ESTTA Tracking number: **ESTTA254045**
Filing date: **12/09/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91177156
Party	Plaintiff H-D Michigan, Inc.
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Date	12/09/2008
Attachments	Trial Brief (Public Version) Final.pdf (59 pages)(6335721 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

H-D MICHIGAN, INC., Opposer v. BRYAN BROEHM, Applicant.	Opposition No.: 91177156 Mark: Serial No.: 78896325 Filed: May 30, 2006

OPPOSER'S TRIAL BRIEF

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I. INTRODUCTION

Harley-Davidson, founded in 1903, has manufactured, promoted, and sold motorcycles and related products for over 105 years. Since at least as early as 1910, Harley-Davidson Motor Company Group, Inc., d/b/a Harley-Davidson Motor Company, and its related companies and affiliates (collectively "Harley-Davidson") have used the HARLEY-DAVIDSON name and mark and the BAR & SHIELD Logo, including the composite logo shown below, in connection with motorcycles and parts and accessories. Since 1914-15, the company has used the HARLEY-DAVIDSON mark and name and BAR & SHIELD Logo, including the composite logo shown below, for clothing, headwear, patches, and other products. In addition to using the composite logo shown below in substantially the same form since 1910, Harley-Davidson has also used the "blank" BAR & SHIELD Logo shown below for clothing for more than thirty years.

With decades of use, and an extensive licensing program that includes more than 25 clothing licensees alone, the company has expanded use of the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo to a wide range of products, including bandanas, suspenders, footwear, boot chains, sunglasses, belt buckles, wallets, tote bags, backpacks, fanny packs, purses, luggage, mugs, key chains, books, pins, earrings, watches, rings, bracelets, toys, dog collars, cell phone cases, knife cases, and money clips, just to name a few.

Harley-Davidson has achieved great commercial success under its HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo.

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Through extensive use, advertising, promotion, and commercial

success, the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo have achieved universal name recognition among consumers, and have become among the most famous and valuable brands in the world.

For the past five consecutive years, the HARLEY-DAVIDSON mark has been ranked among the top 50 most valuable global brands by Interbrand, a leading independent branding firm. The national media, including *The New York Times*, *The Wall Street Journal, The Chicago Tribune*, *The Washington Post, USA Today, The Milwaukee Journal Sentinel*, and *Business Week,* have recognized the HARLEY-DAVIDSON mark and BAR & SHIELD Logo as "famous," "iconic," "distinctive," "legendary," and/or "cult" brands. Because of their extensive use, massive media attention, and award-winning advertising campaigns, the fame and renown of the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo have transcended the company's core goods and services to become iconic brands.

More than 100 years after the emergence of the famous HARLEY-DAVIDSON name and mark, and decades after the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo became famous, Bryan Broehm ("Applicant" or "Broehm") filed an application seeking registration of the mark shown below (the "HOLY-DIVINESON BAR & SHIELD mark") for hats, headwear, shirts, and T-shirts. Broehm admits that, prior to selecting and seeking registration of his mark, he was aware of the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo. He also admits that these marks are famous.

Given the significant and broad scope of protection afforded the famous HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo, and their long and extensive use, Broehm's registration of a substantially similar mark for identical goods will no doubt cause a likelihood of confusion with and dilute the distinctiveness of these marks. For these reasons,

and those detailed below, Harley-Davidson respectfully requests that the Board sustain the Notice of Opposition on all grounds, and refuse registration of Broehm's mark.

II. STATEMENT OF ISSUES

A. Whether Broehm's HOLY-DIVINESON BAR & SHIELD mark shown below so resembles Harley-Davidson's previously used and registered HARLEY-DAVIDSON name and mark and its BAR & SHIELD Logo (representative logos below) as to be likely to cause confusion, mistake, or deception under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).

Opposer's Marks

Applicant's Mark

B. Whether Broehm's HOLY-DIVINESON BAR & SHIELD mark above is likely to dilute the distinctive quality of the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo under Section 43(c), 15 U.S.C. § 1125(c).

III. DESCRIPTION OF THE RECORD

A. Harley-Davidson's Evidence

Harley-Davidson has made the following deposition testimony of record:[1]

1. Scott Beck, Director of Marketing, for Harley-Davidson Motor Company, and Exhibit Nos. 1-75 ("Beck Dep. 9:5-18, Ex. 1.")

2. Laura Johnson, Litigation Clerk, for Finnegan, Henderson, Farabow, Garrett, and Dunner, LLP, and Exhibit Nos. 1-19 ("Johnson Dep. 5:2-22, Ex. 1.")

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[1] References to deposition testimony will be designated by the deponent's name followed by the page and line numbers separated by a colon, for example "Beck Dep. 6:1-7:2, Ex. ___." Some of the exhibits to Scott Beck's deposition contain the words "FOR RESEARCH PURPOSES ONLY." These documents, however, are actual, final documents. The phrase "FOR RESEARCH PURPOSES ONLY" is simply a watermark used by Harley-Davidson's archives department to assist in the preservation of original documents. (Beck Dep. 134:17-20.)

Harley-Davidson has filed the following Notices of Reliance during its testimony period:[2]

1. Notice of Reliance No. 1, dated June 24, 2008, consisting of 63 certified status and title copies of U.S. Trademark Registrations containing HARLEY-DAVIDSON and BAR & SHIELD Logo marks, Exhibits 1 to 63.

2. Notice of Reliance No. 2, dated June 24, 2008, consisting of certified copies of Harley-Davidson Inc.'s 10-K Form and Exhibits as filed with the Securities and Exchange Commission ("SEC") for fiscal years 2004-2007.

3. Notice of Reliance No. 3, dated June 26, 2008, consisting of a copy of certain of Applicant's Responses to Opposer's Requests for Admission Nos. 1-9, 11-15, 17, 19-23, and 35-38.

4. Notice of Reliance No. 4, dated June 26, 2008, consisting of a copy of Applicant's Responses to Opposer's First Set of Interrogatory Nos. 1-3, 5, 7, and 8, and Supplemental Response to Interrogatory Nos. 1, 2, and 3.

5. Notice of Reliance No. 5, dated June 26, 2008, consisting of a copy of certain of Applicant's Responses to Opposer's First Set of Requests for Admission and Responses to Opposer's First Set of Requests for the Production of Documents.

6. Notice of Reliance No. 6, dated June 26, 2008, consisting of the decisions of the Board and Federal Circuit in *Harley-Davidson, Inc. v. Ronda Ag*, Cancellation No. 18,908 (TTAB Aug. 10, 1995 and Feb. 5, 1996), *aff'd, Ronda Ag v. Harley-Davidson, Inc.,* No. 96-1297, 1997 U.S. App. LEXIS 3597, (Fed. Cir. Feb. 27, 1997).

7. Notice of Reliance No. 7, dated June 26, 2008, consisting of a representative sample of books showing, among other things, prominent coverage of and public exposure to the HARLEY-DAVIDSON name and mark and the BAR & SHIELD Logo.

8. Notice of Reliance No. 8, dated June 26, 2008, consisting of a representative sample of unsolicited printed publications showing, among other things, the nature and extent of the public exposure to the HARLEY-DAVIDSON names and marks.

9. Notice of Reliance No. 9, dated June 26, 2008, consisting of a representative sample of unsolicited printed publications showing, among other things, the nature and extent of the public exposure to the BAR & SHIELD Logo.

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[2] Notices of Reliance and accompanying exhibits filed during Opposer's testimony period are designated as, for example, "Opp's Not. of Rel. ___, Ex. ___."

B. Broehm's Evidence

Applicant Bryan Broehm filed the following evidence *after* the close of his testimony period:

1. Applicant's Submission of Evidence to Be Referenced In Final Pleading consisting of images collected from the Internet website http://kerruso.com, images of other apparel designs which the Applicant desires to market under the HOLY-DIVINESON BAR & SHIELD mark, and images collected from various sources and from personal photographs taken by the Applicant.

C. Harley-Davidson's Motion to Strike

On September 11, 2008, Harley-Davidson filed a Motion to Strike Applicant's evidence. As detailed in that motion, which is incorporated by reference, Applicant's evidence was filed on August 27, 2008, *after* the close of his testimony period on August 26, 2008. Accordingly, Applicant's evidence is untimely under Trademark Rule 2.121, and should be given no consideration.

In addition, Applicant seeks to introduce evidence that is not the proper subject matter for introduction through a notice of reliance. A notice of reliance may be stricken if the materials are not the proper subject matter for introduction by notice of reliance. TBMP §§ 532 and 707.02(b)(2); *Boyds Collection, Ltd. v. Herrington & Co.*, 65 USPQ2d 2017 (TTAB 2003) (striking evidence as improper subject matter for submission through notice of reliance).

The Rules permit the submission of certain specific types of evidence directly through notices of reliance without testimony, such as discovery depositions, answers to interrogatories, and admissions (Rule 2.120(j)); party registrations (Rule 2.122(d)(2)); and specified types of printed publications and official records (Rule 2.122(e)). Here, however, Applicant's evidence does not fall into any of the categories of evidence that may be submitted under notice of reliance alone. Applicant's evidence consists of images copied from third-party websites, and images of designs that Applicant claims to intend to use that contain the mark HOLY-DIVINESON. Such evidence requires testimony to lay the foundation for its admissibility (e.g., how was it obtained, when was it obtained, by whom was it obtained, etc. with an opportunity for

cross-examination), but no such testimony has been taken by Applicant. Thus, Applicant's evidence is improper and inadmissible, and should be stricken from the record.

IV. STATEMENT OF FACTS

A. Opposer and its HARLEY-DAVIDSON Name and Mark and BAR & SHIELD Logo

1. Opposer and its Related Companies

H-D Michigan, Inc. ("H-D") owns the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo. (Beck Dep. 14:12-20; Opp's Not. of Rel. 1 and 2, SEC 10-K 2007, p. 13.) Harley-Davidson Motor Company Group, Inc. d/b/a Harley-Davidson Motor Company, uses these marks under a license from H-D. (Beck Dep. 14:2-20.) Harley-Davidson, Inc. is the parent company of both H-D and Harley-Davidson Motor Company (collectively "Harley-Davidson"). (Beck Dep. 14:2-20; Opp's Not. of Rel. 2, SEC 10-K 2007, p. 13.)

2. Harley-Davidson's History and Business

Harley-Davidson, founded in Milwaukee in 1903, has continuously manufactured, promoted, and sold motorcycles and related products for more than 105 years. (Beck Dep. 15:22-16:1.) It is the largest U.S. manufacturer of motorcycles, and it is one of the largest motorcycle manufacturers in the world. (Id. 15:3-15:21.) Harley-Davidson has long been one of the world's most recognized motorcycle companies, having sold millions of motorcycles during its long and successful history. (Id. 193:20-195:1, Ex. 60; Opp's Not. of Rel. 2, SEC 10-K 2006, p. 15-16.) The company sells more than 250,000 motorcycles each year in the U.S. through over 650 authorized dealers. (Beck Dep. 78:13-81:9, Ex. 9; 193:22-195:1, Ex. 60; Opp's Not. of Rel. 2, SEC 10-K 2006, p. 15.) The HARLEY-DAVIDSON dealerships are typically located in high-traffic, high-visibility locations along highways and on major city streets and intersections. (Beck Dep. 81:15-81:19.)

In the U.S., all Harley-Davidson dealerships sell the company's motorcycle parts and accessories, general merchandise, and licensed products, including clothing, headwear,

jewelry, gift items, and collectibles. (Opp's Not. of Rel. 2, SEC 10-K 2006, p. 12-13.) These independent dealers also sell parts and accessories, general merchandise, and licensed products through "non-traditional" retail outlets. (Id.; Beck Dep. 81:15-85:17.) The "non-traditional" outlets, which are extensions of the dealerships, consist of Secondary Retail Locations (SRLs), Alternate Retail Outlets (AROs), and Seasonal Retail Outlets (SROs). (Id.) SRLs are satellites of a main dealership that also provide general merchandise and licensed products. (Opp's Not. of Rel. 2, SEC 10-K 2006, p. 12-13; Beck Dep. 81:15-82:6.) AROs are located primarily in high-traffic locations, such as on Michigan Avenue in Chicago, malls, airports, or popular vacation destinations, and they sell the company's general merchandise and licensed products. (Beck Dep. 83.2-85:17.) SROs are located in similar high-traffic areas, but operate on a seasonal basis out of temporary locations such as vendor kiosks. There are approximately 100 SRLs, 100 AROs, and 10 SROs located in the U. S. (Id.) Harley-Davidson also has numerous licensees that offer a wide variety of products under the HARLEY-DAVIDSON mark and BAR & SHIELD Logo, including more than 25 clothing licensees. (Beck Dep. 150:19-152:3, Ex. 41.)

For decades, Harley-Davidson and its dealers and licensees have sold, in addition to motorcycles and motorcycle parts and accessories, a wide variety of clothing, headwear, jewelry, novelty items, collectibles, and other consumer products to the general public. (Beck Dep. 12:8-14; 29:3-15; 83:7-84:12.) Harley-Davidson creates awareness of its HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo among its customers and the non-riding general public by licensing its marks for a wide range of products. (Opp's Not. of Rel. 2, SEC 10-K 2006, p. 12-13.) Since the 1980's, the company has licensed clothing, headwear, jewelry, bags, pins, small leather goods, footwear, toys and numerous other products under its HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo. (Id., Beck Dep. 150:19-152:3, Ex. 41.) Licensed products are advertised, promoted, and sold through Harley-Davidson

dealerships, mass merchandisers, convenience stores, and boutiques, including Target, K-Mart, Wal-Mart, Sears, J.C. Penney, and 7-Eleven. (Beck Dep. 157:11-158:4; 165:3-17.)

The company's products are advertised and marketed to retail customers primarily through dealer promotions, customer events, and advertising through national television, print, radio and direct mailings, as well as Internet advertising. (Opp's Not. of Rel. 2, SEC 10-K 2007, p. 13; Beck Dep. 95:4-19.) Many of the company's advertising and marketing efforts are accomplished through a cooperative program with its dealers. (Opp's Not. of Rel. 2, SEC 10-K 2007, p. 13.) The company also sponsors racing activities and special promotional events and participates in hundreds of consumer shows and rallies. (Opp's Not. of Rel. 2, SEC 10-K 2007, p. 13.; Beck Dep. 175:19-178:17.)

Harley-Davidson regularly promotes its products and services through the Harley Owners Group or H.O.G. (Opp's Not. of Rel. 2, SEC 10-K 2005-2007, p. 13; Beck Dep. 13:7-14:1; 143:12-22.) The Harley Owners Group has over one million members and is the largest company-sponsored motorcycle enthusiast organization. (Opp's Not. of Rel. 2, SEC 10-K 2005-2007, p. 13.) The company formed the Harley Owners Group in 1983 to encourage Harley-Davidson owners to become more actively involved in the motorcycling sport and lifestyle. (Id.; Beck Dep. 13:7-14:1; 143:12-22.) The group sponsors numerous motorcycle events, including national and state rallies and rides for motorcycle enthusiasts. (Id.)

The company also uses its website (harley-davidson.com) to market products and services under the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo. (Opp's Not. of Rel. 2, SEC 10-K 2005, p. 11; Beck Dep. 61:9-21; 95:8-15; 111:9-113:1.) The website features online catalogs, which allow customers to create and share product wish lists, use a dealer locator, and place orders for various goods, including motorcycle parts and accessories and apparel. (Beck Dep. 111:11-113:1.)

