

ESTTA Tracking number: **ESTTA378159**

Filing date: **11/11/2010**

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

| | |
|------------------------|---|
| Proceeding | 92052327 |
| Party | Defendant King of Rock 'N' Roll Music, Inc. |
| Correspondence Address | JEFFREY E. JACOBSON JACOBSON & COLFIN PC 60 MADISON AVENUE, SUITE 1026 NEW YORK, NY 10010 UNITED STATES JEJESQ@aol.com |
| Submission | Motion for Summary Judgment |
| Filer's Name | Jeffrey E. Jacobson |
| Filer's e-mail | jeffrey@jacobsonfirm.com |
| Signature | /Jeffrey E. Jacobson/ |
| Date | 11/11/2010 |
| Attachments | brief.pdf (20 pages)(7477545 bytes) 1 notice of cross motion.pdf (1 page)(117080 bytes) |

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

In the Matter of Trademark Registration No. 1,909,802

For the Trademark KING OF ROCK 'N' ROLL MUSIC

Registered December 8, 1995

----- x

ELVIS PRESLEY ENTERPRISES, INC.
Petitioner,

Cancellation No. 92052327

v.

KING OF ROCK 'N' ROLL MUSIC, INC.
Registrant.

----- -x

MEMORANDUM OF LAW IN OPPOSITION TO
PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
REGISTRANT'S CROSS-MOTION FOR SUMMARY JUDGMENT.

The Jacobson Firm, P.C.
Attorney for Registrant
60 Madison Avenue, Suite 1026
New York, NY 10010

Of Counsel:
Jeffrey E. Jacobson

TABLE OF CONTENTS

INTRODUCTION.....6

ARGUMENT.....7

I. THE STANDARD FOR SUMMARY JUDGMENT.....7

**II. REGISTRANT IS USING THE “KING OF ROCK ‘N’ ROLL MUSIC” MARK WITH
PHONORECORDS IN COMMERCE**.....9

**III. THE “KING OF ROCK ‘N’ ROLL MUSIC” MARK IS CURRENTLY IN USE AND THEREFORE
HAS NOT BEEN ABANDONED**.....15

IV. CONCLUSION18

AFFIDAVITS & EXHIBITS

AFFIDAVIT OF PETER BENNETT

AFFIRMATION OF JEFFREY E. JACOBSON

EXHIBIT 1, Packaging of Prerecorded Music

EXHIBIT 2, Royalty Statements

EXHIBIT 3, Examples of Retailers Selling Registrant’s Goods

EXHIBIT 4, Billboard Magazine Editorial Coverage of Registrant C.E.O. Peter Bennett

