

This Opinion is Not a
Precedent of the TTAB

Mailed: August 2, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re P&P Imports LLC

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Serial No. 90110212

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Before Wolfson, Lykos and Pologeorgis,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

P&P Imports LLC (“Applicant”) seeks to register on the Principal Register the standard character mark BATTLE STRIKE for “equipment sold as a unit for playing projectile shooting games” in International Class 28.¹

¹ Application Serial No. 90110212, filed April 12, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging April 21, 2020 as the date of first use anywhere and August 4, 2020 as the date of first use in commerce for its goods.

Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's applied-for mark is identical to the standard character mark BATTLE STRIKE, already on the Principal Register for

computer game programmes; downloadable computer game software via a global computer network and wireless devices; downloadable computer programs featuring positionable game piece figures for use in the field of computer games; electronic game software accessible via computers, wired and wireless electronic devices; interactive game software

in International Class 9,² and that Applicant's mark, when used on its goods, is likely to cause confusion or mistake or to deceive.

When the refusal was made final, Applicant filed a notice of appeal and request for reconsideration, which was denied. Applicant's appeal of the final refusal is fully briefed. For the reasons explained below, we affirm the refusal to register.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument, *see In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019); *In re Country Oven, Inc.*, 2019 USPQ2d 443903, *2 (TTAB 2019), but "[n]ot all *DuPont*

² Registration No. 5545406, registered August 21, 2018.

factors are relevant in each case[.]” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, *3 (Fed. Cir. 2020).

Two key considerations are the similarities between the marks and the similarities between the goods and services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004) (cited in *Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, at *5 (TTAB 2019)); *see also In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1628 (TTAB 2018) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”)). In this case, we also consider the trade channels for the goods, the buyers to whom sales are made, and Applicant’s assertion of no actual confusion.

A. The Marks

Commencing with the first *DuPont* factor, it is undisputed that Applicant’s and Registrant’s standard character marks are identical in appearance, sound, connotation, and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (the first *DuPont* likelihood of confusion factor involves an analysis of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression). This first *DuPont* factor therefore weighs

heavily in favor of finding a likelihood of confusion.

B. The Goods

Next, we compare the goods as they are identified in the involved application and cited registration, the second *DuPont* factor. See *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

Preliminarily, we note that the greater the degree of similarity between the marks, the lesser the degree of similarity between the goods is necessary to support a finding of likelihood of confusion. *Bd. of Regents v. S. Ill. Miners, LLC*, 110 USPQ2d 1182, 1189 (TTAB 2014); see also *Orange Bang, Inc. v. Ole Mexican Foods, Inc.*, 116 USPQ2d 1102, 1117 (TTAB 2015); *In re Opus One, Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). In addition, it is well-established that the goods of the parties need not be similar or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. “It is sufficient that the goods or services of the parties are related in some manner, or that the conditions and activities surrounding the marketing of the goods or services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source.” *Bd. of Regents*, 110 USPQ2d at 1189; see also *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012); *Hilson Research, Inc. v. Society for Human Resources Management*, 27 USPQ2d 1423

(TTAB 1993); *In re Int'l Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

Because Applicant's mark BATTLE STRIKE is identical to Registrant's cited mark BATTLE STRIKE, all that is required is a "viable relationship" between Applicant's equipment sold as a unit for playing a projectile shooting game and Registrant's computer game software, including interactive game software and programs featuring positionable game piece figures. *See, e.g., In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Opus One*, 60 USPQ2d at 1815 ("Where the applicant's mark is identical to the registrant's mark, as it is in this case, there need only be a viable relationship between the respective goods or services in order to find that a likelihood of confusion exists"). The issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source thereof. *In re Rexel, Inc.*, 223 USPQ 830 (TTAB 1984); *see also J. C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 52 C.C.P.A. 981, 144 USPQ 435, 438 (CCPA 1965) ("The confusion involved, of course, is not a confusion of goods but a confusion of business"). Because the involved goods are in the nature of games for sport or recreation, the average consumer is an ordinary person who is interested in playing competition games for fun.

