

ESTTA Tracking number: **ESTTA666106**

Filing date: **04/10/2015**

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

Proceeding	91213584
Party	Plaintiff Jaguar Land Rover Limited
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Date	04/10/2015
Attachments	BIS SJ Cancellation - Redacted.pdf(581753 bytes )

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

In re Trademark Application

Serial No.: **85867803**

Filed: **March 5, 2013**

Trademark: **CLOUD ROVER**

Atty. Docket No.: **LAND 7344 OC**

Published in the Official Gazette on July 23, 2013 on page TM 870

JAGUAR LAND ROVER LIMITED,	)	Opposition No. 91213584
	)	
Opposer,	)	
	)	Serial No. 85867803
v.	)	
	)	
TOYS TEKK CORPORATION,	)	
	)	
Applicant.	)	

**BRIEF IN SUPPORT OF OPPOSER'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

**I. CONCISE STATEMENT OF THE ISSUES PRESENTED**

Should the Board deny Applicant's counterclaim for cancellation of Opposer's LAND ROVER mark (U.S. Registration Number 2860099) on the basis of abandonment where the evidence clearly shows that Opposer has continuously used its mark in commerce for at least the past four years?

Opposer answers: *Yes*.

## II. INTRODUCTION

Opposer Jaguar Land Rover Limited (“JLR”) filed this Notice of Opposition against Applicant Toys Tekk Corporation’s (“Toys Tekk”) application to register the mark CLOUD ROVER for toy vehicles. Toys Tekk filed a counterclaim alleging that JLR’s LAND ROVER mark for toy vehicles should be canceled on the basis of abandonment. JLR now moves for summary judgment pursuant to Fed. R. Civ. P. 56(c).

Summary judgment is warranted as JLR has continuously used its LAND ROVER mark in connection with toy vehicles for at least the past five years. Thus, there is no basis for Toys Tekk’s allegation that LAND ROVER has abandoned the mark.

## III. BACKGROUND

JLR is a leading international manufacturer of luxury vehicles, including luxury SUVs, which are sold under JLR’s LAND ROVER and RANGE ROVER marks. While JLR is primarily in the business of manufacturing and selling automobiles, JLR also has a robust licensing program under which licensees may use JLR’s marks on a variety of goods, including toy vehicles. Indeed, over the past several years, JLR licensees have sold over [REDACTED] of toy vehicles bearing its LAND ROVER and RANGE ROVER marks.<sup>1</sup> (See Exhibit A.<sup>2</sup>)

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<sup>1</sup> While these sales are worldwide, they do include US sales.

<sup>2</sup> All letter exhibits refer to exhibits to the Declaration of Edward Clough, which is being submitted concurrently herewith.

Under its licensing program, JLR has entered into licenses with various toy manufacturers. (Exhibit 1.<sup>3</sup>) For example, one of JLR’s toy licenses is with Bruder Spielwaren GmbH & Co. KG (the “Bruder License”). (Exhibit 2.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Other

JLR licenses similarly allow JLR’s licensees to use the LAND ROVER marks on different toy vehicles.<sup>4</sup> Importantly, the toy licenses, including the Bruder License, are not naked licenses. Rather, they contain strict controls that allow JLR to confirm that all toy vehicles sold meet JLR’s quality standards. (*Id.* at Section 6.) Licensees are free to distribute the licensed toys through various channels. For example, Bruder and several other licensees sell toys made under the license through Amazon.com. (Exhibit 4.)

Related to its sales of toy vehicles using the LAND ROVER and RANGE ROVER marks, JLR applied for and received the following US Trademark Registrations, which have been made incontestable in accordance with Section 15 of the Lanham Act:

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<sup>3</sup> All number exhibits refer to exhibits to the Declaration of Rebecca J. Cantor, which is being submitted concurrently herewith

<sup>4</sup> In order to avoid inundating the Board with duplicative licenses, JLR has prepared a summary of its toy licenses, which is attached in Exhibit 1. JLR is happy to produce additional toy licenses at the request of the Board. All relevant licenses were produced to Toys Tekk during discovery in this matter.

