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BRIEF FOR APPLICANT

Introduction

On June 30, 1999, Techinfofocus, LLC ("Applicant") applied to register the trademark "TECHINFOCUS" (word mark) for "software that permits users to transmit over public networks and private networks, reports, invoices, marketing information and data in a graphical format that is interactive." Applicant also applied for registration of "TECHINFOCUS" in a stylized mark on July 9, 1999, as follows:



(collectively, the "TECHINFOCUS Marks").

Information Builders, Inc. ("Opposer") claims ownership of a number of registered trademarks, the relevant marks are as follows:

Mark	U.S. Registration No.	Description of Goods & Services
PC/FOCUS ("PC" disclaimed)	1,300,245	Diskettes containing a microprocessor program for use in preparation of reports and graphs from data stored in a personal computer
FOCUS VISION	1,478,426	Pre-recorded computer programs used to store images in a database
FOCUS	1,652,265	Computer programs for data base management
FOCUS FUSION	1,965,984	Computer software for database management systems
WEBFOCUS	2,248,562	Computer programs for data base management

Opposer also claims ownership of a number of pending trademark applications, the relevant marks are as follows:

Mark	Serial No.	Description of Goods & Services
WEBFOCUS	76/081,024	Computer software for database management; computer software for accessing databases by means of global computer networks to generate reports; software development tools for making reporting and analysis available through global computer network worldwide websites and for extending the functionality of enterprise reporting and analysis systems on to global computer networks; and computer software for accessing and updating databases through global computer networks.
FOCUS	76/083,549	Computer software for database management; computer software for use in decision support systems; computer software for use in enterprise reporting and analysis systems and for building applications for the management and tracking of data for enterprise reporting systems; computer database programs for use in connection with decision support, analysis, and reporting programs; computer software development tools for use in developing decision support, analysis, and reporting systems and applications; computer software, namely, client/server reporting, analysis and decision support tools; computerized database, reporting, and analysis software for use on corporate intranet web sites; enterprise server software for use in web based data publishing, reporting, and analysis solutions; computer software for accessing databases by means of global computer networks to generate reports; software development tools for making reporting and analysis available

		through global computer network worldwide websites and for extending the functionality of enterprise reporting and analysis systems on to global computer networks; and computer software for accessing databases through global computer networks.
FOCUS	76/603,513	Computer services, namely, providing online information to facilitate demonstration, test use, and ordering of computer software. (FN now US Reg. No. 2,606,298)

Opposer lastly claims ownership by assignment of the following registered trademarks:

Mark	U.S. Registration No.	Description of Goods & Services
FOCUS FORECASTING ("FORECASTING" disclaimed)	2,223,450	Consulting services in the field of inventory management and control for businesses including the use of computers and computer techniques in the field of inventory management and control for businesses.
FOCUS FORECASTING ("FORECASTING" disclaimed)	2,223,457	Computer programs recorded on electronic media, namely tapes or discs, for use by businesses to plan inventory needs and to manage and control inventory.

(collectively, the "FOCUS Marks").

Opposer filed its Notice of Opposition on March 28, 2000, claiming a likelihood of confusion between the TECHINFOCUS Marks and the FOCUS Marks, and that the TECHINFOCUS Marks "will impair Opposer's free use of its trademark[s]...."

The Record

The record comprises the following evidence on behalf of Applicant:

- 1) Applicant's Notice of Reliance dated April 15, 2002 ("App. NOR")

The record includes the following evidence on behalf of Opposer:

- 1) Opposer's Notice of Filing Testimony dated June 10, 2002 re: Deposition of Gerald D. Cohen with attached Exhibits ("Opp. NFT");
- 2) Opposer's Notice of Reliance dated February 25, 2002 ("Opp. NOR I");
- 3) Opposer's Notice of Reliance dated June 10, 2002 ("Opp. NOR II");

Neither Applicant nor Opposer took any testimony in this proceeding.

