

This Opinion is Not a
Precedent of the TTAB

Hearing: July 21, 2016

Mailed: September 6, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Merrick Pet Care, Inc.

v.

Petkin Inc.

—
Opposition No. 91217064
—

Christian D. Stewart, Wyatt L. Brooks, and Clint A. Taylor,
Burdett, Morgan, Williamson & Boykin, LLP,
for Merrick Pet Care, Inc.

Thomas I. Rozsa and Zsofia Nemeth, Rozsa Law Group LC,
for Petkin Inc.

—
Before Zervas, Wolfson, and Hightower,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Petkin Inc. (“Applicant”) seeks to register the mark **FLOSSBONE** (in standard characters) on the Principal Register for “edible chews for dogs” in International Class 31.¹

¹ Serial No. 86138999, filed December 9, 2013; based on Applicant’s bona fide intent to use the mark in commerce.

Merrick Pet Care, Inc. (“Opposer”) opposes registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), asserting that Applicant’s mark so resembles Opposer’s previously used and registered mark **FLOSSIES** for “dog treats”² that confusion, mistake or deception of relevant consumers is likely.

The proceeding is fully briefed³ and the Board conducted an oral hearing. We sustain the opposition.

I. Record

The record in this case consists of the pleadings and the file of the involved application. Trademark Rule 2.122(b)(1). In addition, both parties filed two Notices of Reliance and Opposer filed a testimony deposition of Opposer’s founder, Mr. Garth Merrick.

Much of the evidence submitted by the parties under their respective Notices of Reliance has not been submitted in accordance with the Trademark Rules, and the parties have each submitted duplicative copies of some of the same submissions. In view thereof, and because much of the improperly submitted evidence is not adverse to the positions of the non-offering party, we have not excluded such evidence from our consideration.⁴ Thus, in addition to the pleadings and the file of the involved registration, the record consists of:

² Registration No. 2503176, registered October 30, 2001, renewed.

³ Applicant’s motion, filed April 12, 2016, for leave to file an amended trial brief, is granted and the amended brief has been considered.

⁴ In view thereof, Opposer’s motion to strike (filed December 11, 2015) is denied.

Opposer's Notice of Reliance by which it submitted documents produced during discovery by Applicant and the following:

- A printout from the Trademark Electronic Search System (TESS) database of Reg. No. 2503176 for the mark FLOSSIES and printouts of material contained in the file.⁵
- USPTO Abstract of Title showing ownership of the FLOSSIES registration in Opposer.⁶
- TESS printout of Reg. No. 3643236 for the mark SUPER PHAT FLOSSIES owned by Opposer.⁷
- TESS printouts of Applicant's pending applications (not involved in this proceeding) of the marks FLOSSCHEW, FLOSSBITES, and FLOSSBRAID.⁸
- Copy of a complaint filed in Texas district court regarding the mark FLOSS'EMS.⁹
- Applicant's answers to certain of Opposer's interrogatories.¹⁰
- Printed copies of pages from Applicant's website, admissible under *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010) (holding document obtained from the Internet admissible if it identifies its date of publication or date that it was accessed and printed, and its source (e.g., the URL)).¹¹

⁵ 10 TTABVUE 242, Exhibit 49.

⁶ 10 TTABVUE 259, Exhibit 50.

⁷ 10 TTABVUE 328, Exhibit 59. Opposer did not plead ownership of this registration and did not argue its relevance in its brief.

⁸ Serial Nos. 86223820, 86466991, and 86417614. 10 TTABVUE 95-114, Exhibits 5-7.

⁹ 10 TTABVUE 264, Exhibit 52. We note Opposer's submission of additional documents relating to the FLOSS'EMS mark that was the subject of this lawsuit, but as these were filed after the close of all trial periods in the case, and Opposer did not file a request to reopen Opposer's rebuttal trial period for the purpose of making a timely filing, the documents have not been considered. Trademark Rule 2.121(a).

¹⁰ 10 TTABVUE 115-33, Exhibit 8.

¹¹ 10 TTABVUE 144-46 and 278-83, Exhibits 14 and 55.

- Excerpts from the May 12, 2015 discovery deposition of Applicant's President, David Goldberg, with Exhibits 3, 4, 6, 15 and 16.¹²

Opposer also filed the testimony deposition of Opposer's founder, Garth Merrick, taken on August 26, 2015, together with Exhibits 114-50.¹³

Applicant's evidence consists of its Notice of Reliance in which it submitted documents produced during discovery by Opposer and further submitted:

- Printouts of the prosecution history of Applicant's marks FLOSSBONE,¹⁴ FLOSSBITES,¹⁵ and FLOSSBRAID¹⁶ from the Trademark Status & Document Retrieval (TSDR) database.
- May 14, 2015 discovery deposition of Garth Merrick as Opposer's Fed. R. Civ. P. 30(b)(6) designee, with accompanying Exhibits 100-13.¹⁷
- May 12, 2015 discovery deposition of its President, David Goldberg, and accompanying Exhibits.

