UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: February 13, 2007

Opposition No. 91173983

House of Blues Brands Corp.

v.

Andrea L. Tomlinson

George C. Pologeorgis, Interlocutory Attorney:

The Board instituted this proceeding on November 16, 2006. Answer was due on December 26, 2006. On December 18, 2006, applicant filed a communication with the Board inquiring whether applicant may amend its drawing to delete the design portion of its proposed mark.[1] The Board construes this filing as an implied motion to amend applicant's drawing.

By the proposed amendment applicant seeks to amend the drawing page of her application by deleting the "flaming heart logo" design from the drawing and maintaining only the literal portion of the mark, i.e., the wording "PORN FOR PURITANS."

An amendment to the drawing of a mark may not be made if it materially alters the character of the mark. See Trademark

[1] Applicant's December 18, 2006 filing does not indicate proof of service upon opposer as required by Trademark Rule 2.119. In order to expedite matters, a copy of applicant's December 18, 2006 filing is forwarded to opposer with a copy of the instant order. The parties are reminded of their obligations under Trademark Rule 2.119. Any future filings that do not comply with this rule may not be given consideration by the Board.

Rule 2.72(a)(2). The general test of whether an alteration of the mark is material is whether the mark would have to be republished after the alteration in order to fairly present the mark for purposes of opposition. See *Visa International Service Association v. Life-Code Systems, Inc.*, 220 USPQ 740 (TTAB 1983).

As a general rule, the addition of any element, which would require a further search, would constitute a material alteration. See *In re Pierce Foods Corp.*, 230 USPQ 307 (TTAB 1986). However, deletion of matter from the mark can also result in a material alteration. See *In re Dillard Department Stores, Inc.*, 33 USPQ2d 1052 (Com'r Pat. & Trademarks 1993).

As stated above, applicant seeks to amend her drawing by deleting the design portion of the mark and only maintaining the literal element. The Board finds, however, that such a deletion would be a material alteration because the design element constitutes distinctive matter of applicant's original drawing that would have been searched during the prosecution of applicant's application. Accordingly, applicant's proposed amendment is unacceptable.

In view of the foregoing, applicant's implied motion to amend the drawing in the involved application is hereby denied.

Since applicant's December 18, 2006 filing does not constitute a responsive pleading to opposer's notice of opposition, applicant is technically in default.

Nonetheless, applicant is allowed until **thirty days** from the mailing date of this order to file an answer or otherwise properly respond to the notice of opposition, failing which a notice of default will be issued by the Board.[2]

The Board advises applicant that an answer must comply with Federal Rule of Civil Procedure 8(b). Fed. R. Civ. P. 8(b) provides, in part:

> A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder.

The notice of opposition filed by opposer herein consists of twenty-two numbered paragraphs setting forth the basis of opposer's claim of damage. In accordance with Fed. R. Civ. P.8(b), it is incumbent on applicant to answer the notice of opposition by simply admitting or denying the allegations contained in each paragraph. If applicant lacks sufficient knowledge or information on which to form a

[2] The Board notes opposer’s motion for default judgment filed on February 2, 2007. However, in light of the instant order, opposer’s motion is deemed moot and will be given no further consideration by the Board.

belief as to the truth of any one of the allegations, she should so state and this will have the effect of a denial.

Discovery and trial dates remain as set in the Board's November 16, 2006 institution order.

PRO SE INFORMATION

Applicant is reminded that she will be expected to comply with all applicable rules and Board practices during the remainder of this case. The Trademark Rules of Practice, other federal regulations governing practice before the Patent and Trademark Office, and many of the Federal Rules of Civil Procedure govern the conduct of this cancellation proceeding. Applicant should note that Patent and Trademark Rule 10.14 permits any person or legal entity to represent itself in a Board proceeding, though it is generally advisable for those unfamiliar with the applicable rules to secure the services of an attorney familiar with such matters.

If applicant does not retain counsel, then applicant will have to familiarize herself with the rules governing this proceeding. The Trademark Rules are codified in part two of Title 37 of the Code of Federal Regulations (also referred to as the CFR). The CFR and the Federal Rules of

Civil Procedure, are likely to be found at most law libraries, and may be available at some public libraries. Finally, the Board's manual of procedure will be helpful.

On the World Wide Web, applicant may access most of these materials by logging onto <http://www.uspto.gov/> and making the connection to trademark materials.

Applicant must pay particular attention to Trademark Rule 2.119. That rule requires a party filing any paper with the Board during the course of a proceeding to serve a copy on its adversary, unless the adversary is represented by counsel, in which case, the copy must be served on the adversary's counsel. The party filing the paper must include "proof of service" of the copy. "Proof of service" usually consists of a signed, dated statement attesting to the following matters: (1) the nature of the paper being served; (2) the method of service (e.g., first class mail); (3) the person being served and the address used to effect service; and (4) the date of service.

Also, applicant should note that any paper she is required to file herein must be received by the Patent and Trademark Office by the due date, unless one of the filing procedures set forth in Trademark Rules 2.197 or 2.198 is utilized. These rules are in part two of Title 37 of the previously discussed Code of Federal Regulations.

Files of TTAB proceedings can now be examined using TTAB Vue, accessible at http://ttabvue.uspto.gov. After entering

the 8-digit proceeding number, click on any entry in the prosecution history to view that paper in PDF format.

The first revision of the second edition (March 2004) of the Trademark Trial and Appeal Board Manual of Procedure (TBMP) has been posted on the USPTO web site at www.uspto.gov/web/offices/dcom/ttab/tbmp/ <http://www.uspto.gov/web/offices/dcom/ttab/tbmp/>.