

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: September 25, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re AVR Realty Company, LLC*

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Serial No. 90699970

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Warner J. Delaune of Phelps Dunbar LLP,  
for AVR Realty Company, LLC.

Uloma Ukaoma, Trademark Examining Attorney, Law Office 108,  
Kathryn Coward, Managing Attorney.

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Before Zervas, Coggins, and English,  
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

AVR Realty Company, LLC (“Applicant”) seeks registration on the Principal  
Register of the standard-character mark FRANKIE ROSE for:

Cups and mugs, in International Class 21;

Pastries; Sandwiches; Coffee beans; Ground coffee  
beans, in International Class 30;

Smoothies, in International Class 32;

Online retail store services featuring coffee  
featuring in-store order pickup, in International  
Class 35; and

Catering services; Coffee shops, in International Class 43.<sup>1</sup>

The Trademark Examining Attorney partially refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the Classes 21 and 30 goods, and the Classes 35 and 43 services identified in the application,<sup>2</sup> so resembles the same standard-character mark FRANKIE ROSE for "tote bags" in International Class 18 and "shirts" in International Class 25,<sup>3</sup> on the Principal Register as to be likely to cause confusion, to cause mistake, or to deceive.

When the partial refusal was made final, Applicant requested reconsideration which was denied. Applicant then appealed to this Board. Applicant and the Examining Attorney have filed appeal briefs.

For the reasons discussed below, we affirm the refusal to register.

I. Evidentiary Issue

The Examining Attorney objects as untimely to the website printouts attached to Applicant's brief because they were not submitted during prosecution of the

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<sup>1</sup> Application Serial No. 90699970 was filed on May 10, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant's allegation of a bona fide intention to use the mark in commerce. According to the application, the name shown in the mark does not identify a particular living individual.

<sup>2</sup> Applicant's Class 32 goods are not subject to the refusal or at issue in this appeal.

<sup>3</sup> Registration No. 4660497, issued December 23, 2014. Sections 8 and 15 combined declaration accepted and acknowledged. According to the registration certificate, "FRANKIE ROSE" does not identify a particular living individual." The registration also identifies "cosmetics and make-up" which were not cited as part of the refusal.

application but only during appeal with the brief.<sup>4</sup> The objection is sustained. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). Exhibits attached to a brief but not made of record during examination are untimely and will not be considered. *See, e.g., In re Medline Indus., Inc.*, 2020 USPQ2d 10237, at \*2 (TTAB 2020).

## II. Likelihood of Confusion

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 of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d). Our determination under Section 2(d) involves an analysis of all probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*,” setting forth factors to be considered and referred to as “*DuPont* factors”) *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015).

In any appeal, different *DuPont* factors may play a dominant role and some factors may not be relevant. *In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at \*4 (Fed. Cir. 2023). Similarly, varying weight may be assigned to each factor depending on the evidence presented. *Id.* While we consider each *DuPont* factor for which there is evidence and argument, *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019), two key considerations are the similarities

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<sup>4</sup> 6 TTABVUE 3 (objection); 4 TTABVUE 9-10 (attachments as Exhibits A-B). Citations to the briefs in the appeal record refer to the TTABVUE docket system; citations to the prosecution record refer to the .pdf version of the TSDR system.

between the marks and the similarities between the goods. *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent consumer confusion as to source and to protect trademark owners from damage caused by registration of similar marks for related goods likely to cause such confusion. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *DuPont*, 177 USPQ at 566.

A. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrant's marks in their entirety, considering their appearance, sound, connotation, and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014). "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).

Applicant's mark and Registrant's mark are FRANKIE ROSE, in standard characters. As Applicant acknowledges,<sup>5</sup> the marks are identical in appearance and sound.

Applicant contends that the connotation and commercial impression of the marks differ because when the ROSE portion of Applicant's mark is "considered in the context of coffee, [it] suggests that someone has 'risen' after having their coffee, i.e., from the effects of caffeine."<sup>6</sup> Applicant cites to the troika of cases typically relied on for this proposition;<sup>7</sup> however, "unlike in those cases, there is no evidence here, or other reason to find, that the mark [FRANKIE ROSE] has one meaning when used with [any good or service identified in the application] and a second and different meaning when used with [either good identified in the cited registration]." *In re Embiid*, 2021 USPQ2d 577, at \*21 (TTAB 2021). Applicant submitted no evidence at all during prosecution of the application; and, as the Examining Attorney argues, the marks do not convey different commercial impressions because they "are identical and there is no evidence that the wording FRANKIE ROSE has a distinct meaning" in context with either Applicant's goods and services or Registrant's goods."<sup>8</sup>

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<sup>5</sup> "[I]n terms of appearance and sound, the FRANKIE ROSE marks of the Applicant and Registrant are identical." 4 TTABVUE 3.

