This Opinion is Not a Precedent of the TTAB

Hearing: July 22, 2026 Mailed: August 31, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re ALLCITY Network, Inc.

Serial No. 98209334

Jessie L. Pellant and Larissa M. Goodman of StudioIP Law, LLC for ALLCITY Network, Inc.

Lacy Allen, Trademark Examining Attorney,[1] Law Office 114, Nicole Nguyen, Managing Attorney.

Before Heasley, Larkin, and O'Connor, Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

ALLCITY Network, Inc. ("Applicant") seeks registration on the Principal Register of the standard-character mark KNUX for "Clothing, namely, t-shirts, polos, tanks,

[1] The involved application was examined by Trademark Examining Attorney David C. I, who issued the final refusal to register from which this appeal was taken, and who filed the appeal brief of the United States Patent and Trademark Office ("USPTO"). The application was subsequently assigned to Trademark Examining Attorney Allen, who appeared at the oral hearing. We will refer to them both as the "Examining Attorney."

sweatshirts, hoodies, jackets; headwear, namely, sports caps and hats" in International Class 25.[2]

The Trademark Examining Attorney has refused registration of Applicant's mark in Class 25 under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the standard-character mark NUX, registered on the Principal Register for "clothing, namely, blouses, sport shirts, t-shirts, sweatshirts, knit shirts, seamless shirts, shirts, tank tops, short sleeve tops, long sleeve tops, seamless tops, tops, bras, sweatshorts, sweatpants, shorts, seamless shorts, miniskirts, skirts, seamless pants, pants, pantsuits, pullovers, slacks, trousers, jackets, hooded jackets, bodysuits, camisoles, dresses, jumpsuits, overalls, cardigans, caps, sweaters and vests" in Class 25,[3] as to be likely to cause confusion when used on the Class 25 goods identified in the application.

When the Examining Attorney made the refusal final, Applicant appealed and simultaneously requested reconsideration, which was denied. The appeal is fully

[2] Application Serial No. 98209334 was filed on October 4, 2023 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant's claimed first use of the mark anywhere and first use of the mark in commerce at least as early as May 27, 2020. As discussed below, the application also covers services in Classes 35 and 41 that are not at issue on this appeal.

[3] Registration No. 3511969 (the "'969 Registration") issued on October 7, 2008 and has been renewed.

briefed,[4] and counsel for Applicant and the Examining Attorney appeared at an oral hearing before the panel on July 22, 2026.[5] We affirm the refusal to register.

I. Prosecution History and Record on Appeal[6]

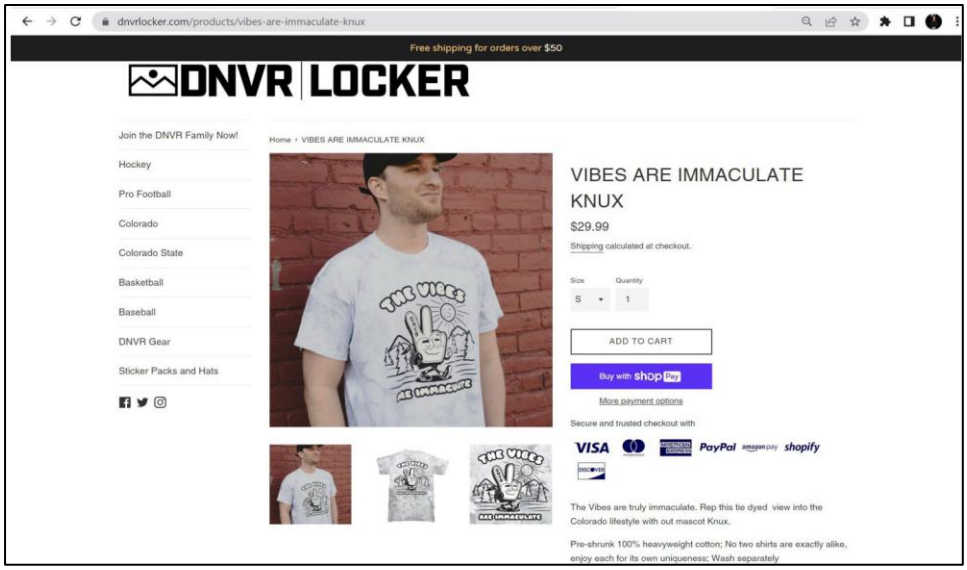
We briefly summarize below the prosecution history of the application because it provides useful background to our disposition of the appeal.

Applicant applied to register its mark for clothing in Class 25 and various services in Classes 35 and 41. The Class 25 portion of the application was supported by a specimen that Applicant described as consisting of "[s]creenshots of Applicant's merchandise website where the applied-for mark is used on apparel goods." We reproduce one of the screenshots below:

[4] 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. Applicant's appeal brief (miscaptioned "Reply Brief on Appeal for Appellant") appears at 6 TTABVUE, and its actual reply brief appears at 9 TTABVUE. The Examining Attorney's brief appears at 8 TTABVUE.

[5] On the morning of the hearing, Applicant emailed to the Board and the Examining Attorney a set of visual aids that it wished to use at the hearing. Parties that wish to use visual aids at a hearing should submit them at least three days before the hearing so that the Board and the opposing party can review them prior to the hearing and confirm that they contain material that is already in the record. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") Section 802.07 (June 2026). Because the visual aids were first provided to the Board and the Examining Attorney on the day of the hearing, the panel confirmed with Examining Attorney Allen that she did not object to their use, and Applicant's counsel Ms. Goodman used them during her argument.

[6] Citations in this opinion to the application record are to pages in the downloadable .pdf version of the USPTO's Trademark Status & Document Retrieval ("TSDR") database.



[7]

The Examining Attorney initially refused registration under Section 2(d) in Classes 25 and 41 based on the '969 Registration and another registration,[8] and raised an issue with Applicant's specimens in Classes 35 and 41.[9] The Examining Attorney made of record USPTO electronic records regarding the '969 Registration.[10]

Applicant responded by arguing against the Section 2(d) refusals. Applicant made of record additional pages from its website, and pages from its social media accounts;[11] third-party commentary on Reddit regarding the pronunciation of "nux;"[12] third-party webpages displaying clothing bearing the cited NUX mark;[13] pages from

[7] October 4, 2023 Application at 1, 11.

[8] February 11, 2024 Office Action at 2-4. The Examining Attorney eventually withdrew the Section 2(d) refusal in Class 41, and we will not summarize evidence that is not relevant to this appeal.

[9] *Id.* at 5-6.

[10] *Id.* at 31-32.

[11] August 12, 2024 Response to Office Action at 23-37, 42-45, 115-21.

[12] *Id.* at 40-41.

