

THIS DECISION IS  
NOT A PRECEDENT  
OF THE TTAB

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  
General Email: [TTABInfo@uspto.gov](mailto:TTABInfo@uspto.gov)

wbc

February 16, 2023

Opposition No. 91277548

*Hangzhou Hikvision Digital  
Technology Co., Ltd.*

*v.*

*Creative Security Technology*

**Before Kuhlke, Taylor and Hudis,  
Administrative Trademark Judges.**

**By the Board:**

Hangzhou Hikvision Digital Technology Co., Ltd. (“Opposer”) opposes registration of Creative Security Technology’s (“Applicant”) application for **Bitvision** for “closed circuit TV systems for security and surveillance, namely, cameras, switchers, monitors, microphones, and recorders”<sup>1</sup> in International Class 9 (the “Current Application”) asserting the following: 1) there is a likelihood of confusion with Opposer’s common law and registered HIKVISION marks in standard characters<sup>2</sup>

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<sup>1</sup> Application Serial No. 90136472 was filed on August 25, 2020 pursuant to Trademark Act Section 1(a), 15 U.S.C. § 1051(a), claiming a date of first use of the mark anywhere and first use in commerce at least as early as July 29, 2020.

<sup>2</sup> Registration No. 3344347 was issued on November 27, 2007, asserting a date of first use of the mark anywhere and first use in commerce at least as early as November 30, 2001; renewed.

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and <sup>3</sup> for a variety of goods including digital video recorders; electric and electronic video surveillance installations in International Class 9, (1 TTABVUE 9-10); 2) the specimens of use submitted with the Current Application do not demonstrate use and as such, the Current Application is void ab initio (*id.* at 11-13); and 3) the Current Application should be denied under the doctrine of claim preclusion based on judgments obtained in Opposition Nos. 91264109 and 91269368 (the “Prior Oppositions”) (*id.* at 10-11). The ESTTA coversheet also indicates that fraud is asserted by Opposer. *Id.* at 1.

Applicant filed a motion captioned as a motion to strike wherein it argued that claim preclusion is improper and that Opposer cannot prevail on claim preclusion. 4 TTABVUE.<sup>4</sup> The parties were then informed that Applicant’s motion would be treated as a motion for summary judgment<sup>5</sup> on the issue of claim preclusion and were allowed time to supplement their briefing. 8 TTABVUE. Opposer submitted supplemental

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<sup>3</sup> Registration No.4476906 was issued on February 4, 2014, under Trademark Act Section 44(e), 15 U.S.C. § 1126(e), relying on Chinese registration nos. 8783831, 8783850, 8783893, and 87839004. Declaration of Use under Trademark Act Section 8, 15 U.S.C. § 1058, accepted, Declaration of Incontestability under Trademark Act Section 15, 15 U.S.C. § 165 acknowledged.

<sup>4</sup> Citations to the record or briefs in this opinion also include citations to the publicly available documents on TTABVUE, the Board’s electronic docketing system. The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry, if applicable.

<sup>5</sup> A party may file its motion for summary judgment based on claim preclusion before making its initial disclosures. See Trademark Rule 2.127(e)(1); *Zoba Int’l Corp. v. DVD Format/LOGO Licensing Corp.*, 98 USPQ2d 1106, 1108 n.4 (TTAB 2011).

briefing and cross-moved for summary judgment on the basis of claim preclusion. 9 TTABVUE. The motions are fully briefed.

We now consider the merits of the motion and cross-motion for summary judgment on claim preclusion based on the Prior Oppositions.

## **I. Motions for Summary Judgment - Claim Preclusion**

### **A. The Prior Oppositions**

#### **i. Opposition No. 91264109**

On August 7, 2020, Opposer filed a notice of opposition in Opposition No. 91264109 opposing Longse USA Inc.'s (Applicant's prior name)<sup>6</sup> application for

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for "closed circuit TV systems for security and surveillance, namely, cameras, switchers, monitors, microphones, and recorders" in International Class 9<sup>7</sup> asserting claims of nonuse, fraud and likelihood of confusion with Opposer's common law use and registrations of HIKVISION.<sup>8</sup>

On September 27, 2020, a notice of default regarding Applicant's failure to file an answer was issued. 4 TTABVUE 1. Thereafter, on November 6, 2020, judgment

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<sup>6</sup> Opposer submitted a copy of Applicant's certificate of amendment changing its name from Longse USA Inc. to Creative Security Technology Inc. 9 TTABVUE 42.

