

Ryan

Opposition No. 107,326

**Black Entertainment
Television, Inc.**

v.

Nancy Delany

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE
TTAB MAY 15, 00

**Before Simms, Quinn, and Hairston, Administrative Trademark
Judges.**

By the Board.

Nancy Delany filed an intent-to-use application seeking registration of BET YOUR BRAINS (in typed form) for goods identified as "equipment sold as a unit for playing a card game involving intellectual skill" in class 28.¹ Black Entertainment Television, Inc. filed a notice of opposition, alleging, *inter alia*, that registration of applicant's mark is barred under Trademark Act Section 2(d), 15 U.S.C. §1052(d). As grounds for the opposition, opposer claims ownership and prior use of the mark BET in typed form, U.S. Registration No. 1,511,259, for "cable television broadcasting services" in class 38 and "production and shows for cable television" in class 41.²

¹ Application Serial No. 75/121,276, filed June 11, 1996.

² We observe that opposer has not submitted a status and title copy or otherwise submitted testimony establishing both title and status of its pleaded registration, U.S. Reg. No. 1,511,259.

Applicant filed an answer in this case, by which she denies the allegations essential to opposer's §2(d) claim and sets forth several affirmative defenses.

This case now comes up for consideration of the following matters:³

- (1) applicant's February 17, 1998 motion for summary judgment on opposer's section 2(d) ground of opposition; and,
- (2) opposer's March 9, 1998 motion to strike the affirmative defenses set forth by applicant in her answer.

We consider first applicant's motion for summary judgment, which has been fully briefed by the parties. The Board has considered the arguments and submissions of both sides in reaching its decision herein.⁴

The purpose of summary judgment is to avoid an unnecessary trial where additional evidence would not reasonably be expected to change the outcome. See *Pure Gold, Inc. v. Syntex (U.S.A.) Inc.*, 730 F.2d 624, 222 USPQ 741 (Fed. Cir. 1984). See also TBMP §528.01 and cases cited therein.

Generally, summary judgment is appropriate in cases where the moving party establishes that there are no genuine issues of material fact which require resolution at trial and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is material when its resolution would affect the outcome

³ Additionally, we acknowledge applicant's March 9, 1998 consented motion to file a late answer (styled as applicant's notice of consent to file late answer) and applicant's March 13, 1998 motion to stay discovery, both of which are moot, inasmuch as applicant's late answer was accepted and proceedings were suspended in the Board's March 13, 1998 order.

⁴ Opposer's response to applicant's summary judgment motion was due on April 30, 1998, but was filed on May 1, 1998. A certificate of mailing or Express Mail, in accord with Trademark Rule 1.8 or 1.10, was not attached to opposer's response. We view as conceded any issue as to timeliness, inasmuch as applicant has not objected to the late filing of opposer's response.

of the proceeding under governing law. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986); and *Octocom Systems Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1786 (Fed. Cir. 1990). A fact is genuinely in dispute if the evidence of record is such that a reasonable factfinder could return a verdict in favor of the nonmoving party. *Anderson*, 477 U.S. at 248.

Furthermore, in deciding a motion for summary judgment, the Board may not resolve an issue of fact; it may only determine whether a genuine issue of material fact exists. See *Meyers v. Brooks Shoe Inc.*, 912 F.2d 1459, 16 USPQ2d 1055 (Fed. Cir. 1990). The nonmoving party must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist, and the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the nonmoving party. See *Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

In certain cases, however, even though disputes remain with respect to certain facts, summary judgment may be granted, so long as all factual disputes are resolved in favor of the nonmoving party and inferences drawn from the undisputed facts are viewed in the light most favorable to the non-moving party. See *Anderson*, 477 U.S. at 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor"); *Bishop v. Wood*, 426 U.S. 341, n.11 (1976); and

Larry Harmon Pictures Corp. v. The William's Restaurant Corp.,
929 F.2d 662, 18 USPQ2d 1292, 1293 (Fed. Cir. 1991).

