

This Opinion is not a
Precedent of the TTAB

Mailed: September 18, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Nomad Goods, Inc.

v.

Nomad Grill LLC

—
Opposition No. 91273170
—

Steven S. Sereboff, Brian Tamsut, SoCal IP Law Group LLP,
for Nomad Goods, Inc.

William W. Stroever, Cole Schotz, P.C.,
for Nomad Grills LLC

—
Before Shaw, Deputy Chief Administrative Trademark Judge, and Casagrande and
O'Connor, Administrative Trademark Judges.

Opinion by Casagrande, Administrative Trademark Judge:

In February 2021, Nomad Grills LLC (Applicant) filed an application to register

the mark  on the Principal Register for “barbecue grills” in

International Class 11.¹ After it was published for opposition, Nomad Goods, Inc., (Opposer) filed, in November 2021, a Notice of Opposition.² The Notice of Opposition alleges that Opposer owns the following five registrations on the Principal Register for the mark NOMAD in standard characters:

- Reg. No. 4951744 (issued May 3, 2016; Section 8 & 15 declaration accepted and acknowledged, respectively) for goods identified as “Data and power cables, namely, power cables in the shape of a key or a credit card for use in charging electronic devices” in International Class 9 (claiming dates of first use and first use in commerce of September 11, 2014);
- Reg. No. 5955758 (issued January 7, 2020) for goods identified as: “Holders and stands specially adapted for use with smart watches; batteries and battery chargers; mobile device battery chargers for use in vehicles; USB cables integrated into decorative carabiners” in International Class 9 (claiming a date of first use anywhere and in commerce of September 5, 2016); “Watch bands and straps, also for use with smart watches” in International Class 14 (claiming a date of first use of September 14, 2015, and first use in commerce of February 13, 2016); and “Wallets sold with integrated batteries and cables for charging mobile devices,” in International Class 18 (claiming a date of first use of November 4, 2015, and first use in commerce of July 29, 2016);
- Reg. No. 6269606 (issued February 16, 2021) for goods identified as “Cell phone auxiliary cables; Cell phone cases; Cell phone straps; Mobile phone straps; Mousepads; Straps for mobile phones; USB cables for cellphones; Wireless chargers; Wireless charging pads for smartphones” in International Class 9 (claiming dates of first use and first use in commerce of November 7, 2019);

¹ Application Serial No. 90514959 was filed under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere of August 2018 and use in commerce since at least as early as June 26, 2020. We note that, on June 25, 2024—after this opposition was filed, fully briefed, and awaiting decision—a registration inadvertently issued. On September 4, 2024, the Office issued a Notice of Inadvertently Issued Registration cancelling the registration and restoring the application to pendency.

² See 1 TTABVUE. Citations in this opinion to filings in proceedings before the Board are to TTABVUE, the Board’s online docketing system. The number preceding “TTABVUE” corresponds to the docket entry number, and any numbers following “TTABVUE” refer to the page(s) of the docket entry, as paginated by TTABVUE, where any specifically cited portions of the document appear.

- Reg. No. 6124154 (issued August 11, 2020) for goods identified as “Key chains; Key holders being key chains; Leather key chains; Plastic key chains; Watch bands; Watch straps made of metal or leather or plastic; Non-metal and non-leather key chains,” in International Class 14 (claiming dates of first use and first use in commerce of April 5, 2019); and
- Reg. No. 6179175 (issued October 20, 2020) for goods identified as “Connecting electrical cables; Connection cables; Distribution boxes for electrical power; Electric charging cables; Electrical cables for use in connections; Electrical plug device enabling connection and disconnection of power and/or control cables; Electrical power devices, namely, multimedia outlets; Electrical power distribution units; Electronic cables; Electronic controllers for use with power converters; Power access port for use with electrical control panels for connecting multiple data and electrical devices; Power adapters; Power cables; Power connectors; Power distributing boxes; Power supplies; Power supply connectors and adaptors for use with portable electronic devices; USB cables,” in International Class 9 (claiming dates of first use and first use in commerce of September 5, 2016).³

The Notice of Opposition claims that registration of Applicant’s mark should be refused on the ground that Applicant’s mark is likely to cause confusion with Opposer’s registered NOMAD marks, in contravention of Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).⁴

³ The Notice of Opposition also alleged ownership of standard character registrations for the marks NOMADKEY and NOMADPLUS for goods covered by the above-referenced NOMAD registrations. But, as explained below, we don’t need to discuss these additional registrations to resolve this case.

⁴ See 1 TTABVUE 9-10. The ESTTA cover sheet specified several other grounds for opposition, *see id.* at 1-2, but the Notice contained no allegations directed to any other claims, nor did Opposer pursue any of the additionally-referenced grounds at trial. These grounds are therefore forfeited. *See, e.g., WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, Opp. No. 91221553, 2018 WL 1326374, at *2 (TTAB 2018). Regarding legal citation format, please note that this opinion is issued as part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases. It cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). Westlaw (WL) citations are used for decisions of the Board, and only precedential Board decisions are cited. This opinion thus conforms to the practice set forth in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 101.03 (2024).

Applicant's Answer to the Notice of Opposition denied the salient allegations in the Notice.⁵ The parties each filed a trial brief and Opposer filed a reply brief.⁶ The case is now ready for decision. For the reasons set forth below, we dismiss the opposition.

I. The Record

The pleadings are part of the record and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), so is the challenged application. During the trial testimony period, Opposer filed a Notice of Reliance attaching many exhibits, including:

- Entire file histories of seven (7) of Opposer's asserted registrations;⁷

⁵ See 9 TTABVUE 2-3. Under the heading "Affirmative Defenses," Applicant included several allegations that aren't actually affirmative defenses. It also included conclusory statements that Opposer's claims are barred by equitable estoppel, laches, waiver, and acquiescence. These would constitute affirmative defenses if properly pleaded and proved. See *id.* at 4-5. Rather than go through these allegations one-by-one, however, it's enough to note that Applicant forfeited them all by not pursuing any of them at trial. See, e.g., *WeaponX*, 2018 WL 1326374, at *2.

⁶ See 31 TTABVUE (Opposer's trial brief); 32 TTABVUE (Applicants' trial brief); 33 TTABVUE (Opposer's reply).

⁷ See 23 TTABVUE 7-149 (Reg. No. 4951744); *id.* at 150-231 (Reg. No. 5955758); *id.* at 232-84 (Reg. No. 6269606); *id.* at 285-322 (Reg. No. 6124154); *id.* at 323-66 (Reg. No. 6179175). All of the foregoing registrations are for the mark NOMAD; see also *id.* at 367-422 (Reg. No. 5207124 for NOMADKEY); *id.* at 423-66 (Reg. No. 5193720 for NOMADPLUS). We note two issues with these attachments. First, absent any need to provide evidence of what happened during prosecution of the applications underlying these registrations—and we discern none—Opposer needed only to submit a current copy of information from the electronic database records of the Office showing the current status and title of the registrations. See 37 C.F.R. § 2.122(d)(1). Submitting more than that unnecessarily and unduly enlarged the record.

