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

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| Proceeding no. | 92085186 |
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| Date | 09/18/2024 |
| Attachments | DTAG Reply ISO Motion to Dismiss Telefonicas Amended Petition for Cancellation.pdf(222215 bytes) |

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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|----------------------|---|---------------------------|
| Telefonica, S.A., |) | |
| |) | |
| Petitioner, |) | Cancellation No. 92085186 |
| |) | |
| v. |) | Registration No. 6839586 |
| |) | |
| Deutsche Telekom AG, |) | Mark: T |
| |) | |
| Registrant. |) | |
| |) | |
| _____ |) | |

**REGISTRANT’S REPLY IN SUPPORT OF PARTIAL MOTION TO DISMISS
PETITIONER’S AMENDED PETITION FOR CANCELLATION FOR FAILURE TO
STATE A CLAIM**

Telefonica’s opposition brief fails because it confuses the issue of entitlement to a statutory cause of action (formerly known as standing) with the issue of the legal sufficiency of Telefonica’s claims as pleaded in the Amended Petition. Telefonica repeatedly argues it will be “harm ed,” that it has a “legitimate interest in the proceedings,” and that it has “standing.” Telefonica’s arguments are misguided, irrelevant, and do not save its claims from dismissal, as DTAG is not moving to dismiss Telefonica’s Amended Petition on the grounds that Telefonica failed to plead its entitlement to a statutory cause of action. Rather, Telefonica’s Amended Petition is fatally defective because Telefonica failed to plead the required elements of its claims, i.e., Telefonica’s allegations are legally insufficient to state a claim for relief under Sections 2(d) and 2(e) of the Lanham Act.

To the extent Telefonica does address the legal insufficiency of its pleading, its arguments are baseless. First, with regard to its Section 2(d) claim, Telefonica’s arguments underscore that it has not and cannot plead the required element of priority. Indeed, Telefonica makes no effort to argue that it is in privity with the owners of any of the third-party trademarks

cited in its Amended Petition, or that it has any “legitimate interest” in those third-party marks. Accordingly, Telefonica has evidently abandoned its baseless theory of priority in which it would have relied on the alleged trademark rights of unrelated third parties.

Instead, Telefonica shifts gears and attempts to argue, despite what is shown on the face of the Amended Petition, that Telefonica itself owns priority of trademark rights over DTAG. But Telefonica’s argument fails because it has not pleaded rights in any standalone “T” mark with a priority date earlier than May 7, 2001 (DTAG’s priority date for its T registration). In fact, the only two U.S. applications Telefonica pleaded were *filed 20 years after* DTAG filed its application for the T mark. Am. Pet. ¶ 3. Desperate to save its claim, Telefonica now argues that a list of registrations buried on page 9 of its opposition brief includes one Telefonica registration with a standalone “T” element that pre-dates DTAG’s T Mark (specifically, Telefonica’s Reg. No. 1381794 for the mark T CTNE). But Telefonica’s argument is laughably defective, as the registration it cites was cancelled 32 years ago, on October 7, 1992, and thus obviously cannot be relied on to establish priority over DTAG.

Plainly without prior rights over DTAG in any standalone “T” mark, Telefonica resorts to irrelevantly arguing that it owns priority of rights in the full word mark “TELEFONICA,” and that such prior rights are sufficient to plead its priority over DTAG in this case. Telefonica cites a single registration in support of this argument: U.S. Reg. No. 2613642, the application for which was filed on February 11, 1999, which is for the word mark TELEFONICA alone, without a standalone “T” element. Telefonica’s argument fails as a matter of law, as Telefonica’s pleading of prior rights in an unrelated trademark without a standalone “T” element is legally insufficient to plead priority of rights vis-à-vis DTAG’s mark at issue, which consists solely of a standalone letter “T.”

Telefonica's remaining arguments are legally irrelevant to the issue of priority, including its misguided focus on the supposed "weakness of the single letter 'T' Mark in a Likelihood of Confusion Analysis." 14 TTABVUE 6-8. The existence of third-party marks, though potentially relevant to the strength-of-the-mark factor of the likelihood of confusion analysis, is irrelevant to the defect at issue in Telefonica's Amended Petition, namely, Telefonica's failure to plead priority.

