

This Opinion is Not a  
Precedent of the TTAB

Mailed: June 13, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*iFIT Inc.*  
*v.*  
*Erb Industries, Inc.*  
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Opposition No. 91264855

**On Remand**  
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Before Adlin, Heasley and Johnson, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

This case is on remand from the U.S. Court of Appeals for the Federal Circuit. It involves Applicant ERB Industries's application to register I-FIT FLEX, in standard characters (FLEX disclaimed), for "industrial protective eyewear; safety eyewear," in International Class 9.<sup>1</sup> Opposer iFIT, Inc. opposes registration on the ground of likelihood of confusion, based on its prior use and registration of IFIT and variations thereof for a variety of health and fitness products and services.

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<sup>1</sup> Application Serial No. 88692606, filed November 14, 2019 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on first use anywhere and in commerce since at least as early as December 31, 2017.

Following a trial on the merits, on June 27, 2023, we dismissed the opposition, finding that Opposer’s failure “to show that the parties’ goods and services are related, or that they travel in the same channels of trade to the same classes of consumers” is “dispositive.” 53 TTABVUE 29-30 (the “Original Decision”).<sup>2</sup>

Opposer appealed to the Federal Circuit, 54 TTABVUE, but Applicant failed to appear in the appeal. Thus, at the Court’s request, the Director of the United States Patent and Trademark Office (“Director”) intervened to defend the appeal. After Opposer filed its opening brief, the Director requested and was granted a remand for the Board to “address all of [Opposer’s] alleged deficiencies.” 55 TTABVUE 2.

We turn to those alleged deficiencies now, building on the Original Decision with this supplemental remand decision, which together comprise and explain our decision to dismiss the opposition.

### **I. Opposer’s Alleged Deficiencies**

As we consider Opposer’s specific grounds for appeal, we keep in mind that Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 2023 USPQ2d 737 at \*6 (Fed. Cir. 2023) (“It is well established that, in opposition proceedings, the burden of proof rests on the opposer.”) (citing *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018));

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<sup>2</sup> Citations to the Board record are to TTABVUE, the Board’s online docketing system. Specifically, the number preceding “TTABVUE” corresponds to the docket entry number(s), and any number(s) following “TTABVUE” refer to the page number(s) of the docket entry where the cited materials appear.

*Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000).

This includes the burden of proving that Opposer's goods or services are related to Applicant's goods.

Put quite simply, the burden of proving likelihood of confusion rests with opposer. Opposer has simply failed to prove any relationship between, on the one hand, [applicant's goods] and, on the other hand, any of opposer's pled goods ... such that the use of applicant's mark on the former goods and the use of opposer's mark ... on the latter goods is likely to result in confusion.

*Fossil Inc. v. Fossil Grp.*, 49 USPQ2d 1451, 1456 (TTAB 1998) (dismissing opposition as to applicant's goods not shown to be related to opposer's). *See also The North Face Apparel Corp. v. Sanyang Indus. Co., Ltd.*, 116 USPQ2d 1217, 1230 (TTAB 2015) ("Opposer has the burden to prove a likelihood of confusion" for each class of the opposed application); *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010) ("Opposer simply has not satisfied its burden of proof of showing that the goods identified in the application are sufficiently related to heart monitors as to create a [likelihood] of confusion."); *Parfums de Coeur, Ltd. v. Lazarus*, 83 USPQ2d 1012, 1019 (TTAB 2007) ("It is still opposer's burden to show that its goods are related to the applicant's services."); *Itel Corp. v. Ainslie*, 8 USPQ2d 1168, 1171 (TTAB 1988) ("since opposer has failed to prove that applicant's goods are related to opposer's services, the opposition is dismissed"); *Amcor, Inc. v. Amcor Indus., Inc.*, 210 USPQ 70, 78 (TTAB 1981) ("Nonetheless, where the goods are different, it is incumbent upon plaintiff to show that they are related in some viable

fashion and/or that they are marketed or promoted under circumstances and conditions that could bring them to the attention of the same purchaser or prospective purchaser in an environment that could cause such purchaser reasonably to assume, because of the identity of the marks, that they have a common origin or sponsor or affiliation.).

Moreover, as pointed out in the Original Decision, 53 TTABVUE 29-30, a single *DuPont* factor may be dispositive, and thus a failure to establish a relationship between the goods and services in question is a valid basis for finding no likelihood of confusion. *See e.g. Kellogg Co. v. Pack'em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (“We know of no reason why, in a particular case, a single *DuPont* factor may not be dispositive.”). Of course, we must balance all of the *DuPont* factors together in reaching our conclusion about likelihood of confusion, and therefore we consider not just the alleged relationship between the goods and services, but also the other *DuPont* factors. We focus in this remand decision on the *DuPont* factors addressed in Opposer’s opening brief.

**A. Fame/Commercial Strength**

Our Original Decision discusses this factor at 53 TTABVUE 14-18, and we adopt those findings here. Opposer alleges, however, that the Original Decision did not provide a “reasonable basis” for “discounting” Opposer’s evidence of fame, specifically its “sales figures, market share figures, advertising figures, length of use, and unsolicited media attention.” Opposer’s Corrected Opening Brief (“Br.”), Dkt. No. 22, at 26. In fact, the Decision did not “discount” this evidence.

