

20-1589
No. _____

ORIGINAL

IN THE
Supreme Court of the United States

FILED
MAR 20 2021
OFFICE OF THE CLERK
SUPREME COURT U.S.

KRIS KASZUBA dba HOLLYWOOD GROUP, pro se

PETITIONER,

v.

ANDRE IANCU,
DIRECTOR OF THE U.S. PATENT and TRADEMARK OFFICE

INTERVENOR.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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PETITIONER

QUESTIONS PRESENTED

1. Has the Federal Circuit erred in refusing to follow this Court's Lexmark precedent, and in not applying precedent to standing under 15 U.S.C. § 1064.
2. Has the Federal Circuit erred in allowing Intervention by the USPTO Director under 35 U.S.C §143 which only allows the Director to intervene in an appeal from a decision entered of the Patent Trial Appeal Board hearings and not an appeal from the Trademark Trial and Appeal Board which is the case in question.
3. Whether Administrative Trademark Judges of the U.S. Trademark Trial and Appeal Board, "who are appointed by the Secretary of Commerce, in consultation with the Director" pursuant to 15 U.S.C. § 1067, are, for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, principal officers who must be appointed by the President with the Senate's advice and consent.

PARTIES TO THE PROCEEDINGS

Kris Kaszuba, dba Hollywood Group who brought this action was the Appellant in the U.S. Court of Appeals for the Federal Circuit.

Kris Kaszuba who holds the registered trademark HOLLYWOOD BEER, was the party defending a cancellation action before the Trademark Trial and Appeal Board.

A petition to cancel was filed by Hollywood Vodka LLC, although when filed, their application to register was in the name of two individuals, German Clavijo and Keith Fox.

When the Board decision was appealed by Kaszuba to the Federal Circuit, Hollywood Vodka LLC never entered any appearance, filed no papers, and defaulted, "Despite several notices from the Court." 823 Fed.Appx. 973, fn. 1.

The Director of the U.S. Patent and Trademark Office, who appoints the administrative trademark judges, intervened on behalf of the defaulting party Hollywood Vodka LLC at the Court of Appeals after six months.

RELATED CASES

No cases are "directly related" to this case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
STATEMENT OF RELATED CASES	ii
INDEX of APPENDICES	iv
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED...	2
STATEMENT OF CASE	3
ARGUMENT	7
I. The Federal Circuit Rejects the Legal Requirement of Statutory Standing To Plead Before an Administrative Tribunal As a “Mistake” and Area of Legal “Confusion.” ...	8
II. Hollywood Vodka, HVL Did Not and Could Not Plead Damage “Proximately Caused” by the Registration of Kazuba’s Trademark.	10
III. Intervention by the USPTO Director, On Behalf of Administrative Trademark Judges Not Appointed by the President And Supporting a Party Who Defaulted on Appeal, Is Legally Improper Under 35 U.S.C §143 And The Appointments Clause of the Constitution. ...	12

CONCLUSION 16

INDEX OF APPENDICES

Opinion of the Court of Appeals Federal Circuit, August 5, 2020 1a

Order of the Court of Appeals Federal Circuit Denying Motions to
Reconsider November 18, 2019 17a

Decision of the Trademark Trial and Appeal Board, Dec 13, 2018 19a

Order of the Court of Appeals Federal Circuit Denying Rehearing and
Rehearing En Banc October 23, 202026a

TABLE OF AUTHORITIES

	Page
Australian Therapeutic Supplies Pty. Ltd. V. Naked TM LLC, 981 F.3d 1083, 1094 (Fed. Cir. Dec. 4, 2020)	12
Arthrex (now U.S. v. Arthrex, 19-1434), Supreme Court Smith & Nephew Inc. v. Arthrex Inc. No. 18-2140 Fed. Cir. Oct 31, 2019 Opinion Precedential	2, 13
Diamond v. Charles 476 U.S. 54, 68 (1986) U.S. Const. Art. III	8, 13
Kaszuba v. Iancu, 823 F. App'x 973 (Fed. Cir. 2020), reh. and reh. en banc denied, (Oct. 23, 2020)	1, 10
Knowles Elecs. LLC v. Iancu, 886 F.3d 1369, 1384 (Fed. Cir. 2018)	8, 13
Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014)	3, 7, 9
Selva & Sons, Inc. v. Nina Footwear, Inc., 705 F.2d 1316, 1325 (Fed. Cir. 1983)	9
SFM, LLC v. Corcamore, LLC, 978 F.3d 1298 (Fed. Cir. 2020)	9
15 U.S.C. § 1064	i, 1, 2, 3, 7, 8, 9, 10
15 U.S.C. § 1067	i, 2
35 U.S.C §143	iii, iv, 3, 12, 13
U.S. Const. Art. II, § 2, Cl. 2	i
U.S. Const. Art. III	11, 14
37 C.F.R. § 2.146(b)	5

