

Case No. 25-1071

**United States Court of Appeals
for the Federal Circuit**

Titanium, LLC dba Dress Up Bolts,

Appellant

v.

ZSpec Design, LLC

Appellee.

Appeal from the United States Patent and Trademark Office
Trademark Trial and Appeal Board
Cancellation Proceeding No. 92079042

REPLY BRIEF OF APPELLANT TITANIUM, LLC

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March 17, 2025

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I. SUMMARY OF THE ARGUMENT

The appellee, ZSpec Design, LLC, fundamentally misapprehends the reasons that the Trademark Trial and Appeal Board's decision was improper. The issue of the likelihood of confusion between the parties' marks was plainly before the Board, regardless of how elegant that confusion was recited in Titanium, LLC's trial brief before the Board. That is apparent from the petition, the trial brief, subsequent briefing before the Board by both sides, and the evidentiary record, which made it clear that the parties were fighting over the exact same mark, "Dress Up Bolts," as used in association with the exact same goods and services, decorative automotive hardware, and there was no dispute that this was the conflict presented before the Board. Nevertheless, there are two specific issues addressed by this Reply Brief.

First, the Board acted arbitrarily when it refused to acknowledge its own rejection of Titanium's trademark applications, based on likelihood of confusion, for the mark "Dress Up Bolts" as used with decorative automotive hardware. Indeed, those applications remain suspended because of the likelihood of confusion that plainly exists and that the parties and the USPTO all know triggered the cancellation proceeding at issue. These are plainly facts within the Board's knowledge, which it can and should take judicial notice of under the Federal Rules of Evidence.

Second, the Board also acted arbitrarily when it refused to hold that a likelihood of confusion existed between these plainly conflicting marks while it simultaneously concluded that standing existed. While Titanium acknowledges that standing and likelihood of confusion are not precisely the same, they are highly related inquiries and ultimately, standing could only exist in this case if a likelihood of confusion existed, too. Yet, the Board concluded that standing existed even though it was raised only in Titanium petition for cancellation, and it was never mentioned again in any of its briefing or its evidence. If, the Board's estimation, this sufficiently presented standing to the Board so that it could evaluate the issue, as it did, then it necessarily follows that it should have evaluated likelihood of confusion, too.

For these reasons, this Court should reverse the Board's decision holding that Titanium waived the only issue presented in its petition, which necessarily avoided making any real ruling at all on the clear conflict presented to it.

II. ARGUMENT

A. The Board's Refusal to Take Judicial Notice of Its Own Actions Was Arbitrary and Capricious.

The Board insisted that it could not determine whether a likelihood of confusion existed because insufficient argument existed, and its internal procedure prohibited it from recognizing its own actions in Titanium's trademark

applications. This was error under the specific and peculiar facts of this case, in which both sides are fighting over who owns trademark rights in a specific mark as used in association with specific goods. The office rightly rejected, based upon a likelihood of confusion, Titanium’s two applications for the phrase “Dress Up Bolts” as used in association with decorative automotive hardware, and those applications remain suspended pending the outcome of the underlying cancellation proceeding.¹

The section of the Code of Federal Regulations governing *inter partes* proceedings, 37 C.F.R. § 2.122(a), provides that “unless the parties otherwise stipulate, the rules of evidence for proceedings before the Trademark Trial and Appeal Board are the Federal Rules of Evidence.” The Federal Rules of Evidence include the ability for a tribunal to take judicial notice of any adjudicative facts that are generally known by the tribunal that “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned,” either by the express request of a party or *sua sponte*. Fed. R. Evid. 201. The only apparent reason that the Board is unwilling to look at its own records is based on its own

¹See

https://tsdr.uspto.gov/#caseNumber=90508223&caseSearchType=US_APPLICATION&caseType=DEFAULT&searchType=statusSearch and https://tsdr.uspto.gov/#caseNumber=90505678&caseSearchType=US_APPLICATION&caseType=DEFAULT&searchType=statusSearch

internal policy, found nowhere in the Code of Federal Regulations, that a petitioner for cancellation must attach such a rejection to its petition or otherwise make it a part of the record.

This is peculiar considering that the Board has in the past taken judicial notice of trademark proceedings at the U.S. Patent and Trademark Office even though they are not a part of the record of a proceeding, and even though a party has not raised them. *See, e.g., In re Chippendales USA, Inc.*, 622 F.3d 1346, 1356 (Fed. Cir. 2010) (taking judicial notice of the Playboy “bunny” registered trademark to reject an application by a confusingly similar mark). Given the fact that this internal policy is nowhere supported by the CFR or the Federal Rules of Evidence and given that the Board has arbitrarily chosen to take judicial notice of the USPTO’s own records before, it follows that its policy of refusing to look at its own records, at least in the special case presented here, is arbitrary and capricious. Indeed, this seems more like *Chevron* on steroids, where a government agency has decided to have its own informal rule that conflicts with a portion of the Code of Federal Regulations, and therefore exists wholly outside the normal administrative rulemaking process. This cannot stand, and the Court should therefore reverse the Board’s decision and compel the Board to evaluate the clear conflict that was placed before it by the parties.

