Mailed: March 20, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

Charles Bertini

v.

Apple Inc.

Cancellation No. 92068213

James Bertini for Charles Bertini.

Joseph Petersen of Kilpatrick Townsend & Stockton LLP for Apple Inc.

Before Cataldo, English and Cohen, Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Respondent, Apple Inc., owns Registration No. 4088195 for the mark APPLE (in standard characters) on the Principal Register, identifying the following services:

> education and training services, namely, arranging and conducting personal training, classes, workshops, conferences and seminars in the field of computers, computer software, online services, information technology, website design, and consumer electronics;
> arranging professional workshop and training courses;
> computer education training services;
> training in the use and operation of computers, computer software and consumer electronics;
> online journals, namely, blogs featuring general interest topics covering a wide variety of topics and subject matter;
> providing on-line publications in the nature of magazines, newsletter and journals in the field of computers, computer software and consumer electronics;

> providing information, podcasts and webcasts in the field of entertainment via the Internet concerning movies, music, videos, television, sports, news, history, science, politics, comedy, children's entertainment, animation, culture, and current events;
> digital video, audio and multimedia publishing services;
> providing entertainment information regarding movies, music, videos, television, sports, news, history, science, politics, comedy, children's entertainment, animation, culture, and current events;
> providing information, reviews and personalized recommendations of movies, music, videos, television, sports, news, history, science, politics, comedy, children's entertainment, animation, culture, and current events in the field of entertainment;
> entertainment services, namely, production of live musical performances;
> entertainment services, namely, providing live musical performances online via a global computer network;
> rental of digital entertainment content in the nature of movies, music, videos, television, sports, news, history, science, politics, comedy, children's entertainment, animation, culture, and current events, by means of communications networks, namely, provision of non-downloadable audio and audiovisual programs via an online video-on-demand service;
> providing a database of digital entertainment content in the nature of movies, music, videos, television, sports, news, history, science, politics, comedy, children's entertainment, animation, culture, and current events via electronic communication networks;
> entertainment services, namely, providing prerecorded audio and audiovisual content, information and commentary in the fields of music, concerts, videos, movies, television, books, news, sports, games and cultural events all via a global computer network, in International Class 41;[1]

Petitioner, Charles Bertini, by his second amended pleading,[2] seeks to cancel Respondent's registration on the ground of abandonment through nonuse. Specifically,

[1] Issued January 17, 2012. Respondent, as applicant in the underlying application Serial No. 77428980, filed its Statement of Use on November 11, 2011, alleging March 1, 1981 as the date of first use anywhere and date of first use in commerce. Trademark Act Section 8 and 15 affidavits, 15 U.S.C. §§ 1058 and 1065, accepted and acknowledged. First Renewal. The identified services are separated by subcategory above for ease of viewing.

[2] 12 TTABVUE. In an interlocutory order, 18 TTABVUE, the Board dismissed with prejudice Petitioner's fraud claim asserted in his second amended petition to cancel, leaving abandonment as the sole operative claim.

Petitioner alleges that "There is no direct association between the standard character mark APPLE and the entertainment services listed or offered on the Registrant's website prior to and on the date of the SOU [Statement of Use] and during a period of at least three years and six months after the date of the SOU."[3] 12 TTABVUE 15.

In its answer, Respondent admitted some allegations that we discuss in our analysis below, but otherwise denied the salient allegations of the second amended petition to cancel and also asserted certain matters as affirmative defenses.[4] Respondent did not pursue its affirmative defenses at trial or in its brief. Thus, to the extent they are applicable against a claim of abandonment, we deem the affirmative defenses impliedly waived.[5] *See Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1422 (TTAB 2014) (pleaded affirmative defenses not pursued in the brief considered waived); *Corporacion Habanos S.A. v. Guantanamera Cigars Co.*, 86 USPQ2d 1473, 1474, n.2 (TTAB 2008) (descriptiveness claim waived because not discussed in brief); *G. B. Kent & Sons, Ltd. v. Colonial Chem. Corp.*, 162 USPQ 557, 558 n.1 (TTAB 1969) (counterclaim not addressed in brief deemed waived).

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[3] In his brief, Petitioner indicates that Respondent's asserted nonuse of its APPLE mark occurred "during a period of at least three years and six months after the date of the SOU, namely during November 11, 2011 – May 31, 2015." 68 TTABVUE 6.

[4] 19 TTABVUE.

[5] We note the admonition of our primary reviewing court regarding the distinction between waiver and forfeiture. *See In re Google Tech. Holdings LLC*, 980 F.3d 858, 2020 USPQ2d 11465, at *3 (Fed. Cir. 2020) ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." (internal quotation marks omitted)). Affirmative defenses that were asserted in an answer but then not pursued at trial may be deemed impliedly waived, while affirmative defenses that were never asserted may be deemed forfeited. *See also JNF LLC v. Harwood Int'l Inc.*, 2022 USPQ2d 862, at *3 n.8 (TTAB 2022) (finding asserted defenses not pursued either waived or forfeited).

I. Description of the Record

The record includes the pleadings and, pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Respondent's challenged registration.[6]

A. Petitioner's Submissions

Petitioner filed the following evidence during trial:

- Declaration of Petitioner, Mr. Charles Bertini, 36 TTABVUE, introducing the following:
    - Photocopies of printed advertisements, invoices, letters, flyers, programs, tickets, posters, recordings and newspaper and periodical articles regarding Petitioner, APPLE JAZZ and services under the mark provided as early as June 1985;
    - Printed copies of webpages, many retrieved from archive.org (The Wayback Machine), showing Petitioner's ownership and use of applejazz.com from October 1999 through September 2017;
    - Printouts from Petitioner's YouTube social media channel displaying still images from videos featuring the APPLE JAZZ band;
    - Printouts from Petitioner's Facebook social media page displaying APPLE JAZZ band photos, tickets, and articles about band concerts;
    - Copies of photographs of Petitioner's APPLE JAZZ concerts;
    - Copies of PayPal payments for Petitioner's APPLE JAZZ concerts; and
    - Copies of contracts, business correspondence, agency and representation agreements, including a January 2012 agreement between Petitioner and Respondent's iTunes music service.
- Petitioner's First Notice of Reliance, 37 TTABVUE:
    - Respondent's answer to the second amended petition for cancellation (19

[6] Portions of the record have been designated confidential pursuant to the Board's Standard Protective Order automatically in place for all inter partes proceedings. In this decision, we will endeavor to discuss any confidential evidence only in general terms.

TTABVUE)[7] and Respondent's opposition to Petitioner's summary judgment motion;

- Petitioner's Second Notice of Reliance, 38 TTABVUE:
    - Portions of Respondent's responses to Petitioner's requests for admission, interrogatories, and document requests;
- Petitioner's Third Notice of Reliance, 39 TTABVUE:
    - Printed copies of Internet documents, including documents retrieved from the Wayback Machine, from Respondent's website, Wikipedia.org, and online dictionaries regarding Respondent and terms comprising Respondent's trademarks;
- Petitioner's Fourth Notice of Reliance, 40 TTABVUE:
    - Copies of portions of the file history of application Serial No. 77428980, underlying Respondent's challenged registration[8] and Petitioner's pleaded application Serial No. 87060640; and
    - Official records from the USPTO database consisting of printouts of status pages and other documents from several of Respondent's trademark registrations and applications not at issue in this proceeding.

