

This Opinion is Not a  
Precedent of the TTAB

Mailed: June 29, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*Rugnur, LLC*  
*v.*  
*Hills Point Industries, LLC*

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Opposition No. 91243873  
Serial Nos. 87853969 and 87872352

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Vladimir T. Sirkin of Vladimir T. Sirkin & Associates  
for Rugnur, LLC.

David S. Jacobson of Gordon & Jacobson PC  
for Hills Point Industries, LLC.

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Before Cataldo, Wolfson, and Lebow, Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Hills Point Industries, LLC (“Applicant”) seeks registration on the Principal Register of the standard character mark GRIPMAX for:<sup>1</sup>

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<sup>1</sup> Application Serial No. 87853969 was filed on March 28, 2018 based on Applicant’s alleged intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The application covers all listed goods except for “Fitted furniture covers” in Class

“Incontinence pads” in International Class 5;

“Drawer liners” in International Class 16;

“Animal carriers; Luggage inserts, namely, packing cubes; Pet products, namely, pet restraining devices consisting of leashes, collars, harnesses, restraining straps, and leashes with locking devices” in International Class 18;

“Bath pillows; Beds for household pets; “Fitted furniture covers” in International Class 20;

“Cutting boards; Scoops for the disposal of pet waste” in International Class 21;

“Mattress pads; Unfitted fabric furniture covers; Bed pads; Unfitted furniture covers not of paper” in International Class 24; and

“Anti-fatigue floor mat; Bath mats; Bathroom rugs; Carpet underlays, namely, rug grippers; Door mats; Floor mats; Pet litter pan floor mats; Rugs; Shower mats; Floor mats in the nature of non-slip pads for use under apparatus to prevent slippage; Underlays for rugs” in International Class 27.

By its Notice of Opposition, Rugnur, LLC (“Opposer”) opposes registration based on alleged priority and likelihood of confusion under Section 2(d) of the Trademark

Act, 15 U.S.C. § 1052(d), with Opposer’s composite mark



, which Opposer alleges it has used on or in connection with the following goods, and for which it asserts it owns a pending application:<sup>2</sup>

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20; these goods are the subject of Application Serial No. 87872352, filed April 11, 2018 based on alleged intent to use the mark in commerce. Both marks were published on July 31, 2018.

<sup>2</sup> Trademark application Serial No. 87908661, filed May 4, 2018. The application includes a claim to the colors white and black, and the following description of the mark: “The mark consists of the white letter ‘GripMAX’ having black contour, whereas first letter ‘G’ and last three letters ‘MAX’ are in the upper case, and letters ‘rip’ are in the lower case.”

Anti-fatigue floor mat; Bath mats; Bathroom rugs; Carpet underlay; Carpet underlays; Carpet underlays, namely, rug grippers; Rugs; Underlay for carpets; Bathroom mats; Carpets, rugs, mats and matting, linoleum for covering existing floors; Door mats; Door mats of textile; Fabric bath mats; Floor mats; Floor mats in the nature of non-slip pads for use under apparatus to prevent slippage; Non slip mats for baths; Non-slip mats for showers; Non-slip bathtub mats; Non-slip shower mats; Pet feeding mats; Pet litter pan floor mats; Plastic bath mats; Rubber bath mats; Rubber mats; Shower mats; Textile bath mats; Textile floor mats for use in the home; Underlays for rugs

in International Class 27. Opposer alleges that its application has been suspended pending disposition of Applicant's applications, which were cited as possible bars to registration. 1 TTABVUE 5.

In its Answer, Applicant admits that its mark "is confusingly similar to Opposer's Mark," that the marks "sound the same," that "Federal registration of Applicant's Mark and future use of Applicant's Mark in connection with Applicant's Goods is likely to cause confusion, deception, and mistake," and that Applicant's applications are "an impediment to Opposer's ability to federally register Opposer's Mark." 6 TTABVUE 5. Applicant did not admit the validity of Opposer's pleaded application, but asserted that Applicant "is without knowledge or information sufficient to form a belief as to whether [Opposer's] application was validly filed." 6 TTABVUE 3. Applicant further denied that Opposer has standing, and asserted additional affirmative defenses that were not pursued at trial and are considered waived. *See Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1422-23 n.7 (TTAB 2014) (finding affirmative defense not pursued at trial waived).

Both parties filed briefs. Neither party submitted evidence during their respective trial periods. Although the submission of evidence is optional for the party in the position of defendant, it is required of an opposer. *See* Trademark Rule 2.132(b), 37 C.F.R. § 2.132(b). Thus, the record consists only of the pleadings and, pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the opposed application.