Telefonica's Section 2(e) arguments are similarly misguided and irrelevant, as Telefonica again devotes most of its attention to arguing that it sufficiently pleaded its "entitlement to a statutory cause of action" (an issue that DTAG is not contesting). Once Telefonica gets around to addressing the legal insufficiency of its claim, its argument fares no better because Telefonica has not and cannot validly plead that the letter "T" is "readily understood by relevant purchasers as substantially synonymous" with telecommunications goods and services. Telefonica again bizarrely argues that "T" is descriptive for "telecommunications" because the word "Telekom" is part of Deutsche Telekom's name. Telefonica's argument is baseless because the test for descriptiveness is whether the *registered trademark*, not the underlying trademark owner's name, immediately conveys to consumers the nature of the goods. Likewise, Telefonica's citation to AT&T's use of the letter "T" as its "ticker symbol" does nothing to show the descriptiveness of "T" for telecommunications, as the purpose of a ticker symbol is to denote a particular stock traded on the exchange, not to refer to a type of goods. Telefonica then concedes that the supposedly "large number of third-party" trademarks consisting of a standalone letter "T" element in connection with telecommunications goods and services amounts to only ten live registrations. However, none of those registrations has a disclaimer of the letter "T" as descriptive. Thus, there is no indication that the letter "T" in those third-party marks was

intended to refer to the goods and services offered under the marks, as opposed to signifying something else. Telefonica's Amended Petition thus falls woefully short of validly pleading that the letter "T" is "readily understood by relevant purchasers as substantially synonymous" with telecommunications goods and services.

Accordingly, Telefonica's Section 2(d) and 2(e) claims are insufficiently pleaded and must be dismissed.

I. TELEFONICA'S SECTION 2(d) CLAIM FAILS BECAUSE TELEFONICA HAS NOT PLEADED ITS OWN PRIORITY OR THAT IT HAS ANY "LEGITIMATE INTEREST" IN THE ASSERTED THIRD-PARTY TRADEMARKS.

A. Telefonica Confuses the Issue of Entitlement to a Statutory Cause of Action With the Issue of Legal Sufficiency of the Claims.

Telefonica's opposition brief repeatedly confuses the issue of entitlement to a statutory cause of action (formerly known as standing) with the issue of the legal sufficiency of Telefonica's pleading. *See, e.g.*, 14 TTABVUE 4 (arguing that "a party has a statutory cause of action to request cancellation of a registration that has been asserted against it"). Telefonica's arguments are irrelevant and do not help it because a plaintiff has the burden of pleading both its entitlement to a statutory cause of action and, separately, the elements of its claims. *See, e.g., Holmes Prods. Corp. v. Duracraft Corp.*, 30 U.S.P.Q.2d 1549, 1551 (T.T.A.B. 1994) ("[T]he real issue here is not standing, but the sufficiency of the pleaded claim of likelihood of confusion"); *Major League Soccer, L.L.C. v. F.C. Internazionale Milana S.p.A.*, Opp. No. 91247160, 16 TTABVUE 10 (T.T.A.B. Jan. 3, 2020) ("Opposer has established standing, but, standing does not preclude Opposer from having to effectively plead all grounds asserted in the notice of opposition."); 37 C.F.R. § 2.104 ("The opposition must set forth a short and plain statement showing why the opposer believes he, she or it would be damaged by the registration

of the opposed mark and *state the grounds for opposition.*”) (emphasis added). Accordingly, Telefonica’s repeated arguments that it will be “harmed,” that it has a “legitimate interest in the proceedings,” and that it has “standing” are irrelevant because they do not absolve Telefonica of the obligation to sufficiently plead the elements of its claims. And as detailed herein, Telefonica has failed to plead the required element of priority for its Section 2(d) claim.

