

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: October 23, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re David Swan

Serial No. 98517490

Amanda M. Prose of Westman, Champlin & Koehler, P.A.,
for David Swan.

Andrea Cornwell, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

Before Wellington, Dunn, and Lavache,
Administrative Trademark Judges.

Opinion by Lavache, Administrative Trademark Judge:

David Swan (“Applicant”) seeks registration on the Principal Register of the standard character mark I HAVE THE POWER for “T-shirts and hats,” in International Class 25.¹

The Trademark Examining Attorney refused registration of Applicant’s mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground of likelihood of

¹ Application Serial No. 98517490, filed April 24, 2024, based on Applicant’s allegation of use in commerce under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), claiming November 27, 2023, as both the date of first use anywhere and the date first use in commerce.

confusion, citing the standard character mark I HAVE THE POWER, which is registered on the Principal Register for “toy action figures and accessories therefor,” in International Class 28.²

After the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, which the Examining Attorney denied. The appeal then resumed and both Applicant and the Examining Attorney filed briefs. For the reasons explained below, we **affirm** the refusal.

I. Likelihood of Confusion

Trademark Act Section 2(d), in relevant part, prohibits registration of a mark that “so resembles a mark registered in the Patent and Trademark Office . . . as to be likely, when used on or in connection with the goods of the applicant, to cause confusion.” 15 U.S.C. § 1052(d). To determine whether confusion is likely, we analyze all probative evidence relevant to the factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”).³ See *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003).

In every Section 2(d) case, two key *DuPont* factors are the similarity or dissimilarity of the marks and the relatedness of the respective goods, because the “fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences

² Registration No. 7108257 issued on July 11, 2023.

³ Citations in this opinion adhere to the guidance in the TRADEMARK TRIAL & APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (June 2025). The TTABVUE citations in this opinion refer to the Board’s docket system. The number preceding the TTABVUE designation is the docket entry number and any numbers following indicate the page numbers within the docket entry. The Trademark Status and Document Retrieval (TSDR) citations refer to the USPTO’s electronic file database for the involved application.

in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976). Here, we have considered each *DuPont* factor that is relevant and for which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).

Varying weight may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 1356 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 1205 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). Ultimately, however, “each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 1199 (CCPA 1973).

A. Comparison of the Marks

We begin our analysis with the first *DuPont* factor, which focuses on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation, and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1371 (quoting *DuPont*, 476 F.2d at 1361).

Here, both Applicant’s mark and the cited mark are I HAVE THE POWER in standard characters. Accordingly, the Examining Attorney argues that the “marks are identical in appearance, sound, and meaning, ‘and have the potential to be used

. . . in exactly the same manner.”⁴ Applicant, on the other hand, contends that “[t]he respective marks have different commercial impressions and the connotation of the marks is distinct.”⁵ In support, Applicant asserts the cited mark uses I HAVE THE POWER “as a tag-line on . . . packaging for a toy figurine,” while Applicant’s mark “is not connected in any way to . . . any . . . toy action figure or character.”⁶

However, “[i]n considering the similarity between the marks, we must compare Applicant’s mark with the cited mark as shown in the registration certificate.” *In re i.am.symbolic, LLC*, No. 85044494, 2015 TTAB LEXIS 369, at *16 (citing *B.V.D. Licensing Corp. v. Rodriguez*, No. 91157529, 2007 TTAB LEXIS 32, at *24; *Jockey Int’l. Inc. v. Mallory & Church Corp.*, No. 91081508, 1992 TTAB LEXIS 53, at *8-10; *Blue Cross & Blue Shield Assoc. v. Harvard Cmty. Health Plan Inc.*, No. 91078270, 1990 TTAB LEXIS 43, at *4). And we must consider the marks in connection with the goods as they are identified in Applicant’s application and the cited registration. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990)).

In this case, the cited registration identifies Registrant’s goods simply as “toy action figures and accessories therefor,” without otherwise limiting the nature of the goods or how the mark is applied to them. Nor has Applicant pointed to anything

⁴ Examining Attorney’s Brief, 8 TTABVUE 3 (quoting *In re i.am.symbolic, LLC*, No. 85044494, 2015 TTAB LEXIS 369, at *15).

⁵ Applicant’s Brief, 6 TTABVUE 17.

