

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.

OPEN STUDIOS, INC., a Colorado Nonprofit Corporation,

Plaintiff,

v.

BOULDER METALSMITHING ASSOCIATION, a Colorado Nonprofit Corporation,

Defendant.

COMPLAINT

COMES NOW the Plaintiff, Open Studios, Inc., by and through its attorneys, Howard O. Bernstein, P.C., and for a Complaint states and avers as follows:

I. PARTIES

1. Plaintiff Open Studios, Inc. (hereinafter “Open Studios”), is a Colorado Nonprofit Corporation, with its principal office located at Rembrandt Yard, 1301 Spruce Street, Boulder, Colorado.
2. Defendant Boulder Metalsmithing Association (herein after “BoMA”), is a Colorado Nonprofit Corporation with its principal place of business located at 1845 Quince Avenue, Boulder, Colorado.

II. JURISDICTION AND VENUE

3. This action presents a claim under the laws of the United States for which the District Courts of the United States have original jurisdiction pursuant to 28 U.S.C. § 1331, et seq.

4. In addition, the District Courts of the United States have supplemental jurisdiction over the State claims made by Plaintiff, which Plaintiff asserts are part of the same case or controversy, pursuant to 28 U.S.C. § 1367.

III. FACTUAL ALLEGATIONS

Background

5. On or about March 14, 1995, Open Studios registered as a nonprofit corporation with the Colorado Secretary of State.
6. Open Studios has been operating as a tax exempt organization, with permission of the IRS, since 1995, using the Open Studios name as part of its flagship programs even during years when the organization used the umbrella name of OpenArts.
7. Open Studios' principal place of business is in Boulder County, Colorado.
8. The mission of Open Studios is to advance and enrich the visual arts and promote the role of artists in the Boulder community.
9. Open Studios' first and recurring annual program, which will celebrate its 21st year this fall, is the Open Studios Fall Artist Tour.
10. The Open Studios Fall Artist Tour quickly grew to include approximately 125 artists opening their personal art studios to the public over the first two weekends of October.
11. Today, Open Studios is a comprehensive visual arts organization encompassing, among other programs, the original Open Studios Fall Artist Tour and the Open Studios Gallery @ Rembrandt Yard.
12. In Boulder County, the term "open studios" is identified with art through Open Studios' branding efforts for its art programs dating back continuously from 1995 to the present.

13. Open Studios has worked hard in the Boulder County community to develop a reputation for advancing the visual arts through education and events.
14. Open Studios has been advertising the Open Studios Fall Artist Tour throughout Boulder County for two decades.
15. On or about February 18, 2013, Ms. Elizabeth Merckel (“Ms. Merckel”) registered Boulder Metalsmithing Association (“BoMA”) with the Colorado Secretary of State.
16. On or about May 4, 2016, Open Studios became aware that BoMA had been using a strikingly similar name to Open Studios in connection with membership programs and access to facilities provided at BoMA.
17. The BoMA website includes a membership program providing access to facilities called “Open Studio” as well as a once a month opportunity to access facilities after BoMA’s 2nd Saturday Demonstration called “Open Studio.”
18. BoMA has never obtained permission from Open Studios to use the name “Open Studio” for BoMA’s programs.
19. In early May, two representatives from Open Studios spoke with Ms. Merckel and BoMA Vice President Jennifer Knollenberg to request that BoMA immediately cease using “Open Studio” in connection with art programs and membership opportunities and in any other way adverse to Open Studios’ intellectual property rights.
20. BoMA refused to cease using the term “Open Studio” on its website or with respect to its programs.
21. On or about May 17, 2016, undersigned counsel for Open Studios spoke with counsel for BoMA, to discuss further Open Studios’ request for BoMA to cease using “Open Studio” in

connection with art programs and membership opportunities and in any other way adverse to Open Studios' intellectual property rights.

