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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Hybrid Athletics, LLC
v.
Hylete LLC

Opposition No. 91213057

Michael J. Kosma of Whitmyer IP Group LLC for
Hybrid Athletics, LLC.

Kyriacos Tsircou and John Begakis of Tsircou Law PC for
Hylete LLC.

Before Mermelstein, Wellington and Shaw,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Hylete LLC ("Applicant") has filed an application seeking to register the mark shown below (hereinafter, "Applicant's H design" mark) for "athletic apparel, namely, shirts, pants, shorts, jackets, footwear, hats and caps" in International Class 25:

 .[1]

Hybrid Athletics, LLC ("Opposer") opposes registration of Applicant's mark on the ground of likelihood of confusion under Section 2(d) of the Trademark Act. Opposer pleads, *inter alia*, ownership of an application (Serial No. 85837045) for the mark shown below (hereinafter, "Opposer's H design" mark) in connection with "conducting fitness classes; health club services, namely, providing instruction and equipment in the field of physical exercise; personal fitness training services and consultancy; physical fitness instruction" in International Class 41:

 .[2]

Opposer also pleads common law rights resulting from its use of the same mark on "athletic apparel, including shirts, hats, shorts and socks" since August 1, 2008.[3] Opposer alleges that "Applicant's Mark so resembles Opposer's Mark, as to be likely

[1] Application Ser. No. 85837045, filed on January 30, 2013, based upon Applicant's allegation of first use anywhere and in commerce on April 9, 2012, under Section 1(a) of the Trademark Act.

[2] 1 TTABVUE 4; Notice of Opposition ¶ 4. In an order denying summary judgment, the Board noted that this application matured into Registration No. 4480850 on February 11, 2014, and Opposer submitted a copy the registration in support of the summary judgment motion. However, as explained *infra*, a copy of the registration was not properly introduced at trial.

[3] *Id.*; Notice of Opposition ¶¶ 2-3.

to cause confusion, or to cause mistake, or to deceive as to the source of the identified goods within the meaning of Section 2(d)."[4]

Applicant, in its answer, denied the salient allegations of the notice of opposition.

I. The Record, Pleaded Registrations and Evidentiary Objections

The Record

The record includes the pleadings and, by way of Rule 2.122, the file of the involved application.

Opposer has introduced the testimony, with accompanying exhibits, of the following individuals: Robert Orlando,[5] Ian Jengten (including rebuttal testimony),[6] Mark Tuthill,[7] David Castro,[8] Dale Saran,[9] Jason Leydon,[10] and Syncere Martinez.[11]

[4] *Id.* at 6; ¶ 11.

[5] 49-54 TTABVUE (redacted copy of testimony and exhibits); 55-58 TTABVUE (designated "confidential" copy testimony and exhibits).

[6] 29 TTABVUE and rebuttal testimony at 59 TTABVUE.

[7] 30 TTABVUE.

[8] 33 TTABVUE.

[9] 31 TTABVUE.

[10] 32 TTABVUE.

[11] 42 TTABVUE.

Applicant, for its part, introduced the testimony, with accompanying exhibits, of the following individuals: Abbe Guddal,[12] James Wardlow,[13] Ron Wilson,[14] Garrett Potter,[15] Jennifer Null,[16] and Matt Paulson.[17]

Opposer's Pleaded Application and Asserted Registrations

In its brief, Opposer notes that it pleaded ownership of an application which "matured to registration on February 11, 2014, Registration No. 4480850, claiming a date of first use in interstate commerce at least as early as August 1, 2008 … [and it] is currently valid and subsisting."[18] Opposer also mentions in its brief that it is the owner of "registration No. 4609469 [which] is currently valid and subsisting."[19] There is no citation to the record for copies of these registrations. Upon review of the aforementioned testimony and exhibits, we note that Opposer did not introduce at trial a copy of the registration that matured from its pleaded application, or any other registration that it may own. Although an opposer is not required to amend the notice of opposition to assert that a pleaded application has matured into a registration, it must make any subsequently issued registrations of record. *See UMG Recordings Inc. v. O'Rourke*, 92 USPQ2d 1042, 1046 (TTAB 2009), *citing Corporate FitnessPrograms*

[12] 34 TTABVUE.

