

This Opinion is Not a  
Precedent of the TTAB

Mailed: December 5, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Callie Renae McMorran*  
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Serial No. 98502058  
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Thomas L. Moses of Southeast IP Group, LLC,  
for Callie Renae McMorran.

Jeffrey DeFord, Trademark Examining Attorney, Law Office 115,  
Daniel Brody, Managing Attorney.

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Before Lykos, Dunn, and Stanley,  
Administrative Trademark Judges.

Opinion by Stanley, Administrative Trademark Judge:

Callie Renae McMorran (“Applicant”) seeks registration on the Principal Register of the standard-character mark HUSTLE SOLD SEPARATELY for “hats; hoodies; shirts,” in International Class 25, and “targets; discs for playing disc golf,” in International Class 28.<sup>1</sup>

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<sup>1</sup> Application Serial No. 98502058 was filed on April 16, 2024 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging June 22, 2022 as the date of first use anywhere and date of first use in commerce for the goods in both Classes 25 and 28.

The Trademark Examining Attorney refused registration as to the Class 25 goods only under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used in connection with the identified goods in Class 25, so resembles the registered standard-character mark THE DREAM IS FREE...THE HUSTLE IS SOLD SEPARATELY for the goods listed below, that it is likely to cause confusion, to cause mistake, or to deceive:

Clothing, namely, hats, shirts, sweatpants, hoodies and jackets, in International Class 25.<sup>2</sup>

When the refusal was made final, Applicant appealed. The appeal is briefed. We affirm the refusal to register Applicant's mark.<sup>3</sup>

### **I. Likelihood of Confusion**

Section 2(d) of 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, mistake, or deception. 15 U.S.C. § 1052(d). *See also In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023). Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003). When analyzing the likelihood of confusion

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<sup>2</sup> Registration No. 6515829 issued on the Principal Register on October 12, 2021. The cited registration is owned by MVM Illuzionz (“Registrant”).

<sup>3</sup> Citations to the prosecution file are to the USPTO's Trademark Status & Document Retrieval (“TSDR”) system in .pdf format. Citations to the appeal record are to TTABVue, the Board's online docketing system.

factors, the overriding concerns are not only to prevent buyer confusion as to the source of the goods, but also to protect registrants from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 1207-08 (Fed. Cir. 1993).

In any likelihood of confusion analysis, different *DuPont* factors may play a dominant role and some factors may not be relevant. *Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 1116 (Fed. Cir. 2024) (citing *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1362 (Fed. Cir. 2022)). In addition, varying weight may be assigned to each factor depending on the evidence presented, and “any one of the factors may control a particular case.” *Id.*; *see also Charger Ventures*, 64 F.4th at 1381. Although we consider each *DuPont* factor for which there is evidence and argument, *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019), two key considerations are the similarities between the marks and the similarities between the goods. *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65 (Fed. Cir. 2002)). These factors, and others, are discussed below.

#### **A. The Services and Trade Channels**

We begin our analysis with the second *DuPont* factor, which considers the “similarity or dissimilarity and nature of the goods ... as described in an application or registration,” and the third *DuPont* factor, which considers “[t]he similarity or dissimilarity of established, likely-to-continue trade channels.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 1306, 1308 (Fed. Cir. 2018) (quoting *DuPont*, 476 F.2d at 1361).

In making our determination regarding the similarity of the goods, we must look to the goods as identified in the subject application and the cited registration. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014) (citing *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990) (“[T]he question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application ... 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.”)). It is sufficient for a finding of likelihood of confusion as to a particular class if relatedness is established for any item of identified goods within that class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981).

The clothing items identified in Class 25 of the subject application (“hats,” “hoodies,” and “shirts”) are in-part identical to the clothing items identified in the cited registration (“clothing, namely, **hats**, **shirts**, sweatpants, **hoodies** and jackets”).

Turning to the trade channels, because Applicant’s Class 25 goods in the application are in-part identical to the Class 25 goods of the cited registration, we must presume that the channels of trade and classes of consumers are the same for such goods. *See In re Fat Boys Water Sports LLC*, No. 86490930, 2016 TTAB LEXIS 150, at \*26 (“Because the goods at issue are legally identical, we must presume that the goods of Applicant and Registrant move in the same channels of trade and are offered to the same classes of consumers.”); *see also In re Viterro Inc.*, 671 F.3d 1358,

1362 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion).

The Examining Attorney has demonstrated that Applicant's and Registrant's goods are in-part identical, and we presume that the trade channels and classes of consumers are the same for the legally identical goods. Accordingly, the second and third *DuPont* factors strongly favor a likelihood of confusion.

