

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: April 29, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Superior Brands, LLC
v.
Retrobrands America LLC
—

Cancellation No. 92081356
—

Superior Brands, LLC, pro se.¹

Retrobrands America LLC, pro se.²
—

Before Wellington, Lykos, and Stanley;
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Respondent Retrobrands America LLC owns a Supplemental Register
registration for the standard character mark KINNEY SHOES for:

On-line retail store services featuring high-end designer
shoes, orthopedic shoes, sailing shoes, and metal tipped
work boots not including dancing shoes or any dancing
related apparel, in International Class 35.³

¹ Michael J. Lee, Petitioner's Managing Partner, filed Petitioner's submissions.

² Jeffrey Kaplan, Respondent's President, filed Respondent's submissions.

³ Registration No. 6822748, issued August 16, 2022 on the Supplemental Register. The registration includes a disclaimer of SHOES.

By way of its amended Petition to Cancel, Petitioner Superior Brands, LLC seeks cancellation of Respondent's registration under Trademark Act ("the Act") Section 2(d), 15 U.S.C. § 1052(d), alleging likelihood of confusion with the mark in its pleaded intent-to-use application for:



for "Footwear, namely, work boots, hiking boots and athletic shoes for running, tennis, baseball, football, and basketball, excluding dance-related footwear" in International Class 25.⁴ Petitioner alleges that it has priority in connection with its likelihood of confusion claim because the filing date of Petitioner's application provides it with a constructive use date that precedes any priority date that Respondent can rely upon.⁵

⁴ 9 TTABVUE 3-4. The allegations of ownership are unnumbered in a paragraph under the title "factual background" in the amended Petition to Cancel.

Citations in this opinion refer to TTABVUE, the Board's online docketing system. Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

⁵ 9 TTABVUE (amended Petition to Cancel ¶¶ 9-15). Specifically, Petitioner alleges that the filing date of its pleaded application is December 16, 2021, and that while Respondent's intent-to-use application for its involved registration was filed on November 26, 2020, before the filing date of Petitioner's pleaded application, the effective filing date of Respondent's application became May 26, 2022 when Respondent filed its amendment to allege use and amended the application to the Supplemental Register. *See* Trademark Rule 2.75(b); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 815.02 (2024).

We point out that a plaintiff may rely on an application and its constructive use provisions of Section 7(c), but that any judgment based on that application is contingent upon the ultimate issuance of a registration. *Larami Corp. v. Talk to Me Programs Inc.*, Opp. No. 91085987, 1995 TTAB LEXIS 13, at *14 n.7 (TTAB 1995). In other words, any judgment in

Respondent, in its answer, denied the salient allegations of the amended Petition to Cancel and asserted, as an affirmative defense, that Petitioner “lacked a bona fide intent to use the KS KINNEY SHOES mark in commerce when Petitioner filed for its application with the United States Patent and Trademark Office on December 16th 2021.”⁶

The case is fully briefed.

I. Petitioner’s Failure to Prove Statutory Entitlement to Bring the Cancellation

In every inter partes case, the plaintiff must establish its entitlement to have invoked the statutory proceeding it filed. In the case of a registration on the Supplemental Register, as is the case here, the applicable statute provides that “[w]henever any person believes that such person is or will be damaged by the registration of a mark on the supplemental register ... such person may at any time, upon payment of the prescribed fee and the filing of a petition stating the ground therefor, apply to the Director to cancel such registration.” Section 24 of the Act, 15 U.S.C. § 1092.

favor of Petitioner in this case based on the constructive use date of its pleaded application would be contingent upon the ultimate issuance of a registration. *See Compagnie Gervais Danone v. Precision Formulations LLC*, Opp. No. 91179589, 2009 TTAB LEXIS 1, at *4 (TTAB 2009).

As part of an internal Board pilot program, this opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion uses citations to the LEXIS legal database and cites only precedential decisions, unless otherwise noted. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03(a)(2) (2024) for acceptable citation forms to TTAB cases.

⁶ 10 TTABVUE 3 (“Affirmative Defense ¶ 1”).

To satisfy its entitlement to the cause of action, the plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute; and (ii) proximate causation. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 120-37 (2014)); *id.* at 1305 (applying *Lexmark* to inter partes TTAB cases). Demonstrating a real interest in cancelling the registration of a mark satisfies the zone-of-interests requirement, and demonstrating a reasonable belief in damage by the continued registration of a mark demonstrates damage proximately caused by registration of the mark. *Id.* at 1305-06.

