

**THIS OPINION IS NOT A
PRECEDENT OF
THE TTAB**

Mailed: January 31, 2013

Hearing: October 25, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Sandshaker Lounge and Package Store, LLC
v.
Quietwater Entertainment, Inc.

Cancellation No. 92051664

Robert O. Beasley of Litvak Beasley & Wilson LLP, for
Sandshaker Lounge and Package Store, LLC.

J Nevin Shaffer Jr., Esq., for Quietwater Entertainment,
Inc.

Before Quinn, Mermelstein, and Ritchie, Administrative
Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Sandshaker Lounge and Package Store, LLC ("petitioner")
has petitioned to cancel Registration No. 2925268 for the
mark BUSHWACKER, owned by Quietwater Entertainment, Inc.
("respondent").¹ The registration issued on February 8,
2005 on the Principal Register, and a Section 8 affidavit
has been accepted. The services are identified therein as

¹ Application Serial No. 78359219, which matured into the
registration at issue, was filed on January 29, 2004, claiming
first use and first use in commerce of January 1, 1988.

"entertainment services in the nature of a festival featuring live musical groups," in International Class 41.

In its petition for cancellation, petitioner asserts that since prior to respondent's first use of its mark, petitioner has been associated with the mark BUSHWACKER in connection with a drink served by petitioner, (petition at paras. 8, 9) as well as with the mark HOME OF THE ORIGINAL BUSHWACKER for services including "musical entertainment events and festivals." *Id.* at para. 18. Petitioner alleges that by virtue of its prior use of the mark BUSHWACKER, it has built up valuable goodwill therein which would be jeopardized by the continued registration of respondent's mark. *Id.* at para. 13. Petitioner further alleged that its BUSHWACKER mark has "acquired distinctiveness," citing Section 2(f) of the Lanham Act. *Id.* at para. 12.

Petitioner thus alleges a likelihood of confusion with its marks. *Id.* at para. 15, 27. Petitioner further alleged that respondent's registration is "likely to cause dilution by blurring." *Id.* at para. 14. However, this claim was not pursued on brief and we consider it to be waived. On the other hand, petitioner included in its trial brief as grounds for likelihood of confusion another mark that was not pleaded, BUSHWACKER BEACH WEEKEND, also based on common law rights for "musical entertainment events and festivals." Since we find that there was no objection by respondent, but

rather, the parties treated the issue as having been tried, we deem the pleadings to be amended under Fed. R. Civ. P. 15(b) to include that mark.²

Respondent's answer denied the salient allegations of the petition. Although respondent did not set forth separate affirmative defenses, we construe the wording of respondent's answer to assert the affirmative defense of acquiescence.³ Such language includes the following statements in the answer:

1. Any rights petitioner may have had with regard to BUSHWACKER for a drink "have long since been abandoned" (answer at para. 14)
2. Petitioner acquiesced "with at least one prior owner of the Sandshaker Lounge participating in the music festival without objection." *Id.* at para. 10.
3. Petitioner's specimen for "Home of the Original Bushwacker" doesn't even show use as mark. *Id.* at para. 18.
4. Petitioner's alleged use of BUSHWACKER and HOME OF THE ORIGINAL BUSHWACKER for a drink "never existed with regard to entertainment services in the nature of a festival featuring live musical groups due to Petitioner's failure to use the term for such a festival and abandonment of any such alleged rights due to acquiescence to Registrant's open, notorious and continuous use of the term BUSHWACKER for festivals since at least 1988" *Id.* at para 26.
5. Further alleging acquiescence: "Petitioner has never complained, in fact a predecessor in interest actually participated in Registrant's festival, and has never offered those services under that term and any rights Petitioner may have had have been abandoned due to such acquiescence and Registrant's detrimental reliance upon its acquiescence." (Para. 27).

Both parties filed trial briefs, and petitioner filed a reply brief. At the request of petitioner, a hearing was

² While, as discussed at the hearing, this case is unusual, we are confined to the grounds pleaded, and must rule accordingly.

³ Although acquiescence was not pleaded specifically as an affirmative defense, it was sufficient to put petitioner on

held, and presided over by this panel, on October 25, 2012. Only petitioner appeared at the hearing.

We have considered all of the evidence and arguments of record in this case, whether or not they are discussed herein, in undertaking our analysis, and in reaching our conclusion, in this decision.

