

This Opinion is Not a
Precedent of the TTAB

Mailed: April 15, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Michelle Mora

Serial No. 88704761

Daniel Griffith of Griffith IP
for Michelle Mora

Christina Sobral, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

Before Wellington, Lynch, and Lebow,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background

Michelle Mora (“Applicant”) seeks registration on the Principal Register of the mark HIGH LIFE COSMETICS in standard characters, with COSMETICS disclaimed, for the following goods, as amended, in International Class 3:

Cosmetics; Cosmetics and cosmetic preparations;
Cosmetics and make-up; Cosmetics for children; Cosmetics

in general; Cosmetics in the form of milks, lotions and emulsions; Cosmetics, namely, compacts; Cosmetics, namely, lip primer; Cosmetics, namely, lip repairers; Anti-aging moisturizers used as cosmetics; Bath powder; Body and beauty care cosmetics; Collagen preparations for cosmetics purposes; Eyebrow cosmetics; Herbal extracts sold as components of cosmetics; Lip stains; Nail cosmetics; Nail paint; Nail primer; Plant and herb extracts sold as components of cosmetics; Pore tightening mask packs used as cosmetics; Private label cosmetics; Skin fresheners; Skin moisturizers used as cosmetics; Solid powder for compacts; none of the foregoing to include perfumes, colognes or other fragrances.¹

The Examining Attorney applied the doctrine of foreign equivalents and refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the registered mark HAUTE VIE in standard characters for “Fragrances and perfumery” in International Class 3.² The registration includes the following statement: “The English translation of ‘Haute Vie’ in the mark is ‘High Life.’”

Applicant’s original identification of goods included “Cosmetics in general, including perfumes,” and Applicant responded to the refusal in part by deleting from her identification the wording, “including perfumes,” and adding at the conclusion, “none of the foregoing to include perfumes, colognes or other fragrances.”³

¹ Application Serial No. 88704761 was filed November 24, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an alleged intent to use the mark in commerce. Applicant subsequently filed an amendment to allege use.

² Registration No. 5961885 issued January 14, 2020, from an underlying application filed February 21, 2017.

³ July 2, 2020 Response to Office Action at 1. Citations to the record are to the USPTO’s TSDR database.

After the Examining Attorney made the refusal final, Applicant appealed and filed a request for reconsideration, which was denied. For the reasons set forth below, we affirm the refusal to register.

II. Likelihood of Confusion

The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (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.”).

A. Similarity of the Marks Under the Doctrine of Foreign Equivalents

We compare the marks “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). The test assesses not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods

offered under the respective marks is likely to result. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

The marks differ in appearance and sound because Applicant's mark is in English while the registered mark is in French, but we find the connotation and commercial impression of the marks quite similar. The registrant's translation of its mark in the registration reflects that the cited mark directly translates from French to English as HIGH LIFE. The Examining Attorney contends that the dominant portion of Applicant's mark is HIGH LIFE, given the disclaimer of COSMETICS, which is generic for Applicant's goods. According to the Examining Attorney, the dominant element HIGH LIFE should be considered the equivalent of the registered mark pursuant to the doctrine of foreign equivalents.

"Under the doctrine of foreign equivalents, foreign words from common [modern] languages are translated into English to determine ... similarity of connotation in order to ascertain confusing similarity with English word marks." *Palm Bay Imps.*, 73 USPQ2d at 1696. Applicant has not disputed that French is a common, modern language for purposes of the doctrine of foreign equivalents, and the record includes the website of the French Embassy in the United States, reporting on Census data that "1,301,443 people in the U.S. speak French at home."⁴ We find that French qualifies as a common, modern language. *See also In re Thomas*, 79 USPQ2d 1021,

⁴ July 20, 2020 Office Action at 3.

1024 (TTAB 2006) (“French is a common foreign language spoken by an appreciable segment of the population.”).

