

This Opinion is Not a  
Precedent of the TTAB

Mailed: December 14, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

---

**Trademark Trial and Appeal Board**

---

*Game Plan, Inc.*  
*v.*  
*Uninterrupted IP, LLC*

---

Opposition No. 91244990

Howard J. Shire and Sean P. McConnell of Troutman Pepper Hamilton Sanders  
LLP, for Uninterrupted IP, LLC

Ryan L. Jones of Ryan L. Jones Law LLC, for Game Plan, Inc.

---



Before Adlin, Thurmon and Johnson, Administrative Trademark Judges.

Opinion by Thurmon, Administrative Trademark Judge:

Uninterrupted IP, LLC (“UNIP”) seeks registration on the Principal Register of  
the marks identified below.<sup>1</sup>

---

<sup>1</sup> All the listed applications were filed on March 10, 2018, based on an alleged intent to use the marks in commerce, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The first four marks are standard character marks and the last two marks are described as the “Handwritten printed words ‘I AM MORE THAN AN ATHLETE.’” Color is not claimed as a part of any of the marks.

Mark	Serial No.	Goods
I AM MORE THAN AN ATHLETE	87828960	entertainment services, namely, providing a website featuring non-downloadable videos, podcasts, films and social media posts in the field of sports, in International Class 41
I AM MORE THAN AN ATHLETE	87828964	clothing, namely, t-shirts, sweatshirts, hats, and jackets in International Class 25
MORE THAN AN ATHLETE	87828963	entertainment services, namely, providing a website featuring non-downloadable videos, podcasts, films and social media posts in the field of sports, in International Class 41
MORE THAN AN ATHLETE	87828958	clothing, namely, t-shirts, sweatshirts, hats, and jackets in International Class 25
	87828965	clothing, namely, t-shirts, sweatshirts, hats, and jackets in International Class 25
	87828966	entertainment services, namely, providing a website featuring non-downloadable videos, podcasts, films and social media posts in the field of sports, in International Class 41

Game Plan, Inc. opposes the registration of the marks identified above based on Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), alleging priority and likelihood of confusion with its registered mark shown below for “Charitable fundraising services by means of selling t-shirts to raise funds for educational and entertainment programs,” in International Class 36.

**I AM MORE  
THAN AN  
ATHLETE.**



UNIP filed an answer denying the salient allegations in the Notice of Opposition and counterclaimed under Section 2(d) seeking cancellation of Game Plan's registration of the mark shown above. UNIP alleges common law priority in the mark MORE THAN AN ATHLETE for t-shirts and a likelihood of confusion with Game Plan's mark.<sup>3</sup> Game Plan denied that UNIP has priority, but admitted, consistent with its claim in the opposition, that a likelihood of confusion exists between the marks.<sup>4</sup> Indeed, Game Plan has been consistent in its position that the counterclaim turns solely on the question of priority.<sup>5</sup> Because we find UNIP has priority, we grant

---

<sup>2</sup> Registration No. 5487497 issued on June 5, 2018, from an underlying application filed December 28, 2016 under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), and alleging October 8, 2017 as the date of first use and first use in commerce. The mark is described as follows: "The mark consists of the wording 'I AM MORE THAN AN ATHLETE.' in stylized font. The wording 'I AM MORE' is on the first line, 'THAN AN' is on the second line, and 'ATHLETE' is on the third line. Beneath this wording are the stylized letters 'GP' between the arrows. The arrow on the left is bent at an angle. Beneath the arrows and the letters 'GP' is the term 'GAMEPLAN' in stylized font." Color is not claimed as a part of the mark.

When we cite to the record, we refer to TTABVUE, the Board's docketing system, by docket entry and page number (e.g., 8 TTABVUE 14).

<sup>3</sup> 12 TTABVUE. UNIP also pleads ownership of a trademark registration it obtained through assignment in support of its counterclaim. For reasons explained below, we find UNIP's common law rights support the counterclaim. We do not rely on the pleaded registration. *See* n.37, *infra*.

<sup>4</sup> 13 TTABVUE.

<sup>5</sup> 76 TTABVUE (Game Plan's Trial Brief) 7 ("Therefore, this Trial Brief is a distillation of remaining issues that focuses on priority since the parties agree there is a likelihood of confusion with the respective marks."), 8 ("From Game Plan's perspective, this incredibly litigious matter has boiled down to one issue: whether Game Plan, Inc. has priority to UNIP.

the cancellation counterclaim. Without its pleaded registration, Game Plan has no support for its Section 2(d) claims, and therefore, we dismiss the Opposition.