<sup>7</sup> Application Serial No. 88662228 was filed October 21, 2019 under Section 1(a) asserting dates of first use anywhere and in commerce of November 6, 2018.

<sup>8</sup> Registration Nos. 3344347 and 4476906.

against Applicant was entered, the opposition sustained, and registration to Applicant refused. 5 TTABVUE 1.

**ii. Opposition No. 91269368**

On May 17, 2021, Opposer filed a notice of opposition in Opposition No. 91269368 opposing Applicant's application for BITVISION in standard characters for "closed circuit TV systems for security and surveillance, namely, cameras, switchers, monitors, microphones, and recorders" in International Class 9,<sup>9</sup> asserting claims of likelihood of confusion with Opposer's common law use and registrations of HIKVISION<sup>10</sup> and claim preclusion based on Opposition No. 91264109.

On July 7, 2021, a notice of default regarding Applicant's failure to file an answer was issued. 4 TTABVUE 1. Applicant failed to respond to the notice of default and on August 16, 2021, judgment against Applicant was entered, the opposition sustained, and registration to Applicant refused. 5 TTABVUE 1.

**B. Summary Judgment**

Summary judgment is an appropriate method of disposing of cases in which there are no genuine disputes as to any material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In reviewing a motion for summary judgment, the evidentiary record must be viewed in the light most favorable to the non-moving party and all justifiable inferences to be drawn from the undisputed facts must be drawn in favor of the non-moving party. *See Lloyd's Food Prods., Inc. v. Eli's,*

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<sup>9</sup> Application Serial No. 88184109 was filed November 6, 2018 asserting an intent to use under Section 1(b).

<sup>10</sup> Registration Nos. 3344347 and 4476906.

*Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992). We may not resolve disputes of material fact; we may only ascertain whether a genuine dispute regarding a material fact exists. *See Lloyd's Food Prods.*, 25 USPQ2d at 2029; *Olde Tyme Foods*, 22 USPQ2d at 1544. A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-moving party. *See Opryland USA Inc. v. Great Am. Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992); *Olde Tyme Foods*, 22 USPQ2d at 1544.

### **B. Entitlement**

Opposer established its entitlement to bring a statutory cause of action. Opposer attached copies of its asserted trademark registrations to the notice of opposition (1 TTABVUE 14-16), and included with its motion printouts from the TSDR database as well as copies of its asserted registrations for the marks HIKVISION and

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(9 TTABVUE 31-40). *See, e.g., Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at \*4 (TTAB 2019); *Primrose Ret. Cmities., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1032 (TTAB 2016); *Research in Motion Ltd. v. Defining Presence Mktg. Grp. Inc.*, 102 USPQ2d 1187, 1190 (TTAB 2012); *Vital Pharms. Inc. v. Kronholm*, 99 USPQ2d 1708, 1712 (TTAB 2011); *Rocket Trademarks Pty. Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1072 (TTAB 2011). In short, Opposer has shown that it has a real interest in this proceeding. *See Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

### **C. Claim Preclusion**

Under the doctrine of claim preclusion, “a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.” *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 55 USPQ2d 1854, 1856 (Fed. Cir. 2000) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979)) (other citations omitted). For claim preclusion to apply, there must be:

- (1) identity of parties (or their privies);
- (2) an earlier final judgment on the merits of a claim; and
- (3) a second claim based on the same set of transactional facts as the first.

*Id.* (citing *Parklane Hosiery*, 439 U.S. at 326 n.5) (other citation omitted). Here, the analysis we undertake implicates the doctrine of “merger,” or offensive claim preclusion, in which we analyze whether the final judgments in the Prior Oppositions operate to foreclose litigating the likelihood of confusion claim against the Current Application.

#### **i. Identity of Parties**

Neither party disputes that the parties involved in this opposition and the Prior Oppositions are the same. *See, e.g.*, 4 TTABVUE; 9 TTABVUE 6; 10 TTABVUE.

#### **ii. Earlier Final Judgment on the Merits**

“[W]hether the judgment in the prior proceeding was the result of a dismissal with prejudice or even default, for claim preclusion purposes, it is a final judgment on the merits. *Urock Network, LLC v. Sulpasso*, 115 USPQ2d 1409, 1411 (TTAB 2015) (citations omitted).

