

**This Opinion is Not a
Precedent of the TTAB**

Mailed: September 7, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Guangzhou Huanmao Business Service Co., Ltd.
v.
Bigo Technology Pte. Ltd. and Likeme Pte. Ltd.
—

Opposition No. 91265013
—

Shiyong Li of Reid & Wise LLC,
for Guangzhou Huanmao Business Service Co., Ltd.

John Alunit of Terramark LLC,
for Bigo Technology Pte. Ltd. and Likeme Pte. Ltd.
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Before Taylor, Greenbaum and English,¹ Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Bigo Technology Pte. Ltd. and Likeme Pte. Ltd. (jointly “Applicant”) seeks registration on the Principal Register of the stylized mark LIKEE, displayed as

Likee, for

Downloadable software in the nature of a mobile application for social networking; Downloadable software in the nature of a mobile application for facilitating

¹ Administrative Trademark Judge Kuczma previously sat on the summary judgment panel in this case together with Judges Taylor and English. 24 TTABVUE. Judge Kuczma has retired from federal service and has been replaced at final decision by Judge Greenbaum.

communication through audio, video, image and text messaging over a wireless network; Downloadable graphics for mobile phones; Downloadable music files; Downloadable software in the nature of a mobile application for casual social online game; Downloadable video files in the fields of music, movies, digital pictures, mobile games, reality show, dancing performance, singing performance; Downloadable applications for mobile phones to download music and videos; Cinematographic film, exposed; Video disks with recorded animated cartoons; Downloadable electronic publications in the nature of books, magazines, news journals, booklets, manuals, and pamphlets, in the fields of music, entertainment and games, in International Class 9.²

In its amended notice of opposition, Guangzhou Huanmao Business Service Co., Ltd. (“Opposer”) opposes registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), asserting priority and a likelihood of confusion with Opposer’s common law mark LIKEE for “ headphones, optical lenses, video screens [and] smartphone mounts.” 8 TTABVUE 5, ¶ 9. Opposer also alleges ownership of a later-filed application. *Id.* at 3-4, ¶ 1.³

Applicant, in its Answer, admits Opposer filed the pleaded application for the standard character LIKEE mark for the identified goods. 18 TTABVUE 2, ¶ 1. Applicant also admits (*id.* at 3, ¶ 8) the following allegations of the amended notice of opposition (8 TTABVUE 4-5, ¶ 8):

Applicant’s applied-for “LIKEE” mark (stylized) is confusingly similar to Opposer’s “LIKEE” mark (standard

² Application Serial No. 88432124 was filed on May 15, 2019 based upon Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

³ Application Serial No. 90077134 was filed on July 28, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), and is based on Opposer’s claim of first use anywhere and first use in commerce since at least as early as March 17, 2017.

character) in appearance[,] sound, connotation, and commercial impression. The wording in Applicant's applied-for mark is the same as the wording in the Opposer's mark. Both marks are comprised of the word "LIKEE." The sound of the two marks is also similar because the two marks are phonetically equivalent. In addition, the connotation and commercial impression of the two marks do not differ when considered in connection with Applicant's and Opposer's respective goods.

Applicant denies the other salient allegations in Applicant's amended notice of opposition.

I. Record

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's application. The record also includes:

1. Testimony Declaration of Guodong He, Opposer's Manager, 26 TTABVue 2-4, with exhibits consisting of printouts from Amazon displaying Opposer's LIKEE mark in association with headphones, bluetooth speakers, fitness trackers/smart sports wrist bands, virtual reality headsets and car mounts for cellphones (*id.* at 5-30 (Exhibit A)), and purchase orders for the foregoing goods sold under Opposer's LIKEE mark (*id.* at 31-147 (Exhibit B)) ("He Test. Decl.").
2. Testimony Declaration of Shiyong Ye, Opposer's counsel, *id.* at 148-150, with exhibits consisting of printouts from third-party websites (Apple,

Apple App Store, Sony PlayStation, Google Store, Google Play Store and Amazon (*id.* at 151-343 (Exhibits C-F)) (“Ye Test. Decl.”).⁴

3. Applicant’s notice of reliance on Internet printouts. 27 TTABVUE.
4. Testimony Declaration of Liu Jiaxin, Applicant’s counsel, 28 TTABVUE 2-4, with exhibits. *Id.* at 5-70. (“Jiaxin Test. Decl.”).⁵

Both parties filed briefs.

