

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: May 20, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

—  
Trademark Trial and Appeal Board

—  
*J-Lynn Entertainment, LLC*

*v.*

*William T. Odonnell d/b/a Odonnell Entertainment*

—  
Opposition No. 91211530  
against Serial No. 85785996

Cancellation No. 92056491  
against Registration No. 3682041

—  
Request for Reconsideration

—  
J-Lynn Entertainment, LLC, *pro se*.<sup>1</sup>

Matthew H. Swyers of The Trademark Company PLLC for William T. Odonnell  
d/b/a Odonnell Entertainment.

—  
Before, Shaw, Adlin and Hightower, Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Petitioner, J-Lynn Entertainment, LLC, has filed a timely request for reconsideration of the Board's decision dated March 31, 2016, to the extent it denied

—  
<sup>1</sup> J-Lynn Entertainment, LLC acted in this proceeding through its member, Neadom T. Medina. *See* Patent and Trademark Office Rule 11.14(e)(3), 37 CFR § 11.14(e)(3); TBMP § 114.01.

Opposition No. 91211530 and Cancellation No. 92056491

the petition for cancellation as to International Class 32. The decision sustained the opposition to Application Serial No. 85785996 and granted, in part, the petition for cancellation of Registration No. 3682041 as to International Classes 9 and 16. Respondent did not file a brief in response to the request for reconsideration.

The premise underlying a request for reconsideration under Trademark Rule 2.129(c) is that, based on the evidence of record and the prevailing authorities, the Board erred in reaching the decision it issued. It is not to be a reargument of the points presented in the movant's brief on the case, nor is it to be used to raise new arguments or introduce additional evidence. Rather, the request should be limited to a demonstration that based on the facts before it and the applicable law, the Board's decision is in error and requires appropriate change. See TBMP § 543 (June 2015) and cases cited therein.

Petitioner maintains that Registration No. 3682041 should be cancelled as to class 32 on the grounds of "non-use, purposeful abandonment, and fraud."<sup>2</sup> We disagree and address each of Petitioner's arguments in turn.

I. Non-use

Petitioner first argues that the Board's decision erred in finding the mark was in use as of the filing date of the underlying application, April 30, 2008, because the evidence of record was insufficient to support Respondent's claimed use of the mark on water bottles.

---

<sup>2</sup> Petitioner's request for reconsideration , p. 4.

Based on Respondent's email dated August 30, 2007, the Board's decision found that Respondent had sold 350 and 600 water bottles in the preceding two years.<sup>3</sup>

Respondent's relevant email states:

After [Monday] the only chance we have of selling anything would be the Maritime Day at Woody Island and the end of (September). Which if this does like last year maybe 35 to 60 bottles of water. Where at Big Foot Days . . . we did about 350 last year [and] the year before was about 600. . . .<sup>4</sup>

Petitioner argues that an earlier email from Respondent suggests that the water bottles sold by Respondent in prior years did not bear the Respondent's mark. For support, Petitioner points to a single sentence in an email from Respondent, sent the day before the above email. The relevant portion of Respondent's email is as follows:

This week I will start to bring the <http://www.shadow.ws/> to life. So win [sic] people go to the site they will know whats [sic] happening. . . . Until last Sunday I never really thought of starting it on water bottles but my guess the Lord had you show up to help you understand creation better and help us out on getting it going.<sup>5</sup>

Petitioner claims that the foregoing excerpt "clearly indicates" that Respondent "never thought about starting his trademark on water bottles" prior to the August 2007 emails.<sup>6</sup> We disagree. It is not clear from the above language whether respondent is "starting" use of the mark on the bottles or merely "starting" use of the web address <http://www.shadow.ws/> on the bottles. In view of this ambiguity, we do

---

<sup>3</sup> Board's decision, p. 15.

<sup>4</sup> 57 TTABVUE 67.

<sup>5</sup> 57 TTABVUE 68.

