

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: June 9, 2011

Opposition No. 91181448

JEFF BROWN

v.

PATRIOT GUARD RIDERS, INC.

Cheryl Butler, Attorney, Trademark Trial and Appeal Board:

Applicant seeks to register the following mark



for "organizing and conducting support groups in the field of combat veterans and their families."¹ (Hereinafter also "logo mark.") The claims in the operative notice of opposition are priority of use and likelihood of confusion, fraud and ownership of the mark.² Opposer pleads ownership and prior use of the marks PATRIOT GUARD RIDERS and PATRIOT GUARD RIDERS and design, and ownership of a pending application to register the mark PATRIOT GUARD RIDERS for "association services, namely, promoting

¹ Application Serial No. 77040379, filed November 9, 2006, claiming a date of first use anywhere of November 11, 2005 and a date of first use in commerce of June 1, 2006.

² See opposer's amended notice of opposition filed March 11, 2010 and the Board's order dated March 1, 2010.

the interest of families of deceased military members and families of deceased veterans," and specific goods identified in five international classes.³

In its answer (filed March 31, 2010), applicant denies the essential allegations of the notice of opposition.⁴

In accordance with the scheduling order dated January 5, 2011, opposer's testimony period closed on April 20, 2011. On that day, opposer filed a notice of reliance. This case now comes up on applicant's fully-briefed motion, filed April 25, 2011, to strike portions of opposer's notice of reliance.

Applicant specifically seeks to strike the following:

1. The file wrapper for applicant's application Serial No. 77383586 for the mark PATRIOT GUARD RIDERS (pending before the Trademark Examining Operation), identified at paragraph No. 1 of opposer's notice of reliance. Opposer states the pertinence of such evidence as follows: "The application history will be relied upon to show material changes in the use of the mark in the United States ... by PGR, Inc. and to corroborate testimony of witnesses as to PGR, Inc.'s use of a confusingly similar mark."

³ Application Serial No. 77041061, filed on November 9, 2006 and claiming an earliest first date of use of October 27, 2005 and an earliest first date of use in commerce of November 9, 2005.

⁴ It has come to the Board's attention that applicant, in its answer, posed objections to the form of opposer's March 11, 2010 amended notice of opposition. Due to the passage of time, and the progress of this case, which is now at trial, applicant's objection that the amended notice of opposition is not double-spaced is overruled. Opposer is reminded, however, that he is required to comply with Trademark Rule 2.126(a)(1), requiring submissions to be double-spaced. Applicant's objections that the notice of opposition does not include a description of the capacity of the signing individual and that opposer's entity type and business address are not included are overruled. These objection address form over substance. The proceeding commenced on December 21, 2007; applicant's attorney made an appearance on October 13, 2008; and the discovery period closed on October 26, 2008. By the time applicant filed its answer (March 31, 2010) to the operative pleading (March 11, 2010), applicant has long been aware of the identity of opposer's attorney (the signatory to the amended pleading) and has had opportunity through discovery (if not already aware) to ascertain opposer's entity type and business address.

2. Internet printouts, identified at paragraph No. 5 of opposer's notice of reliance. Opposer states the pertinence of such evidence as follows: "The home page, the PGR Gear Store home page, the PGR terms of use, the PGR history page, and PGR archived home pages printed from the publicly accessible portions of the PGR website, www.patriotguard.org, on April 18, 2011, relied upon to show PGR's efforts or lack thereof in policing use of the mark and in denying Opposer access to the organization insofar as such denial gives rise to excusable non-use."

In support of its motion, applicant argues that opposer's reliance on the pending application for word-only mark PATRIOT GUARD RIDERS is contrary to the Board's order of March 1, 2010, which stated, in part, that because the pending application "... is currently in examination and has not been published for opposition, any attempt to assert likelihood of confusion or fraud with respect to this application is premature"; that the stated purpose for opposer's intended reliance (to show alleged changes in use of the mark) is not relevant to the claims of priority, likelihood of confusion, fraud, and ownership between opposer's pleaded mark and applicant's logo mark at issue in this proceeding; that reliance on the application is improper to the extent opposer intends to show applicant abandoned its logo mark; and that opposer's intent to rely on the application to corroborate testimony concerning use of a confusingly similar mark is improper because the word-only mark in that application is not at issue in this opposition.

Applicant argues that opposer's stated purposes for relying on the Internet printouts are not relevant because there is no abandonment claim.⁵

In response, opposer argues that it is not introducing the file wrapper from applicant's pending application for the word-only mark to assert any claims against such application; and that introduction of such materials is relevant to the logo mark as "the narrower of the two applications" and to corroborate testimony of witnesses who have made admissions against interest. Opposer argues that the Internet printouts are proper for show applicant's failure to police use of the mark and to show that opposer was denied access to the organization, insofar as such denial gives rise to excusable non-use.