¹² 10 TTABVUE 14-76, Exhibits 1 and 2.

¹³ 16 TTABVUE 10. The parties stipulated to the authenticity of the exhibits produced during Mr. Merrick's deposition, but not their admissibility. We note that the deposition was taken two days before the opening of Opposer's reset trial period. As the trial period had not yet opened, Mr. Merrick's testimony deposition was premature. However, in the interest of fairness, and because Applicant participated in the deposition, we have considered the submission.

¹⁴ 14 TTABVUE 347-68, Exhibit 31.

¹⁵ 14 TTABVUE 237-66, Exhibit 11.

¹⁶ 14 TTABVUE 407-22, Exhibit 35.

¹⁷ 14 (public) and 15 (confidential) TTABVUE 13-139. Applicant also noticed reliance on excerpts from the August 26, 2015 *testimony* deposition of Garth Merrick. However, the entire transcript was already of record and need not have been re-submitted. *Dynamark Corp. v. Weed Eaters Inc.*, 207 USPQ 1026, 1028 n.2 (TTAB 1980) (“[O]nce a trial deposition is made of record, it may be used by any party to the proceeding for any relevant purpose”); *cf.* Trademark Rule 2.120(j)(7) (“When a written disclosure, a discovery deposition, or a part thereof, or an answer to an interrogatory, or an admission, has been made of record by one party in accordance with the provisions of paragraph (j)(3) of this section, it may be referred to by any party for any purpose permitted by the Federal Rules of Evidence.”).

On November 25, 2015, Applicant introduced the complete May 12, 2015 discovery deposition of its President, David Goldberg, and accompanying Exhibits 1-31. Applicant refers to the deposition as “trial period testimony” but the deposition was taken during the parties’ discovery period.¹⁸ We have considered Mr. Goldberg’s entire discovery deposition. Even had we excluded the deposition in its entirety, portions would have been admissible under Trademark Rule 2.120(j)(4). That rule provides that where a portion of a discovery deposition is submitted and made part of the record by a party, “an adverse party may introduce under a notice of reliance any other part of the deposition which should in fairness be considered so as to make not misleading what was offered by the submitting party.” On September 29, 2015, Opposer had submitted portions of Mr. Goldberg’s discovery deposition as part of its case-in-chief. We exercise our discretion under Trademark Rule 2.120(j)(4) to consider those select portions of the Goldberg deposition (including Exhibits) which were identified by Applicant on December 28, 2015 as being responsive to those excerpts submitted by Opposer and which Applicant supported by its written statement¹⁹ explaining why it needed to rely upon the additional excerpts.²⁰

II. Opposer’s Standing and Priority

Standing is a threshold issue that must be proven by the plaintiff in every *inter partes* case. See *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111

¹⁸ By Board order dated April 13, 2015, discovery closed on July 1, 2015. 9 TTABVUE.

¹⁹ 19 TTABVUE.

²⁰ 19 & 20 TTABVUE. These are pages 29, 32, 90, 107, and 141-43 of the deposition testimony and Exhibits 3, 4, 5, 6, 7, 13, 16, 29, 30, and 31.

USPQ2d 1058, 1062 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1401 (2015); *John W. Carson Found. v. Toilets.com Inc.*, 94 USPQ2d 1942, 1945 (TTAB 2010). Opposer's standing to oppose registration of Applicant's mark is established by its pleaded registration, which the record shows to be valid and subsisting, and owned by Opposer. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Otter Prods. LLC v. BaseOneLabs LLC*, 105 USPQ2d 1252, 1254 (TTAB 2012). In addition, because Opposer's pleaded registration is of record, priority is not an issue with respect to the goods listed in the registration. *Penguin Books Ltd. v. Eberhard*, 48 USPQ2d 1280, 1286 (TTAB 1998) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)).

III. Likelihood of Confusion

Our determination under Trademark Act Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods or services, the first two *du Pont* factors. *See 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."). Opposer

bears the burden of proving its claim of likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848.

We address in turn each of the *du Pont* factors for which the parties submitted evidence or argument. To the extent that any other *du Pont* factors for which no evidence was presented may be applicable, we treat them as neutral.

