

This Opinion is Not a  
Precedent of the TTAB

Mailed: March 1, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

—  
Trademark Trial and Appeal Board  
—

*Ibrahim M. Nasser*

*v.*

*Kevin A. Broten*  
—

Opposition No. 91246293  
—

Ibrahim M. Nasser, *pro se*

Kevin A. Broten, *pro se*  
—

Before English, Johnson and Lebow,  
Administrative Trademark Judges.

Opinion by English, Administrative Trademark Judge:

Applicant, Kevin A. Broten, has applied to register the mark set forth below for  
“silk screen printing” in International Class 40.<sup>1</sup>

---


<sup>1</sup> Application Serial No. 88029184 filed July 8, 2018 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on an allegation of first use on March 4, 2010 and an allegation of first use in commerce on December 28, 2016. The application includes the following description: “The mark consists of the wording ‘PEACE GRENADES’ in black to the left of a design of a grenade that is outlined in blue and has a black pin and black handle; a blue universal peace symbol is incorporated in the grenade design; white in the drawing represents background or transparent areas and is not claimed as a feature of the mark.” The colors black and blue are claimed as features of the mark.



In his second amended notice of opposition, Opposer Ibrahim M. Nasser alleges priority and likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), and dilution by blurring under Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c). Opposer alleges ownership of the following registrations and application, electronic copies of which are attached to his second amended notice of opposition:<sup>2</sup>

- LITTLE GRENADE, standard characters, for “air fresheners” in International Class 5;<sup>3</sup>



-  for “air fragrancng preparations” in International Class 3 and “air deodorizing preparations” in International Class 5;<sup>4</sup> and

---

<sup>2</sup> Second Amended Notice of Opposition, 15 TTABVUE 3, 10-19, ¶ 4 and Exhibits 1-3.

<sup>3</sup> Registration No. 3733162; registered January 5, 2010; renewed; “Grenade” disclaimed.

<sup>4</sup> Registration No. 5163717; registered March 21, 2017. The registration includes the following description of the mark: “The mark consists of the design of a grenade.” Color is not claimed as a feature of the mark.



- for “air fragrancng preparations” in International Class 3 and “air deodorizer; air deodorizing preparations” in International Class 5.<sup>5</sup>



Opposer also alleges use of these marks and the mark

since October 31, 1993 for “air fresheners for vehicles, air fragrancng preparations, air deodorizers, air deodorizing preparations, and also commercial brands in silk screen printing, T-shirts, and hats.”<sup>6</sup>

In his answer, Applicant admits that Opposer owns the pleaded registrations and application attached to the second amended notice of opposition,<sup>7</sup> but otherwise denies the salient allegations.

---

<sup>5</sup> Serial No. 86328012 filed on July 3, 2014 under Section 1(a) of the Trademark Act based on an allegation of first use and first use in commerce on October 31, 1993; “Scents” disclaimed. The application includes the following description of the mark: “The mark consists of a depiction of a grenade with a ring pull at the top with the words ‘SERIOUS SCENTS’ written across the middle of the grenade.” Color is not claimed as a feature of the mark.

<sup>6</sup> 15 TTABVUE 3, ¶ 7. We construe references to the “LITTLE GRENADE mark” as including both the word mark and design mark shown above.

The second amended notice of opposition also alludes to Opposer’s potential use of his marks for “drawstring bags,” but Opposer did not allege priority in its marks for “drawstring bags.” *Id.* ¶ 9.

<sup>7</sup> 15 TTABVUE 3, ¶ 4; 16 TTABVUE 3, ¶ 4.

The case is fully briefed. For the reasons explained below, the opposition is dismissed.