## **B. The Marks**

We turn now to the first *DuPont* factor, which involves an analysis of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005); *see also Stone Lion Cap. Partners*, 746 F.3d at 1319. "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, No. 87075988, 2018 TTAB LEXIS 170, at \*13 (quoting *In re Davia*, No. 85497617, 2014 TTAB LEXIS 214, at \*4), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 732 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.") (citation omitted).

"[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 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.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373 (Fed. Cir. 2018) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012)). “The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks.” *In re St. Julian Wine Co.*, No. 87834973, 2020 TTAB LEXIS 196, at \*13.

Our analysis cannot be predicated on dissecting the marks into their various components; that is, our finding must be based on the entire marks, not just part of the marks. *See, e.g., In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). “No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone.” *In re Electrolyte Labs. Inc.*, 929 F.2d 645, 647 (Fed. Cir. 1990) (citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293 (CCPA 1974)). Nonetheless, “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety.” *Detroit Athletic*, 903 F.3d at 1305 (quoting *Nat’l Data Corp.*, 753 F.2d at 1058).

Where the goods are in-part identical, as is the case here, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. *Sunkist Growers, Inc. v. Intrastate Distribs., Inc.*, 144 F.4th 1376, 1379 (Fed. Cir. 2025) (citing *Coach Servs.*, 668 F.3d at 1368) (“[I]f the parties’ goods are closely related, a lesser degree of similarity between the marks may be sufficient to give rise to a likelihood of confusion.”).

With these principles in mind, we compare Applicant’s standard-character mark HUSTLE SOLD SEPARATELY with the cited standard-character mark THE DREAM IS FREE...THE HUSTLE IS SOLD SEPARATELY.

Applicant argues that the first *DuPont* factor weighs against a likelihood of confusion because the commercial impression and meaning of the marks differ. More specifically, Applicant argues that: (1) Applicant’s mark and the cited mark have “distinct consumer interpretations” in that “Applicant’s mark may be perceived as a marketing expression for apparel, detached from motivational slogans” whereas the cited mark “has an established tone of encouragement and self-determination”; (2) the “dominant element” of the cited mark is “THE DREAM IS FREE” because it “positions the [cited] mark in the context of goal-setting and self-improvement[,]” which “duality or aspirational message” Applicant’s mark lacks, as Applicant’s mark “suggest[s] a witty or ironic take on effort and consumer products—effectively separating merchandise from intangible qualities like ambition or motivation”; and

(3) Applicant's mark "functions more as a cultural catchphrase than a motivational principle, which further distinguishes it from the cited mark's philosophical tone."<sup>4</sup>

Applicant further argues that Applicant's mark and the cited mark differ in appearance, sound, and structure because: (1) Applicant's mark is "a succinct, three-word phrase composed of seven syllables" whereas the cited mark is "a substantially longer nine-word phrase containing fourteen syllables and two complete clauses separated by an ellipsis"; (2) "[t]he presence of the introductory clause ['THE DREAM IS FREE'] in the cited mark not only lengthens the phrase but shifts the point of emphasis, guiding the consumer's attention toward the overarching motivational sentiment" and "[t]his tonal difference is reinforced by the ellipsis, which indicates a pause and further separates the two ideas within the cited mark"; (3) "the marks differ in rhythm and stress patterns"; and (4) "the rhythm and cadence of the marks contribute to distinct consumer takeaways."<sup>5</sup>

The Examining Attorney counters that the first *DuPont* factor favors a likelihood of confusion because: (1) "the first part of the registered mark 'THE DREAM IS FREE' element is merely [] a segue and guides the consumer into the main message which is conveyed by the second part of the registrant's mark, 'THE HUSTLE IS SOLD SEPARATELY', meaning you must work hard" and therefore "the 'THE DREAM IS FREE' element is in fact less significant in terms of affecting the mark's commercial impression, and renders the wording 'THE HUSTLE IS SOLD SEPARATELY' the

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<sup>4</sup> Applicant's Br., 4 TTABVUE 6-7.

<sup>5</sup> *Id.* at 7-9.



more dominant wording of the registered mark”; (2) “both marks espouse hard word [sic] or effort” and therefore “are identical in meaning and connotation and more importantly the applied-for mark conveys the same overall commercial impression as the mark of the registrant”; and (3) Applicant’s mark “is likely to appear to prospective purchasers as a shortened form of registrant’s mark.”<sup>6</sup>

As noted above, “[s]imilarity is not a binary factor but is a matter of degree.” *St. Helena Hosp.*, 774 F.3d at 752 (quotation omitted). We need not determine whether “THE DREAM IS FREE...” or “THE HUSTLE IS SOLD SEPARATELY” is the dominant portion of the cited mark. Considering the marks in their entireties, the shared wording HUSTLE SOLD SEPARATELY creates similarities that outweigh the differences introduced by Registrant’s prefatory clause “THE DREAM IS FREE...” and the function words “THE” and “IS” in “THE HUSTLE IS SOLD SEPARATELY.”

