

This Opinion is not a
Precedent of the TTAB

Mailed: July 19, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Mario Enrique Santillan Aguirre
—

Serial No. 90859041
—

Felipe Rubio, of Rubio & Associates,
for Mario Enrique Santillan Aguirre.

Jeffrey Oakes, Trademark Examining Attorney, Law Office 128,
Travis Wheatley, Managing Attorney.

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Before Coggins, Casagrande, and Bradley,
Administrative Trademark Judges.

Opinion by Casagrande, Administrative Trademark Judge:¹

Mario Enrique Santillan Aguirre (Applicant) seeks registration on the Principal Register of the mark MÁXIMO SANTANA (in standard characters) for goods

¹ As part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases, the legal citations in this opinion are in a form provided in the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion cites to Westlaw (WL). Practitioners should also adhere to the practice set forth in TBMP § 101.03.

identified as “Mezcal; Distilled agave liquor; Distilled blue agave liquor” in International Class 33.²

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), due to likelihood of confusion in view of Registration No. 2163245 for the mark SANTANA (in standard characters) for “wines” in International Class 33.³

After the Examining Attorney made the refusal final,⁴ Applicant appealed⁵ and requested reconsideration.⁶ The Board suspended the appeal to allow the Examining Attorney to consider the request for reconsideration.⁷ Upon denial of reconsideration,⁸

² Application Serial No. 90859041 was filed on July 30, 2021, based upon Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The application states that “The English translation of MÁXIMO in the mark is MAXIMUM” and that “The wording SANTANA has no meaning in a foreign language.”

³ Reg. No. 2163245 issued on June 9, 1998 (renewed). *See* May 9, 2022, Nonfinal Office Action. Please note that citations in this opinion to the application file are to pages in the Trademark Status and Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”). All page numbers in citations to the TSDR database are based on the downloadable .pdf version of the documents.

⁴ *See* Dec. 5, 2022, Final Office Action.

⁵ *See* 1 TTABVUE. References to the briefs and other filings in the appeal record all cite to the Board’s TTABVUE electronic docket system. The number preceding “TTABVUE” represents the docket number assigned to the cited filing in TTABVUE and any number immediately following “TTABVUE” identifies the specifically-cited page(s), if any.

⁶ *See* July 6, 2023, Request for Reconsideration. Applicant combined this filing with a petition to revive his application, which had been deemed abandoned as of July 6, 2023, due to Applicant’s failure to timely respond to the December 5, 2022, Final Office action. The Examining Attorney granted Applicant’s Petition to Revive on August 10, 2023.

⁷ *See* 2 TTABVUE.

⁸ *See* Sept. 11, 2023, Denial of Reconsideration (also available at 4 TTABVUE).

the appeal resumed.⁹ Applicant filed a brief,¹⁰ as did the Examining Attorney.¹¹ The case is now ready for decision. For the reasons explained below, we affirm the refusal to register.

I. SECTION 2(D) REFUSALS GENERALLY

Section 2(d) of the Trademark Act prohibits registration of a mark that “so resembles a mark registered in the Patent and Trademark Office ... as to be likely, when used on or in connection with the goods [or services] of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d). We determine whether confusion is likely by analyzing all probative facts in evidence relevant to the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (*DuPont*) (providing a nonexclusive list of 13 factors potentially relevant to likelihood of confusion). *See, e.g., In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023). “We discuss the *du Pont* factors for which there is relevant argument and evidence.” *Fiserv, Inc. v. Elec. Transaction Sys. Corp.*, Opp. No. 91214266, 2015 WL 1227735, at *4 (TTAB 2015); *see also Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) (Board required to consider only those factors “for which there is evidence and argument”) (quoting Bd. Decision). We then weigh together the findings we have made on the relevant likelihood-of-confusion factors to determine if,

⁹ See 5 TTABVUE.

¹⁰ See 10 TTABVUE.

¹¹ See 12 TTABVUE.

on balance, they indicate that confusion is likely. *See, e.g., Charger Ventures*, 64 F.4th at 1381; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1319 (Fed. Cir. 2003).

