

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: January 24, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Gym Rats Only
—

Application Serial No. 90272589
Application Serial No. 90272606
—

Ashley D. Johnson of Dogwood Patent and Trademark Law,
for Gym Rats Only.

Niya Rafari-Pearson, Trademark Examining Attorney, Law Office 112,
Matthew J. Cuccias, Managing Attorney.

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Before Bergsman, Lynch, and Lebow,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Gym Rats Only (“Applicant”) seeks registration on the Principal Register of the marks GYM RATS ONLY (in standard characters, “gym” disclaimed) and GRO GYM RATS ONLY EST 2020 and design (“gym” and “Est 2020” disclaimed), reproduced below, for a myriad of goods and services including the following services on which we focus in International Class 41:¹

¹ Serial No. 90272589 for the mark GYM RATS ONLY (standard characters) and Serial No. 90272606 for the mark GRO GYM RATS ONLY EST 2020 and design were filed October 22, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

Serial No. 90272589

Serial No. 90272606

providing a web site featuring information on exercise and fitness; educational services, namely, providing on-line classes, seminars, workshops in the field of exercise, wellness, nutrition, weightlifting, fitness, health, human performance, mental performance; entertainment services, namely, providing video podcasts in the field of exercise, wellness, nutrition, weightlifting, fitness, health, human performance, mental performance; providing a web site featuring non-downloadable instructional videos in the field of exercise, wellness, nutrition, weightlifting, fitness, health, human performance, mental performance.



The description of the composite work and design mark reads as follows:

The mark consists of the letters "GRO," with the "O" configured as a weightlifting plate. Inside of the plate is the stylized wording "GYM RATS ONLY EST 2020".

The Examining Attorney refused to register Applicant's marks for the services in International Class 41 under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's marks so resemble the registered mark GYMRATTS (in standard characters) for the services listed below as to be likely to cause confusion:

Educational services, namely, providing online instruction in the field of fitness and nutrition; Entertainment services, namely, an ongoing series featuring general human interest, tours of fitness centers, fitness instruction, and nutritional education provided through cable television, satellite, mobile applications, and the internet; Providing entertainment information via a website; Providing a website featuring information on exercise and fitness; Providing a website featuring non-

downloadable videos in the field of fitness, nutrition, and general human interest, in International Class 41.²

Because the appeals involve common questions of fact and law, the Board granted the Examining Attorney's motion to consolidate the appeals.³ When we cite to the record and briefs, we refer to the record and briefs in Serial No. 90272589 unless otherwise indicated.

When we cite to the prosecution history record, we refer to the USPTO Trademark Status and Document Retrieval (TSDR) system in the downloadable .pdf format. When we cite to the briefs, we refer to TTABVUE, the Board's electronic docketing system.

I. Preliminary Issues

Before proceeding to the merits of the refusal, we address two preliminary issues.

A. The Examining Attorney's brief

In her introductory paragraph, the Examining Attorney states that "Registration was refused on the Principal Register on the grounds that the applicant's marks, in connection with Class 41 only, are likely to be confused with the mark based on U.S. Trademark Registration No. 5795559."⁴ The Examining Attorney identified the issue on appeal as follows:

ISSUE

The sole issue on appeal is whether Applicant's marks,

² Registration No. 5795559, registered July 2, 2019.

³ Examiner's motion to consolidate the appeals (9 TTABVUE); Board's order consolidating the appeals (10 TTABVUE).

⁴ 8 TTABVUE 2.

“GYM RATS ONLY” in standard characters (U.S. Trademark Application Serial No. 90272589) and “GRO GYM RATS ONLY EST2020” and design (U.S. Trademark Application Serial No. 90272606), so resembles the mark in U.S. Trademark Registration No. 5795559, when used in connection with relevant services in Class41, as to be likely to cause confusion, to cause mistake, or to deceive under Trademark Act Section 2(d).⁵

The Examining Attorney first identified the mark in the cited registration on page 6 of her brief and first identified the services in the cited registration on pages 12-13.⁶ We suggest the Examining Attorney identify the mark and relevant goods or services in the introductory paragraph.