Second, the copies of USPTO database records showing status and title of three of the registrations are visually shrunken to such an extent that, even viewed in magnification, it is impossible to discern the application and registration numbers to which they correspond. See 23 TTABVUE 8, 150, 232. In the textual statements in the Notice of Reliance itself referring to these exhibits, Opposer alleges that they correspond to Reg. Nos. 4951744, 5955758, and 6269606. Normally, we would not consider illegible documents. See, e.g., *In re Virtual Indep. Paralegals, LLC*, Ser. No. 86947786, 2019 WL 1453034, at *8 n.23 (TTAB 2019) ("If evidence is not legible, we cannot consider it.") (citations omitted); *Alcatraz Media*,

- Copies of print-outs from past Internet webpages obtained through Internet Archive's WayBack Machine (<https://web.archive.org>) of Opposer's past webpages depicting many of Opposer's goods supposedly being offered for sale;⁸
- Copies of the current status and title of several third-party registrations from the USPTO's electronic TSDR database;⁹ and
- A copy of "Applicant's Response to Opposer's First Requests for Admissions."¹⁰

Opposer also submitted a Trial Declaration of its Chief Operating Officer (COO), Brian Hahn.¹¹

During its trial period, Applicant submitted the Testimony Declaration of its co-founder and co-Chief Executive Officer (co-CEO) John Veatch,¹² together with exhibits including print-outs of its own website¹³ and third-party online retail sites offering Applicant's grills for sale,¹⁴ and a co-existence agreement between Applicant and a third-party concerning the signatory parties' respective rights with respect to

Inc. v. Chesapeake Marine Tours Inc., Canc. No. 92050879, 2013 WL 5407315, at *8 (TTAB 2013) (illegible aspects of submitted documents not considered), *aff'd mem.*, 565 F. App'x 900 (Fed. Cir. 2014). Applicant, however, did not object on this basis and, moreover, treats Reg. Nos. 4951744, 5955758, and 6269606 as though they were properly made of record. Consequently, we will do the same.

⁸ See 23 TTABVUE 499-537; 24 TTABVUE 2-90.

⁹ See 24 TTABVUE 91-103.

¹⁰ See 25 TTABVUE 3-15.

¹¹ See 27 TTABVUE.

¹² See 28 TTABVUE 2-4.

¹³ See *id.* at 10-22.

¹⁴ See *id.* at 25-42.

the NOMAD mark for grills and various household cooking appliances.¹⁵ Applicant also submitted a Notice of Reliance attaching many types of documents, including:

- Dozens of printouts of the current status and title of dozens of third-party registrations consisting of or comprising the mark NOMAD from the USPTO's electronic TSDR database;¹⁶
- Dozens of excerpts from third-party websites depicting offerings of various third-party goods under marks consisting of or comprising the term NOMAD;¹⁷ and
- Printouts from the USPTO's electronic TSDR database of the current status and title of several applications for the mark NOMAD filed by Opposer, along with selected documents from those files, including a consent agreement between Opposer and a third party.¹⁸

II. Evidentiary matters.

Opposer's trial brief refers to several additional registrations it allegedly owns, but Applicant objects that they have not been properly made of record.¹⁹ Applicant, however, does not specify which ones. It would have been better practice for Applicant to have specified which of the cited applications and registrations have not been properly made of record. Nevertheless, our review of Opposer's Notice of Reliance,

¹⁵ See *id.* at 44-50.

¹⁶ See 29 TTABVUE 14-377. Applicant also attached hundreds of pages comprising what appear to be entire third-party application files for marks consisting of or including the term NOMAD. See *id.* at 379-894. Third-party applications evidence nothing other than the fact that they were filed, see, e.g., *Edom Lab'ys, Inc. v. Llichter*, Opp. No. 91193427, 2012 WL 1267961, at *4 (TTAB 2012); *Interpayment Servs. Ltd. v. Docters & Thiede*, Opp. No. 91119852, 2003 WL 880552, at *5 n.6 (TTAB 2003), so this evidence unnecessarily and unduly enlarged the record.

¹⁷ See 29 TTABVUE 896-1112.

¹⁸ See *id.* at 1113-1213.

¹⁹ See 32 TTABVUE 21 (referring to applications and registrations referenced in Opposer's trial brief at 31 TTABVUE 13-15).

supra, suggests that Applicant is objecting to Reg. Nos. 6974726, 6907481, 6958065, 7049391, 6763832, 6607377, and 6469523.

We sustain Applicant's objection. It is basic to Board practice that, to be considered as evidence, a plaintiff's registrations must be properly made of record. If not, they will be excluded upon objection. *See, e.g., Teledyne Techs., Inc. v. Western Skyways, Inc.*, Canc. No. 92041265, 2006 WL 337553, at *2-3 (TTAB), *aff'd*, 208 F. App'x 886 (Fed. Cir. 2006); *see also* 37 C.F.R. § 2.122(d) (setting forth how an opposer may make its or third parties' registrations of record).

Applicant also objects to printouts attached to Opposer's Notice of Reliance purporting to show pages from Opposer's website of various product offerings at various times.²⁰ Opposer relies on them for purposes of priority, apparently of its common law usages for goods not listed in the registrations of record²¹ and to show that its marks are commercially strong.²² Applicant argues, correctly, that we may not rely on these webpages for the truth of any statements in them, because they were not accompanied by competent testimony. We may advert to them only for what they may show on their face. *See, e.g., WeaponX*, 2018 WL 1326374, at *6 ("[P]rintouts from the various websites submitted by Opposer with its notice of reliance show on their face that some entity is advertising products and services under the WEAPONX mark, but absent testimony from a competent witness, they are nonetheless hearsay.

²⁰ *See* 32 TTABVUE 31.

²¹ *See* 31 TTABVUE 21.

²² *See id.* at 24-25.

They do not prove that Opposer owns its pleaded WEAPONX mark or that it has offered products or services under that pleaded mark.”); *see also Spiritline Cruises LLC v. Tour Mgmt. Servs., Inc.*, Opp. No. 91224000, 2020 WL 636467, at *3 (TTAB 2020) (“we consider Internet printouts and other materials properly introduced under a notice of reliance without supporting testimony only for what they show on their face rather than for the truth of the matters asserted therein”) (citations omitted). For example, we cannot rely on them to show that Opposer sold, offered, or advertised any of the depicted goods on any specific date. We therefore sustain Applicant’s objections and will not rely on these documents for the truth of the statements in them for purposes of priority or as to the commercial strength of any marks or goods not identified in the six (6) registrations that Opposer properly made of record.

