

Editor's Note: Corrigendum released on April 21, 2011. Original judgment has been corrected with text of corrigendum appended.



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADE-MARKS

**Citation: 2011 TMOB 34**  
**Date of Decision: 2011-03-18**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by James Cogan against registration  
No. TMA639,483 for the trade-mark EMUSIC in the  
name of EMUSIC.COM INC.**

[1] At the request of James Cogan (the Requesting Party), the Registrar of Trade-marks forwarded a notice under s. 45 of the *Trade-marks Act* R.S.C. 1985, c. T-13 (the Act) on July 21, 2008 to EMUSIC.COM INC. (the Registrant), the registered owner of the above-referenced trade-mark registration. The trade-mark EMUSIC (the Mark) is registered for use in association with the following wares and services (the Registered Wares and Services):

- (a) Wares: Audio and video tape and disc players and recorders; radios; headphones; CD, DVD and electronic music players and recorders, sound and video recording and reproduction devices, namely MP3 players and recorders, audio and video tape recorders and tape players, CD players and recorders, audio tapes (pre-recorded) [*sic*], video tapes (pre-recorded); disks and other storage media namely magnetic and optical blank disks for recording audio, video and data; compact disks (pre-recorded audio), compact disks (pre-recorded video), compact disks (pre-recorded software and digital data); music, audio, video, entertainment and multimedia content recorded on discs, tapes, CD's, DVD's; hardware and software for creating still and video images, audio, music and multimedia entertainment content, and for uploading or downloading same to/from the World Wide Web (WWW), and over wide area and global computer network sites; computer software for acquiring, capturing, creating, manipulating, converting, transferring, cataloguing, presenting and storing still and video images and audio;

- (b) Services: Music, audio, video, entertainment and multimedia content distributed electronically, via the Internet, the World Wide Web (WWW) and/or through dial-up or network access connections, distributed in an electronic and computer-readable format; publishing and distribution services for music, audio, video, entertainment and multimedia content recorded on discs, tapes, CD's; promoting concerts and bands; entertainment services namely the presentation of shows and concerts, marketing services namely promoting and offering for sale related music, audio, video, entertainment and multimedia products namely MP3 players and recorders, audio and video tape recorders, and tape players, CD players and recorders, magnetic and optical blank disks for recording audio, video and data compact disks (pre-recorded audio), compact discs (pre-recorded video), compact disks (pre-recorded software and digital data); professional, technical and consulting services in connection with computers, computer software, computer systems, the Internet and world wide web (WWW), and for the music, audio, video, entertainment and multimedia industries; computer software design for others; consulting services and technical assistance services for music, audio, video, entertainment and multimedia content distributed or published electronically, via the Internet, the world wide web (WWW) and/or through dial-up or network access connections; designing and maintaining web sites and electronic commerce (e-commerce) services; maintenance and support services for computer software, namely, telephone consultation, hot line and help desk services, debugging and updating computer software.

[2] Section 45 of the Act requires the registered owner to show whether the trade-mark has been used in Canada in association with each of the wares or services specified in the registration at any time within the three year period immediately preceding the date of the notice and, if not, the date when it was last in use and the reason for the absence of such use since that date. In this case, the relevant period for showing use is any time between July 21, 2005 and July 21, 2008 (the Relevant Period).

[3] "Use" in association with wares is set out in s. 4 of the Act:

4. (1) A trade-mark is deemed to be used in association with wares if, at the time of the transfer of the property in or possession of the wares, in the normal course of trade, it is marked on the wares themselves or on the packages in which they are distributed or it is in any other manner so associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred.

[...]

(3) A trade-mark that is marked in Canada on wares or on the packages in which they are contained is, when the wares are exported from Canada, deemed to be used in Canada in association with those wares.

In this case, s. 4(1) of the Act applies.