[13] *Id.* at 46-48.

the registrant's website at nuxactive.com displaying the cited NUX mark;[14] pages from a trademark search report for the term "Knux;"[15] and USPTO electronic records regarding third-party registrations of NUX- and KNUCKS-formative marks, and the marks KNIX, KNOX, and KNICKS.[16] In its response, Applicant described its KNUX mark as a "sub-brand under Applicant's parent logos [that] is used alongside a mascot logo."[17]

The Examining Attorney then issued an Office Action making final the Section 2(d) refusal as to Classes 25 and 41,[18] and Applicant appealed and simultaneously requested reconsideration. In its Request for Reconsideration, Applicant made of record much of the evidence submitted in its response to the initial Office Action, including pages from its websites and social media accounts;[19] the third-party commentary on Reddit regarding the pronunciation of "nux;"[20] third-party webpages displaying clothing bearing the cited NUX mark;[21] the pages from the trademark search report for the term "Knux;"[22] pages from the registrant's website at nuxactive.com displaying the cited NUX mark;[23] USPTO electronic records regarding

[14] *Id.* at 49-66.

[15] *Id.* at 70-74.

[16] *Id.* at 83-114.

[17] *Id.* at 15.

[18] October 7, 2024 Final Office Action at 1-5.

[19] April 7, 2025 Request for Reconsideration at 19-23, 26-29.

[20] *Id.* at 24-25.

[21] *Id.* at 30-32.

[22] *Id.* at 54-58.

[23] *Id.* at 33-50, 99-100.

the instant application;[24] USPTO electronic records regarding Registration No. 5459387 of the mark KNUX for various Class 9 goods and Class 45 services, owned by Knux, Inc.;[25] USPTO electronic records regarding the '969 Registration;[26] and the USPTO electronic records regarding registrations of third-party NUX- and KNUCKS-formative marks, and the marks KNIX, KNOX, and KNICKS.[27]

The Examining Attorney denied Applicant's Request for Reconsideration, withdrawing the Section 2(d) refusal as to Class 41, but maintaining and continuing the Section 2(d) refusal as to Class 25.[28] The appeal was resumed and following briefing and the oral hearing, it is now ready for decision.

II. Analysis of Likelihood of Confusion Refusal

"The Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion [or] mistake, or to deceive." *In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023) (cleaned up). Our determination of the likelihood of confusion under Section 2(d) of the Trademark Act is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) ("*DuPont*"). *Charger Ventures*, 64 F.4th at 1379. We consider each

[24] *Id.* at 59-61.

[25] *Id.* at 51-53, 62-64.

[26] *Id.* at 65-66.

[27] *Id.* at 67-98.

[28] September 6, 2025 Denial of Request for Reconsideration at 1-2.

DuPont factor for which there is evidence and argument. *See, e.g.*, *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).

"Two key factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because the fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *DC Comics v. Cellular Nerd LLC*, No. 91246950, 2022 WL 17832492, at *10 (TTAB 2022) (internal quotations and quotation marks omitted).

Applicant agrees that "[t]he most relevant du Pont factors are (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression; and (2) the similarity or dissimilarity and nature of the goods and services," 6 TTABVUE 5, and Applicant focuses on these key factors in its appeal brief. *Id.* at 6-12. Applicant also discusses the third *DuPont* factor, the "similarity or dissimilarity of established, likely-to-continue trade channels," *DuPont*, 476 F.2d at 1361, 6 TTABVUE 12-13, the sixth *DuPont* factor, the "number and nature of similar marks in use on similar goods," *DuPont*, 476 F.2d at 1361, 6 TTABVUE 13-15, and the eighth *DuPont* factor, the "length of time during and conditions under which there has been concurrent use without evidence of actual confusion." *DuPont*, 476 F.2d at 1361, 6 TTABVUE 14; 9 TTABVUE 2.[29]

[29] Applicant's appeal brief also lists the fourth *DuPont* factor, the "conditions under which and buyers to whom sales are made, i. e. 'impulse' vs. careful, sophisticated purchasing," *DuPont*, 476 F.2d at 1361, 6 TTABVUE 5, and the thirteenth *DuPont* factor, "[a]ny other established fact probative of the effect of use," *DuPont*, 476 F.2d at 1361, 6 TTABVUE 5, as factors that are pertinent "[i]n most cases . . . ." *Id.* Applicant offers no evidence or argument

A. Similarity or Dissimilarity of the Goods, Channels of Trade, and Classes of Consumers

We begin with the second and third *DuPont* factors. The second factor "considers '[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration . . . ." *In re Detroit Athletic Co.*, 903 F.3d 1297, 1306 (Fed. Cir. 2018). "This factor considers whether 'the consuming public may perceive [the goods or services] as related enough to cause confusion about the source or origin of the goods or services.'" *In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002)). "In analyzing the [goods], the Board considers '[t]he similarity or dissimilarity and nature of the [goods] as described in an application or registration.'" *In re OSF Healthcare Sys.*, No. 88706809, 2023 WL 6140427, at *4 (TTAB 2023) (quoting *In re Embiid*, No. 88202890, 2021 WL 2285576, at *10 (TTAB 2021)).

The goods "'need not be identical or even competitive to find a likelihood of confusion.'" *Id.* (quoting *In re Country Oven, Inc.*, No. 87354443, 2019 WL 6170483, at *2 (TTAB 2019)). "They need only be 'related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [they] emanate from the same source." *Id.* (quoting *Country Oven*, 2019 WL 6170483, at *2 (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012) (internal quotation omitted)).

regarding these factors, so "[w]e need not consider [them]." *Heil Co. v. Tripleye GmbH*, No. 91277359, 2024 WL 4925901, at *37 (TTAB 2024).

The relatedness of goods or services may be established based on (1) the language of the involved identifications of goods or services, which may show, on the face of the identifications, that the goods or services are literally or legally identical, or are otherwise intrinsically related, and (2) evidence of third-party uses or registrations, which may show that the identified goods or services are commonly offered by the same entity under the same mark. *See*, *e.g.*, *id.* at *4.

The "Examining Attorney need not prove, and we need not find, similarity as to each [good] listed in the description of [goods]" in Class 25 in the application. *Id.* at *5 (citation omitted). "It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed in the identification of goods in a particular class in an application." *In re Ye Mystic Krewe of Gasparilla*, No. 90522364, 2025 WL 2953731, at *3 (TTAB 2025) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 648 F.2d 1335, 1336 (CCPA 1981)). "[R]egistration must be refused in a particular class if Applicant's mark for any of its identified goods or services in that class is likely to cause confusion with the Registrant's mark for any of its identified goods or services." *In re Info. Builders Inc.*, No. 87753964, 2020 WL 2094122, at *3 (TTAB 2020).

Applicant argues in its appeal brief that "the Examining Attorney asserts that the goods at issue are related simply because they both fall under the broad category of 'clothing'," and that "a closer examination of each party's commercial identity and product offerings shows that they are fundamentally different in nature, appearance, function, trade channels, and target audience. Such a broad generalization by the

Examining Attorney is not the correct analysis." 6 TTABVUE 9. According to Applicant, its KNUX mark

> is associated with apparel tied to a national sports media company, which operates regional sports media brands including CHGO, DNVR, DLLS, PHLY, and PHNX. These brands offer city-specific sports media content. KNUX functions as a unifying mascot across these markets. The clothing offered under the KNUX mark includes basic apparel items, such as t-shirts, crewnecks, and sports hats, featuring bold designs tailored to the specific sports teams and fanbases of these respective cities. . . . Applicant's goods do not focus on sustainability or a specific "fit". The purpose of the apparel is to get the message across—that the consumer is a die-hard sports fan.
>
> By contrast, the NUX mark is used **only** with women's activewear. As stated on Registrant's website, NUX specializes in women's-only workout clothes, activewear, and loungewear—including leggings, bras, tanks, joggers, and crop tops—with a focus on high-performance, form-fitting athletic wear made with Italian knitting technology and sustainable materials. . . . None of Registrant's goods indicate any connection to, or support for, a specific sports team or city, or sports media in general. In fact, none of Registrant's goods have artistic design elements at all. Instead, Registrant's branding centers around a minimalistic, chic, and eco-conscious aesthetic which is a stark contrast from the bold, loud sports fan identity embodied by Applicant's KNUX-branded goods.