III. Opposer is Entitled to Initiate a Statutory Opposition Proceeding.

We now move to Opposer’s claim. In every inter partes Board case, the plaintiff must establish, as part of any claim, its entitlement to have invoked the statutory proceeding it filed. This requires the plaintiff to demonstrate: (i) an interest falling within the zone of interests protected by the applicable statute and (ii) proximate causation. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 120-37 (2014)); *id.* at 1305 (applying *Lexmark* to inter partes TTAB cases). Demonstrating a real interest in opposing registration of a mark satisfies the zone-of-interests requirement, and demonstrating a reasonable belief in damage by the registration of

a mark demonstrates damage proximately caused by registration of the mark. *Id.* at 1305-06.

Applicant agrees that Opposer has made six of Opposer's asserted registrations of record.²³ Opposer's Notice of Opposition alleges that Applicant's mark creates a likelihood of consumer confusion as to source in view of these registered marks. Accordingly, Opposer has established that it is entitled to invoke the statute permitting the filing of an opposition proceeding. *See, e.g., Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 WL 2188890, at *9 (TTAB 2022) (pleaded registrations demonstrated entitlement to oppose on basis of likelihood of confusion); *Primrose Ret. Communities, LLC v. Edward Rose Senior Living, LLC*, Opp. No. 91217095, 2016 WL 7655551, at *2 (TTAB 2016) (same).

IV. Analysis of Opposer's Section 2(d) claim

As noted earlier, the sole claim that Opposer advances at trial is its Section 2(d) claim. Section 2(d) prohibits registration of a mark that "so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1052(d).

²³ *See* 32 TTABVUE 18-19. We note that Applicant also agrees that Opposer is statutorily entitled to invoke an opposition proceeding. But we have held that "parties may not stipulate to a plaintiff's [statutory entitlement] in the absence of supporting facts." *Wirecard AG v. Striatum Ventures B.V.*, Canc. No. 92069781, 2020 WL 973179, at *3 n.6 (TTAB 2020). Rather, they may stipulate "as to the facts which would support [statutory entitlement], eliminating the need for separate proof of those facts." *Id.*

A. Priority is not an issue because Opposer owns unchallenged registrations

Under Section 2(d), an opposer must prove either ownership of a prior registration or priority of use. Where, as here, an opposer bases its opposition on its ownership of registered marks and has made the registrations of record, and the applicant has not counterclaimed to cancel them, Section 2(d) does not require proof of priority of use as to the marks and goods and services covered by the registrations. *See, e.g., Top Tobacco LP v. N. Atl. Op. Co.*, Opp. No. 91157248, 2011 WL 6099691, at *6 (TTAB 2011) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400 (CCPA 1974)); *see also Massey Junior Coll., Inc. v. Fashion Inst. of Tech.*, 492 F.2d 1399, 1403 n.6 (CCPA 1974) (“prior use need not be shown by a plaintiff relying on a registered mark unless the defendant counterclaims for cancellation”); *Itel Corp. v. Ainslie*, Opp. No. 91072956 1988 WL 252407, at *2 (TTAB 1988) (“because of the existence of opposer’s valid and subsisting registration, it need not prove prior use as to the services recited therein”). Here, Opposer relies on several pleaded registrations, copies of which it has made of record, that pre-date Applicant’s application. Thus, we hold that proof of priority is unnecessary.²⁴

²⁴ Applicant states that it “does not dispute that Opposer has priority with respect to the trademark registrations properly made of record in this case.” *See* 32 TTABVUE 24. But, as held *supra*, Opposer’s arguments that it owns additional registrations identifying additional goods that should be considered, as well as its vague arguments about priority stemming from use as to additional goods, are rejected due to the lack of admissible evidence that could support such arguments.


B. General principles

“In opposition proceedings, the opposer has the burden of proving a likelihood of confusion by a preponderance of the evidence.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 998 (Fed. Cir. 2020) (citation omitted). To determine whether likelihood of confusion has been proved, we look to the likelihood-of-confusion factors listed in *E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973). *See, e.g., Stratus Networks*, 955 F.3d at 998. The Board considers “each ... factor for which there is evidence and argument.” *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) (quoting Bd. Decision); *In re Guild Mortg. Co.*, 912 F.3d 1376, 1380 (Fed. Cir. 2019). But we “may focus on dispositive factors, such as similarity of the marks and relatedness of the goods.” *Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 1379 (Fed. Cir. 2016) (cleaned up; citations omitted); *see also Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1366 (Fed. Cir. 2012). After making findings on the relevant factors, we will weigh those findings, not by mechanically tallying how many factors support each party, *see, e.g., Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 1356 (Fed. Cir. 2011), but rather by weighing them together with the understanding that, in any given case, one or more factors may be more consequential than others. *See, e.g., In re Charger Ventures LLC*, 64 F.4th 1375, 1381 (Fed. Cir. 2023) (“The weight given to each factor depends on the circumstances of each case.”) (citation omitted); *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1362 (Fed. Cir. 2022) (“Not all of the ... factors are necessarily relevant or of equal weight in a given case, and any one of the

factors may control a particular case.”) (internal quotation marks and citation omitted).

C. Preliminary matter

As mentioned, Opposer’s trial brief discusses many registrations that it did not properly place in evidence at trial. We may evaluate likelihood of confusion only as to those registrations properly made of record. Further, Opposer not only provided evidence of several registrations for the mark NOMAD, but also registrations for NOMADKEY and NOMADPLUS. Those two marks are further away from

Applicant’s  mark because they each have an additional word appended to the term “nomad,” and the goods in those two registrations are also found in two of the NOMAD registrations properly of record. Thus, if we find confusion is likely as to any of the NOMAD registrations before us, Applicant will not obtain its registration, but if we find that confusion is unlikely as to any of the NOMAD registrations before us, confusion would be even less likely as to NOMADKEY and NOMADPLUS.


D. Likelihood of confusion factor analysis

We now will assess the relevant likelihood-of-confusion factors and, once we finish, we will weigh our findings on them to determine if confusion is likely.

1. Similarities/dissimilarities in the marks

The first *du Pont* factor concerns “[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.”

476 F.2d at 1361. This, along with the comparison of the goods (or services) at issue, is always one of the most important considerations. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (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.”); *In re Max Cap. Grp. Ltd.*, Ser. No. 77186166, 2010 WL 22358, at *14 (TTAB 2010) (“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services.”).

Opposer argues that Applicant’s mark  is “essentially identical” to Opposer’s standard-character NOMAD mark, save for the stylized font and the rounded-edged rectangular line surrounding the word.²⁵ Opposer points out that when a mark is a composite of literal and a design element, the literal element generally tends to contribute more to the commercial impression given by the mark than the design element (i.e., the literal element is generally considered “dominant”).²⁶ We agree. *See, e.g., In re Viterra Inc.*, 671 F.3d 1358, 1366 (Fed. Cir. 2012) (“The Board’s conclusion is also in line with our decisions holding that the verbal portion of a word and design mark likely will be the dominant portion. This makes sense given that the literal component of brand names likely will appear alone when used in text and will be spoken when requested by consumers.”) (citation

²⁵ *See* 31 TTABVUE 26-27.