B. Telefonica’s Section 2(d) Claim Fails Because It Has Not Sufficiently Pleaded the Required Element of Priority.

For a Section 2(d) claim to survive a motion to dismiss, the petitioner must allege that “(1) it has valid proprietary rights in a mark that are prior to those of the [registrant], or that it owns a registration, and (2) the [registrant’s] mark so resembles the [petitioner’s] mark as to be likely to cause confusion.” *Major League Soccer, L.L.C. v. F.C. Internazionale Milano S.P.A.*, Opp. No. 91247160, 2020 WL 7260794, at *5 (T.T.A.B. Dec. 9, 2020), *opp’n dismissed*, 2023 WL 6290549 (T.T.A.B. Sept. 26, 2023); *see also RLP Ventures, LLC v. Life Line, Inc.*, Canc. No. 92067481, 2018 WL 2445482, at *1 (T.T.A.B. May 22, 2018). “In order to properly assert priority, Petitioner must allege facts showing proprietary rights in its pleaded marks that are prior to Respondent’s rights in the challenged mark, i.e., before the filing date of the application underlying Respondent’s registration or Respondent’s proven date of first use (whichever is earlier).” *KBT Direct, Inc. v. Olander*, Canc. No. 92062304, 2016 WL 1677321, at *2 (T.T.A.B. Mar. 30, 2016); *see also GE Osmonics, Inc. v. Osmosis Tech., Inc.*, Canc. No. 92041173, 2005 WL 2084525, at *2 (T.T.A.B. Aug. 23, 2005). In some limited circumstances in which a petitioner does not itself own prior proprietary rights, “the Board has ... recognized that a [petitioner’s] ‘proprietary interest’ need not be present if the [petitioner] alleges some other ‘legitimate interest’ in preventing a likelihood of confusion between the pleaded mark on which it predicates the Section 2(d) claim.” *Major League Soccer*, 2020 WL 7260794, at *5 (citing

Holmes Prods. Corp., 30 U.S.P.Q.2d at 1552). “This legitimate interest, if pleaded, could serve as part of a proper ground for likelihood of confusion in lieu of a claim of one's own prior proprietary rights in a conflicting mark.” *Major League Soccer*, 2020 WL 7260794, at *5.

Telefonica’s Amended Petition attempted to rely on unrelated third-party trademarks to establish a “legitimate interest” in lieu of its own priority. Specifically, in the Amended Petition, Telefonica irrelevantly added 44 paragraphs and 42 exhibits concerning DTAG’s enforcement of its T-formative trademarks against third parties who have no relationship to Telefonica. Am. Pet. ¶¶ 8-51 & Exs. F-AV. However, as discussed in DTAG’s Motion, Telefonica’s pleading was deficient because it did not plead that it was in privity with any of these third-party trademark owners, nor that it had a “legitimate interest” in any of the third-party marks. Faced with these insurmountable defects, Telefonica’s opposition brief makes no effort to salvage this unsupportable theory of priority. In fact, Telefonica makes no argument whatsoever that it is in privity with the third-party mark owners cited in its Amended Petition, nor that it has any legitimate interest in any of the third-party marks. Telefonica also fails to validly distinguish the *Holmes* decision, which is closely analogous to the instant case. *See Holmes Prods. Corp.*, 30 U.S.P.Q.2d at 1552 (dismissing Section 2(d) claim for failure to state a claim where opposer did not allege “any connection with these [third-party] marks or with those who registered them that would establish its legitimate interest in preventing [a] likelihood of confusion”).

Instead, in its opposition brief, Telefonica shifts gears and attempts to argue, despite what is shown on the face of the Amended Petition, that Telefonica itself owns priority of trademark rights over DTAG. But Telefonica’s meek effort to plead its own priority fails, as Telefonica simply does not own rights in any standalone “T” mark with a priority date earlier than May 7, 2001 (DTAG’s filing date). The face of Telefonica’s Amended Petition pleads only that

