

<p>This Opinion is not a Precedent of the TTAB</p>
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Hearing: December 4, 2018

Mailed: May 9, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Progrexion IP, Inc.

v.

One Technologies, LLC

Opposition No. 91233945

John C. Stringham and James W. McConkie III of Workman Nydegger, for
Progrexion IP, Inc.

Dustin Mauck of Regitzmauck PLLC, for One Technologies, LLC.

Before Mermelstein, Goodman, and Lynch, Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

One Technologies, LLC (“Applicant”) seeks registration on the Principal Register of the mark BETTER CREDIT BETTER LIFE (in standard characters) for “Providing an online computer database in the field of financial information in the specific areas of credit reports checking, credit score services, and credit reporting services” in International Class 36 and “Providing an online computer database in the field of

financial identity monitoring services in the specific areas of financial identity monitoring services for fraud protection purposes and providing information in the field of personal physical security” in International Class 45.¹

Progrexion IP, Inc. (“Opposer”) opposed registration of Applicant’s mark on the ground that Applicant’s mark, when used in connection with Applicant’s services, so resembles Opposer’s previously-used mark BETTER CREDIT, BETTER LIFE for “providing and offering a wide variety of consumer credit repair and legal services, including but not limited to consumer credit consulting and counseling, evaluation of credit bureau data, credit repair and restoration and credit score analysis” as to be likely to cause confusion.² Opposer alleges extensive use of the BETTER CREDIT, BETTER LIFE mark by Opposer (and its related entities) “well before any use or constructive use by Applicant of the BETTER CREDIT BETTER LIFE mark” and alleges that it has “obtained common law rights in such mark, which are superior to Applicant.”³ Opposer also alleges ownership of a pending application for the mark BETTER CREDIT, BETTER LIFE for the following services:⁴

¹ Application Serial No. 86943937 was filed on March 17, 2016 based upon Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

References to the record or briefs are to the Board’s TTABVUE docketing system. The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry.

² 1 TTABVUE 5, ¶ 5.

³ *Id.*, ¶ 6.

⁴ Application Serial No. 87210724 was filed on October 20, 2016, based upon Opposer’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Consumer credit consultation; Credit counseling services; Evaluation of credit bureau data; Financial services, namely, credit repair and restoration; Financial services, namely, credit repair services, namely, assisting consumers to process requests for correction or removal of unverifiable, or erroneous information on record with credit bureaus and credit reporting agencies to require compliance with legally mandated credit reporting rules and regulations in International Class 36 and

Legal services dealing with credit report repair; Consultation services, namely, investigation and authentication of credit reports and credit history, and correcting and ensuring for regulatory compliance with credit reporting rules and regulations, analysis of credit score improvements in International Class 45.⁵

By its answer, Applicant denied the salient allegations in the notice of opposition and asserted as an affirmative defense that Opposer does not use BETTER CREDIT, BETTER LIFE as a service mark or in a manner analogous to service mark use.⁶

The parties filed briefs, Opposer filed a reply brief, and each party was represented by counsel at an oral hearing held before this panel.

I. Evidentiary Matters

A. Objections

Applicant has raised objections as to the weight to be accorded to Opposer's former employees' testimony and certain documentary evidence. As a general matter, the Board is capable of weighing the strength or weakness of the objected-to testimony

⁵ There is an outstanding fee requirement for the Class 45 services.

⁶ 4 TTABVue 3, ¶ 14. This is not a true affirmative defense because it remains Opposer's burden to demonstrate that it owns a trademark that was used, or has made use analogous to trademark use, prior to Applicant's first use or constructive use of its mark. Applicant's other affirmative defenses were more in the nature of amplifications of its denials of the likelihood of confusion claim.

and evidence, including any inherent limitations, and we have accorded whatever probative value the subject testimony and evidence merit.

Applicant objects to consideration of Opposer's witness, Natalie Pino's, declaration testimony because it was allegedly not served.⁷ However, Applicant failed to timely move for an appropriate remedy, and we consider the objection waived. *Cf.* Trademark Rule 2.125(b), 37 C.F.R. § 2.125(b).

B. Stipulations

The parties stipulated to the authenticity of business records produced under Fed. R. Civ. P. 34, in connection with Opposer's Notice of Reliance #5 and Applicant's Notice of Reliance. The parties reserved their right to object to this evidence on the basis of relevance, materiality, and weight.⁸

Applicant also filed a stipulation as to likelihood of confusion between the parties' marks.⁹ By stipulating to likelihood of confusion, Applicant has removed this issue from the case. The only issue remaining is one of priority, that is, which party was the first to use the BETTER CREDIT, BETTER LIFE service mark. *See e.g., Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1602 (TTAB 2018) (parties stipulated to likelihood of confusion, so only priority need be determined); *Cf. Automedx Inc. v.*

⁷ We note that the declaration that was filed with the Board includes a certificate of service, and that a certificate of service is prima facie proof of service. Trademark Rule 2.119(a), 37 C.F.R. § 2.119(a); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 113.02 (2018).

⁸ 15 TTABVUE. The Board approved this stipulation on October 22, 2018. 21 TTABVUE.

⁹ "Applicant One Technologies, LLC hereby stipulates to 'likelihood of confusion' between Applicant's mark and Opposer's claimed mark." 16 TTABVUE.

Artivent Corp., 95 USPQ2d 1976, 1985 (TTAB 2010) (only issue is priority because applicant essentially conceded likelihood of confusion by not submitting any argument or evidence on the issue).

C. Issue Tried by Implied Consent

A plaintiff seeking to prove priority via analogous use must plead such use in its complaint. *See Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 USPQ 1134, 1142 (TTAB 2013); *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1537-38 (TTAB 2007). Opposer, in its notice of opposition, did not specifically plead activities relating to priority by analogous use. However, Applicant raised as an affirmative defense in its answer that “[t]here is no legally sufficient evidence of Opposer’s analogous use and adoption of the ‘BETTER CREDIT, BETTER LIFE’ mark to challenge Applicant’s constructive use priority date of March 17, 2016.”¹⁰ Opposer relied on the same evidence for both technical service mark and analogous use, and both Opposer and Applicant addressed arguments relating to whether Opposer had proven priority based on analogous use. Therefore, we find that the issue of whether Opposer has priority based on analogous use was tried by implied consent.

II. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the involved application. Opposer introduced the following testimony and other evidence:

¹⁰ 4 TTABVUE 3, ¶ 14.

- 1) Testimony declaration of Eric Kamerath, counsel to the Progrexion family of companies;¹¹
- 2) Testimony declaration of Jeff Johnson, Chairman and CEO of PGX Holdings, Inc., Progrexion Holdings, Inc., Progrexion Marketing, Inc., and Progrexion IP, Inc.;¹²
- 3) Testimony declaration of Josh Aston, Vice President of Digital Marketing at Progrexion Marketing, Inc.;¹³
- 4) Testimony declaration of Natalie Pino, former Social Media Coordinator/Integrated Marketing Manager at Progrexion Marketing, Inc.;¹⁴
- 5) Testimony declaration of Sable Petersen, former Brand & Consumer Insights Manager at Progrexion Marketing, Inc.;¹⁵
- 6) Testimony declaration of Gavin Van Wagoner, former Vice President of Consumer Engagement and Insights at Progrexion ASG, Inc.;¹⁶
- 7) Testimony declaration of Emily Madsen, Senior Director of Communications and Culture at Progrexion ASG, Inc.;¹⁷
- 8) A notice of reliance (#1) on Opposer's Answers to Applicant's Interrogatories Nos. 1-15;¹⁸
- 9) A notice of reliance (#2) on official records for trademark application Serial No. 86943937;¹⁹

¹¹ 7 TTABVUE 2-10. The portions of the Kamerath declaration and exhibits designated as confidential are posted at 6 TTABVUE.

¹² 7 TTABVUE 11-27. The portion of the Johnson declaration designated as confidential is posted at 6 TTABVUE.

¹³ 7 TTABVUE 28-39.

¹⁴ 7 TTABVUE 40-47.

¹⁵ 7 TTABVUE 48-79.

¹⁶ 7 TTABVUE 80-162.

¹⁷ 7 TTABVUE 163-291.

¹⁸ 8 TTABVUE 2-15. Opposer's notice of reliance on its own interrogatory responses is not admissible under Trademark Rule 2.120(k)(5).

¹⁹ 8 TTABVUE 16-25.