²⁶ *See id.* at 27.

omitted). We further agree with Opposer's assertion that the design element (the rounded-edged rectangle) in Applicant's mark is minimally distinctive and we find that it does not have any significant impact on the overall commercial impression conveyed by the mark. *See In re Ocean Tech., Inc.*, Ser. No. 87405211, 2019 WL 6245131, at *6 (TTAB 2019) (finding "the inclusion of stylization" and "insignificant background carriers" did not change the "conclusion regarding consumer perceptions of the proposed marks as a whole"). And finally, we note that the stylized typeface used for the lettering in Applicant's mark cannot legally be a basis to distinguish its NOMAD mark from Opposer's NOMAD mark because Opposer's mark is registered in a standard character form, which means it covers any typeface. *See, e.g., In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003); *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 1041 (Fed. Cir. 1983).

We find that the marks are very similar.

2. Similarity or dissimilarity and nature of the goods

The second *du Pont* factor concerns "[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration." 476 F.2d at 1361. As noted above, in general, the comparison of the goods is, along with the comparison of the marks, considered one of the relatively more important inquiries in the *du Pont* calculus. *See, e.g., Federated Foods*, 544 F.2d at 1103; *Max Cap. Grp.*, 2010 WL 22358, at *14.

Here, none of Opposer's registrations identify barbecue grills, and Opposer's CEO acknowledges that it "does not now sell barbe[c]ue grills."²⁷ But the parties' goods don't have to be identical or competing for this factor to weigh in favor of a conclusion that confusion is likely. *See, e.g., Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002); *Gamut Trading Co. v. U.S. Int'l Trade Comm'n*, 200 F.3d 775, 783 (Fed. Cir. 1999).

Opposer does not argue that the goods are identical or competing, but does argue that barbecue grills are related to the goods in the registrations of record.²⁸ One way a party may show that non-competing goods are related is by showing that the goods are "intrinsically related." *See, e.g., Majestic Distilling*, 315 F.3d at 1315. One example of such an "intrinsic" relationship between types of goods is when there is evidence that the goods are "complementary," i.e., they are, or can be, used together for a certain purpose. *See, e.g., In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567 (Fed. Cir. 1984); *Int'l Diagnostic Tech., Inc. v. Miles Labs., Inc.*, 746 F.2d 798, 800 (Fed. Cir. 1984); *Key Chems., Inc. v. Kelite Chems. Corp.*, 464 F.2d 1040, 1042 (CCPA 1972). Opposer, however, does not assert that there is any inherent or intrinsic relationship between the goods in its six registrations made of record (which are largely electronics-focused but include watch bands and wallets) and Applicant's barbecue grills, nor do we see one.

²⁷ 27 TTABVUE 3 (Hahn Decl.).

²⁸ *See* 31 TTABVUE 15, 28-31.

Even if goods are not intrinsically related, however, consumers may still perceive them as related 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.*, 668 F.3d at 1369. One commonly-used method to demonstrate relatedness this way is to submit “advertisements showing that the relevant goods are advertised together ... by the same manufacturer or dealer.” *In re Ox Paperboard, LLC*, Ser. No. 87847482, 2020 WL 4530517, at *6 (TTAB 2020). Opposer does not point to any of this kind of evidence.

Yet another way to show this less-obvious sort of relatedness is to show that third parties have registered, or use, the same mark for both types of goods. *See, e.g., Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 1117 (Fed. Cir. 2024) (uses); *Made in Nature*, 2022 WL 2188890, at *24 (registrations). Opposer does not provide evidence that any third-party uses the same mark for both barbecue grills and any of the goods listed in the six of its registrations that are properly of record. But Opposer did submit evidence of several third-party registrations that identify both barbecue grills and one or more of the goods identified in one or more of Opposer’s six registrations.²⁹ Applicant, however, urges that we discount third-party Registrations Nos. 6886411, 6886412, 6366526, 6805462, and 6996637, because they are all based on either Section 44(e) or Section 66(a) of the Trademark Act and are less than five years old, so no declaration of use has yet been filed.³⁰

²⁹ *See* 31 TTABVUE 28-30 (table listing nineteen alleged third-party registrations).

³⁰ *See* 32 TTABVUE 34. The same applies to Registration No. 6656265.

The probative value of submitting evidence in the form of third-party registrations to prove relatedness depends on the extent that they provide a basis to infer that U.S. consumers would have seen these marks in use. Section 44(e) or Section 66(a) Registrations lacking these declarations of continued use do not provide a sufficient basis for such an inference. The mere fact that these registrations exist, by itself, is insufficient, because “consumers are generally unaware of what resides on the register.” *In re Packaged Ice Inc.*, Ser. No. 74703747, 1999 WL 248957, at *3 (TTAB 1999). *See generally Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 1005 (CCPA 1973) (“in the absence of any evidence showing the extent of use of any of such marks or whether any of them are now in use, they [the third-party registrations] provide no basis for saying that the marks so registered have had, or may have, any effect at all on the public mind ...”) (brackets in original). Until a registrant who filed under Sections 44(e) or 66(a) has filed a declaration under either § 8 (15 U.S.C. § 1058) or § 71 (15 U.S.C. § 1141k(c)) attesting to continuing use in the United States as to the identified goods or services, such registrations have vanishingly little, if any, persuasive value as to consumer perception. *See, e.g., Calypso Tech., Inc. v. Calypso Cap. Mgmt., LP*, Opp. No. 91184576, 2011 WL 4090446, at *9 (TTAB 2011); *In re 1st USA Realty Pros., Inc.*, Ser. No. 78553715, 2007 WL 2315610, at *2 (TTAB 2007); *In re Albert Trostel & Sons Co.*, Ser. No. 74186695, 1993 WL 596274, at *3 (TTAB 1993). So we agree with Applicant on this point.

We further note that, after the parties briefed the case, two of the remaining third-party registrations were cancelled: Reg. No. 5397761 was cancelled on August 16,

2024; and third-party Reg. No. 5315820 was cancelled on May 10, 2024. “[C]ancelled registrations ... are only evidence that the registrations issued, and are not evidence of use of the registered marks at any time.” *Kemi Organics, LLC v. Gupta*, Can. No. 92065613, 2018 WL 2230555, at *6 (TTAB 2018) (citations omitted). They therefore provide no basis to infer anything about whether consumers perceive the goods to be related.

