TTAB

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

INSPIRATION SOFTWARE, INC. Opposer, v. TEACHER INSPIRED PRACTICAL STUFF, INC. Applicant.	)	Application Serial No. 76/541630 Opposition No. 91164083

APPLICANT'S MOTION TO DISMISS NOTICE OF OPPOSITION

Pursuant to 37 C.F.R. §§ 2.127 and 2.116(a) and Federal Rule of Civil Procedure 12(b)(6), Applicant Teacher Inspired Practical Stuff, Inc. ("TIPS"), through its undersigned attorney, hereby moves for dismissal of the Notice of Opposition filed by Opposer Inspiration Software, Inc. ("Inspiration") for failure to state a claim upon which relief may be granted (the "Motion").

FACTUAL AND PROCEDURAL BACKGROUND

I. The Parties

Inspiration purports to be a private corporation organized under the laws of Oregon engaged in the business of marketing computer programs in the field of "idea development" and offering computer education training and other goods and services under the mark "INSPIRATION." Inspiration claims to own the United States Patent and Trademark Office (the "USPTO") registered mark "INSPIRATION" (Reg. No. 1768514) for computer programs in the field of "idea development" through visual diagramming, outlining and text creation, in International Class 9, and the service mark "INSPIRATION" (Reg. No. 1864117) for computer

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education training, in International Class 41, and for computer software design for others, in International Class 42.[1] Inspiration aggressively claims trademark infringement as demonstrated by the sixty-four (64) notice of oppositions it has filed since 2001. See Exhibit A, a copy the TTABVUE record listing oppositions Inspiration has filed before the TTAB.

TIPS is a private corporation organized under the laws of Florida. On August 21, 2003, TIPS, after due diligence and in good faith, filed an application for registration of the unique mark "T.I.P.S. – TEACHER INSPIRED PRACTICAL STUFF" (Serial No. 76/541630) for printed course materials, books, lessons plans, theme units and curriculum support materials, all featuring academic subjects, for the education of elementary school students, in International Class 16, and for educational services, namely, providing learning centers featuring instruction in academic courses for elementary school students, in International Class 41 (the "T.I.P.S. Mark").

II. Inspiration's Notice

Inspiration filed a Notice of Opposition (the "Notice") to the registration sought by TIPS of the T.I.P.S. Mark.[2] The Notice fails to articulate a theory of damages with any particularity. The basis for Inspiration's purported damage, however, appears to be customer confusion. Notice ¶ 7. As demonstrated below, because Inspiration has not and cannot sufficiently plead

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[1] The registration copies attached to the Notice as Exhibit 1 and 2 are photocopies, not current status and title copies prepared by the USPTO as required by Trademark Rule 2.122(d)(1). Thus, the exhibits are not in evidence or part of the record.

[2] The mailing date of the Notice was February 7, 2005. The TTAB notified TIPS that it had forty (40) days from the mailing date of the Notice within which to respond to the Notice. TIPS filed, and the TTAB granted, a consented motion on March 18, 2005 for a sixty-day extension in which to respond to the Notice. Accordingly, TIPS's Answer is due on May 20, 2005. In lieu of filing an Answer to the Notice, TIPS timely files this Motion. Pursuant to Trademark Rule 2.127(d), upon the filing of potentially dispositive motion, such as a motion to dismiss, the proceedings are suspended by the TTAB "with respect to all matters not germane to the motion". Thus, the filing of this Motion suspends the May 20, 2005 deadline in which TIPS must file an Answer to the Notice.

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facts to establish a cause of action for likelihood of confusion, the Notice must be dismissed as a matter of law.

ARGUMENT

III. Introduction

The right to bring an opposition to the registration of a mark flows from Section 13 of the Lanham Act. Section 13 requires that an opposer believe that it would be damaged by the registration of the mark and state the specific grounds for opposition. 15 U.S.C. § 1063; *Young v. AGB Corp.*, 152 F.3d 1337 (Fed. Cir. 1998). To withstand a motion to dismiss for failure to state a claim, an opposer must allege that (1) opposer has standing to maintain the proceedings, and (2) valid grounds exist for denying the registration sought. TBMB § 503.02. The opposition must be examined in its entirety, construing the allegations therein liberally. *Id.* Nonetheless, to successfully prosecute an opposition based on alleged likelihood of confusion, an opposer must "assert[] more than a *mere possibility* of confusion; a *probability* of confusion is required." *See* James E. Hawes and Amanda V. Dwight, 1 Trademark Registration Practice § 16:11, and the cases cited therein (emphasis added). Here, because Inspiration's alleged belief of a likelihood of confusion with the T.I.P.S. Mark is demonstrably without merit, the Notice must be dismissed.