### **I. Evidentiary Issues**

Game Plan submitted no evidence during trial. Instead, “it will reference previously discovered evidence as referenced in filings already submitted to the Board.”<sup>6</sup> Game Plan then “references the entire record found in 1-75 TTABVUE.”<sup>7</sup> UNIP objects to this approach and argues that a party must follow the normal rules for submission of evidence during trial.<sup>8</sup> We agree with UNIP, and, in fact, the Board informed the parties that “evidence submitted in connection with the motion for summary judgment is of record only for consideration of that motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period.”<sup>9</sup> *See also Life Zone Inc. v. Middleman Grp., Inc.*, 87 USPQ2d 1953, 1955 (TTAB 2008) (“Evidence submitted outside of the trial periods—including that attached to briefs—is untimely, and will not be considered.”).

---

... The Parties respectively allege and therefore agree that the other party’s mark or marks are confusingly similar.”), 10 (“It is undisputed that UNIP and Game Plan allege the marks are confusingly similar;” with a reference to UNIP’s counterclaim), 11 (“The true issue presented is whether Game Plan has priority of use to UNIP.”).

<sup>6</sup> *Id.* at 11.

<sup>7</sup> *Id.*

<sup>8</sup> 79 TTABVUE 11-12.

<sup>9</sup> 50 TTABVUE 9 (citing *Drive Trademark Holdings LP v. Inofin*, 83 USPQ2d 1433, 1438 n.14 (TTAB 2007); *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993)).

UNIP filed a motion for judgment following the close of the testimony periods because Game Plan failed to submit any evidence. Trademark Rule 2.132 provides that the Board may grant judgment if the party in the position of plaintiff (i.e., Game Plan, as Opposer here) fails to submit any evidence at trial. 37 C.F.R. § 2.132. After noting that “Opposer has not submitted evidence during its testimony period,” the Board pointed out that Opposer’s Registration is of record by rule, because it “is the subject of Applicant’s counterclaim.”<sup>10</sup> When responding to this motion, Game Plan stated that it was “not requesting to reopen the trial testimony period, to elicit more evidence to be more persuasive to the Board” and that it “simply would like the opportunity to present its legal theory in its forthcoming Trial Brief to persuade the Board, on the merits.”<sup>11</sup> The Board again reminded Game Plan “that neither the documents attached to its notice of opposition, nor any documents attached to previous motions and responses thereto are evidence of record.”<sup>12</sup> With full notice that it had no evidence in the record, Game Plan proceeded and did not seek to reopen its testimony period. Instead, Game Plan referenced materials not in the record, despite the Board’s clear guidance that such practices are not allowed.

Ironically, Game Plan’s failure to submit any evidence at trial would have been fatal to its Section 2(d) claims in the Opposition, but for the filing of the cancellation counterclaim by UNIP. As we noted above, the record of Game Plan’s Registration is

---

<sup>10</sup> 75 TTABVUE 3.

<sup>11</sup> 73 TTABVUE 9.

<sup>12</sup> 75 TTABVUE 2 n.3.

now part of the trial record by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), because this Registration is the subject of UNIP's cancellation counterclaim. While this fact saved Game Plan's Opposition from dismissal for failure to prosecute under Trademark Rule 2.132, it leaves Game Plan with no other evidence to support those claims.

We begin with UNIP's counterclaim. As indicated, only the priority element is in dispute.<sup>13</sup> UNIP's priority claim is somewhat complicated, as it depends on UNIP's acquisition of trademark rights from a third party. We evaluate those matters below and we find: (1) UNIP's predecessor-in-interest had prior common law rights in the mark MORE THAN AN ATHLETE for t-shirts and similar clothing; (2) those common law rights were properly assigned to UNIP; and, (3) that UNIP continues the prior use on the same goods, thus ensuring the goodwill transferred and continues to be associated with the mark. For these reasons, we grant the counterclaim and order the cancellation of Game Plan's Registration.

