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Date July 30, 2007

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

House of Blues Brands Corp.,

Opposer,

v.

Celebrities Publishing Corporation,

Applicant.

Mark: IN ROCK WE TRUST

Consolidated Opposition Nos. 91165876;
91165899; and 91165901



07-30-2007

U.S. Patent & TMO/PTM Mail Room, #11

**APPLICANT'S RESPONSE TO OPPOSER'S MOTION TO STRIKE APPLICANT'S
NOTICE OF RELIANCE ON RULE 30(b)(6) DEPOSITION**

Applicant Celebrities Publishing Corporation files its Response to Opposer's Motion to Strike Applicant's Notice of Reliance on Rule 30(b)(6) Deposition.

Opposer's Motion alleges that Applicant improperly filed a Notice of Reliance that failed to set forth why Opposer's cited deposition passages are misleading when considered without Applicant's deposition passages, and that some of the passages cited by Applicant are not related to passages cited by Opposer. Opposer's assertions are incorrect.

C.F.R. §2.120(j)(4) states:

If only part of a discovery deposition is submitted and made part of the record by a party, an adverse party may introduce under a notice of reliance any other part of the deposition which should in fairness be considered so as to make not misleading what was offered by the submitting party. A notice of reliance filed by an adverse party must be supported by a written statement explaining why the adverse party needs to rely upon each additional part listed in the adverse party's notice, failing which the Board, in its discretion, may refuse to consider the additional parts.

When Opposer cited eighty-two (82) of the one hundred-seven (107) pages of the deposition at issue, Applicant was specifically authorized by C.F.R. §2.120(j)(4) to "introduce

under a notice of reliance any other part of the deposition which should in fairness be considered so as to make not misleading what was offered by the submitting party.” C.F.R. §2.120(j)(4) ensures that one party cannot tell an incomplete story without the other party having recourse. It is about fairness.

For instance, when Opposer cited question after question (page 34 and 35 of the transcript) regarding marketing, to whom Applicant’s goods were targeted, and expectations and plans for the same, Opposer failed to cite the final questions in the string about marketing materials and plans by Applicant. Opposer misleads the Board by only providing eighty percent of the marketing answer. Opposer provided an incomplete citation to the Board by omitting the final response to the line of questioning that detailed searches undertaken by Applicant, research completed, logos designed, and wholesalers being polled (all of which fleshes out the marketing responses). This blatant attempt to mislead the reader is exactly what C.F.R. §2.120(j)(4) is meant to prevent.

Opposer reads more proscription into C.F.R. §2.120(j)(4) than exists. C.F.R. §2.120(j)(4) merely requires a written statement explaining why the adverse party needs to rely upon each additional passage listed in the adverse party’s notice of reliance. For Applicant, that reason was the same for each cite -- Opposer cited incomplete testimony excerpts. Applicant therefore offered the evidence that completed that testimony so as to avoid Opposer’s citations from being misleading. This reasoning was set forth in the Notice of Reliance (“to complete the testimony set forth by Opposer’s citations”). If the reason is the same for each excerpt, there is no requirement to cut and paste the same sentence stating the reason for each excerpt. C.F.R. §2.120(j)(4) does not require that. If there were different reasons for each excerpt, that might be the case.

Applicant complied with the requirements of C.F.R. §2.120(j)(4). However, as a courtesy to the Board, the following sets forth in more detail why each citation merely completes, as Applicant indicated in its Notice of Reliance, the testimony cited by Opposer.

Noah-Marti Depo. 35:25 to 36:24:

This portion directly relates to and expands upon Mr. O'Neill's prior questioning (at 35:4-6, 10-11, 18-19) about Ms. Noah-Marti's expectation to market "In Rock We Trust." The pages and answers cited are relevant because they provide detail of the steps taken to market the mark.

Noah-Marti Depo. 36:21 to 38:02:

This portion again directly relates to and expands upon Mr. O'Neill's questioning (at 35:4-6, 10-11, 18-19) about Ms. Noah-Marti's expectation to market "In Rock We Trust." This section is relevant because it discusses the steps Ms. Noah-Marti took in designing the logo.

Noah-Marti Depo. 48:02 to 50:15:

This portion directly relates to and expands upon Mr. O'Neill's preceding questioning (at 46:8-13; 47:6-7, 12, 14-16,21-22) about the areas Ms. Noah-Marti planned to market "In Rock We Trust." Ms. Noah-Marti's answers in this section are relevant because they detail the geographic and demographic profile of her intended market.

Noah-Marti Depo. 53:03 to 53:15:

This portion again directly relates to and expands upon Mr. O'Neill's questioning (at 46:8-13; 47:6-7, 12, 14-16,21-22) about the Ms. Noah-Marti's plans to market "In Rock We Trust."

Ms. Noah-Marti's answers in this section are relevant because they detail the customer base for her logo.

Noah-Marti Depo. 80:15 to 81:14:

This portion directly relates to and expands upon Mr. O'Neill's preceding questioning (at 78:6-10, 19-21; 79:14-16, 18-19, 21-22) about trademark search reports. This section is relevant because it goes into detail about the various "In ____ We Trust" marks that Ms. Noah-Marti uncovered in her search.

Noah-Marti Depo. 92:07 to 93:20:

This portion directly relates to and expands upon Mr. O'Neill's questioning (at 91:5-7, 9-11, 18) about trademark search reports. This section is relevant because it goes into detail about whether Ms. Noah-Marti thought any of these marks were similar to her mark.

Noah-Marti Depo. 101:21 to 102:13:

This portion directly relates to and expands upon Mr. O'Neill's preceding questioning (at 98:19-20; 99:12, 14, 18-19, 24-25) about Ms. Noah-Marti's familiarity with the House of Blues. The answers in this section are relevant because they detail whether Ms. Noah-Marti had ever been to the House of Blues.

Noah-Marti Depo. 102:21 to 105:09:

This portion again directly relates to and expands upon Mr. O'Neill's questioning (at 98:19-20; 99:12, 14, 18-19, 24-25) about Ms. Noah-Marti's familiarity with the House of Blues.

The answers in this section are relevant because they detail whether Ms. Noah-Marti's had ever been exposed to House of Blues merchandising.

Each citation is needed to complete the testimony cited by Opposer.

Finally, C.F.R. §2.120(j)(4) states that if its requirements are not met “the Board, in its discretion, may refuse to consider the additional parts.” (Emphasis added.) When Opposer cited 82 pages of a 107 deposition (the vast majority of the deposition), it almost goes without saying that the few uncited pages would relate to the testimony already cited. The use of the word “may,” however, indicates that the Board may consider the citations supplied by Applicant at its discretion, even if the Board finds Applicant did not fully comply with the requirements of C.F.R. §2.120(j)(4).

Applicant respectfully submits the testimony cited should be considered.

Respectfully submitted by,
July ~~30~~, 2007



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DEPOSITION was served on the below counsel, via Express Mail, postage pre-paid, on July 30,
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Name of person signing Certificate: Ami Ungos

Signature: Ami Ungos

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**APPLICANT'S RESPONSE TO OPPOSER'S MOTION TO STRIKE APPLICANT'S
NOTICE OF RELIANCE ON PRINTED PUBLICATIONS AND PORTIONS OF
APPLICANT'S NOTICE OF RELIANCE ON THIRD-PARTY FEDERAL
REGISTRATIONS**

Applicant Celebrities Publishing Corporation files its Response to Opposer's Motion to Strike Applicant's Notice of Reliance on Printed Publications and Portions of Applicant's Notice of Reliance on Third-Party Federal Registrations.

Opposer's motion asserts the following:

1. Opposer Argues That Certain Third-Party Federal Trademark Registrations and Dictionary and Encyclopedia Definitions Should Be Barred Because They Were Not Produced in Discovery.
2. Opposer Argues That Six Dictionary and Encyclopedia Publication Materials Cannot Be Properly Authenticated via Notice of Reliance, and Are Inherently Unreliable.

