

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: January 24, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Ramen Hood, LLC

v.

Ramenhood LLC

—
Opposition Nos. 91254894 and 91256310
—

John L. Welch of Wolf, Greenfield & Sacks, PC, and
Dorothy Richardson of Shumaker Mallory LLP,
for Ramen Hood, LLC.

R. Lee Fraley and Mary D. Hallerman of Snell & Wilmer, LLP,
for Ramenhood LLC.

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Before Thurmon, Deputy Chief Administrative Trademark Judge, and
Wolfson and Ciggins, Administrative Trademark Judges.

Opinion by Ciggins, Administrative Trademark Judge:

Ramenhood LLC (“Applicant”) seeks registration on the Principal Register of the
following composite word-and-design marks



for

Asian-themed cuisine, namely, ramen, noodles, packaged meals consisting primarily of rice and also containing meats and vegetables, and steamed buns stuffed with

meats and vegetables; ramen based meals with meat and vegetables, in International Class 30; and

Restaurant services featuring Asian-themed cuisine including ramen, noodles, rice bowls, steamed buns, and appetizers served in a fast casual setting, in International Class 43;¹

and



for

Asian-themed cuisine, namely, ramen, noodles, rice bowls, packaged meals consisting primarily of rice, meats and vegetables, and steamed buns stuffed with meats and vegetables; ramen based meals with meat and/or vegetables, in International Class 30; and

Restaurant services featuring Asian-themed cuisine including ramen, noodles, rice bowls, steamed buns, and appetizers served in fast casual setting; Asian-themed restaurant services featuring take-out and home delivery services, in International Class 43.²

¹ Application Serial No. 87870059, the subject of Opposition No. 91254894, was filed April 10, 2018, 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 marks in commerce. The application contains the following description of the mark: "The mark consists of the wording 'ROBIN HOOD' in stylized capital letters. To the left of the wording is a circle containing a person eating with chop sticks from a bowl. The person is wearing a feathered cap on his head and an arrow case on his back." Color is not claimed as a feature of the mark.

² Application Serial No. 87717912, the subject of Opposition No. 91256310, was filed December 12, 2017, also under Section 1(b). The application contains the following description of the mark: "The mark consists of the wording 'RAMEN HOOD' in stylized capital letters; the vertical portion of the letter 'R' forms an arrow case with the letter 'D' in the shape of a bow; a child eating with chop sticks from a bowl appears to the left of the wording 'RAMEN HOOD'. The child is wearing a hat with a feather and has an arrow case on his back." Color is not claimed as a feature of the mark.

Ramen Hood, LLC (“Opposer”) filed notices of opposition against the registration of Applicant’s marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that the marks for the identified Asian-themed cuisine and restaurants so resemble Opposer’s previously used, common-law mark RAMEN HOOD for restaurant services featuring Japanese cuisine, as to be likely to cause confusion.

In its answers, Applicant denied the salient allegations of the notices of opposition and baldly pleaded two affirmative defenses (waiver and unclean hands) which have been waived for failure to pursue them at trial.³ *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *4 n.5 (TTAB 2021) (“Respondent’s . . . affirmative defenses . . . [were] not pursued by Respondent in its brief and [thus] were . . . waived.”).

The parties’ stipulated motion to consolidate the opposition proceedings was granted on January 8, 2021.⁴ Opposer introduced evidence and filed a main brief on the case; Applicant did not,⁵ nor was it required to do so. *See Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC*, 2022 USPQ2d 1035, *4 (TTAB 2022) (citing

³ Applicant also asserted lack of standing, now referred to as an entitlement to a statutory cause of action (as discussed more fully below), and failure to state a claim, neither of which is a true affirmative defense nor was pursued. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co., Inc.*, 2022 USPQ2d 1424, at *5 n.13 & 14 (TTAB 2022).

⁴ 21 TTABVUE (in Opposition No. 91254894); 14 TTABVUE (in Opposition No. 91256310). The ’894 proceeding was designated as the “parent” case. Citations to the record and briefs reference TTABVUE, the Board’s online docket system. *See, e.g., Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC*, 2022 USPQ2d 1035, at *4 n.6 (TTAB 2022). All TTABVUE citations are to the “parent” case unless otherwise indicated.

⁵ Although Applicant filed notice that it would take oral cross-examination testimony of Opposer’s declarant (33 TTABVUE), it does not appear that the testimony was taken. *See* Trademark Rule 2.123(h), 37 C.F.R. § 2.123 (“All depositions which are taken must be duly filed in the Office.”). Indeed, in its brief Opposer states that “Applicant did not submit any testimony or evidence.” 45 TTABVUE 8.