MARK	REGISTRATION NUMBER & REGISTRATION DATE	GOODS/SERVICES
LAND ROVER	Reg. No.: 2860099 Issued: July 6, 2004	IC 028: Toys, game and playthings, namely toy model vehicles, replica and scale model vehicles, hobby kits for construction of toy model and scale model vehicles
RANGE ROVER	Reg. No.: 2100825 Issued: September 30, 1997	IC 028: Toys, namely, toy automobiles, toy station wagons, and toy sport utility vehicles; games, namely, board games and computer game software; scale models, namely, miniature automobiles, miniature station wagons, and miniature sport utility vehicles sold complete or in kit form

With respect to JLR's LAND ROVER Registration (Registration No. 2860099), JLR filed a Section 8 declaration and specimen of use in commerce as recently as February 17, 2014, which was accepted on April 8, 2014.

In its answer to JLR's Notice of Opposition, Toys Tekk asserted two counterclaims, one for cancellation of U.S. Registration No. 2860099 (the "'099 Registration") and one for cancellation of U.S. Registration No. 2100825 (the "'825 Registration"). (*See* Document No. 4, Toys Tekk Answer at ¶¶13-14.) The basis for both of these cancellation claims was abandonment. (*Id.*) On January 30, 2014, the Board issued a notice setting forth new dates for this proceeding. (*See* Document No. 6, Notice Resetting Trial Dates.) In this Notice, the Board rejected the counterclaim related to the '825 Registration on the basis that Toys Tekk had only paid one fee. (*Id.*) Thus, the only remaining counterclaim is Toys Tekk's petition for cancellation of the '099 Registration.

#### IV. MATERIAL FACTS NOT IN DISPUTE

Toys Tekk has not agreed to any of the material facts in this matter. Indeed, Toys Tekk has even refused to admit that JLR is the owner of the '099 Registration. (Document No. 4, Toys Tekk Answer at 2.) As discussed herein, however, Toys Tekk has no basis to dispute the facts relevant to its counterclaim. Rather, the facts clearly show that JLR has not abandoned the '099 Registration.

#### V. ARGUMENT

##### A. Legal Standard

Under Fed. R. Civ. P. 56(c), summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). “A factual dispute is genuine if, on the evidence of record, a reasonable finder of fact could resolve the matter in favor of the non-moving party.” *Zoba Int'l Corp. v. DVD Format/LOGO Licensing Corp.*, 98 U.S.P.Q.2d 1106 (TTAB 2011) (*citing Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992)). A mark is deemed abandoned when its use has been discontinued without an intent to resume use. 15 U.S.C. §1127. Nonuse for three consecutive years is *prima facie* evidence of abandonment. *Id.* The party seeking cancellation of a mark has the burden of proving abandonment by a preponderance of the evidence. *Cerverceria Centroamericana S.A. v. Cerverceria India Inc.*, 892 F.2d 1021 (Fed. Cir. 1989).

“When the moving party’s motion is supported by evidence sufficient to indicate that there is no genuine issue of material fact, and that the moving party is entitled to judgment, the burden shifts to the nonmoving party to demonstrate the existence of specific genuinely disputed facts that must be resolved at trial.” *Venture Out Properties LLC v. Wynn Resorts Holding, LLC*, 81 U.S.P.Q.2d 1887, 1890 (TTAB 2007). “The nonmoving party may not rest on mere allegations of its pleadings and assertions of counsel, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine issue of material fact for trial.” *Id.*

**B. JLR’s Evidence Clearly Shows it has not Abandoned the ’099 Registration**

**1. JLR has Presented Evidence of Continuous Use**

JLR has presented extensive evidence in this case showing that it has used its mark on toy vehicles since at least 2010—three years before the filing of the cancellation counterclaim. (*See* Exhibits A and 1.) As discussed above, JLR sells its toy products through a licensing program which has been continuous since at least 2010. Moreover, the toys sold by JLR’s toy licensees are the precise goods listed in the ’099 Registration—namely “toy model vehicles, replica and scale model vehicles, hobby kits for construction of toy model and scale model vehicles.”

