

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: December 31, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Shared LLC*  
*v.*  
*SharedSpaceofAtlanta LLC*  
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Opposition No. 91228478  
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Mahsa Hakimi of Hakimi Law, PC,  
for Shared LLC.

J. Tucker Barr and Andrew C. Stevens of Arnall Golden Gregory LLP,  
for SharedSpaceofAtlanta LLC.

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Before Taylor, Mermelstein, and Coggins,  
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

SharedSpaceofAtlanta LLC (“Applicant”) seeks registration on the Principal Register of the composite mark  SharedSpace (with SHARED SPACE disclaimed) for “providing co-working facilities equipped with office equipment; providing facilities for business meetings for others,” in International Class 35.<sup>1</sup>

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<sup>1</sup> Application Serial No. 86833795 was filed on November 30, 2015, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce. On February 16, 2016, Applicant filed a Statement

By way of its First Amended Notice of Opposition, Shared LLC (“Opposer”) opposes the registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).<sup>2</sup> Opposer claimed ownership of the registered marks listed below:

1. Registration No. 4867093 for the mark SHARED (in standard characters) for “incubation services, namely, providing work space containing business equipment to freelancers, start-ups, existing businesses and non-profits,” in International Class 35, and “incubation services, namely, rental of office space to freelancers, start-ups, existing businesses and non-profits; leasing of office space; rental of office space,” in International Class 36;<sup>3</sup> and
2. Registration No. 4880230 for the mark **S H A R E D** for “incubation services, namely, providing work space containing business equipment to freelancers, start-ups, existing businesses and non-profits,” in International Class 35.<sup>4</sup>

Applicant, in its Answer, denied the salient allegations of the amended Notice of Opposition,<sup>5</sup> interposed purported affirmative defenses, and counterclaimed to cancel

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of Use under Section 1(d) of the Act, alleging first use of the mark in commerce as of February 15, 2016. The application contains the following description: “The mark consists of the wording ‘SHAREDSPACE’, which appears to the right of a design consisting of two partially overlapping squares with rounded corners.” Color is not claimed as a feature of the mark.

<sup>2</sup> 9 TTABVUE 16-21. The original and amended notices of opposition also alleged that Applicant’s composite mark is merely descriptive under Section 2(e)(1). However, the Board granted judgment on the pleadings in favor of Applicant as to that ground. 10 TTABVUE 7. Citations in this opinion are to the TTABVUE docket entry number and, where applicable, the electronic page number where the document or testimony appears. Because the Board primarily uses TTABVUE in reviewing evidence, it prefers that citations to non-confidential parts of the record include the TTABVUE docket entry number and the TTABVUE page number. *See RxD Media, LLC v. IP Application Dev. LLC*, 125 USPQ2d 1801, 1804 (TTAB 2018); TBMP §§ 801.01, 801.03 (2019).

<sup>3</sup> Registered December 8, 2015, from an application filed May 8, 2015.

<sup>4</sup> Registered January 5, 2016, from an application filed April 28, 2015.

<sup>5</sup> When the Board granted Opposer’s motion to amend the notice of opposition, 10 TTABVUE 2, it did not allow Applicant time to file an answer to the amended notice. Neither party objected to this technical oversight. Inasmuch as the amended notice is substantively identical to the original notice with respect to the Section 2(d) allegations – the only amendments being two new paragraphs relating to the Section 2(e)(1) ground – we deem the

Opposer's pleaded registration No. 4867093 on the ground that it is merely descriptive under Section 2(e)(1) of the Act, 15 U.S.C. § 1052(e)(1), and registration No. 4880230 on the ground that the word "shared" is merely descriptive and should be disclaimed.<sup>6</sup> Opposer denied the salient allegations in the counterclaim, and alleged purported affirmative defenses including that its marks have acquired distinctiveness.<sup>7</sup>

As explained below, we grant the counterclaims and sustain the opposition.

## **I. Procedural Issues**

Before proceeding to the merits of the refusal, we address some procedural issues.

### **A. Unnecessary evidence**

Each party introduced unnecessary evidence. In view of Trademark Rule 2.122(b), Opposer's first opposition notice of reliance (25 TTABVUE 2-64) and Applicant's first notice of reliance Exhibit B (29 TTABVUE 64-122), each purporting to introduce the records of Opposer's pleaded registrations; and Opposer's second opposition notice of

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answer to the original notice operative upon the amended notice and the allegations in the two new paragraphs denied.

<sup>6</sup> 4 TTABVUE 2-7 (answer), 8-14 (counterclaim). Applicant's reference to "15 U.S.C. § 1058" in the allegations against Registration No. 4880230 appears to be a typo meant to reference Trademark Act Section 18, 15 U.S.C. § 1068. *See* 4 TTABVUE 14. Section 18 states that the Board has the authority to "restrict or rectify . . . the registration of a registered mark." Under Section 18 a plaintiff may seek relief, such as the relief requested here, in the nature of entry of a disclaimer of an assertedly merely descriptive term forming only a portion of the mark, provided that the registration is less than five years old. *See Kellogg Co. v. Pack'em Enters., Inc.*, 14 USPQ2d 1545, 1549 (TTAB 1990) (counterclaim plaintiff seeking, in the alternative, that an amendment be entered to disclaim a purportedly descriptive portion of an asserted mark registered for less than five years stated a claim upon which relief may be granted).

<sup>7</sup> 6 TTABVUE.

reliance (25 TTABVUE 65-126) and Applicant's first notice of reliance Exhibit A (29 TTABVUE 5-63), each purporting to introduce the record of the subject application; were unnecessary.

### **B. Duplicate and triplicate evidence**

Each party introduced duplicative evidence, Opposer making some of it thrice submitted. The material in Applicant's first notice of reliance Exhibits C through E (29 TTABVUE 124-524) are duplicate copies of evidence submitted by Opposer's third notice of reliance. Opposer's first counterclaim notice of reliance contains web pages from [www.shared-sf.com](http://www.shared-sf.com) (30 TTABVUE 5-28) which are effectively duplicates of the web pages submitted under its third opposition notice of reliance (25 TTABVUE 127-153). Opposer's second counterclaim notice of reliance (30 TTABVUE 29-330) contains online and printed publications which are duplicates of the pages submitted under its fifth opposition notice of reliance (26 TTABVUE 2-364); only the Yelp "Best coworking space" pages (30 TTABVUE 326-328) are new. The material in Opposer's third counterclaim notice of reliance Exhibits C through E (30 TTABVUE 331-371) contains duplicates of the pages submitted under its sixth notice of reliance as Exhibits G, I, and J (27 TTABVUE 7-49); only the third-party registrations (30 TTABVUE 372-420) and an updated exhibit to Marilyn Yu's repeated (i.e., identical) testimony declaration are new.

Once testimony or any other evidence is introduced, it may be referred to by any party for any purpose permitted by the Federal Rules of Evidence, and the adverse party need not take any action in order to rely on it. Trademark Rule 2.122(a), 37

C.F.R. § 2.122(a). *See also Nazon v. Ghiorse*, 119 USPQ2d 1178, 1181 n.6 (TTAB 2016) (“Once evidence is properly of record, it may be relied on by any party for any purpose.”). The parties’ submission of unnecessary and duplicative evidence was a waste of time and resources, and was a burden on the Board.<sup>8</sup> *See ITC Entm’t Grp. Ltd. v. Nintendo of Am. Inc.*, 45 USPQ2d 2021, 2022-23 (TTAB 1998).

### **C. Opposer’s motion to strike**

Opposer moves to strike Exhibit G to Applicant’s first notice of reliance (29 TTABVUE 558-606) and the entirety of Applicant’s second notice of reliance (31 TTABVUE), each comprised of third-party registrations.<sup>9</sup> Opposer argues that Applicant failed to “verify[] the status of the registrations,” failed to “check . . . for duplicates,” provided “blatantly irrelevant” examples, and failed to serve disclosures before filing its second notice of reliance for its reply trial period as counterclaim plaintiff.<sup>10</sup> The objections are not well taken. Third-party registrations are not required to be certified or contain status and title information in order to be considered properly of record. *See Rocket Trademarks Pty. Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1070 n.11 (TTAB 2011); TBMP § 704.03(b)(1)(B). The Board is capable of weighing the relevance and strength or weakness of the third-party registrations, including any inherent limitations, and this precludes the need to strike the evidence. *See Poly-Am., L.P. v. Ill. Tool Works, Inc.*, 124 USPQ2d 1508, 1510 (TTAB 2017).

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<sup>8</sup> The parties instead should have pointed to the TTABVUE cite where the evidence was initially submitted.

<sup>9</sup> Brief, pp. 22-24; 32 TTABVUE 28-30.