Applicant's Objections to Evidence Proffered by Opposer

Applicant objects to the admission into evidence of the documents attached to Opposer's Notice of Reliance dated June 14, 2002, as such documents are not admissible or relevant for the purposes stated by Opposer therein. The documents attached to the Notice of Reliance are:

- 1) Printout from Patent and Trademark Office TARR system showing issuance of Registration No. 2,347,228, covering the trademark TECHINFOCUS and Design on May 2, 2000; and
- 2) Letter from Deputy Commissioner for Trademark Operations, dated June 5, 2002, together with Cancellation Order of the same date, canceling Registration No. 2,347,229.

(collectively, the "Proffered Documents").

Opposer asserts that the Proffered Documents are relevant to show that "Applicant did not notify the Patent and Trademark Office of the erroneously issued registration" and that "this fact has bearing on the good or bad faith of Applicant." See Opposer's Notice of Reliance dated June 14, 2002. However, the applicant is practically never in a position to know the date of filing of an opposition because, among other reasons, the date of filing may only be established by reference to the date of the express mail pack (or date of actual hand delivery) which is in the possession and control of the USPTO. Moreover, Applicant did not discover that the Mark had registered until counsel for Applicant received the original registration certificate sometime after May 2, 2000. As shown in the application prosecution file, shortly thereafter the TTAB issued their May 23, 2000 Notice confirming that there was a clerical error and the registration was inadvertently issued. This Notice specifically states that "the above-identified application will be forwarded to the Office of the Assistant Commissioner for Trademarks for appropriate action," but did not instruct Applicant to do anything further. Promptly upon counsel's receipt of the USPTO's letter dated June 5, 2002, Applicant returned to the USPTO the original registration

certificate. Applicant is not responsible for either the manner or length of time it takes for the USPTO to complete its ordinary administrative verification and cancellation process.

The Proffered Documents are not evidence as to the "good or bad faith of the applicant" since there is no duty imposed upon Applicant under law "to notify the Patent and Trademark Office of the erroneously issued registration," nor did the Applicant have a reasonable opportunity to do so in the short time between May 2, 2000 (issuance of the registration certificate) and May 23, 2000 (the date of the USPTO's Notice of inadvertent issuance). Further, the Proffered Documents are not evidence that at any time after May 23, 2000 (the date of the USPTO's Notice of inadvertent issuance) Applicant knowingly marked any of its goods or services under a registration symbol or in any way ever communicated that it held a registered trademark.

For the above reasons, Applicant requests that Opposer's Notice of Reliance dated June 14, 2002 be stricken from the record.

The Issue

The issue to be determined is whether there is a likelihood of confusion between either or both of the TECHINFOCUS Marks, for the goods and services identified in Applicant's applications, and any of the FOCUS Marks, for the goods and services identified in Opposer's registrations and applications (as applicable).¹

¹ In Opposer's Brief, Opposer failed to argue as to dilution or even to list dilution as an issue. However, under the standard set forth by the TTAB in *Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164 (TTAB 2001), Opposer would not have succeeded in such an argument because Opposer failed to present any evidence showing consumer association between the term "Focus" and Opposer as the source of products sold under that term. See *Toro Co.*, 61 USPQ2d at 1179-80 (TTAB 2001) ("Fame for FTDA purposes cannot be shown with general advertising and sales figures and unsupported assertions of fame.").

Facts

Applicant's Goods and Services

Applicant, Techinfocus, LLC ("Applicant") is in the business of: (i) acting as a consultant in assisting small to medium sized business clients in the use of technology in their business operations and (ii) creating, marketing, licensing, maintaining and developing computer software, specifically computer software designed to operate in conjunction with, and as a "plug in" to, third party software products such as Microsoft ® Excel®. (*Opp. NOR I, Applicant's Answers to Interrogatory No. 1*).

Applicant filed its application for registration of the word mark TECHINFOCUS Ser. No. 75/740,761 on June 30, 1999, and Applicant filed a second application for the mark TECHINFOCUS & Design Ser. No. 75/746,499 on July 9, 1999 (collectively, the "TECHINFOCUS Marks"). (*See generally, Applicant's Trademark Applications*) Applicant uses the TECHINFOCUS Marks as a housemark on its software products as identification of and in connection with the source of Applicant's software. (*Opp. NOR I, Applicant's Answers to Interrogatory No. 1*).

