

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

Mailed: May 20, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Abercrombie & Fitch Trading Co.*

*v.*

*FUB LLC*  
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Opposition No. 91208221  
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William H. Oldach III of Vorys Sater Seymour and Pease LLP,  
for Abercrombie & Fitch Trading Co.

FUB LLC, pro se.  
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Before Kuhlke, Greenbaum and Adlin,  
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

FUB LLC (“Applicant”) seeks registration on the Principal Register of the mark F&A (in standard characters) for “Baseball caps; Shorts, T-shirts” in International Class 25.<sup>1</sup>

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<sup>1</sup> Application Serial No. 85559449 was filed on March 3, 2012, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

Abercrombie & Fitch Trading Co. (“Opposer”) has opposed registration of Applicant’s mark on the ground that as used on Applicant’s goods, the mark so resembles Opposer’s previously used and registered A&F marks and variations thereof for, inter alia, assorted clothing and headwear, and retail stores including online retail stores featuring clothing, as to be likely to cause confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).<sup>2</sup> Opposer also opposes registration on the ground of dilution under Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c).

By its answer, Applicant admitted Opposer’s ownership of Opposer’s pleaded registrations,<sup>3</sup> and denied the remaining salient allegations.

## I. Record

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of involved application Serial No. 85559449.

Opposer attached to its notice of opposition printouts from the USPTO TSDR electronic database consisting of copies of its four pleaded registrations showing their current status and title.<sup>4</sup> In addition, Opposer submitted under Notice of Reliance copies of the registrations for Opposer’s pleaded registrations (and the registrations resulting from two of Opposer’s pleaded applications),<sup>5</sup> Applicant’s responses to

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<sup>2</sup> Reg. Nos. 2530664 for A&F, 3221986 for A&F 92, 3624670 for A&F NEW YORK, and 3739561 for .

<sup>3</sup> 4 TTABVUE 3, ¶¶ 3-4.

<sup>4</sup> Opposer also attached copies of nine pleaded applications for the A&F mark and variations thereof, including two which registered during the pendency of this proceeding.

<sup>5</sup> We note that copies of registrations are not sufficient to make them of record. Trademark Rule 2.122(d); TBMP § 704.03(b)(1)(A) (2015). Opposer already made its pleaded registrations of record by attaching printouts of those registrations from the USPTO’s TSDR database to

interrogatories and document requests, and Opposer's 2013 10-K SEC Filing. Opposer also submitted the testimony depositions, with attached exhibits, of Reid Wilson, Opposer's Vice President and Associate General Counsel, and Anthony Braun, Opposer's Finance Manager.

Applicant submitted a Notice of Reliance on third-party registrations, and a Supplemental Notice of Reliance on additional third-party registrations, a printout from [www.interbrand.com](http://www.interbrand.com) entitled "Brand Rankings," and two online articles that quote Opposer's former CEO concerning Opposer's target market. Applicant did not take testimony.

## II. Standing/Priority

Because Opposer's four pleaded registrations are of record, are valid and subsisting, and owned by Opposer, Opposer's standing to oppose registration of Applicant's mark is established. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Further, because Applicant did not counterclaim to cancel any of the registrations, Opposer's priority is not in issue as to the goods and services listed in the registrations. *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). As noted above, in its answer Applicant

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its notice of opposition. However, the registrations for the pleaded applications have not been made properly of record, and Opposer may not rely on them.

admitted Opposer's ownership of Opposer's pleaded registrations. Further, in its brief, Applicant does not contest Opposer's standing or priority.

We turn now to the issue of likelihood of confusion under Section 2(d).

### III. Likelihood of Confusion

Our likelihood of confusion determination under Section 2(d) is based on an analysis of 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 Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). Opposer must establish that there is a likelihood of confusion by a preponderance of the evidence. In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors, and the other relevant *du Pont* factors in the proceeding now before us, are discussed below.