A. Similarity of the Goods

We commence our analysis with the second *du Pont* factor, which assesses the similarity or dissimilarity of the parties' goods. In comparing the parties' goods, "[t]he issue to be determined . . . is not whether the goods of plaintiff and defendant are likely to be confused but rather whether there is a likelihood that purchasers will be misled into the belief that they emanate from a common source." *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989). In determining the relatedness of the parties' goods, we must focus on the goods as identified in the application, rather than what the record may reveal regarding the nature of those particular goods, 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." *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quotation omitted).

The goods in this case are legally identical. Applicant has applied to register its mark for "edible chews for dogs." Opposer's mark is registered for "dog treats." A "chew" is defined as "something that a person or animal chews."²¹ A "treat" is

²¹ Merriam-Webster on-line dictionary, at www.merriam-webster.com. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food*

“something that tastes good and that is not eaten often.”²² Dog treats and edible dog chews are the same in that both are edible, likely taste good to dogs and may be chewy. There is no discernible dissimilarity in purpose, use or function of the goods as identified in Opposer’s registration and Applicant’s application.²³

The second *du Pont* factor strongly supports a finding of likely confusion.

B. Channels of Trade

Turning to a consideration of the trade channels and classes of consumers normal for these goods, we recognize that because the goods are legally identical, and there are no restrictions in either identification limiting their normal channels of trade or the classes of consumers to whom the goods are directed, we must presume that the parties’ goods move in the same channels of trade and are available to the same classes of customers for such goods, namely, ordinary consumers interested in purchasing relatively inexpensive foodstuff for their household pets. *See American Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011); *see also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this presumption).

Imp. Co., 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

²² *Id.*

²³ Applicant’s president, Mr. Goldberg, notes that Applicant’s goods clean between a dog’s teeth and gums. 10 TTABVUE 30. Applicant’s product packaging contains an artist’s rendition of the product breaking into strands, or filaments, that have worked themselves between a dog’s teeth and gums to simulate flossing action. Opposer’s founder, Mr. Merrick disputed this claim, but Opposer did not provide record evidence to support its position, and we do not find the claim refuted in the record. Nonetheless, we are constrained to consider the goods as they are identified in the application and registration.

Accordingly, we find the goods are offered through the same trade channels.²⁴ The third *du Pont* factor also strongly supports a finding of likely confusion.

C. Sophistication of Consumers

Both sides presented confidential evidence under seal regarding the cost of their product. Mr. Goldberg stated that Applicant's product was priced at a "moderate" or "medium" price point.²⁵ Mr. Merrick stated that the retail price for four different types of FLOSSIES products ranged from under five dollars to about eight dollars for one of the items.²⁶ Although we recognize that pet owners may care deeply about the health of their pets and strive to purchase goods that are healthy and nutritional, the record does not support a finding that the buyers would be considered sophisticated purchasers, as Applicant contends. And while record evidence alludes to the supposition that relevant consumers are discerning with respect to the geographical origin of pet food or pet treats and reluctant to purchase goods manufactured in China, the identifications of goods in Opposer's registration and Applicant's application do not contain any limitations regarding the origin of ingredients contained in the products. *Du Pont* factor four is neutral.

²⁴ Applicant argues that the trade channels are distinguishable because it sells in discount markets such as Wal-Mart, while Opposer sells in chain stores for pets, such as Petco. However, the price points for both parties' goods are similar, both parties indicate that their target customers are all dog owners, and there is no showing that customers who shop for pet food, treats, or supplies at Wal-Mart do not also shop for these same goods at Petco.

²⁵ 10 TTABVUE 74.

²⁶ 16 TTABVUE 34.

D. Similarity of the Marks

We turn next to the first *du Pont* factor, the similarity of the parties' marks. In a likelihood of confusion analysis, we compare the marks in their entireties for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). "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." *Coach*, 101 USPQ2d at 1721 (citation omitted). Where, as here, the parties use their marks in connection with goods that are identical in part, the similarity needed to support a determination that confusion is likely declines. *See Bridgestone Ams. Tire Operations LLC v. Federal Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012).

Applicant seeks to register the mark **FLOSSBONE**. The mark is readily perceived as a combination of the two terms "floss" and "bone." Opposer's registered mark **FLOSSIES** is a variation on the term "floss," which is its leading syllable. *See, e.g., Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"). Given the shared leading element "floss," the marks look and sound alike. They also impart similar connotations of a product that "flosses" a dog's teeth through the mechanical action of chewing. In commercial impression, the marks vary slightly; Opposer's mark may denote the female name

“Flossie” while Applicant’s mark has no such connotation, but this difference does not sufficiently distinguish the marks. The marks are similar in their appearance, pronunciation, connotations and commercial impressions.

