

**This Opinion is Not a
Precedent of the TTAB**

Mailed: January 13, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Gregg Moramarco
v.
NY Luxury Publishing LLC
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Opposition No. 91207271
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Gregg Moramarco, *pro se*.

David B. Sunshine of Cozen O'Connor, P.C.
for NY Luxury Publishing LLC.

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Before Wellington, Ritchie and Wolfson,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

NY Luxury Publishing LLC (“Applicant”) has filed an application seeking to register the mark **SCENE IN NEW YORK** (“New York” disclaimed) for “printed magazines in the field of society and culture” in International Class 16.¹

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¹ Application Serial No. 85514764 was filed on January 12, 2012, based upon an allegation of a bona fide intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Greg Moramarco (“Opposer”) opposes registration of Applicant’s mark on the asserted grounds of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), and a lack of bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).² Opposer pleaded prior use and ownership of an application (Serial No. 85598024) for the mark **SCENE MAGAZINE NEW YORK** in connection with “magazines in the field of restaurants, real estate, travel, hotels, spas, cars, fashion, music, nightlife, shopping, fitness, nutrition, beauty, golf, events and area attractions”;³ that “customers familiar with the Opposer's Magazine have already and are likely to continue to mistakenly believe that the Applicant's Magazine is sponsored by, authorized, endorsed, affiliated with or otherwise approved by the Opposer because the SCENE IN NEW YORK Mark sought to be used and registered by the Applicant is identical to or confusingly similar to the Opposer's SCENE NEW YORK Mark”;⁴ and that “at the time Applicant filed the Application on January 12, 2012, Applicant did not have a bona fide intention to use in commerce Applicant's Mark as a trademark with Applicant's goods, namely magazines.”⁵

² Notice of Opposition, 1 TTABVUE. The ESSTA electronic transmittal sheet for the notice of opposition also lists a claim of deceptiveness, under Section 2(a) of the Trademark Act, as a ground for opposition. However, Opposer did not set forth any supporting allegations in the body of the notice of opposition nor did he pursue this ground at trial or on brief. We therefore consider any deceptiveness claim to be waived.

³ 1 TTABVUE 4; Notice of Opposition ¶¶ 4-5.

⁴ *Id.* at 5; ¶ 15.

⁵ *Id.* at 6; ¶ 23.

Applicant, in its answer, denied the salient allegations of the notice of opposition.⁶

Only Applicant filed a trial brief.⁷

Evidence of Record

The record in this case consists of the pleadings and, pursuant to Trademark Rule 2.122, the file of the opposed application.

The only attempt by either party to introduce evidence was a notice of reliance filed by Opposer, introducing the following materials:⁸

- Printouts or excerpts from the website www.scenemagny.com;⁹
- Internet printouts for a “Scene” magazine;¹⁰ and
- Printouts from the website www.scenemag.com, a copy of an article “Scene Magazine Launch Party” (dated March 2, 2012), a copy of an article “Scene Magazine to Debut in New York” (dated February 7, 2012); and a news blurb “Scoop! The Observer’s Glossy is Named ‘SCENE.’”¹¹

Opposer’s Burden of Proof

Opposer, as plaintiff in this proceeding, must prove standing and the substantive claims for opposition by a preponderance of the evidence. *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); *Cerveceria Centroamericana, S.A.*

⁶ 6 TTABVUE.

⁷ 54 TTABVUE.

⁸ 18 TTABVUE (notice of reliance). Pursuant to a Board order (23 TTABVUE), several of the materials submitted under the notice of reliance were stricken by the Board and are not being considered of record. The materials listed herein were not stricken and have been considered.

⁹ 18 TTABVUE 238-240 (identified as “Exhibit D” in Opposer’s submission).

¹⁰ 18 TTABVUE 242-251 (identified as “Exhibit E” in Opposer’s submission).

¹¹ 18 TTABVUE 258-270 (identified as “Exhibit G” in Opposer’s submission).

v. Cerveceria India Inc., 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989); and *Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1959 (TTAB 2008).

Standing

Standing is a threshold issue that must be proven in every *inter partes* case, including this opposition proceeding. *See Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) (“The facts regarding standing . . . must be affirmatively proved. Accordingly, [plaintiff] is not entitled to standing solely because of the allegations in its [pleading].”). To establish standing in an opposition, the plaintiff must show both “a real interest in the proceedings as well as a ‘reasonable’ basis for his belief of damage.” *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). To prove a “real interest” in this case, Opposer must show that he has a “direct and personal stake” in the outcome herein and is more than a “mere intermeddler.” *See Ritchie v. Simpson*, 50 USPQ2d at 1026; *see also Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 853 F.2d 888, 7 USPQ2d 1628 (Fed. Cir. 1988).

