

# TTAB

Docket No. 16513.045

TRADEMARK

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

In The Matter of Application Serial No. 76/420,774  
Published in the Official Gazette of April 15, 2003

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BMG SONGS, INC.,	:	
	:	
Opposer,	:	
	:	
v.	:	Opposition No. 91158707
	:	
ASTRO AMERICA, LLC,	:	
	:	
Applicant.	:	
	:	

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BOX TTAB NO FEE  
Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3514



08-12-2004  
U.S. Patent & TMO/TM Mail Rpt Dt. #22

### MEMORANDUM IN OPPOSITION TO MOTION TO SET ASIDE DEFAULT JUDGMENT

#### Preliminary Statement

Opposer BMG Songs, Inc. ("Opposer") submits this memorandum in response to Applicant's communication filed with the Board on May 17, 2004, which Opposer treats as a motion to set aside the judgment by default entered by the Board on May 10, 2004. Applicant

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EV 421632499 US

I hereby certify that this paper or fee is being deposited with the United States Postal Service "Express Mail Post office to Addressee" service under 37 C.F.R. 1.10 on the date indicated above and is addressed to the Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3514 on

8/12/04      LORRAINE MARINO  
 (Date of Deposit)      (Print name)

Lorraine Marino  
 (Signature)

claims that he did not receive copies of the Notice of Opposition or the Motion for Default Judgment, both of which were served on Applicant's attorney of record. Applicant also claims that he changed attorneys, but neither Applicant nor his new attorney filed a substitute power of attorney. Because Applicant has completely failed to make the required showing for the extraordinary remedy of reopening a default judgment, Applicant's motion should be denied.

### **Facts**

On November 26, 2003, Opposer filed a Notice of Opposition to Application Serial No. 76/420,744, in which Applicant sought to register the mark D1 MUSIC NETWORK. See Exhibit 1 to Declaration of Mary L. Kevlin dated August 6, 2004 ("Kevlin Decl."), submitted herewith. The Board issued a scheduling order on December 8, 2003 requiring Applicant to file an answer within 40 days, i.e., January 17, 2004. See Kevlin Decl., Exhibit 2. This order was correctly served on Applicant's attorney of record at the time, Christopher Day. Applicant never filed an answer.

When no timely answer was served, on February 9, 2004, Opposer filed a Motion for Default Judgment. See Kevlin Decl., Exhibit 3. Opposer served the Motion for Default Judgment not only on Applicant's attorney of record, but also upon the attorney with whom Opposer's counsel had engaged in settlement negotiations regarding this matter, Joel Turtle. *Id.* Three months later, on May 10, 2004, having received no response to Opposer's motion, the Board entered judgment by default against Applicant, sustaining the opposition and refusing Applicant's registration. See Kevlin Decl., Exhibit 4. This order was properly served on Applicant's attorney of record.

Applicant then sent a letter to the Board, received May 17, 2004, claiming that he did not receive any notices regarding this matter from Mr. Day, stating that Mr. Day no longer represents

him, and requesting the opportunity to respond to the Notice of Opposition. See Kevlin Decl., Exhibit 5. On July 13, 2004, the Board issued an order forwarding Applicant's communication to Opposer and amending Applicant's correspondence address to remove Mr. Day as attorney of record. See Kevlin Decl., Exhibit 6.

### Argument

Applicant has not fulfilled his burden to "persuasively show" that the "extraordinary remedy" of relief from a default judgment is warranted. TBMP § 544. Applicant claims that he failed to submit an answer to the Notice of Opposition and failed to respond to Opposer's Motion for Default Judgment because he did not receive copies of any notices regarding this matter, even though all of the relevant communications were duly served by the Board and/or by Opposer on his attorney of record. See Kevlin Decl., Exhibit 4. Relief from a default judgment due to "mistake, inadvertence, surprise, or excusable neglect" under Fed. R. Civ. P. 60(b)(1) is "an extraordinary remedy to be granted in the court's discretion only in extraordinary circumstances." *Djeredjian v. Kashi Co.*, 21 U.S.P.Q.2d 1613, 1615 (T.T.A.B. 1991). No such circumstances are present here.

Applicant claims that Christopher Day, his attorney of record upon whom the Notice of Opposition and Motion for Default Judgment were correctly served, failed to forward copies of any notices to him. However, a party is accountable for the acts and omissions of its chosen counsel. See *Gaylord Entertainment Co. v. Calvin Gilmore Prods., Inc.*, 59 U.S.P.Q.2d 1369, 1373 (T.T.A.B. 2000) ("we do not believe that opposer should escape the consequences of its failure to maintain adequate communications with its former trademark counsel"). "[I]t is well settled that the client and the attorney share a duty to remain diligent in prosecuting or defending the client's case; that communication between the client and the attorney is a two-way affair; and

that action, inaction or even neglect by the client's chosen attorney will not excuse the inattention of the client so as to yield the client another day in court." *CTRL Sys., Inc. v. Ultraphonics of North America, Inc.*, 52 U.S.P.Q.2d 1300, 1302 (T.T.A.B. 1999). Thus, Applicant is bound by his attorney's inaction, and his motion should be denied.

Applicant claims that he changed attorneys, but neither Applicant nor his new attorney Joel Turtle filed a substitute power of attorney or otherwise notified the Board in writing of the alleged change. Applicant alleges that he verbally notified an unnamed "male attorney," who was covering the case load of the Examining Attorney for his application, that Mr. Turtle was replacing Christopher Day as his counsel of record. However, all decisions of the Board are based solely on the written record before it, and all communications with the Board are required to be conducted in writing. *See* TBMP § 104. Any alleged oral communications with Board personnel must be disregarded. *See* 37 C.F.R. §§ 2.191 and 10.93; TBMP § 104 ("No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt."). Applicant had an obligation to inform the Board in writing of any change of attorney, and neither he nor Mr. Turtle did so. Accordingly, the Board correctly forwarded the Notice of Opposition to Applicant's counsel of record at the time the Notice was filed, Christopher Day. 37 C.F.R. § 2.18(b) (correspondence "will be sent to the address already established in the record until the applicant, registrant or party, or its duly appointed attorney, requests in writing that correspondence be sent to another address.").

Moreover, at the time the Notice of Opposition was filed Applicant was also represented by Joel Turtle in the negotiations between the parties. *See* Kevlin Decl., Exhibit 5. Applicant offers no evidence whatsoever that Mr. Turtle was unaware of the Notice of Opposition and has not submitted a declaration from Mr. Turtle. Furthermore, Applicant failed to exercise

reasonable diligence by contacting the attorney he now claims represented him at the time regarding the status of this matter.

Applicant also offers no cognizable excuse for his failure to respond to Opposer's Motion for Default Judgment served February 9, 2004. Although not obligated to do so, Opposer served copies of the motion both on Mr. Day, the attorney of record, and on Mr. Turtle, with whom Opposer had been discussing settlement possibilities and whom Applicant claims was representing him. See Kevlin Decl., Exhibit 2. Applicant has not submitted a declaration from Mr. Turtle stating that he did not receive the motion served by Opposer. Indeed, Applicant does not even dispute that Mr. Turtle received the motion and failed to respond. Such lack of due diligence on the part of Applicant and his counsel is an insufficient basis to set aside the default judgment. See *Marriott Corp. v. Pappy's Enterprises, Inc.*, 192 U.S.P.Q. 735, 736 (T.T.A.B. 1976) (Opposer's counsel's lack of attention and carelessness in failing to docket trial dates or present testimony constituted "inexcusable neglect," not "inadvertence" under Rule 60(b); motion for relief from default judgment denied). Accordingly, Applicant has not fulfilled his burden of showing that relief from the default judgment is warranted.

### **Conclusion**

The Notice of Reliance was correctly served by the Board on Applicant's counsel of record. The Motion for Default Judgment was properly served by Opposer on Applicant's counsel of record and on the attorney representing Applicant in settlement negotiations between the parties. Applicant has not offered any cognizable excuse for his failure to respond. For the foregoing reasons, Applicant's motion to set aside the default judgment should be denied in its entirety.

Dated: New York, New York  
August 12, 2004

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.

By 

Mary L. Kevlin  
Susan R. Schick  
1133 Avenue of the Americas  
New York, New York 10036-6799  
(212) 790-9200

Attorneys for Opposer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing MEMORANDUM IN OPPOSITION TO MOTION TO SET ASIDE DEFAULT JUDGMENT and DECLARATION OF MARY L. KEVLIN with accompanying exhibits was served on Applicant on August 12, 2004 by sending a copy by first class mail, postage prepaid, to Applicant and Applicant's counsel addressed as follows:

Lou Gordon  
Astro America, LLC  
3012 16th Street #201  
San Francisco, CA 94103

Joel S. Turtle, Esq.  
55 Santa Clara Avenue  
Oakland, CA 94610

  
Meichelle R. MacGregor

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

In The Matter of Application Serial No. 76/420,774  
Published in the Official Gazette of April 15, 2003

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BMG SONGS, INC.,	:	
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Opposer,	:	
	:	
v.	:	Opposition No. 91158707
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ASTRO AMERICA, LLC,	:	
	:	
Applicant.	:	
	:	

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BOX TTAB NO FEE  
Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3514

08-12-2004  
U.S. Patent & TMO/c/TM Mail Rcpt Dt. #22

**DECLARATION OF MARY L. KEVLIN, ESQ.  
IN OPPOSITION TO MOTION TO SET ASIDE DEFAULT JUDGMENT**

Mary L. Kevlin, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am a member of the law firm of Cowan, Liebowitz & Latman, P.C., attorneys for Opposer BMG Songs, Inc. ("Opposer"). I submit this declaration in response to Applicant's communication filed with the Board on May 17, 2004, which Opposer treats as a motion to set aside the judgment by default entered by the Board on May 10, 2004.

2. Attached hereto as Exhibit 1 is a true and correct copy of Opposer's Notice of Opposition to Application Serial No. 76/420,744, filed on November 26, 2003.

3. Attached hereto as Exhibit 2 is a true and correct copy of the Board's scheduling order issued on December 8, 2003.

4. Attached hereto as Exhibit 3 is a true and correct copy of Opposer's Motion for Default Judgment filed on February 9, 2004.

5. Attached hereto as Exhibit 4 is a true and correct copy of the Board's May 10, 2004 order entering judgment by default against Applicant.

6. Attached hereto as Exhibit 5 is a true and correct copy of Applicant's letter received by the Board on May 17, 2004.

7. Attached hereto as Exhibit 6 is a true and correct copy of the Board's order issued July 13, 2004.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED IN NEW YORK, NEW YORK ON AUGUST 6, 2004.

  
\_\_\_\_\_  
Mary L. Kevlin

# **EXHIBIT 1**



As grounds for the opposition, it is alleged that:

1. For many years, Opposer BMG Songs, Inc. (referred to as "Opposer") has been engaged in the business of manufacturing and distributing musical sound recordings, offering music library services, and producing, distributing, and exploiting production music under the marks NETWORK and NETWORK MUSIC (the "NETWORK MUSIC Marks").

