

THIS DISPOSITION IS  
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February 17, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Petra Pet, Inc.  
v.  
Aspen Pet Products, Inc.

Opposition No. 91154069  
to application Serial No. 76365184

Marc S. Friedman of Sills Cummis Epstein & Gross P.C. for  
Petra Pet, Inc.

Byron R. Jacobson and Gregory S. Tamkin of Dorsey & Whitney  
LLP for Aspen Pet Products, Inc.

Before Seeherman, Bucher, and Drost, Administrative  
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On September 17, 2002, the application of Aspen Pet  
Products, Inc. (applicant) for registration of the mark  
DOUBLE CHEW (typed) for "rawhide chews for pets" in Class 18  
was published for opposition.<sup>1</sup> The application contains a  
disclaimer of the word "chew."

On September 20, 2002, Petra Pet, Inc. (opposer) filed  
an opposition to the registration of applicant's mark on the

<sup>1</sup> Serial No. 76365184, filed on January 30, 2002, contains an  
allegation of a date of first use and a date of first use in  
commerce of September 12, 2001.

ground that "the mark DOUBLE CHEW for rawhide chews for pets made from two wrapped pieces of rawhide is merely descriptive." Notice of Opposition at 2. Applicant has denied the salient allegations of the Notice of Opposition.

The Record

The record consists of the file of the involved application; opposer's notices of reliance on applicant's design patent, patent application publication, and patent application documents, copies of applicant's advertising materials in publications and on the Internet; and applicant's notice of reliance on dictionary definitions and applicant's advertising.<sup>2</sup>

Only opposer has filed a brief.

Background

In its Notice of Opposition (p. 1), opposer alleges that it "would be damaged by the registration of the mark DOUBLE CHEW." Further, opposer alleges that it is the owner of a pending trademark application for "2 CHEWS TO CHOOSE" for "edible dog treats" (Serial No. 78143025).<sup>3</sup> The Notice of Opposition also alleges (p. 2) that applicant:

has sent a letter from attorney[s] for applicant threatening litigation for trademark infringement of

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<sup>2</sup> Opposer has submitted an appendix to its appeal brief. Since evidence may not be newly submitted with an appeal brief, we have considered only the documents of record herein, and have not separately considered the documents in the appendix.

<sup>3</sup> A review of USPTO's electronic records indicates that this application issued as Registration No. 2,880,261 on August 31, 2004.

DOUBLE CHEW if Petra Pet, Inc. uses its mark. Petra Pet, Inc., DBA Petrapport would, therefore, be damaged by the registration of the mark DOUBLE CHEW, Application Serial No. 76/365,184, as applicant would rely on any registration for the mark DOUBLE CHEW in its threatened litigation.

Standing

A key initial question in any opposition proceeding is whether the opposer has standing to oppose the application. Yamaha Int'l Corp. v. Hoshino Gakki Co., Ltd., 231 USPQ 926, 931 (TTAB 1986) ("Standing to oppose is an essential element of proof in opposition proceedings"), aff'd, 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988). The Federal Circuit has held that "[s]ince the days of our predecessor court, an opposer has been required to show that he has a 'real interest' in the outcome of a proceeding in order to have standing." Ritchie v. Simpson, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

It is recognized that a party need not be a manufacturer or seller of the goods in connection with which a descriptive, misdescriptive, or merely ornamental designation is used in order to object to the registration thereof. It is sufficient that the party objecting to such registration be engaged in the manufacture and/or sale of the same or related goods and that the product in question be one that could be produced in the normal expansion of that person's business. If the designation in question is found to be merely descriptive, merely ornamental or the like, damage is presumed since a registration thereof with the statutory presumptions afforded the registration would be inconsistent with the right of another person to use these designations or designs in connection with the same or similar goods as it would have the right to do when and if it so chooses... Thus, opposer as a competitor of applicant is a proper party to challenge applicant's right of registration.

Federal Glass Co. v. Corning Glass Works, 162 USPQ 279, 282-83 (TTAB 1969). See also 3 *McCarthy on Trademarks and Unfair Competition*, § 20:11 (4<sup>th</sup> ed. 2004) ("Standing is presumed when the mark sought to be registered is allegedly descriptive of the goods and the opposer is one who has a sufficient interest in using the descriptive term in his business").

