

This Opinion is Not a
Precedent of the TTAB

Mailed: August 9, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board

—
In re Parklife Innovations Ltd.

—
Serial No. 88413981

—
Bernhard Molldrem of Law Office of Bernhard Molldrem,
for Parklife Innovations Ltd.

Katherine S. Chang, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

—
Before Kuhlke, Larkin, and Myles,
Administrative Trademark Judges.

Opinion by Myles, Administrative Trademark Judge:

Parklife Innovations Ltd. (“Applicant”) seeks to register the standard character mark BAZOOKAGOAL on the Principal Register for goods ultimately identified as “Sports training apparatus, namely, portable, retractable pop-up goal nets for soccer training and modified soccer training” in International Class 28.¹

¹ Application Serial No. 88413981 was filed on May 3, 2019 under Section 44(e) of the Trademark Act, 15 U.S.C. § 1126(e), based on European Union Trademark Registration No. EU017980783.

The Examining Attorney has 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, when used with the above-identified goods, so resembles the standard character mark BAZOOKA BALL registered on the Principal Register for "Amusement products, namely, inflatable balls; Athletic equipment, namely, striking shields; Balls for games; Balls for sports; Outdoor activity game equipment sold as a unit comprising paint ball equipment modified for playing games; Target equipment, namely, backers for targets; Target equipment, namely, stands for targets; Umpire protection equipment" in International Class 28, as to be likely to cause confusion, to cause mistake, or to deceive.²

I. Prosecution History and Record on Appeal³

We briefly summarize the prosecution history of the application, and the procedural history of the appeal, because they provide useful background to our analysis of the issues.

² The cited Registration No. 5225647 issued on June 20, 2017 and is owned by Media Vision Inflatables Inc. "BALL" is disclaimed. A combined Section 8 and 15 declaration was accepted and acknowledged on February 28, 2023. The registration also identifies services in International Class 41, which are not relevant to the Examining Attorney's final refusal.

³ All citations to documents contained in the Trademark Status & Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents. *See, e.g., In re Seminole Tribe of Fla.*, Ser. No. 87890892, 2023 TTAB LEXIS 184, at *1 n.1 (TTAB 2023).

As part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases, the citation form in this opinion is 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 employs citation to the **Lexis** database. Practitioners should also adhere to the practice set forth in TBMP § 101.03.

The Examining Attorney initially refused registration based on a likelihood of confusion with the cited mark.⁴ The Examining Attorney made of record USPTO electronic records for the cited registration.⁵ Applicant responded by arguing against the refusals.⁶

The Examining Attorney then issued an Office Action making final the refusal to register based on the cited registration, making of record pages from third-party websites,⁷ and copies of USPTO electronic records for third-party registrations,⁸ to show the relatedness of Applicant's goods and the registrant's goods.

Applicant filed a Request for Reconsideration of the final refusal, submitting the following: dictionary definitions for "paintball" and "soccer;"⁹ an image of Applicant's mark on the applied-for goods;¹⁰ a third-party website listing paintball equipment;¹¹ and copies of websites of the owner of the cited registration.¹²

⁴ July 22, 2019 Office Action at 2. The Examining Attorney also refused registration based on a likelihood of confusion with Registration No. 2007157. *Id.* The Examining Attorney withdrew the refusal to register based on Registration No. 2007157, however, and that refusal is not subject to this appeal. August 3, 2022 Final Office Action at 2.

⁵ July 22, 2019 Office Action at 7-9.

⁶ January 17, 2020 Response to Office Action at 1-4.

⁷ August 3, 2022 Final Office Action at 6-19.

⁸ *Id.* at 20-52.

⁹ September 27, 2022 Request for Reconsideration at 14-15; MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com.

¹⁰ *Id.* at 16.

¹¹ *Id.* at 17.

¹² *Id.* at 18-33.

The Examining Attorney denied Applicant's Request for Reconsideration, finding that Applicant had failed to make the dictionary definitions or webpages properly of record.¹³

Applicant filed a second Request for Reconsideration, resubmitting the dictionary definitions, the third-party website listing paintball equipment, and copies of the website of the owner of the cited registration.¹⁴ Applicant also submitted, for the first time, copies of a third-party website offering Applicant's goods under its BAZOOKAGOAL mark,¹⁵ and additional websites showing the registrant's use of the cited mark.¹⁶

The Examining Attorney denied Applicant's second Request for Reconsideration, finding that Applicant had failed to make the copy of the website of the owner of the cited registration properly of record.¹⁷

Applicant filed a third Request for Reconsideration, arguing that the website of the owner of the cited registration is the specimen of use in the prosecution record of the cited registration and should be considered.¹⁸ Applicant filed a notice of appeal while its third Request for Reconsideration was pending.¹⁹

¹³ October 5, 2022 Denial of Request for Reconsideration after Final Office Action at 1-2.

