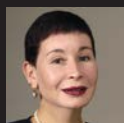


Letter From the Editor



Spring is around the corner and we look forward to the end of another long winter! We are excited about our most recent issue of *The Katten Kattwalk*. We are very pleased to feature my friend, Pamela Weinstock, vice president and associate general counsel at Kenneth Cole. Pamela was gracious enough to speak with us about her passions, the evolving fashion industry and her career. We also include insight on new case rulings and their implications, specifically in trademarks cases involving PNC, Adidas AG and the Urock Networks. We hope you enjoy this issue, and as always, please feel free to contact me or anyone else at Katten to guide you through any of these matters.

Karen Artz Ash

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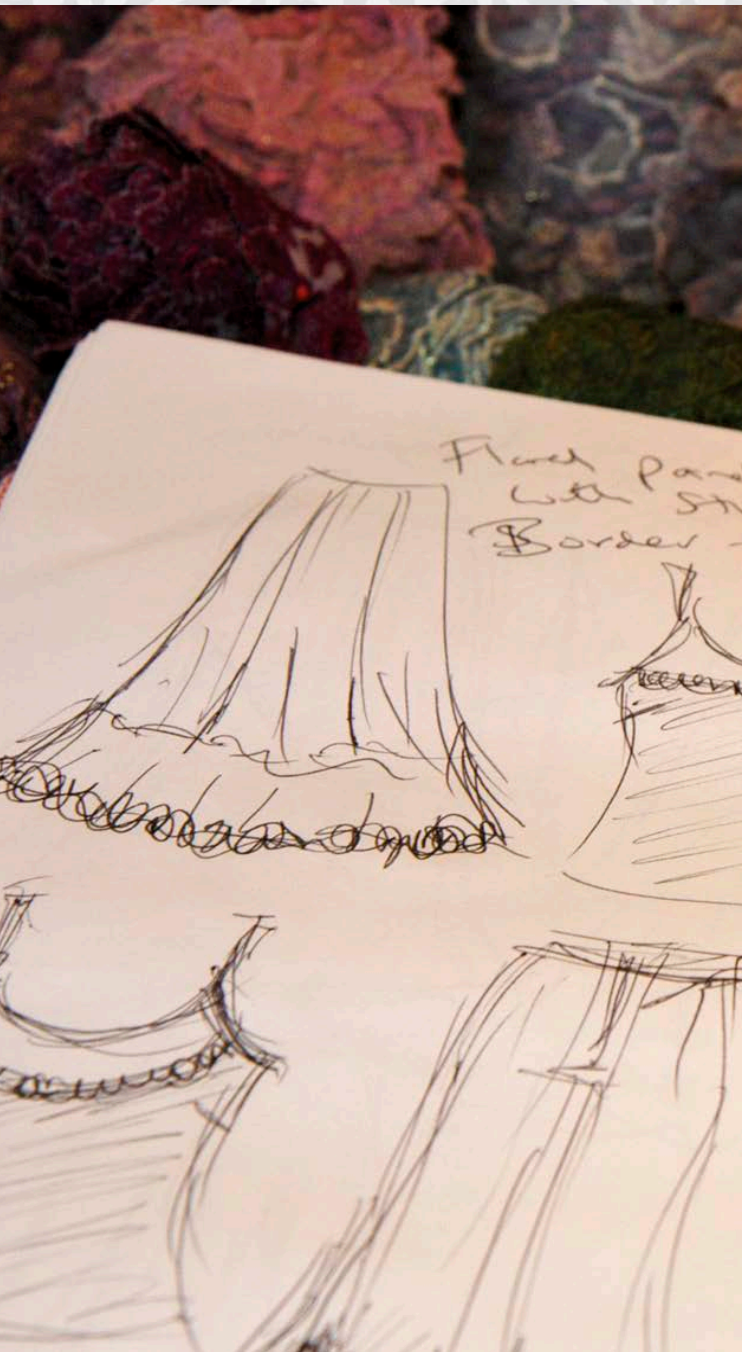
Issue Preclusion Applied to Priority Dispute