- 10) A notice of reliance (#3) on official records for trademark application Serial No. 87210724;²⁰
- 11) A notice of reliance (#4) on Applicant's responses to Interrogatory Nos. 3, 4, 6, 12, 13, 14, 15, 18, 21–25;²¹ and
- 12) A notice of reliance (#5) on Applicant's produced documents (Bates numbers APP0001–APP0009).²²

Applicant introduced the following testimony and evidence:

- 1) Declaration testimony of Michael B. Regitz, counsel for Applicant;²³
- 2) Declarant Deposition of Emily Madsen (oral cross-examination of Opposer's witness);²⁴
- 3) Declarant Deposition of Sable Petersen (oral cross-examination of Opposer's witness);²⁵
- 4) Applicant's Notice of Reliance on documents produced by Opposer, namely e-mail correspondence (Bates numbers OPP000225, OPP000226, and OPP00000450).²⁶

III. Standing

To have standing, a plaintiff must have a real interest, i.e., a personal stake in the outcome of the proceeding and a reasonable basis for its belief that it will be damaged.

²⁰ 8 TTABVUE 26-35.

²¹ 8 TTABVUE 36-52.

²² 8 TTABVUE 53-74. The parties stipulated to the authenticity of Applicant's produced documents listed in this notice of reliance as discussed above. The parties did not stipulate to the authenticity of any other documents produced by Applicant.

²³ 11 TTABVUE.

²⁴ 12 TTABVUE.

²⁵ 13 TTABVUE.

²⁶ 14 TTABVUE. The parties stipulated to the authenticity of Opposer's produced documents listed in this notice of reliance as discussed above. The parties did not stipulate to the authenticity of any other documents produced by Opposer.

See Empresa Cubana Del Tabaco v. Gen. Cigar Co., 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025-28 (Fed. Cir. 1999).

Applicant argues that Opposer has not established its standing because it is relying on use by other entities. Applicant also argues that Opposer's filing of a trademark application six months after Applicant's application is an attempt to manufacture standing.

The purpose of the standing requirement is to prevent mere intermeddlers from initiating proceedings. *Ritchie*, 50 USPQ2d at 1025-26. Here, Opposer has established that it has a commercial interest in using the phrase BETTER CREDIT, BETTER LIFE. Opposer's witnesses testified as to the filing of Opposer's BETTER CREDIT, BETTER LIFE application, the "substantial overlap" in the consumer credit services and consumer credit reporting services in the parties' applications, and the potential for confusion.²⁷ Opposer also has filed for the record a copy of application Serial No. 87210724 (for Opposer Progrexion IP) for the mark BETTER CREDIT, BETTER LIFE for the Class 36 and 45 services identified above.²⁸

It has been shown that Opposer is not an intermeddler by its ownership of a pending application for registration of the same mark and overlapping or similar services. *Toufigh v. Persona Parfum Inc.*, 95 USPQ2d 1872, 1874 (TTAB 2010). The filing of the application subsequent to the filing date of Applicant's application does

²⁷ Aston Decl., ¶¶ 12-21, 7 TTABVUE 30-33; Madsen Decl., ¶ 12, 7 TTABVUE 168.

²⁸ 8 TTABVUE 26, Notice of Reliance #3.

not impact Opposer's standing. *See e.g., Life Zone Inc. v. Middleman Grp. Inc.*, 87 USPQ2d 1953, 1959 (TTAB 2008) (standing found based on application filed subsequent to applicant's application filing date).

Accordingly, we find that Opposer has established its standing in this proceeding.

IV. Priority

Opposer has not pleaded ownership of any registered service mark, and relies on its asserted prior use of BETTER CREDIT, BETTER LIFE to prove priority. *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1040-41 (TTAB 2018). Applicant is entitled to a constructive use date of March 17, 2016, the filing date of its application. *See* Trademark Act Section 7(c); 15 U.S.C. § 1057(c); *Larami Corp. v. Talk to Me Programs, Inc.*, 36 USPQ2d, 1840, 1844 (TTAB 1995); *Zirco Corp. v. Am. Tel. & Tel. Co.*, 21 USPQ2d 1542, 1544 (TTAB 1991). Applicant relies on its constructive use date, and not any earlier date. Thus, Opposer must establish proprietary rights in its pleaded common-law mark that precede Applicant's constructive use of its involved mark. *See Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981); *RxD Media, LLC v. IP Application Dev.*, 125 USPQ2d 1801, 1808 (TTAB 2018) (citing *Larami Corp.*, 36 USPQ2d at 1845), *aff'd*, 2019 WL 1394369 (E.D. Va. Mar. 27, 2019), *appeal docketed*, No. 19-1461 (4th Cir. Apr. 30, 2019).

In order for Opposer to prevail on a claim of likelihood of confusion based on its ownership of common-law rights in a mark, the mark must be distinctive, inherently or otherwise, and Opposer must show priority of use. *See Otto Roth*, 209 USPQ at 44.

It appears that both parties view BETTER CREDIT, BETTER LIFE as a distinctive mark. We will do the same in making our determination. *See, e.g., Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1023 (TTAB 2009) (“Respondent has not raised an issue as to the distinctiveness of petitioner’s mark or otherwise put petitioner on notice of this defense, and therefore we find that the mark is distinctive.”) (citing *Wet Seal Inc. v. FD Mgmt., Inc.*, 82 USPQ2d 1629, 1634 (TTAB 2007) (absent argument or evidence from applicant, opposer’s mark deemed distinctive)).

Before discussing the testimony and evidence of record, we note that the parties disagree as to the applicable standard of proof for priority. Opposer contends that it need only prove priority by a preponderance of the evidence.²⁹ Applicant, citing among other cases, *Hydro-Dynamics, Inc. v. George Putnam & Co., Inc.*, 811 F.2d 1470 , 1 USPQ2d 1772, 1773 (Fed. Cir. 1987), maintains that the appropriate level of proof is clear and convincing evidence because Opposer filed an intent-to-use application, which is a change in position that it was using the mark before Applicant’s constructive use date.³⁰

Applicant’s reliance on *Hydro-Dynamics* is misplaced. The heightened standard of clear and convincing evidence applies only in instances “[w]here an applicant seeks to prove a date earlier than the date alleged in its application.” *Id.* Otherwise, “the decision as to priority is made in accordance with the preponderance of the evidence.” *Id.* *See also Embarcadero Techs., Inc. v. RStudio, Inc.*, 105 USPQ2d 1825, 1834 (TTAB

²⁹ 18 TTABVUE 23.

³⁰ 19 TTABVUE 19.

2013). (“[O]pposer must prove by a preponderance of the evidence that its common law rights were acquired before any date upon which applicant may rely.”). In this case, Opposer filed an intent-to-use application, and it has not yet filed an allegation of use under Trademark Act § 1(c) or (d). Because Opposer has not yet alleged any dates of use in its application, this is not a case in which Opposer “seeks to prove a date earlier than the date alleged in its application.” *Hydro-Dynamics* does not apply.

Applicant also argues that “[i]f Progrexion is found to have standing pursuant to that application, then it should be held to have admitted that Progrexion has never used the BCBL mark in commerce, as it filed an ‘Intent to Use’ trademark application.”³¹ However, the filing of an intent-to-use application is in no way an admission of non-use or otherwise inconsistent with actual use of the mark. *See Corp. Document Servs. Inc. v. I.C.E.D. Mgmt. Inc.*, 48 USPQ2d 1477, 1479 (TTAB 1998) (“An intent-to-use applicant is entitled to rely upon actual use, or use analogous to trademark use, prior to the constructive use date of the intent-to-use application.”). We conclude that priority must be determined by a preponderance of the evidence.

A. Opposer’s Testimony and Evidence

1. Lexington Law and CreditRepair.com

To establish its priority, Opposer relies on the use of BETTER CREDIT, BETTER LIFE through affiliates John C. Heath Law firm d/b/a Lexington Law (“Lexington Law”) and CreditRepair.com, Inc. (“CreditRepair.com”).³²

³¹ 19 TTABVUE 16.

³² Although there is no specific testimony related to CreditRepair.com’s entity type, we know from the witness testimony that its full name is CreditRepair.com Inc., which indicates that

Lexington Law is affiliated with Opposer through licensing and other agreements and provides credit repair and counseling services.³³ Lexington Law's licensing agreements, designated confidential, provide for the licensing of intellectual property products as well as "a proprietary credit repair system and related software."³⁴ The original and amended and restated licensing agreements also "provide that any intellectual property developed by or for . . . Lexington Law belongs to Progrexion IP."³⁵ The Kamerath testimony quotes from and relies on these general terms in the confidentially filed original and restated and amended licensing agreements but does not reference any provision in these agreements that specifically identifies BETTER CREDIT, BETTER LIFE as intellectual property of Opposer.³⁶

Opposer and CreditRepair.com are under the "Progrexion family" of companies.³⁷ Opposer and CreditRepair.com are held by and controlled by PGX Holdings, Inc. ("PGX Holdings").³⁸ Although the testimony relating to the nature of Opposer's

it is an incorporated entity. Kamerath Decl., ¶ 2, 7 TTABVUE 2; Johnson Decl., ¶ 3, 7 TTABVUE 12.

