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Paper No. 10
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8/9/00

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Science Fiction Writers of America, Inc., d/b/a Science
Fiction and Fantasy Writers of America

v.

James Stout

Opposition No. 111,717
to application Serial No. 75/377,639
filed on October 14, 1997

M. Christine Valada, Esq. for Science Fiction Writers of
America, Inc.

Anthony DeToro, Esq. for James Stout.

Before Walters, Bucher and Rogers,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

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James Stout has filed an application to register the mark NEBULA NINE for "entertainment, namely, live performances by a musical group."¹

Science Fiction Writers of America, Inc., d/b/a Science Fiction and Fantasy Writers of America has opposed registration on the ground that since 1965 it has continuously used the mark NEBULA AWARD in connection with the sale of goods and services in interstate commerce "to honor the work of outstanding science fiction writers and promote the field of science fiction to readers and other consumers of science fiction materials; that its use of the mark has been valid and continuous and not abandoned; that the mark is used to promote an annual awards banquet and for "the annual publication of anthologies"; that opposer has developed extensive good will and consumer recognition; and that, "[i]n view of the similarity of the respective marks and the related nature of the services of the respective parties" that there is a likelihood of confusion or mistake by consumers or that they would be deceived.

Applicant has expressly or effectively denied the salient allegations of the notice of opposition.

¹ Serial No. 75/377,639, filed on October 14, 1997, which alleges a date of first use of October 31, 1992 and a date of first use in commerce of March 15, 1993.

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Applicant also affirmatively pleads that its mark is distinctive, but that opposer's mark is not, since "'NEBULA' is a common astronomical term and cannot be distinctive to the opposer." Finally, applicant affirmatively pleads that there is no likelihood of confusion because the parties' marks are not similar and opposer uses its mark "in connection with a literary award given by writers while Applicant's mark is used in the music field."

The record includes the pleadings, the file of the opposed application, and a single notice of reliance filed by opposer. The notice of reliance introduces applicant's responses to opposer's interrogatories; applicant's responses to opposer's request for admissions; applicant's written responses to opposer's request for production of documents and things, and documents actually produced; certain printed publications; a stipulation by the parties that testimony may be taken by affidavit; and affidavits from three witnesses, including attached exhibits.²

² A notice of reliance must be filed during a party's testimony period. See TBMP §718.02(a). In addition, documents produced in response to a party's request for production usually cannot be introduced into the record by notice of reliance, but may be considered by the Board if the non-offering party does not object. See TBMP §711.

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Applicant did not submit any testimony or other evidence. Both parties submitted briefs, but no oral hearing was requested.

Although the applicant has alleged dates of first use in the application, these dates have not been established by evidence in this case. Thus, we consider the application filing date as applicant's constructive date of first use. See Lone Star Manufacturing Co., Inc. v. Bill Beasley, Inc., 182 USPQ 368 (CCPA 1974) and The Chicago Corporation v. North American Chicago Corp., 20 USPQ2d 1715 (TTAB 1991). We find the evidence submitted by opposer sufficient to prove that opposer not only used its mark prior to applicant's filing date, but also that opposer's use of its mark, both for its annual award ceremonies and for its annual anthologies, has been continuous and has not been abandoned. Moreover, applicant submitted no evidence to the contrary. Thus, we find for opposer on the issue of priority and are left to consider the question of likelihood of confusion.

In this case, opposer's testimony period closed August 2, 1999, but its notice of reliance has a certificate of mailing dated September 1, 1999. Applicant has filed a brief but did not object therein to either opposer's late filing of its notice of reliance or opposer's submission of produced documents by notice of reliance. Nor did applicant, prior to briefing, separately object to, or move to strike, the notice of reliance or any portion thereof. Accordingly, we have considered the notice and all accompanying material.

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In any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity of the goods and the similarity or dissimilarity of the marks. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("the fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the mark"). We consider, first, the parties' respective goods and services.

Opposer has established that it uses its mark in connection with an annual awards ceremony, and related activities, and a series of books which, on an annual basis, collect and reprint literary works which have won opposer's awards. Applicant, in contrast, seeks registration of its mark for "entertainment, namely, live performances by a musical group." We find the goods and services of the parties dissimilar. Opposer argues that "[b]ecause of the nature of dissemination of entertainment services today, 'entertainment' is an amorphous and expanding class." The argument, however, is without any evidentiary support.

In regard to the channels of trade for the parties' respective goods and services, opposer argues that "the number of potential markets for goods or services such as

those provided by both Opposer and Applicant are consolidated" and "the goods or services are so similar that the channels of trade have merged." The record, however, provides no support for these arguments.

