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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91239337
Party	Plaintiff Rotary Club of Houston, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 87584637.

Rotary Club of Houston, Inc.

Opposer,

v.

Lombardi Foundation Inc.

Applicant.

Opposition No. 91239337

**REPLY IN SUPPORT OF
OPPOSER’S MOTION FOR SUMMARY JUDGMENT**

Applicant Lombardi Foundation Inc.’s (“Applicant”) effort to defeat Opposer Rotary Club of Houston, Inc.’s (“Rotary Houston”) Motion for Summary Judgment (the “Motion”) is premised almost entirely on the argument that Rotary Houston is not, and never was, the owner of the mark LOMBARDI AWARD. Rather, according to Applicant, Rotary Houston merely licensed that mark from the Lombardi family¹ as the result of an allegedly revocable consent from Marie Lombardi (“Mrs. Lombardi”) to use her late husband’s surname. But, as will be shown below, that argument cannot be sustained for at least the following reasons: First, there is no evidence that the Lombardi family had any proprietary rights, such as a right of publicity, in the name “Lombardi” when Rotary Houston commenced use of the mark. Second, the evidence submitted by Applicant in Applicant’s own Opposition to Opposer’s Motion for Summary Judgment (the “Response”) affirmatively proves that the Lombardi family had neither trademark rights in the mark LOMBARDI AWARD nor other proprietary rights in the name “Lombardi.”

¹ Applicant has submitted no evidence that any member of the Lombardi family owns or controls Applicant.

Moreover, the exact same premise for Applicant's argument that Rotary Houston had only a *license* to use the mark by way of Mrs. Lombardi's consent is the very same premise by which Applicant claims *ownership* of the mark. That necessarily means either that (i) Applicant's argument that Rotary Houston does not have priority must be rejected (which is the correct answer) or (ii) its argument that it owns the mark must be rejected. For similar reasons, Applicant's claim that there are issues of fact as to whether it was using the mark at the time Application Serial No. 87584637 (the "Application") was filed are meritless. As such, there are no issues of material fact that prevent summary judgment in Rotary Houston's favor.

I. There Is No Evidence that Any Member of the Lombardi Family Owned Either Any Enforceable Rights in the Name "Lombardi" or the Trademark LOMBARDI AWARD at the Time of Rotary Houston's First Use.

In the Response, Applicant asks the Board to assume (1) that the Lombardi family was the first owner of enforceable rights in the name "Lombardi" and / or the trademark LOMBARDI AWARD for an award ceremony benefitting cancer research and (2) that Rotary Houston entered into a license with the Lombardi family to use the "Lombardi" name and / or the trademark LOMBARDI AWARD for an award benefitting cancer research.² The evidence of record contradicts these assumptions.

To begin with, Applicant fails to submit any evidence that the Lombardi family owned any enforceable rights in the name "Lombardi" at the time that Rotary Houston sought Mrs. Lombardi's consent to use her late husband's surname in connection with an annual award to the best college football lineman for the benefit of cancer research. Such rights would need to be

² Applicant never argues that it was literally the first user of the mark but instead that Rotary Houston's use of the mark inures to Applicant's benefit by way of the Lombardi family's consent. As noted in the Motion, Applicant did not exist when the mark was first used in the early 1970s because Applicant formed as a corporation in 2017, decades after the mark's first use. 23 TTABVUE 26. As such, Applicant cannot literally be the first user.

based on either prior trademark use or on a recognized proprietary interest, such as a state-law-based post-mortem right of publicity. The Response is utterly devoid of any evidence of the latter.³

