

This Opinion is Not a
Precedent of the TTAB

Mailed: July 29, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Vanner, Inc.

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Serial No. 88877168

Ronald J. Koch of the Eley Law Firm,
for Vanner, Inc.

Leslee A. Friedman, Trademark Examining Attorney, Law Office 120,
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Before Kuhlke, Lykos and Shaw,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Vanner, Inc. (“Applicant”) seeks to register on the Principal Register the standard character mark MBBM for goods identified as “battery monitors” in International Class 9.¹

¹ Application Serial No. 88877168, filed April 17, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1052(d), claiming June 30, 2011 as the date of first use anywhere and in commerce.

Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. Citations to briefs refer to the actual page number, if available, as well as TTABVUE, the Board’s online docketing system. The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the registered mark MBBM-VAS, also in standard characters, for the goods identified below in International Class 9 that it is likely to cause confusion or mistake or to deceive:²

Computer programs, rich client applications and web clients applications for mobile devices for capturing, displaying and managing data and for creating graphics; electric modules and apparatus for treating and processing dynamic data, in particular acoustic signals, digital bus data and vibration signals; electric measuring and checking apparatus and systems comprised of electric measuring and checking apparatus in the field of acoustics, vibration technology and strength, in particular for measuring and processing dynamic data, including acoustic signals, digital bus data and vibration signals; apparatus for recording, transmission or reproduction of sound or images; apparatus and instruments for conducting, switching, transforming, accumulating, voltage regulating, and controlling electric signals and electricity; instruments for measuring and transmitting of commands, namely, instruments for processing electrical signals in the field of acoustics, vibration technology and resistance, in particular for measuring and processing dynamic data, namely, acoustic signals, digital bus data and vibration signals; **all the aforesaid goods being in the fields of development, quality control and fault diagnosis, but not in the field of factory equipment.**

Emphasis added.

Following issuance of the final refusal, Applicant timely filed a notice of appeal and request for reconsideration. The Board suspended the appeal. After the Examining Attorney denied the request for reconsideration, the appeal resumed.

² Registration No. 5969726, registered January 28, 2020 on the Principal Register under Trademark Act, Section 66(a). The registration also includes services in International Classes 41 and 42; however, these services do not provide a basis for the Section 2(d) refusal.

Applicant and the Examining Attorney then filed briefs. For the reasons explained below, we reverse.

I. Evidentiary Issue

Citing Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), the Examining Attorney objects to Applicant's submission with its appeal brief of the following evidence as untimely: "the top picture in Exhibit 3 of Applicant's Appeal Brief."³ Applicant counters that "the picture in question is merely a closeup of a portion of the original specimen filed" with the application which "emphasizes a portion ... [showing] MBBM "Model Based Battery Monitoring."⁴ For this reason, Applicant contends that this portion of the exhibit is not new evidence and therefore is timely.

In order to rule on the objection, we compare Applicant's specimen submitted with its application on April 17, 2020 with Exhibit 3 to its main appeal brief as reprinted below:

³ Applicant also attached to its appeal brief other evidence that was previously made of record. Attaching previously submitted evidence to an appeal brief is unnecessary and impedes efficient disposition of the appeal by the Board. *In re Information Builders Inc.*, 2020 USPQ2d 10444, at *2 n.4 (TTAB 2020), *appeal dismissed*, No. 20-1979 (Oct. 20, 2020). "Such evidence should not, as a matter of course, be resubmitted as exhibits to the brief." TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 1203.02(e) (2022).

⁴ Reply Brief, 9 TTABVUE 4.



EXHIBIT 3

Applicant's use of its mark shows MBBM along with the words *model based battery monitoring* encircling the mark



Upon review, we agree with Applicant and overrule the Examining Attorney's objection. The exhibit does in fact appear to be a magnified portion of the specimen.

However, the better practice would have been for Applicant to have explained in its appeal brief that the image is a magnified portion of Applicant's specimen. We further note that the circular wording is visible on the original specimen and the close up image was unnecessary and does not add to the record.

II. Preliminary Matters

Before analyzing the *DuPont* likelihood of confusion factors, we address two arguments raised by Applicant in its appeal brief.

A. Prior Use

Based on the cited registration's foreign registration priority date and Applicant's alleged date of first use in commerce, Applicant maintains that it was using its mark in commerce over six years prior to Registrant. Applicant also points to its prior registration for the same mark and goods which was not renewed as further evidence that it has been using its mark continuously in commerce.

