

TTAB


Moss & Barnett
A Professional Association

May 3, 2007

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Re: Opposer: Digi International Inc.
Applicant: DigiPos Systems Inc.
Opposition No.: 91163719
Serial No.: 76/561,585
Our File No.: 51307-469997

CERTIFICATE OF MAILING 37 C.F.R. 1.8	
I hereby certify that this correspondence is being deposited with the U.S. Postal Service as First Class Mail in an envelope addressed to: United States Patent and Trademark Office, Trademark Trial and Appeal Board, P.O. Box 1451, Alexandria, Virginia 22313-1451, on the date below:	
<u>5-3-07</u> Date	<u><i>Tyenne Pauluk</i></u> Signature

Dear Sir/Madam:

Enclosed for filing please find the following:

1. Opposer's Objections To Applicant's Evidence Entered Through Notice Of Reliance To Be Determined At Final Decision, with Certificate of Service
2. Opposer's Objections To Testimony Of Mark W. Leaper To Be Determined A Final Decision, with Certificate of Service

If any fees are necessary to secure the filing of this document, the undersigned authorizes that they may be charged to Deposit Account No. 502442, making reference to our file number 51307-469997.

Please acknowledge receipt on the enclosed self-addressed, stamped postcard.

Very truly yours,



Marsha Stolt
Attorney At Law
(612) 877-5443
StoltM@moss-barnett.com

MS/tkp
Enclosures

cc: Serge Anissimoff, Esq.


05-07-2007

U.S. Patent & TMO/TM Mail Rcpt Dt. #72

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

Digi International Inc.,

Opposer

v.

DigiPos Systems Inc.,

Applicant

**OPPOSER'S OBJECTIONS TO TESTIMONY OF
MARK W. LEAPER TO BE DETERMINED AT
FINAL DECISION**

Opposition No. 91163719
Serial No. 76/561,585

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37 C.F.R. 1.8

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5-3-07 *Johannes Pauluit*
Date Signature

Pursuant to Trademark Rule 2.123, Opposer Digi International ("Digi") hereby objects to the Testimony Deposition of Mark W. Leaper ("Leaper") taken January 12, 2007 to the extent that such testimony concerns the products and services offered under the Digi trademarks and service marks. The grounds for Digi's objection are that Leaper is not competent to testify on these subjects and that Leaper's testimony on these subjects is self-serving argument and lacks foundation.

Opposer further objection to Leaper's testimony to the extent that it seeks to make of record sales of products or use of the DIGIPOS trademark outside of the U.S. on the basis that use and registration of a mark outside of the United States is irrelevant. *See Second Circuit: La Societe Anonyme des Parfums le Galion v. Jean Patou, Inc.*, 495 F.2d 1265, 181 U.S.P.Q. 545 (2d Cir. 1974); *Scholastic, Inc. v. Macmillan, Inc.*, 650 F. Supp. 866, 2 U.S.P.Q.2d 1191 (S.D. N.Y. 1987) (use of mark abroad by plaintiff is "of no relevance to its effort to create trademark rights in the United States"); *Buti v. Perosa, S.R.L.*, 139 F.3d 98, 103, 45 U.S.P.Q.2d 1985 (2d Cir. 1998) (" . . . Impresa's registration and use of the Fashion Cafe name in Italy has not, given

the territorial nature of trademark rights, secured it any rights in the name under the Lanham Act, . . ."). See also Linville v. Rivard, 26 U.S.P.Q.2d 1508, 1512, 1993 WL 156480 (T.T.A.B. 1993), vacated on other grounds, 11 F.3d 1074, 31 U.S.P.Q.2d 1218 (Fed Cir 1993) ("The concept of territoriality is basic to trademark law, . . . and it is a fundamental rule that activity outside of the United States is ineffective to create rights in marks within the United States."), later proceedings, 41 U.S.P.Q.2d 1741 (T.T.A.B. 1997), aff'd, 133 F.3d 1446, 45 U.S.P.Q.2d 1374 (Fed. Cir. 1998).

Opposer will renew these objections in its trial brief.

