This Opinion Is Not a Precedent of the TTAB

Mailed: December 23, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

American Polo Association, LLC
v.
Elizabeth Scripps

Cancellation No. 92066032

Correction Order

David N. Sharifi of L.A. Tech & Media Law Firm
for American Polo Association ("Petitioner")

Charles M. Yeomans, Alan G. Towner of Leech Tishman Fuscaldo & Lampl, LLC
for Elizabeth Scripps ("Respondent")

Before Thurmon, Deputy Chief Administrative Trademark Judge, Shaw and Heasley, Administrative Trademark Judges.

By the Board:

The following sentence, from p.21 of the decision dated December 19, 2019: "All of this evidence supports Respondent's testimony that she did not intend to resume use of the mark," is corrected to read "All of this evidence supports Respondent's testimony that she did not intend not to resume use of the mark." The mailing date

of the original decision is not changed by this correction. A corrected copy of the decision is attached to this Order.

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Before Thurmon, Deputy Chief Administrative Trademark Judge, Shaw and Heasley, Administrative Trademark Judges.

Opinion by Thurmon, Deputy Chief Administrative Trademark Judge:

Petitioner seeks partial cancellation of Respondent's mark POLO GIRLS (standard characters) for the following services:

> Organizing and conducting polo sporting events for the purpose of fundraising; Entertainment in the nature of on-going television programs in the field of polo sports events, and polo lifestyle in International Class 41.[1]

[1] Registration Number 4017392 registered on the Supplemental Register on August 23, 2011. Petitioner originally sought full cancellation of the registration, but in a prior decision the Board granted partial summary judgment to the Respondent as to the following two services: "Entertainment services, namely, participation in the sport of polo;" and "Entertainment

The application that led to the challenged registration was filed on March 3, 2011, based on use of POLO GIRLS in commerce. Petitioner alleges that Respondent did not use the mark in commerce with the services identified above on or before the filing date, or, alternatively, that Respondent abandoned its rights in the mark, as to the identified services, after the filing date but before the institution of this cancellation proceeding. We find the evidence supports Petitioner's claim as to the "on-going television programs," and we grant the petition as to those services. We find, however, that Petitioner has failed to prove its claims as to the "[o]rganizing and conducting polo sporting events for the purpose of fundraising," and so we deny the petition as to those services.

I. The Record

The record consists of the file of the POLO GIRLS registration and the evidence submitted by the parties. We will not list here all the evidence in the record, but will identify relevant and probative evidence as appropriate in our discussion of the merits below. We have reviewed and considered the full record before us.

Respondent objected to Exhibits O through T, which Petitioner submitted with a rebuttal Notice of Reliance.[2] Respondent argues that these exhibits are improper

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services, namely, performing and competing in polo sports events." 13 TTABVUE. What remains of Petitioner's original petition constitutes a petition for partial cancellation as to the services identified above. We explain this aspect of the case in more detail below.

Page references to the application record are to the downloadable .pdf version of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs, motions and orders on appeal are to the Board's TTABVUE docket system.

[2] 26 TTABVUE. Respondent also objected to certain testimony of Mioshi Hill and Elizabeth Kofmehi, ne Scripps. We overrule the objections to Ms. Hill's testimony, because she provided

rebuttal testimony because they relate to Petitioner's case-in-chief.[3] We agree. Petitioner argues that each of these exhibits relates to the issue of non-use, but non-use is an element of Petitioner's claims. These exhibits contain evidence relating to what is or is not a television program or to what the word "organizing" means. This evidence goes to Petitioner's case-in-chief and should have been submitted as such. Petitioner cannot credibly claim surprise that Respondent presented evidence and arguments on these issues in its brief.[4] *See, e.g., Automedx, Inc. v. Artivent Corp.*, 95 USPQ2d 1976, 1977 (TTAB 2010) ("Evidence which should constitute part of an opposer's case in chief, but which is made of record during the rebuttal period, is not considered when the applicant objects."). We strike these untimely exhibits from the record.

