

**THIS OPINION IS NOT
CITABLE
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THE T.T.A.B.**

**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513**

Baxley

Mailed: September 23, 2003

Cancellation No. 92/040,746

GEORGIA GRAHAM JONES

v.

ALISON HOLTZSCHUE

Before Simms, Hanak and Hairston,
Administrative Trademark Judges.

By the Board:

Georgia Graham Jones ("petitioner") has filed a petition to cancel Alison Holtzschue's ("respondent") registration of the mark COMPUTERSDOTMOM COMPUTER SKILLS, CONFIDENCE AND REALLY GOOD COFFEE in the following form



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for "educational services, namely computer skills training services by means of classroom instruction"¹ on the grounds of likelihood of confusion with her previously used and registered mark COMPUTER MOMS for computer training services.²

This case now comes up for consideration of (1) petitioner's motion for summary judgment, (2) respondent's motion (filed May 22, 2003) for leave to take discovery pursuant to Fed. R. Civ. P. 56(f), and (3) respondent's motion (filed May 22, 2003) to extend time to respond to the motion for summary judgment.

A brief review of the relevant procedural history of this proceeding is in order. On May 23, 2002, petitioner filed an unsigned petition to cancel.³ On July 12, 2002, the Board issued an order wherein it instituted this proceeding and forwarded a copy of the petition to cancel to

¹ Registration No. 2,412,405, issued December 12, 2000 and reciting January 15, 1999 as the date of first use and date of first use in commerce. The registration includes a disclaimer of any exclusive right to use "COMPUTER SKILLS" apart from the mark as shown and the following description: "The mark consists of the word "COMPUTERSDOTMOM" with a design of a women holding a computer and the tagline "COMPUTER SKILLS, CONFIDENCE AND REALLY GOOD COFFEE."

² Petitioner's pleaded mark is the subject of Registration No. 2,075,655. However, petitioner has not submitted a copy of that registration.

³ We note that the petition to cancel should not have received consideration from the Board until petitioner was notified that the petition to cancel was unsigned and a signed copy thereof was then filed. See Trademark Rule 2.119(e).

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respondent. On October 28, 2002, the Board issued a notice of default inasmuch as no answer was of record. On March 17, 2003, the Board entered judgment by default against respondent inasmuch as no response to the notice of default was of record.

On March 19, 2003, respondent, apparently at the request of the Board attorney assigned to this case,⁴ transmitted to the Board by facsimile a copy of her response to the notice of default.⁵ Based thereon, the Board, on March 24, 2003, issued an order wherein it vacated entry of judgment against respondent, set aside the notice of default,⁶ and allowed petitioner until thirty days therefrom to file a signed petition to cancel. On April 17, 2003, concurrently with a signed petition to cancel and an amended petition to cancel, petitioner filed a motion for summary judgment on her likelihood of confusion claim.

In support of her motion for summary judgment, petitioner, who is appearing *pro se* herein, contends that she has been denied a timely resolution of this matter by

⁴ Angela Lykos, the Board attorney assigned to this case, is away from the USPTO for an extended period.

⁵ A review of that response, which is captioned "motion to set aside default," indicates that it is stamped as having been received by the USPTO on November 27, 2002.

⁶ We note that the Board found that good cause existed to set aside the notice of default based primarily on respondent's non-receipt of the petition to cancel and order instituting this proceeding.

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two incidents of lost mail. Accordingly, petitioner asks that the Board obtain and verify documents attesting to the filing of respondent's response to the notice of default.⁷ Petitioner further contends that her franchisees are concerned or may be concerned about potential confusion between the marks at issue; that she has more than seventy franchisees in sixteen states, including the State of New York, where respondent is located; that the parties' services are marketed to the same potential customers for the same purpose; and that unresolved, continued use by respondent will damage petitioner. As evidentiary support for her motion, respondent has included a report of a search of the USPTO's Trademark Electronic Search System (TESS) indicating that the parties' marks are registered, a TESS printout of respondent's involved registration, two online telephone directory excerpts showing that respondent has a telephone in New York City, two specimens showing use of respondent's mark, and a letter from the Attorney General of the State of New York stating that petitioner is licensed to offer and sell franchises in the State of New York.⁸ Based

⁷ Such copies were obtained prior to the issuance of the March 24, 2003 order. A copy of respondent's response to the notice of default that respondent's counsel transmitted to the Board by facsimile on March 19, 2003 is enclosed with petitioner's copy of this order.

