

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: July 26, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Streamline Performance Boats, Corp.
—

Application Serial No. 88621502
Application Serial No. 88621520
—

Albert Bordas of Albert Bordas P.A.,
for Streamline Performance Boats, Corp.

Tara Bhupathi, Trademark Examining Attorney, Law Office 124,
Lydia M. Belzer, Managing Attorney.

—
Before Bergsman, Goodman, and Lebow,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Streamline Performance Boats, Corp. (“Applicant”) seeks registration on the Principal Register of the mark STREAMLINE BOATS (in standard characters) and STREAMLINE BOATS and design, reproduced below, for the goods and services listed below:



Serial No. 88621502

Serial No. 88621520

Boat hulls; Boats; Boats and structural parts therefor; Fishing boats; Fitted covers for boats and marine vehicles; Recreational watercraft, namely, boats and yachts; Vessels, in International Class 12;

Boat dealerships; Dealerships in the field of boats and yachts; Wholesale and retail store services featuring boats and yachts, in International Class 35; and

Custom manufacture of boats, in International Class 40.¹

Applicant disclaimed the exclusive right to use the word “Boats” in both applications.

With respect to the STREAMLINE BOATS and design application, Applicant described the mark as follows:

The mark consists of the words STREAMLINE BOATS in stylized letters. STREAMLINE appears on top and BOATS on the bottom, along side [sic] to the right of words appears a Marlin fish with the tail sitting below the letter “T” of boats and the bill sits above the letter “E” of the word streamline.

Color is not claimed as a feature of the mark.

The Examining Attorney refused to register Applicant’s marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s marks so resemble the registered mark STREAMLINE TANKERS GMBH and design, reproduced below, for, inter alia, “apparatus for locomotion by water, in particular vessels and tankers,” in International Class 12.²

¹ Application Serial No. 88621502 (the standard character mark) and Serial No. 88621520 (the word and design mark) were filed on September 18, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1052(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as November 1, 2017, in connection with all the goods and services.

² Registration No. 5066558 registered October 25, 2016, under Section 66a of the Trademark Act, 15 U.S.C. § 1141f(a), based on International Registration No. 1294884 registered January 15, 2016.



Registrant describes its mark as follows:

Color is not claimed as a feature of the mark. The mark consists of two curved lines above the wording "STREAMLINE TANKERS GMBH".

Registrant disclaims the exclusive right to use the term "TANKERS GMBH."

Throughout the prosecution of the applications at issue, the Examining Attorney referred only to Registrant's International Class 12 goods as identified above and never referred to Registrant's "arranging of contracts for third parties for the buying and selling of vessels," in International Class 35, or any of the International Class 39 services in the registration. We limit our likelihood of confusion analysis to Registrant's "apparatus for locomotion by water, in particular vessels and tankers" because the Examining Attorney did not identify any other basis for refusing registration.

Because the appeals involve common questions of law and fact, we consolidate the appeals. *See, e.g., In re S. Malhotra & Co.*, 128 USPQ2d 1100, 1102 (TTAB 2018) (Board sua sponte consolidated two appeals); *In re Anderson*, 101 USPQ2d 1912, 1915 (TTAB 2012) (Board sua sponte consolidated two appeals); *In re Country Music Ass'n, Inc.*, 100 USPQ2d 1824, 1827 (TTAB 2011) (same).

Citations to the record refer to the USPTO Trademark Status and Document Retrieval (TSDR) system. Citations to the briefs refer to the TTABVUE database. We refer to the record and brief in Serial No. 88621502 unless otherwise indicated.

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

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

We base our determination under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). “In discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any

single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir. 2020) (citing *Dixie Rests.*, 41 USPQ2d at 1533).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). “Two key factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because the ‘fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *In re Embiid*, 2021 USPQ2d 577, at *10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). *See also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004).

I. The similarity or dissimilarity of the marks.

We turn first to the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*,

126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

In comparing the marks, we are mindful that “[t]he proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)); *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012).