2. Long prior to Applicant's alleged date of first use of April 1, 2002, Opposer has used its NETWORK MUSIC Marks in the United States in connection with the sale of musical sound recordings, offering music library services, and producing, distributing, and exploiting production music. Opposer is the owner of the following federal registrations and applications:

Mark	Reg. No./ Serial No.	Reg./App. Date	Goods/Services
NETWORK	1,267,749 (federal reg.)	02/21/84	Int. 9 - sound recordings of background music and sound effects and blank magnetic tapes and tape reels, for use in the production of audio and audio-visual works
<del>network</del>	1,296,973 (federal reg.)	09/18/84	Int. 41 - producing background music and commercial sound recordings for broadcasters and production music libraries

Mark	Reg. No./ Serial No.	Reg./App. Date	Goods/Services
NETWORK	2,098,885 (federal reg.)	09/23/97	Int. 9 - audio cassettes and compact discs, audio-visual CD-roms, computer software and computer programs containing digitized audio files for use in multi-media applications, and computer software and CD-roms used for searching, auditioning, editing, converting and exporting audio files
NETWORK MUSIC	76/537,344 (federal app.)	08/14/03	Int. 41 - providing music libraries for use by producers of television shows, television advertisements, motion pictures, video recordings, in-house productions, and multi-media applications

Mark	Reg. No./ Serial No.	Reg./App. Date	Goods/Services
	76/540,263 (federal app.)	08/26/03	<p>Int. 9 - musical sound recordings for use by producers of television shows, television advertisements, motion pictures, video recordings, in-house productions, and multi-media applications; computer software and CD-roms used for searching, auditioning, editing, converting and exporting audio files; computer software and computer programs containing digitized audio files for use in multi-media applications</p> <p>Int. 41 - providing music libraries for use by producers of television shows, television advertisements, motion pictures, video recordings, in-house productions, and multi-media applications</p>

Registration Nos. 2,098,885, 1,296,973, and 1,267,749 have become incontestable.

3. Long prior to Applicant's alleged date of first use of April 1, 2002, Opposer has extensively promoted the sale of its musical sound recordings, music library services, and production music services under the NETWORK MUSIC Marks.

4. As a result of the extensive sale and promotion of its goods and services bearing the NETWORK MUSIC Marks for many years, Opposer has built up a valuable goodwill for its mark.

5. On June 13, 2002, Applicant Astro America, LLC filed a use-based application to register the mark D1 MUSIC NETWORK for "music production services" in Class 41. In its application, Applicant claimed a first use date of April 1, 2002.

6. Upon information and belief, Applicant has made no use of the D1 MUSIC NETWORK mark prior to April 1, 2002.

7. Applicant's services bearing the applied-for mark and Opposer's goods and services marked with the NETWORK MUSIC Marks are either identical or closely related and, upon information and belief, are likely to be or are sold or rendered through the same channels of trade to the same kinds of consumers.

8. Applicant's mark so resembles Opposer's NETWORK MUSIC Marks, as to be likely, when applied to Applicant's services, to cause confusion, to cause mistake and to deceive with consequent injury to Opposer, the trade and the public.

WHEREFORE, Opposer believes that it will be damaged by registration of Applicant's mark and prays that said registration not be allowed.

Please recognize as attorneys for Opposer in this proceeding Mary L. Kevlin, Anna M. DePalo (members of the Bar of the State of New York) and the firm of Cowan, Liebowitz & Latman, P.C., 1133 Avenue of the Americas, New York, New York 10036-6799.

Please address all communications to Mary L. Kevlin, Esq. at the above address.

Dated: New York, New York  
November 26, 2003

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.

By Mary L. Kevlin

Mary L. Kevlin  
Anna M. DePalo  
1133 Avenue of the Americas  
New York, New York 10036-6799  
(212) 790-9200

Attorneys for Opposer

TTAB

# Cowan, Liebowitz & Latman, P.C.

LAW OFFICES

1133 Avenue of the Americas \* New York, NY 10036-6799

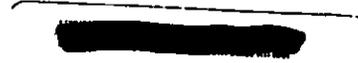
Telephone (212) 790-9200 • Web www.cll.com • Fax (212) 575-0671

Anna M. DePalo  
Direct (212) 790-9217  
amd@cll.com

November 26, 2003

**Via Express Mail**

Box TTAB FEE  
Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, Virginia 22202-3514



11-26-2003  
U.S. Patent & TMO/TM Mail Rep101 #22

Re: BMG Songs, Inc.  
Notice of Opposition Against  
the Mark D1 MUSIC NETWORK,  
Serial No. 76/420,774  
Attorney Ref. No. 16513.045

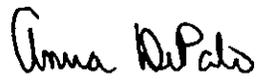
Dear Sir:

We enclose an original and duplicate copy of a Notice of Opposition against application Serial No. 76/420,774, published in the Official Gazette of April 15, 2003. We also enclose a check in the amount of \$300 to cover filing fees.

If the enclosed check is insufficient and additional fees are required, please charge our Deposit Account No. 03-3415.

Kindly confirm receipt of this opposition by returning the attached postcard and address all future correspondence to Mary L. Kevlin, Esq. at the above address.

Respectfully submitted,

  
Anna DePalo

Enclosures

cc: Mary L. Kevlin, Esq. (w/o enclosures)

## **EXHIBIT 2**

UNITED STATES DEPARTMENT OF COMMERCE  
Patent and Trademark Office  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3513

Mailed: December 8, 2003

Opposition No 91158707  
Serial No. 76420774

CHRISTOPHER J DAY  
LAW OFFICE OF CHRISTOPHER DAY  
340 E PALM LN STE 282  
PHOENIX, AZ 85004

BMG Songs, Inc

v.

Astro America, LLC

Mary L. Kevlin  
Cowan Liebowitz & Latman, PC  
1133 Avenue of the Americas  
New York, NY 10036-6799

**TAMMY LOGAN, LEGAL ASSISTANT**

A notice of opposition to the registration sought in the above-identified application has been filed. A copy of the notice is attached.

**ANSWER IS DUE FORTY DAYS** after the mailing date hereof. (See Trademark Rule 2.196 for expiration date falling on Saturday, Sunday or a holiday).

Proceedings will be conducted in accordance with the Trademark Rules of Practice, set forth in Title 37, part 2, of the Code of Federal Regulations. The parties are reminded of the recent amendments to the Trademark Rules that affect the rules of practice before the TTAB. See Rules of Practice for Trademark-Related Filings Under the Madrid Protocol Implementation Act, 68 Fed. R. 55,748 (September 26, 2003) (effective November 2, 2003); Reorganization of Correspondence and Other Provisions, 68 Fed. Reg. 48,286 (August 13, 2003) (effective September 12, 2003). Notices concerning the rules changes, as well as the Trademark Trial and Appeal Board Manual of Procedure (TBMP), are available at [www.uspto.gov](http://www.uspto.gov).

The parties are particularly referred to Trademark Rule 2.126 pertaining to the form of submissions. Paper submissions, including but not limited to exhibits and depositions, not filed in accordance with Trademark Rule 2.126 may not be given consideration or entered into the case file.

Discovery and testimony periods are set as follows:

Discovery period to open: December 28, 2003

Discovery period to close: June 25, 2004

30-day testimony period for party  
in position of plaintiff to close: September 23, 2004

30-day testimony period for party  
in position of defendant to close: November 22, 2004

15-day rebuttal testimony period  
for plaintiff to close: January 06, 2005

A party must serve on the adverse party a copy of the transcript of any testimony taken during the party's testimony period, together with copies of documentary exhibits, within 30 days after completion of the taking of such testimony. See Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

**NOTE:** The Board allows parties to utilize telephone conferences to discuss or resolve many interlocutory matters that arise in inter partes cases. See the *Official Gazette* notice titled "Permanent Expansion of Telephone Conferencing on Interlocutory Matters in Inter Partes Cases Before the Trademark Trial and Appeal Board," 1235 TMOG 68 (June 20, 2000). The notice is available at <http://www.uspto.gov>. Interlocutory matters which the Board agrees to discuss or decide by phone conference may be decided adversely to any party which fails to participate.

If the parties to this proceeding are also parties to other Board proceedings involving related marks or, during the pendency of this proceeding, they become parties to such proceedings, they should notify the Board immediately, so that the Board can consider consolidation of proceedings.

#### **New Developments at the Trademark Trial and Appeal Board**

TTAB forms for electronic filing of extensions of time to oppose, notices of opposition, and inter partes filings are now available at <http://estta.uspto.gov>. Images of TTAB proceeding files can be viewed using TTABVue at <http://ttabvue.uspto.gov>.

## **EXHIBIT 3**

4110

Docket No. 16513.045

TRADEMARK

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

In The Matter of Application Serial No. 76/420,774  
Published in the Official Gazette of April 15, 2003

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BMG SONGS, INC., :

Opposer, :

v. : Opposition No. 91158707

ASTRO AMERICA, LLC, :

Applicant. :

----- X

BOX TTAB - NO FEE  
Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3514

MOTION FOR DEFAULT JUDGMENT

MOTION

Pursuant to Trademark Rule 2.106(a), Opposer hereby moves for a default judgment in this proceeding because Applicant has failed to file a timely answer. In the alternative, if this proceeding is re-opened, Opposer requests that the discovery and trial periods be reset.

02-09-2004

U.S. Patent & TMO/TM Mail Acpt Dt. #30

"Express Mail" Mailing Label Number EV 324 474 258 US

I hereby certify that this paper or fee is being deposited with the United States Postal Service "Express Mail Post office to Addressee" service under 37 C.F.R. 1.10 on the date indicated above and is addressed to the Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3514 on February 9, 2004

Phyllis Buchalter (Print name)

Phyllis Buchalter (Signature)

MEMORANDUM

Opposer's motion for default judgment should be granted because Applicant has failed to submit an answer to the Notice of Opposition. The order instituting this opposition was mailed by the Trademark Trial and Appeal Board on December 8, 2003. As the answer was due January 17, 2004, and no answer has been filed or received, and no good cause shown, a default judgment should be entered.

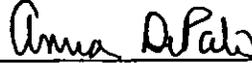
In the event, however, that this proceeding is reopened, Opposer requests that the discovery and trial periods be reset.

Dated: New York, New York  
February 9, 2004

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.

By



Mary L. Kevlin, Esq.  
Anna M. DePalo, Esq.  
1133 Avenue of the Americas  
New York, New York 10036-6799  
(212) 790-9200

Attorneys for Opposer

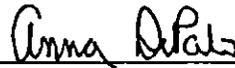
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing MOTION FOR DEFAULT JUDGMENT was served on Applicant by sending a copy by first class mail, postage prepaid, to Applicant's counsel on February 9, 2004, addressed as follows:

Christopher J. Day, Esq.  
Law Office of Christopher Day  
340 East Palm Lane, Suite 282  
Phoenix, Arizona 85004

Joel S. Turtle, Esq.  
55 Santa Clara Avenue  
Oakland, CA 94610

Dated: February 9, 2004

  
\_\_\_\_\_  
Anna M. DePalo

## **EXHIBIT 4**

UNITED STATES DEPARTMENT OF COMMERCE  
Patent and Trademark Office  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3513

cv

Mailed: May 10, 2004

Opposition No. 91158707

BMG Songs, Inc

v.

