

This Opinion is Not a
Precedent of the TTAB

Mailed: April 29, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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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:

A final decision issued in this case on March 1, 2021. This case now comes up on Ibrahim M. Nasser's ("Opposer") post-decision filings of April 9, 2021 and April 14, 2021.

I. Background

Applicant, Kevin Broten, seeks registration on the Principal Register of the mark set forth below for “silk screen printing” in International Class 40.¹



Opposer opposed registration alleging 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). In support of his claims, Opposer alleged ownership of the following registrations and application:²

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

¹ 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.

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

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



- for “air fragrancing preparations” in International Class 3 and “air deodorizing preparations” in International Class 5;⁴ and



- for “air fragrancing preparations” in International Class 3 and “air deodorizer; air deodorizing preparations” in International Class 5.⁵



Opposer also alleged use of these marks and the mark since October 31, 1993 for “air fresheners for vehicles, air fragrancing preparations, air deodorizers, air deodorizing preparations, and also commercial brands in silk screen printing, T-shirts, and hats.”⁶

⁴ 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.

⁵ 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.

⁶ 15 TTABVUE 3, ¶ 7.

On March 1, 2021, we issued a final decision dismissing the opposition. The record on final decision consisted of the pleadings, the involved application, and Opposer's



pleaded Registration No. 5163717 for the mark . With respect to the pleadings, Opposer attached to his second amended notice of opposition printouts from the Office's electronic database showing the current status and title of pleaded Registration No. 3733162 and application Serial No 86328012 and, in his answer, Applicant admitted that Opposer owns the registration and application for the goods recited therein.

As explained in the final decision, Opposer established his entitlement to bring a statutory cause of action and priority in the marks subject to his pleaded registrations and pleaded application for the goods identified therein. Opposer, however, did not properly introduce any evidence to prove prior proprietary rights in his marks for "commercial brands in silk screen printing, T-shirts, and hats." Accordingly, our analysis under Section 2(d) of the Trademark Act was confined to whether Applicant's mark was likely to cause confusion with the marks subject to Opposer's pleaded registrations and application for the goods identified therein. We determined that Opposer did not prove a likelihood of confusion. We further found that Opposer did not prove that his marks are famous as necessary to prevail on a claim of dilution. For these reasons, the opposition was dismissed.

II. Opposer's Post-Decision Filings

Opposer's April 9, 2021 submission is captioned as a "motion to set-aside judgment" and is accompanied by evidence (26 TTABVUE). Opposer's April 14, 2021 submission consists of a declaration from Opposer (27 TTABVUE) filed as an "addendum" to his April 9, 2021 motion. In his motion, Opposer requests: (1) "correction" of the final decision asserting that the Board "erred" in reaching its decision;⁷ and in the alternative (2) that the Board "re set [sic] the entire matter for re trial [sic] and the Plaintiff / Opposer pledges with the help of the trademark court to do everything in his power to adhere to the rules and regulations of the Trademark Trial procedures." *Id.* at 15. We construe Opposer's request for "correction" of the final decision as a request for reconsideration⁸ and Opposer's request to "re set" the matter for a "re trial" as a motion to reopen the case starting with Opposer's trial period. For the reasons explained below, Opposer's construed request for reconsideration and motion to reopen are **denied**.

⁷ 26 TTABVUE 3.

⁸ A request for reconsideration must be filed within one month from the date of the final decision although this deadline may be extended upon a motion for good cause. Trademark Rule 2.129(c), 37 C.F.R. § 2.129(c). On March 10, 2021, nine days after issuance of the final decision, Opposer filed a submission asking the Board to "hold any further action [in this case] in abeyance" asserting an "intent" to file a motion to "Set-aside" the final decision. 25 TTABVUE 2-3. Opposer asserted that "[d]ue to the very long nature and content of the Trademark court [sic] legal judgment [sic] great legal effort is required to properly rebut the court's actions." *Id.* at 2. We construe Opposer's March 10, 2021 filing as a motion to extend time to file a request for reconsideration and we find that Opposer has established good cause for an extension. Accordingly, Opposer's construed motion to extend is granted and we treat Opposer's April 9, 2021 submission timely to the extent we construe it as a request for reconsideration.

