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

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| Applicant | EarlyByrd, LLC |
| Applied for Mark | EARLYBYRD |
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

EARLYBYRD, LLC,
Appellant,

) EARLYBYRD
) Filed 26 June 2014
) Serial 86-321,356

APPLICANT'S BRIEF FOR APPEAL

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1. Applicant, EarlyByrd, LLC, (“EarlyByrd”) through its counsel, respectfully appeals the Examiner's Final Office Action of 15 May 2015, refusing to register applicant's EARLYBYRD trademark. Applicant's Class 42 services for healthcare professionals to make and schedule referrals with other professionals are distinct from the cited Registrant's Class 38 direct communication services between patient and healthcare provider. Six of the DuPont factors clearly favor registration. The Examiner's evidence actually shows the services as unrelated.

A. APPLICANT'S SERVICES

2. Applicant's applied-for services are in Class 42:

Providing an online non-downloadable Internet-based system application for healthcare professionals featuring technology enabling **healthcare professionals** to schedule and to make referrals **with other health care professionals**. (emphasis added).

3. The examiner has *twice* issued office actions based not on Applicant's applied-for services but for a different wording. (Office Actions of 16Dec2014 and 6Feb2015). Applicant brought the first inconsistency to the Examiner's attention with its 7Jan2015 Request for Reconsideration. The responsive office action, 6Feb2015, still recited a services description differing from that of the application. Applicant brought this second inconsistency to the Examiner's attention with its 1Apr2015 Request for Reconsideration.

B. REGISTRANT'S SERVICES

4. The Examiner has refused to register Applicant's trademark, citing the Class 38 services of a word mark and a design mark of EARLY BIRD ALERT, ® 4,199,694 and ® 4,199,696:

Telecommunication services, namely, electronic and digital transmission of voice, data, signals and messages for providing communication **between users of the service and healthcare providers**. (emphasis added).

5. Registrant only provides a telecommunication service, permitting direct communication between a patient (or patient caregiver) and their physician, a communication typically initiated by the non-physician (Exhibits 5 & 6). Registrant's website describes its telecommunications service as a way for a patient to "connect directly" with the physician (x5, "What People Are Saying

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About EasyConnect”). Registrant’s homepage carousel-top likewise describes its service as “a healthcare hotline for patients... and for caregivers” (x6, mid-page). Registrant’s service is simply a means for patients and caregivers of patients to talk, via voice or Internet, to the patient’s physician, without intermediaries of phone receptionists or other barriers.

C. REGISTRANT'S USE IS PATIENT-PHYSICIAN COMMUNICATION

6. In the final office action, 15May2015, the Examiner relied on Internet evidence as relevant to the question whether Applicant's services were so related to Registrant's services to give rise to the mistaken belief that the services emanated from the same source (pages 6-7). Applicant submitted Exhibits 5 and 6 as clear evidence that Registrant's "users of the service" with "healthcare providers" are patients and caregivers, not "other healthcare providers." When a term, such as Registrant's "between users of the service" is ambiguous standard document analysis permits clarification with evidence beyond the four corners of the document.

D. APPLICANT'S USE IS BETWEEN HEALTH CARE PROFESSIONALS

7. Applicant's services are not general communications, but specific referral and scheduling services with other healthcare professionals.

E. APPLICANT'S SERVICES MATERIALLY DIFFER FROM REGISTRANT

8. The difference between a communication service and the provision of additional content is well reflected in the Copyright Act’s safe harbor for online service providers, 17 USC § 512(c). The online service provider typically simply provides the “telecommunication service,” permitting the sender to send and a receiver to receive a communication message. This distinction between the

creator of content and the provider of a communication service is also reflected in the liability limitation for innocent printers and publishers, 15 USC § 1114.

9. Registrant only provides a telecommunication service, permitting direct communication between a patient (or patient caregiver) and their physician, a communication typically initiated by the non-physician (x5 & 6).

10. In marked contrast, Applicant provides significant content, appropriate referrals and referral scheduling services, among health care professionals. Patients do not make the referrals, healthcare professionals do. Typical is for a general practitioner health care professional to arrange a referral to a health care specialist, or to see when the health care specialist has an available time.

11. Were a registration for “telecommunication services” to be found confusingly similar to any service that is communicated between sender and receiver at some distance, then a single Class 38 registration would swallow most of Classes 35 (Advertising and Business), 36 (Insurance & Finance), 37 (Construction and Repair), 41 (Education & Entertainment), 42 (Scientific and Legal Services), 43 (Hotel & Restaurant), 44 (Health care & Agriculture), and 45 (Personal & Social Services, Security).

12. “Providing telecommunication connections to the internet or databases” is a Class 38 service (PTO ID Manual), but a XYZ mark for such services does not preempt an online retail bakery shop (35), insurance (36), real estate development (37), taxi transport (39), material treatment services for recycling (40), online education (41), viewing television programming on the Internet (41), online provision of legal services (42), restaurant reservation services (43), Internet-based health care information services (44), Computer

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