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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92050860
Party	Plaintiff Trans World International, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

TRANS WORLD INTERNATIONAL, INC.,	)	
	)	
	)	
Petitioner,	)	
	)	
vs.	)	Cancellation No. 92050860
	)	
AMERICAN STRONGMAN CORPORATION,	)	
	)	
Respondent.	)	
	)	

**PETITIONER’S BRIEF ON THE CASE**

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## **DESCRIPTION OF THE RECORD**

The record consists of a TESS copy of Petitioner's Trademark Registration No. 2,484,106 and the USPTO prosecution history of Respondent's Trademark Application Serial No. 77-387,835, which became Registration No. 3,522,878 for AMERICA'S STRONGEST MAN. Respondent has not submitted any evidence of record.

## **STATEMENT OF THE ISSUES**

Is the mark AMERICA'S STRONGEST MAN for "entertainment in the nature of competitions in the field of strength athletics and strength entertainment" confusingly similar under section 2(d) to the mark WORLD'S STRONGEST MAN for "entertainment in the nature of on-going television programs in the field of sports competitions."

## **RECITATION OF THE FACTS**

Petitioner, Trans World International, Inc., is the owner of the mark WORLD'S STRONGEST MAN and has registered this mark on the Principal Register under section 2(f) for entertainment in the nature of on-going television programs in the field of sports competitions, Registration No. 2,484,106, registered September 4, 2001, based on Application Serial No. 75-377,504, filed October 22, 1997, claiming a date of first use of 1979, and a date of first use in commerce of 1979.

Respondent, American Strongman Corporation, has registered the mark AMERICA'S STRONGEST MAN for entertainment in the nature of competitions in the

field of strength athletics and strength entertainment on the Supplemental Register, Registration No. 3,522,878, registered October 21, 2008, based on Application Serial No., 77-387,835, filed February 4, 2008, and claiming a date of first use of October 15, 2004, and a date of first use in commerce of March 16, 2005.

The record comprises a TESS copy of Petitioner's Trademark Registration No. 2,484,106. In accordance with section 7, 15 U.S.C. § 1057, Petitioner's registration is prima facie evidence of the validity of the registered mark and of the registration of the mark, of Petitioner's ownership of the mark, and of Petitioner's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the registration. Respondent has chosen to submit no evidence that this registration is invalid, nor has Respondent otherwise challenged Petitioner's trademark rights.

The record further comprises the prosecution history of Respondent's Trademark Application Serial No. 77-387,835, which became Registration No. 3,522,878. *Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F. 3d 1352 (Fed. Cir. 2009). The prosecution history shows that Petitioner's Registration No. 2,484,106 was cited by the Examining Attorney in an Office Action dated May 13, 2008, and that the Examining Attorney refused registration of Respondent's mark AMERICA'S STRONGEST MAN under section 2(d), 15 U.S.C. § 1052(d), as being confusingly similar to Petitioner's registered mark WORLD'S STRONGEST MAN. This Office Action, which is of record herein, presents a well reasoned judgment of the likelihood of confusion between the two marks.

Respondent responded to the Office Action on September 4, 2008 by amending

the application to one seeking registration on the Supplemental Register, but did not otherwise address the section 2(d) refusal to register. Despite Respondent's filing of a nonresponsive amendment, the application was approved for registration on the Supplemental Register, and this cancellation proceeding ensued.

On August 27, 2010 in this cancellation proceeding, Respondent filed a motion for judgment pursuant to Trademark Rule 2.132(b). On December 9, 2010, this Board denied the motion, ruling that the services identified in the parties' registrations appear to overlap in part, and in consideration that Petitioner's mark is distinctive based on its registration under Section 2(f). Furthermore, this Board held, the parties' marks are not so dissimilar as to warrant judgment in Respondent's favor prior to the introduction of any evidence.

## **ARGUMENT**

### **There Is No Dispute Regarding Standing and Priority**

As noted by this Board in its decision of December 9, 2010 in this proceeding, there is no dispute regarding standing and priority, since Petitioner's pleaded registration establishes both. With respect to priority, Petitioner may rely on the filing date of the application which matured into its pleaded Trademark Registration No. 2,484,106, and evidence of use is not required. The filing date of October 22, 1997 of Petitioner's pleaded registration is earlier than both the filing date Respondent's involved registration, and respondent's claimed date of first use.