III. Request for Reconsideration

The premise underlying a request for reconsideration is that, based on the evidence of record before it and prevailing authorities, the Board erred in reaching the decision it issued. The request should not be devoted simply to a re-argument of the points presented in the requesting party's brief on the case. TRADEMARK TRIAL AND APPEAL BOARD MANUAL (TBMP) § 543 (2020). Nor may a request for reconsideration be used to introduce additional evidence. *Id.* Accordingly, we give no consideration to the evidence attached to Opposer's April 9, 2021 motion and Opposer's April 14, 2021 declaration.

In support of his request for reconsideration, Opposer advances four arguments: (1) the opposition should be sustained because Opposer has priority;⁹ (2) the Board erred in comparing the parties' marks because it "ignored" evidence that Opposer's marks connote "love," which is similar in meaning to the word "peace" and the peace symbol in Applicant's mark; (3) Applicant's mark fails to function as a trademark because the peace symbol "is public domain" and a "pervasive universally recognized symbol" (internal quotations omitted);¹⁰ and (4) the Board erred in dismissing Opposer's dilution claim on the basis that Opposer failed to prove the alleged fame of his marks.¹¹ Opposer's arguments are unpersuasive.

⁹ 26 TTABVUE 3, 10-11, 15.

¹⁰ *Id.* at 7-9, 15.

¹¹ *Id.* at 6, 8, 13.

As to Opposer's first argument, priority is not a standalone claim, but rather one element of Section 2(d) claim. To prevail under Section 2(d) of the Trademark Act, a claimant must prove **both** priority **and** a likelihood of confusion. 15 U.S.C. § 1052(d); *see also, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 44-45 (CCPA 1981).

Also, there is no merit to Opposer's second argument that the Board "ignored" evidence that Opposer's marks and Applicant's mark have similar connotations. Opposer argues that: (1) he "artfully and completely encompassed the term peace" when he was the first to use a "Hand Grenade juxtaposed with the term LOVE & AMOR, which includes the term peace in its meaning and understanding";¹² and (2) it "takes no great leap of legal logic to establish Love in its definition embraces and includes the art of words, which is peace."¹³ In reaching a final decision in an opposition, the Board may consider only the record before it. The Board did not "ignore" any evidence because there is **no evidence** in the record to support Opposer's assertion that he displays his "hand grenade" mark "juxtaposed with the term LOVE & AMOR" or that "peace" is "implied" by the word "love."¹⁴

Moreover, as explained in the final decision, Opposer did not prove prior common law rights so we are bound to compare Opposer's marks as they appear in the pleaded

¹² *Id.* at 5-6.

¹³ *Id.* at 4-5.

¹⁴ *Id.* at 5-6.

registration and application to Applicant's mark as it appears in the involved application. *See, e.g., Mini Melts, Inc. v. Reckitt Benckiser, LLC*, 118 USPQ2d 1464, 1470-71 (TTAB 2016) (applicant's attempt to distinguish the marks based on their use with other distinguishing matter was "unavailing"; the Board must consider only the marks as shown in opposer's registration and applicant's application); *Orange Bang, Inc. v. Olé Mexican Foods, Inc.*, 116 USPQ2d 1102, 1112 (TTAB 2015) (comparing marks as they appeared in plaintiff's registration and defendant's registration and application at issue in the proceeding). Opposer's registered and applied-for marks do not incorporate "LOVE & AMOR" or any other matter that connotes "love." Accordingly, the Board did not err in comparing the parties' marks.

Turning to Opposer's third argument, a party cannot obtain judgment on an unpleaded claim. *See, e.g., Syngenta Crop Protection Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1115 n.3 (TTAB 2009) (unpleaded claim of dilution not considered); *Hornby v. Tjx Cos. Inc.*, 87 USPQ2d 1411, 1415 (TTAB 2008) (unpleaded claims were not tried by express or implied consent of the parties such that pleadings could be treated as amended pursuant to Fed. R. Civ. P. 15(b)). Opposer did not plead that Applicant's mark fails to function as a trademark because it incorporates a common symbol in widespread use. Nor did the parties' try such a claim in their briefs. Accordingly, the Board did not err in failing to consider such a claim.

