

ESTTA Tracking number: **ESTTA671126**

Filing date: **05/07/2015**

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

Proceeding	91210506
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Attachments	91210506 Applicant's Opposition to Motion to Compel.pdf(113048 bytes) 91210506 Declaration of Jonathan Fountain.pdf(28495 bytes) 91210506 Exhibit A to Declaration of Jonathan Fountain.pdf(374869 bytes) 91210506 Exhibit B to Declaration of Jonathan Fountain.pdf(79620 bytes) 91210506 Exhibit C to Declaration of Jonathan Fountain.pdf(84091 bytes)

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

Ovation, LLC,
a Delaware limited liability company,

Opposer,

v.

E! Entertainment Television, LLC,
a Delaware limited liability company,

Applicant.

Opposition No. 91210506 (parent)

Application No. 85/569,798

Mark: POP OF CULTURE

Opposition No. 91217286

Application No. 85/937,423

Mark: E POP OF CULTURE

Opposition No. 91217287

Application No. 85/937,399

Mark: E POP OF CULTURE

**APPLICANT E! ENTERTAINMENT TELEVISION, LLC'S
OPPOSITION TO OPPOSER'S MOTION TO COMPEL**

Applicant E! Entertainment Television, LLC ("Applicant" or "E!") hereby opposes Opposer Ovation, LLC's ("Opposer" or "Ovation") motion to compel. This opposition is supported by the Declaration of Jonathan W. Fountain (the "Fountain Decl."), the exhibits thereto, the legal arguments set forth below, and the record in this case.

PRELIMINARY STATEMENT

Ovation's motion to compel is nothing more than a thinly veiled attempt to delay the noticed deposition of Ovation's principals. On March 25, 2015, E! noticed the Rule 30(b)(6) deposition of Ovation for April 7, 2015 in Los Angeles, California. But Ovation refused to produce a witness, claiming the Rule 30(b)(6) topics were objectionable and indicated that a witness will not be produced at all unless all of its objections were resolved prior to the

deposition. Rather than engage Ovation in its stall tactic, E! elected to notice the individual depositions of Ovation's officers, Rob Canter and Shaw Bowman. But again, on April 3, 2015, Ovation refused to produce those individuals for depositions, claiming they were unavailable. On that same date, Ovation filed its 426-page motion to compel, suspending discovery as to all matters. (Ovation has since failed to provide proposed dates for the Ovation depositions).

In its haste, Ovation failed to meet and confer with E! concerning vast numbers of the requests that are the subject of its present motion. Of the remaining requests, the parties conducted a telephonic meet and confer over eight months ago -- in July 2014. E! objected to Ovation's requests because, among other reasons, they were far too broad and duplicative. Nonetheless, E! indicated that it would determine what requests it could or could not supplement. But before E! could complete that onerous process, the parties re-engaged in settlement discussions that resulted in the suspension of these proceedings for several months. Now that settlement discussions have broken down, and without having conducted any additional follow up or an additional meet-and-confer, Ovation has filed its motion to compel (comprised of a total of 426 pages including attachments).

For these and additional reasons detailed below, the Board should deny Ovation's Motion to Compel or sustain E!'s objections and substantially limit the scope of the discovery requests.

FACTUAL BACKGROUND

E! is an American cable and satellite television channel that features programming about entertainment, the entertainment industry and pop culture in general. (Fountain Decl. ¶ 3.) POP OF CULTURE is E!'s tagline and slogan. (*Id.*) The POP OF CULTURE logo followed a re-branding of the company and was introduced on July 9, 2012. (*Id.*)

Ovation alleged that POP OF CULTURE is likely to be confused with a designation it

uses for the name of a show about pop culture -- CULTUREPOP. Ovation served E! with its initial demand letter in May 2012. (Fountain Decl. ¶ 4 & Ex. A.) Ovation filed a Notice of Opposition to E!'s application for POP OF CULTURE on April 29, 2013. (*Id.*)

On November 12, 2013, E! served a set of discovery requests on Ovation. (Fountain Decl. ¶ 5.) Following E!'s service of discovery, Ovation served its own set of requests for discovery on E! (*Id.*) E!'s responses and objections to Ovation's discovery requests were due on April 9, 2014. (*Id.*) Prior to the deadline's expiration, E! filed a motion to compel and a motion to extend the deadline to provide objections and responses to Ovation's discovery requests. (*Id.*) The Board granted in-part and denied in-part E!'s motion to compel and granted E!'s motion to extend the deadline to serve its objections and responses to Ovation's discovery requests. (*Id.*)

E! timely served its objections and responses to Ovation's discovery requests on May 9, 2014. (Fountain Decl. ¶ 6.) On July 1, 2014, Ovation sent E! a letter stating what Ovation believed to be deficiencies in E!'s objections and responses. (*Id.*) On July 9, 2014, Ovation filed separate notices of opposition to E!'s applications for the E POP OF CULTURE mark. (*Id.*) E! served supplemental objections and responses to Ovation's discovery requests on July 11, 2014. (*Id.*)

Ovation then claimed that E!'s supplemental objections and responses were insufficient. Accordingly, the parties met and conferred regarding Ovation's claims by telephone on July 22, 2014. (Fountain Decl. ¶ 7.) E!'s counsel, Jonathan W. Fountain, attended the call. (*Id.*) The parties' counsel did not discuss Requests For Admission ("RFA") Nos. 18, 39, 41-42, 45-46, 62, 64, 68, 70, 72, 74, 76, 78, 91, 93, 95, 97, 99, 102-103, 105, or 113-114. (*Id.*) Nor did the parties' counsel discuss Requests For Production of Documents Nos. 2, 9, 18, 23, 25, 28, 31, 37, 40, 50-52, 57, 77, or 79-80. (*Id.*) Ovation did not meet and confer with E! with respect to these

requests prior to bringing its present motion to compel. (*Id.*) After the call, Mr. Fountain drafted an email detailing the discovery request that Ovation claimed to be deficient during the meet and confer. (*Id.*)

On September 17, 2014, Ovation emailed Mr. Fountain claiming E! agreed to supplement responses by September 22, 2014. (Fountain Decl. ¶ 8 & Ex. B.) In response, Mr. Fountain indicated that he does not recall agreeing to supplement by September 22, but rather recalls informing Ovation that “I am working with E! to see if we can supplement, and we are continuing to do so.” (*Id.* & Ex. C.) Further, Mr. Fountain reminded Ovation that “you have asked for supplemental responses with respect to 35 document requests, 12 interrogatories, and 21 requests for admissions, and have not agreed to narrow the scope of any of these overly broad requests.” (*Id.*)

On October 11, 2014, the current case was consolidated with the E POP OF CULTURE marks applications. (Fountain Decl. ¶ 9.) On November 24, 2014, the parties stipulated to suspend the consolidated proceedings to discuss settlement. (*Id.*) The suspension ended on March 23, 2015 without the parties reaching an agreement to settle. (*Id.*)

After the suspension ended, on March 25, 2015, E! noticed the Federal Rule of Civil Procedure 30(b)(6) deposition of Ovation to occur on April 7, 2015 in Los Angeles, California. (Fountain Decl. ¶ 10.) Ovation refused to produce a witness, claiming that the Rule 30(b)(6) deposition topics were objectionable. (*Id.*) Ovation indicated that it would refuse to produce a Rule 30(b)(6) witness unless all of its objections to E!’s proposed deposition topics were resolved. (*Id.*) E! then noticed the individual deposition of Ovation’s officers, Rob Canter and Shaw Bowman. (*Id.*) On April 3, 2015, Ovation refused to produce those individuals for depositions, stating one individual no longer worked at Ovation and that the other individual was

out of the office. (*Id.*) On that same date, and without having met and conferred with E! since July 22, 2014, Ovation filed its present 426-page motion to compel.