I. Third-Party Registrations, Definitions, and Encyclopedic Materials Are Properly In Evidence

A. The Three Third-Party Registrations (Exhibits 5, 6, and 19) at Issue

In a discovery response dated March 24, 2006, Applicant produced a TESS search on the USPTO website that revealed sixty-three (63) third-party federal registrations that were "live" and

had a combination of the words “in”, “we”, and “trust”. Applicant also produced a printout of these registrations. Opposer has moved to strike three third-party registrations that were not produced during discovery, but that were offered into evidence:

Exhibit 5	IN PROPERTY WE TRUST
Exhibit 6	STRUTTIN' MUTTS INC. IN DOGS WE TRUST
Exhibit 19	INGENEUS WE TRUST

Exhibits 5 and 6 had not yet been published for Opposition by the date of Applicant's document response that produced the list of sixty-three third-party registrations. Exhibits 5 and 6 were published for opposition July 25, 2006, and August 1, 2006, respectively, and both registered on October 17, 2006. Upon renewing the TESS search during the testimony period to determine which third-party registrations were still active, Exhibits 5 and 6 appeared as registered and live. Applicant is entitled to supplement the registrations submitted in that fashion. Opposer cannot in good faith argue surprise or disadvantage, given that Opposer was on notice of Applicant's use of IN __ WE TRUST registrations from the large quantity of active registrations already produced. It is true that Exhibit 19 was registered prior to Applicant's discovery response. Opposer, however, cannot argue lack of notice given the prior production. Furthermore, the Board is entitled to consider the public record.

It is not clear under C.F.R. 37§2.122(e) that for an official and public record of the Patent and Trademark Office, Applicant is required to do anything more than offer a Notice of Reliance on any third-party registration, regardless of whether it was produced in discovery. If Applicant had not yet undertaken a TESS search prior to the testimony period, there is nothing that prohibits Applicant from filing a Notice of Reliance on third-party registrations during the testimony period. Applicant is not required to produce documents or evidence it did not have at

the time of production, or submit its trial brief at that time.

B. The Dictionary and Encyclopedia Materials

Opposer further complains of certain printed publications (dictionary and encyclopedia definitions) used to rebut dictionary definitions relied upon by Opposer. Two of the definitions relied upon by Applicant, however, were the exact word or phrase, from the same online dictionary, as used by Opposer, but merely updated. Opposer filed Exhibits 103 and 104, which are the online dictionary Wikipedia's definitions for "Blues" and "Rock and Roll", respectively. Applicant, in turn, filed Exhibits 34 and 42, which are merely the updated version of the Wikipedia entries. As the Board is most likely aware, Wikipedia is an online dictionary that allows for peer review, which leads to continual updating and verification. That Opposer would object to an updated version of Opposer's cited Wikipedia definitions is tantamount to Opposer objecting to Applicant *Shepardizing* case law.

Opposer also objects to the submission of the Wikipedia definition for "Rock Music" (Exhibit 37), which Opposer oddly omitted (despite citing Wikipedia for "Rock and Roll") in favor of the Merriman-Webster Online dictionary's definition for "Rock". Applicant is certainly entitled in rebuttal to cite the definition of "Rock Music" from Wikipedia in response to Opposer's dictionary definition forum shopping. Applicant submitted the definition of "House" music from Wikipedia as well, using Opposer's online dictionary for said term (as well as the Oxford English Dictionary and Microsoft Encarta as set forth infra).

Applicant also cited the reference standard of dictionaries, the Oxford English Dictionary, Concise Edition (the "OED"), for the definitions of "Blues" (Exhibit 32), "Rock" (Exhibit 35), and "House Music" (Exhibit 38). The OED is held with such regard it is cited as authority, like

Black's Law Dictionary, by Courts and practitioners alike in opinions and briefs without advance preview. It is important to remember that as a general rule, the Board may take judicial notice of dictionary evidence. In re Red Bull GmbH, 78 U.S.P.Q.2d 1375, 1378 (T.T.A.B. 2006) (emphasis added). Therefore, Applicant could have simply argued those definitions in its brief.

