This Opinion is Not a Precedent of the TTAB

Hearing: June 3, 2026 Mailed: November 2, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

FVDED, LLC

v.

Faded Culture Studio, LLC

Opposition No. 91286343

Nick Guinn and Julie Polansky Bell of Gunn, Lee & Cave, P.C. for FVDED, LLC.

Allison M. Corder of Valauskas Corder LLC for Faded Culture Studio, LLC.

Before Larkin, Cohen, and Brock,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

This case involves two sets of brothers in Chicago, Illinois and San Antonio, Texas who are battling over nationwide registration of the mark FADED CULTURE STUDIO for barbering services.[1]

[1] We take judicial notice that Chicago and San Antonio are more than 1,000 miles apart. *Cf. In re Guild Mortg. Co.*, No. 86709944, 2020 WL 1639916, at *9 (TTAB 2020) (taking judicial notice of the distance between the addresses of the applicant and the cited registrant). The geographic separation of the parties' barbershops; the personalized, face-to-face nature of their barbering services; and the several years of what appears to be relatively peaceful

Faded Culture Studio, LLC ("Applicant"), consisting of the DelRio brothers of Chicago, seeks registration on the Principal Register of FADED CULTURE STUDIO in standard characters for "Barber services; Barber shop services; Hair coloring services; Hair cutting services; Hair styling; Men's grooming services featuring haircuts, hair fades in the nature of hair styling, shaves, beard trims, moustache trims, eyebrow trims, facial treatments" in International Class 44. Applicant claims in its application that it first used the mark anywhere and in commerce at least as early as June 19, 2019.[2]

FVDED, LLC ("Opposer"), consisting of the Barron brothers of San Antonio, opposes registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on Opposer's alleged prior common-law rights in the mark FADED CULTURE for barbering services and clothing.

The case is fully briefed,[3] and counsel for the parties appeared at an oral hearing before the panel on June 3, 2026. As discussed below, the parties agree that confusion

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coexistence with each another collectively suggest the possible benefit of a concurrent use proceeding, or a negotiated settlement, two means through which both parties might have been able to obtain geographically limited federal registrations under appropriate restrictions without one party having to take a proverbial haircut with respect to its rights. But the parties did not elect a concurrent use proceeding, and although they tried to settle, they did not succeed, so we must now decide the essentially winner-take-all case that they litigated.

[2] Application Serial No. 97350074 was filed on April 6, 2022 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). Applicant has disclaimed the exclusive right to use STUDIO apart from the mark as shown.

[3] Citations in this opinion to the briefs and other materials in the case docket refer 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 where the cited materials appear. Opposer's main brief appears at 48 TTABVUE and its reply brief appears at 50 TTABVUE. Applicant's brief appears at 49 TTABVUE.

is likely and that the dispositive issue is priority of use. We dismiss the opposition because Opposer failed to prove it.

I. Record

The record includes the pleadings,[4] the file history of the opposed application, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), and the following materials submitted by the parties:

Opposer

- Notice of Reliance on official records, Applicant's discovery responses, Internet materials, and printed publications, and Exhibits 1-42 thereto, 29 TTABVUE 2-834;[5]

[4] The operative pleadings are Opposer's First Amended Notice of Opposition, 10 TTABVUE, and Applicant's Answer to First Amended Notice of Opposition, 26 TTABVUE. Applicant denied most of the salient allegations in the First Amended Notice of Opposition, but admitted that there is a likelihood of confusion arising from the similarity of the parties' marks and services. Answer to First Amended Notice of Opposition ¶¶ 23-25 (26 TTABVUE 10-11).

Applicant also asserted four purported affirmative defenses: (1) failure to state a claim upon which relief can be granted; (2) priority; (3) "laches, acquiesce [sic], estoppel, or waiver;" and (4) a reservation of rights to rely on other affirmative defenses and to amend its answer accordingly. 26 TTABVUE 13-14. "Failure to state a claim is not a true affirmative defense and will be given no consideration because it relates to an assertion of the insufficiency of the pleading rather than a statement of a defense to the merits of a claim." *Sawstop, LLC v. Felder KG*, No. 91255905, 2025 WL 2400134, at *1 n.5 (TTAB 2025) (quotation omitted). Priority is not a defense here but rather the threshold element of Opposer's Section 2(d) claim, on which Opposer bears the burden of proof. *JNF LLC v. Harwood Int'l Inc.*, No. 92070634, 2022 WL 4379238, at *3 (TTAB 2022). The equitable defenses of laches, acquiescence, estoppel, and waiver are generally not available in oppositions, *see*, *e.g.*, *Barbara's Bakery, Inc. v. Landesman*, No. 91157982, 2007 WL 196406, at *11 n.14 (TTAB 2007), and were not pursued in Applicant's brief, and were thus forfeited or waived. *See*, *e.g.*, *JNF*, 2022 WL 4379238, at *1 n.8 (citations omitted). The purported reservation of rights to assert additional affirmative defenses is a nullity. *See*, *e.g.*, *Keystone Consol. Indus., Inc. v. Franklin Inv. Corp.*, No. 92066927, 2024 WL 3771168, at *1 n.5 (TTAB 2024) (citations omitted).

[5] Some of the exhibits to Opposer's Notice of Reliance were also exhibits to the declarations of its co-owners and managers Adrian and Sergio Barron. We also note that Exhibit 1 to Opposer's Notice of Reliance, 29 TTABVUE 14-103, is the file history of the opposed application, which is automatically of record and did not need to be submitted separately.

- Declaration of Adrian Barron, a co-owner and manager of Opposer, and Exhibits 20-24, 28-32, 35, 38-41, and 43-53 thereto, 30 TTABVUE 2-212;
- Declaration of Sergio Barron, the other co-owner and manager of Opposer, and Exhibits 25-27, 33-34, 37, 40, and 42 thereto, 31 TTABVUE 2-22;
- Declaration of Andrew Medina, one of Opposer's customers, 32 TTABVUE 2-3;
- Declaration of Angel Huerta, one of Opposer's customers, 33 TTABVUE 2-4;
- Declaration of Christopher Arevalos, one of Opposer's customers, 34 TTABVUE 2-4;
- Declaration of Jacqueline Chavez, one of Opposer's employees, 35 TTABVUE 2-3;
- Declaration of Frank Gonzales, one of Opposer's customers, 36 TTABVUE 2-3;
- Declaration of Jonathan Gonzales, one of Opposer's customers, 37 TTABVUE 2-3;
- Declaration of Mayra Jimenez, the mother of one of Opposer's customers, 38 TTABVUE 2-4;
- Declaration of Rene Rodriguez, one of Opposer's customers, and Exhibit A thereto, 39 TTABVUE 2-5;
- Declaration of Richard Moreno, one of Opposer's customers, and Exhibit A thereto, 40 TTABVUE 2-7;
- Declaration of Rubben Moreno, one of Opposer's customers, and Exhibit A thereto, 41 TTABVUE 2-6;
- Declaration of Scott Malouff, one of Opposer's customers, 42 TTABVUE 2-3;
- Declaration of Anthony Rodriguez, one of Opposer's customers, 43 TTABVUE 2-4;
- Rebuttal Notice of Reliance on Internet materials, filed during Opposer's rebuttal period, 46 TTABVUE 2-8; and
- Rebuttal Declaration of Adrian Barron, and Exhibits 28 and 55 thereto, filed during Opposer's rebuttal period, 47 TTABVUE 2-57.

Applicant

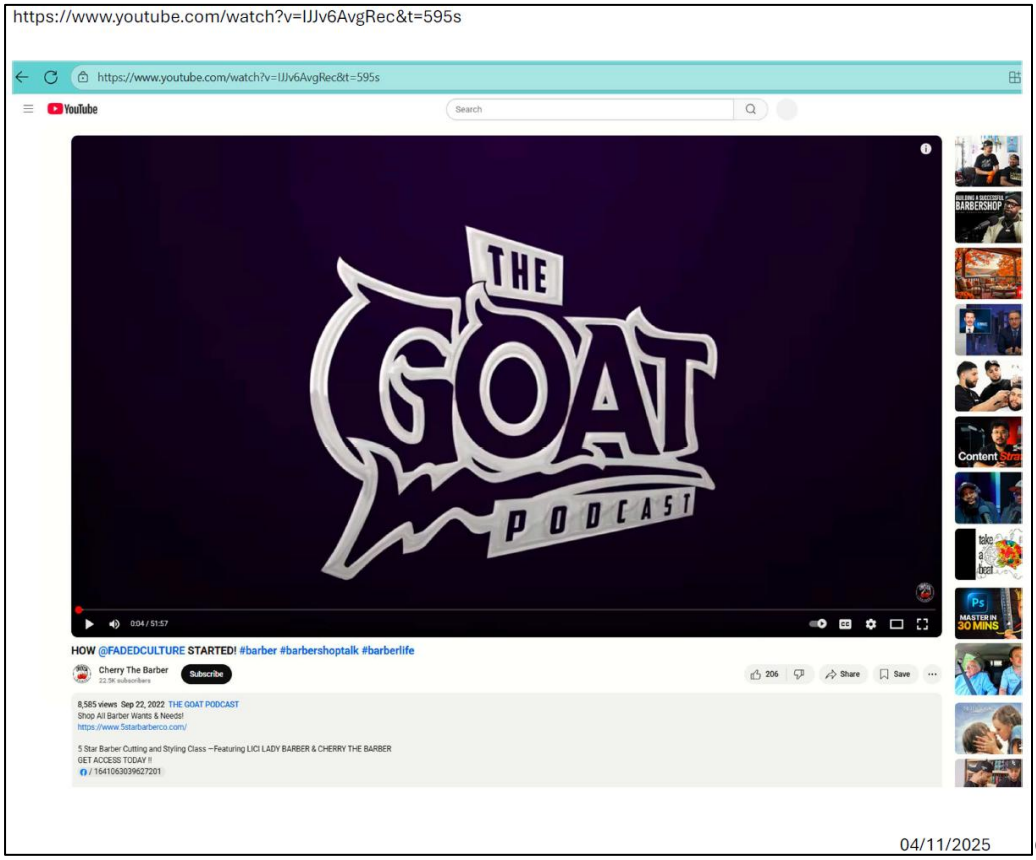
- Notice of Reliance on official records, Internet materials, and Opposer's discovery responses, and Exhibits A-O thereto, 44 TTABVUE 2-492; and
- Declaration of Osvaldo DelRio, one of Applicant's founders, and Exhibits D-T thereto, 45 TTABVUE 2-84.

II. Evidentiary Objection

In an appendix to its main brief, Opposer objects to Exhibit F to Applicant's Notice of Reliance, which consists of what Applicant describes in its Notice of Reliance as a "printout of the publicly available video transcript published September 22, 2022 on the Internet found at https://www.youtube.com/watch?v=IJJv6AvgRec&t=595s, accessed and printed on April 11, 2025," 44 TTABVUE 2, 402-51, and which Applicant claims is a transcript of a podcast interview of the Barron brothers that is available on YouTube. Applicant offers it to show "Opposer's very own statements that it first used FADED CULTURE for barber services in December 2019, some 6 months after Applicant established its rights in the FADED CULTURE STUDIO mark." 49 TTABVUE 6-7. Exhibit F to Applicant's Notice of Reliance is also Exhibit F to the DelRio Declaration, and Opposer also appears to object to Exhibit F submitted in that manner. 48 TTABVUE 39-41.

Mr. DelRio testified that "[w]hile reviewing the Internet, I came across a YouTube video at https://www.youtube.com/watch?v=IJJv6AvgRec&t=595s featuring Adrian Barron and Sergio Barron. **Exhibit E** is a printout of publicly available true and accurate content published September 22, 2022 on the Internet found at https://www.youtube.com/watch?v=IJJv6AvgRec&t=595s, accessed and printed on

April 11, 2025." DelRio Decl. ¶ 18 (45 TTABVUE 5, 11-12) (emphasis in original). We reproduce the referenced Exhibit E below:



Mr. DelRio testified that "YouTube makes available the transcripts for the videos published on the YouTube website" and that "I obtained the transcript of this video by clicking 'more' in the description, and then selecting 'show transcript.'" DelRio Decl. ¶ 19 (45 TTABVUE 6). He further testified that a "transcript panel appeared

[6] Providing a YouTube webpage with a link to a video is insufficient to make the video of record. *Cf. In re Fantasia Distrib., Inc.*, No. 86185623, 2016 WL 5866950, at *8 n.13 (TTAB 2016) (where an applicant's witness authenticated a still frame from a YouTube video, the Board stated that it would "consider the still frame from the video and [the witness's] declaration describing a certain portion of the YouTube video, both of which were included in the record, but we cannot consider the video itself, which we do not have."). We similarly do not have the video of the GOAT Podcast here.

with the video's text, which I cut and paste [sic] into a word document shown at **Exhibit F**," which he described as "a printout of the publicly available true and accurate video transcript published September 22, 2022 on the Internet found at https://www.youtube.com/watch?v=IJJv6AvgRec&t=595s, accessed and printed on April 11, 2025." DelRio Decl. ¶ 19; Ex. F (45 TTABVUE 6, 13-62) (emphasis in original). He then discussed two portions of the transcript by reference to the still frame times. DelRio Decl. ¶¶ 20-21 (45 TTABVUE 6).

Opposer objects to Exhibit F on two grounds: (1) the claimed inaccuracy of the transcript of the YouTube video, and (2) failure to properly authenticate the transcript under Rule 901 of the Federal Rules of Evidence. 48 TTABVUE 39-41.[7]

With respect to the first ground, Opposer argues that Exhibit F "is not true or accurate." *Id.* at 39. According to Opposer,

> YouTube uses machine learning algorithms to automatically generate its captions. . . . YouTube has stated that these automatic captions are not reliable. . . . [and that] "automatic captions are generated by machine learning algorithms, so the quality of the captions may vary," "automatic captions might misrepresent the spoken content due to mispronunciations, accents, dialects, or background noise," and "[y]ou should always review

[7] In its reply brief, Opposer claims that it also asserted an objection in the appendix to its main brief that the interview transcript "violates the best evidence rule under Fed. R. Evid. 1002." 50 TTABVUE 5. The so-called "Best Evidence Rule" in Rule 1002 of the Federal Rules of Evidence, formally captioned "Requirement of the Original," is nowhere mentioned in the appendix to Opposer's main brief, and any objection under it has been waived.

In her rebuttal argument at the oral hearing, Opposer's counsel also argued that Exhibit F should not be considered because it includes out-of-court statements by three participants and is thus hearsay. No such objection was raised in the appendix to Opposer's main brief and this objection has also been waived. If the transcript is otherwise admissible, the statements of the Barron brothers, who Opposer accurately describes as "Opposer's agents," 50 TTABVUE 7, would not be hearsay in any event because they are statements of a party opponent under Rule 801(d)(2) of the Federal Rules of Evidence.

> automatic captions and edit any parts that haven't been properly transcribed").

Id. at 39-40 (record citations omitted).[8]

Opposer argues that "Adrian Barron, who is featured in the YouTube video at issue, provided declaration testimony that he watched the YouTube video and compared the audio from the video with the automatic captioning generated by YouTube in Applicant's Exhibit F," and that he "discovered numerous errors in the transcript that misrepresent what is actually said in the video" and "provided numerous examples of the transcript errors" in his Rebuttal Declaration, *id.* at 40 (record citations omitted), in the form of "an annotated copy of Exhibit F showing the numerous transcript errors that he noticed." *Id.* (record citation omitted).[9]

In support of its authentication objection, Opposer argues that "Applicant provided no foundation establishing that this transcript accurately reflects the audio content of the video" because "[t]here is no certification by a qualified transcriptionist, no declaration from anyone who reviewed the transcript for accuracy, and no evidence

[8] In its Rebuttal Notice of Reliance, Opposer submitted as Exhibit 54 what it described as a "true and correct printout discussing YouTube's use of automatic captioning accessed and printed on October 31, 2025" downloaded from google.com. 46 TTABVUE 3, 5-8.

[9] Opposer states in its main brief that "[d]ue to an inadvertent technical issue during the upload process, the annotations identifying transcription errors in Applicant's Exhibit F did not appear in the version of Exhibit 55 displayed in the prosecution history [sic] at 47 TTABVUE 8–57. The annotated version that Opposer intended to file—and that was uploaded into the TTAB's filing system—is attached hereto as Exhibit 55 to this Appendix A. Opposer served Applicant with a true and correct copy of this annotated Exhibit 55 on December 1, 2025, the same day 47 TTABVUE was filed, and thus Applicant has had notice of this document and its contents since that date. Opposer respectfully requests the Board consider the annotated version of Exhibit 55 attached hereto, which reflects the evidence Opposer intended to present and of which Applicant has been aware since Opposer's rebuttal period deadline." 48 TTABVUE 40 n.127. Applicant does not object to Exhibit 55 attached to Opposer's main brief and we will consider it.

that the transcript was verified against the actual audio." *Id.* at 40-41. Opposer claims that its rebuttal "evidence affirmatively establishes that the transcript is inaccurate." *Id.*

Applicant responds that "Opposer's objection to Applicant's YouTube transcript should be overruled" because "Opposer's own actions during discovery constitute an adoption of the evidence and eliminates any basis for exclusion." 49 TTABVUE 6. Applicant first argues that Opposer waived any objection to the YouTube transcript because Opposer "failed to promptly serve its objection to the YouTube transcript, raising it for the first time in its opening brief." *Id.* at 7 (citations omitted).