Respectfully submitted,

Date:

May 3, 2007



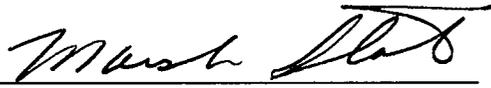
Marsha Stolt, Esq.
MOSS & BARNETT, P.A.
Attorneys for Opposer
90 So. Seventh St.
4800 Wells Fargo Center
Minneapolis, MN 55402-4129
(612) 877-5443

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the OPPOSER'S OBJECTIONS TO TESTIMONY OF MARK W. LEAPER TO BE DETERMINED AT FINAL DECISION was served on May 3, 2007, by first class mail, postage prepaid, on the following attorney for Applicant:

Serge Anissimoff
Anissimoff & Associates
Richmond North Office Centre
Suite 201, 235 North Centre Road
London, Ontario N5X 4E7
CANADA

Date: May 3, 2007


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

Digi International Inc.,

Opposer

v.

DigiPos Systems Inc.,

Applicant

**OPPOSER'S OBJECTIONS TO APPLICANT'S
EVIDENCE ENTERED THROUGH NOTICE OF
RELIANCE TO BE DETERMINED AT FINAL
DECISION**

Opposition No. 91163719
Serial No. 76/561,585

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5-3-07
Date

Therese Paulink
Signature

Pursuant to Trademark Rule 2.122, Opposer Digi International ("Digi") hereby objects to the following evidence entered by Applicant through its Notices of Reliance filed January 17, 2007:

- Applicant's Exhibit Nos. 3 through 1210 to Applicant's Notice of Reliance dated January 17, 2007, on the basis that the Applicant has failed to indicate the relevance of the material being offered, and on the basis that the majority of the material submitted is irrelevant to the question of likelihood confusion between the parties' marks.

- Applicant's Exhibit 1211 to Applicant's Notice of Reliance dated January 17, 2007, , consisting of photocopies of a Decision from the Taiwan Intellectual Property Office. The grounds of the objection are that Objection to evidence of the outcome foreign oppositions are irrelevant to the question of likelihood of confusion in the Unites States. See Vanity Fair Mills, Inc. v. T. Eaton Co. , 234 F.2d 633, 639 (2d Cir. 1956)

- Applicant's Exhibit 1212 to Applicant's Notice of Reliance dated January 17, 2007, on the basis that Notice of Reliance fails to indicate the relevance of the evidence being offered and on the basis that Applicant has not established a proper foundation for the evidence..

- Applicant's Exhibit 1213 to Applicant's Notice of Reliance dated January 17, 2007. Applicant's Notice of Reliance dated January 17, 2007. , consisting of a photocopy of a Certificate of Registration in Canada, on the basis that evidence of foreign registration is irrelevant to the proceeding at hand. *See Second Circuit: La Societe Anonyme des Parfums le Galion v. Jean Patou, Inc.*, 495 F.2d 1265, 181 U.S.P.Q. 545 (2d Cir. 1974); *Scholastic, Inc. v. Macmillan, Inc.*, 650 F. Supp. 866, 2 U.S.P.Q.2d 1191 (S.D. N.Y. 1987) (use of mark abroad by plaintiff is "of no relevance to its effort to create trademark rights in the United States"); *Buti v. Perosa, S.R.L.*, 139 F.3d 98, 103, 45 U.S.P.Q.2d 1985 (2d Cir. 1998) (" . . . Imprensa's registration and use of the Fashion Cafe name in Italy has not, given the territorial nature of trademark rights, secured it any rights in the name under the Lanham Act, . . ."). *See also Linville v. Rivard*, 26 U.S.P.Q.2d 1508, 1512, 1993 WL 156480 (T.T.A.B. 1993), vacated on other grounds, 11 F.3d 1074, 31 U.S.P.Q.2d 1218 (Fed Cir 1993) ("The concept of territoriality is basic to trademark law, . . . and it is a fundamental rule that activity outside of the United States is ineffective to create rights in marks within the United States."), later proceedings, 41 U.S.P.Q.2d 1741 (T.T.A.B. 1997), *aff'd*, 133 F.3d 1446, 45 U.S.P.Q.2d 1374 (Fed. Cir. 1998).

Opposer will renew these objections in its trial brief.

Respectfully submitted,

Date: May 3, 2007


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4800 Wells Fargo Center
Minneapolis, MN 55402-4129
(612) 877-5443

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the OPPOSER'S OBJECTIONS TO APPLICANT'S EVIDENCE ENTERED THROUGH NOTICE OF RELIANCE TO BE DETERMINED AT FINAL DECISION was served on May 3, 2007, by first class mail, postage prepaid, on the following attorney for Applicant:

Serge Anissimoff
Anissimoff & Associates
Richmond North Office Centre
Suite 201, 235 North Centre Road
London, Ontario N5X 4E7
CANADA

Date:

May 3, 2007



Marsha Stolt, Esq.