Astro America, LLC

Answer was due on January 17, 2004. A review of the record shows that an answer has not been filed.

This case now comes up for consideration of opposer's motion, filed February 9, 2004, for default judgment against applicant for failure to file an answer. The motion is uncontested.<sup>1</sup>

Inasmuch as applicant failed to file an answer in this case, and failed to respond to opposer's motion in any manner, the motion for default judgment is granted. See Trademark Rule 2.127(a). Accordingly, judgment is hereby entered against applicant, the notice of opposition is

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<sup>1</sup> If a defendant fails to file an answer to a complaint during the time allowed therefor, the Board, on its own initiative, may issue a notice of default allowing the defendant time to show cause why default judgment should not be entered against it. The issue of whether default judgment should be entered against a defendant for failure to file an answer may also be raised by means of a motion filed by the party in the position of

Opposition No. 91158707

sustained, and registration to applicant is refused. See  
Fed. R. Civ. P. 55 and Trademark Rule 2.127(a).

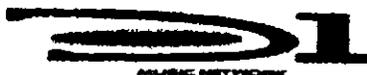
*By the Trademark Trial  
and Appeal Board*

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plaintiff. In such cases, the motion may serve as a substitute  
for the Board's issuance of a notice of default.

## **EXHIBIT 5**

TTAB



3012 16<sup>TH</sup> STREET #201 • SAN FRANCISCO, CA. • 94103-3459  
PHONE: (415) 552-1111 • FAX: (415) 552-8444 • EMAIL: [lou@d1music.com](mailto:lou@d1music.com)  
[www.d1musicnet.com](http://www.d1musicnet.com)

Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, VA. 22202

U.S. PATENT & TRADEMARK OFFICE

76420774

RE: Serial Number: ~~7640774~~; Opposition Number: 158707

05-17-2004

U.S. Patent & TMO/TM Mail Rcpt Dt. #66

To Whom It May Concern:

I have never received the notice dated December 8, 2003. I terminated the services of the attorney of record Christopher Day in June 2003, because he didn't handle the notice of opposition to our satisfaction. He did not forward any of the papers your office thinks, I failed to respond to. He did not send anything to my attention other than the opposing attorneys address and their request for an extension of time, which we granted on 2 different occasions.

I have remained in phone contact with the examining attorney's office. Ms. Cheryl Steplight was away last year on maternity leave and a male attorney took her case load while she was out. I told him on more than one occasion that we terminated the services of Mr. Day and he spoke to the replacement attorney Joel S. Turtle and he called Mr. Turtle's office on more than one occasion. I am confused as to why this was not put on record. I verbally communicated this to both the examining attorney and the opposing attorneys offices. They were in constant negotiations with Mr. Turtle trying to resolve this issue. After they wanted us to comply with unreasonable demands that we didn't believe existed, we decided that there wasn't any conflict of any kind, so we refused to grant the third extension.

I have never received any notices so I called Ms. Steplight's office about 2 months ago and it took her about a month to reply because she stated that her message system was not functioning properly and her response to the message I left her was that this case was with your office (TTAB) and if there were any notices they would send them to us for our response.

I will not sit back and allow the opposing party to bully us without a valid claim and I am requesting that your office send me the notice I never received from December and I will reply immediately.

Thanking you in advance for your understanding and cooperation regarding this request. I am going to file a complaint with the Bar Association against the attorney of record for failure to perform his duties in a professional manner.

Sincerely,

Lou Gordon  
Astro America, LLC  
D/b/a: D1 Music Network

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## **EXHIBIT 6**

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

az

Mailed: July 13, 2004

Opposition No. 91158707

BMG Songs, Inc.

v.

Astro America, LLC

Albert Zervas, Interlocutory Attorney

On May 10, 2004, the Board entered default judgment in view of applicant's failure to respond to opposer's motion (filed February 9, 2004) for default judgment (due to applicant's failure to answer the notice of opposition (filed November 26, 2003)).

On May 17, 2004, applicant filed a communication with the Board. Applicant's communication does not show proof of service thereof on opposer's attorney of record, in accordance with the requirements of Trademark Rule 2.119(a) and (b). As a one time courtesy to applicant, the Board forwards a copy of applicant's communication to opposer's attorney of record with opposer's copy of this order. Strict compliance with Trademark Rule 2.119 is required in all filings with the Board.

Opposition No. 91158707

Opposer is allowed until **thirty days** from the mailing date of this order to file and serve a response to applicant's communication. If opposer files and serves a response, applicant's is allowed **fifteen days** (twenty days if service is by mail) to reply to opposer's response. See Trademark Rule 2.119(c).

Additionally, applicant states in his communication that he has "terminated the services of his attorney in June 2003." In view thereof, the correspondence address for applicant in the Board's file for this proceeding is amended to reflect applicant's address provided in applicant's communication, and set forth below.

-oOo-

cc:

Christopher J. Day  
Law Office Of Christopher Day  
340 E Palm Ln. Ste 282  
Phoenix, AZ 85004

Mary L. Kelvin  
Cowan Liebowitz & Latman, PC  
1133 Avenue of the Americas  
New York, NY 10036-6799

Lou Gordon  
Astro America, LLC  
3012 16<sup>th</sup> Street, # 201  
San Francisco, CA 94103-3459

# **EXHIBIT 1**



As grounds for the opposition, it is alleged that:

1. For many years, Opposer BMG Songs, Inc. (referred to as "Opposer") has been engaged in the business of manufacturing and distributing musical sound recordings, offering music library services, and producing, distributing, and exploiting production music under the marks NETWORK and NETWORK MUSIC (the "NETWORK MUSIC Marks").

2. Long prior to Applicant's alleged date of first use of April 1, 2002, Opposer has used its NETWORK MUSIC Marks in the United States in connection with the sale of musical sound recordings, offering music library services, and producing, distributing, and exploiting production music. Opposer is the owner of the following federal registrations and applications:

Mark	Reg. No./ Serial No.	Reg./App. Date	Goods/Services
NETWORK	1,267,749 (federal reg.)	02/21/84	Int. 9 - sound recordings of background music and sound effects and blank magnetic tapes and tape reels, for use in the production of audio and audio-visual works
<del>network</del>	1,296,973 (federal reg.)	09/18/84	Int. 41 - producing background music and commercial sound recordings for broadcasters and production music libraries

Mark	Reg. No./ Serial No.	Reg./App. Date	Goods/Services
NETWORK	2,098,885 (federal reg.)	09/23/97	Int. 9 - audio cassettes and compact discs, audio-visual CD-roms, computer software and computer programs containing digitized audio files for use in multi-media applications, and computer software and CD-roms used for searching, auditioning, editing, converting and exporting audio files
NETWORK MUSIC	76/537,344 (federal app.)	08/14/03	Int. 41 - providing music libraries for use by producers of television shows, television advertisements, motion pictures, video recordings, in-house productions, and multi-media applications

Mark	Reg. No./ Serial No.	Reg./App. Date	Goods/Services
	76/540,263 (federal app.)	08/26/03	<p>Int. 9 - musical sound recordings for use by producers of television shows, television advertisements, motion pictures, video recordings, in-house productions, and multi-media applications; computer software and CD-roms used for searching, auditioning, editing, converting and exporting audio files; computer software and computer programs containing digitized audio files for use in multi-media applications</p> <p>Int. 41 - providing music libraries for use by producers of television shows, television advertisements, motion pictures, video recordings, in-house productions, and multi-media applications</p>

Registration Nos. 2,098,885, 1,296,973, and 1,267,749 have become incontestable.

3. Long prior to Applicant's alleged date of first use of April 1, 2002, Opposer has extensively promoted the sale of its musical sound recordings, music library services, and production music services under the NETWORK MUSIC Marks.

4. As a result of the extensive sale and promotion of its goods and services bearing the NETWORK MUSIC Marks for many years, Opposer has built up a valuable goodwill for its mark.

5. On June 13, 2002, Applicant Astro America, LLC filed a use-based application to register the mark D1 MUSIC NETWORK for "music production services" in Class 41. In its application, Applicant claimed a first use date of April 1, 2002.

6. Upon information and belief, Applicant has made no use of the D1 MUSIC NETWORK mark prior to April 1, 2002.

7. Applicant's services bearing the applied-for mark and Opposer's goods and services marked with the NETWORK MUSIC Marks are either identical or closely related and, upon information and belief, are likely to be or are sold or rendered through the same channels of trade to the same kinds of consumers.

8. Applicant's mark so resembles Opposer's NETWORK MUSIC Marks, as to be likely, when applied to Applicant's services, to cause confusion, to cause mistake and to deceive with consequent injury to Opposer, the trade and the public.

WHEREFORE, Opposer believes that it will be damaged by registration of Applicant's mark and prays that said registration not be allowed.

Please recognize as attorneys for Opposer in this proceeding Mary L. Kevlin, Anna M. DePalo (members of the Bar of the State of New York) and the firm of Cowan, Liebowitz & Latman, P.C., 1133 Avenue of the Americas, New York, New York 10036-6799.

Please address all communications to Mary L. Kevlin, Esq. at the above address.

Dated: New York, New York  
November 26, 2003

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.

By Mary L. Kevlin

Mary L. Kevlin  
Anna M. DePalo  
1133 Avenue of the Americas  
New York, New York 10036-6799  
(212) 790-9200

Attorneys for Opposer

TTAB

# Cowan, Liebowitz & Latman, P.C.

LAW OFFICES

1133 Avenue of the Americas \* New York, NY 10036-6799

Telephone (212) 790-9200 • Web www.cl.com • Fax (212) 575-0671

Anna M. DePalo  
Direct (212) 790-9217  
amd@cfl.com

November 26, 2003

**Via Express Mail**

Box TTAB FEE  
Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, Virginia 22202-3514

  
11-26-2003  
U.S. Patent & TMO/TM Mail Report #22

Re: BMG Songs, Inc.  
Notice of Opposition Against  
the Mark D1 MUSIC NETWORK,  
Serial No. 76/420,774  
Attorney Ref. No. 16513.045

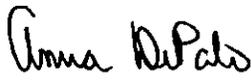
Dear Sir:

We enclose an original and duplicate copy of a Notice of Opposition against application Serial No. 76/420,774, published in the Official Gazette of April 15, 2003. We also enclose a check in the amount of \$300 to cover filing fees.

If the enclosed check is insufficient and additional fees are required, please charge our Deposit Account No. 03-3415.

Kindly confirm receipt of this opposition by returning the attached postcard and address all future correspondence to Mary L. Kevlin, Esq. at the above address.

