

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: December 12, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Status Symbol Clothing Brand LLC

v.

Status Symbol LLC

—
Opposition No. 91264572
—

Michael L. Bartholomew, Chad S. Pehrson and Michele M. Myer,
of Kunzler Bean & Adamson, PC, for Status Symbol Clothing Brand LLC.

Leela Madan of Madan Law PLLC,
for Status Symbol LLC.

—
Before Caltaldo, Adlin, and Allard,
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:

Status Symbol LLC (“Applicant”) seeks registration on the Principal Register of
the mark shown below:



STATUS
Symbol

for various clothing items and footwear, all in International Class 25.¹ Applicant describes its mark as “[consisting] of the stylized wording ‘STATUS SYMBOL’ where the words ‘STATUS’ appear smaller than the word symbol [sic]. The first letter ‘S’ is stylized as a dollar symbol in the word ‘STATUS’. The word ‘SYMBOL’ is in cursive.” Color is not claimed as a feature of the mark.

Status Symbol Clothing Brand LLC (“Opposer”) has opposed registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the basis of priority and likelihood of confusion with its common law mark STATUS SYMBOL CLOTHING for use with various clothing items.² Opposer also alleges ownership of a pending application for its STATUS SYMBOL CLOTHING mark (in standard characters) for clothing items in International Class 25 and certain online retail store services in International Class 35 (Serial No. 90129879) (the “879 application”).³

¹ Application Serial No. 88867635 was filed on April 10, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

² Notice of Opposition, paras. 1-3 (1 TTABVUE 4).

Citations to the record and briefs reference TTABVUE, the Board’s online docket system. Before the TTABVUE designation is the docket entry number; after this designation are the page references or paragraph numbers, as applicable.

³ Notice of Opposition, paras. 5, 16 (1 TTABVUE 4, 6).

Additionally, while not specifically addressed in the body of the Notice of Opposition, the ESTTA coversheet identifies a second application as forming the basis of its opposition: Application Serial No. 90034052 also for the mark STATUS SYMBOL CLOTHING (in standard characters) for “retail clothing stores” in International Class 35 (the “052 application”). Identifying an application in the ESTTA coversheet to a complaint does not make the application of record. *See e.g.*, 37 C.F.R. § 2.122(d)(1) (regarding matters in evidence).

In its Answer, Applicant admits ownership of its involved application⁴ and that the words “\$TATUS SYMBOL” are the dominant portion of its mark⁵ but it denies the remaining salient allegations of the Notice of Opposition.⁶ Additionally, Applicant raised several affirmative defenses but did not file a brief and hence did not pursue the affirmative defenses at trial. The affirmative defenses, therefore, are given no further consideration. *See Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1422 (TTAB 2014) (pleaded affirmative defenses not pursued in the brief considered waived).

Only Opposer has filed a brief.⁷

Having considered the evidentiary record, the Opposer’s brief and applicable authorities, we dismiss the opposition.

I. Record

The record consists of the pleadings, and, by virtue of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), the file history of the opposed application.

Opposer made the following evidence of record, all under a Notice of Reliance:

- TSDR printouts of Opposer’s pending ’879 application to register its STATUS SYMBOL CLOTHING mark (Exhibit 1), the application specimen (Exhibit 2), and TSDR printouts showing its status (Exhibit 3).⁸

⁴ Answer, para. 8 (5 TTABVUE 3).

⁵ *Id.* at para. 10 (5 TTABVUE 3).

⁶ *Id.* (5 TTABVUE).

⁷ Opposer’s brief (11 TTABVUE).

⁸ Opposer’s Notice of Reliance (10 TTABVUE 6-25).

- TSDR printout of the application file for Applicant’s involved application (Exhibit 4), and printouts showing its status (Exhibit 5).⁹
- Printouts from the North Carolina Secretary of State website showing Opposer’s corporate formation and other related documents (Exhibit 6) and its Articles of Organization (Exhibit 7).¹⁰
- Website screen captures from Opposer’s current website (www.statussymbolclothingbrand.com) (Exhibit 8), its former website (www.statussymbolclothing.com) (Exhibit 9), its Instagram account (Exhibit 10), and its Facebook page (Exhibit 11).¹¹
- Printouts of Applicant’s Instagram posts with annotations by Opposer (Exhibit 12).¹²
- Declaration of Christopher Robinson, Opposer’s CEO, with attached exhibits (“Robinson Decl.”).¹³

Applicant did not make any evidence of record.