³³ Kamerath Decl., ¶ 3-4, 7 TTABVUE 3; Van Wagoner Decl., ¶ 3, 7 TTABVUE 81; Johnson Decl., ¶ 18, 7 TTABVUE 14.

³⁴ Kamerath Decl., ¶ 11, 7 TTABVUE 4; Aston Decl., ¶ 7, 7 TTABVUE 29. According to Mr. Kamerath, Opposer entered into a 2010 licensing agreement, and "amended and restated" the licensing agreement in 2012 and 2014. Kamerath Decl., ¶¶ 3, 4, 7 TTABVUE 3. Confidential exhibits referenced in the Kamerath Declaration are posted at 6 TTABVUE.

³⁵ Johnson Decl., ¶ 19, 7 TTABVUE 14.

³⁶ Kamerath Decl., 7 TTABVUE 2-11.

³⁷ Johnson Decl., ¶¶ 1, 3, 7 TTABVUE 11-12.

³⁸ Johnson Decl., ¶ 6, 7 TTABVUE 12.

A holding company is defined as "a Joint stock company that controls another company or companies. Ownership may be complete (100%) or partial (ownership of 50%+ of the voting shares in the company). Such ownership confers powers to control the policies of subsidiary

business and its relationship to the other Progrexion family companies has been designated confidential, we can say generally that Opposer has an affiliate relationship with CreditRepair.com, and that Opposer's assets include intellectual property.³⁹ CreditRepair.com offers credit repair and counseling services that include helping consumers repair and monitor their credit, pulling consumer credit reports and analyzing them in order to create a plan to improve the consumer's credit reports, acting as a liaison with credit bureaus to ensure appropriate changes are made to consumers' credit reports, and providing consumers with tools to monitor their credit reports.⁴⁰ CreditRepair.com "markets and sells its services through direct sales personnel and/or affiliates, website, email, social media, and radio. As the name implies, CreditRepair.com is primarily a website through which credit repair services may be marketed and sold to consumers."⁴¹

2. Opposer's quality control

Jeff Johnson is Chairman and CEO of PGX Holdings, Progrexion Holdings, Inc. ("Progrexion Holdings"), Progrexion Marketing, Inc. ("Progrexion Marketing"), and

companies." Collins Dictionary of Business, (3d ed. 2002), <https://financialdictionary.the free dictionary.com/ holding+company>. Accessed May 2, 2019.

The Board may take judicial notice of dictionary definitions, including online dictionaries, which exist in printed format. *See In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006); *See also Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). We take judicial notice of this definition.

³⁹ Johnson Decl., ¶¶ 13, 19, 16, 20, 7 TTABVUE 13, 14, 16; Aston, Decl., ¶ 7, 7 TTABVUE 29; Petersen Decl., ¶ 3, 7 TTABVUE 49.

⁴⁰ Johnson Decl., ¶¶ 13, 14, 7 TTABVUE 13.

⁴¹ Aston Decl., ¶ 24, 7 TTABVUE 33.

Opposer Progrexion IP, Inc. (“Progrexion IP”).⁴² PGX Holdings “hold[s] and exercise[s] control over the Progrexion family of companies, which includes, among others, Progrexion Holdings, Progrexion Marketing, Progrexion ASG, Inc. (Progrexion ASG), Progrexion IP, and CreditRepair.com, Inc.”⁴³ In these positions, Mr. Johnson works closely with “each of the Progrexion companies to maintain the quality and content of the goods and services we offer to consumers.”⁴⁴ Mr. Johnson oversees, directs and manages the business activities of these Progrexion companies, the goods and services offered by them, and the marketing and advertising efforts for these companies.⁴⁵ As the Chairman and CEO of Opposer, Mr. Johnson makes decisions to ensure the “continued quality of the credit repair and counseling services offered by Creditrepair.com” as well as “the manner in which the BETTER CREDIT, BETTER LIFE mark is used” in connection with the services.⁴⁶ Mr. Johnson monitors and reviews CreditRepair.com’s credit repair and counseling services, and from time to time, reviews and evaluates the work of CreditRepair.com and the goods or services it offers to its customers.⁴⁷ Mr. Johnson also serves as Chairman and CEO of Progrexion Marketing which handles “[m]arketing and brand management for the Progrexion family of companies.”⁴⁸ Mr. Johnson carefully oversees “the work of

⁴² Johnson Decl., ¶ 1, 7 TTABVUE 11.

⁴³ Johnson Decl., ¶¶ 6-7, 7 TTABVUE 12.

⁴⁴ Johnson Decl., ¶ 12, 7 TTABVUE 13.

⁴⁵ Johnson. Decl., ¶ 13, 7 TTABVUE 13.

⁴⁶ Johnson. Decl., ¶¶ 1, 12-13, 7 TTABVUE 11, 13.

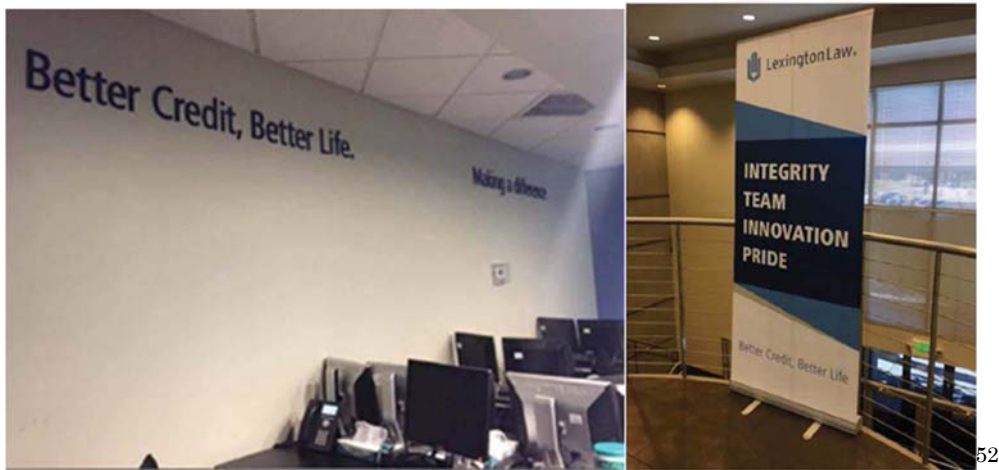
⁴⁷ Johnson. Decl., ¶ 15, 7 TTABVUE 14.

⁴⁸ Johnson. Decl., ¶ 16, 7 TTABVUE 14.

Progrexion Marketing and as it pertains to intellectual property belonging to Progrexion IP.”⁴⁹

3. Lexington Law’s use of Better Credit, Better Life

The BETTER CREDIT, BETTER LIFE mark was first conceived for and used by Lexington Law, in 2010, both internally and “to a lesser extent externally with customers and potential customers.”⁵⁰ Lexington Law used BETTER CREDIT, BETTER LIFE internally on “visible” signage, purchased in 2013.⁵¹ There is no testimony in the record as to when this signage was put into use and whether this signage was visible to customers during the rendering of the services.



Lexington Law also used BETTER CREDIT BETTER LIFE externally in its marketing brochure, shown below, but no dates of use of the marketing brochure have

⁴⁹ *Id.*

⁵⁰ Van Wagoner Decl., ¶¶ 5, 7, 11, 7 TTABVUE 81, 82; Aston Decl., ¶¶ 5, 6, 7 TTABVUE 29; Johnson Decl., ¶ 17, 7 TTABVUE 14.

⁵¹ Van Wagoner Decl., ¶¶ 11, 12a, 7 TTABVUE 82-83.

⁵² Van Wagoner Decl., ¶¶ 11, 12a and Exhibit E, 7 TTABVUE 82-83, 96.

been provided by the witness testimony.⁵³ There also is no testimony or evidence related to sales of services rendered under the BETTER CREDIT, BETTER LIFE mark by Lexington Law.



54

4. CreditRepair.com's use of Better Credit, Better Life

Although the BETTER CREDIT, BETTER LIFE tagline “was first used and developed for use [in 2010] by a Progrexion IP affiliate and licensee,” Lexington Law,

⁵³ Van Wagoner Decl., ¶¶ 12a, 12c, 12e, Exhibits E, H and J, 7 TTABVUE 82-83, 96, 108, 142. Petersen Decl., ¶ 7, Exhibit B, 7 TTABVUE 50, 58.

