

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: July 25, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

206 Macopin Corp.
v.
Body Dynamics, Inc.

Cancellation No. 902046695

Richard G. Martin of Frazer, Martin, & Miller, LLC for 206 Macopin Corp.

Dean E. McConnell of Krieg DeVault, LLP for Body Dynamics, Inc.

Before Hairston, Mermelstein, and Wellington,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

206 Macopin Corp. has petitioned to cancel Registration No. 2968646, owned by Body Dynamics, Inc., for the mark DRINKER'S BUDDY, in standard character format, for a dietary supplement in International Class 5.¹

¹ The registration issued on July 12, 2005, with a claimed date of first use and use in commerce of November 12, 2003. The underlying application (Serial No. 78326230) that matured into the registration was filed on March 11, 2003.

In its petition for cancellation, petitioner alleges that it is the owner of an application for the mark DRINKERS PAL for a "nutritional dietary supplement" in International Class 5 and that the subject registration has been cited against petitioner's application by the USPTO as the basis for a Section 2(d) refusal for likelihood of confusion.² Petitioner alleges that its "date of first use in commerce of its mark DRINKERS PAL was March 1, 2002, which substantially pre-dates Respondent's first use of the mark DRINKER'S BUDDY on December 11, 2003." Petitioner claims that it "has been, and will continue to be, damaged by continued registration and use of the mark DRINKER'S BUDDY by respondent."

In its answer, respondent "admits that petitioner has purportedly filed an application for registration of the DRINKERS PAL mark; however, Registrant is without knowledge or information sufficient to form a belief as to the truth or falsity as to whether or not Petitioner is the owner of such mark and therefore denies the same." Answer, paragraph 1. Respondent denies the other pertinent allegations in the petition for cancellation.

² Application Serial No. 76579021, filed on March 2, 2004, with a claimed date of first use and use in commerce of March 1, 2002.

By operation of the rules, the record includes the pleadings and the subject registration file. Neither party took testimony or offered evidence at trial.

Each party filed a trial brief.

We turn first to petitioner's standing to bring this cancellation. The standing question is a threshold inquiry made by the Board in every *inter partes* case. That is, standing is an essential element of an petitioner's case which, if not proved at trial, will defeat petitioner's claim. See *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982) ("The facts regarding standing ... are part of a petitioner's case and must be affirmatively proved. Accordingly, [petitioner] is not entitled to standing solely because of the allegations in its petition."); and *No Nonsense Fashions, Inc. v. Consolidated Foods Corp.*, 226 USPQ 502 (TTAB 1985). See also *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000); and *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

Here, the petition for cancellation includes a proper allegation of petitioner's standing, i.e., that its pleaded application has been refused registration based on the subject registration. However, petitioner failed to prove this allegation inasmuch as there is no evidence in the record to establish that petitioner is the owner of the

pleaded application or that the application has indeed been refused registration by the USPTO based on respondent's registration. Respondent's admission in its answer that petitioner "purportedly" filed the pleaded application is insufficient for purposes of establishing ownership of the pleaded application; moreover, respondent went on to state that it "is without knowledge or information sufficient to form a belief as to the truth or falsity as to whether or not Petitioner is the owner of such mark and therefore denies the same."

We therefore conclude that petitioner has not established its standing.

Even if petitioner was able to prove its standing (which it did not), we further find that petitioner failed to prove priority. Thus, as explained further below, petitioner's ground for cancellation fails.

In an *inter partes* proceeding, the party in the position of plaintiff bears the burden of proving by a preponderance of the evidence a substantive ground for cancellation of the subject registration. And in a likelihood of confusion case under Trademark Act § 2(d), this burden requires the plaintiff to prove not only that defendant's mark is likely to cause confusion with that trademark, but that the plaintiff has some prior trademark right, i.e., priority.

Petitioner, as plaintiff, set forth allegations of priority and likelihood of confusion in its petition for cancellation resting solely on its ownership of an application for the mark DRINKERS PAL. While this pleaded application recites a date of first use of the mark in commerce on the identified goods (see footnote 1), it is well-established that the recitation of dates of use in an application does not constitute evidence of the application owner's use or priority. Trademark Rule 2.122(b)(2) provides:

The allegation in an application for registration, or in a registration, of a date of use is not evidence on behalf of the applicant or registrant; a date of use of a mark must be established by competent evidence. Specimens in the file of an application for registration, or in the file of a registration, are not evidence on behalf of the applicant or registrant unless identified and introduced in evidence as exhibits during the period for the taking of testimony.

While either party may rely without further proof upon the filing date of its application as a "constructive use date" for purposes of priority, see Trademark Act § 7(c) (contingent upon registration); *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 36 USPQ2d 1328, 1332 (TTAB 1994), petitioner's relied-upon application was filed on March 2, 2004, well after the March 11, 2003 filing date of the application that matured into the subject registration. And as we previously noted, petitioner did not take any testimony or introduce any evidence -- thus we can not make

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any findings whatsoever as to petitioner's use of the mark in its pleaded application prior to its March 2, 2004, filing date.

In view thereof, we conclude that petitioner has failed to prove the allegations regarding its standing to bring this proceeding. We further find that petitioner has failed to establish its priority, which is a necessary element of any claim under Trademark Act § 2(d). We need not reach the issue of likelihood of confusion because without standing and priority, petitioner certainly cannot prevail.

Decision: The cancellation is DISMISSED in its entirety.