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AMERICAN BAR ASSOCIATION

October 22, 2014

Via electronic mail

TMPolicy@uspto.gov

Deborah Cohn

Commissioner for Trademarks

U.S. Patent and Trademark Office

P.O. Box 1451

Alexandria, VA 22313-1451

Re: *Comments on Proposal to Allow Amendments to Identifications of Goods and Services Due to Technology Evolution*

Dear Commissioner Cohn:

I write on behalf of the American Bar Association Section of Intellectual Property Law (“ABA-IPL Section” or “Section”) in response to the United States Patent and Trademark Office’s (“USPTO” or “Office”) *Proposal to Allow Amendments to Identifications of Goods and Services Due to Technology Evolution* (the “Proposal”). The American Bar Association is the largest voluntary professional association in the world, and the ABA-IPL Section is the largest intellectual property law association, with nearly 23,000 members. The views expressed in this letter are those of the Section. These comments have not been approved by the ABA House of Delegates or Board of Governors and should not be considered as views of the American Bar Association.

The Section appreciates the Office’s inquiry regarding possible changes to USPTO policies regarding pre- and post-registration amendments, and specifically, its invitation for responses to the items set forth in the Proposal.

The Section provided comments last year in response to the Office’s *Request for Comments: Post Registration Amendments to Identifications of Goods and Services Due to Technology Evolution* (“*Request for Comments*”). Several of the issues and questions raised by the current Proposal were addressed by the Section at that time, and we take this opportunity to reaffirm the positions and opinions presented in the Section’s letter of November 27, 2013 (the “Letter”) (including those related to the availability of both pre- and post- registration amendments, the need for public notice and opportunity to comment, and the accuracy of dates of first use). A copy of the Letter is attached hereto for reference as Exhibit 1.

The Letter was supported by results of a survey taken of ABA-IPL members directed toward the issues in the Request for Comments. Where applicable to support the Section's response in this current letter, the Section again makes reference to that survey. Copies of both the survey results and a summary thereof are appended to the Letter (Exhibit A) as attachments.

While similar in scope, the current Proposal sets forth a more detailed and focused amendment process and procedure than that initially contemplated in the previous Request for Comments. As such, the Section is limiting its response herein to only those new issues presented by the Proposal not previously addressed in the Letter.

1. Re: the Office's proposed process for amending identifications of goods/services based on changes in the manner or medium by which products and services are offered for sale and provided to consumers due to evolving technology.

The Section respectfully disagrees with the Office's proposed amendment policy, whereby owners of registrations and pending applications seeking such amendments would be required to not only submit a Section 7 request for amendment (for registered marks), but would also be required to petition the Director requesting a waiver of the applicable "scope" rule (Trademark Rule 2.71(a), pre-registration, or Rule 2.173(e), post-registration) pursuant to Trademark Rule 2.146 and make a showing that an "extraordinary situation" exists. This would require declarations by the petitioner that the mark in question is no longer used in connection with the original goods/services, and that the petitioner is using the mark in connection with goods/services reflecting evolved technology.

As supported by the survey results, the Section generally favors a change to the current amendment policy to accommodate evolving technology, so long as the subject matter of the goods/services is unchanged and the change in medium of the good/services due to evolving technology does not materially expand the scope of the identification of the goods/services in the registration or application.¹ Accordingly, the Section views the amendment process set forth in the Proposal as more complicated and restrictive than is necessary to accomplish the goals of a broader amendment policy aimed at accommodating new technology.

The Section is in favor of allowing the amendments contemplated herein based on the premise that such amendments are necessarily non-material and/or do not change the scope of the application or registration at issue. If the amendment is neither material nor changes the scope, it follows that a waiver of the applicable "scope" rule and a showing of an "extraordinary situation" is likely unnecessary.

¹ 91% of survey respondents were in favor of a broader post-registration amendment policy. Of those in favor, 13% responded that, so long as the subject matter of the respective product or service is unchanged, the trademark owner should not be required to file a new separate application; 28% responded that a mere change in medium of delivery of the good/service due to evolving technology does not materially expand the scope of the identification of the goods/services in the registration; and 50% agreed with both of these statements.