[13] 35-36 TTABVUE.

[14] 37 TTABVUE.

[15] 38 TTABVUE.

[16] 39 TTABVUE.

[17] 40 TTABVUE.

[18] 60 TTABVUE 12.

[19] *Id.* at 13.

Inc. v. Weider Health and Fitness Inc., 2 USPQ2d 1682, 1683-84, n.3 (TTAB 1987); *Black & Decker Corp. v. Emerson Electric Co.*, 84 USPQ2d 1482, 1485 n.4 (TTAB 2007). Furthermore, although Opposer submitted copies of registrations in support of its summary judgment motion,[20] the Board clearly informed the parties in its order denying the motion that "evidence submitted in support of or in opposition to a motion for summary judgment is of record only for consideration of that motion" and that "[a]ny such evidence to be considered at final hearing must be properly introduced in evidence during the appropriate trial period."[21] Applicant has not treated any registration as being of record nor has Applicant admitted that Opposer is the owner of any valid and subsisting registrations. Accordingly, on this record, Opposer has not established that it is owner of any of the registrations mentioned in its brief. As a consequence, Opposer must prove and rely only on its pleaded prior common law rights in its H design mark for purposes of establishing a likelihood of confusion with Applicant's H design mark.

Evidentiary Objections

With its trial brief, Opposer attached a list of its objections to testimony and exhibits introduced by Applicant.[22] The basis for the vast majority of the objections is the Board's granting of Opposer's motion for sanctions prohibiting Applicant from "submit[ting] at trial or rely[ing] on as evidence at trial, any information or

[20] Submitted as "Exhibit B" to Opposer counsel's declaration. 18 TTABVUE 193-200.

[21] 26 TTABVUE 3 at Note 3.

[22] 60 TTABVUE 56-67; "Appendix A" to Opposer's brief.

documents that were the subject of Opposer's discovery requests, but which were not served on Opposer prior to the filing of Opposer's motion for sanctions."[23]

Applicant, for its part, has objected to testimony and exhibits, as well as statements made within Opposer's brief, on various bases, including lack of relevance, hearsay, immaterial, lacks foundation or personal knowledge and speculation.[24]

The parties have responded to each other's evidentiary objections. We do not address the numerous individual objections raised by the parties, unless the objected-to evidence is necessary to make a pertinent factual finding or it has a direct bearing on our likelihood of confusion analysis. We do, however, point out that Applicant's reasons for its introduction of testimony or documents, in spite of possibly being subject to the Board's sanctions order, are not well taken.[25] Applicant had an opportunity to argue whether sanctions were appropriate in the first place or to request reconsideration of the Board's order. We will not reconsider the Board's sanction order at this late stage — at least not absent extraordinary circumstances not presented in this case.

[23] 15 TTABVUE; Board order issued on November 18, 2014, referencing Opposer's motion for sanctions filed on August 13, 2014.

[24] 62 TTABVUE 147-166; "Applicant's Statement of Objections" attached to Applicant's brief.

[25] In particular, Applicant, in its response to Opposer's objections, argues that its submissions are "substantially justified" because "(1) such evidence is important to establish the amount of effort that Applicant has dedicated to establishing itself as a premium fitness apparel company; and (2) Applicant did not believe such documents and testimony would be important to its case until after Opposer presented its Trial Testimony." *Id.*

II. Brief Background

By way of background, we begin by mentioning a third-party whose activities have a role in this proceeding. CrossFit, Inc. is worldwide organization that licenses gyms to become CrossFit affiliates who then promote particular method of strength and conditioning exercise and fitness. In 2005, there were approximately 20 to 30 CrossFit-affiliated gyms and today there are 13,000,[26] with approximately 7,000 centers in the United States.[27] CrossFit hosts various competitions, including the "CrossFit Games," with approximately 273,000 individuals participating.[28] At these competitions, vendors set up booths and sell related goods, including athletic clothing.[29]