¹⁴ October 27, 2022 Second Request for Reconsideration at 15-16, 29-45.

¹⁵ *Id.* at 17-28.

¹⁶ *Id.* at 46-50.

¹⁷ November 22, 2022 Denial of Second Request for Reconsideration at 1-2.

¹⁸ January 25, 2023 Third Request for Reconsideration at 2.

¹⁹ 1 TTABVUE. Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. See *New Era Cap. Co. v. Pro Era, LLC*, Opp. No. 91216455, 2020 TTAB LEXIS 199, at *4 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the

The Examining Attorney denied Applicant's third Request for Reconsideration, considering all of Applicant's exhibits, and submitting additional exhibits containing copies of electronic records for third-party registrations and websites purporting to show the relationship of the goods.²⁰

After the Examining Attorney and Applicant submitted their appeal briefs, the application was remanded to the Examining Attorney at Applicant's request for the Examining Attorney to consider additional evidence, namely the statement of Anders A. Wennesland, Managing Director of Applicant, and the declaration of Bernhard P. Molldrem, Jr., counsel for Applicant, who attached photographs of Applicant's goods, a copy of the record for Applicant's European Union Trademark Registration No. UK091780783, and copies of invoices.²¹ The Examining Attorney found Applicant's additional evidence unpersuasive and issued a subsequent Final Office Action and proceedings were resumed.²²

The application was again remanded to the Examining Attorney at Applicant's request for the Examining Attorney to consider additional evidence, namely a supplemental statement of Mr. Wennesland, who attached a copy of the registrant's European Union Trademark Registration No. UK00003242603.²³ The Examining

docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

²⁰ February 9, 2023 Denial of Third Request for Reconsideration.

²¹ 9 TTABVUE.

²² 11 and 12 TTABVUE.

²³ 13 TTABVUE.

Attorney found Applicant's additional evidence unpersuasive and issued a subsequent Final Office Action.²⁴

Proceedings were resumed and Applicant submitted a supplemental brief, attaching a second supplemental statement of Mr. Wennesland, who included a reference to a third-party website, unitedsoccercoachesconvention.org, by web address only.²⁵ The Examining Attorney submitted a supplemental brief, objecting to the second supplemental statement of Mr. Wennesland and the reference to the third-party website by web address only.²⁶ Applicant submitted a reply brief, attaching copies of the third-party website.²⁷

II. Evidentiary Issues

Applicant attached evidence to each of its briefs, which the Board strongly discourages. *In re Info. Builders Inc.*, Ser. No. 87753964, 2020 TTAB LEXIS 20, at *5 n.4 (TTAB 2020). Trademark Rule 2.142(d) provides that “the record should be complete prior to the filing of an appeal” and that “evidence should not be filed with the Board after the filing of a notice of appeal.” 37 C.F.R. § 2.142(d); *In re ZeroSix, LLC*, Ser. No. 88981832, 2023 TTAB LEXIS 209, at *2 (TTAB 2023). Evidence that is attached to a brief that was not made of record during examination is untimely and will not be considered. *Info. Builders Inc.*, 2020 TTAB LEXIS 20, at *6. Reattaching evidence to an appeal brief that already forms part of the prosecution record is

²⁴ 16 TTABVUE.

²⁵ 18 TTABVUE 5-6.

²⁶ 20 TTABVUE.

²⁷ 18, 20, and 21 TTABVUE.

unnecessary and impedes efficient disposition of the appeal by the Board. *Id.* at *5 n.4 (“Because we must determine whether such attachments are properly of record, citation to the attachment requires examination of the attachment and then an attempt to locate the same evidence in the record developed during prosecution, requiring more time and effort than would have been necessary if citations were directly to the prosecution record.”).

The Examining Attorney objects to the second supplemental statement of Mr. Wennesland, which Applicant submitted for the first time with its supplemental brief.²⁸ Because the second supplemental statement was not made of record during prosecution (including on two remands), we sustain the Examining Attorney’s objection to this untimely evidence and have given it no consideration in our decision. *See* 37 C.F.R. § 2.142(d).

The Examining Attorney also objects to Applicant’s reference to a third-party website (unitedsoccercoachesconvention.org/2024-partners-and-exhibits) by web address alone for the first time with its supplemental brief.²⁹ This website was identified solely in the second supplemental statement of Mr. Wennesland and for the same reasons explained above, we have given it no consideration.³⁰ Applicant also attached a copy of the website to its reply brief.³¹ This is improper. Even if Applicant

²⁸ 20 TTABVUE 3.