Applicant describes its software in its trademark applications as "software that permits users to transmit over public networks and private networks, reports, invoices, marketing information, and data in a graphical format that is interactive." (*See generally, Applicant's Trademark Applications*) Each software product sold by Applicant under the TECHINFOCUS Marks is separately branded. (*Opp. NOR I, Applicant's Answers to Interrogatory No. 1*). A user of Applicant's software products would use third party software to, for example, create a spreadsheet, and while still in such third party software, would use Applicant's software to create an attractive presentation formatting of the spreadsheet which may be used for marketing

presentations, internal reports, proposals, invoices, sales reports or other purposes. (*Opp. NOR I, Applicant's Answers to Interrogatory No. 2*). Applicant's software sold under the TECHINFOCUS™ house mark are not stand-alone products. (*Id.*). The user must have third party software running on his or her computer in order to operate any one of Applicant's software products. (*Id.*). Once Applicant's software is downloaded, the software is automatically loaded in to the applicable third party software and an option for Applicant's software appears in the third party software toolbar menu. (*Id.*). With a spreadsheet open, the user can select the option for Applicant's software in the third party software toolbar menu to open an interactive menu allowing the user to format the spreadsheet into a detailed business presentation or "slideshow" which may then be sent using Applicant's software via electronic mail over the Internet to third parties. (*Id.*).

Applicant's software does not function as database management program; it does not allow a user to make database queries or to remotely access a database using a web browser. (*Opp. NOR I, Applicant's Answers to Interrogatory No. 2*). The only conceivable connection Applicant's software could have to a database, is that a person using the software could use a database (such as Access®) to populate an Excel® spreadsheet, and then run Applicant's software to make the spreadsheet information display in an easy to read and interactive format. (*Id.*). Applicant's software is software that allows a user to create a report, spreadsheet or interactive brochure, and send it to a third party over an internal network or over a global computer network, to allow the third party to view it. (*Id.*). Applicant's software also allows a user to convert spreadsheets into HTML and upload the HTML spreadsheet information for presentation on a website. (*App. NOR, Applicant's Supplemental Answers to Interrogatory No. 2*).

Applicant's line of software products are sold collectively for \$199.00 and are sold individually as follows: EP2U® Designer - \$49.00, EP2U® Assembler - \$99.00, EP2U® XL2Web Converter - \$99.00. (*App. NOR, Applicant's Supplemental Answers to Interrogatory No. 8*).

Applicant's software products are marketed to individual users in small to large sized businesses who currently utilize Microsoft® Excel® in their business operations. Applicant's software may be obtained by download from Applicant's website to the user's computer hard drive, (*Opp. NOR I, Applicant's Answers to Interrogatory No. 15*), or installed from CD-ROM onto the user's computer hard drive and billed upon customer service registration during installation. (*App. NOR, Applicant's Supplemental Answers to Interrogatory No. 15*).

Opposer's Goods and Services

Opposer is the owner of multiple trademark registrations and applications for marks containing the root term "FOCUS" for various types of computer software products and consulting services associated with database management and information systems (collectively, the "FOCUS Marks"). (*App. NOR, Opposer's Answers to Interrogatory No. 4*). The FOCUS Marks include the marks: FOCUS, FOCUS FUSION, PC/FOCUS, WEBFOCUS, FOCUS FORECASTING and FOCUS VISION. (*Id.*).

Opposer's software products are sold at an average retail price of between \$15,000 and \$150,000, far in excess of the price of Applicant's software. (*App. NOR, Opposer's Supplemental Answers to Interrogatory No. 4*). Moreover, ancillary services provided by Opposer in connection with sales of its software products range in cost from \$1,500 to \$10,000. (*Id.*). Furthermore, as compared to Applicant's software which is purchased via download from its website or by CD ROM, Opposer's customers spend a significant amount in negotiations with

Opposer prior to their purchase of and payment for Opposer's software products sold under the FOCUS MARKS. (*Id.*).

