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12 Limited and ERNST & YOUNG LLP and Defendant Ernst
& Young Advisory, Inc.

13
14 **THE UNITED STATES DISTRICT COURT**
15 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

16 ENTREPRENEUR MEDIA, INC., a)
17 New York corporation,)
18 Plaintiff,)

19 vs.)

20 EYGN Limited, ERNST & YOUNG)
21 LLP and ERNST & YOUNG)
22 ADVISORY, INC.,)

23 Defendants.)

Case No. SACV08-0608 DOC
(MLGx)
Complaint filed June 2, 2008

**DECLARATION OF CRAIG S.
MENDE**

Date: December 22, 2008
Time: 8:30 a.m.
Courtroom: 9D
Judge: Honorable David O. Carter

24 EYGN Limited, ERNST & YOUNG)
25 LLP,)
26 Counterclaim-Plaintiffs,)

27 vs.)

28 ENTREPRENEUR MEDIA, INC.,)

Counterclaim- Defendant.)

1 I, Craig S. Mende, declare under penalty of perjury:

2 1. I am a member of the bar of the State of New York and of the law firm of
3 Fross Zelnick Lehrman & Zissu, P.C., and have been admitted *pro hac vice* as
4 counsel in this action for Defendants EYGN Limited (“EYGN”), Ernst & Young
5 LLP (“Ernst & Young”), and Ernst & Young Advisory, Inc. (“EYAI”) (collectively,
6 “Defendants”). I submit this declaration in opposition to the Motion for Injunction
7 Regarding Second-Filed Action by Plaintiff Entrepreneur Media, Inc. (“EMI”) and
8 in support of Ernst & Young’s Motion for Judgment on the Pleadings or in the
9 Alternative Transfer, EYGN’s Motion for Judgment on the Pleadings for Lack of
10 Personal Jurisdiction and EYAI’s Motion for Judgment on the Pleadings for Lack
11 of Subject Matter Jurisdiction. This declaration is based on my personal
12 knowledge, the records of my firm, and matters about which I have been informed
13 by persons acting under my supervision.

14 2. On May 1, 2008 my partner Susan Upton Douglass sent a cease and
15 desist letter to EMI’s magazine, Entrepreneur Magazine, at EMI’s California
16 headquarters, concerning EMI’s infringement of the ENTREPREUR OF THE
17 YEAR mark. A true and correct copy of the aforementioned letter is attached as
18 Exhibit A to EMI’s Complaint in this Action.

19 3. By letter dated May 8, 2008, Randall K. Broberg, counsel for EMI,
20 responded to Ms. Douglass’s letter. Attached hereto as **Exhibit 1** is a true and
21 correct copy of Mr. Broberg’s letter.

22 4. On May 16, 2008, Ms. Douglas sent a follow-up email to Mr. Broberg
23 in which she responded to arguments in EMI’s response, reiterated EYGN’s
24 demand that EMI “use a different designation for its award program,” and set a
25 June 2, 2008 deadline for EMI to respond. A true and correct copy of Ms.
26 Douglass’s aforementioned email is attached as Exhibit B to EMI’s Complaint in
27 this Action.

1 5. EMI did not respond to Ms. Douglass's email before the June 2
2 deadline set forth in Ms. Douglass's email. Instead, on June 2, 2008, EMI filed its
3 complaint in this action (the "California Action"), seeking declaratory relief against
4 EYGN, Ernst & Young and EYAI.

5 6. Soon after EMI filed its complaint, I notified EMI's counsel of record,
6 Michael Adele, of Defendants' position that the declaratory judgment action filed
7 by EMI in the California Action was an improper anticipatory filing. I further
8 advised Mr. Adele that Defendants had drafted a complaint for filing in the United
9 States District Court of the Southern District of New York and were planning to
10 move for a dismissal or transfer of the California Action. When Mr. Adele
11 proposed a possible settlement, however, we agreed that Defendants would hold off
12 on commencing the New York action and moving for relief in this Court pending
13 the parties' efforts to settle the case. Attached as **Exhibit 2** is a true and correct
14 copy of the email I sent to Mr. Adele on June 11, 2008 confirming the
15 aforementioned conversation.

16 7. Thereafter, the parties engaged in extensive settlement negotiations
17 and exchanged drafts of a proposed settlement agreement. The parties were not
18 able to reach an agreement, however, and appeared to reach an impasse during the
19 week of July 21, 2008.

20 8. In light of the breakdown of the parties' settlement negotiations, on
21 July 28, 2008, Ernst & Young and EYGN filed a complaint against EMI in the
22 United States District Court for the Southern District of New York with the caption
23 *EYGN Limited and Ernst and Young LLP v. Entrepreneur Media, Inc.*, No. 08 CV
24 6734 (S.D.N.Y.) (the "New York Action"). In their complaint in the New York
25 Action, EYGN and Ernst and Young affirmatively asserted claims for (1)
26 infringement of EYGN's federally registered trademark under Section 32(1) of the
27 Lanham Act, 15 U.S.C. § 1114(1) (by EYGN only); (2) federal unfair competition
28 under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); (3) unfair competition

1 under New York common law; (4) violation of the New York Deceptive and Unfair
2 Trade Practices Act; and (5) cancellation of EMI's United States Trademark
3 Registrations for various ENTREPRENEUR-inclusive marks on the grounds that
4 they are, when used on or in connection with EMI's goods or services, generic
5 and/or merely descriptive and lacking secondary meaning. Attached hereto as
6 **Exhibit 3** is a true and correct copy of the complaint filed in the New York Action.
7 To avoid any possible waiver of counterclaims, and subject to EYGN's express
8 reservation of its right to challenge jurisdiction, EYGN and Ernst & Young also
9 asserted counterclaims against EMI that mirror their affirmative claims for relief in
10 the New York Action.

11 9. On July 29, 2008 counsel for Entrepreneur Media Inc., Mr. Adele,
12 accepted service of the Complaint in the New York Action. That same day my
13 partner David Donahue formally requested by letter that EMI's counsel meet and
14 confer in the California Action pursuant to Local Rule 7-3 regarding Defendants'
15 anticipated motions in that Action for dismissal or, in the alternative, transfer
16 (collectively, "Defendants' Motions"). Attached as **Exhibit 4** is a true and correct
17 copy of Mr. Donahue's aforementioned meet-and-confer letter sent to EMI's
18 counsel.

19 10. On August 1, 2008, Mr. Donahue and I met and conferred with Mr.
20 Adele by telephone, thereby making August 21, 2008 the first possible filing date
21 for Defendants' Motions. *See* Local Rule 7-3. In addition to discussing the
22 grounds for Defendants' Motions during the telephone conference, counsel
23 discussed a new possible framework for settlement. That same day, EMI's
24 principal sent a letter to his counterpart at Ernst & Young seeking to initiate direct
25 business-to-business communications regarding settlement.

26 11. On August 6, 2008 Mr. Adele formally proposed a framework for
27 settlement discussed along the lines of what counsel had discussed during the
28 August 1 telephonic conference. Because the settlement proposal appeared likely

1 to lead to a resolution of the parties' dispute, Mr. Donahue and I advised Mr. Adele
2 that Defendants would refrain from filing their Motions pending the renewed
3 settlement discussions, but reserved their right to file such Motions at a later date if
4 settlement talks ever were to break down.

5 12. From August through early October the parties engaged in extensive
6 substantive settlement negotiations and exchanged several drafts of a settlement
7 agreement incorporating the framework of EMI's August 6 proposal. Over the
8 course of that time period Defendants consented to several requests by EMI to
9 extend its deadline to respond to the complaint in the New York Action and to
10 Defendants' counterclaims in the California action pending settlement discussions.

11 13. Despite more than two months of intense negotiations, the parties were
12 unable to consummate a formal written agreement incorporating the settlement
13 framework to which they had agreed in principle. Thereafter, on October 8, 2008
14 Mr. Donahue sent an email to Mr. Adele enclosing a final, "take-it-or-leave-it" draft
15 settlement agreement.

16 14. October 10, 2008 Steven Pokotilow of Stroock Stroock & Lavan LLP
17 in New York informed me by telephone that his firm would be taking over primary
18 negotiating duties from Mr. Adele and that EMI would be filing its responses to the
19 complaint in the New York Action and to the counterclaims in the California
20 Action on October 14, 2008. Mr. Pokotilow also advised that he would review the
21 October 8, 2008 draft settlement agreement, discuss it with EMI, and get back to us
22 with comments. That same day my partner, Mr. Donahue, advised Mr. Pokotilow's
23 colleague, Richard Eskew, that Defendants would grant an extension of time to
24 respond to the complaint in the New York Action and the counterclaims in the
25 California Action through October 24, 2008 as courtesy to new counsel. This offer
26 was declined.

