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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	Svengirly Music, Inc. P.O. Box 91894 Pasadena, CA 91109 UNITED STATES EdwardSaadi@aol.com
Submission	Motion to Dismiss - Rule 12(b)
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Date	09/11/2007
Attachments	Motion to Dismiss.pdf (4 pages)(338026 bytes)

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

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4 NIAGARA HENDERSON, p/k/a NIAGARA.,) Cancellation No.: 92047753
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vs.

**MOTION TO DISMISS FOR FAILURE
TO STATE A CLAIM**

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Registrant¹ SVENGIRLY MUSIC, INC. hereby moves this Board, pursuant to Rule 12(B)(6) of the Federal Rules of Civil Procedure, Rule 2.116(a) of the Trademark Rules of Practice, and §503 of the T.B.M.P., to dismiss this proceeding because the Petitioner herein has failed to state a claim upon which relief can be granted.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

In order to successfully cancel the Registrant's trademark registration, the Petitioner must plead and prove (1) that the petitioner has standing to maintain the proceeding, and (2) that a valid ground exists for canceling the subject registration. See Young v. AGB Corp., 47 U.S.P.Q.2d 1752, 1754 (Fed. Cir. 1998). The Petition for Cancellation in this case fails on both fronts: It fails to properly allege standing, and it fails to properly allege a valid ground for

¹ There is only one listed owner of the subject Registration, namely, Svengirly Music, Inc. For an unknown reason, the Petition for Cancellation incorrectly lists both Svengirly Music, Inc. (the proper registrant) and Michael Davis (a third-party individual) as "Registrants."

1 cancellation. Even if all of the allegations set forth in the Petition are accepted as true, and even
2 if the Petition is construed in the light most favorable to the Petitioner, the Petitioner still will not
3 be entitled to the relief sought; it is certain beyond any doubt that the Petitioner cannot, under
4 any circumstances, prevail on the allegations contained in the Petition. See Cardinal Engineering
5 Corp. v. Champion Mfg. Co., 300 F.2d 957, 133 U.S.P.Q. 197 (CCPA 1962). Therefore, the
6 Petition is legally insufficient, and should be dismissed.

7 8 9 **II. THE PETITION CANNOT ESTABLISH PETITIONER'S STANDING**

10 To prevail in a cancellation proceeding, a petitioner must have proper standing. The
11 cancellation statute states, in relevant part, that a petition to cancel a mark may be filed by "any
12 person who believes that he is or will be *damaged*...by the registration..." Lanham Act §14, 15
13 U.S.C.A. §1064(emphasis added). A petitioner need not show actual damage, but must show a
14 likelihood of damage from the continuing registration of the mark. See TBMP §303.03(meaning
15 of "Damage," and cases cited therein).

16 In the present case, the petition makes no mention of damage whatsoever. It makes no
17 allegation of actual damage, nor of likelihood of damage, nor of belief of damage. Hence, in the
18 case at bar, even if the allegations set forth in the Petition are accepted as true, the Petitioner
19 cannot prevail in this proceeding because damage, which is a necessary element to achieve
20 cancellation of a registration, will not have been shown.

21 22 23 **III. THE PETITION CANNOT ESTABLISH GROUNDS FOR CANCELLATION**

24 In addition to standing, a petitioner must plead and prove a statutory ground for
25 cancellation. In the present case, the vague and disjointed statements set forth in the Petition for

1 Cancellation appear to be a half-baked attempt to set forth, as the statutory ground for
2 cancellation, a claim of likelihood of confusion under Section 2(d) of the Lanham Act.

3 However, the Petitioner has failed to properly allege such a ground.

4 The petition for cancellation falls short in numerous ways to properly set forth a 2(d)
5 ground for cancellation, including but not limited to the following:

6 A. Priority. A petitioner asserting 2(d) as a ground for cancellation must plead (and
7 later prove) facts showing its proprietary rights in its mark are prior to the Registrant's rights in
8 the challenged mark. 15 U.S.C. §1052(d); See Herbko International Inc. v. Kappa Books, Inc.,
9 308 F.3d 1156, 64 U.S.P.Q.2d 1375, 1378 (Fed. Cir. 2002). It would appear that the Petitioner is
10 vaguely attempting to set forth facts showing prior common-law use of the DESTROY ALL
11 MONSTERS trademark. But a close reading of the petition shows that the Petitioner claims only
12 (1) that the Petitioner has "designed" and is responsible for the "creation" of the logo, artwork,
13 posters, promotional materials, and record covers for a band called "Destroy All Monsters"; (2)
14 that such designs sometimes contained the Petitioner's likeness; (3) that the specimens submitted
15 by Registrant were "created" by the Petitioner; and (4) that such specimens in some instances
16 contained the Petitioner's signature. Such facts, even if assumed to be correct, do not constitute
17 trademark use of the DESTROY ALL MONSTERS mark. Therefore, even if assumed to be
18 correct, they are insufficient to establish Petitioner's priority.


19
20 B. Likelihood of Confusion. Even if the allegations set forth by the petition do
21 establish priority of use, it is Petitioner's duty under 2(d) also to allege (and later prove) that her
22 previously used mark so resembles the challenged mark as to be likely to cause confusion. 15
23 U.S.C. §1052(d). In the present case, the petition makes no mention of confusion whatsoever,
24 neither actual nor likely.
25

1 **IV. CONCLUSION**

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

4
5 Respectfully submitted,

6 Date: 9/11/07

7 By: 

8 Edward T. Saadi, Esq.
9 4527 South Avenue, Unit 1
10 Boardman, OH 44512
11 (330) 782-1954

12 **CERTIFICATE OF SERVICE**

13 I hereby certify that the foregoing MOTION TO DISMISS FOR FAILURE TO STATE
14 A CLAIM was deposited in the United States Mail, First Class, postage prepaid and addressed as
15 follows:

16 Andrew T. Baran
17 Michael A. Novak
18 Elizabeth A. Favaro
19 Giarmarco, Mullins & Horton, P.C.
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23 Date: 9/4/07

24 By: 

25 Edward T. Saadi, Esq.
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26 **CERTIFICATE OF FILING**

27 I hereby certify that on September 11, 2007, I filed this MOTION TO DISMISS FOR
28 FAILURE TO STATE A CLAIM via electronic means (ESTTA).

29 By: 

30 Edward T. Saadi, Esq.