

This Opinion is Not a
Precedent of the TTAB

Mailed: October 6, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Nikon Corporation
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Serial No. 86828751
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Jason S. Nardiello of Barclay Damon LLP,
for Nikon Corporation.

Annie M. Noble, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

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Before Taylor, Bergsman and Wolfson,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Nikon Corporation (“Applicant”) seeks registration on the Principal Register of the mark MMD (in standard characters) for “laser scanners for industrial inspection and for geometrical measurement, and not for use with land surveying equipment; software for collection and interpretation of data in the operation of laser scanners, not for use with land surveying equipment,” in Class 9.¹

¹ Application Serial No. 86828751 was filed on November 23, 2015, under Section 44(d) of the Trademark Act, 15 U.S.C. § 1047(d), based upon Applicant’s Japanese application 2015-114658 filed November 20, 2015. Applicant’s Japanese application registered August 5, 2016 as Registration No. 5971371.

The Trademark Examining Attorney refused registration of Applicant's mark 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 MMD and design, shown below, for "levelling rods; surveying chains; surveying compass needles; surveying instruments; surveying machines and instruments; transits; tripods," in Class 9, as to be likely to cause confusion.²



When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We reverse the refusal to register.

I. Evidentiary Issue

Applicant submitted evidence, not previously of record, attached to its appeal brief and the Trademark Examining Attorney objected to that evidence as being untimely filed.³ Because the record in an application should be complete prior to filing the appeal, the evidence attached to Applicant's appeal brief is untimely and it is given

² Registration No. 4137026, registered May 1, 2012; Sections 8 and 15 affidavits accepted and acknowledged.

³ 10 TTABVUE 12.

no consideration. Trademark Rule 2.142(d); *In re Fiat Grp. Mktg. & Corp. Commc'ns S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014).

Applicant also attached additional evidence for the first time to its reply brief. Again, because this evidence was not timely submitted, we have not considered it. *Id.*

II. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*du Pont*”) (cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015)); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *du Pont* factor that is relevant and for which there is evidence of record. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int'l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *see also In re*

i.am.symbolic, llc, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 303 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. The similarity or dissimilarity of the marks.

We turn first to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *du Pont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014). In comparing marks, we are mindful that “[t]he 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) (quoting *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007); see also *San Fernando Elec. Mfg. Co. v. JFD Elec. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA

1971); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). As discussed more fully below, by virtue of the nature of the products, the average customer is a person that exercises a high degree of purchasing care.

The marks at issue, MMD and MMD and design, shown below, are similar because they share the letters MMD and, to that extent, they are identical in appearance, sound, and meaning.



Although the Applicant and Registrant have derived their MMD marks from different words,⁴ the derivation of letter marks is of no particular significance. See *B.V.D. Licensing Corp. v. Rodriguez*, 83 USPQ2d 1500, 1508 (TTAB 2007); *Edison Bros. Stores, Inc. v. Brutting E.B. Sport-Int'l GmbH*, 230 USPQ 530, 533 (TTAB 1986) (“It should be noted that the lettered marks in almost all of the cited decisions were, as in the case before us, derived from the trade or corporate names of the involved parties, but these facts had no negative influence upon the likelihood of confusion

⁴ Applicant explained that MMD means “Model Maker Digital” (September 6, 2016 Response to an Office Action) and the letters MMD in Registrant’s mark are initials for its trade name Municipal Marketing Distributors, Inc. (February 6, 2017 Request for Reconsideration). See also the printout from Registrant’s website at 4 TTABVUE 7.

