

This Opinion is Not a
Precedent of the TTAB

Mailed: April 5, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Premium Economy Concepts LLC
—

Serial No. 90014041
—

Debra B. Gervais of Law Office of Debra B. Gervais for Premium Economy Concepts LLC.

Shaila Settles Lewis, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Managing Attorney.

—
Before Shaw, Heasley, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:¹

Premium Economy Concepts LLC (“Applicant”) seeks registration on the Principal Register of the standard-character mark DRT MOTORSPORTS (MOTORSPORTS

¹ As part of an internal Board pilot program on possibly broadening acceptable forms of legal citation in Board cases, this opinion varies from the citation form recommended in Section 101.03 of the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) (June 2023). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). This opinion cites only precedential Board decisions and does so by reference to the Westlaw (“WL”) database. No citations to the United States Patents Quarterly (“USPQ”) are used. Until further notice, however, practitioners should continue to adhere to the citation form set forth in TBMP § 101.03.

disclaimed) for goods ultimately identified as “bolt-on styling parts including bumpers, fenders, doors, grills, tire carriers, and hood scoops for off-road recreational vehicles” in International Class 12.²

The Examining Attorney has refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles (1) the mark DRT STYLE in standard characters, registered on the Principal Register for “automotive accessories, namely, fender flares” in International Class 12,³ (2) the mark DRT in standard characters, and (3) the mark shown below



the latter two of which have a common owner and are both registered on the Principal Register for, in pertinent part, “brake parts for automobiles, namely, brake release springs” in International Class 12,⁴ as to be likely, when used in connection with the goods identified in the application, to cause confusion, to cause mistake, or to deceive.

² Application Serial No. 90014041 was filed on June 22, 2020 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce. Applicant subsequently amended its application to allege use in commerce in connection with the goods in the ultimate identification.

³ The cited Registration No. 6396991 (the “991 Registration”) issued on June 22, 2021 and is owned by Bushwacker, Inc.

⁴ The cited Registration No. 4913939 (the “939 Registration”) of the standard-character mark and the cited Registration No. 4913940 (the “940 Registration”) of the composite mark both issued on March 8, 2016 and have been maintained. They are owned by Nucap Industries Inc.

When the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, which was denied. The appeal is fully briefed.⁵ We affirm the refusal to register based on the '991 Registration of DRT STYLE for “automotive accessories, namely, fender flares.”

I. Prosecution History and Record on Appeal⁶

We summarize below the prosecution history of the application because it provides useful background to our disposition of the appeal.

Applicant originally applied to register its mark for the following goods:

Land vehicle structural parts for side by side vehicles; Auto aftermarket accessories, namely, vehicle custom grills; Bumpers for automobiles; Doors for vehicles; Land vehicle parts, namely, fenders; Motor vehicles, namely, automobiles, trucks, vans, sport utility vehicles and structural parts therefor; Plastic parts for vehicles, namely, automotive exterior and interior plastic extruded decorative and protective trim; Roof panels for land vehicles; Spare tire carriers for vehicles; Vehicle bumpers; Vehicle hood and fender louvers and vents; Vehicle hoods; Vehicle roll bars.⁷

In its application, Applicant voluntarily disclaimed the exclusive right to use MOTORSPORTS apart from the mark as shown.⁸

⁵ Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 WL 2853282, at *1 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant’s appeal brief appears at 6 TTABVUE and its reply brief appears at 10 TTABVUE. The Examining Attorney’s brief appears at 9 TTABVUE.

⁶ Citations in this opinion to the application record are to pages in the Trademark Status & Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).

⁷ June 22, 2020 Application at TSDR 1.

⁸ *Id.*

The Examining Attorney refused registration under Section 2(d) based on the '939 and '940 Registrations, and noted that the application that ultimately matured into the '991 Registration of DRT STYLE was a possible bar to registration under Section 2(d).⁹ The Examining Attorney made of record USPTO electronic records regarding the cited registrations and prior pending application,¹⁰ and pages from the third-party carparts.com website to show the relatedness of the involved goods.¹¹

Applicant then amended its application to allege use of its mark based on a specimen of use consisting of screenshots from Applicant's website,¹² and responded to the Office Action, arguing against the likelihood of confusion refusal and making of record pages from its website.¹³ Applicant also purported to amend its identification of goods to limit them to "bolt-on styling parts including bumpers, fenders, doors, grills, tire carriers, and hood scoops for off-road recreational vehicles."¹⁴

Correspondence then ensued between Applicant and the Examining Attorney regarding Applicant's amendment to allege use and its proposed amendment to its identification of goods.¹⁵ The Examining Attorney then suspended the application

⁹ September 24, 2020 Office Action at TSDR 1.

¹⁰ *Id.* at TSDR 2-9.

¹¹ *Id.* at TSDR 10-18.

¹² February 1, 2021 Amendment to Allege Use at TSDR 1-3.

¹³ February 15, 2021 Response to Office Action at TSDR 2-5.

¹⁴ *Id.* at TSDR 1.

¹⁵ March 8, 2021 Notation to File; March 9, 2021 Notation to File; March 10, 2021 Notation to File; March 15, 2021 Notation to File.

pending the disposition of the cited prior pending application to register DRT STYLE.¹⁶

The Examining Attorney subsequently removed the application from suspension and issued a non-final Office Action notifying Applicant that the cited prior pending application had matured into the '991 Registration of DRT STYLE, and refusing registration under Section 2(d).¹⁷ The Examining Attorney made of record USPTO electronic records regarding the '991 Registration,¹⁸ a dictionary definition of “motorsport,”¹⁹ and additional third-party webpages that the Examining Attorney claimed established the similarity and complementarity of brake parts, off-road vehicles, race cars, and related goods.²⁰

Applicant responded by arguing against the Section 2(d) refusal and noting the proposed amendment to the identification of goods.²¹ Applicant made of record pages from its website and the websites of the owners of the cited registered marks.²² Applicant also submitted a second amendment to allege use supported by specimens consisting of pages from its website displaying various products.²³ The USPTO

¹⁶ April 7, 2022 Suspension Notice at TSDR 1.

