

This Opinion Is Not a
Precedent of the TTAB

Mailed: July 22, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Robert Kirkman, LLC

v.

The Toking Dead

—
Opposition No. 91242007
—

Jason D. Jones and Craig S. Mende of Fross Zelnick Lehrman & Zissu, P.C.
for Robert Kirkman, LLC.

The Toking Dead, a Massachusetts partnership,
through partners Benjamin K. Bartlett and Jeffrey T. Homan.

—
Before Bergsman, Heasley and Hudis, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

The Toking Dead, a Massachusetts partnership (Applicant), seeks registration on the Principal Register of the mark THE TOKING DEAD, in standard character form, for “retail store services featuring clothing, mugs, and other consumer goods,” in International Class 35.¹

¹ Application Serial No. 87566930, filed August 14, 2017, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s claim of a bona fide intent to use the mark in commerce.

Robert Kirkman, LLC (Opposer) opposed registration of Applicant's mark under Sections 2(d) (likelihood of confusion) and 43(c) (dilution) of the Trademark Act, 15 U.S.C. §§ 1052(d) and 1125(c). Opposer alleges ownership of the trademark THE WALKING DEAD used in connection with a series of comic books and graphic novels, as well as a television series and an array of associated goods and services, including clothing and mugs, through its licensee AMC Network Entertainment LLC (AMC). Opposer pleaded ownership of the five registrations for the mark THE WALKING DEAD, in standard character form, listed below:

- Registration No. 4443715 for “comic books; graphic novels,” in International Class 16;²

- Registration No. 4007681 for “DVDs featuring an on-going fictional dramatic television program,” in International Class 9, and “entertainment services in the nature of an on-going fictional dramatic television series; providing information about a television series via an on-line global computer network; providing online computer games,” in International Class 41;³

- Registration No. 4314918 for “video recordings featuring fictional dramatic television programming and music; sound recordings featuring fictional dramatic television programming and music; downloadable computer games; interactive video game programs; computer game cartridges and discs; downloadable computer game software for use with mobile telephones and personal computers; downloadable

² Registered December 3, 2013; Section 8 declaration accepted.

³ Registered August 2, 2011; Sections 8 and 15 declarations accepted and acknowledged.

multimedia file containing artwork, text, audio, video, games, and internet web links relating to music and television; electronic game programs; electronic game software for cellular telephones; electronic game software for handheld electronic devices; electronic game software for wireless devices; slot machines; video game cartridges and discs; video game software,” in International Class 9;⁴

- Registration No. 4429084 for “fan club services,” in International Class 41;⁵ and

- Registration No. 5252200 for “amusement park services; entertainment services in the nature of an on-going fictional dramatic television series; entertainment information; providing a website featuring entertainment information; providing online non-downloadable video clips and photographs featuring content from or related to a fictional dramatic television series; providing online computer, electronic and video games; providing temporary use of non-downloadable interactive games; entertainment services in the nature of conducting exhibitions and conventions concerning television and television characters; fan club services,” in International Class 41.⁶

Applicant, in its Amended Answer, denied the salient allegations in the Notice of 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 the subject application. In addition, the parties

⁴ Registered April 2, 2013; Section 8 declaration accepted.

⁵ Registered November 5, 2013; Section 8 declaration accepted.

⁶ Registered July 25, 2017.

stipulated that the documents produced by Applicant in response to Opposer's request for production of documents "constitute Applicant's business records and are authentic and genuine."⁷

The parties introduced the testimony and evidence listed below:

- A. Opposer's testimony and evidence.
 1. Testimony declaration of Stefan Reinhardt, President of Business Operations and Studio Production of AMC Studios, the in-house studio, production and distribution division of AMC Networks, Inc., Opposer's licensee;⁸
 2. Testimony declaration of Sean Mackiewicz, Senior Vice President and Editor-in-Chief for Skybound Entertainment, a multi-platform content company and exclusive licensee for the commercialization of intellectual property owned by Opposer;⁹
 3. Notice of reliance on copies of Opposer's pleaded registrations printed from the USPTO Trademark Status and Document Retrieval system (TSDR) showing the current status of and title to the registrations;¹⁰

⁷ 15 TTABVUE 2. Citations to the record or briefs in this opinion also include citations to the publicly available documents on TTABVUE, the Board's electronic docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). The number preceding "TTABVUE" corresponds to the docket entry number; the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry. All citations to documents contained in the TTABVUE database are to the downloadable .pdf versions of the documents in the USPTO TTABVUE Case Viewer.

⁸ 18 TTABVUE. The USPTO posted the portions of the Reinhardt declaration that Opposer designated confidential at 17 TTABVUE.

⁹ 20 TTABVUE. The USPTO posted the portions of the Mackiewicz declaration that Opposer designated confidential at 19 TTABVUE.

¹⁰ 21 TTABVUE 11-32. Opposer also introduced a copy of Registration No. 5811038 for the mark THE WALKING DEAD for "downloadable computer game software application for use in playing casino style games of chance on portable electronic devices," in International Class 9, as well as two registrations for the mark FEAR THE WALKING DEAD for various goods and services. (21 TTABVUE 33-43). These three registrations are cumulative of Opposer's other evidence and we give them no further consideration.

