

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed:  
May 5, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*Super Sabre Society*

*v.*

*Lester G. Frazier*

Opposition No. 91223853

Peter Collins Jr. of Gust Rosenfeld, PLC for Super Sabre Society.

James O. Guleke II for Lester G. Frazier.

Before Cataldo, Adlin, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Lester G. Frazier (“Applicant”) filed applications<sup>1</sup> to register on the Principal Register the two marks shown below:



<sup>1</sup> Application Serial No. No. 86346297, filed on July 23, 2014, and Application Serial No. 86347249, filed on July 24, 2014, both based on Applicant’s asserted use of the mark in commerce, under Trademark Act Section 1(a), 15 U.S.C. 1051(a).

In each application, Applicant disclaimed the exclusive right to use SUPER SABRE SOCIETY apart from the mark as shown. The design elements of the marks are described in each application as “an F-100 Super Sabre aircraft” and “a sword.” In Serial No. 86346297, the colors red, white, blue and black are claimed as features of the mark. In Serial No. 86347249, color is not a feature of the mark. The marks otherwise differ slightly in that the sword in the color mark is reddened at its edge. Applicant seeks registration of the mark, in both forms, for “Association services, namely, promoting the interests of and preserving the history of the F-100 Super Sabre and the men who flew the aircraft,” in International Class 35.

Super Sabre Society (“Opposer”), a Utah corporation, opposed registration of the marks on the grounds that: Applicant does not own them; they so resemble Opposer’s earlier used marks as to be likely to cause confusion, mistake or deception under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d); Applicant filed the applications in “bad faith” in order to “influence [Opposer’s] Board to achieve a position of power in the organization”; and dilution. In the notice of opposition, Opposer, in the alternative, “moves the Board to assign concurrent registrations, to Applicant and [Opposer],” but Opposer has not filed a concurrent use application.<sup>2</sup>

In his answer, Applicant admits, as Opposer alleges, that he “was the founder of the Super Sabre Society, and its first CEO. He was on the Board of Directors for many

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<sup>2</sup> Issuance of concurrent use registrations is not an available remedy in an opposition proceeding. The Board “will consider and determine concurrent use rights only in the context of a concurrent use registration proceeding.” 37 C.F.R. § 2.99(h). A concurrent use proceeding can be generated only by filing a concurrent use application meeting the requirements of Trademark Act Section 1(a)(3)(D), 15 U.S.C. § 1051(a)(3)(D). *See*, TBMP Chapter 1100. We have given no consideration to Opposer’s request for concurrent use registrations.

years, and helped to guide the organization through its early years.”<sup>3</sup> He also admits that Opposer has used the marks at issue.<sup>4</sup> Applicant otherwise denied the salient allegations of the notice of opposition. Applicant asserted, as affirmative defenses, unclean hands, laches, waiver, estoppel, acquiescence, fraud, as well as many “defenses” potentially relevant in certain other types of litigation that do not appear to have relevance to an opposition proceeding.<sup>5</sup> Applicant did not address his affirmative defenses in his brief. We therefore consider them waived. The case is fully briefed.

I. Evidentiary matters.

Opposer proffered the testimony depositions of six witnesses, and Applicant has objected to the admission of all of them.

The objection to the deposition of Donald W. Shepperd on the ground that it was taken “past the close of the discovery period”<sup>6</sup> is not well taken and is overruled. The deposition is testimony pursuant to Trademark Rule 2.123, was not a discovery deposition and was timely.

Applicant’s objection to the other five depositions requires more discussion. The witnesses in those depositions were William A. Gorton, Robert Medley Gatewood, Robert Noel Hopkins, Duane William Clawson, and Winslow E. Reither. Each

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<sup>3</sup> Answer ¶ 41; *see also id.* ¶ 8; 4 TTABVUE 16, 11.

<sup>4</sup> *Id.* ¶ 3, 4, 18, 4 TTABVUE 10, 12.

<sup>5</sup> “Failure of consideration, statute of frauds, ... no proximate causation, new and independent cause, sole proximate cause, no causal connection, failure to mitigate, assumed risk, comparative fault, too speculative loss or damages, ....” 4 TTABVUE 18.

