

United States Court of Appeals for the Federal Circuit

HYLETE LLC,
Appellant

v.

HYBRID ATHLETICS, LLC,
Appellee

2017-2057

Appeal from the United States Patent and Trademark Office, Trademark Trial and Appeal Board in No. 91213057.

Decided: August 1, 2019

PATTRIC RAWLINS, Procopio, Cory, Hargreaves & Savitch LLP, San Diego, CA, argued for appellant. Also represented by DAVE DEONARINE.

MICHAEL JOSEPH KOSMA, Whitmyer IP Group LLC, Stamford, CT, argued for appellee. Also represented by BENJAMIN N. LUEHRS.

Before MOORE, REYNA, and WALLACH, *Circuit Judges*.



REYNA, *Circuit Judge*.

Hylete LLC appeals from a decision of the Trademark Trial and Appeal Board sustaining Hybrid Athletics, LLC's opposition to Hylete's trademark registration application. We conclude that Hylete waived the arguments on which its appeal relies because it raises new issues that could have been raised and were not considered below. We affirm.

BACKGROUND

In January 2013, Hylete applied to register a design mark for a stylized letter "H" in International Class 25 for "[a]thletic apparel, namely, shirts, pants, shorts, jackets, footwear, hats and caps." J.A. 76–92. After finding no registrations that would bar registration of the Hylete mark, the Examining Attorney approved the application, and the Trademark Office published the Hylete mark for opposition in the Trademark Official Gazette on June 18, 2013.

On October 16, 2013, Hybrid Athletics, LLC filed a Notice of Opposition on the grounds of likelihood of confusion with its mark under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d). Hybrid's mark is also a stylized letter "H." The two marks are shown in the chart below:

| Hylete's Mark | Hybrid's Mark |
|---|--|
|  |  |

Hybrid's Notice of Opposition pleaded ownership in Application No. 86/000,809 ("the '809 application") for a design mark of its stylized "H" used "in connection with conducting fitness classes; health club services, namely, providing instruction and equipment in the field of physical exercise; personal fitness training services and consultancy; physical fitness instruction" in International Class 41. J.A. 3, 98–99. Hybrid also pleaded common law rights from its use of the same mark on "athletic apparel, including shirts, hats, shorts and socks" since August 1, 2008. *Id.*

During opposition proceedings before the Trademark Trial and Appeal Board ("Board"), Hybrid submitted as an exhibit several images depicting the use of its mark on athletic apparel, including shirts, shorts, and jackets. The images showed Hybrid's stylized "H" design appearing on the apparel above the phrase "Hybrid Athletics" and several dots:



J.A. 12.

In its briefing before the Board, Hylete focused on the differences in appearance between the two stylized “H” designs. It argued that its mark was a “highly stylized design logo” that “is substantially dissimilar from [Hybrid’s] letter ‘H’ design logo” and “the lettering style of each mark is substantially dissimilar in appearance and each mark exudes its own distinct commercial expression.” J.A. 405–07 (heading capitalization removed). Hylete further argued that “the stylization of [Hybrid’s] mark[] emphasizes its representation as an ‘H,’ whereas [Hylete’s] mark is a highly stylized design.” J.A. 407 (graphics removed).

On December 15, 2016, the Board issued its final decision sustaining Hybrid’s opposition to Hylete’s registration. J.A. 2–23. Balancing the relevant factors as set forth in *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357 (CCPA 1973), the Board determined that Hylete’s mark would likely cause confusion with Hybrid’s “previously-used mark . . . on some of the same goods, namely jackets, shorts, and shirts.” J.A. 22–23. The Board also found that Hybrid failed to establish ownership of the ’809 application and based its conclusions only on Hybrid’s prior common law rights. J.A. 6.

As to the similarity of the marks, the Board recognized that both marks are stylized versions of the letter “H,” that both parties’ names begin with the letter “H,” and that even if consumers attribute no specific meaning to the letter “H,” they may nonetheless view the marks in the same manner—as an arbitrary use of the stylized letter “H” for athletic clothing. J.A. 15–18. According to the Board, the average consumer would retain a general rather than specific impression of the marks. J.A. 16 (citing *Grandpa Pidgeon’s of Mo., Inc. v. Borgsmiller*, 477 F.2d 586, 587 (CCPA 1973) (noting that the marks in question had “a difference not likely to be recalled by purchasers seeing the marks at spaced intervals”)).

The Board considered various design similarities and differences between the two marks. It acknowledged that specific differences can be seen when the marks are compared side by side, but determined the fact that both are stylized versions of the same letter outweighed those differences. The Board determined that the marks have similar commercial impressions and concluded that Hylete's mark is likely to cause confusion with Hybrid's previously used mark.

Hylete filed a request for reconsideration of the Board's final decision. Hylete asserted that the Board erred in three respects, including the Board's purported "misapprehension of the commercial impression of [Hylete's] mark." J.A. 25. Hylete argued "[t]here was no record evidence demonstrating that consumers would view [Hylete's] mark as a stylized H." J.A. 32. Hylete focused on its own mark and did not argue that the Board's analysis should have compared its mark to anything other than Hybrid's stylized letter "H" design mark.

The Board addressed Hylete's commercial-impression argument by noting its "stark contrast" with Hylete's own characterization of its mark as a stylized letter "H" in its briefing:

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

J.A. 32–33 (quoting Hylete's trial brief). The Board also noted that Hylete's arguments based on how the marks would be perceived relied on testimony from its CEO, stating that he did not "see how anyone looking at *these two logos* would think they look alike" but admitting "*they both are H's [sic]*." J.A. 33 (emphases added). The Board

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