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

In re: Application Serial No. 76/295724
Filed: August 6, 2001
For the Mark: **BLUEMAN**
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BLUE MAN PRODUCTIONS, INC., Opposer, v. **ERICH TARMANN,** Applicant.	**Opposition No. 154,055** **MOTION TO STRIKE OPPOSER'S NOTICE OF RELIANCE**

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Assistant Commissioner for Trademarks
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Arlington, VA 22202-3513

Pursuant to Rule 2.127(a), applicant, Erich Tarmann, moves to strike the Notice of Reliance[1] of opposer, Blue Man Productions, Inc., for reason that:

(i) opposer failed to specify relevance of the purported evidence pursuant to 37 CFR §2.122(e),

(ii) the purported evidence identified does not constitute "printed materials" within the meaning of the rules of practice before the TTBA,

(iii) the purported evidence is hearsay, the therefore inadmissible in the opposition proceedings, and

(iv) the purported evidence is not "self-authenticating" and opposer has failed to provide testimony or other independent evidence to authenticate the same.

[1] Opposer has filed two Notices of Reliance, both purportedly mailed January 21, 2004. This motion is directed to the second Notice of Reliance entitled "Opposer's Notice of Reliance Pursuant to Trademark Rule 2.122(e)."

I. Failure to Specify Relevance

On January 21, 2004, opposer Blue Man Productions, Inc., filed a Notice of Reliance on Opposer's Registrations Pursuant to Rule 1.122(d)(2) (hereafter, the "first Notice of Reliance"). Applicant received the first Notice of Reliance on January 26, 2004. Also on January 21, 2004, opposer purportedly filed and served another Notice of Reliance Pursuant to Rule 2.122(e) (hereafter, the "second Notice of Reliance"), which applicant received on January 29, 2004.

The Second Notice of Reliance included a listing of numerous articles, magazine covers, letters, billboard announcements, and videotape media together with an indication of an associated date publication or release and a page number indication. The listing is objectionable, however, because it does not specify "relevance" of the listed items in any manner or in such a manner to enable applicant to defend against or otherwise challenge the purported evidence. Rule 2.122(e) provides that such a notice "*shall* ... indicate generally the relevance of the material being offered." (emphasis added). Nowhere in the Second Notice of Reliance does opposer indicate the general relevance of the material offered as evidence, and for this reason, applicant moves to strike the Second Notice of Reliance[2] as inadequate and failing to meet the requirements of the rules. See *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230, 1233 (TTAB 1992).

II. Certain Identified Documents Are Not "Printed Publications"

Numerous items identified in opposer's second Notice of Reliance are not "printed publications" within the meaning of the Federal Rules of Evidence or the Rules of Practice of the United States Patent and Trademark Office.

A first item in the Second Notice of Reliance failing to qualify as a printed publication is identified as a "List of Television and Radio Coverage." Upon inspection, this item was clearly generated by opposer for purposes of the present Opposition and is not accompanied by any authenticating testimony. No foundation was laid for truth or accuracy thereof within opposer's allotted testimony period. For this reason among

others, the Board may be properly exclude the listing from evidence. See *Johnson and Johnson v. American Hospital Supply Corp.*, 187 USPQ 478, 479 (TTAB 1975).

Moreover, numerous purported articles or publications contain e-clips or notations from a third-party information service bureau, e.g., Burrelle's Information Services, Video D, Durrants, Ausschnitt, DVD Markt and others, which purportedly indicate or identify a document, a date of publication of a document, a place of publication of a document, and/or a source of a document. Certain other purported publications appear to be "press releases" or to have originated from opposer's own internal records in that they contain a BLUE MAN GROUP header and office address.[3] Opposer provided no authenticating testimony from any of the service bureaus, or any other witness, to authenticate such documents or videotapes, to verify truth or accuracy of the information contained therein, or to overcome hearsay limitations to their admissibility. In addition, "press releases," press clippings, videotape clippings, billboards, photographs, and/or promotional announcements[4], which certain proffered evidence on their face appear to be, clearly do not qualify as "printed publication" since they are not in general public circulation. See *Colt Industries Operating Corp. v. Olivetti Controllo Numerico S.p.A.*, 221 USPQ 73, 74 n.2 (TTAB 1983) (press releases do not qualify as printed publications). See also, *Central Mfg. Co. v. Casablanca Industries, Inc.*, ___ F.3d ___, ___ (decided December 16, 2003, Fed. Cir.) (Appeal no. 03-1294); *Glamorene Products Corp. v. Earl Grissmer Co.*, 203 UPSQ 1090, 1092 n.5 (TTAB 1979) (private promotional literature not presumed to be publicly available within the meaning of the rule); and *Hard Rock Café Licensing Corp. v. Elsea,* 48 USPQ2d 1400, 1403 (TTAB 1998) (press releases and press clippings do not qualify as printed publications); and *Wagner Electric Corp. v. Raygo Wagner, Inc.* 192 USPQ 33, 36 n.10 (TTAB 1976) (catalog sheets, house publication, reprints of advertisements, advertising mats do not qualify as printed publications). Among the documents opposer offered as evidence is a

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[2] In addition, the Rule 2.122(e) provides that the "notice of reliance shall be filed during the testimony period of the party that files the notice." Because the Second Notice was received four days later than the First Notice (purportedly mailed the same day), applicant objects to the timeliness of the Second Notice.

