

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Hearing:
April 25, 2012

Mailed:
February 21, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Katz Communications, Inc.

v.

Katz Marketing Solutions LLC

Opposition No. 91191178
to application Serial No. 77649608
filed on January 14, 2009

Pamela B. Huff, Bart W. Huffman and Marissa Helm of Cox
Smith Matthews Incorporated for Katz Communications, Inc.

Roger A. Gilcrest of Schottenstein Zox & Dunn Co., LPA for
Katz Marketing Solutions LLC.

Before Seeherman, Bucher and Greenbaum, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Katz Communications, Inc. has opposed the application
of Katz Marketing Solutions LLC to register the mark:



for "business marketing consulting services." Applicant seeks registration pursuant to Section 2(f) of the Trademark Act.¹

The grounds for opposition are likelihood of confusion and fraud. Specifically, opposer has alleged that since long prior to applicant's claimed date of first use, opposer has established customer recognition of the term KATZ as the common thread in a family of registered marks used in connection with independent media sales representation services in the fields of radio and television broadcasting and consulting services in connection therewith; that opposer has used and obtained federal registrations for KATZ, KATZ RADIO, KATZ TELEVISION, KATZ. THE BEST., KATZ COMMUNICATIONS, and KATZ HISPANIC MEDIA;² and that applicant's mark so resembles

¹ Application Serial No. 77649608, filed January 14, 2009, and asserting first use on May 27, 2004 and first use in commerce on June 1, 2004.

² In the notice of opposition opposer pleaded ownership of Registration No. 2658151 for KATZ HISPANIC MEDIA. However, this registration, as opposer acknowledged at footnote 8 of its main brief, was cancelled pursuant to Section 8 shortly before the filing of the notice of opposition. Opposer stated in its brief that it had obtained a new registration, No. 3825925, for KATZ HISPANIC MEDIA for the same services as those in Registration No. 2658151. Registration No. 3825925 issued on July 27, 2010, during the pendency of this proceeding. Opposer neither pleaded nor submitted the then-pending application, nor did it submit a

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opposer's KATZ family of marks that, when used in connection with applicant's services, there is a likelihood of confusion. Further, with respect to the fraud claim, opposer has alleged that, at the time applicant's chief executive officer signed the oath in its application swearing that no other entity had the right to use the mark in commerce, opposer had already contacted this person, giving applicant actual notice of opposer's rights in the KATZ family of marks. Opposer therefore alleges that applicant's signature and submission of the oath was a fraud on the Patent and Trademark Office.³

copy of the registration when it issued, which was coincidentally the same date that opposer filed its notice of reliance on its pleaded registrations. Normally in these circumstances we would not treat the newly issued registration for KATZ HISPANIC MEDIA of record, nor deem the pleadings amended to assert this later registration. However, applicant made the file of this registration of record through its notice of reliance filed October 25, 2010, and in its brief lists this registration as one of opposer's six registrations. We therefore treat the pleading amended to assert this registration.

³ In its brief on the case opposer asserts, for the first time, that there were "prosecution irregularities", p. 19, apparently because the examining attorney did not cite opposer's registrations as a bar to the registration of applicant's mark, and because the examining attorney did not require a disclaimer of MARKETING SOLUTIONS, despite the fact that the examining attorney, in the first Office action, had stated that this term was generic for applicant's services. We point out that these are ex parte issues, and do not form grounds for opposition. Cf. Century 21 Real Estate Corp. v. Century Life of America, 10 USPQ2d 2034 (TTAB 1989), rev'd on other grounds, Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992) (Board stated, with respect to opposer's claim that specimens were insufficient, that it was not the Board's function to review the work of examining attorney). To the extent that opposer believes that MARKETING SOLUTIONS is a

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In its answer applicant admitted that opposer obtained the federal registrations pleaded in the notice of opposition, that KATZ is the surname of one of applicant's principals or owners, and that opposer's attorney sent a letter to applicant dated January 12, 2009 mentioning various trademarks allegedly owned by opposer. Applicant otherwise denied the salient allegations in the notice of opposition.

We sustain the opposition on the ground of likelihood of confusion and dismiss it on the ground of fraud.

Objections

With its trial brief opposer submitted a thirteen-page motion to strike a large number of applicant's documentary submissions and testimony related to them, as well as documents submitted by notice of reliance. Many of opposer's objections are that the materials were not provided in discovery. As a general comment, there is no requirement that an adverse party provide in discovery any and all documents on which it intends to rely, it need produce only those documents that are validly part of initial disclosures, pre-trial disclosures or that have been requested pursuant to a valid discovery request; thus,

generic term that is not registrable absent a disclaimer, opposer never pleaded that as a ground, and therefore we give it no consideration.

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a party is not precluded from making evidence of record simply because it was not provided to the adverse party during discovery.

The first group of exhibits to which opposer objects is applicant's exhibits 1-5, introduced during the cross-examination of opposer's witnesses, and consisting of the websites of third parties. Opposer claims that these exhibits should have been produced in response "to at least one document request or interrogatory propounded by Opposer." Motion to strike, p. 3. Opposer identifies the relevant document production request as Request No. 11, for "All documents ... concerning, constituting or related to any formal or informal search, opinion, or recommendation concerning the right of [Applicant] to use KATZ MARKETING SOLUTIONS or the registrability of KATZ MARKETING SOLUTIONS." Id. We find that a reasonable interpretation of this request was that opposer was seeking search reports/results that were obtained in connection with applicant's adoption of its mark. The third-party website evidence would not be responsive to this request and, indeed, based on the copyright dates appearing on some of

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the website pages, they had not been created at the time applicant adopted or applied to register its mark.⁴

Moreover, the various objections to these exhibits-- for example, they were not described in applicant's initial disclosures, they are hearsay, and they are not authenticated--are academic in view of the fact that opposer itself wrote cease and desist letters to the companies named in the exhibits. These letters state that the third-party users "are conducting business under [the particular mark] as evinced by your website [URL given]," and that "[y]our use of [the mark] in association with your own marketing and consulting services will cause customer confusion...." Applicant's ex. K, submitted with deposition of Tammy Katz. We treat opposer's sending these cease and desist letters as an admission by opposer that the websites are genuine and that the various third parties are conducting business under their respective marks. However, we do not accept the exhibits as evidence of the truth of the statements made in the websites, such as the particulars of the third-party businesses and activities.

