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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Nextstage Entertainment Corporation

v.

Stages Theatre Company

Opposition No. 91121402

Mark A. Tidwell of Bracewell & Patterson, L.L.P. for Nextstage Entertainment Corporation.

Barry A. Gersick of Maslon Edelman Borman & Brand, LLP for Stages Theatre Company

Before Seeherman, **Walters and Holtzman**, Administrative Trademark Judges.

Opinion by **Holtzman**, Administrative Trademark Judge:

An application has been filed by Stages Theatre Company (applicant) to register the mark NEXT STAGE on the Principal Register for the following services (as amended): "entertainment

in the nature of theater production in the fields of dramatic arts, music, literature, and dance."¹

On July 12, 2000, Nextstage Entertainment Corporation (opposer) filed an opposition to registration of the above application. As grounds for opposition, opposer asserts that it was formed in 1998; that in 1997 it acquired from its predecessor in interest, NextStage Development, L.P., rights in the mark NEXTSTAGE; that since as early as January 1998, opposer has been using NEXTSTAGE in connection with the promotion of live entertainment events including shows and musical events and the development and operation of live entertainment venues; and that applicant's mark for the services identified in the application so resembles opposer's previously used mark as to be likely to cause confusion, mistake or deception.

Applicant filed an answer denying the salient allegations in the opposition. In addition, applicant affirmatively asserted that its date of first use of the mark was at least as early as June 15, 1997 and that applicant is the senior user of the mark.

Then on May 7, 2001, during the discovery period, applicant filed a motion to amend its application to change the date of first use and first use in commerce from May 11, 1998, to April 15, 1997 and June 15, 1997, respectively. In support of the

¹ Application Serial No. 75528682 filed on July 31, 1998, alleging dates of first use and first use in commerce on May 11, 1998.

motion, applicant submitted an affidavit, with exhibits, executed September 13, 2000 by its producing director, Steve Barberio. The Board deferred consideration of the motion until final decision.

Opposer did not take any testimony, but on the last day of its testimony period submitted a notice of reliance on various materials. Applicant took no testimony nor introduced any other evidence in its own behalf. Only opposer filed a brief. An oral hearing was not requested.

As a preliminary matter, we need to address the admissibility of the materials offered into the record by opposer's notice of reliance.

The documents sought to be introduced by the notice of reliance include the following items: a filing receipt from the USPTO for application Serial No. 75798583 filed by Nextstage Entertainment Corporation (opposer herein) on September 14, 1999 based on an intent to use the mark NEXTSTAGE for, inter alia, "promoting the sports competitions, concerts, and live events of others"; an Office action indicating suspension of that application pending disposition of the subject application; applicant's motion to amend its dates of use along with a copy of the same September 13, 2000 affidavit of Steve Barberio, with attachments, that had been submitted by applicant in support of its motion to amend; and applicant's responses to opposer's

interrogatories and admission requests, and its written responses to opposer's document requests (but not the documents themselves).²

The Office action and filing receipt are admissible by notice of reliance (see Trademark Rule 2.122(e)) as are applicant's responses to opposer's interrogatories and requests for admissions (see Trademark Rule 2.120(j)(3)(i)). Also considered of record under the notice of reliance are applicant's written responses to opposer's document production requests. See, e.g., *NASDAQ Stock Market Inc. v. Antartica S.r.l.*, 69 USPQ2d 1718, 1722 n.6 (TTAB 1998) (Trademark Rule 2.120(j)(3)(ii) does not prohibit introduction of a response to a request for production that states that no responsive documents exist). We note that in response to several of opposer's interrogatories, applicant stated that it "incorporates by reference in this answer the Affidavit of Steve Barberio dated September 13, 2000, with attached exhibits." Therefore, the Barberio affidavit with supporting materials, while not otherwise admissible as a separate submission, is considered as forming part of applicant's answers to the interrogatories and thus properly of record by notice of reliance under Trademark Rule 2.120(j)(3)(i).

² Opposer states in its notice of reliance that the discovery responses have been submitted to show the nature of applicant's services and the market for those services.

Opposer has also attempted to introduce by notice of reliance a number of purported "publications" which opposer has relied on to show, among other things, the date of first use of opposer's mark. These "publications" consist of, or have been identified in the notice of reliance as: a "concert industry consortium" employee name tag; a "schedule of costs" of opposer's affiliates relating to "trade name promotion"; a "client/contact list"; memoranda regarding "artist information"; a NextStage Development, L.P. "contact log"; a NextStage Development L.P., "Information" sheet; a copy of a July 30, 2001 assignment of the mark NEXT STAGE from Constituent Arts, Ltd. to opposer; brochures, newsletters, performance schedules and programs for various years; and a copy of an application for the mark NEXTSTAGE dated September 14, 1999 purportedly filed by opposer in the Office.

