

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Baxley

Mailed: December 21, 2006

Opposition No. 91160266

Christopher Brooks

v.

Creative Arts By Calloway, LLC

Before Seeherman, Bucher and Drost,
Administrative Trademark Judges

By the Board:

On November 23, 2005, the Board issued an order wherein, among other things, it 1) denied opposer's motion for summary judgment, stating that, "[a]t a minimum, there is a genuine issue of material fact as to the relatedness of opposer's goods and services and those of the applicant;" and 2) refused to consider opposer's reply brief, which, including the table of authorities and table of contents, exceeded the ten-page limit for reply briefs in support of motions in Board *inter partes* proceedings. On December 22, 2005, opposer filed a request for reconsideration of that order. The request for reconsideration has been fully briefed.¹

¹ The Board apologizes for the delay in deciding the request for reconsideration.

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Opposer contends that the Board erred in 1) refusing to consider opposer's reply brief; and 2) denying the motion for summary judgment on the basis that there is a genuine issue of material fact as to the relatedness of opposer's goods and services and those of applicant, in view of the fact that applicant admitted in response to opposer's statement of undisputed facts that the parties' goods and services are "identical or closely related." Accordingly, opposer asks that the Board reconsider its November 23, 2005 order and enter summary judgment in opposer's favor.

Opposer's contention that the Board erred in refusing to consider his reply brief is incorrect. "[A]lthough such information as a table of contents and an index of cases and authorities is not required, should a party elect to include such information in its brief, the additional pages are considered in the page count."² *Saint-Gobain Corp. v. Minnesota Mining and Manufacturing Co.*, 66 USPQ2d 1220, 1222 (TTAB 2003). Further, the Board does not consider briefs that exceed the page limitation. See *id.* Accordingly, the Board's refusal to consider opposer's reply brief was correct.

We turn next to opposer's request for reconsideration regarding whether there is a genuine issue of material fact

² An index of cases is required in a brief at final hearing, but is optional in a brief in connection with a motion. Compare Trademark Rules 2.127(a) and 2.128(b).

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as to the relatedness of opposer's goods and services and applicant's recited services. In his statement of undisputed facts, opposer stated that "[o]pposer's goods and services and the services set forth in the Application are identical or closely related." In response thereto, applicant indicated that this statement was "[u]ndisputed." Applicant did not seek to amend or qualify this response in its brief in response to opposer's motion for summary judgment or request for reconsideration. Accordingly, opposer's request for reconsideration is granted to the extent that we find there is no genuine issue of material fact that opposer's pleaded goods and services and applicant's involved services are "identical or closely related."

Nonetheless, we find that this proceeding is not amenable to summary disposition because genuine issues of material fact remain with respect to the issue of priority. Applicant has alleged and has submitted evidence purporting to show prior use of the involved mark through The Cab Calloway School of the Arts, asserted by applicant to be its licensee, in connection with musical, concert and theatrical productions. This is sufficient to raise a genuine issue of material fact regarding priority.

In reaching this conclusion, we must follow the well-established principles that, in considering the propriety of

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summary judgment, all evidence must be viewed in a light favorable to the non-movant, and all justifiable inferences are to be drawn in the nonmovant's favor. The Board may not resolve issues of material fact; it may only ascertain whether such issues are present. See *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

Accordingly, although we have identified a different genuine issue of material fact from that in our November 23, 2005 decision, we adhere to that portion of our decision concluding that opposer's motion for summary judgment must be denied.

In view thereof, the request for reconsideration is granted in part and denied in part. Proceedings herein are resumed. The discovery period remains closed. Testimony periods are reset as follows.

Plaintiff's 30-day testimony period to close: **2/23/07**

Defendant's 30-day testimony period to close: **4/24/07**

Plaintiff's 15-day rebuttal testimony period to close: **6/8/07**

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after

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completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.