

This Opinion is not a
Precedent of the TTAB

Mailed: December 12, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Dongguan Mibang Network Technology Co., Ltd.
v.
Ontek Solutions

—
Opposition No. 91283885
—

Felipe Rubio, of Rubio & Associates,
for Dongguan Mibang Network Technology Co., Ltd.

Ontek Solutions, pro se (by Tran Thi Thu Thuy)

—
Before Goodman, Heasley, and Casagrande, Administrative Trademark Judges.

Opinion by Casagrande, Administrative Trademark Judge:

We dismiss this case because the opposer failed to submit evidence and, as a result, can prove neither entitlement to file this opposition proceeding nor either required element of its likelihood of confusion claim.

Ontek Solutions (“Applicant”) applied to register the stylized-format mark below on the Principal Register for “Bracelets made of seagrass” in International Class 14:

GEJOY₁

Dongguan Mibang Network Technology Co., Ltd. (“Opposer”) filed a Notice of Opposition to registration of Applicant’s mark.² The Notice of Opposition alleges that Opposer owns U.S. Registration No. 5675331 for GEJOY (in standard characters) for “Carnival masks; Knee guards for athletic use; Ornament hooks for Christmas trees; Play balloons; Hand-held party poppers; Hangers for Christmas tree ornaments,” in International Class 28.³ The Notice also alleges that Opposer has filed three U.S. applications to register GEJOY for various goods in International Classes 16 and 28,⁴ none of which identify bracelets. Opposer also alleges that it has used the mark GEJOY since at least as early as June 10, 2018,⁵ and “has acquired valuable common law rights” in the mark GEJOY.⁶ The Notice doesn’t expressly identify which goods

¹ Application Ser. No. 97055624 was filed on October 1, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and in commerce of July 23, 2018.

² See 1 TTABVUE. References to the briefs, other filings in the case, and the record cite the Board’s TTABVUE docket system. The number preceding “TTABVUE” is the docket number assigned to the cited filing in TTABVUE and any number immediately following “TTABVUE” identifies the specific page(s) to which we refer.

³ See *id.* at 2, 5. Opposer did not avail itself of the opportunity to make its registration of record by attaching it to the Notice of Opposition as permitted by Trademark Rule 2.122(d)(1), 37 C.F.R. § 2.122(d)(1).

⁴ See *id.* at 2-3, 5-6.

⁵ See *id.* at 6-7.

⁶ See *id.* at 7.

or services in connection with which its alleged common law rights have been used, but at another point alleges that Opposer has sold bracelets on Amazon.com.⁷

The Notice asserts several grounds for refusing Applicant's application: likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d);⁸ dilution under Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c);⁹ fraud;¹⁰ "Mala-fide [sic] and Dishonest Intention";¹¹ and lack of bona fide use in commerce prior to the application filing date under Section 1(a), 15 U.S.C. § 1051(a).¹²

Applicant, acting pro se, filed an Answer denying the salient allegations in the Notice of Opposition.¹³

Neither party offered evidence or testimony during its respective trial periods. Only Opposer filed a trial brief,¹⁴ although we note that applicants are not required to do so. *See* Trademark Rule 2.128(a)(1), 37 C.F.R. § 2.128(a)(1) ("The brief of the

⁷ *See id.* at 9.

⁸ *See id.* at 8-9.

⁹ *See id.* at 10.

¹⁰ *See id.* at 10-11.

¹¹ *See id.* at 11.

¹² *See id.* at 11-12. Because Opposer's trial brief discusses only its Section 2(d) claim, we deem Opposer to have forfeited the other claims in its Notice of Opposition. *See, e.g., WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, No. 91221553, 2018 WL 1326374, at *2 (TTAB 2018). Regarding citation form, this opinion is issued as part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases. This opinion uses Westlaw (WL) citations for precedential decisions of the Board. Precedential decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals are cited only to the Federal Reporter (e.g., F.2d, F.3d, or F.4th). This opinion thus conforms to the practice set forth in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 101.03 (2024).

¹³ *See* 4 TTABVUE.

¹⁴ *See* 7 TTABVUE.

party in the position of defendant, if filed, shall be due not later than thirty days after the due date of the first brief.”) (emphasis added); *see also Yazhong Investing Ltd. v. Multi-Media Tech. Ventures, Ltd.*, No. 92056548, 2018 WL 2113778, at *4 n.13 (TTAB 2018) (“Because Respondent, as defendant herein, is under no obligation to submit evidence or a brief, we do not construe Respondent’s failure to do so as a concession of the case.”) (citation omitted).