ARGUMENT

I. REQUESTS FOR ADMISSIONS¹

A. RFA Nos. 18, 39, 41-42, and 45-46

The Board should deny Ovation’s request to test the sufficiency of RFA Nos. 18, 39, 41, 42, 45, and 46 as Ovation did not meet and confer regarding these requests before bringing its motion. (Fountain Decl. ¶ 7); 37 CFR § 2.120(e) (1) (“A motion to compel . . . must be supported by a written statement from the moving party that such party or the attorney therefor has made a good faith effort . . . to resolve with the other party or the attorney therefore the issues presented in the motion”); TBMP § 523.02 (2014); *Sentrol, Inc. v. Sentex Sys., Inc.*, 231 U.S.P.Q. 666, 668 (T.T.A.B. 1986) (“it is generally the policy of the Board to intervene in disputes concerning discovery, by determining motions to compel, only where it is clear that the parties have in fact followed the aforesaid process and have narrowed the amount of disputed requests for discovery, if any, down to a reasonable number”); *accord Shuffle Master v. Progressive Games*, 170 F.R.D. 166, 173 (D. Nev. 1996) (denying defendant’s motion to compel discovery responses where it failed “to provide to the court an adequate certification that it has in

¹ Ovation’s statement of facts contains a lengthy footnote claiming that E! has waived its right to object to Ovation’s discovery requests. E! did not waive its right to object because it timely submitted its responses and objections. The Board specifically granted E! an extension to serve any responses and objections by August 30, 2014. (Dkt. No. 18 at 28-29) (“[T]he Board finds that Applicant reasonably delayed in responding to Opposer’s discovery requests. In view thereof, the Board finds that there is good cause for the extension of time sought by Applicant. Accordingly, Applicant’s motion for an extension of thirty days to respond to Opposer’s discovery requests is granted. Applicant is thus allowed until THIRTY DAYS from the mailing date of this order to serve on Opposer complete responses, including documents, to Opposer’s previously served discovery.”). E! served its objections and responses on May 9, 2014, well before the August 30, 2014 deadline.

good faith conferred or attempted to confer with [plaintiff] in order to resolve its discovery dispute”).

B. RFA Nos. 44, 50, and 55

These requests ask E! to admit or deny various ways in which Ovation used or promoted Ovation’s own CULTUREPOP mark. Because these requests are related to Ovation’s mark – not E!’s mark – E! could not admit or deny them in July 2014 because Ovation had refused to sufficiently respond to E!’s discovery requests. In other words, Ovation failed to provide E! with the information and documents E! would have needed to admit or deny the requests. Accordingly, E! filed a motion to compel discovery in April 2014, which the Board granted in part. Ovation subsequently supplemented its responses to E!’s discovery requests on September 9, 2014.

Ovation moves to test the sufficiency of E!’s responses to these requests arguing that E! should be bound by admissions E! made in its initial responses that it later rescinded in the supplemental responses E! served in July 2014. This issue, however, is largely moot. Since July 2014, Ovation has produced the deficient documents and discovery responses in its September 2014 productions – alleviating the need for E! to provide limited responses. Accordingly, E! will agree to provide supplemental responses to these requests.

C. RFA Nos. 62, 64, 68, 70, 72, 74, 76, 78, 91, 93, 95, 97, 99, 102-103, 105, and 113-114

The Board should deny Ovation’s request to test the sufficiency of these requests as Ovation did not meet and confer regarding these requests before bringing its present motion. (Fountain Decl. ¶ 7); 37 CFR § 2.120(e) (1); *Shuffle Master*, 170 F.R.D. at 173. Indeed, had Ovation met and conferred with E!, the disputed issue that Ovation now raises in its motion would likely have been amicably resolved.

Specifically, Ovation claims E! must answer these requests because they relate to the E POP OF CULTURE mark and that mark is part of the consolidated proceedings. (Mot. to Compel at 3.) Ovation forgets, however, that when E! served its objections and responses to these requests on May 9, 2014 Ovation *had not filed* an opposition to the E POP OF CULTURE mark application – the only opposition at issue at the time concerned E!’s POP OF CULTURE application. Accordingly, in May 2014, it was improper for Ovation to seek discovery regarding the E POP OF CULTURE mark because that mark was not at issue in these proceedings. *See* TMBP § 414(11) (“A party need not provide discovery with respect to those of its marks and goods and/or services that are not involved in the proceeding and have no relevance thereto”).²

While Ovation did file its opposition to the E POP OF CULTURE application on July 9, 2014, that proceeding was not consolidated with the present case until October 11, 2014. Ovation met and conferred with E! in July 22, 2014, which was before the consolidation occurred. (Bost Decl. ¶¶ 11-12, Ex. N to Mot. to Compel.)

Now that the E POP OF CULTURE opposition and the POP OF CULTURE opposition have been consolidated, E! does not dispute that the scope of discovery includes the E POP OF CULTURE mark. However, this dispute could have been easily resolved through a meet and confer, which Ovation never attempted before hastily filing its present 426-page motion. For this reason, Ovation’s request should be denied. Nonetheless, E! agrees to serve supplemental responses to these requests.

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² Even if E!’s house mark is always used with the POP OF CULTURE Mark, the requests should be directed at the POP OF CULTURE mark since that was the mark at issue, and not E POP OF CULTURE.

II. INTERROGATORIES

A. Interrogatory Nos. 2 and 3

Interrogatory No. 2 asks E! to provide the date of first use and the date of first use in commerce for E!'s goods and services offered under the POP OF CULTURE and E POP OF CULTURE marks. E! answered that the earliest date of use and use in commerce for *any* of its good and services is July 9, 2012.

Ovation moves to compel E! to identify the date of first use and the date of first use in commerce for each of E!'s goods and services, even though those dates will, by necessity, post-date July 9, 2012. This request should be denied because it is not likely to lead to admissible evidence. The date of first use in commerce is relevant to priority. *See Georgia-Pacific Corp. v. Great Plains Bag Co.*, 1976 WL 20925, at *2 (T.T.A.B. Jan. 15, 1976) (“There is no question that the requested information may be relevant to the issue of priority of use herein and that this information is discoverable”). Here, however, there is no dispute that Ovation registered its CULTUREPOP mark prior to E!'s registration date and prior to E!'s date of first use. According to Ovation, it first used its CULTUREPOP mark in commerce in August or October 2010. As E! provided, the *earliest* date of first use for *any* of the goods or services offered under its POP OF CULTURE or E POP OF CULTURE marks is July 9, 2012. Any later dates of use are irrelevant to the issue of priority. *See, e.g., Hanginout, Inc. v. Google, Inc.*, No. 13cv2811 AJB (NLS), 2014 WL 5113601, at *5 (S.D. Cal. May 13, 2014) (finding that parties' dispute over when Google began using HANGINOUT mark is irrelevant because “the Court finds Hanginout first began using the HANGINOUT mark in commerce in or around May 2011—prior to both of Google's alleged first-use dates”); *Ship Smart, Inc. v. Clifford Holdings, Inc.*, No. 91157915, 2004 WL 2619577, at *4 (T.T.A.B. Oct. 26, 2004) (granting summary judgment because neither

date of use submitted by applicant would pre-date opposer's). E!'s main contention in this proceeding is not priority, but that the marks are not confusingly similar. Alternatively, E! contends that Ovation's mark is not valid as it is descriptive of "pop culture" in general.³ Requiring E! to provide the dates of first use for each and every single good and service is needless, burdensome, and unlikely to produce any evidence of material relevance to the current proceedings. Accordingly, Ovation's motion should be denied with respect to Interrogatory No. 2.

