

**THIS OPINION IS NOT A  
PRECEDENT OF  
THE T.T.A.B.**

Mailed: March 5, 2018

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

RLP Ventures, LLC  
v.  
All Hands Instruction NFP

Cancellation No. 92062870

Willard A. Stanback of Willard Alonzo Stanback PC, for RLP Ventures, LLC.

David L. Bea and Daniel J. Mays of Bea & VandenBerk, for All Hands Instruction NFP.

Before Ritchie, Adlin, and Heasley, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

RLP Ventures, LLC (“Petitioner”) has petitioned to cancel Registration No. 4770195 for the mark MOSAYEC, in standard characters, owned by All Hands Instruction NFP (“Respondent”).<sup>1</sup> The registration issued July 7, 2015 on the Principal Register for “providing temporary use of a web-based software application for use by children and youth to evaluate, select, and

<sup>1</sup> Application Serial No. 86307088, which matured into the registration at issue, was filed on June 11, 2014, with a later-filed Statement of Use claiming dates of first use and first use in commerce of September 13, 2014.

plan extracurricular activities that advance personal, educational, and career goals,” in International Class 42.

Petitioner alleges priority and likelihood of confusion with its mark MOSAEC:

Petitioner is the owner and operator of a social media and e-commerce entity using the trademark “*MOSAEC*” (“**Petitioner’s Mark.**”) The MOSAEC platform is a commerce, content, advertising and social media web environment that spotlights film, music, art, theater, dance, literature, fashion, sports and locales. In addition, via the MOSAEC platform, Petitioner sells consumer goods, buys and sells advertising, and seeks funding from individuals, corporations and governments.<sup>2</sup>

Petitioner pleads ownership of application Serial No. 86587316 for MOSAEC in standard characters. Petitioner asserts that it commenced use of its mark “as early as September 1998.”<sup>3</sup>

Respondent denies the salient allegations of the petition. Both parties filed briefs, and Petitioner filed a reply brief.<sup>4</sup>

### **The Record and Evidentiary Issues**

The record consists of the pleadings; the file of the involved registration; and the following evidence and testimony, together with exhibits thereto:

From Petitioner:

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<sup>2</sup> Petition for Cancellation ¶ 1, 1 TTABVUE 5.

<sup>3</sup> Petition for Cancellation ¶ 2, 1 TTABVUE 6.

<sup>4</sup> With its brief, Respondent filed a motion to strike Petitioner’s main brief on the ground that it was filed one day late. Petitioner’s tardiness, by one day, was the result of a miscalculation made without bad faith, and there is no indication that Respondent has been prejudiced. Moreover, the briefs assist the Board in making a just determination on the merits. Accordingly, Respondent’s motion to strike Petitioner’s main brief on the case is denied.

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1. Declaration of Kescia Prioleau, educator, dated May 1, 2017;
2. Declaration of Lisa Patrick, physician, dated April 30, 2017;
3. Declaration of Pamela Perry, physician, dated May 4, 2017;
4. Declaration of Samantha Miller, educator, dated April 30, 2017; and
5. Declaration of Ramona Prioleau, Respondent's founder, dated May 4, 2017 (the "May 4 Prioleau Declaration"), and rebuttal declaration dated August 18, 2017.

**From Respondent:**

1. Notice of reliance on third-party registrations including the term "MOSAIC" or similar terms for goods and services similar to those at issue here;
2. Notice of reliance on third-party webpages including the term "MOSAIC" for goods and services similar to those at issue here, on prosecution documents from Respondent's registration, and on Petitioner's pretrial disclosures;
3. Declaration of Mohammad Ayoub Hadi, web designer, dated June 27, 2017; and
4. Declaration of Jerome Green, its Executive Director and President, dated June 30, 2017.

Respondent objected to various exhibits to declarations on the basis of hearsay, lack of authentication, and relevance. We find that the authentication objections are not well-founded inasmuch as the declarants state the nature, type, and date of the documents attached as exhibits to

their declarations. See Fed.R.Ev. 901 (witness may provide evidence “that an item is what it is claimed to be.”) As to the hearsay objections, to the extent the declarants do not testify as to contents of the exhibits, they may be submitted not for the truth of the matter, but for what they state on their face. Finally, objections as to relevance are not well taken, since the Board may consider and weigh the probative value of evidence submitted.

Respondent’s objection to Exhibit F to the May 4 Prioleau Declaration, which is the discovery deposition of Jerome Green, is based on a strict reading of Trademark Rule 2.120(k)(3)(i), 37 CFR § 2.120(k)(3)(i), which allows discovery depositions to be introduced in evidence. Respondent’s objection is that the deposition was not submitted with a notice of reliance.<sup>5</sup> The discovery deposition was, nevertheless submitted during Petitioner’s trial period and was introduced into the record with the May 4 Prioleau Declaration. The failure to submit via notice of reliance is therefore harmless and the objection is overruled.

### **Standing and Priority**

Standing is a threshold issue that must be proven in every *inter partes* case. See *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) (“The facts regarding standing . . . must be affirmatively proved. Accordingly, [plaintiff] is not entitled to standing solely because of the allegations in its [pleading].”). See also *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014).

