

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

In re Reg. No.: 2,372,254
Mark: FOSSFYLD PUDER
Registration Date: August 1, 2000

Cancellation No. _____

FOSSNIT A/S, a Danish corporation,

Petitioner,

v.

CREATIVE BEDDING TECHNOLOGIES,
INC., an Illinois corporation,

Registrant.

PETITION FOR CANCELLATION

Petitioner, Fossnit A/S ("Fossnit"), a Danish corporation, with its principal place of business located at Hejreskivvej 20 D, DK-3490, Kvistgaard Denmark, believes that it is or will be damaged by Registration No. 2,372,254 (the "Registration") and accordingly, petitions the Board to cancel the Registration, in whole, pursuant to 15 U.S.C. § 1064. In support, Fossnit alleges:

Fossnit and CBT's Business Relationship

1. Fossnit adopted and has continuously used the mark FOSSFILL since at least as early as 1992 in the United States in connection with pillows and comfort cushion products. Fossnit's markets include the hotel, retail, prison and passenger ship industries.

05/14/2004 SWILSON1 00000019 2372254

01 FC:6401

300.00 OP

2. Since as early as 1992, Fossnit has, itself or through its agents, advertised and/or distributed its FOSSFILL products into the United States. In



05-11-2004

approximately 1994, Creative Bedding Technologies, Inc. ("CBT") was incorporated and began to operate as Fossnit's exclusive distributor in the United States.

3. CBT's distributor and license rights were first memorialized in an exclusive distributor agreement dated January 11, 1994 (the "1994 Agreement"). See Exhibit 1. The 1994 Agreement was later terminated and superceded by a distributor Agreement signed in 2001 (the "2001 Agreement").¹ See Exhibit 2.

4. Pursuant to the Agreements, including any oral agreements and the parties' course of conduct, between 1994 and June 21, 2003 (following expiration of the cure period after a termination letter dated March 21, 2003), Fossnit licensed use of the FOSSFILL mark to CBT for use by CBT in connection with its obligations under the Agreements. The 1994 Agreement clearly put CBT on notice that its rights were mere use rights. Additionally, the 2001 Agreement provided similar notice and also expressly acknowledged that all intellectual property, including the FOSSFILL trademark, belonged to Fossnit. See Exhibit 2, section 11.3.

5. On or about January 15, 1999, unbeknownst to Fossnit, CBT without Fossnit's authority and in violation of the Agreements, filed a trademark application that lists CBT, not Fossnit, as the owner of the FOSSFYLD PUDER mark. CBT's application, fraudulently listing CBT as owner of the FOSSFILL mark, resulted in the Registration.

6. The Danish word for fill is "fylde" and for pillow is "pude." Therefore the Registration roughly translates to "FOSS filled pillow."

¹ The 1994 Agreement and the 2001 Agreement are collectively referred to as the "Agreements."

7. Subsequently, Fossnit first learned that CBT had, without authority, registered the FOSSFYLD PUDER mark impermissibly delineating CBT as the owner of the mark.

8. On or about October 6, 2003, Fossnit applied to register FOSSFILL for cushioning made of plastic in the nature of stuffing for pillows and cushion products.

Cancellation Based Upon Fraud Upon the Trademark Office

9. CBT knew when it filed its application to register the FOSSFYLD PUDER mark that Fossnit had superior rights to the mark.

10. CBT had no reasonable basis for subjectively believing that it had superior rights to ownership of the FOSSFYLD PUDER mark at the time that it made its certification to the PTO or that its rights were anything more than mere use rights.

11. CBT willfully and with intent set out to commit fraud upon the trademark office in order to obtain the Registration, which the PTO, had it known about CBT's fraudulent representation, would have never granted.

Cancellation Based Upon Prior Use

12. Even if CBT is somehow able to demonstrate that it did not intentionally defraud the Patent and Trademark Office, it lacked prior use which would entitle it to ownership rights to the Registration.

13. Based upon the allegations in the trademark application filed by CBT, CBT claimed that it used the FOSSFYLD PUDER mark in commerce as of June 1996.