EXHIBIT 5, Sales Receipts From Registrant’s Radio Advertisements

EXHIBIT 6, Registrant’s BMI Catalog

TABLE OF CASES & AUTHORITIES

Cases

| | |
|--|----------|
| <i>American Lava Corp. v. Multronics, Inc.</i> , 59 C.C.P.A. 1127 (C.C.P.A. 1972)..... | 15 |
| <i>Ansehl v. Williams</i> , 267 F. 9 (8th Cir. Mo. 1920)..... | 12 |
| <i>Beech-Nut Co. v. Lorillard Co.</i> , 273 U.S. 629 (1927)..... | 15 |
| <i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)..... | 7 |
| <i>Continental Distilling Corp. v. Old Charter Distillery Co.</i> , 188 F.2d 614 (D.C. Cir. 1950)..... | 12 |
| <i>DC Comics v. Gotham City Networking, Inc.</i> , 2008 WL 4674611 (T.T.A.B.)..... | 7,8,14 |
| <i>E.I. du Pont de Nemours Co. v. Sunlyra Int'l, Inc.</i> , 35 USPQ2d 1787 (T.T.A.B. 1995)..... | 9,14,17 |
| <i>Enbridge, Inc. v. Excelerate Energy Ltd. Partnership</i> , Opp. No. 91170364 (T.T.A.B.)..... | 8 |
| <i>Hannis Distilling Co. v George W. Torrey</i> , 32 App. D.C. 530 (D.C. Cir. 1909)..... | 12 |
| <i>Hazeltine Corp. v. United States</i> , 245 Ct. Cl. 138 (1959)..... | 15,16,17 |
| <i>In Re Bose Corporation</i> , 580 F.3d 1240 (Fed. Cir. 2009)..... | 13,14 |
| <i>Kingsmen v. K-Tel International, Ltd.</i> , 557 F.Supp. 178 (S.D.N.Y. 1983) | 12 |
| <i>Malibu, Inc. v Reasonover</i> , 246 F. Supp. 2d 1008, 1012 (N.D. Ind. 2003)..... | 9 |
| <i>Miami Credit Bureau, Inc. v. Credit Bureau, Inc.</i> , 276 F.2d 565 (5th Cir. Fla. 1960)..... | 13 |
| <i>Mendinol Ltd. V. Neuro Vasx, Inc.</i> , 56 USPQ2d (BNA) 1205 (T.T.A.B. 2003)..... | 13,14 |
| <i>Old Tyme Foods Inc. v. Roundy's Inc.</i> , 961 F.2d 200 (Fed. Cir. 1992)..... | 7 |
| <i>On-Line Careline, Inc. v. Am. Online</i> , 229 F.3d 1080 (Fed. Cir. 2001)..... | 12,15 |
| <i>Opryland USA, Inc. v. The Great American Music Show</i> , 970 F.2d 847 (Fed. Cir. 1992)..... | 7 |
| <i>Woodward v. White Satin Mills Corp.</i> , 42 F.2d 987 (8th Cir. Minn. 1930)..... | 12 |

Statutes & Regulations

15 U.S.C. § 1051(b).....9

15 U.S.C. § 1127.....9,15

15 U.S.C. § 1068.....14,15,17

17 U.S.C. § 101.....6,8

Fed.R.Civ.P. Rule 56(c)(2).....7

Fed.R.Civ.P. Rule 56(e)(2).....8

Trademark Manual of Examination Procedures § 806.01(a).....9

Trademark Rules of Practice § 2.133(b).....15,18

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

In the Matter of Trademark Registration No. 1,909,802

For the Trademark KING OF ROCK 'N' ROLL MUSIC

Registered December 8, 1995

----- X

ELVIS PRESLEY ENTERPRISES, INC.

Cancellation No. 92052327

Petitioner,

v.

KING OF ROCK 'N' ROLL MUSIC, INC.

Registrant.

----- X

MEMORANDUM OF LAW IN OPPOSITION TO
PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT.

Registrant King of Rock 'N' Roll Music, Inc. ("Registrant") submits this Memorandum of Law in Opposition to Petitioner's Motion for Summary Judgment and in Support of Registrant's Cross-Motion for Summary Judgment. Registrant has not abandoned the use of its KING OF ROCK 'N' ROLL MUSIC mark (the "Mark") because Registrant is using the mark on and in connection with goods and services listed in Registration No. 1,908, 802.

INTRODUCTION

Registrant has continuously used the Mark on goods in interstate commerce since at least as early as 1993, and has no intention to abandon the Mark in the future. In short, Petitioner's claims of abandonment are entirely unfounded. The goods and services listing on Registration No. 1,908,802 states "pre-recorded music on phonorecords, cassettes and compact discs."

Registrant currently uses the mark on compact discs, and previously used the mark on cassettes.

Affidavit of Peter Bennett at ¶11,12; *Exhibit 1, Packaging of Prerecorded Music*. The term

"phonorecord" in Registrant's listing is a term of art defined in Section 101 of the US Copyright Act of 1976, and it includes the compact discs that the mark is currently used in connection with.

See 17 U.S.C. § 101. This term does not refer solely to "vinyl records" as Petitioner

misconstrues, and thus the fact that Registrant does not currently use the mark in connection with vinyl records does not render it abandoned.

