

**THIS OPINION IS NOT A  
PRECEDENT OF  
THE T.T.A.B.**

Hearing: July 29, 2008

Mailed: November 3, 2008

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

World Triathlon Corp.

v.

Traditional Medicinals, Inc.

Opposition No. 91110391  
to application Serial No. 75249885

Frank R. Jakes and Joseph J. Weissman of Johnson, Pope, Bokor, Ruppel & Burns, LLP for World Triathlon Corp.

Jay H. Geller of Jay H. Geller, PC for Traditional Medicinals, Inc.

Before Holtzman, Cataldo and Mermelstein,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

On March 3, 1997 applicant, Traditional Medicinals, Inc., filed an application to register on the Principal Register the mark IRON WOMAN (in typed or standard characters with IRON disclaimed) based upon its assertion of a bona fide intent to use the mark in commerce in connection with "dietary and nutritional supplements" in International Class 5 and "herb teas" in International Class 30.

Registration has been opposed by World Triathlon Corp. ("opposer"). As grounds for opposition, opposer asserts in

its second amended notice of opposition that it is the owner of numerous IRON-formative marks, including the following, previously used and registered on the Principal Register by opposer and its predecessors in interest, for the following goods and services:

**IRONMAN**

for "entertainment services-namely, presentation of athletic contests featuring running, swimming and biking" in International Class 41;<sup>1</sup>

**IRONMAN**

for "watches and chronometers sold in association with contests consisting of running, biking and swimming" in International Class 14;<sup>2</sup>

**IRONMAN**  
**TRIATHLON NUTRITION**

with a disclaimer of "NUTRITION" for "food and vitamin supplements" in Class 5;<sup>3</sup>

IRONMAN TRIATHLON (typed or standard characters)

for "non-carbonated soft drinks, namely bottled water" in

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<sup>1</sup> Registration No. 1353313 issued on August 6, 1985. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Renewed.

<sup>2</sup> Registration No. 2350149 issued on May 16, 2000. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

<sup>3</sup> Registration No. 2325508 issued on March 7, 2000. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

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International Class 32;<sup>4</sup>

IRONWOMAN (standard characters)

for "t-shirts, sweatshirts, denim shirts and hats, marketed in association with contests consisting of running, biking and swimming" in International Class 25;<sup>5</sup> and

IRON GIRL (typed or standard characters)

with a disclaimer of "GIRL" for "clothing and physical fitness apparel for the general female consumer market, namely, sport tops, tanktops, t-shirts, sweatshirts, jackets, warm-up suits, sweatpants, pants, shorts, leotards, leggings, tights, bodysuits, sweatbands, headbands, hats, gloves, and socks" in International Class 25.<sup>6</sup>

Opposer argues that it has made use of its IRON-formative marks in connection with numerous goods and services since prior to any date of first use upon which applicant may rely; that its IRONMAN and IRONMAN TRIATHLON marks have achieved fame and notoriety in the United States prior to the filing of the involved application; and that applicant's mark, when used in connection with applicant's goods, so resembles opposer's IRON-formative marks for its recited goods and services as to be likely to cause confusion, to cause mistake, and to deceive. In addition,

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<sup>4</sup> Registration No. 2571690 issued on May 21, 2002.

<sup>5</sup> Registration No. 2450736 issued on May 15, 2001. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

<sup>6</sup> Registration No. 2787785 issued on December 2, 2003.

opposer asserted a claim of dilution under Section 43(c) of the Trademark Act.

Applicant's answer consists of a general denial of the allegations in the second amended notice of opposition.

**Pleadings and Evidentiary Matters**

In its second amended notice of opposition, opposer pleaded ownership of 12 registrations, as well as 10 pending applications, all for IRON-formative marks. During its testimony period, opposer introduced by notice of reliance copies of 29 of its registrations showing status and title thereof, including 3 registrations that subsequently issued from its pleaded applications, to show that such registrations are valid and subsisting. In addition, opposer introduced 19 of the same registrations as Exhibit E during the first testimony deposition of its executive vice president of marketing and licensing, Mr. Ken Strominger. We note that applicant did not object to the introduction of these registrations during the deposition of Mr. Strominger, but rather stipulated that they are true and accurate copies, and are owned by opposer.<sup>7</sup> We further note that applicant did not object in its brief to opposer's

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<sup>7</sup> Strominger Testimony 1, p. 49-50.