⁸ Petitioner, however, did not submit a title and status copy of her Registration No. 2,075,655 for her COMPUTER MOMS mark.

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on the foregoing, petitioner contends that she is entitled to summary judgment on her claim of likelihood of confusion.

To the extent that petitioner seeks reconsideration of the March 24, 2003 order, the Board shares petitioner's frustration with regard to the disruption of the orderly administration of this proceeding that has been caused by lost mail. Further, the Board notes that, inasmuch as the March 24, 2003 order vacated entry of judgment, that order should have been issued by a three-judge panel of the Board rather than by the Board attorney assigned to this case.⁹ See Trademark Rule 2.127(c); TBMP Section 502.05.

Nonetheless, petitioner has not shown that the findings in the March 24, 2003 order were in error. See Trademark Rule 2.127(b). The copy of the response to the notice of default that petitioner transmitted by facsimile to the Board is stamped as having been received by the USPTO's Office of Initial Patent Examination ("OIPE") on November 27, 2002. As such, the response was timely filed with the USPTO, and the Board correctly vacated its entry of judgment herein.¹⁰ Further, petitioner has not shown that the Board erred in setting aside the notice of default.

⁹ In addition, the March 24, 2003 order should have provided a more thorough explanation of how respondent's timely filed response to the notice of default was brought to its attention.

¹⁰ Although the cover letter to the response is addressed to the Board at the proper street address, the response was hand-delivered to the OIPE instead. The response was then apparently misdirected within the USPTO.

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In view thereof, petitioner's request for reconsideration is hereby denied. The Board hereby adopts the findings in its March 24, 2003 order.

Turning to petitioner's motion for summary judgment, summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(c). Petitioner, as the party moving for summary judgment, has the initial burden of demonstrating the absence of any genuine issue of material fact, and that she is entitled to judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1987).

After reviewing petitioner's arguments and supporting papers, we find that she has failed to meet her burden of establishing that no genuine issues of material fact exist and that therefore she is entitled to judgment on her likelihood of confusion claim. At a minimum, there are genuine issues of material fact as to the similarity or dissimilarity of the overall commercial impressions of the marks at issue and as to petitioner's priority of use.¹¹

¹¹ The fact that we have identified only two genuine issues of material fact as sufficient bases for denying the motion for summary judgment should not be construed as a finding that these are necessarily the only issues which remain for trial.

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In view thereof, petitioner's motion for summary judgment is denied.¹² Respondent's motions for leave to take discovery under Fed. R. Civ. P. 56(f) and to extend time to respond to the motion for summary judgment are moot.

Concurrently with her motion for summary judgment, petitioner filed an amended petition to cancel. Inasmuch as no answer is of record, petitioner's amended petition to cancel is accepted as petitioner's operative pleading herein. See Fed. R. Civ. P. 15(a); TBMP Section 507.02. Respondent is allowed until **thirty days** from the mailing date of this order to file an answer to the amended petition to cancel.

It is noted that petitioner has represented herself in this proceeding thus far. While Patent and Trademark Rule 10.14 permits any person to represent herself, it is generally advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in inter partes proceedings before the Board to secure the services of an attorney who is familiar with such

¹² Petitioner should note that the evidence submitted in connection with her motion for summary judgment is of record only for consideration of that motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. See *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993); *Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB (1993); *American Meat Institute v. Horace W. Longacre, Inc.*, 211 USPQ 712 (TTAB 1981).

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matters. The USPTO cannot aid in the selection of an attorney.

If petitioner continues to represent herself herein, she should obtain a copy of the latest edition of Chapter 37 of the Code of Federal Regulations, which includes the Trademark Rules of Practice, and is available for a fee from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Strict compliance with the Trademark Rules of Practice and where applicable, the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel.¹³

Discovery and trial dates are hereby reset as follows.

DISCOVERY PERIOD TO CLOSE:	1/18/04
Plaintiff's 30-day testimony period to close:	4/17/04
Defendant's 30-day testimony period to close:	6/16/04
15-day rebuttal testimony period to close:	7/31/04

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served

¹³ The Trademark Trial and Appeal Board Manual of Procedure (TBMP) (Stock No. 903-022-00000-1) is available for a fee from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. (Telephone (202) 512-1800). The TBMP is also available on the World Wide Web at <http://www.uspto.gov>.

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on the adverse party within thirty days after completion of the 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.