

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: August 29, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Bogle Vineyards, Inc.
v.
sixmilebridgevineyards, LLC

Opposition No. 91276339

Robert Reynolds of Klintworth & Rosenblat IP, LLP,
for Bogle Vineyards, Inc.

Andrew S. Hartman of Hartman Law Office,
for sixmilebridgevineyards, LLC.

Before Dunn, Allard, and Lavache,
Administrative Trademark Judges.

Opinion by Lavache, Administrative Trademark Judge:¹

¹ Citations to the record refer to TTABVUE, the Board's online docketing system. The number preceding "TTABVUE" corresponds to the docket entry number, and any numbers following "TTABVUE" refer to the page numbers of the docket entry where the cited materials appear. In addition, case citations in this opinion follow the guidance in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2025).

Applicant, sixmilebridgevineyards, LLC, filed an application seeking registration on the Principal Register of the standard character mark **APPARITION** for “wine.”²

Opposer, Bogle Vineyards, Inc., opposes registration of Applicant’s mark based on likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d). In support, Opposer claims ownership of registrations for the standard character marks **PHANTOM** for “alcoholic beverages except beer,”³ and **PHANTOM HILL** for “wine,”⁴ and alleges common law rights since May 2002 in the term **PHANTOM**.⁵

² Application Serial No. 88870814, filed April 14, 2020, based on a bona fide intention to use the mark in commerce, under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

³ Registration No. 6066919 issued on June 2, 2020; maintained. A status-and-title copy of the registration was submitted with Opposer’s notice of opposition. *See* 1 TTABVUE 7.

⁴ Registration No. 2704241 issued on April 8, 2003; renewed. The subject mark is in “typed form.” “Prior to November 2, 2003, ‘standard character’ drawings were known as ‘typed’ drawings. The mark on a typed drawing page had to be typed entirely in capital letters. A typed drawing is the legal equivalent of a standard character drawing.” *See* TRADEMARK MANUAL OF EXAMINING PROCEDURE § 807.03(i) (May 2025).

Registration No. 2704241 was not pleaded by Opposer in the Notice of Opposition; instead, a status-and-title copy of the registration was submitted with Opposer Notice of Reliance. *See* 13 TTABVUE 53-54. However, Applicant has not objected to Opposer’s reliance on the unpleaded registration and, in fact, addresses it in its brief. *See* 32 TTABVUE 5. Therefore, we find that the rights provided by the registration were tried with Applicant’s implied consent and we deem the opposition amended to include Opposer’s claim of ownership of this registration. *See* Fed. R. Civ. P. 15(b)(2); Trademark Rule 2.107(a), 37 C.F.R. § 2.107(a).

Opposer also provided status-and-title copies of Registration No. 4737396 for the standard character mark **PHANTOM** for “wine” (*see* 1 TTABVUE 9) and Registration No. 5251511 for the standard character mark **SEA PHANTOM** for “alcoholic beverages except beers” (*see* 13 TTABVUE 51-52). However, the submitted printout concerning Registration No. 4737396 indicates that the registration is “dead” (i.e. cancelled) and Opposer states that Registration No. 5251511 has “lapsed” (*see* Opposer’s Main Brief, 31 TTABVUE 7), which is consistent with current USPTO records showing that the registration was cancelled. *See Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, Can. No. 92051006, 2014 TTAB LEXIS 95, at *3 n.4 (TTAB 2014) (taking judicial notice of changes in title and status of pleaded and proven registrations); TBMP § 704.03(b)(1)(A). We therefore give these registrations no consideration. *See Time Warner Entm’t Co. v. Jones*, Opp. No. 91112409, 2002 TTAB LEXIS 462, at *4 n.6 (TTAB 2002).

⁵ *See* 1 TTABVUE 3, Par. 1.

Applicant's answer denies most of the salient allegations asserted in the notice of opposition, admitting only that "Opposer has made significant investments to advertise and promote Opposer's Marks in interstate commerce."⁶

The case is fully briefed.⁷ For the reasons explained below, the opposition is **dismissed**.

I. The Record

The record includes the pleadings, the submissions of the parties during their respective trial periods, and, by rule, Applicant's involved application file. *See* Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1). Although we do not list the contents of the record, it has been reviewed and considered in its entirety. *See Quiktrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 1036 (Fed. Cir. 2021) ("We have held 'on multiple occasions that failure to explicitly discuss every issue or every piece of evidence does not alone establish that the tribunal did not consider it.'" (quoting *Novartis AG v. Torrent Pharms. Ltd.*, 853 F.3d 1316, 1328 (Fed. Cir. 2017))); *In re Miracle Tuesday LLC*, 695 F.3d 1339, 1348 (Fed. Cir. 2012) ("[T]he mere fact that the Board did not recite all of the evidence it considered does not mean the evidence was not, in fact, reviewed." (citing *Plant Genetic Sys., N.V. v. Dekalb Genetics Corp.*, 315 F.3d 1335, 1343 (Fed. Cir. 2003))).

⁶ Applicant's Answer, 4 TTABVUE 3, Par. 4. Applicant's answer also asserted a number of affirmative defenses, but did not argue any of them in its brief. Accordingly, all of the defenses are waived. *See, e.g., Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, Can. No. 92050879, 2013 TTAB LEXIS 347, at *5 n.6 (TTAB 2013), *aff'd mem.*, 565 F. App'x 900 (Fed. Cir. 2014).

⁷ Opposer's Main Brief, 31 TTABVUE; Applicant's Brief, 32 TTABVUE; Opposer's Reply Brief, 33 TTABVUE.

II. Evidentiary Objections

During the trial period, Opposer moved to strike portions of Applicant's declaration testimony and notice of reliance.⁸ Consistent with the Board's established policy of not reviewing trial testimony or evidence prior to deliberation on the final hearing, the Board deferred Opposer's objections in the motion to strike until final decision.⁹ *See, e.g., Genesco Inc. v. Martz*, Opp. No. 91121296, 2003 TTAB LEXIS 123, at *9 (TTAB 2003). In the same order, the Board advised that, "[i]f Opposer wants a determination on this objection at final decision, Opposer must maintain its objection in its brief on the case."¹⁰

However, Opposer did not raise the objections in its main brief and thus failed to maintain them. Therefore, Opposer's objections to Applicant's testimony and notice of reliance are waived. *See, e.g., Illyrian Import, Inc. v. ADOL Sh.p.k.*, Opp. No. 91234244, 2022 TTAB LEXIS 91, at *14 (TTAB 2022) (finding objection to deposition waived where the objection was not renewed in the trial brief); *UVeritech, Inc. v. Amax Lighting, Inc.*, Can. No. 92057088, 2015 TTAB LEXIS 242, at *2 n.3 (TTAB 2015) (finding various objections asserted during testimony were not maintained in brief and thus were waived); TBMP § 707.04 ("[B]y failing to preserve [an] objection in its opening brief on the case, or in an appendix to the main brief on the case or in a separate statement of objections filed with the main brief on the case, a party may waive an objection that was seasonably raised at trial.").