<sup>10</sup> Brief, pp. 23, 24; 32 TTABVUE 29, 30,

Although this evidence will be considered, it will be accorded only the probative value to which it may be entitled. While Applicant should have served pretrial disclosures stating that it did not plan to take testimony from any witnesses during its rebuttal period, it was not required to disclose the notice of reliance it intended to file during the rebuttal period. *See* Trademark Rule 2.121(e); TBMP § 702.01.

## **II. The Record**

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Applicant's application file and the registration files of Opposer's pleaded registrations which are subject to Applicant's counterclaim. The record also includes:

### **A. Opposer's testimony and evidence.**

1. Notice of reliance on the following items:
  - a. Web pages from [www.shared-sf.com](http://www.shared-sf.com);<sup>11</sup>
  - b. Web pages from [www.sharedspaceofatl.com](http://www.sharedspaceofatl.com);<sup>12</sup>
  - c. Print and online publications;<sup>13</sup>
  - d. Internet materials,<sup>14</sup> dictionary definitions,<sup>15</sup> Internet search engine results<sup>16</sup>;

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<sup>11</sup> 25 TTABVUE 127-153; 30 TTABVUE 5-28.

<sup>12</sup> 25 TTABVUE 154-184.

<sup>13</sup> 26 TTABVUE 7-364.

<sup>14</sup> 27 TTABVUE 7-20.

<sup>15</sup> 27 TTABVUE 21-34.

<sup>16</sup> 27 TTABVUE 35-49.

- e. Applicant's responses to Opposer's interrogatories;<sup>17</sup>
  - f. Applicant's responses to Opposer's requests for admission;<sup>18</sup> and
  - g. Third-party registrations.<sup>19</sup>
2. First<sup>20</sup> and second<sup>21</sup> testimony declarations of Marilyn Yu, founder and owner of Opposer.

### **B. Applicant's testimony and evidence.**

1. Notice of reliance on the following items:
  - a. Opposer's responses to Applicant's interrogatories;<sup>22</sup> and
  - b. Third-party registrations.<sup>23</sup>

### **III. Standing**

A threshold issue in every inter partes case is the plaintiff's standing to challenge registration. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *John W. Carson Found. v. Toilets.com Inc.*, 94 USPQ2d 1942, 1945 (TTAB 2010). A plaintiff must show in that it possesses a real interest in the proceeding beyond that of a mere intermeddler, and that it has a reasonable basis for its belief of damage resulting from the registration, or continued registration, of the involved mark. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d

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<sup>17</sup> 28 TTABVUE 6-24, 43-44, 51, 59

<sup>18</sup> 28 TTABVUE 25-35, 43, 50-51, 58-59,

<sup>19</sup> 30 TTABVUE 372-420.

<sup>20</sup> 28 TTABVUE 65-72.

<sup>21</sup> 30 TTABVUE 423-430.

<sup>22</sup> 29 TTABVUE 540-557.

<sup>23</sup> 29 TTABVUE 558-606; 31 TTABVUE 2-300.

1023, 1025-26 (Fed. Cir. 1999). An opposer may establish its standing by properly making of record its pleaded registration, if it is the basis for a likelihood of confusion claim that is not wholly without merit. *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, \*4 (TTAB 2019) (citing *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982)).

Opposer's pleaded Registration Nos. 4867093 for the mark SHARED and 4880230 for the mark **S H A R E D** are of record by operation of Trademark Rule 2.122(b). As noted above, Opposer also submitted these registrations with its first notice of reliance in support of the opposition pursuant to Trademark Rule 2.122(d)(2).<sup>24</sup> This is sufficient to establish Opposer's standing for its likelihood of confusion claim. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). In addition, Opposer testified that it has used both SHARED marks for coworking services continuously since 2012.<sup>25</sup> Further, Applicant does not challenge Opposer's standing.

Applicant has standing to assert its counterclaim by virtue of being the defendant in the opposition proceeding. *See Anthony's Pizza & Pasta Intl. Inc. v. Anthony's Pizza Holding Co.*, 95 USPQ2d 1271, 1274 (TTAB 2009) ("Defendant has standing to cancel plaintiff's pleaded registration by virtue of being the defendant in the consolidated proceeding, and the fact that plaintiff has asserted its registration against defendant."), *aff'd*, 415 Fed. Appx. 222 (Fed. Cir. 2010).

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<sup>24</sup> 25 TTABVUE 22-24, 61-64.

<sup>25</sup> Yu Decl'n, para 7; 28 TTABVUE 66.



#### **IV. Counterclaims**

We begin with Applicant's counterclaims because resolution of Applicant's challenges to Opposer's registrations bears on our resolution of Opposer's likelihood of confusion claim. *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069, 2071 (TTAB 1989) ("Because the validity of opposer's pleaded registrations has been made an issue as a result of applicant's counterclaims, we . . . consider the evidence and arguments relating to those counterclaims before turning to the issue of likelihood of confusion in the opposition proceeding.").

##### **A. Applicable law on mere descriptiveness**

Section 2(e) of the Trademark Act prohibits registration on the Principal Register of "a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them," unless the mark has been shown to have acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). "A mark is merely descriptive if it 'consists merely of words descriptive of the qualities, ingredients or characteristics of the goods or services related to the mark.'" *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1252, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012) (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (internal quotation marks omitted)). "A mark need not immediately convey an idea of each and every specific feature of the goods [or services] in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods [or services]." *In re Fat Boys*

*Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987)).

Whether a mark is merely descriptive is “evaluated ‘in relation to the particular goods [or services] for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods [or services] because of the manner of its use or intended use,’” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)), and “not in the abstract or on the basis of guesswork.” *Fat Boys*, 118 USPQ2d at 1513 (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). We ask “whether someone who knows what the goods and services are will understand the mark to convey information about them.’ *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *DuoProSS*, 103 USPQ2d at 1757 (internal quotation marks omitted)).

Registration No. 4867093 is for the word mark SHARED, and Registration No. 4880230 is for the composite word-and-design mark **S H A R E D**. We “‘must consider the *commercial impression* of a mark as a whole,’ ‘viewed through the eyes of a consumer,’” *id.* (quoting *DuoProSS*, 103 USPQ2d at 1757 (citation omitted)), including any design elements. *DuoProSS*, 103 USPQ2d at 1756.

“Evidence of the public’s understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listing in dictionaries, trade journals, newspapers[,] and other publications.” *Real Foods*, 128

USPQ2d at 1374 (quoting *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018)). “These sources may include [w]ebsites, publications and use ‘in labels, packages, or in advertising material directed to the goods [or services].” *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017) (quoting *Abcor Dev.*, 200 USPQ at 218).

A “mark need not be merely descriptive of all recited goods or services in an application. A descriptiveness refusal is proper ‘if the mark is descriptive of any of the [services] for which registration is sought.” *Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (quoting *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1088 (Fed. Cir. 2005)).

Finally, pursuant to Trademark Act Section 18, a registration less than five years old may be cancelled on the ground that an undisclaimed portion of the mark is merely descriptive of the identified services, and that the mark should not be registered without a disclaimer of that portion.<sup>26</sup> *Montecash LLC v. Anzar Enters. Inc.*, 95 USPQ2d 1060, 1064 (TTAB 2010); *Kellogg Co. v. Pack'em Enters.*, 14 USPQ2d at 1549.

Opposer’s Principal Register registrations of SHARED and **S H A R E D** at issue in the counterclaim are prima facie evidence of the validity of those marks, 15 U.S.C. § 1057(b), and “that includes the presumption that the mark[s] subject thereof [are] not merely descriptive of . . . the [services].” *Editorial Am., S.A. v. Gruner + Jahr*

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<sup>26</sup> In lieu of cancellation, a registrant in such a position may submit a disclaimer of the descriptive part of the mark if the mark is otherwise registrable.

*AG & Co.*, 213 USPQ 498, 504 (TTAB 1982). *See also Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006). As the counterclaimant, Applicant bears the burden of proving that the term SHARED in each mark is merely descriptive by a preponderance of the evidence.

### **B. The parties' arguments and evidence**

Opposer's services in Registration No. 4867093 are "incubation services, namely, providing work space containing business equipment to freelancers, start-ups, existing businesses and non-profits," and "incubation services, namely, rental of office space to freelancers, start-ups, existing businesses and non-profits; leasing of office space; rental of office space"; and the services in Registration No. 4880230 are "incubation services, namely, providing work space containing business equipment to freelancers, start-ups, existing businesses and non-profits." Opposer describes these services broadly as "relating to co-working services" and describes itself as "a reputable co-working service provider" and "the top co-working and incubator provider" within the industry.<sup>27</sup> Opposer explains that it offers "a unique co-working space that provides services and amenities not only to its entrepreneurs and start up members, but also to artists and creative talent."<sup>28</sup>

It is Applicant's position that the term SHARED is merely descriptive of Opposer's incubation services in the nature of provision, rental, and leasing of office space, and the average purchaser of Opposer's incubation services would immediately

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<sup>27</sup> Brief, p. 1; 32 TTABVUE 7.