²⁹ *Id.*

³⁰ Web addresses or hyperlinks are insufficient to make the underlying webpages of record. *In re ADCO Indus. – Techs., L.P.*, Ser. No. 87545258, 2020 TTAB LEXIS 7, at *4 (TTAB 2020).

³¹ 21 TTABVUE 2-3, and 5-6.

had properly submitted a copy of the website with its supplemental brief, the evidence was not made of record during prosecution. *See* 37 C.F.R. § 2.142(d). We therefore sustain the Examining Attorney's objection to this untimely evidence and have given it no consideration in our decision.

III. Likelihood of Confusion

Section 2(d) of the Trademark Act provides that a mark may be refused registration if it:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office ... as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive....

15 U.S.C. § 1052(d); *quoted in In re Elster*, 602 U.S. 286, 290 (2024).

Our determination of likelihood of confusion under Section 2(d) of the Trademark Act is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) ("*DuPont*"). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).

"In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the [goods or] services." *Monster Energy Co. v. Lo*, Opp. No. 91225050, 2023 TTAB LEXIS 14, at *18 (TTAB 2023) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976), *civ. action filed*, Case No. 5:23-cv-00549 (C.D. Cal. Mar. 28, 2023).

A. Similarity or Dissimilarity of the Marks

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.’” *Sabhnani v. Mirage Brands, LLC*, Can. No. 92068086, 2021 TTAB LEXIS 464, at *33 (TTAB 2021) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1368, 1371 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *In re Inn at St. John’s, LLC*, Ser. No. 87075988, 2018 TTAB LEXIS 170, at *13 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019) (internal quotation omitted)). We do not predicate our analysis on a dissection of the respective marks, but consider them in their entirety. *Stone Lion Cap. Partners LP v. Lion Cap. LLP*, 746 F.3d 1317, 1321 (Fed. Cir. 2014). One feature of a mark may be more significant than another, however, and it is not improper to give more weight to a dominant feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *In re Charger Ventures LLC*, 64 F.4th 1375, 1382 (Fed. Cir. 2023) (it is permissible for the Board “to focus on dominant portions of a mark”); *In re Chatam Int’l*, 380 F.3d 1340, 1343-44 (Fed. Cir. 2004); *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1357-58 (Fed. Cir. 2000).

“The proper test regarding similarity ‘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 [marks].’” *Sabhnani*, 2021 TTAB LEXIS 464, at

*33 (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373 (Fed. Cir. 2018) (internal quotation omitted)).

Applicant's mark is BAZOOKAGOAL, and the mark in the cited registration is BAZOOKA BALL. Both marks share BAZOOKA as the first word, followed by a word with little or no source-identifying significance. Although Applicant's mark BAZOOKAGOAL contains no spaces, the absence or presence of spaces between the words is an inconsequential difference, where "[t]he two words retain the same meanings when joined as a compound." See *In re Iolo Techs., LLC*, Ser. No. 77399654, 2010 TTAB LEXIS 223, at *4-5 (TTAB 2010) (finding ACTIVECARE and ACTIVE CARE confusingly similar); *Giersch v. Scripps Networks Inc.*, Can. No. 92045576, 2009 TTAB LEXIS 72, at *18-19 (TTAB 2009) (finding DESIGNED2SELL and DESIGNED TO SELL phonetically equivalent). Here, consumers are likely to view and verbalize Applicant's mark as "BAZOOKA GOAL."

BAZOOKA is the dominant portion of both Applicant's mark and the cited mark. Consumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark. See *In re Detroit Athletic Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018); *Palm Bay Imps., Inc.*, 396 F.3d at 1372-73; *In re Integrated Embedded*, Ser. No. 86140341, 2016 TTAB LEXIS 470, at *30-31 (TTAB 2016). Additionally, the second word of both the cited mark and Applicant's mark has little or no source-identifying significance. In the cited mark, "BALL" has been disclaimed and identifies the goods described in the registration as "balls for games" or "balls for sports." The word "GOAL" in Applicant's mark similarly describes Applicant's

identified goods, i.e., “goal nets.” Generally, disclaimed or descriptive terms are considered less significant features of the mark. *Chatam Int’l*, 380 F.3d at 1342-43 (Fed. Cir. 2004); *In re Dixie Rests. Inc.*, 105 F.3d at 1407 (Fed. Cir. 1997)). Consumers are therefore likely to focus on and remember the lead BAZOOKA portion of each mark, which is identical in appearance, sound, connotation, and commercial impression. Neither “GOAL” nor “BALL” is sufficiently distinctive to create a different commercial impression for the marks as a whole.