JLR’s use as discussed above constitutes “use in commerce” as defined in the Lanham Act. Indeed, the Federal Circuit has recognized that use on a website can constitute use in commerce. *See In re Sones*, 93 U.S.P.Q.2d 1118 (Fed. Cir. 2009). Further, this Board has previously held that “a website page which displays a product, and provides a means of ordering the product, can constitute a ‘display associated with the goods,’ as long as the mark appears on

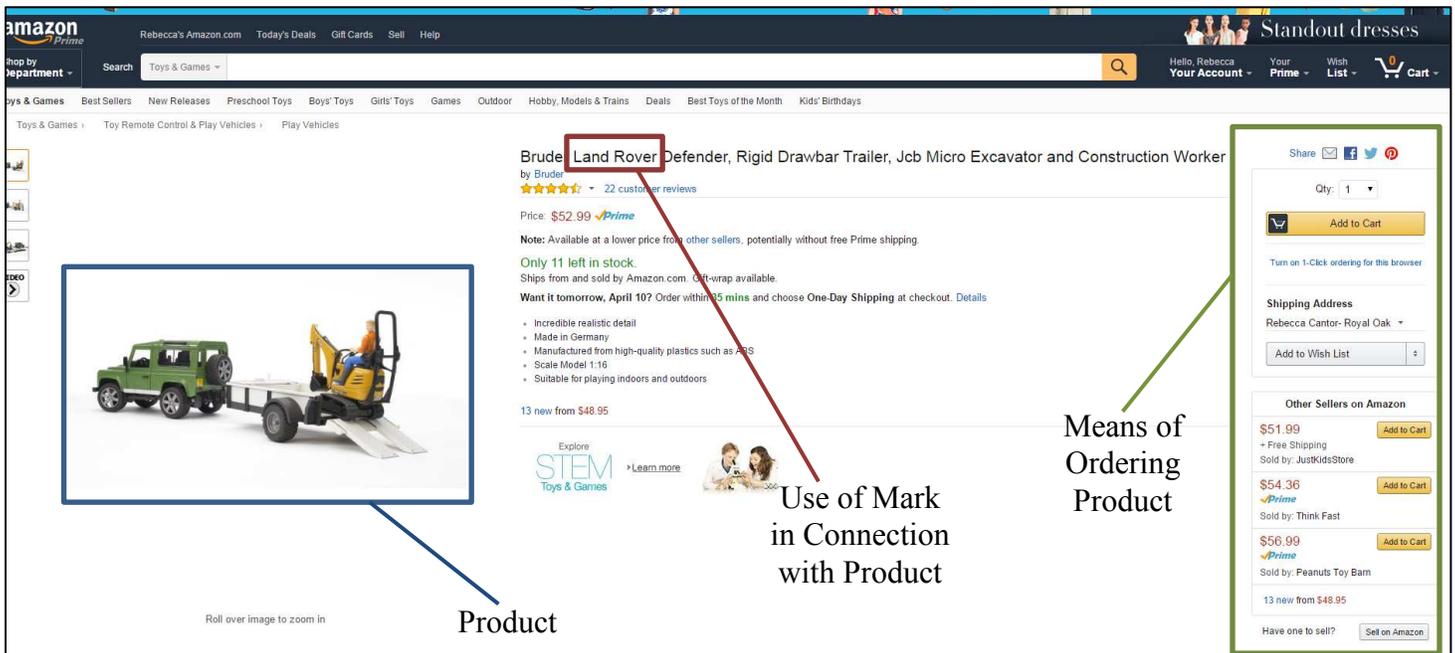
the webpage in a manner in which the mark is associated with the goods.” *In re Dell Inc.*, 71

U.S.P.Q.2d 1725 (TTAB 2004). The Board went on to explain

[w]eb pages which display goods and their trademarks and provide for the on-line ordering of such goods are, in fact, electronic displays which are associated with the goods. Such uses are not merely advertising, because in addition to showing the goods and the features of the goods, they provide a link for ordering the goods. In effect, the website is an electronic retail store, and the webpage is a shelf-talker or banner which encourages the consumer to buy the product. A consumer using the link on the webpage to purchase the goods is the equivalent of a consumer seeing a shelf-taker and taking the item to the cashier in a brick and mortar store to purchase it.