For the reasons explained below, we dismiss the opposition.

I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the challenged application.¹⁵

II. Opposer fails to prove that it is entitled to initiate a statutory opposition proceeding

In every inter partes case, the plaintiff must establish that it is entitled to have invoked the statute authorizing the proceeding it filed. Here, that statute is Section 13 of the Trademark Act, 15 U.S.C. § 1063, which provides for the filing of opposition by “[a]ny person who believes that he would be damaged by the registration of a mark upon the principal register” We and our primary reviewing court, the Court of Appeals for the Federal Circuit, used to call this requirement “standing.” Now, however, it is referred to as “statutory entitlement.” *See, e.g., Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1373 (Fed. Cir. 2020). But only

¹⁵ Opposer’s brief does not argue that anything else is of record. *See* 7 TTABVUE 6 (“The evidence of record consists of: File history for the mark under serial number 97055624 GEJOY.”)

the name has changed; the substance of the Federal Circuit precedents that called it “standing” are still valid, where they apply. *See, e.g., Spanishtown Enters., Inc. v. Transcend Resources, Inc.*, No. 92070340, 2020 WL 6938378, at *1 (TTAB 2020).

The burden of establishing “standing” or “statutory entitlement” rests on the plaintiff. *See, e.g., Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1028 (CCPA 1982) (“The facts regarding standing, we hold, are part of a petitioners case and must be affirmatively proved.”). To discharge this burden, an opposition plaintiff must prove: (i) an interest falling within the zone of interests protected by the opposition statute; and (ii) proximate causation. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 120-37 (2014)); *id.* at 1305 (applying *Lexmark* to inter partes TTAB cases). Demonstrating a real interest in opposing registration of a mark satisfies the zone-of-interests requirement, and demonstrating a reasonable belief in damage by the registration of a mark establishes damage proximately caused by registration of the mark. *Id.* at 1305-06.

Here, Opposer has alleged prior common law rights in, as well as a registration for and pending applications to register, the mark GEJOY, together with a plausible claim of likelihood of confusion with Applicant’s mark. If the evidence supported the alleged common-law rights, the registration, or the allegedly-pending applications, any one of those three things would be a basis to find that Opposer is entitled to file this Section 13, 15 U.S.C. § 1063, opposition proceeding against Applicant. *See, e.g., Made in Nature, LLC v. Pharmavite LLC*, No. 91223352, 2022 WL 2188890, at *9

(TTAB 2022) (registrations); *Toufigh v. Persona Parfum, Inc.*, No. 92048305, 2010 WL 2783900, at *2-3 (TTAB 2010) (pending applications); *Giersch v. Scripps Networks, Inc.*, No. 92045576, 2009 WL 706673, at *2 (TTAB 2009) (prior common law rights).

The problem for Opposer is that there is no proof in the record of its common law rights, registration, or applications. As noted, Opposer neither attached its registration to its Notice of Opposition nor presented any evidence during its trial period.¹⁶ But that is not the end of our analysis. The pleadings also are part of the record, and an admission in an answer of a factual allegation can obviate the need for proof of the alleged fact.¹⁷ We therefore must determine how Applicant answered these allegations. If a defendant's answer admits that Opposer owned common law rights or the pleaded registration or applications, that admission would obviate the need for additional proof. Compare *Tiffany & Co. v. Columbia Indus., Inc.*, 455 F.2d

¹⁶ Opposer's trial briefs contained links to alleged pages on Amazon.com online retail cite, but that is not sufficient to make the linked pages of record. *See, e.g., Hole in 1 Drinks, Inc. v. Lajtay*, No. 9206586, 2020 WL 859853, at *2 (TTAB 2020) ("The Board will not consider evidence and other evidentiary materials attached to the briefs unless they were properly made of record during the time assigned for taking testimony."); *TV Azteca, S.A.B. de C.V. v. Martin*, No. 92068042, 2018 WL 6504575, at *4 n.15 (TTAB 2018) (hyperlink does not make linked page of record). In addition, we will not consider any other of the many factual assertions in Opposer's brief that are unsupported by any evidence of record. *See, e.g., Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1370-71 (Fed. Cir. 2018) (agreeing with Board that factual statements made in a brief are not evidence).