II. ANALYSIS

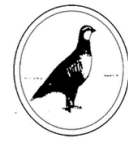
A. Comparison of the marks

The first likelihood-of-confusion factor concerns “[t]he similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *DuPont*, 476 F.2d at 1361. This is always among the most important considerations. *See, e.g., Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed. Cir. 2002) (“the ‘similarity or dissimilarity of the marks in their entirety’ is a predominant inquiry”) (citation omitted). “Marks are compared along the axes of their ‘appearance, sound, connotation and commercial impression.’” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1340 (Fed. Cir. 2015) (citation omitted); *accord In re i.am.symbolic, llc*, 866 F.3d 1315, 1324 (Fed. Cir. 2017). We assess the marks in their entirety. But in so doing, “[i]t is not improper for the Board to determine that, for rational reasons, it should give more or less weight to a particular feature of the mark provided that its ultimate conclusion regarding the likelihood of confusion rests on a consideration of the marks in their entirety.” *See, e.g., QuikTrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 1035 (Fed. Cir. 2021) (cleaned up; citation omitted).

“Exact identity is not necessary to generate confusion as to source of similarly-marked products.” *Bridgestone Ams. Tire Ops., LLC v. Fed. Corp.*, 673 F.3d 1330, 1337 (Fed. Cir. 2012) (citation omitted); *Phillips Petroleum Co. v. Knox Indus. Corp.*, 277 F.2d 945, 947 (CCPA 1960) (the “issue is whether the marks are confusingly

similar, not whether they are identical.”) (citation omitted). The similarity-of-marks inquiry is usually a matter of degree. *See, e.g., In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014) (“Similarity is not a binary factor but is a matter of degree.”) (citation omitted); *Phillips Petroleum*, 277 F.2d at 947 (“The question of similarity is ordinarily one of degree.”).

Applicant says the marks have a “different commercial impression.”¹² Applicant



points out that the USPTO previously allowed registration of the mark **MAXIMO REAL** for wine notwithstanding that REAL had previously been registered for hard cider.¹³ This sort of comparison is not useful. It is well settled that each trademark case must be decided on its own unique facts and evidence. As the Court in *Curtice-Burns, Inc. v. Northwest Sanitation Products, Inc.*, 530 F.2d 1396 (CCPA 1976), put it: “As we shall evidently have to continue saying ad nauseam: ... prior decisions on other marks for other goods are of very little help one way or the other in cases of this type. Each case must be decided on its own facts and the differences are often subtle ones.” *Id.* at 1399 (cleaned up; citation omitted).

Indeed, one such difference should have been apparent to Applicant when it made this argument in prosecution. At that time, Applicant acknowledged that REAL was registered based on a showing of acquired distinctiveness under Section 2(f), 15

¹² *See* 10 TTABVUE 7.

¹³ *See id.* at 6-7.

U.S.C. § 1052(f).¹⁴ This meant that REAL was not considered inherently distinctive and thus was relatively weak as a conceptual matter. *See, e.g., Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, Opp. No. 91263919, 2022 WL 16646840, at *19-20 (TTAB 2022) (registration based on Section 2(f) indicates conceptual weakness of the mark). In light of that weakness, it is apparent that the junior mark's additional design element and word took on increased significance. Here, however, the cited registration SANTANA was registered without a showing of acquired distinctiveness, which means it is presumed to be inherently distinctive. *See, e.g., Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 17 F.4th 129, 146 (Fed. Cir. 2021). In addition, Applicant's mark has no distinctive design element. These exemplify some of the "subtle differences" that make it problematic to compare prior registration decisions concerning other marks.

Here, the cited registration is for the mark SANTANA. Applicant's mark is MÁXIMO SANTANA. As noted earlier, the application states that SANTANA has no meaning in any foreign language but that the English translation of MÁXIMO is "maximum."

The word SANTANA is the only term in the mark of the cited registration. As to Applicant's mark, we find that SANTANA is the dominant component of the mark. Generally, first words in marks are considered "dominant" in creating the commercial impression of the mark as a whole. *See, e.g., In re Detroit Athletic Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018) ("The identity of the marks' initial two words is particularly

¹⁴ *See* 12 TTABVUE 10; June 10, 2022, Response to Office Action, at TSDR 11.

significant because consumers typically notice those words first.”) (citations omitted); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, Opp. No. 91074797, 1988 WL 252340, at *3 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). But not always. *See, e.g., Monster Energy Co. v. Lo*, Opp. No. 91225050, 2023 WL 417620, at *14 (TTAB 2023) (“There is no mechanical test to select the dominant element of a mark.”) (citation omitted). Sometimes, first words modify the term or terms that follow and thus serve to highlight those following terms. *See, e.g., Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1322 (Fed. Cir. 2014) (Board properly found that LION was the dominant element in STONE LION CAPITAL where STONE was a suggestive adjective); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 1341, 1343 (Fed. Cir. 2004) (affirming Board’s finding that, in the mark, JOSE GASPAR GOLD, the name JOSE only modified the following, dominant term GASPAR). We find that to be the case here. The first word MÁXIMO (i.e., “maximum”) is not arbitrary or fanciful, but rather is suggestive of the intensity or level of quality of the products. Consumers familiar with the registrant’s SANTANA products may well interpret it as suggesting a higher-quality line of products from the registrant.

