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

Proceeding	91217238
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11 **IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**
12 **BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

13
14 INSTAGRAM, LLC, a Delaware limited
15 liability company,

16 Opposer/Registrant

17 v.

18 FLIPAGRAM, INC., a California
19 corporation,

20 Applicant/Petitioner
21

**MOTION TO TEST SUFFICIENCY OF
OPPOSER INSTAGRAM'S RESPONSES
TO FLIPAGRAM'S FIRST AND
SECOND SETS OF REQUESTS FOR
ADMISSION**

Opposition No. 91217238

Application No. 86042264

22 Applicant and Counterclaim Petitioner Flipagram, Inc. ("Flipagram") hereby moves pursuant to
23 Fed. R. Civ. P. 37, 37 C.F.R. § 2.120(e) and T.B.M.P. § 523 for the following relief:

24 An order compelling Opposer Instagram, Inc. ("Opposer" or "Instagram"), within 10 business
25 days of issuance of the order, serve a sufficient answer to the following requests from Flipagram's First
26 and Second Sets of Requests for Admission: Nos. 1, 3, 4, 5, 6, 11, 12, 16, 17, 13-15, 20-22, 28-31, 35-
27 42, 43-55, 56, 58-61, 63-65, 67-69, 70-71, 73-74, 76, and 79-81.
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1 **INTRODUCTION**

2 Opposer Instagram claims that Applicant’s mark FLIPAGRAM should be refused registration
3 because it is confusingly similar to Opposer’s registered INSTAGRAM trademarks. For years,
4 however, Opposer actively encouraged Opposer and many other companies to adopt INSTA- and
5 GRAM-formative marks. At the time Flipagram adopted its mark, Opposer advised Flipagram and
6 others as follows:

7 **While you cannot use the word ‘Instagram’ or ‘IG’ in your product’s name, it’s**
8 **okay to use one (but not both) of the following: ‘Insta’ or ‘Gram.’**

9 Opposer granted this consent to Flipagram in the “Terms of Use” for its application
10 programming interface (“API”). Opposer’s API is a software tool that allows third party software like
11 Flipagram to exchange data with Opposer’s software. Flipagram, along with many other companies,
12 relied on this statement when selecting its name and building the goodwill for its business.

13 Opposer did not grant this express consent out of the goodness of its heart. Rather, it did so as
14 part of a calculated business decision. It hoped that its API, along with its favorable trademark policy,
15 would encourage software developers like Flipagram to build a robust “ecosystem” of third-party
16 services related to Opposer. In turn, Opposer hoped these products would it help attract more users to
17 Instagram and grow its social network.

18 Consistent with this goal, Opposer took other affirmative steps to encourage the development
19 of software with GRAM-formative names like Flipagram. For example, it actively promoted third-
20 party products and services with GRAM- and INSTA-formative names, including on its blog and in
21 public media. Opposer also took specific steps with Flipagram to confirm its approval and support,
22 including by (1) collaborating closely with Flipagram to fix interoperability issues; (2) promoting
23 Flipagram’s product through its officers; and (3) actively assisting Flipagram in the policing of its
24 FLIPAGRAM trademark, by confiscating the Instagram username “@flipagram” from a trademark
25 squatter and transferring it to Flipagram.

26 Ultimately, Opposer’s “ecosystem” policy enabled it to expand its footprint significantly and
27 extend the reach of its brand. Opposer ultimately achieved financial success, culminating in its
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1 purchase by Facebook for \$1 billion. After achieving its success, Opposer decided to reverse course
2 and attempt to revoke its express consent. It now opposes Flipagram’s trademark application.

3 In discovery, Flipagram has propounded requests probing the obvious and extreme inequity of
4 this behavior. Opposer, however, has refused to provide substantive responses to the majority of these
5 requests. The few responses it has provided are evasive. Flipagram has engaged in extensive meet and
6 confer sessions with Opposer, but Opposer continues to refuse to produce information that is basic and
7 essential to the claims at issue, necessitating this motion.

8 **FACTUAL BACKGROUND**

9 In its Answer and Counterclaim, Flipagram raised affirmative defenses including: (1) four
10 separate estoppel theories, (2) unclean hands, (3) descriptiveness lacking secondary meaning, and (4)
11 and abandonment by naked licensing. On November 18, 2014, Opposer filed a Motion to Strike all
12 of Flipagram’s affirmative defenses. (D.N. 16.) On May 2, 2015, the Board ruled on the motion, in
13 relevant part granting the motion as to laches and acquiescence, but denying the motion as to (a)
14 estoppel by consent, (b) unclean hands, (c) descriptiveness lacking secondary meaning, and (d)
15 abandonment by naked licensing. (D.N. 22.)

16 On July 16 and September 29, 2015, Flipagram served Opposer with interrogatories and
17 requests for production designed to elicit evidence supporting these defenses. (Declaration of Naomi
18 Jane Gray in Support of Motion to Test Sufficiency of Responses to Flipagram’s First Set of
19 Requests for Admission (“Gray Decl.”) ¶ 2 and Exhs. A-B thereto.) In its responses, Opposer
20 outright refused to respond to 43 out of 81 requests for admission, more than half of the total. (Gray
21 Decl. ¶ 2 and Exhs. A-B.)

22 Flipagram began the process of meeting and conferring with Opposer regarding its deficient
23 discovery responses in September. (Gray Decl. ¶ 3 and Exh. C.) Flipagram sent its initial meet and
24 confer letter to Opposer on September 24, 2015, and conducted telephone conferences with opposing
25 counsel on October 8 and 14, 2015. (Gray Decl. ¶ 4 and Exh. C.) Flipagram followed up on these
26 conversations by letter on October 30, 2015. (Gray Decl. ¶ 4 and Exh. D.) Flipagram wrote to
27 Opposer on November 3, 2015 to initiate discussions regarding Opposer’s deficient responses to
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1 Flipagram’s second set of requests for admission. (Gray Decl. ¶ 5 and Exh. E.) Flipagram engaged
2 in further telephonic meet and confer sessions on November 19, December 2, December 7 and
3 December 11, 2015. (Gray Decl. ¶ 7.) Despite these extensive efforts, Opposer continues to refuse
4 to produce information that is basic and essential to the claims at issue in this proceeding.

5 On December 2, the parties agreed to a further exchange of information on December 18,
6 2015. (Gray Decl. ¶ 9.) This exchange date applied to those responses and documents the parties
7 had agreed to supplement as of that time. (*Id.*) Flipagram confirmed the December 18 exchange date
8 during subsequent telephone conferences with Opposer’s counsel on December 7 and 11, and in an
9 email dated December 14, 2015. (Gray Decl. ¶ 10-11 and Exh. G.)

10 During the parties’ December 11 telephone conference, Opposer claimed it was “still working
11 on trying to resolve” some of the remaining points still in dispute. (Gray Decl. ¶ 11.) Opposer
12 mentioned only three requests. It would not provide a full list of the requests, explain how it would
13 supplement its responses, or commit to a response date beyond other than to say that supplementation
14 would occur sometime “after the first of the year.” (*Id.*) Moreover, this discussion related only to
15 remaining points still in dispute, not to points about which the parties had reached agreement. (*Id.* ¶
16 12.) Opposer gave no indication that it did not intend to adhere to its prior commitment to producing
17 the previously agreed upon materials on December 18. (*Id.*)

18 On December 15, however, Opposer announced that it would not, after all, provide the
19 promised information on December 18, pending resolution of other items Flipagram had requested.
20 (Gray Decl. ¶ 14 and Exhs. I.) Opposer would not commit to a specific future production date, and
21 would not describe what it would be producing with respect to the other items. (*Id.* and Exh. J.)
22 Flipagram does not know what additional supplementation Opposer intends to make, or when that
23 supplementation will occur, beyond “after the first of the year.”

24 **ARGUMENT**

25 Discovery in *inter partes* proceedings is governed by the liberal standards of Rule 26(b)(1) of
26 the Federal Rules of Civil Procedure. T.B.M.P. 402.01. Under that rule, a party “may obtain
27 discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party
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1 and proportional to the needs of the case Information within this scope of discovery need not be
2 admissible in evidence to be discoverable.” Fed. R. Civ. P. 26(b)(1) (as amended December 1, 2015).

3 A party responding to a request for admission “shall specifically deny the matter or set forth
4 in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial
5 shall fairly meet the substance of the requested admission” Fed. R. Civ. P. 36(a).

6 On a motion to compel, the party opposing discovery bears the burden of persuasion. *Chubb*,
7 103 F.R.D. at 58; *Kozlowski v. Sears Roebuck & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976). “The Board
8 expects the parties (and their attorneys or other authorized representatives) to cooperate with one
9 another in the discovery process, and looks with extreme disfavor on those that do not.” T.B.M.P.
10 §401.

11 Flipagram is entitled to the requested discovery because: (1) Flipagram seeks relevant, non-
12 privileged information; (2) Opposer bears the burden of showing that the requested discovery is
13 objectionable; and (3) Opposer’s remaining objections are spurious.

14 **I. Opposer Must Respond to Flipagram’s Requests for Admission No. 28.**

15 Flipagram seeks an admission regarding Opposer’s longstanding awareness of the existence of
16 Flipagram and its trademark.

- 17 • Request For Admission No. 28: Admit that You knew of Flipagram's use of the trademark
18 FLIPAGRAM by no later than March 3, 2012.

19 (Gray Decl. Exh. A pp. 14-15.)

20 This request is highly relevant because it helps establish Flipagram’s affirmative defenses of
21 estoppel by consent and unclean hands, as well as the absence of likely confusion. For example,
22 evidence that Opposer had longstanding knowledge of Flipagram and nevertheless consented to its use
23 of its mark is, “in essence, an admission that the ... use is not likely to cause confusion.” *Richdel, Inc. v*
24 *Mathews Co.*, 190 USPQ 37, 41 (TTAB 1976).

25 Opposer’s claimed objections are baseless. First, there is no merit to the claim this request is
26 “irrelevant given that Flipagram’s delay-based defenses were stricken.” (Gray Decl. Exh. A p. 15.) In
27 TTAB proceedings, “the requirement of relevancy must be construed liberally and [] discovery should,
28 therefore, be generally allowed unless it is clear, beyond any doubt, that the information sought can have

1 no possible bearing upon the issues involved in the particular proceeding.” *Varion Assocs. V. Fairfield-*
2 *Noble Corp.*, 188 U.S.P.Q. 581, 583 (T.T.A.B. 1975). Relevant information “need not be admissible in
3 evidence to be discoverable.” Fed. R. Civ. P. 26(b)(1). These requests easily satisfy this liberal standard
4 because responsive information could lead to admissible evidence relating, *inter alia*, to Flipagram’s
5 defenses of consent and unclean hands.

6 Further, Opposer has served, and received answers to, nearly identical discovery requests. (Gray
7 Decl. Exh. J p. 3.) Where two parties serve “identical discovery requests on each other, they are
8 constrained to answer each and every one of the discovery requests in a complete fashion.” *Sentrol, Inc.*
9 *v. Sentex Sys., Inc.*, 1986 WL 83726, at *2 (TTAB 1986); *see also Amazon Technologies, Inc. v. Wax*,
10 2009 WL 5874857, at *2 (TTAB 2009); TBMP § 402.02. Indeed, such “parties have, in effect, waived
11 their right to object because identical discovery requests were served on the adverse party.” *Sentrol*,
12 1986 WL 83726 at * 3. Thus, Opposer has waived any right to object to the request and must provide a
13 complete response to it.

14 Finally, contrary to Opposer’s claim, this request is not overbroad and unduly burdensome, nor
15 does it require seeking out “former employees.” (Gray Decl. Exh. A p. 15.) If such an objection were
16 proper, any corporate party could defeat any discovery request on burdensomeness grounds. Opposer
17 need only consult those employees who are reasonably likely to have responsive information. At a
18 minimum, Opposer must “go through its trademark and other related files in order to determine when it
19 received actual knowledge” of Flipagram’s mark, and consult with employees reasonably likely to have
20 that information. *Cf. Am. Optical Corp. v. Exomet, Inc.*, 181 U.S.P.Q. 120, 123 (TTAB 1974) (overruled
21 on other grounds, *Johnson & Johnson v. Rexall Drug Co.*, 1975 WL 20825, at *5 (TTAB 1975).

22 After extensive discussions, Opposer represented that it is seeking a way to respond to these
23 requests as propounded, and anticipates responding sometime after the New Year. Opposer has not,
24 however, committed to responding to the request as propounded, or provided a date for producing
25 whatever it is Opposer decides to produce. (Gray Decl. ¶¶ 14-15.) The Board should require Opposer to
26 respond to the request promptly and in full.

1 **II. Opposer Must Respond to Flipagram’s Requests for Admission Nos. 43-55.**

2 Flipagram seeks admissions regarding Opposer’s affirmative efforts to promote, and encourage
3 the development of, the GRAM- and INSTA-formative trademarks of third party software makers.

4 Opposer refused to provide any substantive response to these requests.

- 5 • Request For Admission No. 43: Admit that You Promoted Third Party goods or services
6 using the mark PRINTSTAGRAM.
- 7 • Request For Admission No. 44: Admit that You Promoted Third Party goods or services
8 using the mark ANAGRAM.
- 9 • Request For Admission No. 45: Admit that You Promoted Third Party goods or services
10 using the mark STITCHSTAGRAM.
- 11 • Request For Admission No. 46: Admit that You Promoted Third Party goods or services
12 using the mark WEBSTAGRAM.
- 13 • Request For Admission No. 47: Admit that You Promoted Third Party goods or services
14 using the mark STICKYGRAM.
- 15 • Request For Admission No. 48: Admit that You Promoted Third Party goods or services
16 using the mark CASETAGRAM.
- 17 • Request For Admission No. 49: Admit that You Promoted Third Party goods or services
18 using the mark FOLLOWGRAM.
- 19 • Request For Admission No. 50: Admit that You Promoted Third Party goods or services
20 using the mark INSTACANE.
- 21 • Request For Admission No. 51: Admit that You Promoted Third Party goods or services
22 using the mark INSTAGOODIES.
- 23 • Request For Admission No. 52: Admit that You Promoted Third Party goods or services
24 using the mark INSTAPRINT.
- 25 • Request For Admission No. 53: Admit that You Promoted Third Party goods or services
26 using the mark INSTAGRE.AT.
- 27 • Request For Admission No. 54: Admit that You Promoted Third Party goods or services
28 using the mark INSTAGRAMMERS.COM.
- Request For Admission No. 55: Admit that You Promoted Third Party goods or services
using the mark INSTACHALLENGE. (

(Gray Decl. Exh. A pp. 19-23; Exh. D pp. 3-4.)

1 This information is highly relevant. For years, Instagram routinely promoted interoperable
2 third-party software using INSTA- and GRAM-formative trademarks on its blog and in public media,
3 including marks for related software products.¹ Obviously, Opposer’s promotion of these marks
4 undermines its claim that it has exclusive rights to use INSTA- and GRAM-formative names for related
5 software or that the names are confusing. It also supports Flipagram’s defense of estoppel by consent.
6 For example, Opposer’s decision to actively promote related third party products with GRAM-formative
7 names to its consumers would be an admission against interest showing that Opposer does not really
8 believe such GRAM-formative marks are confusingly similar. *Cf. American Soc’y of Oral Surgeons v.*
9 *American College of Oral and Maxillofacial Surgeons*, 201 U.S.P.Q. 531, at *2-3 (TTAB 1979).
10 Flipagram is entitled to a full response to these requests.

11 Although Opposer claims that these requests are overly broad and unduly burdensome, it has not
12 made the necessary showing. (Gray Decl. Exh. F p. 3.) As the party opposing discovery, Opposer
13 bears the burden of persuasion. *Chubb*, 103 F.R.D. at 58; *Kozłowski v. Sears Roebuck & Co.*, 73
14 F.R.D. 73, 76 (D. Mass. 1976). Because Opposer has not “fulfill[ed its] burden to explain its
15 objections,” *Chubb*, 103 F.R.D. at 58 (citations omitted) (party resisting discovery must explain and
16 support its objections), it must respond to these requests in full.

17 **III. Opposer Must Respond to Flipagram’s Requests for Admission No. 1.**

18 Flipagram seeks an admission that Opposer has never used GRAM -- the only naming
19 component that the parties share -- as a trademark:

- 20 • Request For Admission No. 1: Admit that You have never used the term GRAM, by itself, as
21 a trademark.

22 (Gray Decl. Exh. A p. 4.)
23
24

25 ¹ For example, Opposer’s blog and public statements promoted the following third party applications:
26 CASETAGRAM, PRINSTAGRAM, ANAGRAM, STITCHSTAGRAM, WEBSTAGRAM,
27 STICKYGRAM, FOLLOWGRAM, INSTAGOODIES, INSTAPRINT.ME, INSTAGRE.AT,
28 INSTADROP, INSTAGRAMMERS.COM, INSTACHALLENGE, and INSTACANE. (Declaration
of M. Elena Benavente in Support of Motion to Test Sufficiency of Responses to Flipagram’s First
and Second Sets of Requests for Admission Exhs. A, B.)

1 In substantive response, Opposer states only that “the term ‘GRAM’ is used and recognized
2 by consumers as a reference to Instagram.” (Gray Decl. Exh. A p. 4.). This answer is nonresponsive.
3 Whether GRAM is recognized by consumers as a reference to Opposer is entirely separate from
4 whether Opposer has ever used GRAM, by itself, as a trademark.

5 Opposer’s relevance objection rests on the assertion that its claims in this proceeding are
6 “based on infringement and dilution of Opposer’s Marks.” As an initial matter, this claim is incorrect
7 because TTAB proceedings do not address infringement. Federal courts hear claims of infringement,
8 whereas TTAB proceedings may address the applicant’s right to register a mark. *Research in Motion*
9 *Ltd. v. Defining Presence Marketing Group, Inc.*, 102 U.S.P.Q.2d 1187, at *3 (TTAB 2012). Here,
10 Opposer has asserted a claim that registration of FLIPAGRAM will be likely to confuse consumers
11 under Lanham Act § 2(d), and that it will dilute the INSTAGRAM mark. (Notice of Opposition p.
12 3.) Both of these claims require Opposer to assert and prove ownership of the asserted marks. 15
13 U.S.C. §§ 1052(d); 1125(c). Since, under U.S. law, trademark rights arise from use, whether
14 Opposer has ever used the mark GRAM is relevant to the scope of rights Opposer claims in the marks
15 upon which it bases this opposition proceeding. Opposer’s relevance objection is thus unfounded
16 because it is not “clear, beyond any doubt, that the information sought can have no possible bearing
17 upon the issues involved in the particular proceeding.” *Varion. v. Fairfield-Noble.*, 188 U.S.P.Q. at
18 583.

19 Despite extensive meeting and conferring, Opposer refuses to supplement its response to this
20 request. (Gray Decl. Exh. F p. 6.) Opposer must respond to this request in full.

21 **IV. Opposer Must Respond to Flipagram’s Requests for Admission Nos. 3, 4.**

22 Flipagram seeks admissions regarding the extent of its claim of ownership in the term GRAM,
23 either by itself or as a suffix.

- 24 • Request For Admission No. 3: Admit that You have never claimed exclusive ownership of
25 the term GRAM, by itself, as a trademark.
- 26 • Request For Admission No. 4: Admit that You have never claimed exclusive trademark rights
27 in the suffix -GRAM for Opposer's Goods and Services.

28 (Gray Decl. Exh. A pp. 4-5.)

1 In substantive response to these requests, Opposer merely states: “the term ‘GRAM’ is used
2 and recognized by consumers as a reference to Instagram, such that unauthorized use of the term
3 GRAM in a mark, in certain circumstances, is likely to cause confusion or dilution.” (Gray Decl.
4 Exh. A pp. 4-5.) This answer is non-responsive. Whether GRAM is recognized by consumers as a
5 reference to Instagram is entirely separate from whether Instagram has ever claimed exclusive
6 ownership or trademark rights in GRAM.

7 Contrary to Opposer’s assertion, the requests do not call for legal conclusions. Rather, they
8 call for an admission as to the fact whether Opposer ever claimed the specified rights. Such requests
9 are proper. Fed. R. Civ. P. 36(a)(1)(A). Accordingly, Opposer must respond in a manner that
10 directly addresses the substance of the requests.

11 Despite extensive meeting and conferring, Opposer refuses to supplement its responses to
12 these requests. (Gray Decl. Exh. F p. 6.) Opposer must respond to these requests in full.

13 **V. Opposer Must Respond to Flipagram’s Requests for Admission Nos. 5, 6, 11, 13-15.**

14 Flipagram seeks admissions regarding Instagram’s understanding of the meaning of the
15 components of its asserted marks. Except for Request Nos. 5 and 6,² Opposer claims it is unable to
16 admit or deny these requests.

- 17 • Request For Admission No. 5: Admit that the INSTA- prefix in Your INSTAGRAM mark
18 connotes "instant."³
- 19 • Request For Admission No. 6: Admit that the -GRAM suffix in Your INSTAGRAM mark
20 connotes "message" or "recording."⁴
- 21 • Request For Admission No. 11: Admit that the prefix INSTA- connotes a thing, action or
22 feature which occurs instantly.
- 23 • Request For Admission No. 13: Admit that the suffix -GRAM connotes a message.
- 24 • Request For Admission No. 14: Admit that the suffix -GRAM connotes a recording.

25 ² Opposer’s substantive responses to specific requests are provided in the footnotes that follow.

26 ³ In substantive response, Opposer stated only “Admit that the ‘INSTA-’ prefix in the INSTAGRAM
27 mark is recognized by consumers as a reference to Instagram.” (Gray Decl. Exh. A p. 6.)

28 ⁴ In substantive response, Opposer stated only “Admit that the ‘-GRAM’ suffix in the INSTAGRAM
mark is recognized by consumers as a reference to Instagram.” (Gray Decl. Exh. A p. 6.)

1 • Request For Admission No. 15: Admit that the suffix -GRAM connotes a communication.
2 (Gray Decl. Exh. A pp. 6, 8-10.)

3 Opposer’s answers to Request Nos. 5 and 6 are nonresponsive. Whether GRAM is
4 recognized by consumers as a reference to Instagram is entirely separate from what Instagram
5 understands the components of its mark to mean.

6 Opposer’s objection as to relevance is unfounded since Opposer has asserted a claim of
7 likelihood of confusion under Lanham Act § 2(d). One of the elements to be evaluated in a § 2(d)
8 claim is the similarity of the marks at issue “as to appearance, sound, *connotation* and commercial
9 impression.” *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973) (emphasis
10 added). Accordingly, the meaning of the components of the mark is relevant to Instagram’s claim.
11 Nor is the term “connotes” vague and ambiguous. The verb comes directly from the *DuPont* holding
12 that governs the Board’s analysis in this proceeding.

13 Despite extensive meeting and conferring, Opposer refuses to supplement its responses to
14 these requests. (Gray Decl. Exh. F p. 6.) Opposer should be required to do so.

15 **VI. Opposer Must Respond to Flipagram’s Requests for Admission No. 12.**

16 Flipagram seeks an admission regarding the fact that USPTO assigned a pseudo-mark in
17 connection with the application that is the subject of this proceeding. Opposer’s response is evasive.

18 • Request For Admission No. 12: Admit that in the application for Your INSTAGRAM mark
19 Reg. No. 4,146,057, the USPTO assigned the pseudo mark "INSTANT GRAM."⁵
20 (Gray Decl. Exh. A p. 9.)

21 This request is relevant because it seeks to establish a fact about the USPTO history of
22 Opposer’s mark, not reasonably subject to dispute, without the necessity of formal proof at trial. *See,*
23 *e.g., Champlin v. Oklahoma Furniture Mfg. Co.*, 324 F.2d 74 (10th Cir. 1963). Opposer denies this
24 request, apparently based on a crabbed reading of the phrase “in the application.” Despite
25 Flipagram’s clarification that this phrase refers to the file wrapper associated with Reg. No.

26 _____
27 ⁵ In substantive response, Opposer stated: “Deny that the USPTO took any action ‘in the application’
28 for the INSTAGRAM mark.” (Gray Decl. Exh. A p. 9.)

1 4,146,057, Opposer still refuses to supplement its response. (Gray Decl. Exh. F p. 6.) The USPTO's
2 assignment of a pseudomark to the referenced application is a fact readily verifiable by reference to
3 the application history. Accordingly, the denial does not appear to fairly meet the substance of the
4 request. Opposer must respond to this request.

5 **VII. Opposer Must Respond to Flipagram's Requests for Admission Nos. 16-17.**

6 Flipagram seeks admissions regarding certain dictionary definitions that are not open to
7 dispute and that are relevant to the issues in this proceeding.

- 8 • Request For Admission No. 16: Admit that a Random House Dictionary definition of the
9 suffix -GRAM, attached hereto in Exhibit A, is "a combining form extracted from telegram,
10 used in the formation of compound words that have the general sense 'message, bulletin.'"
11 • Request For Admission No. 17: Admit that the Online Etymology Dictionary definition of
12 the etymology of -GRAM, attached hereto in Exhibit A, is a "suffix from telegram (1852),
first abstracted 1979 (in Gorillagram, a proprietary name in U.S.), and put to wide use in
forming new words, such as stripagram (1981)."

13 (Gray Decl. Exh. A pp. 10-11.)

14 A request for admission may seek an admission that a document is genuine. Fed. R. Civ. P.
15 36(a). Opposer's objections on the ground that these requests would require it "to authenticate and
16 verify a third party internet printout" are thus unfounded. Opposer's objection that the request is
17 vague, ambiguous is misleading because it refers to the Random House dictionary, while the
18 document comes from www.dictionary.com, is equally unfounded. www.dictionary.com is simply
19 the URL from which the document was printed. Indeed, the document on its face states that it is
20 "based on the Random House Dictionary," and bears a Random House Dictionary copyright notice
21 under the definition in question. Likewise, the objection that Exhibit A to the requests "does not
22 appear to include an 'Online Etymology Dictionary definition" is simply wrong. The second page of
23 Exhibit A plainly states:

24 "Word Origin and History for -gram

25 "suffix from telegram (1852), first abstracted 1979 (in Gorillagram, a proprietary name in
26 U.S.), and put to wide use in forming new words, such as stripagram (1981). The
27 construction violates Greek grammar, as an adverb could not properly form part of a
compound noun.

28 Online Etymology Dictionary, © 2010 Douglas Harper."

1 Lastly, the fact that the page contains multiple definitions of the term “-gram” is immaterial
2 given that Request No. 16 seeks an admission regarding a specific one of those definitions.

3 Despite extensive meeting and conferring, Opposer refuses to supplement its responses to
4 these requests. (Gray Decl. Exh. F p. 6.) Opposer should be required to respond to these requests.

5 **VIII. Opposer Must Respond to Flipagram’s Requests for Admission Nos. 20-22.**

6 Flipagram seeks admissions regarding the fact that Opposer has no evidence of consumer
7 confusion between the parties’ marks and services.

- 8 • Request For Admission No. 20: Admit that You have not received any Third Party
9 communications contemplating, or inquiring about, any association or affiliation between
10 You and Flipagram.
- 11 • Request For Admission No. 21: Admit that You are unaware of any actual consumer
12 confusion arising as between You and Flipagram.
- 13 • Request For Admission No. 22: Admit that You are unaware of any actual consumer
14 contusion arising as between Opposer’s Marks and the mark FLIPAGRAM.

14 (Gray Decl. Exh. A p. 12.)

15 These requests could not be more probative, because they go to the central question in this
16 case: whether consumers are likely to be confused by the parties’ respective marks. Yet Opposer’s
17 only substantive response to each request is that it “has insufficient information to admit or deny the
18 Request and on that basis denies the Request.” (*Id.*) Where a party makes this claim, the answer must
19 “state in detail why the answering party cannot truthfully admit or deny it. Fed. R. Civ. P. 36(a).
20 Instagram has not satisfied this requirement. Moreover, Instagram’s objections to these requests are
21 unfounded. The requests are not vague and ambiguous, because actual confusion is a well-defined
22 concept in trademark law. And since the requests seek admissions regarding Instagram’s awareness,
23 plainly they do not call for information outside of Instagram’s possession, custody or control.

24 Despite extensive meeting and conferring, Opposer refuses to supplement its responses to
25 these requests. (Gray Decl. Exh. F. p. 6.)

26 **IX. Opposer Must Respond to Flipagram’s Requests for Admission Nos. 28-31.**

27 Flipagram seeks admissions regarding the timing of the following events relating to the
28 FLIPAGRAM mark: (1) Opposer’s awareness of the mark; (2) Opposer’s first complaint to

1 Flipagram regarding the mark; and (3) Opposer’s assertion of a legal challenge to Flipagram
2 regarding the mark.

- 3 • Request For Admission No. 28: Admit that You knew of Flipagram’s use of the trademark
4 FLIPAGRAM by no later than March 3, 2012.
- 5 • Request For Admission No. 29: Admit that the first time you contacted Flipagram to
6 complain regarding the trademark FLIPAGRAM was November 20, 2013.⁶
- 7 • Request For Admission No. 30: Admit that You did not assert a Legal Challenge to
8 Flipagram's right to use the trademark FLIPAGRAM until November 20, 2013.⁷
- 9 • Request For Admission No. 31: Admit that You did not assert a Legal Challenge to
10 Flipagram’s right to register the trademark FLIPAGRAM until January 9, 2014.⁸

10 (Gray Decl. Exh. A pp. 14-16.)

11 These requests are relevant to Flipagram’s defenses of estoppel by consent and unclean hands,
12 as well as the absence of a likelihood of confusion. For example, Opposer knew of Flipagram’s
13 trademark by March 2012, yet did not challenge the mark until November 2013, only after Opposer
14 had benefitted from Flipagram’s help building an Instagram “ecosystem” and had invested significant
15 resources building goodwill in its name. Such evidence supports a finding that it would be
16 inequitable for Opposer to withdraw its consent to Flipagram’s name, and that Opposer does not
17 really believe the name to be confusing.

18
19 _____
20 ⁶ In substantive response, Opposer only states: “Admit that Flipagram's use of the Instagram service
21 and Instagram API's were at all times subject to the then-current applicable terms, that Flipagram has
22 been in violation of those terms since at least as early as August 2013, and further admit that
23 Instagram sent a brand violation notice regarding Flipagram at least as early as November 20, 2013.”
(Gray Decl. Exh. A pp. 14-16.)

24 ⁷ In substantive response, Opposer only states: “Admit that Flipagram's use of the Instagram service
25 and Instagram API's were at all times subject to the then-current applicable terms, that Flipagram has
26 been in violation of those terms since at least as early as August 2013, and further admit that
27 Instagram sent a brand violation notice regarding Flipagram at least as early as November 20, 2013.”
(Gray Decl. Exh. A pp. 14-16.)

28 ⁸ In substantive response, Opposer only states: “Admit that Instagram admits that Instagram sent a
brand violation notice regarding Flipagram at least as early as November 20, 2013 and timely
opposed registration of the FLIPAGRAM mark on July 7, 2014.” (Gray Exh. A pp. 14-16.)

1 Opposer's objections to these requests are baseless. The requests are not overly broad or
2 unduly burdensome because they only require Opposer to inquire as to the knowledge of employees
3 who are reasonably likely to have responsive information.

4 Despite extensive meeting and conferring, Opposer refuses to supplement its responses to
5 these requests. (Gray Decl. Exh. F pp. 6-7.) Opposer should be required to respond to these requests.

6 **X. Opposer Must Respond to Flipagram's Requests for Admission Nos. 35-42.**

7 Flipagram seeks admissions regarding Opposer's enforcement efforts with respect to its
8 marks. Opposer has refused to provide any substantive response to these requests.

- 9 • Request For Admission No. 35: Admit that You have never asserted a Legal Challenge to the
10 mark INSTAPLACE, reflected in Reg. No. 4457101.
- 11 • Request For Admission No. 36: Admit that You have never asserted a Legal Challenge to the
12 mark INSTAFOOD, reflected in Reg. No. 4457116.
- 13 • Request For Admission No. 37: Admit that You have never asserted a Legal Challenge to the
14 mark INSTAWEATHER, reflected in Reg. No. 4457096.
- 15 • Request For Admission No. 38: Admit that You have never asserted a Legal Challenge to the
16 mark INSTACART, reflected in Serial No. 86323403.
- 17 • Request For Admission No. 39: Admit that You have never asserted a Legal Challenge to the
18 mark INSTAPLY, reflected in Reg. No. 4530667.
- 19 • Request For Admission No. 40: Admit that You have never asserted a Legal Challenge to the
20 mark INSTACURITY, reflected in Reg. No. 4520291.
- 21 • Request For Admission No. 41: Admit that You have never asserted a Legal Challenge to the
22 mark HIPSTAMATIC, reflected in Reg. No. 4012304.
- 23 • Request For Admission No. 42: Admit that You have never asserted a Legal Challenge to the
24 mark INSTAMATIC, reflected in Serial No. 79164380.

25 (Gray Decl. Exh. A pp. 17-19.)

26 The fact that Opposer earlier took inconsistent positions in similar proceedings involving
27 similar marks is plainly discoverable. *See, e.g., American Soc'y of Oral Surgeons v. American*
28 *College of Oral and Maxillofacial Surgeons*, 201 U.S.P.Q. 531, at *2-3 (TTAB 1979); *Interstate*
Brands Corp. v. Celestial Seasonings, Inc., 576 F.2d 926, 929 (C.C.P.A. 1978); *Olin Corp. v. S.A.T.*
Arms Tech., 2008 WL 4354195, at n.17 (TTAB 2008). Moreover, Opposer's position on INSTA-

1 formative marks is directly relevant to the overall impression and descriptiveness of Opposer’s
2 INSTAGRAM marks. *In re Oppedahl & Larson LLP*, U.S.P.Q.2d 1370 (Fed. Cir. 2004) (“In
3 considering the mark as a whole, the [Trademark] Board may weigh the individual components of the
4 mark to determine the overall impression or the descriptiveness of the mark and its various
5 components.”).

6 Despite extensive meeting and conferring, Opposer refuses to respond to these requests.
7 (Gray Decl. Exh. F p. 17.) Opposer must do so.

8 **XI. Opposer Must Respond to Flipagram’s Requests for Admission Nos. 56, 58-61.**

9 Flipagram seeks admissions regarding the derivative nature of the INSTAGRAM marks that it
10 seeks to enforce, a fact that limits Opposer’s trademark rights. Opposer refused to provide any
11 substantive response to these requests.

- 12 • Request For Admission No. 56: Admit that when selecting Opposer's Marks, You were aware
13 of the mobile application HIPSTAMATIC.
- 14 • Request For Admission No. 58: Admit that Your first design mark, attached hereto in Exhibit
15 B, is a rendering of the Polaroid One Step Rainbow Camera.
- 16 • Request For Admission No. 59: Admit that Your “Multi-Color Camera” design mark, Reg.
17 No. 4531884, is Derived from the Polaroid OneStep Rainbow Camera.
- 18 • Request For Admission No. 60: Admit that the color spectrum on Your “Multi-Color
19 Camera” design mark, Reg. No. 4531884, is Derived from Polaroid Color Spectrum
20 trademark reflected in Reg. Nos. 4349054 and 4352706.
- 21 • Request For Admission No. 61: Admit that the square format of Instagram photos is Derived
22 from the square format of Polaroid instant photos.