<sup>6</sup> Shepperd dep. at 7:3-4, 6 TTABVUE 13.

testified by telephone. In each case, Opposer's counsel conducted the deposition from Tucson, Arizona, accompanied by a court reporter. Applicant's counsel participated by telephone from Texas. The witnesses testified by telephone from other states and jurisdictions.<sup>7</sup> At the very beginning of each deposition proceeding, Applicant's counsel objected on the record to the taking of the deposition on the ground that the court reporter was not with the witness.<sup>8</sup> In several cases, Opposer's counsel gave no substantive response to this objection; in two cases, he noted that notice of the deposition had been given and no objection had previously been raised:

For the record, we will oppose your objection. The notice was given on July 20<sup>th</sup> related to this deposition, and no formal objection has been filed with the board.<sup>9</sup>

Well, you may have your running objection; however, the notice was served on July 20, 2016, and there was no objection filed, and, therefore, we're moving forward.<sup>10</sup>

During Applicant's testimony period, Applicant again voiced his objection in his notice of reliance:

Defendant has objected to the depositions in their entirety of [Messrs. Gorton, Gatewood, Hopkins, Clawson, and Reither] on the grounds that the depositions were not taken with the witness physically present before a court reporter who was authorized to administer oaths in the jurisdiction where the depositions were being taken, as

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<sup>7</sup> Mr. Gorton was located in Utah; Mr. Gatewood in New Mexico; Mr. Hopkins in Virginia; Mr. Clawson in Pennsylvania; and Mr. Reither in Washington, DC.

<sup>8</sup> *See, e.g.*, Gorton dep. 4:10-18, 6 TTABVUE 185.

<sup>9</sup> Hopkins dep. 4:24-5:2, 6 TTABVUE 242.

<sup>10</sup> Clawson dep. 5:2-5, 6 TTABVUE 264.

required by the Taking Testimony Rule under TBMP Rule 703, et seq.<sup>11</sup>

Neither party made reference to Applicant's objection in its brief.

Applicant's objection was seasonably made. The relevant Trademark Rules state:

All objections made at the time of an oral examination ... to the manner of taking it ... shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections.

37 C.F.R. § 2.123(e)(4).

(i) *Effect of errors and irregularities in depositions.* Rule 32(d)(1), (2), and (3)(A) and (B) of the Federal Rules of Civil Procedure shall apply to errors and irregularities in depositions. Notice will not be taken of merely formal or technical objections which shall not appear to have wrought a substantial injury to the party raising them; and in case of such injury it must be made to appear that the objection was raised at the time specified in said rule.

37 C.F.R. § 2.123(i).

The Federal Rule of Civil Procedure referred to in the Trademark Rule quoted above, Fed. R. Civ. P. 32(d)(3)(B), provides that an objection to an irregularity at an oral examination is waived if "(i) it relates to the manner of taking the deposition ... and (ii) it is not timely made during the deposition." Here, Applicant's objection was timely made, in each case at the opening of the deposition at issue. There is nothing in the record to show that Applicant had prior knowledge of the intended manner of taking the depositions. There was nothing in any of the five notices of deposition to notify Applicant that the witness would not be in the presence of the court reporter. Each notice of deposition stated that the "PLACE OF DEPOSITION" would be

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<sup>11</sup> Applicant's notice of reliance, 9 TTABVUE 4.

“Tucson, AZ,” and that “[t]he Court Reporter will be present in Tucson, Arizona ...”<sup>12</sup>

Nothing in the notices indicated that the witness would be located elsewhere.

Contrary to Opposer’s suggestion, Applicant was not obligated to file a formal motion to strike the depositions:

[T]he objections described in this section ... generally<sup>13</sup> should not be raised by motion to strike. Rather, objections should simply be made in writing at the time specified in the rules cited above, or orally ‘on the record’ at the taking of the deposition, as appropriate. These objections, if properly asserted and not waived or rendered moot, normally will be considered by the Board in its determination of the case at final hearing.

TBMP § 707.03(c) (citing 37 C.F.R. § 123(j)). Rather, a party in Applicant’s position should expressly maintain its objection in its brief on the case, failing which the Board may deem the objection waived. In this case, we do not deem Applicant’s objection to be waived because Applicant restated his objection in his notice of reliance. Although unorthodox, this repetition of his objection makes clear that Applicant wished to assert the objection.

