

This Opinion is Not a  
Precedent of the TTAB

Mailed: December 19, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

—  
Trademark Trial and Appeal Board  
—

*In re Pinthouse Pizza Holdings, LLC*  
—

Serial No. 87603131  
—

H. Michael Drumm and Trent Rinebarger of Drumm Law LLC,  
for Pinthouse Pizza Holdings, LLC.

Janice L. McMorro, Trademark Examining Attorney, Law Office 115,  
Daniel Brody, Managing Attorney.

—  
Before Kuhlke, Heasley, and English,  
Administrative Trademark Judges.

Opinion by English, Administrative Trademark Judge:

Pinthouse Pizza Holdings, LLC (“Applicant”) seeks registration on the Principal Register of the mark ELECTRIC JELLYFISH, in standard characters, for “beer” in International Class 32.<sup>1</sup>

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

---

<sup>1</sup> Application Serial No. 87603131; filed September 11, 2017 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on a claim of first use and first use in commerce on October 25, 2015.

with several marks consisting of or incorporating the term AGUAMALA registered to Nathaniel Benedict Schmidt Covo, an individual residing in Mexico (“Registrant”), for “beer.” When the refusal was made final, Applicant appealed and requested reconsideration. Action on the appeal was suspended pending disposition of the request for reconsideration. The Examining Attorney denied Applicant’s request for reconsideration, and the appeal resumed.

We affirm the refusal to register.

## **I. Cited Marks**

The following marks for “beer” owned by Registrant form the basis for the Examining Attorney’s refusal to register Applicant’s Mark under Section 2(d):<sup>2</sup>

- AGUAMALA, standard characters;<sup>3</sup>
- CERVECERÍA AGUAMALA, standard characters;<sup>4</sup>

---

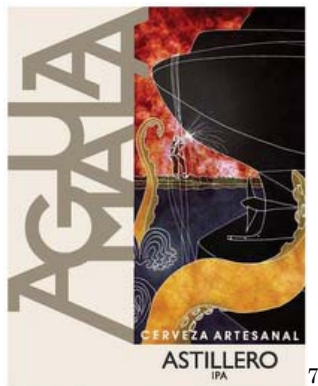
<sup>2</sup> Citations to the prosecution record are to the Trademark Status & Document Retrieval (“TSDR”) system by page number in the downloadable .pdf versions of the documents. All other citations are to TTABVUE, the Board’s online docketing system.

In the first Office Action, the Examining Attorney cited six registrations as bars under Section 2(d) and two pending applications as potential bars to registration. December 18, 2017 Office Action at TSDR 2-3. Subsequently, the cited applications matured to registration. Accordingly, in the second Office Action, the Examining Attorney cited the resulting registrations as additional bars to registration under Section 2(d). June 21, 2018 Office Action at TSDR 2.

Each registration contains a statement that the English translation of the word AGUAMALA is “jellyfish.” We have omitted the other translation statements, disclaimers, color claims and descriptions of the marks due to their length.

<sup>3</sup> Registration No. 5389733; issued January 30, 2018.

<sup>4</sup> Registration No. 5476556; issued May 22, 2018.

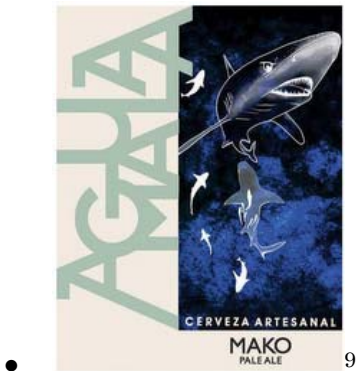
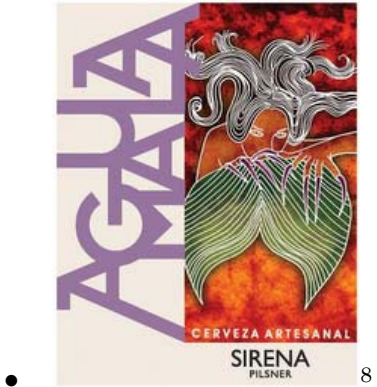


---

<sup>5</sup> Registration No. 4643135; issued November 25, 2014.