Yazhong Inv. Ltd. v. Multi-Media Tech. Ventures, Ltd., 126 USPQ2d 1526, 1531 n.13 (TTAB 2018) (“Because [Applicant], as defendant herein, is under no obligation to submit evidence or a brief, we do not construe [Applicant’s] failure to do so as a concession of the case.”); *see also* TRADEMARK BOARD MANUAL OF PROCEDURE (TBMP) § 801.02(b) (2022) (filing of brief on the case is optional for defendant).

As plaintiff, Opposer bears the burden of proving its entitlement to a statutory cause of action and its Section 2(d) claims by a preponderance of the evidence. *See B&B Hardware, Inc. v. Hargis Ind., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015) (“The party opposing registration bears the burden of proof, see [37 C.F.R.] § 2.116(b), and if that burden cannot be met, the opposed mark must be registered, see 15 U.S.C. § 1063(b).”).

We sustain the oppositions.

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 applications. In addition, Opposer introduced the following testimony and evidence:

- Testimony declaration of Rahul Khopkar, Opposer’s sole and managing member, with Exhibits A-O (32 TTABVUE);
- First Notice of Reliance on Applicant’s responses to Opposer’s requests for admission (28 TTABVUE);
- Second Notice of Reliance on USPTO electronic database records for Application Serial Nos. 87923122 and 88598619 (29 TTABVUE);
- Third Notice of Reliance on USPTO electronic database records of nine third-party registrations (30 TTABVUE); and

- Fourth Notice of Reliance on material printed from the Internet relating to Robin Hood, a music festival, and a public shopping market (31 TTABVUE).

II. Entitlement to Statutory Cause of Action

Entitlement to a statutory cause of action must be established in every inter partes case. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021). A party in the position of plaintiff may oppose registration of a mark where such opposition is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and the party has a reasonable belief in damage that is proximately caused by registration of the mark. *See Peterson v. Awshucks SC, LLC*, 2020 USPQ2d 11526, at *6 (TTAB 2020) (citing *Corcamore*, 2020 USPQ2d 11277, at *6-7).

“[A] party that demonstrates a real interest in [oppos]ing a trademark under [Trademark Act Section 13, 15 U.S.C.] § 106[3] has demonstrated an interest falling within the zone of interests protected by [the Trademark Act]. . . . Similarly, a party that demonstrates a reasonable belief of damage by the registration of a trademark demonstrates proximate causation within the context of § 106[3].” *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *17 (TTAB 2022) (quoting *Corcamore*, 2020 USPQ2d 11277 at *7).

Opposer introduced printouts of the file histories for application Serial Nos. 87923122 and 88598619,⁶ and relies on these applications as a basis for its

⁶ 29 TTABVUE 6-30 (Serial No. 87923122), 32-96 (Serial No. 88598619)

entitlement to bring a statutory cause of action.⁷ Opposer argues that its “pending applications to register its RAMEN HOOD mark are suspended pending final disposition of the two applications here opposed” and that demonstrates its “real interest in this proceeding” and its “reasonable belief that . . . it will be damaged by use and registration of the opposed marks.”⁸

Application Serial No. 87923122 is for the standard-character mark RAMEN HOOD, and application Serial No. 88598619 is for a composite word-and-design mark containing the term RAMEN HOOD, both for various restaurant services including Japanese restaurants and restaurants featuring ramen and noodles. The applications were filed by Opposer prior to the institution of these opposition proceedings, but neither was pleaded in either notice of opposition. Nonetheless, we find the issue of Opposer’s entitlement to a statutory cause of action based on these applications was tried by implied consent because Applicant raised no objection to the introduction of Opposer’s applications (including the Office actions suspending them) and was fairly apprised that they were being offered in support of entitlement.⁹ Fed. R. Civ. P. 15(b)(2); TBMP § 507.03(b); *Shenzhen IVPS Tech. v. Fancy Pants Prods.*, 2022 USPQ2d 1035, at *12-13 (implied consent found where applicant made no objection to introduction of evidence and did not file a brief on the case).

⁷ Brief, p. 10 (45 TTABVUE 16).

⁸ *Id.*

⁹ Opposer’s Second Notice of Reliance indicates that the applications are “relevant to the issue of Opposer’s entitlement to bring this opposition,” 29 TTABVUE 2, and includes the suspension notices based on Applicant’s subject applications as a potential bar. *Id.* at 6-7, 32.