Applicant’s objection to the five depositions is sustained. Under Fed. R. Civ. P. 30(b)(4), when a deposition is taken by telephone, “For the purpose of this rule and Rule[ ] 28(a), ... the deposition takes place where the deponent answers the

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<sup>12</sup> See, e.g., Gorton Ex. 25, 6 TTABVUE 202-5; Gatewood Ex. 32, 6 TTABVUE 236-7; Hopkins Ex. 34, 6 TTABVUE 256-7; Clawson Ex. 37, 6 TTABVUE 286-287; and Reither Ex. 45, 6 TTABVUE 313-4.

<sup>13</sup> Practitioners should note the ellipsis in the quoted language and be aware that that there are exceptions (not applicable here) to this general practice, including objections to testimony as late-taken, which *may* be raised by motion to strike, and objections based on improper or inadequate notice of the taking of an oral deposition, which *must* be raised by motion to strike.

questions.” Rule 28(a) requires that “a deposition must be taken before: (A) an officer authorized to administer oaths ...” “The most logical and obvious construction of these rules requires the notary or court reporter to be in the presence of the deponent, rather than in the presence of the attorneys conducting the examination.” *Aquino v. Automotive Service Industry Association*, 93 F.Supp.2d 922, 923-4 (N.D. Ill. 2000); *see also Hudson v. Spellman High Voltage*, 178 F.R.D. 29, 32 (E.D.N.Y. 1998) (“Spellman properly asserts that the applicable rules require the notary public to be present with the witness at a telephonic deposition rather than in the presence of the persons conducting the examination.”). It is true that the Trademark Rules would have allowed the parties to agree to modify the procedures for taking the depositions. *See* Trademark Rule 2.123(b) (“If the parties so stipulate in writing, depositions may be taken before any person authorized to administer oaths, at any place, upon any notice, and in any manner, and when so taken may be used like other depositions.”). However, in this case there was no such agreement.

The Board very much encourages parties to find efficient and convenient methods for completing the various steps of the trial process. Indeed, the Board’s amended rules, effective January 14, 2017 (*i.e.* not applicable to this case), allow testimony to be submitted in the form of an affidavit or declaration, subject to the adverse party’s right to take oral cross-examination of the witness. 37 C.F.R. 2.123(a)(1). However, a party should not undertake significant departures from prescribed procedures (which are, themselves, streamlined versions of more traditional procedures) in the absence of a stipulation or Board order. In this case, Opposer’s method of taking the

depositions sacrificed important procedural safeguards required by the Federal Rules of Civil Procedure.<sup>14</sup> Therefore, Applicant's objection is **SUSTAINED** and the depositions of Messrs. Gorton, Gatewood, Hopkins, Clawson, and Reither (6 TTABVUE 182-314) have not been considered.<sup>15</sup>

## II. The record.

The record includes the pleadings (except the exhibits attached thereto)<sup>16</sup> and, by operation of Trademark Rule 2.122, 37 C.F.R. § 2.122, the application files for the opposed marks.

Opposer made of record the following testimony and evidence:

- Testimonial deposition of Major General (Ret.) Donald W. Shepperd, Opposer's President, and exhibits thereto (6 TTABVUE 8-181).
- Rebuttal Exhibits Nos. 66-69, admitted by stipulation of the parties as business records of Opposer (11 TTABVUE).

Applicant has made of record:

- Testimonial deposition of Col. Lester G. Frazier (Applicant) (9 TTABVUE), and exhibits thereto (10 TTABVUE).

## III. Standing.

Standing is a threshold issue that must be proven by a plaintiff in every *inter partes* case. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d

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<sup>14</sup> We base our determination solely upon the fact that in each case the court reporter was not in the presence of the deponent. Although the issue was not briefed by either party, we would also be concerned if the court reporter was not authorized to administer an oath to the out-of-state deponent.

<sup>15</sup> Applicant voiced other objections on the record of the Shepperd deposition but did not maintain them in his brief or, as discussed above, his notice of reliance. We have admitted the testimony and exhibits for whatever probative value they may have.

<sup>16</sup> *See* 37 C.F.R. § 2.122(c).