As to whether the Lombardi family owned any *trademark* rights in LOMBARDI or LOMBARDI AWARD at the time that Rotary Houston sought Mrs. Lombardi's consent to use her late husband's surname, the evidence submitted with the Response affirmatively proves that it did not. In the Affidavit of Vince Lombardi Jr., attached to the Response, Vince Lombardi Jr. states that he is "the son of ... Vince Lombardi," that his sister and he "comprise the Estate of Vince Lombardi" and that the "Estate first began actively protecting and licensing the intellectual property rights of [Vince Lombardi] in the late 1980's." *Affidavit of Vince Lombardi Jr.*, ¶¶ 2-4, 29 TTABVue 17. This statement, by the representative of the Lombardi Estate, is a conclusive admission that the Estate did not actively protect or license the mark LOMBARDI – let alone the mark LOMBARDI AWARD – prior to Rotary Houston's first use of that mark, which began no later than 1971. In other words, the undisputed evidence is that Rotary Houston has priority in the mark LOMBARDI AWARD and, contrary to Applicant's argument, Rotary Houston's rights do not depend on any trademark rights held by the Lombardi family because they had none at the time that Rotary Houston first began to use the mark.⁴

Seeking to overcome the indisputable evidence that the Lombardi family had no trademark or other enforceable rights in the name "Lombardi" or the mark LOMBARDI AWARD at the time

³ Applicant's failure to provide any evidence that the Lombardi family had any proprietary rights in the name "Lombardi" when Rotary Houston commenced use of the mark is a crucial difference from cases like *Butkus v. Downtown Athletic Club of Orlando, Inc.*, 2008 U.S. Dist. LEXIS 49828 (Central Dist. Cal. 2008), which Applicant cites in the Response. Unlike here, the plaintiff in *Butkus* was alive when he gave the defendant permission to use his name, which meant that the plaintiff had actual enforceable publicity rights under both California common law and California Civil Code section 3344, which complemented California common law at the time. *See Id.* at *20-22.

⁴ Because there is no evidence that the Lombardi family had any trademark rights or other enforceable rights in the name "Lombardi," let alone the mark LOMBARDI AWARD, at the time of Rotary Houston's first use of that mark, *Moreno v. Pro Boxing Supplies, Inc.*, 124 U.S.P.Q.2d 1028 (T.T.A.B. 2017), on which Applicant relies, is irrelevant. Rotary Houston has always owned the mark LOMBARDI AWARD and has never been a licensee.

Rotary Houston first used the mark LOMBARDI AWARD, Applicant argues that Mrs. Lombardi's consent to Rotary Houston to use the "Lombardi" surname was actually a license, and that this so-called license could be revoked at any time. *Response*, p. 1, 29 TTABVUE 3 ("Marie Lombardi's telegram is a license and [Rotary Houston] operated under that license."); *Id.*, p. 9, 29 TTABVUE 11 ("The 'permission' provided by Marie Lombardi was 'revocable.'"). As a matter of simple logic, however, this argument fails because one must first have an enforceable property right in order to license that right; the fact that Rotary Houston sought Mrs. Lombardi's consent as a courtesy to the widow of Vince Lombardi did not create any such rights or vest them in the Lombardi family. Tellingly, Applicant cites no legal authority to the contrary.

Even assuming that Mrs. Lombardi's consent constituted a license of some undefined intellectual property right, it would not have been revocable at will because Rotary Houston indisputably provided consideration for that consent.⁵ An intellectual property license is not terminable at will when consideration is exchanged. *See Lulirama Ltd., Inc. v. Access Broadcast Servs.*, 44 U.S.P.Q.2d 1731 (Fifth Cir. 1997) (non-exclusive intellectual property license for indefinite term not revocable when supported by consideration); *see also Brosious v. Pepsi-Cola Co.*, 69 U.S.P.Q. 284 (3rd Cir. 1946); *Alonso v. Parfet*, 325 S.E.2d 152 (Ga. 1985) in **Appendix A**. Such consideration was indisputably provided here through Rotary Houston's promise to hold an award ceremony and to donate the proceeds from that ceremony to cancer research, not to mention the undisputed evidence that Rotary Houston in fact did so. *See, e.g., Specimen of Use Evidencing Rotary Houston's Presentation of the LOMBARDI AWARD Since the Early 1970s*, 23

⁵ Even if Mrs. Lombardi's telegram were a license, Vince Lombardi Jr.'s statement is an admission that the Lombardi Estate was not policing such a license until the 1980s, thereby rendering it naked and causing the abandonment of any trademark rights that the Estate may have had. *See In re Derek A. Lopez v. Ted Wong JKD, LLC* (Opposition No. 91216538) (TTAB 2019) ("Abandonment of a mark via naked licensing is a viable ground for opposition.").

