

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

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

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Mailed: June 16, 2010

Opposition No. 91189629

Borghese Trademarks Inc.

v.

Multi Media Exposure, Inc.

**Before Hairston, Cataldo, and Bergsman, Administrative  
Trademark Judges:**

**By the Board:**

This case comes up on the parties' cross-motions for summary judgment on the pleaded issue of priority and likelihood of confusion, and opposer's motion to strike exhibits. The motions have been fully briefed.

On April 8, 2009, Borghese Trademarks Inc. filed a notice of opposition on the ground of priority and likelihood of confusion between opposer's four pleaded registrations for its PRINCESS MARCELLA BORGHESE (Reg. No. 3369371) and BORGHESE (Reg. Nos. 1134398, 3387006, and 3506702) marks for a variety of products, including shampoo, conditioner, and fragrances, and applicant's mark PRINCE LORENZO BORGHESE'S LA DOLCE VITA for "pet shampoo,

conditioners, and body sprays", the subject of opposed Application Serial No. 77435171, based on Trademark Act Sec. 1(b). On May 18, 2009, applicant filed an answer which denied the salient allegations of the notice of opposition.

In support of its motion for summary judgment, applicant contends that its mark identifies a different person than opposer's mark, has additional arbitrary matter which distinguishes the marks, and that the marks are used for substantially different goods, which are sold to different consumers in different channels of trade, and which cannot be used interchangeably.<sup>1</sup> In support of its motion for summary judgment, opposer argues that PRINCE LORENZO BORGHESE is the dominant portion of applicant's mark, and similar in sight, sound and commercial impression to opposer's marks PRINCESS MARCELLA BORGHESE and BORGHESE, that the marks are used on similar goods capable of emanating from the same source, with legally identical channels of trade, and that applicant's deliberate association of its mark with opposer's founder adds to the

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<sup>1</sup> On January 12, 2010, opposer filed a notice that applicant's motion for summary judgment filed with the Board referred to exhibits which were not attached to the motion. On January 13, 2010, applicant electronically filed an unserved document titled "other motions/papers" with the missing exhibits. To expedite matters the Board has accepted the late exhibits, but applicant, who is now represented by different counsel, is advised that such supplements should be accompanied by a motion to accept the late filing and should be served on the other party. The parties are advised that failure to properly file and serve submissions may result in those submissions being given no consideration.

likelihood of confusion. Both parties submitted declarations and exhibits in support of their respective motions.

OPPOSER'S MOTION TO STRIKE

Opposer's motion (incorporated in opposer's reply brief) to strike Exhibits C & D submitted with applicant's reply brief in support of its motion for summary judgment contends that the exhibits are hearsay, are not based on personal knowledge, and have not been properly authenticated. The March 1, 2010 declaration of attorney Jolie Apicella, to which the exhibits were attached, states in relevant part:

Attached hereto as Exhibit C are true and correct copies of website printouts relating to, and photographs of, products and/or services offered for sale commercially under marks that comprise the Borghese name.

Attached hereto as Exhibit D are true and correct copies of trademark registrations for the marks CASTELLO DI BORGHESE and BORGHESE for wine.

With respect to Exhibit D, third party registrations obtained from the Office's electronic databases may be submitted without a supporting declaration in connection with a motion for summary judgment. See *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1370 (TTAB 1998); TBMP Section 528.05(d). Accordingly, opposer's motion to strike Exhibit D is denied.

With respect to Exhibit C, we find that the Apicella declaration fails to properly authenticate the attached photographs, label, advertisement, and article. Specifically, because the declaration does not identify the nature, source and date of each BORGHESE usage, we grant opposer's motion to strike Exhibit C with respect to the photographs of the front and back of a bottle of balsamic vinegar; the wine label; the advertisement for a "Fendi Selleria Small Villa Borghese Handbag"; and the undated Washington Post article "The Impulsive Traveler." *Paris Glove of Can. Ltd. v. SBC/Sporto Corp.*, 84 USPQ2d 1856, 1858-59 (TTAB 2007) ("Like other materials which are not self-authenticating, Internet materials may be admissible as evidence in connection with a summary judgment motion, if competent and relevant, provided they are properly authenticated by an affidavit or declaration pursuant to Fed. R. Civ. P. 56(e).").