Respectfully submitted,

  
Anna DePalo

Enclosures

cc: Mary L. Kevlin, Esq. (w/o enclosures)

## **EXHIBIT 2**

UNITED STATES DEPARTMENT OF COMMERCE  
Patent and Trademark Office  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3513

Mailed: December 8, 2003

Opposition No 91158707  
Serial No. 76420774

CHRISTOPHER J DAY  
LAW OFFICE OF CHRISTOPHER DAY  
340 E PALM LN STE 282  
PHOENIX, AZ 85004

BMG Songs, Inc

v.

Astro America, LLC

Mary L. Kevlin  
Cowan Liebowitz & Latman, PC  
1133 Avenue of the Americas  
New York, NY 10036-6799

**TAMMY LOGAN, LEGAL ASSISTANT**

A notice of opposition to the registration sought in the above-identified application has been filed. A copy of the notice is attached.

**ANSWER IS DUE FORTY DAYS** after the mailing date hereof. (See Trademark Rule 2.196 for expiration date falling on Saturday, Sunday or a holiday).

Proceedings will be conducted in accordance with the Trademark Rules of Practice, set forth in Title 37, part 2, of the Code of Federal Regulations. The parties are reminded of the recent amendments to the Trademark Rules that affect the rules of practice before the TTAB. See Rules of Practice for Trademark-Related Filings Under the Madrid Protocol Implementation Act, 68 Fed. R. 55,748 (September 26, 2003) (effective November 2, 2003); Reorganization of Correspondence and Other Provisions, 68 Fed. Reg. 48,286 (August 13, 2003) (effective September 12, 2003). Notices concerning the rules changes, as well as the *Trademark Trial and Appeal Board Manual of Procedure* (TBMP), are available at [www.uspto.gov](http://www.uspto.gov).

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Discovery and testimony periods are set as follows:

Discovery period to open: December 28, 2003

Discovery period to close: June 25, 2004

30-day testimony period for party  
in position of plaintiff to close: September 23, 2004

30-day testimony period for party  
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15-day rebuttal testimony period  
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A party must serve on the adverse party a copy of the transcript of any testimony taken during the party's testimony period, together with copies of documentary exhibits, within 30 days after completion of the taking of such testimony. See Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

**NOTE:** The Board allows parties to utilize telephone conferences to discuss or resolve many interlocutory matters that arise in inter partes cases. See the *Official Gazette* notice titled "Permanent Expansion of Telephone Conferencing on Interlocutory Matters in Inter Partes Cases Before the Trademark Trial and Appeal Board," 1235 TMOG 68 (June 20, 2000). The notice is available at <http://www.uspto.gov>. Interlocutory matters which the Board agrees to discuss or decide by phone conference may be decided adversely to any party which fails to participate.

If the parties to this proceeding are also parties to other Board proceedings involving related marks or, during the pendency of this proceeding, they become parties to such proceedings, they should notify the Board immediately, so that the Board can consider consolidation of proceedings.

**New Developments at the Trademark Trial and Appeal Board**

TTAB forms for electronic filing of extensions of time to oppose, notices of opposition, and inter partes filings are now available at <http://estta.uspto.gov>. Images of TTAB proceeding files can be viewed using TTABVue at <http://ttabvue.uspto.gov>.

## **EXHIBIT 3**

4110

Docket No. 16513.045

TRADEMARK

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

In The Matter of Application Serial No. 76/420,774  
Published in the Official Gazette of April 15, 2003

----- X

BMG SONGS, INC., :

Opposer, :

v. : Opposition No. 91158707

ASTRO AMERICA, LLC, :

Applicant. :

----- X

BOX TTAB - NO FEE  
Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3514

MOTION FOR DEFAULT JUDGMENT

MOTION

Pursuant to Trademark Rule 2.106(a), Opposer hereby moves for a default judgment in this proceeding because Applicant has failed to file a timely answer. In the alternative, if this proceeding is re-opened, Opposer requests that the discovery and trial periods be reset.

02-09-2004

U.S. Patent & TMO/TM Mail Rcpt Dt. #30

"Express Mail" Mailing Label Number EV 324 474 258 US

I hereby certify that this paper or fee is being deposited with the United States Postal Service "Express Mail Post office to Addressee" service under 37 C.F.R. 1.10 on the date indicated above and is addressed to the Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3514 on

February 9, 2004 Phyllis Buchalter

(Date of Deposit) (Print name)

Phyllis Buchalter

(Signature)

MEMORANDUM

Opposer's motion for default judgment should be granted because Applicant has failed to submit an answer to the Notice of Opposition. The order instituting this opposition was mailed by the Trademark Trial and Appeal Board on December 8, 2003. As the answer was due January 17, 2004, and no answer has been filed or received, and no good cause shown, a default judgment should be entered.

In the event, however, that this proceeding is reopened, Opposer requests that the discovery and trial periods be reset.

Dated: New York, New York  
February 9, 2004

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.

By Anna DePalo

Mary L. Kevlin, Esq.  
Anna M. DePalo, Esq.  
1133 Avenue of the Americas  
New York, New York 10036-6799  
(212) 790-9200

Attorneys for Opposer

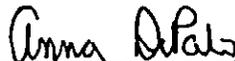
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing MOTION FOR DEFAULT JUDGMENT was served on Applicant by sending a copy by first class mail, postage prepaid, to Applicant's counsel on February 9, 2004, addressed as follows:

Christopher J. Day, Esq.  
Law Office of Christopher Day  
340 East Palm Lane, Suite 282  
Phoenix, Arizona 85004

Joel S. Turtle, Esq.  
55 Santa Clara Avenue  
Oakland, CA 94610

Dated: February 9, 2004

  
\_\_\_\_\_  
Anna M. DePalo

## **EXHIBIT 4**

UNITED STATES DEPARTMENT OF COMMERCE  
Patent and Trademark Office  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3513

cv

Mailed: May 10, 2004

Opposition No. 91158707

BMG Songs, Inc

v.

Astro America, LLC

Answer was due on January 17, 2004. A review of the record shows that an answer has not been filed.

This case now comes up for consideration of opposer's motion, filed February 9, 2004, for default judgment against applicant for failure to file an answer. The motion is uncontested.<sup>1</sup>

Inasmuch as applicant failed to file an answer in this case, and failed to respond to opposer's motion in any manner, the motion for default judgment is granted. See Trademark Rule 2.127(a). Accordingly, judgment is hereby entered against applicant, the notice of opposition is

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<sup>1</sup> If a defendant fails to file an answer to a complaint during the time allowed therefor, the Board, on its own initiative, may issue a notice of default allowing the defendant time to show cause why default judgment should not be entered against it. The issue of whether default judgment should be entered against a defendant for failure to file an answer may also be raised by means of a motion filed by the party in the position of

Opposition No. 91158707

sustained, and registration to applicant is refused. See  
Fed. R. Civ. P. 55 and Trademark Rule 2.127(a).

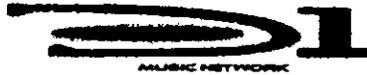
*By the Trademark Trial  
and Appeal Board*

---

plaintiff. In such cases, the motion may serve as a substitute  
for the Board's issuance of a notice of default.

## **EXHIBIT 5**

TTAB



3012 16<sup>TH</sup> STREET #201 • SAN FRANCISCO, CA. • 94103-3459  
PHONE: (415) 552-1111 • FAX: (415) 552-8444 • EMAIL: [lou@d1music.com](mailto:lou@d1music.com)  
[www.d1musicnet.com](http://www.d1musicnet.com)

Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, VA. 22202

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32

76420774

05-17-2004

RE: Serial Number: ~~7649774~~; Opposition Number: 158707

U.S. Patent & TMOR/TM Mail Recpt 01 #98

To Whom It May Concern:

I have never received the notice dated December 8, 2003. I terminated the services of the attorney of record Christopher Day in June 2003, because he didn't handle the notice of opposition to our satisfaction. He did not forward any of the papers your office thinks, I failed to respond to. He did not send anything to my attention other than the opposing attorneys address and their request for an extension of time, which we granted on 2 different occasions.

I have remained in phone contact with the examining attorney's office. Ms. Cheryl Steplight was away last year on maternity leave and a male attorney took her case load while she was out. I told him on more than one occasion that we terminated the services of Mr. Day and he spoke to the replacement attorney Joel S. Turtle and he called Mr. Turtle's office on more than one occasion. I am confused as to why this was not put on record. I verbally communicated this to both the examining attorney and the opposing attorneys offices. They were in constant negotiations with Mr. Turtle trying to resolve this issue. After they wanted us to comply with unreasonable demands that we didn't believe existed, we decided that there wasn't any conflict of any kind, so we refused to grant the third extension.

I have never received any notices so I called Ms. Steplight's office about 2 months ago and it took her about a month to reply because she stated that her message system was not functioning properly and her response to the message I left her was that this case was with your office (TTAB) and if there were any notices they would send them to us for our response.

I will not sit back and allow the opposing party to bully us without a valid claim and I am requesting that your office send me the notice I never received from December and I will reply immediately.

Thanking you in advance for your understanding and cooperation regarding this request. I am going to file a complaint with the Bar Association against the attorney of record for failure to perform his duties in a professional manner.

Sincerely,

Lou Gordon  
Astro America, LLC  
D/b/a: D1 Music Network

ll

**EXHIBIT 6**

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

az

Mailed: July 13, 2004

Opposition No. 91158707

BMG Songs, Inc.

v.

Astro America, LLC

Albert Zervas, Interlocutory Attorney

On May 10, 2004, the Board entered default judgment in view of applicant's failure to respond to opposer's motion (filed February 9, 2004) for default judgment (due to applicant's failure to answer the notice of opposition (filed November 26, 2003)).

On May 17, 2004, applicant filed a communication with the Board. Applicant's communication does not show proof of service thereof on opposer's attorney of record, in accordance with the requirements of Trademark Rule 2.119(a) and (b). As a one time courtesy to applicant, the Board forwards a copy of applicant's communication to opposer's attorney of record with opposer's copy of this order. Strict compliance with Trademark Rule 2.119 is required in all filings with the Board.

Opposition No. 91158707

Opposer is allowed until **thirty days** from the mailing date of this order to file and serve a response to applicant's communication. If opposer files and serves a response, applicant's is allowed **fifteen days** (twenty days if service is by mail) to reply to opposer's response. See Trademark Rule 2.119(c).

Additionally, applicant states in his communication that he has "terminated the services of his attorney in June 2003." In view thereof, the correspondence address for applicant in the Board's file for this proceeding is amended to reflect applicant's address provided in applicant's communication, and set forth below.

-o0o-

cc:

Christopher J. Day  
Law Office Of Christopher Day  
340 E Palm Ln. Ste 282  
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Mary L. Kelvin  
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1133 Avenue of the Americas  
New York, NY 10036-6799

Lou Gordon  
Astro America, LLC  
3012 16<sup>th</sup> Street, # 201  
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# **EXHIBIT 1**



As grounds for the opposition, it is alleged that:

1. For many years, Opposer BMG Songs, Inc. (referred to as "Opposer") has been engaged in the business of manufacturing and distributing musical sound recordings, offering music library services, and producing, distributing, and exploiting production music under the marks NETWORK and NETWORK MUSIC (the "NETWORK MUSIC Marks").