While it is apparent that the marks do not sound or look identical due to the additional word MÁXIMO in Applicant’s mark, we find that their commercial impressions, viewed in their entireties, are similar. We find that the first likelihood-of-confusion factor weighs in favor of a conclusion that confusion is likely.

B. Comparison of the goods

The second likelihood-of-confusion factor assesses “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *DuPont*, 476 F.2d at 1361. In most likelihood-of-confusion cases, the similarity of the goods or services is, along with the similarity of the marks, considered one of the relatively more important factors. *See, e.g., Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (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.”); *In re OSF Healthcare Sys.*, Ser. No. 88706809, 2023 WL 6140427, at *2 (TTAB 2023) (“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the [goods or] services.”) (citation omitted).

In assessing the second factor, we must consider “the applicant’s goods as set forth in its application, and the [registrant’s] goods as set forth in its registration. Likelihood of confusion must be resolved on the basis of the goods named in the registration” *i.am.symbolic*, 866 F.3d at 1325 (citations omitted). “The marks need not be used on [or in connection with] directly competing goods, any relation likely to lead purchasers into assuming a common source being sufficient.” *Dan Robbins & Assocs., Inc. v. Questor Corp.*, 599 F.2d 1009, 1013 (CCPA 1979) (citation omitted). “[T]he relevant inquiry considers 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.” *Tiger*

Lily Ventures Ltd. v. Barclays Cap. Inc., 35 F.4th 1352, 1363 (Fed. Cir. 2022) (cleaned up; citation omitted).

Evidence that other companies offer the goods of both parties under the same mark tends to show that consumers will perceive the goods as related. *See, e.g., Naterra Int'l, Inc. v. Bensalem*, 92 F.4th 1113, 1117 (Fed. Cir. 2024); *Detroit Athletic*, 903 F.3d at 1306. So does evidence that other companies list the goods of both parties in one registration. *See, e.g., Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 WL 2188890, at *24 (TTAB 2022); *In re Ox Paperboard, LLC*, Ser. No. 87847482, 2020 WL 4530517, at *6 (TTAB 2020).

Here, the record contains copious evidence that several third parties offer under the same mark both agave spirits or mezcal (as in the application here) and wines (as in the registration): E&J Gallo;¹⁵ Round Barn;¹⁶ Charbay;¹⁷ Cape Fear;¹⁸ Silver Oak;¹⁹ Tequila & Agave Solutions;²⁰ Pierre's;²¹ Rancho La Gloria;²² and La Paz.²³ There is even more evidence of third-party registrations that identify both agave spirits or mezcal (as in the application here) and wines (as in the registration), including:

¹⁵ *See* May 9, 2022, Nonfinal Office Action, at TSDR 7-9.

¹⁶ *See id.* at 10-13.

¹⁷ *See id.* at 14-17.

¹⁸ *See* Sept. 11, 2023, Denial of Reconsideration, at TSDR 76-77, 79-80.

¹⁹ *See id.* at 81-82.

²⁰ *See id.* at 94-98.

²¹ *See id.* at 100-02.

²² *See id.* at 103-05.

²³ *See id.* at 106-07.

POCKET SHOT;²⁴ THE BITCH IS BACK;²⁵ E. CUARENTA;²⁶ ERNEST HEMINGWAY;²⁷ CABAL;²⁸ RADICAL SEDUCTION;²⁹ SHARE TRUTH;³⁰ 5 LETTER;³¹ NOSOLO;³² DISCOVER YOUR GREATNESS;³³ REINA DE LA MUERTE;³⁴ SILVERKLOOF;³⁵ and LA LEYENDA LOS CLASICOS NUNCA MUEREN.³⁶

Applicant's first rejoinder to this evidence is to mischaracterize the Examining Attorney's refusal as relying on a generalized rule of thumb that "because Applicant's [products] and Registrant's [products] generally contain alcohol, there is a likelihood of confusion."³⁷ Our review of the Office actions and of the Examining Attorney's brief, however, reveal that the Examining Attorney did no such thing. Rather, the

²⁴ See July 11, 2022, Nonfinal Office Action at TSDR 51.