23 (Gray Decl. Exh. A pp. 24-25.)

24 These requests are relevant because they help establish that the marks at issue are derivative
25 of other trademarks and therefore entitled to a limited scope of protection at best. Opposer’s Notice
26 of Opposition defines its marks as any mark containing the word “Instagram,” yet components of
27 Instagram’s design marks copy, or are derivative of, pre-existing third party trademarks. Flipagram is
28 challenging Opposer’s right to register these marks. *See Varian Assoc. v. Fairfield Noble Corp.*, 188

1 U.S.P.Q. 581 (TTAB 1975) (party is entitled to discovery relating to the circumstances surrounding
2 adoption of the mark at issue).

3 Opposer’s objection that the term “Derived” is vague is specious because that term has been
4 defined (and in any event is inapplicable to Request for Admission No. 58, which does not use the
5 term). Moreover, these requests seek information that is reasonably calculated to lead to the
6 discovery of admissible evidence because Opposer put Trademark Reg. No. 4,531,884 at issue by
7 suggesting in discovery that a version of Flipagram’s logo is confusingly similar to that logo (Gray
8 Decl. Exh. L p. 8, Request for Production No. 21.)

9 **XII. Opposer Must Respond to Flipagram’s Requests for Admission Nos. 63-65.**

10 Flipagram seeks admissions regarding the provisions of Instagram’s API Terms of Use, which
11 applied at the time Flipagram adopted the FLIPAGRAM mark. Opposer has refused to provide any
12 substantive answer to these requests.

- 13 • Request For Admission No. 63: Admit that the API Terms of Use is a license.
- 14 • Request For Admission No. 64: Admit that the API Terms of Use purported to license use of
15 the word GRAM to users of the Instagram API.
- 16 • Request For Admission No. 65: Admit that the API Terms of Use purported to license use of
17 the word INSTA to users of the Instagram API.

18 (Gray Decl. Exh. A pp. 26-27.)

19 Instagram objects on the grounds that it is not required to respond to questions of law. (Gray
20 Decl. Exhs. D p. 6; Exh. F p. 7.) The existence of a license is a question of fact, not of law. *See, e.g.,*
21 *Bridgeport Music, Inc. v. DJ Yella Muzick*, 99 Fed. Appx. 686, 691 (6th Cir. 2004) (existence of
22 nonexclusive license is a question of fact). Moreover, “Rule 36 allows for requests applying law to
23 fact. ...” *Music Grp. Macao Commercial Offshore Ltd. v. Foote*, No. 14-cv-03078-JSC, 2015 WL
24 579688, at *2 (N.D. Cal. Feb. 11, 2015). These requests seek admissions that the Instagram API was
25 a license, and admissions regarding the terms of the license. These are not legal conclusions. These
26 requests are both relevant and reasonably calculated to lead to the discovery of admissible evidence,
27 given Flipagram’s defense that Opposer has abandoned its trademark rights by way of “naked
28 licensing.”

1 **XIII. Opposer Must Respond to Flipagram’s Requests for Admission Nos. 67-69.**

2 Flipagram seeks admissions regarding Opposer’s goods and services. Opposer refused to
3 provide any substantive answer to these requests.

- 4 • Request For Admission No. 67: Admit that the only manner in which You give users the
5 ability to upload photographs to Your Service is through Your App.
- 6 • Request For Admission No. 68: Admit that Your App is only available for use on mobile
7 devices.
- 8 • Request For Admission No. 69: Admit that Your Service did not introduce video support
9 until June 20, 2013.

9 (Gray Decl. Exh. A pp. 27-28.)

10 Opposer objects on the grounds that the identification of goods and services in its registrations is
11 what controls rather than how Instagram uses the marks at issue. (Gray Decl. Exh. F, pp. 7-8.)

12 Opposer’s sole legal authority cited in support of this refusal is *The Kosher Garden, Inc. v. Sioux Falls*
13 *Grocery I, LLC*, Cancellation No. 92054073, 2013 WL 6664935, at * 4 (TTAB 2013). This case did not
14 address the discoverability of information relating to an opposer’s goods and services. In pertinent part,
15 that case addressed whether there was a genuine issue of material fact regarding the similarity of the
16 parties’ services sufficient to preclude summary judgment.

17 “These requests are relevant to opposer’s allegations and claims as pleaded, as admitted by the
18 parties, as they seek information about the scope of use, relatedness of the parties’ goods and/or the basis
19 for potential counterclaims.” *The Phillies v. Philadelphia Consolidated Holding Corp.*, 107 U.S.P.Q.2d
20 2149, at *6 (TTAB 2013). Opposer can easily answer whether its product provides the referenced
21 features. Accordingly, Opposer must provide substantive responses to these Requests.

22 **XIV. Opposer Must Respond to Flipagram’s Requests for Admission Nos. 70-71.**

23 Flipagram seeks admissions regarding the timing of Opposer’s release of its product and the
24 channels of trade through which Opposer released it.

- 25 • Request For Admission No. 70: Admit that the Instagram service was not released on the
26 Android platform until April 2012.
- 27 • Request For Admission No. 71: Admit that You did not make the Instagram service available
28 on the world wide web until February 2013.

1 (Gray Decl. Exh. B pp. 4-5.)

2 These requests seek to establish certain facts, not reasonably subject to dispute, without the
3 necessity of formal proof at trial. This is a central and well-settled function of requests for admission.
4 *See, e.g., Champlin v. Oklahoma Furniture Mfg. Co.*, 324 F.2d 74 (10th Cir. 1963). Request No. 70
5 seeks to confirm the date that Instagram first became available on the Android platform. This is relevant
6 to the lack of fame of the INSTAGRAM Marks as of Flipagram’s first use and to the parties’ respective
7 channels of trade in the *DuPont* analysis. Similarly, Request No. 71 seeks to confirm the date that
8 Instagram first provided access to its service on the web, a fact that was well-publicized in an Instagram
9 blog post. (Declaration of M. Elena Benavente in support of Motion to Test Sufficiency, Exh. C.) This
10 request is relevant to the lack of fame and strength of the INSTAGRAM Marks, Opposer’s channels of
11 trade, and the validity of Opposer’s trademark registrations.

12 **XV. Opposer Must Respond to Flipagram’s Requests for Admission Nos. 73-74, 76.**

13 Flipagram seeks admissions regarding the genuineness and accuracy of certain documents.

- 14 • Request For Admission No. 73: Admit that Exhibit A hereto is a true and correct copy of a
15 page from Your online “Help Center” that existed on January 7, 2014.
- 16 • Request For Admission No. 74: Admit that Exhibit B hereto is a true and correct copy of a
17 page from Your online “Help Center” that existed on January 7, 2014.
- 18 • Request For Admission No. 76: Admit that Exhibit C hereto is a true and correct copy of an
19 exchange of correspondence between Flipagram and Instagram relating to the subject
20 “Reporting a Violation or Infringement of Your Rights – Trademark” that You received on or
21 about January 7, 2014.

20 (Gray Decl. Exh. B pp. 5-7.)

21 These are routine requests that perform another central function of requests for admission. Fed.
22 R. Civ. Proc. 36(a)(1)(B). Opposer’s objections and responses are evasive. For example, request Nos.
23 73-74 seek to confirm the accuracy of Opposer’s own policies from Instagram’s own website as of a
24 certain date. Opposer claims it is unable to respond based on the fact that these pages are archived
25 through a web archive. (Gray Decl. Exh. B pp. 5-7.) Obviously, Opposer has the ability to confirm the
26 accuracy of these pages. Similarly, Request No. 76 seeks to confirm the genuineness of email
27 correspondence between the parties. But Opposer admits only that the document “purports to be an
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1 email chain,” sidestepping the purpose of the request: to dispose of an issue about which there is no
2 actual dispute. (Gray Decl. Exh. B pp. 6-7.)

3 **XVI. Opposer Must Respond to Flipagram’s Requests for Admission Nos. 79-81.**

4 Flipagram seeks admissions regarding limitations to the goods and services that Opposer actually
5 offers under its trademarks:

- 6 • Request For Admission No. 79: Admit that You are not providing services involving
7 publishing of electronic publications for others.
- 8 • Request For Admission No. 80: Admit that You are not providing computer services
9 involving hosting online web facilities for others for organizing and conducting meetings,
10 events and interactive discussions via communication networks.
- 11 • Request For Admission No. 81: Admit that You are not providing search engines for the
12 Internet.

(Gray Decl. Exh. B pp. 7-8.)

13 In its applications to register the INSTAGRAM Marks at issue in this dispute, Opposer claimed
14 to be using the marks in connection with various goods and services that it appears Opposer does not
15 actually provide. Flipagram tests these claims in this series of requests, adopting the exact language that
16 Opposer itself used in its goods and services descriptions with the USPTO. These requests are plainly
17 relevant because they speak to the strength of the marks and Flipagram is challenging the validity of
18 Opposer’s registrations. *See The Phillies*, 107 U.S.P.Q.2d 2149, at *6. Opposer’s vagueness objections
19 are specious, since Opposer drafted the very language it claims to be vague.

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1 **CERTIFICATE OF TRANSMISSION**

2 I hereby certify that true and correct copies of the MOTION TO TEST SUFFICIENCY OF
3 OPPOSER INSTAGRAM’S RESPONSES TO FLIPAGRAM’S FIRST AND SECOND SETS OF
4 REQUESTS FOR ADMISSION, DECLARATION OF NAOMI JANE GRAY IN SUPPORT OF
5 MOTION TO TEST SUFFICIENCY OF OPPOSER INSTAGRAM’S RESPONSES TO
6 FLIPAGRAM’S FIRST AND SECOND SETS OF REQUESTS FOR ADMISSION, and
7 DECLARATION OF M. ELENA BENAVENTE IN SUPPORT OF MOTION TO TEST
8 SUFFICIENCY OF OPPOSER INSTAGRAM’S RESPONSES TO FLIPAGRAM’S FIRST AND
9 SECOND SETS OF REQUESTS FOR ADMISSION (Opposition No. 91217238) are being
10 electronically transmitted to the Trademark Trial and Appeal Board on December 28, 2015.

11 /Naomi Jane Gray /
12 Naomi Jane Gray

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7 Attorneys for Applicant/Petitioner
FLIPAGRAM, INC.

8 Mark: FLIPAGRAM
9

10 **IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**
11 **BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**
12

13 INSTAGRAM, LLC, a Delaware limited
14 liability company,

15 Opposer/Registrant
16

17 v.

18 FLIPAGRAM, INC., a California
corporation,

19 Applicant/Petitioner
20
21
22
23
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25
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27
28

**DECLARATION OF NAOMI JANE
GRAY IN SUPPORT OF MOTION TO
TEST SUFFICIENCY OF RESPONSES
TO FLIPAGRAM'S FIRST AND
SECOND SETS OF REQUESTS FOR
ADMISSION
[TBMP 524]**

Opposition No. 91217238

Application No. 86042264

1 I, Naomi Jane Gray, declare as follows:

2 1. I am a partner of Harvey Siskind LLP, counsel for Opposer/Registrant Instagram,
3 LLC. I make this declaration freely and of my own personal knowledge. If called as a witness, I
4 could and would competently testify to the matters set forth.

5 2. On July 16 and September 29, 2015, Flipagram served Opposer with requests for
6 admission seeking admissions as to matters that are relevant and not reasonably subject to dispute. In
7 its responses, Opposer refused to provide any substantive response to 43 out of 81 requests for
8 admission, more than half of the total. Annexed hereto as **Exhibit A** and **Exhibit B** are true and
9 correct copies of Opposer's Responses to Applicant's First Set of Requests for Admissions and
10 Opposer's Responses to Applicant's Second Set of Requests for Admissions, respectively.

11 3. I began the process of meeting and conferring with Opposer's counsel regarding
12 Opposer's deficient discovery responses in September. Annexed hereto as **Exhibit C** is a true and
13 correct copy of my initial meet and confer letter to Opposer's counsel, Bobby Ghajar, dated
14 September 24, 2015.

15 4. I conducted telephone conferences with Opposer's counsel, Marcus Peterson,
16 regarding Opposer's deficient discovery responses on October 8 and 14, 2015. The first telephone
17 conference, on October 8, lasted approximately 3 hours. I wrote to Mr. Peterson to follow up on
18 these discussions on October 30, 2015. Annexed hereto as **Exhibit D** is a true and correct copy of
19 my October 30, 2015 letter to Mr. Peterson.

20 5. On November 3, 2015, I wrote to Mr. Peterson to initiate discussions regarding
21 Opposer's deficient responses to Applicant Flipagram, Inc.'s Second Set of Requests for Admission.
22 Annexed hereto as **Exhibit E** is a true and correct copy of my November 3, 2015 letter to Mr.
23 Peterson.

24 6. Opposer responded to my letters and followed up on our discussions by letter dated
25 November 18, 2015. Annexed hereto as **Exhibit F** is a true and correct copy of Mr. Peterson's
26 November 18, 2015 letter to me.

1 7. I engaged in further telephonic meet and confer sessions with Mr. Peterson regarding
2 both sets of responses on November 19, December 2, December 7 and December 11, 2015.

3 8. During the course of the meet and confer process, Opposer agreed to supplement its
4 responses as to Requests for Admission Nos. 33, 34, and 77-78. Opposer's counsel also committed
5 to "look at" Opposer's response to Request for Admission No. 12 again and consider supplementing
6 that response. Opposer continues to refuse to respond to the remaining requests for admission at
7 issue.

8 9. During the parties' December 2 meet and confer telephone conference, I asked
9 opposing counsel if Opposer would be prepared to supplement its responses and production as to the
10 matters that the parties had reached agreement within the following one to two weeks, or by
11 December 18, 2015. Opposing counsel responded that two weeks "would probably be more
12 accurate" but that the following week would not work. Accordingly, the parties agreed to supplement
13 their responses and productions by December 18, 2015. In view of that agreed supplementation date,
14 I proposed to opposing counsel that the parties stipulate to extend the deadline for the parties to make
15 expert disclosures, which at that time was December 28, 2015. I also informed opposing counsel that
16 Flipagram intended to move to compel further responses and production of documents if the parties
17 could not reach agreement on their outstanding disputes soon.

18 10. I confirmed the parties' agreement to supplement on December 18 during my
19 subsequent telephone conferences with opposing counsel on December 7 and 11, and in an email
20 dated December 14, 2015. Annexed hereto as **Exhibit G** is a true and correct copy of my December
21 14, 2015 email to Mr. Peterson.

22 11. During our December 11 telephone conference, opposing counsel stated that he was
23 still "trying to address" some issues with Flipagram's discovery requests so that it could respond to
24 the requests as propounded and obviate the need for a motion to compel. Opposer stated that it
25 expected that it would "maybe be able to supplement" its responses to "a number of issues [the parties]
26 have been unable to agree on" sometime after the New Year. Opposer did not identify any specific
27 requests other than interrogatory nos. 1 and 2 and request for product no. 3; explain how it would
28

1 supplement its responses; or provide an anticipated response date beyond estimating that
2 supplementation could occur sometime “after the first of the year.” Opposer proposed extending all
3 deadlines while the parties continued to work to resolve discovery issues.

4 12. I responded that the meet and confer process had taken far too long already. I
5 explained that although Flipagram was willing to consider an extension of all deadlines, it did not
6 think it would have much appetite for any further delay in resolving the parties’ discovery disputes
7 based on an amorphous promise that unspecified future supplementation would resolve the
8 outstanding disputes. I asked for clarification regarding which responses Opposer was now
9 proposing to supplement; how Opposer would supplement those responses; and when Opposer would
10 do so. Opposing counsel could not provide any further detail other than to say that the
11 supplementation would occur “after the first of the year” and would include interrogatory nos. 1 and
12 2 and request for production no. 3. Significantly, the discussion regarding supplementation “after the
13 first of the year” related only to discovery requests as to which the parties had not yet reached
14 agreement. Opposing counsel never indicated that Opposer would refrain from supplementing those
15 responses and productions as to which the parties had already reached agreement pending the
16 additional supplementation it was considering.

17 13. On December 15, 2015 I emailed opposing counsel to ensure that it still planned to
18 provide its supplemental production on December 18. Annexed hereto as **Exhibit H** is a true and
19 correct copy of my December 15, 2015 email to Mr. Peterson.

20 14. Opposing counsel responded to my December 14 email on December 15, 2015.
21 Although opposing counsel conceded that the parties had agreed to a December 18 supplementation
22 date, he simultaneously and erroneously took the position that Flipagram had never confirmed that it
23 would produce documents on that date. Despite Flipagram’s clearly stated commitment, both during
24 telephone conferences and in subsequent emails, to supplementing its production on December 18,
25 Opposer refused to adhere to the agreed-upon mutual supplementation on that date. Instead, Opposer
26 suggested that the parties’ discussion regarding supplementation “after the first of the year” of
27 responses still subject to dispute also applied to responses as to which supplementation had been
28

Exhibit A
to Declaration of Naomi Jane Gray in Support of
Motion to Test Sufficiency of Responses to
Flipagram's First and Second Sets
of Requests for Admission

Offered by Applicant Flipagram, Inc.

Instagram, LLC v. Flipagram, Inc.

Opposition No. 91217238

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

Instagram, LLC,

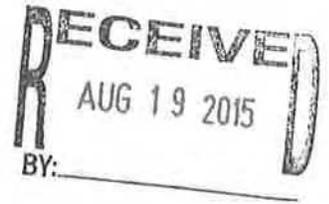
Opposer,

v.

Flipagram, Inc.,

Applicant.

§ Opposition No. 91217238
§
§ Serial No.: 86/042,264
§
§ Mark: FLIPAGRAM
§
§ International Class: 09
§
§ Published: January 7, 2014
§



**OPPOSER'S RESPONSES TO APPLICANT'S FIRST SET OF
REQUESTS FOR ADMISSION**

I. GENERAL OBJECTIONS

The following general objections and statements apply to each of the definitions, instructions, and Requests for Admission propounded by Flipagram, Inc. ("Requests") and are hereby incorporated within each response set forth below. No specific objections are intended to constitute, and should not be construed as constituting, a waiver of any general objection.

1. Instagram objects to each Request to the extent it seeks information that is publicly available, or is otherwise readily available to Flipagram from other sources, and the burden and expense of obtaining such documents is not greater for Flipagram than it is for Instagram.

2. Instagram objects to each Request to the extent the information sought is not in Instagram's possession, custody, or control.

3. Instagram objects to each Request to the extent it seeks information that is proprietary to Instagram and/or other third parties.

4. Instagram objects to each Request to the extent it seeks information that constitutes confidential third-party information disclosed to Instagram on the condition that, or subject to an obligation that, Instagram keep that information confidential.

5. Instagram objects to each Request to the extent it seeks production of information that is prepared in anticipation of litigation, or is protected from disclosure, in whole or in part,

by the attorney-client privilege, the work product doctrine, or any other applicable privileges, including, without limitation, the common interest and joint defense privileges. Instagram hereby claims such privileges, protections, and immunities to the extent implicated by each Request. The inadvertent disclosure of any privileged or protected information will not constitute a waiver of any privilege or protection or of any other grounds for objecting to discovery with respect to such response.

6. Instagram objects to each Request to the extent it seeks the disclosure of information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

7. Instagram objects to each Request, and any instruction or definition, to the extent that it is inconsistent with or seeks to impose obligations on Instagram beyond those imposed by the Federal Rules of Civil Procedure, the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”), and/or any other applicable law or rules.

8. In addition to the foregoing General Objections, Instagram may also state Specific Responses and Objections to the Requests where appropriate, including responses and objections that are not generally applicable to each Request. By setting forth such Specific Responses and Objections, Instagram does not intend to limit or restrict the General Objections set forth above.

9. Instagram’s responses herein are based on facts presently known, and represent a diligent and good faith effort to comply with the Requests. Instagram’s investigation into the matters specified is continuing. Accordingly, Instagram reserves the right, where appropriate, to supplement, alter and/or change the responses contained herein pursuant to Federal Rule of Civil Procedure 26(e). Furthermore, Instagram reserves the right, at trial or during other proceedings in this action, to rely on information, documents, things, evidence, or other matters in addition to the information, documents and/or things produced in response to these Requests, whether or not such information, documents, things, evidence, or other matters are newly discovered or are now in existence, but have not been located despite diligent and good faith effort.

10. Instagram's responses herein do not in any way constitute an adoption of Flipagram's purported Definitions or words or phrases to the extent that they purport to define words or phrases to have a meaning different from their commonly understood meanings or to include more than their commonly understood definitions, particularly with respect to the terms identified in these objections.

11. Instagram objects to Flipagram's requests as overly broad and irrelevant to the extent they are not limited to the United States. Unless stated otherwise, Instagram's responses pertain to the United States.

12. Instagram reserves the right to amend these responses and objections, to correct inadvertent errors, or otherwise to supplement its responses and objections.

II. OBJECTIONS TO DEFINITIONS

1. Instagram objects to the definition of the terms "You," "Your," and "Opposer" and to each Request that uses those terms or a variation thereof, on the grounds that it renders the Requests as being overly broad, unduly burdensome, vague and ambiguous, and oppressive, because it includes entities other than Instagram, and more specifically entities not controlled by Instagram. In addition, Instagram specifically objects to the definition as including "any parent company owning all or part of Opposer...." Instagram has no duty or obligation to produce anything not in the possession, custody, or control of Instagram, including anything that may be in the possession of any parent, including Facebook, Inc. Finally, the definition is overly broad and vague in its reference to "the present and former directors, officers, agents, employees, in-house and outside counsel thereof" as it is not clear whether they refer to Instagram or to "any related company." In responding to any requests that refer to this definition, Instagram responds only on its own behalf.

2. Instagram objects to the definition of "API Terms of Use" to the extent it implies that past versions of the API Terms of Use are relevant or controlling on the parties.

3. Instagram objects to the definitions of “GRAM-Formative Mark” and “INSTA-Formative Mark” as vague and ambiguous, overly broad, and irrelevant, as those definitions would, as provided by Applicant, include such terms as “grammar” or “installation.”

4. Instagram objects to the definition of Flipagram’s Goods and Services as vague and ambiguous to the extent that it refers to services “planned to be marketed, promoted, sold, or offered by Applicant,” as that information is in Flipagram’s possession and is currently unknown to Instagram.

5. Similarly, Instagram objects to the definition of “Flipagram’s Marks” as vague and ambiguous, and misleading, as it purports to cover the FLIPAGRAM mark “in any and all formats,” including those formats currently unknown to Instagram, and given that Flipagram’s trademark application subject to this Opposition is in block letter format.

III. RESPONSES TO REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1:

Admit that You have never used the term GRAM, by itself, as a trademark.

RESPONSE TO REQUEST FOR ADMISSION NO. 1:

Instagram objects to the request on grounds that it is not relevant to the issues in this proceeding, as Instagram’s claims are based on infringement and dilution of Opposer’s Marks. Subject to and without waiving the foregoing objections, Instagram responds: the term “GRAM” is used and recognized by consumers as a reference to Instagram.

REQUEST FOR ADMISSION NO. 2:

Admit that You have never sought to register the term GRAM, by itself, as a trademark with the United States Patent and Trademark Office.

RESPONSE TO REQUEST FOR ADMISSION NO. 2:

Instagram objects to the request on grounds that it is not relevant to the issues in this proceeding, as Instagram’s claims are based on infringement and dilution of Opposer’s Marks. Subject to and without waiving the foregoing objections, Instagram responds: Admit.

REQUEST FOR ADMISSION NO. 3:

Admit that You have never claimed exclusive ownership of the term GRAM, by itself, as a trademark.

RESPONSE TO REQUEST FOR ADMISSION NO. 3:

Instagram objects to the Request on the grounds that it is vague and ambiguous as to the phrase “claimed exclusive ownership.” Instagram also objects to the Request as calling for a legal conclusion as to “(claimed) exclusive ownership.” Instagram objects to the request on grounds that it is not relevant to the issues in this proceeding, as Instagram’s claims are based on infringement and dilution of Opposer’s Marks. Subject to and without waiving the foregoing objections, Instagram responds: the term “GRAM” is used and recognized by consumers as a reference to Instagram, such that unauthorized use of the term GRAM in a mark, in certain circumstances, is likely to cause confusion or dilution.

REQUEST FOR ADMISSION NO. 4:

Admit that You have never claimed exclusive trademark rights in the suffix -GRAM for Opposer’s Goods and Services.

RESPONSE TO REQUEST FOR ADMISSION NO. 4:

Instagram objects to the Request on the grounds that it is vague and ambiguous as to the phrase “claimed exclusive trademark rights in the suffix.” Instagram also objects to the Request as calling for a legal conclusion as to “(claimed) exclusive ownership.” Instagram objects to the request on grounds that it is not relevant to the issues in this proceeding, as Instagram’s claims are based on infringement and dilution of Opposer’s Marks. Subject to and without waiving the foregoing objections, Instagram responds: the term “GRAM” is used and recognized by consumers as a reference to Instagram, such that unauthorized use of the term GRAM in a mark, in certain circumstances, is likely to cause confusion or dilution.

REQUEST FOR ADMISSION NO. 5:

Admit that the INSTA- prefix in Your INSTAGRAM mark connotes “instant.”

RESPONSE TO REQUEST FOR ADMISSION NO. 5:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the term “connotes;” 2) the Request calls for speculation as to how consumers perceive the term “Insta” in the INSTAGRAM mark; and 3) the Request is not reasonably calculated to lead to the discovery of admissible evidence, and further, the Request is an improper attempt to dissect Instagram’s registered trademark.

Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Admit that the “INSTA-” prefix in the INSTAGRAM mark is recognized by consumers as a reference to Instagram.

REQUEST FOR ADMISSION NO. 6:

Admit that the -GRAM suffix in Your INSTAGRAM mark connotes “message” or “recording.”

RESPONSE TO REQUEST FOR ADMISSION NO. 6:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the term “connotes;” 2) the Request calls for speculation as to how consumers perceive the term “gram” in the INSTAGRAM mark; 3) the Request is not reasonably calculated to lead to the discovery of admissible evidence, and further, the Request is an improper attempt to dissect Instagram’s registered trademark; and 4) the Request is compound.

Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Admit that the “-GRAM” suffix in the INSTAGRAM mark is recognized by consumers as a reference to Instagram.

REQUEST FOR ADMISSION NO. 7:

Admit that You chose the mark INSTAGRAM in part to convey the meaning “instant telegram.”

RESPONSE TO REQUEST FOR ADMISSION NO. 7:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the term “convey the meaning;” 2) the Request is further vague and ambiguous

in view of the qualification “in part”; and 3) the Request is not reasonably calculated to lead to the discovery of admissible evidence as Instagram’s reasons for its adoption of the INSTAGRAM mark are not relevant to this proceeding.

Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: the mark INSTAGRAM was originally chosen in part, and among other reasons and factors, to suggest the “right here right now” aspect of the product, the concept of retro instant film cameras, the idea of recording things in your life, and/ or to sending a message, such as with a telegram, but now it simply refers to the Instagram product.

REQUEST FOR ADMISSION NO. 8:

Admit that You chose the mark INSTAGRAM in part to convey the meaning “instant message.”

RESPONSE TO REQUEST FOR ADMISSION NO. 8:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the terms “convey the meaning;” and “instant message;” 2) the Request is further vague and ambiguous in view of the qualification “in part”; and 3) the Request is not reasonably calculated to lead to the discovery of admissible evidence as Instagram’s reasons for its adoption of the INSTAGRAM mark are not relevant to this proceeding.

Subject to and without waiving the foregoing objections, Instagram responds: Deny.

REQUEST FOR ADMISSION NO. 9:

Admit that You chose the mark INSTAGRAM in part to convey the meaning “instant recording.”

RESPONSE TO REQUEST FOR ADMISSION NO. 9:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the term “convey the meaning;” 2) the Request is further vague and ambiguous in view of the qualification “in part”; and 3) the Request is not reasonably calculated to lead to the discovery of admissible evidence as Instagram’s reasons for its adoption of the INSTAGRAM mark are not relevant to this proceeding.

Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: the mark INSTAGRAM was originally chosen in part, and among other reasons and factors, to suggest the “right here right now” aspect of the product, the concept of retro instant film cameras, the idea of recording things in your life, and/ or to sending a message, such as with a telegram, but now it simply refers to the INSTAGRAM product.

REQUEST FOR ADMISSION NO. 10:

Admit that You chose the mark INSTAGRAM in part to convey the meaning “instant communication.”

RESPONSE TO REQUEST FOR ADMISSION NO. 10:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the term “convey the meaning;” 2) the Request is further vague and ambiguous in view of the qualification “in part”; and 3) the Request is not reasonably calculated to lead to the discovery of admissible evidence as Instagram’s reasons for its adoption of the INSTAGRAM mark are not relevant to this proceeding.

Subject to and without waiving the foregoing objections, Instagram responds: Deny.

REQUEST FOR ADMISSION NO. 11:

Admit that the prefix INSTA- connotes a thing, action or feature which occurs instantly.

RESPONSE TO REQUEST FOR ADMISSION NO. 11:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the term “connotes;” 2) the Request is vague and ambiguous as this question cannot be answered in the abstract; 3) the Request is overly broad, and not reasonably calculated to lead to the discovery of admissible evidence, as it is not limited to Instagram’s use of the term “gram” (as a suffix or otherwise); and 4) the Request is compound.

In view of these objections, and as currently worded, Instagram is unable to admit or deny the Request.

REQUEST FOR ADMISSION NO. 12:

Admit that in the application for Your INSTAGRAM mark Reg. No. 4,146,057, the USPTO assigned the pseudo mark “INSTANT GRAM.”

RESPONSE TO REQUEST FOR ADMISSION NO. 12:

Instagram objects to the Request on the ground that the Request is not reasonably calculated to lead to the discovery of admissible evidence in that assignment of pseudo marks by the USPTO has no legal significance, and pseudo marks are not part of an application or registration.

Subject to Instagram’s foregoing General Objections, it responds: Deny that the USPTO took any action “in the application” for the INSTAGRAM mark.

REQUEST FOR ADMISSION NO. 13:

Admit that the suffix -GRAM connotes a message.

RESPONSE TO REQUEST FOR ADMISSION NO. 13:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the term “connotes;” 2) the Request is vague and ambiguous as this question cannot be answered in the abstract; and 3) the Request is overly broad, and not reasonably calculated to lead to the discovery of admissible evidence, as it is not limited to Instagram’s use of the term “gram” (as a suffix or otherwise).

Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Instagram has insufficient information on which to admit or deny the Request, and on that basis denies the Request.

REQUEST FOR ADMISSION NO. 14:

Admit that the suffix -GRAM connotes a recording.

RESPONSE TO REQUEST FOR ADMISSION NO. 14:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the term “connotes;” 2) the Request is vague and ambiguous as this question cannot be answered in the abstract; and 3) the Request is overly broad, and not reasonably

calculated to lead to the discovery of admissible evidence, as it is not limited to Instagram's use of the term "gram" (as a suffix or otherwise).

Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Instagram has insufficient information on which to admit or deny the Request, and on that basis denies the Request.

REQUEST FOR ADMISSION NO. 15:

Admit that the suffix -GRAM connotes a communication.

RESPONSE TO REQUEST FOR ADMISSION NO. 15:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the term "connotes;" 2) the Request is vague and ambiguous as this question cannot be answered in the abstract; and 3) the Request is overly broad, and not reasonably calculated to lead to the discovery of admissible evidence, as it is not limited to Instagram's use of the term "gram" (as a suffix or otherwise).

Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Instagram has insufficient information on which to admit or deny the Request, and on that basis denies the Request.

REQUEST FOR ADMISSION NO. 16:

Admit that a Random House Dictionary definition of the suffix -GRAM, attached hereto in **Exhibit A**, is "a combining form extracted from telegram, used in the formation of compound words that have the general sense 'message, bulletin.'"

RESPONSE TO REQUEST FOR ADMISSION NO. 16:

Instagram objects to the Request on the following grounds: 1) the Request is an improper attempt to require Instagram to authenticate and verify a third party internet printout; 2) the Request is vague and ambiguous, and misleading, given that Exhibit A appears on its face to be from "Dictionary.com," while the Request refers to "a Random House Dictionary definition"; 3) the Request is also vague and ambiguous because the referenced Exhibit A contains multiple alleged definitions of "-gram."

REQUEST FOR ADMISSION NO. 17:

Admit that the Online Etymology Dictionary definition of the etymology of -GRAM, attached hereto in **Exhibit A**, is a “suffix from telegram (1852), first abstracted 1979 (in Gorillagram, a proprietary name in U.S.), and put to wide use in forming new words, such as stripagram (1981).”

RESPONSE TO REQUEST FOR ADMISSION NO. 17:

Instagram objects to the Request on the following grounds: 1) the Request is an improper attempt to require Instagram to authenticate and verify a third party internet printout; 2) the Request is vague and ambiguous, and misleading, given that Exhibit A (attached to Applicant’s Requests for Admission) does not appear to include an “Online Etymology Dictionary definition.”

REQUEST FOR ADMISSION NO. 18:

Admit that Your INSTAGRAM Marks are not arbitrary.

RESPONSE TO REQUEST FOR ADMISSION NO. 18:

Instagram objects to the Request on the following grounds: 1) the Request calls for a legal conclusion as to the term “arbitrary” and is otherwise vague and ambiguous as to that term; and 2) the Request is compound in that it references the plural “INSTAGRAM Marks.” Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Deny.

REQUEST FOR ADMISSION NO. 19:

Admit that Your INSTAGRAM Marks are not inherently distinctive.

RESPONSE TO REQUEST FOR ADMISSION NO. 19:

Instagram objects to the Request on the following grounds: 1) the Request calls for a legal conclusion as to the term “inherently distinctive” and is otherwise vague and ambiguous as to that term; and 2) the Request is compound in that it references the plural “INSTAGRAM Marks.” Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Deny.

REQUEST FOR ADMISSION NO. 20:

Admit that You have not received any Third Party communications contemplating, or inquiring about, any association or affiliation between You and Flipagram.

RESPONSE TO REQUEST FOR ADMISSION NO. 20:

Instagram objects to the Request on the grounds that it is vague and ambiguous as to the term “contemplating.” Instagram also objects to the Request on grounds that it is compound. Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Instagram has insufficient information to admit or deny the Request and on that basis denies the Request.

REQUEST FOR ADMISSION NO. 21:

Admit that You are unaware of any actual consumer confusion arising as between You and Flipagram.

RESPONSE TO REQUEST FOR ADMISSION NO. 21:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to “actual consumer confusion arising as between”; and 2) the Request calls for information not in Instagram’s possession, custody, or control. Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Instagram has insufficient information to admit or deny the Request and on that basis denies the Request.

REQUEST FOR ADMISSION NO. 22:

Admit that You are unaware of any actual consumer confusion arising as between Opposer’s Marks and the mark FLIPAGRAM.

RESPONSE TO REQUEST FOR ADMISSION NO. 22:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to “actual consumer confusion arising as between”; and 2) the Request calls for information not in Instagram’s possession, custody, or control. Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Instagram has insufficient information to admit or deny the Request and on that basis denies the Request.

REQUEST FOR ADMISSION NO. 23:

Admit that by May 22, 2012, the INSTAGRAM mark shown in Your Registration No. 4,146,057 had not acquired secondary meaning for each of the following goods and services: “Downloadable computer software for modifying the appearance and enabling transmission of photographs.”

