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

Proceeding	91217238
Party	Plaintiff Instagram, LLC
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**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 INSTAGRAM, LLC’S MOTION FOR JUDGMENT ON THE PLEADINGS
AS TO APPLICANT FLIPAGRAM, INC.’S COUNTERCLAIM AND SIXTH AND
SEVENTH AFFIRMATIVE DEFENSES**

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, 37 CFR § 2.127 and Sections 504.01 and 504.02 of the Trademark Trial & Appeal Board Manual of Procedure (“TBMP”), Opposer Instagram, LLC (“Instagram”) respectfully moves for judgment on the pleadings as to Counts I and II of the Counterclaim and the Sixth and Seventh Affirmative Defenses asserted by Applicant Flipagram, Inc. (“Flipagram”) in its Answer to Notice of Opposition and Counterclaim Petition to Cancel [TTABVUE Doc. 8] filed on September 15, 2014.

I. INTRODUCTION

Instagram initiated this opposition proceeding because Instagram owns valid and enforceable rights in INSTAGRAM, and is likely to be damaged by the registration of FLIPAGRAM. In response, Flipagram has alleged both that it received a trademark license from Instagram *and* that the license it received was a “naked” license that caused the INSTAGRAM mark to become abandoned. Specifically, Flipagram contends that it and other developers received a trademark license when they accepted a prior version of the terms of use governing access to Instagram’s Application Program Interface (the “API Terms”), which previously tolerated certain uses of “Insta” or “Gram”, but explicitly prohibited use of INSTAGRAM.

The API Terms licensed developers who complied with the Terms to access Instagram’s API, but Instagram denies that the API Terms granted a trademark license of any kind to

Flipagram or any other developer (in which case Flipagram’s naked licensing argument would fail based on the lack of any trademark license, much less a “naked” license).

But even accepting (for purposes of this motion only) Flipagram’s contention that the API Terms conveyed a trademark license, Flipagram’s naked licensing counterclaim and affirmative defense fail as a matter of law for two independent reasons:

1. Assuming *arguendo* that the API Terms conveyed a trademark license of any kind, Flipagram’s naked licensing argument fails because the API Terms expressly prohibited use of INSTAGRAM.
2. Assuming *arguendo* that the API terms conveyed Flipagram a trademark license, Flipagram’s naked licensing argument fails under the doctrine of licensee estoppel.

In other words, Flipagram has not pled – and cannot plead – any legally valid challenge to the INSTAGRAM mark based on naked licensing.

Moreover, insofar as Flipagram’s answer and counterclaim expressly allege that Flipagram was Instagram’s licensee at the time Instagram’s relevant trademark registrations issued, Flipagram is also estopped from alleging that the INSTAGRAM mark was not distinctive when the registrations issued.

Accordingly, Instagram respectfully requests that the Board enter judgment on the pleadings in Instagram’s favor as to both counts of Flipagram’s counterclaim as well as Flipagram’s duplicative Sixth and Seventh affirmative defenses.

II. FACTS AND PROCEDURAL BACKGROUND

A. Instagram’s Rights and Opposition to Flipagram’s Application.

Instagram owns multiple U.S. registrations and applications for the mark INSTAGRAM covering a variety of goods and services, and also owns common law rights in those marks. *See* Notice of Opposition filed on July 7, 2014 [TTABVUE Doc. 1], ¶ 2, Ex. A; Answer to Notice of Opposition and Counterclaim Petition to Cancel filed on September 15, 2014 [TTABVUE Doc. 8], Answer, ¶ 2 (admitting that Instagram “has U.S. registrations and applications for the mark INSTAGRAM, which registrations and applications speak for themselves”). In particular, Instagram is the registrant of U.S. Reg. No. 4,146,057, registered on May 22, 2012 in

International Class 9, for the standard character mark INSTAGRAM for “downloadable computer software for modifying the appearance and enabling transmission of photographs.” Notice of Opposition, Ex. A, at 1. Instagram is also the registrant of U.S. Reg. No. 4,170,675, registered on July 10, 2012 in International Class 42, for the standard character mark INSTAGRAM for the following 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[.]

Id., Ex. A, at 2.

On August 19, 2013, Flipagram filed App. No. 86/042,264 (the “Application”) for the standard character mark FLIPAGRAM in International Class 9 for “Computer application software for mobile phones, portable media players, handheld computers, namely, software for transforming still photographs into video slideshows for sharing on internet social networks.” The Application was published for opposition on January 7, 2014 and, after obtaining an extension of time to oppose, Instagram timely filed a Notice of Opposition [TTABVUE Doc. 1] on July 7, 2014, stating the basis of Instagram’s rights at common law and through its federal registrations and also stating the grounds for its opposition to Flipagram’s application.