II. The Posture and Nature of Petitioner's Claim

Respondent filed on March 3, 2011, a use-based application[5] to register the mark POLO GIRLS, claiming first use of the mark in commerce at least as early as November 5, 2009.[6] The mark was registered on the Supplemental Register on August 23, 2011. About five years later, on July 18, 2016, Petitioner filed an

testimony based on her personal experience and not as an expert. We sustain the objection at to Ms. Kofmehi's cited testimony because it is irrelevant.

[3] 29 TTABVUE 59-60.

[4] We further note that the same factual issues were raised in Petitioner's summary judgment motion, filed almost a year before these so-called rebuttal exhibits were filed. These filings appear to be nothing more than an attempt to bolster the record with evidence that unquestionably could have been presented during Petitioner's testimony period.

[5] 15 U.S.C. § 1051(a).

[6] Application Serial Number 85256494.

application to register the mark AMERICAN POLO GIRL for a variety of polo-related services.[7] Petitioner's application was refused under Section 2(d) (likelihood of confusion) based on Respondent's POLO GIRLS mark.[8] Petitioner filed a Petition to Cancel the POLO GIRLS registration and the prosecution of Petitioner's pending application was suspended.

On February 12, 2018, Petitioner moved for summary judgment on its claims of non-use, abandonment, and fraud.[9] Respondent opposed the motion and filed a cross-

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[7] Application Serial Number 87107610 for

> Entertainment services in the nature of hosting social entertainment events; Entertainment services, namely, an ongoing multimedia program featuring polo matches distributed via various platforms across multiple forms of transmission media; Entertainment services, namely, arranging and conducting of competitions in the field of polo; Entertainment services, namely, contest and incentive award programs designed to reward program participants who exercise, make healthy eating choices, and engage in other health-promoting activities; Entertainment services, namely, multimedia production services; Entertainment services, namely, providing ongoing television programs in the field of polo via a global computer network; Entertainment services, namely, providing ongoing webisodes featuring polo games via a global computer network; Entertainment services, namely, providing webcasts in the field of polo; Instruction in the field of polo; Educational and entertainment services, namely, a continuing program about the sport of polo accessible by radio, television, satellite, audio, video and computer networks; Organizing exhibitions for polo

all in International Class 41.

[8] Office Action dated November 1, 2016. The Examining Attorney also refused registration of the AMERICAN POLO GIRL mark under section 2(e)(1) as merely descriptive. That refusal is not at issue in this proceeding.

[9] 6 TTABVUE.

motion for summary judgment on the same issues.[10] In an August 1, 2018 Order, the Board denied Petitioner's motion and granted, in part, the cross motion of Respondent.[11] The Board dismissed Petitioner's fraud claim as insufficiently pleaded.[12] As to the remaining claims, the Board explained,

> [W]e find that, at a minimum, genuine disputes of material fact remain with respect to Respondent's use of the mark prior to the application filing date and during the alleged abandonment period in connection with "Organizing and conducting polo sporting events for the purpose of fundraising" and "Entertainment in the nature of on-going television programs in the field of polo sports events, and polo lifestyle."[13]

Petitioner's motion for summary judgment and Respondent's cross-motion for summary judgment, therefore, were both denied as to the services noted above. The Board, however, also found

> [N]o genuine disputes of material fact remain for trial regarding Respondent's use in commerce in connection with "entertainment services, namely, participation in the sport of polo" and "entertainment, namely, performing and competing in polo sports events" prior to the application filing date and during the three years prior to the petition for cancellation.[14]

[10] 8 TTABVUE.

[11] 13 TTABVUE.

[12] *Id.* at 6. The Board also dismissed an unclean hands defense raised by Respondent. *Id.* at 8.

[13] *Id.* at 17.

[14] *Id.* at 18.

For that reason, Respondent's cross-motion was granted as to these services. The only issues remaining are whether Petitioner has proven its non-use or abandonment claims as to the remaining services.

III. Standing

Standing is a threshold issue that must be proven by the plaintiff in every inter partes case. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *John W. Carson Found. v. Toilets.com Inc.*, 94 USPQ2d 1942, 1945 (TTAB 2010). Petitioner has submitted into evidence a copy of its pleaded application and the Office Action initially refusing registration of the AMERICAN POLO GIRL mark based on a likelihood of confusion with Respondent's POLO GIRLS registration.[15] This evidence is sufficient to show Petitioner has a "real interest" in the proceeding and "a reasonable basis for [its] belief of damage." *Empresa Cubana Del Tabaco*, 111 USPQ2d at 1062 (citing *Ritchie v. Simpson*, 171 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999)); *see also Yazhong Investing Ltd. v. Multi-Media Tech. Ventures, Ltd.,* 126 USPQ2d 1526, 1532 (TTAB 2018); *ShutEmDown Sports Inc. v. Lacy,* 102 USPQ2d 1036, 1041 (TTAB 2012).

