Mailed: March 15, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Alpha Kitty/Boss Pussycat International
v.
Big Momma Holdings, LLC

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Opposition No. 91184311
to application Serial No. 77209654

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Michael R. Tucci of Mansour, Gavin, Gerlack & Manos for Alpha Kitty/Boss Pussycat International.

David Donahue of Fross Zelnick Lehrman & Zissu, P.C. for Big Momma Holdings, LLC.

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Before Walters, Cataldo and Wellington, Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Big Momma Holdings, LLC ("applicant") filed an application to register in standard characters on the Principal Register the mark ALPHA KITTY for goods and services including

> Sound recordings, audiovisual recordings, DVDs, downloadable sound recordings, downloadable video recordings, all of the foregoing featuring information on topics of personal empowerment, success, self-esteem, fashion, beauty, inspiration, college, school and personal relationships; downloadable electronic publications, namely, books, magazines and newsletters, all of the foregoing featuring

> information on topics of personal empowerment, success, self-esteem, fashion, beauty, inspiration, college, school and personal relationships; computer screen saver software, wallpaper software, and downloadable graphics

in International Class 9; and

> Entertainment services, namely, providing a web site featuring film clips, photographs, and other multimedia materials featuring information on topics of personal empowerment, success, self-esteem, fashion, beauty, inspiration, college, school and personal relationships; entertainment in the nature of an on-going special variety, news, music or comedy show featuring information on topics of personal empowerment, success, self-esteem, fashion, beauty, inspiration, college, school and personal relationships broadcast over television, satellite, audio, and video media

in International Class 41.[1]

Alpha Kitty/Boss Pussycat International opposed registration solely as to the goods in Class 9 and the services in Class 41 under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with applicant's Class 9 goods and Class 41 services, so resembles opposer's previously used mark ALPHA KITTY for "(i) sound recordings since September 20, 1999; and (ii) entertainment services since July 7, 2000"[2] as to be likely to cause confusion.

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[1] Application Serial No. 77209654 was filed on June 19, 2007 based upon applicant's assertion of a bona fide intent to use the mark in commerce in connection with all classes of goods and services. The application recites goods in Class 16 and 25 and services in Class 38 that are not subject to this opposition.
[2] Notice of opposition, paragraph 3.

Applicant, in its answer, denied the salient allegations in the notice of opposition.[3]

THE RECORD

By operation of rule, the file of opposed application Serial No. 77209654 automatically forms part of the record of this proceeding. See Trademark Rule 2.122(b)(1). Similarly, the parties' pleadings, namely, opposer's notice of opposition and applicant's answer, automatically form part of the record of this proceeding. In addition, during its assigned testimony period opposer noticed and took the testimony deposition of applicant's founder, Ms. Atoosa Rubenstein.

Opposer further submitted exhibits with its main brief, consisting of photocopies of opposer's asserted musical CD and cassette tape; images of artwork assertedly submitted by opposer to a guitar art show; a copyright application by opposer for a musical sound recording entitled "Alpha Kitty Songbook #1"; copies of email messages regarding opposer's registration of the domain name alphakitty.com and alphakitty.net; and printouts from informational Internet websites containing articles concerning Ms. Rubenstein.

[3] In addition, applicant asserted as its first affirmative defense that the notice of opposition fails to state a claim upon which relief can be granted, but did not pursue such by motion. Accordingly, applicant's first affirmative defense will not be considered. In its second affirmative defense, applicant asserts matters that amplify its denials of opposer's claim of priority and have been so construed.

