

This Opinion is Not a  
Precedent of the TTAB

Mailed: April 30, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Information Builders, Inc.*

*v.*

*FocusVision Worldwide, Inc.*  
—

Opposition No. 91237349  
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Ira E. Silfin of Mandelbaum Silfin Economou LLP,  
for Information Builders Inc.

John Tehranian and Anna M. Vradenburgh of One LLP,  
for FocusVision Worldwide, Inc.

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Before Zervas, Kuczma and Hudis,  
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

FocusVision Worldwide, Inc. (“Applicant”) seeks registration on the Principal

Register of the mark FOCUSVISION (in standard characters) for:

Market research consultation; market research in International Class  
35;

Electronic transmission of data and images by video broadcasting of  
market research interviews; streaming of audio, visual and audiovisual  
material via a global computer network and wireless broadcasting in the  
field of market research in International Class 38; and

Providing temporary use of online non-downloadable software for conducting and analyzing market research; providing online non-downloadable software for use in data collection and data management in the field of market research; application service provider (ASP) featuring software for use in designing surveys for market research use; software as a service (SaaS) services featuring software for the collection, storage, organization, management, searching, manipulation and analysis of data in the fields of marketing, marketing research, and focus groups; software as a service (SaaS) services featuring software for management of marketing and market research projects, including creation and tracking of budgets for such projects and management of vendors in International Class 42.<sup>1</sup>

In its Notice of Opposition,<sup>2</sup> Information Builders Inc. (“Opposer”) opposes registration of Applicant’s FOCUSVISION mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as applied to the services identified in the application, **in Class 42 only**,<sup>3</sup> so resembles Opposer’s following marks, all registered on the Principal Register, as to be likely to cause confusion, to cause mistake, or to deceive:

<b>Mark</b>	<b>Reg. No./Reg. Date</b>	<b>Goods/Services</b>
FOCUS	Reg. No.: 1652265 Issued: Jul. 30, 1991 Twice Renewed	Computer programs for data base management in Int’l Cl. 9.
FOCUS	Reg. No.: 2821942 Issued: Mar. 16, 2004 Renewed	Computer software for database management; computer software for use in decision support systems; computer software for use in enterprise reporting and analysis systems and for building

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<sup>1</sup> Application Serial No. 86967294 filed on April 7, 2016, under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and use in commerce for the services in Classes 35 and 38 since at least as early as May 30, 1993, and based upon Applicant’s claim of first use anywhere and use in commerce for the services in Class 42 since at least as early as June 3, 2014.

<sup>2</sup> 1 TTABVUE. References to the pleadings, the evidence of record and the parties’ briefs refer to the Board’s TTABVUE docket system. Coming before the designation TTABVUE is the docket entry number; and coming after this designation are the page or paragraph references, if applicable.

<sup>3</sup> Notice of Opposition, 1 TTABVUE 7, ¶ 8; Opposer’s Brief, 18 TTABVUE 6; Opposer’s Rebuttal Brief, 22 TTABVUE 5.

<b>Mark</b>	<b>Reg. No./Reg. Date</b>	<b>Goods/Services</b>
		applications for the management and tracking of data for enterprise reporting systems; computer database programs for use in connection with decision support, analysis, and reporting programs; computer software development tools for use in developing decision support, analysis, and reporting systems and applications; computer software, namely, client/server reporting, analysis and decision support tools; computerized database, reporting, and analysis software for use on corporate intranet web sites; enterprise server software for use in web based data publishing, reporting, and analysis solutions; computer software for accessing databases by means of global computer networks to generate reports; software development tools for making reporting and analysis available through global computer network worldwide websites and for extending the functionality of enterprise reporting and analysis systems on to global computer networks; and computer software for accessing and updating databases through global computer networks in Int'l Cl. 9.
WEBFOCUS	Reg. No.: 2248562 Issued: Jun. 1, 1999 Twice Renewed	Computer programs for data base management in Int'l Cl. 9.
WEBFOCUS	Reg. No.: 2685249 Issued: Feb. 11, 2003 Renewed	Computer software for database management; computer software for accessing databases by means of global computer networks to generate reports; software development tools for making reporting and analysis available through global computer network worldwide websites and for extending the functionality of enterprise reporting and analysis systems on to global computer networks; and computer software for accessing and updating databases through global computer networks in Int'l Cl. 9.

Applicant denied the salient allegations of the Notice of Opposition in its Answer.<sup>4</sup>

The Affirmative Defenses in Applicant's Answer do not recite true affirmative defenses, but rather comprise an amplification of Applicant's denials to the Notice of Opposition.

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<sup>4</sup> Answer, 4 TTABVUE.

The case is fully briefed. Opposer bears the burden of establishing its standing and Section 2(d) claim by a preponderance of the evidence. *See Jansen Enters., Inc. v. Rind*, 85 USPQ2d 1104, 1107 (TTAB 2007). Having considered the evidentiary record, the parties' arguments and applicable authorities, as explained below, we sustain the Opposition.

### **I. The Evidentiary Record**

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's involved application. In addition, the parties introduced the following evidence:

#### **A. Opposer's Evidence**

- Testimonial Declaration of Gerald D. Cohen ("Cohen Decl."), Chief Executive Officer of Opposer,<sup>5</sup> with exhibits (a prior settlement agreement between the parties, a FOCUS User's manual, a list of Opposer's offices, news articles and a book about Opposer's business, Opposer's online advertising, Opposer's fact sheets and brochures, Profiles of Opposer's customers, Opposer's product labels, uses of Opposer's marks within the operation of its software, Opposer's print publications and advertising, purchase orders for Opposer's online keyword advertising, Opposer's course curricula and calendars, and Opposer's conference sponsorships and/or attendance) (7 TTABVUE).
- Opposer's Notices of Reliance ("Opp NOR"), with exhibits (Opposer's registrations of marks comprising or including the term "Focus" and a printout from the Board's TTABVUE database listing opposition and cancellation proceedings Opposer has brought before the Board) (8 and 21 TTABVUE).

#### **B. Applicant's Evidence**

- Testimonial Declaration of Thomas Myers ("Myers Decl."), Data Compliance Director of Applicant, with exhibits (discussions of awards granted to Applicant, historical and current captures of pages from Applicant's website, Applicant's invoices for services rendered, third-party services reporting on

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<sup>5</sup> Mr. Cohen held the position of Opposer's Chief Executive Officer at the time he signed his testimonial declaration. Mr. Cohen no longer holds this position with Opposer, but remains Chairman of Opposer's Board of Directors. Applicant's Brief, 18 TTABVUE 10.

