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**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3514**

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Mailed: May 19, 2004

Opposition No. 91124058

ROBERT BOSCH GMBH

v.

JUN WANG

Before Simms, Hairston and Holtzman,
Administrative Trademark Judges.

By the Board:

Jun Wang, an individual, has filed an application to register on the Principal Register the mark BOSHI for "rearview and sideview mirrors for auto vehicles, e.g., automobiles, trucks, buses", based on applicant's claimed date of first use and first use in commerce of September 15, 2000.¹

Robert Bosch GmbH has opposed registration of applicant's mark, alleging that opposer has continuously used BOSCH throughout the U.S. and worldwide, both as a trademark and service mark in connection with the manufacture, distribution, promotion and sale of its

¹ Application Serial No. 78033950 was filed on November 6, 2000.

automotive goods and services long prior to applicant's filing date and alleged first use; and that applicant's use of BOSHI on parts for automotive vehicles is likely to cause confusion, mistake or deception with opposer's famous BOSCH mark used and registered for similar goods. Opposer subsequently moved to amend its notice of opposition to include an additional claim, the basis for which opposer states was revealed through applicant's responses to opposer's discovery requests. On October 14, 2003, the Board granted opposer's motion to amend its notice of opposition to add the following allegation:

- 15) That whereas the application Serial No. 78/033,950 is based on the allegation of use in commerce, the mark has in fact never been used; and the application is void ab initio.

Opposer moves for summary judgment on this added claim only and argues that although applicant claims in the involved application actual use in commerce since September 15, 2000, based on applicant's answers to opposer's interrogatories the mark has never been used in commerce on the goods identified in the application. In support of its motion for summary judgment, opposer has submitted a copy of applicant's responses to opposer's first set of interrogatories. Specifically, opposer refers to applicant's responses to the three interrogatories set forth below:

Interrogatory No. 3:

Identify and describe each and every product on or in connection with which applicant uses, or intends to use the mark.

Answer:

Boshi mirror is the only product that was designed, to be used commercially, I also tried to use it on the cheap batteries, but proved a complete failure, nobody ever bought from me.

Interrogatory No. 4:

For each product identified in answer to Interrogatory No. 3, state whether such product has been sold in the U.S.A., and, if so, state the date on which such product was first sold to a customer, whether such use continues today and, if not, the date and reasons for discontinuance.

Answer:

I have invested a lot of money on the brochure, retail color package, and designed a nice web site. I planned to find companies that might be interested in this product, but the opposer has huge money, and the opposer has succeeded in damaging my plan to go further trying to locate and find possible companies that might be interested in my product. I can say huge companies did succeed in stopping me marketing successfully, and the answer is: Not a single piece ever sold by me in the USA, and elsewhere in the world. So, small fish can only starve, and now this huge company is happy!

Interrogatory No. 11:

For each product identified in answer to Interrogatory No. 3, state whether Applicant has promoted or exhibited any products bearing the Mark at any conventions, trade shows or exhibitions or has any plans to do so, and if so, state the title, dates and location of each such convention, trade show or exhibition and the products exhibited or expected to be exhibited.

Answer:

At 2001 SEMA show in Las Vegas from Oct.29-Nov.2, I displayed the marked product and the brochure. One postal [sic] is displayed, and several retail boxed mirror is displayed, together with my other products. No intention to do it again as nobody ever bought any marked product from me.

In response to opposer's motion, applicant argues in part:

.... [T]he opposer's allegation 'that this product was never used in commerce', the allegation itself is wrong, this should be regarded as a valid allegation. If the USPTO take so seriously everything the lawyer says that such allegation stands firm, I then correct my letters in the statement before, and it was used in commerce! Because the Applicant purchased from the factory which is a legitimate transaction, and Applicant filed Customs declaration to let the initial purchase from the factory in the US. If the Opposer's "Never Be Used in Commerce" means this product was never sold to the US customers, then the answer is No because the opposer stepped right in time trying to damage all the work the Applicant has done. Remember one thing: the Opposer has not produced a single similar product like BOSHI. As the sample proved in my enclosure before, why they are not going after BUSCH beer?

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of demonstrating the absence of any genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987). A factual dispute is genuine, if, on the evidence of record, a reasonable finder of fact 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); and *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542

(Fed. Cir. 1992). The evidence must be viewed in a light most favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. See *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); and *Opryland USA*, *supra*.

Preliminarily, we note that opposer submitted an unsigned copy of applicant's responses to 19 of opposer's first set of 22 interrogatories. We assume that the applicant signed her responses to opposer's interrogatories, as she was required to do.² With respect to applicant's responses to Interrogatories Nos. 3 and 4, her statements make it clear that she never used the mark prior to the filing date of her application, or prior to her claimed date of first use. As for applicant's response to Interrogatory No. 11, we note that the date of the trade show was subsequent to the filing date of the involved application and her claimed date of first use. Furthermore, applicant's response to opposer's motion for summary judgment confirms what applicant said in response to opposer's interrogatories. The purchase of the mirrors from the factory that manufactured them and applicant's subsequent labeling of the mirrors with the trademark, without sales to

² Apparently, opposer neglected to send in the last page of applicant's responses containing her signature.

the public, is not use in commerce; nor is the filing of a declaration with U.S. Customs.

Based on the record before us, we find that opposer has met its burden of demonstrating the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law on the issue of whether applicant used her mark in commerce before the filing date of her application.

Accordingly, opposer's motion for summary judgment is granted; summary judgment is entered against applicant on the ground that her application is void ab initio;³ and registration to applicant is refused.⁴

³ Regarding applications held void ab initio based on the applicant's failure to use the mark on the identified goods, see, e.g., *E. I. du Pont de Nemours and Co. v. Sunlyra International Inc.*, 35 USPQ2d 1787, 1791 (TTAB 1995); and *CPC International Inc. v. Skippy Inc.*, 3 USPQ2d 1456, 1460 (TTAB 1987).

⁴ In view of our conclusion that applicant never used the mark BOSHI on mirrors prior to the application filing date, opposer's claims of priority and likelihood of confusion are moot.