

This Opinion is Not a
Precedent of the TTAB

Mailed: June 27, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*iFIT Inc.*¹

v.

ERB Industries, Inc.

Opposition No. 91264855

Matthew A. Barlow and Brittany Frandsen of Workman Nydegger
for iFIT, Inc.

Olivia M. Muller of Erik M. Pelton & Associates, PLLC
for ERB Industries, Inc.

Before Adlin, Heasley and Johnson, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant ERB Industries, Inc. seeks registration of I-FIT FLEX, in standard characters (FLEX disclaimed), for “industrial protective eyewear; safety eyewear,” in International Class 9.² In its notice of opposition, Opposer iFIT, Inc. alleges prior use

¹ As explained below, Opposer was formerly known as Icon Health & Fitness, Inc. See Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 512.02 (2022).

² Application Serial No. 88692606, filed November 14, 2019 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on first use anywhere and in commerce since at least as early as December 31, 2017.

and registration of IFIT and variations thereof for a variety of health and fitness products and services, including: indoor exercise equipment such as stationary bikes, treadmills and rowing machines; and personal training and fitness monitoring services provided over the Internet and via a mobile app.³ As grounds for opposition, Opposer alleges that use of Applicant's mark would be likely to cause confusion with Opposer's marks. In its answer, Applicant denies the salient allegations in the notice of opposition, and purports to assert "affirmative defenses" which in fact merely amplify its denials.

I. The Record

The record consists of the pleadings, and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's involved application. In addition, Opposer introduced:

Notice of Reliance ("NOR") No. 1 on official records including its pleaded registrations ("Opp. NOR 1"). 18 TTABVUE.⁴

NOR No. 2 on Applicant's discovery responses ("Opp. Nor 2"). 19 TTABVUE.

NOR No. 3 on Internet printouts ("Opp. Nor 3"). 21 TTABVUE.

³ Registration Nos. 2466474, 2618509, 3755592, 4450213, 4500591, 4604633, 5228698, 5382573, 5530425 and 5500842, described in more detail below. Some of Opposer's pleaded registrations are over five years old, and the underlying applications in all of them were filed before both the involved application and Applicant's claimed first use date.

⁴ Citations to the record are to TTABVUE, the Board's online docketing system. Specifically, the number preceding "TTABVUE" corresponds to the docket entry number(s), and any number(s) following "TTABVUE" refer to the page number(s) of the docket entry where the cited materials appear.

NOR No. 4 on its discovery deposition of Applicant (“App. Disc. Tr.”) under Fed. R. Civ. P. 30(b)(6) (“Opp. NOR 4”). 23 and 52 TTABVUE.

NOR Nos. 5-10 on Internet printouts and official records (“Opp. Nor 5” – “Opp. NOR 10”). 25-30 TTABVUE.

Testimony Declaration of David Chase Watterson, its Vice President of Member Experience, and the exhibits thereto (“Watterson Dec.”). 31 TTABVUE.

Testimony Declaration of Emily Wilson, one of its legal assistants, and the exhibits thereto (“Wilson Dec.”). 33 TTABVUE.

Testimony Declaration of Colleen Logan, its iFIT brand manager, and the exhibits thereto (“Logan Dec.”). 34 TTABVUE.

Rebuttal Testimony Declaration of Mr. Watterson, and the exhibits thereto (“Watterson Reb. Dec.”). 40 TTABVUE.

Applicant introduced:

NOR No. 1 on Internet printouts (“App. NOR 1”). 36 TTABVUE.

NOR No. 2 on third-party registrations (“App. NOR 2”). 37 TTABVUE.

NOR No. 3 on Opposer’s discovery responses (“App. NOR 3”). 38 TTABVUE.

Testimony Declaration of Jacqueline Barker, an employee in its Price and Rebate Management department, and the exhibits thereto (“Barker Dec.”). 39 TTABVUE.

II. Background

For the most part the parties agree on the pertinent facts but disagree as to their legal significance.

A. Opposer and Its Pleaded IFIT Marks

Opposer “is one of the world’s largest manufacturers of exercise and fitness equipment and sells exercise and fitness goods and services throughout the United States” 31 TTABVUE (Watterson Dec. ¶ 3). “[P]roduct lines offered in connection with IFIT include NORDICTRACK, PROFORM, and FREEMOTION.” *Id.* (Watterson Dec. ¶ 5). “[C]ustomers who purchase Opposer’s IFIT-branded goods are typically individuals seeking to engage in exercise and fitness-related activities and/or improve their overall health and fitness.” 38 TTABVUE 13, 14 (Opposer’s response to Interrogatory Nos. 5 and 8).

Since 1999 Opposer has used its IFIT brand in connection with not just “fitness and exercise machines,” but also “personal exercise training services, and other exercise and fitness-related apparel and accessories.” 31 TTABVUE 3 (Watterson Dec. ¶ 4). Opposer changed its name from “ICON Health & Fitness, Inc.” to “iFIT Inc.” in 2021. 33 TTABVUE 3, 8-10 (Wilson Dec. ¶ 3 and Ex. A).

Opposer’s pleaded registrations are summarized in the following chart:

<u>Mark/Reg. No.</u>	<u>Issue Date/ Status</u>	<u>Goods/Services and Class</u>
IFIT.COM Reg. No. 2466474	July 3, 2001 Renewed	“providing information and consultation services in the field of exercise equipment and personal health, fitness and nutrition by means of a global computer network,” in International Class 42
IFIT Reg. No. 2618509	September 10, 2002 Renewed	“fitness and exercise machines,” in International Class 28 “educational services, namely, conducting personal training in the field of health and fitness,” in International Class 41

