The Court Beyond the Court

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When assessing the trademark landscape, don't ignore minor players.

This week, the U.S. Supreme Court denied cert. in *Game Plan, Inc. v. Uninterrupted IP, LLC*, No. 25-1247, leaving in place a Federal Circuit decision that upheld the Trademark Trial & Appeal Board's cancellation of a registration of I AM MORE THAN AN ATHLETE owned by Game Plan, Inc. (Game Plan) and dismissal of Game Plan's opposition against trademark applications including the wording I AM MORE THAN AN ATHLETE filed by Uninterrupted IP, LLC (Uninterrupted).

The interesting part of the underlying dispute is the order of play:

On December 28, 2016, Game Plan, a non-profit company that works with student-athletes, filed an application to register the mark shown above in connection with charitable fundraising services via t-shirt sales. The mark was registered on June 5, 2018.

In March of 2018, LeBron James-founded media company Uninterrupted filed several intent-to-use applications for trademarks containing I AM MORE THAN AN ATHLETE covering clothing and entertainment services. These filings followed LeBron's use of the retort in an Instagram post in February of 2018.

On November 28, 2018, Game Plan opposed those applications, citing its 2016 priority date.

Uninterrupted then answered and indicated that on February 22, 2019 – *after the opposition was filed* – it had acquired common law rights in the mark MORE THAN AN ATHLETE from a prior user having rights dating back to at least 2012.

That trademark jiu-jitsu worked. By acquiring a mark and associated goodwill of a prior rightsholder not previously in the mix, Uninterrupted flipped the seniority of the combatants.

For larger brands clearing a new trademark, search results often reveal prior users that marketers view as competitively irrelevant: different trade channels, different positioning, limited scale, or minimal market visibility. The natural temptation is to focus on what the brand's primary competitors are doing.

It's easy to underestimate a "small" player's motivation or financial wherewithal to object to a larger company's entry with a similar mark. But it's also easy to forget that bench players can suddenly get pulled into the game. You never know whether an arch competitor might acquire rights from a small user – either through assignment or license. Acquiring prior trademark rights is almost always tricky, but when it works out it can be sweet.

The lesson for trademark counsel: when adopting or enforcing a trademark, assess the full rights landscape, not just the current competitive priorities. If a senior mark has meaningful overlap in wording and goods or services, it can be risky to discount it too heavily based only on conceptions as to who owns it today.