Opposer's suspended applications are sufficient to demonstrate Opposer's entitlement to a statutory cause of action. *See, e.g., Rapid Inc. v. Hungry Marketplace, Inc.*, 2022 USPQ2d 678, at *11 (TTAB 2022) (entitlement found where opposer's application suspended pending disposition of subject application which was cited as a potential bar); *Life Zone Inc. v. Middleman Grp. Inc.*, 87 USPQ2d 1953, 1959 (TTAB 2008) ("Opposer's evidence of its pending trademark application, and evidence that the application has been suspended pending resolution of the subject application demonstrate that opposer has a reasonable belief that it would be damaged by registration of applicant's mark, thus establishing [entitlement].").

Further, Opposer's sole and managing member Rahul Khopkar, testified that Opposer has used the name RAMEN HOOD for a restaurant in Los Angeles featuring Asian-themed cuisine including ramen and noodles continuously since 2015.¹⁰ Opposer's use of its mark on competitive services separately establishes that it is entitled to oppose the registration of Applicant's marks. *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009) (testimony that plaintiff uses its mark "is sufficient to support [plaintiff's] allegations of a reasonable belief that it would be damaged"); *Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009) ("Petitioner has established his common-law rights in the mark DESIGNED2SELL, and has thereby established his standing to bring this proceeding.").

¹⁰ Khopkar Decl. ¶¶ 3, 7 (32 TTABVUE 3, 5).

III. Section 2(d) Claim

To prevail on a likelihood of confusion claim brought under Trademark Act Section 2(d), a party must prove that it owns

a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States . . . and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

Trademark Act Section 2(d), 15 U.S.C. § 1052(d). *See also Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000); *DC Comics v. Cellular Nerd LLC*, 2022 USPQ2d 1249, *20-21 (TTAB 2022).

Accordingly, to prevail on its Section 2(d) claim Opposer must prove, by a preponderance of the evidence, that it has priority in the use of its pleaded mark and that use of Applicant's marks is likely to cause confusion, mistake, or deception as to the source or sponsorship of Opposer's services, even in the absence of contrary evidence or argument. *DC Comics*, 2022 USPQ2d 1249, at *20-21 (citing *Cunningham*, 55 USPQ2d at 1848; *Threshold TV, Inc. v. Metronome Enters., Inc.*, 96 USPQ2d 1031, 1040 (TTAB 2010)). We consider each element of this claim, priority and likelihood of confusion, in turn below.

A. Priority

Applicant has not offered any evidence of use of its mark in connection with its goods or services prior to the filing dates of its involved applications. The earliest dates upon which Applicant may rely for priority purposes, therefore, are the filing dates of its applications: December 12, 2017, for the mark in application Serial No.

87717912, and April 10, 2018, for the mark in application Serial No. 87870059. *See Zirco Corp. v. Am. Tel. and Tel. Co.*, 21 USPQ2d 1542, 1544 (TTAB 1991) (“[T]here can be no doubt but that the right to rely upon the constructive use date comes into existence with the filing of the intent-to-use application and that an intent-to-use applicant can rely upon this date in an opposition brought by a third party asserting common law rights.”).

Opposer relies for priority purposes on alleged common law rights in the mark RAMEN HOOD for restaurant services featuring Japanese cuisine. To establish prior common law rights, Opposer must prove that its pleaded RAMEN HOOD mark is distinctive, inherently or otherwise, and that it used the RAMEN HOOD mark prior to Applicant’s constructive first use dates. *See DeVivo v. Ortiz*, 2020 USPQ2d 10153, *3 (TTAB 2020); *Exec. Coach Builders, Inc. v. SPV Coach Co.*, 123 USPQ2d 1175, 1180 (TTAB 2017). In assessing whether Opposer has established priority, we consider the evidence of record as a whole. *W. Fla. Seafood, Inc. v. Jet Rests., Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994) (“[O]ne should look at the evidence as a whole, as if each piece of evidence were part of a puzzle which, when fitted together, establishes prior use.”).

Opposer testified, through its sole and managing member Rahul Khopkar, that it continuously has used the mark RAMEN HOOD for Asian-themed restaurant services featuring, among other foods, ramen, noodles, rice bowls, and broths, since opening its first restaurant in Los Angeles on November 6, 2015.¹¹ In addition to its

¹¹ Khopkar Decl. ¶¶ 3, 7 (32 TTABVUE 3, 5).

continuously operating Los Angeles location, Opposer has at times operated RAMEN HOOD restaurants in New York City, and Indio, California (at the annual Coachella Valley Music and Arts Festival).¹² Opposer's Los Angeles restaurant serves approximately 100,000 customers a year,¹³ is located in the Grand Central Market which houses a number of other restaurants,¹⁴ and has received some online media attention, including reviews in the online editions of EATER LA and the LOS ANGELES TIMES.¹⁵

Opposer displays its RAMEN HOOD mark on signs, menus, take-out containers, chopstick sleeves, and aprons.¹⁶ An example of the typical usage (this one on signage at the Los Angeles restaurant) is displayed below:¹⁷



¹² *Id.* at ¶¶ 9, 11 (32 TTABVUE 5, 6).

