

**THIS OPINION IS NOT A  
PRECEDENT OF  
THE T.T.A.B.**

Mailed: December 2, 2008

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

Cold War Air Museum, Inc.  
v.  
The Cold War Museum, Inc. and Francis Gary Powers, Jr.

Cancellation No. 92047391

Request for Reconsideration

W. Thomas Timmons, Esq., for Cold War Air Museum, Inc.

Katrina Edge and John H. Weber, of Baker & Hostetler LLP for  
The Cold War Museum, Inc. and Francis Gary Powers, Jr.

Before Seeherman, Drost, and Ritchie de Larena,  
Administrative Trademark Judges.

Opinion by Ritchie de Larena, Administrative Trademark  
Judge:

On October 20, 2008, the Board granted the petition brought by Cold War Air Museum, Inc. to cancel "THE COLD WAR MUSEUM" for "museum services," in International Class 41, registered to The Cold War Museum, Inc. on assignment from Francis Gary Powers, Jr., on the ground that respondents'

mark is merely descriptive, and respondents failed to show it had acquired distinctiveness.

Respondents have timely filed a request for reconsideration of the Board's decision. In their request, respondents argue that the Board's decision is in error because (1) the Board admitted evidence of Google search results that should not have been allowed into the record; (2) the Board gave undue weight to that evidence; and (3) the Board should have accepted evidence from respondents' application file into the record and thereby found the requisite showing by respondents of acquired distinctiveness.

With regard to respondents' first contention, as stated in the Board's October 20, 2008 decision, it is because respondents listed the Google search results in their "Description of the Record" in respondents' own brief that the Board treated the search results as having been stipulated into the record.

With regard to respondents' second contention, as stated in the Board's October 20, 2008 decision, we considered petitioner's submitted Google definitions "for the probative value that they may have, as discussed herein." We found that the Google definitions, along with petitioner's other evidence, showed that "'cold war' is a recognized term regarding a particular conflict between nations in the latter half of the twentieth century."

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With regard to respondents' third contention, as stated in the Board's October 20, 2008 decision, it was respondents' choice not to submit any evidence on their behalf, including evidence from the application file. As we stated on p. 11, quoting from our precedential caselaw:

While the application file is automatically part of the record in an opposition proceeding by means of Trademark Rule 2.122(b), the allegations made, and documents and other things filed in connection with the application, are not evidence in the inter partes proceeding on behalf of the applicant. *See: Kellogg Co. v. Pack'em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 21 USPQ2d 1142 (Fed. Cir. 1991); *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895 (TTAB 1989). Accordingly, the materials submitted only in the ex parte effort to establish registrability under Section 2(f) of the Act were not considered in reaching our decision in this opposition proceeding.

*British Seagull Ltd. v. Brunswick Corp.*, 28 USPQ2d 1197, 1200 (TTAB 1993), *aff'd*, 35 F.3d 1527, 32 USPQ2d 1120 (Fed. Cir. 1994).

In view of the foregoing, respondents' request for reconsideration is denied.