⁸ Plaintiff's Motion to Strike, 24 TTABVUE.

⁹ 28 TTABVUE 3.

¹⁰ *Id.*

Although Opposer did reference the objections in its reply brief, we will not consider them now, as doing so would be unfair to Applicant, who is effectively foreclosed from responding to the objections. *See Kohler Co. v. Baldwin Hardware Corp.*, Can. No. 92041434, 2007 TTAB LEXIS 3, at *7 (TTAB 2007) (“Petitioner cannot be allowed to wait until its reply brief to maintain any objections; to allow this would effectively foreclose respondent from responding to the objections.”).

Regardless, the Board is capable of assessing the proper evidentiary weight to be accorded the testimony and evidence, taking into account any inherent limitations. *Inter IKEA Sys. B.V. v. Akea, LLC*, Opp. No. 91196527, 2014 TTAB LEXIS 166, at *4-5 (TTAB 2014); *see also Hangzhou Mengku Tech. Co. v. Shanghai Zhenglang Tech. Co.*, Opp. No. 91272143, 2024 TTAB LEXIS 575, at *9 (TTAB 2024) (“Administrative Trademark Judges are not lay jurors who might easily be misled, confused, or prejudiced by irrelevant or unreliable evidence.”). Accordingly, in our analysis below, we have cited any evidence we have credited, and we have given no weight to factual assertions that are not supported by evidence properly introduced into the record. *See Pierce-Arrow Soc’y v. Spintek Filtration, Inc.*, Opp. No. 91224343, 2019 TTAB LEXIS 388, at *9 (TTAB 2019).

III. Opposer’s Entitlement to a Statutory Cause of Action

Establishing an entitlement to a statutory cause of action is a threshold requirement in every inter partes case. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1373 (Fed. Cir. 2020). Thus, Opposer, as plaintiff in this opposition proceeding, must prove its entitlement to a statutory cause of action by a

preponderance of the evidence. *See, e.g., Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 TTAB LEXIS 228, at *8 (TTAB 2022).

To establish an entitlement to a statutory cause of action, Opposer must demonstrate that it has: (1) an interest falling within the zone of interests protected by the statute, and (2) a reasonable belief in damage proximately caused by the registration of the mark. *Curtin v. United Trademark Holdings, Inc.*, 137 F.4th 1359, 1367 (Fed. Cir. 2025) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-134 (2014)); *Corcamore*, 978 F.3d at 1304-07; *see also Made in Nature*, 2022 TTAB LEXIS 228, at *18.

Here, Opposer has submitted printouts from USPTO records showing the current status and title of Opposer’s claimed registrations.¹¹ These registrations form the basis of a likelihood-of-confusion claim that is not wholly without merit, and thus establish Opposer’s entitlement to oppose Applicant’s application. *N.Y. Yankees P’ship v. IET Prods. & Servs., Inc.*, Opp. No. 91189692, 2015 TTAB LEXIS 96, at *8 (TTAB 2015) (“Opposer’s standing is established with respect to its likelihood of confusion and dilution claims by its . . . registrations . . . which the record shows to be valid and subsisting, and owned by Opposer.”) (citing *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945 (Fed. Cir. 2000)); *see also Corcamore*, 978 F.3d at 1306.

In addition, Opposer’s Vice President of Marketing, Paul Englert, testified as to Opposer’s use of “its PHANTOM brand continuously since its debut in May of 2002

¹¹ Notice of Opposition, 1 TTABVUE 7; Opposer’s Notice of Reliance, 13 TTABVUE 7-9, 48-50, 53-54.

in conjunction with wine,”¹² which provides a separate basis for finding entitlement to its likelihood of confusion claim. See *Monster Energy Co. v. Lo*, Opp. No. 91225050, 2023 TTAB LEXIS 14, at *16 (finding entitlement based on common law use of mark alleged to be confusingly similar).

In reaching this finding, we reject Applicant’s argument that Opposer has not established its entitlement to a statutory cause of action because “virtually all of the *du Pont* Factors support Applicant’s proposed registration of the APPARITION mark, and Opposer’s evidence falls far short of substantiating that an objection to same is reasonable or appropriate.”¹³ In other words, Applicant is asserting that the evidence of record does not support a finding that Opposer has a reasonable belief that it would be damaged by registration of Applicant’s mark.

As Opposer points out, Applicant’s position appears to be that “only parties who ultimately prove a likelihood of confusion” can establish entitlement to a statutory cause of action.¹⁴ We agree with Opposer that this position is “contrary to law and good sense,”¹⁵ because it would require us to engage in the full likelihood-of-confusion analysis before determining Opposer’s entitlement to bring the likelihood-of-confusion claim.

The case law is clear that, to establish such entitlement, Opposer’s belief in damage “must have a reasonable basis in fact.” See *Curtin*, 137 F.4th at 1365 (quoting

¹² Opposer’s Testimony Declaration (Englert), 12 TTABVUE 3.

¹³ Applicant’s Brief, 32 TTABVUE 10.

¹⁴ Opposer’s Reply Brief, 33 TTABVUE 6.

¹⁵ *Id.*

Ritchie v. Simpson, 170 F.3d 1092, 1098 (Fed. Cir. 1999)). Here, Opposer's evidence of prior use and registrations for marks that are arguably similar, at least as to meaning, to Applicant's proposed mark, and cover goods that are legally identical to Applicant's goods, provide a reasonable basis in fact that Opposer may be damaged if Applicant's proposed mark were to register.

IV. Priority

Because Opposer's valid and subsisting registrations are properly of record and Applicant has not counterclaimed to cancel them, priority is not an issue for its claimed marks and goods identified therein. *Heil Co. v. Tripleye GmbH*, Opp. No. 91277359, 2024 TTAB LEXIS 494, at *44 (TTAB 2024) (citing *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1402-03 (CCPA 1974)); *Nkanginieme v. Appleton*, Opp. No. 91256464, 2023 TTAB LEXIS 64, at *4 (TTAB 2023) ("Opposer's registration removed priority as an issue.").