¹³ *Id.* at ¶ 5 (32 TTABVUE 3).

¹⁴ *Id.*

¹⁵ *Id.* at ¶¶ 13-19 (32 TTABVUE 3). *See also, e.g.*, reviews attached as exhibits at 32 TTABVUE 15 (la.eater.com), 17-18 (latimes.com), 21 (thrillist.com), 28 (LA WEEKLY), 30 (vice.com), 40-41 (rollingstone.com).

¹⁶ *Id.* at ¶ 6 (32 TTABVUE 4).

¹⁷ *Id.* at ¶ 4 (32 TTABVUE 3).

Opposer “chose the name RAMEN HOOD as a whimsical play on the name of the famous literary character, Robin Hood,” and the mark on its “signage . . . menus and other printed items . . . include[s] a design of an arrow to subtly remind the public of that reference.”¹⁸

We find that Opposer, through its unchallenged testimony and corroborating documentary evidence, has established common-law rights in the distinctive composite mark RAMEN HOOD, with arrow design, in connection with Asian-themed restaurant services as early as November 6, 2015, prior to either of Applicant’s constructive dates of first use. *Cf. Powermatics, Inc. v. Globe Roofing Prods. Co.*, 341 F.2d 127, 144 USPQ 430, 432 (CCPA 1965) (oral testimony alone of a single, credible witness is enough to establish common law use of a mark for the identified goods or services). *See also Wet Seal Inc. v. FD Mgmt., Inc.*, 82 USPQ2d 1629, 1634 (TTAB 2007) (absent argument or evidence from applicant, opposer’s mark deemed distinctive). Accordingly, Opposer has established its priority.

B. Likelihood of Confusion

Our analysis under Section 2(d) is based on all of the probative evidence of record 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*”). We consider each *DuPont* factor for which there is evidence and argument. *In re Guild*

¹⁸ *Id.*

Mortg. Co., 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

“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 and 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)).

1. Similarity or Dissimilarity of the Goods and Services

We first consider the *DuPont* factor regarding the similarity or dissimilarity of the parties’ respective goods and services. *DuPont*, 177 USPQ at 567. We base our evaluation on the goods and services as they are identified in Applicant’s applications and those services for which Opposer has established common law rights under the RAMEN HOOD mark. The services need only be “related in some manner or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs., Inc. v.*

Triumph Learning, LLC, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (internal citations omitted). It is sufficient if likelihood of confusion is found with respect to Applicant's use of the mark on any good or service that comes within the description of goods and services in the applications and those services for which Opposer has established common law use. *Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651, 1661 (TTAB 2014) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) and *Apple Comput. v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1398 (TTAB 2007)).

Opposer's witness testified that Opposer's "RAMEN HOOD restaurant has offered, exclusively, Asian-themed cuisine featuring 100% vegan dishes, including ramen, noodles, rice bowls, and broths."¹⁹ Opposer introduced the following two photographs of its Los Angeles location and menu demonstrating that it offers Asian-themed cuisine in a fast casual setting:²⁰

¹⁹ Khopkar Decl. ¶ 7 (32 TTABVUE 5).

²⁰ *Id.* at ¶¶ 6, 8 (32 TTABVUE 4, 5). "Fast casual" is "a style of fast food involving healthier, fresher, and more varied dishes than traditional fast food, served in more attractive surroundings." THE FREE DICTIONARY (thefreedictionary.com), accessed January 20, 2023.




The services identified in the applications as “restaurant services featuring Asian-themed cuisine including ramen . . . in a fast casual setting” are identical to the services for which Opposer proved priority of common law use of the RAMEN HOOD and arrow design mark.


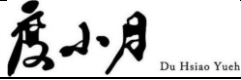
For the goods identified as “Asian-themed cuisine, namely, ramen” in the applications, we find these goods directly related and otherwise inherently related to Opposer’s Asian-themed restaurant services. Most directly, the applications themselves include ramen as goods in addition to services identical to Opposer’s services which feature ramen. The parties’ services specifically include these goods, and the parties’ marks specifically name these goods. Further, inherent relatedness often exists where one party’s restaurant specialized in the other party’s type of goods. *See, e.g., In re Coors Brewing*, 343 F.3d 1340, 68 USPQ2d 1059, 1064 (Fed. Cir. 2003) (finding that a mark for a brewpub “would clearly be related” to a mark for

beer); *In re Country Oven, Inc.*, 2019 USPQ2d 443903, *13 (TTAB 2019) (bread buns related to retail bakery shops. “[T]he relevant line of case law holds that confusion may be likely to occur from the use of the same or similar marks for goods, on the one hand, and for services involving those goods, on the other.”); *In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2050-51 (TTAB 2012) (providing food and drink related to coffee); *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999) (restaurant services related to Mexican food items); *In re Golden Griddle Pancake House Ltd.*, 17 USPQ2d 1074 (TTAB 1990) (restaurant services related to table syrup).

