

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: March 5, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Kennedy International, Inc.*  
*v.*  
*Sutton Home Fashions, Inc.*  
—

Cancellation No. 92080461  
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Todd C. Hunt of Law Office of Todd C. Hunt, APC,  
for Kennedy International, Inc.

Armin Ghiam and Jeremy S. Boczko of Hunton Andrews Kurth LLP,  
for Sutton Home Fashions, Inc.

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Before Dunn, Allard, and Brock,  
Administrative Trademark Judges.

Opinion by Brock, Administrative Trademark Judge:

Kennedy International, Inc. (“Petitioner”) petitions to cancel a registration on the Principal Register owned by Sutton Home Fashions, Inc. (“Respondent”) for the mark BON VOYAGE in standard characters for “travel pillows” in International Class 20 and “towels, wash cloths; and bedding, namely, comforters” in International Class

24.<sup>1</sup> The Petition for Cancellation is directed only to the goods in International Class 20 and asserts several grounds, but in its Brief, Petitioner only addressed the pleaded claims of priority and likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) based on Petitioner’s alleged prior common law rights in the mark BON VOYAGE for travel pillows.<sup>2</sup> Accordingly, we consider the other claims that were asserted in the Petition but not pursued in the Brief waived.<sup>3</sup> *See Knight*

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<sup>1</sup> Registration No. 5276930 issued August 29, 2017 from an application filed on July 17, 2015, and claims first use and first use in commerce on July 17, 2015. The English translation of “BON VOYAGE” in the mark is “good wishes to someone departing on a journey”. A declaration under Section 8 has been accepted.

<sup>2</sup> Petition for Cancellation, 1 TTABVUE. Petitioner’s brief also alleges “that Respondent’s Registration should never have been granted (due to the widespread use of BON VOYAGE on all sorts of travel-related products),” and “[t]here are several apparent problems with Respondent’s Application and conduct related to its BON VOYAGE registration.” 19 TTABVUE 12. While it is not clear what is meant by “apparent problems,” Petitioner failed to plead that Respondent’s mark did not function as a trademark, and that issue is not before us. *See Towers v. Advent Software, Inc.*, 913 F.2d 942, 945 (Fed. Cir. 1990) (“As the Board recognized, Towers chose not to challenge Advent’s registration under section 2(e) as being descriptive; therefore, the Board treated Advent’s term as functioning as a trademark. The degree of descriptiveness of Advent’s mark was not at issue.”). Moreover, since Petitioner presented no evidence during trial on the distinctiveness of Respondent’s mark, there is no question of the issue having been tried by implied consent. *See Morgan Creek Prods. Inc. v. Foria Int’l Inc.*, Opp. No. 91173806, 2009 TTAB LEXIS 445, at \*11 (TTAB 2009) (“Implied consent to the trial of an unpleaded issue can be found only where the nonoffering party (1) raised no objection to the introduction of the evidence on the issue, and (2) was fairly apprised that the evidence was being offered in support of the issue.”).

<sup>3</sup> The waived grounds for cancellation are: (1) dilution by blurring and tarnishment under Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c); and (2) Registrant is not the rightful owner of the mark under Section 1 of the Trademark Act, 15 U.S.C. § 1051. We note the admonition of our primary reviewing court regarding the distinction between waiver and forfeiture. *See In re Google Tech. Holdings LLC*, 980 F.3d 858, 862 (Fed. Cir. 2020) (“Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.” (internal quotation marks omitted)). Claims that were asserted in the petition but then not pursued at trial may be deemed impliedly waived, while claims that could have been asserted, but were not, may be deemed forfeited.

*Textile Corp. v. Jones Inv. Co.*, Opp. No. 91153852, 2005 TTAB LEXIS 250, at \*2 n.4 (TTAB 2005) (pleaded dilution ground not pursued on brief deemed waived).

In its Answer, Respondent denied the salient allegations in the Petition for Cancellation, and pleaded two affirmative defenses: laches<sup>4</sup> and “no likelihood of confusion”.<sup>5</sup> The first affirmative defense, laches, is waived, as Respondent neither submitted evidence on this point nor raised it in its brief, other than in a passing remark by counsel (“Nor did Petitioner ever send Sutton any cease and desist letter despite 7 years of coexistence in the same industry.”).<sup>6</sup> See *Knight Textile*, 2005 TTAB LEXIS 250, at \*2 n.4.

