

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: April 11, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Katharine Lee Streeter
v.
GuideOn Education Consulting LLC
—

Cancellation No. 92077751
—

Cynthia J. Lee, Andrea P. Nguyen, and Joseph W. Staley
of Perilla Knox & Hildebrandt LLP,
for Katharine Lee Streeter.

Thomas P. Gulick, Lois B. Duquette, Diane H. Dobrea
of McNees Wallace & Nurick LLC,
for GuideOn Education Consulting LLC.

—
Before Zervas, Heasley, and Thurmon,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Petitioner, Katharine Lee Streeter, owns a Principal Register registration for the mark GUIDEON, in standard characters, for “Computer application software for smartphone operating systems, namely, software for a directory of listings with

corresponding location primarily on military installations,” in International Class 9.¹

Respondent, GuideOn Education Consulting LLC, owns a Principal Register registration for the mark GUIDEON, in standard characters, for:

Business project management services; marketing plan development; providing marketing consulting in the field of social media; public relations; providing online employment information to veterans, military families, community organizations, and educational institutions in the field of careers, recruitment, job resources and listings, resumes for veteran and military families; providing employment counseling information on how to successfully transition jobs for veterans and military families, in International Class 35;

and

Educational services, namely, providing information to veterans, military families, community organizations and educational institutions in the fields of education and employment training for veteran and military families; Education services, namely, providing mentoring, classes, seminars and workshops in the fields of educational development, employment, and transition to civilian status for personnel who have served or who are serving in the armed forces, and family members of such personnel; educational services, namely, conducting education advisement programs in the field of educational counseling concerning education options to pursue career opportunities for personnel who have served or who are serving in the armed forces, and family members of such personnel; providing career counseling, namely, providing advice concerning education options to pursue career opportunities for personnel who have served or who are serving in the armed forces, and family members of such personnel, in International Class 41.²

Petitioner petitions to cancel Respondent’s registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the basis of likelihood of confusion with her

¹ Application Ser. No. 86403260, filed on Sept. 23, 2014, matured into Registration No. 4734882, issued May 12, 2015, claiming August 2, 2014 as its date of first use and August 17, 2014 as its date of first use in commerce.

² Application Ser. No. 88872630, filed on April 15, 2020, matured into Reg. No. 6304352, issued on March 30, 2021, claiming November 2018 as its date of first use anywhere and in commerce.

registered GUIDEON mark.³ In its Answer, Respondent denies the salient allegations of the petition for Cancellation.⁴ Both parties have briefed the case.⁵

On consideration of all of the parties' arguments and evidence, in light of the applicable law, the Petition for Cancellation is granted in part and denied in part.

I. Entitlement and Priority

"Under § 14 of the Lanham Act, a cancellation challenge may be filed 'by any person who believes that he is or will be damaged . . . by the registration of a mark.' § 1064." *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 1072 (Fed. Cir. 2022).⁶ "The statutory requirements to cancel registration of a mark under § 1064 are substantively equivalent to those required to oppose registration under § 1063. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1306 n.2 (Fed. Cir. 2020)." *Luca McDermott Catena Gift Trust v. Fructuoso-Hobbs SL*, 102 F.4th 1314, 1321n. 1 (Fed.

³ Petition for Cancellation, 1 TTABVUE. Citations to the briefs and other materials in the record refer to the Board's TTABVUE online docket system.

⁴ Respondent also asserted one affirmative defense maintaining that, "Petitioner is not entitled to any of the requested relief because use of Registrant's mark will not be likely, when used in connection with the goods of the Registrant, to cause confusion, or mistake or to deceive consumers as to the affiliation, connection or association of Registrant with Petitioner, or as to the origin, sponsorship or approval of Registrant's goods by Petitioner." Answer, 4 TTABVUE 4. The Board found that this was a permissible amplification of Respondent's denial of likelihood of confusion, TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 311.02(d) (2024), and denied Petitioner's motion to strike this defense. Order, 16 TTABVUE 3.

⁵ Petitioner's main brief 71-72 TTABVUE (public and confidential), Respondent's brief, 75-76 TTABVUE (public and confidential), and Petitioner's reply brief, 77-78 TTABVUE (public and confidential).

⁶ As part of an ongoing pilot, this opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion cites to the Westlaw (WL) legal database and cites only precedential decisions, unless otherwise noted. Practitioners should also adhere to the practice set forth in TBMP § 101.03(a).

Cir. 2024). “A party in the position of plaintiff may seek to cancel registration of a mark where such cancellation is within the zone of interests protected by the statute, and the party has a reasonable belief in damage that is proximately caused by registration of the mark.” *Look Cycle Int’l v. Kunshan Qiyue Outdoor Sports Goods Co., Ltd.*, 2024 WL 3739358, *3 (TTAB 2024) (citing *Corcamore*, 978 F.3d at 1303-05).

Here, the record includes a status and title copy of Petitioner’s pleaded registration showing Petitioner’s ownership of an active registration, supporting a plausible likelihood of confusion claim.⁷ In view thereof, Petitioner’s entitlement to a statutory cause of action to cancel Respondent’s registration is established. *Id.* (citing *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945 (Fed. Cir. 2000)).

“In a cancellation proceeding such as this one where both parties own registrations, priority is in issue.” *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 WL 4877349, *5 (TTAB 2019). Petitioner must prove that she has a priority interest in her mark, and that interest was obtained prior to either the filing date of Respondent’s underlying application for its registration or its date of first use. *Sabhnani v. Mirage Brands, LLC*, 2021 WL 6072822, *7 (TTAB 2021). As Respondent admits in the pleadings, Petitioner’s September 23, 2014 filing date precedes Respondent’s April 15, 2020 filing date, as well as Respondent’s November 2018 claimed date of first use and use in commerce.⁸ Petitioner’s priority is established.

⁷ 1 TTABVUE 9-13; 47 TTABVUE 4-14; Streeter declaration ¶ 2, 47 TTABVUE 517-18 (*see also* substituted Streeter declaration at 58 TTABVUE 7-31).

⁸ Petition for Cancellation ¶¶ 3, 7 & ex 1, 1 TTABVUE 5-6, 9-13; Answer ¶¶ 3, 7, 4 TTABVUE 3. Respondent’s brief, 76 TTABVUE 20. *See also* Streeter dep. 5:12-14, 69 TTABVUE 9, 73 TTABVUE 9 (launched app in September 2014).

II. The Record and Evidentiary Issues

The Board has reviewed all the evidence of record, and presumes the parties' familiarity therewith.⁹ *See Quiktrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 1036 (Fed. Cir. 2021) (Board not obliged to expressly discuss every piece of evidence); *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.”) *See Plant Genetic Sys., N.V. v. DeKalb Genetics Corp.*, 315 F.3d 1335, 1343 (Fed.Cir.2003) (“We presume that a fact finder reviews all the evidence presented unless he explicitly expresses otherwise.”). The entire record has been carefully considered, and relevant evidence is discussed throughout this opinion.

Petitioner objects to certain portions of Respondent's record evidence. She objects that Respondent's Internet evidence lacks foundation, has not been properly authenticated, and constitutes inadmissible hearsay; that Respondent's printed publications lack foundation and constitute inadmissible hearsay; that certain evidence is irrelevant; and that certain interrogatory answers are unverified.¹⁰

Respondent argues that the Board should disregard or limit the weight of certain evidence proffered by Petitioner: evidence claiming use of Petitioner's mark on services, rather than its goods; emails and reports from third parties; Petitioner's

⁹ *See* Petitioner's main brief, 71 TTABVUE 7, and Respondent's brief, 75 TTABVUE 13-14.

¹⁰ Petitioner's main brief, 71 TTABVUE 55-58.

Google search results for GUIDEON; figures relating to the number of downloads of Petitioner's app; Internet articles purporting to relate to the relatedness, vel non of Petitioner's goods and Respondent's services; declaration testimony not based on personal knowledge; Petitioner's testimony regarding her plans for future expansion; analytics proffered without proper foundation; improperly introduced discovery deposition evidence; improper introduction of Appendix B, a chart of third-party registrations, to Petitioner's main brief; compilations of evidence without proper authentication and foundation; and miscellaneous incomplete or unauthenticated documents.¹¹

Each party has responded to the other's objections and motions to exclude.¹²

We remind the parties:

Because a cancellation proceeding is akin to a bench trial, the Board is capable of assessing the proper evidentiary weight to be accorded the testimony and evidence, taking into account the imperfections surrounding the admissibility of such testimony and evidence. As necessary and appropriate, we will point out any limitations in the evidence or otherwise note that we cannot rely on the evidence in the manner sought. We have considered all of the testimony and evidence introduced into the record. In doing so, we have kept in mind the various objections the parties have raised and we have accorded whatever probative value the subject testimony and evidence merit. *See Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1479 (TTAB 2017); *U.S. Playing Card Co. v. Harbro, LLC*, 81 USPQ2d 1542, 1540 (TTAB 2006); *Poly-America, L.P. v. Ill. Tool Works Inc.*, 124 USPQ2d 1508, 1510 (TTAB 2017) (where the objections refer to probative value rather than admissibility and the evidence that is subject to the objections is not outcome determinative, "we choose not to make specific rulings on each and every objection").

Peterson v. Awshucks SC, LLC, 2020 WL 7888976, *4 (TTAB 2020).

¹¹ Respondent's brief, 75 TTABVUE 54-73.

¹² Petitioner's reply brief, 28-64; Respondent's brief, 74-77.

III. Likelihood of Confusion

“[A] basic function of trademark law has always been to prohibi[t] confusion as to the source of good or services.” *Vidal v. Elster*, 602 U.S. 286, 300 (2024) (internal punctuation omitted). *See also Jack Daniel's Properties, Inc. v. VIP Products LLC*, 599 U.S. 140, 147 (2023) (“Confusion as to source is the *bête noire* of trademark law—the thing that stands directly opposed to the law’s twin goals of facilitating consumers’ choice and protecting producers’ good will.”).

Consistent with that purpose, the Trademark Act provides that a mark’s registration may be cancelled if it:

[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....

15 U.S.C. §§ 1052(d), 1064.

To determine whether there is a likelihood of confusion between marks under Section 2(d), we analyze the evidence and arguments under the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (the “*DuPont* factors”) *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 144 (2015). “Whether a likelihood of confusion exists is aided by application of the thirteen *DuPont* factors.” *Bullshine Distillery LLC v. Sazerac Brands, LLC*, 130 F.4th 1025, 1031 (Fed. Cir. 2025) (internal punctuation omitted). Only relevant *DuPont* factors of record must be considered. *Dollar Fin. Grp., Inc. v. Brittex Fin., Inc.*, __F.4th __, 2025 WL 850653, *4 (Fed. Cir. 2025); *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).