The question of likelihood of confusion must be determined on the basis of the goods set forth in Applicant's application and those in the cited registration, rather than on what any evidence may show those goods to be. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987);

see also In re Solid State Design Inc., 125 USPQ2d 1409, 1412-15 (TTAB 2018) (where the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein); *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (same); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”). So viewed, Registrant’s “computer game programmes; downloadable computer game software via a global computer network and wireless devices; downloadable computer programs featuring positionable game piece figures for use in the field of computer games; electronic game software accessible via computers, wired and wireless electronic devices; interactive game software” could encompass the same field as Applicant’s “equipment sold as a unit” for “playing projectile shooting games.” *Cf. In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992) (noting that, where registrant's goods are broadly identified as “computer programs recorded on magnetic disks,” without any limitation as to the kind of programs or the field of use, it must be assumed that registrant’s goods encompass all such computer programs, including computer programs of the type offered by applicant, that they travel in the same channels of trade normal for such goods, and that they are available to all classes of prospective purchasers of those goods).

The third-party evidence submitted by the Examining Attorney substantiates this determination. Evidence of relatedness may include news articles and/or evidence

from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both applicant's goods and the goods listed in the cited registration. *See, e.g., In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores and use them together).

The Examining Attorney introduced the following use-based third-party registrations showing that two entities have each registered a single mark identifying computer game programs generally and shooting game machines, and one has registered its mark for online computer games that involve the virtual equivalent of projectiles and games that involve actual projectiles:

- Registration No. 4722915 for the mark CHICAGO COIN'S for, in part, "computer game programs" in International Class 9 and "gun or rifle-type shooting games, hunting and or fishing game machines" in International Class 28.³
- Registration No. 82624091 for the mark RAW THRILLS for, in part, "computer game software; interactive video game programs" in International Class 9 and "arcade virtual shooting game machines" in International Class 28.⁴
- Registration No. 5288800 for the mark MY PET MONSTER for, in part, "computer game programs,

³ See September 23, 2020 Office Action, TSDR pp. 4-7. All references to the application record are to the Trademark Status and Document Retrieval ("TSDR") system.

⁴ *Id.*, TSDR pp. 8-10.

cartridges and discs; downloadable computer game programs; interactive game programs; interactive game software” in International Class 9 and “ foam action balls; water squirting toys; mechanical action toys; action-type target shooting game sets comprising toy gun, toy suction darts and target; toy weapons; [and] water squirting toys in the form of toy guns” in International Class 28.⁵

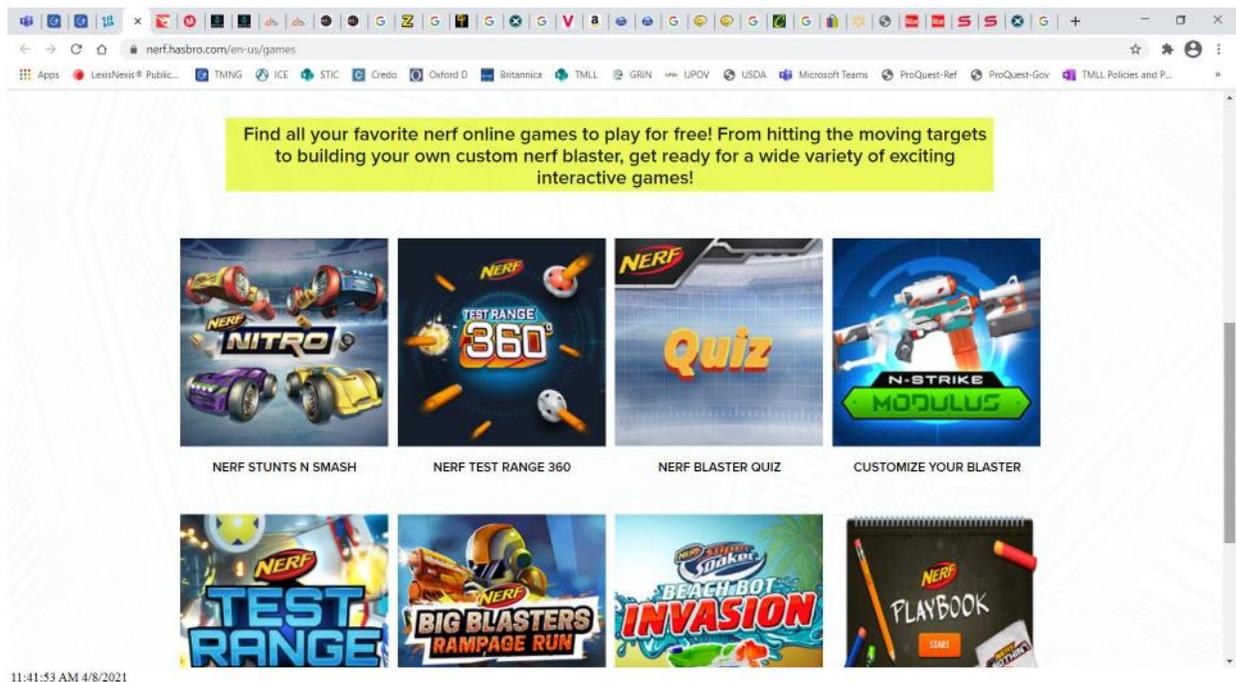
As a general proposition, although use-based third-party registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value to the extent they serve to suggest that the goods are of a kind that emanate from a single source. *See Hewlett-Packard*, 62 USPQ2d at 1004 (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”); *In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009).