B. The Board’s Willingness to Resolve Standing, But Not Likelihood of Confusion, Was Arbitrary and Capricious.

In its brief, ZSpec argues that standing and the likelihood of confusion are different inquiries, and therefore the conclusion that standing exists is not a conclusion that likelihood of confusion exists. As applied to this case, this argument is emphatically not true, since the only ground for cancelling the mark presented by the petitioner was based on the likelihood of confusion that existed between the parties identical marks as used for the same goods. In other words, because standing in the context of an *inter partes* proceeding before the Board requires a party to have experienced a harm that is recognized under the Lanham Act and because the only harm under the Act that Titanium asserted in its cancellation proceeding is the likelihood of confusion between these identical marks as used for the same goods, it necessarily follows that likelihood of confusion is the only real harm that could support the Board’s conclusion that Titanium has standing in this case.

In an opposition or cancellation proceeding before the Board, “standing is conferred by Section 13 of the Lanham Act.” *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 1376 (Fed. Cir. 2012). The purpose of the requirement is “to prevent litigation where there is no real controversy between the parties,” and thereby avoid the situation where a petitioner or opposer “is no more than an intermeddler.” *Id.* (quoting *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d

1024, 1028-29 (C.C.P.A. 1982)). Accordingly, a petitioner for cancellation also “must satisfy two judicially-created standing requirements,” specifically, that the petitioner has “(1) a ‘real interest’ in the proceeding; and (2) a ‘reasonable basis’ for believing that it would suffer damage” from the registered mark. *Id.* Thus, for a petitioner to have standing, the petitioner must be harmed in a manner recognized by the Lanham Act to have grounds for opposition or cancellation. *Id.*

The relevant harm in this matter recognized by the Lanham Act is the harm that would arise if the law failed “to protect the reputation of manufacturers . . . [resulting] from confusion.” *Elec. Design & Sales, Inc. v. Elec. Data Sys. Corp.*, 954 F.2d 713, 719 (Fed. Cir. 1992). “In the usual case,” like this one, where a cancellation “is brought under section 2(d)” alleging a likelihood of confusion, the petitioner has “a proprietary interest in a mark, and standing is afforded through its assertion that it will incur some direct injury to its own established trade identity” as the result of a likelihood of confusion. *Jewelers Vigilance Comm., Inc. v. Ullenberg Corp.*, 823 F.2d 490, 493 (Fed. Cir. 1987). As a result, the standing inquiry and the merits inquiry in § 2(d) cases are nearly indistinguishable for direct competitors. *See id.* at 491-93 (examining standing in the case where a trade group opposed a trademark application for which some of its members arguably had an interest). This is distinguished from other grounds that are possible for *inter partes* proceedings before the board, e.g., § 2(e) based on the descriptiveness of a mark,

which presents a significantly different harm that often has nothing to do with a likelihood of confusion. *Id.* at 493 (explaining that the harm in a descriptive mark case may have nothing to do with an opposer or canceller's trademark but rather their free speech interest in using a term in a descriptive sense and not a trademark sense).

Here, the Board concluded that standing existed based upon the mere allegation in the petition that ZSpec had sent trademark infringement demands to retailers to stop carrying Titanium's competing product, and in doing so it skirted around the entire point of such a demand and the statutory harm that would necessarily exist from such a letter and more broadly in this case: a likelihood of confusion between the marks. There is no other harm in this case that could exist. Saying that an alleged demand letter is the statutory harm misses the point: it's all unavoidably about likelihood of confusion under the facts presented here.² Moreover, the Board managed to conclude that the alleged demand letter was sufficiently argued and proven even though Titanium mentioned the concept only in a single sentence in its petition, and never mentioned it in its briefing or in evidence presented at trial. This fact makes the decision to ignore what everyone knew even more arbitrary: that the parties had a complete, undisputed conflict on

² Priority is not, itself, a separate grounds for cancellation, but merely the rule of decision on who owns a mark once a likelihood of confusion exists.

the ownership of the “Dress Up Bolts” mark for decorative automotive hardware, and the only real question was who had priority. Accordingly, the Board’s decision to completely ignore this through a technical slight-of-hand was arbitrary and capricious.

III. CONCLUSION

For the foregoing reasons, this Court should reverse the Board’s decision and remand with directions that the Board evaluate who owns the mark “Dress Up Bolts” in association with decorative automotive hardware based upon the ample evidence of priority submitted by both sides.

Dated: March 17, 2025

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2025, I served the foregoing Reply Brief of Appellant Titanium, LLC upon all counsel of record by email as follows:

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**UNITED STATES COURT OF APPEALS
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Case Number: 25-1071

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