¹⁷ *See, e.g., Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1353 (Fed. Cir. 2001) ("Pleadings are judicial admissions and a party may use them to render facts indisputable.") (citation omitted), *cert. granted, judgment vacated on other grounds sub nom. DeKalb Genetics Corp. v. Bayer CropScience, S.A.*, 538 U.S. 974 (2003), *opinion modified and reinstated*, 345 F.3d 1366 (Fed. Cir. 2003); *McAfee v. United States*, 832 F.2d 152, 154 n.*(Fed. Cir. 1987) ("an answer to a complaint constitutes an admission" and renders the admitted facts indisputable).

582, (CCPA 1972) (defendant's admission concerning plaintiff's pleaded registration sufficient) and *Cutino v. Nightlife Media, Inc.*, 575 F. App'x 888, 891 (Fed. Cir. 2014) (same) with *Demon Int'l LC v. Lynch*, No. 91166647, 2008 WL 375724, at *3 (TTAB 2008) (defendant's admission concerning plaintiff's asserted rights was not "clear, unequivocal and informed" and therefore required plaintiff to prove such rights).

Below are the salient allegations¹⁸ and answers¹⁹:

1. Opposer is an established and a well-known manufacturer of China supplying various goods. Opponent [sic] Company is the owner of the mark "GEJOY" (collectively the "GEJOY mark"). Opponent Company [sic] commenced use of the GEJOY mark at least as early as 2017 in the US market. Over the past, Opponent Company has expanded its usage of the GEJOY mark and presently offers different types of products and services under the mark in a wide range of areas.

Answer: Applicant gets information in Paragraph 1.

2. Opposer Company has applied for its mark 'GEJOY' covering a wide variety of goods and services, with the USPTO and other countries. Opponent's [sic] registrations and applications to register the 'GEJOY' mark include the following: [table listing one alleged U.S. registration and three alleged pending applications].²⁰

Answer: Applicant gets information in Paragraph 2.

3. Opponent [sic] company has developed an enormous amount of goodwill in its GEJOY mark. This mark is extremely well-known and respected by consumers. The GEJOY mark represents GEJOY's commitment to providing high quality products and services to consumers.

Answer: Applicant lacks knowledge or information sufficient to form a belief as to the truth of the matters alleged in Paragraph 3.

4. Opposer has continuously used "GEJOY" as a trademark (Hereinafter "Opposer's Mark") in connection with the sale of its products. As a result of long

¹⁸ See 1 TTABVUE.

¹⁹ See 4 TTABVUE.

²⁰ This table also lists two alleged foreign registrations and one alleged foreign application, but these are not relevant to establishing rights in the U.S.

use and extensive promotion of the Opposer's mark, the "GEJOY" mark has become distinctive to designate "GEJOY", to distinguish Opposer's mark and its products from the products of others, and to distinguish the source or origin of Opposer's products. As a result of Opposer's efforts, the consuming public throughout the United States widely recognizes and associates the "GEJOY" mark with Opposer and its products.

Answer: Applicant lacks knowledge or information sufficient to form a belief as to the truth of the matters alleged in Paragraph 4.

5. Opposer has priority over Applicant's application as Opposer has made actual use of the trademark "GEJOY" since at least as early as June 10, 2018, which predates Applicant's filing date of Oct. 01, 2021 and claimed date of first use in commerce i.e. Jul. 23, 2018. Therefore, the Opposer enjoys the benefit of priority over Applicant's application on that basis.

Answer: Applicant denies the allegation and/or legal conclusions contained in Paragraph 5.

6. As a result of extensive sales, advertising, and promotion of Opposer's products under the "GEJOY" mark, Opposer's Mark is strong and well-known.

Answer: Applicant lacks knowledge or information sufficient to form a belief as to the truth of the matters alleged in Paragraph 6.

7. The public has come to know Opposer's "GEJOY" mark and recognize that any goods so marked originate with Opposer. By virtue of these efforts and by virtue of the excellence of its goods, Opposer has gained a valuable reputation for its "GEJOY" mark.

Answer: Applicant lacks knowledge or information sufficient to form a belief as to the truth of the matters alleged in Paragraph 7.

