

This Opinion Is Not a  
Precedent of the TTAB

Hearing: February 9, 2021

Mailed: February 11, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Match Group, LLC*

*v.*

*Pooria Shahin*

—  
Opposition No. 91241077  
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Jonathan D. Reichman, Jeremy S. Boczek, and Jessica Cohen-Nowak of Hunton  
Andrews Kurth LLP for Match Group, LLC.

Pooria Shahin, pro se.  
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Before Bergsman, Coggins and Johnson, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Pooria Shahin (Applicant) seeks registration on the Principal Register of the mark **beender**, in standard character form, for “computer application software for mobile phones, namely, software for social introduction and dating,” in International Class 9.<sup>1</sup>

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<sup>1</sup> Serial No. 87589562 filed August 30, 2017, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s claim of a bona fide intent to use his mark in commerce.

Match Group, LLC (Opposer) opposes the registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles Opposer's registered mark TINDER, in standard character form, for the goods and services listed below as to be likely to cause confusion:

Downloadable software in the nature of a mobile application for internet-based dating and matchmaking; downloadable software in the nature of a mobile application in the field of social media, namely, for sending status updates to subscribers of web feeds, uploading and downloading electronic files to share with others, in International Class 9;<sup>2</sup> and

Dating services; Internet-based social networking, introduction and dating services, in International Class 45.<sup>3</sup>

Opposer also alleges common law rights in the TINDER mark as it relates to the above-identified services.

In addition, Opposer alleges that Applicant's mark will dilute the distinctive quality of Opposer's famous TINDER mark under Section 43(c) of the Trademark Act, 15 U.S.C. § 1127(c).

Applicant, in his Answer, denies the salient allegations of the Notice of Opposition.

## **I. The Record**

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's application for his **beender** trademark.<sup>4</sup>

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<sup>2</sup> Registration No. 4479131 registered February 4, 2014; Combined Sections 8 and 15 declaration accepted and acknowledged.

<sup>3</sup> Registration No. 4976225 registered June 14, 2016.

<sup>4</sup> Therefore, it was not necessary for Opposer to introduce a copy of Applicant's application at 24 TTABVue.

Only Opposer introduced testimony and evidence. Opposer introduced the testimony and evidence set forth below:

- A. Notice of reliance on copies of Opposer's pleaded registrations printed from the USPTO's Trademark Status and Document Retrieval system (TSDR) showing the current status of and title to the registrations;<sup>5</sup>
- B. Notice of reliance on excerpts from Applicant's discovery deposition;<sup>6</sup>
- C. Notice of reliance on Applicant's amended responses to Opposer's first set of interrogatories;<sup>7</sup>
- D. Notice of reliance on Applicant's responses to Opposer's second set of interrogatories;<sup>8</sup>
- E. Notice of reliance on Applicant's responses to Opposer's first request for production of documents;<sup>9</sup>

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<sup>5</sup> 23 TTABVUE 22-30 and 38-45. Opposer also introduced copies of four additional TINDER registrations. Because Opposer did not plead ownership of those registrations in the Notice of Opposition, Opposer did not give Applicant notice it was relying on them. Accordingly, we do not give those registrations any further consideration.

<sup>6</sup> 25 TTABVUE. The USPTO posted the portions of Applicant's discovery deposition designated as confidential at 26 TTABVUE.

<sup>7</sup> 28 TTABVUE 7-23.

<sup>8</sup> 28 TTABVUE 25-33.

<sup>9</sup> 28 TTABVUE 25-55. Responses to a request for production of documents introduced through a notice of reliance are admissible solely for purposes of showing that a party has stated that there are no responsive documents; documents produced in response to the requests are generally not admissible by notice of reliance alone. Trademark Rule 2.120(j)(3)(ii), 37 C.F.R. § 2.120(j)(3)(ii); *see also City Nat'l Bank v. OPGI Mgmt. GP Inc./Gestion OPGI Inc.*, 106 USPQ2d 1668, 1674 n.10 (TTAB 2013) (responses to document production requests are admissible solely for purposes of showing that a party has stated that there are no responsive documents); *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036 n.7 (TTAB 2012) (written responses to document requests indicating that no documents exist may be submitted by notice of reliance).

