

**THIS OPINION IS NOT A
PRECEDENT OF
THE T.T.A.B.**

Mailed: January 12, 2009

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Royal King, Inc.
v.
TJ Seven Incorporation

Opposition No. 91178271

Kenneth Cang Li, Attorney-at-law, for Royal King, Inc.

John E. Russell, Esq., for TJ Seven Incorporation.

Before Walters, Walsh, and Ritchie, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

TJ Seven Incorporation applied to register the mark shown below for "edible bird's nests," in International Class 29.¹ The mark includes the following transliteration statement: "The non-Latin character(s) in the mark transliterates into HUANG CHUANG WANG YINWO, and this means KING OF KINGS BIRDNEST in English."

¹ Serial No. 78851771, filed on March 31, 2006, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use in commerce, and disclaiming the exclusive right to use "NEST" or the Chinese characters representing "BIRD'S NEST" apart from the mark as shown.



Royal King, Inc. opposed the registration on the ground of priority and likelihood of confusion. In this regard, opposer pleaded the mark shown below, as well as a list of registrations for ROYAL KING (U.S. Reg. No. 2513007; 2,594,578; 2,643,248; 2,972,424); two pending applications for ROYAL KING (76675158 and 78947613); and a registration for GINSENG ROYAL JELLY (2070337).



Opposer alleged that its pending application 76675158 identifies "edible bird's nest [sic]" in its recital of goods and that its pleaded marks otherwise identify "health goods including herbal supplements and food beverage [sic]." Accordingly, opposer alleged that opposer and applicant offer "identical or related goods" under their respective marks. Opposer further alleged that the marks have a

"similar nature" since the transliteration of the Chinese characters in applicant's ROYAL NEST mark is "King of Kings Bird Nest [sic]," thereby sharing both "ROYAL" and "KING" with opposer's mark. Opposer did not attach copies of any of the pleaded registrations to the notice of opposition.

We note that in the notice of opposition, opposer referred to both Royal King, Inc. and Herba Natural Products, Inc. as the singular "opposer." Opposer offered no explanation of the relationship, if any, between these two entities, and in all future filings in the record, opposer referred solely to Royal King, Inc. as the opposer.

Applicant filed an answer denying the salient allegations in the opposition and asserted as an affirmative defense that opposer lacks standing and priority. Furthermore, applicant averred that "ROYAL," as the common word between opposer's and applicant's marks, is too diluted and weak to cause a likelihood of confusion in this case. Opposer filed a trial brief. Applicant did not.

The Record

The record in this opposition proceeding consists of the pleadings and the application file by operation of Trademark Rule 2.122(b), 37 CFR §2.122(b). Neither party submitted testimony. Opposer filed a notice of reliance, which consisted solely of 1) Opposer's First Set of Requests for Admission, which, according to opposer, "applicant

failed to respond to"²; and 2) a Notice of Suspension and an Office Action, both from opposer's pending application, Serial No. 76675158, and both of which were included in opposer's notice of reliance without exhibits. Applicant submitted no evidence.

Standing and Priority

Standing is a threshold issue that must be proven in every inter partes case. See *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) ("The facts regarding standing . . . must be affirmatively proved. Accordingly, [plaintiff] is not entitled to standing solely because of the allegations in its [pleading]."). To establish standing in an opposition, opposer must show both "a real interest in the proceedings as well as a 'reasonable' basis for his belief of damage." See *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). It is not necessary that opposer establish its own prior rights in the mark at issue in order to prove standing, and the standard is applied liberally.

Id.

² On February 4, 2007, opposer filed a motion to compel discovery responses to Opposer's First Set of Interrogatories and Opposer's First Request for Production of Documents and Things, but not including the requests for admission. The Board did not issue an order suspending the proceedings, and opposer later filed a timely notice of reliance and trial brief. Accordingly, opposer later asked the Board to withdraw the motion to compel, which the Board did via order issued October 26, 2008.

Opposer included with its notice of reliance an office action, dated July 20, 2007, from its application Serial No. 7667518. The office action mentions the present application, then pending, as a potential bar to opposer's registration if this application were to register - as would occur if we were to dismiss this opposition. Accordingly, on that basis, we find that opposer has adequately proven its standing in this opposition.

Nevertheless, opposer has provided no evidence of its priority. Having introduced no pertinent evidence into the record, opposer has failed to establish any information regarding opposer or its business and how opposer may be damaged by applicant's registration. Opposer pleaded several registrations in its notice of opposition. However, opposer did not introduce those registrations into the record. That is, opposer introduced no evidence during its testimony period to show that it is the owner of its pleaded registrations and that the registrations are valid and subsisting in accordance with Trademark Rule 2.122(d); 37 CFR §2.122(d). The Board does not take judicial notice of registrations, and opposer must properly introduce its pleaded registrations into the record. *See, e.g., Demon Int'l LC v. Lynch*, 86 USPQ2d 1058, 1060 (TTAB 2008) (opposition dismissed where opposer failed to submit proper status and title copies of its pleaded registrations and

thus failed to prove standing and priority); *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230, n.2 (TTAB 1992). Opposer attached several exhibits to its trial brief, including copies of some of its pleaded registrations. However, this is too little, too late. The Board will not consider evidence submitted for the first time with an appeal brief.³ Furthermore, since this opposition was filed before August 31, 2007, opposer was required to submit proper status and title copies of the registrations to comply with Trademark Rule 2.122(d), not simply electronic records as included with opposer's brief.

We note that opposer included with its notice of reliance its requests for admission from applicant, along with an assertion that applicant did not respond thereto. Since applicant failed to respond to the requests for admission, each of opposer's requests is deemed admitted, and moreover each fact in the requests deemed admitted is "conclusively established." Fed. R. Civ. P. 36(a)(3) and (b); see also *Hobie Designs Inc. v. Fred Hayman Beverly Hills Inc.*, 14 USPQ2d 2064 (TTAB 1990). However, the admissions do not establish that opposer used its mark prior to the filing date of the opposed application. Nor do the admissions establish either that opposer is the owner of the

³ The brief asserts that the registrations were included with opposer's notice of reliance. However, they were not.

pleaded registrations or that those registrations are valid and subsisting such that the admissions would establish priority. The only reference to the pleaded registrations is in Request for Admission No. 5, which asks applicant to: "Admit that Applicant is aware of the existence of the following registrations for ROYAL KING and marks that include ROYAL KING, and the design: [followed by list of pleaded registrations]." At best, this may be deemed to establish status, but it certainly does not establish opposer's title to any of the pleaded registrations.⁴ Accordingly, we find that opposer has not established priority, and therefore has shown no right to relief on its claims.

DECISION: The opposition is dismissed.

⁴ In fact it appears that some or all of the pleaded registrations are held in the name of Herba Natural Products, Inc., with which Royal King, Inc. did not establish a connection anywhere in the record.