Nonetheless, “the doctrine of foreign equivalents is not an absolute rule and should be viewed merely as a guideline,” applying “only when it is likely that the ordinary American purchaser would ‘stop and translate [the word] into its English equivalent.” *In re Spirits Int’l N.V.*, 563 F.3d 1347, 90 USPQ2d 1489, 1491 (Fed. Cir. 2009) (citations omitted). The *Spirits Int’l* Court describes three exceptions when a consumer familiar with the foreign language would not stop and translate. The first exception was applied in *Palm Bay Imps.*’s holding that French-speaking consumers would not translate VEUVE to “widow” “because its literal translation would be irrelevant” to the sparkling wine at issue. *Id.* Second, the *Spirits Int’l* Court points to *Cont’l Nut Co. v. Cordon Bleu*, 494 F.2d 1397, 181 USPQ 647 (CCPA 1974) as an instance where the French term, CORDON BLEU, “has such a well established alternative meaning that the literal translation is irrelevant because even French speakers would not translate” it to “blue ribbon.” *Spirits Int’l*, 90 USPQ2d at 1492. Third, citing *In re Tia Maria, Inc.*, 188 USPQ 524, 525-26 (TTAB 1975), in which the Board deemed confusion unlikely between TIA MARIA for a Mexican restaurant and AUNT MARY’s for canned vegetables, the *Spirits Int’l* Court describes how some “non-English marks [] will not be translated in context but instead accepted at face value,” such as that one naming a particular person in connection with restaurant services. *Spirits Int’l*, 90 USPQ2d at 1492.

Relying on the third exception, Applicant contends that consumers would not stop and translate the cited mark, HAUTE VIE. Without supporting evidence, Applicant asserts that “[c]onsumers of perfumes and colognes are accustomed to encountering foreign marks and accepting them as they are because these brands are inherently connected to their historical origins.”⁵ Applicant also claims, again without support in the record, that the relevant goods “have a long history of being developed, imported, and otherwise connected to France and other European countries. In fact, it is likely that American entities, such as the Registrant, chose French terms to function as brand names for colognes and perfumes, such as HAUTE VIE, for this very purpose.”⁶

On this record, we find that the relevant consumer would stop and translate HAUTE VIE. As to the first exception, we do not find that “the literal translation is irrelevant,” because, as Applicant has noted, the registered mark for perfume and fragrances “connotes a connection to high fashion and higher end luxury products and lifestyle.”⁷ As to the second exception, we do not find that the French wording HAUTE VIE has a well-established alternative meaning. As to the third exception primarily relied on by Applicant, we do not find that the context in which the mark appears renders translation unlikely. *See Spirits Int’l*, 90 USPQ2d at 1491-92. In fact, the English translation to “high life” appears to be unambiguously literal and direct, with

⁵ 7 TTABVUE 10 (Applicant’s Brief).

⁶ 7 TTABVUE 10 (Applicant’s Brief).

⁷ 7 TTABVUE 11 (Applicant’s Brief).