We focus on Opposer's registration for the mark A&F (in typed form) for "clothing" including "t-shirts" and "short pants" in International Class 25<sup>6</sup> because we deem the mark and the goods to be the most similar to Applicant's mark F&A for its identified goods. If confusion is likely between Applicant's mark and the mark in this registration, that will be sufficient to sustain the opposition. However, if we do not

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<sup>6</sup> Registration No. 2530664 issued on January 15, 2002; renewed. Prior to November 2, 2003, "standard character" drawings were known as "typed" drawings. A typed mark is the legal equivalent of a standard character mark. TMEP § 807.03(i) (April 2016). The registration also covers "retail ... clothing store services" in International Class 35.

find a likelihood of confusion with that mark and its associated goods, then there would be no likelihood of confusion with the marks in the other pleaded registrations. *See In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. Comparison of the Goods/Channels of Trade/Conditions of Sale

We first consider the goods, channels of trade, and conditions of sale. We must make our determinations under these factors based on the goods as they are identified in the registration and application. *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 Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). In this case, the “t-shirts” and “short pants” identified in the registration are identical to the “t-shirts” and “shorts” identified in the application. We need not discuss the remaining goods identified in the application or registration because likelihood of confusion must be found if confusion is likely with respect to use of the mark on any item that comes within a particular class in the identification of goods in the application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1398 (TTAB 2007). Further, because the goods are identical, and as identified are not limited to any specific channels of trade, we must presume that the trade channels and classes of purchasers also are the same. *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (Board “was entitled to rely on this legal presumption in determining likelihood of confusion.”).

*See Stone Lion*, 110 USPQ2d at 1161-1162; *Hewlett-Packard*, 62 USPQ2d at 1005; *Octocom*, 16 USPQ2d at 1787.

Applicant admits that the “goods are similar,”<sup>7</sup> but argues that the trade channels and targeted consumers differ because Opposer’s “target market is exclusive,”<sup>8</sup> and Opposer sells Opposer’s goods exclusively through its own stores and website. Applicant relies on statements made by Opposer’s former CEO in a 2006 interview with Salon magazine concerning Opposer’s targeted consumers as support for these arguments.<sup>9</sup> However, because we must focus on the identification of goods set forth in the application and registration, neither of which includes trade channel limitations, such statements are not relevant to the question of whether Opposer’s and Applicant’s trade channels overlap. *See Stone Lion*, 110 USPQ2d at 1162; *Octocom*, 16 USPQ2d at 1787.

With regard to the “conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing,” *du Pont*, 177 USPQ at 567, Applicant argues that “[t]he consumers Abercrombie markets to are label conscious, and would exercise a great deal of care to purchase the right brand. Although young, these consumers are sophisticated when it comes to shopping for and purchasing clothes. They are not likely to believe goods labeled F&A originate from A&F or

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<sup>7</sup> 51 TTABVUE 12.

<sup>8</sup> 51 TTABVUE 13.

<sup>9</sup> The interview was reported in [www.salon.com](http://www.salon.com) (42 TTABVUE 17) and referenced in the [www.businessinsider.com](http://www.businessinsider.com) article. 42 TTABVUE 29.

Abercrombie.”<sup>10</sup> In addition to lacking evidentiary support, this argument fails because we are bound by the identification of goods in the application and registration, and because the identifications of goods are not restricted as to price, the goods at issue must include inexpensive as well as expensive T-shirts and shorts. There is nothing inherent in the identifications of “T-shirts” and “shorts” or “short pants” which would limit their price point or class of consumer. We therefore cannot assume that consumers who purchase these items would be particularly careful or sophisticated. In our analysis, we must consider all potential customers, including the less sophisticated. Moreover, inexpensive T-shirts and shorts would not be purchased with a great deal of care or require purchaser sophistication, which increases the likelihood of confusion. *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000) (“When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.”).

In view of the foregoing, we find that the goods, channels of trade and classes of purchasers, and conditions of sale favor a finding of likelihood of confusion.

B. Comparison of the Marks, and the Number and Nature of Similar Marks in Use on Similar Goods.

We turn to the *du Pont* factor of the similarities and dissimilarities between Opposer’s mark A&F and Applicant’s mark F&A. We analyze “the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Viterra*,

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<sup>10</sup> 51 TTABVUE 14.

