

**THIS DISPOSITION IS NOT
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

InUnison Integrated Systems Ltd.

v.

Appiant Technologies, Inc.

Opposition No. 91151960 to application Serial No. 76158865
filed on November 2, 2000

Patrick R. Roche, Sandra M. Koenig and Erik J. Overberger of Fay,
Sharpe, Fagan, Minnich & McKee, LLP for InUnison Integrated
Systems Ltd.

Michael J. Hughes of IPLO Intellectual Property Law Offices for
Appiant Technologies, Inc.

Before Simms, Quinn and Hohein, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Appiant Technologies, Inc., by change of name from
Nhancement Technologies, Inc., has filed an application to
register the mark "INUNISON" for the services of "providing
online application hosting services in the field of contact
management, personal information hubs and calendar management."¹

InUnison Integrated Systems Ltd. has opposed
registration on the ground that it is the owner of the mark

¹ Ser. No. 76158865, filed as an intent-to-use application on November 2, 2000 and subsequently amended to set forth a date of first use anywhere and in commerce of November 17, 2000.

Opposition No. 91151960

"INUNISON," which is the "subject of U.S. Service Mark Application No. 76/374,554, and has used the mark continuously, through a predecessor in interest, since at least as early as September 2000 through the present time in association with website design and maintenance services"; that such mark "has not been abandoned"; that "[t]here is no issue as to priority" inasmuch as "[a]pplicant's date of first use and filing date are substantially subsequent to Opposer's date of first use"; that applicant's mark "is identical to Opposer's mark"; that "[t]he commercial impression created by the marks is identical"; that applicant's services "are identical and/or closely related to Opposer's website design and maintenance services"; that the channels of trade for the respective services are identical; and that applicant's mark, when used in connection with its services, so resembles opposer's mark for its services as to be likely to cause confusion, or to cause mistake or to deceive.

Applicant, in its answer, has admitted the allegations that opposer is the owner of the "INUNISON" mark which is the subject of application Ser. No. 76374554; that opposer has used such mark "continuously, through a predecessor in interest, since at least as early as September 2000" and continuing to the present time, "in association with website design and maintenance services"; and that the parties' marks are identical and create identical commercial impressions. Applicant, however, has otherwise denied the salient allegations of the notice of opposition, including the allegations that there is no issue as

Opposition No. 91151960

to priority and that applicant's claimed date of first use and filing date for its involved application are substantially subsequent to opposer's alleged date of first use.² In addition, as amplifications of its denials, applicant sets forth the "Affirmative Allegations" that it "adopted and began using the present mark INUNISON prior to any adoption and/or use by Opposer"; that applicant's "use in commerce precedes any use in commerce by Opposer"; and that applicant's "use of the mark INUNISON has been well established in the marketplace and is well known among users and prospective users of the services for which registration is sought."

The record consists of the pleadings; the file of the involved application; and, as opposer's case-in-chief, the declaration, with exhibits, of John W. Bennett,³ who is "a member of InUnison Ltd., a.k.a., InUnison Integrated Systems Ltd., an Ohio limited liability company."⁴ (Bennett dec. ¶1.) Applicant

² Such denials as to priority would seem to be inconsistent in light of the above noted admissions concerning priority. It is also curious that applicant has denied, on the basis of a pleaded lack of sufficient information to admit or deny, the additional allegations by opposer that applicant "seeks to register INUNISON in association with 'providing online application hosting services in the field of contact management, personal information hubs, and calendar management' ... as is evidenced by the publication of the mark on Page TM 691 of the March 19, 2002 issue of The Official Gazette (copy attached)." Nonetheless, while it would appear that applicant may have meant instead to admit the latter allegations (since it obviously has knowledge of its involved application) and deny the allegations with respect to priority, the admissions and denials pleaded in the answer, which serve to frame the issues in this proceeding, are as indicated above.

³ Opposer's motion to submit testimony "in affidavit form" was granted by the Board "as conceded by applicant under Trademark Rule 2.127(a)."

⁴ It is noted, however, that opposer is identified in the notice of opposition, which was timely filed on June 17, 2002, as "InUnison

did not take testimony or otherwise submit any evidence. Only opposer filed a brief and neither party requested an oral hearing.