⁵⁴ Van Wagoner Decl., Exhibit H, 7 TTABVUE 108.

Opposer later directed external use in 2014 by CreditRepair.com alone.⁵⁵ Opposer's witnesses testified that BETTER CREDIT, BETTER LIFE has been "continuously used" from April 2014 to the present by CreditRepair.com.⁵⁶

The first external uses by CreditRepair.com were on social media in April 2014.⁵⁷ The social media platforms used by CreditRepair.com were Facebook, Google+, YouTube and Twitter.⁵⁸ Social media posts using the BETTER CREDIT, BETTER LIFE tagline were uploaded to CreditRepair.com's social media platforms "on or about the dates listed: Google+ (April 2014); YouTube (July 2014); Twitter (April 2014); and LinkedIn (Summer 2014)."⁵⁹ Prior to and including March 16, 2016, BETTER CREDIT, BETTER LIFE was also used on the CreditRepair.com website,

⁵⁵ Aston Decl., ¶¶ 5, 6, 7 TTABVUE 29; Johnson Decl. ¶ 17, 7 TTABVUE 14.

⁵⁶ Madsen Test., 12 TTABVUE 56-57; Johnson Decl., ¶ 20, 7 TTABVUE 14.

⁵⁷ Petersen Decl. ¶¶ 8, 12, 7 TTABVUE 50-51; Madsen Decl., ¶ 8, 7 TTABVUE 165.

⁵⁸ Aston Decl., ¶ 9, 7 TTABVUE 30; Pino Decl., ¶ 3, 7 TTABVUE 41.

⁵⁹ Pino Decl., ¶ 6, 7 TTABVUE 41; Petersen Test., 13 TTABVUE 52-54. Ms. Petersen's declaration testimony references an email confirming her findings of first use dates of BETTER CREDIT, BETTER LIFE on social media, attached as Exhibit F. Petersen Decl., ¶ 12, 7 TTABVUE 51, 78-79. Although some of these images provided as documentary evidence of CreditRepair.com's use are undated, testimony in the record indicates their placement and use between April 2014 through March 2016. Petersen Decl. ¶ 12, 7 TTABVUE 51; Petersen Test., 13 TTABVUE 54-55; Madsen Decl., ¶ 8, 7 TTABVUE 165; Madsen, Test., 12 TTABVUE 56-57, 61. Ms. Petersen testified that she identified the images used around the April 2014 time frame by accessing the social media accounts by story date, by clicking on the image to obtain the original post date, and through a project management tool. Petersen Test., 12 TTABVUE 52-54. Ms. Madsen testified to CreditRepair.com's "extensive social media use" and the display of the images in the social media campaigns that ran during the time period of April 2014 through March 2016. Madsen Test., 12 TTABVUE 56-57. During the campaigns, Ms. Madsen verified the images were placed on the account pages as she was "often on the social media accounts" and would see the "banners placed," and she was a follower of the Facebook and Twitter accounts. *Id.* According to Ms. Madsen, the Facebook page cover photo is still used. *Id.* at 61.

in radio advertising,⁶⁰ other advertising materials (electronic marketing brochure), and banner ads made available to affiliates between March and April 2014.⁶¹ The mark was also used on stress balls and T-shirts, with both items being given to employees.⁶²

A Facebook “cover photo” and two Facebook pages with the cover photo image that include the dates the page was “liked” are below.⁶³ The profile or cover photo used on Facebook was one that was rotated with other images; Opposer’s witness did not know how often it was displayed during the relevant period.⁶⁴

⁶⁰ The reports provided in connection with the radio spots identify the dates, times, stations, and air dates of the advertisement that mentioned the BETTER CREDIT, BETTER LIFE tagline. Madsen Decl., ¶ 10b, 7 TTABVUE 166. The radio spot that aired multiple times prior to the March 17, 2016 date. Madsen Test., 12 TTABVUE 38. The witness was unable to testify as to the effectiveness or awareness of the radio advertisement. *Id.* at 39.

⁶¹ Aston Decl., ¶ 11, 7 TTABVUE 30; Madsen Decl. ¶¶ 10b-c, 10f, 7 TTABVUE 166, 167; Madsen Test., 12 TTABVUE 52.

Ms. Madsen testified as to seeing the banner ads on multiple affiliate websites “as early as the summer of 2014” and “used regularly and continuously from that point forward.” Madsen Test., 12 TTABVUE 51.

⁶² Petersen Decl., ¶¶ 9-10, 7 TTABVUE 50-51; Madsen Decl. ¶ 4, Exhibit A, 7 TTABVUE 164, 172.

⁶³ Petersen Decl., ¶ 12 Exhibit F, 7 TTABVUE 51, 78.

⁶⁴ Madsen Test., 12 TTABVUE 61.



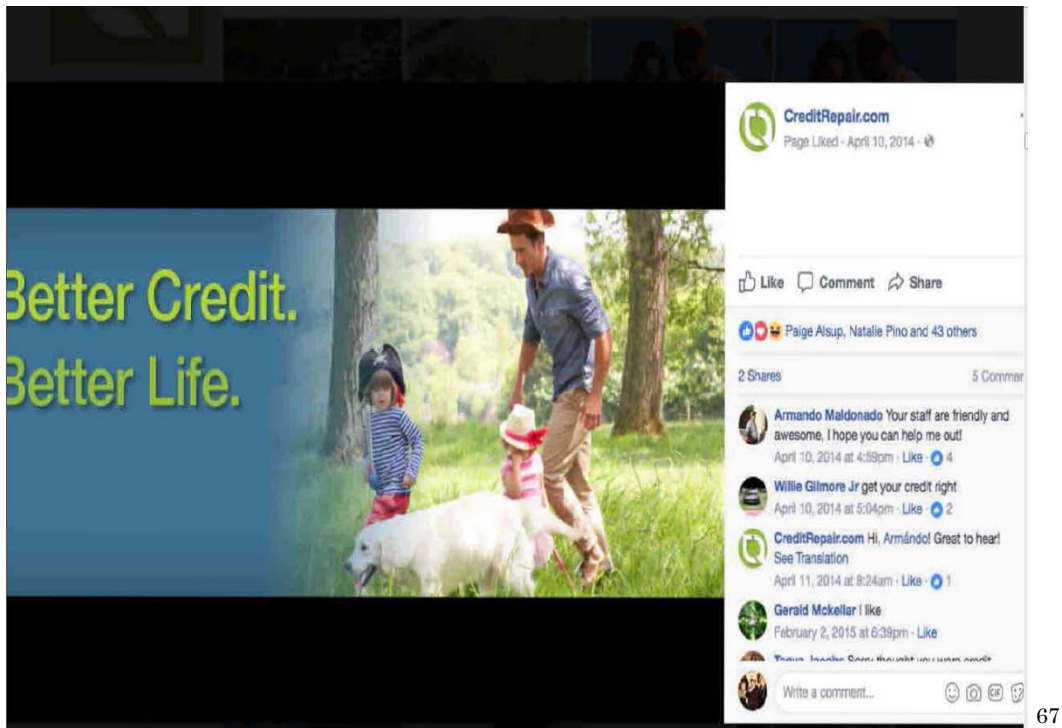
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⁶⁵ Petersen Decl., ¶ 12 and Exhibit F, 7 TTABVUE 51, 78.

⁶⁶ *Id.*



A Google+ image used in April 2014:⁶⁸



A Twitter page image is shown below.⁶⁹ Ms. Petersen's email exhibit states that the Twitter cover page image was "in use since assumed April 2014."⁷⁰ Under cross-

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 51, 78-79; Petersen Test., 13 TTABVUE 43, 53.

⁷⁰ Petersen Decl., Exhibit F, 7 TTABVUE 78.

examination, Ms. Petersen acknowledged that the Twitter page image provided was a recent post and did not reflect an April 2014 date. Ms. Petersen did not explain how she verified that the Twitter page cover image was in use in April 2014, or before the March 17, 2016 date. She did not explain why she was unable to locate or provide evidence of a Twitter page cover image with an earlier use date.



The YouTube page image used in 2014:⁷¹

⁷¹ Petersen Decl., ¶ 12 and Exhibit 12, 7 TTABVUE 51, 79.



A portion of an electronic marketing brochure from February 2015:⁷²



Better Credit. Better Life.
Start repairing your credit today.

