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TTAB

June 20, 2008

Trademark Trial & Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Re: Message In A Bottle, Inc. vs. Cangiarella and Related Counterclaim
Opposition No. 91162780

Ladies/Gentlemen:

I am enclosing a copy of a motion to strike in the above opposition/counterclaim proceeding, along with a certificate of service on the applicant. I am also enclosing an extra copy of the first page of the motion. Please file the motion, stamp the extra page with your filing date, and return the stamped page to me in the enclosed stamped, self-addressed envelope.

I look forward to the ruling on this motion.

Very truly yours,


Peter H. Smith

PHS/clf
Enclosures

cc: Mr. Roger Rojas, Message In A Bottle, Inc.



06-24-2008

COPY OF FIRST PAGE: Stamp with filing date + return. jms

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

<p>MESSAGE IN A BOTTLE, INC. Opposer, v. KEITH CANGIARELLA Applicant</p>	<p>Opposition No.: 91,162,780 Application Serial No.: 78/229,875 Mark: MESSAGE IN A BOTTLE</p>
<p>KEITH CANGIARELLA Petitioner, v. MESSAGE IN A BOTTLE, INC. Registrant</p>	<p>Counterclaim for cancellation Registration No.: 2,243,269 Mark: MESSAGE IN A BOTTLE</p>
<p align="center">OPPOSER MESSAGE IN A BOTTLE, INC.'S MOTION TO STRIKE APPLICANT'S NOTICE OF RELIANCE</p>	

OPPOSER MESSAGE IN A BOTTLE, INC. ("Opposer") hereby moves, pursuant to TMEP §532, to strike portions of the notice of reliance proffered by Applicant Keith Cangiarella on the procedural grounds that, as specified below, some documents submitted with the notice of reliance fail to comply with the requirements of 37 C.F.R. §§ 2.122 and 2.123. Opposer reserves its right to raise additional substantive objections regarding Applicant's notice of reliance in Opposer's brief on the case.

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

<p>MESSAGE IN A BOTTLE, INC.</p> <p style="text-align: center;">Opposer,</p> <p style="text-align: center;">v.</p> <p>KEITH CANGIARELLA</p> <p style="text-align: center;">Applicant</p>	<p>Opposition No.: 91,162,780</p> <p>Application Serial No.: 78/229,875</p> <p>Mark: MESSAGE IN A BOTTLE</p>
<p>KEITH CANGIARELLA</p> <p style="text-align: center;">Petitioner.</p> <p style="text-align: center;">v.</p> <p>MESSAGE IN A BOTTLE, INC.</p> <p style="text-align: center;">Registrant</p>	<p>Counterclaim for cancellation</p> <p>Registration No.: 2,243,269</p> <p>Mark: MESSAGE IN A BOTTLE</p>
<p>OPPOSER MESSAGE IN A BOTTLE, INC.’S MOTION TO STRIKE APPLICANT’S NOTICE OF RELIANCE</p>	

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1. Declaration of Keith Cangiarella In the Matter of Trademark Application Serial No. 78/229,875 Mark: MESSAGE IN A BOTTLE And In the Matter of Trademark Registration No. 2,243,369 Mark: MESSAGE IN A BOTTLE – Opposition No. 91162780 And Counterclaim for Cancellation (“Cangiarella Decl.”)

Grounds for Objection: Opposer objects to the introduction of this declaration and moves to strike it in its entirety on the grounds that it is not the type of evidence that may be introduced via a notice of reliance within the meaning of 37 C.F.R. § 2.122, nor proper testimony that may be introduced pursuant to 37 C.F.R. § 2.123(a)(1) and TBMP § 703.01(b).

37 C.F.R. § 2.122 provides for the introduction of certain types of evidence, such as official records and printed publications, in inter partes proceedings via a notice of reliance. 37 C.F.R. § 2.122. The Cangiarella Decl. purports to consist of the sworn testimony of Applicant Keith Cangiarella. The declaration is not an official record, printed publication, or testimony from another proceeding that may be introduced under § 2.122. *See also Harjo v. Pro-Football Inc.*, 50 USPQ2d 1705, 1722 (TTAB 1999) (declarations of a party or non-party are not documents admissible under a notice of reliance).

