

**THIS DISPOSITION
IS NOT CITABLE AS
PRECEDENT OF
THE TTAB**

Hearing¹:
May 10, 2005

Mailed: October 26, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

LEO STOLLER D/B/A CENTRAL MFG
and CENTRAL MFG CO., joined as party plaintiff
v.
SUTECH U.S.A., INC.

Opposition No. 91117894
to Application No. 75626052
filed on January 22, 1999

Leo Stoller, *Pro Se*, for himself and CENTRAL MFG CO., of
which he is president.

Robert E. Knechtel and David J. Hurley of Knechtel, Demeur &
Samlan for SUTECH U.S.A., INC.

Before Walters, Holtzman and Rogers, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Leo Stoller and Central Mfg Co. have opposed the
application of Sutech U.S.A., Inc. to register the mark
STEALTH for "machinery, namely, lawn mowers," in

¹ Only Leo Stoller, on behalf of opposers, appeared at the oral hearing.

International Class 7. Registration of the proposed mark is sought in standard character form, and the application is based upon an allegation of a bona fide intention to use the mark in commerce in connection with the identified goods.

As grounds for opposition, opposers assert that applicant's mark, when applied to applicant's goods so resembles opposers' previously used and registered mark STEALTH, in standard character format, for "lawn sprinklers" and other "related" goods as to be likely to cause confusion, under Section 2(d) of the Trademark Act.² In connection with this claim, opposers allege ownership of a family of famous STEALTH marks for "a range of goods."

In the notice of opposition,³ opposers also allege that applicant's mark "when used on or in connection with the goods of the applicant, are (*sic*) merely descriptive or deceptively misdescriptive of the goods" (paragraph 31); that applicant fraudulently signed the application statement of its bona fide intention to use the mark in commerce because the mark was already in use in commerce by applicant (paragraph 34); and that "applicant is not the owner of the mark for which the registration is requested" (paragraph 45).

² The Board found opposer's dilution claim to be insufficient and opposer did not submit a proper dilution claim within the period granted by the Board. Therefore, dilution is not an issue in this proceeding.

³ Opposer's "Second Amended Notice of Opposition," received June 4, 2002, is the operative pleading.

Applicant, in its answer, denied the salient allegations of the claim, except that applicant made certain admissions, discussed below, with respect to opposers' paragraph no. 8⁴; and applicant admitted that it used its mark in connection with the identified goods "since at least as early as July 1, 1998."

The record consists of the pleadings; the file of the involved application; various documents, including specified responses of applicant to opposer's interrogatories and requests for admissions, and the affidavit of Mr. Yuning Zhang, applicant's vice president, all made of record by applicant's notice of reliance with opposer's consent; and various documents, including specified responses of opposer to applicant's interrogatories and requests for admissions, and the discovery deposition by opposers of Mr. Yuning Zhang, all made of record by opposer's notice of reliance with applicant's consent.⁵ Both parties filed briefs on the

⁴ Applicant specifically denied opposers' statements in paragraph 8 regarding Registrations Nos. 1717010 and 2227069, one of which applicant asserts is canceled, and the other of which applicant asserts is owned by another entity.

⁵ We note that usually a party may not rely on its own discovery responses except to rebut or otherwise clarify portions of its discovery responses submitted by the other party. In this case, such evidence is submitted with consent and, thus, will be considered. However, while a party's response to an interrogatory is not without evidentiary value, it is generally viewed as "self-serving." General Electric Co. v. Graham Magnetics Inc., 197 USPQ 690, 692 n.5 (TTAB 1977) *citing* Grace & Co. v. City of Los Angeles, 278 F.2d 771, 776 (9th Cir. 1960), and Beecham Inc. v. Helene Curtis Industries, Inc., 189 USPQ 647 (TTAB 1976). The trier of fact has discretion to decide what weight to give to an interrogatory response. Fidelity & Deposit Co. of Maryland v. Hudson United Bank, 653 F.2d 766, 777 (3d Cir. 1981); *Marcoin, supra*;

case and an oral hearing, at which only opposers were present, was held.

We put aside for the moment the pleaded ground of priority and likelihood of confusion to address the myriad other grounds asserted by opposer. We begin with the issues of mere descriptiveness, fraud, and lack of ownership, each of which was pleaded in the notice of opposition and addressed by the parties at trial and in the briefs.

First, regarding mere descriptiveness, opposers' claim of mere descriptiveness rests on statements by Mr. Yuning Zhang, in his discovery deposition, that he believed applicant's parent company chose the trademark STEALTH for the identified goods because he believed that the front of the so-identified lawnmower evoked the shape of a military aircraft of that name. This is insufficient to establish that the mark immediately conveys to purchasers information concerning a significant quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). The

and *Freed v. Erie Lackawanna Railway Co.*, 445 F.2d 619, 621 (6th Cir. 1971).

Additionally, opposer submitted documents that appear to be brochures and packaging by notice of reliance. Such documents are not amenable to submission by notice of reliance and are of no probative value because the documents have not been properly identified or authenticated.

opposition is dismissed as to opposers' claim of mere descriptiveness.

Second, regarding fraud, opposers contend that by signing the application and verifying that it had a bona fide intention to use the mark in commerce, applicant committed fraud on the office because it was, in fact, using its mark as early as July, 1998. There is no prohibition against filing an intent-to-use application even though the mark may be in use on or in connection with the identified goods; and, in this case, the application is based upon applicant's statement of a bona fide intention to use the mark in commerce and no statement of use has been filed.⁶ There is no evidence in the record establishing either a false statement by applicant to the USPTO, or any intent on applicant's part to commit fraud on the USPTO. The opposition is dismissed as to opposers' claim of fraud.