In the notice of opposition, Opposer asserted his standing by not only claiming ownership of an application for a confusingly similar mark used in connection with magazines, but also by asserting that he “provides information about [his] magazines and their topics covered on-line, including a site that is sponsored by Opposer, www.scenemagny.com (the ‘Opposer’s Website’).”¹² He also alleged that third-party

¹² 1 TTABVUE 4; Not. of Opposition ¶ 4.

websites “include information about the Opposer's magazines”¹³ Mere allegations of standing, however, are insufficient proof thereof. A plaintiff cannot rest on mere allegations in its complaint to prove standing. *Lipton Indus.*, 213 USPQ at 188. *See also Ritchie*, 50 USPQ2d at 1027.

Opposer’s evidence, as described above, is extremely limited. He did not properly introduce a copy of his pleaded application.¹⁴ Rather, the properly introduced materials include printouts of what Applicant has acknowledged are copies of Opposer’s website, excerpts from Applicant’s magazines, and articles relating to Applicant.¹⁵ Although these materials, introduced under a notice of reliance without supporting testimony, may not be used to establish the truth of any matters asserted therein, they may be used for what they show on their face. *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010).

Taken in its entirety, the evidence before us establishes that Opposer has a website, www.scenemagny.com, involving a “Scene” magazine. While this showing is

¹³ *Id.*

¹⁴ While an opposer may establish standing by alleging and proving that its pending application was refused registration based on the applicant’s prior pending application, *Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1959 (TTAB 2008), here, Opposer failed to make the pleaded application of record and he did not plead that his application was refused on the basis of Applicant’s mark.

¹⁵ In its brief (54 TTABVUE 4), Applicant characterizes the materials in the following manner:

Those exhibits consist of the following: (a) illegible copies of Opposer’s website; (b) excerpts from Applicant’s magazines and promotional materials and (c) articles relating to Applicant.

minimal, it suffices for purposes of demonstrating that Opposer is more than a *mere intermeddler*. *Ritchie*, 50 USPQ2d 1025. In making this conclusion, we keep in mind that “proof of standing in a Board proceeding is a low threshold.” *See Syngenta Crop Protection Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009).

Priority and Likelihood of Confusion

To prevail on a likelihood of confusion claim brought under Trademark Act Section 2(d), a party must first prove that it owns “a mark registered in the Patent and Trademark Office or a mark or trade name previously used in the United States ... and not abandoned . . .” Trademark Act Section 2(d), 15 U.S.C. § 1052(d). For purposes of priority, Applicant may at the very least rely on the filing date of its application. *M.C.I. Foods, Inc. v. Bunte*, 96 USPQ2d 1544, 1550 (TTAB 2010); *see also, J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 437 (CCPA 1965). The involved application was filed on January 12, 2012 (see footnote 1).

We have carefully reviewed all of the evidence that is properly before us and conclude that Opposer has not established that he is the owner of the pleaded mark, **SCENE MAGAZINE NEW YORK**, in connection with magazines, let alone that he acquired ownership rights in this mark prior to January 12, 2012. That is, while we made a finding in the context of standing that the evidence shows that Opposer’s website involves a “Scene” magazine, there is insufficient evidence to conclude that the pleaded mark is being used in commerce by Opposer or, for the purpose of establishing priority, that it was in use prior to January 12, 2012. As noted above, the entire record consists of internet printouts submitted under a notice of reliance

and there is no accompanying testimony.¹⁶ Thus, while several of the printouts contain depictions of a magazine with SCENE (or SCENE NY) on the cover, there is no further proof that this magazine was actually circulated or commercially available at any time. Statements in the articles, referencing magazine launches, cannot be taken as true. For example, one of the printouts appears to be the copy of the inside of a magazine cover and reads, “We distribute from NYC to the Hamptons”; however, this is not evidence that the magazine is, or was, actually in circulation.¹⁷ *Safer*, 94 USPQ2d at 1040; *see also Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1467 n.30 (TTAB 2014). Even if, *arguendo*, we were to conclude that the internet printouts demonstrate use of the pleaded mark, there is absolutely no evidence indicating that Opposer’s rights in that mark date back to any time before Applicant’s priority date. Again, statements made in the printouts submitted by Opposer under notice of reliance, such as “© 2009 Scene Magazine. All rights reserved,”¹⁸ cannot be used to demonstrate his priority without testimony corroborating the truth of this matter. *Id.*

In sum, Opposer has not proven he is the owner of the mark pleaded in the notice of opposition and, even if he did prove ownership, he has not demonstrated he has priority. Accordingly, he cannot prevail on the likelihood of confusion ground.

¹⁶ Opposer’s attempt to introduce his discovery deposition as testimony was denied by the Board’s grant of Applicant’s motion to strike. *See* 23 TTABVUE.

¹⁷ 18 TTABVUE 240.

¹⁸ *Id.* at 239.

Lack of Bona Fide Intent to Use the Mark

Given there is no evidence regarding Applicant's activities or its intent, Opposer has failed to meet his burden of proof with respect to his claim that Applicant lacked a bona fide intent to use the applied-for mark in commerce at the time of filing the involved application.

Decision: The opposition is dismissed on both the claim of likelihood of confusion and the claim of no bona fide intent to use the mark.