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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91200643
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD**

In the Trademark Opposition of:

DILLE FAMILY TRUST,
Opposer,

vs.

NOWLAN FAMILY TRUST,
Applicant

Opposition No.: 91200643

OPPOSER'S BRIEF

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INTRODUCTION

This is an Opposition proceeding brought by Opposer, the Dille Family Trust against Applicant, the Nowlan Family Trust's Application Serial No. 77-650082 for the mark BUCK ROGERS in International Classes 009, 016, 025, 028 and 041.

Opposer, the Dille Family Trust (hereinafter "Opposer") has been and is now using, itself or through license the BUCK ROGERS mark (hereinafter "the Mark") on goods including but not limited to comic books, action figures, feature films, t-shirts, board games, computer software, DVDs and radio programs.

The Mark has acquired distinctiveness over the past century and is a famous mark, adopted and first used by Opposer as early as 1929.

Opposer's grounds for this Opposition proceeding are Section 2(d) of the Lanham Act (likelihood of confusion) and Section 43(a) and/or 43(c) of the Lanham Act (dilution of the uniqueness of Opposer's mark). Opposer hereby requests, pursuant to TBMP § 801 and 37 C.F.R. § 2.128(a), that judgment be entered on each count set forth in Opposer's Notice of Opposition, filed on July 12, 2011, against Applicant the Nowlan Family Trust for registration of the mark BUCK ROGERS.

DESCRIPTION OF THE RECORD

Opposer filed an application (Serial No. 77/831393) seeking registration of the mark BUCK ROGERS in numerous classes (009, 016, 018, 021, 024, 025, 026, 028, 035 and 041) and for a variety of goods including, computer game programs, downloadable sound recordings and audiovisual recordings featuring music, science fiction and adventure, printed materials, folders, calendars, bags, wallets, mugs, t-shirts, jackets, games, toys, videos, non-downloadable web-based television programs featuring science fiction and adventure, and action figures and

accessories therefor; said application had an application date of September 21, 2009, and a foreign priority date of March 25, 2009.

Opposer also filed an application (Serial No. 77/831213) seeking registration of the mark BUCK ROGERS in numerous classes (009, 016, 020, 028 and 041) and for a variety of goods including, motion picture films featuring science fiction and adventure, audio-visual recordings featuring science fiction and adventure, sound recordings featuring musical soundtracks, a series of books featuring a collection of comic strips, toy action figures, non-downloadable television programs, and figurines made of plastic; said application had an application date of September 21, 2009, and a foreign priority date of March 25, 2009.

Opposer also claimed the priority of prior registrations 0714184 and 155871, each of which predates Applicant's present application.

Applicant filed an application (Serial No. 77/650082), based on an intent-to-use, seeking registration of the mark BUCK ROGERS in numerous classes (009, 016, 025, 028 and 041) and for a variety of goods including, motion picture films featuring science fiction and adventure, audio-visual recordings featuring science fiction and adventure, sound recordings featuring musical soundtracks, a series of books featuring a collection of comic strips, toy action figures. Said application had an application date of January 15, 2009.

Serial No. 77/650082 was published for opposition purposes on June 14, 2011. Opposer timely filed a Notice of Opposition (Docket No. 1) on July 12, 2011. The parties engaged in lengthy discovery, but the proceedings were suspended when Applicant filed a motion for judgment on the pleadings on March 22, 2013 (*see* Docket No. 23). On August 7, 2013, the Trademark Trial and Appeal Board ("TTAB") issued an order denying Applicant's motion for judgment on the pleadings and resetting the trial dates (*see* Docket No. 28).

On March 26, 2014, Opposer timely filed its Notice of Reliance (Docket No. 39). Opposer then timely filed its evidence and testimony on April 25, 2014 (Docket Nos. 40 & 41). On May 27, 2014, Applicant filed its Notice of Reliance (Docket No. 44). Applicant also filed a Motion to Strike Opposer's Notice of Reliance (*see* Docket No. 43). Opposer responded to Applicant's Motion to Strike (*see* Docket No. 45), requesting the opportunity to amend certain portions of its Notice of Reliance.

On October 3, 2014, the proceedings resumed, and Opposer was granted the opportunity to revise certain portions of its Notice of Reliance (Docket No. 48). Opposer revised those sections of its Notice of Reliance as instructed by the TTAB, and timely filed same on October 8, 2014 (*see* Docket No. 49).