II. Procedural History and Scope of Opposer’s Pleaded Goods

In a May 11, 2021 Board order that, *inter alia*, denied Applicant’s motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the Board found the amended notice of opposition states a sufficient claim under Section 2(d) of the Trademark Act based on Opposer’s alleged prior use of its pleaded LIKEE mark for “headphones, optical lenses, video screens, smartphone mounts[.]” 15 TTABVUE 12-13 (citing Amended Notice of Opposition, 8 TTABVUE 5, ¶ 9).

⁴ Opposer submitted the testimony declarations of its witnesses with exhibits on September 29, 2022, 25 TTABVUE, and again on September 30, 2022, 26 TTABVUE, with no explanation. Because the latter appears to incorporate the former, to which Opposer has added exhibits, and both parties referred only to the latter in their briefs, we follow suit and do not refer to the former elsewhere in this decision.

⁵ Although the Board previously cautioned Applicant to organize and label its exhibits, *see* July 25, 2022 order denying Opposer’s motion for summary judgment, 24 TTABVUE 2 n.2, Applicant did not follow this advice when it filed its notice of reliance and testimony exhibits. As we did with Applicant’s evidence on summary judgment, we again have used our best efforts to associate documents with the exhibits Applicant describes. We do not detail the evidence or its various evidentiary irregularities and deficiencies, some of which Applicant repeated despite the Board’s previous admonitions, *see, e.g., id.* at 5 n.10, because we need not and do not rely on any of Applicant’s evidence in reaching our conclusion on Opposer’s Section 2(d) claim.

The Board reiterated this finding in the July 25, 2022 order denying Opposer's summary judgment motion, and accordingly did "not consider the wider variety of unpleaded goods shown in Opposer's evidence, such as Bluetooth speakers, fitness tracker/bands, and virtual reality headsets," citing *Omega SA (Omega AG) (Omega Ltd.) v. Alpha Phi Omega*, 118 USPQ2d 1291 n.2, 1292. 24 TTABVUE 8. The Board then stated: "If Opposer wants to rely on such goods in support of its pleaded claim under Trademark Act Section 2(d), it must seek leave to amend its notice of opposition to so plead. *See* Fed. R. Civ. P. 15(a); *see also* TBMP § 507.02." *Id.* at 8 n.18.

Opposer did not seek leave to amend the notice of opposition. Nonetheless, Opposer submitted as Exhibits A and B to the He Test. Decl., 26 TTABVUE 5-147, the same evidence it submitted on summary judgment, 19 TTABVUE 43-159 (Exhibits 1 and 2 to the Declaration of Guodong He in Support of Opposer's Motion for Summary Judgment), including evidence concerning the "wider variety of unpleaded goods" listed above. Applicant, in its brief, objects to the extent the testimony and evidence pertain to Bluetooth speakers, fitness tracker/bands, and virtual reality headsets, stating that such goods "are not within the scope of the goods serving as the basis for the opposition" and therefore the testimony and evidence is not relevant. App. Br., 30 TTABVUE 6-7. In light of this objection, we do not deem the pleadings amended by the parties' express or implied consent. *See* Fed. R. Civ. P. 15(b). Rather, we consider only the sufficiently pleaded Section 2(d) claim, based on Opposer's alleged prior use of its pleaded LIKEE mark for "headphones, optical

lenses, video screens [and] smartphone mounts.” Applicant’s objection is therefore moot.

Opposer, as plaintiff in this proceeding, bears the burden of establishing its entitlement to a statutory cause of action and Section 2(d) claim by a preponderance of the evidence. *See Cerveceria Centroamericana, S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989). For the reasons explained below, we dismiss the opposition.

III. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action, formerly referred to as “standing” by the Federal Circuit and the Board, must be established by the plaintiff in every inter partes case. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *7 (Fed. Cir. 2020); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26, 109 USPQ2d 2061, 2067 n.4 (2014)); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). To establish 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) a reasonable belief in damage proximately caused by registration of the mark. *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 2022 USPQ2d 602, at *2 (Fed. Cir. 2022); *Corcamore*, 2020 USPQ2d 11277, at *4-6; *see also Empresa Cubana*, 111 USPQ2d at 1062.

As discussed above, Opposer pleaded that it uses its LIKEE mark for “headphones, optical lenses, video screens [and] smartphone mounts.” Amended Notice of Opposition, 8 TTABVUE 5, ¶ 9. Opposer submitted testimony averring that “Opposer started using the ‘LIKEE’ mark in commerce in the United States prior to the filing date of Applicant’s U.S. Application No. 88432124 and has continued to use the ‘LIKEE’ mark in connection with its products.” He Test. Decl., 26 TTABVUE 2, ¶ 2. Opposer also submitted evidence to support its claim that the goods offered under the parties’ respective LIKEE marks are related and move in the same channels of trade. Ye Test. Decl., 26 TTABVUE 148-49, ¶¶ 2-5 (referencing Exhibits C-F, 26 TTABVUE 151-343).

Opposer’s entitlement is established through use of the LIKEE mark on arguably similar goods as those identified in the involved application. *See, e.g., Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *4 (TTAB 2019) (standing established by testimony, with exhibits, of use of a confusingly similar mark); *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009) (where opposer alleged likelihood of confusion, testimony that it uses its mark “is sufficient to support [opposer’s] allegations of a reasonable belief that it would be damaged”); *Grand Canyon W. Ranch LLC v. Hualapai Tribe*, 88 USPQ2d 1501, 1502 (TTAB 2008) (standing established by testimony as to prior use of similar mark). Applicant does not dispute Opposer’s entitlement to a statutory cause of action.

IV. Priority

A. Applicant's Priority Date

As noted above, Applicant filed the involved application on May 15, 2019 based on an allegation of a bona fide intention to use the mark in commerce under Trademark Act Section 1(b). For priority purposes, Applicant “may rely without further proof upon the filing date of its application as a ‘constructive use’ date for purposes of priority.” *Syngenta Crop Prot.*, 90 USPQ2d at 1119. Applicant therefore is entitled to rely on May 15, 2019 as its constructive use priority date. *Exec. Coach Builders, Inc. v. SPV Coach Co.*, 123 USPQ2d 1175, 1180 (TTAB 2017). Applicant does not assert an earlier priority date.

B. Opposer's Priority Date

To establish priority, Opposer must show proprietary rights in the LIKEE mark in the pleaded “headphones, optical lenses, video scanners, [and] smartphone mounts.” These proprietary rights may arise from a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights in the mark vis-à-vis these goods.⁶ *Herbko Int'l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002); *see also* Trademark Act § 2(d) (an opposer may seek to establish priority on its likelihood of confusion claim by proving that, vis-à-vis the applicant, it owns “a mark or trade name previously used in the

⁶ Opposer claims only prior use of LIKEE as a trademark.

United States...and not abandoned”); *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009) (a party may establish prior proprietary rights in a mark through actual use, use analogous to trademark use, or an earlier constructive use date accorded to the party’s own application).

As noted above, Opposer submitted at trial the same testimony (with a new attestation signature and date) from Guodong He as Opposer submitted in support of Opposer’s summary judgement motion. *Compare* 26 TTABVUE 2-4 *with* 19 TTABVUE 14-16. This testimony includes the following statement: “Opposer started using the ‘LIKEE’ mark in commerce in the United States prior to the filing date of Applicant’s U.S. Application No. 88432124 and has continuously used the ‘LIKEE’ mark in connection with **its products.**” 26 TTABVUE 2, ¶ 2 (emphasis added). The Board previously referred to this testimony as “vague.” 24 TTABVUE 9. We agree. Resubmission of the same testimony does not make it more probative.