B. Evidentiary matters

Applicant, for the first time in its brief and without any corroborating evidence, refers to how it is associated with the United States Powerlifting Association.⁷ Specifically, in arguing that both Applicant’s and Registrant’s consumers “are sophisticated and would be expected to be discerning, brand-conscious, and loyal,”⁸

Applicant makes the following assertion:

Applicant’s [sic] has become integrated in the United States Powerlifting Association (USPA) by sponsoring many of the competitions, establishing the brand within a community that focuses primarily on individual sport/progression versus team building. In comparison, the

⁵ 8 TTABVUE 4.

⁶ 8 TTABVUE 6 and 12-13.

⁷ Applicant’s Brief, p. 18 (6 TTABVUE 28).

⁸ *Id.*

consumers that use the GYMRATTS services are team sports (colleges and college teams as described above).⁹

The Examining Attorney objects to the “new information within [Applicant’s] appeal brief[s]” on the ground that the applications should be complete prior to filing the appeal. Trademark Rule 2.142(d) (“The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.”).

Here, Applicant did not submit any new evidence; rather, it made an uncorroborated statement regarding how its association with the USPA demonstrates the high degree of consumer its clients use when selecting their physical fitness services. Suffice it to say that assertions in briefs are not recognized as evidence. *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1339 (Fed. Cir. 2004) (“Statements of counsel . . . are not evidence.”). “Attorney argument is no substitute for evidence.” *Cai v. Diamond 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, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).

Because Applicant did not submit late-filed evidence with its brief, we overrule the Examining Attorney’s objection. However, in accordance with the preceding discussion, we give the uncorroborated statements of counsel the probative value to which they are entitled.

⁹ *Id.*

II. Likelihood of Confusion

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

We base our determination under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). “In discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET*

Commc'ns Inc., 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir. 2020) (citing *Dixie Rests.*, 41 USPQ2d at 1533).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). “Two key factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because the ‘fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.’” *In re Embiid*, 2021 USPQ2d 577, at *10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). *See also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004).

A. The similarity or dissimilarity and nature of the services

It is sufficient for a refusal based on likelihood of confusion that we find any item encompassed by the description of services in a particular class in the application and registration related. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, at

*3-4 (TTAB 2020); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff'd* 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).

As noted above, the cited mark is registered for the services listed below:

Educational services, namely, providing online instruction in the field of fitness and nutrition; Entertainment services, namely, an ongoing series featuring general human interest, tours of fitness centers, fitness instruction, and nutritional education provided through cable television, satellite, mobile applications, and the internet; Providing entertainment information via a website; Providing a website featuring information on exercise and fitness; Providing a website featuring non-downloadable videos in the field of fitness, nutrition, and general human interest, in International Class 41.

Also, as noted above, the services in International Class 41 that Applicant is seeking to register its mark for include, but are not limited to, the following:

Providing a web site featuring information on exercise and fitness; educational services, namely, providing on-line classes, seminars, workshops in the field of exercise, wellness, nutrition, weightlifting, fitness, health, human performance, mental performance; entertainment services, namely, providing video podcasts in the field of exercise, wellness, nutrition, weightlifting, fitness, health, human performance, mental performance; providing a web site featuring non-downloadable instructional videos in the field of exercise, wellness, nutrition, weightlifting, fitness, health, human performance, mental performance.

The services are in part legally identical. For example,

- Applicant's description of services and Registrant's description of services both include "providing a web site featuring information on exercise and fitness";
- Applicant's "educational services, namely, providing on-line classes, seminars, workshops in the field of exercise, wellness, nutrition, weightlifting, fitness, health, human performance, mental performance" are legally identical to Registrant's

“educational services, namely, providing online instruction in the field of fitness and nutrition”;

- Applicant’s “entertainment services, namely, providing video podcasts in the field of exercise, wellness, nutrition, weightlifting, fitness, health, human performance, mental performance” are in part legally identical to Registrant’s “entertainment services, namely, an ongoing series featuring general human interest, tours of fitness centers, fitness instruction, and nutritional education provided through cable television, satellite, mobile applications, and the internet” and

- Applicant’s “providing a web site featuring non-downloadable instructional videos in the field of exercise, wellness, nutrition, weightlifting, fitness, health, human performance, mental performance” is in part legally identical to Registrant’s “providing a website featuring non-downloadable videos in the field of fitness, nutrition, and general human interest.”