In addition to providing copies of use-based third-party registrations, the Examining Attorney also introduced copies of webpages showing companies offer virtual archery or laser tag guns, to support her position that consumers are familiar with computer games that involve projectiles.⁶ Examples include the ACCUBOW

⁵ *Id.*, TSDR pp. 17-20.

⁶ We grant the Examining Attorney's request to take judicial notice of the dictionary definition of “equipment” from the Cambridge Dictionary, defining the term as “the set of tools, clothing, etc., needed for a particular activity or purpose.” Examining Attorney's Br., 8 TTABVUE 7. The Board may take judicial notice of dictionary definitions that are the electronic equivalent of a printed reference work. *See, e.g., In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1747 n.15 (TTAB 2018) (taking judicial notice of definition from Dictionary.com because it was from *The Random House Unabridged Dictionary*), *aff'd per curiam*, 777 F. App'x 516 (Fed. Cir. 2019). Based on this definition, the Examining Attorney argues “the term equipment is broad enough to include computer game software.” Although we accept the term could be employed to describe computer games that involve physical

virtual archery practice system, April 20, 2021 Final Office Action, TSDR 3-17, and the BRX rifle designed for home laser tag, *id.*, TSDR 18-22. The Examining Attorney also submitted webpages from Mattel, showing that Mattel sells toy action cars under the HOT WHEELS mark as well as computer games simulating car races with HOT WHEELS-brand cars. *Id.*, at TSDR 55-9. Webpages from NERF show that a single company under its house mark sells both computer games and games similar to Applicant's, which use actual projectiles to shoot at a target:



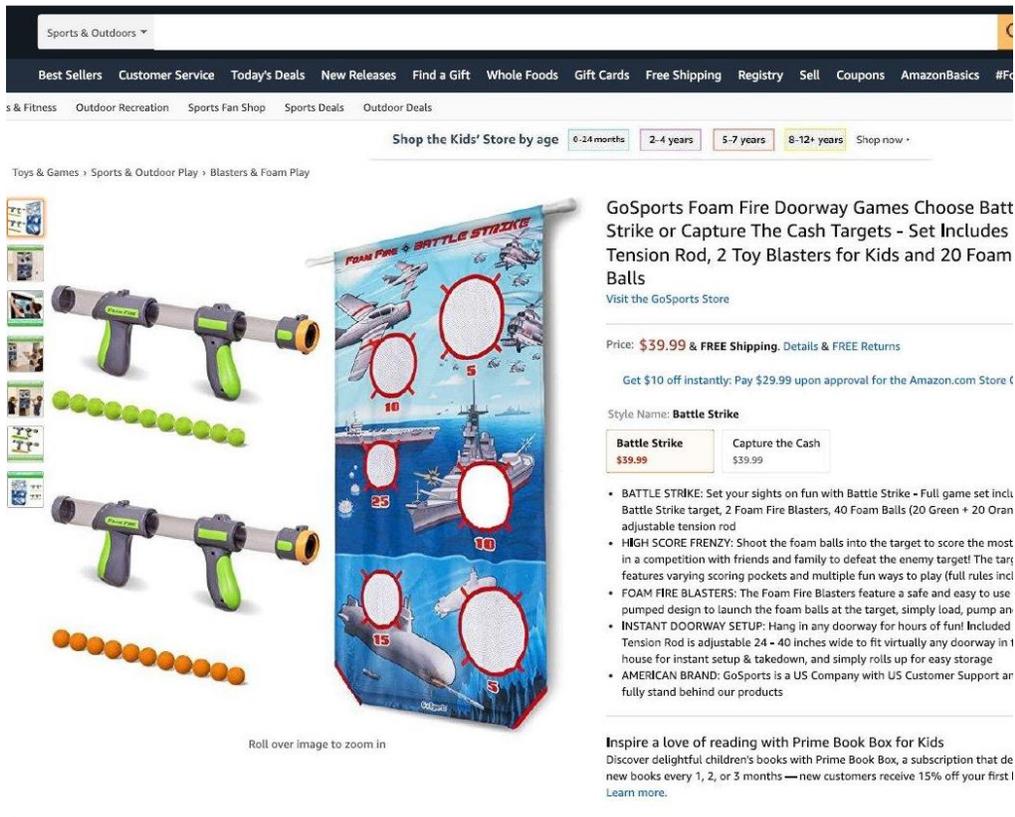
equipment and virtual projectiles, such as the ACCUBOW system, we are not persuaded that the definition of the term “equipment” as meaning “the set of tools needed for a particular activity” demonstrates that relevant purchasers are likely to believe that “on their face, registrant’s goods could be utilized with applicant’s goods.” *Id.*