IV.Analysis

Petitioner alleges non-use prior to the filing date of Respondent's application and abandonment after the registration date.[16] The facts regarding what Respondent did

[15] 16 TTABVUE at Exh. A.

[16] Abandonment requires evidence of (1) non-use of the mark; and, (2) an intent not to resume use. 15 U.S.C. § 1127; *Lens.com, Inc. v. 1-800 Contacts, Inc.*, 686 F.3d 1376, 1379-80 (Fed. Cir. 2012). "Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment." 15 U.S.C. § 1127.

and when are largely undisputed. The disputes in this case relate to the significance of Respondent's actions and her intentions regarding use of the mark for organizing and conducting events.

Petitioner has proven that Respondent failed to use the POLO GIRLS mark in connection with "ongoing television programs in the field of polo sports events, and polo lifestyle" prior to the application filing date. Because the application was filed based on use in commerce, the registration must be canceled as to these services.

Petitioner, however, has not proven its claims as to the other services at issue here. The evidence shows use of the POLO GIRLS mark in connection with "organizing and conducting polo sporting events for the purpose of fundraising" before and after the filing date of the application. Petitioner has proven a period of non-use of the mark for these services, but has not shown that Respondent intended to not resume use of the mark with these services. There is credible evidence refuting any such intent. For these reasons, the petition is denied as to these services.

A. Respondent Did Not Use the POLO GIRLS Mark in Connection with "Ongoing Television Programs" On or Before the Filing Date

There are three uses of the POLO GIRLS mark in connection with video content prior to the March 3, 2011 filing date.

- In 2009, Respondent produced a video bearing the POLO GIRLS mark and circulated this to various groups in the hope of it leading to a television series.[17]

[17] 19 TTABVUE 5-6.

- In 2010, Respondent posted a video bearing the POLO GIRLS mark on her Facebook page.[18]
- In early 2011 (apparently just a day before the application was filed), a third video bearing the POLO GIRLS mark was posted on YouTube.[19]

These facts are not in dispute. It is also clear that Respondent hoped the 2009 video would lead to a television contract.[20] That, however, did not happen prior to the filing date of the application. Instead, Respondent produced two additional videos, both of which were streamed via the Internet (one through Facebook and the other through YouTube).

It is not entirely clear where the line exists (or perhaps whether a line exists) between television programs and Internet videos. Not only are traditional television programs[21] available for viewing on the Internet, but there are many ongoing Internet video programs, as Respondent notes.[22] We need not resolve these issues here, because the three videos noted above clearly do not constitute an ongoing television program. While we do not find any single characteristic of the videos is conclusive, we note that each the following undisputed facts undermines Respondent's argument that it was using the POLO GIRLS mark on an ongoing television program by March 3, 2011.

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[18] *Id.* at 6.

[19] *Id.* at 6-7. This video apparently was posted twice, on March 2, 2011 and March 3, 2011. *Id.*

[20] *Id.* at 5-6.

[21] We mean television programs broadcast via over-the-air transmission or cable and that appear on a specific television channel for viewing.

[22] 29 TTABVUE 30-31.

The videos were short, were produced months apart, and are not linked in any material way. The first video was the longest at just over two minutes. It has the appearance of a music video.[23] It features random scenes, some from what appears to be a polo match on a beach, some showing an award presentation, and several others from clubs or parties. This video identifies three individuals (Melissa, Julia, and Kate) and presents several shots of these individuals. There is no dialog, only a song played over the video. There is no indication in this video that it is part of an on-going television program or series, and this video was not broadcast over the air or via cable. It was sent directly to third parties in the hope of generating interest.[24]

The second video is very short, about twenty seconds and appears to show scenes from a polo event.[25] The riders shown in this video appear to be young, and none of the three individuals featured in the first video are seen in the second video. Again, there is no dialog, only music over the video. There is no apparent connection between this video and the first one. This video was not broadcast over the air or on cable television, but was posted on Respondent's Facebook page.[26]

The third video is also quite short, about twenty-five seconds long. It shows many people walking across what appears to be a polo field during a break in or after a match.[27] The people are stomping down large divots in the grass and can be heard

[23] 19 TTABVUE at Exh. 4AV.