Also as noted above, Opposer submitted at trial the same supporting evidence as Opposer submitted in support of its summary judgment motion. *Compare* 26 TTABVUE 5-147 *with* 19 TTABVUE 17-159. The Board previously found the evidence in Exhibit 2 to the summary judgment motion (resubmitted as He Test. Decl. Exhibit B) “undisputed” as to Opposer’s prior use of its LIKEE mark only as to “headphones and car mounts for cell phones.” 24 TTABVUE 9. Based on the identical evidence, which includes printouts from Amazon showing sales of headphones/earbuds from 2016-18, 26 TTABVUE 32-58, and sales of car mounts for cell phones from 2016-18, 26 TTABVUE 122-147, but no evidence showing sales of video screens or optical

lenses, we find prior use by Opposer of its LIKEE mark only for headphones and car mounts for cell phones.

We further find that despite the Board's observations as to Opposer's lack of evidence of prior use of its LIKEE mark for video screens or optical lenses, 24 TTABVUE 9 n.20, Opposer submitted no documentary evidence during its testimony period to support prior use of its mark on those goods. Moreover, and despite the Board's observations, *id.*, Mr. He's vague averment in his testimony declaration of Opposer's prior and continuous use of its LIKEE mark "in connection with **its products**," 26 TTABVUE 2, ¶ 2 (emphasis added), is insufficient to establish prior use of LIKEE for video screens or optical lenses.

"[T]he decision as to priority is made in accordance with the preponderance of the evidence." *Hydro-Dynamics, Inc. v. George Putnam & Co., Inc.*, 811 F.2d 1470, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987); *see also Embarcadero Techs., Inc. v. RStudio, Inc.*, 105 USPQ2d 1825, 1834 (TTAB 2013). ("[O]pposer must prove by a preponderance of the evidence that its common law rights were acquired before any date upon which applicant may rely."). Oral testimony, if sufficiently probative, normally is sufficient to establish priority of use, *Powermatics, Inc. v. Global Roofing Prods. Co.*, 341 F.2d 127, 144 USPQ 430, 432 (CCPA 1965), and the testimony of a single witness may be adequate to establish priority. *See Exec. Coach Builders, Inc. v. SPV Coach Co.*, 123 USPQ2d 1175, 1184 (TTAB 2017). In considering the testimony and evidence of priority, "we 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." *W.*

Fla. Seafood Inc. v. Jet Rests. Inc., 31 F.3d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994).

Opposer failed during its trial period to clarify “the products” for which it claims prior common law use of its LIKEE mark. Opposer also failed to submit evidence in support of its priority of use as to video screens and optical lenses. On this record, we find Opposer has demonstrated prior use of its LIKEE mark only as to headphones and car mounts for cell phones.

C. Applicant’s Abandonment Arguments

In its brief, Applicant raises for the first time an argument that Opposer has failed to prove that its mark has not been abandoned. 30 TTABVUE 14-16, 24. This argument is unavailing. Non-abandonment is not an element of Opposer’s case-in-chief; rather, Applicant may assert abandonment as an affirmative defense against Opposer’s prior common-law rights. Applicant therefore has the burden to plead and establish a prima facie case of abandonment. *See, e.g., Crash Dummy Movie, LLC v. Mattel, Inc.*, 601 F.3d 1387, 94 USPQ2d 1315, 1316 (Fed. Cir. 2010); *Azeka Bldg. Corp. v. Azeka*, 122 USPQ2d 1477, 1485 (TTAB 2017); *cf. W. Fla. Seafood*, 31 USPQ2d at 1665 (“West was never put on notice that it was faced with an abandonment allegation, and thus West was not provided an adequate opportunity to address this issue.”).

