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

Proceeding	91204777
Party	Plaintiff Apple Inc.
Correspondence Address	JOSEPH PETERSEN KILPATRICK TOWNSEND STOCKTON LLP 31 WEST 52ND STREET, 14TH FLOOR NEW YORK, NY 10019 UNITED STATES JPetersen@kiltown.com, AlJones@kiltown.com, ARoach@kiltown.com, agarcia@kiltown.com, NYTrademarks@kiltown.com, tadmin@kiltown.com
Submission	Reply in Support of Motion
Filer's Name	Alicia Grahn Jones
Filer's e-mail	JPetersen@kiltown.com, AlJones@kiltown.com, ARoach@kiltown.com, agarcia@kiltown.com, NYTrademarks@kiltown.com, tadmin@kiltown.com
Signature	/Alicia Grahn Jones/
Date	02/26/2013
Attachments	Feb. 26, 2013 Reply ISO Opposer_s Motion to Compel- CRAPPLE.PDF (8 pages)(26432 bytes)

Board on the status of the discovery dispute and the remaining deficiencies in Applicant's responses. In short, Applicant failed to provide *any* responses to Apple's Document Requests, has not produced a single document, and failed to provide complete responses to Apple's First Set of Interrogatories. Accordingly, Apple requests that the Board compel Applicant to (1) serve responses to each of Apple's Document Requests; (2) immediately produce all responsive documents; (3) produce a privilege log; (4) serve full and complete responses to Interrogatory Nos. 3-5, 7-8, and 11; and (5) verify its Interrogatory responses.

ARGUMENT

A. Applicant Has Not Served Any Responses to Apple's Document Requests

Federal Rule of Civil Procedure 34 requires that a party responding to requests for the production of documents respond separately to each request. *See* Fed. R. Civ. P. 34(b)(2)(B) ("For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons."). A proper response requires, for each individual request, a statement either (a) that the party has responsive documents that will be produced or withheld based on a claim of privilege, or (b) that the responding party has no responsive documents in its possession, custody, or control. *See No Fear, Inc. v. Rule*, 54 U.S.P.Q. 2d 1551, 1555 (T.T.A.B. 2000). Applicant has failed to comply with the Federal Rule and provide responses to Apple's individual requests. *See* Jones Decl. ¶ 3. Accordingly, Apple requests that the Board compel Applicant to provide written responses to each of Apple's Document Requests.

B. Applicant Has Produced No Documents

Applicant has not produced a single document in response to Apple's twenty-three Document Requests. *See* Jones Reply Decl. ¶4. Moreover, Applicant's representative indicates

that Applicant has conducted an incomplete search for responsive documents and information: “my inbox contains no relevant correspondence between Milton Barr and myself.” Jones Reply Decl., Ex. A. A party’s duty under the discovery rules is to thoroughly search its records for all information properly sought in the request. *See* TBMP § 408.02. A search of **one** individual’s email inbox, only for email correspondence with **one** other individual, falls far short of satisfying this duty to conduct a complete search for all responsive information and documents.

Moreover, Applicant appears to be relying on a misplaced application of the attorney-client privilege. Applicant states: “[t]o the extent Crapple and an association with Apple is mentioned, such is the product of an attorney-client consultation and not discoverable.” Jones Reply Decl., Ex. A. To the extent this statement is intended to assert a privilege claim, Applicant must identify the specific discovery requests in response to which it is asserting such a claim, *see, e.g., No Fear, Inc. v. Rule*, 54 U.S.P.Q. 2d at 1555, and must produce a privilege log describing the nature of the responsive information and documents Applicant has not produced or disclosed. *See* Fed. R. Civ. P. 26(b)(5)(A)(ii).

C. Applicant’s Interrogatory Responses are Materially Incomplete

As noted in Apple’s Motion to Compel, Applicant’s responses to Apple’s Interrogatories were due on October 27, 2012. On January 30, 2013, Applicant served untimely and materially deficient responses to Apple’s Interrogatories.¹ As set forth in greater detail below, Apple requests that Applicant be compelled to provide full and complete responses to Interrogatory Nos. 3-5, 7-8, and 11.

Applicant has provided no response whatsoever to Interrogatory No. 11 (asserting instead

¹ Although interrogatories are required to be answered “under oath,” Fed. R. Civ. P. 33(b)(3), Applicant’s January 30, 2013 letter purporting to respond to Apple’s Interrogatories does not include a verification that the Interrogatories have been answered under oath on Applicant’s behalf by an officer or agent of Applicant. *See* Jones Reply Decl., Ex. A.

a vague, untimely, and waived objection that the information sought is “tough to quantify”) and has provided incomplete responses to Interrogatory Nos. 3-5 and 7-8, which are discussed below.

Interrogatory No. 3: Describe in detail all steps taken by Applicant to determine whether Applicant’s Mark was available for use and registration prior to adoption.

Response: We were well aware of both “Apple” and “Free Crapple” that were registered.

Applicant’s incomplete response to Interrogatory No. 3 identifies two registered marks of which Applicant was aware prior to adoption of Applicant’s Mark, but fails to “[d]escribe in detail” any of the steps Applicant took to ascertain this information, or any other “steps taken by Applicant to determine whether Applicant’s Mark was available for use and registration prior to adoption,” as asked in the Interrogatory. Accordingly, Applicant should be compelled to provide a full and complete response to Interrogatory No. 3.

Interrogatory No. 4: Describe in detail when, where, and how Applicant’s Mark is used and/or intended to be used.

Response: Please see answer to question 1.