⁴ Opposer also points to its Interrogatory No. 15, but this interrogatory did not require the identification of any third-party use, nor did opposer require, as part of its document production request, that applicant provide copies of documents that related to opposer's interrogatories or applicant's responses thereto.

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The next group of objections is directed to certain exhibits introduced during the deposition of applicant's witness Tammy Katz. First, opposer has made general comments objecting to the numbering of these exhibits. Apparently opposer believes that these documents should have shown Bates stamp numbers so that opposer could easily determine whether or not the exhibits had previously been produced during discovery. However, there is no Board requirement to this effect. It also appears that opposer considers the exhibits improperly numbered, either because applicant had previously numbered its exhibits with the letter "A" during the testimony deposition of its witness Stacy Katz, and also started numbering the exhibits for the deposition of Tammy Katz with the letter "A," or because applicant had used numbers for the exhibits it identified during the cross-examination of opposer's witnesses, and then switched to letters to identify the exhibits during the testimony depositions of its own witnesses. If either of these points is in fact the basis for opposer's objection, we must say that we think it ultimately is far more wasteful of the Board's time to have to consider the objection than any technical problem with applicant's numbering of its exhibits might have caused. First, Trademark Rule 2.123(g) does not specifically state that

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exhibits cannot be numbered starting with (1) or (A) for each witness, rather than having the exhibits for all witnesses be consecutively numbered. The purpose of the rule is to make the exhibits easy to locate, without the Board panel of judges having to laboriously fish through pages and pages of randomly assigned numbers as we review the testimony depositions. Clearly that was not the problem in this case. Nor did the numbering present an actual problem for opposer's attorney; in fact, during the testimony of Stacy Katz, when applicant's attorney was trying to understand why opposer's attorney had a problem with the numbering so that he could address the objection, opposer's attorney basically said that the reason she was raising the objection was just to be able to preserve it for final hearing. Stacy Katz dep., p. 12-13.

As for the substantive objections, opposer objects to exhibits E, F, G, H, I, J, Q and R because they were not produced in discovery, and are hearsay, and, in a footnote, opposer states that "a number of these exhibits may also be struck for lack of foundation." Motion, p. 7. As we have already discussed, documents do not have to be produced in discovery unless there is a document production request for such documents. Further, it does not appear that these exhibits had been obtained by applicant during the

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discovery period. Exhibit E is a search summary of company names, bearing a print date of July 16, 2010, after opposer's testimony period had already begun. The remaining exhibits are pages from third-party websites that show on their face KATZ formative names or marks. Exhibits F, G, H, I and J are websites of companies that were the subject of cease and desist letters written by opposer on July 21, 2010; clearly there was no prejudice to opposer by the submission of these exhibits, since opposer was aware of the websites and companies months prior to the exhibits being introduced at Tammy Katz's deposition. We also note that, as recounted in the Board's September 10, 2010 order, applicant was not aware of these third parties during the discovery period, that "applicant first became aware of the existence of the involved third parties as early as the beginning of July 2010 which was the beginning of opposer's testimony period." p. 4. As for exhibits Q and R, they are a collection of pages from third-party websites. We will not burden this opinion with a discussion of each web page, but suffice it to say that we are satisfied that the documents were not required to be produced to opposer during discovery, and that Tammy Katz's testimony was sufficient to authenticate them. Also, opposer should note that the requirements discussed in *Safer Inc. v. OMS*

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Investments Inc., 94 USPQ2d 1031 (TTAB 2010), for submitting Internet printouts by notice of reliance are not applicable to making such documents of record through their introduction by the testimony of a witness.

Although we deny opposer's motion to strike the exhibits, applicant cannot rely on these exhibits to prove the truth of the statements contained in them, as that would violate the proscription against introduction of hearsay. Accordingly, we treat the exhibits as showing only that these web pages are available on the Internet and, insofar as opposer has written cease and desist letters to certain of the third parties, we treat the statements made by opposer about the third parties as admissions, as indicated supra.

Opposer has objected to exhibits A and A2 to Tammy Katz's deposition as improperly numbered, not produced during discovery, hearsay and incomplete because they are only portions of an entire work. We will not again discuss the numbering and discovery objections, but say only that they are overruled. The Board considers the single page of a textbook (Exhibit A) and the slides from a PowerPoint presentation (Exhibit A-2) as acceptable; in fact, the Board frowns on the submission of extraneous material as

needlessly adding to the bulk of the record.⁵ Applicant stated that it had supplied the materials that were submitted as these exhibits during discovery, and opposer did not dispute this in its reply brief. Therefore, to the extent that opposer believed that other pages in these materials contradicted what was submitted, opposer could have made them of record during its rebuttal testimony period. As for the hearsay objection, applicant states that the exhibits served only as "demonstrative exhibits to assist in the organization and understanding of Ms. Katz['s] testimony." Applicant's brief in opp., unnumbered p. 8. We therefore regard these materials as not being used to prove the truth of the statements made therein, but as reflecting only the opinion of the authors.

Finally, opposer has moved to strike the third-party registration and application materials and third-party website materials submitted by applicant under a notice of reliance. In reviewing the objections, we note that opposer has identified the documents (App. N.R. at 3-9 & Docs 7-24; App. N.R. 109-18 and Docs. 25-45) submitted with the notice of reliance filed by applicant on May 3, 2011,

⁵ We also note that during the testimony of opposer's witness James Beloyianis opposer introduced exhibit 14, which Mr. Beloyianis stated he created by pulling pages out of larger marketing presentations. p. 52.

which notice of reliance was the subject of opposer's motion to strike filed on May 10, 2011. The Board ruled on that motion on May 26, 2011, ordering that "applicant's May 3, 2011 notice of reliance will be given no consideration." p. 6. Since that notice of reliance does not form part of the record of this proceeding, opposer's motion to strike these materials is deemed moot.⁶

Accordingly, opposer's motion to strike is denied, although, as noted, the probative value of some of the exhibits is limited.