The second “affirmative defense,” no likelihood of confusion, is not a true affirmative defense so we do not consider it as such. Rather, it constitutes an amplification of Respondent’s denials of Petitioner’s asserted grounds for cancellation. See, e.g., *DeVivo v. Ortiz*, Opp. No. 91242863, 2020 TTAB LEXIS 15, at \*3 (TTAB 2020) (mere amplifications of the applicant’s denials not considered as separate affirmative defenses). Here, Respondent raised in its Answer<sup>7</sup> and argues in its Brief, inter alia, that because “Petitioner has failed to use the BON VOYAGE mark as a trademark prior to” Respondent’s acquisition of trademark rights, Petitioner’s claims as to priority and likelihood of confusion must fail.<sup>8</sup>

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<sup>4</sup> Answer, 11 TTABVUE 6.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> Respondent’s Brief, 21 TTABVUE 23.

<sup>7</sup> 11 TTABVUE 6-7.

<sup>8</sup> Respondent’s Brief, 21 TTABVUE 23.

Both parties filed briefs and Petitioner filed a rebuttal brief. For the reasons discussed herein, we deny the petition to cancel.

## **I. The Record**

The record consists of the pleadings; the file of Respondent's Registration, under Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1); and the parties each introduced testimonial declarations and accompanying exhibits.

Petitioner introduced the following evidence:

- Testimony Declaration of Henry J. Guindi, Petitioner's President, dated April 3, 2024 with accompanying exhibits A-C ("Guindi Declaration").<sup>9</sup>

Respondent introduced the following evidence:

- Testimony Declaration of Vernon E. Wichman, owner of DodgerFL Productions, dated July 1, 2024 with accompanying exhibits A-J ("Wichman Declaration");<sup>10</sup> and
- Testimony Declaration of Jesse Sutton, Respondent's Executive Vice President of Sales, dated June 30, 2024 with accompanying exhibits A-G ("Sutton Declaration").<sup>11</sup>

## **II. 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, 1373-74 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). A party in the position of plaintiff may seek to cancel a registration of a mark when doing so is within the zone of interests protected by the

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<sup>9</sup> 12 TTABVUE.

<sup>10</sup> 17 TTABVUE (public); 15 TTABVUE (confidential).

<sup>11</sup> 26 TTABVUE.

statute and it has a reasonable belief in damage that would be proximately caused by continued registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement, and a reasonable belief in damage by the registration of a mark, which demonstrates damage proximately caused by registration of the mark).

There is no dispute as to Petitioner's allegation that Respondent sent Petitioner a "cease and desist" letter involving Petitioner's use of the mark BON VOYAGE. Henry J. Guindi, Petitioner's President, testified regarding Petitioner's alleged prior use of the mark BON VOYAGE mark for travel pillows and the exhibits accompanying his declaration included a copy of the cease and desist letter.<sup>12</sup> In the letter, Respondent specifically relies on its ownership of the involved registration, Reg. No. 5276930, as a basis for its demand that Petitioner "[c]ease and desist immediately, from advertising, offering for sale, distributing, selling or doing business under the infringing trademark BON VOYAGE and confusingly similar variations thereof, and agree to discontinue such use in the future".<sup>13</sup> In its trial brief, Respondent implicitly acknowledges the evidence, characterizing the letter as "a cease and desist letter from Sutton".<sup>14</sup>

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<sup>12</sup> Guindi Declaration, 12 TTABVUE 5-6, ¶¶ 17; and 28-30 (Exhibit B, letter).

<sup>13</sup> *Id.* at 29.

<sup>14</sup> Respondent's brief, 21 TTABVUE 23, and 19 n.4. While stating the letter speaks for its self, Respondent's answer also admits that Respondent sent the letter as alleged in the Petition.