However, the exhibits attached to opposer's brief were not made of record by opposer during its assigned testimony period. Rather, the only testimony or evidence submitted by opposer during its assigned testimony period is the above-noted testimony deposition of Ms. Rubenstein. Applicant submitted no testimony or evidence and opposer submitted no rebuttal testimony or evidence. However, applicant objected in its brief to opposer's submission of exhibits with its main brief. In its reply brief, opposer argues that it provided applicant with the exhibits to its main brief "as pre-trial disclosures, and in response [to] Applicant's discovery requests. It had sufficient opportunity to review them and as such would not be unfairly prejudiced."[4] With regard to the parties' disclosures, discovery requests and responses, simply exchanging these materials during the discovery period of this proceeding does not make them of record. Further, while the parties to Board inter partes proceedings may stipulate to a wide variety of matters, including a stipulation that materials filed outside the parties' testimony periods may be considered evidence properly made of record, no such stipulations were filed in this case. See, for example, Trademark Rules 2.120(d)(2) and 2.123(b). See also TBMP §501.01. As a result, we agree with applicant that the exhibits attached to opposer's trial

[4] Opposer's reply brief, p. 4.

brief were not properly made of record during opposer's testimony period, and are not evidence in this case.

Both parties submitted briefs on the matters under consideration, and opposer submitted a reply brief.

DISCUSSION

Section 13(a) of the Trademark Act, 15 U.S.C. §1063(a), allows for opposition to the registration of a mark by anyone "who believes that they would be damaged by the registration of a mark..." The party seeking to oppose the registration of the mark must prove two elements: (1) that it has standing, and (2) that there is a valid ground to prevent the registration of the opposed mark. See Young v. AGB Corp., 152 F.3d 1377, 47 USPQ2d 1752, 1755 (Fed. Cir. 1998).

Opposer's Standing

The Board must consider an opposer's standing as a threshold issue in every case. In Ritchie v. Simpson, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999), the Federal Circuit enunciated a liberal threshold for determining standing, i.e., whether one's belief that one will be damaged by the registration is reasonable and reflects a real interest in the case. See also Jewelers Vigilance Committee Inc. v. Ullenberg Corp., 823 F.2d 490, 2 USPQ2d 2021, 2023 (Fed. Cir. 1987). In the notice of opposition opposer adequately asserted its standing by claiming prior

common law rights in its ALPHA KITTY mark. The only issue is whether opposer has proven its standing.

In this case, opposer has not introduced any admissible evidence regarding its asserted prior or current use of the ALPHA KITTY mark. Nor does the testimony of Ms. Rubenstein establish that opposer is currently using ALPHA KITTY as a mark. As such, opposer has failed to introduce sufficient evidence of its standing to bring this proceeding.

In the alternative, we may look to the admissions in applicant's answer for this purpose. However, and as noted above, in its answer applicant denied all of the salient allegations of the notice of opposition. Thus, even under the liberal standard for standing, there are no admissions in applicant's answer regarding opposer's standing.

Accordingly, we conclude that opposer has failed to make the showing necessary to prove its standing. Our conclusion that opposer failed to prove standing is a sufficient basis, by itself, to dismiss the proceeding. Nonetheless, in order to come to a more complete determination of this case we will consider opposer's claim of priority.

Priority of Use

To establish priority on a likelihood of confusion claim brought under Trademark Act §2(d), a party must prove that, vis-à-vis the other party, it owns "a mark or trade

name previously used in the United States … and not abandoned….” Trademark Act Section 2, 15 U.S.C. §1052. A party may establish its own prior proprietary rights in a mark through ownership of a prior registration, actual use or through use analogous to trademark use which creates a public awareness of the designation as a trademark identifying the party as a source. See Trademark Act §§2(d) and 45, 15 U.S.C. §§1052(d) and 1127. See also T.A.B. Systems v. PacTel Teletrac, 77 F.3d 1372, 37 USPQ2d 1879 (Fed. Cir. 1996), vacating Pactel Teletrac v. T.A.B. Systems, 32 USPQ2d 1668 (TTAB 1994).

In this case, opposer has neither pleaded nor proven ownership of a registration for its ALPHA KITTY mark and must, therefore, demonstrate by competent evidence that it has made common law use of ALPHA KITTY prior to the earliest date upon which applicant may rely for purposes of priority.

Applicant filed its involved application on June 19, 2007. Inasmuch as applicant has not introduced evidence of use of its mark in connection with its goods prior to the filing date of its application, the earliest date upon which applicant may rely for priority purposes is June 19, 2007. See Levi Strauss & Co. v. R. Josephs Sportswear Inc., 36 USPQ2d 1328, 1332 (TTAB 1998), quoting Alliance Manufacturing Co., Inc. v. ABH Diversified Products, Inc., 226 UPSQ 348, 351 (TTAB 1985)(“an applicant is entitled to

rely upon the filing date of its application as a presumption of use of the mark subject of the application as of that date"). Thus, in order to establish priority, opposer must show that it used ALPHA KITTY as a mark prior to June 19, 2007.