- F. Notice of reliance Applicant's responses Opposer's first requests for admission;<sup>10</sup>
- G. Notice of reliance on Applicant's responses to Opposer's second request for production of documents;<sup>11</sup>
- H. Notice of reliance on copies of 19 news articles posted on the Internet referring to Opposer and Opposer's TINDER trademark;<sup>12</sup> and
- I. Testimony declaration of Evan Bonnstetter, Opposer's Director of Communications.<sup>13</sup>

## **II. Entitlement to a Statutory Cause of Action.**

Even though Applicant does not contest it, Opposer's entitlement to a statutory cause of action, formerly referred to as "standing,"<sup>14</sup> is a threshold issue in every inter partes case. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277 (Fed. Cir. 2020); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 (Fed. Cir. 2020); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). To establish

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<sup>10</sup> 28 TTABVUE 57-85. A party may introduce only an admission to a request for admission through a notice of reliance. Trademark Rule 2.120(k)(3)(i), 37 C.F.R. § 2.120(k)(3)(i). A denial or statement that the responding party cannot respond to the request does not establish the truth or falsity of the assertion, but rather leaves the matter for proof at trial. *Life Zone Inc. v. Middleman Grp. Inc.*, 87 USPQ2d 1953, 1957 n.10 (TTAB 2008) (denials to requests for admission inadmissible because "unlike an admission (or a failure to respond which constitutes an admission), the denial of a request for admission establishes neither the truth nor the falsity of the assertion, but rather leaves the matter for proof at trial."). As such, we have considered only the admissions to the requests for admission.

<sup>11</sup> 28 TTABVUE 87-92.

<sup>12</sup> 29 TTABVUE. Exhibit I (29 TTABVUE 84) is not a complete article; rather it is an introduction to an article to which one must join Business Insider Prime to access. Exhibits R-W are dictionary definitions. (29 TTABVUE 184-224).

<sup>13</sup> 30 TTABVUE.

<sup>14</sup> Our decisions have previously analyzed the requirements of §§ 1063 and 1064 under the rubric of "standing." We now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting "standing" under §§ 1063 and 1064 remain applicable.

entitlement to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute and (ii) proximate causation. *Corcamore*, 2020 USPQ2d 11277 at \*4. *See also Empresa Cubana*, 111 USPQ2d at 1062; *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (TTAB 1982).

Because Opposer has properly introduced into evidence copies of its pleaded registrations showing the current status of and title to the registrations, Opposer has established its entitlement to a statutory cause of action. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Primrose Ret. Cmty., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1032 (TTAB 2016) (standing established based on pleaded registration made of record).

### **III. Priority**

Because Opposer's pleaded registrations are properly of record, priority is not an issue as to the mark and goods and services covered by the registrations. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)).

### **IV. Likelihood of Confusion**

We base our determination under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“DuPont”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138,

113 USPQ2d 2045, 2049 (2015). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “In discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, \*3 (Fed. Cir. 2020) (citing *Dixie Rests.*, 41 USPQ2d at 1406-07).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See 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, 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.”). *See also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as

similarity of the marks and relatedness of the goods.”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

**A. The fame of Opposer’s TINDER mark.**

This *DuPont* factor requires us to consider the fame of Opposer’s mark. Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use. A famous mark has extensive public recognition and renown. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000); *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

Fame may be measured indirectly by the volume of sales of and advertising expenditures for the goods and services identified by the marks at issue, “the length of time those indicia of commercial awareness have been evident,” widespread critical assessments and through notice by independent sources of the products identified by the marks, as well as the general reputation of the products and services. *Bose Corp. v. QSC Audio Prods. Inc.*, 63 USPQ2d at 1305-06 and 1309. Raw numbers alone may be misleading, however. Thus, some context in which to place raw statistics may be necessary, for example, market share or sales, or advertising figures for comparable types of goods. *Id.* at 1309. Other contextual evidence probative of the renown of a mark may include,

- extent of catalog and direct mail advertising, email blasts, customer calls, and use of social media platforms, such as Twitter, Instagram, Pinterest, and Facebook, identifying the number of followers;

- the number of consumers that Opposer solicits through its advertising throughout the year;
- local, regional, and national radio and television advertising campaigns, free-standing print campaigns, and mentions in national publications;
- unsolicited media attention; and
- product placement in television and in movies.

*Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1690-91 (Fed. Cir. 2018).

Finally, because of the extreme deference that we accord 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, Opposer has the duty to prove the fame of its mark clearly. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012), citing *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007).

In the likelihood of confusion analysis, “fame ‘varies 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) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)).



Opposer alleges that TINDER is a famous mark<sup>15</sup> and reasserts that TINDER is famous in its brief.<sup>16</sup> To prove the fame of TINDER, Opposer introduced the evidence set forth below:<sup>17</sup>

- Opposer released its TINDER app in August 2012, “as an innovative social media platform to allow users to view photos and short profiles of potential social companions within certain geographical radius.”<sup>18</sup>

- “By the start of 2020,” 70 million U.S. customers had downloaded the TINDER app.”<sup>19</sup>

- “Indeed, the TINDER® app is the only dating app that is consistently reported as one of the top five, if not the highest grossing non-gaming app on Apple’s iOS and the Google’s Play store in both the U.S. and worldwide.”<sup>20</sup>

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<sup>15</sup> Notice of Opposition ¶14 (1 TTABVUE 6).