Opposer was founded by Mr. Robert Orlando in 2008 when he opened a personal training facility under the name "Hybrid Athletics."[30] Mr. Orlando is Opposer's principal owner and, in 2008, he began sending workout videos to CrossFit for airing on their website. In 2009, Opposer became a CrossFit affiliate.[31] Mr. Orlando began to compete in CrossFit competitions in 2009, and, by Applicant's own account, Mr. Orlando gained "personal notoriety and success in the world of CrossFit."[32] Mr.

[26] Castro Dep. 13:15-19.

[27] Saran Dep. 21:4.

[28] *Id.* 23:11-14.

[29] Castro Dep. 37:1-38:7.

[30] Orlando 19:4-10.

[31] Orlando 32:16-34:16.

[32] 62 TTABVUE 11.

Orlando ceased competing in CrossFit competitions in 2011, but Opposer remains a CrossFit-affiliated gym.

Applicant is primarily an athletic apparel company with an eye on "the everyday, functional fitness athlete, who cross-trains in a variety of athletic pursuits and displays an infinite capacity to take on new challenges."[33] Applicant began using its H design mark in 2012 on apparel products with the goal of "tak[ing its] first run of products to the 2012 CrossFit Games, and entering into strategic partnerships with athletes, trainers, fitness magazines, and even fitness equipment companies like TRX."[34] In April 2013, Applicant approached Opposer's principal, Mr. Orlando, in connection with its partnership program with athletes and to help promote Applicant's apparel products.[35] In response, Mr. Orlando expressed concern regarding the similarity of parties' names and their stylized H marks.[36] Sales of Applicant's apparel with the stylized H mark have grown since 2012 and Applicant maintains a notable presence in social media, including Facebook and Instagram.

III. Standing.

Standing is a threshold issue that must be proven by a plaintiff in every *inter partes* case. To establish standing in an opposition or cancellation proceeding, a plaintiff must show "both a 'real interest' in the proceedings as well as a 'reasonable

[33] 62 TTABVUE 8, citing to Wilson 92:8-98:11.

[34] *Id.*

[35] Paulson Dep. 42:8-25. Mr. Paulson also acknowledged that Respondent's name, "Hylete," is "a condensed 'Hybrid Athlete' …." *Id.* at 79:21-22, Orlando Exhib. 31 (comprising a printout of a text conversation between Mr. Paulson and Mr. Orlando).

[36] *Id.*

basis' for its belief of damage." *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014) (quoting *ShutEmDown Sports, Inc., v. Lacy*, 102 USPQ2d 1036, 1041 (TTAB 2012)); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). The Court of Appeals for the Federal Circuit has enunciated a liberal threshold for determining standing in Board proceedings. *Ritchie*, 50 USPQ2d at 1030. Here, the issue of Opposer's standing is not disputed; in any event, we find that, through the testimony of Mr. Orlando and others, Opposer has established that it has used its H design mark in connection with health club services and on clothing since 2008.[37] The record shows that Opposer is more than a mere interloper and has a real interest in and standing to bring this proceeding.

IV. Priority.

As mentioned, Opposer did not make of record any registrations that it owns and priority is therefore in issue. *Cf. King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974) (in an opposition where the opposer owns a registration, and of course the applicant only has an application, priority is not in issue). There is no dispute in this case that Opposer has priority and Opposer has demonstrated its first use of its H design mark in connection with health club services

[37] See, *e.g.*, Orlando Dep. 29:13-17.

and on clothing as early as December 2008.[38] This date precedes Applicant's first use date in 2012.[39]

V. Likelihood of confusion.

Our determination of the issue of likelihood of confusion under Section 2(d) of the Trademark Act is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

