

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
May 13, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Rhonda Ademan

v.

Malibu Dream Girl

Cancellation No. 92045376
against Reg. No. 2821534

Brian Gibbons of Brian R. Gibbons, P.A. for Rhonda Ademan.

Lucy B. Arant of Mitchell Silberberg & Knupp LLP for Malibu
Dream Girl.

Before Walters, Bucher and Grendel, Administrative Trademark
Judges.

By the Board:

Rhonda Ademan has filed a petition to cancel the
registration issued to Malibu Dream Girl for the mark **GOSSIP**
for "women's swimwear" in International Class 25.¹

As grounds for cancellation, petitioner alleges, among
other things that long prior to the August 9, 2001 filing
date of the application which matured into respondent's
registration, and long prior to any date on which respondent

¹ Registration No. 2821534 issued on March 9, 2004, which sets
forth a date of first use anywhere at least as early as July 2001
and first use in commerce at least as early as November 2001.

can claim use of its mark, petitioner has been using her **GOSSIP CLOTHING** mark in connection with items of clothing, including swimwear, as well as retail store services featuring such clothing.

Respondent, in its answer, has denied the salient allegations of the petition to cancel.

This case now comes up on petitioner's motion, filed on February 13, 2007, for summary judgment on petitioner's priority and the likelihood of confusion between the marks as applied to these goods and services.

Respondent has filed a brief in opposition to the motion and only petitioner has submitted evidence with respect to her position. In support of her summary judgment motion, petitioner relies primarily on (a) her own declaration and supporting exhibits; (b) respondent's responses to petitioner's interrogatories; (c) respondent's responses to petitioner's requests for admission; and (d) copies of pages from respondent's website.

In her declaration in support of petitioner's claim of priority, Ms. Ademan stated that she has been using the **GOSSIP CLOTHING** mark in interstate commerce in connection with a variety of clothing products, including women's swimwear, as well as using it as a service mark in interstate commerce in connection with retail store services

since at least as early as 1995, and that she has used it in these ways continuously since that time.

Ms. Ademan's declaration also includes a photographic image of an "accurate and representative sample" of articles of clothing with tags bearing the **GOSSIP CLOTHING** trademark; a photographic image of an "accurate and representative sample" of women's swimwear with tags bearing the **GOSSIP CLOTHING** trademark; a copy of representative invoices showing the sale of clothing products in connection with the **GOSSIP CLOTHING** mark; a copy of promotional materials showing the **GOSSIP CLOTHING** mark used in the promotion of petitioner's retail store services; a photographic image of the **GOSSIP CLOTHING** mark being used in connection with retail store services featuring apparel, including women's swimwear; and the photographic image of the interior of a retail store showing clothing products on sale.

In opposition to petitioner's motion for summary judgment, respondent has submitted no evidence or declarations. Rather, respondent disputes many of petitioner's allegedly uncontroverted facts with the arguments of counsel as to the shortcomings of petitioner's proffered evidence, and concludes that petitioner has failed to establish priority of use, that petitioner has failed to establish trademark or service mark usage of the

designation, "Gossip Clothing"; and that petitioner has failed to establish ongoing and continuous use of the designation, "Gossip Clothing." Respondent does not raise any genuine issues as to whether or not a likelihood of confusion would exist between respondent's mark that is the subject of this proceeding and petitioner's alleged mark.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(c). The evidence must be viewed in a light favorable to the nonmoving party, and all justifiable inferences are to be drawn in the nonmovant's favor. See *Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); and *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