¹⁷ January 26, 2022 Office Action at TSDR 1.

¹⁸ *Id.* at TSDR 2.

¹⁹ *Id.* at TSDR 3-8.

²⁰ *Id.* at TSDR 1, 9-89.

²¹ July 8, 2022 Response to Office Action at TSDR 2-8.

²² *Id.* at TSDR 9-26.

²³ July 8, 2022 Amendment to Allege Use at TSDR 1-5.

subsequently accepted the amendment to allege use based on the amended identification of goods.²⁴

The Examining Attorney then issued an office action making final the refusal to register based on the three cited registrations.²⁵ She made of record pages from third-party websites that she claimed showed that the involved goods were provided in the same channels of trade to the same consumers.²⁶

Applicant appealed and requested reconsideration. In its Request for Reconsideration, Applicant made of record additional pages from its website, the websites of the owners of the cited registrations, and third-party websites.²⁷ The Examining Attorney denied Applicant's Request for Reconsideration.²⁸ The appeal was resumed, and is now ready for decision.

II. Analysis of Likelihood of Confusion Refusal

“The Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion [or] mistake, or to deceive.” *In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023) (cleaned up). Our determination of the likelihood of confusion under Section 2(d) of the Trademark Act is based on an analysis of all probative facts in the record that are relevant to the likelihood of

²⁴ August 31, 2022 Notice of Acceptance of Amendment to Allege Use at TSDR 1.

²⁵ November 23, 2022 Final Office Action at TSDR 1.

²⁶ *Id.* at TSDR 1-30.

²⁷ May 16, 2023 Request for Reconsideration at TSDR 8-120. Some of these webpages appear sideways in a vertical orientation in TSDR, making them difficult to read.

²⁸ May 18, 2023 Denial of Request for Reconsideration at TSDR 1.

confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”). *Charger Ventures*, 64 F.4th at 1379. We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).

“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the [goods or] services.” *Monster Energy Co. v. Lo*, 2023 WL 417620, at *6 (TTAB 2023) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976)), *civ. action filed*, Case No. 5:23-cv-00549-GW-PVC (C.D. Cal. Mar. 28, 2023).

Applicant acknowledges the importance of these two key factors, 6 TTABVUE 5, but also purports to invoke the fourth *DuPont* factor, the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful sophisticated purchasing,” *DuPont*, 476 F.2d at 1361, 6 TTABVUE 6; the seventh and eighth factors, the “nature and extent of any actual confusion” and the “length of time during and conditions under which there has been concurrent use without evidence of actual confusion,” respectively, *DuPont*, 476 F.2d at 1361, 6 TTABVUE 6; the ninth factor, the “variety of goods on which a mark is or is not used (house mark, ‘family’ mark, product mark),” *DuPont*, 476 F.2d at 1361, 6 TTABVUE 6; and the tenth factor, the “market interface between applicant and the owner of a prior mark,” *DuPont*, 476 F.2d at 1361, reframed by Applicant as involving the absence of “evidence of any market interface or relationship between the senior and junior users of the mark.” 6 TTABVUE 6.²⁹

²⁹ Applicant misunderstands the tenth factor, which “requires us to consider evidence pertaining to the ‘market interface’ between the parties, including evidence of any past

For purposes of our *DuPont* analysis, we will focus on the standard-character mark DRT STYLE shown in the '991 Registration for “automotive accessories, namely, fender flares.” See *Monster Energy*, 2023 WL 417602, at *6. If we find a likelihood of confusion with respect to the DRT STYLE mark for those goods, we need not find it with respect to the two marks for “brake parts for automobiles, namely, brake release springs;” conversely, if we do not find a likelihood of confusion with respect to the DRT STYLE mark, we would not find it with respect to the other marks and the goods for which they are registered.

A. Similarity or Dissimilarity of the Marks

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.’” *Sabhnani v. Mirage Brands, LLC*, 2021 WL 6072822, at *13 (TTAB 2021) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.2d 1369, 1371 (Fed. Cir. 2005)). “Similarity in any one of these elements

dealings between the parties that might indicate a lack of confusion in the present case.” *KME Ger. GmbH v. Zhejiang Hailiang Co.*, 2023 WL 6366806, at *19 (TTAB 2023), *civil action filed*, Case No. 1:23-cv-01606 (E.D. Va. Nov. 27, 2023). “*DuPont* lists several possible market interfaces, such as (1) consent to register or use; (2) contractual provisions designed to preclude confusion; (3) assignment; and (4) laches and estoppel attributable to the challenger that would indicate lack of confusion.” *Id.* (quoting *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 949 (Fed. Cir. 2000)). In the vast majority of Section 2(d) cases, as in this one, there is no “market interface or relationship between the senior and junior users of the mark,” 6 TTABVUE 6, of the sorts noted in *Cunningham*, but that fact alone does not implicate the tenth factor, much less cause it to support a conclusion that confusion is unlikely. Because the tenth *DuPont* factor does not apply here, we give it no further consideration. See *Naterra Int’l Inc. v. Bensalem*, 92 F.4th 1113, 1116-17 (Fed. Cir. 2024) (“Only the *DuPont* factors of significance to the particular mark need be considered in the likelihood of confusion analysis.”) (quoting *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1362 (Fed. Cir. 2022)).

may be sufficient to find the marks confusingly similar.” *Id.* (quoting *In re Inn at St. John’s, LLC*, 2018 WL 2734893, at *5 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019)) (internal quotation omitted).

