

When it Comes to Wikipedia Evidence, Consider the Source

by Bruce Talbot Margulies¹

Introduction

The Trademark Trial and Appeal Board (“Board”) seemingly opened Pandora’s Box when it decided in *In re IP Carrier Consulting Group (Carrier)*² that it would allow evidence taken from the pages of online encyclopedia Wikipedia.³ Wikipedia has editing policies and guidelines, but accepts submissions from anyone: Supreme Court Justices, supermarket tabloid writers, my three-year-old daughter. This article examines just how radical this decision really isn’t.

Issue

The central issue in *Carrier* was whether or not the marks “ipPICS” and “ipPIPE” were merely descriptive. The examiner’s position was that “IP” was descriptive as being an abbreviation or acronym for “Internet Provider” or “Internet Protocol” and indicated “through the Internet”. The applicant countered that the most common abbreviation for “Internet Provider” was “ISP” (also known as “Internet Service Provider”), citing Wikipedia as support for its position.

In *Carrier*, the Board framed the issue to be examined as:

[W]hether Internet sources in general, and Wikipedia in particular, is admissible evidence. There are inherent problems regarding the reliability of Wikipedia entries because Wikipedia is a collaborative website that permits anyone to edit the entries. *See In re Total [*10] Quality Group, Inc.*, 51 UPSQ2d 1474, 1475-1476 (TTAB 1999) (information retrieved from the Internet is probative to the extent that it is information available to the public, and of the way in which a term is used by the public, but the weight given to such evidence must be carefully evaluated because the source is often unknown).⁴

In *Total Quality Group*, the Board discussed the problem with the examining attorney’s late submission of on-line dictionary evidence:

The Board simply is unsure whether this material is readily available and, more significantly, the Board wonders about the reliability [*6] of it,

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² *In re IP Carrier Consulting Group*, 2007 TTAB LEXIS 66; 84 U.S.P.Q.2D (BNA) 1028.

³ <http://www.wikipedia.org>

⁴ *Carrier*, 2007 TTAB LEXIS 66, 9; 84 U.S.P.Q.2D (BNA) 1028.

noting applicant's legitimate concern that the dictionary's source is unknown. The evidence furnished by the Examining Attorney should have been made of record prior to the filing of the appeal, in which case applicant would have had the opportunity to check the reliability of the evidence and/or timely offer rebuttal evidence.⁵

The opinion in *Total Quality Group* is codified in the Trademark Manual of Examination Procedure (TMEP) – 5th Edition:

Articles downloaded from the Internet are admissible as evidence of information available to the general public, and of the way in which a term is being used by the public. However, the weight given to this evidence must be carefully evaluated, because the source is often unknown. *See In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1475-76 (TTAB 1999)...⁶

For its part, Wikipedia is forthright about its shortcomings:

Most of the articles can be edited by anyone with access to the Internet, simply by clicking the *edit this page* link Users need not worry about accidentally damaging Wikipedia when adding or improving information, as other editors are always around to advise or correct obvious errors, and Wikipedia's software is carefully designed to allow easy reversal of editorial mistakes In particular, older articles tend to be more comprehensive and balanced, while newer articles more frequently contain significant misinformation, unencyclopedic content, or vandalism.⁷

Holding in *Carrier*

The Board cited *Alfa Corp. v. OAO Alfa Bank*, 475 F.Supp.2d 357, 362 (S.D.N.Y. 2007): "[T]he information provided there [Wikipedia] is not so inherently unreliable as to render inadmissible any opinion that references it" especially when the opposing party may "apply the tools of the adversary system to his report."⁸ Hardly a ringing endorsement, but armed with numerous caveats, the Board warms up to Wikipedia:

[T]he Board will consider evidence taken from Wikipedia so long as the non-offering party has an opportunity to rebut that evidence by submitting other evidence that may call into question the accuracy of the particular Wikipedia information. Our consideration of Wikipedia evidence is with the recognition of the limitations inherent with Wikipedia (e.g., that anyone can edit it and submit intentionally false or erroneous information)

As a collaborative online encyclopedia, Wikipedia is a secondary source of information or a compilation based on third party, unknown sources. As recommended by the

⁵ *In re The Total Quality Group, Inc.*, 1999 TTAB LEXIS 127, 5; U.S.P.Q.2D (BNA) 1474.

⁶ TMEP 710.01(b) Internet Evidence.

⁷ <http://en.wikipedia.org/wiki/Wikipedia:About>

⁸ *Alfa Corp. v. OAO Alfa Bank*, 475 F.Supp.2d 357, 362 (S.D.N.Y. 2007).

editors of Wikipedia, the information in a particular article should be independently corroborated. The *Carrier* opinion is also codified in TMEP 710.01(b). It follows FRE 402 and 403 and updates *Total Quality Group*.

Carrier's Impact

Carrier gained attention because it permits the Board to consider Wikipedia evidence. However, the holding in *Carrier* is more limited than the holding in *Total Quality Group*.

In *Total Quality Group*, the Board questioned the availability and reliability of an online dictionary's definition of the term "business plan". The Board held that such evidence must be made prior to the appeal, to give opposing counsel an opportunity to verify and rebut the evidence. In the years leading up to the *Carrier* decision, the Wikipedia site (with its "home-grown" but usually useful information) was launched and took off, and the Internet has become a significantly more common reference tool for the masses.

The Board in *Carrier* permits introduction of Wikipedia entries but with the caveat that Wikipedia evidence must be **corroborated**. There is little probative value in citing a definition of a mundane term like "Internet Provider" if it must then be corroborated by another dictionary definition of the term. Because the Wikipedia evidence had been submitted in time for the examining attorney to verify and rebut it, the Board in *Carrier* did consider Wikipedia's definition of "Internet Provider". But the Board then corroborated the Wikipedia entry with a definition of Internet Service Provider in the American Heritage Dictionary of Cultural Literacy: "A company or organization that provides access to the Internet through its servers, usually for a fee."⁹ Even though this evidence was admissible, the Board determined that the definition of "Internet Provider" was not relevant to the applicant's argument.¹⁰

Wikipedia evidence, though potentially admissible, is no substitute for more traditional sources of evidence -- and careful legal reasoning.

⁹ American Heritage Dictionary of Cultural Literacy (3rd ed. 2005).

¹⁰ *In re IP Carrier Consulting Group*, 2007 TTAB LEXIS 66, 13; 84 U.S.P.Q.2D (BNA) 1028.