That leaves only two third-party registrations that identify both barbecue grills and one or more items listed in those of Opposer’s registrations that are properly of record. Third-party Registration No. 6656754 for TechFronton identifies one good (battery charge devices) that corresponds to a good listed in Opposer’s Registration No. 5955758, which identifies batteries and battery chargers. Third-party Registration No. 6191716 for INNOV8 HOME identifies various goods that correspond to goods listed in Opposer’s Registration Nos. 5955758 and 6124154 (watch bands & straps); 6179175 (electrical cables for use in connections); and 6269606 (USB cables for cellphones; wireless chargers).³¹ This is a paltry foundation upon which to construct an argument that any of the goods in Opposer’s registrations are related to barbecue grills. We find that Opposer has not proved that barbecue grills are related to any of the goods in the five NOMAD registrations owned by Opposer that are properly of record.

³¹ We see no use-based, third-party registration with the specific goods identified in Opposer’s NOMAD Registration No. 4951744.

Opposer also argues that barbecue grills “would be a natural expansion for Opposer.”³² The seminal decision addressing the concept of “zone of natural expansion” is *Mason Engineering and Design Corp. v. Mateson Chemical Corp.*, Opp. No. 91066845, 1985 WL 72027 (TTAB 1985), which Opposer cites.³³ *Mason Engineering* lists a number of relevant considerations:

1. Whether the second area of business (that is, the subsequent user’s area of business into which the first user has or potentially may expand) is a distinct departure from the first area of business (of the prior user), thereby requiring a new technology or know-how, or whether it is merely an extension of the technology involved in the first area of business;
2. The nature and purpose of the goods or services in each area;
3. Whether the channels of trade and classes of customers for the two areas of business are the same, so that the goodwill established by the prior user in its first area of business would carry over into the second area; and
4. Whether other companies have expanded from one area to the other.

Id. at *6; *see also Sky Int’l AG v. Sky Cinemas LLC*, No. 21-1575, 2021 WL 5985363, at *4-5 (Fed. Cir. Dec. 17, 2021) (nonprecedential) (using the *Mason Engineering* factors to assess and affirm the Board’s zone of natural expansion ruling in that case).

On this record, we have no difficulty rejecting Opposer’s conclusory “zone of natural expansion” argument. As to the first *Mason Engineering* factor, Opposer directs us to nothing other than its COO’s say-so that expanding from portable electronics chargers, connectors, and accessories would be natural.³⁴ This is patently

³² See 31 TTABVUE 11, 18, 30-31.

³³ See 31 TTABVUE 30.

³⁴ See 31 TTABVUE 30 (citing 27 TTABVUE 5).

insufficient. For example, Opposer points to nothing about the technology required to execute the required expansion. Nor does the second *Mason Engineering* factor help Opposer's cause: the nature and purpose of barbecue grills is to cook food, a nature and purpose shared by none of the goods in Opposer's six registrations of record. As to the third *Mason Engineering* factor, we find (in the next subsection, *infra*, in our discussion of the channels of trade and classes of customers), it may well be that large box and other large retailers who carry a broad selection of goods might carry barbecue grills and some of Opposer's goods, and, certainly, there may be consumers who need both Opposer's goods and barbecue grills. So that factor lends some support to Opposer's argument that barbecue grills are within Opposer's zone of natural expansion. But the fourth *Mason Engineering* factor, which looks to determine whether others have expanded from the types of goods in Opposer's six registrations to barbecue grills, gives little indication that any others have expanded in that way. Reviewing Opposer's meager showing, as noted above, we have no difficulty on this record finding that barbecue grills would not fall within the zone of natural expansion of an entity selling the sorts of goods reflected in Opposer's registrations.

In summary, based on the record in this case, we find the parties' goods unrelated and that barbecue grills are not within Opposer's zone of natural expansion.

3. Similarity or dissimilarity of trade channels

The third *du Pont* factor concerns "[t]he similarity or dissimilarity of established, likely-to-continue trade channels." 476 F.2d at 1361. Where, as here, the relevant registrations and application disclose no limitations or restrictions as to trade

channels or classes of purchasers, we presume the goods are marketed in all normal trade channels, and to all normal classes of purchasers, of such goods. *See, e.g., Coach Servs.*, 668 F.3d at 1370. Still, that general presumption by itself doesn't yield the answer here, because, as we found above, the goods are different and unrelated. So we need to consider what the evidence of record discloses to determine the similarities and/or dissimilarities between the parties' trade channels as to their respective goods.

Opposer's trial brief cites the declaration of its COO, Mr. Hahn, who avers, in general terms, that Opposer's products "are available on the internet and brick-and-mortar stores throughout the United States" and are sold to "people having or espousing a mobile lifestyle."³⁵ Pointing to the declaration of its Co-CEO, Mr. Veatch, Applicant states that it sells grills "through its website at nomadgrills.com, through the Lowes online store, through the Public Lands store, and through local businesses that sell barbecue grills."³⁶ As noted earlier, we can't rely on the webpages from Opposer's website for the truth of what is stated on them because they were not properly introduced into evidence for that purpose, so all we know about Opposer's goods is that they're available somewhere on the Internet and somewhere in undisclosed brick-and-mortar retail stores. This potentially overlaps with the websites and local retailers to which Applicant's co-CEO referred. It is Opposer's burden to show that the trade channels overlap, and Opposer's evidence here is about as vague about its own trade channels as one can be. Despite lacking in any specifics,

³⁵ *See* 31 TTABVUE 31 (citing 27 TTABVUE 2 ¶¶4, 13).

³⁶ *See* 32 TTABVUE 41 (citing, *inter alia*, 28 TTABVUE 3 ¶ 6).

however, this is enough to find that the parties' trade channels overlap to some indeterminate degree. After all, Opposer doesn't have to prove that the goods are available on the same websites or in the same brick-and-mortar stores (though that would certainly help a plaintiff's case), but just that the parties use the same types of channels. *See, e.g., Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992) ("An opposer need not establish the sale of both parties' services by the same vendor to show employment of the same trade channels" but rather only "the same type of distribution channel").

4. Who, and how sophisticated, are the purchasers?

The likelihood-of-confusion factors also include an assessment of evidence bearing on "[t]he conditions under which and buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing." *du Pont*, 476 F.2d at 1361. The lack of limitations in the goods identified in the respective registrations and application means that the "buyers to whom sales are made" includes all "the normal customers." *See, e.g., Coach Servs.*, 668 F.3d at 1370.

So who are the "normal customers"? Opposer's COO testified, rather cryptically, that:

Nomad Goods manufactures, designs, and sells a wide range of products targeted to people having or espousing a mobile lifestyle, all under our NOMAD trademark. These products include phone chargers, cases, cables, outdoor goods, watch straps, clothing and more.

