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2019 Trademark Law Decisions of the Federal Circuit

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2019 Trademark Law Decisions of the Federal Circuit

2019 TRADEMARK LAW DECISIONS OF THE FEDERAL CIRCUIT

STEPHANIE H. BALD* AND SARA COPELAND PARKER**

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INTRODUCTION

In 2019, the U.S. Court of Appeals for the Federal Circuit issued five precedential trademark decisions—a slight decline from the seven precedential decisions issued in 2018. The cases consist of appeals from the Trademark Trial and Appeal Board (TTAB or “the Board”), U.S. International Trade Commission (ITC or “the Commission”), and a U.S. district court. The majority of these decisions involved the issue of likelihood of confusion and were resolved based on longstanding precedent. The Federal Circuit also issued one notable decision relating to the requirements for specimens of use consisting of webpages.

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Each of the Federal Circuit's precedential 2019 trademark decisions is discussed in detail below.

I. LIKELIHOOD OF CONFUSION

A. *In re Guild Mortg. Co.*

In *In re Guild Mortgage Co.*,¹ the Federal Circuit vacated the TTAB's decision that a likelihood of confusion existed between the mark GUILD MORTGAGE COMPANY & Design (shown below) and the word mark GUILD INVESTMENT MANAGEMENT.²

Figure 1: Guild Mortgage Co. Mark



Guild Mortgage Company (“Applicant”) applied to register the mark GUILD MORTGAGE COMPANY & Design for “mortgage banking services, namely, origination, acquisition, servicing, securitization and brokerage of mortgage loans.”³ The examining attorney refused registration based on a likelihood of confusion with Guild Investment Management’s (“Registrant”) prior registration for the word mark GUILD INVESTMENT MANAGEMENT for “investment advisory services,” stating that the marks, nature of the services, and trade channels were similar.⁴ The TTAB affirmed, noting that these similarities were sufficient to create a likelihood of confusion even though consumers “may exercise a certain degree of care in investing money, if not perhaps in seeking a mortgage loan.”⁵

On appeal to the Federal Circuit, Applicant argued that the Board failed to consider relevant evidence as to concurrent use of the marks without evidence of actual confusion, i.e., evidence directed to the eighth *Dupont* factor of the thirteen-factor test for likelihood of

1. 912 F.3d 1376 (Fed. Cir. 2019).

2. *Id.* at 1378.

3. *Id.*

4. *Id.*

5. *Id.*

confusion.⁶ Applicant presented evidence by way of a declaration from its president and CEO that it had coexisted with Registrant for over forty years without any evidence of actual confusion.⁷ The U.S. Patent and Trademark Office (PTO) argued that the Board need not have addressed this argument because “‘uncorroborated statements of no known instances of actual confusion’ of the only party involved in the case are ‘of little evidentiary value.’”⁸ The PTO also contended, during oral argument, that evidence related to the eighth *DuPont* factor was “irrelevant.”⁹

The Federal Circuit held that the Board erred in failing to mention this factor or address Applicant’s arguments about coexistence.¹⁰ The Federal Circuit cited its precedent that the thirteen *DuPont* factors “must be considered” “when [they] are of record.”¹¹ The Federal Circuit further noted that the consideration of coexistence with no evidence of actual confusion (the eighth *DuPont* factor) is a separate inquiry from the nature and extent of any actual confusion (the seventh *DuPont* factor) and thus remanded for the Board to address Applicant’s evidence of coexistence and reconsider its likelihood of confusion determination.¹²

B. VersaTop Support Systems, LLC v. Georgia Expo, Inc.

In *VersaTop Support Systems, LLC v. Georgia Expo, Inc.*,¹³ the Federal Circuit reversed the district court’s conclusion on summary judgment that a drape and rod company did not infringe its competitor’s trademarks.¹⁴

Georgia Expo and VersaTop are competing drape and rod companies. VersaTop sells a “ball and crown” coupler under the marks PIPE & DRAPE 2.0 and 2.0.¹⁵ Georgia Expo distributed advertising and brochures that contained PIPE & DRAPE 2.0 next to pictures of the VersaTop coupler.¹⁶

6. See *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973) (creating the thirteen-factor test for determining likelihood of consumer confusion).