The Record

The record in this case includes the pleadings and the file of the involved registration. In addition, during its assigned testimony period, petitioner submitted the following:

1. Testimony deposition of June Guerra, major stockholder and president of respondent, Quietwater Entertainment, Inc., dated November 8, 2010.
2. Testimony deposition of Kimberly Bell Campbell, current owner and manager of petitioner, Sandshaker Lounge and Package Store, LLC, dated December 2, 2010.
3. Testimony deposition of Thomas D. Carmichael, manager of entities owned by respondent, Quietwater Entertainment, Inc., relevant to the proceeding, dated November 8, 2010.

notice, and was in any event tried by the parties. Accordingly, we have considered it as such.

4. Affidavit of Linda Murphy, former owner of petitioner, Sandshaker Lounge and Package Store, LLC, dated March 2, 2011.
5. Notice of reliance including: Best Western Hotel Directory; Billboard & Splash Ads; I-10 Billboard Comfort Inn Guest Directory; DeLuna Fest Ads; Songwriters Ads; and Valpack Ads.⁴

Respondent did not submit any testimony or evidence.

Petitioner's Standing and Priority of Use

Among its other pleaded marks, petitioner has pleaded and argued rights to the mark HOME OF THE ORIGINAL BUSHWACKER for services including "musical entertainment events and festivals." (petition at para. 5). Petitioner's witness testified that petitioner filed an application for this mark for these and other services. (Campbell depo at 5). In the past, the Board has found standing based on a party's testimony that it possesses a live application to register a mark, without assertion of having been refused registration, with what the Board described as a "reasonable basis for a belief that he is damaged by the registration sought to be cancelled by the fact that both parties' marks

⁴ To the extent some of this material may not have been properly submitted via notice of reliance or affidavit, respondent did not object, but rather treated it as though it were of record, referring to all of the same "evidence" in its brief as comprising "the record." (respondent's brief at 5). We accordingly treat this material as having been submitted by stipulation.

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are identical, and their services are at least arguably related." *Toufigh v, Persona Parfum Inc.*, 95 USPQ2d 1872, 1874 (TTAB 2010). That is the case here. Thus, we find petitioner has established standing to bring this cancellation proceeding. See *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) (requiring "a reasonable belief of damage"); 15 U.S.C. §1064.

Having established standing, petitioner must also prove priority for its likelihood of confusion claim brought under Trademark Act §2(d). In the absence of a registration, a party alleging priority must prove that, vis-à-vis the other party, it owns "a mark or trade name previously used in the United States ... and not abandoned..." Trademark Act Section 2, 15 U.S.C. §1052. A party may establish its own prior proprietary rights in a mark through actual or constructive use of the mark or through use analogous to trademark use, such as use in advertising brochures, trade publications, catalogues, newspaper advertisements and Internet websites which create a public awareness of the designation as a trademark identifying the party as a source. *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009); Trademark Act §§2(d) and 45, 15 U.S.C. §§1052(d) and 1127. See also *T.A.B. Systems v. PacTel Teletrac*, 77 F.3d 1372, 37

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USPQ2d 1879 (Fed. Cir. 1996), vacating *Pactel Teletrac v. T.A.B. Systems*, 32 USPQ2d 1668 (TTAB 1994).

It is well settled that in the absence of any evidence of earlier use, the earliest date upon which respondent may rely is the filing date of its underlying application, which (contingent upon registration) constitutes constructive use of the mark. See Trademark Act Section 7(c), 15 U.S.C. §1057(c). In this case, and as noted above, the application that matured into the registration at issue herein was accorded a filing date of January 29, 2004. Respondent's witnesses also introduced testimonial and documentary evidence regarding an earlier first date of use, showing continuous use of the mark in connection with "entertainment services in the nature of a festival featuring live musical groups," since 1988. (Guerra depo. at 39).

We note, for purposes of this discussion, that both respondent and petitioner operate or control bars on Pensacola Beach, Florida. (see Guerra depo. at 4 and 14; Campbell depo. at 11). Both sell a drink called the "Bushwacker," which appears to be generic for a type of drink sold locally and available at multiple locations throughout Pensacola Beach, as testified by each of the deposed witnesses.

Q: Are you aware you can buy Bushwacker drinks all over Pensacola Beach?
A: Yes.