<sup>6</sup> 4 TTABVUE 3.

<sup>7</sup> *In re Sears, Roebuck and Co.*, 2 USPQ2d 1312 (TTAB 1987) (CROSS-OVER and CROSSOVER for bras and tops, shorts, and pants), *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984) (PLAYERS for shoes and men's underwear), and *In re Sydel Lingerie Co., Ltd.*, 197 USPQ 629 (TTAB 1977) (BOTTOMS UP for ladies' and children's underwear and men's suits, coats, and trousers).

<sup>8</sup> 6 TTABVUE 5.

Because there is no evidence on the matter, we find it unlikely that the same FRANKIE ROSE mark would have different connotations and commercial impressions on the respective goods and services. Nonetheless, even if it were possible that consumers, upon encountering the mark in the context of caffeinated coffee, would follow a multi-step reasoning process with the ROSE portion of the mark to arrive at a connotation and commercial impression related to the past tense of “rise,” there is no indication – nor even argument – that ROSE would have such meaning or impression in the context of non-coffee goods and services (e.g., the cups and mugs, pastries, sandwiches, and catering services identified in the application) or with decaffeinated coffee goods and services (e.g., decaffeinated coffee beans and services involving decaffeinated coffee, within the scope of the coffee beans and coffee-related services in the application).

We find the FRANKIE ROSE marks identical in appearance, sound, connotation, and commercial impression. The first *DuPont* factor thus “weighs heavily in favor of a likelihood of confusion because identity of the marks is likely to lead to the assumption that there is a common source for the parties’ goods and services.” *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 2022 USPQ2d 513, at \*7-8 (Fed. Cir. 2022) (citations omitted).

B. Similarity or Dissimilarity of the Goods and Services and Trade Channels

The second *DuPont* factor considers the similarity or dissimilarity and nature of the goods and services as described in an application or registration, and the third *DuPont* factor considers the similarity or dissimilarity of established, likely-to-

continue trade channels. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018); *DuPont*, 177 USPQ at 567.

The issue is not whether purchasers would confuse the goods or services, but whether there is a likelihood of confusion as to the source of the goods or services. *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, \*5 (TTAB 2020); *L’Oreal v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012). The goods or services 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 they emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *see also In re Embiid*, 2021 USPQ2d 577, at \*22.

Evidence of relatedness may include excerpts from computer databases showing that the goods and services are used by the same purchasers, and advertisements showing that the goods or services are advertised together or sold by the same manufacturer or dealer. *In re Embiid*, 2021 USPQ2d 577, at \*22-23 (TTAB 2021) (citing *Ox Paperboard*, 2020 USPQ2d 10878, at \*5; and *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”)). Because the marks are identical, the degree of

similarity between the goods and services required for confusion to be likely declines. *In re Embiid*, 2021 USPQ2d 577, at \*23.

We compare the goods and services at issue in this appeal as they are identified in the involved application and cited registration. *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, at \*3 (TTAB 2020) (citing, inter alia, *Detroit Athletic Co.*, 128 USPQ2d at 1052). Applicant's goods and services subject to the partial refusal are: cups and mugs, in International Class 21; pastries, sandwiches, coffee beans, and ground coffee beans, in International Class 30; online retail store services featuring coffee featuring in-store order pickup, in International Class 35; and catering services and coffee shops, in International Class 43. Registrant's goods forming the basis for the refusal are tote bags in International Class 18, and shirts in International Class 25.<sup>9</sup> A finding of likely confusion must be made with respect to at least one item in each class of the application to establish likely confusion as to that class. *See Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

The Examining Attorney contends that Applicant's goods and services are related to Registrant's tote bags and shirts because it is common for the same entity to manufacture, produce, or provide the relevant goods and services; thus, the goods and services are of a kind that may emanate from a single source under a single mark. In

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<sup>9</sup> As noted earlier, the registration also identifies "cosmetics and make-up" which the Examining Attorney did not cite as part of the refusal.



support of these contentions, the Examining Attorney cites the following third-party webpages made of record in the January 22 and July 27, 2022 Office actions showing various third parties offering and advertising for sale under the same mark the respective goods and services:<sup>10</sup>

- Blue Bottle offers tote bags, mugs, and coffee shops.<sup>11</sup>
- Peet's Coffee offers shirts, mugs, coffee beans, online retail store services featuring coffee, and coffee shops.<sup>12</sup>
- Starbucks offers tote bags, coffee beans, and coffee shops.<sup>13</sup>
- Stumptown offers tote bags, mugs, coffee beans, online retail store services featuring coffee, and coffee shops.<sup>14</sup>
- Mayorga Coffee offers shirts, mugs, coffee beans, and coffee shops.<sup>15</sup>
- Dunkin' Donuts offers shirts, pastries, coffee beans, online retail store services featuring coffee with in-store order pickup, and coffee shops.<sup>16</sup>
- Dunn Brothers offers shirts, coffee beans, and coffee shops.<sup>17</sup>