Applicant contends that the services are different.

Particularly, the GYMRATTS mark is limited to educational services related to fitness and nutrition, ongoing series featuring tours of fitness centers, providing a website, etc. In comparison, Applicant’s services in Class 041 are notably different and describe arranging of sports competitions, conducting seminars, conducting on-line programs, and the like.

Applicant further submits that the fitness industry is a broad field, and thus provides opportunities for many different types of goods or services that are unrelated, even if under the same umbrella of “sports” and/or “athletics.” ... When the relatedness of the goods and services is obscure, the examining attorney must show “something more” than

the mere facts that the goods and services may be used together.¹⁰

We disagree with Applicant's contention that the services are different because we must consider the services as they are described in the application and registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys, Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."); *Paula Payne Prods. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods").

There are no limitations or restrictions in Applicant's description of services or Registrant's description of services that narrow the respective services as Applicant contends. We do not read limitations or restrictions into the description of goods. *i.am.symbolic*, 123 USPQ2d at 1748; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations

¹⁰ Applicant's Brief, p.17 (6 TTABVUE 27).

into the registration”); *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *47 (TTAB 2020); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”).

Notwithstanding Applicant’s argument and evidence regarding the actual scope of its own and the cited Registrant’s commercial use of its mark, we may not limit, by resort to extrinsic evidence, the scope of services as identified in the cited registration or in the subject application. *E.g.*, *In re Dixie Rests.*, 41 USPQ2d at 1534; *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987) (quoting *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983)); *In re FCA US LLC*, 126 USPQ2d 1214, 1217 n.18 (TTAB 2018) (“[W]e may consider any such [trade channel] restrictions only if they are included in the identification of goods or services”).

As noted above, the description of services as set forth in the applications and registration are in part legally identical. The Examining Attorney is not required to show “something more” when the description of services are the same.

As noted at the beginning of this section, under this *DuPont* factor, the Examining Attorney need not prove, and we need not find, similarity as to each activity listed in the description of services. Given the partial overlap, this *DuPont* factor weighs heavily in favor of likelihood of confusion as to Applicant’s Class 41 services.

B. Established, likely-to-continue channels of trade

Because the services described in the application and the cited registration are in

part legally identical, we presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (identical goods are presumed to travel in same channels of trade to same class of purchasers) (cited in *Cai*, 127 USPQ2d at 1801) (“With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and ‘presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods....”); *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1745 (TTAB 2018), *aff’d mem.* (No. 18-2236) (Fed. Cir. September 13, 2019) (“Because the services described in the application and the cited registration are identical, we presume that the channels of trade and classes of purchasers are the same.”); *Primrose Retirement Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016) (“Given the identity of the services, at least in part, and the lack of restrictions on trade channels and classes of consumers in the recitations of services, we presume that these services travel through the same channels of trade . . .”).

C. The strength of the registered mark GYMRATTS (in standard characters)

The strength of Registrant’s mark affects the scope of protection to which it is entitled. Thus, we consider the inherent or conceptual strength of Registrant’s mark based on the nature of the mark itself and its commercial strength based on marketplace recognition of the marks. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both

by its conceptual strength (distinctiveness) and its marketplace strength.”); *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017); *Top Tobacco, L.P. v. N. Atlantic Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) (market strength is the extent to which the relevant public recognizes a mark as denoting a single source); 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80 (5th ed. September 2022 update) (“The first enquiry is for conceptual strength and focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another’s use.”).

Because neither Applicant, nor the Examining Attorney, submitted any evidence regarding the commercial strength of Registrant’s mark, our analysis is limited to the inherent strength of Registrant’s mark.¹¹

At a minimum, GYMRATTS has been registered on the Principal Register without a claim of acquired distinctiveness and, therefore, it is entitled to the benefits accorded registered mark under Section 7(b) of the Trademark Act, 15 U.S.C.

