

**THIS DISPOSITION
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7/30/02
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Paper No.

GDH/gdh

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Randal L. Schwartz

v.

RMI.NET, Inc., substituted for Stonehenge Business Systems
Corporation

Cancellation No. 29,681

William E. Goshert of The DuBoff Law Group, LLC for Randal L. Schwartz.

Sabrina C. Stavish and Robert R. Brunelli of Sheridan Ross PC for RMI.NET, Inc., respondent and successor to Stonehenge Business Systems Corporation.

Before Seeherman, Hohein and Bucher, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Randal L. Schwartz has petitioned to cancel the registration owned by RMI.NET, Inc., as successor to Stonehenge Business Systems Corporation, of the mark "STONEHENGE" for "providing multiple-user access to a global computer information network for the transfer and

dissemination of a wide range of information."¹ As grounds for cancellation, petitioner alleges, among other things, that on or before April 4, 1992, he adopted and has continuously used the service mark "STONEHENGE CONSULTING SERVICES" for "educational services, namely conducting classes and seminars in the field of computer programming and distributing course materials in connection therewith"; that on or before July 1986, he also adopted and since November 1986 has continuously used such mark for "consultation [services] in the field of computers, computer security, video production and technical writing"; that on September 8, 1998, he filed an application for registration of such mark for the foregoing services, which was assigned Serial No. 75/549,453; that "[i]n an Office Action mailed April 8, 1999, the Examining Attorney refused Petitioner's pending Application Serial No. 75/549,453 under Section 2(d) of the Trademark Act" on the basis of the registration which petitioner seeks to cancel in this proceeding; that petitioner "has continuously utilized the service mark 'STONEHENGE CONSULTING SERVICES' ... since ... a date well prior to the date of first use alleged by the Respondent for the mark 'STONEHENGE,' which date is March, 1995"; that the respective services of the parties are

¹ Reg. No. 2,193,757, issued on October 6, 1998 from an application filed on August 22, 1997, which sets forth a date of first use anywhere and in commerce of March 1995.

"similar"; and that contemporaneous use of the respective marks in connection with the parties' services is likely to cause confusion.

RMI.NET, Inc., in its timely answer,² admits that it "purchased the assets of Stonehenge Business Systems Corporation on November 30, 1998, including all general intangibles," and thus is the owner of the involved registration,³ but denies the salient allegations of the petition to cancel.

The record consists solely of the pleadings⁴ and the file of the involved registration. Neither party took testimony or otherwise presented any evidence at trial. Only petitioner filed a brief and neither party requested an oral hearing.

² In light of the Board's March 23, 2000 order, which among other things enlarged the time for filing an answer until 40 days from such date, petitioner's March 14, 2000 motion for a default judgment, which was subsequently associated with the record file for this proceeding, is denied as moot.

³ In view thereof, and in light of the accompanying copy, as requested in the Board's March 23, 2000 order, of the "Excerpts of the Purchase Agreement" made with Stonehenge Business Systems Corporation which is dated November 30, 1998, RMI.NET, Inc. is hereby substituted as the respondent in this proceeding. Fed. R. Civ. P. 25(c) and TBMP §512.01.

⁴ While petitioner, with his pleading, attached as Exhibit 1 a copy of the Office Action which is alleged to have issued on April 8, 1999 in connection with his application, Trademark Rule 2.122(c) provides in relevant part that "an exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached unless identified and introduced in evidence as an exhibit during the period for the taking of testimony."

Petitioner, while admitting in his brief that "[r]egistrant, "RMI.NET, Inc., is the successor in interest to Stonehenge Business Systems Corporation," contends among other things that "there is no issue regarding Petitioner's prior use of his mark 'STONEHENGE [CONSULTING SERVICES]' and his right to cancel the mark belonging to Registrant," noting that on September 8, 1998, he filed an application for registration thereof which was assigned Serial No. 75/549,453. Petitioner also asserts in his brief that "no issue exists about ... the identity of the [respective] services sold, or that the channel of trade [therefor] ... is similar," pointing out that "in an Office Action mailed April 8, 1999, the Examining Attorney refused Petitioner's pending Application Serial No. 75/549,453 under Section 2(d) of the Trademark Act ... citing Registrant's mark." In view thereof, and in light of the assertion that "STONEHENGE, as the dominant feature of Petitioner's mark, is identical in appearance, sound and meaning to Registrant's mark," petitioner maintains that confusion as to source is likely.

None of petitioner's contentions, however, is supported by any evidence which is properly of record in this proceeding.⁵ Petitioner, therefore, has neither proven its

⁵ As set forth in TBMP §706.02: "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

standing to be heard that he is being damaged by the continued existence of the involved registration, nor has he shown that he has prior and continuous use of the mark "STONEHENGE CONSULTING SERVICES" for his alleged services such that the contemporaneous use by respondent of the mark "STONEHENGE" for its services (which on their face are specifically different from those which petitioner claims to provide) is likely to cause confusion as to source or sponsorship. Such proof is an essential element of petitioner's case-in-chief and, in the absence thereof, petitioner cannot prevail.

Accordingly, because petitioner, as the party who bears the burden of proof in this proceeding, has failed to properly present any evidence herein in support of the allegations of the petition to cancel which have been denied by respondent, it is adjudged that the petition to cancel must fail.

Decision: The petition to cancel is denied.

in a brief have no evidentiary value, except to the extent that they may serve as admissions against interest." Moreover, as indicated in TBMP §706.01, while "statements in pleadings may have evidentiary value as admissions against interest by the party which made them," "[s]tatements made in pleadings cannot be considered as evidence in behalf of the party making them." Instead, "such statements must be established by competent evidence during the time for taking testimony." Id. See also footnote 4 herein.