

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: July 28, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Bushnell Inc.
—

Application Serial No. 90882684
—

Byron S. Barahona and Jason E. Garcia of Reed Smith LLP,
for Bushnell Inc.

Bria Stephens, Trademark Examining Attorney, Law Office 122,
Kristin Dahling, Managing Attorney.

—
Before Taylor, Bergsman and Thurmon,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Bushnell Inc. (“Applicant”) seeks registration on the Principal Register of the mark WINGMAN (in standard characters) for “portable audio speakers, excluding cases; wireless speakers, excluding cases,” in International Class 9.¹

¹ Application Serial No. 90882684 was filed on August 13, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as April 9, 2020.

Applicant amended the description of goods to add “excluding cases” in its November 1, 2022 Request for Reconsideration (TSDR 4, 5 and 7).

The Examining Attorney refused to register Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the registered mark WINGMAN (in standard characters) for "cell phone cases," in International Class 9, as to be likely to cause confusion.²

When we cite to the record, we refer to the USPTO Trademark Status and Document Retrieval (TSDR) system in the downloadable .pdf format by page number (e.g., October 25, 2021 Office Action (TSDR 24)). When we cite to the briefs, we refer to TTABVUE, the Board's docketing system, by docket number and page number (e.g., 6 TTABVUE 4).

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, 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.

We base our determination under Section 2(d) on an analysis of all 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) (setting forth factors to be considered, referred to as "*DuPont* factors"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). "Whether a likelihood of confusion exists between an applicant's mark and a

² Registration No. 5417653 registered March 6, 2018, based on an application filed August 9, 2017.

previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). “In discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at *4 (Fed. Cir. 2023) (“In any given case, different *DuPont* factors may play a dominant role and some factors may not be relevant to the analysis.”); *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir. 2020) (citing *Dixie Rests.*, 41 USPQ2d at 1533).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). “Two key factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because 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*

Embiid, 2021 USPQ2d 577, at *10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). 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.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004).

I. The strength of Registrant’s WINGMAN trademark

The strength of Registrant’s mark affects the scope of protection to which it is entitled. Thus, we consider the inherent or conceptual strength of Registrant’s mark based on the nature of the mark itself and its commercial strength based on marketplace recognition of the mark. See *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 2023 USPQ2d 737, at *4 (Fed. Cir. 2023) (citing *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength.”)); *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017); *Top Tobacco, L.P. v. N. Atl. Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) (market strength is the extent to which the relevant public recognizes a mark as denoting a single source); 2 J. THOMAS

MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80 (5th ed. March 2023 update) (“The first enquiry is for conceptual strength and focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another’s use.”).

At a minimum, Registrant’s mark WINGMAN has been registered on the Principal Register without a claim of acquired distinctiveness and, therefore, it is inherently distinctive and entitled to the benefits accorded registered marks under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b) (registration is prima facie evidence of the validity of the registration and registrant’s exclusive right to use the mark in commerce).

The MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) defines “wingman” as “informal: a male friend or partner who accompanies and supports a man in some activity.”³ As such, “Wingman” does not have a descriptive or suggestive meaning when used in connection with Registrant’s cell phone cases. Therefore, WINGMAN is an arbitrary and inherently strong mark. *See Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004) (defining an arbitrary mark as a “known word used in an unexpected or uncommon way” and observing that such marks are typically strong); *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (arbitrary terms are conceptually strong trademarks); *Mishawaka*

³ April 25, 2022 Response to Office Action (TSDR 39).

Rubber & Woolen Mfg. Co. v. Bata Narodni Podnik, 222 F.2d 279, 105 USPQ 432, 437 (CCPA 1955) (“A strong and fanciful mark is entitled to broad protection.”); *In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1479 (TTAB 2007) (completely unique and arbitrary, if not coined, nature of mark in relation to goods entitles the registered mark to a broad scope of protection, and significantly increases the likelihood that the marks, when used in connection with the identical goods would cause confusion).