<sup>6</sup> Petitioner's request for reconsideration, p. 5.

not find, as Petitioner suggests, that this email “clearly indicates that the Applicant never used the mark on water bottles prior to this email on August 29th 2007.”<sup>7</sup>

Petitioner also argues that a “grainy picture of the water bottle bearing the Applicant’s mark does not prove or support [Respondent’s] use of the mark on a water bottle on the filing date of the application or prior.”<sup>8</sup> But Petitioner is ignoring the supporting testimony of Respondent who stated that the water bottle in the photograph,<sup>9</sup> bearing Respondent’s mark, was produced following the 2007 email exchange discussed *supra*: “This is the water bottle which I still have a few copies of, and this is the one that they ended up printing. . . .”<sup>10</sup>

Petitioner, nevertheless, complains of Respondent’s “complete lack of evidence via receipts, order confirmations, signed documentation, emails, or witness testimony that is not from the Applicant himself.” But the burden is on Petitioner, as plaintiff in this proceeding, to prove its ground for cancellation by a preponderance of the evidence. Respondent, as defendant, needs only to file an answer denying the essential allegations of the petition to cancel, and was not obligated to present evidence at trial. If Respondent failed to respond to Petitioner’s discovery requests, Petitioner’s remedy was to file a motion to compel and, if appropriate, seek sanctions.<sup>11</sup> Having failed to file a successful motion to compel, Petitioner has only

---

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 6.

<sup>9</sup> 58 TTABVUE 72.

<sup>10</sup> Odonnell testimony, p. 68; 56 TTABVUE 69.

<sup>11</sup> Petitioner filed a motion to compel on May 12 2014 but the motion was denied because Petitioner failed to make sufficient good faith efforts to resolve the discovery issues and failed to set forth any such efforts in support of the motion. 19 TTABVUE 3-5.

itself to blame for not being able to prove its case. We find that petitioner has not shown that the Board's decision was in error regarding respondent's use of the mark as of the filing date of the underlying application.

## II. Abandonment

Petitioner next argues that the Board's decision erred in not finding that Respondent abandoned his mark with no intent to resume use. Petitioner claims it established Respondent's abandonment of his mark because Petitioner's private investigator, Robert Holmes, Jr., was unable to buy Respondent's bottled water between "September 2012 and October 15, 2012."<sup>12</sup> Petitioner states that its private investigator "testified under oath that he could not find water bottles for sale, and he wasn't offered water bottles to be sold to him by the Applicant."<sup>13</sup> Petitioner also claims abandonment was established by Respondent's failure "to supply the Opposer with physical specimens to examine."<sup>14</sup>

Petitioner's arguments are wholly without merit. As the Board's decision noted regarding the Holmes testimony:

We do not find the Holmes testimony persuasive. Much of Holmes' testimony is hearsay and the rest merely shows that Respondent may not have been selling water bottles at the time Holmes contacted Respondent. At best, the Holmes testimony shows a temporary discontinuance of sales which is insufficient to prove abandonment of the mark.<sup>15</sup>

---

<sup>12</sup> Petitioner's request for reconsideration, p. 7.

<sup>13</sup> *Id.* at 8.

<sup>14</sup> *Id.* at 10.

<sup>15</sup> Board's decision, p. 17.

Additionally, Respondent testified that he sold his water bottles primarily at local fairs such as “Big Foot Days” and other events such as flea markets.<sup>16</sup> Thus, it is not surprising that Petitioner’s private investigator was unable to find Respondent’s water bottles for sale during the limited time period in which he attempted to do so.

Similarly, Respondent’s failure to deliver a sample water bottle to Petitioner does not establish abandonment of the mark. As discussed *supra*, if petitioner needed to examine an actual water bottle sold by Respondent, Petitioner’s recourse was to file a motion to compel. In the absence of a successful motion, Petitioner will not now be heard to complain about its lack of evidence.

Petitioner also argues that it established abandonment because Respondent did not provide evidence of use for the mark on water bottles after 2009 even though it had the opportunity to do so.<sup>17</sup> Petitioner is wrong for two reasons.

