

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing: June 13, 2019

Mailed: November 9, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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P.C. Richard & Son Long Island Corp.
v.
Samsung Electronics Co., Ltd.
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Opposition No. 91222405
—

Celeste M. Butera of Hoffmann & Baron LLP
for P.C. Richard & Son Long Island Corp.

Diane J. Mason of Faegre Drinker Biddle & Reath LLP
for Samsung Electronics Co., Ltd.

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Before Kuhlke, Greenbaum and Adlin
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, Samsung Electronics Co., Ltd., seeks registration on the Principal Register for the mark SAMSUNG WIZ in standard characters for “Smartphones; Tablet computer,” in International Class 9.¹

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¹ Serial No. 86003148, filed July 5, 2013, based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b) and later amended to seek registration under Section 44(e) of the Trademark Act, 15 U.S.C. § 1126(e).

Opposer, P.C. Richard & Son Long Island Corp., has opposed registration of Applicant's mark on the ground that, as used in connection with Applicant's goods, the mark so resembles Opposer's previously used and registered marks THE WIZ (in typed form)² for "Retail Store Services for Audio and Visual Equipment," in International Class 42³ and "retail store services in fields of consumer electronics and accessories, computer hardware and software, pre-recorded movies and music and household appliances," in International Class 42,⁴ and NOBODY BEATS THE WIZ (in typed form), for "retail store services for audio and visual equipment and accessories, electrical appliances, and records and tapes," in International Class 42,⁵ and "retail store services in the fields of audio and video equipment and accessories, computers and computer equipment and accessories, office equipment and accessories, computer software, photographic equipment, and household appliances," in International Class 42,⁶ as to be likely to cause confusion under Section 2(d) of the

² A typed mark is the legal equivalent of a standard character mark. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) ("until 2003, 'standard character' marks formerly were known as 'typed' marks.").

³ Registration No. 1204051, filed on May 22, 1980, issued on August 3, 1982, renewed.

⁴ Registration No. 1893461, filed on November 5, 1992, issued on May 9, 1995, renewed.

⁵ Registration No. 1395362, filed on October 7, 1985, issued on May 27, 1986, renewed.

⁶ Registration No. 1905190, filed on December 24, 1992, issued on July 11, 1995, renewed.

Trademark Act, 15 U.S.C. § 1052(d).⁷ Not. of Opp., 1 TTABVUE. By its answer, Applicant denies the salient allegations.⁸ 4 TTABVUE.

I. Preliminary Issues

A. Evidentiary Objections and Motion to Strike.

Opposer's main brief includes an "Appendix of Evidentiary Objections and Motion to Strike." Specifically, Opposer objects to the testimony declaration of Anna Pham and the attached exhibits as inadmissible hearsay and requests the declaration and exhibits be stricken.

Opposer argues that "attorney declarations making statements about what third-parties said and attaching internet printouts from alleged third-party websites is rank hearsay and has no probative value because it is devoid of sales, market share, promotional efforts and the like under the third-party marks." 66 TTABVUE 46. Opposer asserts the attached exhibits consisting of website printouts are also inadmissible hearsay. *Id.* at 47. Opposer relies on several unpublished Board decisions that predate the Federal Circuit's decision in *Juice Generation, Inc. v. GS*

⁷ Opposer did not pursue its other pleaded claim of false suggestion of a connection under Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a), and it is deemed waived. *Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 107 USPQ2d 1750, 1753 (TTAB 2013) (petitioner's pleaded descriptiveness and geographical descriptiveness claims not argued in brief deemed waived), *aff'd*, 565 F. App'x 900 (Fed. Cir. 2014) (mem.).

⁸ The asserted defense of failure to state a claim is not a true affirmative defense because it asserts insufficiency of the pleading. *John W. Carson Found. v. Toilets.com, Inc.*, 94 USPQ2d 1942, 1949 (TTAB 2010). Nonetheless, our consideration of the opposition illustrates that we find Opposer to have properly set forth a claim of likely confusion under Section 2(d). *See also Alcatraz v. Chesapeake*, 107 USPQ2d at 1753 (respondent's affirmative defense of failure to state a claim not argued in brief deemed waived). The remaining "affirmative defenses" are simply amplifications of the denials.

Enters. LLC, 794 F.3d 1334, 115 USPQ2d 1671 (Fed. Cir. 2015) noting that even if “[t]he ‘specifics’ as to the extent and impact of use of the third parties’ marks may not have been proven” the evidence was “nonetheless powerful on its face” in part due to the “considerable number of third parties” using similar marks as “shown in uncontradicted testimony.” *Id.* at 1674-75. Thus, the probative value, even if “specifics” are not provided depends on the totality of the evidence. Moreover, website printouts that show the date of publication or date that it was accessed and printed and its source (e.g., the URL) may be admitted into evidence under notice of reliance without testimony. *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031 (TTAB 2010). The website printouts may be considered for what they show on their face; however, absent testimony, documents obtained through the Internet may not be used to demonstrate the truth of what has been printed.

Applicant responds that Ms. Pham’s testimony is admissible under Fed. R. Evid. 803(3) because her testimony relaying the responses she received from phone inquiries to third-parties consists of the “state of mind of persons surveyed.” 71 TTABVUE 3. Applicant asserts her declaration “regarding what actions she took is [her] own direct testimony.” 71 TTABVUE 4.

In the alternative, Applicant argues the declaration and exhibits are admissible under Fed. R. Evid. 807, the residual exception. However, this exception does not apply because Applicant did not give Opposer reasonable notice of the intent to offer the statement before the trial period.

Some of Ms. Pham's testimony consists of essentially entering website excerpts of third-parties into the record and describing what she is observing, as anyone viewing the website would observe. Other testimony is clearly hearsay relaying information she obtained in telephone conversations with third parties. Opposer's objection is sustained to the extent the Pham testimony constitutes hearsay based on third-party out of court statements or lack of personal knowledge and those portions will not be considered. However, as noted above, the attached exhibits are the type of material that may be introduced under notice of reliance and their introduction under the Pham declaration is sufficient to make them of record. This type of evidence is commonly used to prove third-party use, showing consumer exposure to use of a term or mark by third parties indicating commercial weakness of that term or mark. As explained in *Juice Generation*, although more evidence regarding the extent of consumer exposure to that use would be more persuasive, its absence is not fatal and, depending on the circumstances, the website evidence itself can contribute to evidence that is "powerful on its face."

We further note, the Board is capable of weighing the relevance and strength or weakness of the objected-to testimony and evidence, including any inherent limitations.