We keep in mind that “[s]imilarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)).

Applicant is seeking to register the mark STREAMLINE BOATS, in standard character form, and STREAMLINE BOATS and design, reproduced below:



The registered mark cited as a bar to registration is STREAMLINE TANKERS GMBH and design reproduced below:



- A. STREAMLINE BOATS, in standard character form, versus STREAMLINE TANKERS GMBH and design.

The marks are similar because they both consist in part of the word “Streamline” followed by a descriptive term (i.e., “Boats” or “Tankers GMBH”). In addition, the word “Streamline” is the dominant part of both marks. There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

With respect to Applicant’s mark STREAMLINE BOATS, the word “Streamline” is the first word of the mark. As the Court of Appeals for the Federal Circuit has often said, the lead element in a mark has a position of prominence; it is likely to be noticed and remembered by consumers and play a dominant role in the mark. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding “the identity of the marks’ two initial words is particularly significant because consumers typically notice those words first”); *Palm Bay Imps. Inc. v. Veuve Clicquot*

Ponsardin Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word).

In addition, the word “Boats” is descriptive, and Applicant has disclaimed the exclusive right to use it. It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations. *See In re Detroit Athletic Co.*, 128 USPQ2d at 1050 (citing *Dixie Rests.*, 41 USPQ2d at 1533-34; *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *Nat’l Data Corp.*, 224 USPQ at 752); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”).

Likewise, the word “Streamline” is the dominant element of Registrant’s mark. Although we assess each mark in its entirety, wording often is considered the dominant feature of a mark comprising both literal and design elements because it is most likely to indicate the source of the services. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363,

116 USPQ2d 1129, 1134 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 982 (2016); *Viterra*, 101 USPQ2d at 1908.

Further reinforcing the dominance of the word “Streamline” in Registrant’s mark STREAMLINE TANKERS GMBH and design is (i) its position as the first part of the mark, (ii) that “Streamline” is followed by the descriptive term “TANKERS GMBH,” and (iii) the word “Streamline” is the largest feature of the mark.

Applicant is seeking to register STREAMLINE BOATS in standard character form. Marks presented in standard characters are not limited to any particular depiction. The rights associated with a mark in standard characters reside in the wording, and not in any particular display. Thus, Applicant seeks registration of a mark that might be depicted in any manner, regardless of the font style, size, or color, and might at any time in the future be displayed in a manner similar to Registrant’s mark. *Viterra*, 101 USPQ2d at 1909-11; *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (rejecting argument that for purposes of determining whether two marks are similar, a mark in a typed drawing (equivalent to modern standard character format) is distinct from such mark in a logo format; “[b]y presenting its mark in a typed drawing, a *difference* cannot legally be asserted by that party” (emphasis in original)).

The MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) (accessed July 23, 2022) defines “Streamline” as “a contour designed to minimize resistance to motion through a fluid (such as air)” and “a smooth flowing line designed as if for decreasing

air resistance.”³ Both STREAMLINE BOATS and STREAMLINE TANKERS GMBH and design engender the commercial impression of vessels that are aerodynamically designed. Thus, consumers encountering both marks are likely to mistakenly believe that STREAMLINE BOATS and STREAMLINE TANKERS GMBH and design are variations of a STREAMLINE line of products.

In this case, the peripheral differences in the marks – the descriptive terms following “Streamline” and Registrant’s design element – fail to distinguish the marks. *See In re Denisi*, 225 USPQ 624, 624 (TTAB 1985) (“[I]f the dominant portion of both marks is the same, then confusion may be likely notwithstanding peripheral differences.”).

We find that Applicant’s mark STREAMLINE BOATS, in standard characters, is similar to the Registered mark STREAMLINE TANKERS GMBH and design.