The phrase “THE HUSTLE IS SOLD SEPARATELY” in Registrant’s mark is visually and phonetically almost identical to Applicant’s entire mark, HUSTLE SOLD SEPARATELY. “While there is no explicit rule that the marks are automatically similar because [the cited mark] contains [the applicant’s] entire mark, ‘[l]ikelihood of confusion often has been found where the entirety of one mark is incorporated within another.’” *Double Coin Holdings Ltd. v. Tru Dev.*, No. 92063808, 2019 TTAB LEXIS 347, at \*20 (quoting *Hunter Indus., Inc. v. Toro Co.*, No. 91203612, 2014 TTAB LEXIS 105, at \*33); *see also* *TiVo Brands LLC v. Tivoli, LLC*, No.

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<sup>6</sup> Examining Attorney’s Br., 7 TTABVUE 4-7.

91221632, 2018 TTAB LEXIS 439, at \*51-52 (“Marks have frequently been found to be similar where one mark incorporates the entirety of another mark, as is the case here.”). “[T]he presence of an additional term in [a] mark does not necessarily eliminate the likelihood of confusion if some terms are identical.” *In re Mighty Leaf Tea*, 601 F.3d 1342, 1347-48 (Fed. Cir. 2010) (citations omitted). The addition of the function word “THE” is of minimal importance, *see Motorola, Inc. v. Griffiths Elecs., Inc.*, 317 F.2d 397, 398 (CCPA 1963) (“THE” is “of trifling importance”); *In re Thor Tech Inc.*, No. 78634024, 2009 TTAB LEXIS 253, at \*3 (the word “the” in THE WAVE merely emphasizes the word “wave”), and the addition of the function word “IS” in the cited mark does not materially alter how consumers will see and hear the shared wording HUSTLE SOLD SEPARATELY, as HUSTLE SOLD SEPARATELY is merely a different verb tense of the phrase HUSTLE IS SOLD SEPARATELY. Considered in their entireties, each mark contains the identical words HUSTLE SOLD SEPARATELY, and Applicant’s mark contains no other wording.

Furthermore, the phrases “HUSTLE SOLD SEPARATELY” (Applicant’s entire mark) and “THE HUSTLE IS SOLD SEPARATELY” (part of Registrant’s mark) are arbitrary in relation to Applicant’s and Registrant’s respective goods and are likely to create the same meaning and commercial impression in both marks – namely, that “hustle” is not included for free and must be provided by the individual. *See In re Davia*, 2014 TTAB LEXIS 214, at \*10 (“the meaning of the word CHANTICO, to the extent it is known to the relevant public, is also the same for both marks”). The introductory phrase “THE DREAM IS FREE...” in Registrant’s mark serves to

introduce the shared message, without altering its essential meaning. Therefore, although the marks are not identical, they nevertheless evoke the same connotation and commercial impression.

Moreover, Applicant's omission of Registrant's initial clause produces a shortened form that consumers could readily associate with Registrant, particularly because Applicant's goods (hats, hoodies, and shirts) overlap with Registrant's goods. *See Mighty Leaf Tea*, 601 F.3d at 1348.

Lastly, Applicant's mark and the cited mark are both in standard-character format, so we must consider that Applicant and Registrant could display their marks in a font style, size, or color similar to the other, including that Registrant could emphasize the phrase THE HUSTLE IS SOLD SEPARATELY, thereby heightening the likelihood of confusion. *In re Aquitaine Wine USA, LLC*, No. 86928469, 2018 TTAB LEXIS 108, at \*13; *In re Strategic Partners, Inc.*, No. 77903451, 2012 TTAB LEXIS 80, at \*6-7.

Having considered the marks in their entirety, and keeping in mind that the marks "must be considered ... in light of the fallibility of memory," *St. Helena Hosp.*, 774 F.3d at 751 (citation omitted), and the fact that Applicant's and Registrant's goods are in-part identical, we find that Applicant's mark and the cited mark are similar in sight, sound, connotation, and commercial impression.

Accordingly, the first *DuPont* factor weighs in favor of likelihood of confusion.

### C. Purchasing Conditions

We turn next to 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, the fourth *DuPont* factor. Purchaser sophistication or degree of care may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive goods may tend to have the opposite effect. *Palm Bay*, 396 F.3d at 1376.

Applicant argues that “[p]urchasers of expressive clothing—such as garments featuring short phrases, cultural references, or motivational taglines—typically make choices based on individual tastes, personal identity, or social messaging” and that “[t]hese purchases are often intentional and style-driven rather than impulsive.”<sup>7</sup> Applicant further contends that “purchasers who are knowledgeable or discerning about the type of product or message they are buying may be less likely to be confused by similar marks” and that “[t]his reasoning applies with particular force to expressive fashion goods, where consumers often view the slogan as a defining element of the product.”<sup>8</sup> Applicant, however, failed to introduce any evidence to support these assertions, and “argument is no substitute for evidence.” *Cai*, 901 F.3d at 1371 (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005)).