by Karen Artz Ash and Bret J. Danow

In 2015, the US Supreme Court issued a decision in *B&B Hardware, Inc v Hargis Industries, Inc.* which held that a court should give preclusive effect to decisions made by the US Patent and Trademark Office's Trademark Trial and Appeal Board (TTAB) if the ordinary elements of issue preclusion are met. Although the particular issue which was addressed in the *B&B Hardware* case was whether a TTAB decision should have a preclusive effect in the context of a likelihood of confusion analysis, a recent district court decision indicates that the courts will apply the holding in *B&B Hardware* in other contexts.

Specifically, in *Ashe v The PNC Financial Services Group, Inc.*, the US District Court for the District of Maryland determined that preclusive effect should be given to a TTAB finding on priority. PNC had filed a notice of opposition with the TTAB against Ashe's trademark application for the mark Spendology, claiming that it had senior rights in and to the identical mark. The TTAB granted a motion for summary judgment which PNC had filed, finding that there was no genuine issue of material fact that PNC had established prior use of the mark over Ashe. Ashe subsequently filed a complaint against PNC alleging that PNC's use of the Spendology mark constituted trademark infringement and PNC responded by filing a motion to dismiss.

In determining whether to apply issue preclusion, the court considered five factors, namely whether: (1) the issue or fact is identical to one previously litigated; (2) the issue or fact was actually resolved in the prior proceedings; (3) the issue or fact was critical and necessary to the judgment in the prior proceeding; (4) the judgment in the prior proceeding is final and valid; and (5) the party to be closed by the prior resolution of the issue or fact had a full and fair opportunity to litigate the issue or fact in the prior proceeding.



The key factor in the court’s analysis was whether the issue of priority in the litigation is identical to the issue of priority in the opposition proceedings. The court in *Ashe* held that, unlike in *B&B Hardware* where issue preclusion did not apply because the “likelihood of confusion” test applied by the TTAB when considering an opposition did not equate to a determination of “likelihood of confusion” for purposes of analyzing a claim for trademark infringement, the determination of priority for purposes of a trademark application is the same as the determination of priority of use for the purposes of infringement claims. Since all of the other factors for applying issue preclusion applied, the court granted PNC’s motion to dismiss.

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Whereas this case serves as a reminder that a court may allow a TTAB ruling to serve as the final decision on some issues, it also indicates that parties unhappy with a TTAB decision should carefully consider whether additional issues may apply to a litigation which did not apply to the TTAB proceeding.

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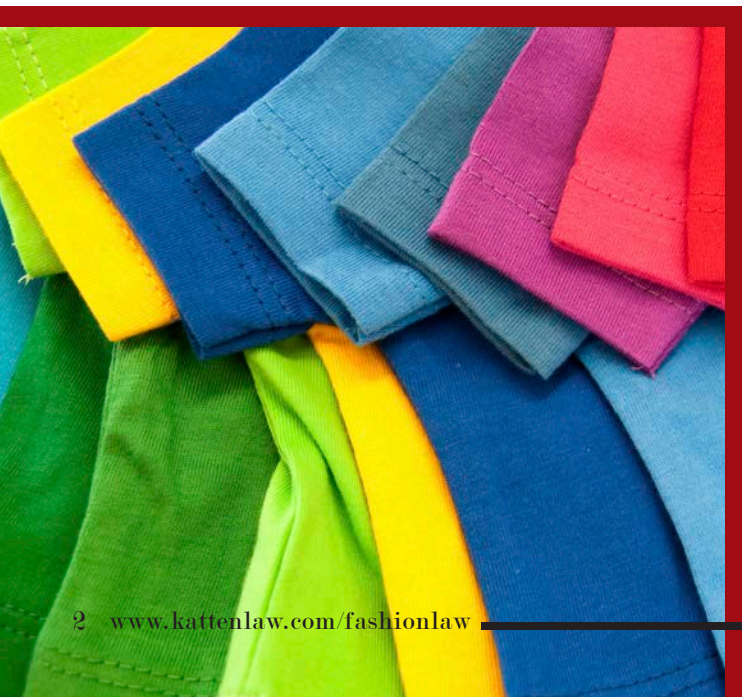
If *Ashe* had been able to proffer evidence of his use of the *Spendology* mark in connection with services other than those recited in his trademark application, it is possible that the issues may not have been identical to those previously litigated such that the TTAB decision would not have been granted a preclusive effect.