Call 1-844-764-1567

Sign up online

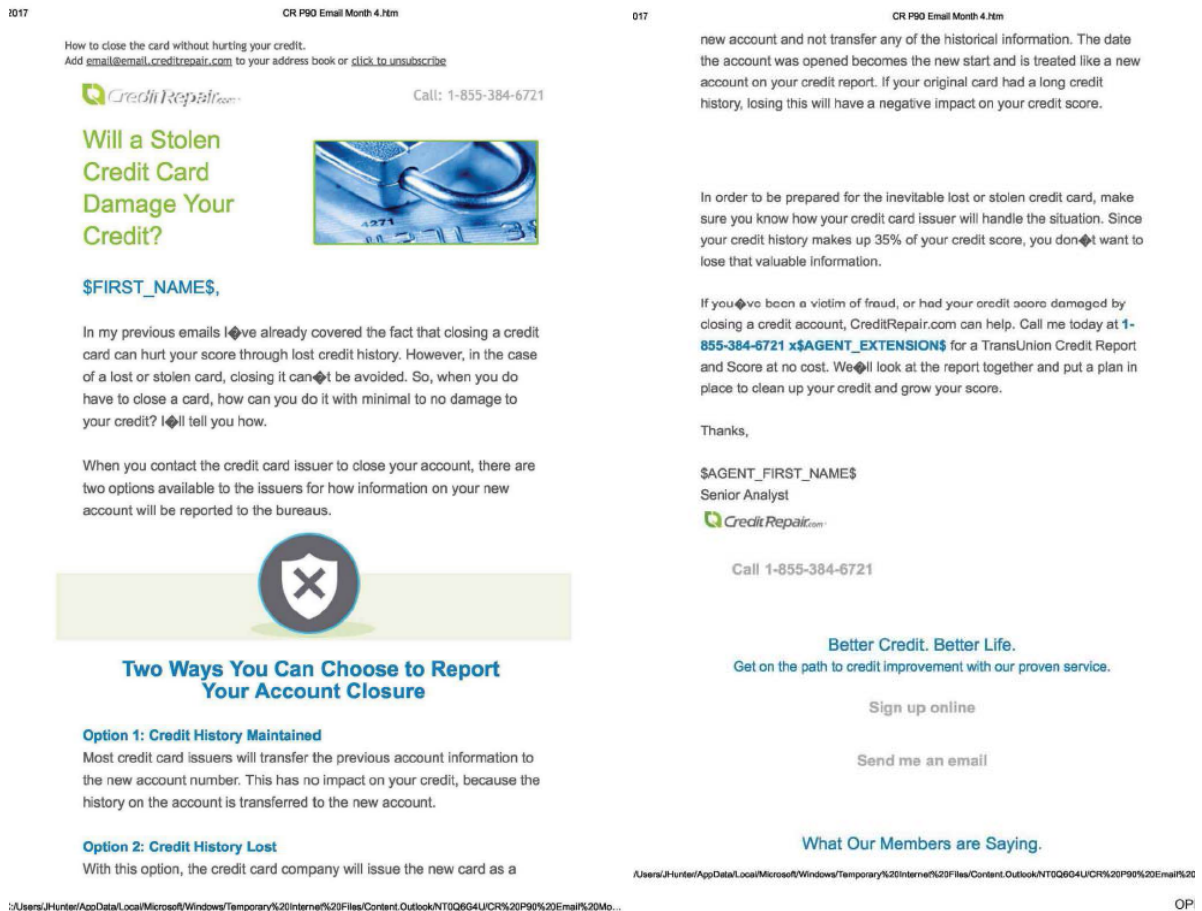
What Our Members are Saying.

According to Ms. Madsen's testimony, marketing emails were created and sent "at least" between June 10, 2014 and June 10, 2016.⁷³ Below is a portion of an email with the BETTER CREDIT, BETTER LIFE tagline sent to consumers "at least between June 2014 and June 2016" for "month 4" of an ongoing 2015 email marketing

⁷² Madsen Decl., 10d, Exhibit F, 7 TTABVUE 166, 230. The brochure is accessed from a link in an email that directs the reader to a web page. Madsen Test., 12 TTABVUE 33.

⁷³ Madsen Decl., ¶ 10e, Exhibit G, 7 TTABVUE 166-67.

campaign.⁷⁴ The originating email of the campaign began in February 2015, with follow-up emails on a timeline; consumers were contacted over a period of many months.⁷⁵



Other emails sent to consumers during the 2015 campaign are in a similar letter format and include the tagline in the same lettering and location:

⁷⁴ Madsen Decl., ¶ 10e, Exhibit G, 7 TTABVUE 166-67, 241-43. The accompanying email campaign report shows the number of emails sent, the bounce rate, the delivery rate, the number of emails opened and click through rates. Madsen Test., and Exhibit 3, 12 TTABVUE 45-51, 141-43. The initial email for the 2015 marketing campaign has not been provided.

⁷⁵ Madsen Test., 12 TTABVUE 58-59. The witness described the email campaign as a “drip campaign.” *Id.* at 58.

Better Credit. Better Life.
Get on the path to credit improvement with our proven service.

76

Below are excerpts from email letters for months 5, 7, 8 and 9 of the 2015 campaign. The last paragraphs of these email letters directly precede the tagline and reference the consumer credit repair services in a call to action:⁷⁷

Credit repair is a process, one that takes motivation and education. Contact me directly if you're looking for an advocate. ... I can help you find the tools to succeed.⁷⁸

If your credit is holding you back from living your life as a money savvy person, I can help. Call me now ... for a free TransUnion credit report and together we'll craft a personalized plan to help you employ these practices in your life.⁷⁹

If you've faced the passing of a loved one unprepared and felt the impact on your credit report. I can help. Please call me today ... to learn how your report can be vindicated from unfair or inaccurate items harming your score.⁸⁰

⁷⁶ Madsen Decl., Exhibit G, 7 TTABVUE 235-281.

⁷⁷ Ms. Madsen's declaration does not provide a "month 6" email as an exhibit.

⁷⁸ Madsen Decl., Exhibit G, Month 5, 7 TTABVUE 244-246.

⁷⁹ Madsen Decl., Exhibit G, Month 7, 7 TTABVUE 247-249.

⁸⁰ Madsen Decl., Exhibit G, Month 8, 7 TTABVUE 250-252.

If your student loans have already negatively impacted your score, I'd love to help in any way that I can. Call me today ... to find out how CreditRepair.com can assist you.⁸¹

Opposer's use in a banner advertisement is shown below:⁸²



B. Arguments and Analysis

1. Can Opposer rely on use of BETTER CREDIT, BETTER LIFE by Lexington Law and Credit Repair.com?

Applicant argues that Opposer cannot claim the benefit of the use of BETTER CREDIT, BETTER LIFE by Lexington Law or CreditRepair.com. As to licensee Lexington Law, Applicant argues that the use by Lexington Law does not inure to Opposer's benefit because the licensing agreement does not identify the BETTER CREDIT, BETTER LIFE mark.

⁸¹ Madsen Decl., Exhibit G, Month 9, 7 TTABVUE 253-255.

⁸² Madsen Decl., ¶ 10f and Exhibit I, 7 TTABVUE 167, 286.

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. *Cent. Fid. Banks, Inc. v. First Bankers Corp. of Fla.*, 225 USPQ 438, 440 (TTAB 1984). Lexington Law is a controlled licensee because the license agreement requires Lexington Law to “maintain the quality of the services it offers” and “to submit to inspection by Opposer or its authorized representative of the facilities used and services offered by Lexington Law under the agreement.”⁸³ Opposer’s licensing agreements with Lexington Law also cover the development and use of intellectual property and provide that intellectual property products produced, created or developed related to the licensed materials and services “shall automatically become the property of [Progrexion IP].”⁸⁴ Although BETTER CREDIT, BETTER LIFE was not specifically identified in the licensing agreements as a mark, the testimony and evidence establish that the BETTER CREDIT, BETTER LIFE tagline was developed for Lexington Law in connection with these agreements and that the provisions of the agreements relating to the ownership and use of developed intellectual property would apply. Therefore, Opposer was the owner of the BETTER CREDIT, BETTER LIFE tagline under the licensing agreement and any use by Lexington Law of BETTER CREDIT, BETTER LIFE would inure to Opposer’s benefit.

⁸³ Kamerath Decl., ¶ 10, 7 TTABVUE 4.

⁸⁴ Kamerath Decl., ¶ 11, 7 TTABVUE 4.

As to CreditRepair.com, Applicant argues that CreditRepair.com's use does not inure to Opposer's benefit because CreditRepair.com is neither Opposer's parent nor subsidiary and there is no written agreement between the companies regarding the use of BETTER CREDIT, BETTER LIFE.⁸⁵

Opposer's testimony indicates that Progrexion IP and CreditRepair.com are affiliates and that they are both held by and under the control of PGX Holdings. Two companies may be affiliated if they are controlled by a separate, third party.⁸⁶

Trademark Act Section 5, 15 U.S.C. § 1055, in pertinent part, provides 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, provided such mark is not used in such manner as to deceive the public." The term "related company," as defined by Trademark Act Section 45, 15 U.S.C. § 1127, means "any person whose use of a mark is controlled by the owner of the mark with respect to the nature and quality of the goods or services on or in connection with which the mark is used."⁸⁷

⁸⁵ 19 TTABVue 26.

