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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

X/OPEN COMPANY LIMITED, Opposer/Respondent, v. WAYNE R. GRAY, Applicant/Petitioner.	Opposition No. 91122254 Application Serial No. 75/680,034 Mark: INUX

01-09-2004
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #22

OPPOSITION TO APPLICANT'S MOTION AND COMBINED BRIEF TO AMEND ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM

Opposer X/Open Company Limited ("X/Open") submits this opposition to the motion to amend answer, affirmative defenses, and counterclaim filed by Applicant Wayne R. Gray ("Gray").

I. Introduction

Through his motion, Gray seeks to add a series of ill-defined affirmative defenses and a counterclaim to cancel X/Open's pleaded registrations, all based on allegedly "newly found evidence" dating as far back as 1985. Having failed to take discovery, Gray should not now be permitted to blindside X/Open by adding these defenses and counterclaims so late in these proceedings, with discovery having closed almost five months ago and X/Open's testimony period set to close in a few weeks. Gray has had ample opportunity to discover the publicly available evidence upon which his motion is based had he been diligent. That Gray recently found evidence that was previously available to him through earlier discovery or investigation does not make such evidence "newly found" for purposes of excusing his delay. Adding Gray's new defenses and counterclaims at this late stage in the case would unfairly result in substantial

burden and prejudice to X/Open. Gray has already failed once to convince the Board to reopen discovery, and is attempting to do so again through this motion. Moreover, Gray's defenses and counterclaims are legally insufficient and serve no useful purpose. The Board should not condone Gray's attempt to add these untimely, prejudicial, and meritless defenses and counterclaims no doubt designed to circumvent the Board's prior order.

II. Facts Relevant to This Motion

On April 11, 2001, X/Open filed this Opposition against Gray's application for the trademark INUX covering operating systems on the ground that the application is likely to cause confusion with Opposer's federally registered UNIX mark covering, among other things, operating systems.

After several extensions, Gray filed his answer and a counterclaim on August 5, 2002, a year and a half after the opposition was filed. After resetting the discovery and testimony periods various times, the Board set the close of discovery for August 7, 2003. That same day, Gray filed a motion to extend the discovery and testimony periods, which X/Open opposed. On October 24, 2003, the Board denied Gray's motion. Among other things, the Board ruled that "Applicant's unsupported statement that further investigation and discovery is necessary is an insufficient basis for establishing good cause" for an extension of the discovery and testimony periods." "Mere delay in initiating discovery does not constitute good cause for an extension of the discovery period." The Board also reset the opposition schedule, with X/Open's initial testimony period to close on January 30, 2004.

On November 25, 2003, almost four months after the service of X/Open's discovery requests, Gray served untimely discovery responses to X/Open's interrogatories, document requests, and requests for admissions.

On December 20, 2003, almost five months after the close of discovery, Gray filed this motion to amend his pleadings to add the affirmative defenses of lack of standing and "fraudulent assignment," and a counterclaim to cancel X/Open's registrations that appears to allege fraud.[1] Gray's motion rests on the following allegedly "newly found evidence," all of which was publicly available at least six months before the filing of Gray's motion, with one exception:

Document	Description of Document	Date of Document	Date Obtained
1	AT&T Technologies, Inc. Software Agreement for UNIX System V, Release 2.0, Version 1	February 1, 1985	N/A
2	Assignment records for X/Open's UNIX trademark registrations	June 5, 2002	N/A
3	Amended Complaint in The SCO Group, Inc. v. International Business Machines Corporation	July 22, 2003	N/A
4	ComputerWeekly.com article entitled "Novell-SuSE Alliance Will Break SCO Contract, SCO's McBride Claims"	November 19, 2003	Printed from the Internet December 12, 2003
5	Excerpts from Securities and Exchange Commission Form 10-K for Santa Cruz Operation Inc.	December 24, 1996	Printed from the Internet October 28, 2003
6	Letter from The SCO Group to Fortune 1000 and Global 500 Customers	March 17, 2003	Printed from the Internet October 31, 2003
7	CNET News.com article entitled "Contract Illuminates Novell-SCO Spat"	June 4, 2003	Printed from the Internet October 31, 2003
8	SCO Group press release entitled "Amendment to Asset Purchase Agreement Confirms Copyright Ownership"	June 6, 2003	Printed from the Internet October 28, 2003
9	Amendment No. 2 to the Asset Purchase Agreement between Novell and The Santa Cruz Operation	October 16, 1996	Printed from the Internet December 12, 2003

[1] Gray's counterclaim appears to allege fraud, but does not contain separate counts and is plead with such a lack of specificity that the precise nature of the counterclaim cannot be determined.