B. Respondent's Submissions

Respondent filed the following evidence during trial:

- Respondent's First Notice of Reliance, 41 TTABVUE:
    - Dictionary definitions;
- Affidavit of Christopher Butler, Office Manager at the Internet Archive (Wayback Machine), 42 TTABVUE, introducing:
    - Screenshots from Respondent's website at apple.com/appletv, 42 TTABVUE;

[7] As noted, the operative pleadings are automatically of record so it was unnecessary for Petitioner to introduce Respondent's answer under notice of reliance.

[8] These materials are automatically of record pursuant to Trademark Rule 2.122(b) and their introduction at trial was unnecessary.

- Screenshots from Respondent's website at apple.com/appletv and apple.com/music, 43 TTABVUE;
- Screenshots from Respondent's website at apple.com/tv, apple.com/appletv, apple.com/education, itunes.apple.com and apple.com/music, 44 TTABVUE;
- Screenshots from Respondent's website at apple.com/tv, apple.com/icloud, apple.com/ios, apple.com/appletv, apple.com/education, and apple.com/apple-music, 45 TTABVUE;
- Screenshots from Respondent's website at apple.com/apple-music, apple.com/apple-tv, apple.com/apple-music, itunes.apple.com/us/app/podcasts, 46 TTABVUE;
- Screenshots from Respondent's website at apple.com/apple-tv, 47 TTABVUE;
- Screenshots from Respondent's website at apple.com/apple-tv, apple.com/legal/internet-services, ticketing.apple.com/AMUpNextLive, apple.com/retail/soho, 48 TTABVUE;
- Screenshots from Respondent's website at apple.com/retail/soho, apple.com/retail/lincolnpark, apple.com/apple-news, apple.com/tv, 49 TTABVUE;
- Screenshots from Respondent's website at apple.com/tv, apple.com/apple-music, 50 TTABVUE;
- Screenshots from Respondent's website at apple.com/apple-music, apple.com/apple-tv, apple.com/music, 51 TTABVUE;
- Screenshots from Respondent's website at apple.com/apple-tv, apple.com/appletv, apple.com/apple-music, apple.com, apple.com/itunes, developer.apple.com/wwdc, 52 TTABVUE;
- Screenshots from Respondent's website at developer.apple.com, apple.com/itunes, apple.com, itunesconnect.apple.com, support.apple.com, apple.com/apple-books, 53 TTABVUE;
- Screenshots from Respondent's website at apple.com/music, apple.com-music, apple.com/tvos, 66 TTABVUE; and
- Screenshots from Respondent's website at apple.com/tvos, apple.com/apple-music, apple.com/apple-tv, 67 TTABVUE.

- Second Affidavit of Christopher Butler, 54 TTABVUE, introducing:

- Screenshots from Respondent's website at apple.com/lincolnpark.

- Declaration of Thomas R. La Perle, Senior Director of Respondent's Legal Department, 61-62 TTABVUE, including screenshots from Respondent's website, television advertisements and live events, and introducing:

  - Screenshots from Respondent's website at apple.com/newsroom, apple.com/wwdc/events, 63 TTABVUE;

  - Screenshots from Respondent's website at apple.com/appletv, apple.com/apple-tv, apple.com/apple-music, 64 TTABVUE;

  - Screenshots from Respondent's website at apple.com/education/challenge-based-learning, apple.com/appletv, apple.com/tv, apple.com/apple-music, apple.com/music, apple.com/itunes, itunes.apple.com/us/app/podcasts, apple.com/tvos, 55 TTABVUE;

  - Screenshots from Respondent's website at apple.com/appletv, apple.com/tv, apple.com/apple-tv, apple.com/itunes, apple.com/music, apple.com/apple-music, apple.com/itc/podcasts, apple.com/tvos, developer.apple.com/news-publisher, itunes.apple.com/us/app/podcasts, and an advertising guide for publishers advertising on Apple News, 56 TTABVUE,

  - Screenshots from Respondent's website at apple.com/appletv, apple.com/tv, apple.com/apple-tv, apple.com/music, apple.com/apple-music, applemusicfestival.com, itunes.apple.com, apple.com/tvos, 57 TTABVUE;

  - Screenshots from Respondent's website at apple.com/retail/lincolnpark, apple.com/retail/soho, ebay.com, the websites of third-party concert ticket vendors, and the social media website YouTube.com, 58 TTABVUE;[9]

  - Screenshots from Respondent's website at apple.com/retail/lincolnpark, apple.com/retail/soho, apple.com/appletv, apple.com/tv, apple.com/music, apple.com/apple-music, the social media website YouTube.com, 59 TTABVUE; and

  - Screenshots from Respondent's website at apple.com/apple-music, podcasts.apple.com, apple.com/us/app/apple-podcasts and the social

[9] Respondent submitted a confidential version of this exhibit at 65 TTABVUE.

media website YouTube.com, 60 TTABVUE.

II. Evidentiary Matters

The evidentiary record in this case is substantial. Petitioner argues that Respondent submitted multiple copies of the same evidence to "burden and harass counsel for Petitioner," 68 TTABVUE 43, and requests that the Board utilize its inherent authority to sanction Respondent, in the form of disqualifying essentially all of its evidence, "for wasting time," 68 TTABVUE 45, and burdening Petitioner and his counsel. Respondent argues that its evidence responds to Petitioner's claim that Respondent abandoned its "substantial list of services in connection with the Apple mark," 70 TTABVUE 57, and "[a]s a result, in many instances, the same item of documentary evidence supports use of the APPLE mark in connection with multiple categories of Disputed Services, necessitating that a duplicate be submitted for each category of Disputed Services." *Id*. While we find Respondent's evidentiary submissions to be less than focused and concise, we disagree that Respondent's conduct in submitting its evidence should be subject to sanction. Petitioner's request for sanctions is denied.[10]

The parties raised a number of objections, based on relevance or lack of probative value, that we will not separately address. TTAB proceedings are heard by Administrative Trademark Judges, not lay jurors who might easily be misled, confused, or prejudiced by irrelevant evidence. *Cf. Harris v. Rivera*, 454 U.S. 339, 346, 102 S. Ct. 460, 70 L. Ed. 2d 530 (1981) ("In bench trials, judges routinely hear inadmissible

[10] We further note that Petitioner's submissions, in particular his 700 page notice of reliance, 39 TTABVUE, contains multiple copies of webpages displaying the same information.

evidence that they are presumed to ignore when making decisions."). As a general matter, "the Board is capable of weighing the relevance and strength or weakness of the objected-to testimony and evidence, including any inherent limitations," and keeping in mind "the various objections raised by the parties" in determining the probative value of objected-to testimony and evidence. *Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1479 (TTAB 2017). Mindful of the objections, we have accorded this evidence whatever probative value is appropriate. *Id.*

Petitioner further objects to Respondent's evidence that has been "altered" to crop, magnify, mark or assertedly create a misleading impression regarding whether the evidence identifies a product or a service. 68 TTABVUE 62-63. Respondent argues that it provided "snapshots" to illustrate its use of its APPLE mark in connection with the identified services, and also included complete copies of the annotated documents with the La Perle declaration. 70 TTABVUE 103-104. Respondent further argues that "if Petitioner had genuine concerns about these matters, they are items that Petitioner could have readily explored upon cross-examination of Mr. La Perle. Petitioner, however, freely elected not to do so." 70 TTABVUE 104. We again note that the Board is capable of weighing the relative strength or weakness of the parties' proffered evidence, and is unlikely to be misled by Respondent's marked documents within the larger framework of its evidentiary submissions.