3. Harley-Davidson's 100 Years of Use of the HARLEY-DAVIDSON Mark

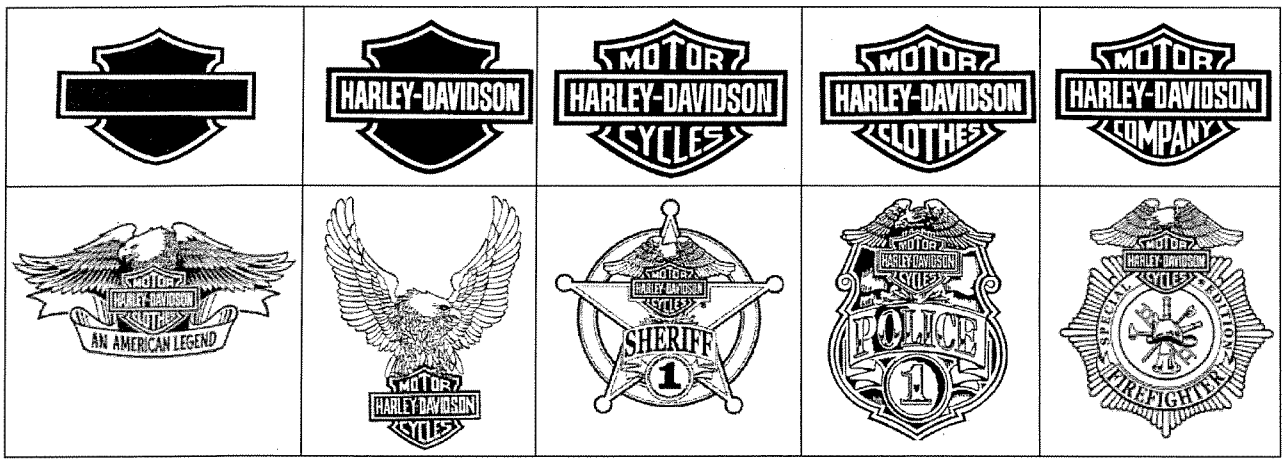
Since 1903, Harley-Davidson has continuously used its HARLEY-DAVIDSON name and mark in commerce for motorcycles and motorcycle parts and accessories. (Beck Dep. 15:22-17:2, Ex. 2.) The company opened its first dealership in Chicago, Illinois in 1904, and it has been continuously selling motorcycles and motorcycle parts and accessories under the HARLEY-DAVIDSON name and mark since then. (Id. 16:9-17:11, 20:20-21:5, Ex. 2.) For over 105 years, the HARLEY-DAVIDSON mark has been prominently displayed on exterior and interior signage at retail dealerships. (Id. 18:22-19:17; 51:16-52:18.)

In 1914, Opposer first used its HARLEY-DAVIDSON mark for clothing, including but not limited to shirts, t-shirts, jackets, pants, jeans, sweatshirts, and gloves. (Beck Dep. 29:16-31:9; 133:2-10, Ex. 35; pp. 15, 73, 78, 163, 261, 290, 296, 324, 414.) In the early 1920's, Harley-Davidson began selling hats, caps and jewelry under its HARLEY-DAVIDSON name and mark. (Id. 31:10-34:13.) Since then, Harley-Davidson and its dealers and licensees have continuously offered and sold, among other things, a wide variety of clothing, headwear, and jewelry under the HARLEY-DAVIDSON name and mark. (Id. 31:10-34:13.) The HARLEY-DAVIDSON mark is embroidered, embossed, imprinted, engraved, and/or screen-printed directly on the goods, and it also appears on hangers, hangtags, packaging, displays, and labels for the goods. (Id. 30:12-31:4; 36:1-16.)

Over the years, Harley-Davidson has expanded its use of the HARLEY-DAVIDSON name and mark to a wide variety of products, including but not limited to bandanas, suspenders, straps, footwear, boot chains, sunglasses, belt buckles, wallets, tote bags, backpacks, fanny packs, purses, luggage, mugs, key chains, books, pins, earrings, watches, rings, bracelets, toys, dog collars, checkbook covers, cell phone cases, knife cases, and money clips, just to name a few. (Beck Dep. 151:1-175:7, Ex. 41 (representative catalogs showing use of marks on products)).

4. Harley-Davidson's Use of the BAR & SHIELD Logo for Nearly 100 Years

For nearly 100 years, since at least as early as 1910, Harley-Davidson has used its BAR & SHIELD Logo in connection with motorcycles and parts and accessories. (Beck Dep. 16:9-17:17, Ex. 2; Opp's Not. of Rel. 2, SEC 10-K 2007, p. 13.) Since 1914-15, the company has used its BAR & SHIELD Logo for a wide variety of clothing, headwear, patches, and other products. (Beck Dep. 47:13-48:10; 133:2-10, Ex. 35, pp. 15, 78, and 163.) Over the years, the company has consistently used its BAR & SHIELD Logo either alone or as part of various BAR & SHIELD Logos including those set forth below (collectively "BAR & SHIELD Logo") from its date of first use to present.



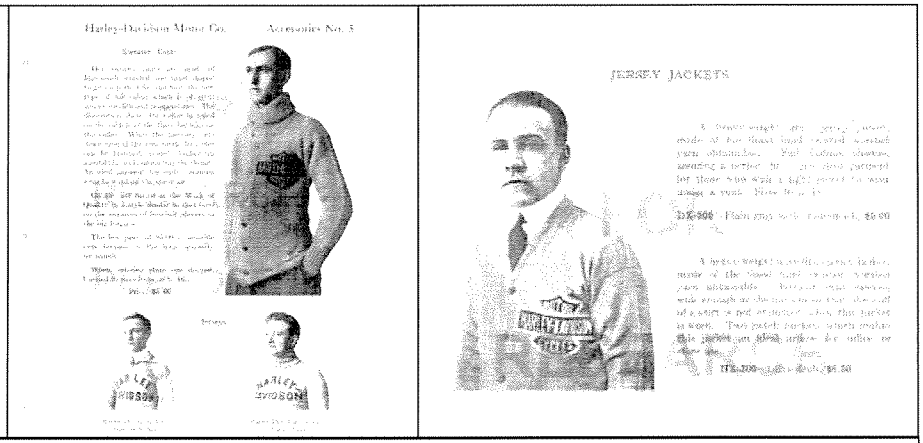
As detailed below, Harley-Davidson's extensive, long, and consistent use of its BAR & SHIELD Logo in connection with such a wide variety of goods and services has reinforced the BAR & SHIELD Logo, with or without any wording in the logo, in the minds of consumers as a trademark and source identifier of Harley-Davidson. (Beck Dep. 71:6-21.) Indeed, the company even has prior, continuous rights in its "blank" BAR & SHIELD Logo for a broad scope of goods and services, which extends Harley-Davidson's exclusive rights in the bar and shield design, regardless of the wording inside.

Since at least as early as 1910, Harley-Davidson has used its HARLEY-DAVIDSON BAR & SHIELD Logo shown below in commerce with motorcycles, motorcycle parts and

accessories, and retail store services for such goods. (Beck Dep. 16:9-17:17, Ex. 2, 30:12-33:7, 50:22-54:9; Opp's Not. of Rel. 2, SEC 10-K 2007, p. 13.) For years prior to the filing date of the opposed application, the company expanded its use of this mark in connection with clothing. (Beck Dep. 130:3-20, Ex. 34.) The HARLEY-DAVIDSON BAR & SHIELD Logo is still in use in commerce today for motorcycles, motorcycle repair services, retail store services, motorcycle parts and accessories, and a wide variety of clothing. (Id. 57:8-58:17; 87:17-88:12; 130:3-20, Ex. 34; 161:2-162:7, Ex. 45.) A representative sample of clothing bearing this mark is set forth below.

HARLEY-DAVIDSON	
De Lux Spring 2008 (2008 Catalog) (Beck Dep. 160:22-162:7, Ex. 45, p. 401.)	

In 1914, Harley-Davidson first used its HARLEY-DAVIDSON MOTORCYCLES BAR & SHIELD Logo shown below in commerce in connection with clothing, including shirts, sweaters, jackets, and vests. (Beck Dep. 47:13-47:21; 133:2-10, Ex. 35, pp. 15, 78, and 163.) Since 1914, Harley-Davidson has continuously used the HARLEY-DAVIDSON MOTORCYCLES BAR & SHIELD Logo, and has expanded use of this mark to, among other things, motorcycles, motorcycle parts and accessories, helmets, caps, coveralls, belts, eyewear, patches, lapel buttons, pins, and tie clasps. (Id. 49:14-51:15; 133:2-10, Ex. 35, pp. 261, 265, 290, 296, 324, 329, 414, and 517.) This mark is still in use in commerce today. (Id. 49:17-52:6.)

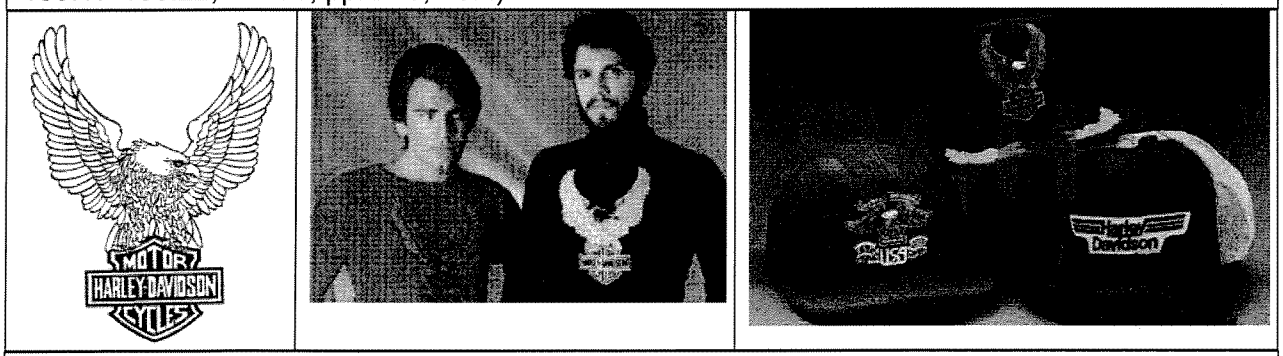


Useful Accessories for Harley-Davidson Motorcycles (1914 Catalog); (Beck Dep. 132:2-133 -10, Ex. 35, pp. 15, 78.)

Follow the Eagle: Fall 1981 Fashions and Accessories-1981 Catalog; *1984 Fashions/Accessories/Motorcycles*-1984 Catalog; (Beck Dep. 135:17-136.22, Ex. 36, pp. 274, 297.)

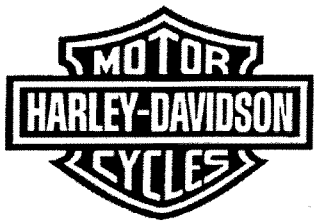
In 1975, Harley-Davidson commenced use of its HARLEY-DAVIDSON MOTORCYCLES BAR & SHIELD Logo shown below in connection with jewelry and clothing, including t-shirts, sweat shirts, hats, and caps. (Beck Dep. 63:12-65:16.) As shown in the representative samples below, this mark has been in continuous use in commerce for clothing and hats, among other things, from 1975 to present. (Id.)

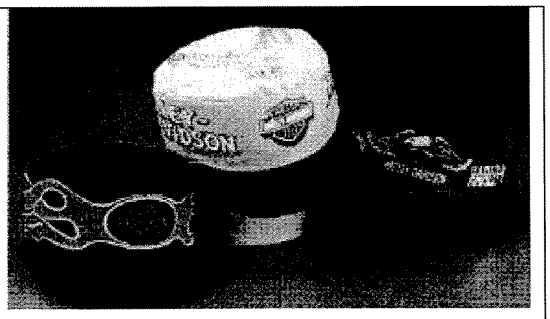
Motorcycle Fashion and Accessories: 75th Anniversary Edition (1978 Catalog) (Beck Dep. 135:17-136:22, Ex. 36, pp. 245, 267.)



Follow the Eagle: Fall 1981 Fashions and Accessories (1981 Catalog); *1984 Fashions/Accessories/Motorcycles* (1984 Catalog) (Beck Dep. 135:17-136:22, Ex. 36, pp. 275, 297.)

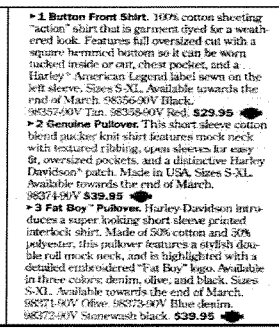
In 1977, Harley-Davidson first used its HARLEY-DAVIDSON MOTORCYCLES BAR & SHIELD Logo shown below for patches. (Beck Dep. 47:22-48:10; 53:9-18.) This version of the BAR & SHIELD Logo, with a slightly shorter crossbar design, is materially the same as the original HARLEY-DAVIDSON MOTORCYCLES BAR & SHIELD Logo shown above. (Id. 49:14-50:4.) Since 1981, Harley-Davidson has continuously used this version of the BAR & SHIELD Logo in connection with clothing, footwear, and headwear, among other things. (Id. 48:11-55:12.) The mark appears in catalogs and on hangtags and labels for the goods, and it is embroidered or silk-screened directly onto the goods. (Id. 32:11-20; 53:9-18.) In addition, Harley-Davidson has continuously used this HARLEY-DAVIDSON MOTORCYCLES BAR & SHIELD Logo on signage and in advertisements for retail store services for motorcycles, motorcycle parts and accessories, and a wide variety of clothing and headwear. (Id. 51:20-52:18.)





1978 Motorcycle Fashion and Accessories: 75th Anniversary Edition-1978 Catalog; *Harley-Davidson Fashions & Collectible Fall/Winter 1987/88-(*1987/88 Catalog) (Beck Dep. 135:17-136:22, Ex. 36, pp. 246, 302.)

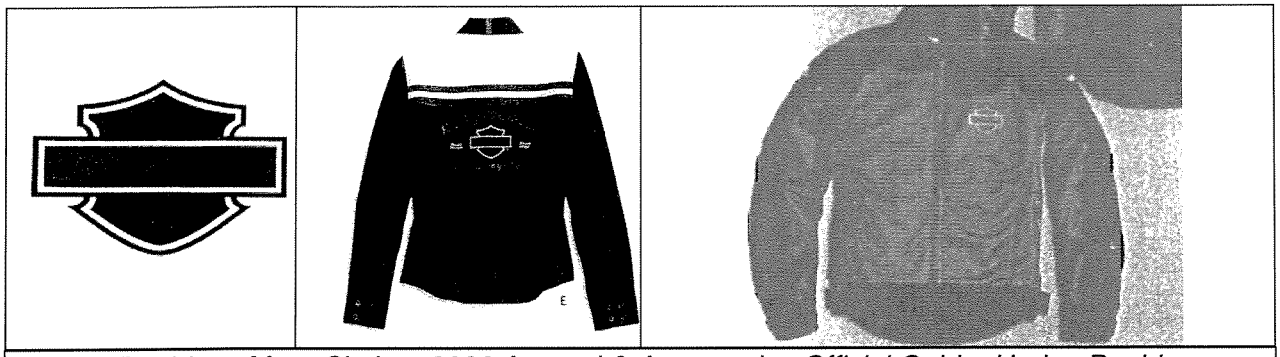
In 1977, Harley-Davidson first used its "blank" BAR & SHIELD Logo shown below for T-shirts, shirts, hats, caps, boots, riding suits, and jeans, and has continuously used this mark for clothing since then. (Beck Dep. 60:1-63:11.) As early as 1992, the company first used the blank BAR & SHIELD Logo for motorcycles and parts and accessories. (Id.) Since then, Harley-Davidson has continuously used its blank BAR & SHIELD Logo for clothing and headwear, motorcycles, motorcycle parts and accessories, and retail store services for such goods. (Id.) The mark is embroidered and/or silk-screened directly onto clothing and headwear, used on packaging, and imprinted directly on motorcycle parts and accessories. (Id.) The blank BAR & SHIELD Logo is prominently displayed on signage and fixtures throughout the retail stores, and it also appears on every page of Harley-Davidson's website at harley-davidson.com. (Id.) A representative sample of clothing bearing this mark is set forth below.


▸1 Button Front Shirt. 100% cotton sheeting "action" shirt that is garment dyed for a weathered look. Features full oversized cut with a square hemmed bottom so it can be worn tucked inside or out, chest pocket, and a Harley® American Legend label sewn on the left sleeve. Sizes S-XL. Available towards the end of March. 98356-90V Black. 98357-90V Tan. 98358-90V Red. **$29.95**

▸2 Genuine Pullover. This short sleeve cotton blend pucker knit shirt features mock neck with textured ribbing, open sleeves for easy fit, oversized pockets, and a distinctive Harley Davidson® patch. Made in USA. Sizes S-XL. Available towards the end of March. 98374-90V **$39.95**

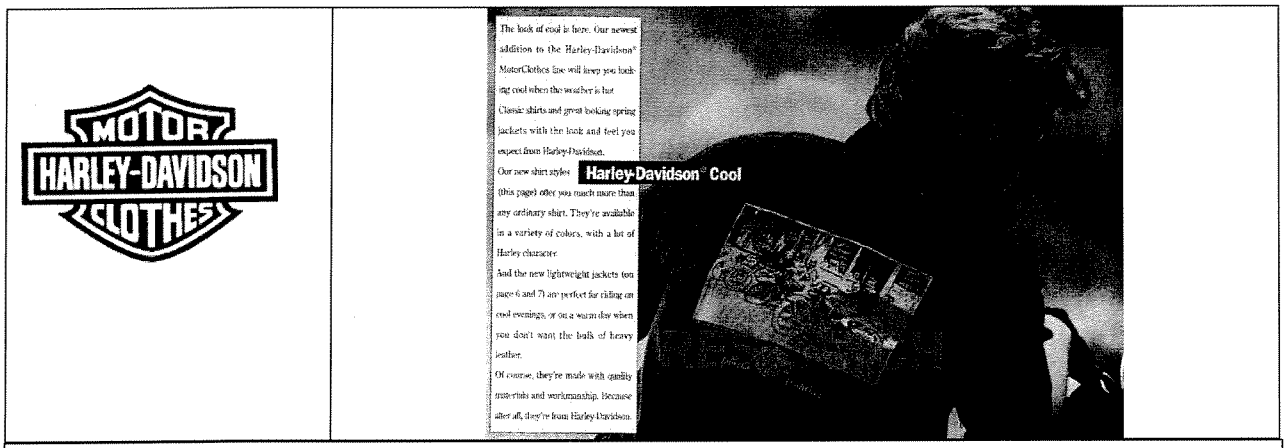
▸3 Fat Boy® Pullover. Harley-Davidson introduces a super looking short sleeve printed interlock shirt. Made of 50% cotton and 50% polyester, this pullover features a stylish double roll mock neck, and is highlighted with a detailed embroidered "Fat Boy" logo. Available in three colors: denim, olive, and black. Sizes S-XL. Available towards the end of March. 98371-90V Olive. 98373-90V Blue denim. 98372-90V Stonewash black. **$39.95**

MotorClothes and Collectibles (1990 Catalog) (Beck Dep. 135:17-136:22, Ex. 36, p. 371); *Harley-Davidson Fashion Quarterly* (2002-03 Catalog) (Beck Dep. 130:3-20, Ex. 34, p. 368.)



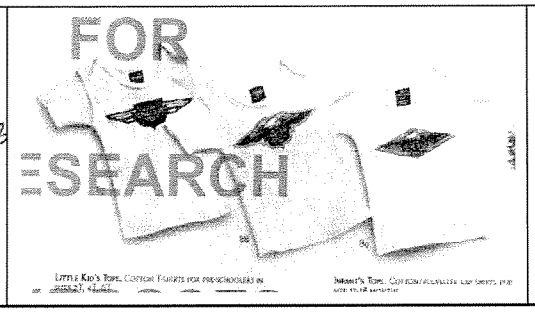
Harley-Davidson MotorClothes 2006 Apparel & Accessories Official Guide; *Harley-Davidson Limited Edition Apparel & Accessories Spring Guide Rumble At Will* (2006 Catalog) (Beck Dep. 130:3-20, Ex. 34, pp. 517, 627.)

Since 1988, Harley-Davidson has continuously used its HARLEY-DAVIDSON MOTORCLOTHES BAR & SHIELD Logo shown below for T-shirts, jackets, denim, jeans, and riding gear among other things. (Beck Dep. 54:12-55:18.) This mark appears on tags inside the clothing and/or is embroidered or imprinted directly on the goods. (Id.)

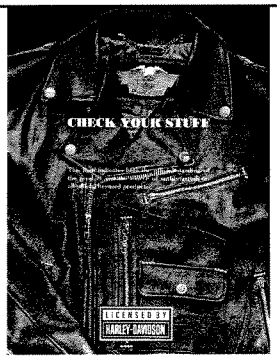


Spring/Summer 1990 MotorClothes and Collectibles (1990 Catalog) (Beck Dep. 135:17-136:22, Ex. 36, p. 370.)

In 1989, Harley-Davidson first used its HARLEY-DAVIDSON MOTORCLOTHES AN AMERICAN LEGEND BAR & SHIELD Logo shown below for a wide variety of clothing, including shirts, hats, caps, jackets, bandanas, jeans, sweaters, pants, scarves, and boots. (Beck Dep. 55:2-57:7; 135:17-136:22, Ex. 36.) This mark appears on hangtags and labels, in catalogs, and it is imprinted directly on the goods. (Id.) A representative sample of clothing bearing this mark is set forth below.



MotorClothes and Collectibles Fall and Winter 1992 (1992 Catalog) (Beck Dep. 135:17-136:22, Ex. 36, pp. 428, 439.)



MotorClothes and Collectibles Fall and Winter 1994 (1994 Catalog) (Beck Dep. 135:17-36:22, Ex. 36, p. 496.); *Harley-Davidson MotorClothes - Apparel & Accessories* (2002/2003 Catalog) (Beck Dep. 130:3-20, Ex. 34, p. 6.)

Since 2002, the company has used the HARLEY-DAVIDSON MOTORCYCLES BAR & SHIELD Logo in the "badge" forms shown below in connection with, among other things, T-shirts, sweatshirts, hats, caps, jackets, belt buckles, pins, motorcycle tank medallions, and collectible badges. (Beck Dep. 67:1-71:5.) The badge HARLEY-DAVIDSON MOTORCYCLES BAR & SHIELD Logos were created at the request of numerous police, sheriff, and fire department officials across the nation who are passionate about their connection to Harley-Davidson. (Id.)

As evidenced above, Harley-Davidson and its dealers and licensees have consistently used the BAR & SHIELD Logo within each of these marks for decades (collectively "BAR & SHIELD Logo"), which has reinforced the BAR & SHIELD Logo in the minds of consumers as a trademark and source identifier of Harley-Davidson. (Beck Dep. 71:6-21.)

5. H-D Michigan, Inc. Owns Over 60 Registrations for the HARLEY-DAVIDSON Mark and BAR & SHIELD Logo

Opposer H-D Michigan, Inc. owns more than 60 U.S. trademark registrations for the HARLEY-DAVIDSON mark and BAR & SHIELD Logo covering a wide variety of goods and services, including motorcycles, motorcycle parts and accessories, clothing, headwear, eyewear, gloves, jewelry, patches, pins, belts, key chains, wallets, purses, bags, decals, books, toys, games, linens, mugs, tools, locks, lamps, mirrors, and retail store services featuring such goods. (Beck Dep. 18:10-72:10, Ex. 3-6; Opp's Not. of Rel. No. 1.) A representative sample of Opposer's registrations introduced as evidence of record and covering a wide variety of clothing and patches for clothing is set forth below:

MARK	REG. NO. REG. DATE	GOODS (DATE OF FIRST USE IN COMMERCE)
HARLEY-DAVIDSON	507163 03-01-1949	Motorcycle shirts, sweaters, breeches, neckties, coveralls, rain coats and hats, jackets, helmets, caps and boots (12-15-1915)
HARLEY-DAVIDSON	1234404 04-12-1983	Clothing-namely, jackets, pants, shirts, t-shirts, vests, jeans, riding suits, bandannas, rain suits, shorts, nightgowns, halters, underwear, tank tops, sweatshirts, night shirts, socks, gloves, hats, caps and boots (12-15-15) [and other goods]
HARLEY-DAVIDSON	1450348 08-04-1987	Sweat pants, sweaters, suspenders, scarves, bandanas, leather clothing, namely, jackets, vests, gloves, jeans, chaps, tops, boots, shorts, caps, belts, and parts of footwear, namely boot tips (08-00-1947) [and other goods]
MOTOR HARLEY-DAVIDSON COMPANY	1205380 08-17-1982	Clothing-namely, T-shirts (06-16-1981) [and other goods]
MOTOR HARLEY-DAVIDSON CYCLES	1263936 01-17-1984	Clothing-namely, T-shirts, jackets, blue jeans, sweat shirts, underwear, nightshirts, bandanas, headwear, socks, boots, cycle riding suits, aprons, belts and suspenders (09-06-1977) [and other goods]

MARK	REG. NO. REG. DATE	GOODS (DATE OF FIRST USE IN COMMERCE)
MOTOR HARLEY-DAVIDSON CYCLES	1660539 10-15-1991	Belts, decorative boot straps, leather bandanas, boot tips, chaps, coveralls, denim pants, gloves, halter tops, hats, caps, heel guards, heel spurs, jackets, neckties, night gowns, night shirts, pants, rain suits, shirts, socks, sole plates, suspenders, sweaters, sweatshirts, tank tops, athletic shoes, shoes, boots, t-shirts, underwear, vests, and wristbands (00-00-1981)[and other goods]
MOTOR HARLEY-DAVIDSON CYCLES	3058720 02-14-2006	Retail store services and distributorships in the fields of motorcycles, motorcycle parts and accessories, footwear, clothing, jewelry, and leather goods; rendering technical assistance in the establishment, operation, and business promotion of retail stores; retail store services in the fields of motorcycles, motorcycle parts and accessories, footwear, clothing, jewelry, and leather goods therefor via a global computer network; dealerships in the fields of motorcycles, motorcycle parts and accessories, footwear, clothing, jewelry, and leather goods (10-00-1981)
MOTOR HARLEY-DAVIDSON CYCLES	3393839 3-11-08	House mark for a full line of clothing, footwear and headwear (00-00-1981)
MOTOR HARLEY-DAVIDSON CLOTHES	1571032 12-12-1989	Clothing, namely, jeans, T-shirts and jackets (09-00-1988)
	1511060 11-01-1988	Clothing, namely, boots, sweat shirts, jeans, hats, caps, scarves, motorcycle riding suits, neck ties, shirts, T-shirts, jackets, vests, ladies tops, bandanas (09-06-1977)
	1741456 12-22-1992	Embroidered patches and belt buckles not of precious metals (00-00-1977)
MOTOR HARLEY-DAVIDSON CYCLES	1224868 1-25-1983	Clothing-namely, jackets, T-shirts, tank tops, halters, panties, sweat shirts, bandannas, hats, caps, boots, and motorcycle riding suits (10-00-1975) [and other goods]
MOTOR HARLEY-DAVIDSON CLOTHES AN AMERICAN LEGEND	2406156 11-21-2000	Jackets, shirts, skirts, gloves, vests, chaps, mittens, scarves, boots, shoes, caps, hats, belts, bootstraps, pants, pajamas, nightgowns, ladies' halter tops, bandanas, rain suits, neckties, jeans, underwear, coats, and sweaters (00-00-1989) [and other goods]

MARK	REG. NO. REG. DATE	GOODS (DATE OF FIRST USE IN COMMERCE)
	2834100 4-20-2004	Shirts, t-shirts, caps, hats, jackets (07-31-2002)
	2230532 3-09-1999	T-shirts, caps, sweat pants, sweat shirts, sweat suits (01-01-1995) [and other goods]
	2873756 8-17-2004	Shirts, t-shirts, caps, hats, jackets, sweatshirts (07-31-2002)

All of these these registrations are valid and subsisting on the Principal Register, and several of them have become incontestable. (Opp's Not. of Rel. No. 1.) Harley-Davidson has submitted status and title copies of its registrations comprised or containing the HARLEY-DAVIDSON mark and/or the BAR & SHIELD Logo under Notice of Reliance and through the deposition testimony of Scott Beck. (Id; Beck Dep. 18:10-72:10, Ex. 3-6.)

B. The HARLEY-DAVIDSON Name and Mark and BAR & SHIELD Logo Are Among the Most Famous Marks in the World

1. Millions of Consumers Are Exposed to These Marks Every Day

Harley-Davidson is one of the largest motorcycle manufacturers in the world. (Beck Dep. 15:3-15:21.) Since 1904, when the company opened its first dealership in Chicago under the HARLEY-DAVIDSON name and mark, it has grown to over 650 retail dealer locations nationwide, and approximately 200 alternative and seasonal retail outlets. (Beck Dep. 193:20-195:1, Ex. 60; 78:13-81:3, Ex. 9; 81:15-85:17; Opp's Not. of Rel. 2, SEC 10-K 2006, pp. 12, 15.) HARLEY-DAVIDSON dealerships and retail stores are typically located in high-traffic, high-visibility locations, malls, airports, and popular vacation destinations, and along major highways,

city streets, and intersections. (Beck Dep. 81:15-82:12; Opp's Not. of Rel. 2, SEC 10-K 2006, p. 12-13.) The dealerships and retail stores, which offer and sell a wide variety of clothing, headwear, jewelry, and accessories, can be found on Michigan Avenue in Chicago, along Route 66, and in the Chicago, Miami, and Minneapolis airports, among hundreds of other locations. (Beck Dep. 83:10-21; 179:12-180:3.) All of the retail locations prominently display the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo on store signage, motorcycles, motorcycle parts and accessories, and on or in connection with licensed products, including clothing, headwear, footwear, and jewelry. (Beck Dep. 28:11-29:15; 58:14-17; 85:18-90:14, Ex. 10; 179:17-180:3.)

For decades, the company has created consumer awareness of its HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo by licensing its marks for a wide range of products. (Opp's Not. of Rel. 2, SEC 10-K 2006, p. 11.) Since the 1980's, the company has licensed clothing, headwear, jewelry, bags, pins, small leather goods, footwear, toys, and numerous other products under its HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo. (Beck Dep. 150:19-152:3, Ex. 41.) Licensed products are advertised, promoted, and sold through Harley-Davidson dealerships, mass merchandisers, convenience stores, and boutiques, including Target, K-Mart, Wal-Mart, Sears, JCPenney, and 7-Eleven, exposing many millions of consumers to the brands every day. (Id. 157:3-158:4; 165:3-17.)

2. Harley-Davidson Has Sold Billions of Dollars of Products and Services Under the Marks Since 1903

Harley-Davidson has achieved great commercial success under its HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo over the years, having sold many billions of dollars worth of products and services in the U.S. (Opp's Not. of Rel. 2, SEC 10-K 2007, p. 53; Beck Dep. 192:1-195:19, Ex. 60-61.)

REDACTED

3. Harley-Davidson Has Extensively Advertised and Promoted its Marks

Harley-Davidson has invested a substantial amount of time, effort, and money in advertising and promoting its HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo nationwide.

REDACTED

Significantly, this total does not include advertising and promotional expenditures of Harley-Davidson's numerous licensees.

Harley-Davidson's advertising and promotional activities include, but are not limited to, national television and radio commercials, print advertisements (e.g., magazines and newspapers), in-store displays, kiosks, catalogs, direct marketing, fliers, airport signage, billboards, bus posters and signs, outdoor venues (e.g., baseball, NASCAR, and other sporting events), store signage, sponsorships, and rallies and events. (Beck Dep. 42:4-14; 93:11-100:13, Ex. 13; 178:18-180:3; 199:21-202:13; Opp's Not. of Rel. 2, SEC 10-K 2005, p. 11.) In determining when and where to place advertisements bearing its marks, the company

specifically targets media and locations with the highest visibility, consumer traffic, circulation, and market penetration. (Beck Dep. 81:15-84:7; Opp's Not. of Rel. 2, SEC 10-K 2005, p. 11.)

a. Print Advertising

For decades, Harley-Davidson's products and services, including clothing, have been advertised under the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo in both motorcycle enthusiast and national general interest magazines. (Beck Dep. 90:20-109:21, Ex. 13.) For example, the company's branded products have appeared in full-page and two-page advertisements in magazines such as *Rolling Stone*, *Spin*, *Sports Illustrated, Entertainment Weekly, Men's Journal, Shape, Maxim, Playboy, Vanity Fair, Glamour, Allure, Self, Vibe, Automobile, Car & Driver, Road & Track, Motor Trend, Field & Stream, Popular Mechanics, Cycle World, American Iron, American Rider, Biker,* and *ESPN,* with a combined monthly circulation in the tens of millions. (Id.)

Harley-Davidson's products and services also have been promoted in local and major metropolitan newspapers, including *The New York Times, The Chicago Tribune, Boston Globe, Detroit News, USA Today, The Wall Street Journal, The Milwaukee Journal Sentinel, The Plain Dealer (Cleveland),* and *The Columbus Dispatch.* (Beck Dep. 96:1-100:12, Ex. 13.) Since 1916, Harley-Davidson has advertised and promoted its motorcycles, motorcycle parts and accessories, and clothing under its HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo in its *Enthusiast* magazine. (Id. 140:12-143:5, Ex. 38.) For decades, this magazine has advertised and promoted licensed products, including jewelry and clothing, bearing the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo. (Id.) The company distributes approximately 4.8 million *Enthusiast* magazines to consumers and dealers each year. (Id.)

In 1983, the company began publishing *Hog Tales* magazine, which is distributed to approximately 800,000 members of the Harley Owners Group six times a year. (Beck Dep. 143:6-145:13, Ex. 39.) A wide variety of clothing, jewelry, motorcycles, motorcycle parts and

accessories, and other products and services are advertised and promoted under the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo in the *Hog Tales* magazines. (Id.)

As early as 1959, famous musicians, actors, and celebrities have appeared and continue to appear in Harley-Davidson print ads and catalogs, including Elvis Presley, U2, Jay Leno, Tim McGraw, Faith Hill, Usher, Malcolm Forbes, Arnold Swartzenegger, Mickey Rourke, Evel Knievel, and many more. (Beck Dep. 17:22-18:9; 182:12-184:1.)

b. Television and Radio Advertising

The company's products and services, including clothing bearing the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo, have been promoted in television and radio ads since the 1980's. (Beck Dep. 108:4-111:08.) All of these marks have been featured on national network, cable, syndicated, and local television, and in radio ads. (Id.; Opp's Not. of Rel. 2, SEC 10-K 2005, p. 11.) The company typically runs two to three 30-second television commercials and radio commercials during heavy viewer programming to gain maximum public exposure to its brands. (Beck Dep. 108:4-111:08.) Harley-Davidson has advertised and promoted its HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo on ABC, ESPN, NASCAR and Ultimate Fighting Championship (UFC) broadcasts, and during primetime sporting events that generate between 2-5 million viewers per show. (Id.) Moreover, virtually every television commercial features the BAR & SHIELD Logo. (Id.) With over twenty years of television and radio advertising, tens of millions of consumers have been exposed to the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo.

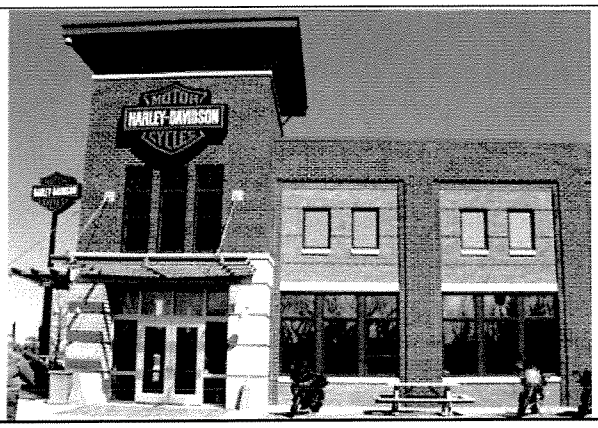
c. Television and Film Product Placement

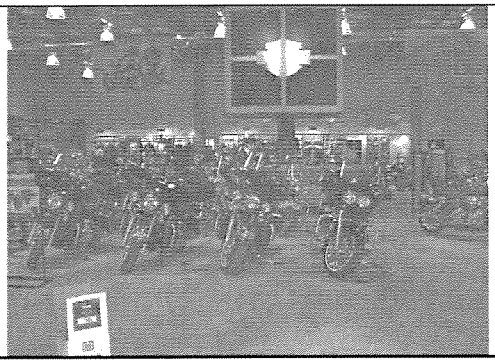
Further, the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo have appeared in numerous popular films and television series. (Beck Dep. 180:4-182:22.) In the 1950s, a HARLEY-DAVIDSON motorcycle was prominently featured in the film *The Wild Ones,* starring Marlon Brando. (Id.) Since then, the company's branded products and store signage have appeared in the films *Easy Rider, Oceans 11, Pulp Fiction, Marlboro Man, Terminator,*

Indiana Jones, Erin Brockovich, The Bad News Bears, and in the television shows *CSI Miami, CSI New York, CSI Las Vegas, X-Files, Chips, Starsky and Hutch, Dukes of Hazard, Sopranos, Six Feet Under, Weeds, Entourage, Nip and Tuck,* and many other films and television programs. (Id.) For the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo, this type of media coverage is tremendously valuable because it reaches the mass consumer market efficiently and effectively, and it creates interest and desire in the brands. (Id.)

d. Signage, Billboards, Buses, Kiosks, and More

In 1904, Harley-Davidson opened its first dealership in Chicago under the HARLEY-DAVIDSON name and mark. (Beck Dep. 16:9-17:11, Ex. 2.) Since then, Harley-Davidson's 650-plus retail dealerships and its approximately 200 non-traditional retail outlets prominently display exterior and interior signage bearing the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo. (Id. 28:2-29:15; 51:20-52:18; 85:18-90:14, Ex. 10.) These stores also display the marks on interior fixtures, displays, labels, and merchandise throughout the stores. (Id.) A representative sample of store signage from the record is set forth below.

MOTOR HARLEY-DAVIDSON CYCLES	
(Beck Dep. 85:18-87:16, Ex. 10, p. 3.)	

	
(Beck Dep. 85:18-89:18, Ex. 10, p. 6.)	

Further, the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo have appeared on billboards, kiosks, bus shelters, and airport signage with heavy pedestrian traffic and wide public exposure. (Beck Dep. 42:12-14; 93:11-100:13, Ex. 13; 178:18-180:3; 199:21-202:13; Opp's Not. of Rel. 2, SEC 10-K 2005, p. 11.) These advertisements have been displayed on major intersections and highways, from Michigan Avenue to Route 66, and in the Chicago, Miami, and Minneapolis airports, just to name a few. (Beck Dep. 83:10-12; 179:12-180:3.)

e. Sponsorships, Sporting Events, and Rallies

For decades, Harley-Davidson and its authorized dealers have sponsored numerous sports teams and major sporting events as part of their advertising and marketing efforts. (Beck Dep. 199:21-202:13.) Advertisements for the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo have been displayed at NASCAR races, NBA basketball games, NFL football games, college football games, MLB games, and UFC Ultimate Fighting Championships. (Id.) The company and its authorized dealers have sponsored major league sports teams, including the Milwaukee Brewers, Milwaukee Bucks, Atlanta Falcons, Boston Red Sox, and Green Bay Packers. (Id.)

In determining the nature and type of sponsorship, the company specifically targets events that reach the broadest, general public market to gain the widest public exposure to its brands. (Beck Dep. 199:21-202:13.) Thus, the company benefits from both the brand

exposure to the audience at the events, and exposure to the general public viewing the television broadcast of those events. (Id.)

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For over 20 years, Harley-Davidson and its authorized dealers and licensees have advertised and promoted products and services, including clothing, jewelry, motorcycles, and parts and accessories, under the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo at national and state motorcycle rallies and consumer shows. (Beck Dep. 175:19-178:17; Opp's Not. of Rel. 2, SEC 10-K 2005, p. 11.) These motorcyle rallies and shows draw millions of consumers each year, including both motorcycle enthusiasts and the general public. (Beck Dep. 175:19-178:17.) The HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo have been advertised and promoted at major events, including Sturgis Bike Week, Daytona Bike Week, Laconia Motorcycle Week, and Rolling Thunder Ride for Freedom, which draw over 1.5 million consumers. (Id.)

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f. Catalogs, Brochures, Direct Mail, Fliers, and More

The HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo have appeared on tens of millions of printed brochures, direct mail pieces, fliers, catalogs, and other materials that are distributed to the public. (Beck Dep. 95:8-19; 120:17-140:11, Ex. 34-37.)

Since 1914, Harley-Davidson has continuously advertised and promoted its motorcycles, parts and accessories, clothing, and headwear bearing the HARLEY-DAVIDSON mark and BAR & SHIELD Logo in catalogs. Each year, the company distributes 2 million *Harley-Davidson*

Motorcycle catalogs, 1 million *Harley-Davidson MotorClothes* catalogs, and 800,000 *Harley-Davidson Parts & Accessories* catalogs to consumers and dealers. (Id. 120:17-137:14, Ex. 34-36.) The company also distributes *Harley Rider Services* catalogs, Harley Owners Group membership materials, rentals materials, and Rider's Edge rider training course materials, all of which bear the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo. (Id.) In addition, since the 1980s, Harley-Davidson's licensees have distributed catalogs for clothing, headwear, footwear, and jewelry bearing the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo. (Id. 156:7-175:18, Ex. 42-54.) A representative sample of catalogs from 1914-2008 is attached as Exhibits 16-36 and 42-54 to Scott Beck's deposition.

g. Internet Advertising

In the early 1990s, Harley-Davidson started advertising and promoting products and services on its website located at harley-davidson.com. (Beck Dep. 61:9-21; 95:8-15; 111:9-113:1.) **REDACTED** The HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo are incorporated into many of the individual web pages within the site, and displayed on branded merchandise shown on the site. (Id.; Johnson Dep. 9:1-31:5.) The blank BAR & SHIELD Logo appears on every page of the website. (Beck Dep. 61:9-21; 111:20-112:2.) Consumers can view motorcycles, parts and accessories, apparel, and a host of other Harley-Davidson merchandise on the website. (Id.) In addition, consumers may view and purchase apparel bearing the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo on the website. (Beck Dep. 111:11-112:13.)

Harley-Davidson's authorized dealers advertise and promote products and services on their own websites in connection with the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo. (Beck Dep. 113:2-114:4.) The vast majority of the 650+ authorized HARLEY-DAVIDSON dealers promote and sell clothing and other products bearing the marks on their own websites. (Id.) Similarly, Harley-Davidson's licensees also advertise and sell products

bearing the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo on their own websites. (Johnson Dep. 37:17-40:3, Ex. 16.)

The company also advertises heavily through search engine marketing, banner advertisements, and brand placement on very broad high-reach media. (Beck Dep. 111:11-16.) For example, Harley-Davidson has a presence on social media sites, such as Facebook and MySpace. (Id.) Through the combined Internet presence of Harley-Davidson and its dealers and licensees, the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo have received significant public exposure on the Internet.

4. Advertisements and Promotional Campaigns Featuring the Marks Have Earned Top Advertising Awards

Harley-Davidson's advertising and marketing campaigns have earned prestigious awards and national media attention. (Beck Dep. 184:2-185:8.) In 2002, the company won the Magazine Publishers of America Kelly Award, which is one of the most prestigious advertising awards in the United States. (Id.) Harley-Davidson's advertising has been consistently recognized as the highest quality and effective advertising by industry leaders. (Id.) Between 1980-1999, Harley-Davidson won multiple Effie Awards from the American Advertising Agency Association, recognizing the company's outstanding advertising campaigns each year. (Id.) The company also earned numerous Direct Marketing Association awards for its *MotorClothes* catalogs. (Id.)

5. The HARLEY-DAVIDSON Name and Mark and BAR & SHIELD Logo Have Received Extensive Unsolicited Media Attention

The company's HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo have earned intense unsolicited media attention. Harley-Davidson's products and services have been featured and identified under these marks in numerous national television programs, books, newspaper and magazine articles, and online publications, including but not limited to MSNBC, CNN Money, Yahoo! Finance, About.com, Foxnews.com, Cnn.com, Bloomberg.com, *The New York Times, USA Today, The Chicago Tribune, Business Week, Forbes, The Wall*

Street Journal, Bloomberg, The Houston Chronicle, Newsday, The Washington Post, The Los Angeles Times, The Miami Herald, The Atlanta Constitution and Journal, and the *Detroit Free Press.* (Beck Dep. 145:14-150:18, Ex. 40; Opp's Not. of Rel Nos. 7-9.)

As shown in the representative excerpts below, in the majority of instances, the publications specifically recognize the "famous," "well-known," and "iconic" HARLEY-DAVIDSON brand and BAR & SHIELD Logo. (Opp's Not. of Rel Nos. 7-9.) Many of these unsolicited stories cover the phenomenal achievements of the company, and its legendary cult brand status. (Id.)

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Such intense media attention and substantial exposure to the consuming public has expanded the universal public awareness and renown of the HARLEY-DAVIDSON mark and BAR & SHIELD Logo beyond its product and service categories. A representative sample of unsolicited media attention includes the following (Opp's Not. of Rel. Nos. 8 and 9):

DATE	HARLEY-DAVIDSON NAME AND MARK ARTICLE EXCERPTS
2-28-1981	Agis Salpukas, "U.S. Group Set to Buy Harley," *The New York Times*, Section 2; Page 29, Column 5; Financial Desk "The new company, which will own **the famous Harley-Davidson name....**"
April 1985	"Penthouse and Harley-Davidson. Of Man and Machine." *Penthouse* **"Harley Davidson builds more than motorcycles. They build legends."**
6-20-1996	"Best Bets; Ventura County Weekend," *Los Angeles Times*, Section Calendar; Part F; Page 1A; Zones Desk "**Famous names such as** Indian, **Harley-Davidson**, Triumph and BSA will rev it up...."
8-23-1999	Fara Warner, "Shake-Up in Light Trucks in Coming Down the Pike — New Marketing, Hybrids and Small, Specialized Runs May Have a Big Impact," *The Wall Street Journal*, Section Industry Focus; Pg. B4 **"The Harley-Davidson F-150, meanwhile, trades on the macho appeal of the famous motorcycle brand**..."

DATE	HARLEY-DAVIDSON NAME AND MARK ARTICLE EXCERPTS
10-5-1999	Judy Fahys, "Court Backs Utah, Tuition Vouchers; State Wins Right to Tout Snow as 'The Greatest'; Snow Motto is Utah's, Court Declares," *Salt Lake Tribune*, Section: Final; Pg. A1 "...its concern about protecting its brand identity was shared by **such famous trademark-holders as** Revlon, John Deere, Listerine, **Harley-Davidson**...."
5-31-2001	Peter Porco, "Harley loses role with APD; HOGLESS: The Police Department's motorcycle officers are now riding RMWs with antilock brakes," *Anchorage Daily News*, Section METRO, Pg. B1 **"Harley-Davidson, the most famous name in motorcycles..."**
12-21-2001	Bob Golfen, "Guitarmaker Moves Into HQ Fender Holds Open House at New Offices," *The Arizona Republic (Phoenix)*, Section NORTHEAST PHOENIX COMMUNITY, Pg. 1 "Just as with **another famous U.S. brand, Harley-Davidson**, new owners built the franchise..."
11-30-2002	G. Chambers Williams, III, "Harley, Ford Continue Marriage; New Cross-Branded Trucks Offer Special Features," *San Antonio Express-News*, Section DRIVE; pg. 1J "Ford has added yet another model to its line of F-150 pickups co-branded with **the famous Harley-Davidson name**."
6-12-2003	"Harley-Davidson Marketing Veteran Clyde Fessler Joins Redline's Board of Directors," *Business Wire* **"Harley-Davidson....one of the most successful companies and well-known brands in the world." "...a brand strategy that has endured for over 20 years and enabled Harley-Davidson to be inducted into the Marketing Hall of Fame**;..."
7-18-2003	Lloyd Price, "Luxurious Touches Soften Rough, Tough Chevy Trucks," *Pittsburgh Post-Gazette*, Section Business, Pg. B-12 "Some, such as Ford, have licensing arrangements with such **well-known brands as Harley Davidson**..."
6-13-2004	Andrew Leckey, "Leisure stocks having a great time," *Chicago Tribune*, Section BUSINESS, ZONE C, Pg. 5 "He also recommends **Harley-Davidson Inc. (HDI), the famous motorcycle company that boasts a solid and growing cult following**."
7-18-2004	"Chick-Fil-A Chief Says Good Hires Key to Success," *Florida Times-Union*, Section BUSINESS; Pg. G-1 "Cathy's goal is to have his family-owned company's brand ranked with such **well-known (and beloved) companies** as Krispy Kreme and **Harley-Davidson**."
10-28-2004	"Briefly: Columbia Helicopters Will Ferry National Tree," *The Oregonian*, Section SOUTH ZONER, Pg. D02 " ' **Harley Davidson is probably the most popular motorcycle in the world today**,' West Linn Police Chief John Ellison said."

