

ESTTA Tracking number: **ESTTA1247364**

Filing date: **11/10/2022**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	91265207
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Date	11/10/2022
Attachments	2022-11-10 Opposer Brief on the Merit_FINAL.pdf(495118 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 88/697,089
For the mark HUDL
Filed on November 18, 2019
Published on August 11, 2020

Agile Sports Technologies, Inc.,

Opposer

v.

Lashion Robinson,

Applicant

Opposition No.: 91265207

OPPOSER'S BRIEF ON THE MERITS

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OPPOSER'S BRIEF ON THE MERITS

This brief is submitted by Opposer Agile Sports Technologies, Inc. d/b/a Hudl (“Opposer” or “Hudl”) in opposition to Applicant Lashion Robinson’s (“Applicant”) registration of U.S. Application Serial No. 88/697,089.

I. INTRODUCTION

Opposer Hudl is a company that has revolutionized the way coaches and athletes prepare for and stay ahead of the competition as well as share highlight reels and videos with the public and their fans. Hudl is the owner of several federal registrations for, and since 2008 has continuously used, the HUDL name and mark in connection with its software, products, and services. In just over a decade, Hudl has become a dominant presence in the sports world. Approximately 180,000 sports teams worldwide use HUDL software, including every team but one in the NBA, several NHL and NFL teams, and **99%** of United States high schools. Video highlights, recruiting reels, and team and athlete profile pages hosted on Hudl’s platform have reached some **80 million** unique fans.

On November 18, 2019, Applicant filed an intent-to-use application, which seeks to register the HUDL word mark for downloadable music files, music production services, online social networking services, and licensing services. Hudl timely opposed the application as likely to cause confusion.

As set forth below, Hudl’s opposition should be sustained. The evidence overwhelmingly establishes that the HUDL mark for which Applicant seeks registration is likely to cause confusion, or to cause mistake, or to deceive. The mark is identical to Opposer’s HUDL mark, the parties’ goods and services are highly related if not overlapping, and Opposer’s HUDL mark is strong. Confusion is not only likely but inevitable.

II. DESCRIPTION OF THE RECORD

A. Opposer's Evidence

The evidence of record submitted by Opposer consists of the following:

1. Opposer's Registration Nos. 3,642,808, 3,642,806, 4,831,441, 5,136,210, 5,150,472, 5,164,412, 5,394,399, and 5,394,400. 1 TTABVUE at 13–72 of 72; *see also* 14 TTABVUE at Exs. 43-50.

2. The Testimonial Declaration of Anthony Galvan (13 TTABVUE and 14 TTABVUE), filed with the Board on September 10, 2021, including Exhibits 1–53 referenced therein (hereinafter, "Galvan Decl."). The exhibits to Mr. Galvan's declaration include printouts from Hudl's website that discuss Hudl, its products and services, and provide samples of some of the content available to fans through the Hudl website, among other things (Exhibits 1–16 and Exhibits 32–33); a press release discussing Hudl's partnership with MaxPreps (Exhibit 17); Internet printouts showing podcasts Hudl has offered (Exhibits 18-19); samples of articles and other Internet evidence showing the media attention and recognition Hudl has received (Exhibits 20-31); printouts from some of Hudl's social media pages (Exhibits 34-36) and its YouTube channel (Exhibit 37); photographs showing some of the events Hudl has hosted or participated in (Exhibit 38) and some of the promotional items branded with the HUDL name and mark that Hudl has distributed (Exhibit 39); printouts of pages from Hudl's hudl.shop website (Exhibit 40); press discussing Hudl's partnerships with the NFL and Nike (Exhibits 41–42); Certificates of Registrations for Hudl's asserted marks, along with copies of USPTO electronic records showing the present status and title of the registrations (Exhibits 43–50); and printouts from Applicant's website (Exhibits 51–52) and Applicant's YouTube channel (Exhibit 53).

3. Opposer's First Notice of Reliance Written Discovery Responses (7 TTABVUE), filed September 10, 2021, which makes of record Applicant's Responses to Interrogatories

Nos. 1, 5–6, 9-17. 20–22, 24 (Exhibit 54) and Applicant’s Responses and Objections to Opposer’s First Set of Requests for Admission (Exhibit 55).¹

4. Opposer’s Second Notice of Reliance Third-Party Internet Material (8 TTABVUE), filed September 10, 2021, which makes of record printouts from third-party websites, which show the relatedness of the parties’ goods and services (Exhibits 56–80).

5. Opposer’s Third Notice of Reliance Third-Party Registrations (9 TTABVUE), which makes of record 44 third-party registrations that demonstrate the relatedness of the parties’ goods and services (Exhibit 81–124).

6. Opposer’s Fourth Notice of Reliance Confidential Document (10 TTABVUE and 11 TTABVUE), filed September 10, 2021, which makes of record a document produced by Applicant in this proceeding (Exhibit 125), as well as Applicant’s Response to Request for Admission No. 19, which authenticates the document (Exhibit 126).

7. Opposer’s Fifth Notice of Reliance Internet Evidence (12 TTABVUE), filed September 10, 2021, which makes of record two printout from Applicant’s Facebook page (Exhibits 127–128).

8. The Supplemental Testimonial Declaration of Anthony Galvan (26 TTABVUE) (hereinafter “Supp. Galvan Decl.”), filed September 12, 2022, including Exhibits 129–141 thereto. Exhibits 129–141 are printouts from various websites relating to the evidence submitted by Applicant regarding purported third-party marks and definitions.

B. Applicant’s Evidence

Applicant submitted a short testimonial declaration from Lashion Robinson

¹ The table in Opposer’s First Notice of Reliance inadvertently refers to these two exhibits as Exhibit 53 and Exhibit 54, instead of Exhibit 54 and Exhibit 55. The cover sheet to the attached exhibits, however, properly refers to the interrogatory responses as Exhibit 54 and the responses to the requests for admission as Exhibit 55.

(20 TTABVUE), as well as five notices of reliance. The first notice of reliance, Applicant's Notice of Reliance TTAB Decision (21 TTABVUE) attaches a TTAB decision (Exhibit 1). The second, Applicant's Notice of Reliance Written Discovery (22 TTABVUE) makes of record certain written discovery responses (Exhibits 2–5). The third and fourth, both titled Applicant's Notice of Reliance Third Party Registrations (23 TTABVUE and 24 TTABVUE) attach third-party registrations or applications (Exhibits 6–39). The final notice of reliance, Applicant's Notice of Reliance Websites (25 TTABVUE) makes of record a page from Opposer's website (Exhibit 40) and pages from third-party websites (Exhibits 41–53)

C. Evidentiary Objections

Hudl's objections to Applicant's evidence are attached to this brief as Appendix A.

III. THE PARTIES AND PROCEEDINGS

Opposer Hudl timely opposed U.S. Application Serial No. 88/697,089 for the HUDL word mark on October 7, 2020, on the grounds of priority and likelihood of confusion under 15 U.S.C. § 1052(d).² Among other things, in its Notice of Opposition, Opposer pleaded ownership of U.S. Registration Nos. 3,642,808, 3,642,806, 4,831,441, 5,136,210, 5,150, 472, 5,164,412, 5,394,399, and 5,394,400—all valid and subsisting registrations for the HUDL mark or a HUDL-derivate mark. *See* 1 TTABVUE. The Board instituted this proceeding as Opposition No. 91265207.

² While Hudl's Notice of Opposition also included a second claim for dilution by blurring on September 16, 2021, Hudl filed a Motion for Leave to Amend Notice of Opposition that requested, among other things, deletion of the dilution claim. 15 TTABVUE. The motion was granted to the extent it allowed deletion of the dilution claim, but otherwise left the initial Notice of Opposition as the operative pleading. 19 TTABVUE.

On November 16, 2020, Applicant filed its answer, which requested that the opposition be denied but did not allege any counterclaims challenging Opposer's registrations. 4 TTABVUE.

Both parties submitted evidence during the testimony periods and now Hudl submits this brief in support of its opposition.

IV. STATEMENT OF THE ISSUES

This opposition proceeding raises the following issues:

1. Does Opposer have entitlement to a statutory cause of action?
2. Does Opposer have priority with respect to its HUDL marks?
3. Does the HUDL mark for which Applicant seeks registration so resemble Opposer's HUDL marks as to be likely, when used on or in connection with the goods of Applicant, to cause confusion, or to cause mistake, or to deceive?

V. STATEMENT OF FACTS

A. Opposer Hudl and Its HUDL Marks

Hudl, as a company, has revolutionized the way coaches and athletes prepare for and stay ahead of the competition. It has also revolutionized the way teams, athletes, fans, and the public interact and share highlight videos and information, as well as the manner in which athletes build their fan base and promote their talents. Hudl provides teams at every level—its users include club and youth teams, high school teams, collegiate teams, and professional teams (across more than 35 different sports)—with software, tools, and services that allow them to capture, edit, analyze, and share video; to interact with stats; and to produce quality highlight reels for entertainment and recruiting purposes. Hudl's products and services do not just aid teams in improving their performance, but they also change the way teams and athletes interact with sports the sports community, as well as sports fans, and the way in which the public views, follows, and

shares videos and information about their favorite teams and players. Hudl does not just provide services to athletes, but for tens of millions of fans across the country, it provides a way in which they can follow and engage with teams and view the millions of videos that have been produced using the HUDL software and that bear the HUDL mark. Testimonial Declaration of Anthony Galvan (13 TTABVUE and 14 TTABVUE) (hereinafter, “Galvan Decl.”) ¶¶ 7–9, 11–22, 25, 29–31 & Exs. 1–2.

Since at least July 1, 2008, Hudl has done business under the Hudl name and has continuously used the HUDL mark in connection with all of its software, products, and services. Galvan Decl. ¶ 10.

