

ESTTA Tracking number: **ESTTA674205**

Filing date: **05/26/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85781180
Applicant	Big Apple Performing Arts, Inc.
Applied for Mark	YOUTH PRIDE CHORUS
Correspondence Address	PHILLIP A ROSENBERG KILPATRICK TOWNSEND & STOCKTON LLP 1114 AVENUE OF THE AMERICAS, THE GRACE BUILDING, 21ST FLOOR NEW YORK, NY 10036-7703 UNITED STATES NYTrademarks@KilpatrickTownsend.com, prosen- berg@kilpatricktownsend.com, agarcia@kilpatricktownsend.com
Submission	Reply Brief
Attachments	--Applicant_s Reply Brief - YOUTH PRIDE CHORUS YOUTH PRIDE CHORUS (Stylized) in Class 41 (Ref 84650.pdf(57282 bytes )
Filer's Name	Phillip A. Rosenberg
Filer's e-mail	NYTrademarks@KilpatrickTownsend.com, prosen- berg@kilpatricktownsend.com, agarcia@kilpatricktownsend.com
Signature	/Phillip A. Rosenberg/
Date	05/26/2015

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Applicant: Big Apple Performing Arts, Inc. :  
Serial No: 85/781,180 & 85/781,188 :  
Filed: November 16, 2012 :  
Marks: **YOUTH PRIDE CHORUS** :  
and :  
 :  
Our Refs: 846505 & 857400 :

**APPLICANT'S REPLY BRIEF**

Jason M. Vogel, Esq.  
Phillip A. Rosenberg, Esq.  
KILPATRICK TOWNSEND & STOCKTON LLP  
The Grace Building  
1114 Avenue of the Americas  
New York, New York 10036  
Tel.: (212) 775-8700  
Fax: (212) 775-8800

Attorneys for Applicant

EXAMINER: Odessa Bibbins  
Law Office: 118

**TABLE OF CONTENTS**

**I.** ARGUMENT.....1

    A. THE EXAMINER’S METHOD FOR CONCLUDING THAT  
    “YOUTH PRIDE CHORUS” IS SO HIGHLY DESCRIPTIVE IS  
    FLAWED .....2

    B. THE EXAMINER ERRS BY REQUIRING THAT EXCLUSIVE  
    AND CONTINUOUS USE OF A MARK BE CALCULATED AS  
    OF THE FILING DATE OF AN APPLICATION.....3

    C. THE EXAMINER’S REPLY MISCHARACTERIZES  
    APPLICANT’S EVIDENCE OF ACQUIRED  
    DISTINCTIVENESS IN A NUMBER OF MATERIAL  
    RESPECTS .....5

**II.** CONCLUSION.....7

**TABLE OF AUTHORITIES**

**Cases**

*In re Bose Corp.*,  
216 U.S.P.Q. 1001 (T.T.A.B. 1983),  
*aff'd*, 227 U.S.P.Q. 1 (Fed. Cir. 1985) ..... 6

*In re Chevron Intellectual Prop. Group LLC*,  
96 U.S.P.Q.2d 2026 (TTAB 2010) ..... 5

*In re Flex-O-Glass, Inc.*,  
194 U.S.P.Q. 203 (T.T.A.B. 1977) ..... 6

*In re IP Carrier Consulting Grp.*,  
84 U.S.P.Q.2d 1028 (T.T.A.B. 2007) ..... 2

**Statutes**

15 U.S.C. § 1052(f) ..... 4

**Rules**

T.M.E.P. § 1212.01 ..... 4

T.M.E.P. § 1212.05(d) ..... 4

T.M.E.P. § 710.01(b) ..... 2

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Applicant: Big Apple Performing Arts, Inc. :  
Serial No: 85/781,180 & 85/781,188 :  
Filed: November 16, 2012 :  
Marks: **YOUTH PRIDE CHORUS** :  
and :  
 :  
Our Refs: 846505 & 857400 :