PETITION for a WRIT of CERTIORARI

Petitioner Kris Kaszuba respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

Kaszuba v. Iancu, 823 F. App'x 973 (Fed. Cir. 2020), reh. and reh. en banc denied, (Oct. 23, 2020).

JURISDICTION

The final judgment of the Federal Circuit court of appeals, denying a timely petition for rehearing and rehearing en banc, was entered on October 23, 2020.

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

The statute allowing a person to plead to the Board to cancel another's trademark is

15 U.S.C. § 1064. The relevant part of that statute is:

A petition to cancel a registration of a mark, stating the grounds relied upon, may, upon payment of the prescribed fee, be filed as follows by any person who believes that he is or will be damaged, including as a result of a likelihood of dilution by blurring or dilution by tarnishment under section 1125(c) of this title, by the registration of a mark on the principal register established by this chapter, or under the Act of March 3, 1881, or the Act of February 20, 1905:

- (1) Within five years from the date of the registration of the mark under this chapter.

Petitions to cancel a trademark are heard and may be decided by "Administrative Trademark Judges" of The Trademark Trial and Appeal Board ... who are appointed by the Secretary of Commerce, in consultation with the Director". 15 U.S.C. § 1067. The appointment procedure in that statute for "administrative trademark judges" is practically the same as that for the appointment of "administrative patent judges" in 35 U.S.C.A. § 6, which this Court now is reviewing in *Smith & Nephew Inc. v. Arthrex Inc.*, No. 19-1452, and consolidated cases.

35 U.S.C §143 - Proceedings on appeal.

With respect to an appeal described in section 142, the Director shall transmit to the United States Court of Appeals for the Federal Circuit a certified list of the documents comprising the record in the Patent and Trademark Office. The court may request that the Director forward the original or certified copies of such documents during pendency of the appeal. In an ex parte case, the Director shall submit to the court in writing the grounds for the decision of the Patent and Trademark Office, addressing all of the issues raised in the appeal. The Director shall have the right to intervene in an appeal from a decision entered by the Patent Trial and Appeal Board in a derivation proceeding under section 135 or in an inter partes or post-grant review under chapter 31 or 32. The court shall, before hearing an appeal, give notice of the time and place of the hearing to the Director and the parties in the appeal.

STATEMENT OF CASE

The Lanham Act, 15 U.S.C. § 1064, gives the administrative trademark judges of the U.S. Trademark Trial and Appeal Board (hereinafter the Board) the statutory power to hear the “petition to cancel” that if, and only if, it is filed by a “person who believes that he is or will be damaged ...by the registration of the mark.” The petition here did not rise to the level required to plead for a Lanham Act remedy based on this Court’s unanimous decision in *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

Procedural Maneuvers of Hollywood Vodka.

A 'thin' petition was filed by the attorney for Hollywood Vodka LLC in August 2015. Then in November 2015, that attorney "withdrew" the petition (TTAB Dkt. 38), after respondent Kaszuba had moved to dismiss it. The "Interlocutory Attorney," who is not an "administrative trademark judge" denied the motion on procedural grounds, and also, rejected the "withdrawal" because it was filed without the Rule 41 consent of respondent Kaszuba. Petitioner Hollywood Vodka LLC [HVL] was given thirty days to correct its erroneous filing. But, as the Federal Circuit noted, HVL did not comply with that order and did not meet that deadline.

In March 2016, over six months after the initial filing, there still was not of record a petition to cancel. On March 28, 29 and 31, and April 4, 2016, the attorney for Hollywood Vodka LLC filed four cancellation petitions, which are similar but the allegations are not identical. These multiple petitions were confusingly captioned "Amended Petition," which was filed after the "Second Amended."

