

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Blast Blow Dry Bar LLC

v.

Blown Away LLC d/b/a Blast Blow Dry Bar

Opposition No. 91204769
to Application Serial No. 85492298

Clark Richards and Paul Skeith of Richards Rodriguez & Skeith, LLP for Blast Blow Dry Bar LLC.

Kenneth L. Kunkle of Kunkle Law PLC for Blown Away LLC d/b/a Blast Blow Dry Bar.

Before Kuhlke, Wellington and Adlin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

On December 10, 2011 applicant Blown Away LLC d/b/a Blast Blow Dry Bar (“applicant”) filed an application to register the mark shown below

blåst
BLOW DRY BAR

with BLOW DRY BAR disclaimed, for “Hair salon services; Hair styling; Providing on-site beauty services, namely, hair styling and make-up application services.”¹ In its amended notice of opposition, Blast Blow Dry Bar LLC (“opposer”) alleges use of BLAST BLOW DRY for identical services, and that prior to applicant’s filing date opposer acquired the domain name “blastblowdry.com,” organized as a limited liability company with the State of Texas, obtained a logo, business cards and fire permit and provided complimentary services for promotional purposes (collectively “Opposer’s Prior Activities”). Amended Notice of Opposition ¶¶ 2-10. Opposer also pleads ownership of a later-filed application to register BLAST BLOW DRY, in standard characters and with BLOW DRY disclaimed, for services identical to those identified in applicant’s involved application.² As grounds for opposition, opposer alleges that use of applicant’s mark would be likely to cause confusion with opposer’s mark.

In its answer, applicant denies the salient allegations in the amended notice of opposition and asserts, as an affirmative defense, that opposer’s claims “are barred under the doctrine of unclean hands” by virtue of opposer’s filing of its pleaded, subsequent application. Applicant also asserts, under the heading “Affirmative Defenses,” that to the extent that Opposer’s Prior Activities are

¹ Application Serial No. 85492298, alleging an intent to use the mark in commerce under Section 1(b) of the Act. The application includes the following description of the mark: “The mark consists of the words ‘blåst blow dry bar’, the word blast includes the Swedish letter ‘a’ with a diacritic circle above it.” The application also includes the following translation statement: “The English translation of ‘blåst’ in the mark is ‘blown.’”

² Application Serial No. 85510853, filed January 6, 2012, alleging first use dates of November 21, 2011.

sufficient to confer priority on opposer, applicant “has similar usage of [its] mark,” earlier than both the filing date of applicant’s involved application and most of Opposer’s Prior Activities.³

The Record

On May 22, 2013, the parties filed a Procedural Stipulation (TTABVue Docket # 11), pursuant to which they agreed, *inter alia*, to submit testimony by affidavit and to waive “[f]ormal or procedural objections” thereto (but reserved the right to object “based on relevancy, materiality, and, competency”). Also on May 22, 2013, the parties filed a Factual Stipulation (TTABVue Docket # 10), pursuant to which they stipulated to certain facts and authenticated and introduced into evidence certain documents.⁴ As a result of the parties’ stipulations and filings, and by rule, the record consists of:

- the pleadings;
- the file of the involved application;
- applicant’s notice of reliance (“NOR”) on opposer’s pleaded application and opposer’s responses to applicant’s interrogatories (TTABVue Docket No. 9);
- documents submitted with the Factual Stipulation, including opposer’s 2011 federal tax return, opposer’s records of payments received for salon services in 2011, opposer’s assumed name filing with the Texas Secretary of State and opposer’s “craigslist.org” want ad seeking hair stylists;

³ This “defense” is in fact merely an amplification of applicant’s denial of the priority allegations in the notice of opposition. *Compare* TBMP § 311.02(b) (3d ed. rev.2 2013) *with* TBMP § 311.02(d).

⁴ The parties are commended for their stipulations, which greatly simplified the presentation of evidence and resulted in an appropriately focused record.

- the Affidavit of Heidi Brownlee (“Brownlee Aff.”), applicant’s co-owner, and document attached thereto (TTABVue No. 11); and
- the Affidavit of Venus Rouhani (“Rouhani Aff.”), opposer’s co-owner, and documents attached thereto (TTABVue No. 12).