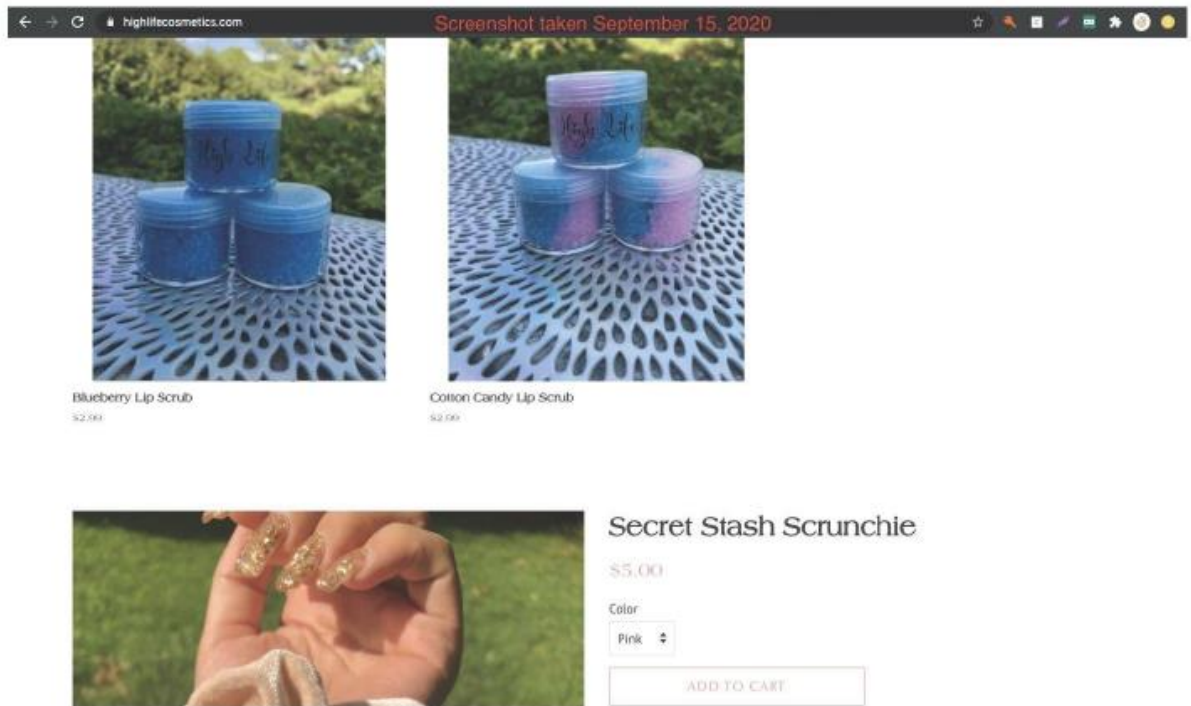
no other relevant connotations or variations in meaning, so we deem it appropriate to apply the doctrine. The record includes no evidence to back up Applicant's contentions about the market for perfumes and cosmetics, or the use of the French language or other foreign languages in marks in the industry. "Attorney argument is no substitute for evidence." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1372, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)). Thus, on this record, we find no reason that the relevant consumer would **not** stop and translate the mark, and we reject Applicant's argument that the Examining Attorney must make some additional showing that consumers would stop and translate HAUTE VIE.

Applicant next contends that even if consumers would stop and translate the cited mark to "high life," the term carries a different connotation and commercial impression than "high life" in Applicant's mark. According to Applicant, "[t]he registered mark connotes a connection to high fashion and higher end luxury products and lifestyle, and the applied-for mark is suggestive of the 'high' as defined by the effects of consuming cannabis sativa, i.e. marijuana, and is associated to the emerging market for legalized marijuana, cannabis products containing CBD, and the culture surrounding this space."⁸ However, the marks themselves and the record do not support the alleged distinction in meaning between "high life" for perfumery and fragrances and "high life" for cosmetics. Applicant relies on the screenshot below from its website for the proposition that references to "Blueberry Lip Scrub" and "Cotton

⁸ 7 TTABVUE 11-12 (Applicant's Brief).

Candy Lip Scrub” point to “popular cannabis sativa strains” that incorporate these terms, and that the reference to “Secret Stash Scrunchie” also is suggestive of marijuana:⁹

Exhibit 2



However, this evidence does not support that contention. Moreover, even if some segment of cosmetics and perfumery consumers are aware of the names of popular sativa cannabis strains, many likely are not.

“We compare the applicant’s and registrant’s ‘marks themselves,’” *i.am.symbolic, llc*, 123 USPQ2d at 1748 (citing *Denney v. Elizabeth Arden Sales Corp.*, 263 F.2d 347, 120 USPQ 480, 481) (CCPA 1959)). Even to the extent we might take into account the

⁹ 7 TTABVUE 12 (Applicant’s Brief); September 15, 2020 Request for Reconsideration at 7 (screenshot).

manner of their use to inform consumer perception of their connotation, we do not agree with Applicant that its use conveys a drug-related meaning of “high life” when used in connection with Applicant’s cosmetics *See Am. Rice, Inc. v. H.I.T. Corp.*, 231 USPQ 793, 796 (TTAB 1986) (“[W]e may take into account whether the trade dress of packages or labels in the application file as specimens, or otherwise in evidence, may demonstrate that the trademark projects a confusingly similar commercial impression.”); *Northwestern Golf Co. v. Acushnet Co.*, 226 USPQ 240, 244 (TTAB 1985) (“Evidence of the context in which a particular mark is used on labels, packaging, etc., or in advertising is probative of the significance which the mark is likely to project to purchasers.”).