DATE	HARLEY-DAVIDSON NAME AND MARK ARTICLE EXCERPTS
4-1-2005	Rebekah Bennett; Sharyn Rundle-Thiele, "The Brand Loyalty Life Cycle: Implications for Marketers," *Journal of Brand Management*, Vol. 12, No. 4; Pg. 250 "Brand communities are groups of consumers whose common theme is their usage of a particular brand. Jeep and **Harley-Davidson** are two **well-known brands** that have established brand communities..."
11-6-2006	"Harley-Davidson Proving its Popularity on eBay According to Research by Terapeak," *Business Wire* "Over the past century **Harley-Davidson has established itself as the most well-known motorcycle brand on the planet**, with one of the most loyal customer bases of any brand."
5-26-2007	Rick Romell, "Hearse Lets Harley Fans Have One Last Ride," *The Milwaukee Journal Sentinel*, Section A News; Pg. 1 "...local **manufacturing icon Harley-Davidson Inc., which carefully guards it famous brand**."
6-16-2007	Joe Michaud, "Mechanic's DVD series allows Harley owners to get their fix," *The San Diego Union-Tribune*, Section AUTO, Pg. L-3 **"The popularity of Harley-Davidson cannot be denied."**
1-19-2008	"Today's Business," *The Myrtle Beach Sun-News,* Section BRIEFS, Pg. 2 "The deal calls for **Harley-Davidson to place its famous logo..."**
1-24-2008	Steve Sievert, "UFC is hoping Lesnar can do heavy lifting," *The Houston Chronicle,* Section SPORTS, Pg. 2 "The UFC **signed a deal this month with Harley-Davidson that puts the company's famous logo** in the center of UFC's octagon and on event-related signage."

DATE	BAR & SHIELD LOGO ARTICLE EXCERPTS
1-23-1989	"High on Hog; Harley Davidson's Influence on Motorcycle Clothes," *Daily News Record,* Section Pg. p24(2) Vol. V19 No. N16 ISSN: 1041-1119 "...almost anything with the name or H-D logo, the **now-infamous bar and shield**, was selling."
7-12-1998	"Harley Bikers Blast East for Motorcycle Company's 95th Birthday Bash," *The Denver Post,* Section DENVER & THE WEST; Pg. B-03 **"The emblems incorporate the familiar Harley-Davidson 'bar-and-shield' logo..."**
8-15-2002	"A Full-Throttle Anniversary Party; Harley Davidson Roars Into Town With Musical Stars Along for the Ride," *The Baltimore Sun,* Section LIVE, Pg. 3T **"The familiar 'Bar and Shield' Logo was placed on Harley-Davidson motorcycles in 1910."**
8-19-2002	"On a Harley-Davidson, Riding Into the Sunset; A Demographic Grows Up, and Grayer," *The Washington Post*, Section STYLE; Pg. C01 **"...trademark of Harley power, nearly synonymous with the bar-and-shield logo...Harley-Davidson has left an indelible mark on the world."**

DATE	BAR & SHIELD LOGO ARTICLE EXCERPTS
9-1-2002	"Harley-Davidson Safety Eyewear," *Roofing Contractor,* Section Pg. 69(2) Vol. 22 No. 9 ISSN: 1098-1519 **"The brand name and famous bar-and-shield logo are also prominently featured on the front."**
9-22-2002	"Happiness is a Harley; Legendary Motorcycles Near the Century Mark With a Legion of Loyal Fans," *Plain Dealer,* Section SUNDAY LIFE; Pg. L1 **"...surrounded by models of every Harley ever made, a Harley clock, belt buckles, photographs, books and mugs—all with Harley's trademark black and orange 'bar and shield' logo."**
8-10-2003	"1903 was Big Year for American Icons; Today's Everyday Names Were Just Getting Started, as Was the City," *The Dallas Morning News,* Section IRVING; Pg. 1K **"The company's famous 'bar and shield' logo came along in 1910."**
8-11-2003	"Harley Riders Hit Road for Anniversary," *Chicago Daily Herald,* Section NEIGHBOR; Lisle; Pg. 1 **"...it has become an American icon in the process. Its 'bar-and-shield' logo has global recognition."**
8-25-2003	"Harley-Davidson Merchandising Goes Full Throttle," *USA TODAY,* Section MONEY; Pg. 1B **"...the company has become a marketing powerhouse, attaching its ubiquitous bar-and-shield logo to everything from toys to underwear."**
9-26-2003	"On the Road Again; Motorcycle Sales Up as Ex-Riders Return. *San Antonio Express-News,* Section S.A. LIFE; Pg. 1F **"These are usually emblazoned with Harley's ubiquitous bar-and-shield logo and range from T-shirts and hats to pet products..."**
1-8-2005	"Future Harley-Davidson-Ford F-150: It's Black of Course," *Duluth News-Tribune,* Section Pg. NATL **"...have a split five-spoke design, exposed lug nuts and the distinctive Bar & Shield logo on the center caps."**
10-3-2005	"Happy Harleyween!" *Pittsburgh Post Gazette,* Section LIFESTYLE, Pg. S-14 **"The range of items branded with that familiar bar and shield logo is staggering."**
2-1-2006	"Kaman Creates Harley Accessory Line; Flash," *Music Trades,* Section Pg. 74(1) Vol. 154 No. 1 ISSN: 0027-4488 **"Each strap features a unique design created by Harley Davidson, focusing on its iconic 'Bar- and-Shield' and 'Harley Eagle' logos."**
2-8-2006	"Get it in Gear; Accessorizing in Harley Stuff Almost a Bigger Business Than the Bikes," *Knoxville News-Sentinel,* Section BUSINESS; Pg. C1 **"Where will the famous bar and shield logo show up next..."**
6-23-2006	Riders Keep it Cool," *Green Bay Press-Gazette,* Section SPECIAL SECTION; Pg. 3T **"Almost any type of apparel, including T-shirts with the well-known Harley bar and shield, boots, hats, belts and blouses..."**

DATE	BAR & SHIELD LOGO ARTICLE EXCERPTS
4-8-2008	"Small U.S. Firms Make Big Global Sales; Sinking Dollar, Cultural Ties, Free Trade Provide Boost," *USA TODAY,* Section MONEY; Pg. 1B **"The demand for goods with Harley-Davidson's famous bar-and-shield logo has grown steadily each year."**

Further, the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo have been featured in numerous books and publications, including use in the titles of publications and on book covers. (Beck Dep. 202:14-209:19, Ex. 65-75; Johnson Dep. 33:7-37:16, Ex. 14-15; Opp's Not. of Rel. 7.) For example, a search of Amazon.com revealed over 900 books, and the Library of Congress holds over 200 books, on or mentioning HARLEY-DAVIDSON. (Id.) The following representative samples of books specifically mention or show the HARLEY-DAVIDSON name and mark and/or BAR & SHIELD Logo as part of the title or on the front cover: *100 Years of Harley-Davidson Advertising, Harley-Davidson Century, Harley-Davidson, Harley-Davidson Motorcycles*, *The Art of Harley, 101 Uses for An Old Harley, American Iron Magazine Presents 90 Years of Harley-Davidson*, *100 Years of Harley-Davidson*, and *The Big Book of Harley-Davidson.* (Id.)

All of these advertising awards, television and film placements, books, and media accolades highlight the widespread and intense exposure and recognition of the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo over decades. They also evidence how the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo have created and influenced a lifestyle, and how these brands have transcended their product and service categories to become iconic brands that are part of the popular culture.

6. The HARLEY-DAVIDSON Mark and BAR & SHIELD Logo Are Recognized as Famous and Iconic Brands

Both the Federal Circuit and the Board have held the HARLEY-DAVIDSON mark famous. In *Ronda Ag v. Harley-Davidson, Inc.*, the Federal Circuit affirmed the Board's order granting summary judgment to Harley-Davidson, Inc. on the grounds of priority of use and likelihood of confusion against Ronda's registration of the mark HARLEY for watches. (Opp's

Not. of Rel. 6, *Ronda Ag v. Harley-Davidson, Inc.,* No. 96-1297, 1997 U.S. App. LEXIS 3597, *4.) (Fed. Cir. Feb. 27, 1997.)[3] In that case, the Board recognized, and the Federal Circuit acknowledged, Harley-Davidson, Inc.'s registrations and long use of the mark HARLEY-DAVIDSON in connection with motorcycles, clothing, jewelry, and watches. (Id., 1997 U.S. App. LEXIS 3597 *3-4.) In its decision, the Federal Circuit specifically held that "HARLEY-DAVIDSON is a well-known and famous trademark." (Id., 1997 U.S. App. LEXIS 3597 *3.) In this case, Harley-Davidson has submitted even more compelling evidence of the fame of both its HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo.

Media, brand leaders, and the public have long recognized the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo as among the most famous and valuable trademarks in the world. For the past five consecutive years, a leading international branding consultancy firm, Interbrand, has ranked HARLEY-DAVIDSON among the top 50 most valuable brands in the world, outranking well-known brands like KODAK, APPLE, GUCCI, KRAFT, and many others. (Beck Dep 185:9-186:6; 190:8-19, Ex. 58.) In 2004, *Business Week* and Interbrand identified HARLEY-DAVIDSON as one of the leading cult brands, stating that "the classic example of a cult brand is Harley-Davidson. . .the brand is self-reinforcing." (Beck Dep. 191:5-22, Ex. 62 (*Business Week*, August 2, 2004).) Similarly, in 2003, *Business Wire* recognized Harley-Davidson as "one of the most successful companies and well-known brands in the world" with "a brand strategy that has endured for over 20 years and enabled Harley-Davidson to be inducted into the Marketing Hall of Fame." (Opp's Not. of Rel. No. 8, Ex. 49 (*Business Wire*, 6-12-2003).) Numerous other national publications have recognized the HARLEY-DAVIDSON mark and BAR & SHIELD Logo as "famous," "well-known," "iconic," "legendary," "distinctive,"

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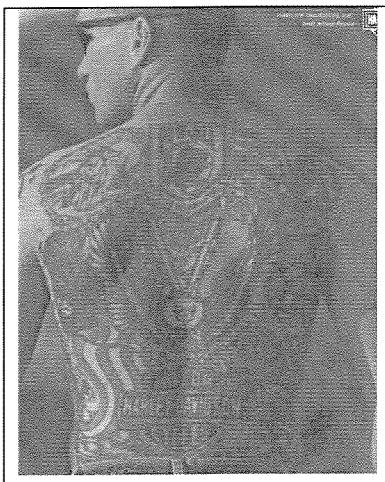
[3] The Federal Circuit has adopted Rule 32.1 that allows the citation of non-precedential decisions, such as *Ronda Ag v. Harley-Davidson, Inc.* The Board has adopted a similar practice of allowing citation of non-precedential decisions in certain circumstances. *See* "Citation of Opinions to the Trademark Trial and Appeal Board," *Official Gazette,* January 23, 2007.

and "beloved" brands. (Opp's Not. of Rel Nos. 7-9.) Indeed, Broehm has admitted in both his Answer to the Notice of Opposition and in discovery admissions that both the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo are famous. (Opp's Not. of Rel. No. 3; Appilcant's Answer ¶ 10.)

Moreover, consumers have long recognized the HARLEY-DAVIDSON mark and BAR & SHIELD Logo as iconic, cult brands that represent not only the company and its products and services, but also a lifestyle. Numerous consumers have demonstrated their customer loyalty to and identification with these brands by placing tattoos of the BAR & SHIELD Logo on their bodies as shown below. (Beck Dep. 118:16-119:12; 205:20-206:7, Ex. 69.)

	
Harley-Davidson, Inc. 2007 Annual Report (Johnson Dep. 29:10-31:3, Ex. 12, p. 1.)	*100 Years of Harley-Davidson Advertising* (1987 print advertisement) (Beck Dep. 114:5-119:12, Ex. 14, p. 101.)

7. Harley-Davidson Aggressively Protects its Marks

Because of the invaluable goodwill that the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo represent, and their importance to the company, Harley-Davidson vigorously protects its marks, and takes legal action when appropriate to prevent others from encroaching upon its rights. (Beck Dep. 72:11-78:12, Ex. 7-8; Opp's Not. of Rel. 2, SEC 10-K 2005, p. 11.) As part of its enforcement efforts, the company has sent cease-and-desist letters and taken legal action. (Beck Dep. 73:21-74:12.) Harley-Davidson has a vigorous program of

trademark registration and enforcement to strengthen the value of its marks and prevent the unauthorized use of them. (Opp's Not. of Rel. 2, SEC 10-K 2005, p. 11.)

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C. Broehm's HOLY-DIVINESON Bar & Shield Mark

1. Broehm's Application

On May 30, 2006, Applicant Bryan Broehm filed intent-to-use Application Serial No. 78896325 seeking registration of the mark shown below for "hats; headwear; shirts; t-shirts." According to Broehm's discovery responses, he has not actively promoted or commenced use of the mark in commerce in connection with the identified goods. (Opp's Not. of Rel. No. 4, Interrogatory Nos. 1, 2, and 8.)

2. Broehm Admits that Harley-Davidson's Marks Are Famous and the Inspiration for His Mark

Broehm admits that Harley-Davidson's marks, including the HARLEY-DAVIDSON name and mark and the BAR & SHIELD Logos shown below, are famous. (Applicant's Answer ¶ 10; Opp's Not. of Rel. No. 3, Admission Nos. 4-8.) He also admits that the BAR & SHIELD Logos shown below were used as inspiration for the design of his mark, and that the parties' marks share geometric aspects. (Opp's Not. of Rel. No. 3, Admission Nos. 11-14 and 19-23.)

Opposer's Mark

Opposer's Mark

Opposer's Mark

Applicant's Mark

3. Broehm Was Aware of Harley-Davidson's Products and Marks Before Selecting His Mark and Filing His Application

Broehm admits that, prior to selecting and seeking registration for his HOLY-DIVINESON BAR & SHIELD mark, he was aware of the HARLEY-DAVIDSON mark and BAR & SHIELD Logo. (Opp's Not. of Rel. No. 3, Admission Nos. 1-3.) Indeed, Broehm admits that he owns a Harley-Davidson motorcycle, and is a member of the Harley Owners Group. (Opp's Not. of Rel. No. 5, Document Req. Nos. 30-31.) Moreover, he purchased Harley-Davidson T-shirts, clothing, and accessories years before filing his application. (Opp's Not. of Rel. No. 4, Interrogaory No. 5.)

4. Broehm's Defenses and Filings Are Improper, Not Supported by Any Evidence of Record, and Should be Given No Consideration

Broehm's Answer, filed July 17, 2007, contains certain arguments and "defenses," including an allegation that his mark constitutes a parody of the HARLEY-DAVIDSON mark and that his mark is comprised of a Maltese cross. However, Broehm has failed to take or submit any testimony or evidence in this case, let alone any evidence that consumers recognize or perceive his mark as a "parody" or a Maltese cross.[4] To the extent Broehm seeks to rely on his untimely and improper evidence filed *after* the close of his testimony period, Harley-Davidson maintains its objections to this evidence. Moreover, the Board should not consider any defenses and arguments made in Broehm's Answer that are not supported by any testimony or evidence. *See Schering-Plough HelathCare Products, Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1328 (TTAB 2007) (refusing to consider arguments not supported by evidence). In this

[4] Even if the Board considers Broehm's argument that his mark is based on a Maltese cross, such argument must fail. According to Webster's New Universal Unabridged Dictionary (1983), copy attached, a Maltese cross has arms that "look like arrowheads pointing inward." Thus, Broehm's mark looks nothing like a Maltese cross. *See University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 217 USPQ 505 (Fed. Cir. 1983) (the Board may take judicial notice of dictionary definitions that are relevant to the issue of likelihood of confusion).

case, the Board should give Broehm's improper and unsupported allegations and arguments no further consideration.