To the contrary, the Original Decision relied on this evidence to find that Opposer’s “pleaded marks have been fairly prominent in health and fitness media,” that Opposer’s revenue and advertising figures are “significant,” and that Opposer’s “market share for stationary bicycles ‘for the last decade,’ and exercise units in 2021” was “impressive.” 53 TTABVUE 17. Based on these findings crediting Opposer’s evidence of commercial strength, the Decision found Opposer’s IFIT mark to be “commercially strong.” *Id.* at 18.

Opposer’s complaint, therefore, is not really that the Decision “discounted” Opposer’s evidence of commercial strength, because the Decision expressly credited and relied upon that evidence in finding Opposer’s IFIT mark to be commercially strong. Opposer’s true complaint is that the Decision did not find that Opposer’s IFIT mark rises to the absolute highest level of commercial strength – “fame” – which lies at one end of the “spectrum” of commercial strength, that ranges “from very strong to very weak.” See *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734-35 (Fed. Cir. 2017); *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694-95 (Fed. Cir. 2005); *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003) (“strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak”).

Opposer, as the party attempting to prove that IFIT enjoys this highest level of commercial strength (fame), bears the burden of proving it. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012),

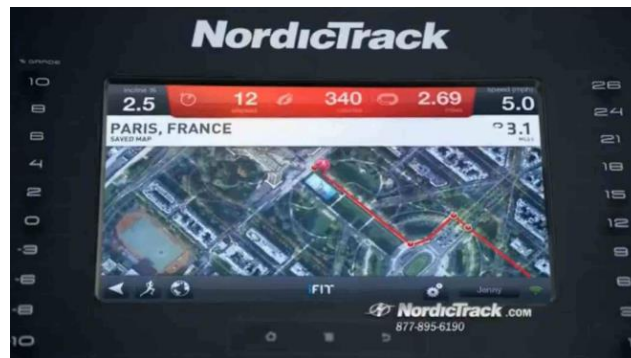
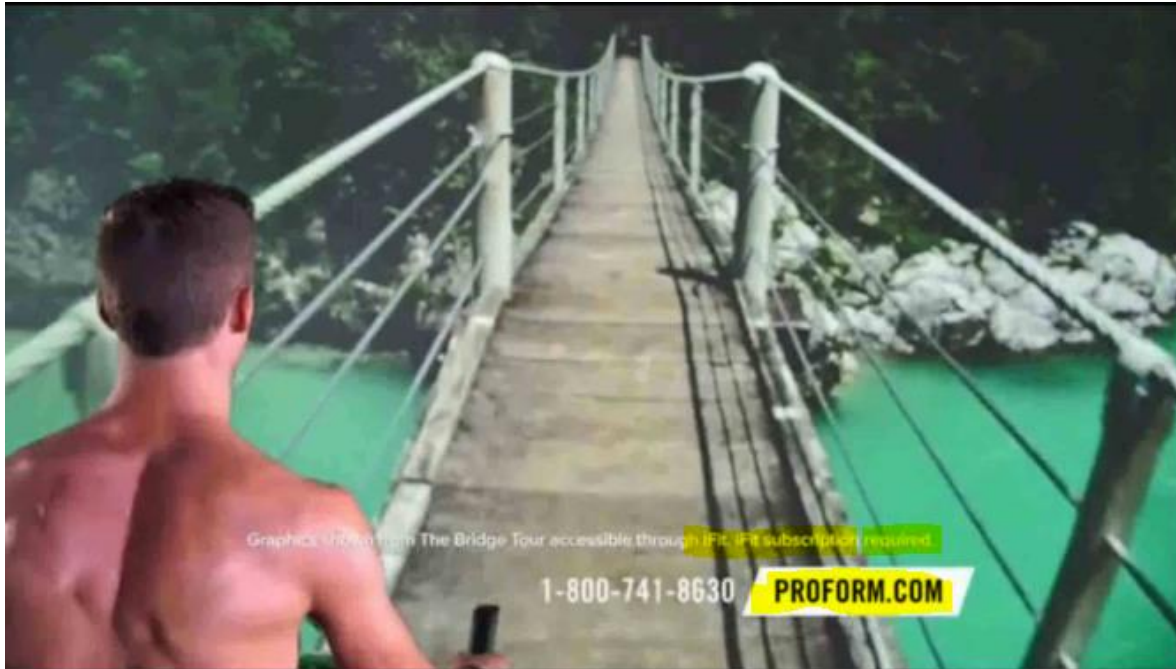
citing *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007) (“It is the duty of a party asserting that its mark is famous to clearly prove it.”). Here, as we found in the Original Decision, Opposer has failed to meet its burden of proving that IFIT has achieved “fame,” the highest possible level of commercial strength, because the record includes “evidentiary gaps.” 53 TTABVUE 18.

Specifically, Opposer provided testimony that “ICON’s<sup>3</sup> average annual revenue” for “each of the last twenty years” was a substantial figure designated “Confidential.” 32 TTABVUE 14 (Watterson Dec. ¶ 34). But, as found in the Original Decision, there are two related problems with this testimony. First, it is apparently not limited to revenue earned from United States use of IFIT.<sup>4</sup> Second, it assumes that all of Opposer’s revenue is attributable to the pleaded IFIT mark, even though Opposer admits that several of its product lines are sold under product marks such as NORDICTRACK, PROFORM and FREEMOTION, with IFIT serving as a less prominent house mark, as shown below:

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<sup>3</sup> Opposer was formerly known as ICON. 53 TTABVUE 4 (citing 33 TTABVUE 3, 8-10 (Wilson Dec. ¶ 3 and Ex. A)).