Applicant's website traffic (Alexa and Google Analytics), Applicant's print advertising, news articles and books mentioning Applicant and its business, and Applicant's FOCUS LIBRARIAN registration) (11 TTABVUE and re-filed at 19 TTABVUE with exhibit numbers embossed on Applicant's exhibits; we cite to the re-filed Myers Declaration in this decision).<sup>6</sup>

- Applicant's Notices of Reliance ("App NOR"), with exhibits (Applicant's registrations of marks including the term "FocusVision") (12 TTABVUE).

## II. Evidentiary Matters

### A. Opposer's and Applicant's Submission of, and Reliance on, Cancelled Registrations, Pending Applications and Abandoned Applications

At trial and during post-trial briefing, Opposer<sup>7</sup> and Applicant<sup>8</sup> each submitted and/or relied upon several of their own trademark registrations that have been cancelled by the U.S. Patent and Trademark Office ("USPTO"). Applicant also made

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<sup>6</sup> Applicant's Exhibits Nos. 10(d), 10(f) and 11-15, mentioned in the Myers Decl. at 19 TTABVUE 13-15, 17-19, ¶¶ 26-29, 33, 35 and 37, do not appear in Applicant's filing. "Parties to Board proceedings are responsible for ensuring the documents they introduce are complete and legible." *Moke America LLC v. Moke USA, LLC*, 2020 USPQ2d 10400 \*1 n.6 (TTAB April 21, 2020) (citing Trademark Rule 2.126(a)(2), 37 C.F.R. § 2.126(a)(2) ("Exhibits pertaining to an electronic submission must be made electronically as an attachment to the submission and must be clear and legible.")).

<sup>7</sup> Opposer's Reg. Nos. 1300245 (PC/FOCUS), 1822512 (PM/FOCUS), 1965984 (FOCUS FUSION), 2989088 (FOCUS), 4013931 (WEBFOCUS ACTIVE TECHNOLOGIES), 1478426 (FOCUS VISION) and 1478427 (PS/FOCUS); Opp NOR, 8 TTABVUE 42-48, 56-72, 75-81, 84-89 and 21 TTABVUE 2-7; Cohen Decl., 7 TTABVUE 13-14, 16-17 and 23, ¶¶ 29, 36, 38-40 and 68; Opposer's Brief, 18 TTABVUE 12 and 22; Opposer's Rebuttal Brief, 22 TTABVUE 6 and 9.

<sup>8</sup> Applicant's Reg. Nos. 4360375 (FOCUSVISION LIBRARIAN), 2913863 (FOCUSVISION VIDEOMARKER), 2307805 (FOCUSVISION MULTIVIEW), 2208484 (FOCUSVISION NETWORK) and 1643165 (FOCUSVISION NETWORK); App NOR, 12 TTABVUE 2-12 and 37-76; Myers Decl., 19 TTABVUE 6 and 12-20 ¶¶ 6, 18, 24, 26, 31, 33, 34, 39 and 40; Applicant's Brief, 18 TTABVUE 8, 9, 11, 13, 19 and 32.

of record and/or relied upon pending and abandoned service mark applications that are not the subject of this Opposition.<sup>9</sup>

A cancelled registration is not evidence of any existing rights in the mark. *See Action Temp. Servs. v. Labor Force*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989). An expired or cancelled registration is evidence of nothing but the fact that it once issued. *Sunnen Prods. Co. v. Sunex Int'l Inc.*, 1 USPQ2d 1744, 1747 (TTAB 1987). Pending applications are evidence only of the fact that they have been filed. *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1270 n.8 (TTAB 2009); *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1366 n.7 (TTAB 2007); *Interpayment Servs. Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003), and have no probative value. Abandoned applications have “no probative value other than as evidence that the applications [were] filed.” *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1403 n.4 (TTAB 2010) (quoting *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002)).

We therefore give no further consideration to the cancelled registrations, pending applications and abandoned applications submitted by the parties, nor the marks recited therein.

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<sup>9</sup> Applicant's Application Serial Nos. 87725568 (FV FOCUSVISION & Design) and 76181636 (FOCUSVISION HILIGHTER); App NOR, 12 TTABVUE 77-89; Myers Decl., 19 TTABVUE 16 and 18 ¶¶ 32 and 35; Applicant's Brief, 18 TTABVUE 13, 19.

**B. Opposer's Submission of and Reliance on Registrations not Plead in the Notice of Opposition; and Applicant's Objections to Opposer's Evidence**

In addition to the registered FOCUS and WEBFOCUS marks plead in the Notice of Opposition, Opposer made of record and relied upon several additional unpleaded active, registered marks including the term "Focus," as follows:

<b>Mark</b>	<b>Reg. No./Reg. Date</b>	<b>Goods</b>
FOCUS FORECASTING	Reg. No.: 2223450 Issued: Feb. 16, 1999 <b>Cancelled</b>	Consulting services in the field of inventory management and control for businesses including the use of computers and computer techniques in the field of inventory management and control for businesses in Int'l Cl. 35.
FOCUS FORECASTING	Reg. No.: 2223457 Issued: Feb. 16, 1999 Twice Renewed	Computer programs recorded on electronic media, namely tapes or discs, for use by businesses to plan inventory needs and to manage and control inventory in Int'l Cl. 9.
OMNIFOCUS	Reg. No.: 3755093 Issued: Mar. 2, 2010 Renewed	Computer software for use in personal task management in Int'l Cl. 9.
WEBFOCUS MAGNIFY	Reg. No.: 3831741 Issued: Aug. 10, 2010	Software for searching structured and unstructured data and database records distributed across multiple applications in an enterprise in Int'l Cl. 9. <sup>10</sup>

Opposer's Reg. No. 2223450 (FOCUS FORECASTING) has been cancelled. Thus, we give this registration no further consideration.

Normally, "a plaintiff cannot use an unpleaded registration as a basis for the opposition (such as for purposes of removing priority as an issue in the case, or for proving standing)." *FUJIFILM SonoSite, Inc. v. Sonoscape Co., Ltd.*, 111 USPQ2d 1234, 1235 (TTAB 2014). "While an unpleaded registration cannot be used as a basis for the opposition, it, like third-party registrations, may be considered for 'whatever

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<sup>10</sup> Opp NOR, 8 TTABVUE 2-15, 35-41 and 73-74; 21 TTABVUE 8-14; Opposer's Brief, 18 TTABVUE 8, 14-15, 18-19 and 22; Opposer's Rebuttal Brief, 22 TTABVUE 6, 8, 10 and 15-16.

probative value' it may lend to opposer's showing under the *DuPont* factors in its case in chief." *Id.* at 1236 (citing *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031, 1035 (TTAB 2010)). *See also* Trademark Rule 2.122(d)(2) (registration owned by any party to a proceeding).