To establish standing in a cancellation proceeding, a petitioner must show both “a real interest in the proceedings as well as a ‘reasonable’ basis for his belief of damage.” *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). Standing has already been established in this case as the Board entered “partial summary judgment in Petitioner’s favor with regard to the issue of Petitioner’s standing to maintain this proceeding.”<sup>6</sup>

To establish priority on a likelihood of confusion claim brought under Trademark Act Section 2(d), a party may rely on its own prior proprietary rights in a mark through ownership of a prior registration, actual use, or through use analogous to trademark use, such as use in advertising brochures, trade publications, catalogues, newspaper advertisements and Internet websites that creates a public awareness of the designation as a trademark identifying the party as a source. *See* Trademark Act §§2(d) and 45, 15 U.S.C. §§ 1052(d) and 1127. *See also T.A.B. Systems v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879 (Fed. Cir. 1996).

Inasmuch as Petitioner has not pleaded ownership of any registered trademark, it must rely on common law use of MOSAEC as a trademark or use analogous to trademark use to prove priority.<sup>7</sup> The mark must be

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<sup>5</sup> 23 TTABVUE 9-11.

<sup>6</sup> 14 TTABVUE 6.

<sup>7</sup> Petitioner pleaded application Serial No. 86587316, which matured into Registration No. 5409856 after briefing was completed in the case. Our precedent is clear that the Board will not consider a registration that issues after the plaintiff’s testimony period closes. *See* Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 704.03(b)1)(A) (June 2017); *UMG Recordings Inc. v. O’Rourke*, 92 USPQ2d 1042, 1045 (TTAB 2009).

distinctive, inherently or otherwise, and plaintiff must show priority of use. *See Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981) Although there is an issue as to whether MOSAEC may be highly suggestive, which we discuss in our analysis of likelihood of confusion, we find that the term is inherently distinctive for Petitioner’s entertainment and website services, as discussed further herein.

Ramona Prioleau, Petitioner’s founder, testified in the May 4 Prioleau Declaration that Petitioner “offers the services identified in Application No. 86/587,316 under the ‘*MOSAEC*’ service mark.”<sup>8</sup> The application, as amended, identifies the following services, in International Class 41:

entertainment services, namely, providing information by means of a global computer network in the fields of celebrities, entertainment, and popular culture; entertainment services, namely, providing on-line reviews of entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, and dance; providing a website featuring entertainment information in the field(s) of entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, dance, and news; providing information, news and commentary in the field of entertainment; providing information, news and commentary in the field of recreation and leisure activities; provision of information relating to children's entertainment

The May 4 Prioleau Declaration also states that “Petitioner is the owner and operator of a social media and e-commerce entity using the service mark ‘MOSAEC;’”<sup>9</sup> that “Petitioner sells consumer goods” via “the MOSAEC

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<sup>8</sup> 15 TTABVUE 392. Ms. Prioleau testifies that Petitioner commenced use “as early as September 1998,” but does not confirm that Petitioner commenced use of all of the listed services “at least as early as” September 1998. 15 TTABVUE 393.

<sup>9</sup> 15 TTABVUE 392.

platform”;<sup>10</sup> and that Petitioner commenced these uses “as early as September 1998.”<sup>11</sup> Prioleau authenticated and submitted webpages from the MOSAEC website.<sup>12</sup> These include online reviews about museums, films, and other cultural institutions.<sup>13</sup> Petitioner’s other witnesses also refer to similar online reviews posted on the MOSAEC website.<sup>14</sup> Ramona Prioleau also testifies that “The MOSAEC platform has been used by youth and adults to advance personal, educational, and career goals,” and that

From a functional aspect, users of the platform can learn, explore, review and share about their extracurricular, recreational and leisure pursuits related to most notably film, fine arts, museums, literature, culture, music, sports, fashion, theater, dance and restaurants.<sup>15</sup>

Ms. Prioleau’s use of the term “extracurricular” is not, however, supported by the evidence of record.

Thus we find that Petitioner has established a priority date of September 1998 for “entertainment services, namely, providing on-line reviews of entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, and dance; providing a website featuring entertainment information in the field(s) of entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, dance, and news.” We recognize that this is an abbreviated list of the services in Petitioner’s

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<sup>10</sup> 15 TTABVUE 393.

<sup>11</sup> 15 TTABVUE 393.

<sup>12</sup> 15 TTABVUE 396.

<sup>13</sup> 15 TTABVUE 347-380.

<sup>14</sup> 15 TTABVUE 10. 15 TTABVUE 37.

<sup>15</sup> 15 TTABVUE 394.

Application No. 86587316, but these are the only services for which we find Petitioner has established priority. While other witnesses referred to other services, their testimony is vague and does not refer to use of the MOSAEC mark.<sup>16</sup>

For its part, Respondent's Executive Director and President, Jerome Green submitted a declaration that "Registrant launched its web-based software on September 13, 2014. Registrant began using the MOSAYEC mark in connection with providing its web-based software and promoting the services identified in the application on September 13, 2014."<sup>17</sup> Thus Petitioner has established priority of use, and we proceed with a likelihood of confusion analysis as to these services.

