

ESTTA Tracking number: **ESTTA725247**

Filing date: **02/05/2016**

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

Proceeding	91215087
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Date	02/05/2016
Attachments	TRIAL BRIEF OF OPPOSER.pdf(386157 bytes)

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

THE UNITED STATES MARINE CORPS

Opposer

v.

PETER J. HEALY,

Applicant

OPPOSITION NO. 91215087

TRIAL BRIEF OF OPPOSER

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OPPOSITION NO. 91215087

TRIAL BRIEF OF OPPOSER

Opposer, the U.S. Marine Corps (“USMC”), by and through its trademark counsel, hereby submits its Trial Brief in the above-captioned proceeding.

I. STATEMENT OF THE CASE

A. Brief Nature of the Case

This is an opposition against an application filed by Peter J. Healy. The application (U.S. Serial No. 85936128) seeks registration of the mark MARINE ONE DOWN (“Opposed Mark”). Applicant seeks registration of the Opposed Mark in Class 9 Goods, namely: “Computer game software for personal computers and home video game consoles; Computer game software for use with personal computers, home video game consoles used with televisions and arcade-based video game consoles; Downloadable multimedia file containing artwork, text, audio, video, games, and Internet Web links relating to fictional adventure entertainment; Interactive video game programs; Video game cartridges; Video game cartridges and discs; Video game discs; Video game software.”

The USMC owns three U.S. trademark registrations on the mark MARINE ONE®, found at U.S. Registration Nos. 4612650, 4619908 and 4698140, on the following goods and services:

4612650: Class 21: Cups and mugs

4619908: Class 16: Occasion cards; Picture cards; Postage stamps; Postcards and greeting cards; Posters.

4698140: Class 25: Neckwear; Shirts.

Additionally, the USMC asserts common law trademark rights in the mark MARINE ONE, and owns 49 registered U.S. trademarks based on/containing the term MARINE. As such, the USMC maintains strong trademark rights on both MARINE ONE® and MARINE, when that term is used in a military context.

The USMC timely commenced this Opposition proceeding by filing a Notice of Opposition, alleging a likelihood of confusion; deception by way of misdescribing the character, quality, function and use of service; false connection; and dilution of currently registered USMC marks. Moreover, the Notice of Opposition alleged that Applicant is currently using the opposed mark without the permission of the USMC in direct violation of 10 U.S.C. § 7881, 32 CFR 765.14, and SECNAV Instruction 5030.7.

B. Description of the Record

The record consists of the following materials, which were submitted by Opposer:

1. USMC Letter of Protest
2. USMC Notice of Opposition

II. STATEMENT OF FACTS

A. The USMC and its Mark(s)

The USMC asserts rights in 49 registered U.S. Trademarks which encompass the term “MARINE” (hereinafter “USMC Marks”). Of these current USMC Marks, the USMC owns three registrations for the specific term MARINE ONE®, in Classes 16, 21 and 25 respectively.¹

The USMC operates a world-renowned helicopter squadron (HMX-1) which, when the President of the United States (POTUS) is onboard as a passenger, is known worldwide as “Marine One.” Similarly, when the POTUS is aboard his United States Air Force aircraft, it is referred to as “Air Force One.” For several decades, the Opposer’s Presidential transportation function, as well as the helicopter on which it is performed, has been known as “MARINE ONE.”

Applicant intends on using the opposed mark for Class 9 Goods. Specifically, Applicant intends on using the mark “MARINE ONE DOWN” for a prospective video game for which “no definitive decision have been made... about content or design.” *See Applicant’s Answer to Interrogatories at 4.* Additionally, Applicant intends on using the term “MARINE ONE” in “one or more of the packaging, marketing, advertising, slogans, taglines, branding, or trade dress of the goods.” *See Applicant’s Answer to Interrogatories at 4.*

III. ISSUES PRESENTED

1. Whether there is a likelihood of confusion between the Applicant’s “MARINE ONE DOWN” mark as applied to the (opposed) goods and services set forth in the opposed

¹ Registration Nos. 4612650, 4619908 and 4698140

applications for the mark and the USMC pleaded and registered “MARINE” and “MARINE ONE” marks.