However, we must also consider the fairness to Applicant who was not put on express notice by the Notice of Opposition that Opposer would rely upon its registered FOCUS FORECASTING, OMNIFOCUS and WEBFOCUS MAGNIFY marks as part of its case-in-chief. Here, we find that Applicant (1) raised no objection to Opposer's introduction of evidence as to its FOCUS FORECASTING and OMNIFOCUS marks, (2) was fairly apprised that Opposer was offering evidence in support of Opposer's reliance on these marks,<sup>11</sup> and (3) as a matter of fairness and without any doubt, indicated its awareness of Opposer's reliance on its FOCUS FORECASTING and OMNIFOCUS marks as being tried.<sup>12</sup>

Thus while the unpleaded FOCUS FORECASTING (of Reg. No. 2223457) and OMNIFOCUS registrations cannot be used as a basis for the opposition, they will be considered for whatever probative value they may lend to Opposer's showing under the *DuPont* factors as part of its Trademark Act Section 2(d) claim. *See DC Comics v. Pan Am. Grain Mfg. Co.*, 77 USPQ2d 1220, 1223 (TTAB 2005) (opposer introduced

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<sup>11</sup> Applicant was apprised that Opposer would rely on these marks in Cohen Decl., 7 TTABVUE 13, ¶ 28; Opp NOR 8 TTABVUE 9-15; and Opposer's Brief, 18 TTABVUE 8, 14, 15, 18 and 22.

<sup>12</sup> Applicant clearly indicated its awareness of Opposer's reliance on its FOCUS FORECASTING and OMNIFOCUS marks as being tried in Applicant's Brief, 20 TTABVUE 7, 16, 18, 23, 26, 34, 35 and 37.



into evidence two unpleaded registrations; applicant did not object and treated them as of record; therefore, the Board deemed the pleading amended pursuant to Fed. R. Civ. P. 15(b)), *republished as precedent*, 2005 TTAB LEXIS 572 (TTAB 2005); *Productos Lacteos Tocumbo S.A. de C.V. v. Paleteria La Michoacana Inc.*, 98 USPQ2d 1921, 1924-26 (TTAB 2011) (petitioner's rights in unpleaded marks tried by implied consent; and Board deemed pleadings to be amended to conform to the evidence, where plaintiff stated the relevance of the submissions under notices of reliance, emphasized its intention to rely on such marks through testimony, and where respondent did not object to the testimony at the time, was afforded an opportunity to cross-examine, and raised an untimely objection), *aff'd*, 188 F. Supp. 3d 22 (D.D.C. 2016), *and aff'd*, 743 Fed. App'x 457, 128 USPQ2d 1172 (D.C. Cir. 2018).

However, we do not afford the same treatment to Opposer's unpleaded WEBFOCUS MAGNIFY registration. First, Applicant objected to the introduction of this registered mark as irrelevant and because Opposer had not properly made this registration of record.<sup>13</sup> Indeed, Opposer did not properly make its WEBFOCUS MAGNIFY registration of record until after the filing of Applicant's Trial Brief,<sup>14</sup> eleven months after the close of Opposer's testimony period for its case-in-chief,<sup>15</sup> and 5 months after Opposer's rebuttal period closed.<sup>16</sup> Opposer's reliance on *Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290, 1291 (TTAB 1986) in

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<sup>13</sup> Applicant's Brief, 20 TTABVUE 9.

<sup>14</sup> Opp NOR, 21 TTABVUE 8-14.

<sup>15</sup> Institution Notice and Trial Order, 2 TTABVUE.

<sup>16</sup> Opposer's Motion to Extend, and Board Order granting same, 13 and 14 TTABVUE.

support of its argument that Applicant waived its objection by not asserting it timely is misplaced. In *Beech Aircraft*, the petitioner timely filed printed publications with its Notice of Reliance, but neglected to serve copies of the filed publications on the registrant. Here, Opposer neither timely filed its WEBFOCS MAGNIFY registration with the Board nor timely served it on Applicant. We therefore sustain Applicant's objection to the introduction of the WEBFOCUS MAGNIFY registration and deny Opposer's motion in its Rebuttal Brief<sup>17</sup> for admission into the record of this registration.

Since, as noted above, we give no consideration to Opposer's cancelled Reg. No. 1478426 (FOCUS VISION), Applicant's objection to the introduction of this registration<sup>18</sup> is moot.

### **III. The Parties**

Since 1975, Opposer has developed computer software programs to aid users to retrieve information from their computer systems, perform mathematical calculations on the data, and present it in reports. Opposer's FOCUS software program allows nonprogrammers to enter English-like commands to extract, manipulate, summarize, and display data from disparate database management systems. The FOCUS program (which has been offered in various formats as computer technology has evolved) is used by private corporations, institutions and

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<sup>17</sup> Opposer's Rebuttal Brief, 22 TTABVUE 6.

<sup>18</sup> Applicant's Brief, 20 TTABVUE 9.

government agencies, on virtually every computer platform from mainframes to personal computers (“PCs”).<sup>19</sup>

Founded as a market research company in 1990, and thereafter incorporated in 1995, Applicant specializes in providing research market research technology solutions to capture and collect real-time human insights and information. Applicant has used FOCUSVISION alone or in combination with other terms as the name of its company and for market research services since 1994.<sup>20</sup>

Applicant began as a market research support company specializing in the provision of live video transmission of qualitative research. Applicant has since expanded its offerings to provide additional services related to the collection of data from individuals including quantitative research as well as sharing and storage solutions for the client’s data. Today, Applicant provides a variety of research technology solutions within the market research industry that focus on the capture and collection of real-time human insights and analytics. Applicant contends its on-line software tools that allow its customers to utilize its products and services are a natural evolution in the rendering of its services, all of which are market research related, and all of which have been associated with the FOCUSVISION mark.<sup>21</sup>

#### **IV. Standing and Priority**

Standing is a threshold issue that must be proven by the plaintiff in every inter partes case. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co. Inc.*, 753 F.3d 1270,

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<sup>19</sup> Cohen Decl., 7 TTABUVE 5-6, ¶¶ 7, 10.

<sup>20</sup> Myers Decl. 19 TTABVUE 6, ¶¶ 3-6.

<sup>21</sup> *Id.* at 8, ¶ 10.

111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *John W. Carson Found. v. Toilets.com, Inc.*, 94 USPQ2d 1942, 1945 (TTAB 2010). An Opposer may establish its standing by properly making of record its pleaded registrations, if they are the basis for a likelihood of confusion claim that is not wholly without merit. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982); *see also Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727-28 (Fed. Cir. 2012). Here, Opposer properly made its pleaded FOCUS and WEBFOCUS registrations of record under Trademark Rule 2.122(d)(1), 37 C.F.R. § 2.122(d)(1),<sup>22</sup> showing their current active status and its ownership thereof, establishing its standing.