conclusions which were reached.”); *Aerojet-Gen. Corp. v. Computer Learning & Sys. Corp.*, 170 USPQ 358, 362 (TTAB 1971) (fact that acronyms are derived from different words is unimportant because average purchasers are probably unaware of the derivation). Neither Applicant’s mark, nor the mark in the cited registration, include the words from which the letter marks were derived; however, whether Registrant or Applicant actually uses the source words with the marks is irrelevant. Thus, we assess the similarity or dissimilarity of the marks as registered and as applied-for, that is, from the perspective that consumers will see only the mark Applicant seeks to register and the mark in the cited registration. *B.V.D. Licensing Corp. v. Rodriguez*, 83 USPQ2d at 1508 (citing *Jockey Int’l Inc. v. Mallory & Church Corp.*, 25 USPQ2d 1233, 1236 (TTAB 1992) (“applicant's argument that we must compare its mark ELAAN (stylized) with ELANCE plus JOCKEY because ‘ELANCE always appears with the Jockey name’ is likewise misplaced”) and *Blue Cross and Blue Shield Ass’n v. Harvard Cmty. Health Plan Inc.*, 17 USPQ2d 1075, 1077 (TTAB 1990) (“The problem that we have with applicant's argument is that applicant is not seeking to register a service mark slogan containing its trade name”)). Because neither mark includes the source words from which the letter combination was derived, “most consumers would think of the letters in applicant’s mark as arbitrary, in the same way that the letters in opposer’s mark would be perceived as arbitrary.” *B.V.D. Licensing Corp. v. Rodriguez*, 83 USPQ2d at 1508.

Such letter combinations have generally been given a wide scope of protection, based on the premise that it is more difficult to remember a series of arbitrarily

arranged letters than it is to remember words, figures, phrases, or syllables. *See Alberto-Culver Co. v. F.D.C. Wholesale Corp.*, 16 USPQ2d 1597, 1602 (TTAB 1990) (FDC is similar to FDS); *see also Weiss Assoc., Inc. v. HRL Assoc., Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1841 (Fed. Cir. 1990) (TMS is similar to TMM because “[i]t is more difficult to remember a series of arbitrarily arranged letters than it is to remember figures.”); *Chemetron Corp. v. N.R.G. Fuels Corp.*, 157 USPQ 111 (TTAB 1968) (NRG is similar to NCG because “unpronounceable letters combinations which are inherently difficult to remember and are therefore more susceptible of confusion or mistake than are word marks.”). As used in the marks before us, the letters MMD have the same meaning and engender the same commercial impression.

While the registered mark includes a design element, the letters MMD are the dominant part of that mark. In the case of marks consisting of words and a design, the words are normally accorded greater weight because the words are likely to make an impression upon purchasers, would be remembered by them, and would be used by them to request the services. *See In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908, 1911 (Fed. Cir. 2012) (citing *CBS Inc. v. Morrow*, 708 F. 2d 1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir 1983)); *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided

the ultimate conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant argues to the contrary that the dog illustration “would first draw the consumers’ attention.”⁵ Whether Applicant’s contention is valid does not change the fact that MMD is likely to appear alone when used in text and will be spoken when Applicant’s goods are requested by consumers. *See In re Viterra Inc.*, 101 USPQ2d at 1911. Even assuming that the dog design is the part of the mark that first catches the consumers’ attention, consumers may mistakenly believe that the registered mark is a variant mark identifying the MMD line of products.

Applicant contends that the facts in this case are similar to the facts in *Steve’s Ice Cream v. Steve’s Famous Hot Dogs*, 3 USPQ2d 1477 (TTAB 1987), where the Board found that applicant’s mark STEVE’S featuring the design of “humanized frankfurters, prancing arm in arm to musical notes [for restaurant services], creates a distinctive commercial impression” from opposer’s mark STEVE’S for ice cream. *Id.* at 1479. In *Steve’s Ice Cream v. Steve’s Famous Hot Dogs*, the Board found that because many different food manufacturers and restaurants use the name “Steve’s,” or a related name like “Steven” or “Stephan” as all or part of their trade name, “the numerous third-party uses demonstrate that the purchasing public has become conditioned to recognize that many businesses in the restaurant and food store fields use the term, or something closely related to it, and that this purchasing public is able to distinguish between these businesses based on small distinctions among the

⁵ Applicant’s Brief, p. 4 (7 TTABVUE 8).

marks.” *Id.* In the application before us, however, there is no evidence regarding any other users of MMD for related goods or services from which we may infer that consumers have become conditioned to encountering different MMD branded products and upon which we could find that the bulldog design is so distinctive that it distinguishes the marks.