Registration Cancelled for *De Minimis* Use

by **Karen Artz Ash** and **Bret J. Danow**

In September, in *Adidas AG v Christian Fellowship Church*, the US Patent and Trademark Office’s Trademark Trial and Appeal Board (TTAB) issued a non-precedential, but potentially instructive, opinion in which it sustained a petition for cancellation on the grounds of non-use. The case analyzed whether sales of only a small number of goods by Christian Fellowship Church constituted “use in commerce” under the Trademark Act.

Adidas had filed a trademark application for the mark *Adizero*, which was refused based upon a likelihood of confusion with two trademark registrations owned by the respondent, Christian Fellowship Church, for the mark *Add A Zero* (one stylized and one in standard letters). Adidas subsequently filed a petition for cancellation, claiming, among other things, that the registrations were void ab initio because the subject marks were not in use in interstate commerce as of the filing date of the underlying use-based applications.



During the cancellation proceedings, the TTAB explored the extent to which the respondent had used its Add A Zero marks. The evidence showed that the respondent operated a church in Illinois, which had a book store in the basement where it sold “a modest quantity” of shirts and caps embroidered with the Add A Zero mark. Such sales included approximately 60 Add A Zero caps and 70 Add A Zero shirts which were sold between January 9, 2005 (the date of first use recited in the Add A Zero trademark registrations) through March 5, 2005 and no additional sales before the March 23, 2005 filing of the use-based applications for the subject marks. All sales of the Add A Zero shirts and caps during that period were made to purchasers who were physically present at the respondent’s Illinois bookstore.

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To counter Adidas’ allegations of non-use, Christian Fellowship Church pointed to sales of one shirt and one cap made on January 30, 2005 and two caps made on February 22, 2005 to customers who may have lived outside of Illinois and to offers to sell Add A Zero branded merchandise to out-of-state parishioners. The TTAB, however, found that the sale of two caps, at a minimal cost, made in the state of Illinois to a customer who lives in a different state “...does not affect commerce that Congress can regulate such that the transaction would constitute use in commerce for purposes of registration.”

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The TTAB would not allow the respondent to rely on the fact that its products could have been purchased by people who reside outside the state as evidence of a sale that *could* arguably affect interstate commerce. As such, the respondent was left with the sale in Illinois of two caps to a Wisconsin resident as its only evidence of a use in interstate commerce. This sale was considered by the TTAB to be *de minimis* and insufficient to show use that affects interstate commerce.

Although the decision in *Adidas AG* is not precedential, it may serve as an indicator as to how the TTAB will decide future cases where a registrant has only sold a relatively small amount of goods and where those sales are local. Caution is warranted for trademark owners when basing a use-based trademark application on the sale of only a few of the products to be identified in their applications. Similarly, parties seeking to cancel a trademark registration based on non-use would be wise to explore the amount of products that a registrant had sold under the mark at issue.



Zia Modabber Comments on California Law Regarding Celebrity Likeness on NPR

Zia Modabber, head of the Los Angeles Litigation and Dispute Resolution practice, was interviewed on NPR’s “Planet Money” podcast on the matter of who owns a celebrity’s face after he or she dies. The program focused on Frank Sinatra’s estate, the recent celebrations for his 100th birthday and how the estate is very particular with regards to how Frank Sinatra’s likeness is used. Zia commented on the California civil code that addresses the usage of likeness for a person who’s no longer alive, stating, “Essentially what it says is that you can’t take someone’s name, likeness, signature or voice and use it for commercial gain without permission from that person and if you do that then you are liable and can be sued and forced to pay damages.” (“Frank Sinatra’s Mug,” December 9, 2015)