27 TTABVUE 2.³⁷ “[P]eople having or espousing a mobile lifestyle” would seem to sweep in a large proportion of the American buying public, which is consistent with the ordinary types of consumer goods Opposer sells (electronics cables, chargers, and other accessories). Applicant’s evidence of its customer classes for barbecue grills consists of its co-CEO’s declaration that “Applicant markets its grills under the NOMAD Mark to individuals who are looking for outdoor cooking equipment either for use at home or on the go.”³⁸ This statement, too, is consistent with the nature of the goods identified in the application, barbecue grills, which is an ordinary type of consumer good. This evidence, while sparse, suggests that the classes of customers, like the trade channels, overlap to some indeterminate degree.

As to consumer sophistication and care, we are mindful that we need to consider the “least sophisticated potential purchasers” for the goods in question. *See, e.g., Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014). Applicant argues that its goods are sold at an “expensive price” and that, as a result, its customers exercise an “elevated level of care during their purchasing decisions.”³⁹ But the application states simply “barbecue grills,” which can range from very inexpensive to very expensive. Where the application identifies a product or service that isn’t necessarily expensive, we cannot credit a party’s argument that it currently chooses to sell only an expensive version of that product or service. After all, if the

³⁷ Although this statement refers to certain goods as to which Opposer failed to introduce either a registration or evidence of prior sales, the statement also includes goods listed in its registrations of record, so we credit the declarant’s characterization of these buyers.

³⁸ *See* 28 TTABVUE

³⁹ *See* 32 TTABVUE 40.

application were to issue, it would provide the registrant with exclusive rights to use the mark with any and all products falling within the identification of goods, and a party would be within its rights to change its business practices at its unfettered whim. *See, e.g., Can. Imperial Bank v. Wells Fargo Bank, NA*, 811 F.2d 1490, 1492-93 (Fed. Cir. 1987); *McDonalds Corp. v. McSweet LLC*, Opp. No. 91178758, 2014 WL 5282256, at *16 (TTAB 2014).

On the other hand, Opposer does not argue that the parties' products are "impulse"-purchase items, urging instead that the relevant groups comprise "ordinary consumers who have no particular sophistication."⁴⁰

We find that goods identified in the registrations and applications are inherently neither expensive nor impulse purchases. Rather, while the goods are quite different, they share the fact that they are ordinary consumer goods. We therefore find consumer sophistication and care to be neutral or, at most, tip slightly in favor of a conclusion that confusion is likely.

5. The strength of opposer's marks

We turn next to the fifth and sixth *du Pont* factors. The fifth factor looks at the "fame" of the prior mark. *du Pont*, 476 F.2d at 1361. This provides an Opposer an opportunity "to prove that its pleaded marks are entitled to an expanded scope of protection by adducing evidence of [their] fame" *Made in Nature*, 2022 WL 2188890, at *11. "Fame for purposes of likelihood of confusion is a matter of degree that varies along a spectrum from very strong to very weak." *Coach Servs.*, 668 F.3d

⁴⁰ *See* 31 TTABVUE 32.

at 1367 (cleaned up; citations omitted). The flip side of the fifth factor is the sixth factor, which “allows Applicant to contract that scope of protection by adducing evidence of ‘the number and nature of similar marks in use on similar goods [or services].” *Monster Energy Co. v. Lo*, Opp. No. 91225050, 2023 WL 417620, at *9 (TTAB 2023) (quoting *Sock It to Me, Inc. v. Fan*, Opp. No. 91230554, 2020 WL 3027605, at *11 (TTAB 2020)); *see also Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) (“Two of the *DuPont* factors (the fifth and sixth) consider strength. The fifth *DuPont* factor, “the fame of the prior mark (sales, advertising, length of use),” is a measure of the mark’s strength in the marketplace. ... The sixth *DuPont* factor, “the number and nature of similar marks in use on similar goods,” ... is a measure of the extent to which other marks weaken the assessed mark.”) (cleaned up; citations omitted).

“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength” *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) (citations omitted).

Opposer argues that its NOMAD mark is conceptually strong because the USPTO allowed it to register several times without requiring Opposer to prove acquired distinctiveness.⁴¹ Opposer explains that the term NOMAD is arbitrary because it has no descriptive or suggestive connotation as to any of the goods in its asserted registrations.⁴² Applicant counters that, since Opposer says that it markets its

⁴¹ See 31 TTABVUE 23.

⁴² See *id.* at 23-24.

products to “people having or espousing a mobile lifestyle,” Opposer’s NOMAD mark is “highly suggestive” in view of the dictionary definition of “nomad” as “an individual who roams about” or “has no fixed residence.”⁴³

We agree with Opposer that its NOMAD marks are presumed to be inherently distinctive because they registered without having to first prove acquired distinctiveness. *See, e.g., Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 17 F.4th 129, 146 (Fed. Cir. 2021). But Applicant’s argument that the mark is suggestive has some resonance. A mark is suggestive if the consumer, with imagination, thought, or perception, understands it to convey information about the nature of the goods. *See, e.g., In re Nett Designs, Inc.*, 236 F.3d 1339, 1341 (Fed. Cir. 2001). Several of the goods listed in Opposer’s registrations are or can be used with portable products: power cables for charging electronic devices;⁴⁴ mobile device battery chargers for use in vehicles, mobile phone straps;⁴⁵ and power supply connectors and adaptors for use with portable electronic devices.⁴⁶ Watch bands and wallets,⁴⁷ as well as key chains,⁴⁸ are also “portable.” It is also well settled that, in assessing public perception of a mark, we can examine how the owner promotes or positions it. *See, e.g., In re N.C. Lottery*, 866 F.3d 1363, 1367-68 (Fed. Cir. 2017) (“This court has

⁴³ *See* 32 TTABVUE 30. We grant Opposer’s request to take judicial notice of the dictionary definition of “nomad” attached to its brief. *See* 32 TTABVUE 29, 49.

⁴⁴ *See* 23 TTABVUE 24.

⁴⁵ *See id.* at 233.

⁴⁶ *See id.* at 324.

⁴⁷ *See id.* at 151, 287.

⁴⁸ *See id.* at 287.

explained that the public's understanding of a mark can be evidenced by any competent source. These sources may include websites, publications, and use in labels, packages, or in advertising material directed to the goods.") (citations and internal quotation marks omitted); *In re Abcor Dev. Corp.*, 588 F.2d 811, 814 (CCPA 1978) ("Evidence of the context in which a mark is used in labels, packages, or advertising materials directed to the goods is probative of the reaction of prospective consumers to the mark.").

Opposer's brief emphasizes how its advertising on its website targets people with "mobile lifestyle[s]" and its ads link its products to many kinds of outdoor activities, such as fishing, off-road driving and motorcycling, surfing, open-water swimming, and mountain biking.⁴⁹ In view of the products identified in the registrations of record and the way Opposer presents them to the public, we find that Opposer's NOMAD mark is suggestive.