Applicant misapprehends the distinction between an inter partes proceeding and ex parte appeal. Any purported claim of prior use is irrelevant in an ex parte proceeding involving a Section 2(d) refusal. *See In re Calgon Corp.*, 435 F.2d 596, 168 USPQ 278 (CCPA 1971) ("As the board correctly pointed out, 'the question of priority of use is not germane to applicant's right to register' in this ex parte proceeding"). In addition, Applicant's prior registration, which was not renewed, has no bearing on this appeal. *See Action Temp. Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989).

B. Improper Collateral Attack on Cited Registration

Observing that the cited registration includes a “voluminous list of goods,” Applicant speculates that “it is hard to image [sic] that Registrant is in fact selling **all** of the goods listed in its registration.”⁵ In support of this assertion, Applicant points to excerpts from Registrant’s website with product offerings solely related to vibroacoustic systems. Applicant further asserts that “the USPTO has a strong public policy to assess and promote the accuracy and integrity of the trademark register as to the actual use of the mark with the goods.”⁶

To the extent Applicant is implying that Registrant is no longer using its mark in commerce, such arguments constitute an improper collateral attack on an existing registration that can be considered only in the context of a petition to cancel, not in an ex parte appeal. *See In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997); *In re Peebles Inc.*, 23 USPQ2d 1795, 1797 n.5 (TTAB 1992).

Alternatively, the Trademark Modernization Act recently created two avenues for litigating allegations of nonuse for the express purpose of protecting the integrity of the register: ex parte expungement or reexamination proceedings. New amendments to the Trademark Act, Sections 16A and 16B of the Trademark Act, 15 U.S.C. § 1066(a) - 1066(b), allow the USPTO to cancel a registration, in whole or in part, for nonuse of a registered mark via ex parte expungement and reexamination proceedings. In an expungement proceeding, the USPTO may cancel a registration if

⁵ Applicant’s Brief, p. 3; 6 TTABVUE 6. Emphasis in original.

⁶ *Id.* at 4; 6 TTABVUE 7.

the evidence of record shows that the registered mark has never been used in commerce on or in connection with some or all of the goods and/or services recited in the registration. 15 U.S.C § 1066(a); 37 C.F.R. § 2.91(a)(1). In a reexamination proceeding, the USPTO may cancel a registration if the evidence of record shows that the registered mark was not in use in commerce on or in connection with some or all of the goods and/or services as of the filing date of the application or amendment to allege use, or before the deadline for filing a statement of use, as applicable. 15 U.S.C § 1066(b); 37 C.F.R. § 2.91(a)(2). A petition requesting institution of an expungement proceeding may be filed within a certain timeframe in connection with a mark registered under Trademark Act Sections 1, 44, or 66(a), 15 U.S.C §§ 1051, 1126, 1141(f). 37 C.F.R. § 2.91(a)(1). However, a petition requesting institution of a reexamination proceeding may be filed only in connection with a mark registered under Section 1 of the Trademark Act.

For further information on expungement and reexamination proceedings and appeals from such determinations, *see* TRADEMARK MANUAL OF EXAMINING PROCEDURE Section 1716 (July 2022) and TBMP Chapter 1300.

III. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 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 must consider each *DuPont* factor for which there is evidence or argument.

See, e.g., In re Guild Mortg. Co., 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). When analyzing these factors, the overriding concerns are not only to prevent buyer confusion as to the source of the goods, but also to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

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); *Shell Oil*, 26 USPQ2d at 1688 (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002); *see also 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.”). These factors are discussed below.

A. The Marks

The first *DuPont* factor involves an analysis of the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En*

1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (citing *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), *aff’d mem.*, 777 F. App’x (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). *Accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

“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.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). Our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also 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.”).

Applicant argues that the marks MBBM and MBBM-VAS have notable differences in connotation and commercial impression that will be readily understood by consumers. Applicant argues that Registrant’s website shows that MBBM-VAS is an abbreviation for Registrant’s full corporate name, MÜLLER-BBM VibroAkustik

Systeme, while Applicant's own product specimen shows that MBBM stands for "model based battery monitoring."⁷

Applicant's arguments are unpersuasive. We find that both marks are similar in sound and appearance. Each mark commences with the letter string "M-B-B-M." In this regard, consumers do not focus on minutia but rather overall impressions. *See In re John Scarne Games, Inc.*, 120 USPQ 315, 315-16 (TTAB 1959) ("Purchasers of game boards do not engage in trademark syllable counting — they are governed by general impressions made by appearance or sound, or both.").

In addition, although marks are compared in their entirety, one feature of a mark may be more significant or dominant in creating a commercial impression. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). Registrant's mark commences with the acronym MBBM, making it the dominant element. It is well established that consumers are generally more inclined to focus on the first word in a trademark. *See 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"); *Palm Bay*, 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

⁷ September 22, 2020 Response to Office Action, pp. 3-8.

