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UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

HRW

Opposition No. 96,338

Rose Marie Raccioppi dba
Apogee Learning

v.

Apogee, Inc.

Before Sams, Rice and Seeherman, Administrative Trademark
Judges.

By the Board:

The Board, in its order of December 5, 1997, granted applicant's motion to amend, and allowed applicant time to file the requisite fee for the counterclaim therein. Applicant has since filed the fee and accordingly the amended answer has been made of record. Opposer is allowed until forty days from the date hereof to file its answer to the counterclaim.

Proceedings were otherwise fully suspended until applicant's copending motion to strike had been decided by the Board. In this motion, applicant seeks to strike paragraphs 4-8, and accompanying exhibits 3-8, of the declaration of counsel Stephen Baker, which was submitted in connection with opposer's motion for summary judgment.

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Applicant challenges this evidence on the grounds that the declaration is not made on personal knowledge as required by FRCP 56(e) and consists of self-serving and unsupported opinion and speculation and that the attached exhibits are inadmissible for various reasons, including being irrelevant, hearsay, prejudicial, not based on personal knowledge, in violation of the best evidence rule and not authenticated.

In the declaration, Stephen Baker states that the documentary evidence submitted therewith is for purposes of demonstrating that the services of the parties, as identified, are either overlapping or substantially related. The documents consist of copies of pages from the yellow or white pages of named phone directories (Exhibits 3-5); printouts from the U. S. Patent and Trademark Office Trademark Reporting and Monitoring System (the file status and location system known as TRAM) with respect to third-party registrations and pending applications and copies of selected pages from the Official Gazette of the U.S. Patent and Trademark Office (Exhibit 6); printouts of articles published on the Internet with the access information provided (Exhibit 7); and copies of portions of applicant's 10-K form filed with the Securities and Exchange Commission

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(Exhibit 8).¹ Mr. Baker has included his comments with respect to these documents in the declaration.

Opposer's initial response to the motion to strike is that such a motion does not constitute a proper response to opposer's motion for summary judgment within the time set therefor and thus the Board should proceed with a decision on opposer's motion. In view, however, of applicant's concurrently filed motion to suspend the time to file its response to the motion for summary judgment until the motion to strike is decided, we find it appropriate to first consider applicant's motion to strike.

Opposer has also responded substantively to the motion to strike, arguing that the Baker declaration and the attached documents are analogous to a notice of reliance and the exhibits are admissible in the same way that printed publications and official records are admissible under Rule 2.122(e). The comments made by Mr. Baker in the declaration are said to be the equivalent of the statement required in Rule 2.122(e) as to the relevance of the material offered.

A party may support its motion for summary judgment by submitting and indicating its reliance upon documents which qualify as being admissible evidence under Trademark Rule 2.122(e). See TBMP § 528.05(a). By their qualification as printed publications or official records under Trademark

¹ Opposer later supplemented this exhibit with a complete copy of

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Rule 2.122(e),² the non-moving party will be able to independently verify the authenticity of the documents; no further evidence of authenticity is required as a condition to the admissibility of these documents.

It is not mandatory, however, that any or all exhibits submitted in connection with a motion for summary judgment be self-authenticating and thus qualify as being admissible under Trademark Rule 2.122(e). Rather, documents and other exhibits which are not self-authenticating may be submitted in connection with a summary judgment motion, pursuant to the provisions of Rule 56(e). To be admissible under Rule 56(e), such documents and/or exhibits must be authenticated by and attached to an affidavit (or declaration in a Board proceeding) complying with the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence. Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2722 (2nd ed.

the 10-K report.

² Trademark Rule 2.122(e) provides, in relevant part, that:

Printed publications, such as books and periodicals, available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant under an issue in a proceeding, and official records, if the publication or official record is competent evidence and relevant to an issue, may be introduced in evidence by filing a notice of reliance on the material being offered. The notice shall specify the printed publication (including information sufficient to identify the source and date of the publication) or the official record and the pages to be read; indicate generally the relevance of the material being offered; and be accompanied by the official record or a copy thereof whose authenticity is established under the Federal Rules

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1983). The requirement of authentication as a condition precedent to the admissibility of evidence is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims. Fed. R. Evid. 901. Thus, in the same manner that depositions may be used during the testimony period to introduce documents which are not self-authenticating, affidavits or declarations may be used to introduce documents in support of a motion for summary judgment, so long as the declarant has personal knowledge of the source thereof.