In addition, Opposer introduced copies of two pending applications for the mark THE WALKING DEAD for a myriad of goods and services. (21 TTABVUE 44-54). Pending applications are evidence only that the applicant filed them on a certain date; they are not evidence of use of the marks. *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1193 n.8

4. Notice of reliance on a copy of the March 1, 2016 Office Action in application Serial No. 86811872 for the mark FEAR THE WALKING DEAD purportedly to prove that THE WALKING DEAD is a famous mark;¹¹
5. Notice of reliance on Applicant's responses to Opposer's requests for admission Nos. 1-8, 14, 16-21, 24-34, and 36;¹²
6. Notice of reliance on Applicant's responses to Opposer's interrogatory Nos. 3-8, 11 and 13;¹³
7. Notice of reliance on documents produced by Applicant in response to Opposer's request for production of documents;¹⁴
8. Notice of reliance on articles printed in publications in general circulation;¹⁵
9. Notice of reliance on articles downloaded from the Internet;¹⁶
10. Testimony declaration of Robert L. Klein, Chairman and Co-Founder of Applied Marketing Science, Inc., a market research and consulting firm that conducted a likelihood of confusion survey in this case;¹⁷ and

(TTAB 2007); *Interpayment Servs. Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003); *In re Juleigh Jeans Sportswear, Inc.*, 24 USPQ2d 1694, 1699 (TTAB 1992). Pending applications are incompetent to prove anything other than the fact that the applicant filed them. *Merritt Foods Co. v. Americana Submarine*, 209 USPQ 591, 594 (TTAB 1980).

¹¹ 21 TTABVUE 56-213.

¹² 22 TTABVUE 2-16.

¹³ 22 TTABVUE 18-26.

¹⁴ 23 TTABVUE. It was not necessary for Opposer to introduce PX22 (23 TTABVUE 6-33) and PX23 (23 TTABVUE 35-83) a second time as PX45 (24 TTABVUE 50-81) and PX46 (24 TTABVUE 83-131). "Once evidence is properly of record, it may be relied on by any party for any purpose." *Nazon v. Ghiorse*, 119 USPQ2d 1178, 1181 n.6 (TTAB 2016). *See also Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 129 USPQ2d 1027, 1030 n.29 (TTAB 2018) (party may rely on testimony from a discovery deposition already made of record by adverse party-no need to resubmit).

¹⁵ 24 TTABVUE.

¹⁶ 25 TTABVUE.

¹⁷ 26 TTABVUE.

11. Rebuttal notice of reliance on dictionary definitions of “toke.”¹⁸

B. Applicant’s testimony.

1. Testimony declaration of Jeffrey Homan, one of the partners in Applicant;¹⁹
2. Testimony declaration of Angela Knaus, owner, creator and writer for TheHorrorReport.com website;²⁰
3. Testimony declaration of Jason Moores, an independent comic publisher and freelance writer and artist in the New England area;²¹
4. Testimony declaration of Rick Naya, “founder and owner of allele genetics annihilated brands and the Director of New Hampshire Cannabis Freedom Festival, New Hampshire’s primary cannabis activist, New Hampshire’s first cannabis patient counsel to the Cannabis commission and expert of cannabis for the State of New Hampshire.”;²² and
5. Testimony declaration of Sean Carnell, “co-host of the Hawco and Carnell show, a podcast of all thing’s entertainment, with educational pieces based on the crisis of veterans in an effort to help educate the benefits of cannabis as a medicinal alternative to pharmaceutical drugs.”²³

II. Standing

Standing is a threshold issue in every inter partes case. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *John W. Carson Found. v. Toilets.com Inc.*, 94 USPQ2d 1942, 1945 (TTAB 2010). To establish standing in an opposition or cancellation proceeding, a plaintiff must prove

¹⁸ 28 TTABVUE.

¹⁹ 27 TTABVUE 2-61.

²⁰ 27 TTABVUE 62-78.

²¹ 27 TTABVUE 79-81.

²² 27 TTABVUE 82-85.

²³ 27 TTABVUE 86-88.

that it has a “real interest” in the proceeding and a “reasonable” basis for its belief of damage. *See Empresa Cubana*, 111 USPQ2d at 1062; *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (TTAB 1982).

Opposer has established its standing by properly introducing into evidence its pleaded registrations showing the status of the registrations and their title in Opposer. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (plaintiff’s two prior registrations suffice to establish plaintiff’s direct commercial interest and its standing); *N.Y. Yankees P’ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1501 (TTAB 2015). Applicant, in its brief, did not challenge Opposer’s standing.²⁴

III. Priority

Because Opposer’s pleaded registrations are of record, priority in the opposition proceeding is not at issue with respect to the mark and goods and services identified therein. *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (citing *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)).

With respect to clothing, mugs, and other consumer goods, Stefan Reinhardt President of Business Operations and Studio Production of AMC Studios, the in-

²⁴ Applicant’s Brief (31 TTABVUE 6) (“To prevail on its claims, Opposer must first establish its standing and prior rights. Applicant does not (and cannot) contest that Opposer has established both.”).

house studio, production and distribution division of AMC Networks, Inc., Opposer's licensee, testified,

15. AMC, on its own and through its corporate affiliates and sublicensees, markets an array of merchandise based on *The Walking Dead* television series, including but not limited to, t-shirts, sweatshirts, shorts, onesies, flip-flops, hats, and other apparel; mugs and beverage ware; phone cases; pens; household furnishings; jewelry; bags and luggage tags; action figures; food; construction sets; trivia games; dart boards; video games; guitars; dog collars, mobile games; slot machines; and calendars. Licensees include BIC, Hallmark, Changes, and McFarlane Toys. All such merchandise bears and/or is offered under THE WALKING DEAD trademark ("THE WALKING DEAD Mark").

16. Worldwide sales of such *The Walking Dead* merchandise has totaled over [Redacted] since 2010—the vast majority of which consist of sales in the United States.²⁵

Reinhardt's testimony is sufficient to prove Opposer's priority because it is clear, convincing, and uncontradicted. *See Nat'l Bank Book Co. v. Leather Crafted Prods., Inc.*, 218 USPQ 826, 828 (TTAB 1993) (oral testimony may be sufficient to prove the first use of a party's mark when it is based on personal knowledge, it is clear and convincing, and it has not been contradicted); *Liquacon Corp. v. Browning-Ferris Indus. Inc.*, 203 USPQ 305, 316 (TTAB 1979) (oral testimony may be sufficient to establish both prior use and continuous use when the testimony is proffered by a witness with knowledge of the facts and the testimony is clear, convincing, consistent, and sufficiently circumstantial to convince the Board of its probative value); *GAF Corp. v.*

²⁵ Reinhardt Decl. ¶¶15-16 (18 TTABVUE 7-8).

