

1715 Letters of Protest Against Pending Applications

37 C.F.R. 2.149 Letters of protest against pending applications.

- (a) A third party may submit, for consideration and entry in the record of a trademark application, objective evidence relevant to the examination of the application for a ground for refusal of registration if the submission is made in accordance with this section.
- (b) A party protesting multiple applications must file a separate submission under this section for each application.
- (c) Any submission under this section must be filed no later than 30 days after the date the application is published for opposition under section 12(a) of the Act and § 2.80 of this part. If the subject application cannot be withdrawn from issuance of a registration while consideration of the protest is pending, the protest may be considered untimely.
- (d)
- (1) If the letter of protest is filed before publication of the subject application, the evidence must be relevant to the identified ground(s) for refusal, such that it is appropriate for the examining attorney to consider whether to issue a refusal or make a requirement under the Act or this part.
 - (2) If the letter of protest is filed on or within 30 days after the date of publication of the subject application, the evidence must establish a prima facie case for refusal on the identified ground(s), such that failure to issue a refusal or to make a requirement would likely result in issuance of a registration in violation of the Act or parts 2 or 7 of this section.
- (e) Filing a submission under this section does not stay or extend the time for filing a notice of opposition.
- (f) Any submission under this section must be made in writing, filed through TEAS, and include:
- (1) The fee required by § 2.6(a)(25);
 - (2) The serial number of the pending application that is the subject of the protest;
 - (3) An itemized evidence index that does not identify the protestor or its representatives, does not contain legal argument, and includes:
 - (i) An identification of the documents, or portions of documents, being submitted as evidence. The submission may not total more than 10 items of evidence in support of a specified ground of refusal and more than 75 total pages of evidence without a detailed and sufficient explanation that establishes the special circumstances that necessitate providing more than 10 items of evidence per refusal ground or more than 75 total pages of evidence; and
 - (ii) A concise factual statement of the relevant ground(s) for refusal of registration appropriate in ex parte examination that each item identified supports; and
 - (4) A clear and legible copy of each item identified in the evidence index where:
 - (i) Copies of third-party registrations come from the electronic records of the Office and show the current status and title of the registration;
 - (ii) Evidence from the internet includes the date the evidence was published or accessed and the complete URL address of the website; and

(iii) Copies of printed publications identify the publication name and date of publication.

(g) Any submission under this section may not be entered or considered by the Office if:

- (1) Any part of the submission is not in compliance with this section;
- (2) The application record shows that the examining attorney already considered the refusal ground(s) specified in the submission; or
- (3) A provision of the Act or parts 2 or 7 of this chapter precludes acceptance of the submission.

(h) If a submission is determined to be in compliance with this section, only the specified ground(s) for refusal and the provided evidence relevant to the ground(s) for refusal will be included in the application record for consideration by the examining attorney. An applicant should not reply to the entry into the application record of evidence entered under this section.

(i) Any determination whether to include in an application record the ground(s) or evidence for a refusal of registration in a submission under this section is not petitionable.

(j) A third party filing a submission under this section will not receive any communication from the Office relating to the submission other than acknowledgement that it has been received by the Office and notification of whether the submission is found to be compliant or non-compliant with this section. Communications with the third party will not be made of record in the application. The Office will not accept amendments to a non-compliant submission that was previously filed. Instead, a third party who previously filed a non-compliant submission may file another submission that meets the requirements of paragraph (f) of this section, provided the time period for filing a submission in paragraph (c) of this section has not closed.

(k) The limited involvement of the third party ends with the filing of the submission under this section. The third party may not directly contact the examining attorney assigned to the application.

A letter of protest is a procedure whereby third parties may submit, for consideration and entry in the record of a trademark application, objective evidence bearing on the registrability of a mark. [37 C.F.R. §2.149\(a\)](#). The letter of protest procedure applies only to pending applications and is intended to aid in examination without causing undue delay and without compromising the integrity and objectivity of the ex parte examination process. See *In re BPJ Enters., Ltd.*, 7 USPQ2d 1375 (Comm'r Pats. 1988); *In re Pohn*, 3 USPQ2d 1700 (Comm'r Pats. 1987).

