

<p>This Opinion is Not a Precedent of the TTAB</p>
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Hearing: March 1, 2017

Mailed: April 5, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Shawn Crenshaw, Inc.*

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Serial No. 86328394

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Patricia Lawrence Kolaras and Lauren Roncoroni of The PLK Law Group, P.C.  
for Shawn Crenshaw, Inc.

Roger T. McDorman, Trademark Examining Attorney, Law Office 109,  
Michael Kazazian, Managing Attorney.

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Before Kuhlke, Taylor and Lynch,  
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

## I. Background and Evidentiary Issue

Shawn Crenshaw, Inc. (“Applicant”) seeks registration on the Principal Register of the mark shown below for “Colognes and perfumes” in International Class 3:<sup>1</sup>





The description of the mark states: “The mark consists of a two-dimensional design mark comprising a bottle in the shape of a flat-sided ring with a cap at the top and the wording ‘OVATION FOR MEN’ appearing on the bottom of the front surface of the ring. The cap is not claimed as a feature of the mark and is intended to show placement.” Applicant disclaimed the wording FOR MEN.

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the following registered marks:

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<sup>1</sup> Application Serial No. 86328394 was filed July 3, 2014 based on an intent to use under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

<b>Reg. No.</b>	<b>Mark</b>	<b>Goods/Services</b>	<b>Owner</b>
3465511	OVATION (standard characters)	Bath oils for cosmetic purposes; Body and beauty care cosmetics; Cleansing creams; Cocoa butter for cosmetic purposes; Coloring preparations for cosmetic purposes; Cosmetic creams; Cosmetic creams for skin care; Cosmetic oils; Cosmetic oils for the epidermis; Cosmetic preparations against sunburn; Cosmetic preparations for body care; Cosmetic preparations for eye lashes; Cosmetic preparations for skin renewal; Cosmetic products in the form of aerosols for skin care; Cosmetic products in the form of aerosols for skincare; Cosmetic rouges; Cosmetic soaps; Cosmetic sun-protecting preparations; Cosmetic sun-tanning preparations; Cosmetic suntan lotions; Cosmetics; Cosmetics, namely, compacts; Cosmetics, namely, lip primer; Cosmetics, namely, lip repairers; Face creams for cosmetic use; Foams containing cosmetics and sunscreens; Nutritional oils for cosmetic purposes; Pencils for cosmetic purposes; Perfume oils for the manufacture of cosmetic preparations; Pre-moistened cosmetic towelettes; Pre-moistened cosmetic wipes; Rose oil for cosmetic purposes; Skin and body topical lotions, creams and oils for cosmetic use; Soaps; Tissues impregnated with cosmetic lotions; Toners; Topical skin sprays for cosmetic purposes	Robert D. Bell & Ann Bell
4483760	OVATION (standard characters)	Hair care preparations	DC Labs, Inc.

<b>Reg. No.</b>	<b>Mark</b>	<b>Goods/Services</b>	<b>Owner</b>
4424387	OVATION ADVANCED CELL THERAPY (standard characters; disclaimer of ADVANCED; 2(f) in part as to CELL THERAPY)	Hair care preparations	DC Labs, Inc.
4424386	OVATION MEN'S CELL THERAPY (standard characters; disclaimer of MEN'S; 2(f) in part as to CELL THERAPY)	Hair care preparations	DC Labs, Inc.
4274867	 OVATION	Hair care preparations	DC Labs, Inc.
4142800	OVATION HAIR (standard characters)	Hair care preparations	DC Labs, Inc.
4283507	OVATION NATION (standard characters)	Hair care products, namely, shampoos, conditioners, and styling preparations, styling spray, styling lotion, styling gel and styling mousse	DC Labs, Inc.
4082489	 OVATION	hair care products, namely, shampoos, conditioners, and styling preparations, styling spray, styling lotion, styling gel and styling mousse	DC Labs, Inc.
4082488	OVATION CELL THERAPY (standard characters; disclaimer of CELL THERAPY)	hair care products, namely, shampoos, conditioners, and styling preparations, styling spray, styling lotion, styling gel and styling mousse	DC Labs, Inc.
4256674	OVATION HAIR THICKER STRONGER LONGER (standard characters; disclaimer of HAIR THICKER STRONGER LONGER)	hair care products, namely, shampoos, conditioners, and styling preparations, styling spray, styling lotion, styling gel and styling mousse	DC Labs, Inc.