In determining whether there is a likelihood of confusion between the marks, there are thirteen evidentiary factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). When any factor has been shown to be material or relevant in the particular case, and evidence has been introduced on such factors, then those factors must be considered by the Board. See *Octocom Systems Inc.*, 16 USPQ2d at 1788.

Based on the record now before us and for the reasons discussed below, we conclude that summary judgment is appropriate in this case.

The Parties' Arguments and Evidence

In her summary judgment motion, applicant argues that confusion is not likely due to the dissimilarities in the appearance, sound, and connotation of the parties' marks. Although applicant concedes that users of the parties' goods and services may overlap, applicant asserts that the nature of the parties' goods and services, channels of trade, and consumer markets are sufficiently different. According to applicant, there is no logical nexus between the parties' goods and services that would suggest common channels of marketing or promotion.

Applicant argues further that the likelihood of confusion is eliminated by the existence of a large number of similar marks in use for similar goods and services. In anticipation of an assertion by opposer, applicant disputes both that opposer owns a

family of BET marks and that confusion is likely with respect to any of the marks in opposer's alleged family. Moreover, applicant contends that applicant is entitled to summary judgment in its favor because there are no genuine issues of material fact in this case.

Applicant's motion is supported by numerous exhibits,⁵ including evidence of third-party marks that incorporate the term BET.⁶ The involved application, Application Serial No. 75/121,276, is of record and the Board has considered applicant's

⁵ Applicant's exhibits consist of the following.

Exhibit A: A Trademarkscan database listing of opposer's 12 registrations that include the term BET, together with copies of Trademarkscan records for those registrations.

Exhibit B: A Trademarkscan database listing of 32 third-party registrations for marks that include the term BET, together with Trademarkscan records for those registrations.

Exhibit C: A Trademarkscan database listing of 136 third-party registrations for marks that include the term BET.

Exhibit D: A copy of a July 18, 1997 letter from opposer's counsel to applicant's counsel wherein opposer's counsel alleges likelihood of confusion, dilution, and infringement of its family of BET marks, that its BET mark has attained famous mark status, broad specific fields of use for its BET marks, use of BET in its marks as both an acronym and in the common sense.

Exhibit E: Trademarkscan copies of PTO records on oppositions and cancellation proceedings involving third-party BET marks.

With applicant's reply brief, applicant submitted Exhibits E, F, and G consisting of the following samples of the term BET as used in marks displayed on the Internet.

Exhibit E: shows "YOU BET SPORTS!" in connection with sports betting services.

Exhibit F: shows "YOU BET YOUR LIFE" in connection with entertainment videos.

Exhibit G: shows "YOU BET" in connection with business management workshops.

⁶ Although applicant submitted with its reply brief copies of documents showing third-party use of the BET term on the Internet, there is little evidence of record of third-party use of BET marks in the marketplace. Contrary to applicant's contentions, third-party registrations are not evidence of use or that purchasers are accustomed to seeing BET marks. See 37 C.F.R. §2.122(b)(2); see also, *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (CCPA 1973), *Alpha Industries, Inc. v. Alpha Microsystems*, 223 USPQ 96 (TTAB 1984).

Further, applicant's reliance on its search reports and copies of records retrieved from its searches is misplaced. First, although such a search report might be used, in an appropriate case, by a party that is opposing a motion for summary judgment to show the existence of a genuine issue of material fact on the issue of third-party use, such a search report is not evidence, on summary judgment, of the absence of any genuine issue of material fact on the issue of third-party use, or as to the issuance of the registrations. See generally *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); TBMP

mark BET YOUR BRAINS and the identification of goods set forth therein⁷. However, applicant's evidence of opposer's family of BET marks has not been considered herein.⁸

Opposer disputes applicant's contentions. In opposer's May 1, 1998 response, opposer argues that applicant has not met her summary judgment burden of establishing the absence of any genuine issues of material fact. Opposer contends that the overall commercial impression created by the parties' marks is the same, taking into consideration the similarities in the appearance, sound, and connotation of the parties' marks. Additionally, opposer believes that "a fair review of the record" shows that a genuine dispute exists as to whether the parties' goods and services, and the channels of trade for those goods and services, are different.

