

Blue Jeans Cable

1419 Elliott Ave W Ste C
Seattle WA 98119
(206) 284-2924
fax (206) 284-2931

April 14, 2008

Christopher Passarelli
LaRiviere, Grubman & Payne
19 Upper Ragsdale Dr Ste 200
PO Box 3140
Monterey CA 93942

RE: Your letter, received April Fools' Day

Dear Mr. Passarelli,

Let me begin by stating, without equivocation, that I have no interest whatsoever in infringing upon any intellectual property belonging to Monster Cable. Indeed, the less my customers think my products resemble Monster's, in form or in function, the better.

I am evaluating your claim that the connectors on certain Tartan brand products infringe Monster's design patents and trademarks. However, the information supplied with your letter is plainly inadequate to support a claim of infringement and so I am writing to you to ask for further information and clarification regarding your claims.

I will begin by addressing your trademark/trade dress claim. You have referred to two trademark registrations, and have attached some printouts from the USPTO system but the depiction of the marks on the drawings provided is small and indistinct, making it difficult to determine exactly what the alleged resemblance is, and I need further information from you.

First, I need legible, scale drawings of the marks, preferably with dimensions shown on the drawing. To the extent that drawings are inadequate to show the nature of materials, finishes, print legends, colors and the like, I will also need examples of each of Monster Cable's actual uses of these marks in commerce; actual physical examples would be best, but photographic reproductions might do. As you will understand, these considerations are essential to any claim arising out of trade dress, as you are alleging in essence that there is a resemblance sufficient to cause confusion over the identity or origin of the goods, and no mere line-drawing can suffice.

Second, I will need copies of the trademark applications and any correspondence between the applicant and the USPTO in support of the applications.

Third, you have not identified the Monster Cable products in question, in actual use and distribution in commerce, whose trade dress you allege has been appropriated. I have reviewed Monster Cable's online materials and have examined connectors on various Monster Cable assemblies in local retail outlets and am unable to determine which, if any, of these are thought by Monster to represent use of these particular marks. I am also unable to determine from this review whether Monster Cable actually offers any product for sale to which the Tartan connectors are alleged to be particularly similar. My own sense of it, in looking at the connectors, has been that there is no similarity between the Tartan connectors and any of the many Monster Cable connectors beyond the general functional and conventional characteristics which all or nearly all solder-cup, mechanical-assembly, barrel-style RCA-type connectors share. It may be that there is some line of products to which you have intended to refer but which I have not found in Monster Cable's marketing materials or displays; but if so, you will need to show me specifically what product it is, and you will need to call to my attention the specific aspects of the connector design which you contend constitute unique Monster Cable trade dress, what the associated secondary meaning of those aspects of the trade dress is, and in what manner and by what characteristics you allege that this trade dress has been appropriated.

Fourth, if the dimensional characteristics of the connector as used in commerce vary from the dimensions of the scale drawing of your mark, I will need a proper scale drawing, with dimensions, of each version of the actual connector as used in commerce, as well as photographs of the connectors showing actual in-use finishes. If there is more than one such connector design in actual use by Monster Cable as to which appropriation of trade dress is alleged, of course, I will require this information for each and every such design.

On the basis of what I have seen, both in the USPTO documents you have sent and the actual appearance of Monster Cable connectors which I have observed in use in commerce, it does not appear to me that Monster Cable is in a position to advance a nonfrivolous claim for infringement of these marks. There simply is not sufficient resemblance between the Tartan connectors and any mark or any example of the marks' actual use that I can find to support such a claim. But if you have further information for me on that point, you are welcome to submit it.

You have also supplied me with partial documentation on five design patents which you claim these connectors infringe. I will begin by observing, first, that the five design patents are so very much unlike one another that it is very hard to imagine that any product could actually infringe more than one of them at a time; anything close enough to one of them to be deemed an infringement would, by that fact alone, be too dissimilar from the other four. The dissimilarity of the Tartan connector from each of them is readily evident.