B. Flipagram’s Answer and Counterclaims.

On September 15, 2014, Flipagram Answered Instagram’s Notice of Opposition and counterclaimed for cancellation of the two federal registrations asserted in Instagram’s Notice of Opposition. [TTABVUE Doc. 8]. As the first basis for its counterclaim, Flipagram alleged that Instagram had abandoned its rights in the INSTAGRAM mark through naked licensing. [TTABVUE Doc. No. 8], Counterclaim, Count I. Flipagram based its naked licensing claim on the fact that a prior version of Instagram’s API Terms which granted developers a license to access Instagram’s Application Program Interface had included the following (subsequently replaced) language: “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.'" *Id.*, Counterclaim, ¶¶ 9-10.

Flipagram alleged that it accepted the API Terms while the agreement included the language quoted above. [TTABVUE Doc. No. 8], Counterclaim, ¶¶ 8-13. It also took the position that the language quoted above conveyed a trademark license in addition to the license for access to the API, and that Flipagram relied on its supposed rights under the supposed trademark license when it selected the FLIPAGRAM mark. "Opposer's relationship with third party software developers, including Flipagram, was governed by the API License[.] ... Opposer's API License contained an express provision governing each licensee's right to choose its name and trademark. ... When selecting its name and trademark in early 2012, Flipagram relied on these terms in Opposer's API License. Flipagram specifically relied upon Opposer's term expressly consenting to the use of a GRAM-formative name." [TTABVUE Doc. 8], Counterclaim, ¶¶ 8-9, 12. Flipagram asserted that its supposed trademark license from Instagram was in effect until "late 2013." *Id.*, Counterclaim, ¶ 17.

At the same time Flipagram alleged that it relied on a supposed trademark license from Instagram, it also alleged that the supposed license was a naked license. Paragraph 11 of the Counterclaim alleges that "[t]he API License [*i.e.*, the API Terms] did not impose any conditions upon [Instagram's] licensees regarding their use of INSTA- or GRAM-formative names. It also did not provide for quality control of the products and services offered by the licensees." [TTABVUE Doc. 8], Counterclaim, ¶ 8. Flipagram put a fine point on its naked licensing claim in Paragraph 20 of its counterclaim:

On information and belief, by the terms of its API License, [Instagram] engaged in uncontrolled or naked licensing of its alleged marks. [Instagram's] API License did not provide for quality control over its licensees, [Instagram] failed in fact to exercise adequate control over its licensees, and [Instagram] did not have a close working relationship with any of its licensees allowing for quality control.

Id., ¶ 20. *See also id.*, ¶ 21 (alleging that "[t]he terms of the API License providing for uncontrolled or naked licensing of its alleged trademarks were in effect at the time of the Registrations" – *i.e.*, U.S. Reg. Nos. 4,146,057 and 4,170,675, which issued on May 22, 2012 and July 10, 2012, respectively. *See id.* at 3:16-18 (introductory paragraph to Counterclaim);

Notice of Opposition, Ex. A, at 1-2)). Paragraphs 22 and 23 of the counterclaim request cancellation of both INSTAGRAM registrations based on abandonment through naked licensing. Flipagram also reiterated its naked licensing claim as the basis for its duplicative Sixth Affirmative Defense. *Id.*, Affirmative Defenses to Opposition, ¶ 6.

Flipagram's counterclaim includes a second count based on alleged lack of distinctiveness. Specifically, Flipagram alleged that: (1) "The term 'INSTA' is a common, descriptive prefix for an action or event that occurs instantly"; (2) "The term 'GRAM' is a common, descriptive suffix for a message or recording"; and (3) Instagram's "combination of these descriptive terms into a composite, INSTAGRAM, produces a descriptive component that is not inherently distinctive." [TTABVUE Doc. 8], Counterclaim, ¶¶ 25-26, 28. Flipagram alleged that "The marks identified in the Registrations were merely descriptive and had not achieved secondary meaning as of the dates of Opposer's Registrations," *i.e.*, May 22, 2012 and July 10, 2012 – during the time period Flipagram contends its alleged license from Instagram was in effect. *Id.*, ¶ 30; *see also* ¶¶ 12, 17 (regarding the dates of the alleged license to Flipagram). Paragraph 31 of the counterclaim requests cancellation of both INSTAGRAM registrations based on lack of distinctiveness. *See id.*, ¶ 31. Flipagram also reiterated its lack of distinctiveness claim as the basis for its duplicative Seventh Affirmative Defense. *Id.*, Affirmative Defenses to Opposition, ¶ 7.