Among other things, the HUDL software products provide sports teams with an online mobile platform for video sharing, editing, and review. Teams upload games (captured on a mobile device running a HUDL app or a digital camera) to Hudl servers, where they are available to anyone with viewing permission. Coaches and training staff can flag sections of video and insert notes or audio commentary for players to review. They can also use clips to create digital playbooks for their team. Athletes can use the HUDL software to study plays and improve their technique. Galvan Decl. ¶ 11.

Additionally, the HUDL software allows teams, coaches, and athletes to create, edit and share polished highlight reels and videos—complete with soundtracks that can be added through the HUDL software.³ These videos can be shared by athletes on their own customizable HUDL public profile pages or by coaches and teams on their HUDL team public profile page. They can

³ Exhibits 6–8 to the Galvan Declaration are printouts from Hudl’s website that describe how athletes can create premium highlight videos and publish those online on various devices, including instructions for adding music to the videos, and Exhibit 9 is a page from Hudl’s website that provides instructions as to how coaches can create and publish premium highlight videos. Galvan Decl. ¶ 46 & Exs. 6–9. The ability to create and share premium highlight videos set to music has long been a feature of the HUDL software. Galvan Decl. ¶ 46

also be shared via Facebook, Twitter, and other social media sites, as well as by posting or sending a link. Through the team and player HUDL profile pages (which can be accessed on Hudl's website), as well as the videos created by teams, coaches, and athletes using HUDL software and services, teams and athletes are able to promote themselves, build a fan base, and engage with other athletes, recruiters, and sports fans across the country. Galvan Decl. ¶ 12.

The videos created and posted by teams and athletes—along with highlight reels and other video content created and posted by Hudl's media team—can be viewed and shared by sports fans or anyone else who visits Hudl's website. Additionally, through Hudl's website, the public can also purchase copies of certain video highlight reels created using the HUDL software on DVD, via download, or both. Galvan Decl. ¶ 13; *see also* Galvan Decl. ¶ 47 & Ex. 10 (detailing how a website visitor can order a copy of a video).

Hudl also offers teams a number of add-ons that build upon its HUDL software, including HUDL ASSIST, a service that allows a team to upload and submit a game or opponent video to Hudl's team of professional analysts, and HUDL SIDELINE, a wireless in-game replay solution that allows coaches to make immediate in-game adjustments by watching previous plays on iPads or iPhones. Galvan Decl. ¶ 17. It also offers more advanced software tools designed for elite teams. Galvan Decl. ¶ 18. And on the hardware side, it offers the HUDL FOCUS smart camera, which automatically records and uploads a team's games and practices to Hudl, as well as a number of other tools designed to make recording and reviewing video easier, including the HUDL bluetooth remote, the HUDL mobile analysis kit, and the HUDL iPad case. Galvan Decl. ¶ 16.

Hudl also provides entertainment services and online social networking services by providing a platform for sharing and viewing videos and information with other athletes, friends, family, and fans using its HUDL mark. Through its hudl.com website, Hudl allows teams,

coaches, and individual athletes to create profile pages on which they can post and share video highlights (including videos that they have edited, customized, and set to music), as well as stats, scores, and other information, as well as to follow other teams and athletes. Galvan Decl. ¶ 17. The hudl.com website, again using the HUDL mark, also provides a hub for the public to search for and view the profiles of their favorite athlete, team, or school or videos showing their favorite athlete or team in action. Sports fans can also search for featured and trending videos and, like coaches and athletes, have the ability to share or purchase videos from the hudl.com website. Galvan Decl. ¶¶ 18, 21.

In addition to videos created by teams, coaches, and athletes, Hudl itself produced a significant amount of content, including videos that features highlights for various sports, top plays, and other content. Hudl's Media business unit is explicitly charged with the creation of video and other content—all of which prominently feature the HUDL marks and are available through Hudl's website and on the various HUDL profile pages managed by Hudl. Hudl also has a YouTube channel on which it posts its videos, as well as various other social media sites where it shares Hudl-created content. Galvan Decl. ¶ 19.

All videos posted on hudl.com/explore or on player or team profile pages (whether posted by Hudl or by an athlete or team) can easily be shared by any viewer (whether an athlete or a member of the general public) on Facebook, Twitter, or via a copied link. Galvan Decl. ¶ 20.

Hudl's products and services have taken the sports world by storm. While Hudl served about 2,000 teams in 2010, that number had increased to more than 100,000 just five years later, in 2015. Since then, the number has only grown. By early 2019 (and prior to the November 18, 2019 filing date of the opposed application), there were more than 160,000 active teams worldwide using the HUDL software and services—the vast majority of which are in the United States. As of September 2021, when Mr. Galvan's testimony was submitted, the number of active

teams had grown to approximately 180,000—with the vast majority of those remaining in the United States. Galvan Decl. ¶ 23. By the end of 2017, there were more than 5.8 million unique registered users of HUDL software (*e.g.*, coaches, trainers, athletes, and recruiters), the vast majority of which are in the United States, and that number has continued to grow. By mid-2019 (and prior to the filing date of the opposed application), that number had increased to at least 6 million unique registered users, with the vast majority of those located in the United States. Galvan Decl. ¶ 24. These numbers, however, are just the tip of the iceberg, as they do not include the millions of members of the public who view team and athlete profile pages and the videos posted on Hudl’s website or bearing the HUDL mark. *Id.*

As noted above, Hudl’s software, products, and services are used by teams at all levels of play. Galvan Decl. ¶ 25. At the professional level in the United States, by 2017, Hudl’s software products and services had been adopted by several NFL teams (by early 2019, eleven NFL teams were HUDL users), six NHL teams, and all but one of the thirty NBA teams; HUDL products are also used (and have been since prior to 2019) by all of the United States National Soccer Teams. Galvan Decl. ¶ 26. Hudl’s greatest success, however, may be at the collegiate and high school levels. Galvan Decl. ¶ 27. By the start of 2019 (and prior to the filing date of the opposed application), a whopping 99% of high schools in the United States were using HUDL software and services (and this percentage was in the high nineties for several years before that). This translates to more than 102,000 high school teams, 405,000 high school coaches, and 1.8 million high school athletes using HUDL software in the United States. Galvan Decl. ¶ 28. Notably, Hudl’s products, software, and services are used by teams across more than 35 different sports, including but not limited to baseball, basketball, cross country, diving, fencing, field hockey, football, golf, gymnastics, ice hockey, lacrosse, rowing, rugby skiing, soccer, softball, swimming,

tennis, track and field, volleyball, water polo, and wrestling. Galvan Decl. ¶ 29; *see also* Galvan Decl. ¶ 30, Ex. 2.

The impact Hudl has had, however, goes beyond just coaches and athletes. Hudl's software, products, and services have not just revolutionized the way coaches and players prepare for the game, it has also revolutionized the way teams and players interact with the public. An important aspect of the services Hudl provides is the ability to produce polished videos and to share those videos with the public online. Galvan Decl. ¶ 31. The HUDL software, and its video and audio editing capabilities, allows coaches, team managers, and training staff to produce quality highlight reels and videos—complete with licensed music⁴ that can be added to the videos using the software—in order to showcase their teams, which can then be shared online via a HUDL team profile page, accessible on Hudl's website. Team information, including schedules, rosters, and results, can also be posted and updated throughout the season. Galvan Decl. ¶ 32. Athletes can likewise produce videos from footage that has been uploaded (and can edit and add music or audio to the footage using Hudl's software) and can share these videos for entertainment and recruiting purposes on their own customizable HUDL profile page, as well as through other social media sites. Galvan Decl. ¶ 33. These videos, highlight reels, team profile pages, and athlete profile pages, as well as videos created by Hudl employees (such as weekly Top 5 Plays videos and sports highlight videos) are available via Hudl's website, at www.hudl.com/explore, and via team and player profile pages on www.hudl.com, where they can be viewed by fans across the

⁴ Recognizing that users want to set their videos to music, Hudl has obtained licenses to an array of musical works for this very purpose. This feature of the HUDL software—the ability to add music to videos created using the HUDL platform and to share those videos with the included music is a feature that Hudl promotes and one that has been available long-prior to the filing date of the opposed application. Galvan Decl. ¶ 34.

country (whether or not the viewer is a user of HUDL software).⁵ Galvan Decl. ¶ 35. These profile pages are much like the profile pages one would find on other online social networking sites. They allow athletes to connect with one another, as well as their fans. Galvan Decl. ¶¶ 35, 45 & Ex. 5 (example of the first portion of one page for a high school athlete who has posted more than 100 videos and has received more than 120,000 views of his page). This ability to create athlete and team profile pages and share content and videos with fans has been a service that Hudl has provided for years and long prior to the date of the opposed application. Galvan Decl. ¶ 44 & Ex. 4 (printouts from Hudl’s website describing how the HUDL software and services allows teams and athletes to engage fans).

Hudl and its website thus provides a hub for videos that connect millions of athletes and fans. This hub is, in fact, *the largest community in high school sports*. This community includes (and did prior to the filing of the opposed application) 99% of high schools, approximately 6 million registered users, approximately 150,000 teams, some 5 million app downloads, more than 35 sports, and approximately *80 million unique fans*, ninety-five percent of whom are in the United States. In other words, in the United States, approximately 75 million unique fans have used Hudl’s online network to view videos and connect with teams and players.⁶ Galvan Decl.