1058, 1062 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1401 (2015). The plaintiff must show that it has a real interest in the proceeding beyond that of a mere intermeddler and that it has a reasonable basis for its belief of damage resulting from registration of the subject mark. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

Opposer has shown that it has used, in connection with association services similar to those identified in Applicant's applications, marks that are essentially identical to the marks that Applicant seeks to register.<sup>17</sup> Indeed, Applicant admitted in his answer that Opposer has used the marks at issue.<sup>18</sup> Opposer therefore has a real interest in this proceeding and a reasonable basis for its belief that it will be damaged by registration of Applicant's marks. *Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009) (standing established by showing of common law interest in a mark).

#### IV. Ownership of the marks.

We turn, then, to the merits of Opposer's claim that Applicant is not the owner of the marks that he seeks to register. An application filed by one who is not the owner of the mark sought to be registered is void *ab initio*. *Conolty v. Conolty O'Connor NYC LLC*, 111 USPQ2d 1302, 1309 (TTAB 2014). *See also*, 15 U.S.C. § 1051(a); *Huang v. Tzu Wei Chen Food Co., Ltd.*, 849 F.2d 1458, 7 USPQ2d 1335 (Fed. Cir. 1988); *Holiday Inn v. Holiday Inns, Inc.*, 534 F.2d 312, 189 USPQ 630, 635 n.6 (CCPA 1976) ("One

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<sup>17</sup> Shepperd dep. 20:21-25 and Ex. 13, 6 TTABVUE 13, 113-169. When Opposer displayed the color mark it often did not include the red on the edge of the sword.

<sup>18</sup> Answer ¶¶ 3, 4, 18, 4 TTABVUE 10, 12.

must be the owner of a mark before it can be registered.”); *Great Seats, Ltd. v. Great Seats, Inc.*, 84 USPQ2d 1235, 1239 (TTAB 2007) (“In a use-based application under Trademark Act Section 1(a), only the owner of the mark may file the application for registration of the mark; if the entity filing the application is not the owner of the mark as of the filing date, the application is void ab initio.”); Trademark Rule 2.71(d).

The parties do not dispute that in 2005 or 2006, Applicant conceived the idea of an association of former Air Force pilots who had flown the F-100 aircraft, also known as the “Super Sabre.” Opposer admits in its brief:

Defendant is the Founder of the Super Sabre Society, founded for the purpose of honoring and preserving the memory and history of the F-100 aircraft, and the men who flew it. While operating as the Founder and organizer of the Society, Defendant obtained and paid for the creation of the two marks which are the subject of this litigation.<sup>19</sup>

Applicant contends that he himself designed the marks on the basis of a photograph of a particular airplane in “2005 I’d say.”<sup>20</sup> He then arranged for digitally reproducible versions of the marks to be prepared and paid for that process. The receipt for that service is dated January 31, 2006.<sup>21</sup> Applicant stated that he had a list of email addresses of pilots who had been stationed with him.

... I contacted those people and asked them if they would be interested in forming a – an F-100 group. Rather than saying, yes, I would be interested in forming an F-100 group, they said sign me up, I want to be a member, and that’s when it started. They sent messages to their friends

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<sup>19</sup> Opposer’s brief at 5, 13 TTABVUE 6.

<sup>20</sup> Frazier dep. 8:22-9:5, 24, 9 TTABVUE 19-20.

<sup>21</sup> *Id.* and Frazier Ex. 59, 10 TTABVUE 42.

and suddenly we had names coming so fast we couldn't keep up.<sup>22</sup>

...

Well, we started keeping the names, and mainly we were – we were so inundated with names it was just keeping a list of the names and telling those who had already joined that here are the new guys that are coming in ... Jack Van Loan was a good friend and he was helping me keep track of it. Russ Violet was also helping me keep track.<sup>23</sup>

...

Well, when the names started coming in, Van Loan and I decided that the first hundred would be charter members. The names were coming in so fast, however, we weren't able to stop at a hundred and so we made it 200. We couldn't stop at 200, so we made it 300. We couldn't stop there and made it 400. We couldn't stop there. We finally slowed it down and stopped it at 430 ...<sup>24</sup>

...