27 15. On October 14, 2008, EMI filed the following documents in the
28 California Action: (i) Answer to Counterclaims of EYGN Limited and Ernst &

1 Young LLP; and (ii) Motion of Plaintiff Entrepreneur Media, Inc. for Injunction
2 Regarding Second-Filed Action with supporting declarations. That same day, EMI
3 filed the following documents in the New York Action: (i) Defendant Entrepreneur
4 Media, Inc.'s Answer and Affirmative Defenses in Response to Plaintiff's
5 Complaint; and (ii) Memorandum in Support of Defendant's Motion to Dismiss
6 This Action in Favor of A First Filed Action, Transfer the Action to the Central
7 District of California, or Stay the Action Pending a Determination of the First Filed
8 Rule by The Central District of California ("Motion to Dismiss") and supporting
9 declarations. Attached as **Exhibit 5** is a true and correct copy of EMI's Answer in
10 the New York Action. Attached as **Exhibit 6** is a true and correct copy of EMI's
11 Notice of Motion to Dismiss in the New York Action.

12 16. Shortly after EMI filed the aforementioned papers, Mr. Pokotilow's
13 firm revived settlement negotiations with Defendants' counsel. To give the parties
14 more time to agree on settlement terms, the parties agreed to propose a briefing
15 schedule to this Court whereby Defendants' opposition to EMI's Injunction Motion
16 would be due on November 12, 2008, Defendants would file Defendants' Motions
17 on November 12, 2008, and the return date on the parties' respective motions would
18 be December 22, 2008. The Court accepted the parties' proposed schedule at the
19 November 3, 2008 Scheduling Conference in the California Action. The parties
20 further stipulated to a stay of the New York Action pending disposition of the
21 parties' motions in the California Action, which stipulation was accepted and so
22 ordered by the court in the New York Action.

23 I declare under penalty of perjury that the foregoing is true and correct.

24
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26
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Executed on November 12, 2008 at New York, New York.



Craig S. Mende

EXHIBIT 1

Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law
12348 High Bluff Drive, Suite 210 | San Diego, CA 92130-3580
Telephone: 858.481.5055 | Facsimile: 858.481.5028
www.allenmatkins.com

Randall K. Broberg
E-mail: rbroberg@allenmatkins.com
Direct Dial: 619.235.1566 File Number: 88888-925/OC844880.01

Via Email/US Postal

May 8, 2008

Ms. Susan Upton Douglas
Fross Zelnick Lehrman & Zissu, P.C.
866 United Nations Plaza
At First Avenue & 48th Street
New York, NY 10017

**Re: Entrepreneur Media Inc. - Entrepreneur magazine's 2008
Entrepreneur of the Year award**

Dear Ms. Douglas:

We represent Entrepreneur Media, Inc., publisher of *Entrepreneur* magazine, and we have been asked by our client to respond to your letter to Ms. Lisa Murray, dated May 1, 2008, regarding EYGN Limited's rights in the mark ENTREPRENEUR OF THE YEAR. Entrepreneur Media certainly had no intention of causing confusion, and does not believe that its establishment, in association with The UPS Store, of an entrepreneur of the year award program infringes upon any of EYGN Limited's rights in such mark.

"Infringement of federally registered marks is governed by the test of whether the defendant's use is likely to cause confusion, or to cause mistake, or to deceive." (J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, Volume 4, § 23.1 (4th ed. 2008).) When evaluating an infringement claim, "[t]he commercial impression of a trademark is derived from it as a whole, not from its elements separated and considered in detail." (Estate of P.D. Beckwith, Inc. v. Commissioner of Patents, 252 U.S. 538, 545-46 (1920).) One way in which a party may reduce the possibility of confusion between marks is to display its own familiar mark along with the mark used by another. (McCarthy, § 23.50.)

In this case, when our client's advertisement of its entrepreneur of the year award program is viewed in context, it does not cause confusion with Ernst & Young's award program. Our client's use of the phrase "Entrepreneur of the Year" is preceded by the words "*Entrepreneur* magazine's 2008." Furthermore, the logo for the awards program (reproduced below) that appears on our client's website and the website of The UPS Store includes our client's registered trademark ENTREPRENEUR® in significantly oversized print. Because our client's trademark and the name

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law

Ms. Susan Upton Douglas
May 8, 2008
Page 2

of its magazine both appear in, or in close proximity to, the phrase at issue, the likelihood that a reader would confuse our client's award program with Ernst & Young's award program is dramatically reduced. The overall impression is that the award program on our client's and The UPS Store's website is being sponsored by *Entrepreneur* magazine, not Ernst & Young:



Further, as you know, Ernst Young and our client have had previous interactions regarding Ernst & Young's publication of an "Entrepreneur of the Year" magazine, in conflict with our client's rights in the registered trademark ENTREPRENEUR used in connection with magazines. The result of those interactions is that to avoid confusion with our client's mark, Ernst & Young prominently includes the words "Ernst & Young" before the words "Entrepreneur of the Year" on its cover and elsewhere. It seems reasonable to us to expect the same principles to apply in the reverse cases.

We trust that the above explanation resolves this matter.

Very truly yours,

A handwritten signature in black ink that reads "Randall K. Broberg".

Randall K. Broberg

RKB:kw

EXHIBIT 2

Craig Mende

From: Craig Mende
Sent: Wednesday, June 11, 2008 12:28 PM
To: 'madele@allenmatkins.com'
Cc: David Donahue; Susan Douglass
Subject: EYGN/Entrepreneur Media Inc. - FOR SETTLEMENT PURPOSES

Michael - It was good speaking with you yesterday afternoon. Thank you for your constructive suggestions re: a possible basis for settlement.

As discussed, we have drafted a complaint for filing in the Southern District of New York re: Entrepreneur Media's infringement of our client's registered ENTREPRENEUR OF THE YEAR mark and seeking cancellation of certain registrations of Entrepreneur Media, and we have been planning to move for dismissal or transfer of the declaratory action by EM in the Central District of California, which we believe to be an improper anticipatory filing.

However, in view of our discussion yesterday concerning a possible resolution of the dispute, which looks promising, we will refrain from moving ahead with the filings at this point. Thank you for your offer to consent to an extension of our clients' time to answer/respond to the complaint. You indicated that we can extend that date by 2 weeks on stipulation, although a Court order is required for a further extension. At this point, I would like to see if we can move ahead promptly on settlement efforts and revisit the issue of extensions if it becomes necessary as the June 23 deadline to answer approaches. Please let me know if you think that presents a problem; if so, I'm sure we can work it out.

I have conveyed to our client your suggestion re: resolving the matter via a non-exclusive license from our client to EM. I will get back to you once I hear back from our client so that we can determine the best way to move ahead. Please feel free to call me at 212-813-5900 if you have any questions or would like to discuss this further in the meantime.

Regards,
Craig

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EXHIBIT 3

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Craig S. Mende
David Donahue
Betsy Judelson Newman
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(212) 813-5900 (phone)
(212) 813-5901 (fax)

Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----X
EYGN LIMITED and ERNST & YOUNG LLP, :

Plaintiffs, :

v. :

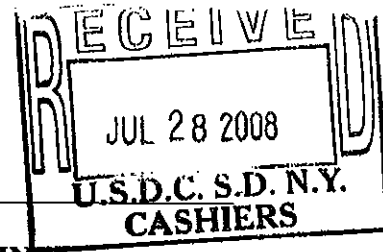
ENTREPRENEUR MEDIA, INC., :

Defendant. :

-----X

Case No. _____

COMPLAINT



Plaintiffs EYGN Limited and Ernst & Young LLP, by their undersigned attorneys, Fross Zelnick Lehrman & Zissu, P.C., for their Complaint against Defendant Entrepreneur Media, Inc., allege as follows:

NATURE OF THE ACTION

1. For more than twenty years, Plaintiffs and their predecessors in interest have used the ENTREPRENEUR OF THE YEAR trademark in connection with an annual contest for the most successful and innovative business leaders in the United States and throughout the world. Plaintiffs' ENTREPRENEUR OF THE YEAR mark is registered with the United States Patent & Trademark Office and is incontestable under Section 15 of the Lanham Act, 15 U.S.C. § 1065.

2. In 2008, long after Plaintiffs registered the ENTREPRENEUR OF THE YEAR mark, and long after the ENTREPRENEUR OF THE YEAR mark achieved prominence in the

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business world as signifying Plaintiffs' contest services, Defendant Entrepreneur Media, Inc. launched a similar contest under an identical mark without Plaintiffs' knowledge or authorization.

3. This is not the first time Defendant has infringed Plaintiffs' mark: in 1994, when Plaintiffs learned of Defendant's adoption of the ENTREPRENEUR OF THE YEAR mark in connection with a similar contest at that time, Plaintiffs objected in writing and Defendant stopped. This time, however, Defendant has rejected Plaintiffs' demand and is pressing forward with its infringing use of the mark.