7. *In re Guild Mortg. Co.*, 912 F.3d at 1379–80.

8. *Id.* at 1380 (quoting *In re Majestic Distilling Co.*, 315 F.3d 1311, 1317 (Fed. Cir. 2003)).

9. *Id.*

10. *Id.* at 1381.

11. *Id.* at 1379 (quoting *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406 (Fed. Cir. 1997)).

12. *Id.* at 1380–81 (citing *In re Majestic Distilling Co.*, 315 F.3d at 1317).

13. 921 F.3d 1364 (Fed. Cir. 2019).

14. *Id.* at 1372.

15. *Id.* at 1366.

16. *Id.*

The district court held on summary judgment that because Georgia Expo had not “affixed” the trademarks to goods that were sold or transported in commerce, it had not violated the Lanham Act.¹⁷ The district court cited 15 U.S.C. § 1127, which states that “use in commerce” requires the mark to be placed on the goods or their containers and that the goods be sold or transported in commerce.¹⁸ The district court concluded that “no remedy [was] available for Georgia Expo’s uses of VersaTop’s trademarks.”¹⁹

Applying Ninth Circuit law, the Federal Circuit noted that § 1127’s definition of “use in commerce” applies “to the required use a plaintiff must make in order *to have rights in a mark*,” not to prove infringement.²⁰

The Federal Circuit then analyzed the likelihood of confusion factors, noting that Georgia Expo had made no argument regarding the similarity of the marks, goods, or trade channels.²¹ Rather, Georgia Expo had argued only that no evidence of actual confusion existed.²² The Federal Circuit held that the failure to prove instances of confusion was not dispositive, and the evidence was “clear and tilts heavily in favor of a likelihood of confusion” because the marks were identical, the goods were related, and the marketing channels overlapped.²³ The Federal Circuit thus concluded as a matter of law that Georgia Expo had infringed VersaTop’s trademarks, reversed the district court’s judgment in favor of Georgia Expo, and remanded the case for any appropriate further proceedings.²⁴

C. Swagway, LLC v. ITC

In *Swagway, LLC*,²⁵ the Federal Court affirmed the ITC’s conclusion that a likelihood of confusion existed between the marks SWAGWAY X1 and X2 and SWAGTRON T1 and T3 for hoverboard products, on the one hand, and the marks SEGWAY and SEGWAY & Design for motorized personal mobility devices, on the other hand.

17. *Id.* at 1367.

18. *Id.* (citing 15 U.S.C. § 1127 (2018)).

19. *Id.*

20. *Id.* at 1370 (emphasis added) (citing § 1127).

21. *Id.* at 1372.

22. *Id.*

23. *Id.*

24. *Id.*

25. 934 F.3d 1332 (Fed. Cir. 2019).

Segway, Inc. (“Segway”) offers motorized personal mobility devices under the registered trademarks SEGWAY and SEGWAY & Design. Segway filed two complaints with the ITC against Swagway, LLC (“Swagway”), which offered self-balancing hoverboard products under the marks SWAGWAY X1 and X2 and SWAGTRON T1 and T3.²⁶ Segway alleged Swagway’s marks infringed its SEGWAY trademarks, among other things.²⁷ The ITC instituted an investigation based on the complaints, consolidated them, and assigned the matter to an administrative law judge (ALJ).²⁸

Swagway moved for partial termination of the investigation regarding the trademark infringement allegations on the basis of a consent order stipulation, which stipulated, among other things, that Swagway would not sell or import “SWAGWAY-branded personal transporter products as well as all components thereof, packaging and manuals therefor.”²⁹ Segway opposed the stipulation and proposed consent order based on the fact that it addressed only a subset of the claims and products at issue in the investigation, and it would allow Swagway to relitigate issues concerning trademarks covered by that order.³⁰ During a hearing in the consolidated investigation, the ALJ advised that the pending motion for consent order would not be ruled on before the end of the hearing.³¹