Applicant also contends that the facts in this case are similar to the facts in *Parfums de Coeur Ltd. v. Lazarus*, 83 USPQ2d 1012 (TTAB 2007), where the Board found that applicant’s mark BODYMAN and design was not similar to opposer’s marks BOD MAN and BOD. In *Parfums de Coeur Ltd. v. Lazarus*, the Board found that the word portion of applicant’s mark BODYMAN was not the dominant element of applicant’s mark because, *inter alia*, the design was such a “grotesque image.” *Id.* at 1016. In this case, the registered mark includes a realistic drawing of a bulldog, which while distinctive, does not create such a strong visual impact as to have the effect of displacing the letters MMD as the dominant part of the registered mark.

Because the marks share the letters MMD, the similarity in appearance, sound, connotation and commercial impression are sufficient to outweigh the design feature of the registered mark and to cause consumers to perceive the marks to be similar. In view of the foregoing, we find that Applicant’s mark and the registered mark are similar in their entireties in terms of their appearance, sound, connotation and commercial impression.

B. The similarity or dissimilarity and nature of the goods.

Applicant is seeking to register its mark for the goods set forth below:

Laser scanners for industrial inspection and for geometrical measurement, and not for use with land surveying equipment; software for collection and interpretation of data in the operation of laser scanners, not for use with land surveying equipment.”

The description of goods in the cited registration is set forth below:

Levelling rods; surveying chains; surveying compass needles; surveying instruments; surveying machines and instruments; transits; tripods.

In analyzing whether the goods at issue are related, the first thing we do is define the goods.

- The word “survey” is defined, *inter alia*, as “the science or scientific method of making surveys of land” and “to determine the exact form, boundaries, position, extent, etc., of (a tract of land, section of a country, etc.) by linear and angular measurements and the application of the principles of geometry and trigonometry.”⁶

- A “leveling rod” is defined as “noun, *Surveying*. 1. rod.”⁷
- A “transit” is defined, *inter alia*, as set forth below:

Also called transit instrument. an instrument, as a theodolite, having a telescope that can be transited, used for measuring horizontal and sometimes vertical angles.

a repeating transit theodolite.⁸

⁶ *Dictionary.com* based on the **Random House Dictionary** (2017) (accessed October 5, 2017). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010).

⁷ *Dictionary.com* based on the **Random House Dictionary**.

⁸ *Id.* A “theodolite” is defined as “*Surveying*. a precision instrument having a telescopic sight for establishing horizontal and sometimes vertical angles.” *Id.* A “transit theodolite” is a “theodolite having a telescope that can be transported.” *Id.*

- A “tripod” is defined, *inter alia*, as “a three-legged stand or support, as for a camera or a telescope.”⁹

The terms “surveying machines and instruments” in the cited registration is broad enough to include surveying machines and instruments incorporating laser scanners. *See In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”). However, Applicant has excluded laser scanners for use with land surveying equipment.

Nevertheless, the Trademark Examining Attorney contends that the above-noted goods are related because “the evidence clearly shows that non-land surveying laser scanners are also sold by the same entities that provide surveying instruments.”¹⁰ The Trademark Examining Attorney refers to the evidence listed below:¹¹

- The Spectra Precision FOCUS 6+ Series (spectraprecision.com) includes a laser pointer, an optional laser plummet, and “on-board software” for a variety of “surveying applications” and “[f]or most construction and surveying applications.”¹²

⁹ *Id.*

¹⁰ Trademark Examining Attorney’s Brief (10 TTABVUE 10).

¹¹ Page citations to documents in the TSDR database are from the .pdf format, as downloaded from the database.

We have not considered the CODY website (lasersurveyingequipment.com.au) because it is an Australian website and there is no evidence in the record showing that the relevant U.S. consumers purchase equipment from CODY. March 7, 2016 Office Action (TSDR 31).

¹² February 7, 2017 Office Action (5 TTABVUE 6).

The Spectra Precision FOCUS 6+ Series may be used for surveying, building and construction, forensics, mining and exploration, and GIS and mapping.¹³

- The LEICA GEOSYSTEMS laser scanner (leico-geosystems.com) are advertised “for any tasks in 3D laser scanning.”¹⁴

- Tiger Supplies (tigersupplies.com) advertises the sale of NIKON DTM-322 and NIKON NIVO 1C surveying equipment.¹⁵ The NIVO 1C includes a laser¹⁶ and is advertised as an “anywhere measurement tool.”¹⁷

- FARO (faro.com) advertises that its FARO ScanArm features a hand-held laser scanner for use in “inspection, point cloud-to-CAD comparison, rapid prototyping, reverse engineering, and 3D modeling.”¹⁸ Faro also advertises a FARO Focus 3D X laser scanner “for surveying applications.”¹⁹

¹³ *Id.*

¹⁴ February 7, 2017 Office Action (5 TTABVUE 8).

