

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: July 17, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*Proximo Spirits, Inc.*  
*v.*  
*West Road Spirits LLC*

Cancellation No. 92080766

Erica R. Halstead and Jennifer Kwon of Womble Bond Dickinson (US) LLP for:  
Proximo Spirits, Inc.

Micah Gunn and Clifford D. Hyra of Fresh IP LLC for:  
West Road Spirits LLC

Before Wellington, Greenbaum, and Myles,  
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Respondent West Road Spirits LLC owns a Principal Register registration for the standard character mark SEXTO for “alcoholic beverages, except beer; alcoholic beverages, namely, distilled agave liquor,” in International Class 33.<sup>1</sup>

<sup>1</sup> Registration No. 5880523, issued October 8, 2019 and maturing from an application filed on May 31, 2017. The registration includes a statement that the English translation of the mark is “sixth.”

Petitioner Proximo Spirits, Inc. seeks cancellation of Respondent's registration under Trademark Act ("the Act") Section 2(d), 15 U.S.C. § 1052(d), alleging likelihood of confusion with the mark in its pleaded registrations, including:

THE SEXTON (in standard characters) for "whiskey" in International Class 33.<sup>2</sup> Petitioner alleges that it has constructive-use priority in connection with its likelihood of confusion claim because the filing date of the underlying application for Petitioner's pleaded registration, above, precedes the filing date for the underlying application that matured into Respondent's registration.<sup>3</sup> Petitioner also alleges that it has used its mark "prior to Respondent's first use of Respondent's mark."<sup>4</sup>

Respondent, in its answer, denies the salient allegations of the Petition to Cancel.<sup>5</sup>

Only Petitioner filed a trial brief. However, we hasten to add that Respondent is not required to file a trial brief and the absence thereof is not a concession of the case. *Yazhong Investing Ltd. v. Multi-Media Tech. Ventures, Ltd.*, 2018 WL 2113778, \*4 n.13 (TTAB 2018) ("Because Respondent, as defendant herein, is under no obligation to submit evidence or a brief, we do not construe Respondent's failure to do so as a concession of the case.") Petitioner, as the plaintiff in this proceeding, bears the

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<sup>2</sup> Reg. No. 5530788 ("Reg. '788"), issued on July 31, 2018, and maturing from an application filed on May 31, 2016. Petitioner also pleaded ownership of Reg. Nos. 5487993 and 5542167, both for composite marks containing the term THE SEXTON, and maturing from applications filed on June 2, 2017.

<sup>3</sup> 1 TTABVUE 3 (Pet. To Cancel ¶ 3).

<sup>4</sup> 1 TTABVUE 3 (Pet. To Cancel ¶ 4).

<sup>5</sup> 4 TTABVUE. Petitioner also asserted several "affirmative defenses," but did not pursue these at trial and, as noted *supra*, did not file a trial brief. Accordingly, we construe the putative affirmative defenses to be waived or forfeited. *See Keystone Consol. Indus. v. Franklin Inv. Corp.*, No. 92066927, 2024 WL 3771168, \*2 n.10 (TTAB 2024); *Coca-Cola Co. v. Meenaxi Enters., Inc.*, No. 92063353, 2021 WL 2681898, \*1 (TTAB 2021).

burden of establishing its entitlement to a cause of action, as well is proving its claim by a preponderance of the evidence. *See Jansen Enters. Inc. v. Rind*, 2007 WL 809857, \*3 (TTAB 2007).

### **I. The Record and Evidentiary Issues**

Both parties submitted evidence during their assigned trial periods. The Board has carefully the evidentiary submissions, and presumes the parties' familiarity therewith. Relevant evidence is discussed, where necessary, throughout this opinion. *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.”).

With its trial brief, Petitioner renewed its objections to Respondent's notices of reliance nos. 1 and 5, as well as the amended notices of reliance nos. 4, 6-7.<sup>6</sup> Petitioner objects to the introduction of materials under these notices essentially on the basis, *inter alia*, that Respondent failed to adequately state the relevance of the materials and that certain materials lacked probative value.