Id. at 10 (record citations omitted; emphasis in bold here in italics in Applicant's appeal brief).

Applicant further argues that "concluding Registrant's women's athleisure and ALLCITY's sports fan merchandise are likely to be confused because they both fall under the broad umbrella of 'clothing' is akin to saying candles and paintings are likely to be confused because they both fall under the broad umbrella of 'home decor.'" *Id.* at 11-12. Applicant concludes that "the parties' respective goods, together with

their commercial impressions and consumers' expectations of them, dispel any likelihood of confusion." *Id.* at 12.

All of these arguments, and their counterparts in Applicant's reply brief that the Examining Attorney "ignores the real-world marketplace in which consumers encounter the goods," 9 TTABVUE 7, and that "the apparel offered under Applicant's Mark are basic cotton apparel items, such as t-shirts, crewnecks, and sports hats, featuring bold designs tailored to the specific sports teams and fanbases of these respective cities," while "Registrant's goods are women's-only workout clothes, activewear, and loungewear, including leggings, bras, tanks, joggers, and crop tops, with a focus on high-performance, form-fitting athletic wear made with Italian knitting technology and sustainable materials," *id.* at 7-8, are based on extrinsic evidence regarding Applicant's and the registrant's actual uses of their respective marks on clothing. As a result, for the reasons discussed below, it is Applicant, not the Examining Attorney, who has failed to use the "correct analysis." 6 TTABVUE 9.

More than 35 years ago, the Federal Circuit observed that "[t]he authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed." *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990) (ten citations omitted). The Federal Circuit reiterated this principle more recently in *Stone Lion Cap. Partners, L.P. v. Stone Lion Cap. LLP*, 746 F.3d 1317,

1323 (Fed. Cir. 2014), in which the court held that the Board must "focus on the application and registrations rather than on real-world conditions, because 'the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application'." (quoting *Octocom*, 918 F.2d at 942).

The same principles apply to the goods or services identified in a cited registration. We must give "'full sweep' to an identification of goods or services regardless of [the] registrant's actual business," *Advance Mag. Publishers, Inc. v. Fashion Elecs., Inc.*, No. 91247034, 2023 WL 4261426, at *15 (TTAB 2023) (quoting *Paula Payne Prods. Co. v. Johnson Publ'g Co.*, 473 F.2d 901, 902 (CCPA 1973)), and "we may consider . . . restrictions [about the actual goods, or channels of trade] only if they are included in the identification of goods or services." *In re FCA US, LLC*, No. 85650654, 2018 WL 1756431, at *4 n.18 (TTAB 2018), *aff'd*, 778 F. App'x 962 (Fed. Cir. 2019).

"As the Board noted in *FCA US*, '[i]n innumerable cases, the Board hears arguments about how the parties' **actual** goods, services, customers, trade channels, and conditions of sale are narrower or different from the goods and services identified in the applications and registrations,' but 'as stated in equally innumerable decisions of our primary reviewing court, we may consider any such restrictions only if they are included in the identification of goods or services.'" *Embiid*, 2021 WL 2285576, at *14 n.38 (quoting *FCA US*, 2018 WL 1756431, at *4 n.18) (emphasis in bold here in italics in *Embiid*). Under these "innumerable decisions," "[o]ur decision . . . must be based on the identification of goods in the ['969] Registration and subject Application, as

that determines the scope of the benefit of registration." *Sock It To Me, Inc. v. Fan*, No. 91230554, 2020 WL 3027605, at *10 (TTAB 2020) (holding that goods identified broadly as "socks" "include[ ] all goods of the type identified, without limitation as to their nature or price").

The goods identified in the application are "Clothing, namely, t-shirts, polos, tanks, sweatshirts, hoodies, jackets; headwear, namely, sports caps and hats." The goods identified in the '969 Registration are "clothing, namely, blouses, sport shirts, t-shirts, sweatshirts, knit shirts, seamless shirts, shirts, tank tops, short sleeve tops, long sleeve tops, seamless tops, tops, bras, sweatshorts, sweatpants, shorts, seamless shorts, miniskirts, skirts, seamless pants, pants, pantsuits, pullovers, slacks, trousers, jackets, hooded jackets, bodysuits, camisoles, dresses, jumpsuits, overalls, cardigans, caps, sweaters and vests." Neither identification contains any restrictions on the nature or users of the goods of the sort argued by Applicant based on extrinsic evidence of actual use of the respective marks.[30] "We agree with the Examining Attorney that because there are no restrictions in the goods identifications in either the application or the cited registration, we may not 'import restrictions into the identification[s] based on alleged real world conditions' of the sort argued by

[30] At the oral hearing, Applicant's counsel rightly noted that certain goods identified in the '969 Registration are traditionally worn only by women, including "blouses," "bras," "miniskirts," "skirts," "pantsuits," "camisoles," and "dresses." But as discussed above, the Examining Attorney need not show that each good identified in the '969 Registration is related to each good identified in the application, and the particular goods identified in the '969 Registration that are relied on by the Examining Attorney, 8 TTABVUE 6, are unisex items of clothing on the face of the identifications.

Applicant . . . or consider extrinsic evidence regarding Applicant and Registrant themselves." *Embiid*, 2021 WL 2285576, at *14 (citing *Stone Lion*, 746 F.3d at 1323).

Goods identified as "t-shirts," "sweatshirts," and "jackets" appear in both identifications, and those goods are literally identical.[31] The goods identified as "shirts" in the '969 Registration encompass the goods identified in the application as "polos," which in the context of clothing is the plural of "polo," a type of shirt. MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, last accessed on July 29, 2026).[32] The goods identified as "tank tops" in the '969 Registration are equivalent to the goods identified in the application as "tanks," which in the context of clothing is the plural of "tank," a type of top. MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, last accessed on July 29, 2026). The goods identified as "caps" in the '969 Registration encompass the goods identified as "sports caps" in the application. Thus, the pairs of goods identified as "shirts" and "polos," "tank tops" and "tanks," and "caps" and "sports caps," are legally identical.

Because the goods identified in the application and the '969 Registration are literally or legally identical in part, the second *DuPont* factor strongly supports a conclusion that confusion is likely. *OSF Healthcare*, 2023 WL 6140427, at *9.