In support of opposer's arguments, opposer's counsel sets forth factual statements in its May 1, 1998 response brief. No documentary evidence or witness affidavits were provided in support of those statements of opposer's counsel. Additionally, we observe that opposer has not introduced into evidence any

§528.05(d). Second, the Board finds that the search reports have limited probative value and fall far short of establishing the absence of any genuine dispute on the issue of third-party use of BET marks. The references are for registrations of BET marks that incorporate a broad range of different terms on a broad range of goods and services. Many of the references were provided in list form, without further detail, and thus are of limited probative value in any event.

⁷ The Board disregards as irrelevant applicant's apparent error in overlooking the second amendment to the identification of applicant's goods for Serial No. 75/121,276, set forth on Office Action No. 2 dated January 29, 1997. For purposes of our §2(d) analysis in this case, we consider the identification of record for the involved application at the time of publication.

⁸ Applicant's arguments and evidence of a family of BET marks, owned by opposer, have not been considered by the Board in view of statements in opposer's response declaring the family of marks issue to be moot. However, we view as conceded any objections to applicant's evidence as to opposer's pleaded registration for BET, U.S. Reg. 1,511,259 and to opposer's registration for the mark BET ON JAZZ, U.S. Reg. No. 2,075,972, in light of opposer's reliance on these two marks in opposer's May 1, 1998 response brief.

status and title copies of any BET trademark registrations. Notwithstanding, we have considered opposer's pleaded BET registration, U.S. Reg. No. 1,511,259, as well as opposer's BET ON JAZZ registration, U.S. Reg. No. 2,075,972, for purposes of the Board's analysis in connection with applicant's summary judgment motion.⁹

In applicant's reply brief, applicant objects to opposer's response, restating the arguments set forth in applicant's summary judgment motion and asserting, in addition, that opposer failed to provide evidence in support of opposer's response brief. Applicant contends that opposer has provided no evidence of use or registration of opposer's BET mark. Applicant views as unsubstantiated opposer's evidence of the parties' goods and services and channels of trade, as well as opposer's evidence of the class of purchasers of the parties' goods and services.

Analysis

It is well settled that when the moving party's motion for summary judgment is supported by evidence sufficient, if unopposed, to indicate that there is no genuine issue of material fact, and that the moving party is entitled to judgment, the nonmoving party may not rest on mere denials or conclusory assertions, but rather must proffer countering evidence, by

⁹ We view as conceded any issue as to opposer's ownership in U.S. Reg. Nos. 1,511,259 and 2,075,972, inasmuch as applicant has not objected to opposer's ownership of these registrations and both parties' have incorporated these registrations in their arguments and/or exhibits, submitted for the Board's consideration herein.

affidavit or as otherwise provided in Fed. R. Civ. P. 56, showing that there is a genuine factual dispute for trial. See Fed. R. Civ. P. 56(e); *Copelands' Enterprises Inc. v. CNV Inc.*, 945 F.2d 1563, 20 USPQ2d 1295 (Fed. Cir. 1991); *Octocom Systems Inc.*, 16 USPQ2d at 1786.

The Board has not considered the factual statements of opposer's counsel, set forth in opposer's May 1, 1998 brief, to the extent the facts are unsubstantiated and otherwise not in compliance with Fed. R. Civ. P. 56(e). In this instance, it was incumbent on opposer to offer substantiating evidence of similarities between the parties' goods and services, channels of trade, usage of its BET mark, the strength of its mark, the conditions surrounding the sale and promotion of opposer's BET services, and the class of purchasers of opposer's services. Examples of such evidence include samples of opposer's advertising, specimens of use of opposer's BET mark, status and title copies of federal registrations for opposer's alleged BET marks, and affidavits of opposer's officers, employees, consumers, and other affiants shown to be competent to testify as to facts of this case.

