

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Trademark Trial and Appeal Board
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THIS DISPOSITION IS NOT
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TTAB 4/13/00
DEB

Opposition No. 108,368

Stephen M. Eisen

v.

Jade Panther Corp. of America

Before Quinn, Chapman and Bucher, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Applicant, Jade Panther Corp. of America, has filed an application to register the mark "JAZZMANIA" for "prerecorded audio tapes, compact discs and other electronic recording media featuring musical performances."¹ Registration has been opposed by Stephen M. Eisen, on the grounds that opposer is the founder and leader of a jazz ensemble; that since 1988 the name "JAZZMANIA" has been used continuously in interstate commerce in connection with live musical entertainment services rendered by his jazz

¹ Serial Number 74/370,589, filed on March 22, 1993, based upon a claim of use in commerce since August 1992.

ensemble; that the mark is currently in such use; that he owns a pending U.S. trademark application, but that applicant's prior-filed application was cited as a potential bar to registration of opposer's mark;² that applicant's mark is identical to his mark; that the parties' marks are being used in connection with related forms of musical performances; and that a likelihood of confusion exists between his previously used mark and the mark in the application at issue.

Applicant, in its answer, denies the salient allegations of the notice of opposition.

This case now comes before the Board for consideration of opposer's motion for summary judgment on the ground of likelihood of confusion under Trademark Act Section 2(d).

In support of his motion for summary judgment, opposer argues that he has established priority of use, that applicant's mark is identical to his pleaded mark; and that applicant's goods are closely related to the musical entertainment services identified by opposer's mark.

Applicant has not responded with contravening evidence on the merits of the summary judgment motion, arguing only that any grant of summary judgment would be inappropriate

because applicant is much more widely recognized in the music and entertainment industries than is opposer.

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 judgment as a matter of law. We are asked herein to apply the legal standard of Federal Rule of Civil Procedure 56(c) to the evidence of record.³

A material fact is one that may affect the decision, so that the finding of that fact is relevant and necessary to the proceedings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (S.Ct. 1986). A genuine issue is shown to exist if sufficient evidence is presented such that a reasonable fact finder could resolve the matter in favor of the non-moving party. See Opryland USA Inc. v. Great American Music Show Inc., 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992). The non-moving party must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist. Furthermore, all

² Serial Number 74/639,750, filed on March 1, 1995, based upon a claim of use in commerce since January 15, 1988.

³ Fed. R. Civ. P. 56(c) states in relevant part:
"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

justifiable inferences to be drawn from the record must be viewed in the light most favorable to the non-moving party. See Olde Tyme Foods Inc. v. Roundy's Inc., 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992) and Action Temporary Servs., Inc. v. Labor Force, Inc., 870 F.2d 1563, 1565, 10 USPQ2d 1307, 1308-09 (Fed. Cir. 1989).

As noted above, in opposition to opposer's motion for summary judgment, applicant has submitted no evidence on the merits of this case. After careful consideration of the evidence and the parties' arguments herein, we conclude that there are no genuine issues of material fact remaining for trial with respect to opposer's standing, opposer's priority of use, or the likelihood of confusion herein.

Opposer, Stephen M. Eisen, has submitted his own affidavit as founder and leader of the band "JAZZMANIA," along with dozens of documents submitted as exhibits accompanying the summary judgment affidavit, and identified therein, such as announcements, brochures and advertisements of specific public performances, copies of contracts between his Jazzmania band and contractors, as well as follow-up letters from the providers of such venues; and finally, correspondence from applicant that has been made part of the record in this proceeding.

In response to the motion for summary judgment, the applicant, acting *pro se*, maintains that it has invested a great deal of money in promoting its record label; that applicant is a member of national and international recorded music organizations; and that opposer's musical cassette, "*First Impressions*," was not offered for sale at the retail level in a manner consistent with the ordinary course of trade.

As a preliminary matter, we note that there is no genuine issue as to opposer's standing. There is of record evidence of opposer's use of the mark "JAZZMANIA" in connection with his services, and evidence that his pending trademark application has been suspended pending the outcome of this proceeding. Together, these facts show that opposer has a "real interest" in this case. See 15 U.S.C. §1064; TBMP §303.03.

Insofar as priority is concerned, based upon the uncontroverted affidavit of Mr. Eisen and the accompanying exhibits filed with its summary judgment motion, we find that opposer has provided his live musical entertainment services under his "JAZZMANIA" mark continuously since 1988. The statements as to opposer's dates of first use of the mark are clear and convincing in character. That is, opposer began using his mark prior to the earliest date

upon which applicant is entitled to rely. The undisputed facts regarding opposer's first use in commerce establish opposer's priority. Thus, there is no genuine issue of material fact as to opposer's priority of use.

Turning to the statutory grounds of likelihood of confusion, in determining the issue thereof, and hence whether there is any genuine issue of material fact relating thereto, we must consider all of the probative facts in evidence which are relevant to the factors bearing on likelihood of confusion, as identified by *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

First, the marks in this proceeding are identical.

Second, as to the relatedness of the parties' services and goods, opposer provides live musical entertainment by a jazz ensemble while applicant is a recording company whose label specializes in promoting the work of jazz musicians. Hence, opposer's live jazz musical entertainment services are closely related to applicant's recorded media featuring musical performances, especially jazz music. In this context, applicant's basic contention -- that its record label is known internationally while opposer has little more than a local presence in the Washington DC

metropolitan area -- is irrelevant to the instant determination.

In view of virtually identical marks being used on such closely related goods and services, a potential purchaser would be likely to mistakenly ascribe a common source to the live musical entertainment services performed under opposer's "JAZZMANIA" mark, and the recorded musical performances sold under applicant's "JAZZMANIA" mark.

Hence, consistent with the factors set out in the *du Pont* decision, we find that there is no genuine issue of material fact as to the issue of likelihood of confusion, and that opposer is entitled to judgment on this issue as a matter of law. See *Kellogg Co. v. Pack 'Em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

Opposer's motion for summary judgment therefore is granted, the opposition is sustained, and judgment is entered in opposer's favor on the issues of priority of use and likelihood of confusion.

T. J. Quinn

B. A. Chapman

D. E. Bucher

Administrative Trademark Judges,
Trademark Trial and Appeal Board