We additionally note that both parties submitted printouts from various websites downloaded from the Internet. Although admissible for what they show on their face, *see* Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2), this evidence also contains

hearsay that may not be relied upon for the truth of the matters asserted unless supported by testimony or other evidence. Fed. R. Evid. 801(c); *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1038 (TTAB 2018); *Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031, 1039-40 (TTAB 2010); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 704.08(b) (2023) ("The probative value of Internet documents is limited. They can be used to demonstrate what the documents show on their face and may not be used to demonstrate the truth of what has been printed because they constitute hearsay.")

Petitioner also argues that some of Respondent's web page exhibits lack the required URLs and access dates. 68 TTABVUE 42, 43, 46, 48, 53, 54, 56, 57, 58, 59, 61. Respondent argues in response that annexures to the La Perle and Butler declarations contain URLs for information obtained from the Internet, and that for information obtained from Respondent's platforms such as iTunes and Quicktime, there are no URLs to identify. 70 TTABVUE 60, 66, 75, 80, 84, 88, 91, 95, 99, 102. We will consider each party's evidence introduced in accordance with the guidelines established in *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031 (TTAB 2010). *See Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1461 n.9 (TTAB 2014).

III. Discussion

A. Entitlement to a Statutory Cause of Action

A plaintiff's entitlement to invoke a statutory cause of action (formerly "standing")

for opposition or cancellation is a necessary element in every inter partes case.[11] *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020). To establish entitlement to a statutory cause of action under Trademark Act Section 14, 15 U.S.C. § 1064, a plaintiff must demonstrate "an interest falling within the zone of interests protected by the statute and … proximate causation." *Corcamore,* 2020 USPQ2d 11277, at *4 (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067-70 (2014)). Stated another way, a plaintiff is entitled to bring a statutory cause of action by demonstrating a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020); *see also Empresa Cubana Del Tabaco v. Gen. Cigar Co.,* 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014).

There is "no meaningful, substantive difference between the analytical frameworks expressed in *Lexmark* and *Empresa Cubana*." *Corcamore*, 2020 USPQ2d 11277 at *4. Thus, "a party that demonstrates a real interest in cancelling a trademark under [Trademark Act Section 14, 15 U.S.C.] § 1064 has demonstrated an interest falling within the zone of interests protected by [the Trademark Act] …. Similarly, a party that demonstrates a reasonable belief of damage by the registration of a trade-

[11] Board decisions previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of "standing." Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain applicable. *See Spanishtown Enters., Inc. v. Transcend Resources, Inc.*, 2020 USPQ2d 11388, at *2 (TTAB 2020).

mark demonstrates proximate causation within the context of § 1064." *See Corcamore*, 2020 USPQ2d 11277 at *7.

In the Board's May 21, 2020 order[12] denying Petitioner's summary judgment motion on his abandonment claim, we found:

> Petitioner has submitted evidence that his pleaded application for the standard character mark APPLE JAZZ has been refused registration based on a likelihood of confusion with the subject registration. Thus, we find no genuine dispute that Petitioner has established his standing to petition to cancel the registration.

35 TTABVUE 6-7. We further noted in that order that Petitioner "must maintain and prove his standing at trial." 35 TTABVUE 10 n.12. At trial, Petitioner introduced official records of the USPTO showing that his pleaded application for APPLE JAZZ has been refused registration on the basis of a likelihood of confusion with the mark APPLE in the challenged registration. 40 TTABVUE 77-107.

Petitioner thus has established and maintained his direct commercial interest and reasonable belief in damage proximately caused by the continued registration of the mark in the challenged registration. *See, e.g., Australian Therapeutic Supplies*, 2020 USPQ2d 10837, at *4 (An opposer may "demonstrate a real interest and reasonable belief of damage by producing and selling merchandise bearing the [proposed] mark.") (citing *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) and *Int'l Order of Job's Daughters v. Lindeburg & Co.*, 727 F.2d 1087, 1091, 220 USPQ 1017, 1018-19 (Fed. Cir. 1984)).

[12] Administrative Trademark Judge Wolfson served on the panel deciding the summary judgment motion, and subsequently retired. Administrative Trademark Judge Cohen serves in her place on final determination of the proceeding.

B. Abandonment

1. Statement of the Law of Abandonment

The Trademark Act provides for the cancellation of a registration if the registered mark has been abandoned. *See* Section 14 of the Trademark Act, 15 U.S.C. § 1064. Under Section 45 of the Trademark Act, 15 U.S.C. § 1127, a mark is considered abandoned when "its use has been discontinued with intent not to resume such use." The definition of abandonment is found in this provision, as follows:

> A mark shall be deemed to be "abandoned" for nonuse:
>
> > When its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment. "Use" of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark.
> >
> > …

15 U.S.C. § 1127.

Because registrations are presumed valid under the law, any party seeking cancellation bears the burden of proving a prima facie case of abandonment by a preponderance of the evidence. *See On-Line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1476 (Fed. Cir. 2000); *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989); *Exec. Coach Builders, Inc. v. SPV Coach Co.*, 123 USPQ2d 1175, 1180-81 (TTAB 2016). If the petitioner presents a prima facie case of abandonment, the burden of production, i.e., going forward, then shifts to the registrant to rebut the prima facie showing with evidence. *Id.* at 1311.

Abandonment is a question of fact. *See Stock Pot Rest., Inc. v. Stockpot, Inc.*, 737

F.2d 1576, 222 USPQ 665, 667 (Fed. Cir. 1984). Thus, any inference of abandonment must be based on proven fact. Section 45 of the Trademark Act. *See also Cerveceria Centroamericana S.A. v. Cerveceria India Inc.,* 13 USPQ2d at 1310 ("The protection due the registrant is provided by requiring that the inference have an adequate foundation in proven fact. Whenever an inference is based on pure speculation and 'there is no basis ... to *infer* nonuse,' a prima facie case of abandonment must fail.") (quoting *P.A.B. Produits et Appareils de Beaute v. Satinine Societa in Nome Collettivo di S.A. e. M. Usellini,* 570 F.2d 328, 332-33, 196 USPQ 801, 804-05 (CCPA 1978)); *Stetson v. Howard D. Wolf & Assoc's*, 955 F.2d 847, 21 USPQ2d 1783, 1785 (2d Cir. 1992) (A party claiming that a mark has been abandoned must show "non-use of the mark by the legal owner and no intent by that person or entity to resume use.").