Letters of protest are reviewed in the Office of the Deputy Commissioner for Trademark Examination Policy (Deputy Commissioner). To preserve the integrity and objectivity of the ex parte examination process, the letter of protest is not entered into the application file. If a letter of protest is mistakenly entered in the record as a document received from the applicant, all evidence of that receipt will be expunged from the application record. The Deputy Commissioner will determine if the letter of protest complies with the requirements of Rule 2.149 and whether any submitted evidence should be included in the application record without consulting with the examining attorney. The Deputy Commissioner considers only the record in the application and the evidence submitted by the protestor. *In re BPJ Enters., Ltd.*, 7 USPQ2d at 1378.

If a third party attempts to contact an examining attorney regarding a letter of protest, the examining attorney will refer the third party to the Deputy Commissioner's Office. [37 C.F.R. §2.149\(k\)](#). If an examining attorney receives a letter of protest, the letter will be referred to the Deputy Commissioner's Office.

A letter of protest may not be entered or considered by the Office if: (1) any part of the submission does not comply with the requirements of Rule 2.149; (2) the application record shows that the examining attorney already considered the refusal ground(s) specified in the submission; or (3) acceptance of the submission is precluded by a provision of the Trademark Act or applicable rules. [37 C.F.R §2.149\(g\)](#).

However, when a letter of protest complies with the requirements of Rule 2.149, the Deputy Commissioner may determine that the evidence should be included in the application record even if the examining attorney already considered the refusal ground(s) when: (1) the evidence provided by the protestor is significant additional evidence not currently of record in the application; or (2) the examining attorney clearly erred in his or her consideration of the issue and such error would result in the issuance of a registration in violation of the Trademark Act or applicable rules. See [TMEP §706.01](#) regarding clear error.

If it is determined that evidence submitted with a letter of protest should be included in the application record, only the evidence and the ground for refusal to which the evidence relates will be so included. [37 C.F.R §2.149\(h\)](#). Any determination whether or not to include evidence in the record of an application is not petitionable. [37 C.F.R §2.149\(i\)](#).

1715.01 Appropriate and Inappropriate Subjects to Be Raised in Letter of Protest

Only issues and evidence relevant to a ground for refusing registration during the ex parte examination of an application are appropriate subjects for a letter of protest. [37 C.F.R. §2.149\(a\)](#). It is inappropriate to use the letter-of-protest procedure to delay registration or to present purely adversarial arguments.

Adversarial arguments objecting to registration must be made in an opposition proceeding after publication or, in the case of the Supplemental Register, a cancellation proceeding after registration. The letter-of-protest procedure may not be used to circumvent the requirements for filing an opposition. The USPTO will not consider letters of protest that do not include factual, objective evidence.

1715.01(a) Issues Appropriate as Subjects of Letters of Protest

Appropriate subjects for letters of protest concern issues that the examining attorney has the authority and resources to pursue to a legal conclusion without further intervention by third parties. The following are examples of the most common areas of protest:

- (1) A third party files an objection to the registration of a term because it is allegedly generic or descriptive. The objection must be accompanied by *evidence* of genericness or descriptiveness. The evidence should be objective, independent, and factual evidence that the examining attorney may use to support the suggested refusal. Personal opinions are subjective and may be self-serving, and are not forwarded to the examining attorney.
- (2) A third party notifies the USPTO of the existence of a federally registered mark or prior-pending application and alleges that there is a likelihood of confusion between this mark and the mark in the application that is the subject of the letter of protest.
- (3) A third party files a request that prosecution of an application be suspended because of pending litigation claiming infringement based on the applicant's use of the applied-for mark. The litigation must be specifically identified and a copy of the relevant pleadings must be enclosed. The litigation must involve a federally registered mark or prior-pending application of the protestor, and the protestor must allege that there is a likelihood of confusion between this mark and the mark in the

application that is the subject of the letter of protest. Normally, a court proceeding is not considered relevant to the registrability of a mark unless the remedy requested in the proceeding is cancellation, abandonment, or amendment of the application that is the subject of the letter of protest.