Game Plan also asserted common law rights as a basis for its Section 2(d) claim against UNIP's applications. In other words, the cancellation of Game Plan's Registration would not typically, standing alone, fully resolve the claims in the Opposition. But with no evidence, Game Plan has only attorney argument about its alleged common law trademark use. It is impossible to prevail based on a claim of

---

<sup>13</sup> UNIP denied that there is a likelihood of confusion in its answer to Game Plan's Notice of Opposition. UNIP has continued to argue that the marks are not likely to cause confusion. But in its counterclaim, UNIP asserts, in the alternative, that there is a likelihood of confusion, and that it has common law priority that requires cancellation of Game Plan's Registration. 12 TTABVUE.

common law rights in a Board proceeding without evidence or an admission in the record establishing prior use of the mark. There is no such evidence in the trial record.

## **II. The Record**

The record consists of the pleadings, and by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), the file of the registrations subject to the petition for cancellation and the counterclaim. In addition, UNIP introduced the following evidence.

- A Notice of Reliance providing portions of the confidential discovery deposition of Sam Sesay/Game Plan and an amended discovery response of Game Plan;<sup>14</sup>
- Trial testimony declaration of Gabriela Goldberg, Vice-President of UNIP, with exhibits;<sup>15</sup>
- Trial testimony declaration of Devin Johnson, President of UNIP, with exhibits;<sup>16</sup>
- Trial testimony declaration of Ricardo Viramontes, previously Vice-President of UNIP, with exhibits;<sup>17</sup> and,
- Trial testimony deposition of DeAndra Alex, a prior user and assignor of the MORE THAN AN ATHLETE mark, with exhibits.<sup>18</sup>

Game Plan submitted no evidence at trial.

---

<sup>14</sup> 64 TTABVUE (nonconfidential), 69 TTABVUE (confidential portions). The deposition was taken under Fed. R. Civ. P. 30(b)(6), meaning it was a deposition of Game Plan. Sam Sesay was the witness, and the deposition is captioned “Deposition of Sam Sesay 30(b)(6).”

<sup>15</sup> 65 TTABVUE.

<sup>16</sup> 66 TTABVUE.

<sup>17</sup> 67 TTABVUE.

<sup>18</sup> 68 TTABVUE.

### III. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action must be established in every inter partes case. *Austl. Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at \*3 (Fed. Cir. 2020), *cert. denied*, 142 U.S. 82 (2021) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067 n.4 (2014)). A party in the position of plaintiff may oppose registration of a mark or petition to cancel a registration when it demonstrates an interest falling within the zone of interests protected by the statute, 15 U.S.C. §§ 1063, 1064, and a reasonable belief in damage that is proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \*6-7 (Fed. Cir. 2020).

The record of Game Plan’s pleaded Registration is in the record as a result of the counterclaim seeking cancellation of Game Plan’s Registration, as we explained above. This establishes its entitlement to bring its Section 2(d) claim against UNIP. *See e.g., Austl. Therapeutic*, 2020 USPQ2d 10837, at \*3; *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (pleaded registrations “suffice to establish ... direct commercial interest”; a belief in likely damage can be shown by establishing a direct commercial interest); *Barbara’s Bakery, Inc. v. Landesman*, 82 USPQ2d 1283, 1285 (TTAB 2007) (opposer’s entitlement to opposition established by pleaded registration being of record and non-frivolous likelihood of confusion claim).

UNIP, as the Petitioner in the cancellation counterclaim, must demonstrate a real interest in the proceeding and a reasonable belief of damage from Game Plan’s



registration. Game Plan's reliance on its Registration as a basis for its claims in the Opposition show that UNIP has standing to bring the counterclaim. *Austl. Therapeutic*, 2020 USPQ2d 10837, at \*3; *see also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012).

#### **IV. UNIP's Section 2(d) Counterclaim**

To prevail on its Section 2(d) counterclaim, UNIP must show by a preponderance of the evidence that it has priority in its MORE THAN AN ATLETE mark, and that Game Plan's use of its mark is likely to cause confusion, mistake, or deception regarding the source of the goods identified Game Plan's involved registration. 15 U.S.C. § 1052(d) (prohibiting the registration] of a mark that "[c]onsists of or comprises a mark which so resembles a mark registered in the Patent or Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive."). Game Plan concedes that a likelihood of confusion exists between the marks, so our inquiry is limited to the question of priority.