To prevail on its Section 2(d) claim, Petitioner must prove likelihood of confusion by a preponderance of the evidence. *Look Cycle*, 2024 WL 3739358, at *4. We consider each class in Respondent’s multi-class registration separately to determine whether Petitioner has shown a likelihood of confusion with respect to each. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1101-02 (CCPA 1976); *N. Face Apparel Corp. v. Sanyang Indus. Co.*, 2015 WL 6467820, *11 (TTAB 2015).

A. Petitioner’s Goods and Respondent’s Services

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration....” *DuPont*, 476 F.2d at 1361. “The second *DuPont* factor ‘considers whether the consuming public may perceive the respective goods or services of the parties as related enough to cause confusion about the source or origin of the goods or services.’ *Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 2024 USPQ2d 293 at *2 (Fed. Cir. 2024) (quoting *In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014) (cleaned up) (citation omitted)).” *Heil Co. v. Tripleye GmbH*, 2024 WL 4925901, *32 (TTAB 2024).

Petitioner’s goods, once again, are “Computer application software for smartphone operating systems, namely, software for a directory of listings with corresponding location primarily on military installations.”

Respondent’s services, on the other hand, are:

Business project management services; marketing plan development; providing marketing consulting in the field of social media; public relations; providing online employment information to veterans, military families, community organizations, and educational institutions in the field of careers, recruitment, job resources and listings, resumes for veteran and military families; providing employment counseling

information on how to successfully transition jobs for veterans and military families, in Class 35;

and

Educational services, namely, providing information to veterans, military families, community organizations and educational institutions in the fields of education and employment training for veteran and military families; Education services, namely, providing mentoring, classes, seminars and workshops in the fields of educational development, employment, and transition to civilian status for personnel who have served or who are serving in the armed forces, and family members of such personnel; educational services, namely, conducting education advisement programs in the field of educational counseling concerning education options to pursue career opportunities for personnel who have served or who are serving in the armed forces, and family members of such personnel; providing career counseling, namely, providing advice concerning education options to pursue career opportunities for personnel who have served or who are serving in the armed forces, and family members of such personnel, in Class 41.

Earlier in this cancellation proceeding, when the Board denied Petitioner's motion for summary judgment, we noted that "Petitioner has not met her burden demonstrating that no genuine dispute of material fact exists, at a minimum, as to the similarity of the parties' respective goods and services," and that Petitioner improperly relied on extrinsic evidence of her use of the mark that did not include the goods identified in her pleaded registration.¹³ When Petitioner moved for reconsideration of that Order, the Board emphasized that the Petition pleaded a Section 2(d) claim based on Petitioner's registration, not on common law rights, and that the time for amending the pleadings to add a new claim had passed.¹⁴ Now, in her main brief, Petitioner acknowledges the Board's ruling on the gravamen of her

¹³ Order denying motion for summary judgment, 27 TTABVUE 10-11.

¹⁴ Order denying request for reconsideration, 36 TTABVUE 2-5.

pleaded claim under Section 2(d), and states “Petitioner hereby focuses its Trial Brief on demonstrating that Petitioner’s prior rights in the GUIDEON mark for the goods in its prior Registration, are highly related to the services recited in Respondent’s registration....”¹⁵

Petitioner’s arguments, however, continue to extrapolate the range of her goods well beyond those identified in her registration. We remind Petitioner that “Our precedent requires the Board to look to the registration to determine the scope of the goods/services covered by the contested mark. ... Proceedings before the Board are concerned with registrability and not use of a mark. Accordingly, the identification of goods/services statement in the registration[s], not the goods/services actually used by the registrant[s], frames the issue.” *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 948 (Fed. Cir. 2000).

As we compare Petitioner’s goods with Respondent’s services, we consider each Class in Respondent’s multi-class registration separately to determine whether Petitioner has shown a likelihood of confusion. “In a multi-class registration, each class stands on its own as it would if it were in a separate registration.” *In re Detroit Athl. Co.*, 2021 WL 2285576, *5 n. 13 (TTAB 2017). As we do so, we bear in mind that “because the marks are identical, the degree of similarity between the goods or services required for confusion to be likely declines.” *In re Country Oven, Inc.*, 2019 WL 6170483, *2 (TTAB 2013).¹⁶

¹⁵ Petitioner’s main brief, 71 TTABVUE 8-9.

¹⁶ Petitioner argues that, given the identical nature of the marks, she need only show a “viable relationship” between the parties’ goods and services. 72 TTABVUE 29. The Federal Circuit has never expressly endorsed that standard, and has instead adhered to the statutory

Respondent contends that Petitioner’s “computer application software for smartphone operating systems, namely, software for a directory of listings with corresponding location primarily on military installations” is just a map app: “As much as Petitioner may argue it is something else, or wants it to be something else, it is a smartphone map application.”¹⁷ According to Petitioner’s marketing materials, “GuideOn is a free smartphone application used to navigate on military installations.”¹⁸ In a contract with an independent contractor, for example, Petitioner (acting through her wholly-owned limited liability company, GA OneDot Solutions, LLC, now named OneDot Solutions, LLC) claims to own and operate “GuideOn Military, a smart phone navigational application for use on military installations....”¹⁹ Google Play describes Petitioner’s app as follows:

Find where you need go, get directions, contact information, informative websites, social media links, and military community relevant content with GuideOn. Search by Bldg. # of keyword for locations, resources, units, graduations and more on and around military installations.²⁰

According to Respondent:

In Petitioner’s own chosen words, the proffered free smartphone map app “allows users to search locations on and around certain military

standard of likelihood of confusion. *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1363n. 3 (Fed. Cir. 2022). We shall do the same.

¹⁷ Respondent’s brief, 76 TTABVUE 9. “We take judicial notice that a mobile application is also known as an ‘app,’ which is ‘typically a small, specialized program downloaded onto mobile devices.’ Dictionary.com, Unabridged Random House, Inc., (www.dictionary.com, accessed on December 6, 2017).” *In re Solid State Design Inc.*, 2018 WL 287909, *6 n.12 (TTAB 2018).

¹⁸ 51 TTABVUE 80.

¹⁹ 47 TTABVUE 74. Streeter decl. ¶6, 47 TTABVUE 518-19, 51 TTABVUE 4-5, 100. Streeter dep. 10:10-19, 63 TTABVUE 95, 6:13-15, 70 TTABVUE 10 (Streeter owns OneDot).

²⁰ Google Play “About this app,” 70 TTABVUE 126.

installations by building number or keywords. GuideOn then provides users information about their selected location along with the ability to start hands free turn by turn directions to their selected destination. Users can browse location listings in GuideOn by categories and save frequently visited locations as favorites.”²¹

Respondent further points out that on Google Play and the Apple App Store, Petitioner categorizes her app under “Travel and Local,” and “Navigation.” “Such admissions by Petitioner show her GUIDEON product is a smartphone map app and nothing more,” Respondent concludes.²²

Petitioner demurs, noting that “Nowhere in the evidence cited by Respondent does Petitioner use the term ‘map app’ to describe the GuideOn app.”²³ In fact, Petitioner points out, its users state that Petitioner’s GUIDEON app should be used in conjunction with map apps such as Waze, Google Maps or Apple Maps, so “[i]f Petitioner’s Goods were merely a map app, then why would it need to use other mapping apps?”²⁴

Focusing on her identification of goods, as she should, Petitioner notes that “Petitioner’s Goods do not recite ‘listings that are limited to location’, or ‘listings only including location’, but instead recite ‘listings with corresponding location primarily on military installations’.”²⁵ We agree that this distinction makes a difference, as the

²¹ Respondent’s brief, 76 TTABVUE 10; *see* Android description of app, 70 TTABVUE 131; Google Play description of app, 51 TTABVUE 138, 492.

²² Respondent’s brief, 76 TTABVUE 30.

²³ Petitioner’s reply brief, 78 TTABVUE 10.

²⁴ Petitioner’s reply brief, 78 TTABVUE 10; *see* 51 TTABVUE 259 (using Waze with GuideOn).

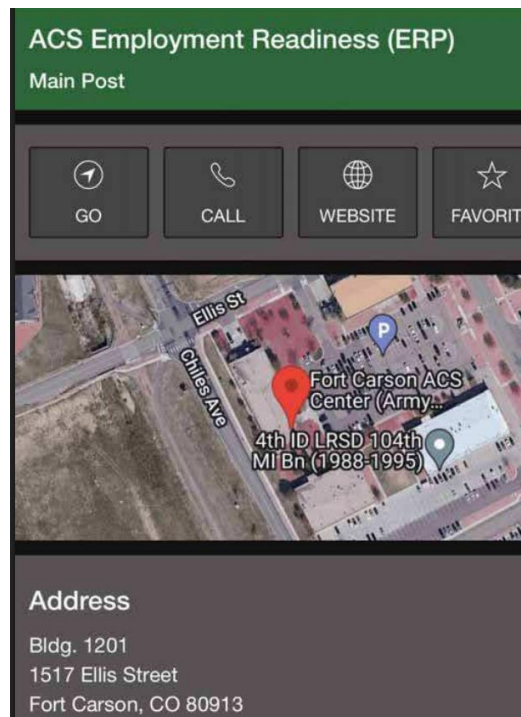
²⁵ Petitioner’s reply brief, 78 TTABVUE 11.

“listings” in Petitioner’s identification of goods can lead to more than a location on a map.