<sup>28</sup> *Id.*, p. 5; 32 TTABVUE 11.

understand SHARED to convey a characteristic or feature of the services, namely, that Opposer provides, rents, and leases shared office space.<sup>29</sup> In support of its position, Applicant points to dictionary definitions, third-party registrations, and Opposer's own use of the term "shared."

Opposer counters that the term "shared" is suggestive of its services and does not by itself immediately inform consumers about the services. Instead, Opposer argues, additional wording or explanation is needed for a consumer to make a connection with and understand what might be "shared." Opposer also argues that third-party registrations are not evidence of use of the registered marks, and further argues that Applicant failed to meet its burden of proof to overcome the presumption that Opposer's marks are inherently distinctive.<sup>30</sup>

Dictionary definitions of the term "shared" in evidence include:

- "owned or used by more than one person: . . . shared services/resources;"<sup>31</sup>
- "used, done, belonging to, or experienced by two or more individuals • a dormitory with *shared* living area;"<sup>32</sup> and
- "use, occupy, or enjoy (something) with another or others. 'they once shared a house in the Hamptons.'"<sup>33</sup>

There is no dictionary definition of "coworking" or "incubation" in the record, but editorial definitions of "coworking" included in internet material submitted by

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<sup>29</sup> Brief, pp. 17, 19; 33 TTABVUE 25, 27.

<sup>30</sup> Rebuttal Brief, pp. 10-16; 34 TTABVUE 18-24.

<sup>31</sup> CAMBRIDGE DICTIONARY, 27 TTABVUE 30.

<sup>32</sup> MERRIAM-WEBSTER, 27 TTABVUE 33.

<sup>33</sup> Google Dictionary, 27 TTABVUE 36.

Opposer explain that “[c]oworking, put simply, is a shared work environment”<sup>34</sup> and is “a style of work that involves a shared working environment, often an office, workbar or hot desk . . . .”<sup>35</sup> “Coworking spaces . . . allow freelancers, small business owners and independent workers to rent a working area that is shared with others.”<sup>36</sup>

Workspace sharing is not a new concept. In truth, there are multiple shared coworking spaces popping up in nearly every major city in the world. This mindset allows coworking community providers to lease commercial real estate and rent out hot desks, conference rooms, private offices, and event space to bootstrappers, entrepreneurs, and individuals simply seeking a commitment-free workplace away from home to keep themselves on task. In fact, some of the well-known “Airbnbs” of coworking or shared workspace that have a global presence are Sharedesk, Regus, Davinci Meeting Rooms, and Deskttime.<sup>37</sup>

The idea that coworking involves shared space is corroborated by Applicant’s website which indicates that coworking involves “shared office spaces” and “shared workspace,”<sup>38</sup> and the First Yu Declaration in which Opposer’s founder and owner Marilyn Yu, explains that she created “a co-working space for creative artist and entrepreneurs who could also collaborate and create as a community.”<sup>39</sup>

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<sup>34</sup> “The Top 100 Coworking Spaces in the U.S.” (symmetry50.com), 26 TTABVUE 93.

<sup>35</sup> “San Francisco to Taipei: the Best Coworking Workspace” (ichitect.com), 26 TTABVUE 10 (internal quotations omitted).

<sup>36</sup> “Working Remotely Around The World: Workspaces To Explore” (smashingmagazine.com), 26 TTABVUE 116.

<sup>37</sup> “San Francisco to Taipei: the Best Coworking Workspace” (ichitect.com), 26 TTABVUE 11.

<sup>38</sup> 25 TTABVUE 158, 160.

<sup>39</sup> 1st Yu Decl’n, para. 3; 28 TTABVUE 65.

Similarly, editorial references to “incubate”-formatives included in internet material submitted by Opposer explain that “[t]he advantages of renting co-working space are numerous indeed: we all know that launching a business can be risky and costly but thanks to the evolution of coworking, incubating startups can significantly reduce business overhead.”<sup>40</sup> “Coworking spaces offer more than a reprieve from the sky-high rent prices of the Bay Area. They also operate as incubators, think tanks and social spaces where freelancers and startups can meet and share ideas.”<sup>41</sup> We take judicial notice that “incubator” means, inter alia, “an organization or place that aids the development of new business ventures especially by providing low-cost commercial space, management assistance, or shared services.”<sup>42</sup> Opposer’s incubation services in the nature of provision, rental, and leasing of office space encompass providing, renting, and leasing of coworking space – that is, shared space.

Opposer’s web site explains that Opposer offers clients a list of amenities including “5500 sq ft of **shared** work space,” “1700 sq ft of private work space,” and “**shared** tools” (such as hand tools, drills, saws, and sewing machines).<sup>43</sup> Opposer describes itself as follows:

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<sup>40</sup> “San Francisco to Taipei: the Best Coworking Workspace” (ichitect.com), 26 TTABVUE 10.

<sup>41</sup> “The 19 best coworking spaces in the Bay Area” (99designs.com), 26 TTABVUE 300.

<sup>42</sup> MERRIAM-WEBSTER, merriam-webster.com/dictionary/incubator. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *See In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014) *aff’d* 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006) (Board may take judicial notice of a widely-known reference readily available in specifically denoted editions via the Internet although not available in print).

<sup>43</sup> 25 TTABVUE 132-33.

[T]he most unique coworking space in San Francisco, located in the heart of SoMa. SHARED has all the office amenities of a traditional coworking space added to a maker space. It has office space, fabrication space, a [sic] **shared** tools and equipment, meeting rooms, kitchen, and classes, and events.

SHARED is a space for creative people to work and collaborate together. . . .

SHARED takes the idea of co-working and applies it to the different types of space that creative people need. SHARED provides creative “play” space — space to think, space to experiment, and space to collaborate. There are several types of space at SHARED:

- Quieter, smaller spaces for work that requires a lot of thought and/or concentration
- Larger spaces that allow people to make a mess
- Opportunities to collaborate with other creative people
- Casual hang-out space<sup>44</sup>

Opposer advertises multiple membership options to access its services including a “Weekday Days Access” membership providing “access to all **shared** spaces and tools M-F 6AM-6PM.” This “[m]embership includes: **shared** work space, **shared** kitchen and lounge, creative community.”<sup>45</sup> An “Evening and Weekend Access” membership provides “access to all **shared** spaces and tools M-F 6PM-2AM and SA-SU 6AM-2AM,” and similarly “includes: **shared** work space, **shared** kitchen and

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<sup>44</sup> 25 TTABVUE 148.

<sup>45</sup> 25 TTABVUE 136.



lounge, creative community.”<sup>46</sup> Under the FAQs section of its website, Opposer answers questions such as:

- Q: What is your guest policy?

A: We welcome collaboration and guests, be they colleagues, partners, clients, visitors, or friends. For meetings of thirty minutes or less, feel free to use the **shared** space. For meetings of more than thirty minutes, please book a meeting room;

and

- Q: Can I rent SHARED for an event?

A: Yes, the first floor and second floor **shared** work-spaces are available for event rental.<sup>47</sup>

In addition to Opposer’s own use of the term “shared” to describe the work and office space it provides, rents, and leases, the record contains many examples of third parties using the term to describe Opposer’s services. For example (all emphasis added):

- “SHARED has all of the amenities of a traditional coworking space, with additional maker spaces, featuring fabrication space, a **shared** workshop with a range of tools and equipment, as well as classes and events.”<sup>48</sup>

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<sup>46</sup> 25 TTABVUE 137.

<sup>47</sup> 25 TTABVUE 145.

<sup>48</sup> “Working Remotely Around The World: Workspaces To Explore” (smashingmagazine.com), 26 TTABVUE 135.

- “SHARED has painting space, fabrication space, sewing equipment, **shared** tools, meeting rooms, kitchen, classes, and events. . . . It is based in the belief that together we can create greater things than we could individually or in isolation.”<sup>49</sup>
- “The environment consists of a toolshed, private lockers, a lounge and **shared** meeting rooms spread across two floors as well as **shared** workspaces with areas specifically designated for sewing, painting and woodworking.”<sup>50</sup>
- “SHARED is exactly how it sounds; a **shared**, communal workplace with a[n] emphasis on community.”<sup>51</sup>
- “SHARED is a, well, **shared**, creative work-space that also features workshops and events, such as ukulele and sewing classes, screenwriting workshops, and a monthly collage party.”<sup>52</sup>

The record is replete with examples of the term “shared” describing third parties’ similar work and office space. For example:

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<sup>49</sup> “Top 40 Coworking Spaces in the San Francisco Bay Area” (blog.getkisi.com), 26 TTABVUE 262.

