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

Proceeding	91195086
Party	Defendant Sirius XM Radio Inc.
Correspondence Address	ERICA D KLEIN KRAMER LEVIN NAFTALIS AND FRANKEL LLP 1177 AVENUE OF THE AMERICAS NEW YORK, NY 10036 UNITED STATES kltrademark@kramerlevin.com
Submission	Motion for Summary Judgment
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Date	04/01/2011
Attachments	Exhibit B.pdf ( 5 pages )(246414 bytes )

Opposition No. 91195086  
*Ira Marlowe v. Sirius XM Radio Inc.*  
Against U.S. Application Serial No. 77/661,457  
For SKYDOCK

**Exhibit B**

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

IRA MARLOWE )  
)  
Opposer )  
)  
v. ) Opposition No. 91195086  
)  
SIRIUS XM RADIO INC. )  
)  
Applicant )

**DECLARATION OF ERICA D. KLEIN IN SUPPORT OF  
APPLICANT'S MOTION FOR SUMMARY JUDGMENT**

I, Erica D. Klein, under penalties of perjury, declare as follows:

1. I am a partner with the law firm of Kramer Levin Naftalis & Frankel LLP, representing Sirius XM Radio Inc. ("Applicant") in this proceeding. I have reviewed the records and files maintained on behalf of Applicant in this matter, and have personal knowledge of the facts set forth in this declaration, except as otherwise stated. I am competent to testify as to all matters stated.

2. This Declaration is submitted in support of Applicant's Motion for Summary Judgment.

3. On May 28, 2010, Opposer Ira Marlowe ("Opposer"), through his counsel, filed a Notice of Opposition directed against Applicant's Application No. 77/661,457 ("Applicant's Application") to register the SKYDOCK Mark, which covers *satellite radio receivers*.

4. As the basis for the Opposition, Opposer pled U.S. Registration No. 3,779,511 ("Opposer's Registration") for the SKYLINK DIRECT Mark, which covers *an electronic interface for a one-way satellite radio receiver, namely, a portable docking holder that is configured to dock a portable consumer satellite audio programming radio receiver, said docking holder to receive and hold said portable consumer satellite audio programming radio receiver and electronically connect it serially or by radio transmission to a consumer car audio radio tuner for playing said consumer satellite audio programming on said tuner, and excluding two-way satellite communications*, in International Class 9 ("Opposer's Registered Goods"), as well as alleged common law rights in the SKYLINK DIRECT Mark based on use with *vehicle satellite radio audio systems, satellite radio docking stations and receivers and replacement parts for the foregoing* ("Opposer's Common Law Goods" and, collectively with Opposer's Registered Goods, "Opposer's Goods").

5. Applicant filed an Answer to the Notice of Opposition on July 6, 2010 (the "Answer").

6. Opposer and Applicant participated in a discovery conference on August 5, 2010, and Applicant served its Initial Disclosures on Opposer the next day.

7. Applicant did not receive any initial disclosures from Opposer.

8. On October 4, 2010, Applicant served Opposer with Applicant's First Request for Production of Documents and Things (the "Document Requests") and Applicant's First Set of Interrogatories to Opposer (the "Interrogatories" and, collectively with the Document Requests, the "Discovery Requests"), which sought information regarding Opposer's alleged use of the SKYLINK DIRECT Mark in connection with Opposer's Goods, as well as other information regarding Opposer's purported common law rights in the SKYLINK DIRECT Mark.

9. After receiving no response to the Discovery Requests from Opposer within the 30-day period set forth under Fed. R. Civ. P. Rules 33 and 34, on November 15, 2010 Applicant's counsel, Nancy Lapidus of Schultis & Vossler Law Group, PLLC, contacted Opposer regarding the status of Opposer's responses to the Discovery Requests.

10. On November 24, 2010, Opposer produced forty three (43) pages of allegedly responsive documents by facsimile (the "Documents"). After another follow-up communication on November 24, 2011 from Ms. Lapidus regarding Opposer's failure to provide written answers to the Discovery Requests, on November 29, 2010, Opposer provided written responses to Applicant's Discovery Requests (the "Written Responses").

11. There was a change of Applicant's counsel, to the undersigned, in respect of this proceeding, which such change was recorded with the TTAB on January 31, 2011.

12. On January 25, 2011, Applicant sent Opposer a letter regarding the deficiencies in its Documents and Written Responses, and subsequently followed up by telephone.