<u>Mark/Reg. No.</u>	<u>Issue Date/ Status</u>	<u>Goods/Services and Class</u>
i-FIT Reg. No. 3755592	March 2, 2010 Renewed	“foundation garments; women’s undergarments; lingerie; women’s intimate apparel, namely, brassieres,” in International Class 25
iFIT Reg. No. 4450213	December 17, 2013 Section 8 Declaration accepted; Section 15 Declaration acknowledged	“personal fitness training services and consultancy; physical fitness instruction; physical fitness training services; providing an on-line computer database featuring information regarding exercise and fitness; providing information in the field of exercise training,” in International Class 41
IFIT Reg. No. 4500591	March 25, 2014 Section 8 Declaration accepted; Section 15 Declaration acknowledged	“an application service provider (ASP) featuring software for use with mobile devices, tablet, and computers for tracking, storing, and displaying personal performance data for various fitness activities; ASP featuring application programming interface (API) software for connecting and interacting with software applications on mobile devices, tablets, and computers to track, store, and display personal performance data for various fitness activities,” in International Class 42
IFIT Reg. No. 4604633	September 16, 2014 Section 8 Declaration accepted	“web-based, downloadable software for the collection, storage and display of personal performance data from various fitness activities, display of nutritional information and fitness and athletic programs and workouts, software for tracking, monitoring and planning fitness training activities,” in International Class 9
IFIT Reg. No. 5228698	June 20, 2017	“mattresses,” in International Class 20
IFIT Reg. No. 5382573	January 16, 2018	“nutritional supplement in the nature of a nutrient-dense, protein-based drink mix; powdered nutritional supplement drink mix; protein supplement shakes for weight gain purposes,” in International Class 5


<u>Mark/Reg. No.</u>	<u>Issue Date/ Status</u>	<u>Goods/Services and Class</u>
iFIT Reg. No. 5530425	July 31, 2018	“pedometers; altimeters; scales; multifunctional electronic devices for displaying, measuring, and uploading to the Internet and computer networks information including time, date, heart rate, global positioning, direction, distance, altitude, speed, steps taken, calories burned, navigational information, weather information, temperature, wind speed, changes in heart rate, activity level, hours slept, and quality of sleep; computer software for wireless data communication for receiving, processing, transmitting and displaying information relating to fitness, body fat, body mass index, and heart rate; electronic monitoring devices incorporating microprocessors, digital display, and accelerometers, for detecting, storing, reporting, monitoring, uploading and downloading sport, fitness training, and activity data to the Internet, and communication with personal computers, regarding time, steps taken, calories burned, distance; computer software and computer application software for mobile phones and personal digital devices that provides tips, coaching, and personalized workouts, to improve the user's fitness level,” in International Class 9
IFIT Reg. No. 5500842	June 26, 2018	“footwear, excluding golf shoes,” in International Class 25

Opposer’s “ifit.com” website offers “access to an exercise and fitness community that includes workouts led by leading athletes and trainers, fitness tracking technology, and other health-related information by way of a subscription service.” 31 TTABVUE 4 (Watterson Dec. ¶ 7). The IFIT subscription service is incorporated

into an app, as well as Opposer's treadmills, exercise bikes, ellipticals, rowers and strength trainers, "all of which bear the iFIT mark":

IFIT APP

3 ways to use iFIT



Use our equipment **Use your equipment** **Just use our app**

Sign up today

Start your free trial and use iFIT whenever, wherever.

MEMBERSHIP INCLUDES:

- ✓ 60+ workout types
- ✓ Live races & events
- ✓ Motivating, world-class trainers
- ✓ Interactive Global Workouts
- ✓ Live Studio Classes
- ✓ Goal-based training programs

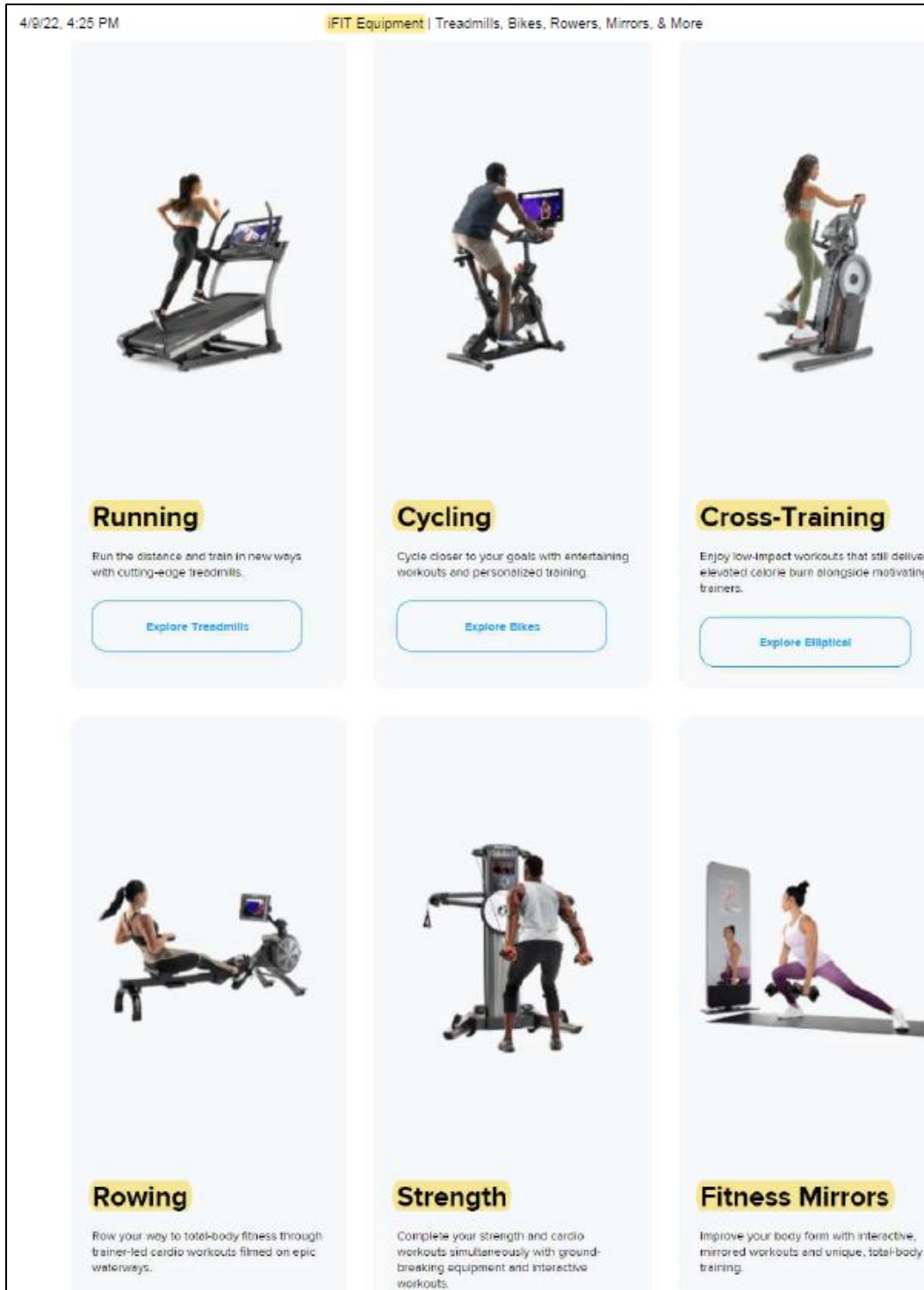
[Start Free 30-Day Trial!](#)