<sup>50</sup> “The 19 best coworking spaces in the Bay Area” (99designs.com), 26 TTABVUE 304.

<sup>51</sup> Yelp review, October 10, 2014; 26 TTABVUE 346.

<sup>52</sup> “Short Cuts,” THE POTRERO VIEW, June 2014; 26 TTABVUE 23.

- “A coworking office exclusively for women in Austin. Their mission is to create a community of cohesion, collaboration and success by offering business support services, and **shared** office spaces.”<sup>53</sup>
- “The work space is designed to encourage both collaboration and focus. The space is broken into **shared** workspace and partitioned desks.”<sup>54</sup>
- “Thrive offers **shared** office space including office suites, day spaces, meeting rooms and all of the features of a full service professional office space.”<sup>55</sup>
- “With a 24/7 dedicated plan you get your own desk in a lovely light-filled office that is **shared** with a few others.”<sup>56</sup>
- “**Shared** work spaces start at \$249 per month.”<sup>57</sup>
- “More than a **shared** work space, it’s an opportunity to harness the collective strengths of individuals who are experts in their field.”<sup>58</sup>
- “At Shift, they’re creating a new working community, offering private offices, desks, **shared** work space, and meeting spaces, along with

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<sup>53</sup> “The Top 75 Coworking Spaces in the U.S.” (symmetry50.com) describing Posh Coworking, 26 TTABVUE 25.

<sup>54</sup> *Id.*, describing Indiegrove, 26 TTABVUE 29.

<sup>55</sup> *Id.*, describing Thrive Workplace Solutions, 26 TTABVUE 30.

<sup>56</sup> *Id.*, describing Get Smart Workspaces, 26 TTABVUE 35.

<sup>57</sup> *Id.*, describing Venture X, 26 TTABVUE 37.

<sup>58</sup> *Id.*, describing Designspaces, 26 TTABVUE 39.

amenities designed around you and the way you work. . . . Choose how you want to work (private, semi-private or **shared**).”<sup>59</sup>

- “Chicago’s largest and best **shared** office environment for freelancers, entrepreneurs and small businesses.”<sup>60</sup>
- “Impact Hub Oakland is equal parts inspiring **shared** working space, entrepreneurial incubator and a membership-based community of socially engaged people, co-working and colearning.”<sup>61</sup>
- “A dynamic coworking space dedicated to helping a diverse and innovative group of entrepreneurs succeed through the power of community. . . . [It] provides a variety of secured **shared** & personal working areas, huddle & conference rooms, whiteboard walls, WiFi, printing/faxing/scanning stations, personal storage, and a fully stocked kitchen for \$350 per month per person.”<sup>62</sup>
- “Oficio is a boutique **shared** office and coworking space . . . that offers members a business mailing address, a variety of seating options, private offices, high speed wifi, meeting rooms, phone booths and complimentary gourmet coffee, cappuccinos, and lattes.”<sup>63</sup>

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<sup>59</sup> *Id.*, describing Shift Workspaces, 26 TTABVUE 40.

<sup>60</sup> *Id.*, describing Office Port, 26 TTABVUE 41.

<sup>61</sup> *Id.*, describing Impact Hub, 26 TTABVUE 48.

<sup>62</sup> *Id.*, describing CIC, 26 TTABVUE 49.

<sup>63</sup> *Id.*, describing Oficio, 26 TTABVUE 51.

- “Sandbox Suites is a **shared** workspace created specifically for freelancers, small business owners, telecommuters and other independent professionals.”<sup>64</sup>
- “Co+Hoots is the only **shared** downtown Phoenix office location that promotes collaboration and provides the professional and inspirational self-sustaining space to grow and nurture entrepreneurialism.”<sup>65</sup>
- “Empowering creatives, entrepreneurs, and start-ups by offering them **shared** work spaces, private offices, meeting and conference rooms . . . .”<sup>66</sup>
- “The Writers Junction is an affordable **shared** workspace for writers. It’s where you’ll find the quiet of a library, the society of a coffee shop, the focus of a daily office, and the camaraderie of a private club.”<sup>67</sup>
- “Not only do members have access to furnished, **shared** workspaces, as well as infrastructure to support their general business needs, the location has industry-specific resources to help their creative business grow.”<sup>68</sup>
- “Enerspace Palo Alto is a modern **shared** office space with coworking, private offices, dedicated desks, meeting space, event space and a great community.”<sup>69</sup>

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<sup>64</sup> *Id.*, describing Sandbox Suites, 26 TTABVUE 52-53.

<sup>65</sup> *Id.*, describing Co+Hoots, 26 TTABVUE 54.

<sup>66</sup> *Id.*, describing The Urban Hive, 26 TTABVUE 55.

<sup>67</sup> “The Top 100 Coworking Spaces in the U.S.” (symmetry50.com) describing The Writers Junction, 26 TTABVUE 79.

<sup>68</sup> *Id.*, describing Creative Colony, 26 TTABVUE 84.

<sup>69</sup> *Id.*, describing Enerspace, 26 TTABVUE 86.

- “The Satellite Centers are comfortable, connected, professional **shared** office space and flexible workspace centers in your community.”<sup>70</sup>
- “TOP is more than a **shared** office space, they foster a culturally diverse community of professional leaders, entrepreneurs and business owners.”<sup>71</sup>
- “Work:) **Shared** Workspace.”<sup>72</sup>
- The campus offers artists individual or **shared** studio spaces, resources (such as a wood shop and print shop) and the ability to work alongside recognized Bay Area artists for costs much lower than market rate.<sup>73</sup>
- “The multi-story building has several spacious private studios plus **shared** spaces.”<sup>74</sup>

The website pages which use “shared” to describe coworking office space show that the public has an immediate understanding of the meaning of the term in association with the provision, rental, or leasing of office space. The term “shared” immediately describes a feature and characteristic of Opposer’s services, namely, work and office space that is used and occupied by more than one person. Shared space is a desirable feature and defining characteristic of coworking space. Consumers of incubation

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<sup>70</sup> *Id.*, describing The Satellite, 26 TTABVUE 101.

<sup>71</sup> *Id.*, describing The Office Pile, 26 TTABVUE 105.

<sup>72</sup> “Top 40 Coworking Spaces in the San Francisco Bay Area” (blog.getkisi.com) describing Work Happy, 26 TTABVUE 263.

<sup>73</sup> “The 19 best coworking spaces in the Bay Area” (99designs.com) describing Minnesota Street Projects, 26 TTABVUE 304.

<sup>74</sup> *Id.*, describing ActivSpace, 26 TTABVUE 314.

services desire a shared office environment to cultivate community, to save costs, and for convenience.

Applicant submitted nearly two hundred third-party registrations in an attempt to show that “shared” and “share” are weak and descriptive.<sup>75</sup> “Third party registrations are relevant to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (internal quotation marks omitted). *See also Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015). The “real evidentiary value of third party registrations per se is to show the sense in which . . . a mark is used in ordinary parlance,” *Juice Generation*, 115 USPQ2d at 1675 (quoting 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:90 (4th ed. 2015)). “Even if ‘there is no evidence of actual use’ of ‘third-party registrations,’ such registrations ‘may be given some weight to show the meaning of a mark in the same way that dictionaries are used.’” *Id.* (quoting *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 917 (CCPA 1976)). Most of the registrations submitted by Applicant identify goods or services not relevant to our inquiry, but four are probative of the descriptiveness of SHARED for the provision, rental, or leasing of office space. They are:

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<sup>75</sup> 29 TTABVUE 558-606, and 31 TTABVUE 2-300.

Registration No.	Mark	Relevant Services
1614148 <sup>76</sup>	 (OFFICE CENTERS and OFFICE AND SHARED SERVICES disclaimed)	Leasing of shared office space
3984636 <sup>77</sup>	 (MIAMISHARED and .COM disclaimed)	Rental of office space featuring computer workstations and private office space room rentals with fee-based memberships
4680380 <sup>78</sup>		Leasing of real estate; rental of meeting rooms
5223847 <sup>79</sup>	 (SHARE disclaimed)	Providing co-working facilities equipped with office equipment

These third-party registrations show the sense in which the term “shared” is used in ordinary parlance and show that “shared” has descriptive significance as applied to Opposer’s services. *See, e.g., Institut National Des Appellations D’Origine v. Vintners Int’l Co.*, 958 F.2d 1574 , 22 USPQ2d 1190, 1196 (Fed. Cir. 1992). These third-party registrations, although not great in number, lend support to finding that “shared” and “share” are merely descriptive for the provision, rental, or leasing of office space.

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<sup>76</sup> 31 TTABVUE 8.

<sup>77</sup> 31 TTABVUE 28.

<sup>78</sup> 31 TTABVUE 172.

<sup>79</sup> 31 TTABVUE 257.



