ESTTA Tracking number: **ESTTA682489**
Filing date: **07/08/2015**

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

Proceeding	91222298
Party	Defendant Software Success LLC
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Date	07/08/2015
Attachments	07-07-2015-response-2.pdf(85288 bytes)

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

INSTAGRAM, LLC, Opposer, v. SOFTWARE SUCCESS LLC, Applicant	ANSWER AND AFFIRMATIVE DEFENSES TO NOTICE OF OPPOSITION Opposition No. 91222298 Application No. 86397280

ANSWER TO NOTICE OF OPPOSITION

Software Success LLC (hereafter “Applicant”) having an address at P.O. Box 191, Fishers IN, 46038, hereby answers the Notice of Opposition (“Opposition”) filed by Instagram, LLC (hereafter “Opposer”). Applicant **denies** the allegation stated in the introductory paragraph that Opposer believes that it will be damaged by the issuance of a registration for the mark SHOWMEGRAM (hereafter "SHOWMEGRAM" or "Applicant’s Mark"). In response to the individually numbered paragraphs of the Opposition, Applicant responds as follows:

1. Applicant admits the allegations in Paragraph 1 of the Opposition.

2. Applicant admits the allegations in Paragraph 2 of the Opposition.

3. Applicant admits that Opposer has U.S. registrations and applications for the mark INSTAGRAM, which registrations and applications speak for themselves. Applicant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 3 of the Opposition, and on that basis denies each and every allegation contained therein.

4. Applicant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 4 of the Opposition, and on that basis denies each and every allegation contained therein.

5. Applicant denies each and every allegation in Paragraph 5 of the Opposition.

6. Applicant admits the allegations in Paragraph 6 of the Opposition.

7. Applicant denies each and every allegation in Paragraph 7 of the Opposition.

8. Applicant denies each and every allegation in Paragraph 8 of the Opposition.

9. Applicant denies each and every allegation in Paragraph 9 of the Opposition.

10. Applicant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 10 of the Opposition, and on that basis denies each and every allegation contained therein.

11. Applicant denies each and every allegation in Paragraph 11 of the Opposition.

12. Applicant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 12 of the Opposition, and on that basis denies each and every allegation contained therein.

13. Applicant denies each and every allegation in Paragraph 13 of the Opposition.

14. Applicant admits the allegations in Paragraph 14, "Registration of Applicant's mark would constitute *prima facie* evidence of the validity of such registration, Applicant's ownership of the mark, and Applicant's exclusive right." Otherwise, Applicant denies each and every allegation in Paragraph 14 of the Opposition.

AFFIRMATIVE DEFENSES

1. The Opposition is barred because the only commonality or similarity of the marks SHOWMEGRAM and INSTAGRAM is the GRAM formant, which is a common English word formant, which has the generic meaning of "message" or "graph", and has been in public use in the form of "telegram" and other constructions to imply a message in a variety of media since the mid 19th century, and because GRAM has been historically used in a variety of English words to denote a *special kind* of "message". Therefore GRAM as a distinquishing formant suffix of any mark is diluted.

> "-Gram... In nouns denoting something written or recorded (especially in a certain way): cryptogram heliogram... Origin... From Greek *gramma* 'thing written, letter of the alphabet', from graphein 'write'." (*Oxford Advanced Learner's Dictionary*, "-gram" entry.)
>
> "Telegram... A message sent by telegraph and then delivered in written or printed form... Origin... Mid 19th century: from tele- 'at a distance' + -gram, on the pattern of telegraph." (*Oxford Advanced Learner's Dictionary*, "Telegram" entry.)
>
> "-gram 1, a combining form meaning "something written, drawn, or plotted" (*diagram; epigram*); "a written or drawn symbol or sequence of symbols" (*ideogram; pentagram*); "a message" (***telegram***); "an image or graphic record made by an instrument or as part of a diagnostic procedure" (*electrocardiogram*). Compare -graph." (*Dictionary.com)*
>
> "-gram 3, a combining form **extracted from telegram**, used in the titles of newsletters, direct-mail solicitations, etc. (*culturegram; electiongram*) or the names, sometimes humorous, of personally delivered messages or gifts (*candygram; strippergram*)." (*Dictionary.com*)

2. The Opposition is barred because Opposer admits (see Exhibits A, B, and C) that the mark INSTAGRAM was derived from the diluted formant GRAM, which is derived from the diluted word TELEGRAM, and because the only commonality or similarity between the SHOWMEGRAM and INSTAGRAM marks is the diluted GRAM.

3. The Opposition is barred because the INSTAGRAM marks, being formed from INSTANT and [TELE]GRAM, are descriptive and lack secondary meaning.

4. The Opposition is barred because, other than the diluted GRAM formant, the remaining part of the SHOWMEGRAM and INSTAGRAM marks, SHOWME and INSTA, are utterly and obviously dissimilar, and have different meanings. "SHOWME" does not denote, connote, or imply anything like "instant", from which INSTA is derived as admitted by Opposer.

5. The Opposition is barred because the marks SHOWMEGRAM and INSTAGRAM and clearly and obviously distinquishable.

6. The Opposition is barred because the marks SHOWMEGRAM and INSTAGRAM refer to products that are not similar enough to cause confusion in the public's mind. The Instagram product is primarily a *mobile phone* based application that allows users to quickly take photographic pictures with their mobile phone and then send broadcast the pictures to their friend's or followers mobile phones. It is primarily a *"social networking"* application. On the other hand, the ShowMeGram product is a *PC-based* application used primarily by *businesses and marketers* to create photographic *slide-show advertisments* for their customers that are hosted on the ShowMeGram website, and for which the users may publish web browser hyper-links to those slide-shows via email or any media where a hyper-link may be posted or sent. ShowMeGram does <u>not</u> have a *mobile phone* application as does Instagram for its primary function. Nor is the building of ShowMeGram slide-shows by users "instant." Nor is ShowMeGram utilized in a manner that is similar to Instagram. Nor is ShowMeGram primarily a "social networking" application. Rather, ShowMeGram is a *marketing tool* that requires skill to learn and use. Instagram is free. ShowMeGram costs $297. ShowMeGram is not a replacement for Instagram and vice versa. Nor are they competing products. (See http://www.instagram.com and http://www.showmegram.com)

EXHIBIT A

Document ESTTA639776 *Instagram vs Flipagram*, *Answer to Counterclaims*, Paragraph 4.)

4. Opposer admits that the well-known trademark INSTAGRAM is an arbitrary combination of the terms "Instant" and "Telegram."]

EXHIBIT B

From Opposer's website

http://www.instagram/about/faq :

Where does the name come from?

When we were kids we loved playing around with cameras. We loved how different types of old cameras marketed themselves as "instant" - something we take for granted today. We also felt that the snapshots people were taking were kind of like telegrams in that they got sent over the wire to others - so we figured why not combine the two?

EXHIBIT C

From *Quora* interview, Kevin Systrom, Instagram founder and former CEO

http://www.quora.com/What-is-the-genesis-of-Instagram :

> 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)

CERTIFICATE OF SERVICE

I, Michael J. Wagner, hereby certify that a true and correct copy of the ANSWER (to opposition 91222298), as contained in ESTTA682475, has been electronically transmitted to the Trademark Trial and Appeal Board on July 8, 2015, and served by first class mail, postage prepaid, and by email to:

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Dated: July 8, 2015

Respectfully Submitted,

Michael J Wagner

Michael J. Wagner
Owner, Software Success LLC