A Tom Brady Trademark Tome

Brady Brand Clothing Illuminates Common Obstacles in the Trademark Registration Process

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March 29, 2022

Depending on your level of fandom, you may or may not be following the recent news about Tom Brady, former longtime quarterback for the New England Patriots. Recently, Brady announced that he is coming out of a brief retirement to play for a third year as quarterback for the Tampa Bay Buccaneers. However, the news I'm referring to has to do with Tom Brady's clothing line, not his football career.

Around the time of Tom Brady's retirement announcement in January of this year, news came out that he was launching a new clothing line. The brand name? Brady™, with a website of https://www.bradybrand.com/.

Surname Trademarks

As a patent and trademark attorney, my "work-mind" immediately went into gear and had the observation that he might have a tough time securing rights for "BRADY" as a trademark for at least two reasons. One, the mark BRADY is primarily a surname. According to U.S. trademark law, a mark is primarily merely a surname if the surname, when viewed in connection with the applicant's recited goods and/or services, is the primary significance of the mark as a whole to the purchasing public. The following five inquiries are often used to determine the public's perception of a term's primary significance:

1. Whether the surname is rare;
2. Whether anyone connected with the applicant uses the term as a surname;
3. Whether the term has any recognized meaning other than as a surname;
4. Whether the term has the structure and pronunciation of a surname; and
5. Whether the term is sufficiently stylized to remove its primary significance from that of a surname.

Existing Trademarks

Another factor that came to mind was that "BRADY" seemed common enough that there may be instances where others have already secured trademark registrations that overcame the surname rejection and are also for clothing-related goods. If such registrations exist then he would be facing a potentially difficult Section 2(d) Refusal for a likelihood of confusion – namely, that his mark BRADY was too confusingly similar to other registered marks containing "BRADY" for clothing.

So, I researched whether Tom Brady had applied for any trademarks. I found that he did file an application to register "BRAND BRADY" for clothing, namely, jeans, pants, overalls, jackets, shirts, tank tops, t-shirts, skirts, shorts, trousers, scarves, gloves, hats, belts, footwear, shoes, sweatshirts, sweatpants, sweaters, socks, rainwear, swimwear, sleepwear, beachwear, underwear, vests, blazers; and also for on-line retail store services featuring clothing, footwear and headwear.

Furthermore, his application had run into the obstacles I highlighted above, refusals for being merely primarily a surname and also for being too confusingly similar with:

- US Reg. No. 4507107 for BRADY for jewelry, paintings, bathing suits; blouses; coats; dress pants; dress shirts; dress suits; hats; jackets; jeans; knit shirts; pants; shirts; skirts; stockings; suits; sweaters; ties; tops; trousers; vests (owned by Brady Legler, LLC).
- US Reg. No. 6170272 for BRADY for too many goods/services to list here but including clothing (owned by The Brady Campaign to Prevent Gun Violence).
- US Reg. No. 5238001 for DREW BRADY for fleece blankets; Bath robes; Dressing gowns; Ear muffs; Fleece pullovers; Fleece tops; Fleece vests; Footwear; Gloves; Hats; Hooded pullovers; Hooded sweatshirts; Hosiery; Housecoats; Jumper dresses; Jumpers; Leg-warmers; Leggings; Long-sleeved shirts; Mittens; Pantsuits; Pullovers; Scarves; Shawls; Shirts; Short-sleeve shirts; Sleeping garments; Sleepwear; Slipper socks; Socks; Sweatshirts; T-shirts; Thermal socks; Thermal underwear; Tights; Toques; Underwear; Clothing, namely, arm warmers, base layers, hand-warmers, knee warmers (owned by Drew Brady Company Inc.).
- US Reg. No. 5381302 for DREW BRADY for Retail store services featuring clothing, footwear and accessories therefor (owned by Drew Brady Company Inc.).

Trademark Clearance Search

One of the best ways to try to bring some degree of certainty and risk quantification into the largely uncertain and subjective process of trademark registration is to do a trademark clearance search. What we don't know is, did Tom Brady have such a clearance search done, and if so, what did it reveal? Were these marks discovered in the search? If not, why not? If yes, then what was the strategy for proceeding? Did Tom Brady's counsel believe they could argue to overcome descriptiveness and merely a surname rejections? Did they believe they could buy these pre-existing and blocking trademark registrations from these other parties and clear a path for the BRADY BRAND registration (if yes, how expensive could this get?)?

These are all common questions and discussions that I have regularly with my trademark clients as we do clearance searches for proposed new marks, assess the results, try to guess what the trademark examiner might say, what the options might be should certain obstacles be thrown at our application for registration, and what might be the costs to secure ultimate success whether by overcoming rejections or purchasing other registrations. At the end of the day, registration of a trademark in the U.S. often experiences these same obstacles and questions (less so for fanciful marks such as made-up words, which I always advocate clients pursue over existing words) – even for someone as prepared and resourceful as Tom Brady (legally and financially).

Buying Third-Party Registered Trademarks

Some time has passed since I first had these observations. Since then it does appear that Brady was able to purchase or otherwise secure rights to the portion of US Reg. No. 4507107 for BRADY that pertained to Bathing Suits; Blouses; Coats; Dress pants; Dress suits; Hats; Jackets; Jeans; Knit shirts; Pants; Shirts; Skirts; Stockings; Suits; Sweaters; Ties; Tops; Trousers; Vests because there is now a registration for BRADY for these items that is owned by B Brand Apparel LLC (which is the owner of the BRADY BRAND trademark application). This means Brady went the route of buying registered trademark rights from another rather than trying to argue with the trademark examiner to secure ownership of a registered mark. In fact, as of when this article was written, no response has been filed to argue against the trademark examiner's rejections of BRAND BRADY, and the deadline was March 14, 2022 (with the caveat that sometimes there can be a significant lag between papers filed and what shows up in the Trademark Office database, though typically not this long). This implies that they have abandoned their attempt to register BRAND BRADY. This is probably made more likely by the fact that TBD TM, LLC (apparently Tom Brady's new company) has filed 95 different trademark applications for BRADY, TOM BRADY, and TB12 (his existing brand), for virtually every product and service

under the sun.

Final Thoughts

One question remains for me. Why did Brady Legler, LLC, who filed the original application for BRADY® for numerous products including clothing back in 2012 not receive a rejection from the trademark examiner for being directed to primarily merely a surname? The owner did have to sign a consent of living individual indicating "I, Brady Legler, consent to my name being registered as shown in U.S. Application Serial No.85/802158 for the mark BRADY." However, "BRADY" is also a surname (and at the time in March of 2013 when this consent was executed, Tom Brady had already won Superbowls in 2002, 2004, and 2005, not to mention the 161,761 instances of "Brady" as a surname in the LexisNexis® database found by the examiner for BRAND BRADY. All of these factors are relevant and could have easily lead to a surname rejection – yet they did not.

This goes to show how unpredictable it is for a trademark applicant to determine what is going to happen after they file their application for trademark registration and what their likelihood is for success. Trademark registration is not as simple as filing a quick application and assuming it will go through to registration. The road to success can be straightforward but is more often what Tom Brady has experienced. An experienced trademark attorney is a great guide through this typically complex process.

If you have questions related to trademark registration or enforcement, please contact Sean Detweiler.