With the testimony periods having been reset by the TTAB's decision on October 3, 2014 (Docket No. 48), Applicant had the opportunity to submit its Notice of Reliance. On November 17, 2014, Applicant filed its Notice of Reliance (Docket No. 50). Applicant's November 17, 2014 Notice of Reliance did not submit evidence, but rather deleted the only documents which it had previously identified in its prior Notice of Reliance (Docket No. 44). It is Opposer's understanding that with this updated Notice of Reliance (Docket No. 50), Applicant has submitted no evidence during its testimony period.

ARGUMENT

I. OPPOSER HAS STANDING TO BRING THIS ACTION

To have standing a party need only have a belief that it is likely to be damaged by applicant's registration. Cunningham v. Laser Golf Corp., 222 F.3d 943, 945, 55 U.S.P.Q.2d 1842 (Fed. Cir. 2000). Such a belief can be shown by "establishing a direct commercial interest." Cunningham, 222 F.3d at 945. Opposer claims the benefit of prior registrations 0714184 and 1555871, each of which

predates Applicant's present application. Moreover, Opposer has been using the Mark in commerce since as early as 1929 (March 25, 2014 Testimony Deposition of Louise A. Geer ("Geer Deposition"), Ex.1).¹ Louise A. Geer is the current Trustee of the Dille Family Trust, which has owned the rights to the Mark decades before Applicant filed its registration (*see* Geer Deposition Exhibits 33, and 59-61).

In its Answer (Docket No. 4), Applicant alleges that it is the successor in interest and creator of the BUCK ROGERS mark. However, any rights alleged by the Nowlan Family Trust were assigned by Theresa Marie Nowlan in or about May of 1942 (*see* Geer Deposition Exhibit 8). As Opposer is the owner of prior registrations 0714184 and 1555871, current Application Nos. 77/831393 and 77/831213, and has used the Mark in commerce well before Applicant filed its application, Opposer has demonstrated that it is likely to be damaged by Applicant's registration of the Mark.

II. OPPOSER HAS PRIORITY

Opposer has priority based upon its prior registrations 0714184 and 1555871. Opposer also has priority based upon its common law rights in the mark BUCK ROGERS. Opposer has used and continues to use the BUCK ROGERS mark in commerce, establishing and retaining its common law rights in the Mark (*see* Geer Deposition Exhibits 6, 13, 14, 19, 34, 36, 37, 39, 40, 42, 43, 51, 53 and 57). Trademark rights can arise through federal registration or under common law; the test in either instance is "conditioned upon use [of the mark] in commerce." Gen. Healthcare Ltd. v. Qashat, 364 F.3d 332, 335 (1st Cir. 2004) (citing United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97 (1918)).

¹ A copy of the Testimony Deposition of Louise A. Geer, and all exhibits thereto, was filed with the TTAB on April 25, 2014 pursuant to 37 CFR § 2.125(c) and section 703.01(1) of the TBMP.

It its Answer (Docket No. 4), Applicant cited Opposer's cancellation of prior registrations 0714184 and 1555871 as an affirmative defense, and Applicant will likely argue that through the aforementioned cancellation, Opposer's rights to the Mark have been abandoned or diminished. However, Opposer has maintained its common law rights by continuing to use the Mark in commerce, specifically during the time period of 2008 through the present day (*see* Geer Deposition Exhibits 6, 13, 14, 19, 34, 36, 37, 39, 40, 42, 43, 51, 53 and 57). "Nonuse [of a mark] for 3 consecutive years shall be prima facie evidence of abandonment [...] [t]he burden shifts to the trademark owner to produce evidence" that the owner used the mark during the three year period or intended to resume use of the mark. Crash Test Dummy Movie, LLC v. Mattel, Inc., 601 F.3d 1387, 1391 (2010).