V. ARGUMENT

A. Harley-Davidson Has Standing

Harley-Davidson has conclusively established standing to bring this opposition. It has presented evidence of its ownership of numerous prior-issued registrations for the HARLEY-DAVIDSON mark and BAR & SHIELD Logo, as well as its prior use of these marks in connection with goods and services identical and closely related to those listed in Broehm's application. (*See Supra,* Section IV A 7, pp. 3-4.) Moreover, Harley-Davidson has submitted evidence showing that its likelihood of confusion and dilution claims are meritorious.

B. Harley-Davidson Has Priority of Use and Registration

Harley-Davidson has introduced over 60 registrations for the HARLEY-DAVIDSON mark and BAR & SHIELD Logo. (*See Supra,* Section IV A 5, pp. 17-19.) All of these registrations are owned by H-D Michigan, Inc., and are valid and subsisting. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 182 USPQ 108, 110 (CCPA 1974) (in an opposition, the issue of priority does not arise for the goods and services recited in opposer's valid and subsisting registrations); *Brewski Beer Co. v. Brewski Bros.*, 47 USPQ2d 1281, 1283-84 (TTAB 1998) (plaintiff may rely on its registration to prove that the mark was in use at least as early as the filing date of the application that matured into its registration).

In addition, Harley-Davidson has introduced testimony and exhibits evidencing its prior and continuous use in commerce of the HARLEY-DAVIDSON name and mark and its BAR & SHIELD Logos in connection with, among other things, motorcycles, motorcycle parts and accessories, clothing, headwear, jewelry, patches, pins, helmets, belts, eyewear, lapel buttons, and retail store services for such goods. (*See Supra,* Section IV A 3, pp. 8-17.) *Nat'l Cable Television Ass'n v. American Cinema Editors Inc.*, 19 USPQ2d 1424 (Fed. Cir. 1991) (canceling mark based on petitioner's prior use of trade name). Harley-Davidson's prior use and

registration of its BAR & SHIELD Logo includes use and registration of the "blank" logo discussed above, which provides rights to the bar and shield shape regardless of any wording inside.

C. There is Significant Likelihood of Confusion Between the Marks

In determining likelihood of confusion, the Board should consider evidence relating to the thirteen factors set forth in *In re E. I. Du Pont de Nemours & Co.*, 177 USPQ 563, 567 (CCPA 1973). The Board need not consider each and every *Du Pont* factor. *Han Beauty, Inc. v. Alberto-Culver Co.*, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001). Rather, the Board is required to consider only those factors that are most relevant in the instant case. The most relevant factors in this case are: (1) the fame of the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo; (2) the identical and closely related nature of the parties' goods and services; (3) the unrestricted channels of trade, class of consumers, and nature and type of merchandising and marketing services as set forth in the opposed application; (4) the unsophisticated consumers of inexpensive goods and services; (5) the similarity of the marks; and (6) the absence of evidence of third-party *use* of marks similar to the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo.

The evidence of record leaves no room for doubt that Broehm's HOLY-DIVINESON BAR & SHIELD mark, when used and/or registered in connection with identical and closely related goods, so resembles the famous HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo that confusion as to source, sponsorship, or affiliation is highly likely.

1. The Fame of the HARLEY-DAVIDSON Mark and BAR & SHIELD Logo Overwhelmingly Supports a Finding of Likelihood of Confusion

The fame of an Opposer's mark plays a "dominant role in the process of balancing the *DuPont* factors." *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005); *Recot, Inc. v. Becton*, 54 USPQ2d 1894, 1897-98 (Fed. Cir. 2000). As the fame of a mark increases, the degree of similarity between the marks and

goods and services necessary to support a conclusion of likely confusion declines. *Bose Corp. v. QSC Audio Prods.*, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002). This is because famous marks are more likely to be remembered and associated in the public mind than a weaker mark, and consumers are less likely to perceive differences from a famous mark. *Id.*; *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 6 USPQ2d 1719, 1722 (Fed. Cir. 1988).

The Federal Circuit has recognized the interaction of fame and the relatedness of goods and services when assessing the likelihood of confusion. In *Recot*, the court *reversed* the Board's finding of no likelihood of confusion between the marks FIDO LAY for edible dog food snacks and FRITO-LAY for human snack food. *Recot*, 54 USPQ2d 1894. There, the court determined that the Board erred in discounting the significance of the admitted fame of the FRITO-LAY mark, stating "[i]ndeed, it is precisely these circumstances which demand great vigilance on the part of a competitor who is approaching a famous mark, for, as the present case illustrates, the lure of undercutting or discounting the fame of a mark is especially seductive." *Id.* at 1897. Where, as here, the senior user's mark is "famous," protection should be accorded "independent of the consideration of the relatedness" of the goods and services. *Id.* at 1898.

Moreover, the Federal Circuit has held that a strong mark casts a long shadow that others must avoid. *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.,* 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). As the court has admonished repeatedly:

> There is 'no excuse for even approaching the well-known trademark of a competitor...and...all doubt as to whether confusion, mistake, or deception is likely is to be resolved against the newcomer, especially where the established mark is one which is famous.' *Id.*

Here, the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo are unquestionably distinctive and famous marks. A famous mark is one "with extensive public recognition and renown." *Id.* The fame of a mark may be measured indirectly by the volume of

sales and advertising expenditures, the length of use of the mark, and widespread unsolicited media attention. *Bose Corp.*, 63 USPQ2d at 1309.

As demonstrated above, the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo are both famous by every one of those measures. (*See Supra,* Section IV B 1-7 at pp. 19-35.) The evidence in this case confirms that the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo are among the most distinctive and famous marks in the U.S. and the world. In fact, the evidence in this case far exceeds the "extensive public recognition and renown" found sufficient to establish fame in many other cases. *See e.g., Nina Ricci S.A.R.L. v. E.T.F. Enters. Inc.*, 12 USPQ2d 1901, 1902 (Fed. Cir. 1989) (NINA RICCI famous for perfume, clothing and accessories based on $200 million in sales and $37 million in advertising over 27 years of use); *Kimberly-Clark Corp. v. H. Douglas Enters., Ltd.*, 227 USPQ 541, 542 (Fed. Cir. 1985) (HUGGIES famous for diapers based on over $300 million in sales over 9 years and $15 million in advertising in one year); *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 223 USPQ 1281, 1284 (Fed. Cir. 1984) (SPICE ISLANDS FAMOUSE for teas, spices and seasonings based on use for 40 years, $25 million annual sales for spices, $12 million sales for tea between 1959 and 1981, and "several million" in advertising); *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 218 USPQ 390, 392-93 (Fed. Cir. 1983) (GIANT FOOD famous for supermarket services and food products based on sales over $1 billion in one year, "considerable amounts of money" in advertising, and 45 years use); *Starbucks U.S. Brands LLC v. Ruben*, 78 USPQ2d 1741 (TTAB 2006) (STARBUCKS famous for restaurant services and coffee products based on total sales revenues of $10 billion, advertising expenditures of $150 million over three years, and over 30 years of use).

Since 1903, Harley-Davidson has grown from a single dealership in Chicago to over 650 dealerships nationwide and approximately 200 other retail outlets. (*See Supra*, Section IV B 1, p. 19-20.) The company also has an extensive licensing program for clothing, headwear,

jewelry, bags, pins, small leather goods, footwear, toys, and numerous other products under its HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo. (Id.) Licensed products bearing these marks are advertised and sold through Harley-Davidson dealerships, mass merchandisers, convenience stores, and boutiques, including Target, K-Mart, Wal-Mart, Sears, JCPenney, and 7-Eleven, exposing tens of millions of consumers to the company's brands every day. (Id.)

Harley-Davidson has achieved great commercial success under its HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo.

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Harley-Davidson's advertising and promotional activities include national and local television and radio commercials, print advertisements (e.g., national magazines and newspapers), signage, in-store displays, billboards, catalogs, rallies, sponsorships, the Internet, and much more. (Id., Section IV B 3, pp. 20-28.)

Accordingly, the fame factor weighs heavily in favor of finding a likelihood of confusion.

2. The Parties' Goods and Services are Identical and Will be Sold Through the Same Channels of Trade to the Same Consumers

The determination of similarity or relationship between the goods and services of the parties must be made on the basis of the goods and services identified in the respective applications and registrations. *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 16 USPQ2d 1783, 1788 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods

are directed.") Neither the Board nor the courts will read limitations into an identification of goods and services. *Squirtco v. Tomy Corp.*, 216 USPQ 937, 940 (Fed. Cir. 1983).

Broehm's application broadly covers "hats; headwear; shirts; t-shirts." The identification of goods is not restricted to any particular class of consumers, channels of trade, or nature of use. Likewise, Harley-Davidson's pleaded registrations are unrestricted and cover the identical and closely related goods and services to those in Broehm's application. (See *Supra*, Section IV A 5, p. 17-19.) Moreover, Harley-Davidson has established extensive use of its HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo for hats, headwear, shirts, and t-shirts well prior to the filing date of the opposed application. (See *Supra*, Section IV A 3-4, pp. 8-17.)

Because the parties' respective application and registrations are unrestricted, and cover the identical or virtually identical goods, the Board must presume that the goods and services of the parties are offered in the same channels of trade and to the same class of consumers in this case. *Hewlett-Packard Co. v. Packard Press Inc.*, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002) ("[A]bsent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers.").

3. The Marks are Strikingly Similar in Sound, Appearance, Connotation, and Overall Commercial Impression

The "similarity or dissimilarity of the marks in their entireties" is a predominant factor. *DuPont*, 177 USPQ at 567. This factor examines the relevant features of the marks, including appearance, sound, connotation, and commercial impression. *Recot*, 54 USPQ2d at 1899. This comparison may give more or less weight to a dominant feature of the marks. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 218 USPQ at 395. Further, similarity as to only one element (i.e., sight, sound, or connotation) may be sufficient to find marks similar. *See Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, 1914 (TTAB 2000); *In re White Swan, Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). Finally, the respective marks need not be identical to support a finding of a likelihood of confusion.

In this case, the similarities between the marks in appearance, sound, connotation, and overall commercial impression are irrefutable. Broehm's mark encompasses the *entirety* of Harley-Davidson's BAR & SHIELD Logo. Both Broehm's mark and Harley-Davidson's BAR & SHIELD Logo contain the virtually identical designs, including the same size, shape, and position of a bar and shield. Indeed, Broehm acknowledges that the Harley-Davidson BAR & SHIELD Logos below were an inspiration for the design of his mark, and that the marks share geometric aspects. (Opp's Not. of Rel. No. 3, Admission Nos. 11-14 and 19-23.) In both parties' marks, the bar is comprised of an elongated rectanglar bar superimposed over a background shield. Further, in both parties' marks, the bar and shield have a black background with white borders, and the lettering with the designs is in substantially the same size and position.

MOTOR HARLEY-DAVIDSON CYCLES	MOTOR HARLEY-DAVIDSON CLOTHES	MOTOR HARLEY-DAVIDSON COMPANY	JESUS HOLY-DIVINE-SON CHRIST
Opposer's Mark	**Opposer's Mark**	**Opposer's Mark**	**Applicant's Mark**

Moreover, both marks contain hypenated terms in bold, capital letters, with the first terms beginning and ending with "H" and "Y," and the second term beginning with the letter "D" and ending in "SON." The Board has found such similarities alone sufficient to sustain a likelihood of confusion finding in other cases. *See, e.g., Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1305 (TTAB 2004) (finding marks OCASE and ONCONASE confusingly similar in sound and appearance and noting that "[a]lthough petitioner's mark includes an additional syllable, it is the middle portion of the mark. As seen and spoken, this middle portion may be missed by many of the relevant purchasers."); *Bottega Veneta, Inc. v. Volume Shoe Corp.*, 226 USPQ 964 (TTAB 1985) (finding confusion between BORSA VENETO and BOTTEGA VENETA, and noting both marks each have the identical first initials, B and V). Also, the font, size, and positions of the wording in Broehm's mark are strikingly similar to Harley-Davidson's

marks. The number and nature of similarities between the marks necessarily results in a strikingly similar appearance, sound, connotation, and overall commercial impression.

Accordingly, this factor also strongly supports a likelihood of confusion.

4. Consumers Are Unsophisticated Buyers of Inexpensive Products

Consumers generally exercise less care in purchasing inexpensive goods, thereby increasing a likelihood of confusion. *See In re Martin's Famous Pastry Shoppe, Inc.*, 223 USPQ 1289, 1290 (Fed. Cir. 1984). In this case, neither Broehm's application nor Harley-Davidson's registrations covering clothing, headwear, jewelry, and related items are limited to any particular price-point or class of consumers. Thus, the Board must presume that both parties' goods include ordinary clothing items that may be inexpensive and available to the public at large, rather than to a discriminating or sophisticated market segment. *See Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 223 USPQ 1281 (Fed. Cir. 1984). Indeed, the evidence of record shows that many of Harley-Davidson's clothing products range in price from $10 to $60. (Beck Dep. 130:3-20, Ex. 34; pp. 176, 200, 430, 472, 719, 729, 738.) Consumers of these ordinary, inexpensive items of clothing are not likely to exercise a high degree of care in purchasing decisions, thus increasing the risk of confusion.

Accordingly, this factor also weighs in favor of a likelihood of confusion.

5. Broehm Admits Awareness of the Famous HARLEY-DAVIDSON Marks Before Selecting His Mark and Filing His Application

Broehm admits that, prior to selecting and seeking registration of his mark, he was aware of the HARLEY-DAVIDSON mark and BAR & SHIELD Logo. (*See Supra*, Section IV C 2-3, pp. 35-36.) Indeed, Broehm has purchased and owned clothing bearing these marks, he owns a HARLEY-DAVIDSON motorycle, and he is a member of the Harley Owners Group. (Id.) He also admits that the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo are famous. (Id.)

As is often stated, a party who knowingly adopts a mark similar to one used or registered by another for the same goods and services does so at his peril. *In re Shell Oil Co.*, 26 USPQ2d 1687, at 1690-91 (Fed. Cir. 1993); *Nina Ricci*, 12 USPQ2d at 1904. As the newcomer, Broehm had a duty to avoid selecting a mark that is likely to cause confusion with the HARLEY-DAVIDSON name and mark and BAR & SHIELD Logo, and he has "no excuse for even approaching the well-known trademark of a competitor." *Kenner Parker Toys*, 22 USPQ2d at 1456.

6. There is No Evidence the HARLEY-DAVIDSON Mark and BAR & SHIELD Logos Have Been Diluted by Third-Party *Use* of Similar Marks

Harley-Davidson vigorously protects its HARLEY-DAVIDSON mark and BAR & SHIELD Logo against unauthorized use and dilution. (*See Supra*, Section IV B 7, pp. 35-36.) Broehm will no doubt argue that there are numerous third-party names and marks in use for similar marks. On this point, Broehm has attempted to submit, *after* the close of his testimony period, a handful of Internet printouts and photographs allegedly showing such third-party marks. As noted above, however, Harley-Davidson has filed a motion to strike such evidence as improperly and untimely filed. (*See Supra*, Section IV C 4, p. 37.) Thus, there is *no* evidence of record. Moreover, even if the Board considered Broehm's submission, he did not submit any evidence as to the *extent* of any use or promotion of these alleged third-party marks. Without such evidence, the Board cannot assess whether there has been *any* third-party *use*, let alone whether such use has been so widespread to have an impact on consumer perception. *7-Eleven, Inc. v. Wechsler*, 83 USPQ2d 1715, 1729 (TTAB 2007).