Applicant’s evidence from the Leafly website identifying marijuana strains shows that the one incorporating “blueberry” is named “Blueberry Yum Yum,”¹⁰ not just “Blueberry” alone, as used by Applicant. Blueberry obviously also is a food item and flavor, and Applicant’s specimen of use website screenshot of the product detail for its Blueberry Lip Scrub shows that the product is described as “a blueberry flavored lip scrub that is made with organic apricot oils to help nourish your lips during and after exfoliation.”¹¹ We find no reference to cannabis. Similarly, “Cotton Candy,” as used by Applicant, also is a food item and flavor, and while the Leafly site shows a cannabis strain known as “Cotton Candy aka Cotton Candy Kush,” again we see no reason that the typical consumer would perceive Applicant’s reference as cannabis-

¹⁰ September 15, 2020 Request for Reconsideration at 8 (leafly.com).

¹¹ May 28, 2020 specimen.

related rather than as a reference to the food item or flavor. The same holds true for the “Secret Stash Scrunchie,” which is less relevant anyway because it is not among the identified goods at issue. Without other indicia, we find it more likely that most consumers would perceive the name of the scrunchie, shown worn on the wrist, as a reference to a hair accessory secretly stashed away as a bracelet, rather than to a secret stash of drugs. Nothing in the available product descriptions or elsewhere in the screenshot shows that consumers would perceive a cannabis-related meaning of “high life,” rather than the connotation of luxury that Applicant asserts is suggested by the cited mark. Thus, we find the connotation of HIGH LIFE in Applicant’s mark to be very similar to, or the same as, the cited mark, HAUTE VIE.

We agree with the Examining Attorney that the HIGH LIFE element of Applicant’s mark is dominant because, as the first part of the mark, it “is most likely to be impressed upon the mind of a purchaser and remembered,” *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) and *Palm Bay Imps.*, 73 USPQ2d at 1692. This is especially true given that the remaining wording COSMETICS is disclaimed as generic for the “cosmetics” in Applicant’s identification. Here, consumers would not view COSMETICS as source-indicating. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985) (“Regarding descriptive terms, this court has noted that the descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion”)); *In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (in

comparing THE DELTA CAFÉ to DELTA, the term CAFÉ lacks sufficient distinctiveness to create a different commercial impression). So, while we do not ignore this portion of Applicant's mark, "the non-source identifying nature of the word[] and the disclaimer[] thereof constitute rational reasons for giving [that] term[] less weight in the analysis." *In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018). In view of the dominant HIGH LIFE element of Applicant's mark, and the diminished significance of COSMETICS, Applicant's mark as a whole is very similar in connotation and commercial impression to the cited mark HAUTE VIE.

Applicant points out the visual and phonetic differences arising from the different languages and wording used in the marks as outweighing any similarities in connotation and commercial impression. However, this is true in many foreign equivalents cases, which by definition involve comparing marks in different languages that typically look and sound different. *Cf. In re Oriental Daily News*, 230 USPQ at 638 (the relevant purchasing public would perceive the Chinese characters sought to be registered in accordance with their English language meaning). Thus, while we have considered the appearance and sound of the marks in their entirety, we find that "the equivalency in meaning of the marks outweighs the differences in how the marks look and sound." *In re Aquamar, Inc.*, 115 USPQ2d 1122 (TTAB 2015) (based on its translation, MARAZUL deemed confusingly similar to BLUE SEA); *see also In re Sarkli, Ltd.*, 721 F.2d 353, 220 USPQ 111, 113 (Fed. Cir. 1983) ("the PTO may reject an application ex parte solely because of similarity in meaning of the mark

sought to be registered with a previously registered mark”); *In re Thomas*, 79 USPQ2d at 1025 (MARCHE NOIR for jewelry likely to be confused with BLACK MARKET MINERALS for retail jewelry store services, despite marks being “decidedly different in sound and appearance,” in large part because “marche noir” means “black market” in French); *In re Perez*, 21 USPQ2d 1075 (TTAB 1991) (EL GALLO for fresh vegetables likely to be confused with ROOSTER for fresh fruit, because “[w]hile the marks are concededly distinguishable in their appearance and sound, it is our view that the equivalency in meaning or connotation is sufficient, in this case, to find likelihood of confusion”).