2. Re: the Proposal’s requirement that a trademark owner show that an “extraordinary situation” exists.

The Section does not favor requiring owners of registrations and applications to declare that their marks are no longer in use in connection with the original goods/services (in addition to declaring that the marks are in use in connection with the evolved technology). Similar to our initial point, if an amendment based on evolving technology is not considered material, then arguing that an “extraordinary situation” exists seems unnecessary and overly burdensome. Additionally, Owners that use their marks in connection with both older and evolved technologies would be prejudiced by the Office’s proposed policy. For example, consider two hypothetical trademark owners: (i) the owner of a mark originally registered in connection with vinyl records that ceases use of the mark for vinyl records and commences use of the mark for MP3s (“Owner 1”); and (ii) the owner of a mark originally registered in connection with vinyl records may currently be using the mark in connection with respect to MP3s, while still using the mark in connection with vinyl records (“Owner 2”). Owner 1 would be permitted to amend its registration to include “MP3s” and claim priority going back to its priority date for vinyl records. But Owner 2 would be prejudiced by its decision to continue selling vinyl records: it would be limited to filing a new application for its mark for MP3s and could not claim an earlier priority date applicable to its prior registration for vinyl records.

While the Section favors a change to the current amendment policy, we believe the new process and requirements set forth in the Proposal are too restrictive.

3. Re: the Office’s proposal that petitioners requesting amendments due to evolving technology must abandon any “incontestable” status under § 15 of the Trademark Act, 15 U.S.C. § 1065, as to the evolved goods/services, and must declare that they will not file (or refile, if applicable) an affidavit or declaration of incontestability under § 15 as to the evolved goods/services for a period of five years from the date of amendment.

The Section generally supports the Office’s proposal to require owners of registrations to abandon incontestable status under Section 15 as to the evolved goods/services. However, the Section respectfully disagrees with the Office’s proposal that owners be prohibited from filing an affidavit or declaration of incontestability until five years after the date of the amendment. If a trademark owner can show at least five years of continuous use of the mark in connection with the goods/services at issue in the amendment (e.g. the evolved technology), the Section sees no reason why owners should not be able to immediately claim incontestable status under Section 15 as to those evolved goods/services, if they meet the other relevant requirements under the statute.

Sixty-one percent (61%) of survey respondents concurred with the proposition that, if the essential nature of the good or service has not changed, the medium by which the public receives the good or service should not affect the timing of its entry into the marketplace. Accordingly, the Section noted in its previous letter that it does not believe amendments based on evolved technology should necessitate a change in registrants’ dates of first use. The Section believes a requirement that owners be automatically prohibited from claiming incontestable status for five

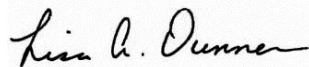
years from the date of the amendment would be inconsistent with a rule allowing registrants' to keep their original dates of first use.

Moreover, owners who obtain amendments based on evolved technology would necessarily have to declare that their marks have been in continuous use in commerce for a period of five years in connection with the evolved goods/services in order to claim incontestable status, the same as any other owner. If the amendments are justified on the basis that they do not materially expand the scope of the identification of the goods/services in the registration, then owners should not automatically be barred from claiming incontestable status until five years from the date of the amendment.² Alternatively, if the amendments are ultimately allowed only for goods and services that specify a particular medium, such as sound recordings or software (as favored by 55% of survey respondents) and the amended goods/services retain the same inherent and identifiable character (as supported by relevant case law³), then it is the Section's view that the benefit to owners in being able to immediately claim incontestable status outweighs any potential harm to third parties. For example, if the mark used in connection with vinyl records (see above) has been registered for 50 years, and Owner 2 is now requesting amendment of the registration to reflect the fact that the mark has been used in connection with MP3s for the past 10 years, there would seem to be no reason to require the owner to wait an additional five years before allowing the owner to claim incontestable status with regard to the evolved goods.

Conclusion

The ABA-IPL Section commends the Office for considering these issues and appreciates the opportunity to offer these comments.

Very truly yours,



Lisa A. Dunner
Section Chair
American Bar Association
Section of Intellectual Property Law

² 78% of survey respondents indicated that they do not consider a mere change in the medium of delivery of a good or service due to evolving technology to be a material expansion of the scope of the identification of goods and services.