Opposer has clearly demonstrated that it used (and intended to continue to use) the BUCK ROGERS mark during the period in question (*see* Geer Deposition Exhibits 6, 13, 14, 19, 31, 34, 36, 37, 39, 40, 42, 43, 51, 53 and 57). Despite the cancellation of its prior registrations, Opposer has continued to use the mark in commerce and has never demonstrated any intent to relinquish or to stop using the Mark. Whereas Applicant has never used the Mark in commerce, Opposer has continued to use the Mark in commerce – maintaining and further establishing its superior priority rights to the Mark. Applicant's attempt to circumvent Opposer's long-standing common law rights by filing the instant trademark application without ever having a bona fide intent to use the Mark, illustrates a long pattern of harassment and unfounded attempts to circumvent Opposer's longstanding rights to the use of the Mark. Through its long-standing and continued use of the mark in question Opposer has maintained its common law rights to the Mark, and has rebutted any question of abandonment of the Mark raised by Applicant.

III. A STRONG LIKELIHOOD OF CONFUSION EXISTS BETWEEN APPLICANT'S AND OPPOSER'S MARKS

The evidence on the record presented by Opposer demonstrates a strong likelihood of confusion between Opposer's BUCK ROGERS mark and Applicant's BUCK ROGERS mark, under the thirteen factor test set forth in In re E.I. DuPont DeNemours & Co., 476 F.2d 1357, 177 U.S.P.Q. 563, 567 (CCPA 1973).

a. Similarity of the Marks – The Marks Are Identical.

It is clear from the applications of both Opposer and Applicant that the marks applied for, BUCK ROGERS, are identical. As Opposer has presented evidence that it has priority and common law rights in the mark BUCK ROGERS, this factor weighs in favor of Opposer. Moreover, Applicant even admits the marks are similar and likely to cause confusion in its Answer (*see* Docket No. 4, ¶13).

Although it is unnecessary given the marks are identical, the test to determine if the marks are similar is whether the marks are similar enough in their overall commercial impressions that confusion among the average purchase is likely. *See Chemetron Corp. v Morris Coupling & Clamp Co.*, 203 U.S.P.Q. 537 (TTAB 1979); Sealed Air Corp. v. Scott Paper Co., 190 U.S.P.Q. 106, 108 (TTAB 1975).

b. Similarity of the Goods – The Goods Identified are Essentially Identical.

The goods to which Applicant's and Opposer's marks are identified, as set forth in their respective applications (and in Opposer's prior registrations) are essentially, if not exactly, identical. Applicant acknowledges that its applied-for mark, used in connection with the applied-for goods is likely to cause confusion with consumers (*see* Docket No. 4, ¶13). All of Applicant's applied-for classes (009, 016, 025, 028 and 041) are similar to those of Opposer's applied for classes. Some classes also overlap as to those classes from Opposer's prior registrations. There are many identical products and goods between Opposer's and Applicant's applications, including but not limited to:

motion picture films featuring science fiction and adventure, audio-visual recordings featuring science fiction and adventure, sound recordings featuring musical soundtracks, a series of books featuring a collection of comic strips, toy action figures. Opposer has demonstrated common law rights by using the BUCK ROGERS mark in commerce for decades (*see* Geer Deposition Exhibits 6, 13, 14, 19, 31, 34, 36, 37, 39, 40, 42, 43, 51, 53 and 57). Applicant has failed to present evidence that it has used the BUCK ROGERS mark in commerce. Moreover, Applicant has failed to present evidence that it ever intended to use the BUCK ROGERS mark it applied for in commerce.

Where, as in the instant matter, the goods applied-for are identical, “[t]he degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines.” Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 877; 23 U.S.P.Q.2d 1698, 1701 (Fed. Cir. 1992). This critical DuPont factor weighs heavily in favor of finding likelihood of confusion, as the goods represented by the respective applications are identical or virtually indistinguishable.

c. The Channels of Trade Presumably Would Overlap.

Opposer again notes that Applicant has filed no evidence during its testimony period, and thus has never presented evidence of a bona fide intent to use. However, as mentioned above, the goods listed on each party’s respective applications are largely identical. As such, Opposer presumes that the channels of trade that the parties’ good would be sold in would also be identical and relevant to the same purchasers (*see* Hewlett-Packard Co. v. Packard Press, Inc., 281 F.3d 1261, 62 U.S.P.Q.2d 1001 (Fed. Cir. 2002)). Opposer’s evidence demonstrates that it is already selling products featuring the MARK in various channels of trade including television, film, music, clothing, comic books, and board games (*see* Geer Deposition Exhibits 6, 13, 14, 19, 31, 34, 36, 37, 39, 40, 42, 43, 51, 53 and 57). Accordingly, this DuPont factor weighs in Opposer’s favor.

d. Lack of Consumer Sophistication is Neutral.