We must also comment on the exhibits submitted by opposer. Opposer submitted numerous multi-page confidential exhibits. In submitting redacted copies of these exhibits, opposer submitted a separate page for each page in the exhibit, with the word REDACTED on each page. As a result, the record includes literally hundreds of blank pages with just the word REDACTED on each. If an entire exhibit is confidential, it is necessary only to submit one page giving the exhibit number and the notation that the exhibit is confidential.

⁶ To the extent that any of the third-party registrations in the May 3, 2011 notice of reliance are also part of the October 25, 2010 notice of reliance, we have, for the reasons discussed infra, considered those registrations.

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Moreover, the record submitted by opposer is extraordinarily and unnecessarily large. For example, opposer's exhibit 13 was introduced during the testimony of Robert Damon, the chief financial officer of opposer's Katz Media Group. It consists of more than 600 pages. On direct testimony, and before applicant's counsel interposed an objection, the totality of Mr. Damon's testimony about this exhibit was:

...this is a printout of the pages of our Katz website as well as printouts of documents that are attached or linked to the website as either, you know, pieces that were prepared by us, research pieces or informational pieces as well as I believe links to industry, some industry-related websites and information contained on those websites.

Test, p. 38. As a result of applicant's counsel's questioning, Mr. Damon went through the documents and further testified that five of the pages were links from third-party sites, and that "the rest of the pages would be Katz' website and attachments to Katz' website and Katz' documents." p. 39. Mr. Damon did not highlight any information in these 600-plus pages of the exhibit that was relevant to the opposition.

Even more egregious is opposer's exhibit 31, which was introduced during the testimony of Amanda Austin, a corporate communications assistant at petitioner. It

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consists of 3039 pages. The testimony about this exhibit was essentially Ms. Austin responding "yes" to petitioner's counsel's questions about the contents, e.g.,

Q. Do these records also contain broadcast calendars used by Katz?

A. Yes.

Q. Do they also contain various PowerPoint presentations that have been used by Katz over the years?

A. Yes.

Q. Do they also contain some archived corporate documents -

A. Yes.

Q. - which have some historical value, but are not maintained by you for corporate purposes?

A. Yes.

Q. Do they also contain some instances of the Katz PluggedIn newsletter?

A. Yes.

...

Q. Are there also some instances of printouts from historical websites of Katz?

A. Yes.

Q. In fact, even a few letters to customers?

A. Yes.

Q. Are some - do some of the records include advertisements and trade publications through the years?

A. Yes, those are in there.

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Austin, test, 7-9. No attempt was made to highlight any particular item or business record within these 3000-plus pages. There is not even testimony that provides the Bates numbers indicating the types of documents mentioned by Ms. Austin. And many of the pages of news articles do not even mention KATZ or any variation of KATZ, since the clipping service obviously provided articles that contained a mention of any of the companies that were associated with opposer, including Clear Channel and Continental TV.

The Board has previously criticized the practice of "dumping" evidence into the record with the idea that the Board will sort through the evidence and possibly find something that will support the submitting party's position. See *In re Thermo LabSystems Inc.*, 85 USPQ2d 1285, 1290 n. 7 (TTAB 2007) ("it is unfair to the examining attorney and the Board to 'dump' hundreds and hundreds of pages of information and expect the Board and the examining attorney, with their limited resources, to ferret through such pages ...") Although *Thermo LabSystems* involved an appeal, the comments about the Board's limited resources apply to an *inter partes* proceeding as well. See *American Speech-Language-Hearing Assn. v. National Hearing Aid Society*, 224 USPQ 798, 800 (TTAB 1984) ("The record that we now have in this case is quite unwieldly [sic] and has been

extremely damaging to the Board's resources in terms of time and manpower.") We can think of no clearer example of a "dump" of evidence than Exhibit 31.

The Record

In view of our rulings above, the record includes the pleadings; the file of the opposed application; the testimony, with exhibits, of opposer's witnesses Robert Damon, James Beloyianis, Chickie Bucco, Amanda Austin, Robert McCurdy and Bonnie Press (all of whom are officers or employees of one of opposer's companies or divisions), and of applicant's witnesses Tammy Katz, applicant's CEO, and Stacy Katz, a third-party witness whose business is called Katz Media Consulting.⁷ In addition, opposer has made of record, under notice of reliance, status and title copies of its five pleaded registrations, details of which are provided infra. Applicant has made of record, under notice of reliance, the portions of the files of opposer's pleaded registrations, as well as the file of opposer's Registration No. 3825925 for KATZ HISPANIC MEDIA,⁸ the files of certain third-party registrations for marks that include

⁷ We note that opposer objected to Stacy Katz's testimony in its entirety at the beginning of her deposition, as well as making specific objections during the course of her deposition. However, opposer did not maintain the objections in its brief or the 13 page motion to strike filed with its brief, and therefore we deem the objections to her testimony waived.

⁸ See footnote 2.

the name KATZ, and certain third-party registrations for marks that include the name KATZ. (Notice of reliance filed October 25, 2010, and supplemented on May 11, 2011).

The opposition has been fully briefed,⁹ and an oral hearing was held at which both parties appeared.