TTABVUE 36; *October 26, 2017 Houston Chronicle Article Referencing Rotary Houston's Annual Organization of the Award Since the Early 1970s*, 23 TTABVUE 77.

In short, the undisputed evidence shows that Rotary Houston was the first entity to acquire trademark or proprietary rights in the mark LOMBARDI AWARD, and that it did so before either Applicant or any member of the Lombardi family acquired rights in the mark LOMBARDI or LOMBARDI AWARD.⁶ Because Applicant now seeks to register and use the mark LOMBARDI AWARD in connection with an identical award ceremony benefitting cancer research, consumer confusion is inevitable and the Board should grant the Motion on this ground.

II. The Evidence Is Undisputed that Applicant Does Not Own the Mark LOMBARDI AWARD.

Citing no evidence, Applicant argues that it owns the mark LOMBARDI AWARD by virtue of obtaining a license from the Lombardi family to use the name “Lombardi.” This argument contradicts clear evidence to the contrary in the record. Moreover, if Applicant’s tortured logic underlying this argument were correct, it would confirm that *Rotary Houston*, not Applicant, owns the mark.

A. Applicant Cannot Contradict Its Admissions that It Does Not Own the Mark.

The Motion cites three separate instances in which Applicant asserted that the Lombardi family, not Applicant, owns the mark. For instance, Applicant’s Second Supplemental Initial Disclosure Statement identifies several witnesses who allegedly have “knowledge regarding the

⁶ Applicant also argues that Rotary Houston has abandoned the LOMBARDI AWARD mark. This argument directly contradicts evidence showing Rotary Houston’s continued use of the mark. *See, e.g.*, 23 TTABVUE 50-54. Moreover, Applicant does not even make a case for *prima facie* abandonment of rights. John Lombardi’s letter was sent less than three years ago, on August 4, 2017. 23 TTABVUE 24. Additionally, Applicant’s statement that “[t]he 2017 RCOH LOMBARDI AWARD presentation was canceled” is misleading, as that presentation actually was to take place in 2018, not 2017. In fact, Rotary Houston did present an award in 2017. Regardless, Rotary Houston continues to have the intent to host the award ceremony that it created, and Applicant knows this, which is why it does not once mention Rotary Houston’s intent in its Response.

Lombardi Family ownership of the LOMBARDI AWARD trademark” 23 TTABVUE 65. Likewise, Rotary Houston’s Interrogatory No. 41 asks Applicant, among other things, to provide “a detailed explanation of how Applicant used the Mark [LOMBARDI AWARD] for ‘five years immediately before the’ application filing date...” *Opposer’s Interrogatory No. 41*, 23 TTABVUE 30. In response, Applicant unambiguously stated: “[T]he Lombardi Foundation is the exclusive licensee of a mark owned by the Lombardi Family.” *Applicant’s Response To Opposer’s Interrogatory No. 41*, 23 TTABVUE 30. Applicant made the same admission in the deposition of its chairman. *Deposition of Richard Slemaker*, p. 36, 23 TTABVUE 59.

Applicant cannot contradict its prior admissions that it does not own the mark by arguing in its Response that it licenses the name “Lombardi” at the same time that it owns the mark LOMBARDI AWARD. *See Del. Valley Floral Group, Inc. v. Shaw Rose Nets, LLC*, 94 U.S.P.Q.2d 1064 (Fed. Cir. 2010) (“When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.”).

B. The Tortured Logic Underlying Applicant’s Argument that It Owns the Mark Cannot Be Reconciled with Its Argument that Rotary Houston Does Not Have Priority.

Without any factual or legal support, Applicant argues that Rotary Houston was a mere licensee of the mark LOMBARDI AWARD because the Lombardi family gave Rotary Houston revocable permission to use the name “Lombardi,” notwithstanding that Rotary Houston was the first entity to use LOMBARDI AWARD as a trademark in connection with an award benefitting cancer research. Remarkably, Applicant also argues that *the same alleged license of the name “Lombardi”* is the basis for Applicant’s alleged *ownership* of the mark LOMBARDI AWARD.