²⁵ See *id.* at 52-53.

²⁶ See *id.* at 54-56.

²⁷ See *id.* at 57-59.

²⁸ See *id.* at 60-61.

²⁹ See *id.* at 65-66.

³⁰ See *id.* at 67-68.

³¹ See *id.* at 69-70.

³² See *id.* at 71-72.

³³ See *id.* at 73-74.

³⁴ See *id.* at 75-77.

³⁵ See *id.* at 78-79.

³⁶ See *id.* at 83-84. The record also contains evidence that agave spirits and wine are mixed together in cocktails, i.e., that they are used together. See, e.g., Sept. 11, 2023, Denial of Reconsideration, at TSDR 59-70. A finding that products are used together, while generally insufficient by itself to prove relatedness, is relevant to (i.e., tends to show) relatedness. See, e.g., *Shen Mfg. Co. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 1244 (Fed. Cir. 2004); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567 (Fed. Cir. 1984).

³⁷ See 10 TTABVUE 9.

Examining Attorney correctly identified and assessed third-party evidence of use and registration of the same mark for both parties' goods, which, as we pointed out at the beginning of this subsection, is evidence that consumers view the products as related.

Applicant next points out that the USPTO has allowed registration of many marks that are similar to one another, to two different entities, for agave spirits and wine, respectively.³⁸ Applicant says that it would be "unjust to deny Applicant's mark" in light of these registrations.³⁹

We disagree. Whether USPTO examining attorneys have previously allowed registration in circumstances Applicant asserts are similar to the current case is of little, if any, probative value. *See, e.g., In re Nett Designs, Inc.*, 236 F.3d 1339, 1342 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court Accordingly, this court finds little persuasive value in the registrations that Nett Designs submitted to the examiner"). One reason for this is that the simple fact of registration tells us next-to-nothing about the evidence that was before the Office in those cases. *See, e.g., In re Harris-Intertype Corp.*, 518 F.2d 629, 632 (CCPA 1975). The Examining Attorney here could have brushed this evidence away summarily based on this settled principle, yet instead exhibited extraordinary patience digging through, and pointing out several facts about, those other instances that find no parallel in this case. One such significant

³⁸ *See* 10 TTABVUE 10-11.

³⁹ *See id.* at 10.

fact is that, in many of those other cases, the applicant had obtained the written consent of the registrant to the registration of the applicant's mark.⁴⁰ A consent agreement that addresses the circumstances that support the parties' agreement that confusion is unlikely and provides for remedial measures should confusion nevertheless arise can be persuasive evidence that confusion is unlikely. *See, e.g., In re Four Seasons Hotels Ltd.*, 987 F.2d 1565, 1568-69 (Fed. Cir. 1993); *In re Mastic Inc.*, 829 F.2d 1114, 1116-17 (Fed. Cir. 1987). Applicant does not point to any consent agreement with the registrant in this case.

Based on the probative evidence in the record, we find that the respective goods are closely related, a fact that weighs in favor of a conclusion that confusion is likely.

C. Comparing the channels of trade and the classes and characteristics of the relevant customers

The third and fourth likelihood-of-confusion factors frequently go hand-in-hand. The third factor considers “[t]he similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 476 F.2d at 1361. The fourth factor considers “[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *Id.* As with the second factor, we base our comparison of the trade channels and classes of customers on what is set forth in the application and registration at issue. *See, e.g., Detroit Athletic*, 903 F.3d at 1308. Where, as here, the application and registration are unrestricted, the identified goods are “presumed

⁴⁰ *See, e.g.*, July 11, 2022, Nonfinal Office Action, at TSDR 6; Dec. 5, 2022, Final Office Action, at TSDR 13-14; Sept. 11, 2023, Denial of Reconsideration, at TSDR 6, 8.

to be sold in all normal trade channels to all the normal classes of purchasers” for the identified goods. *Id.* (citation omitted).

As to trade channels, the Examining Attorney introduced evidence that many retailers and restaurants sell agave spirits, mezcal, and wine. These include retailers Del Mesa Liquor,⁴¹ US Uptown Spirits,⁴² LIQUORSTORE ONLINE,⁴³ Country Wine & Spirits,⁴⁴ LIQUOR KINGDOM,⁴⁵ LIQUORAMA,⁴⁶ T5WNS Wines & Liquors,⁴⁷ East Houston Street Wine & Liquor,⁴⁸ TheLiquorStore.com,⁴⁹ CO\$T PLUS LIQUORS,⁵⁰ Remedy Liquor,⁵¹ Quality Liquor Store,⁵² Astor,⁵³ and Mission Wine & Spirits.⁵⁴ The record also contains evidence of several bars and restaurants that serve both agave spirits and wine.⁵⁵ Applicant does not dispute that the channels of trade overlap.

