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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

The New York Times Company
v.
Worldle LLC

Opposition No. 91291631

Jordan LaVine, Eric R. Clendening, and Laura S. Lipschutz, of Flaster/Greenberg P.C.,
for The New York Times Company.

Worldle LLC, pro se.[1]

Before Elgin, Casagrande, and Bradley, Administrative Trademark Judges.

Opinion by Casagrande, Administrative Trademark Judge:

Applicant Worldle LLC applied to register the mark WORLDLE (in standard-character format) on the Principal Register for "Providing online non-downloadable game software," in International Class 42.[2] The New York Times Company (Opposer)

[1] Worldle LLC appears pro se through its owner, Kory McDonald.

[2] Applicant filed Application Serial No. 97455658 on June 13, 2022, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging dates of first use anywhere and first use in commerce of March 21, 2022. Applicant included a translation statement in the application stating that "[t]he wording 'Worldle' has no meaning in a foreign language."

opposes registration.[3] The Notice of Opposition alleges that Opposer owns a registration on the Principal Register for the mark WORDLE (in standard-character format) for "Downloadable computer application software for social networking, namely, for posting, showing, or displaying information in the field of electronic gaming via the Internet, namely, software for playing word puzzle games."[4] Opposer asserts one claim: likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). In its Answer, Applicant denied the salient allegations in the Notice of Opposition[5] and asserted the affirmative defenses of equitable estoppel and laches.[6] However, the Board granted Opposer's motion to strike these defenses as conceded because Applicant did not file a response to the motion.[7]

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[3] *See* 1 TTABVUE. References to the briefs, other filings in the case, and the record cite the Board's TTABVUE docket system. The number preceding "TTABVUE" is the docket number assigned to the cited filing in TTABVUE and any number immediately following "TTABVUE" identifies any specific page(s) to which we refer.

[4] Registration No. 7140643 issued on August 15, 2023, alleging dates of first use anywhere and in commerce of at least as early as August 24, 2022. In its Notice of Opposition, Opposer also claims ownership of pending Application No. 97248806 for the mark WORDLE in standard-character format for various services in International Class 41. But Opposer didn't rely at trial on this application (which matured into a registration while this case has been pending), so we need not discuss it further.

[5] *See* 5 TTABVUE (Answer).

[6] *See id.* at 10-11 (¶¶ 37-38). The Answer also contains five additional numbered paragraphs that consist of amplifications of Applicant's denials of several of the allegations of the complaint. *Id.* at 8-10 (¶¶ 32-35); *see, e.g.*, *Illyrian Import, Inc. v. ADOL Sh.p.k.*, No. 91234244, 2022 WL 970321, at *2 (TTAB 2022) (amplifications of denials are not affirmative defenses).

[7] 8 TTABVUE 1.

Opposer filed public and confidential versions of its trial brief.[8] So did Applicant.[9] Opposer then filed public and confidential versions of its reply brief.[10] In this opinion, we'll cite to the public versions of these filings unless we indicate otherwise.

For the reasons explained below, we sustain the opposition.

I. The Record

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

During its trial period, Opposer submitted additional evidence, including:

- A First Notice of Reliance attaching a printout from the USPTO's Trademark Status & Document Retrieval (TSDR) database showing current status and title of its asserted registration;[11]
- A Second Notice of Reliance attaching TSDR printouts of the current status and title of several registrations owned by third parties;[12]
- Declaration Testimony of Jonathan Knight, Senior Vice President and Head of Games at Opposer;[13] and
- Declaration Testimony of Hunter Calvert, Executive Director of Data and Insight for Games at Opposer.[14]

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8 *See* 40 TTABVUE (confidential); 41 TTABVUE (redacted public version).

9 *See* 42 TTABVUE (confidential); 43 TTABVUE (redacted public version).

10 *See* 44 TTABVUE (confidential); 45 TTABVUE (redacted public version).

11 *See* 9 TTABVUE.

12 *See* 10 TTABVUE.

13 *See* 14 TTABVUE (redacted public version, attaching exhibits including written publicity generated by Opposer's acquisition of the WORDLE game from its creator); 11 TTABVUE (confidential version without exhibits).

14 *See* 12 TTABVUE (confidential version); 13 TTABVUE (redacted public version).

During its trial period, Applicant submitted the declaration of its owner, Kory McDonald,[15] as well as fourteen (14) Notices of Reliance.[16] We have reviewed all the exhibits attached to the Notices of Reliance, but rather than listing or trying to summarize all the attachments, our analysis below will simply refer to the evidence as it is implicated by the parties' arguments.

During its rebuttal period, Opposer submitted a rebuttal Notice of Reliance attaching: two Notices of Opposition asserting claims under Section 2(d) for likelihood of confusion with the WORDLE registration it asserts here against two other entities; a decision in domain name arbitration obtaining transfer of wordlegame.org and wordle.org; an article on www.npr.org about Opposer sending "hundreds" of "takedown" notices under the Digital Millennium Copyright Act; and a law firm's article about one of the attached Notices of Opposition.[17]

II. Opposer is statutorily entitled to pursue this opposition proceeding

Before we address the merits of Opposer's claim, we need to make sure the relevant statute authorizing us to resolve opposition proceedings entitles Opposer to ask us to do so. An opposer under Section 13 of the Trademark Act, 15 U.S.C. § 1063, must demonstrate: (i) an interest falling within the zone of interests protected by the

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15 *See* 16 TTABVUE.

16 *See* 22-35 TTABVUE.

17 *See* 39 TTABVUE. Opposer's reply brief also attached a June 15, 2026, decision of the European Union Intellectual Property Office upholding an opposition Opposer filed to an application by an Irish company to register WORLDLE. *See* 45 TTABVUE 19-24. We note the decision but do not rely on it as authority as to likelihood of confusion in the U.S.

opposition statute; and (ii) proximate causation. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 120-37 (2014)); *id.* at 1305 (applying *Lexmark* to inter partes TTAB cases). Demonstrating a real interest in opposing registration of the challenged mark satisfies the zone-of-interests requirement, and demonstrating a reasonable belief in damage by the registration of the mark establishes proximate causation. *Id*. at 1305-06.

Opposer's Notice of Opposition plausibly alleges that Applicant's mark creates a likelihood of consumer confusion as to source in view of the mark in Opposer's asserted registration. And during its trial period, Opposer submitted the title and status copy of its registration from the TSDR database.[18] Accordingly, Opposer has established that it is entitled to bring this statutory opposition proceeding. *See, e.g.*, *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945 (Fed. Cir. 2000); *Made in Nature, LLC v. Pharmavite LLC*, No. 91223352, 2022 WL 2188890, at *9 (TTAB 2021).

III. ANALYSIS

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), provides, in pertinent part: "No trademark … shall be refused registration on the principal register on account of its nature unless it … Consists of or comprises a mark which so resembles [1] 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, [2] as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to

[18] *See* 9 TTABVUE.

cause mistake, or to deceive." (bracketed numbers added). As the brackets highlight, there are two elements of a Section 2(d) claim: priority (either under common law or based on a prior registration) and likelihood of confusion.

A. Priority is not an issue

The first element in Section 2(d) requires an opposer to establish priority, either through proof of ownership of a registration or proof of priority of use. This opposition is based on ownership of a registered mark and the registration is of record, and the applicant has not counterclaimed to cancel it. That removes priority as an issue. *See, e.g.*, *Top Tobacco LP v. N. Atl. Op. Co.*, No. 91157248, 2011 WL 6099691, at *6 (TTAB 2011); *Itel Corp. v. Ainslie*, No. 91072956, 1988 WL 252407, at *2 (TTAB 1988).