Opposer, for example, asserts that its anthologies "are available through brick and mortar and on-line book dealers and are promoted with advertising in traditional print publications as well as on-line publications." However, apart from the Summer 1996 issue of its own member publication, The Bulletin of the Science Fiction and Fantasy Writers of America, which contains an advertisement from the publisher of NEBULA AWARDS 30, opposer has offered no testimony or evidence to support this argument.³

Opposer also alleges the following as facts: that "in the recent past" it has "optioned the NEBULA mark for a television anthology series based on NEBULA AWARD winning stories"; that its anthologies and applicant's musical recordings are available through "the Amazon.com website"; that other Internet search engines can retrieve references to both parties; and that both parties use the

³ The Bulletin, according to the evidence, is primarily a publication for members of opposer's organization, but may be available in some bookstores and can be purchased by subscription by any member of the public. We have no evidence,

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Internet to promote their goods and services. Apart from evidence that opposer maintains a website and that applicant markets its music via the Internet, none of these allegations is supported by the record.

Moreover, opposer's argument regarding trade channels overlooks the fact that applicant's services, as identified, are limited to live musical performances. We look to the respective identifications of the parties' goods and services to determine their scope.

In further support of its allegation of likelihood of confusion, opposer notes that applicant has, in response to a request for admission, admitted familiarity with science fiction; and opposer goes on to assert that applicant's "music invokes science fiction" and opposer is, therefore, "justifiably concerned that Applicant is treading on the good will Opposer has developed." The only evidence which can be argued to support opposer's characterization of applicant's music is a document filed as a specimen in applicant's application, produced by applicant to opposer during discovery, and made of record with opposer's notice of reliance, which states: "From the outer limits of our universe, these two powerful performers [applicant and his former musical partner]

however, regarding outlets in which it may be sold or number of

will inspire you with their uplifting progressive trance." We find this insufficient support for opposer's allegation that applicant is "treading on the good will Opposer has developed."

Next we turn to the parties' marks. For our assessment of the marks⁴, we take judicial notice of the following definition of "Nebula":

1. Astron. **a.** a cloudlike, luminous or dark mass composed of gases and small amounts of dust. **b.** Also called **planetary nebula**. a central star surrounded by a gaseous envelope. **c.** Also called **extragalactic nebula**. an exterior galaxy.
889 The Random House College Dictionary (Rev. ed. 1982)

Thus, in connection with opposer's goods and services, the term "NEBULA," at most, vaguely suggests outer space, which often is the setting for science fiction stories. The term "AWARD" in opposer's mark is descriptive when used in conjunction with opposer's

subscribers.

⁴ Opposer has established that, in 1975, a licensee produced NEBULA AWARD STORIES NINE. There is no evidence, however, that this title functioned as a trademark or, if so, that opposer has any current trademark rights in this phrase. Moreover, opposer did not plead use of any specific mark other than NEBULA AWARD. Therefore, our focus herein is only on opposer's NEBULA AWARD mark and applicant's NEBULA NINE mark.

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annual award ceremonies and published anthologies of award-winning literary works.⁵

Opposer claims it has a strong mark; and, in this regard, opposer has established that it has held its annual award ceremonies throughout the United States and that the ceremonies and related events are open to the public, so long as they are willing to pay requisite entrance fees. There is no evidence, however, regarding public attendance at any particular ceremony or event. Though opposer argues that its ceremonies "have been covered by the printed press and on such television programs as SCI-FI Buzz on the SCI-FI Channel," it has offered no testimony or evidence to support the argument, other than evidence of coverage in the Pittsburgh Post-Gazette of the 1999 ceremony.

Opposer estimates that it has earned "substantial royalties" from sales of its anthologies, yet has proffered no revenue figures to support this claim,

⁵ During the pendency of this proceeding, opposer obtained two registrations for the mark NEBULA AWARDS; one is for the mark as used for opposer's annual awards ceremonies and the other is for opposer's annual anthologies. In each instance, the registration includes a disclaimer of "AWARDS". In this case, however, opposer is relying not on these registrations, but on its allegation of prior and continuous use of NEBULA AWARD for its goods and services. Opposer does not contend that "AWARD" is not descriptive in connection with its goods and services and there can be no serious question on the point.

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either for all the years it has published anthologies or for any particular year. The most we have been able to determine, based on our review of opposer's submission of its 1988 application for tax exempt status, is that opposer's income from anthologies for the years 1984-87 totaled no more than \$20,000.⁶ Thus, we have insufficient evidence from which to draw conclusions about the nature and extent of public awareness of opposer's mark in connection with its goods and services.

Regarding applicant's mark, there is insufficient evidence to establish that NEBULA NINE, or the individual terms in the mark, have any descriptive or suggestive significance in connection with applicant's recited services.

Comparing the parties' marks, while it is true that both marks share the initial term "NEBULA," we find that the difference in the additional terms in each mark lend the marks, considered in their entireties, different appearances and connotations. We find the overall commercial impressions of the parties' marks to be quite different.

⁶ The application reports total income for those four years of \$189,500, and states that approximately 10 percent of opposer's income is attributable to sales of its anthologies.

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In sum, notwithstanding that the marks share the same initial term, the marks are sufficiently different that, when used on the dissimilar goods and services involved in this case, we find no likelihood that consumers would be confused, or mistaken, or deceived.

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Decision: The opposition is dismissed.

C. E. Walters

D. E. Bucher

G. F. Rogers

Administrative Trademark
Judges, Trademark Trial
and Appeal Board