

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
June 30, 2009
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

J.L. Pennington

v.

GITZIT, Inc.

Opposition No. 91172981
against Serial No. 78703563

Peter K. Hahn, of Luce Forward Hamilton & Scripps, LLP
for J.L. Pennington.

Christopher Hendershot, President, GITZIT, Inc., *pro se* for
GITZIT, Inc.

Before Quinn, Bucher and Kuhlke, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark **GITZIT** (*in standard character format*) for "fishing
lures" in International Class 28.¹

J.L. Pennington has opposed this application on the
ground of priority of use and likelihood of confusion,

¹ Application Serial No. 78703563 was filed on August 30, 2005 based upon applicant's claims of first use anywhere and first use in commerce at least as early as May 7, 1992.

alleging that applicant's mark, when used in connection with the identified goods, so resembles opposer's previously used mark **GITZIT** for fishing lures as to be likely to cause confusion, to cause mistake or to deceive, under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d).

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

In addition to the pleadings and the file of the involved application, the record includes the testimony deposition of Gary Garland, taken October 24, 2008, with opposer's Exhibits 1 - 10. Mr. Hendershot appeared by telephone for the Garland deposition, but he posed no cross-examination questions to Mr. Garland. Evidence submitted in connection with motions for summary judgment does not form part of the evidentiary record to be considered at final decision unless it is properly introduced in evidence during the appropriate testimony period. Hence, the evidence submitted as part of applicant's several untimely motions for summary judgment has not been considered in reaching our decision herein. TBMP § 528.05(a) (2d ed. rev. 2004). Otherwise, applicant has filed no notice of reliance, has taken no testimony and did not file a final brief.

A. Opposer's Standing

Opposer's standing is a threshold inquiry made by the Board in every *inter partes* case. In *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999), the Federal Circuit enunciated a liberal threshold for determining standing, i.e., whether one's belief that one will be (or is being) damaged by the registration is reasonable and reflects a real interest in the case. See also *Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021 (Fed. Cir. 1987); and *Lipton Industries, Inc. v. Ralston Purina Company*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Opposer has presented uncontroverted evidence of his direct commercial interest (and that of his predecessor in interest) in use of the **GITZIT** trademark in connection with fishing lures, from 1990 to the present. We consider this sufficient to establish opposer's standing in this proceeding to oppose registration of applicant's mark. See *Herbko International Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375 (Fed. Cir. 2002).

B. Opposer's Priority

Moreover, looking at the evidence of record as a whole, opposer has established that he and his predecessors in interest have continuously used the

GITZIT trademark with fishing lures from the fall of 1990 through the present. There is nothing in the record that would cause us to question the reliability or accuracy of Mr. Gary Garland's testimony buttressed by the accompanying documentary evidence. Oral testimony, even of a single witness, if "sufficiently probative," may be sufficient to prove priority. *Powermatics, Inc. v. Glebe Roofing Products Co.*, 341 F.2d 127, 144 USPQ 430 (CCPA 1965); and *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1108-09 (TTAB 2007). In the present case, Mr. Garland's testimony is not "characterized by contradictions, inconsistencies and indefiniteness," but rather carries with it "conviction of its accuracy and applicability." *B.R. Baker Co. v. Lebow Bros.*, 150 F.2d 580, 66 USPQ 232 (CCPA 1945). Accordingly, Mr. Garland's credible oral testimony, coupled with corroborating evidence, satisfies opposer's burden of proof in showing, by a preponderance of the evidence, that opposer and his predecessors used the **GITZIT** trademark earlier than applicant's priority date.

C. Likelihood of Confusion

We turn, then, to the issue of likelihood of confusion under Section 2(d) of the Trademark Act. Our determination

must be based upon our analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

In this case, the marks are identical, the goods are identical, and presumably they move through the same channels of trade to the same groups of ordinary purchasers. Under these circumstances, we conclude that confusion is likely.

Decision: The opposition is sustained, and registration to applicant is refused.