Opposer filed a brief, but Applicant did not.¹⁴

⁹ *Id.* (10 TTABVUE 26-38).

Opposer makes Applicant’s involved application file of record; however, this is unnecessary as the file of the involved application is automatically of record by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b).

¹⁰ Opposer’s Notice of Reliance (10 TTABVUE 39-50).

¹¹ *Id.* (10 TTABVUE 51-86).

¹² *Id.* (10 TTABVUE 87-91).

¹³ *Id.* (10 TTABVUE 92-136). Paragraph 18 of the Robinson Decl. references “Exhibit E”; however, the exhibit is not of record.

It is not proper to submit testimony evidence under a notice of reliance, although it is harmless error to do so. *Syngenta Crop Prot., Inc. v. Bio-Chek, LLC*, 90 USPQ2d 1112, 1115 (TTAB 2009).

¹⁴ Applicant is not required to file a trial brief. The onus is on Opposer, as the party in the position of plaintiff in this proceeding, to prove its case by a preponderance of the evidence. *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015) (“The party opposing registration bears the burden of proof, see § 2.116(b), and if that burden cannot be met, the opposed mark must be registered, see 15 U.S.C. § 1063(b).”).

II. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action, formerly referred to as “standing” by the Court of Appeals for the Federal Circuit and this Board, is an element of the plaintiff’s case in every inter partes case. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 82 (2021); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). To establish entitlement to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute, and (ii) a reasonable belief in damage proximately caused by the registration of the mark. *Corcamore*, 2020 USPQ2d 11277, at *4. *See also Empresa Cubana*, 111 USPQ2d at 1062; *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982); *Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 USPQ2d 11388, at *1 (TTAB 2020). In other words, demonstrating a real interest in opposing or cancelling registration of a mark satisfies the zone-of-interests requirement, and demonstrating a reasonable belief in damage by the registration of a mark demonstrates damage proximately caused by registration of the mark. *Spanishtown*, 2020 USPQ2d 11388, at *2 (citing *Corcamore*, 2020 USPQ2d 11277, at *7).

Opposer relies on its '879 application as a basis for its entitlement to bring a statutory cause of action.¹⁵ Opposer made of record a copy of its '879 application and its specimen,¹⁶ and a printout from TSDR showing that the application remains suspended.¹⁷ Although Opposer did not make of record any Office action refusing registration based on a likelihood of confusion with Applicant's mark, it is reasonable that Opposer would believe that any registration maturing from Applicant's involved application would damage it, e.g., Opposer has a reasonable belief that there is a likelihood of confusion between the marks, or that the presence on the register of Applicant's mark may hinder Opposer in using or registering its mark. *See Toufigh v. Persona Parfum Inc.*, 95 USPQ2d 1872, 1874 (TTAB 2010) (“[E]vidence of such a refusal is not a requirement to establish standing. Rather, it is sufficient if the circumstances are such that it would be reasonable for a petitioner to believe that the existence of the respondent's registration would damage him, e.g. ... that the presence on the register of the respondent's mark may hinder the petitioner in using or registering his mark.”). *See also, Lipton Indus.*, 213 USPQ at 189 (“We regard the desire for a registration with its attendant statutory advantages as a legitimate commercial interest.”).

¹⁵ Opposer's brief, p. 5 (11 TTABVUE 6). Opposer cites to its Notice of Opposition for support for its argument. *Id.* However, allegations made in pleadings are not considered as evidence on behalf of the party making them. *Kellogg Co. v. Pack'Em Enterprises Inc.*, 14 USPQ2d 1545, 1547 n.6 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991); *see also, Intersat Corp. v. Int'l Telecomm. Satellite Org.*, 226 USPQ 154, 156 n.5 (TTAB 1985) (allegation of priority sufficient for purposes of pleading must still be proved during party's testimony period).

¹⁶ Exhibits 1-2 to Opposer's Notice of Reliance (10 TTABVUE 6-21).

¹⁷ Exhibit 3 to Opposer's Notice of Reliance (10 TTABVUE 22-25).

Accordingly, we find that Opposer has shown that it has a reasonable belief of damage and a real interest in this proceeding. Therefore, it is not a mere intermeddler, and it has established its entitlement to bring a statutory cause of action.