Proof of non-use for three consecutive years, however, constitutes prima facie evidence of abandonment, because it supports an inference of lack of intent to resume use. Section 45 of the Trademark Act. *See also On-line Careline Inc. v. America Online Inc.,* 56 USPQ2d at 1476 ("The party seeking cancellation establishes a prima facie case of abandonment by showing proof of nonuse for three consecutive years."); *Emergency One, Inc. v. American FireEagle, Ltd.,* 228 F.3d 531, 56 USPQ2d 1343 (4th Cir. 2000).

2. Petitioner's Evidence of Abandonment or Use of the Challenged APPLE Mark

Petitioner's First Notice of Reliance upon statements in the pleadings and Respondent's memorandum in opposition to Petitioner's summary judgment motion, 37 TTABVUE 7, includes the following admission from Respondent in its answer, 19

TTABVUE 5, ¶ 26, to the second amended petition to cancel, 12 TTABVUE, "Apple admits that among its websites is the website available at www.apple.com."

Petitioner's Second Notice of Reliance upon Respondent's discovery responses, 38 TTABVUE, includes the following discovery requests and responses:

> Petitioner's Request for Admission No. 22: Admit that Registrant informs the public about new products, software and services on Registrant's website apple.com.
> **RESPONSE:** Respondent admits that *one* way in which it communicates with the public about certain new products, software, and services is via its website at www.apple.com. 38 TTABVUE 20-21.
>
> **INTERROGATORY NO. 1:** Describe with particularity on which webpages Registrant provided Registrant's services under [the] standard character mark APPLE during period November 11, 2011 through May 31, 2015. 38 TTABVUE 34.
> **RESPONSE TO INTERROGATORY NO. 1:** Respondent states that it used the APPLE word mark to render relevant services from November 11, 2011 through May 31, 2015 via the Internet, representative examples of which include its website at www.apple.com, its YouTube page at www.youtube.com/user/ Apple, iTunes services, Apple's Podcasts app and services, and Apple QuickTime services. *Id.*
>
> **INTERROGATORY NO. 3:**
> Describe with particularity locations of *live musical performances* done in the U.S. under [the] standard character mark APPLE during period November 11, 2011 through May 31, 2015. *Id.* at 35.
> **RESPONSE TO INTERROGATORY NO. 3:** Respondent provides the following representative examples of locations of live musical performances rendered in the U.S. under the APPLE mark during the period November 11, 2011 through May 31, 2015:
> • Albany, New York
> • Albuquerque, New Mexico
> • Aventura, Florida
> • Boston, Massachusetts
> • Brooklyn, New York
> • Chicago, Illinois
> • Cupertino, California
> • Denver, Colorado
> • Las Vegas, Nevada
> • Minneapolis, Minnesota

- New York, New York
- Orlando, Florida
- Philadelphia, Pennsylvania
- Phoenix, Arizona
- Salt Lake City, Utah
- San Francisco, California
- Santa Monica, California
- Tampa, Florida. *Id.* at 35-36.

INTERROGATORY NO. 6:
Describe with particularity how Registrant's services under [the] standard character mark APPLE during period November 11, 2011 through May 31, 2015 were advertised. *Id.* at 38.
RESPONSE TO INTERROGATORY NO. 6:
Respondent states that Registrant's services rendered from November 11, 2011 through May 31, 2015 in the United States were advertised in a number of ways, representative examples of which include on its website at www.apple.com, through its iTunes service, through Apple's Podcasts app and service, via the Apple QuickTime service, on www.youtube.com/user/ Apple, in nationally televised commercials, in nationally circulated periodicals, and through third-party media coverage. *Id.*

Petitioner's Third Notice of Reliance, 39 TTABVUE, on publicly available webpages downloaded from the Internet Archive for the Wikipedia website pages for Respondent's iTunes, Apple Music, Apple Inc., Apple TV, and for Podcasts (software) and Newsstand (software); Respondent's apple.com, apple.com/apple-music, apple.com/music, apple.com/us/podcasts, apple.com/newsroom; and definitions of music and store from Merriam-Webster online dictionary. A representative sample is displayed below.

WIKIPEDIA

Apple Music

Exhibit 16, p1

Apple Music is a music and video streaming service developed by Apple Inc. Users select music to stream to their device on-demand, or they can listen to existing, curated playlists. The service also includes the Internet radio station Beats 1, that broadcasts live to over 100 countries 24 hours a day. The service was announced on June 8, 2015, and launched on June 30, 2015 in over 100 countries worldwide. New subscribers get a three-month free trial period before the service becomes paid-only.

Originally strictly a music service, Apple Music began expanding into video in 2016. Executive Jimmy Iovine has stated that the intention for the service is to become a "cultural platform", and Apple reportedly wants the service to be a "one-stop shop for pop culture". The company is actively investing heavily in the production and purchasing of video content, both in terms of music videos and concert footage that support music releases, as well as web series and feature films.

