This Opinion is not a
Precedent of the TTAB

Hearing: October 18, 2017 Mailed: March 16, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Hybrid Athletics, LLC
v.
Hylete LLC

Opposition No. 91213057

On Request for Reconsideration

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

Pattric J. Rawlins of Procopio, Cory, Hargreaves & Savitch LLP for
Hylete LLC.[1]

Before Mermelstein, Wellington and Shaw,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

On December 15, 2016, the Board issued a final decision (the "Final Decision") sustaining Hybrid Athletics, LLC's ("Opposer") opposition to the registration of

[1] On January 13, 2017, Applicant filed a revocation of power of attorney and appointment of new attorney. 71 TTABVUE.

Hylete LLC's ("Applicant") proposed mark on the ground of likelihood of confusion, under Section 2(d) of the Trademark Act.[2]

Applicant has filed a request for reconsideration of the Final Decision, which has been fully briefed.

"[T]he premise underlying a request for … reconsideration … is that, based on the evidence of record and the prevailing authorities, the Board erred in reaching the decision it issued. The request may not be used to introduce additional evidence, nor should it be devoted simply to a reargument of the points presented in the requesting party's brief on the case." TBMP § 543 (2016).

In its request, Applicant argues the Board erred in reaching the Final Decision in three respects:[3]

> Specifically, (1) the Board erred by giving unwarranted weight to purported evidence of actual confusion; (2) the Board failed to consider *du Pont* factor number four, despite the evidence presented by Applicant with respect to this factor; and (3) the Board's analysis of the similarity or dissimilarity of the marks was based on a misapprehension of the commercial impression of Applicant's mark.

The Actual Confusion Evidence

Applicant argues that the Board gave "unwarranted weight" to testimony from employees of the company CrossFit, Inc. ("CrossFit") because, according to Applicant, CrossFit has an interest in the outcome of this proceeding and "acted as an unnamed party throughout the present Opposition proceedings."[4] Applicant points out that

[2] 70 TTABVUE.

[3] *Id.* at 2.

[4] *Id.* at 3-4.

CrossFit's counsel, Ms. Sarah Munn, was present at several depositions and, relying on the manner in which she was introduced, concludes that she was acting "as assistant to counsel for Opposer."[5] Applicant also concludes that "at a minimum [CrossFit] provided economic support by instructing its attorney employee, Ms. Dunn, to attend multiple depositions during the present opposition proceeding."[6]

Upon review once more of CrossFit's interest in this opposition proceeding, we find no error in the Final Decision or that we gave undue weight to the testimony of CrossFit employees. Ms. Munn's attendance at several depositions was no secret -- we note she is identified in all transcripts as "counsel for CrossFit" and was clearly introduced in the following manner:

> Mr. Kosma [Opposer's counsel]: My name is Michael Kosma. I'm with the Whitmyer IP Group. I'm here on behalf of Hybrid Athletics, and with me is Sarah Munn.[7]
>
> * * *
>
> Mr. Kosma: … With me is Sarah Munn, and she will be assisting me with the exhibits I'm using, and also she will be observing the deposition.[8]
>
> * * *
>
> Mr. Begakis: All right. So I will start by having everyone in the room identify themselves, ending with the witness. And for third parties in attendance, explain the reason that they're here.
>
> Mr. Wilson: Ron Wilson, CEO of Hylete.

[5] *Id*. at 5.

[6] *Id.* (Note 1).

[7] 37 TTABVUE 10 (Wilson deposition).

[8] 38 TTABVUE 6 (Potter deposition).

> Mr. Kosma: Mike Kosma here on behalf of Hybrid Athletics. I'm an attorney from the Whitmyer IP Group. At John's request, for the third party to identify the reason, there's no requirement to, but I do have Ms. Sarah Munn here, and she's assisting me with exhibits and helping me out with just logistics of the deposition.
>
> [during this deposition Ms. Munn was requested to leave the room during questioning involving the witness' opinion of CrossFit. Counsel for the parties agree to this and Ms. Munn temporarily excused herself.][9]
>
> * * *
>
> Ms. Munn: Sarah Munn from CrossFit, Inc.
>
> Mr. Begakis: Are you an attorney for CrossFit?
>
> Ms. Munn: Yes.[10]

Furthermore, the Board was fully aware of CrossFit's role in this proceeding, including Opposer's status as a CrossFit affiliate and the involvement of Opposer's principal in CrossFit activities. This information was duly noted in the Final Decision.[11] CrossFit's interest in this proceeding was not ignored and was considered in weighing the probative value and reliability of the testimony provided by CrossFit employees. A party, its employees, or affiliates are often the best or only source of highly relevant testimony in a Board proceeding. The fact that a witness has a direct or indirect interest in the outcome of the proceeding should be considered, but that fact alone does not justify ignoring that witness' testimony. Applicant did not argue that the testimony offered by CrossFit employees regarding the instances of actual

[9] 39 TTABVUE 7-8 (Null deposition).