[24] *Id.* at 5-6.

[25] *Id.* at Exh. 8AV.

[26] *Id.* at 6.

[27] *Id.* at Exh. 11AV.

talking. There is no music in the background of this video. The three individuals featured in the first video are not seen in this video, and the young riders from the second video are not seen either. This video was not broadcast over the air or via cable television, but was posted on YouTube.[28]

These three short unconnected videos[29] were not an ongoing television program. At most, they are brief videos showing different aspects of polo events, with the first video also containing scenes from parties or clubs showing some participants from the polo event. The first video features three identified persons, but these three persons are not in the other two videos. There is nothing ongoing about these videos, nothing connecting one to another. And each was distributed via a different media platform. We need not even reach the more difficult line-drawing mentioned above because these three videos were not part of an ongoing program of any kind.

As Petitioner notes, television programs are typically presented in a half-hour or longer time slot.[30] Perhaps some shorter videos streamed on the Internet could be considered television programs, as Respondent argues, but even the examples she identifies feature plot, dialog, and a series of shorter videos that are clearly connected to each other.[31] It strains credulity to suggest the very brief second and third videos

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[28] *Id.* at 6-7.

[29] There is no apparent connection between the videos other than the fact that all three have scenes from polo events.

[30] 27 TTABVUE 22-23.

[31] 21 TTABVUE Exh. D (describing traditional television programs streamed via the Internet), Exh. F (same), Exh. H (identifying a number of shorter "shows" on YouTube). The last exhibit comes closest to supporting Respondent's argument, as it does describe shows as short as 1-6 minutes. But this exhibit does not identify these as television shows, but rather as videos on YouTube. In addition, each entry describes a series of clearly connected "shows"

are ongoing television programs. The first video is much shorter than a typical television program, but even if it were treated as a program, it cannot be, standing alone, an ongoing television program. This conclusion is warranted, particularly since there is no indication in this video that it is part of a series or that more similar videos are to come. It is a one-off product showing varied scenes related to polo.

These three videos were produced over a period of more than two years.[32] Indeed, 17 months separate the first and second videos. For a program to be ongoing, it must be repeated on some sort of regular interval, weekly, quarterly, seasonally, or perhaps at least annually. The long and apparently random gaps between these three videos further undermines Respondent's argument that they formed an ongoing television program.

Each video was distributed differently from the others: the first was distributed directly to discrete recipients; the second was posted on a Facebook page; and, the third was posted on YouTube. There was no continuity of distribution, except that the very short second and third videos were both distributed online. The inconsistent and varied distribution of the three videos also contradicts the claim that they were an ongoing television program.

with plots and continuing characters. The three videos at issue here lack even these rudimentary characteristics of a "show."

[32] 19 TTABVUE 5-7. The first video was produced in April 2009, the second in September, 2010, and the third was posted in early March, 2011.

Two additional considerations support this conclusion. First, Respondent sent the first video to others in the hope of landing a television contract.[33] These actions show that Respondent knew what a television program was. The evidence, therefore, shows that Respondent wanted to produce, or at least participate in the production of, a television program about polo. But the same evidence shows that Respondent knew she had not done so at the time she filed her application.

Another reason for not treating these videos as television programs is that our classification system provides alternative identifications that more closely fit the service of posting and streaming videos on the Internet. When Respondent filed her application in 2011, the following identifications were available:

- Streaming of video material on the Internet, in International Class 38;
- Video broadcasting services via the Internet; and,
- Streaming of {specify format, e.g., audio, video, audiovisual, etc.} material on the Internet, in International Class 38.

Each of these identifications appears to fit Respondent's video services. The classification system is intended to provide sufficient identifications to allow trademark users to find good matches for their specific uses. Respondent failed to do so with respect to her video streaming, and we cannot correct that error now by deeming her limited Internet video streaming to be an ongoing television program.