We do not entertain this argument because Applicant did not plead any affirmative defenses, let alone an affirmative defense of abandonment, and there is

no evidence demonstrating that such affirmative defense was tried.⁷ See Fed. R. Civ. P. 15(b)(2). Cf., e.g., *Syngenta Crop Prot.*, 90 USPQ2d at 1115 n.3 (TTAB 2009) (dilution claim argued in brief not considered because claim was unpleaded).

V. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark, or a mark previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion or mistake, or to deceive. 15 U.S.C. § 1052(d). The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. See *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at *4 (Fed. Cir. 2023) (“In any given case, different *DuPont* factors may play a dominant role and some factors may not be relevant to the analysis.”). “Not all *DuPont* factors are

⁷ In any event, an opposer need only show prior use of a mark, not continuous use, of its mark. *W. Fla. Seafood*, 31 USPQ2d at 1665. The Amazon printouts attached as Exhibit A to the He Test Decl. demonstrate Opposer’s use of the LIKEE mark with headphones and car mounts for cell phones in 2022. 26 TTABVue 6-11 and 26-30, respectively).

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, at *3 (Fed. Cir. 2020) (citing *In re Dixie Rests.*, 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). However, in any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (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.”); *Herbko*, 65 USPQ2d at 1380 (“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.”) (citation omitted). These factors and others for which there are argument and evidence are discussed below.

A. Similarity or Dissimilarity of the Marks

Under this factor, we compare Opposer’s mark LIKEE and Applicant’s mark

Likee

“in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Cliquot Ponsardin Maison*

Fondee En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567).

As noted above, Applicant admits in its answer that the marks are confusingly similar in appearance, sound, connotation and commercial impression. 18 TTABVUE 3, ¶ 8. While the admission technically pertains to the standard character LIKEE mark in Opposer's application vis-à-vis Applicant's mark **Likee**, the admission applies to the iterations of Opposer's common law mark in the record, all of which are presented in nondistinctive typed letters. *See* Exhibits A and B to the He Test. Decl., 26 TTABVUE 6-147. *Cf.* Trademark Rule 2.52(a), 15 U.S.C. § 2.52(a) (a "standard character (typed) drawing" makes no "claim to any particular font style, size, or color").

Even without Applicant's admission, when considered in their entirety, we find the marks identical in sound, connotation and commercial impression, and virtually identical in appearance, due to the shared term LIKEE. The stylization in Applicant's mark is minimal, and does not serve to distinguish Applicant's mark from Opposer's mark. Moreover, there is no evidence that the term "likee" has any meaning or significance when used with the goods identified in the application or for which Opposer has shown prior use, and there is no evidence of use by third parties of similar marks on similar goods that might dilute the source-identifying capacity of the term "likee" for those goods.

Applicant presented no argument in its brief on this *DuPont* factor.

The first *DuPont* factor weighs heavily in favor of a finding of likelihood of confusion.

B. Similarity or Dissimilarity of the Goods and Channels of Trade

Under these *DuPont* factors, we base our evaluation on the goods as they are identified in Applicant's application, and headphones, which are the only goods for which Opposer has established prior common law rights through use of its mark and on which Opposer focuses in its brief.⁸ See *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys. Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

1. Similarity or Dissimilarity of the Goods

Opposer may establish likelihood of confusion as to the identified goods in Applicant's single class application by showing the relatedness of headphones to any item listed in the application. *Bertini v. Apple Inc.*, 63 F.4th 1373, 2023 USPQ2d 407, at *4 (Fed. Cir. 2023) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)). The parties' goods need not be identical to support a finding of likelihood of confusion. See *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000) (the goods and services

⁸ As discussed above, Opposer also has established prior common law use of its LIKEE mark on car mounts for cell phones. However, Opposer limited the arguments in its brief to the purported relatedness of "Opposer's goods of headphones/earphones" and the litany of goods identified in the application, Opp. Br., 29 TTABVUE 14, and we do the same in this decision. Cf., e.g., *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1348 (TTAB 2017) (opposer's failure in its main brief to argue likelihood of confusion claim based on one of two marks pleaded in its notice of opposition resulted in waiver of that claim as to that mark) (citing *Swatch AG v. M.Z. Berger & Co.*, 108 USPQ2d 1463, 1465 n.2 (TTAB 2013), *aff'd*, 787 F.3d 1368, 114 USPQ2d 1892 (Fed. Cir. 2015)).