101 USPQ2d at 1908 (quoting *du Pont*, 177 USPQ at 567). See also *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). In comparing the marks, we are mindful that where, as here, the goods are identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Viterra*, 101 USPQ2d at 1912 (citing *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992)). Further, “[t]he proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs.*, 101 USPQ2d at 1721 (quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Binion*, 93 USPQ2d 1531 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant argues that the differences in the marks in sound and appearance are sufficient to distinguish them. Applicant further contends that the marks create different commercial impressions because A&F is “the acronym for Abercrombie & Fitch, [and] a consumer’s mind goes to Abercrombie as the source,” while “F&A is an acronym for the Applicant’s registered trademark FRANK AND ALBERT.”<sup>11</sup>

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<sup>11</sup> 51 TTABVUE 10.



Even though the letters “A” and “F” are transposed in the respective marks, the marks look and sound similar because they are composed of the same letters, joined by an ampersand. When the primary difference between the marks is the transposition of the elements that comprise the marks, and where the transposition does not change the overall commercial impression, there may be a likelihood of confusion. *See Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) (“With respect to the marks [COZIRC and ZIRCO] of the parties, they are substantially similar, the differences being in a reversal of syllables which are essentially the same. Except for the reversal of syllables, the marks are similar in sound and appearance. It seems reasonable that if any connotation or meaning is to be ascribed to the marks and their syllabic components, it would be the same, namely ‘ZIR’ or ‘ZIRC’ designating zirconium and ‘CO’ designating cobalt.”). In this case, both marks convey the commercial impression of initials or abbreviations. Opposer’s witness Mr. Wilson testified that A&F is the abbreviation for Abercrombie & Fitch<sup>12</sup>, and Applicant contends in its brief that “F&A is an acronym for the Applicant’s registered trademark FRANK AND ALBERT[.]”<sup>13</sup> In other words, Applicant intends its mark to constitute initials or abbreviations. “Initials, by their very nature, are abbreviations, a shortened version designed to be comprehended at a glance. If the number of letters is the same, and there is a significant overlap in the letters used, that is generally sufficient to sustain a claim

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<sup>12</sup> 37 TTABVUE 15.

<sup>13</sup> 51 TTABVUE 10.

of similarity.” *Continental Connector Corp. v. Continental Specialties*, 492 F. Supp. 1088, 207 USPQ 60, 66 (D. Conn. 1979).

In addition, there is nothing in the record to indicate that the letters “A” and “F,” regardless of the order in which they appear in combination, have any meaning or significance as applied to the clothing at issue in this case. We therefore find Opposer’s mark A&F and Applicant’s mark F&A arbitrary for the goods identified in the application and registration. Arbitrary letter combinations generally have been found to be similar because it is difficult for consumers to distinguish between similar letter combinations. *Crystal Corp. v. Manhattan Chem. Mfg. Co.*, 75 F.2d 506, 23 USPQ 5, 6 (CCPA 1935) (“We think that it is well known that it is more difficult to remember a series of arbitrarily arranged letters than it is to remember figures, syllables, words, or phrases. The difficulty of remembering such lettered marks makes confusion between such marks, when similar, more likely.”). *See also Weiss Assoc. Inc. v. HRL Assoc. Inc.*, 902 F.2d 1540, 14 USPQ2d 1840, 1841 (Fed. Cir. 1990) (“Because it is hard to distinguish between these letters, the mark TMM is confusing with TMS.”); *Dere v. Institute for Scientific Info., Inc.*, 420 F.2d 1068, 164 USPQ 347, 348 (CCPA 1970) (“it is more difficult to remember a series of arbitrarily arranged letters than it is to remember figures, syllables, or phrases,” and “the difficulty of remembering such multiple-letter marks makes the likelihood of confusion between such mark, when similar, more probable.”); *Edison Bros. Stores v. Brutting E.B. Sports-Int’l*, 230 USPQ 530, 533 (TTAB 1986) (EB and EBS for shoes are likely to cause confusion because “confusion is more likely between arbitrarily arranged

letters than between other types of marks.”). For this reason, we find unpersuasive Applicant’s argument that consumers are more likely to remember the letter “F” than the letter “A” in Applicant’s mark because the letter “F” appears first.<sup>14</sup>