**APPLICANT’S REPLY BRIEF**

**I. ARGUMENT**

Applicant Big Apple Performing Arts, Inc. (“BAPA”) respectfully submits the following Reply in response to the Examining Attorney’s May 4, 2015 Appeal Brief (the “Examiner’s Brief”) supporting the USPTO’s final refusal, on descriptiveness grounds, to register Application Serial Nos. 85/781,180 and 85/781,188 for the YOUTH PRIDE CHORUS and YOUTH PRIDE CHORUS (Stylized) marks (the “Applications”). Applicant submits this Reply in order to clarify the record for the Board, as the Examiner’s Brief materially misrepresents Applicant’s evidence of acquired distinctiveness and perpetuates a flawed methodology for concluding that Applicant’s YOUTH PRIDE CHORUS marks are so highly descriptive that they are incapable of indicating source or origin without additional evidence of acquired distinctiveness.

**A. THE EXAMINER'S METHOD FOR CONCLUDING THAT "YOUTH PRIDE CHORUS" IS SO HIGHLY DESCRIPTIVE IS FLAWED**

Throughout the record, the Examiner steadfastly relies on a single entry on Wikipedia.com as the definitive authority for the meaning of "Youth Pride," a movement in the LGBTIQA community.<sup>1</sup> With respect to evidence taken from the online Wikipedia® encyclopedia, at www.wikipedia.org, the Board has noted that "[t]here are inherent problems regarding the reliability of Wikipedia entries because Wikipedia is a collaborative website that permits anyone to edit the entries," and has stated the following:

[T]he Board will consider evidence taken from Wikipedia so long as the non-offering party has an opportunity to rebut that evidence by submitting other evidence that may call into question the accuracy of the particular Wikipedia information. Our consideration of Wikipedia evidence is with the recognition of the limitations inherent with Wikipedia (e.g., that anyone can edit it and submit intentionally false or erroneous information)....

As a collaborative online encyclopedia, Wikipedia is a secondary source of information or a compilation based on other sources. As recommended by the editors of Wikipedia, the information in a particular article should be corroborated. The better practice with respect to Wikipedia evidence is to corroborate the information with other reliable sources, including Wikipedia's sources.

*In re IP Carrier Consulting Grp.*, 84 U.S.P.Q.2d 1028, 1032–33 (T.T.A.B. 2007).

Given its inherent limitations, any information obtained from Wikipedia should be treated as having limited probative value. T.M.E.P. § 710.01(b). If the examining attorney relies upon Wikipedia evidence and makes it of record, then additional supportive and corroborative evidence from other sources should also be made of record, especially when issuing final actions.

*Id.*

The "other sources" relied upon by the Examiner to substantiate the Wikipedia reference consist of a reference to some third-party organizations that include the term "Youth Pride" in

---

<sup>1</sup> See, e.g., Examiner's Reply at 6.

their names. In its papers, Applicant has rebutted the Examiner’s evidence by showing that “youth pride” is not found in dictionaries, that “pride” has multiple meanings and that “youth pride chorus” leads singularly to Applicant’s services. That other third parties have decided to incorporate the phrase “Youth Pride” into their distinctive names as well does not render “Youth Pride Chorus” so highly descriptive for Applicant’s services that the extensive evidence Applicant has submitted of acquired distinctiveness should be disregarded. Consumers simply do not use “youth pride chorus” to describe a vocal ensemble comprised of LGBTIQA youth. Nonetheless, under the Examiner’s logic, YOUTH PRIDE CHORUS is just as highly descriptive as THE SCIENTIFIC APPROACH, BLINDSANDDRAPERY.COM, ANNAPOLIS TOURS, and PAINT PRODUCTS CO.<sup>2</sup> The Examiner fundamentally misses the point that “Youth Pride” is not so common an expression in the lexicon of the U.S. consuming public—or even the LGBTIQA lexicon for that matter—that, when combined with the term “Chorus,” is incapable of distinguishing Applicant’s services particularly given the extensive evidence of acquired distinctiveness submitted by Applicant.