In addition, to prove that Asian-themed food products are related to Asian-themed restaurant services, Opposer introduced copies of eight use-based, third-party registrations for restaurant services and various Asian foods including ramen and noodles.²¹ Third-party registrations based on use in commerce that individually cover different goods and services have probative value to the extent that they serve to suggest that the listed goods and services are of a type that may emanate from the same source. *Made in Nature v. Pharmavite*, 2022 USPQ2d 557, at *46-47; *In re Country Oven*, 2019 USPQ2d 443903, at *8. The registrations, with relevant portions of the identifications, are listed below:

Mark	Registration No.	Goods and Services
 <p>Boil Boil Ramen</p>	5397295	Ramen noodles; Restaurant services
ROBOT	5460567	Noodles; Restaurant services

²¹ Exhibit 4, Opposer’s Third Notice of Reliance (30 TTABVUE 9-42). A ninth registration (No. 6093402) identifies “ramen dishes served at restaurants” as goods but does not separately identify restaurant services.

Mark	Registration No.	Goods and Services
	5795168	Ramen noodles; Restaurant services
	5945445	Noodles; Ramen; Restaurants
SUSHI-Q	5986124	Ramen noodles; Restaurant services
HIRONORI	6147404	Noodles; Ramen noodles; Restaurant services
YO-KAI	6301984	Ramen; Noodles; Restaurant services
INTERNATIONAL FOOD CREATIONS	6480849	Tonkotsu ramen; Spicy miso ramen; Asian food take-out restaurant services

Because the services are in-part identical and the goods and services are directly and otherwise inherently related, the second *DuPont* factor weighs in favor of a finding of likelihood of confusion.

2. Similarity or Dissimilarity of the Trade Channels

Under the third *DuPont* factor, we consider “[t]he similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567.

Opposer argues that “[b]ecause the involved goods and services are legally identical, they are presumed to be rendered in the same trade channels to the same classes of consumers.”²² However, since we are considering Opposer’s common law rights in its RAMEN HOOD mark, there is no presumption about channels of trade in connection with its restaurant services. *Bell’s Brewery, Inc. v. Innovation Brewing*,

²² Brief, p. 18 (45 TTABVue 24).

125 USPQ2d 1340, 1345 (TTAB 2017) (no presumptions attach to unregistered common law mark). Opposer's channels of trade are limited to its common law uses. *Hard Rock Cafe Int'l (USA) Inc. v. Elsea*, 56 USPQ2d 1504, 1512 (TTAB 2000).

Opposer's witness testified that Opposer operates its restaurant "in the historic Grand Central Market" in downtown Los Angeles which "houses a number of restaurants" and is a "popular destination" with a "constant flow of foot traffic."²³ In that space, Opposer displays its mark on signage, as well as menus, take-out containers, and chopstick sleeves, among other various items.²⁴ Mr. Khopkar also testified that over the years Opposer has operated a pop-up restaurant in New York City, and provided the same restaurant services annually at a large music and arts festival in Indo, California.²⁵ Mr. Khopkar's statements establish that Opposer's services are directed to persons who purchase Asian-themed food from restaurants.

In the applications, Applicant's identifications of goods and services do not include any restriction as to trade channels, and we must presume that its goods and services move in all normal and usual channels of trade and methods of distribution for those goods and services and are available for purchase by all the usual consumers, including through restaurants. *See Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Hard Rock Cafe Int'l (USA)*, 56 USPQ2d 1504, 1512 (TTAB 2000) (noting that while opposer's channels of trade

²³ Khopkar Decl. ¶¶ 3, 5 (32 TTABVUE 3, 4).

²⁴ *Id.* at ¶ 6 (32 TTABVUE 4).

²⁵ *Id.* at ¶¶ 9, 11 (32 TTABVUE 5, 6).

were limited to its common law uses, there was no restriction in applicant's identification on the channels of trade and therefore applicant's goods were deemed to be sold in all channels of trade appropriate for such goods).

For the services, we find there is overlap in the trade channels and consumers who dine in Asian-themed restaurants where the parties' services are in part legally identical and the identifications of services in the involved applications have no restrictions on channels of trade or classes of consumers. *See e.g., Bell's Brewery*, 125 USPQ2d at 1345 (Board found applicant's unrestricted identification for beer would move in all channels of trade normal for such goods, which included opposer's common law trade channels for beer).