The third *DuPont* factor "considers '[t]he similarity or dissimilarity of established, likely-to-continue trade channels.'" *Detroit Athletic Co.*, 903 F.3d at 1308 (quoting

[31] Applicant states in its reply brief that "the only similarities in the marks' class descriptions are t-shirts, tanks, sweatshirts, and jackets." 9 TTABVUE 9.

[32] The Board may take judicial notice of dictionary definitions, including definitions from online dictionaries that exist in printed format or have fixed regular editions. *See*, *e.g.*, *In re Nursecon, LLC*, No. 88052194, 2024 WL 5265079, at *10 n.64 (TTAB 2024) (citation omitted).

DuPont, 476 F.2d at 1361). Once again citing the "practicalities of the commercial world, where consumers experience the goods and services and their respective marks firsthand," 6 TTABVUE 12, and relying on extrinsic evidence of actual use, Applicant argues that its "goods are sold exclusively through Applicant's own website and are not available in any brick-and-mortar retail locations," while "Registrant's products are distributed through its own website, in addition to a limited number of boutique fitness studios." *Id.* at 13. Applicant concludes that "[b]ecause Applicant's clothing is sold exclusively through their website, there exists virtually no opportunity for the goods to be confused" and that "the differences in classes of consumers and channels of trade pose no likelihood of confusion." *Id.* In its reply brief, Applicant argues that "the Examining Attorney again ignores the real-world marketplace in which consumers encounter the goods," and that "[c]ourt [sic] have found that, when considering legally identical goods under a broad umbrella such as clothing, a careful assessment of each party's respective products can lead to a finding that they are not confusingly similar." 9 TTABVUE 7 (citing *Casa Tradición S.A. de C.V. v. Casa Azul Spirits, LLC*, No. H-22-2972, 2024 U.S. Dist. LEXIS 67802, at 2-3 (S.D. Tex. Apr 15, 2024)).[33]

[33] Applicant's briefs cite Federal Circuit and Board cases, but they also cite more than a dozen decisions from regional circuit courts of appeals and two decisions from federal district courts. 6 TTABVUE 6-9, 12, 14; 9 TTABVUE 4, 7-9. USPTO examining attorneys and the Board apply the law of the Federal Circuit, which "is the Board's primary reviewing court since by statute, any applicant or party to an inter partes proceeding who is dissatisfied with the Board's decision may seek review of the decision in the Federal Circuit," and whose "cases address registration issues more specifically." TBMP § 101.03. There is ample precedent from the Federal Circuit and its predecessor, the Court of Customs and Patent Appeals, on registrability issues, particularly on likelihood of confusion under Section 2(d), and as a result, it is almost always both unnecessary and counterproductive in Board proceedings to

These arguments again do not involve the "correct analysis." 6 TTABVUE 9. As the Federal Circuit recently reiterated in *Fuente Mktg. Ltd. v. Vaporous Techs., LLC*, 172 F.4th 1337 (Fed. Cir. 2026), it is legal error "to disregard the broad language of [the] application and [the cited registration] when assessing *DuPont* factors three and four, and to instead defer to the parties' narrower real-world practices" because "[r]egistrability of an applicant's mark 'must be decided on the basis of the identification of goods set forth **in the application**,' regardless of what the record reveals as to the current real-world nature of the applicant's goods, channels of trade, or class of purchasers." *Id.* at 1345 (quoting *Octocom Sys.*, 918 F.2d at 942) (emphasis in bold here in italics in *Fuente Mktg.*). "And absent a binding agreement limiting an applicant's use of the applied-for mark to goods in certain channels or classes of consumers, an application with no such restrictions cannot be narrowed by evidence that the applicant's use is, in fact, meaningfully restricted." *Id.* (citing *Octocom Sys.*, 918 F.2d at 942; *Stone Lion*, 746 F.3d at 1323-25). "This is because it is the goods and services 'recited in the application' that 'determine the scope of the post-grant benefit of registration.'" *Id.* (quoting *Stone Lion*, 746 F.3d at 1324).

"Because the [goods] described in the application and the ['969] [R]egistration are [literally and] legally identical in part, we must presume that the channels of trade and classes of purchasers are the same as to those . . . identical [goods]." *OSF*

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cite decisions of other tribunals. Applicant concludes its appeal brief by arguing that "[t]he Lanham Act's provisions prohibiting trademark infringement, 15 USC §§ 1114(1) and 1125(a), exist to protect consumers from confusion in the marketplace," 6 TTABVUE 15, but we are not concerned in this ex parte appeal with trademark infringement, which involves real-world marketplace circumstances that generally cannot be considered in registrability determinations.

Healthcare, 2023 WL 6140427, at *9 (quoting *Monster Energy Co. v. Lo*, No. 91225050, 2023 WL 417620, at *8 (TTAB 2023) (citing *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012)). We are entitled to "rely on this legal presumption in determining likelihood of confusion," *Viterra*, 671 F.3d at 1362, both in the absence of evidence regarding the channels of trade and classes of purchasers for the identified goods, or, as in this case, in the presence of evidence regarding the limited actual channels of trade and classes of consumers for the applicant's and registrant's goods, if such limitations are not reflected in the respective identifications of goods. The third *DuPont* factor thus strongly supports a conclusion that confusion is likely. *OSF Healthcare*, 2023 WL 6140427, at *9.

B. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, "we consider the 'similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.'" *Ye Mystic Krewe of Gasparilla*, 2025 WL 2953731, at *4 (quoting *DuPont*, 476 F.2d at 1361). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *Sage Therapeutics, Inc. v. Sageforth Psych. Servs., LLC*, No. 91270181, 2024 WL 1638376, at *5 (TTAB 2024) (quoting *In re Inn at St. John's, LLC*, No. 87075988, 2018 WL 2734893, at *5 (TTAB 2018) (citation omitted), *aff'd per curiam*, 777 F. App'x 516 (Fed. Cir. 2019)); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 732 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.") (citation omitted).

"The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties." *Sage Therapeutics*, 2024 WL 1638376, at *5 (quoting *Coach Servs.*, 668 F.3d at 1368). "The focus is on the recollection of the average purchaser, who normally 'retains a general rather than a specific impression of marks.'" *Id.* (quoting *In re i.am.symbolic, llc*, No. 85916778, 2018 WL 3993582, at *4 (TTAB 2018) (citations omitted)). The "average purchaser" here is an ordinary member of the general public because clothing items of the sort identified in the application "are purchased or used in some form by virtually everyone." *Embiid*, 2021 WL 2285576, at *15.

"[S]imilarity is not a binary factor, but is a matter of degree." *St. Helena Hosp.*, 774 F.3d at 752 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 1344 (Fed. Cir. 2003)). Where, as here, the involved goods are literally and legally identical in part, a lesser degree of similarity between the marks is required for confusion to be likely. *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992) ("When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.").