Registrant's continued commercial use of the mark on prepackaged music demonstrates that Registrant's Mark satisfies the Lanham Act requirements for use in commerce. In fact,

Registrant receives royalties from Collectables Records, among others, for goods sold under the mark, and Registrant's goods are currently offered for sale at various retailers including

Amazon.com and Barnes & Noble's website. See *Exhibit 2, Royalty Statements; Exhibit 3,*

Examples of Retailers Selling Registrant's Goods. A mark cannot be deemed abandoned if the

mark is currently being used in commerce, or if an intention to commence or resume use of the mark is present. Registrant submits this brief to demonstrate that no genuine issue of material fact exists for trial, and thus, *Elvis Presley Enterprises, Inc. 's ("Petitioner's") Motion for Summary Judgment* must be denied and *Registrant's Cross-Motion for Summary Judgment* must be granted.

ARGUMENT

I. THE STANDARD FOR SUMMARY JUDGMENT.

Summary judgment is proper to effectuate a “speedy and inexpensive determination” of an action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The court must view evidence submitted from the nonmoving party, and all justifiable inferences drawn, in a light most favorable to the nonmoving party. *Opryland USA, Inc. v. The Great American Music Show*, 970 F.2d 847, 850 (Fed. Cir. 1992). The party seeking summary judgment will prevail only if it demonstrates “that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. Rule 56(c)(2); *Old Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544, (Fed. Cir. 1992). A dispute over a material fact is genuine “only if a reasonable fact finder viewing the entire record could resolve the dispute in favor of the nonmoving party.” *DC Comics v. Gotham City Networking, Inc.*, 2008 WL 4674611, 4 (T.T.A.B.).

The moving party will succeed only if the “motion is supported by evidence sufficient, if unopposed, to indicate that there is no genuine issue of material fact.” *Enbridge, Inc. v. Excelerate Energy Ltd. Partnership*, Opp. No. 91170364, 5 (T.T.A.B.). A motion for summary judgment is defeated however, if the non-moving party can demonstrate, by not merely relying “on allegations or denials in its own pleading...[but] by affidavits or otherwise...specific facts showing a genuine issue for trial.” Fed.R.Civ.P. Rule 56(e)(2). A material issue is “an evidentiary conflict, created on the record at least by a counterstatement of facts set forth in detail in an affidavit by a knowledgeable affiant.” *DC Comics*, 2008 WL 4674611 at 5.

Here, Petitioner’s assertions concerning abandonment must fail as a matter of law because they are based on an erroneous interpretation of the term “phonorecord.” The definition of “phonorecord” is not a question of fact that would require a trial as it is defined in Section 101 of the US Copyright Act of 1976. See 17 U.S.C. § 101. In fact, “phonorecord” has a broad definition which includes compact discs, and is not limited only to the traditional “vinyl record” as Petitioner incorrectly asserts. Registrant filed its trademark application and subsequent renewal affidavits with this broad definition of “phonorecord” in mind. *Affidavit of Peter Bennett* at ¶ 6,8. Therefore, since Registrant is using the Mark in connection with compact discs (and thus, phonorecords) in accordance with the requirements of the Lanham Act, Petitioner’s

Motion for Summary Judgment must be denied and Registrant *Cross-Motion for Summary Judgment* must be granted.

II. REGISTRANT IS USING THE “KING OF ROCK ‘N’ ROLL MUSIC” MARK WITH PHONORECORDS IN COMMERCE.

A fundamental tenant of trademark law provides that a trademark must be used in commerce in order to be protected under the Lanham Act. 15 U.S.C. §1051(b). “Use in commerce” is further defined as “the bona fide use of the mark in the ordinary course of trade...” 15 U.S.C. §1127; See *Malibu, Inc. v Reasonover*, 246 F. Supp. 2d 1008, 1012 (N.D. Ind. 2003). The applicant may not obtain registration for a mark unless the mark “was in use in commerce on or in connection with the goods or services listed in the application as of the application filing date.” TMEP § 806.01(a); *E.I. du Pont de Nemours & Co. v Sunlyra Int’l, Inc.*, 35 USPQ2d 1787, 1791 (T.T.A.B. 1995).

The Copyright Act of 1976 defines “phonorecord” as “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device...[including] the material object in which the sounds are first fixed.” 17 U.S.C. §101. The term “phonorecord” includes the prepackaged music that Registrant is currently applying the registered Mark to, namely, compact discs. See *Affidavit of Peter Bennett* at ¶ 8,11.