Anatox Analytical Servs., Inc., 192 USPQ 576, 577 (TTAB 1976) (oral testimony may establish prior use when the testimony is clear, consistent, convincing, and uncontradicted). Thus, Opposer has been using THE WALKING DEAD trademark in connection with clothing, mugs, and other consumer items since 2010.

Applicant, in its brief, does not contest Opposer's priority.²⁶

Applicant filed the application at issue on August 14, 2017. Applicant claims no rights in its mark THE TOKING DEAD for "retail store services featuring clothing, mugs, and other consumer goods" prior to August 14, 2017.²⁷ Thus, Opposer has used THE WALKING DEAD trademark to identify clothing, mugs, and other consumer items prior to any date on which Applicant may rely for its first use of THE TOKING DEAD for "retail store services featuring clothing, mugs, and other consumer goods."

IV. Likelihood of Confusion

We base our determination under Section 2(d) on an analysis of all probative facts in evidence relevant to the factors bearing on likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). "In discharging this duty, the thirteen *DuPont* factors 'must be

²⁶ Applicant's Brief (31 TTABVUE 6) ("To prevail on its claims, Opposer must first establish its standing and prior rights. Applicant does not (and cannot) contest that Opposer has established both.").

²⁷ Applicant's response to Opposer's request for admission No. 34 (22 TTABVUE 15). See also Applicant's response to Opposer's interrogatory No. 6 (22 TTABVUE 20) (Applicant introduced its apparel line in August 2017).

considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019), quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997), quoting *DuPont*, 177 USPQ at 567. “Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018), quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010). See also *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. See *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (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.”). See also *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as

similarity of the marks and relatedness of the goods.”), *quoting Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002).

A. Fame of Opposer’s mark.

In its Notice of Opposition, Opposer alleges that THE WALKING DEAD mark has become famous through Opposer’s use of the mark in connection with THE WALKING DEAD television series, comics, and other goods and services.²⁸ Opposer, in its brief, spends ten pages recounting the evidence purportedly establishing the fame of THE WALKING DEAD trademark, primarily due to the success of THE WALKING DEAD television series.²⁹ Applicant, to the contrary, contends that it “finds this notion of fame one of self-righteousness and conceit in the mind of Opposer.”³⁰

Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use. A famous mark has extensive public recognition and renown. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000); *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

Fame may be measured indirectly by the volume of sales of and advertising expenditures for the goods and services identified by the marks at issue, “the length

²⁸ Notice of Opposition ¶4 (1 TTABVUE 8).

²⁹ Opposer’s Brief, pp. 10-19 (30 TTABVUE 12-21).

³⁰ Applicant’s Brief (31 TTABVUE 3).

of time those indicia of commercial awareness have been evident,” widespread critical assessments and through notice by independent sources of the products identified by the marks, as well as the general reputation of the products and services. *Bose Corp. v. QSC Audio Prods. Inc.*, 63 USPQ2d at 1305-06 and 1309. Raw numbers alone may be misleading, however. Thus, some context in which to place raw statistics may be necessary, for example, market share or sales or advertising figures for comparable types of goods. *Id.* at 1309. Other contextual evidence probative of the renown of a mark may include the following:

- extent of catalog and direct mail advertising, email blasts, customer calls, and use of social media platforms, such as Twitter, Instagram, Pinterest, and Facebook, identifying the number of followers;

- the number of consumers that Opposer solicits through its advertising throughout the year;

- local, regional, and national radio and television advertising campaigns, free-standing print campaigns, and referrals in national publications;

- unsolicited media attention; and

- product placement in television and in movies.

Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co., 908 F.3d 1315, 128 USPQ2d 1686, 1690-91 (Fed. Cir. 2018).

Because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, Opposer has the duty to prove the fame of its mark

clearly. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012), citing *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007).

In the likelihood of confusion analysis, “fame ‘varies along a spectrum from very strong to very weak.’” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017), quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003).

Opposer introduced the testimony and evidence listed below to prove THE WALKING DEAD is a famous mark:

- In 2003, Robert Kirkman wrote the first comic book in THE WALKING DEAD comic book series;³¹
- “Since 2003, thirty-two (32) volumes of *The Walking Dead* comic series have been published, made up of over 190 issues.”³²
- THE WALKING DEAD comic book series has been commercially successful.

The series produced a number of issues that were the top selling comic issues in the United States for that year, including the #1 bestselling individual comic book issue of the year in 2012 (Issue #100) and in 2013 (Issue #115), and the #2 bestselling comic book issue of 2014 (Issue #132). *The Walking Dead* comic book series also was the bestselling non-Marvel/DC comic book series in each of these years. More significantly, *The Walking Dead* comic series is the first non-Marvel/DC comic book title to have accomplished these heights since 1999.³³

³¹ Reinhardt Decl. ¶6 (18 TTABVUE 4); Mackiewicz Decl. ¶9 (20 TTABVUE 4).

³² Mackiewicz Decl. ¶11 (20 TTABVUE 4).

³³ Mackiewicz Decl. ¶12 (20 TTABVUE 5).