¹¹ Furthermore, the owner of the cited registration is not a party to this proceeding and thus cannot introduce evidence regarding its use of the mark protected thereby. *See In re Thomas*, 79 USPQ2d 1021, 1027, n. 11 (TTAB 2006) (“Because this is an *ex parte* proceeding, we would not expect the examining attorney to submit evidence of fame of the cited mark”). As a result, the commercial strength of Registrant’s mark simply is not at issue in this proceeding.

§ 1057(b) (registration is prima facie evidence of the validity of the registration and registrant's exclusive right to use the mark in commerce).

Applicant contends that because there are “numerous registered trademarks for use with products/services in Class 041 that incorporate the term RAT (and one for the single term RAT used with educational services),” “marks incorporating the term RAT have been frequently adopted by unrelated entities for products and services in Class 041” and, therefore, “customers have been educated to distinguish between these marks on the basis of minute distinctions.”¹² To support this contention, Applicant submitted copies of 34 third-party registrations for marks registered for services in Class 41.¹³

However, the third-party registrations Applicant submitted are of limited probative value because they do not cover the same services as in Registrant's registration. *See Omaha Steaks Int'l* 128 USPQ2d at 1694 (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *i.am.symbolic*, 123 USPQ2d at 1751 (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration); *TAO Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1058 (TTAB 2017)

¹² Applicant's Brief pp. 18-19 (6 TTABVUE 28-29).

¹³ March 16, 2022 Request for Reconsideration (TSDR 38-78). Applicant also submitted copies of three applications. *Id.* at TSDR 41, 56, and 68. Pending applications are evidence only that the applications were filed on a certain date; they are not evidence of use of the marks. *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1270 n.8 (TTAB 2009); *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1366 n.7 (TTAB 2007); *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1193 n.8 (TTAB 2007). Therefore, we do not consider the applications.

(third party registrations in unrelated fields “have no bearing on the strength of the term in the context relevant to this case.”).

In any event, none of the marks in the third-party registrations are as close to Registrant’s mark GYMRATTS as Applicant’s marks GYM RATS ONLY and GRO GYM RATS ONLY EST 2020 and design. Consequently, their existence does not weaken the inherent strength of Registrant’s mark GYMRATTS, which is entitled to the normal scope of protection accorded to an inherently distinctive mark.

D. Similarity or dissimilarity of the marks

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

In comparing the marks, we are mindful that where, as here, the services are identical in part, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the services. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874,

23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007).

“The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai*, 127 USPQ2d at 1801 (quoting *Coach Servs.*, 101 USPQ2d at 1721); *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012).

We keep in mind that “[s]imilarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)).

1. GYM RATS ONLY (in standard characters) vs. GYMRATTS (in standard characters)

Applicant’s mark is GYM RATS ONLY (in standard characters) and the registered mark is GYMRATTS (in standard characters). The marks are similar in sight and sound because they share the term “Gym Rats.”

Although the registered mark GYMRATTS is presented without a space between the prefix word “Gym” and the suffix word “Ratts,” consumers are likely to view and verbalize it as GYM RATS, based on normal English pronunciation. Thus, the presence or absence of a space between the two words is an inconsequential difference that even if noticed or remembered by consumers would not serve to distinguish these marks. *In re Iolo Technologies, LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010) (finding

ACTIVECARE and ACTIVE CARE confusingly similar); *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1025 (TTAB 2009) (finding that petitioner’s mark DESIGNED2SELL is phonetically identical to respondent’s mark DESIGNED TO SELL and the “marks are also highly similar visually” in part because “the spaces that respondent places between the words do not create a distinct commercial impression from petitioner’s presentation of his mark as one word.”); *Seaguard Corp. v. Seaward Int’l, Inc.*, 223 USPQ2d 48, 51 (TTAB 1984) (SEA GUARD and SEAGUARD are “essentially identical”); *In re Best Western Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (“there can be little doubt that the marks [BEEFMASTER for restaurant services and BEEF MASTER for frankfurters and bologna] are practically identical and indeed applicant has not argued otherwise.”); *Stock Pot, Inc. v. Stockpot Rest., Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff’d* 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) (“There is no question that the marks of the parties [STOCKPOT AND STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical.”).