The involved marks are KNUX and NUX, both in standard characters. With respect to appearance, Applicant argues that the "visual dissimilarity is obvious" because its mark "is four letters and starts with a 'K'," while the cited mark "begins with an 'N'." 6 TTABVUE 6. According to Applicant, "[w]ithout the hard-edged 'K' at

the beginning, NUX appears more condensed and minimalistic, making it easily distinguishable from Applicant's Mark," and the "missing letter also alters the spacing and proportions of the Cited Mark when compared to 'KNUX,' ensuring that the two do not appear visually identical when presented in branding, advertising, or product packaging." *Id.*

With respect to commercial impression, Applicant argues that "[t]he use of a house mark in conjunction with the rest of the mark minimizes the possibility that consumers would confuse the two marks," *id.* at 6-7 (citation omitted), and that its KNUX mark "serves as the overall mascot for the ALLCITY brand and almost always appears in conjunction with the mascot design for Applicant." *Id.* at 7. According to Applicant,

> [d]oing so provides the context that "KNUX" is a coined term for "knuckle" as depicted in the design that KNUX takes on in each region. Yet ALLCITY'S consumers have become so familiar with KNUX that they understand the reference without visual assistance. To be even more specific, consumers encountering Applicant's KNUX mark understand it not as a reference to **all** of Applicant's merchandise, but rather as a unique series of products distinguished by the KNUX mascot design. In this way, KNUX operates similarly to how well-known brands designate individual collections or product lines—signaling to consumers that the item belongs to a distinctive theme within a larger catalog, rather than serving as the umbrella brand for all goods offered by the company. The consistent use of the word KNUX with the visual cue of the mascot significantly strengthens the commercial impression of the mark. Again, as the Mark suggests, it is a fun depiction of a "foam finger." A foam finger is typically [a] stylized colored foam hand, with the hand clenched and the index finger outstretched, signaling the colloquial jester for "number one." Foam fingers have become iconic symbols of sports fandom. . . . Applicant's Mark "KNUX" is

> a play on the word "knuckle" in reference to the foam finger.
>
> . . .
>
> In this case, the mark KNUX, when used together with the ALLCITY house mark, would be recognized by consumers as part of the broader ALLCITY brand family. The presence of the ALLCITY house mark in conjunction with KNUX, therefore serves to assist identifying the commercial origin of the goods, minimizing any potential confusion with uses of KNUX alone.

Id. (record citation omitted; emphasis in bold here in italics in Applicant's brief).

Applicant also argues that the cited mark NUX "does not carry the same connotation, or even an inherent secondary meaning apart from what Registrant may have cultivated in goodwill," because it "is almost always used in connection with the word 'Active,' descriptive of the brand's products—women's 'activewear'," which Applicant states that it does not sell. *Id.* at 8 (record citation omitted).

These arguments again miss the mark. As the Examining Attorney aptly puts it, Applicant "has applied for the mark 'KNUX' not 'KNUX' plus a design of a mascot or 'KNUX' plus the applicant's house mark 'ALLCITY'," and "[s]imilarly, the registered mark is 'NUX', not 'NUX ACTIVE'." 8 TTABVUE 6. Applicant's arguments for dissimilarity are again based on extrinsic evidence of actual use of the involved marks, which we can no more consider under the first *DuPont* factor than under the second and third factors. "[W]e do not consider how Applicant and Registrant actually use their marks in the marketplace, but rather how they appear in the registration and the application. We must compare the marks as they appear in the drawings, and not on any [materials] that may have additional wording or information." *In re*

Aquitaine Wine USA, LLC, No. 86928469, 2018 WL 1620989, at *4 (TTAB 2018) (citations omitted).[34]

As under the second *DuPont* factor, the relevant authority is legion and longstanding: "The fact that each of the parties applies an additional name or trademark to its product is not sufficient to remove the likelihood of confusion" because "our concern here, of course, is whether [NUX], the mark actually registered, and [KNUX], the mark for which registration is sought, are confusingly similar when applied to the instant goods." *SCM Corp. v. Royal McBee Corp.*, 395 F.2d 1018, 1020 (CCPA 1968).

We find that the NUX and KNUX marks are similar in appearance from the standpoint of a consumer with a general rather than specific recollection of the NUX mark for various items of clothing who separately sees the KNUX mark used on identical goods. Both marks share the distinctive three-letter string "N-U-X," and a consumer with a general rather than specific recollection of the cited NUX mark may not notice the presence of the letter "K" at the start of Applicant's mark, particularly

[34] Applicant discusses *Aquitaine Wine* in its reply brief, arguing that the Board's holding limiting the comparison of the marks to what is shown in the respective drawings applies only in the "narrow scenario" of that case, in which the Board compared a standard-character mark to a composite word-and-design mark. 9 TTABVUE 5. Applicant claims that "notwithstanding the decision in *In re Antique* [sic] *Wine USA*, the commercial impression created by the marks remains a relevant, unrelated assessment separate than that of the breadth of rights attached to a standard character mark." *Id.* at 6. Contrary to Applicant's argument, however, *Aquitaine Wine* did not hold that where, as here, two standard-character marks are compared, it is permissible to consider matter extrinsic to the drawings, such as logos or house marks, in assessing similarity. As discussed below, the cases that *Aquitaine Wine* cited hold that the Board must consider the involved marks as registered and as sought to be registered, not in "the manner in which the mark[s] may be actually used." *Bellbrook Dairies, Inc. v. Hawthorn-Mellody Farms Dairy, Inc.*, 253 F.2d 431, 433 (CCPA 1958).

because, as Applicant concedes, the letter "K" at the start of its mark is silent when the mark is verbalized,[35] or may subconsciously "autocorrect" KNUX to NUX and view the recalled and encountered marks as the same. We find that the marks are similar in appearance because they share the three-letter string "N-U-X."

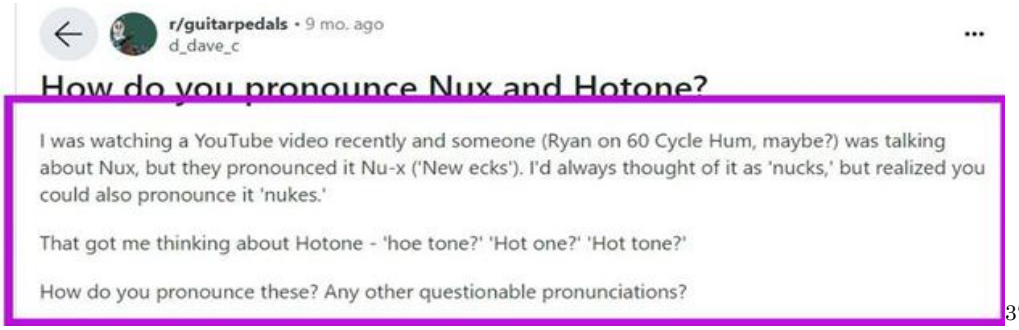
Applicant does not address the similarity of the marks in sound except to the extent that in its reply brief, it challenges what it calls the Examining Attorney's claim that "the phonetic similarity between the marks alone causes the same commercial impression," 9 TTABVUE 3, and argues that the Examining Attorney "fails to produce evidence that Registrant's mark is pronounced as 'nucks' and not 'nukes,' 'new X,' or another plausible variation evident in the marketplace." *Id.* at 4. In that regard, the record contains no evidence that either "nux" or "knux" is a known word in English, and "[t]here is no correct pronunciation of a trademark that is not a recognizable word." *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 1331-32 (Fed. Cir. 2014) (citation omitted). But "[a]bsent evidence to the contrary, we must consider all reasonable possibilities" for the pronunciation of NUX and KNUX. *Look Cycle Int'l v. Kunshan Qiyue Outdoor Sports Goods Co.*, No. 92079409, 2024 WL 373958, at *10 (TTAB 2024) (citing *StonCor*, 759 F.3d at 1332).