(4) A third party notifies the USPTO that registered marks are being used inappropriately in identifications of goods and services, mark descriptions, or other application data fields for particular applications. (See [TMEP §1402.09](#).)

(5) A third party notifies the USPTO that the specimens of use in the protested application feature an image that is used by third parties without the mark in question or an image that appears in multiple prior registrations or applications all bearing different marks.

(6) A third party notifies the USPTO of the existence of a subsequently filed U.S. application and alleges that the application contains a proper claim of priority under §44(d) to which the third party is entitled and that there is a likelihood of confusion between its mark and the mark in a prior-filed application that is the subject of the letter of protest. See [TMEP §§1003.05](#) and [1904.01\(e\)](#).

(7) A third party notifies the USPTO of the serial number of an application filed under §66(a) with an earlier filing date or a priority claim to which the third party is entitled and that there is a likelihood of confusion between its mark and the mark in the application that is the subject of the letter of protest, even if the §66(a) application was not entered into the Trademark database at the time the application that is the subject of the letter of protest was examined. See [TMEP §§1904.01\(b\)](#) and [1904.01\(e\)](#).

(8) A third party notifies the USPTO that the foreign application relied upon as the basis for a claim of priority under §44(d) is not the first application filed in a treaty country and provides evidence of the existence of an earlier-filed foreign registration or pending foreign application. See [TMEP §1003.01](#).

1715.01(b) Issues Inappropriate as Subjects of Letters of Protest

The following are examples of issues that are *not* appropriate to raise in letters of protest:

- (1) A third party claims earlier common-law use of a trademark but does not have a federal registration or previously filed pending application for that mark. The examining attorney can only consider registrations and prior-pending applications when determining likelihood of confusion. Earlier common-law use, state registrations, and other claims based on evidence other than federal registrations and prior-pending applications for federal registration are not appropriate for presentation to examining attorneys during ex parte examination.
- (2) A third party claims that the applicant is not the proper owner of the mark. This issue requires proof that is beyond the scope of authority of an examining attorney to require during ex parte examination. *In re Apple Computer, Inc.*, 57 USPQ2d 1823 (Comm'r Pats. 1998).
- (3) Numerous third parties set forth the opinion that the mark should not register, but do not offer any evidence or legal reason to support a relevant ground for refusing registration. The letter-of-protest procedure is not as a means for expressing public opinion about a particular mark.
- (4) A third party requests that prosecution of an application be suspended or refused because of pending litigation, but does not provide proof that the pending litigation includes grounds upon which the Office can suspend or refuse registration (e.g., the litigation does not involve a federally registered mark or prior-pending application of the protestor).
- (5) A third party claims that the applicant has committed fraud against the USPTO.

1715.02 Timely Filing of Letter of Protest

The most appropriate time for filing a letter of protest is before publication of a mark, because the purpose of the letter of protest is to assist the USPTO in the examination of an application for registration by bringing to its attention evidence that may support a refusal of registration. Because applications that will issue on the Supplemental Register are not published for opposition, letters of protest regarding such applications must be submitted as soon as possible after the filing of the application.

Letters of protest filed more than 30 days after publication are untimely. [37 C.F.R. §2.149\(c\)](#). See also *In re BPJ Enter's. Ltd.*, 7 USPQ2d 1375, 1378 (Comm'r Pats. 1988). This applies to all applications, including intent-to-use applications under [15 U.S.C §1051\(b\)](#). *In re G. Heileman Brewing Co., Inc.*, 34 USPQ2d 1476, 1478 (Comm'r Pats. 1994).