Applicant argues that given its suggestive nature, the term “floss” is weak. The term “floss” has a well-known meaning in association with dental care for humans; “dental floss” is a “special thread that is used to clean between your teeth.”²⁷ While it is not unheard of for persons to floss their dog’s teeth, there is little in the record to show that people use thread or filamentous matter to floss a dog’s teeth. The list of summary results from Google searches for third-party use of “floss” contains a few references that suggest it is possible to floss a dog’s teeth using human dental floss. Of the product offerings, one refers to “actual dental floss twisted in [the rope] with all-natural cotton fibers”²⁸ and one refers to “dog floss” without identifying the nature of the product.²⁹

In addition, Exhibit 32 to Applicant’s Notice of Reliance is a printout of Internet search results from the Google search engine showing third-party use of “floss” as part of other terms or in phrases. In general, such lists have little probative value, because it “does not show sufficient context in which the term is used on the listed web pages.” *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1461 n.10 (TTAB 2014); *see also In re Bayer AG*, 488 F.3d 960, 82 USPQ2d

²⁷ At www.merriam-webster.com. The term is also used as a transitive verb: “to use dental floss to clean your teeth” and as an intransitive verb: “to use dental floss on.” *Id.*

²⁸ 12 TTABVUE 378.

²⁹ 14 TTABVUE 385.

1828, 1833 (Fed. Cir. 2007); *In re Tea and Sympathy, Inc.*, 88 USPQ2d 1062, 1064 n.3 (TTAB 2008). The better practice would have been for Applicant to attach copies of a reasonable number of representative website pages that show how the term is actually used. *In Re Country Music Ass'n, Inc.*, 100 USPQ2d 1824, 1829 (TTAB 2011). Nevertheless, we have considered the list of search results to the extent that we can glean from it any evidence of value, as more fully discussed *infra*. *Couch/Braunsdorf*, 110 USPQ2d at 1461 n.10.

In the search results listing, there are three references to products that appear to be dog toys or dog foodstuff (chews or treats) and which use “floss” as part of the mark for the goods: “Pet Qwerks Fetch-n-Floss Ring;” “Booda Fresh N Floss” (available as a 3 Knot Tug Rope or a 2 Knot Bone Rope), and “Fun N Floss.”³⁰ To the extent these refer to dog toys, there is nothing in the record to suggest that dog toys and dog treats or edible chews would be considered related goods. Finally, several references refer to “indigo™ Fresh Floss Bones” or “Fresh floss dog bones,” which appear to be chewable and which may refer to Applicant’s goods. As best as can be gleaned from these truncated results, and it is difficult to assess their impact on consumers, the term “floss” is not used by third parties to denote a dog treat or chew or if it is, the usage is as part of a mark (e.g., Fetch-n-Floss) and not as a descriptive term. Accordingly, the Google search results do not show that “floss” is weak for dog treats or edible chews.

³⁰ 14 TTABVUE 382. There is no indication in the record that these are active websites.

Applicant also submitted copies of five live registrations for marks including the term “floss” for treats or toys for dogs.³¹ In general, absent evidence of actual use, third-party registrations have little probative value because they are not evidence that the marks are in use on a commercial scale or that the public has become familiar with them. *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the U.S. Patent and Trademark Office). More specifically in this case, the third-party registrations are not persuasive that the term “floss” is weak as they are few in number and only three of the five are for pet treats or chews; the other two are for dog toys.³² On this record, there is insufficient evidence for the proposition that the term is so highly suggestive or diluted that it loses trademark significance when incorporated in the mark FLOSSIES. Nor is Applicant’s mark distinguishable on the basis of the other term, “bone,” as such term is itself highly descriptive of the overall

³¹ 14 TTABVUE 230-236, Exhibit 10.

³² The marks are:

Reg. No. 3623585 BRUSH & FLOSS, for “edible pet chews.”

Reg. No. 2887885 CHEW ‘N FLOSS, for “edible dog chews.”

Reg. No. 2851999 DENTA-FLOSS, for “pet food, namely, rolled beef tendon used to clean teeth in pets.”

Reg. No. 2227949 FLOSSY CHEWS, for “cotton chew toys for dogs and birds.”

Reg. No. 2267420 FRESH ‘N FLOSS, for “rope toy bones for dogs.”