Again, Petitioner pleaded ownership of a pending intent-to-use application for the stylized mark KINNEY SHOES with design, as shown above, and further pleaded that this application was refused registration based on a likelihood of confusion with Respondent's registration.⁷ Generally, these allegations, if proven, are sufficient for establishing a plaintiff's entitlement to bring a cancellation against the cited registration. *See, e.g., Empresa Cubana del Tabaco v. General Cigar Co.*, 753 F.3d 1270, 1274 (Fed. Cir. 2014); *Great Seats, Ltd. v. Great Seats, Inc.*, Can. No. 92032524, 2007 TTAB LEXIS 68, at *5-6 (TTAB 2007) (finding petitioner's ownership of application for mark and services related to registrant's mark and services and refusal of application sufficient to establish entitlement to bring Section 2(d) claim); TBMP § 309.03(b).

⁷ 9 TTABVUE 4-5. Petitioner made these allegations in the amended Petition to Cancel (in unnumbered paragraphs) in a section titled "Entitlement to Statutory Cause of Action."

Although the amended Petition to Cancel sets forth sufficient allegations to establish an entitlement to a statutory cause of action, Petitioner must prove these allegations by a preponderance of the evidence. *Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC*, Opp. No. 91263919, 2022 TTAB LEXIS 383, at *5-6 (TTAB 2022). In this regard and in terms of legal responsibilities, the parties were advised on multiple occasions during the prosecution of this proceeding that “legal representation is strongly encouraged,” and particularly so “for a person who is not acquainted with the technicalities of the procedural and substantive law involved in an opposition or cancellation proceeding to secure the services of an attorney who is familiar with such matters.”⁸ Petitioner did not retain counsel and thus assumed the responsibility and risk of deciding to represent itself. *See Hole In 1 Drinks, Inc. v. Lajtay*, Can. No. 92065860, 2020 TTAB LEXIS 9, at *5 (TTAB 2020); *see also Yanopoulos v. Dep’t of Navy*, 796 F.2d 468, 470 (Fed. Cir. 1986) (“Petitioner chose to proceed pro se and must accept the consequences of that decision.”).

As an initial matter in terms of Petitioner proving its entitlement to a cause of action, we point out that a plaintiff’s pleaded pending application is not automatically of record, and may be introduced as evidence at trial by filing under notice of reliance a copy thereof showing current status and title, or through witness testimony about its ownership and status. *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, Opp. No. 91221553, 2018 TTAB LEXIS 72, at *18 (TTAB 2018).

⁸ 8 TTABVUE 10 (Board’s April 30, 2023 order). *See also* the Board’s institution order (the Board “strongly advises all parties to secure the services of an attorney who is familiar with trademark law and Board procedure.”) 2 TTABVUE 6.

Also, the Board cannot take judicial notice of pleaded registrations or applications that have not been properly made of record. *UMG Recordings Inc. v. O'Rourke*, Opp. No. 91178937, 2009 TTAB LEXIS 533, at *12 (TTAB 2009) (“[i]t is well settled that the Board does not take judicial notice of USPTO records”).

Although Petitioner attached a copy of its pleaded application with its original Petition to Cancel, as well as a copy of the Office Action refusing registration of its mark, Petitioner was specifically informed by the Board that these “materials attached to its complaint, including any printouts related to its pleaded application ..., are not considered to be evidence of record and must be properly introduced on summary judgment or at trial.”⁹ Trademark Rule 2.122(c) provides that, except for pleaded registrations, “an exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached, and must be identified and introduced in evidence as an exhibit during the period for the taking of testimony.” 37 C.F.R. § 2.122(c).

At trial, Petitioner’s submitted the following:¹⁰

- First Notice of Reliance on: Respondent’s responses to Petitioner’s interrogatories and requests for admission, all involving Respondent’s activity and use of its registered mark;
- Second Notice of Reliance on: third-party registrations submitted for purposes of demonstrating relatedness of the parties’ goods and services;
- Third Notice of Reliance on: Internet materials submitted for purposes of demonstrating relatedness of the parties’ goods and services; and

⁹ 8 TTABVUE 5, n. 5.