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introduction by notice of reliance or testimony of its registrations, but discussed such registrations in relation to the issues of priority and likelihood of confusion.

We find, therefore, that the parties have tried by implied consent the issues arising from the unpleaded registrations that were introduced by opposer during its testimony period. See, for example, *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1652 n.2 (TTAB 2002). See also TBMP §507.03(b). Nonetheless, we further find that inasmuch as 9 of the above registrations subsequently have been cancelled, opposer may only rely upon the 20 live registrations properly made of record during its testimony period.

**The Record**

By operation of Trademark Rule 2.122, 37 C.F.R. §2.122, the record in this case consists of the pleadings and the file of the involved application. In addition, during its original testimony period, opposer took the testimony deposition, with exhibits, of its vice president of marketing and licensing, Mr. Ken Strominger. During its reset testimony period, opposer took a second testimony deposition of Mr. Strominger. In addition, opposer submitted three notices of reliance. During its assigned testimony period, applicant took the testimony depositions of its chief executive officer, Mr. Drake Sadler and its

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vice president of research and development, Mr. Josef Brickman. In addition, applicant submitted two notices of reliance. During its assigned rebuttal testimony period, opposer submitted the testimony deposition of its president, Mr. Benjamin Fertic.

Opposer and applicant filed main briefs on the case, and opposer filed a reply brief. In addition, counsel for both parties presented arguments at an oral hearing held before the Board on July 29, 2008.

**Opposer's Standing and Priority of Use**

Because opposer has properly made 20 of its registrations of record, we find that opposer has established its standing to oppose registration of applicant's mark. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

Moreover, because 20 of opposer's registrations are of record, Section 2(d) priority is not an issue in this case as to the IRON-formative marks therefor and goods and services recited in those registrations. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

### Likelihood of Confusion

Our likelihood of confusion 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 likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

#### Fame of Opposer's IRONMAN and IRONMAN TRIATHLON Marks

We begin our likelihood of confusion analysis with the fifth du Pont factor, which requires us to consider evidence of the fame of opposer's IRONMAN and IRONMAN TRIATHLON marks and to give great weight to such evidence if it exists. See *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002); *Recot Inc. v. Becton*, 214 F.3d 1322, 54 F.2d 1894 (Fed. Cir. 2000); and *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992).

Fame of an opposer's mark or marks, if it exists, plays a "dominant role in the process of balancing the DuPont factors," *Recot*, 214 F.3d at 1327, 54 USPQ2d at 1456, and "[f]amous marks thus enjoy a wide latitude of legal protection." *Id.* This is true as famous marks are more likely to be remembered and associated in the public mind than a weaker mark, and are thus

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more attractive as targets for would-be copyists. Id. Indeed, "[a] strong mark ... casts a long shadow which competitors must avoid." Kenner Parker Toys, 963 F.2d at 353, 22 USPQ2d at 1456. A famous mark is one "with extensive public recognition and renown." Id.

Bose Corp. v. QSC Audio Products Inc., supra, 63 USPQ2d at 1305.

Upon careful review of the record in this case, we are not persuaded that opposer's IRONMAN and IRONMAN TRIATHLON marks are famous. It is the duty of a plaintiff asserting that its mark is famous to clearly prove it.

Opposer has testified and introduced evidence that it has used its IRONMAN and IRONMAN TRIATHLON marks continuously since 1979 in connection with its athletic events. In 1980, ABC began broadcasting opposer's athletic event annually on its Wide World of Sports program. NBC began coverage of the event in 1991. By 2003, coverage of opposer's championship event on NBC won nine Sports Emmy Awards. Articles concerning opposer and its athletic events have appeared numerous publications including The New York Times, USA Today, Street & Smith's, The Wall Street Journal, The Washington Post, and Sports Illustrated. Opposer subsequently has used its IRON-formative marks in connection with a variety of goods and services. In addition, opposer's Timex IRONMAN watch, introduced in 1986, currently is the best-selling sports watch in the world.