Applicant next argues that

> Opposer had full opportunity during discovery to challenge the transcript, request clarification, or raise any concerns regarding accuracy. Instead, Opposer affirmatively participated in refining the evidence by producing its own updated and corrected transcript of the same YouTube video in its rebuttal notice of reliance. . . . By doing so, Opposer acknowledged the relevance of the video, accepted the authenticity of the source, and confirmed that the content is capable of accurate transcription. It is counterintuitive that Opposer corrected Applicant's evidence during discovery and now claims that the same evidence is inadmissible. Opposer's participation in refining the transcript demonstrates that the evidence is reliable and appropriate for consideration. Opposer cannot now disavow the very evidence it helped clarify.

Id. (record citation omitted).

Applicant concludes that

> Applicant has provided the URL, access date, and identification of the video and related transcript, satisfying the Board's requirements for admissibility. Moreover, the underlying video itself is available to the Board, with the transcript provided as an aid to understanding. If

> anything, concerns regarding the accuracy of online materials affect the weight assigned to the evidence, not its admissibility. . . . Opposer's objection to Applicant's YouTube evidence should be overruled. The Board should therefore consider the transcript, along with the underlying video, in evaluating the merits of this proceeding.

Id. at 8 (citations omitted).

In its reply brief, Opposer offers three reasons to reject Applicant's arguments regarding the untimeliness of Opposer's objections and Opposer's self-help measures. First, Opposer argues that its objections were timely because they are substantive, not procedural, in nature. 50 TTABVUE 5-7. According to Opposer, "the inaccuracy and unreliability of the transcript in Exhibit F cannot be cured," *id.* at 7, and "Opposer offered Exhibit 55 [to the Adrian Barron Rebuttal Declaration] to visually demonstrate to the Board the unreliability of Applicant's Exhibit F by highlighting its numerous inaccuracies," not "to authenticate or rehabilitate Applicant's Exhibit F." *Id.*[10]

Second, Opposer argues that it "is not asking the Board to consider Exhibit 55 as evidence of what the parties in the YouTube video are saying. Rather, Opposer asks the Board not to consider the transcript in Applicant's Exhibit F." *Id.* Opposer argues that "the transcription does not designate who is speaking, and thus, it is impossible from Exhibit F to determine whether Opposer's agents are speaking and if so, who, or if the third party is speaking." *Id.*

[10] We need not address Applicant's argument that Opposer waived both objections to the YouTube transcript because Opposer did not object to Exhibit F when Applicant's Notice of Reliance and the DelRio Declaration were filed because we find below that the objections are without merit.

Third, "Applicant's assertion that Exhibit F 'is directed to Opposer's very own statements that it first used FADED CULTURE for barber services in December 2019' inaccurately describes the statements made in Exhibit F and in the YouTube video." *Id.* at 8.

We begin with Opposer's "inaccuracy" objection, which in the context of the evidence here, goes to the weight to be given Exhibit F, not its admissibility. The weight (if any) to be given to evidence of questionable accuracy is a matter for which the Board is a particularly well-suited factfinder. *See*, *e.g.*, *Hangzhou Mengku Tech. Co. v. Shanghai Zhenglang Tech. Co.*, No. 91272143, 2024 WL 5265081, at *3 (TTAB 2024) ("Administrative Trademark Judges are not lay jurors who might easily be misled, confused, or prejudiced by irrelevant or unreliable evidence.").

As discussed above, Opposer notes that transcriptions of this nature may contain inaccuracies because they are the product of machine learning algorithms, and that they need to be reviewed and edited to ensure accuracy. Opposer's witness Adrian Barron, "who is featured in the YouTube video at issue," 48 TTABVUE 40, engaged in exactly such self-help when he watched the video, heard his own voice and the voices of his brother and their interviewer, and prepared what he described as "an annotated copy of Exhibit F showing the numerous transcript errors that he noticed." *Id.* Applicant acknowledges that Opposer "produc[ed] its own updated and corrected transcript of the same YouTube video in its rebuttal notice of reliance," and does not dispute the accuracy of Mr. Barron's "updated and corrected transcript." 49 TTABVUE 7. Under the circumstances, we **overrule** Opposer's "inaccuracy"

objection, but find that as between the original Exhibit F and Mr. Barron's annotated Exhibit F, the parties agree that the latter is more accurate.

With respect to Opposer's authentication objection, Rule 901(a) of the Federal Rules of Evidence provides that "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). "Testimony that an item is what it is claimed to be" from a witness with knowledge of the item may satisfy the requirement of authentication. Fed. R. Evid. 901(b)(1).

For authentication purposes, it was unnecessary for Applicant to "establish[ ] that this transcript accurately reflects the audio content of the video," 48 TTABVUE 40,[11] only that the transcript "is what the proponent claims it is." Fed. R. Evid. 901(a). As discussed above, Mr. DelRio testified without contradiction about how he obtained Exhibit F and what it is. Opposer does not dispute that Exhibit F is, in fact, the transcript of the video that is available through YouTube, and its witness Adrian Barron—who appears in the video—annotated it after viewing the video itself. We **overrule** Opposer's authentication objection, and will consider the transcript, as annotated by Mr. Barron, for whatever probative value it may have.

[11] Opposer's argument might be relevant to a Best Evidence Rule objection that the video is a "recording" within the meaning of Fed. R. Evid. 1001(b) and that Applicant was required to produce the "'original' of [the] recording," namely, "the . . . recording itself," Fed. R. Evid. 1001(d), but as noted above, Opposer waived any Best Evidence Rule objection by not asserting it either when Exhibit F was (twice) introduced into evidence, or in its main brief.

III. The Parties and Their Marks

A. Opposer

Opposer is a company formed by the two Barron brothers that provides barbering services in San Antonio, Texas. A. Barron Decl. ¶¶ 2-7 (30 TTABVUE 2-3). As discussed in detail below, Opposer claims common-law rights in the mark FADED CULTURE for barbering services and clothing.

Opposer's Registration of FADED CULTURE for Clothing

Opposer owns Registration No. 6234753 of the standard-character mark FADED CULTURE for "Head wear; hats; baseball caps; shirts; t-shirts; hoodies; hooded sweatshirts; long sleeved shirts" (the "'753 Registration"). 29 TTABVUE 241-44.[12] The '753 Registration issued on December 29, 2020 from an intent-to-use application filed on August 19, 2019.[13]

[12] As discussed below, Opposer pleaded the '753 Registration as a basis for its statutory entitlement to pursue its Section 2(d) claim and its Section 2(d) claim itself. Applicant did not counterclaim to cancel the '753 Registration when Applicant filed its Answer to First Amended Notice of Opposition on August 23, 2024, but instead instituted a separate proceeding more than a year later on December 29, 2025 seeking to cancel the '753 Registration. 49 TTABVUE 10 n.2. The cancellation proceeding was filed "[w]ithin five years from the date of the registration of the mark . . .," 15 U.S.C. § 1064(1), to avoid having Applicant's Section 2(d) claim be time-barred under Section 14(1). Opposer moved with the consent of Applicant to suspend the cancellation proceeding pending the outcome of this opposition, 5 TTABVUE 2-4 (Cancellation No. 92090487), and the cancellation proceeding is currently in suspension. 6 TTABVUE 1 (Cancellation No. 92090487).

[13] The application that matured into the '753 Registration originally also covered "beanies; bandanas; jerseys; crop tops; jackets; tank tops; sweaters; socks; shorts; sweatpants; pants; leggings; barber capes; bikini tops and bottoms," but those goods were deleted when Opposer filed its Statement of Use on November 5, 2020. 29 TTABVUE 314.

Opposer's Pending Application to Register FADED CULTURE[14]

Opposer also owns pending Application Serial No. 97890119 (the "'119 Application"), filed on April 15, 2023, to register the standard-character mark FADED CULTURE for the following goods in Class 8: "scissors; razors; barber tools, namely, hair cutting scissors, hair cutting shears, shave kits, slide razor holders, swing lock razor holders, Turkish style razor holders, razor holders, shaving gel for barbers, enhancement cards for barbers," based on claimed use in commerce,[15] and for "hair clippers," based on claimed intention to use. 29 TTABVUE 360. The '119 Application originally also covered "clothing, including, tops, bottoms, headwear, capes for use in salons and barber shops; barber smocks," which were misclassified in Class 41, *id.* at 469,[16] and "providing online non-downloadable programming, text, graphics, resources, articles, images, photos, video multimedia, audio multimedia,

[14] Faded Culture Academy, LLC, which is owned and managed by the Barron brothers and which, in turn, operates a barber school in San Antonio, A. Barron Decl. ¶ 6 (30 TTABVUE 3), owns intent-to-use Application Serial No. 98511783 to register the standard-character mark FADED CULTURE ACADEMY for "Provision of educational courses relating to barbering and hair services; Educational services, namely, conducting classes in the field of barbering and hair services; Educational services, namely, conducting online classes in the field of barbering and hair services" in Class 41. 29 TTABVUE 527. The application is in suspension based on prospective Section 2(d) citations of the opposed application and Opposer's Application Serial No. 97890119 discussed below. *Id.* at 529.

Opposer also filed intent-to-use Application Serial No. 87928593 on May 19, 2018 to register the standard-character mark FVDED CULTURE for "tops as clothing" in Class 25 (the "'593 Application"). 29 TTABVUE 659-64. The FVDED CULTURE mark was refused registration based on a registration of the standard-character mark FVDED for "promotional merchandise, namely, t-shirts, sweatshirts and hats," *id.* at 580-87, and the '593 Application became abandoned. *Id.* at 558.

[15] The '119 Application claimed first use of the mark and first use of the mark in commerce for these barbering goods at least as early as September 5, 2022. 29 TTABVUE 360.

[16] The '119 Application claimed first use of the mark and first use of the mark in commerce for these clothing goods at least as early as December 14, 2022. 29 TTABVUE 469.

audiovisual multimedia and audiovisual programs in the fields of barbering, hair styling, men's culture, and men's style; organizing educational and entertainment events in the fields of barbering, hair styling, men's culture, and men's style; providing a website featuring information and articles in the fields of barbering, hair styling, men's culture, and men's style; multimedia program series featuring audio and audio visual media; distribution of live visual and audio performances via the Internet and mobile platforms" in Class 41.[17] These goods and services were subsequently deleted from the '119 Application. *Id.* at 400. Further examination of the '119 Application has been suspended pending the outcome of this proceeding based on a prospective citation of the opposed application against the '119 Application. *Id.* at 381-82.

The record does not indicate that Opposer has ever sought registration of FADED CULTURE for barbering services per se.

B. Applicant

Applicant provides barbering services in the Chicago area under the mark FADED CULTURE STUDIO and began operations in 2019. DelRio Decl. ¶ 4 (45 TTABVUE 2). In addition to the opposed application, Applicant owns Registration No. 7384539 of the standard-character mark FADED SOCIETY for "Clothing, namely, beanies, bandanas, hats, jackets, shirts, shorts, socks, sports jerseys, sports shirts, sweaters, sweatshirts," 29 TTABVUE 105, and pending Application Serial No. 98093648 to

[17] *Id.* at 470. The '119 Application claimed first use of the mark and first use of the mark in commerce for these services at least as early as April 1, 2020. *Id.*

register the standard-character mark FADED SOCIETY for "Arranging and conducting of training workshops in the field of hair and barbering; Educational services, namely, conducting programs in the field of hair and barbering; Providing on-line newsletters in the field of hair and barbering; Providing training in the field of hair and barbering" in Class 41 and "Barber services; Barber shop services; Hair coloring services; Hair cutting services; Hair styling; Men's grooming services featuring haircuts, hair fades in the nature of hair styling, shaves, beard trims, moustache trims, eyebrow trims, facial treatments" in Class 44. *Id.* at 133.

IV. Entitlement to a Statutory Cause of Action

"Entitlement to a statutory cause of action is an element of the plaintiff's case in every inter partes proceeding." *Cielo e Terra, S.P.A. v. Hoteles y Viñedos del Valle de Guadalupe S.A. de C.V.*, No. 91287216, 2026 WL 2624328, at *2 (TTAB 2026) (citations omitted). "Section 13 of the Trademark Act, 15 U.S.C. § 1063, provides that [a]ny person who believes that he would be damaged by the registration of a mark . . . may . . . file an opposition with the USPTO . . . ." *Id.* (internal quotation omitted).

"A plaintiff may oppose registration of a mark when (1) [its] interests are within the zone of interests protected by the statute [(i.e., it has a real interest in the outcome of the proceeding)] and (2) [it] has a reasonable belief in damage that would be proximately caused by registration of the mark in violation of the opposition statute." *Id.* at *3 (internal quotation omitted).

Opposer argues that it has "shown its entitlement to bring and maintain the present opposition by its assertion with proof of a claim of priority and likelihood of

confusion that is not wholly without merit" through "making of record its valid registration for the mark FADED CULTURE for clothing and apparel and pending application for the mark FADED CULTURE for various barber related goods, all owned by Opposer and on which Opposer bases its Trademark Act Section 2(d) claim." 48 TTABVUE 16 (citations omitted). Applicant does not contest Opposer's statutory entitlement to oppose.

We find that Opposer has established its statutory entitlement to oppose on at least two bases. First, Opposer properly submitted its pleaded '753 Registration of FADED CULTURE for clothing in Class 25, "which 'demonstrates a plausible Trademark Act Section 2(d) claim against the involved application for the mark' [FADED CULTURE STUDIO]." *Cielo e Terra*, 2026 WL 2624328, at *3 (quoting *Heil Co. v. Tripleye GmbH*, No. 91277359, 2024 WL 4925901, at *15 (TTAB 2024)). Second, Opposer properly submitted the file history of its pending '119 Application to register FADED CULTURE for various barbering equipment, in which the examining attorney noted Applicant's application as a possible bar to registration and has suspended further examination of the application pending the outcome of this proceeding. 29 TTABVUE 364-65. "This is sufficient to establish Opposer's entitlement to bring this opposition." *Rapid Inc. v. Hungry Marketplace, Inc.*, No. 91236033, 2022 WL 2965804, at *6 (TTAB 2022) (citations omitted).

V. Analysis of Likelihood of Confusion Claim

"Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits registration of a mark that '[c]onsists of or comprises a mark which 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 [services] of the applicant, to cause confusion, or to cause mistake, or to deceive." *Cielo e Terra*, 2026 WL 2624328, at *3 (quoting *Sage Therapeutics, Inc. v. Sageforth Psych. Servs., LLC*, No. 91270181, 2024 WL 1638376, at *4 (TTAB 2024) (quoting 15 U.S.C. § 1052(d)). "To prevail on its Section 2(d) claim, Opposer must show by a preponderance of the evidence that it has either a registration of or priority in its . . . mark, and that Applicant's use of its mark is likely to cause confusion, mistake, or deception regarding the source of the [services] identified in its Application." *Id.* (quoting *Sage Therapeutics*, 2024 WL 1638376, at *4).

A. Priority

The parties agree that priority is the dispositive issue here. "For purposes of priority, 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." *Major League Baseball Players Ass'n v. Chisena*, No. 91240180, 2023 WL 2986321, at *4 (TTAB 2023) (internal quotation and citations omitted), *aff'd*, 2026 WL 60319 (Fed. Cir. Jan. 8, 2026). *See also Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1162 (Fed. Cir. 2002).

When an opposer properly introduces into evidence a pleaded registration, and the applicant does not counterclaim to cancel it, priority is not at issue with respect

to the mark and goods or services in the registration. *Cielo e Terra*, 2026 WL 2624328, at *4 (citation omitted). Here, Opposer properly introduced its '753 Registration and Applicant did not counterclaim to cancel it, but as noted above,[18] instead instituted a separate proceeding to cancel the "753 Registration based on a claim of likelihood of confusion after trial concluded in this opposition. We need not address whether Applicant's separate cancellation claim should have been asserted as a compulsory counterclaim in this opposition proceeding, *see generally* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") Section 313.04 and cases cited therein (June 2026), because we find that Opposer does not rely on the '753 Registration for priority.

Although Opposer cites the '753 Registration as one basis for its statutory entitlement to oppose in its main brief, 48 TTABVUE 16, Opposer's arguments for priority, which immediately follow its arguments for statutory entitlement, *id.* at 16-22, focus entirely on its alleged priority of common-law use of FADED CULTURE for barbering services and clothing, and never mention the '753 Registration. The '753 Registration is also never mentioned in Opposer's reply brief, in which Opposer concludes that it "has established priority in FADED CULTURE for barbering services by a preponderance of the evidence." 50 TTABVUE 24.

We find that Opposer, asserting common-law use that predates the filing date of the application that matured into the '753 Registration, relies on its "prior trademark or service mark use" of FADED CULTURE for barbering services and clothing,

[18] *See* n.12 *supra*.

Herbko, 308 F.3d at 1162, to establish its priority, not its pleaded '753 Registration, and we need not consider the pleaded '753 Registration as a basis for Opposer's priority.

Before we discuss the evidence of common-law priority, we must address two preliminary matters.