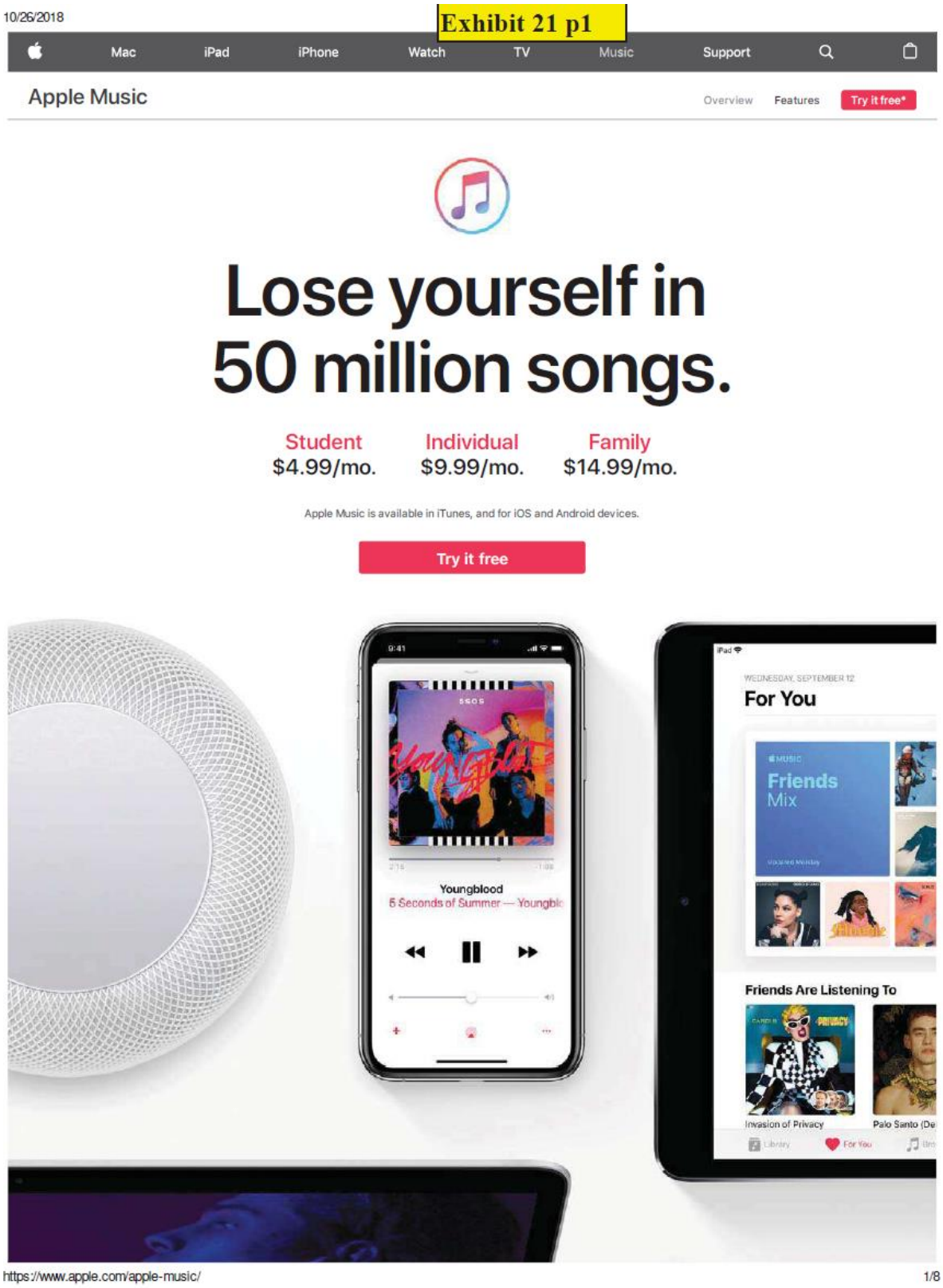
The original iOS version of Apple Music received mixed reviews, with criticism directed towards a user interface deemed "not intuitive" and a "mess", but it was praised for its playlist curation. In iOS 10, the app received a significant redesign, which received mostly positive reviews for an updated interface with less clutter, improved navigation, and bigger emphasis on users' libraries. Apple Music's use of iCloud, which attempts to match uploaded songs to those found on the service, caused significant issues for some users, with duplicate songs, missing tracks, and synchronization problems, to which Apple offered no comment or acknowledgement. It also received criticism for reportedly deleting users' local music, though publications have disagreed on the cause. In its first year, there were reports of user-uploaded content being replaced by versions locked with digital rights management, an issue later fixed. Additionally, Apple Music's use of album exclusives caused backlash and criticism from record labels, prompting the company to scale back its exclusivity efforts.

Apple Music rapidly gained popularity after its launch, passing the milestone of 10 million subscribers after only six months. There were 50 million paying subscribers as of May 2018.[1][2]

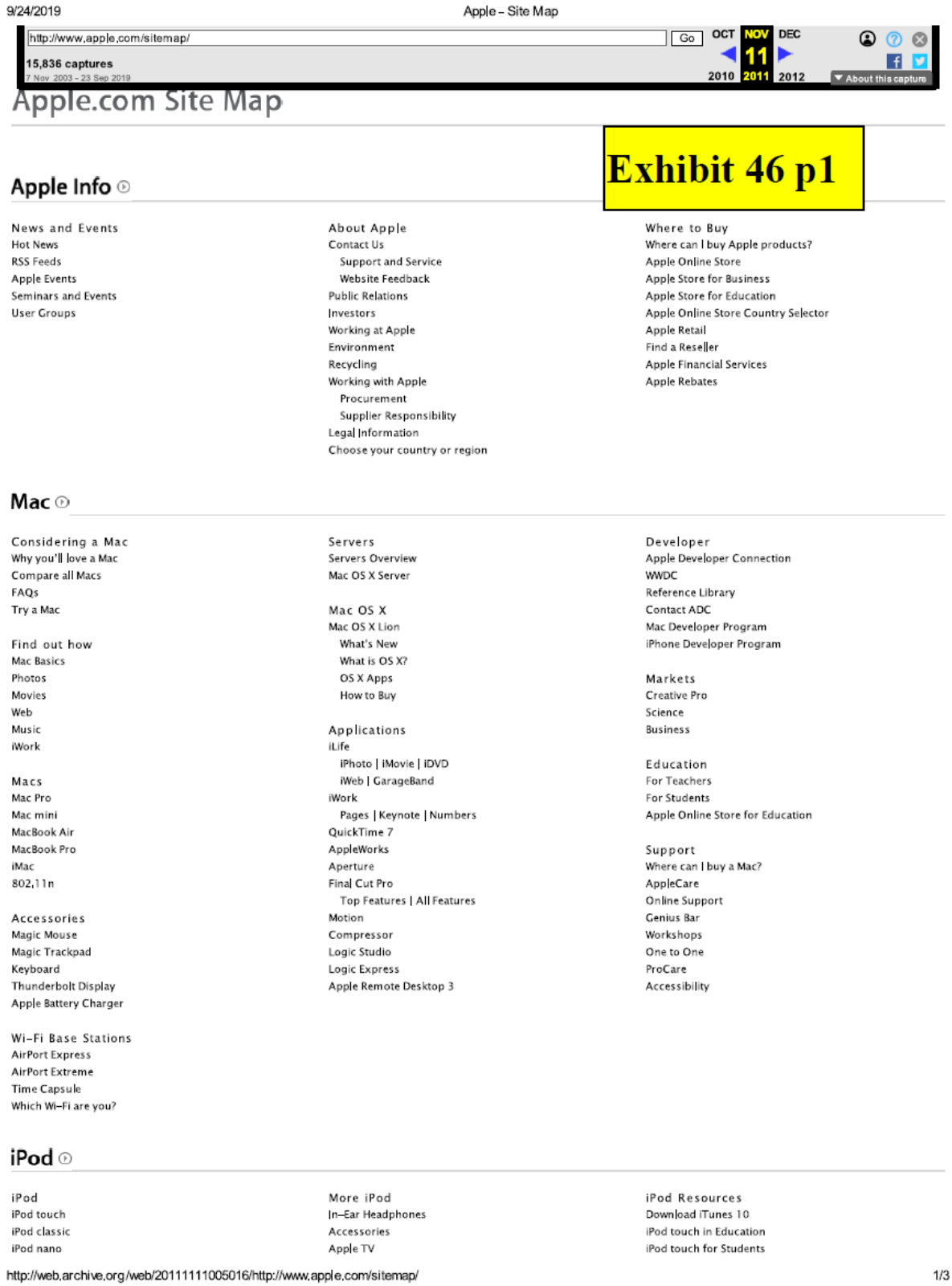
Apple Music

Opened	June 30, 2015
Owner	Apple Inc.
Pricing model	US$9.99 / month for single license US$99.00 / year for single license US$14.99 / month for family license US$4.99 / month for student license
Key People	Oliver Schusser (head of Apple Music worldwide) Brian Bumbery (director, Apple Music Publicity)
Platforms	macOS · iOS · tvOS · watchOS · Windows · Android
Trial	3 months
Availability	Widely in the Americas, Europe, Asia, and Oceania, and in parts of Africa and the Middle East
Website	apple.com/apple-music/ (http://apple.com/apple-music/)