B. Likelihood of confusion

The other element of a Section 2(d) claim is likelihood of confusion. "[T]he opposer has the burden of proving a likelihood of confusion by a preponderance of the evidence." *Stratus Networks, Inc. v. UBTA-UBET Commc'ns Inc.*, 955 F.3d 994, 998 (Fed. Cir. 2020) (citation omitted). We evaluate evidence pertaining to several factors that inform the determination whether confusion is likely. *See, e.g.*, *id.* (citing *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) ("*du Pont*") (listing the factors)). Though *du Pont* lists thirteen numbered factors (some with subparts), we generally address only those that are relevant and material to the case before us. *See, e.g.*, *Shen Mfg. Co. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 1241 (Fed. Cir. 2004); *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 943 (Fed. Cir. 1990). Typically, these are the factors addressed in the briefs and based on relevant evidence

in the record. *See, e.g.*, *Dollar Fin. Grp., Inc. v. Brittex Fin., Inc.*, 132 F.4th 1363, 1371-72 (Fed. Cir. 2025); *Cunningham*, 222 F.3d at 946-47. We then weigh our findings on these factors to determine if, on balance, they indicate that confusion is likely. *See, e.g.*, *In re Mastic Inc.*, 829 F.2d 1114, 1117 (Fed. Cir. 1987) ("The factors themselves, e.g., the similarity or dissimilarity of the marks and trade channels, must be weighed in the likelihood of confusion determination ...."); *see also Fuente Mktg. Ltd. v. Vaporous Techs., LLC*, 172 F.4th 1337, 1347 (Fed. Cir. 2026) ("The likelihood of confusion analysis is a balancing test … ."); *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 1349 (Fed. Cir. 2011) ("[W]e conclude the legal analysis by balancing the *DuPont* factors and assessing the likelihood of confusion between the parties' respective marks.").

We now turn to the relevant factors. Although Opposer focuses its presentation on factors 1–5, Applicant presses arguments on all but the seventh factor.

1. Comparison of the marks

We start with the "similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression." *du Pont*, 476 F.2d at 1361; *see also Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265 (Fed. Cir. 2002); *In re i.am.symbolic, llc*, 866 F.3d 1315, 1323 (Fed. Cir. 2017). Similarity in all aspects of the marks is not required, however. This factor supports refusal "if the similarity in either form, spelling or sound alone is likely to cause confusion." *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 732 (CCPA 1968) (citation omitted); *see also Hancock v. Am. Steel & Wire Co.*, 203 F.2d 737, 740 (CCPA 1953)

("it is proper to consider [the marks'] appearance, sound and meaning … but a combination of all three factors need not necessarily exist") (cleaned up; citations omitted).

We do not compare the marks side-by-side. Rather, we keep in mind both that consumers depend on their recollection of marks to which they've previously been exposed, and that their ability to do so is fallible. *See, e.g.*, *In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014); *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (CCPA 1981). And we compare marks in their entireties, not by dissecting them. *See, e.g.*, *Jack Wolfskin Ausrustung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1371 (Fed. Cir. 2015) ("marks must be viewed in their entireties, and it is improper to dissect a mark when engaging in this analysis") (cleaned up) (quoting *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012)).

"Similarity is not a binary factor but is a matter of degree." *St. Helena Hosp.*, 774 F.3d at 752 (citation omitted). "The proper test is … 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." *i.am.symbolic*, 866 F.3d at 1323 (citation omitted); *see also Phillips Petroleum Co. v. Knox Indus. Corp.*, 277 F.2d 945, 947 (CCPA 1960) ("The issue is whether the marks are confusingly similar, not whether they are identical.") (citation omitted).

The marks (WORDLE and WORLDLE), while not identical, differ only by one letter: an "L" between the "R" and the "D." And "L" appears after the "D" as well in

both, so, at a glance, the difference does not pop out, as might another letter that doesn't already appear in the mark. Thus, the marks look very similar.

Neither mark is a dictionary word, so there's no "correct" pronunciation of either. *See, e.g.*, *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 1331-32 (Fed. Cir. 2014) ("There is no correct pronunciation of a trademark that is not a recognized word.") (citation omitted). As Applicant points out, the words "WORD" and "WORLD" precede the ending "-LE," and to the extent consumers recognize that, they'll likely pronounce that portion of the mark like these respective dictionary words. We may take judicial notice of entries in reliable on-line dictionaries, *see, e.g.*, *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988); *Hancock*, 203 F.2d at 740, and the online version of the Merriam-Webster dictionary tells us that the "word" is pronounced "ˈwərd"[19] and "world" is pronounced "ˈwər(-ə)ld."[20] These first parts of the respective marks both begin with the same sound "wər" and end with a "d." "World" injects an "l" sound between the two that the dictionary entry indicates is sometimes, and sometimes not, pronounced as part of a separate syllable.

Applicant says that the added "L" in the WORLD portion of WORLDLE "require[s] conscious articulation" and "is certainly enough to distinguish the marks in the minds of consumers."[21] In support of this argument, Applicant submitted a video recording of a BBC television news reporter pronouncing "WORLDLE" in a segment about this

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[19] *See* https://www.merriam-webster.com/dictionary/word (last accessed Nov. 4, 2026).

[20] *See* https://www.merriam-webster.com/dictionary/world (last accessed Nov. 4, 2026).

[21] 43 TTABVUE 34.

dispute (where she'd also pronounced "WORDLE").[22] Applicant argues that the fact that she stumbled over the pronunciation of "WORLDLE" means that consumers will be extra careful to articulate Applicant's mark carefully, which will avoid any confusion.[23]

We watched and listened to the BBC segment, but it seems to us that the segment could also be reasonably seen to cut the other way. In the segment, the British television reporter—who likely has prepared for the broadcast and knows full well that WORDLE and WORLDLE are separate games—nevertheless needs to concentrate to pronounce Applicant's nearly identically spelled mark differently from Opposer's WORDLE. We think that if someone in that circumstance needs to focus to pronounce Applicant's mark differently from WORDLE, many consumers of computer games, hearing someone pronounce Applicant's mark in normal speech without consciously trying to articulate it clearly, may not catch any aural difference between the two marks, especially if the "world" portion is pronounced as one syllable. Add to that the fact that both marks begin with the same sound and end in an "l" sound.[24] We therefore find this single British anecdote to add little, if any, support to Applicant's argument that computer game consumers would appreciate the aural differences in the marks.

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[22] *See* 36 TTABVUE.

[23] *See* 43 TTABVUE 34.

[24] Opposer argues that both marks end with the same sound, *see* 41 TTABVUE 26, and Applicant does not argue otherwise. We find that, in phonetic terms, the ending sound is an "ᵊl" sound, as exemplified in the phonetic representation of the word "hurdle" ("ˈhər-dᵊl"), *see* https://www.merriam-webster.com/dictionary/hurdle (last accessed Nov. 4, 2026), which is one of the words Applicant identifies as having a similar "/rdl/ cluster." *See* 43 TTABVUE 34.

Applicant also identifies games (QUORDLE and NERDLE) that, according to Applicant, have names that sound even more similar to WORDLE than WORLDLE, observing that the USPTO registered both and Opposer opposed neither.[25] Even if we assume that Applicant's argument that these marks are even more similar to Opposer's mark is correct, the USPTO examines (and the Board adjudicates) each mark on its own facts and evidence, irrespective of whether other marks that are said to be as or more similar have registered. *See, e.g.*, *In re Nett Designs, Inc.*, 236 F.3d 1339, 1342 (Fed. Cir. 2001) ("The Board must decide each case on its own merits. Even if some prior registrations had some characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court.") (citation omitted); *accord In re Shinnecock Smoke Shop*, 571 F.3d 1171, 1174 (Fed. Cir. 2009); *In re Brockway Glass Co.*, 154 F.2d 673, 674 (CCPA 1946).

As to meaning or connotation, both marks are made-up words. The parties do not point us to any dictionary definition of either. They nevertheless disagree on what the words represent. Opposer says that neither mark has any meaning in the English language.[26] As for WORDLE, Opposer argues that the creator of WORDLE, Josh Wardle (from whom Opposer purchased all rights in the game), coined the name based on a portmanteau of "word" and "Wardle."[27] Applicant insists that both marks follow a convention of using the last two letters "-le" to indicate a "puzzle" and the

[25] *See* 43 TTABVUE 34; *see also id.* at 27-28.

[26] *See* 41 TTABVUE 26.