If a letter of protest is filed against an application that is the subject of a request for extension of protection of an international registration under Trademark Act §66(a), in addition to meeting the timeliness standards set forth above for all letters of protest, it must also satisfy the timeliness requirements for refusals under Trademark Act §68(c) and Article 5 of the Madrid Protocol. In essence, a letter of protest against a §66(a) application must be filed before the 18-month deadline after the application was transmitted to the USPTO from the IB. A letter of protest is untimely and will not be considered if it is more than 18 months from the date the IB transmitted the protested application to the USPTO. [37 C.F.R. §2.149\(g\)\(3\)](#). See [TMEP §1904.03\(a\)](#).

Filing a request for extension of time to oppose does not extend the 30-day deadline for filing a letter of protest.

A protestor may file a petition to the Director under [37 C.F.R §§2.146\(a\)\(5\)](#) and [2.148](#) to waive [37 C.F.R. §2.149\(c\)](#) so that an untimely letter of protest may be considered. However, the Director will waive a rule only in an extraordinary situation, where justice requires, and no other party is injured. See [TMEP §1708](#). For example, an extraordinary situation that would warrant waiver of the timeliness requirement for a letter of protest filed more than 30 days after publication may be established upon a showing that all of the evidence provided in the letter of protest was not in existence prior to publication. However, the evidence must establish a prima facie case for refusal.

The letter of protest procedure applies *only* to pending applications. A letter of protest will be moot if the mark registers before a determination on the letter is made. Once the mark has registered, the protestor's remedy is to file a petition to cancel with the Board.

1715.03 Letter of Protest Filed Before Publication

1715.03(a) Standard of Review for Letter of Protest Filed Before Publication

When a letter of protest filed before publication complies with the requirements of Rule 2.149, the Deputy Commissioner will determine whether the submitted evidence is relevant and supports the identified ground(s) for refusal. [37 C.F.R. §2.149\(d\)\(1\)](#). The letter of protest will be reviewed and a determination will be made even if the examining attorney has not yet taken a first action in the application that is the subject of the letter of protest. If the evidence is relevant to the identified ground(s) for refusal, the Deputy Commissioner will include the evidence (but not the letter of protest itself) in the application record for consideration by the examining attorney. [37 C.F.R. §2.149\(h\)](#).

A letter of protest filed before publication but reviewed by the Deputy Commissioner after publication will be reviewed under the pre-publication standard. [TMEP §1715.02\(b\)](#).

1715.03(b) Action by Examining Attorney Before Publication

The examining attorney is *not* required to issue a refusal as a result of a pre-publication letter of protest where it is determined that the submitted evidence should be included in the application record. The examining attorney is required only to consider the evidence and make an independent determination whether to issue the requirement or refusal refusal to which the evidence relates. The examining attorney need not inform the applicant that evidence submitted with a letter of protest was included in the record unless he or she is issuing a refusal based upon the information provided with the letter of protest. The prosecution history of the application will reflect the entry of the evidence submitted with a letter of protest and a memorandum attaching all relevant evidence and identifying the grounds for refusal and/or requirements to which the evidence relates will be added to the application record. If the examining attorney decides against issuing the refusal or requirement, the prosecution history of the application in the Trademark database will be updated to indicate "LETTER OF PROTEST EVIDENCE REVIEWED - NO FURTHER ACTION TAKEN."

Letters of Protest Filed Before Publication but Determined to be Compliant After Publication

In certain circumstances, a letter of protest filed before publication may not be reviewed by the Deputy Commissioner until after publication or during the period when the USPTO cannot withdraw the mark from publication. Such letters are reviewed under the pre-publication standard. In such cases, if the Deputy Commissioner determines that the evidence submitted with the letter of protest should be included in the application record, the examining attorney is not required to issue a refusal or requirement as a result of the inclusion of the submitted evidence in the record. However, the examining attorney must consult with his or her managing attorney to determine whether a refusal or requirement is warranted.

If the examining attorney determines that a refusal or requirement must be made after publication and prior to the filing of a notice of opposition or issuance of a notice of allowance, the Commissioner for Trademarks will restore jurisdiction, pursuant to the authority delegated by the Director, so that the examining attorney may take action on the application. See [TMEP §1504.04](#). If an opposition proceeding has been instituted, the Board will restore jurisdiction to the examining attorney so that the examining attorney may take the specified action. See [TMEP §1504.05](#).