Applicant submitted copies of two third-party registrations for marks incorporating WINGMAN for goods in International Classes 9. The third-party registrations are listed below:⁴

MARK	REG. NO.	GOODS/SERVICES
WINGMAN	5829246	Computer software for the collection, editing, organizing, modifying, book marking, transmission, storage and sharing of data and information
XWINGMAN	5561106	Rechargeable batteries

The third-party registrations Applicant submitted are of limited, if any, probative value because they do not cover the goods in the cited registration (i.e., cell phone cases). *See Omaha Steaks*, 128 USPQ2d at 1694 (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *i.am.symbolic*, 123 USPQ2d at 1751 (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration); *TAO Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1058 (TTAB 2017) (third party

⁴ April 25, 2022 Response to an Office Action (TSDR 53-57).

registrations in unrelated fields “have no bearing on the strength of the term in the context relevant to this case.”); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) (the third-party registrations are of limited probative value because the goods identified in the registrations appear to be in fields which are far removed from the goods at issue). *See also Key Chem., Inc. v. Kelite Chem. Corp.*, 464 F.2d 1040, 175 USPQ 99, 101 (CCPA 1972) (“Nor is our conclusion altered by the presence in the record of about 40 third-party registrations which embody the word ‘KEY’. The great majority of those registered marks are for goods unrelated to those in issue, and there is no evidence that they are in continued use. We, therefore, can give them but little weight in the circumstances present here.”).

In addition, unlike cases in which extensive evidence of third-party use and other evidence in the record was found to be “powerful on its face” inasmuch as “a considerable number of third parties use [of] similar marks was shown,” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015), Applicant has presented only two third-party registrations, well short of the volume of evidence found convincing in *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) and *Juice Generation*.

The third-party registrations do not detract from the inherent or conceptual strength of Registrant’s mark LAST MILE.

II. The similarity of dissimilarity of the marks

Applicant is seeking to register the mark WINGMAN in standard characters and the mark in the cited registration is WINGMAN in standard characters. The marks are identical.

Applicant argues, to the contrary, that the marks engender different commercial impressions because they are used to identify different products.⁵ According to Applicant, consumers encountering the mark on Registrant's cell phone cases will perceive the mark WINGMAN as describing the wing shaped curvature of the cell phone case.

In other words, when consumers encounter the Cited Mark in the marketplace, the overall meaning and connotation will be referring to a feature of the Registrant's goods, namely, the wing shaped stand on the back of the cell phone cases. This meaning is in sharp contrast to Applicant's portable audio speakers.⁶

We reproduce below Registrant's mark superimposed on the curved kickstand of the cell phone case.⁷

⁵ Applicant's Brief, p. 15 (6 TTABVUE 16).

⁶ Applicant's Brief, p. 15 (6 TTABVUE 16).

⁷ November 1, 2022 Request for Reconsideration (TSDR 16). Even in the original, it is very difficult to make out the mark on the product.



Applicant continues, asserting consumers encountering Applicant’s mark in connection with portable audio speakers “will perceive it as a nod to the informal definition of a wingman, that is, someone who accompanies and supports another person.”⁸

In other words, consumers will perceive the mark as equating the product with a companion that accompanies and supports the consumer while they engage in outdoor activities.⁹

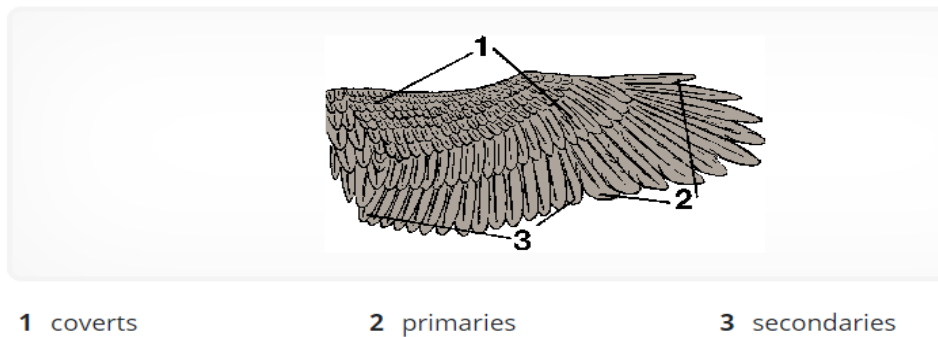
We disagree. There is no reason consumers will perceive WINGMAN as meaning or engendering a commercial impression other than the dictionary definition of the word “Wingman” provided in note 6. First, many consumers will not associate