This *DuPont* factor weighs in favor of likely confusion.

B. Relatedness of the Goods

We turn next to the second *DuPont* factor, regarding the similarity of the goods. Applicant’s cosmetics need not be “competitive or intrinsically related” to Registrant’s fragrances and perfumery to find a likelihood of confusion. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1737 (Fed. Cir. 2017). “Instead, likelihood of confusion can be found ‘if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Coach Servs.*, 101 USPQ2d at 1722 (internal citations omitted). 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 in the application.

Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

In analyzing the second *DuPont* factor, we look to the identifications in the application and cited registration. *See Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Indeed, “[t]he 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 sales of the goods are directed.” *Octocom Syst.*, 16 USPQ2d at 1787. Thus, we must presume that Applicant’s cosmetics encompass all types of cosmetics, except as limited in the identification that “none of the foregoing to include perfumes, colognes or other fragrances.” *See, e.g., In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

While Applicant’s exclusionary language avoids a direct overlap between her goods and the registrant’s, we nonetheless find that cosmetics and perfume related. The Examining Attorney introduced evidence showing that consumers are accustomed to encountering such goods offered under the same mark. *See Detroit Ath. Co.*, 128 USPQ2d at 1050 (crediting relatedness evidence that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells

both”); *Hewlett-Packard, Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”). For example:

- The Avon website shows a wide variety of cosmetics under that mark, along with “Avon Flourish Peony Rose Eau de Parfum.”¹²
- The Lancome website features numerous cosmetics under that mark, along with numerous perfumes and fragrances that also bear the Lancome mark.¹³
- The Marc Jacobs website offers cosmetics and perfumes, all under the Marc Jacobs mark.¹⁴
- The Philosophy website shows various cosmetics as well as perfumes, all bearing the Philosophy mark.¹⁵
- The Pacifica website features under that mark a variety of cosmetics, including, for example, primer and lip stain, as well as perfumes and fragrances.¹⁶

¹² July 20, 2020 Office Action at 5-17 (avon.com).

¹³ July 20, 2020 Office Action at 18-36 (lancome-usa.com).

¹⁴ July 20, 2020 Office Action at 37-43 (marcjacobs.com).

¹⁵ July 20, 2020 Office Action at 44-61 (philosophy.com).

¹⁶ September 28, 2020 Denial of Reconsideration at 2-18 (pacificabeauty.com).

- The Twinkle Apothecary website features, “Lip + cheek tint [,] our house made semi-sheer tinted lip balm” along with “natural perfumes – handcrafted drop-by-drop,” their “signature fragrances.”¹⁷

Such evidence suffices to demonstrate that cosmetics and perfume are related.

Applicant points to *In re L’oreal S.A.*, 222 USPQ 925 (1984), in which the Board held that HAUTE MODE for hair coloring shampoo was not confusingly similar to HI-FASHION SAMPLER for fingernail enamel, in part because the Board considered the goods “disparate.” However, we must consider the record in the case before us. As described in the opinion, the evidentiary record regarding relatedness in *L’oreal* consisted only of third-party registrations, not consumer exposure to third-party use of the same mark on both types of goods, such as we have in this case. *Id.* at 926. Thus, we do not find the goods in this case as “disparate” as the Board deemed the goods in *L’oreal*, nor do we find the marks in this case as suggestive as the Board found the marks at issue in *L’oreal*. We consider the case factually distinguishable from the one before us.

Based on our record, the second *DuPont* factor weighs in favor of likely confusion.

C. Trade Channels and Classes of Consumers

Turning to the trade channels and consumers, the relatedness evidence discussed above demonstrates that cosmetics such as those identified in the subject application and perfumes such as those in the cited registration are featured together on the

¹⁷ September 28, 2020 Denial of Reconsideration at 19-29 (twinkleapothecary.com)

same websites, and would be encountered by the same consumers. This factor also favors likely confusion.

III. Conclusion

The similarity of these marks in their entireties, under the doctrine of foreign equivalents, for related goods that move in the same channels of trade to the same classes of customers renders confusion likely.

Decision: The refusal to register Applicant's mark is affirmed.