14. Even if the PTO accepted the filing and use dates as true and accurate, Fossnit's first use in the United States was as early as 1992. Fossnit has senior use rights to use of the FOSSFILL mark.

Cancellation Based Upon Confusing Similarity of Trademark

15. Because the Registration is confusingly similar to Fossnit's senior mark, the Registration is subject to cancellation pursuant to section 2(d) in order to avoid consumer confusion and damage to Fossnit's trademark rights.

Harm to Fossnit

16. If CBT is permitted to continue to maintain ownership of its invalid Registration, the Registration may be deemed incontestable after five (5) years from the date of registration and CBT would thereby obtain an incontestable right to use a mark which it does not rightfully own.

17. Additionally, the continued existence of the Registration will interfere with and prevent the registration of Fossnit's FOSSFILL trademark application which is pending for cushioning made of plastic in the nature of stuffing for pillows and cushion products.

18. The continued existence of the Registration casts a shadow upon Fossnit's right to continue to use, develop, license, and expand the use of its FOSSFILL mark in the United States and will prevent Fossnit right to enjoyment and exploitation of the trademark.

19. The continued existence of the invalid Registration will interfere with and prevent the registration by Fossnit of an identical or confusingly similar FOSSFILL mark.

20. Continued existence of the invalid Registration will confuse consumers as to the rightful owner of the FOSSFILL or FOSSFYLD PUDER mark.


21. CBT's registration is causing damage and injury to Fossnit.

WHEREFORE, Petitioner, Fossnit A/S respectfully requests that Registration No. 2,372,254 be canceled based upon fraud, lack of prior use, and confusing similarity to Petitioner's senior mark.

A duplicate copy of this Petition and the fee required by 37 C.F.R. § 2.6(a) are enclosed herewith.

Respectfully Submitted,

HOLLAND & KNIGHT, LLP
195 Broadway, 24th Floor
New York, New York 10007
Telephone: (212) 513-3563
Facsimile: (212) 385-9010
Attorneys for Petitioner, Fossnit A/S

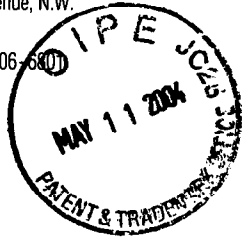
By: 
Tamara Carmichael, Esq.
Stephen J. Jeffries, Esq.

1863111_v1

HOLLAND & KNIGHT LLP

2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006-6807

202-955-3000
202-955-5564 Fax
www.hklaw.com



May 11, 2004

VIA COURIER

TTAB

Annapolis	San Antonio
Atlanta	San Francisco
Bethesda	Seattle
Boston	Tallahassee
Bradenton	Tampa
Chicago	Washington, D.C.
Fort Lauderdale	West Palm Beach
Jacksonville	International Offices:
Lakeland	Caracas*
Los Angeles	Helsinki
Miami	Mexico City
New York	Rio de Janeiro
Northern Virginia	São Paulo
Orlando	Tel Aviv*
Portland	Tokyo
Providence	
St. Petersburg	*Representative Office

Box TTAB – FEE
Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202 - 3514

Re: Fossnit A/S v. Creative Bedding Technologies, Inc.
Petition for Cancellation of Registration No. 2,372,254

Dear Sir:


Enclosed please find the following for filing in the Trademark Trial and Appeal Board of the United States Patent & Trademark Office:

1. A Petition for Cancellation of Registration No. 2,372,254;
2. A duplicate copy of that Petition for Cancellation; and
3. A check in the amount of \$300.00 for filing fees associated with the Petition for Cancellation.

If this amount becomes disassociated from this document or the amount is otherwise found insufficient, the Trademark Office is authorized to charge the Deposit Account of Holland & Knight LLP, Deposit Account No. 501-542.

Very truly yours,

HOLLAND & KNIGHT LLP


Tamara Carmichael
Stephen J. Jeffries

SJJ/
Enclosures

1927761_v1



05-11-2004

U.S. Patent & TMO/TM Mail Rcpt Dt. #39