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

Proceeding	91199186
Party	Defendant DMA International LLC
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Date	05/06/2011
Attachments	ANSWER AND AFFIRMATIVE DEFENSES.pdf (6 pages)(163908 bytes)

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

In the Matter of Application Serial No.s 77/933,144 and 77/929,853
Published in the *Official Gazette* on November 30, 2010

SHOWTIME NETWORKS INC.,		
Opposer,		
- against -		
DMA INTERNATIONAL LLC,		
Applicant.		

Opposition No. 91199186

ANSWER AND AFFIRMATIVE DEFENSES

As and for its Answer and Affirmative Defenses to the Notice of Opposition, Applicant alleges as follows:

Applicant either denies or is without information or knowledge sufficient to form a belief as to the truth or falsity of the introductory statements by Opposer that precede paragraph 1 of the Notice of Opposition and, therefore, denies same.

1. Applicant is without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations in paragraph 1 of the Notice of Opposition and, therefore, denies same.

2. Applicant is without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations in paragraph 2 of the Notice of Opposition and, therefore, denies same.

3. Applicant is without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations in the first sentence of paragraph 3 of the Notice of Opposition and, therefore, denies same. Applicant admits that the United States Patent and Trademark Office (“PTO”) online records at www.tarr.uspto.gov indicate that Registration Nos. 2,014,877 and 3,024,247 issued and that Application Serial Nos. 78/619, 793; 78/436, 347; 78/436, 344; 78/436, 342 and 78/436, 340 were filed in the name of Opposer and that Exhibit A purports to be a schedule of Opposer’s federal trademark registrations and pending applications covering FLIX, but is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 3 of the Notice of Opposition and, therefore, denies same.

4. Applicant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 4 of the Notice of Opposition and, therefore, denies same.

5. Applicant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 5 of the Notice of Opposition and, therefore, denies same.

6. Applicant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 6 of the Notice of Opposition and, therefore, denies same.

7. Applicant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 7 of the Notice of Opposition and, therefore, denies same.

8. Applicant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 8 of the Notice of Opposition and, therefore, denies same.

9. Applicant admits that it filed an application to register MY PHONE FLIX & Design, Serial No.s 77/933,144 and 77/929,853, and that it uses MY PHONE FLIX & Design in connection with its services at www.myphoneflix.com but denies the remaining allegations of paragraph 9 of the Notice of Opposition. Applicant affirmatively alleges that it was required to and in fact disclaimed “FLIX” and that the Examiner found “no similar registered or pending mark” likely to be confused with Applicant’s mark under Section 2(d) of the Trademark Act.

10. Applicant denies the allegations of paragraph 10 of the Notice of Opposition.

11. Applicant denies the allegations of paragraph 11 of the Notice of Opposition.

12. Applicant denies the allegations of paragraph 12 of the Notice of Opposition.

13. Applicant denies the allegations of paragraph 13 of the Notice of Opposition.

AFFIRMATIVE DEFENSES

1. The Notice of Opposition fails to state a claim upon which relief can be granted.

2. Opposer’s claimed Flix Marks, (as that term is “defined” in paragraph 3 of the Notice of Opposition), are generic and fail to function as marks or to identify the source of Opposer’s Services.

3. On information and belief, numerous third parties, independent of Opposer and Applicant, have used, sought to register and registered marks that compromise or include the common term Flix, in connection with films, videos or movies or businesses, services or activities related to films, videos or movies. Opposer has never enjoyed exclusive use of the term

FLIX and cannot, therefore, properly assert a right to exclude others from using that term in respect of films, videos or movies or businesses, services or activities related to films, videos or movies.

4. On information and belief, in view of the concurrent use and registrations and/or pending applications by numerous third parties of marks containing the term Flix, the widely understood meaning of Flix, and the use of Flix in common parlance, the public has been so conditioned to perceiving that term as a reference to film, video and movies or businesses, services or activities related to films, videos or movies that Flix, in and of itself, does not and cannot function as a source indicator and cannot serve to prevent use or registration of Applicant's mark, MY PHONE FLIX and Design.

5. On information and belief, the concurrent use of Flix Marks by Opposer and MY PHONE FLIX and Design by Applicant has been on-going and extensive for a period in excess of 1½ years, during which time, not a single instance of confusion has been reported. As such, confusion is not likely to occur in the future.

6. Applicant's mark, MY PHONE FLIX and Design differs from Opposer's claimed Flix Marks in sound, appearance, meaning and overall commercial impression.

7. On information and belief, Applicant has acquiesced in the use by third parties of designations that incorporate the term Flix in connection with film, video or movies or businesses, services or activities related to films, videos or movies, and, further, has acquiesced in and/or failed to object to, oppose, or seek to cancel registrations for third party marks utilizing Flix in connection with film, video or movies or businesses, services or activities related to films, videos or movies. In reliance on the Trademark Register, the reported use of Flix designations in the marketplace by multiple, third parties and on the basis of the commonly understood meaning

of the term Flix, it was eminently reasonable for Applicant to adopt the mark-in-opposition. Having acquiesced in the use and registration of numerous marks containing Flix as a component, Opposer should be estopped from now claiming injury resulting from Applicant's use and registration of MY PHONE FLIX and Design.

8. The term Flix, as used by Respondent, has not acquired and is incapable of acquiring distinctiveness under Section 2(f) of the Trademark Act.

9. The term Flix, as used by Respondent, has not become famous or distinctive and is incapable of acquiring fame or distinctiveness under Section 43(c) of the Trademark Act.

WHEREFORE, DMA International LLC respectfully requests (i) that Flix be found to be generic (ii) that Opposition No. 91199186 be dismissed in its entirety and (iii) that the Applications for registration should be allowed.

Dated: May 5, 2011

Respectfully submitted,

DMA INTERNATIONAL LLC

By: 

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Applicant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, ANSWER AND AFFIRMATIVE DEFENSES, was served by first class mail on Opposer's counsel of record in an envelope, postage prepaid, as indicated below:

Mallory Levitt
CBS Law
51 West 52nd Street
New York, NY 10019

on May 7, 2011

By: _____



Min Yi Chen