[4] “Use” in association with services is set out in s. 4(2) of the Act:

4. (2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[5] In response to the Registrar’s notice, the Registrant furnished the affidavit of Daniel Stein sworn February 18, 2009, together with Exhibits “A” through “P”. Mr. Stein states that he is the Chairman of the Registrant.

[6] Neither the Registrant nor the Requesting Party filed written submissions. The Requesting Party requested an oral hearing at which both parties were represented.

[7] It is well established that the purpose and scope of s. 45 of the Act is to provide a simple, summary and expeditious procedure for removing deadwood from the register and as such, the threshold test is quite low. As stated by Mr. Justice Russell in *Uvex Toko Canada Ltd. v. Performance Apparel Corp.* (2004), 31 C.P.R. (4th) 270:

68. [...] We know that the purpose of s. 45 proceedings is to clean up the “dead wood” on the register. We know that the mere assertion by the owner that the trade mark is in use is not sufficient and that the owner must “show” how, when and where it is being used. We need sufficient evidence to be able to form an opinion under s. 45 and apply that provision. At the same time, we need to maintain a sense of proportion and avoid evidentiary overkill. We also know that the type of evidence required will vary somewhat from case to case, depending upon a range of factors such as the trade mark owners business and merchandising practices.

[8] I will now turn to the evidence introduced by the Registrant.

### Preliminary Issues

#### *“Use” in a Domain Name*

[9] Mr. Stein states that the Registrant “uses” the Mark in its corporate name and its website located at *www.emusic.com*. At the oral hearing, the Registrant repeatedly submitted that the presence of the Mark in the Registrant’s domain name *emusic.com* was sufficient to evidence use of the Mark. I am of the view that the mere incorporation of a trade-mark into a corporate or domain name does not necessarily constitute use in accordance with s. 4(1) or 4(2) of the Act, as set out above. While in some circumstances use of a trade-mark in a domain name may constitute trade-mark use, it more often amounts to trade name use. Specifically, the incorporation of a trade-mark into a domain name does not necessarily amount to use of the trade-mark to distinguish a party’s wares and/or services. More often, the presence of a trade-mark in a domain name merely serves to identify the name of the party to whom the website belongs. The same is true for the appearance of the Mark in the Registrant’s corporate name.

*The Registrant’s Concession of Non-Use for Some of the Registered Wares and Services*

[10] In his affidavit, Mr. Stein states that the Registered Wares and Services all bear the Mark and/or are marketed under the Mark and are all available in Canada. However, at the oral hearing, the Registrant conceded that some of the Registered Wares and Services were not in use during the Relevant Period. Furthermore, the Registrant did not provide reasons for the absence of use. As a result, the following wares and services will be deleted from the registration for the Mark:

- (a) Wares: Audio and video tape and disc players and recorders; radios; [...] audio tapes (pre- recorded) [*sic*], video tapes (pre-recorded); [...] compact disks (pre-recorded audio), compact disks (pre-recorded video), [...] music, audio, video, entertainment and multimedia content recorded on discs, tapes, CD's, DVD's; hardware and [...]
- (b) Services: publishing and distribution services for music, audio, video, entertainment and multimedia content recorded on discs, tapes, CD's; [...] entertainment services namely the presentation of shows and concerts, [...] computer software design for others; [...] maintenance and support services for computer software, namely, telephone consultation, hot line and help desk services, debugging and updating computer software.

*Requesting Party's Submissions on the Substantive Validity of the Registration for the Mark*

[11] At the oral hearing, the Requesting Party made submissions on the substantive validity of the registration for the Mark. Specifically, the Requesting Party alleged that the Declaration of Use filed by the Registrant in April 2005 is not accurate, that the Mark is not distinctive and that the Mark is descriptive.

[12] The Requesting Party's submissions relate to the issue of distinctiveness which is not an issue in section 45 proceedings. The Registrar's decision under s. 45 of the Act does not determine substantive rights in a trade-mark [see *Philip Morris Inc. v. Imperial Tobacco Ltd.* (1987), 13 C.P.R. (3d) 289 at 293 (F.C.T.D.)].