Campbell depo. at 15.

Q: So if I were to open a bar, to your knowledge, on Pensacola Beach, could I sell a drink called a Bushwacker?

A: Yes.

Q: You would have no problem with that?

A: I believe it's a little late to have a problem with that.

Id. at 47.

A: Everybody sold a drink Bushwacker on the beach.

Q: Which includes Sandshaker?

A: Sandshaker, Flounder's, Boy on a Dolphin.

Guerra depo. at 31.

A: Everybody served a Bushwacker.

Carmichael depo. at 15.

Thus, although the Bushwacker drink first appeared at petitioner's bar, it is now sold by multiple unrelated establishments, and "Bushwacker" is understood to be the name of a particular drink rather than as an identification of source. Because of the renown of the local "Bushwacker" drink, respondent decided to incorporate the name into the festival that it created in consultation with other establishments on the Pensacola Beach in 1988 to promote the local businesses on the beach.

Q: And describe for me what went on in 1988.

A: We hired an advertising agency, Cooper Yates, to promote a festival for us on the boardwalk. We had a big contest of who made the best Bushwacker on the beach and all bars and people that served the Bushwacker competed in

that contest. And we had music, and that was the starting of the Bushwacker Festivals.

Guerra depo. at 32.

From the beginning, it was contemplated that the festival would be held the first week of August. *Id.* at 38. This was arranged between respondent and other local business leaders who decided that since August was a slow month on the beach, they should "try to promote bringing people to the beach," and so "we said we would take the first weekend in August." (*Guerra depo. at 59*).

With the testimony and evidence provided, we find that respondent has, indeed used the mark continuously in connection with a music festival since 1988.

Q: Is there a difference in the events, are they two different events, between Bushwacker Music Festival and Bushwacker Beach Weekend?

A: It's the same event.

Guerra depo. at 44.

Q: Would it be fair to say that the three indications, names, Bushwacker Music Festival, Bushwacker Beach Weekend, and Bushwacker Fest, all three of them kind of indicate an event at the beach related to the Bushwacker?

A: To the Bushwacker Music Festival, yes.

Id. at 49-50.

Accordingly, we find that petitioner has not, and cannot establish priority via a showing regarding its own festival since it is one and the same as the festival held by respondent at the same time in essentially the same

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location. Additionally, we find that petitioner does not purport to have started its festival earlier than respondent, but admits that respondent started a festival which has been held "the first week of August" since 1988, and petitioner simply claims to have been tagging on its own musical activities at the same time in its own nearby bar. (Campbell depo. at 65, Ex. 1) ("It's for the same weekend as Bushwacker Festival runs. I mean, it's for the same weekend."). Not showing an earlier use date than respondent, petitioner has failed to establish priority.

We also find that petitioner has acquiesced to the use of the "BUSHWACKER" term by respondent in using it concurrently over a period of decades without complaint until the filing of this action in 2009.

Q: Have you ever filed any complaint against anybody or made a complaint - not filed. Have you ever made a complaint or voiced a complaint about anybody for a Bushwacker Festival?

A: As far as a complaint against someone else having a festival?

Q: Yes, ma'am.

Mr. Beasley: Other than the present lawsuit.

Mr. Shaffer: Yes. Other than this cancellation proceeding, which was for the record filed, I believe, 28, October, 2009.

The witness: I would never have had a problem with anything across the street if June had not called me and said that we couldn't have Bushwacker Weekend.

Campbell depo at 49.

There is no question that petitioner was well aware of respondent's use of the BUSHWACKER mark at all times relevant to this case. Both parties' establishments are located in close proximity on Pensacola beach and for many years they have both participated in or sponsored activities using the BUSHWACKER mark during the first week of August. We conclude that petitioner's continuing activities—without any protest regarding respondent's notorious use of the mark—reasonably led respondent to conclude that petitioner had no objection to respondent's use of the mark. *Christian Broad. Network Inc. v. ABS-CBN Int'l*, 84 USPQ2d 1560, 1573 (TTAB 2007).

We find that petitioner has not established prior rights in the pleaded marks and therefore cannot prove likelihood of confusion. We also find that petitioner has acquiesced to respondent's use of the BUSHWACKER mark for the registered services.

Decision: The petitioner for cancellation is denied.