IV. The Relevant DuPont Factor Demonstrates No Likelihood of Confusion

A determination of the existence of a likelihood of confusion is based on an analysis of all of the probative facts relevant to the likelihood of confusion factors set forth in *In re E. I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973). *See Shen Mfg. Co., Inc. v. The Ritz Hotel Ltd.*, 393 F.3d 1238, 1241 (Fed. Cir. 2004). Those factors are:

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

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(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.
(3) The similarity or dissimilarity of established, likely-to-continue trade channels.
(4) The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing.
(5) The fame of the prior mark (sales, advertising, length of use).
(6) The number and nature of similar marks in use on similar goods.
(7) The nature and extent of any actual confusion.
(8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.
(9) The variety of goods on which a mark is or is not used (house mark, "family" mark, product mark).
(10) The market interface between applicant and the owner of a prior mark:
(a) a mere "consent" to register or use.
(b) agreement provisions designed to preclude confusion, i.e. limitations on continued use of the marks by each party.
(c) assignment of mark, application, registration and good will of the related business.
(d) laches and estoppel attributable to owner of prior mark and indicative of lack of confusion.
(11) The extent to which applicant has a right to exclude others from use of its mark on its goods.
(12) The extent of potential confusion, i.e., whether de *minimis* or substantial.
(13) Any other established fact probative of the effect of use.

Id. In determining whether a likelihood of confusion exists, however, the TTAB need not consider every *DuPont* factor. *Id.* (citing *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336 (Fed. Cir. 2001); *see also Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375 (Fed. Cir. 1998). Rather, the TTAB is only required to consider *relevant* factors. *See Shen Mfg. Co., Inc.*, 393 F.3d at 1241. As conclusively shown below, the first *DuPont* factor – "[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound connotation and commercial impression" – by itself is dispositive of this case. *In re E. I. DuPont DeNemours & Co.*, 476 F.2d at 1361. *E.g.*, *Kellogg Co. v. Pack'em Enterprises, Inc.*, 951 F.2d 330 (Fed. Cir. 1991) (affirming TTAB decision finding no likely confusion based on the first *DuPont* factor alone).

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A. Appearance

The Notice fails at the most basic aspect of likelihood of confusion in that the marks at issue are patently dissimilar. Indeed, *no* common words are shared. Additionally, the marks are clearly dissimilar in appearance. *See Kellogg Co. v. Pack'em Enterprises, Inc.*, 951 F.2d 330 (Fed. Cir. 1991) (finding no likely confusion between the marks "FROOTEE ICE" and "FROOT LOOPS" based on dissimilar appearance). The T.I.P.S. Mark consists of four words and a corresponding acronym, "T.I.P.S.-TEACHER INSPIRED PRACTICAL STUFF." On the other hand, Opposer's putative mark consists of only one word, "INSPIRATION." Such dissimilarity of the marks in appearance prevents a likelihood of confusion. *See Shen Mfg. Co., Inc.*, 393 F.3d at 1243; *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375 (Fed. Cir. 1998) (affirming TTAB finding of no likelihood of confusion between "CRISTAL" and "CRYSTAL CREEK" wines).

B. Sound Connotation

Just as the T.I.P.S. Mark and "INSPIRATION" are visually distinct from one another, the marks are also verbally dissimilar. *See Jet, Inc. v. Sewage Aeration Sys.*, 165 F.3d 419 (6th Cir. 1999) (finding the marks "JET" and "AEROB-A-JET" visually and verbally distinct). The T.I.P.S. Mark is a unique phrase consisting of ten (10) syllables, where as "INSPIRATION" is a common four (4) syllable word. Moreover, the marks have only *one* common syllable: "ĭn". As such, the marks are phonetically dissimilar. *See Shen Mfg. Co., Inc.*, 393 F.3d at 1243. Inspiration's overbroad claim that it owns all marks containing some form of the word "inspire" should not be allowed to proceed. *See Gruner + Jahr USA Publ'g, A Div. Of Gruner + Jahr Printing Publ'g Co. v. Meredith Corp.*, 991 F.2d 1072, 1077 (2nd Cir. 1993) (reasoning that

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registering a proper noun as a trademark cannot by itself "remove it from being available to others" or "grant exclusive possession" of variations of the word to the trademark registrant").

