

This Opinion is Not a
Precedent of the TTAB

Mailed: February 24, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

WCR Liquors, Inc., d/b/a G-Will Liquors

v.

Gee Williquors, Inc.

Opposition No. 91215975

Mark V. Steffenson and Jacob D. Parsley of Henningson & Snoxell, Ltd. for WCR Liquors, Inc., d/b/a/ G-Will Liquors.

Michael S. Neustel and Jason L. Gilbert of Neustel Law Offices, Ltd., for Gee Williquors, Inc.

Before Zervas, Kuczma and Pologeorgis,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Gee Williquors, Inc. (“Applicant”) is the owner of application Serial No. 86076292 filed on September 26, 2013, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), for the standard character mark GEE WILLIQUORS for “retail liquor store services; retail store services featuring beer, wine and spirits” in International Class 35.

In its Notice of Opposition,¹ WCR Liquors, Inc., d/b/a/ G-Will Liquors (“Opposer”), alleges common law use in commerce since at least as early as July 12, 1982 of the mark G-WILL LIQUORS in connection with retail liquor store services and retail store services featuring beer, wine and spirits. Opposer claims priority and likelihood of confusion between G-WILL LIQUORS and GEE WILLIQUORS pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).

Applicant denied Opposer’s salient allegations in its Answer to the Notice of Opposition.

The parties have fully briefed the case.

Evidentiary Objections

Opposer objects to Exhibits 2-5 submitted with Applicant’s First Notice of Reliance on the ground of irrelevancy. The exhibits are printouts of webpages from the Yelp website for businesses using variations of “Gee Whillikers” as trademarks. “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401. Opposer’s objection to Exhibits 2-5 is overruled because the exhibits are relevant to any claim that Opposer’s mark is weak, which is a fact of

¹ Notice of Opposition, ¶¶ 2, 15 and 22, 1 TTABVUE 4, 5 and 7. Citations in this opinion will be to the TTABVUE docket entry number and the electronic page number where the document or testimony appears. Because the Board primarily uses TTABVUE in reviewing evidence, the Board prefers that citations to material or testimony in the record that has not been designated confidential include the TTABVUE docket entry number and the TTABVUE page number. For material or testimony that has been designated confidential and which does not appear on TTABVUE, the TTABVUE docket entry number where such material or testimony is located should be included in any citation. See *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

consequence in determining Opposer's Section 2(d) claim. Opposer's arguments on why Exhibits 2-5 are irrelevant concern the weight to be accorded to these exhibits, and we have considered them in weighing the probative value of such exhibits.

Applicant objected to the admissibility of email communications forming Opposer's Exhibits 5, 6, 9-11, 13 and 14 on the grounds of authenticity, hearsay and the best evidence rule (*i.e.*, Opposer should have provided an electronic copy of the email rather than a printout).² Applicant's objections to Exhibits 5, 6, 9-11, 13 and 14 are overruled because Opposer has elicited sufficient testimony from its trial witnesses to authenticate the emails and the contents of the emails are not being used for the truth of any assertion being made therein. Further, the exhibits are printouts of electronically stored information permitted under Fed. R. Evid. 1001(d), and there is no reason to believe that they do not accurately reflect the information electronically stored. In addition, we overrule Applicant's objections to Exhibits 5, 10 and 11 because *Applicant* points to these exhibits³ in arguing that the evidence demonstrates a *lack* of confusion and that such exhibits demonstrate that the authors of these emails are able to distinguish between Opposer's and Applicant's marks.

Further, Applicant objected to Exhibits 35-42 consisting of Facebook pages and postings allegedly demonstrating actual confusion. Because Applicant's objections are largely directed to the weight to be accorded to the evidence rather than its

² Applicant has also objected to the admissibility of Exhibit 6 because Opposer's attorney used leading questions in obtaining testimony about Exhibit 6. Applicant's objection is overruled because Applicant did not object when the questions were asked, *i.e.*, during David LeRoux's testimony deposition. See TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 707.04 (2015) and cases cited therein.

³ Applicant's Brief at 30, TTABVUE .

admissibility, Applicant's objections are overruled. Applicant's objection to Exhibit 36, a page from Opposer's Facebook profile demonstrating traffic statistics on its Facebook page(s), on the ground that it is not publically available and hence not appropriate for the notice of reliance procedure is also overruled; the admission of this exhibit does not affect the disposition of this case.