Floyd Mandell Discusses “Orphan Works” and Copyright Law

Floyd Mandell, national co-chair of Katten’s Intellectual Property department and co-head of the Trademarks and Trademark Litigation practice, comments on “orphan works” in response to a Law360 question following a California judge’s recent ruling that Warner/Chappell Music Inc. does not own a valid copyright of the song “Happy Birthday to You.” Floyd notes that with “orphan works,” it is difficult or impossible to know from whom to seek a usage license or to calculate when or if it fell into the public domain. “One limited solution is some form of equitable ‘compulsory license’ structure,” he states. “The benefit is that the financial exposure of the party that used the orphan work would be limited to a predictable license fee.” Floyd is an IP Law360 Voices of the Bar panelist who weighs in on emerging issues in the intellectual property arena. (“What Shall We Do About ‘Orphan Works?’” September 29, 2015)





Through
the Lens



Pamela Weinstock

-----[devotion]-----

Have you always had a passion for art and fashion?

For me, fashion is art that you are lucky enough to be able to wear. Art has always been very meaningful to me as I have been involved from an early age in many of its forms. My media have included painting and photography, dance and choreography, guitar and piano, makeup artistry, and jewelry design. Because of my background, I consider issues from the points of view of both an artist and a lawyer.

Artists in all fields innovate and improvise, and their fellow artists begin to build on these changes with their own innovations. Soon everyone is speaking a new language. I see a great deal of similarity in the manner in which the arts develop. Visual art develops into movements such as Impressionism and Surrealism and music into genres like the Blues and Jazz. Fashion develops trends that may take hold as major style developments or classics.

Laws have developed to support this natural progression of art by attempting to strike a balance between creators' rights and others' creative efforts. In fields like fashion design, which integrate aesthetics with function, more use by others may be allowed.

-----[vision]-----

How do you envision the fashion industry evolving over the next five to ten years?

Technology is truly starting to make an impact throughout the fashion industry, from the products to the manner in which they are marketed and sold. Over the next five to ten years, we should see an even greater impact.

Wearable technology is increasing the functionality of fashion, and we should see greater development in what our apparel and accessories can do for us and how. As a result, we may see many more co-branding relationships and joint ventures between fashion houses and tech companies. 3D printing technology is getting better and becoming more reasonably priced with a greater selection of materials, making it a more viable option for fashion companies and consumers in the near future. As has happened in film and publishing, 3D printing and other new tools may afford greater access to aspiring designers to get their start, and to individuals to take an active role in customizing their fashion items. We may be printing apparel and accessories in stores, in 3D printing centers or even at home. Brands may be able to leverage this upcoming technology to create a more



-----{ forefront }-----

“Advances in technology may provide helpful tools involving virtual reality viewing”

bespoke experience for their customers. Core products may be able to be altered to fit individual needs, with custom measurements, fabrics and materials, color preferences, and more. Also, there may be less waste and a lower carbon footprint for manufacturing processes and transportation of products and materials, since 3D printing creates products on-site and uses additive manufacturing to build a product, eliminating leftover material and possibly packaging in many instances.

With the ease of creating copies from files or even scans of objects themselves, however, there may come an increased concern regarding infringements and counterfeiting activity. Brand owners will need to be even more vigilant, and it remains to be seen how the law will develop to address such issues. One initiative which may be helpful both for designers and potential purchasers would be the development of clearinghouses of code for objects for purchase or fair use, similar to what we now see for photography and in the music industry.

How we shop is also evolving with technology. Many consumers now look online for their fashion and other shopping needs, rather than traveling to the physical locations of stores. Because of that, it will continue to be crucial for brands and retailers to make the online shopping experience as user-friendly as possible. Advances in technology may provide helpful tools involving virtual reality viewing or 3D imaging of products, and applications indicating fit and appearance for a particular customer. Also, as consumers spend more time online, advertising and brand awareness through websites, social media and other outlets will take on increased importance. Brands may be able to customize, tailor and recommend additional items now and in the future given the customer's preferences, creating a digital personal shopper experience.

