

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: November 25, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

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In re Sergey Iotko

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Serial No. 87498790
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Sergei Orel of the Law Office of Sergei Orel LLC,
for Sergey Iotko.

John Sullivan, Trademark Examining Attorney, Law Office 114,
Laurie Kaufman, Managing Attorney.

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Before Shaw, Adlin, and Pologeorgis,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Sergey Iotko (“Applicant”) seeks registration on the Principal Register of the

composite mark  for the following goods in International Class 9:

Antennas; Brackets adapted for setting up flat screen TV sets; Computer stands specially designed for holding a computer, printer and computer peripherals; Mobile telephone accessories, namely, belt clips; Audio cables; Computer cables; Home and office electrical power automation systems comprising wireless and wired controllers, controlled devices, and software for appliances, lighting, HVAC, security and other home

and office electrical power monitoring and control applications; Power cables; Video cables.¹

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the standard character mark HOMYA registered on the Principal Register for the following goods in International Class 9:

Battery chargers; Camera cases; Car video recorders; Carrying cases for cell phones; Cases for pocket calculators; Cell phone cases; Chronographs for use as specialized time recording apparatuses; Computer mouse; Computer peripheral devices; Data cables; Digital photo frames; Dog whistles; Electric cables; Electric navigational instruments; Electrical inductors; Electronic pens; Eyeglasses; Gloves for protection against accidents; Goggles for sports; Headphones; Keyboard covers; Light emitting diodes (LEDs); Loudspeakers; Luminous signs; Pedometers; Protection masks; Radar apparatus; Sound recording apparatus; Sports helmets; Stands for photographic apparatus; Temperature indicators; Theft alarms; Thermostats; Weighing apparatus and instruments.²

Following denial of a request for reconsideration and continuation of the final refusal to register, Applicant appealed. Both Applicant and the Examining Attorney filed briefs. For the reasons explained below, we affirm the refusal.³

¹ Application Serial No. 87498790, filed on June 21, 2017, based on an allegation of use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. 1051(a), claiming February 15, 2017 as the date of first use and April 4, 2017 as the date of first use in commerce. The description of the mark reads as follows: "The mark consists of the stylized wording 'HOMY' with the letters 'H', square letter 'O', and 'M' in blue and the letter 'Y' in red, with a red square around the square letter 'O'." The colors red and blue are claimed as a feature of the mark.

² Registration No. 4794724, issued on August 18, 2015.

³ The TTABVue and Trademark Status & Document Retrieval ("TSDR") citations refer to the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .pdf version of the documents.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor for which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *see also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v.*

Kappa Books, Inc., 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. Similarity of the Goods

We initially compare the goods under the second *DuPont* factor. In making our determination regarding the relatedness of the goods, we must look to the goods as identified in Applicant's application and the goods listed in the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application 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 the sales of goods are directed.")); *see also In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011).

It is well-settled that the goods need not be identical or competitive to support a holding of likelihood of confusion. It is sufficient that the respective 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, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (citation omitted); *Hilson Research, Inc. v. Soc'y for Human Res. Mgmt.*, 27 USPQ2d 1423, 1432 (TTAB 1993). The issue here, of course, is not whether consumers would confuse Applicant's goods with Registrant's goods, but rather whether there is a

likelihood of confusion as to the source of these goods. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984). Moreover, registration must be refused if Applicant's mark for any of his identified goods is likely to cause confusion with the Registrant's mark for any of his identified goods. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (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, 209 USPQ 986, 988 (CCPA 1981) (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 or services in the application).

Applicant's goods include "Power cables." Registrant's goods include "Electric cables." We take judicial notice of the following dictionary definitions of "power cable" and "electric cable":

- Power cable: a "cable for conducting electric power."⁴
- Electrical cable: a "cable that provides an electrical connection for telephone or television or power stations; a conductor for transmitting electrical or optical signals or electric power."⁵

⁴ www.dictionary.com based on the Random House Unabridged Dictionary (2020). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

⁵ www.thefreedictionary.com based on The Free Dictionary, Farlex Financial Dictionary, © Farlex, Inc. Although Registrant's identification employs the word "electric" and the dictionary definition uses the term "electrical," we find that this a distinction without a difference since both terms are adjectives which are identically defined as pertaining to electricity. "Electrical" is defined as "electric" or "concerned with electricity." *See* www.dictionary.com based on the Random House Unabridged Dictionary (2020).

