

**THIS DISPOSITION  
IS NOT A 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**

Lykos

Mailed: December 19, 2008

Cancellation No. 92048005

iLight Technologies, Inc.

v.

Grantham K.H. Pang

Before Rogers, Cataldo, and Taylor, Administrative Trademark Judges.

By the Board:

On August 23, 2007, petitioner filed a petition to cancel respondent's registration for the stylized mark INFO LIGHT ILIGHT for "computer hardware, computer programs for sending and receiving messages, which include audio and digital information, computer interface boards, light emitting diode displays, electronic notice boards" in International Class 9.<sup>1</sup> As grounds for cancellation, petitioner alleges (1) that respondent's registered mark so resembles petitioner's registered marks that it is likely to cause confusion, mistake, or deceive prospective consumers under Section 2(d) of the Lanham Act; and (2) that respondent has discontinued use of the mark with no intent

to resume use, and therefore the mark has been abandoned.  
In the petition to cancel, petitioner pleaded ownership of  
the following three registrations:

Registration No. 2528585 for the mark ILIGHT  
TECHNOLOGIES for "commercial signage and novelty  
lighting using waveguides, higher intensity LEDs and  
discharge sources" in International Class 11;<sup>2</sup>

Registration No. 2704863 for the mark ILIGHT  
TECHNOLOGIES for "electric lighting fixtures and  
lighting strips utilizing waveguides" in International  
Class 11;<sup>3</sup> and

Registration No. 2882962 for the mark ILIGHT for  
"Electric signage using waveguides and high intensity  
light emitting diodes" in International Class 9 and  
"electric lighting fixtures and lighting strips  
utilizing waveguides and high intensity light emitting  
diodes" in International Class 11.<sup>4</sup>

Respondent, who is acting *pro se* in this case, filed on  
November 29, 2007, an "answer"<sup>5</sup> which technically failed to  
conform with Fed. R. Civ. P. 8(f) insofar as it did not

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<sup>1</sup> Registration No. 2751288, registered on August 12, 2003,  
alleging June 15, 2000 as the date of first use anywhere and in  
commerce, with a disclaimer of LIGHT.

<sup>2</sup> Registered January 8, 2002, alleging April 10, 2001 as the date  
of first use anywhere and in commerce, with a disclaimer of  
TECHNOLOGIES, Sections 8 and 15 affidavits accepted and  
acknowledged.

<sup>3</sup> Registered April 8, 2003, alleging December 31, 2001 as the  
date of first use anywhere and in commerce, with a disclaimer of  
TECHNOLOGIES, Sections 8 and 15 affidavits accepted and  
acknowledged.

<sup>4</sup> Registered September 7, 2004, alleging March 2003 as the date  
of first use anywhere and in commerce.

<sup>5</sup> The communication was entitled "Defend Against Cancellation"  
with various materials attached thereto.

specifically "admit" or "deny" each of the allegations set forth in petitioner's complaint, but was construed by the Board as a general denial of the allegations in the petition to cancel.<sup>6</sup>

This case now comes before the Board for consideration of petitioner's motion for summary judgment on its claim of abandonment. The motion is contested.<sup>7</sup>

In support of its motion, petitioner argues that on June 13, 2008, it propounded its first set of interrogatories, document production requests, and requests for admission, and that respondent failed to respond to the discovery requests. Therefore, petitioner contends, respondent has not produced any documentary evidence of use of its registered mark in commerce. Petitioner also maintains that because respondent has not responded to the requests for admission, such requests are deemed admitted, thereby removing any genuine issue of material fact that respondent has abandoned use of its mark. See Admission Nos. 1, 2, 28-34. In further support of its motion,

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<sup>6</sup> On December 19, 2007, the Board discharged respondent's technical default for failure to timely answer the petition to cancel. Thereafter, on February 19, 2008, the Board denied petitioner's motion for default judgment (filed December 19, 2007). The Board later denied petitioner's motion for reconsideration of the Board's denial of said motion on March 31, 2008.

<sup>7</sup> While not captioned as such, on October 8, 2008, the Board issued an order construing respondent's communication filed on September 25, 2008 as a response brief in opposition to petitioner's motion for summary judgment.

petitioner submitted copies of all the discovery requests, including the requests for admission, served on respondent.

In response to petitioner's motion for summary judgment, respondent contends that his mark has been in "continued usage." In support thereof, respondent has now responded to petitioner's first set of interrogatories and document productions requests, and has also submitted purported documentary evidence of use of his registered mark in commerce. Respondent, however, still has not responded to petitioner's outstanding requests for admission, nor has respondent filed a motion for withdrawal pursuant to Fed. R. Civ. P. 36(b) or to reopen his time to respond thereto pursuant to Fed. R. Civ. P. 6(b).

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). The 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 judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The evidence must be viewed, however, in a light favorable to the non-moving party, and all reasonable inferences are to be drawn in the non-movant's favor.

Based on the submissions of the parties, we find that petitioner has met its burden of demonstrating that there are no genuine issues of material fact, and that petitioner is entitled to judgment as a matter of law on its claim of abandonment.