[13] As a result, the Requesting Party's submissions on this issue will not be considered.

The Evidence

*The Registrant's Website*

[14] At the oral hearing the Registrant submitted that the Registrant operates its digital music subscription service through its website located at *www.emusic.com*. Mr. Stein states that the Mark is present on the website. The Registrant further submitted that the Registrant also offers audiobooks and music tracks for individual download from its website and posts reviews thereon for customers to read.

[15] In his affidavit, Mr. Stein states that the website was launched in September, 1995 by the Registrant's predecessor-in-title, Creative Fulfillment Inc. d.b.a. eMusic. Mr. Stein states that in 1999, Goodnoise, which later that year was re-named "eMusic", acquired the website and subsequently launched the "world's first digital music subscription service" thereon in July 2000. Mr. Stein states that in 2001, eMusic was purchased by VU NetUSA. Finally, Mr. Stein states that in 2003, the Registrant acquired the business from VU NetUSA.

[16] Mr. Stein states that the website has been available to Canadians since as early as September 29, 1999. Mr. Stein states that all "editorial content and information about recordings and artists" published on the website has been available to Canadians since that date.

[17] Mr. Stein states that on April 29, 2008 the Registrant launched the Canadian version of its website. Mr. Stein attaches to his affidavit a press release as it appeared on the Canadian website on April 29, 2008 which announces the launch of the Canadian website (Exhibit C).

[18] Mr. Stein attaches to his affidavit archived web pages printed from WayBack Machine which he states display the website as it appeared to Canadians as of January 31, 2008 (Exhibit B). I note that archived web pages produced by WayBack Machine indicating the state of websites in the past have been found to be generally reliable [see *ITV Technologies, Inc. v. WIC Television Ltd.* (2003), 29 C.P.R. (4th) 182 at 192 (F.C.T.D.), affirmed (2005), 38 C.P.R. (4th) 481 (F.C.A.) and *Candrug Health Solutions Inc. v. Thorkelson* (2007), 60 C.P.R. (4th) 35 (F.C.); reversed on other grounds 2008 F.C.A. 100].

[19] I note that the website, as well as many of the other documentary exhibits attached to Mr. Stein's affidavit, display the Mark in the following design format:



[20] The Registrant is not under a restriction to use the Mark in any particular format by virtue of the fact that the registration is for a word mark. As a result, I find that use of the term “emusic” as part of the above design mark can be considered use of the Mark.

[21] I find that when considered as a whole, the Stein affidavit is sufficient to support a finding of use of the Mark in Canada in association with the services “designing and maintaining web sites” by the Registrant during the Relevant Period.

#### *The Registrant's Music and Audiobook Downloading Services*

[22] Mr. Stein states that since the launch of the Canadian version of the website (April 29, 2008) Canadians have been able to download and purchase music and audiobooks therefrom.

[23] Mr. Stein states that during the Relevant Period, 60,946 Canadians downloaded 10,102,489 songs and audiobooks from the Canadian website (Exhibit D). I am satisfied that the

Stein affidavit supports a finding that Canadians have accessed the website, seen the Mark thereon (as seen in Exhibit B) and actively downloaded music and audiobooks from the website (as evidenced in Exhibit D which sets out the number of downloads).

[24] Mr. Stein also attaches an advertisement for the Registrant's music and audiobook downloading services from the Canadian newspaper publication *Exclaim!* from June 2008 (Exhibit C) which displays the Mark. Mr. Stein explains that *Exclaim!* is a Canadian newspaper which is distributed for free across Canada.

[25] I find that, taken together, Mr. Stein's sworn statements regarding the fact that the Registrant has offered songs and audiobooks for download on its Canadian website since April 29, 2008, the number of Canadian customers having purchased these materials and the evidence of use of the Mark in advertising for these services (i.e. in *Exclaim!* in June 2008), enable me to find that the Registrant has used the Mark in association with the services: "music, audio, [...] entertainment [...] content distributed electronically, via the Internet, the World Wide Web (WWW) and/or through dial-up or network access connections, distributed in an electronic and computer-readable format" during the Relevant Period.