“The proper test regarding similarity ‘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.” *Id.* (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373 (Fed. Cir. 2018)) (internal quotation omitted). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than specific impression of marks.” *Id.* (quoting *In re i.am.symbolic, llc*, 2018 WL 3993582, at *4 (TTAB 2018)). The average customer here is a purchaser of “bolt-on styling parts including bumpers, fenders, doors, grills, tire carriers, and hood scoops for off-road recreational vehicles.”

The involved marks are DRT STYLE and DRT MOTORSPORTS, both in standard characters. Applicant argues that DRT in its DRT MOTORSPORTS mark “represents an allusion to ‘dirt,’” while in the cited mark DRT STYLE, DRT means, “apparently, nothing at all for Bushwacker.” 6 TTABVUE 10.³⁰ Applicant does not discuss the

³⁰ Applicant argues that the marks “have different commercial impressions,” 6 TTABVUE 5, citing pages from its website and the websites of the owners of the cited marks, and pages from its product catalog. *Id.* (citing May 16, 2023 Request for Reconsideration at TSDR 8-50). Except for the limited purpose discussed below, we “must compare the marks as they appear in the drawings, and not on any [websites] that may have additional wording or information.” *In re Aquitaine Wine USA, LLC*, 2018 WL 1620989, at *4 (TTAB 2018). Equally irrelevant to our analysis under the first *DuPont* factor are differences in the “trademark owners’ website addresses themselves,” 6 TTABVUE 7, and “the names of the three companies under consideration,” *id.* at 8, which Applicant envisions being used in a search for the websites of the three companies. *Id.*

similarity or dissimilarity of DRT STYLE and DRT MOTORSPORTS in appearance or sound beyond arguing simply that “the marks appear different” and “sound different.” *Id.* at 5. In its reply brief, Applicant argues, without pointing to any record evidence, that “‘DRT STYLE’ does not conjure an image of offroad, sports utility vehicles (the mark is not connected with that type of product),” while “Applicant’s mark makes its product line clear.” 10 TTABVUE 5.

The Examining Attorney argues that “the marks are similar in overall commercial impression because the dominant features of the marks, namely, DRT, are identical.” 9 TTABVUE 6. She argues that “[t]he additional word ‘MOTORSPORTS’ in applicant’s mark was voluntarily disclaimed because it is highly descriptive of the class of goods and their field,” while “[t]he additional word ‘STYLE’ in registrant’s mark is less significant because the term ‘DRT’ is the first word in the mark” *id.*, and “the word ‘STYLE’ is not typically associated with a product source but is instead frequently used to refer to a particular type of appearance or character.” *Id.* at 7.

The cited mark DRT STYLE is identical in structure to Applicant’s mark DRT MOTORSPORTS because each mark begins with DRT and ends with a word with little or no source-identifying significance. In Applicant’s mark, MOTORSPORTS has been disclaimed,³¹ and in the cited mark, STYLE is highly suggestive when used in connection with “fender flares,” which, as shown and discussed below, are in the nature of what Applicant’s identification of goods calls “styling parts” that protect

³¹ A “motorsport” is “any of several sports involving the racing or competitive driving of motor vehicles.” January 26, 2022 Office Action at TSDR 4 (MERRIAM-WEBSTER DICTIONARY).

and adorn a vehicle's fenders. "DRT" is the dominant, source-identifying portion of each mark and it looks and sounds identical in the first part of each mark.

With respect to appearance, Applicant's DRT MOTORSPORTS is a standard-character mark that may be presented in any font style, size, or color. *Aquitaine Wine USA*, 2018 WL 1620989, at *5. We may consider Applicant's actual use of its mark for the limited purpose of "assist[ing] [us] in visualizing other forms in which the mark might appear." *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 1353 (Fed. Cir. 2011). Applicant displays its standard-character DRT MOTORSPORTS mark on its website as follows:



This display accentuates the source-identifying letters DRT and subordinates the non-source-identifying word MOTORSPORTS.

Because DRT STYLE is also a standard-character mark, we must assume that the letters DRT and the word STYLE could be displayed by the registrant in the same colors, font style, and relative size and positioning in which the letters DRT and the word MOTORSPORTS appear in Applicant's mark displayed immediately above. Such a depiction would also accentuate the source-identifying letters DRT and subordinate the suggestive word STYLE. We find that the DRT STYLE and DRT MOTORSPORTS marks are similar in appearance from the perspective of a consumer with a general rather than specific recollection of the DRT STYLE mark

³² May 16, 2023 Request for Reconsideration at TSDR 9.

who separately encounters the DRT MOTORSPORTS mark because both marks contain DRT followed by another word and thus are similarly structured whether they are displayed in block letters or in the visualized manners discussed above.

With respect to sound, both marks will be verbalized using “DRT,” which sounds identical in both marks, and the marks will be identical in sound if consumers of the registrant’s DRT STYLE goods and Applicant’s DRT MOTORSPORTS goods “engage in ‘the penchant of consumers to shorten marks,’” *Sabhnani*, 2021 WL 6072822, at *18 (quoting *In re Bay State Brewing Co.*, 2016 WL 1045677, at *3 (TTAB 2016)), and “drop the non-source-identifying word[s] [STYLE and MOTORSPORTS] when verbalizing” the respective marks. *Id.*

As noted above, Applicant’s main argument is that DRT means “dirt” when it appears in Applicant’s mark DRT MOTORSPORTS and has no meaning when it appears in the DRT STYLE mark. Applicant cannot rely on evidence of actual use of the involved marks to show that “DRT” means “dirt” in its mark and “apparently, nothing at all for Bushwacker,” 6 TTABVUE 10, and there is nothing else offered in support of these claimed meanings beyond argument of counsel, “which is no substitute for evidence.” *In re Embiid*, 2021 WL 2285576, at *20 (TTAB 2021) (quotation and quotation marks omitted). On this record, there is “no evidence here, or other reason to find, that [DRT] has one meaning when used with [fenders for off-road recreational vehicles] and a second and different meaning when used with [fender flares], based on the nature of the respective goods.” *Id.*, at *9. To the contrary, DRT STYLE and DRT MOTORSPORTS look like two variations on a DRT theme,

especially because the registrant's mark is used with a type of "styling part[]" that, as discussed below, must be assumed to be used on off-road recreational vehicles.