The Record

In addition to Applicant's opposed application which is automatically of record pursuant to Trademark Rule 2.122(b), the evidence of record consists of:

- Opposer's First Notice of Reliance filed on March 20, 2015,⁴ submitting:

- (i) Applicant's Answers to Opposer's First Set of Interrogatories, Nos. 6, 12, 18, 19, and 23; and Applicant's First Supplemental Answers to Opposer's First Set of Interrogatories, Nos. 9, 11, 19, 20, and 21. (Opposer's Exhibits 28-29);

- (ii) Applicant's Notice of Pseudo Mark for Serial Number 86076292 published October 5, 2013; TSDR Printout of Applicant's Abandoned Application Serial No. 86047097 of the mark GEE WILQUORS; and North Dakota Attorney General Office's Liquor License Application for G Williquors (Opposer's Exhibits 30-32); and

- (iii) printouts from tsdr.uspto.gov, imgur.com and facebook.com. (Opposer's Exhibits 33-42).

- Opposer's Second Notice of Reliance filed on March 20, 2015,⁵ submitting Applicant's First Supplemental Answers to Opposer's First Set of Interrogatories, No. 8. (Opposer's Exhibit 43).

⁴ 8 TTABVUE.

⁵ 10 TTABVUE.

- Opposer's Rebuttal Notice of Reliance filed on July 10, 2015,⁶ submitting website printouts from geewilliquors.com, and a website printout from facebook.com. (Opposer's Exhibits 44-48).
- Testimony depositions of employees of Opposer or its related companies, James Kast, Grant Rademacher, David LeRoux, Daniel Fields, and Jason Schulz, including Opposer's exhibits introduced during depositions (Opposer's Exhibits 1-14 and 16-27).⁷
- Applicant's Notice of Reliance dated May 22, 2015,⁸ submitting:
 - (i) webpage printouts from G-Will.com and yelp.com (Applicant's Exhibits 1 – 5); and
 - (ii) Office Action dated July 31, 2014 for Opposer's Trademark Application Serial No. 86256214; a listing of Colorado liquor licenses dated May 4, 2015; and a certificate of good standing for G Whil Liquors LLC (Applicant's Exhibits 6 – 8).
- Audio and video files produced by Opposer and Applicant during discovery (Applicant's Exhibits 9 – 35), submitted by Applicant on May 22 and May 26, 2015, pursuant to a stipulation⁹ approved by the Board on May 18, 2015.
- Applicant's Notice of Reliance dated May 22, 2015,¹⁰ submitting the Discovery Deposition of Opposer's personnel.

⁶ 28 TTABVUE.

⁷ 18–26 TTABVUE.

⁸ 14 TTABVUE.

⁹ The stipulation provides:

all audio and video files exchanged by the parties ... are authentic and may be made of record by either party Applicant and Opposer further waive any and all objections to the authenticity of all audio and video files exchanged by the parties and entered into evidence by means of oral testimony during either party's trial testimony period. Each party, however, reserves the right to object to the introduction of any such evidence on the grounds of competency, hearsay, relevance, or materiality.

¹¹ TTABVUE 2.

¹⁰ 15 TTABVUE.

Priority/Standing

Opposer, which has not pleaded a trademark registration,¹¹ must prove its common law rights prior to Applicant's priority date. *Hydro-Dynamics Inc. v. George Putnum and Company Inc.*, 811 F.2d 1470, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987). "Under the rule of *Otto Roth*, a party opposing registration of a trademark due to a likelihood of confusion with his own unregistered term cannot prevail unless he shows by a preponderance of the evidence that his term is distinctive of his goods, whether inherently or through the acquisition of secondary meaning or through 'whatever other type of use may have developed a trade identity.'" *Towers v. Advent Software Inc.*, 913 F.2d 942, 16 USPQ2d 1039, 1041 (Fed. Cir. 1990), citing *Otto Roth & Co. v. Universal Food Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981). Thus, in order to prevail, Opposer must establish that it acquired trademark rights in the G-WILL LIQUORS mark, that the mark is distinctive, either inherently or through acquired distinctiveness, and that its use predates Applicant's first actual or constructive use. Applicant relies on the filing date of its pending application; thus, Opposer must establish use prior to Applicant's constructive use date of September 26, 2013.