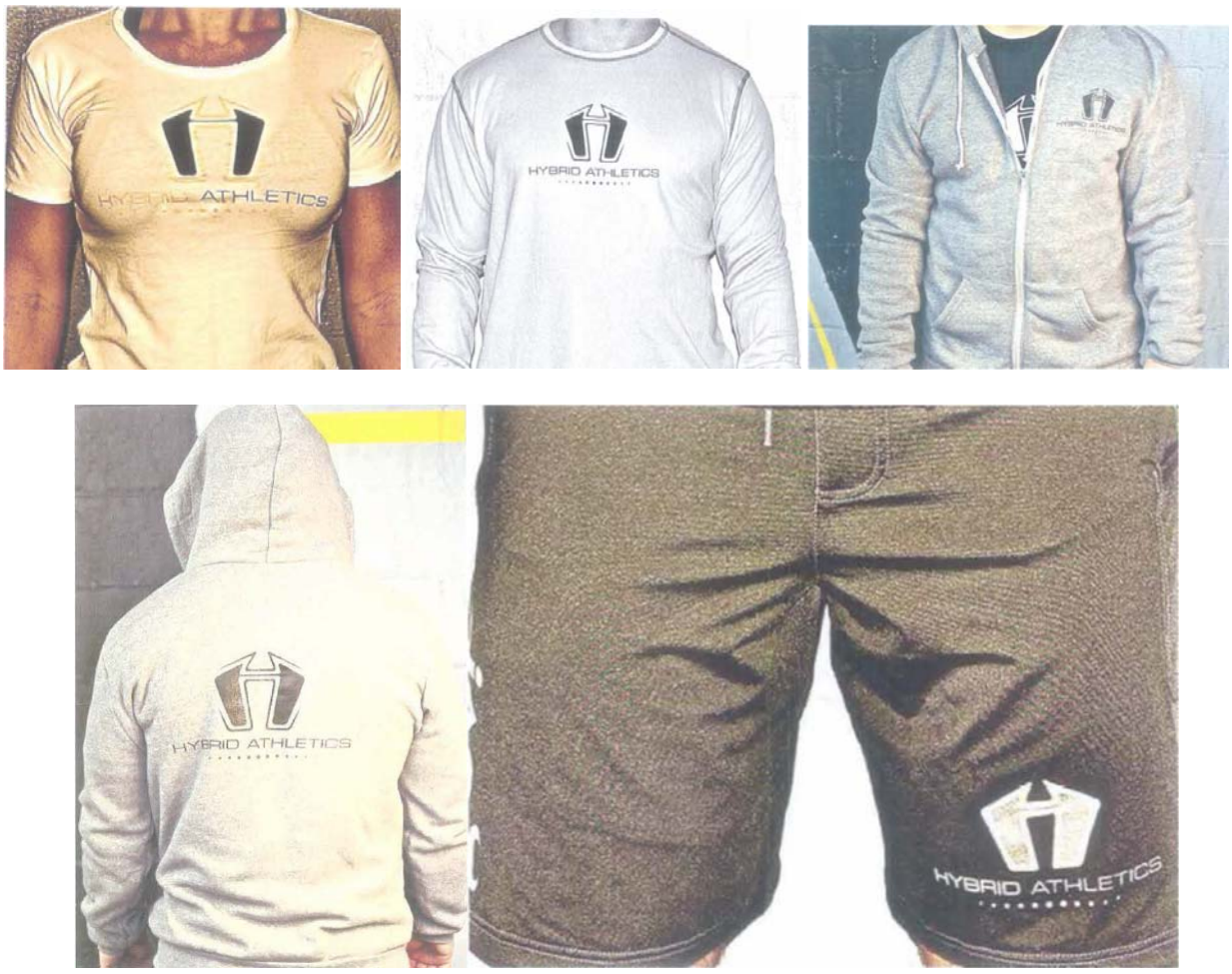
The Goods

We first consider the *du Pont* factor involving "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." *Du Pont*, 177 USPQ at 567. In this case, the involved goods are identical inasmuch as Applicant's goods identified in the involved application are "athletic apparel, namely, shirts, pants, shorts, jackets, footwear, hats and caps" and Opposer has used his mark on some of the same goods, namely, shirts, shorts and jackets. Opposer submitted the following images from its online store depicting use of its mark on goods:[40]