### **The Services Of The Respective Marks Are Very Similar And Even Partially Identical**

The services of the respective marks do not have to be identical or even competitive in order to determine that there is a likelihood of confusion. The inquiry is whether the services are related, not identical. The issue is not whether the services will be confused with each other, but rather whether the public will be confused about their source. See *Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975). It is sufficient that the services of the respondent and the petitioner are so related that the circumstances surrounding their marketing are such that they are likely to be encountered by the same persons under circumstances that would give rise to the mistaken belief that they originate from the same source. See, e.g., *On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000) (ON-LINE TODAY for Internet connection services held likely to be confused with ONLINE TODAY for Internet content); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984) (MARTIN'S for wheat bran and honey bread held likely to be confused with MARTIN'S for cheese); *In re Toshiba Medical Systems Corp.*, 91 USPQ2d 1266 (TTAB 2009) (VANTAGE TITAN for MRI diagnostic equipment held likely to be confused with TITAN for medical ultrasound device); *L.C. Licensing, Inc. v. Berman*, 86 USPQ2d 1883 (TTAB 2008) (ENYCE for custom automotive accessories held likely to be confused with ENYCE for various clothing items and accessories directed to the urban lifestyle market); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (CONFIRM for a buffered solution

equilibrated to yield predetermined dissolved gas values in a blood gas analyzer held likely to be confused with CONFIRMCELLS for diagnostic blood reagents for laboratory use); *In re Jeep Corp.*, 222 USPQ 333 (TTAB 1984) (LAREDO for land vehicles and structural parts therefor held likely to be confused with LAREDO for pneumatic tires).

In this case, the services recited in the respective registrations are “entertainment in the nature of competitions in the field of strength athletics and strength entertainment” on the one hand, and “entertainment in the nature of on-going television programs in the field of sports competitions” on the other hand. Neither party has submitted any evidence relating to the nature and scope of their services.

The nature and scope of each party’s services must be determined on the basis of the services recited in the registration. *See, e.g., Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Shell Oil Co.*, 992 F.2d 1204, 1208 n.4, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); *J & J Snack Foods Corp. v. McDonald’s Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (C.C.P.A. 1973).

If the cited registration describes services broadly, and there is no limitation as to the nature, type, channels of trade, or class of purchasers, it is presumed that the registration encompasses all services of the type described, that they move in all normal channels of trade, and that they are available to all classes of purchasers. *See, e.g., In*

*re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods”); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).

Therefore, if the cited registration of the petitioner has a broad identification of services, the cancellation respondent does not avoid likelihood of confusion merely by more narrowly identifying its related services. *See, e.g., In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992) (where a registrant’s goods are broadly identified as “computer programs recorded on magnetic disks,” without any limitation as to the kind of programs or the field of use, it is necessary to assume that the registrant’s goods encompass all such computer programs, and that they travel in the same channels of trade and are available to all classes of prospective purchasers of those goods); *In re Diet Center Inc.*, 4 USPQ2d 1975 (TTAB 1987) (VEGETABLE SVELTES for wheat crackers sold through franchised outlets offering weight reduction services held likely to be confused with SVELTE for low-calorie frozen dessert); *In re Uncle Sam Chemical Co., Inc.*, 229 USPQ 233 (TTAB 1986) (SPRAYZON for cleaning preparations and degreasers for industrial and institutional use held likely to be confused with SPRA-ON and design for preparation for cleaning woodwork and furniture).

Similarly, there is a likelihood of confusion if the cancellation respondent identifies its services so broadly that the identification encompasses the services identified in the petitioner’s registration of a similar mark. *See, e.g., In re Americor Health Services*, 1 USPQ2d 1670 (TTAB 1986) (RESOLVE for corporate employee assistance services, namely, providing confidential mental health counseling services,

held likely to be confused with RESOLVE for counseling services in the field of infertility); *In re Equitable Bancorporation*, 229 USPQ 709 (TTAB 1986) (RESPONSE for banking services held likely to be confused with RESPONSE CARD for banking services rendered through 24-hour teller machines).