Notably, the software products sold under the FOCUS Marks incorporate a "fourth generation" database computer language known in the computer industry as "focus." (*App. NOR, Printout of www.dictionary.com listings for term "Focus"*). In addition to this known meaning in the computer industry, the dictionary definitions of "focus" are: (i) a center of interest or activity; or (ii) the state of maximum distinctness or clarity of an image; or (iii) to direct toward a particular point or purpose; or (iv) to concentrate attention or energy (*id.*), have resulted in multiple third party registrations and pending applications for computer software products and services containing the term "focus." (*App. NOR, Third Party Registrations*). For example, although the appointed Trademark Examiner for each of Applicant's applications for the TECHINFOCUS Marks cited no third party registrations against either of the TECHINFOCUS MARKS, (*see TECHINFOCUS Marks Application Prosecution File*), Opposer's application for FOCUS Ser. No. 76/083,549 was suspended due to the following third party prior filed applications:

Mark	Ser. No.	Description of Goods & Services
FOCUS	76/075,984	Computer hardware and software.
FOCUS	75/936,545	Computer databases containing information regarding and relating to cable headend and cable system information for cable television, digital audio, digital media, and broadband, and computer programs for use in accessing and reviewing said databases. Providing databases containing marketing and research information regarding and relating to cable headend and cable system information for cable television, digital audio, digital media, and broadband.
FOCUS! & Design	75/618,491	Software and electronic components including firmware for electronic measuring, data collection, analysis, reporting, and warehousing; 3D image capture, manipulation, reporting, and analysis.

Mark	Ser. No.	Description of Goods & Services
EFOCUS (Stylized)	75/704,767	Computer software for conducting and analyzing online surveys, web conferencing, online community creations, namely, software that collects and distributes information to facilitate the creation of relationships between vendors and purchasers, and web site traffic measurement and analysis, in the field of market research. Consulting business strategy and management; consumer and industrial market research; survey research for public opinion studies; specialized research inquiries for public sector and private sector clients in both the consumer and industrial markets; specialized research services such as social, political, consumer, human resources and other related research and opinion surveys; assessing information needs, research design, establishment and allocation of research budgets, selection and supervision of research suppliers, and evaluation of research findings and their implications; enhancing client's presence in the market; measuring effectiveness of client's marketing efforts; business management research consulting, planning, assistance, and supervision; vendor and product analysis research consulting and implementation.

(App. NOR, Trademark Prosecution File for FOCUS, Ser. No. 76/083,549). Notably, the Trademark Examiner failed to cite against the application any third party registered mark, reflecting the Patent and Trademark Office's narrow construction of international class 9, the class of goods in which the FOCUS Marks are registered. (*Id.*).

Due in part to the above third party prior-filed applications cited against Opposer, Opposer admits that it has instituted approximately one hundred opposition proceedings against applicants and/or registrants of trademarks containing terms identical or phonetically similar to, "Focus." (App. NOR, Opposer's Answers to Interrogatory No. 6). Despite Opposer's efforts, the following third party registrations containing the term "Focus" are currently live according to TESS, and strongly suggest that the term "Focus" is highly diluted in strength due to its descriptive and otherwise nondistinctive meaning when applied to computer software. Furthermore, the existence of such third party registrations indicate Opposer's admission that its

registered marks can co-exist without likelihood of confusion or dilution with these third party registrations:

Trademark	Reg. No. & Date	Description of Goods and Services
MICRO FOCUS	1,461,698 October 20, 1987	Computer programs and program instruction manuals supplied as a unit.
UNIFOCUS & Design	2,503,414 November 6, 2001	Computer software for recognizing and analyzing results of surveys taken in the hotel and medical fields. ² Conducting business and market research surveys, namely, conducting customer surveys for hotels, hospitals, and physicians in respect to the quality and efficiency of the service provided.
UNIFOCUS	2,503,415 November 6, 2001	Computer software for recognizing and analyzing results of surveys taken in the hotel and medical fields. ² Conducting business and market research surveys, namely, conducting customer surveys for hotels, hospitals, and physicians in respect to the quality and efficiency of the service provided.
SHARP FOCUS	1,596,157 May 15, 1990	Computer programs and instruction manuals sold therewith, for use in health care and physician referral services, nurse information protocols, marketing and patient satisfaction surveys, and management of membership data.
SPECTRA FOCUS & Design	1,678,294 March 10, 1992	Laboratory equipment; namely, [detectors] * detectors * for sample analysis; computers; computer software for laboratory sample analysis; communication interface device boards and electrical connectors.
FOCUS ONE	1,172,993 October 13, 1981	Computer systems designed for use by credit unions comprising a central processing unit, operating and application software recorded on disks, and one or more peripheral devices consisting of control consoles, tape drives, disk drives, line printers, printer terminals and teller display and input terminals.