<sup>16</sup> Opposer’s Brief, pp. 13-16 (38 TTABVUE 19-22). At oral argument, Applicant conceded that TINDER is commercially strong.

<sup>17</sup> Because trademark rights are territorial, testimony and evidence regarding Opposer’s foreign use of its mark is irrelevant to the issues in this proceeding. *See Double J of Broward Inc. v. Skalony Sportswear GmbH*, 21 USPQ2d 1609, 1612 (TTAB 1991); *Oland’s Breweries [1971] Ltd. v. Miller Brewing Co.*, 189 USPQ 481, 483 n.2 (TTAB 1975) (use or promotion of a mark confined to a foreign country, including Canada, is immaterial to ownership and registration in U.S.), *aff’d*, 548 F.2d 349, 192 USPQ 266 (CCPA 1976). Therefore, Bonstetter’s testimony regarding the global revenue Opposer derived from the TINDER app from 2013 through 2019 is irrelevant because Bonstetter did not testify as to revenue Opposer derived from the U.S. Bonstetter Decl. ¶9 (30 TTABVUE 4). *See also* Bonstetter Decl. ¶12 (30 TTABVUE 4) (“In 2016, [Opposer] announced that it had surpasses 100 million downloads of its TINDER® app worldwide.”); Bonstetter Exhibit C (30 TTABVUE 214-216) (providing statistics that are not limited to the U.S. market). In view of the fact that Opposer has the duty to prove the fame of its mark clearly, we do not consider any testimony that is not expressly limited to use of TINDER in the United States.

<sup>18</sup> Bonstetter Decl. ¶7 (30 TTABVUE 3).

<sup>19</sup> *Id.* at ¶12 (30 TTABVUE 4).

<sup>20</sup> *Id.* at ¶14 (30 TTABVUE 5).

- Business Of Apps website (businessofapps.com) (December 21, 2018) reports that “Among online US adults aged 18+, the % who use Tinder” include 35% ages 18-24, 25% ages 25-34, and 20% ages 35-44.<sup>21</sup> This website is probative that the preceding information has been reported.

- Ian Blair reports on “Tinder Revenue and Usage Statistics Breakdown” (buildfire.com/finder-statistics/) that TINDER generated \$14.95 million in September 2018, in the United States, making it the third-largest, non-game revenue generator in the Apple iOS platform behind Netflix and Tencent and ahead of YouTube, Pandora and Hulu.<sup>22</sup> Blair also reports that TINDER is the third-largest grossing iPhone app worldwide behind Netflix and Fortnite and ahead of Pandora Music, Pokémon Go, Hulu and HBO NOW.<sup>23</sup> Finally, he reports that TINDER is the fifth-

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<sup>21</sup> Bonnstetter Decl. Exhibit B-4 (30 TTABVUE 47). The document is probative to the limited extent that Mr. Bonnstetter testified that this is what a widely reported third party study concluded. *Id.* at ¶13 (30 TTABVUE 5). He did not testify that the study was accurate. The probative value of Internet documents is limited. They can be used to demonstrate what the documents show on their face. However, parties may not use documents obtained through the Internet to demonstrate the truth of what has been printed. *See, e.g., Spiritline Cruises LLC v. Tour Mgmt. Servs., Inc.*, 2020 USPQ2d 48324, \*2 (TTAB 2020) (Internet printouts and other materials properly introduced under a notice of reliance without supporting testimony considered only for what they show on their face rather than for the truth of the matters asserted); *Milwaukee Elec. Tool Corp. v. Freud Am., Inc.*, 2019 USPQ2d 460354, \*4 (TTAB 2019) (same for website, Internet printouts and other materials), *complaint filed*, No. 20-cv-109 (M.D.N.C. Feb. 3, 2020); *Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, \*2 (TTAB 2019) (unaccompanied by testimony, articles from the Internet may not be considered for the truth of the matters asserted but are admissible for what they show on their face); *Optimal Chem. Inc. v. Srills LLC*, 2019 USPQ2d 338409, \*2 n.13 (TTAB 2019) (website printouts are hearsay and admissible under notice of reliance for what they show on their face but may not be relied upon for the truth of the matters asserted unless supported by testimony or other evidence).

<sup>22</sup> Bonstetter Decl. Exhibit B-9 (30 TTABVUE 130-131). *See* the previous footnote regarding the probative value of the Internet evidence.

<sup>23</sup> *Id.* at 131.

highest ranking Android app in the Google Play Store in the U.S. earning revenues of \$14.54 million in November 2018.<sup>24</sup> This website is probative that the preceding information has been reported.