**B. THE EXAMINER ERRS BY REQUIRING THAT EXCLUSIVE AND CONTINUOUS USE OF A MARK BE CALCULATED AS OF THE FILING DATE OF AN APPLICATION**

The Examiner’s Brief suggests that Applicant misled the USPTO in its 2(f) Declarations. Specifically, the Examiner claims that Applicant could not have possibly claimed at least ten years of substantially exclusive and continuous use of the YOUTH PRIDE CHORUS word mark on September 12, 2013—the date of Applicant’s 2(f) Declaration—because Applicant filed the word mark application on November 16, 2012 claiming first use back to April 30, 2003, amounting to only nine years, six months, and 17 days as of “the statement.”<sup>3</sup> (Examiner’s

---

<sup>2</sup> See generally Office Action; see also Second Office Action; see also Examiner’s Reply.

<sup>3</sup> Here, the Examiner identifies the filing date of the Application as “the statement.”

Reply at 8.) Citing to no authority, the Examiner now introduces a novel rule for calculating the period of time for an applicant's claim of substantially exclusive and continuous use in a 2(f) declaration.<sup>4</sup> This is clear error. The plain language of the Lanham Act is instructive:

...The Director may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce *for the five years before the date on which the claim of distinctiveness is made*....

15 U.S.C. § 1052(f) (emphasis added); T.M.E.P. § 1212.05(d); *see also id.* § 1212.01

(“Facts based on events that occurred subsequent to the filing date of the application may be considered.”).

Applicant's declaration, dated September 12, 2013, validly claims at least 10 years of substantially exclusive and continuous use of the YOUTH PRIDE CHORUS mark *immediately before the date on which the claim of distinctiveness is made* (i.e. between April 20, 2003 and September 12, 2013). (Criswell Decl. ¶ 8) (emphasis added).

The Examiner's Brief also mischaracterizes Applicant's statements in its 2(f) Declaration in support of the YOUTH PRIDE CHORUS (Stylized) application. The Examiner claims that Applicant could only have claimed in its Declaration 4 years, 1 month, and 16 days of use, i.e. the time between Applicant's first use date of September 30, 2008 and the filing date of November 16, 2012. (Examiner's Reply at 8.) Since the Examiner's actions refusing registration were based on the descriptiveness of the literal element of the mark, i.e. “YOUTH PRIDE CHORUS,” and not the mark's distinctive stylization, Applicant's 2(f) Declaration addresses the extent of Applicant's use of the literal element (i.e. between first use of April 30, 2003 and the date of Applicant's Declaration, September 12, 2013). As such, Applicant validly

---

<sup>4</sup> Applicant cannot find any authority validating the Examiner's method of calculating the period of substantially exclusive and continuous use in a 2(f) declaration.

claimed at least ten years of substantially exclusive and continuous use of its YOUTH PRIDE CHORUS mark underlying the stylized format.

**C. THE EXAMINER’S REPLY MISCHARACTERIZES APPLICANT’S EVIDENCE OF ACQUIRED DISTINCTIVENESS IN A NUMBER OF MATERIAL RESPECTS**

The Examiner’s Reply mischaracterizes the quantum, quality, and content of Applicant’s acquired distinctiveness evidence, specifically in the following ways.

The Examiner’s Reply erringly claims that “[t]here is no information in any of the above articles [in Applicant’s submissions] that conveys to purchasing consumers that **YOUTH PRIDE CHORUS** is used to identify the origin, Big Apple Performing Arts, Inc., of the services.”<sup>5</sup> (Examiner’s Reply at 12.) First, the Examiner’s assertion is unsupported by the record as numerous articles submitted in the Applications show that YOUTH PRIDE CHORUS is affiliated with the New York City Gay Men’s Chorus, another service of Applicant. Second, the authority relied upon by the Examiner does not stand for the proposition that an Applicant’s evidence of acquired distinctiveness must specifically identify the owner of record for the applied-for mark.