¹⁰ 16 TTABVUE.

- Testimonial Declaration of Michael Lee, a partner at Petitioner’s LLC, who makes averments regarding attachments that include logo designs, email correspondence, website screenshots and activity, submitted for purposes of “among other things, Petitioner had a bona fide intent to use its [pleaded] mark, at the time Petitioner filed its application Petitioner’s activity subsequent to the pleaded filing date of the application it relies upon for priority.”

Notably missing from this evidence is a copy of Petitioner’s pleaded application or evidence to support Petitioner’s allegation that its pleaded applied-for mark was refused registration under Section 2(d) based on Respondent’s registration.¹¹ Mr. Lee’s testimony does not include any averments as to Petitioner’s ownership of the pleaded application or a refusal to registration; rather, his testimony is confined to discussing documents that Petitioner produced during discovery, none of which include a copy of its pleaded application.

Without such evidence, Petitioner has failed to prove the underpinning allegations in the amended Petition to Cancel that would establish its entitlement to a statutory cause of action. This failure, alone, is a sufficient basis to dismiss this proceeding.¹²

¹¹ We also reviewed the evidence adduced by Respondent and this does not include a copy of the Petitioner’s pleaded application or evidence establishing the pleaded applied-for mark being refused registration based on Respondent’s registration. Moreover, Respondent’s Answer does not contain an admission as to the status and title of Petitioner’s pleaded application.

¹² We note that in its brief, “Respondent stipulates that Petitioner has standing to file his Petition for this Cancellation.” 21 TTABVUE 14. However, “parties may not stipulate to a plaintiff’s standing in the absence of supporting facts[.]” *Wirecard AG v. Striatum Ventures B.V.*, Can. No. 92069781, 2020 TTAB LEXIS 12, at *6 n. 6 (TTAB 2020). Rather, “the parties may stipulate as to the facts which would support standing, eliminating the need for separate proof of those facts.” *Id.*; see also *Corcamore*, 978 F.3d at 1303 (“Whether a party is entitled to bring or maintain a statutory cause of action is a legal question.”); *Alexsam, Inc. v. IDT Corp.*, 715 F.3d 1336, 1346 n.9 (Fed. Cir. 2013) (“Courts are ‘not bound to accept, as controlling, stipulations as to questions of law.’”) (quoting *Estate of Sanford v. Comm’r*, 308 U.S. 39, 51 (1939)). Here, the parties did not stipulate to the facts supporting Petitioner’s

See Lumiere Prods., Inc. v. Int'l Tel. & Tel. Corp., Opposition No. 91066857, 1985 TTAB LEXIS 42, at *3 (TTAB 1985). Nevertheless, for sake of completeness, we address the element of priority of Petitioner's Section 2(d) claim.

II. Petitioner's Failure to Prove Priority

To establish priority on a likelihood of confusion claim brought under Section 2(d) of the Act, a party must prove that it owns "a mark or trade name previously used in the United States ... and not abandoned" Trademark Act Section 2(d), 15 U.S.C. §1052. Petitioner's allegation of priority rests entirely on the constructive use (filing) date of Petitioner's pleaded intent-to-use application (see Note 5).

Because Petitioner did not make its pleaded application of record, it cannot rely on any constructive use date for this pleaded application in proving priority and thus cannot prevail on its claim of likelihood of confusion.¹³ *See Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 1370 (Fed. Cir. 2002) ("The burden of proof rests with the [plaintiff] . . . to produce sufficient evidence to support the ultimate conclusion of [priority of use] and likelihood of confusion."). Accordingly, Petitioner's Section 2(d) claim fails on this basis.

entitlement to a statutory cause of action, and as explained, Petitioner did not otherwise prove its entitlement.

¹³ Even if we accepted Respondent's stipulation to Petitioner's entitlement to a statutory cause of action (*see supra* at note 12), Respondent did not stipulate to Petitioner's priority, and Petitioner did not otherwise prove its priority.

Decision:

The Petition to Cancel is denied based on Petitioner's failure to prove its entitlement to a cause of action and Petitioner's failure to prove priority, which is an essential element of its claim under Section 2(d) of the Act.¹⁴

¹⁴ In view of our decision, we need not address Respondent's affirmative defense that Petitioner's pleaded application is void ab initio because Petitioner lacked a bona fide intent to use the mark when the application was filed.