In addition, Opposer's TINDER software has been the subject of numerous articles posted in the Internet. For example,

- Tech website (huffingtonpost.com)

Bianca Bosker, "Why Tinder Has Us Addicted: The Dating App Gives You Mind-Reading Powers (April 9, 2013), reports "Tinder, a dating app for the iPhone, has become so wildly popular in the six months since its launch that it's already spawned its own malady: Tinderitis, or the sensation of having a sore thumb from swiping to approve or reject the faces of people offered up as potential date material."<sup>25</sup>

- The Verge Website (theverge.com)

Chris Welch, "Tinder dating app expands to Android after finding huge success on iOS" (July 16, 2013), reports "Tinder, the simplistic, swipe-based dating app that's exploded in popularity since launching on iOS last year, is finally expanding to Android. ... Like SnapChat's meteoric rise, Tinder's success can be attributed largely to simplicity."<sup>26</sup>

- Mating Rituals website (thecut.com)

Ann Friedman, "How Tinder Solved Online Dating for Women" (October 10, 2013).

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<sup>24</sup> *Id.*

<sup>25</sup> 29 TTABVUE 8.

<sup>26</sup> 29 TTABVUE 16-17.

In July, most of my single female friends weren't playing around with online dating at all. They were busy with work and friends and not looking to settle down immediately, so why put the time and effort into meticulously constructing a profile, screening dozens of messages, and going on dates with guys who look nothing like their pictures? By August, all they could talk about was Tinder. They were meeting a couple of men a week. By September, two were exclusively dating guys they'd met via the app. My friend Jenny refers to her boyfriends as her "Tinderoni."<sup>27</sup>

- New York Times website (nytimes.com)

Nick Bilton, "Tinder, the Fast-Growing Dating App, Taps an Age-Old Truth"

(October 29, 2014)

While conventional online dating sites have been around longer, they haven't come close to the popularity of Tinder. Scientists and relationship specialists who study online dating suggest it isn't what Tinder is doing correctly, but rather what earlier dating sites have done wrong.<sup>28</sup>

- The Bustle website (bustle.com) (June 6, 2018) ranked TINDER as the most popular dating app among millennials in 2018.<sup>29</sup>

- Digital Trends website (digitaltrends.com)

Joshua Fruhlinger, "It's over: Tinder won the dating wars. Swipe or stay home"

(August 2, 2018)

[R]egardless of the choices singles are making when it comes to dating apps, one thing is clear according to app usage data: As of this summer, people are choosing Tinder, and the swipecy dating app's popularity is only growing as others' numbers slump.

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<sup>27</sup> 29 TTABVUE 19.

<sup>28</sup> 29 TTABVUE 33.

<sup>29</sup> 29 TTABVUE 55.

In other words, Tinder won the dating app war. By a large margin.

According to Facebook app login token data tracked by Thinknum, Tinder usage is at the highest it's been. In fact, as of this week, login, beating out both Spotify and Candy Crush Saga for the first time. In other words, that means that as of today, before people are even thinking about listening to some tunes or playing the most popular mobile game in the world, they're turning to Tinder to get some love. Tinder is the most used app via Facebook.<sup>30</sup>

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When a single person then considers the fact that the vast majority of other single people are on Tinder, just like a night club, they realize that that's the place they need to be.<sup>31</sup>

- Business of Apps website (businessofapps.com) (December 21, 2018) describes TINDER as “an irreducible element in the modern dating landscape.”<sup>32</sup>

- New York Times website (nytimes.com)

Brook Lea Foster, “The Tinder Dating Pool Isn’t Completely Shallow” (March 26, 2016)

Still the app has become so popular that couples are shedding some of the shame associated with meeting on it. Many are proudly incorporating Tinder into their engagement or wedding ceremonies.<sup>33</sup>

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<sup>30</sup> 29 TTABVUE 66-68.

<sup>31</sup> 29 TTABVUE 74.

<sup>32</sup> 29 TTABVUE 89.

<sup>33</sup> 29 TTABVUE 145.

- Urban Dictionary (urbandictionary.com) defined “Tinder Bender” as, inter alia, “a verb used to describe a spree of Tinder dates (meeting multiple people from the dating app Tinder) over a short amount of time.”<sup>34</sup>

Based on this record, especially the unsolicited references to TINDER in news articles posted on the Internet, we find that TINDER falls on the very strong side of the spectrum of very strong to very weak and, thus, TINDER is entitled to a broad scope of protection.

**B. The similarity or dissimilarity and nature of the goods and services.**

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

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<sup>34</sup> 29 TTABVUE 241.