The ALJ issued a Final Initial Determination finding, among other things, that Swagway’s use of SWAGWAY, but not its use of SWAGTRON, infringed Segway’s trademarks. This determination was based on an analysis of six likelihood of confusion factors: (1) evidence of actual consumer confusion; (2) the degree of similarity in appearance and pronunciation between the marks; (3) Swagway’s intent in adopting the marks; (4) the relation in use and manner of marketing between the products; (5) the degree of care exercised by consumers; and (6) the strength of the mark.³²

First, the ALJ found “overwhelming evidence” of actual confusion existed between the SWAGWAY and SEGWAY marks but only de

26. *Id.* at 1336.

27. *Id.* at 1335 (noting that Segway also filed six allegations of patent infringement that were not at issue in this appeal).

28. *Id.* at 1336.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

minimis actual confusion between the SWAGTRON and SEGWAY marks.³³ Second, the ALJ stated the SWAGWAY and SEGWAY marks looked alike and had similar pronunciations, but the SWAGTRON and SEGWAY marks did not.³⁴ Third, the ALJ found Swagway's founder did not intend to infringe Segway's marks because he had independently derived the SWAGWAY mark and then changed the designation to SWAGTRON after Segway's counsel sent him a cease-and-desist letter.³⁵ Fourth, the ALJ found that Segway's and Swagway's products were sold through the same websites and stores, but that the SEGWAY products were significantly more expensive than the SWAGWAY and SWAGTRON products, which weighed against a likelihood of consumer confusion.³⁶ The ALJ did not make a finding as to the degree of care exercised by consumers because neither party presented evidence as to that factor.³⁷ Finally, the ALJ found that the SEGWAY marks were commercially and conceptually strong because SEGWAY is a coined term and has strong brand recognition.³⁸ The ALJ thus concluded that the SWAGWAY marks infringed Segway's trademarks, but the SWAGTRON marks did not.³⁹ The ALJ's Final Initial Determination did not mention specifically Swagway's motion for termination based on the consent order stipulation but stated in a footnote that "[a]ny pending motion that has not been adjudicated is denied, unless otherwise noted."⁴⁰

Swagway filed a petition for review of the Determination. Swagway appealed the denial of its consent order and the finding that the SWAGWAY mark infringed the SEGWAY trademarks.⁴¹ The ITC reversed the ALJ's finding on actual confusion, noting that compared to the volume of sales of SWAGWAY products, the incidents of actual confusion were minimal and at least some of the proffered evidence was unreliable.⁴² The Commission stated that the lack of actual confusion "d[id] not weigh in favor of [a finding of a] likelihood of

33. *Id.*

34. *Id.* at 1336–37.

35. *Id.* at 1337.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 1336.

40. *Id.* at 1342.

41. *Id.* at 1337.

42. *Id.*

confusion.”⁴³ However, the ITC affirmed the ALJ’s conclusion that a likelihood of confusion existed between the SEGWAY and SWAGWAY marks based on the remaining likelihood of confusion factors considered by the ALJ.⁴⁴ The ITC determined it would not review the ALJ’s denial of Swagway’s consent order motion.⁴⁵

Swagway appealed to the Federal Circuit, arguing that the Commission did not give sufficient weight to the fact that there was no evidence of actual confusion, and the parties had coexisted for a substantial period of time.⁴⁶ Swagway also challenged the ITC’s failure to enter the proposed consent order.⁴⁷

The Federal Circuit noted that evidence of concurrent use weighs against a likelihood of confusion but must be balanced against the other evidence in the record.⁴⁸ Additionally, the Federal Circuit noted, Swagway had not argued on appeal that its evidence warranted a finding of long-term, concurrent use of the marks in the same trade channels to support its argument that a lack of actual confusion weighed against a likelihood of confusion.⁴⁹