Applicant argues that KNUX is pronounced "nucks,"[36] which is at least a reasonable possibility for its pronunciation and indeed probably the most likely one.

[35] As discussed above, Applicant argues that "'KNUX' is a coined term for 'knuckle,'" 6 TTABVUE 7, a known word in English that is pronounced with a silent "k." This argument undercuts Applicant's argument that its mark begins with a "hard-edged 'K'." *Id.* at 6.

[36] The Examining Attorney requests that we take judicial notice of dictionary definitions of the word "knock" that illustrate that "the letter 'K' is silent in the word knock, which is pronounced without sounding the initial 'K'." 8 TTABVUE 4-5. We need not do so because

Even if NUX might be pronounced as "nukes" or "new X," as Applicant suggests, the pronunciation of "NUX" as "nucks" is also at least a reasonable possibility. Applicant made of record a Reddit entry captioned "How do you pronounce Nux and Hotone?," which we reproduce in part below:


[37]

This entry does not refer to clothing sold by the owner of the cited NUX mark, but it is noteworthy because it states that with respect to the pronunciation of the word "nux," the poster "always thought of [nux] as 'nucks'."[38] We find that it is a reasonable possibility that both NUX and KNUX will be pronounced and heard as "nucks," and when they are pronounced and heard that way, they are identical in sound.[39]

Finally, with respect to meaning, as discussed above, Applicant argues that KNUX evokes "knuckles" based on "the visual cue of the mascot," 6 TTABVUE 7, but

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Applicant does not dispute that the letter "K" is silent in its mark and in many other words in American English, including Knox and Knicks, which, as discussed below, Applicant argues are similar to Nux for purposes of the sixth *DuPont* factor. 6 TTABVUE 14.

[37] August 12, 2024 Response to Office Action at 40.

[38] Two other commenters agreed that "nux" is pronounced "nucks." *Id.* This entry appeared in the visual aids used by Applicant's counsel at the oral hearing, and when she was asked about it, she conceded that NUX could be pronounced "nucks" and that if NUX was pronounced that way, the marks would be identical in sound.

[39] We note that elsewhere in its appeal brief, Applicant describes NUX as one of several "spelling and auditory variations" of KNUX. 6 TTABVUE 14.

as previously explained, we must determine whether KNUX has any particular meaning on the face of the mark itself, where the mascot and its knuckles are not shown. There is nothing on the face of the KNUX mark that evokes "knuckles" or the mascot, and because "knux" is not a known word in English, it is likely to be understood as a coined word devoid of any particular meaning.

Applicant similarly argues that NUX derives its meaning from the fact that it "is almost always used in connection with the word 'Active,' descriptive of the brand's products—women's 'activewear'," *id.* at 8, but there is again nothing on the face of the NUX mark itself that includes or connotes "activewear." Because "nux" is also not a known word in English, it too is likely to be understood as a coined word devoid of any particular meaning.

The NUX and KNUX marks lack any distinctive meanings that could serve to distinguish one from the other; rather, they are likely to be understood as coined terms. Given that the marks are identical in sound, and similar in appearance, we find that they are likely to engender similar overall commercial impressions. To the extent that consumers may view the marks as having different connotations, as Applicant argues, we find that any such differences are easily outweighed by the visual and aural similarities of NUX and KNUX. The key first *DuPont* factor strongly supports a conclusion that confusion is likely.

C. The Sixth *DuPont* Factor

Under the sixth *DuPont* factor, which considers the "number and nature of similar marks in use on similar goods," *DuPont*, 476 F.2d at 1361, "[t]here are two prongs of

analysis for a mark's strength . . .: conceptual strength and commercial strength." *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) (citation omitted). "Conceptual strength is a measure of a mark's distinctiveness . . . and distinctiveness is often classified in categories of generally increasing distinctiveness[:] . . . (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful." *Id.* (citation, quotation, and quotation marks omitted). "Distinctiveness is relevant to a mark's overall strength in the likelihood of confusion analysis." *Id.* (citation omitted). "Commercial strength, on the other hand, is the marketplace recognition value of the mark. [It] is a question of whether consumers in fact associate the . . . mark with a unique source[.]" *Id.* (quotation and quotation marks omitted).

Applicant argues that "the number and nature of similar marks used in connection with similar goods weighs against a finding of likelihood of confusion" because "[i]n a crowded marketplace where there is a heavy existence of similarly situated marks, each mark is afforded relatively narrow rights (and protections) for the goods listed in its registration, and its ability to prevent other similar marks in the marketplace is lowered." 6 TTABVUE 14 (citation omitted). According to Applicant,

> [a] comprehensive search of the USPTO database for KNUX-formative marks, including spelling and auditory variations such as NUX, NUCCS, and KNUCKS, reveals at least ten registered trademarks in classes related to Class 25. . . . Such registration and coexistence of these KNUX formative marks, particularly those that share similar classifications demonstrate a precedent of tolerance and non-conflict within the market.

Id. (record citation omitted).

The Examining Attorney acknowledges that

> [a] large number of active use-based third-party registrations including the same or similar term or mark segment for the same or similar goods may be relevant to prove, in the same way dictionaries are used, that a term or mark segment has "a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak" and entitled to only a narrow scope of protection.

8 TTABVUE 9 (quoting *Spireon*, 71 F.4th at 1364 (internal quotation omitted) and citing *Jack Wolfskin Ausrustung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1374 (Fed Cir. 2015) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir 2015)). The Examining Attorney argues, however, that "[e]vidence comprising only a small number of active use-based third-party registrations including the same or similar component is generally entitled to little weight in determining the strength of a mark," *id.* (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 1328-29 (Fed. Cir. 2017); *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406 (CCPA 1973)), and that this "is especially so where, as here, the marks in those registrations are not as similar in format or commercial impression as registrant's and applicant's marks are to each other." *Id.* (citing *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 675 (Fed. Cir. 1984)). The Examining Attorney concludes that "the few use-based third-party registrations submitted by applicant are insufficient to establish that the mark or portion of the mark is inherently or conceptually weak." *Id.* We agree with the Examining Attorney.