WiFi or internet required. Credit Card required for activation. Individual Membership subscription for \$29/mo., plus tax, unless canceled or otherwise stated at any time.

DISCOVER MORE

Explore iFIT

4/9/22, 4:25 PM **iFIT Equipment** | Treadmills, Bikes, Rowers, Mirrors, & More



Running
Run the distance and train in new ways with cutting-edge treadmills.
[Explore Treadmills](#)

Cycling
Cycle closer to your goals with entertaining workouts and personalized training.
[Explore Bikes](#)

Cross-Training
Enjoy low-impact workouts that still deliver elevated calorie burn alongside motivating trainers.
[Explore Elliptical](#)

Rowing
Row your way to total-body fitness through trainer-led cardio workouts filmed on epic waterways.

Strength
Complete your strength and cardio workouts simultaneously with groundbreaking equipment and interactive workouts.

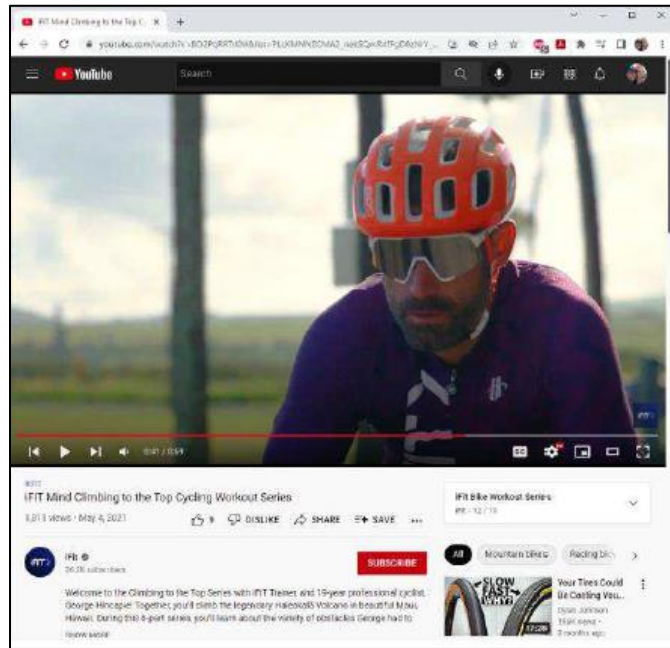
Fitness Mirrors
Improve your body form with interactive, mirrored workouts and unique, total-body training.

Id. at 5, 22, 23 (Watterson Dec. ¶ 8 and Ex. A). Well known athletes and celebrities, including Michael Phelps, Alex Morgan and Jillian Michaels, “have provided

streaming workouts, runs, rides, and routines to IFIT customers and subscribers.”

Id. at 6 (Watterson Dec. ¶ 10).

“IFIT trainers involved in cycling-related exercise videos often wear protective eyewear,” as shown below:



Id. at 10 (Watterson Dec. ¶¶ 14-15). While Opposer’s exercise bikes are for indoor use, and its IFIT bike classes and other bike-related content are intended for users of indoor stationary bikes, Opposer “actively markets its goods and services to cyclists,” including by “providing a streaming exclusive Tour de France workout series, whereby users of the IFIT-branded programs can virtually ride all 21 stages of the 2020 Tour de France on their IFIT-enabled **exercise bikes**.” *Id.* at 10, 67-69 (Watterson Dec. ¶¶ 16 and Ex. K) (emphasis added).

Opposer’s average “annual marketing budget” for the five years prior to trial was significant, but designated “Confidential,” and “[d]uring that time, nearly all marketing materials ... display or have included the IFIT mark across all of

[Opposer's] equipment and accessory lines." *Id.* at 11 (Watterson Dec. ¶ 19). Opposer's "television commercials for IFIT-branded goods and services," which include commercials aired during the 2020 Olympics and Monday Night Football, have "reached millions of people across the United States." *Id.* (Watterson Dec. ¶¶ 21, 24). Opposer has "sponsored major sporting events using IFIT," including the Tour de France ("which takes place in France but has extensive television coverage in the United States") and Boston Marathon. *Id.* at 12 (Watterson Dec. ¶ 25). Opposer's "IFIT-branded goods are also promoted by large national brick-and-mortar and online retailers in the United States, such as Sears, Dick's Sporting Goods and Walmart." *Id.* (Watterson Dec. ¶ 28).

Ads associated with these "large retailer-driven marketing efforts" have appeared in the *New York Times*, *Boston Globe*, *Philadelphia Inquirer*, *Washington Post*, *Chicago Sun-Times*, *St. Louis Post Dispatch*, *Miami Herald*, *Atlanta Journal Constitution*, *San Francisco Chronicle* and *Los Angeles Times*. *Id.* at 13-14 (Watterson Dec. ¶ 29). Opposer's treadmills, exercise bikes and other products are reviewed in a variety of publications, often quite favorably. *Id.* at 14, 122-185 (Watterson Dec. ¶¶ 32-33 and Ex. P). According to *Forbes*, "unlike other companies offering online classes that specialize in one or two types of workouts, NordicTrack makes everything, and one iFit subscription covers them all." *Id.* at 14, 151 (Watterson Dec. ¶ 33 and Ex. P).