Here, Registrant's use of the Mark on compact discs constitutes use of the mark on phonorecords because the definition of phonorecords is *inclusive* of compact discs. The registration certificate lists the goods and services associated with the Mark as "pre-recorded music on phonorecords, cassettes and compact discs." The term "phonorecords" as listed in Registrant's goods and services listing does not mean the traditional vinyl record, but rather the broad definition of any material object containing sound as defined in the Copyright Act of 1976. Petitioner asserts that because the Mark is not being used on *vinyl* records it has therefore been abandoned. Such an argument for abandonment cannot succeed as a matter of law because Petitioner has misconstrued the definition of "phonorecord" to include only traditional vinyl records. Petitioner's unsustainable claims of abandonment are unfounded in the law, are not supported by any documentary evidence supporting such an interpretation of the term "phonorecord," and thus summary judgment in favor of Petitioner is inappropriate.

To the contrary, Registrant provided to Petitioner the packaging of numerous compact discs demonstrating use of the Mark in *Registrant's Response To Petitioner's First Set Of Requests For Documents*. See *Exhibit 1, Packaging of Prerecorded Music*. Additionally, Registrant provided copies of royalty statements to demonstrate that the goods identified in the registration are sold in commerce. See *Exhibit 2, Royalty Statements*. Registrant even went so far as to provide screenshots from Amazon.com and Barnes & Noble's website that demonstrate

Registrant's goods are currently being offered for sale on their respective websites. See *Exhibit 3, Examples of Retailers Selling Registrant's Goods*. The C.E.O. of Registrant has also stated that Registrant intends to offer new releases of pre-recorded music, and that it also intends to expand distribution of both preexisting goods and new goods to other retailers including Wal-Mart, Target, and iTunes. *Affidavit of Peter Bennett* at ¶10,11,15,17.

Although Petitioner's *Brief In Support Of Petitioner's Motion for Summary Judgment* needlessly and inaccurately characterizes Registrant's sales as "sparse," the documents provided by Registrant demonstrate conclusively that 1) Registrant is applying the Mark to compact discs and the packaging of pre-recorded music; and 2) such goods have been sold in commerce, and are continuing to be offered for sale in commerce. For example, Registrant's Mark is prominently displayed on the packaging of the compact disc Bob Hope "Thanks For The Holidays" with a registered trademark notice (®). See *Exhibit 1, Packaging of Prerecorded Music*. Further, the Collectables Records Mechanical Royalty Statement for the period of 01/01/2010-03/31/2010 demonstrates royalty payments to Registrant for the sale of every song comprising the compact disc "Thanks For The Holidays" including "Christmas Day," "Easter," "Father's Day," "Halloween," "Independence Day," "New Year's," "St. Patrick's Day," "Thanksgiving Day," "Valentine's Day," and "Washington's Birthday." See *Exhibit 2, Royalty*

Statements. Taken together these two pieces of documentary evidence conclusively prove trademark usage and even actual sales in commerce.

A trademark has not been abandoned if evidence of use can be shown. See *Kingsmen v. K-Tel International, Ltd.*, 557 F.Supp. 178, 183 (S.D.N.Y. 1983). In *Kingsmen*, the court held the mark “KINGSMEN,” also registered for use in connection with pre-recorded phonograph records, audio and video cassettes, and compact discs featuring music, was not abandoned because members of the musical group The Kingsmen continued to collect royalties from the sale of previous recorded material even after disbandment. *Id.* Similarly, here, Registrant continues to use the mark in connection with the sale of his registered goods, and collects royalties from the sale of said goods. See *Exhibit 2, Royalty Statements*. However, it is notable that while The Kingsmen disbanded and were entitled to continued registration, Registrant still actively uses the Mark in commerce and has plans to continue doing so in the future. Thus, Registrant’s behavior is more extensive and goes beyond the facts of *Kingsmen*. These evidentiary showings establish that the Mark is still being used commercially in connection with goods listed on the trademark registration as required under the Lanham Act, and therefore no issue of material fact is present for trial. See *Hannis Distilling Co. v George W. Torrey*, 32 App. D.C. 530 (D.C. Cir. 1909); *Ansehl v. Williams*, 267 F. 9 (8th Cir. Mo. 1920); *Woodward v. White Satin Mills Corp.*, 42 F.2d 987 (8th Cir. Minn. 1930); *Continental Distilling Corp. v. Old*

