

This Opinion is not a  
Precedent of the TTAB

Mailed: October 30, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Arms Keep, LLC d/b/a Violent Little Machine Shop*  
*v.*  
*Morale Patch Armory LLC*

—  
Cancellation No. 92065573  
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Christina S. Loza of Loza & Loza LLP for  
Arms Keep, LLC d/b/a Violent Little Machine Shop.

Kevin Keener, of Keener & Associates PC for  
Morale Patch Armory LLC.

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Before Zervas, Ritchie and Goodman,  
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Morale Patch Armory LLC (“Respondent”) owns a registration for the mark MORALE PATCH (in standard characters, PATCH disclaimed) for “Ornamental cloth patches; Patches for clothing made of rubber, plastic and vinyl” in International Class 26.<sup>1</sup>

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<sup>1</sup> Registration No. 5136105 issued February 07, 2017.

Arms Keep, LLC d/b/a Violent Little Machine Shop (“Petitioner”) filed a petition to cancel the registration of Respondent’s mark on the grounds of descriptiveness or genericness.<sup>2</sup> Petitioner alleges that it is in the business of selling morale patches and has been doing so on its website, <violentlittle.com>, since at least as early as March 2014. ¶ 5, 1 TTABVUE 4.

Respondent, in its answer, admitted allegations in the petition to cancel regarding its name, address and ownership of the involved registration, as well as the date of registration, the identified goods, and the filing date of the underlying application. Respondent otherwise denied the allegations in the petition to cancel.<sup>3</sup> 5 TTABVUE. Each party filed a brief, and Petitioner filed a reply brief.

#### I. Preliminary Matters – Outstanding Motions or Objections

By request in its reply brief, and by separate motion, Petitioner has sought judicial notice of exhibits attached to its reply brief which it identifies as Petitioner’s web page and an archived version of Petitioner’s web page. Petitioner argues that its web pages are proper subjects of judicial notice because it has provided copies of them to the Board, the web pages are easily verifiable, and the accuracy of these web pages cannot

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References to the briefs and the record refer to the Board’s TTABVUE docket system.

<sup>2</sup> Petitioner also alleged that Respondent’s mark does not identify a single source and that Petitioner and many others are senior or prior users of MORALE PATCH. We construe these allegations to assert that the term MORALE PATCH is in widespread common use by others for the same goods, and not allegations of prior proprietary rights. These assertions do not identify separate grounds for cancellation but are additional allegations that support the descriptiveness and genericness claims.

<sup>3</sup> The only valid affirmative defense in Respondent’s answer is “failure to state a claim,” which was not pursued at trial and has been waived.

reasonably be questioned. It appears that the basis for submitting these exhibits is to show that “Petitioner is in the business of selling ornamental patches made of cloth, rubber, plastic, and/or vinyl, or morale patches, and has been doing so on its website, <www.violentlittle.com>, since at least as early as March 2014.” 22 TTABVUE 5.

Respondent has objected to the request and motion. Respondent also has filed a motion to strike the web page exhibits as untimely filed. 23 TTABVUE.

As Respondent correctly points out, the submission of evidence with Petitioner’s reply brief is untimely as it was not filed during Petitioner’s testimony period. *Life Zone Inc. v. Middleman Group, Inc.*, 87 USPQ2d 1953, 1955 (TTAB 2008); TRADEMARK BOARD MANUAL OF PROCEDURE (“TBMP”) § 704.05(b) (2019). Therefore, this evidence is not properly of record. *Id.*

As to Petitioner’s request for judicial notice, web pages from Petitioner’s website do not constitute the type of source whose accuracy cannot reasonably be questioned nor do the web pages contain facts that are generally known, as contemplated by Fed. R. Evid. 201(b)(2). See *UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868, 1874 (TTAB 2011) (rejecting request for judicial notice of web pages); cf. *In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1768 (TTAB 2016) (on appeal, Board will not take judicial notice of statements from commercial websites that do not constitute dictionary definitions).

