

**THIS OPINION IS  
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OF THE TTAB**

*Decision Mailed:  
January 18, 2008  
GDH/gdh*

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

El Dorado Park Self Storage  
v.  
Marc Yelenich

Opposition No. 91159837 to application Serial No. 78202724  
filed on January 13, 2003

Cleveland R. Williams, Esq. for El Dorado Park Self Storage.  
Mark Rogers, Esq. for Marc Yelenich.

Before Hohein, Holtzman and Wellington, Administrative Trademark  
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Marc Yelenich has filed an application to register the  
mark "TOOMUCHSTUFF SELF STORAGE" in standard character form on  
the Principal Register for "providing self storage services" in  
International Class 39.<sup>1</sup>

El Dorado Park Self Storage has opposed registration on  
the ground that "well prior to" the filing date of applicant's  
application, opposer "has promoted ... self-storage services in

<sup>1</sup> Ser. No. 78202724, filed on January 13, 2003, which is based on an  
allegation of a bona fide intention to use such mark in commerce. The  
words "SELF STORAGE" are disclaimed.

the United States under the mark 'TOO MUCH STUFF?'; that "[a]s a result of OPPOSER'S promotional efforts and commercial success, OPPOSER'S 'TOO MUCH STUFF?' mark has achieved such widespread public recognition that it has become well known and associated with OPPOSER'S self storage facilities and services"; that, in particular, opposer "has used the mark 'TOO MUCH STUFF?' in the United States since at least November, 1998"; and that "[i]n view of the similarity of the parties' marks and the identical and/or closely related nature of the parties['] services, applicant's mark 'TOOMUCHSTUFF SELF STORAGE' is likely to cause confusion ... with OPPOSER'S mark 'TOOMUCHSTUFF?'.<sup>2</sup>

Applicant, in his answer, has denied the salient allegations of the opposition.

While neither party took testimony, at a minimum the record consists of the pleadings, the file of the involved application and a notice of reliance timely filed by applicant during his assigned testimony period on "copies of pages from the February 2004 SBC telephone directory for Little Rock and North Little Rock, Arkansas."<sup>3</sup> Although opposer, as its intended case-

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<sup>2</sup> Although opposer also has pleaded and respectively attached, as Exhibits A through D, copies of "a testimonial letter of Mr. Mark L. BIXBY," "a website advertising 'TOOMUCHSTUFF?' that was created on or before October 25, 1999," "a marketing Brochure that has advertised the mark 'TOOMUCHSTUFF?' since on or before April 30, 1999" and "a telephone book advertisement of OPPOSER'S mark [in use] since on or before January 26, 1999," Trademark Rule 2.122(c) provides that, except in a situation not pertinent herein, any "exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached unless identified and introduced in evidence as an exhibit during the period for the taking of testimony."

<sup>3</sup> Applicant states in his notice of reliance that such pages "are relevant to show that Opposer's alleged mark does not function as a trademark and ... that Opposer has no proprietary rights in the words or question 'TOO MUCH STUFF?'."

in-chief, submitted by mail on the last day of its assigned initial testimony period a notice of reliance on what it characterizes as various "official records and things that establish the date of use of Opposer's mark prior to the filing date of applicant's [application for his] mark,"<sup>4</sup> such notice-- although bearing a so-called certificate of mailing--was not actually received by the U.S. Patent and Trademark Office until three days after opposer's initial testimony period had closed.