• Opposer’s sales of comics, trade paperbacks, and hardcovers in THE WALKING DEAD series have been significant.³⁴ Mr. Mackiewicz testified “this sort of sales success for a zombie series like *The Walking Dead* is unprecedented and has resulted in significant fan recognition, attention, press reports and unsolicited publicity.”³⁵

• “*The Walking Dead* television series debuted on AMC in October 2010. Since then, 131 hour-long episodes of *The Walking Dead* have aired over the course of nine seasons. On October 6, 2019, the series will enter its tenth season.”³⁶

• “*The Walking Dead* television series has the highest total viewership of any series in cable television history. During its third through seventh seasons, *The Walking Dead* averaged the most 18- to 49-year-old viewers of all television shows, including both broadcast and cable.” For example, during its fourth season, THE WALKING DEAD television series averaged 2.5 million more 18 to 49 year old viewers than THE BIG BANG THEORY on CBS television, the next highest-rated program.³⁷

• THE WALKING DEAD television series has garnered critical acclaim. For example,

... *The Walking Dead* was nominated for Best New Series by the Writers Guild of America Awards in 2011 and Best Television Series Drama at the 68th Golden Globe Awards. *The Walking Dead* was named one of the top 10 television programs of 2010 by the American Film Institute Awards.

³⁴ Mackiewicz Decl. ¶14 (20 TTABVUE 5) (Confidential). Because Opposer designated the sales of its publications as confidential, we refer to the sales figures in general terms.

³⁵ Mackiewicz Decl. ¶14 (19 TTABVUE 5).

³⁶ Reinhardt Decl. ¶9 (18 TTABVUE 4).

³⁷ *Id.* at ¶11 (18 TTABVUE 5).

The Walking Dead was nominated for Best Drama Series by the inaugural 1st Critics' Choice Television Awards. The pilot episode for *The Walking Dead*, titled "Days Gone Bye," received three nominations from the 63rd Primetime Emmy Awards—for Outstanding Sound Editing for a Series and Outstanding Special Visual Effects for a Series and won for Outstanding Prosthetic Makeup for a Series, Miniseries, Movie, or Special. ... Most recently, in 2019, *The Walking Dead* was nominated for Favorite TV Drama at the Nickelodeon Kids' Choice Awards and Best Horror Television Series at the 45th Saturn Awards.³⁸

• Because THE WALKING DEAD television series has been so successful, AMC launched a weekly talk show, TALKING DEAD, devoted to THE WALKING DEAD television series, as well as a spin-off series FEAR THE WALKING DEAD.³⁹

• Among television viewers, THE WALKING DEAD has a high level of awareness.

AMC subscribes to two independent proprietary web-based tools: Ipsos Connect's TV Dailies and E-Poll's Program E-Score study. Both studies randomly select members of the public to rate new and returning television series. Ipsos Connect's TVDailies tracks programs weekly, while E-Poll's Program E-Score study tracks in-season programming monthly. Of 5,000 respondents that completed the latest TVDailies questionnaire in August 2019, 78.1% stated that they were aware of *The Walking Dead* television series—putting the series well above the average "awareness" score for cable television dramas in the TVDailies study, which is 28%. Of 1,200 respondents that completed the latest E-Score questionnaire in August 2019, 85% stated that they were aware of the *Walking Dead* series—also putting it well above the average "awareness" score for cable television dramas in the E-Score study, which is 27%.⁴⁰

³⁸ *Id.* at ¶12 (18 TTABVUE 6).

³⁹ *Id.* at ¶13 (18 TTABVUE 7).

⁴⁰ *Id.* at ¶14 (18 TTABVUE 7).

•AMC markets a myriad of merchandise based on THE WALKING DEAD television series, including clothing, mugs, and other consumer goods.⁴¹ Worldwide sales of such THE WALKING DEAD merchandise, “the vast majority of which consist of sales in the United States,” has been significant but not overwhelming.⁴²

•THE WALKING DEAD television series has received unsolicited media. For example,

•Los Angeles Times (August 16, 2015)

Who says nobody walks in L.A.?

With “Fear the Walking Dead,” the prequel to the hugely popular “The Walking Dead,” AMC will fulfill the desire of Robert Kirkman, creator of the series and the comic book that inspired it, to see a huge city get destroyed by flesh-eating corpses. The series premieres Aug. 23 and will have Los Angeles eventually overrun by legions of peripatetic zombies known as “walkers.”⁴³

•The Star-Ledger (Newark, New Jersey) (February 7, 2014)

For the most part, viewers haven’t been troubled by this question [Why go on?]. “The Walking Dead” remains the most popular non-sports show on television (at least in the advertiser-friendly 18 to 49 age demographic), as unstoppable as one of the zombie herds that frequently menace the main characters. (A few times in the fall, it outrated “Sunday Night Football.”)

The series has pushed out its two previous showrunners, and the ratings have only gone up. It’s killed off major characters, and the ratings have only gone up. The public appetite for zombie mayhem is so insatiable that the only

⁴¹ *Id.* at ¶15 (18 TTABVUE 7-8).

⁴² *Id.* at ¶16 (17 TTABVUE 8) (confidential). Because Opposer designated the sales of its collateral merchandise as confidential, we refer to these sales figures in general terms.

⁴³ 24 TTABVUE 6. In addition, this article refers to THE WALKING DEAD as “one of the most-watched shows in television.”

living person, on- or off-screen, who may be wholly irreplaceable -- and that includes writer-producer Robert Kirkman, whose comics inspired the show -- is producer, director and gore makeup master Greg Nicotero.

People love their zombies.⁴⁴

“The Walking Dead” is way too successful for anyone involved to suggest such a radical shake-up, however. Until the ratings start to slip, I expect the show to remain the same uneven mix of thrilling zombie action and depressing human drama, occasionally transcending itself, at other times getting trapped for an extended period down a narrative dead end like Hershel’s farm.⁴⁵

•The Denver Post (August 18, 2017)

AMC’s zombie apocalypse drama “The Walking Dead” quickly became one of the most successful shows in television history after its debut in 2010.⁴⁶

We find that THE WALKING DEAD is a famous mark in connection with comic books and television series for purposes of our likelihood of confusion analysis and, therefore, it is entitled to broad scope of protection for these goods and services. It is common knowledge that famous marks are frequently used on collateral or merchandising products such as clothing, mugs and other consumer goods.