"When viewed in their entirety, the [DRT STYLE and DRT MOTORSPORTS] marks reveal an identical structure and a similar appearance, sound, connotation, and commercial impression. These similarities go a long way toward causing confusion among consumers." *In re Detroit Athletic Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018) (finding that DETROIT ATHLETIC CO. and DETROIT ATHLETIC CLUB were confusingly similar). "[S]imilarity is not a binary factor but is a matter of degree." *In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 1344 (Fed. Cir. 2003)). The DRT STYLE and DRT MOTORSPORTS marks are quite similar in all means of comparison, and the first *DuPont* factor strongly supports a conclusion that confusion is likely. *Naterra*, 92 F.4th at 1119.

B. Similarity or Dissimilarity of the Goods and Channels of Trade

"The second *DuPont* factor 'considers [t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,'" *Embiid*, 2021 WL 2285576, at *10 (quoting *Detroit Athletic Co.*, 903 F.3d at 1306) (quoting *DuPont*, 476 F.2d at 1361), while "the third *DuPont* factor considers 'the similarity or dissimilarity of established, likely-to-continue trade channels.'" *Id.* (quoting *Detroit Athletic Co.*, 903 F.3d at 1308 (quoting *DuPont*, 476 F.2d at 1361)).

1. Similarity or Dissimilarity of the Goods

“In analyzing the [goods], the Board ‘considers ‘the similarity or dissimilarity and nature of the [goods] as described in an application or registration.’” *In re OSF Healthcare Sys.*, 2023 WL 6140427, at *4 (TTAB 2023) (quoting *Embiid*, 2021 WL 2285576, at *10) (internal quotation omitted).³³

The goods “need not be identical or even competitive to find a likelihood of confusion.” *In re Country Oven, Inc.*, 2019 WL 6170483, at *2 (TTAB 2019) (citations omitted). “They need only be ‘related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [they] emanate from the same source.’” *Id.* (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012) (internal quotation omitted)).

Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant’s goods and the goods listed in the cited registration.

Embiid, 2021 WL 2285576, at *10 (quoting *In re Ox Paperboard, LLC*, 2020 WL 4530517, at *6 (TTAB 2020)). In addition, the “application and registration

³³ This is because the respective “identifications determine the scope of the benefit of registration” for both the owner of the ’991 Registration and Applicant, the would-be registrant. *Advance Mag. Publishers, Inc. v. Fashion Elecs., Inc.*, 2023 WL 4261426, at *15 (TTAB 2023) (citing *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1324 (Fed. Cir. 2014)). “[R]egistration provides the registrant with prima facie evidence of . . . the registrant’s ‘exclusive right’ to use the mark on or in connection with **the goods and services specified in the certificate of registration.**” *Stone Lion*, 746 F.3d at 1324 (quoting *U.S. Search LLC v. U.S. Search.com Inc.*, 300 F.3d 517, 524 (4th Cir. 2002) (quoting 15 U.S.C. § 1115(b) (emphasis in bold here in italics in *Stone Lion*)).

themselves may provide evidence of the relationship between the [goods].” *Monster Energy*, 2023 WL 417620, at *7 (citing *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 1376 (Fed. Cir. 2002)).

The Examining Attorney need not prove, and we need not find, that each of the several styling parts identified in the application is related to the goods identified in the '991 Registration. “It is sufficient for finding a likelihood of confusion if relatedness is established for any [good] encompassed by the identification of [goods] within a particular class in the application.” *OSF Healthcare*, 2023 WL 6140427, at *5 (quoting *In re St. Julian Wine Co.*, 2020 WL 2788005, at *5 (TTAB 2020)).

“We must construe the [goods] identified in the cited registration as broadly as reasonably possible ‘to include all [goods] of the nature and type described therein,’” *id.* (quoting *In re Solid State Design Inc.*, 2018 WL 287909, at *6 (TTAB 2018) (quoting *In re Jump Designs, LLC*, 2006 WL 1968602, at *5 (TTAB 2006)), and “we must resolve any ambiguities regarding their coverage in favor of the cited registrant ‘given the presumptions afforded the registration under Section 7(b)’ of the Trademark Act.” *Id.* (quoting *In re C.H. Hanson Co.*, 2015 WL 6121759, at *5 (TTAB 2015) (citing 15 U.S.C. § 1057(b)). “[W]e must also give the [goods] identified in the application their full scope in our analysis of the second *DuPont* factor.” *Id.* (citing *Country Oven*, 2019 WL 6170483, at *3).