⁸⁶ "The definition of "affiliated company" will vary, depending on the context in which the term is used. ... Companies also may be affiliated when they are subsidiaries of a third company." Webster's New World Finance and Investment Dictionary (2010). <https://www.yourdictionary.com/affiliated-company>. Accessed April 4, 2019. We take judicial notice of this definition.

⁸⁷ The term "person" includes a "juristic person." Section 45 of the Trademark Act, 15 U.S.C. § 1127. A juristic person is defined to include "a firm, corporation, union, association, or other organization capable of suing and being sued in a court of law." *Id.*

In cases where the involved entities are sister corporations, the fact that two sister corporations are controlled by a single parent corporation does not necessarily mean that they are “related” companies within the meaning of the statute. *Great Seats, Ltd. v. Great Seats, Inc.*, 84 USPQ2d 1235, 1243 (TTAB 2007). Only if the other sister corporation exercises appropriate control over the nature and quality of the goods or services on or in connection with which the mark is used will use by one sister corporation be considered to inure to the benefit of the other sister corporation. *Moreno v. Pro Boxing Supplies*, 124 USPQ2d 1028, 1035 (TTAB 2017); *Great Seats*, 84 USPQ2d at 1242. Thus, to establish that Opposer and CreditRepair.com, affiliated companies, are “related companies” under the Trademark Act, Opposer must show that it controlled CreditRepair.com’s use of the mark with respect to the nature and quality of the services rendered under the mark.

Opposer’s Chairman and CEO Jeff Johnson testified that he makes decisions to ensure the continued quality of CreditRepair.com’s services and the manner of BETTER CREDIT, BETTER LIFE’s use which includes monitoring and reviewing the services, reviewing and evaluating CreditRepair.com’s work and the goods and services offered by CreditRepair.com from time to time, as well as managing and directing its advertising and marketing. This testimony is sufficient to establish Opposer’s control over the nature and quality of the services rendered by CreditRepair.com under the BETTER CREDIT, BETTER LIFE mark. In this case, there is no formal written agreement in the record; however, the Board recognizes oral and informal agreements. *See, e.g., Nestle Co. Inc. v. Nash-Finch Co.*, 4 USPQ2d

1085, 1089 (TTAB 1987) (written license not required); *Basic Inc. v. Rex*, 167 USPQ 696, 697 (TTAB 1970) (“An oral license is sufficient to show a related company condition and there are elements of control between applicant and the licensee.”). It is apparent there is at least an informal agreement as to CreditRepair.com’s external use of BETTER CREDIT, BETTER LIFE.⁸⁸ Opposer, as an affiliate to Creditrepair.com, exercises appropriate control over the nature and quality of the goods or services on or in connection with which BETTER CREDIT, BETTER LIFE is used. Thus, contrary to Applicant’s arguments, CreditRepair.com’s use inures to Opposer’s benefit.

Applicant also argues that there is no evidence that a consumer would believe that Opposer, Lexington Law, and CreditRepair.com comprise a single source of the services. However, the witness testimony demonstrates that there is a unity of control. Jeff Johnson, the CEO and Chairman of PGX Holdings, the holding company that controls Opposer and CreditRepair.com, as well as the CEO and Chairman of Opposer, provided detailed testimony to establish how he controlled the nature and quality of CreditRepair.com’s services used in connection with BETTER CREDIT, BETTER LIFE as well as his control over the manner of use of BETTER CREDIT, BETTER LIFE. As to any pre-2014 external use of BETTER CREDIT, BETTER LIFE, unity of control was shown by Eric Kamerath’s testimony describing Opposer’s quality control, which would have been overseen by Jeff Johnson, Chairman and CEO of PGX Holdings and Opposer, over licensee Lexington Law’s products and services,

⁸⁸ Van Wagoner Decl., ¶ 13, 7 TTABVUE 84.

and which included the use of any intellectual property developed under the license. Applicant does not point to any evidence that demonstrates a failure on the part of Lexington Law or CreditRepair.com to meet Opposer's requirements to provide products and services of acceptable quality under BETTER CREDIT, BETTER LIFE. Thus, there is no evidence that Opposer's quality control was ineffectual or nonexistent.

2. Does CreditRepair.com's and Lexington Law's use of BETTER CREDIT, BETTER LIFE constitute technical service mark use?

Applicant argues that in its internal marketing materials CreditRepair.com does not refer to BETTER CREDIT, BETTER LIFE as a service mark but as a tagline. But a tagline is just another name for a slogan, and slogans may be trademarks.⁸⁹ *In re Wilderness Grp., Inc.*, 189 USPQ 44, 45 (TTAB 1975) (citing cases); *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1213.05(b)(i) (Oct. 2018) ("A registrable slogan is one that is used in a trademark sense and functions as a trademark or service mark...."). Applicant also argues that Opposer was not using BETTER CREDIT, BETTER LIFE "as a trademark" and that Opposer did not include the trademark ("TM") or service mark ("SM") designation to provide public notice of use of the tagline as a mark. "The fact that no symbol, such as 'TM' or 'SM,' is used to designate an alleged mark is also some evidence that the phrase is not being used in a trademark or service mark sense." *In re Wakefern Food Corp.*, 222 USPQ 76, 78-

⁸⁹ Tagline is defined as "An often repeated phrase associated with an individual, organization, or commercial product; a slogan." American Heritage Dictionary of the English Language, (5th ed. 2016), <https://www.thefreedictionary.com/tagline>. Accessed April 4, 2019. We take judicial notice of this definition.

79 (TTAB 1984). That said, there is certainly no requirement that the “TM” or “SM” symbol must be used in connection with an asserted trademark or service mark, and use of those designations does not establish that the matter so identified is a trademark. *See In re Sones*, 590 F.3d 1282, 93 USPQ2d 1118, 1124 (Fed. Cir. 2009) (noting that the use of “TM” may “lend[] a degree of visual prominence” to the designated matter, but is not dispositive of whether the designated matter functions as a mark (quoting *In re Dell, Inc.*, 71 USPQ2d 1725, 1729 (TTAB 2004))). The question is whether relevant purchasers recognize the matter as an indication of source, not whether it is explicitly identified as such.

In order to demonstrate technical service mark use as defined in the Trademark Act, it must be shown that the mark has been used or displayed in the sale or advertising of the services and that the services have been rendered in commerce. *See* Trademark Act § 45, 15 U.S.C. § 1127; *Aycock Eng’g, Inc. v. Airflite, Inc.*, 560 F.3d 1350, 90 USPQ2d 1301, 1305 (Fed. Cir. 2009).

We consider whether BETTER CREDIT, BETTER LIFE, as used, would have been recognized in itself as an indication of source for Lexington Law’s and CreditRepair.com’s services. This necessitates a determination as to whether BETTER CREDIT, BETTER LIFE is used in such a manner to make it known to purchasers and to have such individuals associate it with a source for the services. We therefore consider whether the slogan or tagline is used in connection with the sale, rendering or performance of the services or whether, as used, the slogan or tagline includes a reference to the services. *Cf. In re Metriplex, Inc.*, 23 USPQ2d 1315,

1316 (TTAB 1992) (indicating that a specimen that does not explicitly refer to the services may be acceptable if it “show[s] use of the mark in the rendering, i.e., sale, of the services”). We also consider whether the designation creates a commercial impression separate and apart from the other material appearing on the signage, the social media uses, the electronic and print brochure, the banner advertisement, or the email solicitation letters so that it will be recognized as an indication of origin for the particular product or service. *See Procter & Gamble Co. v. Keystone Auto. Warehouse, Inc.*, 191 USPQ 469, 474 (TTAB, 1976), and cases cited therein. We discuss the usages of BETTER CREDIT, BETTER LIFE separately, here, and in our discussion of analogous use, but we have viewed all the evidence on which Opposer bases its claim of prior use “as a whole, as if each piece of evidence were part of a puzzle which, when fitted together, establishes priority,” to see if Opposer has established prior use. *W. Fla. Seafood Inc. v. Jet Rests. Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994).

We find that Opposer has not proven priority based on Lexington’s Law’s use of BETTER CREDIT, BETTER LIFE. As to the internal signage, we do not know the date when first used, and there is no testimony that consumers were exposed to these uses during the rendering of services. As to the brochure, there is no testimony relating to its distribution date.

