

TTAB

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Signed Jill K. O'Hara  
Jill K. O'Hara

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

In re registration of:

Registrant: Rabbit Island, Inc.

Registration No: 2,402,633

Date of Issue: November 7, 2000

Mark: WILD HARE



03-12-2004  
U.S. Patent & TMO/TM Mail Rcpt Dt. #22

Erich Russell, )  
 )  
 ) Petitioner, )  
 )  
 ) v. )  
 )  
 ) Rabbit Island, Inc., )  
 )  
 ) Registrant. )

Cancellation No.

OWEN, WICKERSHAM & ERICKSON  
A PROFESSIONAL CORPORATION  
INTELLECTUAL PROPERTY LAW  
455 MARKET STREET, 19TH FLOOR  
SAN FRANCISCO, CALIFORNIA 94105  
(415) 882-3200

03/17/2004 KGIBBONS 00000103 2402633

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300.00 DP

PETITION FOR CANCELLATION

Petitioner, Erich Russell, a United States citizen, with a mailing address of 260 California Street, Suite 1001, San Francisco, CA 94111, believes that he is and will continue to be damaged by Registration No. 2,402,633, and hereby petitions to cancel same.

To the best of Petitioner's knowledge, the name and address of the current owner of the registration is: Rabbit Island, Inc., PO Box 755, 257 West Broad Street, Eufala, AL 36072.

As grounds for this Petition, it is alleged that:

1. Registrant obtained a registration (Registration No. 2,402,633) for WILD HARE for "beer and/or ale" in International Class 32 on November 11, 2000 based on use of the mark

1 since September 2, 1999.

2 2. Petitioner is engaged in the business of making and selling wine.

3 3. Petitioner has filed an application for the mark WILD HARE for "wine" in Class  
4 33 pursuant to Lanham Act Section 1(b) based on an intent-to-use the mark and has been  
5 assigned application Serial No. 76/499,137.

6 4. Petitioner has received an office action dated September 10, 2003 refusing  
7 registration of its WILD HARE mark (Serial No. 76/499,137) based on Section 2(d) confusing  
8 similarity with Registrant's registration for WILD HARE (Registration No. 2,402,633).

9 5. Petitioner is and will continue to be injured and damaged by the existence of  
10 Registration No. 2,402,633 because said Registration will prevent Petitioner from obtaining its  
11 own registration. Registration No. 2,402,633 permits Registrant to retain the presumption of an  
12 exclusive right to the trademark WILD HARE for "beer and/or ale" in International Class 32, and  
13 thereby casts a cloud upon Petitioner's right to use the mark WILD HARE in the United States,  
14 especially as the registration for WILD HARE for "beer and/or ale" has been cited as a basis for  
15 rejecting Petitioner's application for WILD HARE for "wine" in International Class 33.

16 6. Petitioner believes and therefore alleges that Registrant's mark WILD HARE is not,  
17 and at the time of the application which resulted in Registration No. 2,402,633 was not, in  
18 "lawful" use in interstate commerce. Registrant submitted labels as specimens to demonstrate its  
19 use of the WILD HARE mark in commerce on beer and/or ale. Pursuant to 27 CFR §7.41(a), no  
20 malt beverage can be released for sale or other use until a certificate of label approval (COLA) is  
21 obtained from the Alcohol and Tobacco Tax and Trade Bureau ("TTB"). A search of TTB  
22 records reveals that Registrant never received a COLA for use of a label with the mark WILD  
23 HARE. Failure to obtain a COLA constitutes a *per se* violation of the Federal Alcohol  
24 Administration Act. Thus, Registrant could not have lawfully sold, in interstate commerce, any  
25 beer or ale with the labels provided as specimens, and cannot currently be lawfully selling any  
26 beer or ale in commerce.

27 7. Because "illegal" use of a mark is the same as non-use, Petitioner believes and  
28 therefore alleges that Registrant committed a fraud on the Trademark Office by alleging use of its

1 WILD HARE mark in commerce and that Registrant's WILD HARE mark has become  
2 abandoned on the basis of such non-use.

3 8. Petitioner further believes and therefore alleges that Registrant has statutorily  
4 abandoned its mark by not using it in any manner in interstate commerce for three consecutive  
5 years.

6 9. Petitioner believes and therefore alleges that because it will be harmed as a result  
7 of the Office's finding of likelihood of consumer confusion between the parties' respective marks  
8 pursuant to Section 2(d) and because of Registrant's fraudulently obtained registration and  
9 abandonment of its rights in the mark WILD HARE, Petitioner is entitled to the exclusive right  
10 to use WILD HARE in commerce and the right to registration thereof. If Registrant is permitted  
11 to continue to maintain its invalid registration, it will raise doubts as to Petitioner's right to use  
12 the mark WILD HARE. Said registration would thus cause injury and damage to Petitioner.

13 WHEREFORE, Petitioner prays that Registration No. 2,402,633 for WILD HARE be  
14 canceled and that this Petition for Cancellation be sustained in favor of Petitioner.


15 A duplicate copy of this petition is enclosed herewith along with a check for \$300.00 for  
16 the filing fee.

17 Respectfully submitted,

18 OWEN, WICKERSHAM & ERICKSON, P.C.

19  
20 Dated: March 9, 2004

21 By

  
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26 Attorneys for Petitioner  
27 Erich Russell  
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