The Parties

Opposer, or more accurately, the company that was opposer's original predecessor-in-interest, was founded in 1888 by Emanuel Katz, under the name E. Katz Advertising Agency. At that time, it represented various newspapers, selling advertising space in those papers. It expanded its advertising representation to radio stations in the 1920s, and to television stations in 1949, and stopped

⁹ In its reply brief opposer asked us to take judicial notice of U.S. Census Bureau data from Census 2000 regarding frequently occurring surnames, in an attempt to show that Katz is not a very common surname. Opposer also listed various registrations for these other surnames, which are not of record. We decline to take judicial notice of any of this material. First, the Board does not take judicial notice of records residing in the U.S. Patent and Trademark Office. Second, although opposer provided the URL for where the census information could be found, opposer did not provide the particular web pages so that we could ascertain the accuracy of the information that was merely written in opposer's brief. In general, when parties wish the Board to take judicial notice of information, they supply a copy of the reference material that they want the Board to consider. In this regard, because opposer did not provide the full information regarding KATZ from the information on the Census site, but merely listed the statistical ranking, applicant had no opportunity to reply to this point, or put the information into context, such as by pointing out the number of people with the KATZ surname in the 2000 census, rather than just the ranking of the surname. Finally, even if we were to take judicial notice of this information, it would not affect our decision herein.

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representing newspapers at some point well in the past. Opposer was purchased by Clear Channel in 2000. It currently represents 4000 radio stations and 500 television stations. Its revenue comes from commissions from the sale of advertising time on the radio and television stations it represents. That is, it sells advertising time to advertisers, usually dealing with the advertiser's advertising agencies, and the stations pay it a commission.

Opposer has gone through a variety of corporate organizations, with divisions becoming subsidiaries, or subsidiaries or divisions being divided into further divisions. It has used a variety of names for these companies or divisions throughout the years, most of which have included the element KATZ.

Applicant is a sole proprietorship, and Tammy Katz is its CEO. It gives guidance on the entirety of marketing—product, price, distribution and promotion.

Standing

In view of opposer's registrations for marks containing the name KATZ, as well as the testimony regarding the use of KATZ in various company names and marks, opposer has established its standing. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir.

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2000); Lipton Industries, Inc. v. Ralston Purina Co., 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

Priority

Federal Registrations

Of record are opposer's registrations for KATZ,¹⁰ KATZ. THE BEST.,¹¹ KATZ COMUNICATIONS¹² and KATZ HISPANIC MEDIA,¹³ all for "independent media sales representation services in the fields of radio and television broadcasting and consulting services in connection therewith"; for KATZ RADIO for "independent media sales representation services in the field of radio broadcasting and consulting services in connection therewith"¹⁴; and for KATZ TELEVISION for "independent media sales representation services in the field of television broadcasting and consulting services in connection therewith."¹⁵ Accordingly, priority is not in issue with respect to these marks for their respective

¹⁰ Registration No. 1786989, issued August 10, 1993, pursuant to Section 2(f) of the Act; Section 8 affidavit accepted; Section 15 affidavit received; renewed.

¹¹ Registration No. 1788403, issued August 17, 1993, with BEST disclaimed; Section 8 affidavit accepted; Section 15 affidavit received; renewed.

¹² Registration No. 1801030, issued October 26, 1993 pursuant to Section 2(f) of the Act; COMMUNICATIONS disclaimed; Section 8 affidavit accepted; Section 15 affidavit received; renewed.

¹³ Registration No. 3825925, issued July 27, 2010, with HISPANIC MEDIA disclaimed and under Section 2(f) with respect to KATZ.

¹⁴ Registration No. 1788400, issued August 17, 1993, pursuant to Section 2(f) of the Act; RADIO disclaimed; Section 15 affidavit accepted; Section 15 affidavit received; renewed.

¹⁵ Registration No. 1788401, issued August 17, 1993, pursuant to Section 2(f) of the Act; TELEVISION disclaimed; Section 8 affidavit accepted; renewed.

services. King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).¹⁶

Common Law Marks

Opposer also claims common law rights in various KATZ formative marks. However, we find opposer's witnesses' testimony about common law marks to be too vague for us to ascertain when, or for what services, opposer used a particular mark, or whether the use of a particular mark has been continuous. Since the founding of opposer's predecessor in 1888, the company has undergone a series of name changes and corporate reorganizations and the creation and merger of divisions, and the adoption of trademarks and trade names and division names and company names, none of which is clearly spelled out in the testimony in a way that we can make a finding of fact as to the date of use and continuing use of particular trademarks for particular services, and a finding of law as to opposer's common law rights in any of its asserted marks.

Opposer's Claimed Family of Marks

Opposer has also asserted that it has a family of KATZ marks. We discuss this claim in the context of priority

¹⁶ Opposer also mentioned, for the first time in its brief, that it owned an application for another KATZ formative mark. p. 7. However, the application was neither pleaded nor tried, and there is no evidence to support that such a registration even exists. We have given this supposed application no consideration.

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because opposer began using the trade name/mark KATZ MARKETING SOLUTIONS, the same mark that applicant seeks to register, *after* applicant began using it. However, if opposer can show that it had established a family of marks prior to applicant's first use, and that KATZ MARKETING SOLUTIONS is part of that family, then opposer would have priority with respect to that name/mark.

We note that opposer has worded its claim of a family in a variety of ways. In the notice of opposition, opposer claimed a "family of federally registered marks", and listed each of its pleaded registrations as constituting that family. ¶ 2. In its brief it states it has a "family of registered ('KATZ Registrations') and common-law trademarks ('KATZ Common Law Marks')," p. 1, later stating that the KATZ registrations are "within a larger family of KATZ Common Law Marks." p. 7.

In order to establish a family of marks, it is not sufficient to show that one has registered or used several marks having a common characteristic:

A family of marks is a group of marks having a recognizable common characteristic, wherein the marks are composed and used in such a way that the public associates not only the individual marks, but the common characteristic of the family,, with the trademark owner. Simply using a series of similar marks does not of itself establish the existence of a family. There must be a recognition among the purchasing public that

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the common characteristic is indicative of a common origin of the goods.

J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991). "Recognition of the family is achieved when the pattern of usage of the common element is sufficient to be indicative of the origin of the family. It is thus necessary to consider the use, advertisement, and distinctiveness of the marks..." Id.