Insofar as Exhibits 3-5 of Mr. Baker's declaration are concerned, telephone directories clearly qualify as printed publications in general circulation. Copies of the portions being relied upon have been submitted, as well as sufficient information to identify the source and date thereof. Thus, these exhibits are admissible under Trademark Rule 2.122(e). Similarly, Exhibit 6, in part, consists of copies of portions of the U.S. Patent and Trademark Office Official Gazette, which qualifies as a printed publication available in libraries.

In addition, applicant's 10-K form (Exhibit 8), of which opposer has now submitted a complete certified copy, qualifies as an official record of the Securities and Exchange Commission.

of Evidence, or by the printed publication or a copy of the

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The remainder of Exhibit 6, however, consists of printouts from the Office's TRAM system. Although the TRAM system is an official record, the printouts therefrom submitted by opposer are incomplete. Only soft copies of the registrations, or the complete electronic equivalents thereof obtained from the Office automated systems, are sufficient for purposes of making third-party registrations of record. See *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994); *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992); and TBMP §§ 528.05(d) and 703.02(b). Third-party applications may be made of record in a similar manner, or by submitting copies of pages from the Official Gazette in which they have been published. The incomplete excerpts of registrations and applications taken by opposer from the Office TRAM system, with only partial listings of the services covered thereby, cannot serve to make the registrations and applications of record, nor can they serve the purpose for which opposer is seeking to introduce this evidence, i.e., to demonstrate the interrelationship of the involved services. Accordingly, applicant's motion to strike is granted with respect to the portion of Exhibit 6 containing printouts from the Office TRAM system.

As to the printouts from the Internet (Exhibit 7) opposer has included access information with respect to the

relevant portion thereof.

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publication of this material on the Web (the Web site address), but there is no identification of a permanent source for the articles, except for the reprint of an article which originally appeared in the Australian Journal of Psychology. Thus, contrary to opposer's arguments, the printouts (except for one) cannot be considered the equivalent of printouts from a Lexis-Nexis search, where the printouts are electronically generated versions of the printed publications and permanent sources are identified. See *Weyerhaeuser Co. v. Katz*, supra. The element of self-authentication which is essential to qualification under Rule 2.122(e) cannot be presumed to be capable of being satisfied by Internet printouts. Instead these printouts must be viewed simply as information available to the general public at the time opposer's counsel accessed the Internet. In view of the recognized transitory nature of Internet postings, the information posted may be modified or deleted at a later date without notice, and thus is not "subject to the safeguard that the party against whom the evidence is offered is readily able to corroborate or refute the authenticity of what is proffered." *Id.* at 1232.

Thus, the Board must determine, as a question of first impression, whether printouts of articles downloaded from the Internet, which have been introduced by means of a declaration of the person who accessed this information on

the Internet, constitute admissible evidence for purposes of summary judgment.

Looking to the treatment by the federal courts in trademark and unfair competition cases of information accessed on the Internet, we find that information obtained in this manner has been specifically held admissible in several cases, although with varying amounts of probative value being given thereto. In *Mid City Bowling Lanes & Sports Palace Inc. v. Don Carter's All Star Lanes-Sunrise Ltd.*, C.A. No. 96-643 (E.D. La. Mar. 12, 1998), 1998 U.S. Dist. LEXIS 3297, the court denied plaintiff's motion in limine to prohibit defendant's introduction into evidence of information obtained from Internet sites on the basis that it was inadmissible hearsay. While plaintiff argued that Web site advertisements should be prohibited due to the lack of testimony regarding the authenticity of the information, the court found the advertisements admissible as evidence of the purchasing public's perception of a mark. The court held that Internet listings fell within the same category as direct testimony of consumers, consumer surveys, trade journals, dictionary listings, newspapers and other publications in showing purchaser understanding of a term and whether this term had achieved trademark status.

In a similar vein, in *General Cigar Co., Inc. v. G.D.M. Inc.*, 45 USPQ2d 1481 (S.D.N.Y. 1997), the district court

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allowed the introduction of a printout from an Internet dictionary listing as being relevant to the meaning of the Taino term "cojiba", although noting that this could not be relied upon as evidence of knowledge of the Taino language by U.S. purchasers of COHIBA cigars. The same district court, in *Trustees of Columbia University in the City of New York v. Columbia/HCA Healthcare Corp.*, 964 F.Supp. 733, 43 USPQ2d 1083 (S.D.N.Y. 1997), allowed the introduction of a survey conducted on the Internet as evidence of some actual confusion with respect to the name "Columbia", but stated at the same time that the survey was entitled to little weight in that small numbers of people were actually involved and the trustworthiness of the survey method was questionable.