RESPONSE TO REQUEST FOR ADMISSION NO. 23:

Instagram objects to the Request on the following grounds: 1) the Request calls for a legal conclusion as to “secondary meaning”; 2) the Request is irrelevant, as it improperly assumes that Instagram is required to show secondary meaning; and 3) the Request is compound. Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Instagram denies the Request.

REQUEST FOR ADMISSION NO. 24:

Admit that by July 10, 2012, the INSTAGRAM mark shown in Your Registration No. 4,170,675 had not acquired secondary meaning for each of the following goods and services: “Providing a web site that gives users the ability to upload photographs; technical support services, namely, providing help desk services in the field of computer software, namely, providing users with instructions and advice on the use of downloadable computer software, provided online and via e-mail; computer services, namely, providing an interactive website featuring technology that allows users to manage their online photograph and social networking accounts.”

RESPONSE TO REQUEST FOR ADMISSION NO. 24:

Instagram objects to the Request on the following grounds: 1) the Request calls for a legal conclusion as to “secondary meaning”; 2) the Request is irrelevant, as it improperly assumes that Instagram is required to show secondary meaning; and 3) the Request is compound. Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Instagram denies the Request.

REQUEST FOR ADMISSION NO. 25:

Admit that by March 3, 2012, Opposer's Marks were not widely recognized by the general consuming public of the United States as a designation of source of Opposer's Goods or Services, as defined by 15 USC 1125(c)(2)(a).

RESPONSE TO REQUEST FOR ADMISSION NO. 25:

Instagram objects to the Request on grounds that it calls for a legal conclusion as to the application of 15 U.S.C. § 1125(c)(2). Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Instagram denies the Request.

REQUEST FOR ADMISSION NO. 26:

Admit that by June 7, 2012, Opposer's Marks were not widely recognized by the general consuming public of the United States as a designation of source of Opposer's Goods or Services, as defined by 15 USC 1125(c)(2)(a).

RESPONSE TO REQUEST FOR ADMISSION NO. 26:

Instagram objects to the Request on grounds that it calls for a legal conclusion as to the application of 15 U.S.C. § 1125(c)(2). Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Instagram denies the Request.

REQUEST FOR ADMISSION NO. 27:

Admit that Opposer's Marks are not currently widely recognized by the general consuming public of the United States as a designation of source of Opposer's Goods or Services, as defined by 15 USC 1125(c)(2)(a).

RESPONSE TO REQUEST FOR ADMISSION NO. 27:

Instagram objects to the Request on grounds that it calls for a legal conclusion as to the application of 15 U.S.C. § 1125(c)(2). Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Instagram denies the Request.

REQUEST FOR ADMISSION NO. 28:

Admit that You knew of Flipagram's use of the trademark FLIPAGRAM by no later than March 3, 2012.

RESPONSE TO REQUEST FOR ADMISSION NO. 28:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the term “knew of;” 2) the Request is overbroad; 3) the Request is overly broad and unduly burdensome in that the definition of “You” could require identification of any number of people, including former employees; and 4) the Request is not reasonably calculated to lead to the discovery of admissible evidence in that it purports to require Instagram to identify when any number of people became aware of Applicant, and further, on the grounds that Flipagram’s delay-based defenses were stricken. Thus, the date of Instagram’s first awareness of the FLIPAGRAM mark has no bearing on the issues raised in this proceeding.

REQUEST FOR ADMISSION NO. 29:

Admit that the first time you contacted Flipagram to complain regarding the trademark FLIPAGRAM was November 20, 2013.

RESPONSE TO REQUEST FOR ADMISSION NO. 29:

Instagram objects to the Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence in that Flipagram’s delay-based defenses were stricken and thus the date of Instagram’s first correspondence to Flipagram regarding us of the FLIPAGRAM mark has no bearing on the issues raised in this proceeding.

Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Admit that Flipagram’s use of the Instagram service and Instagram API’s were at all times subject to the then-current applicable terms, that Flipagram has been in violation of those terms since at least as early as August 2013, and further admit that Instagram sent a brand violation notice regarding Flipagram at least as early as November 20, 2013.

REQUEST FOR ADMISSION NO. 30:

Admit that You did not assert a Legal Challenge to Flipagram’s right to use the trademark FLIPAGRAM until November 20, 2013.

RESPONSE TO REQUEST FOR ADMISSION NO. 30:

Instagram objects to the Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence in that Flipagram's delay-based defenses were stricken and thus the date of Instagram's first correspondence to Flipagram regarding us of the FLIPAGRAM mark has no bearing on the issues raised in this proceeding.

Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Admit that Flipagram's use of the Instagram service and Instagram API's were at all times subject to the then-current applicable terms, that Flipagram has been in violation of those terms since at least as early as August 2013, and further admits that Instagram sent a brand violation notice regarding Flipagram at least as early as November 20, 2013.

REQUEST FOR ADMISSION NO. 31:

Admit that You did not assert a Legal Challenge to Flipagram's right to register the trademark FLIPAGRAM until January 9, 2014.

RESPONSE TO REQUEST FOR ADMISSION NO. 31:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the phrase "right to register the trademark;" and 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence in Flipagram's delay-based defenses were stricken; thus, the date of Instagram's first challenge to Flipagram's attempt to register the FLIPAGRAM trademark is not relevant.

Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Admit that Instagram admits that Instagram sent a brand violation notice regarding Flipagram at least as early as November 20, 2013 and timely opposed registration of the FLIPAGRAM mark on July 7, 2014.

REQUEST FOR ADMISSION NO. 32:

Admit that You consented to Flipagram's use of the trademark FLIPAGRAM.

RESPONSE TO REQUEST FOR ADMISSION NO. 32:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the term “consented;” 2) the Request is vague and overbroad as to time; 3) the Request calls for a legal conclusion as to whether Instagram consented to use of the FLIPAGRAM mark in connection with Flipagram’s services; and 4) the Request is overly broad and not reasonably calculated to lead to the discovery of admissible evidence given that this proceeding concerns Flipagram’s attempted registration of the mark FLIPAGRAM.

Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Deny.

REQUEST FOR ADMISSION NO. 33:

Admit that You have never asserted a Legal Challenge to the mark CINEMAGRAM, reflected in Reg. No. 4211631.

RESPONSE TO REQUEST FOR ADMISSION NO. 33:

Instagram incorporates its General Objections. Instagram also objects to the Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 34:

Admit that You have never asserted a Legal Challenge to the mark ANIGRAM, reflected in Reg. No. 4398866.

RESPONSE TO REQUEST FOR ADMISSION NO. 34:

Instagram incorporates its General Objections. Instagram also objects to the Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 35:

Admit that You have never asserted a Legal Challenge to the mark INSTAPLACE, reflected in Reg. No. 4457101.

RESPONSE TO REQUEST FOR ADMISSION NO. 35:

Instagram incorporates its General Objections. Instagram also objects to the Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 36:

Admit that You have never asserted a Legal Challenge to the mark INSTAFOOD, reflected in Reg. No. 4457116.

RESPONSE TO REQUEST FOR ADMISSION NO. 36:

Instagram incorporates its General Objections. Instagram also objects to the Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 37:

Admit that You have never asserted a Legal Challenge to the mark INSTAWEATHER, reflected in Reg. No. 4457096.

RESPONSE TO REQUEST FOR ADMISSION NO. 37:

Instagram incorporates its General Objections. Instagram also objects to the Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 38:

Admit that You have never asserted a Legal Challenge to the mark INSTACART, reflected in Serial No. 86323403.

RESPONSE TO REQUEST FOR ADMISSION NO. 38:

Instagram incorporates its General Objections. Instagram also objects to the Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 39:

Admit that You have never asserted a Legal Challenge to the mark INSTAPLY, reflected in Reg. No. 4530667.

RESPONSE TO REQUEST FOR ADMISSION NO. 39:

Instagram incorporates its General Objections. Instagram also objects to the Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 40:

Admit that You have never asserted a Legal Challenge to the mark INSTACURITY, reflected in Reg. No. 4520291.

RESPONSE TO REQUEST FOR ADMISSION NO. 40:

Instagram incorporates its General Objections. Instagram also objects to the Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 41:

Admit that You have never asserted a Legal Challenge to the mark HIPSTAMATIC, reflected in Reg. No. 4012304.

RESPONSE TO REQUEST FOR ADMISSION NO. 41:

Instagram incorporates its General Objections. Instagram also objects to the Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 42:

Admit that You have never asserted a Legal Challenge to the mark INSTAMATIC, reflected in Serial No. 79164380.

RESPONSE TO REQUEST FOR ADMISSION NO. 42:

Instagram incorporates its General Objections. Instagram also objects to the Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 43:

Admit that You Promoted Third Party goods or services using the mark PRINTSTAGRAM.

RESPONSE TO REQUEST FOR ADMISSION NO. 43:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the phrase “using the mark” as it suggests that Instagram used the mark PRINTSTAGRAM to promote third-party goods or services; 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence because the mark cited in the request is irrelevant and is distinguishable from the mark and goods/services at issue in this proceeding.

REQUEST FOR ADMISSION NO. 44:

Admit that You Promoted Third Party goods or services using the mark ANAGRAM.

RESPONSE TO REQUEST FOR ADMISSION NO. 44:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the phrase “using the mark” as it suggests that Instagram used the mark ANAGRAM to promote third-party goods or services; 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence because the mark cited in the request is irrelevant and is distinguishable from the mark and goods/services at issue in this proceeding.

REQUEST FOR ADMISSION NO. 45:

Admit that You Promoted Third Party goods or services using the mark STITCHSTAGRAM.

RESPONSE TO REQUEST FOR ADMISSION NO. 45:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the phrase “using the mark” as it suggests that Instagram used the mark STITCHSTAGRAM to promote third-party goods or services; 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence because the mark cited in the request is irrelevant and is distinguishable from the mark and goods/services at issue in this proceeding.

REQUEST FOR ADMISSION NO. 46:

Admit that You Promoted Third Party goods or services using the mark WEBSTAGRAM.

RESPONSE TO REQUEST FOR ADMISSION NO. 46:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the phrase “using the mark” as it suggests that Instagram used the mark WEBSTAGRAM to promote third-party goods or services; 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence because the mark cited in the request is irrelevant and is distinguishable from the mark and goods/services at issue in this proceeding.

REQUEST FOR ADMISSION NO. 47:

Admit that You Promoted Third Party goods or services using the mark STICKYGRAM.

RESPONSE TO REQUEST FOR ADMISSION NO. 47:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the phrase “using the mark” as it suggests that Instagram used the mark STICKYGRAM to promote third-party goods or services; 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence because the mark cited in the request is irrelevant and is distinguishable from the mark and goods/services at issue in this proceeding.

REQUEST FOR ADMISSION NO. 48:

Admit that You Promoted Third Party goods or services using the mark CASETAGRAM.

RESPONSE TO REQUEST FOR ADMISSION NO. 48:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the phrase “using the mark” as it suggests that Instagram used the mark CASETAGRAM to promote third-party goods or services; 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence because the mark cited in the request is irrelevant and is distinguishable from the mark and goods/services at issue in this proceeding.

REQUEST FOR ADMISSION NO. 49:

Admit that You Promoted Third Party goods or services using the mark FOLLOWGRAM.

RESPONSE TO REQUEST FOR ADMISSION NO. 49:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the phrase “using the mark” as it suggests that Instagram used the mark FOLLOWGRAM to promote third-party goods or services; 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence because the mark cited in the request is irrelevant and is distinguishable from the mark and goods/services at issue in this proceeding.

REQUEST FOR ADMISSION NO. 50:

Admit that You Promoted Third Party goods or services using the mark INSTACANE.

RESPONSE TO REQUEST FOR ADMISSION NO. 50:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the phrase “using the mark” as it suggests that Instagram used the mark INSTACANE to promote third-party goods or services; 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence because the mark cited in the request is irrelevant and is distinguishable from the mark and goods/services at issue in this proceeding.

REQUEST FOR ADMISSION NO. 51:

Admit that You Promoted Third Party goods or services using the mark INSTAGOODIES.

RESPONSE TO REQUEST FOR ADMISSION NO. 51:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the phrase “using the mark” as it suggests that Instagram used the mark INSTAGOODIES to promote third-party goods or services; 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence because the mark cited in the request is irrelevant and is distinguishable from the mark and goods/services at issue in this proceeding.

REQUEST FOR ADMISSION NO. 52:

Admit that You Promoted Third Party goods or services using the mark INSTAPRINT.

RESPONSE TO REQUEST FOR ADMISSION NO. 52:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the phrase “using the mark” as it suggests that Instagram used the mark INSTAPRINT to promote third-party goods or services; 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence because the mark cited in the request is irrelevant and is distinguishable from the mark and goods/services at issue in this proceeding.

REQUEST FOR ADMISSION NO. 53:

Admit that You Promoted Third Party goods or services using the mark INSTAGRE.AT.

RESPONSE TO REQUEST FOR ADMISSION NO. 53:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the phrase “using the mark” as it suggests that Instagram used the mark INSTAGRE.AT to promote third-party goods or services; 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence because the mark cited in the request is irrelevant and is distinguishable from the mark and goods/services at issue in this proceeding.

REQUEST FOR ADMISSION NO. 54:

Admit that You Promoted Third Party goods or services using the mark INSTAGRAMMERS.COM.

RESPONSE TO REQUEST FOR ADMISSION NO. 54:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the phrase “using the mark” as it suggests that Instagram used the mark INSTAGRAMMERS.COM to promote third-party goods or services; 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence because the mark cited in the request is irrelevant and is distinguishable from the mark and goods/services at issue in this proceeding.

REQUEST FOR ADMISSION NO. 55:

Admit that You Promoted Third Party goods or services using the mark INSTACHALLENGE.

RESPONSE TO REQUEST FOR ADMISSION NO. 55:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the phrase “using the mark” as it suggests that Instagram used the mark INSTACHALLENGE to promote third-party goods or services; 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence because the mark cited in the request is irrelevant and is distinguishable from the mark and goods/services at issue in this proceeding.

REQUEST FOR ADMISSION NO. 56:

Admit that when selecting Opposer's Marks, You were aware of the mobile application HIPSTAMATIC.

RESPONSE TO REQUEST FOR ADMISSION NO. 56:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to the term "aware" and "selecting"; 2) the Request is overly broad and unduly burdensome in that it purports to cover "awareness" of any Instagram employee or former employee; and 3) the Request is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 57:

Admit that Your INSTAGRAM word mark is Derived from the Eastman Kodak Company's line of "Instamatic" cameras.

RESPONSE TO REQUEST FOR ADMISSION NO. 57:

Instagram objects to the Request on the grounds that: 1) the term "derived" is vague and ambiguous, even as purportedly defined by Applicant and such definition is also compound; and 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence as the derivation of the INSTAGRAM mark is not relevant to this proceeding.

Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Deny.

REQUEST FOR ADMISSION NO. 58:

Admit that Your first design mark, attached hereto in **Exhibit B**, is a rendering of the Polaroid One Step Rainbow Camera.

RESPONSE TO REQUEST FOR ADMISSION NO. 58:

Instagram objects to the Request on the grounds that: 1) the term "derived" is vague and ambiguous, even as purportedly defined by Applicant and such definition is also compound; and 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence as Instagram's first "design mark" is not relevant to, or the subject of, this proceeding.

REQUEST FOR ADMISSION NO. 59:

Admit that Your “Multi-Color Camera” design mark, Reg. No. 4531884, is Derived from the Polaroid OneStep Rainbow Camera.

RESPONSE TO REQUEST FOR ADMISSION NO. 59:

Instagram objects to the Request on the grounds that: 1) the term “derived” is vague and ambiguous, even as purportedly defined by Applicant and such definition is also compound; and 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence as Reg. No. 4531884 is not the subject of this proceeding.

REQUEST FOR ADMISSION NO. 60:

Admit that the color spectrum on Your “Multi-Color Camera” design mark, Reg. No. 4531884, is Derived from Polaroid Color Spectrum trademark reflected in Reg. Nos. 4349054 and 4352706.

RESPONSE TO REQUEST FOR ADMISSION NO. 60:

Instagram objects to the Request on the grounds that: 1) the term “derived” is vague and ambiguous, even as purportedly defined by Applicant and such definition is also compound; and 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence as Reg. No. 4349054 is not the subject of this proceeding.

REQUEST FOR ADMISSION NO. 61:

Admit that the square format of Instagram photos is Derived from the square format of Polaroid instant photos.

RESPONSE TO REQUEST FOR ADMISSION NO. 61:

Instagram objects to the Request on the grounds that: 1) the term “derived” is vague and ambiguous, even as purportedly defined by Applicant and such definition is also compound; and 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 62:

Admit that from the date of its creation through at least July 10, 2012, Your API Terms of Use stated: “While you cannot use the word ‘Instagram’ or ‘IG’ in your product’s name, it’s okay to use one (but not both) of the following: ‘Insta’ or ‘Gram.’”

RESPONSE TO REQUEST FOR ADMISSION NO. 62:

Instagram objects to the Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence in that the current API Terms of Use is the operative agreement between Instagram and Flipagram.

Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Admit that on July 10, 2012, Instagram’s API Terms of Use contained the provision: “While you cannot use the word ‘Instagram’ or ‘IG’ in your product’s name, it’s okay to use one (but not both) of the following: ‘Insta’ or ‘Gram,’” and further admit that it contained other, related provisions, such as “Note that we reserve the right to reject any use of these terms in connection with the use of the Instagram API” and “We reserve the right to update and change these terms from time to time without notice.”

REQUEST FOR ADMISSION NO. 63:

Admit that the API Terms of Use is a license.

RESPONSE TO REQUEST FOR ADMISSION NO. 63:

Instagram objects to the Request on the grounds that 1) it calls for a legal conclusion as to whether the API Terms of Use constitutes a license; 2) it is vague and ambiguous as to which provisions of the API Terms of Use or what type of license it refers.

REQUEST FOR ADMISSION NO. 64:

Admit that the API Terms of Use purported to license use of the word GRAM to users of the Instagram API.

RESPONSE TO REQUEST FOR ADMISSION NO. 64:

Instagram objects to the Request on the grounds that it calls for a legal conclusion, and as not reasonably calculated to lead to the discovery of admissible evidence; and thus no response is required.

REQUEST FOR ADMISSION NO. 65:

Admit that the API Terms of Use purported to license use of the word INSTA to users of the Instagram API.

RESPONSE TO REQUEST FOR ADMISSION NO. 65:

Instagram objects to the Request on the grounds that it calls for a legal conclusion, and as not reasonably calculated to lead to the discovery of admissible evidence; and thus no response is required.

REQUEST FOR ADMISSION NO. 66:

Admit that the API Terms of Use purported to license Opposer's Marks to users of the Instagram API.

RESPONSE TO REQUEST FOR ADMISSION NO. 66:

Instagram objects to the Request on the grounds that it calls for a legal conclusion, and as not reasonably calculated to lead to the discovery of admissible evidence; and thus no response is required. The Request is also vague and ambiguous as to "purported to license." In addition, subject to and without waiving its objections, based on the definition of Opposer's Marks, Instagram denies this request.

REQUEST FOR ADMISSION NO. 67:

Admit that the only manner in which You give users the ability to upload photographs to Your Service is through Your App.

RESPONSE TO REQUEST FOR ADMISSION NO. 67:

Instagram objects to the Request on the grounds that 1) it is vague and ambiguous as to the phrase "give users the ability to upload photographs" and 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 68:

Admit that Your App is only available for use on mobile devices.

RESPONSE TO REQUEST FOR ADMISSION NO. 68:

Instagram objects to the Request on the grounds that 1) it is vague and ambiguous as to the term “mobile device” and as to the phrase “only available for use” and 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence

REQUEST FOR ADMISSION NO. 69:

Admit that Your Service did not introduce video support until June 20, 2013.

RESPONSE TO REQUEST FOR ADMISSION NO. 69:

Instagram objects to the Request on the following grounds: 1) the Request is vague and ambiguous as to “video support;” and 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence because the date on which Instagram first offered video support is not relevant to any of the issues raised in this proceeding.

Dated: August 17, 2015

/s/ Bobby A. Ghajar
Bobby A. Ghajar
PILLSBURY WINTHROP SHAW
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Tel: (213) 488-7100

Attorneys for Opposer,
Instagram, LLC

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **OPPOSER'S RESPONSES TO APPLICANT'S FIRST SET OF REQUESTS FOR ADMISSION** was served on Applicant's counsel, D. Peter Harvey, Harvey Siskind LLP, 4 Embarcadero Center, 39th Floor, San Francisco, CA 94111, via postage prepaid first-class mail on August 17, 2015.

/s/ Bobby A. Ghajar

Bobby A Ghajar

Exhibit B
to Declaration of Naomi Jane Gray in Support of
Motion to Test Sufficiency of Responses to
Flipagram's First and Second Sets
of Requests for Admission

Offered by Applicant Flipagram, Inc.

Instagram, LLC v. Flipagram, Inc.

Opposition No. 91217238



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

Instagram, LLC,	§	Opposition No. 91217238
	§	
Opposer,	§	Serial No.: 86/042,264
	§	
v.	§	Mark: FLIPAGRAM
	§	
Flipagram, Inc.,	§	International Class: 09
	§	
Applicant,	§	Published: January 7, 2014
	§	

**OPPOSER’S RESPONSES TO APPLICANT’S SECOND SET OF
REQUESTS FOR ADMISSION**

I. GENERAL OBJECTIONS

The following general objections and statements apply to each of the definitions, instructions, and Requests for Admission propounded by Flipagram, Inc. (“Requests”) and are hereby incorporated within each response set forth below. No specific objections are intended to constitute, and should not be construed as constituting, a waiver of any general objection.

1. Instagram objects to each Request to the extent it seeks information that is publicly available, or is otherwise readily available to Flipagram from other sources, and the burden and expense of obtaining such documents is not greater for Flipagram than it is for Instagram.

2. Instagram objects to each Request to the extent the information sought is not in Instagram’s possession, custody, or control.

3. Instagram objects to each Request to the extent it seeks information that is proprietary to Instagram and/or other third parties.

4. Instagram objects to each Request to the extent it seeks information that constitutes confidential third-party information disclosed to Instagram on the condition that, or subject to an obligation that, Instagram keep that information confidential.

5. Instagram objects to each Request to the extent it seeks production of information that is prepared in anticipation of litigation, or is protected from disclosure, in whole or in part, by the attorney-client privilege, the work product doctrine, or any other applicable privileges, including, without limitation, the common interest and joint defense privileges. Instagram hereby claims such privileges, protections, and immunities to the extent implicated by each Request. The inadvertent disclosure of any privileged or protected information will not constitute a waiver of any privilege or protection or of any other grounds for objecting to discovery with respect to such response.

6. Instagram objects to each Request to the extent it seeks the disclosure of information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

7. Instagram objects to each Request, and any instruction or definition, to the extent that it is inconsistent with or seeks to impose obligations on Instagram beyond those imposed by the Federal Rules of Civil Procedure, the Trademark Trial and Appeal Board Manual of Procedure ("TBMP"), and/or any other applicable law or rules.

8. In addition to the foregoing General Objections, Instagram may also state Specific Responses and Objections to the Requests where appropriate, including responses and objections that are not generally applicable to each Request. By setting forth such Specific Responses and Objections, Instagram does not intend to limit or restrict the General Objections set forth above.

9. Instagram's responses herein are based on facts presently known, and represent a diligent and good faith effort to comply with the Requests. Instagram's investigation into the matters specified is continuing. Accordingly, Instagram reserves the right, where appropriate, to supplement, alter and/or change the responses contained herein pursuant to Federal Rule of Civil Procedure 26(e). Furthermore, Instagram reserves the right, at trial or during other proceedings in this action, to rely on information, documents, things, evidence, or other matters in addition to the information, documents and/or things produced in response to these Requests, whether or not

such information, documents, things, evidence, or other matters are newly discovered or are now in existence, but have not been located despite diligent and good faith effort.

10. Instagram's responses herein do not in any way constitute an adoption of Flipagram's purported Definitions or words or phrases to the extent that they purport to define words or phrases to have a meaning different from their commonly understood meanings or to include more than their commonly understood definitions, particularly with respect to the terms identified in these objections.

11. Instagram objects to Flipagram's requests as overly broad and irrelevant to the extent they are not limited to the United States. Unless stated otherwise, Instagram's responses pertain to the United States.

12. Instagram reserves the right to amend these responses and objections, to correct inadvertent errors, or otherwise to supplement its responses and objections.

II. OBJECTIONS TO DEFINITIONS

1. Instagram objects to the definition of the terms "You," "Your," and "Opposer" and to each Request that uses those terms or a variation thereof, on the grounds that it renders the Requests as being overly broad, unduly burdensome, vague and ambiguous, and oppressive, because it includes entities other than Instagram, and more specifically entities not controlled by Instagram. In addition, Instagram specifically objects to the definition as including "any parent company owning all or part of Opposer...." Instagram has no duty or obligation to produce anything not in the possession, custody, or control of Instagram, including anything that may be in the possession of any parent, including Facebook, Inc. Finally, the definition is overly broad and vague in its reference to "the present and former directors, officers, agents, employees, in-house and outside counsel thereof" as it is not clear whether they refer to Instagram or to "any related company." In responding to any requests that refer to this definition, Instagram responds only on its own behalf.

2. Instagram objects to the definition of "API Terms of Use" to the extent it implies that past versions of the API Terms of Use are relevant or controlling on the parties.

3. Instagram objects to the definitions of “GRAM-Formative Mark” and “INSTA-Formative Mark” as vague and ambiguous, overly broad, and irrelevant, as those definitions would, as provided by Applicant, include such terms as “grammar” or “installation.”

4. Instagram objects to the definition of Flipagram’s Goods and Services as vague and ambiguous to the extent that it refers to services “planned to be marketed, promoted, sold, or offered by Applicant,” as that information is in Flipagram’s possession and is currently unknown to Instagram.

5. Similarly, Instagram objects to the definition of “Flipagram’s Marks” as vague and ambiguous, and misleading, as it purports to cover the FLIPAGRAM mark “in any and all formats,” including those formats currently unknown to Instagram, and given that Flipagram’s trademark application subject to this Opposition is in block letter format.

III. RESPONSES TO REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO.70:

Admit that the Instagram service was not released on the Android platform until April 2012.

RESPONSE TO REQUEST FOR ADMISSION NO.70:

Instagram objects to the Request on the grounds that 1) it is vague and ambiguous as to the phrase “Instagram service...on the Android platform” and for purposes of this response only, Instagram interprets that to mean “published a mobile application that is compatible with the Android operating system” and; 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence because the date on which Instagram first published a mobile application that is compatible with the Android operating system is not relevant to any of the issues raised in this proceeding because, among other reasons, there is no limitation in Applicant’s identification of goods or services as to channels of distribution, marketing, or trade.

REQUEST FOR ADMISSION NO. 71:

Admit that You did not make the Instagram service available on the world wide web until February 2013.

RESPONSE TO REQUEST FOR ADMISSION NO. 71:

Instagram objects to the Request on the grounds that it is vague and ambiguous as to the phrase “make the Instagram service available on the world wide web.”

Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Deny.

REQUEST FOR ADMISSION NO. 72:

Admit that the “Brand Assets” section of Your Instagram Brand Website has never listed INSTA or GRAM as a “brand asset.”

RESPONSE TO REQUEST FOR ADMISSION NO. 72:

Instagram objects to the Request on the grounds that 1) it is vague and ambiguous as to the term “‘Brand Assets’ section;” and 2) the Request is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Admit that the “Brand Assets” section of the www.instagram-brand.com website does not list any standard character trademarks.

REQUEST FOR ADMISSION NO. 73:

Admit that Exhibit A hereto is a true and correct copy of a page from Your online “Help Center” that existed on January 7, 2014.

RESPONSE TO REQUEST FOR ADMISSION NO. 73:

Instagram objects to the Request on the grounds that Exhibit A is not a copy of a page of Instagram’s website, but is a copy of a page from the third-party “Wayback Machine,” the reliability of which Instagram cannot assess in response to the Request. Instagram further objects that the date of the crawl in Exhibit A appears to differ from the date set forth in the Request. On these bases, Instagram lacks sufficient information to admit or deny that what is depicted in Exhibit A is identical to what one might have found on a portion of Instagram’s website on January 7, 2014.

REQUEST FOR ADMISSION NO. 74:

Admit that Exhibit B hereto is a true and correct copy of a page from Your online “Help Center” that existed on January 7, 2014.

RESPONSE TO REQUEST FOR ADMISSION NO. 74:

Instagram objects to the Request on the grounds that Exhibit B is not a copy of a page of Instagram’s website, but is a copy of a page from the third-party “Wayback Machine,” the reliability of which Instagram cannot assess in response to the Request. Instagram further objects that the date of the crawl in Exhibit B appears to differ from the date set forth in the Request. On these bases, Instagram lacks sufficient information to admit or deny that what is depicted in Exhibit B is identical to what one might have found on a portion of Instagram’s website on January 7, 2014.

REQUEST FOR ADMISSION NO. 75:

Admit that on January 7, 2014, You transferred the Instagram username “@flipagram” from a Third Party to Flipagram.

RESPONSE TO REQUEST FOR ADMISSION NO. 75:

Instagram objects to the Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Admit.

REQUEST FOR ADMISSION NO. 76:

Admit that Exhibit C hereto is a true and correct copy of an exchange of correspondence between Flipagram and Instagram relating to the subject “Reporting a Violation or Infringement of Your Rights – Trademark” that You received on or about January 7, 2014.

RESPONSE TO REQUEST FOR ADMISSION NO. 76:

Instagram objects to the Request on the grounds that 1) it is vague and ambiguous as to “exchange of correspondence...that You received;” 2) the Request is not reasonably calculated

to lead to the discovery of admissible evidence; and 3) the Request is an improper attempt to have Instagram authenticate a document produced by Applicant.

Subject to and without waiving the foregoing General and Specific Objections, Instagram responds as follows: Admit that Exhibit C purports to be an email chain between Farhad Mohit and an Instagram employee identified as Catriona on January 7-8, 2014.

REQUEST FOR ADMISSION NO. 77:

Admit that You did not notify users of the Instagram API when You deleted the following language from Your API Terms of Use: “While you cannot use the word ‘Instagram’ or ‘IG’ in your product’s name, it’s okay to use one (but not both) of the following: ‘Insta’ or ‘Gram.’”

RESPONSE TO REQUEST FOR ADMISSION NO. 77:

Instagram objects to the Request on the following grounds: 1) the Request is not reasonably calculated to lead to the discovery of admissible evidence; and 2) the Request is vague and ambiguous as to the term “notify” and vague and overbroad as to time, and for these reasons, Instagram lacks sufficient information to admit or deny the Request.

REQUEST FOR ADMISSION NO. 78:

Admit that You did not notify users of Your API when You added the following provision to Your Instagram Brand Website: “Try using ‘[Your App Name] for Instagram’ to indicate that your product is integrated with Instagram. Avoid using the words ‘Instagram,’ ‘IG,’ ‘insta’ or ‘gram’ in any other way.”

RESPONSE TO REQUEST FOR ADMISSION NO. 78:

Instagram objects to the Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 79:

Admit that You are not providing services involving publishing of electronic publications for others.

RESPONSE TO REQUEST FOR ADMISSION NO. 79:

Instagram objects to the Request on the grounds that it is vague and ambiguous as to the phrase “publishing of electronic publications for others.” Instagram further objects that the Request is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 80:

Admit that You are not providing computer services involving hosting online web facilities for others for organizing and conducting meetings, events and interactive discussions via communication networks. Instagram further objects that the Request is not reasonably calculated to lead to the discovery of admissible evidence.

RESPONSE TO REQUEST FOR ADMISSION NO. 80:

Instagram objects to the Request on the grounds that it is vague and ambiguous as to the phrase “hosting online web facilities for others for organizing and conducting meetings, events and interactive discussions via communication networks.” Instagram further objects that the Request is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR ADMISSION NO. 81:

Admit that You are not providing search engines for the Internet.

RESPONSE TO REQUEST FOR ADMISSION NO. 81:

Instagram objects to the Request on the grounds that it is vague and ambiguous as to the phrase “providing search engines for the Internet.” Instagram further objects that the Request is not reasonably calculated to lead to the discovery of admissible evidence.

Dated: October 29, 2015

/s/ Bobby A. Ghajar
Bobby A. Ghajar
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Tel: (213) 488-7100

Attorneys for Opposer,
Instagram, LLC

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **OPPOSER'S RESPONSES TO APPLICANT'S SECOND SET OF REQUESTS FOR ADMISSION** was served on Applicant's counsel, D. Peter Harvey, Harvey Siskind LLP, 4 Embarcadero Center, 39th Floor, San Francisco, CA 94111, via postage prepaid first-class mail on October 29, 2015.

/s/ Bobby A. Ghajar

Bobby A Ghajar

Exhibit C
to Declaration of Naomi Jane Gray in Support of
Motion to Test Sufficiency of Responses to
Flipagram's First and Second Sets
of Requests for Admission

Offered by Applicant Flipagram, Inc.

Instagram, LLC v. Flipagram, Inc.

Opposition No. 91217238

HARVEY ■ SISKIND LLP

BY EMAIL

September 24, 2015

Bobby A. Ghajar, Esq.
Pillsbury Winthrop Shaw Pittman LLP
725 S. Figueroa, Suite 2800
Los Angeles, CA 90017
<bobby.ghajar@pillsburylaw.com>

Re: Instagram, LLC v. Flipagram, LLC, TTAB Opposition No. 91217238

Dear Mr. Ghajar:

I write pursuant to 37 C.F.R. § 2.120(e)(1) and TBMP § 408.01 to meet and confer with respect to Instagram's responses to Flipagram's written discovery requests. Instagram's responses are patently insufficient. Instagram has outright refused to respond to 77 requests, more than half of the total. Where it has responded, its answer is often evasive or devoid of meaningful information. In some instances, Instagram has refused to provide discovery in response to requests that are virtually identical to requests that Instagram served upon Flipagram (and to which Flipagram has agreed to provide discovery). Such responses do not demonstrate a good-faith effort by Instagram to cooperate in the discovery process. Flipagram requests that Instagram promptly supplement its responses to the following requests.

Interrogatory Nos. 1-2; Request for Admission Nos. 28, 56; Request for Production No. 3. These requests seek information regarding how and when Instagram became aware of the trademark FLIPAGRAM, when it became aware that Flipagram used Instagram's API, and Instagram's awareness of the mobile application HIPSTAMATIC. Interrogatory No. 1 is virtually identical to Instagram's Interrogatory to Flipagram seeking a description of the "facts and circumstances under which [Flipagram] first heard of or learned of Instagram." (Opposer's First Set of Interrogatories to Applicant ("Opp. Rog."), Interrogatory No. 14.) "[A]s a general rule, any interrogatory seeking relevant information is proper notwithstanding which of the parties propounded it." *Sentrol, Inc. v. Sentex Sys., Inc.*, 1986 WL 83726, at *2 (T.T.A.B. 1986). Where two parties serve "identical discovery requests on each other, they are constrained to answer each and every one of the discovery requests in a complete fashion." *Id.* Indeed, under such circumstances, "the parties have, in effect, waived their right to object because identical discovery requests were served on the adverse party. ..." *Id.* at * 3. Because Instagram served a virtually identical request on Flipagram, Instagram has waived any right to object to the request and must provide a complete response to it.