After the Examining Attorney made the refusal final, Applicant requested reconsideration and appealed. On remand, the Examining Attorney denied the request for reconsideration. The appeal resumed, has been fully briefed, and an oral hearing took place.

Turning first to the record on appeal, the version of Trademark Rule 2.142(d) operative at the time that the record and briefing were completed provided that “[t]he 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.”<sup>2</sup> Therefore, to the extent that any of the evidence attached to Applicant’s appeal brief was not previously submitted, it is not timely and we give it no consideration. *See In re Michalko*, 110 USPQ2d 1949, 1950 (TTAB 2014) (rejecting untimely evidence attached to a brief and noting that parties should avoid the practice because even if such evidence already is in the record, attaching it to the brief increases the burden on the Board to review and attempt to locate the same evidence in the prosecution record). In addition, where Applicant attempts to rely on third-party registrations that are not in the record, we decline to consider them. *See In re Volvo Cars of N. Am.*,

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<sup>2</sup> The current Trademark Rule 2.142(d) reads:

The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal. If the appellant or the examining attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a request to the Board to suspend the appeal and to remand the application for further examination.

*Inc.*, 46 USPQ2d 1455, 1456 (TTAB 1998) (“[T]he mere listing of third-party registrations and/or applications is insufficient to properly make them of record. Rather, copies of the official records themselves, or the electronic equivalent thereof, ... must be submitted”).

## II. Likelihood of Confusion

The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*du Pont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods. *See In re Chatam Int’l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944 (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.”).

We focus our analysis primarily on Registration Nos. 3465511 and 4483760, both for OVATION in standard characters (hereinafter, “the Registrations”) because if we find no likelihood of confusion with these marks, then it follows there would be no likelihood of confusion with the marks in the other cited registrations, which bear less similarity to Applicant’s mark. *See In re Max Capital Group Ltd.*, 93 USPQ2d

1243, 1245 (TTAB 2008) (confining likelihood of confusion analysis to one of multiple cited registrations deemed closest to the applied-for mark).

#### A. Similarity of the Marks

Turning to the comparison of the applied-for and marks in the cited Registrations, we consider them “in their entirety as to 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 assesses not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Edom Laboratories Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

Applicant’s mark consists of the two-dimensional image of a ring-shaped bottle that bears the wording OVATION FOR MEN. We find that the word OVATION dominates Applicant’s mark. Given the use on colognes and perfumes, we agree with Applicant in finding that consumers likely will perceive the ring-shaped bottle design as a depiction of the cologne or perfume bottle.<sup>3</sup> Typically, when a mark comprises both wording and a design, greater weight is given to the wording in a likelihood of confusion analysis. *See, e.g., In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1911

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<sup>3</sup> 7 TTABVue 11 (Applicant’s Brief) (Applicant refers to “... the O-shaped ring which represents a bottle of cologne”).

(Fed. Cir. 2012); *see also Max Capital Grp. Ltd.*, 93 USPQ2d at 1248 (holding applicant's mark, MAX with pillar design, and registrant's mark, MAX, likely to cause confusion, noting that the "addition of a column design to the cited mark ... is not sufficient to convey that [the] marks ... identify different sources for legally identical insurance services"). Consumers tend to focus on wording over a design because the wording is used to "call for" the goods. *See Viterra*, 101 USPQ2d at 1911. We reject Applicant's contention that "a consumer is more likely to reference the design element of Applicant's mark rather than the literal word portion when purchasing the goods." Of the wording in Applicant's mark, we note that the disclaimed FOR MEN portion merely describes that the cologne or perfume is for men, such that consumers would not be inclined to rely on that wording as source indicating. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985). Thus, the OVATION portion of Applicant's mark, which also is in larger font, stands out as the dominant part of the mark. Turning to the marks in the Registrations, they consist only of the word OVATION in standard characters, which could be presented in the same font used in Applicant's mark. *See Viterra*, 101 USPQ2d at 1909; *see also* 37 C.F.R. § 2.52(a).