Based on these dictionary definitions, we find that Applicant's "power cables" are legally equivalent to Registrant's "electric cables."

The Examining Attorney also provided evidence demonstrating that Applicant's "Mobile telephone accessories, namely, belt clips" and "Brackets adapted for setting up flat screen TV sets" are related to Registrant's "Cell phone cases" and "Electric cables." Specifically, evidence in the form of screenshots from the websites of the online retailers InCase, Otterbox, Spigen, Echogear, Sanus, VideoSecu, Mophie, Lifeproof, Turtleback, Firefold, One For All, and Rocketfish shows that these goods are provided under the same mark by the same entity, indicating these goods frequently emanate from a common source.⁶

Applicant argues that the Examining Attorney improperly concluded the goods at issue are related merely because the goods are all classified in International Class 9.⁷ Additionally, Applicant merely states, without any explanation, that Applicant's goods and those of the Registrant are different.⁸ Applicant's arguments are unpersuasive.

As explained above, certain goods identified in Applicant's application and the cited registration were found related because there is evidence of record showing these goods are offered by the same source under the same mark. Moreover, Applicant's argument the parties' respective goods are different without explaining

⁶ September 20, 2017 Office Action, TSDR pp. 8-19; February 12, 2019 Office Action, TSDR pp. 6-18.

⁷ Applicant's Appeal Brief p. 15; 8 TTABVUE 16.

⁸ *Id.* at p. 16; 8 TTABVUE 17.

how they are different is unconvincing, especially when dictionaries reveal that the goods are identical in-part.

As previously noted, registration must be refused if Applicant's mark for any of his identified goods is likely to cause confusion with the Registrant's mark for any of his identified goods. Because we have found that Applicant's "power cables" are legally identical to Registrant's "electric cables," and insofar as some of the remaining goods, based on the evidence of record, are related in that they emanate from the same source under the same mark, we find that the second *DuPont* factor strongly favors a finding of likelihood of confusion.

B. Similarity of Trade Channels and Classes of Purchasers

Next we consider established, likely-to-continue channels of trade, the third *DuPont* factor. Because Applicant's "power cables" and Registrant's "electric cables" are legally identical goods, we must presume that these goods travel through the same channels of trade and are offered to the same purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same).

As for some of the remaining goods, i.e., mobile telephone accessories, namely, belt clips, brackets adapted for setting up flat screen TV sets, cell phone cases, and electric cables, the evidence of record demonstrates that these goods are offered via online retailers. Thus, certain goods identified in Applicant's involved application and listed

in the cited registration travel in overlapping trade channels and are offered to overlapping consumers, i.e., customers interested in electronic peripherals.⁹ Accordingly, the third *DuPont* factor also weighs heavily in favor of finding a likelihood of confusion.

C. Similarity of the Marks

We next consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 369 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019)).

“The proper test 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.” *In re i.am.symbolic, LLC*, 123 USPQ2d at 1748 (quoting *Coach Servs. Inc.*, 101 USPQ2d at 1721 (internal quotation marks omitted)). The focus is on the recollection of the average purchaser, who normally retains a general rather than

⁹ Applicant argues that the goods of the parties do not travel in similar channels of trade because “electronic peripherals are not necessarily sold in the same stores.” *See Applicant’s Brief*, p. 16; 8 TTABVue 17. Applicant, however, has failed to offer any explanation as to what trade channels the goods of the parties do travel in, or how they differ. Moreover, Applicant has not addressed the evidence provided by the Examining Attorney that shows the some of the parties’ respective goods are offered through the same trade channels. Thus, Applicant’s arguments are unavailing.

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a specific impression of trademarks. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Because the goods at issue include consumer electronics, the average purchaser is an ordinary consumer.

Although marks must be considered in their entireties, it is settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *In re Viterra Inc.*, 101 USPQ2d at 1908; *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (“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 entireties. Indeed, this type of analysis appears to be unavoidable.”). Further, where, as here, some of the goods are in-part legally identical, the degree of similarity between the marks necessary to find a likelihood of confusion declines. *In re Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *In re Max Capital Grp., Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010).