[38] *Id.*; *see also*, Orlando Dep. 5:19-6:14 and Exhibit 2 (comprising a declaration and attached exhibits), 49:12-55:22 and referenced exhibits.

[39] The involved application contains an allegation of first use anywhere and in commerce on April 9, 2012, and Applicant established this use date through the testimony of Mr. Paulson.

[40] *Id.*, Exhibit 8.



Because Opposer's and Applicant's goods are identical in part, this factor strongly favors Opposer and a finding of a likelihood of confusion.

Channels of Trade and Classes of Consumers

We now consider the *du Pont* factor involving the established and likely-to-continue channels of trade, as well as the classes of consumers to whom these goods are being offered for sale. Because it relies on its common-law rights, for the purposes of this analysis, Opposer can claim only those channels of trade and classes of consumer which it has established on the record. Nonetheless, because the identification in the Application has no restrictions on channels of trade, or classes of

customers we must presume that Applicant's goods travel in all channels of trade appropriate for such goods, and to all usual purchasers of them, which necessarily includes Opposer's actual channels of trade and classes of consumers for the identical goods. *Cf. In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). Even without this presumption, the record establishes that the parties' goods have been found in the same trade channels offered to the same consumers. Applicant's own witness, Mr. Paulson, admits that both Opposer and Applicant have encountered each other at some of the same fitness events and trade shows.[41] Indeed, by their own admissions, Applicant and Opposer have at one point or another attempted to market their fitness apparel to the same consumers at CrossFit events.[42]

Accordingly, the third *du Pont* factor involving channels of trade and classes of customers favors a finding of likelihood of confusion.

Strength or Weakness of Opposer's Mark

We next turn to the relative strength or weakness of Opposer's mark. Opposer argues that its H design mark is "extraordinarily well-known and famous throughout the health and fitness industry, but especially in the world of CrossFit."[43] In support, Opposer relies primarily on the renown of its founder, Robert Orlando, in the CrossFit

[41] 40 TTABVUE 50 (Paulson Dep. 50:20-51:4) and 54 (Paulson Dep. 53:1-4).

[42] See, *e.g.*, Applicant's brief (62 TTABVUE 8 "Applicant's goal was to take this first run of products to the 2012 CrossFit Games, as well as to enter into strategic partnerships with athletes"); and Saran Dep. 64:17-65:11.

[43] 60 TTABVUE 6.

community and resulting exposure of its H design mark. Opposer asserts that the mark has been used "extensively in commerce since 2008 in the sale of gym and fitness services, fitness apparel and fitness equipment, including axles, farmer's handles, yokes, logs, and atlas stone molds, all over the world" and "appears nationally in competitions, advertisements, fitness videos, fitness magazines and social media."[44]

Applicant, on the other hand, asserts that Mr. Orlando's "personal notoriety and success in the world of CrossFit" are irrelevant in this matter and argues that Opposer's "direct-to-consumer apparel business has seen significant decline since 2012."[45] Applicant argues that Opposer's mark is not well-known in the field of apparel and that Opposer's apparel business is "secondary to Opposer's operation of its gym and equipment business," pointing to Mr. Orlando's testimony that sales of apparel account for only 15-20% of Opposer's total revenue.[46] Applicant further argues that there is "crowded field of letter marks," and that the involved marks "co-exist with [135] other 'H' marks registered … in connection with athletic-related clothing."[47] With respect to Applicant's latter argument, the only evidence that it relies on consists of a listing of registrations that were submitted for the first time with its brief and, accordingly, are not properly of record.[48]

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[44] *Id.* at 9.