[27] *See id.* at 11.

immediately preceding part of the name identifies the subject matter of the puzzle.[28] In support, Applicant has submitted hundreds of pages of screenshots of similar guessing games that fit the naming convention Applicant describes.[29]

While Opposer is correct that neither term is in the dictionary, that doesn't necessarily mean that consumers won't perceive them to have any meaning. We determine the meaning and connotation of the respective marks in Section 2(d) cases just as we assess consumer perception of marks in any other sort of case: in the context of the goods and/or services at issue. *See, e.g.*, *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012); *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, No. 91074797, 1988 WL 252340, at *3 (TTAB 1988); *In re Sydel Lingerie Co.*, 1977 WL 22667, at *2 (TTAB 1977). Here, Opposer's registration is for software for playing a word puzzle game. Applicant's service also concerns provision of "game software" (but it's nondownloadable, so it's a service, not a product). The term "game" in Applicant's application is a broad category that includes puzzle games. Notwithstanding Opposer's "portmanteau" explanation of the origin of WORDLE, the evidence of hundreds of other online games that Applicant submitted that end in -le leads us to infer that, at the present time, the naming convention Applicant describes for electronic puzzle games is the more likely way consumers will perceive both terms: Opposer's mark as suggesting a word-puzzle game; and Applicant's mark as

[28] *See, e.g.*, 43 TTABVUE 33.

[29] *See* 25 TTABVUE (Applicant's Fourth Notice of Reliance).

suggesting a "world" (i.e., geography-based) puzzle game.[30] *See generally* 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12:3 (5th ed. Sept. 2026 update) ("MCCARTHY") ("the meaning of a word or symbol is not necessarily fixed for all time as it is first used … but may grow and develop new meaning and nuances according to its use"). So, the current meanings are similar in one respect (they suggest puzzle games in a particular subject) and different in another (the respective subjects).[31]

In summary, while the marks aren't identical, we find that they look very similar and that many consumers will pronounce them similarly. As to meaning, we find, based on the limited record before us, that to the extent that some consumers derive any meaning from them (as opposed to viewing them as made-up words) both marks are suggestive of puzzle games, one involving words and the other involving geography. Overall, the marks, viewed in their entireties, are quite similar. This factor will therefore count in favor of a conclusion that confusion is likely when we engage in our weighing and balancing of the relevant factors at the end of this analysis.

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[30] We also address this matter, *infra*, in the context of Applicant's argument on the sixth *du Pont* factor.

[31] The current meanings are important because we decide registrability as of the time of our decision, not when the terms were first used. *See, e.g.*, *Fortunoff Silver Sales, Inc. v. Norman Press, Inc.*, No. 91064943, 1985 WL 72022, at *6 (TTAB 1985) ("The likelihood of confusion must be decided on the basis of facts as they exist at the time when the issue is under consideration.") (citing *R.J. Reynolds Tobacco Co. v. Am. Brands, Inc.*, 493 F.2d 1235, 1238 (CCPA 1974) ("evidence bearing on the issue of likelihood of confusion is admissible for the period extending through the latest date permitted by the procedural rules of the Patent Office for taking testimony and presenting evidence")).

2. Comparison of the goods/services

The second likelihood-of-confusion factor is "[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use." *du Pont*, 476 F.2d at 1361. When making this comparison, we keep in mind that "[i]t is … not necessary that the goods [or services] of the parties be identical in order to sustain a finding of likelihood of confusion." *In re Rsch. & Trading Corp.*, 793 F.2d 1276, 1278 (Fed. Cir. 1986) (citations omitted). "Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services." *Hewlett-Packard*, 281 F.3d at 1267 (citation omitted); *see also Naterra Int'l, Inc. v. Bensalem*, 92 F.4th 1113, 1117 (Fed. Cir. 2024) (second factor "considers whether the consuming public may perceive the respective goods and services of the parties as related enough to cause confusion about the source or origin of the goods and services") (cleaned up; citation omitted). But "if the parties' goods [or services] are closely related, a lesser degree of similarity between the marks may be sufficient to give rise to a likelihood of confusion." *Sunkist Growers, Inc. v. Intrastate Distribs., Inc.*, 144 F.4th 1376, 1379 (Fed. Cir. 2025) (citing *Coach Servs.*, 668 F.3d at 1368 ("In this fact-specific inquiry, if the parties' goods are closely related, a lesser degree of similarity between the marks may be sufficient to give rise to a likelihood of confusion.")).

In this case, Opposer's registration identifies "Downloadable computer application software … for playing word puzzle games." The application identifies "Providing

online non-downloadable game software." Both provide consumers with software for playing games. Opposer provides it by allowing customers to download the software. Applicant provides it by allowing customers to access and use its software but not download it. Thus, Opposer's software is considered a good, while Applicant technically provides a service. The application isn't limited to any particular type(s) of game, so it includes Opposer's "word puzzle games." There is a close intrinsic relationship between the respective goods and services, as identified in the application and registration. *See, e.g.*, *In re Anderson*, No. 76511652, 2012 WL 680264, at *10 (TTAB 2012) (inherent relationship between tires and hub caps, on the one hand, the service of "custom manufacture of automobile[s]" because tires and hub caps "may be an essential element in the manufacture of many automobiles"); *Avenza Sys. Inc. v. Avencia Inc.*, No. 92046736, 2009 WL 4086592, at *8 (TTAB 2009) (sales of software for creating maps "inherently related" to consulting and advisory services directed to creation of software for use with geographic data); *In re Thomas*, No. 78334625, 2006 WL 1258862, at *2 (TTAB 2006) (jewelry as a good and "retail jewelry … store services" are "competitive, inherently related goods and services").

Another way to show that consumers perceive products or services to be related in a way that tends to support a likelihood of confusion as to source is to show that other companies offer the goods (or services) in an application **and** those in a cited registration under one mark. *See, e.g.*, *Naterra Int'l*, 92 F.4th at 1117 ("testimony that third-party companies sell both types of goods is pertinent to the relatedness of the goods") (citation omitted); *Hewlett-Packard*, 281 F.3d at 1267 ("evidence, such as

whether a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis"); *accord Recot, Inc. v. Becton*, 214 F.3d 1322, 1328 (Fed. Cir. 2000). The more consumers are exposed to companies who put out the same goods and/or services as the parties, the more they tend to see those goods and/or services as related, in the sense that they emanate from a single source. Here, Opposer placed in the record evidence that four other companies own active registrations that either are use-based or for which a declaration attesting to use has been filed that identify both downloadable game software (which encompasses the goods in Opposer's registration) and the service of offering nondownloadable game software (as in the application).[32] This constitutes a bit more evidence that consumers view the respective software products and services to be related. *See, e.g.*, *In re Ox Paperboard, LLC*, No. 87847482, 2020 WL 4530517, at *6 (TTAB 2020).

Applicant's only rejoinder is to make two irrelevant arguments. The first irrelevant argument is the parties offer different games: Opposer offers a word game and Applicant offers a geography game.[33] This point is irrelevant because the service identified in the application is not limited to geography games. "Registrability of an

[32] *See, e.g.*, Opposer's Second Notice of Reliance, 10 TTABVUE at 7-12 (MILLION LORDS); *id.* at 20-25 (FIDGETOLOGY); *id.* at 40-45 (THE OUTER WORLDS); *id.* at 46-50 (TENACIOUS ENTERTAINMENT). We note that several other third-party registrations Opposer submitted were based on foreign applications or registrations, and the associated status and title information for them does not reflect that any declaration attesting to use had been filed. We give very little weight to those registrations because if the evidence doesn't show that the registrant has submitted proof of use in the U.S., the inference that U.S. consumers are aware of the use of these marks is weak-to-nonexistent. *See, e.g.*, *In re Textnow Inc.*, No. 98231457, 2026 WL 1920576, at *6 n.29 (TTAB 2026); *In re 1st USA Realty Professionals, Inc.*, No. 78553715, 2007 WL 2315610, at *2 (TTAB 2007).

[33] *See* 43 TTABVUE 35-37.

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." *Fuente Mktg.*, 172 F.4th at 1345 (cleaned up; citation omitted); *accord Stone Lion Cap. Partners v. Lion Cap. LLP*, 746 F. 3d 1317, 1324 (Fed. Cir. 2014). Applicant's broadly-identified "Online non-downloadable game software" includes software for word puzzle games, so the different subject of Applicant's current game doesn't matter.

Applicant also argues that Opposer cannot assert rights in "game format" or "game mechanics."[34] This argument is irrelevant because this case solely concerns the trademarks under which the respective goods and services are offered (i.e., the names the parties have assigned their games).

We find Applicant's non-downloadable game software very closely related to Opposer's "downloadable software for playing word puzzle games." This factor will count in favor of a conclusion that confusion is likely when we engage in our weighing and balancing of the relevant factors at the end of this analysis.