Petitioner explains that:

The “listings with corresponding location” in the GuideOn Platform often provide a corresponding physical location ... but also often provide much more than that, such as providing an online/website location for further information from or about the listing, which either opens directly in the GuideOn Platform or in the device’s browser In addition to providing links to online/website locations, the listings may also provide information directly about the listing and has cultivated third party sources of information about the listing ..., including social media links for the various listings....²⁶

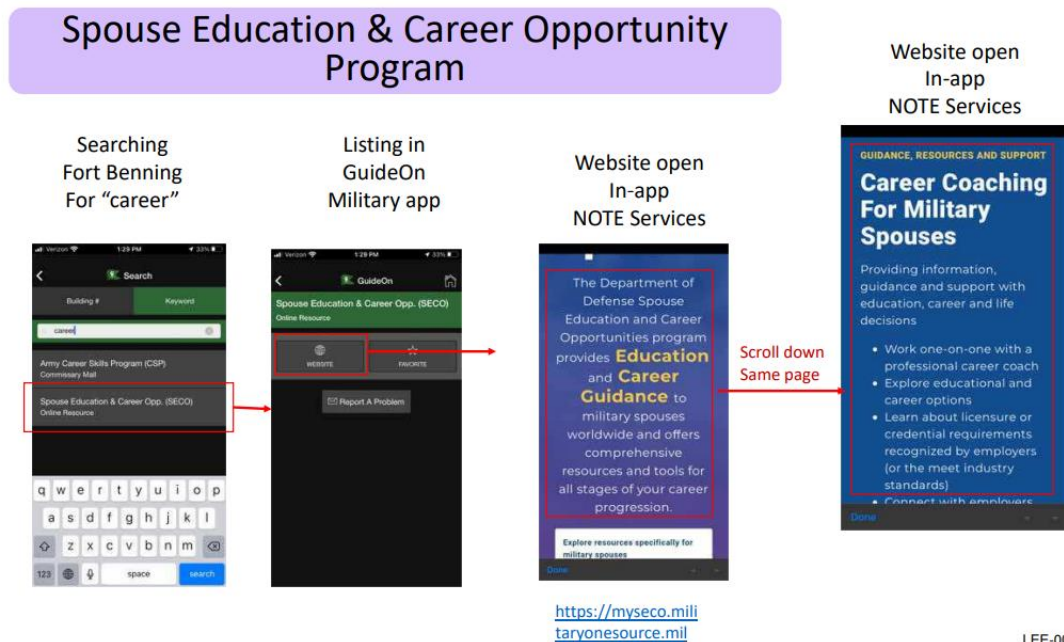
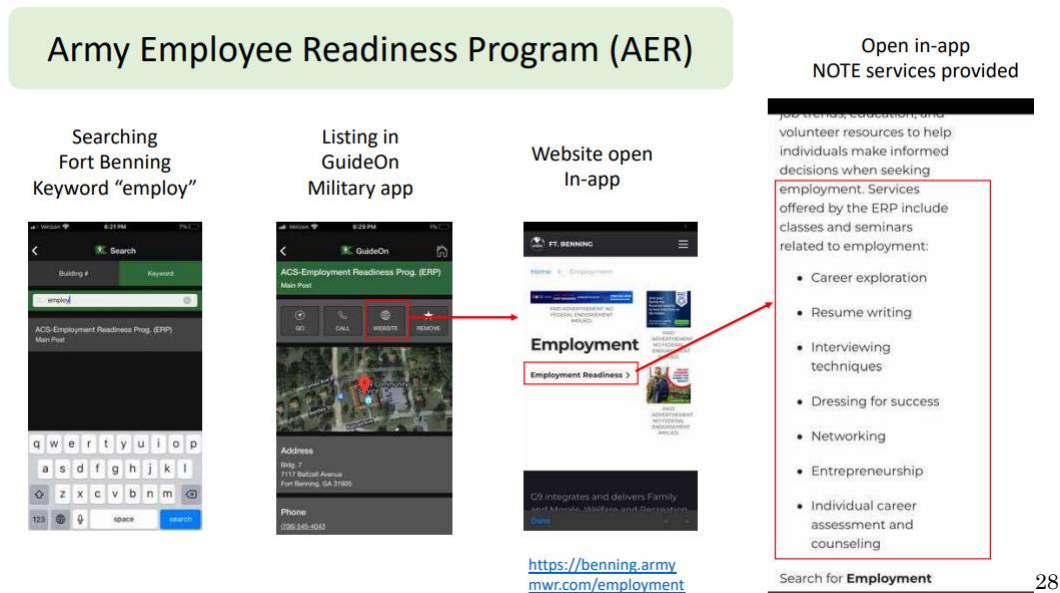
For example, Petitioner’s application lists map locations:



²⁶ Petitioner’s main brief, 72 TTABVUE 12 (internal citations omitted); Streeter decl. ¶¶ 15-17, 47 TTABVUE 522-23.

²⁷ 47 TTABVUE 155; 51 TTABVUE 202, 225.

But the listings also lead to website locations providing information about the services provided there, as Petitioner demonstrates with the following diagrams:



²⁸ 47 TTABVUE 149, 166, 178; 51 TTABVUE 196.

²⁹ 47 TTABVUE 152, 181; 51 TTABVUE 199, 228.



³⁰ 47 TTABVue 153, 182; 51 TTABVue 200, 229.

³⁰ 47 TTABVue 153, 182; 51 TTABVue 200, 229.

a directory of listings with corresponding location primarily on military installations” encompasses Respondent’s Class 35 services of “**providing online employment information** to veterans, military families, community organizations, and educational institutions in the field of careers, recruitment, **job resources and listings....**” (Emphasis added.) “It is sufficient for a finding of likelihood of confusion if relatedness is established for any one of the identified goods or services within the class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981).” *DowntownDC Business Improvement District v. Clarke*, 2024 WL 4449409, *21 (TTAB 2024). We find accordingly that Petitioner’s identified goods are related to Respondent’s Class 35 services.

The same cannot be said of Respondent’s educational services in Class 41. That Class comprehends such services as “employment training,” “mentoring, classes, seminars and workshops,” “educational counseling,” and “career counseling.” Petitioner claims her app links its users to such services:

Specifically, as can be seen in the various screenshots, the GuideOn Platform, through its listings, **connects its users with various amenities, services, and resources, including educational centers, career skills centers, transition assistance programs, counseling centers, job placement centers, training areas**, restaurants, visitor centers, religious services, and events.³¹

Even though **not specifically recited in Petitioner’s registration** for GUIDEON, the foregoing **services are integral with the offering of the GuideOn** Platform and its functionality and efficacy, such as the

³¹ Petitioner’s main brief, 72 TTABVUE 12 (emphasis added).

services of consulting to and provision of information about educational and career opportunities to the military-connected community.³²

Petitioner's app may provide online listings about such services, but Petitioner does not provide those services. As Respondent rightly responds:

While Petitioner would like to claim that she provides information on such activities as job placement, the only “information” that Petitioner can fairly claim is information that may include the website, links, identities, addresses, phone numbers and directions to get to the entities listed on her app, not the goods and services and related information that those linked entities are offering. ... The goods and services and related information that linked entities are offering do not impute to the Petitioner.³³

Petitioner does not offer the services that may be found at the places that her map app links to. If such conflation were to be entertained, the result would be to grant no less than a trademark in gross to Petitioner – expanding the scope of Petitioner's registration for GUIDEON to religious services, dry cleaning, or restaurant services – all businesses whose address and contact information are linked on the GUIDEON software app.³⁴

We agree. The third parties that Petitioner's app lists are not her “related companies”; they are not persons “whose use of a mark is controlled by the owner of the mark with respect to the nature and quality of the goods or services on or in connection with which the mark is used.” 15 U.S.C. § 1127. Petitioner does not control the nature or quality of their goods or services, and has no licensing agreement with them. *Cf. Sock It To Me, Inc. v. Aiping Fan*, 2020 WL 3027605, *4-5 (TTAB 2020) (a

³² Petitioner's main brief, 72 TTABVUE 21 (emphasis added); Streeter dep. 98:21-107:4, 60 TTABVUE 52-54 (app links to job placement services, among other third parties).

³³ Respondent's brief, 76 TTABVUE 36.

³⁴ Respondent's brief, 76 TTABVUE 31.

licensee is a related company whose use of a mark inures to the licensor's benefit).

Thus, the services the third parties provide do not inure to Petitioner's benefit.

Petitioner retreats in her reply brief, stating that:

Petitioner is not conflating its use of the GUIDEON mark with the businesses of the listings provided in Petitioner's Goods. The various services cited by Respondent (religious, dry cleaning, restaurant services) are part of the many businesses provided in the listings of Petitioner's Goods ..., but Petitioner is not claiming anywhere in her claims or in the record to offer these services in connection with Petitioner's Goods. Petitioner does, however, in providing the listings of the GuideOn app, perform the services set forth in each class of Respondent's Services.³⁵

We disagree. Petitioner does not perform services such as "employment training," "mentoring, classes, seminars and workshops," "educational counseling," and "career counseling."

Petitioner argues that "Respondent's recited services involve the use of technology that is similar to Petitioner's software application." "Thus, because Petitioner's goods are of the type that would be used together by consumers with Respondent's services, this demonstrates the relatedness of the parties' goods and services."³⁶ Respondent responds that "the use of a tool such as an online platform or form of social media or an item that might be listed in Petitioner's directory listing does not make the Petitioner's goods related to Registrant's Services. Such an analogy is too attenuated."³⁷ We agree with Respondent.

³⁵ Petitioner's reply brief, 78 TTABVUE 11.

³⁶ Petitioner's main brief, 72 TTABVUE 31-32.

³⁷ Respondent's brief, 76 TTABVUE 31.

“Given the ubiquitous use of computers in all aspects of business in the United States today, this Board and its reviewing Court have rejected the view that a relationship exists between goods and services simply because each involves the use of computers.” *Electronic Data Systems Corp. v. EDSA Micro Corp.*, 1992 WL 184671, *4 (TTAB 1992) *quoted in Micro Mobio Corp. v. General Motors, LLC*, 2021 WL 4735312, *4 (Fed. Cir. 2021). Petitioner’s app may lead its users to a multiplicity of diverse services performed by others, but so does any search engine. Petitioner’s trademark rights reside in its listings, not in the services to which they lead.

Petitioner asseverates that “[t]hird party evidence supports that Petitioner’s goods and Respondent’s services are related.”³⁸ We find that this evidence falls short.

Petitioner contends that she “has provided TSDR records for several third-party registrations, where third parties use the same mark both services that are similar to Respondent’s listed services and goods and/or services that are similar to Petitioner’s goods.”³⁹ However, eight of these third-party registrations have been cancelled.⁴⁰ “A cancelled or expired registration has no probative value other than to show that it once issued....” *Made in Nature v. Pharmavite*, 2022 WL 2188890, at *15.

³⁸ Petitioner’s main brief, 72 TTABVUE 34. Petitioner cites to a table of third-party registrations she labels “Appendix B,” appended to her brief. Petitioner’s main brief, 72 TTABVUE 35. Inclusion of that appendix would put Petitioner well over the 55 page limit on her main brief, imperiling the entire brief. *See* Trademark Rule 2.128(b), 37 C.F.R. § 2.128(b) (“a main brief on the case shall not exceed fifty-five pages in length in its entirety, including the table of contents, index of cases, description of the record, statement of the issues, recitation of the facts, argument, and summary”; an over-length brief “may not be considered by the Board.”). Rather than strike the entire brief, we give no consideration to the appendix, and consider only the third-party registrations in the record. 46 TTABVUE 7-165.