C. Commercial Impression

The word "INSPIRATION" and the T.I.P.S. Mark evoke completely different images in the minds of relevant consumers. The "INSPIRATION" mark suggests nothing about the goods or services offered by Inspiration.[3] In fact, the "INSPIRATION" mark is illustrative of the weakest category of marks, descriptive marks. *Gruner + Jahr USA Publ'g,* 991 F.2d at 1072 (finding no likely confusion between magazines using the descriptive mark "PARENTS" and the mark "PARENTS DIGEST"); *see also Long John Distilleries LTD v. Sazerac Co., Inc.*, 426 F.2d 1406 (CCPA 1970) (finding no likely confusion between spirits using the marks "FRIER JOHN" and "LONG JOHN"); *Nestle's Milk Products, Inc. v. Bake Importing Co., Inc.*, 182 F.2d 193 (CCPA 1950) (finding the marks "Nescafe" and "Hycafe" dissimilar).

The word "inspiration" is defined as follows: "a divine influence or action on a person believed to qualify him or her to receive and communicate sacred revelation." Merriam-Webster Online Dictionary, at http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=inspiration. Given this definition, in the improbable event that Opposer's mark "INSPIRATION" carries any commercial meaning at all, it would probably be that of some sort of religious items.[4] On the other hand, the T.I.P.S. Mark conveys commercial meaning on its face: "TEACHER INSPIRED

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[3] Where the pleader asserts ownership of a registered mark, the proceeding focuses on the marks as set forth in the application and the registration, not on the style of mark used in commerce. *See* 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §20:15 (4th ed.); *see also* James E. Hawes and Amanda V. Dwight, 1 Trademark Registration Practice § 16:11, and the cases cited therein.

[4] See TBMB § 704.12, and the cases cited therein, for instruction concerning judicial notice of dictionary definitions.

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PRACTICAL STUFF." Clearly, "[t]he differences in sound, appearance and commercial impression of the two marks are obvious and one is no way suggestive of the other." *Long John Distilleries LTD v. Sazerac Co., Inc.*, 426 F.2d 1406, 1407 (CCPA 1970).

CONCLUSION

Inspiration asserts, without any basis whatsoever, that the T.I.P.S. Mark is confusingly similar to its "INSPIRATION." As this Motion conclusively demonstrates, however, confusion of the two marks is impossible as a matter of law. Inspiration has thus failed to satisfy its burden to allege facts sufficient to deny the registration sought by TIPS of the T.I.P.S. Mark. Accordingly, the Notice should be dismissed.

For the foregoing reasons, TIPS respectfully requests that Notice be dismissed pursuant to 37 C.F.R. §§ 2.127 and 2.116(a) and Federal Rule of Civil Procedure 12(b)(6), and that all proceedings not germane to this Motion be suspended pursuant to 37 C.F.R. § 2.127 (d) and TBMP § 528.03.

Respectfully submitted:

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CERTIFICATE OF MAILING

I hereby certify that this document is being sent via the Electronic System for Trademark Trials and Appeals to the Trademark Trial and Appeal Board and U.S. Mail to the service list below.