Opposer's average annual revenue for the 20 years preceding trial is also significant, but it too is designated "Confidential." *Id.* at 14 (Watterson Dec. ¶ 34).

There is no indication that the figure provided covers only the United States, nor is this figure tied specifically to Opposer’s pleaded IFIT marks. Nonetheless, Opposer’s share of the market for “exercise units sold in the United States in 2021” is impressive by any measure, and its share of the market for “stationary bicycles in the United States for the last decade” is as well. 35 TTABVUE 3, 7-14 (Logan Dec. ¶¶ 5-6 and Exs. A, B). Moreover, the IFIT app “has been downloaded by more than one million users on the Google Play store alone.” Opposer does not specify how many of these users are from the United States, however. 31 TTABVUE 15 (Watterson Dec. ¶ 37).⁵

B. Applicant and Its Involved I-FIT FLEX Mark

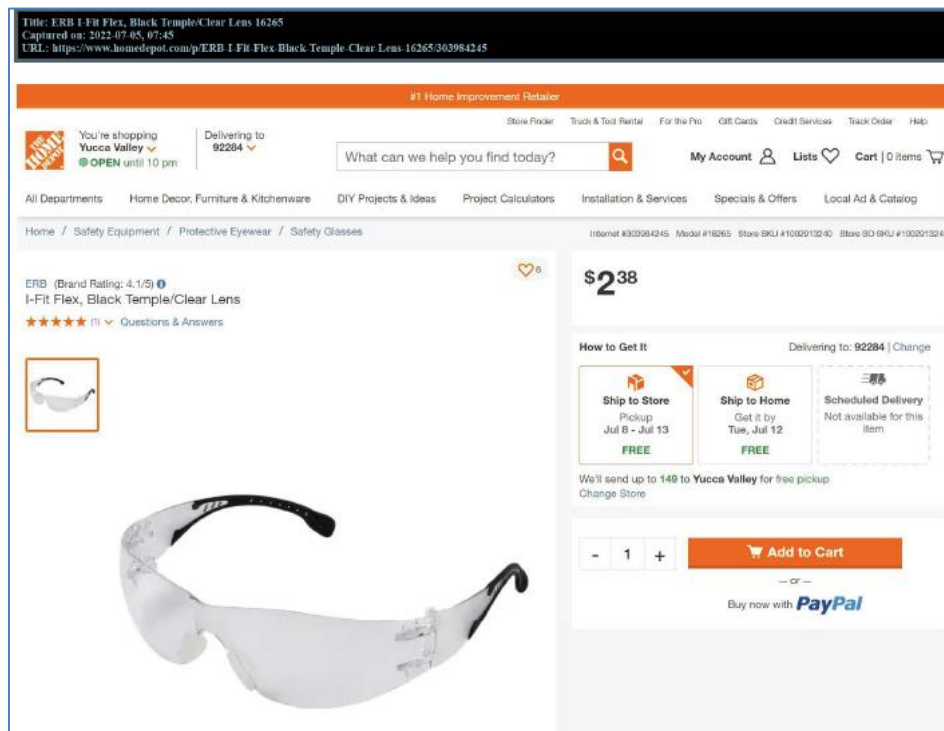
Applicant is “in the safety products industry.” 39 TTABVUE 3 (Barker Dec. ¶ 12). It has offered “personal protection products” since 1971. *Id.* (Barker Dec. ¶ 13). Its products, which include “head protection, eye protection, extremity protection (such as gloves), high visibility apparel, weather protection, and first-aid products” are “sold for the purpose of protecting workers from potentially dangerous working conditions in the construction, manufacturing, and other manual-labor heavy industries.” *Id.* (Barker Dec. ¶¶ 16, 17). *See also* 52 TTABVUE 26-28 (App. Disc. Tr. 21-23).

Applicant “has used its I-FIT FLEX mark solely in connection with protective eyewear” since 2017. 39 TTABVUE 4 (Barker Dec. ¶ 19). The mark is not used with

⁵ Opposer claims to have made “numerous and ongoing efforts to protect” its pleaded marks. 33 TTABVUE 5 (Wilson Dec. ¶ 7). However, the “efforts” are not specifically described and any results achieved are not revealed. Instead, Opposer merely provided a list of case names and numbers, application numbers, and a cursory description of “cease and desist” efforts against third-party uses of marks containing the term “fit.” *Id.* at 34-43 (Wilson Dec. Ex. M).

“general non-safety eyewear,” and Applicant does not manufacture or sell “general non-safety eyewear.” *Id.* (Barker Dec. ¶¶ 23-25).

Applicant’s I-FIT FLEX products are sold through its “printed catalog, qualified sales representatives, and e-commerce website at e-erb.com.” *Id.* at 5 (Barker Dec. ¶ 31). Applicant’s own “website sales are exclusively for wholesalers and distributors,” but Applicant “does not control third-party marketing.” *Id.* at 6 (Barker Dec. ¶¶ 37, 39). In fact, Applicant’s “products can be purchased through homedepot.com,” as shown below:



Id. (Barker Dec. ¶ 41); 36 TTABVUE 25.

III. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020), *cert. denied*, 142 S.Ct. 82 (2021) (citing

Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125-26 (2014)).

A party in the position of plaintiff may oppose registration of a mark when doing so is within the zone of interests protected by the statute and it has a reasonable belief in damage that would be proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020), *cert. denied*, 141 S.Ct. 2671 (2021) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement, and a reasonable belief in damage by the registration of a mark, which demonstrates damage proximately caused by registration of the mark). Here, Opposer's pleaded registrations establish that it is entitled to oppose registration of Applicant's mark on the ground of likelihood of confusion. 18 TTABVUE 13-146 (Opp. NOR 1 Exs. 2-11); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (registration establishes "standing").