3. Comparison of the respective trade channels and customers

We next consider "[t]he similarity or dissimilarity of established, likely-to-continue trade channels" as well as "[t]he … buyers to whom sales are made … ." *du Pont*, 476 F.2d at 1361. As with the comparison of the goods, we base our comparison of the trade channels and customers on what is set forth in the application and cited registration, irrespective of any current limitations on how the parties distribute

[34] *See id.* at 36-38.

their goods or services and to whom. *See, e.g.*, *Fuente Mktg.*, 172 F.4th at 1345; *Stone Lion*, 746 F.3d at 1324; *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581 (Fed. Cir. 1983). Here, neither the application nor the registration identify any restrictions as to trade channels or customers.

Further, where, as here, the goods and services are very closely related, we presume that they're distributed through the same channels to the same types of customers. *See, e.g.*, *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1166 (Fed. Cir. 2002) (where "the parties' goods are very similar," court held "absent restrictions in the registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers"); *Hewlett-Packard*, 281 F.3d at 1268 (where "several of HP's registrations cover goods and services that are **closely related** to the broadly described services that Packard Press seeks to register under the PACKARD TECHNOLOGIES mark," court held that "absent restrictions in the application and registration, goods and services are presumed to travel in the **same** channels of trade to the same class of purchasers") (emphasis added); *Venture Out Props. LLC v. Wynn Resorts Holdings LLC*, No. 91167237, 2007 WL 39112, at *7 (TTAB 2007) ("Because the services are clearly related, they would be offered in the same channels of trade and offered to the same classes of consumers, namely, the general public.").

Beyond the presumption, we find that game software, whether downloadable or not, is offered to the general public, so the customer classes plainly overlap. But as to trade channels, Applicant argues that Opposer has conceded that the channels don't

overlap, because it says that its games are offered through Opposer's "website as well as through its downloadable mobile Games application"—the latter of which suggests use of a third-party "app store"—while acknowledging that Applicant's software is accessed through Applicant's website.[35] This seems to undermine the presumption we'd otherwise apply. Without more explanation and evidence of how these channels overlap, we think this factor tips slightly in Applicant's favor. This is particularly so in light of the Federal Circuit's observation in *St. Helena Hospital*, 774 F.3d at 754-55, that "[a]dvertising on the Internet is ubiquitous and proves little, if anything" (citation omitted) about trade channel overlap.

Thus, while the classes-of-customers factor supports Opposer, the trade-channels factor supports Applicant.

4. Customer sophistication and degree of care

We also consider "[t]he conditions under which … sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing." *du Pont*, 476 F.2d at 1361. Our determination under this factor requires us to base our finding "on the least sophisticated potential purchasers" within the classes of customers. *See Stone Lion*, 746 F.3d at 1323 (citations omitted). And we cannot base our decision on who the parties currently sell or distribute their products to, but rather, as with most other *du Pont* factors, we must base our findings on consumer sophistication and care on the goods and services identified in the application and registration. *See, e.g.*, *Can. Imperial Bank of Com. v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1492-93 (Fed. Cir. 1987).

[35] *See* 42 TTABVUE 38 (Applicant's brief); 41 TTABVUE 31 (Opposer's brief).

Although Applicant insists that puzzle game players are "highly sophisticated consumers,"[36] Applicant does not point us to any evidence in the record supporting this assertion. Further, there are no price restrictions inherent in the respective word puzzle game goods and game software services, and Applicant acknowledges that "[b]oth Opposer's and Applicant' s games are entirely free to play."[37] *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 648 F.2d 1335, 1337 (CCPA 1981) (current circumstances such as the "asserted restriction of sales to an exclusive boutique" considered "irrelevant to the question of registrability of appellant's mark when such limitations are not inherent in marketing of the goods or specifically set forth as limitations in the application") (citations omitted). As such, we find that the respective game software goods and services are subject to impulse use. *See, e.g.*, *Recot*, 214 F.3d at 1329 ("When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care."); *Colgate-Palmolive Co. v. Purex Corp.*, 451 F.2d 1401, 1402 (CCPA 1971) ("we agree with the board that 'an average purchaser at least of low-cost, shelf goods such as those involved here is not likely to remember symbol marks in their specific details'") (citation and brackets omitted).

The general public includes a substantial proportion of unsophisticated consumers. And because the game software is free and therefore subject to impulse

[36] *See id.* at 39.

[37] *See id.* at 40.

downloading, the degree of care in choosing game software is likely to be low. Together, the circumstances reflected by the record here indicate, and we so find, that this factor favors a conclusion that confusion is likely.

5. Degree of strength or weakness of Opposer's mark

"Both the fifth and the sixth *DuPont* factors consider strength [of an Opposer's mark]. While the fifth factor considers the prior mark's fame in an effort to assess its strength in the marketplace, the sixth considers the existence of similar marks on similar goods as a measure of the extent to which other marks weaken the prior mark." *Fuente Mktg.*, 172 F.4th at 1345 n.3 (citation omitted). For purposes of the fifth factor, "[f]ame is a matter of degree that varies along a spectrum from very strong to very weak, and relevant factors include sales, advertising, length of use of the mark, market share, brand awareness, licensing activities, and variety of goods bearing the mark." *Id.* (cleaned up; citation omitted). Under the sixth factor, we assess evidence of the extent to which the quantum of third-party **use** of similar marks has conditioned consumers "to distinguish between different such marks on the bases of minute distinctions," *see, e.g.*, *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1324 (Fed. Cir. 2018), thus weakening a mark commercially, as well as evidence, such as third-party registrations, that together with third-party use bear on the mark's conceptual weakness. *See, e.g.*, *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1363 (Fed. Cir. 2023); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015).

Taking first conceptual strength, in discussing the degree of similarity and dissimilarity of the respective marks' meanings, we already referred, in the subsection addressing the meaning or connotation of the marks, to Applicant's evidence of a plethora of electronic puzzle games that end in "-le," many of which have a term immediately preceding "-le" that defines the subject of the puzzle. That evidence indicates to us that, conceptually, Opposer's mark for a word puzzle has a degree of suggestiveness. But suggestive marks are inherently distinctive. *See, e.g.*, *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992), and this is confirmed by the fact that Opposer's mark was registered without a claim of acquired distinctiveness. *See, e.g.*, *Brooklyn Brewery Corp. v. Brooklyn Brew Shop*, LLC, 17 F.4th 129, 146 (Fed. Cir. 2021).

Applicant insists that there are so many games ending in "-le" in the marketplace that Opposer has allowed its mark to become generic, entitled to no protection.[38] Because, however, we must presume marks registered on the Principal Register to be valid, we cannot entertain this argument in the absence of a counterclaim to cancel Opposer's registration on that basis. *See, e.g.*, *In re Nat'l Data Corp.*, 753 F.2d 1056, 1060 n.8 (Fed. Cir. 1985); *Food Specialty Co. v. Std. Prods. Co.*, 406 F.2d 1397, 1397-98 (CCPA 1969).

To summarize, we find that Opposer's mark, notwithstanding that it was a coined term when Opposer's predecessor started using it, is conceptually suggestive. *Cf. Minn. Min. & Mfg. Co. v. Johnson & Johnson*, 454 F.2d 1179, 1181 (CCPA 1972) ("[A]

[38] *See id.* at 41, 43-44.

coined word … is descriptive if it happens to be the new name of a new product. Names are necessarily coined in the beginning.").

As to marketplace strength, Opposer argues that the evidence shows that its WORDLE mark is "famous, strong, and well-known."[39] Applicant argues that WORDLE is weakened by third-party use that has created a "crowded field."[40] We'll first examine Opposer's argument that its marks are "famous, strong, and well-known."

Opposer has submitted confidential and redacted public versions of declaration of Jonathan Knight, Opposer's Senior Vice President, Head of Games.[41] As to the strength of its WORDLE mark, Mr. Knight testified how the WORDLE game was created by Josh Wardle, went viral between late 2021 and early 2022, which prompted Opposer to make a deal with Mr. Wardle to acquire all rights in the game on January 31, 2022.[42] Mr. Knight details that "tens of millions" of people played the game during this period, and that the game was played 4.8 billion times in 2023.[43] He also testified that, immediately following Opposer's acquisition of the game, over 1,200 articles were published about WORDLE, that CNN conducted an on-air

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[39] *See* 41 TTABVUE 29 (capitalization altered).