13. On February 2, Applicant served on Opposer: (i) Applicant's Second Set of Interrogatories to Opposer; (ii) Applicant's Second Request for Production of Documents and Things; and (iii) Applicant's First Request for Admissions to Opposer ("Applicant's 2011 Discovery Requests").

14. Following service of Applicant's 2011 Discovery Requests, Applicant called Opposer to inquire as to the status of any additional discovery and responses to the identified deficiencies in Opposer's Documents and Written Responses.

15. More than 3 weeks later, on February 25, 2011, Opposer returned Applicant's call, and Applicant spoke with Opposer by telephone.

16. While Opposer's focus during the call was primarily directed to seeking payment from Applicant, Opposer noted that he received Applicant's communications and Applicant's 2011 Discovery Requests, acknowledged his obligations in connection with same, and did not raise any objections.

17. On February 17, 2011, Applicant moved to amend its Answer to add counterclaims and affirmative defenses, which such motion is currently pending.

18. Opposer failed to respond to Applicant's deficiency letter, Applicant's 2011 Discovery Requests (for which responses were due on March 9, 2011), or to Applicant's Motion to Amend its Answer to allege fraud and non-use concerning Opposer's Marks. As of the date hereof, Opposer has not served pretrial disclosures, the due date for which was March 19, 2011.

19. I hereby attest to my personal knowledge that attached hereto as **Exhibit B-1** is a true and correct copy of the Statement of Use and supporting specimen submitted by Opposer in Opposer's Application Serial No. 78/306,496 ("Opposer's Application") for the SKYLINK DIRECT Mark on February 23, 2010, which was obtained from the United States Patent and Trademark Office ("PTO") Trademark Applications and Registrations Retrieval ("TARR") records for Opposer's Application.

20. I hereby attest to my personal knowledge that attached hereto as **Exhibit B-2** is a true and correct copy of Opposer's "Amendment" filed on December 14, 2004 in response to the Office Action issued in Opposer's Application (the "Office Action Response"), which was obtained from the PTO TARR records for Opposer's Application.

21. I hereby attest to my personal knowledge that attached hereto as **Exhibit B-3** is a true and correct copy of facsimile pages 008-010, 027-029, 031 from Opposer's Documents which were produced by Opposer in response to Applicant's First Request for Production of Documents and Things.

22. I hereby attest to my personal knowledge that attached hereto as **Exhibit B-4** is a schedule listing third party registrations for marks containing SKY covering devices that receive wireless transmissions (or the like) and accessories therefor in Class 9. I hereby further attest to my personal knowledge that, for each of the cited registrations in the schedule, attached are true and correct copies of the corresponding TESS page, certificate of registration, relevant pages of specimens obtained from the PTO TDR database (where available), and print-outs of webpages showing use of the respective registrants' goods (where available), the foregoing printed on March 29, 30 and 31, 2011.

23. I hereby attest to my personal knowledge that attached hereto as **Exhibit B-5** is a schedule listing third party registrations for marks containing SKYLINK in Class 9. I hereby further attest to my personal knowledge that, for each of the cited registrations in the schedule, also attached are true and correct copies of the corresponding TESS page and certificate of registration, the foregoing printed on March 29, 30 and 31, 2011.

24. I hereby attest to my personal knowledge that attached hereto as **Exhibit B-6** is a schedule listing third party registrations for marks beginning with "i" used to indicate that their products may be used with the IPOD or IPHONE. I hereby further attest to my personal knowledge that, for each of the cited registrations in the schedule, also attached are true and correct copies of the corresponding TESS pages, certificates of registration, relevant pages of specimens obtained from the PTO TDR database (where available), and print-outs of webpages showing use of the respective registrants' goods (where available), the foregoing printed on March 29, 30 and 31, 2011.

25. I hereby attest to my personal knowledge that attached hereto as **Exhibit B-7** are true and correct copies of the TESS pages and certificates of registration or notices of allowance (where applicable) corresponding to the marks listed below, the foregoing printed on March 30 and 31, 2011.

MARK	APP. NO. / REG. NO.	CLASS 9 GOODS
SKYFI	3,780,382	Digital audio radio receivers
SKYKUBE	77/489,925	Satellite radio receiver
SKYBUDS	77/384,993	Antennas, digital audio radio receivers and portable audio earpieces for use with digital audio radio receivers
XMSKYBOX	3,149,163	Satellite radio receivers

26. The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false

statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of her own knowledge are true; and all statements made on information and belief are believed to be true.

Executed on this 1st day of April 2011.

By:



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