Instagram answered Flipagram's counterclaim on November 18, 2014 [TTABVUE Doc. 15]. Instagram denied Flipagram's counterclaims and also asserted the affirmative defense of estoppel: "Based on the allegations in [Flipagram's] Counterclaims, the doctrine of estoppel prevents [Flipagram] from seeking the relief set forth in its Counterclaims, including [Flipagram's] acceptance of the API Terms and its own conduct in seeking to register the mark FLIPAGRAM." *Id.*, Second Affirmative Defense.

III. LEGAL STANDARD

"A motion for judgment on the pleadings is a test solely of the undisputed facts appearing in all the pleadings, supplemented by any facts of which the Board will take judicial notice."

Kraft Group LLC v. William A. Harpole, 90 U.S.P.Q.2d 1837, 1840 (TTAB 2009), *dismissed in*

favor of a cancellation proceeding, slip op., Opp. No. 91/185,033 (TTAB Sept. 5, 2011); *Media Online Inc. v. El Clasificado, Inc.*, 88 U.S.P.Q.2d 1285, 1288 (TTAB 2008); TBMP, § 504.02. “For purposes of the motion, all well pleaded factual allegations of the non-moving party must be accepted as true, while those allegations of the moving party which have been denied (or which are taken as denied, pursuant to Federal Rule 8(b)(6), because no responsive pleading thereto is required or permitted) are deemed false. Conclusions of law are not taken as admitted.” *Kraft Group LLC*, 90 U.S.P.Q.2d at 1840.

Judgment on the pleadings should be granted where “on the facts as deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment on the substantive merits of the controversy, as a matter of law.” *Kraft Group LLC*, 90 U.S.P.Q.2d at 1840. The Board has noted that as with a motion to dismiss, a cancellation petition cannot survive a motion for judgment on the pleadings unless it contains “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Fifty-Six Hope Rd. Music Ltd.*, CANCELLATION 9205705, 2014 WL 4896416, at *2 (Sept. 17, 2014) (non-precedential)¹ quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (internal quotations omitted). “Motions for partial judgment on the pleadings are appropriate.” *Kraft Group LLC*, 90 U.S.P.Q.2d at 1840. Instagram does not concede that the API Terms conveyed a trademark license of any kind. Rather, this motion should be granted because Flipagram’s counterclaim and duplicative corresponding defenses would fail as a matter of law *even if* Flipagram’s (inaccurate) characterization of the API Terms were to be accepted as true. *Id.*

IV. ARGUMENT

a. Flipagram’s Naked Licensing Counterclaim and Sixth Affirmative Defense Fail Because the API Terms Expressly Prohibited Use of the Mark INSTAGRAM.

Under the Lanham Act, “abandonment” occurs “[w]hen any course of conduct of the owner, including acts of omission as well as commission, causes *the mark* to . . . lose its significance as a mark.” 15 U.S.C.A. § 1127 (emphasis added). Naked licensing of a mark

¹ Non-precedential TTAB opinions are not “binding on the Board, but may be cited for whatever persuasive weight to which they may be entitled.” TBMP, § 101.03.

“whereby the licensee can place the mark on any quality or type of goods or services may cause the mark to lose any significance it may have”, resulting in the mark becoming abandoned. 3 McCarthy on Trademarks and Unfair Competition § 18:48 (4th ed.). “Because a finding of insufficient control essentially signals involuntary trademark abandonment and works a forfeiture, however, the proponent of a naked license theory faces a stringent standard of proof.” *Moore Bus. Forms, Inc. v. Ryu*, 960 F.2d 486, 489 (5th Cir. 1992) (internal quotations omitted).

In this case, Flipagram contends that Instagram abandoned its rights in the INSTAGRAM mark through naked licensing. [TTABVUE Doc. No. 8], Counterclaim, ¶ 21. But Flipagram has *not* alleged that Instagram permitted uncontrolled use of the INSTAGRAM mark. To the contrary, Flipagram admits in its counterclaim that the API Terms explicitly stated: “*you cannot use the word ‘Instagram’ or ‘IG’ in your product’s name[.]*” [TTABVUE Doc. 8], Counterclaim, ¶ 9 (emphasis added). Flipagram’s argument that a contract *prohibiting* the use of the INSTAGRAM mark could somehow constitute a license for uncontrolled use of the INSTAGRAM mark is nonsensical and implausible on its face.