10	Trademark Assignment Recordation Form Cover Sheet and Deed of Assignment between Novell and X/Open	June 22, 1999	N/A
11	Printout from X/Open's website entitled "Backgrounder on the UNIX® System and SCO/IBM Legal Action"	N/A	Printed from the Internet October 28, 2003

In addition to seeking to amend his pleadings on the basis of the above documents, Gray seeks "additional discovery" on his new affirmative defenses and counterclaims.

III. ARGUMENT

A. The Standard for Granting Leave to Amend

"Amendments to pleadings in inter partes proceedings before the Board are governed by Fed. R. Civ. P. 15." TBMP § 507.01. Although the Board will liberally grant leave to amend when justice so requires, it will not grant leave to amend where the entry of the proposed amendment would violate settled law or be prejudicial to the rights of the adverse party. Fed. R. Civ. P. 15(a); TBMP § 507.02. Moreover, "where the moving party seeks to add a new claim or defense, and the proposed pleading thereof is legally insufficient, or would serve no useful purpose, the Board normally will deny the motion for leave to amend." TBMP § 507.02.

As detailed below, Gray's motion should fail because it is untimely and, if granted, would be grossly prejudicial to Opposer. Moreover, Gray's proposed amendments are legally insufficient because they lack evidentiary support. Allowing them would therefore serve no useful purpose.

1. Gray's Motion is Untimely and, if Granted, Would be Grossly Prejudicial to Opposer

"The timing of a motion for leave to amend under Fed. R. Civ. P. 15(a) plays a large role in the Board's determination of whether the adverse party would be prejudiced by allowance of

the proposed amendment." TBMP § 507.02(a). The Board has noted that "[a]ny party who delays filing a motion for leave to amend its pleading and, in so delaying, causes prejudice to its adversary, is acting contrary to the spirit of Rule 15(a) and risks denial of that motion." Trek Bicycle Corp. v. StyleTrek Ltd., 64 U.S.P.Q.2d 1540, 1541 (TTAB 2001) (citing Wright, Miller and Kane, Federal Practive and Procedure: Civil 2d, Section 1488 (1990); Chapman Tips From the TTAB: Amending Pleadings: The Right Stuff, 81 Trademark Rep. 302, 307 (1991)).

Moreover, "[t]he timing of a motion for leave to amend is particularly important" where, as here, the motion is sought "to assert a counterclaim for cancellation of one or more of the plaintiff's pleaded registrations." TBMP § 507.02(b). In such cases, the "counterclaim should be pleaded with or as part of the answer." Id. Otherwise, "the counterclaim should be pleaded promptly after the grounds therefore are learned." Id.

In this case, Gray cannot credibly argue that its motion is timely. It was filed almost fifteen months after Gray's original answer, affirmative defenses, and counterclaim; almost five months after the close of discovery; and a few weeks before the close of X/Open's initial testimony period. Hoping to justify the late filing of his motion, Gray argues that it rests on "newly" discovered evidence. But Gray's own motion shows that he printed most of the evidence from the Internet on October 28 and 31, 2003, and still sat idly by for two months before filing his motion.

More fundamentally, none of Gray's "evidence" is new. None of the attachments to Gray's motion was created any later than June 6, 2003, with one exception, and one document dates back to 1985. Thus, the vast majority of Gray's "newly found evidence" has been long accessible through publicly available sources. With minimal effort, it could have been discovered much earlier.