April 20, 2021 Final Office Action, TS DR 65-7.

Applicant's goods are similar target-practice games, as shown by the specimen of use submitted with the application:

Amazon.com : GoSports Foam Fire Battle Strike Game Set Includes Universal Door Frame Ten



Applicant criticizes the Examining Attorney's evidence of third-party registrations and use-based evidence on the basis that games that use actual projectiles ("a body projected or impelled forward, as through the air") and those that only simulate projectiles cannot possibly be related. Applicant argues that the goods "are specifically different," contending that "[o]ne is nonoperational in the absence of an electrical power source, and the other does not need electricity, a computer, or a mobile device at all. Surely it goes without saying that one does not download the physical pop gun from a computer or use one to control software running on a mobile device." 6 TTABVUE 11. But as we have held, the fact that consumers will not confuse the goods themselves is not the test; whether consumers will mistakenly believe the goods emanate from a single source is. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *see also Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984); *cf. Paula Payne Prods. Co. v. Johnson's Publ'g Co.*, 473 F.2d 901, 902, 177 USPQ 76, 77 (CCPA 1973) ("[T]he question is not whether people will confuse the marks, but rather whether the marks will confuse people into believing that the goods they identify emanate from the same source.").

Applicant urges us to adopt an enhanced standard for finding relatedness. Arguing that "[o]nly in limited circumstances can the trademark office conclude that goods are related without the introduction of 'something more,'" 6 TTABVUE 10, Applicant likens this appeal to *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003) and *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082

(Fed. Cir. 2014). Applicant contends, citing *St. Helena*, that the Examining Attorney “*must* satisfy the something more standard except when there is conclusive evidence in the record that that the relatedness of the goods is ‘evident, well known, or generally recognized.’” 6 TTABVUE 10.

Applicant’s reliance on *Coors Brewing* and *St. Helena* is misplaced. This argument goes too far and takes what is a long-standing general test for relatedness, with exceptions discussed in *Coors Brewing* and *St. Helena* for odd situations where something more may be required, and tries to remake the “something more” test into the general rule. Were that the case, however, the exception would swallow the general rule, and no longer be an exception. “Something more” is generally only required in the context of comparing goods versus services, where evidence that the goods and services may be used together is insufficient to support a finding of likelihood of confusion; that is, without “something more” in the record, sufficient evidence of relatedness may be lacking. *See St. Helena*, 113 USPQ2d at 1087 ((finding that substantial evidence did not support relatedness of hospital-based residential weight and lifestyle program and printed materials dealing with physical activity and fitness and stating, in recognition of the *Coors Brewing* decision, that while the “something more” requirement is not limited to the restaurant industry, it is only applicable where “the relatedness of the goods and services is not evident, well-known or generally recognized.”).

Because the evidence sufficiently demonstrates a viable relationship exists between Applicant’s goods and those in the cited registration, there is no need to

address the “something more” standard. Based on the identification of the goods, and corroborated by the remaining evidence, we find there is a viable relationship between Applicant’s and Registrant’s goods. The second *DuPont* factor favors a finding of likelihood of confusion.

C. The Trade Channels, Consumer Classes, and Sales Conditions

Under the third *DuPont* factor, we consider the “similarity or dissimilarity of established, likely-to-continue trade channels,” and under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made[.]” *DuPont*, 177 USPQ at 567. We base our consideration of the channels of trade and classes of consumers on the goods recited in the application and cited registration. *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 sales of the goods are directed.”).

