THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 5, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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H. Michael Bishop

v.

Marina Flournoy

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Opposition No. 91175625
to Application No. 78780720
filed on December 26, 2005

Opposition No. 91175737
to Application No. 78780721
filed on December 26, 2005

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Christine Lardas, Esq., for H. Michael Bishop.

Marina L. Flournoy, *pro se*.

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Before Drost, Mermelstein, and Bergsman, Administrative Trademark Judges.

Opinion by Mermelstein, Administrative Trademark Judge:

Applicant Marina Flournoy seeks registration of the marks 100% ART ('720 Application) and ONEHUNDREDPERCENT ART ('721 Application), both for

> Printed informational cards in the field of art, cards, greeting cards, correspondence cards, gift cards, invitation cards, mounted posters, note cards, occasion cards, paintings, paintings and calligraphic works, paintings and their reproductions, posters, tarot cards, unmounted posters,

water color finished paintings, pastel and oil colors finished paintings.

International Class 16. Both applications were filed based on the allegation of a *bona fide* intent to use the marks in commerce, and both include disclaimers of the word ART apart from the mark as shown.

Opposer H. Michael Bishop filed an opposition to registration of each application alleging standing and (1) priority and a likelihood of confusion with opposer's previously used mark; and (2) that applicant committed fraud in applying for and prosecuting its applications. Applicant filed an answer, denying the allegations in the notice of opposition. Because these proceedings present common issues of law, we consolidate them for purposes of issuing this decision.

On May 12, 2008, opposer filed a trial brief in each opposition, attaching evidence in support of its case. Applicant did not file trial briefs. Then, on July 27, 2008, opposer filed a reply brief in each opposition, arguing that it is entitled to judgment because applicant did not respond to opposer's brief.

Discussion

In any opposition proceeding before the Trademark Trial and Appeal Board, the opposer bears the burden of proving its case by a preponderance of evidence. *Eastman Kodak Co.*

v. Bell & Howell Document Mgmt. Prods. Co., 994 F.2d 1569, 26 USPQ2d 1912, 1918 (Fed. Cir. 1993)("the challenger's burden of proof in both opposition and cancellation proceedings is a preponderance of the evidence"). Our rules prescribe the procedures for introducing evidence to be considered. *See* Trademark Rule 2.120(j); 2.122 – 2.125. In each opposition proceeding, the Board sets the schedule for a trial, during which each party is afforded the opportunity to present evidence in support of its case by testimony, or by notice of reliance.

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In the oppositions at bar, opposer's thirty-day trial period was set to close on November 29, 2007 ('625 Opposition), and on December 3, 2007 ('737 Opposition). Opposer did not file testimony or a notice of reliance in either opposition.[1] Although opposer did attach evidence to its trial brief, that evidence may not be considered because it was not properly submitted during opposer's assigned trial period. Trademark Rule 2.123(l)("Evidence not obtained and filed in compliance with these sections will not be considered.").

We find it unnecessary to address the arguments made in

[1] An unsigned "License Agreement" was attached to both notices of opposition. This is not evidence which may be considered; with one exception not relevant here, "an 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." Trademark Rule 2.122(c).

opposer's brief. As noted above, it was opposer's burden to prove its case by a preponderance of evidence. Without such evidence, the arguments made in opposer's brief are not entitled to any weight because they lack factual support. Because it has submitted no evidence, opposer has not proven its standing or any pleaded ground for relief.[2]

Conclusion

After careful consideration of the record, we conclude that opposer has failed to submit admissible evidence which would establish either its standing or a ground for refusal of registration of applicant's trademarks.

Decision: The opposition is accordingly DISMISSED.

[2] For instance, opposer has not proven that it has any prior trademark right upon which its claims of damage or likelihood of confusion may be predicated. Further, opposer has not proven the falsity of any statement made by applicant during prosecution of the subject applications or that such statements were made with the requisite intent to support opposer's claim of fraud.