Applicant's mark is . Registrant's mark is HOMYA in standard characters.

In challenging the refusal, Applicant maintains that his applied-for mark is

“readily distinguishable from the Registrant’s mark when read in its entirety because it has a different appearance, sound, and connotation, as well as a distinct meaning to consumers.”¹⁰ Specifically, Applicant contends that the stylization of his



mark is sufficient to distinguish the marks because Applicant’s mark “creates a distinct phonetic and connotative impression from the cited mark.”¹¹ Additionally, Applicant argues that the parties’ respective marks are both weak and laudatory and, therefore, the cited mark should be entitled to only a narrow scope of protection.¹²

We do not find Applicant’s arguments persuasive. We first note that the entirety of the literal portion of Applicant’s mark is incorporated into the cited mark, which increases the likelihood of confusion. *See, e.g., Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419 (CCPA 1977) (CALIFORNIA CONCEPT with surfer logo for men’s hair and cosmetic products confusingly similar to CONCEPT for cold permanent wave lotion and neutralizer); *Coca-Cola Bottling Co. of Memphis, Tenn., Inc. v. Joseph E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (BENGAL LANCER for club soda, quinine water and ginger ale likely to cause confusion with BENGAL for gin).

The only difference in sound between the marks is the letter “A” at the end of the

¹⁰ Applicant’s Appeal Brief, p. 11; 8 TTABVUE 12.

¹¹ *Id.* at p. 13; 8 TTABVUE 14.

¹² *Id.* at pp. 3 and 5; 8 TTABVUE 4 and 6.

cited mark. While there is no one correct pronunciation of a mark, *see In re Viterra Inc.*, 101 USPQ2d at 1912, the inclusion of the letter “A” at the end of the cited mark is a minor subordinate suffix, which we find fails to meaningfully differentiate the marks aurally. *Cf. In re Mighty Leaf Tea*, 94 USPQ2d at 1260 (“[T]he presence of an additional term in the mark does not necessarily eliminate the likelihood of confusion if some terms are identical.”).

As to stylization, Registrant’s HOMYA mark is a standard character mark, and marks appearing in standard character form may be displayed in any font style, color and size, including the identical stylization and color scheme of Applicant’s mark, because the rights reside in the wording and not in any particular display or rendition. *See SquirtCo v. Tomy Corp.*, 216 USPQ at 939 (“[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display. By presenting its mark merely in a typed drawing, a difference cannot legally be asserted by that party.”); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186-87 (TTAB 2018). Thus, because Registrant’s standard character mark HOMYA may be displayed in the identical manner as Applicant’s mark, the mere stylization of the wording HOMOY and the use of the colors red and blue in Applicant’s mark is insufficient to distinguish the marks.

As noted, Applicant also argues the marks can coexist because they are both weak and laudatory. In support of his argument, Applicant submitted a dictionary definition of the term “homy” which is defined as “comfortably informal and inviting;

cozy; homelike.”¹³

This argument is unpersuasive as well. In connection with goods such as furniture or décor, the wording HOMY may have a suggestive connotation, however, it is unclear what about Applicant’s electronic goods could be described as “inviting,” “cozy,” or “homelike.” Instead, consumers would perceive the wording HOMY to be arbitrary when used in connection with Applicant’s goods. Applicant does not provide a separate explanation as to why the cited mark HOMYA is weak or laudatory, but goes on to state “[w]hatever the image, it is clear that HOMY or HOMYA is laudatory, weak and is adopted by firms to project a desirable image.”¹⁴ Later in his brief Applicant states that “HOMYA, the cited mark, is a made-up word without any apparent meaning....”¹⁵ Therefore, while it is unclear which position Applicant is taking regarding the impression of the wording HOMYA, we nonetheless find that Registrant’s mark is arbitrary and should be accorded the normal scope of protection afforded arbitrary marks.¹⁶ Consumers would either perceive it to be a combination of the arbitrary word HOMY and the letter A, or as a made-up word without any apparent meaning. As such, Applicant has failed to show that the cited mark is

¹³ July 21, 2019 Request for Reconsideration, TSDR p. 21.