First, the burden of proof does not shift to Respondent unless petitioner has made a *prima facie* case of abandonment. This Petitioner did not do. Petitioner is not able to point to any admissions by Respondent, whether through discovery or otherwise, that would assist in proving abandonment, such as by making a *prima facie* case by proving nonuse for at least three consecutive years. *See Toufigh v. Persona Parfum Inc.*, 95 USPQ2d 1872, 1875 (TTAB 2010). Petitioner’s argument is thus an improper attempt to shift its burden of proof to Respondent before Petitioner has made a *prima facie* case of abandonment with respect to bottled waters. *See Cerveceria Centroamericana, S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309

---

<sup>16</sup> Odonnell testimony, p. 25; 56 TTABVUE 26.

<sup>17</sup> Petitioner’s Request for reconsideration, p. 11.

(Fed. Cir. 1989) (Burden of proof is on petitioner to establish a *prima facie* case of abandonment by a preponderance of evidence.).

Second, Petitioner's own statements belie its argument that Respondent has abandoned his use of the mark. During the Odonnell deposition, Petitioner stated that "during our investigation we did find one water bottle on -- a picture of a water bottle on Facebook."<sup>18</sup> This confirms Respondent's testimony that he advertised his goods on Facebook beginning in late 2011 or early 2012:

Q: Generally speaking, do you (Odonnell) advertise in connection with Facebook?

A: That is -- I have it on Facebook, that is correct, and that's one of the sources.

\* \* \*

Q: Okay. Do you know about how long odonnellentertainment.com has been posted for?

A: Odonnellentertainment.com on this particular Facebook page was posted as soon as I went to Facebook, which wasn't until -- on January/February of 2012 is when I started Facebook.

\* \* \*

A: Possible December 2011, but it's somewhere in that timeframe.<sup>19</sup>

Based on the foregoing, we find that Petitioner has not shown that the Board erred in finding that Respondent had not abandoned use of his mark for water bottles in class 32.

---

<sup>18</sup> Odonnell testimony, p. 27; 62 TTABVUE 28.

<sup>19</sup> Odonnell Testimony, pp.74-76; 62 TTABVUE 75-76.

III. Fraud

Finally, Petitioner argues that Respondent's mark is subject to cancellation on the ground of fraud because Respondent "committed perjury about the sale of water bottles during his deposition constituting the Opposer's claim of fraud."<sup>20</sup> Specifically, Petitioner argues that because the Board's decision found that Respondent's clothing specimens appeared to be "mock ups," all of Respondent's evidence and specimens must have been created after this proceeding was filed.<sup>21</sup> We disagree.

Petitioner's argument is simply speculation and is not supported by any evidence. *Martahus v. Video Duplication Servs., Inc.*, 3 F.3d 417, 27 USPQ2d 1846, 1849 (Fed. Cir. 1993) ("mere attorney arguments unsubstantiated by record evidence are suspect at best"). Respondent's "mock up" specimens are more likely explained as a simple and common misunderstanding regarding the kind of material that is appropriate as a specimen. See Trademark Manual of Examining Procedure § 904.04(a) (April 2016). Such a misunderstanding does not rise to the level of fraud absent an intent to deceive the USPTO. See *In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009). Applicant has introduced no evidence whatsoever regarding Respondent's intent to deceive the USPTO. As discussed *supra*, Petitioner bears the burden of proving its claims, and Petitioner has failed to make its case for cancellation. Respondent, for his part, had no duty submit any evidence, and his failure to do so to Petitioner's satisfaction is not evidence in Petitioner's favor and is certainly not evidence of fraud or perjury.

---

<sup>20</sup> Petitioner's request for reconsideration, p. 4.

<sup>21</sup> *Id.* at 13.

Opposition No. 91211530 and Cancellation No. 92056491

In conclusion, Petitioner has not demonstrated that the Board erred in its findings, or that, based on the evidence properly of record and the applicable law, the decision is in error.

**Decision:** The request for reconsideration is denied. The Board's decision of March 31, 2016 stands.