4. Accordingly, to protect their substantial investment and the resultant goodwill they have established in the ENTREPRENEUR OF THE YEAR mark, Plaintiffs bring this action for trademark infringement and unfair competition under Sections 32(1) and 43(a) of the Lanham Act, and related claims under New York State law. Plaintiffs seek an injunction, an accounting of Defendant's profits flowing from its use of the ENTREPRENEUR OF THE YEAR mark, damages, attorneys' fees and such other relief as the Court deems just and proper.

THE PARTIES

5. Plaintiff EYGN Limited ("EYGN") is a company incorporated in the Bahamas with a registered office at One Montague Place, East Bay Street, Nassau, Bahamas. EYGN owns the ENTREPRENEUR OF THE YEAR mark and registration. (References to "Plaintiffs" are to EYGN and/or Ernst & Young LLP.)

6. Plaintiff Ernst & Young LLP ("Ernst & Young") is a limited liability partnership registered under the laws of the State of Delaware with its principal place of business at 5 Times Square, 37th Floor, New York, NY 10036. Ernst & Young is one of the largest professional

services organizations in the United States and uses the ENTREPRENEUR OF THE YEAR mark under license from EYGN.

7. Upon information and belief, Defendant Entrepreneur Media, Inc. ("EM") is a corporation organized and existing under the laws of the State of California, with an office and principal place of business at 2445 McCabe Way, Suite 400, Irvine, CA 92614.

JURISDICTION AND VENUE

8. This Court has jurisdiction over the subject matter of this action pursuant to Section 39 of the Trademark Act of 1946 (the "Lanham Act"), 15 U.S.C. § 1121, and under Sections 1331, 1338(a) and 1338(b) of the Judicial Code, 28 U.S.C. §§ 1331, 1338(a) and 1338(b). The Court has supplemental jurisdiction over the state law claims under Section 1367(a) of the Judicial Code, 28 U.S.C. § 1367(a).

9. Upon information and belief, EM regularly does and solicits business within the State of New York; has engaged in conduct in this judicial district, including the promotion, distribution and/or sale of magazines and/or other materials advertising its contest under the infringing ENTREPRENEUR OF THE YEAR mark, causing injury to Plaintiffs within this district and within the State; has derived and/or intends to derive substantial revenues from such conduct within this district and State; and has and should have reasonably expected such conduct to have consequences within this district and within the State, including, but not limited to, the harm suffered by Plaintiffs complained of herein. As such, EM is subject to personal jurisdiction in this Court.

10. Venue in this judicial district is proper pursuant to Sections 1391(b) and (c) of the Judicial Code, 28 U.S.C. § 1391(b) and (c), in that a substantial part of the events giving rise to Plaintiffs' claims, including, but not limited to, defendant's promotion, distribution and sale of

magazines and/or other promotional materials advertising its contest under the infringing ENTREPRENEUR OF THE YEAR mark in violation of Plaintiffs' exclusive rights, occurred in this district, and in that Defendant is subject to personal jurisdiction in New York State and is therefore deemed to reside in New York State.

FACTS COMMON TO ALL CLAIMS FOR RELIEF

A. Plaintiffs' ENTREPRENEUR OF THE YEAR Mark

11. For more than two decades, Ernst & Young has conducted an annual contest and awards program under the ENTREPRENEUR OF THE YEAR mark to commemorate the exceptional achievement of business leaders and to make the general public more aware of the benefits these leaders provide to the world economy.

12. Ernst & Young's ENTREPRENEUR OF THE YEAR award is highly sought-after and is the most prestigious business award of its kind.

13. Past ENTREPRENEUR OF THE YEAR award honorees have included some of the most influential business leaders in the world, including Michael Dell of Dell Computer Corp. (1989), Howard Schultz of Starbucks Corp. (1991), Steve Case of America Online (1994), Jeff Bezos of Amazon.com (1997), John P. Mackey of Whole Foods Market, Inc. (2003) and Wayne Huizenga of Blockbuster Entertainment (2004).

14. Ernst & Young recognizes its honorees at a series of ENTREPRENEUR OF THE YEAR regional awards banquets, at the national ENTREPRENEUR OF THE YEAR gala, and at the WORLD ENTREPRENEUR OF THE YEAR award ceremony.

15. Ernst & Young maintains an ENTREPRENEUR OF THE YEAR Hall of Fame at the company's United States Headquarters at 5 Time Square in New York, which is open to the

public, and operates an ENTREPRENEUR OF THE YEAR Hall of Fame website at <http://eoyhof.ey.com> with a searchable database of past ENTREPRENEUR OF THE YEAR award winners. See <http://eoyhof.ey.com/SearchHallofFame.aspx>.

16. The ENTREPRENEUR OF THE YEAR mark has also been publicized in numerous Ernst & Young authorized books and other publications, including: *The Ernst & Young Entrepreneur of the Year Award Insights from the Winners' Circle* published in 2002 by Kaplan Business; *Women Entrepreneurs Only: 12 Women Entrepreneurs Tell the Stories of Their Success* published in 1999 by Wiley; *Net Entrepreneurs Only: 10 Entrepreneurs Tell the Stories of Their Success* published in 2000 by Wiley, and *What's Luck Got to Do With It?: Twelve Entrepreneurs Reveal the Secrets Behind Their Success* published in 1996 by Wiley.

17. Ernst & Young's ENTREPRENEUR OF THE YEAR program also garners a tremendous amount of third-party press coverage. A recent search of Westlaw's ALLNEWS database returned more than 1,500 news articles in United States publications referencing Ernst & Young's ENTREPRENEUR OF THE YEAR awards in the last three years alone.

18. As a result of Ernst & Young's extensive use of the ENTREPRENEUR OF THE YEAR mark, the mark has acquired tremendous value and has become extremely well known to the consuming public and trade as identifying and distinguishing Plaintiffs exclusively and uniquely as the source of services available under the mark. The mark has thus come to represent an enormous goodwill of Counterclaim Plaintiffs.

19. In addition to its common law rights in the ENTREPRENEUR OF THE YEAR trademark, EYGN owns United States Trademark Registration No. 1,587,164 issued by the United States Patent and Trademark Office (the "USPTO") for ENTREPRENEUR OF THE YEAR in connection with "Conducting an annual awards ceremony commemorating the

recipient's exceptional achievement in entrepreneurial business achievements" in International Class 41 (the "ENTREPRENEUR OF THE YEAR Registration"). A true and correct printout from the USPTO's database reflecting the ENTREPRENEUR OF THE YEAR Registration is attached hereto as **Exhibit 1**.

20. The ENTREPRENEUR OF THE YEAR Registration is valid, subsisting, and in full force and effect. The Registration also is incontestable under Section 15 of the Lanham Act, 15 U.S.C. § 1065, and therefore constitutes conclusive evidence of EYGN's ownership of the mark and of its exclusive right to use the mark in commerce on or in connection with the identified services pursuant to Section 33(b) of the Lanham Act, 15 U.S.C. § 1115(b).

B. EM's Infringing Conduct

21. EM has no connection to Plaintiffs.

22. Upon information and belief, EM publishes *Entrepreneur Magazine*, a monthly magazine for and about entrepreneurs.

23. In 1994, when Ernst & Young learned that EM was sponsoring a contest under the ENTREPRENEUR OF THE YEAR trademark, Ernst & Young's counsel sent a cease-and-desist letter to the editor of *Entrepreneur Magazine* demanding that EM immediately stop using the ENTREPRENEUR OF THE YEAR mark. In response, corporate counsel for the EM thanked Ernst & Young's counsel for "bringing the matter to [EM's] attention" and advised that EM had chosen to discontinue the program. A true and correct copy of this correspondence is attached as **Exhibit 2**.

24. Notwithstanding its actual notice of Plaintiffs' exclusive rights in and registration of the ENTREPRENEUR OF THE YEAR mark, and of Ernst & Young's prior objection to

EM's use of the mark, EM recently launched a new contest under the ENTREPRENEUR OF THE YEAR mark. Upon information and belief, nominations for the new EMI contest were accepted through June 30, 2008. A true and correct copy of a press release concerning Defendant's new contest is attached as Exhibit 3.

25. EM's new contest under the ENTREPRENEUR OF THE YEAR mark, like the well-known contest Ernst & Young has long operated under the ENTREPRENEUR OF THE YEAR mark, seeks nominations from the general business community and honors successful business leaders.

26. EM's ENTREPRENEUR OF THE YEAR mark is identical in all respects to Ernst & Young's famous ENTREPRENEUR OF THE YEAR trademark.

27. Upon information and belief, EM has engaged in and is continuing to engage in the above conduct willfully and deliberately, with full knowledge of Plaintiffs' prior rights in the ENTREPRENEUR OF THE YEAR mark and the incontestable registration for that mark, and with an intent to misappropriate Plaintiffs' goodwill in the ENTREPRENEUR OF THE YEAR mark and deceive consumers into believing that EM and/or its services are legitimately connected with Plaintiffs.