2. Long prior to Applicant's alleged date of first use of April 1, 2002, Opposer has used its NETWORK MUSIC Marks in the United States in connection with the sale of musical sound recordings, offering music library services, and producing, distributing, and exploiting production music. Opposer is the owner of the following federal registrations and applications:

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NETWORK MUSIC	76/537,344 (federal app.)	08/14/03	Int. 41 - providing music libraries for use by producers of television shows, television advertisements, motion pictures, video recordings, in-house productions, and multi-media applications

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Registration Nos. 2,098,885, 1,296,973, and 1,267,749 have become incontestable.

3. Long prior to Applicant's alleged date of first use of April 1, 2002, Opposer has extensively promoted the sale of its musical sound recordings, music library services, and production music services under the NETWORK MUSIC Marks.

4. As a result of the extensive sale and promotion of its goods and services bearing the NETWORK MUSIC Marks for many years, Opposer has built up a valuable goodwill for its mark.

5. On June 13, 2002, Applicant Astro America, LLC filed a use-based application to register the mark D1 MUSIC NETWORK for "music production services" in Class 41. In its application, Applicant claimed a first use date of April 1, 2002.

6. Upon information and belief, Applicant has made no use of the D1 MUSIC NETWORK mark prior to April 1, 2002.

7. Applicant's services bearing the applied-for mark and Opposer's goods and services marked with the NETWORK MUSIC Marks are either identical or closely related and, upon information and belief, are likely to be or are sold or rendered through the same channels of trade to the same kinds of consumers.

8. Applicant's mark so resembles Opposer's NETWORK MUSIC Marks, as to be likely, when applied to Applicant's services, to cause confusion, to cause mistake and to deceive with consequent injury to Opposer, the trade and the public.

WHEREFORE, Opposer believes that it will be damaged by registration of Applicant's mark and prays that said registration not be allowed.

Please recognize as attorneys for Opposer in this proceeding Mary L. Kevlin, Anna M. DePalo (members of the Bar of the State of New York) and the firm of Cowan, Liebowitz & Latman, P.C., 1133 Avenue of the Americas, New York, New York 10036-6799.

Please address all communications to Mary L. Kevlin, Esq. at the above address.

Dated: New York, New York  
November 26, 2003

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.

By Mary L. Kevlin

Mary L. Kevlin  
Anna M. DePalo  
1133 Avenue of the Americas  
New York, New York 10036-6799  
(212) 790-9200

Attorneys for Opposer

TTAB

# Cowan, Liebowitz & Latman, P.C.

LAW OFFICES

1133 Avenue of the Americas \* New York, NY 10036-6799

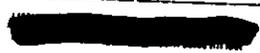
Telephone (212) 790-9200 • Web [www.cl.com](http://www.cl.com) • Fax (212) 575-0671

Anna M. DePalo  
Direct (212) 790-9217  
[amd@cl.com](mailto:amd@cl.com)

November 26, 2003

**Via Express Mail**

Box TTAB FEE  
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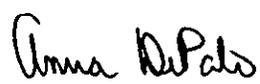
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Anna DePalo

Enclosures

cc: Mary L. Kevlin, Esq. (w/o enclosures)

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CHRISTOPHER J DAY  
LAW OFFICE OF CHRISTOPHER DAY  
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PHOENIX, AZ 85004

BMG Songs, Inc

v.

Astro America, LLC

Mary L. Kevlin  
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1133 Avenue of the Americas  
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**TAMMY LOGAN, LEGAL ASSISTANT**

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**ANSWER IS DUE FORTY DAYS** after the mailing date hereof. (See Trademark Rule 2.196 for expiration date falling on Saturday, Sunday or a holiday).

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A party must serve on the adverse party a copy of the transcript of any testimony taken during the party's testimony period, together with copies of documentary exhibits, within 30 days after completion of the taking of such testimony. See Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

**NOTE:** The Board allows parties to utilize telephone conferences to discuss or resolve many interlocutory matters that arise in inter partes cases. See the *Official Gazette* notice titled "Permanent Expansion of Telephone Conferencing on Interlocutory Matters in Inter Partes Cases Before the Trademark Trial and Appeal Board," 1235 TMOG 68 (June 20, 2000). The notice is available at <http://www.uspto.gov>. Interlocutory matters which the Board agrees to discuss or decide by phone conference may be decided adversely to any party which fails to participate.

If the parties to this proceeding are also parties to other Board proceedings involving related marks or, during the pendency of this proceeding, they become parties to such proceedings, they should notify the Board immediately, so that the Board can consider consolidation of proceedings.

#### New Developments at the Trademark Trial and Appeal Board

TTAB forms for electronic filing of extensions of time to oppose, notices of opposition, and inter partes filings are now available at <http://estta.uspto.gov>. Images of TTAB proceeding files can be viewed using TTABVue at <http://ttabvue.uspto.gov>.

## **EXHIBIT 3**

4110

Docket No. 16513.045

TRADEMARK

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

In The Matter of Application Serial No. 76/420,774  
Published in the Official Gazette of April 15, 2003

----- X

BMG SONGS, INC., :

Opposer, :

v. : Opposition No. 91158707

ASTRO AMERICA, LLC, :

Applicant. :

----- X

BOX TTAB - NO FEE  
Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3514

MOTION FOR DEFAULT JUDGMENT

MOTION

Pursuant to Trademark Rule 2.106(a), Opposer hereby moves for a default judgment in this proceeding because Applicant has failed to file a timely answer. In the alternative, if this proceeding is re-opened, Opposer requests that the discovery and trial periods be reset.

"Express Mail" Mailing Label Number EV 324 479 258 US

I hereby certify that this paper or fee is being deposited with the United States Postal Service "Express Mail Post office to Addressee" service under 37 C.F.R. 1.10 on the date indicated above and is addressed to the Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3514 on

February 9, 2004 Phyllis Buchalter

(Date of Deposit) (Print name)

Phyllis Buchalter

(Signature)

02-09-2004

U.S. Patent & TMO/TM Mail Rcpt Dt. #39

MEMORANDUM

Opposer's motion for default judgment should be granted because Applicant has failed to submit an answer to the Notice of Opposition. The order instituting this opposition was mailed by the Trademark Trial and Appeal Board on December 8, 2003. As the answer was due January 17, 2004, and no answer has been filed or received, and no good cause shown, a default judgment should be entered.

In the event, however, that this proceeding is reopened, Opposer requests that the discovery and trial periods be reset.

Dated: New York, New York  
February 9, 2004

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.

By Anna DePalo  
Mary L. Kevlin, Esq.  
Anna M. DePalo, Esq.  
1133 Avenue of the Americas  
New York, New York 10036-6799  
(212) 790-9200

Attorneys for Opposer

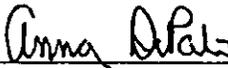
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing MOTION FOR DEFAULT JUDGMENT was served on Applicant by sending a copy by first class mail, postage prepaid, to Applicant's counsel on February 9, 2004, addressed as follows:

Christopher J. Day, Esq.  
Law Office of Christopher Day  
340 East Palm Lane, Suite 282  
Phoenix, Arizona 85004

Joel S. Turtle, Esq.  
55 Santa Clara Avenue  
Oakland, CA 94610

Dated: February 9, 2004

  
\_\_\_\_\_  
Anna M. DePalo

## **EXHIBIT 4**

UNITED STATES DEPARTMENT OF COMMERCE  
Patent and Trademark Office  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3513

CV

Mailed: May 10, 2004

Opposition No. 91158707

BMG Songs, Inc

v.

Astro America, LLC

Answer was due on January 17, 2004. A review of the record shows that an answer has not been filed.

This case now comes up for consideration of opposer's motion, filed February 9, 2004, for default judgment against applicant for failure to file an answer. The motion is uncontested.<sup>1</sup>

Inasmuch as applicant failed to file an answer in this case, and failed to respond to opposer's motion in any manner, the motion for default judgment is granted. See Trademark Rule 2.127(a). Accordingly, judgment is hereby entered against applicant, the notice of opposition is

---

<sup>1</sup> If a defendant fails to file an answer to a complaint during the time allowed therefor, the Board, on its own initiative, may issue a notice of default allowing the defendant time to show cause why default judgment should not be entered against it. The issue of whether default judgment should be entered against a defendant for failure to file an answer may also be raised by means of a motion filed by the party in the position of

Opposition No. 91158707

sustained, and registration to applicant is refused. See  
Fed. R. Civ. P. 55 and Trademark Rule 2.127(a).

*By the Trademark Trial  
and Appeal Board*

---

plaintiff. In such cases, the motion may serve as a substitute  
for the Board's issuance of a notice of default.

## **EXHIBIT 5**



**EXHIBIT 6**

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

az

Mailed: July 13, 2004

Opposition No. 91158707

BMG Songs, Inc.

v.

Astro America, LLC

Albert Zervas, Interlocutory Attorney

On May 10, 2004, the Board entered default judgment in view of applicant's failure to respond to opposer's motion (filed February 9, 2004) for default judgment (due to applicant's failure to answer the notice of opposition (filed November 26, 2003)).

On May 17, 2004, applicant filed a communication with the Board. Applicant's communication does not show proof of service thereof on opposer's attorney of record, in accordance with the requirements of Trademark Rule 2.119(a) and (b). As a one time courtesy to applicant, the Board forwards a copy of applicant's communication to opposer's attorney of record with opposer's copy of this order. Strict compliance with Trademark Rule 2.119 is required in all filings with the Board.

**Opposition No. 91158707**

Opposer is allowed until **thirty days** from the mailing date of this order to file and serve a response to applicant's communication. If opposer files and serves a response, applicant's is allowed **fifteen days** (twenty days if service is by mail) to reply to opposer's response. See Trademark Rule 2.119(c).

Additionally, applicant states in his communication that he has "terminated the services of his attorney in June 2003." In view thereof, the correspondence address for applicant in the Board's file for this proceeding is amended to reflect applicant's address provided in applicant's communication, and set forth below.

-o0o-

cc:

Christopher J. Day  
Law Office Of Christopher Day  
340 E Palm Ln. Ste 282  
Phoenix, AZ 85004

Mary L. Kelvin  
Cowan Liebowitz & Latman, PC  
1133 Avenue of the Americas  
New York, NY 10036-6799

Lou Gordon  
Astro America, LLC  
3012 16<sup>th</sup> Street, # 201  
San Francisco, CA 94103-3459

# **EXHIBIT 1**



As grounds for the opposition, it is alleged that:

1. For many years, Opposer BMG Songs, Inc. (referred to as "Opposer") has been engaged in the business of manufacturing and distributing musical sound recordings, offering music library services, and producing, distributing, and exploiting production music under the marks NETWORK and NETWORK MUSIC (the "NETWORK MUSIC Marks").