The Cangiarella Decl. also cannot be considered proper testimony under 37 C.F.R. § 2.123(a)(1). “The testimony of witnesses in inter partes cases may be taken by depositions upon oral examination as provided by this section or by depositions upon written questions as provided by Sec. 2.124.” 37 C.F.R. § 2.123(a)(1). The Cangiarella Decl. is neither a deposition upon oral examination nor a deposition upon written

questions. The Board should exclude the Cangiarella Decl. and its attached exhibits in its entirety.

2. Cangiarella Decl. Ex. A (newsgroup postings).

Grounds for Objection: Opposer objects to the introduction of these documents and moves to strike them on the grounds that these are not the type of evidence that may be introduced under a notice of reliance within the meaning of 37 C.F.R. § 2.122. Internet postings “may be modified or deleted at any time without notice and thus are not subject to the safeguard that the party against whom the evidence is offered is readily able to corroborate or refute the authenticity of what is proffered.” TBMP § 704.08.

The types of records that may be introduced via a notice of reliance include, *inter alia*, printed publications and official records. Printed publications must be publications which are “available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant under an issue in a proceeding.” 37 C.F.R. § 2.122(e). Official records are “records of public offices or agencies, or records kept in the performance of duty by a public officer.” TBMP § 704.07. Exhibit A to the Cangiarella Decl. are neither printed publications, official records, nor any other type of document that may be introduced via a notice of reliance and it should be stricken.

3. Cangiarella Decl. Ex. BB (California state trademark registration).

Grounds for Objection: Opposer objects to the introduction of this document and moves to strike it on the grounds that it is not an official record within the meaning of 37 C.F.R. § 2.122(e).

When introducing an official record via a notice of reliance “the notice shall specify the official record and the pages to be read; indicate generally the relevance of the material being offered; and be accompanied by the official record or a copy thereof whose authenticity is established under the Federal Rules of Evidence.” 37 C.F.R. § 2.122(e). The Federal Rules of Evidence require that a public record must be “certified as correct by the custodian or other person authorized to make the certification.” FRE 902(4).

Exhibit BB purports to be Applicant’s California state registration for the mark MESSAGE IN A BOTTLE. However, Applicant does not state the relevance of this record, it is attached to a declaration rather than the notice of reliance, and it is not a certified copy. Exhibit BB to the Cangiarella Decl. should be stricken.

4. Cangiarella Decl. Ex. C (newspaper advertisement).

Grounds for Objection: Opposer objects to the introduction of this document and moves to strike it on the grounds that the relevance of this document has not been set forth in the notice of reliance as required by 37 C.F.R. § 2.122(e).

When introducing printed publication via a notice of reliance “the notice shall ... indicate generally the relevance of the material being offered.” 37 C.F.R. § 2.122(e). Exhibit C purports to be Applicant’s advertisement in a newspaper. However, Applicant

does not state the relevance of this publication and it is attached to a declaration rather than the notice of reliance. Exhibit C to the Cangiarella Decl. should be stricken.

5. Cangiarella Decl. Ex. D (undated magazine advertisement).

Grounds for Objection: Opposer objects to the introduction of this document and moves to strike it on the grounds that the relevance of this document has not been set forth in the notice of reliance and the date of the advertisement cannot be ascertained as required by 37 C.F.R. § 2.122(e); *see also Harjo*, at 1722 n56 (undated advertisements are not admissible under a notice of reliance).

When introducing printed publication via a notice of reliance “the notice shall ... indicate generally the relevance of the material being offered.” 37 C.F.R. § 2.122(e). Exhibit D purports to be Applicant’s advertisement in a magazine. However, Applicant does not state the relevance of this publication and it is attached to a declaration and rather than the notice of reliance. Additionally, although the first page of Exhibit D purports to be the cover of a bridal magazine from 2001, the advertisement itself includes no page numbers, magazine title, or date to establish that it appeared in the magazine identified on page one of the exhibit. Exhibit D to the Cangiarella Decl. should be stricken.

6. Cangiarella Decl. Exs. D [sic]¹ (Canadian patent application).and DA (California seller’s permit)

¹ Applicant has labeled two exhibits, an undated magazine advertisement and a Canadian patent application, as Exhibit D.

Grounds for Objection: Opposer objects to the introduction of these documents and moves to strike them on the grounds that they are not official records within the meaning of 37 C.F.R. § 2.122(e).

