

**This Opinion is Not a
Precedent of the TTAB**

Mailed: November 18, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Gary Hale

v.

Go Pro Workouts, LLC

Opposition No. 91211810

Wesley W. Whitmyer Jr., Andy I. Corea and Lori L. Benavente of St. Onge Steward
Johnston & Reens LLC, for Gary Hale

Brendan M. Shortell, Esq. of Lambert & Associates for Go Pro Workouts, LLC.

Before Kuhlke, Mermelstein and Kuczma,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Applicant, Go Pro Workouts, LLC, (“Applicant”), filed a use-based application to
register the mark GO PRO OR GO HOME with a standard character claim for:

Clothing, namely, shirts, pants, sweatshirts, hats, socks,
shorts, jackets, headbands, warmup suits and footwear in
Class 25.¹

¹ Application Serial No. 85756704 was filed on October 17, 2012, alleging first use of the mark at least as early as March 4, 2011 and first use in commerce at least as early as March 15, 2011. The application also includes goods and services in International Classes 5 and 41 which are not at issue in this proceeding. See Opposer’s Opening ACR Brief at p. 2

Opposer, Gary Hale (“Opposer”), opposes the registration of Applicant’s mark on the ground of priority and likelihood of confusion under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d). Opposer alleges that his rights in the similar mark GO PRO for clothing items commenced as of his November 15, 1995 constructive use date which is prior in time to Applicant’s filing date as well as any date of use of the mark claimed by Applicant.

Opposer is the owner of Registration No. 2,086,424 for the mark GO PRO with a standard character claim for:

Clothing, namely, T-shirts, hats, caps, jerseys, shorts, tank shirts, socks, warm-up suits, jackets, pants, sweat shirts, sweat pants, coats, sneakers, boots, and sandals, in International Class 25,

and alleges dates of first use and first use in commerce on November 20, 1995, and March 16, 1996, respectively.²

In its answer, Applicant denied the salient allegations and alleged several defenses, identified as affirmative defenses, including lack of likelihood of confusion as to source, sponsorship, association or approval, unclean hands, laches, estoppel, and acquiescence.³

(9 TTABVUE 3).

² Registration No. 2086424 issued on the Principal Register on August 5, 1997, based on an intent to use application filed on November 15, 1995, and has been renewed.

³ Applicant’s defenses as to unclean hands, laches, estoppel and acquiescence were not argued in its briefs, so we consider them waived. *General Mills Inc. v. Fage Dairy Processing Industry SA*, 100 USPQ2d 1584, 1588 n.1 (TTAB 2011).

The parties agreed to resolve this proceeding by Accelerated Case Resolution (“ACR”) in lieu of a trial.⁴ The Board’s Order of March 19, 2014, approved the parties’ agreement regarding the ACR procedure for this case as set forth in the parties’ March 12, 2014 Stipulation to Elect the Accelerated Case Resolution Procedure namely, that in lieu of trial, the Board can resolve any issues of material fact in making the final determination on the merits; included a proposed schedule for the close of discovery and the submission of briefs and evidence; and provided for the submission of testimony by written declarations and affidavits.

I. The Record

A. Opposer’s Evidence

Opposer introduced Declarations of the following:

Declaration of Gary Hale (9 TTABVUE 68-98)

Declaration of Andy I. Corea (9 TTABVUE 10-67)

Declaration of Andy I. Corea (12 TTABVUE 10-13)

B. Applicant’s Evidence

Applicant introduced Declarations of the following:

Declaration of Joseph Lamourex (11 TTABVUE 18-33)

⁴ ACR is a procedure akin to summary judgment in which parties can receive a prompt determination of the claims and defenses in their case, but without the uncertainty and delay typically presented by standard summary judgment practice. To take advantage of ACR, the parties must stipulate that, in lieu of trial, the Board can resolve any material issues of fact. After the briefs are filed, the Board will issue a decision within fifty days, which will be judicially reviewable as set out in 37 CFR §2.145. *Ballet Tech Foundation, Inc. v. Joyce Theater Foundation, Inc.*, 89 USPQ2d 1262, 1266 n. 9 (TTAB 2008).