As to CreditRepair.com’s social media and other Internet use of BETTER CREDIT, BETTER LIFE, the cover images or header images for Facebook, Twitter, Google+ and YouTube, and the use of BETTER CREDIT, BETTER LIFE on the

banner advertisement, do create a separate and distinct commercial impression, given the size and position of BETTER CREDIT, BETTER LIFE on the cover or header images and banner advertisement. But the Facebook, Google+ and YouTube header images and the banner advertisement do not include textual references to any services, only a reference to CreditRepair.com's website, although the banner advertisement does include the additional text "learn more." We find that the Facebook, Google+ and YouTube pages or header images and the banner advertisement do not constitute technical service mark use because there are no references to CreditRepair.com's services to create an association for the consumer between BETTER CREDIT, BETTER LIFE and CreditRepair.com's services.

The Twitter page header image does create an association between the BETTER CREDIT, BETTER LIFE and the services by the wording "We are the Credit Repair Experts. Our motto is Better Credit Better Life." But the testimony in the record does not clearly establish that this header image and reference to the services was in use prior to Applicant's March 17, 2016 constructive use date. Therefore, we cannot rely on this evidence for purposes of priority as technical service mark use.

With regard to the email marketing letters and electronic brochure, although BETTER CREDIT, BETTER LIFE is shown on the second page of both the multi-page letter and the brochure, the slogan is not buried within a line of text but is set out separately from the other text in a distinctly different color and typeface. *Cf. In re McDonald's Corp.*, 229 USPQ 555, 556 (TTAB 1985) ("It is not that the subject matter must be more prominent than everything else on the specimens. On the other

hand, it must not blend so well with other matter on the specimens that it is difficult or impossible to discern which element is supposed to be the service mark.”); *In re Niagara Frontier Servs., Inc.*, 221 USPQ 284, 285 (TTAB 1983) (while slogan “We Make It, You Bake It!” appears on two separate lines of the five line message, “it reads as a natural part of the larger thought, is presented in the same type size and style as the other matter (with the exception of the term PIZZA which appears in all capital letters)”).

The email marketing letters’ call to action, which directly precede the BETTER CREDIT, BETTER LIFE slogan, explain the nature of the services. For example, the letter from the fourth month of the 2015 email campaign states: “If you’ve been a victim of fraud, or had your credit score damaged by closing a credit account, CreditRepair.com can help. ...We’ll look at the report together and put a plan in place to clean up your credit and grow your score.”⁹⁰ The services are also referenced in the email letters by the wording that follows below the BETTER CREDIT, BETTER LIFE slogan: “Get on the path to credit improvement with our proven service.” As to the electronic brochure, reference to the services is shown below the BETTER CREDIT, BETTER LIFE slogan by the sentence “start repairing your credit today.”

Contrary to Applicant’s arguments, we find that this evidence shows use of BETTER CREDIT, BETTER LIFE in the manner of a service mark in connection with the email marketing letters and the electronic brochure.

⁹⁰ Madsen Decl., Exhibit G, 7 TTABVUE 241-242.

The testimony is consistent and clear that Opposer was offering the services under BETTER CREDIT, BETTER LIFE prior to March 17, 2016, and the documentary evidence shows use in the manner of a service mark. Additionally, although less clear and detailed, the testimony indicates that Opposer was rendering services under BETTER CREDIT, BETTER LIFE prior to March 17, 2016.⁹¹ We find that Opposer has established technical service mark use of BETTER CREDIT, BETTER LIFE prior to Applicant's constructive use date.

Because Applicant stipulated that the parties' use of their marks is likely to cause confusion, our finding that Opposer established priority is sufficient to render judgment in Opposer's favor.

3. Whether Opposer has established use analogous to service mark use?

For completeness, we consider whether, in the alternative, Opposer's evidence establishes use analogous to service mark use. Applicant argues that "[t]he evidence before this Board conclusively proves that Progrexion's use of BCBL was non-trademark use, while the evidence conspicuously absent (i.e., evidence of substantial impact on the purchasing public) is dispositive."⁹² Opposer argues, on the other hand, that the uses described above "also constitute the kind of analogous use sufficient to

⁹¹ Johnson Decl., ¶¶ 13-14, 7 TTABVUE 13; Van Wagoner Decl., ¶ 14, 7 TTABVUE 84; Aston Decl., ¶ 7, TTABVUE 29. Applicant has not argued that Opposer's affiliate was not rendering services under the mark. We consider Applicant's arguments to be aligned with those priority cases where the party was selling goods or rendering services but had not used the designation in the manner of a mark.

⁹² 19 TTABVUE 22.

establish priority in and with PROGREXION”⁹³ if its uses do not constitute technical service mark use.⁹⁴

Before a prior non-technical trademark or service mark use can become an analogous use sufficient to create proprietary rights, a party must show prior use sufficient to create an association in the minds of the purchasing public between the mark and the services. *Malcolm Nicol & Co. v. Witco Corp.*, 881 F.2d 1063, 11 USPQ2d 1638, 1639 (Fed. Cir. 1989). The activities claimed to constitute non-technical trademark or service mark use, or analogous use, must have a substantial impact on the purchasing public. *T.A.B. Sys. v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879, 1882 (Fed. Cir. 1996). *See, e.g., Liqwacon Corp. v. Browning-Ferris Indus., Inc.*, 203 USPQ 305, 308-309 (TTAB 1979) (“the use ... must be an ‘open and notorious’ use reaching purchasers or prospective purchasers of the goods or services for which the mark is employed”).

We reject Applicant’s contention that we should draw a negative inference from the fact that Opposer did not conduct a survey regarding whether the consuming public associates BETTER CREDIT, BETTER LIFE with Opposer or its services. “The cases on analogous use have not required that the opposer proffer survey evidence or other direct evidence of the consuming public’s identification of the target word or phrase with the opposer as the source of a given product or service.” *T.A.B. Sys. v. PacTel Teletrac*, 37 USPQ2d at 1881. Rather, “we may infer the fact of

⁹³ 18 TTABVUE 28.

⁹⁴ 19 TTABVUE 30.

identification of the mark with the party on the basis of indirect evidence regarding the party's use of the word or phrase in advertising [such as] brochures, catalogs, newspaper ads, and articles in newspapers and trade publications" as well as online advertising. *Id.*

As stated above, we do not rely on Lexington Law's use on signage or the print brochure due to lack of sufficient testimony regarding its use. We also cannot determine the impact on the consumer of CreditRepair.com's electronic brochure (accessible from a webpage) because Opposer's witness did not provide any information as to how often CreditRepair.com's electronic brochure was viewed.

As to Opposer's social media use, as stated above, except for the Twitter page, which we do not rely on for the reasons already discussed, there is no reference to the services. There also is no testimony relating to the extent of consumer exposure to the social media platforms (such as the number of followers, likes, or other analytics) during the relevant period prior to March 17, 2016.⁹⁵ To the extent the documentary evidence demonstrating CreditRepair.com's use of BETTER CREDIT, BETTER LIFE on various social media accounts bears figures that would purport to show the exposure of these pages to the public, those figures are hearsay and do not establish the truth of the matter.⁹⁶

⁹⁵ There is testimony that "as of March 19, 2018, ... 101,579 people have liked the CreditRepair.com Facebook page, and 100,969 people are following the CreditRepair.com Facebook page." Pino Decl., ¶ 7, 7 TTABVUE 41-42.

⁹⁶ In any event, these numbers do not show significant exposure to the public from the social media platforms. The social media exhibits show on their face the following: YouTube channel (274 subscribers), Twitter (1684 followers and 283 likes); Facebook (likes from Natalie Pino

As to the BETTER CREDIT, BETTER LIFE banner advertisement, as stated above, there is no reference to the services. The testimony indicates that it was a “popular ad” for affiliates and was used (and still is used) regularly by affiliates to generate sales leads,⁹⁷ but there is no specific testimony related to how often the banner ad was used or its impact on consumers (e.g., number of times the ad was served (impressions), the click through rates, number of viewers or potential viewers, or number of conversions) during the period prior to March 17, 2016. Testimony in the record also indicates that radio advertisements ran in media markets in the United States from March 14 through April 17, 2016.⁹⁸ One advertisement that, according to the testimony, included the BETTER CREDIT, BETTER LIFE tagline ran multiple times two days prior (March 14 - March 16, 2016) to the critical March 17, 2016, date. But there is no testimony related to impressions, reach or market share resulting from the radio advertisement, and Opposer’s witness could not speak to the effectiveness or increased awareness for the March 14th - March 16th time period.⁹⁹ Opposer also points to its distribution of BETTER CREDIT, BETTER LIFE T-shirts and stress balls to employees as a basis for priority, but these items were not distributed to prospective purchasers.

and 10 others on March 14, 2014; Likes from Paige Alsup, Natalie Pino and 43 others on April 14, 2014). Petersen Decl., ¶ 12, 7 TTABVUE 75, 92-94.