##### **A. Priority**

UNIP asserts common law rights from at least 2013 in the mark MORE THAN AN ATHLETE for t-shirts. This priority claim relies on uses made by a third-party who later assigned its rights to UNIP. Game Plan argues the assignment was in gross and that the mark was abandoned prior to the assignment. Game Plan does not

directly challenge the establishment of common law rights by UNIP's assignor, nor does Game Plan dispute that UNIP continues to use the mark on t-shirts. The assignment is the disputed part of the story. To put the assignment in context, we begin with the first uses by the assignor.

### **1. First Uses of the MORE THAN AN ATHLETE Mark**

DeAndra Alex has been a sports lover all her life and is the founder of More Than An Athlete, Inc.<sup>19</sup> In 2012, she began to develop an idea to promote the non-sports side of athletes. As part of this effort, she wrote the following creed, which was a starting point for her More Than An Athlete business: "I am more than an athlete. I am a human being with integrity and purpose. I have a talent that is God-given, but I am not my talent. My talent does not define who I am, I am more than an athlete."<sup>20</sup>

Ms. Alex "decided to create some branded products that could be sold at games, online and at schools to help promote the campaign."<sup>21</sup> The first such products were wristbands and t-shirts, shown below, that Ms. Alex obtained during 2012 and sold from 2013-18.<sup>22</sup>

---

<sup>19</sup> 68 TTABVUE 85.

<sup>20</sup> *Id.* at 86.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*



As she was developing her business idea and selling the wristbands and t-shirts, Ms. Alex also decided to try to register her mark. She filed an application on April 27, 2012, to register the mark MORE THAN AN ATHLETE for “publicity and sales promotion services” in International Class 35. Ms. Alex was successful in this effort and a registration issued on May 28, 2013.<sup>23</sup> She did not register the mark for the wristbands or t-shirts, but she continued to sell these goods as a part of her business.<sup>24</sup>

During 2013, Ms. Alex’s “teenage son was playing basketball at a high-competition level and traveled regionally to compete and showcase in front of Division 1 college coaches and circuit writers.”<sup>25</sup> She began selling wristbands and t-shirts at the

---

<sup>23</sup> *Id.*; Registration No. 4343953.

<sup>24</sup> 68 TTABVUE 87.

<sup>25</sup> *Id.*

various basketball tournaments and other programs her son attended. Below Ms. Alex describes, in some detail, her first sales at such an event:

The first sales of the MORE THAN AN ATHLETE t-shirts and wristbands [sic] basketball tournaments were made at the basketball tournament named the Nike Memorial Classic in Atlanta, Georgia, May 26-29, 2013. My son's team was a contender at this tournament, so, I decided to promote the MORE THAN AN ATHLETE campaign there. I called and spoke to someone about being a vendor at this tournament. I paid roughly \$250 to have a table and I was the only vendor there. I made a sign for MORE THAN AN ATHLETE, printed some pamphlets promoting the campaign, and loaded my car with MORE THAN AN ATHLETE t-shirts and wristbands. The MORE THAN AN ATHLETE products and campaign were a hit with coaches, parents, and kids.<sup>26</sup>

From 2013-15, Ms. Alex regularly sold wristbands and t-shirts at basketball games and tournaments. These events included AAU tournaments in Georgia, Maryland, South Carolina, North Carolina, Florida, Virginia and Washington, DC.<sup>27</sup> Ms. Alex explained, "I packed my car for every tournament with the wristbands and t-shirts to publicize the MORE THAN AN ATHLETE campaign. I was trying to publicize the program, create a buzz, get kids' attention, and raise money for MORE THAN AN ATHLETE initiatives."<sup>28</sup> In 2017, Ms. Alex launched a new website at [morethanathlete.life](http://morethanathlete.life), where visitors to the site can "buy branded products, namely wrist bands and t-shirts, bearing the mark."<sup>29</sup>

---

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 88.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 89.

When Ms. Alex’s son graduated from high school, her business activities shifted, as she was no longer traveling to basketball tournaments on a regular basis.<sup>30</sup> From 2015 to 2018, she worked on an academic program to aid student athletes and also “continued to sell the MORE THAN AN ATHLETE t-shirts and wristbands.”<sup>31</sup> In 2017, Ms. Alex developed sportswear products bearing her mark. These included long-sleeve shirts made from a performance fabric and bearing the MORE THAN AN ATHLETE mark.<sup>32</sup> These shirts have been worn and promoted by National Football League professional football players from at least three teams.<sup>33</sup>

We find Ms. Alex’s sales of t-shirts under the MORE THAN AN ATHLETE mark were sufficient to establish valid and enforceable common law trademark rights. Her sales continued over several years and were part of a commercial business. Game Plan points to no evidence suggesting otherwise, and indeed, appears to acknowledge that Ms. Alex established prior rights when it states that “all acts by Applicant/Petitioner [UNIP] by selling and marketing ‘More Than An Athlete’ mark [sic] caused confusion, mistake, dilution, and deception against the Opposer/Respondent [Game Plan] ... .”<sup>34</sup> We understand this assertion to mean that Ms. Alex had trademark rights.