<sup>4</sup> Opposer does not argue on appeal that this “average annual revenue” was derived solely from United States use of its pleaded IFIT-formative marks, and, more to the point, Opposer does not cite to any evidence that it was. Br. at 27-34.



31 TTABVUE 3, 11, 72, 85 (Watterson Dec. ¶¶ 5, 23 and Ex. L) (“[Opposer’s] product lines offered in connection with IFIT include NORDICTRACK, PROFORM, and FREEMOTION.”). Similarly, while Opposer points out that its IFIT app has been downloaded by a large number of people, it does not indicate where those app users are located. Br. at 27. Revenue and downloads from other countries and revenue attributable in part to Opposer’s unpleaded marks is not sufficient to establish that IFIT is “famous.”

Federal Circuit decisions on trademark fame and strength focus on United States rather than foreign use. *See e.g. Coach Servs.*, 101 USPQ2d at 1719 (affirming Board's exclusion of evidence, pointing out that "the sales figure Ms. Sadler quoted during her testimony was for worldwide sales, not sales within the United States, and there was no indication as to whether the advertising figures quoted were limited to the United States"); *Palm Bay*, 73 USPQ2d at 1694-95 (focusing on the "U.S. population," and finding that the Board properly acknowledged "Palm Bay's argument that a mark must be famous among purchasers in the United States"); *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1306-07 (Fed. Cir. 2002) (focusing on "nationwide" advertising and "critical attention"). In fact, it is settled that foreign trademark uses are not relevant in United States trademark disputes unless they have some impact on the American consuming public. *See also New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at \*11 (TTAB 2020) ("Because Opposer failed to break down sales and expenditures for the United States alone, the probative value of this evidence to prove commercial strength or fame is diminished."); *Hard Rock Café Licensing Corp. v. Elsea*, 48 USPQ2d 1400, 1405 ("[O]nly the fame of opposer's mark among consumers in the United States is of relevance to us. The renown of opposer's marks outside the United States or exposure of the foreign public to opposer's marks is irrelevant."); *Olin Corp. v. Hydrotreat, Inc.*, 210 USPQ 63, 68 (TTAB 1981) (discounting sales evidence that "included domestic and international sales without any indication what the domestic sales were," and discounting advertising expenses with "no separation of domestic and foreign advertising").



Following this principle, the Original Decision found that “**crucially**, Opposer’s average annual revenue figure is apparently not limited to revenues derived from the United States, nor is the figure specifically tied to Opposer’s pleaded IFIT marks.” *Id.* at 17 (emphasis added).<sup>5</sup> Finding Opposer’s mark to be “only” commercially strong, rather than “famous,” on these grounds was appropriate.

In the same way that mixed evidence of foreign and domestic trademark use is of limited probative value in showing commercial strength in the United States, mixed evidence concerning multiple marks that are typically used together is unpersuasive when it is not clear how much “strength” is attributable to the mark in question.

The principal difficulty presented by these figures, which represent large numbers of dollars, is that the SMART ONES mark always appears in conjunction with the WEIGHT WATCHERS trademark. Logically, moneys spent to support the SMART ONES mark promote the WEIGHT WATCHERS mark at the same time, and sales of SMART ONES products are, by definition, sales of WEIGHT WATCHERS SMART ONES products. Consequently, we are unable to attribute either promotional expenditures or resulting sales to the SMART ONES mark as opposed to either the WEIGHT WATCHERS mark alone or to some combination of the two. It is well-settled that, where, as here, a party's advertising and sales data is based on materials and packaging in which the mark at issue is almost always displayed with another mark, such data does not prove that the mark at issue possesses the requisite degree of consumer recognition.

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<sup>5</sup> Opposer’s advertising expenses are also not limited to the United States. 31 TTABVUE 11 (Watterson Dec. ¶ 19). Nonetheless, Opposer has established significant use of IFIT-formative marks in United States advertising, which contributed to the finding that IFIT is commercially strong in the United States.

*ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1245 (TTAB 2015). See *In re Bongrain Int'l (Am.) Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990) (finding that secondary meaning evidence “may indicate acceptance of Bongrain’s other mark ‘Alouette’, which was used along with ‘BABY BRIE’ on the packages”); *In re Soccer Sport Supply Co.*, 507 F.2d 1400, 184 USPQ 345, 348 (CCPA 1975) (same).

Here, Opposer claims that “nearly all” of its marketing materials “have included the IFIT mark across all of [Opposer’s] equipment and accessory lines.” Br. at 33. However, as shown above, Opposer uses IFIT with product marks, such as NORDICTRACK, and Opposer’s marketing materials sometimes focus on the product marks and downplay (or do not even include) IFIT. The mixed, undifferentiated evidence contributes to our finding that IFIT is commercially strong, but falls short of supporting Opposer’s argument that IFIT is famous.