[40] *See, e.g.*, 43 TTABVUE 8-9, 23, 25-29, 41, 54.

[41] *See* 11 TTABVUE (confidential); 14 TTABVUE (public).

[42] *See* 14 TTABVUE 4-5. Applicant's contention that Opposer cannot invoke its mark's pre-August 2022 renown absent evidence of technical trademark use before the registration's first-use date (*see* 43 TTABVUE 41-42) conflates use with recognition. The fifth *du Pont* factor looks to marketplace strength, and the declaration evidence of daily players, press coverage, and search activity before August 2022 speaks to consumer recognition, irrespective of when Opposer's technical use in commerce commenced.

[43] *See id.* at 6.

interview with him about the acquisition, and that in 2022 WORDLE was globally the most searched word on the Internet.[44] He testified about co-branding deals Opposer struck with Hasbro Games and Meta concerning the WORDLE mark, a deal in which Delta Airlines has made WORDLE available to Delta SkyMiles Members in the air while flying with Delta, and a deal with the Discord platform to offer WORDLE to its users.[45] He further testified that "A-list celebrities" such as Ben Affleck, Matt Damon, Jason Bateman, Bradley Cooper, Allison Janney, Julia Louis-Dreyfus, and Charlize Theron have publicly said they play the game,[46] and that the Pope's brother told "Today" that he plays the game with his brother regularly.[47]

Opposer has successfully monetized WORDLE, enjoying advertising revenue in the tens of millions of dollars between Sept. 2022 and June 2025.[48] Mr. Knight also testified that Opposer promotes WORDLE in its advertising, which expenditures appear to be substantial,[49] but we're unsure precisely how much of this to allocate to WORDLE because the testimony was not precise in that regard and Opposer supplied no examples of the advertising.

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44 *See id.* at 5-7.

45 *See id.* at 7-8.

46 *See id.* at 8.

47 *See id.*

48 *See id.* at 9; 11 TTABVUE 9 (confidential version). We are describing the revenue in vague terms because the precise number was submitted confidentially, but we do need to give some indication of the order of magnitude in order to explain our ruling.

49 *See* 14 TTABVUE 9.

Opposer also supplied the declaration testimony of Hunter Calvert, Opposer's Executive Director of Data and Insight for Games.[50] His testimony provides detail about the number of daily U.S. players and total U.S. players from 2022 through early 2025. While the exact numbers are confidential, the daily player number is in the millions throughout this period, and the latter is several multiples higher.[51] He also details the number of daily downloads of the software from Opposer's Games App.[52]

Although generally we like to see some sort of contextual evidence that allows us to compare these numbers to those of competing products, and Opposer did not supply that information, we find this testimony nevertheless gives substantial support to Opposer's argument that its mark is, at minimum, strong and well-known in the U.S. Without additional contextual information, however, we do not feel confident enough to find that WORDLE is a famous mark. As a strong and well-known mark, however, the fifth *du Pont* factor will favor a conclusion that confusion is likely, unless Applicant can successfully show, under the sixth *du Pont* factor, that the mark has appreciably been weakened in the marketplace by third-party use of similar marks for similar goods and services. It is to that factor that we now turn.

As noted above, the relevance of evidence of third-party use of marks that are the same or similar to an opposer's mark is that, the more third-party uses there are, the greater the inference that consumers have been acclimated to distinguish marks

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50 *See* 12 TTABVUE (confidential version); 13 TTABVUE (public version).

51 *See* 12 TTABVUE 4-10 (confidential version).

52 *See id.* at 7-8.

bearing the common element by other differences in the marks. In other words, an applicant who invokes the sixth factor is saying, "If consumers can distinguish these other marks from the opposer's mark, they can distinguish mine too by its differences from the opposer's mark." In order for that argument to work, however, the difference between the applicant's mark and the opposer's mark can't be greater than the differences reflected by the third-party uses. Otherwise, we can't confidently infer that consumers can distinguish the greater degree of similarity reflected in the applicant's mark. And the Federal Circuit's precedents reflect this understanding. *See, e.g.*, *In re Mighty Leaf Tea*, 601 F.3d 1342, 1347 (Fed. Cir. 2010) ("[M]ore is required than a showing of the existence of various marks. No additional evidence, or proffer, was presented to contravene the Board's finding that the third-party marks were not similar enough to the mark ML to establish that there is a crowded field for the letters 'ML.'"); *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc*., 748 F.2d 669, 675 (Fed. Cir. 1984) ("Applicant introduced evidence of eight third-party registrations for tea which contain the word 'SPICE', five of which are shown to be in use. None of these marks has a 'SPICE (place)' format or conveys a commercial impression similar to that projected by the SPICE ISLANDS mark, and these third-party registrations are of significantly greater difference from SPICE VALLEY and SPICE ISLANDS than either of these two marks from each other."); *Palisades Pageants, Inc. v. Miss Am. Pageant*, 442 F.2d 1385, 1388 (CCPA 1971) ("While we agree with the appellant that this does, indeed, seem to be a crowded field, we are of the opinion that appellant's mark is closer to appellee's than even the closest of the third-party

registrations in that it bodily incorporates appellee's mark, merely adding an adjective to the beginning thereof which, as the board observed, 'directs attention to the words which follow.'").

With that in mind, we turn to Applicant's third-party evidence. Applicant's presentation of this issue is a bit confusing. At one point it mentions "338 screenshots of live, active '-le' suffix games taken August 1, 2025, each showing game name, URL, and live interface—establishing the crowded field at the consumer-facing level."[53] Elsewhere, Applicant mentions "437 games incorporating 'Wordle' literally in their names" and "75 phonetic rhymes (-ORDLE) and 144 consonant-frame variants (-ERDLE, -URDLE, -IRDLE)."[54] And in another place, it mentions "1,263 WORDLE-derivative games."[55] As best we can tell, save for three third-party registrations for NERDLE, QUORDLE, and OCTORDLE,[56] the evidence of these third-party marks is attached to Applicant's Fourth Notice of Reliance.[57] While this reflects hundreds of puzzle game names that end in "-le," we see only eleven (11) that differ from Opposer's mark by one letter, as Applicant's mark does: two other WORLDLE games,[58]

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[53] *See* 43 TTABVUE 8-9.

[54] *See id.* at 21; *see also id.* at 28, 43.

[55] *See id.* at 9.

[56] *See* 26 TTABVUE 9-11.

[57] 25 TTABVUE.

[58] *See id.* at 335, 337. Applicant includes a screen shot of its own game at www.worldledaily.com, *see id.* at 336, which doesn't count as a third-party use.

DORDLE,[59] JORDLE,[60] KORDLE,[61] two NORDLE games,[62] WHODLE,[63] WORMLE,[64] XORDLE,[65] and ZORDLE.[66] The ones that begin with a letter other than "W" are easier to see as more different from WORDLE than Applicant's mark. And Applicant provides no evidence that the first part of these marks has the same vowel sound as WORDLE and WORLDLE. That leaves NERDLE, the two other WORLDLE games, along with WHODLE, WORMLE, the latter two of which also are more easily visually- and aurally-distinguishable from Opposer's mark than Applicant's mark. Five third-party marks arguably as close to Opposer's mark as Applicant's is a far cry from the amount of relevant third-party marks that would tend to make this factor a significant one. *See, e.g.*, *i.am.symbolic*, 866 F.3d at 1329 ("Symbolic's evidence of third-party use of I AM for the same or similar goods falls short of the 'ubiquitous' or 'considerable' use of the mark components present in its cited cases."); *Bell's Brewery,*

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59 *Id.* at 73.

60 *Id.* at 139.

61 *Id.* at 144.

62 *Id.* at 177, 178.

63 *Id.* at 329.

64 *Id.* at 338.

65 *Id.* at 341.