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<sup>6</sup> 57 TTABVUE 49-55. Petitioner had previously raised objections to these notices of reliance on the same basis. 45 TTABVUE. The Board sustained these procedural objections as to Respondent's notices of reliance nos. 4, 6-7, but allowed Respondent time to correct the procedural deficiencies (49 TTABVUE). Respondent filed amended notices of reliance nos. 4, 6-7 (50-52 TTABVUE).

In this case, we take the following approach to Petitioner's objections:

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.

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

In sum, we have carefully considered all evidentiary submissions, but do not provide a complete recitation of the record in this decision. And, the evidentiary objections are discussed only when necessary, including what weight, if any, is accorded to the objected-to materials.

## **II. Petitioner's Statutory Entitlement to Bring the Cancellation**

In every inter partes case, the plaintiff must establish its entitlement to have invoked the statutory proceeding it filed. In a cancellation proceeding, a party in the position of petitioner may petition to cancel the respondent's registered mark where such action is within the zone of interests protected by the statute, 15 U.S.C. § 1064, and the petitioner's reasonable belief in damage is proximately caused by continued registration of the respondent's mark. *Curtin v. United Trademark Holdings, Inc.*, \_\_ F.4th \_\_, 2025 WL 1461512, \*6 (Fed. Cir. May 22, 2025); *see also Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020).

Thus, to satisfy its entitlement to a cause of action, the plaintiff must demonstrate:

- (i) an interest falling within the zone of interests protected by the statute; and
- (ii) proximate causation. *Corcamore*, 978 F.3d 1303 (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 120-37 (2014)); *id.* at 1305 (applying *Lexmark* to inter partes TTAB cases). Demonstrating a real interest in cancelling the registration of a mark satisfies the zone-of-interests requirement, and demonstrating a reasonable belief in damage by the continued registration of a mark demonstrates damage proximately caused by registration of the mark. *Id.* at 1305-06.

Here, Petitioner established its entitlement to seek cancelation of Respondent’s registration by introducing copies of its pleaded registrations for marks containing the term THE SEXTON, including the above-mentioned Reg. ’788,<sup>7</sup> for whiskey, and which form the basis for a plausible Section 2(d) likelihood of confusion claim. Petitioner’s ownership of these registrations demonstrates both an interest falling within the zone of interests protected by 15 U.S.C. § 1064, and a reasonable belief in damage that is proximately caused by the continued registration of Respondent’s mark. *Sabhnani v. Mirage Brands, LLC*, 2021 WL 6072822, \*7 (TTAB 2021).

### **III. Priority**

“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). The parties may rely upon the filing (constructive use) dates of the underlying applications for their registrations for purposes of priority or

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<sup>7</sup> 14 TTABVUE.

either party may demonstrate an earlier priority date with evidence. *Sabhnani*, 2021 WL 6072822, \*7.

Petitioner's pleaded Reg. '788 (for the standard character mark THE SEXTON) has a constructive (filing) use that precedes Respondent's registration's constructive use date. Specifically, the former was filed on May 31, 2016 and the latter on May 31, 2017 (see Notes 1-2). Respondent's witness Jaime Davila also testified that Respondent "adopted its SEXTO mark" and "has been continuously selling distilled agave spirits, namely, SEXTO brand tequila" on dates that are after May 31, 2016, namely, the constructive use date for Petitioner's Reg. '788.<sup>8</sup>

Accordingly, we find that Petitioner's priority with respect to its pleaded Reg. '788 is established.

#### **IV. Likelihood of Confusion**

Section 2(d) of the Trademark Act prohibits registration of a mark that "[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1052(d). The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as "*DuPont* factors"); *see also In re Majestic*

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<sup>8</sup> 41 TTABVUE 4 (Davila Dec. ¶ 3).

*Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003). A likelihood of confusion analysis often particularly focuses on the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortgage Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019). Again, Petitioner bears the burden of proving its claim of likelihood of confusion by a preponderance of the evidence. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 951 (Fed. Cir. 2000).

Here, although Petitioner pleaded ownership of three registrations,<sup>9</sup> we make our likelihood of confusion determination focusing on Petitioner’s pleaded Reg. ’788 for the standard-character THE SEXTON on whiskey, vis-à-vis Respondent’s SEXTO registration. Not only has Petitioner established priority with respect to this mark, but it is also the most similar to Respondent’s mark. *New Era Cap Co. v. Pro Era, LLC*, 2020 WL 2853282, at \*11 (TTAB 2020).

**A. Legally Identical or Related Goods; Channels of Trade and Classes of Consumers**

We first consider the “similarity or dissimilarity and nature of the goods or services as described in an application or registration”; “[t]he similarity or dissimilarity of established, likely-to-continue trade channels”; and the classes of

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<sup>9</sup> See Note 2.

consumers to which the goods are marketed. *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1320 (Fed. Cir. 2014) (quoting *DuPont*, 476 F.2d at 1361).

Here, we bifurcate our analysis as to Respondent’s “alcoholic beverages, except beer” and its “alcoholic beverages, namely, distilled agave liquor” in terms of relatedness with Petitioner’s whiskey.<sup>10</sup>

### **1. Respondent’s “Alcoholic Beverages, Excluding Beer”**

We begin with Respondent’s “alcoholic beverages, excluding beer,” and find that this broad description encompasses Petitioner’s “whiskey,” an alcoholic beverage. *See In re Hughes Furniture Indus., Inc.*, 2015 WL 1734918, \*3 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”) Thus, with respect to Respondent’s “alcoholic beverages, excluding beer,” the parties’ goods are legally identical. Because Applicant’s and Registrant’s goods are legally identical, we must also presume that these goods are provided in the same trade channels and are offered to the same classes of purchasers. *Monster Energy Co. v. Lo*, 2023 WL 417620, at \*8 (TTAB 2023) (citing *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion)); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 771 (CCPA 1968) (where

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<sup>10</sup> Prior to trial, Respondent filed an unconsented motion to delete “alcoholic beverages, except beer” from the registration’s identification of goods “in the event the Board deems such amendment [is] necessary to dismiss the cancellation.” 9 TTABVUE 2. The Board deferred decision of the motion until final decision. 12 TTABVUE. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 514.03 (2025). We address this motion briefly at the end of this decision (see footnote 25).



there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same).

## **2. Respondent's "Alcoholic Beverages, Namely, Distilled Agave Liquor"**

As to Respondent's "alcoholic beverages, namely, distilled agave liquor," which can be commonly referred to as "tequila" or "mezcal." Petitioner submitted evidence showing that these goods and whiskey are closely related, share the same channels of trade and will be offered to the same classes of purchasers. In addition to copies of over thirty (30) third-party registrations for marks covering both tequila and whiskey,<sup>11</sup> Petitioner submitted screenshots from ten third-party distillery websites offering tequila and whiskey under the same mark.<sup>12</sup> The third-party registration evidence is probative because it serves to suggest that tequila and whiskey are the types of alcoholic beverages that emanate from the same source. *In re Albert Trostel & Sons Co.*, 1993 WL 596274, \*3 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 1988 WL 252484, \*3 n.6 (TTAB 1988), *aff'd mem.* 864 F.2d 149 (Fed. Cir. 1988).

## **3. Conclusion: The Goods, Their Trade Channels and Classes of Consumers**

Accordingly, in view of our above findings, the second *DuPont* factor weighs heavily in favor of finding a likelihood of confusion with respect to all of Respondent's goods identified in the registration, and particularly so as to the "alcoholic beverages, excluding beer," given the legal identity with Petitioner's whiskey.

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<sup>11</sup> 15 TTABVUE (Petitioner's 2<sup>nd</sup> Notice of Reliance).

<sup>12</sup> 16 TTABVUE (Petitioner's 3<sup>rd</sup> Notice of Reliance).