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<sup>4</sup> In addition to providing that "[t]he notice of reliance shall be filed during the testimony period of the party that files the notice," Trademark Rule 2.122(e) states in relevant part that: "Printed publications, such as books and periodicals, available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant under an issue in a proceeding, and official records, if the publication or official record is competent evidence and relevant to an issue, may be introduced in evidence by filing a notice of reliance on the material being offered." However, as pointed out in TBMP §704.07 (2d ed. rev. 2004) (footnotes omitted): "The term 'official records' as used in ... [Trademark Rule] 2.122(e) refers not to a party's company business records, but rather to the records of public offices or agencies, or records kept in the performance of duty by a public officer. These official records are considered self-authenticating, and as such, require no extrinsic evidence of authenticity as a condition to admissibility." Thus, the copies of various business records of opposer attached to its notice of reliance are not proper subject matter for such a notice. Similarly, with respect to Internet evidence, it is stated in TBMP §704.08 (2d ed. rev. 2004) (footnotes omitted) that: "The element of self-authentication cannot be presumed to be capable of being satisfied by information obtained and printed out from the Internet. Internet postings are transitory in nature as they may be modified or deleted at any time without notice and thus are not 'subject to the safeguard that the party against whom the evidence is offered is readily able to corroborate or refute the authenticity of what is proffered.' For this reason, Internet printouts cannot be considered the equivalent of printouts from a NEXIS search where printouts are the electronic equivalents of the printed publications and permanent sources for the publications are identified." Therefore, the copies of opposer's purported former and current webpages are not proper subject matter for its notice of reliance. In consequence of the above, the only attachment which even arguably constitutes proper subject matter for opposer's notice of reliance, and hence may be considered of record if the notice of reliance is deemed to have been timely filed, is the copy of what seems to be a telephone directory advertisement for opposer's self-storage services.

Applicant, however, has filed uncontested motions to strike opposer's notice of reliance and for entry of judgment in his favor dismissing the opposition for failure of opposer to take testimony or otherwise offer any proper evidence in support of its claim of priority of use and likelihood of confusion. Opposer, in the meantime,<sup>5</sup> filed its main brief on the case,<sup>6</sup> along with a reply brief pointing out, *inter alia*, that applicant has not submitted a brief on the case.<sup>7</sup>

Turning, therefore, to applicant's motions to strike and for judgment, applicant maintains that opposer's notice of reliance was not timely filed and, inasmuch as such notice consequently should be stricken, the opposition should be dismissed because of the failure of opposer to offer any proof in

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<sup>5</sup> Rather than otherwise suspending proceedings pending disposition of applicant's potentially dispositive motion for judgment, the Board improvidently allowed trial and briefing dates to continue to run and subsequently issued a show cause order to opposer under Trademark Rule 2.128(a)(3). In reply, opposer filed an uncontested motion to reopen the time to file its main brief, as well as copies of such brief, and the Board granted such motion as conceded, even though the certificate of service sets forth applicant's counsel's former rather than current address. As a result, the order to show cause was considered discharged and due dates for filing remaining briefs were reset, notwithstanding the pendency of applicant's motions to strike and for judgment. Nothing further, however, has been heard from applicant.

<sup>6</sup> Nonetheless, suffice it to say that as set forth in TBMP §704.06(b) (2d ed. rev. 2004): "Factual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial." Moreover, as stated in TBMP §704.05(b) (2d ed. rev. 2004): "Exhibits and other evidentiary materials attached to a party's brief on the case can be given no consideration unless they were properly made of record during the time for taking testimony."

<sup>7</sup> Contrary to opposer's assertion therein that "[i]t is Plaintiff's contention that Defendant has conceded this case by failing to file a Brief," it is pointed out that as set forth in TBMP §801.02(b) (2d ed. rev. 2004): "The filing of a brief on the case is optional, not mandatory, for a party in the position of defendant." In addition, it is noted that the accompanying declaration of A. Terrance Dickens is untimely and thus forms no part of the record in this proceeding.

support of its pleaded claim. Specifically, applicant correctly notes that, as rescheduled, opposer's initial testimony period closed on April 8, 2005, but the notice of reliance, which is the sole evidence submitted by opposer, was not actually received until April 11, 2005. Applicant contends that the mailing certificate which accompanies the notice of reliance and which is dated April 8, 2005, that is, the final day of opposer's initial testimony period, is invalid and of no legal effect because it sets forth an incorrect mailing address. In particular, although bearing the title "CERTIFICATE OF MAILING" and signed by counsel for opposer, applicant accurately notes that such certificate states in pertinent part that: "I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3513 on 04-08-05."

Applicant, in support of his position, correctly asserts in relevant part, however, that:

5. Trademark Rule 2.197 provides that correspondence will be considered timely filed if it is mailed ... prior to expiration of the set period of time by being "[a]ddressed as set out in [37 C.F.R.] §2.190 and deposited with the U.S. Postal Service with sufficient postage as first class mail ...." [Trademark] Rule 2.197 also provides that "[t]he actual date of receipt will be used for all other purposes."