When introducing an official record via a notice of reliance “the notice shall specify the official record and the pages to be read; indicate generally the relevance of the material being offered; and be accompanied by the official record or a copy thereof whose authenticity is established under the Federal Rules of Evidence.” 37 C.F.R. § 2.122(e). The Federal Rules of Evidence require that a public record must be “certified as correct by the custodian or other person authorized to make the certification.” FRE 902(4).

Exhibit D [sic] purports to be a Canadian patent application and exhibit DA appears to be a California state seller’s permit in the name of the Applicant. However, Applicant does not state the relevance of these records, they are attached to a declaration and not the notice of reliance, and they are not certified copies. Exhibits D and DA to the Cangiarella Decl. should be stricken.

7. Cangiarella Decl. Exs. E (correspondence from Opposer’s counsel) and F² (correspondence to Applicant, correspondence to Opposer).

Grounds for Objection: Opposer objects to the introduction of these documents and moves to strike them on the grounds that these are not the types of documents that may be introduced via a notice of reliance within the meaning of 37 C.F.R. § 2.122.

² Applicant has labeled two exhibits, a February 17, 2004 e-mail addressed to Applicant and a July 26, 2006 e-mail addressed to Opposer, as Exhibit F.

Correspondence between, to, or on behalf of a party cannot be introduced as evidence under a notice of reliance. *Conde Nast Publications Inc. v. Vogue Travel, Inc.*, 205 USPQ 579, 580 n.5 (TTAB 1979) (copy of letter from Amtrak to applicant was not admissible via notice of reliance).

Exhibits E and F to the Cangiarella Decl. are neither printed publications, official records, nor any other type of document that may be introduced via a notice of reliance. These documents are correspondence and they should be stricken.

8. Cangiarella Decl. Exs. G, R and S (undated internet advertisements).

Grounds for Objection: Opposer objects to the introduction of these documents and moves to strike them on the grounds that the relevance of these documents has not been set forth in the notice of reliance as required by 37 C.F.R. § 2.122(e). Additionally, printed pages from websites are not proper subject matter for a notice of reliance. *Plyboo America Inc. v. Smith & Fong Co.*, 51 USPQ2d 1633, 1634 n.3 (TTAB 1999).

When introducing printed publication via a notice of reliance “the notice shall ... indicate generally the relevance of the material being offered.” 37 C.F.R. § 2.122(e). Exhibits G, R and S purport to be a number of internet advertisements for Applicant’s and a number of third parties’ goods and services. The dates of these advertisements are not legible and as web page printouts there are not the proper subject matter for a notice of reliance. Exhibits G, R and S should be stricken.

9. Cangiarella Decl. Ex. I (online dictionary records).

Grounds for Objection: Opposer objects to the introduction of these documents and moves to strike them on the grounds that the relevance of these documents has not been set forth in the notice of reliance as required by 37 C.F.R. § 2.122(e). Additionally, Applicant has not established that the online dictionary he used is available in a published copy available to the public. *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002) (judicial notice taken of online dictionary definition where resource was also available in book form).

When introducing printed publication via a notice of reliance “the notice shall ... indicate generally the relevance of the material being offered.” 37 C.F.R. § 2.122(e). Exhibit I purports to be a number of definitions of various terms from an online dictionary. Applicant has made no attempt to indicate the relevance of these definitions or that the definitions are available in book form. The definitions are also attached to a declaration rather than a notice of reliance. Exhibit I should therefore be stricken.

10. Cangiarella Decl. Exs. J, K, L (Stanislaus County fictitious business name statements) M and MA (California Secretary of State records).

Grounds for Objection: Opposer objects to the introduction of these documents and moves to strike them on the grounds that the relevance of these documents has not been set forth in the notice of reliance as required by 37 C.F.R. § 2.122(e). Opposer additionally objects to the introduction of Exhibits M and MA on the grounds that the documents are not certified copies.

When introducing an official record via a notice of reliance “the notice shall specify the official record and the pages to be read; indicate generally the relevance of the

material being offered; and be accompanied by the official record or a copy thereof whose authenticity is established under the Federal Rules of Evidence.” 37 C.F.R. § 2.122(e). The Federal Rules of Evidence require that a public record must be “certified as correct by the custodian or other person authorized to make the certification.” FRE 902(4).

Exhibits J, K and L purport to be fictitious business names records of the Opposer and an unknown third party. Exhibits M and MA are, respectively, the articles of incorporation and statement by domestic stock corporation of a third party. Applicant has made no attempt to indicate the relevance of these documents and Exhibits M and MA are not certified copies. Exhibits J, K, L, M, and MA should be stricken.