The Prior Oppositions were sustained and judgment by default was entered against Applicant. *See* Opposition No. 91264109, 5 TTABVUE 1; Opposition No. 91269368, 5 TTABVUE 1. As such, there is no dispute that the Board’s dismissals of the Prior Oppositions are final judgments on the merits. *Flowers Indus. Inc. v. Interstate Brands Corp.*, 5 USPQ2d 1580, 1583 (TTAB 1987) (claim preclusion applies “even when the prior judgment resulted from default, consent, or dismissal with prejudice”).

**iii. Second Claim Based on Same Set of Transactional Facts as First Claim**

We now turn to the question of whether Opposer’s likelihood of confusion claim in this proceeding is based on the same set of transactional facts as those in the Prior Oppositions. To determine if separate opposition proceedings involve claims with the same set of transactional facts for purposes of claim preclusion, we consider:

- 1) Whether the mark involved in the first proceeding is the same mark, in terms of commercial impression, as the mark involved in the second proceeding; and
- 2) whether the evidence of likelihood of confusion between the opposer’s mark and the applicant’s first mark would be identical to the evidence of likelihood of confusion between the opposer’s mark and the applicant's second mark.



*Be Sport, Inc. v. Al-Jazeera Satellite Channel*, 115 USPQ2d 1765, 1767 (TTAB 2015) (citing *Institut Nat’l Des Appellations d’Origine v. Brown-Forman Corp.*, 47 USPQ2d 1875, 1894-95 (TTAB 1998)).

a) Commercial Impression

The proper test for determining whether two marks have the same commercial impression, for purposes of the claim preclusion doctrine, is the test used to determine whether or not tacking is allowed, *i.e.*, whether the marks are legal equivalents. *See*

*Institut Nat'l Des Appellations d'Origine*, 47 USPQ2d at 1894-95. The previous mark must be indistinguishable from the mark in question; the consumer should consider both as the same mark; and they must create “the same, continuing commercial impression.” *Hana Fin., Inc. v. Hana Bank*, 113 USPQ2d 1365, 1367 (2015) (internal quotation marks and citations omitted).

Contrary to Applicant’s arguments that the “marks are not the same, and the differences are neither minor nor insignificant” (4 TTABVUE 4), we find the variations in Applicant’s marks are insignificant and that they create substantially the same commercial impression. All of Applicant’s marks include a single term, BITVISION and to the extent stylization is incorporated, the stylizations include the color red with no additional significant design elements. For ease of review, the marks appear as follows:

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The font of the Current Application is not so stylized as to evoke a different commercial impression from the prior marks. As is evident from review of the marks, any variations in the marks are minor and do not rise to the level of a new mark sufficient, under the circumstances, to allow Applicant to seek registration herein. *See Aromatique Inc. v. Lang*, 25 USPQ2d 1359, 1361 (TTAB 1992); *In re Pickett Hotel Co.*, 229 USPQ 760, 763 (TTAB 1986).



Additionally, we do not wish to encourage losing parties to insignificantly modify their marks after an adverse decision and thereby avoid the preclusive effect of the prior adjudication. *J.I. Case Co. v. F.L. Indus., Inc.*, 229 USPQ 697, 700 (TTAB 1986) (citing *Miller Brewing Co., v. Coy Int'l Corp.*, 230 USPQ 675, 678 (TTAB 1986)).

b) Evidence of Likelihood of Confusion

The Current Application identifies goods which are identical to the goods identified in the each of Applicant's applied-for marks involved in the Prior Oppositions. *See, e.g., Gen. Elec. Co. v. Raychem Corp.*, 204 USPQ 148, 150 (TTAB 1979) (citing *Toro Co. v. Hardigg Indus., Inc.*, 549 F.2d 785, 193 USPQ 149 (CCPA 1977)). Given the identical nature of the applied-for goods in addition to the same commercial impression of each of Applicant's marks, evidence regarding likelihood of confusion would be the same in this opposition as in the Prior Oppositions.

**II. Decision**

We find there is no genuine dispute of material fact regarding the requisite elements for claim preclusion. In view thereof, Applicant's construed motion for summary judgment is **denied** and Opposer's cross-motion for summary judgment is **granted**; judgment is hereby entered against Applicant, the opposition is sustained and registration to Applicant is refused.