

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

JAIME KEELING

Petitioner,

v.

EVE HARS

Registrant

In the Matter of Trademark Reg.  
No. 4,334,491

Cancellation No. 92057380

For the Mark: Point Break Live!

Registered May 14, 2013

85.731, 931

## BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

MOTION FOR SUSPENSION

Registrant, Eve Hars, submits this motion for suspension of proceedings of cancellation No. 92057380 pursuant to C.F.R. 37 B2.117.

## MEMORANDUM OF LAW

## I. STATEMENT OF FACTS

A. As described by petitioner, Jaime Keeling, in her petition for cancellation of Registrant, Eve Hars' trademark, Keeling sued Hars in 2010 for infringement of Keeling's alleged copyright to a work entitled *Point Break LIVE!* in

the U.S. District Court of the Southern District of New York, civil case number 10-9345.

B. Hars concedes that after the conclusion of a jury trial judgment was entered in petitioner/plaintiff Keeling's favor on January 10, 2013 but does not concede to petitioner's other statements regarding that case.

C. Keeling neglected to mention in her petition that this district court judgment is currently being appealed, (as of February 8, 2013, **see Exhibit A**) in the U.S. Court of Appeals for the Second Circuit.

D. Additionally, the Second Circuit appellate court expedited the appeal "nostra sponte" on June 24, 2013 (**see Exhibit B**).

E. On June 25, 2013, the appellate court notified the parties of the expedited briefing schedule (**see Exhibit C**) stating that the appeal would be "heard as early as October 7, 2013.

F. Hars submitted her Appellant Brief on July 30 according to the Court's schedule.

G. Soon thereafter on August 7, the Court of Appeals for the Second Circuit, scheduled the case to be heard on October 8, 2013, thereby calendaring the hearing on practically the earliest possible date- October 8 (**No. 75, Exhibit D**).

## II. ARGUMENT.

### ***A. Appeal being considered by U.S. Court of Appeals for the Second Circuit.***

According to 37 CFR § 2.117, Suspension of proceedings:

- (a) Whenever it shall come to the attention of the Trademark Trial and Appeal Board that a party or parties to a pending case are engaged in a civil action or another Board proceeding which may have a bearing on the case, proceedings before the Board may be suspended until termination of the civil action or the other Board proceeding.

Keeling's petition for cancellation relies almost entirely on the history of and outcome of her lawsuit against Hars in the district court. Specifically, Keeling uses that history and verdict of the lawsuit as evidence against Hars in the second, third and fourth basis of her cancellation claims against Hars.

It would then follow that the verdict of that civil action has a strong bearing on this present action before the Trademark Trial and Appeal Board. The fact that the verdict is undergoing serious review by a higher court and moreover, the appeal has been fast-tracked by the court should be cause for suspension of this cancellation proceeding until the appellate court renders a decision.

***B. Direct impact of appeal on this cancellation petition.***

What would such a reversal mean to Keeling's petition? The impact would be immense.

*1. Keeling's second basis for cancellation: fraud.*

If the lower court's verdict is overturned, it will mean that Keeling, and not Hars was the one committing fraud- because it will mean that Keeling never actually had a valid copyright of any work called "Point Break LIVE!" in the first place. Keeling provided a copy of an agreement which Hars allegedly breached which supposedly proves that Hars knew of Keeling's "senior rights" to the trademark at issue. However it has been Hars' contention since signing that contract in 2007 that signing it was a mistake because Hars came to understand that Keeling's claim of those rights was fraudulent: Keeling never owned a copyright and not only that, according to law, could not possibly own that copyright. In the most twisted interpretation of copyright statute ever proposed in the history of the court system involving the complicated issues of fair use, a jury decided Keeling's copyright was valid. Hars still disagrees and it seems like the Court of Appeals for the Second Circuit may very well agree with Hars. If it does, then Keeling never had a

copyright and the support for her fraud claim against Hars becomes deeply compromised. Therefore it would be appropriate for the TTAB to suspend proceedings pending a judgment by the appellate court.

*2. Third Basis of Cancellation: Abandonment.*

As Keeling accurately states, Hars has not, as of January 10, 2013 used the disputed trademark in commerce as she had been doing, because of an injunction ordered by the district court as a result of the verdict. However, if the appellate court reverses that verdict, the injunction will no longer be in effect and Hars will be free to engage in commerce using the "Point Break LIVE!" trademark as she had been doing since 2007. In order for a trademark to be cancelled for abandonment the trademark has to be abandoned for three years. It has only been eight months that Hars has not used the trademark and she certainly intends to use it again as soon as her appeal goes through. Thus another factor of Keeling's petition relies on the outcome of the appeal and thus suspension of the cancellation proceedings pending the decision of the appellate court is again warranted.

*3. Third basis for cancellation: Priority of use and likelihood of confusion.*

Keeling claims in paragraph 32 of her petition:

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