6. According to a final rule effective November 1, 2004, Trademark Rule 2.190 was amended to call for the use of the following address: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

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7. According to a notice published in the March 29, 2005 Official Gazette, effective April 4, 2005:

Correspondence in trademark-related matters, except documents sent to the Assignment Services Division for recordation, requests for copies of trademark documents, and documents directed to the Madrid Processing Unit, must be addressed to:

Commission for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

(emphasis added).

8. MPEP [sic, should be TMEP] Section 305.02(h) states that[:] "The requirements of 37 C.F.R. §2.197 are strictly enforced, and the USPTO denies petitions to consider a document timely filed as of the date on the certificate if a party fails to comply with these requirements."

In view thereof, applicant insists that "the notice of reliance was not addressed as set out in ... [Trademark Rule] 2.190"; that "[p]ursuant to Trademark Rule 2.197, Opposer is not entitled to rely upon the April 8, 2005 date of deposit of the notice of reliance with the United States Postal Service as its filing date" [thereof]; and that "[i]nstead, the later actual date of receipt must be used, making the attempted filing of the notice of reliance untimely." Applicant accordingly urges that because opposer "took no testimony and offered no evidence before expiration of Opposer's time for taking testimony, [the notice of reliance should be stricken as untimely] and Opposer's opposition should be dismissed under ... [Trademark Rule] 2.132."

We are constrained to agree with applicant that opposer's notice of reliance is untimely for the reasons advanced by applicant. Irrespective thereof, Trademark Rule 2.127(a) specifies in relevant part that "[w]hen a party fails to file a brief in response to a motion, the Board may treat the motion as conceded." Moreover, with respect to applicant's motion for judgment, Trademark Rule 2.132(a) provides, *inter alia*, that:

If the time for taking testimony by any party in the position of plaintiff has expired and that party has not taken testimony or offered any other evidence, any party in the position of defendant may, without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground of the failure of the plaintiff to prosecute. The party in the position of plaintiff shall have fifteen days from the date of service of the motion to show cause why judgment should not be rendered against him. In the absence of a showing of good and sufficient cause, judgment may be rendered against the party in the position of plaintiff. ....

Furthermore, although applicant filed such a motion with just one day left in his assigned testimony period, Trademark Rule 2.132(c) provides that while "[a] motion filed under paragraph (a) ... must be filed before the opening of the testimony period of the moving party, ... the ... Board may in its discretion grant a motion under paragraph (a) even if the motion was filed after the opening of the testimony period of the moving party."

Inasmuch as applicant's motion to strike is not only uncontested but, in any event, is well taken, such motion is granted and opposer's notice of reliance is hereby stricken from the record. Since, in view thereof, the record contains no evidence in support of opposer's case, applicant's motion for

judgment, which likewise is not only uncontested but, in any event, is also well taken, is granted and the opposition is dismissed.

Nevertheless, even if opposer could be permitted to amend the mailing certificate accompanying its notice of reliance so as to state the correct mailing address thereon or if its initial testimony period could be reopened upon a showing of excusable neglect until April 11, 2005 so as to make its notice of reliance timely filed, it is pointed out for the sake of completeness that opposer would still fail to meet its burden of proof in this proceeding. Specifically, as noted earlier, the sole evidence which constitutes proper subject matter for its notice of reliance is the following advertisement, which bears a copyright date of 2002 and appears to be taken from a telephone directory listing for opposer's self-storage services:

**Too Much Stuff?**

Temperature Controlled Environment

8150 E. Wardlow Rd. Long Beach

**(562) 799-9900**  
or call toll-free:  
**(877) EDSTORE**  
337-8673  
[www.cdstore.com](http://www.cdstore.com)

**EL DORADO PARK**  
SELF STORAGE

Each unit individually alarmed  
Open 7 days  
Gate: 7am-7pm • Office: 9am-5pm  
Competitive monthly rates  
Boxes • Supplies • Insurance

We accept VISA, M/C,  
AMERICAN EXPRESS, DISCOVER,  
ATM/Debit cards

**WOW!**

© 2002 Verizon Directories Corp.