### **I. Standing**

As a threshold matter, we note that respondent has not challenged petitioner's standing. Moreover, with its motion for summary judgment, petitioner has provided status and title copies of its three pleaded registrations. In view of petitioner having made the pleaded registrations properly of record, we find that there is no genuine issue that petitioner has a direct commercial interest in this proceeding, and that petitioner has demonstrated its standing. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *see also Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

### **II. Abandonment**

Section 45 of the Trademark Act, 15 U.S.C. § 1127, provides that a mark is abandoned when "its use has been discontinued with intent not to resume use. . . . Nonuse for three consecutive years shall be prima facie evidence of abandonment." In order to prevail on a claim for cancellation on the ground of abandonment, a party must

allege and prove, in addition to its standing, abandonment of the mark as the result of nonuse or other conduct by the registrant. See Trademark Act Section 45, 15 U.S.C. § 1127; see also, *On-Line Careline, Inc. v. Am. Online*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *Lipton Industries.*, *supra*. Evidence of nonuse of the mark for three consecutive years constitutes a prima facie claim of abandonment and shifts the burden to the party contesting abandonment to show either: (1) evidence to disprove the underlying fact triggering the presumption of nonuse, or (2) evidence of an intent to resume use to disprove the presumed fact of no intent to resume use. See Trademark Act Section 45, 15 U.S.C. § 1127; *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 899 F.2d 1575, 14 USPQ2d 1390 (Fed. Cir. 1990); see generally, 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 17:18 (4th ed. 1996). In order to establish an intent to resume use, a respondent must put forth evidence with respect to either specific activities undertaken during the period of nonuse or special circumstances which excuse nonuse. See *Cerveceria India Inc. v. Cerveceria Centroamerica, S.A.*, 10 USPQ2d 1064 (TTAB 1989), *aff'd*, 892 F.2d 1021, 13 USPQ2d 1307 (Fed. Cir. 1989); see also, *On-Line Careline, Inc.*, *supra*.

As noted above, in support of its *prima facie* case of abandonment, petitioner relies primarily on respondent's admissions.

If a party fails to file timely responses to requests for admission, the requests will stand admitted unless the party is able to show that its failure to timely respond was the result of excusable neglect; or unless a motion to withdraw or amend the admissions is filed pursuant to Fed. R. Civ. P. 36(b) and is granted by the Board. Responses to requests for admission must be served within 35 days after the date of service, if served by mail. Fed. R. Civ. P. 36(a).

It is clear that respondent has not responded to the requests for admissions and has not requested withdrawal or amendment of the admissions. Fed. R. Civ. P. 36(a) provides that a matter is admitted unless a response is timely served or "the [Board] on motion permits withdrawal or amendment of the admission". Insofar as respondent has not responded to petitioner's requests for admissions, nor filed a motion to withdraw or amend those admissions, those matters are thus "conclusively established". Fed. R. Civ. P. 36(b).

Respondent's admissions establish the following:

-Respondent has not used its registered mark in commerce (Admission Nos. 1, 2, 28-34).

-Respondent has not sold to the general public any products bearing his registered mark (Admission No. 28);

-Respondent has not manufactured, assembled, or otherwise made or produced for commercial sale products bearing the registered mark, other than prototypes or demonstration products (Admission No. 29);

-Respondent has not advertised for commercial sale any products that bear the registered mark (Admission No. 30);

-Respondent is not currently advertising for commercial sale any products that bear the registered mark (Admission No. 31);

-Respondent has not offered for commercial sale any products bearing the registered mark (Admission No. 32);

- Respondent is not currently offering for commercial sale any products bearing the registered mark (Admission No. 33);

-Respondent has received no revenue from commercial sales of products bearing the registered mark (Admission No. 34);

-The publication described in Paragraph 4 of Respondent's "Defend Against Cancellation" dated November 20, 2007, is a technical publication and is neither an advertisement for sale nor point of purchase material for products bearing the registered mark (Admission No. 37); and

-The report from which respondent submitted an excerpt in support of respondent's statement of use filed on October 22, 2002 is a technical publication and is neither an advertisement for sale nor point of purchase material for products bearing the registered mark (Admission No. 38).<sup>8</sup>

Thus, in view of the admissions noted above and the statutory presumption with regard to a claim of abandonment,

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<sup>8</sup> While non-use is not an asserted claim in this proceeding, the Board notes that the specimen submitted during *ex parte* examination of respondent's registration does not on its face evidence use in commerce of respondent's mark.

petitioner has made a *prima facie* case of abandonment.

Consequently, we must now analyze whether respondent has put forth sufficient evidence to at least raise a genuine issue of material fact that it can at trial, either (1) disprove the underlying fact triggering the presumption of three years nonuse (e.g., that excusable nonuse exists or that respondent is indeed using the marks), or (2) prove his intent to resume use of the involved mark. See Fed. R. Civ. P. 56(c).

We find respondent has not put forth sufficient evidence to raise a genuine issue about the possibility he could, at trial either disprove the presumption of three years of nonuse or prove his intent to resume use. Respondent's late responses to petitioner's document production requests, submitted with his response to the summary judgment motion, appear to be academic and technical materials as opposed to advertisements for sale of products bearing the registered mark. None of the documents consists of evidence supporting use of his mark in commerce such as product labels or bills of sale. Nor has respondent submitted evidence of specific activities he has undertaken during the period of nonuse or special circumstances which excuse nonuse. Indeed, in examining the materials submitted by respondent, it appears that respondent's INFO LIGHT ILIGHT product has not progressed past the prototype stage.

Accordingly, in view of the effective admissions and the statutory presumption with regard to a claim of abandonment, no genuine issue of material fact exists with respect to petitioner's abandonment claim. Petitioner's motion for summary judgment is therefore granted and respondent's Registration No. 2751288 will be cancelled in due course.

**NEWS FROM THE TTAB:**

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:

<http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf>

[http://www.uspto.gov/web/offices/com/sol/notices/72fr42242\\_FinalRuleChart.pdf](http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf)

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address:

<http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm>