

# Gidget Goes Abandoned (the trademark registrations, that is)

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May 7 was no day at the beach for Multi-Media Tech. Ventures, Ltd., whose registrations for the mark GIDGET were cancelled in a precedential opinion by the Trademark Trial and Appeal Board. Yazhong Investing, Ltd. v. Multi-Media Tech. Ventures, Ltd. It is unclear whether there is any connection between registrant Multi-Media and the 1959 movie starring Sandra Dee or the follow-on 1960s era TV series made famous by Sally Field, but the specimens of use submitted in connection with one of the registrations at issue in the proceeding showed that Multi-Media was

promoting a GIDGET “lifestyle brand” for surfing and other products and activities for girls and young women associated with the 1959 movie.

The challenges in establishing such a commercial enterprise are reflected in the difficulties the registrant encountered in proving actual commercial use of its marks for the goods and services registered, particularly because the registrations at issue covered dozens of different goods and services. We think a few takeaways are almost as interesting as the true origins of the word “Cowabunga.”

Petitioner, Yazhong sought cancellation of four of Multi-Media’s GIDGET registrations on the grounds of abandonment and fraud after the USPTO refused intent to use applications filed by Yazhong based on a likelihood of confusion with Multi-Media’s marks. The registrations at issue a broad variety of goods and services including apparel, cosmetics, bicycles, stationery, books, home goods, and entertainment in the nature of theater and musical productions. While the TTAB’s decision does not break new ground on the legal standard for proving abandonment, it articulates the types of

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evidence that can cause or avoid a wipe out.

Yazhong succeeded in satisfying the well-established standard for abandonment, a showing of nonuse for at least three consecutive years, from 2008 to 2012, which shifted the burden to Multi-Media to rebut the presumption of abandonment. Yazhong's evidence consisted mostly of discovery responses as well as testimony and declarations from officers of a predecessor in interest to Multi-Media. This evidence showed an absence of sales figures; product samples but no commercially manufactured or marketed products during the time period under review; efforts to seek licensing partners; an advance against future revenues and a mistaken understanding about what was legally necessary to file a statement of use in connection with intent to use applications covering multiple products and services.

Multi-Media also submitted a declaration by a board member stating that Multi-Media never intended to abandon the mark, but in line with prior precedent, the TTAB rejected this argument, focusing on the need to establish actual use of a mark or an intent to resume use in the reasonably foreseeable future, rather than a lack of intent to abandon. Its decision states: "the owner must do more than simply assert a vague, unsubstantiated intent to make use of the mark at some unspecified time in the future." While "reasonably foreseeable future" might mean years down the road for some products, like movies, the TTAB felt that production of consumer goods covered by the registrations "may be effected much more easily."

Multi-Media's lack of evidence regarding annual sales of units bearing the GIDGET mark had a particularly negative effect on its case. The TTAB expected to see such information as operating budgets and licenses demonstrating a "specific and consistent plan" to resume use of the mark, assuming the mark had ever been used commercially at all. The TTAB was unmoved by Multi-Media's evidence that the mark had been used in connection with marketing activities, including advertising, participation at trade shows, and seeking licensing partners: "Simply put, there is no credible evidence that Respondent or its predecessors made any use of the GIDGET mark apart from a few sporadic promotions of surfing events in the subject registrations...."

Having found that Multi-Media failed to overcome the presumption of abandonment, the Board held that it did not need to reach the additional ground of cancellation based on allegations of fraud.