1. Claimed Assignment of the FADED CULTURE Mark

In its main brief, Opposer claims that the FADED CULTURE mark was used by the Barron brothers prior to Opposer's formation, and that "[i]n 2017, [they] transferred all rights in the FADED CULTURE mark, together with the goodwill of the business symbolized by the trademark, to the Opposer, FVDED, LLC, which the Barron brothers co-own and manage." 48 TTABVUE 7. Opposer's counsel acknowledged at the oral hearing that there is no evidence of a written transfer, but "[i]t is well settled that an assignment in writing is not necessary to pass rights in a [common-law] trademark." *Diebold, Inc. v. Multra-Guard, Inc.*, No. 91052196, 1975 WL 20913, at *6 (TTAB 1975).[19] "The acquisition of such rights may be established by oral testimony and if such oral testimony is clear and uncontradictory testimony it may be accepted to prove the assignment." *Id.* (citation omitted).

The problem here is that there is **no** oral testimony regarding the claimed assignment, much less "clear and uncontradictory testimony," because neither of the

[19] A writing is required, however, with respect to marks shown in registrations and pending applications under 15 U.S.C. § 1060(a)(3) ("Assignments shall be by instruments in writing duly executed.").

Barron brothers testified about an assignment.[20] We have only the argument of Opposer's counsel, which "is no substitute for evidence." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (internal quotation omitted).

Applicant does not address the absence of evidence of an assignment in its brief, however, and we will deem Applicant's silence to mean that it does not dispute that whatever trademark rights the Barron brothers developed while they conducted their business in the form of the Barron's Barbershop general partnership were transferred to Opposer FVDED, LLC upon its formation.

2. Opposer's Claimed Prior Use of Marks Other Than FADED CULTURE

The "Federal Circuit has instructed us that in considering evidence of prior use, we must not consider individual portions in isolation, but must '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.'" *Kemi Organics, LLC v. Gupta*, No. 92065613, 2018 WL 2230555, at *5 (TTAB 2018) (quoting *W. Fla. Seafood Inc. v. Jet Rests. Inc.*, 31 F.3d 1122, 1125-26 (Fed. Cir. 1994) (finding priority of use of a mark for restaurant services on the basis of three advertisements in local newspapers, a Florida state service mark registration, three regulatory licenses, and a food service inspection report)). The second issue arises because, as shown and discussed below, almost all

[20] The Barron brothers each testified only that "[p]rior to forming and registering FVDED, LLC with the Texas Secretary of State, [we] ran our barbershop as a general partnership under the name Barron's Barbershop." A. Barron Decl. ¶ 7 (30 TTABVUE 3); S. Barron Decl. ¶ 6 (31 TTABVUE 3). Neither testified as to when Opposer was formed and registered, or that there was an assignment of rights from their partnership to Opposer. As discussed below, they also did not testify as to when their barbershop stopped operating as "Barron's Barbershop."

of the puzzle pieces here show or refer to marks other than FADED CULTURE, including FADED alone, FΛDED alone, FVDED CULTURE, FXDED CULTURE, F∀DED CULTURE, and FΛDED CULTURE, 50 TTABVUE 16, all of which Opposer describes as "stylistic variations" and "minor stylistic displays" of FADED CULTURE. *Id.* at 17-18.

Applicant argues that

> [t]he record shows that Opposer used multiple different marks, none of which are legally equivalent to FADED CULTURE for barber services. These variations appear only on clothing and do not (1) qualify as legal equivalents of the claimed mark for barber services, (2) create the same continuing commercial impression, or (3) permit tacking across different goods and services. As a result, Opposer cannot rely on these uses to claim a priority date earlier than Applicant's first use of its FADED CULTURE STUDIO mark.

49 TTABVUE 11.[21]

In its reply brief, Opposer makes two primary arguments in response.[22] First, Opposer claims that it "does not need to rely on tacking because Opposer's prior use of variations of FADED CULTURE, including FVDED CULTURE, FXDED CULTURE, F∀DED CULTURE, and FΛDED CULTURE, are minor stylistic displays

[21] The doctrine of "tacking" allows a party to "clothe a new mark with the priority of an older mark" when "the original and revised marks are 'legal equivalents' in that they create the same continuing commercial impression." *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418, 419-20 (2015) ("*Hana Bank*").

[22] Opposer makes a third argument that "[r]egardless of whether these minor stylistic variations of FADED CULTURE can be used to show priority, Opposer provided testimony from witnesses, which is corroborated by documentary evidence showing use of the FADED CULTURE mark to promote Opposer's barbering services before June 2019." 50 TTABVUE 19.

of the same FADED CULTURE mark," and that "[t]hese types of minor stylistic variations in presentation of a trademark do not destroy trademark rights or create distinct marks." *Id.* at 16. Opposer cites *Paris Glove of Can., Ltd v. SBC/Sporto Corp.*, No. 92044132, 2007 WL 2422997 (TTAB 2007) and *Humble Oil & Refin. Co. v. Sekisui Chem. Co. of Japan*, No. 42401, 1970 WL 9925 (TTAB 1970), in support of this argument. 50 TTABVUE 16-17.

Second, Opposer claims that tacking is nevertheless available to it as a means to show priority because all of these claimed "minor stylistic variations" of FADED CULTURE "have the same continuing commercial impression" because "[t]here is evidence showing that the relevant public perceived these minor stylistic variations of the FADED CULTURE mark as the same mark" in the form of "declarations from Opposer's current and former clients, testifying that Opposer used variations of the term 'faded' in FADED CULTURE, including FVDED, FXDED, and FΛDED, and that the witnesses understood these variations to be mean 'faded.'" *Id.* at 17-18.

We begin with Opposer's first argument that tacking is unnecessary because the several prior "minor stylistic variations" of FADED CULTURE are all one and the same FADED CULTURE mark. Neither case cited by Opposer supports this argument.

The *Humble Oil* case involved the opposer's mark ESCON and the applicant's mark ESLON. The applicant counterclaimed to cancel the opposer's registration of ESCON on the ground that the applicant was the prior user based on its use of the mark S-LON. In the counterclaim, the applicant alleged that ESLON was "but a mere

modification of its trademark 'S-LON' or 'S'-LON' which has been used in commerce by [the applicant] from a date prior to the date of first use by [the opposer] of the registered mark 'ESCON.'" *Humble Oil*, 1970 WL 9925, at *2. The opposer denied that ESLON was a modified version of S-LON.

The Board ultimately "conclude[d] that 'S-LON' and 'ESLON' are legal equivalents" and that the applicant could rely on its prior use of S-LON in the United States, *id.* at *10, in essence allowing the applicant to tack its prior use of S-LON onto its use of ESLON for purposes of establishing its priority. *Humble Oil* does not support Applicant's first argument because it is clear that the Board applied the doctrine of tacking without expressly saying so.

Paris Glove involved an attempt to cancel a registration of a mark consisting of the words AQUA STOP in the form shown below

AQUA
STOP

The registration was renewed based on the form of the mark in the specimen shown below

Paris Glove, 2007 WL 2422997, at *4.[23] The issue before the Board was whether summary judgment was appropriate on the petitioner's claims that the respondent had abandoned the mark, or fraudulently renewed it, by failing to use it in the stacked-presentation form in which it was originally registered.

The Board found that there was no "material alteration" of the registered mark for purposes of the petitioner's claims because "[m]arks entirely comprised of words can sometimes be varied as to their style of lettering, size and other elements of form without resulting in a material alteration of the mark," and because "the commercial impression of the mark is dependent upon the literal terms AQUA STOP and not on the rectangular, semicircular or linear forms of display. The particular stylizations of the semicircular and linear forms simply do not change the essential nature of the rectangular form mark." *Id.* at *6. *Paris Glove* does not support Opposer's first argument because we are not dealing with the issue of possible amendment of a registration of the FADED CULTURE mark under the material alteration standard.

If any of the uses of FADED, FΛDED, FVDED CULTURE, FXDED CULTURE, F∀DED CULTURE, and FΛDED CULTURE give Opposer priority of use of FADED CULTURE, it is because one or more of those uses may be tacked onto Opposer's actual use of FADED CULTURE. We thus turn to the question of whether Opposer may rely on tacking to establish priority.

[23] The respondent in *Paris Glove* also filed an amendment of its mark to render it in the semicircular form in which appeared in its maintenance specimen. *Paris Glove*, 2007 WL 2422997, at *4.

Tacking is typically invoked by a defendant in an affirmative defense or counterclaim that the defendant has priority over the plaintiff because the defendant can tack prior use of another mark onto the use of its current mark, *see*, *e.g.*, *Hana Bank*, 574 U.S. at 421; *Anthony's Pizza & Pasta Int'l, Inc. v. Anthony's Pizza Holding Co.*, No. 91171509, 2009 WL 4075365, at *5 (TTAB 2009), but tacking may also be invoked by a plaintiff. *See*, *e.g.*, *Jimlar Corp. v. Army & Air Force Exch. Serv.*, No. 83984, 1992 WL 280636, at *6 (TTAB 1992). The Board has held that "'tacking' is a defense that must be pleaded to put opposer on notice of new matter that applicant is placing at issue (i.e., a new mark previously used by applicant that is the legal equivalent of applicant's opposed mark, and provides the basis for applicant to claim prior use," *H. D. Lee Co. v. Maidenform, Inc.*, No. 91168309, 2008 WL 1976596, at *4 (TTAB 2008), and the same notice principle applies where the plaintiff seeks to tack. Accordingly, we must first determine whether Opposer gave Applicant adequate notice through its pleadings that at trial Opposer intended to tack prior use of one or more specific prior marks onto its use of FADED CULTURE for purposes of establishing its priority.

Opposer's original Notice of Opposition alleged use of the FVDED CULTURE mark and expressly discussed tacking. Opposer alleged, inter alia, (1) that "[s]ince at least as early as May 2018, Opposer has used the trademark FVDED CULTURE in connection with barbering services, educational and entertainment services related to barbering, hair styling, and popular culture" and that a "true and correct copy of a screenshot of post from Opposer's Instagram account is attached hereto as Exhibit

A," 1 TTABVUE 4 (Not. of Opp. ¶ 2); (2) that "[a]t least as early as September 5, 2022, Opposer began using the legally equivalent FADED CULTURE trademark in connection with barbering services, educational and entertainment services related to barbering, hair styling, and popular culture (collectively with the FVDED CULTURE trademark referred to as the "Faded Culture Mark")," *id.* (Not. of Opp. ¶ 3); and that "Opposer's prior use of the legally equivalent FVDED CULTURE trademark, which creates the same, continuing commercial impression such that consumers consider both as the same mark, cements Opposer as the clear priority user" because the "Supreme Court has held that two marks may be 'tacked' when the original and revised marks are 'legal equivalents' or two marks that 'create the same, continuing commercial impression' so that 'consumers consider both as the same mark.'" *Id.* at 7 (Not. of Opp. ¶ 21) (citing *Hana Bank*).

Applicant moved to dismiss the original Notice of Opposition, arguing, inter alia, that "Opposer relies on the unregistered mark FVDED CULTURE without alleging that it used this term as a trademark such as displayed in the sale or advertising of services or that services were rendered in commerce," that Opposer "further pleads that it used FADED CULTURE in connection with barbering services as early as September 5, 2022," a date "well after June 19, 2019 that is Applicant's first use of its mark with barber services," and that the "Notice of Opposition does not sufficiently allege Opposer's use prior to Applicant's first use to warrant refusal of the Application." 8 TTABVUE 3.

In response to the motion to dismiss, Opposer did not defend the sufficiency of its pleading, but instead filed its First Amended Notice of Opposition. The First Amended Notice of Opposition never mentioned the FVDED CULTURE mark, or any mark other than FADED CULTURE, and contained no allegations regarding tacking. Opposer alleged, inter alia, (1) that "[s]ince at least as early as May 2018, Opposer has used the trademark FADED CULTURE in U.S. commerce in connection with barbering services, educational and entertainment services related to barbering, hair styling, and popular culture," 10 TTABVUE 3 (First Amended Not. of Opp. ¶ 2);[24] (2) that "[s]ince at least as early as 2018, Opposer has used the FADED CULTURE trademark in U.S. commerce in connection with clothing, namely, t-shirts," *id.* (First Amended Not. of Opp. ¶ 3; (3) that "Opposer's continuous and ongoing use of the FADED CULTURE trademark in interstate commerce in connection with at least barbering services, educational and entertainment services related to barbering, hair styling, and popular culture, and clothing, namely, t-shirts . . . commenced almost a half-decade prior to the filing of the Subject Application and at least a year prior to Applicant's declared date of first use of the Subject Mark," *id.* at 4-5 (First Amended

[24] Paragraph 2 in Opposer's First Amended Notice of Opposition referenced Exhibit A, which is a May 17, 2018 page from Opposer's Instagram account on which the words FVDED CULTURE appear after Sergio Barron's Instagram user handle "@sergiobarron_" and the words "Just keep doing shit you love" that was also Exhibit A to the original Notice of Opposition. 10 TTABVUE 9. In its Answer to the First Amended Notice of Opposition, Applicant "admit[ted] Exhibit A shows the mark FVDED CULTURE" and averred that "[o]n May 19, 2018 Opposer submitted US Federal trademark serial no. 87928593 for the mark FVDEDCULTURE based on a bona fide intent to use the mark on 'tops as clothing'. This application was abandoned on January 17, 2020." 26 TTABVUE 3. This suggests that following the filing of the First Amended Notice of Opposition, Applicant understood that Opposer was claiming that FVDED CULTURE was a separate and distinct mark from FADED CULTURE, at least for clothing, not a forerunner to it.

Not. of Opp. ¶ 11); (4) that "Opposer has priority of rights based on Opposer's ongoing use of the FADED CULTURE trademark in U.S. commerce in connection with Opposer's Goods and Services since at least as early as May 2018," *id.* at 6 (First Amended Not. of Opp. ¶ 22); (5) that Applicant's "Mark is confusingly similar to Opposer's FADED CULTURE trademark because it contains identical, dominant wording 'FADED CULTURE'," *id.* (First Amended Not. of Opp. ¶ 23); and (6) that Applicant's "Mark is therefore similar in sound, pronunciation, appearance, and commercial impression to the Opposer's FADED CULTURE trademark." *Id.* (First Amended Not. of Opp. ¶ 24).[25] These allegations did not put Applicant on notice that Opposer continued to intend to tack prior use of FVDED CULTURE onto its use of FADED CULTURE for purposes of priority; to the contrary, they suggested that Opposer was no longer invoking tacking, but rather was claiming that it would prove use of FADED CULTURE itself "at least as early as May 2018." Following the filing of the First Amended Notice of Opposition, tacking had become an unpleaded (and apparently abandoned) claim.

"Generally, parties in proceedings before the Board may not rely on unpleaded claims, issues or defenses, and the Board will not consider them." *DowntownDC Bus. Improvement Dist. v. Clarke*, No. 91275100, 2024 WL 4449409, at *9 (TTAB 2024). "A party's pleading must be amended under Fed. R. Civ. P. 15(b) to assert the

[25] Some of the claimed earlier marks appear in exhibits to both Opposer's Notice of Opposition and First Amended Notice of Opposition, including, as noted above, Exhibit A, the May 17, 2018 page from Opposer's Instagram account. This exhibit appears to have been the use of FVDED CULTURE that was addressed in Applicant's motion to dismiss. 8 TTABVUE 3-5.

[unpleaded] claim, issue or defense, or the claim, issue or defense must have been tried by express or implied consent for the Board to consider it." *Id.* Opposer never further amended its First Amended Notice of Opposition to reassert tacking, so "it must have been tried by express or implied consent under Fed. R. Civ. P. 15(b)(2) in order to be considered at final hearing." *Id.* (citation omitted).

"Implied consent to the trial of an unpleaded issue can be found only where the nonoffering party (1) raised no objection to the introduction of evidence on the issue, and (2) was fairly apprised that the evidence was being offered in support of the issue." *Iron Balls Int'l Ltd. v. Bull Creek Brewing, LLC*, No. 92079099, 2024 WL 2844425, at *10 n.52 (TTAB 2024). "Fairness considerations are paramount in assessing whether an issue has been tried by implied consent – there must be an absence of doubt that the non-offering party is aware that the issue is being tried." *Id.* (citation omitted).

During its trial period, Opposer submitted evidence of use of what Opposer calls "minor stylistic variations" of the FADED CULTURE mark, including evidence of use of the FVDED CULTURE mark alleged in Opposer's original Notice of Opposition. Both Barron brothers testified identically that "[o]ver the years we have occasionally used several stylistic variations FVDED, FXDED, F∀DED CULTURE and FΛDED followed by CULTURE. All these terms are pronounced as 'faded' and I never heard anyone pronounce it [sic] otherwise." A. Barron Decl. ¶ 30 (30 TTABVUE 16); S. Barron Decl. ¶ 15 (31 TTABVUE 21). Seven of Opposer's 12 customer/employee witnesses testified about the use of such marks. Huerta Decl. ¶ 11 (33 TTABVUE 3)

("FVDED and FΛDED"); Arevalos Decl. ¶ 12 (34 TTABVUE 3) ("FVDED"); F. Gonzales Decl. ¶ 10 (36 TTABVUE 3) ("FΛDED"); J. Gonzales Decl. ¶ 10 (37 TTABVUE 3) ("FVDED and FΛDED"); Richard Moreno Decl. ¶ 11 (40 TTABVUE 3) ("FVDED, FXDED, and FΛDED"); Rubben Moreno Decl. ¶ 11 (41 TTABVUE 3) ("FVDED, FXDED, and FΛDED"); Rodriguez Decl. ¶ 11 (43 TABVUE 3) ("FVDED"). Applicant did not object to the testimony of any of these witnesses regarding Opposer's claimed use of these other marks.