Respondent Kaszuba filed a motion to dismiss, citing a lack of standing, and other failures to properly plead a claim on which relief might be granted. Also, the motion pleaded the failure of Hollywood Vodka LLC, or the actual owners, to comply with the order requiring a proper pleading to have been filed in "thirty days."

All of this pleading, withdrawal, failure to comply, then multiple “Amended” petitions caused much delay and unnecessary effort and expense to respondent Kaszuba.

In July 2016, almost a year after that initial ‘thin’ petition was filed, the Board gave Hollywood Vodka every break it ever could have asked for. As to the passage of time and the failure to comply within “thirty days,” the Board called that “excusable neglect.” In regard to the delay and inconvenience to Kaszuba, and the prejudice from the uncertainty of what was being pleaded, by whom and whether it met the statutory requirements, Board felt that the prejudice was ‘not significant.’ Kaszuba petitioned the Director of USPTO, pursuant to 37 C.F.R. §2.146(a), which virtually asks for review of an interlocutory decision by someone the Director hired. The petition was denied, over the signature of another attorney, who is not an “administrative trademark judge”.

The motion challenging standing was denied solely because the application to register Hollywood Vodka had been rejected due to Kaszuba’s existing trademark registration. More important and overlooked was that the Hollywood Vodka was denied registration based on several other grounds, which had nothing to do with Kasuba’s trademark being registered.

Instead of addressing, by way of amendment or disclaimer or other act while the prosecution of its mark application still was active, the attorney for Hollywood Vodka filed the 'thin' petition to cancel.

That unilateral act of termination ended the prosecution of the application to register Hollywood Vodka, and put aside the open questions in the prosecution by switching the matter to the Board.

Kaszuba repeatedly raised concerns about how the interlocutory attorneys, and the administrative trademark judges, and the Director showed favoritism to Hollywood Vodka, a mere applicant, and showed an inclination to penalize and give no breaks to Kaszuba who holds a registered trademark. Two later petitions by Kaszuba asking the Director to exercise supervisory authority went denied. Unlike that six-month delay by Hollywood Vodka in correcting its 'thin' pleading being deemed non-prejudicial "excusable neglect," one petition by Kaszuba to the Director was denied as "untimely" because it was mailed before the thirty-day deadline but was received on the thirty-first day. Again, in these petitions Kaszuba asked the Director to use his "supervisory powers" over decisions by the officers of the Board that he appointed.

When the case went on appeal to the Federal Circuit, Hollywood Vodka had new attorneys, but no appearance ever was filed in the appeal. “Despite several notices from the Court,” Hollywood Vodka defaulted and never appeared in the appeal proceeding. 823 Fed.Appx. 973, fn. 1.

Over Kaszuba’s objections, the Director of the USPTO intervened, on the side of the defaulting party and in support of those the Director had appointed. Instead of supporting the conclusion of the trademark examiner that cited several grounds that make Hollywood Vodka mark un-registerable, and instead of supporting the allowance and issuance decisions of the trademark examiner that earlier determined Kaszuba’s mark was registerable according to the Lanham Act provisions, the Director took the side of the defaulting party on the appeal. It is expected that Hollywood Vodka LLC will not appear here, but will accept the free representation that the Director of the USPTO has provided and will still provide.

SUMMARY OF ISSUES and ARGUMENT

The “person” pleading to cancel Kaszuba’s registered trademark did not plead Lanham Act §1064 standing up to the standard required in this Court’s decision in *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

Those who pleaded this case in the Trademark Trial and Appeal Board defaulted and did not appear in the appeal before the Federal Circuit.

The USPTO Director stepped in their place as intervenor. However, an “intervenor's right to continue ... in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.” *Diamond v. Charles*. 476 U.S. 54, 68 (1986)

Because the intervenor USPTO Director has no “independent interest or injury, and no party remains as appellee on the side favored by the intervenor, the requirements of intervenor status are not met.” *Knowles Elecs. LLC v. Iancu*, 886 F.3d 1369, 1384 (Fed. Cir. 2018)(C.J. Newman, dissenting).

I.

The Federal Circuit Rejects the Legal Requirement of Statutory Standing To Plead Before an Administrative Tribunal As a “Mistake” and Area of Legal “Confusion.”