⁵ A more detailed description of content found on www.hudl.com/explore and how users search, explore, view, and share the content and videos, along with sample pages, is found in the Galvan Declaration at ¶¶ 48-55 and Exhibits 11–13, 16. As shown therein, some of the individual profile pages have extensive views and followings. For example, the “Hudl Top 5” profile page—a page maintained by Hudl and to which Hudl posts highlight reels that it produces showing the week’s top football plays—had more than 18 million views and 5.1 million followers as of September 17, 2020 and by September 2021, this number had grown to more than 27 million views and 5.7 million followers. Galvan Decl. ¶ 52 & Ex. 13; *see also* Galvan Decl. ¶ 53 (discussing other video content produced by Hudl and made available on its website that has garnered tens of millions of views and millions of followers); Galvan Decl. ¶¶ 54–55 & Ex. 16 (providing an example of just one high school team page).

⁶ Because of the extensive reach of this network, many advertisers and brands have partnered with Hudl and have sought to advertise in conjunction with Hudl produced media. Exhibit 3 to

¶ 36. Notably, these fans are very familiar with the HUDL mark, as not only does the HUDL mark appear prominently in the header of every team and athlete profile page available on hudl.com/explore, as well as in the header of every highlight page on Hudl's website, but the HUDL mark also appears in the upper right hand corner of all recruiting reels or videos created and posted on these pages from early 2014 forward. Galvan Decl. ¶ 38. By early 2019, there had already been more than 1 billion views of highlights posted on Hudl's website and that number continues to grow rapidly. Galvan Decl. ¶ 43.

Further, players, coaches, and fans can easily share these profile pages via a link or can post highlight reels and videos prepared using the HUDL software (and containing the HUDL mark in the upper-right hand corner) directly to other social media platforms. HUDL highlight reels and videos are routinely posted to Facebook, Instagram, and YouTube and frequently go viral. Galvan Decl. ¶¶ 39–40. As a result, the 80 million fans who know the HUDL mark because they view the highlight reels and videos produced using the software for entertainment purposes through hudl.com's hub vastly underestimates the audience for the HUDL highlight reels and videos because these videos (which, as noted above, include the HUDL mark in the upper right-hand corner) are routinely posted directly to other social media sites and platforms, including Facebook and Twitter. Galvan Decl. ¶¶ 41–42.

In addition to the above, Hudl has also entered into multiple agreements in which it licensed or allowed its videos to be used by third parties. Galvan Decl. ¶ 56 & Ex. 17. It has also


the Galvan Declaration is a page of Hudl's website directed to brand-owners that may wish to reach this community. It also displays some of the brands that have partnered with Hudl. Galvan Decl. ¶ 37 & Ex. 3.

used its HUDL mark in connection with podcasts since 2017. Galvan Decl. ¶ 57 & Exs. 18–19 (discussing two podcast series that Hudl has made available using its mark).⁷

Hudl owns the following valid and subsisting U.S. Registrations, many of which are incontestable, that protect its HUDL mark as well as HUDL-derivative marks:

Registration	Mark	Good/Services
No. 3,642,808 Filed: 11/11/08 Issued: 6/23/09	HUDL	Class 9: Computer hardware and computer software programs for the integration of text, audio, graphics, still images and moving pictures into an interactive delivery for multimedia applications for use by athletic teams and athletic departments in preparation for athletic competitions
No. 3,642,806 Filed: 11/11/08 Issued: 6/23/09	HUDL PRO	Class 9: Computer hardware and computer software programs for the integration of text, audio, graphics, still images and moving pictures into an interactive delivery for multimedia applications for use by athletic teams and athletic departments in preparation for athletic competitions
No. 4,831,441 Filed: 3/5/15 Issued: 10/13/15	HUDL	Class 41: Education and entertainment services, namely, providing a website featuring audio clips, video clips, photographs, other multimedia materials, and information related to athletic and sports performances Class 42: Software as a service services featuring software for video motion analysis, software for training and coaching in the field of sports, athletics, and physical education, and software for athletes, students, coaches, trainers, and instructors to create and view video, audio, and text, and communicate via video, audio and text
No. 5,136,210 Filed: 6/1/16 Issued: 2/7/17	HUDL ASSIST	Class 42: Software as a service services featuring software for receipt of raw video and software tools for editing and analysis of video, including generation of statistical information related to raw video footage
No. 5,150,472 Filed: 7/7/16 Issued: 2/28/17	 hudl	Class 9: Computer hardware and computer software programs for the integration of text, audio, graphics, still images and moving pictures into an interactive delivery for multimedia applications for use by athletic teams and athletic departments in preparation for athletic competitions

⁷ The cover sheet to Exhibit 18 was inadvertently omitted, but the exhibit immediately follows Exhibit 17 and begins on page 183 of 368 in 13 TTABVue.

		<p>Class 41: Education and entertainment services, namely, providing a website featuring audio clips, video clips, photographs, other multimedia materials, and information related to athletic and sports performances</p> <p>Class 42: Software as a service services featuring software for video motion analysis, software for training and coaching in the fields of sports, athletics, and physical education, and software for athletes, students, coaches, trainers, and instructors to create and view video, audio, and text, and communicate via video, audio and text</p>
No. 5,164,412 Filed: 6/1/16 Issued: 3/21/17	HUDL SIDELINE	<p>Class 9: Computer hardware and computer software programs for communication and video recording, transmission of video, playback of video</p> <p>Class 42: Software as a service services featuring software for video acquisition, transmission of video, playback of video, edit and analysis tools for video</p>
No. 5,394,399 Filed: 1/30/17 Issued: 2/6/18	HUDL	Class 38: Audio and video broadcasting services over the Internet or other communications network, namely, featuring the uploaded, posted, and tagged videos of others related to sports and athletic performances and electronically transmitting information, audio, and video clips; providing access to information, audio, and video via websites
No. 5,394,400 Filed: 1/30/17 Issued: 2/6/18		Class 38: Audio and video broadcasting services over the Internet or other communications network, namely, featuring the uploaded, posted, and tagged videos of others related to sports and athletic performances and electronically transmitting information, audio, and video clips; providing access to information audio, and video via websites

Galvan Decl. ¶ 90 & Exs. 43-50; *see also* 1 TTABVUE at 13-72 of 72.

Hudl has continuously and substantially exclusively used the HUDL mark and the HUDL & Design mark in commerce in connection with the goods and services identified in U.S. Registration Nos. 3,642,808, 4,831,441, 5,150,472, 5,394,399, and 5,394,400 since at least as early as July 1, 2008. Galvan Declaration ¶ 91. Hudl has continuously and substantially exclusively used its HUDL ASSIST mark in commerce in connection with the services identified

in U.S. Registration No. 5,136,210 since at least February 4, 2016, and the HUDL SIDELINE mark in commerce in connection with the goods and services identified in U.S. Registration No. 5,164,412 since at least March 1, 2015. Galvan Decl. ¶¶ 92–93. Notably, at the time Hudl first adopted the HUDL mark in approximately 2008, it was not aware of any other company using the HUDL mark—a factor that was important to Hudl as it understood it would be investing heavily in the name and mark. Galvan Decl. ¶ 94.

Hudl and its HUDL-branded goods and services have received extensive publicity and recognition, including in publications such as *The New York Times* and on *CBS This Morning*. A sample of some of the media attention and recognition Hudl has received is attached as Exhibits 20–30 to the Galvan Declaration. Galvan Decl. ¶¶ 58-69.

Notably, Hudl’s growth has continued even amidst the Covid-19 pandemic, during which Hudl saw a 30% increase in highlight videos watched. The decrease in attendance of live sporting events gave Hudl the opportunity to provide services in the form of live streaming of sporting events and other school events. And the decrease in travel and face-to-face interactions between athletes and team personnel increased the use of Hudl’s software. This increased use of Hudl’s services further strengthened its HUDL mark. Galvan Decl. ¶¶ 70–71 & Ex. 31–32.

Hudl invests millions of dollars annually in marketing its HUDL software, services, and product offerings. In 2017, Hudl’s marketing budget was 6.2 million dollars. In 2018, its marketing budget was 7.4 million dollars. And in 2019, its marketing budget was 8.7 million dollars. As Hudl uses its HUDL mark across all of its products and services, virtually all of its marketing efforts prominently feature its HUDL name and marks. Galvan Decl. ¶ 72.

Hudl markets its goods and services in numerous ways. Among other things, Hudl markets its products and services through its website. The website not only has information about Hudl’s software, products, and services (*see, e.g.*, Galvan Decl. at Exs. 1–4) and highlight reels

and videos (*see, e.g.*, Galvan Decl. at Exs. 5, 11, 13, 16), it also includes a blog that has articles of interest to coaches, athletes, and other members of the sports community, as well as various coaching resources (including e-books, guides, and webinars created by Hudl). Galvan Decl. ¶¶ 73–74 & Ex. 33; *see also* Galvan Decl. at Ex. 19. In addition to its website, Hudl uses social media to advertise and promote its software, products, and services, post videos and highlight reels, and to engage coaches, athletes, recruiters, and sports fans, including multiple Twitter accounts, multiple Facebook accounts, multiple Instagram accounts, and YouTube. Galvan Decl. ¶¶ 75–79 & Exs. 34–37.

Hudl further promotes its goods and services through its “Hudl, The Magazine” magazine, which it distributes to customers and which features insights and stories from the performance analysis industry. Hudl also engages in traditional print and online advertising. Galvan Decl. ¶ 80. It also promotes itself and its goods and services through its large team of sales representatives. Galvan Decl. ¶ 81. Hudl has entered into agreements with high school athletic organizations that use its products and services, which require certain advertising of its HUDL brand at sporting events or venues, as well as numerous cross-promotional agreements in conjunction an array of events and content it sponsors or has sponsored. Galvan Decl. ¶ 82. Hudl further hosts and participates in an array of events. Galvan Decl. ¶ 83 & Ex. 38. In connection with events it attends (either as a host or participant), as well as in its other interactions with those in the sporting world, Hudl often distributes promotional items branded with the HUDL name and mark that are designed to promote consumer awareness of Hudl and the software, goods, and services it offers using its HUDL mark. Galvan Decl. ¶ 84 & Ex. 39. Individuals can also purchase t-shirts and baseball caps bearing the HUDL mark, as well as certain HUDL-branded iPad and electronic accessories on Hudl’s website at <https://hudl.shop/>. Galvan Decl. ¶ 85, Ex. 40.