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Opposer's evidence supports a finding that its IRONMAN and IRONMAN TRIATHLON marks have achieved a level of media exposure and recognition at least with regard to its athletic events. On the other hand, we have little, if any, evidence to show the level of brand awareness that has resulted from opposer's media exposure and recognition. For instance, we do not have figures regarding household penetration or brand awareness that would tend to establish that opposer provides products and services of lasting value. For comparison, we note the evidence of record in the Kenner Parker and Recot cases:

In the two- to seven-year-old age group, one in every two children currently owns a PLAY-DOH product. A survey showed that 60% of mothers named PLAY-DOH for modeling compound without any prompting. One witness characterized PLAY-DOH as a "piece of gold" which has lasted over thirty years as a successful toy – a very unusual occurrence in the toy business.

Kenner Parker, 963 F.2d at 351, 22 USPQ2d at 1455.

Recot ... has manufactured and sold a wide variety of snack food under its mark, FRITO-LAY, for over thirty years. Recot now sells products nationwide in supermarkets, grocery stores, mass merchandisers, and wholesale clubs, convenience stores, food services, and vending machines... . In any given year, up to 90 percent of American households purchase at least one FRITO-LAY brand snack.

Recot, 214 F.3d at 1326, 54 USPQ2d at 1896.

We do not have a similar record in this case.

Opposer's testimony and evidence fall far short of demonstrating the extent to which its length of use of its

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marks, media exposure, or marketing efforts translate into widespread recognition of the IRONMAN and IRONMAN TRIATHLON marks among the general public. That is to say, the testimony and evidence do not establish that opposer's IRONMAN and IRONMAN TRIATHLON marks are widely recognized outside the field of triathlons. Indeed, it is unclear to what extent, if any, opposer's goods and services are recognized among the general public.

Accordingly, we find on this record that the evidence fails to establish that opposer's IRONMAN and IRONMAN TRIATHLON marks are famous for purposes of our likelihood of confusion determination. Nevertheless, we find that the evidence is sufficient to show that opposer's marks have achieved at least some degree of recognition and strength in the sports market.

Family of Marks

Next, we turn to opposer's contention that it owns a family of "IRON-gender/age formative marks" for a variety of products and services. We find that the requisite showing of a family of marks has not been made. The fact that opposer has used and registered several marks incorporating the prefix IRON, is not in itself sufficient to establish the existence of a family of marks. See *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991). As stated by the Court "There must be a

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recognition among the purchasing public that the common characteristic is indicative of a common origin of the goods." J & J Snack Foods, supra at 1891. Accordingly, opposer must demonstrate that the marks asserted to comprise the family, or a number of them, have been used and advertised in promotional material or in everyday sales activities in such a manner as to create common exposure and thereafter recognition of common ownership based upon a feature common to each mark. See Truescents LLC v. Ride Skin Care LLC, 81 USPQ2d 1334 (TTAB 2006) citing American Standard, Inc. v. Scott & Fetzer Co., 200 USPQ 457, 461 (TTAB 1978).

In this case, opposer has introduced very little evidence to support its allegations that its marketing efforts have created common exposure to its IRON-formative marks such that the purchasing public recognizes the common origin of its goods and services provided thereunder. Opposer's testimony and evidence establishes that it has marketed a wide variety of products under its IRON-formative marks.<sup>8</sup> Opposer has introduced a small number of advertisements suggesting its attempts to market its goods under its IRON-formative marks together and also to market

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<sup>8</sup> Strominger Testimony 1, p. 54, Exhibit K; Strominger Testimony 2, p. 66-76, 133-4 Exhibits Z, BB, CC.