28. When Plaintiffs learned of EM's infringing use of the ENTREPRENEUR OF THE YEAR mark, they demanded in writing that EM stop such use. EM refused to stop such use and instead filed a declaratory judgment action against Plaintiffs in the United States District Court for the Central District of California with the caption *Entrepreneur Media, Inc. v. EYGN Limited*, No. SACV08-0608 DOC (C.D. Cal.) (the "Anticipatory California Action"). Plaintiffs intend to file a motion to transfer the Anticipatory California Action to this Court.

29. EM's use of the ENTREPRENEUR OF THE YEAR mark unfairly and unlawfully wrests from Plaintiffs control over the federally registered ENTREPRENEUR OF THE YEAR mark and Plaintiffs' reputation. Plaintiffs have no control over the quality of EM's services, and Plaintiffs' extremely valuable reputation and the hard-earned goodwill built up in Plaintiffs' mark may be permanently damaged if EM—an entrant in the economically challenged magazine industry—offers services under the ENTREPRENEUR OF THE YEAR mark that are inferior to Plaintiffs' services.

30. Unless EM's conduct is enjoined, it will greatly injure the value of the ENTREPRENEUR OF THE YEAR mark to Plaintiffs and the ability of that mark to identify services emanating from Plaintiffs.

31. Plaintiffs have no adequate remedy at law.

**FIRST CLAIM FOR RELIEF (BY EYGN) FOR
TRADEMARK INFRINGEMENT UNDER 15 U.S.C. § 1114(1)**

32. Plaintiffs repeat and reallege paragraphs 1 through 31 above as if fully set forth herein.

33. EYGN is the owner of the ENTREPRENEUR OF THE YEAR mark and Registration, which is valid, subsisting, and in full force and effect.

34. EM's activities as described herein are likely to cause confusion, or to cause mistake or to deceive consumers and the public as to the source or sponsorship of EM's goods and services. Consumers are likely to be misled into believing that EM's contest was licensed by, sponsored by or otherwise approved by EYGN.

35. EM was on both actual and constructive notice of EYGN's exclusive rights in the ENTREPRENEUR OF THE YEAR mark at the time EM decided to use the mark. EM's use of

the ENTREPRENEUR OF THE YEAR mark is willful, in bad faith, and with full knowledge of EYGN's prior use of, exclusive rights in and ownership of that mark, with full knowledge of the goodwill and reputation associated with that mark, and with full knowledge that EM has no right, license or authority to use that mark or any other mark confusingly similar thereto.

36. EM's acts are intended to reap the benefit of the goodwill that EYGN has created in the ENTREPRENEUR OF THE YEAR mark and constitute infringement of EYGN's federally registered trademark in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1).

37. EM's conduct has caused and is causing immediate and irreparable injury to EYGN and will continue both to damage EYGN and to deceive the public unless enjoined by this Court. EYGN has no adequate remedy at law.

**SECOND CLAIM FOR RELIEF (BY EYGN and ERNST & YOUNG)
FOR FEDERAL UNFAIR COMPETITION UNDER 15 U.S.C. § 1125(a)**

38. Plaintiffs repeat and reallege paragraphs 1 through 37 above as if fully set forth herein.

39. EM's activities as described herein are likely to cause confusion, mistake, or deception as to the source of EM's goods and services and are likely to create the false impression that EM is affiliated with Plaintiffs or that its goods and services are authorized, sponsored, endorsed, licensed, or authorized by Plaintiffs. EM's actions constitute unfair competition, false designation of origin and use of a false description in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

40. EM's conduct has caused and is causing immediate and irreparable injury to Plaintiffs and will continue both to damage Plaintiffs and to deceive the public unless enjoined by this Court. Plaintiffs have no adequate remedy at law.

**THIRD CLAIM FOR RELIEF (BY EYGN and ERNST & YOUNG)
FOR UNFAIR COMPETITION UNDER NEW YORK COMMON LAW**

41. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 40 above as if fully set forth herein.

42. Defendant's conduct complained of herein is likely to confuse the public as to the origin, source or sponsorship of Defendant's goods and services, or to cause mistake or to deceive the public into believing that Defendant is affiliated with or that its goods and services authorized, sponsored, endorsed, licensed, or authorized by Plaintiffs, in violation of Plaintiffs' rights in the ENTREPRENEUR OF THE YEAR mark under New York State common law.

43. Defendant chose to use the ENTREPRENEUR OF THE YEAR mark with constructive and/or actual knowledge of Plaintiffs' prior use of and rights in the ENTREPRENEUR OF THE YEAR mark.

44. By adopting and using a colorable imitation of the valuable and distinctive ENTREPRENEUR OF THE YEAR mark, Defendant has been unjustly enriched and Plaintiffs have been damaged.

**FOURTH CLAIM FOR RELIEF (BY EYGN and ERNST & YOUNG)
FOR VIOLATION OF THE NEW YORK DECEPTIVE AND UNFAIR TRADE
PRACTICES ACT UNDER NEW YORK GENERAL BUSINESS LAW § 349**

45. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 44 above as if fully set forth herein.

46. Defendant's use of the ENTREPRENEUR OF THE YEAR mark has the capacity to deceive and is deceiving the public as to the source or sponsorship of Defendant's goods and services. As a result, the public will be damaged.

47. Defendant's conduct is willful and in knowing disregard of Plaintiffs' rights.

48. Defendant has been and is engaged in deceptive acts or practices in the conduct of a business, trade or commerce in violation of Section 349 of the New York General Business Law.

49. Defendant's conduct has caused and is causing immediate and irreparable injury to Plaintiffs.

**FIFTH CLAIM FOR RELIEF (BY EYGN and ERNST & YOUNG) FOR
CANCELLATION OF EM'S U.S. TRADEMARK REGISTRATIONS
UNDER 15 U.S.C. §§ 1052, 1065(4), 1092**

50. Plaintiffs repeat and reallege paragraphs 1 through 49 above as if fully set forth herein.

51. In response to Plaintiffs' recent demand that EM stop using the ENTREPRENEUR OF THE YEAR mark, EM asserted that confusion was not likely because of the strength of EM's purported "family" of ENTREPRENEUR-formative marks for which EM owns trademark registrations issued by the USPTO.

52. The following registrations (collectively, "EM's Registrations") in EM's purported family of marks are for terms that, when used on or in connection with EM's goods or services, are generic and/or merely descriptive without a showing of secondary meaning:

- (a) Registration No. 2,391,145 of ENTREPRENEUR EXPO in connection with
"Arranging and Conducting Trade Show Exhibitions in the Field of

Entrepreneurial Activities, Namely the Start-Up and Operation of Small Business Enterprises”;

- (b) Registration No. 3,315,154 of ENTREPRENEURIAL WOMAN in connection with “Publications, Namely, Magazines, Magazine Inserts, Booklets, Books, and Published Reports, Featuring Information of Interest to Women in the field of Business”;
- (c) Registration No. 3,470,064 of ENTREPRENEUR PRESS for “Paper goods and printed matter, namely, books, manuals, prepared reports, work books, study guides, legal and business forms, and newsletters concerning advice and information relating to the subjects of starting, running and operating a business, and individuals who succeeded in business, which subjects are of interest to entrepreneurs, new and existing businesses and members of the general public” and “On-line ordering services featuring printed and electronically downloadable publications, namely, books, study guides, legal and business forms, and newsletters, concerning advice and information relating to the subjects of starting, running and operating a business and individuals who succeeded in business, which subjects are of interest to entrepreneurs, new and existing businesses and members of the general public”;
- (d) Registration No. 2,653,302 of SOYENTREPRENEUR.COM for “Advertising and business services, namely, advertising for others via a global computer information network; providing computerized on-line ordering featuring printed publications, books, magazines, reports and printed manuals containing advice for starting and operating small businesses; providing business information in the

Spanish language in the field of starting and operating small businesses via the Internet”;

- (e) Registration No. 3,374,476 of WOMENENTREPRENEUR.COM for “Dissemination of advertising for others via the Internet; providing business information about small business operations via the internet; providing an online searchable database featuring business reports, advice and information regarding starting and operating small businesses” and “Providing online electronic bulletin boards for transmission of messages among computers users concerning small business operations”;
- (f) Registration No. 3,266,532 of ENTREPRENEURENESPANOL.COM for “Advertising and business services, namely, arranging for the promotion of goods and services of others by means of a global computer network and other computer online service providers; providing business information for the use of customers in the field of starting and operating businesses and permitting customers to obtain the aforesaid information via a global computer network and other computer online service providers; Internet advertising services, namely, promoting the goods and services of others by providing a web site with active links to their websites featuring their goods and services”;
- (g) Registration No. 3,204,899 of ENTREPRENEUR’S STARTUPS for “Paper goods and printed matter; namely, magazines, books, booklets and published reports pertaining to business opportunities.”
- (h) Registration No. 2,502,032 of ENTREPRENEUR for “Arranging and Conducting Trade Show Exhibitions in the Field of Entrepreneurial Activities, Namely the

Start-Up and Operation of Small Business Enterprises” and “Educational Services, Namely, Conducting Seminars on the Development and Operation of Businesses, and Conducting Work Shops on Computer Technology, Telecommunications, Marketing, Financing Options, Real Estate Management, Tax Planning and Insurance”; and

- (i) Registration No. 2,263,883 of ENTREPRENEUR in connection with “Advertising and business services, namely, arranging for the promotion of the goods and services of others by means of a global computer network and other computer online services providers; providing business information for the use of customers in the field of starting and operating small businesses and permitting customers to obtain information via a global computer network and other computer online service providers and; web advertising services, namely, providing active links to the websites of others.”