Neither party has submitted evidence concerning the degree of care employed by the end consumer. However, Applicant has submitted no evidence demonstrating it has, or it intends to use the Mark on products, as such, the end consumer does not currently need to distinguish between the parties, as Opposer's goods are the only goods on the market. This DuPont factor is essentially moot.

e. Opposer's Mark Are Well-Established in the Market, While Applicant's Mark has Never Been Used in Commerce.

To find "fame" and a well-established mark under DuPont, direct evidence of fame is not required; rather, indirect evidence, such as the length of use of the mark, evidence of use in commerce and marketing expenditures are typically sufficient to prove the "fame" of a mark. *See Bose Corp. v QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 U.S.P.Q.2d 1303, 1305-09 (Fed. Cir. 2002). Opposer has submitted substantial evidence, in the form of print advertising, covers of comic books, licensing agreements, foreign trademark registrations and trial testimony, attesting to the efforts Opposer has made to establish, and keep established the BUCK ROGERS mark in the market place, as well as the degree of recognition the BUCK ROGERS mark has achieved in light of Opposer's efforts (*see generally* Geer Deposition; *see also* Geer Deposition Exhibits 6, 13, 14, 19, 31, 34, 36, 37, 39, 40, 42, 43, 51, 53,57, 60, 61 and 62).

By contrast, Applicant filed an intent-to-use application; however, upon information and belief, no Allegation of Use or Statement of Use has ever been filed, and Applicant has submitted no evidence to demonstrate its applied-for mark has ever been used in commerce. As such, this DuPont factor must weigh strongly in favor of likelihood of confusion.

f. Similar Marks In Use On Similar Goods.

A search of the USPTO online database shows that Opposer and Applicant are the only two parties that have applied for the mark in the applied for classes. However, Opposer has also applied for the mark "BUCK ROGERS IN THE 25th CENTURY" (Serial Number 85512662) in primary

class 016. This class is also an applied-for class for Opposer's mark and Applicant's mark at the heart of the instant matter. As Opposer is the only other active user filing a mark containing BUCK ROGERS in a similar class, this DuPont factor must weigh in favor of Opposer.

g. Actual Confusion Cannot Exist Because Applicant Has Not Used the Mark In Commerce.

Applicant has submitted no evidence that it has used its applied-for mark in commerce; therefore, there can be no evidence of either actual confusion or the absence thereof, and these DuPont factors are neutral as to finding a likelihood of confusion.

h. The Parties Use Their Marks On a Variety of Goods.

As stated above, Opposer has applied for use of the Mark in a variety of classes and on a variety of goods. Moreover, Opposer has presented evidence of use of the Mark in commerce on goods such as films, comic books, television shows, and board games (*see* Geer Deposition Exhibits Geer Deposition Exhibits 6, 13, 14, 19, 31, 34, 36, 37, 39, 40, 42, 43, 51, 53 and 57). Although Applicant has listed multiple classes and goods in its application, it has submitted no evidence that it has or ever intended to use the mark on such goods. Therefore, this factor must weigh in favor of Opposer.

i. Market Interface.

Opposer admits that during the 1920s through the 1940s, Phillip Nowlan was retained to develop goods and services that used the BUCK ROGERS mark. However, such a relationship does not support Applicant's claim that Phillip Nowlan created the BUCK ROGERS mark (*see* Docket No. 4); this claim by Applicant is patently false. Any rights Applicant might have had were released and assigned to the Dille Family Trust in or about 1942 (*see* Geer Deposition Exhibit 8). Applicant has presented no evidence, rather only hollow statements that it is the creator and owner of the BUCK ROGERS mark; therefore, this factor must weigh in favor of Opposer.

j. Applicant Has No Right to Exclude Others.

Applicant has no right to exclude others from use of the BUCK ROGERS mark, as it has submitted no evidence that would support such an exclusion. The mere fact that Applicant has filed an application for the BUCK ROGERS mark does not confer any such right. Moreover, Applicant has submitted no evidence that it has, or that it intends to use the BUCK ROGERS mark in commerce. As such, Applicant cannot claim any common law rights to the Mark. By contrast, Opposer has submitted substantial evidence demonstrating its past and continued use of the Mark in commerce (*see* Geer Deposition Exhibits 6, 13, 14, 19, 31, 34, 36, 37, 39, 40, 42, 43, 51, 53 and 57). Opposer has clearly established that it has common law rights in the Mark, as it has been continuously using the Mark in commerce long before Applicant filed its application. This DuPont factor therefore favors Opposer.

k. The Extent of Potential Confusion is Substantial.