Instagram also objects on the ground that Interrogatory Nos. 1-2 are “vague and ambiguous” as to the terms “aware” and “knew of.” These objections are frivolous. “Aware” means, *inter alia*, “having knowledge” of something. The New Shorter Oxford English Dictionary, Vol. 1, 157 (1993 ed.). It is an ordinary word with plain meaning. The same holds true for “knew of.”

The requests are not overbroad or unduly burdensome. Contrary to Instagram’s claim, they do not require Instagram to “survey all of its employees, former employees, and others . . .” If such an objection were proper, any corporate party could defeat any discovery request on burdensomeness grounds. Instagram must, at a minimum, “go through its trademark and other related files in order to determine when it received actual knowledge” of Flipagram’s mark. *Am. Optical Corp. v. Exomet, Inc.*, 181 U.S.P.Q. 120, 123 (T.T.A.B. 1974).

Lastly, Instagram objects to these Interrogatories on the ground that it is “irrelevant given that Flipagram’s delay-based defenses were stricken. . .” In TTAB proceedings, “the requirement of relevancy must be construed liberally and [] discovery should, therefore, be generally allowed unless it is clear, beyond any doubt, that the information sought can have no possible bearing upon the issues involved in the particular proceeding.” *Varion Assocs. V. Fairfield-Noble Corp.*, 188 U.S.P.Q. 581, 583 (T.T.A.B. 1975). Relevant information “need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1). Interrogatory Nos. 1 and 2 easily satisfy this liberal standard because responsive information could lead to admissible evidence relating, *inter alia*, to Flipagram’s defenses of consent and unclean hands. For example, evidence that Instagram had longstanding knowledge of Flipagram and nevertheless consented to its use of its mark is, “in essence, an admission that the . . . use is not likely to cause confusion.” *Richdel, Inc. v Mathews Co.*, 190 USPQ 37, 41 (TTAB 1976).

Interrogatory Nos. 3-4; Request for Production Nos. 11, 32. These requests seek the date on which Instagram first asserted a legal challenge to a GRAM-formative mark that was not also an INSTA-formative mark, and vice versa; documents relating to legal challenges to Instagram’s asserted marks; and documents relating to communications with third parties relating to the rights Instagram claims to own in the asserted marks. Flipagram’s definition of GRAM and INSTA do not render the Interrogatory vague and ambiguous, even if, as Instagram asserts, those definitions would include such terms as “grammar” or “installation.” If Instagram challenged any such mark, it is required to respond to the Interrogatories. It cannot be overbroad or unduly burdensome for a company that has only been in business for five years to search for and identify the dates of its first legal challenges. Nor are such legal challenges necessarily publicly available. As defined in the Interrogatories, the requested information would encompass cease and desist letters and other communications relating to instances where Instagram challenged a mark without instituting formal legal proceedings. Even if such challenges were publicly available, it would not be less burdensome for Flipagram to retrieve them. Instagram knows when and where it made legal challenges, whereas Flipagram would have to search undisclosed dockets to uncover the information at issue.

Interrogatory No. 5; Request for Admission Nos. 43-55; Request for Production No. 31. These requests seek information regarding Instagram’s promotional efforts and consumer

studies relating to third-party INSTA- and GRAM-formative marks. Instagram's objection that the phrase "using the mark" is vague and ambiguous is unfounded. However, in the spirit of cooperation, Flipagram clarifies that these requests seek information relating to Instagram's promotion of third-party uses of the marks in question. Instagram's objection that the requests are not reasonably calculated to lead to the discovery of admissible evidence is unfounded, as the marks in question share significant elements with Instagram's asserted marks. As such, the requests seek information that is relevant to the strength and scope of rights Instagram claims in its asserted marks, and Flipagram's defense of consent.

Although Instagram objects to these requests on the ground that INSTA prefixes are irrelevant to this proceeding, Instagram itself has put INSTA prefixes at issue by propounding discovery relating to INSTABACKGROUND. Instagram has also put consumers' perception of INSTA- and GRAM- formative marks at issue by asserting that consumers recognize "-GRAM" and "-INSTA" as referring to Instagram. (*See, e.g.,* Response to Request for Admission Nos. 5-6.) Instagram cannot now claim that such information is irrelevant. *See, e.g., Sentrol, Inc. v. Sentex Sys., Inc.*, 1986 WL 83726, at *2.

Interrogatory No. 6; Request for Production No. 23. These requests seek identification of past or present users of the Instagram API that used a GRAM-formative or INSTA-formative mark. This Interrogatory is virtually identical to Instagram's Interrogatory No. 2, seeking identification of users of the FLIPAGRAM mark. Moreover, Instagram affirmatively seeks information regarding Flipagram's selection and development of the INSTABACKGROUND mark. Therefore, Instagram has put INSTABACKGROUND in issue and has waived any objection to this Interrogatory. *See Sentrol v. Sentex*, 1986 WL 83726, at * 3.

Interrogatory No. 7. Flipagram is entitled to serve 75 interrogatories on Instagram. Instagram objects to this Interrogatory on the ground that it would require answers to approximately 40 requests for admission. Thus, taking into consideration that Flipagram has served a total of 16 interrogatories on Instagram, responding to this Interrogatory with respect to 40 responses to Requests for Admission would not exceed the 75-interrogatory limit. Nevertheless, in the spirit of cooperation, Flipagram will narrow this request such that, for each response to Flipagram's First Set of Requests to Admission that is not an unqualified admission, Instagram need only state all facts upon which it bases its response.

Interrogatory No. 11; Request for Production Nos. 24-25, 33-36, 38. These requests seek information relating to the explicit permission in the Instagram API Terms of Use for users to employ either "Insta" or "Gram" in their names, as well as legal challenges and communications relating to certain third-party marks and Instagram's asserted marks. These requests seek information that is directly relevant to the strength and scope of rights that Instagram claims in its asserted marks, and Flipagram's defense of consent. Moreover, since use in commerce provides a basis for registration under U.S. law, Instagram's consent to Flipagram's use of "gram" in its name is directly relevant Flipagram's application to register FLIPAGRAM.

Interrogatory No. 12; Request for Production 29. Your objection that the phrases "measures You have employed" and "licensees of Opposer's Marks" are ambiguous lacks merit. You responded to Interrogatory No. 13 which includes the same language. Flipagram will limit

the Interrogatory and Request for Production to measures employed in the United States on or after October 1, 2010. The objection regarding confidentiality is not a basis to withhold documents because that is addressed by an appropriate protective order. TBMP §412.01. You have not identified any reason why a protective order is insufficient to protect the information sought by this request. Please provide a response.

Interrogatory No. 13. Your response to Interrogatory 13 is insufficient in that it does not identify how the API Terms and Conditions regulate the quality of goods and services that use the Instagram API. Please provide complete information.

Interrogatory No. 14; Request for Production No. 8. Instagram objects on the grounds that the terms “developed,” “evaluated,” “searched,” “considered,” and “selection factors” are ambiguous, but Instagram’s Interrogatory No. 7 is very similar to these requests. Instagram’s Interrogatory No. 7 seeks an explanation of how Flipagram “conceived, selected, developed, adopted and arrived at the selection of the term FLIPAGRAM. . . .” Having served a virtually identical interrogatory, Instagram cannot be heard to complain that Flipagram’s Interrogatory is vague and ambiguous. Instagram’s Interrogatory No. 8 also sought identification of persons with knowledge of the selection of Flipagram’s marks. Instagram thus cannot object to Flipagram’s request for the same information with respect to Instagram.

Request for Admission No. 1. Instagram’s relevance objection rests on the assertion that its claims in this proceeding are “based on infringement and dilution of Opposer’s Marks.” Response p. 4. As an initial matter, this claim is incorrect because T.T.A.B. proceedings do not address infringement. Federal courts hear claims of infringement, whereas T.T.A.B. proceedings may address the applicant’s right to register a mark. *Research in Motion Ltd. v. Defining Presence Marketing Group, Inc.*, 102 U.S.P.Q.2d 1187, at *3 (T.T.A.B. 2012). Here, Instagram has asserted a claim that registration of FLIPAGRAM will be likely to confuse consumers under Lanham Act § 2(d), and that it will dilute the INSTAGRAM mark. (Notice of Opposition p. 3.) Both of these claims require Instagram to assert and prove ownership of the asserted marks. 15 U.S.C. §§ 1052(d); 1125(c). Since, under U.S. law, trademark rights arise from use, whether Instagram has ever used the mark GRAM is relevant to the scope of rights Instagram claims in the marks upon which it bases this opposition proceeding. Instagram’s relevance objection is thus unfounded because it is not “clear, beyond any doubt, that the information sought can have no possible bearing upon the issues involved in the particular proceeding.” *Varion. v. Fairfield-Noble*, 188 U.S.P.Q. at 583.

Moreover, a party responding to a request for admission “shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission . . .” Fed. R. Civ. P. 36(a). Instagram’s answer to this request is nonresponsive. Whether GRAM is recognized by consumers as a reference to Instagram is entirely separate from whether Instagram has ever used GRAM, by itself, as a trademark.

Request for Admission Nos. 3, 4. Instagram’s objections on the grounds of relevance are unfounded for the same reasons as set forth with respect to Request for Admission No. 1. Nor are the phrases “claimed exclusive ownership” or “claimed exclusive trademark rights in the

suffix” vague and ambiguous. These phrases are made up of ordinary words with plain meanings. That a discovery request calls for a legal conclusion is not a valid objection. *See, e.g., Thomas v. Cate*, 715 F. Supp. 2d 1012, 1029 (E.D. Cal. 2010). In any event, the requests do not call for legal conclusions. Rather, they call for an admission as to the fact whether Instagram ever claimed the specified rights. Instagram’s answers to these requests are nonresponsive. Whether GRAM is recognized by consumers as a reference to Instagram is entirely separate from whether Instagram has ever claimed exclusive ownership or trademark rights in GRAM.

Request for Admission Nos. 5, 6, 11, 13-15. These requests seek Instagram’s understanding of the meaning of the components of its asserted marks. Instagram’s objection as to relevance is unfounded since Instagram has asserted a claim of likelihood of confusion under Lanham Act § 2(d). One of the elements to be evaluated in a § 2(d) claim is the similarity of the marks at issue “as to appearance, sound, connotation and commercial impression.” *DuPont*, 476 F.2d at 1361. Accordingly, the meaning of the components of the mark is relevant to Instagram’s claim. Nor is the term “connotes” vague and ambiguous. The verb comes directly from the *DuPont* holding that governs the Board’s analysis in this proceeding.

Instagram’s answers to Requests 5 and 6 are nonresponsive. Whether GRAM is recognized by consumers as a reference to Instagram is entirely separate from what Instagram understands the components of its mark to mean.

Request for Admission No. 12. Instagram has apparently based its denial of this request for Admission on a crabbed reading of the phrase “in the application.” To remove any conceivable doubt, this phrase refers to the file wrapper associated with Reg. No. 4,146,057. The USPTO’s assignment of a pseudomark to the referenced application is a fact readily verifiable by reference to the application history. Accordingly, the denial does not appear to fairly meet the substance of the request.

Requests for Admission Nos. 16-17. A request for admission may seek an admission that a document is genuine. Fed. R. Civ. P. 36(a). Instagram’s objections on the ground that these requests would require it “to authenticate and verify a third party internet printout” are thus unfounded. Instagram’s objection that the request is vague, ambiguous is misleading because it refers to the Random House dictionary, while the document comes from www.dictionary.com, is equally unfounded. www.dictionary.com is simply the URL from which the document was printed. Indeed, the document on its face states that it is “based on the Random House Dictionary,” and bears a Random House Dictionary copyright notice under the definition in question. Likewise, the objection that Exhibit A “does not appear to include an ‘Online Etymology Dictionary definition’” is simply wrong, and raises the question whether Instagram actually read Flipagram’s Requests for Admission before asserting its objections. The second page of Exhibit A plainly states:

“Word Origin and History for –gram

“suffix from telegram (1852), first abstracted 1979 (in *Gorillagram*, a proprietary name in U.S.), and put to wide use in forming new words, such as *stripagram* (1981). The

construction violates Greek grammar, as an adverb could not properly form part of a compound noun.

Online Etymology Dictionary, © 2010 Douglas Harper.”

Lastly, the fact that the page contains multiple definitions of the term “-gram” is immaterial given that Request No. 16 seeks an admission regarding a specific one of those definitions.

Request for Admission Nos. 18-19. Where a party has insufficient information to permit it to admit or deny a request for admission, the answer must “state in detail why the answering party cannot truthfully admit or deny it. Fed. R. Civ. P. 36(a). Instagram has not satisfied this requirement. Moreover, Instagram’s objections to these requests are unfounded. The requests are not vague and ambiguous, because actual confusion is a well-defined concept in trademark law. And since the requests seek admissions regarding Instagram’s awareness, plainly they do not call for information outside of Instagram’s possession, custody or control.

Request for Admission Nos. 33-42. Instagram has refused to provide any answer to these requests. They seek admissions regarding Instagram’s enforcement efforts with respect to its marks. Discovery seeking this information is generally proper. *See, e.g., American Soc’y of Oral Surgeons v. American College of Oral and Maxillofacial Surgeons*, 201 U.S.P.Q. 531, at *2-3 (T.T.A.B. 1979); *Olin Corp. v. S.A.T. Arms Tech.*, 2008 WL 4354195, at n.17 (TTAB 2008). Thus, Instagram must respond to these requests.

Request for Admission No. 58-61. Instagram’s objection regarding the term “Derived” is inapplicable to Request for Admission No. 58, which does not use the term. Moreover, these requests seek information that is reasonably calculated to lead to the discovery of admissible evidence because (1) Instagram put Trademark Reg. No. 4,531,884 at issue by suggesting in discovery that a version of Flipagram’s logo is confusingly similar to that logo; (2) the requests seek information relating to the strength of Instagram’s marks; and (3) Instagram defines its marks in the Notice of Opposition as any mark containing the word Instagram.

Request for Admission Nos. 63-65. The existence of a license is a question of fact, not of law. *See, e.g., A. Natterman & Cie. GmbH v. Bayer Corp.*, 428 F. Supp.2d 253, 259 (E.D. Pa. 2006). Even if a legal conclusion were required, Instagram would still be obligated to answer. *Cate, supra*, 715 F.Supp.2d at 1029-30. Plainly, these requests are both relevant and reasonably calculated to lead to the discovery of admissible evidence, since Instagram would have no basis to assert likely confusion or dilution if it licensed, or consented to, Flipagram’s adoption of the FLIPAGRAM mark.

Request for Admission Nos. 67-69. These requests are relevant and reasonably calculated to lead to the discovery of admissible evidence on the issue of the similarity of the parties’ goods and services. They employ ordinary language to be interpreted according to its plain meaning. Accordingly, Instagram must provide substantive responses to these requests.

Request for Production Nos. 1-2. The objection that the phrase “relate to Flipagram” is vague and ambiguous is plainly frivolous. This phrase is formulated in a manner that is

absolutely standard for discovery requests. Nor is it overly broad or unduly burdensome. It does not seek “all documents,” but all documents that relate to Flipagram and its marks. Plainly, these documents are relevant to Instagram’s claims that registration of the Flipagram mark is likely to confuse consumers, and dilute Instagram’s mark, as well as Flipagram’s defense of consent. Equally obviously, the request only requires Instagram to produce nonprivileged documents in its possession, custody or control. Instagram’s attempt to limit this request is far too narrow.

Limiting Instagram’s production to communications regarding Instagram’s objection to Flipagram’s mark is overly narrow. On its face, this would exclude communications and other documents indicating that Instagram consented to Flipagram’s mark, or did not view it as likely to confuse consumers or dilute the INSTAGRAM mark.

Request for Production Nos. 4-5, 9, 39, 40, 42. Producing trademark file wrappers to identify the goods and services covered by INSTAGRAM’s federal trademark registrations is insufficient. As Instagram is no doubt aware, failure to use a mark in commerce in connection with goods and services covered by the registration is a ground for cancellation of the mark. As such, these requests seek information that relates directly to the validity of Instagram’s registration. Moreover, Request No. 4 is not overly broad or unduly burdensome, because it only seeks document “sufficient to identify” the in-use goods and services. To the extent Request No. 39 seeks commercially sensitive information, Instagram can designate the documents appropriately pursuant to a protective order.

Request for Production Nos. 7, 43, 44. Instagram served requests for production that are virtually identical to these requests. (*See* Opposer’s First Set of Requests for Production of Documents and Things, Nos. 20, 26, 48, 53.) Accordingly, Instagram must respond to Flipagram’s requests.

Request for Production No. 12. Instagram’s limitation of this request to communications between management and third parties that relate to this opposition proceeding is too narrow. Communications with third parties relating to the subject matter of this proceeding - specifically, Flipagram’s mark and whether it is likely to create consumer confusion or dilute Instagram’s marks - is also likely to lead to the discovery of admissible evidence. Likewise, communications between nonmanagement personnel and third parties is relevant. Please provide a full response to this request.

Request for Production No. 13. This request seeks Instagram’s reports, studies, and opinions, regarding consumer perceptions of INSTA- and GRAM-formative marks. Instagram may possess non-privileged documents, such as marketing studies or internal analyses of the strength of the components of its brand. These documents are plainly discoverable because they may contain admissions against interest. None of Instagram’s objections is a proper basis to refuse to provide any response.

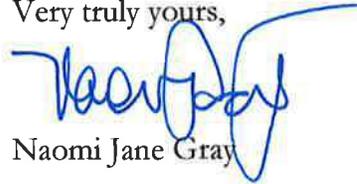
Request for Production Nos. 15-20. Instagram’s response to this request is limited to producing documents upon which Instagram intends to rely at trial. This is improper because it seeks to exclude from production documents relating to the same subject matter that contradict,

rather than support, Instagram's position. Instagram must produce documents that refer or relate to the allegations in paragraphs 4, 10, and 18-20 of the Notice of Opposition and its affirmative defense for "estoppel" regardless whether Instagram intends to rely on them.

As you know, the deadline to make expert disclosures is October 30, 2015. In order to ensure that Flipagram obtains the documents its experts will need sufficiently in advance of that deadline, please commit within one week of the date of this letter to producing all of the requested documents, and produce those documents promptly.

Please do not hesitate to contact me with any questions.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Naomi Gray", with a long horizontal flourish extending to the right.

Naomi Jane Gray

Exhibit D
to Declaration of Naomi Jane Gray in Support of
Motion to Test Sufficiency of Responses to
Flipagram's First and Second Sets
of Requests for Admission

Offered by Applicant Flipagram, Inc.

Instagram, LLC v. Flipagram, Inc.

Opposition No. 91217238

BY EMAIL

October 30, 2015

Marcus Peterson, Esq.
Pillsbury Winthrop Shaw Pittman LLP
725 S. Figueroa, Suite 2800
Los Angeles, CA 90017
<marcus.peterson@pillsburylaw.com>

Re: Instagram, LLC v. Flipagram, LLC, TTAB Opposition No. 91217238

Dear Marcus:

I write to follow up on our telephone conferences of October 8 and 14, 2015 with respect to Instagram's responses to Flipagram's written discovery requests.

Flipagram's Discovery Requests to Instagram.

Interrogatory Nos. 1-2; Request for Admission Nos. 28, 56; Request for Production No. 3. During our discussions, you defended Instagram's objections on the basis that the terms "aware" and "know of" were vague and ambiguous, and that Flipagram's definition of "You" was so broad that it would require Instagram to consult with every single current and former employee as to the state of his or her awareness. As I noted, the vagueness objections are frivolous. "Know of" and "aware" are ordinary words that everyone understands. Nor would responding to the requests require inquiry of every current or former employee. A party's obligation in responding to discovery is to search sources within its possession, custody or control where information is reasonably likely to be located. Obviously, former employees and any documents they may have are not within Instagram's possession, custody or control. As for employees within the company, Instagram need only consult those who are reasonably likely to have responsive information. These objections are straw men.

After extensive discussion, during our initial call on October 8, you stated that Instagram would be willing to produce information responsive to these requests as to its legal counsel's awareness or knowledge of Flipagram, but only if Flipagram would agree not to move to compel further responses. I objected to this limitation during both of our conversations. During our follow-up call, you agreed to reconsider whether Instagram would produce the information regarding legal counsel without requiring Flipagram to waive its right to move to compel further responses. At the end of the call, you stated that you would "think about it and can figure

something out.” Instagram has still not committed to producing even the information as to its legal counsel.

Instagram’s limitation of its responses to its legal counsel’s knowledge or awareness of Instagram is overly restrictive. Obviously, a company’s legal counsel tends to be informed of matters well after the business team is aware of those matters. Limiting your response to legal counsel would thus give the misleading impression that the company was aware of Flipagram later than it actually was. Flipagram is entitled to full responses to these requests, which seek information that is plainly calculated to lead to the discovery of admissible evidence regarding Flipagram’s defense of consent.

Moreover, it is highly improper for Instagram to condition its production of information on Flipagram’s waiver of its right to move to compel further responses. The purpose of meeting and conferring is to narrow the scope of issues to present to the Board. Refusing to give anything absent a waiver of the right to move to compel defeats this purpose.

If Instagram has reconsidered and is willing to produce information from a wider range of sources within the company, please let me know.

Instagram has refused to provide a response to Request for Admission No. 56 regarding HIPSTAMATIC. Hipstamatic is a similar app with a similar name that has seniority of trademark use. It is plainly relevant to the strength of the Instagram Marks. Please respond to this request.

Interrogatory Nos. 3-4; Request for Production Nos. 11, 32.

These requests seek information regarding legal challenges to, and communications with third parties regarding, GRAM- and INSTA-formative marks. During our initial call, you stated that Instagram was only willing to produce representative information regarding legal challenges and communications relating to GRAM-formative marks in the United States, but not INSTA-formative marks. Although you claimed that providing a full response with respect to GRAM-formative marks would be too burdensome, you could not give me an estimate of how many legal challenges or communications there had been, or explain to me what selection criteria Instagram would use to retrieve its “representative sample.” You represented that you would get information from Instagram regarding the culling process and would consider looking into how many legal challenges and communications there had been. As for information relating to INSTA-formative marks, you asserted that such marks have no relevance to these proceedings. I pointed out that Instagram is seeking to enforce rights in a mark that is made up of two elements: INSTA and GRAM; thus, information regarding INSTA-formative marks is relevant to the strength of Instagram’s asserted mark. Despite my repeated requests, you could not articulate a reason why information relating to INSTA-formative marks would not be relevant to the strength of INSTAGRAM.

By the time of our follow-up call, you still did not have information regarding the culling process that Instagram intends to use to select the “representative sample” of information

regarding GRAM-formative marks. During the follow-up call, you said would discuss with Instagram the possibility of narrowing the request by defining the places where Instagram would search for responsive information. You asked that Flipagram consider how much responsive information it would be willing to accept. I agreed to consider this question with Flipagram, though of course it is a very difficult question to answer before Instagram defines the universe of potential responsive information and how much it is going to cull from its responses.

Please let me know (1) approximately how many responsive legal challenges and communications have occurred; where Instagram is willing to search for responsive information; and the criteria it intends to apply to cull “representative” information; and (2) when Instagram can produce the information.

Interrogatory No. 5; Request for Admission Nos. 43-55; Request for Production No. 31.

These requests seek information regarding Instagram’s promotional efforts and consumer studies relating to third-party INSTA- and GRAM-formative marks. During our initial call, you stated that Instagram would not produce any information relating to INSTA-formative marks, and continued to insist that such marks are not relevant to this dispute. I explained that Instagram has put INSTA at issue by seeking discovery from Flipagram regarding its prior use of the mark INSTABACKGROUND. You stated that such use is relevant to Flipagram’s intent under the *du Pont* factors. I again pressed you for a rationale why INSTA is not relevant to the strength of Instagram’s mark. You responded, “It’s an academic exercise to explain why INSTA isn’t relevant to the strength of the mark.” You also asserted that Instagram’s promotion of GRAM-formative marks is not relevant. At the end of our initial call, you committed to thinking further about these responses and discussing them with your client. During our follow-up call, you stated that Instagram “maintains its objection” to any information regarding INSTA-formative marks.

An “academic exercise” is generally understood to be one that has no practical meaning or application in the real world. Explaining Instagram’s basis for asserting that INSTA is not relevant is hardly an “academic exercise.” We await your explanation.

Interrogatory No. 6; Request for Production No. 23. These requests seek identification of past or present users of the Instagram API that used a GRAM-formative or INSTA-formative mark. In our initial call, you disputed that these requests were virtually identical to Instagram’s requests seeking identification of users of the FLIPAGRAM mark and information regarding Flipagram’s selection and development of the INSTABACKGROUND mark. You also asserted that some requests “are relevant one way and not the other,” arguing that even if Instagram asked virtually identical requests, Flipagram could not do the same. In response to Instagram’s objections, I clarified during the call that Flipagram seeks information relating to past or presents users of the Instagram API that used a GRAM- or INSTA-formative mark in connection with the API. You asserted that this clarification would not help, because it did not address Instagram’s other objections. During our follow-up call on October 14, you committed to following up and discussing these requests further with your client.

Please let me know whether Instagram will supplement its responses to these requests.

Interrogatory No. 7. As I noted in my September 24 letter to Mr. Ghajar, and reiterated during our calls on October 8 and 14, Flipagram is entitled to serve 75 interrogatories on Instagram. Instagram objects to this Interrogatory on the ground that it would require answers with respect to approximately 40 requests for admission. Taking into consideration that Flipagram has served a total of 16 interrogatories on Instagram, responding to this Interrogatory with respect to 40 responses to Requests for Admission would not exceed the 75-interrogatory limit. You did not dispute this. Consequently, according to Instagram's own counting methodology, responding to this interrogatory would yield a total interrogatory count of 56. By Instagram's own admission, Flipagram has not exceeded the permissible number of interrogatories.

Notwithstanding the fact that there is no actual dispute over whether Flipagram has exceeded the allowable number of interrogatories, Instagram has insisted that it will not respond to this request unless Flipagram agrees to Instagram's counting methodology. Since even Instagram's counting methodology gives it no basis to object to responding to this request, Instagram's objection is frivolous. Nonetheless, for purposes of streamlining this meet and confer process, Flipagram will limit this interrogatory to seek responses relating to the following requests for admission: 1, 3-6, 24, 26, 32, and 66. For purposes of the first set of interrogatories only, Flipagram will agree that if Instagram provides full responses relating to the specified requests for admission, Flipagram will have propounded a total of 25 interrogatories. Flipagram reserves its rights to seek responses relating to requests for admission for which Instagram has not yet provided a substantive response, but has promised to supplement.

Interrogatory No. 11; Request for Production Nos. 24-25, 33-36, 38. These requests seek information relating to the explicit permission in the Instagram API Terms of Use for users to employ either "Insta" or "Gram" in their names, as well as legal challenges and communications relating to certain third-party marks and Instagram's asserted marks. Instagram has refused to respond to these requests unless Flipagram provide legal authority for the proposition that the Instagram terms of use in effect at the time Flipagram adopted its mark are relevant. "A trademark owner may be precluded from terminating its consent by the express or implied terms of an agreement with the actor. The trademark owner may also be estopped from terminating the consent if the termination would be inequitable because of the actor's reasonable reliance, evaluated in light of the specific terms of any agreement between the parties." Restatement (Third) on Unfair Competition, § 29, comment d (1995). The Instagram API Terms of Use in effect at the time Flipagram adopted its trademark affirmatively granted Instagram's consent to third-party adoption and use of INSTA- and GRAM-formative marks. Consequently, discovery relating to the API Terms of Use in effect in early 2012 is relevant. Please respond to these requests.

Interrogatory No. 12; Request for Production 29. During our call, you stated that Instagram would be willing to revisit its objections to these requests once the parties have entered an appropriate protective order. Thomas Harvey sent you a proposed protective order on August 13, 2015, and has followed up with you repeatedly since then. I asked regarding the

status of the proposed protective order during our calls on October 8 and 14. During each of our calls, you committed to check in with your client regarding its review of the proposed order's terms. As of the date of this letter, Instagram still has not responded to any of these inquiries. Instagram cannot sit on a proposed order for months and then refuse to respond to discovery on the basis that the order has not been finalized and entered.

Interrogatory No. 13. During our telephone calls, I stated that Flipagram would agree to narrow this Interrogatory to goods and services offered under GRAM- or INSTA-formative marks using the Instagram API. During our first call, you stated that this limitation "would help." During our second call, you committed to consult with your client on this limitation.

Interrogatory No. 14; Request for Production No. 8. During our calls, you indicated that Instagram's relevance objection to these requests is "not the holdup" and that Instagram "could figure out" these terms. Instead, Instagram's primary objection to these requests is on the basis of relevance. Despite the fact that Instagram served virtually identical requests on Flipagram, Instagram will not respond to these requests.

Request for Admission Nos. 1, 3, 4. Instagram has refused to supplement its responses to these requests.

Request for Admission Nos. 5, 6, 11, 13-15. During our initial call, you committed to ask your client whether it would respond to these requests if Flipagram narrowed them to Instagram's understanding of the terms at issue. During our second call, you stated that you were still waiting to hear back from Instagram on these requests.

Requests for Admission Nos. 12, 16-17. Instagram has refused to supplement its response to these requests because it will not "admit that a document says what it says." But Instagram's request for admission no. 66 asks the same type of question. Please respond to these interrogatories.

Request for Admission Nos. 20-22. Instagram has objected to these requests on two grounds: (1) that it does not understand what actual consumer confusion means; and (2) that the request supposedly calls for information outside its possession, custody or control. The first objection is plainly frivolous. The presence or absence of actual consumer confusion as between an applied-for mark and an existing mark is one of the *du Pont* factors, and Flipagram is entitled to know whether Instagram has received any communications indicating that consumers are confused. As for the second objection, as we discussed during our call, inherent in every discovery request that is propounded is the notion that a party need only respond with information that is in its possession, custody or control. Therefore, Instagram's second objection is baseless. Instagram plainly knows whether it has evidence of consumer confusion. Please respond to these requests.

Request for Admission Nos. 28-31. These request seeks information relating to when Instagram learned of Flipagram's use of the FLIPAGRAM trademark and when Instagram began objecting to that use. Instagram's objections to these requests are baseless. The term

“knew of” is not vague and ambiguous. The request is not overly broad or unduly burdensome because it only requires Instagram to inquire as to the knowledge of employees who are reasonably likely to have responsive information. And the request seeks information relevant to Flipagram’s defense of estoppel by consent. As noted above, a trademark owner’s consent to a third party’s adoption of a mark, once given, cannot be revoked. Plainly, the timing of Instagram’s knowledge of Flipagram is relevant to this question. Please respond to this request.

Request for Admission Nos. 33-42. Instagram has agreed to respond to these requests as to the enforcement of GRAM-formative marks in the United States, but not INSTA-formative marks. You have not provided a date by which Instagram will provide the responses.

Request for Admission No. 58-61. Instagram objects to these requests on the grounds that Instagram’s adoption of these marks is not relevant. You asked me to cite authority supporting these requests. “Information concerning a party’s selection and adoption of its involved mark is generally discoverable (particularly of a defendant).” TBMP § 414; *see Varian Assocs. v. Fairfield-Noble Corp.*, 188 U.S.P.Q. 581 (T.T.A.B. 1975) (party is entitled to discovery relating to the circumstances surrounding adoption of mark at issue). As you are aware, Flipagram is challenging Instagram’s right to register the INSTAGRAM trademark. Moreover, Instagram’s Notice of Opposition defines its marks as any mark containing the word “Instagram.” Several components of Instagram’s design marks copy, or are derivative of, Polaroid marks. Accordingly, these requests also seek information relevant to the strength of Instagram’s asserted marks.

Request for Admission Nos. 63-65. During our initial call, you stated that Instagram is not required to respond to questions of law. I pointed out that, as noted in my September 24 letter, the existence of a license is a question of fact, not of law. *See, e.g., A. Natterman & Cie. GmbH v. Bayer Corp.*, 428 F. Supp.2d 253, 259 (E.D. Pa. 2006). Even if a legal conclusion were required, Instagram would still be obligated to answer. *Thomas v. Cate*, 715 F.Supp.2d 1012, 1029-30 (E.D. Cal. 2010).

You stated that you would provide me with relevant authority demonstrating that Instagram does not have to respond to questions of law. Please either provide such authority or respond to the requests.

Request for Admission Nos. 67-69. Instagram has refused to supplement these responses on the grounds that the identification of goods and services in Instagram’s registrations is what controls rather than how Instagram uses the marks at issue.

Request for Production Nos. 1-2. During our first telephone conference, you stated that you “have no clue what exists” in the way of responsive documents, but that responding would be unduly burdensome and irrelevant. You did not explain why searching for such documents would be unduly burdensome or irrelevant. During our second telephone conference, you stated that Instagram would respond to the requests if narrowed. However, you refused to provide me with any guidance as to how the requests would need to be narrowed in order for Instagram to be willing to respond to them. Obviously, only Instagram knows what

documents it has in its possession. I repeatedly asked you to tell me what documents Instagram thinks would be encompassed by this request that would not be relevant or that would be overly broad, so that I could attempt to narrow the request in a way to exclude those documents. You would not do so, but simply insisted that Flipagram narrow the requests. Flipagram is thus left to guess how to amend these requests in a manner that would satisfy Instagram and exclude from the universe of responsive documents items that would have no relevant to this dispute. Instagram's refusal to work cooperatively with Flipagram to narrow these requests defeats the purpose of the meet and confer process. Tellingly, Instagram's request for production no. 58 is virtually identical to this request.

Please either provide some guidance as to why the requests are overbroad so that Flipagram can narrow them in a way that is productive and makes sense, or respond to the request as written.

Request for Production Nos. 4-5, 9, 39, 40, 42. During our initial call, you stated that Instagram would not supplement its responses to these requests; but that if Flipagram thinks there is a specific good or service that is not in use under Instagram's marks, Flipagram should first identify that good or service. Flipagram is not required to do so. Instagram bears the burden of proving that its registrations are valid. Accordingly, it is required to produce the requested information.

With respect to Request No. 39, you have agreed to produce information pursuant to a protective order. Please respond to the proposed protective order that Thomas Harvey sent you on August 13, 2015, well over two months ago.

Request for Production Nos. 7, 43, 44. During our initial telephone conference, you stated that "Instagram doesn't do advertising or marketing," implying that there would be no documents responsive to Request nos. 7 and 43. If that were the case, then Instagram would not need to object to those requests on the grounds that they are unduly burdensome. If Instagram has no responsive documents, it should amend its response to say so. If it does, it should produce the requested documents.

Instagram has agreed to supplement its response and produce documents responsive to Request No. 44 after the protective order is finalized. Please respond to the proposed protective order that Thomas Harvey sent you on August 13, 2015, well over two months ago.

Request for Production No. 12. During our telephone conference, you stated that the language regarding "the subject matter of" this proceeding was confusing because Instagram thought it meant this proceeding alone, and not the issues raised in this proceeding. My letter, however, clearly stated that limiting this request to "this opposition proceeding is too narrow." You also reiterated your earlier objection that the request would require Instagram to seek documents from every single employee in the company. For the reasons stated previously, this is obviously not the case. Instagram continues to refuse to supplement its response to this request.