The Board considered a somewhat similar factual situation in *South Cent. Cmty. Servs., Inc. v. Wood*, Cancellation No. 92048239, 2011 WL 3871950, at *3 (TTAB

[33] *Id.* at 5-6 (the video was sent "to several production companies" and to "networks"); Exhs. 6-7 (emails and contracts related to the same effort).

2011) (not precedential). Though not a precedent of the Board, the analysis in the cited case is instructive, as the Board panel found that "Internet postings of short, incomplete snippets of an off-the-air television show" did not constitute an "ongoing television program." *Id.* There were other facts supporting the panel's decision in that case that are not present here, but we agree with the general proposition that posting video clips on the Internet is a different service than providing an ongoing television program.

As we noted above, the evidence shows Respondent hoped to produce an ongoing television program, but had not done so on or before the application filing date.[34] In this regard, the present case is similar to *Couture v. Playdom, Inc.*, 778 F.3d 1379, 113 USPQ2d 2041 (Fed. Cir. 2015), where Mr. Couture filed a use-based application to register the mark PLAYDOM for various entertainment services involving script writing. Couture, an aspiring screen writer, had sent his work to several parties, had a website to promote his work, and had engaged in other efforts to become a screen writer. But none of his scripts had been accepted when he filed the trademark application.

The Federal Circuit held that services must be rendered on or before the filing date of a used-based trademark application. *Id.* Mr. Couture clearly intended and hoped to provide the identified services and was offering to provide the services, but that was not enough. The same result follows here. Respondent may have intended to provide ongoing television programs under the POLO GIRLS mark when she filed

[34] 19 TTABVUE 5-6; 29 TTABVUE 26, 28 (and the record evidence cited therein).

her use-based trademark application, but no such services had been rendered. Thus, the petition to cancel as to "Entertainment in the nature of on-going television programs in the field of polo sports events, and polo lifestyle" is granted.

B. Petitioner Has Failed To Prove Non-use of the POLO GIRLS Mark in Connection with "Organizing and Conducting Polo Sporting Events" Before the Filing Date, or Abandonment of the Mark After the Filing Date

We turn now to uses of the POLO GIRLS mark in connection with "[o]rganizing and conducting polo sporting events for the purpose of fundraising." Petitioner argues the mark was not used with such services prior to the filing date. Petitioner further argues that even if the mark was used before the filing date, it was abandoned as to these services after the filing date. Petitioner's abandonment argument relies primarily on the statutory presumption of abandonment that arises upon a showing of a three-year period of non-use, but we read Petitioner's abandonment claim to include the argument that the traditional elements of abandonment are met, even if the statutory presumption is not triggered by the evidence. 15 U.S.C. § 1127 (abandonment requires proof of (1) non-use of the mark; and, (2) an intent not to resume use).

The evidence does not support Petitioner's claims. First, there is evidence showing Respondent used the POLO GIRLS mark with the relevant services on or before the filing date of her application. Second, Petitioner has failed to prove a three-year period of non-use, and therefore, the statutory presumption of abandonment is not relevant here. Finally, although Petitioner has established two years of non-use,

Petitioner has failed to prove an intent not to resume use of the mark with the relevant services. We address these points separately below.

1. Use of the POLO GIRLS Mark On or Before the Filing Date

There are three elements in the identified services: (1) organizing and conducting (2) of polo sporting events (3) for the purposes of fund raising. We provide this breakdown because only the first element is in dispute. Petitioner does not dispute that Respondent used the POLO GIRLS mark with polo sporting events, and does not appear to seriously question the fundraising aspect of many of the events.

Not only does Petitioner focus on the "organizing and conducting" part of the services, it reads those roles in an extremely narrow fashion. Petitioner appears to construe the identification as requiring that Respondent play a primary role in both the organizing and the conducting of every relevant event. We take a broader view. If the evidence, taken as a whole, shows both organizing and conducting actions by Respondent (using the POLO GIRLS mark), the identified services have been rendered. We find the evidence more than sufficient to satisfy this standard.