If the letter of protest concerns a mark in an intent-to-use application where a notice of allowance has issued, the examining attorney has jurisdiction over the application. [37 C.F.R. §2.84\(a\)](#). If the examining attorney determines, after consulting with his or her managing attorney, that a refusal or requirement must be made, and a statement of use has not been filed, before issuing an Office action, he or she must contact the ITU/Divisional Unit to cancel the notice of allowance and refund any fees paid for requests for an extension of time to file a statement of use. See [TMEP §1106.03](#).

If the letter of protest concerns a mark for which a statement of use has been filed, the examining attorney has jurisdiction over the application. If the examining attorney determines, after consulting with his or her managing attorney, that a refusal or requirement must be made, and no action has been taken on the statement of use, he or she must review the statement of use and include any issues relevant to the statement of use in the Office action resulting from the letter of protest. If an Office action regarding the statement of use has already issued, the examining attorney must issue a supplemental action regarding the refusal(s) or requirement(s) resulting from the letter of protest and incorporating by reference or restating any other outstanding refusal(s) or requirement(s).

1715.04 Letters of Protest Filed on the Date of Publication or After Publication

1715.04(a) Standard of Review for Letters of Protest Filed on the Date of Publication or After Publication

When a letter of protest filed on the date of publication or within 30 days after the date of publication complies with the requirements of Rule 2.149, the Deputy Commissioner will determine whether the evidence establishes a prima facie case for refusal of registration on the identified ground(s), such that failure to issue a refusal or to make a requirement would likely result in issuance of a registration in violation of the Trademark Act or applicable rules. [37 C.F.R. §2.149\(d\)\(2\)](#). *In re BPJ Enters. Ltd.*, 7 USPQ2d 1375, 1379 (Comm'r Pats. 1988). See [TMEP §1715.04](#) regarding the nature of relevant evidence.

1715.04(b) Jurisdiction of Application After Publication

As a general rule, after publication, the examining attorney does not have jurisdiction to act on an application. [TMEP §1504.04](#). Therefore, if a letter of protest filed after publication and before issuance of the registration or notice of allowance complies with the requirements of Rule 2.149 and the Deputy Commissioner determines that the submitted evidence will be included in the application record for consideration by the examining attorney, the Commissioner for Trademarks will restore jurisdiction of the application to the examining attorney pursuant to the authority delegated by the Director. The Commissioner will also restore jurisdiction under such circumstances when extension of time to file an opposition has been filed. However, if an opposition has been instituted, the Board has jurisdiction over the application and the Commissioner will request that the Board restore jurisdiction to the examining attorney. [TMEP §1504.02](#).

If the letter of protest concerns a mark in an intent-to-use application where a notice of allowance has issued, the examining attorney has jurisdiction. [37 C.F.R. §2.84\(a\)](#). If the Deputy Commissioner determines that the evidence submitted with the letter of protest should be included in the application record and a statement of use has not been filed, the USPTO will cancel the notice of allowance and refund any fees paid for requests for an extension of time to file a statement of use. [TMEP §1106.03](#).

Furthermore, if a statement of use has been filed, the examining attorney has jurisdiction and must review the statement of use and include any issues relevant to the statement of use in the Office action resulting from the letter of protest. If an Office action regarding the statement of use has already issued, the examining attorney must issue a supplemental action regarding the refusals or requirements resulting from the evidence included in the record and incorporating by reference or restating any other outstanding refusals or requirements.

1715.04(c) Action by Examining Attorney After Publication

If the Deputy Commissioner determines that evidence submitted with a letter of protest filed on the date of publication or after publication establishes a prima facie case for refusal on the identified ground(s) and should be included in the record of the protested application, the examining attorney must issue the refusal or requirement, except in unusual circumstances. The examining attorney must inform the applicant that such evidence was entered after submission of a letter of protest. If the notice of allowance

was cancelled, the examining attorney must so inform the applicant. Before issuing the Office action with the refusal or requirement, the examining attorney must have the action reviewed by his or her managing attorney.