In addition, as mentioned above, Opposer has established priority of use since May 2002 based on its common law use of PHANTOM on wine. Applicant, on the other hand, has a constructive use date of April 14, 2020 (the filing date of its application), and has not offered testimony or evidence of use prior to that date. *See Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, Opp. No. 91263919, 2022 TTAB LEXIS 383, at *26 (TTAB 2022) (finding application filing date to be the earliest date on which applicant could rely for priority where there was no testimony to establish an earlier date) (citing *Miss Universe, Inc. v. Drost*, Opp. No. 91055151, 1975 TTAB LEXIS 180, at *3 (TTAB 1975)).

V. Likelihood of Confusion

We now turn to Opposer's likelihood-of-confusion claim. Trademark Act Section 2(d), in relevant part, prohibits registration of a mark that "so resembles a mark registered in the Patent and Trademark Office . . . as to be likely, when used on or in connection with the goods of the applicant, to cause confusion." 15 U.S.C. § 1052(d). Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham*, 222 F.3d at 951. To determine whether confusion is likely, we analyze all probative evidence relevant to the factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) ("*DuPont*"). See *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003).

In every Section 2(d) case, two key *DuPont* factors are the similarity or dissimilarity of the marks and the relatedness of the respective goods, 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." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976). Here, we have considered these *DuPont* factors, as well as any other factors that are relevant and for which there is evidence and argument of record. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 1356 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 1205 (Fed. Cir. 1993) ("[T]he various evidentiary factors may play more or less weighty roles in any particular determination."). Ultimately, however, "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, 1199 (CCPA 1973).

A. Opposer’s Pleaded Common Law Use of PHANTOM

In support of its pleaded common law rights in the mark PHANTOM, Opposer has submitted testimony from its VP of Marketing that Opposer “has used its PHANTOM brand continuously since its debut in May of 2002 in conjunction with wine” and its “wines are sold both in consumer-facing stores, such grocery and liquor stores, and in its tasting room.”¹⁶ Opposer also submitted excerpts from its website, showing the PHANTOM mark in use on wine¹⁷ and listing awards that PHANTOM-branded wines have won.¹⁸

Applicant has not submitted any evidence that would undermine Opposer’s claims as to its common law rights and, in fact, acknowledges that Opposer sells its wines “through retail facilities”¹⁹ and that “Opposer has made significant investments to advertise and promote Opposer’s Marks in interstate commerce.”²⁰ That said, based on the relatively little evidence before us, we view Opposer’s common

¹⁶ Opposer’s Testimony Declaration (Englert), 12 TTABVUE 3.

¹⁷ Opposer’s Notice of Reliance, 13 TTABVUE 46. This website excerpt does not include the date of access or publication, as required by Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2). Nonetheless, Applicant has not objected to its submission and Applicant’s brief lists the website excerpt as part of Opposer’s evidence. *See* 31 TTABVUE 6. Therefore, we have considered the excerpt for whatever probative value it may have. *See Fancy Pants Prods.*, 2022 TTAB LEXIS 383, at *29 n.26 (waiving procedural shortcomings of website documents where they were not timely raised).

¹⁸ *Id.* at 11.

¹⁹ Applicant’s Brief, 32 TTABVUE 8, 12.

²⁰ Applicant’s Answer, 4 TTABVUE 3, Par. 4.

law rights in the mark PHANTOM for wine as essentially coextensive with the presumed rights under Opposer's claimed prior Registration No. 6066919 for PHANTOM, which covers "alcoholic beverages, except beer." In other words, whatever rights Opposer seeks to establish by claiming common law use are already encompassed by the presumptions afforded to Opposer through its registration. Indeed, the only potentially meaningful detail established by Opposer's claimed common law use of the PHANTOM mark is that it dates back to May 2002, which we have considered to the extent it is pertinent to the *DuPont* factors discussed below.

B. Opposer's Pleaded Registration

Opposer has pleaded ownership of both Registration No. 6066919 for PHANTOM, which covers "alcoholic beverages, except beer," and claimed ownership of Registration No. 2704241 for PHANTOM HILL, which covers "wine." However, we focus our analysis on Registration No. 6066919, because, of the two registered marks, PHANTOM has fewer differences as compared to Applicant's mark. Therefore, if we do not find a likelihood of confusion with respect to the mark PHANTOM, then there would be no likelihood of confusion as to the mark PHANTOM HILL. *See, e.g., Sock It To Me, Inc. v. Fan*, Opp. No. 91230554, 2020 TTAB LEXIS 201, at *20-21 (TTAB 2020) (confining Section 2(d) analysis to most similar pleaded mark) (citing *N. Face Apparel Corp. v. Sanyang Indus. Co.*, Opp. No. 91187593, 2015 TTAB LEXIS 328, at *20-21 (TTAB 2015)).

C. Relatedness of the Goods

We begin with the second *DuPont* factor, which concerns the similarity or dissimilarity and nature of the respective goods. *DuPont*, 476 F.2d at 1361. In

determining the relatedness of the goods, we look to the goods as identified in Applicant's application and the goods listed in Opposer's registration. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990)).

It is sufficient that the goods are related in some manner, or that the conditions and activities surrounding their marketing 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. v. Triumph Learning LLC*, 668 F.3d 1356, 1396 (Fed. Cir. 2012); *7-Eleven, Inc. v. Wechsler*, Opp. No. 91117739, 2007 TTAB LEXIS 58, at *18 (TTAB 2007). The issue is not whether consumers would confuse Applicant's goods with Opposer's goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L'Oreal S.A. v. Marcon*, Opp. No. 91184456, 2012 TTAB LEXIS 77, at *16 (TTAB 2012); *In re Rexel Inc.*, Ser. No. 73241423, 1984 TTAB LEXIS 57, at *2 (TTAB 1984).

Here, Applicant's goods are "wine," in International Class 33, and Opposer's goods are "alcoholic beverages, except beer," in International Class 33.

The wording "alcoholic beverages, except beer" in Opposer's registration is broad enough to encompass Applicant's more specifically identified "wine."²¹ Thus,

²¹ "Wine" is defined as "the alcoholic usually fermented juice of a plant product (such as a fruit) used as a beverage." MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/wine> (accessed on August 21, 2025). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed form or regular fixed editions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, Opp. No.

Applicant's and Opposer's goods are legally identical. *In re Solid State Design Inc.*, Ser. No. 87269041, 2018 TTAB LEXIS 1, at *16 (TTAB 2018) (noting that, 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); *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, Proc. No. 94002242, 2015 TTAB LEXIS 176, at *60-61 (TTAB 2015) (same). We therefore reject Applicant's argument that, because Applicant offers a different type of wine than Opposer, the respective goods are not identical.²²

With respect to Opposer's common law rights, Opposer's testimony declaration establishes common law use of PHANTOM in connection with "wine."²³ Because Applicant's identification of "wine" is unrestricted and thus encompasses all types of wine, we need not address the specific wines with which Opposer has used the mark. These goods too are legally identical.