Applicant cannot have it both ways. Either Rotary Houston owns the mark through use for the better part of 50 years after having sought Mrs. Lombardi's consent (which, in fact, is the correct answer) or Applicant's permission from the Lombardi family to organize an award under the mark LOMBARDI AWARD is conclusive evidence that Applicant does not own the mark. In other words, based on Applicant's "logic," its alleged license to use the name "Lombardi" can give it no more than a license to *use* (not own) the mark LOMBARDI AWARD.

III. Applicant Has Produced No Evidence that It Used the Mark Prior To Filing the Application.

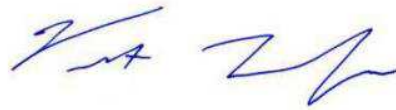
The undisputed evidence is that Applicant was not using the mark before the filing date of the Application. The only evidence of record regarding Applicant's use of the mark LOMBARDI AWARD as of the Application filing date of August 25, 2017 is the specimen submitted with the Application, which shows *Rotary Houston's* use of the mark, not Applicant's.⁷ Further, Applicant's argument that there is a factual issue as to whether Rotary Houston's use inures to Applicant's benefit by way of the Lombardi family's consent is both incorrect and legally unfounded. Whether that use would inure to the benefit of Applicant is a legal issue, not a factual issue, and Applicant has failed to cite any legal authority suggesting that this is the case. To the contrary, *Moreno v. Pro Boxing Supplies*, 124 U.S.P.Q.2d 1028, a case cited by Applicant, squarely holds that a licensee cannot rely on its licensor's use to prove priority. If a licensee cannot rely on its licensor's use to prove the licensee's priority, it surely cannot rely on its licensor's *alleged prior licensee's* use to do so.

⁷ Applicant admits this. *Applicant's Opposition*, 29 TTABVUE 14 ("The trademark attorney inadvertently filed specimens used by RCHO.").

CONCLUSION

There are no fact disputes on the issues of (1) Rotary Houston's priority ownership of a mark identical to the applied-for mark, (2) Applicant's non-ownership of the applied-for mark, and (3) Applicant's non-use of the applied-for mark prior to the Application filing date. Consequently, for the foregoing reasons, the Board should grant Rotary Houston's Motion.

Dated: January 26, 2020



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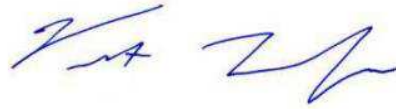
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CERTIFICATE OF SERVICE

The foregoing REPLY IN SUPPORT OF OPPOSER'S MOTION FOR SUMMARY JUDGMENT was served on counsel for Applicant by electronic mail at the following email address:

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Appendix A



Neutral

As of: January 25, 2020 2:32 PM Z

Alonso v. Parfet

Supreme Court of Georgia

January 30, 1985, Decided

No. 41264

Reporter

253 Ga. 749 *; 325 S.E.2d 152 **; 1985 Ga. LEXIS 572 ***; 52 A.L.R.4th 151

ALONSO v. PARFET et al.

Prior History: [***1] Certiorari to the Court of Appeals of Georgia -- [171 Ga. App. 74](#).

Disposition: *Judgment reversed.*

Core Terms

appropriation, documents, license, expenditure of funds, irrevocable license, unsanctioned, Laboratory, surname, summary judgment motion, trial court's ruling, implied license, reasonable time, license to use, trade name, irrevocable, interviews, sanctioned, terminate, likeness, damages, halt, lab

Case Summary

Procedural Posture

Appellant doctor sought review of a decision of the Court of Appeals of Georgia, which affirmed a trial court ruling awarding summary judgment to appellees, laboratory and principal, in the doctor's action claiming damages for the unsanctioned appropriation of his name.

