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GO's Appeal Is No-Go: Federal Circuit Says Everybody Vs Racism Fails to Function as Source Identifier

WRITTEN BY

Howard J. Shire | Justin W. Tilghman

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- The examining attorney found that the mark was merely an informational phrase conveying support for a particular message, and the TTAB affirmed.
- The Federal Circuit agreed, finding that substantial evidence supported the TTAB's conclusion that the mark failed to function as a source identifier.
- GO's appeal amounted to a mere disagreement with the weight that the TTAB had assigned to conflicting evidence.

In *In re GO & Associates LLC* (Appeal No 2022-1961, 14 November 2023, re-designated as precedential, 22 January 2024), the US Court of Appeals for the Federal Circuit has affirmed the Trademark Trial and Appeal Board (TTAB)'s refusal to register EVERYBODY VS RACISM because the mark failed to function as a source identifier.

Background

GO & Associates LLC ('GO'), a consulting firm, led a use-based application for the mark EVERYBODY VS RACISM for bags, apparel and services promoting racial reconciliation. The examining attorney refused registration because the mark failed to function as a source identifier for GO's goods and services, reasoning that the mark was merely an informational phrase conveying support for a particular message. In support, the examining attorney cited several third parties using the mark in informational ways rather than as a source identifier. GO appealed to the TTAB. The TTAB, however, affirmed the refusal, finding that the record showed that the mark was commonly used to convey an informational, anti-racist message to the public, as opposed to a source identifier.

GO then appealed to the Federal Circuit, arguing that the TTAB's decision was not supported by substantial evidence.

Decision

The Federal Circuit, agreeing with the TTAB, found that substantial evidence supported the TTAB's conclusion that EVERYBODY VS RACISM failed to function as a source identifier, which is the essential function of a trademark.

To determine whether the TTAB's finding was supported by substantial evidence, the Federal Circuit asked whether a reasonable person would accept the evidence as adequate to support the finding. In applying that standard, the court reviewed the evidence that the board relied on to conclude that EVERYBODY VS RACISM failed to function as a mark. The Federal Circuit found that the TTAB had "properly considered the evidence of record, which included not only the third-party evidence identified by the examining attorney, but also GO's specimens and other evidence of its own use."

Given the record, it was reasonable for the TTAB to conclude that GO's mark is commonly used in an informational and ornamental manner on apparel items sold by third parties to convey an anti-racist sentiment. In particular, the mark had been used in this manner by referees in the National Basketball Association, in music, podcasts, church sermons and YouTube videos, and on various articles of clothing.

The court reasoned that GO's appeal amounted to a mere disagreement with the weight that the TTAB had assigned to conflicting evidence, emphasizing that the TTAB had properly considered the record evidence and that reweighing the evidence is not the responsibility of the Federal Circuit.

GO then argued that per se refusals based on the 'informational matter' doctrine are unconstitutional because they involve content-based discrimination not justified by a compelling or substantial government interest. GO relied on *Elster v Vidal*, where the Federal Circuit concluded that the TTAB's refusal to register TRUMP TOO SMALL was an unconstitutional violation of speech. The Federal Circuit, however, found GO's reliance misplaced. In *Elster*, there was no issue as to whether the mark functioned as a source identifier. Moreover, it is not a general rule that an informational mark cannot also function as a source identifier (e.g., JUST DO IT for Nike), but, in this case, EVERYBODY VS RACISM was not only informational but also failed to identify a single commercial source.

Because substantial evidence showed that EVERYBODY VS RACISM was unlikely to be associated with a single source for GO's goods and services, the Federal Circuit affirmed the refusal.

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