Likewise, Interrogatory No. 3 asks E! to provide the first date of "sale" for every single good and service E! has offered under the POP OF CULTURE mark. This request should also be denied because it is unlikely to lead to the discovery of admissible evidence. The first date of use in commerce is relevant to priority. *See Georgia-Pacific Corp.*, 1976 WL 20925, at *5. E! already provided the earliest date of use in commerce in response to Interrogatory No. 2. Ovation has not provided any authority stating the first date of "sale" would be material and Ovation has not supplied any reason as to why the first date of "sale" for each and every good or service E! has offered under the POP OF CULTURE mark is an important fact in the present proceeding. Accordingly, Ovation's motion should be denied with respect to Interrogatory No. 3.

B. Interrogatory No. 9

Interrogatory No. 9 asks E! to, "[s]tate all facts related to Applicant's awareness or knowledge of Opposer's use of the CULTUREPOP Mark, the CulturePop.com website, or the services offered by Opposer"

³ If E! determines that Ovation has not been using its mark since August or September 2010, the issue of priority might become relevant. However, at this point, Ovation's desire to expend money, time and resources litigating an issue with no probative value should be rejected.

By requesting E! to provide “all facts” regarding these general topics, this request is plainly overbroad. *See, e.g., Bituminous Cas. Corp. v. Scottsdale Ins. Co.*, No. 1:12–CV–84–SNLJ, 2013 WL 1411544, at *4 (E.D. Mo. Apr. 8, 2013) (“In addition, the Court agrees that the interrogatory is, on its face, overly broad and unduly burdensome to the extent it asks Farmers to state ‘any and all facts’ that support its contention”); *Moses v. Halstead*, 236 F.R.D. 667, 674 (D. Kan. 2006) (“The Court, however, does find it to be overly broad and unduly burdensome on its face to the extent it asks Allstate to state ‘all’ facts that support each defense and to identify persons who have knowledge of ‘the facts’ that support each defense”). Regardless, E! answered this interrogatory by disclosing when E! learned of Ovation’s mark and the website www.culturepop.com. *Id.* (providing that party may respond to overly broad interrogatory seeking “all facts” with the material facts).

Ovation’s motion requests that E! supplement its answer to add, at least, information identifying the person who “learned” of Ovation’s website and how such person learned of the mark. (Mot. to Compel at 5.) In light of Ovation’s narrowed request, E! will agree to supplement its answer to Interrogatory No. 9.

C. Interrogatory No. 12

Interrogatory No. 12 asks E! to “[s]tate separately the annual and total amount spent by or on behalf of Applicant for advertising, promoting, or marketing the POP OF CULTURE Goods and Services from the date of first use to present”

As Ovation admits, E! answered this request by providing information concerning the promotional merchandise that was manufactured bearing the POP OF CULTURE and E POP OF CULTURE marks. (Mot. to Compel at 5.) In its motion, Ovation seeks information regarding the amount E! spent in conjunction with the “day-of rebrand launch with new on-air graphic

elements, E! Online, marketing and promotional materials” and “consistent[] use [of the marks] on an ongoing basis domestically and internationally on all trade and consumer facing materials (*i.e.* print and online campaigns, building signage, and corporate ID materials).”

Ovation’s request for supplement falls well beyond the scope of this interrogatory. The POP OF CULTURE mark is the new tagline for E! and was unveiled on July 9, 2012 – the date E! identified as the first date of use in commerce for the mark. Logically, E! would have expended money to prepare to re-brand, launch the re-brand, and create the new graphics before its launch and date of first use. In contrast, this interrogatory sought the amount spent to promote the mark “from the date of first use.” To the extent Ovation seeks the amount E! spent to re-brand and create the tagline POP OF CULTURE before its unveil on July 9, 2012, Ovation should serve an interrogatory covering the appropriate period of time. Ovation also seeks E!’s annual advertising spending for its “ongoing” use of the mark in connection with E!’s trade and on consumer facing materials. Because POP OF CULTURE is E!’s tagline, Ovation’s interrogatory covers the entire amount of money E! has spent on advertising company-wide. This interrogatory is far too broad. However, to the extent the advertising spend for the entire company should be disclosed, it should be limited to annual expenditures, stated in round numbers. *See* TBMP § 414(18) (“Annual sales and advertising figures, stated in round numbers, for a party’s involved goods or services sold under its involved mark are proper matters for discovery.”).

Thus, Ovation’s motion to compel a further answer to Interrogatory 12 should be denied. However, if the Board grants Ovation’s motion, this interrogatory should be substantially narrowed to encompass only annual advertising or marketing expenditures for E! from 2012 to the present, stated in round numbers.

D. Interrogatory No. 19

Interrogatory No. 19 asks E! to identify and describe, “*all* cross-marketing agreements, website linking agreements, promotion agreements, sponsorship agreements, or other marketing or advertising arrangements between Applicant and any third party relating to any of the POP OF CULTURE Goods and Services.” (Emphasis added).

This request is overly broad. Advertising figures, stated in round numbers, is discoverable but there is no requirement to provide exact dollar figures. *See* TBMP § 414(18) (“Annual sales and advertising figures, stated in round numbers, for a party’s involved goods or services sold under its involved mark are proper matters for discovery.”); *Am. Optical Corp. v. Exomet, Inc.*, 181 U.S.P.Q. 120 (1975) (“However, in responding to the interrogatory, applicant need furnish only round figures for the years in question, *the exact sales to the specific dollar not being necessary*”) (emphasis added). It logically follows that the production of all marketing or advertising agreements is also unnecessary, as this would be more onerous and burdensome than providing an exact figure for advertising.

Here, Interrogatory No. 19 sought “all . . . marketing and advertising arrangements between Applicant and any third party” related to E!’s marks. It is clearly overbroad and Ovation refused to narrow its request. (*See* Sept. 17, 2014 Email from J. Fountain to P. Bost, Ex. N to Decl. of Bost, Mot. to Compel) (“I note that you have asked for supplemental responses . . . and have not agreed to narrow the scope of any of these overly broad requests”). Indeed, Ovation’s motion argues that Ovation needs the agreements to determine the “duration and extensiveness” of E!’s advertising. (Mot. to Compel at 6.) But Ovation never explains why it would need every single marketing agreement E! has entered into to determine this. A statement of the annual advertising expenditures for the goods and services for the years in which the

marks have been in use should be more than sufficient. Indeed, given that POP OF CULTURE is E!'s tagline and slogan, Ovation's request could entail nearly all of E!'s marketing agreements with any company, which would clearly be unduly burdensome to identify and produce.