<sup>6</sup> Registration Nos. 5285256 and 5285257; both issued September 12, 2017. The registrations differ only in the description of the mark and translation statements. In Registration No. 5285256, the description of the mark and translation statement identifies AGUAMALA as one word while the description of the mark and translation statement in Registration No. 5285257 identifies AGUA MALA as two words.

<sup>7</sup> Registration No. 5183391; issued April 11, 2017.



In considering whether there is a likelihood of confusion, we focus our analysis on the cited standard character mark AGUAMALA for “beer” (the “Cited Registration” or “Cited Mark”). If we find that Applicant’s mark is likely to cause confusion with the Cited Mark, it will be unnecessary to consider whether there is a likelihood of confusion between Applicant’s mark and the other cited marks. Conversely, if we find no likelihood of confusion between Applicant’s mark and the Cited Mark, we would not find a likelihood of confusion between Applicant’s mark and the other cited marks. *See, e.g., In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

---

<sup>8</sup> Registration No. 5183392; issued April 11, 2017.

<sup>9</sup> Registration No. 5183393; issued April 11, 2017.

## II. Analysis

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 or mistake, or to deceive. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) (cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015)); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor that is relevant or for which there is evidence of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 Commc’ns., Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and 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 and Trade Channels and the Care and Sophistication of the Purchasers**

The goods identified in both Applicant’s application and the Cited Registration are “beer.” Because the goods are identical and there are no restrictions or limitations in the respective identifications, we presume that the goods travel through the same channels of trade—liquor stores, bars, and restaurants, as well as supermarkets and convenience stores in some jurisdictions—to the same classes of purchasers: adult beer drinkers. *See, e.g., In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 (TTAB 2015).

In addition, because there is no price limitation in Applicant’s application or the Cited Registration we must further presume that the goods include inexpensive beer that may be purchased on impulse by ordinary consumers. *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 and n.4 (TTAB 2016) (taking judicial notice that “in the absence of any evidence to the contrary, ... beer is relatively inexpensive, subject to impulse purchase[.]”). “When products are relatively low-priced and subject to

impulse buying, the likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.” *Recot Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *see also Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984).

The identity of the goods and channels of trade and the low-cost, impulse-purchase nature of the goods weigh heavily in favor of a likelihood of confusion.

### **B. Similarity or Dissimilarity of the Marks**

We next consider the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *DuPont*, 177 USPQ at 567. “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) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)) *aff’d* 777 Fed. Appx. 516 (Fed. Cir. 2019). Because the goods are identical, the degree of similarity between the marks that is necessary for confusion to be likely is reduced. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (“When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.”).

The issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar that

confusion as to the source of the goods offered under the respective marks is likely to result. *In re i.am.symbolic*, 123 USPQ2d at 1748; *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1721; *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, \*6 (TTAB 2019). The focus is on the recollection of the average purchaser, who normally retains a general rather than specific impression of trademarks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *Double Coin Holdings*, 2019 USPQ2d at \*6; *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012). We do not predicate our analysis on a dissection of the involved marks; we consider the marks in their entirety. *Stone Lion*, 110 USPQ2d at 1160; *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (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.”). But there is nothing improper in giving more or less weight to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant’s mark ELECTRIC JELLYFISH is different from the Cited Mark AGUAMALA in appearance and sound, but equivalency in meaning or connotation can outweigh the differences in marks. *In re Aquamar, Inc.*, 115 USPQ2d at 1127-28; *In re Perez*, 21 USPQ2d 1075, 1077 (TTAB 1991). The Examining Attorney relies on the doctrine of foreign equivalents to assert that the marks are similar in meaning and connotation because AGUAMALA is Spanish for “jellyfish.”