³ See, e.g., *Ralston Purina Co. v. On-Cor Frozen Foods, Inc.*, 746 F.2d 801, 805 (Fed. Cir. 1984); *E.I. du Pont de Nemours & Co. v. G.C. Murphy Co.*, 199 U.S.P.Q. 807, 813 (T.T.A.B. 1978); see also *Societe de Developments et d'Innovations v. Int'l Yogurt Co.*, 662 F. Supp. 839, 852 (D. Or. 1987).

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November 27, 2013

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U.S. Patent and Trademark Office
P.O. Box 1451
Alexandria, VA 22313-1451

Attn: Cynthia G. Lynch, Administrator for Trademark Policy & Procedure
USPTO

Re: Comments on *Post Registration Amendments to Identifications of
Goods and Services Due to Technology Evolution*

Dear Ms. Lynch:

I write on behalf of the American Bar Association Section of Intellectual Property Law (“ABA IPL Section” or “Section”) in response to the United States Patent and Trademark Office’s *Request for Comments: Post Registration Amendments to Identifications of Goods and Services Due to Technology Evolution*. The American Bar Association is the largest voluntary professional association in the world, and the ABA IPL Section is the largest intellectual property law association, with over 25,000 members. The views expressed in this letter are those of the Section. These Comments have not been approved by the ABA House of Delegates or Board of Governors and should not be considered as views of the American Bar Association.

The Section appreciates the Office’s inquiry regarding possible changes to the Office’s policies regarding post-registration amendments, and specifically, its invitation for responses to the questions set forth in the Request for Comments.

In connection with its response to the Request for Comments, the ABA IPL Section surveyed its members about (i) their current practices in trademark prosecution, clearance, and maintenance, (ii) whether they favor a broader post-registration amendment policy as described in the Request for Comments, (iii) whether such a change should be permitted in pending applications for registration as well as existing registrations; (iv) how such a change would affect dates of first use; and (v) whether public notice should be required. For a *Summary of the Survey Results*, see Attachment A; for the actual *Survey Results*, see Attachment B.

Responses to the Office's Questions

1. Please identify your relevant background on this issue, including whether you are a trademark owner or practitioner, and the general size and nature of your business or trademark practice, including the number of trademark applications and registrations your business has, or your practice handles.

The Section's membership comprises attorneys in a broad range of trademark practices. The majority of the 206 respondents to the survey referenced above are in private practice at law firms consisting of two or more attorneys (69%), but the respondents also included a significant number of solo practitioners (18%), in-house counsel for corporations or other organizations (9%), attorneys in academia (2%), and government attorneys (1%). 64% of survey respondents dedicate at least a quarter of their practice to trademark clearance, prosecution, and maintenance, and 31% of respondents dedicate more than half of their practice to trademark clearance, prosecution, and maintenance.

Over 70% of survey respondents indicated that their law practice presently handles (or their company owns) more than 100 trademark applications and registrations, with 35% indicating that they handle/own over 1000 trademark applications and registrations.

2. Do you think the USPTO should allow amendments to identifications of goods/services in registrations based on changes in the manner or medium by which products and services are offered for sale and provided to consumers?

The Section's view is that the USPTO should permit such amendments on the grounds that mere changes in medium do not change the essential nature of the goods or services and do not affect the continuity of the mark in the minds of consumers. This conclusion is borne out by the fact that 84% of survey respondents favor some form of change to the USPTO's current post-registration amendment policy.

More than half (55%) of survey respondents favor limiting the expansion to only goods and services that specify a particular medium, such as sound recordings or software. Of that group, more than half would further limit the expansion to allow such changes only to accommodate new technology that has evolved since the registration was originally granted. However, nearly a third (31%) of survey respondents indicated that they would favor a broader change in USPTO policy to permit post-registration amendments as long as the amendments do not change the essential nature of the goods and services.

