

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

BUO

Mailed: August 14, 2014

Opposition No. 91215266

Premier Sys. USA, Inc.

v.

Griffin Tech., Inc.

By the Trademark Trial and Appeal Board:

On March 4, 2014, Premier Systems USA, Inc. (“opposer”) filed a notice of opposition against Griffin Technology, Inc.’s (“applicant”) registration of the mark OLLI, for use with “electronic hardware for attachment to portable electronic devices to convert them to point-of-sale terminals, barcode scanners and magnetic stripe readers,” in International Class 009.¹

The notice of opposition alleges that registration should be denied based upon a likelihood of confusion between the applied-for mark and marks owned by opposer, under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). In support of its ground for opposition, opposer pleaded ownership

¹ Application Serial No. 85939010, filed on May 22, 2013, under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), alleging applicant’s intent to use the mark in commerce.

of the marks OLLO,² and OLLOCLIP,³ for “lenses for cameras; lenses for cameras incorporated in mobile electronic devices,” “carrying cases for mobile electronic devices,” and “software for taking, processing, uploading, organizing, viewing, enhancing, sharing and commenting on images, graphics, video and photographs; software to enable the transmission of images, graphics, video and photographs using mobile electronic devices; software for editing, altering, enlarging, reducing, retouching and finishing images, graphics, video and photographs,” all in International Class 9. Notice of Opposition, ¶¶ 2-3 and 5-7.

Opposer asserts that the applied for mark “OLLI so resembles Opposer’s OLLOCLIP and OLLO marks registered and applied for in the PTO,” which are “valid, subsisting, unrevoked and uncanceled,” and have been “continuously used and promoted,” “as to be likely, when used on or in connection with the goods identified in Applicant’s OLLI Application, as to cause confusion.” *Id.*, ¶¶ 4, 8 and 12. Opposer also asserts that applicant’s mark poses a likelihood of confusion with opposer’s use of marks “in which Opposer owns common law trademark rights.” *Id.*, ¶¶ 1, 8 and 12.

² Application Serial Nos. 85631170 (“the ‘170 application”) and 85668401 (“the ‘401 application”), filed May 21, 2012, and July 3, 2012, respectively; both alleging opposer’s intent to use the mark in commerce under Section 1(b).

³ Registration Nos. 4137064 (“the ‘064 registration”) and 4380611 (“the ‘611 registration”), issued May 1, 2012, and August 6, 2013, respectively. Opposer attached a “soft” copy of its registration certificates and printouts from the USPTO’s TSDR database showing current status and title of those registrations.

And Application Serial No. 85668411 (“the ‘411 application”), filed July 3, 2012, alleging opposer’s intent to use the mark in commerce under Section 1(b).

Now before the Board is applicant's motion, filed on April 4, 2014, in lieu of filing an answer, under Fed. R. Civ. P. 12(b)(6) to dismiss the notice of opposition for failure to state a claim upon which relief may be granted. Applicant argues that opposer "uses fact-barren conclusory allegations to assert that [applicant] is not entitled to register the OLLI mark because that mark is likely to confuse consumers when viewed in connection with [opposer's] use of *different* marks on *different* categories of goods." Motion, p.11 (emphasis in original). Applicant asserts that the notice of opposition "leaves both the Board and [applicant] guessing as to what similarities [opposer] alleges exist between [applicant's] OLLI mark and [opposer's] alleged OLLOCLIP and OLLO marks," and that the notice of opposition "provides nothing more than threadbare conclusory statements related to the similarity of goods analysis." *Id.*, pp.8-9. Applicant also notes the short length of the notice of opposition, stating that the notice "uses boilerplate language over a mere thirteen paragraphs to allege in conclusory fashion that [applicant's] OLLI mark is not entitled to registration," and that the notice "contains no factual allegations regarding similarity between the connotation or commercial impression of the parties' respective marks." *Id.*, pp.3 and 7.

Opposer contests this motion, arguing that "facts establishing the *DuPont* factors do not need to be alleged in a Notice of Opposition because they are matters for proof and not pleading," and that a notice of opposition "must be examined in its entirety, 'construing the allegations therein liberally.'" Opp.

Br., pp.2 and 3 (*quoting Meckatzer Lowenbrau Benedikt WeiB KG v. White Gold, LLC*, 95 USPQ2d 1185, 1187 (TTAB 2010)). In the event the Board grants applicant's motion however, opposer requests leave to file an amended notice of opposition. *Id.*, p.9.

Motion to Dismiss

A motion to dismiss for failure to state a claim upon which relief may be granted is a test solely of the legal sufficiency of a complaint. *See Advanced Cardiovascular Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993). In order to withstand such a motion, a complaint need only allege such facts as would, if proven, establish that the plaintiff is entitled to the relief sought; that is, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid statutory ground exists for cancelling the registration. *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998). The complaint need only "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Opposer is not under a burden to prove its case in its notice of opposition. *Enbridge, Inc. v. Excelerate Energy Ltd. P'ship*, 92 USPQ2d 1537, 1543 n.10 (TTAB 2009).

- Standing

Opposer has sufficiently pleaded its standing to bring this action by pleading ownership of the '064 and '611 registrations for the mark OLLOCLIP, and the '170 and '401 applications for the mark OLLO. The

marks as registered and applied for, are for use with goods that are alleged to overlap with those identified in the subject application. Notice of Opposition, ¶¶ 2-3, 5-7 and 11. Through these allegations, opposer has adequately pleaded a real interest in the outcome of this proceeding and has therefore pleaded its standing to bring this opposition. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); *Research in Motion Ltd. v. Defining Presence Mktg. Group Inc.*, 102 USPQ2d 1187, 1190 (TTAB 2012); *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009).

