UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

COLLOPY/BUTLER

Mailed: June 19, 2013

Cancellation No. 92056705

/r/gaymers subreddit

v.

Chris Vizzini

By the Board:

Respondent is the owner of a registration for the mark GAYMER for "computer services, namely, creating an online community for registered users to participate in competitions, showcase their skills, get feedback from their peers, form virtual communities, engage in social networking and improve their talent; computer services, namely, hosting and maintaining an online website for others to discuss, receive, and disseminate information concerning video games; computer services, namely, hosting on-line web facilities for others for organizing and conducting online meetings, gatherings, and interactive discussions."[1]

Petitioner avers that it is an unincorporated association of individuals who subscribe to and participate in the Reddit,

[1] Registration No. 3400949 issued on March 25, 2008, claiming a date of first use anywhere and a date of first use in commerce of May 26, 2003.

Inc. (hereinafter also "Reddit") online forum as a subgroup known as a "subreddit" located at http://www.reddit.com/r/gaymers. Petitioner alleges that it uses the term "gaymers" to describe its subreddit forum and participants therein.

Petitioner seeks to cancel respondent's registration for the term GAYMER. As grounds for cancellation, petitioner alleges that the term GAYMER is a generic term for "a member of the LGBT [lesbian, gay, bisexual, and transgendered] community who has an interest in video games and the online video game community;" that petitioner and others are using the term GAYMER in a descriptive or generic manner; and that the word GAYMER is merely descriptive of registrant's services within the meaning of Trademark Act § 2(e)(1). Petitioner further claims that it will be damaged by continued registration of the term GAYMER because it creates a presumption that the term is distinctive of registrant's services and that registrant enjoys the exclusive right to use the term GAYMER in association with such services.

This case now comes up on respondent's fully briefed motion, filed March 1, 2013, to dismiss the petition to cancel for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6).[2]

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[2] Respondent's application, filed March 7, 2013, for a leave of absence is noted. No action is required as the schedule was not affected.

ARGUMENTS

In support of his motion,[3] respondent argues that petitioner lacks standing; that petitioner has not alleged a reasonable basis for belief that it would be damaged by the continued registration of the mark; and that petitioner fails to state sufficiently claims that the mark is generic or merely descriptive. More specifically, respondent argues that petitioner has no real interest in the proceeding because participation in Reddit's services by a subreddit does not confer any right to use or interest in Reddit's content; that the organization and title of petitioner's "online community" belongs to Reddit, not to petitioner; that, as a group of users of Reddit's services, petitioner is not the owner of, and cannot have a real interest in, "subreddit titles"; and that Reddit is actually the real party-in-interest. Respondent argues that petitioner did not establish "damage" for the purposes of standing because petitioner did not assert either likelihood of confusion, a trademark application that was rejected due to registrant's mark, or that its marks would be refused due to registrant's mark. Registrant further argues that petitioner fails to state a claim that the registered mark is generic or merely descriptive because,

[3] In his motion to dismiss, respondent asks the Board to take judicial notice of numerous exhibits of purportedly adjudicative facts. The Board declines to do so. In a motion to dismiss, the Board need only look at whether petitioner sufficiently pled the elements of a petition to cancel, not at the facts of the case. Moreover, because respondent has not indicated it served its initial disclosures, the Board will not consider respondent's motion as one for summary judgment. See TBMP § 503.04 (3d ed. rev. 2012).

even if petitioner's allegations that there is generic use of the term GAYMER, petitioner mischaracterizes registrant's services as targeting the gay gaming community rather than gamers in general. Registrant contends that his mark is a "distinctive, alternative spelling of 'gamer'" that targets the general gaming community rather than a purposeful misspelling that targets the gay gaming community.

In response, petitioner contends that it has alleged its belief that it is damaged by respondent's registration. Petitioner explains that, although it uses Reddit's platform to distribute its messages and coordinate its activities, it is petitioner that offers the activities to its membership, not Reddit. Thus, petitioner indicates it is the real party-in-interest. Petitioner also argues that it has sufficiently alleged claims that respondent's mark is generic and merely descriptive because it has averred the genus of goods and services at issue as well as how the term is understood by the relevant public, and that nothing more is required at the pleading stage.

In reply, respondent argues that petitioner has no standing because it has not proven any kind of commercial interest in the term GAYMERS; that Reddit is the service provider; that "subreddits" are controlled by Reddit; and that Reddit is the real party-in-interest. Registrant further argues that even if plaintiff's allegations are true, they do not demonstrate that the

registration at issue is or has the potential to be inconsistent with the petitioner's ability to use the mark.