2. Long prior to Applicant's alleged date of first use of April 1, 2002, Opposer has used its NETWORK MUSIC Marks in the United States in connection with the sale of musical sound recordings, offering music library services, and producing, distributing, and exploiting production music. Opposer is the owner of the following federal registrations and applications:

Mark	Reg. No./ Serial No.	Reg./App. Date	Goods/Services
NETWORK	1,267,749 (federal reg.)	02/21/84	Int. 9 - sound recordings of background music and sound effects and blank magnetic tapes and tape reels, for use in the production of audio and audio-visual works
<del>network</del>	1,296,973 (federal reg.)	09/18/84	Int. 41 - producing background music and commercial sound recordings for broadcasters and production music libraries

Mark	Reg. No./ Serial No.	Reg./App. Date	Goods/Services
NETWORK	2,098,885 (federal reg.)	09/23/97	Int. 9 - audio cassettes and compact discs, audio-visual CD-roms, computer software and computer programs containing digitized audio files for use in multi-media applications, and computer software and CD-roms used for searching, auditioning, editing, converting and exporting audio files
NETWORK MUSIC	76/537,344 (federal app.)	08/14/03	Int. 41 - providing music libraries for use by producers of television shows, television advertisements, motion pictures, video recordings, in-house productions, and multi-media applications

Mark	Reg. No./ Serial No.	Reg./App. Date	Goods/Services
	76/540,263 (federal app.)	08/26/03	<p>Int. 9 - musical sound recordings for use by producers of television shows, television advertisements, motion pictures, video recordings, in-house productions, and multi-media applications; computer software and CD-roms used for searching, auditioning, editing, converting and exporting audio files; computer software and computer programs containing digitized audio files for use in multi-media applications</p> <p>Int. 41 - providing music libraries for use by producers of television shows, television advertisements, motion pictures, video recordings, in-house productions, and multi-media applications</p>

Registration Nos. 2,098,885, 1,296,973, and 1,267,749 have become incontestable.

3. Long prior to Applicant's alleged date of first use of April 1, 2002, Opposer has extensively promoted the sale of its musical sound recordings, music library services, and production music services under the NETWORK MUSIC Marks.

4. As a result of the extensive sale and promotion of its goods and services bearing the NETWORK MUSIC Marks for many years, Opposer has built up a valuable goodwill for its mark.

5. On June 13, 2002, Applicant Astro America, LLC filed a use-based application to register the mark D1 MUSIC NETWORK for "music production services" in Class 41. In its application, Applicant claimed a first use date of April 1, 2002.

6. Upon information and belief, Applicant has made no use of the D1 MUSIC NETWORK mark prior to April 1, 2002.

7. Applicant's services bearing the applied-for mark and Opposer's goods and services marked with the NETWORK MUSIC Marks are either identical or closely related and, upon information and belief, are likely to be or are sold or rendered through the same channels of trade to the same kinds of consumers.

8. Applicant's mark so resembles Opposer's NETWORK MUSIC Marks, as to be likely, when applied to Applicant's services, to cause confusion, to cause mistake and to deceive with consequent injury to Opposer, the trade and the public.

WHEREFORE, Opposer believes that it will be damaged by registration of Applicant's mark and prays that said registration not be allowed.

Please recognize as attorneys for Opposer in this proceeding Mary L. Kevlin, Anna M. DePalo (members of the Bar of the State of New York) and the firm of Cowan, Liebowitz & Latman, P.C., 1133 Avenue of the Americas, New York, New York 10036-6799.

Please address all communications to Mary L. Kevlin, Esq. at the above address.

Dated: New York, New York  
November 26, 2003

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.

By Mary L. Kevlin

Mary L. Kevlin  
Anna M. DePalo  
1133 Avenue of the Americas  
New York, New York 10036-6799  
(212) 790-9200

Attorneys for Opposer

TTAB

# Cowan, Liebowitz & Latman, P.C.

LAW OFFICES

1133 Avenue of the Americas \* New York, NY 10036-6799

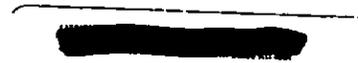
Telephone (212) 790-9200 • Web www.cll.com • Fax (212) 575-0671

Anna M. DePalo  
Direct (212) 790-9217  
amd@cll.com

November 26, 2003

Via Express Mail

Box TTAB FEE  
Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, Virginia 22202-3514



11-26-2003  
U.S. Patent & TMO/™ Mail Report DL #22

Re: BMG Songs, Inc.  
Notice of Opposition Against  
the Mark D1 MUSIC NETWORK,  
Serial No. 76/420,774  
Attorney Ref. No. 16513.045

Dear Sir:

We enclose an original and duplicate copy of a Notice of Opposition against application Serial No. 76/420,774, published in the Official Gazette of April 15, 2003. We also enclose a check in the amount of \$300 to cover filing fees.

If the enclosed check is insufficient and additional fees are required, please charge our Deposit Account No. 03-3415.

Kindly confirm receipt of this opposition by returning the attached postcard and address all future correspondence to Mary L. Kevlin, Esq. at the above address.

Respectfully submitted,

Anna DePalo

Enclosures

cc: Mary L. Kevlin, Esq. (w/o enclosures)

## **EXHIBIT 2**

UNITED STATES DEPARTMENT OF COMMERCE  
Patent and Trademark Office  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3513

Mailed: December 8, 2003

Opposition No 91158707  
Serial No. 76420774

CHRISTOPHER J DAY  
LAW OFFICE OF CHRISTOPHER DAY  
340 E PALM LN STE 282  
PHOENIX, AZ 85004

BMG Songs, Inc

v.

Astro America, LLC

Mary L. Kevlin  
Cowan Liebowitz & Latman, PC  
1133 Avenue of the Americas  
New York, NY 10036-6799

**TAMMY LOGAN, LEGAL ASSISTANT**

A notice of opposition to the registration sought in the above-identified application has been filed. A copy of the notice is attached.

**ANSWER IS DUE FORTY DAYS** after the mailing date hereof. (See Trademark Rule 2.196 for expiration date falling on Saturday, Sunday or a holiday).

Proceedings will be conducted in accordance with the Trademark Rules of Practice, set forth in Title 37, part 2, of the Code of Federal Regulations. The parties are reminded of the recent amendments to the Trademark Rules that affect the rules of practice before the TTAB. See Rules of Practice for Trademark-Related Filings Under the Madrid Protocol Implementation Act, 68 Fed. R. 55,748 (September 26, 2003) (effective November 2, 2003); Reorganization of Correspondence and Other Provisions, 68 Fed. Reg. 48,286 (August 13, 2003) (effective September 12, 2003). Notices concerning the rules changes, as well as the *Trademark Trial and Appeal Board Manual of Procedure* (TBMP), are available at [www.uspto.gov](http://www.uspto.gov).

The parties are particularly referred to Trademark Rule 2.126 pertaining to the form of submissions. Paper submissions, including but not limited to exhibits and depositions, not filed in accordance with Trademark Rule 2.126 may not be given consideration or entered into the case file.

Discovery and testimony periods are set as follows:

Discovery period to open: December 28, 2003

Discovery period to close: June 25, 2004

30-day testimony period for party  
in position of plaintiff to close: September 23, 2004

30-day testimony period for party  
in position of defendant to close: November 22, 2004

15-day rebuttal testimony period  
for plaintiff to close: January 06, 2005

A party must serve on the adverse party a copy of the transcript of any testimony taken during the party's testimony period, together with copies of documentary exhibits, within 30 days after completion of the taking of such testimony. See Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

**NOTE:** The Board allows parties to utilize telephone conferences to discuss or resolve many interlocutory matters that arise in inter partes cases. See the *Official Gazette* notice titled "Permanent Expansion of Telephone Conferencing on Interlocutory Matters in Inter Partes Cases Before the Trademark Trial and Appeal Board," 1235 TMOG 68 (June 20, 2000). The notice is available at <http://www.uspto.gov>. Interlocutory matters which the Board agrees to discuss or decide by phone conference may be decided adversely to any party which fails to participate.

If the parties to this proceeding are also parties to other Board proceedings involving related marks or, during the pendency of this proceeding, they become parties to such proceedings, they should notify the Board immediately, so that the Board can consider consolidation of proceedings.

#### New Developments at the Trademark Trial and Appeal Board

TTAB forms for electronic filing of extensions of time to oppose, notices of opposition, and inter partes filings are now available at <http://estta.uspto.gov>. Images of TTAB proceeding files can be viewed using TTABVue at <http://ttabvue.uspto.gov>.

## **EXHIBIT 3**

4410

Docket No. 16513.045

TRADEMARK

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

In The Matter of Application Serial No. 76/420,774  
Published in the Official Gazette of April 15, 2003

----- X

BMG SONGS, INC., :

Opposer, :

v. : Opposition No. 91158707

ASTRO AMERICA, LLC, :

Applicant. :

----- X

BOX TTAB - NO FEE  
Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3514

MOTION FOR DEFAULT JUDGMENT

MOTION

Pursuant to Trademark Rule 2.106(a), Opposer hereby moves for a default judgment in this proceeding because Applicant has failed to file a timely answer. In the alternative, if this proceeding is re-opened, Opposer requests that the discovery and trial periods be reset.



02-09-2004

U.S. Patent & TMO/TM Mail Rcpt Dt. #39

"Express Mail" Mailing Label Number EV 324 474 258 US

I hereby certify that this paper or fee is being deposited with the United States Postal Service "Express Mail Post office to Addressee" service under 37 C.F.R. 1.10 on the date indicated above and is addressed to the Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3514 on February 9, 2004

Phyllis Buchalter  
(Date of Deposit) (Print name)

Phyllis Buchalter  
(Signature)

MEMORANDUM

Opposer's motion for default judgment should be granted because Applicant has failed to submit an answer to the Notice of Opposition. The order instituting this opposition was mailed by the Trademark Trial and Appeal Board on December 8, 2003. As the answer was due January 17, 2004, and no answer has been filed or received, and no good cause shown, a default judgment should be entered.

In the event, however, that this proceeding is reopened, Opposer requests that the discovery and trial periods be reset.

Dated: New York, New York  
February 9, 2004

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.

By Anna DePalo  
Mary L. Kevlin, Esq.  
Anna M. DePalo, Esq.  
1133 Avenue of the Americas  
New York, New York 10036-6799  
(212) 790-9200

Attorneys for Opposer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing MOTION FOR DEFAULT JUDGMENT was served on Applicant by sending a copy by first class mail, postage prepaid, to Applicant's counsel on February 9, 2004, addressed as follows:

Christopher J. Day, Esq.  
Law Office of Christopher Day  
340 East Palm Lane, Suite 282  
Phoenix, Arizona 85004

Joel S. Turtle, Esq.  
55 Santa Clara Avenue  
Oakland, CA 94610

Dated: February 9, 2004

  
\_\_\_\_\_  
Anna M. DePalo

## **EXHIBIT 4**

UNITED STATES DEPARTMENT OF COMMERCE  
Patent and Trademark Office  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3513

CV

Mailed: May 10, 2004

Opposition No. 91158707

BMG Songs, Inc

v.