IV. Priority

Because Opposer's pleaded registrations are of record, 18 TTABVUE 13-146, and Applicant has not counterclaimed to cancel any of them, priority is not at issue with respect to the marks and goods identified therein. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

V. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth

factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848. We consider the likelihood of confusion factors about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

A. Strength of Opposer’s Mark

We turn first to the strength of Opposer’s mark, to determine the scope of protection to which it is entitled. There are two types of strength: conceptual and commercial. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength ... and its marketplace strength”).

Turning first to conceptual strength, Applicant introduced a dictionary definition revealing that “fit” is an adjective meaning “sound physically and mentally: HEALTHY.” 36 TTABVUE 6.⁶ To illustrate how the term is used, the definition states

⁶ <https://www.merriam-webster.com/dictionary/fit>.

that people may “keep[] fit by playing tennis and handball.” *Id.* Applicant also introduced two third-party registrations for marks containing the term “fit” that are

registered for fitness-related goods or services: **i will be fit** (Reg. No. 2987040) for “exercise fitness program provided via an online computer database;” and FIT-I-M (Reg. No. 5733185) for “stretch bands used for yoga and physical fitness purposes.” 37 TTABVUE 5, 8. While two registrations is not a substantial number, these registrations tend to corroborate the dictionary definition, as they show how “a mark is used in ordinary parlance.” *Juice Generation, Inc. v. GS Enter., LLC*, 794 F.2d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015). Opposer’s use of the term “fit” is consistent with the dictionary definition and the third-party registrations. In fact, in an Instagram post it promoted a “cycling series” featuring “4 different types of rides: fit, strong, powerful and fast.” 31 TTABVUE 48 (Watterson Dec. Ex. H). Thus, when the term “fit” is used for health and fitness-related products or services, it is suggestive of physical fitness and entitled to less weight in our analysis than an arbitrary term.

While there is little evidence concerning the meaning of the “I” in Opposer’s pleaded IFIT/I-FIT marks, we agree with Applicant that in Opposer’s marks the “I” is most likely to “refer[] to the person using the goods or services, indicating that the goods and services make the user healthier.” 47 TTABVUE 25.

Of course, we must presume that Opposer’s pleaded registered marks are inherently distinctive overall, i.e. that they are, at worst, suggestive of Opposer’s goods and services. 15 U.S.C. § 1057(b) (registration is “prima facie evidence of the

validity of the registered mark”); *In re Fiesta Palms, LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) (when a mark is registered on the Principal Register, “we must assume that it is at least suggestive”). *See also In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997). Nonetheless, we have no doubt that “fit” is conceptually weak for fitness-related goods and services, and to a slightly lesser extent IFIT is as well. We therefore find that Opposer’s inherently distinctive marks are conceptually fairly weak.

Turning to commercial strength, Opposer argues that its pleaded marks are “famous.” 43 TTABVue 39-43. Fame is not “an all-or-nothing” proposition, however. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734-35 (Fed. Cir. 2017). Rather, we must determine where to place IFIT on the “spectrum” of marks, which ranges from “very strong to very weak.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)). The stronger the mark, the greater the scope of protection to which it is entitled. *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1056 (TTAB 2017) (“A very strong mark receives a wider latitude of legal protection in the likelihood of confusion analysis.”); *Nike, Inc. v. WNBA Enters., LLC*, 85 USPQ2d 1187, 1198 (TTAB 2007). When a mark is famous or very strong, that plays a dominant role in the likelihood of confusion analysis. *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) (quoting *Recot, Inc. v. Benton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir.

2000)); *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

Fame or commercial strength “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*, 63 USPQ2d at 1305. Other relevant factors include “length of use of the mark, market share, brand awareness, licensing activities, and variety of goods bearing the mark.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012).

Here, Opposer’s evidence falls short of establishing that its pleaded marks are famous. On the one hand, Opposer has used IFIT for over 20 years, its pleaded marks have been fairly prominent in health and fitness media for much of that time, the “ifit.com” website has had many visitors, Opposer’s confidential revenue and advertising figures are significant, and its market share for stationary bicycles “for the last decade,” and exercise units in 2021, is impressive. 31 TTABVUE 11-14, 122-185 (Watterson Dec. ¶¶ 19, 21, 24, 25, 28-30, 32, 34 and Ex. P); 35 TTABVUE 3, 7-14 (Logan Dec. ¶¶ 5-6 and Exs. A, B).

On the other hand, and crucially, Opposer’s average annual revenue figure is apparently not limited to revenues derived from the United States, nor is the figure specifically tied to Opposer’s pleaded IFIT marks. 31 TTABVUE 14 (Watterson Dec. ¶ 34). And while Opposer’s following on social media is consistent with some public recognition, the follower and subscriber numbers for its IFIT goods and services fall

short of establishing “fame,” as they are significantly less than those for marks found to be “famous.” 31 TTABVUE 14, 111-120 (Watterson Dec. ¶ 31 and Ex. O).

Considering the evidence of commercial strength as a whole, we find that Opposer’s pleaded IFIT marks are commercially strong. However, as a result of the evidentiary gaps in the record, Opposer has fallen short of its heavy burden to “clearly prove” fame. *Coach Servs.*, 101 USPQ2d at 1720; *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007).

We find that on balance Opposer’s pleaded marks are conceptually somewhat weak, but enjoy strong recognition among consumers of exercise and fitness equipment, and fitness-related services provided online.