Because Opposer's pleaded registrations are of record, and Applicant did not counterclaim to cancel them, priority is not at issue as to the marks and goods covered by the registrations. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1436 n.7 (TTAB 2012).

## **V. Likelihood of Confusion**

Trademark Act Section 2(d), 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.

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<sup>22</sup> Opp NOR, 8 TTABVUE 16-29, 30-34, 49-55.

Our analysis is based on all of the probative evidence of record. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). In making our determination, we consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”).

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

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See 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.”). These factors, and the other *DuPont* factors argued by each party, are discussed below.

We center our likelihood of confusion analysis on Opposer's assertion of its FOCUS marks of Registration Nos. 1652265 ("265") and 2821942 ("942"). These marks, along with the identified goods, are the most similar to Applicant's FOCUSVISION mark and Class 42 Services. If we find that there is a likelihood of confusion with these marks, there is no need for us to consider a likelihood of confusion with Opposer's WEBFOCUS marks of Registration Nos. 2248562 and 2685249. Conversely, if we find there is no likelihood of confusion with Opposer's FOCUS marks, we would find no likelihood of confusion with Opposer's WEBFOCUS marks as they incorporate other matter (i.e., the prefix "Web ...") – even though the WEBFOCUS marks are registered for the much of the same goods as are Opposer's FOCUS marks. *See In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

**A. Comparison of the Parties' Goods and Services, and Trade Channels**

We first compare the parties' goods and services at issue, and their established, likely-to-continue, trade channels, the second and third *DuPont* factors. In making our determination regarding the relatedness of the goods and services, we must look to the Class 9 goods as identified in Opposer's '265 and '942 FOCUS registrations and the Class 42 Services as identified in Applicant's FOCUSVISION application. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Computs. 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.”).

The goods and services of the Opposer and Applicant need not be competitive, or even be offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods and services are related in some manner, or that the conditions and activities surrounding the marketing of the goods and services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Coach Servs.*, 101 USPQ2d at 1722.

Opposer's '265 and '942 Registrations identify the Class 9 Goods as “computer software for database management.” Opposer's '942 registration additionally identifies, in part, the Class 9 Goods as “computer database programs for use in connection with decision support, analysis, and reporting programs.” Among the Class 42 Services in the FOCUSVISION application are “providing online nondownloadable software for use in data collection and data management in the field of market research.” Opposer argues that the only difference between the nature of the parties' goods and services is that the identification of Class 42 Services in the FOCUSVISION application are limited to the field of market research. On the other hand, the goods identified in Opposer's FOCUS registrations are not limited to any particular business use.<sup>23</sup> We agree.

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<sup>23</sup> Opposer's Brief, 18 TTABVUE 19-20.

Applicant argues that the parties' "goods and services are not in competition with one another" and that "they operate in distinct niches and their products serve different functions."<sup>24</sup> However, the fundamental principle of registration practice is that regardless of the parties' actual business activities, the goods or services in a registration or an application are construed to include all goods or services of the types identified, sold in all normal channels of trade for such goods or services, to all usual purchasers of them. *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1825-26 (TTAB 2009).

Thus, a relationship between the parties' goods and services may be found even in the absence of evidence beyond the identifications themselves. *See, e.g., Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (when addressing the issue of likelihood of confusion, the court held that the respective identifications of goods were, themselves, evidence of the relatedness of the parties' goods, and extrinsic evidence of relatedness was not per se required). We also need not consider whether each of Opposer's identified Class 9 Goods is related to Applicant's Class 42 Services for purposes of a *DuPont* analysis; it is sufficient if likelihood of confusion is found with respect to use of an applicant's mark in connection with any product or service in a particular International Class. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1397 (TTAB 2007).

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<sup>24</sup> Applicant's Brief, 20 TTABVUE 16-17.



Because there are no limitations as to channels of trade or classes of purchasers in the identification of goods in Opposer's '265 and '942 Registrations, it is presumed that Opposer's goods move in all channels of trade normal for those goods, and that they are available to all classes of purchasers for those goods. *See Citigroup*, 98 USPQ2d at 1261; *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983). Also, in the absence of such limitations in Opposer's registrations, we must presume that Opposer's identified goods will be marketed in all normal and usual channels of trade and methods of promotion. *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983).

Thus, the channels of trade and classes of purchasers are legally the same for both parties' goods and services. We therefore find that a comparison of the parties' goods, services and channels of trade support a finding that confusion is likely.

#### **B. Strength of Opposer's Marks**

As part of our likelihood of confusion analysis, "[i]n determining strength of [the Opposer's] mark, we consider both its conceptual strength, based on the nature of the mark itself and its commercial strength, based on the marketplace recognition value of the mark." *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014); *see also 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 ... and its marketplace strength ...."); McCarthy, T.J., MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80 (5th ed. 2020 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.”).

Under the fifth and sixth *DuPont* likelihood of confusion factors, we also consider the strength of Opposer's mark by considering its “fame” and the number and nature of similar marks in use on similar goods. *DuPont*, 177 USPQ at 567.

**1. Inherent or Conceptual Strength of Opposer's Marks**

Neither party submitted argument regarding the inherent or conceptual strength of Opposer's marks. Since Opposer's FOCUS marks were registered on the Principal Register without a required showing of acquired distinctiveness pursuant to Trademark Act Section 2(f), 15 U.S.C. § 1052(f), and Applicant did not counterclaim to cancel the registrations, Opposer's FOCUS marks are presumed to be valid and at least suggestive. Trademark Act Section 7(b), 15 U.S.C. § 1057(b).

**2. Commercial or Marketplace Strength of Opposer's Marks**

Commercial or marketplace strength is the extent to which the relevant public recognizes a mark as denoting a single source. *See Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006). To determine whether a mark has attained commercial strength, as part of our analysis we consider: prolonged exclusive use of the marks, extensive promotion and marketing, media publicity, critical acclaim and a very large dollar volume of sales of products bearing Opposer's marks. *Bridgestone Ams. Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012).