Request for Production No. 13. During our initial call, you asked if Flipagram would narrow this request to seek documents regarding consumer perceptions of the INSTAGRAM mark, rather than INSTA- and GRAM-formative marks. Instagram, however, has asserted in its discovery responses that consumers understand INSTA and GRAM to refer to Instagram. Obviously, it must have had a basis for making that assertion. Any studies, reports or opinions in Instagram's possession relating to this assertion are thus relevant. You stated that "there might be something" that Instagram "can respond to" if Flipagram "is asking for studies regarding the perception of the INSTAGRAM mark." Plainly, any such documents would be responsive to the request as propounded, and Instagram should produce them promptly. Although you offered to produce any expert reports prepared on this issue once they are prepared (which Instagram would be required to do anyway), contemporaneous documents prepared in the ordinary course of business are, of course, relevant and probative of this issue.

Request for Production Nos. 15-20. Instagram's response to this request is limited to producing documents upon which Instagram intends to rely at trial. This is improper because it seeks to exclude from production documents relating to the same subject matter that contradict, rather than support, Instagram's position. Instagram must produce documents that refer or relate to the allegations in paragraphs 4, 10, and 18-20 of the Notice of Opposition and its affirmative defense for "estoppel" regardless whether Instagram intends to rely on them.

Instagram's Discovery Requests to Flipagram.

Interrogatories - General. Where Flipagram has responded to interrogatories by referring documents pursuant to Fed. R. Civ. P. 33(d), Instagram has requested that Flipagram identify the responsive documents being produced. Pursuant to Fed. R. Civ. P. 33(d) and TBMP 405.04(b), once Flipagram has produced the documents in question, it will supplement its responses to specify those documents in sufficient detail to permit Instagram to locate and identify them as readily as Flipagram can.

With respect to the "general" issue you raised regarding Flipagram's responses to requests regarding INSTABACKGROUND, I can confirm that Flipagram is not withholding any documents based on the objections that the requests lack foundation and assume facts.

Interrogatory No. 1. You acknowledged that Flipagram agreed, in its initial written responses, to produce documents responsive to this interrogatory, and that Instagram withdraws this item from its meet and confer efforts.

Interrogatory Nos. 29-35. Flipagram will supplement its responses to these interrogatories.

Requests for Admission 14-15. During our second telephone conference, Instagram offered to amend this request to replace "well known" with "known to a majority of U.S. users of social media." That amendment addresses Flipagram's vagueness objection. It would not, however, change Flipagram's response.

Requests for production - General. With respect to a date for the mutual exchange of documents, Flipagram has been prepared to begin producing documents since mid-October. As you know, the date of the mutual exchange has been the subject of discussions between you and Thomas Harvey. Please let us know when Instagram will be ready to make a mutual production.

With respect to its responses to request nos. 36-48, Flipagram agrees to replace “nonprivileged” for “non-objectionable.”

Request for Production Nos. 15, 17. Flipagram will produce documents responsive to these requests.

Request No. 25. Flipagram expects that documents that it has already agreed to produce in response to interrogatory no. 20 will also be responsive to this request.

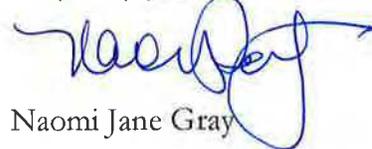
Request No. 54. You stated during our initial telephone conference that this request is not intended to ask for Flipagram’s trial exhibits, but rather “other documents that Flipagram intends to rely on that are not responsive to other requests.” Any documents that Flipagram intends to rely on at trial will be disclosed in its pretrial exhibit list. Obviously, it is too early in the proceedings for Flipagram to have determined what those documents will be. Consequently, this request is premature.

Summary

No later than November 6, 2015, please (1) confirm in writing that Instagram will supplement its responses and produce the information it has agreed to produce no later than November 13, 2015; and (2) respond to the proposed protective order that Thomas Harvey sent you on August 13, 2015.

Please do not hesitate to contact me with any questions.

Very truly yours,



Naomi Jane Gray

Exhibit E
to Declaration of Naomi Jane Gray in Support of
Motion to Test Sufficiency of Responses to
Flipagram's First and Second Sets
of Requests for Admission

Offered by Applicant Flipagram, Inc.

Instagram, LLC v. Flipagram, Inc.

Opposition No. 91217238

HARVEY • SISKIND LLP

November 3, 2015

Naomi Jane Gray
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VIA EMAIL

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Re: *Instagram, LLC v. Flipagram, LLC*
TTAB Opposition No. 91217238

Dear Marcus:

I write to meet and confer regarding Instagram's responses to Flipagram's second set of discovery requests. Like its responses to Flipagram's first set of discovery requests, Instagram's responses to this set are insufficient. Instagram has refused to respond to a majority of the requests. Where Instagram has offered substantive responses, those responses are evasive. Instagram has refused to respond to several requests that are nearly identical to requests that Instagram itself has made. Flipagram requests that Instagram promptly supplement its responses to the following requests.

Interrogatory No. 18; Request for Admission Nos. 77-78, Request for Production Nos. 45-46, 50-51. These requests seek information regarding Instagram's decision to repudiate its prior API Terms of Use, which gave explicit permission for Flipagram and others to incorporate either "Insta" or "Gram" in their names. It also seeks related information about the benefits Instagram derives from maintaining its API. These requests are clearly relevant to the affirmative defenses of unclean hands and estoppel by consent. Moreover, at your request, Flipagram already has provided you with legal authority showing why Instagram's prior express terms are relevant. (See my October 30, 2015 letter at p. 4.) "Estoppel can also prevent the trademark owner from withdrawing or terminating a consent. That is, the person who benefits from the consent to use the trademark may so rely on the consent as to create an estoppel which prevents later withdrawal or termination of the consent." McCarthy on Trademarks, § 32.106. These requests are plainly relevant.

Instagram also raises a variety of unfounded vagueness objections. For example, "notify" is an ordinary word with a plain meaning. So are the words "analysis," "benefit," and "value," which are identical to the words that Instagram used in its own discovery requests (see Instagram's Request for Production Nos. 38-40). Similarly, because Request for Production No.

Marcus Peterson, Esq.
November 3, 2015
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46 is essentially identical to Instagram's Request for Production No. 36, Instagram has waived any right to object to it. *Sentrol, Inc. v. Sentex Sys., Inc.*, 1986 WL 83726 (T.T.A.B. 1986), at *3 (explaining right to object is waived because identical discovery requests were served on the adverse party).

Please respond to these requests promptly.

Request for Production Nos. 48-49. Instagram has refused to respond to these requests on relevance and vagueness grounds. Request No. 48 seeks documents relating to Flipagram in connection with Instagram's development and use of the video feature on the Instagram app. This request is relevant to the similarity of the parties' respective goods and services and to Flipagram's affirmative defense of unclean hands. Instagram's relatively recent decision to expand to video support, after Flipagram pioneered many video functionalities, raises questions regarding Instagram's motivation for opposing Flipagram's trademark application. Flipagram's request is narrowly tailored to investigate this issue. Indeed, it is similar to Instagram's Request for Production Nos. 13-14. *Sentrol, Inc., supra*, at *3. To address Instagram's vagueness objection, "video feature" refers to Instagram's support for videos, not just photos, on the Instagram app. "Relate to Applicant" means mention or discuss Applicant.

Request No. 49 seeks your communications or agreements regarding the trademark SHOWMEGRAM. This request is plainly relevant as it concerns another GRAM-formative trademark registration for a set of goods and services similar to those of Flipagram. Instagram consented to the registration of the SHOWMEGRAM mark, thus acknowledging that the mark is not confusingly similar to its INSTAGRAM Marks. Although Instagram also claims that it does not understand the terms "relate to" and "concerning," these are routine phrases and they permeate Instagram's own discovery requests. Please respond to these requests.

Request for Admission Nos. 70-71. These requests seek to establish certain facts, not reasonably subject to dispute, without the necessity of formal proof at trial. This is a central and well-settled function of requests for admission. *See, e.g., Champlin v. Oklahoma Furniture Mfg. Co.*, 324 F.2d 74 (10th Cir. 1963). Request No. 70 seeks to confirm the date that Instagram first became available on the Android platform. This is relevant to the fame of the INSTAGRAM Marks and the parties' respective channels of trade in the *DuPont* analysis. Similarly, Request No. 71 seeks to confirm the date that Instagram first provided access to its service on the web, a fact that was well-publicized in this Instagram blog post: <<http://blog.instagram.com/post/42363074191/instagramfeed>>. This request is relevant to the fame and strength of the INSTAGRAM Marks, the channels of trade, and the validity of Instagram trademark registrations. To address Instagram's vagueness objection, "make the

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November 3, 2015
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Instagram service available on the world wide web” refers to making the Instagram photo feed available on a web browser. Please supplement these responses.

Request for Admission Nos. 73-74, 76. These requests seek admissions regarding the genuineness and accuracy of certain documents. These are routine requests that perform another central function of requests for admission. Fed. R. Civ. Proc. 36(a)(1)(B). Instagram’s objections and responses are evasive. For example, request Nos. 73-74 seek to confirm the accuracy of Instagram’s own policies from Instagram’s own website as of a certain date. Instagram claims it is unable to respond based on the fact that these pages are archived through a web archive. Obviously Instagram has the ability to confirm the accuracy of these pages. Similarly, Request No. 76 seeks to confirm the genuineness of email correspondence between the parties. But Instagram admits only that the document “purports to be an email chain,” sidestepping the purpose of the request: to dispose of an issue about which there is no actual dispute. Please supplement these responses.

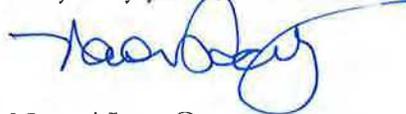
Request for Admission Nos. 79-81. In its applications to register the INSTAGRAM Marks at issue in this dispute, Instagram claimed to be using the marks in connection with various goods and services that it appears Instagram does not actually provide. Flipagram tests these claims in this series of requests, adopting the exact language that Instagram itself used in its goods and services descriptions with the USPTO. Instagram’s vagueness objections to this language are frivolous. These requests are plainly relevant because they speak to the strength of the marks and Flipagram is challenging the validity of Instagram’s registrations. Please respond to these requests.

Summary

Please advise me of your availability this week to discuss the foregoing issues. Alternatively, please confirm in writing by November 6 that Instagram will supplement its responses and produce responsive documents no later than November 13, 2015.

Please do not hesitate to contact me with any questions.

Very truly yours,



Naomi Jane Gray

NJG:cl

Exhibit F
to Declaration of Naomi Jane Gray in Support of
Motion to Test Sufficiency of Responses to
Flipagram's First and Second Sets
of Requests for Admission

Offered by Applicant Flipagram, Inc.

Instagram, LLC v. Flipagram, Inc.

Opposition No. 91217238



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November 18, 2015

Naomi Jane Gray, Esq.
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Re: *Instagram adv. Flipagram* – Opposition No. 91217238
Meet and Confer Discussions

Dear Ms. Gray:

We are writing in response to your October 30 letter regarding the parties' meet and confer efforts and November 3 letter regarding Instagram's responses to Flipagram's second set of discovery requests. This is also in follow-up to our multiple meet and confer efforts by phone.

October 30 Letter

As an initial matter, we take exception with your attempts to parse words from our discussion and to take things out of context. We have genuine disputes on a number of topics, and we are happy to continue to discuss those with you in an attempt to resolve the issues raised in your initial meet and confer letter and during our calls on October 8 and 14. Although we have no interest in engaging in a game of "he said, she said," we must clear the record on a couple of points.

1. Interrogatory Nos. 1-2; Requests for Admission Nos. 28, 56; Request for Production No. 3

These requests seek information and documents relating to Instagram's (as broadly defined in your Definitions to include former employees) "awareness" of Flipagram or its goods and services. We made clear during our call that all of the discovery requests in this category were objectionable on a number of grounds, including that they were overly broad and unduly burdensome, but that in an attempt to reach a resolution, Instagram would agree to respond to a narrower request. Instagram proposed such a narrower request, offering to provide information as to

when in-house legal counsel became aware of your client, based on your assertion in your meet and confer letter that the requests were not unduly burdensome because Instagram need only search through its “trademark and other related files.” We made that offer to avoid any further disagreement or a motion to compel on these requests, which is appropriate given that we have no obligation to respond to these requests since they are objectionable on a number of grounds. You refused that offer without even suggesting an alternative to narrowing the requests. We are still willing to consider any proposal you have in that regard.

Moreover, you still have not explained the relevance of the information sought in these requests in view of the fact that Flipagram’s delay-based defenses were stricken, and an Instagram employees’ “awareness” of your client or its services has no bearing on your consent or unclean hands defenses.

Finally, as to the HIPSTAMATIC mark (Request for Admission 56), we simply disagree that there is any relevance to that mark in this proceeding and will maintain our response.

2. Interrogatory Nos. 3-4; Request for Production Nos. 11, 32

These requests seek information and documents relating to Instagram’s trademark enforcement against other marks with the prefix INSTA- or -GRAM suffix. Instagram objected to these requests on a number of grounds, which we do not repeat here.

Nonetheless, during our calls, we offered to produce a representative sample of enforcement efforts against GRAM-formative marks in the United States. My understanding is that there have been over 100 third parties that have been contacted by Instagram relating to trademark objections. Going through and locating documents “relating” to each of those matters, or even attempting to determine where to “search for responsive information” as to all of those matters is overly broad and unduly burdensome, either which outweigh your client’s desire to have all such files and documents. We are unaware of any authority that would require Instagram to search for and produce the entirety of this type of information. If you have authority that supports your position, please send it to us.

Otherwise, Instagram is within its rights to stand on its responses, but is willing to produce representative samples in an effort to reach an agreement on this issue. Please let us know what you propose in terms of narrowing these requests.

3. Interrogatory No. 5; Request for Admission Nos. 43-55; Request for Production No. 31

These requests seek information, admissions, and documents relating to INSTA- and GRAM-formative marks that Instagram has “promoted” (which Flipagram attempted to define as “to draw positive attention to something in the public medium, or to publicly encourage its growth, progress, adoption, or sales. To ‘Promote’ specifically includes featuring Third Parties on Your Blog, as described in paragraph 14 of Your Counterclaim Answer.”). Instagram objected on a number of grounds.

In your letter, you have inaccurately quoted our conversation, specifically my comment regarding an “academic exercise.” . During our call, you and I had gone back-and-forth regarding information you seek for “INSTA-Formative Marks.” We disagreed as to the relevance of such information, and I mentioned that continuing to try to convince you to accept Instagram’s position felt like an academic exercise because the parties simply were not going to agree on that point. And even assuming *arguendo* that the information is relevant, Instagram objected to these requests on a number of other grounds (including on the grounds that the requests were vague and ambiguous, overly broad, and unduly burdensome), none of which you have ever addressed.

Further, as you note, your client’s adoption of the INSTABACKGROUND mark *is* relevant to its intent in selecting the FLIPAGRAM mark. However, you did not demonstrate the relevance of third party INSTA-formative marks, only arguing that they go to the “strength of Instagram’s mark.” We disagree and you have not provided any authority to support your position.

For example, you have not explained why the name INSTACANE (RFA No. 50) has any relevance to this current proceeding or why dissecting portions of the INSTAGRAM mark is proper for a “strength” analysis. Taking your argument to its logical conclusion, whether the “INSTA” portion of the INSTAGRAM mark is “weak” (a position with which we disagree) has no bearing on your client’s attempt to register the mark FLIPAGRAM.

Accordingly, Instagram will continue to maintain its objections to these requests unless you can address all of Instagram’s objections.

4. Interrogatory No. 6; Request for Production No. 23

These requests seek information and documents relating to “all past and present users of the Instagram API that used a GRAM-Formative Mark or INSTA-

Formative Mark.” Instagram objected to these requests on a number of grounds. Your clarification as to the meaning of Interrogatory No. 6, *i.e.* that it is directed to third parties who used such a mark in connection with the Instagram API, does not address the other objections.

In defending the propriety of your requests, you argued that they were “virtually identical” to requests propounded by Instagram. Even if the requests were “identical,” that alone is not a basis for requiring Instagram to answer them. *See Miss America Pageant v. Petite Productions, Inc.*, 17 USPQ2d 1067, 1069 (TTAB 1990) (“We are persuaded, however, that certain of the interrogatories were proper when served upon respondent but are unduly burdensome when served upon petitioner.”). Accordingly, Instagram will continue to maintain its objections to these requests. If you are able to address the other bases for Instagram’s objections and provide legal authority in support of your position, we would be willing to reconsider our objections.

5. Interrogatory No. 7

This Interrogatory seeks information supporting any response to a Request for Admission that is not an unqualified admission. Instagram objected that the Interrogatory is compound and also incorporated the objections to each Request for Admission. While Instagram is under no obligation to respond to the compound Interrogatory, it offered to respond to the Interrogatory as to certain of the Requests for Admission so long as the parties agreed that each Request for Admission for which Instagram provided the requested information would count as a separate Interrogatory response.

You were unwilling to make such an agreement, in effect asking Instagram to respond fully to the compound Interrogatory and leaving for a later date a determination of the number of Interrogatories Instagram had answered, creating the potential for future conflict. Because we could not reach an agreement, Instagram continued to rest on its objections.

It appears you are now, in your October 30 letter, narrowing the Interrogatory to seek information as to Request for Admission Nos. 1, 3-6, 24, 26, 32, and 66. Instagram rested on its objections on some of those Requests for Admission, and responded to others. Instagram will agree to provide the requested information as to those it denied or gave a qualified admission (Request for Admission Nos. 5, 6, 24, 26, 32) if Flipagram agrees that such a response will be counted as five interrogatory responses, and if it agrees not to pursue further such responses as to other Requests for Admission.

6. Interrogatory No. 11; Request for Production Nos. 24-25, 33-36, 38

These requests seek information and documents relating to Instagram's API terms of use and changes to those terms (Interrogatory No. 11 and Request for Production No. 25) as well as documents relating to third parties with which Instagram has a "business relationship" (Request for Production No. 24), license or coexistence agreements (Request for Production Nos. 33-35), communications with Polaroid (Request for Production No. 36), and "legal challenges" against third parties (Request for Production No. 38). Instagram objected to the requests on a number of grounds.

You appear to assert that Interrogatory No. 11 and Request for Production No. 25 seek relevant information because Instagram may have been estopped from revoking its consent (which is not how Flipagram plead its affirmative defense), but you stated on our call that you would send me a case on that issue. To date, you have not done so – instead citing generally to the Restatement. You also do not address any of the objections as to the other categories of documents sought.

As you have not addressed the bases for Instagram's objections to these requests, Instagram maintains those objections.

7. Interrogatory No. 12; Request for Production No. 29

Interrogatory No. 12 seeks information relating to "quality control" over "licensees" of Instagram's trademarks, while Request for Production No. 29 seeks documents relating to quality control over users of the Instagram API. Instagram objected to each request on several grounds. While the stipulated protective order that was filed recently addresses one of the grounds for objection, it does not obviate all of Instagram's objections. For example, you have not addressed the relevance of seeking quality control over users of the Instagram API that are not also licensees of one of Instagram's trademarks. Instagram may supplement its responses to these requests once its other objections have been addressed.

8. Interrogatory No. 13

This Interrogatory seeks information relating to quality control over users of the Instagram API. Instagram provided a full response to this Interrogatory in light of its objections, which we discussed during our calls. I have consulted with Instagram and it will not supplement its response.

9. Interrogatory No. 14; Request for Production No. 8

These requests seek information and documents relating to the conception, selection, and adoption of Instagram's trademarks. You claim that I "indicated that Instagram's relevance objection to these requests is 'not the hold up.'" This is untrue. I stated that Instagram's vague and ambiguous objections did not, alone, prevent it from responding, and noted that the information sought is not relevant. You have not identified any relevance for the information sought, other than stating that Instagram served similar requests on Flipagram. As you know, Flipagram's intent in selecting its trademark is a factor in analyzing likelihood of confusion. Instagram's intent in selecting its own trademark is not a factor and has no relevance.

10. Request for Admission Nos. 1, 3, 4

These requests seek admissions relating to the meaning of "Gram." Instagram objected to Request No. 1 and responded to Request Nos. 3 and 4. Instagram will not further supplement these responses.

11. Request for Admission Nos. 5, 6, 11, 13-15

These requests seek admissions regarding the "connotation" of "INSTA" and "GRAM." During our meet and confer call, you offered to narrow these requests to seek Instagram's understanding of "INSTA" and "GRAM." Such a limitation does not fully address Instagram's objections. Accordingly, Instagram will not supplement its responses to these requests.

12. Request for Admission Nos. 12, 16-17

These requests seek admissions as to whether the USPTO assigned a pseudo-mark to an INSTAGRAM application (Request No. 12) and as to online dictionary printouts attached to Flipagram's requests (Request Nos. 16-17). You clarified in your October 30 letter that Request No. 12 refers to the trademark file wrapper and not Instagram's application itself, but Instagram is still unclear why Flipagram would need for Instagram to admit to something that is in the USPTO records. Please clarify. Instagram maintains its objections with respect to the third-party online dictionary printouts.

13. Request for Admission Nos. 20-22

These requests seek admissions regarding whether "Third Party communications contemplating, or inquiring about, any association or affiliation between" Instagram and Flipagram (Request No. 20) and consumer confusion

(Request Nos. 21-22). You misinterpret Instagram's objections – Instagram does not object that it “does not understand what actual confusion means,” but objects as to the wording of Flipagram's requests. Instagram also responded to the requests. Thus, your demand that Instagram respond to the requests is misguided.

14. Request for Admission Nos. 28-31

These Requests seek admissions relating to Instagram's awareness of Flipagram and its communications with Flipagram. Instagram responded to Request Nos. 29-31, so we are unclear as to your letter in that regard. Instagram's objections as to Request No. 28 (awareness of Flipagram) were addressed above.

15. Request for Admission Nos. 33-42

Instagram will supplement its responses to Request Nos. 33 and 34 on a date we can mutually agree on given that Flipagram is also supplementing its discovery responses.

16. Request for Admission Nos. 63-65

These Requests seek admissions that the Instagram API Terms of Use is a license and that it licenses use of INSTA and GRAM to users of the Instagram API. Instagram objected that the requests call for a legal conclusion and are not reasonably calculated to lead to the discovery of admissible evidence. You cited a case for the proposition that the existence of a license is a question of fact; however that case is not helpful to this discussion. It merely deals with a motion for summary judgment as to a patent license, and has no bearing on whether Instagram must respond to the requests at issue.

Moreover, I mentioned that there is case law supporting use of the “calls for a legal conclusion” objection when the Request for Admission implicates a legal conclusion or asks the responding party to “ratify” a legal conclusion that is merely “attached to operative facts.” *See Music Grp. Macao Commercial Offshore Ltd. v. Foote*, No. 14-CV-03078-JSC, 2015 WL 579688, at *2 (N.D. Cal. Feb. 11, 2015) (regarding a request to admit that certain conduct was illegal). Under the circumstances, Instagram will not supplement these responses.

17. Requests for Admission Nos. 67-69

These Requests seek admissions regarding Flipagram's attempts to define limitations in Instagram's services that do not appear in Instagram's description of services in its trademark registrations or applications. Such limitations are not

relevant here. *See The Kosher Garden, Inc. v. Sioux Falls Grocery I, LLC*, Canc. No. 92054073 (TTAB 2013) (where both parties' ID of services include "retail grocery services," evidence that petitioner was primarily a kosher market serving the Orthodox Jewish community in Brooklyn, New York and registrant was an organic food store in Sioux Falls did not raise a genuine issue of material fact to overcome summary judgment granting cancellation). Accordingly, Instagram will not supplement these responses.

18. Request for Production Nos. 1-2

These Requests seek all documents "that relate to Flipagram or Flipagram's Marks" (Request No. 1) and that "relate to your communications with Flipagram" (Request No. 2). Instagram objected on several grounds, including that the requests are overly broad and could encompass documents not relevant to this proceeding. Instagram nonetheless offered to produce communications with Flipagram relating to its objection to the Flipagram trademark. You rejected this offer but did not give an indication as to what other documents would be relevant to this proceeding. Instead, you put the burden on Instagram to search for documents in its possession and clarify what is has that is not relevant. This is unduly burdensome and Instagram has no obligation to do so. Instagram is willing to respond to a properly narrowed request and is willing to discuss additional categories of documents Flipagram believes are relevant. This is not an attempt to force Flipagram to "guess how to amend the requests," but to propound a narrow request so that Instagram can reasonably search for responsive documents.

19. Request for Production Nos. 4-5, 9, 39, 40, 42

These Requests seek an identification of each of Instagram's goods and services (Request No. 4), the date of first use of each of Instagram's goods and services (Request No. 5), documents that refer or relate to Instagram's trademark registrations or applications (Request No. 9), the number of "registered users" for each of Instagram's goods and services (Request No. 39), the total number of downloads of the Instagram mobile application on a monthly basis (Request No. 40), and the total number of visitors to the Instagram.com website on a monthly basis (Request No. 42). Instagram objected to the requests on various grounds, agreed to produce its trademark file wrappers in response to Request Nos. 4 and 9, and agreed to produce publicly-available data in response to Request Nos. 39 and 42.

During our meet and confer calls, you argued that Instagram is required to prove that its registrations are valid, which we believe relates to Request Nos. 4-5. As I stated during the calls, the validity of Instagram's registrations has not been challenged based on a lack of use and Instagram's trademark registrations carry with

them the presumption of validity. Instagram agreed to consider providing documents as to any good or service that Flipagram specifically requests, but Instagram does not bear the burden of providing the validity of its trademark registrations beyond the presumptions afforded. Instagram will not supplement its responses at this time.

We are unclear why Flipagram contends that the other responses are incomplete or improper. We are willing to discuss those further if needed.

20. Request for Production Nos. 7, 43, 44

The Requests seek “marketing plans, marketing projections, and other Documents...relating to Opposer’s Marks and/or Opposer’s Goods and Services” (Request No. 7), monthly advertising and marketing expenditures (Request No. 43) and monthly sales or revenue (Request No. 44). Instagram objected on several grounds, including that Request No. 7 is overly broad in that it essentially seeks any document relating to Instagram or its services, and to the extent it seeks creation of documents (monthly advertising or sales) that are not maintained in the ordinary course of business. Now that the parties have agreed on the Stipulated Protective Order, Instagram will supplement its responses to Request Nos. 43 and 44, but cannot respond to Request No. 7 as written.

21. Request for Production No. 12

The Request seeks documents “relating to communications with Third Parties regarding this proceeding or the subject matter hereof.” Instagram objected on a number of grounds, including that the Request is overly broad in that it seeks documents on a variety of subjects, including the INSTAGRAM marks, the Instagram API, opposition proceedings in general, etc. Instagram narrowed the request in its response to communications regarding this proceeding. You assert that such a limitation is too narrow, but have not provided an alternative that would be narrow enough for Instagram to respond. Instagram will respond to a narrower request, but is unclear what documents Flipagram seeks or the relevance of such documents.

22. Request for Production No. 13

The Request seeks documents “relating to any reports, studies, or opinions regarding consumers’ perception of GRAM-Formative Marks or INSTA-Formative Marks.” Instagram objected on a number of grounds, most of which you do not address in your letters. You now appear to offer to narrow the request to seek only “reports, studies, or opinions regarding consumers’ perceptions of the INSTAGRAM mark.” If that is the case, Instagram will supplement its response.

23. Request for Production Nos. 15-20

These Requests seek all documents that “refer to, relate to, or support” various allegations in Instagram’s Notice of Opposition and its Second Affirmative Defense to Flipagram’s Counterclaims. Instagram objected to the Requests on various grounds and responded that it would produce documents on which it intends to rely in proving its allegations or affirmative defense. You have not addressed all of Instagram’s objections, and argue that Instagram’s response is too narrow. However, you have not identified what other relevant documents Flipagram seeks.

If you can narrow the requests and explain what documents Flipagram seeks that would “relate to” Instagram’s allegation that its marks are famous (Request No. 15) beyond the documents Instagram has agreed to produce, Instagram may be able to supplement its responses. During our call, you suggested that Instagram is required to produce any document demonstrating that INSTAGRAM is not a famous mark. It is unclear what such a document would be. That said, if you are narrowing the requests to seek all documents that *disprove* the allegations in Instagram’s Notice of Opposition, please serve additional requests on those topics and Instagram will consider a response.

24. Flipagram’s Responses to Instagram’s Discovery Requests.

Flipagram is agreeing to supplement its responses to a number of discovery requests. For those requests, Instagram will wait to review the supplemental responses and document production to determine whether they adequately and fully respond to the requests.

November 3 Letter

1. Interrogatory No. 18; Request for Admission Nos. 77-78; Request for Production Nos. 45, 46, 50, 51

The requests seek a variety of information and documents relating to Instagram’s API Terms of Use, including changes to the Terms of Use (Interrogatory No. 18, Requests for Admission Nos. 77-78, and Request for Production No. 45), Flipagram’s use of the Instagram API (Request for Production No. 46), and analysis regarding allowing Flipagram or others to use the API (Request for Production Nos. 50 and 51). Instagram objected to each request on a number of grounds and you appear to address only the relevance and vagueness objections as to some of the requests in your letter.

As we have discussed previously, Instagram does not agree that its previous API Terms of Use, which were modified years ago as per Instagram's express ability to make such modifications, are relevant to this opposition proceeding. Thus, the "reasons" for making changes to the Terms of Use are also irrelevant. Instagram is willing to review any Board decision Flipagram can cite on this issue, but a general citation to the Restatement is not persuasive. Instagram will not agree to supplement its responses to Interrogatory No. 18 at this time.

On the other hand, without waiving any of its objections, or admitting the relevance of any of the information sought, Instagram will agree to supplement its responses to Request for Admission Nos. 77-78 and Request for Production Nos. 45 and 50.

Instagram also cannot supplement its response to Request for Production No. 46. Notwithstanding your argument that Instagram has waived its objections by propounding a similar request, it is unclear what documents Flipagram seeks through this Request. As noted above, this is not a valid justification for Flipagram's request, in any event. Instagram sought Flipagram's documents relating to its use of the Instagram API. Instagram is unclear what documents Flipagram seeks from Instagram on that subject.

Similarly, Instagram is unable to supplement its response to Request for Production No. 51 at this time because you have not fully addressed Instagram's objections. Instagram will consider responding to a narrower or clearer request on this subject.

2. Request for Production Nos. 48-49

These Requests seek documents that "relate" to Flipagram in connection with Instagram's "conception, development, launch, and use of the video feature on the INSTAGRAM App" (Request No. 48) and documents that relate to communications or agreements with third parties regarding an application named SHOWMEGRAM.

Instagram objected to Request No. 48 on a number of grounds that you do not address in your letter. You argue that the documents sought are relevant to Flipagram's unclean hands defense and to "Instagram's motivation for opposing Flipagram's trademark application." We do not understand what this means, and do not agree that the documents sought have any relevance to a trademark opposition proceeding. We also do not know the basis of your assertion that "Flipagram pioneered many video functionalities," or why, if true, that would make the documents sought relevant.

Instagram objected to Request No. 49 on a number of grounds. As written, the Request does not seek, as you state, communications and agreements – it seeks

documents “that relate to” communications and agreements and Instagram objected to that language as vague and ambiguous and calling for privileged documents. Even if worded to seek communications and agreements themselves, such a request would still not lead to the discovery of admissible evidence – assuming, as you argue, Instagram “acknowledged” that SHOWMEGRAM is not confusingly similar to INSTAGRAM (which we do not admit), that has no bearing on the registrability of the FLIPAGRAM mark given the differences between the SHOWMEGRAM and FLIPAGRAM marks and respective products. If you are aware of any legal authority that would support your position, please provide it. Until then, Instagram maintains its objections.

3. Request for Admission Nos. 70-71

These Requests seek admissions as to when Instagram’s services were available on the Android operating system (Request No. 70) and the World Wide Web (Request No. 71).

Notwithstanding your argument that Flipagram is seeking to “establish certain facts,” the date on which Instagram’s services were available on the Android operating system is not relevant here. Please clarify why it would be relevant to the fame of Instagram or the parties’ channels of trade as set forth in their respective identifications of services.

Instagram notes your clarification of “made available on the World Wide Web,” which does not change Instagram’s response to Request No. 71.

4. Request for Admission Nos. 73, 74, 76

These Requests seek admissions relating to the authenticity of your printouts from the Internet Archive “Wayback Machine” and an email chain produced by Flipagram.

Instagram objected to each Request on a number of grounds. Given the differences between the date on the “Wayback Machine” crawl and the date in Flipagram’s requests, Instagram stated it is unable to admit or deny the request. If Instagram is able to confirm the accuracy of the pages produced by Flipagram, Instagram will amend its responses. Similarly, Instagram has not yet been able to verify that the email chain produced by Flipagram is a “true and correct copy” of an email exchange between Mr. Mohit and an Instagram employee. If Instagram is able to confirm as much, it will supplement its response.

Naomi Jane Gray, Esq.
November 18, 2015
Page 13

We look forward to discussing these issues further with you.

Sincerely,

/s/ Marcus D. Peterson

Marcus D. Peterson

Exhibit G
to Declaration of Naomi Jane Gray in Support of
Motion to Test Sufficiency of Responses to
Flipagram's First and Second Sets
of Requests for Admission

Offered by Applicant Flipagram, Inc.

Instagram, LLC v. Flipagram, Inc.

Opposition No. 91217238

From: Naomi Jane Gray
Sent: Monday, December 14, 2015 12:02 AM
To: Peterson, Marcus D. (marcus.peterson@pillsburylaw.com)
Subject: Document production

Marcus,

We are considering your extension proposal as discussed Friday afternoon. In the meantime, I write regarding Instagram's document production.

To date, Instagram has produced a total of 107 documents, composed entirely of publicly available materials. 86 of these documents are screenshots of articles, books, or videos that reference Instagram. The remainder are screenshots of Instagram's PTO file wrappers or screenshots from Instagram's websites. Instagram has not produced any correspondence or email. Although Instagram took over two months to finalize edits to Board's standard protective order, Instagram has not produced any documents with a confidentiality designation. The word "Flipagram" does not appear anywhere in the production. Instagram has indicated that it will supplement this production but that most documents already have been produced.

Instagram has agreed to produce documents to the following RFPs, but no responsive documents appear to have been produced: 1, 2, 6, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 30, 37, 38, 39, 41, 42, and 47. Please confirm either that Instagram will produce all responsive documents on December 18, the date the parties have agreed to supplement their productions, or that no responsive documents exist. If responsive documents exist but Instagram does not expect to produce them on December 18, please advise me when Instagram expects to produce the documents.

In addition, Instagram refused to produce any documents in response to the following RFPs: 3, 5, 7, 8, 11, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 40, 43, 44, 45, 46, 48, 49, 50, and 51. After our meet and confer discussions (summarized in other correspondence), Instagram now agrees to produce certain documents responsive to requests: 7, 32, 43, 44, 45, and 50. Please confirm either that Instagram will produce these documents on December 18 or that no responsive documents exist. If responsive documents exist but Instagram does not expect to produce them on December 18, please advise when Instagram will produce the documents.