### **I. Evidentiary Record and Related Matters**

The record consists of the pleadings,<sup>8</sup> and by operation of Trademark Rule 2.122(b), 37 C.F.R § 2.122(b), the file of Applicant's involved application. Opposer's pleaded Reg. No. 5163717 also is of record because the electronic copy of the registration that Opposer attached to his second amended notice of opposition shows the registration is active and owned by Opposer.<sup>9</sup>

Neither party submitted evidence during his main trial period, but on September 17, 2020 – the last day of his rebuttal trial period – Opposer filed a submission consisting of arguments in support of his claims, allegations regarding use of his pleaded marks, and purported photographs of Opposer's and Applicant's goods. To the extent the submission contains arguments, it was premature. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL § 801.01 (2020) (explaining that the time to

---

<sup>8</sup> However, the photographs embedded in the second amended notice of opposition are not of record and Applicant did not make any pertinent admissions regarding the photographs. *Cf.* Trademark Rule 2.122(c), 37 C.F.R. § 2.122(c) (With the exception of a pleaded registration, an exhibit to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached unless identified and introduced in evidence as an exhibit during the period for the taking of testimony); *see also, e.g., Syosset Labs., Inc. v. TI Pharms.*, 216 USPQ 330, 332 (TTAB 1982) (unauthenticated exhibits attached to complaint are not evidence of allegations in the complaint and inadmissible in the form presented).

<sup>9</sup> As noted, Opposer also attached to his second amended notice of opposition printouts from the Office's electronic database showing the current status and title of pleaded Reg. No. 3733162 and application Serial No. 86328012. The record for Reg. No. 3733162 does not reflect Opposer as the owner. Moreover, a pleaded application cannot be made of record by attaching it to a notice of opposition. Trademark Rule 2.122(d), 37 C.F.R. 2.122(d). But as set forth above, Applicant admitted in his answer that Opposer owns the registration and application for the identified goods. *UMG Recordings, Inc. v. O'Rourke*, 92 USPQ2d 1042 (TTAB 2009) ("An admission obviates the need to prove the admitted allegation of fact[.]").

present arguments is after the close of the trial periods). To the extent Opposer intended the submission to be considered as evidence, we cannot consider it as testimony because it lacks the required attestation.<sup>10</sup> Trademark Rule 2.123(a)(1), 37 C.F.R. § 2.123(a)(1) (testimony may be submitted in the form of an affidavit or declaration, both of which are made under “penalty of perjury”); *see also* FED. R. EVID. 603 (“Before testifying, a witness must give an oath or affirmation to testify truthfully.”) (emphasis added); *McDonald’s Corp. v. McKinley*, 13 USPQ2d 1895, 1897 n.4 (TTAB 1989) (“unsworn statement does not constitute testimony”). The photographs attached to the submission also are not properly in evidence because they have not been authenticated by testimony nor are they self-authenticating under Trademark Rule 2.122(e), 37 C.F.R. § 2.122(e). For these reasons, we give no consideration to Opposer’s September 17, 2020 submission. *TV Azteca, S.A.B. de C.V. v. Martin*, 128 USPQ2d 1786, 1790 n.18 (TTAB 2018) (statement not in declaration or affidavit form not considered).

We also note that Opposer’s brief and reply brief are supported by the following “verification”: “The Plaintiff swears and affirms that the foregoing is true and correct under the penalty of perjury of the laws of the United States.”<sup>11</sup> And Applicant’s brief

---

<sup>10</sup> The parties were repeatedly advised to consider hiring counsel familiar with trademark law and Board procedure. 14 TTABVUE 1; 6 TTABVUE 2; 2 TTABVUE 6.

<sup>11</sup> Opposer’s Brief, 20 TTABVUE 9; Opposer’s Rebuttal Brief, 22 TTABVUE 16.

includes the following statement: “The Defendant swears and affirms that the statements in this document are true and correct.”<sup>12</sup>

Absent a stipulation between the parties, testimony that is not made of record during a party’s trial period is untimely. Trademark Rule 2.121(a) (“No testimony shall be taken or evidence presented except during the times assigned, unless by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board.”); Trademark Rule 2.123(a)(1) (testimony of a witness submitted in the form of a declaration or affidavit must be filed during the proffering party’s testimony period.). There is no such stipulation in the record and we do not construe any stipulation based on the parties’ actions. They did not forego the trial period, Opposer attempted to introduce evidence during his rebuttal trial period, and Applicant’s brief is not in an acceptable form for testimony, e.g. “under the penalty of perjury.” Accordingly, we do not consider the briefs as testimony, but rather consider them only for the arguments presented therein.