Declaration of Brendan M. Shortell (11 TTABVUE 34-408)

Declaration of Joseph Lamourex (14 TTABVUE 10-14)

II. Standing and Priority

Opposer bears the burden of proving both standing to oppose and at least one valid ground for refusal of registration. *Ritchie v. Simpson*, 170 F.3d 1092, 1095, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999) and *Sanyo Watch Co., Inc. v. Sanyo Electric Co., Ltd.*, 691 F.2d 1019, 1021, 215 USPQ 833, 834 (Fed. Cir. 1982). Because Opposer has properly made his pleaded Registration for the GO PRO mark of record, he has established standing to oppose registration of Applicant's mark and his priority is not an issue as to those goods covered by the registration. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1402, 182 USPQ 108, 110 (CCPA 1974). Additionally, we note that Applicant expressly concedes Opposer's priority.⁵

III. Likelihood of Confusion

In determining the likelihood of confusion, we must analyze all of the probative facts in evidence that are relevant to the factors set forth in *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, 1314-15, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). Two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort*

⁵ Applicant's ACR Brief on the Merits at pp. 6-7 (11 TTABVUE 7-8).

Howard Paper Co. 544 F.2d 1098, 1103, 192 USPQ 24, 29 (CCPA 1976). We have considered these and any other *du Pont* factors on which the parties have submitted evidence or argument.

A. Similarity of the Goods, Trade Channels and Conditions of Purchase

1. Similarity of Goods

There is no question that the parties' goods are identical in part, as both Opposer's Registration and Applicant's application include pants, sweatshirts, hats, socks, shorts, jackets, and warmup suits. Additionally, the "footwear" items in the application encompass the boots and sandals in Opposer's Registration.

2. Similarity of Trade Channels

Because the goods are in large part identical and otherwise overlapping and closely related, and because neither Applicant's identification of goods nor the identification of goods contained in Opposer's Registration contain a limitation of any kind with respect to consumers or channels of trade, we must presume that the goods move in the same channels of trade and are sold to the same classes of consumers. *See American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). *See also In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

3. Class of Purchasers

Although Applicant admits that the parties sell similar goods in similar trade channels, it contends that the class of purchasers and conditions under which the goods are purchased are so different as to avoid any potential confusion.⁶ According to Applicant, Opposer sells only clothing items on his website, while Applicant's website offers clothing items as an ancillary product to its workout training and nutritional programs.⁷ Specifically, Applicant sells dietary and nutritional supplements; and provides a website featuring online sports training and training advice, and recordings of training and workouts.⁸ Thus, Applicant argues that its clothing items are just one part of its overall GO PRO OR GO HOME brand and these other goods and services offered by Applicant which feature professional athletes wearing such clothing items, ensure a unique and distinct condition of purchase and consumers.⁹ Based on the foregoing, Applicant maintains that the purchasers of its goods and services, unlike those of Opposer's goods, are athletes who train with Applicant or with professional sports teams and associations with which Applicant has partnered.¹⁰

Applicant's argument has little merit. First, the other products and services offered by Applicant are not relevant. It is well-settled that the issue of likelihood of

⁶ Applicant's ACR Brief on the Merits (hereafter "Applicant's ACR Brief") at p. 11 (11 TTABVUE 12).

⁷ Applicant's ACR Brief at p. 11 (11 TTABVUE 12).

⁸ Applicant's ACR Brief at p. 9 (11 TTABVUE 10).

⁹ Applicant's ACR Brief at p. 11 (11 TTABVUE 12).