---

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 89-90.

<sup>33</sup> *Id.* at 89.

<sup>34</sup> 14 TTABVUE 3 (answer to counterclaim).

There is also evidence that Ms. Alex objected to Game Plan's intended use of its mark. Ms. Alex became aware of Game Plan's trademark application and she reached out to Samuel Sesay, the owner of Game Plan, to express her concerns with Game Plan's trademark application.<sup>35</sup> Game Plan did not withdraw its application after this discussion, and therefore, Ms. Alex filed a letter of protest with the USPTO concerning Game Plan's application.<sup>36</sup> Ms. Alex later sought extensions of time to oppose, but she did not bring an opposition proceeding to block Game Plan's application.<sup>37</sup>

In the summer of 2018, Ms. Alex, acting through counsel, also contacted UNIP to object to its use of MORE THAN AN ATHLETE as a mark:<sup>38</sup> As Ms. Alex explains, that first contact led to business discussions with UNIP.

That letter led to further communications with Uninterrupted that ultimately concluded with Uninterrupted, LLC and Uninterrupted IP, LLC (collectively, "Uninterrupted") acquiring of all of the rights to the MORE THAN AN ATHLETE brand I had built. As the discussions with Uninterrupted progressed, I realized there was no need for me to seek cancellation of the registration for the Game Plan Mark, since I would be assigning my company's rights to the MORE THAN AN ATHLETE mark to Uninterrupted.<sup>39</sup>

---

<sup>35</sup> *Id.* at 91; 69 TTABVue (confidential deposition transcript excerpts) 30 (Mr. Sesay referring to a phone conversation with Ms. Alex, stated "Mostly she was talking about they have shirts [bearing the MORE THAN AN ATHLETE mark]."), 31 (acknowledging the conversation with Ms. Alex occurred before Game Plan first started using its mark).

<sup>36</sup> *Id.* at 92. Her letter of protest was filed on July 7, 2017.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 93.

<sup>39</sup> *Id.*

The assignment, which we will discuss more below, was executed on February 22, 2019.

Game Plan argues Ms. Alex abandoned her mark before the 2019 assignment.<sup>40</sup> To prove abandonment, Game Plan must show that Ms. Alex (1) discontinued use; and (2) had an intent to not resume use in the foreseeable future. 15 U.S.C. § 1127; *Rivard v. Linville*, 133 F.3d 1446, 45 USPQ2d 1374, 1376 (Fed. Cir. 1998); *Imperial Tobacco Ltd. v. Philip Morris, Inc.*, 899 F.2d 1575, 14 USPQ2d 1390, 1394 (Fed. Cir. 1990); *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036, 1042 (TTAB 2012).

As we noted above, Game Plan submitted no evidence. In support of its abandonment argument, Game Plan points only to the fact that Ms. Alex's business changed in 2013, "when she stopped using twitter to do publicity and sales promotions."<sup>41</sup> The evidence, however, shows that Ms. Alex continued to use her mark well past 2013. Game Plan has not proven either element of its abandonment defense.

Game Plan cross-examined Ms. Alex, but her testimony was consistent with her declaration.<sup>42</sup> There is no evidence to refute or contradict Ms. Alex's testimony concerning the continuous use of her mark through 2018. In addition, Ms. Alex's efforts to block Game Plan's application to register its mark and her objection to UNIP's use of its mark are efforts to enforce her rights in the MORE THAN AN ATHLETE mark, which contradict Game Plan's assertion that she intended to

---

<sup>40</sup> 76 TTABVUE 20-21.

<sup>41</sup> *Id.* at 21.