Finally, as discussed in our meet and confer efforts, Instagram objects to the sufficiency of many of Instagram's substantive RFP responses, including but not limited to 4, 9, 12, 13, 37, 38, 39, 41, and 42. Following our discussions, Instagram now agrees to supplement its responses and/or provide additional documents as to request 13. Please confirm either that Instagram will provide these supplemental responses on December 18, or advise me when Instagram will supplement these responses. If no responsive information exists, please so advise me.

Thanks.

Naomi Jane Gray | HARVEY · SISKIND LLP

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Exhibit H
to Declaration of Naomi Jane Gray in Support of
Motion to Test Sufficiency of Responses to
Flipagram's First and Second Sets
of Requests for Admission

Offered by Applicant Flipagram, Inc.

Instagram, LLC v. Flipagram, Inc.

Opposition No. 91217238

From: Naomi Jane Gray
Sent: Tuesday, December 15, 2015 11:58 AM
To: Peterson, Marcus D. (marcus.peterson@pillsburylaw.com)
Subject: Supplemental discovery responses and production

Marcus,

Just confirming we are still on to exchange supplemental discovery responses and document production this Friday, Dec. 18. Please confirm.

Naomi

Exhibit I
to Declaration of Naomi Jane Gray in Support of
Motion to Test Sufficiency of Responses to
Flipagram's First and Second Sets
of Requests for Admission

Offered by Applicant Flipagram, Inc.

Instagram, LLC v. Flipagram, Inc.

Opposition No. 91217238

From: Peterson, Marcus D. [mailto:marcus.peterson@pillsburylaw.com]
Sent: Tuesday, December 15, 2015 1:49 PM
To: Naomi Jane Gray
Cc: Ghajar, Bobby; De La Rosa, Inga L.
Subject: RE: Document production

Naomi,

We called you this morning to follow up on the status of the stipulated extension, and you have not responded. Given that the expert disclosure deadline is in two weeks, amidst the holidays, we will move on our own to extend discovery and trial deadlines if we cannot reach an agreement with you by tomorrow on the stipulated extension.

Additionally, we have two issues regarding your email below with respect to Instagram's document production.

First, when we spoke on December 2, we asked you when Flipagram would be supplementing its document production. You said you were unsure and would speak to Thomas about it. We provided you the list of all of the categories of documents for which Flipagram stated it would produce documents, but no documents have yet been produced. This includes Interrogatories for which Flipagram stated it would produce documents sufficient to provide the information sought. When we spoke last Friday, December 11, we again inquired when Flipagram anticipated supplementing its document production. You said you believed that it had produced documents for some of the categories, but were still unsure when additional documents would be produced. It is not clear why you now purport to require Instagram to supplement its document production by December 18, which is an arbitrary deadline, when you have not addressed our requests as to a time frame for Flipagram's supplemental production, and the parties never discussed supplementing their respective document productions on or by December 18. Please let us know when Flipagram will be supplementing its production.

Second, when we spoke on December 2, you asked when Instagram would supplement the written responses that it had agreed, at that point, to supplement. Similarly, we asked when Flipagram would be able to do so. You stated that Flipagram would be able to do so in the next week or two and asked if Instagram would be able to in that time frame. We said that two weeks might be possible, and said we would pencil it in on our calendar for December 18. However, when we spoke on Friday, December 11, we informed you that Instagram was working on supplementing its responses, including as to issues on which we had met and conferred and not reached resolution. We said that we believed we would be able to supplement the responses, and produce additional documents, to remove issues from your potential motion to compel, and that we would not be in a position to do so until after the first of the year, given the holidays and vacation schedules. As noted above, we still have not received confirmation as to when Flipagram will be supplementing its discovery responses, and your email is silent on that issue. We are therefore unsure why you expect supplemental responses from Instagram on December 18th.

As to Instagram's document production, we are looking into the specific discovery requests raised below, and will provide a response under separate cover. We hope to make an additional document production before the end of the year, with more to come just after the New Year.

We look forward to your prompt response,

Marcus

Marcus D. Peterson | Senior Associate

Pillsbury Winthrop Shaw Pittman LLP

725 South Figueroa Street, Suite 2800 | Los Angeles, CA 90017-5406

t 213.488.7410 | f 213.629.1033

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ABU DHABI AUSTIN BEIJING HOUSTON LONDON **LOS ANGELES** NASHVILLE NEW YORK
NORTHERN VIRGINIA PALM BEACH SACRAMENTO SAN DIEGO SAN DIEGO NORTH COUNTY
SAN FRANCISCO SHANGHAI SILICON VALLEY TOKYO WASHINGTON, DC



From: Naomi Jane Gray [<mailto:ngray@harveysiskind.com>]

Sent: Monday, December 14, 2015 12:02 AM

To: Peterson, Marcus D.

Subject: Document production

Marcus,

We are considering your extension proposal as discussed Friday afternoon. In the meantime, I write regarding Instagram's document production.

To date, Instagram has produced a total of 107 documents, composed entirely of publicly available materials. 86 of these documents are screenshots of articles, books, or videos that reference Instagram. The remainder are screenshots of Instagram's PTO file wrappers or screenshots from Instagram's websites. Instagram has not produced any correspondence or email. Although Instagram took over two months to finalize edits to Board's standard protective order, Instagram has not produced any documents with a confidentiality designation. The word "Flipagram" does not appear anywhere in the production. Instagram has indicated that it will supplement this production but that most documents already have been produced.

Instagram has agreed to produce documents to the following RFPs, but no responsive documents appear to have been produced: 1, 2, 6, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 30, 37, 38, 39, 41, 42, and 47. Please confirm either that Instagram will produce all responsive documents on December 18, the date the parties have agreed to supplement their productions, or that no responsive documents exist. If responsive documents exist but Instagram does not expect to produce them on December 18, please advise me when Instagram expects to produce the documents.

In addition, Instagram refused to produce any documents in response to the following RFPs: 3, 5, 7, 8, 11, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 40, 43, 44, 45, 46, 48, 49, 50, and 51. After our meet and confer discussions (summarized in other correspondence), Instagram now agrees to produce certain documents responsive to requests: 7, 32, 43, 44, 45, and 50. Please confirm either that Instagram will produce these documents on December 18 or that no responsive documents exist. If responsive documents exist but Instagram does not expect to produce them on December 18, please advise when Instagram will produce the documents.

Finally, as discussed in our meet and confer efforts, Instagram objects to the sufficiency of many of Instagram's substantive RFP responses, including but not limited to 4, 9, 12, 13, 37, 38, 39, 41, and 42. Following our discussions, Instagram now agrees to supplement its responses and/or provide additional documents as to request 13. Please confirm either that Instagram will provide these supplemental responses on December 18, or advise me when Instagram will supplement these responses. If no responsive information exists, please so advise me.

Thanks.

Naomi Jane Gray | HARVEY · SISKIND LLP

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Exhibit J
to Declaration of Naomi Jane Gray in Support of
Motion to Test Sufficiency of Responses to
Flipagram's First and Second Sets
of Requests for Admission

Offered by Applicant Flipagram, Inc.

Instagram, LLC v. Flipagram, Inc.

Opposition No. 91217238

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7 Attorneys for Applicant/Petitioner
Flipagram, Inc.

8 **IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**
9 **BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**
10

11 INSTAGRAM, LLC, a Delaware limited
12 liability company,

13 Opposer/Registrant

14 v.

15 FLIPAGRAM, INC., a California
16 corporation,

17 Applicant/Petitioner
18

**APPLICANT'S RESPONSE TO
OPPOSER'S FIRST SET OF
REQUESTS FOR ADMISSION**

Opposition No. 91217238

Application No. 86042264

19 Applicant/Petitioner Flipagram, Inc. ("Applicant"), hereby responds to Opposer's First Set of
20 Requests for Admission to Applicant propounded by Opposer/Registrant Instagram, LLC
21 ("Opposer") as follows:

22 Applicant, based upon its current knowledge, understanding, and belief of the facts,
23 information and documents available to it, responds as set forth below. As this action proceeds,
24 Applicant may discover further facts, information and documents. Applicant reserves the right to
25 modify or supplement these responses accordingly.

26 These responses are given without prejudice to using or relying on at trial documents omitted
27 from these responses as a result of mistake, error, oversight, or inadvertence. Applicant further
28

1 reserves the right to object on appropriate grounds to the introduction at trial of any information or
2 documents included in these responses.

3 Applicant's responses and objections are made without waiving or intending to waive, but on
4 the contrary, preserving and intending to preserve, all objections as to competency, relevancy,
5 materiality, privilege, and admissibility as evidence for any purpose of the responses, or the subject
6 matter thereof, in this or any subsequent proceeding.

7 GENERAL OBJECTIONS

8 Applicant objects generally to the following:

9 1. Applicant objects to the requests to the extent that they seek to impose duties or
10 obligations on Applicant beyond those imposed by the Federal Rules of Civil Procedure or the
11 applicable Rules of Practice of the United States Patent and Trademark Office.

12 2. Applicant objects to the requests insofar as they are vague, ambiguous, indefinite,
13 overbroad, unduly burdensome, duplicative, cumulative, unintelligible or otherwise unclear as to the
14 precise information sought.

15 3. Applicant objects to the requests insofar as they seek information that is neither
16 relevant to the claims or defenses of either party in this action nor reasonably calculated to lead to
17 the discovery of admissible evidence.

18 4. Applicant objects to the requests to the extent that they call for admissions that are
19 protected from discovery by the attorney-client privilege, the work product doctrine, or any other
20 applicable privilege, doctrine, protection or immunity.

21 5. Applicant objects to the extent that the requests are not limited by geography or
22 jurisdiction. Unless stated otherwise in its response, Applicant will only respond as to the United
23 States.

24 6. Applicant responds to the requests with information of which it is now aware.
25 Applicant reserves its right to modify or amend its responses to the requests if and when it becomes
26 aware of information not reflected in its responses.

27 7. Applicant objects to each and every request to the extent that it calls for the
28 admission of confidential business information, trade secrets, or commercially sensitive information

1 of Applicant. Unless otherwise agreed, to the extent Applicant produces such information, it will
2 only do so pursuant to an appropriate protective order.

3 **SPECIFIC RESPONSES TO INDIVIDUAL REQUESTS**

4 Applicant expressly incorporates the above General Objections as though set forth fully in
5 response to each of the following individual requests, and, to the extent that they are not raised in
6 any particular response, Applicant does not waive those objections. A response to a request shall not
7 be deemed a waiver of any applicable specific or general objection to the request.

8 **RESPONSES TO REQUESTS FOR ADMISSIONS**

9 **REQUEST FOR ADMISSION NO. 1:** Admit that You were aware of Instagram prior to
10 YOUR selection and adoption of the FLIPAGRAM MARK.

11 **RESPONSE TO REQUEST NO. 1:**

12 Subject to and without waiving its objections, Applicant responds as follows: Admit.

13 **REQUEST FOR ADMISSION NO. 2:** Admit that You were aware of Instagram prior to
14 YOUR selection and adoption of the INSTABACKGROUND MARK.

15 **RESPONSE TO REQUEST NO. 2:**

16 Applicant objects that this request lacks foundation and assumes facts.

17 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
18 Applicant was aware of Instagram when it was considering use of the term
19 INSTABACKGROUND.

20 **REQUEST FOR ADMISSION NO. 3:** Admit that You were aware of one or more of the
21 INSTAGRAM MARKS at the time You applied to register the FLIPAGRAM MARK with the
22 United States Patent and Trademark Office (“USPTO”).

23 **RESPONSE TO REQUEST NO. 3:**

24 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
25 Applicant was aware of the Instagram name and logos when it applied to register the FLIPAGRAM
26 MARK with the USPTO. Otherwise, denied.

1 **REQUEST FOR ADMISSION NO. 4:** Admit that You did not conduct a trademark clearance
2 search prior to filing YOUR application to register the FLIPAGRAM MARK with the United States
3 Patent and Trademark Office.

4 **RESPONSE TO REQUEST NO. 4:**

5 Subject to and without waiving its objections, Applicant responds as follows: Denied.

6 **REQUEST FOR ADMISSION NO. 5:** Admit that You did not consult a trademark search
7 report (e.g., Thompson Reuters) prior to filing Your application to register the FLIPAGRAM
8 MARK with the United States Patent and Trademark Office.

9 **RESPONSE TO REQUEST NO. 5:**

10 Subject to and without waiving its objections, Applicant responds as follows: Denied.

11 **REQUEST FOR ADMISSION NO. 6:** Admit that You were aware that one or more of the
12 INSTAGRAM MARKS were registered in the United States prior to applying to register the
13 FLIPAGRAM MARK with the USPTO.

14 **RESPONSE TO REQUEST NO. 6:**

15 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
16 Applicant was aware of the Instagram name and logos when it applied to register the FLIPAGRAM
17 MARK with the USPTO. Otherwise, denied.

18 **REQUEST FOR ADMISSION NO. 7:** Admit that You did not seek legal advice
19 CONCERNING YOUR decision to adopt the FLIPAGRAM MARK prior to filing YOUR
20 application to register the FLIPAGRAM MARK with the United States Patent and Trademark
21 Office.

22 **RESPONSE TO REQUEST NO. 7:**

23 Applicant objects to this request to the extent it seeks information protected by attorney-
24 client and/or attorney work product privileges.

25 Subject to and without waiving its objections, Applicant responds as follows: Denied.

26 **REQUEST FOR ADMISSION NO. 8:** Admit that Instagram did not consent to YOUR
27 application to register the FLIPAGRAM MARK.

1 **RESPONSE TO REQUEST NO. 8:**

2 Subject to and without waiving its objections, Applicant responds as follows: Denied.

3 **REQUEST FOR ADMISSION NO. 9:** Admit that You are not currently licensed or otherwise
4 authorized by INSTAGRAM to use any of the INSTAGRAM MARKS in connection with the
5 goods and services offered under the FLIPAGRAM MARK.

6 **RESPONSE TO REQUEST NO. 9:**

7 Subject to and without waiving its objections, Applicant responds as follows: Denied.

8 **REQUEST FOR ADMISSION NO. 10:** Admit that You are not currently licensed or otherwise
9 authorized by INSTAGRAM to use the term “GRAM” in connection with the goods and services
10 offered under the FLIPAGRAM MARK.

11 **RESPONSE TO REQUEST NO. 10:**

12 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
13 Opposer’s current API Terms of Use no longer contain the following provision: “While you cannot
14 use the word ‘Instagram’ or ‘IG’ in your product’s name, it’s okay to use one (but not both) of the
15 following: ‘Insta’ or ‘Gram.’” Otherwise, denied.

16 **REQUEST FOR ADMISSION NO. 11:** Admit that You are not currently licensed or otherwise
17 authorized by INSTAGRAM to use the term “AGRAM” in connection with the goods and services
18 offered under the FLIPAGRAM MARK.

19 **RESPONSE TO REQUEST NO. 11:**

20 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
21 Opposer’s current API Terms of Use no longer contain the following provision: “While you cannot
22 use the word ‘Instagram’ or ‘IG’ in your product’s name, it’s okay to use one (but not both) of the
23 following: ‘Insta’ or ‘Gram.’” Otherwise, denied.

24 **REQUEST FOR ADMISSION NO. 12:** Admit that You do not contest INSTAGRAM’s
25 ownership of the INSTAGRAM MARKS.

26 **RESPONSE TO REQUEST NO. 12:**

27 Subject to and without waiving its objections, Applicant responds as follows: Denied.
28

1 **REQUEST FOR ADMISSION NO. 13:** Admit that You do not contest the validity of any of
2 INSTAGRAM's applications or registrations for the INSTAGRAM MARKS.

3 **RESPONSE TO REQUEST NO. 13:**

4 Subject to and without waiving its objections, Applicant responds as follows: Denied.

5 **REQUEST FOR ADMISSION NO. 14:** Admit that the INSTAGRAM MARKS are well-
6 known.

7 **RESPONSE TO REQUEST NO. 14:**

8 Applicant objects to this request as vague and ambiguous as to the undefined term "well-
9 known." Applicant further objects as to relevance. Applicant objects that this request is premature.
10 Discovery is ongoing.

11 Subject to and without waiving its objections, Applicant responds as follows: Applicant is
12 without sufficient information to admit or deny this request and therefore denies same.

13 **REQUEST FOR ADMISSION NO. 15:** Admit that the INSTAGRAM MARKS were well-
14 known at the time You filed YOUR application to register the FLIPAGRAM MARK.

15 **RESPONSE TO REQUEST NO. 15:**

16 Applicant objects to this request as vague and ambiguous as to the undefined term "well-
17 known." Applicant further objects as to relevance. Applicant objects that this request is premature.
18 Discovery is ongoing.

19 Subject to and without waiving its objections, Applicant responds as follows: Applicant is
20 without sufficient information to admit or deny this request and therefore denies same.

21 **REQUEST FOR ADMISSION NO. 16:** Admit that the INSTAGRAM MARKS are famous.

22 **RESPONSE TO REQUEST NO. 16:**

23 Subject to and without waiving its objections, Applicant responds as follows: Denied.

24 **REQUEST FOR ADMISSION NO. 17:** Admit that the INSTAGRAM MARKS were famous at
25 the time You applied to register the FLIPAGRAM MARK with the USPTO.

26 **RESPONSE TO REQUEST NO. 17:**

27 Subject to and without waiving its objections, Applicant responds as follows: Denied.
28

1 **REQUEST FOR ADMISSION NO. 18:** Admit that the INSTAGRAM MARKS were famous at
2 the time You first used the FLIPAGRAM MARK in commerce.

3 **RESPONSE TO REQUEST NO. 18:**

4 Subject to and without waiving its objections, Applicant responds as follows: Denied.

5 **REQUEST FOR ADMISSION NO. 19:** Admit that at the time You adopted the FLIPAGRAM
6 MARK, YOU knew consumers were likely to associate the FLIPAGRAM MARK with Instagram
7 and the INSTAGRAM MARKS.

8 **RESPONSE TO REQUEST NO. 19:**

9 Applicant objects to this request as vague and ambiguous as to the undefined term
10 “associate.” Opposer is voluntarily “associated” with Applicant through at least Opposer’s API.

11 Subject to and without waiving its objections, Applicant responds as follows: Denied.

12 **REQUEST FOR ADMISSION NO. 20:** Admit that you adopted the FLIPAGRAM MARK
13 with the intention of capitalizing on the goodwill of the INSTAGRAM MARKS.

14 **RESPONSE TO REQUEST NO. 20:**

15 Subject to and without waiving its objections, Applicant responds as follows: Denied.

16 **REQUEST FOR ADMISSION NO. 21:** Admit that you adopted the INSTABACKGROUND
17 MARK with the intention of capitalizing on the goodwill of the INSTAGRAM MARKS.

18 **RESPONSE TO REQUEST NO. 21:**

19 Applicant objects that this request lacks foundation and assumes facts.

20 Subject to and without waiving its objections, Applicant responds as follows: Denied.

21 **REQUEST FOR ADMISSION NO. 22:** Admit that you adopted the FLIPAGRAM MARK
22 with Instagram in mind.

23 **RESPONSE TO REQUEST NO. 22:**

24 Applicant objects to this request as vague and ambiguous as to the undefined phrase “in
25 mind.”

26 Subject to and without waiving its objections, Applicant responds as follows: Denied.

27 **REQUEST FOR ADMISSION NO. 23:** Admit that you adopted the FLIPAGRAM MARK as a
28 reference to Instagram.

1 **RESPONSE TO REQUEST NO. 23:**

2 Applicant objects to this request as vague and ambiguous as to the undefined term
3 “reference.”

4 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
5 the FLIPAGRAM Mark contains the letter string GRAM, as allowed and encouraged by Opposer’s
6 API Terms of Use. Otherwise, denied.

7 **REQUEST FOR ADMISSION NO. 24:** Admit that you adopted the INSTABACKGROUND
8 MARK with Instagram in mind.

9 **RESPONSE TO REQUEST NO. 24:**

10 Applicant objects that this request lacks foundation and assumes facts.

11 Subject to and without waiving its objections, Applicant responds as follows: Denied.

12 **REQUEST FOR ADMISSION NO. 25:** Admit that you adopted the INSTABACKGROUND
13 MARK as a reference to Instagram.

14 **RESPONSE TO REQUEST NO. 25:**

15 Applicant objects that this request lacks foundation and assumes facts. Applicant objects to
16 this request as vague and ambiguous as to the undefined term “reference.”

17 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
18 the term “Instabackground” contains the letter string INSTA, as allowed and encouraged by the API
19 Terms of Use. Otherwise, denied.

20 **REQUEST FOR ADMISSION NO. 26:** Admit that both the FLIPAGRAM MARK and the
21 INSTAGRAM MARKS contain the component “AGRAM.”

22 **RESPONSE TO REQUEST NO. 26:**

23 Admitted that the term “Flipagram” and the term “Instagram” both contain the letter string
24 “AGRAM.” Otherwise, denied.

25 **REQUEST FOR ADMISSION NO. 27:** Admit that “AGRAM” is the dominant component of
26 the FLIPAGRAM MARK.

27 **RESPONSE TO REQUEST NO. 27:**

28 Subject to and without waiving its objections, Applicant responds as follows: Denied.

1 **REQUEST FOR ADMISSION NO. 28:** Admit that the component “AGRAM” as it appears in
2 the FLIPAGRAM MARK is intended to call to mind Instagram.

3 **RESPONSE TO REQUEST NO. 28:**

4 Subject to and without waiving its objections, Applicant responds as follows: Denied.

5 **REQUEST FOR ADMISSION NO. 29:** Admit that the component “AGRAM” as it appears in
6 the FLIPAGRAM MARK is a reference to Instagram.

7 **RESPONSE TO REQUEST NO. 29:**

8 Applicant objects to this request as vague and ambiguous as to the undefined term
9 “reference.”

10 Subject to and without waiving its objections, Applicant responds as follows Denied.

11 **REQUEST FOR ADMISSION NO. 30:** Admit that FLIPAGRAM intends that users of its
12 goods and services will think of the INSTAGRAM MARKS upon encountering the FLIPAGRAM
13 MARK.

14 **RESPONSE TO REQUEST NO. 30:**

15 Subject to and without waiving its objections, Applicant responds as follows: Denied.

16 **REQUEST FOR ADMISSION NO. 31:** Admit that FLIPAGRAM intends that users of its
17 goods and services will associate Your goods and services with Instagram.

18 **RESPONSE TO REQUEST NO. 31:**

19 Subject to and without waiving its objections, Applicant responds as follows: Denied.

20 **REQUEST FOR ADMISSION NO. 32:** Admit that the FLIPAGRAM MARK and the
21 INSTAGRAM MARKS are visually similar in that they both contain the letter string “AGRAM.”

22 **RESPONSE TO REQUEST NO. 32:**

23 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
24 the term “Flipagram” and the term “Instagram” both contain the letter string “AGRAM.”
25 Otherwise, denied.

26 **REQUEST FOR ADMISSION NO. 33:** Admit that the FLIPAGRAM MARK and the
27 INSTAGRAM MARKS are aurally similar in that they both contain the letter string “AGRAM.”
28

1 **RESPONSE TO REQUEST NO. 33:**

2 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
3 the term “Flipagram” and the term “Instagram” both contain the letter string “AGRAM.”

4 Otherwise, denied.

5 **REQUEST FOR ADMISSION NO. 34:** Admit that both the FLIPAGRAM MARK and the
6 INSTAGRAM MARKS contain the same number of syllables.

7 **RESPONSE TO REQUEST NO. 34:**

8 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
9 the word mark FLIPAGRAM and the word mark INSTAGRAM contain the same number of
10 syllables.

11 **REQUEST FOR ADMISSION NO. 35:** Admit that “flipping” is an action that happens in the
12 Flipagram App.

13 **RESPONSE TO REQUEST NO. 35:**

14 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
15 “flipping” is a metaphor for cycling through the imagery in the video slide shows in Applicant’s
16 product. Otherwise, denied.

17 **REQUEST FOR ADMISSION NO. 36:** Admit that in the Flipagram app, the photos visually
18 “flip.”

19 **RESPONSE TO REQUEST NO. 36:**

20 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
21 “flipping” is a metaphor for cycling through the imagery in the video slide shows in Applicant’s
22 product. Otherwise, denied.

23 **REQUEST FOR ADMISSION NO. 37:** Admit that the prefix “FLIP” is descriptive of or is
24 otherwise related to the goods and/or services sold or offered in connection with the FLIPAGRAM
25 MARK.

26 **RESPONSE TO REQUEST NO. 37:**

27 Subject to and without waiving its objections, Applicant responds as follows: Applicant
28 objects that this request is vague and ambiguous.

1 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
2 the prefix “FLIP” is related to the goods and/or services sold or offered in connection with the
3 FLIPAGRAM MARK, insofar as “flipping” is a metaphor for cycling through the imagery in the
4 video slide shows in Applicant’s product. Otherwise, denied.

5 **REQUEST FOR ADMISSION NO. 38:** Admit that the prefix “FLIP” is descriptive of or is
6 otherwise related to the goods and/or services listed in Application Serial No. 86/042,264.

7 **RESPONSE TO REQUEST NO. 38:**

8 Applicant objects that this request is vague and ambiguous.

9 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
10 the prefix “FLIP” is related to the goods and/or services sold or offered in connection with the
11 FLIPAGRAM MARK, insofar as “flipping” is a metaphor for cycling through the imagery in the
12 video slide shows in Applicant’s product. Otherwise, denied.

13 **REQUEST FOR ADMISSION NO. 39:** Admit that when Flipagram was launched it worked
14 exclusively with the Instagram API.

15 **RESPONSE TO REQUEST NO. 39:**

16 Subject to and without waiving its objections, Applicant responds as follows: Denied.

17 **REQUEST FOR ADMISSION NO. 40:** Admit that when a PERSON signs up to use the
18 FLIPAGRAM APP, that PERSON may authorize the FLIPAGRAM APP to access that PERSON’S
19 Instagram account.

20 **RESPONSE TO REQUEST NO. 40:**

21 Subject to and without waiving its objections, Applicant responds as follows: Admit.

22 **REQUEST FOR ADMISSION NO. 41:** Admit that a user of the FLIPAGRAM APP may
23 import digital photographs from the user’s Instagram account.

24 **RESPONSE TO REQUEST NO. 41:**

25 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
26 if a user of the FLIPAGRAM APP elects to grant appropriate permissions, the user may import
27 digital photographs from the user’s Instagram account. Otherwise, denied.
28

1 **REQUEST FOR ADMISSION NO. 42:** Admit that a user of the FLIPAGRAM APP is offered
2 the ability to “share” the slideshow from the FLIPAGRAM APP on Instagram once the user has
3 completed making a slideshow.

4 **RESPONSE TO REQUEST NO. 42:**

5 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
6 if a user of the FLIPAGRAM APP elects to grant appropriate permissions, it is possible for a
7 Flipagram user to share a Flipagram video story or slideshow on other media platforms. Admitted
8 that such sharing is currently possible on Instagram, though not directly through the FLIPAGRAM
9 APP. Otherwise, denied.

10 **REQUEST FOR ADMISSION NO. 43:** Admit that a user of the FLIPAGRAM APP can
11 “share” slideshows from the FLIPAGRAM APP on Instagram.

12 **RESPONSE TO REQUEST NO. 43:**

13 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
14 that if a user of the FLIPAGRAM APP elects to grant appropriate permissions, it is possible for a
15 Flipagram user to share a Flipagram video story or slideshow on other media platforms. Admitted
16 that such sharing is currently possible on Instagram, though not directly through the FLIPAGRAM
17 APP. Otherwise, denied.

18 **REQUEST FOR ADMISSION NO. 44:** Admit that the FLIPAGRAM APP is targeted to
19 Instagram users.

20 **RESPONSE TO REQUEST NO. 44:**

21 Subject to and without waiving its objections, Applicant responds as follows: Denied.

22 **REQUEST FOR ADMISSION NO. 45:** Admit that You have an Instagram Account under the
23 name FLIPAGRAM.

24 **RESPONSE TO REQUEST NO. 45:**

25 Subject to and without waiving its objections, Applicant responds as follows: Admit.

26 **REQUEST FOR ADMISSION NO. 46:** Admit that You have a Facebook Account under the
27 name FLIPAGRAM.

1 **RESPONSE TO REQUEST NO. 46:**

2 Subject to and without waiving its objections, Applicant responds as follows: Admit.

3 **REQUEST FOR ADMISSION NO. 47:** Admit that You post images and/or slideshows bearing
4 the FLIPAGRAM MARK to YOUR Instagram account.

5 **RESPONSE TO REQUEST NO. 47:**

6 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
7 from time to time, Applicant posts music video stories or slideshows bearing the FLIPAGRAM
8 MARK on Applicant's Instagram account.

9 **REQUEST FOR ADMISSION NO. 48:** Admit that You post images and/or slideshows bearing
10 the FLIPAGRAM MARK to YOUR Facebook account.

11 **RESPONSE TO REQUEST NO. 48:**

12 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
13 from time to time, Applicant posts music video stories or slideshows bearing the FLIPAGRAM
14 MARK on Applicant's Facebook account.

15 **REQUEST FOR ADMISSION NO. 49:** Admit that slideshows created by YOUR users on the
16 FLIPAGRAM App bear the FLIPAGRAM Mark.

17 **RESPONSE TO REQUEST NO. 49:**

18 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
19 some video stories or slideshows created by Applicant's users bear the FLIPAGRAM Mark.

20 **REQUEST FOR ADMISSION NO. 50:** Admit that You have currently have over one million
21 followers on Instagram.

22 **RESPONSE TO REQUEST NO. 50:**

23 Subject to and without waiving its objections, Applicant responds as follows: Admit.

24 **REQUEST FOR ADMISSION NO. 51:** Admit that You have currently have over 300,000
25 followers on Facebook.

26 **RESPONSE TO REQUEST NO. 51:**

27 Subject to and without waiving its objections, Applicant responds as follows: Admit.

28

1 **REQUEST FOR ADMISSION NO. 52:** Admit that You use Facebook’s services to market
2 goods and/or services offered in connection with the FLIPAGRAM MARK.

3 **RESPONSE TO REQUEST NO. 52:**

4 Applicant objects that this request is vague and ambiguous as to the undefined term
5 “Facebook’s services.”

6 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
7 like many companies, Applicant has a Facebook business page, and that the page is titled
8 “Flipagram App Page.” Admitted that this page is used to promote Applicant. Otherwise, denied.

9 **REQUEST FOR ADMISSION NO. 53:** Admit that You have acknowledged the validity of the
10 INSTAGRAM MARKS.

11 **RESPONSE TO REQUEST NO. 53:**

12 Subject to and without waiving its objections, Applicant responds as follows: Denied.

13 **REQUEST FOR ADMISSION NO. 54:** Admit that You use Instagram’s services to market
14 goods and/or services offered in connection with the FLIPAGRAM MARK.

15 **RESPONSE TO REQUEST NO. 54:**

16 Applicant objects that this request is vague and ambiguous as to the undefined term
17 “Instagram’s services.”

18 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
19 like many companies, Applicant has an Instagram account. Admitted that this account is used to
20 promote Applicant. Otherwise, denied.

21 **REQUEST FOR ADMISSION NO. 55:** Admit that the goods and services You offer under the
22 FLIPAGRAM MARK are related to the goods and services that Instagram offers under the
23 INSTAGRAM MARKS.

24 **RESPONSE TO REQUEST NO. 55:**

25 Applicant objects that this request is vague and ambiguous as to the undefined term
26 “related.”
27
28

1 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
2 Applicant's product allows users create and share music video stories using their photos, videos,
3 text, and music. Admitted that Opposer's product allows users to capture and share photographs.

4 **REQUEST FOR ADMISSION NO. 56:** Admit that each parties' service allow users to share
5 photographs on internet social networks.

6 **RESPONSE TO REQUEST NO. 56:**

7 Applicant objects that this request is vague and ambiguous as to the undefined terms "share"
8 and "internet social networks."

9 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
10 Applicant's product allows Applicant's users create and share music video stories using their
11 photos, videos, and written text, coupled with music from a variety of sources. Admitted that
12 Opposer's product allows users to capture and share photographs.

13 **REQUEST FOR ADMISSION NO. 57:** Admit that each parties' service allow users to
14 "follow" other users of that service.

15 **RESPONSE TO REQUEST NO. 57:**

16 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
17 like most software applications with a social networking feature, Applicant's product allows users
18 to "follow" other users of Applicant's product. Admitted that Opposer's product allows Opposer's
19 users to "follow" other users of Opposer's product.

20 **REQUEST FOR ADMISSION NO. 58:** Admit that both parties offer application software for
21 mobile phone, portable media players, and handheld computers under their respective
22 FLIPAGRAM MARK and INSTAGRAM MARKS.

23 **RESPONSE TO REQUEST NO. 58:**

24 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
25 Applicant offers application software for mobile phone, portable media players, and handheld
26 computers under the FLIPAGRAM Mark. Otherwise, Applicant is without sufficient information to
27 admit or deny this request and therefore denies same.
28

1 **REQUEST FOR ADMISSION NO. 59:** Admit that each parties' service allows users to
2 transform photographs.

3 **RESPONSE TO REQUEST NO. 59:**

4 Applicant objects that this request is vague and ambiguous as to the undefined terms
5 "transform."

6 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
7 Applicant's product allows users create and share music video stories using their photos, videos,
8 text, and music. Admitted that Opposer's product allows users to edit photographs. Otherwise,
9 denied.

10 **REQUEST FOR ADMISSION NO. 60:** Admit that You and Instagram both offer free mobile
11 applications where users can post and/or share pictures.

12 **RESPONSE TO REQUEST NO. 60:**

13 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
14 Applicant offers a free mobile application in which users can post a music video story that can
15 include pictures. Admitted that long after Applicant offered video stories, Opposer began to offer
16 video support on its product as well.

17 **REQUEST FOR ADMISSION NO. 61:** Admit that the FLIPAGRAM APP is available on
18 iPhone, iOS, Android, and Windows phones.

19 **RESPONSE TO REQUEST NO. 61:**

20 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
21 Flipagram offers versions of its mobile application that are compatible with the Windows, Android,
22 and iOS platforms.

23 **REQUEST FOR ADMISSION NO. 62:** Admit that the FLIPAGRAM APP is available through
24 iTunes.

25 **RESPONSE TO REQUEST NO. 62:**

26 Subject to and without waiving its objections, Applicant responds as follows: Admit.

27 **REQUEST FOR ADMISSION NO. 63:** Admit that the FLIPAGRAM APP is available through
28 Google Play.

1 **RESPONSE TO REQUEST NO. 63:**

2 Subject to and without waiving its objections, Applicant responds as follows: Admit.

3 **REQUEST FOR ADMISSION NO. 64:** Admit that design elements of the user interface of the
4 FLIPAGRAM APP, as reflected in the specimen of use YOU submitted to the USPTO in
5 connection with YOUR application to register the FLIPAGRAM MARK, are intended to be
6 suggestive of design elements of the Instagram Camera Logo as depicted in U.S. Trademark Reg.
7 No. 4,531,884.

8 **RESPONSE TO REQUEST NO. 64:**

9 Applicant objects on relevance grounds in that that the design elements reflected in the
10 specimen in Applicant's trademark application are not part of Applicant's product.

11 Applicant objects that this request is vague and ambiguous as to the undefined phrase
12 "suggestive of design elements."