Hudl has also engaged in strategic partnerships with organizations like the NFL and Nike that promote awareness of Hudl and its products and services. For example, Hudl has partnered with the NFL to extend the NFL's Way to Play Award to high school athletes and to provide NFL Game Pass subscriptions to varsity high school football programs. Similarly, Hudl partnered with Nike to create the HUDL Combine app, which allows athletes to test their own athleticism using an iPhone. Galvan Decl. ¶¶ 86–87 & Exs. 41–42.

As a result of Hudl's marketing and promotional efforts, its continuous and exclusive use of its HUDL mark, and the widespread adoption of its software and use of its services, which revolutionized the way coaches and athletes prepare for games and engages with fans, Hudl has built massive goodwill in its HUDL mark, which Hudl works diligently to protect. Galvan Decl. ¶¶ 88–89, 95.

B. The Opposed Application

On November 18, 2019, Applicant filed the opposed intent-to-use application, Application Serial No. 88/697,089, for the word mark HUDL. In the November 18, 2019 application, Applicant sought to register the HUDL work mark for a broad set of goods and services in classes 9, 39, 41, 42, and 45, namely:

Class	Goods/Services
9	Downloadable audio, video and digital recordings featuring music; mobile communications and mobile telephone software applications for transmission of podcasts, data, sound, images, music, photos, graphics, audio and video content between two points; computer software for the collection, editing, organizing, modifying, transmission, uploading, downloading, streaming, storage and sharing of podcasts, data, sound, images, music, photos, graphics, audio and video content; software and software applications for the collection, editing, organizing, modifying, transmission, streaming, uploading, downloading, storage and sharing of podcasts, data, sound, images, music, photos, graphics, audio and video content; mobile software application for recording, reproducing and/or transmission including uploading, downloading, streaming and distribution of music and music-related media; downloadable audio, video and digital recordings featuring music; downloadable recordings, content and media, namely, content in the field of music; software and software applications for the collection, editing, organizing, modifying, transmission, streaming, uploading, downloading, storage and sharing of music and music-related media; mobile software application for facilitating communication and interaction between application users; mobile software application for enabling users to share music and music-related media with each other; mobile software application for enabling users to search for music or artist featured on the platform; all of the foregoing specifically excluding any software and applications featuring sports or sports-related content or features.
38	Telecommunications services and telecommunication services provided via the internet, mobile networks and computer networks, namely, transmission of data, sound, images, music, photos, graphics, audio and video content all featuring music-related content; online distribution of music, data, sound, images, photos, graphics, audio and video content all in the field of music; broadcasting, transmitting and streaming music, music video and music related media; providing temporary use of online non-downloadable software for uploading, downloading and streaming music, data, sound, images, photos, graphics, audio and video content, all in the field of music; all of the foregoing specifically excluding any broadcasting, transmission or streaming of content featuring sports or sports-related content.
41	Music production services; recording and publishing services, namely, multimedia entertainment services in the nature of audio and video recording in the fields of music and music publishing services; entertainment services, namely, providing entertainment information; providing on-line non-downloadable audio and video recordings featuring music; all of the foregoing specifically excluding any sports, sports-related content, athletics, physical education, sports or physical coaching content or features
42	Hosting websites and webpages featuring music, video, audio, graphic, image and photo content for others, all featuring music and music-related content; hosting online website featuring music, video, graphics and data, all relating to music; providing a website featuring technology that enables users to upload, download and share information, data, sound, images, music, photos, graphics, audio and video content and to organize and conduct online meetings, gatherings, and interactive discussions, all in the field of music; electronic data storage in the field of music; computer services

	relating to the online provision of services for others, namely, providing an interactive website featuring technology that allows users to upload, download and share social networks, accounts and connections, all in the field of music; all of the foregoing specifically excluding any software and applications featuring sports, sports-related content, athletics, physical education, sports or physical coaching content or features.
45	Online social networking services; licensing services, namely, licensing of music, data, information, audio, video and digital content all in the field of music and the provision of information, advice and consultancy relating to all of aforesaid; all of the foregoing specifically excluding any services or content featuring sports, sports-related content, athletics, physical education, sports or physical coaching.

Applicant readily admits that at the time it filed its intent-to-use application, and prior to any use of the term HUDL, it was aware of Hudl and its use of the HUDL name and mark. 7 TTABVUE at Ex. 54, Response to Interrogatory Nos. 5 and 12; 7 TTABVUE at Ex. 55, Responses to Requests for Admission Nos. 3-4.

After a March 9, 2020 Office Action refused registration of the application based, in part, on a likelihood of confusion with Hudl’s U.S. Registration Nos. 3642806, 3642808, 4831441, 5136210, 5150472, 5164412, 5394399, and 5394400, Applicant filed a June 11, 2020 Response to Office Action in which it deleted classes 38 and 42 from the application, deleted the vast majority of goods and services from classes 9 and 41, and amended the remaining goods and services, leaving the following goods and services for which registration is presently sought:

Class	Goods/Services
9	Downloadable music files
41	Music production services
45	Online social networking services; licensing services, namely, licensing of music and the provision of information, advice and consultancy relating to the licensing of music

In its response, Applicant represented that it was “address[ing] the Examiner’s 2(d) concerns by deleting several Classes and by substantially amending each of the remaining classes”

To date, Applicant has not amended its applications to allege use of the HUDL mark for any of the listed goods. Applicant further admits that it did not use the applied-for HUDL mark

in commerce prior to the filing date Application Serial No. 88/697,089. 7 TTABVUE at Ex. 55, Responses to Requests for Admission No. 10.

Despite having amended its application, it is clear that Applicant still intends to use the applied-for mark on a broader set of goods and services, including many of the very goods and services that it deleted from its application. During discovery, Applicant represent that it intends “to use the HUDL mark in connection with all those goods and services which are made available through its website at hudlmusic.com and on its mobile application accessible through the Apple App Store under Hudl Music.” 7 TTABVUE at Ex. 54, Response to Interrogatory No. 9; *see also* 7 TTABVUE at Ex. 55, Response to Requests for Admission Nos. 6–7, 9 (admission that Applicant intends to offer software applications that will enable independent music creators to upload their original music and share it within the community). Notably, the hudlmusic.com website contains profile pages for various artists, including a number of profile pages that contain videos—the videos on these pages are both viewable and downloadable by the website visitor. Galvan Decl. ¶¶ 96 & Exs. 51–52; *see also* 7 TTABVUE at Ex. 55, Response to Request for Admission No. 15. The hudlmusic.com website also contains a link to Applicant’s YouTube channel, which contains several videos—including a series of “HUDL Music Featured Artist Series” videos and “This Week in HUDL Music News” videos. Galvan Decl. ¶ 97 & Ex. 53.

All of the goods and services in Application Serial No. 88/697,089 have been opposed by Hudl based on a likelihood of confusion.

VI. ARGUMENT

A. Entitlement to a Statutory Cause of Action

A plaintiff’s entitlement to a statutory cause of action is a threshold issue in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LC*, 965 F3d. 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 82 (2021). To establish entitlement

to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute and (ii) proximate causation. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *4 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021). Demonstrating a real interest in opposing registration of a mark satisfies the zone-of-interests requirement, and demonstrating a reasonable belief in damage by the registration of a mark demonstrates damage proximately caused by registration of the mark. *Id.* at 7–8.

Here, Opposer has made eight Principle Register registrations for Opposer’s HUDL and HUDL-derivative marks of record—namely, Registration Nos. 3,642,808, 3,642,806, 4,831,441, 5,136,210, 5,150,472, 5,164,412, 5,394,399, and 5,394,400. 1 TTABVUE at 13–72 of 72; *see also* 14 TTABVUE at Exs. 43–50. These registrations are valid and subsisting and establish Opposer’s direct commercial interest in the proceeding and its belief in damages. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (pleaded registrations “suffice to establish . . . direct commercial interest”; a belief in likely damages can be shown by establishing a direct commercial interest).

Therefore, Opposer has shown its statutory entitlement to a cause of action and hence, to oppose registration. *Australian Therapeutic Supplies Pty. Ltd.*, 2020 USPQ2d 10837, at *3; *Cunningham*, 55 USPQ2d at 1844; *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *6 (TTAB 2020) (pleaded registrations establish statutory entitlement to bring opposition); *Barbara’s Bakery v. Landesman*, 82 USPQ2d 1283, 1285 (TTAB 2007) (opposer’s entitlement to opposition established by pleaded registration being of record and non-frivolous likelihood of confusion claim).

B. Likelihood of Confusion

Section 2(d) of the Trademark Act 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.” 15 U.S.C. § 1052(d). To prevail on its likelihood of confusion claim, Hudl must show (1) that it has priority and (2) that Applicant’s use of the HUDL mark for the goods and services for which registration is sought is likely to cause confusion, mistake, or deception as to the source or sponsorship of those goods and services.