In fact, had Gray conducted discovery in this case in accordance with the Board's scheduling order, he could have obtained most if not all of the evidence he now claims is "newly found" and amended his pleadings early in the case. But he did not. Or, Gray could have conducted his searches for such publicly available information earlier. But he did not. Gray cannot excuse a delay caused solely by his failure to defend his application, either by participating in discovery or conducting his own investigations in a timely manner. See CashFlow Techs., Inc. v. NetDecide, 2002 TTAB LEXIS 147, at *5 (TTAB 2002) (holding that "the Board may deny a motion to amend when the movant knew *or should have known* of the facts upon which the amendment is based when the original pleading was filed and the movant offers no excuse for the delay") (emphasis added); Long John Silver's, Inc. v. Lou Scharf Inc., 213 U.S.P.Q. 263, 265 (TTAB 1982) (refusing motion to amend because the marks sought to be added to the action "were in existence at the time the opposition was filed," and thus "Opposer knew, or *should have known* of the existence of these marks at time of the filing of the notice of opposition") (emphasis added).

Gray's counterclaim is pure bootstrapping, as the core evidence he claims is "newly found" was available to him during the discovery period set by the Board. Gray did not take discovery during this period, and the Board has already denied his earlier request to reopen discovery. That Gray recently found evidence that was previously available to him through earlier discovery does not make such evidence "newly found" for purposes of excusing his delay. Having failed to provide any justifiable reason for his long delay, Gray's motion should be denied. TBMP § 507.02(a); International Finance Corp. v. Bravo Co., 64 U.S.P.Q.2d 1597, 1604 (TTAB 2002) (motion denied where movant provided no explanation for two-year delay in seeking to add new claim); Trek Bicycle Corp. v. StyleTrek Ltd., 64 U.S.P.Q.2d 1540, 1541

(TTAB 2001) (motion denied, in part, because filed eight months after notice of opposition, with no explanation for delay).

Moreover, granting Gray's motion would greatly and materially prejudice X/Open. First, granting the motion would require that the discovery period be reopened.[2] As a result, Gray would essentially obtain, through this motion, the reopening of discovery that was already denied by the Board. Gray should not be permitted to circumvent the Board's prior order through the backdoor technique of amending his pleadings this late in the proceedings. Simply put, Gray should not be allowed to benefit from his negligent indifference to this case and the Board's rules.

Second, if Gray's motion is granted, Gray would obtain, to X/Open's detriment, a further delay of the trial and the Board's decision on whether Gray's INUX mark for operating systems is confusingly similar to X/Open's UNIX mark for operating systems. This would be particularly harmful here, for Gray has continuously tried to delay this matter. He failed to serve discovery requests on X/Open before the close of discovery, and his untimely motion to extend the discovery and testimony periods was denied. His discovery responses were served on X/Open almost four months late. It is apparent that, through this motion, Gray seeks to reinsert himself into the discovery process in an effort to make up for past mistakes. His attempts to reopen discovery would further delay the proceedings, and should be denied. Indeed, the Board

[2] The Board rules recognize that if a claim is added to a case, discovery is usually needed by the adverse party: "In order to avoid any prejudice to the adverse party when a motion for leave to amend under Fed. R. Civ. P. 15(a) is granted, the Board may, in its discretion, reopen the discovery period to allow the adverse party to take discovery on the matters raised in the amended pleading." TBMP § 507.02(a).

recently held in an analogous case that the addition of a new claim after the close of discovery would prejudice the other party. International Finance Corp. v. Bravo Co., 64 U.S.P.Q.2d 1597, 1604 (TTAB 2002).

Third, having already taken discovery on the issues it believed were at issue in this case, if Gray's motion is granted, X/Open would have no choice but to spend more time and money taking and responding to discovery on Gray's "new" defenses and counterclaims, all of which could have been explored expeditiously and economically had they been raised before the close of discovery. X/Open should not be forced to engage in piecemeal discovery simply because of Gray's dilatory tactics.