Consistent with its First Amended Notice of Opposition, the body of Opposer's main brief discusses only the FADED CULTURE mark, and never discusses tacking. Applicant acknowledges in its brief that "[t]he record shows that Opposer used multiple different marks," 49 TTABVUE 11, stating that "Opposer addresses these inconsistent, multiple, and materially different uses of the marks in two sentences that appear in footnote 71 of Opposer's Brief . . . ." *Id.* at 29.[26] But rather than arguing that any unpleaded claim relying on these uses, including tacking, was not before the Board at final hearing because it had been abandoned in Opposer's First Amended Notice of Opposition, Applicant states that "[a]ddressing these variations in a footnote underscores the problem: the terms shown in these exhibits are not legal equivalents, do not create the same continuing commercial impression, and cannot

[26] In the referenced footnote, Opposer states that "[o]ver the years Opposer occasionally used stylistic variations of the term FADED, including FVDED, FXDED, F∀DED, and FΛDED, followed by CULTURE. All these variations are merely stylistic displays of the term FADED and are all pronounced as 'faded.'" 48 TTABVUE 18 n.71. As discussed above, this is the linchpin of Opposer's argument that each of these marks, and FADED CULTURE, are one and the same mark.

support any claim of tacking to achieve a priority date." *Id.* Applicant proceeds to argue that none of the "multiple different marks" "are legally equivalent to FADED CULTURE for barber services," *id.*, the test for tacking, and that "[t]hese variations appear only on clothing and do not (1) qualify as legal equivalents of the claimed mark for barber services, (2) create the same continuing commercial impression, or (3) permit tacking across different goods and services." *Id.* Applicant concludes that "Opposer cannot rely on these uses to claim a priority date earlier than Applicant's first use of its FADED CULTURE STUDIO mark," *id.*, because "Opposer did not bear the burden to show that all of its variations of marks 'create the same, continuing commercial impression' so that consumers 'consider all of them as the same mark that identify the same source'," and that "[w]hen used in connection with clothing, the variation of marks FADED, FVDED, FXDED, F∀DED, FΛDED, FXDED, with or without CULTURE, are not 'legal equivalents'" because "[t]hey simply do not create the same, continuing commercial impression so that consumers consider both as the same mark." *Id.* at 31 (citations omitted).

Accordingly, even though Opposer did not move to amend its First Amended Notice of Opposition to reassert tacking, and "gave no indication that this evidence would be used in support of such a claim until it submitted its brief," *Iron Balls*, 2024 WL 2844425, at *10 n.52, Applicant's brief does not claim that Applicant was surprised to be confronted with a renewed tacking claim, or unable to defend it, and Applicant addresses tacking on the merits, 49 TTABVUE 31-33, concluding that "Opposer has failed to meet its heavy burden required to tack its first use of FADED,

FVDED, FXDED, F∀DED, FΛDED, FXDED (with or without CULTURE) to FADED CULTURE." *Id.* at 33. Under the circumstances, we find that the issue of tacking was tried by the implied consent of the parties, and we will consider Opposer's claim that it can tack each of these uses onto its use of FADED CULTURE to establish its priority.[27]

"The standard for a trademark owner to invoke tacking is strict," *Bertini v. Apple Inc.*, 63 F.4th 1373, 1377 (Fed. Cir. 2023) (citation omitted), requiring "showing more than a likelihood of confusion between the two marks." *Id.* (citation omitted). The Federal Circuit also held in *Bertini* that a "trademark owner must show tacking is available for each good or service for which it claims priority on that ground," *id.* at 1379 (citation omitted), and that "the goods or services must be substantially identical for tacking to apply." *Id.* at 1381. By definition, clothing and barbering services are not "substantially identical" and thus the use of any prior mark for clothing per se cannot be tacked onto Opposer's current use of FADED CULTURE for barbering services to establish priority of use of FADED CULTURE for those services.[28]

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[27] Tacking does not contemplate the merger of two or more distinct prior marks into a later single mark. *Hana Bank*, 574 U.S. at 419-20 (tacking allows a party to "clothe a new mark with the priority of an older mark" when "the original and revised marks are 'legal equivalents' in that they create the same continuing commercial impression."). Accordingly, to the extent that Opposer relies on all of the claimed prior uses of other marks, Opposer must show that each separate mark is the legal equivalent of FADED CULTURE.

[28] In *Bertini*, the Federal Circuit explained that "[g]oods and services are substantially identical for purposes of tacking where the new goods or services are within the normal evolution of the previous line of goods or services. This inquiry depends, at least in part, on whether consumers would generally expect the new goods or services to emanate from the same source as the previous goods or services." *Bertini*, 63 F.4th at 1381 (holding that

3. Applicant's Date of First Use of its FADED CULTURE STUDIO Mark

We begin by determining Applicant's date of first use, which fixes the date before which Opposer must have used its common-law FADED CULTURE mark, or a legal equivalent, for barbering services or clothing. *See Kemi Organics*, 2018 WL 2230555, at *3-4. For priority purposes, Applicant can rely on its April 6, 2022 application filing date as its constructive date of first use of its mark, *Sawstop*, 2025 WL 2400134, at *5, or it can try to prove an earlier date of first use through evidence. *Id.* Applicant seeks here to prove use of FADED CULTURE earlier than its April 6, 2022 constructive use filing date.

The application claims a first use date of at least as early as June 19, 2019, which Applicant describes in its brief as the date on which it "first opened its business, booked appointments, and performed barber services . . . ." 49 TTABVUE 9 (citing DelRio Decl. ¶¶ 13-14; Exs. M, Q, S (45 TTABVUE 4, 69-70, 77-78, 81-82)). Opposer quibbles with this date, arguing that "an Instagram post published on June 27, 2019 on Applicant's Instagram account states Applicant was 'Opening very soon'," 48 TTABVUE 14 (citing DelRio Decl. ¶ 15; Ex. N (45 TTABVUE 5, 71-72), and that an "Instagram post published on August 14, 2019 on Applicant's Instagram account states Applicant's grand opening was August 17, 2019, which indicates Applicant's

"gramophone records" and "live musical performances" were not "substantially identical."). As discussed above, clothing and barbering services are not "substantially identical." We discuss below whether the use of any prior mark on clothing worn while rendering barbering services may be considered use of that mark **for** barbering services that may be tacked onto use of FADED CULTURE for those services if the involved mark is a legal equivalent of FADED CULTURE.

actual date of first use in commerce was August 17, 2019." *Id.* at 15 (citing DelRio Decl. ¶ 16; Ex. O (45 TTABVUE 5, 73-74)). Applicant responds that the phrase "opening very soon" "refers to the grand opening event, not the commencement of business operations." 49 TTABVUE 12.

Mr. DelRio testified credibly and without contradiction that Applicant began providing barbering services under the FADED CULTURE STUDIO mark on June 19, 2019, prior to its August 17, 2019 "grand opening." DelRio Decl. ¶¶ 13-14; Exs. M, P, Q, S (45 TTABVUE 4, 69-70, 75-76, 77-78, 81-82)). We display below depictions of Applicant's exterior and interior signage as of June 19, 2019:

DelRio Decl. Exs. M, Q, S (45 TTABVUE 69-70, 77-78, 81-82).

We find that Applicant established that it first used the FADED CULTURE STUDIO mark in connection with the services identified in the opposed application on June 19, 2019, the date of first use claimed in the application.[29]

[29] Applicant discusses various pre-opening activities, including the selection of its mark, the launch and use of its social media accounts, and the installation of a floor decal bearing the mark in its barbershop. 49 TTABVUE 8-9 (citing DelRio Decl. ¶¶ 4-6, 9, 11-12; Exs. J, K, L, R (46 TTABVUE 2-4, 63-68, 79-80). We view Applicant's references to these activities as providing background support for Mr. DelRio's testimony that Applicant first used its mark when it opened its business on June 19, 2019, not as an attempt to prove any earlier date of first use. As discussed below, a party's claim in litigation of a date of first use earlier than the date claimed in its application carries risk because "[w]hen a party claims a date earlier than the date it alleged when it filed its application, that is considered a change in position, contrary to the admission it made against interest at the time it filed the application; in these circumstances, its proof of the earlier date must be clear and convincing." *JNF*, 2022 WL 4379238, at *4 (citing *Hydro-Dynamics, Inc. v. George Putnam & Co.*, 811 F.2d 1470, 1473 (Fed. Cir. 1987)).

4. Opposer's Proof of Use of FADED CULTURE or a Legal Equivalent Prior to June 19, 2019

To establish its priority, Opposer must establish that its claimed FADED CULTURE mark, or a legal equivalent, is inherently distinctive, or that it acquired distinctiveness before Applicant's June 19, 2019 date of first use. *See*, *e.g.*, *Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, No. 91263919, 2022 WL 16646840, at *16 n.51 (TTAB 2022). Applicant does not challenge the inherent distinctiveness of Opposer's alleged common-law FADED CULTURE mark,[30] and in the absence of such a challenge, we find that the alleged common-law FADED CULTURE mark is inherently distinctive. *Giersch v. Scripps Networks, Inc.*, No. 92045576, 2009 WL 706673, at *3 (TTAB 2009) (citing, inter alia, *Wet Seal Inc. v. FD Mgmt. Inc.*, No. 91157022, 2007 WL 458529, at *4 (TTAB 2007)). Opposer is thus required only to show that it used the claimed FADED CULTURE mark, or a legal equivalent, in connection with barbering services or clothing, the claimed manners of prior service mark and trademark use, 48 TTABVUE 12, prior to June 19, 2019.

Opposer argues that beginning in 2016, the Barron brothers "adopted and started using the mark FADED CULTURE in connection with their barbering services, clothing, and apparel," that they "gave customers haircuts using the FADED CULTURE mark and sold shirts and other apparel bearing the FADED CULTURE

[30] Applicant would be hard pressed to make such an argument because Applicant was not required during prosecution of the opposed application to show that the phrase FADED CULTURE in its mark FADED CULTURE STUDIO had acquired distinctiveness for barbering services, and Applicant admitted in discovery that FADED CULTURE is distinctive in the context of barbering services. 29 TTABVUE 683 (Applicant's Resp. to Int. No. 23).

mark," and that they "used the FADED CULTURE mark on social media to promote their barbering services and clothing." 48 TTABVUE 7 (citations omitted). We will address these claimed forms of prior use in turn.

a. Giving Customers "Haircuts Using the FADED CULTURE Mark" (or a Legal Equivalent)

A mark is used in connection with services when "it is used or displayed in the sale or advertising of services and the services are rendered." 15 U.S.C. § 1127. The statute imposes two requirements, and the rendering of services is indispensable; advertising alone, however prominent, will not do. *See Couture v. Playdom, Inc.*, 778 F.3d 1379, 1381 (Fed. Cir. 2015); *Aycock Eng'g, Inc. v. Airflite, Inc.*, 560 F.3d 1350, 1358 (Fed. Cir. 2009) ("Without question, advertising or publicizing a service that the applicant intends to perform in the future will not support registration;" the advertising must instead "relate to an existing service which has already been offered to the public."). For purposes of common-law service mark priority, Opposer must show that the FADED CULTURE mark was used in the rendering of barbering services.

The Barron brothers testified identically that beginning in 2016, "[w]e gave friends and longtime customers haircuts using the name FADED CULTURE . . . ." A. Barron Decl. ¶ 8 (30 TTABVUE 3); S. Barron Decl. ¶ 7 (31 TTABVUE 3). The brothers were running their barbershop at that time as "Barron's Barbershop." A. Barron Decl.

¶ 7 (30 TTABVUE 3); S. Barron Decl. ¶ 6 (31 TTABVUE 3).[31] Neither Barron brother elaborated on how they "gave friends and longtime customers haircuts using the name FADED CULTURE . . . ." Opposer relies instead on the testimony of a dozen such "friends and longtime customers." We summarize their testimony immediately below.[32]

i. Andrew Medina

Andrew Medina, Adrian Barron's customer since 2017, Medina Decl. ¶ 5 (32 TTABVUE 2), testified that "[t]he first time I encountered [Opposer's] use of the FADED CULTURE trademark in connection with barbering services was around 2017," and that "it was being used on shirts and haircutting capes to promote their barbering services." Medina Decl. ¶¶ 6-7 (32 TTABVUE 3). As shown in an Instagram post from Applicant's account downloaded by Opposer on August 13, 2025 and reproduced below, a "haircutting cape" is a protective garment worn by a customer when receiving a haircut:

[31] Although it is clear when Applicant first began operating its barbershop under the FADED CULTURE STUDIO mark, it is not clear when "Barron's Barbershop" changed its name to FADED CULTURE.

[32] It is self-evident that the declarations of the Barron brothers, and the declarations of Opposer's "friends and longtime customers," were all prepared by Opposer's counsel, because much of their testimony is identical (even containing the same errors), and other testimony is very similar in both substance and language. It is no secret that lay witnesses almost never write their own declarations, which are instead prepared by counsel, and there is nothing improper about that process so long as the testifying witness reads, understands, and agrees with the contents of a declaration before signing it under oath. In assessing the testimony of Opposer's witnesses, however, we must take into account that we have no idea whether any witness deliberated about, or contributed to, the contents of his or her testimony, instead of simply signing what was presented by Opposer's counsel.

A. Barron Decl. ¶ 33; Ex. 41 (30 TTABVUE 6, 115) (the identity of the customer is obscured in the original exhibit). Mr. Medina also testified that the Barron brothers "were talking about FADED CULTURE a lot." Medina Decl. ¶ 7 (32 TTABVUE 3).

ii. Angel Huerta

Angel Huerta, who claimed to have been the Barron brothers' customer since 2007,[33] Huerta Decl. ¶ 5 (33 TTABVUE 2), as well as a high school classmate of Sergio Barron, Huerta Decl. ¶ 7 (33 TTABVUE 3), testified that he first encountered the

[33] Although Sergio Barron testified that he has been cutting hair "since at least as early as 2005," S. Barron Decl. ¶ 3 (31 TTABVUE 2), Adrian Barron testified that he has been cutting hair only "since at least as early as 2010." A. Barron Decl. ¶ 3 (30 TTABVUE 2). Mr. Huerta could not have been his customer "since 2007."

FADED CULTURE trademark in connection with barbering services "around 2016," Huerta Decl. ¶ 6 (33 TTABVUE 3), and that it was being used on "social media hangtags and barber capes to promote their barbering services." Huerta Decl. ¶ 8 (33 TTABVUE 3). Mr. Huerta also testified that the Barron brothers "were talking about FADED CULTURE a lot during that time." Huerta Decl. ¶ 8 (33 TTABVUE 2).

Mr. Huerta further testified that "[w]hen they first started using FADED, [Opposer] also used the marks FVDED and FΛDED." Huerta Decl. ¶ 11 (33 TTABVUE 3). He stated that he "pronounced these terms as 'faded' and never heard anyone pronounce it [sic] otherwise." Huerta Decl. ¶ 11 (33 TTABVUE 3).

iii. Christopher Arevalos

Christopher Arevalos, Sergio Barron's customer since 2011, and the operator of Opposer's Instagram account since 2023, Arevalos Decl. ¶¶ 5-6 (34 TTABVUE 2-3), testified that the first time he recalled Opposer's "use of the FADED CULTURE trademark in connection with barbering services was around 2018." Arevalos Decl. ¶ 7 (34 TTABVUE 3). He testified that the mark "was being used on shirts to promote their barbering services." Arevalos Decl. ¶ 9 (34 TTABVUE 3). Mr. Arevalos also testified that "[w]hen they first started using FADED, [Opposer] also used the mark FVDED," and that he "pronounced these terms as 'faded' and never heard anyone pronounce it [sic] otherwise." Arevalos Decl. ¶ 12 (34 TTABVUE 3).

iv. Jacquelyn Chavez

Jacquelyn Chavez, Opposer's employee since 2023, Chavez Decl. ¶ 5 (35 TTABVUE 2), testified that she first encountered Opposer's use of FADED CULTURE "to promote their barbering services . . . around December 2018," when

she started following the Barron brothers' Instagram accounts. Chavez Decl. ¶ 7 (35 TTABVUE 3).

v. Frank Gonzalez

Frank Gonzalez, the Barron brothers' customer "since at least [as] early as around the summer of 2011," F. Gonzalez Decl. ¶ 5 (36 TTABVUE 2), testified that the first time that he encountered use of the FADED CULTURE mark in connection with barbering services was "at least as early as 2018," F. Gonzalez Decl. ¶ 6 (36 TTABVUE 3), when it "was being used on shirts worn by Adrian and Sergio Barron at their studio while I was getting my hair cut." F. Gonzalez Decl. ¶ 7 (36 TTABVUE 3). He testified that "[w]hen they first started using FADED, [Opposer] also used the mark FΛDED," and that he "pronounced this term as 'faded' and never heard anyone pronounce it otherwise." F. Gonzalez Decl. ¶ 10 (36 TTABVUE 3).

vi. Jonathan Gonzalez[34]

Jonathan Gonzalez, who claimed that he had been the Barron brothers' customer since "at least as early as 2005,"[35] J. Gonzalez Decl. ¶ 5 (37 TTABVUE 2), testified that he first encountered Opposer's use of FADED CULTURE in connection with barbering services "at least as early as 2016." J. Gonzalez Decl. ¶ 6 (37 TTABVUE 3). He testified that when he first encountered the mark, it was "being used on clothing and apparel, hair palm aid, and hair cutting capes to promote their barbering

[34] Jonathan Gonzalez and Frank Gonzalez do not appear to be related.