We find this third-party webpage evidence showing the same mark used for both Applicant's goods and services and Registrant's goods is probative to demonstrate

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<sup>10</sup> There are additional third-party websites of record not specifically mentioned in the Examining Attorney's brief demonstrating at least some of Applicant's goods and/or services as well as mugs and/or shirts emanate from a single source under a single mark. *See* February 22, 2023 Request for Reconsideration Denied at 12-15 (deathwishcoffee.com), 36-43 (bonescoffee.com), 44-51 (cariboucoffee.com), 52-57 (facebook.com/coffeebeaneryflint).

<sup>11</sup> January 22, 2022 Office Action at 9-12 (bluebottlecoffee.com).

<sup>12</sup> January 22, 2022 Office Action at 13-16 (peets.com).

<sup>13</sup> January 22, 2022 Office Action at 17-19 (starbucks.com).

<sup>14</sup> January 22, 2022 Office Action at 20-22 (stumptowncoffee.com).

<sup>15</sup> July 27, 2022 Office Action at 7-8, 21-24 (mayorgacoffee.com).

<sup>16</sup> July 27, 2022 Office Action at 6, 9-10, 15-20 (dunkindonuts.com).

<sup>17</sup> July 27, 2022 Office Action at 11-14 (dunnbrothers.com).

that the goods and services are related for likelihood of confusion purposes. *See, e.g., Detroit Athletic Co.*, 128 USPQ2d at 1051 (relatedness supported by evidence that third parties sell both types of goods under same mark, showing that “consumers are accustomed to seeing a single mark associated with a source that sells both.”); *In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012) (Internet excerpts from “several third-party car dealerships offering ‘tires’ for sale on their websites” was “evidence that consumers expect to find both ‘tires,’ . . . “and ‘automobiles’ . . . emanating from a common source.”).

Applicant does not challenge any of the Examining Attorney’s evidence and concedes “that tote bags and shirts are sometimes sold within coffee shops.”<sup>18</sup> Instead, Applicant argues that its goods and services “are all related to food and beverage items” while Registrant’s goods are “ancillary goods to [Registrant’s] cosmetics products,” and that there is no evidence demonstrating that Applicant itself sells Registrant’s goods (i.e., tote bags and shirts) or that Registrant itself sells Applicant’s goods (i.e., “coffee-related products”).<sup>19</sup> However, we are not concerned with “extrinsic evidence regarding Applicant and Registrant themselves,” *In re Embiid*, 2021 USPQ2d 577, at \*28, and it is not dispositive that Applicant itself might not sell shirts or tote bags, or that Registrant itself might not offer any of Applicant’s goods or services.<sup>20</sup> Rather, as noted above, the evidence need only establish that the goods

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<sup>18</sup> 4 TTABVUE 5.

<sup>19</sup> 4 TTABVUE 5.

<sup>20</sup> Given Applicant’s repeated arguments about alleged real world differences between the goods at issue that are not reflected in the identification of goods of the cited registration (i.e., that Registrant is a cosmetics company whose tote bag and shirt goods are inseparably

and services are related in some manner, or the conditions surrounding their marketing are such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the services come from a common source. *Coach Servs.*, 101 USPQ2d at 1721; *In re Embiid*, 2021 USPQ2d 577, at \*22; *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993); *In re Rexel, Inc.*, 223 USPQ 830, 831 (TTAB 1984).

With regard to the similarity of the trade channels in which the goods and services are encountered and the types of purchasers, we must base our likelihood of confusion determination on the goods and services as they are identified in the application and registration at issue. *In re FCA US LLC*, 126 USPQ2d 1214, 1217 (TTAB 2018), *aff'd mem.*, 778 F. App'x 962 (Fed. Cir. 2019). The same third-party webpages referenced above demonstrate that tote bags or shirts, on the one hand, and mugs, pastries, coffee beans, online retail store services featuring coffee with in-store order pickup, and/or coffee shops, on the other hand, may be encountered by the same classes of consumers under the same marks in at least two common trade channels – the websites and physical locations of the coffee shops. This evidence supports a finding, in line with the Examining Attorney's argument, that Registrant's goods and

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related to its cosmetics business), we emphasize that we must “decide this ex parte appeal based on the information on the face of the cited registration; we do not read in limitations.” *In re Cook Med. Techs. LLC*, 105 USPQ2d 1377, 1384 (TTAB 2012). The proper remedy for an applicant to limit the scope of a registrant's identified goods is via an inter partes proceeding seeking partial cancellation or restriction pursuant to Section 18 of the Trademark Act, 15 U.S.C. § 1068. *See e.g., id.* at 1384-85. Alternatively, an applicant may seek consent from the owner of the cited registration. *Id.* at 1384.