³⁹ Petitioner’s main brief, 72 TTABVUE 34.

⁴⁰ Reg. Nos. 4226232, 4222408, 5512905, 5921875, 5398438, 5441241, 5077348, 5010489.

Two were issued under the Paris Convention, with no proof of use in the United States. *Id.* at *14 (citing *In re 1st USA Realty Profs., Inc.*, 2007 WL 2315610, *2 (TTAB 2007) (“Because these registrations are not based on use in commerce they have no probative value in showing the relatedness of the services, and they have not been considered.”). Four of the third-party registrations do not identify the pertinent sort of directory services identified in Petitioner’s registration.⁴¹ *In re Thor Tech, Inc.*, 2015 WL 496133, *2 (TTAB 2015) (“[T]he following third-party registrations have no probative value in this case because the specially-designed trailers listed in the respective descriptions of goods are so different from recreational vehicles”). Thirteen identify such a diverse range of goods or services that they carry little or no weight in showing the relatedness of Petitioner’s Class 9 app to Respondent’s Class 41 educational services.⁴² *In re Princeton Tectonics, Inc.*, 2010 WL 2604976, *3 (TTAB 2010). (“The diversity of the goods identified in this registration diminishes the probative value in establishing that any two items identified in the registration are related.”). For example, the twelfth registration is for the old Twitter logo,



,⁴³ which identifies a multiplicity of varied, diverse goods and services in Classes 9, 16, 18, 21, 25, 35, 36, 38, 41, 42, and 45. And the thirteenth is for EXPEDIA

⁴¹ Reg. Nos. 5965731, 5097155, 6145029, and 6139584. See Board Order on Petitioner’s request for reconsideration, 36 TTABVUE 5 & n.5.

⁴² Reg. Nos. 4622815, 4367964, 6384870, 6437820, 6548688, 6732515, 5453741, 5481224, 6756705, 6756704, and 5404461. See Board Order on Petitioner’s request for reconsideration, 36 TTABVUE 6 & n.6.

⁴³ Reg. No. 5001027.

GROUP,⁴⁴ identifying a vast variety of goods and services in Classes 9, 35, 36, 39, 41, 42, and 43.

That leaves three possibly probative third-party registrations. The first⁴⁵ does not identify any app goods in Class 9 (Petitioner's Class). In Class 35, the pertinent services it recites are "providing an online searchable database featuring employment opportunities in the field of leadership studies; providing an online web directory service featuring hyperlinks to the websites of others in the field of leadership programs in higher education." And in Class 41, it recites *inter alia* "education services, namely, providing conferences in the field of leadership and leadership studies." The second and third, owned by the same registrant,⁴⁶ recite, in pertinent part, "Education services, namely, providing workshops, seminars, and conferences in the fields of natural products, organic, biodynamic, and other regenerative and restorative practices" in Class 41, and "Providing on-line trade directory services; Association services, namely, promoting natural products community and responsible business practices; Promoting economic development in the fields of natural products, organic, biodynamic and other regenerative and restorative practices; Providing on-line web directory services featuring hyperlinks to the websites of others" in Class 35.

These third-party registrations concern unrelated services: leadership studies and education services in the fields of natural products, organic, biodynamic, and other

⁴⁴ Reg. No. 6428611.

⁴⁵ Reg. No. 5583915.

⁴⁶ Reg. Nos. 5756689 and 5756690.

regenerative and restorative practices. They are too few in number to carry much probative value. *See Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 2015 WL 5316485, *13 (TTAB 2015) (six third-party registrations too few); *In re Donnay Int'l, Societe Anonyme*, 1994 WL 515456, *2 (TTAB 1994) (two third-party registrations not sufficient to establish that “it is the norm for companies to sell both [products] and to adopt a single product mark for both, or that customers would be aware of such a practice, such that they would assume that the products emanate from the same source if they were sold under the same or similar marks.”). And they do not compare Class 9 goods with Class 41 services. In sum, Petitioner’s third-party registration evidence does not support her position that the parties’ respective goods and services are of a type that emanate from a single source.

Petitioner’s third-party website evidence fares no better. As Respondent notes, “[i]t is difficult to discern what Petitioner is arguing regarding the relevance of third-party websites, however, it is simple to determine that the websites fall short of evidencing any relatedness of Petitioner’s goods and Registrant’s Services.”⁴⁷ We agree. Petitioner’s third-party website evidence consists in the main of Government sites—websites such as MilitaryOneSource.mil, an official Defense Department website; the Veterans Benefits Administration; USAF Connect U.S. Air Force, The Official app of the United States Air Force; and USAJOBS.GOV⁴⁸—all of which cover a diffuse array of topics and services, and none of which pertain to this proceeding.

⁴⁷ Respondent’s brief, 76 TTABVUE 32.

⁴⁸ 48 TTABVUE 83-224.

These government sites are different in kind, offering comprehensive services to their service members, not specified goods and services offered by private concerns like Petitioner and Respondent. Petitioner cites a few private entities, such as Indeed.com, which helps jobseekers, including veterans, post their resumes to employers,⁴⁹ and Monster.com, which provides an app for browsing jobs, including military jobs.⁵⁰ But these show, at most, a relationship between certain Class 9 apps and Class 35 online listing services, not the Class 41 educational services Respondent recites.

As a fallback position, Petitioner argues that Respondent's services are within the natural zone of expansion of Petitioner's goods.⁵¹ She states in her rebuttal declaration:

Although the GuideOn mobile app links to a wide variety of different types of businesses (e.g., relocation services, dry-cleaning services, etc.), I consider the services offered by these establishments to be very different from the services of Registrant's Registration for several reasons. For example, Registrant's recited services (just by way of example, see "Business project management services; providing marketing consulting in the field of social media; public relations") are all services that are conducted for the benefit of others, as part and parcel of providing the GUIDEON Platform, or at the very least, within a reasonable zone of expansion thereto. The GuideOn Platform does not, however, offer ancillary services related to—continuing the examples above—relocation services, dry-cleaning services, etc.⁵²

⁴⁹ 48 TTABVUE 226-251.

⁵⁰ 48 TTABVUE 198-209.

⁵¹ Petitioner's main brief, 72 TTABVUE 35 et seq.; Streeter decl. ¶33, 47 TTABVUE 530.

⁵² Streeter rebuttal declaration ¶16, 63 TTABVUE 6-7.

She states in her brief, “Petitioner has testified that Respondent’s services are the type that she has been offering and/or could foreseeably expand into through the provision of the GuideOn Platform.”⁵³

Respondent responds that “Despite the Board’s directive, Petitioner attempts in her testimony and Trial Brief to include services beyond the scope of her registration.”⁵⁴ “Instead of focusing on the goods in the registration, Petitioner has repeatedly and flagrantly ignored the Board’s orders, focusing her testimony and trial documents primarily on services that Petitioner aspires to provide and those she has already been precluded from claiming per the Board’s express orders,”⁵⁵ Respondent states.

We agree. That is a bridge too far.

Under the doctrine of natural expansion,

the first user of a mark in connection with particular goods or services possesses superior rights in the mark as against subsequent users of the same or similar mark for any goods or services which purchasers might reasonably expect to emanate from it in the normal expansion of its business under the mark.

Dollar Fin. Grp., Inc. v. Brittex Fin., Inc., __ F.4th __, 2025 WL 850653, at *3 (quoting *Orange Bang, Inc. v. Ole Mexican Foods, Inc.*, 2015 WL 5675641, *19 (TTAB 2015)).

Our primary reviewing Court has explained the policy underlying this doctrine:

If a consumer is familiar with a user’s mark that has been established on a particular line of goods (i.e., the senior user with regard to that line of goods), and that consumer sees a similar mark on a logically related line of

⁵³ Petitioner’s main brief, 72 TTABVUE 36.

⁵⁴ Respondent’s brief, 76 TTABVUE 20.

⁵⁵ Respondent’s brief, 76 TTABVUE 8.

goods from another user (i.e., the junior user with regard to the original line of goods), the consumer might naturally attribute the junior user's goods to the senior user because the logically related goods would seem to be a natural "zone of expansion" for the senior user's goods. Defensive use of the doctrine would allow the senior user to prevent the junior user's registration of a similar mark on logically related goods.

Id. (citing *Jackes-Evans Mfg. Co. v. Jaybee Mfg. Corp.*, 481 F.2d 1342, 1345 (CCPA 1973)).

The Board has explained the limitations circumscribing the doctrine:

The application of the doctrine is strictly limited to those cases where the expansion, whether actual or potential, is "natural", that is, where the goods or services of the subsequent user, on the one hand, and the goods or services as to which the first user has prior use, on the other, are of such nature that purchasers would generally expect them to emanate from the same source ... The reason for the limitation is that the prior user of a mark on particular goods or services cannot extend its use of the mark to distinctly different goods or services if the result could be a conflict with valuable intervening rights established by another through extensive use and/or registration of the same or similar mark for the same or closely related goods or services in the new sphere of trade.

Mason Eng'g. and Design Corp. v. Mateson Chemical Corp., 1985 WL 72027,

*6 (TTAB 1985).

To determine whether the doctrine is applicable in a particular case, we generally consider a number of nonexclusive factors:

1. Whether the second area of business (that is, the subsequent user's area of business into which the first user has or potentially may expand) is a distinct departure from the first area of business (of the prior user), thereby requiring a new technology or know-how, or whether it is merely an extension of the technology involved in the first area of business;
2. The nature and purpose of the goods or services in each area;
3. Whether the channels of trade and classes of customers for the two areas of business are the same, so that the goodwill established

by the prior user in its first area of business would carry over into the second area; and

4. Whether other companies have expanded from one area to the other.

Id.

Petitioner must present persuasive evidence that the new business represents an expansion of, and not merely an unrelated addition to, the business she conducted in connection with her identified goods. *Electronic Data Systems Corp. v. EDSA Micro Corp.*, 1992 WL 184671, at *5 (“Without such evidence of a natural expansion, opposer would be asserting the dreaded right in gross to a mark”).