Under the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine similarity of connotation with English word marks. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005). The rule, however, is not absolute and should be viewed merely as a guideline. *Id.* The doctrine should be applied only when: (1) the relevant English translation is direct and literal and there is no contradictory evidence establishing another relevant meaning, *In re Sadoru Grp., Ltd.*, 105 USPQ2d 1484, 1485 (TTAB 2012); and (2) “it is likely that the ordinary American purchaser would ‘stop and translate [the word] into its English equivalent.’” *Palm Bay*, 73 USPQ2d at 1696 (quoting *In re Pan Tex Hotel Corp.*, 190 USPQ 109, 110 (TTAB 1976)). The “ordinary American purchaser” includes “all American purchasers, including those proficient in a non-English language who would ordinarily be expected to translate words into English.” *In re Spirits Int’l N.V.*, 563 F.3d 1347, 90 USPQ2d 1489, 1492 (Fed. Cir. 2009).

Applicant does not dispute that Spanish is a common, modern language in the United States, and “we have routinely applied the doctrine of foreign equivalents to Spanish language marks.” *See, e.g., In re Aquamar*, 115 USPQ2d at 1127; *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1648 (TTAB 2008). Applicant argues that the doctrine of foreign equivalents should not be applied because “jellyfish” is not the literal or direct translation of the Spanish word AGUAMALA. Applicant asserts that in Spanish “agua” means “water” and “mala” means “bad” so “the term AGUAMALA

literally and directly translates to ‘bad water.’”<sup>10</sup> Applicant further asserts that “medusa” is the Spanish word for “jellyfish” and AGUAMALA is merely “a regionalism, used by certain Spanish speakers in parts of Mexico and Colombia as a colloquial alternative term for ‘medusa.’”<sup>11</sup> Accordingly, “Spanish speakers broadly ... would be unlikely to translate the term [AGUAMALA] as ‘jellyfish’” and “the overwhelming majority of English speakers who know a smattering of Spanish would see the term ‘aguamala’ as ‘bad water.’”<sup>12</sup>

In determining whether the doctrine of foreign equivalents is applicable, we must consider the Cited Mark as registered: AGUAMALA, one word. The Examining Attorney has submitted the following translation statement prepared by the Translations Branch of the U.S. Patent and Trademark Office:<sup>13</sup>

The original language of the non-English wording “AGUAMALA” is “Spanish.” The English translation of the non-English wording in the mark is “jellyfish”.

The Office’s translator, who is proficient in Spanish, acknowledges that “[a]s two words, AGUA MALA means ‘bad water,’” but explains that “[a]s one word, [AGUAMALA] would **\*only\*** be interpreted as meaning ‘jellyfish.’”<sup>14</sup> The record also includes printouts of English translations from the Spanish Oxford Living

---

<sup>10</sup> 7 TTABVUE 7 and n.1.

<sup>11</sup> *Id.* at 7.

<sup>12</sup> *Id.*

<sup>13</sup> January 2, 2019 Final Office Action at TSDR 4-5.

<sup>14</sup> *Id.* at 4.

Dictionaries,<sup>15</sup> Collins Spanish to English Dictionary,<sup>16</sup> Collins Complete Spanish Electronic Dictionary,<sup>17</sup> and The American Heritage Spanish Dictionary<sup>18</sup> identifying AGUAMALA as Spanish for “jellyfish.”

In support of its position that AGUAMALA is Spanish for “bad water,” Applicant has submitted the following Google translation:<sup>19</sup>



---

<sup>15</sup> June 8, 2018 Resp. to Office Action at TSDR 11-12; June 21, 2018 Office Action at TSDR 23 (es.oxforddictionaries.com).

Applicant attached the same four exhibits (A-D) to both of its Office Action responses and its Request for Reconsideration. We cite to the exhibits in Applicant’s June 8, 2018 response to the first Office Action.

