
TTAB Catches Mayweather Looking

In Re Mayweather Promotions LLC, Case No. 86753084 (TTAB Oct. 29, 2020)

By: Ifti Zaim & Nick Wheeler | November 6, 2020

Floyd Mayweather, the infamously elusive twelve-time world champion boxer, caught a stiff jab from the Trademark Trial and Appeal Board (“Board” or “TTAB”)’s rejection of his “PAST PRESENT FUTURE” (“the Mark”) on grounds that it could not function as a source identifier. The Board found that the Mark failed to function as a trademark because it would be perceived by the public not as an indicator of source, but rather as a commonplace term or phrase used by a variety of sources to convey a concept.

Mayweather founded Mayweather Promotions, LLC in 2007. On September 10, 2015, the company applied for the Mark (originally with periods, as “PAST. PRESENT. FUTURE.”) for use on T-shirts, as well as for the mark “PAST, PRESENT & FUTURE OF SPORTS & ENTERTAINMENT” for online retail sales of sports apparel, clothing, and hats. The Examining Attorney rejected both marks as commonplace expressions frequently used “to refer to describe or recount the general history/background, the current state[,] and the direction/projection of a person, animal, idea, or concept in a lineal fashion based on a timeline.” As such, consumers would perceive the marks as expressing a message rather than indicating the source of goods. Although the PTO maintained its rejection of the shorter Mark, it dropped its opposition to the longer-form mark, which was subsequently registered on the Principal Register.

On appeal to the Board, Mayweather argued that the Mark was associated with his boxing career and promotion company; the relevant public consists of sports fans who associate the Mark with Mayweather; his investment of significant resources in promoting goods and services featuring the Mark; and that the Mark has become highly distinctive among the boxing and fans through Mayweather’s use of it. The Board disagreed, finding that Mayweather Promotions failed to submit evidence supporting any of these assertions (or even any connection between Mayweather Promotions and Floyd Mayweather’s boxing career), the relevant public was not limited to sports fans but rather all potential purchasers of T-shirts, and, regardless, there was too much evidence of third-party use of the phrase for the message it conveyed.

As evidence that such slogans do function as source indicators in the sports industry, Mayweather pointed to the PTO’s prior allowance of trademarks on slogans for other sports-related companies, as well as its allowance of its own longer-form mark. However, the Board rejected these arguments as “irrelevant” on the basis that these other marks comprised different wording, “and regardless, the prior decisions and actions of other trademark examining attorneys in registering other marks have little evidentiary value and are not binding upon the USPTO or the [Board],” as “the Board must decide each case on its own merits.” Ironically, by designating this decision as “precedential,” the Board made it relevant to any future application similarly seeking registration of a familiar phrase the public may associate with the message.

The Board’s designation of this decision as “precedential” puts future applicants on notice that marks consisting of familiar phrases may be rejected for failure to function as trademarks. At the very least, applicants seeking such marks should be prepared to produce evidence that the relevant public understands the mark to be an indicator of source. All that said, and even though the Board has Mayweather Promotions down for the count, there is still the possibility of appeal. This bout may not be over just yet.