⁶ *Id.*

about the inherent nature of “T-shirts and hats” that would give the phrase I HAVE THE POWER a different meaning than when that same phrase is used in connection with “toy action figures and accessories therefor.” If anything, in both contexts, the phrase I HAVE THE POWER could be perceived as a slogan connoting personal empowerment. Thus, we conclude that the respective identical marks are likely to have the same meaning and engender the same overall commercial impression. *See i.am.symbolic*, 2015 TTAB LEXIS 369, at *16. Accordingly, the first *DuPont* factor weighs heavily in favor of a conclusion that confusion is likely. *See Majestic Distilling*, 315 F.3d at 1315 (“[W]hen word marks are identical but neither suggestive nor descriptive of the goods associated with them, the first *DuPont* factor weighs heavily against the applicant.”).

B. Relatedness of the Goods

We turn now to the second *DuPont* factor, which concerns the similarity or dissimilarity and nature of the respective goods. *DuPont*, 476 F.2d at 1361. In determining the relatedness of the goods, we must consider the goods as they are identified in Applicant’s application and the cited registration. *See Stone Lion*, 746 F.3d at 1323 (quoting *Octocom*, 918 F.2d at 942).

Generally, it is sufficient that the goods are related in some manner, or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1396 (Fed. Cir. 2012); *7-Eleven, Inc. v. Wechsler*, No. 91117739, 2007 TTAB

LEXIS 28, at *18. And “where identical marks are involved, as is the case here, the degree of similarity between the goods that is required to support a finding of likelihood of confusion declines.” *i.am.symbolic*, 2015 TTAB LEXIS 369, at *16 (citing *Shell Oil*, 992 F.2d at 1207 (“[E]ven when goods . . . are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source.”)).

Further, registration may be refused as to an entire class of goods if Applicant’s mark as used in connection with any of its identified goods in that class is likely to cause confusion with Registrant’s mark for any of the goods listed in the cited registration. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 1041 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981) (indicating that likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods in the application).

Here, Applicant’s goods are “T-shirts and hats,” in International Class 25. Registrant’s goods are “toy action figures and accessories therefor,” in International Class 28.

The Examining Attorney argues that the respective goods are closely related based on internet evidence of record showing “that the same entity commonly produces the relevant goods and markets the goods under the same mark.”⁷

⁷ Examining Attorney’s Brief, 8 TTABVUE 4.

For example:

- Funko (funko.com) offers FUNKO-branded hats and toy figures, including, in some instances, sets featuring both a t-shirt and toy figure;⁸
- Lucy Store (lucystore.com) offers I LOVE LUCY-branded toy action figures and hats;⁹
- Hasbro Pulse (hasbropulse.com) offers G.I. JOE-branded toy action figures and t-shirts;¹⁰
- DC Shop (shop.dc.com) offers DC-branded and BATMAN-branded toy action figures, t-shirts, and hats;¹¹
- Disney Store (disneystore.com) offers, inter alia, STAR WARS-branded and CAPTAIN AMERICA-branded t-shirts, hats, and toy action figures;¹²
- Nickelodeon Universe (store.nickelodeon.com) offers, inter alia, t-shirts, hats, and toy action figures, all featuring the brands TMNT, SPONGEBOB SQUAREPANTS, or PAW PATROL;¹³
- Nintendo (nintendo.com) offers, inter alia, SUPER MARIO-branded t-shirts, hats, and toy action figures;¹⁴ and
- The Back to the Future online store (backtothefuture.store) offers BACK TO THE FUTURE-branded toy action figures, hats, and t-shirts.¹⁵

⁸ November 18, 2024 Nonfinal Office Action at TSDR 7-14.

⁹ *Id.* at 25-30.

¹⁰ *Id.* at 31-46.

¹¹ January 16, 2025 Final Office Action at TSDR 7-15.

¹² *Id.* at 16-31.

¹³ *Id.* at 32-37.

¹⁴ *Id.* at 38-56.

¹⁵ *Id.* at 57-66.