For the goods, the third-party registrations listed above are also evidence that the likely trade channels overlap because the inherently related goods and services provided under a single mark are likely to flow through the same trade channels. There are no trade channel limitations for the goods or restaurant services identified in the third-party registrations. We must presume, therefore, that each third party provides the goods and services identified in its registration through at least in-part overlapping trade channels. If third parties provide these different types of goods and services through a single trade channel or at least overlapping trade channels, it is likely that consumers are accustomed to that practice.

The third *DuPont* factor supports a finding of a likelihood of confusion.

3. Conditions of Sale

The fourth *DuPont* factor considers the "conditions under which and buyers to whom sales are made." *DuPont*, 177 USPQ at 567. The applicable standard of care

for the likelihood of confusion analysis is that of the least sophisticated consumer. *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014).

Opposer argues that “[t]here are no limitations as to price points or types of consumers in the opposed applications” and “[t]he relevant consumers of the involved goods and services – the general public – are likely to exercise no more than ordinary care when purchasing the involved goods and services.”²⁶ As for the price point and types of consumers of Opposer’s common law services, Opposer’s witness introduced a menu from Opposer’s restaurant showing its Asian-themed food items range in price from \$5-\$12, and stated the restaurant is in an historic and popular food hall with a “constant flow of foot traffic” from “not just Los Angelinos, but visitors from across the country.”²⁷

Applicant’s “restaurant services featuring Asian-themed cuisine” are limited to the fast casual style of service but are without any limitation as to cost. They must be presumed to “encompass all services of the type identified,” *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015), including inexpensive ramen and appetizers, and the least sophisticated potential purchaser may include ordinary consumers who consume fast casual Asian-themed food and frequent inexpensive restaurants on impulse. *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007). Indeed, the menu on Applicant’s website shows its Asian-themed food items

²⁶ Brief, pp. 18-19 (45 TTABVUE 24-25).

²⁷ Khopkar Decl. ¶¶ 3, 5, 6 (32 TTABVUE 3, 4).

range in price from \$7-17²⁸ and are offered “to everyone.”²⁹ “When [goods and services] are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such [goods and services] are held to a lesser standard of purchasing care.” *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000). As a result, the fourth *DuPont* factor weighs in favor of a finding of likelihood of confusion.

4. Strength or Weakness of Opposer’s Mark

Before we evaluate the similarity or dissimilarity of the parties’ marks, we first consider the strength or weakness of Opposer’s asserted RAMEN HOOD mark under the fifth and sixth *DuPont* factors as that may affect the scope of protection to which Opposer’s mark is entitled. *See Made in Nature v. Pharmavite*, 2022 USPQ2d 557, at *17 (citing *DuPont*, 177 USPQ at 567). In determining the strength of a mark, we consider both its conceptual strength, based on the nature of the mark itself, and, if there is probative evidence in the record, its commercial strength, based on marketplace recognition of the mark. *New Era Cap v. Pro Era*, 2020 USPQ2d 10596, *10 (TTAB 2020); *see also In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength . . . and its marketplace strength . . .”). “[T]he strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak.” *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003). *See also Joseph*

²⁸ Opposer’s First Notice of Reliance, Exhibit B (28 TTABVUE 16, 36).

²⁹ *Id.*, Exhibit C (28 TTABVUE 21, 36).

Phelps Vineyards, LLC v. Fairmont Holdings, LLC, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017).

a. Conceptual Strength

As to the conceptual strength of Opposer's mark, "we evaluate [the mark's] intrinsic nature, that is, where it lies along the generic-descriptive-suggestive-arbitrary (or fanciful) continuum of words." *In re Davia*, 110 USPQ2d 1810, 1815 (TTAB 2014). "Marks that are descriptive or highly suggestive are entitled to a narrower scope of protection, i.e., are less likely to generate confusion over source identification, than their more fanciful counterparts." *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015). Conversely, marks that are arbitrary, fanciful, or suggestive are "held to be inherently distinctive." *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000).