Opposer itself introduced evidence of use of “shared” as a component of a mark by a third-party. Opposer attached as an exhibit to Ms. Yu’s declaration a screen shot of a web page showing a coworking space offered under the name SHARED Brooklyn, in New York. While Opposer states that it negotiated a disclaimer “(among other restrictions) through a settlement agreement” with this third-party,<sup>80</sup> the screen shot reveals use of the term “shared” by the third-party. The disclaimer on the web page states that “SHARED Brooklyn is owned and operated by SHARED Brooklyn, LLC, a neighborhood coworking space within Red Hook and is not in any way associated, connected to or sponsored by SHARED, LLC.”

Opposer’s marks must be considered in relation to the particular services involved, in the context in which the marks are being used, and in the perception of the average purchaser of the services. On the basis of the record as a whole (including the dictionary definitions of “shared,” internet evidence explaining the nature of coworking spaces and incubators, Opposer’s own website repeatedly describing its shared space and tools, internet evidence showing third-party use of “shared” to describe both Opposer’s services and third-parties’ provision of office and work space, and the four third-party registrations), we find that a consumer who knows that the services provided under the SHARED and **S H A R E D** marks are various incubation services involving the provision, rental, or leasing of office and work space, would understand the marks to immediately convey information about those services,

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<sup>80</sup> 1st Yu Decl’n, para. 12; 28 TTABVue 67 (declaration), 72 (exhibit).

namely, that they feature shared work and office space. No thought or imagination is required to reach that conclusion about the nature of the services.

Accordingly, we find that Applicant proved, by a preponderance of the evidence, that Opposer's standard character mark SHARED is merely descriptive and that Opposer's composite mark **S H A R E D** should not have registered without a disclaimer of the merely descriptive word "shared."<sup>81</sup> Having so found, we turn to Opposer's claim that the marks have acquired distinctiveness.

### **C. Acquired distinctiveness**

Opposer defends the counterclaims on the ground that if the term SHARED is found to be merely descriptive, Opposer is entitled to maintain the marks' registration because the term SHARED has acquired distinctiveness. "Under Section 2(f) of the Trademark Act, matter that is merely descriptive under Section 2(e)(1) may nonetheless be registered on the Principal Register if it 'has become distinctive of the applicant's goods . . . in commerce.'" *In re Virtual Indep. Paralegals, LLC*, 2019 USPQ2d 111512, \*9-10 (TTAB 2019) (quoting 15 U.S.C. § 1052(f)). A party "seeking registration of a mark under Section 2(f) bears the ultimate burden of establishing acquired distinctiveness." *Id.* (citing *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1264 (Fed. Cir. 2015)). To show that a mark has acquired distinctiveness, a party "must demonstrate that the relevant public understands the

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<sup>81</sup> Applicant did not claim, the parties did not litigate, and we have not determined whether Opposer's composite mark is comprised of non-distinctive design elements. See *In re Serial Podcast, LLC*, 126 USPQ2d 1061 (TTAB 2018) (citing *In re Cordua Rests. Inc.*, 118 USPQ2d at 1639).

primary significance of the mark as identifying the source of a product or service rather than the product or service itself.” *Id.* at \*11 (quoting *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005)).

### **1. Degree of descriptiveness**

Opposer’s burden of proving acquired distinctiveness is commensurate with the degree of descriptiveness of the term “shared.” The Federal Circuit has “long held that ‘the applicant’s burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning.’” *Royal Crown*, 127 USPQ2d at 1047 (quoting *In re Steelbuilding.com*, 75 USPQ2d at 1424). We must assign to the term “shared” a degree of descriptiveness “on the scale ranging from generic to merely descriptive.” *Id.* at 1048.

Opposer ignores the degree of descriptiveness, and Applicant only conclusively states that “Opposer’s mark is highly descriptive.”<sup>82</sup> The most probative evidence on the degree of descriptiveness of the term “shared” is the internet evidence explaining the nature of coworking spaces and incubators which feature shared office space, Opposer’s own website which repeatedly touts its shared space and tools, and the internet evidence showing third-party use of the term “shared” to describe both Opposer’s own services and numerous third-parties’ provision of similar coworking and incubation space. An article from THE POTRERO VIEW newspaper uses an interjection (“well”) to draw attention to the use of the term “shared” both as

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<sup>82</sup> Rebuttal Brief, p. 4; 35 TTABVUE 8.

Opposer's name and the nature of Opposer's incubation services: "SHARED is a, well, **shared**, creative work-space . . . ."83

We find that the evidence of record cumulatively demonstrates that the term "shared" is highly descriptive "on the scale ranging from generic to merely descriptive," *Royal Crown*, 127 USPQ2d at 1048, and literally describes a defining characteristic and feature of incubation services and coworking spaces generally and Opposer's services specifically, namely, the provision, rental, and leasing of shared office and work space. Consumers seeking incubation services in the nature of work and office space desire and expect shared space.

## **2. Opposer's evidence of acquired distinctiveness**

To maintain its standard character registration, and avoid having to disclaim SHARED from its composite registration, Opposer must show, by a preponderance of the evidence, that SHARED has acquired distinctiveness. *Real Foods*, 128 USPQ2d at 1374. Our analysis and determination in this case is based on all of the evidence considered as a whole:

[T]he considerations to be assessed in determining whether a mark has acquired secondary meaning can be described by the following six factors: (1) association of the [mark] with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark.

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<sup>83</sup> "Short Cuts," THE POTRERO VIEW, June 2014; 26 TTABVUE 23.

*In re SnowWizard, Inc.*, 129 USPQ2d 1001, 1105 (TTAB 2018) (quoting *Converse, Inc. v. Int'l Trade Comm'n*, 907 F.3d 1361, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018)); see also *Steelbuilding.com*, 75 USPQ2d at 1424. On this list, no single factor is determinative. *In re Tires, Tires, Tires Inc.*, 94 USPQ2d 1153, 1157 (TTAB 2009). Opposer may show acquired distinctiveness using direct or circumstantial evidence. Direct evidence includes actual testimony, declarations, or surveys of consumers as to their state of mind, while circumstantial evidence is evidence from which consumer association might be inferred, such as years of use, extensive sales and advertising, and any similar evidence showing wide exposure of the mark to consumers. *Milwaukee Elec. Tool Corp. v. Freud Am., Inc.*, 2019 USPQ2d 460354 (TTAB 2019).

As to association of the mark with a particular source by actual purchasers (i.e., factor one), Opposer did not present any direct consumer evidence, such as, for example, a survey. Instead, Opposer seeks to rebut Applicant's showing with circumstantial evidence establishing continuous use of the mark SHARED since July 2012, recognition as "a top co-working space both nationally and locally several years in a row," both print and electronic advertising and outreach, and unsolicited media attention.<sup>84</sup>

Ms. Yu, Opposer's founder and owner, testified that "[t]he business was first launched and introduced to the public in July of 2012" and the SHARED marks "have been used in representation of the co-working services offered to our members and

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<sup>84</sup> Rebuttal Brief, p. 16-17; 34 TTABVUE 24-25.

public continuously since the inception of the business in 2012.”<sup>85</sup> As of the date of her declaration, Ms. Yu testified that Opposer had 68 active members, with average membership between 60-80 per month and a total of 478 (presumably unique) members since 2013.<sup>86</sup> In addition, approximately 100 non-members participate per week in classes, events, and workshops.<sup>87</sup> Ms. Yu also testified that Opposer has received unsolicited media attention and recognition within the industry by multiple national and international publications since as early as November 2013, has been recognized two years in a row as one of the top 100 coworking spaces in the United States, and has created partnerships and collaboration with other similar service providers in other states.<sup>88</sup> Opposer also claims to have “continuously and successfully monitored the co-working industry . . . to enforce its federal trademark rights and ensure there is no likelihood of confusion among consumers [as] to the source of its marks.”<sup>89</sup>

As to the length, degree, and exclusivity of use (i.e., factor two), Opposer does not claim that its seven-year use of the marks has been exclusive or even substantially exclusive. Opposer’s evidence showing use of the term “shared” in a mark by third-party “SHARED Brooklyn” is probative to establish that Opposer’s use of the term

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<sup>85</sup> 1st Yu Decl’n, paras. 4, 7; 28 TTABVUE 65, 66.

<sup>86</sup> *Id.*, para. 8; 28 TTABVUE 66.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* paras. 9-11; 28 TTABVUE 66.

<sup>89</sup> *Id.* para. 12; 28 TTABVUE 67.

“shared” has not been exclusive since at least after the time of registration.<sup>90</sup> *See Miller v. Miller*, 105 USPQ2d 1615, 1625 (TTAB 2013) (in connection with claim of acquired distinctiveness, applicant’s consent and agreement to third party use of the surname Miller for legal services militated against finding substantially exclusive use). But, of course, absolute exclusivity is not required. *See L.D. Kitchler Co. v. Davoli, Inc.*, 192 F.3d 1349, 52 USPQ2d 1307 (Fed. Cir. 1999).