B. The Marks

The marks (I-FIT FLEX vs. iFIT) are highly similar in “appearance, sound, connotation and commercial impression.” *Palm Bay*, 73 USPQ2d at 1691 (quoting *Du Pont*, 177 USPQ at 567). In fact, the hyphen and trailing term FLEX in Applicant’s mark I-FIT FLEX do not meaningfully distinguish it from Opposer’s IFIT mark.⁷

The hyphen in Applicant’s mark is minor punctuation that does not appreciably distinguish it – in appearance, sound, meaning or commercial impression – from Opposer’s IFIT marks. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016) (finding “the hyphen in Applicant’s mark MINI-MELTS [did]

⁷ Opposer pleaded ownership of I-FIT for clothing, a mark that like Applicant’s involved mark includes a hyphen between “I” and “FIT.” We have not focused on this pleaded mark, however, because Opposer’s argument that the goods and services are related is not based on its use of iFIT on clothing.

not distinguish it from Opposer's mark [MINI MELTS]"); *Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1712 (TTAB 2010), *aff'd*, 2011 WL 5400095 (Fed. Cir. 2011) (“[B]oth marks begin with the term MAGNUM or MAG-NUM. Thus, the initial term in both marks is essentially identical; the hyphen in the Mag Instrument’s mark does not distinguish them.”); *Charette Corp. v. Bowater Comm’n Papers Inc.*, 13 USPQ2d 2040, 2042 (TTAB 1989) (finding PRO-PRINT confusingly similar to PROPRINT, and stating “[i]t is also quite obvious that the marks are identical except for the division of registrant’s mark by a hyphen between the syllables”).

Moreover, Applicant essentially concedes that the disclaimed term FLEX at the end of its involved mark merely describes a feature of Applicant’s identified safety glasses. 24 TTABVUE 31-33 (App. Disc. Tr. 26-28). Thus, I-FIT is the dominant portion of Applicant’s mark, as it is settled that descriptive and disclaimed terms such as FLEX are entitled to less weight in our analysis. *Cunningham*, 55 USPQ2d at 1846 (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *see also In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (DELTA, not the disclaimed term CAFÉ, is the dominant portion of the mark THE DELTA CAFÉ).

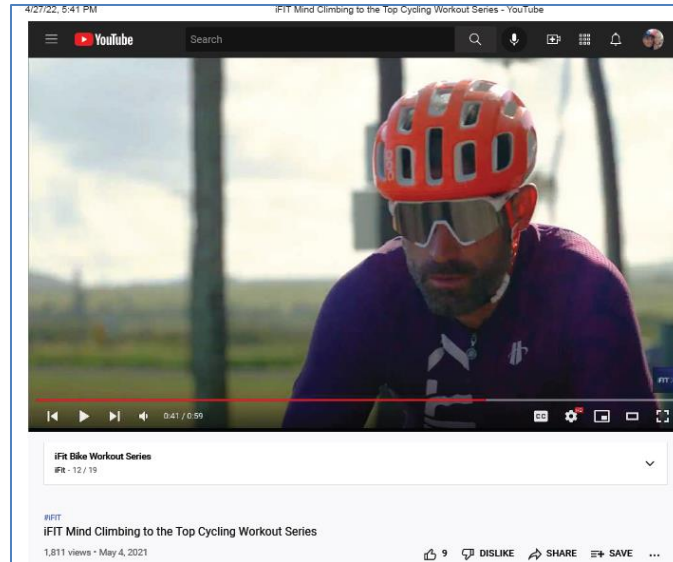
We acknowledge that the term “FIT” conveys a different meaning in Opposer’s mark (fitness) than it does in Applicant’s (the correct size or shape). We find, however,

that this difference in meaning is outweighed by how similar the parties' marks are in appearance and sound. This factor also weighs in favor of finding a likelihood of confusion.

C. The Goods and Their Channels of Trade and Classes of Consumers

In considering the goods and services, we have kept in mind that they need not be identical or even competitive in order to find a likelihood of confusion. Rather, the question is whether the goods and services are marketed in a manner that “could give rise to the mistaken belief that [the] goods [or services] emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 227 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (“Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services.”); *Recot*, 54 USPQ2d at 1898 (“even 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”).

Here, Opposer argues that “Applicant’s protective eyewear is related to Opposer’s exercise equipment and fitness training services because protective eyewear is commonly used in connection with physical activities such as cycling.” 43 TTABVUE 31. It specifically points out that the “iFIT trainers in iFIT’s cycling exercise videos often wear protective eyewear, *id.*, and that “iFIT actively markets its goods and services to cyclists,” as shown below:



31 TTABVUE 9-10, 63 (Watterson Dec. ¶ 14 and Ex. J); 43 TTABVUE 34.

Moreover, Opposer introduced evidence that in online forums “cyclists discuss purchasing safety glasses from hardware stores to use during cycling.” 43 TTABVUE 35. For example, a cyclist posted on reddit.com that after his cycling glasses broke he used a pair of safety glasses he “got at work” instead, and said he was “quite pleased” with them because: they are “light, cheap, keep my eyes safe from dirt, debris, wind and even UVA/B;” and he had no “problem with fogging or sweat building up around the frame or in my eyes.” He asked, “[i]s there anything I’m missing? Are there any major safety or performance issues I am not considering?” 26 TTABVUE 6. The vast majority of responses were supportive, and included the following comments:

“if they work for you, keep using them. I can’t think of any reason to switch or performance you’d be missing out on;”

“those will be fine;”

“I’ve also been using safety glasses for years;”

“I use safety glasses when cycling, too, because I use safety glasses professionally;” and

“As long as they state some level of reliable safety, they’re probably designed to withstand a faulty nail gun firing in your eye. So I trust them on my commute.”

Id. at 6-12. The responses to a quite similar question from another reddit.com poster included the following:

“people do this. it’s ok;”

“can confirm;”