We find that Opposer has established its priority for retail liquor store services and retail store services featuring beer, wine and spirits. Mr. Rademacher testified that his father, William Rademacher, was president of Opposer in 1982, that his father owns with his wife all of Opposer's stock, and that his father signed a document "so that WCR could use the assumed name of G-Will Liquors." A letter dated July 21,

¹¹ Although Opposer pleaded ownership of a trademark application, Opposer did not enter the registration which has issued from its application into the record.

1983 (marked WCR 000012) states that William Rademacher, President of WCR Liquors, Inc. “consents on behalf of such corporation to the use of the assumed name ‘G-Will Liquors’ for which WCR Liquors, Inc. filed a Certificate of Assumed Name on July 12, 1982.”¹² Further, Mr. LeRoux testified that Opposer was using the G-Will Liquors name in 1997 in Minnesota.¹³ Applicant has not contested Opposer’s priority and there is no dispute that the mark is inherently distinctive. Thus, Opposer has established dates of use of the G-WILL LIQUORS mark prior to Applicant’s September 26, 2013 constructive first use date.¹⁴ *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1119 (TTAB 2009) (“applicant may rely without further proof upon the filing date of its application as a ‘constructive use’ date for purposes of priority”).

In view of the above, we find that Opposer has sufficiently demonstrated a real interest in preventing registration of the proposed mark and has established that it has standing to bring this proceeding. *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); *Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021 (Fed. Cir. 1987; *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

We turn then to consider whether Opposer has sustained its burden of establishing a likelihood of confusion.

¹² Opposer’s Exh. 1, 23 TTABVUE 2-14; 21 Kast Dep. 16, TTABVUE 17; Rademacher Dep. 17-19, 20 TTABVUE 18-20.

¹³ LeRoux Dep. 9-10, 19 TTABVUE 10-11.

¹⁴ Applicant commenced use of its mark on December 10, 2014. *See* Opposer’s First Not. of Rel., Applicant’s Supp. Answer to Int. No. 9, 8 TTABVUE 43.

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he 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.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We begin with the *du Pont* factor of fame, because when fame is present, it plays a dominant role in the likelihood of confusion analysis. *See Kenner Parker Toys Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). Opposer relies primarily on its advertising figures, which are \$130,000 to \$140,000 annually, with a cumulative total of \$1,971,000 from 1999 through 2014, for advertising in local and Minneapolis and St. Paul newspapers, on radio stations which can be heard in Minneapolis and St. Paul, on Facebook and on a billboard in Cottage Grove, Minnesota.¹⁵ Seventy thousand individuals are members of its “Club Card Reward Program.”¹⁶ Opposer’s advertising figures for a fifteen-year period are not significant and they are not comparable to advertising figures set forth in cases where marks

¹⁵ Schultz Dep. 15, 22 TTABVUE 16; Field Dep. 14 and 18, 18 TTABVUE 15 and 19; Kast Dep. 35, 21 TTABVUE 36.

¹⁶ Opposer’s Ex. 16, 24 TTABVUE 2-1276; Fields Dep. 27-28, 18 TTABVUE 28-29.

have been found to be famous. *See, e.g., Nina Ricci, S.A.R.L. v. E.T.F. Enters., Inc.*, 889 F.2d 1070, 12 USPQ2d 1901, 1902 (Fed. Cir. 1989) (NINA RICCI for perfume, clothing and accessories: over \$37 million in advertising over 27 years); *Kimberly-Clark Corp. v. H. Douglas Enter., Ltd.*, 774 F.2d 1144, 227 USPQ 541, 542 (Fed. Cir. 1985) (HUGGIES for diapers: \$15 million in advertising in one year); *Specialty Brands Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1284 (Fed. Cir. 1984) (SPICE ISLANDS for teas, spices and seasonings: “several million” in advertising, in use for 40 years); *Planters Nut & Chocolate Co. v. Crown Nut Co.*, 305 F.2d 916, 134 USPQ 504, 506 (CCPA 1962) (MR. PEANUT DESIGN for nuts and nut products: \$10 million in advertising over 10 years). Opposer has not provided any context for its advertising figures so that we can measure them against other brands used in the retail liquor store industry. There is no precise information about the readership of the newspapers or radio listeners who have heard or seen Applicant’s advertisements, and there is no information on the volume of sales made in Opposer’s liquor stores. Further, with regard to the imgur.com¹⁷ website, which contains a photograph of Opposer’s sign with the caption “I See your ‘Best Liquor Store Name’ and raise you a ‘Gee Willikers’” and which states there have been “69,354 views,” even if we consider the stated number of views for the truth of the assertion, we would find it unpersuasive because there is no evidence that the viewers are adult consumers of alcohol. 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