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such goods at its athletic events.<sup>9</sup> However, such evidence is insufficient to establish public exposure to opposer's marks in such a manner that demonstrates recognition of common ownership thereof based upon the IRON feature common to each mark. Cf. Sports Authority Michigan Inc. v. PC Authority Inc., 63 USPQ2d 1782, 1801 (TTAB 2002).

Opposer further asserts that its "family of marks has been established through these similar presentations along with the millions of dollars in advertising on and sales of products containing the marks" (brief, p. 23). However, opposer has not introduced evidence of its sales and advertising expenditures to support such allegations, but merely relied upon statements in its testimony depositions and assertions in its brief to support its claims. In short, there is insufficient evidence that opposer has used and advertised in promotional material or in everyday sales activities its IRON-formative marks in such a manner as to create a family of marks.

Therefore, we will determine the issue of likelihood of confusion based on the individual marks that are the subject of opposer's pleaded registrations. In our analysis, we will concentrate our discussion of the issue of likelihood of confusion on those of opposer's registrations

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<sup>9</sup> Id.

which recite goods most similar to those of applicant, namely, Registration No. 2325508 for the mark



"food and vitamin supplements" in Class 5; and Registration No. 2571690 for the mark IRONMAN TRIATHLON in typed or standard characters for "non-carbonated soft drinks, namely bottled water" in International Class 32.<sup>10</sup>

The Marks

We turn to the first du Pont factor, i.e., whether applicant's mark and opposer's IRONMAN TRIATHLON NUTRITION and IRONMAN TRIATHLON marks are similar or dissimilar when viewed in their entirety in terms of appearance, sound, connotation and overall commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot*, supra. The test, under the first du Pont factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion

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<sup>10</sup> We note, in that regard, that while opposer has made of record a copy of its above-noted Registration No. 2450736 for the mark IRONWOMAN, which is virtually identical to the mark in the involved application, there is no evidence of record that the various items of clothing identified as goods therein are related to the goods recited in applicant's application.

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as to the source of the goods offered under the respective marks is likely to result.

In this case, we find that applicant's mark, IRON WOMAN, is similar to opposer's marks, IRONMAN TRIATHLON NUTRITION in stylized form and IRONMAN TRIATHLON. In comparing the marks, we find that IRONMAN is the dominant element of opposer's marks, and accordingly it is entitled to more weight in our analysis. It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

The mark in opposer's Registration No. 2325508 consists of the word IRONMAN in large, bold letters with the letter M stylized in the form of a man, and the words TRIATHLON NUTRITION beneath in smaller letters. In addition to being displayed in smaller type than IRONMAN, the descriptive word NUTRITION is disclaimed, and thus appears to serve relatively little source-identifying function. As a result, TRIATHLON NUTRITION is less visually significant than

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IRONMAN and NUTRITION is less distinctive in the mark in opposer's Registration No. 2325508.

Further, with regard both to opposer's IRONMAN TRIATHLON NUTRITION mark in stylized form and its IRONMAN TRIATHLON mark in its Registration No. 2571690, we note that IRONMAN is also the first word in both the marks. *Presto Products, Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("...[it is] a matter of some importance since it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered."). See also *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1692 ("The presence of this strong distinctive term as the first word in both parties' marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of ROYALE."). Thus, the word IRONMAN, being the first word in both of opposer's marks, is most likely to make a strong impression upon consumers and to be remembered thereby.

Applicant's mark, IRON WOMAN, is highly similar in appearance and sound to the dominant IRONMAN portion of opposer's IRONMAN TRIATHLON NUTRITION and IRONMAN TRIATHLON marks. Both applicant's mark and those of opposer convey the sense of persons possessed of strong body, will, and resolve, i.e., men and women of iron. The mere

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difference in gender between the parties' marks is insufficient to create significantly different commercial impressions given the overall similarities in the marks. The marks respectively suggest men and women with wills and bodies of iron, and thus are similar in connotation and convey highly similar overall commercial impressions. As a result, we find that, when viewed as a whole, the similarities between applicant's IRON WOMAN mark and opposer's IRONMAN TRIATHLON NUTRITION mark in stylized form and IRONMAN TRIATHLON mark outweigh the dissimilarities.