Based on the record, we find Petitioner is entitled to seek cancellation on the basis of likelihood of confusion. *See Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, Opp. No. 91219435, 2017 TTAB LEXIS 260, at \*11 (TTAB 2017) (finding entitlement to the likelihood of confusion claim in part because plaintiff received a cease and desist letter from defendant); *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, Can. No. 92050879, 2013 TTAB LEXIS 347, at \*34 (TTAB 2013) (a cease and desist letter sent by an applicant to an opposer included in consideration of opposer's entitlement to the likelihood of confusion claim); *Ipcor Corp. v. Blessings Corp.*, Opp. No. 91069106, 1988 TTAB LEXIS 1, at \*10 (TTAB 1988) (cease and desist letter coupled with plaintiff's use of the mark was sufficient to establish entitlement to the likelihood of confusion claim).

### **III. Priority and Likelihood of Confusion**

Under Section 2(d) of the Trademark Act, a mark may not be registered if it “consists of or comprises a mark which so resembles a mark registered in the Patent and 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 ....” 15 U.S.C. § 1052(d). As the plaintiff in this proceeding, Petitioner bears the burden of proof. *Bose Corp. v. QSC Audio Prods.*, 293 F.3d 1367, 1370 (Fed. Cir. 2002); *see also Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 1023 (Fed. Cir. 1989) (“Because a trademark owner’s certificate of registration is ‘prima facie evidence of the validity of the registration’ and continued use of the registered mark, the burden of proof is

placed upon those who seek cancellation”) (internal citations omitted). To prevail on its likelihood of confusion claim, Petitioner must establish priority. *See Embarcadero Techs., Inc. v. RStudio, Inc.*, Opp. No. 91193335, 2013 TTAB LEXIS 6, at \*28 (TTAB 2013) (citing *Hydro-Dynamics Inc. v. George Putnam & Co. Inc.*, 811 F.2d 1470 (Fed. Cir. 1987)). Petitioner focuses most of its Brief on priority.

To establish priority, Petitioner must prove by a preponderance of the evidence that, vis-à-vis Respondent, it owns proprietary rights in “a mark or trade name previously used in the United States . . . and not abandoned . . .” *Threshold.TV, Inc. v. Metronome Enters., Inc.*, Opp. No. 91152662, 2010 TTAB LEXIS 314, at \*13-14 (TTAB 2010); *see also Hydro-Dynamics*, 811 F.2d at 1472. In this case, Petitioner does not rely on ownership of a pleaded federal registration for priority, but instead relies on its claim of prior common law use of BON VOYAGE for travel pillows. Where a plaintiff seeks to cancel a registration on the Principal Register under Trademark Act Section 2(d) based on an assertion of common law rights, the petitioner is required to demonstrate that it has prior use of **a mark that is distinctive, inherently or otherwise**, prior to the first use or constructive first use of the respondent’s mark. *See Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 1320 (CCPA 1981) (emphasis added); *see also Towers v. Advent Software, Inc.*, 913 F.2d 942, 946-47 (Fed. Cir. 1990) (rule of *Otto Roth* applicable to cancellation proceedings).

That is, Petitioner must first “show[] that [the] term is distinctive of [Petitioner’s] goods, whether inherently or through the acquisition of secondary meaning or through whatever other type of use may have developed a trade identity.” *Towers*,

913 F.2d at 945 (citing *Otto Roth*, 640 F.2d at 1320) (internal quotation omitted). “One way a proposed mark fails to function is if consumers will view it as a merely informational slogan or phrase instead of something that ‘point[s] out distinctively the origin of the goods to which it is attached.’” *In re Brunetti*, Ser. Nos. 88308426, 88308434, 88308451, and 88310900, 2022 TTAB LEXIS 297, at \*16 (TTAB 2022) (quoting *In re Bose Corp.*, 546 F.2d 893, 897 (CCPA 1976)).