None of these documents is admissible by a notice of reliance. They do not qualify as either printed publications, such as books and periodicals, available to the public, or as official records, as contemplated by Rule 2.122(e). See *Wagner Electric Corporation v. Raygo Wagner, Inc.*, 192 USPQ 33 (TTAB 1976) and *The Conde Nast Publications Inc. v. Vogue Travel, Inc.*, 205 USPQ 579 (TTAB 1979). See also, for example, *Colt Industries Operating Corp. v. Olivetti Controllo Numerico S.p.A.*, 221 USPQ 73, 74 n.2 (TTAB 1983) (an agreement between applicant and a

third party, press releases, and a shipping document are not acceptable for a notice of reliance); *Glamorene Products Corporation. v. Earl Grissmer Company, Inc.*, 203 USPQ 1090, 1092 n.5 (TTAB 1979) (private promotional literature is not presumed to be publicly available within the meaning of the rule); and *Hunt-Wesson Foods, Inc. v. Riceland Foods, Inc.*, 201 USPQ 881, 883 (TTAB 1979) (brochures and other promotional literature are not admissible by notice of reliance).

In addition, the document which appears to be opposer's own file copy of an application and which does not even reflect that it was received by the Office is not admissible as an official record. See *Hard Rock Cafe International (USA) Inc. v. Elsea*, 56 USPQ2d 1504 (TTAB 2000) and *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992).

As provided in Trademark Rule 2.123(1), evidence not obtained and filed in compliance with the rules of practice will not be considered by the Board. On occasion, the Board has considered improperly filed evidence to be of record where there has been no objection by the adverse party and where the conduct of, or papers filed by, the adverse party could be fairly interpreted as a stipulation that the evidence be considered of record. See, e.g., *Southwire Co. v. Kaiser Aluminum & Chemical Corp.*, 196 USPQ 566, 569 n.1 (TTAB 1977). However, in this case, since applicant filed no evidence or a brief or any other papers,

we cannot presume that the evidence was treated as being of record. See *Original Appalachian Artworks Inc. v. Streeter*, 3 USPQ2d 1717 (TTAB 1987). Accordingly, these materials have been given no consideration.

On the basis of the evidence that is properly of record, opposer has demonstrated its standing, that is, its real interest in the proceeding, by the submission of an Office action showing that opposer's application has been suspended as a result of the application herein. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 942, 55 USPQ2d 1842 (Fed. Cir. 2000); and, e.g., *The Hartwell Co. v. Shane*, 17 USPQ2d 1569 (TTAB 1990).

With respect to priority, we turn first to applicant's claim of prior use and its proposed amendment to the dates of use in its application. The exhibits submitted with Mr. Barberio's affidavit consist of a 1997-1998 season schedule and a printer's invoice for the schedule. The affidavit states only that the schedule was "ordered" on April 15, 1997 and "sent through the United States mails to [applicant's] constituency on or about June 15, 1997."

An applicant is entitled to prove an earlier use than the date alleged in its application but its proof must be clear and convincing and must not be characterized by contradiction, inconsistencies and indefiniteness. See *Hydro-Dynamics, Inc. v.*

George Putnam & Co., Inc., 811 F.2d 1470, 1 USPQ2d 1772 (Fed. Cir. 1987).

Applicant's submission is insufficient to establish that applicant used NEXT STAGE on April 15, 1997 and in commerce on June 15, 1997. The mere ordering of promotional materials from the printer clearly does not amount to technical service mark use or use analogous to service mark use. Further, the distribution of a season schedule that advertises upcoming performances without evidence that the performances actually occurred on the dates stated in the schedule does not constitute technical service mark use. See Section 45 of the Trademark Act ("...a mark shall be deemed to be in use in commerce ... on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce...").

Thus, applicant's motion to amend the dates of first use is denied. Because applicant did not otherwise submit any convincing evidence of its use, the earliest date upon which applicant is entitled to rely for purposes of priority is the July 31, 1998 filing date of its application.

However, opposer, for its part, has failed to properly introduce any evidence that its mark NEXTSTAGE was used at all,

let alone used prior to the filing date of applicant's application.³

Accordingly, inasmuch as we find that opposer has not established its priority, opposer cannot prevail on its claim of likelihood of confusion.

Decision: The opposition is dismissed.

³ Opposer's request, in its brief, that the Board take judicial notice of two applications (other than the application submitted with its notice of reliance) namely, application Serial No. 75421657, filed by opposer's predecessor and subsequently abandoned and Serial No. 75646852 filed by opposer, is denied. The Board does not take judicial notice of applications filed in the Office. See *In re Consolidated Cigar Co.*, 35 USPQ2d 1290 (TTAB 1995). Even if these applications were properly of record, they would only be admissible and probative for what they show on their face and not for proving the truth of any statements made therein. See TBMP §§ 704.07 and 704.08 For example, any dates of use alleged in these applications would not be evidence of such use.