In a similar vein, Microsoft Encarta entries for "Blues", "Rock Music", and "House" were cited (Exhibits 33, 36, and 39). Interestingly, Microsoft Encarta stands in such prominence this very Board recognizes its status and that the Board may take judicial notice of it. The TTAB has stated that Encarta Dictionary, while not available as a print publication, is "a widely-known reference that is readily available in specifically denoted editions via the Internet and CD-Rom. Thus, it is the electronic equivalent of a print publication and [an] applicant may easily verify the excerpt." Id.¹ Ironically, the only internet dictionary source the Redbull Board refused to take judicial notice of, and specifically named, is www.wordsmyth.net, which Opposer cites for Opposer's Exhibit 105. Id.

Applicant did cite a publically available article regarding music history as Exhibit 44 in rebuttal to Opposer's historical citations. Rebuttal testimony is allowable, and in this circumstance "harmless" under Rule 26(e)(2) in that it was publically available material and readily available to anyone, and as described below, properly authenticated when its URL source code is present.

II. Printed Publication Materials Are Properly Authenticated Via A Notice of Reliance

Finally, Opposer argues that Applicant's Exhibits 34, 37, 40, 42, 43, and 44 are Internet materials and cannot be admitted under a Notice of Reliance. Opposer is wrong as to the state of

¹ Printed publications offered via notice of reliance should be available to the general public or relevant public. Gary D. Krugman, Trademark Trial and Appeal Board Practice and Procedure § 3:134 (West 2007).

the law. More interestingly, four of the six Exhibits (34, 37, 40, and 42) were definitions from a dictionary (Wikipedia) that Opposer had already authenticated, two of which Opposer cited itself (albeit Opposer cited outdated versions of these definitions). Additionally, Exhibit 43 is a United States Department of Treasury article on the history of In God We Trust from the United States Treasury Department's website. Exhibit 44 is a historical article on Rock Music. All six exhibits very prominently display the website URL needed to access the publications, identifying the location and availability of the publication to the general public, and the date accessed or the copyright date.

Opposer ignores the present state of law as set forth in both TTAB caselaw and the Trademark Trial and Appeal Board Practice and Procedure manual. The Trademark Trial and Appeal Board,

considers printouts from articles downloaded from the internet to be the electronic equivalent of printed publications provided the printouts include sufficient information to identify the source and date of the publication.

Gary D. Krugman, Trademark Trial and Appeal Board Practice and Procedure § 3:134 (West 2007).

While Opposer cites the Raccioppi case, Opposer fails to cite the relevant more focused holding in Raccioppi, which states "the general trend appears to be admit information obtained from the Internet into evidence, without requiring further authentication, but at the same time to carefully evaluate the probative weight to be given to this evidence." Raccioppi v. Apogee Inc., 47 U.S.P.Q.2d 1368, 1371 (T.T.A.B. 1998).

In 2006, the Redbull Board reiterated this sentiment, holding it could take judicial notice of online definition materials where "the sources of the definitions are clearly identified even

though the excerpts were downloaded from the noted Internet websites.” Id at 1378. In fact, the Redbull Board made this holding despite that the online dictionary definitions and the Encarta materials were only first submitted with the examining attorney’s appeal brief. Where prominent definitional or encyclopedic materials are printed out from the internet, and the URL code is readily identifiable on the print out, the Board takes judicial notice of the same (and a Notice of Reliance is proper).

For the foregoing reasons, Opposer’s motion should be denied.

Respectfully submitted by,

July 30, 2007



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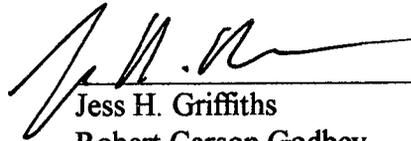
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