Moreover, as pointed out in the Original Decision, “while Opposer’s following on social media is consistent with some public recognition, the follower and subscriber numbers for its IFIT goods and services” compare unfavorably to “marks found to be ‘famous’” for likelihood of confusion purposes. 53 TTABVUE 17-18. Specifically, Opposer’s IFIT social media follower/subscriber numbers are: 3,584 Pinterest followers; 16,094 YouTube subscribers; 551,563 Google+ followers; 127,007 Facebook followers; and 97,200 Instagram followers. 31 TTABVUE 14, 111-120 (Watterson Dec. ¶ 31 and Ex. O). Cf. *Advance Mag. Publishers, Inc. v. Fashion Elecs., Inc.*, 2023 USPQ2d 753 at \*2 (TTAB 2023) (fame found based in part on 10 million Facebook

followers, 40 million Instagram followers and 15 million Twitter followers); *New Era Cap*, 2020 USPQ2d 10596, at \*4-5 (mark found to be “on the much higher end of the commercial strength spectrum” based in part on 3.5 million Facebook likes, 204,000 Twitter followers, 710,000 Instagram followers and 37,000 YouTube subscribers). *See also Spotify AB v. U.S. Software Inc.*, 2022 USPQ2d 37 (TTAB 2022) (fame for dilution purposes found based in part on 23.3 million Facebook “likes,” 5.3 million Instagram followers, 3.5 million Twitter followers and one million YouTube subscribers); *Chanel Inc. v. Makarczyk*, 110 USPQ2d 2013 (TTAB 2014) (finding fame for dilution purposes based in part on 9.5 million Facebook “fans,” 40 million views and over 100,000 subscribers on YouTube, 2 million Twitter followers and “over 900,000 ‘+1s’ and over 600,000 users’ ‘circles’” on Google+).

Finally, Opposer’s argument that it has “received significant unsolicited media attention from nationwide publications,” as opposed to just “health and fitness media,” Br. at 29, is overstated. While Opposer or its products are mentioned in articles in nationwide publications including THE WALL STREET JOURNAL, WIRECUTTER (which is published by the NEW YORK TIMES), FORBES and BUSINESS INSIDER, among others, in most of these articles: (1) Opposer’s products are discussed or reviewed in passing, or along with many other third-party products; (2) the primary focus is on Opposer’s product marks such as NORDICTRACK, rather than IFIT; or (3) the discussion of Opposer’s products is not in a general interest section of the publication, but rather in “review,” “fitness,” “tech” or other sections. Appx 1313-

1704; Appx 2098-2161. There is no evidence concerning how many United States consumers have been exposed to any of these articles.

In short, the Original Decision did not “discount,” but rather credited, Opposer’s evidence of commercial strength. However, because of gaps in that evidence, Opposer did not meet its burden of proving fame, the absolute highest level of commercial strength.

### **B. Similarity of the Marks**

The Original Decision found the parties’ marks to be “highly similar,” and thus weighed this factor in Opposer’s favor. 53 TTABVUE 18-20. However, as Opposer points out, Br. at 54-55, the Federal Circuit’s subsequent decision in *Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 2024 USPQ2d 293 (Fed. Cir. 2024) held that this sort of finding should weigh “heavily” in the confusion analysis. *Naterra*, 2024 USPQ2d at \*5.

Here, because we found the parties’ marks “highly similar,” we now clarify, pursuant to *Naterra*, that the similarities between IFIT and I-FIT FLEX weigh heavily in favor of finding a likelihood of confusion.

### **C. The Goods and Services and Their Channels of Trade and Classes of Consumers**

The Original Decision found not just that “[t]hese factors weigh heavily against a finding of likelihood of confusion,” but that they were “dispositive.” 53 TTABVUE 28, 29. These findings were appropriate given the limited and unpersuasive evidence Opposer made of record.

For the most part, Opposer's proffered evidence endeavoring to show a relationship between the parties' goods and services does not consist of testimony, or other evidence on which we may rely for the truth of the matters asserted. Rather, Opposer's argument that the goods and services are related is based in large part on what Opposer itself describes as "several blogs and online forums," postings from which it introduced through notice of reliance, but did not support with witness testimony. Br. at 40 (citing Appx1124-1171, Appx1178-1179, Appx1188-1194 and Appx1200-1218).

The problem with this evidence is that while material obtained from the Internet may be introduced through notice of reliance and relied upon for what it shows on its face, when Internet materials are submitted without accompanying testimony they remain hearsay, and are not admissible for the truth of the matters asserted therein. *See e.g. Piano Factory Grp., Inc. v. Schiedmayer Celesta GmbH*, 11 F.4th 1363, 2021 USPQ2d 913 at \*12 (Fed. Cir. 2021) (affirming Board decision that found material printed from the Internet, but not supported by witness testimony, was "hearsay" and "not admissible for the truth of the matters asserted therein"); *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1038 (TTAB 2018) (website evidence introduced through notice of reliance "constitutes hearsay and may not be relied upon for the truth of the matters asserted therein") (citing Fed. R. Evid. 801(c), *Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031, 1040 (TTAB 2010) and TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 704.08(b)).

Moreover, the vast majority of Opposer’s evidence on these factors is atypical at best. Even if it was admissible for the truth of the matters asserted, it would merely establish that “cyclists discuss purchasing safety glasses, even from hardware stores, to use during cycling.” Br. at 40. Based on these online discussions, Opposer argues that “once cyclists purchase safety eyewear, they use it during fitness training services (e.g., during outdoor cycling training).” *Id.*<sup>6</sup> This is a far cry from showing that sources of fitness training services or exercise equipment such as stationary bikes also offer safety glasses under the same mark. *Cf. In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (crediting relatedness evidence showing that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard Co. v. Packard Press Inc.*, 227 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”). There is simply no persuasive evidence in the record that sources of fitness training services or exercise equipment also offer safety glasses, much less that consumers would perceive safety glasses, which they purchased

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<sup>6</sup> In fact, there is no evidence that cyclists use safety eyewear during “fitness training services.” Rather, as discussed below, Opposer’s evidence shows only that its own IFIT fitness trainers, as opposed to consumers, wear dark glasses, which have not been shown to be “safety glasses,” or anything other than cycling glasses.

