



B&B Hardware, Inc. v. Hargis Industries, Inc., Potential Issue Preclusion on Likelihood of Confusion Rulings

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The TTAB and federal courts both determine whether consumers are likely to be confused by similar marks, but they do so for different purposes. The TTAB determines whether to issue a federal trademark registration for a mark, while federal courts decide whether there is infringement of a mark. In *B&B Hardware*, the Supreme Court considered whether an earlier TTAB ruling on likelihood of confusion can preclude later litigation on the same issue in federal court.

In a 7-2 opinion, the Supreme Court held that “[s]o long as the other ordinary elements of issue preclusion are met, when the usages adjudicated by the TTAB are materially the same as those before a district court, issue preclusion should apply.” Slip. op. at 22. Writing for the majority, Justice Alito explained that “likelihood of confusion for purposes of registration is the same standard as likelihood of confusion for purposes of infringement.” Id. at 16. The Court noted, however, that for “a great many registration decisions issue preclusion

obviously will not apply because the ordinary elements [of preclusion] will not be met.” Id. at 14. For example, “[i]f the TTAB does not consider the marketplace usage of the parties’ marks, the TTAB’s [registration] decision should have no later preclusive effect in a suit where actual usage in the marketplace is the paramount issue.” Id. at 18 (citations and quotation marks omitted).

B&B Hardware Inc. v. Hargis Industries Inc. et al., Case No. 13352, U.S. Supreme Court (March 24, 2015).

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