* * *

9. As a result of Opponent's long use and extensive promotion of the "GEJOY" the mark has acquired valuable common law rights in the "GEJOY" mark throughout the United States.

Answer: Applicant denies the allegation and/or legal conclusions contained in Paragraph 9.

Applicant’s answers to the allegations in ¶¶ 3-7 and ¶ 9 are all either clear denials or effective denials under Fed. R. Civ. P. 8(b)(5) (“A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.”). *See also Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 1554 (Fed. Cir. 1991) (effective denials “put [a plaintiff] on notice that its claim was being challenged, thereby requiring [plaintiff] to prove its case”).

The answers to ¶¶ 1 & 2 in the Notice—which are allegations about Opposer’s marks, registrations, and applications—are in an unusual form, stating “Applicant gets information in Paragraph [1 or 2].” This is not a clear denial. Nor is it in the precise language used in Fed. R. Civ. P. 8(b)(5), which authorizes effective denials. But, in the context of Applicant’s Answer, it is clear that this response is not an admission. We know it is different from an admission because Applicant admitted four allegations in the Notice concerning its own actions in filing the subject application. In each admission, Applicant stated: “Applicant admits Paragraph [].”²¹ We therefore find that Applicant—who, as noted earlier, is proceeding pro se—has effectively denied ¶¶ 1 & 2 in the Notice. *See* Fed. R. Civ. P. 8(e) (“Pleadings must be construed so as to do justice.”); *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (“[a] document filed *pro se* is to be liberally construed”) (citation omitted); *cf. Demon Int’l*, 2008 WL 375724, at *3 (where applicant was pro se, Board held: “We view the ‘does not dispute’ phrase [in applicant’s answer] as a statement that applicant was without

²¹ *See* 4 TTABVUE 3 (answering ¶¶ 13-15, 23 in the Notice).

sufficient information to be able to dispute the contention and therefore as an effective denial.”).

In view of Opposer’s failure to submit proof of its alleged common law rights or its registration or applications, together with Applicant’s denials in its Answer of such allegations, we find that Opposer has failed to prove that it is statutorily entitled to bring this opposition proceeding.

III. Opposer fails to prove priority and likelihood of confusion

Opposer’s failure to demonstrate statutory entitlement itself requires dismissal of this opposition. In addition, Opposer’s failure to prove prior common law rights or a prior registration means that it failed to prove either required element of its Section 2(d) claim. A Section 2(d) claim requires proof of priority (e.g., prior common law rights or a prior registration) and likelihood of confusion. *See, e.g., Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1162 (Fed. Cir. 2002) (“a party petitioning for cancellation under section 2(d) must show that it had priority and that registration of the mark creates a likelihood of confusion”); *see also Hornby v. Tjx Cos.*, No. 92044369, 2008 WL 1808555, at *9 (TTAB 2008) (to prevail on a Section 2(d) claim, “petitioner must prove both the elements of priority of use and likelihood of confusion”). Having failed to provide proof of priority through common law rights or a registration, Opposer’s Section 2(d) claim must be dismissed for this independent reason. *See, e.g., Syngenta Crop Protection, Inc. v. Bio-Chek, LLC*, No. 91175091, 2009 WL 691309, at *6 (TTAB 2009) (“without proof of priority, opposer cannot prevail” on a Section 2(d) claim).

The second element, likelihood of confusion, requires an assessment of the various factors identified in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*du Pont*”). Opposer’s brief argues that the first four factors listed in *du Pont* support its position that confusion is likely.²² These factors require us to compare the parties’ marks, goods, trade channels, and classes of customers, respectively. *See id.* We know what Applicant’s mark and goods are, because the application is automatically of record. Because there are no restrictions in the application, we also may presume that Applicant’s goods are sold through the usual trade channels for such goods and to the usual customer for such goods. *See, e.g., Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1370 (Fed. Cir. 2012). But without any evidence in the record of Opposer’s mark, the goods sold under Opposer’s mark, and the trade channels and classes of customers for Opposer’s goods, we have nothing to compare Applicant’s mark **to**. As a consequence, Opposer’s failure to submit any evidence at all necessarily means it cannot prove, and has not proved, that confusion is likely. This is a third independent reason Opposer’s case fails.

Decision: For these reasons, we dismiss this opposition.

²² *See* 7 TTABVUE 9-13. We generally assess only those factors for which there is evidence or argument. *See, e.g., Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023).