In her declaration, executed on October 16, 2023, Petitioner Streeter avers in pertinent part that:

12. **The current business plan for the GuideOn Platform** is to build a robust user base, and to continue to expand the information available on the GuideOn Platform, including ongoing updates to include additional military installations, points of interest (whether physical location, geographic location, online location, and/or other resources and information), and event listings (collectively, “listings”) in the GuideOn Platform.⁵⁶

65. I would like to continue to expand all of the various uses of the GuideOn Platform, and the services that I offer integral with the GuideOn Platform, such as the consulting to and provision of information about educational and career opportunities to the military-connected community, to continue to improve upon its utility and enhance the experience of both classes of users. **In addition, to the extent they might not be covered by my ‘882 Registration, I would like to apply to register the GUIDEON Mark in connection with the services that are integral with the offering of the GuideOn Platform**, such as the consulting to and provision of information about educational and career opportunities to the military-connected community. However, Registrant’s ‘352 Registration is hampering me in both of these endeavors.

66. **To the extent they might not be covered by my ‘882 Registration**, the services that are integral with the offering of the

⁵⁶ 47 TTABVue 521.

GuideOn Platform, such as the consulting to and provision of information about educational and career opportunities to the military-connected community, are certainly within an intended zone of expansion for me as a provider of a mobile application that provides listings that include corresponding locations.⁵⁷

Petitioner asserts that she satisfies the four *Mason Engineering* factors by virtue of her earlier arguments and evidence, discussed above:

Regarding factor 1, Petitioner has overwhelmingly demonstrated that the Respondent's listed services are not a distinct departure for Petitioner from her present listed goods, i.e., the GuideOn Platform. Indeed, Petitioner is already performing all of the same or highly similar services for the two classes of customers for Petitioner's listed goods, the GuideOn Platform. ... Regarding factor 2, both Petitioner's software application and Respondent's services are of a similar nature and purpose, i.e., provision of information, whether in form of geographical or online information and the related consulting by Petitioner or via the marketing, educational, and consulting by Respondent. Regarding factor 3, as noted in more detail below, both parties have overlapping channels of trade (word of mouth, social media, their websites, trade shows or similar events, third-party recommendations, etc.) to an identical class of customers (the military-connected community). ... Regarding factor 4, Petitioner has demonstrated that third parties offer both similar mobile applications or downloadable software or online platforms as Petitioner's goods and the services recited in Respondent's registration.⁵⁸

We agree with Respondent, however, that Petitioner is limited to the goods identified in her registration. That registration, once again, identifies only "Computer application software for smartphone operating systems, namely, software for a directory of listings with corresponding location primarily on military installations." We have found these goods related to Respondent's Class 35 services, so the issue is

⁵⁷ 47 TTABVUE 540-41 (emphasis added).

⁵⁸ Petitioner's main brief, 72 TTABVUE 36-37.

whether the doctrine of natural expansion enlarges Petitioner's domain to encompass Respondent's Class 41 educational services. We find it does not. Petitioner cannot use the zone of natural expansion doctrine offensively to defeat Respondent's intervening rights. *Dollar Fin. v. Brittex*, __ F.4th __, 2025 WL 850653, at *4.

Under the first factor, Respondent's educational services are not merely an extension of the technology involved in Petitioner's registered, identified goods. Those goods, as noted, are merely an app that links users to various services, much as a search engine may lead to a website. Petitioner does not perform those services—be they educational, religious, dry cleaning, or restaurant services. Performing those services would be a distinct departure from simply providing an app that leads users to various service providers.

Under the second factor, Petitioner cannot lump her app and Respondent's educational services together under the general rubric "provision of information." *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 1376 (Fed. Cir. 2002) ("[A] broad general market category is not a generally sound reliable test of relatedness of products."). The nature and purpose of the goods or services in each area are quite distinct.

Under the third factor, channels of trade and classes of customers, there is some broad overlap, as we discuss below.

And under the fourth factor, we have noted the dearth of evidence showing that other companies have expanded from one area to the other. If anything, Petitioner's third-party evidence was notable more for its insufficiency than for its probative value.

More to the point, Petitioner's declaration, executed in October 2023, speaks of her "current business plan" to expand, and of her wish to register the GUIDEON mark for services.⁵⁹ But Respondent commenced rendering its Class 41 educational services in November 2018.⁶⁰ That established valuable intervening rights with which Petitioner's expansion of use would conflict. *Mason Eng'g.*, 1985 WL 72027, at *6.

Overall, Petitioner cannot rely on the doctrine to expand into Respondent's Class 41 services. To expand Petitioner's rights beyond those specified in her identification of goods would, in effect, accord her trademark rights in gross, covering all of the same or similarly named websites, businesses and service providers to which her app may lead her customers.

Based on the respective identifications of Petitioner's goods and Respondent's services, and the evidence of record, we find that Petitioner's Class 9 goods are related to Respondent's Class 35 services, but not to Respondent's Class 41 services.

B. The Strength or Weakness of Petitioner's Registered Mark

"Two of the *DuPont* factors (the fifth and sixth) consider strength." *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023). The fifth *DuPont* factor enables Petitioner to prove that her pleaded mark is entitled to an expanded scope of protection by adducing evidence of "[t]he fame of the prior mark (sales, advertising, length of use)," whereas the sixth *DuPont* factor allows Respondent to contract that

⁵⁹ Streeter decl. ¶¶ 12, 65-66, 47 TTABVUE 521, 540-41.

⁶⁰ Petitioner's Notice of Reliance, Gorbulja dep. 56:3-19, 49 TTABVUE 28; Respondent's answer to Int. No. 7, 44 TTABVUE 16.

scope of protection by adducing evidence of “[t]he number and nature of similar marks in use on similar goods.” *DuPont*, 476 F.2d at 1361.

In determining strength of a mark, we consider its inherent strength, based on the nature of the mark itself, and its commercial strength or recognition. *In re Chippendales USA Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning”); 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80 (5th ed. Feb. 2025) (“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.”). Likelihood of confusion strength is not “an all-or-nothing measure.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 1325 (Fed. Cir. 2017). It “varies along a spectrum from very strong to very weak.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1375 (Fed. Cir. 2005). The burden of establishing the strength of her mark falls on Petitioner. *Spireon v. Flex*, 71 F.4th at 1365.

Conceptually, we must presume the GUIDEON mark is inherently distinctive--at least suggestive--because it is registered on the Principal Register. Trademark Act Section 7(b), 15 U.S.C. § 1057(b); *In re Fat Boys Water Sports LLC*, 2016 WL 3915986, *8 (TTAB 2016). Petitioner adopted GUIDEON as a play on the word “guidon,” a

military flag or the person carrying that flag at the front of a military formation.⁶¹ Like the guidon flag or flagbearer, GUIDEON suggests that Petitioner’s app serves as a “guide” to its users.⁶² We accordingly find the mark conceptually suggestive.

Commercial strength “may be measured not only directly by consumer surveys or declarations but also indirectly by the volume of sales and advertising expenditures in connection with the goods or services sold under the mark, and supported by other indicia such as length of time of use of the mark; widespread critical assessments; notice by independent sources of the goods or services identified by the marks; the general reputation of the goods or services; and social media presence.” *Heil v. Tripleye*, 2024 WL 4925901, at *19.

Petitioner “is not arguing its mark rises to the level of being ‘famous’ per se....”⁶³ Nonetheless, she states that her mark has gained recognition in the eyes of the relevant classes of customers, which in her view includes individuals and organizations that list on her app, as well as end users who download the app for guidance and advice.⁶⁴ To prove recognition by these classes of customers, Petitioner points to: ten years’ use of the mark on the app; downloads to at least 652,000 devices as of November 2021, and downloads of at least 905,000 times as of October 1, 2023;⁶⁵ “analytics” indicating that “users of the mobile app repeatedly engage with the

⁶¹ Petitioner’s main brief, 72 TTABVUE 23; Streeter decl. ¶ 47, 47 TTABVUE 534; Petitioner’s reply brief, 78 TTABVUE 7.

⁶² Petitioner’s main brief, 72 TTABVUE 10n.4, 23; Streeter decl. ¶ 48, 47 TTABVUE 534-35.

⁶³ Petitioner’s main brief, 72 TTABVUE 43.

⁶⁴ Petitioner’s main brief, 72 TTABVUE 15.

⁶⁵ Petitioner’s main brief, 72 TTABVUE 23, 43; Streeter rebuttal decl. ¶¶ 23-24, 63 TTABVUE 9; ex. 19, 63 TTABVUE 221; 51 TTABVUE 519.

GuideOn Platform well beyond the initial download”;⁶⁶ Google search results for “Guideon” referring primarily to Petitioner’s website at www.GuideonMilitary.com or the Guideon platform—with certain exceptions, including a Wikipedia article on the military guidon flag, and “another company called ‘GuideOn Group’, which is a transportation company with services unrelated to those ancillary to the GuideOn Platform....”⁶⁷

“Overall,” Petitioner concludes, “there is measurable recognition and use of the GUIDEON mark among the relevant consumers, demonstrating greater than average commercial strength of Petitioner’s mark, even though not necessarily the highest degree on the spectrum.”⁶⁸

Respondent rejoins that:

Petitioner has failed to establish that its mark has any fame. In fact, Petitioner concedes that its mark is not famous. ... Petitioner admitted it has not “conducted or ordered any market studies, consumer studies, surveys, focus groups, or other studies related to Petitioner’s Mark or the marks for the goods offered by Petitioner under Petitioner’s Mark” nor offered any such information as part of the record. ... The record provides that Petitioner has not had any sales. ... Petitioner’s GUIDEON app is free. ... Petitioner admitted that it does not advertise or promote its mark to

⁶⁶ Petitioner’s main brief, 72 TTABVUE 44.

⁶⁷ Petitioner’s main brief, 72 TTABVUE 23-24, Streeter decl. ¶ 51, 47 TTABVUE 22-23, ex. 20, 47 TTABVUE 476-89, 535-36; 51 TTABVUE 523-36. Redactions have been omitted because the material designated as confidential was not, in fact, confidential. “The Board will not be bound by the parties’ designations, and will treat as confidential only testimony and evidence that is truly confidential, so that it can discuss the pertinent evidence of record.” *MLBPA and Judge v. Chisena*, 2023 WL 2986321, *2n. 8 (TTAB 2023) (citing Trademark Rule 2.116(g), 37 C.F.R. § 2.116(g) (“The Board may treat as not confidential that material which cannot reasonably be considered confidential, notwithstanding a designation as such by a party.”)).

