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**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
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Paper No. 24
GDH/gdh

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Bennett
v.
City of Canton, Texas

Cancellation No. **27,927**

Ben H. Bennett, pro se.

Dan L. Tucker and Kristin Jordan Harkins of **Locke Liddell & Sapp LLP** for **City of Canton, Texas**.

Before **Cissel, Hohein and Holtzman**, Administrative Trademark
Judges.

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

Ben H. Bennett, d.b.a. World Wide First Monday, has petitioned to cancel the registration owned by the **City of Canton, Texas** for the mark "FIRST MONDAY" for the services of "organizing, promoting and conducting flea markets for others".¹ As grounds for cancellation, petitioner alleges in his amended pleading that respondent's "mark was and is generic" for its services in that such mark "was and is in concurrent use by

¹ Reg. No. 1,277,326, issued on May 8, 1984 from an application filed on October 16, 1981, which sets forth a date of first use anywhere of 1873 and a date of first use in commerce of 1960. The registration issued pursuant to the provisions of Section 2(f) of the Trademark Act.

several communities" which "sponsor activities virtually identical to those of the registrant, and have done so during the relevant period of time"; that "petitioner has and does publish an on-line magazine furnishing information on the activities of these various community markets"; that petitioner "has made application for and has been refused protection afforded by registration of his mark, used in the publishing field, due to perceived conflicts by the examining attorney"; and that "[c]ancellation of the registrant's mark is necessary to preserve the rights of other communities with 'first Monday' traditions and to allow the protection of the publishing mark of the petitioner."

Respondent, in its answer, has denied the salient allegations of the amended petition to cancel.

The record consists of the pleadings; the file of the involved registration; and, as petitioner's case-in-chief, five notices of reliance on various newspaper articles which mention the term "first Monday(s)" or "First Monday" in connection with community trade and barter events, i.e., flea markets, held on the first Monday of a month in the towns of Scottsboro, Alabama and Trenton, Tennessee.² Petitioner, however, did not furnish

² Because the accompanying certificates of service indicate that the notices of reliance were served directly upon respondent rather than its counsel as required by Trademark Rule 2.119(b), the Board on June 20, 2000 granted respondent's contested motion to extend its testimony period. Petitioner was allowed until June 30, 2000 to serve its notices of reliance upon respondent's counsel and, in a communication received on June 22, 2000, advised the Board that it had done so, but since the communication failed to indicate proof of service of a copy thereof upon respondent's counsel, the Board on October 2, 2000

any proof of its standing to bring this proceeding and respondent did not take testimony or otherwise present any evidence. Only petitioner filed a brief and neither party requested an oral hearing.

Whether the evidence submitted by petitioner with its notices of reliance is sufficient to establish that respondent's "FIRST MONDAY" mark is generic for the services recited in its registration is an issue which we need not decide in view of petitioner's failure to provide any evidence of his standing to bring this case. Specifically, petitioner has offered no proof that, as alleged in the amended cancellation petition and denied in respondent's answer, he is in fact the owner of an application for a mark for an on-line magazine that furnishes information on the activities of various community flea markets and which has been refused registration in light of respondent's involved registration.³ Petitioner, therefore, has not proven his standing to be heard that he is damaged by the continued existence of such registration. Such proof, just as is the case

further extended respondent's testimony period "to avoid possible prejudice to respondent."

³ Although we note the statement in his brief that "petitioner has and does publish an on-line magazine offering information on the activities of various community markets and sales, and has made application for, and has been refused protection afforded by, registration of his mark, used in the publishing field, due to perceived conflicts by the examining attorney," such statement does not constitute proof of petitioner's standing. As stated in TBMP §706.02, "[f]actual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial." Here, as pointed out above, petitioner has failed to introduce any evidence to establish his standing and the Board does not take judicial notice of applications filed in (or registrations issued by) the United States Patent and Trademark Office which are not the subject of an *inter partes* proceeding. See, e.g., *In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974), and TBMP §703.03.

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with proof of the genericness of respondent's mark, is an essential element of petitioner's case-in-chief and, in the absence thereof, petitioner cannot prevail.

Accordingly, inasmuch as petitioner is the party who bears the burden of proof in this proceeding, and since petitioner has failed to present proof of his standing to be heard herein, it is adjudged that the petition to cancel must fail.

Decision: The petition to cancel is denied.