The third *DuPont* factor also weighs heavily in favor of finding a likelihood of confusion given the evidence showing that all of Respondent's goods may be found in the same trade channels as Petitioner's whiskey, and will be offered to the same classes of consumers.

**B. Strength of Petitioner's THE SEXTON mark**

Before considering the marks themselves, we first assess how strong Petitioner's mark is, in order to determine the scope of protection to which it is entitled. There are two types of strength: conceptual and commercial. *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 ... and its marketplace strength ..."). That is, "the fifth *DuPont* factor enables Opposer to prove that its pleaded marks are entitled to an expanded scope of protection by adducing evidence of '[t]he fame of the prior mark (sales, advertising, length of use)'." *Made in Nature, LLC v. Pharmavite LLC*, 2022 WL 2188890, \*11 (TTAB 2022) (quoting *DuPont*, 476 F.2d at 1361). Our determination of commercial strength or fame for likelihood of confusion purposes is not an 'all or nothing' proposition. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 1325 (Fed. Cir. 2017). Rather, it involves a determination, based on the evidence, as to the strength of the mark and this can "var[y] along a spectrum from very strong to very weak." See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1375 (Fed. Cir. 2005) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 1344 (Fed. Cir. 2003)).

Petitioner argues that its THE SEXTON mark is both conceptually and commercially strong, deserving “a wide ambit of protection.”<sup>13</sup> Petitioner points out that the meaning of its mark is arbitrary in connection with its whiskey goods—a “sexton” is defined “a church officer or employee who takes care of the church property and performs related minor duties (such as ringing the bell for services and digging graves).”<sup>14</sup>

In terms of commercial strength, Petitioner relies on evidence, including testimony from its Senior Vice President of Marketing, it submitted regarding its gross sales and promotional expenditures for the years 2017-2023.<sup>15</sup> Petitioner also points to evidence showing that its THE SEXTON whiskey has received significant attention, including being featured in various prominent publications, receiving numerous awards for its quality and taste, and “[i]n 2021, THE SEXTON became the Official Whiskey of the highly acclaimed AMC Network television series *The Walking Dead*.”<sup>16</sup>

Petitioner acknowledges evidence submitted by Respondent regarding putative third-party use and registration of similar marks in connection with alcoholic beverages. However, aside from its objections, Petitioner also argues that Respondent’s evidence, in its entirety, is:<sup>17</sup>

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<sup>13</sup> 57 TTABVUE 30.

<sup>14</sup> 34 TTABVUE 6.

<sup>15</sup> 25 TTABVUE (Otegui Dec. ¶¶ 13-25).

<sup>16</sup> 25 TTABVUE (Otegui Dec. ¶ 24); *see also* Otegui Dec. Exs. 1-29).

<sup>17</sup> 57 TTABVUE 29.

... insufficient to establish third-party use of the term SEXTON in connection with whiskey or, for that matter, with any alcoholic beverages. And to the extent Respondent's evidence is considered, Respondent has presented a mere three third-party registrations of varying probative value (two for non-identical goods and two for non-identical terms) and minimal evidence of use of three third-party marks, also of limited probative value (all for non-identical goods and incorporating other distinctive wording).

For example, Petitioner not only objected to Respondent's reliance on a third-party registration for SEXTON HILL for wine and third-party uses of SEXTON-formative marks, but also argues that "there are **no** coexisting registrations or third-party uses of SEXTON-formative marks in connection with whiskey."<sup>18</sup> Similarly, Petitioner objected to Respondent's reliance on a third-party registration for the mark SEXTANT, also for wine, but also argues that this registration is "likewise immaterial" because it "both visually and phonetically distinct from THE SEXTON and has a distinguishable connotation (the meaning of 'sextant' being wholly distinct from the meaning of 'sexton') and commercial impression."<sup>19</sup>

With respect to Petitioner's argument that Respondent's evidence of third-party use or registration of marks in connection with wine is irrelevant for purposes of showing weakness, we agree that any probative value of such evidence hinges on the evidence involving the same or related goods or services. *See Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1324-26 (Fed. Cir. 2018); *In re i.am.symbolic, LLC*, 866 F.3d 1315, 1328-29 (Fed. Cir. 2017) ("Symbolic has not

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<sup>18</sup> 57 TTABVUE 26, referring to copy of registration submitted by Respondent under a notice of reliance (at 33 TTABVUE).