[10] 40 TTABVUE 7 (Paulson deposition).

[11] 70 TTABVUE 7-8.

confusion was fabricated. Indeed, as noted in the Final Decision, testimony from one CrossFit witness involving an incident in which he expressed confusion was corroborated by Applicant's own witness.[12]

Applicant also takes issue with the Board's reliance on testimony from a third party, Jason Leydon, who stated that he was confused after ordering shorts from Applicant because he believed that Applicant's H design mark looked "a lot like" Opposer's mark.[13] Applicant contends that the Board should not consider this as an "actual confusion" incident because Mr. Leydon's decision to purchase the shorts was not influenced by the similarity of the marks. Applicant argues that "for purported evidence of actual confusion to be relevant, it must be evidence of confusion that affects purchasing decisions specifically,"[14] citing *Sunenblick v. Harrell*, 895 F. Supp. 616, 38 USPQ2d 1716 (SDNY 1995).

The Final Decision made clear the relevant factual circumstances behind Mr. Leydon's testimony; namely, as Applicant correctly points out, Mr. Leydon did not make his decision to purchase the goods based on the similarity of the parties' marks. Rather, Mr. Leydon stated that his "confusion" occurred after his purchase and upon seeing Applicant's mark on the goods. Mr. Leydon then mistakenly believed Opposer was affiliated ("had some sort of role") with the source of the goods based on the similarity of the parties' marks.

[12] *Id.* at 19-20.

[13] *Id.* at 19.

[14] 70 TTABVUE 6.

Applicant has not shown that the incident recounted by Mr. Leydon is not "actual confusion" or, more importantly, has no relevance to the likelihood of confusion analysis. The circumstances of this proceeding are distinguishable from those in *Sunenblick*, as well as *Lang v. Retirement Living Publ'g Co., Inc.,* 949 F.2d 576, 21 USPQ2d 1041, 1046 (2d Cir. 1991), which was cited by the District Court in *Sunenblick*. In both *Sunenblick* and *Lang*, the courts accorded no or little weight to instances of reverse confusion because they did not involve an actual purchaser or prospective purchaser of the involved goods. As the Second Circuit explained in *Lang*:

> Evidence of actual reverse confusion that might support Lang's claim would involve purchasers or prospective purchasers of Lang's products who believed that they were produced by or affiliated with Retirement Living's magazine. Appellant, however, has failed to proffer any such evidence. Similarly, Lang has not shown that these misdirected callers were prospective purchasers of Lang's products. In sum, there is no reason to believe that confusion represented by the phone calls could inflict commercial injury in the form of either a diversion of sales, damage to goodwill, or loss of control over reputation. Accordingly, this evidence failed to demonstrate a genuine issue as to any material actual confusion.

Lang, 21 USPQ2d at 1046. In other words, the Second Circuit declined to consider the purported evidence as "actual" confusion because it was not shown that the confused individuals were purchasers or prospective purchasers of the relevant goods. In contrast, Mr. Leydon was an actual purchaser of the involved parties' goods, *i.e.*, athletic shorts. His testimony is clearly relevant given his confusion over the source of the goods upon receiving them based on the similarity of the parties' marks. His status as a buyer of the involved goods, as well as an individual with experience in the field, increases the probative value of his testimony.

We also keep in mind the totality of the evidence involving instances of confusion and the weight given to this evidence in view of the fact that these marks have coexisted for only three to four years and the goods are relatively inexpensive. As Professor McCarthy advises, "the evidence of the number of instances of actual confusion must be placed against the background of the number of opportunities for confusion before one can make an informed decision as to the weight to be given the evidence." J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 23:14 (4th ed. 2017) (Actual confusion as evidence of a likelihood of confusion—Weight of the evidence).

Ultimately, we find that Mr. Leydon's testimony regarding his post-purchase confusion is relevant to the likelihood of confusion analysis. The testimony, along with the other testimony regarding confusion based on the similarity of the marks, was appropriately weighed, bearing in mind the status of the persons testifying and the factual circumstances surrounding the incidents. Accordingly, we find no error in the weight we gave to Mr. Leydon's testimony.