39 TTABVUE 32.



39 TTABVUE 60.



9/24/2019 Apple – Site Map

http://www.apple.com/sitemap/ Go OCT NOV DEC 11 2010 2011 2012 About this capture

15,836 captures 7 Nov 2003 – 23 Sep 2019

Apple.com Site Map

Exhibit 46 p1

Apple Info

News and Events
Hot News
RSS Feeds
Apple Events
Seminars and Events
User Groups

About Apple
Contact Us
Support and Service
Website Feedback
Public Relations
Investors
Working at Apple
Environment
Recycling
Working with Apple
Procurement
Supplier Responsibility
Legal Information
Choose your country or region

Where to Buy
Where can I buy Apple products?
Apple Online Store
Apple Store for Business
Apple Store for Education
Apple Online Store Country Selector
Apple Retail
Find a Reseller
Apple Financial Services
Apple Rebates

Mac

Considering a Mac
Why you'll love a Mac
Compare all Macs
FAQs
Try a Mac

Find out how
Mac Basics
Photos
Movies
Web
Music
iWork

Macs
Mac Pro
Mac mini
MacBook Air
MacBook Pro
iMac
802.11n

Accessories
Magic Mouse
Magic Trackpad
Keyboard
Thunderbolt Display
Apple Battery Charger

Wi-Fi Base Stations
AirPort Express
AirPort Extreme
Time Capsule
Which Wi-Fi are you?

Servers
Servers Overview
Mac OS X Server

Mac OS X
Mac OS X Lion
What's New
What is OS X?
OS X Apps
How to Buy

Applications
iLife
iPhoto | iMovie | iDVD
iWeb | GarageBand
iWork
Pages | Keynote | Numbers
QuickTime 7
AppleWorks
Aperture
Final Cut Pro
Top Features | All Features
Motion
Compressor
Logic Studio
Logic Express
Apple Remote Desktop 3

Developer
Apple Developer Connection
WWDC
Reference Library
Contact ADC
Mac Developer Program
iPhone Developer Program

Markets
Creative Pro
Science
Business

Education
For Teachers
For Students
Apple Online Store for Education

Support
Where can I buy a Mac?
AppleCare
Online Support
Genius Bar
Workshops
One to One
ProCare
Accessibility

iPod

iPod
iPod touch
iPod classic
iPod nano

More iPod
In-Ear Headphones
Accessories
Apple TV

iPod Resources
Download iTunes 10
iPod touch in Education
iPod touch for Students

http://web.archive.org/web/20111111005016/http://www.apple.com/sitemap/ 1/3

39 TTABVUE 128.

Exhibit 62

Apple Inc.

From Wikipedia, the free encyclopedia

Apple Inc. is an American multinational technology company headquartered in Cupertino, California, that designs, develops, and sells consumer electronics, computer software, and online services. Its hardware products include the iPhone smartphone, the iPad tablet computer, the Mac personal computer, the iPod portable media player, the Apple Watch smartwatch, and the Apple TV digital media player. Apple's consumer software includes the macOS and iOS operating systems, the iTunes media player, the Safari web browser, and the iLife and iWork creativity and productivity suites. Its online services include the iTunes Store, the iOS App Store and Mac App Store, and iCloud.

Apple was founded by Steve Jobs, Steve Wozniak, and Ronald Wayne on April 1, 1976, to develop and sell personal computers.[5] It was incorporated as **Apple Computer, Inc.** on January 3, 1977, and was renamed as Apple Inc. on January 9, 2007, to reflect its shifted focus toward consumer electronics. Apple (NASDAQ: AAPL (https://web.archive.org/web/20160630064452/http://www.nasdaq.com/symbol/aapl)) joined the Dow Jones Industrial Average on March 19, 2015.[6]

Apple is the world's largest information technology company by revenue, the world's largest technology company by total assets,[7] and the world's second-largest mobile phone manufacturer.[8] In November 2014, in addition to being the largest publicly traded corporation in the world by market capitalization, Apple became the first U.S. company to be valued at over US$700 billion.[9] The company employs 115,000 permanent full-time employees as of July 2015[4] and maintains 478 retail stores in seventeen countries as of March 2016.[1] It operates the online Apple Store and iTunes Store, the latter of which is the world's largest music retailer. There are over one billion actively used Apple products worldwide as of March 2016.[10]

Apple Inc.

Apple Campus (1 Infinite Loop, Cupertino, California)

Type	Public
Traded as	NASDAQ: AAPL (https://web.archive.org/web/20160630064452/http://www.nasdaq.com/symbol/aapl) Dow Jones Industrial Average component NASDAQ-100 component S&P 500 component
Industry	Computer hardware Computer software Consumer electronics Digital distribution Fabless Silicon Design Corporate Venture Capital Energy Production
Founded	April 1, 1976, in Cupertino, California, U.S.
Founders	Steve Jobs Steve Wozniak Ronald Wayne

39 TTABVUE 487.

WIKIPEDIA

Apple Inc.

Coordinates: 37.3349°N 122.0090°W

Exhibit 65

Apple Inc. is an American multinational technology company headquartered in Cupertino, California, that designs, develops, and sells consumer electronics, computer software, and online services. It is considered one of the Big Four tech companies along with Amazon, Google, and Facebook.[6][7]

The company's hardware products include the iPhone smartphone, the iPad tablet computer, the Mac personal computer, the iPod portable media player, the Apple Watch smartwatch, the Apple TV digital media player, the AirPods wireless earbuds and the HomePod smart speaker. Apple's software includes the macOS, iOS, iPadOS, watchOS, and tvOS operating systems, the iTunes media player, the Safari web browser, the Shazam acoustic fingerprint utility, and the iLife and iWork creativity and productivity suites, as well as professional applications like Final Cut Pro, Logic Pro, and Xcode. Its online services include the iTunes Store, the iOS App Store, Mac App Store, Apple Music, Apple TV+, iMessage, and iCloud. Other services include Apple Store, Genius Bar, AppleCare, Apple Pay, Apple Pay Cash, and Apple Card.

Apple was founded by Steve Jobs, Steve Wozniak, and Ronald Wayne in April 1976 to develop and sell Wozniak's Apple I personal computer, though Wayne sold his share back within 12 days. It was incorporated as **Apple Computer, Inc.**, in January 1977, and sales of its computers, including the Apple II, grew quickly. Within a few years, Jobs and Wozniak had hired a staff of computer designers and had a production line. Apple went public in 1980 to instant financial success. Over the next few years, Apple shipped new computers featuring innovative graphical user interfaces, such as the original Macintosh in 1984, and Apple's marketing advertisements for its products received widespread critical acclaim. However, the high price of its products and limited application library caused problems, as did power struggles between

Apple Inc.