Even if we were to assume that Opposer has enjoyed substantially exclusive use, because the term “shared” is highly descriptive, seven years of continuous use is not sufficient standing alone to prove that the term “shared” has acquired distinctiveness. *See Real Foods*, 128 USPQ2d at 1378 (“while evidence of substantially exclusive and continuous use may be sufficient to prove a prima facie case of acquired distinctiveness, this is not always the case. ... ‘Particularly for a mark that is ... highly descriptive like [Real Foods’ proposed marks], the [TTAB] was within its discretion not to accept [Real Foods’] alleged five years of substantially exclusive and continuous use as prima facie evidence of acquired distinctiveness.’”) (internal citations omitted). *See also SnowWizard*, 129 USPQ2d at 1006 (length of use of mark for over nine years insufficient by itself to bestow acquired distinctiveness); *Target Brands, Inc. v. Hughes*, 85 USPQ2d 1676, 1681 (TTAB 2007) (“Applicant’s continuous use since 1992 is a fairly lengthy period, but not necessarily conclusive or persuasive on the Section 2(f) showing.”); *In re Kalmbach Publ’g Co.*, 14 USPQ2d 1490, 1494 (TTAB 1989) (for highly descriptive term, applicant’s statement of long use of a purported mark was

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<sup>90</sup> *See* Exhibit N to Yu Decl’n, 28 TTABVUE 72.

insufficient to establish distinctiveness, absent specific evidence of the extent of the mark's exposure to the purchasing public and of the purchasers' perception of the asserted mark).

As to the amount and manner of advertising (i.e., factor three), Opposer ignores the amount and mentions the manner only in passing, stating that it "uses both print and electronic advertising and outreach."<sup>91</sup> In response to Applicant's Interrogatory No. 10, which asked Opposer to "[i]dentify all advertising, marketing, brand consulting, or promotional companies or agencies with whom Opposer has worked regarding the development or creating of marketing pieces, websites, [etc.]," Opposer replied "[n]one."<sup>92</sup> Instead, Opposer revealed that it has "utilized various social media and online advertising and promotional outlets, including but not limited to, Yelp, Google, FaceBook, Craigslist [sic], wiki.Coworking, Alcubic, Desks Near Me, Share Your Office, Pick Space, Deskwanted, Desktimes, Instant, Concourse, PickSpace, LiquidSpace, OfficeBook, PivotDesk, Spacefy, and SFMADE."<sup>93</sup> Opposer provided no context for this alleged advertising (e.g., number or frequency of ads, number of hits or impressions, etc.). When asked to "[s]tate the amount of money, on a year-by-year basis, expended on sales and advertising relating to Opposer's" marks, Opposer failed to provide any figures and instead stated that it "has no set dollar amount because almost all marketing is through client referrals, online through listing websites and

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<sup>91</sup> Rebuttal Brief, p. 18; 34 TTABVUE 26.

<sup>92</sup> 29 TTABVUE 544.

<sup>93</sup> Response to Interrogatory No. 34; 29 TTABVUE 553.



online presence.”<sup>94</sup> Without further information as to the nature, kind, and extent of its advertising expenditures or context, Opposer’s statements are of little probative value. *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1480 (TTAB 2016) (probative value of sales revenue figures quantified as doses sold is diminished by the fact that the amount is just a raw number without context as to applicant’s market share or whether this amount is significant in the industry). While “no set dollar amount” has been provided, we note that in other cases annual advertising expenditures of \$100,000 or less have been considered relatively modest for a highly descriptive designation. *See, e.g., Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1856 (TTAB 2017) (finding \$75,000 for one year of advertising and promotion expenditures “hardly impressive, falling far below levels deemed persuasive in other cases involving the acquired distinctiveness of marks that may be highly descriptive”); *Burke-Parsons-Bowlby Corp. v. Appalachian Log Homes, Inc.*, 871 F.2d 590, 10 USPQ2d 1443, 1447 (6th Cir. 1989) (finding \$100,000 for one year’s advertising expenditures did not evidence secondary meaning in “Appalachian Log Structures” for log houses without additional evidence “to establish the amount as extensive or to distinguish it as beyond that necessary to survive in the market”).

As to the amount of sales and number of customers (i.e., factor four), Opposer did not present any evidence of sales but did testify as to the size of its membership base. When asked to state its “yearly dollar volume of sales of goods and services sold

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<sup>94</sup> Response to Interrogatory No. 36; 29 TTABVUE 553.

under” the marks, Opposer objected and provided no substantive response.<sup>95</sup> However, Ms. Yu testified that since 2013 Opposer has had a total of 478 members, averaging between 60 and 80 active memberships per month.<sup>96</sup> Opposer did not provide any context for these membership numbers, and there is no evidence about the size of the incubation or coworking market. We cannot say that 478 members over the course of seven years is significant, because the record indicates that there is “a plethora of coworking possibilities . . . in most major cities.”<sup>97</sup> In an article allegedly from 2014<sup>98</sup> discussing coworking space in several major domestic and foreign cities (including Atlanta, Chicago, Los Angeles, New York, and San Francisco), the authors indicate that they have “literally just skimmed the tip of the iceberg in this article, touching upon a small selection of locations and contrasting a minute percentage of actual coworking rental rates.” Other articles from 2016 indicate that “[t]he last few years have seen a renaissance in maker spaces, with the independent shops, startups and community organizations opening shared workshops in every state,”<sup>99</sup> “[c]oworking spaces are popping up in cities all around the world,”<sup>100</sup> and “more and more coworking spaces [are] opening every day throughout the San Francisco Bay

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<sup>95</sup> Response to Interrogatory No. 37; 29 TTABVUE 554.

<sup>96</sup> Yu Decl’n, para. 8; 28 TTABVUE 66.

<sup>97</sup> “San Francisco to Taipei: the Best Coworking Workspace” (ichitect.com), 26 TTABVUE 18.

<sup>98</sup> Opposer indicates that the article was “published in June of 2014,” but the article has the date “3/15/2015” on each page. 26 TTABVUE 2, 9-23.

<sup>99</sup> “The Field Guide to Maker Spaces in All 50 States” (blog.westelm.com), 26 TTABVUE 238.

<sup>100</sup> “Working Remotely Around The World: Workspaces To Explore” (smashingmagazine.com), 26 TTABVUE 116.

Area.”<sup>101</sup> From this, we infer that there is great interest in incubation and coworking space, the national market for such space is large, and Opposer occupies but a small fraction of the shared space market.

Opposer does not discuss intentional copying (i.e., factor five), but focuses on unsolicited media coverage (i.e., factor six) of its incubation and coworking space. Specifically, Opposer argues that it “offers a unique service within the industry by providing more than just [a] traditional co-working office facility. Opposer offers amenities, equipment, tools, workshops and other creative and collaborative services to entrepreneurs, artist and creative audience alike” and that “[c]onsumers recognize the uniqueness of the space.”<sup>102</sup> We note that the services recited in the composite mark registration are “incubation services, namely, providing work space containing business equipment to freelancers, start-ups, existing businesses and non-profits.” Such services do not appear to be unique within the industry, and there is no mention in the registration of workshops or other creative and collaborative services. Nonetheless, we consider Opposer’s evidence in support of this factor which includes several articles, Yelp pages, and a Google Business Review relating to Opposer’s business.<sup>103</sup> Although Opposer appears in a few “best” and “top” coworking space listings, Opposer did not provide circulation figures for any of the publications or numbers of impressions or unique hits for the web sites in which the unsolicited

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<sup>101</sup> “Top 40 Coworking Spaces in the San Francisco Bay Area” (blog.getkisi.com), 26 TTABVUE 249.

<sup>102</sup> Rebuttal Brief, p. 18; 34 TTABVUE 26.

<sup>103</sup> 30 TTABVUE 29-330

media appeared. “Thus, we are at a disadvantage to accurately gauge the degree of exposure and the achievement of distinctiveness among the relevant classes of purchasers.” *Apollo Med. Extrusion Techs.*, 123 USPQ2d at 1855-56. In sum, the record falls far short of establishing that Opposer’s promotional efforts have borne fruit with respect to acquired distinctiveness. *Id.* at 1856; *see also Mini Melts*, 118 USPQ2d at 1480 (“The ultimate test in determining whether a designation has acquired distinctiveness is [the party’s] success, rather than its efforts, in educating the public to associate the proposed mark with a single source.”).