### **Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all of the relevant, probative evidence in the record related to a likelihood of confusion.

*See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563

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<sup>16</sup> One, for example, refers to Petitioner having donated MOSAEC-branded goods to students and faculty at an event on March 18, 2010. 15 TTABVUE 388. However, this alone is not enough to establish trademark use or use analogous sufficient to establish priority as there is no evidence that there was any follow up beyond this brief promotional activity. *See T.A.B. Systems v. PacTel Teletrac*, 37 USPQ2d at 1883 (user must prove that the "necessary association" was created among more than an insubstantial number of potential consumers). Petitioner does not rely on priority of use for clothing for its claims in this case. Furthermore, as discussed below, even if we were to find that Petitioner has priority as to clothing, it does not affect the outcome of this case.

<sup>17</sup> 20 TTABVUE 4. The application that matured into the Respondent's registration was filed as an intent-to-use application on June 11, 2014. A Statement of Use was filed on April 15, 2015, alleging dates of first use anywhere and in commerce on September 13, 2014.

(CCPA 1973); *see also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). While all of the relevant *du Pont* factors must be considered, various factors “may play more or less weighty roles in any particular determination.” *In re E.I. du Pont*, 177 USPQ at 567. “Indeed, any one of the factors may control a particular case.” *In re Dixie Restaurants*, 41 USPQ2d at 1533 citing *du Pont*, 177 USPQ at 567.

#### The Similarity and Dissimilarity of the Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports*, 73 USPQ2d at 1692. In comparing the marks, we are mindful that the test 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 and/or services offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average consumer, who retains a general rather than specific impression of the

marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Petitioner's mark is MOSAEC. Respondent's mark is MOSAYEC. The marks differ only by a "Y" which is unlikely to affect the pronunciation. The marks are therefore similar in sight, sound, and commercial impression, and this *du Pont* factor favors finding a likelihood of confusion.

#### Strength of the Mark

Respondent alleges that Petitioner's mark MOSAEC is weak and entitled to a narrow scope of protection. *See Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015); *Promark v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1244 (TTAB 2015) .

Specifically, Respondent points to a number of websites that use the term "MOSAIC" for services similar to those of Petitioner or Respondent, and to third-party registrations for the term "MOSAIC."<sup>18</sup> We find, however, that by and large these overwhelmingly include the term "MOSAIC" spelled with an "I" and not an "E" as in Petitioner's and Respondent's marks.

Overall, we find the strength of Petitioner's mark to be neutral.

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<sup>18</sup> See 17 TTABVUE 5-44 and 18 TTABVUE 5-87.

The Services and Channels of Trade

The services identified in Respondent's registration are "providing temporary use of a web-based software application for use by children and youth to evaluate, select, and plan extracurricular activities that advance personal, educational, and career goals." We have found that Petitioner has established priority for "entertainment services, namely, providing on-line reviews of entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, and dance; providing a website featuring entertainment information in the field(s) of entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, dance, and news." Despite conclusory allegations by Petitioner and its declarants, there is no evidence that consumers would expect these services to derive from a single source. Petitioner did not attach any third-party registrations, web evidence, or other evidence to show that the services are related.<sup>19</sup>

As for the channels of trade, both Petitioner and Respondent offer their services via the web. While Respondent's services are targeted "for use by children and youth," Petitioner's services are more generally oriented and may also include services for children and youth. However, there is insufficient evidence to find that the channels of trade will overlap.

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<sup>19</sup> Although we do not find that Petitioner has established its priority as to clothing, there is nevertheless no evidence of relatedness of clothing to Respondent's listed services.

Petitioner's evidence is insufficient to prove that the services are related or that the channels of trade will overlap. These *du Pont* factors weigh heavily against finding a likelihood of confusion.

Actual Confusion

Finally, Respondent asks us to consider the lack of actual confusion. While actual confusion, where it exists, may be very powerful evidence, the lack of evidence of actual confusion carries little weight. *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965). This is especially true where, as here, the record is unclear as to the amount of meaningful opportunities for confusion to have occurred. *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1202 (TTAB 2007).

Accordingly, we find this *du Pont* factor to be neutral.

Conclusion

Considering all of the arguments and evidence of record as they pertain to the relevant *du Pont* factors, we have found that while Petitioner has demonstrated priority of its mark MOSAEC for “entertainment services, namely, providing on-line reviews of entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, and dance; providing a website featuring entertainment information in the field(s) of entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, dance, and news,” and the marks are substantially similar in sight, sound and commercial impression, Petitioner has not demonstrated that the parties’

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services are related or that they will travel through similar channels of trade. *See Giersch v. Scripps Network Inc.*, 90 USPQ2d 1020, 1027 (TTAB 2009) (finding no likelihood of confusion despite “nearly identical mark” where services are “dissimilar and unrelated”). Thus, there is no likelihood of confusion.

**DECISION:** The petition for cancellation is denied.