Thus, Ovation's motion should be denied with respect to Interrogatory No. 19. However, if the Board grants the motion, this request should be substantially narrowed to require only the disclosure of E!'s annual advertising expenditures from 2012 to the present, in round numbers. *See* TBMP § 414(2) ("In those cases where complete compliance with a particular request for discovery would be unduly burdensome, the Board may permit the responding party to comply by providing a representative sampling of the information sought, or some other reduced amount of information which is nevertheless sufficient to meet the propounding party's discovery needs").

E. Interrogatory No. 20

Interrogatory No. 20 asks E! to identify, "all" keywords, Adwords, and search terms it has purchased "or bid on" for goods and services under the POP OF CULTURE or E POP OF CULTURE marks.

This interrogatory is overly broad and not likely to lead to the discovery of admissible evidence. Ovation's motion claims that this information is relevant because purchasing keywords of another's trademark is evidence of willful trademark infringement. (Mot. to Compel. at 7.) But Interrogatory No. 20 did not ask whether E! purchased Adwords or keywords for Ovation's mark, CULTUREPOP. Instead, it sought "all" of E!'s purchased keywords or Adwords, even those that E! simply "bid on."

Recognizing this issue, Ovation claims that it is entitled to know all Adwords or keywords because other words E! may have purchased (or just "bid on") will show which terms

E! believes its customers will associate with E!'s goods and services. However, if those words do not include Ovation's trademark, then they have little relevance to the present proceedings. *See, e.g., FenF, LLC v. Taylor Gifts, Inc.*, No. 10-14351, 2011 WL 3422789, at *4 (E.D. Mich. Aug. 3, 2011) (granting motion to compel regarding purchases of Adwords that include plaintiff's trademark, but denying request seeking information "regarding Defendant's purchasing of keywords used to sell" defendant's product as it was "overly broad and unduly burdensome").

In sum, this request is overly broad and unlikely to lead to discovery of admissible evidence. Thus, Ovation's motion should be denied with respect to Interrogatory No. 20. However, if the Board grants the motion, this interrogatory should be limited to Adwords and search terms that E! purchased that include the term "culturepop" or "culture pop." *See* TBMP § 414(2) ("In those cases where complete compliance with a particular request for discovery would be unduly burdensome, the Board may permit the responding party to comply by providing a representative sampling of the information sought, or some other reduced amount of information which is nevertheless sufficient to meet the propounding party's discovery needs").

F. Interrogatory No. 24

In May 2012, E!'s attorneys responded to Ovation's cease and desist letter. Interrogatory No. 24 asks E! to, "[s]tate all facts that relate to, support, or negate Applicant's contention" in E!'s May 2012 letter where E!'s counsel stated that Ovation's mark (CULTUREPOP) is weak due to the presence of third parties who also use POP CULTURE-formative marks.

In seeking "all facts," this interrogatory is overly broad and burdensome on its face. *See, e.g., Moses*, 236 F.R.D. at 674 ("The Court, however, does find it to be overly broad and unduly burdensome on its face to the extent it asks Allstate to state 'all' facts that support each defense

and to identify persons who have knowledge of ‘the facts’ that support each defense”). This objection is especially notable as this interrogatory does not simply seek facts supporting E!’s contentions but also seeks facts that “negate” E!’s contentions. E! can only speculate as to “all facts” that would undermine the legal analysis made by its attorneys in response to Ovation’s demand letter.

However, without waiving its objections, E! answered Interrogatory No. 24 with all material facts E! possessed that support its contention, including providing the names of the various third parties who use trademarks that contain the term “pop culture” or who use POP CULTURE-formative marks.

Ovation’s Motion to Compel asks E! to provide additional information regarding those third party companies’ advertising revenue and information regarding the scope of use of those third parties’ marks. (Mot. to Compel at 7-8.) Such information is beyond the scope of discovery as it is not within E!’s possession, custody, or control, and E! has no actual knowledge of a third party company’s advertising budget or entire scope of use. *See* TBMP § 414(9) (“Information concerning a party’s awareness of third-party use and/or registration of the same or similar marks for the same or closely related goods or services as an involved mark, is discoverable *to the extent that the responding party has actual knowledge thereof* (without performing an investigation)”) (emphasis added).

Accordingly, the Board should deny Ovation’s motion with respect to Interrogatory No. 24 because E! has already fully answered this interrogatory with the material facts in its possession, custody, or control.

G. Interrogatory No. 31

Interrogatory No. 31 asks E! to, “[s]eparately state the total amount of sales, in units and

dollars, of each product bearing, sold under, or offered under the POP OF CULTURE Marks, and the total revenue generated from the services offered under the POP OF CULTURE Marks.”

As Ovation admits, E! produced documents reflecting the sales of goods bearing the POP OF CULTURE and E POP OF CULTURE marks. (Mot. to Compel at 8.) Ovation requests that E! supplement this answer to provide the total revenue generated from services offered under E!’s marks. Because POP OF CULTURE is E!’s tagline, Ovation’s interrogatory seeks all revenue generated by the entire company. This interrogatory is far too broad and Ovation’s motion to compel should be denied. However, if the Board grants Ovation’s motion, this interrogatory should be limited to annual, U.S. revenues, stated in round numbers, from 2012 (the date of first use) to the present. *See* TBMP § 414(18) (“Annual sales and advertising figures, stated in round numbers, for a party’s involved goods or services sold under its involved mark are proper matters for discovery.”); *see also* TBMP § 414(13) (noting that generally, “information concerning a party’s foreign use of its involved mark is usually irrelevant to the issues in a Board proceeding, and thus not discoverable . . .”).

H. Interrogatory No. 32

Interrogatory No. 32 asks E! to provide the names of “all persons” who “provided information for Applicant’s responses” to Ovation’s interrogatories, requests for production of documents, and requests for admissions. This request is overbroad and ambiguous. For instance, with respect to Ovation’s requests for the production of documents, E!’s documents could include art and print ads and other creative materials generated in the normal course of business for a major and mainstream entertainment company over several years. Those persons who “provided information” could include everyone on the entire company’s payroll. The

production of their names would be overly burdensome and unlikely to lead the discovery of admissible evidence. Moreover, the request for “all persons” and any “information” is overly broad as it would include both E!’s attorneys as well as privileged “information” E!’s attorneys communicated or received in order to respond to E!’s interrogatories and requests for admissions. Such information would fall under the ambit of the attorney-client privilege.

For the foregoing reasons, Ovation’s motion should be denied with respect to Interrogatory No. 32. However, if the Board grants the motion, this interrogatory should be substantially narrowed to the names of E! employees who provided factual information to answer the interrogatories; the custodian of the documents that E! produced in response to the requests for production of documents; and the names of the E! employees, if any, who provided factual information to enable E! to admit or deny Ovation’s requests for admissions.

III. REQUESTS FOR PRODUCTION OF DOCUMENTS

A. RFP Nos. 7, 14-16, 21-22, 24, 29, 32-33, 36, 45-49, and 54

Ovation argues that E! waived its right to withhold documents to these requests because it previously submitted a limited response in which it agreed to produce responsive documents, subject to various objections. (Mot. to Compel. at 14.) Ovation has presented no authority indicating that E! cannot timely amend its responses to withdraw its prior response. Ovation claims doing so is tantamount to inserting an untimely objection. E! never withdrew its objections, however, but merely amended its limited response, making Ovation’s argument of waiver inapposite.

