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

Proceeding	92047753
Party	Defendant Svengirly Music, Inc.
Correspondence Address	Edward T. Saadi, Esq. 4527 South Avenue, Unit 1 Boardman, OH 44512 UNITED STATES EdwardSaadi@aol.com
Submission	Motion to Dismiss - Rule 12(b)
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Date	10/10/2007
Attachments	Second Motion to Dismiss.pdf ( 5 pages )(423839 bytes )



1 Engineering Corp. v. Champion Mfg. Co., 300 F.2d 957, 133 U.S.P.Q. 197 (CCPA 1962).

2 Therefore, the Amended Petition is legally insufficient, and should be dismissed.

3 **II. THE AMENDED PETITION FAILS TO ALLEGE GROUNDS FOR**  
4 **CANCELLATION**

5 The Amended Petition for Cancellation attempts to set forth two grounds for cancellation:

6 (1) That the Registrations contain the name, picture, or signature of a particular living individual,  
7 namely, the Petitioner, without her consent, under 15 U.S.C. §1052(c); and (2) That the  
8 Petitioner has priority in the mark DESTROY ALL MONSTERS that there is a likelihood of  
9 confusion between the Petitioner's mark and Registrant's marks, under 15 U.S.C. §1052(d). The  
10 Petitioner has not properly alleged either one of these grounds.

11 A. **The 15 U.S.C. §1052(c) Ground.**

12 15 U.S.C. §1052(c) states, in relevant part, "No trademark...shall be refused  
13 registration...unless it...consists or comprises a name, portrait, or signature identifying a  
14 particular living individual except by his written consent..." In order to properly allege a ground  
15 for cancellation under §1052(c), therefore, a petitioner must allege that a registrant's **trademark**  
16 (i.e., the one which the petitioner seeks to cancel) consists or comprises of the petitioner's name,  
17 portrait, or signature. The Amended Petition makes no such allegation. Rather, the Amended  
18 Petition merely states that "the goods sold and distributed" by the Registrant and "certain  
19 specimens" submitted to the U.S.P.T.O. by the Registrant contain the Petitioner's portrait.  
20 Amended Petition, ¶5.

22 It is of absolutely no relevance whatsoever whether "goods sold and distributed" by the  
23 Registrant, or Registrant's specimens, contain portraits of the Petitioner. The only relevant  
24 inquiry in a cancellation proceeding brought under §1052(c) is whether the Registrant's  
25 **trademarks**—not the Registrant's goods or specimens—consist or comprise of the Registrant's

1 name, portrait, or signature. The Amended Petition makes no allegation that the Registrant's  
2 *marks* consist or comprise of her name, portrait or signature; any such allegation would, of  
3 course, be absurd because the Registrations under attack in this proceeding are a standard-  
4 character mark for DESTROY ALL MONSTERS (Reg. No. 3,158,060), and a stylized version  
5 of the DESTROY ALL MONSTERS mark (Reg. No. 3,134,736). No plausible argument can be  
6 made that such marks in any way comprise the name, portrait, or signature of the Petitioner.  
7 Hence, even if all of the allegations made by Petitioner with regard to 15 U.S.C. §1052(c) are  
8 taken as true, a proper ground for cancellation has not been alleged.  
9

10 B. **The 15 U.S.C. §1052(d) Ground.**

11 The Petitioner has likewise failed to properly allege a ground for cancellation under 15  
12 U.S.C. §1052(d). A petitioner seeking cancellation of a mark under §1052(d) must prove that it  
13 has proprietary rights in the term that it relies upon to prove likelihood of confusion. If, as here,  
14 the petitioner does not own a registration, but instead alleges prior use of an unregistered mark,  
15 such use must result in the establishment of a trade identity. Otto Roth & Co. v. Universal Foods  
16 Corp., 640 F.2d 1317, 1321 (C.C.P.A. 1981)(Without source-indicating proprietary rights in a  
17 mark, a likelihood of confusion cannot be established). See also Jewelers Vigilance Committee  
18 v. Ullenberg, 853 F.2d 888 (Fed. Cir. 1988)(No likelihood of confusion can arise with a name or  
19 term which does not indicate source).  
20

21 Here, Petitioner alleges (1) that she was an original member of a band with the name  
22 DESTROY ALL MONSTERS for which she designed the logo, artwork, posters, promotional  
23 materials, and record covers, many of which contain her image and signature, and (2) that she  
24 designed and made use in commerce of the DESTROY ALL MONSTERS name and logo, and  
25

1 has sold and distributed items containing such name and logo in artwork, on album covers, and  
2 on clothing. Amended Petition, ¶¶6(A) & 6(B).

3 None of these alleged facts—i.e., neither being the original member of a band with a  
4 particular name, nor designing logos and materials for such band, nor using a name and logo in  
5 commerce—necessarily establish proprietary rights. Of even less relevance is the Petitioner’s  
6 allegation that such materials contain her image. In the morass of facts alleged by the Petitioner,  
7 there contains not a single allegation that the Petitioner has developed any proprietary rights  
8 whatsoever. Without such proprietary rights, there can be no likelihood of confusion. Herbko  
9 Intern., Inc. v. Kappa Books, Inc., 308 F.3d 1156 (Fed. Cir. 2002)(Party petitioning for  
10 cancellation under §2(d) must show proprietary rights in the mark which produce a likelihood of  
11 confusion); Kelly Services, Inc., v. Greene’s Temporaries, Inc., 25 U.S.P.Q.2d 1460, \_\_\_  
12 (T.T.A.B. 1992)(“If one of the necessary elements of the plaintiff’s pleaded ground for  
13 opposition or cancellation is plaintiff’s ownership of a proprietary right in a mark which is the  
14 same as, or similar to, the defendant’s mark, than the plaintiff must plead, and ultimately prove,  
15 its proprietary right, in order to establish its ground for opposition or cancellation”).

16  
17 **III. CONCLUSION**

18 For all of the reasons discussed above, the Amended Petition for Cancellation fails to  
19 state a claim upon which relief can be granted. Therefore, this proceeding should be dismissed.

20  
21  
22 Respectfully submitted,

23 Date: 10/10/07

24 By: 

25 Edward T. Saadi, Esq.  
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that the foregoing **SECOND MOTION TO DISMISS FOR FAILURE**  
3 **TO STATE A CLAIM** was deposited in the United States Mail, First Class, postage prepaid  
4 and addressed as follows:

5 Andrew T. Baran  
6 Michael A. Novak  
7 Elizabeth A. Favaro  
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10 101 West Big Beaver Road  
11 Troy, Michigan 48084-5280

12 Date: 10/10/07

13 By: 

14 Edward T. Saadi, Esq.  
15 4527 South Avenue, Unit 1  
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18 **CERTIFICATE OF FILING**

19 I hereby certify that on October 10, 2007, I filed this **SECOND MOTION TO DISMISS**  
20 **FOR FAILURE TO STATE A CLAIM** via electronic means (ESTTA).

21 By: 

22 Edward T. Saadi, Esq.