[3] See, for example, numerous items identified in the letterhead as "BLUE MAN GROUP - Live at Luxor" contained in the section marked "BMG Las Vegas - Local."

[4] See, for example, "University Wire (Champain, IL)," "the Salt Lake Tribune," "Philadelphia Enquire, July 28, 2003,""laOresse, July 11, 2003," "CMJ - June 2003,"and "The Plain Dealer - Jule 24, 2003."

letter dated September 22, 1992 from Jay Leno of the Tonight Show, yet no authenticating testimony was provided.

In the section entitled "The Complex Rock Tour," opposer listed, identified and provided printouts of Internet web pages, to which applicant objects as being unreliable hearsay.[5] Absent authenticating testimony, Internet publications or other purported publications of a "transient" nature, i.e., video broadcasts, do not quality as "printed publications" and require independent authenticating testimony prior to their admission into evidence. See *Harjo v. Pro-Football Inc.*, 50 USPQ2d 1705, 1722 (TTAB 1999) and *Raccioppi v. Apoee Inc.*, 47 USPQ2d 1368, 1370 (TTAB 1998), Plyboo America Inc. v. Smigh & Fong Co., 51 USPQ2d 1633, 1634, n. 3 (TTAB) (printout of page of website is not proper subject matter for a notice of reliance).

III. None of the Documents Overcomes The Hearsay Exclusion

None of the documents listed in opposer's second Notice of Reliance overcomes the hearsay exclusion. Although the Board usually reserves ruling on these types of questions at final hearing, it may in its discretion decide these types of questions at the current stage of the Opposition. Applicant thus requests expedited rulings on evidentiary issues in order to promptly and fairly disposes of the Opposition, including rulings on hearsay exclusions.

Certain documents identified by opposer in its second Notice of Reliance may, however, qualify as "printed publications," but no testimony was provided to prove any truth of their content. Even if such documents were admitted into evidence, absent witness testimony, the purported publications in no way evidence that any of the document was publicly circulated, that the identified video recordings were actually broadcasts, of that the public gained any familiarity the opposer's BLUE MAN GROUP mark. See, *Volkswagenwerk Aktiengesellschaft v. Ridewell Corp.*, 201 USPQ 404, 410 (TTAB 1978). In addition, no document, even if admitted for the truth of its content, demonstrates or even tends to demonstrate "actual" dilution, harm, or confusion to make

[5] See, for example, web page printouts of "Dayton Daily News," "Cincinnati Post," "www.newsok.com," "PalmBeach.com," "newsbank.com (Lancaster)," "nighttimes.com," "demoinesregister.com," and "Charleston.Net."

opposer's complaint actionable under the guidelines of *Moseley, et al. v. V Secret Catalogue, Inc.*, 537 U.S. ___ (2003).

Because opposer has not specified any relevance of any of the identified documents, applicant is not in a position to properly defend or to provide opposing evidence. Should the Board deny the motion and provides opposer with an opportunity to supplement the second Notice of Reliance with a designation of relevance, applicant reserves a right to further challenge any supplemental Notice.

IV. The Documents Lack Relevance Due To Their Purported Publication Date

As shown by the record of these proceedings, applicant's adoption and use of the **BLUEMAN** mark occurred in 1997 along with registration of that mark under the Madrid Protocol, to which the United States acceded in August 2003.[6] Applicant's first use in commerce in the United States occurred in the spring of 1999.[7] Opposer, on the other hand, has identified documents purportedly made public well after applicant's first adoption and use in 1997. Most of opposer's identified documents appear to have been published in the 2000-2003 time frame. As such, they are not relevant to any issue in the present opposition proceeding.

Accordingly, applicant objects to on grounds of relevance and moves to strike all documents in opposer's second Notice of Reliance that was purportedly published "after" applicant's adoption and use of the **BLUEMAN** mark in 1997.

V. Conclusion

The Board should strike the second Notice of Reliance because (i) opposer failed to specify relevance of the purported evidence as required by 37 CFR §2.122(e), (ii) much of the purported evidence identified does not constitute "printed materials" within the meaning of the rules of practice before the TTBA, (iii) the purported evidence is hearsay, and therefore inadmissible in the opposition proceedings, and (iv) the purported evidence is not "self-authenticating" and opposer has failed to provide testimony or other independent evidence to authenticate the same.

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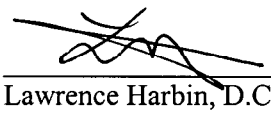
[6] See Interrogatory Answer No. 3(c), Exhibit 4 to applicant's motion to dismiss.

The delay in registration has prejudiced applicant. No useful purpose would be served by permitting opposer to supplement the second Notice of Reliance with a designation of relevance as the Opposition should summarily be dismissed on other grounds.

Respectfully submitted,

Counsel for Applicant
ERICH TARMANN



2/23/2004

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[7] See Interrogatory Answer No. 9(a), Exhibit 4 to applicant's motion to dismiss

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing motion to strike was mailed on this 23 day of February, first-class, postage prepaid to counsel for opposer at the following address:

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Lawrence Harbin