE MOBILITY PRODUCTS and PRIDE-THE FIRST NAME IN SCOOTERS, respectively, are legally identical to the goods identified in the application.

Co., 194 USPQ 444, 445 (TTAB 1977) (“The mark of the applicant, ‘KIKS’ and the cited mark ‘KIKI’ differ only in the terminal letter of each mark. While differing in sound, the marks are similar in appearance and have a somewhat similar connotation.”).

PRIDE also is the most prominent part of registrant’s marks PRIDE-THE FIRST NAME IN SCOOTERS and PRIDE MOBILITY PRODUCTS as it is the first word in both marks. *See Palm Bay*, 73 USPQ2d at 1692; *see also Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[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.”). The slogan PRIDE-THE FIRST NAME IN SCOOTERS emphasizes the word PRIDE, stressing that PRIDE is “the first name in scooters.” Moreover, at a minimum, the disclaimed wording MOBILITY PRODUCTS merely describes a significant feature of registrant’s wheelchairs, lifts, scooters, etc. Descriptive and disclaimed matter typically is less significant or less dominant when comparing marks. *See In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re National Data Corp.*, 753 F.2d 1056, 1060, 224 USPQ 749, 752 (Fed. Cir. 1985).

Furthermore, PRIDER is a telescoped term consisting of the recognizable words PRIDE and RIDER. As such, PRIDER and PRIDE have related connotations and create the same overall commercial impression, namely, mobility products that individuals (riders) use with pride. Moreover, purchasers reasonably could assume

that registrant refers to users of its PRIDE products (or the users refer to themselves) as “PRIDERS.”

Due to the overall similarities in sound, appearance, connotation and commercial impression, purchasers likely will assume that applicant’s goods sold under the PRIDER mark constitute a new or related product line from the same source as the goods sold under the PRIDE and PRIDE-inclusive marks with which they are acquainted, with the “R” possibly referring to a particular model of registrant’s PRIDE scooters. Applicant’s specimens, which display the mark as “PrideR”, support this interpretation.

Therefore, we find that when applicant's mark and registrant's marks are compared in their entireties, they are sufficiently similar in appearance, sound, connotation and commercial impression that, if used in connection with related goods, confusion would be likely to occur.

Applicant has peppered his brief with references to issues that are not pertinent to our determination, such as acquired distinctiveness, acceptability of specimens, laches, and consent or concurrent use agreements. We need not discuss these issues, and focus instead on arguments directed to the relevant *du Pont* factors. To this end, applicant raises numerous arguments to support his position that confusion is unlikely because the marks, goods, classes of consumers and channels of trade differ, and the consumers are sophisticated.

As to the similarity of the goods, as noted above, the issue is not whether the goods will be confused with each other, but rather whether the public will be

confused about their source. *Majestic Distilling*, 65 USPQ2d at 1205; *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). Clearly, consumers routinely are exposed to these types of goods coming from the same source. The cited registrations for various accessibility and mobility devices, including those of applicant and registrant, and examples of third-party websites submitted by the examining attorney, wherein scooters, wheelchairs, lifts, ramps and scooter parts are sold on the same site under the same mark, further support this conclusion.

As to applicant's arguments regarding the differences between standing and seated scooters, we refer to the EV Rider "Stand-N-Ride" Electric Scooter, offered on the Electric Scooters Galore website <electric-scooters-galore.com>.<sup>12</sup> This product transforms from a standing into a sitting scooter, thus indicating that standing and sitting scooters may be one in the same. In addition, we note that the "motorized personal mobility scooters" identified in the application are not limited to "standing" scooters, and registrant's "electrically powered scooter vehicles" do not specify whether they are standing or sitting scooters. As noted above, the question of likelihood of confusion is determined based on the identification of goods set forth in the application and registrations at issue, not on extrinsic evidence of actual use. *See, e.g., Coach Services Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369-70, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *Octocom*, 16 USPQ2d at 1787. Also as noted above, unrestricted and broadly-worded identifications of goods are presumed to encompass all goods of the type described. *See In re Jump Designs, LLC*, 80

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<sup>12</sup> June 14, 2013 Denial of Request for Reconsideration.

USPQ2d 1370, 1374 (TTAB 2006) (*citing In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)). Consequently, applicant's "motorized personal mobility scooters" and registrant's "electrically powered scooter vehicles" include both sitting and standing scooters.