⁶⁸ Petitioner’s main brief, 72 TTABVUE 44-45.

consumers. ... Petitioner has spent next to nothing for advertising or promotion of the goods offered under Petitioner's mark.⁶⁹

Downloads may be substituted for sales figures. *In re Serial Podcast, LLC*, 2018 WL 1522217 (TTAB 2018). In *Serial Podcast*, the Board found 172 million downloads and a rank as number one podcast on iTunes insufficient to show that the merely descriptive term SERIAL had acquired distinctiveness. *Id.* In this case, the mark GUIDEON is suggestive, not descriptive, so the download numbers have some probative value in terms of evincing consumer recognition. But the number of downloads (far fewer than in *Serial Podcast*) and the “analytics” indicating repeated use of the app may be more reflective of the popularity of the product than recognition of the mark. *Id. at* *10-11. Respondent finds Petitioner's calculation of downloads suspect, given that Petitioner had to correct her numbers in her rebuttal declaration, cited above.⁷⁰ Even if we accept Petitioner's numbers, as corrected, we lack any context from which we could reasonably infer the mark's recognition. “Raw numbers alone may be misleading, however. Thus, some context in which to place raw statistics may be helpful....” *Made in Nature, LLC v. Pharmavite LLC*, 2022 WL 2188890, at *16. That evidence is absent.

⁶⁹ Respondent's brief, 76 TTABVUE 23-24; *see* Streeter dep. 53:9-11 (has not paid for advertising space), 55:16-18, (has not appeared at trade show), 57:8-11 (app is free to end users), 60:19-20, 63:16-17 (no current advertisers). Streeter dep. 5:21-23, 70 TTABVUE 9 (downloading app is free). Streeter dep. 8:3-7 (Streeter spends money in efforts to advertise GUIDEON application), 52:4-5, 70 TTABVUE 32. *See* Petitioner's Ans. to Int. Nos. 10, 17, 61 TTABVUE 27, 29 (no sales of goods or services).

⁷⁰ Respondent's brief, 76 TTABVUE 24. Streeter rebuttal decl. ¶¶ 23-24, 63 TTABVUE 9

As for Petitioner’s Google search, Respondent points out, and we agree, that the search results pages, taken alone, are of little help.⁷¹ As the Federal Circuit has observed, “Search engine results—which provide little context to discern how a term is actually used on the webpage that can be accessed through the search result link—may be insufficient to determine the nature of the use of a term or the relevance of the search results....” *In re Bayer AG*, 488 F.3d 960, 967 (Fed. Cir. 2007).

Under the sixth *DuPont* factor, Respondent notes that “Petitioner has readily admitted that it has allowed for the use of the term GUIDEON by a third party. Specifically, Petitioner is aware of the use of the GUIDEON mark for transportation services. 60 TTABVUE 50, 58 and 61 TTABVUE 18-19. Yet Petitioner has no issue with this third party’s use of the GUIDEON mark.”⁷² In her deposition, when Petitioner was asked, “Do you believe the transportation Company’s use of the GuideOn mark harms you?” she replied, “No.”⁷³

Petitioner counters that her testimony involved “just one other party that allegedly uses the GUIDEON mark, in connection with transportation services.”⁷⁴ Petitioner also cites *In re Thomas*, 2006 WL 1258862 (TTAB 2006) for the proposition that “[W]ithout evidence as to the extent of third-party use, such as how long the

⁷¹ Respondent’s brief, 76 TTABVUE 26-27.

⁷² Respondent’s brief, 76 TTABVUE 44, citing Petitioner’s responses to request for admission Nos. 19 and 20, admitting it was aware of GuideOn Group and of its use of “GuideOn.” 61 TTABVUE 18-19. Streeter dep. 88:20-89:23, 154:8-10, 60 TTABVUE 50-51, 58, 61 TTABVUE 18-19. Streeter dep. 11:3-11, 70 TTABVUE 15 (aware of Guideon Group trucking company). 70 TTABVUE 35-37 (GuideOn Group website).

⁷³ Streeter dep. 154:8-10, 60 TTABVUE 58; *see* Petitioner’s Responses to Requests for Admission Nos. 19-20, 60 TTABVUE 18-19.

⁷⁴ Petitioner’s reply brief, 78 TTABVUE 22.

websites have been operational or the extent of public exposure to the sites, the probative value of this evidence...is minimal.” *Id.* at *6.

We note that the evidence proffered in *In re Thomas* was not a third-party website, but a summary of Google hits, much like Petitioner’s results list in this case. There, as here, the Board found this evidence wanting: “some of the website summaries in the list are so abbreviated that the context of use, such as the specific nature of the business or the particular goods or services offered on the various websites or in connection with the term ‘black market,’ is unclear.” *Id.*

In any event, a single third-party use of GUIDEON is insufficient to show the commercial weakness of GUIDEON. *See Sabhnani v. Mirage Brands*, 2021 WL 6072822, at *12. It does, however, illustrate another point made earlier: Even if Petitioner’s GUIDEON app leads users to transportation services offered on or near military bases, she cannot claim that those transportation services are, by that fact itself, related to her identified goods. By the same token, Petitioner cannot claim that other services, such as Respondent’s Class 41 educational services, are deemed related to her app, even if that is one of the many services to which the app leads users.

On the whole, we find the fifth and sixth *DuPont* factors neutral in our analysis of the likelihood of confusion. We accord Petitioner’s mark the normal scope of protection to which inherently distinctive marks are entitled. *Id.*

C. The Marks

Under the first *DuPont* factor, we find that the parties’ marks are identical in

sight, sound, connotation, and commercial impression.⁷⁵ *DuPont*, 476 F.2d at 1361. Both are spelled the same, and are in standard characters, so they may be displayed in the same font, color, and size. *Look Cycle*, 2024 WL 3739358, at *9. Both marks would presumably be pronounced the same. *In re Vittera Inc.*, 671 F.3d 1358, 1367 (Fed. Cir. 2012) (XCEED and X-SEED similar). The marks' phonetic equivalence takes on added significance, as both are promoted by word of mouth.⁷⁶ *In re Vittera Inc.*, 671 F.3d 1358, 1366 (Fed. Cir. 2012) ("the literal components of brand names likely will appear alone when used in text and will be spoken when requested by consumers."). Both parties adopted GUIDEON as a play on the word "guidon," which is a military flag or the person carrying that flag at the front of a military formation.⁷⁷ The guidon flag frequently has a triangular portion removed, creating a "swallow-tailed" flag. For example:⁷⁸



⁷⁵ Respondent admits that the marks are identical. Respondent's Response to Request for Admission No. 3, 45 TTABVUE 12.

⁷⁶ Respondent's brief, 76 TTABVUE 15, Gorbulja dep. 18:1-4, 49 TTABVUE 16.

⁷⁷ Petitioner's main brief, 72 TTABVUE 23; Streeter decl. ¶ 47, 47 TTABVUE 534; Streeter dep. 22:1-9, 60 TTABVUE 36; Petitioner's reply brief, 78 TTABVUE 7; Respondent's brief, 76 TTABVUE 9; Respondent's ans. to int. no. 2, 44 TTABVUE 12-13. Dictionary.com, 51 TTABVUE 500, Merriam-Webster.com, 51 TTABVUE 504; en.Wikipedia.org, 47 TTABVUE 462-70, 51 TTABVUE 509-17.

⁷⁸ En.Wikipedia.org, 51 TTABVUE 509-14.

And like the guidon flag or flagbearer, both GUIDEON marks suggest that the parties' goods or services serve as a "guide" to their followers.⁷⁹ Thus, both convey the same suggestive connotation and commercial impression. On the whole, then, this *DuPont* factor weighs heavily in favor of finding a likelihood of confusion. *Tiger Lily Ventures v. Barclays*, 35 F.4th at 1362.

D. The Channels of Trade and Classes of Customers

The third *DuPont* factor considers "[t]he similarity or dissimilarity of established, likely-to-continue trade channels." *In re Detroit Athletic Co.*, 903 F.3d 1297, 1308 (Fed. Cir. 2018) (quoting *DuPont*, 476 F.2d at 1361)). Like the second factor, the third factor "must be evaluated with an eye toward the channels specified in the application and registration, not those as they exist in the real world." *Id.*

We find that the parties' classes of customers and channels of trade only overlap in a very broad sense. Respondent's recited services are directed toward personnel who are serving or have served in the armed forces, as well as their family members. Part of that broad class of consumers would be stationed at military installations, or could live nearby. Of that group, those contemplating education and employment training, or a transition to civilian status, would have access to Petitioner's app, which is offered for direct download by users through smartphone application providers and others, such as the Apple App Store and Google Play.⁸⁰ These app users

⁷⁹ Petitioner's main brief, 72 TTABVUE 10n.4, 23; Streeter decl. ¶ 48, 47 TTABVUE 534-35. Respondent's brief, 76 TTABVUE 16; Respondent's ans. to int. no. 2, 44 TTABVUE 12-13.

⁸⁰ Petitioner's Ans. to Int. No. 6, 60 TTABVUE 25.

could well consult Petitioner's directory of listings to find corresponding locations, primarily on military installations. So, in that very broad sense, the parties' classes of customers and channels of trade overlap. *See generally Embarcadero Technologies, Inc. v. RStudio, Inc.*, 2013 WL 2365029, *17 (TTAB 2013) (presume normal channels of trade and usually classes of customers for the respective goods and services).

Those classes and channels are so broad, though, that they carry little weight in assessing likelihood of confusion. The classes of consumers include active personnel, veterans, and their families. The channels of trade include vast military installations and areas beyond. In the analogous context of big box and department stores, which offer a virtually unlimited array of disparate goods and services, we have found such generalized evidence lacking in probative value:

It has long been held that the mere fact that two different items can be found in a supermarket, department store, drugstore or mass merchandiser store is not a sufficient basis for a finding that the goods are related. *Recot Inc. v. M.C. Becton*, [214 F.3d 1322, 1330] (Fed. Cir. 2000) ("the law is that products should not be deemed related simply because they are sold in the same kind of establishments"); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, [1103] (CCPA 1976) ("A wide variety of products, not only from different manufacturers within an industry but also from diverse industries, have been brought together in the modern supermarket for the convenience of the customer. The mere existence of such an environment should not foreclose further inquiry into the likelihood of confusion from the use of similar marks on any goods so displayed"); *Shoe Factory Supplies Co. v. Thermal Engineering Company*, [1980 WL 30144, *9] (TTAB 1980) ("This contention [to equate different or unrelated goods by urging that they are all sold in supermarkets, department stores, and similar establishments] has been rejected...").

Morgan Creek Prods. Inc. v. Foria Int'l Inc., 2009 WL 1719597, *8 (TTAB 2009).

In this case, a fortiori, the goods and services are not limited to the base PX; they extend to the entire military base, its environs, and beyond. The overlap in the

parties' channels of trade and classes of customers is at such a general level that it adds very little to our analysis.