... I asked for and received a hundred dollars from every charter member and they all paid it.<sup>25</sup>

Applicant testified that he considered Messrs. Van Loan and Violet, as well as others, to be “founders” of the organization.<sup>26</sup> Shortly after these initial steps, Applicant sought and appointed a treasurer (Col. David Hatten), a president (Major General William Gorton), and a secretary (Art Oken) for the organization. After General Gorton became president he incorporated the organization under Utah law.<sup>27</sup> That incorporated entity is Opposer in this proceeding. Applicant's recollection is that

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<sup>22</sup> *Id.* at 13:8-14, 9 TTABVUE 24.

<sup>23</sup> *Id.* at 20:19-25, 9 TTABVUE 31.

<sup>24</sup> *Id.* at 23:6-13, 9 TTABVUE 34.

<sup>25</sup> *Id.* at 24:3-5, 9 TTABVUE 35.

<sup>26</sup> *Id.* at 42:17-43:1, 9 TTABVUE 53-54.

<sup>27</sup> *Id.* at 31:3-32:17, 9 TTABVUE 42-43.

the organization was incorporated in February of 2006.<sup>28</sup> It may have been incorporated as early as February 2, 2006.<sup>29</sup>

Major General Donald Shepperd, Opposer's current president, testified, "I was a charter member, so I kind of watched the organization from the very beginning."<sup>30</sup> He explained that a "charter member" was "[o]ne of the original members that started the organization when it was announced."<sup>31</sup> Gen. Shepperd was one of the persons that Applicant asked to become the president of the organization, but he declined at that time.<sup>32</sup> He testified that he perceived the marks at issue as marks of the organization "[b]ecause it was there from the very beginning. We all signed up to it; we joined the organization. They were there from day one, or very early in the process ..."<sup>33</sup> He stated that, to his knowledge, Applicant never claimed to own the marks, or asked for payment for them, or suggested that they were used by the organization under license.<sup>34</sup> After Opposer's incorporation in 2006, it provided association services continually through the time of trial, displaying the marks on its membership applications,<sup>35</sup> its publications,<sup>36</sup> the minutes of its board of directors,<sup>37</sup>

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<sup>28</sup> *Id.* at 20:5-12, 9 TTABVUE 31.

<sup>29</sup> Shepperd dep. 44:10-14, 6 TTABVUE 22.

<sup>30</sup> *Id.* at 10:25-11:2, 6 TTABVUE 14.

<sup>31</sup> *Id.* at 11:20-21, 6 TTABVUE 14.

<sup>32</sup> Frazier dep. 32:9-11, 9 TTABVUE 43.

<sup>33</sup> Shepperd dep. 20:21-23, 6 TTABVUE 16.

<sup>34</sup> *Id.* at 14:6-7, 14, 6 TTABVUE 15.

<sup>35</sup> Shepperd Ex. 24, 6 TTABVUE 180-181.

<sup>36</sup> Shepperd Ex. 11, 6 TTABVUE 113-169.

<sup>37</sup> Shepperd Ex. 6, 6 TTABVUE 82.

and materials used in connection with its annual reunions of members.<sup>38</sup> Applicant appears to have acknowledged that the marks have come to be associated with Opposer: “They’ve recently removed this – the—the logo from the website. I don’t think that is a step in the right direction. You go to our website and you expect to see the logo and it’s not there.”<sup>39</sup>

Applicant contends that Opposer “[a]t best ... had an oral trademark license ... from Col. Frazier ...” under which it used the marks at issue.<sup>40</sup> However, the speedy trajectory of the association from an idea conceived by Applicant to an incorporated entity providing services to hundreds of members, perhaps within the space of only two months, is not consistent with Applicant’s implicit suggestion that he operates a sole proprietorship that merely licenses the marks at issue to Opposer. If association services of the type identified in the applications were provided prior to Opposer’s incorporation (and that is not clear on this record), it appears that they would have been the result of a group endeavor. From the earliest days, Applicant relied upon the assistance (and finances) of other individuals interested in forming an association, including individuals designated as president, treasurer and secretary of the organization. The fact that the group so quickly undertook to create a corporation indicates that the members of the group did not perceive themselves as investing their money and efforts in a sole proprietorship of Applicant. Indeed, Applicant

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<sup>38</sup> Shepperd Exs.14-23, 6 TTABVUE 170-179.

<sup>39</sup> Frazier dep. 118:21-24, 9 TTABVUE 129.