<sup>42</sup> 68 TTABVUE 13-80. Game Plan's counsel had Ms. Alex read every paragraph in her declaration and then asked, paragraph-by-paragraph, if she had any changes to make. She did not. This process continued and accounted for almost the entire deposition.

permanently stop using her mark. Game Plan failed to prove an abandonment of the mark by Ms. Alex prior to the assignment. We hold, therefore, that Ms. Alex had common law trademark rights in the mark MORE THAN AN ATHLETE for t-shirts when she executed the assignment on February 22, 2019.<sup>43</sup>

## **2. The Assignment to UNIP and Ongoing Use by UNIP**

On February 22, 2019, Ms. Alex and her “company More Than An Athlete, Inc. (‘MTAA’) entered into an Asset Purchase Agreement with Uninterrupted.”<sup>44</sup> Through this agreement, MTAA assigned all its rights in the MORE THAN AN ATHLETE mark to UNIP, MTAA ceased all use of its mark, and Ms. Alex was hired as a consultant by UNIP.<sup>45</sup> The agreement included an assignment of all goodwill in the mark.<sup>46</sup> There is nothing improper on the face of the agreement.

The assignment was recorded by UNIP, which constitutes prima facie evidence of the execution of the underlying assignment. Trademark Act Section 10(a)(3), 15 U.S.C. § 1060(a)(3). In the absence of evidence rebutting the assignment, we must treat UNIP as the owner of the rights MTAA owned in the MORE THAN AN

---

<sup>43</sup> As we explain in the following section, Ms. Alex assigned her trademark registration and rights to her company More Than An Athlete, Inc (“MTAA”) on August 30, 2018. It was, therefore, MTAA, that assigned the trademark rights to UNIP, though both Ms. Alex and MTAA executed the primary agreement with UNIP.

<sup>44</sup> 68 TTABVUE 93; 66 TTABVUE 20-22 (recorded Trademark Assignment); 25-29 (IP Assignment). Ms. Alex filed the application to register the MORE THAN AN ATHLETE mark in her own name, and assigned the resulting registration to MTAA on August 30, 2018, an assignment that is recorded with the USPTO. The Purchase Agreement, which covers more than trademark assignment, is between Ms. Alex and her company MTAA on one hand, and UNIP, on the other. A trademark assignment from MTAA to UNIP was also executed, and is recorded with the USPTO.

<sup>45</sup> 68 TTABVUE at 93-94.

<sup>46</sup> *Id.* at 94.



ATHLETE mark. *See, e.g., Karsten Mfg. Corp. v. Editoy AG*, 79 USPQ2d 1783, 1790 n.9 (TTAB 2006) (“the law is well established that an assignee stands in the shoes of its assignor.”). *See also Sonic Distribs., Inc. v. Int’l Battery, Inc.*, 175 USPQ 255, 256 (TTAB 1972) (in the absence of rebuttal evidence, the Board must respect a recorded assignment and treat the assignee as the owner of the trademark rights).

Game Plan submitted no evidence but argues repeatedly that the assignment was invalid as an assignment in gross.<sup>47</sup> One reason Game Plan gives for disputing the assignment is the timing. This proceeding began on November 28, 2018, about three months before the assignment. Game Plan argues this fact alone proves there was an assignment in gross, “because UNIP made the purchase after the start of this action, in order to litigate from a changed position.”<sup>48</sup> “However, the motivation for a sale is irrelevant and senior user status may be properly achieved by assignment in anticipation or in the midst of litigation.” *Dial-A-Mattress Operating Corp. v. Mattress Madness, Inc.*, 841 F. Supp. 1339, 33 USPQ2d 1961, 1967 n.10 (E.D.N.Y. 1994) (citing *Money Store v. Harriscorp Fin., Inc.*, 689 F.2d 666, 678 (7th Cir. 1982)). The question of whether the assignment is valid does not turn on the reasons the parties agreed to the deal.

UNIP uses the mark MORE THAN AN ATHLETE in connection with the sale of t-shirts and similar clothing, which is effectively the same use Ms. Alex made prior to the assignment. Ms. Alex sold t-shirts as part of a business intended to emphasize

---

<sup>47</sup> 76 TTABVUE 17-19.