⁸ The MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) defines “wingman” as “informal: a male friend or partner who accompanies and supports a man in some activity.” April 25, 2022 Response to Office Action (TSDR 39).

⁹ *Id.*

WINGMAN or the cell phone case with a “wing shaped curvature.” We reproduce below the illustration of a wing displayed in the MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) (accessed July 24, 2023).¹⁰

 **Illustration of *wing***



Consumers are just as likely to perceive the cell phone case as simply having a curved kickstand to prop-up the cell phone. As noted in figure 4 in Applicant’s November 1, 2022 Request for Reconsideration, reproduced below, the WINGMAN folds flat into the case.¹¹

¹⁰ The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *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); *In re Omniome, Inc.*, 2020 USPQ2d 3222, at *2 n.17 (TTAB 2019).

¹¹ November 1, 2022 Request for Reconsideration (TSDR 15). Even in the original, it is very difficult to make out the mark on the product.



Many consumers may not even realize the kickstand has a curve, let alone a curve that may perceive as a wing.¹²

Second, because the WINGMAN case has a kickstand that may be used to prop-up, support, or grip the cell phone, consumers may perceive Registrant’s WINGMAN mark as engendering the commercial impression of assistance or support for the user.

Finally, assuming arguendo that WINGMAN engendered different commercial impressions as applied to Applicant’s speakers and Registrant’s cell phone cases, the marks are still identical in appearance, sound, and meaning any one of which is sufficient to find that the marks are similar. . “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812

¹² Applicant did not submit any evidence showing that consumers perceive Registrant’s product to be a wing.

(TTAB 2014)), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

We find the marks are identical and, therefore, this factor weighs in favor of finding likelihood of confusion.

III. The similarity or dissimilarity and nature of the goods

Applicant is seeking to register its mark for “portable audio speakers, excluding cases; wireless speakers, excluding cases” and the mark in the cited registration is registered for “cell phone cases.” To begin our analysis of the similarity or dissimilarity of the goods, we note that an objective reading of Applicant’s attempt to restrict its description of goods by “excluding cases” refers to cases for speakers. Even if we construe the restriction to include cell phone cases, the purported restriction does not affect our analysis because we are analyzing whether consumers perceive portable or wireless speakers to be related to cell phone cases. “Excluding cases” does not accomplish anything toward distinguishing the goods at issue.

In determining whether the goods are related, it is not necessary that the goods are similar or competitive in character to support a holding of likelihood of confusion; it is sufficient for such purposes that a party claiming damage establish that the goods are related in some manner and/or that conditions and activities surrounding marketing of these goods are such that they would or could be encountered by same persons under circumstances that could, because of similarities of marks used with

them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010).

Where identical marks are involved, as is the case here, the degree of similarity between the parties' goods required to support a finding of likelihood of confusion declines. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688-1689 (Fed. Cir. 1993) (“[E]ven when the goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source.”); *Time Warner Entm’t Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002); *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). It is only necessary that there be a viable relationship between the two to support a finding of likelihood of confusion. *In re Concordia Int’l Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

The issue is not whether purchasers would confuse Applicant’s speakers and Registrant’s cell phone cases, but rather whether there is a likelihood of confusion as to the source of these goods. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”); *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1737 (TTAB 2018) (“[T]he test is not whether consumers would be likely to confuse these goods, but rather whether they would be likely to be confused as to their source.”); *In re Cook Med. Tech. LLC*, 105 USPQ2d 1377, 1380 (TTAB

2012); *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

Applicant proffers that there are only eight third-party registrations based on use in commerce for marks registered for both Applicant's "portable audio speakers" and Registrant's "cell phone cases."¹³ According to Applicant, there are 13,312 registrations for cell phone cases and 273 registrations for portable speakers.¹⁴ In other words, .05% of the registrations contain both products.