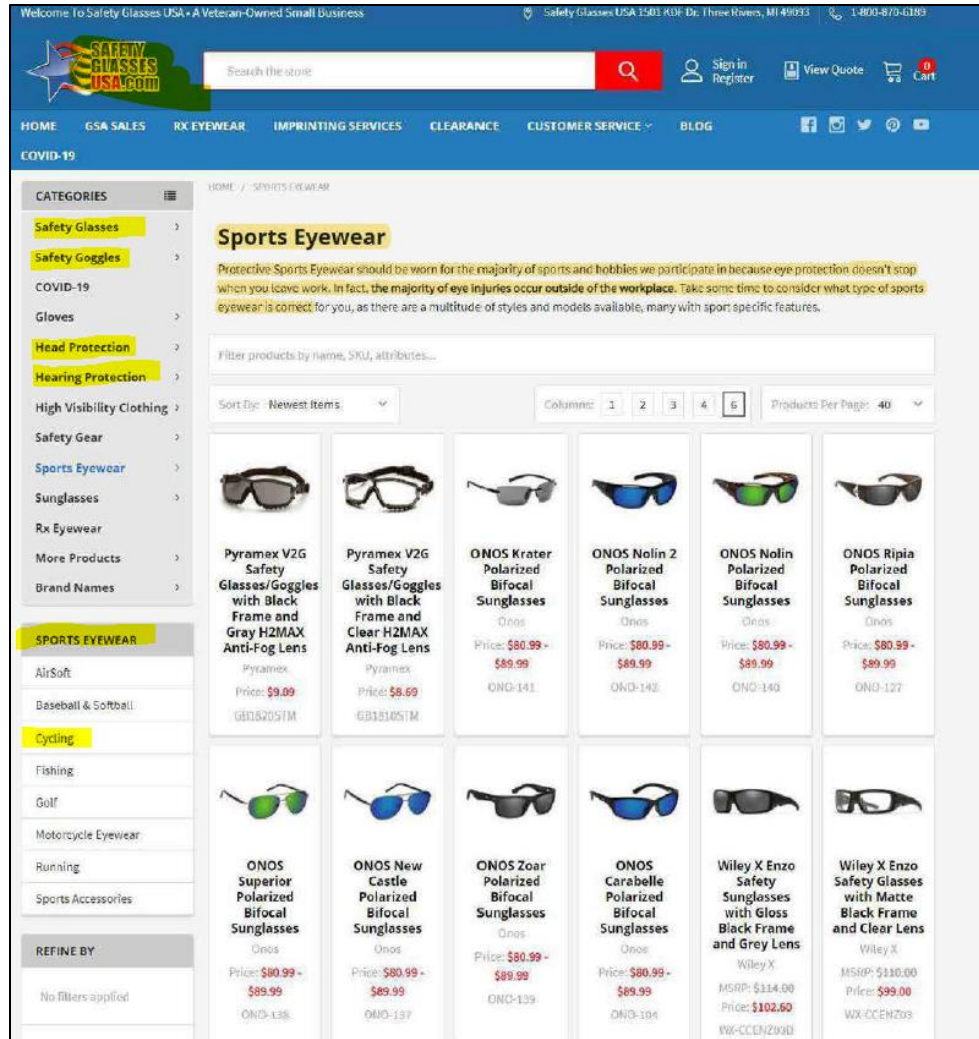
“I’ve seen it mentioned multiple times here ... ‘Cycling’ glasses do end to be a little lighter weight, but that only matters on really long rides;”

“I ride safety glasses I got for 5 bucks at home depot;”

“Cycling glasses are expensive just ‘cos they are marketed differently.”

Id. at 16-20; *see also id.* at 22-31, 49-53.


Opposer also introduced evidence that three third-party sources of safety glasses also offer sports eyewear, including cycling eyewear, as shown in the example below:



Id. at 54, 57; *see also id.* at 62-67, 77-81. As shown, the “safetyglassesusa.com” website offers not just “safety glasses,” “safety goggles,” “head protection” and “hearing protection,” but also “sports eyewear,” including “cycling” eyewear. *Id.*

Finally, Opposer relies on third-party registrations that it argues cover “both protective eyewear and fitness goods, including fitness trackers, treadmills, weights, fitness training services.” 43 TTABVUE 35. However, we do not find any third-party registrations covering safety or protective eyewear and weights probative, because Opposer does not plead ownership of any marks used for weights. Similarly, we do

not find any third-party registrations for eyeglasses but not protective or safety eyewear probative, because Applicant's involved application does not identify eyeglasses. We also have not considered Registration No. 4735699, 27 TTABVUE 21-44, because it is a certification mark covering an astronomically large number of disparate goods. The remaining probative third-party registrations Opposer relies upon which cover safety or protective eyewear on the one hand and fitness trackers, fitness machines or fitness training services on the other are:

UNDER ARMOUR (Reg. No. 5137860) and  (Reg. No. 5193655) are registered to the same owner for "protective eyewear" and "electronic devices, namely, data sensors, transmitters and receivers for relaying physical exercise data."

Airwheel (Reg. No. 5429233) is registered for "protective eyewear" and "exercise treadmills."

ATHLETES INSIGHT (Reg. No. 5600176) is registered for "sports eyewear" and "personal fitness training services."

ENDORPHINS MAKE YOU HAPPY (Reg. No. 6070156) is registered for "retail store services featuring ... eyewear ... exercise equipment"

HISEA (Reg. No. 5199993) is registered for "protective eyewear" and "exercise machines."

27 TTABVUE 6-10, 13, 20, 45-47.⁸ "Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although

⁸ The following registrations identify "eyewear" or "eye shields" but not fitness trackers, machines or training services, and are therefore not relevant: Registration Nos. 5568587, 5710702, 5726043, 6062130, 5423902 and 5423901. 27 TTABVUE 11-12, 14-17, 48-51.

not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source.” *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1998).

Opposer’s evidence does not persuade us that the parties’ goods are related. We accept that outdoor cyclists often use eyewear to protect from debris, dirt, wind or other hazards. But that does not establish that “industrial protective eyewear; safety eyewear” is related to Opposer’s indoor stationary bikes or other fitness or exercise machines. Indeed, there is no need for indoor cyclists to protect their eyes from hazards, and, more to the point, there is no evidence that indoor cyclists wear safety or protective eyewear. Furthermore, there is no evidence that any third-parties offer both industrial protective or safety eyewear and fitness or exercise machines.⁹ While it seems likely that some users of indoor stationary bikes also bike outdoors, that does not make it likely that they would believe that fitness and exercise machines and “industrial protective eyewear; safety eyewear” emanate from the same source. *Coach*

Registration No. 6062130 does not identify fitness trackers, machines or training services, and, although it identifies “eyeglasses,” it does not identify protective eyewear or goods encompassing protective eyewear (i.e. “eyewear”). 27 TTABVUE 18-19.

⁹ The third-party registrations Opposer introduced are not evidence of the extent of third-party use of the registered marks in the marketplace. See *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009) (citing *Olde Tyme Foods Inc. v. Roundy’s Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992)); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009); see also *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) (“The existence of these registrations is not evidence of what happens in the market place or that customers are familiar with them”).