Opposer asserts that it has made use of ALPHA KITTY in interstate commerce on sound recordings since September 20, 1999 and in connection with entertainment services since July 7, 2000. However, opposer relies upon evidence attached to its brief in support of such use. As discussed above, such evidence is not of record. The only evidence made of record by opposer, namely, the testimony deposition of applicant's founder, Ms. Rubenstein, fails to establish opposer's use of the ALPHA KITTY mark.

Furthermore, even if the evidence attached to opposer's brief was properly of record, it fails to prove that opposer has made prior use of the ALPHA KITTY mark in commerce. For example, the musical CD made of record bears the mark ALPHA KITTY and a date of 2001; however, there is no corroborating testimony to indicate whether that disc or the "Rough Cuts" or "Nonny" cassette tapes, which bear no visible dates, were released or made available in interstate or international commerce. As such, we cannot determine simply by the date printed on the submitted compact disc or tapes that opposer has priority of use.

Similarly, opposer's evidence of registration of alphakitty.com and alphakitty.net as domain names is not evidence of use of ALPHA KITTY as a trademark or use analogous to trademark use on or in connection with any goods or services. While a domain name may attain trademark status, its use as an address does not support trademark use. See In re Eilberg, 49 USPQ2d 1959 (TTAB 1998). "When a domain name is used only to indicate an address on the Internet, the domain name is not functioning as a trademark … domain names, like trade names, do not act as trademarks when they are used merely to identify a business entity; in order to infringe they must be used to identify the source of goods or services." Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949, 956, 44 USPQ2d 1865, 1871 (C.D. Cal. 1997). See also Data Concepts Inc. v. Digital Consulting Inc., 150 F.3d 620, 47 USPQ2d 1672, concurring opinion, Merritt (6th Cir. 1998); and J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §7:17.50 (4th ed. updated June 2008). Likewise, opposer's evidence of its certificate of copyright registration for ALPHA KITTY SONGBOOK #1 and its entry of artwork in a guitar artwork competition fails to demonstrate trademark use of ALPHA KITTY. Finally, the Internet articles concerning Ms. Rubenstein, assertedly submitted as evidence of actual

confusion, fails to indicate use of ALPHA KITTY as a trademark by opposer.

Thus, even the evidence improperly attached to opposer's brief and excluded above fails to establish that opposer made prior use of ALPHA KITTY as a trademark or otherwise made use analogous to trademark use which would create a public awareness of ALPHA KITTY as a trademark identifying opposer as the source of goods or services thereunder.

Opposer asserts in its notice of opposition that it has made prior use of ALPHA KITTY as a trademark.[5] However, statements made in pleadings cannot be considered as evidence on behalf of the party making them; such statements must be established by competent evidence during the time for taking testimony. See Times Mirror Magazines, Inc. v. Sutcliff, 205 USPQ 656, 662 (TTAB 1979); and TBMP §704.06(a) (2d ed. rev. 2004). Further, applicant did not make any admissions in its answer that would excuse opposer from having to prove its priority of use.

Lastly, opposer's brief contains numerous factual allegations in support of its claim. However, factual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial. Statements in a brief have no

[5] Notice of opposition, paragraphs 3-6.

evidentiary value. See Electronic Data Systems Corp. v. EDSA Micro Corp., 23 USPQ2d 1460, 1462 n.5 (TTAB 1992); and TBMP §704.06(b).

In short, the record is devoid of any testimony or evidence in support of opposer's claim of priority. Opposer has the burden of coming forward with evidence to support its claim, but has failed to do so.

Likelihood of Confusion

Because opposer has failed to prove either its standing to bring this proceeding or priority, its claim under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d) must fail, and we need not consider its claim of likelihood of confusion.

Decision: The opposition is dismissed.