Second, the Examiner again cherry-picks from the record in order to minimize Applicant’s acquired distinctiveness evidence. Specifically, the Examiner focuses on the 5,000 palm cards, 2 performances per year over the last 10 years, and 2,000 tickets at Applicant’s inaugural concert, *see* Examiner’s Reply at 12, but ignores the more than 126,000 views of its Youth Pride Chorus channel and the more than 103,000 views of Applicant’s “It Gets Better” video on YouTube. *See* Applicant’s Appeal Brief at 5. The Examiner also ignores the extent of Applicant’s social media following, the unsolicited media mentions, Applicant’s use of its mark

---

<sup>5</sup> Citing to *In re Chevron Intellectual Prop. Group LLC*, 96 U.S.P.Q.2d 2026, 2031 (TTAB 2010) (finding evidence of acquired distinctiveness deficient in part because of the lack of advertisements promoting recognition of pole spanner design as a service mark).

at events of prominence in the LGBTIQA community and within the LGBTIQA choral movement itself. Thus, when the Examiner states that the 2,000 tickets sold at Applicant's inaugural concert "[are] not supported by a numeric reference which ties this effort to an increase in sales and concurrently an increase in recognition by the consuming public of the mark, **YOUTH PRIDE CHORUS**, as the source of the services,"<sup>6</sup> such statements are unsupported by the record. While the record does not include an increase in ticket sales, per se, the record does reflect that the relevant consuming public—consumers interested in entertainment by an LGBTIQA vocal ensemble group—have come to identify YOUTH PRIDE CHORUS singularly with Applicant.<sup>7</sup>

Lastly, the Examiner dismisses the affidavits from leaders from the LGBTIQA youth vocal ensemble movement. (Examiner's Reply at 12-13.) However, the declarants are all deeply involved in the LGBTIQA vocal ensemble movement and therefore represent the views of the trade. They are also consumers of Applicant's Services. Nonetheless, the views expressed by the trade should be given greater weight than the Examiner is willing to give them. *See, e.g., In re Bose Corp.*, 216 U.S.P.Q. 1001, 1005 (T.T.A.B. 1983), *aff'd*, 227 U.S.P.Q. 1 (Fed. Cir. 1985) (deeming retailer's statement that he has been in contact with many purchasers of loudspeaker systems of whom a substantial number would recognize the depicted design as originating with applicant competent evidence of secondary meaning); *see also In re Flex-O-Glass, Inc.*, 194 U.S.P.Q. 203, 206 (T.T.A.B. 1977) ("[T]he fact that the affidavits may be similar in format and expression is of no particular significance ... since the affiants have sworn to the statements contained therein.")

---

<sup>6</sup> See Examiner's Reply at 12.

<sup>7</sup> It is unclear whether the Examiner agrees with Applicant that the relevant consuming public in this instance are consumers of LGBTIQA youth vocal ensemble services. See Examiner's Reply at 13 ("Lastly, applicant argues the *general consuming public* is not the relevant segment of the purchasing public. The trademark examining attorney respectfully disagrees. The *average or general* consumer of entertainment and educational services provided by applicant is the relevant segment of the purchasing public.")

## II. CONCLUSION

BAPA submits that its arguments and evidence demonstrate that, to the extent that its marks YOUTH PRIDE CHORUS and YOUTH PRIDE CHORUS (stylized) are considered merely descriptive of Applicant's Services, the evidence of acquired distinctiveness submitted by Applicant was more than sufficient to establish that the YOUTH PRIDE CHORUS marks are entitled to registration on the Principal Register under Section 2(f). For the reasons set forth in this Reply, and all other papers submitted previously at the PTO and Board, BAPA respectfully requests that this Board reverse the refusal and allow this application to proceed to registration.

Dated: May 26, 2015

Respectfully submitted,

KILPATRICK TOWNSEND & STOCKTON LLP

By: /s/ Phillip A. Rosenberg  
Jason M. Vogel, Esq.  
Phillip A. Rosenberg, Esq.

The Grace Building  
1114 Avenue of the Americas  
New York, New York 10036  
Tel.: (212) 775-8700  
Fax: (212) 775-8800

Attorneys for Applicant

CERTIFICATE OF TRANSMISSION

This is to certify that this APPLICANT'S REPLY BRIEF was filed electronically with the Trademark Trial and Appeal Board via transmission through ESTTA on May 26, 2015.

/s/ Alberto Garcia  
Alberto Garcia