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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Inspiration Software, Inc.
v.
Siemens Aktiengesellschaft

Opposition No. 91155251 to application Serial No. 76228781
filed on March 22, 2001

David P. Cooper of Kolisch, Hartwell, Dickinson, McCormack for
Inspiration Software, Inc.

Julie B. Seyler, Marie-Anne Mastrovito and Lawrence E. Abelman of
Abelman, Frayne & Schwab for Siemens Aktiengesellschaft.

Before Hohein, Rogers and Bergsman, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Siemens Aktiengesellschaft has filed an application to
register the mark "be inspired" in standard character form on the
Principal Register for the following goods and services:

"telephones, mobile phones, videophones,
telephone answering machines, telephone
answering sets, telephone dialing devices,
private automatic branch exchanges,
photocopiers, facsimile machines and computer
hardware for reading, recording and
transmitting data from magnetic and optical
media such as data encoded on users cards,
communications computers, computers, data
processing programs; computer incorporating
wireless telephones[,] videophones, telephone
answering machines, telephone answering sets,
telephone dialing devices, private automatic

branch exchanges, photocopiers, facsimile machines and computer hardware for reading, recording and transmitting data from magnetic and optical media such as data encoded on user cards; computer hardware and software for use in accessing global computer networks; power supply units for communications computers and telecommunication exchange and transmission equipment; telecommunication cables and optical fibers, fiber optic connectors and electrical and electronic connectors" in International Class 9;

"operation of telecommunication systems and telecommunication networks for others" in International Class 38; and

"consultancy in the setting-up and operation of data processing systems, data bases and telecommunication networks; planning development and project design of telecommunication and information processing services and facilities, and telecommunication networks; consultancy, testing and technical monitoring in the field of system integration and product integration of telecommunication networks and data processing in the field of electronic services, especially collecting, storing, translating, transmitting or distributing of data, information, images, video and audio sequences, and in the field of providing and communicating information stored on a data base by means of interactively communicating computer systems; development and generation of data processing programs, namely, computer programming for others; [and] renting of data processing programs" in International Class 42.¹

Inspiration Software, Inc. has opposed registration on the ground that opposer, "through its predecessors and itself, has been engaged in the business of marketing computer programs in the field of idea development and offering computer education

¹ Ser. No. 76228781, filed on March 22, 2001, which is based on ownership of German Reg. No. 30090786, which issued on February 14, 2001 and expires on December 31, 2010.

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training and other goods/services ... throughout the United States under the mark INSPIRATION"; that opposer "has used in interstate commerce the mark INSPIRATION for computer programs in the field of idea development and other goods since February 4, 1988 and has used in interstate commerce the mark INSPIRATION for computer education training and other services since August, 1991"; that opposer "owns Reg. No. 1,768,514, registered on the Principal Register in the United States Patent and Trademark Office on May 4, 1993 for [the mark] INSPIRATION for computer programs in the field of idea development through visual diagramming, outlining and text creation"; that such registration "is valid and subsisting, and a copy of the registration is attached ... as Exhibit 1"; that opposer also "owns Reg. No. 1,864,117, registered on the Principal Register in the United States Patent and Trademark Office on November 22, 1994 for [the mark] INSPIRATION for computer education training"; that such registration "is valid and subsisting, and a copy of the registration is attached ... as Exhibit 2"; that "[a]pplicant's mark 'be inspired' when used in connection with the goods [and services] set forth in its application, is confusingly similar to opposer's use of its INSPIRATION mark" for its goods and services; and that "registration of applicant's mark and continued use by it with its goods [and services] is likely to cause confusion, mistake and deception."

Applicant, in its answer, has denied the salient allegations of the opposition.