2. Whether the Opposed Mark may lead to a false connection to the USMC.
3. Whether the Opposed Mark is deceptively misdescriptive, leading to a violation of the Trademark Act section 2(a).
4. Whether the Opposed Mark leads to the dilution of current USMC Marks.
5. Whether the Opposed Mark is in direct violation of statute, regulation, and other authority, notably 10 U.S.C. §7881, 32 CFR 765.14, and SECNAV Instruction 5030.7.

IV. ARGUMENT

To prevail in this opposition proceeding, the USMC must establish: (1) its standing to oppose, and (2) at least one statutory (or by operation of law) ground of opposition to registration. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945 (Fed Cir. 2000).

A. The USMC Has Standing to bring Its Opposition Claims

The USMC pleaded and properly made of record (by attaching TSDR print outs showing status and title to the Notice of Opposition) its pleaded registrations for MARINE®, MARINES®, and MARINE ONE® mark(s). The USMC has also established its actual use of those registered marks. Therefore, the USMC has shown it has a real interest in the outcomes of this opposition proceeding and thus has a reasonable basis for believing that it would be damaged by the issuance to Applicant of the trademark registration he seeks. Accordingly, the USMC has established its standing to oppose registration of Applicant’s mark in its opposition. *Id.* See Also *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1028 (CCPA 1982).

B. The Opposed Mark and Likelihood of Confusion

A determination of likelihood of confusion regarding the registrability of a specific mark is based on an analysis of probative facts in evidence relevant to the factors bearing on the issue. See *Miles Labs v. Naturally Vitamin Supplements*, 1 USPQ2d 1445, 1450 (T.T.A.B. 1987). In re *E.I. du Pont de Nemours & Co.*, 476 F. 2d 1357, 1361 (CCPA 1973) established an exhaustive list of potentially relevant factors.² Yet, not every factor is germane in establishing a likelihood of confusion, consideration of all factors is not needed. *Miles Labs.*, 1 USPQ2d at 14, n.23.

The opposed mark consists of or comprises a mark which so resembles a mark registered in the U.S. Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the services of the Applicant, to cause confusion, or to cause mistake, or to deceive, in violation of Trademark Act section 2(d). If any doubt exists whether there is a likelihood of confusion between the Opposed Mark and the USMC Marks, the doubt must castoff to Applicant as a newcomer. See, 15 U.S.C. 1052(d), *Giant Food, Inc. v. Nation's Foodservice, Inc.* 710 F.2d 1565, 1567 (Fed. Cir. 1983).

² Factors:

- (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression;
- (2) the similarity or dissimilarity of the goods/services as described in an application or registration or in connection with which a prior mark is used;
- (3) the similarity or dissimilarity of established, likely-to-continue trade channels;
- (4) the conditions under which and buyers to whom sales are made, i.e., impulse versus careful, sophisticated purchasing;
- (5) the fame of the prior mark (sales, advertising, length of use);
- (6) the number and nature of similar marks in use on similar goods;
- (7) the nature and extent of any actual confusion;
- (8) the length of time during and conditions under which there has been concurrent use without evidence of actual confusion;
- (9) the variety of goods on which a mark is or is not used (house mark, "family" mark, product mark);
- (10) the market interface between applicant and the owner of a prior mark (i.e., issues of consent, laches, estoppel, etc.);
- (11) the extent to which applicant has a right to exclude others from use of its mark on its goods;
- (12) the extent of potential confusion; i.e., whether de minimus or substantial; and
- (13) any other established fact probative of the effect of use.

The USMC believes that many if not all of the factors listed in the du Pont case, referenced above, exist in this matter. With respect to “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression,” the USMC notes that two-thirds of the Applicant’s mark is the property of the USMC. Indeed, Applicant is merely appending the word “down” to the USMC’s registered trademark, MARINE ONE®. The Applicant would wholly appropriate the USMC’s trademark MARINE ONE within its own mark; it is not merely “similar” but it is verbatim. The USMC’s strength and public recognition in its MARINE ONE Presidential helicopter is such that the Applicant would thereby bank upon the goodwill that the USMC has earned over the decades in that mark, to the USMC’s detriment.