66 *See id.* at 346. We also note that several of these third-party screenshots refer to other countries or contain text in other languages and/or non-Roman alphabet, including KORDLE (*id.* at 144). *See id.* at 22, 38, 40, 87, 114, 118, 136, 145, 146, 150, 153, 159, 167, 171, 176, 192, 198, 199, 200, 213, 217, 264, 273, 290, 349. Since we're concerned with U.S. consumer perception, these examples are of minimal probative value because, on their faces, they suggest that they're directed to people in other countries. To attribute more probative value to these screenshots, we'd need to see additional evidence that would provide some information as to the extent U.S. consumers have been exposed to these uses. *See, e.g.*, *In re Bayer AG*, 488 F.3d 960, 969 (Fed. Cir. 2007); *In re Canine Caviar Pet Foods, Inc.*, No. 85710350, 2018 WL 2277123, at *4-5 (TTAB 2018).

Inc. v. Innovation Brewing, No. 91215896, 2017 WL 6525233, at *9 (TTAB 2017) (13 third-party registrations and uses found to be insufficient "to establish that the terms either have a descriptive significance or are in such widespread use that consumers have come to distinguish marks containing them based on minute differences") (citations omitted).

Applicant also highlights that there are "[a]nother 144 games are exact phonetic rhymes with Opposer's Mark by substituting a different vowel (-ERDLE, -URDLE, -IRDLE)"[67] and "437 games incorporating 'Wordle' literally in their names."[68] The exhibit Applicant cites is a list, apparently typed-out by Applicant, of what is labeled a "Combined Database of Wordle-like Games."[69] It purports to list 1263 game names with corresponding hyperlinked URLs, with no exemplars of any of the webpages at these cites, and Applicant leaves us to rummage through to identify what we think Applicant considers to be the 144 phonetically-rhyming and 437 games that incorporate "Wordle" in their names.[70]

This is unacceptable at many levels. First, the mere submission of a list of URLs or hyperlinks alone is insufficient to make the associated web pages of record. *See Luxco, Inc. v. Consejo Regulador Del Tequila, A.C.*, No. 91190827, 2017 WL 542344, at *11 n.59 (TTAB 2017); *In re Change Wind Corp.*, No. 86046590, 2017 WL 3446786, at *9 n.8 (TTAB 2017); *In re Powermat Inc.*, No. 77715011, 2013 WL 326571, at *3

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67 *See* 43 TTABVUE 14 (citing Applicant's Sixth Notice of Reliance, 35 TTABVUE Exh. 43).

68 *See* 43 TTABVUE 14, 21, 28, 32, 43, 51 (also citing 35 TTABVUE Exh. 43).

69 35 TTABVUE 6, 216.

70 35 TTABVUE 216-92.

(TTAB 2013); *In re Future Ads LLC*, No. 85134539, 2012 WL 3263733, at *1 (TTAB 2012). Second, if Applicant wanted us to accept as evidence a document it created for this case, it would have to be submitted, not by a notice of reliance, *see* Trademark Rule 2.122(g), 37 C.F.R. § 2.122(g) (setting forth the types of materials that may be submitted by notice of reliance), but by declaration, and even then there may be issues with such a document. Third, if Applicant wants us to consider any evidence, Applicant needs to tell us where the evidence is in the record. "It is not the function of the Board to scour the record in search of facts or evidence to support a party's position." *DC Comics v. Cellular Nerd LLC*, No. 91246950, 2022 WL 17832492, at *18 n.81 (TTAB 2022).

As previously noted, Applicant's brief repeatedly points to this purported third-party evidence, asserting that Opposer's failure to police its mark against these third parties has weakened Opposer's mark to the point of genericness. We've already held that, absent a counterclaim to cancel Opposer's mark, we cannot entertain arguments that Opposer's mark is no longer distinctive. But even putting that aside, the argument that Opposer's inaction let its mark get weak by failing to police it depends on the factual premise that the third parties it did not pursue were using marks that are likely to cause confusion as to source. And as we have found, almost none of the identified third-party marks are as similar to Opposer's mark as Applicant's.

In sum, Applicant's sixth-factor arguments move the needle little. Overall, we find that the evidence shows that Opposer's WORDLE mark is suggestive and thus inherently distinctive, possessing a degree of conceptual strength on par with the

average mark that has been registered without a showing of acquired distinctiveness under Section 2(f). As to strength in the marketplace, we find that Opposer's mark is strong and well-known. Thus, overall, while the sixth *du Pont* factor will be neutral in our weighing, the marketplace strength of Opposer's mark under the fifth factor will count in favor of a conclusion that confusion is likely.

6. The lack of evidence of actual confusion

The eighth factor listed in *du Pont* states: "The length of time during and conditions under which there has been concurrent use without evidence of actual confusion." *See du Pont*, 476 F.2d at 1361. Applicant asserts that this factor favors it because there is no evidence of actual confusion even though the marks have been in concurrent use since 2022.[71] Opposer counters that four years isn't a long-enough period to draw the conclusions that actual confusion isn't happening.[72]

We note first that "[l]ack of evidence of actual confusion or mistake … does not preclude a finding of likelihood of confusion." *In re Calgon Corp.*, 435 F.2d 596, 597 (CCPA 1971) (citations omitted). That is in part because "actual confusion is hard to prove." *Sunkist Growers*, 144 F.4th at 1381 (citations omitted). To determine how much weight, if any, to give to the lack of evidence of any instances of actual consumer confusion, we look to evidence in the record of actual market conditions surrounding the parties' concurrent use to determine the significance of the lack of actual

[71] *See* 43 TTABVUE 24.

[72] *See* 45 TTABVUE 16.

confusion evidence. *See, e.g.*, *In re Guild Mortg. Co.*, No. 86709944, 2020 WL 1639916, at *8 (TTAB 2020).

Here, Applicant emphasizes the four-year period of concurrent use,[73] but, as Applicant notes, "[b]oth Opposer's and Applicant's games are entirely free to play."[74] This market circumstance greatly reduces the probative value of the absence of documented instances of consumer confusion over the four-year concurrent use period. When the goods and services are very inexpensive (or, here, free) consumers are less apt to spend the time and effort to report instances of confusion. *See Gen. Mills, Inc. v. Fage Dairy Processing Indus. S.A.*, No. 91118482, 2011 WL 6001095, at *18 (TTAB 2011) ("In general, evidence of actual confusion is notoriously difficult to come by and, in particular, where relatively inexpensive items such as food products are involved, confusion about sponsorship or affiliation would not necessarily be brought to the attention of either applicant or opposers.") (citation omitted), *judgment altered by settlement*, No. 06:11-CV-01174 (N.D.N.Y. Nov. 5, 2013) & 2014 WL 343267, at *2 (TTAB 2014) (non-precedential) ("[T]he September 14, 2011 opinion is not vacated, the findings of fact, legal analysis and rulings of law otherwise stand undisturbed."); *accord In re Azteca Rest. Enters.*, No. 74666488, 1999 WL 221655, at *5 (TTAB 1999); *see also* 3 MCCARTHY § 23:18 ("The absence of evidence of actual confusion does not necessarily support a finding of no likelihood of confusion when the goods are inexpensive. Purchasers are unlikely to bother to inform the trademark

[73] *See* 43 TTABVUE 21, 23-25, 49, 53.

[74] *See id.* at 40.

owner when they are confused about an inexpensive product.") (cleaned up; citation omitted).

Further, as Applicant emphasizes in a different argument, any instances of actual confusion can quickly be corrected, if the consumer wants to do so, "at zero cost" by simply closing the browser tab for Applicant's game.[75] This further saps consumers' incentive to report any instances of actual confusion and, thus, the probative value of the lack of such evidence.

In these market circumstances, we find the lack of actual confusion evidence neutral or, at best, to weigh only very slightly in Applicant's favor.

7. The variety of goods on which a senior user's mark is used

The ninth factor listed in *du Pont* is "[t]he variety of goods on which a mark is or is not used (house mark, 'family' mark, product mark)" where there is evidence of record bearing on this factor. 476 F.2d at 1361. Applicant argues that WORDLE isn't a house mark, and that, as a result, WORDLE receives "narrower protection" as a result.[76] Applicant's argument is slightly off. A product mark doesn't get diminished protection from the protection accorded a registered mark under Section 2(d) of the Act, but sometimes this factor might give a boost to a house mark or one used in connection with a variety of goods and/or services. *See, e.g.*, *Dollar Fin. Grp.*, 132 F.4th at 1373; *see also Owens-Illinois Glass Co. v. Clevite Corp*., 324 F.2d 1010, 1012 (CCPA 1963) (under section 2(d), confusion as to source more likely when the senior

[75] *See id.* at 40; *see also id.* at 44.