While the marks are not identical, we find that Applicant’s BAZOOKAGOAL and the cited mark BAZOOKA BALL, when viewed in their entirety, are similar in appearance, sound, connotation, and commercial impressions, and therefore the first *DuPont* factor weighs in favor of a conclusion that confusion is likely.

B. Similarity or Dissimilarity of the Goods

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *DuPont*, 476 F.2d at 1361; *Stone Lion*, 746 F.3d at 1318. “We must construe the [goods] identified in the cited registration as broadly as reasonably possible ‘to include all [goods] of the nature and type described therein..., and we must resolve any ambiguities regarding their coverage in favor of the cited registrant ‘given the presumptions afforded the registration under 7(b)’ of the Trademark Act.” *In re OSF Healthcare Sys.*, Ser. No. 88706809, 2023 TTAB LEXIS 353, at *11 (TTAB 2023) (citing *In re C.H. Hanson Co.*, Ser. No. 77983232, 2015 TTAB LEXIS 357, at *14 (TTAB 2015) (internal citation omitted)).

The goods “need not be identical or even competitive to find a likelihood of confusion.” *In re Country Oven, Inc.*, Ser. No. 87354443, 2019 TTAB LEXIS 381, at *4 (TTAB 2019) (citations omitted). “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.” *Id.* (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012) (internal quotation omitted)). Evidence of relatedness includes, for example, advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer and copies of prior use-based registrations of the same mark covering both an applicant’s and the registrant’s goods. *See In re Davia*, Ser. No. 85497617, 2014 TTAB LEXIS 214, at *19-21 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both used for the same purpose in the same recipes and consumers were therefore likely to purchase the products at the same time and in the same stores).

It is sufficient for a finding of likelihood of confusion as to an entire class in an application if relatedness is established for any goods encompassed by the identification of goods within that class. *Cai*, 901 F.3d at 1372; *Double Coin Holdings Ltd. v. Tru Dev.*, Can. No. 92063808, 2019 TTAB LEXIS 347, at *18 (TTAB 2019) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981)).

Applicant argues that the registrant's goods are limited to paintball equipment, and that paintball and soccer are not related and use different equipment.³² Applicant relies on the registrant's website and specimen of use, and third-party websites showing use of the registrant's mark, in support of its argument that the registrant's goods are limited to equipment used in paintball.³³ The Board's analysis of a likelihood of confusion is based on the full scope of the identifications in the cited registration and the subject application. *Stone Lion*, 746 F.3d at 1324; *In re Embiid*, Ser. No. 88202890, 2021 TTAB LEXIS 168, at *35-36 (TTAB 2021). Only one of the registrant's goods is specifically restricted to paintball, i.e., "Outdoor activity game equipment sold as a unit comprising paint ball equipment modified for playing games." None of the other identified goods are so restricted. "[W]e may not 'import restrictions into the identification[s] based on alleged real world conditions' of the sort argued by Applicant ... or consider extrinsic evidence regarding Applicant and Registrant themselves." *Embiid*, 2021 TTAB LEXIS 168, at *37-38 (internal citation omitted).

Here, the cited registration identifies, for example, both "balls for games" and "balls for sports." See *In re Midwest Gaming & Entm't LLC*, Ser. No. 85111552, 2013 TTAB LEXIS 55, at *9 (TTAB 2013) (because a semicolon separates two relevant clauses, "restaurant and bar services" is a discrete category that stands alone and is "not connected to nor dependent on the [other] services set out on the other side of

³² 6 TTABVUE 3-4, 7-8.

³³ See, e.g., September 27, 2022 Request for Reconsideration at 21-33.

semicolon.); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 1402.01(a) (May 2024). The registrant's goods therefore are not limited to paintball balls, but instead broadly cover balls used for all games and sports, including soccer. Applicant's identified goods are "Sports training apparatus, namely, portable, retractable pop-up goal nets for soccer training...." Applicant's "goal nets" are therefore identified as used for training in the sport of soccer.

