

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: April 22, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Snowcats LLC
v.
Trendsetters Direct, LLC
—

Opposition No. 91256075
—

Ronnie Fischer of Fischer & Fischer P.C.,
for Snowcats LLC.

Mark A. Nields of Henderson Franklin Starnes & Holt, P.A.,
for Trendsetters Direct, LLC.

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Before Cataldo, Kuczma, and Heasley,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Trendsetters Direct, LLC (“Applicant”) seeks registration on the Principal Register of PAWTY PACK (in standard characters, with “PACK” disclaimed) for “beverages for pets; edible pet treats” in International Class 31.¹

Snowcats LLC (“Opposer”) filed a Notice of Opposition, as amended,² to

¹ Application Serial No. 88700852 was filed on November 21, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as November 2016.

² 5 TTABVUE.

registration of Applicant's proposed mark, claiming that it is merely descriptive of the goods, 15 U.S.C. § 1052(e)(1), or in the alternative, that it is likely to cause confusion with Opposer's common law PAWTY PACK mark. 15 U.S.C. § 1052(d).

Opposer's brief focuses solely on the issue of mere descriptiveness under Section 2(e)(1).³ 15 U.S.C. § 1052(e)(1). Its claim of likelihood of confusion is therefore not before us. *Alcatraz Media, Inc. v. Chesapeake Marine Tour Inc.*, 107 USPQ2d 1750, 1753 (TTAB 2013) (petitioner's pleaded descriptiveness and geographical descriptiveness claims not argued in brief deemed waived) *aff'd*, 565 F. App'x 900 (Fed. Cir. 2014) (mem.) *cited in Norris v. PAVE: Promoting Awareness, Victim Empowerment*, 2019 USPQ2d 370880, *1 n.2 (TTAB 2019) ("...Opposer did not pursue either claim in her trial brief. Therefore, neither of these claims is before us.").

Applicant's Answer denied the salient allegations of the Amended Notice of Opposition.⁴ Applicant has not filed a brief.

I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122, 37 CFR § 2.122, the file of the subject application. Opposer has submitted a Notice of Reliance on third-party website screen shots showing use of "party pack," use of

³ Opposer's brief, 9 TTABVUE 8 ("This Opposition has one issue: 1. Whether the terms [sic] PAWTY PACK is descriptive of the goods identified in Serial No. 88700852, namely: beverages for pets; edible pet treats, requiring that the opposition be sustained and the application be refused.").

⁴ 7 TTABVUE. Applicant's Answer raised three "affirmative defenses." 7 TTABVUE 9-10. The first, failure to state a claim on which relief can be granted, is not a true affirmative defense. *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, *4n.5 (TTAB 2021). The second and third, laches and acquiescence, are waived because Applicant did not pursue them at trial. *U.S. Olympic Committee v. Tempting Brands*, 2021 USPQ2d 164, *4 (TTAB 2021).

“pawty” for “party” on pet-related goods, use of “pawty pack” on pet-related goods, dictionary definitions, and USPTO records regarding third-party registrations.

Opposer submitted no testimony. Applicant submitted no evidence.

II. Entitlement to a Statutory Cause of Action

In every *inter partes* opposition or cancellation proceeding, the party in the position of plaintiff must plead and prove its entitlement to a statutory cause of action. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 (Fed. Cir. 2020), *reh’g en banc denied*, 981 F.3d 1083, 2020 USPQ2d 11438 (Fed. Cir. 2020), *cert. denied*, ___ U.S. ___ (2021). This holds true even if the defendant does not contest the plaintiff’s entitlement. *Chutter, Inc. v. Great Mgmt. Grp.*, 2021 USPQ2d 1001, *10 (TTAB 2021); *Sabhmani v. Mirage*, 2021 USPQ2d 1241, at *13-14.

A party in the position of plaintiff may oppose registration of a mark when opposition is within the zone of interests protected by statute, and the plaintiff has a reasonable belief in damage proximately caused by the prospective registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at * 6-7 (Fed. Cir. 2020), *cert. denied*, ___ U.S. ___ (2021); *Mars Generation, Inc. v. Carson*, 2021 USPQ2d 1057, * 6 (TTAB 2021). As the Court of Appeals for the Federal Circuit has observed, there is “no meaningful, substantive difference between the analytical frameworks” in the prior “standing” case law, under which an opposer must show a real interest in the proceeding and a reasonable basis for its belief in damage, *see Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058,

1062 (Fed. Cir. 2014), and the current “entitlement” case law, under which an opposer must show an interest falling within the zone of interests protected by statute and damage proximately caused by registration. *Corcamore v. SFM*, 2020 USPQ2d 11277, at *4. Thus, “a party that demonstrates a real interest in [opposing registration of] ... a trademark under [Trademark Act Section 13, 15 U.S.C.] § 106[3] has demonstrated an interest falling within the zone of interests protected by [the Trademark Act]. ... Similarly, a party that demonstrates a reasonable belief of damage by the registration of a trademark demonstrates proximate causation within the context of § 106[3].” *Id.* at *7. *U. Kentucky v. 40-0, LLC*, 2021 USPQ2d 253, *8-9 (TTAB 2021).

As the Board has declared, a plaintiff “must maintain its entitlement to the statutory cause of action throughout the proceeding and affirmatively prove its existence at the time of trial by introducing evidence to support the allegations in its pleading that relate to such entitlement as an element of its case-in-chief.” *Philanthropist.com, Inc. v. General Conference Corp. of Seventh-Day Adventists*, 2021 USPQ2d 643, *11-12 (TTAB 2021) *appeal docketed*, Case No. 21-2208 (Fed. Cir. 2021). *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 309.03(b) (2021) (“Allegations in support of standing which may be sufficient for pleading purposes must later be affirmatively proved by the plaintiff at trial....”).