Opposer asserts that its FOCUS marks have not only acquired commercial strength through use in the marketplace, but that this use has been so extensive that Opposer's marks have become famous in the marketplace for computer software.<sup>25</sup> In support of its fame argument, Opposer points to (1) continuous use of its FOCUS mark since 1975, (2) expenditures of \$ 2 million annually to advertise its FOCUS products, (3) hundreds of thousands of dollars spent on Google keyword advertisements when the word "focus" is searched on the Internet, (4) articles concerning FOCUS software in the press, (5) annual attendance of over a thousand users at conferences Opposer has run for its users, (6) approximately \$30 million in annual sales of FOCUS software, (7) a congratulatory proclamation for Opposer's 25 years in business from a former New York City Mayor in the year 2000, and (8) the operation of Opposer's business in over 40 countries around the world.<sup>26</sup>

Applicant challenges Opposer's assertion that its FOCUS marks are famous in that: (1) Opposer relies on evidence of press articles, most of which are from the 1990s, some of which appear to be nothing more than a republication of press releases echoing Opposer's opinion, there is no evidence regarding the circulation of these press reports or articles, and several articles say little about Opposer's FOCUS marks at all; (2) Opposer migrated to using the mark WEBFOCUS for the goods and services previously offered under its FOCUS marks in 1995, (3) Opposer's \$ 2 million annual advertising spend on its FOCUS products is a paltry investment relative to Opposer's

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<sup>25</sup> Opposer's Brief, 18 TTABVUE 21.

<sup>26</sup> Opposer's Brief, 18 TTABVUE 21-22; Cohen Decl., 7 TTABVUE 6-9, 18, 25-27, 299-310, 346, 661-62, 772-832, ¶¶ 8-9, 13-20, 43, 82, 83, 85-87.

enterprise value of \$300 million in total annual revenues, of which annual FOCUS product sales are only 10%, or \$30 million, (4) Opposer's proffered \$ 1 million in expenditures for Google search term advertising fails to identify how many "hits" were actually for the term FOCUS and not some other key term, (5) Opposer offers no context or data that would allow the fame and investment in Opposer's FOCUS marks to be compared to either other marks in Opposer's industry, or other famous marks in any industry.<sup>27</sup>

Overall, we find that the infirmities in Opposer's sales, advertising and third-party recognition evidence significantly detract from the evidentiary showing it must provide to demonstrate fame. *See Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007). ("It is the duty of a party asserting that its mark is famous to clearly prove it."). To begin, raw advertising and sales numbers alone can be misleading. Thus, some context in which to place raw financial data is necessary; for example, market share or sales or advertising figures for comparable types of goods, *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002), neither of which Opposer provided.

An Opposer also may place its raw financial data in context by including proofs of the general reputation of its FOCUS products, or other contextual evidence of the

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<sup>27</sup> Applicant's Brief, 20 TTABVUE 22-25, providing a critique as to Cohen Decl. testimony and exhibits at 7 TTABVUE 8-10, 25-26 and 299-358, ¶¶ 19, 22 and 82. As to the operation of Opposer's business in over 40 countries around the world, we find this to be irrelevant. *See In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1596 (TTAB 2018) ("While evidence of foreign use may in some cases be probative, in this case it does not serve to tell us the norms specific to pet owners in the United States, who are the relevant consumers.") (citing *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1835 (Fed. Cir. 2007)).

type of advertisements and promotions Opposer uses to gain sales to show that the consuming public has been regularly exposed to Opposer's FOCUS marks on a nationwide scale. *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1690-91 (Fed. Cir. 2018). Opposer did not do this either. More particularly, Opposer provides no evidence as to the degree of national exposure to its FOCUS marks within its on-line advertising, fact sheets, brochures, customer profiles, labels, software in operation, print advertising, key word advertising or its courses and conferences introduced into the record.<sup>28</sup>

In this connection, fame for purposes of likelihood of confusion is a matter of degree that varies along a spectrum from very strong to very weak. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017). Here, because of the weaknesses and lack of comparative data in the presentation of Opposer's evidence, we find Opposer has shown only that its FOCUS marks are commercially strong in connection with database management software products – considerable sales figures, hefty marketing expenditures and a degree of media attention over a period of several years. However, on this record Opposer has not demonstrated that the FOCUS marks are famous at the highest range of the spectrum of commercial strength.<sup>29</sup> *Barbara's Bakery, Inc. v. Landesman*, 82 USPQ2d

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<sup>28</sup> Cohen Decl., 7 TTABVUE 10-11, 15-27 and 394-832, ¶¶ 24-26, 33-35, 38-43, 46-48, 51-66, 68-71, 74-80, 83-85 and 87.

<sup>29</sup> Opposer also asserts ownership of a family of FOCUS marks in its Trial Brief, 18 TTABVUE 5, 9, 12, 18, 23, 25, but a family of marks was not plead in the Notice of Opposition. Therefore, whether Opposer owns a family of FOCUS marks will not be further considered. *Wise F&I, LLC v. Allstate Ins. Co.*, 120 USPQ2d 1103, 1107 (TTAB 2016) (“A plaintiff must

1283, 1287 (TTAB 2007) (“[A]lthough not rising to the level of fame which has been found to exist for other consumer products ..., opposer’s marks ... have achieved a degree of renown, at least in the natural foods marketplace. This evidence is sufficient to establish that opposer’s mark is a strong mark.”).

We therefore find that the inherent and commercial strength of Opposer’s FOCUS marks support a finding of likelihood of confusion, but only slightly because we do not find that Opposer’s marks are famous for this purpose.

### **3. The Presence of Third-Party Marks**

On the other hand, Applicant did not establish the marketplace weakness of Opposer’s FOCUS marks. In support of its argument that Opposer’s FOCUS marks are commercially weak, Applicant listed in its Trial Brief<sup>30</sup> a number of third-party marks comprising or including the term “Focus” purportedly registered with the USPTO in connection with software products or software related services – none of which Applicant made of record during its testimony period.<sup>31</sup>

A party wishing to make third-party registrations of record in a Board inter partes proceeding may file, during its testimony period, plain copies of the registrations, printouts or copies of information of the registrations from the USPTO’s electronic database records (i.e., TESS or TSDR), together with a notice of reliance thereon

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plead ownership of a family of marks in its complaint in order to rely on the marks as a family as a basis for sustaining the opposition at trial....”).

<sup>30</sup> Applicant’s Brief, 20 TTABVUE 26-31.

<sup>31</sup> Applicant did not provide any evidence regarding the marketplace **use** of third-party marks comprising or including the term “Focus” in connection with software products or related services.

specifying the registration and indicating generally its relevance and associating the registration with one or more issues in the case. The party also may make third-party registrations of record by introducing copies of them as exhibits to testimony, or by stipulation of the parties. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 704.03(b)(1)(B) (June 2019). Applicant did not avail itself of any of these procedures in this proceeding.