We find Petitioner’s website web pages are not suitable matter for judicial notice. Therefore, the motion and request to take judicial notice of Petitioner’s web pages is denied, and Respondent’s motion to strike these exhibits as untimely is granted to

the extent that the Board will not consider the web pages attached to Petitioner's reply brief.

Respondent has objected to "all exhibits" submitted by Petitioner under notice of reliance as lacking authentication.

Notice of reliance exhibit 6, "Air Force Guidance Memorandum to AFI 36-2903, Dress and Personal Appearance of Air Force Personnel" (February 9, 2017) is an official government publication which is self-authenticating. Trademark Rule 2.122(e); Fed. R. Evid. 902(5). Therefore, the objection to authentication is overruled.

Notice of reliance exhibits 2, 3, 5, 7, 8, 10, and 11 all contain the URL and publication date and are properly authenticated. Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122; *Safer, Inc. v. OMS Investments, Inc.* 94 USPQ2d 1031, 1039 (TTAB 2010) (a document obtained from the Internet may be admitted into evidence pursuant to a notice of reliance in the same manner as a printed publication in general circulation so long as the document identifies the date accessed as well as its source (the Internet address or URL). Therefore, this objection is overruled.

On the other hand, notice of reliance exhibits 1, 4, and 9 contain the URL but lack the publication date. However Petitioner's counsel has signed the notice of reliance and provided the statement that these web pages were accessed on September 10, 2018. We find this statement is sufficient to authenticate these exhibits. *See* Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122; Trademark Rule 11.18, 37 C.F.R. § 11.18 (the signing of a paper by counsel is a certification that the information provided therein is true and that statements based on information and belief are

believed to be true). Therefore, we overrule Respondent's objection to exhibits 1, 4 and 9 based on lack of authentication.

We overrule Respondent's hearsay objection to exhibit 6 submitted under the notice of reliance.<sup>4</sup> Fed. R. Evid. 803(8); *see, e.g., Lorraine v. Market American Ins. Co.*, 241 F.R.D. 534, 551 (D. Md. 2007) ("Given the frequency with which official publications from government agencies are relevant to litigation and the increasing tendency for such agencies to have their own websites, Rule 902(5) provides a very useful method of authenticating these publications. When combined with the public records exception to the hearsay rule, Rule 803(8), these official publications posted on government agency websites should be admitted into evidence easily."); *Stawski v. Lawson*, 129 USPQ2d 1036, 1040 (TTAB 2018).

We sustain Respondent's hearsay objections to exhibits 1, 2, 3, 4, 5, 7, 8, 9, 10, and 11 submitted under notice of reliance to the extent that Petitioner is offering these exhibits for the truth of any matter stated therein.<sup>5</sup> *See, e.g., 7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1717 n.2 (TTAB 2007) (materials made of record by notice of

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<sup>4</sup> In its brief, Petitioner points to the memorandum's definition of "morale patch" as "a design symbol locally developed and displayed," as well as three instances where "morale patch" is used in a generic manner. 20 TTABVUE 16.

<sup>5</sup> Exhibits 1-5 are articles about morale patches or interviews with Respondent's principal. Exhibits 7-11 are Internet web page printouts from websites offering morale patches. Petitioner indicates that these exhibits were "submitted to demonstrate the manner in which Julio Medina, online retailers, and online forums, describe their goods and use the term 'morale patch'" and the web page evidence was submitted "to show whether the relevant public understands the term primarily to refer to the identified products." 22 TTABVUE 3. Petitioner also maintains that the printed publications in the notice of reliance "serve as evidence establishing widespread and prolific use of the term 'morale patch' to refer to ornamental patches and patches for clothing, not for the truth of the statements within the printed publications." 22 TTABVUE 4.

reliance under 37 C.F.R. § 2.122(e) not admissible for the truth of the matters contained therein, unless a competent witness has testified to the truth of such matters). However, the documents are admissible for what they show on their face, which is that the public may have been exposed to the articles and websites and therefore may be aware of the information contained therein.