In view of our finding that the respective goods are legally identical, the second *DuPont* factor weighs in favor of finding a likelihood of confusion.

D. Similarity of Trade Channels

Next, we consider established, likely-to-continue channels of trade, the third *DuPont* factor. *DuPont*, 476 F.2d at 1361. Because the goods identified in

91061847, 1982 TTAB LEXIS 146, at *7 (TTAB 1982), *aff'd*, 703 F.2d 1372 (Fed. Cir. 1983); *In re Red Bull GmbH*, Ser. No. 75788830, 2006 TTAB LEXIS 136, at *7 (TTAB 2006); TBMP § 1208.04.

²² See Applicant's Brief, 32 TTABVUE 11-12 (arguing that "[t]he goods identified in Applicants application are not identical to any of Opposer's goods," because "Opposer's PHANTOM red wine is not a Bordeaux blend and on information and belief consists of 43% Petite Sirah, 44% Zinfandel, 10% Merlot and 2% Cabernet Sauvignon").

²³ 12 TTABVUE 3.

Opposer's registration and Applicant's application are legally identical and the identifications have no restrictions as to channels of trade or classes of consumers, we presume that the relevant trade channels and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (finding Board entitled to presume that trade channels and classes of purchasers were the same where the respective goods were identical); *In re Am. Cruise Lines, Inc.*, Ser. No. 87940022, 2018 TTAB LEXIS 363, at *5 (TTAB 2018); *In re Inn at St. John's, LLC*, Ser. No. 87075988, 2018 TTAB LEXIS 170, at *6 (TTAB 2018), *aff'd*, 777 Fed. Appx. 516 (Fed. Cir. 2019). Therefore, Applicant's arguments that its goods are sold "direct to consumers through tasting room sales and internet sales" rather than through "liquor stores or grocery stores," like Opposer's goods,²⁴ are unavailing.

Turning to common law rights, an opposer relying on such rights must establish the relevant trade channels and classes of consumers through evidence. *See, e.g., Bell's Brewery, Inc. v. Innovation Brewing*, Opp. No. 91215896, 2017 TTABVUE 452, at *12 (TTAB 2017) (indicating that no presumptions attach to an unregistered common law mark). Here, Opposer submitted testimony that is PHANTOM "wines are sold both in consumer-facing stores, such grocery and liquor stores, and in its tasting room."²⁵ Because the trade channels are unrestricted for Applicant's wines, they include the same grocery and liquor stores, and tasting rooms.

²⁴ *Id.* at 12.

²⁵ Opposer's Testimony Declaration (Englert), 12 TTABVUE 3.

The third *DuPont* factor therefore also weighs in favor of a finding of likelihood of confusion.

E. Strength of Opposer’s PHANTOM Mark

Before we compare the marks at issue, we consider the strength or weakness of Opposer’s PHANTOM mark as used in connection with “alcoholic beverages, except beer,” because it affects the mark’s scope of protection. *See Made in Nature*, 2022 TTAB LEXIS 228, at *23-24 (quoting *DuPont*, 476 F.2d at 1361); *In re Morinaga Nyugyo K.K.*, Ser. No. 86338392, 2016 TTAB LEXIS 448, at *17-18 (2016) (“[T]he strength of the cited mark is—as always—relevant to assessing the likelihood of confusion under the *du Pont* framework.”). “A well-known mark enjoys an appropriately wider latitude of legal protection, for similar marks tend to be more readily confused with a mark that is already known to the public.” *Opryland USA Inc. v. Great Am. Music Show, Inc.*, 970 F.2d 847, 851 (Fed. Cir. 1992) (citation omitted).

When evaluating the strength or weakness of a mark, we look at the mark’s inherent conceptual strength based on the nature of the term itself and its commercial strength in the marketplace. *See Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) (“Two of the *DuPont* factors (the fifth and sixth) consider strength. The fifth *DuPont* factor, ‘[t]he fame of the prior mark (sales, advertising, length of use),’ is a measure of the mark’s strength in the marketplace. . . . There are two prongs of analysis for a mark’s strength under the sixth factor: conceptual strength and commercial strength.” (internal citations omitted)); *In re Chippendales*

USA, Inc., 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) (measuring both conceptual and marketplace strength); *Made in Nature*, 2022 TTAB LEXIS 228, at *24.

The fifth *DuPont* factor enables an opposer to prove that its pleaded mark is entitled to an expanded scope of protection by adducing evidence of the fame of the prior mark (sales, advertising, length of use). *Spireon*, 71 F.4th at 1362. By contrast, the sixth *DuPont* factor allows an applicant to argue that confusion is less likely by adducing evidence of conceptual and commercial weakness. *Id.*

1. The Sixth *DuPont* Factor

We first consider the conceptual strength of Opposer's PHANTOM mark under the sixth *DuPont* factor. Conceptual strength, or inherent strength, is a measure of a mark's distinctiveness and may be placed "in categories of generally increasing distinctiveness: . . . (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful." *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992). Marks in the latter three categories are considered inherently distinctive. *See Chippendales*, 622 F.3d at 1351.

Because Opposer's PHANTOM mark issued on the Principal Register without a claim of acquired distinctiveness, the mark is presumed to be inherently distinctive as to the goods listed in the registration. 15 U.S.C. § 1057(b); *Tea Bd. of India v. Republic of Tea, Inc.*, Opp. No. 9118587, 2006 TTAB LEXIS 330, at *62 (TTAB 2006) ("A mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods.").

Based on the dictionary evidence of record, PHANTOM is a known word with no descriptive significance as applied to Opposer's goods. Accordingly, we find that Opposer's common law PHANTOM mark is arbitrary and thus inherently distinctive. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1372 (Fed. Cir. 2005) (indicating that an arbitrary term is "conceptually strong as a trademark"); *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1340 (Fed. Cir. 2004) ("[A]n arbitrary mark is a known word used in an unexpected or uncommon way.").

However, the U.S. Court of Appeals for the Federal Circuit has held that if there is evidence that a mark, or an element of a mark, is commonly adopted by many different registrants, that may indicate that the mark or common element has some conceptual weakness as an indicator of a single source. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1374 (Fed. Cir. 2015) ("[E]vidence of third-party registrations is relevant to 'show the sense in which a mark is used in ordinary parlance,' . . . that is, some segment that is common to both parties' marks may have 'a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that segment is relatively weak.'") (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015)).

