

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: July 14, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*Pynk Branded, LLC*  
v.  
*BleuLife Media & Entertainment, Inc.*

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Opposition No. 91220320

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Norman Keith White of Keith White PLLC for  
Pynk Branded, LLC.

Kuscha Hatami of HP Law Group for  
BleuLife Media & Entertainment, Inc.

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Before Zervas, Wellington, and Pologeorgis,  
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

BleuLife Media & Entertainment, Inc. (“Applicant”) filed an application to register the mark shown below (hereinafter referred to as “the PYNK logo”) for a “general feature magazine in the field of women's fashion and lifestyle, the foregoing to exclude the subject of careers and careers women” in International Class 16:<sup>1</sup>

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<sup>1</sup> Application Serial No. 86144073, filed on December 16, 2013, based on an allegation of use



The color pink and is claimed as a feature of the mark and the mark is described in the application as “consist[ing] of letters PYNK spelled out in black block letters with a splash of pink paint across it.”

Pynk Branded, LLC (“Opposer”) has opposed registration of Applicant’s mark. The Notice of Opposition consists of the following paragraph:<sup>2</sup>

The Principals of Pynk Branded, LLC and Bleu Life Media are former business partners. Bleu Life Media ran a magazine entitled Bleu. Bleu Life Media asked Pynk Branded to start a female version and Pynk Branded started Pynk Magazine in 2010. The Principals of Pynk Branded and Bleu Life Media had a disagreement and agreed to no longer work together with the understanding that each entity would walk away from the business with their separate Intellectual properties and assets. Since then, Bleu Life has attempted to use the Pynk Brand for a new magazine without permission or license from Pynk branded LLC.

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in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging May 1, 2011 as the date of first use and June 1, 2011 as the date of first use in commerce.

<sup>2</sup> 1 TTABVUE. We note the ESTTA transmittal page’s “grounds for opposition” section, Opposer listed “fraud” and “[t]he mark was created by Opposer and the application by Bleu Life Media is an attempt to steal the Opposers' copyright.” To the extent that Opposer seeks to set forth a copyright infringement claim, we may not hear such a claim. The Board’s jurisdiction is limited to questions regarding the registration of trademarks. *See* TBMP § 102.01 (June 2017). Moreover, since Opposer has not properly pleaded a fraud claim nor was such a claim tried by the parties, we have given no consideration to said claim.

Applicant, in its answer, “admits that it publishes a magazine titled BLEU”; and states, “[e]xcept as expressly admitted, [Applicant] denies each and every remaining allegation in the unnumbered paragraph” of the Notice of Opposition.<sup>3</sup>

Opposer’s trial brief was due by October 27, 2016. On November 16, 2016, no brief having been filed, the Board issued a show cause order pursuant to Trademark Rule 2.128(a)(3).<sup>4</sup> On December 16, 2016, Opposer filed its main brief concurrently with a motion to reopen its time to file its brief.<sup>5</sup> By order dated April 3, 2017, the Board denied Opposer’s motion to reopen and stated that Opposer’s brief filed on December 16, 2016 would be given no consideration.<sup>6</sup> Applicant filed its trial brief and Opposer then filed a reply thereto.<sup>7</sup>

### **The Record**

The record includes the pleadings and, pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the involved application.

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<sup>3</sup> 5 TTABVUE. Applicant also set forth several affirmative defenses, including an allegation that Opposer fails to state a claim upon which relief can be granted. *Id.* at p. 3. However, Applicant did not pursue these at trial and we consider them to have been waived. *See, e.g., Daniel J. Quirk, Inc. v. Vill. Car Co.*, 120 USPQ2d 1146, 1147 n.4 (TTAB 2016) (affirmative defenses not pursued through the presentation of evidence or in brief deemed waived).

<sup>4</sup> 19 TTABVUE.

<sup>5</sup> 20 and 21 TTABVUE.

<sup>6</sup> 23 TTABVUE.

<sup>7</sup> Respectively, 24 and 25 TTABVUE. Both parties attached materials as exhibits to their briefs. This is unnecessary and inappropriate. TBMP § 801.01 (“Exhibits to briefs are generally unnecessary and are discouraged. The parties should cite to the evidence in the trial record by referencing the TTABVUE entry and page number, and not attach previously-filed evidence to their briefs.”). To the extent that any of these materials were not properly introduced into evidence, they have not been given further consideration. *Id.* (“brief may not be used as a vehicle for the introduction of evidence”); see also TBMP §§ 704.05(b) and 704.06(b) and authorities cited therein.