[35] As noted above, Jonathan Gonzalez could not have been Adrian Barron's customer "since at least as early as 2005."

services." J. Gonzalez Decl. ¶ 7 (37 TTABVUE 3).[36] He further testified that "Adrian and Sergio Barron were talking about FADED CULTURE a lot" and that "[w]hen it first started using FADED, [Opposer] also used the marks FVDED and FΛDED," and that he "pronounced these terms as 'faded' and never heard anyone pronounce it [sic] otherwise." J. Gonzalez Decl. ¶¶ 7, 10 (37 TTABVUE 3).

vii. Mayra Jimenez

Mayra Jimenez, who has been taking her son to get haircuts from the Barron brothers since at least as early as 2014, Jimenez Decl. ¶ 5 (38 TTABVUE 2), testified that she remembered first encountering Opposer's use of the FADED CULTURE mark in connection with barbering services "around 2016." Jimenez Decl. ¶ 6 (38 TTABVUE 3). She testified that after she moved back to San Antonio in 2014, she remembered that "they were using FADED and then within a couple of years later started using FADED CULTURE," Jimenez Decl. ¶ 7 (38 TTABVUE 3), and that the FADED CULTURE mark "was being used on shirts to promote their barbering services." Jimenez Decl. ¶ 8 (38 TTABVUE 3).

viii. Rene Rodriguez

Rene Rodriguez, who claimed that had been receiving haircuts from the Barron brothers since "at least as early as 2007,"[37] R. Rodriguez Decl. ¶ 5 (39 TTABVUE 2), testified that "the first time I remember encountering [Opposer's] use of the FADED

[36] There is no explanation of the product referred to as "hair palm aid." That may be a mistaken reference by counsel and the witness to "hair promade."

[37] As noted above, Mr. Rodriguez could not have been Adrian Barron's customer "since at least as early as 2007."

trademark in connection with barbering services was on September 21, 2016," R. Rodriguez Decl. ¶ 6 (39 TTABVUE 3), a date that he remembered because "I have a picture on my phone that was taken at their shop and in the picture is a framed shirt with the FADED mark." R. Rodriguez Decl. ¶ 7 (39 TTABVUE 3). We reproduce the picture below:

R. Rodriguez Decl. ¶ 7; Ex. A (39 TTABVUE 3, 5). Mr. Rodriguez further testified that "[a]t some point after this, I remember [Opposer] started using the FADED CULTURE trademark." R. Rodriguez Decl. ¶ 8 (39 TTABVUE 3).

ix. Richard Moreno

Richard Moreno, who claimed that he had been receiving haircuts from the Barron brothers since "at least as early as 2006,"[38] Richard Moreno Decl. ¶ 5 (40 TTABVUE

[38] As noted above, Richard Moreno could not have been Adrian Barron's customer "since at least as early as 2006."

2), testified that "the first time I remember encountering [Opposer's] use of the FADED trademark in connection with barbering services was around 2016." Richard Moreno Decl. ¶ 6 (40 TTABVUE 3). He "remember[ed] this date because I bought a shirt from the Barron brothers around this time and the shirt had the FADED mark on the front of the shirt and the shirt tag had the FADED CULTURE mark." Richard Moreno Decl. ¶ 7 (40 TTABVUE 2). He attached photographs of the shirt and the shirt tag, which we reproduce in pertinent parts below:

Richard Moreno Decl. Ex. A (40 TTABVUE 6-7). It is not clear when he took the photographs.

Richard Moreno further testified that the "first time I encountered the FADED CULTURE trademark, it was being used on shirts and hats to promote their barbering services" and that "Adrian and Sergio Barron were talking about FADED CULTURE a lot during that time," Richard Moreno Decl. ¶ 8 (40 TTABVUE 3), and he claimed that "[w]hen they first started using FADED, [Opposer] also used the marks FVDED, FXDED, and FΛDED. I pronounced these terms as 'faded' and never heard anyone pronounce it [sic] otherwise." Richard Moreno Decl. ¶ 11 (40 TTABVUE 3).

x. Ruben Moreno

Rubben Moreno, Richard's brother, Rubben Moreno Decl. ¶ 7 (41 TTABVUE 2), who also claimed that he had "been receiving haircuts from the Barron brothers since "at least as early as 2006,"[39] Rubben Moreno Decl. ¶ 5 (41 TTABVUE 2), testified that the first time he encountered Opposer's "use of the FADED CULTURE trademark in connection with barbering services was around 2016," Rubben Moreno Decl. ¶ 6 (41 TTABVUE 3), and that he remembered that date because, like his brother, he "bought the same shirt at the same time." Rubben Moreno Decl. ¶ 7 (41 TTABVUE 3). He attached a March 28, 2016 photograph of himself wearing the shirt, which we reproduce below:

[39] As noted above, Rubben Moreno could not have been Adrian Barron's customer "since at least as early as 2006."

Rubben Moreno Decl. Ex. A (41 TTABVUE 6).

Like his brother, Rubben Moreno testified that the "first time I encountered the FADED CULTURE trademark, it was being used on shirts and hats to promote their barbering services" and that "Adrian and Sergio Barron were talking about FADED CULTURE a lot during that time," Rubben Moreno Decl. ¶ 8 (41 TTABVUE 3), and he claimed that "[w]hen they first started using FADED, [Opposer] also used the marks FVDED, FXDED, and FΛDED. I pronounced these terms as 'faded' and never heard anyone pronounce it [sic] otherwise." Rubben Moreno Decl. ¶ 11 (41 TTABVUE 3).

xi. Scott Malouff

Scott Malouff, who has been receiving haircuts from Sergio Barron since at least as early as 2009, Malouff Decl. ¶ 5 (42 TTABVUE 2), testified that the first time he remembered encountering Opposer's "use of the FADED CULTURE trademark in connection with barbering services was at least as early as 2017." Malouff Decl. ¶ 6

(42 TTABVUE 2). He remembered that date "because I was working in real estate in 2017 and Adrian's girlfriend at the time joined my real estate team that year." Malouff Decl. ¶ 7 (42 TTABVUE 3). He testified that when he first encountered the mark, "it was being used on haircutting capes and other marketing materials in their studio to promote their barbering services" and that "Adrian and Sergio were talking about building the FADED CULTURE brand during this time." Malouff Decl. ¶ 8 (42 TTABVUE 3). He did not identify the referenced "other marketing materials."

xii. Anthony Rodriguez[40]

Anthony Rodriguez, who claimed that he had been receiving haircuts from "Adrian and Sergio Barron since at least as early as 2007,"[41] A. Rodriguez Decl. ¶ 4 (43 TTABVUE 2), testified that the first time he encountered Opposer's "use of the FADED CULTURE trademark in connection with barbering services was as least as early as early 2017," a date he remembered because "it was around this time that I started my career with Hartford Insurance." A. Rodriguez Decl. ¶¶ 6-7 (43 TTABVUE 3). He testified that the first time he encountered the mark, "it was being used on shirts to promote their barbering services" and that "Adrian and Sergio Barron were talking about FADED CULTURE lot during this time." A. Rodriguez Decl. ¶ 8 (43 TTABVUE 3). He also testified that when Opposer first started using FADED, Opposer "also used the mark FVDED" and that "I pronounced this term as 'faded' and

[40] Rene Rodriguez and Anthony Rodriguez do not appear to be related.

[41] As noted above, Anthony Rodriguez could not have been Adrian Barron's customer "since at least as early as 2007."

never heard anyone pronounce it otherwise." A. Rodriguez Decl. ¶ 11 (43 TTABVUE 3).

"Oral testimony, if sufficiently probative, is normally satisfactory to establish priority of use . . . and the testimony of a single witness may be adequate to establish priority." *DeVivo v. Ortiz*, No. 91242863, 2020 WL 1227592, at *4 (TTAB 2020) (citations omitted). "Such testimony 'should not be characterized by contradictions, inconsistencies, and indefiniteness but should carry with it conviction of its accuracy and applicability.'" *Exec. Coach Builders, Inc. v. SPV Coach Co.*, No. 91212312, 2017 WL 3034059, at *11 (TTAB 2017) (quoting *B. R. Baker Co. v. Lebow Bros.*, 150 F.2d 580, 583 (CCPA 1945)). "Oral testimony is strengthened by corroborative documentary evidence." *Id.* (citing *Elder Mfg. Co. v. Int'l Shoe Co.*, 194 F.2d 114, 118 (CCPA 1952)).

Here, there is much more than just "the testimony of a single witness" because Opposer offers two party witnesses and a dozen non-party witnesses. The Board has observed that the Federal Circuit has suggested, in the context of large numbers of third-party marks under the sixth *DuPont* factor, that "quantity has a quality all its own," *Cielo e Terra*, 2026 WL 2624328, at *20, but in the context of a party's proof of common-law priority, quantity does not have a quality all its own. We must evaluate the credibility and probative value of the testimony of each of Opposer's witnesses to determine whether it is "characterized by contradictions, inconsistencies, and indefiniteness," both internally and in comparison to the other witnesses' testimony, or instead "carr[ies] with it conviction of its accuracy and applicability.'" *Exec. Coach*

Builders, 2017 WL 3034059, at *11. We turn now to analysis of the testimony allegedly supporting a showing that the Barron brothers "gave customers haircuts using the FADED CULTURE mark" starting in 2016. 48 TTABVUE 7.

Opposer's customer witnesses testified to different dates for Opposer's first use of the FADED CULTURE mark (alone or together with one or more variants) in connection with barbering services. Six witnesses recalled Opposer's first use of FADED CULTURE in 2016. J. Gonzalez Decl. ¶ 6 (37 TTABVUE 3) ("at least as early as 2016");[42] Huerta Decl. ¶ 6 (33 TTABVUE 3) ("around 2016"); Jimenez Decl. ¶ 6 (38 TTABVUE 3) ("around 2016"); Richard Moreno Decl. ¶ 6 (40 TTABVUE 3) ("around 2016"); Rubben Moreno Decl. ¶ 6 (41 TTABVUE 3) ("around 2016"); R. Rodriguez Decl. ¶ 6 (39 TTABVUE 3) (September 21, 2016). Two other witnesses who were also Opposer's customers in 2016 recalled Opposer's first use of FADED CULTURE in 2017, not in 2016. Malouff Decl. ¶ 6 (42 TTABVUE 2) ("at least as early as 2017"); A. Rodriguez Decl. ¶¶ 6-7 (43 TTABVUE 3) ("at least as early as early 2017").[43] Two other witnesses who were also Opposer's customers in both 2016 and 2017 recalled Opposer's first use of FADED CULTURE in 2018, not in 2016 or 2017. Arevalos Decl.

[42] The phrase "at least as early as" that appears in the declarations of several of Opposer's customer witnesses is legalese that appears in applications for registration such as those discussed above, not colloquial language typically used by non-lawyers. Its artificiality is aptly illustrated by its use in the Jonathan Gonzalez Declaration, in which the witness seems to suggest that the FADED CULTURE mark might have been used earlier than 2016. The Barron brothers make no such claim.

[43] Mr. Medina also placed Opposer's first use "around 2017," Medina Decl. ¶ 6 (32 TTABVUE 3), the year in which he first started getting haircuts from Adrian Barron.

¶ 7 (34 TTABVUE 3) ("around 2018"); F. Gonzalez Decl. ¶ 6 (36 TTABVUE 3) ("at least as early as 2018").[44]

Opposer's customer witnesses were also inconsistent about which marks Opposer used. Three witnesses testified that their first exposure was to FADED CULTURE alone, and they never mentioned any of the multiple variants discussed above. Medina Decl. ¶ 6 (32 TTABVUE 3); Chavez Decl. ¶ 7 (35 TTABVUE 3); Malouff Decl. ¶ 6 (42 TTABVUE 2).[45] Seven others, however, testified that when Opposer first began use of FADED CULTURE, it was **also** using one or more of the variants, although these witnesses differed as to which variants were also being used, and when they were being used.[46] Huerta Decl. ¶ 11 (33 TTABVUE 3) ("[w]hen they first started using FADED [around 2016], [Opposer] also used the marks FVDED and FΛDED"); Arevalos Decl. ¶ 12 (34 TTABVUE 3) ("[w]hen they first started using FADED [around 2018], [Opposer] also used the mark FVDED"); F. Gonzalez Decl.

[44] Ms. Chavez, who was never a customer but who later became Opposer's employee, testified that she first learned of Opposer's use of FADED CULTURE in 2018 through social media. Chavez Decl. ¶ 7 (35 TTABVUE 3). We discuss her testimony below.

[45] Ms. Jimenez testified that after she moved back to San Antonio in 2014, she remembered that "they were using FADED and then within a couple of years later started using FADED CULTURE." Jimenez Decl. ¶ 7 (38 TTABVUE 3). She did not mention use of any of the other variants together with FADED CULTURE.

[46] Their testimony was also inconsistent with that of the Barron brothers, who testified identically that "[o]ver the years we have occasionally used several stylistic variations FVDED, FXDED, F∀DED, and FADED, followed by CULTURE," A. Barron Decl. ¶ 31 (30 TTABVUE 6); S. Barron Decl. ¶ 15 (31 TTABVUE 4), and with Opposer's tacking claim, which presupposes use of these "stylistic variants" **before** use of FADED CULTURE, not adjacent to it. In that regard, in the GOAT Podcast discussed above, one of the Barron brothers stated that "initially it was going to be faded by itself you know," 48 TTABVUE 46, but that some sort of legal issue arose, so after consulting with their attorney, the brothers used variants followed by CULTURE. *Id.* at 46-47.

¶ 10 (36 TTABVUE 3) ("[w]hen they first started using FADED [at least as early as 2018], [Opposer] also used the mark FΛDED"); J. Gonzalez Decl. ¶ 10 (37 TTABVUE 3) ("[w]hen it first started using FADED, [at least as early as 2016], [Opposer] also used the marks FVDED and FΛDED"); Richard Moreno Decl. ¶ 11 (40 TTABVUE 3) ("[w]hen they first started using FADED [around 2016], [Opposer] also used the marks FVDED, FXDED, and FΛDED"); Rubben Moreno Decl. ¶ 11 (41 TTABVUE 3) ("[w]hen they first started using FADED [around 2016], [Opposer] also used the marks FVDED, FXDED, and FΛDED"); A. Rodriguez Decl. ¶ 11 (43 TTABVUE 3) (when Opposer first started using FADED "at least as early as early 2017," Opposer "also used the mark FVDED").

Finally, Opposer's customer witnesses were also inconsistent about how the FADED CULTURE mark was first used in connection with barbering services. Four testified that their first exposure to Opposer's use of FADED CULTURE was on what they described as haircutting or barber capes, Medina Decl. ¶ 7 (32 TTABVUE 3); Huerta Decl. ¶ 8 (33 TTABVUE 3); J. Gonzalez Decl. ¶ 7 (37 TTABVUE 3); Malouff Decl. ¶ 8 (42 TTABVUE 3), but neither the Barron brothers nor any of the other customer witnesses ever mentioned capes bearing the mark.[47]

[47] As discussed above, Opposer's '119 Application as originally filed in 2023 covered goods identified as "capes for use in salons and barber shops," as to which Opposer claimed first use in December 2022, 29 TTABVUE 469, but those goods were deleted from the application, and the August 19, 2019 intent-to-use application that matured into Opposer's '753 Registration originally covered "barber capes," *id.* at 354, but those goods were also deleted.

A January 23, 2019 Instagram post attached to the Sergio Barron Declaration shows a barbering cape that does not appear to bear the mark FADED CULTURE. S. Barron Decl. Ex. 25 (31 TTABVUE 7).

Nine witnesses testified that the first use of FADED CULTURE that they encountered was use in some manner on shirts.[48] Rene Rodriguez testified that he saw a framed shirt bearing the word "Faded" in script on September 21, 2016, R. Rodriguez Decl. ¶¶ 6-7; Ex. A (39 TTABVUE 3, 5),[49] but he acknowledged that this was not use of FADED CULTURE for barbering services or otherwise when he testified that "[a]t some point after this, I remember [Opposer] started using the FADED CULTURE trademark." R. Rodriguez Decl. ¶ 8 (39 TTABVUE 3). He did not specify when at "some point after this" such use began.

Frank Gonzalez testified that FADED CULTURE "was being used on shirts worn by Adrian and Sergio Barron at their studio while I was getting my hair cut," F. Gonzalez Decl. ¶ 7 (36 TTABVUE 3), but neither the Barron brothers nor any of the other witnesses who were customers at the same time testified that the Barron brothers wore shirts bearing the FADED CULTURE mark at their studio.[50] Against the backdrop of the silence of the Barron brothers and the other witnesses on this point, we do not credit Mr. Gonzalez's singular recollection of seeing both Barron brothers wearing such shirts at their studio "at least as early as 2018."