## **II. Entitlement to a Statutory Cause of Action**

Entitlement to a statutory cause of action is a threshold issue in every inter partes case.<sup>13</sup> See *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at \*3 (Fed. Cir. 2020) (citing *Lexmark Int’l, Inc. v. Static*

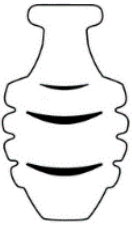
---

<sup>12</sup> Applicant’s Brief, 21 TTABVUE 4.

<sup>13</sup> Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of “standing.” We now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting “standing” under §§ 1063 and 1064 remain applicable. See *Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 USPQ2d 11388, at \*2 (TTAB 2020).

*Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067 n.4 (2014)). A party in the position of plaintiff may oppose registration of a mark when such opposition is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and the plaintiff has a reasonable belief in damage that is proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \*6-7 (Fed. Cir. 2020).

Opposer has properly introduced pleaded Reg. No. 5163717 for the mark



. In addition, Applicant, in his answer, admitted that the pleaded registrations and application are active and owned by Opposer. Accordingly, Opposer has proven his entitlement to bring a statutory cause of action. *Primrose Ret. Cmty., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1032 (TTAB 2016) (pleaded registration demonstrated entitlement to bring a statutory cause of action); *Barbara's Bakery v. Landesman*, 82 USPQ2d 1283, 1285 (TTAB 2007) (pleaded registration of record and opposer's likelihood of confusion claim was plausible); see also *WeaponX Performance Prods. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1040 (TTAB 2018) (entitlement to a statutory cause of action established, in part, by admission that Opposer owned the pleaded application).

### **III. Priority and Likelihood of Confusion**

To prevail on its Section 2(d) claim, Opposer must prove priority and likelihood of confusion by a preponderance of the evidence. *Cunningham v. Laser Golf Corp.*, 222

F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Hydro-Dynamics Inc. v. George Putnam & Co.*, 811 F.2d 147, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987).




### A. Priority

Priority is not an issue with respect to the marks and goods covered by Opposer's pleaded registrations. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400,



182 USPQ 108, 110 (CCPA 1974). Opposer also has priority in the mark for the goods identified in pleaded application Serial No. 86328012, subject to issuance of a registration, because the July 3, 2014 filing date of the application is before Applicant's July 8, 2018 filing date and there is no evidence that Applicant made prior use of its mark. 15 U.S.C. § 1057(c); *see also, e.g., Truescents LLC v. Ride Skin Care LLC*, 81 USPQ2d 1334, 1339 (TTAB 2006) (plaintiff may rely on plaintiff's application filing dates, subject to issuance of a registration, for purposes of priority).

Regarding Opposer's pleaded common law rights, Opposer did not properly introduce any evidence nor did Applicant make any pertinent admissions in his answer. Accordingly, Opposer has not demonstrated prior proprietary rights in the

marks LITTLE GRENADE, , , and 

for "commercial brands in silk screen printing, T-shirts, and hats."



## B. Likelihood of Confusion Between

Because Opposer has not proven prior common law rights, our likelihood of confusion analysis is limited to whether there is a likelihood of confusion between Applicant's mark and the marks covered by Opposer's pleaded registrations and application. We focus our analysis on the registered marks LITTLE GRENADE and



because these marks are closer to Applicant's mark than the applied-for



mark . *Sock It To Me, Inc. v. Aiping Fan*, 2020 USPQ2d 10611, at \*6 (TTAB 2020) (confining 2(d) analysis to most similar pleaded mark); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010) (same).

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *Du Pont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 Commc'ns., Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

1. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we consider the “similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Du Pont*, 177 USPQ at 567; *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014). The issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012).

The focus is on the recollection of the average purchaser, who normally retains a general rather than specific impression of trademarks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). We do not predicate our analysis on a dissection of the involved marks; we consider the marks in their entirety. *Stone Lion*, 110 USPQ2d at 1160; *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ

233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”).



The word portion of Applicant’s mark **PEACE GRENADES** and Opposer’s mark **LITTLE GRENADE** are structurally similar in that each consists of a term modifying the word “grenade.”<sup>14</sup> Applicant’s mark also incorporates the design of a grenade,



which is the entirety of Opposer’s design mark . The similarities between the marks end there.

