Mailed: October 26, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Six Figga Entertainment, Inc.

v.

Taylor, Anthony T.

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Opposition No. 91160894
to application Serial No. 78296713
filed on September 5, 2003

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John R. Mugno of Law Offices of John R. Mugno for Six Figga Entertainment, Inc.

Anthony T. Taylor, appearing pro se.

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Before Hairston, Rogers and Cataldo,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

On September 5, 2003, applicant, Anthony T. Taylor, an individual and United States citizen, filed an application to register on the Principal Register the mark 6 FIGURES ENTERTAINMENT ("ENTERTAINMENT" disclaimed) based upon an allegation of a bona fide intention to use the mark in

commerce for "musical sound recordings" in International Class 9.[1]

Registration has been opposed by Six Figga Entertainment, Inc. ("opposer"). As grounds for opposition, opposer asserts that it is the owner of application Serial No. 76589897, filed subsequently to the challenged application, for the mark SIX FIGGA ENTERTAINMENT; that it has used the mark SIX FIGGA ENTERTAINMENT in connection with musical production services and distribution of musical compact discs since at least December 1997; that such use is prior to the September 5, 2003 filing date of the involved intent-to-use application; and that applicant's mark 6 FIGURES ENTERTAINMENT when used on applicant's goods so resembles opposer's mark SIX FIGGA ENTERTAINMENT for musical production services and distribution of musical compact discs as to be likely to cause confusion.

Applicant's answer consists of a general denial of the allegations in the opposition, although applicant admits "that the Opposer has filed an application for the trademark" claimed therein (answer para. 1). In addition, applicant asserts certain affirmative defenses.

In view of applicant's admission of the filing of opposer's pleaded application, and in view of opposer's pleading of a reasonable claim of likelihood of confusion,

[1] Application Serial No. 78296713.

we consider there to be no issue regarding opposer's standing. However, prior to our consideration of opposer's pleaded claim of priority and likelihood of confusion, we must first address the admissibility of certain materials offered into the record by opposer. During its assigned testimony period, opposer filed the affidavit of its attorney, John R. Mugno, accompanied by the following exhibits:

(1) A print-out from the Internet website of the State of Delaware Division of Corporations indicating the address, entity type, and date of incorporation of opposer;

(2) A copy of applicant's affirmative defenses;

(3) A copy of applicant's responses to opposer's admission requests;

(4) A copy of applicant's responses to opposer's interrogatories; and

(5) A document produced by applicant in response to opposer's requests for production of documents.

In a Board inter partes proceeding, a party may submit testimony by affidavit only by written stipulation with the adverse party, approved by the Board. *See* Trademark Rule 2.123(b). *See also* TBMP §705 (2d ed. rev. 2004). *Cf.* Trademark Rule 2.127(e)(2); and TBMP §528.05(b) (2d ed. rev. 2004). However, in this case there is no indication that the parties entered into any stipulation allowing opposer to

introduce trial testimony by affidavit. Evidence not filed in compliance with the rules of practice governing inter partes proceedings before the Board will not be considered. *See* Trademark Rule 2.123(l). *See also Original Appalachian Artworks Inc. v. Streeter*, 3 USPQ2d 1717, 1717 n.3 (TTAB 1987) (a party may not reasonably presume evidence is of record when that evidence is not offered in accordance with the applicable rules of practice). Inasmuch as opposer's affidavit evidence was not filed in compliance with the applicable rules, it will be given no further consideration, either as evidence of the matters of fact asserted therein or as foundation for exhibits attached thereto which would normally require identification and introduction by a witness. If, however, we view the affidavit as serving in lieu of a notice of reliance, we may yet consider certain exhibits attached thereto.

In addition, opposer indicates in its notice of opposition, in the referenced testimonial affidavit, and in its trial brief that, pursuant to Trademark Rule 2.122(d), it intends to rely upon its asserted application Serial No. 76589897. However, Trademark Rule 2.122(d) provides for the introduction of registrations, not applications, owned by a plaintiff in a Board inter partes proceeding. Introduction into evidence of pending applications owned by an opposition or cancellation plaintiff is governed by Trademark Rule

2.122(e). Rule 2.122(e) provides for the introduction during plaintiff's testimony period of printed publications and official records, including those of the United States Patent and Trademark Office, by notice of reliance. As noted above, opposer stated in its testimonial affidavit that it intends to rely upon its asserted application. However, opposer failed to introduce a copy of the application file, or those portions thereof upon which it intends to rely, along with an indication of its relevance. *See* Trademark Rule 2.122(e). *See also, for example, St. Louis Janitor Supply Co. v. Abso-Clean Chemical Co.*, 196 USPQ 778, 780 n.4 (TTAB 1977). Inasmuch as opposer failed to introduce a copy, or relevant portions thereof, of its asserted application Serial No. 76589897, such application may be given no consideration, even if the affidavit is treated as the equivalent of a notice of reliance.[2]