“Petitioner owns a pending application for a stylized T TELEFONICA with US Serial Number 79317156 (Exhibit B) and a pending application for a ‘T TELEFONICA’ with US Serial Number 79975637 (Exhibit C).” Am. Pet. ¶ 3. However, both of those applications were filed **20 years after** DTAG filed its application for the T mark, and thus plainly do not plead Telefonica’s priority. In its opposition brief, Telefonica argues for the first time that it owns other standalone “T” marks that pre-date DTAG’s T mark. However, the only example of a “standalone T” mark that Telefonica highlights in the text of its opposition brief is Reg. No. 1381794 for the mark T CTNE, which was cancelled 32 years ago, on October 7, 1992. 14 TTABVUE 8. Moreover, of the 43 Telefonica-owned registrations and applications cited by Telefonica on page 9 of its opposition brief as supposed evidence of its priority in a standalone “T” mark, an astounding 40 of them have been cancelled or abandoned. *Id.* And the only three remaining Telefonica registrations cited on page 9 do not use a standalone “T” element at all, namely, registrations for the word marks “TELEFONICA,” “TELEFONICA KITE PLATFORM,” and “TELEFONICA KERNEL.” *Id.* Accordingly, Telefonica has not sufficiently pleaded its priority of rights in any standalone “T” mark over DTAG.

Telefonica then desperately argues that, if it doesn’t own prior rights in any standalone “T” mark, it at least owns priority of rights in the full word mark “TELEFONICA.” To support this argument, Telefonica cites a single registration (U.S. Reg. 2613642 for the mark “TELEFONICA”), the application for which was filed on February 11, 1999. 14 TTABVUE 9-10. Telefonica’s argument is baseless because the mere presence of the letter “T” as part of the full word “TELEFONICA” does nothing to confer Telefonica with priority of rights in a single letter “T” trademark over DTAG. *See Perfecta Fed., LLC v. Guantong Sun and Juying Qin*, Opp. Nos. 91255153, 91255154, 2022 WL 1403585, at *4 (T.T.A.B. Apr. 28, 2022) (“To

establish priority, the [plaintiff] must show proprietary rights in the mark that produce a likelihood of confusion.”); *Green v. Tensar Int’l Corp.*, Canc. No. 9206873, 2021 WL 2287046, at *7 (T.T.A.B. May 25, 2021) (“To establish priority ... Petitioner must show proprietary rights in his mark as to which Respondent's mark gives rise to a likelihood of confusion.”).

Telefonica’s remaining arguments are legally irrelevant to the issue of priority. For example, Telefonica devotes nearly three pages of its opposition brief to arguing that “third-party uses show weakness of the single letter ‘T’ ... in a likelihood of confusion analysis ...” 14 TTABVUE 6-8. Telefonica’s argument and the authorities it cites are irrelevant to the defect at issue in Telefonica’s Amended Petition, namely, its failure to plead priority. While evidence of third-party registration and use of similar trademarks may be relevant to the likelihood of confusion factor considering the strength of the plaintiff’s mark, such evidence does nothing to establish Telefonica’s priority over DTAG. *See, e.g., Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339-40, 115 U.S.P.Q.2d 1671, 1675 (Fed. Cir. 2015) (discussing evidence of third-party use and registrations as relevant to the strength-of-the-mark *DuPont* factor, not the issue of priority).

Likewise, the fact that DTAG’s subject T registration was opposed by the Texas Rangers does absolutely nothing to plead Telefonica’s priority over DTAG. 14 TTABVUE 7.

Lastly, Telefonica offers a contorted argument positing that since DTAG has opposed Telefonica’s application for the mark T TELEFONICA (Opposition No. 91287659), this somehow helps Telefonica on the issue of priority in the instant case. 14 TTABVUE 8. Telefonica’s argument is illogical. DTAG pleaded its priority over Telefonica in Opposition No. 91287659 (*see* <https://ttabvue.uspto.gov/ttabvue/v?pno=91287659&pty=OPP&eno=1>), and likewise argues in the instant case that Telefonica does not own prior rights over DTAG.

DTAG's position on priority is thus consistent in both cases. Telefonica's tortured argument therefore does nothing to show that it has sufficiently pleaded its priority over DTAG in the instant case.

Consequently, Telefonica has failed to plead the required element of priority, and thus its Section 2(d) claim must be dismissed.

