

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB OCT. 27, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Bed-Check Corporation
v.
Paul Newham

Opposition No. 107,711 to application Serial No. 75/187,291
filed on October 24, 1996

Frank J. Catalano of Catalano, Zingerman & Associates for Bed-
Check Corporation.

Mark A. Kammer of Kammer & Huff, PLLC for Paul Newham.

Before Hohein, Chapman and Wendel, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Paul Newham has filed an application to register the
mark "BED-EX" for an "electronic bed occupancy monitor".¹

Bed-Check Corporation has opposed registration on the
ground that opposer is "engaged in the manufacture, distribution
and sale ... of electronic bed and chair monitoring/alarm
systems, designed to monitor the activity of persons in medical

¹ Ser. No. 75/187,291, filed on October 24, 1996, which alleges a bona
fide intention to use the mark in commerce.

or other similar care situations"; that since 1977, opposer has used the mark "BED-CHECK" in connection with "electronic bed and chair occupancy monitors in the health and patient care industry"; and that applicant's mark, when applied to his goods, so resembles the mark "BED-CHECK," which opposer has previously registered for "electronic systems--namely, a pressure-sensitive bed mat connected by wire to a control unit timer, which is connected by wire to the existing nurse-call system for monitoring the activity of persons in beds, for example, medical patients, nursing home residents, and the like,"² as to be likely to cause confusion, mistake or deception.

Applicant, in his answer, has denied the salient allegations of the notice of opposition.

The record consists solely of the pleadings and the file of the opposed application. Neither party took testimony or properly introduced any other evidence.³ Briefs have been

² Reg. No. 1,152,227, issued on April 28, 1981, which sets forth a date of first use anywhere of April 15, 1977 and a date of first use in commerce of September 15, 1977.

³ We note, in this regard, that opposer has failed to utilize any of the various means for making its pleaded registration properly of record in this proceeding. In particular, as indicated in TBMP §703.02(a), a party pleading ownership of a subsisting federal registration may properly make such registration of record by (i) filing with its notice of opposition two copies of the registration which have been prepared and issued by the Patent & Trademark Office ("PTO") and which show both the current status of and current title to the registration; (ii) filing a notice of reliance, during the party's testimony period for its case-in-chief, on an accompanying copy of the registration which has been prepared and issued by the PTO and which shows both the current status of and current title to the registration; (iii) introducing a copy of the registration, during the party's testimony period for its case-in-chief, as an exhibit to the testimony of a witness who has knowledge of the current status of and title to the registration and who thus can establish that the registration is still subsisting and is owned by the offering party; or (iv) having the adverse party stipulate to such facts. See

filed,⁴ but an oral hearing was not requested.

Inasmuch as the issues to be determined in this proceeding, in light of the denials in applicant's answer, are priority and likelihood of confusion, and since opposer, having the burden of proof, has offered no properly admissible evidence to prove its case, it is accordingly adjudged that the opposition must fail.

Decision: The opposition is dismissed.

G. D. Hohein

B. A. Chapman

H. R. Wendel

Trademark Rules 2.122(d)(1), 2.122(d)(2) and 2.123(b). Here, opposer attached only a plain copy of its pleaded registration to its notice of opposition and, in any event, such copy does not form part of the record in this proceeding. See Trademark Rule 2.122(c).

⁴ Although not made of record at trial, opposer with its initial brief submitted an accompanying plain copy of its pleaded registration. Such copy, however, fails in any event to demonstrate that the registration was subsisting and owned by opposer as of the closing date of its case-in-chief. Applicant, in his brief, correctly observes that opposer "has provided no evidence of a likelihood of confusion and has therefore not met its burden of proof in this Opposition." Opposer's statement to the contrary in its reply brief is unavailing since, as stated in TBMP §705.02, "[e]xhibits and other evidentiary materials attached to a party's brief on the case can be given no consideration unless they were properly made of record during the time for taking testimony." Consequently, as set forth in TBMP §706.02, the "[f]actual 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." Here, as previously pointed out, opposer simply failed to make a copy of its pleaded registration, showing that the registration was subsisting and owned by opposer, of record during the testimony period assigned for presenting its case-in-chief. The arguments in its briefs concerning its mark and goods are thus unsupported.

Opposition No. 107,711

Administrative Trademark Judges,
Trademark Trial and Appeal Board