However, the Examining Attorney proffers that Applicant's third-party registration evidence is misleading because "there are 3,076 registrations containing cell phone cases or covers and audio speakers."¹⁵ The Examining Attorney submitted copies of 50 registrations showing marks registered for both cell phone cases or covers and audio speakers.¹⁶

¹³ November 1, 2022 Request for Reconsideration (TSDR 14 and 60-82).

We consider Registration No. 4824384 for the mark CATH KIDSTON (stylized) even though it registered under Section 66(a) of the Trademark Act because the registrant filed a Section 71 declaration of use, thus, providing some evidence of use. *Id.* at TSDR 60-61.

We note that Applicant did not search for registrations registered for both "wireless speakers" and "cell phone cases." Accordingly, Applicant's evidence tells only half the story.

¹⁴ *Id.* at TSDR 14. The Examining Attorney does not object to Applicant's failure to submit corroborating documentation, rather, as discussed below, the Examining Attorney contends that Applicant's numbers are misleading. November 23, 2022 Denial of Request for Reconsideration (TSDR 3)

¹⁵ November 23, 2022 Denial of Request for Reconsideration (TSDR 3). The 3,076 registrations is suspect because there is no indication in the search history that the Examining Attorney limited the search to registrations based on use in commerce.

¹⁶ November 23, 2022 Denial of Request for Reconsideration (TSDR 7-106). For some reason, the Examining Attorney submitted the copies of the registrations a second time at TSDR 110-209. Suffice it to say, evidence does not become more persuasive based on the number of times it is submitted.

We note that every registrant in the registrations the Examining Attorney submitted is a Chinese national. Many of the registered marks are fanciful and strange to the American ear

As noted above, Applicant is seeking to register its mark for portable speakers and wireless speakers (excluding cases). The Examining Attorney executed a search for cell phone cases or covers and audio speakers rather than portable speakers or wireless speakers. Generally, as noted above in our discussion regarding the strength of Registrant's mark, we require that the goods in the third-party registrations be the same goods as are at issue in the case before us. *See Omaha Steaks Int'l*, 128 USPQ2d at 1694; *i.am.symbolic*, 123 USPQ2d at 1751; *TAO Licensing*, 125 USPQ2d at 1058.

Nevertheless, the results of the Examining Attorney's search using audio speakers instead of portable speakers and wireless speakers is probative because audio speakers encompass portable speakers and wireless speakers. *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1413-14 (TTAB 2018) (where the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein); *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, the better practice would have been for the Examining Attorney to have submitted the results of the search for cell

(e.g., RUEOTSK, IMMOENUC, DISXKAER, EILNEMQ, etc.). Despite our skepticism, because the USPTO registered those marks, they are entitled to a presumption of validity in accordance with Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b) ("A certificate of registration of a mark upon the principal register provided by this chapter shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate."). We might have been able to discount the presumptions had Applicant submitted evidence or testimony showing that it was unable to find evidence that the third parties were using these purported marks.

phone cases or covers and portable speakers or wireless speakers and, then depending on the results, expanding the search to audio speakers.