11. Cangiarella Decl. Ex. P (third party press release).

Grounds for Objection: Opposer objects to the introduction of this document and moves to strike it on the grounds that the relevance of this document has not been set forth in the notice of reliance as required by 37 C.F.R. § 2.122(e) and that press releases are not documents subject to admission under a notice of reliance.

When introducing printed publication via a notice of reliance “the notice shall ... indicate generally the relevance of the material being offered.” 37 C.F.R. § 2.122(e). Press releases are not documents that may be admitted via notice of reliance. *Colt Industries Operating Corp. v. Olivetti Controllo Numerico S.p.A.*, 221 USPQ 73, 74 n.2 (TTAB 1983); *see also Harjo*, at 1721 (TTAB 1999).

Exhibit P purports to be a third party press release from 1996. However, Applicant does not state the relevance of this document and press releases are not

publications subject to introduction via notice of reliance. Exhibit P to the Cangiarella Decl. should be stricken.

12. Cangiarella Decl. Ex. Q (conference paper).

Grounds for Objection: Opposer objects to the introduction of this document and moves to strike it on the grounds that the relevance of this document has not been set forth in the notice of reliance as required by 37 C.F.R. § 2.122(e) and that conference papers are not documents subject to admission under a notice of reliance.

When introducing printed publication via a notice of reliance “the notice shall ... indicate generally the relevance of the material being offered.” 37 C.F.R. § 2.122(e). Because conference papers, dissertations and journal papers are not usually in general circulation they are not admissible via a notice of reliance under 37 C.F.R. § 2.122(e). *see e.g. Hunter Publishing Co. v. Caulfield Publishing Ltd.*, 1 USPQ. 2d 1996, 1999 n.2 (TTAB 1986).

Exhibit Q purports to be a conference paper on virtual environments. However, Applicant does not state the relevance of this document and conference papers are not publications subject to introduction via notice of reliance. Exhibit Q to the Cangiarella Decl. should be stricken.

13. Cangiarella Decl. Exs. T and C (newspaper articles).

Grounds for Objection: Opposer objects to the introduction of these documents and moves to strike them on the grounds that the relevance of the documents have not been set forth in the notice of reliance as required by 37 C.F.R. § 2.122(e).

When introducing printed publication via a notice of reliance “the notice shall ... indicate generally the relevance of the material being offered.” 37 C.F.R. § 2.122(e). Exhibit T and C purport to be a number of newspaper articles obtained from an online library. However, Applicant does not state the relevance of these publications and they are attached to a declaration and not the notice of reliance. Exhibits T and C to the Cangiarella Decl. should be stricken.

14. Cangiarella Decl. Exs. V and OZ (portions of books).

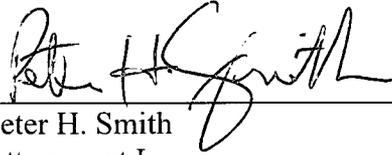
Grounds for Objection: Opposer objects to the introduction of these documents and moves to strike them on the grounds that the relevance of the documents have not been set forth in the notice of reliance as required by 37 C.F.R. § 2.122(e).

When introducing printed publication via a notice of reliance “the notice shall ... indicate generally the relevance of the material being offered.” 37 C.F.R. § 2.122(e). Exhibits V and OZ purport to be portions of books. However, Applicant does not state the relevance of these publications and they are attached to a declaration and not the notice of reliance. Additionally, Applicant has not established that these books are available to the general public in libraries or of general circulation among members of the public. A stamp on the first page of Exhibit V states that it is a “discarded book” which indicates that it is not available to the general public. Similarly, Exhibit OZ contains no dates and thus raises doubts as to its availability. Exhibits V and OZ to the Cangiarella Decl. should be stricken.

Respectfully submitted,

MESSAGE IN A BOTTLE, INC.

By its attorney,

A handwritten signature in black ink, appearing to read "Peter H. Smith", is written over a horizontal line.

Peter H. Smith
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Date: June 20, 2008

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposer Message In A Bottle, Inc.'s Motion to Strike Applicant's Notice of Reliance was mailed first class mail, postage pre-paid, to Keith Cangiarella, 331 N. Harrington Drive, Fullerton, California 92831, on June 21, 2008.

Dated: June 21, 2008



Peter H. Smith