The burden is on opposer to prove that its marks have been promoted in such a way that purchasers would recognize that KATZ is a surname of a family of marks. Although opposer has made some general statements that it "has used its family of KATZ marks on advertisements, letterhead, and other promotional materials associated with its services, on the Internet, and in other ways customary in the trade," brief, p. 9, opposer has not pointed to any specific evidence in which several KATZ marks have been used or promoted together that would result in the recognition of a family. As previously noted, opposer has "dumped" as Exhibit 31 over 3000 pages of documents from its files, without providing any testimony as to which documents show that it has promoted a family of marks. Even in its brief opposer has not identified specific documents that it

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believes demonstrate the promotion of a family of KATZ marks.

Because opposer could not take the trouble to identify particular advertisements or other promotional materials that it asserts shows it has established a family of marks, we will not discuss in detail why this evidence is insufficient. We do point out that many of the documents are internal pieces and there is no indication that they were distributed outside of the company or, if so, to what extent they reached potential consumers. Hundreds of pages that were submitted are press releases relating to personnel moves, and it is not clear that these press releases were ever picked up in publications. Other personnel changes are the subject of published articles, but there is mention of only a single company or division name.

Many of the articles were apparently clipped merely because they contained a mention of a Katz company, even if it is a company that does not have "Katz" in its name, or because they contain a mention of one of opposer's employees, even if there was no mention of "Katz." Most of the articles refer to opposer or one of its divisions only in passing, such that the reference to a single Katz company name would not make an impression on the reader,

e.g., a TVIndustry.com February 3, 2000 article on Building the Local Station Brand includes a quote by "Bill Carroll, VP and director of programming at media rep firm Katz Television," Exhibit 31, Bates # KATZ000310-11.¹⁷ To the extent that there are articles that include a reference to a Katz trade name, it is only one trade name, so obviously they do not show a family of marks.

Of the very few instances in which more than one KATZ name or mark appears, it is difficult to tell what the material is, or how it was distributed or the number of people it might have reached. Again, when Ms. Austin identified Exhibit 31, she gave no testimony about any particular pages in the exhibit. For example, at Bates # KATZ002387 there is a page on which there is a square in the middle, and in the square the phrase "KATZ COMMUNICATIONS INC" appears at the top, with a list of companies or divisions beneath, i.e., Banner Radio Christal Radio, Eastman Radio, Katz Radio, Katz Hispanic Radio, Katz American Television, Katz Continental Television, Katz Independent Television," and a "K" logo at the bottom, with

¹⁷ The number of articles that were apparently supplied by a clipping service and form part of Exhibit 31 remind us of what the Federal Circuit said in *In re Societe Generale des Eaux Minerales de Vittel S.A.*, 824 F.2d 957, 3 USPQ2d 1450 1451 (Fed. Cir. 1987): It is indeed remarkable to see the thoroughness with which NEXIS can regurgitate a placename casually mentioned in the news.

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the slogan "Katz. The best" below the logo. The preceding page is a copy of what appears to be the cover of a document with the words "Directory of New York State Radio and Television Stations 1991-1992" at the top, and in large letters over the bottom half of the document, "The New York State Broadcasters Association, Inc." To the extent that KATZ002387 is an advertisement in the Directory (and we have no information to this effect other than the pages themselves), there is no information about the distribution of this document. Further, we cannot conclude that anyone viewing it would understand that opposer was promoting a KATZ family of marks. The names on the list would most likely be understood as company names, not marks, and because of the presence of so many non-Katz names, it would not make an impression on purchasers that KATZ is the "surname" of a family of trademarks.

As for opposer's Exhibit 13, as we discussed above, the 600 pages are a combination of the web pages on opposer's website as well as articles that are linked to the website, and third-parties' materials that are linked to the website. The only term that appears consistently as a trademark in the webpages is KATZ MEDIA GROUP. Other listings of Katz names are generally not as trademarks, but as company or division names, e.g., "Chad Brown, President,

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Katz Radio.” To the extent that more than one of opposer’s marks appears on the website (and opposer has not identified any pages on which specific marks appear), we do not regard the presence of KATZ-formative marks at different points in a 600-page exhibit as establishing a family of marks. It is extremely unlikely that purchasers or prospective purchasers would review 600 webpages, let alone draw any conclusion from the fact that individual KATZ-formative marks appear on separate web pages scattered throughout the website that KATZ has been promoted as the basis of a family of marks.

In short, opposer has failed to meet its burden of showing that it has established a family of marks based on the element “KATZ,” and therefore it cannot rely on such a family to establish priority for the mark KATZ MARKETING SOLUTIONS, or as a basis for its likelihood of confusion claim.

Likelihood of Confusion

In view of our findings above that opposer has failed to establish a family of marks based on the element KATZ, and that opposer has failed to show that it has established common law rights in any particular KATZ-formative mark for particular services, we confine our likelihood of analysis to opposer’s registered marks. We further focus our

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discussion on opposer's registration for KATZ for "independent media sales representation services in the fields of radio and television broadcasting and consulting services in connection therewith," as in that registration appears to be the closest to applicant's mark as there are no terms modifying the name KATZ, thereby adding a potentially distinguishing element, and the identification of services is as broad as or broader than those in the other registrations.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

We turn first to the du Pont factor of "the similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use." 177 USPQ at 567. As noted, opposer's services are identified in its registration as "independent media sales representation services in the fields of radio and television broadcasting and consulting services in connection therewith."

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Applicant makes much of the fact that opposer obtains its revenue by commissions paid to it by the television and radio stations that it represents, and contends that opposer's consulting services are limited to services it offers the radio and television stations. It is true that one of opposer's classes of customers is the radio or television station or broadcaster for which it sells advertising space. However, the companies that place the ads, and the advertising agencies that place commercials on behalf of these companies, must also be considered as consumers of opposer's services. Although the primary purpose of opposer's consulting services is to sell more ad time on the stations that it represents, these services also benefit the advertisers and advertising agencies. As Mr. Beloyianis, the president of Katz Television Group, testified, the consultation services include working with advertisers "as to how they should spread these media dollars." p. 22-23. Ms. Bucco, the president of Katz Direct Marketing, testified that in addition to providing consulting services to radio and television stations to help them set pricing and help them with programming decisions, p. 28, her division also advises advertisers "where something should run, maybe the time of day, maybe the time of the month" p. 32. We view applicant's

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interpretation of opposer's services to be too narrow; the identification of media representation sales services in the registration includes services rendered to advertisers, even though the advertisers do not pay opposer directly for such services, and we find that the consulting services in connection with the independent media representation includes advising advertisers as to how their television and radio advertising dollars should be spent.