-----{ collaboration }-----

What do you find most important in the in-house/outside counsel relationship?

I look to outside counsel for subject matter expertise and for additional resources on time-sensitive matters. Responsiveness, experience in the field and the ability to provide excellent legal and business insight in a cost-effective manner are key. Advice should be geared towards how to move forward with the practical needs

of the business. For in-house counsel, many matters can be on a tight turnaround. When you reach out to outside counsel to discuss a matter, you want to hear up front a certain level of familiarity and experience. If he or she can also identify best practices in the industry, risks and solutions, then you are glad you made that call.

-----{ insight }-----

What advice would you give to yourself at the start of your career, knowing what you know now?

That it is best not to get caught up in the generalizations you hear about legal practice, and really for most things in life! I have noticed that newly minted attorneys often approach me to discuss how to reach their career goals. I am frequently asked how to get into fashion law, which has become a recognized legal practice area in its own right during the past few years. Usually these associates repeat what has been passed down to them by well-meaning friends and colleagues. They say that attorneys at law firms get the best training at the highest pay but have incredibly long hours, and that in-house positions pay less but have better work/life balance. Their plan often is to first spend a certain number of years at a law firm, the bigger the better, and preferably in a corporate practice group, as they understand that only then would they be considered as a candidate for an in-house position. And at that point, they only want to consider companies in a particular industry or segment.

While there may be a kernel of truth here, the reality is that there is no one path. There are many in-house attorneys that came not from the corporate department, but from different practice areas at law firms, such as litigation or real estate, or in my case, intellectual property. And there are in-house attorneys who have never worked at a law firm, or who started at a company and moved to law firms. Also, many folks don't always stay in one industry. You can work in related fields, and gain industry experience and knowledge, which will help you going forward in your career. I did not start out in fashion. I have worked at both large and small law firms, and in-house in the entertainment industry as the general counsel of an interactive television company and on the executive staff at the Writers Guild of America, East, the union for television and film screenwriters, in the beauty industry at Coty Inc., and

continued on page 6

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“I am now starting to see these industries more formally grouped together as perhaps a larger practice area”



continued from page 5

now in fashion at Kenneth Cole Productions, Inc. And while I have always maintained that much of my practice has remained consistent in these different but related industries, I am now starting to see these industries more formally grouped together as perhaps a larger practice area, in particular with the recent launch of Cardozo Law School's FAME Center for studies in fashion, arts, media and entertainment law.

On another note, I would have liked to have heard just how important it is to become involved in your legal community. A lot of young associates tend to silo themselves off within their law firms or companies. Particularly given the long hours in law together with

other commitments, attorneys often feel that they do not have the extra time to attend functions or join committees of the bar associations, alumni groups or trade associations in their field. Or if they do make an attempt, they may find these meetings intimidating and feel that it is hard to make connections or relate to the subject matter. My advice would be to make the time and go, and stick with it. Find one or two avenues that work for you and take it from there. Once I did get more involved much later on in my career, I found the career direction, information and relationships developed to be invaluable. It is a great privilege to have the opportunity to meet and speak to attorneys in every practice area, at all levels of seniority. And your connections can create many options and opportunities along the way.

When Is Discount Pricing Considered to be Deceptive? Practical "Tips"

by David B. Sherman and Jessica M. Garrett

A recent spate of consumer class-action lawsuits has brought attention to discount- and outlet-pricing tactics. A number of well-known fashion designers and retailers have been sued under various state and federal laws for deceptive pricing practices. Many of these lawsuits allege that the use of "false" original prices on discounted or outlet merchandise (where the referenced "retail" price for the item is either artificially inflated or never existed) communicates "illusory discounts" or "phantom markdowns" and violates various state unfair competition and false advertising laws, among others, and the Federal Trade Commission Act.