1. Opposer Has Priority

To establish priority, Hudl must show rights in its HUDL mark arising from a “prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights.” *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1152, 1162, 64 USPQ2d 1375 (Fed. Cir. 2002). Here, priority is not in dispute. Because “Opposer properly made of record its valid and subsisting pleaded registrations and Applicant did not counterclaim to cancel them, priority is not at issue for the goods and services identified in each of these registrations.” *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *9 (TTAB 2020).⁸

2. There is a Likelihood of Confusion

A “determination under Section 2(d) is based on an analysis of all the facts in evidence that are relevant to the factors bearing on the likelihood of confusion.” *Mini Melts, inc. v. Reckitt*

⁸ While not necessary to establish priority given the facts, Hudl nonetheless notes that each of the pleaded registrations was filed and issued long before Applicant filed the opposed application or made any use of the applied-for mark. Two of Hudl’s asserted registrations—U.S. Registration Nos. 3,642,808 and 3,642,806 were filed on November 11, 2008 and issued on June 23, 2009—while the remaining asserted registrations were filed on March 5, 2015 (U.S. Registration No. 4,831,331), June 1, 2016 (U.S. Registration Nos. 5,136,210 and 5,164,412), July 7, 2016 (U.S. Registration No. 5,150,472), and January 30, 2017 (U.S. Registration Nos. 5,394,399 and 5,394,400). 1 TTABVUE at 13–72 of 72; *see also* Galvan Decl. at Exs. 43–50. By contrast, the opposed application—U.S. Application Serial No. 88/697,089—was not filed until November 18, 2019 and, at the time, Applicant had not yet begun using the HUDL mark in commerce for any of the identified goods. *See* 7 TTABVUE at Ex. 55, Responses to Requests for Admission No. 10.

Benckiser LLC, 118 USPQ2d 1464, (TTAB 2016). The factors bearing on the likelihood of confusion are laid out in *In re E.I DuPont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563 (CCPA 1973); *see also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 1314-15, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 1406, 41 USPQ2d 1531 (Fed. Cir. 1997). The *DuPont* factors include: (1) the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression; (2) the similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use; (3) the similarity or dissimilarity of established, likely-to-continue trade channels; (4) the conditions under which and buyers to whom sales are made, *i.e.*, “impulse” vs. careful, sophisticated purchasing; (5) the fame of the prior mark (sales, advertising, length of use); (6) the number and nature of similar marks in use on similar goods; (7) the nature and extent of any actual confusion; (8) the length of time during and conditions under which there has been concurrent use without evidence of actual confusion; (9) the variety of goods on which a mark is or is not used (house mark, “family” mark, product mark); (10) the market interface between applicant and the owner of a prior mark; (11) the extent to which applicant has a right to exclude others from use of its mark on its goods; (12) the extent of potential confusion, *i.e.*, whether *de minimis* or substantial; and (13) any other established fact probative of the effect of use. *DuPont*, 476 F.2d at 1361. Not all *DuPont* factors will be relevant or deserving of equal weight in a given case. *Majestic Distilling*, 315 F.3d at 1315; *Dixie Restaurants*, 105 F.3d at 1406-07. In assessing these factors, “all doubt as to whether confusion, mistake, or deception is likely is to be resolved against the newcomer.” *Nina Ricci, S.A.R.L. v. E.T.F. Enters., Inc.*, 889 F.2d 1070, 1074, 12 USPQ2d 1901, 1904 (Fed. Cir. 1989).

Here, every relevant *DuPont* factor favors Opposer.

i. The Similarity of the Marks Weighs Strongly in Favor of Opposer.

The first *DuPont* factor requires consideration of “[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression.” *DuPont*, 476 F.2d at 1361. In assessing this factor, the Board asks not whether the marks are distinguishable when placed side-by-side, but whether they “are sufficiently similar in their overall commercial impression.” See *Midwestern Pet Foods, Inc. v. Societe Des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435 (Fed. Cir. 2012).

This factor strongly favors Hudl. Applicant seeks to register the standard character word mark HUDL. This mark is ***identical*** to the Hudl’s HUDL mark. Notably, Hudl’s U.S. Registration Nos. 3,642,808, 4,831,441, and 5,394,399 all protect the standard character word mark HUDL. HUDL’s U.S. Registration Nos. 5,150,472 and 5,394,400 protect the HUDL & Design mark—a mark for which the sole literal element is identical. And HUDL is the dominant and leading term in the remaining three registrations asserted by Hudl—U.S. Registration No. 3,642,806 for HUDL PRO, U.S. Registration No. 5,136,210 for HUDL ASSIST, and U.S. Registration No. 5,164,412 for HUDL SIDELINE. 1 TTABVUE at 13–72 of 72; see also Galvan Decl. at Exs. 43–50.

Given that Applicant’s proposed HUDL mark is identical to Opposer’s HUDL mark—they are spelled the same, visually identical, likely to be pronounced the same, and create the same commercial impression—this factor strongly weighs in favor of Opposer. “The identity of words, connotation, and commercial impression weighs heavily against the applicant,” even in cases where the goods are not intrinsically related. *In re Shell Oil Co.*, 992 F.2d 1204, 1206 (Fed. Cir. 1993).

ii. The Similarity of the Goods and Services Favors Opposer.

This *DuPont* factor requires consideration of “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.” *DuPont*, 476 F.2d at 1361. Goods or services need not be identical or even competitive to be “similar” under this standard. *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); *In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1368 (TTAB 2009). “[E]ven if the goods in question are different from, and thus not related to one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis.” *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000).

Here the goods and services for which Applicant seeks registration are closely related to the goods and services covered by Hudl’s registrations, if not directly overlapping. While Applicant will undoubtedly attempt to focus on the internal use of Hudl’s software and services by athletic departments, Hudl’s use of its mark is far broader, as our Hudl’s registrations. As noted above, the videos and profiles created using Hudl’s software, products, and services reach not just athletes and coaches, but approximately 80 million unique fans, ninety-five percent of whom are in the United States. Galvan Decl. ¶ 36.

First, to see how closely related the services are, one need only look at Hudl’s U.S. Registration No. 5,394,399 for the standard character HUDL word mark, which explicitly covers “providing access to information, audio, and video via websites.” The “online social network services” Applicant intends to offer using the applied-for mark appears to overlap with (or at a minimum be highly related) to “providing access to information, audio, and video via websites.” It also appears that the manner in which Applicant seeks to provide downloadable music files and

music production services similarly entails the providing access to information and audio via a website.

As explained in the Testimonial Declaration of Lashion Robinson, submitted by Applicant, what Mr. Robinson envisioned creating and using the HUDL mark on is a platform that will be accessible both online and via a mobile app that will accommodate both music creators/artists and music fans. 20 TTABVUE (Robinson Decl.) ¶¶ 3–4. Specifically, Mr. Robinson explained that artists will be “able to create unique profile pages, which the artist is then able to populate with original music and a bio” and can utilize the platform “to distribute and share music.” *Id.* at ¶ 4. Fans are then able to “browse the various artists” and search the site to locate music consistent with their taste, as well as leave comments. *Id.* Mr. Robinson claims that the platform is currently marketed under the HUDL MUSIC name and accessible online at hudlmusic.com and via a HUDL MUSIC mobile app, but he contends that he has not yet used HUDL alone for these services. *Id.* at ¶¶ 7–9.

When asked in an interrogatory to identify all goods and services in connection with which Applicant intends to use the HUDL mark, Applicant responded: “Applicant intends to use the HUDL mark in connection with all those goods and services which are made available through its website at hudlmusic.com and on its mobile application accessible through the Apple App Store under Hudl Music. Aside from those goods and services, Applicant does not currently intend to offer goods or services other than the ones currently offered by him [under] HUDL MUSIC.” 7 TTABVUE at Ex. 54, Response to Interrogatory No. 9. In short, all of Applicant’s goods and services (downloadable music files, music production, social networking, and music licensing) are tied to this platform created by Mr. Robinson and presently accessible through his hudlmusic.com website. In other words, Applicant seeks to use the HUDL mark to provide access to information about artists and music files (*e.g.* “audio files”) files through a website—yet these

very services are covered by U.S. Registration No. 5,394,399: “providing access to information, audio, and video via websites.”

Further, while Applicant appears to seek to distance itself from video offerings—recognizing that one of the key features of Hudl’s software is its ability to provide users with the tools necessary to create, edit, and share polished highlight videos—any attempt by Applicant to distance itself from video is disingenuous. Hudlmusic.com, which Applicant contends represents its platform and how it intends to use the HUDL mark, contains several artist profile pages that have videos posted and available for viewing. Galvan Decl. ¶ 96 & Ex. 52. Applicant also has a HUDL Music YouTube channel that has multiple “HUDL Music Features Artist Series” videos, as well as “This Week in HUDL Music News” videos. Galvan Decl. ¶ 97 & Ex. 53. Additionally, video content is also available on Applicant’s HUDL Music Facebook page. 7 TTABVUE Ex. 55 at Response to Request for Admission No. 16 (Applicant’s Facebook page is <https://www.facebook.com/HUDLmusic/>); 12 TTABVUE at Exs. 127–128 (printouts from Applicant’s Facebook page). Further, nothing in the “online social networking services” for which Applicant seeks registration would prevent those services from encompassing the sharing of videos—including the sharing of video relating to sports and athletic highlights.⁹

Second, Hudl’s U.S. Registration No. 4,831,441, covers the HUDL word mark for (among other services) “education and entertainment services, namely, providing a website featuring

⁹ In addition to covering “providing access to information, audio, and video via websites,” U.S. Registration No. 5,394,399 also covers “audio and video broadcasting services over the Internet or other communications network, namely, featuring the uploaded, posted, and tagged videos of others related to sports and athletic performances and electronically transmitting information, audio, and video clips.” While this set of services specifically mentions videos related to sports and athletic performances, it also includes the electronic transmission of information, audio, and video clips without specifying the subject. However, even assuming arguendo that this particular set of services is limited to the field of sports, as discussed below, the same companies that offer broadcasting, production, and entertainment services relating to sports often provide these same sets of services in the field of music.