During prosecution, Applicant made of record USPTO electronic records regarding the following third-party registrations:[40]

- Registration No. 5459387 of KNUX in standard characters for "Computer application software for mobile phones, namely, software for sending and receiving customized messages, photographs, content and data in real time; Computer application software for mobile devices, namely, software for sending and receiving customized messages, photographs, content and data in real time" in Class 9;[41]

- Registration No. 5874114 of NUX in standard characters for "Desktop computers; Laptop computers; Solid state drives; Tablet computers" in Class 9;[42]

- Registration No. 4284439 of NUX in stylized lettering for "sound effect pedals for musical instruments" in Class 15;[43]

- Registration No. 7092402 of CHUCKIN' KNUCKS in standard characters for "Socks; Sweatshirts; T-shirts; Tank tops; Hooded sweatshirts" in Class 25 and "Entertainment services, namely, providing podcasts in the field of sports discussions; Entertainment services, namely, providing video podcasts in the field of sports discussions; Providing sports information via a website" in Class 41;[44]

[40] Applicant claims that there are "at least ten registered trademarks in classes related to Class 25," 6 TTABVUE 14, that are relevant under the sixth *DuPont* factor. During prosecution, Applicant made of record a document captioned "Comprehensive Search Report" based on the search term "Knux" and the variants "Nux, Nuccs, Knucks." August 12, 2024 Response to Office Action at 70-74. This document listed 11 marks, including Applicant's KNUX mark and the NUX mark shown in the '969 Registration, *id.* at 71, and the ten third-party marks that we summarize below. *Id.* at 71-74. We note that there are actually only nine different third-party marks because the same KNICKS mark is registered in standard-character and stylized versions.

[41] August 12, 2024 Response to Office Action at 78-80.

[42] *Id.* at 83-84. Other goods were deleted from the registration during maintenance.

[43] *Id.* at 85-88. A separate class and other goods in Class 15 were deleted from the registration during maintenance.

[44] *Id.* at 89-90.

- Registration No. 4098836 of KNUCKS OUT and a design of knuckles for "hats, sweatshirts, boxer shorts, yoga pants, polo shirts; t-shirts, beanies, tanktops, sweatpants" in Class 25;[45]

- Registration No. 5981000 of KNIX in standard characters for "Bras; Brassieres; Camisoles; Loungewear; Shirts; Shorts; Swim wear; Swimwear; Tank-tops; Tank tops; Sports bras, none of the aforesaid relating to or in the promotion of the sport of basketball" in Class 25;[46]

- Registration No. 2874372 of KNOX in standard characters for "Hats and caps" in Class 25;[47]

- Registration No. 5103173 of KNICKS in standard characters for "Clothing, namely, hosiery, footwear, basketball shoes, basketball sneakers, slippers, T-shirts, shirts, polo shirts, sweatshirts, sweatpants, pants, tank tops, jerseys, shorts, pajamas, sport shirts, rugby shirts, sweaters, belts, ties, nightshirts, hats, caps, visors, warm-up suits, warm-up pants, warm-up tops/shooting shirts, jackets, wind resistant jackets, parkas, coats, baby bibs not of paper, head bands, wrist bands, aprons, undergarments, boxer shorts, slacks, ear muffs, gloves, mittens, scarves, woven and knit shirts, jersey dresses, dresses, cheerleading dresses and uniforms, swim wear, bathing suits, swimsuits, bikinis, tankinis, swim trunks, bathing trunks, board shorts, beach cover-ups, bathing suit cover-ups, bathing suit wraps, sandals, beach sandals, beach hats, sun visors, swim caps, bathing caps" in Class 25;[48] and

- Registration No. 1988809 of KNICKS in stylized lettering for "clothing; namely, hosiery, footwear, T-shirts, sweat shirts, sweatpants, pants, tank tops, jerseys, shorts, pajamas, sport shirts, rugby shirts, sweaters, belts, ties, nightshirts, hats, warm-up suits, jackets, parkas, coats, cloth bibs, head bands and wrist bands" in Class 25.[49]

For the reasons discussed below, these third-party registrations do not support Applicant's arguments that there is "a crowded marketplace where there is a heavy

[45] *Id.* at 91-94.

[46] *Id.* at 95-98.

[47] *Id.* at 99-104.

[48] *Id.* at 105-07. Other goods were deleted from the registration during maintenance.

[49] *Id.* at 108-114. This registration and Registration No. 5103173 are both owned by New York Knicks, LLC.

existence of similarly situated marks," 6 TTABVUE 14, and that there exists "a precedent of tolerance and non-conflict within the market." *Id.*

First, although Applicant properly made Registration No. 5459387 of record during prosecution in August 2024,[50] we take judicial notice that this registration was subsequently cancelled about three months later because the registrant did not file the required declaration of continuing use of the mark.[51] A cancelled registration has no probative value under the sixth *DuPont* factor. *Made in Nature, LLC v. Pharmavite LLC*, No. 91223352, 2022 WL 2188890, at *15 (TTAB 2022).[52]

Second, the sixth *DuPont* factor involves third-party marks used on "similar" goods or services. *DuPont*, 476 F.2d at 1361. Under the sixth factor, the similarity of the goods or services identified in a cited registration to the goods or services identified in third-party registrations must be shown in every case unless it is self-evident from the involved identifications. *Cf. Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1325 (Fed. Cir. 2018) (finding that the Board erred in considering third-party uses of marks for goods and services such as oriental foods, alcoholic beverages, café food, or grocery delivery services where the applicant

[50] *Id.* at 78-80.

[51] The Board's general practice is to not take judicial notice of USPTO records regarding registrations, *see In re Weiss*, No. 88621608, 2024 WL 3617597, at *1 (TTAB 2024), but an exception exists for changes in the status or title of a registration that has been properly made of record in a proceeding. *Cf. Harry Winston Inc. v. Bruce Winston Gem Corp.*, No. 91153947, 2014 WL 3686875, at *4 n.19 (TTAB 2014) (taking judicial notice of status of pleaded registration made of record).

[52] Even if the registration were still in effect, it would not be probative of conceptual weakness because, as discussed below, there is no evidence that the Class 9 goods identified in the registration are similar to the Class 25 goods identified in the '969 Registration.

had failed to show that those goods and services were similar to the parties' identical meat products). Registration Nos. 5874114 and 4284439 cover goods identified as "Desktop computers; Laptop computers; Solid state drives; Tablet computers" and "sound effect pedals for musical instruments," respectively, but Applicant has not shown that those goods are similar to the clothing items identified in the '969 Registration. These registrations have no probative value under the sixth factor.

Third, the sixth *DuPont* factor requires that third-party marks be "similar" to the cited mark, which means that Applicant must show that each third-party mark, including the KNIX, KNOX, and KNICKS marks, is "similar" to NUX even though Applicant argues under the first *DuPont* factor that KNUX and NUX are dissimilar.

Applicant did not attempt, much less make, such a showing. We find that the KNIX, KNOX, and KNICKS marks are dissimilar to NUX in appearance, sound, and meaning, in part because KNOX is a recognized surname, KNICKS is well-known as the team nickname of the New York Knicks, the reigning NBA champions, and KNIX is sufficiently similar to KNICKS to have induced the owner of the KNIX registration to specify that its clothing is not "relating to or in the promotion of the sport of basketball." We find that although the KNIX, KNOX, and KNICKS marks are used in connection with clothing items similar to those identified in the '969 Registration, the marks are not similar enough to NUX to support Applicant's argument that they are relevant under the sixth *DuPont* factor.