We agree with the board that appellee’s evidence establishes that appellee has built up an enormous goodwill in the mark MONOPOLY, which has been used since 1935 for a board game and that MONOPOLY may properly be termed a “famous” mark. We also find no error in the board’s conclusion that it is a matter of common knowledge that famous marks are frequently used on items

⁴⁴ 24 TTABVUE 11.

⁴⁵ 24 TTABVUE 13.

⁴⁶ 24 TTABVUE 15.

such as clothing, glassware, and trash cans and that appellee's licensing of its mark for use on certain novelty items supports this conclusion.

Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., 648 F.2d 1335, 200 USPQ 986, 988 (CCPA 1981).

Likewise, as the Board found in *Harley-Davidson Motor Co. v. Pierce Foods Corp.*, 231 USPQ 857, 863 (TTAB 1986):

That the mark HARLEY-HOG used on pork products is likely to be associated as to source with opposer is also corroborated by the fact that opposer's uses of HARLEY and HOG in relation to its collateral goods frequently have been whimsical in character (e.g., HOG piggy banks, T-shirts bearing the phrase, "I LOVE MY HOG HARLEY," "the HOG Tales" publication, etc.). Because of these uses, a person having knowledge of them would not be surprised to see HARLEY-HOG used in connection with hot dogs or similar products, and the association with opposer of the mark so used would also be not at all surprising.

The likelihood of confusion is further enhanced by the fact that opposer's line of products has been extended to include such goods as beer, wine coolers and chocolate bars. While these products are different than pork, the fact that beer and hot dogs or pork sausages are frequently consumed together, for example, is significant.

B. Actual Confusion

Robert L. Klein, Chairman and Co-Founder of Applied Marketing Science, Inc., a market research and consulting firm, conducted a market research survey to measure the degree, if any, to which Applicant's mark THE TOKING DEAD for "retail store services featuring clothing, mugs, and other consumer goods" is likely to cause confusion with Opposer's mark THE WALKING DEAD.⁴⁷ We may regard a properly

⁴⁷ Klein Decl. ¶6 (26 TTABVUE 3).

conducted survey as evidence akin to actual confusion. *Blue Cross Blue Shield Ass'n v. Harvard Cmty. Health Plan, Inc.*, 17 USPQ2d 1075, 1078 n.7 (TTAB 1990), citing 2 J. McCarthy, TRADEMARKS AND UNFAIR COMPETITION, Section 32:54 (2d ed. 1984) (“Survey results are generally classified as evidence of actual confusion ...”).

Professor McCarthy more recently opines that survey evidence is not direct evidence of actual confusion but circumstantial evidence from which we may infer likelihood of confusion.

As discussed previously, survey evidence is circumstantial, not direct, evidence of the likelihood of confusion. Surveys do not measure the degree of actual confusion by real consumers making mistaken purchases. Rather, surveys create an experimental environment from which we can get useful data from which to make informed inferences about the likelihood that actual confusion will take place. Direct evidence of actual confusion can come only from such sources as misdirected phone calls or letters or even from that rarest of evidence, the testimony of someone willing to testify that they were once a confused customer.

MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:184 (5th ed. 2020). Thus, a properly conducted survey is circumstantial evidence from which we may infer a likelihood of confusion.

Mr. Klein designed and conducted an *Eveready* style survey first approved by the Seventh Circuit. *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366, 188 USPQ 623 (7th Cir. 1976). An *Eveready* style survey is a reliable format that the Board accepts. See *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1829 (TTAB 2015) (An *Eveready*-type survey is a “widely used and well-accepted format for likelihood of confusion surveys.”); *Starbucks U.S. Brands, LLC and Starbuck Corp. v. Marshall S. Ruben*, 78 USPQ2d 1741, 1753 (TTAB 2006) (“[G]iven the way

in which this survey format carefully follows the *Ever-Ready* likelihood of confusion survey format, we find that it is reliable and therefore of probative value on the issue of likelihood of confusion herein.”).

“In the typical *Eveready* survey, respondents are shown the junior user’s mark in connection with the junior user’s applied for services and are asked open-ended questions about the source of the junior user’s services.”⁴⁸ In *Union Carbide Corp. v. Ever-Ready. Inc.*, the survey asked: “Who do you think puts out the lamp shown here? [showing a picture of defendant's EVER-READY lamp and mark], and “What makes you think so?” 188 USPQ at 640.

After showing the qualified respondents Applicant’s mark (or a control group stimulus) Mr. Klein asked the following questions:

Q1. Who or what brand, company, or business do you believe would use this name in connection with a retail store selling clothing, mugs, and other consumer goods?

⁴⁸ Klein Decl. ¶8 (26 TTABVUE 4). See also MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:174.

To prove that consumers were likely to confuse the source of defendant’s EVER-READY lamps with plaintiff Union Carbide’s EVEREADY branded batteries, flashlights and bulbs, Union Carbide introduced the results of a survey with the following questions:

1. [Screening question to eliminate persons in the bulb or lamp industries.]
2. Who do you think puts out the lamp shown here? (A picture of defendant's EVER-READY lamp with its mark is shown).
3. What makes you think so?
4. Please name any other products put out by the same concern which puts out the lamp shown here.

