Hearing:
February 17, 2010

Mailed:
September 17, 2010

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Coach Services, Inc.
v.
Triumph Learning LLC

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Opposition No. 91170112
to Application Serial No. 78535642
filed on December 20, 2004

and to Application Serial No. 78536065
and Application Serial No. 78536143
filed on December 21, 2004

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Norman H. Zivin of Cooper & Dunham LLP for Coach Services, Inc.

R. David Hosp and Robert M. O'Connell, Jr. of Goodwin Procter LLP for Triumph Learning LLC.

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Before Holtzman, Walsh and Bergsman,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Triumph Learning LLC ("applicant") filed use-based applications for the mark COACH, in standard character form (Serial No. 78535642), Coach, shown below (Serial No. 78536065),

Coach

and COACH and design, shown below (Serial No. 78536143),

(applicant's marks are hereinafter referred to as "COACH")

all for the following goods:

> Computer software for use in child and adult education, namely, software to assist teachers and students at all levels in mastering standards-based curricula and in preparing for standardized exams; prerecorded audio and video tapes in the field of child and adult education, featuring materials to assist teachers and students at all levels in mastering standards-based curricula and in preparing for standardized exams, in Class 9; and,
>
> Printed materials in the field of child and adult education, namely, textbooks, workbooks, teacher guides and manuals, posters and flashcards, all featuring materials to assist teachers and students at all levels in mastering standards-based curricula and in preparing for standardized exams, in Class 16.

(hereinafter "educational materials for preparing for standardized tests").

Coach Services, Inc. ("opposer") opposed the registration of applicant's marks on the ground of priority of use and likelihood of confusion under Section 2(d) of the

Trademark Act of 1946, 15 U.S.C. §1052(d), dilution under Section 43(c) of the Trademark Act of 1946, 15 U.S.C. § 1125(c), and that applicant's marks are merely descriptive under Section 2(e)(1) of the Trademark Act of 1946, 15 U.S.C. §1052(e)(1).

Applicant denied the salient allegations in the notice of opposition.

Evidentiary Issues

A. Opposer's objection to the testimony of Jane Fisher.

Applicant proffered the testimony of Jane Fisher, applicant's Vice President of Marketing, to authenticate catalogs, brochures and other advertising materials distributed by applicant since at least as early as 1990. However, because Ms. Fisher only has worked for applicant since July 2003, opposer objected to Ms. Fisher's testimony regarding any matters other than the identification of business records prior to July 2003 on the ground that she lacks personal knowledge about applicant's business prior to that date. Opposer's objection is sustained to the extent that we will consider Ms. Fisher's testimony regarding matters prior to July 2003 only for purposes of authenticating documents kept by applicant in the ordinary course of business. *See* Fed. R. Evid. 803(6).

B. Applicant's objection to opposer's notice of reliance.

Opposer proffered seven of its annual reports (Exhibits 206-212) in its first notice of reliance pursuant to Trademark Rule 2.122(e) pertaining to printed publications and official records. Applicant objected to the introduction of opposer's annual reports on the ground that annual reports may not be introduced through a notice of reliance, but must be introduced and authenticated by competent testimony.[1]

Trademark Rule 2.122(e) provides, so far as pertinent, that "[p]rinted publications, such as books and periodicals, available to the general public in libraries or of general circulation among member of the public or that segment of the public which is relevant under an issue in a proceeding … may be introduced in evidence by filing a notice of reliance on the material being offered." In this regard, corporate annual reports are not considered to be printed publications available to the general public.[2] *Midwest Plastic Fabricators v. Underwriters Laboratories,* 12 USPQ2d 1267, 1270 n.5 (TTAB 1989), *aff'd,* 906 F.2d 1568, 15 USPQ2d 1359 (Fed. Cir. 1990); *Jeanne-Marc, Inc. v. Cluett, Peabody & Co., Inc.,* 221 USPQ 58, 59 n.4 (TTAB 1984); *Andrea Radio*

[1] Applicant's brief, p. 27.
[2] Because the annual reports were not printed from the Internet, they may not be admitted into evidence pursuant to a notice of reliance. *Safer Inc. v. OMS Investments Inc.,* 94 USPQ2d 1031, 1039 n.18 (TTAB 2010).

Corp. v. Premium Import Co., Inc., 191 USPQ 232, 234 (TTAB 1976).

To the extent opposer responded to applicant's objection, opposer noted that Carole Sadler, opposer's former Vice President, General Counsel, and Secretary, testified that opposer's revenues were published in its annual reports. However, Ms. Sadler did not authenticate the annual reports attached to opposer's notice of reliance.

In view of the foregoing, applicant's objection is sustained and we give opposer's annual reports no consideration.

We also note that as part of its first notice of reliance, opposer introduced numerous catalogs (Exhibits 1-42). Catalogs are not considered to be printed materials in general circulation within the meaning of Rule 2.122(e). *Hiraga v. Arena*, 90 USPQ2d 1102, 1104-1105 (TTAB 2009); *Boyds Collection Ltd. v. Herrington & Co.*, 65 USPQ2d 2017, 2020 (TTAB 2003). While our general practice is not to consider evidence that has not been properly made of record, because we want to decide this case on the merits and because applicant did not object to the catalogs, we exercise our discretion in this case to treat the catalogs as having been stipulated into the record for whatever probative value they may have. *See Autac Inc. v. Viking Industries, Inc.*, 199 USPQ 367, 369 n.2 (TTAB 1978).

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