Opposer submitted the trial testimony of its principal, Latresa Moore, with exhibits.<sup>8</sup> The exhibits include: a printout from the New York Department of State Division of Corporations containing information regarding Opposer; a printout from the Office's TESS database for Applicant's (abandoned) application Serial No. 86192727 for the standard character mark PYNK; printouts of emails between Ms. Moore and Devon Christopher Johnson, Opposer's principal; and printouts of what Ms. Moore testified is "a blog, and it has a posting from our first PYNK cover."<sup>9</sup>

Applicant, during its trial period, submitted four notices of reliance<sup>10</sup> attaching printouts from the USPTO's TSDR database of Opposer's application Serial No. 86520023 (in suspension status) for the standard character mark PYNK for a variety of goods and services, including magazines; printouts from Opposer's Instagram webpage ([www.instagram.com/pynkmagazine](http://www.instagram.com/pynkmagazine)) and website ([www.thinkpynk.com](http://www.thinkpynk.com)); printouts from Applicant's website ([www.pynkmag.com](http://www.pynkmag.com)); printout of a legalzoom.com "comprehensive trademark search report" for the term PYNK and prepared for Devon Johnson, Applicant's principal; and a copy of an "inside sleeve of Applicant's Pynk Magazine."

### **Background**

Latresa Moore, Opposer's owner, partnered with Applicant (or Applicant's principal, Mr. Johnson) in 2010 or 2011.<sup>11</sup> Opposer alleged that Applicant (or Mr.

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<sup>8</sup> 7 TTABVUE.

<sup>9</sup> 7 TTABVUE 20 (Moore dep. 19:5-6).

<sup>10</sup> 15-18 TTABVUE.

<sup>11</sup> See 7 TTABVUE 9. Moore Dep. 7:10 (testifies she "came up with the name PYNK" in

Johnson) asked Ms. Moore to “start a female version [of Applicant’s “Bleu” magazine].”<sup>12</sup>

In “late 2010, early 2011,” Ms. Moore asked a “freelancer” to create the PYNK logo, without Mr. Johnson’s involvement.<sup>13</sup> A magazine was later created at some point in 2011, with the PYNK logo mark appearing at the top of the cover page:



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Ms. Moore testified that she has been “running or operating the PYNK name, logo and brand for magazine advertising and charitable services consistently” since 2010. At some point prior to or in 2013, the relationship between Mr. Johnson and Ms. Moore soured. Email correspondence between Ms. Moore and Mr. Johnson in 2013-2014 reveals a dispute about payments between Mr. Johnson and Ms. Moore; the

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February 2010”) and 7:16-23 (testifies she was “partners in a business” with Mr. Johnson PYNK name was created).

<sup>12</sup> 1 TTABVUE

<sup>13</sup> 7 TTABVUE 20-21; Moore Dep. 19:15-16, 20:5, and 20:12-13.

<sup>14</sup> Both parties acknowledge the existence of the magazine and introduced copies of the same cover page. See, e.g., 15 TTABVUE 53 and Moore Dep., Exh. 5. It is not clear when exactly the magazine first appeared, and there is no date on the magazine pages in the record, but Ms. Moore testified that “our first PYNK cover” was referenced in a blog post dated June 22, 2011. Moore Dep. 19:5-9.

emails also contain remarks regarding responsibility for creating the PYNK magazine.<sup>15</sup> In September 2013, Ms. Moore incorporated Opposer.

On December 13, 2013, Applicant filed the involved application. The application's specimen of use is the same magazine cover page (shown above) created in 2011.

On February 13, 2014, Opposer filed application Serial No. 86192727 (for the standard character mark PYNK), but this was abandoned on December 18, 2014. On January 30, 2015, Opposer filed a second application, Serial No. 86520023, for the same mark and this application has been suspended by the Office.

Opposer currently operates an Instagram webpage advertising a "PYNK Magazine," as well as a "THINK PYNK" webpage containing information in the fields of entertainment, travel, beauty, etc.<sup>16</sup> Applicant currently operates a PYNK Magazine website (with the PYNK logo mark placed at the top of the page) featuring information in the fields of entertainment, fashion, celebrity lifestyle, etc.<sup>17</sup> Ms. Moore has acknowledged that Mr. Johnson "has a website called Pynkmag.com" that he has operated since 2014, but claims "the website and use of the name PYNK [are] in violation of [her] use and ownership of the name PYNK."<sup>18</sup>

### **Opposer's Standing**

Standing is a threshold issue that must be proven by a plaintiff in every *inter partes* case. To establish standing in an opposition or cancellation proceeding, a

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<sup>15</sup> Moore Dep., Exh. 3; 7 TTABVUE 42-48.

<sup>16</sup> 16 TTABVUE 6-25.

<sup>17</sup> *Id.* at 27-43.

<sup>18</sup> 7 TTABVUE 26-27; Moore Dep. 25:15-26:10.

plaintiff must show “both a ‘real interest’ in the proceedings as well as a ‘reasonable basis’ for its belief of damage.” *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014) (quoting *ShutEmDown Sports, Inc., v. Lacy*, 102 USPQ2d 1036, 1041 (TTAB 2012)); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). The Court of Appeals for the Federal Circuit has enunciated a liberal threshold for determining standing in Board proceedings. *Ritchie*, 50 USPQ2d at 1030.