The remaining CHUCKIN' KNUCKS and KNUCKS OUT and design marks for clothing contain the word KNUCKS, which is similar only in sound to the cited NUX

mark, as well as significant additional matter, but even assuming that CHUCKIN' KNUCKS and KNUCKS OUT and design are "similar" in overall commercial impression to NUX for sixth-factor purposes, "two [registrations] are not enough to show dilution of a mark, nor [do] they show that there is a 'crowded field' of sources utilizing these similar terms." *In re Textnow Inc.*, No. 98231457, 2026 WL 1920576, at *9 (TTAB 2026) (citing *Embiid*, 2021 WL 2285576, at *19) ("three third-party registrations [are] a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant in both" *Jack Wolfskin* and *Juice Generation*)).

The '969 Registration issued on the Principal Register without a showing of acquired distinctiveness for the NUX mark, and "we must presume it is inherently distinctive, i.e., that it is at worst suggestive of the goods." *Heil Co.*, 2024 WL 4925901, at *18 (citing 15 U.S.C. § 1057(b)). Accordingly, we must accord the cited NUX mark the "normal scope of protection to which inherently distinctive marks are entitled." *Sage Therapeutics*, 2024 WL 1638376, at *10 (quoting *Bell's Brewery, Inc. v. Innovation Brewing*, No. 91215896, 2017 WL 6525233, at *9 (TTAB 2017)).

The sixth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

D. The Eighth *DuPont* Factor

The eighth *DuPont* factor addresses the "length of time during and conditions under which there has been concurrent use without evidence of actual confusion." *DuPont*, 476 F.2d at 1361. Unlike under the first, second, and third *DuPont* factors, where we must operate within the four corners of the '969

Registration and the application, under the eighth *DuPont* factor, we must "look at **actual market conditions**, to the extent there is evidence of such conditions of record." *In re Guild Mortg. Co.*, No. 86709944, 2020 WL 1639916, at *8 (TTAB 2020) (emphasis in original).

Citing three First Circuit cases, Applicant argues that "[a] lack of evidence of actual confusion weighs against a finding of likely confusion when competing marks have competed in the same market, even for less than five years." 6 TTABVUE 14.[53] According to Applicant, its mark "has been used in commerce for over five years, beginning in March 2020," and "[t]hroughout this time, Applicant's Mark and the Cited Mark have coexisted without notice of potential or actual confusion." *Id.*

Applicant's claim that its mark has been in use for over five years, and that there has been no actual confusion, is unsupported by any record evidence, and "[a]ttorney argument is no substitute for evidence." *Ye Mystic Krewe of Gasparilla*, 2025 WL 2953731, at *6 n.15 (citing *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (internal citation omitted)).[54] Moreover, "in this ex parte context, there has

[53] Applicant accuses the Examining Attorney of "simply ignoring the holding" in *Oriental Fin. Grp., Inc. v. Cooperativa De Ahorro Y Crédito Oriental*, 832 F.3d 15 (1st Cir. 2016), which Applicant quotes as follows: "Evidence of actual confusion is not invariably necessary to prove likelihood of confusion; on the other hand, absent evidence of actual confusion, when the marks have been in the same market, side by side, for a substantial period of time, there is a strong presumption that there is little likelihood of confusion." 6 TTABVUE 14 (quoting *Oriental Fin.*, 832 F.3d at 30-31). Like the Board, the Examining Attorney is not obliged to apply the law of a regional circuit court of appeals, but as discussed below, the binding Board authority similarly requires a showing that the involved marks "have been in use, side by side, for a substantial period of time," which showing Applicant not only has not made, but has expressly contradicted in its arguments under other *DuPont* factors.

[54] Applicant's application claims first use of the mark in March 2020, but in inter partes cases, "[t]he allegation in an application for registration . . . of a date of use is not evidence on behalf of the applicant . . .; a date of use of a mark must be established by competent evidence."

been no opportunity to hear from Registrant about whether it is aware of any reported instances of confusion," and "[w]e therefore are getting only half the story." *Guild Mortg.*, 2020 WL 1639916, at *9 (citations omitted). "This constraint inherent in the ex parte context necessarily limits the potential probative value of evidence bearing on the eighth *du Pont* factor, compared with an inter partes proceeding, where the registrant has an opportunity to present argument and evidence in response." *Id.*

But even assuming coexistence of the marks without actual confusion since 2020, "[t]he absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by [Applicant] of its mark[ ] for a significant period of time in the same markets as those served by [the registrant] under [its] mark[ ]." *Sabhnani v. Mirage Brands, LLC*, No. 92068086, 2021 WL 6072822, at *25 (TTAB 2021) (citing *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, No. 91177415, 2010 WL 595586, at *17 (TTAB 2010), *aff'd*, 637 F.3d 1344 (Fed. Cir. 2011) (citing *Gillette Can. Inc. v. Ranir Corp.*, No. 82769, 1992 WL 215312, at *6 (TTAB 1992)). "In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred. *Id.* (quotation and quotation marks omitted).

Trademark Rule 2.122(b)(2), 37 C.F.R. § 2.122(b)(2). The same principle applies in this ex parte appeal with respect to Applicant's unsupported claim of use since 2020 for purposes of the eighth *DuPont* factor. We note in that regard that in *Guild Mortg.*, the applicant submitted a declaration from its President and CEO attesting to the length and circumstances of the applicant's use of its mark. *Guild Mortg.*, 2020 WL 1639916, at *8. No such evidence is present here.

As discussed above, Applicant argues under the second and third *DuPont* factors that "examination of each party's commercial identity and product offerings shows that they are fundamentally different in nature, appearance, function, trade channels, and target audience," 6 TTABVUE 9; that the involved goods are "sold and marketed to entirely different groups of consumers, though [sic] independent and non-overlapping channels of trade," *id.* at 13; that "[b]ecause Applicant's clothing is sold exclusively thought [sic] their website, there exists virtually no opportunity for the goods to be confused," *id.*; and that "the marks do not share overlapping trade channels or consumers" because "Applicant sells its goods exclusively through its own website, whereas Registrant's goods are marketed and sold through their own website, and limited retailers." 9 TTABVUE 9. Applicant thus "argue[s] repeatedly in its appeal brief and reply brief that, without regard to the identifications as stated, the consumers of Registrant's and Applicant's [goods] are quite different," *Guild Mortg.*, 2020 WL 1639916, at *9, and, as a result, "there is a lack of evidence that **in the actual marketplace**, the **same** consumers have been exposed to **both** marks for the respective [goods], such that we could make a finding as to the length of time during and conditions under which there has been concurrent use without evidence of actual confusion." *Id.* at *10 (quotation and citations omitted; emphasis in original). The eighth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

E. Summary of *DuPont* Factors

The key first and second *DuPont* factors, and the third *DuPont* factor, support a conclusion that confusion is likely, while the sixth and eighth *DuPont* factors are

neutral. The involved goods are literally and legally identical in part, which reduces the degree of similarity between the KNUX and NUX marks that is required for confusion to be likely, the channels of trade presumptively overlap to this extent, and the marks are quite similar in overall commercial impression. We conclude that a consumer with a general rather than specific recollection of the cited NUX mark for clothing who separately encounters Applicant's KNUX mark for the identical goods is likely to believe mistakenly that the goods have a common source.

Decision: The refusal to register as to Class 25 is affirmed. The application will proceed in Classes 35 and 41 only.