Applicant’s incomplete response to Interrogatory No. 1—which Applicant refers to as its response to Interrogatory No. 4—does not include detailed descriptions as to when Applicant’s Mark is used and/or intended to be used, where Applicant’s mark is used and/or intended to be used, and how Applicant’s Mark is used and/or intended to be used, as asked in Interrogatory No. 4. Accordingly, Applicant should be compelled to provide a full and complete response to Interrogatory No. 4.

Interrogatory No. 5: Identify each Person involved with or having knowledge of the selection, adoption, or first use of Applicant’s Mark, and describe each such Person’s knowledge.

Response: Milton Barr and Daniel Kelman are the exclusive authors of this project and it was not revealed publicly until after the domain “crapple.com” was purchased and significant resources expended to make such a reality. The

primary reason for this was to prevent anyone else from trying to purchase the domain and driving up the price.

As defined in Apple's Interrogatories, "identify," when used in reference to a Person who is an individual, means to state his or her full name, present or last known address and phone number, and present or last known position or business affiliation. Applicant's incomplete response to Interrogatory No. 5 names Milton Barr and Daniel Kelman as Persons involved with or having knowledge of the selection of Applicant's Mark, but fails (a) to state each individual's last known address and phone number, and present or last known position or business affiliation, and (b) to describe each Person's knowledge of the selection, adoption, or first use of Applicant's Mark, as asked in the Interrogatory. Accordingly, Applicant should be compelled to provide a full and complete response to Interrogatory No. 5.

Interrogatory No. 7: Identify each good or service for which Applicant has used or intends to use Applicant's Mark.

Response: We plan to use the name Crapple to operate a website that purchases used smartphones. The smartphones will be repaired/refurbished and resold. At this point we have not determined whether we will resell the phones as "Crapple" phones, but we plan on selling through store fronts and on online auction sites.

Applicant's response to Interrogatory No. 7 is incomplete in that it refers only to goods or services for which Applicant intends to use Applicant's Mark; it does not identify any goods or services for which Applicant has used Applicant's Mark, as asked in the Interrogatory. On information and belief, for several months, Applicant used Applicant's Mark in connection with the website crapple.com featuring a number of consumer electronic products, including Apple's products. Moreover, Applicant's response to Interrogatory No. 8 indicates that Applicant currently is offering services in connection with Applicant's Mark. Accordingly, Applicant should be compelled to provide a full and complete response to Interrogatory No. 7.

Interrogatory No. 8: Identify the Channels of Trade through which Applicant distributes, has distributed, or intends to distribute Applicant's Goods and Services.

Response: Crapple only delivers a service: Crapple will buy your phone and resell or recycle it. Everything is done online and through the mail.

Applicant's response to Interrogatory No. 8 is incomplete in several ways. First, the response does not address Channels of Trade for goods, only services. However, Applicant's statement that "Crapple only delivers a service" is inconsistent with Applicant's response to Interrogatory No. 7, which indicates that Applicant may use Applicant's Mark on goods, namely phones.

Second, the response addresses Channels of Trade only for certain of Applicant's services. Applicant's response to Interrogatory No. 8 identifies purchasing, reselling, and recycling as Applicant's "service," noting that "[e]verything is done online and through the mail." Although Applicant's response to Interrogatory No. 7 also identifies repairs/refurbishment, Applicant's response to Interrogatory No. 8 fails to identify the Channels of Trade for such repair/refurbishment services.

Finally, even for the handful of services for which Applicant does provide a response, Applicant does not identify all of the relevant Channels of Trade. Applicant's statement that "[e]verything is done online and through the mail," is inconsistent with Applicant's response to Interrogatory No. 7, which includes the statement "we plan on selling through store fronts." Applicant's response to Interrogatory No. 8 fails to identify "store fronts" as a Channel of Trade through which Applicant intends to distribute Applicant's Goods and Services. Accordingly, Applicant should be compelled to provide a full and complete response to Interrogatory No. 8.

CONCLUSION

Apple requests that the Board compel Applicant to (1) serve responses to each of Apple's Document Requests; (2) immediately produce all responsive documents; (3) produce a privilege log; (4) serve full and complete responses to Interrogatory Nos. Nos. 3-5, 7-8, and 11; and (5) verify its Interrogatory responses

This the 26th day of February, 2013.

Respectfully submitted,

KILPATRICK TOWNSEND & STOCKTON LLP

By: /Alicia Grahn Jones/

Joseph Petersen
1114 Avenue of the Americas
New York, New York 10036
Telephone: (212) 775-8700
Facsimile: (212) 775-8800

Alicia Grahn Jones
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309
Telephone: (404) 815-6500
Facsimile: (404) 815-6555

Attorneys for Opposer Apple Inc.

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

In the Matter of Application Serial No. **85/379,097**
For the mark: **CRAPPLE**
Filed: July 22, 2011
Published: December 20, 2011

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APPLE INC.,	:
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Opposer,	:
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v.	:
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NINJA ENTERTAINMENT	:
HOLDINGS, LLC,	:
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Applicant.	:
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing REPLY IN SUPPORT OF OPPOSER’S MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS has been served on Ninja Entertainment Holdings, LLC by sending a copy via e-mail to Daniel Kelman at danielkelman@gmail.com and depositing a copy with the United States Postal Service as First Class Mail, postage prepaid, in an envelope addressed to:

Daniel Kelman
1934 Josephine Street
Pittsburgh, Pennsylvania 15203

This the 26th day of February, 2013.

/Alicia Grahn Jones/
Alicia Grahn Jones
Attorney for Opposer Apple Inc.