[76] *See id.* at 45-46.

user offers a wide variety of goods under the mark). This factor essentially is a one-way ratchet that can either help a senior user or is neutral. Here, Opposer doesn't contend that it uses the mark on a wide variety of goods or services, so this factor is neutral. *See, e.g.*, *DeVivo v. Ortiz*, No. 91242863, 2020 WL 1227592, at *16 (TTAB 2020).[77]

8. The market interface between the parties

The tenth likelihood-of-confusion factor looks at the "market interface" between the two parties. *du Pont*, 476 F.2d at 1361. It lists several examples:

> (a) a mere "consent" to register or use.
>
> (b) agreement provisions designed to preclude confusion, i. e. limitations on continued use of the marks by each party.
>
> (c) assignment of mark, application, registration and good will of the related business.
>
> (d) laches and estoppel attributable to owner of prior mark and indicative of lack of confusion.

Id.

[77] The circumstances in which the fact that marks used on a variety of goods and/or services may take on significant importance is where there is insufficient evidence to find that the goods are related (the second *du Pont* factor). In such cases, the ninth factor may, to an extent, counter that fact and provide support for a conclusion that confusion is nevertheless likely because the senior party is known to offer a wide array of products. But we typically find no need to rely on this factor where, as here, there is evidence—as we have found—that the respective goods and services are very closely related. *See, e.g.*, *Iron Balls Int'l Ltd. v. Bull Creek Brewing, LLC*, No. 92079099, 2024 WL 2844425, at *26 (TTAB 2024); *Monster Energy Co. v. Lo*, No. 91225050, 2023 WL 417620, at *19 (TTAB 2023); *Made in Nature*, 2022 WL 2188890, at *31-32.

Here, Applicant's tenth-factor argument asserts only subsection (d) of the tenth factor: "laches and estoppel … indicative of lack of confusion."[78]

As to estoppel, Applicant argues that Opposer's predecessor "celebrated" "subject-matter variants" of the game format of Opposer's WORDLE game.[79] Applicant cites examples of a puzzle game where players guess hockey players' names and guessing games involving foreign-language words.[80] Applicant argues that because the game format belongs to no one, Opposer has signaled to the world—and to Applicant—that there's nothing wrong subject-matter variants of games using the format of Opposer's WORDLE game.[81]

Applicant misunderstands the nature of this case. It's not about game format. It's about **the name** by which Applicant calls its game, i.e., the brand by which Applicant's game is known. Opposer does not seek to prohibit Applicant from offering its geography puzzle game or any other kind of puzzle game. In this case, Opposer simply seeks to prevent Applicant from registering as a trademark a name that Opposer alleges is so similar that it likely will result in confusion as to source. Thus, Opposer's failure to assert rights in the format of the game cannot estop it from enforcing the mark by which its game is known.[82]

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[78] *See* 43 TTABVUE 29-32. As noted earlier, the Board previously struck these affirmative defenses to the entire Section 2(d). Applicant's brief addresses them only as factors to be considered in the determination of likelihood of confusion, as per factor 10(d) in *du Pont*.

[79] *See id.*

[80] *See id.*

[81] *See id.* at 37.

[82] For this reason, statements made by Opposer or its predecessor about approval of (or at least non-objection to) games involving other subjects that use the same game **format** that

Applicant also complains that Opposer's enforcement record is so lacking that Opposer should be estopped from enforcing its registered trademark rights against Applicant. Specifically, Applicant points out that Opposer has previously has only instituted one UDRP domain name proceeding and two TTAB oppositions, all against "literal mark appropriation or direct impersonation" and has engaged mostly in copyright enforcement (presumably of proprietary computer source code), not trademark enforcement.[83] We fail to see how this other enforcement activity directed at others constitutes "misleading conduct … leading [Applicant] to reasonably infer that rights will not be asserted against it," which is a core element of estoppel. *See Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes, Inc.*, 971 F.2d 732, 734 (Fed. Cir. 1992).

Applicant argues that Opposer failed to try to stop another person who hosts or hosted another WORLDLE game.[84] Applicant also complains that Opposer did not file notices of opposition to the registration of the marks NERDLE, QUORDLE, and OCTORDLE.[85] "[C]ourts have long recognized that a trademark owner has no obligation to sue all possible infringers," but rather "can legitimately take a cost-effective litigation strategy." 2 MCCARTHY § 17:17; *see also* 1 MCCARTHY § 11:91 ("It is not necessary for a trademark owner to object to all unauthorized uses that might

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the current version of WORDLE uses—which Applicant repeatedly highlights—has nothing to do with Opposer's enforcement of its trademark rights in the term WORDLE.

[83] *See id.* at 31-32.

[84] *See id.* at 31-32.

[85] *See id.* at 32.

conflict."); *cf. Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 682 (2014) ("It is hardly incumbent on copyright owners, however, to challenge each and every actionable infringement. And there is nothing untoward about waiting to see whether an infringer's exploitation undercuts the value of the copyrighted work, has no effect on the original work, or even complements it."). In addition, this does not constitute "misleading conduct" toward Applicant, nor is it apparent to us how it led Applicant "to reasonably infer that rights will not be asserted against it." *Lincoln Logs*, 971 F.2d at 734.

Nor do we see any laches. Laches requires, inter alia, "unreasonable delay in assertion of one's rights against another." *Id.* Applicant's application was published for opposition in January 2024. Applicant's Answer admitted that Opposer obtained extensions of time to oppose the application from the USPTO and then, in May 2024, filed its Notice of Opposition.[86] Applicant does not contend that the Notice of Opposition was filed after the final extension expired. We do not understand how filing a notice of opposition within the USPTO's deadline for doing so—and only four months after the mark was published for opposition—constitutes laches. *See Brooklyn Brewery*, 17 F.4th at 142 ("Laches and acquiescence are generally not available as defenses in an opposition proceeding, given that the clock for laches begins to run from the date the application is published for opposition.") (citation omitted).

[86] *See* 5 TTABVUE 6 (¶ 18); 1 TTABVUE 8 (¶ 18).

With no evidence to support Applicant's argument that Opposer is guilty of laches or should be equitably estopped from pursuing this opposition, the tenth *du Pont* factor is neutral.

9. The extent to which applicant has a right to exclude others from use of its mark on its goods

The eleventh factor considers "the extent to which applicant has a right to exclude others from use of its mark on its goods." *du Pont*, 476 F.2d at 1361. Applicant argues that if it receives a registration, it won't pose a threat to Opposer.[87] That's not what this factor is about. It looks to see whether Applicant already has developed its brand to the point where it has enforceable rights adjacent to the right that would be conferred by the desired registration because, if so, that's a fact that would weigh against an opposer. Applicant's argument about this factor does not direct us to any evidence that would support an argument that the eleventh factor favors it, such as advertising, sales, or user figures, and any enforcement activity in which Applicant has engaged.[88] *See generally DeVivo*, 2020 WL 1227592, at *16 ("This factor is neutral in our analysis because Opposer [sic; should be "Applicant"] has not provided any significant information about the advertising and sales of her goods and services

[87] *See* 43 TTABVUE 47.

[88] Indeed, as we mentioned above, Applicant has asserted that there is another person using WORLDLE for a puzzle game, and asserted in its brief that it has engaged in a separate proceeding against that person, *see* 43 TTABVUE 15, but has not directed us to any evidence of such enforcement activity or, more importantly, whether any such activity resulted in the exclusion of the other person due to Applicant's rights. *See, e.g.*, *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (an assertion of a fact in a brief "is not evidence under any of the relevant rules") (citation omitted); *Peeler v. Miller*, 535 F.2d 647, 654 (CCPA 1976) ("We will not accept statements in briefs as substitutes for evidence.").

offered under the ENGIRLNEER mark."); *McDonald's Corp. v. McSweet LLC*, No. 91178758, 2014 WL 5282256, at *17 (TTAB 2014) ("Applicant's sales figures and Applicant's advertising and promotional expenditures are not sufficient to establish an appreciable level of consumer recognition. Importantly, there is no evidence that Applicant, in fact, has successfully asserted its rights so as to 'exclude' anyone else from using MCSWEET or any similar mark. Accordingly, we treat this factor as neutral.").

