

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

PWC

Mailed: May 29, 2002

Opposition No. 91-121,759

HEWLETT-PACKARD COMPANY

v.

HOPONE INTERNET
CORPORATION

This case now comes before the Board for consideration of applicant's motion (filed April 10, 2002), *inter alia*, to set aside the Board order of March 28, 2002 entering judgment by default against applicant. The motion is fully briefed.

A brief review of the relevant history of this case is believed to be helpful at this time.

On November 2, 2001, the Board issued an order granting applicant's motion to dismiss to the extent that opposer was allowed twenty days in which to serve an amended notice of opposition alleging a proper pleading of its dilution claim, failing which, the dilution claim would be given no consideration. In the same order, applicant was allowed forty days thereafter in which to serve an answer to the amended notice of opposition, if one was filed, or to serve a proper answer to the original notice of opposition, in the event opposer elected not to pursue its claim of dilution.

Opposition No. Error! Reference source not found.

On February 11, 2002, opposer filed a response and motion for default judgment indicating that it had not received a copy of the Board's November 2, 2001 order and, accordingly, had not served an amended notice of opposition. Opposer further asserted that applicant had failed to serve its answer to the original notice of opposition as required by the November 2, 2001 order. Accordingly, opposer argued, applicant was in default under Fed. R. Civ. P. 55(b). On March 28, 2002, the Board granted opposer's motion for default judgment. However, on March 12, 2002, applicant filed a motion to accept its answer to the original notice of opposition, indicating that it was not in receipt of the Board's November 2, 2001 order, and that it had just learned of the order from opposer's February 11, 2002 motion.¹

Subsequently, on April 10, 2002, as noted above, applicant filed a motion to set aside default judgment and to enter judgment against opposer. Opposer served its response in opposition thereto on April 12, 2002.

The Board has carefully considered the arguments of both parties with regard to the above motion. However, an exhaustive review of those arguments would only serve to delay the Board's disposition of this matter.

Once default judgment has been entered against a

¹ At the time the Board issued its March 28, 2002 order, the Board was not in receipt of applicant's March 12, 2002 filing.

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defendant pursuant to Fed. R. Civ. P. 55(b), the judgment may be set aside only in accordance with Fed. R. Civ. P. 60(b), which governs motions for relief from final judgment. See Fed. R. Civ. P. 55(c), and 6 *Moore's Federal Practice*, §55.10 (2d ed. 1985). See also *Waifersong Ltd. Inc. v. Classic Music Vending*, 976 F.2d 290, 24 USPQ2d 1632 (6th Cir. 1992). Fed. R. Civ. P. 60(b), as made applicable by Trademark Rule 2.116(a), applies to all final judgments issued by the Board, including default and consent judgments, summary judgments, and judgments entered after trial on the merits. As a practical matter, motions to vacate or set aside a final Board judgment are usually based upon the reasons set forth in subsections (1), (2) and/or (6) of Fed. R. Civ. P. 60(b).

In this case, the Board notes that both parties herein assert that they did not receive the Board's November 2, 2001 order, and that they were accordingly unable to comply with the requirements thereof. The Board notes in addition that examination of the file for this case reveals that the Board's November 2, 2001 order may have been mailed to incorrect addresses for both parties to this proceeding.

In short, from the record before the Board, it appears that neither party herein was able to comply with the November 2, 2001 order because neither received it in a timely fashion. Thus, the failure of both parties to comply

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with the November 2, 2001 order appears to stem from inadvertence or a clerical error on the part of the Board. Furthermore, there is nothing in the record to indicate that either party herein has acted in bad faith, or otherwise acted in a negligent manner in the prosecution of this action.

Accordingly, applicant's motion to set aside default judgment is hereby **granted** to the extent that the March 28, 2002 order entering judgment by default against applicant is hereby vacated. Applicant's motion for judgment against opposer is denied.

Further, the Board order issued November 2, 2001 is hereby **modified** solely as follows:

First, the time allowed for the parties to take the actions required in the November 2, 2001 order is considered to run from the mailing date appearing on the first page of this order²;

Second, applicant's answer (filed March 12, 2002) to the original notice of opposition is accepted and made of record; accordingly applicant is required to serve an amended answer only in the event opposer files an amended notice of opposition.

² A copy of the Board's November 2, 2001 order is enclosed with both parties' copy of this order.