Exhibits A-C are printouts from the Internet. The printouts do not include the dates the pages were printed and the first exhibit does not include a full URL address. Nor did Applicant otherwise provide this required information. *In re I-Coat Co.*, 126 USPQ2d 1730, 1733 (TTAB 2018) (full URL addresses and dates must be provided for Internet evidence). The Examining Attorney, however, did not object to these deficiencies so we deem any such objections waived and have considered Applicant’s Exhibits A-C. *In re Mueller Sports Meds., Inc.*, 126 USPQ2d 1584, 1586 (TTAB 2018) (objection may be deemed waived if examining attorney fails to object and advise applicant of the proper way to make Internet evidence of record).

<sup>16</sup> June 21, 2018 Office Action at TSDR 11 (dictionary.reverso.net) and TSDR 13 (collinsdictionary.com). The second webpage printout includes the notation: “Used Rarely, aguamala is in the lower 50% of commonly used words in the Collins dictionary.” *Id.* at TSDR 13. Given that dictionaries include numerous words, we do not find this notation significant.

<sup>17</sup> *Id.* at TSDR 9 (spanishdict.com).

<sup>18</sup> *Id.* at 15 (Spanish.yourdictionary.com).

<sup>19</sup> June 8, 2018 Resp. to Office Action at TSDR 10 (google.com).

Applicant did not submit the second referenced Google translation.

The Examining Attorney also submitted a Google translation reflecting a question as to whether the translation should be for “agua mala,” two words, and listing AGUAMALA, one word, as a Spanish word for “jellyfish.”<sup>20</sup>



We find the Office’s translation statement and the corroborating translations of record from established dictionaries more reliable than the Google translations because the record does not include the sources of the Google translations and the translations are not otherwise corroborated.

We acknowledge the evidence showing other Spanish words for “jellyfish,” including “medusa,” but it is not unusual for a language to have more than one word for the same thing. The record also does not support Applicant’s contention that AGUAMALA is used only in “parts of Mexico and Colombia as a colloquial alternative term for ‘medusa.’”<sup>21</sup> The dictionary definitions of record include the following

---

<sup>20</sup> June 21, 2018 Office Action at TSDR 21 (google.com).

<sup>21</sup> 7 TTABVUE 7.

notations after AGUAMALA: (1) “Mexico, Colombia”;<sup>22</sup> (2) “Mexico[,] Colombia[,] Cuba”;<sup>23</sup> and (3) “Andes,”<sup>24</sup> a region that extends over Argentina, Bolivia, Chile, Colombia, Ecuador, Peru, and Venezuela.<sup>25</sup> If anything, this evidence indicates that AGUAMALA is a term for “jellyfish” in a number of Spanish-speaking countries. A significant portion the U.S. Hispanic and Latino population comes from these countries. We take judicial notice of U.S. Census data from 2017 showing that nearly two-thirds of the Hispanic and Latino population in the United States (37 of 58 million) is composed of Mexicans and Colombians.<sup>26</sup>

Based on the evidence, we find that the direct and literal translation of AGUAMALA, one word, is “jellyfish,” and that a substantial portion of Spanish-speaking American purchasers would stop and translate AQUAMALA into its English equivalent “jellyfish.” Accordingly, we apply the doctrine of foreign equivalents.

---

<sup>22</sup> June 8, 2018 Resp. to Office Action at TSDR 12; June 21, 2018 Office Action at TSDR 23.

<sup>23</sup> June 8, 2018 Resp. to Office Action at TSDR 11.

<sup>24</sup> June 21, 2018 Office Action at TSDR 11 and 13.

<sup>25</sup> The list of countries covered by the Andes region is from the New World Encyclopedia at <https://www.newworldencyclopedia.org/entry/Andes> (last visited December 17, 2019). The Board may take judicial notice of encyclopedias and other standard reference works. *See, e.g., In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1087 n.3 (TTAB 2016); *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.24 (TTAB 2013).