² The International Class 9 description of goods for these marks was deleted by amendment by the owner of the mark UNIFOCUS as part of the resolution of an opposition proceeding instituted by Opposer against the marks. The TTAB inadvertently failed to enter the amendment prior to issuance of the registration certificate.

Trademark	Reg. No. & Date	Description of Goods and Services
PHOCUS	1,492,014 June 14, 1988	Computer programs for photogrammetric evaluation purposes, particularly map-making and making precise measurements by using photographs.
FOCUSED CONSULTATION ("CONSULTATION" disclaimed)	2,432,238 February 27, 2001	Providing business management and consulting services to businesses and organizations participating in electronic commerce on the global communications network; providing business management and consulting services to businesses and organizations in the field of electronic data warehousing.
FOCUSSEND	2,544,754 March 5, 2002	Electronic transmission of data and documents via the Internet, namely, providing free secure file delivery service that poses no file-size restrictions.
INITIAL FOCUS	1,987,192 July 16, 1996	Computer consulting services.
FOCUSWORDS	2,387,575 September 19, 2000	Computer services, namely, on-line search engines offered via global computer networks which offer visual tools for composing search criteria, enhanced searching, enhanced retrieval of web sites, and providing search formulation and web site summation services.
FOCUS 247	2,452,584 May 22, 2001	Promoting the sale of goods and services of others through an online global computer network, through the distribution of printed material, audio and video tapes, television and radio broadcasts, and promotional contests.
FOCUS247.COM	2,452,583 May 22, 2001	Promoting the sale of goods and services of others through an online global computer network, through the distribution of printed material, audio and video tapes, television and radio broadcasts, and promotional contests.
INFORMEDFOCUS	2,325,433 March 7, 2000	Custom manufacture of computer monitoring systems to meet individual customer manufacturing requirements for industrial processes.
DATA FOCUS	1,392,702 May 6, 1986	Retail store services in the field of word processors and computer-related office products.
FOCUSED PRESENCE	2,111,555 November 11, 1997	Providing dissemination of advertising for others via an on-line electronic communications network. Computer site design services.

(App. NOR, Third Party Registrations).

Finally, despite Opposer's factual recitations in its Brief and multiple Notices of Reliances, Opposer has failed to present any factual evidence to this tribunal to substantiate Opposer's claims that its FOCUS Marks are famous for purposes of likelihood of confusion analysis. Opposer has not entered into evidence and surveys to show the level of brand awareness resulting from Opposer's expansion and promotional efforts, nor has Opposer provided any testimony or reports from outside valuation experts or other experts or figures regarding consumer penetration or brand awareness to establish that Opposer provides products and services of lasting value.

Summary of Argument

When the *duPont* factors are considered in light of the evidence presented in this opposition, the balance of the factors weighs in favor of Applicant as Opposer has failed to establish fame of the FOCUS Marks, or any likelihood of confusion as to TECHINFOCUS Marks.

Argument

The Court of Customs and Patent Appeals set out a non-exclusive list of thirteen factors to be considered when determining whether one mark is likely to cause confusion with another mark. *E.I. duPont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). Although certain factors may not be relevant due to lack of evidence, we review all of the factors below. In making a comparison between the FOCUS Marks and the TECHINFOCUS Marks, Applicant limits its discussion in Part A to the FOCUS Marks FOCUS U.S. Reg. No. 1,652,265, and FOCUS Ser. No. 76/083,549, with portions of the discussion relating to WEBFOCUS Ser. No. 76/081,024 (as Opposer claims this software is the most similar to that of Applicant).