The Examining Attorney submitted copies of eight third-party webpages listed below showing a single entity advertising the sale of cell phone cases and portable speakers or wireless speakers under the same mark:¹⁷

- Apple.com showing the apple design logo used to advertise cell phone cases and speakers;¹⁸
- Cricket website (cricketwireless.com) advertising CRICKET portable speakers and cell phone cases;¹⁹
- Insignia website (insigniaproducts.com) advertising INSIGNIA cell phone covers and portable speakers;²⁰
- Razer website (razer.com) advertising RAZER “gaming” speakers and cell phone cases;²¹
- Belkin website (belkin.com) advertising BELKIN headphones, ear buds, and cell phone cases;²²

¹⁷ Although, as noted below, Applicant acknowledges that Samsung uses SAMSUNG to identify audio speakers, we could not find that evidence in the record. In her brief, the Examining Attorney cites the October 25, 2021 Office Action (TSDR 17-18) as showing use of SAMSUNG to identify portable and wireless speakers. However, neither the SAMSUNG trademark, nor Samsung trade name, appear on those web pages.

¹⁸ October 25, 2021 Office Action (TSDR 5-9).

¹⁹ *Id.* at TSDR 10-11.

²⁰ *Id.* at TSDR 12-16.

²¹ May 22, 2022 Office Action (TSDR 6-12).

²² *Id.* at TSDR 13-17.

- LG website (lg.com) advertising LG cell phone cases and wireless and portable speakers;²³
- Philips website (usa.philips.com) advertising PHILIPS cell phone case and wireless and portable speakers;²⁴ and
- Sony website (electronics.sony.com) advertising SONY portable, wireless speakers and cell phone cases.²⁵

Applicant argues that because the goods are so different, consumers will not perceive them to be related products.²⁶

By nature, portable audio speakers are electronic devices embedded with Bluetooth technology designed to amplify the sound of other electronic devices. In contrast, cell phone cases are specialized mobile accessories that are directly affixed to cell phones for protection or aesthetic purposes. Again, the purpose of portable audio speakers is to amplify the sound of other electronic devices. Conversely, the purpose of a cell phone case is to protect and otherwise enhance the visual appeal of the cell phone. It is not an electronic or audio product device like Applicant's goods. Moreover, the primary feature of the Cited Mark's goods is to hold up a cell phone via a kickstand feature. This feature has no relevance whatsoever to portable audio speakers, which further evidences the degree of dissimilarity between the goods in question. Thus, Applicant submits that the goods are *not* closely related and that each product is distinct in terms of nature and purpose.

Given the distinctions in nature and purpose, Applicant submits that there is not a natural logical or functional

²³ *Id.* at TSDR 18-24.

²⁴ *Id.* at TSDR 33-40.

²⁵ *Id.* at TSDR 43-46.

²⁶ Applicant's Brief, p. 8 (6 TTABVUE 9).

relationship between portable audio speakers and cell phone cases.²⁷

There is no dispute that the cell phone cases and portable or wireless speakers are distinct in nature and purpose. However, as noted above, the issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods or services. *See Recot*, 54 USPQ2d at 1898); *I-Coat Co.*, 126 USPQ2d at 1737; *Cook Med. Tech.*, 105 USPQ2d at 1380; *Helene Curtis Indus.*, 13 USPQ2d at 1624. Here, the Examining Attorney submitted third-party registrations and webpages showing the same entities advertising the sale of both products under the same mark. *See, e.g., In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (relatedness supported by evidence that third parties sell both types of goods under same mark, showing that “consumers are accustomed to seeing a single mark associated with a source that sells both.”); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002) (evidence that consumers encounter one mark designating a single source for the services of both parties supports a finding that the services are related); *In re Embiid*, 2021 USPQ2d 577, at *22-23 (TTAB 2021) (citing *Ox Paperboard*, 2020 USPQ2d 10878, at *5 (TTAB 2020); and *Hewlett-Packard*, 62 USPQ2d at 1004); *In re Integrated Embedded*, 120 USPQ2d 1504, 1514-15 (TTAB 2016) (websites made of record by examining attorney “demonstrate[d] that services of the type offered by both Applicant . . . and Registrant are marketed and sold together online under the

²⁷ *Id.*

same marks” and “[s]uch evidence is sufficient to find that the services at issue are related.”).

Applicant contends that its cell phone cases and Registrant’s portable audio speakers and wireless speakers are marketed in distinct ways.²⁸

If the goods in question are not marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then **even if the marks are identical**, confusion is not likely.

Applicant introduced evidence to show that none of the leading manufacturers of portable audio speakers market or even sell cell phone cases. April 25, 2022 Response to Office Action, TSDR p. 41-47. Similarly, the owner of the Cited Mark does not market portable audio speakers or cases for portable audio speakers. This is no coincidence. The commercial reality is that manufacturers of portable audio speakers rarely (if ever) market portable audio speakers with cell phone cases.²⁹ (Emphasis in the original).

Applicant refers to “Top 5 Most Popular Wireless Speaker Brands,” WirelessSpeakers.com listing Bose (\$130-\$900), Beats by Dr. Dre, Ban & Olufsen Beoplay, Anker, and JBL,³⁰ and asserts that “none of the leading manufacturers of wireless audio speakers even make cell phone cases.”³¹ This statement is

²⁸ Applicant’s Brief, p. 9 (6 TTABVUE 10).

²⁹ *Id.* In the downloadable .pdf format, the evidence of the leading speakers is posted at TSDR 46-51.

³⁰ April 25, 2022 Response to Office Action TSDR 46-51.

³¹ *Id.* at TSDR 13. *See also* “The Best Portable Bluetooth Speaker,” posted at NYTimes.com/wirecutter/reviews/bestbluetooth-speaker/ (August 18, 2022) attached to the November 1, 2022 Request for Reconsideration (TSDR 25-33). This review identified the Ultimate Ears Wonderboom 2 (\$95) and Utimate Ears Hyperboom (\$433), JBL Xtreme 3 (\$300), Tribit XSound Go (\$25), and Sony SRZ-XB33 (\$178) bluetooth speakers.

uncorroborated. Applicant did not submit any evidence showing that it searched for cell phone cases identified the same marks used to identify the speakers and found none. “Attorney argument is no substitute for evidence.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005); *Martahus v. Video Duplication Servs. Inc.*, 3 F.3d 417, 27 USPQ2d 1846, 1849 (Fed. Cir. 1993) (“[M]ere attorney arguments unsubstantiated by record evidence are suspect at best.”).

Assuming arguendo that the five “most popular wireless speaker brands” did not identify cell phone cases with the same mark as their speakers, all that means is that those five speaker brands do not offer cell phone cases or use the same mark to identify cell phones. It does not rebut the eight examples of companies using the same mark to identify audio speakers and cell phone cases.

To further boost its position that the goods are not related, Applicant submitted webpages posted on Bestbuy.com and Amazon.com for “cell phone cases” and notes that the results do “not reveal a single reference to portable audio speakers.”³² In this regard, Applicant contends that if the products were related then Registrant’s competitors would sell both products. “However, a review of [Registrant’s] competitors reveals that neither offers cell phone cases and portable audio speakers.”³³

³² November 2, 2022 Response to Office Action (TSDR 11 and 40-48).

³³ *Id.* at TSDR 11 and 50-58.

First, we would not expect that a search for cell phone cases would return portable audio speakers or wireless speakers.

Second, Applicant did not search for portable audio speakers or wireless speakers and compare the results with the results for cell phone cases to see if any of the companies used the same mark for those products. If it had, Applicant might have found the following:

- CRICKET cell phone cases³⁴ and, as noted above, CRICKET portable speakers;³⁵ and
- Cell phone cases with the Apple design logo³⁶ and, as noted above, audio speakers.³⁷

Finally, Applicant asserts that the third-party Internet evidence the Examining Attorney submitted is not probative and should be accorded little weight because “[c]ompanies like Apple and Samsung are well-established and widely recognized companies that are known to have large, diverse consumer electronic product portfolios; and therefore also offer a range of consumer electronic accessories (often under third party marks but sometimes under Apple or Samsung).”³⁸ Nevertheless, consumers encounter the same companies, whether large or small, offering both cell phone cases and portable and wireless speakers under the same mark. Thus, a

³⁴ *Id.* at TSDR 50.