<sup>48</sup> *Id.* at 17.

that student athletes are students and not just athletes.<sup>49</sup> UNIP sells t-shirts and similar clothing as part of a business that tells stories of professional athletes' journeys, with an emphasis on the non-athletic parts of the stories.<sup>50</sup> For example, ESPN features UNIP's MORE THAN AN ATHLETE stories, and one season, Michael Strahan is featured talking about "his journey from a childhood in Germany to playing in the NFL and now a media personality."<sup>51</sup>

Not only does UNIP sell t-shirts and related clothing in a manner almost identical to that of its assignor, MTAA, the two businesses use the t-shirt sales in a similar manner. MTAA focused on student athletes and provided programs to help them retain their focus on academics. UNIP provides real-life stories of how leading athletes became successful.<sup>52</sup> In both instances, the t-shirt sales are a part of a larger effort that relates to the well-being of athletes. We find the similarity of the businesses facilitated transfer of the goodwill Ms. Alex had developed in connection with the sale of t-shirts. UNIP even retained Ms. Alex as a consultant, another fact that supports the transfer of the goodwill. All the evidence of record supports the validity of the assignment.

Game Plan's argument that UNIP acted improperly by acquiring Ms. Alex's prior rights does not ring true given the time line established by the evidence. Game Plan was contacted by Ms. Alex in 2017, before Game Plan started using its mark, but

---

<sup>49</sup> 68 TTABVUE 89-90 (noting the need for more emphasis on academics for student athletes).

<sup>50</sup> 66 TTABVUE 7-8.

<sup>51</sup> *Id.* at 9.

<sup>52</sup> 67 TTABVUE 3-4 (Declaration of Ricardo Viramontes).

Game Plan did not withdraw its trademark application or change its business plans as a result. So, Game Plan's owner, Mr. Sesay, was aware of Ms. Alex's prior use of the mark well before Ms. Alex had any contact with UNIP.

We further note that the record shows Ms. Alex first contacted UNIP in the summer of 2018.<sup>53</sup> Game Plan filed its Notice of Opposition months later, on November 28, 2018.<sup>54</sup> In other words, Ms. Alex and UNIP were in contact before this proceeding began, which undermines Game Plan's assertions that there was something wrong with the assignment because it occurred during this proceeding. It is far more likely that UNIP and Ms. Alex were discussing the mark before Game Plan began this proceeding. In any event, as we noted above, an assignment made during litigation is not, for that reason alone, improper. We find nothing suspect about the timing of the assignment.

There is no dispute concerning the timing of the uses relevant to our priority analysis. Indeed, the evidence shows Ms. Alex's first sales occurred by May 29, 2013,<sup>55</sup> which is well before Game Plan's December 28, 2016 filing date priority.<sup>56</sup> Game Plan

---

<sup>53</sup> 68 TTABVUE 93.

<sup>54</sup> 1 TTABVUE.

<sup>55</sup> 68 TTABVUE 87 (referring to first use of the mark at "the Nike Memorial Classic in Atlanta, Georgia, May 26-29, 2013"). When we have a period during which use occurred, rather than a single date, we use the last date of the period. *See Bass Pro Trademarks, LLC v. Sportsman's Warehouse, Inc.*, 89 USPQ2d 1844, 1856 (TTAB 2008); *Osage Oil & Trans., Inc. v. Standard Oil Co.*, 226 USPQ 905, 911 n.22 (TTAB 1985) (evidence established first use in 1968-1969, therefore December 31, 1969 is date of first use); *EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc.*, 213 USPQ 597, 598 n.5 (TTAB 1982) (documentary evidence showed first use in 1977, the month and day were unknown, therefore, the Board could not presume any date earlier than the last day of the proved period).

<sup>56</sup> Game Plan submitted no evidence so it cannot establish an earlier priority date.

argues that Ms. Alex abandoned her mark, but there is no evidence supporting that argument. Game Plan does not dispute that Ms. Alex was selling t-shirts during 2013 and thereafter or that she and her company MTAA entered into the assignment with UNIP on February 22, 2019. The trademark assignment means that UNIP stands in the shoes of MTAA, and UNIP, therefore, has established priority for purposes of its counterclaim.

Finally, we note that Game Plan does not dispute UNIP's continued use of the MORE THAN AN ATHLETE mark on t-shirts and similar clothing. This fact is important because it shows a continuation of the same type of use Ms. Alex was making prior to the assignment. There is continuity in the uses, the marks are the same, and the goods are the same. For all these reasons, we hold that UNIP has priority with respect to use of the mark MORE THAN AN ATHLETE on t-shirts.