The issues to be determined on this record are whether opposer has established that it has priority of use and ownership of the "INUNISON" mark and whether it has proven that applicant's "INUNISON" mark for the services of providing online application hosting services in the field of contact management, personal information hubs and calendar management so resembles the identical "INUNISON" mark for opposer's website design, hosting and maintenance services⁵ as to be likely to cause confusion as to the source or sponsorship of such services.⁶

Integrated Systems Ltd., a corporation organized and existing under the laws of the State of Ohio."

⁵ Although opposer, in its brief, repeatedly refers to its services as "website design, hosting and maintenance services," opposer did not file a motion under Fed. R. Civ. P. 15(a) for leave to amend its pleading to include "hosting" services as part of its claim of priority of use and likelihood of confusion. However, Fed. R. Civ. P. 15(b) provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings" and that "[s]uch amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion by any party at any time" Taking the references in opposer's brief to include a request to conform the pleadings to the evidence regarding website "hosting" services, there obviously is no express consent by applicant to such a request. Nonetheless, in view of both applicant's failure to contest opposer's motion to submit testimony in the form of an affidavit or declaration and its further failure to move to strike the references to website "hosting" services from the record and opposer's brief, applicant is regarded as having implicitly consented to the trial of a claim of priority of use and likelihood of confusion which includes prior use by opposer of the "INUNISON" mark in connection with website "hosting" services as well as website design and maintenance services. The pleadings are thus deemed, pursuant to Fed. R. Civ. P. 15(b), to have been so amended.

⁶ It is noted with respect thereto that opposer, in its statement of the issues in its brief, frames the issues herein as follows:

According to the record, opposer's witness, Mr. Bennett, has "been a member of the company," namely, "InUnison Ltd., a.k.a., InUnison Integrated Systems Ltd." (i.e., opposer), "since its inception on November 21, 2000." (Id. ¶2.) He has been "involved in using the INUNISON mark and trade name since the inception of the ... company and well prior thereto." (Id.) "In June 2000," he "noted that a company named Website Enterprises, Inc. was advertised for sale in *The Cleveland Plain Dealer*" and "approached Mark Sullivan, owner of Website Enterprises, to buy the company." (Id. ¶3.) "In July 2000, after analyzing the Website Enterprises ... company," Mr. Bennett decided that a fresh, new look and new name would be needed for the company to portray ... new concepts and attract potential new investors." (Id.) "After conducting some research," he "selected the name InUnison." (Id.)

"In August 2000, Mr. Bennett "paid Mark Sullivan a deposit for the purchase of an interest in Website Enterprises ... and a partnership was formed with the intention of gradually changing the name of the company to InUnison." (Id. ¶4.) Prior thereto, according to Mr. Bennett, a marketing firm "was hired to develop the InUnison logo and letterhead" and, "[a]fter reviewing a number of designs, one was finally selected on or about July 26, 2000." (Id. ¶5.) Later on, as evidenced by the copy of the

The issues presented by this proceeding are relatively straightforward: Opposer's ownership of and priority in the INUNISON mark, and whether registration of Applicant's INUNISON mark would create a likelihood of confusion with those marks so as to prevent registration under Section 2(d) of the Lanham Act.

certificate issued by the Ohio Secretary of State on November 27, 2000, InUnison Ltd. filed and recorded its articles of incorporation.

"In August 2000," Mr. Bennett "joined Website Enterprises ... and began to develop new clients under the INUNISON mark." (Id. ¶8.) Inasmuch as such firm "had no marketing materials," he "temporarily put together" "a simple brochure" which, while advertising such services as "Interactive Web Designs" and "Internet hosting and reporting," featured the "INUNISON" mark solely as part of the phrase "InUnison Network." (Id. and Exhibit C.) Such brochure was "sent to current and prospective clients all over the United States." (Bennett dep. ¶8.) During the same month, Mr. Bennett also "developed the InUnison business plan" which "was distributed to a number of potential investors in Ohio and Florida." (Bennett dec. ¶9.)

"In September and October of 2000," Mr. Bennett "continued to develop customers for Website Enterprises using the INUNISON mark." (Id. ¶10.) In addition, the "INUNISON mark and logo were gradually implemented into the Website Enterprises website" and "[n]ew brochures were designed utilizing the mark INUNISON without the Website Enterprise[s] name," which were distributed beginning "in September-October 2000." (Id.) Such brochures variously show, among other things, use of the mark "INUNISON" in connection with the offering of such services as "Complete Internet Design and Hosting" and "WebSite Design and Implementation" (Exhibit D) and the services of "Web Design, Research & Architecture" (Exhibit E), while also stating that "we

create websites" (Exhibit H). Further, Mr. Bennett noted that, "[i]n November 2000, investors were beginning to commit to the InUnison concept"; "[c]ustomers were developed"; an attorney "was retained to develop the operating agreements and investment structure for the company"; and "[a] decision was made to change to a limited liability company." (Id. ¶11.) He also indicated that, in the same month, he and "Mark Sullivan ... attended the COMDEX trade show in Las Vegas, Nevada as representatives of InUnison," and that such trade show "is the largest computer and information technology show in the country." (Id. ¶12.)