Applicant is seeking to register his mark for “computer application software for mobile phones, namely, software for social introduction and dating.” In Registration No. 4479131, Opposer has registered its mark for, inter alia, “downloadable software in the nature of a mobile application for internet-based dating and matchmaking.” Because both products are application software for dating via mobile phones, the descriptions of goods are in part identical. Under this *DuPont* factor, Opposer need not prove, and we need not find, similarity as to each product listed in the description of goods. It is sufficient for us to find the goods are similar that we find any item encompassed by the identification of goods in a particular class in the application and registration related. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014); *Gen. Mills Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1588 n.1 (TTAB 2011), *judgment set aside on other grounds*, 110 USPQ2d 1679 (TTAB 2014).

As best we understand Applicant’s argument as to why the goods are different, Applicant contends that just because the software may fall under the same broad category that does not mean the products are similar.

The same is true for beender. beender was created because of inadequacy and sketchiness of online dating apps, where you are introduced to strangers. As the opposing party describes in its written argument, TINDER® tries “to decrease creepiness of communicating with strangers”, whereas beender is an app designed to facilitate

approaching people you meet in person, and not strangers.<sup>35</sup>

There are several problems with Applicant's argument. First, because Applicant did not introduce any testimony or evidence, there is no factual basis to support Applicant's argument.<sup>36</sup> Second, even if Applicant had supported his argument with testimony and evidence, as noted above we look to the description of goods in the application and registration, not to extrinsic evidence about the scope of the goods. *See Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987) (quoting *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983)); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981) (citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958)). Thus, we may not consider Applicant's arguments regarding the differences in the actual apps.<sup>37</sup> Finally, Applicant's argument does not present any meaningful distinction between his software and Opposer's software: that is, both products seek to make meeting people easier or less difficult (e.g., "TINDER® tries 'to decrease creepiness of communicating with strangers', whereas beender is an app designed to facilitate approaching people you meet in person, and not strangers.").

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<sup>35</sup> Applicant's Brief, p. 8 (39 TTABVUE 9).

<sup>36</sup> Likewise, we may not consider the excerpts from the Google Play Store Applicant inserted into his brief. Applicant's Brief, pp. 8-9 (39 TTABVUE 9-10). If we did consider the excerpts, they would not support Applicant's position inasmuch as they both advertise that they are apps for dating.

<sup>37</sup> Applicant's Brief, p. 8 (39 TTABVUE 9).



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

Because the goods described in the application and Opposer's registration are in part identical, we presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (identical goods are presumed to travel in same channels of trade to same class of purchasers) (citing *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) ("With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and 'presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods...."); *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

**D. Similarity or dissimilarity of the marks.**

We now turn to the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is

sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

In comparing the marks, we are mindful that where, as here, the goods are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs.*, 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); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Prod. Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

“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.” *Cai v. Diamond Hong, Inc.*, 127 USPQ2d at 1801 (quoting *Coach Servs.*, 101 USPQ2d at 1721). *See also* *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012).

The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d at 1740; *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012). Because the goods at issue are software for dating via mobile telephones, the average customer is an ordinary consumer using mobile dating apps.

Applicant's mark is **beender**, in standard character form, and Opposer's mark is TINDER, in standard character form. Marks presented in standard characters are not limited to any particular depiction. The rights associated with a mark in standard characters reside in the wording, and not in any particular display. Thus, Applicant seeks registration of a mark that Applicant might depict in any manner, regardless of the font style, size, or color, and might at any time in the future display in a manner similar to Opposer's mark and vice versa. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-11 (Fed. Cir. 2012); *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (rejecting argument that for purposes of determining whether two marks are similar, a mark in a typed drawing (equivalent to modern standard character format) is distinct from such mark in a logo format; “[b]y presenting its mark in a typed drawing, a *difference* cannot legally be asserted by that party” (emphasis in original)). For example, Applicant displays his mark as reproduced below:<sup>38</sup>



Because Opposer registered its TINDER mark in standard character form, Opposer may display it as reproduced below:



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<sup>38</sup> Bonnstetter Decl. Exhibit H (30 TTABVUE 273).

Under these circumstances, including the renown of Opposer's mark and the identity of the services, the marks are similar, albeit not identical in appearance.<sup>39</sup>

In addition, the marks are similar in sound. Consumers are likely to pronounce Opposer's mark as "tin-der," rhyming with "hinder." Under normal English pronunciation, where the word "been" is pronounced as "bin,"<sup>40</sup> a substantial segment of consumers is likely to pronounce Applicant's mark **beender** as "bin-der," also rhyming with "hinder." We acknowledge that there is not necessarily one correct pronunciation of a trademark. "[I]t is impossible to predict how the public will pronounce a particular mark." *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1409 (TTAB 2010). Absent evidence to the contrary, we must consider all reasonable possibilities. *See StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1651 (Fed. Cir. 2014) ("Where a trademark is not a recognized word and the weight of the evidence suggests that potential consumers would pronounce the mark in a particular way, it is error for the Board to ignore this evidence entirely and supply its own pronunciation."). However, on this record, it strains credulity to reject finding that a significant segment of consumers will pronounce Applicant's mark as rhyming with Opposer's mark and instead find that

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<sup>39</sup> Accordingly, we may not entertain Applicant's argument that his mark is in "small cap letters" while Opposer's mark is in "block letters" and in "all caps." Applicant's Brief, p. 4 (39 TTABVUE 5) ("Any arguments against the mark 'beender' in all capital letters in the opposer's argument should be dismissed as it is not the mark [Applicant] applied for.").

