

THIS DISPOSITION IS NOT CITABLE  
AS PRECEDENT OF THE TTAB

AUG. 18,99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Dianne R. Jimenez  
v.  
Richard Fowler

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Opposition No. 106,850  
to application Serial No. 75/037,230  
filed on December 18, 1995

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Dianne R. Jimenez, pro se.

LeAnne E. Maillian for Richard Fowler.

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Before Simms, Quinn and Chapman, Administrative Trademark  
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by Richard Fowler to register the mark BUTTERFLY RECORDS ("RECORDS" disclaimed) for "music recordings" (in International Class 9) and "live performances by a musical group" (in International Class 41).<sup>1</sup>

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<sup>1</sup> Application Serial No. 75/037,230, filed December 18, 1995, alleging a bona fide intention to use the mark in commerce.

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Dianne R. Jimenez, doing business as Butterfly Records, has opposed registration in International Class 9 only. As the ground for opposition, opposer essentially alleges that applicant's mark, when applied to applicant's goods, so resembles opposer's mark BUTTERFLY RECORDS, previously used as a trade name and a mark in connection with musical recordings, as to be likely to cause confusion. Section 2(d) of the Trademark Act.<sup>2</sup>

Applicant, in its answer, denied the salient allegations of the notice of opposition.<sup>3</sup>

The Board, at the outset, must consider a crucial evidentiary matter relating to opposer's submission of her declaration testimony. The record clearly includes the pleadings<sup>4</sup> and the file of the involved application.

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Applicant subsequently filed an amendment to allege use wherein applicant set forth dates of first use of May 25, 1996.

<sup>2</sup> The notice of opposition hardly qualifies as a model pleading. See: Section 312.03, *Trademark Trial and Appeal Board Manual of Procedure (TBMP)*. Nevertheless, under the "simplified notice pleading" of the Federal Rules of Civil Procedure, the allegations of a complaint should be construed liberally so as to do substantial justice. *Scotch Whisky Assoc. v. United States Distilled Products Co.*, 952 F.2d 1317, 21 USPQ2d 1145 (Fed. Cir. 1991). Taking the allegations in their entirety, it is apparent that opposer is claiming priority and likelihood of confusion as the basis of the opposition.

<sup>3</sup> Applicant also set forth affirmative defenses. Inasmuch as applicant did nothing other than pleading these defenses, they must fail.

<sup>4</sup> Statements made in pleadings cannot be considered as evidence in behalf of the party making them; such statements must be established by competent evidence during the time for taking testimony. *Kellogg Co. v. Pack'Em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir.

Applicant neither took testimony nor offered any other evidence. Only opposer filed a brief.<sup>5</sup> The evidentiary problems raised by opposer's declaration testimony are that (i) it was submitted after the close of opposer's testimony period, and (ii) the record does not include a written agreement between the parties that such submission is permissible.

Trademark Rule 2.121(a)(1) provides, in relevant part, that a party which desires to take testimony may do so only during its assigned testimony period. Further, Trademark Rule 2.123(b) provides, in relevant part, as follows:

If the parties so stipulate in writing, depositions may be taken before any person authorized to administer oaths, at any place, upon any notice, and in any manner, and when so taken may be used like other depositions. **By written agreement of the parties**, the testimony of any witness or witnesses of any party, may be submitted in the form of an affidavit by such witness or witnesses. (emphasis added)

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1991); and *Times Mirror Magazines, Inc. v. Sutcliff*, 205 USPQ 656 (TTAB 1979). See: *TBMP* § 706.01. Further, exhibits attached to a notice of opposition, as in this case, are not part of the record except to the extent that they are later introduced during the testimony periods. Trademark Rule 2.122(c); and *TBMP* § 705.01.

<sup>5</sup> Factual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial. See, e.g., *BL Cars Ltd. v. Puma Industria de Veiculos S/A*, 221 USPQ 1018 (TTAB 1983); and *Abbott Laboratories v. TAC Industries, Inc.*, 217 USPQ 819 (TTAB 1981). See also: *TBMP* § 706.02. Here, as discussed infra, there is no evidence properly introduced at trial.

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See, e.g., *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); and *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895 (TTAB 1989). See also: *TBMP* § 713.02.

Trademark Rule 2.123(1) provides that evidence not obtained and filed in compliance with the Trademark Rules of Practice will not be considered. See: *Binney & Smith Inc. v. Magic Marker Industries, Inc.*, 222 USPQ 1003 (TTAB 1984); and *Industrial Adhesive Co. v. Borden, Inc.*, 218 USPQ 945 (TTAB 1983). See also: *TBMP* § 717.

In the present case, Ms. Jimenez's declaration (with accompanying exhibits), although dated February 18, 1998, was not filed with the Board until March 24, 1998 (certificate of mailing dated March 21, 1998). This date is over one month after the close of opposer's testimony period (February 19, 1998).<sup>6</sup> Moreover, the declaration testimony was filed in direct contravention of Trademark Rule 2.123(b) inasmuch as the record is devoid of a written agreement between the parties which permits testimony to be submitted in declaration form.

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<sup>6</sup> The Trademark Rules of Practice governing the submission of testimony in affidavit/declaration form contemplate that the testimony be filed with the Board during the offering party's testimony period. This is to be contrasted with the submission of testimony taken by oral deposition. In this later case, time is needed for the testimony deposition to be transcribed, and then to be reviewed by the deponent.

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Accordingly, Ms. Jimenez's declaration and accompanying exhibits were not properly introduced and are not part of the record. In considering this evidentiary point, we recognize that applicant did not make any objection to the untimely and improper submission.<sup>7</sup> Nevertheless, the Trademark Rules of Practice, which allow the Board to ensure the orderly litigation of cases before it, have not been followed.

In view thereof, the opposition must fail for lack of proof. Although this result may appear to be harsh, the Trademark Rules of Practice are reasonably straightforward, and opposer's failure to familiarize herself with the pertinent rules and/or her failure to follow them are no excuse, and are at her own peril. *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 551, 18 USPQ2d 17170 (Fed. Cir 1991); *Plantronics Inc. v. Starcom Inc.*, 213 USPQ 699 (TTAB 1982); *Acme Boot Co., Inc. v. Tony and Susan Alamo Foundation, Inc.*, 213 USPQ 591 (TTAB 1980); and *W.R. Grace & Co. v. Red Owl Stores, Inc.*, 181 USPQ 118 (TTAB 1973).

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<sup>7</sup> We likewise note, however, that applicant also did not file any paper, such as a brief, from which we might have construed applicant's consent to the improper submission or wherein applicant might have otherwise treated the evidence as if properly made of record.

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Decision: The opposition is dismissed.

R. L. Simms

T. J. Quinn

B. A. Chapman  
Administrative Trademark  
Judges, Trademark Trial  
and Appeal Board