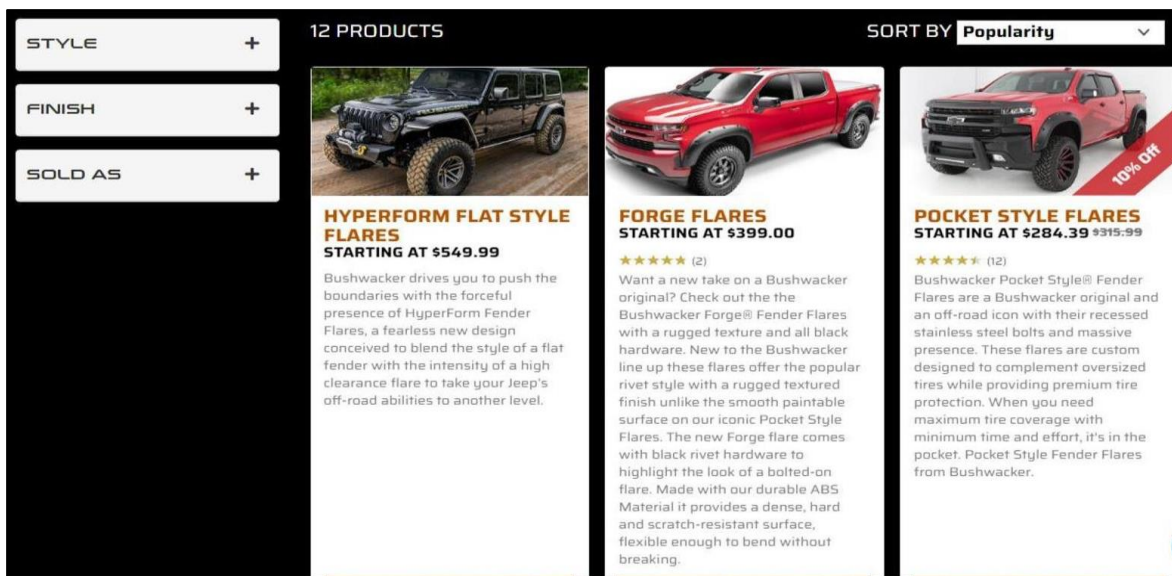
We begin our analysis with the identification of goods in the '991 Registration, which covers “automotive accessories, namely, fender flares.” *Country Oven*, 2019 WL 6170483, at *3. “When identifications are technical or vague and require clarification,

it is appropriate to consider extrinsic evidence of use to determine the meanings of the identification of goods.” *C.H. Hanson*, 2015 WL 6121759, at *4 (citations omitted).

We reproduce below pages from the website of the owner of the '991 Registration that display and discuss “fender flares”:



34






35

³⁴ July 8, 2002 Response to Office Action at TSDR 11.

³⁵ *Id.*

12 PRODUCTS SORT BY Popularity

 <p>FLAT STYLE FLARES STARTING AT \$345.99</p> <p>★★★★★ (2)</p> <p>Bushwacker Flat Style Fender Flares are the first and only flat style flares made for intense off-road use. If you want the look and the real-world performance that best fits an American icon, nothing goes with your Jeep brand vehicle better than Bushwacker Flat Style Fender Flares.</p> <p>SEE DETAILS</p>	 <p>MAX COVERAGE POCKET STYLE FLARES STARTING AT \$284.39 \$315.99 10% Off</p> <p>★★★★★ (4)</p> <p>Bushwacker Max Coverage Pocket Style® Flares deliver premium-grade protection in our original debossed pocket style. Made from Dura-Flex® 2000 ABS Material, these flares are 100% UV protected to hold up against a lifetime of use and abuse. The Max Coverage Pocket Style Fender Flares are rugged, easy to install, and perfect for vehicles with big tires and wide wheels.</p> <p>SEE DETAILS</p>	 <p>DRT STYLE FLARES STARTING AT \$354.37</p> <p>★★★★★ (3)</p> <p>Bushwacker DRT Style Fender Flares have a sleek vented design for a one-of-a-kind look, while protecting your vehicle from on and off-road hazards. They can also keep you from getting pulled over if you drive in one of the 38 states that require wider tires to be covered!</p> <p>SEE DETAILS</p>
---	--	---

36

It is self-evident that “fender flares” are intrinsically related to “fenders” because “fender flares” exist only for use in connection with “fenders.”³⁷ That does not end our analysis, however, because the “fender flares” identified in the ’991 Registration are limited to ones that are “automotive accessories,” while the “fenders” identified in the application are “bolt-on styling parts . . . for off-road recreational vehicles.” We must determine whether the “fender flares” identified in the ’991 Registration encompass ones for use with the “fenders . . . for off-road recreational vehicles” identified in the application.

We begin our determination of the full scope of the goods identified in the application as “fenders . . . for off-road recreational vehicles” by defining “off-road

³⁶ *Id.* at TSDR 13.

³⁷ “The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed form.” *Monster Energy*, 2023 WL 417620, at *10 n.41. We take judicial notice that a “fender” is “a guard over the wheel of a motor vehicle,” MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, last accessed on April 2, 2024), and a “flare” is a “part that curves or spreads outward.” COLLINS DICTIONARY (collinsdictionary.com/us, last accessed on April 2, 2024).

recreational vehicles.”³⁸ We take judicial notice that in the context of vehicles, “off-road” means “designed, built, or used for traveling off public roads, especially on unpaved roads, trails, beaches, or rough terrain,”³⁹ and as “relating to or using a vehicle or bicycle that can be used on rough ground as well as on normal roads.”⁴⁰ We take judicial notice that in the context of the identification as a whole, the term “recreational vehicles” does not have its usual meaning of “a motor home” and “a large motor vehicle in which you can sleep and often cook, used for traveling and camping.”⁴¹ Instead, the adjective “recreational” relates to the use of “vehicles” by people “in their spare time to relax.”⁴² The goods identified as “fenders . . . for off-road recreational vehicles” thus encompass fenders for any vehicle that can be used away from normal highways and streets during one’s spare time to relax.

While the dune buggy-type vehicles shown on Applicant’s website are one such “off-road” recreational vehicle,⁴³ the registrant’s website shows that other vehicles such as trucks and Jeep vehicles can be used “off-road” for recreational purposes and

³⁸ The identification of goods in the application contains the word “including” in its listing of the specific styling parts. Section 1402.03(a) of the Trademark Manual of Examining Procedure (“TMEP”) (Nov. 2023) states that the identification of goods or services in an application “should state common names for goods or services, be as complete and specific as possible, and avoid indefinite words and phrases,” such as “including,” which “are almost always unacceptable.” Nevertheless, we must consider the identification that is before us, *cf. Solid State Design*, 2018 WL 287909, at *7, and we will focus on the specific listed “fenders.”

³⁹ DICTIONARY.COM (dictionary.com, last accessed on April 2, 2024). This definition is accompanied by use of “off-road” in the phrase “an off-road vehicle.”

⁴⁰ CAMBRIDGE DICTIONARY (dictionary.cambridge.org/us, last accessed on April 2, 2024).

⁴¹ CAMBRIDGE DICTIONARY (dictionary.cambridge.org/us, last accessed on April 3, 2024).

⁴² COLLINS DICTIONARY (collinsdictionary.com, last accessed on April 3, 2024).

⁴³ *See, e.g.*, July 8, 2022 Response to Office Action at TSDR 17.

these vehicles fall within the full scope of the “off-road recreational vehicles” to which Applicant’s fenders may be applied.⁴⁴

We turn next to the task of “constru[ing] the [goods] identified in the cited registration as broadly as reasonably possible ‘to include all [goods] of the nature and type described therein.’” *OSF Healthcare*, 2023 WL 6140427, at *5. The adjective “automotive” in the prefatory phrase “automotive accessories” in the identification of goods in the ’991 Registration means “relating to or concerned with motor vehicles.”⁴⁵ As discussed above, various types of “motor vehicles” can be used “off-road” for recreation and can feature “fender flares.”

The website of the owner of the ’991 Registration shows trucks and Jeep vehicles with what appear to be bolt-on fender flares driving on unpaved roads,⁴⁶ and states in multiple places that the registrant’s fender flares protect such vehicles when they are used off-road.⁴⁷ The Hyperform Flat Style Flare product description states that this fender flare will “take your Jeep’s off-road abilities to another level.”⁴⁸ The Pocket Style Flare product description characterizes this fender flare as “an off-road icon with . . . recessed stainless steel bolts and massive presence” that is “custom designed to complement oversized tires while providing premium tire protection” and “ready

⁴⁴ Applicant’s original identification of goods identified “fenders” as “land vehicle parts.”

⁴⁵ OXFORD ENGLISH DICTIONARY (oed.com, last accessed on April 2, 2024).

⁴⁶ July 8, 2022 Response to Office Action at TSDR 11.

⁴⁷ *Id.* at TSDR 11-13.

⁴⁸ *Id.* at TSDR 11.

to install out of the box”⁴⁹ The Cut-Out Flares product description states that these fender flares “are individually designed for extreme performance and perfect for off-road vehicles that need extreme amounts of tire coverage and clearance.”⁵⁰ The Flat Style Flares product description states that this fender flare is “made for intense off-road use.”⁵¹ The Max Coverage Pocket Style Flares product description states that these flares are “rugged, easy to install, and perfect for vehicles with big tires and wide wheels.”⁵² The product description of the fender flares with which the DRT STYLE mark is used states that these flares “have a sleek vented design for a one-of-a-kind look, while protecting your vehicle from on and off-road hazards,”⁵³ and that they “can also keep you from getting pulled over if you drive in one of the 38 states that require wider tires to be covered!”⁵⁴

To the extent that there are any ambiguities about the type of vehicles on which the “fender flares” identified in the ’991 Registration may be used, we must resolve those ambiguities in favor of the registrant. *OSF Healthcare*, 2023 WL 6140427, at *5. We hold that the “fender flares” identified in the ’991 Registration must be deemed to be used with fenders for any motor vehicle, including those falling within the full

⁴⁹ *Id.* at TSDR 12.

⁵⁰ *Id.*

⁵¹ *Id.* at TSDR 13.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

scope of the “off-road recreational vehicles” identified in the application, for which Applicant sells “fenders.”⁵⁵

Goods identified as “fender flares” and “fenders for off-road recreational vehicles” are inherently related on the face of the respective identifications when they are given their full scope because, as shown and described on the registrant’s website, “fender flares” are an extension of a vehicle’s fenders that provide additional protection for wheels and tires, including large tires used for off-road driving. Such complementary use makes the goods related. *See In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567 (Fed. Cir. 1984) (“[C]omplementary use has long been recognized as a relevant consideration in determining a likelihood of confusion.”); *In re Cook Med. Techs. LLC*, 2012 WL 8254584, at *4 (TTAB 2012) (“If goods are complementary in nature, or used together, this relatedness can support a finding of likelihood of confusion.”). Where, as here, goods or services are intrinsically related on the face of the involved identifications, extrinsic evidence of relatedness is not required. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267-68 (Fed. Cir. 2002). The second *DuPont* factor supports a conclusion of a likelihood of confusion with respect to the DRT STYLE mark shown in the ’991 Registration.

⁵⁵ As noted above, Applicant originally sought registration of its mark for numerous broadly identified goods, including “Land vehicle parts, namely, fenders” and “Motor vehicles, namely, automobiles, trucks, vans, sport utility vehicles and structural parts therefor.” The registrant’s “fender flares” and Applicant’s “fenders . . . for off-road recreational vehicles” are both automotive aftermarket products rather than original equipment manufacturer (“OEM”) products.

2. Similarity or Dissimilarity of the Channels of Trade

The third *DuPont* factor “considers ‘the similarity or dissimilarity of established, likely-to-continue trade channels’” for the goods. *Embiid*, 2021 WL 2285576, at *10 (quoting *Detroit Athletic Co.*, 903 F.3d at 1306) (quoting *DuPont*, 476 F.2d at 1361)). The application and the ’991 Registration contain no restrictions as to the channels of trade for the identified goods, and “[w]e therefore must presume that the identified goods move in all normal and usual channels of trade and methods of distribution for those goods, and that they are available for purchase by all the usual purchasers.” *KME*, 2023 WL 6366806, at *8 (citing *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1361 (Fed. Cir. 2000); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1042-43 (Fed. Cir. 1983)).