II. RECORD

The record includes the pleadings and, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), the file of the application subject to the notice of opposition. In addition the record includes:

- Opposer's Notice of Reliance⁹ on: TSDR printouts, file histories and copies of Opposer's pleaded Registrations; printouts from various websites, including Opposer's and Applicant's, and based on searches in different browsers; printouts of websites from the Internet Archive Wayback Machine; Applicant's application;¹⁰ Opposer's various discovery requests and Applicant's responses thereto;
- Testimony Affidavits of Thomas Pohmer (Opposer's Vice President and Chief Financial Officer),¹¹ and John Pflug (Opposer's Director of Marketing);¹²
- Opposer's Rebuttal Notice of Reliance¹³ on 1) printouts from Opposer's, Applicant's, and various third-parties' websites; 2) printouts from TTABVUE of filings and the prosecution history for other proceedings brought by Opposer;
- Rebuttal Testimony Affidavit of Thomas Pohmer;¹⁴
- Applicant's Notices of Reliance 1-2¹⁵ on: printouts of several of Applicant's registrations for the marks SAMSUNG and TOUCHWIZ; printouts of several third-party registrations for marks that include the term WIZ; printouts from various third-party websites; Opposer's supplemental responses to Applicant's First Set of Interrogatories;
- Declaration Testimony of Yoonyeong Yang (Applicant's Principal Engineer),¹⁶ Madison Bartlett (Marketing Specialist, Mobile Demand Generation with Samsung Electronics America, Inc.),¹⁷ Gabriela Martinez

⁹ 40-45 TTABVUE.

¹⁰ This was unnecessary inasmuch as it is included in the record by way of Trademark Rule § 2.122.

¹¹ 46 TTABVUE (confidential); 47 TTABVUE (public).

¹² 51 TTABVUE (confidential); 52 TTABVUE (public).

¹³ 64 TTABVUE.

¹⁴ 63 TTABVUE.

¹⁵ 59-60 TTABVUE.

¹⁶ 55 TTABVUE.

¹⁷ 56 TTABVUE.

(Merchandising Project Manager with Samsung Electronics America Inc.),¹⁸ Anna T. Pham (Applicant’s outside counsel).¹⁹

III. SECTION 2(d) CLAIM

Section 2(d) of the Trademark Act 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.” 15 U.S.C. § 1052(d). To prevail on its Section 2(d) claim, Opposer must prove, by a preponderance of the evidence, that it is entitled to a statutory cause of action, has priority with respect to its previously used and registered THE WIZ and NOBODY BEATS THE WIZ marks vis-à-vis Applicant’s mark SAMSUNG WIZ, and that Applicant’s use of its mark in connection with its goods is likely to cause confusion, mistake, or deception as to the source or sponsorship of those goods. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000).

A. Entitlement to a Statutory Cause of Action and Priority²⁰

Entitlement to a statutory cause of action is a requirement that must be proven by the plaintiff in every inter partes case. *See Australian Therapeutic Supplies Pty.*

¹⁸ 57 TTABVUE.

¹⁹ 58 TTABVUE.

²⁰ Board decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of “standing.” Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain applicable as the tests “share a similar purpose and application.” *Corcamore LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *7 (Fed. Cir. 2020), *see also*

Ltd. v. Naked TM, LLC, 965 F.3d 1370, 2020 USPQ2d 10837, *3 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067 n.4 (2014)). A party in the position of plaintiff may oppose registration of a mark where such opposition is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and the party has a reasonable belief in damage that is proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 2020 USPQ2d 11277, *6-7.

As listed above, the record includes status and title copies of Opposer's pleaded registrations. In view thereof, Opposer's entitlement to a statutory cause of action to oppose registration of Applicant's mark is established.

In addition, because the pleaded registrations are not the subject of a counterclaim, priority is not in issue with respect to the marks and services in the registrations. See *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); and *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).²¹

Spanishtown Enters., Inc. v. Transcend Resources, Inc., 2020 USPQ2d 11388, at *2 (TTAB 2020).

²¹ Opposer asserts that it “advertised and marketed its retail services and products, and continues to advertise and market its retail services and products, including, but not limited to, tablet computers, tablet computer cases, smart phone cases and covers, and other smart phone accessories utilizing the Wiz Trademarks on the Wiz websites” and “[t]he integrated ww.pcrichard.com website ... contains electronic products for sale branded and advertised with the Wiz Trademarks and ‘WIZ’ deals [and] [o]pposer’s retail customers search for, research, navigate to and purchase Opposer’s tablet computer products, tablet computer

B. Likelihood of Confusion

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) (*DuPont*). See also *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019) (Board considers each *DuPont* relevant factor for which there is evidence and argument). Two key considerations are the similarities between the marks and the similarities between the goods and services. *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (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 1340, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)). The other factors for which there is argument and evidence are the channels of trade and conditions of marketing, the strength of Opposer’s marks and Applicant’s house mark, and the weakness of the term WIZ.

cases and covers, and smart phone cases, covers and accessories from these pages.” 66 TTABVUE 20, 22-23. To be clear, these goods are sold under other brand names, (e.g., Sony, Apple, Samsung, Amazon). Opposer’s marks are registered and used in connection with their retail store services. Applicant’s arguments that Opposer does not use its marks as a source indicator for its services cannot be asserted against Opposer’s registered marks absent a counterclaim.

For our analysis, we focus on Opposer's mark THE WIZ for "retail store services in fields of consumer electronics and accessories, computer hardware and software, pre-recorded movies and music and household appliances," in Class 42, in Registration No. 1893461. *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010). If we find a likelihood of confusion as to the mark and services in this registration, we need not find it as to the others. On the other hand, if we do not find a likelihood of confusion with the mark in this registration, we would not find it as to the other services, which are essentially the same, and the NOBODY BEATS THE WIZ mark, which includes additional differences. *See, e.g., Fiserv, Inc. v. Elec. Transaction Sys. Corp.*, 113 USPQ2d 1913, 1917 (TTAB 2015).

1. Relatedness of the Goods and Services, Channels of Trade, Classes of Purchasers, and Conditions of Sale

We turn first to a consideration of the goods and services, channels of trade, classes of purchasers and conditions of sale. We must make our determinations under these factors based on the goods and services as they are recited in the registrations and applications. *See 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."); *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

Applicant's goods are "smartphones; tablet computers" and Opposer's services are "retail store services in fields of consumer electronics and accessories, computer hardware and software, pre-recorded movies and music and household appliances."²² It is well recognized that confusion may be likely to occur from the use of the same or similar marks for goods, on the one hand, and for services involving those goods, on the other. *See, e.g., In re Detroit Athletic Co.*, 903 F.3d 1297, 1307 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) ("[W]e have held that confusion is likely where one party engages in retail services that sell goods of the type produced by the other party... ."); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988) (holding BIGG'S (stylized) for retail grocery and general merchandise store services and BIGGS and design for furniture likely to cause confusion); *cf. Steelcase Inc. v. Steelcare Inc.*, 219 USPQ 433 (TTAB 1983) (holding STEELCARE INC. and design for refinishing of furniture, office furniture, and machinery and STEELCASE for office furniture and accessories, likely to cause confusion); *Corinthian Broad. Corp. v. Nippon Elec. Co., Ltd.*, 219 USPQ 733 (TTAB 1983) (holding TVS for transmitters and receivers of still television pictures and TVS for television broadcasting services likely to cause confusion).