Overhead view of Apple Park located in Cupertino, California, April 2018

Formerly	Apple Computer Company (1976–1977) Apple Computer, Inc. (1977–2007)
Type	Public
Traded as	NASDAQ: AAPL (https://www.nasdaq.com/symbol/aapl) NASDAQ-100 component DJIA component S&P 100 component S&P 500 component
ISIN	US0378331005
Industry	Computer hardware Computer software Consumer electronics Cloud computing Digital distribution Fabless silicon design

39 TTABVUE 651.

Petitioner's Fourth Notice of Reliance, 40 TTABVUE, on official records of the USPTO. The following example is illustrative:

PTO Form 1581 (Rev 9/2005)
OMB No. 0651-0054 (Exp. 09/30/2011)

SOU Extension Request
(15 U.S.C. Section 1051(d))

To the Commissioner for Trademarks:

MARK: APPLE
SERIAL NUMBER: 77428980

Exhibit *7* p*3*

The applicant, Apple Inc., having an address of
1 Infinite Loop
Cupertino, California 95014
United States
requests a six-month extension of time to file the Statement of Use under 37 C.F.R. Section 2.89 in this application. The Notice of Allowance mailing date was 05/11/2010.

For International Class 041:
Current identification: Education and training services, namely, arranging and conducting personal training, classes, workshops, conferences and seminars in the field of computers, computer software, online services, information technology, website design, and consumer electronics; arranging professional workshop and training courses; computer education training services; training in the use and operation of computers, computer software and consumer electronics; online journals, namely, blogs featuring general interest topics covering a wide variety of topics and subject matter; providing on-line publications in the nature of magazines, newsletter and journals in the field of computers, computer software and consumer electronics; providing information, podcasts and webcasts in the field of entertainment via the Internet concerning movies, music, videos, television, sports, news, history, science, politics, comedy, children's entertainment, animation, culture, and current events; digital video, audio and multimedia publishing services; providing entertainment information regarding movies, music, videos, television, sports, news, history, science, politics, comedy, children's entertainment, animation, culture, and current events; providing information, reviews and personalized recommendations of movies, music, videos, television, sports, news, history, science, politics, comedy, children's entertainment, animation, culture, and current events in the field of entertainment; entertainment services, namely, production of live musical performances; entertainment services, namely, providing live musical performances online via a global computer network; rental of digital entertainment content in the nature of movies, music, videos, television, sports, news, history, science, politics, comedy, children's entertainment, animation, culture, and current events, by means of communications networks, namely, provision of non-downloadable audio and audiovisual programs via an online video-on-demand service; providing a database of digital entertainment content in the nature of movies, music, videos, television, sports, news, history, science, politics, comedy, children's entertainment, animation, culture, and current events via electronic communication networks; entertainment services, namely, providing prerecorded audio and audiovisual content, information and commentary in the fields of music, concerts, videos, movies, television, books, news, sports, games and cultural events all via a global computer network

The applicant has a continued bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with all of the goods and/or services listed in the Notice of Allowance or as subsequently modified for this specific class.

For International Class 042:
Current identification: Providing a website for the uploading, sharing, viewing and posting of photographs, digital images, movies, videos, online journals covering general interest topics, and other related multimedia entertainment materials over a global computer network covering a wide variety of topics and subjects

This filing does **not** cover this specific class. This **entire class** is either to be permanently **deleted** from the application OR **processed according to a separately filed Statement of Use and Request to Divide.**

This is the third extension request. The applicant has made the following ongoing efforts to use the mark in commerce on or in connection with each of those goods and/or services covered by the extension request: The applicant believes that it has made valid use of the mark in commerce, and is currently filing a Statement of Use (SOU), but that if the USPTO finds the SOU to be fatally defective, the applicant will need additional time to file a new SOU.

40 TTABVUE 19.

3. Findings of Fact

The issue before us is whether Petitioner has established that Respondent abandoned its APPLE mark, as abandonment is defined above in the law, during the alleged nonuse period from November 11, 2011 to May 31, 2015.

The declaration of Petitioner Charles Bertini and attached exhibits illustrate Petitioner's use of his APPLE JAZZ mark. This evidence establishes Petitioner's entitlement to a statutory cause of action, but does not provide evidence of Respondent's use or abandonment of its APPLE mark. Petitioner submitted a Cloud Service License Agreement (36 TTABVUE 74-84) between Petitioner and Respondent "in 2012 for iTunes Store services and not APPLE services" 68 TTABVUE 36. However, an agreement between Petitioner and Respondent regarding Respondent's iTunes Store services does not establish that Respondent's use of iTunes or iTunes Store was to the exclusion of APPLE as a mark for the recited services during the relevant time period. *See, e.g., In re Yarnell Ice Cream,* LLC, 2019 USPQ2d 265039, at *15 (TTAB 2019) ("Indeed, it has long been 'settled that a product label or in the case of a service mark, an advertisement or similar material can bear more than one mark without diminishing the identifying function of each.'") (quoting *In re Morganroth*, 208 USPQ2d 284, 287 (TTAB 1980)); *Amica Mutual Ins. Co. v. R. H. Cosmetics Corp.*, 204 USPQ 155, 161 (TTAB 1979) ("It is well established that a product [or service] can bear more than one trademark, that each trademark may perform a different function for consumers and recipients of the product[.] … The usual situation in

which this principle has normally been applied ... involves a house mark which normally serves to identify the source of the product, per se, and a product mark which serves to identify a particular product within a line of merchandise normally associated with and distinguished by the house mark. That is, a house mark serves as an umbrella for all of the product marks and merchandise emanating from a single source.").

Respondent admitted in its answer to the second amended petition for cancellation that among its websites is the website at www.apple.com, but no admissions that would support a conclusion that a prima facie case of abandonment of its APPLE mark for any of the recited services has been shown.[13] Respondent answers the majority of Petitioner's salient allegations with denials. Similarly, Respondent's brief in opposition to Petitioner's summary judgment motion contains no statements against interest to support that Respondent abandoned its mark.

Petitioner's Second Notice of Reliance on Respondent's discovery responses does not provide evidence of abandonment of its APPLE mark. Respondent does not answer a request for admission, interrogatory or request for production of documents with an admission or response indicating that Respondent ceased use of its mark or that no documents exist to support such use. Petitioner argues, 68 TTABVUE 28-32,

[13] Applicant admitted para. 46 of the second amended petition for cancellation: "Prior to and on the date of the SOU and during a one-year period after the date of the SOU Registrant didn't offer on its website 'entertainment services, namely, production of live musical performances' under standard character mark APPLE. Exhibits 11; 18." 12 TTABVUE 12, ¶ 46; 19 TTABVUE 8, ¶ 46. However, Respondent is not required to offer all of its services on its websites and, in any event, nonuse for one year does not constitute abandonment.

that Respondent "didn't produce any documents concerning use of the Mark in commerce for the services during the Relevant Period" 68 TTABVUE 29 in response to Petitioner's discovery requests. Respondent's answers to Petitioner's discovery requests, e.g., Request for Production No. 1 and Interrogatory Nos. 7 – 13, 38 TTABVUE 38-42, 44, 48, refusing to produce documents are procedural in nature, and do not indicate that Respondent does not possess responsive documents. Indeed, in response to Petitioner's first request for production seeking documents showing use of the APPLE mark for the involved services during the alleged period of nonuse, Respondent offered to "make available a representative sample of non-privileged, relevant and reasonably available documents in its possession, custody or control that are responsive to this request." 38 TTABVUE 47. This response indicates that Respondent does in fact possess responsive documents.