To the extent Flipagram contends that the prior language temporarily tolerating certain uses of “Insta” or “Gram” but not INSTAGRAM caused the INSTAGRAM mark to lose all of its trademark significance, Instagram is aware of no authority from the Board or federal courts that would support Flipagram’s position. To the contrary, such an argument would be utterly inconsistent with the stringent standard required to prove abandonment through naked licensing. Thus, Flipagram’s naked licensing argument fails as a matter of law under Rule 8’s plausibility standard, and the Board should enter judgment on the pleadings in Instagram’s favor as to Flipagram’s naked licensing counterclaim and Sixth Affirmative Defense.

b. Flipagram’s Naked Licensing Counterclaim and Sixth Affirmative Defense also Fail as a Matter of Law Regardless of Whether the API Terms Conveyed a Trademark License.

Flipagram’s naked licensing argument would also fail as a matter of law even if the Board were to overlook the fact that the API Terms expressly prohibited third party use of INSTAGRAM. Flipagram’s claim that the INSTAGRAM mark has been abandoned through

naked licensing depends entirely on its allegation that the API Terms conveyed a trademark license to developers who accepted the agreement. Flipagram concedes it accepted the API Terms, and even expressly asserts that it selected and used the FLIPAGRAM mark pursuant to the alleged trademark license it contends was contained within the API Terms.

As emphasized above Instagram denies that the API Terms conveyed a trademark license at all, in which case Flipagram's counterclaim and affirmative defense would fail because the Terms could not as a matter of law have conveyed a "naked" trademark license. But even accepting *arguendo* Flipagram's allegation that the API Terms granted Flipagram a trademark license, Flipagram's naked licensing argument would still fail, based on licensee estoppel.

The Board has stated the doctrine of licensee estoppel as follows:

a licensee is estopped to challenge the licensor's rights in the licensed mark during the time that the license is in force. Upon termination of the license, the licensee is no longer hampered by the estoppel to the extent that the licensee is then free to challenge the licensor's title on the basis of facts which arose after the expiration of the license.

Garri Publ'n Associates Inc., 10 U.S.P.Q.2d 1694, 1697 (P.T.O. Dec. 16, 1988), citing *Prof'l Golfers Ass'n of Am. v. Bankers Life & Cas. Co.*, 514 F.2d 665, 671 (5th Cir. 1975). The doctrine properly acknowledges that a party which "has, by virtue of the agreement, recognized the holder's ownership" of a mark is bound to its acknowledgment for the time period in which it received the benefit of the license. *Prof'l Golfers Ass'n*, 514 F.2d at 671; *see also Arleen Freeman v. Nat'l Ass'n of Realtors*, 64 U.S.P.Q.2d 1700, 1703 (P.T.O. June 18, 2002) (non-precedential) (agreeing with respondent's argument that "[a]ttacking the validity of the very marks [petitioner] was licensed to use is the type of conduct which the doctrine of licensee estoppel is intended to prevent").

Garri is on point. In that case, the petitioner requested leave to amend his cancellation petition to allege that the registrant had abandoned its rights by entering into an agreement with the petitioner that constituted a naked license. 10 U.S.P.Q.2d at 1696-97. The registrant denied that the agreement conveyed a license but argued that leave to amend should be denied because even if the agreement had conveyed a license the petitioner would be estopped from asserting naked licensing. *Id.* at 1697. The Board properly denied leave to amend, ruling "assuming

arguendo that there was a license” licensee estoppel would preclude the petitioner from pursuing his naked licensing argument. *Id.*

Garri is consistent with numerous other decisions by the Board and federal courts, rejecting the same argument Flipagram is trying to advance here. *See, e.g., Estate of Biro*, 18 U.S.P.Q.2d 1382, 1386 (P.T.O. Feb. 4, 1991) (“Assuming arguendo that the agreement at issue is a license agreement, we agree with opposer that applicant is estopped from challenging the validity of the agreement on the basis of lack of quality control. Inasmuch as applicant is challenging the agreement based on facts which occurred during the time frame of the ‘license’, we find that applicant is estopped under the doctrine of licensee estoppel.”); *Leatherwood Scopes Int’l, Inc.*, 63 U.S.P.Q.2d 1699, 1703 (P.T.O. Feb. 21, 2002) (non-precedential) (“Even accepting opposer’s allegations of naked licensing as true, we find that they fail to state a claim for relief in this case because opposer, as the alleged licensee, is estopped to challenge applicant’s ownership of the mark, under the doctrine of licensee estoppel.”); *see also Prof’l Golfers Ass’n of Am.*, 514 F.2d at 671 (licensee was estopped from arguing abandonment based upon alleged lack of quality control occurring during the term of the license); *E.G.L. Gem Lab Ltd. v. Gem Quality Institute, Inc.*, 90 F. Supp. 2d 277, 291-92 (S.D.N.Y. 2000) (defendant, as sublicensee of mark, was estopped from claiming that either the original license or the sublicense was “naked” and therefore resulted in abandonment of mark).