Petitioner also attached exhibits (Internet website printouts) to the petition to cancel. These exhibits are not evidence on behalf of Petitioner. To be of record, these exhibits must be identified and introduced in evidence as an exhibit during the period for the taking of testimony. Trademark Rule 2.122(c), 37 C.F.R. § 2.122(c).

## 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 files of the involved applications. In addition, Petitioner introduced a notice of reliance upon printed publications, Internet website evidence (online catalogs), and Air Force Guidance Memorandum to AFI 36-2903, Dress and Personal Appearance of Air Force Personnel. 19 TTABVUE.

The admissibility of these publications has been discussed above. Respondent did not submit any evidence during its trial period.

## III. Standing

Section 14 of the Trademark Act allows for a petition to cancel a registration of a mark, “by any person who believes that he is or will be damaged ... by the registration of a mark on the principal register. ...” For a petitioner to prevail in a cancellation proceeding, the petitioner must show by a preponderance of the evidence (1) that it

possesses standing to challenge the continued presence on the register of the subject registration and (2) that there is a valid ground why the registrant is not entitled under law to maintain the registration. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 187 (CCPA 1982).

Standing is a threshold issue that must be proven by the plaintiff in every inter partes case. See *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Lipton Indus.*, 213 USPQ at 189 (“The facts regarding standing ... are part of a petitioner’s case and must be affirmatively proved. Accordingly, [petitioner] is not entitled to standing solely because of the allegations in its petition.”).

A plaintiff must demonstrate that it possesses a “real interest” in a proceeding beyond that of a mere intermeddler, and “a reasonable basis for his belief of damage.” See *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 111 USPQ2d at 1062 (citing *Ritchie v. Simpson*, 170 F.3d 1902, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999)). Attorney argument does not substitute for evidence. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (citation omitted). If standing is unproven at trial, it defeats a plaintiff’s case. See *Lipton Indus.*, 213 USPQ at 189-190; *No Nonsense Fashions, Inc. v. Consolidated Foods Corp.*, 226 USPQ 502, 504 (TTAB 1985).

As noted above, the petition to cancel includes an allegation that Petitioner sells morale patches on its website violentlittle.com. ¶ 5, 1 TTABVUE 4. This allegation suffices as a pleading of standing, and would suffice, if proven at trial, to establish

Petitioner's standing in this case. *See, e.g., Eastman Kodak Co. v. Bell & Howell Document Management Products Co.*, 23 USPQ2d 1878 (TTAB 1992), *aff'd* 994 F.2d 1569, 26 USPQ2d 1912, (Fed. Cir. 1993) (where a plaintiff challenges a mark on the ground of mere descriptiveness, the plaintiff may establish its standing by pleading and then proving that it is engaged in the manufacture or sale of the same or related products).

However, Petitioner failed to take any testimony or introduce any other evidence at trial to prove its standing to bring this cancellation proceeding based on the allegation in its petition to cancel that it is a competitor of Respondent. The documents identified above submitted under notice of reliance are relevant to the descriptiveness or genericness ground and do not relate to Petitioner's activities. None of those documents establish that Petitioner is the owner of a website where it sells morale patches. As stated, we do not consider the untimely web page evidence for the website [violentlittle.com](http://violentlittle.com). But even if we had considered this evidence, there is no corroborating testimony or other evidence that Petitioner owns or controls this website. Absent testimony, the website evidence would not be admissible to prove the truth of the matter contained therein.

In addition, Respondent's answer does not contain any admissions which would establish Petitioner's standing. Thus, there are no admissions in Respondent's answer that would excuse Petitioner from having to prove, as an element of its case in chief, its standing to be heard in this proceeding.



Because Petitioner has failed to establish its standing, the petition to cancel must fail.

**Decision:** The petition to cancel is denied.