Astro America, LLC

Answer was due on January 17, 2004. A review of the record shows that an answer has not been filed.

This case now comes up for consideration of opposer's motion, filed February 9, 2004, for default judgment against applicant for failure to file an answer. The motion is uncontested.<sup>1</sup>

Inasmuch as applicant failed to file an answer in this case, and failed to respond to opposer's motion in any manner, the motion for default judgment is granted. See Trademark Rule 2.127(a). Accordingly, judgment is hereby entered against applicant, the notice of opposition is

---

<sup>1</sup> If a defendant fails to file an answer to a complaint during the time allowed therefor, the Board, on its own initiative, may issue a notice of default allowing the defendant time to show cause why default judgment should not be entered against it. The issue of whether default judgment should be entered against a defendant for failure to file an answer may also be raised by means of a motion filed by the party in the position of

Opposition No. 91158707

sustained, and registration to applicant is refused. See  
Fed. R. Civ. P. 55 and Trademark Rule 2.127(a).

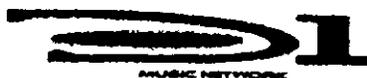
*By the Trademark Trial  
and Appeal Board*

---

plaintiff. In such cases, the motion may serve as a substitute  
for the Board's issuance of a notice of default.

## **EXHIBIT 5**

TTAB



3012 16<sup>TH</sup> STREET #201 • SAN FRANCISCO, CA. • 94103-3459  
PHONE: (415) 552-1111 • FAX: (415) 552-8444 • EMAIL: [lou@d1music.com](mailto:lou@d1music.com)  
[www.d1musicnet.com](http://www.d1musicnet.com)

Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, VA. 22202



05-17-2004

U.S. Patent & TMO/TM Mail Report DL #06

RE: Serial Number: ~~7648774~~; Opposition Number: 158707

To Whom It May Concern:

I have never received the notice dated December 8, 2003. I terminated the services of the attorney of record Christopher Day in June 2003, because he didn't handle the notice of opposition to our satisfaction. He did not forward any of the papers your office thinks, I failed to respond to. He did not send anything to my attention other than the opposing attorneys address and their request for an extension of time, which we granted on 2 different occasions.

I have remained in phone contact with the examining attorney's office. Ms. Cheryl Steplight was away last year on maternity leave and a male attorney took her case load while she was out. I told him on more than one occasion that we terminated the services of Mr. Day and he spoke to the replacement attorney Joel S. Turtle and he called Mr. Turtle's office on more than one occasion. I am confused as to why this was not put on record. I verbally communicated this to both the examining attorney and the opposing attorneys offices. They were in constant negotiations with Mr. Turtle trying to resolve this issue. After they wanted us to comply with unreasonable demands that we didn't believe existed, we decided that there wasn't any conflict of any kind, so we refused to grant the third extension.

I have never received any notices so I called Ms. Steplight's office about 2 months ago and it took her about a month to reply because she stated that her message system was not functioning properly and her response to the message I left her was that this case was with your office (TTAB) and if there were any notices they would send them to us for our response.

I will not sit back and allow the opposing party to bully us without a valid claim and I am requesting that your office send me the notice I never received from December and I will reply immediately.

Thanking you in advance for your understanding and cooperation regarding this request. I am going to file a complaint with the Bar Association against the attorney of record for failure to perform his duties in a professional manner.

Sincerely,

*Lou Gordon*

Lou Gordon  
Astro America, LLC  
D/b/a: D1 Music Network

ll

**EXHIBIT 6**

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

az

Mailed: July 13, 2004

Opposition No. 91158707

BMG Songs, Inc.

v.

Astro America, LLC

Albert Zervas, Interlocutory Attorney

On May 10, 2004, the Board entered default judgment in view of applicant's failure to respond to opposer's motion (filed February 9, 2004) for default judgment (due to applicant's failure to answer the notice of opposition (filed November 26, 2003)).

On May 17, 2004, applicant filed a communication with the Board. Applicant's communication does not show proof of service thereof on opposer's attorney of record, in accordance with the requirements of Trademark Rule 2.119(a) and (b). As a one time courtesy to applicant, the Board forwards a copy of applicant's communication to opposer's attorney of record with opposer's copy of this order. Strict compliance with Trademark Rule 2.119 is required in all filings with the Board.

**Opposition No. 91158707**

Opposer is allowed until **thirty days** from the mailing date of this order to file and serve a response to applicant's communication. If opposer files and serves a response, applicant's is allowed **fifteen days** (twenty days if service is by mail) to reply to opposer's response. See Trademark Rule 2.119(c).

Additionally, applicant states in his communication that he has "terminated the services of his attorney in June 2003." In view thereof, the correspondence address for applicant in the Board's file for this proceeding is amended to reflect applicant's address provided in applicant's communication, and set forth below.

-o0o-

cc:

Christopher J. Day  
Law Office Of Christopher Day  
340 E Palm Ln. Ste 282  
Phoenix, AZ 85004

Mary L. Kelvin  
Cowan Liebowitz & Latman, PC  
1133 Avenue of the Americas  
New York, NY 10036-6799

Lou Gordon  
Astro America, LLC  
3012 16<sup>th</sup> Street, # 201  
San Francisco, CA 94103-3459

# **EXHIBIT 1**



As grounds for the opposition, it is alleged that:

1. For many years, Opposer BMG Songs, Inc. (referred to as "Opposer") has been engaged in the business of manufacturing and distributing musical sound recordings, offering music library services, and producing, distributing, and exploiting production music under the marks NETWORK and NETWORK MUSIC (the "NETWORK MUSIC Marks").

2. Long prior to Applicant's alleged date of first use of April 1, 2002, Opposer has used its NETWORK MUSIC Marks in the United States in connection with the sale of musical sound recordings, offering music library services, and producing, distributing, and exploiting production music. Opposer is the owner of the following federal registrations and applications:

Mark	Reg. No./ Serial No.	Reg./App. Date	Goods/Services
NETWORK	1,267,749 (federal reg.)	02/21/84	Int. 9 - sound recordings of background music and sound effects and blank magnetic tapes and tape reels, for use in the production of audio and audio-visual works
<del>network</del>	1,296,973 (federal reg.)	09/18/84	Int. 41 - producing background music and commercial sound recordings for broadcasters and production music libraries

Mark	Reg. No./ Serial No.	Reg./App. Date	Goods/Services
NETWORK	2,098,885 (federal reg.)	09/23/97	Int. 9 - audio cassettes and compact discs, audio-visual CD-roms, computer software and computer programs containing digitized audio files for use in multi-media applications, and computer software and CD-roms used for searching, auditioning, editing, converting and exporting audio files
NETWORK MUSIC	76/537,344 (federal app.)	08/14/03	Int. 41 - providing music libraries for use by producers of television shows, television advertisements, motion pictures, video recordings, in-house productions, and multi-media applications

Mark	Reg. No./ Serial No.	Reg./App. Date	Goods/Services
	76/540,263 (federal app.)	08/26/03	<p>Int. 9 - musical sound recordings for use by producers of television shows, television advertisements, motion pictures, video recordings, in-house productions, and multi-media applications; computer software and CD-roms used for searching, auditioning, editing, converting and exporting audio files; computer software and computer programs containing digitized audio files for use in multi-media applications</p> <p>Int. 41 - providing music libraries for use by producers of television shows, television advertisements, motion pictures, video recordings, in-house productions, and multi-media applications</p>

Registration Nos. 2,098,885, 1,296,973, and 1,267,749 have become incontestable.

3. Long prior to Applicant's alleged date of first use of April 1, 2002, Opposer has extensively promoted the sale of its musical sound recordings, music library services, and production music services under the NETWORK MUSIC Marks.

4. As a result of the extensive sale and promotion of its goods and services bearing the NETWORK MUSIC Marks for many years, Opposer has built up a valuable goodwill for its mark.

5. On June 13, 2002, Applicant Astro America, LLC filed a use-based application to register the mark D1 MUSIC NETWORK for "music production services" in Class 41. In its application, Applicant claimed a first use date of April 1, 2002.

6. Upon information and belief, Applicant has made no use of the D1 MUSIC NETWORK mark prior to April 1, 2002.

7. Applicant's services bearing the applied-for mark and Opposer's goods and services marked with the NETWORK MUSIC Marks are either identical or closely related and, upon information and belief, are likely to be or are sold or rendered through the same channels of trade to the same kinds of consumers.

8. Applicant's mark so resembles Opposer's NETWORK MUSIC Marks, as to be likely, when applied to Applicant's services, to cause confusion, to cause mistake and to deceive with consequent injury to Opposer, the trade and the public.

WHEREFORE, Opposer believes that it will be damaged by registration of Applicant's mark and prays that said registration not be allowed.

Please recognize as attorneys for Opposer in this proceeding Mary L. Kevlin, Anna M. DePalo (members of the Bar of the State of New York) and the firm of Cowan, Liebowitz & Latman, P.C., 1133 Avenue of the Americas, New York, New York 10036-6799.

Please address all communications to Mary L. Kevlin, Esq. at the above address.

Dated: New York, New York  
November 26, 2003

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.

By Mary L. Kevlin

Mary L. Kevlin  
Anna M. DePalo  
1133 Avenue of the Americas  
New York, New York 10036-6799  
(212) 790-9200

Attorneys for Opposer

TTAB

# Cowan, Liebowitz & Latman, P.C.

LAW OFFICES

1133 Avenue of the Americas \* New York, NY 10036-6799

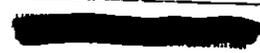
Telephone (212) 790-9200 • Web www.cll.com • Fax (212) 575-0671

Anna M. DePalo  
Direct (212) 790-9217  
amd@cll.com

November 26, 2003

**Via Express Mail**

Box TTAB FEE  
Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, Virginia 22202-3514

  
11-26-2003  
U.S. Patent & TMO/TM Mail Rep1Dt. #22

Re: BMG Songs, Inc.  
Notice of Opposition Against  
the Mark D1 MUSIC NETWORK,  
Serial No. 76/420,774  
Attorney Ref. No. 16513.045

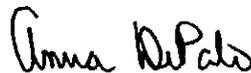
Dear Sir:

We enclose an original and duplicate copy of a Notice of Opposition against application Serial No. 76/420,774, published in the Official Gazette of April 15, 2003. We also enclose a check in the amount of \$300 to cover filing fees.

If the enclosed check is insufficient and additional fees are required, please charge our Deposit Account No. 03-3415.

Kindly confirm receipt of this opposition by returning the attached postcard and address all future correspondence to Mary L. Kevlin, Esq. at the above address.

Respectfully submitted,



Anna DePalo

Enclosures

cc: Mary L. Kevlin, Esq. (w/o enclosures)

## **EXHIBIT 2**

UNITED STATES DEPARTMENT OF COMMERCE  
Patent and Trademark Office  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3513

Mailed: December 8, 2003

Opposition No 91158707  
Serial No. 76420774

CHRISTOPHER J DAY  
LAW OFFICE OF CHRISTOPHER DAY  
340 E PALM LN STE 282  
PHOENIX, AZ 85004

BMG Songs, Inc

v.