Additionally, Applicant made of record the dictionary definition for "soccer," which MERRIAM-WEBSTER defines as "a game played on a field between two teams of 11 players each with the object to propel a round ball into the opponent's goal by kicking or by hitting it with any part of the body except the hands and arms."³⁴ By the definition adopted by Applicant, the game of soccer requires both the use of a ball and a goal, and the object of the game is to propel the ball into a goal and to prevent one's opponent from doing so. Balls and goals are therefore both used in, and are integral to, soccer. "If goods are complementary in nature, or used together, this relatedness can support a finding of likelihood of confusion." *In re Cook Med. Techs. LLC*, Ser. No. 77882876, 2012 TTAB LEXIS 496, at *10 (TTAB 2012) (medical guiding sheaths used in conjunction with catheters are closely related, complementary goods) (citing *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567 (Fed. Cir. 1984) (bread and cheese are complementary and often used and consumed together)). In view of their complementary nature, the goods are therefore likely to be purchased together and used in conjunction with each other.

³⁴ *Id.* at 15.

The related and complementary nature of the goods is corroborated by the copies of 25 third-party use-based registrations for marks registered for both soccer balls or game balls and soccer goal nets or nets for sports by different owners, made of record by the Examining Attorney.³⁵ *See Country Oven*, 2019 TTAB LEXIS 381, at *9-10 (“As a general proposition, third-party registrations that cover goods and services from both the cited registration and an Applicant’s application are relevant to show that the goods and services are of a type that may emanate from a single source under one mark.”). Additionally, the Examining Attorney made of record Internet evidence of third-party websites offering both soccer balls and soccer goals for sale, including pages from opengoaaalusa.com, kwikgoal.com, playgosports.com, quickplaysport.us, sklz.com, and bownet.net.³⁶ We find this evidence to be highly probative of, and to establish, relatedness. *See, e.g. Detroit Athletic Co.*, 903 F.3d at 1303 (third-party registration evidence showed “consumers are accustomed to seeing a single mark associated with a source that sells both”); *In re Anderson*, Ser. No. 88360870, 2012 TTAB LEXIS 42, at *22-25 (TTAB 2012) (relatedness found where third-party websites showed tires and automobiles emanating from a common source).

Based on the evidence of record, we find that Applicant’s goods and the registrant’s goods, as identified, are related and are the types of goods that have been offered

³⁵ August 3, 2022 Final Office Action at 20-50; February 9, 2023 Denial of Request for Reconsideration at 3-26.

³⁶ February 9, 2023 Denial of Request for Reconsideration at 29-30, 33-34; August 3, 2022 Final Office Action at 6-7, 10-15.

under a single mark by a single entity, and this factor therefore weighs in favor of a conclusion that confusion is likely.

C. Similarity or Dissimilarity of Channels of Trade and Classes of Consumers

The third *DuPont* factor considers ‘the similarity or dissimilarity of established, likely-to-continue trade channels’” for the goods. *Embiid*, 2021 TTAB LEXIS 168, at *10 (quoting *DuPont*, 476 F.2d at 1361)). Here, neither the application nor the cited registration contains any restriction on the channels of trade or classes of consumers. “We therefore must presume that the identified goods move in all normal and usual channels of trade and methods of distribution for those goods, and that they are available for purchase by all the usual purchasers.” *KME Ger. GmbH v. Zhejiang Hailiang Co.*, Opp. No. 91267675, 2023 TTAB LEXIS 379, at *20 (TTAB 2023) (citing *Packard Press, Inc. v. Hewlett-Packard Co.*, 277 F.3d 1352, 1361 (Fed. Cir. 2000)); *Embiid*, 2021 TTAB LEXIS 168, at *42 (quoting *DeVivo v. Ortiz*, Opp. No. 91242863, 2020 TTAB LEXIS 15, at *39-40 (TTAB 2020) (internal quotation omitted)).

As discussed above, “balls for games” and “balls for sports” include balls used for soccer. The record shows that balls for soccer are sold through the websites of various sporting goods stores.³⁷ The record also shows that soccer goals are also sold through

³⁷ August 3, 2022 Final Office Action at 11 (playgosports.com), 13 (quickplaysports.us), 15 (sklz.com), and 17 (bownet.net); February 9, 2023 Denial of Third Request for Reconsideration at 30 (opengoaalusa.com), and 33 (kwikgoal.com).

websites of various sporting goods stores.³⁸ The channels of trade for Applicant's goods and the registrant's goods therefore overlap.