Considering Opposer’s evidence as a whole, we find that Opposer has failed to establish that the term “shared” has acquired distinctiveness as a source-indicator for Opposer’s services. That is, Opposer has not established that, “in the minds of the public, the primary significance of [‘shared’] is to identify the source of the [services] rather than the [service] itself.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1729 (Fed. Cir. 2012). The record evidence establishes that the word “shared” is, at a minimum, a highly descriptive designation that identifies a significant and defining characteristic and important feature of incubation services and coworking, namely, shared office and work space. Given that the designation is highly descriptive, much more persuasive evidence than Opposer has submitted would be necessary to show that the term “shared” has become distinctive as a source indicator for Opposer’s incubation services in the nature of provision, rental, and leasing of shared office and work space. *Cf. In re Bos. Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056, 1057-58 (Fed. Cir. 1999) (even where there

was evidence of “annual advertising expenditures in excess of ten million dollars and annual sales under the mark of approximately eighty-five million dollars,” the Court held that, “considering the highly descriptive nature of the proposed mark, [the applicant] has not met its burden to show that the proposed mark has acquired secondary meaning”).

#### **D. Decision on the counterclaims**

We grant Applicant’s counterclaim for cancellation of Registration No. 4867093 on the ground that it is merely descriptive under Section 2(e)(1) of the Act, and Registration No. 4880230 on the ground that the word “shared” is merely descriptive and should be disclaimed. Opposer may, within thirty days from the mailing date of this decision, file a disclaimer of SHARED for Registration No. 4880230, in which event judgment will be set aside as to Registration No. 4880230 only.<sup>104</sup>

#### **V. Priority and Likelihood of Confusion**

Although we grant Applicant’s counterclaims against Opposer’s registrations and Opposer has not shown that the term “shared” has acquired distinctiveness, we observe that Applicant concedes priority and “does not dispute Opposer’s claim of priority . . . .”<sup>105</sup> Applicant did not claim, the parties did not litigate, and we have not

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<sup>104</sup> A properly worded disclaimer will read as: No claim is made to the exclusive right to use “shared” apart from the mark as shown. TMEP § 1213.08(a)(i) (Oct. 2018).

<sup>105</sup> Brief, p. 2, n.1; 33 TTABVUE 10. Nonetheless, we note that the filing date of the application underlying Opposer’s Registration No. 4880230 is earlier than the filing date of Applicant’s application; and Opposer testified that its composite mark has “been used . . . continuously since the inception of the business in 2012.” 1st Yu Decl’n, para. 7; 28 TTABVUE 66.

determined above whether Opposer's composite mark is comprised of non-distinctive design elements. *See In re Serial Podcast, LLC*, 126 USPQ2d 1061 (TTAB 2018) (citing *In re Cordua Rests. Inc.*, 118 USPQ2d at 1639). Opposer may, as noted above, file a disclaimer of "shared" in Registration No. 4880230, in which event judgment will be set aside as to that registration.

Inasmuch as Applicant conceded priority, and Opposer may maintain registration of the mark **SHARED** with entry of a disclaimer, we will presume, solely for purposes of determining Opposer's claim of likelihood of confusion, that Opposer has filed the required disclaimer and thus maintains proprietary rights in the service mark **SHARED** as a whole for the incubation services listed in the registration, such mark is distinctive, whether inherently or otherwise, and that Opposer maintains its standing to bring the opposition. *See Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981). Because Opposer has not demonstrated acquired distinctiveness in the standard character mark SHARED, Opposer has not established, on this record, proprietary rights in that mark. Accordingly, we focus our likelihood of confusion inquiry on Opposer's composite mark **SHARED**.

#### **A. Applicable law on likelihood of confusion**

Our determination under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *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. *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.”). We make that determination on a case-by-case basis, aided by the application of the factors set out in *du Pont, On-Line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000), and we must consider each *du Pont* factor for which there is evidence or argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019). Opposer bears the burden of proving a likelihood of confusion by a preponderance of the evidence. *Weider Publ’n’s, LLC v. D & D Beauty Care Co., LLC*, 109 USPQ2d 1347, 1353 (TTAB 2014).

### **1. The services and trade channels**

There is no dispute that Applicant’s provision of “co-working facilities equipped with office equipment” and “facilities for business meetings for others” are encompassed within Opposer’s “incubation services, namely, providing work space containing business equipment to freelancers, start-ups, existing businesses and non-profits.” Because the services are in-part identical and unrestricted as to trade channels, we must presume that these particular services travel in the same ordinary trade and distribution channels and will be marketed to the same potential consumers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir.

2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

Accordingly, the *du Pont* factors regarding the similarity or dissimilarity of the services and the similarity or dissimilarity of established, likely to continue trade channels each favor a finding of likelihood of confusion.

## **2. Degree of purchasing care, customer sophistication**

The fourth *du Pont* factor is the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ v. ‘careful,’ sophisticated purchasing.” *du Pont*, 177 USPQ at 567. As noted above, the classes of purchasers for each parties’ coworking space are the same. Precedent requires that we base our decision on the least sophisticated potential purchasers. *See Double Coin Holdings v. Tru Dev.*, 2019 USPQ2d 377409 at \*7 (citing *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014)). Applicant argues that the typical consumer of the parties’ services “is a professional” who is “likely to be careful . . . given the non-impulsive nature of the services . . . .”<sup>106</sup> Applicant points to an articles describing coworking consumers in San Francisco as bootstrapping entrepreneurs and use of

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<sup>106</sup> Brief, p. 14; 33 TTABVUE 22.



coworking spaces by mobile app developers.<sup>107</sup> There is no evidence of record to indicate that bootstrapping entrepreneurs or mobile app developers are careful consumers, and the standard of care for our analysis is that of the least sophisticated purchaser. *See Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004). Even if the parties' services are not subject to impulse buying, absent evidence showing that consumers will exercise a higher than ordinary degree of purchasing care (and there is none in this record), we find this *du Pont* factor to be neutral. *See In re Iolo Techs. LLC*, 95 USPQ2d 1498, 1501 (TTAB 2010) ("Applicant urges us to consider consumer sophistication as a factor. However, applicant has submitted no evidence that either its consumers or those of registrant would be sophisticated.").

### **3. Strength of Opposer's mark**

Before turning to the similarity of the marks, we consider the strength of Opposer's mark, as that will affect the scope of protection to which it is entitled. In determining the strength of a mark, we consider both its inherent or conceptual strength, based on the nature of the mark itself and its commercial strength, based on the marketplace recognition value of the mark. *See Top Tobacco, L.P. v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d at 1899. Market strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Id.* For

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<sup>107</sup> "Everything You Can Borrow, Loan, or Co-op in San Francisco," (thrillist.com) 26 TTABVUE 71; "Out of the basement: How co-working spaces are changing the game for mobile devs," (fiercedevolver.com) 26 TTABVUE 112-14.

purposes of analysis of likelihood of confusion, a mark's renown may "var[y] along a spectrum from very strong to very weak." *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (internal quotation marks omitted). The proper standard is the mark's "renown within a specific product market," *id.*, and "is determined from the viewpoint of consumers of like products," *id.* at 1735, and not from the viewpoint of the general public.

As noted above in our discussion of mere descriptiveness, Applicant submitted substantial evidence that the term "shared" is merely descriptive of Opposer's services. Although we presume for purposes of the likelihood of confusion analysis that Opposer's composite mark possesses some degree of distinctiveness, we nonetheless note that similar "rounded rectangular backdrops for each letter" have been found "not inherently distinctive." *Serial Podcast*, 126 USPQ2d at 1073. Similarly, it is well settled that "[m]ost common geometric shapes, such as circles, squares, triangles, ovals, and rectangles, when used as backgrounds for the display of word marks, are not considered inherently distinctive, and have difficulty acquiring distinctiveness." *Id.* (citing *In re Benetton Grp. S.p.A.*, 48 USPQ2d 1214, 1215-16 (TTAB 1998) and *In re Anton/Bauer Inc.*, 7 USPQ2d 1380, 1381 (TTAB 1988)). We accordingly find that the overwhelming evidence discussed above (including the dictionary definitions of "shared," internet evidence explaining the nature of coworking spaces and incubators, Opposer's own website repeatedly describing its shared space and tools, internet evidence showing third-party use of "shared" to describe both Opposer's services and third-parties' provision of office and

work space, and the four third-party registrations), show that the “shared” word portion of the composite mark is highly descriptive, and when combined with the simple rounded square backdrop for each letter the overall mark as a whole is conceptually weak.