The Section also notes that the proposed change would merely build on existing case law, which has allowed post-registration amendments where the amended goods and services retained the same "inherent and identifiable character." *See, e.g., Ralston Purina Co. v. On-Cor Frozen Foods, Inc.*, 746 F.2d 801, 805 (Fed. Cir. 1984); *E.I. du Pont de Nemours & Co. v. G.C. Murphy Co.*, 199 U.S.P.Q. 807, 813 (T.T.A.B. 1978); *see also Societe de Developments et d'Innovations v. Int'l Yogurt Co.*, 662 F. Supp. 839, 852 (D. Or. 1987).

3. If such amendments are permitted, should they only be allowed post registration to account for changes in technology following registration, or should similar amendments be permitted in applications prior to registration (see 37 C.F.R. §2.71(a), stating that prior to registration, an applicant may clarify or limit, but not broaden, the identification)?

If the USPTO decides to permit such amendments for existing registrations, the Section would favor allowing similar amendments to pending applications if the amendments are necessitated by changes in technology occurring during the pendency of the application. If the USPTO were to bar such amendments to pending applications while allowing them for registrations, the impact on applicants could be prejudicial. 52% of survey respondents support the view that the USPTO should permit amendments to both existing registrations and pending applications.

With respect to amendments that are not necessitated by changes in technology during the pendency of an application, the Section sees no reason that the proposed change in post-registration amendments would necessitate a change in USPTO policy for pending applications. Current USPTO policy permits changes to clarify identifications of goods and services *See* Trademark Rule 2.71(a), 37 C.F.R. § 2.71(a); Trademark Manual of Examining Procedure § 1402.06 *et seq.* Similarly, the USPTO Trademark Manual of Acceptable Identifications of Goods and Services includes several broad identifications of goods, such as “musical recordings,” that do not require applicants to limit their protection to a particular medium.

4. What type of showing should be required for such amendments? Should a special process be required to file such amendments, apart from a request for amendment under §7?

Only 18% of survey respondents consider the current procedure for Section 7 amendments sufficient with regard to public notice. 42% of respondents favor a notice requirement, and 44% responded that such amendments should require republication and an opportunity for public comment. However, the Section notes that a republication requirement potentially could create an inconsistency in USPTO Rules, which generally do not require republication for amendments that are considered immaterial.

5. Should such amendments be limited to certain goods, services or fields (such as computer software, music, etc.), and if so, how should the determination be made as to which goods, services or fields?

As indicated above, 55% of survey respondents favor limiting the expansion to only goods and services that specify a particular medium, such as sound recordings or software. Of that group, more than half would further limit the expansion to allow such

changes only to accommodate new technology that has evolved since the registration was originally granted.

However, nearly a third (31%) of survey respondents indicated that they would favor a broader change in USPTO policy to permit post-registration amendments as long as the amendments do not change the essential nature of the goods and services.

6. Should a distinction be made between products that have been phased out (such as eight-track tapes), as opposed to products for which the technology is evolving (such as on-line magazines), or should amendments be permitted for both categories of products?

The Section's view is that it would be impractical to require USPTO examiners to determine whether a given technology has been phased out in a particular field. Such a requirement potentially could require a level of expertise that would far exceed the scope of *ex parte* examination.

7. Do you believe the scope of protection in an identification of goods/services is expanded if an amendment is allowed to alter the medium of the goods/services?

The Section's view is that a mere change in medium due to evolving technology does not expand the identification of goods and services. 78% of survey respondents indicated that they do not consider a mere change in the medium of delivery of a good or service due to evolving technology to be a material expansion of the scope of the identification of goods and services.

8. Would the original dates of use remain accurate if such amendments are permitted?

The Section responds that if the essential nature of the good or service has not changed, the medium by which the public receives the good or service should not affect the timing of its entry into the marketplace. The Section therefore does not believe the proposed amendment would necessitate a change in registrants' dates of first use. 61% of survey respondents concurred with this view.

9. What would the impact of such amendments be on the public policy objective of ensuring notice of the coverage afforded under a registration?

The Section's view is that concerns regarding public notice do not outweigh the potential benefits of the proposed changes to trademark owners, who otherwise may be forced to surrender their trademark registrations unnecessarily. If the USPTO determines that public notice is required, it may be accomplished through publication in the Official Gazette. Such re-publication is already required for other types of Section 7 amendments. 42% of survey respondents expressed the opinion that the proposed amendments to identifications of goods and services should require some form of public notice, and 44%

of respondents would favor more specifically a requirement for re-publication and an opportunity for the public to comment.