Applicant's services are identified as "business marketing consulting services." Tammy Katz described marketing consulting services as an "array of things":

In general, it is experts in marketing either holistically marketing in brand management, like my company, or specialists in aspects of marketing who charge for their expertise to their clients. We typically give guidance on market--holistic marketing issues, which tends to include the entirety of marketing, which are all the cross-functional aspects of executing the marketing strategy within the company and all aspects of the marketing mix, being product, price, distribution, and promotion.

Tammy Katz, p. 8. Applicant states on its website that its marketing solutions include "Advertising and marketing communication programs." Tammy Katz, exhibit B. Opposer's witness Bonnie Press described advertising as a subset of marketing, that "advertising is part of the marketing equation," and that in her 34 years of experience,

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advertising within a customer's organization would fall within the marketing group. p. 29.

Marketing consulting services are, thus, very broad, and include product promotion. The identified services must therefore be interpreted as including advising companies having a product or service to market about advertising on television and radio. Accordingly, as identified, applicant's services and the services identified in opposer's registration overlap. In saying this, we acknowledge that applicant does not actually advise or consult on media. "I do not handle media." Tammy Katz, p. 21. "[M]ost all of my clients do not purchase media, to my knowledge." Tammy Katz, p. 28. However, it is well settled that in a proceeding such as this, the question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in an opposer's registration, rather than what the evidence shows the goods and/or services to be. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987).

Accordingly, because applicant's services are broadly described in its identification, and because this broad

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identification of services can include consulting on the purchase of television and radio advertising spots, the identified services must be deemed to overlap with the consulting services in connection with the radio and television representation identified in opposer's registration.

As for the du Pont factor of "the similarity or dissimilarity of established, likely-to-continue trade channels," opposer has submitted testimony that, in addition to advertising agencies, it works directly with the advertisers. See, for example, Press, p. 10. Applicant works directly with the companies that market a product. There can also be overlap in the personnel within a company that encounter the parties' services. With respect to its consulting services, opposer's witness testified that opposer can deal with an advertiser's senior media strategist, brand manager, marketing and advertising director, director of marketing or chief marketing officer. For smaller companies, it can even be the owner of the company. Beloyianis, pp. 29-30. Applicant provides services directly to the chief executive officer or second-most senior person in a company. Tammy Katz, p. 17. Although applicant makes the point that the companies it works with do not purchase media, and therefore would not

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be the same companies that would use opposer's particular type of consulting services, there is nothing in applicant's identification that would restrict it from offering its services to any companies, including companies that would have the need to buy television and radio advertising, and obtain consulting services in connection with such purchases. Again, we note applicant's argument that the purchasers of opposer's services are the radio and television stations that opposer represents, because opposer is paid by them, but we are not persuaded by this argument.

We turn next to consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. As part of this analysis, we also consider the strength of opposer's mark, the number and nature of similar marks in use on similar goods or services, and the conditions under which and buyers to whom sales are made.

First, we note that opposer has not claimed that its mark is famous, as that term has been interpreted in the case law. See, for example, *Kenner Parker Toys Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). Applicant has submitted evidence of third-party registrations and third-party use to show that

opposer's mark is not entitled to a broad scope of protection. With respect to the third-party registrations, such registrations are not evidence of the use of the marks shown therein. However, they may be used in the same manner as dictionary definitions, to show that a term has a particular significance. *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 153 (CCPA 1978); *The Conde Nast Publications, Inc. v. Miss Quality, Inc.*, 507 F.2d 1404, 184 USPQ 422, 425 (CCPA 1975). In this case, they show only what is already uncontroverted by the evidence submitted by opposer and applicant, namely, that KATZ is a surname and people with this surname have adopted and used their name in their businesses. In this connection, we note the testimony that opposer's predecessor, in effect the founder of the company that eventually became opposer, was named Emanuel Katz, and applicant is owned by Tammy Greenberg Katz. In addition, opposer's registration issued, and applicant has sought registration, pursuant to the provisions of Section 2(f), such that both parties have admitted the surname significance of KATZ.¹⁸

¹⁸ Opposer has objected that many of the third-party registrations are for services in different fields, e.g., KATZ'S DELICATESSEN for restaurant services, WELSH & KATZ, LTD. For legal services. Although the probative value of such registrations might be less if the registrations were used to

Although opposer's mark consists of KATZ per se, and "Katz" is a surname, a surname can become a strong mark through use. In this case, we have relatively little evidence about opposer's use of KATZ per se; there is no specific testimony as to how long this particular mark has been used,¹⁹ or sales made under this mark, or advertising expenditures. Opposer and its witnesses have in general referred to "KATZ marks" without specifying any particular mark, including the mark KATZ. As a result, opposer has failed to prove that KATZ per se is a strong mark.

We acknowledge that each year opposer distributes thousands of broadcast calendars bearing the name KATZ to its own personnel, agencies and advertisers. These calendars are different from regular calendars; they show the broadcast month, and can be used "to keep track of when invoices are due, and so forth." McCurdy, p. 96. The calendars are sent to people at advertising agencies at the

show the meaning of a term in a particular field, because the meaning of KATZ is that of a surname, we have considered all of the registrations.

¹⁹ We note that exhibit 1, "a list of names that we compiled that have been used over the years in our businesses and divisions," i.e., "Katz trademarks, trade names, business divisions, d/b/a's, et cetera, et cetera," Damon, p. 12, does not include KATZ per se, although this list was compiled by asking "all of our business leaders to send me a list of names that have been used over the years in various divisions, plus from corporate records as well." Id. The list includes almost 90 names, including many that were not in use as of the time of trial, and many that are not even for KATZ-formative names or marks.