Further, to the extent that the record shows any derivational meaning of the letters in the parties’ respective marks, the derivations of letter marks and acronyms are of no particular significance. *See B.V.D. Licensing Corp. v. Body Action Design Inc.*, 846 F.2d 727, 6 USPQ2d 1719, 1723 (Fed. Cir. 1988) (J. Nies, dissenting) (citing *Aerojet-General Corp. v. Computer Learning & Sys. Corp.*, 170 USPQ 358, 362 (TTAB 1971) (fact that acronyms are derived from different words unimportant because average purchasers probably unaware of derivation). *See also* authorities collected in *Edison Bros.*, 230 USPQ at 533 (“It should be noted that the lettered marks in almost all of the cited decisions were, as in the case before us, derived from the trade or corporate names of the involved parties, but these facts had no negative influence upon the likelihood of confusion conclusions which were reached.”).

Applicant made of record three third-party registrations “for AF letter marks with same or similar goods.”<sup>15</sup> Applicant points to the three registrations as support for its argument that Applicant’s F&A mark can coexist with Opposer’s A&F mark without causing consumer confusion. However, as Opposer notes, two of the three registrations were cancelled in 2015, and therefore are not persuasive evidence that

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<sup>14</sup> 51 TTABVUE 9.

<sup>15</sup> 51 TTABVUE 10-11; 40 TTABVUE 24-26.

“AF letter marks” are in use or commercially weak for clothing.<sup>16</sup> The third registration is for a composite mark comprising a shield design with the letters AF in highly stylized form appearing in the middle. Although this registration includes the letters AF and identifies shirts and baseball caps, we agree with Opposer that this single registration for a mark different from the one cited herein “falls short of demonstrating a crowded field of marks.”<sup>17</sup> Moreover, absent evidence of actual use, a single third-party registration has little probative value, especially absent evidence that the mark is in use on a commercial scale or that the public has become familiar with it. *See Olde Tyme Foods Inc. v. Roundy’s Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992) (“As to strength of a mark, however, registration evidence may not be given any weight.”); *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (purchasing public unaware of registrations residing in the USPTO).<sup>18</sup> There is no other evidence of record of third-party “A” and “F” inclusive marks for clothing or retail clothing store services.

Applicant also made of record pairs and trios of two letter marks, not including the letters “A” and “F,” in 22 third-party registrations, some of which cover clothing

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<sup>16</sup> We also note that one of the cancelled registrations does not cover clothing or retail clothing stores, and therefore would not support Applicant’s argument in any event.

<sup>17</sup> 52 TTABVue 10.

<sup>18</sup> The Federal Circuit’s decisions in *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1135-36 (Fed. Cir. 2015) and *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) do not compel a different result. Those decisions emphasized that a “considerable” or “extensive” number of third-party registrations may well have, in the aggregate, evidentiary value. *See In re Mr. Recipe*, 118 USPQ2d 1084, 1089 n.9 (TTAB 2016). “Here, in stark contrast, we have one registration and no indication of the impact of its use on consumers.” *Id.*

or retail clothing stores, and some of which do not.<sup>19</sup> It is Applicant's position that the registrations are "strong probative evidence that a number of registrations coexist with transposed letters and symbols for same or similar goods or services[.]" and that this evidence shows that the USPTO "has a history of approving for registration trademarks with transposed letters and symbols in [sic] same or similar goods or services."<sup>20</sup>