⁹⁷ Madsen Test., 12 TTABVUE 52.

⁹⁸ Madsen Decl., 7 TTABVUE 165-66. The script of the radio advertisement was not provided.

⁹⁹ Madsen Test., 12 TTABVUE 39.

Lastly, we consider CreditRepair.com's February 2015 email campaign. One report evidencing the campaign covers the period from June 10, 2014 through June 10, 2016, while an excerpted second report covers the period from June 4, 2014 through February 29, 2016. As to the excerpted report, Applicant submits that we should make an adverse inference against Opposer because this report fails to include delivery information. As to the June 10, 2014 through June 10, 2016 report, Applicant submits that this report is not reliable because it "includes a significant amount of time that is after the Critical Date (i.e., March 17, 2016), [and] it cannot be relied upon to accurately reflect e-mails sent only prior to the Critical Date."¹⁰⁰

We need not make an adverse inference regarding the June 4, 2014 - February 29, 2016 excerpted report, but have accorded it less probative weight. In connection with the June 10, 2014 - June 10, 2016 report, Opposer's witness testified that the origination date for the email campaign was February 2015, with follow-up emails to the consumer over a period of months.

Q Okay. Do you see anywhere on this document the same information that you just identified in Exhibit 7?

A I do. The top line of this under "Campaign" is "CR Infographic February 2015."

Q Does that in any way refresh your recollection as to when this information, this marketing particular campaign would have been sent out or used by Progrexion?

A Yes. It would have been sent in February 2015.

Q ... Are the other entries on this particular table, which is Exhibit 7 -- or Exhibit

¹⁰⁰ 19 TTABVUE 34.

3, are they -- do you know whether or not they represent marketing pieces, e-mails, et cetera, sent out in connection with the CR Infographic blast February 2015 campaign?

A So this shows that, yes, the CR Infographic blast campaign would have happened in 2015, February of 2015.¹⁰¹

Q So once the original -- I just want to make sure we understand this. Once the original blast goes out in February of 2015, can you tell me whether or not your -- whether or not it's your testimony that the following nine e-mails listed on the table went out in successive months?

A That's correct. It would be a series or a campaign that would then run its course over those --that time frame.¹⁰²

A This report shows the number of times these different e-mail campaigns were sent during this two-year window. The name of the campaign indicates to me the point of time that they were sent. Month 4 would indicate the fourth month they were involved in one of our campaigns. Month 5 would mean Month 5 of that campaign. Month 6, the sixth month of that campaign and so forth. And then the same is to be said for days. They receive an initial transmission of an e-mail, and then these are follow-up campaigns.¹⁰³

Q The information with respect to the e-mails, as far as the time period this report was ran, it has a period of time, a significant period of time that ran after March 17, 2016, correct?


A I wouldn't call it a significant time, but there are a couple months, a few months. But, again, this shows a campaign series that would have lasted at least eight months beyond an initial e-mail. So this backs up at least

¹⁰¹ *Id.* at 45-46.









¹⁰² *Id.* at 46-47.

¹⁰³ Madsen Test., 12 TTABVUE 20.

eight months prior to June 16.¹⁰⁴

Program	Campaign Detail	Campaign	Sent	Bounce Rate	Delivered Rate	Open Rate	Unique Open Rate	Click-Through Rate	Unique Click-Through Rate	Responder Rate
CR Dream Campaign NFL Email		CR Infographic Blast Feb 2015	13,745	0.16%	99.84%	44.60%	31.63%	1.64%	1.44%	1.31%
CR Email Month 24-36		CR Email Month 30 - Relationship Prob	4,855	0.76%	99.24%	27.46%	20.15%	0.66%	0.46%	0.44%
		CR Email Month 33 - Balance Transfers	4,017	0.40%	99.60%	19.47%	14.57%	0.30%	0.30%	0.30%
		CR Email Month 36 - Renting	3,635	0.52%	99.48%	21.82%	15.79%	0.55%	0.53%	0.53%
CR Email Month 4-10		CR Email Month 4 - Lost Card	8,807	0.14%	99.86%	41.59%	29.30%	0.93%	0.88%	0.75%
		CR Email Month 5 - Loan Types	8,750	0.16%	99.84%	40.74%	28.57%	1.03%	0.94%	0.82%
		CR Email Month 6 - Debt Cons	9,278	0.26%	99.74%	35.38%	24.83%	0.58%	0.51%	0.49%
		CR Email Month 7 - Money Savvy	9,220	0.27%	99.73%	26.08%	19.34%			
		CR Email Month 8 - Death	8,635	0.21%	99.79%	29.80%	22.12%	0.78%	0.71%	0.58%
		CR Email Month 9 - Student Loans	7,869	0.23%	99.77%	24.52%	19.09%	0.41%	0.38%	0.37%

105

Campaign	Content	Link	Device	Segment	Segment Group	Multivar
Program	Campaign Detail	Campaign	Sent			
CR Email Month 24-36		CR Email Month 30 - Relationship Prob	4,028			
		CR Email Month 33 - Balance Transfers	3,666			
CR Email Month 4-10		CR Email Month 4 - Lost Card	6,331			
		CR Email Month 5 - Loan Types	6,415			
		CR Email Month 6 - Debt Cons	6,977			
		CR Email Month 7 - Money Savvy	7,166			
		CR Email Month 8 - Death	6,846			
		CR Email Month 9 - Student Loans	6,190			

106

¹⁰⁴ Madsen Test., 12 TTABVUE 59.

¹⁰⁵ Madsen Decl., Exhibit H, 7 TTABVUE 283.

¹⁰⁶ *Id.* at 284.

Based on the testimony, we can consider the portion of the June 10, 2014 - June 10, 2016 report in connection with the “CR Infographic Blast Feb 2015” and the CR email months 4-9, all of which would have been sent prior to Applicant’s March 17, 2016 constructive use date.¹⁰⁷ The campaign was a “drip campaign” that resulted in an originating email with follow-up emails sent to these consumers over a period of months.¹⁰⁸ We also know from the testimony that different personalized email templates with the BETTER CREDIT, BETTER LIFE tagline were sent to the consumers based on the months of the campaign.¹⁰⁹ As discussed above, these emails included the BETTER CREDIT, BETTER LIFE tagline followed by the wording “Get on the path to credit improvement with our proven service,” and a reference to the credit repair services in the call to action, directly preceding the tagline.

Although the two reports are inconsistent as to the numbers of emails sent due to the periods of time covered by the reports, both show that the campaign involved sending a substantial number of consumer emails. We know from the June 2014 - June 2016 report that the delivery rate was at least 99%, and we can infer a similar delivery rate with the excerpted report that does not include the delivery rate. Even if we consider the lower numbers of emails sent, based on the excerpted report, a

¹⁰⁷ Ms. Madsen’s testimony did not address the CV campaign listed on the report, and given the time frame of the report, we do not consider it.

¹⁰⁸ Madsen Test., 12 TTABVUE 58-59.

¹⁰⁹ Madsen Test., 12 TTABVUE 50. Although Applicant complains that email templates were provided as evidence rather than actual emails to consumers, the testimony corroborates that these were the templates used in the campaign, and sent to the customers in personalized form. Madsen Test., 12 TTABVUE 16. (“Templates? I don’t know if templates describes them, but these are actual e-mails that were sent. Templates, yes, in that you can insert a name to personalize them.”).

substantial amount of consumers received and accessed these emails. Also, the 2015 email advertising campaign was of sufficient clarity and repetition using the BETTER CREDIT, BETTER LIFE tagline to create the required identification with the consumers who might be expected to purchase CreditRepair.com's services. We find that the email campaign sufficiently establishes priority based on use analogous to service mark use.

Considering the evidence as a whole, we find in the alternative, that Opposer has established by a preponderance of the evidence that it made analogous use of BETTER CREDIT, BETTER LIFE prior to any date upon which Applicant may rely, and that Opposer's use was sufficient to create an association in the mind of the relevant public with Opposer and its services.

V. Conclusion

As to priority, Opposer proved that it used BETTER CREDIT, BETTER LIFE as a mark prior to Applicant's constructive use date, or in the alternative, made sufficient analogous use. As to likelihood of confusion, the marks are identical, the services similar or related, and Applicant has stipulated that confusion is likely. We find that Opposer has proven its Section 2(d) claim.

Decision: The opposition is sustained and registration to Applicant is refused.