II. TELEFONICA FAILS TO SUFFICIENTLY PLEAD ITS SECTION 2(e) CLAIM AND THUS IT MUST BE DISMISSED.

Telefonica's opposition brief offers no valid basis to save its Section 2(e) claim from dismissal. Similar to its misguided approach to its Section 2(d) claim, Telefonica irrelevantly devotes the first four pages of its Section 2(e) argument to claiming that Telefonica is entitled to a statutory cause of action. *See* 14 TTABVUE 10-11 (arguing that "when descriptiveness ... of the mark is in issue, [petitioner] may plead (and later prove) its *entitlement to a statutory cause of action* by alleging that it is engaged in the sale of the same or related products or services (or that the product or service in question is within the normal expansion of [petitioner's] business) and that the [petitioner] has an interest in using the term descriptively in its business.") (emphasis added). Telefonica's argument is irrelevant and does not save its claim from dismissal because a plaintiff has the burden of pleading both its entitlement to a statutory cause of action and, separately, the elements of its claims. *See, e.g., Major League Soccer, L.L.C.*, Opp. No. 91247160, 16 TTABVUE 10 ("Opposer has established standing, but, standing does not preclude Opposer from having to effectively plead all grounds asserted in the notice of opposition."); 37 C.F.R. § 2.104. Here, although DTAG does not in its Motion contest Telefonica's entitlement to a statutory cause of action, Telefonica plainly has not pleaded the required elements of descriptiveness.

To sufficiently plead such a claim, Telefonica must plausibly allege that DTAG's T Mark "serves merely to denote an ingredient, quality, characteristic, function, feature, purpose, or use of the specified services." *Vespa v. Interdent Serv. Corp.*, Canc. No. 92054096, 2012 WL 12517491, at *4 (T.T.A.B. Oct. 1, 2012). "The determination of whether a mark is merely descriptive must be made in relation to the goods or services for which registration is sought, not in the abstract." TMEP § 1209.01(b). A mark is merely descriptive under Section 2(e)(1) if it would immediately convey to one seeing or hearing it the thought of registrant's goods or services. *In re Bed & Breakfast Registry*, 791 F.2d 157, 159, 229 U.S.P.Q. 818, 819 (Fed. Cir. 1986). By contrast, "if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive." *In re Tennis in the Round, Inc.*, 199 U.S.P.Q. 496, 498 (T.T.A.B. 1978)

"As a general rule, an acronym or initialism cannot be considered descriptive unless the wording it stands for is merely descriptive of the goods or services, and the acronym or initialism is readily understood by relevant purchasers to be 'substantially synonymous' with the merely descriptive wording it represents." TMEP § 1209.03(h); *see also Modern Optics, Inc. v. Univis Lens Co.*, 234 F.2d 504, 506, 110 U.S.P.Q. 293, 295 (C.C.P.A. 1956); ("[I]nitials cannot be considered descriptive unless they have become so generally understood as representing descriptive words as to be accepted as substantially synonymous therewith."). "A mark consisting of an initialism or acronym will be considered substantially synonymous with descriptive wording if: (1) the applied-for mark is an initialism or acronym for specific wording; (2) the specific wording is merely descriptive of applicant's goods and/or services; and (3) a relevant consumer viewing the initialism or acronym in connection with applicant's goods and/or

services will recognize it as an initialism or acronym of the merely descriptive wording that it represents.” Order, *Collaborative Continuing Educ. Council Inc. v. Illumni Inst. Inc.*, Opp. No. 91256129, 15 TTABVUE 13 (T.T.A.B. Dec. 30, 2020) (citing *In re Thomas Nelson, Inc.*, 97 U.S.P.Q.2d 1712, 1715-16 (T.T.A.B. 2011) and *In re Harco Corp.*, 220 U.S.P.Q. 1075, 1076 (T.T.A.B. 1984)).