To determine whether summary judgment is appropriate in this case, we turn our focus now to those *du Pont* factors contested in the parties' submissions of record. Specifically, we consider the similarities and dissimilarities of the parties' marks, the parties' goods and services, and the channels of trade.

Comparison of the Parties' Marks

Opposer's mark is BET. Applicant's mark is BET YOUR BRAINS. Considering the visual appearance of the marks, we observe that the parties' marks each contain the term BET. Looking to the application and pleaded registration, we find, however, that the addition of the terms YOUR BRAINS in applicant's mark renders the marks visually distinguishable in overall appearance. Inasmuch as opposer states that the existence of a family of BET marks owned by opposer is a moot issue, and there being no evidence in the record that consumers would perceive the BET term as a housemark, opposer has not established a genuine factual dispute as to the visual similarities of the marks.

We consider next the similarities and dissimilarities in the sound and connotation of the parties' marks. In this case, pronunciation is dependent on the meaning of the marks, and consequently, we will consider these issues together. We evaluate these issues based on the record before us.

As a preliminary matter, it is helpful to distinguish the differences in meaning and pronunciation of the term BET if perceived as an acronym, an initialism, or an ordinary English word.¹⁰ We observe differences in pronunciation of marks, generally, that function as an acronym or an initialism.

¹⁰ The Board takes judicial notice of the following definitions.

The term "acronym" is defined as: "a word (as *radar* or *snafu*) formed from the initial letter or letters of each of the successive parts or major parts of a compound term."

The term "initialism" is defined as: "an acronym formed from initial letters."

See *Merriam-Webster's Collegiate Dictionary, Tenth edition, copyright 1997 by Merriam-Webster, Incorporated.*

An acronym is pronounced and read in the same manner as a spoken word, e.g., as "radar", or in this case as "bet." However, an acronym does not generally convey the common meaning of the ordinary word; rather, it is understood that each component letter represents another entire word and that the acronym takes on its own meaning, perhaps, as an identifier of source or origin.

In an initialism, a type of acronym, each letter typically is stated and the entire word is not pronounced, e.g., as "P" "T" "O", or in this case as "B" "E" "T". Each component letter of an initialism represents the initial letter of another entire word; however, this may not be the case with an ordinary acronym.

The verb form of the term "bet" essentially means to wager.¹¹ In the context of applicant's overall mark, BET YOUR BRAINS, and in the context of the intended use of applicant's mark in connection with a game, the Board finds that applicant uses the BET term in the manner of a verb and in the sense of an ordinary English word, not as an ordinary acronym or initialism. Accordingly, there can be no dispute that a reasonable consumer

¹¹ The Board takes judicial notice of the following definition of the term "**bet**":

noun 1 a: something that is laid, staked, or pledged typically between two parties on the outcome of a contest or a contingent issue: wager b: the act of giving such a pledge 2: something to wager on 3: a choice made by consideration of probabilities. . .

verb 1 a: to stake on the outcome of an issue or the performance of a contestant b: to be able to be sure that - - usu. used in the expression *you bet*. . . 2 a: to maintain with or as if with a bet b: to make a bet with c: to make a bet on.

See Merriam-Webster's Collegiate Dictionary, Tenth edition, copyright 1997 by Merriam-Webster, Incorporated.

would pronounce applicant's mark as "bet", as one would say the ordinary word while reading.

It is not disputed that opposer's BET mark is an initialism. Opposer's name, identified in the notice of opposition is "Black Entertainment Television". The initial letters in opposer's name are "B", "E", and "T". However, the dispute in this case centers around whether opposer's mark would mean and sound the same as applicant's mark.

Relying on opposer's registration for the mark BET ON JAZZ, opposer argues that consumers would perceive and pronounce opposer's BET mark as one would pronounce the ordinary word, "bet." However, there is nothing in the record showing opposer's actual usage of the term BET in the context of an ordinary word. Nor has opposer offered any supporting affidavits attesting to consumer perception of the pronunciation of opposer's BET mark as an ordinary word (or as an ordinary acronym that is similarly pronounced). We find opposer's argument that its BET mark is pronounced as "bet" unpersuasive in light of the undisputed fact that BET is an initialism.