³⁵ October 25, 2021 Office Action (TSDR 10-11).

³⁶ November 2, 2022 Response to Office Action (TSDR 52-53).

³⁷ October 25, 2021 Office Action (TSDR 8-9).

³⁸ Applicant’s Brief, p. 11 (6 TTABVUE 12).

consumer familiar with Registrant's cell phone case encountering Applicant's portable or wireless speaker may mistakenly believe that the products emanate from the same source because of the identity of the marks.

Applicant relies on *In re Pfanner Schutzbekleidung GmbH* (Serial No. 79247130) (TTAB 2021) (nonprecedential) as support for finding the goods are not related.³⁹

In *Pfanner*, the Examining Attorney submitted excerpts from five (5) third-party websites showing the same mark used to identify the relevant goods. However, only two of the five third-party websites showed entities selling the relevant goods as their core product line. In light of this, the Board afford lesser probative value to the remaining evidence. Consequently, the Board held that two examples of entities selling the relevant goods as their core product lines, and three examples of entities selling the relevant goods as promotional items were insufficient to prove relatedness.⁴⁰

We are not persuaded by the facts in *Pfanner*. In *Pfanner*, applicant was seeking to register PFANNER STRETCHFLEX (standard characters) and the mark in the

cited registration was **PFANNER**, whereas, here the marks are identical.

With respect to the similarity or dissimilarity of the goods, in *Pfanner*, the Board found the evidence was insufficient to prove protective clothing and protective sporting gear are related to underwear or loungewear because the Examining Attorney submitted two examples of entities selling protective clothing and underwear as their core products and three examples of entities selling both protective sporting gear and underwear or loungewear. In this case, the Examining

³⁹ Applicant's Brief, p. 12 (6 TTABVUE 13).

⁴⁰ *Id.*

Attorney's evidence is more extensive including eight examples of entities selling the same products, as well as, numerous third-party registrations.

We find that cell phone cases and portable or wireless speakers are related.

IV. Conditions which and consumers to whom sales are made (i.e., impulse v. sophisticated purchasing)

Applicant contends that its portable or wireless speakers cost \$150 and, therefore, are “relatively expensive compared to other audio speakers and cell phone cases.”⁴¹ In addition, Applicant's customers are golfers and, according to Applicant, “[a]s a class, golfers are generally well educated, and not likely to make a \$150 impulse purchase for a portable audio speaker without examining the source of the good.”⁴²

We must consider the goods as they are described in the application and registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys, Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”); *Paula Payne Prods. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76,

⁴¹ Applicant's Brief, p. 14 (6 TTABVUE 15).

⁴² *Id.*

77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods”).

We do not read limitations into the identification of goods. *i.am.symbolic*, 123 USPQ2d at 1748; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) (“There is no specific limitation and nothing in the inherent nature of Squirtco’s mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration”); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”).

We look to the registration and application, not to extrinsic evidence about the actual goods, customers, or channels of trade. *See Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987) (quoting *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983)); *In re FCA US LLC*, 126 USPQ2d 1214, 1217 n.18 (TTAB 2018) (“[W]e may consider any such [trade channel] restrictions only if they are included in the identification of goods or services”). That is, we cannot resort to extrinsic evidence to restrict the prices of an applicant’s or registrant’s goods. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration); *see also In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (finding that not all purchasers of wine may be

discriminating because while some may have preferred brands, “there are just as likely to be purchasers who delight in trying new taste treats.”).

Therefore, we presume that Applicant’s speakers include all types of portable or wireless speakers regardless of their price or intended market (i.e., golfers). *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014) (recognizing Board precedent requiring consideration of the “least sophisticated consumer in the class”). In this regard, we note that wireless speakers may cost between \$25-\$100.⁴³

We find the conditions under which sales are made is a neutral *DuPont* factor.