¹⁰ Applicant's ACR Brief at p. 11 (11 TTABVUE 12); Lamourex Decl. ¶ 10 (11 TTABVUE 20).

confusion between applied-for and registered marks must be determined on the basis of the goods and services as they are identified in the involved application and registration. *Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, 473 F.2d 901, 902, 177 USPQ 76, 77 (CCPA 1973). Moreover, each Class stands on its own, for all practical purposes like a separate application, and we must make determinations for each separate Class. *General Mills v. Fage*, 100 USPQ2d at 1588 n.1, *citing G&W Laboratories, Inc. v. G W Pharma Ltd.*, 89 USPQ2d 1571, 1573-74 (TTAB 2009)). Thus, the goods listed in the other Classes in the application do not serve to restrict the trade channels for the goods in the opposed class. There are no restrictions in the identifications of goods which differentiate potential purchasers and given the identity of the goods, we must presume that the purchasers are the same. Even if this presumption did not apply, Applicant has “been developing apparel using the GO PRO OR GO HOME mark targeted at the *general purchaser of athletic apparel*” (emphasis added),¹¹ and Opposer likewise targets his apparel and footwear to the general purchaser of athletic apparel.¹² Because there are no restrictions in the description of goods in Applicant’s application or in Opposer’s Registration, we must consider the parties’ identical goods to move in all the normal and usual channels of trade and methods of distribution to all potential purchasers, and these customers would include the general public. *Octocom Systems, Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811

¹¹ Lamourex Decl. at ¶¶ 6, 11 (11 TTABVUE 19, 21).

¹² Hale Decl. ¶ 5 (9 TTABVUE 69).

F.2d 1490, 1493, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Thus, we find that Applicant's products and the products in Opposer's registration move in the same channels of trade and are sold to the same classes of customers which include the general public including, but not limited to "general purchaser[s] of athletic apparel."

4. Conditions Under Which and Buyers to Whom Sales Are Made

The fourth *du Pont* factor is the conditions under which and buyers to whom sales are made, i.e., "impulse versus careful, sophisticated purchasing." In order to purchase Applicant's goods, visitors to its website are required to register and create an account for either a free trial session or a paid plan for its workout training programs or nutritional plans. Based on this requirement, Applicant argues that an enhanced degree of care not required to purchase Opposer's goods, is necessary to the purchase of its goods.¹³

The registrability of an application must be considered with respect to the goods identified in it. Thus, Applicant's goods are not limited to those sold to purchasers who have previously registered on Applicant's website or those sold in conjunction with its training or nutritional plans. But even if they were, and even if such purchasers are presumed to use a reasonable amount or possibly even a high amount of care when making a purchase, there is no evidence that purchasers of Opposer's goods exercise a greater degree of care in purchasing his products. Opposer's clothing products are everyday clothing items of the type purchased on

¹³ Applicant's ACR Rebuttal Brief at 6 (14 TTABVUE 7).

impulse and without much care or deliberation. Thus, purchasers who are not likely to exercise great care in their purchasing decisions may be confused by the marks. In view of the foregoing, purchasers for the goods exercise an ordinary degree of care, i.e., neither especially careful nor careless, in selecting the goods.

B. Similarity of Marks

We next consider the *du Pont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *du Pont*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009) and *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988).

To the extent that Applicant's GO PRO OR GO HOME mark begins with the same two words that comprise Opposer's GO PRO mark, they are similar overall in sound, appearance and meaning. This is particularly so because consumers are generally more inclined to focus on the first word in any trademark or service mark. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); see also *Presto Products, Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of mark which is most likely to be impressed upon the mind of a purchaser and remembered" when making purchasing decisions).

Although we must determine likelihood of confusion on the basis of the facts and context of each case, it is significant that Opposer's GO PRO mark is contained in

its entirety within Applicant's GO PRO OR GO HOME mark; in such cases, confusing similarity has often been found. *See Coca-Cola Bottling Co. of Memphis, Tennessee, Inc. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (BENGAL LANCER similar to BENGAL); *In re El Torito Restaurants, Inc.*, 9 USPQ2d 2002 (TTAB 1988) (MACHO COMBO likely to cause confusion with registered MACHO mark); *In re Christian Dior, S.A.*, 225 USPQ 533, 535 (TTAB 1985) (addition of house mark in LE CACHET De DIOR does not avoid likelihood of confusion with registered CACHET mark).