Applying the foregoing legal standards, Telefonica’s opposition brief does nothing to show that Telefonica has plausibly pleaded that DTAG’s T Mark is “substantially synonymous” with, or is recognizable as a descriptive abbreviation for, telecommunications goods and services. Quite the opposite, Telefonica’s opposition brief does little more than recapitulate the allegations set forth in its Amended Petition, and argue *ipse dixit* that those allegations plead descriptiveness, without any citation to relevant legal authority. For example, Telefonica again bizarrely argues that “T” is descriptive for “telecommunications” because the word “Telekom” is part of Deutsche Telekom’s name. Telefonica’s argument is plainly baseless because the test for descriptiveness is whether the **registered trademark**, not the underlying trademark owner’s name, immediately conveys to consumers the nature of the goods. See TMEP § 1209.01(b) (“To be refused registration on the Principal Register under §2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), **a mark** must be merely descriptive or deceptively misdescriptive of the goods or services to which it relates.”) (emphasis added).

Likewise, Telefonica’s citation to AT&T’s use of the letter “T” as its “ticker symbol” does nothing to show the descriptiveness of “T” for telecommunications, as the purpose of a ticker symbol is to denote a particular stock traded on the exchange, not to refer to a type of goods. See <https://corporatefinanceinstitute.com/resources/wealth-management/what-is-ticker/>

(last visited Sept. 17, 2024) (“A ticker is a symbol, a unique combination of letters and numbers that represent a particular stock or security listed on an exchange.”).

Telefonica then concedes that the supposedly “large number of third-party” trademarks consisting of a standalone letter “T” element in connection with telecommunications goods and services amounts to only ten live registrations. However, none of those registrations has a disclaimer of the letter “T” as descriptive. Thus, there is no indication that the letter “T” in those third-party marks was intended to refer to the goods and services offered under the marks, as opposed to signifying something else. Telefonica cites no authority for the proposition that a mere ten third-party registrations containing a standalone letter “T,” none of which includes a disclaimer, supports a finding of descriptiveness. And again, the legal standard for finding an acronym or initialism merely descriptive is that it is “readily understood by relevant purchasers to be ‘substantially synonymous’ with the merely descriptive wording it represents.” TMEP § 1209.03(h). In decisions finding an acronym or initialism merely descriptive, the evidence of descriptiveness is overwhelming, and stands in stark contrast to Telefonica’s Amended Petition, which comes nowhere close to meeting the “substantially synonymous” standard. *See, e.g., Martell & Co. v. Societe Anonyme De La Benedictine, Distillerie De La Liqueur De L’Ancienne Abbaye De Fecamp*, 116 F.2d 516, 519, 48 U.S.P.Q. 116, 119 (C.C.P.A. 1941) (since “B and B” was a designation of Benedictine and brandy and had been so used in the United States for thirty years, “we think that the term is necessarily descriptive of the said goods”); *In re Innova Elecs. Corp.*, Ser. No. 90174255, 2022 WL 14813664, at *5 (T.T.A.B. Sept. 21, 2022) (in light of voluminous evidence including dictionary definitions and descriptive use in newspaper articles, “[t]he record leaves no doubt that CARAI is merely descriptive of Applicant’s goods featuring, and services employing, artificial intelligence for cars”).

Lastly, Telefonica strangely argues that “[t]he plethora of oppositions and cancellations [sic] Registrant has already filed” somehow shows the descriptiveness of DTAG’s “T” mark. 14 TTABVUE 15-17. This is yet another illogical argument by Telefonica, since DTAG’s successful enforcement of its rights in its T mark illustrates, if anything, the *distinctiveness* of DTAG’s T Mark, not its descriptiveness. Indeed, if DTAG’s T mark were in fact descriptive, as Telefonica contends, the mark would be unprotectable (without secondary meaning) and there would be no evidence of DTAG’s enforcement of it.

Consequently, Telefonica’s opposition brief offers no valid arguments to save its Section 2(e) claim from dismissal.

III. CONCLUSION

For the reasons discussed herein, and in DTAG’s Motion, Telefonica has failed to sufficiently plead its Section 2(d) and 2(e) claims, and thus those claims should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2024, I filed the foregoing Registrant's Reply In Support of Partial Motion to Dismiss Petitioner's Petition for Cancellation for Failure to State A Claim with the TTAB and served a copy on Counsel for Telefonica, S.A. via e-mail as follows:

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