Applicant also argues that the classes of consumers are different because there is no evidence that they are the same, and because "PrideR is for everyone who can stand but can't walk long; Pride wheelchairs are only for 'elderly, disabled and infirm persons.'" App. Br., pp. 4, 21. However, as the examining attorney aptly notes, the "persons who can stand and drive" limitation pertains only to one item in applicant's identification of goods; the other two items contain no such limitation. Moreover, an individual who can stand and drive but is unable to walk for a long time or over a long distance may have such physical limitations due to age, disability or infirmity. Thus, the intended users, as identified in the application and registrations, may be identical. In addition, the identification of goods in cited Reg. No. 2476247 includes lift chairs and electrically powered scooter vehicles and wheelchairs "for use primarily by elderly, disabled and infirm persons," with the word "primarily" indicating that others, such as "those who can stand but can't walk long," may use the goods, and the identification of goods in cited Reg. No. 2484480 is for "electrically driven mid-wheel drive powered wheelchairs" with no limitations as to intended users.

Next, applicant argues that the channels of trade are different because there is no evidence that wheelchairs are sold online, as are applicant's scooters.

However, the application and cited registrations do not specify whether they are sold online or in brick and mortar stores, and we cannot presume that registrant does not sell wheelchairs online or that applicant only sells scooters online, when such limitations are absent from the application and registrations. *Viterra*, 101 USPQ2d at 1908, *quoting Hewlett-Packard*, 62 USPQ2d at 1005 (absent restrictions in an application and/or registration, the identified goods are “presumed to travel in the same channels of trade to the same class of purchasers.”). In any event, the record includes printouts of web pages from the heartwayusa.com and unitedseating.com websites, each of which shows scooters and wheelchairs for sale at an “Online Store” associated with the website.<sup>13</sup>

Applicant further contends that registrant does not actually make scooters because registrant’s goods have more than two wheels, and that “scooters” should not have been included in the registrant’s identifications of goods. However, a trademark or service mark registration on the Principal Register is *prima facie* evidence of the validity of the registration and the registrant’s exclusive right to use the mark in commerce in connection with the specified goods and/or services. 15 U.S.C. § 1057(b). Consequently, such arguments constitute an impermissible collateral attack on the cited registrations, and may not be considered in an *ex parte* proceeding. *See Dixie Restaurants*, 41 USPQ2d at 1534-35; *In re Peebles Inc.*, 23 USPQ2d 1795, 1797 n.5 (TTAB 1992).

As to applicant’s argument that purchasers of mobility devices are sophisticated and would exercise care in buying such products, it is well-settled that

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<sup>13</sup> January 30, 2013 Office action.

even if purchasers are sophisticated or knowledgeable in a particular field, that does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. This is especially true in cases such as the instant one, involving similar marks and legally identical and otherwise closely related goods. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), *citing Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) (“Human memories even of discriminating purchasers ... are not infallible.”). *See also In re Decombe*, 9 USPQ2d 1812 (TTAB 1988). We find that the similarities between the marks and the goods sold thereunder outweigh any sophisticated purchasing decision. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff’d*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods).

As to the marks, applicant argues, without support, that PRIDE is weak and diluted. The third-party registrations that applicant made of record do not include the word PRIDE, or any derivative thereof, and none of the registrations identifies mobility devices such as those identified in the involved application or cited registrations. Therefore, while third-party registrations may be used to show that a term has some significance in the industry such that consumers would look to other elements of the mark to distinguish source, the third-party registrations that applicant submitted have little probative value on this point. Moreover, there is no

other evidence that third-parties use the word PRIDE or any derivative thereof to identify the source of such mobility devices.

When we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, including arguments not specifically addressed herein, we conclude that in view of the substantial similarity in the appearance, sound and commercial impression of applicant's mark, PRIDER, and registrant's marks, PRIDE, PRIDE MOBILITY PRODUCTS and PRIDE-THE FIRST NAME IN SCOTERS, their contemporaneous use on the legally identical and otherwise closely related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods. To the extent that any of applicant's arguments raises a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant "because the newcomer has the opportunity and obligation to avoid confusion with existing marks." *Hewlett-Packard*, 62 USPQ2d at 1003.

**Decision:** The refusal of registration under Trademark Act Section 2(d) is affirmed.