audio clips, video clips, photographs, other multimedia materials, and information related to athletic and sports performances” in Class 41. As noted above, Applicant itself acknowledges that the goods and services it seeks to provide using the applied-for HUDL mark are the same as those it presently offer via the online platform accessible at hudlmusic.com—in other words, a platform that is offered via a website on which artists can create profile pages and populate them with original music (*e.g.*, audio clips) and a bio (which presumably includes photographs of the artist and information about the artist) for entertainment purposes (*e.g.*, for music fans to browse and locate music of their liking). 20 TTABVue (Robinson Decl.) ¶ 4. Further, the hudlmusic.com website, which Applicant contends represents its platform and how it intends to use the HUDL mark, contains not only audio clips, but video clips, photographs, multimedia materials and information. Galvan Decl. ¶ 96 & Ex. 52. In short, the services Applicant acknowledge that it intends to provide using the applied-for HUDL mark and says it is now providing using the HUDL MUSIC mark (including the social networking services, the musical production services, and the providing of downloadable music) all involve “providing a website featuring audio clips, video clips, photographs, other multimedia materials,” for entertainment purposes. The only difference between this set of services and those claimed in U.S. Registration No. 4,831,441 is that Opposer’s registration specifies that the material relates to athletic and sports performance. While Opposer expects Applicant will rely heavily on this distinction, any such reliance is misplaced for at least two reasons. First, as noted above, the services included in the opposed application include “online social networking services,” with no limitation as to field or subject of those service. Second, the type of website platform Applicant has described offering using the applied-for HUDL mark (where Applicant provides a website featuring artists profile pages and music files for fans to consume and download) mirrors the entertainment services being provided by Hudl (where Hudl provides a website featuring athlete and team profile pages and

highlight reels for fans to consume) with the difference between simply the field—sports versus music. However, as discussed below, significant evidence establishes that the same entities routinely provide entertainment services, broadcasting services, and production services in both the music and sports fields and that these fields are closely related.

Finally, Opposer’s asserted registration cover a variety of computer hardware and software in class 9, as well as software services in class 42, including:

- “Computer hardware and software programs for the integration of text, audio, graphics, still images and moving pictures into an interactive delivery for multimedia applications for use by athletic teams and athletic departments in preparation for athletic competitions” (*see, e.g.*, U.S. Registration No. 3,642,808);
- “Computer hardware and computer software programs for communication and video recording, transmission of video, playback of video” (*see, e.g.*, U.S. Registration No. 5,164,412);
- “Software as a service services featuring software for video motion analysis, software for training and coaching in the field of sports, athletics, and physical education, and software for athletes, students, coaches, trainers, and instructors to create and view video, audio, and text, and communicate via video, audio and text” (*see, e.g.*, U.S. Registration No. 4, ,831,441);
- “Software as a service services featuring software for receipt of raw video and software tools for editing and analysis of video, including generation of statistical information related to raw video footage” (*see, e.g.*, U.S. Registration No. 5,136,210);
and

- Software as a service services featuring software for video acquisition, transmission of video, playback of video, edit and analysis tools for video (*see, e.g.*, U.S. Registration No. 5,164,412).

It should be noted that only two of the above identifications of goods or services contain any language referencing the field of athletics.

As discussed in more detail above, one of the key features of Hudl’s software products and services is the tools they provide to create, edit, analyze, and view premium highlight videos that can be shared internally and externally. In other words, the software products and services provides, among other things, video production tools—including tools for the integration of audio (*e.g.*, music) into the videos. These video production tools are closely related to the music production services (as well as music licensing services) for which Applicant seeks registration.

Lest there be any doubt as to how closely related the goods and services for which Applicant seeks registration are to those identified in the asserted registrations, Opposer has submitted more than 40 third-party registrations (all based on use in commerce) that establish the relatedness of the parties’ respective goods and services. “Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce . . . suggest that such goods or services are the type which may emanate from a single source.” *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); *see also*, TMEP § 1207.01(a)(ii).

These registrations include: 9 TTABVUE at Ex. 81 (covering “music production service” and “entertainment services, namely, providing a web site featuring musical performances, musical videos, and other multimedia materials featuring sports, pop culture, music and lifestyles”); Ex. 82 (“production of musical sound recording” and “video editing”); Ex. 83 (“musical production services,” “video editing,” and “entertainment in the nature of competitions in the

field of sports, nutrition, health, fitness, exercise, and training”); Ex. 84 (“music production services,” “providing a website in the field of entertainment and sports entertainment via global computer network and wireless communication network,” and “providing prerecorded music on line. . .”); Ex. 85 (“providing information in the field of sports and entertainment . . . via a global computer network” and “digital video, audio, and multimedia publishing services”); Ex. 86 (“computer software for viewing and analyzing sports performance,” “downloadable music files,” and “computer software . . . for online social networking”); Ex. 87¹⁰ (“digital music downloadable from the Internet,” “entertainment services, namely, providing a web site featuring non-downloadable musical performances, musical videos, . . . and other multimedia materials in the field of sports, pop culture, . . . , music and lifestyles,” and “video editing”); Ex. 88 (“providing a website featuring non-downloadable videos in the field of football, sport, trends and current events” and “music production services”); Ex. 89 (“providing access to social networking websites,” “music production services,” and “electronic transmission of text, data, image, audio, video and multimedia content via global communications networks”); Ex. 90 (“online social media services, namely, online social networking services provided through a community website, and social networking services in the field of general interest, computer games and video games, motion picture films, music, television, sports, cultural topics and entertainment provided via a website”); Ex. 91 (“music production services” and “entertainment in the nature of providing an informational and entertainment website in the fields of celebrity gossip, entertainment, sports and fitness”); Ex. 92 (“music production services” and “providing an interactive website featuring advice and information in the field of collegiate athletics programs”); Ex. 93. (“online social networking services,” “audio, text and video broadcasting

¹⁰ Exhibit 87 is out of order and appears at the end of 9 TTABVUE (after Exhibit 125).

services over the internet or other communications networks featuring the uploaded, posted, displayed, modified, tagged, and electronically transmitted data, information, audio and video content of others,” and “providing temporary use of nondownloadable software for evaluating and matching players and athletes for practice, competition, and personal similarities”); Ex 94. (“computer software for viewing and analyzing sports performance” and “downloadable music files”); Ex 95 (“electronic transmission of digital photo files and video files among internet users” and “social networking services in the field of . . . music, politics, religion, science, academia, sports . . .”); Ex. 96 (“music production services” and “providing automated filming of sports games”); Ex 97 (“photo and video editing, modifying, and filtering software” and “on-line social networking services”); Ex 98 (“downloadable music files” and “recorded computer software for video editing”); Ex 99 (“downloadable software application for mobile devices providing the creation of profiles, databases, social networking, photo, video and live-streaming of events and content for individuals involved with youth sports” and “online social networking services for individuals involved in youth sports”); Ex 100 (“entertainment services in the nature of recording, production and post-production services in the field of music” and “providing news and information in the field of sports”); Ex 101 (“providing a web site featuring information on youth sports” and “music production services”); Ex 102 (“music production services,” “coaching in the field of sports,” and “video editing”); Ex 103 (“providing an informational and entertainment website in the fields of celebrity gossip, entertainment, sports and fitness” and “music production services”); Ex 104 (“entertainment services, namely, providing podcasts in the field of entertainment, media and sports,” “music production services,” and “music video production”); Ex 105 (“multimedia publishing of . . . music” and “providing news and information in the field of sports”); Ex 106 (“video recording featuring music, artistic performances, sports”); Ex 107 (“entertainment in the nature of providing an informational and entertainment website in the

fields of celebrity news, current events news, interviews, music and sports”); Ex 108 (“digital video, audio, and multimedia publishing services,” “providing information relating to sports and sporting events,” and “provision of information relating to music”); Ex 109 (“online transmission of streamed and downloadable music files” and “streaming of audio and video material in the fields of news, sports and entertainment on the internet”); Ex 110 (“entertainment services, namely, production of videos, animation, music, movies, films, television programs, photos, and audio content” and “entertainment services, namely, providing a website featuring non-downloadable music videos, movie videos, animation, music, movies, films, television programs, photos and user-generated multimedia content in the field of drama, comedies, animation, reality-based programs, news and sports”); Ex 111 (“downloadable software in the nature of a mobile application for social networking” and “providing a website featuring entertainment information relating to music and sports”); Ex 112 (“film and video production,” “production of sound and music video recordings,” and “providing a website featuring non-downloadable videos in the field of current event news, entertainment news, music, and sports”); Ex 113 (“providing a website featuring information in the fields of entertainment, music, and sports”); Ex 114 (“providing news and information in the field of sports,” and “providing an Internet website portal featuring entertainment news and information specifically in the field of sports, music, movies,” “providing an Internet sports news portal . . . ,” and “providing an Internet website portal featuring entertainment news and information specifically in the field of music”); Ex 115 (“providing news and information in the field of sports” and “providing an Internet website portal in the field of music”); Ex 116 (“providing an Internet website portal featuring entertainment news and information specifically in the fields of music and sports”); Ex 117 (“digital music downloadable from the Internet,” “downloadable podcasts in the field of sports . . . ,” “entertainment services, namely, providing nondownloadable playback of music via global

communications networks,” and “entertainment services, namely, providing podcasts in the field of sports, motivation, current events, and popular culture”); Ex 118 (“downloadable video files in the fields of sports . . . ” and “downloadable music files”); Ex 119 (“production of sound and music video recordings” and “providing news and information in the field of sports”); Ex 120 (“computer services, namely, creating an on-line community for registered users to participate in discussions, get feedback from their peers, form virtual communities, and engage in social networking services in the field of music and sports”); Ex 121 (“video production services,” “music video production,” “providing news and information in the field of sports,” and “providing an Internet website portal featuring entertainment news and information specifically in the field of sports, music, movies, news, entertainment”); Ex 122 (“entertainment services, namely, providing podcasts in the field of music and sports”); Ex 123 (“production of sound and music video recordings,” “providing news and information in the field of sports,” and “providing an Internet website portal in the field of music”); and Ex 124 (“downloadable computer programs for pre-recording sports games” and “downloadable music files”). The upshot of all these registrations is clear—there are *many* marks that apply equally to the goods and services for which Hudl owns registered marks, as well as the goods for which Applicant seeks registration.¹¹