[26] At the oral hearing the Requesting Party submitted that the Registrant had not provided any specific evidence of "video" available for download but rather had merely incorporated this into the "music" and "audio" services. I agree with the Requesting Party and find that "video" should be struck from the registered statement of services as set out above. Likewise, I found no reference to "multimedia" content in the Registrant's evidence and as a result "multimedia" will also be struck from the registered statement of services.

[27] I am also satisfied that the evidence discussed above supports a finding that the Registrant has used the Mark in association with the services "electronic commerce (e-commerce) services" during the Relevant Period.

#### *The Registrant's "Promoting Concerts and Bands" Services*

[28] Mr. Stein states that the Registrant promotes bands on its website by providing editorial content, including "thousands of reviews of bands, and a guided listing of the best music the

website has to offer” as well as “in-depth columns” and “genre-specific newsletters”. Mr. Stein states that Canadians have had access to the editorial content on the US website since September 29, 1999 and on the Canadian website since its launch on April 29, 2008.

[29] Mr. Stein attaches samples of this editorial content in the form of excerpts from the Canadian website presumably obtained from WayBack Machine from April and June 2008 (Exhibit E). The materials feature a review by Billy Altman of the Martha Wainwright album entitled “I Know You’re Married But I’ve Got Feelings” from June 2008, a review by Dan Epstein of the Rush album entitled “Fly By Night” from April 2008 and a review by Mark Kemp of the Joel Plaskett Emergency album entitled “Ashtray Rock” from April 2008.

[30] I note that the website print outs all feature the Mark in the top left-hand corner.

[31] Based on a review of the affidavit as a whole, I am satisfied that the Registrant has provided sufficient evidence to support a finding of use of the Mark in association with the services “promoting [...] bands” during the Relevant Period. I am not satisfied, however, that the evidence supports a finding of use of the Mark in association with “[promoting] concerts [...]” and as a result “concerts” will be deleted from the registered statement of services.

#### *The Registrant’s “Promotion” Activities*

[32] Mr. Stein states that the Registrant is engaged in a number of promotional activities in Canada which involve the Registrant pairing up with third party providers of various consumer products such as headphones and MP3 players. Through these promotional activities, the Registrant offers 50 free songs and 1 free audiobook to purchasers of these consumer products. Details of these promotional activities are as follows:

- (a) *Coby Electronics Corp.* – Mr. Stein states that since June 2008, purchasers of various products, including MP3 CD players, headphones and MP3 speakers sold by Coby Electronics Corp. have been offered 50 free songs and one free audiobook download from the Registrant. Mr. Stein attaches to his affidavit a copy of a sticker depicting the Mark that he states has been placed on packaging for products since the beginning of the promotion (Exhibit F).



Mr. Stein also attaches to his affidavit copies of photographs of products displaying the stickers on packaging and package inserts (Exhibits G, H, I). Mr. Stein states that from April 29, 2008 to July 21, 2008, 64 Canadian customers purchased the participating products and took advantage of the promotion.