In this case, Applicant argues that "there is a plethora of similar marks in the wine space,"²⁶ and has made of record status-and-title copies of four active, use-based,

²⁶ Applicant's Brief, 32 TTABVue 9 n.9.

third-party registrations for the marks GRAY GHOST, WRAITH, SILVER SPIRIT, and WIGHT VINEYARD, each of which covers “wine” in International Class 33.²⁷

At best, this evidence shows that there are at least four existing registrations (other than Opposer’s registration) for marks that could be perceived as connoting the concept of a ghost. None of these registrations include the word PHANTOM, however. Thus, this evidence falls short of establishing that PHANTOM is conceptually weak in view of other marks on the trademark register.

Moving on to our assessment of the commercial strength of Opposer’s mark under the sixth *DuPont* factor, we consider the number and nature of similar marks in use on similar goods. *DuPont*, 476 F.2d at 1361; see *Primrose Ret. Cmty., LLC v. Edward Rose Senior Living, LLC*, Opp. No. 91217095, 2016 TTAB LEXIS 604, at *11 (TTAB 2016). If the evidence establishes that the consuming public is exposed to widespread third-party use of similar marks for similar goods, it “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay*, 396 F.3d at 1373.

Here, Applicant has introduced evidence of third-party wines being sold under the following names:²⁸

- PHANTOM RIVERS
- GHOST
- GHOST BLOCK
- GHOST HULL
- GHOST HOUSE
- OLD GHOST
- STOKES’ GHOST
- VILLAGE GHOST

²⁷ Applicant’s Notice of Reliance, 23 TTABVUE 11-24.

²⁸ *Id.* at 56-151.

- SILVER GHOST
- GHOST IN THE MACHINE
- FANTOME
- APPARITION
- SPECTRE
- GHOST HORSE
- GHOST VINE
- THE GHOST OF AUTUMN
- MILES WINE CELLARS
- GHOST WHITE
- HUNDRED ACRE
- VINEYARD WRAITH

Based on these examples, it appears that GHOST is a popular term in the naming of wines. However, Opposer's mark is PHANTOM, not GHOST, and these examples do not show that PHANTOM is so widely used in connection with wine that it could be considered relatively weak and thus entitled to a narrower scope of protection. Indeed, only two of the examples above could be considered close to Opposer's mark: PHANTOM RIVERS and FANTOME. And at least one of these marks, PHANTOM RIVERS, arguably creates a different commercial impression than Opposer's mark.

In sum, Applicant's evidence of third-party registrations and third-party marketplace use does not support a finding that Opposer's PHANTOM mark is entitled to a narrower scope of protection. *See In re Charger Ventures LLC*, 64 F.4th 1375, 1383 (Fed. Cir. 2022) (agreeing with Board that one third-party registration and about twenty-four third-party uses of a SPARK-formative mark were insufficient to limit scope of protection); *Sabhnani v. Mirage Brands, LLC*, Can. No. 92068086, 2021 TTAB LEXIS 46, at *32-33 (TTAB 2021) (finding evidence of one third-party use and six third-party registrations to be insufficient); *Inn at St. John's*, 2018 TTAB LEXIS 170, at *12 (noting that a few third-party registrations and no third-party uses

were “a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant” in *Jack Wolfskin* and *Juice Generation*).

The sixth *DuPont* factor is therefore neutral in our analysis.

2. Fifth *DuPont* Factor

Opposer argues that its PHANTOM mark “is well-known and well-regarded among the wine-consuming general public,”²⁹ invoking the fifth *DuPont* factor concerning “[t]he fame of the prior mark.” *DuPont*, 476 F.3d at 1361. The fame or commercial strength of a mark is relevant to the likelihood-of-confusion analysis because, “[a] mark with extensive public recognition and renown deserves and receives more legal protection than an obscure or weak mark.” *Omaha Steaks Int’l, Inc. v Greater Omaha Packing Co.*, 908 F.3d 1315, 1319 (Fed. Cir. 2018) (quoting *Kenner Parker Toys Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 353 (Fed. Cir. 1992)). Such strength rests on the extent to which “a significant portion of the relevant consuming public . . . recognizes the mark as a source indicator.” *Joseph Phelps Vineyards Holdings, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 1324-25 (Fed. Cir. 2017) (citing *Palm Bay* 396 F.3d at 1374-75). In this context, the commercial strength of a mark is not a binary factor, but instead “varies along a spectrum from very strong to very weak.” *Joseph Phelps Vineyards*, 857 F.3d at 1325 (quoting *Palm Bay*, 396 F.3d at 1374-75).

In assessing commercial strength or fame, we may consider not only direct evidence, such as consumer surveys or declarations, but also indirect evidence,

²⁹ Opposer’s Main Brief, 31 TTABVUE 15.

including the volume of sales and advertising expenditures in connection with the identified goods sold under the mark; the length of time the mark has been in use; widespread critical assessments; notice by independent sources of the goods offered under the marks; and the general reputation of the goods. *Weider Publ'ns, LLC v. D & D Beauty Care Co.*, No. 91199352, 2014 TTAB LEXIS 2, at *18-19 (TTAB 2014); *see also Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 1371 (Fed. Cir. 2002) (recognizing indirect evidence as appropriate proof of strength).

As the party asserting that its mark is famous, Opposer must clearly prove it. *Coach Servs.*, 668 F.3d at 1367 (citing *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, No. 91160856, 2007 TTAB LEXIS 35, at *12 (TTAB 2007)). To that end, Opposer makes the following claims, primarily supported by the testimony declaration of its VP of Marketing, to establish that its PHANTOM mark has achieved a “moderate level of fame”:³⁰

- “[Opposer] has grown to the 13th largest winery in the United States, producing 2.7 million cases of wine in 2022.”³¹
- “PHANTOM has been continuously used for over twenty years.”³²

³⁰ Opposer’s Reply Brief, 33 TTABVUE 9.

³¹ Opposer’s Testimony Declaration (Englert), 12 TTABVUE 41; *see also* Opposer’s Notice of Reliance, 13 TTABVUE 36-38 (excerpt from the February 2023 issue of WINE BUSINESS MONTHLY, listing the 50 largest U.S. wineries by case sales).

³² Opposer’s Main Brief, 31 TTABVUE 15; *see also* Opposer’s Testimony Declaration (Englert), 12 TTABVUE 3 (“[Opposer] has used its PHANTOM brand continuously since its debut in May of 2002 in conjunction with wine.”).