Applicant also submitted a copy of a TESS printout for the mark FLOSS’EMS for “pet dental floss,” filed under Serial No. 86086808. We have given this application no evidentiary weight. Third-party applications are evidence only of the fact that they have been filed. *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003).

shape of the goods. When compared in their entireties, the marks are similar in overall appearance, sound, connotation and commercial impression.³³

The first *du Pont* factor thus favors a finding that confusion between the marks is likely, particularly in light of the lesser similarity required because the respective goods are legally identical.

E. Strength of Opposer's Mark

The fifth *du Pont* factor is the fame of the prior mark, in terms of sales, advertising, and length of use. In the likelihood of confusion context, fame “varies along a spectrum from very strong to very weak.” *Midwestern Pet Foods Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012) (quoting *Palm Bay*, 73 USPQ2d at 1694); see also *Carefirst of Maryland Inc. v. FirstHealth of the Carolinas Inc.*, 77 USPQ2d 1492, 1507 (TTAB 2005) (stating that “[f]ame is relative . . . not absolute”), *aff'd*, 479 F.3d 825, 81 USPQ2d 1919 (Fed. Cir. 2007). A famous mark is one that has extensive public recognition and renown. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002).

Mr. Merrick testified that Opposer's mark has been continuously used on dog treats since 2000³⁴ and that FLOSSIES treats were Opposer's number one seller for

³³ Applicant argues that because Opposer uses its house mark with the registered FLOSSIES mark confusion may be avoided. This argument is specious. Opposer has shown that the FLOSSIES mark creates a separate commercial impression when used on the goods, and the registered mark does not include the house mark.

³⁴ 16 TTABVUE 20.

many of those years.³⁵ The evidence shows sales records since 2003.³⁶ Sales figures, designated confidential and submitted under seal, were strong, particularly during a specific three-year period.

We also note that there is scant record evidence of third-party marks for dog treats or chews that use the term “floss” as the leading element of the mark, as discussed *supra*. Opposer contends that as a result of its aggressive enforcement policy, unauthorized use of “floss” derivative marks has been eliminated, and submitted a large number of cease-and-desist letters and emails that it has sent to alleged infringers. Upon review, the majority of these are directed to Opposer’s asserted trade dress in its packaging or Opposer’s attempt to prevent third parties from using FLOSSIES in connection with products manufactured or produced by others, and do not show that third-parties were attempting to use “floss” derivative marks that Opposer successfully prevented. Nonetheless, the letters and emails corroborate the showing that virtually no marks exist that use the term “floss” as a prefix for marks for dog treats or chews.

Considering the record as a whole, however, Opposer has not established that its mark is famous, in part because Opposer has not provided any information that would allow us to evaluate its share of the U.S. dog treats market. *Cf., e.g., Recot Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000) (noting that retail sales of products under the famous mark FRITO-LAY exceeded \$6 billion in 1995, for

³⁵ 16 TTABVUE 47.

³⁶ 17 TTABVUE 29, Exhibit 131 (confidential)

a greater than 50 percent market share in the domestic snack chip industry); *Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1438 (TTAB 2014) (finding HARRY WINSTON famous in the jewelry field on evidence opposers summarized as “sales in the billions, advertising and marketing expenditures in the millions, and editorial mentions valued in the millions over an eighty year period”). Thus, while we find that Opposer has not clearly proven that its mark is famous, making the fifth *du Pont* factor neutral, on this record we find Opposer’s mark to be commercially strong.

F. No Actual Confusion

Applicant argues that there is no evidence of actual confusion between its mark and Opposer’s mark. This assertion relates to the eighth *du Pont* factor, assessing the length of time during and conditions under which there has been concurrent use without evidence of actual confusion.

Proof of actual confusion is not necessary to show a likelihood of confusion. *See Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1843 (Fed. Cir. 1990). In this case, Applicant has been using its mark only since 2013,³⁷ and its sales have been “rather limited.”³⁸ Therefore, there is no evidence of concurrent use in the United States that would result in a meaningful opportunity for actual confusion to occur, and we find *du Pont* factor eight to be neutral.

³⁷ 10 TTABVUE 41, 120.

³⁸ 10 TTABVUE 35.

IV. Conclusion

In sum, we have found that Opposer's mark is commercially strong, the parties' goods are legally identical, moving in the same channels of trade to the same customers; the marks in their entireties are similar; and the record evidence of third-party use and registration of similar marks for similar goods is insignificant. The first, second, and third *du Pont* factors weigh in favor of a likelihood of confusion, while the remaining factors are neutral. Considering the record as a whole, we find that Opposer has carried its burden to establish by a preponderance of the evidence that Applicant's mark is likely to cause confusion with Opposer's mark FLOSSIES.

Decision: The opposition is sustained pursuant to Trademark Act Section 2(d).