When the goods and services in question are well known or otherwise generally recognized as having a common source of origin, the burden of establishing relatedness is easier to satisfy. *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d

²² Opposer's argument that "the goods in Applicant's trademark application and those in opposer's trademark registration are identical [and] ... the goods sold by Opposer and Applicant are identical," 66 TTABVUE 35, overstates the situation. As noted above, Opposer uses its mark for retail services not goods.

1082 (Fed. Cir. 2014). Relatedness would generally be recognized when the services clearly include or encompass the goods in the identification. *In re Coors Brewing Co.*, 343 F.3d 1340, 1347, 68 USPQ2d 1059, 1064 (Fed. Cir. 2003); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002).

Applicant argues that “Opposer does not offer smartphones for sale, although it does offer tablet computers and accessories for smartphones and tablet computers at its PC Richards retail stores and its web site www.pcrichards.com. Opposer has not introduced evidence that it offers THE WIZ branded smartphone covers or tablet computer covers or chargers.” 69 TTABVUE 31. Applicant also argues that “there is no evidence consumer electronics stores generally offer those branded or private label products such as smartphones, tablet computers and their accessories.” 69 TTABVUE 32.

The record shows Opposer offers tablets and smartphone accessories for sale on its retail online store, and such types of goods are encompassed by the identification of retail services in Opposer’s registration. While there is no evidence showing a retail store also selling its own private label branded products in the electronics field, the services include sales of the goods in the application; therefore, we find the goods and services to be related.

Further, because there are no limitations as to channels of trade or classes of purchasers for Applicant’s goods and Opposer’s services, we presume that Applicant’s goods and Opposer’s services are offered in the ordinary channels of trade and offered to all the usual classes of purchasers for these goods and services. *Levi Strauss & Co.*

v. Abercrombie & Fitch Trading Co., 719 F.3d 1367, 1373, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *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.”). The record clearly shows Applicant’s type of goods are sold on retail online stores featuring such goods. In particular, Applicant’s tablets are sold on Opposer’s website. *Pohmer Aff.*, Exh. 7, 64 TTABVUE 136. Thus, the channels of trade and classes of consumers for the goods and services overlap.

The same is true as to the conditions of sale and whether the goods and services are subject to more careful purchasing decisions. As explained above, the nature and scope of a party’s goods and services must be determined on the basis of the goods or services recited in the application or registration. *See, e.g., Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (Board must “give full sweep” to an identification of goods regardless of registrant’s actual business). We must consider the goods and services as identified and base our determination on the least sophisticated consumer of the identified goods and services. *Stone Lion*, 110 USPQ2d at 1163 (cited in *In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) (“Board precedent requires our decision to be based on the least sophisticated potential purchasers.”)). Because the parties’ respective identifications of goods and services are unrestricted, we must assume that these goods and services are offered to ordinary purchasers who exercise no more than ordinary care in their purchasing decisions. Here, the consumers for Applicant’s and Opposer’s goods and services comprise the general public. While the relevant goods

and services may involve a raised level of care in the purchasing decision because they are not inexpensive goods, they do not require heightened purchaser sophistication, the general public is the relevant consumer, and this factor does not weigh against a likelihood of confusion.

In view of the above, the similarity of the goods and services, the channels of trade, classes of purchasers and conditions of sale favor a finding of likelihood of confusion for the goods and services identified.

2. Strength of Opposer's THE WIZ mark

Opposer argues that its THE WIZ mark “can be said to have developed fame in its Wiz Trademarks for the sale of computers and electronics and electronic accessories and appliances” and concludes “Opposer’s mark is strong and this factor weighs heavily in Opposer’s favor.”²³

The strength of a mark is not “an all-or-nothing measure” in the context of likelihood of confusion. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (Fed. Cir. 2017). Rather, it “varies along a spectrum from very strong to very weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015) (internal citations omitted). “A very strong mark receives a wider latitude of legal protection in the likelihood of confusion analysis,” *Tao Licensing, LLC v. Bender Consulting Ltd.*,

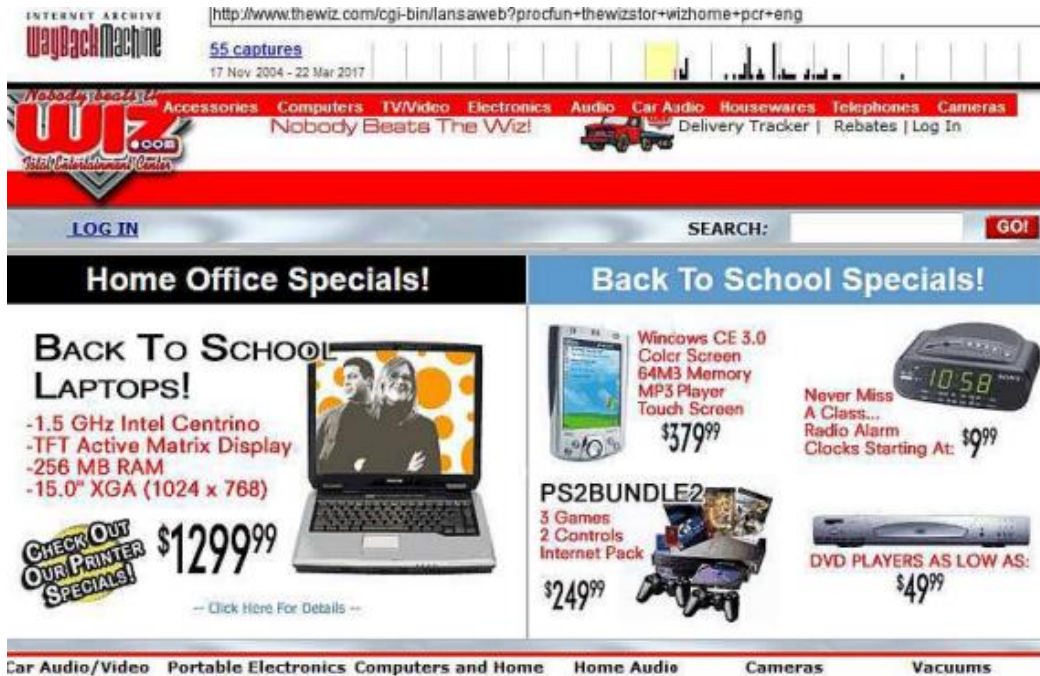
²³ Opposer addresses this factor for “the Wiz Trademarks” which includes NOBODY BEATS THE WIZ, but later confines the expenditures on acquisition, advertising and development to THE WIZ mark alone. As noted above, we focus on THE WIZ mark; however, aside from the advertising expenditures, the remaining evidence on this factor applies to both and our determination on this factor would be the same for NOBODY BEATS THE WIZ.