A plaintiff challenging a term as merely descriptive may establish its entitlement to a statutory cause of action by showing that it is engaged in the manufacture or sale of the same or related goods as those covered by the challenged mark. *See, e.g., Australian Therapeutic Supplies*, 2020 USPQ2d 10837, at *4-5 (An opposer may

“demonstrate a real interest and reasonable belief of damage by producing and selling merchandise bearing the [proposed] mark.”) (citing *Int’l Order of Job’s Daughters v. Lindeburg & Co.*, 727 F.2d 1087, 220 USPQ 1017, 1020 (Fed. Cir. 1984)). See also *U.S. Olympic Committee v. Tempting Brands*, 2021 USPQ2d 164, at *16-17; *Int’l Dairy Foods Assn. v. Interprofession du Gruyère*, 2020 USPQ2d 10892, *10-11 (TTAB 2020), *civil action filed*, No. 1:20-cv-01174-TSE-TCB (E.D. Va. 2020); *Milwaukee Electric Tool Corp. v. Freud America, Inc.*, 2019 USPQ2d 460354, *4 (TTAB 2019); *Eastman Kodak Co. v. Bell & Howell Document Mgmt. Prods. Co.*, 23 USPQ2d 1878, 1879 (TTAB 1992), *aff’d*, 994 F.2d 1569, 26 USPQ2d 1912 (Fed. Cir. 1993).

That sort of evidence can prove that the plaintiff, like other competitors, has the right to use the wording in a merely descriptive manner, and may bring a proceeding to prevent its exclusive registration by the applicant. See *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981); *Apollo Medical Extrusion Technologies, Inc. v. Medical Extrusion Technologies, Inc.*, 123 USPQ2d 1844, 1848 (TTAB 2017). See generally 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 20:50 (5th ed. March 2022).

Here, Opposer pleaded its entitlement to assert a statutory cause of action,⁵ but “[t]he facts regarding standing . . . must be affirmatively proved. Accordingly,

⁵ Opposer alleged *inter alia* that it has standing based on its real interest in the proceeding, that it has used the Pawty Pack term in commerce, that it has a real commercial interest in protecting the Pawty Pack term, that it has expended resources on its use of the Pawty Pack term, and would be damaged by registration of Applicant’s mark (Amended Notice of Opposition ¶ 4); that it would be injured by registration of Applicant’s mark (Op. ¶ 15); that it has expended resources to develop and market merchandise under the Pawty Pack mark (Op. ¶ 16). 5 TTABVUE 3-4. In its sole surviving Count, claiming mere descriptiveness, it alleges that an applicant cannot claim exclusive rights to terms that others may need to use

[plaintiff] is not entitled to standing solely because of the allegations in its [pleading].” *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). “Mere allegations or arguments in support of standing are insufficient proof thereof. A plaintiff cannot rest on mere allegations in its complaint or arguments in its brief to prove standing.” *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1039 (TTAB 2018)

Opposer, however, failed to adduce **any** evidence establishing its entitlement to a statutory cause of action. As the Board has noted before, decisions to forego testimony and rely instead on notices of reliance alone often prove fateful. That proves to be the case here. Opposer’s single notice of reliance contains Internet printouts from 18 third-party websites showing various uses of “party pack” and “pawty pack.”⁶ But there is no testimony authenticating and linking any of them to Opposer. *Id.* at 1040 (“...Opposer’s Internet evidence is only probative for what it shows on its face and not the truth of what has been printed.”); *Safer Inc. v. OMS Inv., Inc.*, 94 USPQ2d 1031, 1040 (TTAB 2010) (webpages introduced by notice of reliance “have little probative value. They are admissible only to show what has been printed, not the truth of what has been printed”); As Opposer concedes, it “does not offer any of the Internet printouts reflecting **third parties’** use of the terms for the truth of the matter asserted therein. Rather, these exhibits are offered to show that **third parties** are

to describe their goods in the marketplace. (Op. ¶ 27). 5 TTABVUE 6. Applicant’s Answer denied these allegations, as well as the substantive claim of mere descriptiveness. 7 TTABVUE 2-6.

⁶ Notice of Reliance Exs. 1-18, 8 TTABVUE 8-113.

using the term on the Internet to describe their goods.”⁷ The notice of reliance contains two **third-party** registration files for the marks PARADISE PARTY PACK and PARTY PAC and Design.⁸ And it contains dictionary definitions of “pack” and “party pack.”⁹ But none of this evidence establishes anything about Opposer or its business; none of it establishes that Opposer presently or prospectively manufactures or sells goods that are the same as or related to those identified in the involved Application.

Consequently, Opposer, bearing the burden of proof, fails to demonstrate an interest falling within the zone of interests protected by the Trademark Act or a reasonable belief of damage proximately caused by registration of Applicant’s proposed trademark. For these reasons, Opposer has not shown its entitlement to the statutory cause of action it asserts here.

III. Decision

The opposition to registration of the proposed mark PAWTY PACK in Application Serial No. 88700852 is dismissed.

⁷ Opposer’s brief, 9 TTABVUE 9 n. 1 (emphasis added).

⁸ Notice of Reliance Exs. 21-22, 8 TTABVUE 138-288.

⁹ Notice of Reliance Exs. 19-20, 8 TTABVUE 114-137.