Charter Distillery Co., 188 F.2d 614 (D.C. Cir. 1950); *Miami Credit Bureau, Inc. v. Credit Bureau, Inc.*, 276 F.2d 565 (5th Cir. Fla. 1960).

Further, it must be noted that Petitioner cites cases in support of its motion in which the trademark owner misrepresented its trademark use to the Patent and Trademark Office in an effort to gain a trademark registration for particular goods and services. Here, however, Registrant has not made any attempt to defraud the U.S. Patent and Trademark Office or engage in questionable behavior to obtain and renew its trademark registration. The lack of any evidence suggestive of fraud on the part of Registrant makes these cases wholly inapplicable to the facts presented here.

In *Mendinol Ltd. v. Neuro Vasx, Inc.*, the Registrant's Mark was cancelled because the company did not use the mark on one of the two goods listed in the registration despite filing a statement of use to the contrary. *Mendinol*, 67 USPQ2d (BNA) 1205, 1221-23 (T.T.A.B. 2003). On those facts the board found that fraud had been committed on the Trademark Office with the filing of the inaccurate statement, and that the Mark should be cancelled. *Id.* However, it was subsequently held by the U.S. Court of Appeals for the Federal Circuit that the Board in *Mendinol* "erroneously lowered the fraud standard to a simple negligence standard." *In Re Bose Corporation*, 580 F.3d 1240, 1244 (Fed. Cir. 2009). To the extent Petitioner is implying

fraudulent conduct on the part of Registrant, *Mendinol* is not authoritative due to the decision in *In Re Bose*.

In *DC Comics v. Gotham City Networking, Inc.*, this Board denied registration of the mark, "GOTHAM" for "entertainment services in the nature of softball, baseball, basketball and hockey games" because the Registrant misrepresented how "GOTHAM" would be used in connection with the goods listed in the application. *DC Comics v. Gotham City Networking, Inc.*, 2008 WL 4674611 (T.T.A.B. 2008) (not citable as precedent of the T.T.A.B).

However, the case at bar is in complete contrast to both *Mendinol* (whose fraud standard was overruled) and *DC Comics* (a non-binding case) because Registrant was using the mark in connection with all of the goods listed in the registration at the time of the filing of the application and the subsequent renewal affidavits. *Affidavit of Peter Bennett* at ¶ 6,8. Thus, no inference of fraud can be drawn from the facts at bar, and without the presence of fraud, *Mendinol* and *DC Comics* are simply not instructive. Although Registrant no longer uses the Mark in connection with cassette tapes, the Mark is still being used on pre-recorded music in the form of compact discs (and thus phonorecords). *Affidavit of Peter Bennett* at ¶ 11,12.

Registrant's discovery responses demonstrate that the mark is in use in commerce as required to maintain a federal trademark registration, and thus, Registrant has not committed any fraud on the U.S. Patent and Trademark Office in gaining or renewing its registration. It is undeniable that

the Registrant has been successfully using the Mark on the goods recited in the Registration for more than fifteen years without objection as demonstrated by the accompanying exhibits, and therefore its registration has not been abandoned and should not be cancelled.

**III. THE “KING OF ROCK ‘N’ ROLL MUSIC” MARK IS CURRENTLY IN USE
AND THEREFORE HAS NOT BEEN ABANDONED.**

A trademark cannot be abandoned unless “its use has been discontinued with intent to not resume.” 15 U.S.C. §1127. The party seeking to cancel a mark on abandonment grounds must plead and prove that the trademark owner abandoned the mark as a result of nonuse or other conduct by the registrant. *On-Line Careline, Inc. v. Am. Online*, 229 F.3d 1080, 1087 (Fed. Cir. 2001). It has been held that the mere non-use of a trademark is not enough to establish abandonment. *American Lava Corp. v. Multronics, Inc.*, 59 C.C.P.A. 1127 (C.C.P.A. 1972). Although the public demand for a particular product previously associated with a trademark disappears, the owner of the trademark can still retain it with the possibility of using it again upon another product of the *same class*. *Hazeltine Corp. v. United States*, 145 Ct. Cl. 138, 145 (1959) (citing *Beech-Nut Co. v. Lorillard Co.*, 273 U.S. 629, 632 (1927))(emphasis added).