Therefore herein, Respondent's services of "entertainment in the nature of competitions in the field of strength athletics and strength entertainment" must be construed to include competitions rendered through the medium of television as well as live, and must be construed to appeal to all audiences that watch sports competitions. Likewise, Petitioner's services of "entertainment in the nature of on-going television programs in the field of sports competitions" must be construed to include strength athletics and strength entertainment and must be construed to appeal to audiences that watch strength athletics and strength entertainment. As such, the services of the respective parties are very similar and are even practically identical.

This Board has further held in this cancellation proceeding, in its denial of Respondent's motion for judgment pursuant to Trademark Rule 2.132(b) on December 9, 2010, that "the services identified in the parties' registrations appear to overlap in part." This conclusion was reached on the same record presently before the Board, since Respondent has refused to introduce any evidence of record since the Board entered its decision on that motion.

### **The Dominant Portion Of Each Of The Respective Marks Is Identical**

It is a general rule that likelihood of confusion is not avoided between otherwise confusingly similar marks merely by adding or deleting matter that is descriptive or suggestive of the named goods or services. Sometimes, the rule is expressed in terms of the dominance of the common term. Therefore, if the dominant portion of both marks is the same, then confusion may be likely notwithstanding peripheral differences. See, e.g., *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257 (Fed. Cir. 2010) (ML likely to be perceived as a shortened version of ML MARK LEES when used on the same or closely related skin-care products); *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005) (VEUVE ROYALE for sparkling wine found likely to be confused with VEUVE CLICQUOT and VEUVE CLICQUOT PONSARDIN for champagne, noting that the presence of the “strong distinctive term [VEUVE] as the first word in both parties’ marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of the word ROYALE”); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 1343, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (“Viewed in their entireties with non-dominant features appropriately discounted, the marks [GASPAR’S ALE for beer and ale and JOSE GASPAR GOLD for tequila] become nearly identical”); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002) (even though applicant’s mark PACKARD TECHNOLOGIES (with “TECHNOLOGIES” disclaimed) does not incorporate every feature of opposer’s HEWLETT PACKARD

marks, similar overall commercial impression is created); *In re Max Capital Group Ltd.*, 93 USPQ2d 1243 (TTAB 2010) (MAX (and pillar design) held likely to be confused with MAX in typed form and MAX (and dot design) for legally identical insurance services); *In re Toshiba Medical Systems Corp.*, 91 USPQ2d 1266 (TTAB 2009) (VANTAGE TITAN for MRI diagnostic equipment held likely to be confused with TITAN for medical ultrasound device, noting that the marks are more similar than they are different and that the addition of applicant's "product mark" to the registered mark would not avoid confusion); *In re SL&E Training Stable, Inc.*, 88 USPQ2d 1216 (TTAB 2008) (Board found likelihood of confusion between SAM EDELMAN and EDELMAN both for wallets and various types of bags noting that the marks are similar because they share the same surname, and it is the practice in the fashion industry to refer to surnames alone); *In re Chica*, 84 USPQ2d 1845 (TTAB 2007) (Board found likelihood of confusion between CORAZON and design and CORAZON BY CHICA and design, both for jewelry); *In re El Torito Restaurants Inc.*, 9 USPQ2d 2002 (TTAB 1988) (MACHO COMBOS (with "COMBOS" disclaimed) held likely to be confused with MACHO (stylized), both for food items as a part of restaurant services); *In re Computer Systems Center Inc.*, 5 USPQ2d 1378 (TTAB 1987) (CSC ADVANCED BUSINESS SYSTEMS for retail computer stores held likely to be confused with CSC for computer time sharing and computer programming services); *In re Equitable Bancorporation*, 229 USPQ 709 (TTAB 1986) (RESPONSE held likely to be confused with RESPONSE CARD (with "CARD" disclaimed), both for banking services); *In re Apparel Ventures, Inc.*, 229 USPQ 225 (TTAB 1986) (SPARKS BY SASSAFRAS (stylized) for clothing held likely to be