III. Opposer's Claim of Priority

Inasmuch as Applicant has not offered any evidence of use of its mark in connection with its goods prior to the filing date of its involved application (or any evidence at all for that matter), the earliest date upon which Applicant may rely for priority purposes is its April 10, 2020 filing date. *See Zirco Corp. v. American Tel. and Tel. Co.*, 21 USPQ2d 1542, 1544 (TTAB 1991) (“[T]here can be no doubt but that the right to rely upon the constructive use date comes into existence with the filing of the intent-to-use application and that an intent-to-use applicant can rely upon this date in an opposition brought by a third party asserting common law rights.”). Thus, in order to establish priority, Opposer must show that it used its mark in connection with its pleaded goods or services prior to April 10, 2020.

Although Opposer bears the burden of establishing priority, it does not address the issue squarely in its brief but only mentions it in passing in the context of other discussions, which we address in turn.

A. Opposer's Arguments Based on its '879 Application

First, Opposer argues that it has priority due to its pending '879 application. Although Opposer's pleaded application has a filing date that is subsequent to that

of Applicant's, Opposer claims that it has priority because its application recites a first use date, i.e., June 4, 2018, that is earlier than Applicant's filing date.

To support its claim, Applicant made of record a copy of its pleaded application and related specimen.¹⁸ However, it is well-settled that the allegation of a date of use of a mark made in an application or registration is not evidence in the proceeding on behalf of the applicant or registrant and the specimen in the application or registration, without more, is not evidence on behalf of the applicant or registrant. Trademark Rule 2.122(b)(2), 37 C.F.R. § 2.122(b)(2) ("The allegation in an application for registration, or in a registration, of a date of use is not evidence on behalf of the applicant or registrant; a date of use of a mark must be established by competent evidence. Specimens in the file of an application for registration, or in the file of a registration, are not evidence on behalf of the applicant or registrant unless identified and introduced in evidence as exhibits during the period for the taking of testimony."). *See, e.g., UMG Recordings, Inc. v. O'Rourke*, 92 USPQ2d 1042, 1047 (TTAB 2009) (allegations in application are not evidence); *Omega SA v. Compucorp*, 229 USPQ 191, 195 (TTAB 1985) (allegations and documents in application file not evidence unless and to the extent they have been identified and introduced in evidence during testimony). Consequently, we find that Opposer's application and related specimen are insufficient to support its claim of priority.

¹⁸ Opposer's brief, pp. 1-2, 8 (11 TTABVUE 2-3, 9); Exhibits 1-3 to Opposer's Notice of Reliance (10 TTABVUE 16-21).

B. Opposer's Arguments Based on its Facebook Posts, Its Website Printouts, and Its Corporate Formation Evidence

In the context of its arguments regarding the relatedness of the parties' goods, Opposer makes more arguments about priority:

Opposer has been manufacturing a variety of apparel and accessory products utilizing its mark since 2018. Notice of Reliance Exhibit 11. Opposer's clothing items include t-shirts, hoodies, crew neck sweatshirts, pants, joggers, hats, socks and more. Notice of Reliance Exhibit 8. Opposer was established prior to the organization of Status Symbol Clothing Brand LLC as a Limited Liability Company with the North Carolina Secretary of State in June of 2019. Notice of Reliance, Exhibit 6. In contrast, Applicant's first mention of its mark occurred on February 14, 2020, long after Opposer had already made use of its mark in commerce. Notice of Reliance Exhibit 12.¹⁹

As shown above, Opposer points to Exhibits 11, 8, and 6 to support its claim of priority. We discuss each in turn and in this order.

First, Exhibit 11 consists of screen captures of Opposer's Facebook page, which states "Page created – June 27, 2019" and which contains a post on this same date consisting of what appears to be a screen capture of Opposer's logo, all of which are prior to Applicant's filing date.²⁰ However, these printouts are not accompanied by any testimony by Mr. Robinson. For example, there is no testimony that this Facebook page is owned and controlled by Opposer and that the creation date and posts dates are accurate. Without corresponding testimony, the probative value of Internet documents is limited and Opposer may not use the documents obtained through the Internet to demonstrate the truth of what has been printed. *See,*

¹⁹ Opposer's brief, p. 11 (11 TTABVUE 12).