Both parties filed briefs.

Facts

Opposer is an Austin, Texas hair salon which provides “wash and blow dry services,” but not “hair cut or hair color services.” Rouhani Aff. ¶ 2. Opposer’s Prior Activities undertaken in the summer and fall of 2011 include the following preparations to do business:

- opposer registered the domain name “blastblowdry.com” on August 30, 2011 (but its website and Facebook page were not publicly available until December 30, 2011 and opposer’s initial blog posting was not until February 22, 2012); *id.* ¶¶ 3, 15; Factual Stipulation ¶ 1;
- opposer was formed as a limited liability company on August 31, 2011; Rouhani Aff. ¶ 4 and Ex. A;
- opposer entered into a lease agreement for its place of business on October 13, 2011 and on November 1, 2011 had business cards and postcards printed bearing the name BLAST BLOW DRY; *id.* ¶¶ 5, 7 and Exs. B, C;
- opposer placed a want ad seeking hair stylists on November 11, 2011, passed out business cards to City of Austin employees when obtaining a fire permit on November 21, 2011⁵ and trained employees during November 2011; *id.* ¶¶ 8, 9; Factual Stipulation Ex. S-4;

⁵ Applicant’s hearsay objection to Ms. Rouhani’s testimony about the distribution of business cards to Austin employees is overruled. The testimony does not include an out of court statement and in Paragraph 1 of her affidavit, Ms. Rouhani testifies that “[t]he facts

- on December 5, 2011, opposer placed a banner “on its retail store location” which stated “Blast Blow Dry, Opening December 15th;” Rouhani Aff. ¶ 11;
- opposer distributed promotional materials bearing the mark BLAST BLOW DRY door-to-door in Austin between December 10, 2011 and January 6, 2012; *id.* ¶ 14; and
- opposer sought an assumed name certificate for “Blast Blow Dry” which issued on January 30, 2012; Factual Stipulation ¶ 4 and Ex. S-3.

In addition, one of Opposer’s Prior Activities was an agreement with Sikara Jewelry, pursuant to which opposer, on December 8, 2011, provided hair styling services at Sikara’s holiday party. Specifically, opposer provided its services without charge to four of Sikara’s customers,⁶ with opposer’s stylists wearing clothing bearing the name BLAST BLOW DRY and distributing promotional materials during the event. Rouhani Aff. ¶¶ 10, 12.⁷ Opposer provided additional complimentary services at its place of business to prospective clients on December 28, 2011. *Id.* ¶ 17. Opposer did not receive payment for salon services until December 31, 2011. Factual Stipulation ¶ 3 and Ex. S-2.

Applicant is a North Oaks, Minnesota hair salon which does business as BLAST BLOW DRY BAR, and provides “blow-dry and hair care services.” Brownlee

stated in this affidavit are within my personal knowledge,” which, coupled with the foundation laid about her role with opposer and relationship to Jinous Rouhani is sufficient.

⁶ Sikara’s owner and two of Sikara’s employees were also present at the event.

⁷ Applicant’s hearsay objection to the December 8, (not December 1) 2011 e-mail from Sikara’s Mousemi Shaw, attached to the Rouhani Affidavit as Exhibit D, is sustained. The e-mail, as opposed to Ms. Rouhani’s testimony about the event, has been given no consideration.

Aff. ¶¶ 2, 4. Prior to the December 10, 2011 filing date of its involved application, applicant, like opposer, engaged in preparations to do business, as follows:

- applicant organized as a Minnesota limited liability company on November 4, 2011; *id.* Ex. D-1;
- Ms. Brownlee agreed to host a tennis program's annual holiday party and on December 8, 2011 applicant promoted its services at the event, which was attended by approximately 20 people not affiliated with applicant; during the event applicant demonstrated its "blow out" technique on one of applicant's co-owners, and applicant's "logo was on hand on a hard poster and on various promotional items distributed to attendees;" *id.* ¶¶ 7-8; and
- applicant registered the domain name "blastdrybar.com" on December 9, 2011 (but the site was not "first used" until February 13, 2012). Factual Stipulation ¶ 1.