[45] 62 TTABVUE 11.

[46] *Id.* at 12, citing to Orlando Dep. 161:6-162:5.

[47] *Id.*

[48] Opposer's objection, raised in its reply brief at 64 TTABVUE 7, to this evidence is sustained. *See* TBMP Section 704.03 (introduction of registrations not subject of the proceeding).

Upon review of the entire record, we do not find Opposer's H design mark to be famous for athletic apparel. Indeed, Opposer's sales of apparel were relatively modest for the years 2011-2014[49] and while the evidence shows Mr. Orlando has had considerable exposure within the fitness community, it has not been demonstrated that Opposer's H design mark, as used on clothing, has benefitted significantly from that exposure. In other words, we see no direct or substantial correlation between Mr. Orlando's notoriety within the fitness community and the popularity of Opposer's H design mark on clothing. On the other hand, there is no evidence to support Applicant's arguments that Opposer's mark is weak or that it lacks distinctiveness in the context of athletic apparel or in general. Accordingly, the *du Pont* factor involving the fame of Opposer's mark and the factor involving any possible weakness as a result of similar marks being used on the same or related goods remain neutral in our likelihood of confusion analysis.

Similarity of the Parties' Marks

We now consider the *du Pont* factor of the similarity or dissimilarity of the marks in terms of their appearance, sound, connotation and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The proper test is not based on consumers having the luxury of a side-by-side comparison of the marks, as they appear below, but "whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a

[49] Orlando Dep. 159:16-18.

connection between the parties." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). Where, as here, the parties use their marks in connection with goods that are legally identical, the similarity needed to support a determination that confusion is likely declines. *See Bridgestone Ams. Tire Operations LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012).

Again, the two involved marks are as follows:

 and  .

The points of similarity and dissimilarity between these marks are visually apparent. The parties acknowledge that each mark is a stylized version of the letter H and this plays a role the overall commercial impressions engendered by the marks. To the extent consumers are aware of the fact that both parties' names begin with the letter "H," the letter will have some significance. Even if consumers attribute no specific meaning or relevance to the letter H, they may still view the marks in the same manner, namely, an arbitrary use of a stylized letter H for athletic clothing. We also keep in mind that the proper emphasis is on the recollection of the average consumer, who normally retains a general rather than a specific impression of marks. See, *e.g.*, *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); *Envirotech Corp. v. Solaron Corp.*, 211 USPQ 724 (TTAB 1981);

and *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Upon viewing the marks once, consumers attempting to recall or verbalize either mark at a later date will find it easier to describe the marks, in general, as being fanciful representations of the letter H, rather than attempting to remember and relate the particular design features of the marks.

This is not to say we can ignore the different manners in which the same letter H is presented in the parties' marks. In typographic terms, the "crossbar" in Applicant's mark is lower than in Opposer's mark and the interior space is circular rather that straight. We also agree in general with Applicant's description of the design elements found in its mark ("the imbalance between the bottom portion and the top portion, the significant curves, the incorporation of circles and the infinity symbol, and the overall sharp weapon-like feel"), as well as its characterization of Opposer's mark as having a "heavy, thick, and bulky overall" appearance.[50] On the other hand, we are also able to discern at least one design similarity in the marks, namely, they each have a "stretched wide" letter appearance; that is, the letter H bows out in the center-top portions of both marks. The "stem" portions of the letter "H" in both marks are narrow at the top, extend outwards at the shoulder, and narrow again at the base. We have considered the relevance of the visual differences, and at least one similarity, between the marks and the effect these may have on consumers in terms of distinguishing the marks. While there are specific differences that can be seen when

[50] 62 TTABVUE 18.

the marks are side-by-side, as shown above, we reiterate that this is not how the marks are encountered by consumers.