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[48] We will address the testimony of the Moreno brothers that they purchased shirts bearing the FADED CULTURE mark on the shirt tag, Richard Moreno Decl. ¶ 7 (40 TTABVUE 2); Rubben Moreno Decl. ¶ 7 (41 TTABVUE 3), in our analysis below of Opposer's claimed priority based on the sale of "shirts and other apparel bearing the FADED CULTURE mark." 48 TTABVUE 7.

[49] The framed shirt appeared in the array of shirts that Adrian Barron attached as Exhibit 43 to his Declaration, A. Barron Decl. Ex. 43 (30 TTABVUE 116-17), which we discuss below.

[50] We discuss below the Barron brothers' testimony and exhibits regarding wearing shirts outside their studio.

None of the other customer witnesses testified that the Barron brothers displayed the FADED CULTURE mark on shirts in their studio or used the mark on shirts while cutting hair; instead, they all testified identically and vaguely that FADED CULTURE "was being used on shirts to promote their barbering services." Medina Decl. ¶¶ 6-7 (32 TTABVUE 3);[51] Arevalos Decl. ¶ 9 (34 TTABVUE 3); J. Gonzalez Decl. ¶ 7 (37 TTABVUE 3);[52] Jimenez Decl. ¶ 8 (38 TTABVUE 3); A. Rodriguez Decl. ¶ 8 (43 TTABVUE 3). None of these witnesses explained what they meant by the Barron brothers' "use[ ] on shirts to promote their barbering services."

Use of a mark on a uniform or other garment worn while rendering a service may show service mark use of the mark, but the vague testimony of these customer witnesses, and the equally vague testimony of the Barron brothers that beginning in 2016, they "gave friends and longtime customers haircuts using the name FADED CULTURE," A. Barron Decl. ¶ 8 (30 TTABVUE 3); S. Barron Decl. ¶ 7 (31 TTABVUE 3), do not support a finding of such use of FADED CULTURE or a legal equivalent prior to June 19, 2019 in rendering barbering services.

Adrian Barron testified that the Barron brothers wore shirts bearing what they claimed to be a variant of the FADED CULTURE mark "at an event in San Antonio the day before the Alamo Barber's Expo on or around March 18, 2016." A. Barron

[51] As noted above, Mr. Medina also claimed that the mark was in use on haircutting capes.

[52] Jonathan Gonzalez testified that the mark was being used "as early as 2016" on "clothing and apparel, hair palm aid, and hair cutting capes to promote their barbering services." J. Gonzalez Decl. ¶ 7 (37 TTABVUE 3). As noted above, the reference to "hair palm aid" may be a mistaken reference to "hair pomade." No other witness mentioned "hair palm aid" or hair pomade.

Decl. ¶ 10; Ex. 45 (30 TTABVUE 3, 123-24). We reproduce photographs of the shirts below:

A. Barron Decl. Ex. 45 (30 TTABVUE 123-24).[53] The nature of this event and the referenced Alamo Barber's expo is unclear, but even if the Barron brothers wore the

[53] Both of these pictures bore a designation of "Highly Confidential." We are at a loss to see how these picture could be considered confidential, and they were filed with the publicly accessible Declaration of Adrian Barron.

shirts to identify the source of their barbering services, we find that the word F∀DED alone that is visible on the shirts is not the legal equivalent of FADED CULTURE.[54]

Finally, six customer witnesses testified substantially identically that when they first encountered Opposer's use of FADED CULTURE, the Barron brothers "were talking about FADED CULTURE a lot" or "were talking about FADED CULTURE a lot during that time." Medina Decl. ¶ 7 (32 TTABVUE 3) ("around 2017"); Huerta Decl. ¶ 8 (33 TTABVUE 2) ("around 2016"); J. Gonzalez Decl. ¶ 7 (37 TTABVUE 3) ("at least as early as 2016"); Richard Moreno Decl. ¶ 8 (40 TTABVUE 3) ("around 2016"); Rubben Moreno Decl. ¶ 8 (41 TTABVUE 3) ("around 2016"); A. Rodriguez Decl. ¶ 8 (43 TTABVUE 3) ("at least as early as early 2017"). A seventh customer witness testified similarly that "Adrian and Sergio were talking about building the FADED CULTURE brand during this time." Malouff Decl. ¶ 8 (42 TTABVUE 3) ("at least as early as 2017"). None of these witnesses testified as to the specific statements made in connection with FADED CULTURE, and they conspicuously left out any detail about whether the Barron brothers discussed any goods or services that were being offered or might be offered in connection with FADED CULTURE.

None of the other witnesses, and notably neither of the Barron brothers, testified that the Barron brothers were "talking about FADED CULTURE a lot" or "talking about building the FADED CULTURE brand" when Opposer's use of FADED CULTURE began. But even assuming that to be the case, as the old adage goes, "talk

[54] Adrian Barron testified that these shirts had "the FADED CULTURE mark on the shirt tag," A. Barron Decl. ¶ 10 (30 TTABVUE 3), but there is no evidence that the shirt tags were visible to others at the Alamo Barber's Expo.

is cheap" and it does not buy priority. "Mere invention, creation, or discussion of a trademark does not create priority rights," *CBC Mortg. Agency v. TMRR, LLC*, No. 92076723, 2022 WL 3444028, at *11 (TTAB 2022) (quoting *Hydro-Dynamics*, 811 F.2d at 1473 (internal quotation omitted)), and "conception of [a] mark and discussion with others does not create priority." *Hole in 1 Drinks, Inc. v. Lajtay*, No. 92065860, 2020 WL 859853, at *10 (TTAB 2020) (citing *La Maur Inc. v. Int'l Pharm. Corp.*, No. 91057590, 1978 WL 21258, at *4 (TTAB 1978)).

As discussed above, the testimony of Opposer's customer witnesses is riddled with inconsistencies regarding when the FADED CULTURE mark was first used, whether it was first used alone or with other marks (and with which other marks), and how it was first used. Given the fallibility of human memory, one would expect some inconsistency between witnesses testifying about events that occurred many years before trial in the summer of 2025, even when their testimony appears to have been scripted by Opposer's counsel. But almost all of the witnesses were what Opposer describes as its "longtime customers," and with the exception of Mr. Medina, all of the customer witnesses had been receiving haircuts from one or both of the Barron brothers (undoubtedly several times per year) since at least as early as 2015, and in many cases since much earlier. One would reasonably expect that witnesses who were all customers of the Barron brothers between 2016 and June 19, 2019 would have a much more uniform recollection of when and how the FADED CULTURE mark was used if, as Opposer claims, beginning in 2016, the Barron brothers "gave customers haircuts using the FADED CULTURE mark . . . ." 48 TTABVUE 7. We find that the

testimony of the Barron brothers and their customers regarding whether the Barron brothers "gave customers haircuts using the FADED CULTURE mark" is "characterized by contradictions, inconsistencies, and indefiniteness," and does not "carry with it conviction of its accuracy and applicability.'" *Exec. Coach Builders*, 2017 WL 3034059, at *11. On this record, we find that it is more likely than not that the Barron brothers were not giving "haircuts to customers using the FADED CULTURE mark," 48 TTABVUE 7, before June 19, 2019.

b. Sale of "Shirts and Other Apparel Bearing the FADED CULTURE Mark"

As discussed above, the second basis for Opposer's claim of common-law priority is based on the Barron brothers' identical testimony that beginning in 2016, they "sold shirts and other apparel bearing the FADED CULTURE name." A. Barron Decl. ¶ 8 (30 TTABVUE 3); S. Barron Decl. ¶ 7 (31 TTABVUE 3).[55]

Opposer's claim in this case of first use of FADED CULTURE on "shirts and other apparel" in 2016 is inconsistent with its claim in the application that matured into its pleaded '753 Registration that it first used FADED CULTURE in "April 2020" on goods identified as "shirts," as well as on goods identified as "t-shirts; hoodies; hooded

[55] We are uncertain of the exact nature of Opposer's claim of priority based on its claimed sale of "shirts and other apparel." As discussed above, Opposer's ownership of its '753 Registration, which covers "shirts" and various types of "other apparel," removes priority as an issue on Opposer's Section 2(d) claim, but Opposer does not rely on that registration to show priority or likelihood of confusion. We interpret Opposer's claim of common-law priority based on its sales of "shirts and other apparel" to be that its sales of those goods promoted its barbering services. As noted above, however, the use of a mark in the advertising or promotion of services does not suffice to establish priority if the services are not being rendered under the mark, and we have found above that Opposer was not rendering barbering services under the FADED CULTURE mark prior to June 19, 2019.

sweatshirts; long sleeved shirts," which are types of "other apparel." 29 TTABVUE 258.[56] As noted above, "[w]hen a party claims a date earlier than the date it alleged when it filed its application, that is considered a change in position, contrary to the admission it made against interest at the time it filed the application; in these circumstances, its proof of the earlier date must be clear and convincing." *JNF*, 2022 WL 4379238, at *4 (citation omitted). "This enhanced burden of proof can apply to either party in an inter partes proceeding, plaintiff or defendant." *Id.* (citation omitted).

Accordingly, we will require Opposer to prove that it "sold shirts and other apparel," A. Barron Decl. ¶ 8 (30 TTABVUE 13), prior to June 19, 2019 by clear and convincing evidence. This heightened burden is appropriately imposed upon Opposer because while the April 19, 2019 date on which the application that matured into Opposer's '753 Registration was filed is substantially contemporaneous with the April 2020 date of first use alleged therein, Opposer now seeks five years later "to establish an earlier date" of first use that is four years earlier than the one that it claimed in the '753 Registration. *Id.* (quoting *Elder*, 194 F.2d at 118).

[56] As noted above, the application that matured into Opposer's '753 Registration was filed on April 19, 2019 based on Opposer's allegation of a bona fide intention to use the mark in commerce, 29 TTABVUE 258, not on the basis of Opposer's prior use of the mark in commerce. As Sergio Barron put it in a San Antonio Express News article dated November 14, 2024 attached to his brother's Declaration as Exhibit 24, "[t]he merchandise was a gradual thing. . . . When we first started cutting, people would ask if we had shirts or hats so they could rep us." A. Barron Decl. ¶ 30; Ex. 24 (30 TTABVUE 6, 84).

Opposer's proof of use of FADED CULTURE in the sale of "shirts and other apparel" consists of the testimony of Adrian Barron, and exhibits thereto,[57] and the testimony of Richard and Rubben Moreno discussed above.

Adrian Barron testified that Exhibit 43 to his Declaration "is a true and correct image, dated February 23, 2016, of the styles of shirts we first started selling in 2016" and that "[a]t least one of these styles used the FADED CULTURE trademark on the tag of the shirt." A. Barron Decl. ¶ 9; Ex. 43 (30 TTABVUE 13, 126-27). The bodies of the referenced shirts bear only F∀DED, or "Faded" in script, consistent with the photographs discussed above.

Mr. Barron also testified that the images in Exhibit 44 to his Declaration "are true and correct pictures of one such shirt with the FADED CULTURE mark on the shirt tag." A. Barron Decl. ¶ 9; Ex. 44 (30 TTABVUE 13, 128-31). The shirts in these photographs do not bear the mark FADED CULTURE on the neck tag, but rather FΛDED CULTURE, and Mr. Barron did not testify expressly that they were sold prior to June 19, 2019.[58]

Mr. Barron further testified that Exhibit 46 to his Declaration "is a true and correct screenshot of the image file and image dated May 18, 2018 showing the FADED CULTURE image that was used on shirt tags for some of [Opposer's] shirts."

[57] Sergio Barron did not testify about the use of the FADED CULTURE mark on clothing beyond the paragraph discussed above that is identical to his brother's testimony.

[58] The neck tag in the photographs appears to be identical to the neck tag in specimens of use in the application that matured into the '753 Registration, which were filed with Opposer's Statement of Use on November 5, 2020 based on claimed first use in April 2020. 29 TTABVUE 301-03.

A. Barron Decl. ¶ 13; Ex. 46 (30 TTABVUE 14, 136-37). We reproduce the image file below. Mr. Barron did not testify when (or if) the image was used on shirt tags.

Mr. Barron further testified that Exhibit 47 to his Declaration "is a true and correct screenshot of a picture taken on or around October 3, 2018 showing use of the FADED CULTURE mark" and that Opposer "used the picture in Exhibit 47 to promote its barbering services and clothing." A. Barron Decl. ¶ 14; Ex. 47 (30 TTABVUE 14, 138-39). The referenced image shows a person wearing a shirt bearing FVDED alone, not FADED CULTURE, and the image shows FVDED CULTURE, not FADED CULTURE. Mr. Barron did not specify when and how the image was used, or who (if anyone) was exposed to it.

Finally, Mr. Barron testified that the pictures in Exhibit 52 to his Declaration "are true and correct pictures showing use of the FADED CULTURE mark in connection with water bottles, hats, and shirts." A. Barron Decl. ¶ 26; Ex. 52 (30 TTABVUE 16, 217-20). Only one of the pictures appears to show the mark FADED CULTURE, and all of them bear dates in 2024.

As discussed above, the two Moreno brothers, who claimed to have been the Barron brothers' customers since 2006, testified substantially identically that they purchased shirts from Opposer containing tags displaying FΛDED CULTURE on the same day in 2016, which Rubben Moreno identified as March 28, 2016. 41 TTABVUE

6. Their testimony establishes that the Barron brothers sold them two shirts with tags displaying a legal equivalent of FADED CULTURE on the same day in early 2016.[59] But none of Opposer's nine other customer witnesses testified about buying shirts bearing FΛDED CULTURE (or any other mark) from Opposer at any time, and Adrian Barron provided no details about the sales to the Moreno brothers, or any other sales. If the Barron brothers regularly sold shirts bearing the FADED CULTURE mark or a legal equivalent before June 19, 2019 for the purpose of promoting their barbering services, one would expect more customer witnesses to have testified about the availability of such shirts for purchase, but none did.

As noted above, Sergio Barron told the San Antonio Express News in November 2024 that "[t]he merchandise was a gradual thing" and that "[w]hen we first started cutting, people would ask if we had shirts or hats so they could rep us." A. Barron Decl. ¶ 30; Ex. 24 (30 TTABVUE 6, 84). We find that Opposer did not prove by clear and convincing evidence that it sold "shirts and other apparel" under the FADED CULTURE mark prior to June 19, 2019.[60] At most, the record shows the sale of two such shirts to the Moreno brothers in 2016 in what appear to be nominal one-off transactions with two of the Barron brothers' longest-standing customers, but even if

[59] As noted above, the USPTO accepted such a shirt as a specimen of use of FADED CULTURE.

[60] There is no evidence of sales of any "other apparel" prior to June 19, 2019. The record contains multiple customer reviews of Opposer's products, including shirts, hats, barbering capes, and barbering equipment and goods, but they are all "from September 6, 2022 to the present." A. Barron Decl. ¶ 18; Ex. 48 (30 TTABVUE 4, 130-200). This is consistent with Sergio Barron's statement to the San Antonio Express News in November 2024 that "[t]he merchandise was a gradual thing." Barron Decl. ¶ 30; Ex. 24 (30 TTABVUE 6, 84).

these sales were for the purpose of promoting Opposer's barbering business, they could not support the existence of rights in the FADED CULTURE mark for barbering services because we have found above that such services were not being rendered under the mark at the time, or at any time prior to June 19, 2019. *Cf. Couture*, 778 F.3d at 1381 ("advertising or publicizing a service that the applicant intends to perform in the future will not support registration"; the advertising must instead "relate to an **existing service** which has already been offered to the public.") (quoting *Aycock*, 560 F.3d at 1360) (emphasis in bold here in italics in *Couture*).[61]

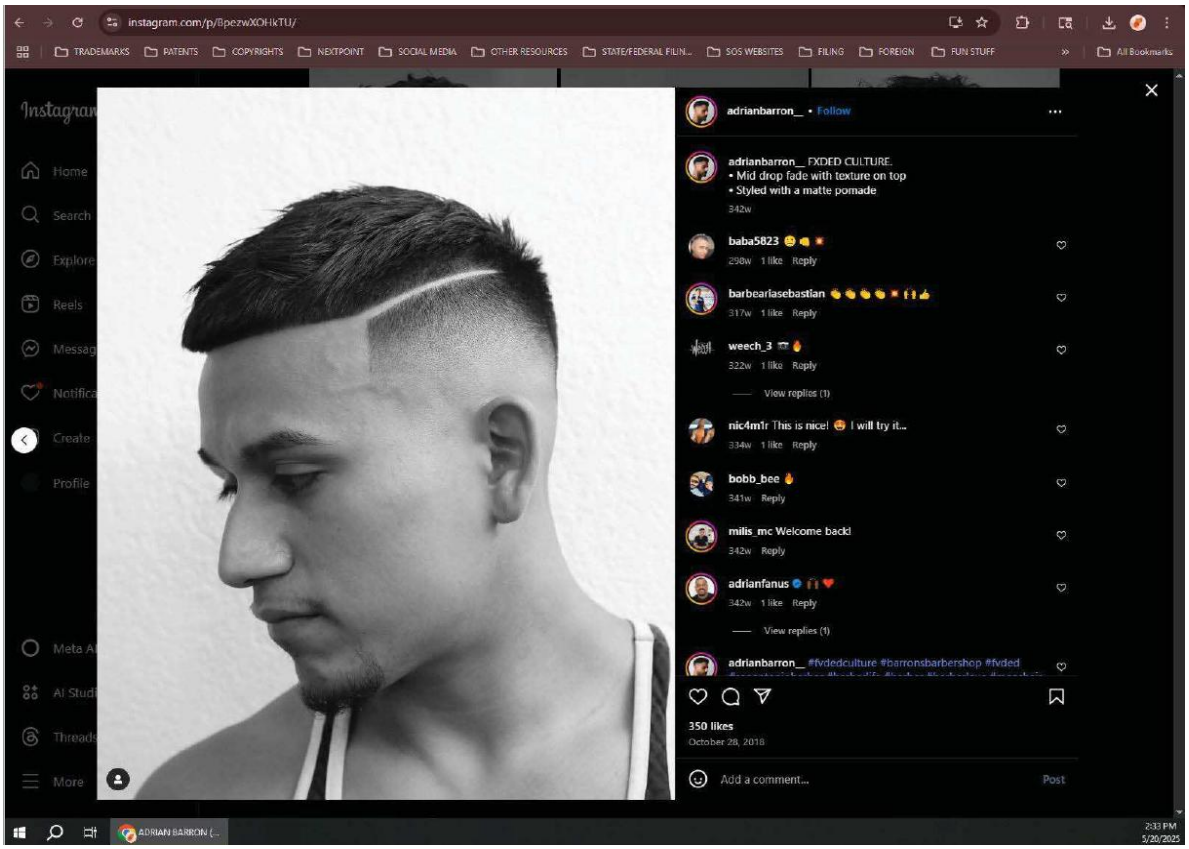
c. Opposer's Use of the FADED CULTURE Mark "on Social Media to Promote Their Barbering Services and Clothing."