Opposer argues that its mark is conceptually strong because it is "a whimsical play on the name 'Robin Hood,' creates a strong commercial impression that, in its entirety, neither describes nor suggests any characteristic of Opposer's . . . services." Opposer acknowledges that "the word 'ramen' has meaning in connection therewith," but argues that "coupling that word with 'hood' produces a strong, memorable, and inherently distinctive trademark."³⁰

In support of the conceptual strength of its mark, Opposer submitted reference media defining and identifying Robin Hood, a legendary English outlaw and highly-

³⁰ Brief, p. 19 (45 TTABVUE 25).

skilled archer famous for his courage, chivalry, and practice of robbing the rich to aid the poor.³¹ In popular culture, the term “Robin Hood” is often used to describe any heroic outlaw or rebel against tyranny.³²

On this record, we find Opposer’s composite mark RAMEN HOOD, with arrow design, as used at common law with Asian-themed restaurant services is inherently and conceptually strong because it incongruously associates the legendary English outlaw Robin Hood with a “Japanese dish of noodles in broth.”³³

b. Commercial Strength

Commercial strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006). Commercial strength “may be measured indirectly by the volume of sales and advertising expenditures in connection with the goods [or services] sold under the mark, and other factors such as length of time of use of the mark; widespread critical assessments; notice by independent sources of the goods [or services] identified by the mark; and the general reputation of the goods.” *Made in Nature v. Pharmavite*, 2022 USPQ2d 557, at *31; *Weider Publ’ns, LLC v. D & D*

³¹ Opposer’s Fourth Notice of Reliance, Exhibits 5-7 (31 TTABVUE 6 (ahdictionary.com), 8 (merriam-webster.com), 10-21 (en.wikipedia.org)).

³² *Id.*, Exhibits 6, 7 (31 TTABVUE 8, 10).

³³ Definition of “ramen” from the AMERICAN HERITAGE DICTIONARY (ahdictionary.com), accessed January 19, 2023. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or regular fixed editions. *Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC*, 2022 USPQ2d 1035, at *27 n.41 (TTAB 2022).

Beauty Care Co., 109 USPQ2d 1347, 1354 (TTAB 2014); *see also Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1308 (Fed. Cir. 2002).

Opposer's managing member testified that Opposer has used the mark since November 6, 2015, serves about 100,000 customers per year, has been reviewed and discussed in newspapers and other media, and has maintained an Instagram account since October 2015.³⁴ Opposer introduced no evidence of annual sales revenue, advertising expenditures, the number of consumers it solicits through advertising, or the number of followers or other analytics of its Instagram account. Without sales, revenue, advertising, or marketing numbers for Opposer, and how they compare to others in the restaurant industry, it is difficult to assess the commercial strength of Opposer's mark. *See Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1690-91 (Fed. Cir. 2018). We acknowledge Opposer's estimation of the number of customers it serves per year, but we have no data to compare Opposer to the fast food industry in general where the number of customers would naturally be elevated because the service turnover innately is quick.

While Opposer's Los Angeles restaurant is obviously successful, having been in business since 2016, there is little evidence of its renown, if any, beyond Los

³⁴ Khopkar Decl. ¶¶ 3, 5, 12, 20 (32 TTABVUE 3, 4, 6, 9).

Angeles.³⁵ Indeed, Opposer admits that “its renown may be geographically limited.”³⁶ We are hard pressed to find any degree of commercial strength of the mark based on the low quality and quantity of media attention and minimal social media presence. Six of the media mentions include Opposer in a list of other similarly situated restaurants (e.g., serving vegan food, located in Downtown Los Angeles’ Grand Central Market food hall), many of the mentions are just short three- or four-sentence blurbs, and only three of the reviews show a clear image of Opposer’s common-law mark.³⁷ Taken as a whole, we find that while Opposer’s evidence of commercial strength may demonstrate that its Los Angeles restaurant is commercially successful and positioned in an area with constant flow and foot traffic, it does not necessarily indicate that the comm-law mark with arrow design is commercially strong.

Applicant introduced no evidence of third-party uses of similar marks for similar services. *See In re FCA US LLC*, 126 USPQ2d 1214, 1224 (TTAB 2018) (“Evidence of third-party use may reflect commercial weakness.”). As to this facet of the inquiry, Opposer implies that the lack of evidence of third-party use of the mark RAMEN HOOD should boost the degree of commercial strength of its mark.³⁸ In addressing a

³⁵ Two online articles from 2018 mention Opposer’s pop-up restaurant in New York which operated for only five months. Opposer submitted no information on the circulation or number of hits for either review, and the review at eatthisny.com received zero comments. *See Khopkar Decl.* ¶¶ 9, 16, Exhibits H-I (32 TTABVUE 5, 47-50, 54-55). Given the fleeting nature of the New York restaurant and age of the two reviews, we find the reviews are minimally probative of Opposer’s reputation outside of Los Angeles.

³⁶ Brief, p. 20 (45 TTABVUE 26).

³⁷ *See Khopkar Decl.* Exhibits B-L (32 TTABVUE 15-85).