May 20, 2005

Jake A. Baccari

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Proceeding Filing Date	Defendant(s), Property(ies)	Plaintiff(s), Property(ies)
78419132 03/31/2005	Inspired Life Ministries, Inc. **Mark:** INSPIRED PARENTS **S#:**78419132	Inspiration Software, Inc.
76472318 03/02/2005	FAMILY DIRECT, INC. **Mark:** TOYS THAT INSPIRE THE IMAGINATION **S#:**76472318	Inspiration Software, Inc.
78306433 03/01/2005	Inspirasian Limited **Mark:** INSPIRASIAN **S#:**78306433	Inspiration Software, Inc.
78335268 03/01/2005	Target Brands, Inc. **Mark:** READ. BE INSPIRED. WRITE BACK **S#:**78335268	Inspiration Software, Inc.
78397364 03/01/2005	Nobel Learning Communities, Inc. **Mark:** INSPIRATION . . . MOTIVATION . . . EDUCATION **S#:**78397364	Inspiration Software, Inc.
91164083 01/25/2005	Teacher Inspired Practical Stuff, Inc. **Mark:** T.I.P.S. - TEACHER INSPIRED PRACTICAL STUFF **S#:**76541630	INSPIRATION SOFTWARE, INC. **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
91164074 01/25/2005	Inspired eLearning Inc **Mark:** INSPIRED ELEARNING EDUCATION FOR YOUR ENTERPRISE **S#:**78259505	INSPIRATION SOFTWARE, INC. **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
91164064 01/25/2005	Correales, Diana **Mark:** PARENTS INSPIRATION INSTITUTE **S#:**76553615	Inspiration Software, Inc.
78351892 11/30/2004	Schneider, Gary **Mark:** INSPIRE **S#:**78351892	Inspiration Software, Inc. INTRA/AMERICA BEAUTY NETWORK, INC
78365820 11/30/2004	Caesars Entertainment, Inc. **Mark:** BE INSPIRED **S#:**78365820	Inspiration Software, Inc.
91163028 11/08/2004	FAVERO, Mauro, S. **Mark:** INSPIRIZED **S#:**78112873	Inspiration Software, Inc. **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
78259505 10/20/2004	Inspired eLearning Inc **Mark:** INSPIRED ELEARNING EDUCATION FOR YOUR ENTERPRISE **S#:**78259505	Inspiration Software, Inc. INSPIRATION SOFTWARE, INC. **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
76553615 10/20/2004	Correales, Diana **Mark:** PARENTS INSPIRATION INSTITUTE **S#:**76553615	Inspiration Software, Inc.

76541630 10/20/2004	Teacher Inspired Practical Stuff, Inc. **Mark:** T.I.P.S. - TEACHER INSPIRED PRACTICAL STUFF **S#:**76541630	Inspiration Software, Inc. INSPIRATION SOFTWARE, INC. **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
76535375 10/20/2004	Alpha Xi Delta Fraternity **Mark:** INSPIRING WOMEN TO REALIZE THEIR POTENTIAL **S#:**76535375	Inspiration Software, Inc.
91161700 08/09/2004	Guideposts, a Church Corporation **Mark:** DAILY GUIDEPOSTS YOUR SOURCE OF INSPIRATION **S#:**76510277	INSPIRATION SOFTWARE, INC. **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
78112873 08/05/2004	FAVERO, Mauro, S. **Mark:** INSPIRIZED **S#:**78112873	Inspiration Software, Inc. **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
91160838 06/03/2004	Weekly Reader Corp. **Mark:** INSPIRE THE FUTURE **S#:**78215859	Inspiration Software, Inc. **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
76233406 05/17/2004	Cybermax, Inc. **Mark:** INSPIRE **S#:**76233406	Acer Incorporated **Mark:** ASPIRE **S#:**74722020 **R#:**2124703 Acer Inc. and Acer America Corporation Inspiration Software, Inc.
76510277 05/10/2004	Guideposts, a Church Corporation **Mark:** DAILY GUIDEPOSTS YOUR SOURCE OF INSPIRATION **S#:**76510277	INSPIRATION SOFTWARE, INC. **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
91160332 04/23/2004	Edwards Lifesciencs Corporation **Mark:** INSPIRATION FROM LIFE FOR LIFE **S#:**78239018	Inspiration Software, Inc.
91160103 03/29/2004	The Marguerite Petersen Foundation **Mark:** INSPIRATION POINT **S#:**76438186	INSPIRATION SOFTWARE, INC.
78215859 03/05/2004	Weekly Reader Corp. **Mark:** INSPIRE THE FUTURE **S#:**78215859	Inspiration Software, Inc. **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
91159417 02/02/2004	Inspired Leap Consulting Inc. **Mark:** INSPIRED LEAP **S#:**78212794	INSPIRATION SOFTWARE, INC
76510354 01/23/2004	Two Busy Moms, Inc. **Mark:** INSPIRE 2 **S#:**76510354	INSPIRATION SOFTWARE, INC