In sum, there is no evidence in the record of any third-party *use* of similar marks. Accordingly, the HARLEY-DAVIDSON mark and BAR & SHIELD Logo are extremely strong and entitled to a broad scope of protection.

7. Any Doubts Concerning Likelihood of Confusion Should be Resolved in Harley-Davidson's Favor

The Federal Circuit has repeatedly held in trademark cases that all doubts as to whether confusion, mistake, or deception is likely should be resolved in favor of the senior user. *Century 21 Real Estate Corp. v. Century Life of America*, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992); *Kimberly-Clark Corp.,* 227 USPQ at 543. Harley-Davidson has established that it is the senior registrant and user of the HARLEY-DAVIDSON mark and BAR & SHIELD Logo; that it is the senior user of the trade name HARLEY-DAVIDSON; that its marks are distinctive and famous; and that Broehm is clearly the newcomer. Thus, any doubts regarding likelihood of confusion between Harley-Davidson's famous trade name and mark and BAR & SHIELD Logo and Broehm's mark should be resolved in Harley-Davidson's favor.

D. Broehm's HOLY-DIVINESON BAR & SHIELD Mark is Likely to Dilute the Distinctiveness of Both the Famous HARLEY-DAVIDSON Mark and Famous BAR & SHIELD Logo

The Board also should deny registration of the opposed mark because it is likely to dilute the distinctiveness of both the famous HARLEY-DAVIDSON mark and famous BAR & SHIELD Logo in violation of Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c). *Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164 (TTAB 2001). Dilution is defined as the "lessening of the capacity of a famous mark to identify and distinguish goods and services." 15 U.S.C. § 1125; *NASDAQ Stock Mkt., Inc. v. Antartica S.r.l.*, 69 USPQ2d 1718, 1733 (TTAB 2003).

To prevail on a likelihood-of-dilution claim in an opposition proceeding, an Opposer must show (1) its mark is distinctive; (2) its mark is famous; (3) its mark had become famous prior to the filing date of the involved application and any date of use established by Applicant; and (4) the capacity of Opposer's mark to identify its goods and services is likely to be lessened by the opposed mark. *Toro*, 61 USPQ2d at 1173.

In evaluating the fame and distinctiveness of a mark, the Federal Trademark Dilution Act sets forth eight non-exclusive factors. 15 U.S.C. § 1125(c)(1); *Toro*, 61 USPQ2d at 1175-76.

These factors include the degree of inherent or acquired distinctiveness of the mark, the duration and extent of use of the mark in connection with the goods or services with which the mark is used, the duration and extent of advertising and publicity of the mark, the geographical extent of the trading area in which the mark is used, the channels of trade for the goods or services, the degree of recognition of the mark in the trading areas and channels of trade used by the mark's owner, the nature and extent of use of the same or similar marks by third parties, and whether the mark is registered on the Principal Register.

Here, the HARLEY-DAVIDSON mark and BAR & SHIELD Logo are both distinctive. The BAR & SHIELD Logo is an arbitrary combination of design elements. The fact that the HARLEY-DAVIDSON mark and BAR & SHIELD Logo are distinctive is beyond reasonable dispute. The marks are registered on the Principal Register for a wide variety of goods and services. (Opp's Not. of Rel. 1.) The numerous registrations for these marks on the Principal Register are conclusive evidence of the distinctiveness of the marks. 15 U.S.C. §§ 1057 and 1115(b). These distinctive marks are thus highly vulnerable to dilution.

1. The HARLEY-DAVIDSON Mark and BAR & SHIELD Logo Had Both Achieved Widespread Public Recognition and Fame Prior to Broehm's Filing Date

A mark is famous for purposes of dilution if there is evidence of widespread recognition of the mark. *Toro*, 61 USPQ2d at 1180-81. Such evidence may include an admission of fame by the other party, intense media attention, or surveys. *Id.* In this case, Harley-Davidson has presented compelling evidence that easily satisfies the *Toro* requirements. (*See Supra*, Section IV B 1-7, pp. 19-35.) As a result of Harley-Davidson's extensive use, tremendous investment in advertising, and substantial sales, the HARLEY-DAVIDSON mark and BAR & SHIELD Logo have attracted intense unsolicited media attention from national and local media. (Id.) All of this exposure has elevated the HARLEY-DAVIDSON mark and BAR & SHIELD Logo to among the most famous global brands, and has expanded the public awareness and renown of the marks well beyond the company's core products and services. Indeed, Broehm admits that both

marks are famous. Further, as shown above, Harley-Davidson's marks became famous well prior to Broehm's filing of the opposed application on May 30, 2006. (*See Supra*, Section IV C 2-3, pp. 36-37.)

2. The HOLY-DIVINESON BAR & SHIELD Mark Will Lessen the Capacity of the HARLEY-DAVIDSON Name and Mark and BAR & SHIELD Logo as Source Identifiers

Once fame and distinctiveness are shown, a likelihood of dilution is established if the marks are sufficiently similar that the junior mark will conjure up an association with the senior mark in the mind of consumers or in the post-sale environment. *Toro*, 61 USPQ2d at 1182-83.

In determining whether dilution is likely to occur, the Board will consider various factors, including: (1) the renown of the senior party; (2); the similarities of the marks, and (3) whether the target customers are likely to associate the underlying products with the mark even if they are not confused as to the origins of these products. *Id.* at 1193. Having established the worldwide renown of the HARLEY-DAVIDSON mark and BAR & SHIELD Logo, the only remaining issues are the similarities of the marks and whether consumers, when encountering Broehm's mark and goods, are likely to make an association with the HARLEY-DAVIDSON mark and BAR & SHIELD Logo.

Regarding the similarities of the marks, both the Board and courts have made clear that the marks need not be identical to find a likelihood of dilution. *Eli Lilly & Co. v. Natural Answers, Inc.*, 86 F. Supp. 2d 834, 847 (S.D. Ind. 2000), *aff'd,* 56 USPQ2d 1942 (7th Cir. 2000) (HERBROZAC substantially similar to PROZAC mark for dilution); *McNeil Consumer Brands v. U.S. DenTek Corp.*, 56 USPQ2d 1758 (E.D. Pa. 2000) (TEMPANOL and TYLENOL held similar for dilution); *Wawa Inc. v. Haaf*, 40 USPQ2d 1629 (E.D. Pa. 1996), *aff'd,* 116 F.3d 471 (3d Cir. 1997) (HAHA similar to WAWA for dilution); *Toro*, 61 USPQ2d at 1183 (the marks in question need only be substantially similar).

In this case, the parties' marks are substantially similar for purposes of dilution. Broehm admits that the parties' respective marks contain geometric similarities, and that Harley-

Davidson's marks were inspiration for the design of his mark. (*See Supra*, Section IV C 2-3, pp. 36-37.) Consumers who are familiar with the renown of the HARLEY-DAVIDSON mark and BAR & SHIELD Logo, when encountering Broehm's mark, are likely to immediately make an association with those famous marks. This is particularaly true where, as here, Broehm's mark contains both words and designs that are substantially similar to Harley-Davidson's words and designs and that are positioned in exactly the same places.

To allow registration of Broehm's mark will erode the distinctiveness and prestige of the HARLEY-DAVIDSON mark and BAR & SHIELD Logo, and encourage the proliferation of marks that will deprive the marks of their unique distinctiveness and impact in the market. *Toro*, 61 USPQ2d at 1183.

VI. CONCLUSION

For the reasons stated herein, Harley-Davidson respectfully requests that the Board sustain the Notice of Opposition.

Respectfully Submitted,

Date: December 9, 2008

By: _____

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CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing OPPOSER'S TRIAL BRIEF has been served upon Applicant via first class mail with postage fully prepaid on this 9th day of December 2008, as follows:

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Dictionary Editorial Offices
New World Dictionaries
850 Euclid Avenue
Cleveland, Ohio 44114

Manufactured in the United States of America

DW 20 19 18 17 16 15

Library of Congress Catalog Card Number: 83-42537

ISBN 0-671-41819-X

Previous editions of this book were published by The World Publishing Company, William Collins +World Publishing Co., Inc. and William Collins Publishers, Inc.

PRINTED IN THE UNITED STATES OF AMERICA

black head and a band of white around the neck.

mal″lē·ȧ·bil′i·ty, *n.* the quality or condition of being malleable.

mal′lē·ȧ·ble, *a.* [Fr. *malléable*, from LL. *malleare*, to beat with a hammer, from L. *malleus*, a hammer.]
1. that can be hammered, pounded, or pressed into various shapes without breaking or returning to its original shape: said of metals.
2. yielding; amenable; adaptable.

mal′lē·ȧ·ble ī′ron (ī′ŭrn), 1. cast iron made from a kind of pig iron by a special process of long heating at a high temperature: it is especially strong and malleable: also *malleable pig iron.*
2. wrought or forged iron.

mal′lē·ȧ·ble·īze, *v.t.* to make malleable.

mal′lē·ȧ·ble·ness, *n.* malleability.

mal′lē·ăl, *a.* pertaining to the malleus.

mal′lē·āte, *v.t.*; malleated, *pt., pp.*; malleating, *ppr.* to hammer; to draw into a plate or leaf by beating.

mal·lē·ā′tion, *n.* the act of beating into a plate or leaf, as a metal.

mal′lē·chō, *n.* mischief. [Obs.]

mal′lee, *n.* [Australian.] any one of several small species of eucalyptus growing in Australia, notably *Eucalyptus dumosa*; also, the scrubby thicket formed by the plants.

mal′lee bīrd, a mound bird of Australia, *Leipoa ocellata.*

mal·lē′i·form, *a.* [L. *malleus*, a hammer, and *forma*, form.] having the form of a hammer.

mal′lē·in, *n.* a culture of the glanders bacillus: used to diagnose the disease.

mal′lē·muck, *n.* [D. *mallemok*, from *mal*, foolish, and *mok*, a gull.] any one of several species of large ocean birds, as the petrel or albatross; especially, the *Fulmarus glacialis*: also written *mallemock, mallemoke.*

mal′len·dērs, *n.pl.* same as *malanders.*

mal·lē′ō·lăr, *a.* in anatomy, pertaining to the malleolus or the malleoli.

mal·lē′ō·lus, *n.*; *pl.* **mal·lē′ō·lī,** [L. *malleolus*, dim. of *malleus*, a hammer.] a rounded bony protuberance on each side of the ankle joint.

mal′let, *n.* [OFr. *mallet, maillet*, dim. of *mal, mail*, a hammer.]
1. a kind of hammer, usually with a heavy wooden head and a short handle, for driving a chisel, etc.
2. (a) a long-handled hammer with a cylindrical wooden head, used in playing croquet; (b) a similar but lighter instrument used in playing polo.

mal′lē·us, *n.*; *pl.* **mal′lē·ī,** [L. *malleus*, a hammer.]
1. in anatomy, the largest and outermost of the three small bones of the middle ear, shaped somewhat like a hammer: also called *hammer.*
2. in zoology, a hammer-shaped body forming part of the masticatory apparatus in some microscopic forms, as *Chætonotus.*
3. [M–] a genus of irregular and inequivalve mollusks, including the hammer shells.

Mal·loph′ȧ·gȧ, *n.pl.* [Gr. *mallos*, a lock of wool, and *phagein*, to eat.] a large group of wingless insects that live as parasites on birds: called also *bird lice.*

mal·loph′ȧ·găn, *a.* same as *mallophagous.*

mal·loph′ȧ·găn, *n.* an insect of the group *Mallophaga.*

mal·loph′ȧ·gous, *a.* 1. devouring feathers, fur, etc.
2. relating to the *Mallophaga.*

mal′lōw, *n.* [ME. *malowe, malue*; AS. *malwe, mealwe*, from L. *malva*, mallow.]
1. any of a family of plants, including the hollyhock, cotton, marsh mallow, and okra, typically with large, showy flowers and a sticky juice in their stems, leaves, and roots.
2. any of a certain genus of plants in this family; especially, the wild mallow, a plant with purplish, pink, or white flowers and hairy leaves and stems.
Indian mallow; see under *Indian.*
mallow rose; (a) any of several mallows with large pink or white flowers; (b) the flower itself: also called *rose mallow.*

mal′lōw·wŏrt, *n.* any plant of the mallow family.

mal′lum, mal′lus, *n.* [LL., of Teut. origin, compare O.H.G. *mahal*, assembly; AS. *mæl*, time, mark.] under old English law, a kind of court or council.

mälm (mäm), *n.* [ME. *malm*; AS. *mealm*, sand.] a kind of calcareous soil suitable for making brick: called also *malmstone* and *malm rock*; also, the brick made from the soil; malmbrick. [Brit. Dial.]

mal′mag, *n.* [native name.] a nocturnal lemur of Madagascar.

mälm′brick, *n.* brick made from malm, a kind of light-colored calcareous earth found in the southern part of England. [Brit. Dial.]

mal·mi·gnatte′ (-nyat′), *n.* [It. *malmignatta*.] a black, red-spotted spider, *Latrodectus malmignattus*, of southern Europe, reputed to be very poisonous.

mälm′sey (mäm′zi), *n.* [ME. *malvesie, malweysy*; OFr. *malvesie, malvoisie*, from It. *malvasia*, a kind of wine, from *Malvasia*, a city on the southeast coast of Laconia, Greece.]
1. a strong, full-flavored, sweet white wine.
2. the grape from which this is made.

mal·nū·tri′tion, *n.* [*mal-* and *nutrition*.] faulty or inadequate nutrition; undernourishment resulting from insufficient food, improper diet, etc.

mal·ob·sĕr·vā′tion, *n.* [*mal-* and *observation*.] faulty or defective observation.

mal·oc·clū′sion, *n.* improper occlusion of the upper teeth with the lower.

mal·ō′dŏr, *n.* [*mal-* and *odor*.] an offensive odor; a bad smell.

mal·ō′dŏr·ous, *a.* having a bad smell; of bad odor.

mal·ō′dŏr·ous·ness, *n.* the quality of having a bad smell.

mal′ō·nāte, *n.* [*malon*ic and *-ate*.] a salt of malonic acid.

mȧ·lō′nic, *a.* of or produced by the oxidation of malic acid.
malonic acid; a colorless, crystalline, dibasic acid, $C_3H_4O_4$, derived from malic acid by oxidation.

mal′ō·nyl, *n.* [*malon*ic and *-yl*.] a radical contained in the compounds of malonic acid.

mä′loo, *n.* a plant of the genus *Bauhinia.*

Mal′ō·pē, *n.* [L. *malope*, a mallow.]
1. a genus of malvaceous herbs of the Mediterranean region cultivated for their handsome flowers.
2. [m–] a plant of the genus *Malope.*

mal′paīs, *n.* [Fr. *mal pays*; *mal*, from L. *malus*, bad, and *pays*, from L. *pagus*, country.] rough, cooled and hardened lava.

Mal·pigh′i·ȧ (-pig′), *n.* [after Marcello *Malpighi*, 17th-c. Italian scientist.] a genus of shrubs of the family *Malpighiaceæ* of tropical America.

Mal·pigh″i·ā′cē·ae, *n.pl.* [*Malpighia* and *-aceæ*.] a family of tropical plants, with leaves set oppositely and red or yellow flowers having a pentamerous calyx and three carpels.

mal·pigh″i·ā′ceous, *a.* of or related to the *Malpighiaceæ.*

Mal·pigh′i·ăn, *a.* of, related to, discovered by, or associated with Marcello Malpighi, the scientist.

Mal·pigh′i·ăn bod′y (or **çor′pus·cle),** 1. any nodule of lymphatic tissue in the spleen.
2. any of a number of small masses of blood vessels (*Malpighian tufts*) in the kidney, enclosed by a capsule that is an enlargement of the end of a tubule through which urine passes.

Mal·pigh′i·ăn lāy′ēr, the soft, lowest layer of the epidermis from which the other layers are derived.

Mal·pigh′i·ăn tūbeş (or **ves′selş),** a group of small, tubular glands that open into the hind part of the alimentary canal in most insects.