<sup>40</sup> Dictionary.com based on the RANDOM HOUSE UNABRIDGED DICTIONARY (2020) (29 TTABVUE 193), MACMILLAN DICTIONARY (29 TTABVUE 209).

consumers will use some alternative pronunciation (although some might). Thus, we find that the marks rhyme and sound similar.

At first blush, TINDER and **beender** appear to have different meanings and engender different commercial impressions. The RANDOM HOUSE UNABRIDGED DICTIONARY defines “Tinder” as “a highly flammable material or preparation formerly used for catching the spark from a flint and steel struck together for fire or light” and “any dry substance that readily takes fire from a spark.”<sup>41</sup> **beender**, on the other hand, is a term coined by Applicant as a derivation of “Been There, Done That.”

Q. [W]here did the name come from?

A. Basically, the app saves the places you’ve been to. So you’ve been there. You’ve done that. “Been There, Done That.”

So it’s the first half of “Been There, Done That.”

And then, you know, most apps are not two-words - don’t have two-word names. So we shortened the play on words, Beender, “Been There, Done That.”

That’s where it comes from.<sup>42</sup>

The RANDOM HOUSE UNABRIDGED DICTIONARY defines “Bender,” *inter alia*, as a slang term meaning “a drinking spree.”<sup>43</sup> Thus, as noted above, the Urban Dictionary

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<sup>41</sup> Dictionary.com (29 TTABVUE 215).

<sup>42</sup> Applicant’s Discovery Dep., p. 71 (25 TTABVUE 57).

<sup>43</sup> Dictionary.com (accessed February 9, 2021). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

(urbandictionary.com) defines the term “Tinder Bender” as “a spree of Tinder dates.”<sup>44</sup> Opposer introduced two Internet articles referring to “Tinder Bender”:

- TheOdysseyonline.com website posting “Me, On A Tinder Bender: Why Tinder teaches self-love and empowerment.” (May 17, 2016);<sup>45</sup> and
- Pennsylvania State University: Psychology 424 Blog (<https://sites.psu.edu>) posting “A New Era: The Tinder Bender.”<sup>46</sup>

Some consumers may believe that **beender** is a shortened form of “Tinder Bender.” “[U]sers of language have a universal habit of shortening full names – from haste or laziness or just economy of words. Examples are: automobile to auto; telephone to phone; necktie to tie; gasoline service station to gas station.” *In re Abcor Dev. Corp.*, 588 F.2d 511, 200 USPQ 215, 219 (CCPA 1978) (J. Rich, concurring) (explaining that it is “inevitable” that consumers will call a gas monitoring badge a gas badge).

[C]ompanies are frequently called by shortened names, such as Penney’s for J.C. Penney’s, Sears for Sears and Roebuck (even before it officially changed its name to Sears alone), Ward’s for Montgomery Ward’s, and Bloomies for Bloomingdales.

*Marshall Field & Co. v. Mrs. Fields Cookies*, 25 USPQ2d 1321, 1333 (TTAB 1992).  
*See also Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1819 (TTAB 2015) (“While Opposer’s beer was originally sold under the BUDWEISER

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<sup>44</sup> 29 TTABVUE 241.

<sup>45</sup> 29 TTABVUE 226.

<sup>46</sup> 29 TTABVUE 248.

brand, customers soon began to abbreviate the mark, calling for BUDWEISER beer just by the name ‘BUD.’”).

Thus, Opposer’s contention that “no evidence in the record suggests BEENDER has a commercial meaning different from Opposer’s TINDER® mark” and “consumers are more apt to believe [beender] is an extension or variation of, or otherwise related to, [Opposer’s] famous TINDER® app” is not frivolous.<sup>47</sup>

Applicant contends that the marks are not similar because “[i]t is a known fact that consumers focus on the first syllables or prefix of any given mark, and therefore, the first syllable carries almost all the weight,” citing *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *Mattel Inc. v. Funline Merch. Co.*, 81 USPQ2d 1372, 1374-75 (TTAB 2006); and *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988).<sup>48</sup> However, there is no mechanical test to select the dominant element of a mark. *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1059 (TTAB 2017). While the first term in a mark generally is considered to be the feature which will be called for, and so remembered, by consumers, this is not invariably the case. See *Stone Lion Capital Partners v. Lion Capital*, 110 USPQ2d at 1161 (“the Board did not err in finding that ‘STONE LION CAPITAL’ is ‘similar in sight, sound, meaning, and overall commercial impression’ to ‘LION CAPITAL’ and ‘LION.’”); *In re Chatam Int’l Inc.*, 71 USPQ2d at 1946 (“Viewed in their entirety with non-dominant

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<sup>47</sup> Opposer’s Brief, p. 19 (38 TTABVUE 25).