- “[Opposer’s] wines are sold both in consumer-facing stores, such as grocery and liquor stores, and in its tasting room.”³³
- “In the United States alone, the PHANTOM brand has earned 47 medals, 17 awards, and 22 scores over 90 points.”³⁴
- “The red blend version of PHANTOM [wine] is known by over 86% of relevant US consumers, and the chardonnay version . . . is known by over 90% of the same.”³⁵

On their face, these claims indicate that Opposer’s winery has a large market presence in the wine industry and has produced a substantial amount of wine; that Opposer offers its wine in various types of retail locations and has used the PHANTOM mark on wine for a relatively long period of time; and that Opposer’s PHANTOM-branded wine has garnered industry awards and achieved high levels of consumer recognition.

However, while Mr. Englert has testified that Opposer’s PHANTOM mark has been used for over twenty years, the record does not contain much in the way of examples of such use during that relatively long period that would allow us to make a determination as to the impact of that use on the mark’s fame. And while Applicant has admitted that “Opposer has made significant investments to advertise and

³³ Opposer’s Testimony Declaration (Englert), 12 TTABVUE 3.

³⁴ Opposer’s Main Brief, 31 TTABVUE 15; *see also* Opposer’s Testimony Declaration (Englert), 12 TTABVUE 3.

³⁵ Opposer’s Main Brief, 31 TTABVUE 15; *see also* Opposer’s Testimony Declaration (Englert), 12 TTABVUE 3.

promote Opposer's Marks in interstate commerce,"³⁶ the record does not contain any specific information as to sales volume and advertising expenditures relating to PHANTOM-branded wine. *See New Era Cap v. Pro Era*, Opp. No. 91216455, 2020 TTAB LEXIS 199, at *32 (finding that lack of specific sales and expenditures data for the U.S. market diminished the probative value of the sales/expenditures evidence that was provided). In addition, Opposer asserts in its main brief that its "PHANTOM brand is sold in every state in the United States in liquor stores, wine shops, [and] grocery stores,"³⁷ but there is no evidence or testimony of record to support the assertion.³⁸ *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (indicating that attorney argument is no substitute for evidence).

Further, while Opposer's claimed consumer recognition levels, based on Opposer's "most recent brand study for PHANTOM,"³⁹ are superficially impressive, we do not have any details as to how Opposer arrived at these numbers. The record does not contain a copy of the brand study, nor has Opposer explained the methodology for its study, including the number and nature of the study's participants or the questions asked of them. Thus, Opposer's consumer recognition claims are entitled to little

³⁶ Applicant's Answer, 4 TTABVUE 4.

³⁷ Opposer's Main Brief, 31 TTABVUE 15.

³⁸ Opposer's VP of Marketing testified that Opposer "sells its wines in 40 countries worldwide, and specifically sells its PHANTOM brand in 30 non-US jurisdictions" and that Opposer's "wines are sold both in consumer-facing stores, such as grocery and liquor stores, and in its tasting room." Opposer's Testimony Declaration (Englert), 12 TTABVUE 3. However, this testimony did not provide any specific information as to how and where its PHANTOM-branded wine is sold in the U.S.

³⁹ *Id.* at 4.

weight. *Cf. ProMark Brands, Inc. v. GFA Brands, Inc.*, Opp. No. 91194974, 2015 TTAB LEXIS 67, at *46 (TTAB 2015) (finding consumer recognition studies inconclusive on the question of fame because the evidence of record did not provide sufficient information as to the methodology of the studies).

Lastly, the record is generally lacking the type of evidence that would otherwise indirectly support a finding that Opposer's mark enjoys wide recognition among the relevant consumers, such as evidence of advertisements over the duration of the mark's use; promotional activities in various forms of media in connection with the mark; and unsolicited media coverage of the goods sold under the mark. *Cf. Palm Bay*, 396 F.3d at 1375-76 (finding VEUVE CLICQUOT famous among purchasers of champagne and sparkling wine based upon sale in 8,000 restaurants nationwide, and in liquor stores, wine shops and other retail establishments; extensive promotional campaign consisting of print advertisements in general interest magazines and in wine specialty magazines, radio ads, point-of-sale displays, wine tastings; and unsolicited media coverage in publications including the *New York Times*, *Boston Globe*, and *Money Magazine*).

Based on this record, we find that, while PHANTOM may have some degree of recognition among wine purchasers, Opposer has not met its burden of proving that the mark has achieved such a level of fame that is entitled to a broader scope of protection under the fifth *DuPont* factor. Therefore, this factor is neutral in our analysis.

F. Comparison of the Marks

We turn now to the first *DuPont* factor, which focuses on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay*, 396 F.3d at 1371 (quoting *DuPont*, 476 F.2d at 1361). Similarity as to any one of these elements may be sufficient to support a finding that the marks are confusingly similar. *See Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 732 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”); *Inn at St. John’s*, 2018 TTAB LEXIS 170, at *13.

In assessing the similarity of the marks, “[t]he proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *In re i.am.symbolic*, 866 F.3d 1315, 1324 (Fed. Cir. 2017) (quoting *Coach Servs.*, 668 F.3d at 1368 (internal quotation marks 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 Box Sols. Corp.*, Ser. No. 76267086, 2006 TTAB LEXIS 176, at *14 (TTAB 2006).

All elements of the respective marks must be considered. *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985). However, “there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.” *Id.*

Here, Applicant's mark is **APPARITION** in standard characters and Opposer's mark is **PHANTOM**, also in standard characters. While the record contains some evidence of how Opposer's mark is actually used in commerce (*see, e.g.*, Opposer's Notice of Reliance, 13 TTABVUE 46), it is not clear that this evidence was submitted in support of Opposer's common law rights in the mark. In any event, the stylized version of the mark depicted in this evidence is encompassed by the standard character claim set forth in Opposer's registration for PHANTOM. *See* Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a) (indicating that standard character claims are for registration of "words, letters, numbers, or any combination thereof without claim to any particular font style, size, or color"). Accordingly, our findings as to Opposer's registered PHANTOM mark also apply to its common law PHANTOM mark.

Opposer does not argue that the respective marks are similar in terms of sound and appearance,⁴⁰ and asserts only that the marks "are identical in connotation and commercial impression."⁴¹ Specifically, Opposer contends that "[p]hantoms are apparitions, and apparitions are phantoms," and "[s]ince the average consumer purchasing wine will only retain a general recollection of the commercial impression of each mark, namely, that of a frightening supernatural being (a phantom/apparition), brand confusion is likely."⁴²

⁴⁰ *See* Opposer's Main Brief, 31 TTABVUE 12 (admitting that "the marks differ in sound (different phonemes and different number of syllables)" and presenting no arguments concerning similarity of appearance).