Given that the applied-for marks and applied-for goods are identical, the extent of potential confusion is substantial. Despite no presentation of evidence demonstrating prior use or an intent to use the Mark in commerce, it is clear that given Opposer's well-established use of the Mark, that any use by Applicant would cause substantial confusion among consumers. Therefore, this DuPont factor must weigh in favor of Opposer.

l. Opposer Has Demonstrated A Likelihood of Confusion Based Upon the DuPont Factors.

It is well established that all DuPont factors for which there is evidence presented should be considered; however, the Board may "focus [...] on dispositive factors, such as similarity of the marks and relatedness of the goods." Han Beauty, Inc. v. Alberto-Culver Co., 57 U.S.P.Q.2d 1557, 1559 (Fed. Cir. 2001). In the instant matter, Opposer's unrebutted evidence clearly demonstrates these two factors weigh heavily in favor of Opposer. Nevertheless, Opposer submits that a majority, if not all, of the remaining factors also weigh heavily in its favor, again due to the substantial and unrebutted

evidence Opposer has submitted during its testimony period. By contrast, Applicant's lack of evidence makes it impossible to argue that any DuPont factor weighs in favor of Applicant.

IV. AT THE TIME APPLICANT FILED ITS APPLICATION, APPLICANT DID NOT HAVE A BONA FIDE INTENT TO USE THE BUCK ROGERS MARK FOR THE GOODS APPLIED FOR.

The failure of an intent to use applicant to have a bona fide intent to use the mark applied for when it filed its application is a ground for opposition (*see* 3 McCarthy On Trademarks § 20:21 at 20-66). This Board has held that if an intent to use applicant "when challenged in an opposition, has no documents support of or bearing on its claimed intent to use, then this absence of evidence alone is sufficient to prove that applicant lacked a bone fide intention to use." 3 McCarthy on Trademarks § 19:14 at 19-46; Commodore Elecs. Ltd. v. CBM Kabushiki Kaisha, 26 U.S.P.Q.2d 1503, 1507 (TTAB 1993). *See also* L.C. Licensing, Inc. v. Cary Berman, 86 U.S.P.Q.2d 1883 (TTAB 2008). The law requires that the intent to use be "in the ordinary course of trade, and [the application] not [be] made merely to reserve a right in a mark." Commodore Elecs. Ltd., 26 U.S.P.Q.2d at 1507. As discussed throughout this brief, Applicant submitted no evidence during its testimony period. As such, Applicant has not presented any evidence whereby it could establish promotional materials, marketing materials or advertisements demonstrating its intent to use the BUCK ROGERS mark in commerce. As a result of this lack of evidence of a bona fide intent to use, Applicant's application is *void ab initio*. *See* Saul Azentz Co. v. Bumb, 95 U.S.P.Q.2d 1723, 1724 (TTAB 2010). Opposer has clearly established its Section 1(b) ground of opposition to registration of Applicant's BUCK ROGERS mark based on Applicant's lack of a bona fide intent to use the mark when it filed its intent to use application.

CONCLUSION

For the foregoing reasons, Opposer respectfully requests that Application Serial No. 77/650082 be rejected, and that registration of Applicant's mark for the classes and goods specified in its application be refused.

Dated: Buffalo, New York
February 10, 2015

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DILLE FAMILY TRUST,
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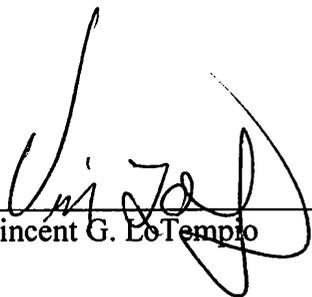
NOWLAN FAMILY TRUST,
Applicant

Opposition No.: 91200643

CERTIFICATE OF SERVICE

I, Vincent G. LoTempio, hereby certify that I caused a copy of the foregoing Opposer's Brief to be served upon counsel of record for Applicant by causing the same to be sent via regular first-class mail, postage prepaid on this 10 day of February 2015, addressed as follows:

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