

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

Baxley

Mailed: April 1, 2008

Opposition No. 91160266

Christopher Brooks

v.

Creative Arts by Calloway, LLC

Before Seeherman, Bucher, and Drost,
Administrative Trademark Judges,

By the Board:

On December 21, 2006, we issued an order wherein we granted in part and denied in part opposer's first motion for reconsideration of the Board's November 23, 2005 order in which we denied opposer's motion for summary judgment on his pleaded priority and likelihood of confusion ground. In particular, we granted the motion for reconsideration 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,'" but nonetheless found that "this proceeding is not amenable to summary disposition because genuine issues of material fact remain with respect to the issue of priority."

On January 19, 2007, opposer filed a motion for reconsideration of the December 21, 2006 order ("the second

Opposition No. 91160266

motion for reconsideration"), which was been fully briefed. Inasmuch as second motions for reconsideration regarding the same basic issue are prohibited, we will consider opposer's motion only to the extent that it seeks reconsideration of our finding that "genuine issues of material fact remain with respect to the issue of priority."¹

After reviewing the parties' arguments, opposer has failed to persuade us that our finding that there remains a genuine issue of material fact as to priority was in error. In reaching this conclusion, we must follow the well-established principles that, in considering the propriety of 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.

¹ Opposer contends in the second motion for reconsideration that applicant is precluded from asserting priority in view of decisions in a civil action in the United States District Court for the Southern District of New York styled *Creative Arts by Calloway, LLC v. Brooks*, No. 01 Civ. 3192 (CLB), S.D.N.Y., December 11, 2001), aff'd, No. 02-7050 (2d Cir. October 11, 2002). However, because we declined in footnote 1 of the November 23, 2005 order denying opposer's motion for summary judgment to give those decisions preclusive effect for purposes of the motion for summary judgment, such contention is untimely raised in the second motion for reconsideration. Rather, such contention should have been raised in the first motion for reconsideration. See Trademark Rule 2.127(b); TBMP Section 518 (2d ed. rev. 2004). In any event, opposer has failed to persuade us that our refusal to give preclusive effect to the decisions in the prior civil action is in error.

Opposition No. 91160266

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). Opposer's arguments concerning 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 go to the probative weight of that evidence, which is a matter for trial and not properly decided by way of motion for summary judgment.

Accordingly, opposer's second motion for reconsideration of the Board's denial of opposer's motion for summary judgment is denied. We will not consider any further requests for reconsideration in any way connected to our denial of opposer's motion for summary judgment. See TBMP Section 518 (2d ed. rev. 2004). This case should move forward to trial without further delay.

Proceedings herein are resumed. The discovery period remains closed. Testimony periods are reset as follows.

Plaintiff's 30-day testimony period to close: **June 6, 2008**

Defendant's 30-day testimony period to close: **August 5, 2008**

Plaintiff's 15-day rebuttal testimony period to close: **September 19, 2008**

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served

Opposition No. 91160266

on the adverse party within thirty days after 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.