⁴¹ *Id.* at 13-14.

⁴² *Id.* 14.

For its part, Applicant counters that “[t]he APPARITION mark and the PHANTOM mark are not in any way similar as to appearance, sound, connotation, or commercial impression.”⁴³ In particular, Applicant argues that “Apparition means primarily an act of becoming visible or available” and that the term also “might mean an appearance of an unnatural entity, but this meaning is secondary” and “usually refers not to the unnatural entity itself, but rather to its image becoming visible.”⁴⁴

The record includes dictionary evidence defining “apparition” as “an unusual or unexpected sight : PHENOMENON,” “a ghostly figure,” or “the act of becoming visible : APPEARANCE,”⁴⁵ and “phantom” as, *inter alia*, “something apparent to sense but with no substantial existence : APPARITION,”⁴⁶ “something (as a ghost) that seems to be there but is not real : APPARITION,”⁴⁷ “something elusive or visionary,” “an object of continual dread or abhorrence,” or “a representation of something abstract, ideal, or incorporeal.”⁴⁸

Based on this evidence, we agree with Opposer that the terms in the respective marks are synonyms, in at least one sense of each term. And we acknowledge that similarity in connotation or commercial impression alone may be sufficient to find marks confusingly similar, despite differences in sound and appearance. *See Procter*

⁴³ Applicant’s Brief, 32 TTABVUE 11.

⁴⁴ *Id.*

⁴⁵ Applicant’s Notice of Reliance, 23 TTABVUE 152 (definition of “apparition” from www.merriam-webster.com).

⁴⁶ Opposer’s Notice of Reliance, 13 TTABVUE 15 (definition of “phantom” from www.merriam-webster.com).

⁴⁷ *Id.* at 20 (definition of “phantom” from www.merriam-webster.com).

⁴⁸ *Id.* at 15 (definition of “phantom” from www.merriam-webster.com).

& Gamble Co. v. Conway, 419 F.2d 1332, 1336 (CCPA 1970) (MISTER STAIN confusingly similar to MISTER CLEAN); *In re M. Serman & Co., Inc.*, Ser. No. 73348680, 1984 TTAB LEXIS 74, at *3 (TTAB 1984) (CITY WOMAN confusingly similar to CITY GIRL); *Andrew Jergens Co. v. Sween Corp.*, Opp. No. 91068874, 1986 TTAB LEXIS 129, at *4 (TTAB 1986) (KIND TOUCH confusingly similar to GENTLE TOUCH); *Gastown Inc. v. Gas City, Ltd.*, Opp. No. 91054551, 195 TTAB LEXIS 95, at *10 (TTAB 1975) (GAS CITY confusingly similar to GASTOWN); *Watercare Corp. v. Midwesco-Enter., Inc.*, 1971 TTAB LEXIS 204, at *17 (TTAB 1971) (AQUA-CARE confusingly similar to WATERCARE) (no number in original).

On the other hand, similarity between marks in one respect, e.g., connotation, does not automatically result in a finding of likelihood of confusion even if, as here, the parties' goods are legally identical. Rather, whatever "similarity . . . there is in connotation must be weighed against the dissimilarity in appearance, sound, and all other factors, before reaching a conclusion on likelihood of confusion as to source." *In re Sarkli, Ltd.*, 721 F.2d 353, 354 (Fed. Cir. 1983) (citing *Sure-Fit Prods. Co. v. Saltzon Drapery Co.*, 254 F.2d 158, 160 (CCPA 1958)).

With that in mind, we note that, unlike the marks in the cases cited above, APPARITION and PHANTOM are completely different words that otherwise share no similarities as to sound or appearance. Indeed, they are both common, familiar words that are easily distinguishable from one another because they start with different letters, are formed by a different number of syllables, and have no terms, or even syllables, in common. *C.f., e.g., Lever Bros. Co. v. Babson Bros. Co.*, 197 F.2d

531, 534 (CCPA 1952) (“We think the words ‘Surge’ and ‘Surf’ considered in their entireties do not look alike or sound alike. While the first three letters of each word are alike, there is quite a difference between the final letters ‘f’ and ‘ge,’ so much so as to make the words as a whole distinctively different in sound, pronunciation, and appearance.”).

Further, as a general matter, two synonyms may each have their own additional, different meanings.⁴⁹ In this case, “phantom” may be synonymous with “apparition” in one sense, but it could also refer to “something elusive or visionary,” “an object of continual dread or abhorrence” or to “something abstract, or ideal, or incorporeal.” And, as Applicant notes, “apparition” can refer to “the act of becoming visible.” Given that “phantom” and “apparition” each have additional meanings that differ from their shared meaning, the two terms could stimulate different mental reactions in the minds of the relevant consumers when the terms are applied to wine, thus engendering different commercial impressions overall.

Accordingly, while we must presume that the relevant consumers will retain a general rather than specific recollection of trademarks, *see Box Sols.*, 2006 TTAB LEXIS 176, at *14, we conclude that consumers here are likely to differentiate between PHANTOM and APPARITION in view of their differences in sound, appearance, and overall commercial impression. *See Lever Bros.*, 197 F.2d at 534

⁴⁹ A “synonym” is “one of two or more words or expressions of the same language that have the same or nearly the same meaning **in some** or all senses.” MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/synonym> (accessed on August 20, 2025) (emphasis added).

(indicating that a common meaning between the terms SURF and SURGE is not controlling because the differences in sound and appearance between the terms outweigh whatever significance consumers might attach to the meaning of the terms, “notwithstanding that one of the six dictionary definitions of the word ‘surge’ is similar to the definition of the word ‘surf’”).

The first *DuPont* factor thus weighs heavily against a finding of likelihood of confusion.

G. Purchasing Conditions and Sophistication of Purchasers

Under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 476 F.2d at 1361.