This evidence is relevant and probative because it shows that various third parties in the marketplace offer, on the same website and under the same mark, t-shirts and/or hats, as well as toy action figures. Thus, it indicates that consumers are accustomed to encountering these goods being offered by a single source together in the same place under the same mark and that they may therefore view the goods as related. *See, e.g., Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 1117 (Fed. Cir. 2024) (“[T]estimony that third-party companies sell both types of goods is pertinent to the relatedness of the goods.”); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1328-29 (Fed. Cir. 2000) (finding the Board “erred when it refused to consider the lay evidence that several large companies produce and sell both pet and human food in deciding whether a consumer would reasonably believe that . . . dog treats originated from the same source as . . . human snacks”).

The Examining Attorney has also made of record copies of 34 active, used-based, third-party registrations showing instances of a single mark being registered for toy action figures and shirts and/or hats.¹⁶ This evidence also suggests that the listed goods are of a type that commonly emanate from a single source and thus may be

¹⁶ *See id.* at 67-96. The Examining Attorney submitted a total of 36 third-party registrations, but, as Applicant points out (*see* Applicant’s Brief, 6 TTABVUE 10-11), two of these registrations have been cancelled, either in whole or in part as to the goods in Class 25. *See In re Audemars Piguet Holding SA*, No. 90045780, 2025 TTAB LEXIS 1, at *60 n.103 (taking judicial notice of registration status reflected in USPTO records). Thus, they are not probative evidence of the relatedness of the goods at issue. *Made in Nature, LLC v. Pharmavite LLC*, No. 91223352, 2022 TTAB LEXIS 228, at *31 (“A cancelled or expired registration has no probative value other than to show that it once issued.”).

perceived as related.¹⁷ *In re Albert Trostel & Sons Co.*, No. 74186695, 1993 TTAB LEXIS 36, at *7.

Applicant argues that this evidence is insufficient to establish the relatedness of the goods identified in its application and the cited registration.¹⁸ First, Applicant asserts that the Examining Attorney has failed to establish “‘something more’ to show relatedness in a manner that indicates the relatedness is well known or generally recognized.”¹⁹ In support of this argument, Applicant cites *In re St. Helena Hosp.*, 774 F.3d 747 (Fed. Cir. 2014) and *In re Coors Brewing Co.*, 343 F.3d 1340 (Fed. Cir. 2003). However, we agree with the Examining Attorney that Applicant’s reliance on the “‘something more” principle is misplaced here.²⁰ As the Board has previously held, the cases cited by Applicant “involved the question of relatedness of **goods and services**, limiting the requirement for ‘something more’ to circumstances where goods are used in the rendering of services and the relatedness of the goods and services is not evident, well known, or generally recognized.” *In re Samsung Display Co.*, No.

¹⁷ Applicant argues that two of the 34 active third-party registrations submitted by the Examining Attorney are not probative of the actual use of the goods at issue because the registrations’ underlying records do not include evidence of use in connection with those goods. See Applicant’s Brief, 6 TTABVUE 10. However, even without such evidence, these registrations show that the goods at issue are the type that may emanate from the same source under the same mark. See *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, No. 91197659, 2013 TTAB LEXIS 314, at *27-28 (“[U]se-based, third-party registrations, although not evidence that the marks shown therein are in use or that the public is familiar with them, nonetheless 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.”).

¹⁸ See Applicant’s Brief, 6 TTABVUE 9-13.

¹⁹ *Id.* at 9.

²⁰ See Examining Attorney’s Brief, 8 TTABVUE 10.

90502617, 2024 TTAB LEXIS 258, at *16 (emphasis added). Extending this principle “to circumstances involving a comparison of goods . . . goes beyond its intended application.” *Id.* Again, for our purposes, it is sufficient that the conditions and activities surrounding the marketing of the respective goods are such that they would or could be encountered by the same persons under circumstances that could give rise to the mistaken belief that they originate from the same source if sold under similar marks. *See Coach Servs.*, 668 F.3d at 1396; *7-Eleven*, 2007 TTAB LEXIS 28, at *18.

Applicant also dismisses the Examining Attorney’s evidence of third-party marketplace use and third-party registrations noted above, arguing that the cited mark “is the tag-line of the action hero He-Man,” and, “[i]n contrast, the evidence submitted by the Examiner does not relate to tag-line marks being registered in connection with both toy action figures and clothing.”²¹

Again, we must consider the respective marks and goods as they are set forth in Applicant’s application and the cited registration. *See Stone Lion*, 746 F.3d at 1323; *Octocom*, 918 F.2d at 942; *i.am.symbolic*, 2015 TTAB LEXIS 369, at *16. And, as already addressed above, Applicant’s arguments essentially impose a limitation on Registrant’s mark and goods that is not reflected in the cited registration itself. Rather, the registration identifies the goods simply as “toy action figures and accessories therefor,” without otherwise limiting the nature of the goods or how the mark is applied to them. Therefore, Applicant’s arguments are unavailing.