However, the inclusion of evidence submitted with the letter of protest into the application record is not a final determination by the USPTO that registration must be refused. In unusual circumstances, the examining attorney may discover additional evidence that would justify approval of the application for registration after acceptance of a letter of protest, or the applicant may overcome the refusal or satisfy the requirement. In such a case, if the examining attorney later determines that the mark should be approved for issuance of a registration or notice of allowance, the examining attorney must obtain permission from the Office of the Deputy Commissioner for Trademark Examination Policy before approving the application for issue. After conferring with that Office, an appropriate Note to the File must be entered in the record.

1715.04(d) Letter of Protest Does Not Stay or Extend Opposition Period

Filing a letter of protest does not stay or extend the opposition period. [37 C.F.R. §2.149\(e\)](#). Therefore, a party who files a letter of protest after publication should also file a timely request(s) for extension of time to oppose under [15 U.S.C. §1063](#) with the Trademark Trial and Appeal Board. See [TBMP §215](#) for further information. The Board will not suspend a potential opposer's time to file a notice of opposition because a letter of protest has been filed. See notice at [68 Fed. Reg. 55748, 55760](#) (Sept. 26, 2003).

1715.05 Information for Parties Filing Letter of Protest

Third parties who object to the registration of a mark in a pending application must never directly contact an examining attorney in any way. Instead, they may submit evidence for consideration for inclusion in the record via the letter-of-protest procedure.

Letters of protest must be filed electronically via the Trademark Electronic Application System (TEAS) and must be accompanied by the fee required under [37 C.F.R. §2.6](#). [37 C.F.R. §2.149\(f\)](#). Letters of protest filed on paper will not be considered. A separate letter of protest, including relevant grounds and evidence, must be filed for each individual application that is being protested. [37 C.F.R. §2.149\(b\)](#). See [TMEP §§1715.04\(a\)](#) and [\(b\)](#) regarding the nature and format of evidence to be included with a letter of protest.

The letter of protest must include an email address for receiving an acknowledgment of the submission and notification of whether the submission was determined to be compliant or noncompliant with the requirements of Rule 2.149. [37 C.F.R. §2.149\(j\)](#). If the letter of protest does not comply with the requirements of Trademark Rule 2.149, the protestor may not amend the non-compliant submission. *Id.* Instead, the party may file another letter of protest that meets the requirements, provided the time period for filing has not closed. *Id.*

Generally, the protestor should expect to receive the notification within 60 days of filing the letter. The protestor should monitor the application status by checking the TSDR database at <https://tsdr.uspto.gov> to determine whether an action concerning the letter of protest has been taken. This information will be in the public record only if the letter of protest submission is compliant and evidence is entered into the application record. If a protestor has not received a response within three

months of submitting a letter of protest, the protestor should contact the Petitions Office to confirm receipt of the letter of protest.

Protestors should continue to monitor the status of the application being protested because the application may be approved for publication, republication, or issuance of a registration even when the evidence submitted with a compliant letter of protest is included in the application record. Ongoing monitoring will ensure protestors the opportunity to take other action such as filing a notice of opposition.

1715.05(a) Types of Evidence Appropriate for Letter of Protest

If the letter of protest complies with the requirements of Rule 2.149, only the specified ground(s) for refusal and the provided evidence relevant to the ground(s) for refusal will be included in the application record for consideration by the examining attorney. [37 C.F.R. §2.149\(h\)](#). See [37 C.F.R. §2.149\(f\),\(g\)](#) and [TMEP §1715.04\(b\)](#) regarding the amount and format of evidence for letters of protest.

Note that a letter of protest should not include information or evidence concerning prior use, actual confusion, or ownership disputes. These are not appropriate grounds for refusing registration during ex parte examination and must be addressed in an inter partes proceeding before the Trademark Trial and Appeal Board or a civil court.