When the marks are used in connection with the physical fitness and nutrition educational and entertainment services, GYM RATS ONLY and GYMRATTS mean and engender the same commercial impression (i.e., a person who spends a lot of time in the gym).

Applicant’s addition of the word “Only” fails to distinguish Applicant’s mark from Registrant’s mark because it highlights “Gym Rats” by adding a slight nuance of exclusivity (e.g., these services are only for gym rats). As the Court of Appeals for the

Federal Circuit has often said, the lead element in a mark (i.e., “Gym Rats”) has a position of prominence; it is likely to be noticed and remembered by consumers and so as to play a dominant role in the mark. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding “the identity of the marks’ two initial words is particularly significant because consumers typically notice those words first”); *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word).

There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Viterra*, 101 USPQ2d at 1908); *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant parses the marks into their constituent parts arguing that they are “significantly different in visual appearance and pronunciation.”¹⁴ However, “[e]xact identity is not necessary to generate confusion as to source of similarly-marked [services].” *Bridgestone Ams. Tire Operations LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064, (Fed. Cir. 2012). The public does not

¹⁴ Applicant’s Brief, pp. 11-12 (6 TTABVUE 21-22).

scrutinize marks. *See B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 6 USPQ 1719, 1721 (Fed. Cir. 1988) (“The purchasing public, we believe, does not indulge in such recognitional contortions but sees things as they are.”); *In re Johnson Prods. Co., Inc.*, 22 USPQ 539, 540 (TTAB 1983) (“It is undeniable that if the mark is carefully examined, the two overlapping ‘S’s can be discerned. What is more significant, however, is that this sort of studied analysis of the mark is unlikely to occur in the marketplace where these products are sold.”). Consumers do not focus on minutia such as the counting of the number of syllables in each mark, but rather form “general rather than specific impressions” of marks. *See In re John Scarne Games, Inc.*, 120 USPQ 315, 316 (TTAB 1959) (“Purchasers of game boards do not engage in trademark syllable counting[;] they are governed by general impressions made by appearance or sound, or both.”).

With respect to the commercial impressions engendered by the marks, Applicant argues that GYM RATS ONLY “creates the commercial impression of items and services that are used to allow a user to grow strength, grow muscle, grow in their fitness journey – i.e., the products are for serious athletes and fitness junkies only.”¹⁵ “In comparison, the GYMRATTS Registration creates the commercial impression of a series tailored to individuals that spend time in the gym, focused on new gyms, unique fitness locations, and different fitness events.”¹⁶ Applicant’s argument simply points out how the commercial impressions engendered by the marks are similar,

¹⁵ Applicant’s Brief, p. 13 (6 TTABVUE 23).

¹⁶ Applicant’s Brief, p. 14 (6 TTABVUE 24).

albeit not identical (i.e., Applicant's services are for serious athletes and fitness junkies and Registrant's services are for people who spend time in the gym).

We find that Applicant's mark GYM RATS ONLY is similar to the registered mark GYMRATTS in terms of its appearance, sound, meaning and commercial impression.

2. GRO GYM RATS ONLY EST 2020 and design vs. GYMRATTS

As noted above, Applicant is also seeking to register the mark reproduced below:



The marks are similar insofar as they share the term GYM RATS/GYMRATTS. While there are obvious differences between Applicant's mark and Registrant's mark, including but not limited to the prominent letters GRO, because GRO are the initials for "Gym Rats Only," the letters GRO reinforce the association with "Gym Rats Only." Thus, the relatively larger letters emphasize the wording that in part is shared with Registrant's mark.

There is no doubt that if the marks at issue were placed side-by-side, the differences between them, including those specifically enumerated by Applicant, would be readily discernible. However, in the normal environment of the marketplace where purchases are actually made, purchasers and prospective purchasers usually do not carefully examine marks in minute detail. An individual relies on the recollection of the various marks that he or she has previously seen in the marketplace. More frequently than not, the consumer's recollection comes from an