With respect to the pleaded registration, our analysis is based on the goods as they are identified in the registration and application. *See Stone Lion*, 746 at F.3d 1324. Here, the respective identifications of goods identify legally identical goods and include no restrictions as to the relevant purchasers or purchasing conditions. And, as Opposer points out,⁵⁰ we may not impose limitations on the identifications based on purported real-word conditions or other extrinsic evidence of actual use. *See id.*; *In re Embiid*, Ser. No. 88202890, 2021 TTAB LEXIS 168, at *37-38 (TTAB 2021). Therefore, we must presume that the parties’ goods could encompass inexpensive or moderately-priced wine, in addition to expensive wine. We must also presume that the relevant consumers could include both the general wine-purchasing public, who

⁵⁰ Opposer’s Reply Brief, 33 TTABVUE 8.

may exercise on only ordinary care in their purchasing decisions, and sophisticated purchasers who may exercise heightened discernment when buying wine. *See In re Aquitaine Wine USA, LLC*, Ser. No. 86928469, 2018 TTAB LEXIS 108, at *29 (TTAB 2018) (“Wine purchasers are not necessarily sophisticated or careful in making their purchasing decisions, and where, as here, the goods are identified without any limitations as to trade channels, classes of consumers or conditions of sale, we must presume that Applicant’s and Registrant’s wine encompasses inexpensive or moderately-priced wine.”); *In re Bercut-Vandervoort & Co.*, Ser. No. 73448806, 1986 TTAB LEXIS 124, at *7-8 (TTAB 1986) (rejecting consumer sophistication arguments where the goods were identified as “wine”).

With respect to Opposer’s common law use, Opposer’s evidence does not specifically address purchasing conditions or consumer sophistication. Applicant contends that it “sell[s] to sophisticated wine buyers who are willing to pay over \$60 for a bottle of wine,” while “Opposer’s sales of its PHANTOM wines typically retail for less than \$20 per bottle.”⁵¹ However, Applicant’s evidence of Opposer’s sales conditions or the sophistication of its customers cannot serve to reduce the likelihood of confusion because Applicant’s unrestricted application must be read to include those sales conditions and customers.

We find the fourth *DuPont* factor to be neutral.

⁵¹ Applicant’s Brief, 32 TTABVUE 9.

H. Actual Confusion

The seventh and eighth *DuPont* factors relate, respectively, to the nature and extent of any actual confusion and the extent of the opportunity for actual confusion. *See DuPont*, 476 F.2d at 1361. These “factors are interrelated; the absence of evidence of actual confusion, under the seventh *DuPont* factor, by itself is entitled to little weight in our likelihood of confusion analysis unless there also is evidence, under the eighth *DuPont* factor, that there has been a significant opportunity for actual confusion to have occurred.” *Keystone Consol. Indus. v. Franklin Inv. Corp.*, Can. No. 92066927, 2024 TTAB LEXIS 290, at *75-76 (TTAB 2024) (citing *In re Cont’l Graphics Corp.*, Ser. No. 75033628, 1999 TTAB LEXIS 500, at *9 (TTAB 1999); *Gillette Can. Inc. v. Ranir Corp.*, Opp. No. 91082769, 1992 TTAB LEXIS 24, at *19 (TTAB 1992)).

Applicant asserts that it “is not aware of, and has not been made aware of, any incident of actual confusion between the APPARITION mark and the PHANTOM mark.”⁵² Opposer, in turn, asserts, correctly, that a showing of actual confusion is not necessary to find that there is a likelihood of confusion.⁵³ *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1309 (Fed. Cir. 2018).

Opposer also argues that there is nothing in the record to indicate that there has been a reasonable opportunity for confusion to have occurred.⁵⁴ We agree. In fact, Applicant indicates that it made only limited use of its mark when, in 2021, its licensee “marketed the APPARITION product primarily through one release to its

⁵² Applicant’s Brief, 32 TTABVUE 11.

⁵³ Opposer’s Reply Brief, 33 TTABVUE 9.

⁵⁴ *Id.* at 9-10.

membership which at the time . . . did not exceed one hundred and fifty people.”⁵⁵ In view of such minimal use of the mark, we cannot say that there has been a significant opportunity for confusion to have occurred and thus cannot find that the absence of actual confusion here is legally significant. *See, e.g., Keystone*, 2024 TTAB LEXIS 290, at *78-79 (“Because of the more limited nature of Respondent’s activities . . ., we find the evidence of concurrent use based on actual market conditions does not indicate a significant opportunity for confusion to occur.”); *In re Guild Mortg.*, Ser. No. 86709944, 2020 TTAB LEXIS 17, at *25 (TTAB 2020) (“[T]here is a lack of evidence that in the actual marketplace, the same consumers have been exposed to both marks for the respective services, such that we could make a finding as to the ‘length of time during and conditions under which there has been concurrent use without evidence of actual confusion.’”); *Time Warner*, 2002 TTAB LEXIS 462, at *35-36 (finding that, despite thirteen years of concurrent use of the parties’ marks, “we cannot conclude that applicant’s sales and advertising . . . have been so substantial that the absence of actual confusion is surprising or legally significant”).

Therefore, we treat the seventh and eighth *DuPont* factors as neutral. *See In re Davey Prods. Pty*, Ser. No. 77029776, 2009 TTAB LEXIS 524, at *22-25 (TTAB 2009).

VI. Conclusion

With respect to Opposer’s pleaded registration, having reviewed all of the evidence and arguments as they apply to the relevant *DuPont* factors, we find that the parties’

⁵⁵ Applicant’s Brief, 32 TTABVUE 12. Applicant’s application is based on an intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b). The asserted use occurred after the filing date of the application.

respective goods, as identified in Opposer's registration and Applicant's application, are legally identical under the second *DuPont* factor, and thus the identified goods are presumed to be sold through the same trade channels and encountered by the same classes of consumers. With respect to Opposer's common law rights, because Applicant's goods, trade channels and classes of purchasers are unrestricted, they overlap with Opposer's goods, trade channels, and classes of purchasers.

However, we also find that the differences between the marks in sound, appearance, and overall commercial impression outweigh any similarity in connotation. And all other relevant *DuPont* factors are neutral.

On balance, with respect to both Opposer's registration and its common law rights, we find that the first *DuPont* factor outweighs the second and third. *See Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375 (Fed. Cir. 1998) (“[O]ne *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks.”).

Accordingly, Opposer has failed to satisfy its burden to show, by a preponderance of the evidence, that confusion as to source is likely. *See Boston Red Sox Baseball Club LP v. Sherman*, Opp. No. 91172268, 2008 TTAB LEXIS 67, at *29 (TTAB 2008) (“In appropriate cases, a single du Pont factor may be dispositive of the likelihood of confusion analysis.”) (citing *Champagne Louis Roederer*, 148 F.3d at 1375; *Kellogg Co. v. Pack’Em Enters.*, Opp. No. 91080586, 1990 TTAB LEXIS 3, at *15 (TTAB 1990), *aff’d*, 951 F.2d 330 (Fed. Cir. 1991)).

Decision: The opposition to registration of Applicant's **APPARITION** mark based on Trademark Act Section 2(d) is **dismissed**.