<sup>19</sup> 57 TTABVUE 28, referring to copy of registration submitted by Respondent under a notice of reliance (at 33 TTABVUE).

pointed to any record evidence to support a finding that multiple third parties use the mark I AM for the listed goods in its class 3 and 9 applications.”); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877-78 (Fed. Cir. 1992) (“The relevant *DuPont* inquiry is ‘[t]he number and nature of similar marks in use on *similar goods*’ ... It is less relevant that ‘Century is used on unrelated goods or services such as ‘Century Dental Centers’ or ‘Century Seafoods.’”) (quoting *Weiss Assocs. v. HRL Assocs.*, 902 F.2d 1546, 1548 (Fed. Cir. 1990)); *In re Inn at St. Johns, LLC*, 2018 WL 2734893, \*3-4 (TTAB 2018).

Based on the record before us, we find Petitioner’s mark THE SEXTON has no demonstrated weakness, but is conceptually strong because the term is arbitrary in connection with whiskey. In addition, the evidence further demonstrates that Petitioner’s mark has enjoyed success in terms of sales in recent years as well as received considerable attention in terms of industry awards and exposure through promotions in conjunction with television programs.

Accordingly, the fifth *DuPont* factor weighs in favor of a conclusion that confusion is likely. The sixth *DuPont* factor, involving any possible weakness due to third-party use of the same or similar term on the same or related goods, is neutral.

### **C. Dissimilarity of the Marks**

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Petitioner’s and Respondent’s marks in their entirety, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 476 F.2d at 1361.

“The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *i.am.symbolic*, 866 F.3d at 1323 (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012) (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. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 2016 WL 3915987, \*5 (TTAB 2016); *In re Mr. Recipe, LLC*, No. 2016 WL 1380730, \*6 (TTAB 2016).

Here, we find the marks are dissimilar because Petitioner’s mark, THE SEXTON, has a specific meaning in English and may be distinguished from Respondent’s mark, SEXTO, that has no meaning in English. Specifically, as Petitioner has acknowledged in the context of the conceptual strength of its mark, a “sexton” is “a church officer or employee who takes care of the church property and performs related minor duties (such as ringing the bell for services and digging graves).”<sup>20</sup> According to Wikipedia, “[h]istorically in North America and the United Kingdom the ‘sexton’ was sometimes a municipal official responsible for overseeing the town graveyard.”<sup>21</sup> The graveyard connotation is not lost in Petitioner’s promotional activity for its THE SEXTON whiskey, including the “co-branded bottle to commemorate the final season [of The

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<sup>20</sup> Definition from MERRIAM-WEBSTER dictionary (copy attached at 34 TTABVUE 6; Respondent’s Ex. 1).

<sup>21</sup> 34 TTABVUE 12 (Respondent’s Ex. 1).

Walking Dead television show] ... featuring ... a walker's head in place of the brand's trademark skeleton logo.”<sup>22</sup>

As to the first word, THE, in Petitioner's mark, Petitioner contends that this term plays no importance in distinguishing the marks.<sup>23</sup> This is generally true in most analyses involving determinations of a mark's overall commercial impression and connotation and, indeed, the Board has held on many occasions that the mere addition of the word “the” plays little to no importance for purposes of distinguishing otherwise similar marks. However, the Federal Circuit has held that such a proposition “is not universally true.” *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1245 (Fed. Cir. 2004) (reversing a Board decision and holding word “the” in the mark THE RITZ KIDS helps distinguish from the mark RITZ). Here, while consumers may not look to the word “the” in Petitioner's mark for source-identification purposes, the word reinforces the connotation of the “sexton” occupation by conjuring a particular person holding this position. In other words, as a definite article, the “the” in Petitioner's mark will be understood identifying a specific individual holding the occupation of sexton.