In this case and for the reasons outlined above, however, we conclude that the two marks are overall more similar than not. The design differences between the two marks are outweighed by the fact that are both stylized versions of the same letter, H, and will thus have similar commercial impressions. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1741 (TTAB 2014) (the similarities of fanciful or arbitrary marks are often more important than their differences). We reiterate that our decision is based on the record before us and, as already discussed, it has not been demonstrated that the letter H is conceptually weak or diluted in the context of the involved goods or in general for that matter.

Accordingly, the *du Pont* factor involving the similarity of the marks also weighs in favor of finding a likelihood of confusion.

Instances of Actual Confusion

We now turn to the *du Pont* factor involving instances of actual confusion between the parties' marks. As Professor McCarthy points out:

> ***Actual Confusion is the Best Evidence of a Likelihood of Confusion.*** Convincing evidence of significant actual confusion occurring under actual marketplace conditions is the best evidence of a likelihood of confusion. Any evidence of actual confusion is strong proof of the fact of a likelihood of confusion. No matter how convinced a trial judge may be of the absence of any likelihood of confusion, he or she must at least listen to evidence presented of actual confusion. The Fifth Circuit stated that, "There can be no more positive or substantial proof of the likelihood of confusion than proof of actual confusion." Other courts agree. Obviously, the evidence of actual confusion is the testimony of a "reasonably prudent purchaser" who was in fact confused by defendant's trademark.

J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 23:13 (Fourth Edition 2016).[51]

The Board, and our primary reviewing Federal appellate court, have long agreed on the importance of any evidence of *actual* confusion to the analysis of whether there is a *likelihood* of confusion. See, *e.g.*, *In re Majestic*, 65 USPQ2d 1201 ("A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion") and *Molenaar, Inc. v. Happy Toys Inc.*, 188 USPQ 469 (TTAB 1975) (single instance of confusion is at least "illustrative of how and why confusion is likely").

In spite of there being only three to four years of coexistence of the involved marks, Opposer asserts there has been "an abundance of instances of actual consumer confusion."[52] In support, Opposer relies on the testimony of its witnesses who either testify that they themselves were confused as to source or that they have encountered others who expressed confusion as to source or a relationship between the parties based on a similarity of the H design marks. In its brief, Opposer identifies fourteen episodes of what it calls instances of actual confusion. Some of these instances merely involve individuals expressing their opinions regarding the similarity of the parties' H design marks[53] or inquiring into whether there is a relationship between the

[51] Citations omitted, except to note that reference to Fifth Circuit case is from *World Carpets, Inc. v. Dick Littrell's New World Carpets*, 438 F.2d 482, 168 USPQ 609 (5th Cir. 1971), and reference to a "reasonably prudent purchaser" is from § 23:91 of the same treatise.

[52] 31 TTABVUE 31.

[53] On March 10, 2013, a man named Jessie Clay wrote to Mr. Orlando, "you should investigate HYLETE …unless they r a branch of Hybrid they chicken hawked your logo…heads up." Orlando Dep. 129:10-23, Exhibit 2. On December 5, 2013, an individual wrote on Opposer's

parties.[54] Other instances, however, involve individuals with experience in the fitness industry who, already familiar with Opposer's H design mark, expressed source confusion upon encountering Applicant's H design mark. For example, Mr. Leydon, owner of a CrossFit-licensed gym in Connecticut, testified that he was confused after ordering shorts from Applicant that had Applicant's H design mark co-branded with his gym's logo:[55]

> [I]t looks a lot like [Opposer's H design mark]. There was confusion. For myself, I didn't see [Applicant's H design mark] before I got the shorts with my logo on it. When I did get it, I thought that [Opposer] had some sort of role in it because the H's are similar…when my wife saw the shorts, again she thought [Opposer] had [taken] on some sort of clothing line because the H's were very similar.