We take judicial notice of the following definitions from well-known and widely-available online dictionaries:[35]

[35] The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *See In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014) *aff'd* 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006) (Board may take judicial notice of widely-known reference readily available in specifically denoted editions via the Internet although not available in print); s*ee also Univ. of Notre Dame du Lac v. J. C. Gourmet Food Imps. Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

- organize –
    - "to arrange by systematic planning and united effort" as in "organize a tour of the campus for the new students" – Merriam-Webster[36]
    - "to prepare or arrange an activity or event" - MacMillan[37]
- conduct –
    - "to direct or take part in the operation or management of" as in "conduct an experiment" – Merriam Webster[38]
    - "to do something in an organized way" - MacMillan[39]

The terms "organizing" and "conducting" are similar. A temporal distinction between the terms is possible, as the organizing might occur before the event and the conducting might occur during the event. We hold that such fine distinctions are inappropriate. The marketing and promotion of an event, for example, are part of the organization of the event, but may also be fairly viewed as part of conducting the event, particularly if the promotion is done at the event site and while the event is occurring.

We make note of these points because the evidence shows that Respondent has used the POLO GIRLS mark in connection with promoting numerous charitable events. For some of these events, Respondent and her polo team participated to some

[36] https://www.merriam-webster.com/dictionary/organize (site last visited on December 4, 2019).

[37] https://www.macmillandictionary.com/us/dictionary/american/organize (site last visited on December 4, 2019).

[38] https://www.merriam-webster.com/dictionary/conduct (site last visited on December 4, 2019).

[39] https://www.macmillandictionary.com/us/dictionary/american/conduct_1 (site last visited on December 4, 2019).

extent in the polo matches, a fact that Petitioner interprets as inconsistent with also "conducting" the event.[40] Again, the distinction is too fine. The evidence shows active participation in the promotion and carrying out of these events, and we believe such actions can be fairly viewed as part of the "organizing and conducting" of the events. The fact that Respondent was riding her horse in a polo match during part of a particular event does not say anything about what else she did or how the POLO GIRLS mark was being used in connection with the event.

Under the Trademark Act's definition of abandonment, "'use' of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark." 15 U.S.C. § 1127. A service mark is used

> [W]hen it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services.

Id. There is no threshold magnitude of use required as long as the requirements set forth above are met. *Person's Co. v. Christman,* 900 F.2d 1565, 14 USPQ2d 1477, 1481 (Fed. Cir. 1990).

The evidence shows use of the POLO GIRLS mark in connection with three charitable events prior to the March 3, 2011 filing date. On June 28, 2010, a

[40] *See, e.g.,* 27 TTABVUE 36 (arguing "respondent promoted the event but neither organized or conducted it" and that Respondent was not involved in "coordinating any standard logistical aspects of events"). For the reasons given above, we find Petitioner's arguments overly narrow and, therefore, unpersuasive.

fundraising event was held at the Las Colinas Polo Club in Irving, Texas.[41] Respondent issued a press release and was involved in the marketing and promotion of the event.[42] The POLO GIRLS mark was used in these materials. These efforts were a part of the organizing of the event.

On August 6, 2010, an event titled "Polo Girls Friday Night Under the Lights" was held in Darlington, Pennsylvania.[43] This event raised funds for the Lion's Club. Respondent was involved in the promotion of this event and in the conducting of novice polo matches to teach new players the sport.[44] In this instance, Respondent was involved in both the pre-event organizing and on-site conducting of the event.

An event titled "Pinot and Polo" was held in Irving, Texas on October 10, 2010 and was co-sponsored by Respondent and the Texas Christian University (TCU) women's polo team to raise funds for the team.[45] The evidence shows a Facebook post bearing the POLO GIRLS mark promoting this event. The mark, therefore, was used in connection with the organizing of the event.

We find this evidence shows sufficient use of the POLO GIRLS mark in connection with the recited services before the application was filed. All three events show Respondent was involved in the organization of the events. The evidence further shows that for at least the Darlington, Pennsylvania event, Respondent was also

[41] 19 TTABVUE 12, Exh. 23.

[42] *Id.*

[43] *Id.* at 12, Exh. 24.

[44] *Id.*

[45] *Id.* at 13, Exh. 25.

involved in conducting the event, for example, by conducting polo matches for beginning players. These are all bona fide uses of the mark in connection with the identified services prior to the filing date. Petitioner has failed to prove the application was void ab initio due to non-use on or before the filing date.