Applicant argues that the channels of trade are “in fact mutually exclusive,” 6 TTABVue 24, because its “fungible” goods are shipped via ground shipping only and are “necessarily excluded from digital channels of trade such as Google Play[.] In stark contrast, the only way to acquire Registrant’s goods is to download the program via the Internet, and specifically via Google Play.” *Id.*

Applicant offers a projectile shooting game, while Registrant offers computer game software in general, but not all the items in Registrant's identification of goods are limited to downloadable programs or software. Specifically, the list includes "computer game programmes" and "electronic game software accessible via computers, wired and wireless electronic devices; interactive game software." These goods may be available by disc or game cartridge for home gaming systems.

Neither the registration nor the application contains any restriction on the channels of trade or classes of purchasers. We do not consider Applicant's asserted restrictions because they have not been included in the identification of goods of its application. Even if they were, this argument would be unavailing, because Registrant's identification of goods is not limited to Google Play or distribution over the Internet only. *See, e.g., Detroit Athletic Co.*, 128 USPQ2d at 1052 ("the registration does not set forth any restrictions on use and therefore cannot be narrowed by testimony that the applicant's use is, in fact, restricted to a particular class of purchasers") (internal citation omitted); *Stone Lion*, 110 USPQ2d at 1161-63 ("It was proper, however, for the Board to focus on the application and registrations rather than on real-world conditions, because 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.") (internal citation omitted); *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) ("Because the parties' trade channels and classes of consumers are unrestricted, the third and fourth *DuPont* factors also favor Citigroup.").

The Examining Attorney's evidence of third-party use shows that both traditional games and computer games may be purchased on the Internet via direct-to-consumer websites specializing in such products, and that online retailers such as Mattel specialize in games of all types. Further, brick-and-mortar toy and game stores sell both equipment for playing action games and computer game programs designed for playing shooting practice or target-style games. The class of consumers for both games using physical equipment and their virtual equivalents played on computers are people who like to play such battle-themed games. As for the conditions of sale, because the identification of goods set forth in the application and the cited registration have no restrictions as to price, target consumer, or mode of operation, and because Applicant has not submitted any evidence to the contrary, the record does not show that the relevant consumers are sophisticated or exercise a heightened degree of care. We find the third and fourth *DuPont* factors favor a finding of likelihood of confusion.

D. Actual Confusion

The seventh *DuPont* factor is the "nature and extent of any actual confusion," while the eighth *DuPont* factor considers the "length of time during and conditions under which there has been concurrent use without evidence of actual confusion." *DuPont*, 177 USPQ at 567.

Applicant asserts that its goods bearing its BATTLE STRIKE mark have been offered for sale at least as early as April 21, 2020, and during this time there has been no evidence of actual confusion in the marketplace. "Because there is no evidence of

actual confusion in the marketplace, this factor further supports granting Applicant's application." 6 TTABVUE 25.

Applicant's allegations that the involved marks have been in use without evidence of actual confusion are unsupported. The record before us is devoid of any specifics regarding the geographic extent or overlap of Applicant's or Registrant's goods. *See In re Guild Mtg. Co.*, 2020 USPQ2d 10279 *6 (TTAB 2020) ("The eighth *du Pont* factor, by contrast . . . requires us to look at actual market conditions, to the extent there is evidence of such conditions of record."). *See also In re Calgon Corp.*, 435 F.2d 596, 168 USPQ 278, 280 (CCPA 1971).

Furthermore, the fact that an applicant in an ex parte proceeding is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis. 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." *Guild Mtg.*, 2020 USPQ2d at *7 (citing *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). *See also Detroit Athletic*, 128 USPQ2d at 1053 ("[T]he relevant test is likelihood of confusion, not actual confusion."); *In re i.am.symbolic*,

123 USPQ2d at 1747 (“[A] showing of actual confusion is not necessary to establish a likelihood of confusion.”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

This *DuPont* factor is neutral.

II. Conclusion

We have carefully considered all of the evidence made of record, as well as all of the arguments related thereto. As indicated earlier, the identical nature of the marks weighs heavily in finding a likelihood of confusion. This, coupled with the related nature of the goods and the overlapping trade channels and classes of consumers, leads us to the conclusion that prospective consumers, ordinary buyers exercising no heightened level of care, are likely to confuse the involved goods as originating from or associated with or sponsored by the same entity when used under the same mark BATTLE STRIKE.

Decision: The Section 2(d) refusal to register Applicant’s mark is affirmed.