As discussed above, in giving full scope to Applicant’s identification of goods, we have construed the referenced “fenders . . . for off-road recreational vehicles” to encompass fenders for any vehicle that can be used away from normal highways and streets, including trucks and Jeep vehicles. The record shows that fender flares for such vehicles, including the registrant’s, are sold through the websites of multiple sellers of automotive aftermarket accessories,⁵⁶ and that fenders, including ones specifically identified as “off-road” fenders, are also sold by sellers of automotive

⁵⁶ January 26, 2022 Office Action at TSDR 23 (Carshop); November 23, 2022 Final Office Action at TSDR 11 (NAPA), 17 (AutoAnything), 29 (Pelican Parts); May 6, 2023 Request for Reconsideration at TSDR 51 (CARiD), 54-75 (NAPA), 80-81, 83-84, 86 (AutoAnything), 95, 98-101 (carparts.com).

aftermarket accessories.⁵⁷ The channels of trade for the goods as broadly construed thus overlap.

Applicant focuses on the fact that the current actual channels of trade for its particular goods do not overlap with the actual channels of trade for the goods identified in the cited registrations. 6 TTABVUE 8-10; 10 TTABVUE 3-5. This argument misses the mark because we must focus on “the application and registration[] rather than on real-world conditions” in deciding registrability “regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.” *Stone Lion*, 746 F.3d at 1323 (quoting *Octocom Sys., Inc. v. Hous. Comp. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990)). “[E]ven assuming that there is no overlap between [Applicant’s and the registrant’s] current customers” we are required not “to look beyond the application and registered mark[] at issue.” *Id.*; see also *Canadian Imperial Bank of Com. v. Wells Fargo Bank*, 811 F.2d 1490, 1492 (Fed. Cir. 1987) (“The description of the goods in the application for registration is critical because any registration that issues will carry that description” and “although a registrant’s current business practices may be quite narrow, they may change at any time”) (quoting *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581 (Fed. Cir. 1983)).

Moreover, even if the current actual channels of trade do not overlap, we must take into account that (1) the same vehicle, such as a truck or Jeep vehicle, can be

⁵⁷ November 23, 2022 Final Office Action at TSDR 23 (Pelican Parts), 30 (AutoAnything) (showing a DV8 Jeep Inner Fender Kit and Fishbone Offroad Inner Fenders).

used for both street driving and off-road recreation, and (2) owners of vehicles such as dune buggies that are used solely for off-road recreation, and may not be legal for street driving, necessarily must own other vehicles for street driving. Accordingly, the same consumer may enter both of the current actual channels of trade for aftermarket products for off-road recreational vehicles and street or hybrid vehicles,⁵⁸ and thus may be exposed to the DRT STYLE mark when purchasing fender flares and the DRT MOTORSPORTS mark when purchasing fenders. The third *DuPont* factor supports a conclusion that confusion is likely with respect to the DRT STYLE mark shown in the '991 Registration.

C. Purchase Conditions and Consumer Care

“Next, we consider the conditions under which the goods . . . are likely to be purchased, e.g., whether on impulse or after careful consideration, as well as the degree, if any, of sophistication of the consumers.” *KME*, 2023 WL 6366806, at *9. Under this fourth *DuPont* factor, “[p]urchaser sophistication may tend to minimize likelihood of confusion. Conversely, impulse purchase[s] of inexpensive items may tend to have the opposite effect.” *Id.* (quoting *Palm Bay Imps.*, 396 F.2d at 1376). “Precedent requires that we base our decision on the least sophisticated potential purchasers.” *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 WL 4877349, at *9 (TTAB 2019) (citing *Stone Lion*, 746 F.3d at 1325).

⁵⁸ In that regard, Applicant characterizes its target market as consumers of “automotive products,” 6 TTABVUE 6, and claims that it sells products “to a small fraction of the overall automotive market to which the registered owners sell their separate and distinct products.” *Id.* at 9.

Applicant argues that the involved goods are “addressed to a specific niche market of sophisticated consumers looking for specific after-market products for specific vehicles, with no crossover in product lines” 10 TTABVUE 6. “Applicant’s ‘assertions are unsupported by sworn statements or other evidence’ and, as noted above, ‘attorney argument is no substitute for evidence.’ *OSF Healthcare*, 2023 WL 6140427, at *3 n.8 (quoting *In re OEP Enters., Inc.*, 2019 WL 3941266, at *19 (quoting *Cai*, 901 F.3d at 1371)). The record does show, however, that the goods identified in the application are purchased by consumers who want to stylize their particular vehicles used partially or solely for off-road recreation, and they necessarily must purchase goods that fit their particular vehicles.⁵⁹ The least sophisticated such consumer is likely to exercise at least a moderate degree of care in purchasing the goods, but “even consumers who exercise a higher degree of care are not necessarily knowledgeable regarding the trademarks at issue, and therefore immune from source confusion.” *Made in Nature, LLC v. Pharmavite LLC*, 2022 WL 2188890, at *29 (TTAB 2022) (quotation and quotation marks omitted). The fourth *DuPont* factor is thus neutral in our analysis of the likelihood of confusion.⁶⁰

⁵⁹ July 8, 2022 Response to Office Action at TSDR 17-21, 23-26 (offering specific products for Can-Am and Polaris off-road recreational vehicles); May 16, 2023 Request for Reconsideration at TSDR 9, 20-44 (offering specific products for Can-Am, Polaris, and Kawasaki off-road recreational vehicles). Some of the goods identified in the application also cost several hundred dollars.

⁶⁰ Given the similarity of the marks, even a careful consumer could conclude that Applicant’s DRT MOTORSPORTS mark is a variant of the cited DRT STYLE mark that refers to an off-road product line from the same source. “Even those purchasers who are fully aware of the specific differences between the marks may well believe, because of the similarities between them, that the two marks are simply variants of one another, used by a single producer to identify and distinguish companion lines of goods.” *In re Great Lakes Canning, Inc.*, 1985 WL 71929, *3 (TTAB 1985) (CAYNA confusingly similar to CANA).

D. Absence of Evidence of Actual Confusion

The eighth *DuPont* factor considers “[t]he length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *KME*, 2023 WL 6366806, at *21 (quoting *DuPont*, 476 F.2d at 1361). As noted above, “our analysis as to the second, third, and fourth *du Pont* factors, discussing the similarity or dissimilarity of the [goods], channels of trade, and relevant consumers, is based, as dictated by precedent from the Federal Circuit, on the identifications **as set forth** in the application and the cited registration.” *In re Guild Mortg.*, 2020 WL 1639916, at *8 (TTAB 2020) (citing *Stone Lion*, 746 F.3d at 1324-25) (emphasis in bold in original). The eighth *DuPont* factor, by contrast, “requires us to look at actual market conditions, to the extent there is evidence of such conditions of record.” *Id.*

Applicant argues that “these marks have coexisted in the marketplace for years and there is no evidence of actual confusion,” 6 TTABVUE 6, but “an absence of evidence of actual confusion is meaningful only if the record indicates appreciable and continuous use by Applicant of its mark for a significant period of time in the same markets as those served by” the registrant under its mark. *KME*, 2023 WL 6366806, at *21 (citing *Citigroup, Inc. v. Cap. City Bank Grp., Inc.*, 2010 WL 595586, at *17 (TTAB 2010); *Gillette Can. Inc. v. Ranir Corp.*, 1992 WL 215312, at *6 (TTAB 1992)). As noted above, Applicant itself argues that there has been no overlap in the actual channels of trade for the involved goods, and thus admits that there has not been “a reasonable opportunity for confusion to have occurred.” *Id.* The eighth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

E. The Variety of Goods on Which the Marks Are Used

The “ninth *DuPont* factor requires us to consider “[t]he variety of goods on which a mark is or is not used (house mark, ‘family’ mark, product mark).” *KME*, 2023 WL 6366806, at *22 (quoting *DuPont*, 476 F.2d at 1361). Applicant argues that the involved marks are used only on the specific goods for which they are registered. 6 TTABVUE 6. We have found above under the second *DuPont* factor that the goods are inherently related, and there is “no need to rely on this factor which, in essence, is used to show relatedness of the goods and services.” *KME*, 2023 WL 6366806, at *22.

F. Prior Examination Decisions

Applicant argues that the co-existence of the cited registrations inter se shows that confusion is not likely between Applicant’s mark and any of the marks shown in the cited registrations. 6 TTABVUE 12-14. Applicant submits that

this particular case is distinct: the Examining Attorney is using the exact SAME marks considered in the applications for Bushwacker and Nucap as the basis for denial of this application. These cases are the SAME facts, and the SAME marks, standing on the SAME merits. The same issues, with the same marks, were considered in the prior registrations. If DRT STYLE and DRT DRAG REDUCTION TECHNOLOGY are not confusingly similar because they are distinct enough in the marketplace either due to consumer type or product line or names themselves, how can they now BOTH be considered to be confusingly similar to Applicant’s mark? Regardless of whether prior findings by other examining attorneys need not be followed, in these circumstances, it is respectfully submitted that the Examining Attorney in this case has submitted no reason for why these prior decisions, regarding these same marks, and this same issue, were in error or should be ignored.

Id. at 13.

The file histories of the cited registrations are not of record and we do not know the factual bases on which the registrations were issued,⁶¹ but in any event “[i]t is axiomatic that we must decide each case on its own merits.” *In re United Trademark Holdings, Inc.*, 2017 WL 2876825, at *5 (TTAB 2017).

G. Summary

The first *DuPont* factor strongly supports a conclusion that confusion is likely with respect to the mark shown in the '991 Registration. As noted above, the close similarity of the DRT STYLE and DRT MOTORSPORTS marks by itself “go[es] a long way toward causing confusion among consumers.” *Detroit Athletic Co.*, 903 F.3d at 1303; *see also Naterra*, 92 F.4th at 1119 (holding that the Board erred by failing to weigh the first *DuPont* factor “heavily in favor of a likelihood of confusion finding” where the “marks’ lead words are their dominant portions and are likely to make the greatest impact on consumers.”) (quoting *Detroit Athletic Co.*, 903 F.3d at 1303-04).

The second and third *DuPont* factors also support a conclusion that confusion is likely. The goods identified as “bolt-on styling parts including . . . fenders . . . for off-road recreational vehicles,” on the one hand, and “automotive accessories, namely, fender flares,” on the other hand, are intrinsically related based on the language of the identifications when they are given their full scope because they are necessarily used together. There are no restrictions on the channels of trade for the goods

⁶¹ Applicant’s argument also ignores the differences in the goods recited in the respective registrations.

identified in the application or in the '991 Registration, and those goods, as broadly construed, are offered in overlapping channels of trade. In addition, it is likely that at least some of the same consumers in the current actual channels of trade for the goods will be exposed to both the DRT STYLE mark and the DRT MOTORSPORTS mark. The other pertinent *DuPont* factors are neutral. We conclude that a consumer familiar with the DRT STYLE mark for fender flares who separately encounters the DRT MOTORSPORTS mark for fenders for off-road recreational vehicles is likely to believe mistakenly that those goods have a common source.

Decision: The refusal to register is affirmed based on the cited '991 Registration.