²¹ Applicant’s Brief, 6 TTABVUE 10.

We also reject Applicant’s argument that the Examining Attorney’s evidence of third-party marketplace use does not support a conclusion that the respective goods are related because the use shown “is not actual trademark use of these marks as a source identifier on the clothing items but is instead ornamental use” “related to the specific action figures or characters being printed on the art of the t-shirts or hats.”²² As the Examining Attorney points out,²³ aside from any potentially ornamental use exhibited in this evidence, the relevant third-party marks also appear in a non-ornamental, source-indicating fashion in product descriptions and elsewhere on the webpages.

In sum, we find, in view of the evidence of record, that toy action figures, on one hand, and t-shirt or hats, on the other, are the types of goods that consumers may view as closely related because such goods are commonly offered by the same source under the same mark. *See Coach Servs.*, 668 F.3d at 1396. Thus, the second *DuPont* factor weighs in favor of a conclusion that confusion is likely.²⁴

C. Trade Channels and Classes of Consumers

Next, we consider the established, likely-to-continue channels of trade, the third *DuPont* factor. *DuPont*, 476 F.2d at 1361. Applicant argues that it and

²² *Id.* at 12.

²³ *See* Examining Attorney’s Brief, 8 TTABVUE 5.

²⁴ Applicant devotes a portion of its brief to addressing evidence from Registrant’s website provided by the Examining Attorney, which shows that the cited mark is used in connection with t-shirts. *See* Applicant’s Brief, 6 TTABVUE 12-13. Applicant argues that this evidence is “not material to any allegations of relatedness” because it is “extrinsic evidence.” *Id.* at 13. We agree, however, with the Examining Attorney that this evidence is part of “a body of evidence establishing that producers of action figures commonly also produce clothing goods and market them under the same mark.” Examining Attorney’s Brief, 8 TTABVUE 5.

Registrant “are not competitors” and “are in different industries and fields, have different buyers or customers, and are in distinct channels of trade.”²⁵ Applicant again attempts to limit Registrant’s goods to those “that are directed to consumers familiar with the persona of [a] toy action figure.”²⁶ However, neither Applicant’s identification of goods nor Registrant’s identification of goods has any restrictions as to channels of trade or classes of consumers. Accordingly, we presume that the identifications encompass all goods of the type described, that the goods travel through all normal channels of trade for such goods, and that they are available to all classes of purchasers of such goods. *See Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1373 (Fed. Cir. 2013); *Univ. of Ky. v. 40-0, LLC*, No. 91224310, 2021 TTAB LEXIS 68, at *32-33 (“Because there are no limitations on the channels of trade or classes of consumers of the . . . [goods] identified in the application, the relevant consuming public comprises all potential purchasers of . . . [such goods].”).

Here, the evidence discussed above establishes that the goods at issue may be offered through the same trade channels and thus encountered by the same classes of consumers. We therefore find that the third *DuPont* factor also weighs in favor of a conclusion that confusion is likely.

²⁵ Applicant’s Brief, 6 TTABVUE 18.

²⁶ *Id.* at 17.

D. Consumer Sophistication and Purchasing Conditions

Under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 476 F.2d at 1361. Regarding this factor, Applicant argues that “[t]oy action figures are directed to characters which are the basis of the trademark” and “[t]hus, the registered goods are obviously secondary uses of a tag-line where the marks are tied by artistic depictions to a character.”²⁷ Therefore, Applicant asserts, “[n]o consumer is purchasing these goods without an understanding that there is a relation between the character and the t-shirt as evidenced by external factors (e.g., art and logos on the respective items).”²⁸ According to Applicant, “[t]his indicates a further sophistication and care undertaken by the consumers which further distinguishes the goods.”²⁹

Once again, the cited registration’s identified “toy action figures and accessories therefor” are not restricted in the manner alleged by Applicant, or in any other manner. Therefore, we must presume that the identification encompasses all types of “toy action figures”—including those that are not connected to a particular character’s tagline—and that the goods are available to all potential purchasers. *See Univ. of Ky.*, 2021 TTAB LEXIS 68, at *32-33.