- (b) *Audiovox Electronics Corporation* – Mr. Stein states that since April 2008 in Canada purchasers of MP3 players sold by Audiovox Electronics Corporation have been offered 50 free songs and one free audiobook available for download from the Registrant’s Canadian website. Mr. Stein attaches to his affidavit copies of inserts depicting the Mark which have been included in the packaging for MP3 players sold throughout the promotion (Exhibit K). Mr. Stein states that from April 29, 2008 to July 21, 2008, 272 Canadian customers purchased the participating products and took advantage of the promotion.
- (c) *Verbatim* – Mr. Stein states that since June 15, 2008, the Registrant has been running a co-marketing campaign with Verbatim for its blank DVDs. Mr. Stein states that the promotion offers purchasers of the DVDs 50 free songs and one free audiobook available for download from the Registrant’s website. Mr. Stein attaches to his affidavit photographs of the point-of-sale display for the DVDs depicting the Mark as used by Canadian retailers selling these DVDs (Exhibit L). Mr. Stein states that the Canadian retailer London Drugs Canada has featured these point-of-sale displays in its stores since at least July 1, 2008. Mr. Stein states that from July 1-21, 2008, four Canadian customers purchased these DVDs and took advantage of the promotion.
- (d) *Nero* – Mr. Stein states that since April 2008 in Canada, the Registrant has been offering purchasers of the software sold by Nero entitled “Nero 7” 50 free song downloads from the Registrant’s website. Mr. Stein attaches to his affidavit a copy of a sticker depicting the Mark that has been placed on packaging for the Nero 7 software sold in Canada since the beginning of the promotion (Exhibit M).

[33] Firstly, the Registrant submits that these promotional activities constitute use of the Mark in association with the services: “marketing services namely promoting and offering for sale related music, audio, video, entertainment and multimedia products namely MP3 players and recorders, audio and video tape recorders, and tape players, CD players and recorders, magnetic and optical blank disks for recording audio, video and data compact disks (pre-recorded audio), compact discs (pre-recorded video), compact disks (pre-recorded software and digital data).” I do not agree. Based on my review of the affidavit as a whole, I am not satisfied that the Registrant is marketing, promoting or offering for sale these products but rather, as will be set out in further detail below, is merely promoting its own music and audiobook downloading services.

[34] Secondly, the Registrant submits that the presence of the Mark on these third party consumer products constitutes use of the Mark in association with these various products, namely, “headphones; CD, DVD and electronic music players and recorders, sound and video recording and reproduction devices, namely MP3 players and recorders, audio and video tape recorders and tape players, CD players and recorders, [...] disks and other storage media namely magnetic and optical blank disks for recording audio, video and data [...] compact disks (pre-recorded software and digital data) [...] software for creating still and video images, audio, music and multimedia entertainment content, and for uploading or downloading same to/from the World Wide Web (WWW), and over wide area and global computer network sites [...]”.

[35] I am of the view that the consumer perception of these labels would likely be that the Mark is being used to promote the Registrant’s music and audio downloading services. I base this finding in part on the fact that the Mark consistently appears in association with language suggesting the promotional nature of the activities, for example: “Free Songs from eMusic ... 50 Free Songs + 1 Free Audiobook for your Coby MP3 Player ... Redeem @ [www.emusic.com/coby](http://www.emusic.com/coby)” (Exhibit F)

[36] Based on the foregoing, I find that, at best, these promotional activities (i.e. placement of labels on third party consumer products which display the Mark and offer free music and audiobook downloads) constitute evidence of use of the Mark in advertising for the Registrant’s services: “music, audio, [...] entertainment [...] content distributed electronically, via the Internet, the World Wide Web (WWW) and/or through dial-up or network access connections,

distributed in an electronic and computer-readable format” [see *SeaMiles LLC v. Air Miles International Trading B.V.* (2009), 79 C.P.R. (4<sup>th</sup>) 391 (T.M.O.B.)]. I have previously held that these services were in use during the Relevant Period (see finding above in paragraph 25).

#### *The Registrant’s Software*

[37] Mr. Stein states that the Registrant offers a computer software program entitled “Download Manager” to its customers to enable them to download music and audiobooks from its website.

[38] Mr. Stein states that Canadians have been able to download this software from the Canadian website since its launch on April 29, 2008. Mr. Stein states that during the period from April 29, 2008 to June 21, 2008, the Download Manager software was downloaded by 9,456 Canadians (Exhibit O). The Registrant further submitted that these 9,456 Canadians had, during the same time period, downloaded over 800,000 music tracks and audiobooks from the Canadian website (Exhibit O).