E!’s amendment to the limited response was proper. Federal Rule of Civil Procedure 26(e) states that a party must “correct its . . . response” in a timely manner if the party learns that in some material respect the response is incomplete or incorrect. *See also* TBMP § 408.03.

Here, after E! served its initial responses, Ovation claimed that E!'s responses to Ovation's document requests were incorrect as E! can only respond by stating that there are responsive documents, stating an objection with appropriate reasons, or stating that no responsive documents existed. (*See* July 1, 2014 Letter From Paul Bost, at 6, Ex. I to Bost Decl.) Rather than engage Ovation over the merits of its claim, E! supplemented some of its responses to remove the limited response to produce documents and instead, chose to stand on its objections. Ovation has cited no prejudice from the timely amendment. (*See, generally*, Mot. to Compel.) Accordingly, Ovation's motion to compel should be denied.

However, if the Board grants the motion, it should only reinstate E!'s original responses, which includes the stated objections. The objections were timely raised and well founded. Furthermore, it would be improper to hold E!'s objections waived as Ovation did not meet and confer with E! regarding those objections prior to filing its motion to compel.

B. RFP No. 10

RFP No. 10 seeks, “[a]ll documents relating to the channels of distribution and intended channels of distribution of each of the POP OF CULTURE Goods and Services.”

Ovation admits that E! already agreed to produce documents sufficient to identify the channels of distribution for its goods and services. (Mot. to Compel at 10.) Nonetheless, Ovation moves to compel production of documents showing the “intended” channels of distribution for E!'s goods and services, claiming this is relevant to the likelihood of confusion analysis. (*Id.*) The likelihood of confusion analysis follows the factors set forth under *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973), which include:

- (1) the similarity of the marks
- (2) the relatedness of the goods and/or services

(3) the channels of trade and classes of purchasers for the goods and/or services

(4) the number and nature of similar marks in use on similar goods

(5) the nature and extent of any actual confusion, and (6) the fame of the prior mark

See also TBMP § 309.03(c)(B) (emphasis added).

The “intended” the channel of distribution is not a listed factor and Ovation has cited no authority indicating the intended channel of distribution is “clearly relevant.” (Mot. to Compel at 10.) Accordingly, Ovation’s motion should be denied with respect to RFP No. 10.

C. RFP No. 40

Ovation’s motion to compel this request should be denied as it never met and conferred regarding this request before bringing its motion. (Fountain Decl. 7); *Shuffle Master*, 170 F.R.D. at 173.

Additionally, this request is far too broad. RFP No. 40 seeks “[a]ll contracts, licensing agreements, web hosting agreements, linking agreements, website affiliation agreements, web design agreements, *or other arrangements*” relating to the POP OF CULTURE mark between E! and a third party. All contracts between E! and a third party is clearly overbroad. Even Ovation’s own legal authority provides that discoverability for third party contracts is limited to, for example, “information concerning litigation and controversies” regarding the marks or “licensing agreements . . . between opposer and third parties.” (Mot. to Compel. at 10-11.)

To the extent Ovation is now willing to narrow its request to documents specified in its motion, Ovation should be required to meet and confer with E! regarding the scope of the documents it seeks before obtaining an order compelling production from the Board. Accordingly, Ovation’s motion should be denied with respect to RFP No. 40.

D. RFP No. 42

RFP No. 42 seeks, “[a]ll emails, letters, notes, or other communications to or from Applicant or amongst or between Applicant's employees, consultants, management, Board of Directors, or officers relating to Opposer, the CULTUREPOP Mark, the CulturePop.com website, or any marks including the terms POP or CULTURE.”

This request is overbroad and would plainly include all communications with E!'s attorneys regarding the present dispute. After all, E! first learned of Ovation in 2012. (*See* Resp. to Interrogatory No. 9, *supra*), and Ovation served E! with its initial demand letter in May 2012. (Ex. A to Fountain Decl.) Accordingly, since the beginning of this dispute, there must have been communications “to or from” E! to its attorneys regarding this case. Indeed, Ovation admits that the communications it seeks are probably those where E! discusses “the parties’ marks and *any likelihood of confusion resulting therefrom.*” (Mot. to Compel at 11) (emphasis added). The likelihood of confusion analysis is a legal issue and the only reason E! would discuss it is in connection with the present dispute with Ovation. Even if such communication is done between employees, it would not lose its privileged nature given the basis for such communications would undoubtedly be to assess Ovation’s claims in these proceedings. *See* Edna Selan Epstein, American Bar Ass’n, *The Attorney-Client Privilege and the Work-Product Doctrine* 190 (4th ed. 2001) (“Communications within corporations often must be filtered through many employees. These inter-corporate communications do not defeat the requisite confidentiality necessary for the privilege to attach.”); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 442 (S.D.N.Y. 1995) (“[T]he privilege protects from disclosure communications among corporate employees that reflect advice rendered by counsel to the corporation . . . This follows from the recognition that since the decision-making power of the corporate client may be

diffused among several employees, the dissemination of confidential communications to such persons does not defeat the privilege.”); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 518 (D. Conn.) (“A privileged communication [does] not lose its protection if an executive relays legal advice to another who shares responsibility for the subject matter underlying the consultation”) (citation omitted), *appeal dismissed*, 534 F.2d 1031, 1032 (2d Cir. 1976)).

It would be overly burdensome for E! to produce a privilege log of communications for over two years where E! has communicated regarding Ovation’s legal positions regarding likelihood of confusion, as such communications would encompass vast arrays of privileged emails. Thus, Ovation’s motion should be denied with respect to RFP No. 42. However, if the Board grants the motion, this request should be substantially narrowed in terms of time, for instance, by limiting it to the time period prior to May 4, 2012, when Ovation served its initial demand letter. *See* TBMP § 414(2) (“In those cases where complete compliance with a particular request for discovery would be unduly burdensome, the Board may permit the responding party to comply by providing a representative sampling of the information sought, or some other reduced amount of information which is nevertheless sufficient to meet the propounding party’s discovery needs”).

E. RFP Nos. 58-76

RFP Nos. 58 to 64 seeks documents that “relate to, support or negate” E!’s denials in its answer to the Notice of Opposition. These requests are cumulative of each other and with other requests in general. In addition to seeking cumulative documents, these requests cover nearly every paragraph of the answer, as the entire answer was only nine (9) paragraphs, as well as E!’s denial that Ovation is entitled to relief, and E!’s affirmative defense. For example, RFP No. 65 seeks documents that “relate to, support or negate” E!’s “intellectual property rights in the POP

OF CULTURE Marks” or any other marks that include the terms “POP or CULTURE.” RFP Nos. 66 to 74 seeks documents that “relate to, support or negate” E!’s statements made in its May 18, 2012 response to Ovation’s demand letter. RFP No. 75 seeks documents relating to other federal registrations or pending applications by E! for trademarks “relating to, derived from, or including the terms POP or CULTURE.” RFP No. 76 seeks documents relating to E!’s “belief that it may sell or offer products or services under the names or trademarks POP OF CULTURE or any other trademark or name related to, derived from, or including the terms POP or CULTURE.”