B. STREAMLINE BOATS and design versus STREAMLINE TANKERS GMBH and design.

Again, the word “Streamline” is the dominant part of both marks. As discussed above, “[i]n the case of marks, such as Applicant’s, consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods.” *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184

³ The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

(TTAB 2018) (citing *Viterra*, 101 USPQ2d at 1908). In addition, the word “Streamline,” in Applicant’s mark is the first part of the word portion of the mark, it is the largest part of the mark, and the remainder of the words are descriptive.

The marks “must be considered ... in light of the fallibility of memory ...” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Accordingly, we find that the word “Streamline” will be the part of both Applicant’s mark and Registrant’s mark that consumers will remember and use to refer to the products.

As in the case of Applicant’s standard character mark, the peripheral differences in the marks do not distinguish them. For example, consumers will perceive the different design elements as associated with the different STREAMLINE product lines.

We find that Applicant’s mark STREAMLINE BOATS and design is similar to the registered mark STEAMLIN TANKERS GMBH and design.

C. Applicant's arguments

Applicant contends, on one hand, that its marks give a mental impression of fast fishing boats because Applicant's boats are for pleasure cruising, fishing and diving.⁴ On the other hand, Applicant contends that Registrant's mark does not give a mental impression of anything fast because it identifies slow tankers.⁵ However, as discussed above, the word "Streamline" means and engenders the commercial impression of something that is aerodynamically designed. Thus, all the marks – Applicant's marks STREAMLINE BOATS and STEAMLINER BOATS and design and Registrant's mark STREAMLINE TANKERS GMBH and design – engender the commercial impression of aerodynamically designed products.

II. The similarity or dissimilarity of the goods and services.

As noted above, Applicant is seeking to register its marks for boats, boat dealership services, and the custom manufacture of boats. The mark in the cited registration is registered for, inter alia, "apparatus for locomotion by water, in particular vessels and tankers."

We provide the definitions below from the MERRIAM-WEBSTER DICTIONARY (accessed July 23, 2022) of relevant terms to assist in understanding the products and services at issue.

- "Apparatus" is "an instrument or appliance designed for a specific operation."
- "Locomotion" is "an act or power of moving from place to place."

⁴ Applicant's Brief, pp. 12-13 (4 TTABVUE 13-14).

⁵ *Id.* at p. 15 (4 TTABVUE 15).

- “Vessel” is “a watercraft bigger than a rowboat.”
- “Watercraft” is a “ship, boat,” or “craft for water transport.”
- “Tankers” are “a cargo ship fitted with tanks for carrying liquid in bulk.

Applying the definitions of these terms to Registration’s description of goods, Registrant’s products are means of moving through water specifically by ships, boats, or craft for water transport.

Inasmuch as both Registrant’s description of goods and Applicant’s description of goods include or encompass boats, they are in part identical. Under this *DuPont* factor, the Examining Attorney need not prove, and we need not find, similarity as to each product listed in the description of goods. It is sufficient for a refusal based on likelihood of confusion that we find any item encompassed by the identification of goods in a particular class in the application and registration related. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff’d* 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).

This leaves us to determine whether Applicant’s boat dealership services and custom manufacture of boats are related to Registrant’s ships, boats, and cargo ships carrying liquids. To prove that Registrant’s ships, boats, and cargo ships carrying liquids are related to boat dealership services and the custom manufacture of boats, the Examining Attorney submitted the following third-party website evidence:

- The Metal Shark website (metalsharkboats.com). Metal Shark manufactures watercraft up to 300 feet in length for fire rescue, law enforcement, military,

passengers, and recreational purposes.⁶ The website touts that Metal Shark specializes “in the design and production of boats and ships for military, law enforcement, fire rescue and a wide spectrum of commercial applications.”⁷

- Newton Boats website (newtonboats.com). Newton Boats builds custom boats in size from 26 feet to 71 feet. The company specializes in dive boats, yacht sport fishermen, patrol boats, and research vessels.⁸

- Pluckenbaum Custom Boats website (pluckenbaum.com). Pluckenbaum Custom Boats builds aluminum coastal cruisers and motor yachts up to 78 feet. Occasionally, the company will build a special purpose commercial vessel or a high performance yacht. “Pluckenbaum produces only a handful of boats per year each one custom built to the owners [sic] specification and desires.”⁹

- Bayliner website (bayliner.com). One of Bayliner’s webpages advertises various types of boats (e.g., deck boats, center consoles, and bowriders) with various models.¹⁰ Another webpage advertises “Build my Bayliner” identifying various types of boats and models.¹¹ Presumably, the purchaser or prospective purchaser is permitted to select options for the base model.