2. Gray's Motion is Legally Insufficient and, if Granted, Would Serve No Useful Purpose

Gray asserts that X/Open does not have standing to oppose his application because X/Open allegedly does not own the UNIX mark. According to Gray, The Santa Cruz Operation ("SCO") is the true owner of the UNIX mark by operation of an asset purchase agreement dated 1995. But this plainly is not the case. Gray conveniently neglects to mention that one of the exhibits attached to his motion shows that SCO prominently acknowledges that it licenses the UNIX mark from X/Open and that UNIX is a registered trademark of X/Open. That exhibit, which concerns SCO's ownership in the *copyrights* to the UNIX source code, and not the UNIX mark, plainly states:

> UNIX and UnixWare are registered trademarks of The Open Group [X/Open's trading name] in the United States and other countries.

Gray also claims that X/Open does not have standing on the ground that a prior transfer of the UNIX mark from Novell to X/Open was invalid because Novell had already transferred the goodwill associated with the UNIX mark to SCO by selling the UNIX source code to SCO.

The glaring flaw in Gray's argument is this: Gray equates source code with goodwill, even though the two have no connection. Goodwill is not a tangible thing, but an intangible business asset, and the goodwill associated with the UNIX mark was properly transferred to X/Open along with the mark. This is evident from two of Mr. Gray's exhibits (the PTO's assignment records for the UNIX mark and the Trademark Assignment Recordation Form Cover Sheet and Deed of Assignment between Novell and X/Open), which show that the UNIX mark and the goodwill associated with the mark was transferred from Novell to X/Open in 1999. (Gray Motion at Exhibits 2 and 10.) Once again, Gray's motion is lacking in evidentiary support because the exhibits to the motion itself negate the spurious assertions made in the motion.

Finally, Gray appears to claim that X/Open, being aware of the above "evidence," fraudulently obtained the UNIX mark from Novell. This assertion is without factual support for the same reasons discussed above. The UNIX mark, along with the goodwill associated with the mark, was transferred from Novell to X/Open in 1999, as the materials in Gray's own motion demonstrate.

Moreover, Gray's motion is legally deficient because Fed. R. Civ. P. 9(b) requires that allegations of fraud be pled with specificity. Gray has plainly failed to meet this requirement. In fact, Gray's counterclaim is so cursory that the exact nature of the claim is difficult to understand.

IV. Conclusion

Granting Gray's motion would be highly prejudicial to X/Open, and Gray should not be permitted to profit from his extreme delay in bringing the motion based on allegedly "new" evidence, which was publicly available long ago, as well as during the discovery period period in this case. Further, Gray's motion is legally insufficient because it lacks evidentiary support.

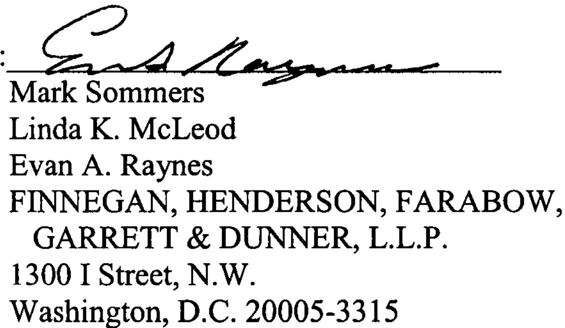
Granting it would thus serve no useful purpose and not be in the interests of justice.

Accordingly, X/Open respectfully requests that the Board deny Gray's motion to amend his pleadings and reopen discovery.[3]

Respectfully submitted,

Date: January 9, 2004

By:



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Washington, D.C. 20005-3315

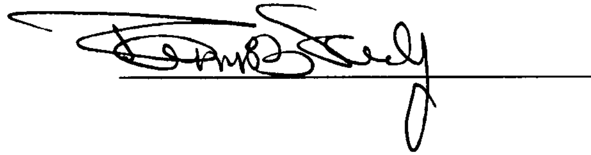
Attorneys for Opposer

[3] Given that Mr. Gray's motion is wholly lacking in evidentiary support, the Board should also consider, in its discretion, whether sanctions against Mr. Gray are appropriate under its inherent disciplinary powers. TBMP § 527.03.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing **OPPOSITION TO APPLICANT'S MOTION AND COMBINED BRIEF TO AMEND ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM** was served via first-class mail, postage prepaid and faxed on January 9, 2004, upon counsel for Applicant/Petitioner to the following address and facsimile number:

David L. Partlow, Esq.
David L. Partlow, P.A.
4100 W. Kennedy Blvd., Suite 201
Tampa, Florida
Telephone: 813-287-8337
Facsimile: 813-287-8234



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

X/OPEN COMPANY LIMITED,	)	
Opposer/Respondent,	)	
v.	)	Opposition No. 91122254 Application Serial No. 75/680,034 Mark: INUX
WAYNE R. GRAY,	)	
Applicant/Petitioner.	)	01-09-2004 U.S. Patent & TMOfc/TM Mail Rcpt Dt. #22

OPPOSER'S FIRST NOTICE OF RELIANCE

Opposer X/Open Company Limited ("X/Open"), in accordance with Rule 2.120(j) of the Trademark Rules of Practice, submits the following requests for admissions that X/Open served on Applicant, which Applicant failed to timely respond to, and which are thus deemed admitted pursuant to Fed. R. Civ. P. 36(a):

1. Exhibit A: Opposer's/Registrant's First Set of Requests for Admissions, served on August 7, 2003.

These admissions are relevant because they establish many of the factors that the Board uses to determine the likelihood of confusion in accordance with In re E.I. DuPont DeNemours & Co., 476 F.2d 1357, 1361, 177 U.S.P.Q. 563, 567 (CCPA 1973).

Respectfully submitted,

Date: January 9, 2004

By: [signature]

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Linda K. McLeod
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Washington, D.C. 20005-3315

Attorneys for Opposer

Opposition No. 91122254

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing **OPPOSER'S FIRST NOTICE OF RELIANCE** was served via first-class mail, postage prepaid and faxed on January 9, 2004, upon counsel for Applicant/Petitioner to the following address and facsimile number:

David L. Partlow, Esq.
David L. Partlow, P.A.
4100 W. Kennedy Blvd., Suite 201
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Telephone: 813-287-8337
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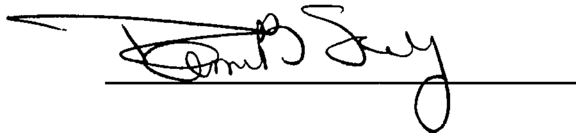


EXHIBIT A

Attorney Docket: 07737.8056

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

X/Open Company Limited, Opposer/Registrant, v. Wayne R. Gray, Applicant/Petitioner.	:	Opposition No. 122,524

Application Serial Number: 75/680,034
Mark: INUX
Published in Official Gazette of December 12, 2000 at Page TM 191

ASSISTANT COMMISSIONER FOR TRADEMARKS
2900 Crystal Drive
Arlington, Virginia 22202-3513

ATTN: BOX TTAB FEE

OPPOSER'S/REGISTRANT'S
FIRST SET OF REQUESTS FOR ADMISSIONS

Pursuant to Rule 36 of the Federal Rules of Civil Procedure and Trademark Trial and Appeal Board Manual of Procedure § 410, Opposer/Registrant X/Open Company Limited ("X/Open") requests that Applicant/Petitioner Wayne R. Gray provide sworn answers to these requests at the offices of X/Open's counsel, Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P., 1300 I Street, N.W., Washington, D.C. 20005-3315, within thirty (30) days of the service of this document.

DEFINITIONS AND INSTRUCTIONS

1. These requests for admissions are continuing in nature. Any information that may be discovered subsequent to the service of these requests for admissions should be brought to X/Open's attention through supplemental answers within a reasonable time following such discovery, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure.

2. The term "X/Open" means X/Open Company Limited, its predecessors in interest, related companies, licensees, subsidiaries, divisions, directors, officers, employees, agents, and representatives. The term "X/Open" encompasses the term "The Open Group," X/Open's trading name.

3. The term "Applicant/Petitioner" means Wayne R. Gray, his predecessors in interest, related companies, licensees, directors, officers, employees, agents, and representatives.

4. The term "person" or "persons" means and includes, without limitation, individuals, firms, associations, partnerships, and corporations.

5. The term "document" or "documents" has the same meaning as set forth in Rule 34(a) of the Federal Rules of Civil Procedure, including but not limited to: drafts; handwritten notes; and printouts of electronic mail messages, webpages, and other digital documents.