2. Use of the POLO GIRLS Mark After the Filing Date

The record contains evidence the POLO GIRLS mark was used after the registration date in connection with the following polo events, most of which clearly involved some form of fundraising:

- An event on November 17, 2012 to support victims of Hurricane Sandy;[46]
- A September 7, 2013 event near Pittsburgh;[47]
- A Christmas event on December 21, 2013 in Wellington, Florida;[48]
- A May 30, 2014 event near Pittsburgh;[49] and,
- Another event near Pittsburgh on September 6, 2014.[50]

Respondent was involved in the organization and conducting of these events. We need not parse out every event to determine the precise role Respondent played. The evidence shows use of the POLO GIRLS mark in connection with these events, and there is ample evidence that Respondent was involved in organizing, conducting, or both for each event.

[46] 19 TTABVUE Exh. 32.

[47] *Id.* at Exh. 33, 35.

[48] *Id.* at Exh. 37-39.

[49] *Id.* at Exh. 26-27.

[50] *Id.* at Exh. 28-29.

To rely on the statutory presumption of abandonment, Petitioner must prove non-use of the mark for three years. The Petition to Cancel was filed on May 1, 2017. The evidence cited above shows ongoing use of the POLO GIRLS mark in connection with the organizing and conducting of charitable polo events from prior to the application filing date through September, 2014, which is less than three years before the institution of this proceeding. There is some evidence in the record of later uses of the POLO GIRLS mark with these services,[51] but the evidence cited above is sufficient to show that no three-year period of non-use has been established.

3. There Is Insufficient Evidence of an Intent Not To Resume Use of the POLO GIRLS Mark

The evidence shows about a two-year period of non-use of the mark, that is, from about March, 2015 until about May, 2017. This non-use satisfies the first element of abandonment, but Petitioner also must prove an intent not to resume use of the mark. Respondent presented unrebutted testimony that she "experienced severe, life threatening medical issues from March of 2015 through May of 2017."[52]

The evidence we reviewed above shows direct, personal involvement by Respondent in the listed events. Much of the promotion was done on her social media pages and she was present at the events. She was involved in conducting matches

[51] *See, e.g., id.* at Exh. 30 (2015 event in Arizona).

[52] *Id.* at 22-25. Respondent provided details of her medical issues and there is no evidence in the record contradicting or questioning her account of these facts. The evidence of record shows reasonably steady use of the POLO GIRLS mark until the time period covered by Respondent's serious health issues. It also shows that the individual Respondent here is not only the owner of the mark but appears to be the person directly responsible for uses of the POLO GIRLS mark. We find Respondent's testimony credible and that her serious health issues explain and excuse the period of non-use.

with new players at some events. These events occurred in different states, which meant Respondent had to travel regularly, presumably with her horse.

These are not trivial activities. We find Respondent's medical challenges during the period of non-use would make most of the activities noted above difficult, if not impossible. Additionally, the following evidence corroborates Respondent's desire to resume use of the mark during the period of non-use:

- A September 10, 2016 text message concerning possibly organizing an event in the fall;[53]
- A July 7, 2017 Facebook post referring to possible collaboration "on an event."[54]

In addition to this evidence, there are invitations or inquiries from third parties to Respondent about participation in events during the period of non-use.[55] Respondent also maintained her social media sites, which all used the POLO GIRLS mark, even during the period of non-use.[56] All of this evidence supports Respondent's testimony that she did not intend not to resume use of the mark. There is, on the other hand, no evidence to support Petitioner's argument that Respondent intended not to resume use of the POLO GIRLS mark. Petitioner has failed to prove abandonment.

Decision: The petition to cancel is granted in part. Registration number 4017392 will be canceled as to "Entertainment in the nature of on-going television programs in the field of polo sports events, and polo lifestyle in International Class 41" in due

[53] 19 TTABVUE at Exh. 58.

[54] *Id.* at Exh. 61.

[55] *Id.* at Exhs. 59, 60, 62.

[56] *Id.* at Exhs. 63, 64.

course. The petition to cancel Registration number 4017392 is denied as to all other recited services.