⁶ December 21, 2019 Office Action (TSDR 11-14).

⁷ *Id.* at TSDR 11.

⁸ *Id.* at TSDR 15.

⁹ *Id.* at TSDR 16.

¹⁰ July 28, 2021 Office Action (TSDR 7).

¹¹ *Id.* at TSDR 8.

- Beneteau website (beneteau.com). The Beneteau website advertises sailboats and powerboats.¹² The website has a “Boat Configurator” that allows you to build your own BENETEAU boat.¹³
- Boston Whaler website (bostonwhaler.com).¹⁴ The website advertises various BOSTON WHALER models. There is a link to “Build Your Whaler.”
- Chaparral website (chaparralboats.com).¹⁵ The webpages advertises various CHAPARRAL boat models. Nothing posted on the webpages submitted by the Examining Attorney refer to custom boat making.
- Chris Craft website (chriscraft.com).¹⁶ The website has links to “Models” and “Design Yours.” The “Design Yours” webpage instructs the view to “Start by choosing any Chris-Craft model, then build and price your dream boat.”¹⁷
- Cobalt Boats website (cobaltboats.com).¹⁸ The webpages advertise various COBALT boat models along with the option of being able to design your own COBALT boat.
- Glastron Boats website (glastron.com).¹⁹ The webpages presents various types of GLASTRON boats and models with the option to “Build Your Own.”

¹² *Id.* at TSDR 9-12.

¹³ *Id.* at TSDR 10.

¹⁴ *Id.* at TSDR 11-15.

¹⁵ *Id.* at TSDR 16-18.

¹⁶ *Id.* at TSDR 19-22.

¹⁷ *Id.* at TSDR 22.

¹⁸ *Id.* at TSDR 23-30.

¹⁹ *Id.* at TSDR 31-34.

- Malibu website (malibuboats.com).²⁰ The website advertises various types and models of MALIBU boats and there is a link to “Build A Boat.”
- Mastercraft website (mastercraft.com).²¹ The website advertises various types and models of MASTERCRAFT boats. There is a link to “Design Your Boat.”
- Nautique website (nautique.com).²² The website advertises various types and models of NAUTIQUE boats. Nothing posted on the webpages submitted by the Examining Attorney refer to custom boat making.

The evidence shows that boat manufactures often custom manufacture boats for purchasers and prospective purchasers under the same mark they use to identify their boats. However, none of the third-party websites submitted by the Examining Attorney refer to “boat dealerships; dealerships in the field of boats and yachts; wholesale and retail store services featuring boats and yachts.”

Applicant argues that it uses its mark to identify boats for “recreational boaters that boat with friends or to cruise or go fishing.”²³ Applicant’s boats are 26, 35 and 45 feet.²⁴ In contrast, Registrant’s products are “for commercial companies involved in freight transportation that often hold hundreds and hundreds of shipping containers.”²⁵

²⁰ *Id.* at TSDR 35-37.

²¹ *Id.* at TSDR 38-41.

²² *Id.* at TSDR 42-45.

²³ Applicant’s Brief, p. 15 (4 TTABVUE 16).

²⁴ *Id.*

²⁵ *Id.* at p. 16 (TSDR 17).

Respectfully ... the Examining Attorney fails to produce any evidence demonstrating that a recreational/sport boat company is also in the business of manufacturing tankers that haul shipping containers across seas and oceans on earth. They are simply two completely different products and services, and for that reason, Applicant's mark and that of Registrant's are not confusingly similar.²⁶

There are several problems with Applicant's argument. First, we must consider the goods as they are described in the application and registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys, Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."); *Paula Payne Prods. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods").