Inasmuch as opposer's pleaded registration does not cover playing cards, gaming, casinos, or gambling services, it is more appropriate to consider the meaning and pronunciation of opposer's mark in the context of its registration for cable television broadcasting and cable television production services. A reasonable consumer encountering opposer's mark in connection with the services listed in the registration is not likely to immediately think of gambling and casinos, but rather is likely

to view the pleaded BET mark as an initialism for opposer's name, or just simply, as a collection of identifying letters inasmuch as consumers may be accustomed to the use of "call letters"¹² by television broadcasting companies. In view thereof, consumers would likely pronounce each letter in opposer's BET mark in the manner of an initialism, i.e., as "B" "E" "T", rather than as an ordinary acronym or common word.

Under the circumstances, and considering the additional wording, YOUR BRAINS, is included in applicant's mark, we find that there is no genuine issue of material fact that the parties' marks are different in sight, sound, connotation, and overall commercial impression. In the context of summary judgment, the Board does not accept the contrary unsubstantiated arguments of opposer's counsel as sufficient to establish that a genuine issue of fact exists as to this *du Pont* factor.

Comparison of the Parties' Goods and Services

We look next to the similarities and dissimilarities in the parties' goods and services. For the reasons discussed more fully below, we find the parties' goods and services to be dissimilar.

Where likelihood of confusion is asserted with a registered mark, the issue must be resolved on the basis of the goods named in the registration and, in the absence of specific limitations

¹² We take judicial notice of the meaning of the term "call letters" which supports our view that opposer's BET mark, will likely be perceived as identifying code letters for a television channel. The term "call letters", in noun form, is defined as:

"The identifying code letters or numbers of a radio or television transmitting station, assigned by a regulatory body. Also called *call sign*."

See *The American Heritage® Dictionary of the English Language, Third Edition* copyright 1992 by Houghton Mifflin Company.

in the registration, on the basis of all normal and usual channels of trade and methods of distribution. See *Squirtco v. Tomy Corp.*, 216 USPQ 937, 940 (Fed. Cir. 1983).

The question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade, or the class of purchasers to which sales of the goods are directed. See *Octocom Systems, Inc.*, 16 USPQ2d at 1787; *Bongrain International (American) Corp. v. Moquet Ltd.*, 230 USPQ 626 (TTAB 1986).

Accordingly, the Board must presume that the goods and services identified by applicant and by opposer in its pleaded registration encompass all goods and services of the type described, move in all normal channels of trade and under all normal methods of distribution, and are available to all classes of purchasers. See also *In re Diet Center, Inc.*, 4 USPQ2d 1975 (TTAB 1987); and *In re Americor Health Services*, 1 USPQ2d 1670 (TTAB 1986).

In view thereof, we look to the identification of goods set forth in Application Serial No. 75/121,276. As stated in the application, applicant's goods are for "equipment sold as a unit for playing a card game involving intellectual skill" in class 28. This identification can be construed broadly to cover a range of equipment used in connection with card games involving intellectual skill, for example, game boards, dice, game pieces,

poker chips, play money, and score pads and pencils used to keep score.

Opposer's pleaded registration recites generally "cable television broadcasting services" in class 38 and "production and shows for cable television" in class 41. Insofar as opposer's pleaded registration does not describe any specific gaming or casino services and there is nothing in the record to indicate that opposer broadcasts or produces television programming related to card games, we find, based on the record before us, that the parties' goods and services are dissimilar.

We find unpersuasive opposer's general allegation that opposer's BET mark is used on a wide variety of goods and services. Inasmuch as there is no evidence of record to support this allegation, it is inappropriate for us look outside the context of opposer's registration in our evaluation of the similarity and dissimilarity of the parties' goods and services.