Standing

Opposer has established that at the time it filed its original notice of opposition, it was using BLAST BLOW DRY for wash and blow dry services. Rouhani Aff. ¶¶ 2, 10, 12, 17; Factual Stipulation ¶ 3 and Ex. S-2. Accordingly, opposer has standing. *Automedx, Inc. v. Artivent Corp.*, 95 USPQ2d 1976, 1978 (TTAB 2010); *Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009) ("Petitioner has established his common-law rights in the mark DESIGNED2SELL, and has thereby established his standing to bring this proceeding."); *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009) (testimony that opposer uses its mark "is sufficient to support

opposer's allegations of a reasonable belief that it would be damaged ..." where opposer alleged likelihood of confusion).

Likelihood of Confusion

This case is in essence a priority dispute. Indeed, there can be little doubt that there is a likelihood of confusion.

The parties' services are identical, at least in part. This not only weighs heavily in favor of a finding of likelihood of confusion, but also reduces the degree of similarity of the marks necessary to find a likelihood of confusion. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010).

The parties' marks are highly similar in any event, with the only differences between them being that applicant's mark includes the descriptive and disclaimed word BAR and the diacritic circle above the "a" in BLAST, and is presented in a stylized format. These minor distinctions are not enough to prevent confusion when the parties' marks are used on identical services. Descriptive and disclaimed words such as BAR are entitled to less weight in our analysis of the similarity of the parties' marks. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'" (quoting *In re Nat'l Data*, 224 USPQ at 752); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re*

Binion, 93 USPQ2d 1531, 1534 (TTAB 2009) (BINION’S, not disclaimed word ROADHOUSE, is dominant element of BINION’S ROADHOUSE); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”). The diacritic circle is nothing more than a minor feature of applicant’s mark which does not meaningfully change its appearance, nor does it change the mark’s likely pronunciation by English speaking American consumers or the mark’s meaning. Furthermore, the first three words of the parties’ marks are essentially identical, further increasing the likelihood of confusion. *See Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”); *see also Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word).

In the absence of any evidence of record which weighs against a finding of likelihood of confusion, and given the identical services and highly similar marks, we have no difficulty finding that there is a likelihood of confusion between the parties’ marks. The question, therefore, is whether opposer can establish priority.

Priority

“To establish priority, [opposer] must show proprietary rights in the mark that produce a likelihood of confusion.... These proprietary rights may arise from a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights.” *Herbko International, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002) [internal citations omitted]; *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 1320, 209 USPQ 40, 43 (CCPA 1981).⁸ Here, applicant may rely on the filing date of its involved application, December 10, 2011, and we must therefore determine whether opposer can establish proprietary rights in its pleaded mark before that date. *Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 USPQ2d 1134, 1140 (TTAB 2013) (“for when an application or registration is of record, the party may rely on the filing date of the

⁸ To establish that it has proprietary rights in the mark, opposer must establish that BLAST BLOW DRY “is distinctive of its [services] either inherently or through the acquisition of secondary meaning.” *Hoover Co. v. Royal Appliance Manufacturing Co.*, 238 F.3d 1357, 57 USPQ2d 1720, 1721 (Fed. Cir. 2001); *Otto Roth & Co., Inc. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 44 (CCPA 1981) (discussing requirements of inherent distinctiveness). While it seems clear that BLOW DRY is merely descriptive under Section 2(e)(1) of the Act, and there is no evidence that it has acquired distinctiveness, by the same token there is no evidence that BLAST is anything other than inherently distinctive, and applicant, which has disclaimed all elements of its mark other than the word BLÅST, does not argue to the contrary. Accordingly, we find that BLAST BLOW DRY is as a whole inherently distinctive, even if BLOW DRY by itself is not. *See, e.g., Giersch*, 90 USPQ2d at 1023 (“Respondent has not raised an issue as to the distinctiveness of petitioner's mark or otherwise put petitioner on notice of this defense, and therefore we find that the mark is distinctive.”) (citing *Wet Seal Inc v. FD Mgmt., Inc.*, 82 USPQ2d 1629, 1634 (TTAB 2007) (absent argument or evidence from applicant, opposer's mark deemed distinctive)); *Chicago Corp. v. N. Am. Chicago Corp.*, 20 USPQ2d 1715, 1717 n. 5 (TTAB 1991)(rejecting applicant's argument that opposer failed to prove that its mark was distinctive where applicant failed to plead the issue or introduce evidence of non-distinctiveness).

application for registration, *i.e.*, its constructive use date”); *Syngenta*, 90 USPQ2d at 1119 (“applicant may rely without further proof upon the filing date of its application as a ‘constructive use’ date for purposes of priority”).