On the whole, therefore, the third *DuPont* factor is neutral.

E. Consumers' Care and Sophistication

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.

Respondent urges that its customers would exercise far greater care in selecting its services than they would in downloading Petitioner's free app:

The commonly understood conditions under which people download apps are in stark contrast to the conditions under which one searches for, and ultimately contracts, and pays substantial sums of money for the professional business, marketing, education, and career counseling services provided by Registrant.

Registrant's Services require a "personal level of customization" for clients tailored to customer needs. See 49 TTABVUE 22, 33, and 141. After initial contact, Registrant helps determine what level of involvement the client wants — guidance, collaboration, or full service. ... Registrant's Services cannot be simply downloaded onto a smartphone or any other device.⁸¹

And unlike Petitioner's app, which may be downloaded for free, Respondent charges fees for its services in amounts that, though confidential, range from the low thousands to tens of thousands of dollars.⁸² Respondent concludes that "The difference between the standard of care exercised by a consumer of Registrant's

⁸¹ Respondent's brief, 76 TTABVUE 41.

⁸² *Id.* (citing Gorbulja dep. 97:17-20, 50 TTABVUE 72, confidential).

Services and that of a consumer of Petitioner’s free app weighs against any likelihood of confusion.”⁸³

Petitioner answers that “there is no evidence that the relevant customers in this case are particularly ‘discriminating’ or employ a ‘sophisticated decision-making process in purchasing and using the products at issue’ such that a likelihood of confusion is avoided.”⁸⁴ Further, Petitioner notes, “Nowhere in the record is there any evidence that Respondent has actually received such sums for its Services.”⁸⁵

We recognize that “[p]urchaser sophistication may tend to minimize the likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect.” *Sabhnani v. Mirage Brands*, 2021 WL 6072822, at *20 (quoting *Palm Bay Imps. v. Veuve Clicquot*, 396 F.3d at 1376).

In this case, each of the parties has a mixed bag of customers. Petitioner markets her app to presumably sophisticated entities—the military installations and those associated with the listings in the app directory. But she offers the app for free to end users who download the app for information, and these individuals could come from all walks of life.⁸⁶ Similarly, Respondent offers business project management services, marketing plan development, and marketing consulting in the field of social media to presumably sophisticated entities. But it also offers online employment information and listings, as well as educational services, to personnel who are

⁸³ Respondent’s brief, 76 TTABVUE 42.

⁸⁴ Petitioner’s reply brief, 78 TTABVUE 7.

⁸⁵ Petitioner’s reply brief, 78 TTABVUE 21. *See* Respondent’s Ans. to Int. No. 15, 43 TTABVUE 20 (Attorneys’ Eyes Only).

⁸⁶ Petitioner’s main brief, 72 TTABVUE 15.

actively serving in the armed forces, those who have served in the armed forces, and their family members. Thus, both parties offer their goods and services to members of the general public who have a military connection. These consumers may not be particularly sophisticated, and we must consider likelihood of confusion from the perspective of the least sophisticated consumers, *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d at 1325. These consumers may purchase educational services with a degree of care, rather than impulsively, but that does not prevent them from mistaking one trademark for another. *WinchargerCorp. v. Rhino Inc.*, 297 F.2d 261, 264 (CCPA 1962).

Consequently, we have no reason to find that ordinary consumers would exercise more than an ordinary degree of care in availing themselves of the parties' goods and services. This factor is neutral.

F. The Presence or Absence of Actual Confusion

Under the seventh and eighth *DuPont* factors, we consider the nature and extent of any actual confusion, in light of the length of time and conditions under which there has been contemporaneous use of the subject marks. *DuPont*, 476 F.2d at 1361. Although a showing of actual confusion is not necessary to establish a likelihood of confusion, a showing of actual confusion would be probative. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1372 (Fed. Cir. 2018); *Monster Energy Co. v. Lo*, 2023 WL 417620, *18 (TTAB 2023).

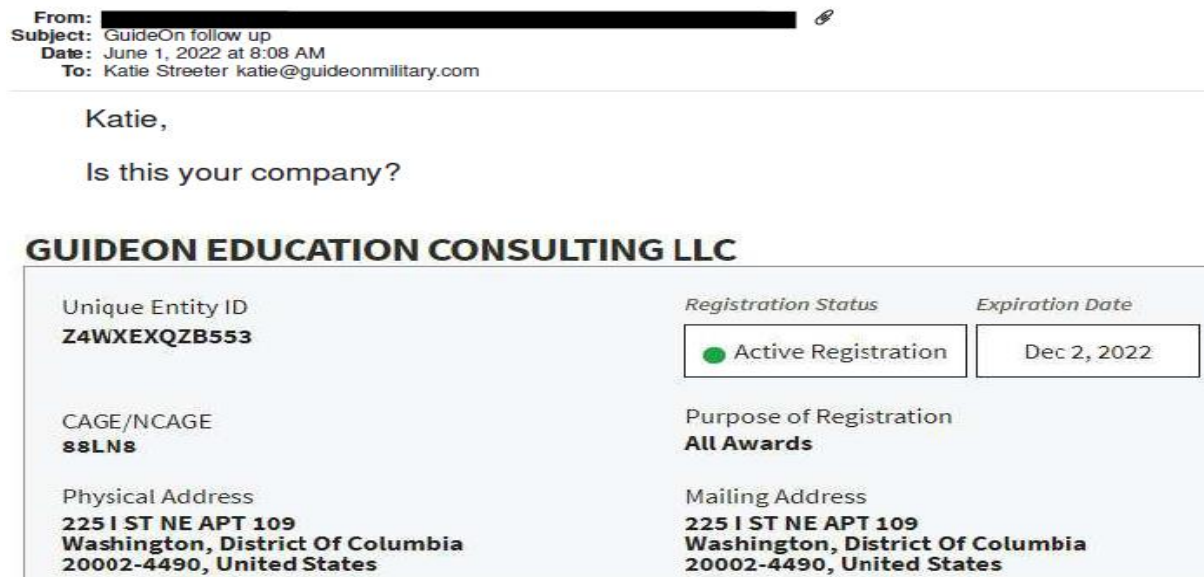
Petitioner declares that:

On June 1, 2022, I received an email from a representative of a potential buyer who works as a contractor at the U.S. Army Garrison at Fort

Benning, Georgia. ... In this email, the sender, following up on a previous communication with me, forwarded a screenshot of [Respondent] Guideon Education Consulting LLC's registration information on the SAM.gov website ... [the System for Award Management (SAM.gov), an official website on which entities register to do business with the U.S. Government].⁸⁷

Petitioner's company, OneDot Solutions, LLC, is also registered on SAM.gov.⁸⁸

The email read:



Respondent counters that this is not an instance of actual confusion of trademarks:

As is plain from the text of the email, the sender is not confused between the goods sold by Petitioner (i.e., the actual use of marks as source identifiers) and any other entity's goods or services, much less the services rendered by Registrant. Rather, the sender is simply inquiring whether a company name in a database is Petitioner's company or not. ... Clearly, the email is inquiring about whether the entry was Petitioner's company. ... In addition, the entry shows "GUIDEON EDUCATION CONSULTING LLC".

⁸⁷ Streeter decl. ¶ 55, 47 TTABVUE 537-38; Streeter rebuttal decl. ¶ 18, 63 TTABVUE 7. Streeter dep. 110:1-14, 60 TTABVUE 56.

⁸⁸ Streeter decl. ¶ 56, 47 TTABVUE 538, ex. 34, 63 TTABVUE 99-101; Streeter dep. 118:20-24, 119:15-18, 60 TTABVUE 56-57. Streeter dep. 26:17-27:10, 70 TTABVUE 30-31.

⁸⁹ Ex. 23 to Streeter decl., 47 TTABVUE 514, 51 TTABVUE 561.

Id. A trade name or a company name is not a trademark nor trademark use. It is a reference to a business entity. *See* 1 McCarthy on Trademarks § 9.3⁹⁰

Petitioner answers that even though this is a registration of Respondent's trade name, GuideOn Education Consulting, LLC, it nonetheless prompted the email inquiry because it "begins with Petitioner's distinctive trademark, followed by two merely descriptive or generic terms."⁹¹

A single inquiry of this sort does not generally evidence actual confusion. *Major League Baseball Players Ass'n v. Chisena*, 2023 WL 2986321, *25 (TTAB 2023) (citing *National Rural Elec. Coop. Ass'n v. Suzlon Wind Energy Corp.*, 2006 WL 1151404, *6 (TTAB 2006), *aff'd*, 214 Fed. Appx. 987 (Fed. Cir. 2007)). *Chisena* notes that an inquiry by a businessperson affiliated with a party may carry more probative value; but the Board there still found "this single inquiry insufficient to show actual confusion under the seventh *DuPont* factor...." *Id.* It did, however, consider the businessperson's testimony relevant to show the similarity of the subject marks. *Id.*

Here, as in *Chisena*, the contractor's inquiry tends to bear out the undeniable identity of the parties' marks under the first *DuPont* factor. It does not evince actual confusion, however, as the SAM.gov entry was merely a listing of entities registered to do business with the federal government, not use of the marks in connection with goods or services as they would be offered in the marketplace. *See Kraft, Inc. v. Balin*, 1981 WL 48124, *5 (TTAB 1981) ("it is so necessary to probe fully into the

⁹⁰ Respondent's brief, 76 TTABVUE 49.

⁹¹ Petitioner's reply brief, 78 TTABVUE 27.

circumstances surrounding an incident of alleged actual confusion to learn whether it sheds any light on what may normally be expected to occur in the marketplace; this is particularly so when, despite active use of their marks by both parties, only the one example of alleged real confusion is known to the parties.”). Moreover, the contractor was not called as a witness or subjected to cross-examination as to the reasons for his inquiry. “While this email ... is offered by petitioner to indicate the customer's ‘state of mind’ rather than for the truth of the matter contained therein, its probative value is diminished by the fact that the prospective or actual customer was not called as a witness to testify and be subject to cross-examination as to the circumstances and conditions under which she received the email and why she contacted respondent.” *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 2014 WL 1390528, *23 (TTAB 2014).

Properly introducing instances of actual confusion into the record and persuading the trier of fact as to the probative value of such evidence is Petitioner’s burden. *Id.* “Actual confusion is entitled to great weight but only if properly proven. ... Such is not the case here.” *Georgia-Pacific Corp. v. Great Plains Bag Co.*, 614 F.2d 757, 762 (CCPA 1980).