In reply, applicant emphasizes that abandonment is not a claim in this proceeding and, because the evidence in question here concerns abandonment, it should be stricken. Applicant concedes the issues of likelihood of confusion between the parties' respective marks. In view of such concession, applicant contends that there is no reason to present evidence (in the nature of the file wrapper) to corroborate likelihood of confusion. Consequently, applicant argues, the file wrapper

⁵ As applicant now realizes, documents obtained from the Internet may be admitted into evidence pursuant to a notice of reliance, in the same manner as printed publications in general circulation provided they identify the date of publication or date they were accessed and printed, and their source (URL). See *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031 (TTAB 2010); and TBMP § 704.08(b) (3d ed. 2011).

evidence should be stricken. Applicant states it does not concede priority, fraud, and ownership.

Objections to a notice of reliance on substantive grounds (e.g., that the evidence offered hearsay or improper rebuttal, or is incompetent, irrelevant, or immaterial), normally need not and should not be raised by motion to strike. Instead, such objections ordinarily should be raised in the objecting party's brief on the case. See TBMP § 532 (3d ed. 2011).

Here, in view of applicant's unusual, but highly relevant concession on the issue of likelihood of confusion between the parties' marks, the Board finds it appropriate to make a determination on applicant's motion to strike, even though such motion is substantive in nature.

As a preliminary matter, the Board addresses some confusion that has arisen concerning the evidence in question and "abandonment." As applicant has stated repeatedly, there is no abandonment claim. Thus, applicant is not expected to provide a defense on an unpleaded claim of abandonment. As a corollary, opposer is not to argue any unpleaded claim of abandonment. It is the Board's understanding that opposer, when referencing "excusable non-use," is not referring to any period of purported nonuse by applicant. Rather, opposer seems to be seeking to preempt any anticipated argument, and proactively proffer evidence in support of his position, that may be made by applicant that opposer abandoned his use of his mark and that

such purported abandonment is relevant with respect, at least, to the issue of priority. There may be other reasons that opposer is seeking to offer the evidence going to his purported "excusable non-use" that will not become apparent until briefing. The Board notes in passing that applicant, in its answer, did not affirmatively assert abandonment, or nonuse, by applicant.

1. The file wrapper of applicant's pending application for the word mark PATRIOT GUARD RIDERS.

The purposes stated for introduction of such material, particularly to corroborate testimony of witnesses, is not improper. Although of limited probative value, a copy of an application filed, whether owned by a party or not, may be introduced into evidence. See TBMP § 704.03(b)(2) (3d ed. 2011). If owned by a party, the allegations made, and documents and things filed, in the application may be used as evidence against the applicant, that is, as admissions against interest and the like. See TBMP §§ 704.03(b)(2) and 704.04 (3d ed. 2011).

However, this evidence no longer appears relevant because of applicant's material concession on the issue of likelihood of confusion. While there does not seem to be any reason to reference the evidence in briefing, should opposer do so, for reasons other than likelihood of confusion, opposer should fully explain why he is doing so. Consequently, the Board declines to strike the evidence, but also expects that it is highly unlikely there will be any need to rely upon it.

Accordingly, applicant's motion to strike the file wrapper of applicant's pending application Serial No. 77383586, introduced by opposer's notice of reliance at paragraph No. 1, is denied.

2. Internet printouts

The Board has explained that there is no abandonment claim and that opposer's reference to "excusable non-use" is not directed to any purported nonuse by applicant but, apparently, to some anticipated argument that opposer has had periods of nonuse. Consequently, the Internet printouts may be relevant at least with respect to opposer's claim of priority. The materials may also be relevant to the remaining claims.

Accordingly, applicant's motion to strike the Internet printouts, introduced by opposer's notice of reliance at paragraph No. 5, is denied.

Notwithstanding the denial of the motion to strike portions of opposer's notice of reliance, applicant may pose substantive objections to the evidence in its brief should such objections be appropriate in view of applicant's concession of the likelihood of confusion issue and the nature of the remaining issues and claims.

Proceedings resumed; issues going forward

Applicant has conceded the issue of likelihood of confusion only. This opposition continues through trial and briefing on

the issue of priority and on opposer's claims of fraud and ownership.

As noted by the Board's order of May 6, 2010, the parties have stipulated as follows:

1) To allow each Party may make of record by way of its Notice of Reliance any document obtained from the other party, or which it produced to the other party ... which bear[s] Bates Stamps identified as PGR XXXXXX or Brown XXXXXX.

2) To the authenticity of any documents made of record pursuant to #1 above ... for the limited purpose of showing what has been printed, but not the truth of what has been printed.

See also docket entry No. 34, filed April 28 "Joint Motion to Rely on Stipulated Evidence."

Remaining dates are reset as follows:

Defendant's Pretrial Disclosures	6/24/2011
Defendant's 30-day Trial Period Ends	8/8/2011
Plaintiff's Rebuttal Disclosures	8/23/2011
Plaintiff's 15-day Rebuttal Period Ends	9/22/2011

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

NEWS FROM THE TTAB: The third edition (2011) of the TBMP recently was posted on the TTAB's website. The parties are directed to this invaluable, updated resource.