Additionally, we reject opposer's arguments that the parties' marks are used on related goods and services. Mere assertions of commercial relatedness, unsupported by evidence, carry no weight. In this case, opposer has failed to support its relatedness argument with proof that consumers are likely to think that card game equipment is produced by, distributed by, or associated with, an entity that also renders cable television broadcasting and production services. Nor has opposer provided any evidence that consumers are accustomed to seeing opposer's mark on a wide variety of goods including card game equipment or board games. Recognizing the lack of evidence in support of the

statements of opposer's counsel, we find no genuine factual dispute on the relatedness issue.

Comparison of the Channels of Trade

As discussed above, assumptions as to the channels of trade and the nature of the consumers of the parties' goods and services all flow from the involved application and opposer's pleaded registration. We consider all normal and reasonable channels of trade and channels of distribution for the parties' identified goods and recited services.

Absent from opposer's pleaded registration are any restrictions in the channels of trade, the channels of distribution, and the classes of consumers. We find the consumers of opposer's services to be the general public, which includes all subscribers, sponsors, and viewers of cable television. Additionally, we find, based on the recited services in opposer's pleaded registration, that consumers would likely encounter opposer's BET broadcasts and production services in all places where cable television programs normally are viewed, e.g., in personal residences, restaurants, hotel rooms, and also in television studios where opposer's programs are produced.

We find the normal and reasonable channels of trade for applicant's goods to be retail toy stores and other outlets for card games sold as a unit with card game equipment. We reject as mere speculation opposer's unsupported statements that applicant's goods normally would be distributed by or to casinos.

Accordingly, based on the record before us, we find the channels of trade for the parties' goods and services to be

dissimilar in this case. Here, too, opposer has failed to support its contrary arguments with evidence sufficient to establish that a factual dispute exists as to this *du Pont* factor.

Other du Pont Factors

In opposer's response to applicant's summary judgment motion, opposer argues that several other *du Pont* factors weigh in opposer's favor, namely, the existence of common purchasers and the existence of a BET housemark owned by opposer. Opposer's counsel also asserts widespread use and marketing of its BET mark, which tends to support the *du Pont* factor as to the strength of opposer's mark. However, we find that opposer has not provided evidence sufficient to establish any genuine issues of material fact as to these other *du Pont* factors.

There is no issue as to the class of purchasers of the parties' goods and services, inasmuch as opposer's services are directed to the general public. The mere fact that there exist overlapping purchasers is not enough to establish a likelihood of confusion in this case.

Furthermore, we reject opposer's arguments that consumers would likely perceive the BET term to be a housemark owned by opposer. Opposer has failed to provide evidence in support of its allegations that its mark is widely recognized, that BET would be perceived as a housemark, and that opposer's mark is used in connection with a wide variety of services and a wide variety of goods. And therefore, opposer has not established any genuine dispute as to these other *du Pont* factors.

Conclusion and Decision

After a careful review of the record in this case, and drawing all reasonable inferences in favor of opposer as the non-moving party, we find that the unsubstantiated statements of fact set forth in opposer's response brief fall far short of raising any genuine issues of material fact. Inasmuch as opposer failed to introduce any evidence to support its alleged claims of similarities between the parties' marks, goods and services, and channels of trade, there is no evidentiary basis on which to ground opposer's claim that these *du Pont* factors are disputed.

In sum, we have found dissimilarities between the parties' marks, the parties' goods and services, and the channels of trade. A genuine issue has not been established as to the strength of opposer's BET mark, the existence of a BET housemark, and the existence of a family of BET marks owned by opposer.

We find that applicant has adequately met her burden of showing that no genuine issues of material fact remain as to likelihood of confusion, and that applicant is entitled to judgment on opposer's §2(d) claim. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Accordingly, applicant's motion for summary judgment is hereby **granted**. See Fed. R. Civ. P. 56(c).

Judgment is hereby entered against opposer and the opposition is dismissed with prejudice.

In view of the dismissal of proceedings herein, opposer's March 9, 1999 motion to strike the affirmative defenses set forth in applicant's answer is moot.

R. L. Simms

T. J. Quinn

P. T. Hairston

Administrative Trademark Judges
Trademark Trial and Appeal Board