10. Please provide any additional comments you may have.

The Section encourages the USPTO to undertake the proposed amendment. The Section also applauds the USPTO's efforts to craft identifications of goods and services that are not unduly limited in scope. The Section encourages the USPTO to be cognizant of the potential for emerging technologies when creating / accepting additional entries to the Trademark Manual of Acceptable Identifications of Goods and Services.

Conclusion

The ABA IPL Section commends the Office for considering these issues and appreciates the opportunity to offer these comments.

Very truly yours,



Robert O. Lindefjeld
Section Chair
American Bar Association
Section of Intellectual Property Law

Attachment A

Summary of the Survey sent to the entire ABA-IPL Section

1. We received 206 responses; of those responding 69% worked in a firm of 2 or more people, 18% were solo attorneys, 9% were in house counsel, 2% in academia, and 1% were government lawyers.
2. Of those who responded, 36% dedicate less than 25% of their time focused on trademarks, 33% spend from 25-50% of their time on trademarks, 31% spent more than half of their work time focused on trademarks.
3. Of those who responded, 36% manage from 100-1000 trademark applications annually, 35% handle over 1000, 10% handle from 11-50, 8% from 51-100, and 8% handled fewer than 10 applications.
4. In response to the question: would you generally be in favor of a USPTO policy to permit post-registration amendments to the identification of goods and services listed?
 - a. 38% said yes, but only to the extent that the change is merely a change in medium (for goods and services that require a medium, such as sound recordings and software), and only if the change is directly the result of new technology that has evolved since the initial registration.
 - b. 31% said yes, so long as the amendment does not change the essential nature of the goods or services.
 - c. 17% said yes, but only to allow for narrow amendments to goods and services that specify a particular medium, such as sound recordings or software.
 - d. 11% said yes, but only if a change in classification is not required.
 - e. 16% said no, I am not in favor of expanding the scope of the post-registration amendment process.
5. When asked, why are you in favor of broader post-registration amendment policy?
 - a. 13% said So long as the subject matter of the respective product or service is unchanged, the trademark owner should not be required to file a new separate application.
 - b. 28% said, a mere change in medium of delivery of the good/service due to evolving technology does not materially expand the scope of the identification of the goods/services in the registration.
 - c. 50% said both of the above answers (a-b)
 - d. 15% said they were not in favor
6. When asked, why are you NOT in favor of broader post-registration amendment policy?

- a. 18% said any change to the registration beyond a restriction of the identification of goods/services is an impermissible expansion of the scope of the registration and should require republication.
 - b. 13% said technology is and always been evolving and does not create a material need to change the USPTO's current policy.
 - c. 16% said both of the above answers (a-b)
 - d. 61% said they were in favor.
7. When asked, if broader amendments to registrations are permitted, will the original date(s) of use remain accurate?
- a. 61% said yes, because if the essential nature of the good/service has not changed, the medium by which the public receives the good/service should not affect the timing of its entry into the marketplace.
 - b. 28% said no, new dates of first use should be submitted per new medium being introduced by the amendment.
 - c. 13% said no, if the amendment requires a change in the classification of the good/service.
8. When asked, should the USPTO expand its post-registration amendment policy, what processes, if any, should be put in place?
- a. 52% said amendments to the manner or medium by which products or services are offered or delivered to customers should be permitted both post-registration, and during the application process prior to registration.
 - b. 42% said such amendments should require some form of public notice.
 - c. 44% said such amendments should require republication and opportunity by the public to comment.
 - d. 18% said the current process for amendments under §7(e) of the Trademark Act should suffice.