In view thereof, this du Pont factor favors opposer.

The Goods

We turn now to the second du Pont factor, i.e., the similarity or dissimilarity of the goods identified in the involved application and opposer's Registration Nos. 2325508 and 2571690. With respect to the goods, it is well established that the goods or services of the parties need not be similar or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods or services of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods or services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to

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the mistaken belief that they originate from the same source. See *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

The goods identified in opposer's Registration No. 2325508 for its IRONMAN TRIATHLON NUTRITION mark are "food and vitamin supplements" in International Class 5. The goods identified in opposer's Registration No. 2571690 for its IRONMAN TRIATHLON mark are "non-carbonated soft drinks, namely bottled water" in International Class 32. Applicant's goods under its mark are identified as "dietary and nutritional supplements" in International Class 5 and "herb teas" in International Class 30.

We note that, as identified, the parties' Class 5 goods are closely related, if not virtually identical, products inasmuch as both identify food or dietary supplements. In that regard, we hereby take judicial notice of the following definition of "dietary supplement:" "the wide assortment of minerals, vitamins, and sundry herbs that are taken as nutritional supplements to regular food."<sup>11</sup> As defined,

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<sup>11</sup> The American Heritage New Dictionary of Cultural Literacy, 3<sup>rd</sup> Ed., 2005. The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002). See also *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

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opposer's food and vitamin supplements as well as applicant's dietary and nutritional supplements both are used to provide extra nutrition beyond a consumer's regular food diet. Thus, on the face of the identification of goods, the Class 5 supplements identified in opposer's Registration No. 2325508 are related to the supplements identified in Class 5 of the involved application. As a result, we find that these goods are highly similar as identified in the involved application and pleaded registration.

However, opposer's "non-carbonated soft drinks, namely bottled water" identified in its Registration No. 2571690 are not so closely related to applicant's "herb teas." Both obviously may be ingested as beverages, but beyond that commonality, there is nothing on the face of the respective identifications of goods to support a finding these goods are similar for our likelihood of confusion analysis. We further note that opposer has introduced no evidence to support its contention that these goods are related, or that they typically emanate from a common source. The mere opinion of its witness, Mr. Strominger, is insufficient to establish a relationship between these goods, and opposer merely relies upon such conclusory assertions as "[a]pplicant's applied-for 'herb teas' goods description is also too close to [opposer's] established areas of trade for

its IRON-gender/age formative marks" (brief, p. 27).

Inasmuch as we have found above that opposer has failed to demonstrate that it owns a family of IRON-formative marks, and further because opposer has introduced no evidence that its bottled water is related to applicant's herb teas, there is nothing in the record to support a finding that these goods are related.<sup>12</sup>

In view thereof, this du Pont factor favors opposer as to the goods identified in Class 5 of the application but favors applicant as to the goods identified in Class 30 of the application.

Channels of Trade

Because we have found that the parties' Class 5 goods are closely related, and because there are no recited restrictions as to their channels of trade or classes of purchasers, we must assume that opposer's food and vitamin supplements on the one hand and applicant's dietary and nutritional supplements on the other are available in all the normal channels of trade to all the usual consumers of such goods, and that the channels of trade and the purchasers for the parties' Class 5 goods would overlap.

See Interstate Brands Corp. v. McKee Foods Corp., 53 USPQ2d

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<sup>12</sup> Nor do we find that opposer has introduced any evidence to establish that applicant's herb teas are related to any of the goods for which opposer asserts common law use of its IRON-formative marks.

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1910 (TTAB 2000). See also *Octocom Systems, Inc. v. Houston Computers Services Inc.*, supra ("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 directed.") See also *Paula Payne Products v. Johnson Publishing 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 find that, as a result of the foregoing, this du Pont factor also favors opposer as to the goods identified in Class 5.

