

ESTTA Tracking number: **ESTTA355237**

Filing date: **06/28/2010**

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

Proceeding	91179897
Party	Plaintiff Information Builders, Inc.
Correspondence Address	HOWARD F. MANDELBAUM LEVINE & MANDELBAUM 222 BLOOMINGDALE ROAD , SUITE 203 WHITE PLAINS, NY 10605 UNITED STATES mail@levman.com
Submission	Rebuttal Brief
Filer's Name	Howard F. Mandelbaum
Filer's e-mail	mail@levman.com
Signature	/Howard F Mandelbaum/
Date	06/28/2010
Attachments	Reply Brief for Opposer1.pdf (9 pages)(22575 bytes)

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

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INFORMATION BUILDERS, INC. :

 Plaintiff, :

 v. : Opposition No. 91179897

BRISTOL TECHNOLOGIES INC. :

 Defendant. :
-----X

REPLY BRIEF FOR PLAINTIFF

Levine & Mandelbaum
222 Bloomingdale Road
Suite 203
White Plains, N.Y. 10605
(914) 421-0500

June 28, 2010

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I. INTRODUCTION

Plaintiff supplements the arguments in its main brief with the following in reply to the arguments in Defendant's brief. Plaintiff also points out the untimeliness of Defendant's brief.

II. DEFENDANT'S BRIEF NOT TIMELY FILED

Rule 2.128 (a) (1) provides,

The brief of the party in the position of plaintiff shall be due not later than sixty days after the date set for the close of rebuttal testimony. The brief of the party in the position of defendant, if filed, shall be due not later than thirty days after the due date of the first brief. A reply brief by the party in the position of plaintiff, if filed, shall be due not later than fifteen days after the due date of the defendant's brief.

By order of the Trademark Trial and Appeal Board dated October 21, 2009, the date set for the close of rebuttal testimony was March 15, 2010. Accordingly, the filing of Plaintiff's brief was due May 14, 2010 and the filing of Defendant's brief was due June 14, 2010 (June 13 was a Sunday). Defendant's Brief was served and filed on June 18, 2010, four days late. Defendant made no motion for leave to file its brief late.

III. FRAUD ON THE PATENT AND TRADEMARK OFFICE

The Defendant confirms in its answering brief its verified responses to Plaintiff's Interrogatory No. 32, namely that the specimen image submitted to the Examining Attorney, after the

original specimen was refused, was created on February 27, 2007; the photo of the specimen that was submitted to the Examining Attorney was taken on March 26, 2007; the photo was taken by Defendant's President, David W. Bristol; and Defendant, by its attorney, signed a declaration attesting to the second specimen having been in existence at the time the application was filed on August 17, 2006. Yet Defendant claims that there was no fraud because "Plaintiff misinterprets Defendant's answer to Plaintiff's Interrogatory No. 32". Defendant never specifies the supposed misinterpretation.

Defendant further argues that the BRISTOL FOCUS software had a copyright notice dated 2006 and that this gave the Defendant time to demonstrate its software. There is no actual claim that Defendant did in fact demonstrate its software and no evidence in the record to support such a claim.

Even if there was evidence that Defendant demonstrated its software before the specimen was created, it would not change the fact that Defendant stated under oath that the specimen created on February 27, 2007 was created prior to August 17, 2006.

Defendant speaks of "meetings" which are unsubstantiated. Other than attorney argument there is no indication that such meetings ever took place and no evidence in the record to

support them. In fact there is no testimony by Defendant or its President to support such allegations.

Even if evidence of Defendant'S meetings and use of its software did exist, again it would not contradict the plain fact that a specimen created on February 27, 2007 by David W. Bristol was offered as being in existence on August 17, 2006 in an oath signed by Defendant's attorney.

Defendant also relies on the examining attorney's acceptance of the second specimen as "clear and convincing evidence" that Defendant complied with the Examining Attorney's requirements. What the record shows is that in substituting a new specimen accompanied by an oath falsely stating that the specimen was in existence prior to the time of the application, Defendant succeeded in misleading the Examining Attorney into approving the application for publication.

Only after Plaintiff opposed the application did the Defendant move for permission to change the basis of its application to intent-to-use under Section 1(b).

IV. LIKELIHOOD OF CONFUSION - SIMILARITY OF THE GOODS

Defendant urges that Plaintiff does not produce operating systems software and the differences between the software of the parties. The issue is not whether consumers would confuse the goods, but rather whether they would be confused as to the source of the goods.

Plaintiff has cited in its main brief, authority supporting a likelihood of confusion based on similarities between the goods of the parties under factor no. 2 of the Polaroid factors. The Board may also take judicial notice that companies such as Microsoft, Apple, and IBM produce both operating system software and applications software. e.g., Microsoft's Windows operating software and the Access database management program of Microsoft Office software.

V. FAME OF PLAINTIFF'S MARK

Defendant questions the fame of Plaintiff's mark.

Fame of a mark is a relevant factor in that it is applicable to a determination of likelihood of confusion under 15 USC 1052(d) as well as dilution under 15 USC 1125(c). Defendant asserts that "the fame of [Plaintiff's] mark remains unproven."

Section 1125(c)'s four factors to be considered in determining whether a mark is famous for purposes of dilution are considered below.

(i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.

Plaintiff has been selling its FOCUS software for some 35 years, i.e., since 1975 [PX-3]; [pg. 8, line 11 - [pg. 9, line 6]. IBI has advertised its FOCUS products since it began

business. IBI's annual marketing budget for advertising is about 5-8 million dollars approximately 75% of which is spent promoting FOCUS products. [pg. 61 line 19] - [pg. 62, line 7].

(ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark.

IBI has annual sales in the neighborhood of \$300 million dollars of which FOCUS software products account for approximately one half, i.e., \$150 million. [pg. 7 lines 14-22].

(iii) The extent of actual recognition of the mark.

The fame which IBI and its FOCUS software have garnered are evidenced by their press coverage over the years including for example, articles in Hoover's profiles [PX-2], Software Magazine [PX-6], Computer Reseller News [PX-38], Database Programming and Design [PX-50], Enterprising Computing Magazine [PX-51], Mid-Range Systems Magazine [PX-52], DEC Professional [PX-53], DBMS [PX-54], Cranes [PX-55], Main Frame Executive [PX-56], and DM Review [PX-39]. Wikipedia currently maintains a section devoted to IBI and its FOCUS software [PX-1].

(iv) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

FOCUS and other marks of the family of FOCUS marks are registered on the principal register of the Patent and Trademark Office. [P. Not. of Rel. II].

Plaintiff submits that its FOCUS trademark is famous within the meaning of 15 USC 1052(d) and 15 USC 1125(c), and that registration of Defendant's BRISTOL FOCUS mark will result in a likelihood of confusion with, and dilution of, Plaintiff's FOCUS mark.

VI. CONCLUSION

In view of the above and for the reasons set forth in Plaintiff's main brief, this opposition should be sustained and registration denied to Defendant.

Respectfully,
INFORMATION BUILDERS INC.

Date: June 28, 2010

By: /Howard F. Mandelbaum/
Howard F. Mandelbaum
Attorney for Plaintiff
Levine & Mandelbaum
222 Bloomingdale Road
Suite 203
White Plains, N.Y. 10605
(914) 421-0500

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing
REPLY BRIEF FOR PLAINTIFF has been sent this 28th day of June,
2010, by first class mail to:

Roger L. Belfay, Esq.
829 Tuscadora Avenue
Saint Paul, Minnesota 55102

/Howard F. Mandelbaum/
Howard F. Mandelbaum