I should add that, for the purpose of this letter, I am assuming that these patents are valid. This is in no way a concession of the point. In fact, this is a very significant and likely inaccurate assumption, and you should expect the patentability of these designs to be under attack if you commence an action for infringement.

The fact that you have presented me with five completely distinct design patents, I have to say, gives me pause. I would go over them and detail the differences between the Tartan connectors and those shown in the patents, but if you are taking the position that it appears you are taking, there might be very little point in discussing it with you. Take, for example, the patent you mark as Exhibit B. The connector shown there is substantially different from the Tartan connectors in every respect, unless one ignores design specifics and focuses on the core attributes of the connector which are dictated by function. If your view of Exhibit B is that it is to be construed broadly enough as to encompass the Tartan connector, it is very hard to imagine that there is such a thing as a solder-assembly style RCA plug which is not similarly, in your view, encompassed by this patent. And, needless to say, it is very hard to imagine that any court would ever adopt such a view of the patent's scope; if you file on this sort of basis, you are in Rule 11 frivolous-claim territory.

I will point out, though you are no doubt already well aware, that the gross morphology of the RCA plug is pretty well dictated by function. RCA plugs intended for soldering and assembly have certain attributes in common; their diameter is constrained by the need for the shell to fit over an internal set of solder points and cable clamp, and their length by the need to provide some room for cable end prep and attachment; they are generally radially symmetrical along the anterior/posterior axis owing to the need to accommodate both a round-profile cable and the round-profile RCA socket; the connector end is constrained by the standard dimensions of the RCA socket, and by the need, as the socket provides for no bayonet or screw attachment, to provide sufficient tension on insertion to maintain good mechanical and electrical contact; the barrel, grasped by the user for the purpose of insertion and removal, requires traction which is typically provided by raised or recessed rings, plastic inserts, knurling, or the like; and transition between the connector and the cable to which it is attached requires, in one form or another, a reduction in barrel size at the connector rear. It is my assumption, since you cite design patents only and no utility patents, that Monster Cable makes no claim here for any functional aspect of any of these designs; if I am wrong, please let me know what utility patents Monster Cable does hold, and what claims, if any, Monster asserts on the basis of those utility patents.

Further, on that point: one of the design patents you attached is closely related to a utility patent applicable to the same design, and you failed to point that fact out. I need to be able to rely upon the completeness and accuracy of the information you send to me and I find this sort of omission deeply disturbing because it is clear that the effect of this nondisclosure is to obscure the real significance of the patent features. Similarly, as I note further below, you omit reference to another patent Monster has held which appears, frankly, to be fatal to your position. If you expect to persuade me, you had better start making full, open and honest disclosures; I will find out the facts sooner or later in any event, but the impact upon your credibility will not be repaired. It looks like when you sent this letter, you were operating on the premise that I am not smart enough to see through your deceptions or sophisticated enough to intelligently evaluate your claims; shame on you. You are required, as a matter of legal ethics, to display good faith and professional candor in your dealings with adverse parties, and you have fallen miserably short of your ethical responsibilities.

My sense, in looking at these five patents, is that either you are attempting to present some argument that I simply do not understand or you are arguing for untenably broad coverage of these patents which would sweep every functional aspect of the typical solder-assembly RCA connector within the scope of a handful of mere design patents. You need to clarify this, and frankly, I think you need to indicate to me which, if any, of these patents you actually contend are relevant to the present discussion. It cannot possibly be that you believe that more than one of these patents is pertinent, and if you insist that they are, we cannot have an intelligent dialogue on this subject. Once you have identified the patent which you contend is relevant, I need to see the file history and the references to prior art; I need copies of the applicant's correspondence with the USPTO; and I need a clear and cogent explanation from you as to exactly what aspects of the Tartan connector design are alleged to constitute the infringement, and how.

Additionally, if you are able to identify any of these patents as applicable, please let me know whether Monster Cable presently sells, or has at any time sold, any products bearing connectors which are in conformity with the patent drawings or which are otherwise contended to be within the coverage of the patents, and identify those products for me. Please also provide photographs and/or physical examples of these connectors as manufactured and sold.