Merely listing the third-party “Focus” marks, registration numbers, and recited goods and services (or portions thereof) in Applicant’s Trial Brief was insufficient to make these registrations of record. *Edison Bros. Stores, Inc. v. Brutting E.B. Sport-Int’l GmbH*, 230 USPQ 530, 532 n.11 (TTAB 1986) (Applicant’s reference to third-party registrations in its brief is unsupported by any evidence whatsoever, as the Board does not take judicial notice of registration documents). *See also W. R. Grace & Co. v. Herbert J. Meyer Industries, Inc.*, 190 USPQ 308, 309 n.5 (TTAB 1976) (reference to third-party registrations in answer, without filing copies with a notice of reliance, was insufficient to make them of record).

We therefore find the sixth *DuPont* factor, the number and nature of similar marks in use on similar goods, *DuPont*, 177 USPQ at 567, to be neutral. The absence of cognizable evidence and Applicant’s unsupported arguments are insufficient to weaken the scope of protection for Opposer’s FOCUS marks.

### **C. Comparison of the Parties’ Marks**

We next consider the similarity or dissimilarity of the parties’ FOCUS and FOCUSVISION marks in their entirety as to appearance, sound, connotation, and commercial impression, under the first *DuPont* factor. *See Palm Bay Imps., Inc. v.*

*Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). “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); accord *Krim-Ko Corp. v. Coca-Cola 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). Moreover, “[w]hen [, as here, the parties’ marks] ... would appear on substantially [overlapping, if not] identical goods [or services], ‘the degree of similarity necessary to support a conclusion of likely confusion declines.’” *Coach Servs.*, 101 USPQ2d at 1722 (internal citations omitted).

“The 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.” *In re I.AM.Symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (quoting *Coach Servs.*, 101 USPQ2d at 1721 (internal quotation omitted)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Assoc. of the U.S. Army*, 85 USPQ2d 1264, 1268 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

While likelihood of confusion cannot be predicated on dissecting the marks into their various components, different features may be analyzed and given more or less weight, provided the ultimate conclusion rests on a consideration of the marks in



their entireties. *See In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Coach Servs.*, 101 USPQ2d at 1721.

Here, the similarities between Opposer's and Applicant's marks are immediately apparent through Applicant's incorporation of the entirety of Opposer's mark as the first term in its mark, comprised of the terms "FOCUS" and "VISION." Likelihood of confusion is often found where the entirety of one mark is incorporated within the other. *In re Denisi*, 225 USPQ 624, 626 (TTAB 1985) (PERRY'S PIZZA for restaurant services specializing in pizza and PERRY'S for restaurant and bar services); *Johnson Publ'g Co. v. Int'l Dev. Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner); *In re South Bend Toy Mfg. Co.*, 218 USPQ 479, 480 (TTAB 1983) (LIL' LADY BUGGY for toy doll carriages and LITTLE LADY for doll clothing).

FOCUS also is the first term consumers would consider in perceiving, and in articulating, Applicant's mark. It often has been said that the first term in a mark is the dominant term. *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"). *See also, Palm Bay Imps.*, 73 USPQ2d at 1692; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). In terms of meaning, FOCUS in both marks are exhortations "to be concentrated."<sup>32</sup> The addition of the term VISION does

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<sup>32</sup> We take judicial notice of the definition of "focus" ("to cause to be concentrated.") located at <https://www.merriam-webster.com/dictionary/focus> (accessed April 30, 2020). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir.

nothing to change the meaning of FOCUS in Applicant's mark. Even with the addition of VISION, FOCUS exhorts the consumer to concentrate, although emphasizing that the focus is on a vision. With regard to commercial impression, due to the prominence of FOCUS in Opposer's mark, and the identical meaning, we find that the commercial impression of the marks are similar.

We therefore find that the first *DuPont* factor, the similarity of the parties' marks, supports a finding of likelihood of confusion.

#### **D. Sales Conditions and Purchaser Sophistication**

The fourth *DuPont* factor is the "conditions under which and buyers to whom sales are made, i.e. 'impulse' v. 'careful, sophisticated purchasing.'" *DuPont*, 177 USPQ at 567. Precedent requires that we base our decision on the least sophisticated potential purchasers. *Stone Lion*, 110 USPQ2d 1163. Opposer argues that "There is no direct evidence in the record as to whether or not purchases of [Opposer's] ... or [Applicant's] ... goods [or services] would be made on impulse[,]""<sup>33</sup> and says nothing more.

Applicant disagrees, arguing that:

Access to [Applicant's] ... software ... requires a license that costs between \$5,000 to \$7,000, Myers Decl. ¶ 17 [19 TTABVUE 11], making it unlikely that the consumers will make the purchase carelessly or on an impulse. Likewise, [Opposer's] ... customers are likely to be sophisticated consumers who make considered purchases after careful research: "The target market for [Opposer's] ... FOCUS software is any organization that has the need to analyze data and make it available to decision makers." Cohen Decl. ¶ 44 [7 TTABVUE 18].<sup>34</sup>

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1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

<sup>33</sup> Opposer's Brief, 18 TTABVUE 21.

<sup>34</sup> Applicant's Brief, 20 TTABVUE 21.

Applicant further contends that investments in technology on behalf of organizations are not impulse purchases, especially one that will place at the helm the management of all a company's relevant information, such as, financial and inventory, citing *Cortex Corp. v. W.L. Gore & Assocs., Inc.*, 1 F.3d 1253 (Fed. Cir. 1993) (“[T]he sophistication of Cortex's computer software requires extensive instructions and ongoing servicing. Licensees do not purchase CORTEX software on an impulse, but only after deliberate and careful consideration. These licensees know exactly with whom they are dealing.”).

In rebuttal, Opposer argues (without evidence) that “[w]hile [the cost of Applicant’s software] ... may be an expensive purchase for individual consumers, this is not a lot of money for the corporations purchasing from [Opposer] ... and [Applicant] ...”<sup>35</sup> These statements are unsupported in the record and purchasers of the parties’ goods and services are not limited to corporations flush with cash. Arguments of Opposer’s counsel are not evidence, and we will not rely on them. *See 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, 1284 (Fed. Cir. 2005) (“Attorney argument is no substitute for evidence.”)).

Circumstances suggesting care in purchasing may tend to minimize the likelihood of confusion. *DuPont*, 177 USPQ at 567; *In re N.A.D., Inc.*, 754 F.2d 996, 224 USPQ 969, 971 (Fed. Cir. 1985) (confusion is unlikely when sophisticated purchasers are buying goods with great care). Nonetheless, the fact that purchasers are sophisticated

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<sup>35</sup> Opposer’s Rebuttal Brief, 22 TTABVUE 12.

or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *Stone Lion*, 110 USPQ2d at 1163-64; *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011). Even discerning and sophisticated purchasers are likely to be confused between the sources of overlapping goods and services when offered under similar marks.