In *Playtex Products Inc. v. Gerber Products Co.*, 981 F. Supp. 827, 44 USPQ2d 1797 (S.D.N.Y. 1997), the court, appearing to become even more receptive to information obtained on the Internet, allowed Internet searches as evidence in support of defendant's defense that its advertising claims were not false. The court specifically referred to concerns voiced by consumers on the Internet which concurred with the claims being asserted by defendant in its advertisements. In *Harley-Davidson Motor Co. v. Iron Eagle of Central Florida, Inc.*, 973 F.Supp. 1421, 1423 (M.D.Fla. 1997), Internet searches were taken into

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consideration as support for the defense that plaintiff's policing of its marks had not been totally effective.

Thus, although we have found but a limited number of cases addressing this issue, the general trend appears to be to admit information obtained from the Internet into evidence, without requiring further authentication, but at the same time to carefully evaluate the probative weight to be given to this evidence.

Here the declaration of Mr. Baker states that the articles set forth in the printouts of Exhibit 7 were published on the Internet and were accessed by the declarant at the Internet address included on the printouts. The source of the information is within the personal knowledge of the declarant Baker and, thus, it has been adequately shown that Exhibit 7 is what opposer claims it to be, i.e., printouts of information accessed at specified Internet addresses. We find this sufficient to hold the proffered printouts admissible as evidence in support of opposer's motion for summary judgment. The declarant is not required to have personal knowledge of the information set forth in these printouts. He obviously does not have personal knowledge of these matters. Instead, the reliability of the information becomes a matter of the weight or probative value to be given to the proffered evidence.

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Now that the issues of self-authentication or the need for personal knowledge of the content of the documents have been laid to rest, we turn to the purely substantive objections which have been raised to this documentary evidence, and to the comments made with respect thereto by Mr. Baker in his declaration. We find applicant's major contentions are that the documentary evidence in general consists of hearsay, is irrelevant, or is prejudicial to applicant and that Mr. Baker's comments are self-serving and opinionative.

The documentary evidence introduced in Exhibits 3-5, i.e., copies of yellow and white pages from phone directories containing advertisements and listings for both educational and psychiatric and psychological services are being relied upon by opposer to demonstrate the range of services offered by the same provider. Opposer is attempting to introduce this information, not to prove the truth of the matter set forth in the specific advertisements, but rather for what these documents show on their face, i.e., the types of services advertised as being provided by persons in the mental health, self-help and learning enhancement fields. Accordingly, these documents cannot be deemed inadmissible hearsay or prejudicial to applicant. Clearly they are not irrelevant, in view of the nature of the services involved herein. The published

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applications of third parties (Exhibit 6) are being relied upon to show that the third parties have each applied to register their marks for these various services and applicant's objections thereto are similarly overruled. See *in re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

In Exhibit 7 opposer is introducing printouts of articles published on the Internet. The articles are also being relied upon, not to prove the truth of the statements made in these articles, but simply to prove that learning disabilities and other educational problems fall within the scope of matters discussed by psychologists and psychiatrists. As such, the articles are being introduced by opposer for what they show on their face and do not constitute inadmissible hearsay. As with all of these documents, the probative weight to be given thereto, as well as to Mr. Baker's comments, remains a matter to be determined upon consideration of the motion for summary judgment on its merits. There is no valid basis for striking the documentary evidence or the comments at this point.

The final document under question is applicant's 10-K form filed with the Securities and Exchange Commission. We agree with opposer that applicant's description of its own services therein would qualify as an admission of applicant, and thus would fall within the statements which

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are expressly excluded from the definition of hearsay in Fed. R. Evid 801(d)(2).

Accordingly, applicant's motion to strike is granted to the extent that the printouts from the Office TRAM system in Exhibit 6 are stricken, but is otherwise denied.

Applicant's response to the motion for summary judgment is due thirty days from the date hereof.

J. D. Sams

J. E. Rice

E. J. Seeherman
Administrative Trademark Judges,
Trademark Trial and Appeal Board