125 USPQ2d 1043, 1056 (TTAB 2017), while a very weak mark receives a narrower scope of protection. A mark in the middle of the spectrum receives an intermediate scope of protection. *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1347 (TTAB 2017) (finding opposer's marks entitled to "the normal scope of protection to which inherently distinctive marks are entitled"). 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). Fame, if it exists, plays a dominant role in the likelihood of confusion analysis. *Kenner Parker Toys Inc. v. Rose Art Indus. Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). In view of the extreme deference that is accorded to a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to prove it clearly.

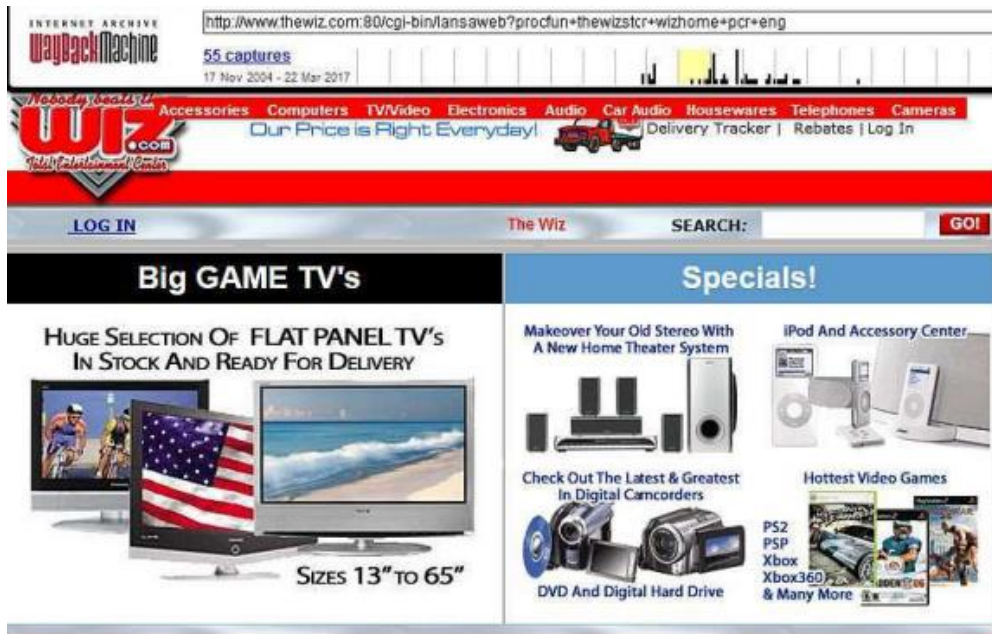
In determining strength of a mark, we consider both conceptual strength, based on the nature of the mark itself, and commercial strength, based on marketplace recognition. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength."). J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80 (5th ed. March 2021 update) ("The first enquiry focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time

registration is sought or at the time the mark is asserted in litigation to prevent another's use.”).

The record shows that Opposer purchased its THE WIZ trademark in 2003 and since that time has “continually used the mark in advertising and marketing campaigns for its retail store electronics, goods and services,” Pohmer Aff. ¶¶ 14-19, 47 TTABVUE 4. “Opposer owns 66 brick-and-mortar retail stores in various cities and towns in the States of New York, New Jersey, Connecticut and Pennsylvania” and “since at least as early as 1999 and 2004” Opposer has maintained “nationally accessible consumer websites through which customers can purchase any of our retail consumer products.” *Id.* at ¶¶ 4-5, 47 TTABVUE 4. We note, from 1999-2003 Opposer did not own THE WIZ and the shops and websites prior to 2003 are not relevant. By at least November 2004, however, Opposer operated the websites www.thewiz.com and www.nobodybeatsthewiz.com as retail consumer websites for electronic goods. *Id.* at ¶ 23, 47 TTABVUE 7. Screen captures from 2004-2015 show how the marks appeared on the websites. Examples from 2004, 2006 and 2010 are set forth below:



24

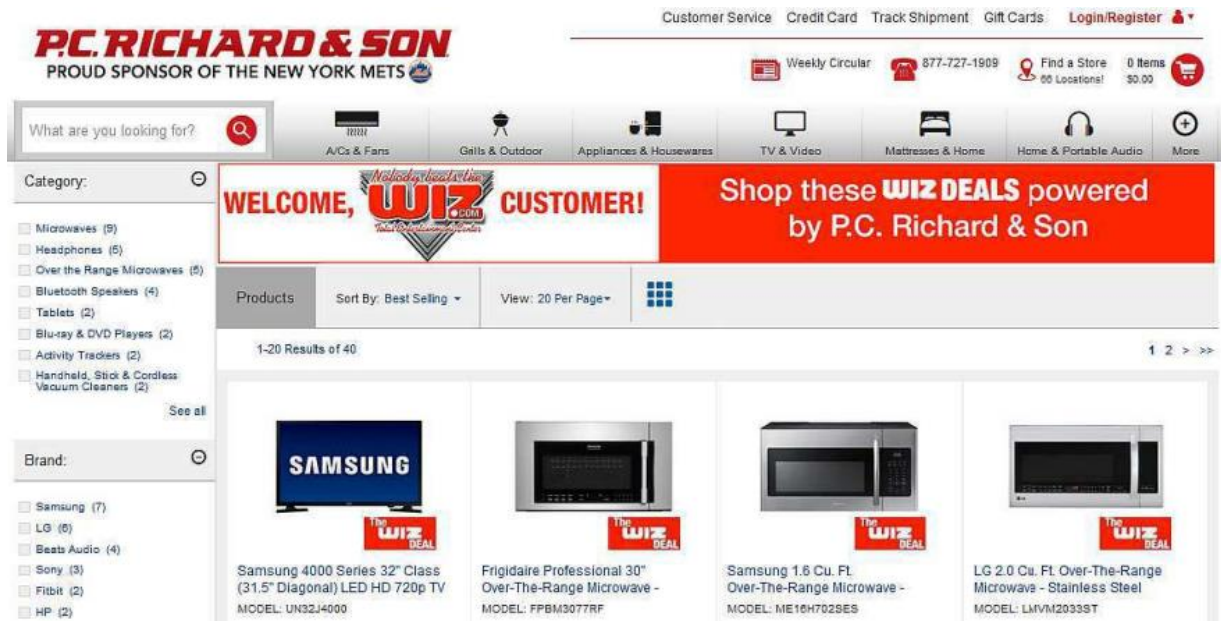


25

²⁴ Pohmer Aff. Exh. 6, 49 TTABVUE 3. Mr. Pohmer testifies “Exhibit 6 is an accurate and true example and screen shot of our www.nobodybeatstheWiz.com and www.thewiz.com website printed from www.wayback.com. This screen shot is a true and correct depiction and example of how our website appeared and existed in 2004.” Pohmer Aff. ¶ 28, 47 TTABVUE 8.