Such advertisement, on its face, fails to show, however, that as displayed the term "Too Much Stuff?" functions as a service mark which would be perceived by purchasers and prospective customers of opposer's services as identifying and distinguishing its alleged self-storage services. Instead, as used therein, such term appears simply to ask consumers the rhetorical question of whether they have accumulated "too much stuff" and hence would need to rent space for their "stuff" in self-storage facilities of the kind offered under the mark and the associated logo "EL DORADO PARK SELF STORAGE." Applicant, by its notice of reliance, has made of record numerous examples of telephone directory advertising which show on their face that it is not unusual or uncommon for such advertising to feature, as part of the advertising message or copy, rhetorical or other questions, of which none appear to also function as trademarks or service marks for the goods or services being advertised. Consumers viewing the single example furnished by opposer likewise would regard the words "Too Much Stuff?" as a question rather than as a service mark. Such example, in short, fails to plainly show that the words "Too Much Stuff?" function as a service mark anymore that do such terms as, for instance, "WOW!" or "Temperature Controlled Environment," which also appear prominently in the advertisement upon which opposer seeks to rely to establish its right to relief in this proceeding. Thus, even if, as the 2002 copyright date would seem to indicate, the telephone directory advertisement furnished by opposer with its notice of reliance was in actual use prior to the January 13,

2003 filing date of applicant's application, and which is the earliest date upon which applicant can rely in this proceeding,<sup>8</sup> opposer has not demonstrated that it possesses proprietary service mark rights in its pleaded mark "TOO MUCH STUFF?" for the purpose of there being a likelihood of confusion with applicant's "TOOMUCHSTUFF SELF STORAGE" mark.

Accordingly, even if its notice of reliance were deemed or otherwise regarded as being timely filed, it would still be the case that because opposer, as the party bearing the burden of proof in this proceeding,<sup>9</sup> failed on this record to establish

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<sup>8</sup> Because applicant has neither taken testimony nor otherwise submitted any proof that he has commenced use of his mark, the earliest date upon which applicant is entitled to rely in this proceeding for purposes of priority is the filing date of the involved application. See, e.g., Lone Star Mfg. Co., Inc. v. Bill Beasley, Inc., 498 F.2d 906, 182 USPQ 368, 369 (CCPA 1974); Columbia Steel Tank Co. v. Union Tank & Supply Co., 277 F.2d 192, 125 USPQ 406, 407 (CCPA 1960); Zirco Corp. v. American Telephone & Telegraph Co., 21 USPQ2d 1542, 1544 (TTAB 1991); and Miss Universe, Inc. v. Drost, 189 USPQ 212, 213 (TTAB 1975).

<sup>9</sup> It is settled that opposer, as the plaintiff herein, bears the burden of proof with respect to its claim of priority of use and likelihood of confusion. See, e.g., Bose Corp. v. QSC Audio Products Inc., 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) ["[t]he burden of proof rests with the opposer ... to produce sufficient evidence to support the ultimate conclusion of [priority of use] and likelihood of confusion"]; Hoover Co. v. Royal Appliance Mfg. Co., 238 F.3d 1357, 57 USPQ2d 1720, 1722 (Fed. Cir. 2001) ["[i]n opposition proceedings, the opposer bears the burden of establishing that the applicant does not have the right to register its mark"]; Champagne Louis Roederer S.A. v. Delicato Vineyards, 143 F.3d 1373, 47 USPQ2d 1459, 1464 (Fed. Cir. 1998) (Michel, J. concurring); Sanyo Watch Co., Inc. v. Sanyo Elec. Co., Ltd., 691 F.2d 1019, 215 USPQ 833, 834 (Fed. Cir. 1982) ["[a]s the opposer in this proceeding, appellant bears the burden of proof which encompasses not only the ultimate burden of persuasion, but also the obligation of going forward with sufficient proof of the material allegations of the Notice of Opposition, which, if not countered, negates appellee's right to a registration"]; and Clinton Detergent Co. v. Proctor & Gamble Co., 302 F.2d 745, 133 USPQ 520, 522 (CCPA 1962) ["[o]pposer ... has the burden of proof to establish that applicant does not have the right to register its mark"]. It remains opposer's obligation to satisfy its burden of proof, notwithstanding that applicant did not file a brief on the case.

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that there is a likelihood of confusion, it could not in any event prevail on its claim of priority of use and likelihood of confusion and therefore the opposition must fail.

**Decision:** The opposition is dismissed.