Third, regarding opposers' claim that applicant is not the owner of the mark, opposers note the fact that applicant is the subsidiary of a Chinese company and argue a number of points regarding ownership of marks as between related

⁶ An exhibit introduced in connection with opposers' discovery deposition of applicant's vice president, Mr. Yuning Zhang, appears to be a statement of use signed by Mr. Zhang on March 14, 2000. However, this appears to be a copy of a document from applicant's or its attorney's files. This document could not be a misrepresentation to the USPTO because such a document is not of record in this application file at the USPTO. Moreover, considering this document as part of the record in this opposition, there is no legal inconsistency with applicant's statement in its application filed January 22, 1999, of a bona fide intention to use its mark in commerce and its statement that it has used the mark in commerce since at least as early as July 1, 1998.

companies and as between manufacturers and distributors. While the record establishes that applicant is a subsidiary of a Chinese company, it is the prerogative of such companies to decide who shall own the mark and opposers have not shown any facts establishing that applicant does not possess the relevant control of the nature and quality of the goods identified by the mark. Nor is there any basis in this record for opposers' claim that applicant should have disclosed its relationship with its parent company in the application. Further, Mr. Yuning Zhang's statements establish that applicant purchases the parts for, and manufactures and sells to distributors, the goods identified by the mark. There are no facts in this record sufficient to even raise a suspicion that applicant is not the owner of the mark. The opposition is dismissed as to opposers' claim that applicant is not the owner of the mark.

In their brief, opposers' raise, for the first time, several unpleaded grounds of opposition. Applicant did not object and, in fact, addressed each of these grounds in its brief. However, after reviewing opposers' allegations, we cannot discern any additional grounds for opposition that are legally viable.

We note, first, that, as applicant contends, opposers' allegation of functionality is completely irrelevant because the subject matter in this case is a word mark shown in

standard character form. The claim of functionality is dismissed and has not been considered further.

Second, opposers make various claims challenging the viability of the application due to alleged incorrect dates of use, invalid specimens of use, and alleging, essentially, that the mark in the drawing is a mutilation of the mark as used in the specimens. These allegations are totally inappropriate in this case. As previously stated, this application is based on applicant's allegation of a bona fide intention to use the mark in commerce. It contains no statement of use or specimens, so there cannot be a misrepresentation with respect thereto in the application.

In their brief (p. 19), opposers "move ... for leave to amend its notice of opposition to conform to the said evidence presented herein." Not only is this "motion" too vague to warrant consideration, but opposers present no basis for making such a request at this late stage of the proceeding, and the motion is therefore denied.

Finally, we turn to opposers' ground of likelihood of confusion and we find that opposers have not established the threshold issue of priority through use or registration of any mark.

In paragraph 8 of opposers' amended notice of opposition, opposers claim that opposers "hold rights directly in" twenty-six federal trademark registrations

which are listed therein.⁷ Opposers have not submitted status and title copies of any of these registrations, either with the original or amended notice of opposition⁸ or during opposers' trial period.

Regarding use of its pleaded marks, the only evidence of record is a single customer affidavit by Mr. Ray Webber, dated September 6, 2002. Mr. Webber made the following statements, *inter alia*:

[H]e has been a customer of the Opposer since the middle 1980's. ... [H]e has been purchasing STEALTH branded products exclusively with the Opposer. ... [He] purchased lawn sprinklers from the Opposer in 1996. ...

Mr. Webber's declaration does not indicate the type of "branded products" with which he associates the STEALTH trademark, how many lawn sprinklers he purchased from opposers, or whether the STEALTH trademark was used on or in connection with the lawn sprinklers he purchased. This single declaration is insufficient to establish opposers' use of STEALTH as a trademark in connection with lawn sprinklers or any other product or service.

In opposers' discovery deposition of Mr. Yuning Zhang, Mr. Stoller showed Mr. Zhang copies of at least one alleged trademark registration and asked Mr. Yuning Zhang several

⁷ The paragraph also claims ownership of listed pending applications, which have not been considered further because such applications have not been made of record.

⁸ While the amended notice of opposition states that registration copies are attached, no such submission was made.

questions about it. Mr. Yuning Zhang was able only to read what was on the page and he clearly stated that he had no knowledge of any use of a STEALTH trademark other than applicant's mark on or in connection with any other product. There is no statement by Mr. Yuning Zhang in this deposition that would constitute an admission by applicant as to the use or registration by opposers of their pleaded marks.

In its answer, applicant responded, *inter alia*, to paragraph 8 of the notice of opposition by denying opposers' ownership of listed Registration Nos. 1717010 and 2227069, and by stating the following:

Applicant admits the allegations contained in Paragraph 8 with respect to the particular trademarks corresponding to a particular registration and/or serial number. Applicant otherwise denies each and every remaining allegation contained in Paragraph 8.

This statement is not an admission of either ownership or status of any of opposers' pleaded registrations. Applicant merely admits that the listed registration numbers correspond to the respective marks identified therewith in the list. Were the Board to consider this an admission, which we do not, it would at most be an admission of ownership, but not status, of the pleaded registrations.

Therefore, opposers have established in this record neither use of the pleaded marks nor ownership of any validly subsisting federal registrations. We conclude that opposers have not established either standing or priority

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and, thus, opposers' claim of likelihood of confusion must fail.

Decision: The opposition is dismissed.