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<sup>7</sup> Applicant’s Br., 4 TTABVUE 10.

<sup>8</sup> *Id.*

Applicant's application and the cited registration identify goods that are not restricted by target market, price, or consumer sophistication. We must assume that the types of buyers overlap to include both the sophisticated fashionista as well as the ordinary bargain hunter. Ordinary consumers of apparel are likely to exercise only ordinary care, and given the lack of price restrictions in the identifications, they may even buy inexpensive items on impulse. *See Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000) ("When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.").

Accordingly, the fourth *DuPont* factor is neutral.

#### **D. The Strength or Weakness of the Cited Mark**

Relying on *Jack Wolfskin Ausrüstung Für Draußen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1373, (Fed. Cir. 2015), Applicant argues that "[a]pparel is a crowded field in which common terms, slogans, and expressions frequently appear in trademarks" and that "[t]he TTAB has acknowledged that the mere co-existence of similar marks for similar goods is not unusual in this space, especially where the shared terms are descriptive, diluted, or convey broad cultural themes."<sup>9</sup> This argument suggests that Applicant is attacking the strength of the cited mark by relying on the sixth *DuPont* factor, which considers "[t]he number and nature of similar marks in use on similar goods[.]" *See DuPont*, 476 F.2d at 1361.

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<sup>9</sup> Applicant's Br., 4 TTABVUE 9.

We agree with the Examining Attorney that “there is no evidence that the shared terms or slogans appearing in the marks at issue are ... descriptive, diluted, or [] convey any broad cultural themes” and that Applicant “has provided no evidence to show widespread use of similar marks on similar goods.”<sup>10</sup> Because there is no evidence in the record of third-party use or registration of the phrase “THE DREAM IS FREE...THE HUSTLE IS SOLD SEPARATELY” (or any component thereof), let alone evidence of third-party use or registration of the cited mark (or any component thereof) in connection with similar goods as are at issue here, we cannot find that the scope of protection afforded to the cited mark is lessened. *See Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015) (“Third party registrations are relevant to prove that some segment of the [mark] has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.”); *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co., Inc.*, 908 F.3d 1315, 1324 (Fed. Cir. 2018) (“[T]he controlling inquiry is the extent of third-party marks in use on ‘similar’ goods or services.”) (citing *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992)).

Because the cited registration is “prima facie evidence of the validity of the registered mark,” *see* Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), we must assume that the mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act. *See New Era Cap Co., Inc. v. Pro Era, LLC*, No. 91216455, 2020

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<sup>10</sup> Examining Attorney’s Br., 7 TTABVUE 6.

TTAB LEXIS 199, at \*29. We therefore treat the sixth *DuPont* factor as neutral and accord the cited mark “the normal scope of protection to which inherently distinctive marks are entitled.” *In re Info. Builders Inc.*, No. 87753964, 2020 TTAB LEXIS 20, at \*26.

## **II. Conclusion –Balancing the *DuPont* Factors**

The final step in analyzing likelihood of confusion is to weigh the *DuPont* factors for which there is evidence and argument, “explain the results of that weighing,” and address “the weight [we] assigned to the relevant factors.” *Charger Ventures*, 64 F.4th at 1384. “No mechanical rule determines likelihood of confusion, and each case requires weighing of the facts and circumstances of the particular mark.” *Mighty Leaf Tea*, 601 F.3d. at 1346; *see also Naterra Int’l*, 92 F.4th at 1116-17 (“Only the *DuPont* factors of significance to the particular mark need be considered in the likelihood of confusion analysis.”).

We have carefully considered all of the evidence and arguments. The Class 25 goods of Applicant’s application and the Class 25 goods of the cited registration are in-part identical, and the trade channels and classes of consumers for the identical goods are presumed to be the same. Accordingly, the second and third *DuPont* factors strongly weigh in favor of a likelihood of confusion for the Class 25 goods. Applicant’s mark and the cited mark are similar in appearance, sound, meaning, and commercial impression. The first *DuPont* factor therefore weighs in favor of finding a likelihood of confusion. The fourth and sixth *DuPont* factors are neutral in our likelihood of confusion analysis. No *DuPont* factor weighs against a finding of likelihood of

confusion. Accordingly, we conclude that confusion is likely between Applicant's mark for the identified goods in Class 25 and the cited mark for the in-part identical goods in Class 25.

**Decision:** The Section 2(d) refusal to register is affirmed as to the goods in Class 25. The application will proceed with respect to the goods in Class 28.