53. Under Sections 2, 15(4) and 24 of the Lanham Act, 15 U.S.C. §§ 1052, 1065(4) and 1092, the terms registered in EM’s Registrations should not be registered as trademarks because they are generic terms when used on or in connection with EM’s products and services and/or do not serve to identify and distinguish EM’s goods or services from those of others and do not otherwise function as trademarks as defined in Section 45 of the Lanham Act, 15 U.S.C. § 1127.

54. Plaintiffs are being and will continue to be damaged by the aforementioned EM Registrations because, among other things, EM is relying on such registrations to justify its infringement of Plaintiffs’ ENTREPRENEUR OF THE YEAR mark.

55. Pursuant to Section 37 of the Lanham Act, 15 U.S.C. § 1119, this Court should direct the Director of the United States Patent and Trademark Office to cancel EM's Registrations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully demand judgment as follows:

(1) That a permanent injunction be issued enjoining EM and its officers, agents, privies, principals, directors, licensees, attorneys, servants, employees, affiliates, subsidiaries, successors and assigns, and all those persons in concert or participation with any of them, and any entity owned or controlled in whole or in part by EM, from:

- (a) Using the ENTREPRENEUR OF THE YEAR mark, or any simulation, reproduction, copy, colorable imitation or confusingly similar variation thereof, in or as part of a trademark, service mark, corporate name or trade name, or otherwise in connection with awards and/or ceremonies honoring businesspersons or goods or services related thereto;
- (b) using any false designation of origin or false description (including, without limitation, any letters or symbols), or performing any act, which can, or is likely to, lead members of the trade or public to believe that EM is associated with Plaintiffs or that any product imported, manufactured, distributed, sold or offered or any service offered by EM is in any manner associated or connected with Plaintiffs, or is authorized, licensed, sponsored or otherwise approved by Plaintiffs;

- (c) purchasing Plaintiffs' ENTREPRENEUR OF THE YEAR mark in connection with any sponsored advertising on the Internet or using Plaintiffs' ENTREPRENEUR OF THE YEAR mark in any source code or otherwise using Plaintiffs' ENTREPRENEUR OF THE YEAR mark such that a search for ENTREPRENEUR OF THE YEAR on the Internet will cause any domain name or website of EM to appear in search results;
- (d) using or registering Plaintiffs' ENTREPRENEUR OF THE YEAR mark as part of any domain name or internet address, regardless of country-code top-level domain or general top-level domain;
- (e) engaging in any other activity constituting unfair competition with Plaintiffs, or constituting an infringement of Plaintiffs' ENTREPRENEUR OF THE YEAR mark;
- (f) applying to register or registering in the United States Patent and Trademark Office or in any state trademark registry any mark consisting of or including Plaintiffs' ENTREPRENEUR OF THE YEAR mark or any simulation, reproduction, copy or colorable imitation thereof; and
- (g) assisting, aiding or abetting any other person or business entity in engaging in or performing any of the activities referred to in subparagraphs (a) through (f) above.

(2) Issuing judgment from this Court ordering the Director of the United States Patent and Trademark Office to cancel EM's Registrations.

(3) Ordering the destruction of all materials (including, without limitation, all brochures and other promotional materials) in EM's custody, possession or control bearing the

ENTREPRENEUR OF THE YEAR mark or any simulation, reproduction, copy or colorable imitation thereof within (30) thirty days.

(4) Directing that EM file with the Court and serve upon Plaintiffs' counsel within thirty (30) days after entry of judgment a report in writing under oath, setting forth in detail the manner and form in which they have complied with the above.

(5) Awarding Plaintiffs EM's profits.

(6) Awarding Plaintiffs their actual damages, trebled, pursuant to 15 U.S.C. § 1117(a).

(7) Awarding to Plaintiffs exemplary and punitive damages to deter any further willful infringement as the Court finds appropriate.

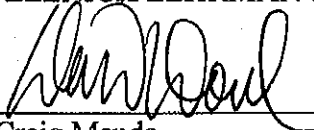
(8) Awarding to Plaintiffs their costs and disbursements incurred in this action, including reasonable attorneys' fees.

(9) Awarding to Plaintiffs interest, including pre-judgment interest on the foregoing sums.

(10) Awarding to Plaintiffs such other and further relief as the Court may deem just and proper.

Dated: New York, NY
July 28, 2008

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: 
Craig Mende
David Donahue
Betsy Judelson Newman

866 United Nations Plaza
New York, NY 10017
Tel: (212) 813-5900
Fax: (212) 813-5901
Counsel for Plaintiffs

EXHIBIT 1

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2008-07-28 18:29:19 ET

Serial Number: 73749392 Assignment Information Trademark Document Retrieval

Registration Number: 1587164

Mark (words only): ENTREPRENEUR OF THE YEAR

Standard Character claim: No

Current Status: This registration has been renewed.

Date of Status: 2000-02-11

Filing Date: 1988-08-31

Transformed into a National Application: No

Registration Date: 1990-03-13

Register: Principal

Law Office Assigned: (NOT AVAILABLE)

If you are the applicant or applicant's attorney and have questions about this file, please contact the Trademark Assistance Center at TrademarkAssistanceCenter@uspto.gov

Current Location: 900 -File Repository (Franconia)

Date In Location: 2002-05-07

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. ERNST & YOUNG. U.S. LLP

Address:

**ERNST & YOUNG. U.S. LLP
787 SEVENTH AVENUE
NEW YORK, NY 10019
United States**

**Legal Entity Type: LIMITED LIABILITY PARTNERSHIP
State or Country Where Organized: New York**

GOODS AND/OR SERVICES

International Class: 041

Class Status: Active

CONDUCTING AN ANNUAL AWARDS CEREMONY COMMEMORATING THE
RECIPIENT'S EXCEPTIONAL ACHIEVEMENT IN ENTREPRENEURIAL BUSINESS
ACHIEVEMENTS

Basis: 1(a)

First Use Date: 1986-02-00

First Use in Commerce Date: 1987-02-00

ADDITIONAL INFORMATION

Disclaimer: "ENTREPRENEUR"

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

NOTE: To view any document referenced below, click on the link to "Trademark Document Retrieval" shown near the top of this page.

2000-02-11 - First renewal 10 year

2000-02-11 - Section 9 granted/check record for Section 8

1999-10-27 - Combined Section 8 (10-year)/Section 9 filed

1996-06-21 - Section 8 (6-year) accepted & Section 15 acknowledged

1995-12-21 - Section 8 (6-year) and Section 15 Filed

1990-03-13 - Registered - Principal Register

1989-08-29 - Published for opposition

1989-07-29 - Notice of publication

1989-07-29 - Notice of publication

1989-07-28 - Notice of publication

1989-03-14 - Published for opposition

1989-02-10 - Notice of publication

1988-12-09 - Approved for Pub - Principal Register (Initial exam)

1988-11-21 - Communication received from applicant

1988-11-07 - Non-final action mailed

1988-10-14 - Assigned To Examiner

ATTORNEY/CORRESPONDENT INFORMATION

Attorney of Record

SUSON UPTON DOUGLASS

Correspondent

SUSAN UPTON DOUGLASS

FROSS, ZELNICK, LEHRMAN & ZISSU, P.C.

866 UNITED NATIONS PLAZA

NEW YORK, NY 10017



Assignments on the Web > Trademark Query

Trademark Assignment Abstract of Title

Total Assignments: 3

Serial #: 73749392 Filing Dt: 08/31/1988 Reg #: 1587164 Reg. Dt: 03/13/1990

Registrant: ARTHUR YOUNG & COMPANY

Mark: ENTREPRENEUR OF THE YEAR

Assignment: 1

Reel/Frame: 0777/0404 Received: Recorded: 03/25/1991 Pages: 2

Conveyance: MERGER

Assignor: ERNST & WHINNEY AND ARTHUR YOUNG & COMPANY

Exec Dt: 02/27/1990

Entity Type: SEE DOCUMENT FOR DETAILS

Citizenship: NONE

Entity Type: SEE DOCUMENT FOR DETAILS.