In *Hazeltine*, the plaintiff held a trademark that was used in connection with radio receivers. 145 Ct. Cl. 138, 148-49 (1959). By 1930, the receivers had become obsolete and the plaintiff discontinued the mark’s use. *Id.* at 150. The Court of Claims held that the plaintiff did

not have the intent to abandon the mark as evidenced by the inclusion of the marks as assets in its books and records. *Id.* at 145. Although the public demand for radio receivers under plaintiff's mark had vanished, the plaintiff had the right to retain these trademarks on the possibility that it might seem feasible to utilize them again with other radio receiving sets, transformers, and condensers. *Id.*

Even if Petitioner were to claim that the lack of current use on cassettes listed in the registration constitutes sufficient intent to abandon the Mark, such nonuse is excusable. The particular class of goods at issue here is International Class 9 – Electrical and Scientific Apparatus. See United States Patent and Trademark Office, Trademark FAQs, www.uspto.gov/faq/trademarks.jsp#Applications018 (accessed October 12, 2010). Included in Class 9 are “apparatus for recording, transmission or reproduction of sound or images.” Similar to *Hazeltine*, even though the use of cassettes has become obsolete because public demand has vanished, this does not render the trademark abandoned because future use is still a possibility. Cassettes, which have been displaced by compact discs and other forms of pre-recorded music mediums, could feasibly be used again in the future, similar to the radio receivers' possibility of future use under *Hazeltine*. Furthermore, Registrant's current commercial use of the Mark on compact discs, a type of phonorecord in the same class of goods as a cassette tape, evidences that the Mark continues to be used in connection with the goods and services that are technologically

feasible and demanded by the public. Thus, Registrant has gone beyond the facts of *Hazeltine* and is actually using the Mark on goods of the same class as opposed to merely retaining the Mark with the possibility of using it with goods of the same class.

Alternatively, if the current nonuse of the Mark on cassettes is inexcusable then cancellation of the entire registration is not the appropriate remedy. In the context of trademark applications, nonuse of a Mark with certain goods listed in the application can lead to those goods being stricken from the description of goods. See *E.I. du Pont De Nemours & Co. v. Sunlyra International, Inc.*, 35 USPQ2d 1787, 1791 (TTAB 1995). In *E.I. du Pont*, the applicant was found not to be using the applied-for mark (“LYRA”) with two types of goods within a single class of goods at the time the mark was applied for (“socks and leotards”). *Id.* Thus, it was held that the application was void *ab initio* with respect to those two goods, but not with respect to the goods actually in use. Section 1068 of the Lanham Act gives the Board the power to modify a registration “by limiting the goods or services specified therein.” 15 U.S.C. § 1068. Notably, *E.I. du Pont* does not stand for the proposition that such nonuse requires striking the entire description of goods. In an *inter partes* proceeding before the Board, when a determination is made that a party is not entitled to continued registration without some type of restriction on its registration, then “the Board will allow the party time in which to file a motion

that the...registration be amended to conform to the findings of the Board....” Trademark Rules of Practice § 2.133(b).

Here, should the Board find that Registrant is not able to retain the registration for potential future use with cassettes, then the appropriate remedy would be to strike the word “cassettes” from the registration’s goods and services listing pursuant to 15 U.S.C. § 1068 or to allow Registrant to make a motion to amend its registration with respect to the goods and services listing pursuant to Rule 2.133(b) of the Trademark Rules of Practice. Thus, cancellation of the entire Mark is inappropriate.