Respondent's registered mark, SEXTO, on the other hand, has no understood meaning in English. In Spanish, the word “sexto” means “sixth.”<sup>24</sup> Thus, whether

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<sup>22</sup> 29 TTABVUE 256 (Otegui Dec. Exh. 26).

<sup>23</sup> 57 TTABVUE 33.

<sup>24</sup> Translation taken from SPANISH TO ENGLISH CAMBRIDGE DICTIONARY (copy attached at 34 TTABVUE 7; Respondent's Ex. 1).

consumers are familiar with the Spanish meaning or not, Respondent's mark has no meaning or connotation similar to that of the word "sexton."

We do not ignore the visual similarity between the marks inasmuch as Respondent's mark SEXTO is merely one letter away from SEXTON. Nevertheless, for the reasons mentioned above, we find the omission of the letter N at the end of Respondent's mark is significant because consumers are unlikely to view the mark as a misspelling of SEXTON. Rather, as mentioned, consumers are likely to perceive SEXTO as an unknown term, possibly a combination of the words SEX and TO, or if consumers understand Spanish, they will understand it to mean "sixth."

In terms of sound, it is well settled that there is no "correct" pronunciation of a trademark and that consumers may pronounce trademarks differently from what the mark owner intends. *See, e.g., Viterro*, 671 F.3d 1367 ("It is also true, as the Board recognized, that there is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than intended by the brand owner.") Nevertheless, we find it unlikely that these marks will be pronounced in manners as to make them sound alike.

Ultimately, we find the Petitioner's mark, THE SEXTON, has such a different meaning from Respondent's registered mark, SEXTO, and that these marks are so different that first *DuPont* factor weighs strongly against a likelihood of confusion.

#### **D. Conclusion: Weighing of Factors**

We must "weigh the *DuPont* factors used in [our] analysis and explain the results of that weighing." *In re Charger Ventures LLC*, 64 F.4th 1375, 1383-84 (Fed. Cir.



2023). “In any given case, different *DuPont* factors may play a dominant role,” and the “weight given to each factor depends on the circumstances of each case.” *Id.* (citation omitted).

The parties’ goods are legally identical or closely related and these goods will be offered in the same trade channels to the same classes of consumers. Moreover, Petitioner’s mark, THE SEXTON, is conceptually strong and the evidence demonstrates that it is also commercially strong. These factors are accorded their appropriate weight and Petitioner’s mark is given its attendant scope of protection.

Nonetheless, in this case, the dissimilarity of the parties’ marks outweighs the other relevant factors in our analysis, including that the marks are used on closely related or identical goods. *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373 (Fed. Cir. 1998) (CRYSTAL CREEK for wine has different connotation than CRISTAL for champagne; marks found to be dissimilar). Although Petitioner’s mark is strong, it possesses a meaning and connotation that is not present in Respondent’s mark. This creates such a significant difference between the marks that it outweighs the aforementioned factors favoring a finding of a likelihood of confusion. *See, e.g., Kellogg Co. v. Pack’em Ent., Inc.*, 951 F.2d 330 (Fed. Cir. 1991) (citing *DuPont*, 476 F.2d at 1361) (holding that “substantial and undisputed differences” between two competing marks justified a conclusion of no likelihood of confusion on summary judgment).

In sum, weighing together the *DuPont* factors for which there has been evidence and argument in this proceeding, we ultimately do not find confusion is likely between Petitioner's mark, THE SEXTON, and Respondent's mark, SEXTO.

**Decision:** The Petition to Cancel is denied under Section 2(d) of the Act.<sup>25</sup>

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<sup>25</sup> In view of our decision, Respondent's motion (as discussed in footnote 10) to amend the identification of goods in its registration is moot.