¹⁷ Opposer’s Exh. 34, 8 TTABVUE 68-69.

fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it. *Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1438 (TTAB 2014); *see also, Coach Services Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012); *Leading Jewelers Guild Inc. v. LJOH Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007). Opposer has not met its burden of proving that its mark is famous.

Applicant has introduced listings on the yelp.com website of four businesses using variations of “gee whillikers” as a mark. This evidence has limited probative value because only an address is provided for one listing, and there is no indication how long the businesses have been in existence and the extent of consumer exposure to such businesses. Further, as best as we can tell, none of the businesses identified involve retail liquor store services. We therefore find that Applicant has not established that Opposer’s mark should be accorded anything but the typical scope of protection due to an arbitrary mark.

We now consider the *du Pont* factors regarding the similarity or dissimilarity of the services, purchasers and trade channels. As noted above, Opposer has established priority of use of its mark in connection with retail liquor store services and retail store services featuring beer, wine and spirits, which are the same services identified in the application involved herein. Because the parties’ services are identical, we presume that Applicant’s channels of trade and classes of purchasers, which are not limited in Applicant’s recitation of services, include Opposer’s channels of trade and classes of purchasers. *See In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) (“Because the goods are legally identical, they must be presumed to travel in

the same channels of trade, and be sold to the same class of purchasers”). Such purchasers are the segment of the general adult population which consumes alcohol. Thus, the *du Pont* factors involving the services, the trade channels and the classes of purchasers favor a finding of likelihood of confusion.

Next, with regard to the *du Pont* factor concerning the conditions under which and buyers to whom sales are made, Opposer argues that customers make impulse purchases at liquor stores.¹⁸ “Some customers come in for one item, but end up leaving with several items that they never intended on buying”¹⁹ As Applicant points out, we are concerned with retail liquor store services, not the beer, wine and liquor sold in the stores. Inasmuch as Opposer has not offered any evidence on the purchasing habits of consumers of retail liquor store services, the *du Pont* factor regarding purchasing conditions is neutral.

We next consider the similarity or dissimilarity of the marks at issue, in their entirety, in terms of appearance, sound, meaning, and overall commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). In doing so, we bear in mind 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.” *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721.

¹⁸ Opposer’s Brief at 16, 29 TTABVUE 18.

¹⁹ *Id.*

Moreover, the marks ‘must be considered ... in light of the fallibility of memory’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014), quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). In comparing the marks, we are mindful that “[w]hen marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

With regard to the sound of the marks, Opposer maintains that G-WILL LIQOURS is phonetically identical to the expression “gee whillikers.” “Gee whillikers” is defined as an “interjection” “used as an intensive after gee or golly gee to express astonishment, delight, etc.”²⁰ Applicant, however, argues:

²⁰ Dictionary.com (<http://dictionary.reference.com/>), based on the *Random House Dictionary* (2016). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

- Applicant’s mark is naturally pronounced as a “cluster” without any pauses,²¹ while Opposer’s mark will be pronounced, and is pronounced, with pauses;
- Opposer’s advertisements consistently pronounce Opposer’s mark with pauses, suggesting that the mark should be pronounced with pauses;
- A television news story about Applicant pronounces Opposer’s mark with pauses; and
- Opposer’s employee handbook instructs employees to refer to the store as “GeeWilliker’s”; and such instruction is evidence that Opposer’s mark is naturally pronounced with pauses.