¹¹ Other evidence similarly establishes a strong link between sports and music. *See, e.g.*, 8 TTABVUE at Ex. 56 (TuneIn “brings together live sports, music, news, and podcasts”); *id.* at Ex. 57-62 (L2 Productions advertises on its website that it provides live video production, live streaming, and TV broadcasting for “sports, music, and corporate events”); *id.* at Ex. 73-75 (Fifty Three Films advertises production of both sporting event and music videos); and *id.* at Ex. 80 (depicting ESPN’s Music Issue). Likewise, multiple music licensing entities underscore the connection between music and sports videos by offering catalogs of music specifically targeted for use with sports videos and productions. 8 TTABVUE at Ex. 63 (FirstCom Music), Exs. 64-67 (Audio Network); Exs. 68-70 (Universal Production Music); Exs. 71-72 (Tunedge Music Licensing); Exs. 76-77 (Yummy Sounds); *see also* Ex. 78 (listing music libraries for sports).

In short, the evidence of record strongly suggests that the goods and services covered by Hudl's registrations and those for which Applicant seeks registration overlap or, at a minimum, are highly related, and that confusion is likely if Applicant's registration is allowed.

iii. The Fame of Opposer's HUDL Mark Strongly Favors Opposer.

"[F]ame of the prior mark, when present, plays a 'dominant' role in the process of balancing the *DuPont* factors." *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1327, 54 USPQ2d 1894 (Fed. Cir. 2000). Fame, for purposes of likelihood of confusion analysis, is not "an either/or proposition" but instead "varies along a spectrum from very strong to very weak." *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1375, 73 USPQ2d 1689 (Fed. Cir. 2005) (quotation and citation omitted). "Famous marks enjoy wide latitude of legal protection since they are more likely to be remembered and associated in the public mind than weaker marks." *Id.* at 1374. Because "[d]irect evidence of fame, for example from widespread consumer polls, rarely appears in contests over likelihood of confusion . . . the fame of a mark may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident." *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 1371, USPQ2d 1303 (Fed. Cir. 2002).

As a preliminary matter, the inherent or conceptual strength of Opposer's HUDL mark is not in dispute. "Opposer's mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act." *New Era Cap Co.*, 2020 USPQ2d 10596, at *10 (TTAB 2020).

Hudl has been continuously and substantially exclusively using the HUDL name and mark since mid-2008. Galvan Decl. ¶¶ 10, 91. It has invested millions in promoting its HUDL

mark and the goods and services offered thereunder, and it has received extensive publicity. Galvan Decl. ¶¶ 58–72 & Exs. 20–32.

However, the most notable indication of the strength of the HUDL mark and the goodwill Hudl has built in its HUDL name and mark is the success it has achieved in the market. Hudl's products and services have taken the sports world by storm. As of September 2021, when Mr. Galvan's testimony was submitted, the number of active teams using the HUDL software and services was approximately 180,000—the vast majority of which are in the United States. Galvan Decl. ¶ 23. This translates to at least 6 million unique registered users, with the vast majority of those located in the United States. Galvan Decl. ¶ 24. While Hudl's products and services are used at all levels and it has been adopted widely by professional teams (for example, all but one of the NBA teams uses Hudl's software products and services, as do all of the United States National Soccer Teams), Hudl's greatest success is at the high school levels where a whopping 99% of high schools in the United States are using HUDL software (and this percentage was in the high nineties for several years before that). Galvan Decl. ¶¶ 26–28. This translates to more than 102,000 high school teams, 405,000 high school coaches, and 1.8 million high school athletes using HUDL software in the United States. Galvan Decl. ¶ 28. If a person has been in high school sports in the last five plus years, or they have family who has been, they are very likely familiar with HUDL software.

These numbers are just the tip of the iceberg, however, because Hudl is not just a software company but also provides entertainment services and content for sports fans. Hudl provides a platform that connects sports fans with teams, players, and highlight reels, including videos that Hudl itself produces and have been viewed by tens of millions of fans. *See, e.g.*, Galvan Decl. ¶¶ 52–53. As noted above, highlight reels and videos branded with the HUDL mark have been viewed by more than 80 million unique fans—95% of whom are in the United States. In other

word, approximately 75 million unique fans in the United States (or between 20% and 25% of the entire U.S. population) have used Hudl’s online network to view videos and connect with teams and players. Galvan Decl. ¶ 52. The size of that number is astounding, particularly when you consider that not all individuals in the United States are sports fans or of an appropriate age to be in the target market. Moreover, the 75 million United States fans who know the HUDL mark because they view the highlight reels and videos produced using the software for entertainment purposes through hudl.com’s hub vastly underestimates those who have actually viewed HUDL-branded content, as HUDL highlight reels and videos (which, as noted above, include the HUDL mark in the upper right-hand corner) are routinely posted directly to other social media sites and platforms, including Facebook and Twitter. Galvan Decl. ¶¶ 41–42.

This evidence demonstrates that HUDL is a strong mark for purposes of a likelihood of confusion analysis, deserving of a “wide latitude of legal protection.” *Recot*, 214 F.3d at 1327. This factor heavily weighs in Opposer’s favor.

iv. The Number and Nature of Similar Marks in Use on Similar Goods Also Favors Opposers.

“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay Imps.*, 396 F.3d at 1373. While it appears that Applicant has clearly scoured the USPTO’s database and Internet searching for any evidence that Hudl’s mark may be weak due to third-party usage of similar marks, it came up short.

First, Applicant attempts to introduce evidence of dozens of certificates of registration (including several that have been cancelled). *See* 23 TTABVUE at Exs. 6–31 and 24 TTABVUE at Exs. 32–39. But these only serve to demonstrate that HUDL is a strong mark with no similar

marks on similar goods in the marketplace to reduce its value. Nearly all of the registrations introduced by Applicant use the English word “HUDDLE,” not the more distinctive “HUDL” used by Hudl and for which Applicant seeks registration. Notably, Applicant itself, in selecting the mark, acknowledged that he chose HUDL, not HUDDLE, as it created a different impression that did not have the same association with sports. 20 TTABVUE (Robinson Decl.) ¶ 10; *accord* 7 TTABVUE at Ex. 54, Response to Interrogatory 11. The four-letter term “HUDL” has only one vowel and looks utterly distinct from the known term “HUDDLE.” In fact, when “HUDL” is typed in an online dictionary, the term “HUDDLE” does not even come up as a suggestion. Supp. Galvan Decl. (26 TTABVUE) ¶ 7 & Ex. 132; *see also* 11 TTABVUE at Ex. 125 (confidential document produced by Applicant regarding evaluation of mark) & Ex. 126, Response to Request for Admission 19 (authenticating Ex. 125). Further, while Applicant attempts to offer into evidence a number of registrations, it has come forward with no evidence that the marks identified in those registration are even in use, much less for goods or services similar to those Hudl offers using its HUDL marks.

Notably, the only active registration that Applicant submits that include “HUDL” is easily distinguished—it covers the mark MYHUDLHEALTH (and is directed to software that is specific to the field of healthcare (not a field in which Hudl offers products and services). 23 TTABVUE at Ex. 20. The mark is also visually distinct in that the term “HUDL” is sandwiched between “MY” and “HEALTH” as part of one long word. Furthermore, the mark does not appear to be in use and the website once used by its owner, <http://hudlhealth.com>, is inactive. Supp. Galvan Decl. (26 TTABVUE) ¶ 4 & Ex. 129.¹²

¹² While Applicant also submits two registrations for a PIZZA HUDL mark (one standard character and one design), Applicant’s submission shows that these registrations have been cancelled. 23 TTABVUE at Exs. 30–31. Cancelled third-party registrations are not probative. *See Bond v. Taylor*, 119 USPQ2d 1049, 1054 (TTAB 2016).

While Applicant also attempts to introduce a handful of webpage printouts, these too are easily dismissed. Most do not use the distinctive coined spelling “HUDL.” In fact, Applicant has only found one use of the term “HUDL.” Specifically, an app named “my-hudl” that appears to be available on the Google Store. 25 TTABVUE at Ex. 49 It is unclear what the app does (Applicant offers no evidence), but the page Applicant submits refers to it as a “social network to find new fun things to do and places to go” and indicates it has been downloaded *fewer* than 100 times and has not been updated in over two years. 25 TTABVUE at Ex. 49. In other words, it appears there is virtually no use of this app. *See also* Supp. Galvan Decl. ¶ 8 (noting that the developer’s website for this app is no longer active).¹³

Ironically, in attempting to show that the HUDL marks are weak, Applicant has inadvertently demonstrated their strength. The fact is that there are very few uses of the coined spelling “HUDL” by anyone other than Opposer, and none on products similar to those offered by Opposer. “The probative value of third-party marks depends entirely upon their usage,” *Palm Bay Imps.*, 396 F.3d at 1373, and given the usage of these marks (both registered and nonregistered), it is unlikely one of them would have any actual influence on the strength Hudl’s registered HUDL marks.

v. The Similarity of Channels of Trade and Conditions Under Which, and Buyers to Whom, Sales are Made Favors Opposer.