6. The term "the UNIX mark" means X/Open's UNIX trademark.

7. The term "UNIX registrations" means X/Open's U.S. Trademark Registration Nos. 1,390,593 and 1,392,203 for the mark UNIX.

8. The term "UNIX product" means any product that conforms to X/Open's Single UNIX Specification or any other UNIX specification created by X/Open, such as the products listed on X/Open's website, located at "www.opengroup.org."

9. The term "Applicant's/Petitioner's INUX mark" refers to the mark shown in U.S. Trademark Application Serial No. 75/680,034, and includes the mark as used or intended to be used in any stylization, with any design, and/or with any other terms.

10. Where an assertion of privilege or work product is asserted and documents are not provided on the basis of such assertion, identify the nature of the privilege being claimed and provide the following information:

(a) For written documents:

(i) The type of document;

(ii) The general subject matter of the document;

(iii) The date of the document; and

(iv) Such other information as is sufficient to identify the document for a subpoena duces tecum, including the author of the document, the addressee of the document, and the relationship between the author and the addressee.

(b) For oral communications:

(i) The name of the person making the communication, the name of each person present while the communication was made, and the relationship between these persons;

(ii) The date and place of communication; and

(iii) The general subject matter of the communication.

11. If any information provided by Applicant/Petitioner is asserted to contain confidential business information, such information should be so designated and produced. X/Open will limit the disclosure of such information to its counsel working on this matter, until such time as an appropriate protective order is entered or the Court rules that the information is not entitled to confidential treatment.

REQUESTS FOR ADMISSIONS

Request for Admission No. 1

Admit that, before adopting its INUX mark, Applicant/Petitioner was aware of X/Open's UNIX mark.

Request for Admission No. 2

Admit that, before adopting its INUX mark, Applicant/Petitioner was aware of UNIX.

Request for Admission No. 3

Admit that, before adopting its INUX mark, Applicant/Petitioner used UNIX.

Request for Admission No. 4

Admit that one of the functions of X/Open is to conduct tests to determine whether a product conforms to X/Open's Single UNIX Specification.

Request for Admission No. 5

Admit that, before adopting its INUX mark, Applicant/Petitioner was aware that one of the functions of X/Open is to conduct tests to determine whether a product conforms to X/Open's Single UNIX Specification.

Request for Admission No. 6

Admit that products that conform to X/Open's Single UNIX Specification are listed on X/Open's website, located at www.opengroup.org.

Request for Admission No. 7

Admit that, before adopting its INUX mark, Applicant/Petitioner was aware that products that conform to X/Open's Single UNIX Specification are listed on X/Open's website, located at www.opengroup.org.

Request for Admission No. 8

Admit that X/Open licenses others to use the UNIX mark in connection with products that confirm to X/Open's Single UNIX Specification.

Request for Admission No. 9

Admit that, before adopting its INUX mark, Applicant/Petitioner was aware that X/Open licenses others to use the UNIX mark in connection with products that confirm to X/Open's Single UNIX Specification.

Request for Admission No. 10

Admit that third parties advertise, promote, market, and sell operating systems under the UNIX mark licensed to them by X/Open.

Request for Admission No. 11

Admit that, before adopting its INUX mark, Applicant/Petitioner was aware that third parties advertise, promote, market, and sell operating systems under the UNIX mark licensed to them by X/Open.

Request for Admission No. 12

Admit that the use of the UNIX mark by X/Open's licensees constitutes use of the UNIX mark by X/Open.

Request for Admission No. 13

Admit that Applicant/Petitioner has not conducted any tests to determine whether Applicant's/Petitioner's INUX product conforms to X/Open's Single UNIX Specification.

Request for Admission No. 14

Admit that Applicant/Petitioner has not submitted its INUX product to X/Open for testing to determine whether it conforms to X/Open's Single UNIX Specification.

Request for Admission No. 15

Admit that Applicant's/Petitioners INUX product does not conform to X/Open's Single UNIX Specification.

Request for Admission No. 16

Admit that Applicant/Petitioner is not licensed by X/Open to use the UNIX mark.