13 Subject to and without waiving its objections, Applicant responds as follows: Denied.

14 **REQUEST FOR ADMISSION NO. 65:** Admit that the font used in the stylized version of the
15 FLIPAGRAM MARK, as reflected in the screenshots posted the iTunes app store listing for the
16 FLIPAGRAM app and shown in the specimen of use YOU submitted to the USPTO in connection
17 with YOUR application to register the FLIPAGRAM MARK, is intended to be suggestive of the
18 font used in the Instagram Logo as depicted in U.S. Trademark App. Serial No. 85/866,573.

19 **RESPONSE TO REQUEST NO. 65:**

20 Applicant objects on relevance grounds in that that the font reflected in the specimen in
21 Applicant's trademark application are not part of Applicant's product.

22 Applicant objects that this request is vague and ambiguous as to the undefined phrase
23 "suggestive of the font."

24 Subject to and without waiving its objections, Applicant responds as follows: Denied.

25 ///

26 ///

27

28

1 **REQUEST FOR ADMISSION NO. 66:** Admit that the attached search conducted on the
2 Google search engine (Attachment 1) demonstrates that when a PERSON searches the term
3 “Flipagram”, a link to Flipagram’s Instagram page will appear with the title: “Flipagram™
4 (@flipagram) · Instagram photos and videos,” as follows:

5 **Flipagram™ (@flipagram) · Instagram photos and videos**
6 <https://instagram.com/flipagram/> ▾
7 Bring Moments to Life! Create fun short videos with your photos, video clips, and favorite
8 music. Tag your videos #flipagram.
You've visited this page 2 times. Last visit: 5/20/15

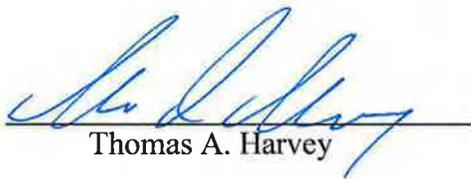
9 **RESPONSE TO REQUEST NO. 66:**

10 Applicant objects to this request as vague, ambiguous, and misleading. The image Opposer
11 references is a function of Opposer’s own software design.

12 Subject to and without waiving its objections, Applicant responds as follows: Admitted that
13 Opposer has structured its own software such that the name of any brand that has an Instagram
14 account, including that of Applicant, will appear in the following written format as a search
15 result: “[Brand name] (@[Brand Name]) · Instagram photos and videos.”

16
17 DATED: August 12, 2015

HARVEY SISKIND LLP
D. PETER HARVEY
THOMAS A. HARVEY

18
19
20
21 By: 

Thomas A. Harvey

22
23 Attorneys for Applicant/Petitioner
24 Flipagram, Inc.
25
26
27
28

Exhibit K
to Declaration of Naomi Jane Gray in Support of
Motion to Test Sufficiency of Responses to
Flipagram's First and Second Sets
of Requests for Admission

Offered by Applicant Flipagram, Inc.

Instagram, LLC v. Flipagram, Inc.

Opposition No. 91217238

EXHIBIT A

-gram¹

Word Origin

1. a combining form occurring in loanwords from Greek, where it meant "something written," "drawing" (*epigram*; *diagram*); on this model, used in the formation of compound words (*oscillogram*).

Compare [-graph](#).

Origin of -gram¹



< Greek *-gramma*, combining form of *gramma* something written or drawn; akin to *carve*

-gram²

1. a combining form of [gram¹](#):
kilogram.

-gram³

1. a combining form extracted from **telegram**, used in the formation of compound words that have the general sense "message, bulletin":
culturegram; *electiongram*; *prophecy-gram*.

Dictionary.com Unabridged

Based on the Random House Dictionary, © Random House, Inc. 2015.

[Cite This Source](#)



British Dictionary definitions for -gram

-gram

combining form

1. indicating a drawing or something written or recorded: *hexagram*, *telegram*

Word Origin

from Latin *-gramma*, from Greek, from *gramma* letter and *grammē* line

Collins English Dictionary - Complete & Unabridged 2012 Digital Edition
© William Collins Sons & Co. Ltd. 1979, 1986 © HarperCollins
Publishers 1998, 2000, 2003, 2005, 2006, 2007, 2009, 2012
[Cite This Source](#)

Word Origin and History for -gram

suffix from telegram (1852), first abstracted 1979 (in *Gorillagram*, a proprietary name in U.S.), and put to wide use in forming new words, such as *stripagram* (1981). The construction violates Greek grammar, as an adverb could not properly form part of a compound noun.

Online Etymology Dictionary, © 2010 Douglas Harper
[Cite This Source](#)

-gram in Medicine

-gram *suff.*

Something written or drawn; a record: *cardiogram*.

Exhibit L
to Declaration of Naomi Jane Gray in Support of
Motion to Test Sufficiency of Responses to
Flipagram's First and Second Sets
of Requests for Admission

Offered by Applicant Flipagram, Inc.

Instagram, LLC v. Flipagram, Inc.

Opposition No. 91217238

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

Instagram, LLC,	§	Opposition No. 91217238
	§	
Opposer,	§	Serial No.: 86/042,264
	§	
v.	§	Mark: FLIPAGRAM
	§	
Flipagram, Inc.,	§	International Class: 09
	§	
Applicant.	§	Published: January 7, 2014
	§	

**OPPOSER’S FIRST SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS AND THINGS TO APPLICANT**

PROPOUNDING PARTY: OPPOSER INSTAGRAM, LLC
RESPONDING PARTY: APPLICANT FLIPAGRAM, INC.
SET NUMBER: ONE

Pursuant to 37 C.F.R. § 2.120 and Federal Rule of Civil Procedure 34, Opposer Instagram, LLC (“Instagram”) hereby requests that Applicant Flipagram, Inc. (“Applicant”) respond to this First Set of Requests for Production of Documents and Things (“Requests”) within thirty (30) days of service hereof and in accordance with the Definitions and Instructions set forth below.

I. DEFINITIONS

Notwithstanding any definition below, each word, term, or phrase used in these Requests is intended to have the broadest meaning permitted under the Federal Rules of Civil Procedure. As used in these Requests, words in capital letters are defined as follows:

1. YOU, YOUR, or YOURS refer to Applicant and any parent company owning all or part of Applicant, any subsidiary, joint venture, partnership or other business cooperation involving Applicant, and any related company, as well as to the present and former directors,

officers, agents, employees, in-house and outside counsel thereof, and other Persons under the control of Applicant, regardless of their affiliation or employment

2. COMMUNICATION is used in its broadest sense, and means any transmission of information from one PERSON or entity to another by any means, including without limitation written communications, telephone communications, in-person communications, email, instant messaging, and other electronic communications.

3. CONCERNING and REGARDING means constituting, relating to, reflecting, memorializing, identifying, embodying, referring to, pertaining to, commenting on, discussing, analyzing, considering, describing, containing, consisting of, connected to, indicating, evidencing, supporting, or refuting.

4. DOCUMENT or DOCUMENTS shall have the broadest meaning ascribed to those terms by Federal Rule of Civil Procedure 34, and include electronically stored information and tangible things, whose discovery is permitted under Rule 34(a)(1), and writings as defined by Rule 1001(1) of the Federal Rules of Evidence. A draft or non-identical copy is a separate "document" within the meaning of this term.

5. PERSON means any natural person, corporation, partnership, proprietorship, group, association, organization, business entity, governmental body, agency, and any agent of the foregoing.

6. THIRD PARTY shall refer to any person other than Applicant and Instagram.

7. OPPOSITION refers to Opposition No. 91217238, filed by Instagram on July 7, 2014.

8. YOUR ANSWER refers to the Answer you filed in this Opposition on September 15, 2014.

9. The term APPLICATION or its plural refers to trademark applications filed with the Patent and Trademark Office.

10. FLIPAGRAM MARK mark reflected in Application Serial No. 86/042,264, filed on May 22, 2012. INSTABACKGROUND MARK refers to the trademark

INSTABACKGROUND, regardless of font or stylization used.

11. The INSTAGRAM MARKS refers collectively to all of Instagram's marks that consist of or incorporate the term INSTAGRAM, including without limitation the INSTAGRAM marks in U.S. Reg. Nos. 4,146,057 and 4,170,675, and the INSTAGRAM marks and variants thereof in Application Serial Nos. 85/866,573, 85/965,167, 85/965,169, 85/965,174, 85/965,171, 85/965,177, and 86/100,072

12. A Request to provide DOCUMENTS that SUPPORT something means relating to, referring to, describing, referencing, evidencing, concerning or constituting.

13. In the following discovery requests, unless the context of the question dictates a broader or different time reference, the questions refer to the time beginning with the earliest date upon which Applicant may attempt to rely for priority purposes in this proceeding with regard to the FLIPAGRAM MARKS, or any variation thereof.

14. All references in these discovery requests to "commerce" signify commerce that may lawfully be regulated by the United States Congress.

15. The singular shall be deemed to include the plural and vice versa; the disjunctive ("or") shall be deemed to include the conjunctive ("and"); and the conjunctive ("and") shall be deemed to include the disjunctive ("or").

16. In the following discovery requests, the geographic scope of the requests is limited to the United States, unless otherwise indicated.

II. INSTRUCTIONS

The following instructions apply to the discovery requests below and should be considered as part of each such request:

1. YOU shall produce all non-privileged DOCUMENTS or tangible things in YOUR possession, custody, or control that are responsive to these Requests. It is intended that these Requests will not solicit the production of any material protected either by the attorney-client privilege or by the work product doctrine.

2. If YOU object to part of a Request and refuse to respond to that part, YOU shall produce all DOCUMENTS called for which are not subject to that objection. If YOU object to the scope or time period of a Request, YOU shall state YOUR objection and respond to the Request for the scope or time period YOU believe is appropriate.

3. If, in responding to these Requests, YOU encounter any ambiguities when construing a Request or definition, YOU shall set forth in YOUR response the matter deemed ambiguous and the construction used in responding.

4. Each DOCUMENT or tangible thing produced in response to these Requests shall be produced as it is kept in the usual course of business, including file folders, binders, notebooks, and other devices by which such papers or things may be organized or separated, or it shall be organized and labeled to correspond with the Requests to which it is responsive. All DOCUMENTS that are physically or electronically attached to each other shall be produced in that form and designated accordingly in an electronic production.

5. DOCUMENTS should be produced in a form pursuant to a production protocol to be agreed upon by the parties, in a form in which it is ordinarily maintained (*e.g.*, native form), or in a reasonably usable form (*e.g.*, TIFF images with Concordance-compatible load files).

6. If there are no DOCUMENTS or things responsive to any particular Request, YOU are requested to indicate the same in writing.

7. These Requests are continuing so as to require prompt supplemental responses as required under Federal Rule of Civil Procedure 26(e) up to and including the time of trial of this OPPOSITION. If YOU come into possession, custody, or control of responsive DOCUMENTS or things after the initial production, YOU should supplement the production by promptly producing such DOCUMENTS or things.

8. When a DOCUMENT contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without disclosing the privileged material. If a privilege is asserted with regard to part of the material contained in a DOCUMENT, the party claiming the privilege must clearly indicate the portions as to which the

privilege is claimed. When a DOCUMENT has been redacted or altered in any fashion, YOU shall identify as to each document the reason for the redaction or alteration, the date of the redaction or alteration, and the person performing the redaction or alteration. Any redaction must be clearly visible on the redacted DOCUMENT.

9. If YOU believe that any Request calls for the disclosure of privileged information, YOU must comply with the requirements of Federal Rule of Civil Procedure 26(b)(5) as to each DOCUMENT for which a claim of privilege or protection from discovery is made.

10. If any responsive DOCUMENT or thing no longer exists, cannot be located, or is not in YOUR possession, custody, or control, YOU shall identify the DOCUMENT, describe its subject matter, describe its disposition, and identify all persons with knowledge of the disposition.

11. Whenever used herein, the present tense includes the past and future tenses. The singular includes the plural, and the plural includes the singular. "All" means "any and all"; "any" means "any and all." "Including" means "including but not limited to." "And" and "or" encompasses both "and" and "or." Words in the masculine, feminine, or neutral form shall include each of the other genders.

III. REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1:

All DOCUMENTS that refer to or SUPPORT allegations made by YOU in YOUR ANSWER.

REQUEST FOR PRODUCTION NO. 2:

All DOCUMENTS used, identified, relied upon or referred to by YOU when answering Instagram's First Set of Interrogatories or any other discovery requests propounded by Instagram.

REQUEST FOR PRODUCTION NO. 3:

DOCUMENTS sufficient to show each good or service on which YOU use, have used, or will use the FLIPAGRAM Mark.

REQUEST FOR PRODUCTION NO. 4:

DOCUMENTS sufficient to show the date the FLIPAGRAM MARK was first used by or on behalf of YOU, either alone, or in combination with other terms or designs, in any manner, in connection with any good or service, including use in commerce and use anywhere in the United States.

REQUEST FOR PRODUCTION NO. 5:

All DOCUMENTS CONCERNING YOUR adoption, origination, selection and development of the FLIPAGRAM MARK as a name, term, trademark, and/or domain name.

REQUEST FOR PRODUCTION NO. 6:

All DOCUMENTS CONCERNING YOUR adoption, origination, selection and development of the INSTABACKGROUND MARK as a name, term, trademark, and/or domain name.

REQUEST FOR PRODUCTION NO. 7:

Documents sufficient to identify any trademarks YOU considered other than FLIPAGRAM and the factors used or considered in selecting the term FLIPAGRAM.

REQUEST FOR PRODUCTION NO. 8:

Documents sufficient to identify any trademarks YOU considered other than INSTABACKGROUND and the factors used or considered in selecting the term INSTABACKGROUND.

REQUEST FOR PRODUCTION NO. 9:

All DOCUMENTS CONCERNING any opinion requested by, or received by, YOU relating to: YOUR use or adoption of the FLIPAGRAM MARK, YOUR right to use or register any marks or designations consisting of or including the term FLIPAGRAM, or whether YOUR use or adoption of the FLIPAGRAM MARK would not infringe upon the rights of any other entity or Person.

REQUEST FOR PRODUCTION NO. 10:

All DOCUMENTS CONCERNING any opinion requested by, or received by, YOU relating to: YOUR use or adoption of the INSTABACKGROUND MARK, YOUR right to use or register any marks or designations consisting of or including the term INSTABACKGROUND, or whether

YOUR use or adoption of the INSTABACKGROUND MARK would not infringe upon the rights of any other entity or PERSON.

REQUEST FOR PRODUCTION NO. 11:

All DOCUMENTS CONCERNING YOUR decision to adopt the FLIPAGRAM MARK, either in connection with YOUR business or YOUR products and services.

REQUEST FOR PRODUCTION NO. 12:

All DOCUMENTS CONCERNING YOUR decision to adopt the INSTABACKGROUND MARK, either in connection with YOUR business or YOUR products and services.

REQUEST FOR PRODUCTION NO. 13:

All Documents and Communications Concerning, discussing, or mentioning Instagram in connection with Your decision to adopt the FLIPAGRAM Mark.

REQUEST FOR PRODUCTION NO. 14:

All DOCUMENTS and COMMUNICATIONS CONCERNING, discussing, or mentioning INSTAGRAM in connection with YOUR decision to adopt the INSTABACKGROUND MARK.

REQUEST FOR PRODUCTION NO. 15:

All DOCUMENTS CONCERNING YOUR planned or considered use of any mark that includes the terms "AGRAM" and/or "GRAM."

REQUEST FOR PRODUCTION NO. 16:

All COMMUNICATIONS REGARDING YOUR planned or considered use of any mark that includes the terms "AGRAM" and/or "GRAM."

REQUEST FOR PRODUCTION NO. 17:

All DOCUMENTS CONCERNING YOUR planned or considered use of any mark that includes the term "INSTA."

REQUEST FOR PRODUCTION NO. 18:

All COMMUNICATIONS REGARDING YOUR planned or considered use of any mark that includes the term "INSTA."

REQUEST FOR PRODUCTION NO. 19:

DOCUMENTS sufficient to show the target market of goods and/or services sold or offered for sale in connection with the FLIPAGRAM MARK.

Request for Production No. 20:

All DOCUMENTS CONCERNING YOUR proposed, intended or actual use of the FLIPAGRAM MARK, whether internal or available to public or customers, including but not limited to business plans, financial estimates, advertising designs and mock ups, marketing memoranda and materials, or advertising materials in the form of any online, social media, and/or internet marketing or advertising, web sites, electronic kiosks, electronic commerce devices, trade shows, sales pitches, customer brochures, direct mail, contests, catalogs, labels, and packaging.

Request for Production No. 21:

All DOCUMENTS CONCERNING the design of the logos and user interface depicted in the specimen of use YOU submitted to the USPTO in connection with YOUR application to register the FLIPAGRAM MARK.

REQUEST FOR PRODUCTION NO. 22:

All DOCUMENTS CONCERNING proposed, intended or actual use of the FLIPAGRAM MARK by any THIRD PARTY, whether internal or available to public or customers, including but not limited to business plans, financial estimates, advertising designs and mock ups, marketing memoranda and materials, or advertising materials in the form of any online, social media, and/or internet marketing or advertising, web sites, electronic kiosks, electronic commerce devices, trade shows, sales pitches, customer brochures, direct mail, contests, catalogs, labels, and packaging.

REQUEST FOR PRODUCTION NO. 23:

All advertisements and marketing or promotional DOCUMENTS RELATING TO the goods and/or services offered, sold, or planned to be sold in the future, in connection with the FLIPAGRAM MARK.

REQUEST FOR PRODUCTION NO. 24:

All COMMUNICATIONS RELATING TO the advertising and promotion of goods and/or services offered, sold, or planned to be sold in the future, in connection with the FLIPAGRAM MARK.

REQUEST FOR PRODUCTION NO. 25:

DOCUMENTS sufficient to identify the channels of trade through which YOU offer or plan to offer each good and/or service sold, to be sold, advertised, or to be advertised, bearing the FLIPAGRAM MARK.

REQUEST FOR PRODUCTION NO. 26:

DOCUMENTS sufficient to show the advertising, marketing, and promotion expenses associated with the goods and services offered under the FLIPAGRAM MARK.

REQUEST FOR PRODUCTION NO. 27:

DOCUMENTS sufficient to show the identities of PERSONS who have ever been involved with the marketing of any goods and/or services offered under the FLIPAGRAM MARK.

REQUEST FOR PRODUCTION NO. 28:

All DOCUMENTS CONCERNING any instances of actual confusion, mistake, deception or association of any kind between YOU and Instagram or between YOUR goods and services and Instagram's goods and services.

REQUEST FOR PRODUCTION NO. 29:

All DOCUMENTS CONCERNING any instances of a PERSON inquiring whether, or otherwise making a statement or committing some act that evidenced a belief that YOU are associated with, or sponsored or approved by Instagram; or Instagram is associated with, or sponsored or approved by YOU; or that the FLIPAGRAM MARK calls to mind the INSTAGRAM MARKS.

REQUEST FOR PRODUCTION NO. 30:

For each month that YOU have offered goods or services under the FLIPAGRAM MARK, DOCUMENTS sufficient to show the number of customers of the goods and services offered under the FLIPAGRAM MARK.

REQUEST FOR PRODUCTION NO. 31:

For each month that YOU have offered goods or services under the FLIPAGRAM MARK, DOCUMENTS sufficient to show the total number of downloads of the FLIPAGRAM mobile application on each platform that YOUR goods and/or services are available.

REQUEST FOR PRODUCTION NO. 32:

For each month that YOU have offered goods or services under the FLIPAGRAM MARK, DOCUMENTS sufficient to show the total number of monthly active users of the FLIPAGRAM mobile application.

REQUEST FOR PRODUCTION NO. 33:

For each month that YOU have offered goods or services under the FLIPAGRAM MARK, DOCUMENTS sufficient to show the total number of visitors to YOUR website located at www.flipagram.com, including but not limited to Google Analytics data.

REQUEST FOR PRODUCTION NO. 34:

For each month that YOU have offered goods or services under the FLIPAGRAM MARK, DOCUMENTS sufficient to show the total number of visitors who have visited YOUR website, YOUR mobile application or to YOUR Instagram page by way of the Instagram mobile application or instagram.com.

REQUEST FOR PRODUCTION NO. 35:

All DOCUMENTS evidencing or RELATING TO COMMUNICATIONS between YOU and Instagram, or any current or former Instagram employee or agent, REGARDING the FLIPAGRAM MARK and/or the INSTABACKGROUND MARK.

REQUEST FOR PRODUCTION NO. 36:

All DOCUMENTS evidencing or RELATING TO YOUR use of the INSTAGRAM APIS.

REQUEST FOR PRODUCTION NO. 37:

All DOCUMENTS evidencing or RELATING TO YOUR use of the FACEBOOK PLATFORM.

REQUEST FOR PRODUCTION NO. 38:

All DOCUMENTS CONCERNING any communication or analysis of the benefits or value of

the Instagram APIs

REQUEST FOR PRODUCTION NO. 39:

All DOCUMENTS CONCERNING any communication or analysis of the benefits or value of the Instagram Platform

REQUEST FOR PRODUCTION NO. 40:

All DOCUMENTS CONCERNING any communication or analysis of the benefits or value of the Facebook Platform

REQUEST FOR PRODUCTION NO. 41:

All DOCUMENTS that refer to or SUPPORT YOUR alleged affirmative defense that Instagram's claim for relief is barred by the doctrine of estoppel by consent.

REQUEST FOR PRODUCTION NO. 42:

All DOCUMENTS that refer to or SUPPORT YOUR alleged affirmative defense that Instagram's claim for relief is barred by the doctrine of unclean hands.

REQUEST FOR PRODUCTION NO. 43:

All DOCUMENTS that refer to or SUPPORT YOUR alleged affirmative defense that the Instagram's claim for relief is barred because the INSTAGRAM Marks have been abandoned due to naked licensing.

REQUEST FOR PRODUCTION NO. 44:

All DOCUMENTS that refer to or SUPPORT YOUR alleged affirmative defense that Instagram's claim for relief is barred because the INSTAGRAM MARKS are descriptive and lack secondary meaning.

REQUEST FOR PRODUCTION NO. 45:

All DOCUMENTS that refer to or SUPPORT YOUR Counterclaim that the INSTAGRAM Marks have been abandoned due to naked licensing.

REQUEST FOR PRODUCTION NO. 46:

All DOCUMENTS that refer to or SUPPORT YOUR Counterclaim that the INSTAGRAM MARKS are descriptive.

REQUEST FOR PRODUCTION No. 47:

All DOCUMENTS CONCERNING the INSTAGRAM Marks, including without limitation any COMMUNICATIONS CONCERNING the trademark rights of Instagram in the INSTAGRAM MARKS.

REQUEST FOR PRODUCTION No. 48:

DOCUMENTS CONCERNING any application submitted by YOU or any other PERSON to any state agency or other governmental authority, including the U.S. Patent & Trademark Office, for registration of the term FLIPAGRAM as a trade name, corporate name, trademark or service mark.

REQUEST FOR PRODUCTION No. 49:

All Facebook or Instagram Terms and Conditions or API Terms and Conditions to which YOU have agreed.

REQUEST FOR PRODUCTION No. 50:

All COMMUNICATIONS YOU received from Instagram.

REQUEST FOR PRODUCTION No. 51:

All DOCUMENTS RELATED TO surveys which YOU conducted regarding the use of FLIPAGRAM as a mark, relating to the issues in this Opposition proceeding, or relating to Instagram.

REQUEST FOR PRODUCTION No. 52:

For each expert that Applicant intends to call to testify in this proceeding produce the written report required by Fed. R. Civ. P. 26(a)(2)(B).

REQUEST FOR PRODUCTION No. 53:

Financial DOCUMENTS, including but not limited to, invoices, billing documents, or accounting documents, CONCERNING the annual sales or revenues in units and dollars for goods or services provided by YOU under or in connection with the FLIPAGRAM MARK, from the earliest date of YOUR alleged first use of the FLIPAGRAM MARK, in any manner to present.

REQUEST FOR PRODUCTION No. 54:

All DOCUMENTS upon which YOU intend to rely in this matter.

REQUEST FOR PRODUCTION No. 55:

All DOCUMENTS RELATED TO products, including but not limited to clothing and sundry items, that use or display the FLIPAGRAM MARK.

Dated: July 8, 2015

/s/ Bobby A. Ghajar
Bobby A. Ghajar
PILLSBURY WINTHROP SHAW
PITTMAN LLP
725 S. Figueroa, Suite 2800
Los Angeles, CA 90017
Tel: (213) 488-7100
Fax: (213) 629-1033

Attorneys for Instagram

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **OPPOSER'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS TO APPLICANT** was served on Applicant's counsel, D. Peter Harvey, Harvey Siskind LLP, 4 Embarcadero Center, 39th Floor, San Francisco, CA 94111, via postage prepaid first-class mail on July 8, 2015.

/s/ Bobby A. Ghajar

Bobby A Ghajar

Exhibit M
to Declaration of Naomi Jane Gray in Support of
Motion to Test Sufficiency of Responses to
Flipagram's First and Second Sets
of Requests for Admission

Offered by Applicant Flipagram, Inc.

Instagram, LLC v. Flipagram, Inc.

Opposition No. 91217238

From: Naomi Jane Gray
Sent: Wednesday, December 23, 2015 6:01 PM
To: 'Peterson, Marcus D.' <marcus.peterson@pillsburylaw.com>
Cc: Ghajar, Bobby <bobby.ghajar@pillsburylaw.com>; De La Rosa, Inga L. <inga.delarosa@pillsburylaw.com>
Subject: RE: Document production

Marcus,

I write to follow up on the issue of the supplementation of the parties' discovery responses and productions. The parties clearly agreed to supplement, on December 18, their responses to requests as to which we had reached agreement during our meet and confer sessions. As you and I explicitly discussed, Flipagram stood ready to supplement its responses on that date, and remains prepared to do so on the basis of a mutual, simultaneous exchange. When you proposed additional supplementation after the New Year, you did so in the context of items that remain in dispute. You never indicated that Instagram would refrain from supplementing items as to which the parties had reached agreement while it continued to consider items still in dispute. Indeed, it makes no sense to do so.

Please let me know when Instagram is prepared to exchange supplemental responses and production relating to items as to which the parties have reached agreement.

Wishing you the best for the holidays and a happy New Year,

Naomi

From: Peterson, Marcus D. [<mailto:marcus.peterson@pillsburylaw.com>]
Sent: Tuesday, December 15, 2015 1:49 PM
To: Naomi Jane Gray
Cc: Ghajar, Bobby; De La Rosa, Inga L.
Subject: RE: Document production

Naomi,

We called you this morning to follow up on the status of the stipulated extension, and you have not responded. Given that the expert disclosure deadline is in two weeks, amidst the holidays, we will move on our own to extend discovery and trial deadlines if we cannot reach an agreement with you by tomorrow on the stipulated extension.

Additionally, we have two issues regarding your email below with respect to Instagram's document production.

First, when we spoke on December 2, we asked you when Flipagram would be supplementing its document production. You said you were unsure and would speak to Thomas about it. We provided you the list of all of the categories of documents for which Flipagram stated it would produce documents, but no documents have

yet been produced. This includes Interrogatories for which Flipagram stated it would produce documents sufficient to provide the information sought. When we spoke last Friday, December 11, we again inquired when Flipagram anticipated supplementing its document production. You said you believed that it had produced documents for some of the categories, but were still unsure when additional documents would be produced. It is not clear why you now purport to require Instagram to supplement its document production by December 18, which is an arbitrary deadline, when you have not addressed our requests as to a time frame for Flipagram's supplemental production, and the parties never discussed supplementing their respective document productions on or by December 18. Please let us know when Flipagram will be supplementing its production.

Second, when we spoke on December 2, you asked when Instagram would supplement the written responses that it had agreed, at that point, to supplement. Similarly, we asked when Flipagram would be able to do so. You stated that Flipagram would be able to do so in the next week or two and asked if Instagram would be able to in that time frame. We said that two weeks might be possible, and said we would pencil it in on our calendar for December 18. However, when we spoke on Friday, December 11, we informed you that Instagram was working on supplementing its responses, including as to issues on which we had met and conferred and not reached resolution. We said that we believed we would be able to supplement the responses, and produce additional documents, to remove issues from your potential motion to compel, and that we would not be in a position to do so until after the first of the year, given the holidays and vacation schedules. As noted above, we still have not received confirmation as to when Flipagram will be supplementing its discovery responses, and your email is silent on that issue. We are therefore unsure why you expect supplemental responses from Instagram on December 18th.

As to Instagram's document production, we are looking into the specific discovery requests raised below, and will provide a response under separate cover. We hope to make an additional document production before the end of the year, with more to come just after the New Year.

We look forward to your prompt response,

Marcus

Marcus D. Peterson | Senior Associate

Pillsbury Winthrop Shaw Pittman LLP

725 South Figueroa Street, Suite 2800 | Los Angeles, CA 90017-5406

t 213.488.7410 | f 213.629.1033

marcus.peterson@pillsburylaw.com | website bio

ABU DHABI AUSTIN BEIJING HOUSTON LONDON **LOS ANGELES** NASHVILLE NEW YORK
NORTHERN VIRGINIA PALM BEACH SACRAMENTO SAN DIEGO SAN DIEGO NORTH COUNTY
SAN FRANCISCO SHANGHAI SILICON VALLEY TOKYO WASHINGTON, DC

pillsbury



From: Naomi Jane Gray [<mailto:ngray@harveysiskind.com>]

Sent: Monday, December 14, 2015 12:02 AM

To: Peterson, Marcus D.

Subject: Document production

Marcus,

We are considering your extension proposal as discussed Friday afternoon. In the meantime, I write regarding Instagram's document production.

To date, Instagram has produced a total of 107 documents, composed entirely of publicly available materials. 86 of these documents are screenshots of articles, books, or videos that reference Instagram. The remainder are screenshots of Instagram's PTO file wrappers or screenshots from Instagram's websites. Instagram has not produced any correspondence or email. Although Instagram took over two months to finalize edits to Board's standard protective order, Instagram has not produced any documents with a confidentiality designation. The word "Flipagram" does not appear anywhere in the production. Instagram has indicated that it will supplement this production but that most documents already have been produced.

Instagram has agreed to produce documents to the following RFPs, but no responsive documents appear to have been produced: 1, 2, 6, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 30, 37, 38, 39, 41, 42, and 47. Please confirm either that Instagram will produce all responsive documents on December 18, the date the parties have agreed to supplement their productions, or that no responsive documents exist. If responsive documents exist but Instagram does not expect to produce them on December 18, please advise me when Instagram expects to produce the documents.

In addition, Instagram refused to produce any documents in response to the following RFPs: 3, 5, 7, 8, 11, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 40, 43, 44, 45, 46, 48, 49, 50, and 51. After our meet and confer discussions (summarized in other correspondence), Instagram now agrees to produce certain documents responsive to requests: 7, 32, 43, 44, 45, and 50. Please confirm either that Instagram will produce these documents on December 18 or that no responsive documents exist. If responsive documents exist but Instagram does not expect to produce them on December 18, please advise when Instagram will produce the documents.

Finally, as discussed in our meet and confer efforts, Instagram objects to the sufficiency of many of Instagram's substantive RFP responses, including but not limited to 4, 9, 12, 13, 37, 38, 39, 41, and 42. Following our discussions, Instagram now agrees to supplement its responses and/or provide additional documents as to request 13. Please confirm either that Instagram will provide these supplemental responses on December 18, or advise me when Instagram will supplement these responses. If no responsive information exists, please so advise me.

Thanks.

Naomi Jane Gray | HARVEY · SISKIND LLP

Four Embarcadero Center, 39th Floor | San Francisco, CA 94111 | T: 415-354-0100 | F: 415-391-7124
www.harveysiskind.com | Blog: [Shades of Gray®](#) | Twitter: [@shadesofgraylaw](#)

The contents of this e-mail message and any attachments are confidential and are intended solely for the addressee. The information may be privileged by law. This transmission is sent in trust, for the sole purpose of delivery to the intended recipient. If you are not the intended recipient and/or have received this transmission in error, any use, reproduction or dissemination of this transmission or its contents is strictly prohibited. If you are not the intended recipient, please immediately notify the sender by reply e-mail or at 415-354-0100 and delete this message and its attachments, if any.

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1 HARVEY SISKIND LLP
D. PETER HARVEY (CA SBN 55712)
2 pharvey@harveysiskind.com
THOMAS A HARVEY (CA SBN 235342)
3 tharvey@harveysiskind.com
4 Four Embarcadero Center, 39th Floor
San Francisco, CA 94111
5 Telephone: (415) 354-0100
Facsimile: (415) 391-7124
6

7 Attorneys for Applicant/Petitioner
FLIPAGRAM, INC.

8 Mark: FLIPAGRAM
9

10 **IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**
11 **BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**
12

13 INSTAGRAM, LLC, a Delaware limited
14 liability company,

15 Opposer/Registrant
16

17 v.

18 FLIPAGRAM, INC., a California
corporation,

19 Applicant/Petitioner
20

**DECLARATION OF M. ELENA
BENAVENTE IN SUPPORT OF
MOTION TO TEST SUFFICIENCY
OF RESPONSES TO FLIPAGRAM'S
FIRST AND SECOND SETS OF
REQUESTS FOR ADMISSION**

Opposition No. 91217238

Application No. 86042264

1 I, M. Elena Benavente, declare as follows:

2 1. I am a senior paralegal at Harvey Siskind LLP, counsel for Applicant Flipagram, Inc.
3 (“Flipagram”). I make this declaration freely and of my own personal knowledge. If called as a
4 witness, I could and would competently testify to the matters set forth herein.

5 2. Annexed hereto as Exhibit A are true and correct copies of screen shots I captured
6 from Opposer’s website, www.instagram.com, on December 17 and December 22, 2015.

7 3. Annexed hereto as Exhibit B are true and correct copies of screen shots I captured
8 from the Forbes website, www.forbes.com, on December 22 and December 23, 2015.

9 4. Annexed hereto as Exhibit C is a true and correct copy of a screen shot I captured
10 from Opposer’s website, www.instagram.com, on December 28, 2015.

11 I declare under penalty of perjury under the laws of the State of California that the foregoing is
12 true and correct and that this declaration was executed this 28th day of December, 2015, in San
13 Francisco, California.

14 */M. Elena Benavente/*
15 _____
16 M. Elena Benavente
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Exhibit A
to Declaration of M. Elena Benavente in Support
of Motion to Test Sufficiency of Responses to
Flipagram's First and Second Sets
of Requests for Admission

Offered by Applicant Flipagram, Inc.

Instagram, LLC v. Flipagram, Inc.

Opposition No. 91217238

Instagram's Black Friday Holiday Gift Guide

95 NOTES NOVEMBER 25, 2011

CanvasPop



Has a friend ever asked for the original version of a beautiful Instagram photo you took so they could use it as the background on their phone? Have your parents been ranting and raving to all of their friends about how wonderful your Instagram images are to anyone who will listen? If so, **CanvasPop's Instagram printing** addition is the perfect holiday gift! You easily can transform any of your images into a 12x12 or 20x20 art piece for the home.

CanvasPop is providing a special price for a limited time and you can also buy a **CanvasPop gift card** for any of your Instagramming friends.

Casetagram



Let's get real: Dropping an iPhone can be an expensive mistake, especially if it falls at just the right glass-shattering angle. Why not protect that brand new iPhone with a durable case made out of Instagram images? Create a unique design with **Casetagram** using any of the six layouts, including two new special edition holiday cases, for yourself or someone you care about.