Thereafter, "[i]n January 2001, InUnison investors," including Mr. Bennett, "decided to separate InUnison from Mark Sullivan and Website Enterprises." (Id. ¶13.) In accordance therewith, "[o]n February 7, 2001, Mark Sullivan, the investors and ... [Mr. Bennett] reached an agreement for separating Mark Sullivan and Website Enterprises from InUnison" and, around the same time, InUnison's business operations were relocated. (Id. ¶14.) Although the record does not contain a copy of such agreement, Mr. Bennett specifically testified that:

Attached as Exhibit I is a true copy of a Confirmatory Assignment document dated February 21, 2002 which confirms that Website Enterprises, Inc. transferred all its right, title and interest in and to the INUNISON mark and name together with the goodwill of the business symbolized by the mark and name to me as of February 7, 2001. The February 21, 2002 Confirmatory Assignment confirms that by the Agreement dated February 7, 2001, it was the intention of Website Enterprises, Inc. and Bennett to transfer all rights, including common law use rights, in the INUNISON mark and name to Bennett.

(Id. ¶15.)

The "CONFIRMATORY ASSIGNMENT," which is signed by Mark Sullivan as "President" of Website Enterprises, Inc., states in particular that:

WHEREAS, Website Enterprises, Inc. (hereinafter "Website"), an Ohio corporation, had adopted and used in its business the service mark and trademark INUNISON in association with website design and maintenance services and products at least as early as September 2000; and

WHEREAS, John W. Bennett, Jr. (hereinafter "Bennett"), an Ohio resident, ... had registered the right to use INUNISON as an Ohio trade name in August 2000, and while in his association with Website had promoted and used the INUNISON mark; and

WHEREAS, by an Agreement dated February 7, 2001, it was the intention of Website and Bennett to transfer all rights, including any common law use rights, in the INUNISON mark and name to Bennett;

NOW, THEREFORE, for good and valuable consideration, the receipt of which is hereby acknowledged, Website does hereby confirm that it had sold and assigned unto Bennett, at least as early as February 7, 2001, all right, title and interest in and to the INUNISON mark and name, together with the goodwill of the business symbolized by the mark and name and with the right to register with the U.S. Patent and Trademark Office the INUNISON mark benefiting from the use by Website, and to recover and have any damages and profits for infringement of the INUNISON mark and name, if any.

(Exhibit I.) Also of record "are copies of several pages from InUnison's current website," which include the copyright notice "© 2002 InUnison Ltd." and list such firm's "service expertise" as encompassing "Web Design." (Bennett dec. ¶16. and Exhibit J.) Such copies appear to have been printed on June 5, 2003.

Turning first to the issue of priority of use and ownership, it is clear that notwithstanding applicant's initial admissions in the answer which it filed on August 5, 2002 that opposer is the owner of the "INUNISON" mark which is the subject of application Ser. No. 76374554 and that, through a predecessor in interest, opposer has continuously used such mark since at least as early as September 2000 in association with website design, hosting and maintenance services, the actual ownership of the "INUNISON" mark for such services lies with a third party-- John W. Bennett--rather than opposer as of the close of its initial testimony period on June 11, 2003.⁷ Moreover, while the record discloses that Mr. Bennett is "a member of InUnison Ltd., a.k.a., InUnison Integrated Systems Ltd.," there is nothing which establishes that his ownership of the "INUNISON" mark inures to the benefit of opposer or that opposer, as of the close of trial in this proceeding, otherwise possesses rights in such mark which are equal or superior to the earliest date upon which applicant is entitled to rely, namely, the November 2, 2000 filing date of its involved application. See, e.g., Lone Star Mfg. Co., Inc. v. Bill Beasley, Inc., 498 F.2d 906, 182 USPQ 368, 369 (CCPA 1974); Columbia Steel Tank Co. v. Union Tank & Supply Co., 277 F.2d 192, 125 USPQ 406, 407 (CCPA 1960); and Miss Universe, Inc. v. Drost, 189 USPQ 212, 213 (TTAB 1975).