²⁵ Pohmer Aff. Exh. 8, 49 TTABVUE 9. Mr. Pohmer testifies “Exhibit 8 is an accurate and true example and screen shot of our www.nobodybeatstheWiz.com and www.thewiz.com

From 2015 to 2017 the websites were under construction and did not provide retail sales services. Pflug Aff. ¶ 15, 52 TTABVUE 6-7. In February 2017, Opposer integrated the “Wiz brands” on Opposer’s www.pcrichard.com website and customers of the “Wiz websites were and are currently brought to landing pages on [the] integrated www.pcrichard.com website.” *Id.* at ¶ 15, 52 TTABVUE 7. When a consumer conducts a search on the Google search engine the first result is the www.pcrichard.com website landing page and when “a consumer ‘clicks’ on that first result, they are brought directly to Plaintiff’s landing pages with THE WIZ deals and NOBODY BEATS THE WIZ marks used and advertised.” *Id.* ¶¶ 20-22, 52 TTABVUE 8.



26

website printed from www.wayback.com. This screen shot is a true and correct depiction and example of how our website appeared and existed in 2006.” Pohmer Aff. ¶ 30, 47 TTABVUE 8.

²⁶ Pohmer Aff. Exh. 18, 50 TTABVUE 3.

Opposer also asserts it “has spent millions in acquisition, advertising and development of THE WIZ brand,” and has had a certain amount of sales.²⁷ The advertising expenditures and sales from 2003-2013 are from THE WIZ.com and NOBODYBEATSTHEWIZ.com websites. These sales are not very high and we do not have evidence to understand where such sales stand in the marketplace. We do have Opposer’s sales for one year, 2017, where the sales are incorporated into all sales made, including under the mark PC RICHARD & SON and they are substantially higher.²⁸

The record thus falls short of proving that THE WIZ (or NOBODY BEATS THE WIZ) has obtained, maintained, or retained any renown in the market.²⁹ The length of use, in itself, is insufficient to establish commercial strength. The sales in the 2000’s appear to be minimal, and after 2013 Opposer did not separately track sales generated through the websites but incorporated those sales in Opposer’s overall online sales figures which includes Opposer’s other mark PC RICHARD & SON.

²⁷ The sales were submitted under seal.

²⁸ Mr. Pohmer states in his affidavit that “[a]fter 2013, sales derived from www.thewiz.com and www.nobodybeatstheviz.com websites were included in all of PC Richard’s internet sales, designated as ‘Store 12.’ Sales from store 12 for the year 2017 totaled \$53 million.” Pohmer Aff. ¶ 56, 47 TTBVUE 15 (this sales figure appears in the public version). No sales report was attached for 2017, those websites were no longer operating in 2017, and that figure is very different from the entire period 2003-2013. Further, it is not explained how store 12 is somehow recording sales under only THE WIZ brand.

²⁹ That the marks may have had renown at an earlier time under prior ownership is not relevant, we look to the fame or strength of a mark at the time of trial. *Cf. Tivo Brands LLC v. Tivoli, LLC*, 129 USPQ2d 1097, 1113 (TTAB 2018). Fame comes and goes, we must make a determination as to whether likelihood of confusion exists today, not only sometime in the distant past. In any event, this record does not support a finding of fame even prior to Opposer’s ownership beginning in 2003.

There is no evidence showing commercial impressions, social media following, or third-party mentions.

Applicant seeks to restrict the scope of protection to be accorded to Opposer's THE WIZ marks by arguing that WIZ is conceptually weak. In determining the conceptual strength of Opposer's THE WIZ mark, "we evaluate its intrinsic nature, that is, where it lies along the generic-descriptive-suggestive-arbitrary (or fanciful) continuum...." *In re Davia*, 110 USPQ2d 1810, 1815 (TTAB 2014).


Applicant points to the *Cambridge Dictionary* definition of WIZ as shortened for "a wizard" meaning "a skilled person."³⁰ In addition, Applicant submitted third-party registrations and third-party uses for marks that incorporate the word WIZ, for a variety of electronics goods and services.³¹ We turn first to the evidence of third-party registrations which "is relevant to show the sense in which a mark is used in ordinary parlance, ... that is, some segment that is common to both parties' marks may have a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak... ." *Jack Wolfskin Austrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports*,

³⁰ App. NOR Exh. 42, 60 TTABVUE 169 (<https://dictionary.combridge.org>).

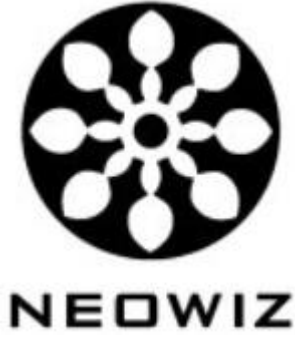

³¹ Applicant also submitted its registration for SAMSUNG TOUCHWIZ and other third-party registrations (PWIZ, SERVICEWIZ, BIZ WIZ, WIZPAY) that are now cancelled. Such registrations are not evidence of anything except that the registration issued; they are not evidence of any presently existing rights in the mark shown in the registration, or that the mark was ever used. *Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1606 (TTAB 2018). In addition, the registrations (WIZTOPIC, FLOWIZ, WIZMART) that issued under Sections 44 or 66 and for which no § 8 or § 71 affidavits or declarations of continuing use have been filed (15 U.S.C. §1058), have very little, if any, persuasive value. *See Calypso Tech., Inc. v. Calypso Capital Mgmt., LP*, 100 USPQ2d 1213, 1221 n.15 (TTAB 2011).

797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (citing *Juice Generation*, 115 USPQ2d at 1675) (internal punctuation omitted).