separately from exercise equipment or fitness training services, as emanating from the same source.<sup>7</sup>

Opposer's argument that the parties' goods and services are related is essentially: (1) some consumers of exercise products and services and providers of fitness training services may use safety or cycling glasses; and (2) there is evidence that perhaps a couple dozen bicyclists have posted on the Internet that they have used safety glasses for cycling. According to Opposer, this makes the parties' goods and services "complementary." Br. at 38. We disagree.<sup>8</sup>

Significantly, while there is some evidence that IFIT fitness **trainers** wear cycling or safety glasses, the record contains no evidence upon which we may rely for the truth of the matters asserted that any **consumers** of exercise products or fitness training services wear safety glasses, or that they consume Opposer's products or services outdoors. "Attorney argument is no substitute for evidence." *Cai v. Diamond*

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<sup>7</sup> While Opposer introduced three websites offering safety glasses and sports eyewear, 53 TTABVUE 22-23, these Internet materials are unaccompanied by testimony and thus we do not rely on them for the truth of the matters asserted. In any event, even if these website pages were not hearsay, they do not show that sources of exercise machines or fitness training services also offer safety glasses.

<sup>8</sup> Opposer points to no authority holding that good or service "A" (in this case exercise products and fitness training services), may be found related to good or service "B" (in this case safety glasses), merely because some consumers of "A" may substitute good or service "B" (safety glasses) for allegedly related good or service "C" (in this case cycling glasses). By Opposer's logic: (1) screws are related to butter knives because butter knives can perform the same function as flathead screwdrivers; (2) t-shirts are related to hair clips because hair clips can be used as clothespins; and (3) drum lessons are related to wooden spoons because wooden spoons can substitute for drumsticks. Opposer's argument does absolutely nothing to answer the essential question, however, which is whether the goods and services are marketed in a manner that "could give rise to the mistaken belief that they emanate from the same source." *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven, Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

*Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005)); see also *In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006 (TTAB 2014) (finding that there was no proof to support counsel’s statements). Even the Internet postings Opposer relies upon do not mention exercise products or fitness training services.

Moreover, Opposer’s claim that it markets its goods and services to “cyclists,” Brief at 39 n.1, is unsupported. It is based on Opposer’s streaming of a “Tour de France workout series” that allows consumers to “**virtually ride** all 21 stages of the 2020 Tour de France course **on their iFIT-enabled exercise bikes.**” Appx1986 ¶ 16 (emphasis added). But there is no evidence that “virtual” riders on “exercise bikes” wear or purchase safety or cycling glasses, or that they use the types of goods and services Opposer offers outdoors.

According to Opposer, a “collection of evidence shows that once cyclists purchase safety eyewear, they use it during fitness training services (e.g. during outdoor cycling training). This is established with multiple images of **iFIT’s fitness instructors wearing safety eyewear** while providing fitness instruction related to cycling.” Brief at 40-43 (emphasis added).<sup>9</sup> This is misleading. There is no evidence in the record that consumers of exercise products or fitness training services, as opposed to Opposer’s fitness instructors, purchase safety eyewear, much less use it during “fitness training services” or while using exercise equipment such as

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<sup>9</sup> Opposer’s cite to these images, “*Id.*, ¶13” (Br. at 43), is incorrect. It appears that Opposer intended to cite Appx 1982-1985 and 2015-2028.



stationary bicycles.<sup>10</sup> None of the Internet comments about using safety glasses for cycling mention exercise machines, or fitness training services.

Thus, Opposer's reliance on what it calls this "best evidence that the parties' goods and services are related," Br. at 44, is misplaced. As Opposer admits, this evidence depicts only its "fitness instructors" riding outside, *id.*, not its customers or potential customers. There is no evidence of record that any of those customers or potential customers wear cycling or safety glasses when using stationary bikes or other exercise machines, or when participating in fitness training services.

While it is reasonable to assume that some consumers of stationary bikes or fitness training services will at times ride bicycles outdoors, and use cycling or safety glasses while doing so, that is not enough to find a relationship between Opposer's identified goods and services and Applicant's safety glasses. *Coach Servs.* 101 USPQ2d at 1723; *Sports Authority Michigan Inc. v. PC Authority Inc.*, 63 USPQ2d 1782, 1794 (TTAB 2002) ("We think it a fit subject for judicial notice that purchasers of computer hardware and software also would be purchasers of, at least, footwear and apparel, and perhaps sporting goods and equipment. There is nothing in the record, however, to suggest that merely because the same consumer may purchase

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<sup>10</sup> In fact, it is clear from the images Opposer relies upon that the consumers are indoors, while the trainers leading those indoor riders are outdoors. For example, text accompanying several of these images encourages users to "Add to your iFIT library and get pedaling." Appx2015, 2018, 2024. In other words, consumers are not outdoors where the trainers are, but are instead adding the IFIT content to, and later accessing it from, their digital "libraries." These consumers pedal on stationary bikes while watching video of and listening to trainers who already prepared the IFIT content somewhere else, apparently while riding outdoors in a different location.

these items, such consumer would consider the goods as likely to emanate from the same source or have the same sponsorship.”).

