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

Proceeding	91225628
Party	Defendant Tencent Holdings Limited
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Submission	Motion to Dismiss - Rule 12(b)
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DELSON GROUP INC.,	)	
	)	
Opposer,	)	Opposition No. 91225628
	)	
v.	)	Application Serial No. 86633476
	)	
TENCENT HOLDINGS LIMITED,	)	
	)	
Applicant.	)	

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**TENCENT’S MOTION TO DISMISS OR, IN THE  
ALTERNATIVE, FOR A MORE DEFINITE STATEMENT**

Applicant Tencent Holdings Limited (“Tencent”) hereby moves, pursuant to Federal Rule of Civil Procedure 12(b)(6) and Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 503, to dismiss Opposition No. 91225628 on the grounds that the Notice of Opposition (“Notice”) filed by Opposer Delson Group Inc. (“Delson”) fails to state a claim on which relief can be granted. In the alternative, Tencent requests, pursuant to Federal Rule of Civil Procedure 12(e) and TBMP § 503, the Board to compel Delson to provide a more definite statement.

**I. STATEMENT OF FACTS**

Delson and Tencent are parties to multiple opposition proceedings, all involving TENCENT-related marks: Opposition No. 91207516 (consolidated with Opposition No. 91215611), Opposition No. 91225630, and Opposition No. 91225628.<sup>1</sup>

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<sup>1</sup> Concurrently with filing this motion, Tencent is also filing with the Board motions to consolidate Opposition Nos. 91207516, 91225628, and 91225630.

In this opposition, Delson filed the Notice against Tencent’s application Serial No. 86633476 for the mark TENCENT (the “Application”). The Notice alleges false suggestion of a connection pursuant to Section 2(a), 15 U.S.C. § 1052(a), and likelihood of confusion pursuant to Section 2(d), 15 U.S.C. § 1052(d). Notice at ¶¶ 22-29. Both claims are based on rights that Delson has allegedly established in the mark TENCENT. Notice at ¶¶ 23, 27.

The Notice does not contain any allegations that address the rights of privacy and/or of publicity, which typically accompany a claim of false suggestion of a connection. Moreover, the Notice uses only vague and ambiguous language to claim prior rights:

Through Delson, Prof. Lu founded “TENCENT R&D Service” or “TENCENT Research”, which is a research and development (R&D) service platform on mobile and wireless technology and other information and communication technology (“ICT”) technologies. . . . Delson’s R&D services include technical trainings, technical publications, technical advertisement and marketing as well as consulting and analysis, etc.

Notice at ¶ 2 (emphasis added).

Delson used TENCENT to market and promote its R&D and consulting service platforms in the ICT (information and communication technology) sector including research and development, on-line publications, print publications, trainings, consultancy and advisory, advertisement during conferences, business consulting and analysis, on-line advertisement and marketing, and technical publications, etc.

Notice at ¶ 4 (emphasis added).

Delson used TENCENT to market and promote its R&D and consulting service platforms in the ICT (information and communication technology) sector including research and development, on-line publications, print publications, trainings, consultancy and advisory, advertisement during conferences, business consulting and analysis, on-line advertisement and marketing, and technical publications, etc.

Notice at ¶ 24 (emphasis added).

As a result, the Notice fails to state a claim on which relief can be granted or is so vague or ambiguous that Tencent cannot reasonably frame a responsive pleading.

## II. LEGAL STANDARD

With respect to a motion to dismiss, a complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Doyle v. Al Johnson's Swed. Rest. & Butik Inc., 101 U.S.P.Q.2d 1780, 1782 (TTAB 2012). Dismissal of an opposition under Fed. R. Civ. P. 12(b)(6) is appropriate when it is clear that the party opposing the registration can prove no set of facts in support of the claims in the opposition. See Young v. AGB Corp., 152 F.3d 1377, 1379 (Fed. Cir. 1998). In determining whether or not a litigant before the Board has stated a claim upon which relief can be granted, “we must assume that the facts alleged in the petition are true.” Id., quoting Abbott Labs. v. Brennan, 21 U.S.P.Q.2D 1192, 1198 (Fed. Cir. 1991). In evaluating a motion to dismiss, all of the opposer’s well-pleaded factual arguments must be accepted as true, and the complaint must be construed in the light most favorable to the opposer. See Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc., 26 U.S.P.Q.2d 1038, 1041 (Fed. Cir. 1993).

The standard for a motion for a more definite statement is set forth in Federal Rule 12(e): “If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading.” See TBMP § 505; see, e.g., Kelly v. L.L. Cool J., 145 F.R.D. 32, 35 (S.D.N.Y. 1992).