⁴¹ See July 11, 2022, Nonfinal Office Action, at TSDR 9-10.

⁴² See *id.* at 11-13.

⁴³ See *id.* at 14-16.

⁴⁴ See *id.* at 17-18.

⁴⁵ See *id.* at 19-21.

⁴⁶ See *id.* at 22-24.

⁴⁷ See *id.* at 25-27.

⁴⁸ See *id.* at 28-30.

⁴⁹ See *id.* at 31-34.

⁵⁰ See *id.* at 35-37.

⁵¹ See *id.* at 38-40.

⁵² See *id.* at 41-43.

⁵³ See *id.* at 47-48.

⁵⁴ See *id.* at 49-50.

⁵⁵ See Sept. 11, 2023, Denial of Reconsideration, at TSDR 10-49.

This evidence also shows that the classes of customers to whom the respective goods are offered overlap as well. Because the goods at issue are wines, mezcal, and agave spirits, the relevant purchasers are ordinary adult consumers who purchase or consume these alcoholic beverages. Applicant does not dispute that the classes of customers overlap.

What Applicant does argue is that wine and agave spirit consumers are so sophisticated that they won't be confused, even by similar marks. In support, Applicant returns to its evidence of pairs of third-party registrations of allegedly similar marks for agave spirits and wines, respectively.⁵⁶ Applicant urges that this evidence shows that consumers of both mezcal and wine "have learned to differentiate and distinguish between marks on the basis of careful attention, given the appearance of not only similar terms, but rather, even identical terms appearing in marks."⁵⁷ We disagree; the evidence shows no such thing.

A mere listing of pairs of various marks that are allegedly similar to one another for agave spirits and wine does not speak to any of the likelihood-of-confusion factors, let alone specifically indicate anything about the sophistication of such consumers in this case. In assessing purchaser sophistication, our analysis must take into account "the least sophisticated purchasers" within the classes of purchasers. *See, e.g., Stone Lion*, 746 F.3d at 1325 (citations omitted). Here, there are no limitations on the channels of trade or customers classes in either the registration or the application.

⁵⁶ *See* 10 TTABVUE 10-11.

⁵⁷ *See id.* at 11.

The only implicit limitation that flows from the identified goods is that the consumers be of legal age to purchase alcoholic beverages. The lack of express limitations means that the customer classes encompass both discerning connoisseurs of agave spirits and wine as well as those just seeking to get intoxicated, those who purchase on a whim as well as those who research before they buy, the wealthy and those of modest means, and people of all levels of education. We therefore see no basis to credit Applicant's unsupported argument about the brand-differentiating expertise of such a broad cross-section of the purchasing public. *See, e.g., Stawski v. Lawson*, Conc. Use No. 94002621, 2018 WL 6921710, at *19 (TTAB 2018) (“[S]ince there is no restriction in the subject application[] and registration as to price or quality, there is no reason to infer that the consumers or purchasers of these alcoholic beverages will be particularly discriminating or careful in distinguishing” the goods).

On the other hand, we see no evidence that consumers exercise less than ordinary care with respect to the products at issue. We therefore find the sophistication factor neutral.

In sum, we find that the overlap in the channels of trade and classes of customers support a conclusion that confusion is likely. Customer sophistication and care is neutral.

D. Weighing the findings on the relevant factors together.

Having made findings on all the likelihood-of-confusion factors Applicant discussed in his brief, our final step is to assess these findings together to determine if, on balance, confusion is likely. *See, e.g., Charger Ventures*, 64 F.4th at 1384. Here,

weighing in favor of a conclusion that confusion is likely are the facts that the marks are similar in a key respect and the goods are related. These are usually important considerations, *see, e.g., Federated Foods*, 544 F.2d at 1103, and we see no reason why they are not important in this case as well. In addition, the trade channels and classes of customers overlap. While not as central to the analysis, *see, e.g., id.*, they, too, favor a conclusion that confusion is likely. The sophistication and purchaser care factor is, on this record, neutral. No factor weighs against a finding that confusion is likely. On balance, it is clear to us that confusion is likely.

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