[39] Mr. Stein attaches to his affidavit print outs from the website from February 14, 2008 obtained from WayBack Machine which discuss, and provide links to download the Registrant’s “Download Manager” software (Exhibit N). I note that, given the date of the website, Exhibit N must be a print out of materials from the Registrant’s US website. Mr. Stein states that the pages attached as Exhibit N demonstrate how the Registrant’s customers, including its Canadian customers, would have accessed the Registrant’s Download Manager software after the launch of the Canadian website in April 2008. I note that Exhibit N to the Stein affidavit features the Mark on the portion of the website from which subscribers would download the software. At the oral hearing, the Registrant submitted that this qualifies as use of the Mark pursuant to the Act [see *Info Touch Technologies Corp. v. HE Holdings Inc.* 2005 CarswellNat 2763 (T.M.O.B.)]. I agree. Based on the foregoing, I find that the Registrant has provided evidence of use of the Mark in association with: “computer software for acquiring, capturing, creating, manipulating, converting, transferring, cataloguing, presenting and storing still [...] images and audio” during the Relevant Period.

#### *The Registrant’s Technical Support Services*

[40] Mr. Stein states that the Registrant provides maintenance and support to all of its customers including its Canadian customers for its software and website. As evidence of these services, Mr. Stein provides a series of emails between representatives for the Registrant and alleged Canadian customers (Exhibit P). Exhibit P features email exchanges between the Registrant's Customer Support (accessed at *canadahelp@help.emusic.com*) and alleged Canadian customers during the period of July 2-3, 2008. The emails are dated from the Relevant Period. The Mark is displayed at the bottom of each of the emails from representatives of the Registrant in the form "eMusic Customer Support". Ultimately, I am willing to accept this as evidence of use of the Mark in association with "[...] technical [...] services in connection with computer software [...] technical assistance services for music, audio, [...], entertainment [...] content distributed or published electronically, via the Internet, the world wide web (WWW) and/or through dial-up or network access connections" during the Relevant Period.

[41] I am not, however, willing to accept that this constitutes evidence of use with professional services, consulting services or technical assistance services for computers, computer services, the Internet or the music, audio, video, entertainment and multimedia industries. As a result, the following services will be deleted from the registration for the Mark: "professional, [...] and consulting [...] computers, [...], computer systems, the Internet and world wide web (WWW), and for the music, audio, video, entertainment and multimedia industries; [...] consulting services [...]".

### Conclusion

[42] Following my analysis of the evidence, I am satisfied that the Registrant has evidenced use of the Mark in Canada during the Relevant Period within the meaning of s. 4(1) of the Act in association with the following wares: "computer software for acquiring, capturing, creating, manipulating, converting, transferring, cataloguing, presenting and storing still [...] images and audio" during the Relevant Period.

[43] However, I find that there is no evidence of use of the Mark in association with "*audio and video tape and disc players and recorders; radios; headphones; CD, DVD and electronic music players and recorders, sound and video recording and reproduction devices, namely MP3 players and recorders, audio and video tape recorders and tape players, CD players and*

*recorders, audio tapes (pre-recorded) [sic], video tapes (pre-recorded); disks and other storage media namely magnetic and optical blank disks for recording audio, video and data; compact disks (pre-recorded audio), compact discs (pre-recorded video), compact discs (pre-recorded software and digital data); music, audio, video, entertainment and multimedia content recorded on discs, tapes, CD's, DVD's; hardware and software for creating still and video images, audio, music and multimedia entertainment content, and for uploading or downloading same to/from the World Wide Web (WWW), and over wide area and global computer network sites; [computer software for acquiring, capturing, creating, manipulating, converting, transferring, cataloguing, presenting and storing still] and video [images and audio];” during the Relevant Period nor any reasons for the absence of use.*

[44] Furthermore, I am satisfied that the Registrant has evidenced use of the Mark during the Relevant Period in Canada within the meaning of s. 4(2) of the Act in association with the following services: “music, audio, [...] entertainment [...] content distributed electronically, via the Internet, the World Wide Web (WWW) and/or through dial-up or network access connections, distributed in an electronic and computer-readable format; [...]; promoting ... bands; [...] technical [...] services in connection with [...] computer software [...] technical assistance services for music, audio, [...] entertainment [...] content distributed or published electronically, via the Internet, the world wide web (WWW) and/or through dial-up or network access connections; designing and maintaining web sites and electronic commerce (e-commerce) services [...]” during the Relevant Period.