V. No instances of actual confusion

Applicant argues there have been no reported instances of actual confusion.⁴⁴

Applicant has been using the mark since at least as early as April 09, 2020. The Cited Mark’s owner claims to have used the mark since at least as early as July 2017. To this day, there has been no demonstrated instance of confusion by consumers between the respective marks. In the absence of evidence to the contrary, such lack of actual confusion over a three-year period must be considered as supportive of a finding that confusion is not likely in the future.⁴⁵

Our analysis as to the similarity or dissimilarity of the goods, channels of trade, and conditions under which sales are made is based, as dictated by precedent from the Federal Circuit, on the identifications **as set forth** in the application and the

⁴³ See note 28 above.

⁴⁴ Applicant’s Brief, p. 15 (6 TTABVUE 16).

⁴⁵ *Id.* at p. 16 (6 TTABVUE 17).

cited registration. *See Stone Lion*, 110 USPQ2d at 1162. As such, we may not consider, in assessing these factors, evidence of how Applicant and Registrant are **actually rendering** their services in the marketplace. *Id.*

The eighth *DuPont* factor, by contrast — “[t]he length of time during and conditions under which there has been concurrent use without evidence of actual confusion,” *see DuPont*, 177 USPQ at 567 — requires us to look at **actual market conditions**, to the extent there is evidence of such conditions of record. In this regard, we consider all of the evidence of record that may be relevant to the eighth *DuPont* factor. *In re Guild Mort’g. Co.*, 2020 USPQ2d 10279, at *6 (TTAB 2020).

As discussed above, Applicant submitted webpages showing the sale of cell phone cases, as well as photographs displaying a kiosk for cell phone related accessories, including cell phone cases.⁴⁶ Applicant did not, however, provide any specifics as to its advertising or marketing in comparison to Registrant’s advertising or marketing including whether they sell their products in the same geographic trading areas. We also note that in this appeal, Applicant vigorously has argued that the goods at issue are not related and are marketed differently.

Finally, in this *ex parte* context, there has been no opportunity to hear from Registrant about whether it is aware of any reported instances of confusion. We therefore are getting only half the story. *See, e.g., Guild Mort’g.*, 2020 USPQ2d 10279, at *7 (citing *In re Opus One, Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001) (“The fact that

⁴⁶ November 1, 2022 Response to Office Action (TSDR 12-13).

an applicant in an ex parte case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis, inasmuch as the Board in such cases generally has no way to know whether the registrant likewise is unaware of any instances of actual confusion, nor is it usually possible to determine that there has been any significant opportunity for actual confusion to have occurred.”) (citations omitted); *In re Wilson*, 57 USPQ2d 1863, 1869 (TTAB 2001) (“[I]nasmuch as we have heard from neither registrant nor the Highland Orange Association in this appeal, we cannot conclude that, in fact, no instances of actual confusion ever occurred.”); and *In re Cruising World, Inc.*, 219 USPQ 757, 758 (TTAB 1983) (“Concerning the lack of actual confusion argument, in an ex parte hearing where only the applicant's position is expressed and there is no way to assess what the experience of the registrant has been, it is impossible to conclude that actual confusion has never occurred.”)). This constraint inherent in the ex parte context necessarily limits the potential probative value of evidence bearing on the eighth *DuPont* factor, compared with an inter partes proceeding, where the registrant has an opportunity to present argument and evidence in response.

Based on this record, we find the lack of any reported instances of actual confusion a neutral *DuPont* factor.

VI. Conclusion

Because the marks are identical and the goods are related, we find that Applicant's mark WINGMAN for “portable audio speakers, excluding cases; wireless

speakers, excluding cases” is likely to cause confusion with the registered mark WINGMAN for “cell phone cases.”

Decision: We affirm the refusal to register Applicant’s mark WINGMAN.