Opposer has demonstrated that it is more than a mere interloper and has a real interest in and standing to bring this proceeding. Particularly, as explained above, Opposer’s owner was in a business partnership with Applicant’s principal and this partnership involved a magazine bearing the PYNK logo mark and Opposer’s owner was instrumental in the adoption of this mark. Opposer currently operates an Instagram webpage advertising a “PYNK Magazine,” as well as a “THINK PYNK” webpage containing information in the fields of entertainment, travel, beauty, etc.

### **Ground for Opposition**

The notice of opposition sets forth a single ground for opposition, namely, that Applicant was not the owner of the PYNK logo mark at the time of filing the involved application. Essentially, Opposer’s claim is that it is the owner of the mark, not Applicant.

An application filed by one who is not the owner of the mark sought to be registered is void *ab initio*. *Conolty v. Conolty O’Connor NYC LLC*, 111 USPQ2d 1302,

1309 (TTAB 2014); *see also* 15 U.S.C. § 1051(a); *Huang v. Tzu Wei Chen Food Co., Ltd.*, 849 F.2d 1458, 7 USPQ2d 1335 (Fed. Cir. 1988); *Holiday Inn v. Holiday Inns, Inc.*, 534 F.2d 312, 189 USPQ 630, 635 n.6 (CCPA 1976) (“One must be the owner of a mark before it can be registered.”); *Great Seats, Ltd. v. Great Seats, Inc.*, 84 USPQ2d 1235, 1239 (TTAB 2007) (“In a use-based application under Trademark Act Section 1(a), only the owner of the mark may file the application for registration of the mark; if the entity filing the application is not the owner of the mark as of the filing date, the application is void ab initio.”); Trademark Rule 2.71(d).

Opposer, as plaintiff, bears the burden of establishing by a preponderance of the evidence that Applicant was not the owner of the PYNK logo mark at the time of filing the involved application, that is, on December 13, 2013. We find that Opposer has met this burden inasmuch as the evidence shows that Applicant was not the sole owner of the mark at that time.

On the record before us, we find that Opposer, or Ms. Moore, had at least a partial interest in the PYNK logo mark on December 13, 2013. Ms. Moore testified she was and is an owner the mark and that she and Mr. Johnson “decid[ed] to partner on the magazine.”<sup>19</sup> In addition to testifying that she has been the person “running or operating the PYNK name, logo and brand for magazine advertising ... [from 2010] until now,” she testified that Mr. Johnson did not “creatively contribute to the logo for PYNK” nor did he “ever operate the PYNK Magazine.”<sup>20</sup> In email exchanges with

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<sup>19</sup> 7 TTABVUE 16; Moore Dep. 15:4-11.

<sup>20</sup> *Id.* at 26; Moore Dep. 24:10-25:7.



Ms. Moore, that are contemporaneous with the filing of the involved application, Mr. Johnson acknowledges Ms. Moore's interest in the mark:<sup>21</sup>

For me this entire ordeal has been about two issue (sic). One, credit for the foundation of starting PYNK together ...

You [Ms. Moore] didn't start PYNK by yourself.

I am still a co-founder of PYNK, to be clear, and always will be that...; and

PYNK became everything you [Ms. Moore] wanted it to be, and I sat on the sideline and let you do your thing and just asked for meat at the table.

Applicant, for its part, relies on information contained on the "inside sleeve" of the magazine and argues this shows Opposer "could not have a valid claim to the PYNK trademark."<sup>22</sup> The document Applicant refers to contains a description of Mr. Johnson as "publisher of both PYNK and our broth pub, Bleu," and as the "proud poppa responsible for our immaculate conception," whereas Ms. Moore is described as "PYNK's popular publicist."<sup>23</sup> This information, however, is not conclusive regarding either party's ownership interest in the PYNK logo mark.

Neither party submitted a document memorializing the business relationship between Mr. Johnson and Ms. Moore or involving any ownership rights in the PYNK logo mark. Moreover, we find on this record that Opposer has not proven its allegation that the "Principals of [Opposer] and [Applicant] had a disagreement and agreed to no longer work together with the understanding that each entity would walk away from the business with their separate Intellectual properties and assets." Simply put,

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<sup>21</sup> 7 TTABVUE; Moore Dep., Exh. 3 (emails directed from Mr. Johnson to Ms. Moore dated December 20, 2013).

<sup>22</sup> 24 TTABVUE 3.

<sup>23</sup> 18 TTABVUE 6.

it is not possible to delineate what particular “intellectual properties and assets” remained and with whom. Nevertheless, upon consideration of the entire record, including Ms. Moore’s testimony and Mr. Johnson’s email communications, the preponderance of the evidence shows that Applicant, by way of any rights it may have acquired via Mr. Johnson, was not the sole owner of the PYNK logo mark in December 2013. At a minimum, Opposer has demonstrated that Ms. Moore had at least some ownership rights in the mark due to her operation of the magazine, as she testified.

In sum, Opposer has demonstrated by a preponderance of the evidence that Applicant was not the exclusive owner of the PYNK logo mark at the time of filing the involved application. Accordingly, the application is void *ab initio*.

**Decision:** The opposition is sustained and the application will be abandoned in due course.