The Federal Circuit rejected Swagway’s argument that the ITC failed to properly reweigh the likelihood of confusion factors after reversing the ALJ’s determination with regard to actual confusion.⁵⁰ The Federal Circuit noted that it is appropriate to give certain factors different weights under different circumstances.⁵¹ In this case, the Federal Circuit held the ITC properly gave strong weight to the strength of the SEGWAY marks and the similarity of the marks.⁵²

Finally, the Federal Circuit held that Segway’s failure to submit a survey did not require the Commission to apply an adverse inference that such a survey would not have shown a likelihood of confusion between the marks.⁵³ The Federal Circuit noted that it had previously declined to apply an adverse inference on this basis, and thus, the Commission did not err in according no weight to Segway’s lack of

43. *Id.* (alteration in original).

44. *Id.*

45. *Id.*

46. *Id.* at 1339.

47. *Id.* at 1337.

48. *Id.* at 1339.

49. *Id.*

50. *Id.* at 1340.

51. *Id.*

52. *Id.*



53. *Id.*

survey evidence.⁵⁴ The Federal Circuit accordingly affirmed the ITC's conclusion that Swagway infringed Segway's trademarks.⁵⁵

Regarding the consent order motion, the Federal Circuit rejected Swagway's arguments that the ITC's failure to provide an express explanation for denial of the consent order motion violated the Administrative Procedure Act or that the denial of Swagway's consent order motion by footnote in the ITC's decision entitled Swagway to relief.⁵⁶ The Federal Circuit found that the denial by footnote was no more than harmless error.⁵⁷ Accordingly, the Federal Circuit affirmed the ITC's denial of Swagway's consent order motion.⁵⁸

D. Hylete LLC v. Hybrid Athletics, LLC

In *Hylete LLC v. Hybrid Athletics, LLC*,⁵⁹ the Federal Circuit affirmed the TTAB's decision that applicant Hylete's design mark shown below ("Hylete's Mark") for athletic apparel was likely to cause confusion with opposer Hybrid Athletics' design mark shown below ("Hybrid's Mark") for athletic apparel and fitness services.⁶⁰

Hylete's Mark	Hybrid's Mark
	

At the Board, Hybrid relied on its prior-filed application for Hybrid's Mark for "conducting fitness classes; health club services, namely, providing instruction and equipment in the field of physical exercise; personal fitness training services and consultancy; physical fitness

54. *Id.* (citing *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1054 (Fed. Cir. 2012)).

55. *Id.* at 1344.

56. *Id.* at 1342.

57. *Id.* at 1343–44.

58. *Id.* at 1344.

59. 931 F.3d 1170 (Fed. Cir. 2019).

60. *Id.* at 1171, 1175.

instruction” and on common law rights from the same mark for athletic apparel, including shirts, hats, shorts, and socks.⁶¹ Hybrid submitted evidence of its mark on athletic apparel that showed Hybrid’s Mark above the phrase “Hybrid Athletics” and a row of dots as shown below (“Hybrid’s Composite Mark”).

Figure 2: Hybrid’s Composite Mark



Hylete argued before the Board that the differences between the two designs in appearance were sufficient to avoid a likelihood of confusion.⁶² The Board disagreed, finding that both marks are stylized versions of the letter “H” and that the marks have similar commercial impressions.⁶³ The Board relied only on Hybrid’s common-law rights after finding that it had failed to establish ownership of the prior-filed application.⁶⁴

Hylete filed a Request for Reconsideration of the Board’s decision, arguing that there was no evidence that consumers would view Hylete’s Mark as a stylized “H.”⁶⁵ Hylete did not argue that the Board erroneously analyzed Hybrid’s Mark as being a stylized “H.” The Board

61. *Id.* at 1171–72.

62. *Id.* at 1172.

63. *Id.* at 1172–73.

64. *Id.* at 1172.