- Priority

Opposer attached copies of printouts from the USPTO's Trademark Status and Document Retrieval ("TSDR") website, showing current status and title of its pleaded registrations. *See* Trademark Rule 2.122(d)(1) (general rule that exhibits attached to pleadings are not evidence on behalf of the submitting party has two exceptions – current status and title copies, or photocopies of the pleaded registration(s) prepared by the USPTO, or current printouts of information from the electronic database records of the USPTO showing the current status and title of the registration(s)).

To the extent opposer intends to rely on its pleaded registrations, priority is not an issue in this opposition. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). In other words,

opposer need not prove (and therefore need not allege) that the marks in its registrations were “previously used ... and not abandoned” in order to prevail. *See* Trademark Act § 2(d), 15 U.S.C. 1052(d).

In any event, opposer’s allegations regarding the constructive use dates, or filing dates of its pleaded applications, which list dates prior to the constructive use date of the subject application,⁴ also sufficiently plead opposer’s priority with regard to the marks found in those applications.

- Likelihood of Confusion

A notice of opposition is a “short and plain statement” of the allegations against a party sufficient to place that party on notice of the claims being brought against it. Trademark Rule 2.101(b); Fed. R. Civ. P. 8(a); *Ashcroft*, 556 U.S. 662. It is important to note that the claims asserted in a notice of opposition need only be “plausible on [their] face.” *Ashcroft*, 556 U.S. 662 (quoting *Bell Atlantic Corp.*, 550 U.S. at 570). This should be kept distinct from the probability of success of the claims asserted, as again, a plaintiff need not prove its case in its complaint. *Enbridge, Inc.*, 92 USPQ2d at 1543, n.10.

Thus, applicant’s contentions regarding opposer’s “failure” to assert facts pertinent to the cited *DuPont*⁵ factors is not well-taken. Indeed, opposer provided a “short and plain” statement, which would not have been subserved by a

⁴ This is the earliest date upon which either party could rely without proof by “competent evidence” of an earlier date of actual use. *See* Trademark Rule 2.122(b)(2) (the date of use in an application is not evidence on behalf of the applicant; “a date of use of a mark must be established by competent evidence”); *see also* *Coach Servs. Inc. v. Triumph Learning LLC*, 96 USPQ2d 1600, 1606 n.7 (TTAB 2010).

⁵ *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

discussion of the individual *DuPont* factors. Moreover, applicant spent the last three pages of its motion to dismiss, arguing the facts of the case, going as far as discussing the foreign significance of a portion of opposer's pleaded marks. This is an inappropriate attempt at arguing the merits of opposer's claims. Applicant is reminded that a motion to dismiss is a test solely of the legal sufficiency of the complaint and not a measurement of the claims' probability of success at trial. Whether a plaintiff can actually prove its allegations is a matter to be determined not upon motion to dismiss, but rather at final hearing or upon summary judgment, after the parties have had an opportunity to submit evidence in support of their respective positions.⁶ *Advanced Cardiovascular Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993).

Considering the notice of opposition as a whole, as the Board must, *see IdeasOne Inc. v. Nationwide Better Health*, 89 USPQ2d 1952, 1953 (TTAB 2009), paragraphs 2-3, 5-7, and 11-12 of the notice of opposition allege sufficient facts that, if proven, would entitle opposer to the relief that it seeks under Trademark Act Section 2(d), 15 U.S.C. 1052(d). That is, opposer has informed applicant of the nature of its marks, the goods that it claims are used in connection with its pleaded marks (it is presumed that applicant is familiar with its own claimed goods and its mark), and opposer then alleged the similarity of the applied-for mark with its pleaded marks and the relatedness of the goods and services

⁶ Applicant's request for judicial notice regarding the foreign significance of the term OLLO is **DENIED**. The Board will generally not take judicial notice of definitions or entries found only in online dictionaries or reference works not available in a printed format. *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 n.5 (TTAB 2007) (Board would not take judicial notice of online encyclopedia).

covered by those marks. There is nothing left for the applicant or to Board to guess about. There is also no formulaic requirement as to how this must be done.

Inasmuch as opposer has alleged that registration of applicant's mark is likely to cause confusion, opposer's claim of likelihood of confusion is sufficiently pleaded.⁷

Accordingly, applicant's motion to dismiss the notice of opposition alleging likelihood of confusion for failure to state a claim upon which relief may be granted is **DENIED**. The connotation of the marks, and all other relevant *DuPont* factors will be decided at trial.

Schedule

Proceedings are **RESUMED**, and applicant is allowed **TWENTY DAYS** from the mailing date of this order to file its answer. The remaining conferencing, disclosure, discovery, and trial dates are reset as follows:

Deadline for Discovery Conference	9/22/2014
Discovery Opens	9/22/2014
Initial Disclosures Due	10/22/2014
Expert Disclosures Due	2/19/2015
Discovery Closes	3/21/2015
Plaintiff's Pretrial Disclosures	5/5/2015
Plaintiff's 30-day Trial Period Ends	6/19/2015
Defendant's Pretrial Disclosures	7/4/2015
Defendant's 30-day Trial Period Ends	8/18/2015
Plaintiff's Rebuttal Disclosures	9/2/2015
Plaintiff's 15-day Rebuttal Period Ends	10/2/2015

⁷ To state a claim of likelihood of confusion under Trademark Act Section 2(d), opposer must merely allege facts from which it may be inferred that applicant's applied-for mark so resembles opposer's previously used or registered marks that it is likely that a potential consumer would be confused or mistaken or deceived as to the source of the services of the applicant and opposer. See 15 U.S.C. § 1052(d); *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); see also TMEP § 1207.01.

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.