The amount of evidence required to demonstrate that an opposer has standing is not onerous. See, e.g., Yamaha Int'l, 231 USPQ at 931 ("Opposer has pleaded, and in its testimony and exhibits establish[ed], that it is a competitor of applicant in the sale of guitars in the United States, hence demonstrating the requisite 'real interest' in this proceeding required for standing"). An opposer alleging that applicant's mark is merely descriptive must submit evidence that it is a competitor or, at the very least, "one who has a sufficient interest in using the descriptive term." In this case, opposer has not submitted evidence to show that it is a competitor of applicant or that it has sufficient interest in using the term. Its notices of reliance concern applicant's patent documents and advertisements for applicant's products. See Notices of Reliance filed October 14, 2003.<sup>4</sup>

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<sup>4</sup> Applicant's notice of reliance merely adds dictionary definitions and more of applicant's advertising.

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In its answer to the Notice of Opposition, applicant has not admitted that it has even threatened trademark infringement. It merely "admits it has sent correspondence to Opposer and states such correspondence speaks for itself." Answer at 3. The correspondence was not made of record.

Furthermore, while opposer has referred to its pending application in the Notice of Opposition, it does not allege that the opposed application has been cited as a potential bar to the registration of applicant's mark. Obviously, the mere ownership of a pending application does not in itself provide standing to oppose other applications. Moreover, in this case even if the Notice of Opposition contained allegations that the opposed application was cited as a potential bar to registration, opposer has not submitted any evidence on this point.<sup>5</sup>

Petitioner has pleaded rejection of its own application for registration of the mark LIGHTNING on the basis of registrant's outstanding registration and, on this ground, would clearly not be a mere "intermeddler". Lipton Industries, Inc. v. Ralston Purina Co., 213 USPQ 185, 189, [670] F.2d 1024 (CCPA 1982). However, petitioner's evidence of its rejected application is defective. Although its notice of reliance of October 5, 1984 specified its pending application for registration of LIGHTNING (with Section 2(d) refusal notice) as one of the documents relied upon, that file was not among the documents actually received by the

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<sup>5</sup> Also, even if there were proper allegations in the complaint, this is not a motion to dismiss where "a reviewing court must accept as true all well-pled and material allegations of the complaint, and must construe the complaint in favor of the complaining party." Ritchie, 50 USPQ2d at 1027.

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Board and we do not take judicial notice of application and registration files that reside in the Patent and Trademark Office on the basis of their mere identification in briefs, pleadings, and evidentiary submissions.

Beech Aircraft Corp. v. Lightning Aircraft Co., 1 USPQ2d 1290, 1293 (TTAB 1986).

When we review this record, we cannot conclude that opposer has established its standing. Compuclean Marketing and Design v. Berkshire Products Inc., 1 USPQ2d 1323, 1324-25 (TTAB 1986) ("In the case at bar, there has been identification of a previously used, nearly identical mark on goods which clearly overlap those of applicant. However, the record fails to connect opposer with use of that mark in a way that demonstrates its commercial stake or 'real interest' in precluding registration to applicant and, by virtue thereof, the reasonableness of opposer's belief or apprehension that it might be damaged by registration of applicant's mark").

In this case, opposer has failed to introduce evidence that it is a competitor of applicant or even that it has a sufficient interest in using the term. No Nonsense Fashions, Inc. v. Consolidated Foods Corp., 226 USPQ 502, 504-05 (TTAB 1985) ("No Nonsense introduced no direct evidence, testimonial or otherwise, to establish that it is in the hosiery business, or in any other business for that

matter").<sup>6</sup> Therefore, we hold that "although the threshold for determining standing generally is quite low, [opposer] has failed to clear it in this case." Nobelle.com LLC v. Quest Communications Int'l Inc., 66 USPQ2d 1300, 1304 (TTAB 2003).<sup>7</sup>

Decision: The opposition is dismissed.

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<sup>6</sup> The board has previously noted in a case where applicant's participation in the opposition proceeding was minimal that "the Board is reluctant to reach a disposition based not on the merits of the case but rather on a record that is too sparse to establish standing of the opposer before use. Nevertheless, since the record falls below threshold levels of proof on the standing issue under any viable criterion of 'real interest,' we are required to reach such a disposition." Compuclean Marketing, 1 USPQ2d at 1326.

<sup>7</sup> In view of our determination that opposer does not have standing, we do not address the issue of whether applicant's mark is merely descriptive.