Because Opposer’s exercise machines and fitness training services and Applicant’s safety glasses have not been shown to be used together by relevant consumers, and, as discussed below, are not generally sold in the same channels of trade by the same retail outlets, they are not “complementary.” See *Edwards Lifesciences*, 94 USPQ2d at 1411 (finding that heart monitors and a computer monitoring system that anticipates and detects adverse drug events and alerts healthcare providers are not complementary or related); *The H.D. Lee Co., Inc. v. Maidenform, Inc.*, 87 USPQ2d 1715, 1725 (TTAB 2008) (finding that that while undergarments and outerwear are clothing, they are sold in different sections of department stores, are not complementary goods, and are not related); *In re British Bulldog, Ltd.*, 224 USPQ 854, 856 (TTAB 1984) (finding men’s underwear and shoes unrelated and not complementary).

Moreover, even if Opposer had introduced evidence that safety glasses and fitness training services or exercise machines are used together, which Opposer has not, “the mere fact that goods and services are ‘used together’ does not, on its own, show relatedness.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (in comparing goods to services, finding a hospital-based residential program to evaluate and improve weight and health unrelated to printed materials on physical activity and physical fitness); *Shen Mfg. Co. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 73


USPQ2d 1350, 1355 (Fed. Cir. 2004) (“That two goods are used together, however, does not, in itself, justify a finding of relatedness.”).

As the Federal Circuit held in *Shen*, “although a student of RHL’s cooking classes would undoubtedly use kitchen textiles, it does not necessarily follow that the consuming public would understand those products to have originated from the same source.” *Shen*, 73 USPQ2d at 1356. This holding was based on cooking classes not being “the same type of product as kitchen textiles,” and there being “no indication that the consuming public would perceive them as originating from the same source.” *Id.* (reversing finding of likelihood of confusion even though “the marks are identical”).

Similarly, in *Shen* the Federal Circuit reversed the Board’s finding “that gloves are related to barbeque mitts.” *Id.* at 1357. It found that “[t]he mere fact that ‘mitt’ is defined as a type of glove has no relevance to whether a consumer would believe that the two products emanate from the same source,” pointing out that a barbeque mitt “is designed to protect the hand from heat while cooking,” while a glove keeps hands warm. *Id.* (analogizing the differences between these goods to the differences between “hard hats used by construction workers and fedoras”). This case is analogous to *Shen* in that safety glasses are not the same type of product as either exercise equipment or fitness training, and there is no indication that consumers would perceive them as originating from the same source. Significantly, because *Shen* reversed the Board’s findings of a relationship between cooking classes and kitchen textiles, and gloves and barbeque mitts, it also reversed “the ultimate conclusion as to the likelihood of

confusion.” *Id.* at 1356-57. *See also The North Face*, 116 USPQ2d at 1232 (“[W]e cannot say that merely because Opposer has shown one example of a so-called moto jacket it has shown that its goods and motorcycles or scooters are complementary. Nor does the fact that Opposer's goods could be used while riding a motorcycle or scooter because they offer a range of movement or can withstand the elements make these goods complementary. Merely because goods can be used together is not a sufficient basis on which to find them to be complementary.”).

Turning to Opposer’s third-party registration evidence, as we pointed out in the Original Decision, use-based third-party registrations “may serve to suggest” that the goods or services identified therein “are of a type which may emanate from a single source.” 53 TTABVUE 25 (citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1998)). Here, however, the third-party registrations Opposer relies upon, Br. at 44-46, do not meaningfully move the needle on the question of whether the parties’ goods and services are related.

The first two registrations (UNDER ARMOUR, Reg. No. 5137860, and , Reg. No. 5193655), Appx1224-1226, no longer identify “electronic devices, namely, data sensors, transmitters and receivers for relaying physical exercise data.” In fact, the owner of these registrations deleted the identified electronic devices from these registrations when it filed its July 28, 2023 declarations of continued use under

Section 8 of the Trademark Act.<sup>11</sup> The registrations therefore do not suggest a relationship between protective eyewear and electronic devices, much less protective eyewear and exercise machines or fitness training services.<sup>12</sup> Similarly, the sixth registration (ENDORPHINS MAKE YOU HAPPY, Reg. No. 6070156), Appx1238, no longer identifies “exercise machines,” as the owner of this registration deleted all of the Class 28 goods, including “exercise machines,” from the registration when it filed its May 23, 2023 declaration of continued use under Section 8. This registration therefore does not suggest a relationship between protective eyewear and exercise machines.

The third registration (**Airwheel**, Reg. No. 5429233), Appx1227, covers not just “protective eyewear” and “exercise treadmills,” but a wide variety of other, disparate goods, including “fire alarms,” “headphones,” “smart watches,” “artificial limbs,” “condoms,” “enema apparatus for medical purposes,” “love dolls,” “medical endoscopes,” “suitcases,” “fishing rods” and “toy airplanes.” Similarly, the sixth registration (ENDORPHINS MAKE YOU HAPPY, Reg. No. 6070156), Appx1238, is for retail store services featuring a wide variety of disparate goods, including

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<sup>11</sup> “[W]hen it is apparent that the status of a registration may have changed under 8, 15, or 9 of the Trademark Act between the time when a status and title copy of a registration, complete and correct when filed, was made of record and the date when the case is decided, the Board will ascertain from Office records and will rely upon the status of the registration when the case is decided.” *Duffy-Mott Co., Inc. v. Borden, Inc.*, 201 USPQ 846, 847 n.5 (TTAB 1978).

<sup>12</sup> Even if the deletions were not considered, these registrations are commonly-owned so would at most suggest that a single source offers Applicant’s goods and “electronic devices , namely, data sensors, transmitters and receivers for relaying physical exercise data” under the same mark.