¹⁵ February 7, 2017 Office Action (5 TTABVUE 13).

¹⁶ February 7, 2017 Office Action (5 TTABVUE 7). Because the NIKON DTM-322 is so similar in appearance to the NIKON NIVO 1C and is advertised alongside the NIKON NIVO 1C, we assume that that the NIKON DTM-322 includes a laser.

¹⁷ February 7, 2017 Office Action (5 TTABVUE 12). *See also* 5 TTABVUE 7 (“Both of the Nivo series are the absolute leaders for go anywhere measurement tools.”).

Tiger Supplies (tigersupplies.com) advertises the sale of CST berger laser levels as construction lasers. March 7, 2016 Office Action (TSDR 30). The CST berger laser level kit is sold on eBay (ebay.com) as a rotary laser. March 7, 2016 Office Action (TSDR 27). There is nothing in the record that shows that these laser levels are used in surveying applications.

¹⁸ October 12, 2016 Office Action (TSDR 5).

¹⁹ October 12, 2016 Office Action (TSDR 7). We note that FARO has one model laser scanner for surveying applications and another model for other applications.

• Trimble (trimble.com) advertises its DPI-8 handheld laser scanner for use on construction projects.²⁰ Trimble (trimble.com) also advertises its TRIMBLE R series GNSS Surveying Systems.²¹

In contrast, Applicant, on its website “nikon.com,” advertises the K-Scan MMD as “a handheld walk-around laser scanner for portable metrology applications in large work volumes,” particularly “part-to-CAD inspection and productive reverse engineering of large components.”²²

The Examining Attorney submitted copies of four use-based, third-party registrations that include “the same or similar goods as those of both applicant and registrant.”²³ Third-party registrations based on use in commerce that individually cover a number of different goods may have probative value to the extent that they serve to suggest that the listed goods are of a type that may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). The registrations, with relevant portions of the description of goods, are listed below.

²⁰ October 12, 2016 Office Action (TSDR 9).

²¹ October 12, 2016 Office Action (TSDR 11-13). The Trimble website does not expressly state that the TRIMBLE R series GNSS surveying systems include a laser scanner, however, the instrument resembles the laser scanners of record.

²² February 7, 2017 Office Action (5 TTABVUE 10). “Metrology” is defined as “the science of weights and measures.” *Dictionary.com* based on the **Random House Dictionary**.

“CAD” is defined as “computer-aided design.” *Dictionary.com* based on the **Random House Dictionary**.

²³ Trademark Examining Attorney Brief (10 TTABVUE 11). The Trademark Examining Attorney submitted six registrations in the March 7, 2016 Office of which we find four to have goods common to both Applicant and Registrant.

Mark	Reg. No.	Services
LOMO (stylized)	2356798	Laser scanners for industrial inspection; lasers for measuring purposes; lasers not for medical use; Devices for measuring levelness; camera tripods
HELPING THE WORLD MEASURE	3083688	Laser scanners; Optical tooling transits; electronic levels
NOMAD	3669923	Rugged handheld computers equipped with laser scanners for use in geographical information systems field work, agriculture and construction work, land surveying, forestry, public safety, field service, utilities, military and other outdoor or service-related applications
M (stylized)	3909786	Laser scanning and imaging systems comprising, <i>inter alia</i> , laser scanners, and data and computer interfaces; Computer software for planning, modeling, surveying, visualizing, and otherwise analyzing nature and manmade geological mining systems

Applicant contends that although the same entity may advertise the sale of laser scanners for surveying and other applications, those entities advertise those laser scanners under different marks. For example, Faro (Faro.com) advertises the sale of FOCUS 3D laser scanners for surveying applications under the FOCUS 3D mark and other applications under the ScanArm mark. Trimble advertises the sale of the R

series for GNSS surveying systems (*e.g.*, Trimble R10, Trimble R8. *etc.*), and DPI-8 for other applications.²⁴

With respect to the other evidence of third-party use and the third-party registrations, Applicant asserts that the evidence does not show that those third parties are selling laser scanners for surveying and non-surveying applications under the same mark.²⁵ However, the evidence shows that Spectra Precision FOCUS 6+ Series, LEICA GEOSYSTEMS, and FARO ScanArm and FARO Focus 3D are used to identify laser scanners with multiple applications, including surveying. Also, the third-party registrations “serve to suggest” that the products emanate from the same source.