Applicant's description of goods includes boats and vessels without any restrictions or limitations. The Registrant's description of goods includes vessels and tankers. As noted above, a "vessel" is a "a watercraft bigger than a rowboat" and a "watercraft" is a ship, boat and craft for water transport. Therefore, the goods are in part identical.

²⁶ Applicant's Brief, p. 17 (16 TSDR 18).

Second, we do not read limitations into the identification of goods. *i.am.symbolic, LLC*, 123 USPQ2d at 1748; *Squirtco*, 216 USPQ at 940 (“There is no specific limitation and nothing in the inherent nature of Squirtco’s mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration”); *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *13 (TTAB 2020) (“Caps” encompasses all types of caps); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”). Therefore, we must presume that Registrant’s vessels include all types of watercraft including Applicant’s recreational vessels.

Finally, in considering the scope of the cited registration, we look to the registration itself, and not to extrinsic evidence about the Registrant’s actual goods, customers, or channels of trade. *See Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987) (quoting *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983)); *In re FCA US LLC*, 126 USPQ2d 1214, 1217 n.18 (TTAB 2018) (“[W]e may consider any such [trade channel] restrictions only if they are included in the identification of goods or services”); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981) (citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958)).

We find that Applicant’s boats and vessels in International Class 12 and custom manufacture of boats in International Class 40 are related to Registrant’s vessels in International Class 12. However, the Examining Attorney failed to meet her burden

of showing that Applicant's "boat dealerships; dealerships in the field of boats and yachts; wholesale and retail store services featuring boats and yachts," in International Class 35, are related to Registrant's vessels in International Class 12.

III. Established, likely-to-continue channels of trade and classes of consumers.

Because Applicant's boats and vessels, in International Class 12, are in part identical to Registrant's goods in International Class 12 (i.e., vessels), we presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (identical goods are presumed to travel in same channels of trade to same class of purchasers) (cited in *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) ("With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and 'presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods...."); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same).

The third-party websites discussed in the previous section prove that boat manufacturers offer their boats and the custom manufacture of boats in the same channels of trade to the same classes of consumers.

There is no evidence referring to Applicant's "boat dealerships; dealerships in the field of boats and yachts; wholesale and retail store services featuring boats and yachts." In addition, the Examining Attorney did not make any argument explaining

how these services are related to Registrant's vessels. Thus, the Examining Attorney has failed to meet her burden of showing that these services are offered in the same channels of trade to the same classes of consumers as Registrant's vessels.

IV. Conditions under which and consumers to whom sales are made.

Applicant contends that consumers will exercise a high degree of purchasing care when acquiring a boat because they are expensive.²⁷ The record shows the following representative price information:

- A 50-foot Pluckenbaum Performance costs \$250,000;²⁸
- A 50-foot Pluckenbaum Wide Body costs \$165,500;²⁹
- An 18-foot Bayliner deck boat costs \$22,164;³⁰
- An 18-foot Bayliner center console costs \$23,702;³¹ and
- A 19-foot Glastron bowrider costs \$35,668.³²

In addition to the price, there are other factors that increase the consumer care boat purchasers will exercise when shopping for a boat. For example, a boat is not an ordinary consumer item that a prospective purchaser will acquire on impulse. It is a special purchase a consumer will make perhaps once every several years. The consumer is going to have a reasonably focused reason for purchasing a boat (e.g.,

²⁷ Applicant's Brief, pp. 21-22 (4 TTABVUE 22-23).

²⁸ December 21, 2019 Office Action (TSDR 18).

²⁹ *Id.*

³⁰ July 28, 2021 Office Action (TSDR 7).

³¹ *Id.*

³² *Id.* at TSDR 31.

fishing, cruising, or water skiing). Finally, the purchaser is probably a boating enthusiast and, therefore, will have a greater interest in researching the purchase and satisfying personal tastes as opposed to the time spent on an ordinary consumer product.