Opposer is correct that most of these third-party registrations are not for the same or similar goods and services at issue in this case. However, a few are directly relevant and overall they do tend to show the common adoption of the word WIZ by third parties to carry the suggestion the goods or services are associated with skill. A few examples are listed below.³²

Exh.	Reg. No.	Mark	Goods/Services	Owner
8	5065211	WIZPAK	Backpacks, bags, briefcases, handbags, messenger bags,...all specifically adapted to carry music, audio and related electronic equipment...portable computers	Shannon Thomas Ridley
10	5378517		Audio cables...cell phone covers...computer hardware and peripheral devices and computer software...earphones and headphones...mobile phones	Shenzhen Yingdakang Technology Co., Ltd.

³² 60 TTABVUE.

Exh.	Reg. No.	Mark	Goods/Services	Owner
13	3994810		<p>Computer software, namely, downloadable computer software programs for playing interactive online computer games and video games...</p> <p>Entertainment services, namely, providing interactive online computer and video games for playing via a global computer network</p>	Neowiz Holdings Corp.
15	2709453	GIZ WIZ BIZ	<p>Providing online product information about consumer products...</p> <p>Entertainment services, namely, continuing television and radio programs featuring consumer product information</p>	Richard DeBartolo
17	4566526		On-line retail store ... retail store services, ... all featuring automotive parts, supplies, tools and accessories therefor;	Car Parts Wiz, Inc.
19	5255581	MILEWIZ	<p>Downloadable software in the nature of a mobile application for tracking, logging and reporting the miles driven by a vehicle;</p> <p>Computer software for tracking, logging and reporting the miles driven by a vehicle</p>	Silverwiz LLC
21	5348678	VIDWIZ	educational and entertainment services in	Emma M. Stirling

Exh.	Reg. No.	Mark	Goods/Services	Owner
			the nature of aquatic programs by which guests can view aquatic life and habitats and interact with mammals	
22	5375643	WIZEYE	Computer systems comprising a data processing apparatus and software for collecting and analyzing information related to internal business resources and infrastructure in the field of information technology; computer software for collecting and analyzing information related to internal business resources and infrastructure in the field of information technology...	N3N Co., Ltd.
23	5286602	WIZMD	Computer software in the field of disease management, namely, for tracking, collecting and analyzing health data for use in conducting health risk assessments, recommending preventative health measures, condition management, making informed health care decisions, and tracking behavior modification	GenIT, LLC
24	3543629	WIZ	computer software for lending and marketing analysis and regulatory compliance for use by financial institutions; electronic databases in the fields of banking and lending recorded on	Wolters Kluwer Financial Services, Inc.

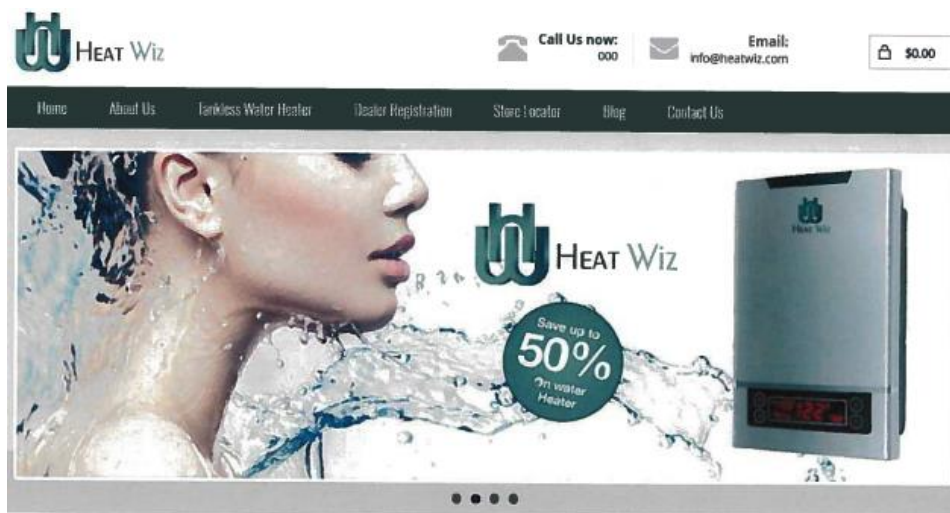
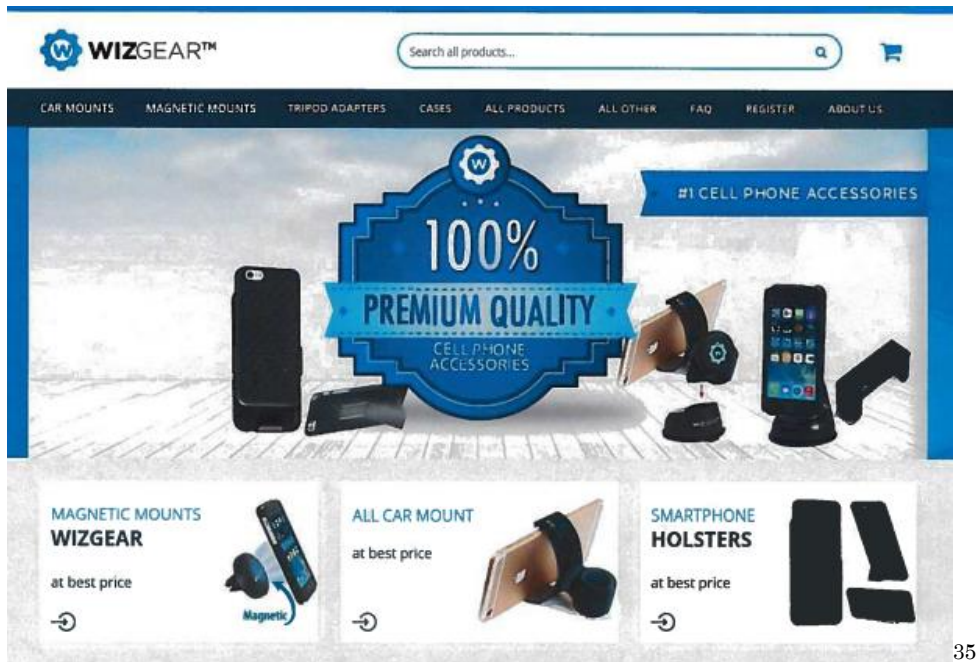
Exh.	Reg. No.	Mark	Goods/Services	Owner
			computer media for use by financial institutions	

While these third-party registrations do not diminish the commercial strength of Opposer’s THE WIZ mark, they do underscore the somewhat suggestive and laudatory nature of the word WIZ in connection with electronic goods as something that is very good, something possessing skill. In that sense they serve to corroborate the relevance of the dictionary definition of the word WIZ in connection with electronic goods and services. Thus, conceptually the word THE WIZ mark appears to be somewhat suggestive in connection with a variety of electronic goods, including computer hardware and software.