<sup>48</sup> Applicant’s Brief, pp. 5-6 (39 TTABVUE 6-7).

features appropriately discounted, the marks [GASPAR'S ALE for beer and ale and JOSE GASPAR GOLD for tequila] become nearly identical.”).

Given the commercial strength of Opposer's TINDER mark, the identity of the goods, and the similarity in the appearance and sound of the marks, consumers familiar with the TINDER mark may perceive Applicant's **beender** mark as a variant mark denoting a product line extension to attract frequent users. *See, e.g., Schieffelin & Co. v. Molson Cos., Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) (“Those consumers who do recognize the differences in the marks may believe that applicant's mark is a variation of opposer's mark that opposer has adopted for use on a different product.”); *cf. In re Toshiba Med. Sys. Corp.*, 91 USPQ2d at 1271 (VANTAGE TITAN “more likely to be considered another product from the previously anonymous source of TITAN medical diagnostic apparatus, namely, medical ultrasound devices”).

In addition, Applicant contends that the common use of the “der” suffix is not a sufficient basis upon which to find the marks are similar.

As for the second syllab[le], der and DER, this suffix is common not only between beender and TINDER®, but amongst many, many social media / dating apps as well as many other apps. This is not surprising since the “er” or the “ur” sound is by far **the most common suffix** amongst phone applications. The suffix “er” is usually used to suggest an act or function performed by the app, which is why it is so common.<sup>49</sup>

The problem with this argument is that Applicant submitted no evidence to support these statements. As such, it is simply argument. *Cf.* “Attorney argument is no

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<sup>49</sup> Applicant's Brief, p. 6 (39 TTABVUE 7).



substitute for evidence.” *Cai*, 127 USPQ2d at 1799 (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005)).

We find that because Applicant’s mark is similar in appearance and sound to Opposer’s mark, the marks are more similar than dissimilar.

**E. Conclusion as to likelihood of confusion**

The tolerance for similarity between competing marks varies inversely with the strength of the prior mark. As a mark’s strength increases, the tolerance for similarity in competing marks falls.

When an opposer’s trademark is a strong, famous mark, it can never be “of little consequence”. The fame of a trademark may affect the likelihood purchasers will be confused inasmuch as less care may be taken in purchasing a product under a famous name.

*Specialty Brands*, 748 F.2d 669, 223 USPQ 1281, 1284 (Fed. Cir. 1984). *See also B.V.D. Licensing v. Body Action Design*, 846 F.2d 727, 6 USPQ2d 1719, 1722 (Fed.Cir.1988) (Nies, J., dissenting) (“a purchaser is less likely to *perceive* differences from a famous mark.”). In accord with the same principles, the Federal Circuit states:

[T]here is “no excuse for even approaching the well-known trademark of a competitor ... and that all doubt as to whether confusion, mistake, or deception is likely is to be resolved against the newcomer, especially where the established mark is one which is famous...”

*Nina Ricci, S.A.R.L. v. E.T.F. Enters.*, 889 F.2d 1070, 12 USPQ2d 1901, 1904 (Fed. Cir. 1989) (quoting *Planters Nut & Choc. Co. v. Crown Nut Co.*, 305 F.2d 916, 134 USPQ 504, 511 (CCPA 1962)).

Inasmuch as Opposer has proven its TINDER mark is a very strong, if not famous mark, for a software dating, we find that the marks are similar, the goods are in part

identical and we presume the parties offer their products in the same channels of trade and to the same classes of consumers. Therefore, Applicant's mark **beender** for "computer application software for mobile phones, namely, software for social introduction and dating" is likely to cause confusion with Opposer's mark TINDER for, inter alia, "downloadable software in the nature of a mobile application for internet-based dating and matchmaking."

Opposer's likelihood of confusion claim under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) is sustained.

## **V. Dilution**

For purposes of completion, we consider Opposer's dilution claim.

Dilution by blurring is "association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark." Section 43(c)(2)(B) of the Trademark Act, 15 U.S.C. § 1125(c)(2)(B). Dilution may be likely "regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury." Section 43(c)(1) of the Trademark Act, 15 U.S.C. § 1125(c)(1).

The Federal Circuit has set forth the following four elements a plaintiff must prove in a Board proceeding in order to prevail on a claim of dilution by blurring:

- (1) [the plaintiff] owns a famous mark that is distinctive;
- (2) the defendant is using a mark in commerce that allegedly dilutes the plaintiff's famous mark;
- (3) the defendant's use of its mark began after the plaintiff's mark became famous; and

(4) the defendant's use of its mark is likely to cause dilution by blurring or by tarnishment.

*Coach Servs.*, 101 USPQ2d at 1723-24.

**A. The fame of Opposer's mark.**

As noted above, fame for purposes of likelihood of confusion is a matter of degree that “varies along a spectrum from very strong to very weak.” *Joseph Phelps Vineyards*, 122 USPQ2d at 1734 (quoting *Coors Brewing*, 68 USPQ2d at 1063). However, fame for likelihood of confusion and fame for dilution are distinct concepts, and dilution fame requires a more stringent showing. *Coach Servs.*, 101 USPQ2d at 1724. *See also* 4 J. Thomas McCarthy, MCCARTHY ON TRADEMARK AND UNFAIR COMPETITION § 24:104 (5th ed. 2020) (“The standard for the kind of ‘fame’ needed to trigger anti-dilution protection is more rigorous and demanding than the ‘fame’ which is sufficient for the classic likelihood of confusion test.”). While fame for dilution “is an either/or proposition” — it either exists or does not — fame for likelihood of confusion is a matter of degree along a continuum. *Coach Servs.*, 101 USPQ2d at 1724 (citing *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1694). Accordingly, a mark can acquire “sufficient public recognition and renown to be famous for purposes of likelihood of confusion without meeting the more stringent requirement for dilution fame.” *Coach Servs.*, 101 USPQ2d at 1724 (quoting *7-Eleven, Inc. v. Wechsler*, 83 USPQ2d 1715, 1722 (TTAB 2007)).

It is well established that dilution fame is difficult to prove. *See Coach Servs.*, 101 USPQ2d at 1724 (citing *Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164, 1180 (TTAB 2001) (“Fame for dilution purposes is difficult to prove.”) and *Everest Capital Ltd. v.*

*Everest Funds Mgmt. LLC*, 393 F.3d 755, 73 USPQ2d 1580, 1585 (8th Cir. 2005) (“The judicial consensus is that ‘famous’ is a rigorous standard.”). *See also* 4 MCCARTHY § 24:104 (noting that fame for dilution is “a difficult and demanding requirement,” “difficult to prove,” and that, although “all ‘trademarks’ are ‘distinctive’ — very few are ‘famous’”).

Fame for dilution requires widespread recognition by the general public. 15 U.S.C. § 1125(c)(2)(A). To establish the requisite level of fame, the “mark’s owner must demonstrate that the common or proper noun uses of the term and third-party uses of the mark are now eclipsed by the owner’s use of the mark.” *Coach Servs.*, 101 USPQ2d at 1725 (quoting *Toro*, 61 USPQ2d at 1180 n.8). An opposer must show that, when the general public encounters the mark “in almost any context, it associates the term, at least initially, with the mark’s owner.” *Id.* In other words, a famous mark is one that has become a “household name.” *Coach Servs.*, 101 USPQ2d at 1725 (quoting *Nissan Motor Co. v. Nissan Comput. Corp.*, 378 F.3d 1002, 72 USPQ2d 1078, 1083 (9th Cir. 2004) (quoting *Thane Int. Inc. v. Trek Bicycle Corp.*, 305 F.3d 894, 64 USPQ2d 1564, 1575 (9th Cir. 2002))). With this framework in mind, we turn to Opposer’s evidence of fame discussed above.

The testimony and evidence shows that Opposer’s mark TINDER is very strong, if not famous, among people who use mobile dating apps, but the record fails to show that TINDER has that level or renown in the general public. Under Section 43(c)(2)(A), 15 U.S.C. § 1125(c)(2)(A), a mark is famous if it “is widely recognized by the general consuming public in the United States as a designation of source of the

goods or services of the mark's owner. By using the "general public" as the benchmark, the Trademark Act eliminated "niche fame." *See Coach Servs.*, 101 USPQ2d at 1724. Despite the testimony and evidence showing the strength of Opposer's mark among mobile dating app users, Opposer failed to meet its burden of proving the requisite level of fame for dilution.

Opposer's dilution claim under Section 43(c), 15 U.S.C. § 1125(c), is dismissed.

**Decision:** The likelihood of confusion claim under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) is sustained.

The dilution claim under Section 43(c), 15 U.S.C. § 1125(c), is dismissed.

Registration to Applicant is refused.