If we set this single inquiry aside, there is no evidence of actual confusion between the parties’ marks. Respondent’s principal testified at deposition that the marks had never been confused, to her knowledge.⁹² Under the eighth *DuPont* factor, Respondent accordingly argues that “Petitioner’s mark has been registered since

⁹² Gorbulja dep. 88:13-18, 49 TTABVUE 57.

2015. ... Registrant's GUIDEON mark has been used since 2018. ... If it has not occurred yet, it is difficult to see why it would subsequently occur.”⁹³ There is some appeal to this argument. After all, given the identity of the marks and the broadly overlapping channels of trade and classes of customers, one might reasonably expect greater evidence of actual confusion, if confusion was indeed likely.

But the probative value of the absence of confusion depends on there being an opportunity for actual confusion to have occurred. *Barbara's Bakery, Inc. v. Landesman*, 2007 WL 196406, *5 (TTAB 2007). And as Petitioner points out, “Respondent's only supporting evidence of its alleged nationwide use or for an extended time period is its website and social media channels. ... As such, Respondent offers no proof of actual nationwide sales of Respondent's Services under Respondent's Mark (i.e., no corroborating evidence in the record of sales such as sales receipts, invoices, purchase orders, etc.).”⁹⁴ The absence of evidence of confusion is not always evidence of its absence. *Tiger Lily v. Barclays*, 35 F.4th at 1364.

On this record, then, the seventh and eighth *DuPont* factors are neutral.

G. The Extent of Potential Confusion

The twelfth *DuPont* factor is “[t]he extent of potential confusion, i.e., whether de minimis or substantial.” *DuPont*, 476 F.2d at 1361.

Petitioner argues that as her “GuideOn Platform user base, geographic footprint,

⁹³ Respondent's brief, 76 TTABVUE 50. See Respondent's Ans. to Int. No. 7, 43 TTABVUE 16.

⁹⁴ Petitioner's reply brief, 78 TTABVUE 27. See Respondent's Ans. to Int. No. 10, 43 TTABVUE 17 (“Registrant offers its services online at www.guideoneducation.com and its social media channels and therefore, its services are offered for sale nationwide.”).

and directory/information about listings and resources grow, the potential will also grow for confusion between, on the one hand, the GuideOn Platform and services that are integral to the GuideOn Platform's offering, and, on the other hand, Respondent's services."⁹⁵ Petitioner foretells, ominously, that "[t]his confusion could spread across the entire military-connected community."⁹⁶

This argument has some merit as applied to Respondent's Class 35 services, as there is a confluence of Petitioner's identified listings and Respondent's recited listings.⁹⁷ As to Respondent's Class 41 services, though, it assumes too much. It assumes the veracity of the very arguments we rejected under the second *DuPont* factor. It assumes that Respondent's educational services are in the natural zone of expansion of Petitioner's app goods. And it assumes that users will mistakenly infer an association with third party services, such as Respondent's, simply because they may be directed there by Respondent's app goods.

Petitioner's argument is, as Respondent puts it, "another backdoor effort to try to claim that Petitioner offers services under her mark – which has already been rejected by the Board...."⁹⁸ Respondent further notes that "Petitioner's mark has been registered since 2015. ... Registrant's GUIDEON mark has been used since 2018. ...

⁹⁵ Petitioner's main brief, 72 TTABVUE 50.

⁹⁶ Petitioner's main brief, 72 TTABVUE 48.

⁹⁷ See pp. 15-16 *supra*.

⁹⁸ Respondent's brief, 76 TTABVUE 50.

If [confusion] has not occurred yet, it is difficult to see why it would subsequently occur.”⁹⁹

We have already observed that the lack of evidence of confusion does not, in and of itself, warrant a conclusion that there has been no confusion. On the other hand, Petitioner “has the burden of proof and must establish its likelihood of confusion claim by a preponderance of the evidence, and we see Opposer’s likelihood of confusion claim as amounting to only a speculative, theoretical possibility.” *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 2016 WL 3915987, *16 (TTAB 2016). Language by our primary reviewing court is helpful:

We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.

Elec. Design & Sales Inc. v. Elec. Data Sys. Corp., 954 F.2d 713, 717 (Fed. Cir. 1992), (citing *Witco Chemical Co. v. Whitfield Chem. Co., Inc.*, 418 F.2d 1403, 1405 (CCPA 1969)).

On the whole, we find that Petitioner’s argument has some merit with respect to Respondent’s Class 35 services. With respect to Respondent’s Class 41 services, though, we find Petitioner’s ominous extrapolation of theoretical possibilities too tenuous to convince us that confusion is likely, rather than merely possible. As to those services, the twelfth *DuPont* factor is neutral.

⁹⁹ Respondent’s brief, 76 TTABVue 50.

H. The Good or Bad Faith of Respondent

The thirteenth and final *DuPont* factor pertains to “any other established fact probative of the effect of use.” *DuPont*, 476 F.2d at 1361. This factor “accommodates the need for flexibility in assessing each unique set of facts....” *In re Country Oven*, 2019 WL 6170483, at *8 (quoting *In re Strategic Partners Inc.*, 2012 WL 1267930, *2 (TTAB 2012)).

During her Rule 30(b)(6) deposition, Respondent’s principal was asked:

Q. Were you aware of the GuideOn app prior to receiving an e-mail from Ms. Lee?

A. So when I initially did my search before this e-mail, it did come up. And, as I’ve stated, it’s a Army GPS app for very specific installations that has nothing to do, in my professional opinion, with what I’m currently doing.¹⁰⁰

Consistent with this view, Respondent’s brief insists that “Petitioner’s goods and Registrant’s Services are too far afield to believe that a map app would be in the business management, educational, or marketing services offered by Registrant.”¹⁰¹




Petitioner points out that in that same deposition, Respondent’s principal admitted receiving an email cease and desist letter from Petitioner in 2019, and, seeing no confusion, proceeded to file the application that matured into Respondent’s subject registration.¹⁰² Furthermore, Petitioner notes, Respondent displays its

¹⁰⁰ Gorbulja dep. 88:2-8, 49 TTABVUE 57.

¹⁰¹ Respondent’s brief, 76 TTABVUE 48.

¹⁰² Gorbulja dep. 85:2-21, 49 TTABVUE 56. Petitioner’s main brief, 72 TTABVUE 51.

standard character mark in a manner similar to Petitioner’s: “GuideOn” with a military-type guidon flag to the right:¹⁰³

<u>PETITIONER’S MARK IN USE</u>	<u>RESPONDENT’S MARK IN USE</u>
 	

From this Petitioner infers, “It is reasonable to conclude that Respondent adopted and registered the GUIDEON mark in bad faith or with an intent to confuse, and thus this factor weighs in favor of a likelihood of confusion.”¹⁰⁴

Bad faith adoption or intent to confuse falls under the thirteenth *DuPont* factor. Establishing bad faith requires a showing that the defendant intentionally sought to trade on the plaintiff’s goodwill or reputation. *Look Cycle*, 2024 WL 3739358, at *10. *See, e.g., Tiger Lily Ventures v. Barclays*, 35 F.4th at 1364 (“attempts to capitalize on the fame of the LEHMAN BROTHERS mark weighs in favor of finding a likelihood of confusion.”). It is a serious allegation, requiring proof, not speculation.

We compare the parties’ registered standard character marks as they appear in their respective registrations, not as used in commerce. Even so, we have noted under the first *DuPont* factor that Respondent adopted its GUIDEON mark for much the same reasons as Petitioner: as a play on the word “guidon,” suggesting a military flag guiding the way. Respondent’s display of its mark is consistent with this suggestive intent. Respondent thought Petitioner’s app was far afield from its services, and

¹⁰³ Petitioner’s main brief, 72 TTABVUE 51. 47 TTABVUE 154, 44 TTABVUE 91.

¹⁰⁴ Petitioner’s main brief, 72 TTABVUE 50.

succeeded in obtaining its registration despite Petitioner's prior registration of its mark (which, we have found, is not famous). We note further that third-party GuideOn Group also displays the term as "GuideOn," and also uses the swallow-tailed guidon military-style flag:¹⁰⁵



Yet Petitioner claims this third-party use is harmless.¹⁰⁶

"[T]he Federal Circuit and the Board repeatedly have held that mere knowledge of a prior similar mark is insufficient to demonstrate bad faith in adoption. ... There are no reasons here to deviate from this settled point, and we find the evidence that Applicant knew of Opposer's use of its mark insufficient to support a finding of bad faith adoption intended to confuse customers." *Monster Energy v. Lo*, 2023 WL 417620, at *23 (collecting cases). So too here. On the other hand, we note that "while evidence of bad faith adoption typically will weigh against an applicant, good faith adoption typically does not aid an applicant [or registrant] attempting to establish no likelihood of confusion." *Eveready Battery Co. v. Green Planet Inc.*, 2009 WL 2176668, *5 (TTAB 2009).

The thirteenth *DuPont* factor is, in consequence, neutral.

¹⁰⁵ 70 TTABVUE 35-37, 74 TTABVUE 76 (GuideOn Group website).

¹⁰⁶ Streeter dep. 154:8-10, 60 TTABVUE 58; see Petitioner's Responses to Requests for Admission Nos. 19-20, 60 TTABVUE 18-19.

I. Balancing the Factors

Having considered all of the parties' arguments and evidence, in light of the applicable law, we weigh and balance the relevant *DuPont* factors as follows.

The parties' registered standard character marks are identical in sight, sound, suggestive connotation, and commercial impression. Petitioner's mark is not famous, and is accorded the normal scope of protection to which inherently distinctive marks are entitled. Petitioner's goods are related to Respondent's Class 35 services, but not to its Class 41 services. The relevant classes of customers and channels of trade overlap in very broad sense, but not in a way that appreciably enhances the likelihood of confusion. The least sophisticated customers for the parties' goods and services can be expected to exercise no more than normal care in making their purchases. There is no evidence of actual confusion. The extent of potential confusion is greater for Respondent's Class 35 services than for its Class 41 services. Respondent's good or bad faith is a neutral factor.

As we noted at the outset of this opinion, we consider each class in Respondent's multi-class registration separately to determine whether Petitioner has shown a likelihood of confusion with respect to each by a preponderance of the evidence. *See Federated Foods v. Fort Howard Paper*, 544 F.2d at 1101-02. We accordingly find a likelihood of confusion as to Respondent's Class 35 services, and no likelihood of confusion as to its Class 41 services.

IV. Decision

The petition to cancel is **granted** as to Respondent's Class 35 services and **denied** as to Respondent's Class 41 services.