confused with SPARKS (stylized) for footwear); *In re U.S. Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (CAREER IMAGE (stylized) for clothing held likely to be confused with CREST CAREER IMAGES (stylized) for uniforms); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (CONFIRM for a buffered solution equilibrated to yield predetermined dissolved gas values in a blood-gas analyzer held likely to be confused with CONFIRMCELLS for diagnostic blood reagents for laboratory use); *In re Energy Images, Inc.*, 227 USPQ 572 (TTAB 1985) (SMART-SCAN (stylized) for optical line recognition and digitizing processors held likely to be confused with SMART for remote-data gathering and control systems); *In re Riddle*, 225 USPQ 630 (TTAB 1985) (RICHARD PETTY'S ACCU TUNE and design for automotive service stations held likely to be confused with ACCUTUNE for automotive testing equipment); *In re Denisi*, 225 USPQ 624 (TTAB 1985) (PERRY'S PIZZA held likely to be confused with PERRY'S, both for restaurant services); *In re Collegian Sportswear Inc.*, 224 USPQ 174 (TTAB 1984) (COLLEGIAN OF CALIFORNIA and design (with "CALIFORNIA" disclaimed) held likely to be confused with COLLEGIENNE, both for items of clothing); *In re Pierre Fabre S.A.*, 188 USPQ 691 (TTAB 1975) (PEDI-RELAX for foot cream held likely to be confused with RELAX for antiperspirant).

In this case the respective marks are WORLD'S STRONGEST MAN on the one hand and AMERICA'S STRONGEST MAN on the other hand. The words "STRONGEST MAN" are clearly the only dominant portions of the respective marks, as the words "AMERICA'S" or "WORLD'S" are descriptive or generic geographic identifiers. It has been frequently held that the word "AMERICA" or "AMERICA'S" does

nothing to distinguish a mark, and, in fact, a mark that is otherwise generic and contains the word “AMERICA” or “AMERICA’S” may still be generic and incapable of acquiring distinctiveness. *In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999) (THE BEST BEER IN AMERICA so highly laudatory and descriptive as applied to beer and ale that it is incapable of acquiring distinctiveness); *In re Carvel Corp.*, 223 USPQ 65 (TTAB 1984) (AMERICA’S FRESHEST ICE CREAM held incapable). Similarly, the terms “GLOBAL” and “WORLDWIDE” are also considered to be highly descriptive of services that are global or worldwide in scope. See TMEP § 1209.03(o).

Thus, the dominant portions of the respective marks, the words “STRONGEST MAN,” are identical. The only differences between the marks are the generic geographical descriptive words “AMERICA’S” and “WORLD’S” which are so highly descriptive as to be incapable of distinguishing the respective marks.

Further, it would only be reasonable to assume that the prospective audience of the athletic competitions provided under the two marks would assume that the entertainment services rendered using the marks would be provided by a single source. The audience familiar with WORLD’S STRONGEST MAN competitions would naturally assume that the competitions rendered using the mark AMERICA’S STRONGEST MAN which feature strongmen from around the U.S. rather than strongmen from around the world, would originate from the same source. The audience would not place any distinguishing weight or importance on the differences between the words “WORLD’S” and “AMERICA’S” to presume that the services originated from difference sources, because these words are merely generic geographic identifiers.



Finally, it should be noted that this Board in its denial of Respondent's motion for judgment pursuant to Trademark Rule 2.132(b) on December 9, 2010, concluded that "the parties' marks are not so dissimilar as to warrant judgment in respondent's favor." While this conclusion was reached awaiting the introduction of further evidence, the same record is presently before the Board, since Respondent has not introduced any evidence of record since the Board entered its decision on that motion.

### SUMMARY

In conclusion, Petitioner submits that the mark AMERICA'S STRONGEST MAN for "entertainment in the nature of competitions in the field of strength athletics and strength entertainment" and the mark WORLD'S STRONGEST MAN for "entertainment in the nature of on-going television programs in the field of sports competitions" are confusingly similar under section 2(d), and that Respondent's Registration No. 3,522,878 should be cancelled.




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June 9, 2011

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Petitioner's Brief on the Case* was served on Sepehr Daghighian, 433 North Camden Drive, Fourth Floor, Beverly Hills, California 90210, attorney for Respondent, this 9th day of June, 2011.

  
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