In considering the commercial impressions of the marks, we find that they are similar. According to Opposer, the GO PRO brand targets to a wide range of consumers, including athletes looking to go pro, who want to strive to go a step beyond the norm in everything they do across all aspects of life.¹⁴

Applicant's GO PRO OR GO HOME mark is a play on the "commonly used expression among athletes GO BIG OR GO HOME."¹⁵ The purpose of the mark is to motivate people to give it their all when they are reminded of two choices, *i.e.*, going pro or going home, they are likely to choose the one that ends up in victory (going "pro") instead of defeat (going "home").¹⁶ Applicant maintains that the "GO HOME" portion of its mark is significant because it represents the consequence of failure

¹⁴ Hale Decl. ¶ 2 (9 TTABVUE 68).

¹⁵ Applicant's ACR Brief at p. 9 (11 TTABVUE 10).

¹⁶ Applicant's ACR Brief at p. 9 (11 TTABVUE 10).

and thus, the additional term “OR GO HOME” in its mark creates a distinct commercial impression regarding the consequences of failure.¹⁷

In attempting to distinguish the meaning and commercial impression of its mark from Opposer’s mark, Applicant points to the additional dietary and nutritional supplements and online sports training and training advice services it provides in connection with its clothing items arguing that they create a distinct commercial impression “of professional athlete training programs and lifestyles on consumers.”¹⁸ However, in determining the commercial impressions or connotations created by the marks we must consider the marks in relation to the parties’ identified goods. *See Coach Services, Inc. v. Triumph Learning LLC*, 96 USPQ2d 1600 (TTAB 2010), *aff’d*, 668 F.3d 1356, 101 USPQ2d 1713 (Fed. Cir. 2012) (COACH for educational software does not dilute or create likelihood of confusion with COACH for handbags, luggage, etc.); *Embarcadero Technologies Inc. v. RStudio Inc.*, 105 USPQ2d 1825, 1835 (TTAB 2013).

Inasmuch as Applicant’s supplements and training services are not the subject of this proceeding, the marks have the same meaning and commercial impression when used on the identical and otherwise related clothing items recited in Opposer’s Registration and Applicant’s application. This is particularly so where the marks begin with the identical phrase GO PRO and the additional phrase OR GO HOME in Applicant’s mark does not impart a different meaning or commercial impression to Applicant’s mark.

¹⁷ Applicant’s ACR Brief at pp. 9-10 (11 TTABVUE 10-11).

¹⁸ Applicant’s ACR Brief at p. 9 (11 TTABVUE 10).

For the reasons set forth above, when considering the marks in their entirety, we find that the similarities outweigh any differences between the marks and that the marks are similar in sound, appearance, meaning and commercial impression.

C. Nature and Number of Similar Marks in Use on Similar Goods

The parties agree that there is only one other registered mark that incorporates the shared GO PRO term for goods in Class 25, namely, Registration No. 4219155 for the mark KEY WEST WHERE THE WEIRD GO PRO for various clothing items.¹⁹ Inasmuch as the GO PRO term is not a dominant part of the mark, this Registration is not relevant. Nor are the three trademark applications for marks containing the term GO PRO cited by Applicant as such applications evidence only that the applications were filed on a certain date, they are not evidence of use or that the marks, in fact, co-existed in the marketplace with Opposer's mark.²⁰ *Nike Inc. v. WNBA Enterprises LLC*, 85 USPQ2d 1187, 1193 n.8 (TTAB 2007); *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003); *In re Juleigh Jeans Sportswear, Inc.*, 24 USPQ2d 1694, 1699 (TTAB 1992).

In arguing the weakness of Opposer's mark, Applicant contends the USPTO has already determined that a number of marks containing the term "Go Pro," including

¹⁹ Opposer's ACR Brief at p. 7 (9 TTABVUE 8) and Hale Decl. ¶ 18, Ex. I (9 TTABVUE 71, 98); Applicant's ACR Brief at pp. 12-13 (11 TTABVUE 13-14). Although the listing of the Registration in the TESS summary search report submitted by Opposer as Ex. I to the Hale Decl. is not sufficient to make the Registration of record, Applicant expressly addressed this Registration in its Brief so we have treated it as of record. *See Lebanon Seaboard Corp. v. R&R Turf Supply Inc.*, 101 USPQ2d 1826, 1829 n.8 (TTAB 2012) (summary of search results from USPTO's electronic database is not an official record of the Office).