Further, because Applicant's description of its Class 42 Services does not include any restrictions or limitations as to classes of consumers, Applicant's prospective purchasers of its services include a variety of purchasers, including buyers that do not have significant knowledge or experience with non-downloadable software for market research, or for use in data collection and management in the field of market research. *See Stone Lion*, 110 USPQ2d at 1163-64 (recognizing Board precedent requiring consideration of the "least sophisticated consumer in the class"); *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).

Thus the conditions under which, and corporate purchasers to whom, sales of the parties' products and services are made comprise a neutral factor as to whether confusion is likely.

#### **E. Lack of Actual Confusion**

The seventh and eighth *DuPont* factors examine "[t]he nature and extent of any actual confusion" and "[t]he length of time during and the conditions under which there has been concurrent use without evidence of actual confusion." *DuPont*, 177

USPQ at 567. Applicant points to the concession in Opposer’s Trial Brief that no proof of actual confusion between the parties’ marks has been introduced in this proceeding.<sup>36</sup> Since Opposer has only challenged the FOCUSVISION Application for the services recited in Class 42 (that is, “providing temporary use of online non-downloadable software, ... software as a service (SaaS) services,” etc.), the relevant time period to measure concurrent use of the parties’ marks such that actual confusion could occur is from June 2014 to January 2018 (the period from when Applicant claims it began using the FOCUSVISION mark in connection with its Class 42 Services to the close of Opposer’s Rebuttal period),<sup>37</sup> and not during the earlier time period that Applicant used its FOCUSVISION mark for other services.

As we noted earlier in this opinion in our discussion of evidentiary matters, Applicant’s FOCUSVISION VIDEOMARKER and FOCUSVISION LIBRARIAN registrations have been cancelled;<sup>38</sup> and thus we have given no consideration to those registrations or the marks contained therein. Consequently, Applicant’s argument that Opposer’s FOCUS marks coexisted for some time with Applicant’s FOCUSVISION VIDEOMARKER and FOCUSVISION LIBRARIAN marks without

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<sup>36</sup> Applicant’s Brief, 20, TTABVUE 32; Opposer’s Brief, 18 TTABVUE 23.

<sup>37</sup> Myers Decl., 19 TTABVUE 9, ¶ 12.

<sup>38</sup> Applicant’s FOCUSVISION VIDEOMARKER and FOCUSVISION LIBRARIAN registrations were cancelled in 2015 and February 2020, respectively. There is no evidence in the record of use of the FOCUSVISION VIDEOMARKER mark past 2009, and no evidence in the record of use of the FOCUSVISION LIBRARIAN mark past 2012. Myers Decl., 19 TTABVUE 12, 13, 15, 19-20, ¶¶ 18, 24, 31, 39, 227-233, 283-328 and 441-447, Exhs 4, 8-9, 16(1) and 16(2). We find that Exhibit 4 to the Myers Decl., 19 TTABVUE 227-233, does not show FOCUSVISION LIBRARIAN as a unitary mark in 2018, as Mr. Myers claims at ¶ 18 of his declaration.

evidence of actual confusion is not well taken;<sup>39</sup> and Opposer's arguments challenging the nature, extent and length of time Applicant used the FOCUSVISION VIDEOMARKER mark<sup>40</sup> are thus moot.

Noting that Applicant claims use of the FOCUSVISION mark for software related services since June 2014, Opposer argues that while Applicant provides broad-based sales figures, they are company-wide; there is no separate accounting of sales of Applicant's software services from Applicant's provision of other services. Opposer also contends that Applicant submitted a group of sales invoices Applicant issued to customers from 2000 to 2016. None of these invoices mentions "software" or "software services."<sup>41</sup> We agree.

Opposer also argues that to the extent Applicant may now be using the FOCUSVISION mark for software, it provides no evidence of how widespread and successful these marketing and sales efforts have been. While Applicant provides evidence of hundreds of millions of dollars of sales and hundreds of thousands of website hits, it does not provide any evidence of how many of these sales or hits relate to software. Without this evidence, Opposer maintains it is possible Applicant's alleged sales of software under the FOCUSVISION mark are de minimus. Therefore, the amount of concurrent use of the parties' marks relevant to this proceeding cannot

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<sup>39</sup> Applicant's Brief, 20 TTABVUE 32.

<sup>40</sup> Opposer's Rebuttal Brief, 22 TTABVUE 13-14.

<sup>41</sup> Opposer's Brief, 18 TTABVUE 22-23, providing a critique of Myers Decl., 19 TTABVUE 10-11, 116-226, ¶¶ 14-15.

be determined, and the thus the absence of evidence of actual confusion is not surprising.<sup>42</sup>

Based on the evidence of record, Applicant's reliance on the lack of actual confusion is misplaced. "The absence of any reported instances of 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 opposer under its marks." *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff'd*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred. *Barbara's Bakery*, 82 USPQ2d at 1287 ("In the absence of a significant opportunity for actual confusion to have occurred, the absence of actual confusion is of little probative value ....").

Here, Applicant claims that there has been concurrent use of the parties' FOCUS and FOCUSVION marks in connection with software products and services for four years without evidence of actual confusion. However, as Opposer correctly observes, Applicant provided insufficient evidence to indicate whether there has been a meaningful opportunity for actual confusion to occur. We therefore find the absence of actual confusion to be a neutral factor in the likelihood of confusion analysis in this case.

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<sup>42</sup> Opposer's Rebuttal Brief, 22 TTABVUE 14, providing a critique of Myers Decl., 19 TTABVUE 10, 12 and 13, ¶¶ 14, 19, 21 and 23.

## F. Prior Market Interface between the Parties

Among the considerations of “the [prior] market interface between [A]pplicant and the owner of a prior mark [Opposer,]” under the tenth *DuPont* factor, *DuPont*, 177 USPQ at 568, are “agreement provisions designed to preclude confusion, i.e.,[.] limitations on continued use of the marks by each party.” *See also Bongrain Int’l (Am.) Corp. v. Delice de France, Inc.*, 811 F.2d 1479, 1 USPQ2d 1775, 1778 (Fed. Cir. 1987) (“[I]n trademark cases involving agreements reflecting parties’ views on the likelihood of confusion in the marketplace, ... such agreements may, depending on the circumstances, carry great weight ...”).

Accompanying Mr. Cohen’s Testimony Declaration, Opposer introduced the parties’ settlement agreement entered into in 2002 resolving their dispute over the mark FOCUSVISION VIDEOMARKER.<sup>43</sup> Opposer barely mentions this agreement in its Trial Brief,<sup>44</sup> Applicant argues the agreement has no bearing on the issues in this Opposition,<sup>45</sup> and curiously Opposer claims there has been “no [prior] interface between the parties.”<sup>46</sup> Since the parties see no relevance of their 2002 agreement to this proceeding, we discuss this agreement no further and find the prior market interface between the parties to be a neutral factor.