22. On or about May 20, 2016, undersigned counsel for Open Studios emailed counsel for BoMA to suggest alternative names that would be acceptable to Open Studios' Board of Directors, including "Open Workshop," "Studio Workshop," and "Studio Workshop Open to the Public."
23. As of the date of this Complaint, BoMA has not responded to the May 20, 2016 email.
24. On or about May 23, 2016, Ms. Merckel filed a Statement of Trade Name of a Reporting Entity ("Statement of Trade Name") for the trade name "Open Studio" on behalf of BoMA. A copy of the Statement of Trade Name is attached hereto as Exhibit 1.
25. In the Statement of Trade Name, BoMA asserts that "An Open Studio is intended to foster creativity and encourage experimentation in an atmosphere of cultural exchange, conversation, encouragement, and freedom of expression."
26. BoMA's designation of "Open Studio" in the Statement of Trade name does not mention that its "Open Studio" programs are visual arts programs.
27. As of the date of the Complaint, in relevant part the BoMA website says of BoMA's "Open Studio": "Bring your projects and use the studio for a day or month. Studio tools and equipment include soldering stations, flex shafts, jewelers' saws, hammers and pliers, forming tools, vises, a guillotine sheer, a draw bench, a hydraulic press and a rolling mill."
28. As of the date of this Complaint, in relevant part the BoMA website says of its monthly "Open Studio": "We'll also open the studio to everyone once a month after the 2nd Saturday Demonstration. There's nothing quite as wonderful as a group of people making things together. Get encouragement, find inspiration, talk about projects and project ideas, and check out the new studio."

29. The BoMA website descriptions of its “Open Studio” programs make clear that these programs involve the visual arts.
30. There have been many disputes over the use of names in Boulder County recently, including two chocolatiers using similar names and two brewers using the same name for their product.
31. When Open Studios has explained to other Boulder County art organizations that the terms “open studios” or “open studio” to describe art programs in Boulder are Open Studios’ intellectual property, those organizations have voluntarily changed the names of their programs in ways that are acceptable to Open Studios.
32. For example, on or about December 3, 2014, Open Studios became aware that Boulder Art Therapy Collective (“BATC”) had been using the name “Open Studio” and “Open Studios” in connection with programs provided at BATC.
33. On or about January 14, 2015, Open Studios contacted the owner of BATC to request that BATC cease using the “Open Studios” and “Open Studio” names in connection with art programs and in any other way adverse to Open Studios’ ownership interest in these names.
34. BATC promptly complied with Open Studios’ request, changing the names of BATC’s programs.
35. By contrast, BoMA has intentionally continued to create confusion in the Boulder County art community regarding its programs.
36. The Open Studios Board of Directors has expressed concern that members of the public might mistakenly believe that one or more of BoMA’s “Open Studio” programs are affiliated with Open Studios.

37. The confusion BoMA has created is exacerbated by the fact that several BoMA artists participate in the Open Studios Fall Artist Tour during which Open Studios signage is prominently displayed at BoMA in accordance with Open Studios Fall Artist Tour rules.
38. BoMA has actively participated in creating this confusion by the language in its website, including the continued use of “open studio” when the Open Studios Fall Artist Tour is not taking place.
39. Despite being notified by Open Studios that BoMA’s use of “open studio” to identify its programs was causing confusion, BoMA refused to change the name of its programs to names that are acceptable to Open Studios and has continued its infringing use of the name “Open Studio.”
40. BoMA is continuing to advertise membership opportunities and other art programs using the name “Open Studio” to confuse customers in order to capitalize on the Open Studios reputation in order to gain business and to deceive customers regarding its affiliations and connections. A copy of BoMA’s website is attached hereto as Exhibit 2.
41. BoMA has diminished Open Studios’ intellectual property by using the name “Open Studio” in connection with membership opportunities and other art programs.

IV. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Trade Dress Infringement; False Designation of Origin - 15 U.S.C. § 1125(a))

42. Plaintiff realleges and incorporates all previous paragraphs by reference.
43. Defendant, in connection with promotion of its services, uses in commerce terms and names that are clearly associated with Plaintiff and by which Plaintiff is known, to wit, “Open Studios”.