Applicant argues that the channels of trade do not overlap, because "soccer balls, soccer shoes and other soccer equipment may be available at many sporting goods stores and athletic products stores," while paintball equipment is "not sold through these same sources, but [is] usually rented... ." ³⁹ As explained above, however, the cited mark is not limited to paintball equipment. Applicant is attempting to import a limitation that is not present in the registrant's identification of goods, which is improper. *See Stone Lion*, 746 F.3d at 1323 ("[E]ven assuming that there is no overlap between [Applicant's and the registrant's] current customers," we are not required "to look beyond the application and registered mark[] at issue.") (quoting *Octocom Sys., Inc. v. Hous. Comp. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990)); *Canadian Imperial Bank of Com. v. Wells Fargo Bank*, 811 F.2d 1490, 1492 (Fed. Cir. 1987) ("[A]lthough a registrant's current business practices may be quite narrow, they may change at any time....") (quoting *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581 (Fed. Cir. 1983)). The third *DuPont* factor therefore supports a conclusion that confusion is likely.

³⁸ August 3, 2022 Final Office Action at 10 (playgosports.com), 12 (quickplaysports.us), 14 (sklz.com), 16 (bownet.net); February 9, 2023 Denial of Third Request for Reconsideration at 27 and 31 (dicks.com), 29 (opengooaalusa.com), 34 (kwikgoal.com).

³⁹ 6 TTABVUE 8-9.

D. Strength or Weakness of the Cited Mark

The cited mark is registered on the Principal Register without a claim of acquired distinctiveness and is therefore presumed to be inherently distinctive for the identified goods. *See Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 TTAB LEXIS 228, at *24 (TTAB 2022). Applicant argues that the cited mark “is not particularly distinctive, but has quite limited trademark strength” due to the existence of third-party registrations for similar marks for purportedly similar goods.⁴⁰ These arguments implicate the sixth *DuPont* factor, under which we consider the “[n]umber and nature of similar marks in use on similar goods.”⁴¹ 476 F.2d at 1359. However, “citation of third-party registrations as evidence of market weakness is unavailing because third-party registrations standing alone, are not evidence that the registered marks are in use on a commercial scale, let alone that consumers have become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences.” *In re Morinaga Nyugyo K. K.*, 2016

⁴⁰ 6 TTABVUE 10-11.

⁴¹ In its appeal brief, Applicant lists “[t]he existence of a valid consent agreement” as numbered factor 6 and argues that it “does not apply.” *Id.* at 6. The tenth *DuPont* factor is “[t]he market interface between applicant and the owner of a prior mark,” including “a mere ‘consent’ to register or use,” *DuPont*, 476 F.2d at 1361, and Applicant acknowledges that the factor is not relevant. 6 TTABVUE 6. In its supplemental brief, Applicant states that it sought a consent agreement with the owner of the cited registration, but that no agreement was reached. 13 TTABVUE 3; 18 TTABVUE 3.

The sixth *DuPont* factor considers the “number and nature of similar marks in use on similar goods,” while the fifth *DuPont* factor is “[t]he fame of the prior mark (sales, advertising, length of use). 476 F.2d at 1361. Here, Applicant has only submitted evidence of third-party registrations, and there is no evidence of record with respect to the fame of the cited mark. In an ex parte appeal, the fifth *DuPont* factor is normally treated as neutral where no evidence as to fame has been provided, as is the case here. *In re Mr. Recipe, LLC*, Ser. No. 86040643, 2016 TTAB LEXIS 80, at *4-5 (TTAB 2016).

TTAB LEXIS 448, at *22 (TTAB 2016). Nonetheless, evidence that a mark, or an element of a mark, appears in the marks of many different third-party registrants may undermine the common element's conceptual or inherent strength as an indicator of a single source. *Jack Wolfskin Austrang Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1374 (Fed. Cir. 2015) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ ... that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.’”) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1338-39 (Fed. Cir. 2015)).

In its brief, Applicant identifies four registrations in support of its argument: the cited registration and third-party Registration Nos. 2007157,⁴² 5747388, and 5434927,⁴³ as evidence of similar marks registered for similar goods. The cited registration, which is the subject of the Examining Attorney's refusal, is “[b]y definition,” not a “third-party” registration, *Made in Nature*, 2022 TTAB LEXIS 228,

⁴² Registration No. 2007157 was made of record by the Examining Attorney during prosecution. July 22, 2019 Non-Final Office Action at 6.

⁴³ Registration Nos. 5747388 and 5434927 were not made of record during prosecution. The Board does not take judicial notice of registrations in Office records. *See In re Olin Corp.*, 2017 TTAB LEXIS 337, at *29 n.22 (TTAB 2017). “[M]erely listing third-party registrations does not make them of record.” *ZeroSix*, 2023 TTAB LEXIS 209, at *2. However, the Examining Attorney did not object to the discussion of both registrations, substantively addressed both registrations in her briefs, and attached copies of the registrations to her briefs. 8 TTABVUE 5-6, 12-15; 20 TTABVUE 6, 14-21. We therefore treat the two registrations as though they are of record. *See Olin Corp.*, 2017 TTAB LEXIS 337, at *29 n.22.

at *31-32, nor is it evidence of the purported weakness of the cited mark itself. The remaining three third-party registrations are:

- Registration No. 2007157 for the standard character mark BAZOOKA on the Principal Register for “golf clubs and components thereof, namely golf club heads, golf club shafts and hand grips for golf clubs” in International Class 28; and
- Registration Nos. 5747388 and 5434927, each owned by the same entity, for the standard character mark BAZOOKA JOE for, respectively, “Dolls” and “Toy figurines, namely, modeled plastic toy figures and accessories therefor; poseable figurines, namely, positionable toy figures and accessories therefor; toy action figures and accessories therefor” in International Class 28.

The existence of three registrations, with two owners, is a “far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant in both *Jack Wolfskin* and *Juice Generation*.” *Embiid*, 2021 TTAB LEXIS 168, at *52-53 (quoting *Inn at St. John’s LLC*, 2018 TTAB LEXIS 170, at *12). Additionally, the registrations for BAZOOKA JOE are of little probative value, because there is no evidence in the record to suggest that dolls or toy figurines are similar to Applicant’s goods. *See Omaha Steaks Int’l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1325 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *In re i.am.symbolic*, 866 F.3d 1315, 1328-29 (Fed. Cir. 2017) (disregarding third-party

registrations for other types of goods where the proffering party had neither proven nor explained that the goods were related to the goods in the cited registration); *Made in Nature, LLC*, 2022 TTAB LEXIS 228, at *28-29 (third-party registrations of marks for unrelated goods “have little or no probative value in showing the conceptual weakness of the terms” in Opposer’s marks).

We find Applicant’s submission of three registrations with two owners insufficient to demonstrate that the cited mark is conceptually weak in relation to balls for sports or balls for games and this factor is therefore neutral in our analysis.

E. Purchase Conditions and Consumer Care

The fourth *DuPont* factor considers “the conditions under which and buyers to whom sales are made, i.e., ‘impulse vs. careful, sophisticated purchasing.’” *Embiid*, 2021 TTAB LEXIS, at *10 (quoting *DuPont*, 476 F.2d at 1361). “Purchaser sophistication may tend to minimize likelihood of confusion. Conversely, impulse purchase of inexpensive items may tend to have the opposite effect.” *KME*, 2023 TTAB LEXIS 379, a *22 (quoting *Palm Bay Imps. Inc.*, 396 F.3d at 1376).

Applicant argues that “young athletes who are serious about improving their soccer skills are likely to be careful to purchase quality soccer equipment, with the purchase being driven by quality, not by impulse.”⁴⁴ Applicant’s argument is not supported by any evidence and attorney argument is no substitute for evidence. *OSF Healthcare*, 2023 TTAB LEXIS 353, at *6-7 n.8 (quoting *In re OEP Enters., Inc.*, Ser. No. 87345596, 2019 TTAB LEXIS 278, at *46 (TTAB 2019) (quoting *Cai*, 901 F.3d at

⁴⁴ 6 TTABVUE 9.

1371)). Applicant did not make any evidence of record to support its argument that purchasers of soccer equipment are likely to exercise a higher degree of care. Nor is there anything in the nature of the goods that would suggest that their purchasers are particularly sophisticated or careful. *See In re I-Coat Co., LLC*, 2018 TTAB LEXIS 171, at *31-32 (TTAB 2018). “Precedent requires that we base our decision on the least sophisticated potential purchasers.” *Double Coin*, 2019 TTAB LEXIS 347, at *23-24 (citing *Stone Lion*, 746 F.3d at 1325).

Applicant also argues that paintball equipment is typically rented and expensive and, therefore, consumers of paintball equipment are likely to exercise a high degree of care.⁴⁵ For the same reasons explained above, the majority of registrant’s goods are not limited to paintball equipment and Applicant’s arguments and evidence purporting to show that paintball equipment is expensive are inapposite. Additionally, in a “forward confusion” scenario, i.e., “when consumers believe that goods bearing the junior mark ... came from, or were sponsored by, the senior mark holder,” it is the sophistication of the applicant’s consumers that is relevant to the fourth *DuPont* factor. *In re FCA US LLC*, 2018 TTAB LEXIS 116, at *47 (TTAB 2018) (internal quotation omitted). The sophistication of consumers of a cited registration’s goods or services is generally relevant in the context of reverse confusion, “where a significantly larger or more prominent newcomer ‘saturates the market’ with a trademark that is confusingly similar to that of a smaller, senior registrant for related goods or services.” *Sabhnani*, 2021 TTAB LEXIS 464 at *21 (quoting *In re Shell Oil*

⁴⁵ *Id.*

Co., 992 F.2d 1204, 1208 (Fed. Cir. 1993) (internal quotation omitted)). Here, there is no evidence that Applicant's mark "saturates" the market such that reverse confusion, or the sophistication of consumers of the registrant's goods, should be considered.

Accordingly, we find that the fourth *DuPont* factor is neutral in our analysis of likelihood of confusion.

F. The Absence of Evidence of Actual Confusion

The seventh *DuPont* factor considers "[t]he nature and extent of any actual confusion" and the eighth *DuPont* factor considers "[t]he length of time during which and conditions under which there has been concurrent use without evidence of actual confusion." *DuPont*, 476 F.2d at 1361.

Applicant submits the statement and supplemental statement of its Managing Director, Mr. Wennesland, who states that despite the parties' coexistence for a period of over a decade, there is no evidence of any actual confusion.⁴⁶ Mr. Wennesland also avers that he was in contact with the owner of the cited mark in an attempt to reach a consent agreement, and that the owner of the cited mark represented that he had "never heard" of BAZOOKAGOAL.⁴⁷

"[A] showing of actual confusion is not necessary to establish a likelihood of confusion." *Herbko Int'l v. Kappa Books*, 308 F.3d 1156, 1164 (Fed. Cir. 2002). In the context of an ex parte appeal, where there has been no opportunity for evidence of

⁴⁶ 13 TTABVUE 5-6.

⁴⁷ *Id.* at 5.

actual confusion to be presented by the registrant, the probative value of evidence purporting to show the absence of actual confusion is limited. *See In re Majestic Distilling Co.*, 315 F.3d 1311, 1317 (Fed. Cir. 2003) (“The lack of evidence of actual confusion carries little weight, especially in an ex parte context.”) (internal citation omitted). Applicant argues that we can infer that the registrant also has no evidence of actual confusion, because Applicant presumes the registrant would have mentioned any instances of actual confusion during the course of their negotiations had such confusion occurred.⁴⁸

Even assuming that such an inference would be appropriate, “an absence of evidence of actual confusion is meaningful only if the record indicates appreciable and continuous use by Applicant of its mark for a significant period of time in the same markets as those served by” the registrant under its mark. *KME*, 2023 TTAB LEXIS 379, at *53 (citing *Citigroup, Inc. v. Cap. City Bank Grp., Inc.*, Opp. No. 91177415, 2010 TTAB LEXIS 40, at *50 (TTAB 2010)). While Applicant relies on the statement of Mr. Wennesland, who states that Applicant has “sold more than 10,000” BAZOOKAGOAL soccer goals in the past decade,⁴⁹ there is no evidence of record to establish whether a meaningful opportunity for actual confusion to occur ever existed.⁵⁰ Nor do we find Applicant’s arguments regarding the parties’ coexistence

⁴⁸ *Id.* at 5-6.

⁴⁹ 9 TTABVUE 8. Applicant included additional information concerning Applicant’s promotion and advertising in the second supplemental statement of Mr. Wennesland, but for the reasons explained above, the second supplemental statement does not form part of the record and we have given it no consideration.

⁵⁰ While the second, third, and fourth *DuPont* factors are based solely “on the identifications as set forth in the application and the cited registration,” the eighth *DuPont* factor “requires

and registration in the United Kingdom persuasive.⁵¹ The coexistence of the marks outside of the United States is not relevant to our determination of likelihood of confusion.

We therefore find that the seventh and eighth *DuPont* factors are neutral.

G. Summary

Having considered and weighed all of the arguments and evidence of record and the relevant likelihood of confusion factors, we find that (1) Applicant's mark and the cited mark are similar; (2) the scope of protection of the cited mark is not diminished by Applicant's third-party registrations; (3) Applicant's goods and the registrant's goods are related because they are complementary in use and are often sold under the same marks; (4) the goods travel in at least overlapping trade channels and are offered to the same or overlapping consumers; (5) the least sophisticated potential consumers would exercise only ordinary care in making purchasing decisions; and (6) the absence of evidence of actual confusion is of no probative value. We conclude based on these *DuPont* factors that confusion is likely.

Decision: The Section 2(d) refusal is **affirmed**.

us to look at **actual market conditions**, to the extent there is evidence of such conditions of record." *In re Guild Mortg. Co.*, 2020 TTAB LEXIS 17, at *18-19 (TTAB 2020) (emphasis in original) (citations omitted).

⁵¹ 13 TTABVUE 6-10.