For the purposes of a summary judgment motion, materials may be submitted as an attachment to the brief which, at trial, would require a notice of reliance. TBMP §528.095(a). Inasmuch as the Internet printouts attached to Exhibit C clearly indicate the date the website was accessed and the URL at which the website is located, no further authentication is required, and opposer's motion to strike Exhibit C is denied with respect to the attached Bizrate,

Home Shopping network, Borghese Law Firm, and Villa Borghese website printouts. *See Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031, 1040 (TTAB 2010) ("[I]f a document obtained from the Internet identifies its date of publication or date it was accessed and printed, and its source [e.g., the URL], it may be admitted into evidence pursuant to a notice of reliance in the same manner as a printed publication in general circulation in accordance with Trademark Rule 2.122(e)."). In sum, opposer's motion to strike Exhibits C & D of applicant's reply brief is granted in part and denied in part as to Exhibit C and denied as to Exhibit D.

THE CROSS-MOTIONS FOR SUMMARY JUDGMENT ARE DENIED

In an effort to determine the motions as expeditiously as possible, an exhaustive review of the record will not be provided. It is presumed that the parties are familiar with the record. The Board has carefully reviewed the arguments and all accompanying evidence properly made of record relating to the motions for summary judgment.

Each party, in regard to its own motion for summary judgment, bears the burden of showing the absence of any genuine issue of material fact, and that it is entitled to judgment as a matter of law. *See Fed. R. Civ. Pro. 56(c)*; and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548

(1986). In assessing each motion, the evidence must be viewed in a light favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. See *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993). The fact that both parties have filed motions for summary judgment does not necessarily mean that there are no genuine issues of material fact, and that trial is unnecessary. *Fishking Processors Inc. v. Fisher King Seafoods Ltd.*, 83 USPQ2d 1762, 1764 (TTAB 2007).

Upon careful consideration of the arguments and evidence presented by the parties on both motions for summary judgment, and resolving all reasonable inferences in the non-movants' favor, we find that in each instance there are genuine issues of material fact which preclude a grant of summary judgment. Specifically, there are genuine issues of material fact as to, at a minimum, the commercial impressions created by the parties' respective marks, the connotations of the marks as used, or as intended to be used, on the parties' goods, the relationship between the parties' goods, and the channels of trade in which the goods move.

Accordingly, applicant's motion for summary judgment and opposer's cross-motion for summary judgment are denied.<sup>2</sup> Proceedings are resumed, and trial dates are reset as indicated below.

Expert Disclosures Due	8/18/10
Discovery Closes	9/17/10
Plaintiff's Pretrial Disclosures	11/1/10
Plaintiff's 30-day Trial Period Ends	12/16/10
Defendant's Pretrial Disclosures	12/31/10
Defendant's 30-day Trial Period Ends	2/14/11
Plaintiff's Rebuttal Disclosures	3/1/11
Plaintiff's 15-day Rebuttal Period Ends	3/31/11

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served 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 Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

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<sup>2</sup> The fact that we have identified certain genuine issues of material fact as sufficient bases for denying the parties' cross-motions for summary judgment should not be construed as a finding that these are necessarily the only issues that remain for trial. *Fishing Processors Inc. v. Fisher King Seafoods Ltd.*, 83 USPQ2d at 1766 n.8. Evidence submitted in support of or in opposition to a summary judgment motion is considered only for purposes of deciding the motion. To have such materials considered at trial, they must be properly introduced into the record during the appropriate testimony period. *Id.* at 1767 n.9.