²⁰ Opposer's Notice of Reliance (10 TTABVUE 79).

e.g., Ricardo Media Inc. v. Inventive Software, LLC, 2019 USPQ2d 311355, at *2 (TTAB 2019) (unaccompanied by testimony, articles from the Internet may not be considered for the truth of the matters asserted but are admissible for what they show on their face); *WeaponX Performance Prods. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1041 (TTAB 2018) (“[A]ssertions appearing in the printouts submitted by Opposer under notice of reliance cannot be used to demonstrate its priority without testimony corroborating the truth of this matter.”).

We turn next to Exhibit 8, which includes screen captures of Opposer’s website. Again, there is no accompanying testimony attesting to the truth of the matters contained therein, so this evidence is of limited probative value. For example, there is no testimony that Opposer is the owner of the website or that the mark displayed on the website was used before Applicant’s filing date. *See, e.g., WeaponX*, 126 USPQ2d at 1041.

Finally, Opposer cites to Exhibit 6, and elsewhere in Opposer’s brief it combines Exhibit 6 with Exhibit 7, to support its argument that it has priority.²¹ Exhibit 6 consists of printouts related to Opposer’s corporate formation, and Exhibit 7 consists of Opposer’s articles of organization.²² Opposer argues that these documents show “Opposer was established prior to the organization of Status Symbol Clothing Brand LLC as a Limited Liability Company with the North Carolina Secretary of State in

²¹ Opposer’s brief, pp. 8, 11 (11 TTABVUE 9, 12).

²² Exhibits 6-7 to Opposer’s Notice of Reliance (10 TTABVUE 39-50).

June of 2019.”²³ This argument is somewhat confusing as Opposer is identified as “Status Symbol Clothing Brand LLC” in Opposer’s pleading but we take this to mean that Opposer had a predecessor-in-interest. Regardless, while these documents show use of the terms in the Opposer’s mark, they serve merely to identify Opposer as a business entity and do not show trademark use, much less on a date prior to Applicant’s filing date, so Exhibits 6 and 7 are not probative on the issue of priority. *See In re Diamond Hill Farms*, 32 USPQ2d 1383, 1384 (TTAB 1994) (holding that DIAMOND HILL FARMS, as used on containers for goods, is a trade name that identifies applicant as a business entity rather than a mark that identifies applicant’s goods and distinguishes them from those of others).

In sum, we find that none of this evidence is sufficient to support Opposer’s claim of priority.

C. Testimony Declaration of Opposer’s CEO

Opposer also points to the testimony of its CEO, Mr. Robinson, to support its claim of priority.²⁴ Specifically, Mr. Robinson testified as follows:

4. [Opposer] has conducted business related to the production, manufacture, and sales of products bearing the **Status Symbol mark**.

5. [Opposer] is **now** engaged in the manufacture, distribution, sale, advertising, and promotion in interstate commerce of clothing products, including shirts, hats, and hooded sweatshirts. Examples of the goods bearing the **Status Symbol mark** are attached as Exhibit A.

²³ Opposer’s brief, p. 11 (11 TTABVUE 12).

²⁴ *Id.* at pp. 4-5 (11 TTABVUE 5).

6. [Opposer] **has been providing its clothing products** continuously under the **Status Symbol Clothing Mark** in the United States since at least as early as June 4, 2018.

7. Photographic representations of a selection of the goods sold, including examples of product packaging are attached as Exhibit B.²⁵

Mr. Robinson offers limited testimony on the issue of priority, addressing the issue solely in paragraph 6. Mr. Robinson's testimony must be considered in the context of the pleaded mark and the exhibits attached to his declaration. While his testimony about the date is clear, i.e., "at least as early as June 4, 2018", the nature of the goods or services offered under the mark as of this date is not, i.e., "providing its clothing products".

The Notice of Opposition alleges that (1) Opposer engages in the "manufacture, distribution, sale, advertising, and promotion in interstate commerce of clothing products ...";²⁶ (2) Opposer's mark is used with "goods and services" without specifying the nature of the services;²⁷ and (3) Opposer uses its mark with online retail store services.²⁸ Opposer also argues in its brief that "Opposer has been manufacturing a variety of apparel and accessory products utilizing its mark since 2018."²⁹

Mr. Robinson's testimony must also be considered in light of this photograph, which is attached as an exhibit to his testimony declaration:

²⁵ Robinson Decl., paras. 5-7 (10 TTABVUE 92-93) (emphasis added).

²⁶ Notice of Opposition, para. 1 (1 TTABVUE 4).

²⁷ *Id.* at paras. 7, 18, 19, 20 (1 TTABVUE 4, 6-7).