Citizenship: NEW YORK

Assignee: ERNST & YOUNG U.S.
277 PARK AVENUE
NEW YORK, NEW YORK 10172

Correspondent: ERNST & YOUNG
380 MADISON AVENUE
NEW YORK, NY 10017

Assignment: 2

Reel/Frame: 1304/0282 Received: Recorded: 02/17/1995 Pages: 5

Conveyance: CHANGE OF NAME EFFECTIVE 8-1-94 SEE RECORD FOR DETAILS.

Assignor: ERNST & YOUNG U.S.

Exec Dt: 08/01/1994

Entity Type: GENERAL PARTNERSHIP

Citizenship: NEW YORK

Entity Type: LIMITED LIABILITY PARTNERSHIP

Citizenship: DELAWARE

Assignee: ERNST & YOUNG U.S. LLP
787 SEVENTH AVENUE
NEW YORK, NEW YORK 10019

Correspondent: SUSAN UPTON DOUGLASS - WEISS DAWID
FROSS ZELNICK & LEHRMAN, P.C.
633 THIRD AVENUE
NEW YORK, NY 10017

Assignment: 3

Reel/Frame: 2479/0868 Received: 04/12/2002 Recorded: 03/25/2002 Pages: 23

Conveyance: ASSIGNS THE ENTIRE INTEREST

Assignor: ERNST & YOUNG U.S. LLP

Exec Dt: 12/27/2001

Entity Type: DELAWARE LIMITED LIABILITY PARTNERSHIP

Citizenship: NONE

Entity Type: CORPORATION

Citizenship: BAHAMAS

Assignee: EYGN LIMITED
ONE MONTAGUE PLACE EAST BAY STREET
NASSAU, BAHAMAS

Correspondent: FROSS ZELNICK LEHRMAN & ZISSU, P.C.
SUSAN UPTON DOUGLASS

866 UNITED NATIONS PLAZA
NEW YORK, NY 10017

Domestic rep: ZELNICK LEHRMAN & ZEISSU, P.C.
866 UNITED NATIONS PLAZA
NEW YORK, NY 10017

Search Results as of: 07/28/2008 08:30 PM

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Web interface last modified: April 20, 2007 v.2.0.1

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EXHIBIT 2

January 12, 1994

Ms. Rieva Lesonsky
Editor in Chief
Entrepreneur
P. O. Box 57050
Irving, CA 92619-7050

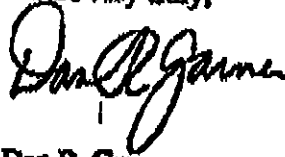
Dear Ms. Lesonsky:

It has come to our attention that *Entrepreneur* magazine is sponsoring an award program using the name Entrepreneur of the Year. Entrepreneur Of The Year® is a registered service mark of Ernst & Young. We have used this service mark for our firm's program for many years. Because we are an international firm, this contest is held in all regions of the United States and in many other countries.

Since Entrepreneur Of The Year is a registered service mark of Ernst & Young, it is inappropriate for you to use it without our consent.

Thank you for your cooperation in this matter. If you have any questions, please feel free to contact me or our counsel, Howard Freedman. We can be reached at (214) 979-1673 or (212) 773-3855, respectively.

Yours very truly,



Dan R. Garner

Copy to Howard Freedman

*File EY legal -
Service Mark*

Entrepreneur Group

January 21, 1994

Ronald L. Young
Corporate Counsel

Dan R. Garner
ERNST & YOUNG
2001 Ross Avenue, Suite 2800
Dallas, Texas 75201

Dear Mr. Garner:

Our Editor-in-Chief, Rieva Lesonsky, has asked me to respond to your letter of January 12, 1994, in which you advise us that the name "Entrepreneur of the Year" is a registered service mark of Ernst & Young. We thank you for bringing this matter to our attention. However, we have already (and for unrelated reasons) decided not to pursue an awards program using that name.

I trust that the foregoing satisfactorily responds to your concerns. However, should you have any further questions, please do not hesitate to contact me at the telephone number below.

Very truly yours,

ENTREPRENEUR MEDIA, INC.

Ronald L. Young
Ronald L. Young

RLY:cs
cc : Rieva Lesonsky

*cc Howard Freedman
NY legal dk*

EXHIBIT 3

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2008 Press Releases

Entrepreneur magazine and The UPS Store to hunt business pioneers

IRVINE, Calif., March 10, 2008 -- *Entrepreneur* magazine and *The UPS Store* today launched the "Entrepreneur of the Year" contest. Nationwide, the business community is being called upon to find those who best exemplify the entrepreneurial spirit.

"Without entrepreneurs, there would be no business community; these are the people who represent 99.7 percent of all employers," said Rieva Lesonsky, Director of *Entrepreneur* magazine. "Their passion fuels America's economy. This contest is truly a unique opportunity for entrepreneurs to celebrate their own."

Eligible business owners are invited to submit an online entry at the contest's Web site, www.entrepreneur.com/eyo. Nominations will be accepted through June 30, 2008. Businesses will be eligible if they have more than 100 employees and gross sales revenue of at least \$5 million in 2007. All will qualify for the "Entrepreneur of the Year" award; "Emerging Entrepreneur of the Year" is open to companies that have been in business for less than five years with less than five employees and which posted at least \$500,000 in gross sales revenue for 2007.

An expert panel of judges will choose the finalists, including representatives from *Entrepreneur's* editorial department and Mail Boxes Etc., Inc. (MBE), the franchisor of *The UPS Store*, along with *Entrepreneur* columnist Robert Kiyosaki ("Rich Dad, Poor Dad"). The panel's decision will be based on several criteria, including business growth in terms of number of employees and annual gross sales revenue as well as impact on an industry, the community, employees and customers.

Once finalists are chosen, the public will select its winners by an online vote at www.entrepreneur.com/eyo. Voting will take place from July 21 to Aug. 20.

"*The UPS Store* franchisees are entrepreneurs and small-business owners, so it's our privilege to acknowledge peers who have created and sustained their own successful business endeavors," said Stuart Mathis, president of MBE. "Many of our customers are everyday entrepreneurs and small-business owners; we make it our goal to help see their businesses grow and succeed."

The two winning business leaders will be profiled in the December 2008 issue of *Entrepreneur* magazine and honored at an awards luncheon and ceremony in December 2008 in Long Beach, Calif. Additionally, the winners will receive two roundtrip tickets to anywhere in the United States, a gift certificate for free services at *The UPS Store*, a three-year subscription to *Entrepreneur* magazine and a selection of *Entrepreneur* Press books.

For complete rules and regulations for *Entrepreneur* magazine's 2008 Entrepreneur of The Year Contest Presented by *The UPS Store*, visit www.entrepreneur.com/eyo.

About Entrepreneur Media, Inc.

Entrepreneur Media Inc. is the premier content provider for and about entrepreneurs. Our products engage and inspire every day with the advice, solutions and resources that fuel the bold and independent way entrepreneurs think.

After 30 years, nobody reaches more growing businesses. As the original magazine for the small and midsize business community, *Entrepreneur* continues to be the definitive guide to all the diverse challenges of business ownership. *Entrepreneur.com* is the most widely used website by entrepreneurs and emerging business worldwide. *Entrepreneur Press* publishes the books that turn entrepreneurial skills into business success.

To learn more, visit www.entrepreneur.com.

About The UPS Store

The UPS Store and Mail Boxes Etc. retail locations are franchised by Mail Boxes Etc., Inc., a UPS subsidiary. Together, The UPS Store and Mail Boxes Etc. locations comprise the world's largest franchise network of retail shipping, postal and business service centers, with more than 8,000 locations around the world. In the United States, The UPS Store and Mail Boxes Etc. locations are independently owned and operated by licensed franchisees of Mail Boxes Etc., Inc. Outside the United States, locations are owned and operated by MBE master licensees or their franchisees. For additional information, please visit www.theupsstore.com or www.mbe.com.