The type of evidence relevant to the examination of the mark depends upon the nature of the objection raised. For example, if an objection is filed on the basis that a mark, or portion of a mark, is descriptive or generic, the protestor must submit factual, objective evidence, such as descriptive or generic use by others or excerpts from the dictionary showing the meaning of the mark. Merely submitting a list of web sites is not sufficient. If third-party registrations are offered to show that the mark or a portion of the mark is descriptive, generic, or so commonly used that the public will look to other elements to distinguish the source of the goods or services, a mere list of the registrations or copy of a search report is not proper evidence of such registrations. Rather, copies of the registrations or the electronic equivalent thereof showing the current status and title (i.e., printouts or electronic copies taken from the TESS or TSDR databases of the USPTO) must be submitted. See [TMEP §1207.01\(d\)\(iii\)](#).

If an objection is based on a likelihood of confusion with existing federally registered marks or prior-pending applications, and the goods and/or services are not identical, evidence of the relatedness of the goods and/or services must be included. Such evidence may include advertisements showing that the relevant goods/services are advertised together or sold by the same manufacturer or copies of registrations showing that such goods/services emanate from the same source. Note that a list of registration numbers, a chart containing the registration numbers and identified goods/services, or a copy of a search report is not proper evidence to show the relatedness of the goods or services in the registrations. Rather, copies of the registrations or the electronic equivalent thereof showing current status and title (i.e., printouts or electronic copies taken from the TESS or TSDR databases of the USPTO) must be submitted. However, third-party registrations not based on use in commerce have little, if any, persuasive value and generally will not be included in the application record for consideration of the relatedness of the goods and services. See [TMEP §1207.01\(d\)\(iii\)](#). In addition, where a protestor wants to establish that its goods or services are related to those in the application(s) for which it is submitting the letter of protest, such evidence must pertain to the goods or services identified in the application. Evidence regarding how the protestor is using its mark for goods or services not identified in the registration or prior-pending application that form the basis for the letter of protest is inappropriate and will not be included in the application record.

1715.05(b) Amount and Format of Evidence for Letter of Protest

The letter of protest should include only a simple statement of the proposed legal ground(s) for refusing registration or issuing a requirement, together with succinct, factual, objective evidence to support the refusal or requirement. It should not include arguments. The letter of protest process is intended to provide an opportunity for the protestor to efficiently and effectively provide relevant evidence in support of the proposed legal grounds for refusing registration identified in the letter of protest. It is inappropriate for the protestor to "dump" evidence and leave it to the USPTO to determine its possible relevance. Therefore, evidence submitted with the letter of protest should be succinct, not duplicative, and be limited to the most relevant evidence. A separate itemized index that does not identify the protestor or its representatives or contain legal argument is required for all evidentiary submissions. [37 C.F.R. §2.149\(f\)\(3\)](#). See *infra*, this section, for the requirements of an evidentiary index.

When the basis of the letter of protest is the existence of federally registered marks, or prior-pending applications, with which the protestor alleges that there is, or would be, a likelihood of confusion with the mark in the protested application, the protestor should not identify more than the five most relevant registrations or applications that could form a basis for refusal. If the protestor identifies more than five registrations or applications, only the first five identified registrations or applications will be considered.

Where numerous examples of third-party registrations or web pages exist regarding the relatedness of the goods and/or services, or to support any other refusal, it is not necessary to provide them all. The evidence of third-party registrations and/or use submitted with the letter of protest should be limited to the most relevant examples. Copies of third-party registrations must come from the electronic records of the USPTO and show the current status and title of the registration. [37 C.F.R. §2.149\(f\)\(4\)\(i\)](#). When submitting web pages from the Internet as evidence, the web page must include the date the web page was published or accessed and the complete URL address of the web page. [37 C.F.R. §2.149\(f\)\(4\)\(ii\)](#). See *In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1593 (TTAB 2018); *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1586 (TTAB 2018); *Safer Inc. v. OMS Inv. Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010). Similarly, scanned copies of pages from printed books or articles must identify the publication name and the date of publication. [37 C.F.R. §2.149\(f\)\(4\)\(iii\)](#).