The *DuPont* factors requiring consideration of “[t]he similarity or dissimilarity of established, likely-to-continue trade channels” and “[t]he conditions under which and buyers to whom sales are made,” likewise favor Opposer. *See DuPont*, 476 F.2d at 1361. It is well-settled

¹³ Many of the other website exhibits Applicants attempt to offer are wholly irrelevant as they relate to uses of the term “HUDDLE” outside the United States or to websites that no longer appear operational. *See* Supp. Galvan Decl. ¶¶ 6, 9–12 & Exs. 131, 135–140.

that “absent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers.” *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001 (Fed. Cir. 2002); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 1327, 123 USPQ2d 1744 (Fed. Cir. 2017).

Here Applicant, as well as Hudl, are offering many of their respective services (including the ability to view artist profiles and (listen to audio files, in the case of Applicant, or view team and player profiles and watch highlight videos in the case of Hudl) via their respective website or apps. Both parties are also promoting or will be promoting the entertainment content they provide through the same social media channels. 7 TTABVUE Ex. 54, Response to Interrogatory Nos. 14–15 (Applicant intends to promote its goods/services through its website, as well as on Facebook, Youtube, Twitter, Instagram, and the Apple App Store.); Galvan Decl. ¶¶ 75–79 & Exs. 34–37 (Hudl uses social media to advertise and promote its software, products, and services, including multiple Twitter accounts, multiple Facebook accounts, multiple Instagram accounts, and YouTube.) Galvan Decl. ¶¶ 75–79 & Exs. 34–37. This use of convergent marketing channels “increase the likelihood of confusion.” *Official Airline Guides*, 6 F.3d 1385, 1394 (9th Cir. 1993) (citation and quotation omitted).

Additionally, both Hudl’s and Applicant’s products are targeted, in part, to unsophisticated purchasers. *See N.A.D., Inc.*, 754 F.2d 996, 999–1000, 224 USPQ 969, 971 (Fed. Cir. 1985) (finding confusion less likely where purchases would be made by “very sophisticated purchasers . . . who would buy with great care and unquestionably know the source of the goods”). While certain users of Hudl’s software—such as coaches and team managers are relatively sophisticated—its software and services are also used by youth and high schoolers, as well as approximately 75 million sports fans in the United States. Hudl does not charge fans for viewing its highlight videos. Likewise, Applicant has indicated that it does not charge for general

use of its website or mobile software, though the website features a “tipping jar” in which a user can voluntarily leave a tip for an artist. 7 TTABVUE at Ex. 54, Response to Interrogatory No. 20. Like the entertainment services Hudl directs to sports fans, the potential clientele for Applicant’s proposed services is broad—essentially anyone who likes music—and would include unsophisticated consumers. Moreover, there is likely to be considerable overlap between sports fans and music fans. In light of the broad target market for at least a portion of the parties’ respective services and the fact content is offered for free, there is no reason to expect consumers would exercise any particular care in investigating the source of the products or services. Accordingly, this factor also weighs heavily in favor of finding a likelihood of confusion.

vi. The Other Relevant DuPont Factors Favor Opposer.

“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need to be considered.” *Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1372, 127 USPQ2d 1797 (Fed. Cir. 2018) (citation and quotation omitted). *DuPont* factors seven and eight, regarding “the nature and extent of any actual confusion” and “the length of time during and conditions under which there has been concurrent use without evidence of actual confusion,” are not relevant here as Applicant’s HUDL application was filed on an intent-to-use basis and Applicant has not alleged use of the mark in commerce. Similarly, the tenth *DuPont* factor—the market interface between Applicant and Opposer—is also not particularly relevant. Hudl certainly has not consented to Applicant’s use of the mark and it timely opposed the intent-to-use applications, but this is typically the case in opposition proceedings.

The remaining *DuPont* factors favor a finding of a likelihood of confusion. The ninth factor is “the variety of goods on which a mark is or is not used.” *DuPont*, 476 F.2d at 1361. Hudl uses its HUDL mark not for a single product but rather in connection with all of the company’s

software, products, and services. It appears that Applicant intends to do the same. Given this broad usage of the HUDL mark by Opposer (as well as the fact that Applicant appears to seek a similarly broad use), the risk of confusion is exacerbated.

Similarly, the final *DuPont* factor—“the extent of potential confusion, i.e., whether *de minimis* or substantial”—weighs in favor of finding a likelihood of confusion. *Id.* Hudl’s software, products, and services are used by millions of coaches and athletes and tens of millions of fans. And as Applicant’s target market is anyone who enjoys music (*see* 7 TTABVUE at Ex. 54, Response to Interrogatory No. 17), the potential for overlap in the target market is huge. In light of these factors, Applicant’s adoption of an identical mark is likely to cause substantial confusion.

Applicant has acknowledged that it was aware of Opposer’s use of the HUDL mark before filing the opposed application. 7 TTABVUE at Exhibit 54, Response to Interrogatory No. 5; see also 11 TTABVUE at Exs. 125–126. Yet Applicant chose to proceed knowing that confusion would be likely. Applicant’s attempt to register a mark identical to Opposer’s HUDL mark for services that are closely related if not overlapping should be rejected. In sum, the relevant *DuPont* factors all indicate that confusion is likely. The marks are identical and Opposer’s HUDL mark is strong. It is an inherently distinctive term known to tens of millions as a source identifier for Hudl and its goods and services. Confusion would not only be likely, it would be inevitable. Moreover, to the extent there is any doubt as to whether confusion is likely, that doubt must be resolved in favor of Hudl, the prior user. *In re i.am.symbolic*, 866 F.3d at 1322.

VII. CONCLUSION

Based on the evidence of record and the above analysis, Applicant respectfully submits that its oppositions should be sustained as registration of the applied-for HUDL mark will create a likelihood of confusion. As noted above, to the extent there is any doubt as to whether or not

confusion is likely to arise, any such doubt must be resolved in favor the prior registrant and user, Hudl. Accordingly, Hudl respectfully requests that the Board sustain its opposition and refuse registration of U.S. Application Serial No. 88/697,089.

Dated: November 10, 2022

Respectfully submitted,

By: /Mary Ann Novak/

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **OPPOSER’S BRIEF ON THE MERITS**, including appendix, has been served on Moshe D. Lapin by emailing a copy on November 10, 2022 to moshe@lapinlegal.com.

Dated: November 10, 2022

/Mary Ann Novak/

Mary Ann Novak

APPENDIX A

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 88/697,089
For the mark HUDL
Filed on November 18, 2019
Published on August 11, 2020

Agile Sports Technologies, Inc.,

Opposer,

v.

Lashion Robinson

Applicant

Opposition No.: 91265207

OPPOSER’S EVIDENTIARY OBJECTIONS

Opposer Agile Sports Technologies, Inc. d/b/a Hudl (“Opposer”) hereby asserts the following objections to the evidence and testimony submitted by the Applicant Lashion Robinson (“Applicant”):

1. Exhibits 1 to Applicant’s Notice of Reliance (21 TTABVUE)

Opposer objects to Exhibit 1 as hearsay to the extent it is used to demonstrate the truth of facts or matter discussed therein or to introduce evidence from a prior proceeding not made of record in this proceeding. Opposer further objects to Exhibit 1 pursuant to Federal Rule of Evidence 402 and 403 to the extent the opposed marks at issue in that proceeding and the evidence of record differ from that in this proceeding.

2. Exhibits 6 – 31 and Exhibits 32 – 39 to Applicant’s Notices of Reliance (23 TTABVUE and 24 TTABVUE)

Opposer objects to Exhibits 6 – 31 and Exhibits 32 – 39 as hearsay and, pursuant to Federal Rule of Evidence 402, relevance to the extent Applicant seeks to use the exhibits or any statements

contained within them for other than the limited purposes permitted. *See* TBMP 704.03(b)(1)(B); *Weider Publications, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1351 n.10 (TTAB 2014) (third-party registrations do not constitute evidence of use and are thus of limited probative value to show a mark is weak). Additionally, Opposer further objects to Exhibits 19, 28 – 31, and 33 – 35 as these registrations have been cancelled. *See Bond v. Taylor*, 119 USPQ2d 1049, 1054 (TTAB 2016) (cancelled third-party registrations are not probative).

3. Exhibits 41 – 53 to Applicant’s Notice of Reliance (25 TTABVUE)

Opposer objects to Exhibits 41 – 53 as hearsay. “[D]ocuments obtained through the Internet may not be used to demonstrate the truth of what has been printed.” TBMP 704.08(b); *see also Safter, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031 (TTAB 2010). Moreover, Exhibit 48 is not the type of definition or evidence of which the Board may take judicial notice. *See In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1767-68 (TTAB 2016).

Opposer further objects to these exhibits pursuant to Federal Rule of Evidence 402 and 403. Most of these exhibits appear to be related to third-party uses. However, the evidence is insufficient to show the actual use of a relevant mark—much less the scope and nature of that use. Moreover, the evidence appears to include documents that on their face suggest extremely little use. *See e.g.*, Ex. 49 (showing less than 100 downloads of an app). Other documents appear wholly unrelated to any of the goods and services at issue or provide virtually no information about the usage being made. Additionally, many documents appear to relate to uses or entities outside the United States. *See e.g.*, Ex. 41 (relating to Malaysia); Ex. 51 (an app which is used to book “Venues Across India”).

Dated: November 10, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **OPPOSER'S EVIDENTIARY OBJECTIONS**, has been served on Moshe D. Lapin by emailing a copy on November 10, 2022 to moshe@lapinlegal.com.

Dated: November 10, 2022

/Mary Ann Novak/
Mary Ann Novak