We find that this *DuPont* factor weighs against finding a likelihood of confusion.

- V. The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.

Applicant asserts that “Applicant and Registrant have co-existed going on three years in November 2020 without any evidence of confusion.”³³ The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by Applicant of its mark for a significant period of time in the same markets as those served by Registrant under its mark. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff’d*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011); *New Era Cap Co.*, 2020 USPQ2d 10596, at *17; *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred. *New Era Cap Co.*, 2020 USPQ2d 10596, at *17; *Barbara’s Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (the probative value of the absence of actual confusion depends upon there being a significant opportunity for actual confusion to have occurred); *Red Carpet Corp. v. Johnstown Am. Enters. Inc.*, 7 USPQ2d 1404, 1406-07 (TTAB

³³ Applicant’s Brief, p. 14 (4 TTABVUE 15).

1988); *Central Soya Co. v. N. Am. Plant Breeders*, 212 USPQ 37, 48 (TTAB 1981) (“[T]he absence of actual confusion over a reasonable period of time might well suggest that the likelihood of confusion is only a remote possibility with little probability of occurring.”).

As noted above, our analysis as to the second *DuPont*, discussing the similarity or dissimilarity of the goods, is based, as dictated by precedent from the Federal Circuit, on the identifications as set forth in the application and the cited registration. *See Stone Lion*, 110 USPQ2d at 1162. As such, when determining that factor, we may not consider evidence of how Applicant and Registrant are actually selling their goods in the marketplace. *Id.*

This eighth *DuPont* factor, by contrast, requires us to look at actual market conditions, to the extent there is evidence of such conditions of record. *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, at *6 (TTAB 2020). Any lengthy absence of actual confusion during a period of known, rather than legally presumed, use in the same channels of trade could be telling. In this regard, we consider all of the evidence of record that may be relevant to the eighth *DuPont* factor.

In its June 22, 2020 Response to an Office Action, Applicant embedded excerpts from its website (streamlineboats.com) and Registrant’s website (streamline-tankers.com).³⁴ The excerpt of Applicant’s website made of record displays three

³⁴ June 22, 2020 Response to an Office Action (TSDR 7-8). Applicant and the Examining Attorney must download and attach the evidence it wants to make of record. Because of the transitory nature of Internet postings, websites referenced only by links may be modified or deleted at a later date without notification. *See Safer Inc. v. OMS Invs. Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010). Thus, the information identified only by links would not be available for verification to corroborate or refute. *See In re HSB Solomon Assocs. LLC*, 102 USPQ2d

recreational boats. The excerpt of Registrant's website made of record displays one tanker.

Obviously, Applicant advertises its products to recreational boaters and Registrant advertises its product to commercial shippers: two distinct channels of trade. Otherwise, there is no testimony or other record regarding advertising, marketing, or sales. There is no evidence of any meaningful overlap in the markets for Applicant's goods and services and Registrant's products. Indeed, Applicant in its appeal brief stated that Applicant's and Registrant's customers are different.³⁵

Finally, in the ex parte context, there has been no opportunity to hear from Registrant about whether it is aware of any reported instances of confusion. We therefore are getting only half the story. *See, e.g., Guild Mortg. Co.*, 2020 USPQ2d 10279, at *7; *In re Opus One, Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001) ("The fact that an applicant in an ex parte case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis, inasmuch as the Board in such cases generally has no way to know whether the registrant likewise is unaware of any instances of actual confusion, nor is it usually possible to determine that there has been any significant opportunity for actual confusion to have occurred.") (citations omitted); *In re Wilson*, 57 USPQ2d 1863, 1869 (TTAB 2001) ("[I]nasmuch as we have heard from neither registrant nor the

1269, 1274 (TTAB 2012) (noting that "a reference to a website's internet address is not sufficient to make the content of that website or any pages from that website of record."). Accordingly, the links Applicant placed in its response, do not make the websites of record.