We turn finally to Opposer's claim that prior to June 19, 2019, it used the FADED CULTURE mark on social media to promote its barbering services. 48 TTABVUE 7. Opposer's witnesses on this claim are the Barron brothers, Mr. Huerta, and Ms. Chavez.[62]

[61] Opposer relies in its main brief on prior technical service mark use of FADED CULTURE. In its reply brief, Opposer purports to shift gears to assert analogous use, where preparatory activities may create rights, but as discussed below, that unpleaded theory was asserted too late and Opposer's counsel disavowed it at the oral hearing.

[62] All but one of Opposer's customer witnesses testified identically that Opposer runs "a few Instagram accounts and a YouTube channel that are very popular." Medina Decl. ¶ 7 (32 TTABVUE 3); Huerta Decl. ¶ 8 (33 TTABVUE 3); Arevalos Decl. ¶ 9 (34 TTABVUE 3); F. Gonzales Decl. ¶ 7 (36 TTABVUE 3); J. Gonzales Decl. ¶ 7 (37 TTABVUE 3); Jimenez Decl. ¶ 8 (38 TTABVUE 3); Richard Moreno Decl. ¶ 8 (40 TTABVUE 3); Rubben Moreno Decl. ¶ 8 (41 TTABVUE 3); Malouff Decl. ¶ 8 (42 TTABVUE 3); A. Rodriguez Decl. ¶ 8 (43 TTABVUE 3). None of them testified about Opposer's activities on social media prior to June 19, 2019, and Adrian Barron testified that Opposer's YouTube channel was launched in December 2019, after Applicant's first use of its mark. A Barron Decl. ¶ 21 (30 TTABVUE 5).

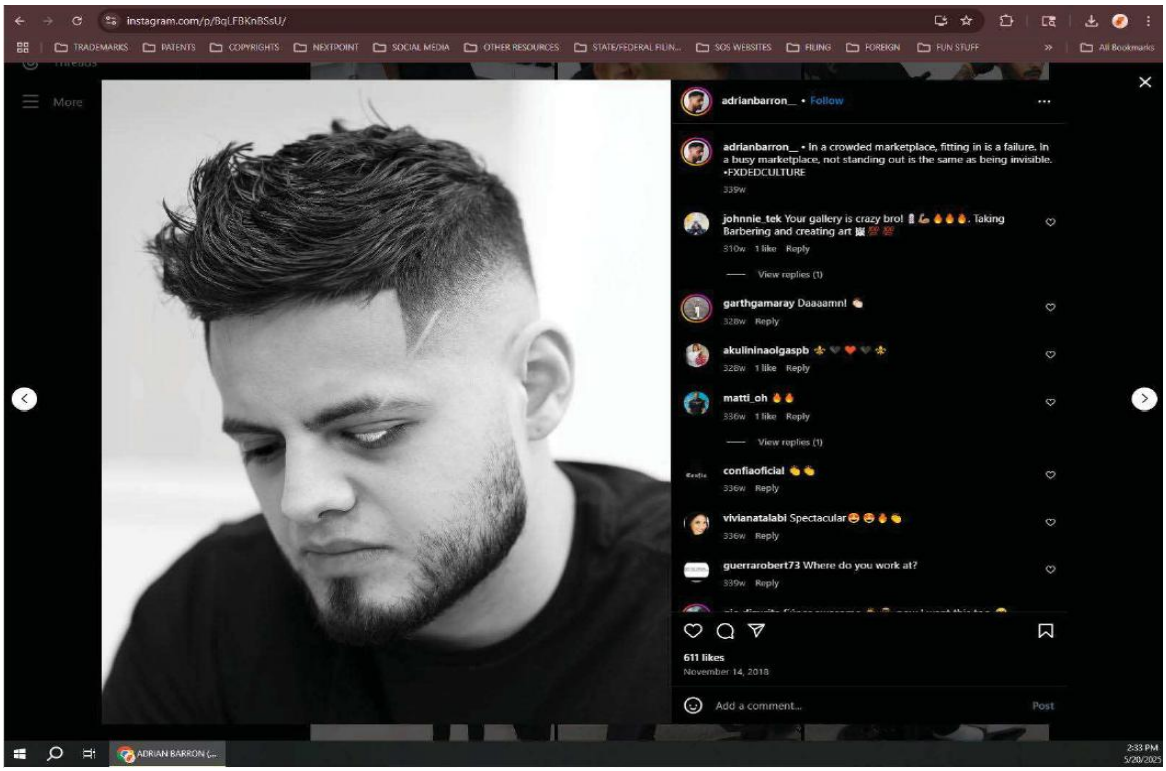
Adrian Barron testified that he has an Instagram account, @adrianbarron_, through which he promotes Opposer's goods and services. A. Barron Decl. ¶ 11 (30 TTABVUE 3). He authenticated multiple Instagram posts that he claimed "are dated from October 28, 2018 to February 20, 2019 and show use of the FADED CULTURE mark to promote [Opposer's] barbering services." A. Barron Decl. ¶ 12; Exs. 28-32 (30 TTABVUE 3, 88-97). We display the referenced posts below:



A. Barron Decl. Ex. 28 (30 TTABVUE 89).[63] This October 28, 2018 page displays a post containing FXDED CULTURE after the second use of Mr. Barron's Instagram

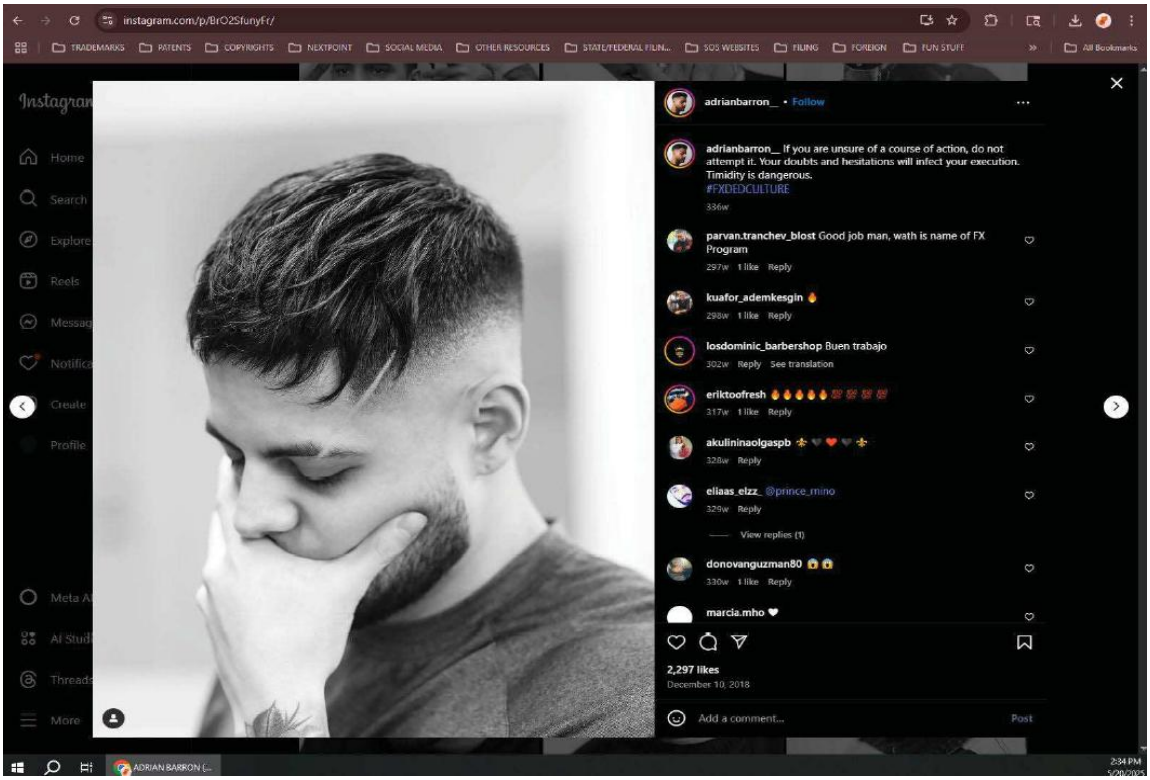
[63] At the oral hearing, Opposer's counsel pointed to the reference on this page to the "mid drop fade with texture on top," which she identified as a style of haircut, but there is no use of FADED CULTURE per se on the page.

username handle, and the hashtags #fvdedculture, #barronsbarbershop, and #fvded in another post by Mr. Barron.[64]

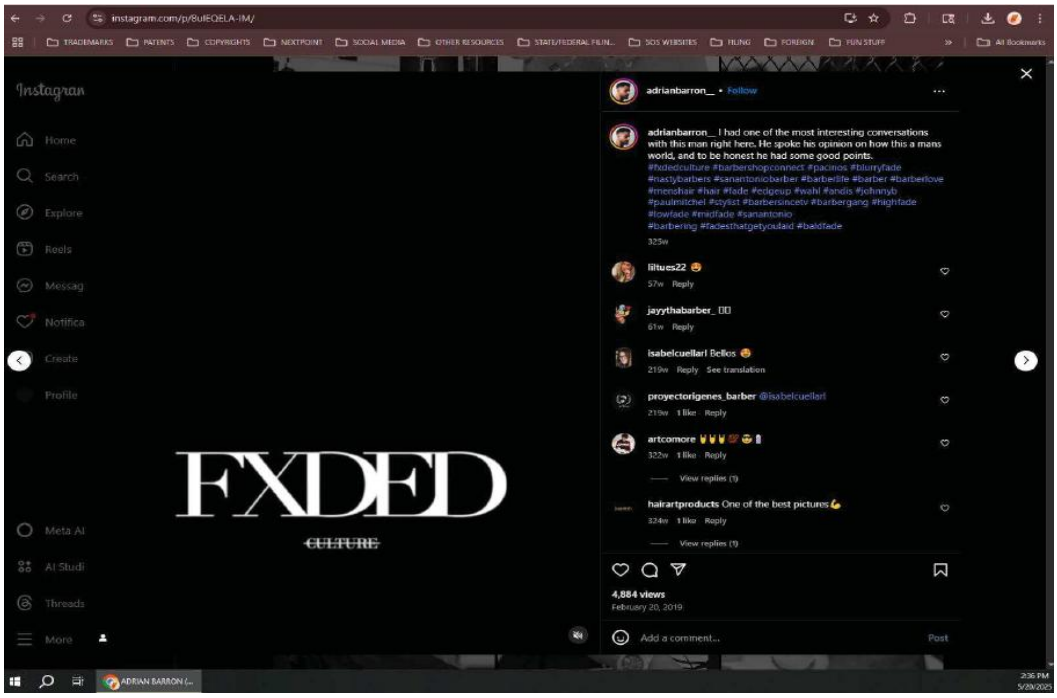


A. Barron Decl. Ex. 29 (30 TTABVUE 91). This November 14, 2018 page displays FXDEDCULTURE at the end of one post by Mr. Barron after his handle and the words "In a crowded marketplace, fitting in is a failure. In a busy marketplace, not standing out is the same as being invisible."

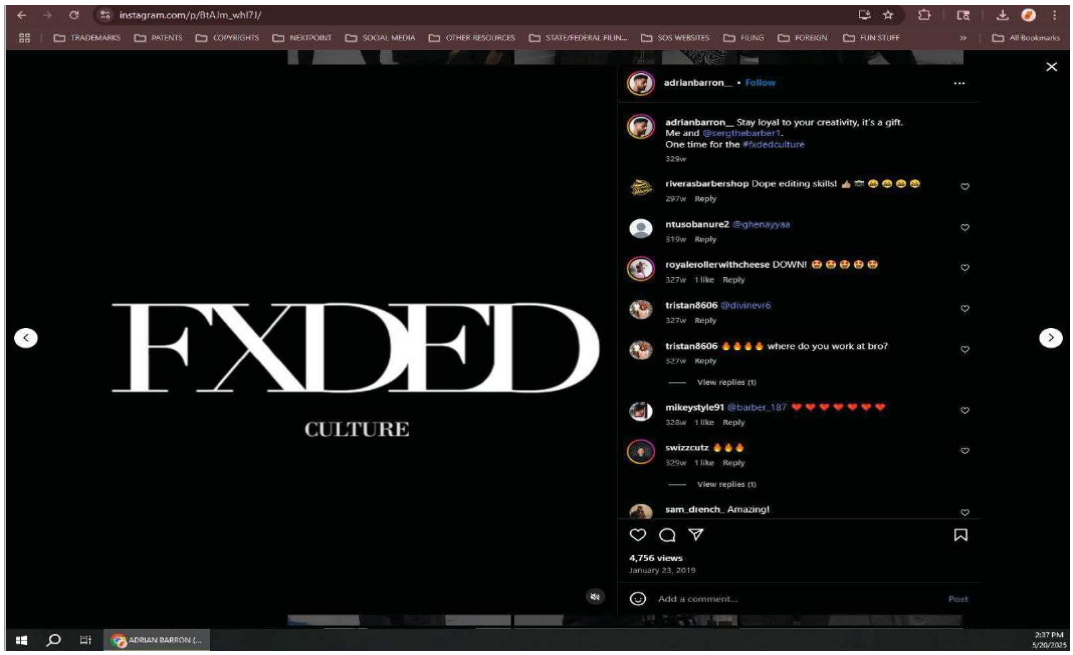
[64] The display of the hashtag #barronsbarbershop indicates that as of October 28, 2018, the Barron brothers were still operating their studio under that mark rather than under the FADED CULTURE mark. As noted above, the Barron brothers did not establish when the name change occurred.



A. Barron Decl. Ex. 30 (30 TTABVUE 93). This December 10, 2018 page displays #FXDEDCULTURE at the end of a post by Mr. Barron containing his handle and the words "If you are unsure of a course of action, do not attempt it. Your doubts and hesitation will infect your execution. Timidity is dangerous."



A. Barron Decl. Ex. 31 (30 TTABVUE 95). This February 20, 2019 page displays FXDED CULTURE with a line through CULTURE and numerous hashtags, including #fxdedculture.