Opposer also argues that its NOMAD marks are commercially strong.⁵⁰ Marketplace strength evidence includes "sales, advertising, length of use of the mark, market share, brand awareness, licensing activities, and variety of goods bearing the mark." *Coach Servs.*, 668 F.3d at 1367. Opposer's CEO, in generalized terms, averred that its marks have been in use since 2013, but cites only registrations for support.⁵¹ *See, e.g., Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 204 (Fed. Cir. 1992)

⁴⁹ See 31 TTABVUE 10.

⁵⁰ See 31 TTABVUE 24-25.

⁵¹ See 27 TTABVUE 3-5.

“As to strength of a mark, however, registration evidence may not be given any weight.”); *Smith Bros. Mfg.*, 476 F.2d at 1005 (the purchasing public is not aware of registrations). Opposer provides no sales data, no advertising data, no market share or brand awareness data, no evidence of licensing activity, no evidence of third-party awareness of the mark. As we explained earlier, it provided screenshots purportedly from March 2023 of what it represents are pages on its website displaying various goods for sale, but we cannot rely on those webpages for the truth of the matter displayed on them. But even if we did, these pages are simply a snapshot of one quick segment of time last year, which would tell us almost nothing about commercial strength over time. These pages certainly look professionally designed and attractive. As is well-settled in the analogous areas of trademark law, it’s not a party’s efforts to develop a brand that count, but results. *See, e.g., T.A.B. Sys. v. Pactel Teletrac*, 77 F.3d 1372, 1376 (Fed. Cir. 1996) (“[T]he Board in this case clearly misstated the law when it concluded that PacTel’s advertising, media and sales efforts were sufficient for analogous use as ‘intended to create an association in the mind of the relevant purchasing public between the mark, the services to be offered, and a single source.’ The user’s intent, no matter how clearly established, cannot suffice in lieu of proof of the necessary ‘prior public identification.’”); *Target Brands, Inc. v. Hughes*, Opp. No. 91163556, 2007 WL 4287253, at *6 (TTAB 2007) (“While there is no question that applicant has spent substantial sums of money to promote his product under the designation ULTIMATE POLO, the numbers only suggest the efforts made to acquire

distinctiveness, and do not demonstrate that the efforts have borne fruit.”) (citation omitted). Opposer has failed to prove any significant degree of commercial strength.

Under the sixth likelihood-of-confusion factor, Applicant repeatedly notes, and provides supporting evidence, that there are dozens of other NOMAD registrations and uses for goods falling within the broad “outdoor accessories” category Opposer argues is the relevant market.⁵² But we have rejected Opposer’s attempt to broadly define the composite “outdoor accessories” or “lifestyle and outdoor goods” market⁵³ for all the goods it offers because the evidence it submitted didn’t match that broad category. Rather, it submitted only registrations covering a narrower composite category, comprising accessories and components for use with mobile electronics, as well as watch bands and wallets.

If Opposer had been able to prove use of the mark on a broad range of “outdoorsy” products, Applicant’s argument that the outdoorsy field is crowded with NOMAD marks would have been formidable, for the vast majority of the third-party uses and registrations it marshalled fall within that broadly-defined category. But as to the core category for the registrations that Opposer properly made of record—which concern, almost exclusively, electronic connectors, power sources, and accessories therefor, plus watch bands and wallets—few of the third-party uses and registrations

⁵² See 32 TTABVUE 8, 10-18, 25-27, 30, 32.

⁵³ See 31 TTABVUE 8 (listing wallets, watch straps, phone chargers, phone cases, mobile charge cables, laptop sleeves, t-shirts, sweatshirts, hats, key chains, mouse pads, medical masks, surface cleaner, hand sanitizer, eyeglass straps, pet tags and jigsaw puzzles). While we are not persuaded that this list of items—many of which are not identified in the registrations Opposer properly made of record—can be said to define an “outdoor accessories” or “lifestyle and outdoor goods” market, that is of no moment.

fall within that much narrower category. And we must tailor our assessment of the third-party registration and use evidence to the market covered by the parties' goods, collectively. *See, e.g., Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1325 (Fed. Cir. 2018) (“the real world segment of the public is limited to the market or universe necessary to circumscribe purchasers or users of products or services like those being offered by the parties under a common mark”); *Nat'l Cable Tel. Ass'n, Inc. v. Am. Cinema Eds., Inc.*, 937 F.2d 1572, 1579 (Fed. Cir. 1991) (uses outside the range encompassed by the parties' uses are “essentially irrelevant”). As to the range of goods properly before us—comprising Opposer's goods and barbecue grills (i.e., outdoor cooking devices)—we see only three of even arguable relevance.⁵⁴ This comes nowhere close to weakening Opposer's mark for the goods before us.

To summarize our findings on the fifth and sixth factors, Opposer's mark, which we find to be suggestive, possesses the conceptual strength of any mark registered without a required showing of acquired distinctiveness. In other words, it's conceptually stronger than a descriptive term that acquired distinctiveness, but conceptually weaker than an arbitrary mark. However, we have found that Opposer has failed to prove any degree of commercial strength. For its part, Applicant has not shown that significant third-party registration and/or use of NOMAD in the relevant market decreases the level of strength we otherwise would attribute to Opposer's mark.

⁵⁴ *See* 32 TTABVUE 11 (NOMAD Reg. No. 3669923 covering handheld computers for use in geographical information systems field work); *id.* at 17 (use of NOMAD for handheld computer); *id.* at 18 (use of NOMAD for computer mouse).

6. Whether the lack of actual confusion evidence is significant.

There is no evidence of actual confusion ever having occurred in this case, and the parties argue about the significance of this fact. The lack of any instances of actual confusion implicates the eighth likelihood-of-confusion factor listed in *du Pont*: “The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *See du Pont*, 476 F.2d at 1361. This requires us “to look at actual market conditions, to the extent there is evidence of such conditions of record.” *In re Guild Mortgage Co.*, Ser. No. 86709944, 2020 WL 1639916, at *8 (TTAB 2020). The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by Applicant of its mark for a significant period of time in the same markets as those served by Registrant under its marks. *Citigroup*, Opp. No. 91177415, 2010 WL 595586, at *17 (TTAB 2010), *aff’d*, 637 F.3d 1344 (Fed. Cir. 2011); *Gillette Can. Inc. v. Ranir Corp.*, Opp. No. 91082769, 1992 WL 215312, at *6 (TTAB 1992). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred. *See, e.g., Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1338 (Fed. Cir. 2001) (averments of no actual confusion properly discounted due to absence of evidence of length of time and circumstances in which the parties’ goods under respective marks were sold); *Barbara’s Bakery Inc. v. Landesman*, Opp. No. 91157982, 2007 WL 196406, at *5 (TTAB 2007) (probative value of the absence of actual confusion depends on whether circumstances indicate a significant opportunity for actual confusion to have occurred).