Overview

The laboratory continued to use the doctor's name on forms and documents after terminating his employment as a laboratory director. The laboratory and principal argued on appeal that the use of the doctor's name was sanctioned. The court reversed the judgment. The court determined that the evidence did not establish an express license to use the doctor's name beyond the term of his employment. The court held that absent express agreement, the license granted or implied and made irrevocable by the expenditure of funds was the license to use the employee's name in connection with his employment, and that such a license would normally have terminated along with the employment, although the employer would have had a reasonable time to halt the use of the name. The court held that the doctor granted the laboratory and principal the right to use his name in conjunction with his employment. The court determined that the evidence established a question of fact as to whether the laboratory and principal halted the use of the doctor's name within a reasonable time after his dismissal, and that the court of appeals erred in affirming the ruling of the trial court.

Outcome

The court reversed the judgment of the court of appeals affirming the award of summary judgment to the laboratory and principal.

LexisNexis® Headnotes

Torts > ... > Invasion of
Privacy > Appropriation > General Overview

[HN1](#) **Invasion of Privacy, Appropriation**

One who makes an unsanctioned appropriation of another's name or likeness for his own benefit may be liable to that person in tort.

Business & Corporate
Compliance > ... > Trademark
Law > Conveyances > Licenses

Trademark Law > Special Marks > Trade
Names > General Overview

Civil Procedure > ... > Privileged
Communications > Work Product
Doctrine > General Overview

Torts > ... > Invasion of
Privacy > Appropriation > General Overview

Trademark Law > ... > Particular Subject
Matter > Names > Personal Names

[HN2](#) **Conveyances, Licenses**

Express consent to the use of an employee's surname in a trade name followed by expenditures in the use of the surname, will establish an irrevocable license to use the surname in the trade name. An employer gains an irrevocable license to use an employee's work product when the materials in question are collected at a time when the employee is in the employ of the employer, and the employer incurs expenses in reliance upon the implied license to use the work.

Torts > ... > Invasion of
Privacy > Appropriation > General Overview

[HN3](#) **Invasion of Privacy, Appropriation**

While the expenditure of funds may convert an express or an implied license into an irrevocable license, the expenditure of funds cannot expand such a license beyond its original terms.

Business & Corporate Compliance > ... > Contracts
Law > Types of Contracts > Express Contracts

Labor & Employment Law > Wrongful
Termination > Breach of Contract > Express
Contracts

Labor & Employment Law > Wrongful
Termination > Breach of Contract > Implied
Contracts

Torts > ... > Invasion of
Privacy > Appropriation > General Overview

[HN4](#) **Types of Contracts, Express Contracts**

Absent express agreement, the license granted or implied and made irrevocable by the expenditure of funds is the license to use the employee's name in connection with his employment. Such a license will normally terminate along with the employment, although the employer will have a reasonable time to halt the use of the employee's name.

Civil Procedure > Special Proceedings > Eminent
Domain Proceedings > Jury Trials

Real Property Law > Inverse
Condemnation > Remedies

Civil Procedure > Remedies > Damages > Punitive
Damages

Civil Procedure > Special Proceedings > Eminent
Domain Proceedings > General Overview

Torts > ... > Invasion of
Privacy > Appropriation > General Overview

[HN5](#) **Eminent Domain Proceedings, Jury Trials**

The measure of damages in an unsanctioned appropriation case is the value of the benefit derived by the person appropriating the other's name or likeness. To discourage the "inverse condemnation" of a name, the jury may award punitive damages when it finds such

an appropriation, and it finds that the acts of the defendant have been of a character to import premeditation or knowledge and consciousness of the appropriation and its continuation.

Counsel: *Sutherland, Asbill & Brennan, John W. Bonds, Jr., Thomas A. Varlan*, for appellant.

Kilpatrick & Cody, Matthew H. Patton, for appellees.

Judges: Smith, Justice. All the Justices concur.

Opinion by: SMITH

Opinion

[*749] [**153] Appellant, Dr. Kenneth Alonso, sued appellees to recover for the unsanctioned appropriation of his name. The trial court granted appellees' motion for summary judgment, and the Court of Appeals affirmed the trial court's ruling. [Alonso v. Parfet, 171 Ga. App. 74 \(318 SE2d 696\) \(1984\)](#). We granted certiorari to determine whether appellees are entitled to a verdict as a matter of law. We reverse.