In January 2014, a group of congressional Democrats wrote to Federal Trade Commission Chairwoman Edith Ramirez, voicing concern that outlet stores, which have become an increasingly popular retail forum, "may have fueled some deceptive marketing practices." Multiple lawsuits have been filed in California, Florida, New York and elsewhere against numerous designers and retailers including, among others, Macy's, Bloomingdale's, Nordstrom, Neiman Marcus, Saks Fifth Avenue, Ralph Lauren, Kate Spade, Michael Kors, Amazon, Gap, Burlington Coat Factory, TJX and Kohl's. In view of this rising tide of litigation, and the potential costs associated with it, here are a few takeaways from recent cases:

- If using a "reference" price, it is a good idea to use a combination of (1) language on hangtags, such as "Compare At...", "Comparable Value" or "Value," **AND** (2) signage posted throughout the store or online explaining the meaning of the language on the hangtag.
- A reasonable consumer should easily be able to (1) see the signage, and (2) understand what the hangtag and signage mean. To this end:

- It is helpful for signage to be written clearly, in plain English, so it is unambiguous and easy to understand; and it is most effective when posted in plain view in retail locations and/or on applicable website pages.
- It is helpful if hangtags use language that is consistent and parallel with the language used on signage, and vice versa.
- It is important for language on hangtags and signage to be (1) based on fact, and (2) able to be substantiated. For example, ideally, a "Compare At" price should not exceed the price at which comparable products were actually offered for sale in that locality.
- Consider not using a "reference" price and, instead, using the one, actual price for each product. If a product is actually offered at a price for a substantial amount of time (e.g., three months in California) and then offered at a lower discounted that price, then a second, lower, discounted price could be placed on the label without it being considered deceptive.
- Consider identifying when certain products are made only for outlet stores with special labels and/or hangtags; it is helpful for any ancillary tags and signage to be consistent with such "outlet exclusive" messaging.
- Ultimately, the criteria to satisfy is that the language on any hangtag and signage should be truthful, accurate, substantiated, and not deceptive.

As lawsuits involving deceptive pricing proliferate, "best practices" will continue to evolve.



David B. Sherman
Associate, Intellectual Property



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Design Marks: Comparing and Tacking

by Karen Artz Ash and Bret J. Danow

In the case *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co KGAA v New Millennium Sports, SLU*, the US Court of Appeals for the Federal Circuit issued an instructive decision overturning a US Patent and Trademark Office's Trademark Trial and Appeal Board (TTAB) finding of a likelihood of confusion between two design marks.

Jack Wolfskin had filed a trademark application for a design mark consisting of an angled paw print. New Millennium opposed the application based on a claim of a likelihood of confusion with its own registered mark consisting of the stylized word "Kelme" in conjunction with a paw print mark. In response, Jack Wolfskin filed a counterclaim for cancellation of New Millennium's trademark registration alleging that its design mark had been abandoned. The TTAB rejected the counterclaim and sustained the opposition, after which Jack Wolfskin took appeal to the Federal Circuit.

The first issue for the court to consider was whether New Millennium had abandoned its registered design mark. Jack Wolfskin's claim of abandonment was based on the fact that New Millennium had ceased using the registered version of its design mark and had switched to a new, modified version of that mark.