²⁰ Opposer's ACR Brief at p. 7 (9 TTABVUE 8) and Applicant's ACR Brief at pp. 12-13 (11 TTABVUE 13-14).

Applicant's mark, are not likely to cause confusion with Opposer's mark. In support of its position, Applicant points to the issued Registration and three applications.²¹ The fact that the trademark examining attorneys, in the *ex parte* examination of Applicant's and third parties' applications, did not cite Opposer's previously registered mark is irrelevant and is not a binding determination that there is no likelihood of confusion between Opposer's and Applicant's marks. In any event, the Board is not bound by the prior decisions of examining attorneys in allowing the Applicant's mark for registration. It has been noted many times that each case must be decided on its own facts. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court."); and *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987).

In addition to the foregoing, Applicant maintains that any likelihood of confusion between the parties' marks will be reduced by the fact that the shared term "GO PRO" is in common use by many others in the market. According to Applicant, the dilution of "GO PRO" in the marketplace makes it impossible for the term to distinguish the parties' goods and the addition of the words "OR GO HOME" in Applicant's mark alleviates any likelihood of confusion.²² In support of its position, Applicant submitted Internet search result summaries generated by the *Google* search engine based on searches for the terms "go pro" and "go pro clothing." The

²¹ Applicant's ACR Brief at. pp. 12-13 (9 TTABVUE 13-14).

²² Applicant's ACR Brief at p. 10 (9 TTABVUE 11).

“go pro” and “go pro clothing” search summaries yielded 22 and 27 pages of results respectively.

Generally, search result summaries generated by Internet search engines have limited probative value because they do not show the context in which the term or phrase is used on the listed web pages and may not include sufficient surrounding text to show the context within which the term or phrase is used. *See In re Bayer Aktiengesellschaft*, 488 F.3d 960, 967, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) (because the *Google* search report provides very little context of the use of ASPIRINA on the webpages linked to the search report, it is of little value in assessing the consumer public perception of the ASPIRINA mark); *In re Thomas Nelson, Inc.*, 97 USPQ2d 1712, 1715 (TTAB 2011); *In re Thomas*, 79 USPQ2d 1021, 1026 (TTAB 2006).

The search results in this case provide little context to discern how the term is actually used on the webpage that can be accessed through the search result links as such, they are insufficient to determine the nature of the use of a term or the relevance of the search results to registration considerations. Web-based information that includes greater context for the use of a term, such as a complete webpage that is accessible as a link within the search engine results, will have greater probative value in determining how a term will be perceived. *See In re King Koil*, 79 USPQ2d 1048, 1050 (TTAB 2006) (list of internet search results is “not given much weight” because “[t]hese web page excerpts do little to show the context within which a term is used on the web page that could be accessed by the link).

Even if, as Applicant contends, none of the listings in the search reports are for Opposer's products, the *Google* summary search reports provide little context as to the manner in which the term "Go Pro" is used on the webpages linked to the search report listings and is of little value in assessing the consumer public perception of the GO PRO mark. A large number of the entries appear to relate to dissimilar products and services, such as cameras, tax consulting, and plumbing and heating services.²³ Even if the referenced pages had been provided in full, they would fail to demonstrate the weakness of the GO PRO mark for clothing items and accordingly, are not probative. Furthermore, many of the entries in the "go pro clothing" report contain no mention of the term "go pro" and there is no indication that the entries link to pages evidencing use of marks comprising GO PRO.²⁴

Similarly, while Applicant argues that the term "go pro" has been made famous by a third party, Go Pro, Inc.,²⁵ nothing in evidence establishes that Go Pro, Inc. uses "Go Pro" as a trademark for identical or related goods or services, or even that the name "Go Pro" was used first by Go Pro, Inc. In view of the foregoing, this evidence does not affect Opposer's rights.