LIFE OF AMERICA in part because “consumers must first notice th[e] identical lead word”). The Board has the discretion to place more weight on a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Nat’l Data*, 224 USPQ at 751. *See, e.g., In re Dixie Rests., Inc.*, 41 USPQ2d at 1533-34.

Consumers, focusing on this shared common element, are likely to perceive the applied-for mark MBBM as a shortened version of the cited mark MBBM-VAS. *See, e.g., In re Mighty Leaf Tea*, 601 F.3d, 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (affirming Board decision that ML is likely to be perceived as a shortened version of ML MARK LEES, and noting that “the presence of an additional term in the mark does not necessarily eliminate the likelihood of confusion if some terms are identical.”); *Big M Inc. v. U.S. Shoe Corp.*, 228 USPQ 614, 616 (TTAB 1985) (“[W]e cannot ignore the propensity of consumers to often shorten trademarks and, in the present case, this would be accomplished by dropping the ‘T.H.’ in referring to registrant’s stores [T.H. MANDY].”).

In addition, we are unpersuaded by Applicant’s argument that consumers are likely to perceive MBBM as having an entirely different connotation and commercial impression when compared with Registrant’s mark MBBM-VAS. Nothing suggests in the record that MBBM-VAS is a widely known corporate designation or that MBBM is a well-known brand acronym for battery monitors. Both acronyms are coined. As such, consumers familiar with the cited mark are likely to perceive Applicant’s mark as a truncated version denoting a product line extension. *See, e.g., Schieffelin & Co.*

v. Molson Cos., Ltd., 9 USPQ2d 2069, 2073 (TTAB 1989) (“Those consumers who do recognize the differences in the marks may believe that applicant’s mark is a variation of opposer’s mark that opposer has adopted for use on a different product.”); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (VANTAGE TITAN “more likely to be considered another product from the previously anonymous source of TITAN medical diagnostic apparatus, namely, medical ultrasound devices”). Applicant’s and Registrant’s marks therefore engender highly similar connotations and commercial impressions as well.

We note the specific differences pointed out by Applicant. These differences, however, are outweighed by the similarities of the marks. Thus, when comparing the marks overall, they are similar in sound, meaning, connotation and overall commercial impression. The similarity of the marks weighs in favor of finding a likelihood of confusion. This *DuPont* factor weighs in favor of finding a likelihood of confusion.

B. The Goods

Next we compare the goods as they are identified in the involved application and cited registration, the second *DuPont* factor. See *Detroit Athletic Co.*, 128 USPQ2d at 1050; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). The goods need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc.*

v. Am. Online Inc., 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods] emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Evidence of relatedness might include news articles and/or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both an applicant’s goods and the goods listed in the cited registration. *See, e.g., Davia*, 110 USPQ2d at 1817 (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores).

In her appeal brief, the Examining Attorney focuses on the following goods from the cited registration:

Electric measuring and checking apparatus and systems comprised of electric measuring and checking apparatus in the field of acoustics, vibration technology and strength, in particular for measuring and processing dynamic data, including acoustic signals, digital bus data and vibration signals; apparatus for recording, transmission or reproduction of sound or images; apparatus and instruments for conducting, switching, transforming, accumulating, voltage regulating, and controlling electric signals and electricity; all the aforesaid goods being in the

fields of development, quality control and fault diagnosis, but not in the field of factory equipment.

Without pointing to specifics, the Examining Attorney maintains that during prosecution she submitted evidence from the third-party websites purportedly showing that the following companies offer both “battery monitors,” Applicant’s goods, and Registrant’s “apparatus and instruments for conducting, switching, transforming, accumulating, voltage regulating, and controlling electric signals and electricity in the fields of development, quality control and fault diagnosis” under the same trademark: SBS Storage Battery Systems, Victron Energy, Sendyne, Maxim Integrated, Enerpic Plus, Kongter, Vertiv, Balmar, and Eagle Eye.⁸

Upon close review, we do not find that the third-party website evidence supports such a finding. While Applicant’s “battery monitors” are unrestricted as to field of use, the identification of the goods in the cited mark expressly limits use to “the fields of development, quality control and fault diagnosis, but not in the field of factory equipment.” In this regard, the Examining Attorney’s evidence is problematic. None of the third-party website evidence appears to identify products for use in these fields. Another deficiency is that some of these third-party websites only include Applicant’s goods (battery monitors or the equivalent thereof) and not any goods that fall within the purview of any goods from Registrant’s identification. Below we address each piece of evidence in turn:

⁸ See Office Actions dated July 14, 2020; October 13, 2020; and November 24, 2021.