Also, please provide me all of the information referenced above as it relates to your expired patent D323643, a copy of which I am attaching. I will need to know what products Monster now offers or at any time has offered for sale which were believed to fall within the scope of D323643, and what claims, if any, of infringement of D323643 were made against others by Monster, whether those claims of infringement took the form of correspondence only, litigation, or otherwise. Please let me know which, if any, products Monster has ever sold or offered for sale which were marked with the patent number, or other reference, to D323643. Please also advise me whether, in your view, the Tartan connector does or does not fall within the scope of D323643, and if it is your view that it does not, please identify each and every difference between the Tartan connector and the connector represented by D323643 upon which your view is based. (On that note, let me point out to you that the "turbine cut" feature is irrelevant here as your client makes only functional, not design, claims for that feature in its marketing materials for the product.) I would assume that you would agree with me that if the Tartan connector is less dissimilar from the D323643 patent than from any of the five patents you cite in your letter, then the Tartan connector is within the coverage of the prior art and cannot, as a matter of law, infringe any of your client's current patents.

I must also point out that unless there is a good deal of background information you have not provided me which makes the case otherwise, Monster Cable cannot possibly square its patent infringement claim(s) with its own patent history. Two views of the matter might be taken; the first, which is my view, is that none of the design patents, including D323643, encompass the Tartan connector. If that is so, of course, the claim for infringement fails. But if one grants the sort of breadth to these patents that you appear to wish to do, a problem arises for Monster. D323643 is the least dissimilar to the Tartan connector of any of the patents, and stands as an obstacle to any claim of infringement of the others because it establishes prior art; if its scope, like the others, is granted the breadth you argue for, then the Tartan connector falls

plainly under the prior art and cannot constitute an infringement of the later, and more dissimilar, patents. Read the patents narrowly, and Monster loses; read them broadly, and Monster loses. You are welcome to point out any error in my reasoning; but I have to say that I will be unreservedly surprised if you are successful in doing so.

Please also let me know whether Monster Cable or any related entity has brought actions to enforce any of the patents and trademarks referenced in your letter or above, and provide me with the jurisdiction, court and docket information pertaining thereto, along with copies of any decisions or judgments resulting therefrom. If any such litigation proceeded through discovery, I will need all discovery responses, including document production, issued by Monster, as well as copies of any and all depositions taken and the exhibits thereto.

Further, if any of these patents or trademarks has been licensed to any entity, please provide me with copies of the licensing agreements. I assume that Monster Cable International, Ltd., in Bermuda, listed on these patents, is an IP holding company and that Monster Cable's principal US entity pays licensing fees to the Bermuda corporation in order to shift income out of the United States and thereby avoid paying United States federal income tax on those portions of its income; my request for these licensing agreements is specifically intended to include any licensing agreements, including those with closely related or sham entities, within or without the Monster Cable "family," and without regard to whether those licensing agreements are sham transactions for tax shelter purposes only or whether they are *bona fide* arm's-length transactions.

Once I have received the above materials and explanations from you, I will undertake to analyze this information and let you know whether we are willing to accede to any of the demands made in your letter. If my analysis shows that there is any reasonable likelihood that we have infringed in any way any of Monster Cable's intellectual property rights, we will of course take any and all action necessary to resolve the situation. If I do not hear from you within the next fourteen days, or if I do hear from you but do not receive *all* of the information requested above, I will assume that you have abandoned these claims and closed your file.

As for your requests for information, or for action, directed to me: I would remind you that it is you, not I, who are making claims; and it is you, not I, who must substantiate those claims. You have not done so.

I have seen Monster Cable take untenable IP positions in various different scenarios in the past, and am generally familiar with what seems to be Monster Cable's *modus operandi* in these matters. I therefore think that it is important that, before closing, I make you aware of a few points.

After graduating from the University of Pennsylvania Law School in 1985, I spent nineteen years in litigation practice, with a focus upon federal litigation involving large damages and complex issues. My first seven years were spent primarily on the defense side, where I developed an intense frustration with insurance carriers who would settle meritless claims for nuisance value when the better long-term view would have been to fight against vexatious