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buying level, as opposed to those at the most senior level, and are also sent to trade associations. *Id.* at 97. The calendars do not bear any advertising per se, merely the phrase KATZ STANDARD BROADCAST CALENDAR. Opposer has submitted evidence of these annual calendars going back to 1984.

We do not regard these calendars as showing that KATZ is a strong mark for media placement consulting services. These calendars are not used to promote the consulting services for which we have found overlap with applicant's services. Further, these calendars are not directed to the senior level people who would be the direct customers or purchasers of the business marketing consulting services identified in applicant's application, and who would be likely to encounter the services identified in both opposer's KATZ registration and applicant's application.

As for the evidence of third-party use of KATZ marks, applicant has submitted, as Katz exhibit E, a listing of company names retrieved by a search by OneSource, all of which have KATZ in their names. We have given no probative weight to this document, as it would be hearsay to use the document to prove the existence of the companies retrieved by the search. Similarly, much of the third-party website evidence has limited probative value. Although this

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evidence shows that websites bearing such names exist, we cannot treat the information about the companies that is contained in the websites as proving the truth of those statements. However, as noted in our discussion of opposer's objections to applicant's exhibits, there is evidence that opposer has written cease and desist letters to six third-party users of KATZ marks, exhibit K, and we can accept opposer's statements as to those third-party uses. Thus, opposer has provided evidence of the use of KATZ STRATEGIC SOLUTIONS, KATZ COMMUNICATIONS GROUP, KATZ GLOBAL MEDIA, KATZ MARKETING COMMUNICATIONS, KATZ DIRECT MARKETING and KATZ MEDIA CONSULTING for "marketing and consulting services." With the exception of KATZ MEDIA CONSULTING, that is the extent of the information we have as to those third parties' use of their marks. For KATZ MEDIA CONSULTING, applicant took the testimony deposition of Stacy Katz, the owner of this company. Ms. Katz testified that she has used the mark KATZ MEDIA CONSULTING since the summer of 2009, and that she offers personal brand strategy, for example, helping a consultant or individual proprietor promote their services by better articulating their personal brand. In connection with the media, her services can involve public relations through

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the media, product placement, working with media bloggers, and obtaining publicity on television, radio and the like.

Third-party use of similar marks for similar goods or services can be evidence that consumers have become conditioned to recognize that businesses in a particular field use a specific term, and that they are able to distinguish between these businesses based on small distinctions among the marks. See *Steve's Ice Cream v. Steve's Famous Hot dogs*, 3 USPQ2d 1477, 1479 (TTAB 1987).

As a result, we approach our comparison of the parties' marks with the understanding that consumers are not likely to believe that every mark that contains the name KATZ in the general field of marketing or advertising identifies goods or services emanating from a single source, and that, simply because marks contain this name is not a sufficient basis on which to find a likelihood of confusion.

Applicant's mark obviously begins with the identical element that makes up the whole of opposer's mark. However, for the reasons discussed above, the fact that both marks contain this name is not a sufficient basis on which to find likelihood confusion. The question is whether consumers will assume that KATZ and KATZ MARKETING SOLUTIONS identify services of a single source, or separate

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sources, when the marks are used for overlapping services. Although applicant's mark includes the words MARKETING SOLUTIONS, we find that the addition of these descriptive words is not sufficient to distinguish the marks when they are used in connection with legally identical services. That is, although purchasers will certainly notice the additional words, they will regard them as merely providing further information about the services, and still view the marks as indicating services emanating from or sponsored by the same source. Because KATZ is the dominant term in applicant's mark, the marks overall are similar in appearance, pronunciation, connotation and commercial impression. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties).

We acknowledge that the consumers of opposer's and applicant's services are both sophisticated and careful. They will clearly notice that applicant's mark contains the additional words MARKETING SOLUTIONS. However, because, as stated above, these words provide additional information about the services, these discriminating purchasers are

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likely to view KATZ MARKETING SOLUTIONS as a variation of opposer's mark KATZ, when used in connection with services that overlap with opposer's consulting services. We are aware that during the process of a company's decision to hire a company to place media advertising and obtain consulting services in connection therewith, or to hire a company for business marketing consulting, details about the company will be made known, so that a potential customer will know that Tammy Katz is the principal of applicant, and that she is not associated with opposer.²⁰ However, the question is not whether, before the ultimate purchase is made, the customer knows what company he is dealing with, but whether the customer is likely to believe, when he contacts Katz Marketing Solutions, that the services offered under the KATZ MARKETING SOLUTIONS mark emanate from the same source as the services offered under the KATZ mark.

The next du Pont factors we consider are the related factors of the nature and extent of any actual confusion, and the length of time during and conditions under which

²⁰ For example, Tammy Katz testified that the hiring process would typically involve "a one-hour conversation face to face or on the phone to see if there's a fit for what their marketing services needs are and what we provide. If there is a fit, we provide a proposal, a written proposal, outlining the program, the plan and the budget for their review, editing, refinement or, ideally, signature." p. 40.

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there has been concurrent use without evidence of actual confusion. There is no evidence of any confusion during the nine years from when applicant began using the mark KATZ MARKETING SOLUTIONS in 2002²¹ until the time testimony was taken in 2011. However, we do not treat the lack of evidence of actual confusion as indicative that confusion is not likely. Although we deem applicant's services, as identified, to encompass advising on television and media advertising, including the placement of such ads, applicant does not in fact engage in such activities. As a result, we cannot conclude that the parties' activities have been such that there would have been an opportunity for confusion to occur. As a result, we treat these du Pont factors as neutral.