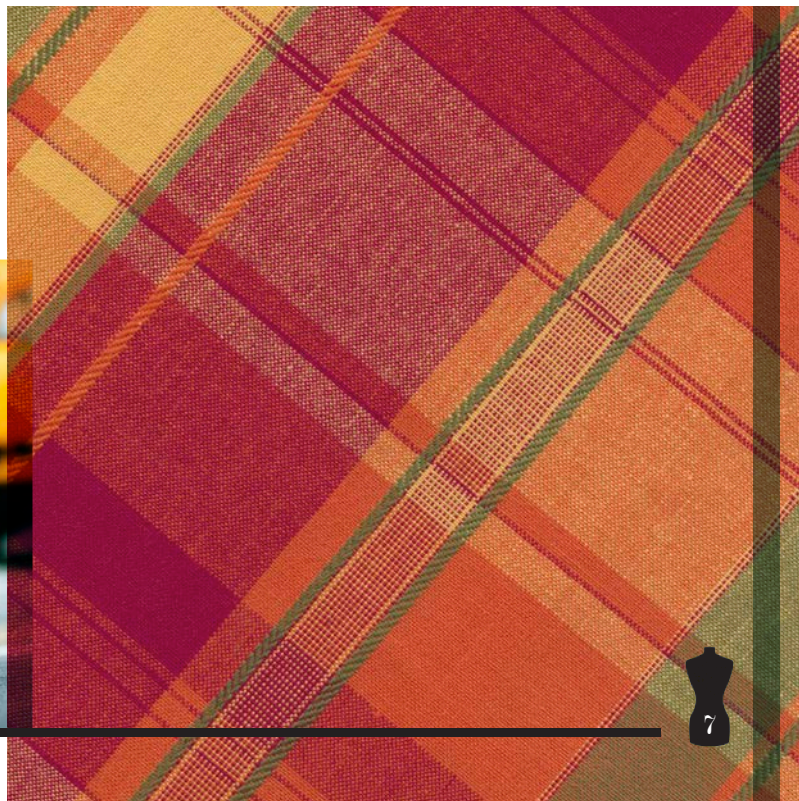
The court held that when a trademark owner transitions to a modified version of its registered design mark, it may avoid abandonment of the original mark and retain the benefits of its use of the earlier format only if the modified version "creates the same, continuous commercial impression" as the original.

In the context of a priority dispute, the court noted that if the old form of the design mark and the new form are "legal equivalents,"

the legal attack will fail. Applying this standard, the court determined that the minor adjustments made to the font of New Millennium's design mark were not sufficient to warrant a finding that the marks created a different commercial impression. Accordingly, the court agreed with the TTAB's finding that the registered design mark was not abandoned.

Having determined that New Millennium did not abandon its mark, the court next turned to reviewing the TTAB's finding of a likelihood of confusion between the marks at issue. The TTAB had taken the position that the marks were confusingly similar even though New Millennium's mark contained the word "Kelme," reaching abroad conclusion that "companies that use marks consisting of a word plus a logo often display their logos alone, unaccompanied by the literal portions of their trademarks." The court held that the TTAB's finding "essentially disregarded the verbal portion of New Millennium's mark" and did not consider the marks as a whole, an issue exacerbated by the wealth of evidence of third-party design marks comprised of paw prints submitted by Jack Wolfskin. While the TTAB could place greater emphasis on a design element under certain circumstances, the court indicated that a rational reason for doing so was required, something that the TTAB did not provide.

This decision is instructive in that it provides guidance on the issue of tacking (namely, the ability to rely on an earlier form of a design mark when switching to a modified version) and on the factors considered when comparing two design marks for purposes of a likelihood of confusion analysis.



TTAB Allows Only One Bite at the Apple

by **Karen Artz Ash** and **Bret J. Danow**

In July 2015, in the case *The Urock Network, LLC v Umberto Sulpasso*, the US Patent and Trademark Office's Trademark Trial and Appeal Board (TTAB) issued a precedential decision holding that a party who unsuccessfully opposes an application for a particular mark is precluded from petitioning to cancel the registration that subsequently issues for such mark, regardless of whether the judgment in the opposition proceeding was the result of a default, consent or dismissal with prejudice.

In January 2010, John Kevin Timothy d/b/a UROCK Radio had filed a notice of opposition against Sulpasso's trademark application for the stylized mark UROCK claiming a likelihood of confusion. The opposition was ultimately dismissed by the TTAB due to the opposer's failure to take testimony or enter evidence. Following the dismissal of the opposition, in March 2014, the USPTO issued a certificate of registration for the stylized UROCK mark and Timothy shortly thereafter filed a cancellation action, this time through his corporate entity, The Urock Network, LLC. Sulpasso filed a motion for summary judgment based on the doctrine of claim preclusion.