In addition, Applicant submitted examples of 17 different third-party uses across the United States of the term WIZ in connection with various electronic goods and services in the form of website printouts.³³ Examples are excerpted below:³⁴

³³ We do not consider the examples from New Zealand and Trinidad and Tobago. The Federal Circuit has explained that “[i]nformation originating on foreign websites or in foreign news publications that are accessible to the United States public may be relevant to discern United States consumer impression of a proposed mark.” *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1835 (Fed. Cir. 2007). However, the court cautioned that “[t]he probative value, if any, of foreign information sources must be evaluated on a case-by-case basis.” *Id.* The foreign evidence discussed in *Bayer* involved news articles retrieved from the NEXIS database, not screenshots of websites for electronics repair services. *Id.* Such services would not be available to consumers in the United States, and there is no indication that the webpages or the services therein are directed or available to consumers in the United States; therefore, those foreign webpages are less probative of commercial weakness in the United States. *See, e.g., In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1595-96 (TTAB 2018) (website evidence of foreign use of caviar in pet food not probative of norms of pet owners in the U.S.).

³⁴ Pham Decl. Exh. A, 58 TTABVUE 11.



Tankless Water Heater
Whole New Way To Think About Water

³⁵ *Id.* at 30. We note the application for this mark was the subject of an opposition proceeding brought by Opposer and has been abandoned as discussed *infra*. Despite the abandonment of the application, we continue to accord this use evidence some probative value as to consumer exposure to other WIZ marks.

³⁶ Pham Decl. Exh. B, 58 TTABVUE 49.

The screenshot displays the Lil' Wiz website interface. At the top left is the 'Lil' Wiz' logo. To the right are links for 'ACCOUNT' and 'CART'. Below these is a search bar with the placeholder text 'Search entire store here.' and a magnifying glass icon. A navigation menu includes 'LIL' WIZ PRODUCTS', 'TESTIMONIALS', 'BECOME A DEALER', and 'ABOUT LIL' WIZ'. The main content area is titled 'LIL' WIZ BLUETOOTH SPEAKERS' and features a large banner for the 'Lil' Wiz' Magic II Multi-Function Audio System with Portable Wireless Speaker. The banner includes a list of features: '~ Home Sound System', '~ Sound bar for your TV', and '~ Portable Wireless Speaker'. A photograph of the speaker is shown on the right. At the bottom of the banner are icons for Bluetooth, NFC, power, and location, along with callouts for '35 W' and '2.1 system'.

37

³⁷ Pham Decl. Exh. C, 58 TTABVUE 58.



CLOUD-CENTRIC PLATFORM

38



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39

³⁸ Pham Decl. Exh. D, 58 TTABVUE 77 (showing an enterprise lighting interface).

³⁹ Pham Decl. Exh. E, 58 TTABVUE 99.



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- Home
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<p>SALE!</p> <p>Acer Aspire E 15 E5-575-3...</p> <p>ADD TO CART</p> <p>VIEW DETAILS</p> <p>\$355.99 \$349.99</p>	<p>SALE!</p> <p>Apple MacBook Air 13.3-l...</p> <p>ADD TO CART</p> <p>VIEW DETAILS</p> <p>\$888.99 \$878.99</p>	<p>Apple MacBook Pro</p> <p>ADD TO CART</p> <p>VIEW DETAILS</p> <p>\$2,234.89</p>	<p>SALE!</p> <p>ASUS Chromebook C202SA</p> <p>ADD TO CART</p> <p>VIEW DETAILS</p> <p>\$225.01 \$220.01</p>
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Wiz PC & Cell Phone Repair | No one in Richmond can beat our prices!



41

⁴⁰ *Id.* 116.

⁴¹ Pham Decl. Exh. F, 58 TTABVUE 126.

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(<https://cellularwizatlantia.files.wordpress.com/2014/11/cell-phone-post.jpg>)

42



43

⁴² Pham Decl. Exh. I, 58 TTABVUE 180.



44



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⁴³ Pham Decl. Exh. J, 58 TTABVUE 188.

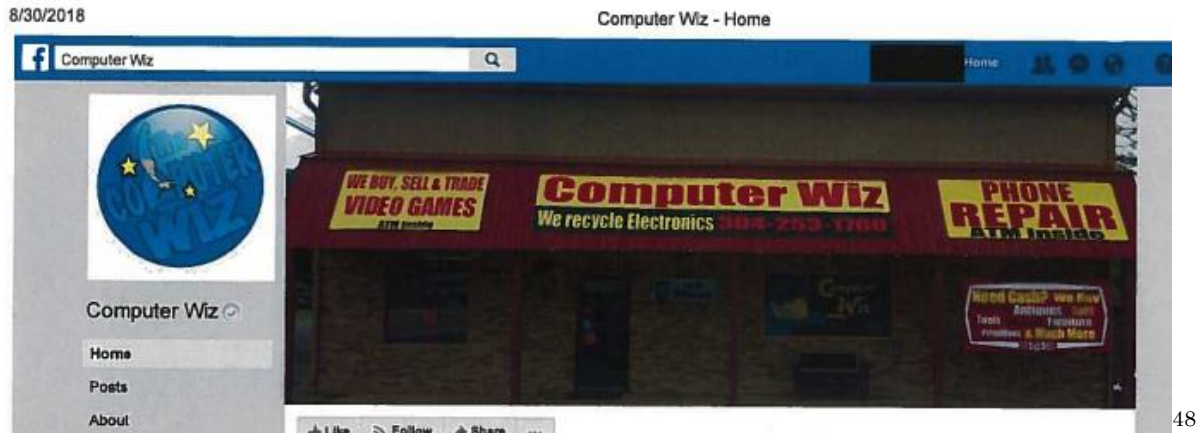
⁴⁴ Pham Decl. Exh. K, 58 TTABVUE 193.

⁴⁵ Pham Decl. Exh. M, 58 TTABVUE 204.



⁴⁶ Pham Decl. Exh. N, 58 TTABVUE 208.

⁴⁷ Pham Decl. Exh. O, 58 TTABVUE 221.



48



49

These examples show the use of WIZ in connection primarily with electronics services. They do tend to show some commercial weakness of the term WIZ in the electronics goods and services fields.

Overall, we find both some conceptual and commercial weakness for the word WIZ in the mark(s) THE WIZ (and NOBODY BEATS THE WIZ) in connection with retail store services in the field of consumer electronics and accessories. We accord the word WIZ in Opposer's THE WIZ mark a somewhat restricted scope of protection.

⁴⁸ Pham Decl. Exh. P, 58 TTABVUE 225.

⁴⁹ Pham Decl. Exh. S, 58 TTABVUE 256.