IV. CONCLUSION.

No evidence exists, nor has any conduct been manifested to prove, that Registrant has abandoned the Mark. Registrant submitted to the Petitioner documentary evidence of its use of the Mark on prepackaged music in the form of compact discs (and thus phonorecords). Registrant also provided royalty statements proving that those goods have been sold in commerce in the last year. Common sense dictates that the Mark cannot be abandoned if in fact the Registrant has used the Mark on goods within the last year, especially since Registrant has provided evidence that the Mark will continue to be used in the immediate future. Furthermore, the mark has been in use on prepackaged music for more than fifteen years, without objection by the Petitioner who is now seeking to cancel the Mark in an apparent attempt to register a nearly

identical trademark for identical goods. See Trademark Application Serial No. 77776311. As the foregoing demonstrates, the Mark has been in use at least as early as 1993, and is currently still in use with compact discs (and thus phonorecords). Further, Registrant intends to continue using the Mark on the goods listed in the Registration.

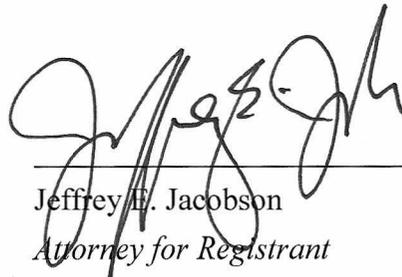
Viewing the facts in a light most favorable to the Registrant, sufficient evidence exists to support a finding that Registrant has not abandoned the Mark as a matter of law. Thus, *Petitioner's Motion for Summary Judgment* should be denied, and *Registrant's Cross-Motion for Summary Judgment* should be granted.

Respectfully submitted,

Date: November 11, 2010

THE JACOBSON FIRM, P.C.

By:



Jeffrey E. Jacobson

Attorney for Registrant

60 Madison Avenue, Suite 1026

New York, NY 10010

Telephone: (212) 683-2001

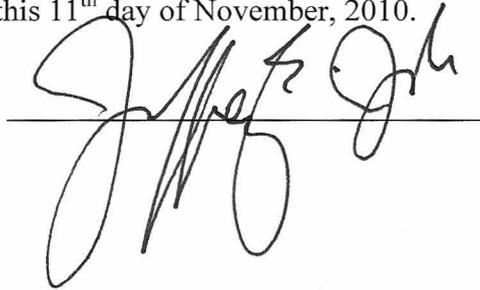
Fax: (212) 645-5038

CERTIFICATE OF SERVICE

I, Jeffrey E. Jacobson, hereby certify that a copy of the MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF REGISTRANT'S CROSS-MOTION FOR SUMMARY JUDGMENT has been served upon:

Seth A. Rose
Loeb & Loeb LLP
321 North Clark Street, Suite 2300
Chicago, IL 60654

via first class mail, postage prepaid, this 11th day of November, 2010.

A handwritten signature in black ink, appearing to read "Jeffrey E. Jacobson", is written over a horizontal line. The signature is stylized and cursive.

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

In the Matter of Trademark Registration No. 1,909,802

For the Trademark KING OF ROCK 'N' ROLL MUSIC

Registered December 8, 1995

----- X
ELVIS PRESLEY ENTERPRISES, INC.

Cancellation No. 92052327

Petitioner,

v.

KING OF ROCK 'N' ROLL MUSIC, INC.

Registrant.
----- X

REGISTRANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that upon the Affidavit of Peter Bennett dated November 10, 2010; the Affirmation of Jeffrey E. Jacobson dated November 11, 2010 and the exhibits attached thereto; and the accompanying Memorandum of Law, Registrant King of Rock 'N' Roll Music, Inc. moves for an order granting summary judgment in favor of Registrant on Petitioner's claim for abandonment of U.S. Registration No. 1,909,802 and denying Petitioner's motion for summary judgment.

Respectfully submitted,

The Jacobson Firm, P.C.

DATED: November 11, 2010
New York, N.Y.

By: ___/Jeffrey E. Jacobson/_____
Jeffrey E. Jacobson
Attorney for Registrant
60 Madison Avenue, Suite 1026
New York, NY 10010
(212) 683-2001