*Id.*

Here, the webpages identified by JLR clearly meet the requirement of *Dell*. For example, the Bruder Amazon page: (1) displays the product; (2) provides a means of ordering the product; and (3) uses the mark in a manner that is associated with the toy vehicles as shown below.



In addition, JLR may rely on authorized use through licensees to establish continuous use in commerce. The Lanham Act specifically states that “[w]here a registered mark or a mark

sought to be registered is or may be used legitimately by related companies, such use shall inure to the benefit of the registrant or applicant for registration, and such use shall not affect the validity of such mark or of its registration.” 15 U.S.C. § 1055; *see also Brody Chemical Co. Inc. v. Tammy L. Goldthorpe F/K/A Tammy Price*, Opp. No. 91204070, Document No. 43, at 5 (“Ownership rights in a trademark or service mark may be acquired and maintained through the use of the mark by a controlled licensee **even when the only use of the mark has been made by the licensee.**”) (emphasis added) (citing *Turner v. HMH Publ'g Co.*, 154 USPQ 330, 334 (5th Cir. 1967)); *Cent. Fid. Banks, Inc. v. First Bankers Corp. of Fla.*, 225 USPQ 438, 440 (TTAB 1984).

Based on the foregoing, there can be no question that JLR has continuously used its LAND ROVER mark in commerce in connection with toy vehicles and that there is no basis for Toys Tekk’s claim of abandonment.

## **2. Even if Toys Tekk Could Show Abandonment, Which it Cannot, JLR Still has an Intent to Use**

Finally, even if Toys Tekk could prove that JLR has not continuously used the LAND ROVER mark, which it cannot, a finding of abandonment would not be proper because JLR clearly has an intent to use its mark. As discussed above, JLR has entered into toy licenses that do not expire until December 2016.<sup>5</sup> *See Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947, 956 (7th Cir. 1992) (“Karp’s efforts to license the THIRST-AID to Shasta and Tropicana were sufficient to establish Karp’s intent to resume use.”). If JLR truly intended to abandon its mark for toy vehicles, it would not have entered into these licenses. Thus, there is

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<sup>5</sup> As shown in Exhibit 1, JLR also has several other toy licenses that do not expire for several years. Moreover, JLR continues to extend its toy licenses.

ample evidence that JLR has not abandoned the LAND ROVER mark and intends to keep using it on toy vehicles.

**C. Toys Tekk has Failed to Produce Any Evidence of Abandonment**

As discussed above, JLR has provided extensive evidence that it has continuously used the LAND ROVER mark since at least 2010. Toys Tekk, despite having had numerous opportunities, has never presented any evidence to the contrary, and instead has merely relied on conclusory statements regarding JLR's purported non-use. For example, during discovery JLR served Toys Tekk with an interrogatory seeking the factual bases for the cancellation claim. The entirety of Toys Tekk's response was "Lack of use in the United States in the past 3 years." (Exhibit 5 at Interrogatory No. 17.) Similarly, during the Fed. R. Civ. P. 30(b)(6) deposition of Toys Tekk, Toys Tekk's corporate representative was unable to present or enumerate any of the factual bases for the cancellation claim. (Exhibit 6.)

**VI. CONCLUSION**

For all of the aforementioned reasons, JLR respectfully requests that the Board grant its Motion for Summary Judgment and refuse to cancel the '099 Registration.

**BROOKS KUSHMAN P.C.**

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Dated: April 10, 2015

**CERTIFICATE OF SERVICE**

I certify that I served:

**BRIEF IN SUPPORT OF OPPOSER'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

on April 10, 2015 by:

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