³⁵ Applicant's Brief, pp. 15-16 (4 TTABVUE 116-17).

Highland Orange Association in this appeal, we cannot conclude that, in fact, no instances of actual confusion ever occurred.”); *In re Cruising World, Inc.*, 219 UISPQ 757, 758 (TTAB 1983) (“Concerning the lack of actual confusion argument, in an ex parte hearing where only the applicant’s position is expressed and there is no way to assess what the experience of the registrant has been, it is impossible to conclude that actual confusion has never occurred.”). This constraint inherent in the ex parte context necessarily limits the potential probative value of evidence bearing on the eighth *DuPont* factor, as compared with an inter partes proceeding, where the registrant has an opportunity to present argument and evidence in response.

There is no evidence that in the actual marketplace the same consumers have been exposed to both marks for the goods and services of Applicant and Registrant such that we could make a finding as to whether there has been a reasonable opportunity for confusion to occur. Upon full consideration of the record, we find this *DuPont* factor to be neutral.

VI. Conclusion

Even assuming that boat purchasers and prospective boat purchasers exercise a high degree of purchasing care when it comes to their buying decisions, it is settled that even sophisticated purchasers are not immune from source confusion, especially in cases such as this one involving very similar marks and partially identical goods and closely related goods and services. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (“Human memories even of discriminating purchasers...are not infallible.”) (quoting *Carlisle Chem. Works, Inc. v. Hardman &*

Holden Ltd., 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)). Furthermore, careful purchasers who do notice the difference in the marks will not necessarily conclude that there are different sources for the goods and services, but will see the marks as variations of each other, pointing to a single source. *See, e.g., Kangol Ltd. v. Kangaroos U.S.A., Inc.*, 974 F.2d 161, 23 USPQ2d 1945, 1946 (Fed. Cir. 1992) (“What is important is not whether people will necessarily confuse the marks, but whether the marks will be likely to confuse people into believing that the goods they are purchasing emanate from the same source.”) (citations omitted).

With respect to Applicant’s boats and vessels in International Class 12, we find that because the marks are similar, the goods are in part identical and we presume they are offered in the same channels of trade to the same classes of consumers, Applicant’s marks STREAMLINE BOATS and STREAMLINE BOATS and design for “boat hulls; boats; boats and structural parts therefor; fishing boats; fitted covers for boats and marine vehicles; recreational watercraft, namely, boats and yachts; vessels” are likely to cause confusion with the registered mark STREAMLINE TANKERS GMBH and design for “apparatus for locomotion by water, in particular vessels and tankers.”

With respect to Applicant’s custom manufacture of boats, in International Class 40, we find that because the marks are similar, the goods and services are related, and the goods and services offered in the same channels of trade, Applicant’s marks STREAMLINE BOATS and STREAMLINE BOATS and design for the “custom manufacture of boats” are likely to cause confusion with the registered mark

STREAMLINE TANKERS GMBH and design for “apparatus for locomotion by water, in particular vessels and tankers.”

With respect to Applicant’s boat dealership services, in International Class 35, we find that because the Examining Attorney failed to prove that the goods and services are related or offered in the same channels of trade or to the same classes of consumers, Applicant’s marks STREAMLINE BOATS and STREAMLINE BOATS and design for “boat dealerships; dealerships in the field of boats and yachts; wholesale and retail store services featuring boats and yachts” are not likely to cause confusion with the registered mark STREAMLINE TANKERS GMBH and design for “apparatus for locomotion by water, in particular vessels and tankers.”

Decision: We affirm the refusals to register Applicant’s marks STREAMLINE BOATS and STREAMLINE BOATS and design for the goods and services in International Classes 12 and 40 under Section 2(d) of the Trademark Act.

We reverse the refusal to register Applicant’s marks STREAMLINE BOATS and STREAMLINE BOATS and design for the services in International Class 35 under Section 2(d) of the Trademark Act.