Opposer claims rights in the service mark BLAST BLOW DRY by virtue of use and use analogous to service mark use. Turning first to the claim of actual use, “[f]or service marks, the ‘use in commerce’ requirement is met when (1) a mark is ‘used or displayed in the sale or advertising of services’ and (2) either (i) the services are ‘rendered in commerce’ or (ii) the services are ‘rendered in more than one State or in the United States and a foreign country and the person rendering those services is engaged in commerce in connection with the services.’” *Aycock Engineering Inc. v. Airflite Inc.*, 560 F.3d 1350, 90 USPQ2d 1301, 1305 (Fed. Cir. 2009) (citing 15 U.S.C. § 1127).

Here, opposer used its mark on the “Blast Blow Dry, Opening December 15th” banner to advertise its services, starting on December 5, 2011, and opposer first *rendered hair styling services* on December 8, 2011, when it provided these services free of charge to four Sikara Jewelry customers. While applicant characterizes the Sikara services not as service mark use, but instead, at best, as use analogous to service mark use, we disagree. In fact, opposer provided hair styling services at the Sikara event and this, coupled with opposer’s earlier and simultaneous advertising of its services under the mark, constitutes “use in commerce,” notwithstanding that the services were provided free of charge. *American Express Marketing & Development Corp. v. Gilad Development Corp.*, 94

USPQ2d 1294, 1298 n.3 (TTAB 2010) (“... use of marks in conjunction with the rendering of free services still constitutes a ‘use in commerce’ under the Trademark Act. In other words, a for profit sale is not required.”); *Capital Speakers Inc. v. Capital Speakers Club of Washington D.C. Inc.*, 41 USPQ2d 1030, 1034 n.3 (TTAB 1996); *McDonald’s Corp. v. McKinley*, 13 USPQ2d 1895, 1898 n. 6 (TTAB 1989) (finding that goods need not be sold “in order to come within the ambit of the statute”); *Tiberghien Freres S.A. v. Miguel Gil, S.A.*, 185 USPQ 183, 184 (TTAB 1974).

While the services were rendered to only four customers, which in some cases, depending upon the circumstances, may be too limited to establish “use,” in this case we have taken into account the low cost and limited nature of the parties’ hair styling services, and the local nature of the parties’ businesses, which currently operate in single locations. We note also that only three weeks after opposer provided complimentary services at the Sikara event, it was paid for services rendered to a larger number of customers at opposer’s place of business, and that opposer’s use continued thereafter. Factual Stipulation ¶ 3 and Ex. S-2; Rouhani Aff. ¶ 17. *See E.I. du Pont de Nemours and Co. v. Big Bear Stores, Inc.*, 161 USPQ 50, 51 (TTAB 1969) (test marketing and a small volume of sales established use); *see also, E.I. du Pont de Nemours and Co. v. G.C. Murphy Co.*, 199 USPQ 807, 812 (TTAB 1978).⁹

⁹ The legislative history to the Trademark Law Revision Act of 1988 is also relevant here:

As for opposer's claim of use analogous to service mark use, specifically raised for the first time in Opposer's Trial Brief at pages 6-7, applicant argues that it "is beyond the pleading in this case and [has] not been fully tried." Applicant's Trial Brief at 8. Applicant is correct that claims of use analogous to service mark use must be pleaded, *Cent. Garden & Pet Co.*, 108 USPQ2d at 1142, and that opposer did not explicitly plead use analogous to service mark use in its amended notice of opposition. However, we find that the issue was tried by implied consent under Fed. R. Civ. P. 15(b)(2). The vast majority of opposer's amended notice of opposition is devoted to opposer's claim of priority, not based on claims of actual service mark use, but instead based on Opposer's Prior Activities most of which are in the nature of use analogous to service mark use rather than actual service mark use. And in its answer to the amended notice of opposition, applicant asserts, as an "affirmative defense," that to the extent Opposer's Prior Activities confer priority on opposer, applicant has "similar usage of its mark," *i.e.* its own use analogous to service mark use, and applicant goes on to specify those usages in its pleading, just as opposer did by specifying Opposer's Prior Activities in its pleading. More importantly, much

The committee intends that the revised definition of "use in commerce" be interpreted to mean commercial use which is typical in a particular industry. Additionally, the definition should be interpreted with flexibility so as to encompass various genuine, but less traditional, trademark uses, such as those made in test markets, infrequent sales of large or expensive items, or ongoing shipments of a new drug to clinical investigators by a company awaiting FDA approval, and to preserve ownership rights in a mark if, absent an intent to abandon, use of a mark is interrupted due to special circumstances.

S. Rep. No. 100-515, pp. 44-45 (Sept. 15, 1988).

of the evidence of Opposer's Prior Activities was introduced by way of the parties' Factual Stipulation, to which applicant obviously did not object.¹⁰ In other words, applicant was "fairly apprised that the evidence was being offered in support of the issue" by way of the amended notice of opposition and Factual Stipulation, and "raised no objection to the introduction of evidence on the issue," instead stipulating thereto. TBMP § 507.03(b).¹¹

"Of course, an applicant or registrant involved in an inter partes proceeding before the Board may himself rely upon use analogous to trademark or service mark use to the extent that he may tack such use on to his technical trademark or service mark use for purposes of determining priority." *In re Cedar Point, Inc.*, 220 USPQ 533, 537 (TTAB 1983). Here, we find that applicant may also rely on its own claim of use analogous to service mark use for the same reasons that opposer is entitled to do so. Answer to Amended Notice of Opposition ¶ 15; Factual Stipulation ¶ 1.

As for whether either party can prove its claim of use analogous to service mark use, we must consider the extent to which their activities impacted the public.

¹⁰ The Factual Stipulation also includes evidence of applicant's similar activities, as raised in the "affirmative defense" that applicant has "similar usage." Factual Stipulation ¶ 1.

¹¹ While applicant objected to consideration of the issue for the first time in its brief, that was too late under the circumstances of this case, where the trial was effectively conducted by stipulation and opposer's evidence of use analogous to service mark use was introduced via the parties' Factual Stipulation. In other words, having agreed in the preamble of the Factual Stipulation to "not contest" the evidence introduced thereby, applicant could not fairly change its mind and object to that evidence after the trial was over and after opposer relied on applicant's agreement to not contest the evidence. We also note that whereas the parties reserved in the Procedural Stipulation the right to object on certain grounds to the affidavit testimony, they did not include any such reservation in the Factual Stipulation which contained much of the evidence relating to opposer's claim of use analogous to service mark use.

Before a prior use becomes an analogous use sufficient to create proprietary rights, the petitioner must show prior use sufficient to create an association in the minds of the purchasing public between the mark and the petitioner's goods ... A showing of analogous use does not require direct proof of an association in the public mind ... Nevertheless, the activities claimed to create such an association must reasonably be expected to have a substantial impact on the purchasing public before a later user acquires proprietary rights in a mark

Herbko International, 308 F.3d at 1156, 64 USPQ2d at 1378; *T.A.B. Systems v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879 (Fed. Cir. 1996). In addition, we must weigh the evidence on use analogous to service mark use as a whole, rather than considering each piece of evidence in isolation. *West Florida Seafood Inc. v. Jet Restaurants Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994) (“However, whether a particular piece of evidence by itself establishes prior use is not necessarily dispositive as to whether a party has established prior use by a preponderance. Rather one should look at the evidence as a whole, as if each piece of evidence were part of a puzzle which, when fitted together, establishes prior use.”). Under these standards, we find based on the record herein that neither party may rely on use analogous to service mark use because the evidence of record regarding the parties’ earlier activities, considered as a whole, does not establish that those activities had a “substantial impact on the purchasing public.”