[45] However, I find that there is no evidence of use of the Mark in association with “[music, audio,] *video*, [entertainment], *multimedia* [content distributed electronically, via the Internet, the World Wide Web (WWW) and/or through dial-up or network access connections, distributed in an electronic and computer-readable format;] *publishing and distribution services for music, audio, video, entertainment and multimedia content recorded on discs, tapes, CD's*; [promoting] *concerts and [bands;] entertainment services namely the presentation of shows and concerts, marketing services namely promoting and offering for sale related music, audio, video, entertainment and multimedia products namely MP3 players and recorders, audio and video tape recorders, and tape players, CD players and recorders, magnetic and optical blank disks for recording audio, video and data compact disks (pre-recorded audio), compact discs (pre-*

*recorded video), compact discs (pre-recorded software and digital data); professional, [technical] and consulting [services in connection with] computers, [computer software] , computer systems, the Internet and world wide web (WWW), and for the music, audio, video, entertainment and multimedia industries; computer software design for others; consulting services and [technical assistance services for music, audio,] video, [entertainment] and multimedia [content distributed or published electronically, via the Internet, the world wide web (WWW) and/or through dial-up or network access connections; designing and maintaining web sites and electronic commerce (e-commerce) services;] maintenance and support services for computer software, namely, telephone consultation, hot line and help desk services, debugging and updating computer software ” during the Relevant Period nor any reasons for the absence of use.*

[46] Pursuant to the authority delegated to me under s. 63(3) of the Act, Registration No. TMA639,483 will be amended by deleting the following wares (in italics):

*“audio and video tape and disc players and recorders; radios; headphones; CD, DVD and electronic music players and recorders, sound and video recording and reproduction devices, namely MP3 players and recorders, audio and video tape recorders and tape players, CD players and recorders, audio tapes (pre-recorded) [sic], video tapes (pre-recorded); disks and other storage media namely magnetic and optical blank disks for recording audio, video and data; compact disks (pre-recorded audio), compact disks (pre-recorded video), compact disks (pre-recorded software and digital data); music, audio, video, entertainment and multimedia content recorded on discs, tapes, CD's, DVD's; hardware and software for creating still and video images, audio, music and multimedia entertainment content, and for uploading or downloading same to/from the World Wide Web (WWW), and over wide area and global computer network sites; [computer software for acquiring, capturing, creating, manipulating, converting, transferring, cataloguing, presenting and storing still] and video [images and audio];*

and Registration No. TMA639,483 will be amended by deleting the following services (in italics):

[music, audio,] *video*, [entertainment], *multimedia* [content distributed electronically, via the Internet, the World Wide Web (WWW) and/or through dial-up or network access connections, distributed in an electronic and computer-readable format;] *publishing and distribution services for music, audio, video, entertainment and multimedia content recorded on discs, tapes, CD's;* [promoting] *concerts and [bands;] entertainment services namely the presentation of shows and concerts, marketing services namely promoting and offering for sale related music, audio, video, entertainment and multimedia products namely MP3 players and recorders, audio and video tape recorders, and tape players, CD players and recorders, magnetic and optical blank disks for recording audio, video and data compact disks (pre-recorded audio), compact discs (pre-recorded video), compact discs (pre-recorded software and digital data); professional, [technical] and consulting [services in connection with] computers, [computer software]; computer systems, the Internet and world wide web (WWW), and for the music, audio, video, entertainment and multimedia industries; computer software design for others; consulting services and [technical assistance services for music, audio,] video, [entertainment] and multimedia [content distributed or published electronically, via the Internet, the world wide web (WWW) and/or through dial-up or network access connections; designing and maintaining web sites and electronic commerce (e-commerce) services;] maintenance and support services for computer software, namely, telephone consultation, hot line and help desk services, debugging and updating computer software”.*

[47] Based on the foregoing, the registered statement of wares and services as amended will read as follows:

Wares: computer software for acquiring, capturing, creating, manipulating, converting, transferring, cataloguing, presenting and storing still images and audio.

