

## No likelihood of confusion between chevron marks United States - **Knobbe Martens**

## Examination/opposition Confusion

November 28 2017

- **Brooks Sports opposed Anta's design mark based on a likelihood of confusion**
- **TTAB found no likelihood of confusion due to prominent differences between the marks' commercial impressions**
- **Common usage of chevron designs on relevant goods means that the design is not a strong source identifier**

In *Brooks Sports, Inc v Anta (China) Co, Ltd*, the Trademark Trial and Appeal Board (TTAB) found that there was no likelihood of confusion between Brooks Sports' marks (opposer) and Anta (China)'s design mark (applicant).

Brooks Sports opposed Anta's design mark based on a likelihood of confusion under Section 2(d) of the Trademark Act, among other claims. The opposer relied on the two registrations depicted below, which consisted of the flair chevron design. Both the opposer's registrations and the applicant's mark cover various types of clothing and footwear in Class 25.



(Registration 1683840)



(Registration 2750754)

Opposer's marks



(Serial 86268523)

Applicant's mark

### Likelihood of confusion

The TTAB based its likelihood of confusion analysis on all the probative facts in evidence which were relevant to the factors set out in *In re El du Pont de Nemours & Co*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). It first considered the relationship between the goods, the class of purchasers and the channels of trade.

The TTAB determined that the description of goods in the applicant's mark was partially identical to the opposer's description of goods in its two registrations, due to the fact that they all included "shoes, footwear, shirts, pants, jackets, shorts, tights, and T-shirts". Further, identical goods are presumed to travel in the same channels of trade, absent any restrictions in the application and registration. Here, the applicant did not contest the fact that the goods were partially identical or that the channels of trade or classes of consumers overlapped. Thus, it was uncontested that these *du Pont* factors supported the finding of a likelihood of confusion.

The TTAB next considered the opposer's assertion that its marks were famous. In order to determine whether the designs were famous, the TTAB considered the opposer's use and promotion of its marks. Moreover, in order for a mark to be considered famous for the purposes of confusion, a significant number of

relevant consumers must view the mark as a source identifier. The TTAB noted that the following factors were relevant in determining fame in this instance:

- sales;
- advertising;
- length of use of the mark;
- market share;
- brand awareness;
- licensing activities; and
- variety of goods bearing the mark.

In order to demonstrate the fame of its mark, the opposer provided a declaration by its executive senior vice president which stated that Brooks Sports' revenue increased 127% based on its business and marketing strategies between 2010 and 2015. Additionally, it introduced footwear and apparel catalogues to exhibit the wide range of its products. However, the TTAB was not convinced with either piece of evidence, determining that the opposer had failed to provide any specific information about its sales that would allow the TTAB to determine the range of the opposer's revenue and how its revenue compares with other vendors of athletic footwear and clothing. Furthermore, the TTAB found that the catalogues showed only minimal usage of the opposer's design mark.

Brooks Sports also introduced advertisements depicting its use of the chevron design marks as a running path. However, the TTAB determined that the modern usage of the design mark as a running path, with runners running along the path of the design mark, in its advertisements reflected a focus on running and was insufficient to demonstrate that consumers would recognise the running path in the advertisement as a chevron design. Finally, Brooks introduced a corporate brand and market survey to demonstrate its prominent market position. However, the TTAB was unconvinced by the survey results because minimal information was provided about the subjects of the survey and how it was conducted. It also pointed out that the survey was conducted after the filing date of the applicant's mark. The TTAB therefore concluded that the opposer did not establish the fifth *du Pont* factor – fame of the mark.

The TTAB then considered third party usage and registration of similar marks as well as the strength of the marks. The introduction of third party use of similar marks helps to demonstrate that consumers have become so accustomed to seeing such marks that they are able to distinguish between them. To demonstrate common usage of the chevron design marks, the applicant introduced 25 use-based registrations for marks covering clothing, which contain or consist of a variety of chevron design marks. Additionally, the applicant introduced Internet evidence of chevron marks used on athletic shoes. Persuaded by this evidence of common usage, the TTAB concluded that the evidence indicated that consumers have become conditioned to encountering chevron design marks and will focus on other elements to identify source. Therefore, the TTAB held that the sixth *du Pont* factor did not favour a finding of a likelihood of confusion.

The TTAB then considered the first *du Pont* factor – similarity of the marks. It analysed each of the opposer's two marks – the mark consisting of the name 'Brooks' and a chevron design, and the mark consisting solely of the chevron design. The TTAB first looked at the opposer's combined word and chevron design mark and compared it with the applicant's mark. To determine similarity, the TTAB compared the marks "in their entireties as to appearance, sound, connotation and commercial impression". It noted that the verbal portion of the mark was most likely the portion that served as a source identifier because consumers would use the literal portion to request the goods. Therefore, the TTAB determined that with emphasis placed on the more dominant verbal component of the opposer's mark, the two marks were dissimilar.

The TTAB next compared the opposer's second mark which consisted solely of the chevron design with the applicant's mark. In order to evaluate their similarities, the TTAB noted that because it was comparing two design marks, the emphasis should be placed on their visual similarities. The TTAB determined that although the marks were visually similar, they had different representations – the opposer's design represented a running path and the applicant's design represented the tip of an arrow. Moreover, the TTAB found that this evidence, coupled with the common usage of the designs, demonstrated that the marks were dissimilar. Therefore, based on its analysis the TTAB held this *du Pont* factor did not support a likelihood of confusion.

### Decision

Taking all the factors into account, the TTAB determined that although the goods, channels of trade and consumers were identical, and the opposer's marks were not famous, there was no likelihood of confusion

due to the fact that there were prominent differences between the marks regarding their commercial impressions, and the common usage of chevron designs on relevant goods demonstrated that the design was not a strong source identifier. The TTAB therefore dismissed the Section 2(d) opposition claim as well as the dilution claim as the opposer would not be able to meet the more stringent standard of establishing dilution when there was a failure to establish a likelihood of confusion.

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