Given that Applicant's and Registrants' marks share the identical word OVATION, and given its dominance in Applicant's mark, we find the three marks similar in appearance and sound. Also, the shared wording contributes to a strong similarity in connotation and commercial impression among the marks, dictated by



OVATION as the ascendant element of Applicant's mark. The other elements, descriptive wording and a picture of a container for such goods, have diminished importance to the connotation and commercial impression of the mark because they emphasize the nature of the goods.

In view of the resemblance in sound, appearance, connotation and commercial impression, we therefore find Applicant's mark and the marks in the Registrations very similar.

#### B. The Goods, Trade Channels, and Classes of Consumers

We next address the second and third *du Pont* factors, the similarity or dissimilarity of the goods and channels of trade. The test is not whether consumers would be likely to confuse the goods, but rather whether they would be likely to be confused as to their source. *In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012). Therefore, to support a finding of likelihood of confusion, the goods need not be identical or even competitive. "Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such, that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source or there is an association or connection between the sources of the goods." *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009). We must focus on the goods as identified in the application and the Registrations, not on any extrinsic evidence of actual use. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110

USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Applicant's goods are "Colognes and perfumes," while the goods in the Registrations are "Hair care preparations" and a variety of "Body and beauty care cosmetics." While Applicant correctly notes that the goods are not identical, the record nonetheless includes voluminous evidence of the relatedness of the goods in the Registrations and in the application. For example:

- The website of Aveda offers its hair care products such as shampoo, hair spray, and smoother, various cosmetics such as foundation, powder, and eye color, and men's cologne, all under the AVEDA mark.<sup>4</sup>
- Under the AVON mark, Avon.com offers hair masks, hair serum, and other hair treatments, as well as cosmetics such as lipsticks, skin treatments, and eau de parfum spray.<sup>5</sup>
- Under the PHILOSOPHY mark, the Philosophy.com website offers hair conditioner, shampoo, eau de parfum, and cosmetics such as foundation, concealer, moisturizer, and eye cream.<sup>6</sup>
- Under the SANTA MARIA NOVELLA mark, its website offers cream, shampoo, hair conditioner, hair cream, and cologne.<sup>7</sup>
- Under the SEI BELLA mark, the Melaleuca website offers fragrances, hair care products such as shampoo, conditioner, and mousse, and cosmetics such as facial crème, lotion, serum and "firming treatment."<sup>8</sup>

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<sup>4</sup> May 13, 2015 Office Action at 2-4 ([www.aveda.com](http://www.aveda.com)).

<sup>5</sup> *Id.* at 8-15 ([www.avon.com](http://www.avon.com)).

<sup>6</sup> *Id.* at 20-22 ([www.philosophy.com](http://www.philosophy.com)).

<sup>7</sup> *Id.* at 26-28 ([www.santamarianovellausa.com](http://www.santamarianovellausa.com)).

<sup>8</sup> *Id.* at 29-31 ([www.melaleuca.com](http://www.melaleuca.com)).

- The website of Askmen.com features under the heading “Men’s Cosmetics” guides on, *inter alia*, “The Best Skin Products for Fall,” and “The Best Colognes for Fall.”<sup>9</sup>

In addition, numerous third-party registrations identify both Applicant’s goods and the goods in the Registrations under the same mark, thereby suggesting that such goods may emanate from the same source. *See Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013) (“The use-based, third-party registrations . . . also have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark.”); *see also In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). For example:

- Reg. No. 4562674 for STYLEPOINTS for goods and services including “hair care preparations,” “perfume,” skin, face, hand and body oils, creams, milks, lotions, gels and powders.”<sup>10</sup>
- Reg. No. 4587291 for BEAUTY BEGINS INSIDE for goods including “shampoo and conditioner,” “colognes, perfumes and cosmetics.”<sup>11</sup>
- Reg. No. 4602961 for SYMBIOTIC for goods including “Body and beauty care cosmetics,” “Hair care preparations,” and “Cologne.”<sup>12</sup>
- Reg. No. 4494992 for CADICE TOAL for, *inter alia*, “Colognes, perfumes and cosmetics,” “Hair masks,” “shampoo, conditioner,” and “Cosmetic hair dressing preparations.”<sup>13</sup>

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<sup>9</sup> Oct. 20, 2014 Office Action at 49 (www.askmen.com).

<sup>10</sup> Oct. 20, 2014 Office Action at 62-64.

<sup>11</sup> *Id.* at 65-71.

<sup>12</sup> *Id.* at 72-75.

<sup>13</sup> *Id.* at 76-79.

- Reg. No. 4577626 for BRILANKA for goods that include “body and beauty care cosmetics,” “perfumes and colognes” and “hair lotions.”<sup>14</sup>
- Reg. No. 4537346 for ANIISE for, *inter alia*, various cosmetic products, “perfumes, colognes,” “shampoos, hair conditioners and oil treatments.”<sup>15</sup>
- Reg. No. 4559953 for GREENISLAND & design for goods including “Cosmetics,” “Hair lotions; Hair oils,” “Perfumery,” and “Toilet water.”<sup>16</sup>
- Reg. No. 4583439 for NATIVE NATURALS for, *inter alia*, “cosmetics,” “hair shampoo, hair conditioner, hair gel,” and “perfumes.”<sup>17</sup>
- Reg. No. 4579938 for LOEL for goods that include “Cosmetics,” “Cosmetics in general, including perfumes,” and “Cosmetic hair dressing preparations; Cosmetic hair filling powders for covering bald and thinning spots on the scalp.”<sup>18</sup>
- Reg. No. 4580067 for ESIKA for goods including various cosmetics, “shampoo, hair conditioner,” “hair gel,” and “Fragrance products for personal use, namely, perfumes, colognes, eau de toilette.”<sup>19</sup>
- Reg. No. 4600665 for ORIGUMI for, *inter alia*, “hair care products,” “toilet water, perfume” and “cosmetics, and makeup.”<sup>20</sup>
- Reg. No. 4613036 for MAN-LUXE for goods including “Colognes, perfumes and cosmetics; conditioners,” as well as “Non-medicated preparations all for the care of skin, hair and scalp.”<sup>21</sup>
- Reg. No. 4601272 for MENSCEINCE for goods that include “Cosmetics,” “Hair care preparations,” and “Perfume.”<sup>22</sup>

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<sup>14</sup> *Id.* at 83-85.

<sup>15</sup> *Id.* at 86-88.

<sup>16</sup> *Id.* at 89-91.

<sup>17</sup> *Id.* at 92-94.

<sup>18</sup> *Id.* at 95-98.

<sup>19</sup> *Id.* at 99-101.

<sup>20</sup> *Id.* at 102-104.

<sup>21</sup> *Id.* at 105-07.

<sup>22</sup> *Id.* at 108-10.

- Reg. No. 4605447 for SOUTHLAND for, *inter alia*, “Hair Shampoos,” “Conditioners,” “Hair styling preparations,” various cosmetic products, “Cologne,” and “Perfume.”<sup>23</sup>
- Reg. No. 4603534 for CALIFORNIA KIDS for goods including “shampoo, conditioner,” “Hair styling preparations,” “Cosmetic preparations,” “Cosmetic preparations for the hair and scalp,” “Oils for perfumes and scents,” and “Body spray used as a personal deodorant and as fragrance.”<sup>24</sup>

Turning to the trade channels, the identification of Applicant’s goods and those in the cited Registrations are unrestricted. Thus, they are presumed to move in all channels of trade usual for such goods and are available to all potential classes of ordinary consumers. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, “we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods”); *In re Jump Designs LLC*, 80 USPQ2d at 1374; *In re Elbaum*, 211 USPQ at 640. The relatedness evidence described above establishes that cosmetics, hair care preparations, and perfume or cologne move in the same retail trade channels to the same consumers, who are ordinary members of the public.