Ovation claims E! must produce documents in response to these requests because they are specifically directed at the parties’ pleadings and allegations and relate to the fundamental issues in this proceeding. (Mot. to Compel at 12.) Ovation overstates its case.

Ovation’s requests are inherently overbroad and entirely cumulative of each other as well as Ovation’s other discovery requests. For instance, RFP Nos. 58 to 64 track nearly the entire answer. Such requests are overbroad. *See Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 405 (D. Kan. 1998) (holding that an interrogatory requiring the responding party to identify all facts and each and every witness and document that support the allegations in the complaint was overly broad and unduly burdensome on its face). RFP No. 65 seeks documents regarding E!’s “intellectual property rights” in the POP OF CULTURE mark, but that information would be cumulative of E!’s documents supporting its denial of Ovation’s Notice of Opposition since Ovation’s Notice of Opposition is claiming E! has no trademark rights to the POP OF CULTURE mark. Likewise, RFP Nos. 66 to 74 relate to E!’s answer to Ovation’s demand letter, but documents relevant to that topic would be cumulative of the documents supporting the answer and documents supporting E!’s “intellectual property rights” as sought in the previous

document requests. Finally, RFP No. 76 asking why E! believes it can sell products bearing the POP OF CULTURE mark is just another way of asking for the same documents regarding why E! denied Ovation's allegations in its answer, why E! has intellectual property rights in the mark, and how E! responded to Ovation's demand letter.

To the extent all of these requests effectively ask why E! believes there is no likelihood of confusion between Ovation's and E!'s marks (which is the principal issue at dispute in this proceeding), E! has already agreed to produce responsive documents to that issue as stated in its response to RFP No. 30.

In sum, Ovation's shotgun approach to discovery is needlessly cumulative and overly burdensome in seeking documents "without regard to importance of the evidence to the central issues in this case or whether such document(s) are cumulative of other evidence." *Geiger v. Z-Ultimate Self Def. Studios LLC*, No. 14-cv-00240-REB-NYW, 2015 WL 1598092, at *13 (D. Colo. Apr. 9, 2015) (denying request for any document that supports responses to any interrogatory or admission or supports any affirmative defense). As such, Ovation's motion should be denied with respect to RFP Nos. 58-76. *See* Fed. R. Civ. P. 26(b)(2) (allowing for limitations on discovery where such discovery is "unreasonably cumulative or duplicative, or can be obtained from another source that is more convenient, less burdensome, or less expensive").

F. RFP Nos. 78 and 82

RFP No. 78 seeks, "[a]ll royalty statements or other documents reflecting revenue earned or generated" and RFP No. 82 seeks "[a]ll documents *relating to* advertising revenue generated, earned, or paid for" (Emphasis added). Both requests are overly broad.

Ovation claims these requests are proper because it is entitled to "[a]nnual sales and advertising figures, stated in round numbers, for a party's involved goods or services sold under

its involved mark are proper matters for discovery.” See TBMP § 414(18). (Mot. to Compel at 12.) RFP Nos. 78 and 82 do not seek a statement of annual sales or advertising figures in round figures. They seek “all” documents “reflecting” revenue and “all” documents “relating” to advertising revenue. “However, in responding to the interrogatory, applicant need furnish only round figures for the years in question, *the exact sales to the specific dollar not being necessary.*” *Am. Optical Corp.*, 181 U.S.P.Q. at 120 (emphasis added). It follows that requiring the production of documents that specify the exact dollar figure would be equally onerous and beyond the scope of discovery.

Additionally, requests seeking documents “relating” to a general category of documents (like revenue) are overly broad. *Aikens v. Deluxe Fin. Servs., Inc.*, 217 F.R.D. 533, 538 (D. Kan. 2003) (“This Court has held on numerous occasions that a request or interrogatory is unduly burdensome on its face if it uses the omnibus term ‘relating to’ or ‘regarding’ with respect to a general category or group of documents”).

Thus, Ovation’s motion should be denied with respect to RFP Nos. 78 and 82. However, if the Board grants the motion, this request should be substantially narrowed to documents that sufficiently demonstrate the annual revenue for E!’s goods and services offered under the POP OF CULTURE and E POP OF CULTURE marks, stated in round numbers. See TBMP § 414(2) (“In those cases where complete compliance with a particular request for discovery would be unduly burdensome, the Board may permit the responding party to comply by providing a representative sampling of the information sought, or some other reduced amount of information which is nevertheless sufficient to meet the propounding party's discovery needs”).

G. RFP No. 81

RFP No. 81 seeks “all documents relating to streaming or broadcasting” services offered

under the POP OF CULTURE or E POP OF CULTURE marks.

This request is overly broad because it seeks documents “relating” to a general category of documents. *Aikens*, 217 F.R.D. at 538. Ovation claims this information is relevant to the services offered under E!’s mark as well as to E!’s channels of trade. (Mot. to Compel at 12.) However, that information can be obtained by a production of a representative sample of documents showing the mark in use with respect to streaming and broadcasting, not by the unnecessary production of “all documents relating to streaming or broadcasting.”

Thus, Ovation’s motion should be denied with respect to RFP No. 81. However, if the Board grants the motion, this request should be substantially narrowed to documents that sufficiently demonstrate E!’s uses of the POP OF CULTURE mark in connection with streaming or broadcasting services. *See* TBMP § 414(2) (“In those cases where complete compliance with a particular request for discovery would be unduly burdensome, the Board may permit the responding party to comply by providing a representative sampling of the information sought, or some other reduced amount of information which is nevertheless sufficient to meet the propounding party’s discovery needs”).

H. RFP Nos. 2, 9-10, 12, 18, 23, 25, 28, 31, 37, 50-52, 57, 77, and 79-80

Other than RFP Nos. 10 and 12,⁴ Ovation did not meet and confer regarding these requests before filing its present motion. (Fountain Decl. ¶ 7); *Shuffle Master*, 170 F.R.D. at 173. Accordingly, Ovation’s motion should be denied with respect to RFP Nos. 2, 9-10, 12, 18, 23, 25, 28, 31, 37, 50-52, 57, 77, and 79-80.

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⁴ With respect to Request No. 12, E! agreed to produce responsive documents and will supplement this information.

CONCLUSION

For the foregoing reasons, Ovation's motion to compel should be denied. If any requests are granted, the scope of the request should be substantially narrowed.

Dated: this 7th day of May, 2015.

LEWIS ROCA ROTHGERBER

By: /s/ Jonathan W. Fountain
Michael J. McCue
Jonathan W. Fountain
3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169-5996
(Tel.) 702-949-8200
(Fax) 702-949-8398

*Attorneys for Applicant
E! Entertainment Television, LLC*

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that a true and complete copy of the foregoing APPLICANT E! ENTERTAINMENT TELEVISION, LLC'S OPPOSITION TO OPPOSER'S MOTION TO COMPEL is being transmitted electronically with the United States Patent and Trademark Office, Trademark Trial and Appeal Board, through ESTTA at <http://estta.uspto.gov> on May 07, 2015.

/s/ Joy A. Jones, CP
An employee of Lewis and Roca LLP

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing APPLICANT E! ENTERTAINMENT TELEVISION, LLC'S OPPOSITION TO OPPOSER'S MOTION TO COMPEL has been served on attorneys for Opposer, by mailing a copy on May 07, 2015, via First Class Mail, postage prepaid, to:

Jill M. Pietrini, Esq.
Whitney Walters, Esq.
Sheppard Mullin Richter & Hampton LLP
1901 Avenue of the Stars, Suite 1600
Los Angeles, CA 90067-6017

/s/ Joy A. Jones, CP
An employee of Lewis and Roca LLP

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

OVATION, LLC,
a Delaware limited liability company,

Opposer,

v.

