

ESTTA Tracking number: **ESTTA470999**

Filing date: **05/04/2012**

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

Proceeding	91204082
Party	Defendant Dish Network, L.L.C.
Correspondence Address	Erik C. Kane Kenyon & Kenyon LLP 1500 K Street, NW Suite 700 Washington, DC 20005 UNITED STATES ekane@kenyon.com, tmdocketdc@kenyon.com, ssmith@kenyon.com
Submission	Answer
Filer's Name	Erik C. Kane
Filer's e-mail	ekane@kenyon.com, tmdocketdc@kenyon.com, ssmith@kenyon.com, jrosini@kenyon.com
Signature	/Erik C. Kane/
Date	05/04/2012
Attachments	Answer to Notice of Opposition - Hulu.pdf (10 pages)(23962 bytes)

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

In the Matter of Application Serial No. 77/828,705
Published in the Official Gazette on November 1, 2011

HULU, LLC,

Opposer,

v.

DISH NETWORK, L.L.C.,

Applicant.

Opposition No. 91/204,082
Mark: TV EVERYWHERE
Filed: September 17, 2009
Published: November 1, 2011

ANSWER TO NOTICE OF OPPOSITION

Applicant Dish Network, L.L.C. (“Applicant”), by and through its undersigned attorneys, hereby answers the Notice of Opposition in the above-identified proceeding. Applicant’s responses to the allegations of Opposer, Hulu, LLC (“Opposer”) are based upon actual knowledge of its own actions and information and belief with respect to all other matters. For reference, the original paragraphs in the Notice of Opposition are reproduced here, followed by Applicant’s response. The paragraph numbers below correspond to those in the Notice of Opposition.

1. Hulu is a limited liability company organized and existing under the laws of the state of Delaware, with a principal place of business located at 12312 West Olympic Boulevard, Los Angeles, California 90064.

Applicant’s Answer

Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph and therefore denies them.

2. Founded in March 2007 and launched in private Beta form in October 2007 and generally to the public in March 2008, which is well before the filing date of Applicant's Application, Hulu is an online video service that offers a selection of hit television shows, video clips, movies, and more at the website www.hulu.com, numerous other popular destination websites online, and through its ad-supported subscription service, Hulu Plus. Hulu's selection of premium programming is provided by more than 350 content companies.

Applicant's Answer

Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph and therefore denies them.

3. Hulu allows users to watch favorite shows or movies or discover new shows or movies anytime, anywhere, at home or when traveling. Hulu videos are also available on the Yahoo!, MSN, AOL, IMDb, and TV Guide websites, as well as a growing network of personal blogs, fan sites, and other sites where users choose to embed the Hulu video player. Additionally, Hulu Plus subscribers can access and watch video content through desktop computers, PC computers, laptops, tablet computers, internet-connected TVs, set-top boxes, gaming consoles, and mobile telephones and other handheld electronic devices.

Applicant's Answer

Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph and therefore denies them.

4. Third parties have already used the generic or merely descriptive term "TV everywhere" in commerce to refer to an industry-wide initiative whereby subscribers of cable, satellite, and other television services can access and watch video content (including movies and TV shows) on multiple devices, including desktop computers, PC computers, laptops, tablet computers, internet-connected TVs, set-top boxes, gaming consoles, and mobile telephones and other handheld electronic devices.

Applicant's Answer

Denied.

5. By way of example, a search for the generic or merely descriptive term “TV everywhere” on one of the most significant Internet search engines, Google, currently yields 20.4 million results, with Applicant only appearing once in the top ten results. Third parties and references to the industry-wide initiative appear in the other nine of the top ten results.

Applicant’s Answer

Denied.

6. The industry-wide “TV everywhere” initiative has been the subject of widespread attention from the media and public and has been frequently featured in third party news articles and on other media.

Applicant’s Answer

Denied.

7. The purchasing public uses, understands, and associates the term “TV everywhere” to refer to the category or class of services in question, namely as a non-distinctive, generic or merely descriptive designation for “television transmission services; transmission of audio, video, and data via satellite, interne, or other communication networks; television broadcasting services; streaming of video and audio via communication networks; data transmission via communication networks; peer-to-peer network computer services, namely, electronic transmission of audio, video and other data and documents among computers; providing subscription television broadcasting services; satellite communication services; rental of set-top boxes for use with televisions” and related services.

Applicant’s Answer

Denied.

8. The term “TV everywhere” has become so widely recognized as a generic or merely descriptive term that it is incapable of functioning as a trademark for any goods and services in the industry because it cannot identify or distinguish the source of any such goods and services.

Applicant’s Answer

Denied.

9. Upon information and belief, Applicant is a limited liability company organized and existing under the laws of the state of Colorado, with a principal place of business located at 9601 S. Meridian Blvd., Englewood, Colorado 80112. Applicant has no relationship with Opposer.

Applicant's Answer

Admitted.

10. The designation "TV everywhere" as a whole is no less generic than its generic constituent parts "TV" and "everywhere."

Applicant's Answer

Denied.

11. On or about September 17, 2009, Applicant filed the Application (Serial No. 77828705). As currently pending, the Application covers "Television transmission services; transmission of audio, video, and data via satellite, internet, or other communication networks; television broadcasting services; streaming of video and audio via communication networks; data transmission via communication networks; peer-to-peer network computer services, namely, electronic transmission of audio, video and other data and documents among computers; providing subscription television broadcasting services; satellite communication services; rental of set-top boxes for use with televisions" in International Class 38.

Applicant's Answer

Admitted.