²⁸ *Id.* at para. 16 and ESTTA coversheet (1 TTABVUE 1-2, 6).

²⁹ Opposer's brief, p. 11 (11 TTABVUE 12).



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Mr. Robinson’s testimony about this photograph is limited to his statement that it shows “a selection of [Opposer’s] goods [that are] sold.”³¹

In this context, it is not clear what Mr. Robinson intends by the use of the phrase “providing its clothing products”. It is not clear if services were offered (such as

³⁰ Exhibit B to Robinson Decl. (10 TTABVUE 104).

³¹ Robinson Decl., para. 6 (10 TTABVUE 93).

manufacturing or distribution services), or if clothing products bearing the mark were offered.

Further, Mr. Robinson's testimony is confusing to the extent that he testifies that the "Status Symbol mark" (para. 5) is in use by Opposer now but that Opposer has been providing its clothing products since its priority date under a different mark, i.e., "Status Symbol Clothing Mark" (para. 6). Neither term is defined. The declaration also refers to the "Status Symbol Mark" (para. 9), which is different from the other two but similarly not defined. The use of these differing terms causes all of his testimony to be confusing and unclear, reducing its probative value. *See Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1607 (TTAB 2018) (oral testimony of a single witness may suffice to show priority, but only if it is sufficiently probative).

As for the exhibits attached to his testimony declaration, Exhibit A shows the STATUS SYMBOL CLOTHING mark displayed in large font on the front of t-shirts;³² there are no images of the mark on labels or tags affixed to goods. Even assuming that the display of the mark across the front of the shirt functions as a mark, not mere decoration, *cf. Univ. of Kentucky v. 40-0, LLC*, 2021 USPQ2d 253 (TTAB 2021) ("Where purchasers buy goods based on the common message they display, that message fails to function as a trademark, even if it is displayed in a conventional trademark manner."), there is no date on these images that corroborates Mr. Robinson's testimony about priority.

³² Exhibit A to Robinson Decl. (10 TTABVUE 96-100).

Exhibit B is a photograph of packaging bearing the STATUS SYMBOL CLOTHING mark.³³ This photograph shows proper trademark use; however, the photograph is undated so it similarly does not corroborate Mr. Robinson's testimony as to priority.

Exhibit B also includes a "Custom Design Sheet,"³⁴ and Exhibit C includes a copy of a "Purchase Order TBD" and a digital mock-up of socks bearing the mark.³⁵ None of this constitutes evidence of use of the mark and, further, these documents appear to be internal business documents with no evidence of public exposure to them.

Mr. Robinson describes the documents attached as Exhibit D as copies of "business records, including invoices and lease agreements"³⁶ without going into more detail. Some of these documents have no obvious relationship to the present case, such as an invoice dated after the priority date, describing the purchase of a "10-person first aid kit"³⁷ and another invoice for sanitizer.³⁸

In sum, we find that Opposer has failed to present sufficient persuasive evidence that would support a finding that Opposer acquired rights in its mark prior to April 10, 2020, which is Applicant's filing date. Mr. Robinson's testimony on the issue of priority is too vague and the use of multiple, apparently different defined terms

³³ Exhibit B to Robinson Decl. (10 TTABVUE 102).

³⁴ *Id.* (10 TTABVUE 107-10).

³⁵ Exhibit C to Robinson Decl. (10 TTABVUE 111-13).

³⁶ Robinson Decl., para. 11 (10 TTABVUE 93).

³⁷ Opposer's Notice of Reliance (10 TTABVUE 132).

³⁸ *Id.* (10 TTABVUE 133).

without corresponding definitions causes the entire testimony to be confusing. The exhibits attached to his testimony are largely irrelevant and do not serve to remedy the deficiencies in his testimony. *See e.g., Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 USPQ2d 1134, 1145 (TTAB 2013) (“While a party may establish priority by oral testimony alone, testimony which is uncertain or inconsistent is insufficient.”).

D. Conclusion

Priority must be proven by Opposer as an element of its *prima facie* case under Section 2(d). *Kemi Organics*, 126 USPQ2d at 1605. As Opposer has not demonstrated its priority, Opposer cannot prevail on its claim of likelihood of confusion. *WeaponX*, 126 USPQ2d at 1041-42.

IV. Decision

The opposition to registration of the mark of Application Serial No. 88867635 is dismissed.