The Trademark Trial and Appeal Board has the limited power to hear a trademark cancellation if it is pleaded, according to 15 U.S.C. §1064, by a “person who believes that he is or will be damaged ... by the registration of a mark on the principal register.” This limitation is referred to as statutory standing, that is, if you do not meet the ‘statutory’ requirements, then you do not have ‘standing’ to seek cancellation.

Other decisions about statutory standing from the Federal Circuit have stated that “there exists confusion in the law stirred by the inconsistent use of the term ‘standing,’” *SFM, LLC v. Corcamore, LLC*, 978 F.3d 1298 (Fed. Cir. 2020), and that extends back almost forty years to its statement that “there has been much confusion in the cases between standing and damage” in proceedings before the TTAB. *Selva & Sons, Inc. v. Nina Footwear, Inc.*, 705 F.2d 1316, 1325 (Fed. Cir. 1983).

It respectfully is observed that any confusion about statutory standing in a Lanham Act matter before the TTAB “exists” because the decisions of the Federal Circuit on statutory standing are “inconsistent.”

In the proceedings below, Kaszuba urged the Board and the Circuit to follow this Court’s precedent on Lanham Act standing, and apply the test set out in *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Both refused to follow this Court’s decision.

Petitioner Kaszuba respectfully requests that certiorari be granted because the Board and the Federal Circuit decided the question of statutory standing under Lanham Act § 1064 in a way that conflicts with this Court’s decision in *Lexmark*, and conflicts with the decision of another Circuit Court of Appeals.

II.

HVL Did Not and Could Not Plead Damage “Proximately Caused” by the Registration of Kaszuba’s Trademark.

The Lexmark decision and § 1064 require that to plead for Lanham Act remedies a “person” must be within the “zone of interests” protected by Act, and be “damaged” specifically damage “proximately caused” by conduct of another. The Board and the Circuit avoided the fact that damage “proximately caused” was not pleaded because they used a “belief” test instead of what the Lexmark decision and § 1064 require.

The Federal Circuit identified, but never decided the issue that “HVL should have addressed the other issues raised in the Board's rejection before it could allege a reasonable belief of damage from Kaszuba's mark.” *Kaszuba v. Iancu*, 823 F. App'x 973, 978 (Fed. Cir. 2020). The background is that the party seeking cancellation, HVL, never responded to the trademark examiner’s rejection on several grounds, but just dropped its application and filed a cancellation petition. Importantly, the examiner rejected HVL’s application because of numerous marks containing “Hollywood.” Therefore, HVL could not ‘believe,’ could not and did not plead that its application was denied solely because of the one trademark registered to Kaszuba.

Unless all the four pre-existing “Hollywood” marks were cancelled, then the trademark examiner’s rejection would stand.

A letter of protest was submitted to the USPTO pointing out that there were 4 registered trademarks including a “Hollywood Vodka” which all were a “likelihood of confusion” with HVL’s proposed application.

This was documented in a Petition to the Director on December 15, 2015.

Kaszuba’s Petition was erroneously filed by the USPTO in his Trademark file and not in the TTAB Record. Also two other Petitions were erroneously filed.

Therefore, all three were not in the Appendix of the Certified Record submitted to the Federal Circuit and not available for consideration at the Appeals Hearing.

Thus this evidence had been withheld by the Director contrary to the law.

More correctly, the rejection of HVL’s application was not “proximately caused,” per Lexmark, by Kaszuba’s registered mark, but it was rejected based on several marks as well as on other grounds. Because the “proximate” cause standard could not be satisfied, the decisions below based on a “belief” of damage test are legal errors.

At least one Circuit Judge of the Federal Circuit, the Honorable Judge Wallach has acknowledged, in dissent, that “En banc action is necessary to maintain the uniformity our decisions and clarify the impact of Lexmark on those decisions.

"Australian Therapeutic Supplies Pty. Ltd. V. Naked TM LLC, 981 F.3d 1083, 1094 (Fed. Cir. Dec. 4, 2020)(element of being "damaged" does not require "proprietary rights" in the mark, at 1089).

III.

Intervention by the Director, On Behalf of Administrative Trademark Judges Not Appointed by the President And Supporting a Party Who Defaulted on Appeal, Is Legally Improper Under 35 U.S.C §143 And The Appointments Clause of the Constitution.