The doctrine of claim preclusion is an equitable doctrine that holds that a "judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." In *The Urock Network, LLC*, it was conceded that the plaintiff in the opposition, John Kevin Timothy, and the plaintiff in the cancellation proceeding, The Urock Network, LLC, were "the same person." The Urock Network had argued that the decision in the opposition proceeding should not bar it from seeking to cancel

the registration that subsequently issued because the opposition was decided on a "technical procedure" rather than on the merits of the case and because there are differences between the goods and services at issue in the two proceedings.

The TTAB, however, rejected these arguments, ruling that that the doctrine of claim preclusion applies regardless of the reason for the dismissal of the opposition; and that the doctrine extends to the relitigation of claims that were raised during the first proceeding as well as claims that could have been raised.

In short, the TTAB held that both the opposition proceeding and the cancellation action "involve the same nucleus of operative facts such that both proceedings stem from the same set of transaction facts," as the plaintiff could have brought the claims raised in the cancellation proceeding during the opposition.

Accordingly, the TTAB granted Sulpasso's motion for summary judgment, ruling that a plaintiff is barred from a "subsequent assertion of the same transactional facts in the form of a different cause of action or theory of relief." This case is instructive in that it confirms that a party only gets one bite of the proverbial apple if it opposes a trademark application. An opposer who is lax in prosecuting its claims in an opposition proceeding against a particular mark will likely be precluded from subsequently petitioning to cancel a registration that later issues for such mark.



FTC Issues Much-Anticipated Guidance Regarding “Native” Advertising

by **Doron S. Goldstein** and **Michael R. Justus**

“Native” advertising is advertising or sponsored content that “bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online.” In other words, it looks and feels like other non-advertising or “editorial” content, such that it blends in and may not come across as advertising to viewers. Native ads have become increasingly prevalent given the changing technology allowing consumers to skip or block ads and the corresponding changing business models of publishers.

The Federal Trade Commission (FTC) recently released two highly anticipated documents regarding native advertising, namely, its *Enforcement Policy Statement on Deceptively Formatted Advertisements* and *Native Advertising: A Guide for Businesses*. The documents detail FTC’s views and enforcement approach to native ads and similar sponsored content.

As explained by FTC, “many publishers have begun to offer advertisers formats and techniques that are closely integrated with and less distinguishable from regular content so that they can capture the attention and clicks of ad-avoiding consumers.”

According to the FTC guidance, native ads will be considered deceptive “if they convey to consumers expressly or by implication that they’re independent, impartial, or from a source other than the sponsoring advertiser – in other words, that they’re something other than ads.” This is “[b]ecause knowing that something is an ad likely will affect whether consumers choose to interact with it and the weight or credibility consumers give the information it conveys.”

FTC reiterates that transparency is key, and that traditional advertising rules apply with equal force in new media, including with for native content. FTC considers the “net impression” of the content, including words, images, audio, and so forth, in deciding whether the content is deceptive. The FTC further emphasized the importance of disclosures being straightforward, and that while terms like “Ad” or

“Paid Advertisement” were likely to be understood, “Promoted” or “Promoted Story” are ambiguous and potentially misleading.

Some forms of native ads will require clear and prominent disclosures signaling that the content is indeed paid advertising. The more similar in format and topic the sponsored content is to, and the less it is distinguished from, the non-sponsored content on the site, the more likely that specific disclosure will be necessary. FTC points out that it is also necessary to take into account the target audience of the ad, consumers’ ordinary expectations regarding with the type of media in which the ad appears, and how consumers consume content in that media. The FTC’s also reminds advertisers to follow the *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*.

The *Guide for Businesses* document may be especially helpful in practice, since it contains examples of what may and may not be considered deceptive, and when a disclosure would or would not be required. For example, the *Guide* addresses thumbnail versions of native content (click-through images to that lead to the full content), abbreviated versions of native content in news feeds and “content recommendation widgets,” content integrated into entertainment programming and video games, and, of course, native content on social media.

Finally, FTC made clear that its enforcement policy does not apply only to advertisers, but rather to “everyone who participates directly or indirectly in creating or presenting native ads,” including ad agencies and operators of affiliate networks.



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