

this subsection does not substitute for issuance of a proper notice of examination under § 2.123(c) or § 2.124(b). If a party does not plan to take testimony from any witnesses, it must so state in its pretrial disclosure. When a party fails to make required pretrial disclosures, any adverse party or parties may have remedy by way of a motion to the Board to delay or reset any subsequent pretrial disclosure deadlines and/or testimony periods.

[48 FR 23138, May 23, 1983; 48 FR 27226, June 14, 1983, as amended at 54 FR 34899, Aug. 22, 1989; 63 FR 48099, Sept. 9, 1998; 68 FR 55767, Sept. 26, 2003; 72 FR 42262, Aug. 1, 2007]

§ 2.122 Matters in evidence.

(a) *Rules of evidence.* The rules of evidence for proceedings before the Trademark Trial and Appeal Board are the Federal Rules of Evidence, the relevant provisions of the Federal Rules of Civil Procedure, the relevant provisions of Title 28 of the United States Code, and the provisions of this part of title 37 of the Code of Federal Regulations.

(b) *Application files.* (1) The file of each application or registration specified in a notice of interference, of each application or registration specified in the notice of a concurrent use registration proceeding, of the application against which a notice of opposition is filed, or of each registration against which a petition or counterclaim for cancellation is filed forms part of the record of the proceeding without any action by the parties and reference may be made to the file for any relevant and competent purpose.

(2) The allegation in an application for registration, or in a registration, of a date of use is not evidence on behalf of the applicant or registrant; a date of use of a mark must be established by competent evidence. Specimens in the file of an application for registration, or in the file of a registration, are not evidence on behalf of the applicant or registrant unless identified and introduced in evidence as exhibits during the period for the taking of testimony.

(c) *Exhibits to pleadings.* Except as provided in paragraph (d)(1) of this section, 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.

(d) *Registrations.* (1) A registration of the opposer or petitioner pleaded in an opposition or petition to cancel will be received in evidence and made part of the record if the opposition or petition is accompanied by an original or photocopy of the registration prepared and issued by the United States Patent and Trademark Office showing both the current status of and current title to the registration, or by a current print-out of information from the electronic database records of the USPTO showing the current status and title of the registration. For the cost of a copy of a registration showing status and title, see § 2.6(b)(4).

(2) A registration owned by any party to a proceeding may be made of record in the proceeding by that party by appropriate identification and introduction during the taking of testimony or by filing a notice of reliance, which shall be accompanied by a copy (original or photocopy) of the registration prepared and issued by the Patent and Trademark Office showing both the current status of and current title to the registration. The notice of reliance shall be filed during the testimony period of the party that files the notice.

(e) *Printed publications and official records.* Printed publications, such as books and periodicals, available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant under an issue in a proceeding, and official records, if the publication of official record is competent evidence and relevant to an issue, may be introduced in evidence by filing a notice of reliance on the material being offered. The notice shall specify the printed publication (including information sufficient to identify the source and the date of the publication) or the official record and the pages to be read; indicate generally the relevance of the material being offered; and be accompanied by the official record or a copy thereof whose authenticity is established under the Federal Rules of Evidence, or by the printed publication or a copy of the relevant portion thereof. A copy of an official record of the Patent and Trademark

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Office need not be certified to be offered in evidence. The notice of reliance shall be filed during the testimony period of the party that files the notice.

(f) *Testimony from other proceedings.* By order of the Trademark Trial and Appeal Board, on motion, testimony taken in another proceeding, or testimony taken in a suit or action in a court, between the same parties or those in privity may be used in a proceeding, so far as relevant and material, subject, however, to the right of any adverse party to recall or demand the recall for examination or cross-examination of any witness whose prior testimony has been offered and to rebut the testimony.

[48 FR 23138, May 23, 1983, as amended at 54 FR 34899, Aug. 22, 1989; 54 FR 38041, Sept. 14, 1989; 63 FR 48099, Sept. 9, 1998; 72 FR 42262, Aug. 1, 2007]

§ 2.123 Trial testimony in *inter partes* cases.

(a)(1) The testimony of witnesses in *inter partes* cases may be taken by depositions upon oral examination as provided by this section or by depositions upon written questions as provided by § 2.124. If a party serves notice of the taking of a testimonial deposition upon written questions of a witness who is, or will be at the time of the deposition, present within the United States or any territory which is under the control and jurisdiction of the United States, any adverse party may, within fifteen days from the date of service of the notice, file a motion with the Trademark Trial and Appeal Board, for good cause, for an order that the deposition be taken by oral examination.

(2) A testimonial deposition taken in a foreign country shall be taken by deposition upon written questions as provided by § 2.124, unless the Board, upon motion for good cause, orders that the deposition be taken by oral examination, or the parties so stipulate.

(b) *Stipulations.* If the parties so stipulate in writing, depositions may be taken before any person authorized to administer oaths, at any place, upon any notice, and in any manner, and when so taken may be used like other

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depositions. By written agreement of the parties, the testimony of any witness or witnesses of any party, may be submitted in the form of an affidavit by such witness or witnesses. The parties may stipulate in writing what a particular witness would testify to if called, or the facts in the case of any party may be stipulated in writing.

(c) *Notice of examination of witnesses.* Before the depositions of witnesses shall be taken by a party, due notice in writing shall be given to the opposing party or parties, as provided in § 2.119(b), of the time when and place where the depositions will be taken, of the cause or matter in which they are to be used, and the name and address of each witness to be examined; if the name of a witness is not known, a general description sufficient to identify the witness or the particular class or group to which the witness belongs, together with a satisfactory explanation, may be given instead. Depositions may be noticed for any reasonable time and place in the United States. A deposition may not be noticed for a place in a foreign country except as provided in paragraph (a)(2) of this section. No party shall take depositions in more than one place at the same time, nor so nearly at the same time that reasonable opportunity for travel from one place of examination to the other is not available.

(d) *Persons before whom depositions may be taken.* Depositions may be taken before persons designated by Rule 28 of the Federal Rules of Civil Procedure.

(e) *Examination of witnesses.* (1) Each witness before testifying shall be duly sworn according to law by the officer before whom his deposition is to be taken.

(2) The deposition shall be taken in answer to questions, with the questions and answers recorded in their regular order by the officer, or by some other person (who shall be subject to the provisions of Rule 28 of the Federal Rules of Civil Procedure) in the presence of the officer except when the officer's presence is waived on the record by agreement of the parties. The testimony shall be taken stenographically and transcribed, unless the parties present agree otherwise. In the absence