PostalPix - Aluminum Prints





Metal is totally awesome, especially the kind of metal you can find on the periodic table. Do you know what would be even more awesome than metal? Your Instagram photos infused onto a scratch resistant aluminum plate, that's what!

With **PostalPix** you can easily order long-lasting prints of your Instagram images with your iOS device **directly from their application**. You could even turn them into a fantastically unique holiday card for your family members! Each aluminum print comes with magnets and double sided tape for easy mounting.

Be sure to use the code "**weloveIG**" at checkout for 15% off any purchase made before midnight tonight!

Hatchcraft - Boo Box



These beautiful **bamboo shadow box frames**, from the freshly relaunched **Hatchcraft**, are a fantastic way to display Instagram images and would make a wonderful gift for that Instagram fanatic in your life!

Though the frames won't be shipping until the new year, Hatchcraft is offering **gift certificates** under face value Black Friday through Cyber Monday weekend only. While you're ordering a Boo Box gift certificate, be sure to check out their limited edition **IG Addict bamboo iPhone case!**

#APL #BRANDS



96 notes

harry-is-a-cutie reblogged this from **instagram**

harry-is-a-cutie likes this

lexparsimoniae likes this

promo-codes-june-2013-week reblogged this from **instagram**

zhengyang likes this

bird-in-a-cage likes this

bauknecht-gka-175-optima reblogged this from **instagram**

delonghi-esam-6700 reblogged this from **instagram**

novedades-nikon-2012 reblogged this from **instagram**

televisori-led-samsung-prezzi reblogged this from **instagram**

fokakier21-blog reblogged this from **instagram**

farmakeio21 reblogged this from **instagram**

-  [dirpros92](#) reblogged this from [instagram](#)
-  [prosdire23-blog](#) reblogged this from [instagram](#)
-  [chiangmai-house-blog](#) likes this
-  [sailajajoshi](#) reblogged this from [instagram](#)
-  [gretchenalice](#) likes this
-  [nathanmanousos](#) likes this
-  [kalebaskew](#) likes this
-  [tee-dee1310](#) likes this
-  [dubutorres](#) likes this
-  [gladyzloretta](#) likes this
-  [ohstellabella](#) likes this
-  [jalondna](#) likes this
-  [thekingdom-isnow](#) likes this
-  [joshuahenry](#) likes this
-  [jas132](#) likes this
-  [kris10330](#) likes this
-  [talkyapple](#) likes this
-  [hellojewlie](#) likes this
-  [halfbaconed-blog](#) likes this
-  [easilystupefied](#) likes this
-  [brandisimmons](#) likes this
-  [gailbautista](#) likes this
-  [mrbushido](#) likes this
-  [washedbythesun](#) likes this
-  [paulkatcher](#) likes this
-  [fatgirlinohio](#) likes this
-  [yadvigita](#) likes this
-  [abdulsmith](#) likes this
-  [electpeace-blog](#) likes this
-  [jhnstn](#) likes this
-  [multicolouredmemories](#) likes this
-  [instagram](#) posted this

[SHOW MORE NOTES](#)

<http://blog.instagram.com/post/13304305790/holiday-gift-guide-2011>

Instagram's 2012 Black Friday Holiday Gift Guide

♥ 687 NOTES 📅 NOVEMBER 23, 2012



Looking for more?
Be sure to check out our 2011 Black Friday Holiday Gift Guide, or pay a visit to the photo gift experts over at [The Photojojo Store](#).

Every year people from around the world hunt for the perfect gift to get for their Instagram-obsessed loved ones for the holidays, so we thought we'd make the search a little easier by sharing a few of our favorite Instagram-inspired gift ideas!

Projecteo



Projecteo, a tiny Instagram projector, is the perfect gift for an analog film loving Instagrammer. Order your Instagram photographs on 35mm film through their application, then view them on your walls with an adorably small projector. Don't let the estimated delivery date of February 2013 stop you from gifting it this holiday season!

Printstagram Calendar





There's no better way to celebrate 2013 than by having a look through all of your Instagrammed memories and photography from 2012 one day at a time. **Printstagram** uses paper that's heavier than an average calendar, so as you tear-away each day you're left with beautiful photographs that can be reused as notecards or decorations! It's the perfect gift for parents or grandparents.

Anagram



What do you get for the Instagrammer who has everything? The most fabulous Instagram-inspired knickknack—that's what! From the imaginative minds behind Twig Creative comes **Anagram**, a nostalgia-inducing toy made out of wood, cork and leather.

Stitchstagram





Who wouldn't love a handmade pillow, tote bag, clutch or coin purse covered in memories from a recent camping trip, photographs of the family dog, or your beautiful Instagram photography for a parent's home? **Stitchstagram** is the perfect way to take your photographs off of your phone and bring them to life!

#BLACK FRIDAY #INSTAGRAM GIFT GUIDE



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<http://blog.instagram.com/post/36348758940/blackfriday-2012>

v2.0.1 Submitted to the App Store

66 NOTES • SEPTEMBER 22, 2011

Good news! We submitted Instagram v2.0.1 to the App Store today and we expect to release it soon. In the meantime, take a look at some of the fixes coming your way in v2.0.1.

Earlybird looks more like old version

In v2.0, the Earlybird filter was altered slightly. This was unintentional and in v2.0.1 we've restored the filter back to its original state.

Tilt-shift has softer cutoff

We noticed the blur on tilt-shift in v2.0 was more intense when applied after capture. In v2.0.1, we've made the tilt-shift preview consistent between screens and less intense.

Bug fix for black image uploads

We fixed a bug where tilt-shifted photos would upload as black squares. If you're having this problem, please follow our [instructions for a temporary fix](#) while we wait for v2.0.1 to be approved.

Save filter photo bug fixed

We fixed a bug where filtered photos would fail to save to the camera library even when the "save filtered photo" setting was turned on. If you're having this problem, please follow our [instructions for a temporary fix](#) while we wait for v2.0.1 to be approved.

Fix for sending filter information to third-party sites

When you view your photos on third-party sites, such as [web.stagram.com](#), you'll be able to see what filter was used on the photo.

Better live video quality on iPad 2

We improved the live video quality in the photo capture state for the iPad 2.

#INSTAGRAM NEWS



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10:22:59 AM 12/22/2015

Instagram

DOWNLOAD FOR IOS, ANDROID, OR WINDOWS PHONE

Be Our 7th

40 NOTES | SEPTEMBER 27, 2011

With the addition of **Jess** and **Oli**, the Instagram team has grown from **4 people** to 6. But we still have 4 empty desks, and we just announced that the Instagram community has surpassed **10 million members**, so we're looking to expand our team!

We're looking for extraordinary engineers and designers who want to help us build and scale one of the fastest growing companies in the social web. You can read about what we're looking for in candidates on our **Jobs page**, but first we wanted to share a few photos with you to introduce ourselves and show you what it's like to work at Instagram. Take a look through our photos, check out our Jobs page, and **send us your resume**. Oli, our people/recruiting guy, will be in touch if it sounds like you'd be a good fit!



@mikeyk and @kevin, Instagram co-founders



@shayne, Engineer



@josh, Community + Partnerships



@jayzombie, Community Evangelist



@oliryan, Recruiting



Shayne, Kevin and Oli on the way to the food truck lot, just down the street from our office



One of our favorite food trucks



Our office is dog friendly. This is Fred.



Healthy treats: bacon popcorn



And camera cookies!



One of the services that uses our API, Stickygram, sent us Instagram magnets!

Want to join the team? Check out the [Jobs page](#) and then [drop us a note](#) – we're excited to hear from you!

#TEAM, #INSTAGRAM NEWS



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<http://blog.instagram.com/post/10741141150/beour7th>

#instameet Invitation Challenge

6 NOTES MARCH 16, 2011

Want to win an **Instagram stickerbook** from @instagoodies? Help spread the word about the **Worldwide InstaMeet on 24 March** by sharing an invitation to your city's meetup and tagging it #instameet. The good folks at @instagoodies are giving away their Instagram stickerbooks to 3 lucky participants!



#INSTAMEET, #USER FEATURE



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<http://blog.instagram.com/post/8756679596/instameet-invitation-challenge>

Instagram at SXSW

♥ 9 NOTES 🕒 MARCH 8, 2011

Heading down to Austin for SXSW? Here's a roundup of Instagram-related events you should try to check out:

Limited Edition Brisk Cans

Keep an eye out for **this limited edition can** from Brisk that features Instagram photos.

#atxvworld: Austin Photo Challenge

Tag your photos of Austin #atxvworld to enter your photo in @grether's **Instagram Showdown: Austin vs. The World**.

Instaprint Photo Booths

Try to find one of these location-based photo booths for Instagram at a SXSW party. A full list of places to spot one and a cool video of how it works can be found at [instaprint.me](#). Kudos to **BREAKFAST** for creating this!

SWSW Found Type Photowalk (Sunday, 10am)

The SXSW Found Type Photowalk in its 3rd year, and Instagrammers are invited! It starts at 10am on Sunday. Get more details and join up on the [Meetup page](#).

Instagram API Office Hours (Sunday, 6pm)

Join Instagram co-founder Mike Krieger and other developers for Instagram API office hours on Sunday from 6pm-8pm at Halcyon Coffee Shop. Get more details and join up on the [Meetup page](#).

KCRW

Not heading to Austin but want to keep tabs on what's going on? The **KCRW** team will be snapping photos at SXSW Interactive and Music. Follow @kcrw to see a bunch of photos from the event.

Know about other Instagram events going on at SXSW? Add them to the [Austin Instagram Meetup page](#).

#INSTAGRAM NEWS



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<http://blog.instagram.com/post/8756225141/instagram-at-sxsw>

A Real-Time API for Next-Generation Apps

♥ 13 NOTES 🕒 FEBRUARY 23, 2011

When we set out to create our API, we knew we had to support a basic set of interactions that developers would expect from a simple API. At the end of the day, though, we really wanted to push our API to the next level to support a new kind of interaction around photos – one that supported the real-time nature of the content that people create on Instagram. So, we put in a bit of extra elbow grease, and today we're launching an API with real-time update support.

So what exactly is Instagram's Real-Time API?

As of today, developers will be able to tell the Instagram API that they'd like to subscribe to new photos from four different entities: 1) **Users of the developer's application**: every time a user of an Instagram-linked application posts a photo, the developer's application will receive a notification. Developers like Foodspotting and sites like Dropbox now both utilize this new functionality. 2) **Tags**: An application can track a given tag and receive updates every time a new photo is posted with a given tag. 3) **Locations**: Every time a new photo is geo-tagged with a specific location, the developer will receive a notification. 4) **Geographies**: Sometimes individual locations are too specific. For these cases, we suggest subscribing to Geographies. Geographies consist of a latitude and longitude and a radius. This allows developers to subscribe to a given area like Austin or a specific city block of Manhattan. For an example we cooked up over this past couple days, take a look at <http://demo.instagram.com/> If you're interested in having a look, we've open sourced the [source code](#). On this site, we've subscribed to 20 or so geographies of major cities around the world. This demo site gets a ping every time a photo is posted near that location with a geotag (note that only a small portion of our photos are geotagged today). If you're in SF (or NYC) try posting a photo with a geo-tag and watch it pop up on the screen.

How does the real-time API work?

1) As a developer, you can sign up for the API at <http://instagram.com/developer/> 2) You can then create a subscription using a simple command as outlined in the [real-time section](#) of the documentation 3) Every time there's an update to a subscription, our servers POST an update your server using a simple web hook. 4) Your servers then query for the latest information. These subscriptions and the new API enable three major enhancements to Instagram:

1) Universal Sharing on Any Service

We have a long list of sites that we'd like to integrate with – we knew we wanted to support more options, but the question was: how do we do it in a scalable, self-service way? We could have developers poll our servers every five minutes for every user of their application, but this quickly becomes inefficient and nearly impossible for large services. Instead, a site like [Foodspotting](#) can have their users link up with the Instagram real-time API and instantly they're receiving notifications of new photos taken by Foodspotting users. When the user uses the hashtag "#fs", the picture is cross-posted on the user's foodspotting account. Also, an independent developer can decide that they really love a service, and would like to see better integration. Dropbox backup of Instagram photos is a pretty great example of this: <http://instadrop.appspot.com/> Notice that the site doesn't live with Instagram, nor does it live with Dropbox. A few hours can mean that a motivated developer can create new sharing options for Instagram on a whim. In fact, the Instadrop website is open-source, so any developer can take that code and create new sharing possibilities with ease. [Check out the source code](#). We're excited to have both Foodspotting and Dropbox as consumers of the real-time API from day one.

2) Bringing Live to the Web

The real-time nature of the API means that developers that use next-gen servers like [Tornado](#) and [Node.js](#) can create live experiences to browse what's happening on Instagram - and throughout the world. The demo site I mentioned above uses Node.js.

3) New browsing options

5) new browsing options

Today, **Momento** (one of the most popular personal apps) launches a new version of their app with full Instagram integration. Now Momento users can import their entire Instagram feed and browse posts day by day since their first photo. **Flipboard** is one of the companies working with the Instagram API to explore beautiful new ways to view and interact with Instagram images. While we're not quite ready to talk about it, all we can say is that it's very cool, and we believe it's a superlative experience for Instagram and Flipboard users. **About.me** also has some really cool stuff up their sleeve – so expect to see full Instagram integration there as well in the coming week. And finally, one of our favorite new sites is **instagre.at** which provides a super slick way to browse Instagram's most popular photos. 2000 developers have already signed up for the private beta, and we're excited to support a growing community of enthusiastic and creative engineers. Have a cool idea? Get started by reading the **API documentation** And by the way, if you're a talented engineer and think this is pretty cool stuff – we're hiring! Send your resume to jobs@instagram.com Kevin + The Instagram Team

#API, #INSTAGRAM NEWS, #BRANDS



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<http://blog.instagram.com/post/8756150468/a-real-time-api-for-next-generation-apps>

InstaCity: Berlin

40 NOTES NOVEMBER 30, 2011

InstaCity is a weekly blog series that introduces you to Instagrammers in different parts of the world. We'll feature a new city, and a new group of Instagrammers, in each installment. We love exploring the world through photos, and hope you'll be inspired to follow some of the users we feature here to learn more about the city they call home.

This week, we're taking you to **Berlin, Germany!** There's an extremely active local group of Instagrammers in Berlin, and we'd like to introduce you to four of them.

Thomas



Thomas (@thomas_k) has been on Instagram since last October, and in that time his photos have been featured across the web, including in [Mashable's article on mobile street photography](#). Thomas works near Potsdamer Platz in Berlin, and so it's the place where most of his shots are taken. "I've always found this area interesting because of the modern architecture that surrounds it," he says, "which I try to use it as background while shooting. The main reason why I'm still not tired of photographing Potsdamer Platz almost every day is that it always looks different to me somehow." Check out a full interview with Thomas on [Instagrammers.com](#).



This photo was taken early in the morning on my way to work. It was quite dark and foggy so I didn't expect it to turn out well. I chose this angle because I wanted the buildings to look somehow massive and huge with just a slice of white sky over the figure. The low light created a special effect I really enjoyed when the editing was finished. It made the picture look like it was taken many years ago. That's one of the many things I appreciate about photographing in Berlin – it's really hard to tell if your shot was taken yesterday or twenty years ago.

Chris



[@aufgetaucht](#) I posted my first photo last November, and I never imagined that the app I downloaded that day would turn out to be the one I'd get addicted to so fast. I always try to post only my "treasures", and not every single photo I shoot. Berlin is a great city to explore using your iPhone. I'm in love with its architecture and its colours. I dream of the day when I can meet my IG-friends from all around the world



in Berlin and show them my city.



This photo was taken in a museum in Berlin. I was on a photowalk for 2 or 3 hours and the light was perfect for this kind of picture. I love shooting silhouettes or shadows of people, using them as my actors walking through the scene.

Arne



@herrkrueger: I joined Instagram the first week it was released and was immediately hooked . First, I was looking for an easy, beautiful way to share my daily morning pictures of Berlin to Tumblr, Twitter and Facebook, but it became so much more. My love for photos and the exploding Instagram community led to the start of the first Community Exhibition of Instagram photos, which took place in March - April 2010 in a cafe in the Bergmannkiez of Berlin, with more than 80 photographs from 10 European Instagram photographers.



This is with where it all started. The sunrise after dropping off my daughter at kindergarten was always so beautiful that I wanted to capture it somehow. In January 2009 I started a daily picture project on my Tumblr. Two years later, these daily pictures became a integral part of my life and help me to connect with the moment, the place and weather.

Michael



@king_fisher: I wasn't that much into photography before I discovered Instagram in November last year. I don't own a DSLR, so all pictures were taken with my iPhone 4 (except some of the very early posts in my stream). I love going on photowalks with other Instagrammers to get an idea of the people behind the photos I like most. When not taking pictures, I do web development, so as a logical consequence, I developed **InstaChallenge**, a free web service to manage challenges on Instagram as well as to produce photobooks (using a print-on-demand service) from the results.



This photo shows the mystery that surrounds the city of Berlin. It was taken on a photowalk with some other IGers from Berlin. We're doing these walks quite often, mostly with different people. It shows the roof of the "Tempodrom", a well-known venue for concerts and other events. I used Hipstamatic for this and added some filters for color and contrast corrections.

#INSTACITY #USERFEATURE



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Hurricane Irene

40 NOTES AUGUST 29, 2011

Hurricane Irene swept through the Caribbean and East Coast of the United States last week, causing damage and major flooding in many states. While Irene made its way up the coast, photos uploaded to Instagram provided live coverage. You can discover more images of the rain, flooding, empty streets, and various survival kits via [#irene](#) and [#hurricaneirene](#) tags, as well as on [instacane.com](#), a website created by developers Chris Ackermann and Peter Ng that uses the Instagram API to display photos related to the hurricane.

We also saw journalists and news organizations utilize Instagram in order to record activity surrounding this story. To complement its live coverage, the Wall Street Journal displayed a feed of Instagram photos on its [live blog](#), and New York Times journalist Brian Stelter ([@brianstelter](#)) shared his photos of the hurricane as it passed through Nags Head, N.C.



Photos from [richardls](#) [allaneschoening](#) [dewtau](#) [blacked](#) [bradwalsh](#) [toddcam](#) [brianstelter](#) [hoeg](#) [snowqueentlc](#) [jordyhyle](#) [roadapples](#) [betty_harris](#) [delcolife](#) [arzarz](#) [toddschwartz](#) [hearteheart](#) [r_i_zz](#) [mllemonique](#) [keithwj](#) [chasi](#) [herongio](#) [briannaoney](#) [idlegnome](#)

#EVENTS



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<http://blog.instagram.com/post/9558149423/hurricaneirene>

Exhibit B
to Declaration of M. Elena Benavente in Support
of Motion to Test Sufficiency of Responses to
Flipagram's First and Second Sets
of Requests for Admission

Offered by Applicant Flipagram, Inc.

Instagram, LLC v. Flipagram, Inc.

Opposition No. 91217238



APR 9, 2012 @ 11:35 PM 67,052 VIEWS

Inspiring Insights by Instagram CEO Kevin Systrom, The Man Who Built A \$1 Billion Startup



Lim Yung-Hui, CONTRIBUTOR

I write about tech products and business strategies.

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FULL BIO

Instagram co-founder Kevin Systrom is undoubtedly one of the most active startup CEOs on Quora. Over the past two years, Quora users have read the many stories behind the creation of Instagram, one of the hottest startups in San Francisco. The stories are pretty much inside scoops, directly from the CEO and product creator.



Today, Facebook announced the acquisition of Instagram for \$1 billion, in Facebook shares and cash. The Instagram story will surely inspire aspiring tech entrepreneurs around the world. Answers by Systrom on the leading Q&A site, Quora, offer glimpses of how the 28-years-old entrepreneur managed to build a \$1 billion startup in just 2 years.

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Starting Up

What is the history of Instagram?

“ First off, we have to say that we never expected the overwhelming response that we’ve seen. We went from literally a handful of users to the #1 free photography app in a matter of hours. But as my cofounder Mike Krieger likes to say, Instagram is an app that only took 8 weeks to build and ship, but was a product of over a year of work.

The story starts when I worked at Nextstop. While I was there working in

- Menu icon
- Search icon
- User profile icon
- COMMENT NOW
- Envelope icon
- Facebook icon
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- TRENDING
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- Twitter icon



marketing, I started doing more and more engineering at night on simple ideas that helped me learn how to program (I don't have any formal CS degree or training). One of these ideas was combining elements of foursquare (check-ins) with elements of Mafia Wars (hence the name Burbn). I figured I could build a prototype of the idea in HTML5 and get it to some friends. Those friends ended up using the prototype without any branding elements or design at all. I spent weekends working on improving the prototype for my friends. At a party for the Hunch folks I ran into a bunch of people who would basically make starting Burbn a reality. At that party were two people from Baseline Ventures and Andreessen Horowitz. I showed the prototype, and we decided we'd meet up for coffee to talk about it. After the first meeting, I decided to take the dive and leave my job to go solo and see if Burbn could be a company. Within two weeks of leaving, I raised \$500k from both Baseline and Andreessen Horowitz, and started work on finding a team.

Mike Krieger and I started talking and he decided he liked the idea of helping start the company. Once he joined, we took a step back and looked at the product as it stood. By this time, we had built Burbn into a (private) really neat HTML5 mobile web app that let you: Check in to locations, Make plans (future check-ins), Earn points for hanging out with friends, post pictures, and much more.

We decided that if we were going to build a company, we wanted to focus on being really good at one thing. We saw mobile photos as an awesome opportunity to try out some new ideas. We spent 1 week prototyping a version that focused solely on photos. It was pretty awful. So we went back to creating a native version of Burbn. We actually got an entire version of Burbn done as an iPhone app, but it felt cluttered, and overrun with features. It was really difficult to decide to start from scratch, but we went out on a limb, and basically cut everything in the Burbn app except for its photo, comment, and like capabilities. What remained was Instagram. (We renamed because we felt it better captured what you were doing — an instant telegram of sorts. It also sounded camera-y)

So 8 weeks later, we gave it to our friends, beta tested, bug fixed, etc. and this Monday we decided it was ready to ship. We've got a long road ahead of us, but we're encouraged by the adoption and usage that has far exceeded our bets pre-launch.

It's a long story, but that's what you asked for :) October 8, 2010

How did Instagram get its name?

“ A long week of searching for something that combined the 'right here right now' aspect of what we were trying to accomplish with the idea of recording something in your life (hence the suffix -gram).

We also wanted something relatively unique. We had a bunch of other names that were in the running, but there were lots of other apps with names that were too similar. Another characteristic was whether or not you could tell someone the name and they could spell it easily. November 22, 2010

How long was Instagram in development for before launch?

“ It's hard to answer this question, because there's the client and then there's the server. Most of the server code was taken from Burbn. (For those who never used Burbn, Instagram looks/feels/acts a lot like burbn, only it's focused on posting a photo). That code took many months to develop, refine, and turn into libraries that we can use internally on just about any project. We built them knowing we'd likely reuse them in other experiments down the road. We learned "a lot" along the way that made Instagram act the way it does currently.

The app itself took about 8 weeks from start to where we are today. October 14, 2010





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Lim Yung-Hui, CONTRIBUTOR

I write about tech products and business strategies.

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Continued from page 1

Does Kevin Systrom code at Instagram?

“ Yes. I’ve been doing mostly backend work lately – python/django stuff.
December 10, 2010

Recommended by Forbes



Why didn't Instagram buy the .COM version of its name?

“ Not sure it really matters – the domain name’s shorter this way, though slightly more difficult to spell. In the end, we decided most folks would learn about us through links on other services, and therefore the .com wasn’t a must-have. November 22, 2010

Why did Andreessen Horowitz invest in Burbn when it had already invested in Foursquare?

“ Actually, Marc and Ben did our seed round well before they invested in Foursquare. To be fair, the feedback when we raised our round was not “Looks like a foursquare competitor, go compete”. It was “You’ve got a lot of good ideas in the product so far, go figure out what company you want to build”. — it took us a while, but we took the best elements of what we were building (social mobile photos) and built Instagram. Our development of Instagram was never influenced by their investment in Foursquare — it was about needfinding and developing ‘product market fit’ — something all very tiny startups need to do.

We’ve had a great experience with Andreessen Horowitz, and have become good friends with the folks at Foursquare — in fact, their API has been an essential way for people to tag their photos. October 8, 2010

The Story Behind the Fast & Beautiful Photo Sharing App

Vertical sidebar with navigation icons: menu, search, user profile, comment now, email, social media (Facebook, Twitter, LinkedIn, Google+, RSS), trending (+), and more social media icons.



Who is responsible for Instagram's UI design?

“ For better or for worse, I've done most of the pixel pushing in our app. ;) August 24, 2011

At what point in Instagram's product development did square photos become the standard?

“ From day one. We realized that if we were going to do photos, that we'd have to be different and stand out. Square photos displayed really well in a feed format and frankly we just liked the aspect ratio better. It wasn't much more complex than that. September 28, 2011

What servers would Instagram have used in their early stage, and what servers do they use now?

“ When we first launched we used a very small box in a managed data center. Needless to say, we had to upgrade very quickly — so we moved the entire site over to amazon EC2 which we've been using ever since. As far as instance sizes go, I believe we use nearly every size available for different functions. August 24, 2011

Why did Instagram choose Jinja2 instead of Django Templates?

“ At the time, it was simply more flexible than the built-in templating language (inline python). In our initial experience it was also much (much) faster. However, I believe in recent releases of Django they've addressed many of these differences, so I'm not sure we'd necessarily use Jinja2 from the start today. August 24, 2011

How and why did Instagram select its initial set of free image filters?

“ No rhyme or reason — just lots of experimentation and feedback from beta users. We made about 30, but only 11 are in the product today. October 8, 2010

How does Instagram develop their filters?

“ It's really a combination of a bunch of different methods. In some cases we draw on top of images, in others we do pixel math. It really depends on the effect we're going for.

For instance, Lomo-fi really isn't much more than the image with boosted contrast. Whereas Toaster is one of the most complex (and slow, yet popular) filters we have with multiple passes and drawing.

I'd give up more info, but it's our secret sauce :) Maybe some day... January 6, 2011

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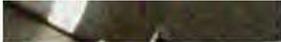
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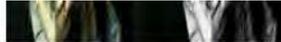
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How does Instagram choose names for their filters?

“ I wish that I could say it’s more interesting – but often it has to do with the inspiration for the filter... a type of film, a photo we’ve seen, or simply what we were doing at the time. September 28 2011

Recommended by Forbes



What do the different image filters on Path, Instagram, Oink, etc. actually do?

“ Our filters are a combination of effects – curve profiles, blending modes, color hues, etc. In fact, I usually create them in photoshop before creating the algorithms to do them on the phone. January 4, 2012

Why did Instagram change its iPhone icon?

“ I designed the original one – and honestly it came down to branding. I’m very excited about our 2.0 icon and the reaction has been overwhelmingly positive. The initial icon was a rendering of an actual camera that had nothing to do with Instagram. At that point, you have to realize, we had 80 users and I really just liked the idea of having a retro camera stand for Instagram.

It became really clear very quickly that we needed our own brand, and as part of that we enlisted help from one of our users Cole Rise – who after many iterations has created a really gorgeous icon that we all identify with as Instagram today. September 28, 2011

What image processing library does Instagram use to apply filters on photos?

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“ I wrote the code from scratch – to my knowledge there aren’t any libraries that do it for you. November 19, 2010

Growing the Community

How many beta users did Instagram have right before launch?

“ Robert Scoble is right that we had about 100 people provisioned to use the beta. Many of those people were users of Burbn so naturally we ported them over. However, not all of those people actually installed Instagram (at that time it was known as ‘codename’) – in fact, we used up a good portion of those provisions on people who never ended up using it. So a bit of advice to new iOS startups: choose your beta testers carefully. 100 provisions go very very quickly. January 16, 2011

Why are there so many Instagram users from Asia?

“ We have a lot of usage in Asia – we also have a lot of usage in Europe. I’m not sure it’s higher than average for a startup with global reach. You may encounter more content from Asian users because of the language-agnostic characteristics of photos (you don’t need to speak Japanese to enjoy photos from Japanese people). August 24, 2011

Instagram told 3rd Party developers today to stop using their site data, shutting down Followgram and possibly others. Was this the right move to make for users?

“ First, thanks for the healthy discussion. It’s encouraging to see everyone chime in with very thoughtful answers as to why we should allow third parties to access user’s data or not through our undocumented and private API endpoints.

I want to say, before anything else, that we are absolutely 100% behind supporting developers that want to build on top of Instagram... soon. We’re currently working on our first release of an API (as we mentioned in a TechCrunch interview in late December when we crossed 1 million users). There’s clearly a lot of excitement behind building things for Instagram, and I only wish that we could have an API out today, but unfortunately it’s harder than simply flipping a switch.

An API is a contract with the developer world. It says “Here’s how to interact with our system, the set of rules, guidelines, etc. that come along with it, and we promise not to change the endpoints/responses without notice.” The current private API changes on a daily basis. Endpoints are added and removed, response formats are changed with new client releases, etc. In other words, the private API’s stability and isn’t fit for anyone to use except for the developers that understand what’s going on with those changes. When 3rd parties develop using this API, their sites will inevitably break when we change things. We don’t think this is a good experience for developers or for users.

So, to the developers who built cool stuff (like followgram.com), we sent a note asking them to comply with our terms of use and to not use the API. We *also* said we were very excited about what they were doing and invited them to participate in the beta program of our API when it becomes available (likely in the next week or so). In Followgram’s case, they ducked our attempts to protect our private API endpoints following this email, and didn’t cooperate. Over the next couple of days, more emails and requests were met with silence – so we took further action to protect our API. Eventually Herman understood the situation and said he’d be happy to cooperate. Because of this, we’re going to work with Followgram to be on the beta of our new API so he can build an awesome directory for Instagram users.

Also, we had numerous support emails from users asking why their photos and information were showing up on a third party site (followgram.com). Many got very angry that their photos were seemingly being hosted by a 3rd party. Because followgram doesn’t require any type of authentication, you can simply enter in anyone’s name to show up in the directory, and unfortunately many users were entered without their permission and it caused problems. Like I said, we’re all for Followgram. we just would like to





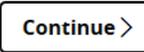
make sure that it happens the right way. Partially, this is a communications issue to let the community know what an API is, how it works, and how to make sure that their content is seen by the people they want it seen by. We don't have this in place, so we asked Followgram for their help.

As for instagram.tk — we're also very excited about this site, and simply asked them to change/redirect their domain name for trademark reasons. It's completely in line (and commonplace) with trademark protection to ask another party to do this. In our email to them, we explained our situation and said we were super excited about their site and just needed their help on the trademark issue. I'd expect any brand to ask politely the same thing in a similar situation.

So to be clear: We'd like to 100% support developers building on top of Instagram. We're working our hardest at coming out with a simple API that people can start using freely to create cool projects just like Followgram. I'm excited for the release of our API, and even more excited to see the cool stuff folks will build on top of it.

Please understand that our first responsibility is to the quality of service of our site and the protection of data for our users. So, we've asked specific developers to help us create a situation that works reliably and safely for everyone involved. [January 13, 2011](#)

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Etc.

For how long have you been coding and how did you get started with coding?

☞ Depends what you mean by coding. I've been programming here and there since I was in middle school. In high school I was excused from my foreign language requirement so I could take more computer science classes. The first real class I took was in Pascal, and then later in c++. Independently I started playing with MySQL and PHP, but never did anything significant.

My freshman year at Stanford I took CS106X which was the first year's worth of CS in 1 quarter (it's usually two). I wouldn't say I did so well... I looked around and saw so many fantastically smart folks in that class and decided I was better off majoring in something like business. Looking back I wish I had stuck with it. It turns out that no undergrad class prepares you to start a startup — you learn most of it as you do it.

So anyway, long story short, I only took one CS class at Stanford, and instead of majoring in it, I coded basic projects on the side for fun (a student marketplace, an internet radio station, etc). At Odeo as the intern I picked up Ruby on Rails but forgot it quickly as I took a marketing job at Google GOOG -0.13%.

Only at my next job at Nextstop would I say I went from being a hobbyist to being able to write code that would go into production. The lesson I take from this all is that a) don't give up so quickly if it's something you actually enjoy and b) 99% of what I do on a daily basis I learned on the job — classes/majors can prepare you to learn on the job, but *doing* the work is where you learn what you'll use every day.
December 10, 2010

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What did Kevin Systrom major in at Stanford?

Management Science and Engineering with a concentration in Financial & Decision Analysis. December 5, 2010

How old is Kevin Systrom?

I'm 27 (Dec. 30th 1983). April 14, 2011

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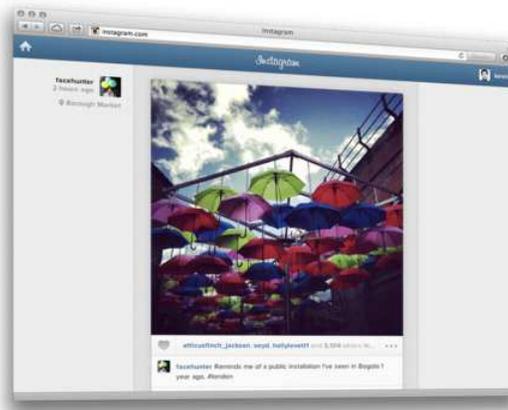
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Introducing Your Instagram Feed on the Web

♥ 1,558 NOTES 🕒 FEBRUARY 5, 2013



Today, I'm very excited to announce the launch of a product we've been wanting to build for quite some time now. Since our launch in October of 2010, we've focused on building a simple app that has inspired creativity while capturing everyday moments through the lens of your mobile phone. In fact, our focus on building out a mobile-only experience is a unique path that we've chosen for many reasons, the most important of which is that Instagram, at its core, is about seeing and taking photos on-the-go. However, to make Instagram even more accessible to our growing community, at the end of last year we started to expand to the desktop web, giving you the ability to see profiles from instagram.com. To continue that path, as of today, you can now browse your Instagram feed on the web – just like you do on your mobile device. Go to instagram.com and log in to your account to give it a try.

Your Instagram Feed on the web functions much like it does on your mobile phone. You can browse through the latest photos of people whom you follow with updates as people post new photos. Like photos by double clicking on them or pressing the like button. Or, engage in a conversation around a photo with inline commenting. Browse through pages of the most recent images to keep up on what's happening with the people you follow in realtime. And shrink your browser down to a single column for your feed to look more like your mobile feed. Simply put, we've brought a simple, powerful, and beautiful Instagram browsing experience to the web.

We believe that you should be able to access Instagram on a variety of different devices, any of which may be convenient to you at a given moment – including your desktop computer or tablet. We do not offer the ability to upload from the web as Instagram is about producing photos on the go, in the real world, in realtime. On the other hand, Instagram for the web is focused on making the browsing experience a fast, simple and enjoyable one.

This product was made possible by a small, talented group of engineers and designers on the Instagram team whose goal it was to make Instagram for the web be the most simple, straightforward, and beautiful web experience for the Instagram community. We look forward to hearing your feedback, and thank you as always for your support as we build this product and community together.

Kevin Systrom

co-founder, Instagram

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