Astro America, LLC

Mary L. Kevlin  
Cowan Liebowitz & Latman, PC  
1133 Avenue of the Americas  
New York, NY 10036-6799

**TAMMY LOGAN, LEGAL ASSISTANT**

A notice of opposition to the registration sought in the above-identified application has been filed. A copy of the notice is attached.

**ANSWER IS DUE FORTY DAYS** after the mailing date hereof. (See Trademark Rule 2.196 for expiration date falling on Saturday, Sunday or a holiday).

Proceedings will be conducted in accordance with the Trademark Rules of Practice, set forth in Title 37, part 2, of the Code of Federal Regulations. The parties are reminded of the recent amendments to the Trademark Rules that affect the rules of practice before the TTAB. See Rules of Practice for Trademark-Related Filings Under the Madrid Protocol Implementation Act, 68 Fed. R. 55,748 (September 26, 2003) (effective November 2, 2003); Reorganization of Correspondence and Other Provisions, 68 Fed. Reg. 48,286 (August 13, 2003) (effective September 12, 2003). Notices concerning the rules changes, as well as the *Trademark Trial and Appeal Board Manual of Procedure* (TBMP), are available at [www.uspto.gov](http://www.uspto.gov).

The parties are particularly referred to Trademark Rule 2.126 pertaining to the form of submissions. Paper submissions, including but not limited to exhibits and depositions, not filed in accordance with Trademark Rule 2.126 may not be given consideration or entered into the case file.

**Discovery and testimony periods are set as follows:**

Discovery period to open:	December 28, 2003
Discovery period to close:	June 25, 2004
30-day testimony period for party in position of plaintiff to close:	September 23, 2004
30-day testimony period for party in position of defendant to close:	November 22, 2004
15-day rebuttal testimony period for plaintiff to close:	January 06, 2005

A party must serve on the adverse party a copy of the transcript of any testimony taken during the party's testimony period, together with copies of documentary exhibits, within 30 days after completion of the taking of such testimony. See Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

**NOTE:** The Board allows parties to utilize telephone conferences to discuss or resolve many interlocutory matters that arise in inter partes cases. See the *Official Gazette* notice titled "Permanent Expansion of Telephone Conferencing on Interlocutory Matters in Inter Partes Cases Before the Trademark Trial and Appeal Board," 1235 TMOG 68 (June 20, 2000). The notice is available at <http://www.uspto.gov>. Interlocutory matters which the Board agrees to discuss or decide by phone conference may be decided adversely to any party which fails to participate.

If the parties to this proceeding are also parties to other Board proceedings involving related marks or, during the pendency of this proceeding, they become parties to such proceedings, they should notify the Board immediately, so that the Board can consider consolidation of proceedings.

**New Developments at the Trademark Trial and Appeal Board**

TTAB forms for electronic filing of extensions of time to oppose, notices of opposition, and inter partes filings are now available at <http://estta.uspto.gov>. Images of TTAB proceeding files can be viewed using TTABVue at <http://ttabvue.uspto.gov>.

## **EXHIBIT 3**

TTAB

Docket No. 16513.045

TRADEMARK

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

In The Matter of Application Serial No. 76/420,774  
Published in the Official Gazette of April 15, 2003

----- X

BMG SONGS, INC., :

Opposer, :

v. : Opposition No. 91158707

ASTRO AMERICA, LLC, :

Applicant. :

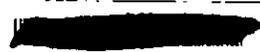
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BOX TTAB - NO FEE  
Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3514

MOTION FOR DEFAULT JUDGMENT

MOTION

Pursuant to Trademark Rule 2.106(a), Opposer hereby moves for a default judgment in this proceeding because Applicant has failed to file a timely answer. In the alternative, if this proceeding is re-opened, Opposer requests that the discovery and trial periods be reset.



02-09-2004

U.S. Patent & TMO/TM Mail Rcpt Dt. #39

"Express Mail" Mailing Label Number EV 324 479 258 US

I hereby certify that this paper or fee is being deposited with the United States Postal Service "Express Mail Post office to Addressee" service under 37 C.F.R. 1.10 on the date indicated above and is addressed to the Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3514 on

February 9, 2004 Phyllis Buchalter

(Date of Deposit) (Print name)

Phyllis Buchalter

(Signature)

MEMORANDUM

Opposer's motion for default judgment should be granted because Applicant has failed to submit an answer to the Notice of Opposition. The order instituting this opposition was mailed by the Trademark Trial and Appeal Board on December 8, 2003. As the answer was due January 17, 2004, and no answer has been filed or received, and no good cause shown, a default judgment should be entered.

In the event, however, that this proceeding is reopened, Opposer requests that the discovery and trial periods be reset.

Dated: New York, New York  
February 9, 2004

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.

By



Mary L. Kevlin, Esq.  
Anna M. DePalo, Esq.  
1133 Avenue of the Americas  
New York, New York 10036-6799  
(212) 790-9200

Attorneys for Opposer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing MOTION FOR DEFAULT JUDGMENT was served on Applicant by sending a copy by first class mail, postage prepaid, to Applicant's counsel on February 9, 2004, addressed as follows:

Christopher J. Day, Esq.  
Law Office of Christopher Day  
340 East Palm Lane, Suite 282  
Phoenix, Arizona 85004

Joel S. Turtle, Esq.  
55 Santa Clara Avenue  
Oakland, CA 94610

Dated: February 9, 2004

  
\_\_\_\_\_  
Anna M. DePalo

## **EXHIBIT 4**

UNITED STATES DEPARTMENT OF COMMERCE  
Patent and Trademark Office  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3513

cv

Mailed: May 10, 2004

Opposition No. 91158707

BMG Songs, Inc

v.

Astro America, LLC

Answer was due on January 17, 2004. A review of the record shows that an answer has not been filed.

This case now comes up for consideration of opposer's motion, filed February 9, 2004, for default judgment against applicant for failure to file an answer. The motion is uncontested.<sup>1</sup>

Inasmuch as applicant failed to file an answer in this case, and failed to respond to opposer's motion in any manner, the motion for default judgment is granted. See Trademark Rule 2.127(a). Accordingly, judgment is hereby entered against applicant, the notice of opposition is

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<sup>1</sup> If a defendant fails to file an answer to a complaint during the time allowed therefor, the Board, on its own initiative, may issue a notice of default allowing the defendant time to show cause why default judgment should not be entered against it. The issue of whether default judgment should be entered against a defendant for failure to file an answer may also be raised by means of a motion filed by the party in the position of

Opposition No. 91158707

sustained, and registration to applicant is refused. See  
Fed. R. Civ. P. 55 and Trademark Rule 2.127(a).

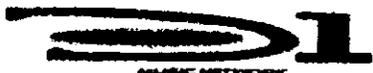
*By the Trademark Trial  
and Appeal Board*

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plaintiff. In such cases, the motion may serve as a substitute  
for the Board's issuance of a notice of default.

**EXHIBIT 5**

TTAB



3012 16<sup>TH</sup> STREET #201 • SAN FRANCISCO, CA. • 94103-3459  
PHONE: (415) 552-1111 • FAX: (415) 552-8444 • EMAIL: [lou@d1music.com](mailto:lou@d1music.com)  
[www.d1musicnet.com](http://www.d1musicnet.com)

Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, VA. 22202

05-17-2004

RE: Serial Number: ~~7640774~~; Opposition Number: 158707

U.S. Patent & TMO/TM Mail Rpt DL #66

To Whom It May Concern:

I have never received the notice dated December 8, 2003. I terminated the services of the attorney of record Christopher Day in June 2003, because he didn't handle the notice of opposition to our satisfaction. He did not forward any of the papers your office thinks, I failed to respond to. He did not send anything to my attention other than the opposing attorneys address and their request for an extension of time, which we granted on 2 different occasions.

I have remained in phone contact with the examining attorney's office. Ms. Cheryl Steplight was away last year on maternity leave and a male attorney took her case load while she was out. I told him on more than one occasion that we terminated the services of Mr. Day and he spoke to the replacement attorney Joel S. Turtle and he called Mr. Turtle's office on more than one occasion. I am confused as to why this was not put on record. I verbally communicated this to both the examining attorney and the opposing attorneys offices. They were in constant negotiations with Mr. Turtle trying to resolve this issue. After they wanted us to comply with unreasonable demands that we didn't believe existed, we decided that there wasn't any conflict of any kind, so we refused to grant the third extension.

I have never received any notices so I called Ms. Steplight's office about 2 months ago and it took her about a month to reply because she stated that her message system was not functioning properly and her response to the message I left her was that this case was with your office (TTAB) and if there were any notices they would send them to us for our response.

I will not sit back and allow the opposing party to bully us without a valid claim and I am requesting that your office send me the notice I never received from December and I will reply immediately.

Thanking you in advance for your understanding and cooperation regarding this request. I am going to file a complaint with the Bar Association against the attorney of record for failure to perform his duties in a professional manner.

Sincerely,  
*Lou Gordon*  
Lou Gordon  
Astro America, LLC  
D/b/a: D1 Music Network

*ll*

**EXHIBIT 6**

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

az

Mailed: July 13, 2004

Opposition No. 91158707

BMG Songs, Inc.

v.

Astro America, LLC

Albert Zervas, Interlocutory Attorney

On May 10, 2004, the Board entered default judgment in view of applicant's failure to respond to opposer's motion (filed February 9, 2004) for default judgment (due to applicant's failure to answer the notice of opposition (filed November 26, 2003)).

On May 17, 2004, applicant filed a communication with the Board. Applicant's communication does not show proof of service thereof on opposer's attorney of record, in accordance with the requirements of Trademark Rule 2.119(a) and (b). As a one time courtesy to applicant, the Board forwards a copy of applicant's communication to opposer's attorney of record with opposer's copy of this order. Strict compliance with Trademark Rule 2.119 is required in all filings with the Board.

Opposition No. 91158707

Opposer is allowed until **thirty days** from the mailing date of this order to file and serve a response to applicant's communication. If opposer files and serves a response, applicant's is allowed **fifteen days** (twenty days if service is by mail) to reply to opposer's response. See Trademark Rule 2.119(c).

Additionally, applicant states in his communication that he has "terminated the services of his attorney in June 2003." In view thereof, the correspondence address for applicant in the Board's file for this proceeding is amended to reflect applicant's address provided in applicant's communication, and set forth below.

-o0o-

cc:

Christopher J. Day  
Law Office Of Christopher Day  
340 E Palm Ln. Ste 282  
Phoenix, AZ 85004

Mary L. Kelvin  
Cowan Liebowitz & Latman, PC  
1133 Avenue of the Americas  
New York, NY 10036-6799

Lou Gordon  
Astro America, LLC  
3012 16<sup>th</sup> Street, # 201  
San Francisco, CA 94103-3459