With respect to the remaining du Pont factors, applicant treats them in a rather pro forma manner, while opposer has not addressed them, stating that it has limited its comments to those factors it deems relevant. Accordingly, we too will mention these factors only briefly. In its discussion of the factor of the variety of goods or services on which a mark is or is not used (factor

²¹ Tammy Katz testified that applicant began using the name KATZ MARKETING SOLUTIONS in July 2002;, although use of KATZ MARKETING SOLUTIONS in the applied-for stylized format came some years later. We have considered the period of contemporaneous use as starting with the non-stylized mark, since that mark is even closer to opposer's mark.

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9), and the factor of the market interface between applicant and opposer (factor 10), it concludes that "this factor [10] does not appear to weigh favorably in Opposer's favor," brief, pp. 15-16, and "this factor [10] cannot be said to favor Opposer." Brief, p. 16. Although it later states that these factors favor applicant, there is nothing in the record that would show this. As for factors 11 (the extent to which applicant has a right to exclude others from use of its mark on its goods) 12 (the extent of potential confusion, i.e., whether de minimis or substantial) and 13 (any other established fact probative of the effect of use), applicant says that there is no direct testimony on these factors. To the extent that any of these factors are relevant, we treat them as neutral.

After considering all of the relevant du Pont factors, and the evidence and arguments submitted in connection with them, we find that applicant's mark used for its identified "business marketing consulting services" is likely to cause confusion with opposer's mark KATZ for the consulting services in connection with independent media sales representation services in the fields of radio and television broadcasting identified in its registration. We make this finding because the consulting services identified in opposer's registration must be deemed to be

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encompassed by the "business marketing consulting services" identified in applicant's application. Because these services are legally identical, when the highly similar marks KATZ and KATZ MARKETING SOLUTIONS are used therewith, consumers are not likely to distinguish the source of the services based on the additional descriptive wording MARKETING SOLUTIONS in applicant's mark. We want to make clear, though, that we are not finding that KATZ is a strong mark, or that it is entitled to a broad scope of protection, even for related goods or services, or even against other marks consisting of the name KATZ and descriptive wording. Nor are we finding that applicant's mark is likely to cause confusion if it were used solely for the services in connection with which applicant actually uses its mark, as opposed to the services recited in its application. Our decision is solely that the additional descriptive words MARKETING SOLUTIONS in applicant's mark KATZ MARKETING SOLUTIONS is not sufficient to distinguish applicant's mark from opposer's mark KATZ when the marks are used for the legally identical services identified in their respective application and registration.

Fraud

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We turn now to the second ground on which this opposition is based. Opposer contends that applicant committed fraud in filing the trademark application because applicant knew that opposer had superior rights to various KATZ marks, and nevertheless Tammy G. Katz, applicant's chief executive officer, signed on behalf of applicant the declaration in the application stating that she "believes applicant to be the owner of the trademark/service mark sought to be registered...; [and] to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive..." Opposer asserts that applicant had knowledge that opposer had superior rights because opposer had sent her a cease and desist letter shortly before it filed its application.

"Fraud in procuring a trademark registration or renewal occurs when an applicant knowingly makes false, material representations of fact in connection with its application." *In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938, 1941 (Fed. Cir. 2009) ("*Bose*"), quoting *Torres v. Cantine Torresella S.r.l.*, 808 F.2d 46, 1 USPQ2d 1483, 1484

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(Fed. Cir. 1986). "The very nature of the charge of fraud requires that it be proven 'to the hilt' with clear and convincing evidence. There is no room for speculation, inference or surmise and, obviously, any doubt must be resolved against the charging party." *Id.*, at 1939, quoting *Smith Int'l, Inc. v. Olin Corp.*, 209 USPQ 1033, 1044 (TTAB 1981).

In *Qualcomm, Inc. v. FLO Corp.*, 93 USPQ2d 1768, 1771 (TTAB 2010), the Board set out the allegations necessary to state a claim of fraud that is based on statements made in a declaration:

A plaintiff claiming that the declaration or oath in a defendant's application for registration was executed fraudulently, in that there was another use of the same or a confusingly similar mark at the time the oath was signed, must allege particular facts which, if proven, would establish that: (1) there was in fact another use of the same or a confusingly similar mark at the time the oath was signed; (2) the other user had legal rights superior to applicant's; (3) applicant knew that the other user had rights in the mark superior to applicant's, and either believed that a likelihood of confusion would result from applicant's use of its mark or had no reasonable basis for believing otherwise; and that (4) applicant, in failing to disclose these facts to the U.S. Patent and Trademark Office, intended to procure a registration to which it was not entitled. *Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 USPQ2d 1203, 1205 (TTAB 1997).

Opposer bases its claim of fraud on its assertion that applicant had actual notice of opposer's superior rights

due to a cease and desist letter it states it sent to applicant shortly before applicant filed its application. Surprisingly, though, opposer did not make a copy of the cease and desist letter of record. The only way we know that a letter was sent was because applicant admitted in its answer that "Opposer's attorney sent a letter to Applicant dated January 12, 2009, mentioning various trademarks allegedly owned by Opposer," and during her testimony, Tammy Katz acknowledged receiving such a letter:

Q. (cross-examination by opposer's counsel):
And you filed--you filed the application upon receiving or after receiving a letter from my client, Katz Communications, regarding the Katz Communications marks.

A.: Yes.

Tammy Katz, p. 166. However, there is virtually no information about what opposer stated in its letter, except that Tammy Katz said, "Well, in their letter it said they were an independent media representation company." *Id.* at 167.

Given that fraud must be proven to the hilt, we find that opposer has failed to prove that applicant knew that opposer had rights in any KATZ or KATZ-formative mark,²² let

²² As noted, applicant's admission was limited to stating that opposer's letter mentioned "various trademarks allegedly owned by Opposer." This is not an admission that opposer owned any trademarks, nor is it an admission that opposer claimed rights in any particular trademarks.

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alone that opposer had rights superior to applicant's, or that applicant believed that its use of its mark would be likely to cause confusion.

Opposer's evidence falls far short of meeting the standard of proof for fraud, and its ground that applicant committed fraud in executing the application is therefore dismissed.

Decision: The opposition is sustained on the ground of likelihood of confusion, and dismissed on the ground of fraud.