As to “the similarity or dissimilarity of the goods/services as described in an application or registration or in connection with which a prior mark is used,” and “the similarity or dissimilarity of established, likely-to-continue trade channels,” the USMC notes that while it has not yet licensed a video game, per se, it has an active presence in videos, movies, DVDs, CDs, apps, and other media very similar to what Applicant proposes to do.

As to the du Pont factor relating to “the conditions under which and buyers to whom sales are made, i.e., impulse versus careful, sophisticated purchasing,” the USMC asserts that, generally, patriotism is at an all-time high, with “Support Our Troops,” “Support Wounded Warriors,” “Honor Our Veterans,” and a multitude of similar tributes occurring on a regular basis (during sporting events, movies, commercials, and other forms of expression). As such, the USMC would argue that a video game that relies so strongly on the USMC’s famous Presidential helicopter program (two-thirds of Applicant’s mark is the USMC’s trademark) would lead purchasers of both stripes, impulse and careful, to believe that the product was in some way connected to the USMC.

As to “the fame of the prior mark (sales, advertising, length of use),” the USMC repeats its assertion that the mark MARINE ONE® has attained a degree of acclaim, fame, and reputation over the

past five decades, and that through its authorized licensees, sales of merchandise have been strong for many years. The USMC argues that it would be unfair and wrongful to allow the Applicant to ride the coattails of that goodwill, fame and length of use.

As to “the number and nature of similar marks in use on similar goods,” the USMC notes that it is unaware of any other marks owned by third parties (and not the USMC) such as that proposed by the Applicant.

As to du Pont factors seven, eight and ten, the USMC notes that because this is an Intent-to-Use applicant, the USMC is unable to address these factors to the extent to which no use of the mark by Applicant has taken place.

As to factor nine, the USMC has authorized a range of licensed products to be made and sold by its licensees and contractors, and considers these expressions of MARINE ONE to be a family of marks. Further, the USMC believes that through the strength, popularity and prominence of its Trademark Licensing Office and its reputation in the field (nearly 500 trademark licensees), that it “has a right to exclude others from use of its mark on its goods.”

In short, the USMC believes that it satisfies the majority of the du Pont factors, and believes that the Applicant’s proposed use of the USMC’s registered trademark MARINE ONE® within its proposed mark would create a likelihood of confusion, in violation of Section 2(d) of the Act.

C. The Opposed Mark is Deceptive

The Opposed Mark consists of or comprises matter that is deceptive, in violation of Trademark Act section 2(a). See, 15 U.S.C. 1052(a). The mark is to be used by Applicant on various retail-based video game services, referenced above. The mark is deceptive in that it creates the impression among consumers and the general public at large that the Applicant’s services are either offered by the Opposer, or licensed by the Opposer, and/or are otherwise

authorized by or affiliated with the Opposer. The Opposer respectfully asserts that the Opposed Mark is deceptive and is misdescriptive of the character, quality, function, composition or use of the services, to the extent to which it deceives the public into believing that the goods on which the mark is used, are either the official such services of the USMC, or licensed by the USMC. Further, Opposer asserts that prospective purchasers are likely to believe that the misdescription actually describes the goods as being the official such goods of the USMC. The Opposer also asserts that this misdescription is likely to affect the public's decision to purchase such goods.

D. The Opposed Mark and the Potential for False Connection

In order to effectively plead false connection under Trademark Act Section 2(a) the following is required:

- (1) The mark sought to be registered is the same as, or a close approximation of, the name or identity previously used by another person or institution;
- (2) The mark would be recognized as such, in that it points uniquely and unmistakably to that person or institution;
- (3) The person or institution identified in the mark is not connected with the goods sold or services performed by applicant under the mark; and
- (4) The fame or reputation of the named person or institution is of such a nature that a connection with such person or institution would be presumed when applicant's mark is used on its goods and/or services.

See *Petroleos Mexicanos v. Intermix SA*, 97 USPQ2d 1403, 1405 (TTAB 2010), citing *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 703 F.2d 1372, 217 USPQ 505, 508-10 (Fed. Cir. 1983).