Flipagram’s naked licensing argument fails as a matter of law regardless of whether the API Terms conveyed a trademark license. Assuming for this motion the agreement did convey a trademark license (as Flipagram contends), the analysis in this case is the same as in *Garri* and the other cases cited above: Flipagram obtained and benefited from a revocable license, and is now estopped from challenging Instagram’s rights based on the terms of that license or any other facts that occurred before the license was revoked. Assuming *alternatively* that the agreement did not convey a trademark license at all (as Instagram contends), it could not have conveyed a “naked” trademark license. In either case, Flipagram’s naked licensing counterclaim and affirmative defense fail as a matter of law and Instagram is entitled to judgment on the pleadings as to both Count I of the counterclaim and the duplicative Sixth Affirmative Defense.

c. The Doctrine of Licensee Estoppel Bars Flipagram’s Counterclaim and Seventh Affirmative Defense for Lack of Distinctiveness.

Accepting solely for purposes of this motion Flipagram’s allegation that it received a trademark license from Instagram, the Board should also rule that licensee estoppel bars Flipagram’s counterclaim and Seventh Affirmative Defense that the INSTAGRAM mark was not distinctive on the dates Instagram’s relevant trademark registrations issued. *See* [TTABVUE Doc. No. 8], Counterclaim ¶¶ 30. Consistent with the principles underlying the licensee estoppel doctrine as discussed in Section IV.b, a licensee is estopped from arguing that its licensor’s mark was not sufficiently distinctive to merit trademark protection while the alleged license was in force. *See, e.g., Freeman v. Nat’l Ass’n of Realtors*, 64 U.S.P.Q.2d at 1703-04 (petitioner was estopped from arguing that registrant’s mark was generic); *Sturgis Area Chamber of Commerce v. Sturgis Rally & Races, Inc.*, 99 F. Supp. 2d 1090, 1096-97 (D.S.D. 2000) (licensees of service marks were estopped from asserting that marks lacked secondary meaning and were invalid and unenforceable).

Flipagram alleges that the supposed trademark license from Instagram was in effect from “early 2012” until “late 2013”. TTABVUE Doc. 8, Counterclaim, ¶¶ 12, 17. That time period encompasses the dates on which Instagram’s registrations issued, *i.e.*, May 22, 2012 and July 10, 2012. Thus, Flipagram’s claim of descriptiveness lacking secondary meaning is predicated upon facts that existed during the time when Flipagram contends that it was Instagram’s licensee. Accepting Flipagram’s allegations as true for purposes of this motion, Flipagram’s claim of non-distinctiveness on the dates of registration is barred by licensee estoppel. The Board should enter judgment on the pleadings in Instagram’s favor with respect to Count II of Flipagram’s counterclaim and its Seventh Affirmative Defense.

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V. CONCLUSION

For the reasons stated herein, the Board should grant Instagram judgment on the pleadings as to (1) Flipagram's counterclaims for abandonment due to naked licensing and descriptiveness without secondary meaning and (2) Flipagram's duplicative Sixth and Seventh Affirmative Defenses.

Respectfully submitted,

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Dated: September 16, 2016

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CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that this correspondence is being transmitted to the United States Patent and Trademark Office Trademark Trial and Appeal Board using the Electronic System for Trademark Trials and Appeals (ESTTA) on the date indicated below.

Dated: September 16, 2016

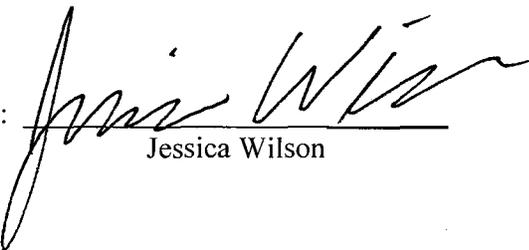
By: /Christopher T. Varas/
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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2016, I served the foregoing OPPOSER INSTAGRAM, LLC'S MOTION FOR JUDGMENT ON THE PLEADINGS AS TO APPLICANT FLIPAGRAM, INC.'S COUNTERCLAIM AND SIXTH AND SEVENTH AFFIRMATIVE DEFENSES on the parties in said action by depositing a true copy thereof with the United States Postal Service as first class mail, postage prepaid, at Seattle, Washington, enclosed in a sealed envelope addressed as follows:

Thomas A. Harvey
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Dated: September 16, 2016

By: 

Jessica Wilson