The Fourth du Pont Factor

Applicant argues in its request for reconsideration that the Board erred by failing "to consider *du Pont* factor number four, despite the evidence presented by Applicant with respect to this factor."[15] Applicant argues that it "presented evidence showing the relatively higher cost of its premier athletic apparel when compared to competing products in the marketplace, an indicator that the consumers purchasing Applicant's

[15] 72 TTABVUE 2.

expensive products are more sophisticated and will exercise caution when selecting Applicant's products."[16] Applicant notes that it argued in its trial brief that "[a]n average crewneck tri-blend t-shirt bearing Applicant's stylized logo sells on Applicant's e-commerce website for $35.00, while the average comparable crew-neck t-shirt bearing the Under Armour [logo] sells for $24.95."[17]

Applicant's argument in its trial brief with regard to this factor was an attempt to disprove Opposer's contention that the goods were subject to impulse purchasing.[18] Applicant did not actually argue in its trial brief that the relevant consumers of the parties' goods are "sophisticated" or would exercise a higher degree of care than normal when purchasing the goods, but asserted that "consumers of such goods do not purchase the goods on impulse."

In any event, the fact that Applicant may sell its goods at prices higher than competitors set for the same goods is irrelevant given that Applicant's goods are identified as "athletic apparel, namely, shirts, pants, shorts, jackets, footwear, hats and caps," without any restriction as to their price point. Thus, for purposes of registration, we must consider Applicant's goods to include athletic apparel sold at any price that is usual for goods of that type, including prices comparable to Under

[16] Id. at 9.

[17] 62 TTABVUE 22-23. We further note that Applicant did not cite to any evidence in the record to support this claim in its trial brief

[18] Indeed, Applicant ends its discussion of this factor by asserting that "[Opposer's] contentions are not grounded in fact or supported by case law, and Applicant's Trial Brief clearly establishes that Applicant and Opposer's goods are relatively expensive and not purchased on impulse." 62 TTABVUE 23.

Armour's athletic wear.[19] *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157 (Fed. Cir. 2014) (determinations in our likelihood of confusion analysis based on the goods as they are identified in the Application).

As stated in the Final Decision, the Board gave "consideration [to] all relevant *du Pont* factors." In this proceeding and based on the evidence of record, the fourth *du Pont* factor involving the sophistication of the relevant consumer did not influence the overall likelihood of confusion analysis. While it may have been better to state in the Final Decision that this factor was "neutral," we find no error in failing to do so.

Alleged Error Based On
"Misapprehension of the commercial impression of Applicant's mark"

Finally, Applicant argues in its request for reconderation that the Board erred in the Final Decision because:[20]

> [T]here was no record evidence demonstrating that consumers would view Applicant's mark as a stylized H, [thus] the Board erred in reaching such a conclusion. This erroneous conclusion with respect to the commercial impression of Applicant's mark led to an improper analysis of the similarity or dissimilarity of the marks. Specifically, despite identifying numerous design differences and only one design similarity in the marks, the Board nonetheless found that "[t]he design differences between the two marks are outweighed by the fact that [they] are both stylized versions of the same letter, H, and will thus have similar commercial impressions."

In addressing this argument on reconsideration, we initially note that it is in stark contrast to Applicant's own characterization of the marks in its trial brief:[21]

> When the Board performs its analysis, it will find two distinct letter "H" marks that already co-exist with one hundred and thirty five (135) other

[19] We also note, for example, that Opposer's shirts sell for as low as $ 25. See 57 TTABVUE 412 (Orlando Ex. 57).

[20] 72 TTABVUE 10, quoting Final Decision at 70 TTABVUE 17.

[21] 62 TTABVUE 5.

> "H" marks registered to International Class 25, thirty-three (33) of which are specifically used in connection with athletic-related clothing.

Indeed, Applicant described the mark in its own Application as "consist[ing] of [a] stylized 'H'." These statements are admissions that the mark is a stylized letter "H."

Even if we were not to rely on these admissions , we find no error in the Board's characterization of Applicant's mark as a stylized letter H and finding that consumers are likely perceive the mark as such. The finding is based on a reasonable interpretation of the mark and how it will be viewed. As for evidence as to how Applicant's mark would be perceived, we point out that Applicant's own CEO, Ron Wilson, testified that although he believed the involved marks are overall very different, they both comprise a stylized letter H:[22]

> I don't see how anyone looking at these two logos would think they look alike. I can see how maybe if you say they're similar, that they both are H's in a very broad context like a lot of other logos are, then I'll give you that.

In sum, the Board's finding that the parties' marks would likely be perceived as stylized letter H logos was based on a reasonable visual interpretation of the marks, the entire record, as well as the parties' own descriptions of their marks. The Board noted differences between the marks but ultimately found them to be similar in commerical impression and we find no error in this regard in the Final Decision.

For the aforementioned reasons, Applicant's request for reconsideration is hereby denied.

[22] 37 TTABVUE 155.