1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

Appearance. The FOCUS Marks and the TECHINFOCUS Marks vary vastly in appearance. Applicant's TECHINFOCUS Marks are a unitary mark combining the first syllable of "Technology," the word "in" and "Focus." As a unitary mark, it has six letters in the prefix, none of which are similar in any respect to the FOCUS Marks. Also, by using "Focus" as the suffix, more emphasis is applied to the initial term "Tech," and "Focus" serves more as an adjective than it does as a source identifying component of the TECHINFOCUS Marks.

Sound. None of the FOCUS Marks have the "t" sound in the beginning - they all begin with the "FOUGH" sound (FOcus). In contrast, the TECHINFOCUS Marks sound out as "TECH" and trails with "Focus" as only the tail of the sound, also as a unitary sound.

Connotation. The connotation (or non-literal suggestion of) the TECHINFOCUS Marks is technology, though not specifically software. The 'Focus' part of the marks is more of an adjective describing the technology, not as a stand-alone thought. The FOCUS Marks, on the other hand, do not relate to technology in and of itself and have a direct but unspecific connotation of "being focused" or to "bring into focus." The relevant definitions of "Focus" in Webster's New Riverside Dictionary (Office Ed. Paperback) include: (i) a center of interest or activity; or (ii) the state of maximum distinctness or clarity of an image; or (iii) to direct toward a particular point or purpose; or (iv) to concentrate attention or energy. (the other definitions relate to an optical system). Thus, the two marks differ substantially in their non-literal connotation because the TECHINFOCUS Marks more specifically identify technology, whereas the FOCUS Marks do not.

Commercial Impression. None of the marks by themselves (in word form) have a specific commercial impression. If there is a commercial impression for the FOCUS Marks, it

would be more the literal, definitional meaning of "focus" in the sense of the product described in the description of goods and services - namely, a database software product. The commercial impression of the TECHINFOCUS Marks, however, is bringing technology into focus, and in respect of the design portion of the TECHINFOCUS Marks, the impression of shooting stars is more related to the presentation aspect of Applicant's software (i.e. 'award winning' or 'fantastic' or 'fireworks' or 'impressive'). When the design element is combined with the word TECHINFOCUS, the rather clear impression is, particularly in context of the nature of goods Applicant licenses, related to a WOW presentation. This is vastly different to the commercial impression of the word "Focus" in the context of a database program.

2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.

Both the Applicant and Opposer license software. However, Applicant's software is used as a plug-in to Excel® for making presentations and delivering items such as reports and invoices. Opposer's software is a database program. Because none of the applications or registrations for any of the Marks at issue in this Opposition contain any restrictions on the trade channels or consumers to which the goods and services may be marketed towards or through, it may be assumed that consumers might see both marks in the same context (i.e. marketing, purchasing solution investigation etc.). Even if this is presumed, however, there is simply not a sufficient similarity, particularly in light of the 'crowded field' of "Focus" marks, between the TECHINFOCUS Marks and the FOCUS marks to deny Applicant registration of the TECHINFOCUS Marks.

3) The similarity or dissimilarity of established, likely-to-continue trade channels.

As none of the applications or registrations for any of the Marks at issue in this Opposition contain any restrictions on the trade channels or consumers to which the goods and services may be marketed towards or through, it may be assumed that all available trade channels are utilized by Applicant and Opposer.

4) The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing.

Due to the severe disparity in cost between Applicant's software products and those of Opposer, it is evident that purchasers of Opposer's software are likely to take much greater care and deliberation in selecting and purchasing Opposer's products. Additionally, Applicant notes: (i) the crowded field of "Focus" marks already in existence (which suggest that consumers of these products are not unsophisticated); and (ii) the Board has refused to use 'per se' rules in the computer industry (at least as between hardware and software). See *In re Quadram Corporation*, 228 USPQ 863 (TTAB 1985) ("a per se rule relating to source confusion vis-a-vis computer hardware and software is simply too rigid and restrictive an approach and fails to consider the realities of the marketplace."). While in *Quadram* this was an application of the rule in the hardware vs. software situation, it is clear that in the 15 years since 1985, the premise that the Board recognized has done nothing but become more pronounced. Indeed, the vast majority of entrepreneurship occurs in the software technology area, or in the combination of hardware and software technology. Thus, the distinction between FOCUS and TECHINFOCUS is more substantial because the industry in which these Marks may exist is already so crowded, consumers are much less likely to confuse the marks.