(Please answer as completely as possible. You are not limited by the size of the answer box)

Q2. Why do you say that? *(Please answer as completely as possible. You are not limited by the size of the answer box.)*

Q3. What else, if anything, do you believe would come from the brand, company, or business using this name in connection with a retail store selling clothing, mugs, and other consumer goods? *(Please answer as completely as possible. You are not limited by the size of the answer box.)*

Q4. Why do you say that? *(Please answer as completely as possible. You are not limited by the size of the answer box.)*

Q5. Do you believe the user of this name in connection with a retail store selling clothing, mugs, and other consumer goods is or is not associated or affiliated with any other brand, company, or business? *(Select one only)*

- It IS associated or affiliated

- It is NOT associated or affiliated

- Don't know/Unsure

Q6. What other brand, company, or business do you believe is associated or affiliated with the user of this name in connection with a retail store selling clothing, mugs, and other consumer goods? *(Please answer as completely as possible. You are not limited by the size of the answer box.)*

Q7. Why do you say that? *(Please answer as completely as possible. You are not limited by the size of the answer box.)*⁴⁹

⁴⁹ Expert Report of Robert L. Klein in the matter of *Robert Kirkman, LLC v. The Toking Dead: Likelihood of Confusion Survey Methodology and Results* (May 9, 2019) (26 TTABVUE 28-29). We find that these questions are consistent with the *Eveready* format and are not leading. Thus, we disagree with Applicant's contention that the "the survey, itself, in the way it was designed, steers the respondents towards a desired result due to the manner in how the questions we asked in an attempt to manipulate the results." Applicant's Brief (31 TTABVUE 5).

“After subtracting the Test Group results from the Control Group (*i.e.*, 17.4% minus 1.0%), the net confusion measured in the survey was 16.4%.”⁵⁰

As evidence that confusion is likely, a higher rate of confusion will always be better than a lower one, but the Trademark Act does not set a threshold percentage of relevant consumers who must be confused in order to bar registration under Section 2(d) of the Trademark Act. While survey results showing *de minimis* confusion in the relevant population would not support an inference that confusion is likely, courts have often found survey results probative of likely confusion even when they suggest that far less than 50 percent of the relevant population is likely to be confused. *E.g.*, *Exxon Corp. v. Tex. Motor Exch. of Hous., Inc.*, 628 F.2d 500, 208 USPQ 384, 390 (5th Cir. 1980) (a showing that “[a]pproximately 15 percent of the individuals surveyed associated the” defendant’s mark with plaintiff “indicate[s] a high possibility of confusion”); *James Burrough, Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 192 USPQ 555, 565 (7th Cir. 1976) (“Though the percentage of likely confusion required may vary from case to case, we cannot consider 15 percent, in the context of this case, involving the entire restaurant-going community, to be *de minimis*.”); *Mut. of Omaha Ins. Co. v. Novak*, 648 F. Supp. 911, 231 USPQ 963, 966 (D. Neb. 1986), *aff’d*, 836 F.2d 397, 5 USPQ2d 1314, 1317 (8th Cir. 1987) (10%-11%); *RJR Foods, Inc. v. White Rock Corp.*, 201 USPQ 578, 581 (SDNY 1978) (15%-20% confusion a “sufficient showing”), *aff’d*, 603 F.2d 1058, 203 USPQ 401 (2d Cir. 1979); *Humble Oil & Ref. Co.*

⁵⁰ Klein Decl. ¶8 (26 TTABVUE 4). *See also* Expert Report of Robert L. Klein in the matter of *Robert Kirkman, LLC v. The Toking Dead: Likelihood of Confusion Survey Methodology and Results* (May 9, 2019) (26 TTABVUE 34).

v. Am. Oil Co., 259 F. Supp. 559, 151 USPQ 266, 270 (E.D. Mo. 1966), *aff'd*, 405 F.2d 803, 160 USPQ 289, 300 (8th Cir. 1966) (11%); *Anheuser-Busch v. Innvopak*, 115 USPQ2d at 1829 (noting “an emerging national consensus that a showing of ten percent or more is sufficient to establish likelihood of confusion”); *Miles Labs., Inc. v. Naturally Vitamin Supplements, Inc.*, 1 USPQ2d 1445, 1457 (TTAB 1986) (survey showing 18 percent confusion corroborates finding of likely confusion; “surveys disclosing likelihood of confusion ranging from 11% to 25% have been found significant”). We find that the 16.4 percent level of confusion shown in the results of the Klein survey is not *de minimis*, it is representative of the potential rate of confusion among the universe of prospective purchasers, and it supports Opposer’s likelihood of confusion claim.

Applicant challenges Klein’s survey results because “[i]t is unclear to Applicant as to why there were only 610 individuals that actually participated in the survey after vetting the responders.”⁵¹ To select the proper universe of survey respondents, Mr. Klein worked with Prodege Market Research who maintains a panel of 6 million members in the United States willing to participate in market research surveys.⁵² In this case, the proper survey universe is potential customers for Applicant’s proposed “retail store services featuring, clothing, mugs, and other consumer goods.”⁵³

Thus, in this proceeding, the relevant population consists of consumers who shop for or purchase “clothing, mugs, or other consumer goods” at a retail store. The survey began

⁵¹ Applicant’s Brief (31 TTABVUE 5).

⁵² Klein Decl. ¶12 (26 TTABVUE 5).

⁵³ Klein Decl. ¶14 (26 TTABVUE 5).

with a series of screening questions to determine if a respondent was a member of this target population. Only men and women residing in the U.S. aged 18 or older who had shopped for or purchased “clothing, mugs, or other consumer goods” at a retail store in the past 12 months were allowed to participate in the survey.⁵⁴

Only 610 of the six million potential respondents qualified for the survey.⁵⁵ This is an acceptable number of respondents. *See, e.g., Ava Enters., Inc. v. Audio Boss USA, Inc.*, 77 USPQ2d 1783, 1786 (TTAB 2006) (accepting survey with 200 respondents); *Carl Karcher Enters., Inc. v. Stars Rests. Corp.*, 35 USPQ2d 1125, 1131 (TTAB. 1995) (accepting survey with 403 respondents).