As noted above in our discussion of acquired distinctiveness, Opposer submitted evidence of the commercial strength of the SHARED mark. *See Weider Publ’ns, LLC v. D & D Beauty Care Co.*, 109 USPQ2d at 1354; *see also Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1308 (Fed. Cir. 2002) (recognizing indirect evidence as appropriate proof of strength). Opposer’s testimony and evidence shows that Opposer is commercially successful as indicated by the fact that it has been rendering its services since at least 2012, and has received minor local attention in the mainstream media as well as some national and regional attention in niche publications relating to coworking space. However, the record does not necessarily show that Opposer’s composite mark is commercially strong. For example, Opposer did not introduce any evidence placing Opposer’s success in context with other providers of incubation or coworking space. Similarly, we have no context for the media attention Opposer has received; we lack industry information to put this information in context. Even more compelling, however, is the fact that the design mark appears only once in all of the unsolicited media evidence submitted by Opposer;<sup>108</sup> all of the other mentions of “shared” as Opposer’s name are simply

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<sup>108</sup> “Top 40 Coworking Spaces in the San Francisco Bay Area” (blog.getkisi.com), 26 TTABVUE 253.

textual. Further, other than submitting its own website, Opposer did not include any samples of its online advertising allegedly promoted through multiple outlets.


Considering the record as a whole, the extreme conceptual weakness of the term “shared” for incubation and coworking spaces, and that simple rounded square backdrop for each letter are on the “less distinctive part of the spectrum,” *Serial Podcast*, 126 USPQ2d 1075, we find that Opposer’s composite mark **S H A R E D** is appropriately placed at the lower or weaker end of the spectrum of “very strong to very weak.” *Joseph Phelps Vineyards*, 122 USPQ2d at 1734 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)).

#### **4. Similarity of the marks**

With respect to the marks, we must compare them “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). Similarity in any one of the elements of sound, appearance, meaning, or commercial impression suffices to support a determination of likelihood of confusion. *See In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (“Similarity in any one of these elements may be sufficient to find the marks confusingly similar.”). It is well-settled that where the services are identical in part, as is the case here, less similarity between the marks is needed for us to find a likelihood of confusion. *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (“When marks would appear on virtually

identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.”).

The test assesses not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1721 (Fed. Cir. 2012); *see also Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Opposer’s composite mark is **S H A R E D** while Applicant’s composite mark is . The marks are similar in sound and appearance to the extent they both contain the word “shared,” and further similar in appearance to the extent that they each contain rounded square shapes. However, they differ in sound and appearance to the extent Applicant’s mark contains the additional word “space,” and further differ in appearance due to the number, shading, and placement of the rounded square shapes as well as the differing capitalization of the wording.

The overall impression of Applicant’s mark is that of shared space. The special placement and intersection of the rounded, overlapping squares is evocative of a Venn diagram or something shared, particularly shared space in view of the accompanying words which visually run together. Conversely, the individual rounded squares

enclosing each letter of the literal element “shared” of Opposer’s mark evoke a sense at the same time of both separation and delineation of individual space as well as the sharing of such space.

In most cases, “when evaluating a composite mark containing both words and designs, the verbal portion of the mark often is more likely to indicate the origin of the goods to which it is affixed because it is the portion of the mark that consumers would use to refer to or request the . . . services.” *Bond v. Taylor*, 119 USPQ2d 1049, 1055 (TTAB 2016) (citing *In re Viterra*, 101 USPQ2d at 1908, 1911). In this case, Opposer’s literal element “shared” is highly descriptive and without acquired distinctiveness, and Applicant’s literal element “shared space” is also descriptive and disclaimed. We are mindful that descriptive and disclaimed terms generally have less significance in likelihood of confusion determinations. *See Cunningham v. Laser Golf*, 55 USPQ2d at 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *In re Dixie Rests. Inc.*, 41 USPQ2d at 1533-34; *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”). Nevertheless, “shared” is not only the first element of Applicant’s mark, it is the entire literal element of Opposer’s mark. The addition of “space” after “shared” in Applicant’s mark presents the same meaning as “shared” in Opposer’s mark (i.e., shared space is a desirable feature and defining characteristic of coworking

space). Indeed, the combination of these terms makes the marks resemble each other very closely in sight, sound, connotation and commercial impression. *See Shen Mfg. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1355 (Fed. Cir. 2004) (“The disclaimed elements of a mark, however, are relevant to the assessment of similarity. This is so because confusion is evaluated from the perspective of the purchasing public, which is not aware that certain words or phrases have been disclaimed.”) (citations omitted); *Schwarzkopf v. John H. Breck, Inc.*, 340 F.2d 978, 144 USPQ 433 (CCPA 1965).

Although there are visual difference between the marks, and Opposer’s mark falls on the lower or weaker end of the spectrum of “very strong to very weak” marks, *Joseph Phelps Vineyards*, 122 USPQ2d at 1734, we find that their overall similarities in sound, meaning, and commercial impression outweigh any visual difference. Even marks that are deemed “weak” or merely descriptive are still entitled to protection under Section 2(d) against the registration by a subsequent user of a similar mark for related services. *See King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 1401, 182 USPQ 108, 109 (CCPA 1974); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010). Accordingly, this *du Pont* factor supports a finding of likelihood of confusion.

#### **5. Absence of actual confusion**

Lastly, we turn to the seventh *du Pont* factor (nature and extent of any actual confusion) and the related eighth *du Pont* factor (extent of the opportunity for actual

confusion). *du Pont*, 177 USPQ at 567. Applicant argues that after close to four years of concurrent use<sup>109</sup> Opposer has produced no evidence of any actual confusion.<sup>110</sup>

The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by Applicant of its mark for a significant period of time in the same markets as those served by Opposer under its mark. *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff'd*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011); *Gillette Can. Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred. *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (the probative value of the absence of actual confusion depends upon there being a significant opportunity for actual confusion to have occurred); *Red Carpet Corp. v. Johnstown Am. Enters. Inc.*, 7 USPQ2d 1404, 1406-07 (TTAB 1988); *Cent. Soya Co., Inc. v. N. Am. Plant Breeders*, 212 USPQ 37, 48 (TTAB 1981) (“the absence of actual confusion over a reasonable period of time might well suggest that the likelihood of confusion is only a remote possibility with little probability of occurring”). Because Applicant points to no evidence of record to support actual confusion, we analyze Applicant’s impact in the market to determine the probative value of the lack of any reported instances of confusion.

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<sup>109</sup> Applicant’s response to Opposer’s Interrogatory No. 4 indicates that Applicant “began using its mark on February 10, 2016.” 28 TTABVUE 7. Opposer does not challenge this date.

<sup>110</sup> Brief, p. 15; 33 TTABVUE 23.



Although we consider the parties' trade channels identical under the third *du Pont* factor, in our analysis of the eighth *du Pont* factor we look to the evidence of record and determine whether Applicant has demonstrated that the trade channels are, in fact, similar. Opposer identified its channels of trade as follows: "Opposer has utilized various social media and online outlets, including but not limited to, Yelp, Google, FaceBook, Craigslist [sic], wiki.Coworking, Alcubic, Desks Near Me, Share Your Office, Pick Space, Deskwanted, Deskttime, Instant, Concourse, PickSpace, LiquidSpace, OfficeBook, PivotDesk, Spacefy, and SFMADE."<sup>111</sup> Applicant identified its channels of trade as follows: "Applicant markets its services to businesses and individuals who have a need for office space, services, and amenities."<sup>112</sup> Needless to say, Applicant's description does not describe trade channels. Moreover, there is no evidence regarding the extent of Applicant's use of its mark.

At best, the time within which confusion could have arisen is not significant, as Applicant claims to have first used its mark in February, 2016. In any event, the test under Section 2(d) of the Act is likelihood of confusion, not actual confusion. Applicant's evidentiary showing is insufficient to prove that there has been a reasonable opportunity for confusion to have occurred. Thus, the seventh and eighth *du Pont* factors are neutral.

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<sup>111</sup> Response to Interrogatory No. 34; 29 TTABVUE 553.

<sup>112</sup> Response to Interrogatory No. 22; 28 TTABVUE 14


**B. Conclusion on likelihood of confusion**

Because the services are in-part identical and unrestricted as to trade channels, the second and third *du Pont* factors favor finding that confusion is likely. The overall similarities in sound, connotation, and commercial impression between the marks outweigh their visual differences. Although Opposer's composite mark is neither conceptually nor commercial strong, it is still entitled to protection. The factors involving the conditions under which and buyers to whom sales are made, nature and extent of any actual confusion, and extent of the opportunity for actual confusion are all neutral. On balance, we find that the in-part identity of the services and the similarity of the marks' commercial impressions outweigh any weaknesses in Opposer's mark, and that confusion is likely between Opposer's mark

**SHARED** and Applicant's mark  **SharedSpace**.

**VI. Summary of Decision**

The counterclaim petition is granted on the ground of mere descriptiveness. Registration No. 4867093 will be cancelled in due course. Opposer is allowed until thirty days from the mailing date of this decision in which to file a disclaimer of SHARED for Registration No. 4880230, in which case judgment will be set aside as to that registration.

The opposition to registration of the mark  **SharedSpace** of Application Serial No. 86833795 is sustained, and registration to Applicant is refused.