D. ACTUAL OR POTENTIAL CONFUSION

According to Applicant, there is no evidence of actual confusion. Applicant argues that both parties sell exclusively on websites. In over 3 years of ongoing concurrent use, according to Applicant, neither party is aware of a single instance of

²³ See for example, 11 TTABVUE 118, 124, 126.

²⁴ See for example, 11 TTABVUE 207, 209, 211, 213, 215.

²⁵ Applicant's ACR Brief at p. 13 (14 TTABVUE 14).

confusion.²⁶ Applicant contends these circumstances present a situation where the parties have coexisted in the marketplace “for many years,” and the absence of a single instance of actual confusion suggests strongly that confusion is unlikely citing *G.H. Mumm & Cie v. Desnoes & Geddes, Ltd.*, 16 USPQ2d 1635, 1638 (Fed. 1990) and McCarthy on Trademarks § 23.18.²⁷

On the other hand, Opposer contends that a newcomer does not gain the right to register a substantially identical mark simply because the number of persons exposed to the registrant’s mark may be small in relation to the newcomer’s volume of use. According to Opposer, Applicant, a company likely with greater resources than Opposer, has the ability to promote its confusingly similar mark in such a way that purchasers may come to associate Opposer’s mark with Applicant. Specifically, the ability of a second comer to overwhelm the use of the prior user has the potential for reverse confusion.²⁸

We first observe that three years is a relatively short period of time and simply because both parties offer goods on the Internet is not sufficient to establish that there has been a meaningful opportunity for confusion to occur. Moreover, the reported lack of an occurrence of actual confusion is not dispositive inasmuch as such evidence is notoriously difficult to come by, in particular here, given Opposer’s small sales presence. While evidence of actual confusion is “highly probative, if not conclusive” of the issue, its absence is not, unless it is accompanied by evidence

²⁶ Applicant’s ACR Rebuttal Brief at p. 6 (14 TTABVUE 7).

²⁷ Applicant’s ACR Rebuttal Brief at p. 6 (14 TTABVUE 7).

²⁸ Opposer’s Rebuttal Brief pp. 4-5 (12 TTABVUE 5-6).

demonstrating that in light of the parties' actual business activities, confusion, if likely, would have occurred. *General Mills v. Fage*, 100 USPQ2d at 1603 (quoting *Majestic*, 65 USPQ2d at 1205).

To the extent Applicant's argument goes to the premise that there would be *de minimis* confusion, we again disagree. The fact that the number of consumers who may use Opposer's services is small does not mean that confusion caused by Applicant's mark sought to be registered would therefore be *de minimis* since rights flowing from federal registration do not vary with the size of registrants. Applicant as the newcomer does not gain rights to register its very similar mark simply because the number of persons exposed to Opposer's registered mark may be small in relation to Applicant's volume of use. *In re Shell Oil Co.*, 992 F.2d 1204, 1207-08, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

IV. Conclusion

Applicant's mark includes Opposer's entire mark. Moreover, where the goods of an applicant and cited registrant are highly similar or closely related as they are in this case, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would be required with less similar goods. *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) and *Top Tobacco LP v. North Atlantic Operating Co.*, 101 USPQ2d 1163, 1173 (TTAB 2011). Additionally, based on the identical and highly related nature of the goods set forth in the application and Opposer's registration, and the identical or similar trade channels and classes of customers, the *du Pont* factors of the

similarity of the goods, trade channels and customers also favor a finding of likelihood of confusion. Even if we assume that GO PRO is a weak mark, “[l]ikelihood of confusion is to be avoided, as much between ‘weak’ marks as between ‘strong’ marks, or as between a ‘weak’ and ‘strong’ mark.” *King Candy v. Eunice King’s Kitchen*, 182 USPQ at 109.

Decision: In view of the foregoing, the opposition is sustained.