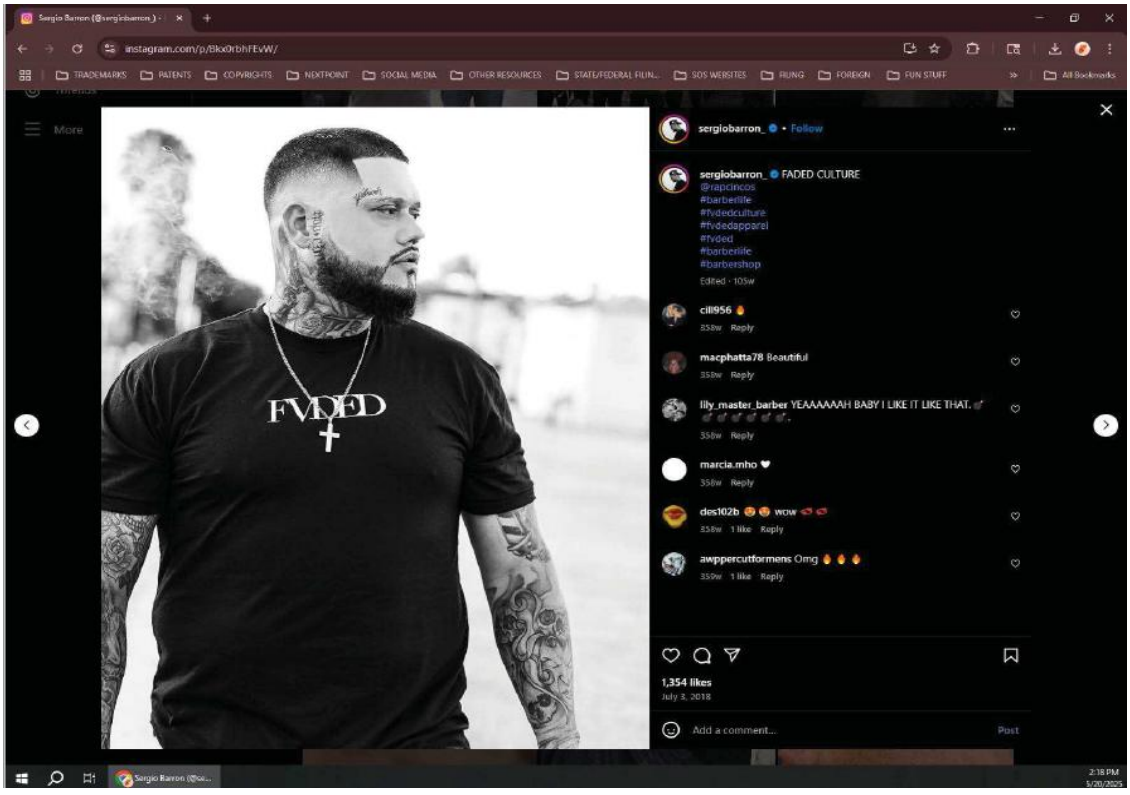


A. Barron Decl. Ex. 32 (30 TTABVUE 97). This January 23, 2019 page displays FXDED CULTURE and the hashtag #fxdedculture after the words "One time for the."

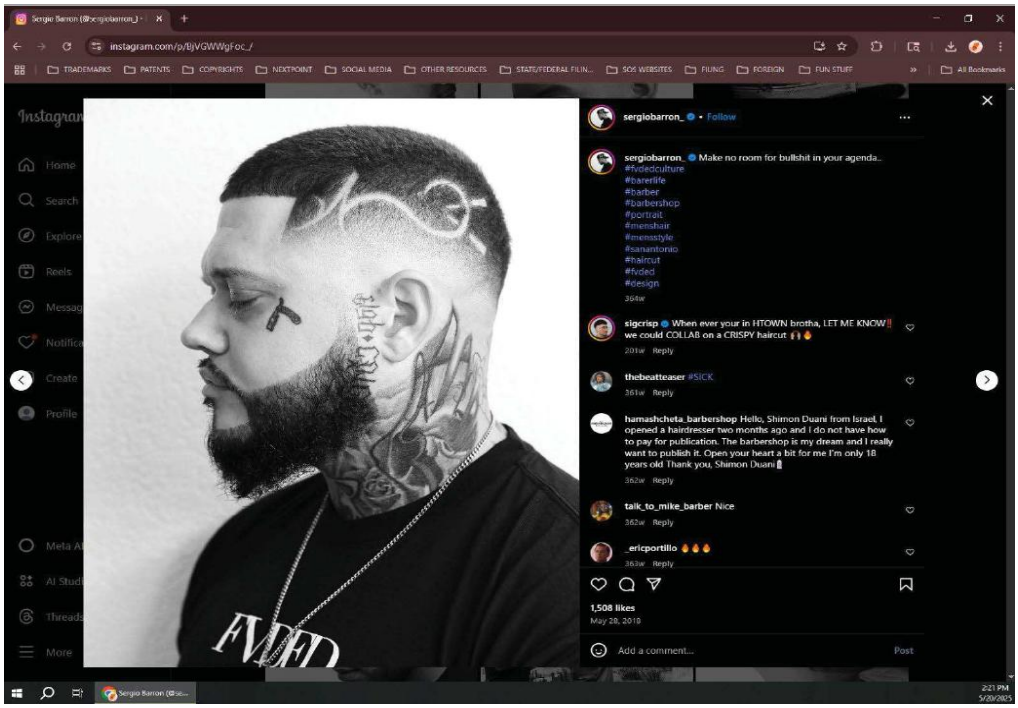
Sergio Barron testified that he also has an Instagram account, @sergiobarron_, through which he promotes Opposer's goods and services. S. Barron Decl. ¶ 8 (31 TTABVUE 3). He authenticated multiple Instagram posts that he claimed are "dated from October 9, 2017 to January 23, 2019 and show use of the FADED CULTURE mark to promote [Opposer's] barbering services." S. Barron Decl. ¶ 9; Exs. 25-27, 33-34 (31 TTABVUE 3, 6-15). We display the referenced posts in pertinent parts below:

S. Barron Ex. 25 (31 TTABVUE 7). This January 23, 2019 page displays FXDED CULTURE after Mr. Barron's Instagram user handle and the words "Get lost in what you do," and multiple hashtags, including #fxdedculture.

S. Barron Ex. 26 (31 TTABVUE 9). This October 9, 2017 page displays FVDED CULTURE after Mr. Barron's handle.

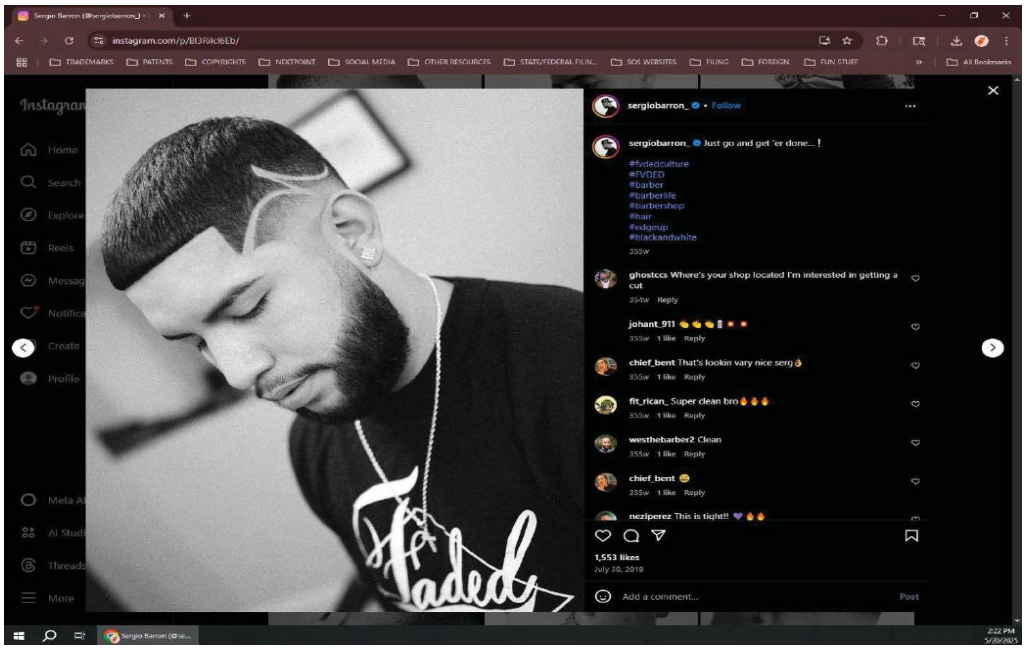


S. Barron Ex. 27 (31 TTABVUE 11). This July 3, 2018 page displays a FVDED shirt, the term FADED CULTURE after Mr. Barron's handle, and multiple hashtags, including #fvdedculture, #fvdedapparel, and #fvded, as well as #barbershop.[65]



S. Barron Ex. 33 (31 TTABVUE 13). This May 28, 2018 page displays the FVDED shirt and multiple hashtags beneath Mr. Barron's handle and the words "Make no room for bullshit in your agenda," including #fvdedculture and #fvded.

[65] Pointing to this exhibit in its reply brief, Opposer argues that "Sergio Barron testified that he used the Instagram account @sergiobarron_ to promote Opposer's goods and services, including barbering services," and that "Exhibit 27, along with Sergio Barron's testimony, and the other witnesses' testimonies, establishes priority in the FADED CULTURE mark in connection with barbering services." 50 TTABVUE 20. At the oral hearing, Opposer's counsel similarly pointed to this post as an example of prior use of FADED CULTURE in social media.



S. Barron Ex. 34 (31 TTABVUE 15). This July 30, 2018 page displays a shirt with "Faded" in script, and multiple hashtags, including #fvdedculture and #FVDED, beneath Mr. Barron's handle and the words "Just go and get 'er done!"

Opposer's customer Angel Huerta testified that "around 2016," when he "first encountered the FADED CULTURE trademark," it "was being used on social media hashtags and barber capes to promote their barbering services." Huerta Decl. ¶¶ 6, 8 (33 TTABVUE 3). We do not credit his testimony regarding use in social media hashtags because the Barron brothers themselves made no claim that the mark appeared in social media hashtags or otherwise before October 2017.

Opposer's employee Jacquelyn Chavez testified that she first became aware of Opposer's use of FADED CULTURE "to promote their barbering services . . . around December 2018," when she started following the Barron brothers' Instagram accounts. Chavez Decl. ¶ 6 (35 TTABVUE 3). She further testified that "[t]he first time I encountered the FADED CULTURE trademark was through Adrian and

Sergio Barron's Instagram where they used FADED CULTURE in their posts to promote their barbering services." Chavez Decl. ¶ 7 (35 TTABVUE 3). She did not mention any of the variants that appear above in the Barron brothers' Instagram posts.

The Instagram posts collectively show the Barron brothers' display of multiple terms, including a single display of the claimed FADED CULTURE mark, S. Barron Ex. 27 (31 TTABVUE 11), in connection with exhortations such as "Get lost in what you do," "Just go and get 'er done!," and "Make no room for bullshit in your agenda," as well as observations such as "In a crowded marketplace, fitting in is a failure. In a busy marketplace, not standing out is the same as being invisible." These uses are primarily in the nature of commentary regarding a particular lifestyle associated with the Barron brothers' barbershop,[66] not uses of FADED CULTURE or other claimed marks as the brand name under which the Barron brothers' Barron's Barbershop was then rendering barbering services.

The several terms are also regularly used in hashtags, usually displayed with other hashtags. Hashtags generally do not function as trademarks or service marks "because [they] merely facilitate[ ] categorization and searching within online social media," *In re DePorter*, No. 87229701, 2019 WL 460492, at *7 (TTAB 2019) (internal quotation omitted), and this principle applies with particular force here because the

[66] We note in that regard that in Exhibit 20 to the Declaration of Adrian Barron, a page on Opposer's current website at fadedculture.com states that "Faded Culture is a way of life. Inspired by that young and hungry individual looking for purpose through a world of chaos, it's our lifestyle." A. Barron Decl. ¶ 17; Ex. 20 (30 TTABVUE 4, 14).

Instagram pages show numerous hashtags displayed together, including ones such as #hair, #haircut, #barber, and #barbershop that consist of generic names.[67]

Opposer argues in its reply brief that "there are Board decisions demonstrating that use of a mark on social media posts can establish priority in a mark, especially when the social media evidence corroborates offered testimony." 50 TTABVUE 14 (citing *U.S. Events, LLC v. Ridgeway*, No. 92076564, 2025 WL 854939 (TTAB Feb. 26, 2025) (nonprecedential) and *Premier Rsch. Int'l LLC v. Medpace, Inc.*, No. 91251921, 2024 WL 397476 (TTAB Jan. 31, 2024) (nonprecedential)).[68] We are not bound by nonprecedential decisions, *Cielo e Terra*, 2026 WL 2624328, at *13 (citation omitted), but we may consider them for whatever persuasive value they may have. In the nonprecedential cases cited by Opposer, the Board found priority based on more than just social media posts. *U.S. Events*, 2025 WL 854939, at *4 ("clear and

[67] We note in that regard that in discovery, Opposer explained that "[t]he term 'faded' is a variant on the word 'fade,'" and that "[a] 'fade hairstyle' is a haircut where the hair gradually transitions from longer on top to significantly shorter at the sides and back, essentially 'fading' into the skin, creating a smooth blend with visible skin exposure depending on the fade level (low, mid, high) around the ears and neck." 44 TTABVUE 456 (Opposer's Response to Int. No. 5). In its reply brief, Opposer lists these generic hashtags and claims that they "show a clear association with barbering services." 50 TTABVUE 23. Opposer also argues that "the comments made by third parties (*i.e.*, consumers) show that consumers associate use of the FADED CULTURE mark in the Instagram posts in Exhibits 25–34 with Opposer's barbering services. For example, Exhibit 29 displays a comment that states: 'Taking Barbering and creating art.' Exhibit 33 displays a comment that states: 'We could COLLAB on a CRISPY haircut.' Exhibit 34 displays a comment that states: 'Where's your shop located I'm interested in getting a cut.'" *Id.* at 24. We do not view the comments as establishing that the commentors viewed FADED CULTURE as the Barron brothers' mark for barbering services, but rather simply as acknowledgments that the Barron brothers are barbers.

[68] The TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") provides that "[a]ny nonprecedential cases must be clearly identified as nonprecedential." TBMP Section 101.03(a)(2) (June 2026). Opposer did not designate the cited cases as nonprecedential.

consistent" witness testimony corroborated by Facebook posts); *Premier Rsch.*, 2024 WL 397476, at *6 ("four trade shows, presentations to prospective customers, industry publications, and social media posts").

Opposer also argues in its reply brief that "to the extent it is found that Opposer's use of FADED CULTURE in Opposer's predecessors-in-interest's Instagram posts fails to show trademark use, it should at least be found that this is analogous use sufficient to establish prior common law rights." 50 TTABVUE 15. A claim of analogous use must be pleaded, *Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, No. 91188816, 2013 WL 4635990, at *7 (TTAB 2013), and Opposer's reply brief is the first place where Opposer discussed the unpleaded analogous use theory. At the oral hearing, Opposer's counsel appropriately disavowed reliance on this unpleaded theory.

The single use of FADED CULTURE in a 2018 Instagram post, the scattered and apparently indiscriminate uses of FXDED CULTURE and FXDEDCULTURE by Adrian Barron, and FVDED CULTURE, FVDED, and "Faded" in script by Sergio Barron, and both brothers' use of hashtags containing those terms, did not create technical service marks rights in the FADED CULTURE mark for barbering services because we have found above that Opposer was not rendering barbering services under the FADED CULTURE mark when these promotional activities occurred.

d. Summary

We have found above that Opposer was not giving haircuts to customers under the FADED CULTURE mark or a legal equivalent prior to June 19, 2019, and that any promotional use of FADED CULTURE on shirts or in social media did not create

such rights where the promoted services were not being rendered under the FADED CULTURE mark. We must note in that regard that conspicuously absent from Opposer's evidence that the Barron brothers "gave customers haircuts using the FADED CULTURE mark" prior to June 19, 2019 are any of the normal trappings of the use of a mark for barbering services, such as the signage shown and discussed above that established Applicant's first use of its FADED CULTURE STUDIO mark,[69] or even the type of circumstantial evidence credited in *W. Fla. Seafood* as establishing prior use of a mark for restaurant services, such as the "advertisements placed in local newspapers,"[70] regulatory licenses,[71] and inspection reports. *W. Fla. Seafood*, 31 F.3d at 1126-28. In the terms of the Federal Circuit's puzzle metaphor in *W. Fla. Seafood*, there are a large number of pieces here, but they simply do not fit together to form a discernible picture of prior use of FADED CULTURE for barbering services. We find that Opposer did not establish priority of use of its common-law FADED CULTURE mark.

[69] Opposer stated in discovery that among the manners in which the FADED CULTURE mark has been used is on "physical signage." 44 TTABVUE 456 (Opposer's Response to Int. No. 6). There is no evidence that the FADED CULTURE mark or a legal equivalent was used on physical signage prior to June 19, 2019.

[70] Opposer stated in discovery that another manner in which the FADED CULTURE mark has been used is in "various advertising media." *Id.* (Opposer's Response to Int. No. 6). There is no evidence that the FADED CULTURE mark or a legal equivalent was used in any advertisements prior to June 19, 2019.

[71] Both of the Barron brothers hold licenses to provide barbering services, A. Barron Decl. ¶ 3 (30 TTABVUE 2); S. Barron Decl. ¶ 3 (31 TTABVUE 2), and we presume that any other barbers employed by the brothers have held them as well. There is no evidence that any of their barbering licenses reflected the brothers' operation of their barbershop under the FADED CULTURE mark.

B. Likelihood of Confusion

The second element of Opposer's Section 2(d) claim is likelihood of confusion. The weary reader will surely be happy to learn that our discussion of that element will be mercifully short. "Because Opposer has not established priority, the claim under Trademark Act Section 2(d) must fail, and we need not reach the issue of likelihood of confusion." *Sawstop*, 2025 WL 2400134, at *15 (citation omitted).

C. Conclusion

Opposer established its statutory entitlement to bring its Section 2(d) claim, but did not establish that it used the FADED CULTURE mark at common law for barbering services prior to Applicant's first use of its FADED CULTURE STUDIO mark for barbering services, and Opposer thus failed to establish the threshold element of its Section 2(d) claim.

Decision: The opposition is dismissed.