The words “peace” and “little” are very different in appearance, sound and meaning. Applicant’s mark juxtaposes the word “peace,” meaning “freedom from war or a stopping of war” and the word “grenade” defined as “a small bomb detonated by a fuse and thrown by hand or fired from a rifle”<sup>15</sup> creating the optimistic commercial

---

<sup>14</sup> That Applicant’s mark incorporates “grenades” in plural form is of little significance. *See, e.g., Weidner Publ’ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1355 (TTAB 2014) (SHAPES is similar to SHAPE).

The word “grenade” has been disclaimed in Registration No. 3733162, but the reason for the disclaimer is unclear. The file history of the registration is not of record, and the word “grenade,” on its face, does not appear to be descriptive or generic for “air fresheners.”

<sup>15</sup> Collins Dictionary, <https://www.collinsdictionary.com/dictionary/english/peace> and <https://www.collinsdictionary.com/dictionary/english/grenade> (last visited February 26, 2021). We take judicial notice of the dictionary definitions of the words “peace” and “grenade.” *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, \*7 n.23 (TTAB 2019) (Board may sua sponte take judicial notice of dictionary definitions, including online dictionaries that exist in printed format).

impression of a “peace bomb.” The grenade design in Applicant’s mark incorporates a peace sign reinforcing this commercial impression. In contrast, the word “little” in Opposer’s mark does not change or juxtapose the meaning of the word “grenade” in any way. It connotes a particularly small hand or rifle bomb, and when considered in the context of Opposer’s goods, creates the very different commercial impression of a product that destroys odor and freshens the air. Opposer’s grenade design mark creates this same commercial impression.

For these reasons, while the marks share the word and design of a “grenade,” when considered in their entirety, the marks are overall very different in appearance, sound, connotation and commercial impression. The first *DuPont* factor therefore weighs against a finding of likely confusion.

2. Similarity or Dissimilarity of the Goods and Services, Trade Channels and Classes of Consumers

Under the second *DuPont* factor we consider “[t]he similarity or dissimilarity and nature of the goods or services” and under the third *DuPont* factor we consider “the similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567; *see also In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018). We must base our comparison of the goods and services and trade channels on the identifications in Opposer’s registrations and Applicant’s involved application. *See Stone Lion*, 110 USPQ2d at 1162; *Octocom Sys., Inc. v. Houston Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Opposer’s “air fresheners,” “air fragrancings preparations,” and “air deodorizing preparations,” on their face, do not appear to be related to Applicant’s service of “silk

screen printing.” Nor has Opposer introduced any evidence to establish that the goods and services are related. There also is no evidence demonstrating similarities between the trade channels and consumers of the parties’ goods and services.

The second and third *DuPont* factors therefore weigh in favor of finding no likelihood of confusion.

### 3. Balancing the Factors

There are significant differences between the parties’ marks in overall appearance, sound, meaning and commercial impression, and Opposer has not established any relationship between the parties’ goods and services, channels of trade and consumers. Accordingly, we find that Opposer has failed to establish a likelihood of confusion between his marks and Applicant’s mark.

## IV. Dilution

To prevail on a claim of dilution by blurring an opposer must prove that: (1) the opposer owns a famous mark that is distinctive; (2) the applicant is using a mark in commerce that allegedly dilutes the opposer’s famous mark; (3) the applicant commenced use of his mark after the opposer’s mark became famous; and (4) the Applicant’s mark is likely to cause dilution by blurring. *Chanel, Inc. v. Makarczyk*, 110 USPQ2d 2013, 2018 (TTAB 2014).

Opposer has not properly introduced any evidence regarding his use of the pleaded marks so there is no basis for finding that Opposer’s marks are famous.<sup>16</sup> For this reason, Opposer’s dilution claim fails.

---

<sup>16</sup> A mark is “famous” for dilution purposes “if it is widely recognized by the general consuming public of the United States as a designation of source for the goods or services of

## V. Conclusion

Opposer has proven his entitlement to bring a statutory cause of action, but he has not proven priority and likelihood of confusion or dilution.

**Decision:** The opposition is dismissed.

---

the mark's owner." 15 U.S.C. § 1125(c)(2)(A). Factors relevant to fame include the duration, extent, and geographic reach of advertising and publicity of the mark, the amount, volume and geographic extent of sales of goods under the mark, and the extent of any actual recognition of the mark. *Id.*