Applicant's goods and services are offered in at least two common channels of trade, that is, the websites and physical locations operated by the third-party coffee shops.

Applicant contends that Registrant's tote bags and shirts are sold in channels of trade involving cosmetics, while Applicant's coffee-related goods are sold in channels of trade involving coffee shops.<sup>21</sup> However, because the identifications of goods in the application and cited registration do not include any restrictions or limitations as to trade channels, we presume the respective goods are or would be marketed in all normal trade channels for such goods and services, and that they are available to all classes of purchasers for those goods and services. *See, e.g., In re i.am.symbolic, llc*, 123 USPQ2d at 1750; *Packard Press*, 56 USPQ2d at 1361.

In view of the evidence adduced by the Examining Attorney, we find that the second and third *DuPont* factors regarding the similarity of the goods and services and channels of trade weigh in favor of finding of a likelihood of confusion.

### C. Purchasing Conditions and Consumer Sophistication

"The fourth *DuPont* factor . . . considers '[t]he conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing.'" *In re Embiid*, 2021 USPQ2d 577, at \*31 (quoting *DuPont*, 177 USPQ at 567). Purchaser sophistication or degree of care may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396

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<sup>21</sup> 4 TTABVue 5.

F.3d 1369, 73 USPQ2d 1689, 1695 (Fed. Cir. 2005). “[T]he applicable standard of care is that of the least sophisticated consumer.” *Stone Lion*, 110 USPQ2d at 1163. There is no evidence of record demonstrating that consumers of shirts, tote bags, mugs, pastries, coffee beans, online retail store services featuring coffee with in-store order pickup, and/or coffee shop services are sophisticated or would exercise any special care in purchasing such goods and services.

Once again attempting to bind Registrant to “the cosmetics actually sold by the Registrant” which are not at issue in this appeal, Opposer insists that cosmetics are “highly relevant to the sophistication question.”<sup>22</sup> However, there is nothing in the nature of Applicant’s or Registrant’s goods (none of which are limited as to their types, price points, or intended consumers) to suggest their purchasers are particularly sophisticated or careful. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1739 (TTAB 2018). Because the respective identifications have no limitation on price point or purchasers, we must treat the goods as including inexpensive shirts, tote bags, mugs, coffee beans, and pasties, and the services as including inexpensive coffee beverages, and therefore presume that purchasers for these goods and services include ordinary consumers who may buy inexpensive items on impulse.<sup>23</sup> *See In re Embiid*, 2021 USPQ2d 577, at \*31 (“By their nature, . . . shirts . . . are ‘general consumer goods’ that are ‘marketed

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<sup>22</sup> 4 TTABVUE 7.

<sup>23</sup> Indeed, the record demonstrates the goods and services are not expensive. *See* January 22, 2022 Office Action at 15 (mugs at \$10.45, peets.com); February 22, 2023 Reconsideration Denied at 19 (hot coffee at a coffee shop for \$2.75, lioncoffee.com), 20 (coffee beans at \$9.95, honolulucoffee.com), 40 (tote bags at \$14.99, bonescoffee.com), 46-47 (shirts at \$13.99, cariboucoffee.com), 55 (ground coffee from \$3.75, coffeebeanery.com).

to the general population,’ and that are purchased or used in some form by virtually everyone.”) (quoting *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at \*13-14 (TTAB 2020)); *Starbucks U.S. Brands, LLC v. Marshall Ruben*, 78 USPQ2d 1741, 1752 (TTAB 2006) (“[B]ecause retail coffee and tea beverages and coffee and tea itself are inexpensive products and may be purchased on impulse and without care, consumers devote limited attention to the purchase of such goods and services, and thus are more susceptible to confusion.”). Accordingly, the fourth *DuPont* factor is neutral.

#### D. Conclusion as to Likelihood of Confusion

When we consider and weigh the evidence of record and the relevant likelihood of confusion factors, *In re Charger Ventures*, 2023 USPQ2d 451, at \*7, we find confusion is likely between Applicant’s mark FRANKIE ROSE for the goods and services identified in Classes 21, 30, 35, and 43; and the cited mark FRANKIE ROSE for tote bags and shirts. The marks are identical in appearance, sound, connotation, and commercial impression; and the goods are related and travel in at least two of the same trade channels to ordinary consumers who exercise no more than an ordinary degree of care. All other *DuPont* factors are neutral on this record.

### III. Decision

The refusal under Trademark Act Section 2(d) to register Applicant’s mark for the goods in International Classes 21 and 30, and the services in International Classes 35 and 43, is affirmed. In due course, the goods and services in International Classes 21, 30, 35, and 43 will be deleted, and the application will proceed with the remaining goods in International Class 32.