5) The fame of the prior mark (sales, advertising, length of use)

Opposer has argued that its mark is famous. However, Applicant has identified a number of marks applied to software products, particularly "FOCUS ONE" and "MICRO FOCUS," that are also long standing registered marks (FOCUS ONE being registered nearly 20 years and MICRO FOCUS over 13 years). The presence of these marks, even if Opposer's mark has been extensively advertised, militate against a finding of famousness. In any event, Opposer cannot merely argue its FOCUS Marks are famous, it has to prove it by proffering competent evidence, which Opposer has not done. *See Sports Authority Michigan, Inc. v. PC Authority Inc.*, 63 USPQ2d 1782 (TTAB 2001) (Opposer's failure to present evidence such as consumer surveys or expert testimony and figures regarding consumer penetration to show the level of brand awareness resulting from opposer's advertising and promotional efforts mitigated in favor of Applicant.). Opposer's advertising figures, sales dollars, annual reports and financial analysis are simply not enough. *See id.*

6) The number and nature of similar marks in use on similar goods.

As evidenced by the USPTO database and the prosecution file for the mark FOCUS Ser. No. 76/083,549, there are numerous third party marks registered and/or pending in Class 9 in which the goods and services include software, and several in other classes involving custom software, in which the word "Focus" is a part of the mark. The presence of third party registrations which, in light of the claim of the Opposer, would also be considered similar goods or services and thus within the scope of the claimed rights in the alleged senior mark, are evidence weighing against a finding of likelihood of confusion. *E.I. duPont de Nemours Corp.*, 476 F.2d at 1361, 177 USPQ at 567; *see also*, *Sports Authority Michigan Inc.*, 63 USPQ2d at 1798 ("We find the numerous registrations and web site uses probative evidence that marks

using a descriptive or suggestive term followed by the term Authority are attractive to many businesses, are adopted to convey the very suggestive connotations that the entity is an authority in the field and such marks often co-exist and are distinguished because of other terms in the marks.").

In General Mills Inc. v. Kellogg Co., 3 USPQ2d 1442 (8th Cir. 1987), the court said:

Determining that mark is weak means that consumer confusion has been found unlikely because the mark's components are so widely used that the public can easily distinguish slight differences in the marks, even if the goods are related. *Telemed Corp. v. Tel-Med, Inc.*, 588 F.2d 213, 219 [200 USPQ 427, 433] (7th Cir. 1978) (citation omitted). See *Beech-Nut, Inc. v. Warner-Lambert Co.*, 346 F.Supp 547, 549 [175 USPQ 583, 585] (S.D.N.Y. 1972), *aff'd* 480 F.2d 801 [178 USPQ 385] (2d Cir. 1973) (in denying preliminary injunctive relief sought by "BREATH SAVERS mints against "BREATH PLEASERS," small variations between marks likely to make enough of a difference to defeat infringement claim). Second, under the Lanham Act, registration of a trademark is indeed prima facie evidence of the validity of the registration, the registrant's ownership of the mark, and of the registrant's exclusive right to use the mark in commerce with the goods or services specified in the certificate of registration. See 15 U.S.C. § 1057(b). However, a mark's registered status is only an evidentiary tool, and the fact of registration does not affect the plaintiff's ultimate burden of proof in an infringement action. [cites omitted] Third, although Kellogg argues that evidence of third party registrations without accompanying proof of the extent and length of actual use is of slight evidentiary value, evidence of third party usage of similar marks on similar goods is admissible and relevant to show that the mark is relatively weak and entitled to a narrowed scope of protection. *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 259-60 [205 USPQ 969, 975-76] (5th Cir.), *cert. denied*, 449 U.S. 899 [208 USPQ 464] (1980), quoting *Restatement of Torts § 729 comment g* (the greater the number of identical or more or less similar trademarks already in use, the less is the likelihood of confusion).

The same result should be reached here. Opposer's scope of protection for the FOCUS Marks, as a matter of law, should be narrow.