overall or general impression of the many and various marks that he or she has encountered in his or her daily living experiences, which is not obscured with minute details or specific characteristics of the marks. *See Johnson Prods., Inc.*, 220 USPQ at 540 (“It is undeniable that if the mark is carefully examined, the two overlapping ‘S’s can be discerned. What is more significant, however, is that this sort of studied analysis of the mark is unlikely to occur in the marketplace where these products are sold.”); *John Scarne Games*, 120 USPQ at 315-16 (TTAB 1959) (“Purchasers of game boards do not engage in trademark syllable counting — they are governed by general impressions made by appearance or sound, or both.”). For example, consumers familiar with the registered mark GYMRATTS for entertainment and educational services in the fields of fitness and nutrition are likely to assume, when they



encounter Applicant’s mark

in connection with the

same or closely related services, that Applicant’s mark is a variation of the registrant’s GYMRATTS trademark with the initials GRO and design elements for esthetic or marketing reasons. *See Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980) (applicant’s block letter “W” within a circular design is similar to opposer’s block “W” with a line extending from the top portion of the right leg of the “W”).

While Applicant’s multi-component mark contains additional wording and graphics, for the reasons discussed above, we find that due to the similarity of terms

GYM RATS ONLY and GYMRATTS, consumers are likely to believe that the Applicant's services are associated with Registrant.

Applicant argues that because the dominant part of its mark is the letters "GRO," Applicant's mark has a unique visual appearance.¹⁷ We agree that the letters are the most prominent part of Applicant's mark. However, as noted above, the dominance of the letters "GRO" does not distinguish Applicant's mark because the letters "GRO" are the initials for, and appear in close proximity to, "Gym Rats Only." Thus, the letters reinforce the association of "GRO" as the initials for "Gym Rats Only," which, as we have previously held, consumers will associate with Registrant's mark GYMRATTS.

We find that Applicant's mark GRO GYM RATS ONLY EST 2020 and design is similar to the registered mark GYMRATTS.

E. Conditions under which and customers to whom sales are made

Applicant contends that the relevant consumers will exercise a high degree of purchasing care because the services involved are educational services.

The customers of both Applicant's services and those of the cited Registration are receiving educational services in the nature of classes and the like related to exercise and wellness. As such, the target customers are sophisticated and would be expected to be discerning, brand-conscious, and loyal.¹⁸

There is no evidence regarding the process by which consumers make their purchasing decision regarding Applicant's and Registrant's services. Nor is there

¹⁷ Applicant's Brief, p. 12 (6 TTABVUE 22) (Serial No. 90272606).

¹⁸ Applicant's Brief, pp. 17-18 (6 TTABVUE 27-28).

anything inherent in the descriptions of services that indicate that consumers will exercise a higher degree of purchasing care. For example, Registrant’s services include “providing a website featuring information on exercise and fitness” and “providing a website featuring non-downloadable videos in the field of fitness, nutrition, and general human interest.” A person with merely a passing interest in fitness or nutrition could access Registrant’s website. Likewise, Applicant’s description of services include “providing a web site featuring information on exercise and fitness” and “providing a website featuring non-downloadable articles in the field of exercise, wellness, nutrition, weightlifting, fitness, health, human performance, mental performance.” A person with merely a passing interest in exercise, fitness, or nutrition could access Applicant’s website. *See Stone Lion Capital Partners*, 110 USPQ2d 1163-64 (recognizing Board precedent requiring consideration of the “least sophisticated consumer in the class”).

This *DuPont* factor regarding the conditions under which sales are made is neutral.

F. Conclusion

Because the marks are similar, the services are in part legally identical, and there is a presumption that the services are offered in the same channels of trade to the same classes of consumers, we find that Applicant’s marks GYM RATS ONLY and



for the applied-for services in International Class 41

are likely to cause confusion with the registered mark GYMRATTS for “educational

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services, namely, providing online instruction in the field of fitness and nutrition; Entertainment services, namely, an ongoing series featuring general human interest, tours of fitness centers, fitness instruction, and nutritional education provided through cable television, satellite, mobile applications, and the internet; Providing entertainment information via a website; Providing a website featuring information on exercise and fitness; Providing a website featuring non-downloadable videos in the field of fitness, nutrition, and general human interest.”

Decision: We affirm the refusals to register Applicant’s marks in International Class 41.

Applicant’s applications will proceed for publication processing for the remaining goods and services in International Classes 5, 18, 25, and 30.