There are several problems with Applicant's argument. First, actions of trademark examining attorneys in registering other marks have little evidentiary value and are not binding upon the USPTO or the Trademark Trial and Appeal Board. *See In re Midwest Gaming & Entm't LLC*, 106 USPQ2d 1163, 1165 n.3 (TTAB 2013) (citing *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)). Second, the registrations alone are not evidence of use of the marks in commerce or that the public is familiar with them. *See, e.g., In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988). Third, the files of the registrations are not of record, and there is no way to tell, for example, whether the owners of the registrations have entered into consent agreements, or whether the marks were at one point owned by the same entity. That is, there might be a reason that the marks coexist on the register, but that reason is not readily apparent from the face of the

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<sup>19</sup> Of the non-clothing letter pairs and trios, some cover similar or related goods and services, e.g., MF for wine and FM for various alcoholic beverages, and some do not, e.g., C&F for insurance services and F&C for various financial services.

<sup>20</sup> 51 TTABVUE 10.

registrations. Finally, and importantly, the lettering in almost all of the pairs is highly stylized, and several of the marks also include a design element which helps to distinguish them from each other, and also from the present situation, where both are standard character marks. Each case is decided on its own facts, and each mark stands on its own merits. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *Binion*, 93 USPQ2d at 1536.

For the reasons explained above, although Opposer's mark A&F and Applicant's mark F&A are not identical, when considered in their entirety, we find them highly similar in appearance and sound, and to convey the same commercial impression of initials or abbreviations including the same two letters.<sup>21</sup> Further, Applicant's evidence does not demonstrate that Opposer's A&F mark is weak or diluted for clothing or retail clothing stores.

### C. Strength or Fame of Opposer's A&F Mark

Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use. A famous mark has extensive public recognition and renown. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000). *Kenner Parker Toys*

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<sup>21</sup> In making this finding, we give little weight to Opposer's argument that consumers will associate Applicant's F&A mark with Opposer's A&F brand clothing because the "Google algorithm" suggested "A&F baseball caps" and "A&F baseball jackets" when searches were performed for "F&A baseball cap." 50 TTABVUE 15-16; 52 TTABVUE 8. Suffice it to say that such results are not evidence of the likelihood of confusion between the marks of Opposer and Applicant.

*Inc. v. Rose Art Indus. Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). In the likelihood of confusion context, fame “is a matter of degree that ‘varies along a spectrum from very strong to very weak.’” *Midwestern Pet Foods Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012) (quoting *Palm Bay Imps.*, 73 USPQ2d 1689). *See also Carefirst of Maryland Inc. v. FirstHealth of the Carolinas Inc.*, 77 USPQ2d, 1492, 1507 (TTAB 2005) (stating that “[f]ame is relative ... not absolute”), *aff’d*, 479 F.3d 825, 81 USPQ2d 1919 (Fed. Cir. 2007).

Fame may be measured indirectly by the volume of sales and advertising expenditures of the goods identified by the marks at issue, “the length of time those indicia of commercial awareness have been evident,” widespread critical assessments, and through notice by independent sources of the products identified by the marks, as well as by the general reputation of the products. *Bose*, 63 USPQ2d at 1305-06. In addition, some context in which to place raw statistics may be necessary. *Id.* at 1309. Finally, because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, “[i]t is the duty of the party asserting that its mark is famous to clearly prove it.” *See Coach Servs.*, 101 USPQ2d at 1720 (citation omitted).

Opposer points to a nationwide presence of brick and mortar Abercrombie & Fitch and abercrombie kids stores,<sup>22</sup> an increase in net sales for all brands from \$2.9 billion

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<sup>22</sup> 32 TTABVUE 41,

in fiscal year 2009 to \$4.1 billion in fiscal year 2013,<sup>23</sup> and an increase in spending on marketing and advertising for all brands from \$353 million in fiscal year 2009 to \$482 million in fiscal year 2013.<sup>24</sup> Opposer's retail sales for A&F branded clothing for the years 2012-2014 (deemed confidential) were appreciable.<sup>25</sup> As evidence of consumer recognition, Opposer refers to the A&F Club, which offers discounts and other benefits for consumers of A&F, Abercrombie, and Abercrombie & Fitch branded products,<sup>26</sup> Opposer's direct marketing efforts through several mobile apps, which were downloaded more than one million times in 2013,<sup>27</sup> and a significant number of consumers who used the search terms "A & F" or "AF" during one 30-day period in 2014 to locate Opposer's online Abercrombie & Fitch store.<sup>28</sup> Mr. Wilson also testified regarding Opposer's attempts to protect the pleaded A&F marks, including sending cease and desist letters, and filing oppositions against applications it believes are confusingly similar.<sup>29</sup>