Two employees of CrossFit also testified that they each mistakenly believed there was a connection between the Applicant and Opposer upon encountering Applicant's H design mark at CrossFit regional events. One of these instances involved Mr. Castro, a Director of CrossFit games; he testified that in 2013 at a CrossFit Regional event, he encountered Applicant's H design mark for the first time and approached an employee at Applicant's booth to inquire, "Oh, Rob's selling here, is he here?" Mr. Castro testified that Applicant's employees at the booth responded that they did not have any affiliation with Opposer. The substance of this encounter was corroborated

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Facebook website asking, "How do [you] feel about Hylete athletics, basically copying your logo and name?" Orlando Dep. 133:19-134:10, Exhibit 41.

[54] On July 28, 2013, a CrossFit consumer from Hawaii wrote an email to Mr. Orlando, "At the games, I see a lot of people wearing Hylete clothing and posting on Facebook. Does it have anything to do with Hybrid Athletics? The logo looks a lot like Hybrid and the name is very similar so was just wondering." Orlando Dep. 130:19-131:19, Exhibit 2.

[55] Leydon Dep. 22:17-23:23; Exhibits 6-7.

by Applicant's Director of Sales, Ms. Null, who was present at the booth at the time.[56] In addition, Mr. Orlando has testified that, on numerous occasions, he has encountered individuals with Applicant's H design mark-branded clothes who mistakenly thought the clothes originated from Opposer because of the similar H design marks.[57]

Applicant has attacked Opposer's actual confusion evidence as being "insufficient" and as either "merely unsubstantiated inquiries concerning an affiliation between Applicant and Opposer"[58] or as "testimony of … Mr. Orlando's friends and colleagues, which also fail to definitively establish the source of any actual confusion."[59] With respect to Mr. Orlando's testimony, Applicant points out that there is no documentary evidence to support his allegations of numerous instances of actual confusion.

We disagree with Applicant's characterization and estimation of the importance of Opposer's evidence of actual confusion. Rather, we find the evidence of actual confusion to be highly persuasive with respect to our likelihood of confusion analysis. It is especially concerning that individuals with a higher level of awareness of the relevant players in the industry, including CrossFit employees and owners of other gyms, could mistakenly believe that there was relationship between Applicant and

[56] Null Dep. 25:18-23.

[57] Orlando Dep. 124:7-125:25. We note, however, that this type of testimony has very little probative value inasmuch as Mr. Orlando provided little specificity, *e.g.*, dates or names of involved persons, for these alleged instances of actual confusion and Opposer did not submit any corroborating physical evidence.

[58] 62 TTABVUE 24.

[59] *Id.* at 27.

Opposer based on the stylized H marks. These are members with a business interest and knowledge of the athletic apparel market. The fact that these individuals were *actually* confused certainly raises the stakes that less-informed consumers are *likely* to be confused. Applicant's latter point with respect Mr. Orlando's testimony is well-taken and we note the shortcomings with respect to that testimony (see footnote 42, *supra*). Nevertheless, as discussed above, Mr. Orlando's testimony is not the only evidence indicating that there have been instances of actual confusion based on the parties' concurrent use of the H design marks on the same goods. Furthermore, we do not consider the evidence to be "insufficient" or *de minimis*. Any evidence of actual confusion is relevant and should be carefully considered. Again, given that the parties' marks have coexisted for only three to four years, we find the amount of confusion as to a connection between the parties based on their use of the H design marks is substantial.

In sum, the evidence of actual confusion before us has clear probative value and helps show that confusion amongst consumers is likely, and the *du Pont* factor is weighed accordingly.

Balancing of the Factors - Conclusion

Upon consideration of all relevant *du Pont* factors and as discussed above, we find that Applicant's use of its mark  for "athletic apparel, namely, shirts, pants, shorts, jackets, footwear, hats and caps is likely to cause confusion" with Opposer's previously-used mark  on some of the same goods, namely, jackets, shorts and

shirts. We make this decision keeping in mind that there are obvious visual differences between the marks, but also bearing in mind that the goods are found in the very same trade channels, are offered to the same consumers, and it has been shown that confusion as to source has already ocurred.

Decision: The opposition is sustained.