The mark consists of or comprises matter which falsely suggests a connection to the USMC, in violation of Trademark Act section 2(a). See, 15 U.S.C. 1052(a). The Opposer respectfully asserts that (1) the mark is the same as, or a close approximation of, the name or identity previously (and continuously) used by the Opposer, the USMC, for several decades; (2) the mark would be recognized as such, in that it points uniquely and unmistakably to the Opposer, the USMC; (3) the person or institution named by the mark, namely, the Opposer, the USMC, is not connected with the goods offered by the Applicant under the mark; and (4) the fame or reputation of the Opposer, the USMC and its world-renowned HMX-1/Marine One helicopter squadron, is such that, when the mark is used with the Applicant's goods, a connection with the person or institution (USMC/HMX-1) would be presumed.

Opposer asserts, and intends to show, that consumers would view, and do in fact view, the mark MARINE ONE as pointing uniquely to Opposer, the USMC. The USMC currently operates a trademark and licensing office responsible for licensing product owners who wish to sell products containing USMC Marks or pertaining to the USMC. In fiscal year 2015, the USMC Trademark Licensing Office (TMLO) collected more than \$2.5 million in royalties from product owners wishing to sell products containing USMC Marks or pertaining to the USMC. Given the sheer size of the USMC TMLO, the likelihood of a false connection of the Opposed Mark with the USMC is very high.

E. Whether the Opposed Mark is deceptively misdescriptive, leading to a violation of the Trademark Act Section 2(e)(1).

The mark consists of or comprises matter that is deceptively misdescriptive, in violation of Trademark Act Section 2(e)(1). See, 15 U.S.C. §1052(e)(1). Opposer asserts that the term MARINE ONE within the Opposed Mark conveys that the goods offered thereunder are the

official goods of the Marine Corps, and/or is authorized by or approved by the Marine Corps. However, Opposer asserts that the ideas immediately conveyed are false, and are deceptively misdescriptive, and that the mark is therefore unregistrable under §2(e)(1). Opposer asserts that the Opposed Mark MARINE ONE DOWN misdescribes the services in a deceptive manner, and that members of the public are likely to believe the misrepresentation; in other words, members of the public are likely to believe that the goods offered under the Opposed Mark are the official such goods of the Marine Corps. Further, Opposer asserts that this misrepresentation materially affects the decision to purchase the goods, i.e., many purchasers of goods bearing the Marine Corps Marks do so under the belief that the services are the official goods of the Marine Corps and/or USMC trademark licensees.

F. Whether the Opposed Mark leads to the dilution of current USMC MARKS in violation of Section 43(c) of the Trademark Act.

In order to successfully demonstrate dilution, USMC Marks must have become famous as trademarks prior to Applicants use of the Opposed Mark. See *Polaris Industries Inc. v. DC Comics* 59 USPQ2d 1798 (TTAB 2000); *Trek Bicycle Corp. v. StyleTrek Ltd.*, 64 USPQ2d 1540, 1542 (TTAB 2001). Opposer asserts specifically that the terms MARINE and MARINE ONE have become famous marks, and points to the goods and services provided by the United States Marine Corps and its licensees, particularly the illustrious HMX-1 helicopter squadron, known as MARINE ONE. This squadron has been in existence and known by that name at least as early as 1972, and the term MCX has become synonymous with the Marine Corps. The Opposed Mark dilutes the Opposer's USMC Marks, referenced above, particularly MARINE ONE, in violation of Trademark Act section 43(c). See, 15 U.S.C. 1125(c). The Marine Corps has a thriving trademark licensing program, through which it grants to private entities the right to use various USMC trademarks. As such, when consumers see the term MARINE and MARINE

ONE on consumer-oriented products, such as those to be offered by the Applicant, consumers may come to believe that the Applicant's goods rendered under the Opposed Mark are officially licensed by the Marine Corps, or somehow affiliated with or endorsed by the Marine Corps, the Opposer's trademark rights in the term MARINE and MARINE ONE become diluted.

G. Whether the Opposed Mark Violates Section 14 of the Trademark Act; 10 U.S.C. § 7881, 32 C.F.R. 765.14 as well as SECNAV Instruction 5030.7.