Conditions of Sale

The next du Pont factor discussed by the parties is that of the conditions of sale. Applicant asserts that because it "carefully targets and nurtures its consumer base, the evidence establishes that its customers are careful, sophisticated purchasers and not impulse purchasers" (brief, p. 39). However, as identified, neither opposer's nor applicant's goods are so highly specialized as to exclude casual purchase. Nor is there any evidence that

applicant's goods are of a type that would be limited by expense or marketing channels in such a manner as to restrict their availability solely to exclusive, sophisticated purchasers. As such, we must presume that both parties' goods are available to all types of purchaser, including casual, impulse buyers. Moreover, it is settled that even sophisticated purchasers are not necessarily knowledgeable in the field of trademarks or immune from source confusion. See *In re Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988).

Thus, this du Pont factor also favors opposer.

Registration of Similar Marks

In its brief, applicant refers to a number of third-party IRON-formative marks registered in connection with various goods and services. We note, however, that most of these third-party registrations are for goods and services that are far removed from the goods at issue herein. As a result, we cannot say that these registrations demonstrate that opposer's IRONMAN TRIATHLON NUTRITION and IRONMAN TRIATHLON marks are so weak or entitled to such a limited scope of protection as to allow registration of a confusingly similar mark, especially for goods that are nearly identical. Because of the differences primarily in the goods and services identified in the submitted third-party registrations, we find that, consistent with our above

discussion of the fame of opposer's marks, that its marks at issue herein are entitled to more than a narrow scope of protection that would be afforded a weaker or less distinctive mark.<sup>13</sup>

Actual Confusion

Another du Pont factor discussed by the parties is the lack of instances of actual confusion. Applicant asserts that the absence of actual confusion for more than eight years suggests no likelihood of confusion. However, it is not necessary to show actual confusion in order to establish likelihood of confusion. See *Weiss Associates Inc. v. HRL Associates Inc.* 902 F.2d 1546, 223 USPQ 1025 (Fed. Cir. 1990). Moreover, on the record before us there is no evidence as to whether there has been any opportunity for confusion to occur. Thus, this du Pont factor is neutral.

**Summary**

We have carefully considered all of the evidence pertaining to priority of use and the relevant du Pont factors, as well as all of the parties' arguments with respect thereto, including any evidence and arguments not specifically discussed in this opinion.

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<sup>13</sup> We also point out that third-party registrations are not evidence that the marks shown therein are in use. See *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973).

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We conclude that opposer has established its standing to bring this proceeding as well as its priority of use.

We further conclude that consumers familiar with opposer's "food and vitamin supplements" under its IRONMAN TRIATHLON NUTRITION mark in its Registration No. 2325508 would be likely to believe, upon encountering applicant's involved mark for its nearly identical "dietary and nutritional supplements," that the parties' goods originate with or are associated with or sponsored by the same entity. The du Pont factors of the similarity between the marks and the nearly identical nature of the goods weigh strongly in opposer's favor.

However, we also conclude that because opposer failed to introduce any evidence that its "non-carbonated soft drinks, namely bottled water" under its IRONMAN TRIATHLON mark in its Registration No. 2571690 or, for that matter, that any of its goods or services recited under any of its 20 marks of record, are related to applicant's "herb teas," consumers encountering the parties' marks for these goods are unlikely to believe that they originate from the same entity.

**Dilution**

Given our determination that there is a likelihood of confusion herein, we decline to reach a determination on the question of dilution in this proceeding.<sup>14</sup>

DECISION: The opposition is sustained as to "dietary and nutritional supplements" recited in International Class 5, and registration to applicant is refused on the ground of priority and likelihood of confusion as to those goods. The opposition is dismissed as to "herb teas" recited in International Class 30, and application Serial No. 75249885 will proceed to issuance of a Notice of Allowance as to those goods.

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<sup>14</sup> We note in addition that while opposer presented arguments in its brief with regard to its claim of dilution, counsel for opposer indicated at oral argument that it was opposer's intention to withdraw its dilution claim.