Similarly, even considering the affidavit as a notice of reliance, exhibit number one attached thereto is a printout from the Internet. The Board has held that such printouts may only be introduced by proper testimony of the individual that conducted the search for the documents. *See Raccioppi v. Apogee, Inc.*, 47 USPQ2d 1368 (TTAB 1998). In

[2] We note in addition that the Board does not take judicial notice of files of applications or registrations, where no copies thereof are filed, and where they are not the subject of the proceeding. *See Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290 (TTAB 1986).

addition, exhibit number five attached to the affidavit is a document produced by applicant in response to a request for production of documents. Such documents may not be submitted by notice of reliance. *See* Trademark Rule 2.120(j)(3)(ii). Accordingly, neither the Internet printout nor the document produced has been considered.

Applicant's affirmative defenses, as part of applicant's pleading, are already part of the record and need not have been submitted by opposer. That leaves items three and four as the only items attached to the affidavit that might be construed to be properly of record if opposer's affidavit were viewed as a notice of reliance. Normally, an answer to an interrogatory or an admission to a request for admission may be offered into evidence by notice of reliance by filing a copy of the interrogatory or admission request along with corresponding answers and admissions. *See* Trademark Rule 2.120(j)(3)(i). In this case, opposer has not submitted copies of its own written discovery requests, but only applicant's corresponding admissions and interrogatory answers. Nonetheless, we will consider these written discovery responses as having properly been made of record by notice of reliance in coming to our determination in this matter.

In consequence of the foregoing, the record in this case includes the pleadings[3]; the file of the involved application; and applicant's admissions and answers to opposer's interrogatories. Opposer did not take any testimony other than by the referenced affidavit. Applicant did not take any testimony or submit any other evidence in its own behalf. Only opposer filed a brief on the case.

Opposer argues in its brief that applicant commenced use of his mark in 2004; but that "it appears that the mark is only used in the State of Illinois, thus not meeting the requirements for a federal trademark registration." Brief at p. 5. Opposer argues with respect to the issue of likelihood of confusion that it has used the mark SIX FIGGA ENTERTAINMENT since December 1997; that applicant's 6 FIGURES ENTERTAINMENT mark is nearly identical to opposer's mark; and that the respective goods and services are closely related and could be marketed in the same trade channels to the same potential purchasers.

First, we note opposer's claim in its brief that applicant has not commenced use of his mark in interstate commerce; and that, as a result, the mark is not entitled to

[3] However, the exhibit submitted with opposer's notice of opposition, apparently consisting of the cover from a compact disc case, is not of record. *See* Trademark Rule 2.122(c). The only exhibit to a pleading that will be received and made into evidence without identification and introduction at trial is a status and title copy of a registration pleaded in an opposition or petition for cancellation. *See* Trademark Rule 2.122(d).

registration. To the extent that opposer is asserting a claim in its brief that the application is void ab initio based upon applicant's failure to commence use prior to filing for registration, we find that such a claim was neither pleaded by opposer nor tried by the parties, and therefore it will not be considered.[4] *See Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993). *See also* TBMP §314 (2d ed. rev. 2004) and cases cited therein.

We turn then to opposer's pleaded claim of priority and likelihood of confusion. In this case, opposer claims priority because of its asserted ownership and rights since December 1997 in the mark SIX FIGGA ENTERTAINMENT. However, opposer has failed to properly introduce any admissible testimony or evidence that its asserted mark SIX FIGGA ENTERTAINMENT was used prior to the September 5, 2003 filing date of the involved application. Opposer's asserted application, even if made of record, was filed subsequently to the application involved herein. In addition, neither the dates of use alleged in opposer's application nor the statements made in the application's

[4] We note in addition that the involved application is based upon applicant's claim of a bona fide intent to use the mark in commerce under Trademark Act Section 1(b), and that applicant has not yet filed an allegation of use in accordance with Trademark Rule 2.76. As such, any claim based upon applicant's non-use of its mark raised at the present time would appear to be premature.

declaration can serve opposer's purpose of proving the date of first use of opposer's mark. *See* TBMP §704.07 (2d ed. rev. 2004). Finally, neither applicant's admissions nor his interrogatory answers provide any proof that opposer made prior use of the mark SIX FIGGA ENTERTAINMENT.

Accordingly, inasmuch as we find that opposer has not established its priority, opposer cannot prevail on its claim of likelihood of confusion.

Decision: The opposition is dismissed.