#*#

For more information, contact:

UPS Pressroom
PR@ups.com
404-828-7123

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EXHIBIT 4

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

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ROGER L. ZISSU
RICHARD Z. LEHV
DAVID W. EHRLICH
SUSAN UPTON DOUGLASS
JANET L. HOFFMAN
PETER J. SILVERMAN
LAWRENCE ELI APOLZON
BARBARA A. SOLOMON
MARK D. ENGELMANN
NADINE H. JACOBSON
ANDREW N. FREDBECK
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866 UNITED NATIONS PLAZA
AT FIRST AVENUE & 48TH STREET
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MICHAEL CHIAPPETTA
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TAMAR NIV BESSINGER
DIANE MARCOVICI PLAUT
COUNSEL

NANCY C. DICOZZA
LAURA POPP-ROSENBERG
CARA A. BOYLE
CHARLES T. J. WEIGELL III
MARILYN F. KELLY
VANESSA HWANG LUI
DOROTHY C. ALEVIZATOS
BETSY JUDELSON NEWMAN
NICHOLAS H. EISENMAN
SUZANNE WHITE
KAREN LIM
GRACE KANG
TODD MARTIN

July 29, 2008

BY EMAIL AND FEDEX

Michael Adele, Esq.
Allen Matkins Leck Gamble Mallory & Natsis
12348 High Bluff Drive, Suite 210
San Diego, CA 92130-3580

Re: *EYGN Limited v. Entrepreneur Media, Inc.*, No. 08 CV 6734 (S.D.N.Y.);
Entrepreneur Media, Inc. v. EYGN Limited, SACV08-0608 DOC (MLGx)
(C.D. Cal.) (Our Ref.: EYGN USA TC 0806950)

Dear Michael:

This is further to our telephone conference on July 21, 2008 concerning the ongoing dispute between EYGN Limited and Ernst & Young LLP (collectively, "our clients"), on the one hand, and Entrepreneur Media, Inc. ("EMI"), on the other hand, regarding EMI's unauthorized use of the ENTREPRENEUR OF THE YEAR mark.

As we advised from the outset of our prior correspondence and telephone conferences with you, EMI's institution of the above-referenced declaratory judgment action in the U.S. District Court for the Central District of California (the "California Action") is a prohibited "anticipatory filing" designed to secure an improper tactical advantage in litigation in the face of our clients' written demand that EMI stop using the ENTREPRENEUR OF THE YEAR mark. Based on your assurances that EMI was willing to pursue an amicable resolution, however, our clients held off on filing an action in the proper forum—New York—but expressly reserved the right to do so if settlement negotiations failed.

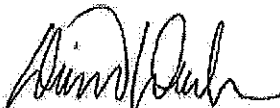
On July 15, 2008, we sent you our client's counteroffer in response to your June 20, 2008 settlement proposal. On July 21, 2008, you advised that EMI rejected our counteroffer. You also explained the parameters that EMI would agree to in settlement of the parties' dispute. As you requested, we have conveyed EMI's most-recent proposal to our clients. Our clients hereby reject EMI's proposal.

Michael Adele, Esq.
July 29, 2008
Page 2

In light of the parties' failure to settle the matter, our clients see no choice other than to press forward with their claims against EMI in the proper forum. As such, on behalf of our clients we have instituted an action against EMI in the U.S. District Court for the Southern District of New York with the caption *EYGN Limited v. Entrepreneur Media, Inc.*, No. 08 CV 6734 (S.D.N.Y.) (the "New York Action"). A courtesy copy of the Complaint, Summons, Individual Practices of the Honorable Alvin K. Hellerstein, and Individual Practices of Magistrate Judge Theodore H. Katz are enclosed (and by email, attached) for your reference. Please let us know by **2:00 pm, Pacific Time, July 30, 2008**, whether you accept service on EMI's behalf. Otherwise we will proceed with service in the normal course.

With respect to the California Action, we are writing pursuant to C.D. Cal. Local R. 7-3 to request a telephone conference of counsel to discuss the following contemplated motions: (1) Motion by Ernst & Young Advisory Inc. for Judgment on the Pleadings, or in the Alternative, Summary Judgment for Lack of Subject Matter Jurisdiction; (2) Motion by EYGN Limited for Judgment on the Pleadings, or in the Alternative, for Summary Judgment, for Lack of Personal Jurisdiction; and (3) Motion to Transfer the California Action to the U.S. District Court for the Southern District of New York. Please let us know when you or another lawyer at your firm who is working on the case will be available on July 30 or July 31 to meet and confer on the above.

Sincerely,



David Donahue

Enclosure

cc: Craig S. Mende, Esq. (by email)
Kevin Lussier, Esq. (by email)

EXHIBIT 5

Steven B. Pokotilow
Richard Eskew
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038-4982
Tel: (212) 806-5400
Fax: (212) 806-6006
E-mail: spokotilow@stroock.com
reskew@stroock.com

*Attorneys for Defendant
Entrepreneur Media, Inc.*

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

EYGN LIMITED and ERNST & YOUNG)
LLP,) **ECF CASE**
)
Plaintiff,) Civil Action No. 08-CIV-6734 (AKH)
)
vs.)
)
ENTREPRENEUR MEDIA, INC.)
)
Defendant.)

**DEFENDANT ENTREPRENEUR MEDIA, INC.’S ANSWER AND
AFFIRMATIVE DEFENSES IN RESPONSE TO PLAINTIFF’S COMPLAINT**

Defendant, Entrepreneur Media, Inc. (“EMI”), by and through its undersigned counsel, answers the allegations set forth in the Complaint filed by Plaintiffs EYGN Limited and Ernst & Young LLP (collectively “E&Y”) and sets forth its affirmative defenses thereto.

NATURE OF THE ACTION

1. Defendant admits that Plaintiffs have used the ENTREPRENEUR OF THE YEAR designation in connection with a contest for business leaders and that ENTREPRENEUR OF THE YEAR is the subject of a United States trademark registration, but otherwise denies the remaining allegations of paragraph 1 of the Complaint.

2. Defendant admits that, in 2008, Defendant sponsored a contest and awards program for “Entrepreneur Magazine’s 2008 ENTREPRENEUR® OF THE YEAR” and “Entrepreneur Magazine’s 2008 Emerging ENTREPRENEUR® OF THE YEAR”, but otherwise denies the remaining allegations of paragraph 2 of the Complaint.

3. Defendant admits that it previously contemplated holding an entrepreneur contest, decided not to hold such contest at that time and received a letter from one or more of the Plaintiffs objecting to EMI holding such a contest, and that EMI is currently in the process of holding an entrepreneur of the year contest and has rejected Plaintiffs’ demands, but otherwise denies the remaining allegations of paragraph 3 of the Complaint.

4. Defendant admits that this action purports to be for trademark infringement and unfair competition is commenced under Section 32(1) and 43(a) of the Lanham Act and related claims under New York State law and that Plaintiffs seek an injunction and accounting of Defendant’s profits, damages, attorneys’ fees and other relief, but otherwise denies the remaining allegations of paragraph 4 of the Complaint.

THE PARTIES

5. Defendant admits that Plaintiff EYGN is a company incorporated in the Bahamas with a registered office at One Montague Place, East Bay Street, Nassau, Bahamas, but otherwise denies the remaining allegations of paragraph 5 of the Complaint.

6. Defendant admits that Plaintiff Ernst & Young is a limited liability partnership registered under the laws of the state of Delaware with its principle place of business at 5 Times Square, 37th floor, New York, NY 10036, but otherwise denies the remaining allegation of paragraph 6 of the Complaint.

7. Defendant admits the allegations of paragraph 7 of the Complaint.

JURISDICTION AND VENUE

8. Defendant admits the allegations of paragraph 8 of the Complaint.

9. Defendant admits that EMI is subject to personal jurisdiction in this court, but denies that it infringes the ENTREPRENEUR OF THE YEAR mark or that it has caused injury or harm as Plaintiffs have alleged in paragraph 9 of the Complaint.

10. Defendant denies that any of its conduct was infringing in violation of Plaintiff's exclusive rights and otherwise admits Defendant is subject to personal jurisdiction in New York State and is therefore deemed to reside in New York State as alleged in paragraph 10 of the Complaint.

FACTS ALLEGED

A. Plaintiffs ENTREPRENEUR OF THE YEAR Mark

11. Defendant admits that Plaintiff E&Y has conducted an awards program under the ENTREPRENEUR OF THE YEAR mark, but otherwise denies the remaining allegations of paragraph 11 of the Complaint.

12. Defendant is without knowledge or information sufficient to form a belief as to the truth of each of the allegations in paragraph 12 of the Complaint, and therefore denies the same.

13. Defendant is without knowledge or information sufficient to form a belief as to the truth of each of the allegations in paragraph 13 of the Complaint, and therefore denies the same.

14. Defendant is without knowledge or information sufficient to form a belief as to the truth of each of the allegations in paragraph 14 of the Complaint, and therefore denies the same.

15. Defendant admits that Ernst & Young sponsors a website for the Entrepreneur of the Year Hall of Fame at <http://eoyhof.ey.com>, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 15 of the Complaint, and therefore denies the same.

16. Defendant is without knowledge or information sufficient to form a belief as to the truth of each of the allegations in paragraph 16 of the Complaint, and therefore denies the same.

17. Defendant is without knowledge or information sufficient to form a belief as to the truth of each of the allegations in paragraph 17 of the Complaint, and therefore denies the same.

18. Defendant is without knowledge or information sufficient to form a belief as to the truth of each of the allegations in paragraph 18 of the Complaint, and therefore denies the same.

19. Defendant admits that United States Trademark Registration No. 1,587,164 is for the designation ENTREPRENEUR OF THE YEAR for “conducting an annual awards ceremony commemorating the recipient’s exceptional achievement in entrepreneurial business achievements” in International Class 41, and that Exhibit 1 is a correct printout thereof.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 19 of the Complaint, and therefore denies the same.