In view of the foregoing, we find that the goods at issue are related.

C. Established, likely-to-continue channels of trade.

By virtue of the description of goods, we surmise that Registrant’s “surveying machines and instruments,” including levelling rods and transits, are sold to land surveyors for the purpose of determining the exact form, boundaries, position, extent, etc., of a tract of land, section of a country, etc., and that Applicant’s goods are sold to industrial engineers for use in manufacturing applications. Accordingly, the goods move in different channels of trade.

²⁴ Applicant’s Reply Brief, pp. 5-6 (11 TTABVUE 9-10). However, the FARO website shows that Faro uses FARO ScanArm and FARO FOCUS 3D. October 12, 2016 Office Action (TSDR 5 and 7).

²⁵ Applicant’s Reply Brief, p. 6 (11 TTABVUE 10).

With respect to tripods, there is no evidence showing tripods used with laser scanners for industrial inspection and for geometrical measurement.²⁶ The evidence of record, introduced by the Trademark Examining Attorney, indicates that Applicant's laser scanner is a handheld instrument.²⁷ This is consistent with the other evidence in the record. For example, the FARO ScanArm, used in connection with "inspection, point cloud-to-CAD comparison rapid prototyping, reverse engineering and 3D modeling," is a handheld scanner while the FARO FOCUS 3D, in connection with surveying, is pictured on a tripod.²⁸ Likewise, the TRIMBLE DPI-8, used in connection with building construction, is a handheld laser scanner, while the TRIMBLE R-series GNSS Surveying System is displayed on a stand.²⁹

While we suspect that laser scanners for industrial inspection and for geometrical measurement may be used with a tripod, there is no evidence to support that supposition. In fact, as noted above, the record shows just the opposite. Based on the record before us, we find that laser scanners for industrial inspection and for geometrical measurement and tripods move in different channels of trade.

²⁶ The *Engineeringsupply.com* website displays tripods sold as surveying equipment as opposed for use in connection with other types of laser scanners. March 7, 2016 Office Action (TSDR 29).

²⁷ February 7, 2017 Office Action (5 TTABVUE 10-11).

²⁸ October 12, 2016 Office Action (TSDR 5-8).

²⁹ *Id.* (TSDR 9-13).

D. The conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing.

Applicant argues that laser scanners and surveying instruments are not bought by members of the general public, but by purchasers who exercise a high degree of care.³⁰ While Applicant’s argument is not supported by any evidence, the inherent nature of the products (laser scanners for industrial inspection and for geometrical measurement and surveying instruments) indicate that the products are purchased by consumers who exercise a high degree of purchasing care. For example, the consumers of these products have a specialized or focused need for the products and they are used by experts or skilled personnel who would likely exercise a high degree of purchasing care.

E. Conclusion

Despite the fact that the marks are similar and the goods are related, because the goods move in different channels of trade, they will not be encountered by the same consumers under circumstances likely to give rise to the mistaken belief that the products emanate from the same source. In other words, if the same consumers do not encounter Applicant’s mark and Registrant’s mark, there are no consumers likely to be confused about the source of the products. The likelihood of confusion is further minimized because the consumers of both Applicant’s products and Registrant’s products will exercise a high degree of purchasing care. Accordingly, we find that Applicant’s mark MMD (standard characters) for “laser scanners for industrial

³⁰ Applicant’s Brief, p. 6 (7 TTABVUE 10).

inspection and for geometrical measurement, and not for use with land surveying equipment; software for collection and interpretation of data in the operation of laser scanners, not for use with land surveying equipment” is not likely to cause confusion with the registered mark MMD and design for “levelling rods; surveying chains; surveying compass needles; surveying instruments; surveying machines and instruments; transits; tripods.”

Decision: The refusal to register Applicant’s mark MMD is reversed.