Appellant worked as a laboratory director for appellee Laboratory Procedures South, Inc. (LPS). His job was terminated in March 1979. Although appellant no longer worked for LPS, his name continued to appear along with the title "Laboratory Director" on a number of forms and documents that LPS continued to use. Appellant protested the use of his name by LPS at least twice over a period of months before his name stopped appearing on LPS's reports [***2] and documents. A more detailed account of the facts in this case may be found in the Court of Appeals' opinion. [Alonso v. Parfet, supra](#).

The courts in this state have long recognized that [HN1](#) [↑] one who makes an unsanctioned appropriation

of another's name or likeness for his own benefit may be liable to that person in tort. [Cabaniss v. Hipsley, 114 Ga. App. 367 \(151 SE2d 496\) \(1966\)](#). Here, appellees listed appellant's name on various forms and documents. The perception created by the use of appellant's name, that [**154] this medical doctor was in charge of the general operation of the lab and of some specific tests performed in the lab, could establish a benefit for appellees.

The crucial question here, as the Court of Appeals recognized, is whether the use of appellant's name was sanctioned. In answering this question, we must construe the evidence in favor of the party opposing the motion for summary judgment, here the appellant. [Tri-Cities Hosp. Auth. v. Sheats, 247 Ga. 713 \(279 SE2d 210\) \(1981\)](#).

In [Tanner-Brice Co. v. Sims, 174 Ga. 13 \(161 SE 819\) \(1931\)](#), we held that [HN2](#) [↑] express consent to the use of an employee's surname in a trade name followed by expenditures [***3] in the use of the surname, will establish an irrevocable license to use the surname in the trade name. In [Buchanan v. Foxfire Fund, 151 Ga. App. 90, 91 \(258 SE2d 751\) \(1979\)](#), the Court of Appeals held that an employer gains an irrevocable license to use an employee's work product when the materials in question "[are] collected at a time when [the employee is] in the employ of [the employer]," and the employer incurs expenses in reliance upon the implied license to use the work. [City Council of Augusta v. \[*750\] Burum, 93 Ga. 68 \(19 SE 820\) \(1893\)](#), established limits on "irrevocable" licenses.

The evidence in this case, construed in favor of appellant, does not establish an express license to use appellant's name beyond the term of his employment. Appellant's claim does not involve the use of his name in connection with work performed while he was employed by LPS. Appellees admit that they used appellant's name on various documents unrelated to his employment even after he complained of that use.

[HN3](#) [↑] While the expenditure of funds may convert an express or an implied license into an irrevocable license, the expenditure of funds cannot expand such a license beyond [***4] its original terms. As the Court of Appeals noted, the use of appellant's name on LPS's business documents arose "as a part of [appellant's] employment." In this situation, we hold that [HN4](#) [↑] absent express agreement, the license granted or implied and made irrevocable by the expenditure of funds is the license to use the employee's name in

connection with his employment.¹ Such a license will normally terminate along with the employment, although the employer will have a reasonable time to halt the use of the employee's name.

[HNS](#) [↑] The measure of damages in an unsanctioned appropriation case such as this is the value of the benefit derived [***5] by the person appropriating the other's name or likeness. [Cabaniss, supra](#); [Martin Luther King, Jr. Center v. American Heritage Products, 250 Ga. 135, 142-43 \(296 SE2d 697\) \(1982\)](#). To discourage the "inverse condemnation" of a name, the jury may award punitive damages when it finds such an appropriation, and it finds "that the acts of the defendant have been of a character to import premeditation or knowledge and consciousness of the appropriation and its continuation." [Cabaniss, supra at 386, 387](#).

We thus hold that appellant granted appellees the right to use his name in conjunction with his employment. The evidence establishes a question of fact as to whether appellees halted the use of appellant's name within a reasonable time after his dismissal. The Court of Appeals erred in affirming the ruling of the trial court.

Judgment reversed.

End of Document

¹For example, Foxfire magazine could not have used preprinted forms bearing Buchanan's name to attribute interviews, conducted by someone other than Buchanan after Buchanan had left Foxfire, to Buchanan. The court there only sanctioned the use of Buchanan's name in connection with interviews that he had performed while working for Foxfire. [Buchanan v. Foxfire Fund, supra](#).