³⁸ Brief, p. 20 (45 TTABVUE 26).

similar contention based on the absence of third-party use evidence in *DeVivo v. Ortiz*, 2020 USPQ2d 10153, *15 (TTAB 2020), the Board deemed the sixth factor neutral.

c. Conclusion Regarding Strength of Opposer's Mark

Opposer has demonstrated that its mark is conceptually strong, but has not demonstrated on this record that the mark is commercially strong. Accordingly, we afford Opposer's common law RAMEN HOOD mark with arrow design "the normal scope of protection to which inherently distinctive marks are entitled." *Bell's Brewery*, 125 USPQ2d at 1347. The fifth and sixth *DuPont* factors are neutral in our analysis of the likelihood of confusion.

5. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we consider "the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. Sept. 13, 2019).

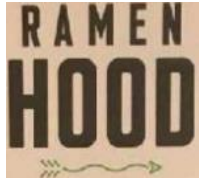
The proper test regarding similarity "is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph*

Learning LLC, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks and citation omitted)). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than specific impression of marks,” *Id.* (quoting *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018)), and the parties’ marks “must be considered . . . in light of the fallibility of memory” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). See also *In re Assoc. of the U.S. Army*, 85 USPQ2d 1264, 1268 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, our overall analysis cannot be predicated on dissecting the marks into their various components. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). On the other hand, different features may be analyzed to determine whether the marks are similar. *Price Candy Co. v. Gold Medal Candy Corp.*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955). That is, more or less weight may be given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161; see also *In re Nat’l Data*, 224 USPQ at 751 (“[I]n articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular

feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.”).

For reference, we reproduce the marks at issue in these consolidated oppositions:



(Opposer's mark)



(Application Serial No. 87870059)



(Application Serial No. 87717912)

RAMEN HOOD is the dominant and most significant feature of each mark “because it has stronger source-identifying significance than the other elements of the mark.” *Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651, 1660 (TTAB 2014). “In marks ‘consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods.’” *Sabhani*, 2021 USPQ2d 1241, at *31 (quoting *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *In re Viterra Inc.*, 101 USPQ2d at 1908; *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)). In addition, RAMEN HOOD is the largest portion of Opposer’s common-law mark and the mark in Application Serial No. 87870059.

“The verbal portion of a word and design mark ‘likely will appear alone when used in text and will be spoken when requested by consumers.’” *Id.* (quoting *Aquitaine Wine USA*, 126 USPQ2d at 1184). Indeed, the record shows that the term RAMEN HOOD is the portion of Opposer’s and Applicant’s marks that is used to identify the

respective parties' goods and services in textual references,³⁹ and we infer that "Ramen Hood" would also be used to identify Opposer's and Applicant's restaurants, and Applicant's goods, when the parties' marks are verbalized. The identity of the RAMEN HOOD element of Applicant's marks in sound to Opposer's mark when it is verbalized is especially significant in our analysis of the similarity of the marks "in view of the propensity of persons to try restaurants based on word-of-mouth recommendations." *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); *see also In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) (because "restaurants are often recommended by word of mouth and referred to orally," the word portion of a restaurant mark "is more likely to be impressed on the consumer's memory." (internal quotation omitted)).

We also find that the RAMEN HOOD element of each of Applicant's marks is identical in connotation and commercial impression to the RAMEN HOOD element in Opposer's mark, especially in the context of the use of the marks for Asian-themed restaurant services and cuisine. Applicant's goods and services involve ramen, and when the word RAMEN is combined with HOOD and the design elements that include archery-related objects, Applicant's marks, like Opposer's mark, incongruously associates the highly skilled archer Robin Hood with the Japanese ramen dish of noodles in broth.

³⁹ *See, e.g.*, Khopkar Decl. Exhibits B-D (32 TTABVUE 14, 17, 21); Opposer's First Notice of Reliance, Exhibits A-C (28 TTABVUE 14-15, 19, 21, 36).

We do not ignore the overall differences between the parties' marks – such as the different cartoon characters in Applicant's marks which do not appear in Opposer's mark; however, the differing characters and design elements of Applicant's marks reinforce the connotation and commercial impression of the RAMEN HOOD element, just as Opposer's squiggly arrow design does in Opposer's mark.

We find the marks identical in sound, connotation, and commercial impression, and overall more similar than dissimilar in appearance. The first *DuPont* factor thus weighs in favor of finding a likelihood of confusion.

6. Conclusion on Likelihood of Confusion

In view of the similar marks, and their identical in part services and inherently related goods which travel in the same or overlapping channels of trade to the same classes of ordinary consumers who consume inexpensive fast casual Asian-themed cuisine, confusion is likely between Opposer's common law mark and Applicant's marks when the marks are viewed in their entirety.

IV. Decision

The consolidated oppositions to registration of the marks of Application Serial Nos. 87717912 and 87870059 are sustained on the ground of likelihood of confusion under Section 2(d), and registration to Applicant is refused.