Further, we will not infer from Respondent's objections to Petitioner's discovery requests that no responsive documents exist, particularly given the objections made concurrently with the responses. If Petitioner was dissatisfied with the response and believed the discovery requests to be appropriate and not unduly burdensome, Petitioner could have moved to compel a complete response absent objection. Rather than availing itself of this procedural tool, Petitioner opted to present a case of abandonment based on these responses. *British Seagull Ltd. v. Brunswick Corp*., 28 USPQ2d 1197, 1201 (TTAB 1993) *aff'd Brunswick Corp. v. British Seagull Ltd*., 35 F.3d 1527, 32 USPQ2d 1120 (Fed. Cir. 1994); *Time Warner Ent., Co. v. Jones*, 65 USPQ2d 1650, 1656 (TTAB 2002).

Petitioner's Third Notice of Reliance on webpages does not provide evidence of Respondent's abandonment of its APPLE mark. Petitioner argues that Respondent does not use APPLE by itself but rather surrounded by other matter, e.g., APPLE STORE, APPLE TV or APPLE MUSIC, and that its manner of use shows APPLE as a trade name and not a source identifier. First, we have recognized that "it is up to the applicant to choose what it seeks to register," so long as what the applicant seeks to register "make[s] a distinct commercial impression as used." *In re Fallon*, 2020 USPQ2d 11249, at *6 (TTAB 2020) (quoting *In re Yale Sportswear Co.,* 88 USPQ2d 1121, 1123 (TTAB 2008)).

The addition of a generic or highly descriptive term does not necessarily detract from the separate commercial impression created by the mark APPLE alone. *Am. Sec. Bank v. Am. Sec. & Tr. Co.*, 571 F.2d 564, 567 (CCPA 1978) ("the word 'bank' is purely descriptive and adds nothing to the origin-indicating significance of AMERICAN SECURITY" which is the legal equivalent of AMERICAN SECURITY BANK.); *In re Raychem Corp.*, 12 USPQ2d 1399, 1399-1400 (TTAB 1989) (specimen displaying TR06AI-TINEL-LOCKRING 07/22/87 supported registration for TINEL-LOCK because the alphanumeric part number and generic designation Ring were not essential to the commercial impression of the mark and played no integral role in distinguishing applicant's goods.); *Nat'l Bakers Servs., Inc. v. Hain Pure Food Co.*, 207 USPQ 701 (TTAB 1980), (HOLLYWOOD HEALTH FOODS legal equivalent of HOLLYWOOD.) As indicated in the evidence of record, Respondent's use of, e.g., APPLE TV, APPLE STORE or APPLE MUSIC all feature the distinctive term

APPLE and a generic term. Such use supports Respondent's use of APPLE in connection with the services identified in this evidence. Further, we are not convinced that this evidence of Respondent's use of APPLE TV, APPLE STORE or APPLE MUSIC indicates that it did not also use APPLE during the relevant time period in connection with the identified services.[14]

Second, "[t]he question of whether a name used as a trade name or a part thereof also performs the function of a trademark and/or a service mark is one of fact" and is "determined from the manner in which the name is used and the probable impact thereof upon purchasers and prospective customers." *In re Univar Corp.*, 20 USPQ2d 1865, 1866 (TTAB 1991). Based on our review of the record, we disagree with Petitioner that Respondent's use of APPLE as a trade name precludes the term from also serving as a trademark or service mark to indicate source. We further note that Petitioner's evidence of Respondent's use of APPLE as a trade name does not create an inference that Respondent did not also use APPLE as a trademark or service mark during the relevant time period.

With regard to Petitioner's Wikipedia evidence submitted at 39 TTABVUE, we have stated on numerous occasions that we give guarded consideration to evidence taken from Wikipedia, bearing in mind the limitations inherent in this open-source reference work. *Cf. In re IP Carrier Consulting Grp.*, 84 USPQ2d 1028, 1032 (TTAB 2007). In this case, we are not convinced that the presence or absence of the term

[14] As discussed infra, we need not look to Respondent's use of its APPLE mark in connection with its recited services. Nonetheless, we note that Respondent has introduced evidence of use of its APPLE mark alone in connection with its recited services.

APPLE in connection with Respondent's services on Wikipedia, an open-source website featuring user-generated content, is probative of the issue of whether Respondent abandoned use of the mark. In addition, and as noted above, Internet printouts in general, although admissible for what they show on their face, *see* Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2), also contain hearsay that may not be relied upon for the truth of the matters asserted unless supported by testimony or other evidence. Fed. R. Evid. 801(c); *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d at 1038 (TTAB 2018); *Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d at 1039-40. Thus, we may not rely upon Petitioner's Wikipedia evidence to support Petitioner's claims regarding Respondent's putative dates of use of its APPLE mark in connection with its services.

Finally, Petitioner introduced its Fourth Notice of Reliance upon official records of the USPTO "to show that Registrant did not use [the] standard character mark APPLE for the services listed in the Registration certificate No.4088195, that instead [Respondent] used other marks…." 40 TTABVUE. Petitioner's arguments that Respondent's use of other marks, such as iTunes, APPLE MUSIC or APPLE TV to identify its services, has been discussed above. Petitioner's Fourth Notice of Reliance does not provide evidence of Respondent's abandonment of its APPLE mark.

Reviewing the evidence, Petitioner has not presented a prima facie case of abandonment based on three years of nonuse of the APPLE mark for any services identified in the challenged registration. Petitioner has submitted examples of websites that display Respondent's APPLE mark in connection with other terms, display other

marks owned by Respondent, or do not display the APPLE mark, and essentially requests that the Board infer that Respondent was not using the APPLE mark in connection with the recited services from November 11, 2011 to May 31, 2015.

Abandonment is a question of fact; thus, any inference of abandonment must be based on proven fact. *Quality Candy Shoppes v. Grande Foods*, 90 USPQ2d at 1393. The record consists only of circumstantial evidence of abandonment. Petitioner could have taken the oral testimony deposition of Respondent to ascertain whether Respondent had indeed discontinued use of it registered mark and if so, whether it had any intent to resume use, but elected not to do so. Petitioner further could have compelled responses to his discovery requests or amended his requests to obviate the objections raised by Respondent. Petitioner, however, elected to proceed with discovery responses consisting largely of procedural objections rather than substantive responses and evidence showing use of the APPLE mark that Respondent believed was insufficient. Therefore, Petitioner has failed to make a prima facie showing that there is no use of Respondent's registered mark for the services identified in its Registration over a three-year period.

C. Summary

Considering all of the evidence of record, we find that Petitioner has proven and maintained his entitlement to a statutory cause of action, but failed to make a prima facie showing of Respondent's abandonment of the APPLE mark as to the services in Respondent's challenged registration. Thus, there is no prima facie case for Respondent to rebut.

Decision: The petition to cancel is denied.