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78239018 01/22/2004	Edwards Lifesciencs Corporation **Mark:** INSPIRATION FROM LIFE FOR LIFE **S#:**78239018	Inspiration Software, Inc.
76438186 12/22/2003	The Marguerite Petersen Foundation **Mark:** INSPIRATION POINT **S#:**76438186	INSPIRATION SOFTWARE, INC. INSPIRATION SOFTWARE, INC.
91158904 12/19/2003	In2Books, Inc. **Mark:** INSPIRATION CENTER **S#:**76468188	INSPIRATION SOFTWARE, INC.
78212794 11/03/2003	Inspired Leap Consulting Inc. **Mark:** INSPIRED LEAP **S#:**78212794	INSPIRATION SOFTWARE, INC
91158140 10/18/2003	Whirlpool Properties, Inc. **Mark:** INSPERIENCE **S#:**78163947	INSPIRATION SOFTWARE, INC. **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
91158146 10/08/2003	SPIREMEDIA, INC. **Mark:** SPIREMEDIA **S#:**75908140	INSPIRATION SOFTWARE, INC. **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
91158092 10/06/2003	Leszynski Group, Inc. **Mark:** INSPIRE **S#:**78176368	Inspiration Software, Inc
91158098 10/06/2003	Mitten Group, Inc., The **Mark:** ASPIRE. INSPIRE. **S#:**76404801	Inspiration Software, Inc **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
91158119 10/06/2003	Inspire International, Inc. **Mark:** INSPIRE INTERNATIONAL INC. **S#:**76441108	INSPIRATION SOFTWARE, INC. **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
91158145 10/06/2003	Inspiring Solutions, Inc. **Mark:** INSPIRING SOLUTIONS **S#:**76384940	INSPIRATION SOFTWARE, INC. **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
91158079 09/29/2003	Roy, Debra E. **Mark:** INSPIRINGS **S#:**76458575	Inspiration Software, Inc.
91158048 09/29/2003	In2Books, Inc. **Mark:** INSPIRATION CENTER **S#:**76468184	Inspiration Software, Inc. (Inspiration)
76468188 09/15/2003	In2Books, Inc. **Mark:** INSPIRATION CENTER **S#:**76468188	Inspiration Software, Inc. INSPIRATION SOFTWARE, INC.
91157813	IDEA Health & Fitness, Inc.	Inspiration Software, Inc

09/08/2003	**Mark:** INSPIRE THE WORLD TO FITNESS **S#:**78174282	
91157769 09/08/2003	Windsor, Tiffany M. **Mark:** INSPIRED AT HOME **S#:**78116152	Inspiration Software, Inc. ("Inspiration")
76418520 09/08/2003	SPIR COMMUNICATION (S.A.) **Mark:** SPIR COMMUNICATION **S#:**76418520	INSPIRATION SOFTWARE, INC.
91157891 09/03/2003	Miller, Susan **Mark:** INSPIRATION NATION **S#:**76407537	INSPIRATION SOFTWARE, INC. **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
76441108 08/08/2003	Inspire International, Inc. **Mark:** INSPIRE INTERNATIONAL INC. **S#:**76441108	INSPIRATION SOFTWARE, INC. **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
76404801 08/08/2003	Mitten Group, Inc., The **Mark:** ASPIRE. INSPIRE. **S#:**76404801	Inspiration Software, Inc **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
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76468184 07/02/2003	In2Books, Inc. **Mark:** INSPIRATION CENTER **S#:**76468184	Inspiration Software, Inc. (Inspiration)
76458575 06/30/2003	Roy, Debra E. **Mark:** INSPIRINGS **S#:**76458575	Inspiration Software, Inc Inspiration Software, Inc.

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76407537 06/18/2003	Miller, Susan **Mark:** INSPIRATION NATION **S#:**76407537	INSPIRATION SOFTWARE, INC. INSPIRATION SOFTWARE, INC. **Mark:** INSPIRATION **S#:**74311686 **R#:**1768514
78174282 06/11/2003	IDEA Health & Fitness, Inc. **Mark:** INSPIRE THE WORLD TO FITNESS **S#:**78174282	Inspiration Software, Inc
78116152 06/10/2003	Windsor, Tiffany M. **Mark:** INSPIRED AT HOME **S#:**78116152	Inspiration Software, Inc. ("Inspiration")
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76228781 12/04/2002	Siemens Aktiengesellschaft **Mark:** BE INSPIRED **S#:**76228781	Inspiration Software, Inc.
91155251 02/10/2002	Siemens Aktiengesellschaft **Mark:** BE INSPIRED **S#:**76228781	Inspiration Software, Inc.
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Mark: SUPERGROUPER **S#:**76075813

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