65. *Id.* at 1173.

rejected Hylete's arguments in the Request for Reconsideration, noting that Hylete itself had characterized its mark as a stylized letter "H" in its briefing.⁶⁶ Hylete appealed.⁶⁷

On appeal, Hylete argued that the Board erred by comparing Hylete's Mark to Hybrid's Mark rather than to Hybrid's Composite Mark.⁶⁸ The Federal Circuit held that Hylete had "never contended that Hybrid's common law rights implicated a 'composite common law mark' that differed from the stylized 'H' design mark identified in the [prior-filed] application" and thus waived the issue on appeal.⁶⁹ The Federal Circuit accordingly affirmed the Board's finding of likelihood of confusion.

II. SPECIMENS OF USE

A. In re Siny Corp.

In *In re Siny Corp.*,⁷⁰ the Federal Circuit affirmed the TTAB's decision refusing to register the mark CASALANA based on a specimen consisting of a webpage printout.⁷¹

Siny Corp. ("Siny") sought to register CASALANA for "[k]nit pile fabric made with wool for use as a textile in the manufacture of outerwear, gloves, apparel, and accessories."⁷² Siny submitted a webpage printout as the specimen.

66. *Id.*

67. *Id.*

68. *Id.* at 1173–74.

69. *Id.* at 1174–75.

70. 920 F.3d 1331 (Fed. Cir. 2019).

71. *Id.* at 1337.

72. *Id.* at 1332.

Figure 3: Siny Webpage

5162016
Glenoit Fabrics is a division of Monterey Mills - Silver Knit Pile Fabrics - Face Fur

GLENOIT FABRICS
Glenoit Fabrics is affiliated with Monterey Mills

Masters of Comfort Knit Pile Fabrics
Founded over 50 years ago in Becht, Wisconsin, Glenoit Fabrics is the largest manufacturer of silver knit pile fabrics in North America. Together with its flexible workforce and strict turnaround period, it supplies a major share of the comfort and performance pile fabrics produced in the world.

Glenoit Fabrics takes pride in partnering with each manufacturing customer to design and create the right fabric "fit" and in their production for the right and correct. Offering seamless variety, our customers a strong network of design and engineering facilities across Glenoit Fabrics and factories. This produces unique comfort knit pile fabrics made with the finest fibers that meet specific specifications. Glenoit Fabrics also provides assistance with cutting and sewing and other construction and fitting services. All are offered in the success of the final product through customer inquiries.

"Fabrics Made from Fiber"
Glenoit Fabrics' comfort knit pile products are described as "Fabrics Made from Fiber" because of the process by which they are made.


Glenoit Fabrics' special silver knit pile fabrics feature individual fibers directly after a lightweight knit backing allowing each fiber to relax upright, free from the backing to form the knit pile on the face of the fabric. This means Glenoit Fabrics' comfort knit pile fabrics soften, warm, move, drape and move more than fabrics made from yarns.

Features and Benefits of Glenoit Fabrics' Comfort Knit Pile
Glenoit Fabrics' silver knit pile is made like no other fabric. For more information how Glenoit Fabrics' comfort knit fabric are made, see the [Glenoit Knit Pile Video](#).

Because Glenoit Fabrics' special silver knit pile's knitting process looks individual fibers directly into a lightweight knit backing allowing each fiber to relax upright, free from the backing, the special construction creates a fabric with extraordinary performance and tactile benefits. "Fabrics Made from Fiber" offers:

- **Light Weight:** Not related into dense yarns, pile's fibers along with the fine dense filament backing yarn, yield a fabric that weighs nearly negligible for its volume.
- **Multi-season comfort:** The hollow of fiber or pockets created between pile's fibers act as tiny air conditioners to regulate an even temperature. The result is multi-season comfort.
- **Easy Care:** With the exception of Glenoit Fabrics' extra low for slacks, pile's non-stretch construction and select fibers make it washable.
- **Non-shrink:** Because of the stability of its knit backing yarn, pile's shrinkage is virtually nonexistent. Though individual fibers may stretch slightly, there is no effect on the fabric itself.
- **Soft, Drapability:** The flexibility of pile's filament knit backing yarns and lightweight loose fibers, delivers an appealing softness, drape and hand every time.
- **A nearly endless array of backings and patterns:** Pathways from computerized jacquard knitting machines and novel finishing techniques make Glenoit Fabrics' fabric unique.
- **High values:** Glenoit Fabrics' fibers, are pre-dyed before construction (environmentally advantageous over yarn or fabric dyeing). They can feature benefits for an exceptional depth of color and tactile variations within one fabric and pattern.

Some Of Our Most Popular Fabrics:



5162016
Glenoit Fabrics is a division of Monterey Mills - Silver Knit Pile Fabrics - Face Fur

All-purpose comfort
Rich and melon-like
Silky textured pile
The calmness of pile
Glenoit's The "Original" pile
The washable wool

Favorite Pile
Fur-like
Lustrously knitted fabric

Stylish
The sturdy pile

Minimalist
Versatile lightweight pile

Fingers
Shrugs
Drapes
Easily comfortable pile

Texture
Face fur to truly rival the original

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info@montereymills.com

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monthe
Glenoit Fabrics Corporation is in no way related to Glenoit LLC, Glenoit Threaded, or Glenoit Corporation.
Glenoit Fabrics Corporation is a premium pile fabric manufacturer.

22
<http://www.glenoitfabrics.com/>

The examining attorney refused registration on the basis that the webpage appeared to be “mere advertising material” and did not show the mark’s use in commerce in connection with the goods because it did not include a means for ordering the goods.⁷³

Siny then submitted a substitute specimen showing the same webpage but with additional text stating “[f]or sales information:” followed by a phone number and email address.⁷⁴ The examining attorney again rejected the specimen, stating that the added text only indicated how consumers could obtain more information necessary to make a purchase but was insufficient for consumers to actually make a purchase.⁷⁵ The examining attorney noted that the specimen did not indicate minimum quantities for an order, cost, payment options, or shipping information.⁷⁶

Siny appealed the refusal to register to the TTAB, arguing that the webpage was a “display associated with the goods.”⁷⁷ Siny also argued

73. *Id.*

74. *Id.* at 1334.

75. *Id.*

76. *Id.*

77. *Id.* at 1334–35.

that because the goods are industrial materials used by manufacturers, the sales transaction requires assistance from Siny's sales personnel.⁷⁸

The Board agreed with the examining attorney that the specimen lacked information the Board considers essential to a consumer's purchasing decision, such as the price, minimum quantities required for an order, and payment and shipping methods.⁷⁹ The Board rejected Siny's argument that the fact that Siny's sales personnel must assist consumers means such information is not necessary, stating that "while some details must be worked out by telephone, if virtually all important aspects of the transaction must be determined from information extraneous to the web page, then the web page is not a point of sale."⁸⁰ The Board also stated that in such cases, the applicant "would be well advised to provide the examining attorney with additional evidence and information regarding the manner in which purchases are actually made through the webpage."⁸¹ In a split decision, the Board concluded the webpage was not a "point of sale" display and affirmed the examining attorney's finding.⁸²

On appeal, the Federal Circuit stated that the Board had carefully considered the specimen, and substantial evidence supported its conclusion that the specimen did not cross the line from mere advertising to a display associated with the goods.⁸³ The Federal Circuit thus affirmed the Board's decision.⁸⁴

CONCLUSION

The Federal Circuit was relatively quiet in terms of trademark decisions in 2019. Many of the Federal Circuit's decisions focused on the multi-factor likelihood of confusion test. While useful guidance for practitioners, these cases were not groundbreaking. The Court's determination in *In re Siny Corp.* regarding what constitutes a proper specimen of use will likely have the greatest impact on the day-to-day practice of trademark law before the PTO.

78. *Id.* at 1335.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1337.

84. *Id.*