Applicant, in its brief, asserts that it conducted its own survey both online and at events.⁵⁶

Based on all of the claims of confusion, it was decided to do a petition and gather signatures to show that people are not confused at all and that The Toking Dead has just as much right to exist as The Walking Dead. An online petition was implemented, as well as paper ones used at events we participated in to gather signatures showing a basis for no confusion. These documents are included in the exhibit section.⁵⁷

While there are multiple problems with Applicant’s evidence, we point out three. First, Applicant did not design and conduct a survey in accordance with the principles

⁵⁴ Klein Decl. ¶14 (26 TTABVUE 6).

⁵⁵ Klein Decl. ¶15 (26 TTABVUE 6). “Respondents were randomly assigned to either the Test Group (304 respondents) or Control Group (306 Respondents).” *Id.* at ¶18 (26 TTABVUE 7). Klein showed the Test Group Applicant’s mark THE TOKING DEAD and the Control Group a fictitious mark THE DEAD TOKERS. The Control Group “serves as a control stimuli for capturing and eliminating survey noise.” *Id.* at ¶¶19-20 (26 TTABVUE 7).

⁵⁶ Applicant’s Brief (31 TTABVUE 5).

⁵⁷ Homan Decl. ¶9 and Exhibits 3 and 4 (27 TTABVUE 6 and 19-37).

in the MANUAL FOR COMPLEX LITIGATION or the REFERENCE MANUAL ON SCIENTIFIC INFORMATION. Courts recognize these manuals as providing guidance and recommendations as to the design and use of surveys. *See Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 51 USPQ2d 1705, 1710 (2d Cir. 1999) (citing the MANUAL FOR COMPLEX LITIGATION as an authority regarding a survey universe); *The Sports Auth., Inc. v. Abercrombie & Fitch, Inc.*, 965 F. Supp. 925, 42 USPQ2d 1662, 1667 (E.D. Mich. 1997); 6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:158. *Cf. Markman v. Westview Instru., Inc.*, 52 USPQ2d 967, 34 USPQ2d 1321, 1368 n.12 (Fed. Cir. 1995) (citing MANUAL FOR COMPLEX LITIGATION and REFERENCE MANUAL ON SCIENTIFIC INFORMATION for other issues); *Glasstech, Inc. v. AB Kyro OY*, 769 F.2d 1574, 226 USPQ 949, 951 (Fed. Cir. 1985) (citing the MANUAL FOR COMPLEX LITIGATION for other issue).

Second, Applicant's evidence does not have a proper universe of respondents. For example, in "The fight for our trademark" petition on Change.org, Applicant writes that it is trying "to educate through adult humor the positive effects of cannabis using zombies as our subjects."⁵⁸ Thus, Applicant is making an appeal to cannabis users for support. However, cannabis users are not proper universe of respondents in this opposition because the services at issue are "retail store services featuring clothing, mugs, and other consumer items." Thus, the proper universe is consumers who patronize "retail store services featuring clothing, mugs, and other consumer items."

⁵⁸ 27 TTABVUE 19.

Finally, Applicant is prejudicing its potential “survey” respondents against Opposer by writing, “show corporate America that just because you have lots of money doesn’t mean that you can try and crush the little guys [sic] dreams.”⁵⁹ The similarity or dissimilarity of the marks.

Opposer’s survey evidence is more reliable than Applicant’s purported survey because, inter alia, Opposer used a reliable and accepted format and surveyed the proper universe of respondents.

C. Similarity or dissimilarity of the marks.

We now turn to the *DuPont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)); accord *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

In comparing the marks, we are mindful that “[t]he 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.” *Cai*, 127 USPQ2d at 1801 (quoting *Coach Servs.*, 101 USPQ2d at 1721). See also *Midwestern Pet Foods*,

⁵⁹ 27 TTABVUE 19.

Inc. v. Societe des Produits Nestle S.A., 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *San Fernando Elec. Mfg. Co. v. JFD Elec. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd mem.*, 972 F.2d 1353 (Fed. Cir. 1992).

The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Because the services at issue are “retail store services featuring clothing, mugs, and other consumer goods,” the average customer is an ordinary consumer.

Applicant’s mark THE TOKING DEAD is similar to Opposer’s mark THE WALKING DEAD because they have the same structure. The marks begin with the definite article “the” followed by two-syllable verbs (toking or walking) and finish with the word “Dead.” Thus, each mark produces the same lilt and cadence and convey the same general idea or stimulate the same mental reactions of active zombies either walking or smoking. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018)(“As the Board noted, both marks consist of three words beginning with the identical phrase ‘Detroit Athletic’ and ending with one-syllable ‘C’ words (i.e., ‘Co.’ and ‘Club’). *Id.* Both marks, moreover, conjure an image of sporting goods or services having a connection to Detroit. When viewed in their entireties, the

marks reveal an identical structure and a similar appearance, sound, connotation, and commercial impression. These similarities go a long way toward causing confusion among consumers.”); *Ralston Purina Co. v. Old Ranchers Canning Co.*, 199 USPQ 125, 128 (TTAB 1978) (likely confusion between TUNA O’ THE FARM and CHICKEN OF THE SEA).

We find Applicant’s mark THE TOKING DEAD similar to Opposer’s mark THE WALKING DEAD.

D. The similarity or dissimilarity and nature of the goods and services.

The description of services in Applicant’s application is “retail store services featuring clothing, mugs, and other consumer goods.” Opposer has used its mark on clothing, mugs, and other consumer goods.⁶⁰ As the Court of Appeals for the Federal Circuit has often stated, we must analyze the question of likelihood of confusion based on the identification of goods and services set forth in the application, rather than what evidence might show the actual nature of the goods and services or purchasers to be. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Systems Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). (“The 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 the sales of goods are

⁶⁰ Reinhardt Decl. ¶¶15 (18 TTABVUE 7-8).

directed.”); *Paula Payne Prods. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods”).