Applicant has not provided any evidence of consumer sophistication or purchasing care in connection with the goods at issue here. And, as a general matter, “we must

²⁷ *Id.* at 14.

²⁸ *Id.*

²⁹ *Id.*

make our determination based on the least sophisticated consumer.” *In re Guild Mortg. Co.*, No. 86709944, 2020 TTAB LEXIS 17, at *17 (citing *Stone Lion*, 746 F.3d at 1325); *In re FCA US LLC*, No. 85650654, 2018 TTAB LEXIS 116, at *29. The evidence provided by the Examining Attorney suggests that toy action figures, t-shirts, and hats can be relatively inexpensive. For instance, such goods can be found for under \$20 in the Nintendo online store.³⁰ “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.” *i.am.symbolic*, 2015 TTAB LEXIS 369, at *21 (quoting *Recot*, 214 F.3d at 1329).

Thus, in the absence of evidence to the contrary, we presume that the least sophisticated of Applicant’s and Registrant’s overlapping consumers will not exercise anything other than ordinary care in selecting the goods. In any event, even sophisticated purchasers are not immune from source confusion, especially where, as here, the goods are closely related and are being offered under identical marks. *See Shell Oil*, 992 F.2d at 1208 (citing *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 1548 (Fed. Cir. 1990) (affirming the Board’s reasoning that even sophisticated purchasers may be confused by similar marks)).

Accordingly, we find the fourth factor to be neutral in our analysis.

³⁰ January 16, 2025 Final Office Action at TSDR 38-56.

E. Applicant's Ownership of Prior Registrations

A heading in Applicant's brief references the ninth *DuPont* factor,³¹ under which we consider any evidence or arguments as to 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. Under this heading, Applicant suggests that the Examining Attorney failed to give adequate weight to the fact that Applicant is the owner of three registrations for the mark I HAVE THE POWER for decorative magnets; refrigerator magnets, animal leashes; pet collars; pet tags; various types of bags; and key chains in International Classes 9, 14, and 18, and that all of these registrations issued prior to the cited registration.³²

As to those prior registrations, while Applicant claimed ownership of them in its application, and listed the goods covered by the registrations in a response during examination,³³ the registrations were never properly made of record. *See In re Volvo Cars of N. Am., Inc.*, No. 74212578, 1998 TTAB LEXIS 20, at *4 n.2 ("[C]opies of the official records themselves, or the electronic equivalent thereof, that is, printouts of the registrations taken from the electronic records of the Patent and Trademark Office's own data base, must be submitted."); TBMP § 1208.02 (indicating that to properly make of record a copy of a registration owned by applicant but not the subject of the appeal, "a copy of the registration (from either the electronic records of the

³¹ *See* Applicant's Brief, 6 TTABVUE 15.

³² *Id.* at 15-16.

³³ *See* January 3, 2025 Response to Nonfinal Office Action at TSDR 2 (referencing registrations that cover decorative magnets; refrigerator magnets, animal leashes; pet collars; pet tags; various types of bags; and key chains).

Office or the paper USPTO record) must be submitted”); *see also In re House Beer, LLC*, No. 85684754, 2015 TTAB LEXIS 66, at *3 (“[T]he Board does not take judicial notice of the files of applications or registrations residing in the Office.”). However, the Examining Attorney did not advise Applicant that the registrations were not properly of record or how to make them so, despite acknowledging the registrations and noting that they covered “differing goods than in the present case.”³⁴ Under these circumstances, we consider Applicant’s reference to these prior registrations and the covered goods for whatever probative value they may have. *See In re Thomas Nelson, Inc.*, No. 76681269, 2011 TTAB LEXIS 9, at *20 (considering a list of registrations that were not properly introduced where the examining attorney had failed to advise applicant of the defect when there was still an opportunity to cure it); TBMP § 1208.02.

