

**THIS OPINION IS NOT  
CITABLE AS PRECEDENT OF  
THE T.T.A.B.**

**UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451**

DUNN  
Mailed: 9/13/2007

Cancellation No. 92045555

ALLIANCE ENTERTAINMENT  
CORPORATION, by change of  
name from AEC ONE STOP  
GROUP INC.<sup>1</sup>

v.

ERIC RUSS

Before Hairston, Grendel, and Cataldo, Administrative  
Trademark Judges.

By the Board:

On March 1, 2006, AEC One Stop Group Inc. filed a  
petition to cancel Registration No. 2971705 for the mark



for "general interest men's multimedia magazine not having a  
permanent or significant portion of its content directed to  
computer and/or video games or snowboarding" in

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<sup>1</sup> The change of name is recorded with the USPTO Assignment Branch  
at Reel 3346, Frame 0241.

International Class 16 on the grounds of nonuse and likelihood of confusion with petitioner's pleaded registrations. Respondent Eric Russ filed an answer denying the salient allegations of the petition to cancel.

This case now comes up on the parties' cross-motions for summary judgment on the issues of nonuse and likelihood of confusion.<sup>2</sup> We turn first to the issue of nonuse, and whether on March 16, 2005, the date that respondent filed its statement of use, respondent was using the AMPED THE MAGAZINE mark in commerce on its general interest men's multimedia magazine.

An exhaustive review of the record will not be provided. It is presumed that the parties are familiar with the record. Indeed, the facts in this matter largely are undisputed. The parties disagree as to the conclusion to be drawn from those facts. The Board has carefully reviewed the motions for summary judgment, the responses, and all accompanying evidence. Because respondent's evidence was designated confidential, to the extent description is necessary, it will be made in general terms.

The evidence submitted by respondent shows that, as of the filing date of the statement of use, respondent had

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<sup>2</sup> Petitioner's cross-motion also seeks summary judgment on the ground that respondent committed fraud in the procurement of its registration. Inasmuch as a party may not obtain summary judgment on an issue that has not been pleaded, the Board will not consider this claim.

registered the domain name ampedmag.com, and at the website had a screen bearing the mark AMPED THE MAGAZINE. At the same time, respondent was using the mark AMPED THE MAGAZINE on his paper and electronic communications involving advertisements of his upcoming magazine launch and arrangements for a photo shoot involving a studio, models, and hair and makeup stylists. Respondent also was using the mark AMPED THE MAGAZINE to identify the client when signing contracts for studio space and model release forms. There is no evidence that at the time the statement of use was filed the mark AMPED THE MAGAZINE was in use with the goods listed in the registration, namely a general interest men's multimedia magazine.

In fact, the evidence submitted by respondent confirms that on March 16, 2005 use of the mark was limited to preparations for a magazine launch. Respondent's September 25, 2006 declaration submitted in support of his motion for summary judgment does not state that the mark AMPED THE MAGAZINE was in use with a magazine but avers (paragraph 6) "Since at least as early as May 2004, I have conducted my business under AMPED THE MAGAZINE, and I continue to use the mark in commerce throughout the United States." We note respondent's April 13, 2005 email to a contributor stating "I will of course notify you when AMPED THE MAGAZINE launch[es]", his August 5, 2005 letter to a publicist

stating "We are interested in doing a feature on ... for our October 2005 launch"; and his August 11, 2005 letter to a publicist stating "You can view our teaser trailer at [www.ampedmag.com](http://www.ampedmag.com). We are interested in featuring ... in a player profile and fashion shoot for our October 2005 launch."

In support of its cross-motion for summary judgment, petitioner submitted the November 21, 2006 declaration of Katy Schanz, an employee of petitioner's law firm, averring that on February 25, 2006 and June 29, 2006, she printed out every screen available from the [www.ampedmag.com](http://www.ampedmag.com) website and on both occasions there was a loop of screens limited to several single flashing words, a screen with a photo and the mark AMPED THE MAGAZINE, and a screen with the words "Coming Soon."

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). A party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to summary judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986).

As a preliminary matter, we find that petitioner has established its standing to seek cancellation of respondent's registration inasmuch as petitioner submitted its pleaded registrations. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

A registration issued under Section 1 of the Trademark Act requires use in commerce either at the time that the use-based application is filed, or, for an application filed under intent to use, at the time applicant's allegation of use is filed. Trademark Act Sec 1; 15 U.S.C. §1051. The registration is subject to cancellation if, at the time the application or allegation of use is filed, the mark is not in use on goods sold or transported in commerce or in connection with services being rendered in commerce.<sup>3</sup>

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<sup>3</sup> Section 45 defines "use in commerce" as follows:

The term "use in commerce" means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For purposes of this chapter, a mark shall be deemed to be in use in commerce—

(1) on goods when—

(A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and

(B) the goods are sold or transported in commerce, and

(2) on services when 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

*Avakoff v. Southern Pacific Co.*, 765 F.2d 1097, 1098, 226 USPQ 435, 436 (Fed. Cir. 1985) ("The evidence of subsequent sales of programs bearing the marks is not relevant in the absence of use in commerce prior to filing."). Here, the record is bereft of evidence that, at the time the statement of use was filed, the mark AMPED THE MAGAZINE was used on a printed magazine which was sold or transported in commerce or that the mark AMPED THE MAGAZINE was used in connection with an online magazine.<sup>4</sup> So as to be clear, respondent's specimen "screen shot", without any magazine content, is insufficient to establish use of the mark in connection with an online magazine. *In re Port Authority of New York*, 3 USPQ2d 1453, 1455 (TTAB 1987) ("The use of a mark in connection with advertising, promotion and preparatory activities for services to be available at some time in the future cannot support registration."); *Intermed Communications, Inc. v. Chaney*, 197 USPQ 501, 507-508 (1977) ("{M}ere publicity about services to be rendered in

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in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services. (emphasis added).

<sup>4</sup> The subject registration issued under International Class 16, the class for printed publications. Online publications are classified as International Class 41 services. See Trademark Manual of Examining Procedure §1402.11 (4th ed., rev. 2005) ("TMEP"). Because the USPTO will allow reclassification in the case of a USPTO error in classification of a registration that issued based on an application under §1 or §44 of the Trademark Act (TMEP Section 1609.10), the Board has evaluated all record evidence to determine whether use in commerce has been shown as to either a print or an online magazine.

the future does not lay a foundation for an application. The statute requires not only the display of the mark in the sale or advertising of services but also the rendition of those services in order to constitute use of the service mark in commerce.").

Upon careful consideration of the record, we find that there is no genuine issue that the registered mark was not in use in commerce with the goods listed in the registration as of the filing date of the statement of use, and petitioner is entitled to summary judgment on that claim.

Accordingly, petitioner's motion for summary judgment is granted, and judgment is entered against respondent on the claim that respondent's mark was not in use in commerce as of the filing date of the statement of use.

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