¹⁴ Applicant’s Appeal Brief, p. 5; 8 TTABVUE 6.

¹⁵ *Id.*

¹⁶ In fact, the cited mark issued on the Principal Register without a showing of acquired distinctiveness under Section 2(f) of the Trademark Act. Accordingly, the cited mark is inherently distinctive and, therefore, is entitled to the normal scope of protection accorded an inherently distinctive mark. We also observe that there is no evidence of record demonstrating that third parties use marks similar to the cited mark HOMYA for similar goods. Thus, the cited mark HOMYA, based on this record, is not weakened commercially.

entitled only to a narrow scope of protection.

With regard to commercial impression, the root term of the cited mark, i.e., HOMY, comprises the entirety of the literal portion of Applicant's mark. Consumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1692 (finding similarity between VEUVE ROYALE and two VEUVE CLICQUOT marks in part because "VEUVE . . . remains a 'prominent feature' as the first word in the mark and the first word to appear on the label"); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed Cir. 1992) (finding similarity between CENTURY 21 and CENTURY LIFE OF AMERICA in part because "consumers must first notice th[e] identical lead word"); *see also In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding "the identity of the marks' two initial words is particularly significant because consumers typically notice those words first"). Thus, despite the addition of a peripheral suffix in the cited mark, we find that the marks convey similar and sufficient commercial impressions to cause purchasers and prospective purchasers who then encounter the other's mark on the other's goods, to mistakenly believe that these goods originate from or are sponsored by the same entity.

In sum, when viewing the marks in their entireties, we find that Applicant's



mark and the cited mark HOMYA in standard characters are more

similar than dissimilar for likelihood of confusion purposes.

For these reasons, the first *DuPont* factor also favors a finding of likelihood of confusion.

D. Sophistication of Consumers

The fourth *DuPont* factor concerns the “conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Applicant argues that consumers of electronic peripherals are sophisticated and are therefore able to differentiate between Applicant’s and Registrant’s marks.¹⁷

Applicant has not pointed us to any evidence supporting his argument that purchasers of either Applicant’s goods or Registrant’s goods are sophisticated and make purchasing decisions through careful consideration. In addition, his argument is not plausible given the identifications of goods involved in this appeal. Because there are no restrictions as to classes of purchasers or price points for either Applicant’s goods or Registrant’s goods, we find that the purchasers of the parties’ respective goods are members of the general public interested in electronics or electronic peripherals. Our decision must be based on the “least sophisticated purchasers,” *Stone Lion*, 110 USPQ2d at 1163, and we consider those purchasers. In any event, we do not need evidence to know that cables and phone accessories are sold in many types of stores and are everyday, minor consumer purchases.

¹⁷ *Id.* at p. 15; 8 TTABVUE 16.

Even if Applicant had demonstrated that the actual or potential consumers of the parties' goods may be sophisticated, we point out that they may not be sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *See In re Shell Oil Co.*, 26 USPQ2d at 1690 (indicating that "even sophisticated purchasers can be confused by very similar marks"); *Top Tobacco, LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01(d)(vii) (October 2018). Here, where the marks at issue are similar and the goods are in part legally identical, confusion is often found likely despite customer sophistication and care. "That the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods. 'Human memories even of discriminating purchasers . . . are not infallible.'" *In re Research & Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (quoting *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)); *In re Wilson*, 57 USPQ2d 1863, 1865-66 (TTAB 2001) (where marks are very similar and goods related, confusion may be likely even among sophisticated purchasers).

Thus, this *DuPont* factor is neutral.

II. Conclusion

We have considered all of the arguments and evidence of record. We have found that: (1) the marks are similar; (2) some of Applicant's identified goods and Registrant's goods are in part legally identical or otherwise related; (3) the parties' respective goods move in identical or overlapping trade channels and would be offered to the same or overlapping classes of purchasers; and (4) Applicant has not

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demonstrated that the cited mark is either weak or laudatory as to allow the registration of Applicant's mark. In view thereof, we conclude that Applicant's



mark, as used in connection with the goods identified in his involved application, so resembles the cited standard character mark HOMYA for Registrant's identified goods as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act.



Decision: The refusal to register Applicant's mark under Section 2(d) of the Trademark Act is affirmed.