It should be a rare situation in which more than 10 items of evidence in support of a specified ground of refusal and more than 75 total pages of evidence is necessary to support the proposed legal grounds for refusal. Therefore, a letter of protest accompanied by more than 10 items of evidence in support of a specified ground of refusal or more than 75 total pages of evidence will not be considered unless it includes a detailed and sufficient explanation establishing the special circumstances that necessitate providing the additional evidence. [37 C.F.R. §2.149\(f\)\(3\)\(i\)](#).

The index must be provided as a separate electronic attachment to the TEAS Letter of Protest form, and contain a concise factual description of each category or form of evidence included. *Id.* If any item of evidence attached to the letter of protest consists of multiple pages, the index must specifically identify the page on which the relevant information appears within the item of evidence. To maintain the integrity of the ex parte examination process, the index must not identify the protestor or its representatives or contain any arguments or use subjective terms to identify or describe the evidence. [37 C.F.R. §2.149\(f\)\(3\)](#)

1715.05(c) Letter-of-Protest Evidence – Trademark Trial and Appeal Board Proceedings

As discussed above, if a letter of protest filed before publication is determined to be compliant, only the relevant evidence and grounds for refusal to which the evidence relates is included in the application record. However, the examining attorney is not required to issue a refusal or requirement as a result of the entry of the evidence in the record. See [TMEP §1715.02\(b\)](#).

In an ex parte proceeding regarding an application in which the record includes evidence submitted in a letter of protest filed before publication, if the examining attorney did not issue a refusal or requirement based on the evidence, the Trademark Trial and Appeal Board will not rely on the evidence in the Board proceeding because the applicant would not have the opportunity to rebut the evidence.

In an inter partes proceeding, a party may not rely on such evidence unless it introduces the evidence during the assigned testimony period, either through testimony or by a notice of reliance, as appropriate. See, e.g., [37 C.F.R. §2.122\(b\)\(2\)](#) and [TBMP §704.03\(a\)](#).

1715.06 Requests for Copy of Letter of Protest

Any party who wishes to receive a copy of a letter of protest must file a request online through the Trademark Electronic Application System (TEAS) using the TEAS Letter of Protest form. Once in the form, the party must check "Other" and in the box provided state that it is requesting a copy of the letter or protest.

Upon review of the request, the Deputy Commissioner will usually forward a copy of the letter of protest and its attachment to the requester, subject to any exemptions from the Freedom of Information Act (FOIA) or other applicable regulations. If, in the opinion of the Deputy Commissioner, any part of the letter of protest or its attachments should be exempt from disclosure under FOIA, the matter will be forwarded to the Office of General Counsel of the USPTO for further review.

1715.07 Recourse if Letter of Protest Submission is Determined to be Noncompliant

If the Deputy Commissioner determines that a letter of protest submission does not comply with the requirements of Rule 2.149, such that the evidenced submitted is not included in the application record, the protestor may pursue remedies otherwise available, such as an opposition proceeding, if the protestor complies with all relevant requirements and deadlines. Filing a letter of protest does not stay or extend the time for filing a notice of opposition. [37 C.F.R. §2.149\(e\)](#); [TMEP §1715.03\(b\)](#).

The protestor may not amend or file a request for reconsideration of the determination whether to include in the application record the ground(s) or evidence for a refusal identified in a letter of protest with the Deputy Commissioner. [37 C.F.R. §2.149\(i\),\(j\)](#); see also *In re BPJ Enter's. Ltd.*, 7 USPQ2d 1375, 1378 (Comm'r Pats. 1988). Nor may the protestor petition the Director to review the Deputy Commissioner's determination. [37 C.F.R. §2.149\(i\)](#). Instead, a party who previously filed a non-compliant submission may file another letter of protest submission that meets the requirements of [37 C.F.R. §2.149\(f\)](#), provided the time period for filing a submission has not closed.