11. The Application was filed based on an Intent-To-Use basis of the Lanham Act, 15 U.S.C. § 1051(b), and remains filed on an Intent-To-Use basis as of the date of this Opposition.

Applicant's Answer

Admitted.

12. Upon information and belief, Applicant knew at the time it filed the Application that the term “TV everywhere” was a generic or merely descriptive term used by third parties in connection with the services described in the Application.

Applicant’s Answer

Denied.

13. Upon information and belief, Applicant therefore knew at the time it filed the Application that it was not entitled to claim exclusive rights in the generic or merely descriptive term “TV everywhere”.

Applicant’s Answer

Denied.

14. Upon information and belief, Applicant has never established any trademark or service mark rights or any other exclusive rights in the term “TV everywhere” because this term is a non-distinctive, generic or merely descriptive designation used to describe or denote a category or class of services including the services described in Applicant’s Application.

Applicant’s Answer

Denied.

COUNT I
GENERICNESS

15. Opposer incorporates paragraphs 1-14 by reference and realleges the same as if originally set forth herein.

Applicant’s Answer

Applicant incorporates its answers to paragraphs 1-14 by reference and realleges the same as if originally set forth herein.

16. As applied to the services described in Applicant's Application, the term "TV everywhere" is a non-distinctive, common, generic name for Applicant's services.

Applicant's Answer

Denied.

17. The term "TV everywhere" is in the public domain, is part of the common fund of language, and is part of the common parlance used by members of the industry as well as the media and the relevant consuming public.

Applicant's Answer

Denied.

18. The designation "TV everywhere" as a whole is no less generic than its generic constituent parts "TV" and "everywhere".

Applicant's Answer

Denied.

19. Members of the relevant public use, understand, and associate the term "TV everywhere" as a generic term for a particular type, category, or class of services, namely the services Applicant describes in the Application and related services.

Applicant's Answer

Denied.

20. Accordingly, the term "TV everywhere" is incapable of distinguishing Applicant's services and is incapable of functioning as a source identifier, and, therefore, the term "TV everywhere" is incapable of registration.

Applicant's Answer

Denied.

COUNT II
DESCRIPTIVENESS AND LACK OF SECONDARY MEANING

21. Opposer incorporates paragraphs 1-20 by reference and realleges the same as if originally set forth herein.

Applicant's Answer

Applicant incorporates its answers to paragraphs 1-20 by reference and realleges the same as if originally set forth herein.

22. The term "TV everywhere" is merely descriptive of the services described in Applicant's Application and, therefore, the term fails to function as a source identifier indicating the source of Applicant's services.

Applicant's Answer

Denied.

23. Applicant has never made substantially-exclusive use of the term "TV everywhere" and, therefore, the term has not acquired distinctiveness or secondary meaning in connection with Applicant. Moreover, since the Application was filed and remains on an Intent-To-Use basis, Applicant currently has no claim available that acquired distinctiveness or secondary meaning exists with respect to the term "TV everywhere".

Applicant's Answer

Denied.

24. No individual or entity is entitled to claim exclusive rights in the term "TV everywhere" for the services covered by the Application and for which Applicant seeks registration.

Applicant's Answer

Applicant is entitled to claim exclusive rights in its mark TV EVERYWHERE for its services; otherwise admitted.

DEFENSES

First Defense – Applicant’s Mark Is Not Generic

1. Applicant’s mark TV EVERYWHERE is not generic for Applicant’s services, i.e., Applicant’s mark is not understood by the relevant purchasing public primarily as the common or class name for Applicant’s services.

Second Defense – Applicant’s Mark Is Not Descriptive

2. Applicant’s mark TV EVERYWHERE is not descriptive, i.e., the mark TV EVERYWHERE does not convey to the relevant purchasing public an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the Applicant’s services. Instead, Applicant’s mark TV EVERYWHERE is inherently distinctive as used by Applicant in association with its services for the purchasing public.

Third Defense – Applicant’s Mark Has Attained Secondary Meaning

3. Given the duration, extent, and nature of Applicant’s usage of the TV EVERYWHERE mark, Applicant’s mark TV EVERYWHERE has attained secondary meaning. Applicant has been successful in creating a commercial impression for the mark through its advertising, and the consuming public recognizes the mark TV EVERYWHERE as a source-indicator for Applicant’s services.

WHEREFORE, Applicant respectfully requests that the Notice of Opposition be dismissed and that Application Serial No. 77/828,705 proceed to registration.

Respectfully submitted,

KENYON & KENYON LLP

Dated: May 4, 2012

By: /Erik C. Kane/

James E. Rosini
Kenyon & Kenyon LLP
One Broadway
New York, NY 10004
Tel: (212) 425-7200
Fax: (212) 425-5288

Susan A. Smith
Erik C. Kane
Kenyon & Kenyon LLP
1500 K Street, NW, Suite 700
Washington, DC 20005
Tel: (202) 220-4200
Fax: (202) 220-4201

*Attorneys for Applicant
Dish Network, L.L.C.*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ANSWER TO NOTICE OF OPPOSITION was served by first class mail, postage prepaid, on this 4th day of May, 2012 to:

Thomas J. Mango
Cantor Colburn LLP
20 Church Street, 22nd Floor
Hartford, CT 06103

Date: May 4, 2012

By: /Erik C. Kane/
Erik C. Kane
KENYON & KENYON LLP
1500 K Street, N.W.; Suite 700
Washington, D.C. 20005
Tel.: (202) 220-4200
Fax: (202) 220-4201

*Attorney for Applicant,
Dish Network, L.L.C.*