“clothing,” “household items,” “personal care products” and “bags.”<sup>13</sup> By Opposer’s logic, these registrations establish that safety eyewear is related not just to exercise treadmills, but to “artificial limbs,” “enema apparatus” and “household items.” As we stated under analogous circumstances:

The PANASONIC registration illustrates another limitation in the probative value of a number of the third-party registrations at issue here. In addition to goods concerned with lighting, the registration also identifies automatic bread-making machines, rice cookers, various types of cooking ovens, ventilation systems and air conditioners. The diversity of the goods identified in this registration diminishes the probative value in establishing that any two items identified in the registration are related. *See In re Davey Products Pty Ltd*, 92 USPQ2d 1198, 1203 (TTAB 2009) ... In sum, we find that the third-party registrations are not probative of whether personal headlamps and electric lighting fixtures are related.

*In re Princeton Tectonics Inc.*, 95 USPQ2d 1509, 1511 (TTAB 2010). *See also In re Mucky Duck*, 6 USPQ2d at 1470 n.6 (discounting third-party registrations “issued to Saks & Company and to Knott’s Berry Farm, owners of a large department store and an amusement or theme center, respectively, where a wide variety of goods and services are sold”).

The fourth registration (ATHLETES INSIGHT, Reg. No. 5600176), Appx1231, covers “personal fitness training services” on the one hand, and “sports eyewear” on the other. It therefore does not suggest a relationship between fitness training

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<sup>13</sup> The HISEA registration, which no longer covers “exercise machines” or any other Class 28 goods, still covers a large number of disparate goods, including “diving suits,” “luminous safety beacons,” “luggage,” “umbrellas” and “unfitted vanity cases.”

services and the goods identified in Applicant's involved application: "industrial protective eyewear; safety eyewear."

In any event, even if Opposer's third-party registration evidence was of higher quality, the quantity remains lacking. In fact, we have found a similar number of third-party registrations insufficient to establish a relationship between goods or services in a number of cases. *See e.g. In re Princeton Tectonics*, 95 USPQ2d at 1510-11 (finding six third-party registrations insufficient to show that personal headlamps are related to lighting fixtures); *The H.D. Lee Co., Inc. v. Maidenform, Inc.*, 87 USPQ2d at 1724-25 (finding women's undergarments unrelated to clothing such as coats, shirts, skirts and pants, despite eight third-party registrations covering both types of goods, finding the goods to not be complementary). While Opposer cites to cases in which a similar number of third-party registrations was found probative, Br. at 49-50, the third-party registrations in those cases did not suffer from the evidentiary deficiencies discussed above. Perhaps even more importantly, there was additional evidence of a relationship between the goods and services in those cases, and in some of them other *DuPont* factors weighed more heavily in favor of finding a likelihood of confusion than they do here. *Cf. Motion Picture Ass'n of Am. Inc. v. Respect Sportswear Inc.*, 83 USPQ2d 1555, 151-63 (TTAB 2007) (plaintiff's mark was "famous" rather than commercially strong, and testimony and other evidence showed third-party use, not just registration, of the same marks for the goods and services at issue); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1109-10 (TTAB

2007) (identical rather than highly similar marks, and goods were found to be complementary).<sup>14</sup>

As we found in the Original Decision, Opposer has not introduced evidence sufficient to establish that consumers would be likely to believe that industrial protective eyewear or safety eyewear emanates from the same source as exercise machines or fitness training services. *Coach Servs.*, 101 USPQ2d at 1722. Indeed, there is no evidence that any sources of exercise machines or providers of fitness training services also offer safety or protective glasses, much less under the same mark.<sup>15</sup>

As the Original Decision also pointed out, the mere fact that the parties' goods and services may be sold by mass merchandisers such as Amazon and Walmart does not establish that the goods and services travel through the same channels of trade. 53 TTABVUE 27-28. Opposer now appears to concede the point, as it does not argue on appeal that the channels of trade for its products or services overlap with those for

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<sup>14</sup> While the other cases Opposer relies upon were not precedential, they are also distinguishable from this case. *In re Compute N. LLC*, 2022 WL 17370220 at \*5-6 (TTAB 2022) (evidence of third-party use, not just registration, of the same marks for the services at issue); *In re Iron Balls Int'l*, 2019 WL 646091 at \*4-5 (TTAB 2019) (evidence of third-party use, not just registration, of the same marks for the goods at issue); *In re Annovium Prod., LLC*, 2014 WL 343261 at \*9-11 (TTAB 2014) (parties both offered exercise equipment sold in "the same marketing milieu" and there was evidence of third-party use of the same marks for the goods at issue, not just third-party registration).

<sup>15</sup> The few third-party registrations that cover exercise machines or fitness training services and safety or protective glasses are "not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them." *In re Mucky Duck*, 6 USPQ2d at 1470 n.6.



Applicant's goods, choosing to focus instead on its claim that Applicant and Opposer have overlapping customers. Br. at 50-53.

However, as with Opposer's assertion that the goods and services are related, there is no evidence supporting Opposer's claim that the parties have overlapping customers. Opposer merely assumes, without evidence, that "cyclists" are customers for Applicant's goods and Opposer's goods and services. *Id.* But, even if hearsay evidence implies that some cyclists may use safety glasses while cycling, there is no evidence, much less evidence that we may rely on for the truth of the matter asserted, that any particular cyclist has ever purchased both safety glasses and either exercise machines or fitness training services. Furthermore, the classes of consumers for Applicant's goods are consumers seeking eye protection, and the classes of consumers for Opposer's goods and services are consumers seeking to improve their physical fitness. There is likely some incidental overlap between these consumers and "cyclists," but Opposer has not shown a meaningful overlap or that "cyclists" are more likely to purchase the parties' goods and services than, for example, hikers, who would not typically require protective or safety glasses. *See Sports Authority*, 63 USPQ2d at 1794.