Services: music, audio, entertainment content distributed electronically, via the Internet, the World Wide Web (WWW) and/or through dial-up or network access connections, distributed in an electronic and computer-readable format; promoting bands; technical services in connection with computer software; technical assistance services for music, audio, entertainment content distributed or published electronically, via the Internet, the world wide web (WWW) and/or through dial-up or network access connections; designing and maintaining web sites and electronic commerce (e-commerce) services.

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Andrea Flewelling  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office





LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADE-MARKS

**Citation: 2011 TMOB**  
**Date of Decision: 2011-04-21**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by James Cogan against registration  
No. TMA639,483 for the trade-mark EMUSIC in the  
name of EMUSIC.COM INC.**

[1] Having been notified of typographical errors in my decision dated March 18, 2011, specifically that registration No. TMA639,483 for the trade-mark EMUSIC was incorrectly identified as registration No. TMA455,196 in paragraph 46 of my decision, I hereby amend this paragraph.

[2] Paragraph 46 of my decision dated March 18, 2011 is amended to read:

[46] Pursuant to the authority delegated to me under s. 63(3) of the Act, Registration No. TMA639,483 will be amended by deleting the following wares (in italics):

*“audio and video tape and disc players and recorders; radios; headphones; CD, DVD and electronic music players and recorders, sound and video recording and reproduction devices, namely MP3 players and recorders, audio and video tape recorders and tape players, CD players and recorders, audio tapes (pre-recorded) [sic], video tapes (pre-recorded); disks and other storage media namely magnetic and optical blank disks for recording audio, video and data; compact disks (pre-recorded audio), compact disks (pre-recorded video), compact disks (pre-recorded software and digital data); music, audio, video, entertainment and multimedia content recorded on discs, tapes, CD's, DVD's; hardware and*

*software for creating still and video images, audio, music and multimedia entertainment content, and for uploading or downloading same to/from the World Wide Web (WWW), and over wide area and global computer network sites; [computer software for acquiring, capturing, creating, manipulating, converting, transferring, cataloguing, presenting and storing still] and video [images and audio];*

and Registration No. TMA639,483 will be amended by deleting the following services (in italics):

*[music, audio,] video, [entertainment], multimedia [content distributed electronically, via the Internet, the World Wide Web (WWW) and/or through dial-up or network access connections, distributed in an electronic and computer-readable format;] publishing and distribution services for music, audio, video, entertainment and multimedia content recorded on discs, tapes, CD's; [promoting] concerts and [bands;] entertainment services namely the presentation of shows and concerts, marketing services namely promoting and offering for sale related music, audio, video, entertainment and multimedia products namely MP3 players and recorders, audio and video tape recorders, and tape players, CD players and recorders, magnetic and optical blank disks for recording audio, video and data compact disks (pre-recorded audio), compact discs (pre-recorded video), compact discs (pre-recorded software and digital data); professional, [technical] and consulting [services in connection with] computers, [computer software]; computer systems, the Internet and world wide web (WWW), and for the music, audio, video, entertainment and multimedia industries; computer software design for others; consulting services and [technical assistance services for music, audio,] video, [entertainment] and multimedia [content distributed or published electronically, via the Internet, the world wide web (WWW) and/or through dial-up or network access connections; designing and maintaining web sites and electronic commerce (e-commerce) services;] maintenance and support services for computer software, namely, telephone consultation, hot line and help desk services, debugging and updating computer software”.*

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Andrea Flewelling  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office