Opposer says lack of actual confusion is neutral because there is no evidence in the record that “indicates appreciable and continuous use by Applicant of its mark for a significant period of time in the same markets as those served by Opposer under its mark.”⁵⁵ Applicant notes that, if we credit Opposer’s argument that the goods are related and the trade channels and customers the same, the lack of actual confusion might actually weigh in its favor, but if we reject those arguments then the lack of actual confusion is neutral.⁵⁶

We agree that the record does not present nearly enough evidence of the parties’ uses of their marks for us to find that there has been a reasonable opportunity for confusion to have occurred. We therefore find the lack of any evidence of instances of actual confusion to be neutral on the spotty record in this case.

7. Applicant’s intent in adopting NOMAD as its mark.

“A party’s bad faith in adopting a mark is relevant to the thirteenth *DuPont* factor, which includes any other established fact probative of the effect of use. It requires an intent to confuse.” *QuikTrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 1036 (Fed. Cir. 2021); *see du Pont*, 476 F.2d at 1361. Opposer and Applicant disagree whether Applicant adopted NOMAD in good faith, but neither party argues that this factor should weigh in its favor.⁵⁷ Because the record contains no evidence of Opposer’s bad faith adoption and good faith is essentially irrelevant, *see Lebanon Seaboard Corp. v.*

⁵⁵ 31 TTABVUE 32 (citing *Citigroup*, 2010 WL 595586, at *17; *Gillette*, 1992 WL 215312, at *6).

⁵⁶ *See* 32 TTABVUE 42-43.

⁵⁷ *See* 31 TTABVUE 32-33; 32 TTABVUE 42.

R&R Turf Supply Inc., Opp. No. 91197241, 2012 WL 953406, at *8 (TTAB 2012) (good faith adoption has “very little, if any, persuasive value”), this factor is neutral, *see, e.g., Eveready Battery Co. v. Green Planet, Inc.*, Opp. No. 91180015, 2009 WL 2176668, at *5 (TTAB 2009).

8. Whether the parties’ consent agreements with third parties bear on likelihood of confusion between the parties’ marks and goods in this case.

Applicant argues that “the Board should take into account the parties’ previous coexistence agreements signed with third parties also using a NOMAD trademark, as those agreements demonstrate an established pattern by both Opposer and Applicant of peacefully coexisting with other ‘nomad’ users.”⁵⁸ We decline to do so. Where the **parties** whose marks are before the Board have entered into an agreement reflecting the marks and goods or services at issue, the existence of such an agreement may be an important piece of evidence bearing on consumer perception. *See, e.g., Amalgamated Bank of N.Y. v. Amalgamated Trust & Sav. Bank*, 842 F.2d 1270 (Fed. Cir. 1988) (Board improperly ignored agreement between the parties to the dispute); *Bongrain Int’l (Am.) Corp. v. Delice de France, Inc.*, 811 F.2d 1479 (Fed. Cir. 1987) (same). *See generally du Pont*, 476 F.2d at 1361 (noting that a consent agreement between the owners of the two marks at issue can be relevant).

But Applicant’s argument is directed to agreements between itself and a third party and between Opposer and a different third party. It does not reflect the **parties’** considered judgment about the circumstances before us. Our primary reviewing court

⁵⁸ 32 TTABVUE 44-45.

has frequently observed that no two trademark disputes are alike. Each case comparing one company's products and marks to another's presents its own unique blend of facts and evidence that bear on the ultimate determination of whether confusion is likely. *See, e.g., Curtice-Burns, Inc. v. Nw. Sanitation Prods., Inc.*, 530 F.2d 1396, 1399 (CCPA 1976) ("Each case must be decided on its own facts and the differences are often subtle ones.") (citation omitted). And that is the same sort of calculus that businesspeople make when considering entering into an agreement with another company addressing their respective marks, products, services, business models, and customers—which is why we typically assign significant weight to considered agreements between the parties. *See, e.g., In re N.A.D. Inc.*, 754 F.2d 996, 998 (Fed. Cir. 1985). But, as noted, the agreements here involve parties and goods not before us. Thus, we reject the argument that the parties' prior consent agreements with different third parties, which reflect the unique circumstances in those cases, bear on whether confusion is likely in this case.

9. Weighing our findings on the relevant factors.

Our last step is to weigh together our findings on the individual likelihood-of-confusion factors to determine whether confusion is likely or unlikely. *See, e.g., Charger Ventures*, 64 F.4th at 1384. In so doing, we understand that this is not a simple matter of counting how many factors support each party, but instead reflects weighing how important the factors are relative to one another in this particular case, i.e., how heavily each factor weighs in one or the other party's favor under the particular circumstances, as illuminated by the evidence of record. *See, e.g.,*

Citigroup, 637 F.3d at 1356 (“Citigroup’s approach of mechanically tallying the ... factors addressed is improper, as the factors have differing weights.”); *see also* *Charger Ventures*, 64 F.4th at 1381 (“In any given case, different ... factors may play a dominant role and some factors may not be relevant to the analysis.”) (citation omitted).

Here, we found that the marks are nearly identical, but the goods are unrelated. These two factors ordinarily are the weightiest ones. *See, e.g., Federated Foods*, 544 F.2d at 1103 (“The means of distribution and sale, although certainly relevant, are areas of *peripheral* inquiry. 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.”) (emphases added); *Max Cap.*, 2010 WL 22358, at *1 (“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services.”). Here, they point in different directions.

We found many factors to be neutral, weighing neither for or against a conclusion that confusion is likely. These were purchaser sophistication, the strength of Opposer’s mark, the lack of evidence of actual instances of consumer confusion, Applicant’s intent, and the parties’ consent agreements with third parties.

The additional factors weighing in favor of a conclusion that confusion is likely are that the trade channels and classes of customers overlap to some indeterminate degree. These two factors generally considered, as noted above, to be more peripheral areas of inquiry. *See, e.g., Federated Foods*, 544 F.2d at 1103. In addition, the sparsity

of the evidence concerning them in the record reduces their relative salience in this case even further.

If we were merely counting beans, Opposer has more factors than Applicant. But we are convinced that the goods at issue here, as set forth in the registrations of record and the application, are so far apart that, notwithstanding the near identity of the marks, consumers are unlikely to be confused. *Cf. In re Princeton Tectonics, Inc.*, Ser. No. 77436425, 2010 WL 2604976, at *5 (TTAB 2010) (“[W]e find the evidence of record insufficient to show that the circumstances surrounding the marketing of electric lighting fixtures, on the one hand, and personal headlamps, on the other hand, are such that relevant purchasers would mistakenly believe that the respective goods originate from the same source, even if the same mark is used on both.”).

V. Conclusion

Decision: Because Opposer has failed to prove by a preponderance of the evidence that confusion is likely, we dismiss this opposition.