E! ENTERTAINMENT TELEVISION, LLC,
a Delaware limited liability company,

Applicant.

Opposition No. 91210506 (parent)

Application No. 85/569,798

Mark: POP OF CULTURE

Opposition No. 91217286

Application No. 85/937,423

Mark: E POP OF CULTURE

Opposition No. 91217287

Application No. 85/937,399

Mark: E POP OF CULTURE

DECLARATION OF JONATHAN W. FOUNTAIN

I, Jonathan W. Fountain, declare under penalty of perjury under the laws of the United States that the following is true and correct:

1. I am an employee of Lewis Roca Rothgerber LLP, counsel for Applicant E! Entertainment Television LLC (“Applicant” and/or “E!”). This declaration is based upon my own personal knowledge and I am competent to testify to the facts set forth herein.

2. Applicant is a corporate affiliate of NBCUniversal Media, LLC and the owner of the popular E! Entertainment cable television network.

3. E! is an American cable and satellite television channel that features programming about entertainment, the entertainment industry and pop culture in general. POP OF CULTURE is E!’s tagline and slogan. The POP OF CULTURE logo followed a re-branding of the company and was introduced on July 9, 2012.

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4. Ovation alleged that POP OF CULTURE is likely to be confused with a designation it uses for the name of a show about pop culture -- CULTUREPOP. Ovation served E! with its initial demand letter in May 2012. A true and accurate copy is attached hereto as **Exhibit A**. Ovation filed a Notice of Opposition to E!'s application for POP OF CULTURE on April 29, 2013.

5. On November 12, 2013, E! served a set of discovery requests on Ovation. Following E!'s service of discovery, Ovation served its own set of requests for discovery on E! E!'s responses and objections to Ovation's discovery requests were due on April 9, 2014. Prior to the deadline's expiration, E! filed a motion to compel and a motion to extend the deadline to provide objections and responses to Ovation's discovery requests. The Board granted in-part and denied in-part E!'s motion to compel and granted E!'s motion to extend the deadline to serve its objections and responses to Ovation's discovery requests.

6. E! timely served its objections and responses to Ovation's discovery requests on May 9, 2014. On July 1, 2014, Ovation sent E! a letter stating what Ovation believed to be deficiencies in E!'s objections and responses. On July 9, 2014, Ovation filed separate notices of opposition to E!'s applications for the E POP OF CULTURE mark. E! served supplemental objections and responses to Ovation's discovery requests on July 11, 2014.

7. Ovation then claimed that E!'s supplemental objections and responses were insufficient. Accordingly, the parties met and conferred regarding Ovation's claims by telephone on July 22, 2014. I participated in the call on behalf of E!. During the call, we did not discuss RFA Nos. 18, 39, 41-42, 45-46, 62, 64, 68, 70, 72, 74, 76, 78, 91, 93, 95, 97, 99, 102, 103, 105, or 113-114. Nor did we discuss RFP Nos. 2, 9, 18, 23, 25, 28, 31, 37, 40, 50, 51-52, 57, 77, 79 or 80. Ovation did not meet and confer with E! with respect to these requests prior to bringing

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its present motion to compel. After the call, I drafted an email detailing the discovery request that Ovation claimed to be deficient during the meet and confer.

8. On September 17, 2014, Ovation's counsel emailed me claiming that E! had agreed to supplement its discovery responses by September 22, 2014. A true and accurate copy of the email is attached hereto as **Exhibit B**. In response, I indicated that I did not recall E! agreeing to supplement its discovery responses by September 22, but rather recalled informing Ovation that "I am working with E! to see if we can supplement, and we are continuing to do so." A true and accurate copy of the email is attached hereto as **Exhibit C**. Further, I reminded Ovation's counsel, Mr. Paul Bost, that he had "asked for supplemental responses with respect to 35 document requests, 12 interrogatories, and 21 requests for admissions, and have not agreed to narrow the scope of any of these overly broad requests." (*Id.*)

9. On October 11, 2014, the current case was consolidated with the E POP OF CULTURE marks applications. On November 24, 2014, the parties stipulated to suspend the consolidated proceedings to discuss settlement. The suspension ended on March 23, 2015 without the parties reaching an agreement to settle.

10. After the suspension ended, on March 25, 2015, E! noticed the Federal Rule of Civil Procedure 30(b)(6) deposition of Ovation to occur on April 7, 2015 in Los Angeles, California. Ovation refused to produce a witness, claiming that the Rule 30(b)(6) deposition topics were objectionable. Ovation indicated that it would refuse to produce a Rule 30(b)(6) witness unless all of its objections to E!'s proposed deposition topics were resolved. E! then noticed the individual deposition of Ovation's officers, Rob Canter and Shaw Bowman. On April 3, 2015, Ovation refused to produce those individuals for depositions, stating one individual no longer worked at Ovation and that the other individual was out of the office. On that same date, and without having met and conferred with E! since July 22, 2014, Ovation filed

its motion to compel (comprised of a total of 426 pages including attachments). (Ovation has since failed to provide proposed dates for the Ovation depositions).

Executed on: May 07, 2015.

/s/ Jonathan W. Fountain
(Signature)

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that a true and complete copy of the foregoing DECLARATION OF JONATHAN W. FOUNTAIN is being transmitted electronically with the United States Patent and Trademark Office, Trademark Trial and Appeal Board, through ESTTA at <http://estta.uspto.gov> on May 07, 2015.

/s/ Joy A. Jones, CP
An employee of Lewis and Roca LLP

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing DECLARATION OF JONATHAN W. FOUNTAIN has been served on attorneys for Opposer, by mailing a copy on May 07, 2015, via First Class Mail, postage prepaid, to:

Jill M. Pietrini, Esq.
Whitney Walters, Esq.
Sheppard Mullin Richter & Hampton LLP
1901 Avenue of the Stars, Suite 1600
Los Angeles, CA 90067-6017

/s/ Joy A. Jones, CP
An employee of Lewis and Roca LLP

EXHIBIT A

EXHIBIT A

SheppardMullin

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1901 Avenue of the Stars, Suite 1600
Los Angeles, CA 90067-6055
310.228.3700 main
310.228.3701 main fax
www.sheppardmullin.com

Jill M. Pietrini
310.228.3723 direct
jpietrini@sheppardmullin.com

May 4, 2012

File Number: 17BD-148405

John Wilson, Esq.
E! Entertainment, LLC
5750 Wilshire Blvd.
Los Angeles, CA 90036-3697

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Re: Infringement of CULTUREPOP Trademark by E! Entertainment Network

Dear Mr. Wilson:

We are writing to request that E! Entertainment Television, LLC ("E! Entertainment") stop the use of POP OF CULTURE and abandon its application to register the trademark with the U.S. Patent & Trademark Office ("PTO").