The problem with Applicant’s arguments is that they are based on the assumption that there is a correct way to pronounce Opposer’s mark. The Federal Circuit has advised that “there is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than intended by the brand owner.” *In re Viterra Inc.*, 671 F.3d 1358, 1367, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012). *See also In re Belgrade Shoe*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969). Further, any coaching of purchasers by the pronunciation of the mark in Opposer’s advertising and the news story is potentially offset by the pronunciation of the mark by employees following Opposer’s employee handbook,²² which requires Opposer’s mark to be pronounced as “a singular word,”²³ and by those who make an association between “gee whillikers” and G-WILL LIQUORS through Opposer’s Club Card Program named

²¹ “Without any hyphenation or spacing between ‘WILL’ and ‘LIQUORS’, it is natural for a consumer to pronounce WILLIQUORS [as] one fluid statement.” Applicant’s Brief at 16, 30 TTABVUE 36.

²² Opposer’s Exh. 4, 23 TTABVUE 266.

²³ Rademacher Dep. 20, 20 TTABVUE 21.

“GeeWillickers!”²⁴ In addition, there is a substantial similar phonetic similarity between the terms “G” and “GEE”, between the terms “WILL” and “WHIL” and between the terms “LIQUORS” and “LIKERS.” Thus, even if Opposer’s mark is pronounced with pauses in the advertisements and the television news story, we find that many consumers would still pronounce Applicant’s mark as “gee whillikers.”

There is no dispute that Applicant’s mark, GEE WILLIKERS, which contains a slight misspelling of “gee whillikers,” would be pronounced identically to “gee whillikers.” We therefore find that any differences in sound between these marks as described by Applicant may go undetected by consumers, and is not sufficient to distinguish the marks.

We next consider the appearance of the marks. The record reflects that Opposer has used its marks as follows:²⁵



Applicant argues that its mark, as actually used, is remarkably different from Opposer’s mark as used. Applicant, however, seeks registration of its mark in standard characters, and therefore it is not limited to any particular font, size, style or color. *See In re Viterra Inc.*, 101 USPQ2d at 1909; *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011). Applicant may use its mark in the same font and style as Opposer’s mark, and may even display

²⁴ Opposer’s Exh. 19, Fields Dep. 26-27, 18 TTABVUE 27-28.

²⁵ Second Not. of Rel. Exh. 34, 8 TTABVUE 68-69.

the term LIQUORS in a manner where it is smaller than other terms and elements of the marks. Because the marks both begin with “G” or “GEE” followed by “WILL” or “WIL,” and terminate with “LIQUORS” or “LIKERS,” we find the marks to be more similar than different in appearance.

As for the meaning of the marks, Applicant disputes that consumers of Opposer’s services will associate Opposer’s mark with “gee whillikers,” and maintains that the phrase “gee willickers” is no longer in the modern lexicon. Applicant relies on testimony by Mr. Rademacher, who testified:

“The issue that we’ve had over the years is young kids don’t know what GeeWillicker’s - - that it’s an exclamation. So we’ve tried again to reeducate our staff and re-educate the population that - - or at least our customers that GeeWillicker’s is a phrase, it’s a brand, it’s an exclamation. So yes, we’ve tried to teach our customers and our employees it’s said as a single word.”²⁶

Mr. Rademacher refers to “young kids,” and his testimony cannot be construed as including middle-aged and older purchasers who purchase alcohol within those who do not recognize the expression. Further, the dictionary definition noted above has no indication that the term is not in modern use. At a minimum, we find that middle-aged and older purchasers will know the expression because the term is a defined term, which is not identified as obscure or formerly in use.

Applicant also cites testimony in the record providing that customers have confused “G-WILL” in Opposer’s mark with the word “goodwill” and Goodwill stores.²⁷

²⁶ Rademacher Dep. 21-22, 20 TTABVUE 22-23.

²⁷ Rademacher Dep. 53-55, 20 TTABVUE 54-57; LeRoux Dep. 33, 19 TTABVUE 34; Fields Dep. 38, 18 TTABVUE 39.

One of Opposer's stores is across the street from a Goodwill store.²⁸ The occasional incidents where "g-will" was interpreted as "goodwill" noted by the witnesses have been *de minimis* over the many years of their employment with Opposer. Further, there is no evidence in the record that "G-Will" is a recognized abbreviation for anything. We therefore give this testimony limited weight in connection our consideration of the meaning, as well as the commercial impression, of G-WILL LIQUORS.