Mal·pigh′i·ăn tuft, see *Malpighian body.*

mal·pō·şi′tion (-zish′un), *n.* a faulty, abnormal, or wrong position, especially of the fetus in the uterus.

mal·praç′tice, *n.* [*mal-* and *practice*.]
1. injurious or unprofessional treatment or culpable neglect of a patient by a physician or surgeon.
2. misconduct or improper practice in any professional or official position.
3. in general, wrongdoing; criminal practice; illegal or immoral conduct.

mȧlt, *n.* [ME. *malt*; AS. *mealt*, malt.]
1. barley or other grain steeped in water till it germinates, and then dried in a kiln. It is used in brewing and in the distillation of certain alcoholic liquors.
2. such liquor; beer, ale, etc.

mȧlt, *a.* made with malt.

mȧlt, *v.t.* 1. to change (barley, etc.) into malt or something maltlike.
2. to treat or prepare (milk, etc.) with malt or malt extract.

mȧlt, *v.i.* 1. to be changed into malt or something maltlike.
2. to change barley, etc. into malt; to germinate grain artificially in order to change the starch into a sugar.

Mȧl′tȧ fē′vēr, [so named because prevalent in Malta and other Mediterranean areas.] undulant fever: also called *Mediterranean fever.*

mȧlt′āse, *n.* [*malt* and *-ase*.] an enzyme, occurring in animals, plants, bacteria, etc., that changes maltose into dextrose.

mȧlt dust, the refuse from the grain in malting.

mȧlt′ed milk, 1. a powdered preparation of dried milk and malted cereals.
2. a drink made by mixing this with ice cream, whole milk, and flavoring.

Mȧl·tēşe′, *a.* [*Malta* and *-ese*.]
1. relating to the island of Malta or to its people, their language, etc.
2. of the medieval Knights of Malta.

Mȧl·tēşe′, *n.* 1. *pl.* **Mȧl·tēşe′,** a native or inhabitant of Malta.
2. the language spoken in Malta, a mixture of Arabic and Italian.
3. a Knight of Malta.
4. a Maltese cat or dog.

Mȧl·tēşe′ çat, a variety of domestic cat with bluish-gray fur.

Mȧl·tēşe′ çross, [so called from its use as an emblem by the medieval Knights of Malta.] a cross whose arms look like arrowheads pointing inward: see illustration with *cross.*

Mȧl·tēşe′ dog, a variety of small spaniel with long, silky, white hair, originated in Malta.

mȧlt ex′traçt, an extract of malt evaporated to a sirup and used in medicine as a remedy for debility.

mȧlt flōor, a floor for drying malt.

mal′thȧ, *n.* [L., from Gr. *maltha, malthē*, a mixture of wax and pitch for calking ships.] a kind of mineral pitch, a black, semisolid bitumen.

mȧlt hoṛse, a horse employed in grinding malt; hence, a dull fellow. [Obs.]

mȧlt′house, *n.* a building used for malting.

Mal·thū′şi·ăn, *a.* relating to the English writer, Thomas R. Malthus (1766–1834), or to his doctrines and theories.

Mal·thū′şi·ăn, *n.* a disciple or follower of Malthus.

Mal·thū′şi·ăn·işm, *n.* the doctrine of Malthus that the increase in population is greater than the increase in the means of subsistence, and that unless birth is controlled, poverty and war must serve as a natural restriction of the increase.

mȧlt′in, *n.* maltine.

mȧlt′ine, *n.* [*malt* and *-ine*.] a former medicinal preparation from malt.

mȧlt′ing, *n.* the act or process of making malt.

mȧlt kiln (kil), a structure for drying malt to retard or stop fermentation.

mȧlt liq′uŏr (lik′ĕr), beer, ale, or other fermented liquor made with malt or barley.

mält′-mad, *a.* made mad or intoxicated by drinking; drunken.

mȧlt′măn, *n.*; *pl.* **mȧlt′men,** a maltster.

mält mȧs′tēr, a chief maltmaker.

mȧl·ton′iç, *a.* produced from maltose; as, *maltonic* acid.

mȧlt′ōse, *n.* [*malt* and *-ose*.] a white, crystalline, dextrorotatory sugar, $C_{12}H_{22}O_{11}$, obtained by the action of the diastase of malt on starch; malt sugar.

mal·trēat′, *v.t.*; maltreated, *pt., pp.*; maltreating, *ppr.* [*mal-* and *treat*.] to treat ill; to abuse; to treat roughly, rudely, unkindly, brutally, etc.

mal·trēat′ment, *n.* mistreatment; ill usage; abuse.

mȧlt′stēr, *n.* [*malt* and *-ster*.] a maker of or dealer in malt; a maltman.

mȧlt şug′ăr (shoog′), maltose.

mȧlt′wŏrm, *n.* a tippler.

mȧlt′y, *a.*; *comp.* maltier; *superl.* maltiest, 1. of, like, or containing malt.
2. fond of malt liquor.
3. drunk. [Slang.]

mal·ū·lel′lȧ, *n.*; *pl.* **mal·ū·lel′lae,** [a double dim. from L. *mala*, jaw.] an appendage to the edge of the second pair of jaws of a myriapod.

mā′lum, *n.*; *pl.* **mā′lȧ,** [L.] an evil.

Mal′vȧ, *n.* [L. *malva*, mallow.] a genus of plants typical of the family *Malvaceæ*, or mallow family.

Mal·vā′cē·ae, *n.pl.* [*malva* and *-aceæ*.] the mallow family of plants, characterized chiefly by having the stamens monadelphous and the

who sings popular songs in a soft, sentimental manner.

crop, *n.* [AS. *crop, croppe,* craw, top, or head of a plant; D. *krop,* an excrescence, the gullet, craw.]
1. a saclike enlargement of a bird's gullet, with thick muscular walls in which food is softened for digestion; craw.
2. any agricultural product, growing or harvested, as wheat, cotton, fruit, etc.
3. the yield of any product in one season or place.
4. a group or collection appearing together; as, a new *crop* of students, a *crop* of suggestions.
5. the entire tanned hide of an animal.
6. the handle or butt of a whip.
7. a whip with a looped lash and a short stock, used in horseback riding.
8. the act or result of cropping; especially, (a) hair cut close to the head; (b) this style of haircut; (c) an earmark made by clipping.
9. the top or end of a thing. [Obs.]
10. in mining, an outcropping lode.
11. in architecture, an apex ornament. [Obs.]

crop, *v.t.*; cropped (kropt) *or occas.* cropt, *pt., pp.*; cropping, *ppr.* 1. to cut off the ends of (anything); to eat off; to pull off; to pluck; to mow; to reap; as, to *crop* flowers, trees, or grass.
2. to cut off prematurely.
3. to cause to bear a crop; as, to *crop* a field.
4. to cut (hair, etc.) short.

crop, *v.i.* 1. to bear a crop or crops.
2. to plant or grow a crop.
to crop out (or *up*); (a) to appear unexpectedly; (b) to appear at the surface.

crop'-ēar, *n.* one having cropped ears.

crop'-ēared, *a.* 1. having the ears cropped.
2. having the hair cut short, so that the ears show.

crop'fūl, *a.* having a full crop or belly; satiated.

crop'pēr, *n.* a pigeon, the pouter.

crop'pēr, *n.* 1. a person or thing that crops.
2. a machine for cutting or shearing.
3. a person whose work is shearing the nap from cloth.
4. a farmer who works another's land and receives a share of the crop as wages; a sharecropper.
5. a heavy or headlong fall. [Colloq.]
6. a failure; a disastrous occurrence. [Colloq.]
to come a cropper; (a) to fall heavily or headlong; (b) to come to ruin; fail. [Colloq.]

crop'pie, *n.*; *pl.* **crop'pies** *or* **crop'pie,** a fish, the crappie.

crop'ple-crown, *n.* a copple crown.

crop rō·tā'tion, a system of growing successive crops that have different food requirements, to prevent soil depletion, break up a disease cycle, etc.

crop'sick, *a.* sick from repletion. [Obs.]

crop'sick"ness, *n.* sickness from repletion. [Obs.]

cropt, occasional past tense and past participle of *crop.*

crop'weed, *n.* a plant, the knapweed.

crō·quet' (-kā'), *n.* [Fr., from *croquer,* to crack; Walloon, *croque,* a blow, fillip.]
1. an outdoor game played with mallets, balls, posts, and a series of hoops on a prepared lawn, the object of the game being the driving of a ball through the hoops subject to certain rules.
2. the act of croqueting.

crō·quet', *v.t.*; croqueted (-kād'), *pt., pp.*; croqueting, *ppr.* in croquet, to drive away (an opponent's ball) by hitting one's own which has been placed in contact with it.

crō·quette' (-ket'), *n.* [Fr., from *croquet,* a crisp cake, from *croquer,* to crunch.] a small, rounded or cone-shaped mass of chopped meat, fish, or vegetables, fried in deep fat until browned.

crō'qui·gnōle (-ki-nōl *or* -kin-yōl), *n.* [Fr., fillip, from *croquer,* Norm. form of *crocher,* to hook up, crook, from *croc,* a hook.] a method of imparting a wave to the hair by winding strands of the hair around metal rods and applying heat by chemical or electrical means.

crōre, *n.* [Hind. *kror, koti*; Sans. *koti,* ten millions.] in India, one hundred lacs, or ten millions (of rupees).

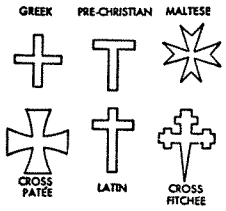
crosh'ä·bell, *n.* a courtezan. [Obs.]

crō'siēr (-zhēr), *n.* [ME. *crocer, croyser*; OFr. *crocier, crossier,* bearer of a staff, from *croce, crosse,* bishop's staff.] the staff carried by or before a bishop or abbot as a symbol of his function as a pastor: also spelled *crozier.*

crō'siēred, *a.* having a crosier.

cros'let, *n.* see *crosslet.*

cross, *n.* [ME. *cros, crosse, crois*; OFr. *crois, croiz*; Pr. *cros, croitz*; L. *crux,* a cross.]



TYPES OF CROSS

1. a gibbet or ancient instrument of torture, generally made of two pieces of timber placed across each other, usually with an upright set in the ground and a horizontal crosspiece below the top of the upright. Upon this, criminals were in ancient times nailed or bound and left to die.
2. the emblem of the Christian religion; a symbol representing the cross on which Jesus died.

MONUMENTAL CROSS

3. a mark of a cross instead of a signature, used by those unable to write.
4. a monument in the form of a cross, or surmounted by a cross, set up as a shrine, memorial, or landmark or to designate a market place.
5. formerly, in England, a coin stamped with the figure of a cross.
6. [C–] in theology, the sufferings of Christ by crucifixion; the atonement.
7. the doctrine of Christ's sufferings and of the atonement, or of salvation by Christ.
8. a trial or affliction that tries one's patience or virtue.
9. anything that thwarts, obstructs, or perplexes; hindrance; vexation.
10. a crossing, or mixing, of varieties, breeds, or races; hybridization.
11. the result of such mixing; a hybrid.
12. [C–] in astronomy, (a) the Northern Cross; (b) the Southern Cross.
13. a casual electrical contact of two wires by which electricity passes from one to the other.
14. a representation or figure of a cross, given as a distinction, or worn as a token of membership in some order or society; as, the *cross* of the Legion of Honor; the Victoria *cross.*

HERALDIC CROSS

15. any of various charges used in heraldry.
16. a crucifix such as may be attached to a rosary or worn about the neck.
17. a contest decided dishonestly, as through one of the parties allowing himself to be beaten for the sake of gaining money by bribery. [Slang.]
18. anything in the form of a cross.
19. a crozier, or pastoral staff.
20. a pipe fitting having two arms at right angles to each other; a four-way joint.
cross and pile; the ancient English game of heads and tails.
surveyor's cross; an apparatus for determining perpendiculars to a given line.
the Cross; (a) the cross on which Jesus was put to death; (b) the suffering and death of Jesus; (c) Christianity or Christendom.
to take the cross; to become a crusader.

cross, *v.t.* 1. to make the sign of the cross over or upon.
2. to place across or crosswise; as, *cross* your fingers.
3. to lie or cut across; intersect; as, Broadway *crosses* Seventh Avenue at Times Square.
4. to draw or put a line or lines across.
5. to pass over; go from one side to the other of; go across; as, he *crossed* the ocean.
6. to carry (troops, etc.) across.
7. to extend or reach across; as, the bridge *crosses* a river.
8. to meet (each other) in passing.
9. to thwart; oppose; go counter to; as, no one likes to be *crossed.*
10. to interbreed (animals or plants); hybridize; cross-fertilize.
to cross off (or *out*); to cancel by or as by drawing crosses over or lines across.
to cross oneself; to outline the form of a cross by moving the hand from the forehead to the breast and then from one shoulder to another a religious gesture.
to cross one's fingers; to cross one finger over another of the same hand: superstitiously believed to bring good luck or mitigate the wrong of telling a half-truth.
to cross one's heart; to make the sign of the cross over one's heart as a token that one is telling the truth.
to cross one's mind; to suggest itself to one.
to cross one's palm; (a) to make a cross on one's hand with a coin, specifically in paying a fortune teller; (b) to pay one money, especially as a bribe.
to cross one's path; to meet one.

cross, *v.i.* 1. to lie across; intersect.
2. to go or extend from one side to the other.
3. to meet in passing.
4. to interbreed; hybridize; cross-fertilize.
to cross over; to pass over from one chromosome to another that is homologous: said of chromatin material in a gene or factor.

cross, *prep.* athwart; transversely; over; from side to side; across. [Dial. or Poet.]
And *cross* their limits cut a sloping way.
—Dryden.

cross, *a.* 1. transverse; oblique; intersecting, passing from side to side; crossing or crossed, lying or passing across.
2. adverse; thwarting; obstructing: sometimes with *to*; as, an event *cross to* our inclinations.
3. peevish; fretful; ill-humored; quick-tempered; as, a *cross* person; a *cross* answer.
4. contrary; opposed; counter.
5. involving reciprocation.
6. of mixed variety, breed, or race; hybrid, crossbred.
Syn.—counter, contrary, opposite, morose, sullen, peevish, petulant, perverse, ill-tempered, fractious, crusty, fretful, irritable.

cross-, *cross* used as a combining form in forming words containing any of the various senses of the word, as *cross*bow, *cross*bred, *cross*breed.

cross ac'tion, in law, an action brought against a plaintiff by a defendant, arising out of the same transaction as occasioned the first suit.

cross aīsle (-īl), a transept. [Obs.]

cross'-ärmed, *a.* 1. with arms across.
2. in botany, brachiate; decussate.

cross ax'le (ak'sl), 1. a device like a windlass, operated by two levers, one at either end.
2. a driving axle in a steam engine turned by cranks placed at right angles to one another.

cross'-band"ed, *a.* in architecture, having the grain of the wood in a veneer crossing that of the rail: applied to hand rails.

cross'bär, *n.* a bar, line, or stripe placed crosswise, as a bar placed between goal posts on a football field.

cross'bär, *v.t.* to furnish or mark with cross bars.

cross'bär shot, a shot so constructed that when it left the gun it expanded into the form of a cross with the four quarters of the ball at its radial points. It was formerly used in naval battles because it was so highly destructive to a ship's rigging.

cross'bēak, *n.* a bird, the crossbill.

cross'bēam, *n.* a beam placed across another or from one wall to another; a transverse beam.

cross'-beär"ēr, *n.* 1. a person who bears or wears a cross.
2. in a furnace, a support for grate bars.

cross'bed·ded, *a.* in geology, having irregular laminations oblique to the main beds of stratified rock.

cross bill, a bill in an equity suit in which the defendant alleges certain charges against the plaintiff as regards the subject matter of that suit.

cross'bill, *n.* any passerine bird of the genus *Loxia* and family *Fringillidæ,* having the mandibles of the bill curving oppositely and crossing; the crossbeak. *Loxia curvirostra* is the common species.

cross'birth, *n.* in obstetrics, any abnormal presentation of the fetus requiring manual turning in the uterus.