“Matter may be merely informational and fail to function as a trademark if it is a common term or phrase that consumers of the goods ... are accustomed to seeing used by various sources to convey ordinary, familiar, or generally understood concepts or sentiments.” *Id.* at \*17. “Such widely used messages will be understood as merely conveying the ordinary concept or sentiment normally associated with them, rather than serving any source-indicating function.” *Id.* at \*17-18 (citing *D.C. One Wholesaler, Inc. v. Chien*, Cons. Opp No. 91199035 and Canc. No. 92053919, 2016 TTAB LEXIS 536, at \*20 (TTAB 2016) (sustaining opposition to registration of I ♥ DC for clothing because it “has been widely used, over a long period of time and by a large number of merchandisers as an expression of enthusiasm, affection or affiliation with respect to the city of Washington, D.C.” and thus would not be perceived as a source-indicator)); *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 1202.04(b) (Nov. 2024).

To determine whether a proposed mark functions as a mark, “we look to [any] evidence of record showing how the designation is actually used in the marketplace.” *In re Brunetti*, 2022 TTAB LEXIS 297, at \*18-19 (internal quotations omitted).



“Consumers ordinarily take widely-used, commonplace messages at their ordinary meaning, and not as source indicators, absent evidence to the contrary.” *Id.* at \*19 (internal quotation omitted). To establish its ownership of the BON VOYAGE mark, Petitioner offered testimony and exhibits with the following examples of its use on U-shaped neck pillows intended for travel:



Guindi Declaration, 12 TTABVUE 4-5. Additional examples of use show Petitioner's travel pillows bearing the alleged mark alongside other styles of Petitioner's travel pillows:



*Id.* at 32, Guindi Declaration, Exhibit C.



*Id.* at 34.



*Id.* at 35.



*Id.* at 36.

“Bon voyage” is a French expression “[u]sed to express farewell and good wishes to a departing traveler”; the words “bon voyage” translate directly to “good journey.”<sup>15</sup> Here, Petitioner applied the travel-related phrase “Bon Voyage” to its travel pillows,

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<sup>15</sup> AMERICAN HERITAGE DICTIONARY, <https://ahdictionary.com/word/search.html?q=bon+voyage> (accessed March 4, 2025). The Board may take judicial notice of dictionary definitions. *In re Nextgen Mgmt., LLC*, Ser. No. 88098031, 2023 TTAB LEXIS 1, at \*10 n.5 (TTAB 2023).

in the same manner as its other travel pillows display other travel-related words and phrases: “Vacay Vibes”, “Do Not Disturb”, “Frequent Flyer”, “Vacay”, “Jet Set”, “First Class”, “Live Love Travel”, and “Explore”. Petitioner’s use of BON VOYAGE makes clear that the term is not a designation of source but a feature of the goods. In selecting one of these travel pillows, customers may choose one reading “Bon Voyage” instead of “Vacay” based on personal preference of the message conveyed. Expressing enthusiasm for travel does not serve a source-indicating function. *See D.C. One Wholesaler, Inc. v. Chien*, 2016 TTAB LEXIS 536, at \*20. We find that Petitioner’s use of “Bon Voyage” fails to function as a trademark and is just one of many stylistic options that Petitioner makes available on its travel pillows.<sup>16</sup>

Based on this record, we find Petitioner has not proved it owns trademark rights in BON VOYAGE to “rel[y] upon to demonstrate likelihood of confusion as to source, whether by ownership of a registration, prior use of a technical ‘trademark,’ prior use in advertising, prior use as a trade name, or whatever other type of use may have developed a trade identity.” *Otto Roth*, 640 F.2d at 1320. Consequently, we find that Petitioner has not demonstrated that it owns prior common law rights in the trademark BON VOYAGE for travel pillows.

Because Petitioner has failed to establish that it owns common law rights in the proposed mark, Petitioner has also failed to establish its priority, which is a necessary element of any claim under Trademark Act § 2(d). We need not reach the issue of

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<sup>16</sup> Indeed, as noted earlier, Petitioner’s brief admits “widespread use of BON VOYAGE on all sorts of travel-related products.” 19 TTABVUE 12.

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likelihood of confusion because without proof of priority, Petitioner cannot prevail. *See Syngenta Crop Prot., Inc. v. Bio-Chek, LLC*, 2009 TTAB LEXIS 70, at \*18-19 (TTAB 2009).

**Decision:** The petition to cancel Registration No. 5276930 on the basis of priority and likelihood of confusion is denied.