DISCUSSION

In order to withstand a motion to dismiss for failure to state a claim upon which relief can be granted, a pleading need only allege such facts, as would, if proved, establish that the plaintiff is entitled to the relief sought; that is, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for cancelling a registration. See *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA). Specifically, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1927, 1949-50 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). For purposes of determining a motion to dismiss for failure to state a claim upon which relief can be granted, all of the plaintiff's well-pleaded allegations must be accepted as true, and the complaint must be construed in the light most favorable to the plaintiff. See *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038 (Fed. Cir. 1993); Fed. R. Civ. P. 12(b)(6); and TBMP § 503.02 (3d ed. 201).

1. Standing and Damage

Contrary to respondent's position, petitioner need not prove its standing at the pleading stage. Instead, petitioner need only allege such facts which, if proven, would establish its standing. Where a petitioner claims that the registered mark at issue is merely descriptive or generic, it need only allege that the registration is inconsistent with petitioner's equal right to use the term on similar goods or services. See *Yard-Man, Inc. v. Getz Exterminators, Inc.*, 157 USPQ 100 (TTAB 1968). Petitioner has done so here. Petitioner has asserted that it is "an association of gaymers" that uses the term "gaymers" to describe its services.

Petitioner's pleadings do not contradict its position that it is the proper party as plaintiff. Petitioner asserted that, shortly after Reddit received a cease-and-desist letter from respondent, Reddit provided the letter to petitioner. This suggests an independence in the relationship between Reddit and its subreddits. In this case, petitioner has alleged that it is a competitor of registrant's, that it has a need to use the registered term GAYMER, and that it will be damaged by continued registration of the term GAYMER. Therefore, petitioner has sufficiently alleged facts which, if proven, would establish standing in this cancellation proceeding.

Additionally, registrant seems to be under the mistaken impression that actual damage must be proved in order to have standing to bring a petition to cancel. This is not the case. "The focus must be on whether petitioner has shown a reasonable basis for its belief in damage, and there is no requirement that any actual 'damage' be pled or proved to establish standing or even to prevail in a cancellation proceeding ... [in] a case involving assertion of an equal right to use a term, the question is whether the presumptions flowing from the respondent's registration are damaging to petitioner's right to legal and continuous use of that term. Competitors in the same field or industry as the respondent have a personal state in the resolution of the question." *Montecash LLC v. Anzar Enterprises, Inc.*, 95 USPQ2d 1060 (TTAB 2010). See also *Duramax Marine LLC v. R.W. Fernstrum & Co.*, 80 USPQ2d 1780 (TTAB 2006); *M-5 Steel Manufacturing v. O'Hagin's Inc.* 61 USPQ2d 1086, 1094 (TTAB 2001); and *Plyboo America, Inc. v. Smith & Fong Co.*, 51 USPQ2d 1633, 1634 (TTAB 1999).

2. The Claims

At Count IV, petitioner has alleged that the registered mark GAYMERS is the generic term for respondent's services. The allegations sufficiently plead a claim of genericness.

At Count V, petitioner has alleged that the registered mark is merely descriptive, and has not acquired distinctiveness, in

that the term immediately conveys to the relevant public the intended consumers. The allegations are sufficiently plead within the meaning of Trademark Act § 2(e)(1).

Accordingly, registrant's motion to dismiss, based on its claim that that the petitioner lacks standing, failed to allege sufficient damage and failed to sufficiently plead its claims is denied.

RESET SCHEDULE

Proceedings are now resumed and dates are reset as follows:

Time to Answer	**7/24/2013**
Deadline for Discovery Conference	**8/23/2013**
Discovery Opens	**8/23/2013**
Initial Disclosures Due	**9/22/2013**
Expert Disclosures Due	**1/20/2014**
Discovery Closes	**2/19/2014**
Plaintiff's Pretrial Disclosures	**4/5/2014**
Plaintiff's 30-day Trial Period Ends	**5/20/2014**
Defendant's Pretrial Disclosures	**6/4/2014**
Defendant's 30-day Trial Period Ends	**7/19/2014**
Plaintiff's Rebuttal Disclosures	**8/3/2014**
Plaintiff's 15-day Rebuttal Period Ends	**9/2/2014**

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served 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 Rules 2.123(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

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