The parties’ mere registration of their marks as domain names is not enough to establish service mark use or use analogous to service mark use where neither party operated an active website accessible through its domain name. See *Brookfield Communications Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036

50 USPQ2d 1545, 1555 (9th Cir. 1999). Nor was the mere formation of limited liability companies using the names BLAST BLOW DRY or BLAST BLOW DRY BAR sufficient; rather, only uses of the names or marks or uses analogous to service mark use “directed to customers or to potential customers” would be enough to confer prior rights. *See Liqwacon Corp. v. Browning-Ferris Industries, Inc.*, 203 USPQ 305, 309, 316 (TTAB 1979). Opposer’s lease is a “private agreement” and does not constitute “public use” of the mark. *Computer Food Stores Inc. v. Corner Store Franchises, Inc.*, 176 USPQ 535, 539 (TTAB 1973). As for opposer’s distribution of business cards and promotional materials, there is no evidence regarding how many customers or potential customers were reached via these efforts, and applicant’s promotional efforts at the tennis program’s small holiday party did not reach a sufficient number of people. As for opposer’s banner, while it may very well have had the requisite impact on the purchasing public, we are not able to determine that from the record. The photograph of the banner included with the Rouhani Affidavit does not show how the banner appeared “on” opposer’s retail store, as Ms. Rouhani testified, but instead merely shows an individual holding the banner, apparently inside rather than outside of opposer’s place of business. Rouhani Aff. Ex. E. Moreover, opposer’s address is “3800 North Lamar Boulevard, Suite 750,” suggesting that opposer’s store may be on the 7th floor or otherwise not on street level, and there is simply no way for us to determine, even by inference, how many passersby were likely to view the banner when it was “on” opposer’s store.

Considered as a whole, the parties' evidence falls short for the same reason. That is, even where the parties made open use of their names or marks, such as through a banner "on" opposer's store or through promotional appearances at events, there is simply no evidence that these efforts reached a sufficient number of people, and we therefore cannot determine whether the parties' efforts had an impact, much less a "substantial impact," on the purchasing public. *See, T.A.B. Systems*, 77 F.3d at 1372, 37 USPQ2d at 1882-84 ("Nor can there be any doubt that purchaser perception must involve more than an insubstantial number of potential customers. For example, if the potential market for a given service were 10,000 persons, then advertising shown to have reached only 20 or 30 people as a matter of law could not suffice."); *Westrex Corp. v. New Sensor Corp.*, 83 USPQ2d 1215, 1219 (TTAB 2007). Accordingly, we find that neither party has established use analogous to service mark use.

That brings us back to opposer's actual rendering of hair styling services at the December 8, 2011 event. While applicant also participated in a promotional event on the same date, applicant did not couple its promotional efforts at the event with the actual rendering of the involved services *to potential customers*. By contrast, opposer both promoted its services and actually rendered them in commerce to potential customers. That distinction is sufficient, under the facts of this case, for us to find that opposer established actual trademark use on December 8, 2011, while applicant's purely promotional efforts before a small group of people were insufficient to establish either actual service mark use or use analogous to

service mark use, leaving applicant to rely on the subsequent December 10, 2011 filing date of its involved application. Accordingly, opposer has established both priority of use and likelihood of confusion.¹²

Decision: The opposition is sustained and registration of applicant's mark is refused under Section 2(d) of the Trademark Act.

¹² Applicant argues in its brief that opposer has "unclean hands." While the basis for this defense is not entirely clear, applicant's position appears to be that it was improper for opposer to file its own application after being informed, in January 2012, about applicant's involved application, because opposer's application asserted a first use date of November 21, 2011 and identified services identical to those identified in applicant's application. Applicant's Trial Brief at 12-13. We fail to see how this was improper or why it constitutes unclean hands. Moreover, while we do not find herein that opposer established use in commerce prior to December 8, 2011, that does not mean that opposer filed its application in anything other than good faith. In any event, our decision herein is not based on opposer's application or any information contained therein.