44. Defendant continues to knowingly and willfully use such terms and names clearly associated with Plaintiff and by which Plaintiff is known in connection with promotion of its services.
45. Defendant's usage of such terms and names clearly associated with Plaintiff and by which Plaintiff is known is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of Defendant with Plaintiff.
46. Defendant's usage of such terms and names clearly associated with Plaintiff and by which Plaintiff is known is likely to cause confusion, or to cause mistake, or to deceive as to the origin, sponsorship, or approval of Defendant's services by Plaintiff.
47. Plaintiff is likely to be damaged by Defendant's usage of such terms and names clearly associated with Plaintiff and by which Plaintiff is known.
48. Defendant's usage of such terms and names clearly associated with Plaintiff and by which Plaintiff is known has already, in fact, caused confusion and deceived persons as to the affiliation between Defendant and Plaintiff.
49. Defendant has caused damages to Plaintiff in an amount to be determined at trial.

SECOND CLAIM FOR RELIEF

(Deceptive Trade Practices – C.R.S. § 6-1-105)

50. Plaintiff realleges and incorporates all previous paragraphs by reference.
51. Defendant, in the course of conducting its business, has knowingly passed off its services as those of Plaintiff by continuing to use the name "Open Studio" after being expressly informed that such usage is resulting in public confusion.
52. Defendant, in the course of conducting its business, has knowingly made a false representation as to the source, sponsorship, approval, or certification of the services Defendant provides by

continuing to use the name “Open Studio” after being expressly informed that such usage is resulting in public confusion.

53. Defendant, in the course of conducting its business, has knowingly made a false representation as to Defendant’s affiliation, connection, or association, with or certification by Plaintiff by continuing to use the name “Open Studio” despite the fact that Defendant is aware of the confusion caused by such usage.

54. Defendant’s actions, as stated in paragraphs 50 through 53 above, significantly impact the public as potential consumers of Defendant’s services.

55. Defendant’s actions, as stated in paragraphs 50 through 53 above, have caused Plaintiff to incur damages in an amount to be determined at trial.

THIRD CLAIM FOR RELIEF

(Unfair Competition)

56. Plaintiff realleges and incorporates all previous paragraphs by reference.

57. The name “Open Studio” has acquired a secondary meaning or significance that identifies Plaintiff.

58. Defendant unfairly uses the name “Open Studio” to promote its services.

59. Defendant’s usage of the name “Open Studio” is likely to deceive the public, as evidenced by public confusion as to the affiliation between Plaintiff and Defendant.

60. By continuing to advertise membership opportunities and other art programs using the name “Open Studio,” as well as filing a Statement of Trade Name for “Open Studio” after being informed of its infringement of Open Studios’ intellectual property rights, Defendant is knowingly and intentionally causing confusion among customers in order to capitalize on the

Open Studios reputation in order to gain business and to deceive customers regarding Defendant's affiliations and connections.

61. Defendant's usage of names that identify Plaintiff has caused Plaintiff damages in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF

(Injunction – 15 U.S.C. § 1114(2) and Colorado Common Law)

62. Plaintiff realleges and incorporates all previous paragraphs by reference.

63. Plaintiff is entitled to injunctive relief in order to prevent further damage to Plaintiff's reputation and to prevent Defendant from continuing to derive an economic benefit from its unlawful actions that are damaging Plaintiff.

64. Accordingly, based on all of the foregoing, Plaintiff seeks an immediate injunction against the Defendant, prohibiting Defendant from continuing to use Plaintiff's distinct trade names.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Open Studios, Inc., prays for judgment against the Defendant, Boulder Metalsmithing Association, in an amount to be determined at trial, including actual and consequential damages, economic and non-economic damages, punitive damages, statutory damages including attorney fees and costs incurred in pursuing this matter, pre- and post- judgment interest, injunctive relief and for such other and further relief as this Court deems just and proper.

DATED this 5th day of August, 2016.

Respectfully submitted,

HOWARD O. BERNSTEIN, P.C.

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