Opposer mistakenly relies on its pleaded application to support its standing because it did not properly make the application of record in this proceeding. Unlike the file of the opposed application, which automatically becomes part of the record of an opposition proceeding under Trademark Rule 2.122(b), a pleaded application does not. 37 C.F.R. § 2.122(b). To make the application of record, Opposer could have filed, “during its testimony period, a copy of the application file, or of the portions which it wishes to introduce, together with a notice of reliance thereon specifying the application and indicating generally its relevance as well as associating the application with one or more issues in the case.” TRADEMARK BOARD MANUAL OF PROCEDURE (TBMP) § 704.03(b)(2) (June 2020). Opposer could also have introduced the application through witness testimony. *See WeaponX Performance Products Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1040 (TTAB 2018) (plaintiff’s pleaded pending application is not automatically of record, and may be introduced as evidence at trial by filing under notice of reliance a copy thereof showing current status and title, or through witness testimony about its status). Opposer did neither.

Notwithstanding this error, the Board will not take judicial notice of registrations or applications residing in the USPTO. *See, e.g., UMG Recordings, Inc. v. O’Rourke*,

92 USPQ2d 1042, 1046 (TTAB 2009) (“it is well settled that the Board does not take judicial notice of USPTO records”); *Demon Int’l LC v. Lynch*, 86 USPQ2d 1058, 1060 (TTAB 2008) (opposition dismissed where opposer failed to submit proper status and title copies of its pleaded registrations and thus failed to prove standing and priority).

Opposer asserts that it “has shown that it’s been using its Opposer’s Mark in commerce since as early as the summer of 2016.” However, Opposer presented no evidence in support of its assertion during its assigned testimony period. Even if Opposer’s application was in evidence, the date of use stated therein “is not evidence on behalf of [Opposer]; a date of use of a mark must be established by competent evidence.” 37 C.F.R. § 2.122(b)(2). The exhibits Opposer attached to its pleading purportedly showing Opposer’s use of its mark are also not evidence on behalf of Opposer because they were not properly introduced at trial. *See* Trademark Rule 2.122(c), 37 C.F.R. § 2.122(c) (“Except as provided in paragraph (d)(1) of this section,<sup>3</sup> an exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached, and must be identified and introduced in evidence as an exhibit during the period for the taking of testimony.”). Thus, there is no evidence of record to support Opposer’s allegation of use.

Given Opposer’s lack of evidence, it has failed to make the requisite showing of standing to proceed on its claim. An opposer must prove standing by showing a real interest in the outcome of the proceeding and a reasonable basis for believing that it would suffer damage if the mark is registered. *See* 15 U.S.C. § 1063; *Empresa Cubana*

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<sup>3</sup> This exception is inapplicable here.

*Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). Although a pleaded application that has been refused registration based on perceived likelihood of confusion with an applicant's involved mark may establish an opposer's standing where ownership of the application and its status has been demonstrated, here, Opposer failed to introduce its pleaded application during trial. Thus, it cannot rely on the application to prove its standing. *See, e.g., Lipton Inds., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) ("Thus, to have standing in this case, it would be sufficient that [plaintiff] prove that it filed an application and that a rejection was made because of [defendant's] registration."); *Spirits Int'l, B.V. v. S.S. Taris Zeytin Ve Zeytinyagi Tarim Satis Kooperatifleri Birligi*, 99 USPQ2d 1545, 1548 (TTAB 2011) (finding opposer proved standing by properly making a copy of its application of record by notice of reliance). Moreover, Opposer may not rely on the exhibits attached to its pleading in support of its standing allegation. Having introduced no evidence during its testimony period to show that it is the owner of its pleaded mark or that it used its mark prior to Applicant's constructive use date, Opposer has not demonstrated its standing.

Opposer's failure to prove standing by itself warrants dismissal of the opposition. *See Lumiere Prods., Inc. v. Int'l Tel. & Tel. Corp.*, 227 USPQ 892, 893 (TTAB 1985). However, even if Opposer had established its standing, there is no evidence to prove priority of use of its pleaded mark (a required element in a likelihood of confusion claim). Opposer therefore could not prevail on its claim of likelihood of confusion because the record includes no evidence that Opposer owns "a mark registered in the

Patent and Trademark Office, or a mark or trade name previously used in the United States.” 15 U.S.C. § 1052(d); *see also Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) (“The burden of proof rests with the [plaintiff] ... to produce sufficient evidence to support the ultimate conclusion of [priority of use] and likelihood of confusion.”). Because Opposer has failed to properly submit any evidence supporting its asserted claim of likelihood of confusion and has failed to prove any common law rights in its pleaded mark, Opposer has failed to demonstrate its standing or that it is entitled to any relief under its asserted claim of likelihood of confusion. Thus, Opposer’s asserted likelihood of confusion claim also must fail.

**Decision:** The opposition is dismissed.