The SBS website displays the “Arga Battery Monitor Portable.”⁹

The Victron Energy website advertises nine different battery monitors and the “Battery Protect” which “disconnects the battery from nonessential loads before it is completely discharged (which would damage the battery) or before it has insufficient power left to crank the engine.” A product branded the “Battery Management System BMS 12/200” is designed for “12V systems with 12V alternators such as vehicles and boats.”¹⁰

Sendyne website touts its SIM100MOD as “the first high voltage isolation monitoring/insulation monitoring /IMD device for Electric Vehicles (EV/HEVs) and charging stations...” Additional fields of use include “photovoltaics/solar panels.”¹¹

Maxim Integrated website offers the MAX11080/11081, “battery-pack fault monitor ICs” for the following applications/uses: electric bikes, electric vehicles, high-power battery backup, high voltage multi-series stacked battery, hybrid electric vehicles, solar cell battery backup and super-cap battery backup.¹²

Energic Plus website advertises a “Portable Battery Discharger & Battery Monitoring System (BMS-SYSTEM)... capable of monitoring up to 12 lithium-ion (Li+) battery cells” and “SmartBlinky-Cyclops: Electrolyte Level Monitor.”¹³

Kongter website displays “a whole BMS-3923 battery system ... composed of two basic hardware components and one software component” as well as a “K-3837 Ground Fault Locator.” The website shows a drop down menu for the following applications: telecommunication, power

⁹ July 14, 2020 Office action, pp. 5-6.

¹⁰ *Id.* at 7-17.

¹¹ *Id.* at 18-24.

¹² *Id.* at 24-25.

¹³ October 13, 2020 Office action, pp. 2-5.

utility, data center, motive/power forklift, industrial manufacturing, and offshore platform.¹⁴

Vertiv offers the “Alber BDS 256-XL Battery Monitoring System” for 2V to 16V systems and is “best suited for” “Data Center/Colocation/Hosting, Government and Healthcare.” In addition it offers the “Liebert STS2 Static Transfer Switch” which is “best suited for” “Data Center/Colocation/Hosting; Banking, Financial, and Insurance; Government; Healthcare; Retail/Wholesale and Education.”¹⁵

Balmar touts its “patented Max Charge and ARS-Voltage Regulators” which “provides a dynamic method for monitoring battery condition” as well as the “SG200 Battery Monitor.”¹⁶

Eagle Eye offers the “Vigilant Next Generation Battery Monitoring System” and “DC power systems for telecom and network applications.”¹⁷

Although both Applicant’s and Registrant’s goods fall under the general category of electrical products, that standing alone does not suffice to show that the goods are related. The Board’s analysis in *In re Princeton Tectonics, Inc.*, 95 USPQ2d 1509 (TTAB 2010) is instructive here. The examining attorney in that case argued that the applicant’s “personal headlamps” in International Class 11 were related to the registrant’s “electric lighting fixtures” in the same class because “the primary purpose of both types of goods is ‘... to emit and to provide light’” and because registrant’s identification of goods was “broad enough to encompass applicant’s goods.” *Id.* at 1510. The Board, however, was not persuaded:

¹⁴ *Id.* at 6-10.

¹⁵ November 24, 2021 Office action, pp. 2-8.

¹⁶ *Id.* at 9-16.

¹⁷ *Id.* at 17-24.

At the outset we note that the mere fact that both types of goods at issue here emit and provide light is not a sufficient basis for us to conclude that the goods are related. The goods, as identified, are sufficiently different in their uses to require proof that they are related. Nor can we conclude by intuition that both types of goods would be sold through common trade channels.

Id.

Ultimately the Board found the third-party registrations and website evidence submitted by the examining attorney insufficient to show relatedness. *Id.* at 1512. Thus on the record before us, the Examining Attorney has not introduced any evidence (i.e. third-party registrations or excerpts from third-party websites) to show that Applicant's and Registrant's goods may emanate from a single source. *See, e.g., Princeton Tectonics*, 95 USPQ2d at 1510; *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (finding Office had failed to establish that wine and vodka infused with caffeine are related goods because there was no evidence that vodka and wine emanate from a single source under a single mark or that such goods are complementary products that would be bought and used together). This critical *DuPont* factor weighs against finding a likelihood of confusion.

III. Conclusion

We have carefully considered all of the evidence made of record, as well as all of the arguments related thereto. Although the similarity of the marks weighs in favor of finding a likelihood of confusion, the record fails to show that the goods are related. We emphasize that we have reached our determination that confusion is not likely

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based on the record before us. On a different record, such as might be adduced in an inter partes proceeding, we might well come to a different conclusion.

Decision: The Section 2(d) refusal is reversed.