Last, Opposer has not demonstrated that the Board erred in dismissing Opposer's dilution claim because Opposer failed to prove that his pleaded marks are famous. A mark is famous for purposes of dilution "if it is widely recognized by the general

consuming public of the United States as a designation of source of the goods or services of the mark's owner." Trademark Act Section 43(c)(2)(A), 15 U.S.C. § 1125(c)(2)(A). Evidence relevant to whether a mark is famous includes: (i) "The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties"; (ii) "The amount, volume, and geographic extent of sales of goods or services offered under the mark"; and (iii) "The extent of actual recognition of the mark." *Id.* Opposer did not properly introduce any such evidence or any other evidence from which we could have concluded that his marks are "widely recognized by the general consuming public of the United States."

In view of the foregoing, Opposer's request for reconsideration is **denied**.

IV. Motion to Reopen

Because this case has been finally determined on the merits, Opposer must establish "excusable neglect" to reopen the case starting with Opposer's trial period. *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1852 (TTAB 2000) ("Pursuant to Fed. R. Civ. P. 6(b)(2), the requisite showing for reopening an expired period is that of excusable neglect."). The Supreme Court has explained that determining whether a party's neglect is excusable is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission" including: (1) the danger of prejudice to the non-moving party; (2) the length of delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the moving party;

and (4) whether the moving party has acted in good faith. *See Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *Baron Philippe*, 55 USPQ2d at 1852. Here, equity weighs strongly against setting aside the final decision and allowing Opposer to retry the case.

First, Applicant would suffer prejudice re-litigating a case he has already won. “Orderly and expeditious procedure requires that a party present its best case during its testimony period and not be granted a second chance after the [the Board explains] the existence of errors or weaknesses [in a party’s case].” *Amoco Oil Co. v. Amerco, Inc.*, 201 USPQ 126, 128 (TTAB 1978).

Second, allowing Opposer to retry the case would add, at a minimum, seven months to this proceeding, which was finally determined nearly two months ago. Such a delay would be substantial and extremely detrimental to the orderly administration of this proceeding. “Opposer brought this case and, in so doing, took responsibility for moving forward on the established schedule” and complying with all applicable rules and procedures. *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 USPQ2d 1858, 1860 (TTAB 1998); *Amoco Oil Co.*, 401 USPQ at 128 (denying request for a rehearing to reopen applicant’s trial period after final decision; “the further prolongation of this already lengthy case is wholly unwarranted”).

Third, it was entirely within Opposer’s reasonable control to properly introduce evidence pursuant to the proceeding schedule and applicable rules and procedures, or to hire counsel to do so on his behalf. As noted in the final decision, the Board repeatedly and “**strongly**” recommended that the parties consider hiring counsel

familiar with trademark law and Board procedure.¹⁵ The Board further explained in multiple orders that a party not represented by counsel still must strictly comply with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure and the Federal Rules of Evidence.¹⁶ Opposer elected not to follow the Board's advice to his detriment. The "pledge" Opposer has made in his motion to retain counsel and "do everything in his power to adhere to the rules and regulations of the Trademark Trial procedures" is far too late.

The first three *Pioneer* factors weigh heavily against reopening proceedings, and the fourth factor is neutral as there is no evidence that Opposer acted in good or bad faith in failing to comply with the Board's schedule, rules and procedures. Accordingly, we find that Opposer has failed to establish excusable neglect as necessary to reopen proceedings for a retrial. Accordingly, Opposer's motion to reopen is **denied**.

V. Conclusion

For the reasons explained above, Opposer's request for reconsideration and motion to reopen are **denied**.

¹⁵ 24 TTABVUE 5 n.10; *see also* February 20, 2020 Order, 14 TTABVUE 1 (first heading in the Board's order was "Counsel Strongly Recommended").

¹⁶ 14 TTABVUE 1; 6 TTABVUE 2; 2 TTABVUE 6.