Respectfully Submitted,

/Francine D. Ward/

Francine D. Ward, Esq.
Chair, ABA-IPL Ex Parte Trademark Committee 2013-2014

Attachment B - SURVEY RESULTS

1. Please select one that applies

#	Answer	Bar	Response	%
1	I am employed as in-house counsel for a corporation or other organization	0.092233	19	9%
2	I work in a law firm of 2+ attorneys	0.694175	143	69%
3	I am a solo attorney	0.179612	37	18%
4	I work in academia	0.019417	4	2%
5	I am employed by the government	0.014563	3	1%
	Total		206	

2. What is the general size of the organization for which you work?

#	Answer	Bar	Response	%
1	1-10 employees	0.281553	58	28%
2	11-49 employees	0.18932	39	19%
3	51-100 employees	0.116505	24	12%
4	101-500 employees	0.169903	35	17%
5	501-1,000 employees	0.082524	17	8%
6	Over 1,000 employees	0.160194	33	16%
	Total		206	100%

3. Approximately how much of your individual practice is dedicated to trademark clearance, prosecution or maintenance?

#	Answer	Bar	Response	%
1	Less than 25%	0.357143	70	36%
2	Between 25% and 50%	0.331633	65	33%
3	Greater than 50%	0.311224	61	31%
	Total		196	100%

4. Approximately how much of your firm's or company's practice is dedicated to trademark clearance, prosecution or maintenance?

#	Answer	Bar	Response	%
1	Less than 25%	0.683417	136	68%
2	Between 25% and 50%	0.221106	44	22%
3	Greater than 50%	0.070352	14	7%
4	Not applicable	0.025126	5	3%
	Total		199	100%

5. Approximately how many trademark applications and registrations does your company presently own, or does your law practice presently handle?

#	Answer	Bar	Response	%
1	1-10	0.080808	16	8%
2	11-50	0.10101	20	10%
3	51-100	0.075758	15	8%
4	100-1000	0.363636	72	36%
5	Over 1000	0.353535	70	35%
6	Not applicable	0.025253	5	3%
	Total		198	100%

6. Would you generally be in favor of a USPTO policy to permit post-registration amendments to the identification of goods and services listed?

#	Answer	Bar	Response	%
1	Yes, so long as the amendment does not change the essential nature of the goods o	0.310881	60	31%
2	Yes, but only to allow for narrow amendments to goods and services that specify a	0.165803	32	17%
3	Yes, but only to the extent that the change is merely a change in medium (as conte	0.378238	73	38%
4	Yes, but only if a change in classification is not required.	0.11399	22	11%
5	No, I am not in favor of expanding the scope of the post-registration amendment p	0.15544	30	16%
6	Additional Comments	0.093264	18	9%

7. Why are you in favor of broader post-registration amendment policy?

#	Answer	Bar	Response	%
1	So long as the subject matter of the respective product or service is unchanged, the	0.129534	25	13%
2	A mere change in medium of delivery of the good/service due to evolving technolo	0.279793	54	28%
3	BOTH	0.497409	96	50%
4	Other	0.031088	6	3%
5	I am not in favor of a broader post-registration amendment policy.	0.150259	29	15%
6	Additional Comments	0.036269	7	4%

8. Why might you be against a broader post-registration amendment policy?

#	Answer	Bar	Response	%
1	Any change to the registration beyond a restriction of the identification of goods/s	0.175532	33	18%
2	Technology is and always been evolving and does not create a material need to cha	0.12766	24	13%
3	BOTH	0.164894	31	16%
4	I am in favor of a broader post-registration amendment policy.	0.606383	114	61%
5	Additional Comments	0.079787	15	8%

9. If broader amendments to registrations are permitted, will the original date(s) of use remain accurate?

#	Answer	Bar	Response	%
1	Yes, because if the essential nature of the good/service has not changed, the medi	0.610526	116	61%
2	No, new dates of first use should be submitted per new medium being introduced	0.278947	53	28%
3	No, if the amendment requires a change in the classification of the good/service.	0.126316	24	13%
4	Additional Comments	0.1	19	10%

10. Should the USPTO expand its post-registration amendment policy, what processes, if any, should be put in place? [Choose all that apply]

#	Answer	Bar	Response	%
1	Amendments to the manner or medium by which products or services are offered	0.518519	98	52%
2	Such amendments should require some form of public notice.	0.417989	79	42%
3	Such amendments should require republication and opportunity by the public to co	0.444444	84	44%
4	The current process for amendments under §7(e) of the Trademark Act should suff	0.179894	34	18%
5	Additional Comments	0.068783	13	7%