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<sup>43</sup> Cohen Decl., 7 TTABVUE 4, 31-36, ¶ 4.

<sup>44</sup> Opposer’s Brief, 18 TTABVUE 16.

<sup>45</sup> Applicant’s Brief, 20 TTABVUE 13

<sup>46</sup> Opposer’s Brief, 18 TTABVUE 23.



**G. The Extent to which Applicant has a Right to Exclude Others from Use of its FOCUSVISION mark in connection with Its Services**

The eleventh *DuPont* factor is “[t]he extent to which [A]pplicant has a right to exclude others from use of its mark [in connection with] ... its [services] ....” *DuPont*, 177 USPQ at 567. The parties appear to have misread this portion of *DuPont*, because their briefs discuss the extent to which Opposer has a right to exclude others from use of its FOCUS marks in connection with its goods.<sup>47</sup> We will discuss these arguments below, under the thirteenth *DuPont* factor.

**H. The Extent of Potential Confusion**

The twelfth *DuPont* factor is “[t]he extent of potential confusion, i. e., whether de minimis or substantial.” *DuPont*, 177 USPQ at 567. Opposer’s argument of this factor is a rehash of its prior arguments that the parties’ marks are confusingly similar and that the parties’ goods and services are related.<sup>48</sup> Applicant makes no mention of this factor in its Trial Brief. We need not discuss this *DuPont* factor further.

**I. Other Considerations**

The thirteenth *DuPont* factor is “[a]ny other established fact probative of the effect of use.” *DuPont*, 177 USPQ at 567. As noted above, the parties devoted their arguments of this factor toward the extent to which Opposer has a right to exclude others from use of its FOCUS marks in connection with its goods. Opposer argues that since 1985, it has been diligent in objecting to the use of “Focus” trademarks by

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<sup>47</sup> Opposer’s Brief, 18 TTABVUE 23-24; Applicant’s Brief, 20 TTABVUE 35-36; Opposer’s Rebuttal Brief, 22 TTABVUE 15.

<sup>48</sup> Opposer’s Brief, 18 TTABVUE 24-25.

others on computer software by filing hundreds of oppositions and three cancellation proceedings before the Board.<sup>49</sup> In almost all cases that have been terminated, the opposition was sustained (by default or concession on the part of the defendant), and the cancellation petitions were granted. In some cases, the oppositions were settled, and withdrawn, after the identification of goods in the applications were amended to make clear that the party's mark is not used on computer software.

Opposer also mentions its success in previously opposing Applicant's prior applications to register the marks FOCUSVISION VIDEOMARKER and FOCUSVISION HILIGHTER for software.<sup>50</sup> The first proceeding was resolved by settlement. The second proceeding was terminated after Applicant abandoned its application.

Applicant argues that Opposer's mention of the prior Board proceedings it has brought, as recited in Opposer's Notice of Reliance, is nothing more than a listing. There is no specific evidence to demonstrate which, if any, those proceedings were won on the merits or won at all. The supporting statements by Mr. Cohen in his Testimony Declaration, says Applicant, fail to specifically point to any specific cases, other than the two FOCUSVISION VIDEOMARKER and FOCUSVISION HILIGHTER oppositions Applicant elected not to defend.<sup>51</sup>

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<sup>49</sup> Opposer's Brief, 18 TTABVUE 23-24; Opposer's Rebuttal Brief, 22 TTABVUE 15; Cohen Decl., 7 TTABVUE 27-28, ¶¶ 88-89; Opp NOR, 8 TTABVUE 90-162.

<sup>50</sup> Opposer's Brief, 18 TTABVUE 16, 24.

<sup>51</sup> Applicant's Brief, 20 TTABVUE 35, providing a critique of Cohen Decl., 7 TTABVUE 4-5, 25-26, ¶¶ 4-5, 88-89. See also Myers Decl., 19 TTABVUE 17-18, ¶¶ 33-35.

Further, Applicant notes Opposer's abandonment of its mark FOCUS VISION registration in 2008<sup>52</sup> as a concession that Opposer does not offer any goods or services under that mark, and that Opposer has offered no evidence it has used this mark in the ordinary course of trade in the eleven years since the registration was abandoned. Opposer cannot, on the one hand says Applicant, abandon its use and registration of the FOCUS VISION mark, and on the other hand, oppose registration of Applicant's FOCUSVISION mark that is similar to the mark Opposer surrendered to the public domain.<sup>53</sup>

In Rebuttal, Opposer does not deny its abandonment of the FOCUS VISION mark and registration, and therefore does not argue that Applicant's FOCUSVISION mark would likely cause confusion with Opposer's abandoned FOCUS VISION mark. Instead, Opposer emphasizes its argument that Applicant's FOCUSVISION mark is likely to cause confusion with Opposer's FOCUS, WEBFOCUS, WEBFOCUS MAGNIFY, FOCUS FORECASTING, and OMNIFOCUS marks.<sup>54</sup>

In the past, we have credited "an [opposer's] active and extensive trademark enforcement program in connection with its ... marks" as evidence of the commercial strength of the opposer's mark or alternatively as evidence of the absence of similar third-party marks that otherwise would detract from the commercial strength of an opposer's mark. *UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868, 1883 (TTAB

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<sup>52</sup> See Cohen Decl., 7 TTABVUE 13-14, ¶ 29; Opp NOR 21 TTABVUE 2-7.

<sup>53</sup> Applicant's Brief, 20 TTABVUE 36.

<sup>54</sup> Opposer's Rebuttal Brief, 22 TTABVUE 15.

2011). Since we already have determined that Opposer's FOCUS marks are commercially strong (but not famous), and that Applicant provided no cognizable evidence of similar third-party marks, Opposer's evidence of its enforcement program against third parties is simply surplusage.

Since Opposer concedes it has no rights in the mark FOCUS VISION per se, further discussion of this point is moot.

**J. Summary: Likelihood of Confusion**

We find the inherent and commercial strength (but not fame) of Opposer's FOCUS marks, a comparison of the parties' FOCUS and FOCUSVISION marks, and their related goods, services and channels of trade, support the conclusion that confusion is likely. Opposer's evidence of its enforcement program against third parties is simply excess evidence. We find the other likelihood of confusion factors to be neutral.

**VI. Decision**

Opposer has demonstrated its standing and priority, and based on the evidence of record there is a likelihood of confusion between the parties' marks, goods and services. The opposition to registration of Applicant's mark FOCUSVISION, **in Class 42 only**, is therefore sustained. The application will move forward for registration of the mark for the identified International Class 35 and 38 services.