⁷ We observe, however, that nowhere in its brief does opposer rely upon any admission made by applicant in the answer to the notice of opposition. Instead, opposer grounds its arguments exclusively on the basis of the evidence which it introduced and, as pointed out earlier, concedes in its brief that one of the issues in this proceeding is its ownership and priority of use of the mark "INUNISON."

Therefore, even though the September 2000 date of first use of the "INUNISON" mark by Website Enterprises, Inc., upon which opposer seeks to base its claim of priority, is before the November 2, 2000 filing date of applicant's application, the evidence introduced by opposer unambiguously shows that it is not in fact the successor-in-interest to such rights and thus is not presently the owner of the "INUNISON" mark with respect to website design, hosting and maintenance services.⁸ In fact, opposer concedes in its brief that such rights were transferred to and are owned by John W. Bennett, as the record plainly shows, and offers no explanation in its brief for the discrepancy. Given its failure of proof, however, opposer cannot prevail herein, even if the record establishes that there is a likelihood of confusion from contemporaneous use of the mark "INUNISON" in connection with the respective services of the parties.

Turning to the issue of likelihood of confusion, the determination thereof is based upon consideration of all of the pertinent factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). However, as indicated in *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity in the goods or services at issue and the similarity or dissimilarity of the respective marks in their

⁸ In effect, the evidence presented by opposer demonstrates that the particular allegations in the notice of opposition with respect to priority and ownership, which mistakenly or otherwise were admitted by applicant in its answer, were in fact false.

entireties.⁹ Such considerations, in this proceeding, are the only *du Pont* factors for which there is any evidence in the record.¹⁰

As to the respective marks, applicant has admitted in its answer that they are identical and create identical commercial impressions. Furthermore, none of the other evidence of record is to the contrary. It is plain, therefore, that if the mark "INUNISON" were to be used in connection with the same or closely related services, confusion as to the origin or affiliation of such services would be likely to occur.

With respect to the services at issue, opposer asserts that applicant's services of providing online application hosting services in the field of contact management, personal information hubs and calendar management "are closely related and are directed to the same people as are its website design, hosting and maintenance services." The respective services, in fact, would appear to overlap inasmuch as opposer's website hosting services would encompass applicant's online application hosting services. Moreover, as to opposer's website design and maintenance services and applicant's online application hosting services, opposer insists that the channels of trade therefor

⁹ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks." 192 USPQ at 29.

¹⁰ Contrary to the contentions in opposer's brief, there is no evidence that its "INUNISON" mark has achieved a degree of fame"; there is an absence of any evidence regarding the number and nature of similar marks in use in connection with similar services; and there is no proof as to the extent of potential confusion, i.e., whether such is *de minimis* or substantial.

"are similar" inasmuch as both opposer and applicant "market their services on-line over the Internet, through brochures and at trade shows." However, even assuming such to be the case with applicant's services, the mere fact that its services would be rendered through similar channels of trade to the same classes of consumers as opposer's services would not, without more, be sufficient to establish that a likelihood of confusion exists from contemporaneous use of the mark "INUNISON" in connection therewith. Nonetheless, having shown by its Exhibit D that, as an entity which offers website design and maintenance services, opposer also offers website hosting services, and since, as noted previously, website hosting services would plainly encompass the kind of online application hosting services rendered by applicant in the field of contact management, personal information hubs and calendar management, consumers could reasonably believe that applicant's online application hosting services are indeed closely related to opposer's website design and maintenance services, especially when such services are rendered under the identical mark "INUNISON." Confusion, therefore, as to source or sponsorship of the services at issue would be likely to occur.