### **3. Game Plan's Remaining Arguments Lack Merit**

Game Plan begins its Trial Brief with a story about LeBron James, a well-known professional basketball player who is apparently a principal with UNIP. According to Game Plan, Mr. Sesay attended a professional basketball game on October 8, 2017 and was with a group of persons who were wearing shirts bearing the MORE THAN AN ATHLETE mark.<sup>57</sup> LeBron James played in that game, according to Game Plan, and on that basis alone, Game Plan alleges that "LeBron James used Game Plan's exact mark to rebrand UNIP's parent company, Uninterrupted."<sup>58</sup> There is no

---

<sup>57</sup> 76 TTABVUE 5.

<sup>58</sup> *Id.*

evidence in the record to support the argument that UNIP intentionally copied Game's Plan's mark, and we reject it for that reason.<sup>59</sup>

Game Plan also makes much of the fact that the Board denied a motion for summary judgment filed by UNIP, in part because the Board found that UNIP cannot rely on the statutory priority date of the registration it obtained from MTAA because "it did not plead a tacking or prior registration defense and thus did not provide Game Plan fair notice of reliance on Registration No. 4343953 for purposes of priority."<sup>60</sup> Game Plan argues this decision by the Board means UNIP cannot rely on the assignment from Ms. Alex and MTAA to establish priority.<sup>61</sup>

Game Plan is mistaken, because the Board noted, in its decision denying the motion, that "UNIP also relies on alleged common law rights."<sup>62</sup> The Board found the common law priority claim was disputed. The Board never held that UNIP was prohibited from claiming the benefits of the assignment, only that there were disputed facts that precluded granting summary judgment. UNIP's counterclaim, including its priority claim, is supported by Ms. Alex's prior use and the assignment of the rights acquired through that use. The Board's prior rulings in this proceeding did not limit UNIP from proving priority based on Ms. Alex's assigned common law

---

<sup>59</sup> UNIP submitted testimony from Ricardo Viramontes and Gabriela Goldberg, the persons involved in the creation of UNIP's marks, and both testified that they had no awareness of the basketball game Game Plan references and that they did not attend the game or speak to LeBron James about the game. 65 TTABVUE 3; 67 TTABVUE 4. This testimony was not rebutted or contradicted by Game Plan.

<sup>60</sup> 50 TTABVUE 7.

<sup>61</sup> 76 TTABVUE 9.

<sup>62</sup> 50 TTABVUE 7.

rights. To the extent Game Plan argues otherwise, it is misinterpreting the Board's prior decisions.

Game Plan also argues that because UNIP had its own plans for use of the MORE THAN AN ATHLETE mark and did not intend to offer charitable services or offer services in schools, it could not obtain MTAA's trademark rights.<sup>63</sup> There may be something to this argument as it relates to UNIP's acquisition of the registration for "publicity and sales promotion services" in International Class 35. If UNIP is not offering these services and does not intend to offer them in the future, then UNIP may not have enforceable rights as to these services. But even if that were true, it would not impact the assignment of common law rights in connection with clothing, namely t-shirts. We find the assignment valid as to the common law rights. Whether UNIP also obtained service mark rights from Ms. Alex and MTAA does not matter to the result in this proceeding because UNIP's counterclaim is supported by the common law rights it obtained.

### **B. Likelihood of Confusion**

Game Plan conceded likelihood of confusion, a point it made repeatedly in its Trial Brief.<sup>64</sup>

---

<sup>63</sup> 76 TTABVUE 19.

<sup>64</sup> See n.5, *supra*.

### **C. Conclusion**

UNIP has proven its counterclaim by a preponderance of the evidence. It has priority based on the assignment from MTAA. Likelihood of confusion was conceded by Game Plan. Both elements of UNIP's Section 2(d) claim are established, and we, therefore, hold that Game Plan's Registration No. 5487497 must be cancelled.

### **V. Game Plan's Opposition Claims Fail Without Its Registration**

Game Plan asserted rights in its registration and common law rights in support of its Section 2(d) claims in the Opposition. We have granted UNIP's cancellation counterclaim, which eliminates Game Plan's pleaded registration. That leaves Game Plan's alleged common law rights, but Game Plan's failure to submit any trial evidence leaves those claims without any support. One cannot prove common law rights without evidence.

Game Plan, therefore, has no support for its Section 2(d) claims in the Opposition, and therefore, we dismiss those claims.

**Decision:** The counterclaim petition to cancel is granted, and Registration No. 5487497 will be cancelled in due course. The Opposition claims lack support and are dismissed. The six opposed Applications shall proceed.