need not be identical or even competitive to find a likelihood of confusion). Rather, “likelihood of confusion can be found ‘if the respective products are related in some manner and/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) (quoting *7-Eleven v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). In this regard, the Federal Circuit has stated that “evidence, such as whether a single company sells the goods ... of both parties, if presented, is relevant to a relatedness analysis” *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002).

As support for its argument that headphones and Applicant’s identified goods are related, Opposer points generally to Ye Test. Decl., Exhibits C-F, 26 TTABVUE 151-343. Opposer asserts this evidence shows that “[t]hird-party brands such as Apple, Sony PlayStation, Google and Amazon offer Opposer’s goods of headphones/earphones” and Applicant’s identified goods. 20 TTABVUE 14 (cleaned up). Opposer did not further specify the pages that purportedly support Opposer’s argument, “apparently in the hope that in wading through it, we might find something probative. This is not productive.” *RxD Media, LLC v. IP Application Dev. LLC*, 125 USPQ2d 1801, 1803 (TTAB 2018) *aff’d*, 377 F. Supp. 3d 588 (E.D. Va. 2019), *aff’d*, 986 F.3d 361, 2021 USPQ2d 81 (4th Cir. 2021). “Judges are not like pigs, hunting for truffles buried in briefs,” or for that matter in the record. *Id.* (quoting *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)).

Nonetheless, we have reviewed the evidence, and find it does not support Applicant's argument that the goods are related.⁹ The evidence from the Apple and Sony PlayStation websites, 26 TTABVUE 151-208 (Ye Test. Decl., Exhibits C and D) (generally), lacks probative weight because it does not identify both headphones/earbuds and any of Applicant's identified goods.¹⁰ The remaining evidence from the Google, Google Play and Amazon websites, 26 TTABVUE 209-343 (Ye Test. Decl., Exhibits E and F) (generally), shows that Google and Amazon both offer headphones and one or more of the goods identified in Applicant's application under their respective house marks, e.g., Google Pixel headphones/earbuds (*id.* at 210-215, 236-247, 261) and Google Photos (*id.* at 231-35), and Amazon Basics headphones/earbuds (*id.* at 263-72) and Amazon Prime Video (*id.* at 311-14). However, this evidence is lacking in both quantity and quality. Because house marks are used to identify a broad range of products, their probative value is not as great as product marks used to identify both headphones and any of Applicant's identified goods. *Cf. In re Donnay Int'l, S.A.*, 31 USPQ2d 1953, 1954 n.3 (TTAB 1994) (minimizing the significance of two third-party registrations for house marks "since

⁹ Again, we have not considered evidence pertaining to the unpleaded Bluetooth speakers, fitness trackers/smart sports wrist bands, and virtual reality headsets.

¹⁰ The Board reviewed this evidence when Opposer submitted it on summary judgment, and observed "[i]t is not entirely clear, however, that the "Apple Music" application allows consumers to download (as opposed to stream) music: the exhibit states only that the consumer may "[g]et unlimited access to millions of tracks, curated playlists and original content from the artists you know and love." 24 TTABVUE 11-12 n.22. Opposer presented no evidence or argument to clarify this matter, despite the Board's pointed observation. We find this evidence does not support a finding that headphones are related to any of Applicant's identified goods for purposes of our likelihood of confusion analysis.

house marks can be used to identify a broad range of products”). The record lacks any such evidence of product marks.

Nor can we find headphones and any of Applicant’s identified goods related simply because Amazon and Google, who are among the largest online retailers in the United States, offer them on their websites. *Cf. In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *8 (TTAB 2020) (“[T]he fact that more targeted sellers offer goods of both the Registrant and the Applicant tells us that the goods are related.”); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (noting that large department stores sell a wide variety of goods and services, and therefore registrations owned by department stores listing a wide variety of products have little probative value in showing that goods are related).