We also do not read limitations into the identification of goods. *In re i.am.symbolic, LLC*, 123 USPQ2d at 1748; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) (“There is no specific limitation and nothing in the inherent nature of Squirtco’s mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration”); *In re Thor Tech*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”).

There are no limitations on the types of clothing, mugs, or other consumer goods proposed for sale in Applicant’s retail stores. While the products sold in Applicant’s store may be related to cannabis education, or more specifically cannabis education through the use of zombies, the term “retail store services featuring clothing, mugs, and other consumer items”, encompasses all kinds of clothing, mugs, and other consumers items, including clothing, mugs and other consumer goods sold by Opposer’s licensee. Therefore, we must presume that Applicant’s retail store services featuring clothing, mugs, and other consumer goods includes the same type of clothing, mugs, and other consumer products as Opposer producers.⁶¹

⁶¹ Thus, we cannot consider Applicant’s argument that “its primary emphasis is education” because Applicant did not include that explanation in its description of services. Applicant’s Brief (31 TTABVUE 8).

“[S]tore services and the goods which may be sold in that store are related goods and services for the purpose of determining likelihood of confusion.” *In re Peebles Inc.*, 23 USPQ2d 1795, 1796 (TTAB 1992) (clothing is related to retail outlet services for camping and mountain climbing equipment). *See also In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988) (retail general merchandise store services are related to furniture); *In re Thomas*, 79 USPQ2d 1021, 1024 (TTAB 2006) (jewelry store services are related to jewelry); *In re Best Prods. Co., Inc.*, 231 USPQ 988, 989 (TTAB 1986) (retail jewelry store services are related to men’s and ladies’ bracelets and watch bracelets).

As the Federal Circuit observed:

The only aspect of this case which is unusual is that the marks sought to be registered are for services while the prior registration on which their registration is refused is for wares. Considering the facts (a) that trademarks for goods find their principal use in connection with *selling* the goods and (b) that the applicant's services are general merchandising--that is to say *selling*--services, we find this aspect of the case to be of little or no legal significance. The respective marks will have their only impact on the purchasing public in the same marketplace.

Hyper Shoppes, 6 USPQ2d at 1026.

We find that Applicant’s “retail store services featuring clothing, mugs, and other consumer goods” are related to Opposer’s clothing, mugs, and other consumer goods.

E. Established, likely-to-continue channels of trade and classes of consumers.

Opposer sells THE WALKING DEAD merchandise through the internet, including but not limited to at shophewalkingdead.com and Amazon.com, at comic conventions, and in brick-and-mortar stores, including but not limited to Walmart,

Target, Barnes & Noble, Bid Bad Toy Store, Entertainment Earth, Midtown Comics, Spencer's, and Hot Topic.⁶²

As it stated in an interrogatory answer, "Applicant intends to offer goods and services through internet marketing and on-line stores, cannabis conventions and events, smoke shops and other cannabis related market places, in house and store signings, Tattoo parlors and specialty shops, music festivals, bike rally's [sic], comic conventions and pop culture events."⁶³ As Applicant further stated in admissions' responses:

Applicant admits that the consumers for the goods and services offered or intended to be offered under Applicant's Mark **may** overlap with consumers of Opposer's goods and services offered under Opposer's Mark. This possibility **may** exist for those consumers who like the zombie genre in general.⁶⁴

Applicant admits that Applicant's goods and services offered or intended to be offered under Applicant's Mark **will** be advertised in the same channels as Opposer's goods and services offered under Opposer's Mark.⁶⁵

We therefore find that Applicant intends to offer its services in some of the same channels of trade and to some of the same classes of consumers as Opposer offers its clothing, mugs, and other consumer goods.

⁶² Reinhardt Decl. ¶17 (18 TTABVUE 8); Mackiewicz Decl. ¶19 (20 TTABVUE 6).

⁶³ Applicant's Response to Opposer's interrogatory No. 8 (22 TTABVUE 20).

⁶⁴ Applicant's Response to Opposer's request for admission No. 14 (22 TTABVUE 9).

⁶⁵ Applicant's Response to Opposer's request for admission No. 17 (22 TTABVUE 10).

F. Conclusion

In our consideration of this case, we note that Applicant, as an additional ground of defense, has alleged in its pleading⁶⁶ and argued in its brief⁶⁷ that the USPTO has already ruled that THE TOKING DEAD is not likely to cause confusion with THE WALKING DEAD because it did not refuse registration under Section 2(d) based on Opposer's registrations during the ex parte prosecution of the application. However, the prior implicit finding of the USPTO in the ex parte prosecution of Applicant's application is not binding on this Board in a subsequent adversary proceeding. *Cineplex Odeon Corp. v. Fred Wehrenberg Circuit of Theatres Inc.*, 56 USPQ2d 1538, 1541 (TTAB 2000); *H. Sichel Sohne, GmbH v. John Gross & Co.*, 204 USPQ 257, 261 (TTAB 1979).

Because the marks of the parties are similar, the goods and services of the parties are related and are offered in some of the same channels of trade to some of the same classes of consumers, we find that Applicant's mark THE TOKING DEAD for "retail store services featuring clothing, mugs, and other consumer goods" is likely to cause confusion with Opposer's THE WALKING DEAD mark used in connection with clothing, mugs, and other consumer products. The Klein survey, discussed above, finding a 16.4% potential net rate of confusion among the universe of prospective purchasers, supports Opposer's likelihood of confusion claim and corroborates our findings of fact and conclusions of law.

⁶⁶ Applicant's Amended Answer ¶23 (8 TTABVUE 8-9).

⁶⁷ Applicant's Brief (31 TTABVUE 4-5).

Because we have found for Opposer on its likelihood of confusion claim, we need not reach the merits of its dilution claim. *See Multisorb Techs., Inc. v. Pactiv Corp.*, 109 USPQ2d 1170 (TTAB 2013).

Decision: The opposition is sustained and registration to Applicant is refused.