The USMC asserts that the Opposed Mark is proposed to be used by, or with the permission of, the Applicant so as to misrepresent the source of the goods on or in connection with which the mark is used, in violation of Trademark Act Section 14. The Opposer asserts that the Applicant's use of the mark MARINE ONE, on the goods referenced above, would misrepresent the source of the goods as being from the Marine Corps, or one of its authorized licensees, and not from the Applicant.

The USMC further asserts that the Applicant's proposed use of the Opposed Mark would violate 10 U.S.C. § 7881. That statute reads in pertinent part as follows:

10 U.S.C. 7881 - Unauthorized use of Marine Corps insignia

(a) The seal, emblem, and initials of the United States Marine Corps shall be deemed to be insignia of the United States.

(b) No person may, except with the written permission of the Secretary of the Navy, use or imitate the seal, emblem, name, or initials of the United States Marine Corps in connection with any promotion, goods, services, or commercial activity in a manner reasonably tending to suggest that such use is approved, endorsed, or authorized by the Marine Corps or any other component of the Department of Defense.

The USMC asserts that the Applicant's proposed use (and registration) of its trademark MARINE ONE would violate this statute, in that MARINE ONE is one of the USMC's names, prominently associated with the USMC.

Further, the USMC asserts that the Opposed Mark's registration would be in violation of 32 Code of Federal Regulations 765.14 (hereinafter "32 CFR 765.14"). The Opposer notes that 32 CFR 765.14 was promulgated to implement 10 U.S.C. § 7881, and sets forth guidelines with respect to the circumstances under which the Marine Corps may allow third parties to use its seal, emblem, *names* or initials of the Marine Corps, and the requirements for such use by third parties without such permission. In particular, 32 CFR 765.14(c)(2) reads as follows:

"(2) Requests from civilian enterprises to use or imitate the Marine Corps emblem, names, or initials will ordinarily be approved where use or imitation merely provides a Marine Corps accent or flavor to otherwise fungible services. Disapproval, however, usually may be expected where such use or imitation reasonably would:

- (i) Imply any official or unofficial connection between the Marine Corps and the user;
- (ii) Tend to create the impression that the Marine Corps or the United States is in any way responsible for any financial or legal obligation of the user;
- (iii) Give the impression that the Marine Corps selectively benefits the particular manufacturer, commercial entity, or other user, as in displaying the Marine Corps emblem, names, or initials on musical instruments, weapons, or the like, and in using the emblem, names, or initials in connection with advertising, naming, or describing services and services such as insurance, real estate, or financial services; or
- (iv) Tend to subject the Marine Corps to discredit or would be inimical to the health, safety, welfare, or morale of the members of the Marine Corps."

The Opposer asserts that Applicant's proposed use of the name MARINE ONE is contrary to the guidelines of 32 CFR 765.14(c)(2), and would be conducted in such a way as to imply an official or unofficial connection between the Marine Corps and the consumer goods to be offered by the Applicant, gives the impression that the Marine Corps selectively benefits the goods of the Applicant, and would be inimical to the health, safety, welfare, or morale of the members of the Marine Corps, to the extent to which it compromises the strength and effectiveness of the Marine Corps' trademark licensing program, and harmful to its Marine Corps' brand. Therefore, the Opposed Mark should not become registered.

Finally, the proposed use of the Opposed Mark by Applicant would be in violation of SECNAV Instruction 5030.7. The Applicant notes that SECNAV Instruction 5030.7 is virtually identical to 32 CFR 765.14. For the reasons stated above, Opposer asserts that Applicant's Opposed Mark and use of the mark is contrary to SECNAV Instruction 5030.7. Accordingly, Opposer asserts that the Opposed Mark should not become registered. See Also 10 U.S.C. §7881.

V. CONCLUSION

For all of the reasons set forth above, and based on the evidence of record, the USMC has proved all of its opposition claims by a preponderance of the evidence. Accordingly, Opposition no. in regard to the opposed goods, should be sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition to Cancel was served on this 5th day of February, 2016 by postage pre-paid, first-class mail to the following:

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