20. Defendant denies the allegations of paragraph 20 of the Complaint.

B. EM' s Alleged Infringing Conduct

21. Defendant admits the allegations of paragraph 21 of the Complaint.

22. Defendant admits the allegations of paragraph 22 of the Complaint.

23. Defendant admits that Exhibit 2 is a copy of the correspondence that is alleged to have been sent to Defendant in 1994, but otherwise denies the remaining allegations of paragraph 23 of the Complaint.

24. Defendant admits that it sponsors a contest under the designation Entrepreneur Magazine's 2008 ENTREPRENEUR OF THE YEAR® and "Entrepreneur Magazine's 2008 Emerging ENTREPRENEUR OF THE YEAR®", but otherwise denies the remaining allegations of paragraph 24 of the Complaint.

25. Defendant admits that EMI's contest under the name Entrepreneur Magazine's 2008 ENTREPRENEUR OF THE YEAR® and "Entrepreneur Magazine's 2008 Emerging ENTREPRENEUR OF THE YEAR®" honors successful business leaders, but otherwise denies the remaining allegations of paragraph 25 of the Complaint.

26. Defendant denies the allegations of paragraph 26 of the Complaint.

27. Defendant denies the allegations of paragraph 27 of the Complaint.

28. Defendant admits that Plaintiffs have demanded that Defendant cease and desist use of the designations “Entrepreneur Magazine’s 2008 ENTREPRENEUR OF THE YEAR®” and “Entrepreneur Magazine’s 2008 Emerging ENTREPRENEUR OF THE YEAR®”, but otherwise denies the remaining allegations of paragraph 28 of the Complaint.

29. Defendant denies the allegations of paragraph 29 of the Complaint.

30. Defendant denies the allegations of paragraph 30 of the Complaint.

31. Defendant denies the allegations of paragraph 31 of the Complaint.

FIRST CLAIM FOR RELIEF

32. Defendant incorporates its responses to the allegations of paragraphs 1 through 31 above as if fully set forth herein.

33. Defendant denies the allegations of paragraph 33 of the Complaint.

34. Defendant denies the allegations of paragraph 34 of the Complaint.

35. Defendant denies the allegations of paragraph 35 of the Complaint.

36. Defendant denies the allegations of paragraph 36 of the Complaint.

37. Defendant denies the allegations of paragraph 37 of the Complaint.

SECOND CLAIM FOR RELIEF

38. Defendant incorporates its responses to the allegations of paragraphs 1 through 37 above as if fully set forth herein.

39. Defendant denies the allegations of paragraph 39 of the Complaint.

40. Defendant denies the allegations of paragraph 40 of the Complaint.

THIRD CLAIM FOR RELIEF

41. Defendant incorporates its responses to the allegations of paragraphs 1 through 40 above as if fully set forth herein.

42. Defendant denies the allegations of paragraph 42 of the Complaint.

43. Defendant denies the allegations of paragraph 43 of the Complaint.

44. Defendant denies the allegations of paragraph 44 of the Complaint.

FOURTH CLAIM FOR RELIEF

45. Defendant incorporates its responses to the allegations of paragraphs 1 through 44 above as if fully set forth herein.

46. Defendant denies the allegations of paragraph 46 of the Complaint.

47. Defendant denies the allegations of paragraph 47 of the Complaint.

48. Defendant denies the allegations of paragraph 48 of the Complaint.

49. Defendant denies the allegations of paragraph 49 of the Complaint.

FIFTH CLAIM FOR RELIEF

50. Defendant incorporates its responses to the allegations of paragraphs 1 through 49 above as if fully set forth herein.

51. Defendant admits that confusion with any of Plaintiffs' marks is not likely because of the strength of EMI's purported "family" of ENTREPRENEUR-formative marks for

which EMI owns trademark registrations issued by the USPTO, but otherwise denies the remaining allegations of paragraph 51 of the Complaint.

52. Defendant denies the allegations of paragraph 52 of the Complaint.

53. Defendant denies the allegations of paragraph 53 of the Complaint.

54. Defendant denies the allegations of paragraph 54 of the Complaint.

55. Defendant denies the allegations of paragraph 55 of the Complaint.

AFFIRMATIVE DEFENSES

Without admitting any of the allegations in the Complaint, and without admitting or suggesting that Defendant bears the burden of proof on any of the following issues, Defendant alleges the following affirmative defense:

FIRST AFFIRMATIVE DEFENSE (SECOND FILED ACTION)

This action involves the substantially similar issues and substantially the same parties as the action styled, *Entrepreneur Media, Inc. v. EYGN Limited et al.*, Civil Action No. SACV08-0608DOC (MLGx), filed June 2, 2008, in the Central District of California and as a matter of law should be dismissed, transferred, and/or stayed in favor of the first filed action in the Central District of California in the interests of justice and judicial economy and to avoid an inconsistent verdict in favor of one of the parties.

SECOND AFFIRMATIVE DEFENSE (FAILURE TO STATE A CLAIM)

Plaintiff's asserted causes of action fail to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE
(ASSERTED TRADEMARKS GENERIC)

Plaintiff's causes of action are barred because Plaintiffs' "ENTREPRENEUR OF THE YEAR" trademark is or has become generic.

FOURTH AFFIRMATIVE DEFENSE
(FAIR USE)

Plaintiff's causes of action are barred because the alleged use by Defendant of designations that include the words "entrepreneur of the year" to describe an entrepreneur of the year program and/or contest is a fair use under the Lanham Act.

FOURTH AFFIRMATIVE DEFENSE
(MISUSE)

Plaintiff's causes of action are barred, and the alleged mark should be cancelled and/or held unenforceable, because Plaintiffs have, and currently are misusing the "ENTREPRENEUR OF THE YEAR" mark in seeking to utilize trademark law, among other things, to restrict competition and obtain a monopoly over yearly awards ceremonies involving entrepreneurs.

FIFTH AFFIRMATIVE DEFENSE
(ABANDONMENT)

By reason of acts, omissions and their failure to police their mark, the phrase "ENTREPRENEUR OF THE YEAR" has been abandoned by Plaintiffs and has become invalid and/or unenforceable.

SIXTH AFFIRMATIVE DEFENSE
(NOMINATIVE FAIR USE)

As used by Defendant, the phrase "entrepreneur of the year" meets each and every criteria for nominative fair use at least because one cannot effectively sponsor an entrepreneur of the year award without the use of the phrase "entrepreneur of the year."

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 14, 2008, the foregoing was caused to be electronically filed with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered participants.

Fross Zelnick Lehrman & Zissu, P.C.
David A. Donahue, Esq.
Craig S. Mende, Esq.
Betsy Judelson Newman, Esq.
866 United Nations Plaza
New York, New York 10017

Dated: New York, New York
October 14, 2008

By: s/ Steven B. Pokotilow
Steven B. Pokotilow
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Attorneys for Defendant
ENTREPRENEUR MEDIA, INC

EXHIBIT 6

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Attorneys for Defendant
ENTREPRENEUR MEDIA, INC

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

-----X	
EYGN LIMITED and ERNST & YOUNG LLP,	: <u>ECF CASE</u>
	: :
	: Civil Action No. 08-CIV-6734 (AKH)
Plaintiffs,	: :
	: :
v.	: :
	: :
ENTREPRENEUR MEDIA, INC.,	: :
	: :
Defendant	: :
-----X	

TO: Fross Zelnick Lehrman & Zissu, P.C.
Craig S. Mende, Esq.
David A. Donahue, Esq.
Betsy Judelson Newman, Esq.
866 United Nations Plaza
New York, New York 10017

PLEASE TAKE NOTICE that Defendant, Entrepreneur Media, Inc., by and through its counsel, Stroock & Stroock & Lavan LLP, shall move at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, NY, on such date as the Court shall deem appropriate, for an order to either dismiss or transfer this action to the Central District of California in favor of a first filed action or stay this action pending consideration of the first to file issue in the Central District of California, and for such other and further relief as the Court

deems appropriate consistent with Defendant's Memorandum In Support Of Defendant's Motion To Dismiss This Action In Favor Of a Favor Of a First Filed Action, Transfer The Action To The Central District Of California, Or Stay The Action Pending a Determination Of The First To File Rule By The Central District Of California.

Description of Motion

The Motion seeks to dismiss this action in favor of a first filed action, transfer the action to the Central District Of California, or stay the action pending a determination of the first to file rule by the Central District Of California.

A proposed order is being concurrently submitted to the Clerk.

Dated: New York, New York
October 14, 2008

By: s/ Steven B. Pokotilow
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Attorneys for Defendant
ENTREPRENEUR MEDIA, INC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 14, 2008, the foregoing was caused to be electronically filed with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered participants.

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