We find that on this record, Opposer has failed to meet its heavy burden of proving fame. While Opposer's sales figures under the A&F mark are appreciable, raw

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<sup>23</sup> 36 TTABVUE 10-12, 67, 70, and 81. Mr. Wilson identified "Abercrombie & Fitch; Abercrombie; A&F, which is A ampersand F; Hollister; and Gilly Hicks" as "some of Abercrombie's significant trademarks." 37 TTABVUE 11-12.

<sup>24</sup> 36 TTABVUE 11-12, 67, 70, and 81.

<sup>25</sup> Mr. Wilson's testimony concerning Opposer's revenue from A&F branded products is located at 37 TTABVUE 23-29 (the confidential portions are found in 38 TTABVUE 23-29).

<sup>26</sup> 38 TTABVUE 14-15.

<sup>27</sup> 32 TTABVUE 42.

<sup>28</sup> 37 TTABVUE 18-20 (the confidential portions are found in 38 TTABVUE 20). This sample period covered August 26, 2014 to September 25, 2014.

<sup>29</sup> 37 TTABVUE 29-31.



numbers alone are not necessarily sufficient to prove fame, since such figures may be misleading. *See Bose*, 63 USPQ2d at 1309. For example, without context, Opposer's sales figures could represent a somewhat limited market share. Further, Opposer has not persuasively established the percentage of advertising which pertains specifically to the A&F brand (rather than Opposer's various other brands). There is no evidence of media exposure other than the two articles which Applicant made of record, which portray Opposer in a less-than-flattering light. We cannot conclusively say how many of the consumers who searched for "A&F" or "AF" were actively searching for Opposer, how many of them are unique rather than repeat consumers, and how many of the searches culminated in a sale of A&F branded apparel or in recognition of the A&F brand. Moreover, Opposer provided no information on consumer impressions of the A&F mark. For example, it is unclear how many of the mobile apps downloaded in 2013 pertain to Opposer's A&F branded clothing and retail stores, rather than Opposer's other marks (Abercrombie, Abercrombie & Fitch, Gilly Hicks, and Hollister). Similarly, Opposer did not provide the number of A&F Club members, the number or frequency of emails sent to those members, or the revenue from A&F branded clothing sold as a result of such emails.

The totality of Opposer's evidence concerning the fame of the A&F mark shows that Opposer has enjoyed wide recognition of the A&F mark for clothing, but does not "clearly prove" that the mark is famous for clothing. *See Coach Servs.*, 101 USPQ2d at 1720 (citation omitted). Nonetheless, based on the foregoing evidence, we consider Opposer's A&F mark strong in connection with clothing.

D. Conclusion

We conclude, after considering all evidence and arguments bearing on the relevant *du Pont* factors, including the evidence and arguments that we have not specifically discussed herein, that Applicant's mark F&A, as used on the goods identified in the application, so resembles Opposer's registered mark A&F (Reg. No. 2530664) as used on the goods identified in the registration, as to be likely to cause confusion, mistake, or deception. In view thereof, Opposer has proved its claim under Section 2(d) of the Trademark Act.

IV. Dilution

Having determined that Opposer is entitled to prevail in this opposition proceeding based upon its Section 2(d) claim of likelihood of confusion, we need not reach the merits of Opposer's dilution claim. *See American Paging Inc. v. American Mobilphone Inc.*, 13 USPQ2d 2036, 2039-40 (TTAB 1989), *aff'd without opinion*, 17 USPQ2d 1726 (Fed. Cir. 1990).

**Decision:** The opposition is sustained and registration to Applicant is refused.