Applicant makes a variety of misplaced arguments regarding trade channels and consumers. First, Applicant contends that its goods are “high-end,” such that consumers would exercise greater care in selecting. However, given that the application includes no restriction as to the high-end nature of Applicant’s perfume and cologne, Applicant’s argument is not borne out by its identification, which

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<sup>23</sup> *Id.* at 111-16.

<sup>24</sup> *Id.* at 117-

controls the analysis. We must “focus on the application and registrations rather than on real-world conditions, because ‘the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application.’” *Stone Lion Capital Partners*, 110 USPQ2d at 1162 (quoting *Octocom Sys., Inc. v. Houston Comp. Servs. Inc.*, 16 USPQ2d at 1787). For the same reason, we remain unpersuaded by Applicant’s claims and evidence about the alleged marketplace realities of the Registrants’ goods being sold only by particular methods or at certain price points. *See Cunningham*, 55 USPQ2d at 1848 (holding that the appellant “misstates the law” in arguing that the Board must focus on the goods as sold in the marketplace, and stating that “the Board must look to the registrations themselves to determine the scope of goods covered”).

Next, Applicant relies on an overly narrow view of likely confusion by arguing differences in the intended uses of the goods and how they are applied to argue that consumers would not confuse the goods themselves. As noted above, however, “a mistaken belief that [the relevant goods] originate from the same source or that there is an association or connection between the sources of the goods” may establish likely confusion. *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1353 (TTAB 2015).

Applicant also contends that distinctions in the Food and Drug Administration’s classification of the goods as cosmetics, drugs, or both, should bear on the analysis. Such potential differences in the way the goods are regulated is not dispositive as to a finding regarding relatedness or trade channels. Rather, we must assess whether

consumers, who might not be familiar with the details of such regulation, would mistakenly believe that the respective goods originate from the same source.

In considering all the arguments and timely, relevant evidence, the *du Pont* factors relating to the relatedness of the goods and the identity of trade channels weigh in favor of likely confusion.

### C. Number and Nature of Similar Marks for Similar Services

Applicant makes a two-pronged argument under this *du Pont* factor. First, Applicant contends that because both the Registrations coexist, registering Applicant's mark would not "present[] any greater likelihood of confusion."<sup>25</sup> The fact that the cited Registrations belonging to two different owners coexist is not determinative of the registrability of Applicant's mark, as each case must be decided on its own facts. *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to [Applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court.") We are not privy to the available evidence of relatedness of the relevant goods in those cases at the time of examination, but the evidentiary record before us provides compelling support for likely confusion between Applicant's mark and these marks. Furthermore, we have no evidence of other OVATION marks for cosmetics or for hair care products, and therefore find no basis

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<sup>25</sup> 7 TTABVUE 21 (Applicant's Brief).

upon which to conclude that the term is weak or diluted in the industry of either of the Registrations.

Second, Applicant argues that its mark can coexist with those in the cited Registrations in view of other third-party registrations for “same formative word” marks for “overlapping descriptions of goods.”<sup>26</sup> For example, Applicant points to coexisting NAKED-formative marks for similar goods. However, Applicant failed during prosecution to introduce the registrations upon which it seeks to rely, and as noted above, its untimely attachments to the Brief will not be considered. Thus, we are left only with “[a]ttorney argument [that] is no substitute for evidence.” *Enzo Biochem Inc. v. Gen Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005). Regardless, even if they were considered, those cases involve different marks and have their own records that are not before us, such that we do not find the registrations persuasive of a different result under the particular circumstances in this case.

### Conclusion

The overall similarity of the marks for related goods that move in the same channels of trade to the same classes of customers renders confusion likely.

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

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<sup>26</sup> *Id.* at 20.