As Opposer points out, the Original Decision assumed that some cyclists may work out on indoor stationary bikes during inclement weather, 53 TTABVUE 28, but this is not a basis for finding that any such cyclists would purchase safety glasses, much less be confused that any safety glasses they encounter emanate from the same source as their stationary bikes or fitness trainers. Attorney argument is no substitute for

evidence. *Cai.*, 127 USPQ2d at 1799 (quoting *Enzo Biochem*, 424 F.3d at 1284). The Federal Circuit held confusion unlikely in analogous circumstances:

Although there could be some overlap in the classes of purchasers for the parties' products, we agree it is unlikely that, in the circumstances in which the products are sold, customers would associate CSI's COACH brand products with educational materials used to prepare students for standardized tests. And, there is nothing in the record to suggest that a purchaser of test preparation materials who also purchases a luxury handbag would consider the goods to emanate from the same source. *See Sports Auth, Mich.*, 63 USPQ2d at 1794 ("There is nothing in the record, however, to suggest that merely because the same consumer may purchase these items, such consumer would consider the goods as likely to emanate from the same source or have the same sponsorship.").

*Coach Servs.*, 101 USPQ2d at 1723.

Similarly, we dismissed an opposition to registration of the mark LITTLE PLUMBER for liquid drain opener filed by the owner of the same mark for advertising services in the plumbing field. As we stated in that case:

We see no reason why plumbing contractors would believe that an advertising agency sells or sponsors a liquid drain opener, or that a liquid drain opener manufacturer would provide advertising services. Thus, even though opposer's services and applicant's product are or can be marketed to the same class of customers, namely plumbing contractors, these services and goods are so different that confusion is not likely even if they are marketed under the same mark.

*Local Trademarks Inc. v. The Handy Boys Inc.*, 16 USPQ2d 1156, 1158 (TTAB 1990).

These factors weigh heavily against finding a likelihood of confusion. And in this case, they are dispositive. Moreover, even if Opposer's pleaded IFIT mark was famous, and Opposer has not shown it to be, our findings under the factors of the

relatedness of the goods and services, and channels of trade and classes of consumers would outweigh fame/strength and the other *DuPont* factors.

On appeal, CSI argues that the Board should have given more weight to its determination that its COACH mark was famous. As the Board correctly found, however, fame, while important, is insufficient standing alone to establish likelihood of confusion. On the record before us, and after weighing the relevant *DuPont* factors *de novo*, we agree with the Board that customer confusion is not likely between the parties' respective COACH marks. Although CSI's COACH mark is famous for likelihood of confusion purposes, the unrelated nature of the parties' goods and their different channels of trade weigh heavily against CSI. Absent overlap as to either factor, it is difficult to establish likelihood of confusion. Because the *DuPont* factors favoring Triumph outweigh the factors favoring CSI, the Board was correct in finding no likelihood of confusion.

*Coach Servs.*, 101 USPQ2d at 1723.

## II. Conclusion

In particular cases, the dissimilarity of the goods and services and their channels of trade and classes of consumers may be dispositive. *See e.g. M2 Software, Inc. v. M2 Commc'ns., Inc.*, 450 F.3d 1478, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (“The board placed the greatest weight on its findings that the goods in question were not related and that the channels of trade and purchasers are different. Because of the dominant role these factors play in this case, we find no error in the weight the board accorded them.”); *Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 15560 (Fed. Cir. 2001) (“While it must consider each [*DuPont*] factor for which it has evidence, the Board may focus its analysis on dispositive factors, such as similarity of the marks and relatedness of the goods.”); *Kellogg Co.*, 21 USPQ2d at 1145 (“We

know of no reason why, in a particular case, a single *DuPont* factor may not be dispositive.”); *The North Face*, 116 USPQ2d at 1233 (TTAB 2015) (“The difference in the goods and services is dispositive on the issue of likelihood of confusion.”); *In re HerbalScience Group LLC*, 96 USPQ2d 1321, 1325 (TTAB 2010) (despite nearly identical marks, “there is no evidence of overlap between the channels of trade for and purchasers of applicant’s and registrant’s products ... the examining attorney has failed to prove that applicant’s mark, if used for its identified goods, is likely to cause confusion with the cited registration”); *Morgan Creek Prods. Inc. v. Foria Int’l Inc.*, 91 USPQ2d 1134, 1143 (TTAB 2009) (finding no likelihood of confusion despite nearly identical marks, stating “the dissimilarity of the goods due to their nature, the manners in which they are sold or distributed, and the circumstances under which consumers would encounter them, is a dispositive factor in this case”). That is the case here, despite: (1) the marks being highly similar, which weighs heavily against finding a likelihood of confusion; and (2) Opposer’s IFIT mark being commercially strong. In fact, even if Opposer’s IFIT mark was shown to be famous, Opposer’s failure to introduce reliable evidence that the parties’ goods and services are related, or that their channels of trade and classes of consumers overlap would be dispositive.

**Decision:** For the reasons stated in the Original Decision and this remand decision, the opposition is dismissed.