Servs., 101 USPQ2d at 1722. For example, some racecar drivers and chemists also use safety eyewear, but that does not mean that safety eyewear is related to racecars or ammonia. There is even less reason to believe that fitness training services, whether offered by a personal trainer or an app, would emanate from the same source as safety glasses.

While third-party registrations such as those Opposer introduced here “may serve to suggest” that the parties’ “goods or services are of a type which may emanate from a single source,” *In re Mucky Duck*, 6 USPQ2d at 1470 n.6, here there are not enough of them to be persuasive. The fact that a mere five third parties own registrations covering safety or protective eyewear on the one hand and fitness trackers, fitness machines or fitness training services on the other is simply not enough to carry Opposer’s burden of proving a relationship between the parties’ goods and services, especially where the third-party registrations are unsupported by any persuasive corroborating evidence of a relationship between the goods and services.

Nor has Opposer established that the channels of trade or classes of consumers for the parties’ goods and services overlap. Opposer mistakenly claims that because the identifications of goods and services in the pleaded registrations and involved application are unlimited as to channels of trade or classes of consumers, the goods and services “are presumed to travel in the same channels of trade to the same class of purchasers.” 43 TTABVUE 36. In fact, the presumption on which Opposer seeks to rely applies only when the goods and services are identical or quite closely related. Here, where the goods have not been shown to be related at all, the lack of trade

channel restrictions means that we simply presume the goods and services move in all channels of trade normal therefor. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-62 (Fed. Cir. 2014); *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (goods presumed to be “offered in all channels of trade which would be normal therefor”); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

Moreover, Opposer’s evidence and argument that both parties sell their goods through Amazon and Walmart, 43 TTABVUE 36-37, is not persuasive. “A wide variety of products, not only from different manufacturers within an industry but also from diverse industries, have been brought together in the modern supermarket for the convenience of the customer. The mere existence of such an environment should not foreclose further inquiry into the likelihood of confusion arising from the use of similar marks on *any* goods so displayed.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *Mini Melts*, 118 USPQ2d at 1472; *Morgan Creek Prods. Inc. v. Foria Int’l Inc.*, 91 USPQ2d 1134, 1142 (TTAB 2009) (“It has long been held that the mere fact that two different items can be found in a supermarket, department store, drugstore or mass merchandiser store is not a sufficient basis for a finding that the goods are related.”); *7-Eleven v. Wechsler*, 83 USPQ2d at 1724 (“Opposer contends that because applicant’s products may be sold in convenience stores and because opposer sells pet products, the channels of trade overlap. However, we must recognize the following facts: (i) opposer is a convenience

store chain whose individual stores sell a wide variety of products including groceries, snacks, drugstore items, and sometimes gasoline; and (ii) the products at issue are of such diverse nature and utilized for such different purposes that even if all of the products are sold in opposer's convenience stores, consumers would not believe that they emanate from a single source.”).

Opposer's argument that the classes of consumers are the same because “Applicant's goods may be purchased by cyclists,” 43 TTABVUE 37, is also not well-taken. While some outdoor “cyclists” may work out on indoor stationary bikes during inclement weather, the extent of any such overlap between “cyclists” and consumers of Opposer's products and services has not been established. While there is certainly some amount of overlap, we cannot assume overlap sufficient to make confusion likely without evidence. Here there is no evidence that any of the cyclists who posted on the Internet that they use safety glasses for cycling are also consumers of the types of goods and services Opposer offers under iFIT, nor is the number of Internet postings sufficient to establish a meaningful overlap in consumers.

These factors weigh heavily against finding a likelihood of confusion.

D. Consumer Sophistication and Care

We accept Opposer's argument, *id.*, that because Applicant's goods are so inexpensive, Applicant's consumers will not exercise significant care in purchasing. This factor weighs in favor of finding a likelihood of confusion.

E. Opposer's Use of IFIT for a Variety of Goods and Services

Opposer argues that because it offers a “wide variety of health and fitness-related goods and services” under its pleaded marks, consumers may be more likely to believe

that there is a connection between Opposer and Applicant's goods. 43 TTABVUE 43-44. However, because IFIT is not a typical "merchandising mark" used on goods and services beyond Opposer's core field of health and fitness, this factor is neutral. *Cf. DC Comics v. Pan Am. Grain Mfg. Co.*, 77 USPQ2d 1220, 1225-27 (TTAB 2005) (plaintiff's mark was used on "collateral products"); *Time Warner Entm't. Co. v. Jones*, 65 USPQ2d 1650, 1661-62 (TTAB 2002) ("The evidence shows that opposer has licensed that character for use on a wide variety of goods, including automotive items ... and office stationary items"); *Harley-Davidson Motor Co., Inc. v. Pierce Foods Corp.*, 231 USPQ 857 (TTAB 1986) (HARLEY-HOG for pork likely to be confused with HARLEY-DAVIDSON and HARLEY for motor vehicles and a wide range of unrelated consumer products including beverages and chocolate bars but not meat).

VI. Conclusion

Although the parties' marks are similar and Opposer's pleaded marks enjoy some commercial strength, Opposer uses its marks on health and fitness goods and services, while Applicant's mark is used for industrial protective eyewear and safety eyewear. Opposer has failed to show that the parties' goods and services are related, or that they travel in the same channels of trade to the same classes of consumers. This failure is dispositive. Here, because the goods are not related, confusion is unlikely notwithstanding that the marks are similar. *See Kellogg Co. v. Pack'em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single *duPont* factor may not be dispositive."); *Local Trademarks Inc. v. The Handy Boys Inc.*, 16 USPQ2d 1156, 1158 (TTAB 1990) ("even though opposer's services and applicant's product are or can be marketed to

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the same class of customers, namely plumbing contractors, these services and goods are so different that confusion is not likely even if they are marketed under the same mark”); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668, 1669-70 (TTAB 1986) (opposition dismissed because the goods were “quite different,” notwithstanding that the marks were the same).

Decision: The opposition is dismissed.