7) Any other established fact probative of the effect of use.

Although Opposer has shown that it has been aggressive in challenging third party applications and registrations in computer-related fields for marks that contain the term "Focus,"

Opposer's actions do not appear to have diminished the attractiveness of such marks to others as shown by the suspension of Opposer's application for FOCUS Ser. No. 76/083,549 due to four third party prior filed applications. *See Sports Authority Michigan, Inc., 63 USPQ2d at 1799.*

Lastly, Opposer has shown ownership of multiple marks containing the term "Focus." However, this falls short of Opposer's claim that such marks constitute a "family." Opposer cannot merely show that it has a number of registrations with a common term, but must show that use of the FOCUS marks sharing "a recognizable common characteristic" predates Applicant's first use of the TECHINFOCUS Marks and is made in such a way as to create "recognition among the purchasing public that the common characteristic is indicative of a common origin of the goods." *Sports Authority Michigan, Inc., 63 USPQ2d at 1800 (citing, J&J Snack Foods Corp. V. McDonald's Corp., 932 F.2d 1460, 1462 (Fed. Cir. 1991))*. Opposer has failed to present any evidence, such as multiple advertisements promoting the "recognizable common characteristic" of the marks and the goods, which would support "recognition among the purchasing public." *See id. at 1801*. Summary figures of annual advertising dollars spent on all Opposer's products and services fails to show that such expenditures were for ads featuring family members or endorsing the family characteristic. *See id. at 1802*. Moreover, since the "recognizable common characteristic" of the FOCUS Marks is, as discussed earlier, the highly suggestive, if not merely descriptive, term "Focus," the strength of such family characteristic is quite limited. *See id.*

8) Remaining factors.

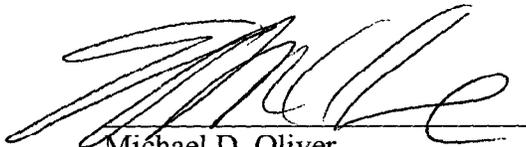
The remaining duPont factors are not significant in this opposition and/or no evidence has been presented by either party regarding such factors.

Conclusions

For the reasons set forth above, Applicant prays that the Board dismiss the Opposition proceeding and register the Applicant's TECHINFOCUS Marks.

Date: 9-17-02

Respectfully submitted,



Michael D. Oliver
Elizabeth S. McClure
Bowie & Jensen, LLC
29 W. Susquehanna Ave., Suite 600
Towson, Maryland 21204
(410) 583-2400

Attorneys for Applicant,
Techinfocus, Inc.

CERTIFICATE OF SERVICE

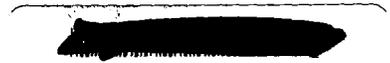
I certify that on this 17th day of September, 2002, I served a copy of the above "Brief of Applicant" on Alan H. Levine and Howard F. Mandelbaum, Levine & Mandelbaum, 350 Fifth Ave., Suite 7814, New York, NY 10118 first class regular United States Postal Mail, in accordance with 37 C.F.R. § 2.119(b)(4).


Deborah Allison

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BOWIE & JENSEN, LLC
ATTORNEYS AT LAW
6TH FLOOR, 29 W. SUSQUEHANNA AVENUE
TOWSON, MARYLAND 21204-5274
<http://www.bowie-jensen.com/>
INFO@bowie-jensen.com
(410) 583-2400
FAX (410) 583-2437



09-18-2002
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E-MAIL:
ALLISON@BOWIE-JENSEN.COM

September 17, 2002

VIA OVERNIGHT DELIVERY
Trademark Trial & Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202

Re: Information Builders, Inc. vs. Techinfocus, LLC
Opposition Nos. 117,490; 117,505 (Jointly administered)

Dear Sir/ Madame:

Enclosed for filing please find an original plus two (2) copies of "Brief for Applicant" in the above matter.

Thank you and please do not hesitate to contact us if you have any questions.

Very truly yours,

Deborah L. Allison
Paralegal

TRADEMARK TRIAL AND
APPEAL BOARD
02 SEP 25 PM 9:44

Enclosures