We have found that Opposer's mark, like Applicant's mark, is similar in sound to the interjection "gee whillikers." In view of this similarity in sound, and because "G-Will" has no established meaning, consumers will construe Opposer's mark as a misspelling of "gee whillikers." And, because both marks are associated with "gee whillikers," we find that the meaning of the marks is the same. Further, because consumers will associate both marks with "gee whillikers," we find the commercial impression of the marks is also the same.

Applicant argues that the term G-WILL is the dominant term in Opposer's mark in view of the genericness of the term LIQUORS.²⁹ We are not persuaded by this argument; the Federal Circuit has counseled that a mark may not be dissected into its component parts. *In re Hearst Corp.*, 25 USPQ2d 1238, 1239 (Fed. Cir. 1992) ("By stressing the portion 'varga' and diminishing the portion 'girl,' the Board

²⁸ Rademacher Dep. 53-54, 20 TTABVUE 54-55.

²⁹ Applicant's Brief at 12-13, 30 TTABVUE 18-19. Applicant notes that Opposer has entered a disclaimer of LIQUORS in its trademark application Serial No. 86256214. Opposer has not made the application or resulting registration of record, and the Board does not take judicial notice of applications or registrations.

inappropriately changed the mark.”) Also, when considered as a whole, the mark bears a strong resemblance to the expression “gee whillikers.”

Upon consideration of the foregoing, we find the marks to be similar in sound and appearance, and identical in meaning and commercial impression.

Actual Confusion

Opposer has submitted evidence purporting to show that there has been actual confusion between its mark and Applicant’s mark. Evidence of actual confusion is normally very persuasive evidence of likelihood of confusion. *Exxon Corp. v. Texas Motor Exchange, Inc.*, 628 F.2d 500, 208 USPQ 384, 389 (5th Cir. 1980) (“The best evidence of likelihood of confusion is provided by evidence of actual confusion”).

The evidence of alleged actual confusion consists primarily of emails expressing a misunderstanding that Opposer was opening or had opened a store in North Dakota and comments on Opposer’s and Applicant’s Facebook pages regarding a store in North Dakota. With regard to the emails, we are mindful of the Board’s treatment of similar evidence in *Coach/braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458 (TTAB 2014). There, the Board discounted emails supposedly evidencing actual confusion because the party offering the emails did not depose any of the allegedly confused individuals who authored the emails. *Id.* at 1481. (“[P]robative value is diminished by the fact that the prospective or actual customer was not called as a witness to testify and be subject to cross-examination as to the circumstances and conditions under which she received the email and why she contacted respondent.”). As in *Coach/braunsdorf*, there could be any number of reasons why the individuals identified in Opposer’s exhibits contacted Opposer or

Applicant. *Id.* (“The confusion, if any, could be explained by factors other than the similarity of the marks ...”). The Facebook postings suffer for the same reason. Thus, this evidence, without any further evidence from the allegedly confused individuals, has limited probative value.

In addition to the email and Facebook evidence, Opposer relies on Mr. LeRoux’s testimony regarding a conversation he had with Dave Grotta, one of Opposer’s vendors, about a new store in North Dakota. Because of the lack of specifics regarding this conversation, Mr. LeRoux’s testimony too has limited probative value.

In sum, the Opposer’s evidence regarding actual confusion has limited probative value. The *du Pont* factor regarding actual confusion therefor is neutral in our analysis. We point out, however, that the absence of significant evidence of actual confusion does not mean that there is no likelihood of confusion. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983).

We now weigh the relevant *du Pont* factors. As discussed above, the services, purchasers and trade channels are identical, and the marks are similar in sound and appearance and identical in meaning and commercial impression. The factors regarding purchasing conditions and actual confusion are neutral in our analysis, and Applicant has not established that Opposer’s mark is weak and therefore entitled to only a limited scope of protection. Thus, we find that Applicant’s mark GEE WILLIKERS for “retail liquor store services; retail store services featuring beer, wine

and spirits” is likely to be confused with Opposer’s mark G-WILL LIQUORS for the same services.³⁰

Decision: The opposition to the registration of Applicant’s mark is sustained.

³⁰ In arriving at our decision, we have considered all of the parties’ arguments and evidence, including the arguments and evidence not specifically discussed in this opinion.