

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: October 16, 2008

PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Randolph James Buchan

v.

Prophet K.M. Livingood

Cancellation No. 92043742

James Michael Faier of Faier & Faier, P.C. for Randolph
James Buchan.

Prophet K.M. Livingood, pro se.

Before Hairston, Bucher and Kuhlke, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

Randolph James Buchan has petitioned to cancel the
registration owned by Prophet K.M. Livingood for the mark
shown below,

Man From UNCLE
Girl from UNCLE



U.N.C.L.E.

United Network Command For
Law & Enforcement, Incorporated

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for "printed membership cards, printed membership certificates, calendars, newsletters, stationery and printed educational, instructional and teaching material in the field of law and enforcement relating to security guard and private detective training, paralegal and Christian psychological training" in International Class 16.¹

As grounds for cancellation, petitioner alleges that he is the owner of application Serial No. 78304902 for the mark shown below,



for "paper banners and decals" in International Class 16; "clothing, namely, shirts, jackets, windbreakers, shorts, skirts, scarves, pants, coats; headgear, namely, hats, visors, helmets" in International Class 25; and "meetings on

¹ Registration No. 2467184, issued on July 10, 2001, and claiming October 31, 1998 as the date of first use anywhere and in commerce; Section 8 affidavit accepted. The wording "UNITED NETWORK COMMAND FOR LAW & ENFORCEMENT, INCORPORATED" has been disclaimed apart from the mark as shown.

the subject of liberal expansion and activities against liberal expansion; education, namely, providing classes, lectures, rallies, seminars, congresses, and symposia on the subject of liberal expansion and activities against liberal expansion; providing of training on liberal expansion and activities against liberal expansion" in International Class 41;² that registration of petitioner's application has been refused in view of respondent's registration; that petitioner first used his mark as early as 1995 which is prior to respondent's claimed date of first use of October 31, 1998; that the goods and services of the respective parties are related; that the contemporaneous use of the parties' marks in connection with their respective goods and services is likely to cause confusion; and that respondent has abandoned his mark.

Respondent, in his answer, has denied the salient allegations of the petition to cancel.³

Before consideration of petitioner's pleaded claims of likelihood of confusion and abandonment, we must first

² Serial No. 78304902, filed on September 24, 2003, alleging a bona fide intention to use the mark in commerce. The application contains the statement that "[t]he mark consists of a seal with a globe and a man and the literal element around it."

³ Respondent also counterclaimed to cancel petitioner's application Serial No. 78304902. Apart from the fact that a counterclaim may not be filed against an application, we note that respondent withdrew the counterclaim on April 9, 2007.

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address the admissibility of the materials offered into the record by petitioner and respondent.

We note that petitioner did not take testimony or present any other evidence during his assigned testimony period in chief. Rather, during his assigned rebuttal testimony period petitioner submitted his own testimony deposition with exhibits. The problem with this evidence, however, is that rebuttal testimony may be used only to rebut evidence offered by the defendant. *Western Leather Goods Co. v. Blue Bell, Inc.*, 178 USPQ 382 (TTAB 1973). In this case, respondent did not take testimony or present any other evidence during his assigned testimony period. Thus, petitioner's evidence was not submitted for the purpose of rebutting respondent's case but instead was clearly an attempt by petitioner to prove his case-in-chief. Because petitioner's evidence is improper rebuttal, it will not be considered.

As noted above, respondent did not take testimony or present any other evidence during his testimony period. Rather, respondent submitted exhibits, at the time he filed his final brief on the case. We note that exhibits A-C are copies of Board orders issued in this proceeding and are therefore automatically of record in this case. Exhibits D-P include, inter alia, copies of Office actions issued in connection with petitioner's application Serial No.

78304902, copies of respondent's Iowa state trademark registrations, and printouts of search results of the records of the U.S. Copyright Office. Evidentiary material accompanying a brief on the case can be given no consideration unless it was properly made of record during the testimony period of the offering party. *Plus Products v. Physicians Formula Cosmetics, Inc.*, 198 USPQ 111, 112 n.3 (TTAB 1978); and TBMP §539 (2d ed. rev. 2004). Because respondent neither took testimony nor introduced any other evidence, Exhibits D-P submitted with the brief obviously are not of record. Thus, these materials will not be considered.

In view of the foregoing, the record in this case includes the pleadings and the file of the registration sought to be cancelled. Petitioner and respondent filed briefs, petitioner filed a reply brief, and respondent filed a rebuttal brief. There is no provision in the Trademark Rules for a rebuttal brief by the party in the position of defendant. Thus, we will give no consideration to respondent's rebuttal brief.

We turn then to petitioner's pleaded claims of likelihood of confusion and abandonment. With respect to the likelihood of confusion claim, petitioner alleged that he first used his mark as early as 1995 which is prior to respondent's claimed date of first use of October 31, 1998.

However, petitioner has failed to properly introduce any admissible testimony or evidence that his mark was used prior to respondent's claimed date of first use.

Accordingly, irrespective of whether confusion is likely from contemporaneous use of the marks at issue in connection with the parties' respective goods and services, because petitioner, as the party bearing the burden of proof in this proceeding has not presented testimony or properly introduced any other evidence during his initial testimony period as proof establishing his priority of use, petitioner cannot prevail on the claim of likelihood of confusion.

With respect to the abandonment claim, petitioner alleged that respondent "abandoned its rights in the mark by non-use of the mark without intent to use the mark..."

(Amended Petition To Cancel ¶8). Again, however, petitioner has failed to properly introduce any admissible testimony or evidence which establishes that respondent has abandoned the mark in the involved registration. Accordingly, petitioner's claim of abandonment has not been proven.

Lastly, petitioner's brief contains numerous factual allegations in support of his claims. However, factual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial. Statements in a brief have no evidentiary value. *Electronic Data Systems Corp. v. EDSA*

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Micro Corp., 23 USPQ2d 1460, 1462 n. 5 (TTAB 1992); and TBMP §704.06(b) (2d ed. rev. 2004).

Decision: The petition to cancel is dismissed.