We represent Ovation LLC ("Ovation") in connection with its intellectual property and entertainment matters. Ovation has been using the mark CULTUREPOP for its entertainment, arts and culture based website associated with its television and internet broadcasting channel since at least as early as August 2010. Both the channel and website focus on content and programming dedicated to the arts, lifestyle, and entertainment. The content is not limited by geographic boundaries and thus includes or covers subject matter from across the United States as well as international and has a worldwide target audience. Information on the use of CULTUREPOP can be found at www.ovationtv.com. The CULTUREPOP trademark is also the subject of U.S. Trademark Application Serial No. 85/096252, which has been allowed by the PTO.

Ovation recently became aware of E! Entertainment's proposed use of POP OF CULTURE and of its pending U.S. Trademark Application Serial No. 85/569798 covering "television, cable television, satellite television, internet, wireless, mobile, radio, and interactive multimedia broadcasting services; broadcasting and transmission of programming, audio and visual content, and entertainment media content via television, cable television, satellite television, video-on-demand, digital media, multimedia, the internet, and wireless and mobile networks; podcasting and webcasting services; providing on-line chat rooms and electronic bulletin boards for transmission of messages among users in Class 38; and, television programming services; entertainment in the nature of television programming, cable television programming, satellite television programming, internet programming, multimedia programming, and programming via wireless and mobile networks; audio and video programming via the internet and wireless and mobile networks; production of television, cable, video-on-demand, digital, satellite, wireless, mobile, internet, and multimedia programs and entertainment media content; production and programming of audio and video content; providing online journals, namely, blogs; provision of news and information via the internet and mobile and wireless networks" in Class 41.

SheppardMullin

John Wilson
May 4, 2012
Page 2

Ovation has expended a substantial amount of effort and expense in the ongoing development, advertisement of the CULTUREPOP mark and the business associated therewith. As we are sure that you will appreciate, intellectual property rights, including the trademarks, are the core of Ovation's business and are extremely valuable to our client. Just as E! Entertainment would not want someone to infringe its trademark rights, neither does Ovation. In that regard, the services that E! Entertainment is planning on providing under the POP OF CULTURE mark are highly similar, if not identical, to the goods and services offered by Ovation under the CULTUREPOP mark. Based on the similarity of the marks, the similarity of the goods and services, and the fact that both parties are in the same business, we believe that the use of POP OF CULTURE will infringe and otherwise violate Ovation's trademark rights in CULTUREPOP. The remedies for infringement, false designation of origin, and unfair competition include, without limitation, immediate and permanent injunctive relief, damages, E! Entertainment's profits, and an award for attorney's fees and costs incurred in obtaining such remedies.

Notwithstanding E! Entertainment's available remedies, Ovation would like to resolve this matter amicably. To do so, Ovation requests that E! Entertainment:

1. Immediately cease any and all use of the mark POP OF CULTURE as set forth in the pending trademark application and in recent press releases, and agree not to use any mark, name, or logo confusingly similar to CULTUREPOP and POP OF CULTURE in the future;
2. Abandon its application to register POP OF CULTURE; and,
3. Advise us in writing of the compliance with the forgoing no later than **May 18, 2012**.

If we have not received such written confirmation by that date, Ovation will be left with no choice but to escalate this matter to a formal resolution.

We look forward to receiving your timely response. This letter is not a complete recitation of the facts and circumstances surrounding this matter, nor is it a waiver of the rights and remedies of Ovation, all of which are expressly reserved.

Very truly yours,


Jill M. Pietrini
SHEPPARD MULLIN RICHTER & HAMPTON LLP

cc: Chad Gutstein
David Sands, Esq.



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8:00PM ET/PT



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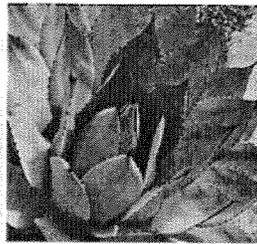
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448 .JPG - vickie2010 Jack

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OVATION PARTNERS WITH AMERICANS FOR THE ARTS TO LAUNCH THE OVATION: A NEW NATIONAL GRANT PROGRAM

Ovation to Contribute \$110,000 for the Inland Year's Grants Washington D.C. April 17, 2012 - Ovation, the only network dedicated to art, artists and all forms of artistic storytelling, is putting its money where its passion is once again, this time funding a national arts grant program called The InaOVATION Grant Program...

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EXHIBIT B

EXHIBIT B

Fountain, Jonathan

From: Paul Bost <PBost@sheppardmullin.com>
Sent: Wednesday, September 17, 2014 8:01 AM
To: Fountain, Jonathan
Cc: McCue, Michael; Jill Pietrini; Beth Anderson; Ben Aigboboh
Subject: Ovation v. E!

Hi, Jonathan.

A few things:

- (1) Given that Ovation's motion to consolidate the proceedings is pending, we think it makes sense to table the parties' discovery conference in the E POP OF CULTURE proceedings until the motion is decided. Please let us know if you agree.
- (2) We have not received any supplemental discovery responses from E! pursuant to our conversation on July 22, 2014. You had advised at the time that E! would supplement its responses by July 25 or, at the latest, August 1. Thus, these responses are past due. Please confirm that you will serve supplement responses by Monday, September 22, 2014.
- (3) I will soon be on paternity leave, so please copy Ben Aigboboh on all correspondence in this matter.

Thanks,

Paul

[Paul Bost](#)

310.228.2249 | direct
310.228.3960 | direct fax
PBost@sheppardmullin.com | [Bio](#)

SheppardMullin

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Attention: This message is sent by a law firm and may contain information that is privileged or confidential. If you received this transmission in error, please notify the sender by reply e-mail and delete the message and any attachments.

EXHIBIT C

EXHIBIT C

Fountain, Jonathan

From: Fountain, Jonathan
Sent: Wednesday, September 17, 2014 10:42 AM
To: 'Paul Bost'
Cc: McCue, Michael; Jill Pietrini; Beth Anderson; Ben Aigboboh
Subject: RE: Ovation v. E!

Hi Paul:

We agree to (1) below.

With respect to (2) below, I do not recall stating that E! would serve supplemental discovery responses by 7/22 or 8/1. I do recall telling you that I am working with E! to see if we can supplement, and we are continuing to do so. I note that you have asked for supplemental responses with respect to 35 document requests, 12 interrogatories, and 21 requests for admissions, and have not agreed to narrow the scope of any of these overly broad requests. We are continuing to work with E! to see if/when we can supplement and we will get back to you and/or Mr. Aigboboh as soon as possible.

Best regards,

Jonathan

From: Paul Bost [<mailto:PBost@sheppardmullin.com>]
Sent: Wednesday, September 17, 2014 8:01 AM
To: Fountain, Jonathan
Cc: McCue, Michael; Jill Pietrini; Beth Anderson; Ben Aigboboh
Subject: Ovation v. E!

Hi, Jonathan.

A few things:

(1) Given that Ovation's motion to consolidate the proceedings is pending, we think it makes sense to table the parties' discovery conference in the E POP OF CULTURE proceedings until the motion is decided. Please let us know if you agree.

(2) We have not received any supplemental discovery responses from E! pursuant to our conversation on July 22, 2014. You had advised at the time that E! would supplement its responses by July 25 or, at the latest, August 1. Thus, these responses are past due. Please confirm that you will serve supplement responses by Monday, September 22, 2014.

(3) I will soon be on paternity leave, so please copy Ben Aigboboh on all correspondence in this matter.

Thanks,

Paul

Paul Bost

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