Accordingly, while opposer, as the party bearing the burden of proof in this proceeding,¹¹ has shown that confusion is

¹¹ See, e.g., *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 143 F.3d 1373, 47 USPQ2d 1459, 1464 (Fed. Cir. 1998) (Michel, J. concurring); *Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1007 (Fed. Cir. 1988); *Sanyo Watch Co., Inc. v. Sanyo Elec. Co., Ltd.*, 691 F.2d 1019, 215 USPQ 833, 834 (Fed. Cir. 1982); and *Clinton Detergent Co. v. Proctor & Gamble Co.*, 302 F.2d 745, 133 USPQ 520, 522 (CCPA 1962). It remains opposer's obligation to satisfy its burden of proof, irrespective of whether applicant offers any evidence and/or files a brief.

likely from the contemporaneous use by applicant of its "INUNISON" mark in connection with the services of "providing online application hosting services in the field of contact management, personal information hubs and calendar management" and the use by opposer of the same mark with respect to "website design, hosting and maintenance services," in the absence of proof that opposer is the owner of superior rights in the "INUNISON" mark, opposer cannot prevail on its claim of priority of use and likelihood of confusion.¹²

Decision: The opposition is dismissed.

¹² The dissenting viewpoint places heavy reliance on the procedural fact that, "after filing its answer in this case, applicant has in essence disappeared, failing to respond to opposer's motion to submit testimony by way of affidavit, or otherwise file any paper at all in this proceeding." However, as indicated above, it is opposer--and not applicant--who bears the burden of proof in this proceeding. Thus, applicant had no obligation to introduce any evidence in its behalf if it believed that the proof offered by opposer is insufficient to meet opposer's burden herein. Likewise, while it is indeed the better practice for a defendant who believes that the plaintiff has failed to sustain its burden of proof to file a brief indicating the inadequacy of the plaintiff's evidence, there is no requirement that a defendant do so. See Trademark Rule 2.128(a)(3); and TBMP § 801.02(b) (2d ed. rev. 2004) ["The filing of a brief on the case is optional, not mandatory, for a party in the position of defendant"]. Consequently, it cannot be said that applicant "has waived any objection to opposer's evidence" as the dissenting opinion asserts. Finally, as to the alternative advanced in the dissenting opinion for sustaining the opposition, in the face of clear evidence that Mr. Bennett--rather than opposer--is the owner of the "INUNISON" mark by assignment from Website Enterprises, Inc., based in part on the theory that "opposer is simply a prior authorized user of the mark," suffice it to say that not only does opposer in its brief not even argue such a proposition (and, in fact, it diametrically contends to the contrary by insisting that it is the owner of the "INUNISON" mark), but such a theory is mere conjecture and thus is too speculative to meet opposer's burden of proof herein.

Opposition No. 91151960

Simms, Administrative Trademark Judge, concurring in part and dissenting in part:

Although I agree with the majority's conclusion that confusion is likely if this identical mark is used in connection with opposer's website design, hosting and maintenance services, and with applicant's "providing online application hosting services in the field of contact management, personal information hubs and calendar management" (in fact, I believe that confusion is inevitable), I also believe that this record establishes that opposer should prevail on the issues of priority and ownership.

First, opposer is entitled to rely upon critical admissions in applicant's answer. See Fed.R.Civ.P. 8(b) and (d). See also, for example, *FTC v. Brown Shoe Co.*, 384 U.S. 316, 320, 86 S.Ct. 1501, 1503 (1966)("Indeed, in view of the crucial admissions in Brown's formal answer to the complaint we cannot attribute to the Court of Appeals a purpose to set aside the Commission's findings that these restrictive agreements existed and that Brown and most of the franchised dealers in varying degrees lived up to their obligations"); and *Brown Co. v. American Stencil Manufacturing Co.*, 180 USPQ 344, 345 n.5 (TTAB 1973)(applicant having admitted in its answer that it did not use mark prior to a certain date was estopped from later contending that it has an earlier date of use). Applicant has admitted that opposer is the owner of the INUNISON mark, that this mark is the subject of opposer's application Serial No. 76374554,¹ that

¹ Opposer's pleaded application is not of record, but Office computer records show that this application was filed on February 21, 2002,

opposer has used this mark continuously through a predecessor in interest since at least September 2000 in connection with website design and maintenance services, and that applicant's mark is identical to opposer's mark. While applicant also denied that "[t]here is no issue as to priority," and affirmatively alleged in its answer that applicant used the mark prior to opposer, applicant has failed to prove any use at all at trial, let alone use prior to September 2000.² In fact, as the majority indicates, applicant failed to take any testimony or file a brief in this case. Indeed, after filing its answer in this case, applicant has in essence disappeared, failing to respond to opposer's motion to submit testimony by way of affidavit, or otherwise file any paper at all in this proceeding.