<sup>40</sup> Applicant’s brief at 18, 14 TTABVUE 19.

asserted that his commercial activities under the mark, such as sales of marked merchandise, were always done for the benefit of the organization and not for himself.<sup>41</sup> Once the corporate entity (Opposer) came into being, it proceeded to provide association services of the type identified in the applications and to use the marks in connection with them. Although Applicant would contend that he controlled Opposer, that has not been established by the evidence of record. It appears, moreover, that the association services that, according to Applicant, give rise to his trademark rights are, in fact, services provided by Opposer. For example, there is no evidence to indicate that when Applicant filed his use-based application to register the word mark SUPER SABRE SOCIETY for association services,<sup>42</sup> in 2014, there were any such services being provided at the time under that mark other than those offered by Opposer. Neither does the evidence show that Applicant controlled, at any time, the nature and quality of the services Opposer provided.

It is a fundamental principle that “[a] trademark has no existence separate from the good will of the product or service it symbolizes. Good will and its tangible symbol, a trademark, are inseparable.” 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:15 (4<sup>th</sup> ed.). As the Supreme Court stated in a seminal case, “There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed. ... [I]t is not the subject of property except in connection with an existing business.” *United*

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<sup>41</sup> Frazier dep. 85:21-25, 9 TTABVUE 96.

<sup>42</sup> See Frazier Ex. 52 (Reg. No. 4766143), 10 TTABVUE 12. The mark is registered on the Supplemental Register.

*Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918). Applicant's intention to depart from Opposer's association and take the marks with him is essentially an attempt to separate the marks from the good will that they symbolize.<sup>43</sup> Applicant has acknowledged that a potential member looking at Opposer's website would "expect to see the logo" there,<sup>44</sup> in essence admitting that the marks symbolize Opposer's good will. But when the marks are separated from the business that they symbolize, they are no longer trademarks, but merely graphic designs. As Applicant himself phrases it: "The logos belonged to me. I designed them, I paid for them and they're mine ... period."<sup>45</sup> Although Applicant may own rights in the graphic design or the digital versions thereof, subject to any agreement with Opposer, it is well settled that merely designing or inventing a symbol is not sufficient to give rise to trademark rights. *Invisible, Inc. v. National Broadcasting Co.*, 212 USPQ 576 (C.D. Cal. 1980); see also 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 16:11 (4<sup>th</sup> ed.), and cases cited therein.

On this record, we are persuaded that Applicant does not own the involved marks. Applicant's conduct in the short period between his initial efforts to organize an association of pilots and Opposer's incorporation indicates his intention to create an organization, separate from himself, to provide association services; and this intention appears to have been shared by those other persons who cooperated with

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<sup>43</sup> See, e.g., Frazier dep. 39:4-22, 9 TTABVUE 50.

<sup>44</sup> Frazier dep. 118:21-24, 9 TTABVUE 129.

<sup>45</sup> *Id.* 65:5-19, 9 TTABVUE 76. See also *id.* at 64:14-18, 9 TTABVUE 75 ("Yes, I allowed the use without restriction of my logos, but they were mine. I paid for them. I designed them. They cannot be anyone else's – period.")

Applicant in forming the association and incorporating it. The evidence shows that the incorporated association (*i.e.*, Opposer) proceeded to provide its association services to the member pilots under the marks; and there is no evidence to indicate that Applicant controlled the incorporated association or the identified services. In short, he did not control the nature and quality of the association services offered. Although Applicant designed the marks and conceived the idea of an association of pilots, the evidence does not show that he, individually, offered association services at any time, much less under the involved marks.<sup>46</sup>

We have considered all of the evidence and testimony properly of record, including all evidence not expressly discussed herein. For the reasons stated, we find that Applicant is not the owner of the marks as contemplated by Section 1(a)(1) of the Trademark Act. He therefore is not entitled under the statute to seek registration of the marks, and his applications are void *ab initio*. We therefore SUSTAIN the opposition on the ground that Applicant is not the owner of the marks.

In light of our finding that registration of the marks must be refused, we do not reach Opposer's other claims.

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<sup>46</sup> To the extent that Applicant's dealing in merchandise bearing the marks might give rise to trademark rights, they would nonetheless not give rise to service mark rights with respect to association services.

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**Decision:**

The opposition is SUSTAINED on the ground that Applicant is not the owner of the marks, and registration is refused as to Applications Serial Nos. 86346297 and 86347249.