3. Similarity of the Marks

We now consider the similarity or dissimilarity of the parties' marks THE WIZ and SAMSUNG WIZ and compare them in their entireties in terms of appearance, sound, connotation and commercial impression. *Detroit Athletic*, 128 USPQ2d at 1048; see also *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)). "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 Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quotation omitted). The marks must be considered in their entireties, but "in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." *Detroit Athletic*, 128 USPQ2d at 1051 (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)).

The only point of similarity between the marks is the shared term WIZ. Both marks begin with different words SAMSUNG and THE. In general, and with respect to SAMSUNG WIZ, the first part of a mark is often the more prominent or likely to

be remembered, *In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018) (citing *Presto Prods., Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (the first part of a mark “is most likely to be impressed upon the mind of a purchaser and remembered”)); *Palm Bay Imps.*, 73 USPQ2d at 1692).

Opposer argues that Applicant’s mark incorporates Opposer’s entire mark. This is obviously incorrect, as Opposer’s mark THE WIZ includes another word. However, in the case of Opposer’s mark the addition of the term THE does not present a strong point of difference. The addition of the definite article “the” typically does not create a different commercial impression, *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009) (“The addition of the word ‘The’ at the beginning of the registered mark does not have any trademark significance.”); *see also In re G.D. Searle & Co.*, 360 F.2d 650, 149 USPQ 623 (CCPA 1966), and we find that to be the case here. Nonetheless we still must consider the marks in their entirety and the word “THE” in front of “WIZ” does create a commercial impression of a specific person and possibly a specific thing. To the extent it connotes a specific thing this does not particularly serve to distinguish it from SAMSUNG WIZ which also has the commercial impression of a specific thing, a Samsung Wiz. We are not persuaded by Applicant’s argument that the Broadway musical and movie based on the novel *The Wizard of Oz* called THE WIZ has impacted consumers of electronics products to understand Opposer’s THE WIZ for retail stores as that wizard.

Although there is no mechanical test to select a “dominant” element of a mark, consumers would be more likely to perceive a fanciful or arbitrary term, rather than

a descriptive or generic term, as the source-indicating feature of the mark. *See, e.g., In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (affirming TTAB's finding that "DELTA," not the disclaimed generic term "CAFE," is the dominant portion of the mark THE DELTA CAFE).

Clearly, SAMSUNG is the dominant portion of Applicant's mark in view of its position at the beginning of the mark and the record reveals great commercial strength of the SAMSUNG mark by itself. In addition, as shown above WIZ is somewhat suggestive and weak in connection with these goods and services.

Opposer is correct in its statement of the law that adding a house mark may in fact aggravate confusion. *See In re Christian Dior, S.A.*, 225 USPQ 533 (TTAB 1985) (LE CACHET DE DIOR for shirts confusingly similar to CACHET for dresses); *In re Riddle*, 225 USPQ 630 (TTAB 1985) (RICHARD PETTY'S ACCUTUNE and design for automotive service center confusingly similar to ACCUTUNE for automotive testing equipment). However, it is also the case that if the common element of two marks is "weak," it is unlikely that consumers will be confused unless the overall combinations have other commonality. *Juice Generation*, 115 USPQ2d at 1674-75 (remanded for consideration of whether and to what degree the phrase PEACE & LOVE for the marks PEACE LOVE AND JUICE and PEACE & LOVE was suggestive or descriptive in the food-service industry); *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818, 819 (Fed. Cir. 1986) (reversing TTAB's holding that contemporaneous use of BED & BREAKFAST REGISTRY for making lodging reservations for others in private homes, and BED & BREAKFAST

INTERNATIONAL for room booking agency services, is likely to cause confusion, because, inter alia, the descriptive nature of the shared wording weighed against a finding that the marks are confusingly similar).

While Applicant's and Opposer's marks include the identical word WIZ, in connection with these goods and services it is somewhat suggestive and commercially weak in the electronics field. Moreover, SAMSUNG is dominant, placed at the beginning of Applicant's mark, and presents a different overall commercial impression, sufficient to avoid likely confusion. In connection with Applicant's goods, WIZ is modified by SAMSUNG, it is an electronic SAMSUNG product that is a wiz, by comparison, THE WIZ for retail stores featuring electronic products connotes a person or store that is a wiz.

We note that in the prior decision where WIZGEAR for electronic accessories, including cell phone cases, was found confusingly similar to THE WIZ and NOBODY BEATS THE WIZ,⁵⁰ the shared term WIZ was found to be the dominant element in applicant's mark due to its placement at the beginning of the mark and the descriptiveness of the term GEAR. However, here the dominant element in Applicant's mark is SAMSUNG.

We recognize that "when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines," *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23

⁵⁰ Opp. Rebuttal NOR Exh. 9, 64 TTABVue 174 (Notice of Opposition). We take judicial notice of the Board's decision in Opp. No. 91223383 issued on July 25, 2019, affirmed by the Court of Appeals for the Federal Circuit October 7, 2020.

USPQ2d 1698, 1701 (Fed. Cir. 1992), but here the goods and services, although related, are not identical. We are cognizant of Opposer's argument that if Opposer were to sell the Samsung tablet computer on Opposer's own retail website using its SAMSUNG WIZ trademark, Opposer's customers would be confused. Considering the amount of WIZ marks used and registered in connection with electronic goods and services, we find that tends towards a mere theoretical possibility, given the dominant element in Applicant's mark. Given the dissimilarities in appearance, sound, connotation and commercial impression, and the somewhat weak nature of the word WIZ in connection with electronic goods and services, we find the marks are not confusingly similar when used on Applicant's goods and Opposer's services.⁵¹

This factor weighs against finding likely confusion.

4. Balancing of the Factors

We have considered all of the evidence pertaining to the relevant *DuPont* factors, as well as the parties' arguments with respect thereto. In balancing the relevant factors, we find the differences between the marks sufficient to avoid likely confusion despite the relatedness of the goods and services, and trade channels, in particular given the differences in overall commercial impression. "No mechanical rule determines likelihood of confusion, and each case requires weighing of the facts and circumstances of the particular mark." *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) (citing *Century 21 v. Century Life*, 23 USPQ2d

⁵¹ Nor do we view this as a circumstance for reverse confusion or confusion as to sponsorship in view of the weakness of the common term.

at 1698)); *see also Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 119 USPQ2d 1286, 1290 (Fed. Cir. 2016) (MAYA not confusingly similar to MAYARI) (quoting *Kellogg Co. v. Pack'em Enters.*, 951 F.2d 330, 21 USPQ2d 1142, 1144-45 (Fed. Cir. 1991) (“We know of no reason why, in a particular case, a single *duPont* factor may not be dispositive”)).

IV. Conclusion

Because Opposer has not shown, by a preponderance of the evidence, the existence of a likelihood of confusion, Opposer has not established its claim under Section 2(d).

Decision: The opposition is dismissed.