It is my belief that, in the face of applicant's critical admissions, opposer should be able to prevail on the merits without any testimony whatsoever. That is because applicant's admissions serve to establish opposer's standing (its ownership of a pending application to register the mark INUNISON), as well as opposer's use of this mark since September 2000 in connection with the related services of website design

asserting use of the mark since September 2000. It seeks registration of this mark for "computer services, namely, designing and implementing web sites for others." The application is now under suspension.

² Contrary to the majority, I do not believe that applicant's answer is internally inconsistent. Applicant merely admits that opposer commenced use of the mark as early as September 2000, but maintains that it (applicant) used the mark before that date. However, any date prior to applicant's asserted date of first use in its application (November 17, 2000) would have to be proven by clear and convincing evidence. See Hydro-Dynamics Inc. v. George Putnam & Co., 811 F2d 1470, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987).

and maintenance. This September 2000 date precedes applicant's filing date, so applicant's admission establishes opposer's priority. Because opposer's services are closely related to applicant's online application hosting services, the use and registration by applicant of the identical mark will surely result in confusion.

Nevertheless, the majority has chosen to give little or no weight to applicant's critical admissions, instead relying entirely upon opposer's declaration submitted in lieu of testimony. However, here, too, I disagree with the majority's conclusion that opposer cannot prevail even on this evidence.

Even assuming that Mr. John Bennett is the owner of the mark INUNISON by assignment from Website Enterprises, Inc., that does not mean that opposer does not have rights in the mark sufficient for it to prevail against applicant, the junior user.

Mr. Bennett indicates in his declaration that he is a "member" of InUnison Ltd., which is another name under which opposer operates. He states that he has been "a member" of opposer since its inception on November 21, 2000. While it is not clear what this "member" relationship to opposer is, it is clear that Mr. Bennett's declaration was filed on behalf of opposer in this case. Mr. Bennett further indicates that he developed opposer's ("InUnison's") business plan, which was distributed to potential investors in August 2000. He attended the COMDEX trade show as a representative of opposer, and registered opposer's name with COMDEX for future shows and

Opposition No. 91151960

mailings. Mr. Bennett states that he helped relocate opposer's business operations. Further, Mr. Bennett references and attaches to his declaration copies of pages of opposer's (InUnison Integrated Systems) brochures (Exhibits D-H) and pages from opposer's website (Exhibit J) which show prominent use of the mark "InUnison" by InUnison Integrated Systems (opposer). Drawing all reasonable inferences from Mr. Bennett's declaration and the attached exhibits, it is clear that opposer is using the mark with Mr. Bennett's permission or consent. It simply makes no sense to believe that the owner of the mark, who is a "member" of opposer testifying and submitting evidence on behalf of opposer in an attempt to prevent registration of the identical mark, which evidence shows use of the mark by opposer (whose company name itself contains this mark), does not agree to or is not permitting opposer's use of this mark. Such use by opposer of this mark which, according to the declaration, was used by a predecessor as early as August or September 2000, entitles opposer to prevail. That is because, in order to prevail in an *inter partes* proceeding before the Board, the plaintiff need not establish ownership of a pleaded mark. A plaintiff may have standing and may succeed in a case brought under Section 2(d) of the Act even if it does not prove ownership of the assertedly similar mark, or the right to control its use. See J.L. Prescott Co. v. Blue Cross Laboratories, 216 USPQ 1127 (TTAB 1982)(opposer that had assigned mark and obtained exclusive license from assignee held to have standing); see also, Universal Oil Products Co. v. Rexall Drug and Chemical Co., 463 F.2d 1122, 174 USPQ 458

Opposition No. 91151960

(CCPA 1972); BRT Holdings Inc. v. Homeway Inc., 4 USPQ2d 1952 (TTAB 1987); Chemical New York Corp. v. Conmar Form Systems, Inc., 1 USPQ2d 1139 (TTAB 1986); and Yasutomo & Co. v. Commercial Ball Pen Co., Inc., 184 USPQ 60 (TTAB 1974). It is sufficient, therefore, to show that the opposer is simply a prior authorized user of the mark, and that confusion is likely.

Moreover, in my opinion, applicant, having failed to file any brief before the Board, has waived any objection to opposer's evidence. For example, I believe it was incumbent on applicant to raise an objection to any alleged deficiency in opposer's proof. However, as indicated above, even assuming that ownership lies with Mr. Bennett, opposer's prior use, consented to by the owner of the mark, is sufficient to establish its standing and its right to prevail in this case.

I would sustain this opposition and refuse registration to applicant, from whom we have not heard in two years.