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

Proceeding	91270721
Party	Plaintiff Entrepreneurial Ventures Capital Co., L.L.C.
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Submission	Motion to Dismiss - Rule 12(b)
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Date	11/20/2021
Attachments	Response in Opposition.pdf(525364 bytes)

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

In re Application of **APPLE, INC.** **Serial Nos.: 90270683** **Mark: ONE**	:	**Opposition No. 91270721** **RESPONSE IN OPPOSITION TO MOTION TO DISMISS**
ENTREPRENEURIAL VENTURES CAPITAL CO., L.L.C. Opposer, v. **APPLE, INC.,** Applicant.	:	

RESPONSE IN OPPOSITION APPLICANT'S AMENDED NOTICE OF OPPOSITION

Registrant Opposer hereby opposes Applicant's motion, as follows:

A motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of a complaint. In order to withstand such a motion, a complaint need only allege such facts as would, if proved, establish that the plaintiff is entitled to the relief sought, that is, that (1) the plaintiff has an entitlement to a statutory cause of action to bring the proceeding (formerly referred to as "standing"), see TBMP § 309.03(b), and (2) a valid ground exists for denying the registration sought (in the case of an opposition), or for canceling the subject registration (in the case of a cancellation proceeding). TBMP § 503.02

Therefore, a plaintiff served with a motion to dismiss for failure to state a claim upon which relief can be granted need not and should not respond by submitting proofs in support of its complaint. Whether a plaintiff can actually prove its allegations is a matter to be determined not upon

motion to dismiss, but rather at final hearing or upon summary judgment, after the parties have had an opportunity to submit evidence in support of their respective positions. TBMP § 503.02

1. At Page 2, ¶1, Apple immediately asserts a fact-based argument; to wit, that there is a "false premise" that its "ONE" services involves "bibles." This is non-responsive or otherwise not determinative of the question based upon the aforesaid applicable standard of review. Opposer sells physical and digital bibles pursuant to the registered brand "ONE" and Apple's services, as alleged traverse a commercial basis that is likely to confuse Apple's proposed brand with Opposer's registered brand and the respective sources. Indeed, Apple has not and refuses to limit the application claim. The Board must accept all of the Amended Notice of Opposition averments as true.

A. Apple's argument simply remains to be seen, as a matter of fact, as to whether the proposed services, in light of the mark, will be referenced in the relevant channel as "The Apple Picture Thingy with the Word ONE" or simply as "ONE" by name or nickname, but, such as it is pleaded, Opposer's assertion is that the service claimed by Apple is likely to cause confusion, etc., for a service that traverses the same purchasing audience as the purchasers of Opposer's products.

Among other things, Apple is seeking a registration in International Class: 35: "*Retail store and online retail store services featuring ... an electronic publication subscription service...; subscription services, namely, providing subscriptions to text, data, image, audio, video, and multimedia content, provided via the Internet and other electronic and communications networks; subscription services, namely, providing subscriptions to text, data, image, audio, video, and multimedia content, provided via the Internet and other electronic and communications networks, namely, providing bundled ... an electronic publication subscription service...; providing subscriptions to downloadable pre-recorded text, data, image, audio, video, and multimedia content for a fee or pre-paid subscription, via the Internet and other electronic and communications networks; providing an Internet portal allowing users to preview and download electronic books, publications, and other documents as part of a fee or pre-paid subscription*" and in International Class: 42: "*... providing online non-downloadable software for use in connection with accessing, delivering, purchasing, and sharing bundled subscription packages to online digital content and media services comprised of ... an electronic publication subscription service ... via a fee or pre-paid subscription.*"

Apple is simply concluding the fact to be proved at trial without any facts in the record, and none to be provided at this stage of the proceeding.

B. Opposer's products were released almost 15 years ago, and they are cited by *Wikipedia* throughout the world in various languages. Opposer's products have been used as a source work to develop other publication textual framework. To the extent that Apple asserts a technical fact regarding fame that must be additionally pleaded, it is not a fatal requirement and Opposer would amend accordingly. TBMP § 507.01; Fed. R. Civ. P. 15 (leave to amend freely given). However, Opposer's position is that it has satisfied all requirements for the claim to be sustained.

C. Trademark Act § 13(a) provides relief "for any person who believes that he would be damaged by the registration of a mark upon the principal register, including the registration of any mark which would be likely to cause dilution by blurring or dilution by tarnishment under section 1125(c) of this title." TBMP § 303.01. To the extent that there is a minor conformity issue with the count title, it is immaterial and certainly not futile.

WHEREFORE, Registrant Opposer requests that Apple's motion to dismiss be denied in its entirety, or, alternatively, be granted leave to amend as there are no arguments that indicate futility.

November 20, 2021

Respectfully submitted,

/s/Gregg R. Zegarelli/
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CERTIFICATE OF SERVICE

The following person or persons have been served by electronic mail on the date below:

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November 20, 2021

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