Even though the degree of similarity between the goods required for confusion to be likely declines where, as here, the marks are virtually identical, *see In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688-69 (Fed. Cir. 1993) (“even where the goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source”), the record does not demonstrate that it is common for a single entity to offer under the same mark headphones and any of the goods identified in the application.

2. Similarity or Dissimilarity of Trade Channels

The third *DuPont* factor concerns the “similarity of dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567. Because the identification of goods in the application contains no restrictions or limitations on the nature of the goods, their channels of trade, or classes of customers, we must presume

that the identified goods travel through all normal and usual trade channels for such goods, i.e., online stores that sell mobile apps such as the Google Play Store, and that they are sold to all classes of prospective purchasers for those goods, who include members of the general public who use mobile application software. *Stone Lion*, 110 USPQ2d at 1161; *see also Coach Servs.*, 101 USPQ2d at 1723 (absent limitation, “goods are presumed to travel in all normal channels ... for the relevant goods.”).

For Opposer’s common law goods, i.e., headphones, we consider Opposer’s actual trade channels. *See Barbara’s Bakery, Inc v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007). The record as to Opposer’s actual trade channels is very thin, and supports only a finding that headphones/earbuds may be purchased online through Amazon (Ye Test. Decl., 26 TTABVUE 210-15, 263-272), the Apple Store (*id.* at 165-67, 176-77) and the Google Store (*id.* at 236-47) by members of the general public who use or know someone who uses headphones/earbuds. There is no evidence that the actual trade channels for Opposer’s goods overlap with the presumed trade channels for Applicant’s identified goods.

We find Opposer has not established that headphones are related to any of the goods identified in the application, or that they are offered in the same channels of trade. These factors weigh heavily against a finding of a likelihood of confusion, for “[i]t is difficult to establish likelihood of confusion in the absence of overlap as to either factor.” *M2 Software Inc. v. M2 Commc’ns Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1948 (Fed. Cir. 2006).

C. Conclusion

We have weighed and balanced the *DuPont* factors for which there has been evidence and argument in this appeal. *Charger Ventures*, 2023 USPQ2d 451, at *7 (“[I]t is important ... that the Board ... weigh the *DuPont* factors used in its analysis **and** explain the results of that weighing.”) (emphasis in original). Notwithstanding the virtual identity of the marks, Opposer has not shown that any of the goods identified in Applicant’s application are related to headphones, which are the pleaded goods for which Opposer has established prior use of its LIKEE mark and to which Opposer limits its argument in its brief. Nor has Opposer shown that such goods move through the same channels of trade.

The Federal Circuit has instructed that a single *DuPont* factor may be dispositive in any particular case. *Kellogg Co. v. Pack’em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (“*DuPont* recognized that in determining likelihood of confusion ‘each case must be decided on its own facts.’ *DuPont*, 476 F.2d at 1361, 177 USPQ at 567. It also recognized that ‘each [of the thirteen elements] may from case to case play a dominant role.’ *Id.*”). We find the second and third *DuPont* factors dispositive here. *See, e.g., N. Face Apparel Corp. v. Sanyang Indus. Co.*, 116 USPQ2d 1217, 1230-34 (TTAB 2015) (dismissing opposition as to classes of goods and services for which opposer did not establish relatedness to its goods); *Itel Corp. v. Ainslie*, 8 USPQ2d 1168, 1171 (TTAB 1988) (dismissing opposition in which marks were nearly identical but opposer failed to prove relatedness of the goods and services).

Accordingly, we find Opposer has not carried its burden to establish by a preponderance of the evidence that Applicant's mark **Likee**, when used with the goods identified in the application, is likely to cause confusion with Opposer's mark **LIKEE**, when used with headphones.

Decision: The opposition is dismissed under Section 2(d) of the Trademark Act.