The Issue of Priority

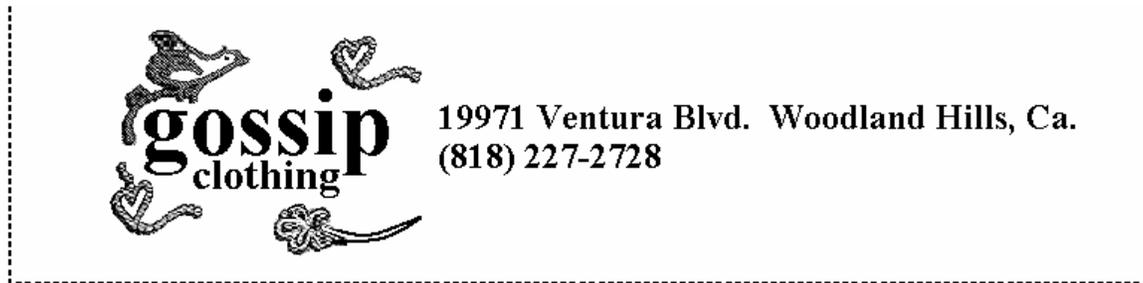
Ms. Ademan states in her declaration that petitioner first used the mark in connection with apparel at least as early as 1995. The earliest date on which respondent can rely is the filing date of the application which matured into respondent's registration, or August 9, 2001.

However, respondent bases its opposition to the motion for summary judgment on the alleged failures of proof related to petitioner's exhibits. We agree with respondent that some of these exhibits submitted in support of Ms. Ademan's averment of continuous use since at least as early as 1995 fail to document this claim of priority. For example, respondent argues that there is a genuine issue of material fact as to petitioner's claim of priority because the photographs of clothing and swimwear bearing the mark are undated. Exhibit A-1 is an undated photograph of women's outerwear bearing petitioner's alleged "gossip clothing" trademark on clothing labels, and Exhibit A-2 is an undated photograph of women's swimwear bearing petitioner's alleged mark on swimwear labels. Respondent argues that these two undated photographs of items of apparel with sewn-in tags provide no corroboration for petitioner's declaration.

On the other hand, there is nothing about the photographs which actually contradicts or is inconsistent with petitioner's declaration of use since 1995. In fact, petitioner did not need to corroborate her undisputed declaration with photographs, but rather, could have relied solely upon the declaration to establish her use since 1995.

Furthermore, it appears from the initial pleadings and from the evidence attached to the motion for summary judgment that petitioner is relying upon prior trademark use as well as prior service mark use. Demonstrating prior use of her **GOSSIP CLOTHING** mark on either one entitles her to prevail herein.

In this context, we turn our attention to four lay-away receipts where the top portion thereof is printed with "Gossip Clothing" in trade name or service mark format, as follows:



- Exhibit A-3.2: Receipt #1475 was dated March 11, 2000;
- Exhibit A-3.3: Receipt #1478 was dated March 22, 2000;
- Exhibit A-3.4: Receipt #1486 was dated October 18, 2000; and
- Exhibit A-3.5: Receipt #1498 was dated February 16, 2001.

Each receipt listed at least one purported item of clothing. As seen above, these four receipts have transaction dates prior to respondent's constructive use date.

These receipts presumably are proffered as evidence of service mark use for the retail store services offered under

the **GOSSIP CLOTHING** service mark. The mark clearly appears at the top of the receipts, and demonstrates good service mark usage. As such, these lay-away receipts suffice to prove petitioner's claim of prior service mark use in connections with retail store services.

Respondent notes that rather than reflecting the sale of **GOSSIP CLOTHING** brand swimwear, the actual goods listed on the receipts appear to be overalls, most of which appear to be Dickie® brand overalls. However, clothing and swimwear retailers commonly sell items of clothing and swimwear bearing third-party trademarks. Hence, the fact that the listed goods themselves are different items of clothing marketed under another brand is neither relevant nor dispositive of the question of whether petitioner has used the claimed mark as a service mark in connection with retail store services.

Respondent, as the nonmoving party, simply cannot rest on the mere allegations of its pleadings and assertions of counsel in order to defeat a motion for summary judgment.

Respondent has honed in on specific portions of petitioner's evidentiary record. However, nothing in the record belies petitioner's explicit averment of use of the mark as a service mark and as a trademark since 1995.

Hence, we find that there is no genuine issue of material fact as to petitioner's priority herein.

Respondent has raised no genuine issues of material fact for trial as to petitioner's standing or as to the factors determining a likelihood of confusion. Based upon this record, we find that petitioner does have standing and priority and that a likelihood of confusion exists. Accordingly, we grant summary judgment to petitioner.

Decision: We hereby grant summary judgment to petitioner, and respondent's Registration No. 2821534 will be cancelled in due course.