That said, Applicant’s arguments regarding its prior registrations appear to be based on a misconception of the ninth *DuPont* factor’s significance and application. Under this factor, the issue is not whether Applicant uses its mark on a variety of goods, but whether Registrant does. That is, if the prior user, the plaintiff in an inter partes case or the registrant in an ex parte case, uses its mark on a variety of goods, then purchasers are more likely to view a newcomer’s related goods under a similar mark as an extension of the prior user’s line. *See, e.g., In re Hitachi High-Techs. Corp.*, No. 79110412, 2014 TTAB LEXIS 32, at *17 (“[C]onsumers who may be familiar with various products in the [Registrant’s] product line, when confronted with applicant’s

³⁴ January 16, 2025 Final Office Action at TSDR 5.

mark, would be likely to view the goods marked therewith as additional products from registrant.”); *In re Wilson*, No. 75285881, 2001 TTAB LEXIS 53, at *13 (finding that, because registrant’s mark was used on a variety of fruits and vegetables, consumers “encountering additional fruits such as applicant’s marketed under the [similar] arbitrary PINE CONE mark, would assume that a source, sponsorship or other connection exists”). Here, the evidence of record does not establish that Registrant’s mark is used on a variety of goods.³⁵ Thus, the ninth *DuPont* factor does not come into play and is therefore deemed neutral.³⁶

We also consider whether Applicant intended to submit its registration evidence, such as it is, for consideration under the eleventh *DuPont* factor, which assesses “the extent to which applicant has a right to exclude others from use of its mark on its goods.” *DuPont*, 476 F.2d at 1361. In this regard, we note that Applicant seeks registration in connection with t-shirts and hats, but the claimed registrations cover different goods, namely, decorative magnets, refrigerator magnets, animal leashes, pet collars, pet tags, various types of bags, and key chains. And Applicant has not

³⁵ The record does contain a piece of evidence showing that Registrant offers a hat and t-shirt under the cited mark. *See* May 9, 2024 Denial of Request for Reconsideration at TSDR 4. But such evidence does not, by itself, establish a variety of usage that would be significant under the ninth *DuPont* factor. *Cf., e.g., Made in Nature*, 2022 TTAB LEXIS 228, at *76 (“Opposer’s uses of the MADE IN NATURE marks, as established by the record, are insufficient to persuade us that Opposer has used its marks on an extended variety of goods.”).

³⁶ In the same section referencing the ninth *DuPont* factor, Applicant notes that the Examining Attorney “has not actually provided probative evidence of any relatedness of the respective goods” and argues that, in refusing registration of Applicant’s mark based on likelihood of confusion, “the Examining Attorney is effectively and inappropriately providing the owner of the Cited Mark a right in gross to its trademark.” Applicant’s Brief, 6 TTABVue 16. To the extent these arguments pertain to the sufficiency, or insufficiency, of the evidence as to the goods’ relatedness, that issue has already been addressed above.

otherwise made any showing that its use of its mark in connection with these different goods has affected marketplace conditions or consumer perception so as to establish a right to exclude others from use of its mark on t-shirts and hats. *See Made in Nature*, 2022 TTAB LEXIS 228, at *78 (“While brand extension is a desirable business goal, Applicant provides no legal support for finding that this recognition of its registered mark for different goods provides Applicant any right to exclude others from using the NATURE MADE mark, or similar marks, on food and beverages.”); *see also Jackes-Evans Mfg. Co. v. Jaybee Mfg. Corp.*, 481 F.2d 1342, 1345 (CCPA 1973) (“There is no right to register one’s mark on an expanded line of goods where the use of the mark covered by such registration would lead to a likelihood of confusion, mistake or deception.”); *Monster Energy Co. v. Lo*, No. 9125050, 2023 TTAB LEXIS 14, at *59 (“In a likelihood of confusion determination, ‘applicant’s right to exclude’ considers applicant’s place in the market and any resulting consumer perception as defined by the applicant’s trademark use, insofar as that use is reflected in the mark and goods described in the application.”). We therefore deem the eleventh *DuPont* factor to be neutral.

II. Conclusion

Having considered all of the arguments and evidence of record pertaining to the relevant *DuPont* factors, we find that Applicant’s mark and the cited mark are identical in terms of appearance, sound, connotation, and overall commercial impression; that Applicant’s goods and Registrant’s goods are closely related; and that the respective goods travel in overlapping trade channels and are offered to the same classes of consumers. All other relevant factors discussed above are neutral. Thus,

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the relevant *DuPont* factors weigh in favor of a conclusion that confusion as to source is likely.

Decision: The refusal under Trademark Act Section 2(d) to register Applicant's mark I HAVE THE POWER is **affirmed**.