## III. ARGUMENT

### A. **Delson’s Section 2(a) Claim Should Be Dismissed Because Delson Does Not Plead Critical Requirements**

The Notice in its entirety fails to plead allegations that are mandatory to a Section 2(a) claim. “[T]he portion of Section 2(a) dealing with false suggestion of a connection resulted from the desire to give statutory effect to the notions of rights of privacy and of publicity, the elements

of which are distinctly different from elements of a trademark or trade name infringement claim, which are the essence of Section 2(d).” Estate of Biro v. Bic Corp., 18 USPQ2d 1382, 1385 (T.T.A.B. 1991). Because the “elements of a claim of invasion of one's privacy have emerged as distinctly different from those of trademark or trade name infringement,” a party opposing a trademark application based on Section 2(a) must allege facts in addition to those that support a likelihood of confusion. See, e.g., Univ. of Notre Dame Du Lac v. J.C. Gourmet Food Imports Co., 703 F.2d 1372, 1376 (Fed. Cir. 1983). The elements of a false suggestion of a connection claim are well established:

To properly plead a Section 2(a) claim of false suggestion of a connection, a plaintiff must allege the following:

1. Defendant’s mark is the same or a close approximation of the name or identity of a person or institution;
2. Defendant’s mark would be recognized as such by purchasers, in that the mark points uniquely and unmistakably to the person or institution named or identified;
3. the person or institution named or identified is not connected with the goods sold or activities performed by the defendant under the mark; and
4. the name or identity of the person or institution is of sufficient fame or reputation that when the defendant’s mark is used in connection with its goods or services, a connection with the person or institution identified would be presumed.

Nike, Inc. v. Palm Beach Crossfit Inc. d/b/a Crossfit CityPlace, 116 U.S.P.Q.2d 1025, 1031

(TTAB 2015) (granting motion to dismiss Section 2(a) claim).

Liberally construing the language of the Notice, it does not plead any of the required allegations for a Section 2(a) claim. Among other things, the Notice fails:

1. to address any connection or relationship or lack thereof between Delson and Tencent (pertaining to the third required allegation);
2. to indicate that Delson has developed sufficient fame or reputation such that Tencent’s use of the mark generates the presumption of a connection with Delson (pertaining to the fourth required allegation); and

3. to state that the TENCENT mark uniquely and unmistakably point to Delson (pertaining to the second required allegation).

In sum, Delson “has not pleaded facts which, if proved, would establish grounds for refusing registration to” Tencent with respect to the Section 2(a) claim. See Miller Brewing Co. v. Anheuser-Busch Inc., 27 U.S.P.Q.2d 1711 (T.T.A.B. 1993). Accordingly, the Board should dismiss with prejudice the Section 2(a) false suggestion of a connection claim.

**B. In the Alternative, Delson Should Be Required to Provide a More Definite Statement**

The repeated use of vague and indefinite terms contained in the Notice causes it to be so vague or ambiguous that Tencent cannot reasonably be required to frame a responsive pleading. With respect to the likelihood of confusion claim alone, any assessment requires a fact-dependent analysis, as set out in E.I. du Pont de Nemours & Co., 177 U.S.P.Q. 563 (CCPA 1973). The TBMP summarizes the evidentiary factors, stating: “These factors include the similarity of the marks, the relatedness of the goods and/or services, the channels of trade and classes of purchasers for the goods and/or services. . . .” TBMP § 303(c)(B) (emphasis added). Accordingly, in order for an applicant to evaluate, assess, and respond to a claim of likelihood of confusion, it is critical that an opposer unambiguously set forth in its notice of opposition the goods and/or services offered in connection with its pleaded marks.

The repeated use of terms such as “including” and “etc.” in the Notice when alleging the goods and services of Delson communicates a limitless scope of use. Such a broad set of allegations, particularly in the context of the Notice’s Section 2(d) claim, prevents Tencent from reasonably framing a responsive pleading. Accordingly, insofar as the Board does not dismiss the Notice, Delson should be required to provide a more definite statement.

#### IV. CONCLUSION

For the foregoing reasons, Tencent respectfully requests that the Board grant its motion to dismiss with prejudice or, in the alternative, compel Delson to provide a more definite statement. Tencent further respectfully requests that the Board suspend these proceedings pending disposition of this motion and reset the dates in this proceeding, in view of Tencent's pending motions to consolidate.

Date: February 11, 2016

Respectfully Submitted,

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

By: 

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Matthew J. Kuykendall

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Please address all U.S.P.T.O. correspondence to:

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**CERTIFICATE OF SERVICE BY MAIL**

I, Elvira Minjarez, declare:

I am employed in Santa Clara County. I am over the age of 18 years and not a party to the within action. My business address is Wilson Sonsini Goodrich & Rosati, 650 Page Mill Road, Palo Alto, California 94304-1050.

I am readily familiar with Wilson Sonsini Goodrich & Rosati's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence would be deposited with the United States Postal Service on this date.

On this date, I served this **TENCENT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT** on each person listed below, by placing the document described above in an envelope addressed as indicated below, which I sealed. I placed the envelope for collection and mailing with the United States Postal Service on this day, following ordinary business practices at Wilson Sonsini Goodrich & Rosati.

J. James Li  
LiLaw Inc.  
5050 El Camino Real, Suite 200  
Los Altos, CA 94022

I declare under penalty of perjury that the foregoing is true and correct. Executed at Palo Alto, California on February 11, 2016.

  
\_\_\_\_\_  
Elvira Minjarez