Before the Federal Circuit, the USPTO Director stepped in to argue in favor of the position of the defaulting party HVL, when in fairness the Director's interest should have been in supporting and defending the trademark examiner's good grounds for rejecting HVL's application.

Again, before filing its cancellation petition, HVL made no effort to address or refute or even respond to the trademark examiner's rejection of HVL's application.

The Director's intervention was, according to footnote 1 of the Federal Circuit's opinion, based on 35 U.S.C §143, which expressly pertains to patent cases and patentability cases.

In the Circuit case, Kaszuba made motions challenging the Director's standing to intervene. Also, Kaszuba had asserted that the appointment of the "administrative trademark judges" who handled Kaszuba's case (through government attorneys)

was constitutionally infirm for the same reasons that this Court is considering with respect to administrative patent judges.

Here, Kaszuba took rulings of the TTAB up for review by the Director, who reaffirmed what the TTAB had ruled.

(see, docket entries 30 and 82 in Cancellation case no. 92061976).

The motions in the Circuit court that Kaszuba made were

“denied without prejudice to Mr. Kaszuba raising any challenge to the Director’s participation” in later filings. (see, for example, Federal Circuit docket entry #37).

The Director lacks standing to intervene, even if the “patent” intervention statute §143 should be applied.

As intervenor, the Director does not meet “the requirements of Art. III,

” *Diamond v. Charles*. 476 U.S. 54, 68 (1986), and as intervenor USPTO Director

has no “independent interest or injury, and no party remains as appellee on the side

favoured by the intervenor, [therefore] the requirements of intervenor status are not

met.” *Knowles Elecs. LLC v. Iancu*, 886 F.3d 1369, 1384 (Fed. Cir. 2018)(C.J. Newman, dissenting).

It must be asked here, what “injury or interest” does the Director have in this case.

The Director’s allegiance is divided between all sides of the case, and should not be legally able to ‘choose sides’ in favor of one against all the others.

The Director has a self-interest in reaffirming the rulings made by his office attorneys. (see, docket entries 30 and 82 in Cancellation case no. 92061976).

The Director should have an interest in supporting the decision of the trademark examiner that found multiple grounds to deny registration of the HVL mark. The Director should have some interest in supporting the decision of the USPTO to grant registration to Kaszuba's trademark.

Instead, the Director took the side of the private party applicant HVL, which defaulted on appeal, and so, the Director took sides against the trademark examiner and against the registrant Kaszuba.

It is respectfully requested that certiorari be granted to consider the issue of standing of the Director to intervene.¹

The decisions that that Director as intervenor acted to support and advance on behalf of the defaulting party HVL and its rejected application to register, were decisions made by "administrative trademark judges" (and their subordinate law staff). These "administrative trademark judges" who are appointed by the Secretary of Commerce, are "principal officers" for the same reasons as it has been held that "administrative patent judges" are "principal officers" who were appointed in a manner that violated the Appointments Clause of the U.S Constitution.

¹ Kaszuba filed Motions to Dismiss and Opposition to the USPTO Director appearing as "Intervenor" in the Appeal which were denied by the Federal Circuit Order on Nov 18 2019. App. 17a & App. 18a

The “administrative trademark judges” and their decisions are not reviewed or controlled by the Director more than or differently from administrative patent judge decisions.

The Director and the Secretary of Commerce have the same authority to remove administrative trademark judges as they did with respect to the administrative patent judges in *Arthrex* (now *U.S. v. Arthrex*, 19-1434 and consolidated matters). These judges are not removable without cause, as is so with administrative patent judges. The Director only exercises review authority over “matters of procedure” and not the substantive rulings of the TTAB “judges.”

37 C.F.R. § 2.146(b).

Based on those statutory similarities, it is respectfully submitted that the “administrative trademark judges” that issued rulings on statutory standing and other matters of substance, were unconstitutionally appointed. The decision of the TTAB, as well as that of the Federal Circuit, which “denied without prejudice” Kaszuba’s motions to dismiss the intervention and the appeal, should be vacated and remanded.

CONCLUSION

Good cause exists for the petition for certiorari to be granted. A grant would correct errors of law that result from the Trademark Board, TTAB and the Federal Circuit refusing to follow this Court's decision in Lexmark.

Also, good cause exists to conform the rule of law applicable to both "administrative trademark judges" and "administrative patent judges."

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

/kk/ electronically signed

May 1, 2021

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