The record consists solely of the pleadings and the file of the involved application. The copies which opposer attached as Exhibits 1 and 2 to the opposition when it was filed are only plain copies, rather than copies prepared by the U.S. Patent and Trademark Office ("USPTO") showing the current status of and title to such registrations,² and thus fail to form part of the record in this proceeding.³ Trial dates have expired without either party having taken testimony or filed a notice of reliance, and neither party has filed a brief on the case.⁴

² The Board, in its August 18, 2005 order denying applicant's motion for judgment under Trademark Rule 2.134(a), erroneously stated with respect to the copies attached to the opposition that "opposer has properly offered and made of record the status and title copies of its pleaded registrations as evidence on opposer's behalf." The record, however, does not contain any certified or other copies, as prepared by the USPTO, which set forth the status of and title to opposer's pleaded registrations.

³ Under Trademark Rule 2.122(c), exhibits attached to a pleading are generally not evidence on behalf of the party to whose pleading such are attached unless thereafter, during the party's time for taking testimony, they are properly identified and introduced in evidence as exhibits. See TBMP §§317 and 704.05(a) (2d ed. rev. 2004). The sole exception, which is not present here, is that when a current status and title copy, prepared by the USPTO, of a plaintiff's pleaded registration is filed with the notice of opposition, the registration will be received in evidence and forms part of the record. See Trademark Rule 2.122(d)(1); and TBMP §§317, 704.03(b)(1)(A) and 704.05(a) (2d ed. rev. 2004).

⁴ In view of opposer's indication that the parties were engaged in negotiating a settlement of this matter, the Board in an order issued on May 3, 2006 found that opposer had discharged the order under Trademark Rule 2.128(a)(3) to show cause for its failure to file a brief on the case and suspended proceedings for sixty days pending word from the parties as to the progress of their negotiations. No word having been received, however, the Board on August 3, 2006 resumed proceedings and, noting in particular that opposer had neither taken testimony nor filed a notice of reliance in support of its case, reset the times for the parties to file briefs. Although such order specifically stated that the Board's "patience has now been exhausted" and that "[n]o further suspensions or extensions of time will be granted," opposer--while acknowledging such--subsequently filed a motion to suspend proceedings pending settlement negotiations. The motion was denied in an order issued by the Board on October 31, 2006.

Accordingly, because opposer, as the party bearing the burden of proof in this proceeding,⁵ has not presented testimony or properly introduced any other evidence during its initial testimony period as proof of the allegations of the opposition which have been denied by applicant, it is adjudged that opposer cannot prevail on its claim of priority of use and likelihood of confusion and that the opposition must fail.

Decision: The opposition is dismissed.

⁵ It is settled that opposer, as the plaintiff in this proceeding, bears the burden of proof with respect to its claim of priority of use and likelihood of confusion. See, e.g., Bose Corp. v. QSC Audio Products Inc., 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) ["[t]he burden of proof rests with the opposer ... to produce sufficient evidence to support the ultimate conclusion of [priority of use] and likelihood of confusion"]; Hoover Co. v. Royal Appliance Mfg. Co., 238 F.3d 1357, 57 USPQ2d 1720, 1722 (Fed. Cir. 2001) ["[i]n opposition proceedings, the opposer bears the burden of establishing that the applicant does not have the right to register its mark"]; Champagne Louis Roederer S.A. v. Delicato Vineyards, 143 F.3d 1373, 47 USPQ2d 1459, 1464 (Fed. Cir. 1998) (Michel, J. concurring); Sanyo Watch Co., Inc. v. Sanyo Elec. Co., Ltd., 691 F.2d 1019, 215 USPQ 833, 834 (Fed. Cir. 1982) ["[a]s the opposer in this proceeding, appellant bears the burden of proof which encompasses not only the ultimate burden of persuasion, but also the obligation of going forward with sufficient proof of the material allegations of the Notice of Opposition, which, if not countered, negates appellee's right to a registration"]; and Clinton Detergent Co. v. Proctor & Gamble Co., 302 F.2d 745, 133 USPQ 520, 522 (CCPA 1962) ["[o]pposer ... has the burden of proof to establish that applicant does not have the right to register its mark."]. It remains opposer's obligation to satisfy its burden of proof, irrespective of whether applicant offers any evidence.