Though Applicant does not argue that its sales or advertising have contributed to the development of enforceable rights in WORLDLE, it mentions that it has "thousands of dedicated daily players."[89] On the other hand, it emphasizes that there is another person who operates a geography-based online puzzle game under the same mark (WORLDLE) that Applicant uses.[90] Applicant asserts in its brief that it is involved in an opposition proceeding with the other person[91] but does not point to evidence of this dispute or its status in the record.[92] Without any evidence that Applicant has established superior rights over the other WORLDLE user, the admitted existence of another user that, according to Applicant, has substantially more users than Applicant, severely undercuts any assertion that Applicant has enforceable rights under its mark.

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89 43 TTABVUE 24.

90 *See id.* at 10, 15, 20, 24, 25, 31-32, 45.

91 *See id.* at 15.

92 *See DC Comics*, 2022 WL 17832492, at *18 n.81 ("It is not the function of the Board to scour the record in search of facts or evidence to support a party's position.").

Given the lack of any relevant evidence that Applicant has developed enforceable rights in WORLDLE, we find this factor neutral.

10. The extent of potential confusion, i.e., whether de minimis or substantial

The twelfth factor considers "[t]he extent of potential confusion, i.e., whether de minimis or substantial." *du Pont*, 476 F.2d at 1361. Applicant argues that this factor favors it, making two basic arguments: "First, there is no financial commitment. Both games are free, browser-based products."[93] But the fact that these are free products of a sort that appeals to the general public cuts against Applicant. *Compare In re Davey Prods. Pty Ltd.*, No. 77029776, 2009 WL 2420527, at *9 (TTAB 2009) (rejecting an applicant's twelfth-factor argument that the potential for confusion is "de minimis" because "the goods involved here are the type of goods that would be marketed to and purchased by significant numbers of purchasers) *with Toro Co. v. Torohead Inc.*, No. 91114061, 2001 WL 1734485, at *6 (TTAB 2001) ("the highly technical nature of applicant's goods, and the limited number of potential purchasers" tended to diminish the potential for confusion).

Second, Applicant argues that "[w]hatever theoretical initial confusion risk exists" is dispelled when an initially confused consumer who seeks Opposer's WORDLE game opens up a webpage and sees Applicant's game is geography based.[94] But as the Board pointed out in a case involving a deceptive trademark, "customers will have been misled by the name in the first place—causing them to decide to patronize"

[93] 43 TTABVUE 44.

[94] *See id.*

Applicant's game instead of the one they sought (Opposer's game). *See In re ALP of S. Beach Inc.*, No. 75819306, 2006 WL 936984, at *6-7 & n.13 (TTAB 2006) (rejecting this argument in a Section 2(a) deceptiveness case, explaining: "The defendant's actions may attract or lure potential customers by improperly benefiting from the goodwill that the plaintiff developed in its mark, even though any confusion as to the source of goods or services may be dispelled before an actual sale occurs."). Where that occurs, Opposer will be deprived of a "click" that reduces the value of Opposer's game as a generator of advertising or subscription revenue.

We see nothing in the record that suggests to us that the risk of confusion is de minimis. This factor is neutral.

11. Applicant's "good faith" adoption of its mark

du Pont lists as a thirteenth factor "[a]ny other established fact probative of the effect of use." 476 F.2d at 1361. While "[a] party's bad faith in adopting a mark is relevant to the thirteenth DuPont factor," *QuikTrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 1036 (Fed. Cir. 2021) (citation omitted), Opposer does not argue that Applicant adopted its mark in bad faith, nor make any other argument under this factor. Applicant, however, argues that this factor should favor it because it adopted its mark in good faith.[95] Even if we were to credit Applicant's assertion that it adopted its mark in good faith, that does not mean that this factor weighs in favor of a conclusion that confusion is unlikely. *See, e.g.*, *Lebanon Seaboard Corp. v. R&R Turf Supply Inc.*, No. 91197241, 2012 WL 953406, at *8 (TTAB 2012) ("Although evidence

[95] *See id.* at 48-49.

of an intent to confuse or deceive may lead to the conclusion that a defendant's efforts were successful, the converse is not true. Good faith adoption of a mark will not prevent a finding of likelihood of confusion.") (citation omitted); *Miss Universe L.P. v. Community Mktg., Inc.*, No. 91160627, 2007 WL 458530, at *12 (TTAB 2007) ("even if we accept as true applicant's contention that it adopted its mark in good faith, such good faith adoption does not establish the absence of a likelihood of confusion, nor does it negate the other evidence of record which weighs in favor of a finding of likelihood of confusion"); *Time Warner Entm't Co. v. Jones*, No. 91112409, 2002 WL 1628168, at *12 n.25 (TTAB 2002) ("the fact that applicant apparently adopted her mark in good faith does not weigh in applicant's favor in our likelihood of confusion analysis"); *see also Bourjois, Inc., v. Cheatham Chem. Co.*, 47 F.2d 812, 814 (CCPA 1931) ("if confusion or mistake it likely to be caused by the use of appellee's mark, its good faith cannot aid it in securing registration").[96]

We find this factor neutral.

[96] Seeking to turn the bad faith inquiry against Opposer, Applicant argues that Opposer has brought this case as a "pretext," not to address Opposer's fear of damage from likelihood of consumer confusion as to source. *See* 43 TTABVUE 49-51. It points to Opposer's allegation in the Notice of Opposition that the damage Opposer fears is that allowing registration of WORLDLE would "would restrict and impair Opposer's right to use, develop and expand its use of its WORDLE mark." *See id.* at 50 (citing 1 TTABVUE 10). We don't see anything wrong with this allegation. Any opposer must allege a reasonable belief in damage, and the damage Opposer alleged is typical of many opposers asserting claims under Section 2(d). Expanding use of a mark could involve, for instance, co-branding and licensing opportunities. Potential partners in such activities may be less inclined to enter into these arrangements if the mark owner has allowed third parties to register marks arguably very similar to the mark owner's. We also find nothing pretextual in the statement of Mr. Knight that Opposer desires to expand someday into "games that aren't language-based." This statement says nothing about using the WORDLE mark for such games.

12. Weighing all our findings on the relevant likelihood-of-confusion factors together

As we mentioned earlier, the last step in analyzing a claim under Section 2(d) is to balance all the findings on the relevant factors to determine whether confusion is likely or unlikely. *Fuente Mktg.*, 172 F.4th at 1347; *Citigroup*, 637 F.3d at 1349. In doing so, we must "weigh the *DuPont* factors used in [our] analysis" and explain "the results of that weighing," including "the weight [we] assigned to the relevant factors." *In re Charger Ventures LLC*, 64 F.4th 1375, 1383-84 (Fed. Cir. 2023) (citation omitted). "The weight given to each factor depends on the circumstances of each case." *Id.* at 1381 (citation omitted).

Here, we have found that, overall, the marks, viewed in their entireties, are quite similar. We have also found that Applicant's non-downloadable game software is very closely related to Opposer's "downloadable software for playing word puzzle games." These are important factors. *See, e.g.*, *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976) ("The **fundamental** inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.") (emphasis added); *In re Max Cap. Grp.*, No. 77186166, 2010 WL 22358, at *1 (TTAB 2010) ("In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services.") (citations omitted).

Two more factors weighing in favor of a conclusion that confusion is likely are that the respective goods and services are offered to general public, and that these goods

and services are subject to impulse downloading and use. Weighing in Applicant's favor is that, on this record, the trade channels do not overlap.

As to the strength/ weakness of Opposer's WORDLE mark (the fifth and sixth *du Pont* factors), Opposer's mark is strong in the marketplace, but it's of average conceptual strength. Thus, the fifth factor will count in Opposer's favor, and the sixth factor is neutral.

As to the eighth factor, there are no documented instances of confusion over an approximately four-year period. But the probative value of this fact is weakened considerably by the fact that the public has little incentive to report actual confusion where, as here, the software is for games and is offered to the public at no cost.

Finally, we found that *du Pont* factors 9-13 are neutral on this record.

It is clear to us that, on balance, the relevant factors overwhelmingly weigh in favor of a conclusion that Applicant's mark is likely to cause confusion in view of Opposer's registered mark.

Decision: We sustain the Notice of Opposition.