Request for Admission No. 17

Admit that Applicant/Petitioner is aware of trademark attribution statements contained in the publications of third parties acknowledging that UNIX is a trademark of X/Open or its predecessor including, but not limited to, statements such as "UNIX is a trademark of X/Open," "UNIX is a trademark of AT&T," and similar statements.

Request for Admission No. 18

Admit that, before filing its counterclaim, Applicant/Petitioner was aware of trademark attribution statements contained in the publications of third parties acknowledging that UNIX is a trademark of X/Open or its predecessor including, but not limited to, statements such as "UNIX is a trademark of X/Open," "UNIX is a trademark of AT&T," and similar statements.

Request for Admission No. 19

Admit that Applicant/Petitioner is aware that Internet search engines, such as the Google search engine, reveal thousands of hits when a search is conducted for the phrase "UNIX is a registered trademark."

Request for Admission No. 20

Admit that, before filing its counterclaim, Applicant/Petitioner was aware that Internet search engines, such as the Google search engine, reveal thousands of hits when a search is conducted for the phrase "UNIX is a registered trademark."

Request for Admission No. 21

Admit that Applicant/Petitioner is aware that the records of the Trademark Trial and Appeal Board show that X/Open has enforced its rights in its UNIX mark.

Request for Admission No. 22

Admit that, before the filing of its counterclaim, Applicant/Petitioner was aware that the records of the Trademark Trial and Appeal Board show that X/Open has enforced its rights in its UNIX mark.

Request for Admission No. 23

Admit that Applicant/Petitioner is aware that the records of the World Intellectual Property Organization show that X/Open has enforced its rights in its UNIX mark.

Request for Admission No. 24

Admit that, before the filing of its counterclaim, Applicant/Petitioner was aware that the records of the World Intellectual Property Organization show that X/Open has enforced its rights in its UNIX mark.

Request for Admission No. 25

Admit that X/Open's website gives examples of correct and incorrect use of its UNIX mark.

Request for Admission No. 26

Admit that the second letter in Applicant's/Petitioner's INUX mark and X/Open's UNIX mark is "N."

Request for Admission No. 27

Admit that the first consonant sound in Applicant's/Petitioner's INUX mark and X/Open's UNIX mark, made from the letter "N," is the same.

Request for Admission No. 28

Admit that the last letter in Applicant's/Petitioner's INUX mark and X/Open's UNIX mark is "X."

Request for Admission No. 29

Admit that the last consonant sound in Applicant's/Petitioner's INUX mark and X/Open's UNIX mark, made from the letter "X," is the same.

Request for Admission No. 30

Admit that the first and last consonant sounds in Applicant's/Petitioner's INUX mark and X/Open's UNIX mark are the same.

Request for Admission No. 31

Admit that many Internet servers run UNIX products.

Request for Admission No. 32

Admit that Applicant's/Petitioner's U.S. trademark application for its INUX mark covers "computer operating system software for use in consumer hardware systems."

Request for Admission No. 33

Admit that the term "operating system" is not equivalent to the term "business and consumer desktop computer system software."

Request for Admission No. 34

Admit that the product or service used or intended to be used in connection with Applicant's/Petitioner's INUX mark is not an "operating system," but "business and consumer desktop computer system software."

Dated: August 7, 2003

By:

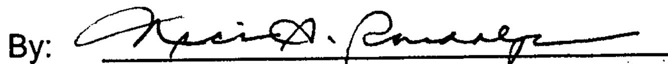
Mark Sommers
Evan A. Raynes

Attorneys for Opposer

CERTIFICATE OF SERVICE

I, Nichelle A. Randolph, hereby certify that on August 7, 2003, a true and correct copy of the foregoing **Opposer's/Registrant's First Set of Interrogatories, Opposer's/Registrant's First Set of Requests for Documents, and Opposer's/Registrant's First Set of Requests for Admissions** was served via First Class Mail on the following attorney for the Applicant:

Josiah E. Hutton, Esq.
Transworld Center, Suite 210
4100 West Kennedy Boulevard
Tampa, Florida 33609-2244

By: 

Nichelle A. Randolph
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