This Opinion is a
Precedent of the TTAB

Hearing: November 15, 2022 Mailed: May 4, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Rebecca Curtin

v.

United Trademark Holdings, Inc.

Opposition No. 91241083

John C. Stringham and Matthew A. Barlow of Workman Nydegger
for Rebecca Curtin.

Erik M. Pelton of Erik M. Pelton & Associates PLLC
for United Trademark Holdings, Inc.

Before Adlin, Lynch and Dunn, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

The Board, *sua sponte*, bifurcated this case into "two separate trial phases." 49 TTABVUE 6-7.[1] The first trial phase concerned, and this decision addresses, only "Opposer's entitlement to a statutory cause of action." *Id.*

[1] Citations to the record are to TTABVUE, the Board's online docketing system. Specifically, the number preceding "TTABVUE" corresponds to the docket entry number(s), and any number(s) following "TTABVUE" refer to the page number(s) of the docket entry where the cited materials appear.

More specifically, we address a single, threshold question: is Opposer Rebecca Curtin, as a purchaser of goods bearing the challenged mark, entitled to oppose the mark's registration under Section 13 of the Trademark Act, 15 U.S.C. § 1063, when she alleges the proposed mark is both invalid and the subject of a fraudulent application? Because our answer to this question is "no," we dismiss the opposition and do not reach the second (merits) trial phase.

I. The Pleadings

Applicant United Trademark Holdings, Inc. seeks registration of RAPUNZEL, in standard characters, for "dolls; toy figures," in International Class 28.[2] In her second amended notice of opposition ("NOO"), Opposer alleges that RAPUNZEL is "synonymous with the name of a well-known childhood fairytale character," and that consumers will recognize it as such. 14 TTABVUE 2, 3 (NOO ¶¶ 2, 6). As grounds for opposition, Opposer alleges that RAPUNZEL not only fails to function as a trademark, but also is generic for and merely descriptive of the identified goods, and that Applicant committed fraud. *Id.* at 3, 5, 8 (NOO ¶¶ 8, 13, 20-24).[3] In its answer, Applicant denies the salient allegations in the second amended notice of opposition, and asserts "affirmative defenses" that merely amplify its denials.

[2] Application Serial No. 87690863, filed November 20, 2017 under Section 1(a) of the Act, based on first use dates of August 2017.

[3] Opposer also alleges that Applicant's mark is "functional under section 2(e)(5) of the Trademark Act," even though this claim was previously dismissed. 14 TTABVUE 5 (NOO ¶ 15); 12 TTABVUE 10; 13 TTABVUE 10 n.1. Opposer claims that she reasserted this dismissed claim "to preserve the right to appeal at a later date the dismissal." 13 TTABVUE 10 n.1.

At this initial stage of this bifurcated case, we need not address the ultimate merits of Opposer's claims, except to the extent those claims may bear on Opposer's entitlement to oppose the involved mark. We thus turn to Opposer's allegations in the second amended notice of opposition intended to support her claim of entitlement to a statutory cause of action.

Opposer alleges that she "is a professor of law teaching trademark law, and is also a consumer who participates amongst other consumers in the marketplace for dolls and toy figures of fairytale characters, including Rapunzel." 14 TTABVUE 6 (NOO ¶ 16). She claims that she and "other consumers will be denied access to healthy marketplace competition" for "products that represent" Rapunzel if private companies are allowed "to trademark the name of a famous fairy tale character in the public domain." *Id.* Opposer further alleges that she "and other consumers will also likely face an increased cost of goods associated with Rapunzel merchandise, given the lack of competition." *Id.* According to Opposer, "more than 171 petition signatures" support her claims of damage. *Id.* (NOO ¶ 17). To determine whether Opposer proved these allegations of entitlement, we turn to the evidentiary record.[4]

[4] Over four years ago, in the pleading phase of this case, the Board issued a decision denying Applicant's motion to dismiss, stating that Opposer "sufficiently alleged that she has a direct and personal stake in the outcome of the proceeding and that her belief of damage has a reasonable basis in fact." 12 TTABVUE 7. The order was based in large part, 12 TTABVUE 9, on *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999), a case that addressed a section of the Trademark Act barring registration of "immoral" or "scandalous" matter. 15 U.S.C. § 1052(a). Six months after the Board's decision on the motion to dismiss issued, the Supreme Court found the bar on registration of "immoral" or "scandalous" matter unconstitutional. *Iancu v. Brunetti*, 139 S.Ct. 2294, 2019 USPQ2d 232043 (2019). Two years after *Brunetti* was decided, and following updates to the "standard for determining whether

II. The Record

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's involved application. In addition, Opposer introduced her own declaration, with exhibits ("Curtin Dec."). 53 TTABVUE. Applicant chose to not introduce any testimony or other evidence. 54 TTABVUE.

III. Entitlement-Related Facts of Record

Since 2015 Opposer has purchased "dolls, doll fashions, toys, books, e-books, and other fairytale themed items" for her daughter, "including Rapunzel dolls and toys." 53 TTABVUE 2-3, 11-59, 84 (Curtin Dec. ¶¶ 3-6 and Exs. 1-35, 37). Opposer often purchases these products online, finding them by typing "'Rapunzel' into the online search box." *Id.* at 3 (Curtin Dec. ¶ 9). Similarly, "[w]hen shopping in person [Opposer looks] for the Rapunzel name or image to locate products," or asks for "Rapunzel" dolls. *Id.* (Curtin Dec. ¶¶ 10, 11).

Opposer "believes" that if Applicant registers RAPUNZEL she "and other consumers will be denied access to healthy marketplace competition for products that represent the well-known fictional character." *Id.* at 8 (Curtin Dec. ¶ 48). She also contends that she and "other consumers" will "also likely face an increased cost of goods associated with Rapunzel merchandise, given the lack of competition." *Id.* (Curtin Dec. ¶ 49).

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a party is eligible to bring a statutory cause of action," the Board denied Opposer's motion for summary judgment on her entitlement to bring a statutory cause of action, and bifurcated this case requiring that Opposer's entitlement be tried first, before the merits. 49 TTABVUE 5-7.

Furthermore, Opposer "believes" that registration of Applicant's mark "could chill the creation of new dolls and toys by fans of the Rapunzel fairytale, crowding out the substantial social benefit of having diverse interpreters of the fairy tale's legacy," and deny Opposer and "other consumers" of "access to classic, already existing, Rapunzel merchandise." *Id.* at 9 (Curtin Dec. ¶¶ 50, 51). Opposer introduced a petition with 432 signatures from people who share Opposer's "belief that registration of [Applicant's proposed mark] would adversely impact a consumer's ability to find dolls depicting the Rapunzel character, and would also harm marketplace competition for dolls personifying the Rapunzel character." *Id.* at 9, 61-83 (Curtin Dec. ¶ 52 and Ex. 36).

IV. Is Opposer Entitled to a Statutory Cause of Action?

Entitlement to the statutory cause of action invoked (e.g., opposition or cancellation) is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020), *cert. denied*, 142 S.Ct. 82 (2021) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26, 109 USPQ2d 2061 (2014)). A plaintiff may oppose registration of a mark when doing so is within the zone of interests protected by the statute and she has a reasonable belief in damage that would be proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at * 6-7 (Fed. Cir. 2020), *cert. denied*, 141 S.Ct. 2671 (2021) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement, and a reasonable belief in damage by the registration of a mark, which

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