<sup>26</sup> Selected Population Profile in the United States:

<https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited December 17, 2019). We may take judicial notice of U.S. Census data. *See, e.g., In re Highlights for Children, Inc.*, 118 USPQ2d 1268, 1271 n.7 (TTAB 2016); *In re Aquamar, Inc.*, 115 USPQ2d at 1127 n.6.

Applicant argues that even if the doctrine of foreign equivalents applies, confusion is not likely because Registrant uses the mark AGUAMALA as a “house brand” to identify a brewery whereas Applicant uses the mark ELECTRIC JELLYFISH for a specific India pale ale beer and the product label “prominently identif[ies] that the maker of [Applicant’s] goods is Pinthouse Pizza[.]”<sup>27</sup> This argument fails because we must compare the marks and goods as they appear in the application and cited registration without extrinsic evidence as to actual use in the marketplace. *In re Aquitaine Wines USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018); *see also In re i.am.symbolic*, 123 USPQ2d at 1749; *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

We now consider the connotations and commercial impressions of the marks. A mark may be refused registration solely because it is similar in meaning to a previously registered mark. *In re Sarkli, Ltd.*, 721 F.2d 353, 220 USPQ 111, 113 (Fed. Cir. 1983). But “such similarity as there is in connotation must be weighed against the dissimilarity in appearance, sound, and all other factors, before reaching a conclusion on likelihood of confusion as to source.” *Id.*; *see also, In re Ithaca Indus., Inc.*, 230 USPQ 702, 704 (TTAB 1986) (“[O]ther factors to be considered are the dissimilarity in overall appearance and pronunciation of the marks, the differences in the goods to which the marks are applied, and the degree of suggestiveness of applicant’s mark and the cited mark as applied to the respective goods.”).

---

<sup>27</sup> 7 TTABVUE 12.

The marks are substantially similar in meaning and commercial impression. The term ELECTRIC in Applicant's mark merely modifies the term JELLYFISH and does not change the general commercial impression of the mark, which remains that of a jellyfish—the same as the cited AGUAMALA mark. *See Stone Lion*, 110 USPQ2d at 1161 (finding that the Board did not err in “according little weight to the adjective ‘STONE’” in applicant's STONE LION CAPITAL mark); *see also, e.g. Coca-Cola Bottling Co. of Memphis, Tenn., Inc. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (a likelihood of confusion increases when a mark incorporates a registered mark in its entirety).

Moreover, AGUAMALA is arbitrary as applied to beer, so it is a conceptually strong trademark. *Palm Bay*, 73 USPQ2d at 1692 (finding VEUVE dominant feature of VEUVE ROYALE mark because it was arbitrary as applied to champagne and sparkling wine whereas ROYALE was “largely laudatory” and less significant). Also, Registrant has registered its AGUAMALA mark in conjunction with other terms (*e.g. CERVECERÍA AGUAMALA*) increasing the likelihood that consumers would be likely to mistakenly believe that Applicant's mark, with the addition of one term, is related to Registrant. *In re Hitachi High-Techs. Corp.*, 109 USPQ2d 1769, 1774 (TTAB 2014) (“[C]areful purchasers who do notice the difference in the marks will not necessarily conclude that there are different sources for the goods, but will see the marks as variations of each other, pointing to a single source.”).

When viewing the marks in their entirety, the substantial similarities between the marks in commercial impression outweigh the differences between the marks in

appearance and sound, particularly when we take into account the identity of the goods and inherent strength of the Cited Mark. Accordingly, the similarity of the marks also weighs in favor of finding a likelihood of confusion.

### **III. Conclusion**

Confusion between Applicant's mark and the Cited Mark is likely given that the goods and trade channels are identical, the goods include inexpensive products that may be purchased on impulse, the meaning and commercial impression of the marks are substantially similar, and the Cited Mark is conceptually strong.

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