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

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/Leah Z. Halpert/

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

EMBARCADERO TECHNOLOGIES, INC.

Opposer

v.

RSTUDIO, INC.

Applicant.

Opposition No.: 91-193,335

Trademarks: RSTUDIO

Serial Nos.: 77/691,980
77/691,984
77/691,987

OPPOSER'S REPLY BRIEF

Opposer, EMBARCADERO TECHNOLOGIES, INC., (“Embarcadero”, or “Opposer”), by its attorneys, hereby submits its Reply Brief supporting its request that the Board deny RStudio’s (“Applicant”) U.S. Trademark Application Serial Nos: 77/691,980, 77/691,984, and 77/691,987 for the mark RSTUDIO in Classes 9, 41, and 42.

Dated: September 19, 2011

Respectfully Submitted,

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I. INTRODUCTION

Many of the issues raised in Applicant's Trial Brief (hereinafter "Applicant's Brief") were anticipated and addressed by Opposer's Trial Brief on the Merits (hereinafter "Opposer's Brief"). Opposer's arguments to these issues will not be reiterated, as Opposer has already shown by a preponderance of the evidence that all of the *du Pont*¹ factors, including those highlighted in Applicant's Brief, actually and clearly favor sustaining Embarcadero's opposition to registration of Applicant's RSTUDIO marks based on likelihood of confusion. Opposer will however, show herein that Applicant's Brief refers to several inaccurate facts which are contrary to the record, ignores other significant facts, and spends the bulk of the brief obfuscating the issues at hand with carefully selected, incomplete, and mostly irrelevant evidence.

Applicant's Brief, from the start, focuses on what the Applicant claims to be its intended usage of the RSTUDIO marks rather than the goods and services actually stated in the Applications. These arguments are wholly irrelevant as the Applications at issue are intent-to-use applications, and through the entire evidence period there was no actual, commercial use of the mark – only highly limited "stealth" beta use, followed much later by expanded beta use.² Such arguments about a purported future intended use are also beyond the realm of a TTAB opposition.³ Additionally, when viewed in light of the correct characterizations of the breadth of Opposer's rights under the

¹*In re E.I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

² With no actual use, Applicant cannot have built up any common law rights in connection with the RSTUDIO marks. Therefore, the only way to measure a potential likelihood of confusion is to look at the specific goods and services in the Applications – those that Applicant would have rights in should the Applications be allowed to register. As these directly overlap with Opposer's rights (both obtained via Registration No. 2,203,227 and through extensive common law usage and expansion), and in addition to the other *du Pont* factors, confusion is both likely and probable.

³ The Board is empowered to determine only the right to register. *See* Trademark Act §17, Trademark Act §18, Trademark Act §20, Trademark Act §24, 15 U.S.C. §1067, 15 U.S.C. §1068, 15 U.S.C. §1070, 15 U.S.C. §1092; TBMP §102.01. The decision looks at whether an application has a right to be registered for the goods and services *in* the application, based on the trademark rights held by others (both common law and statutory). It does not delve into potential conflict based on possible future use as is discussed throughout the entirety of Applicant's Brief.

ER/STUDIO brand and interrelated Embarcadero products, as accurately described in Opposer's Brief, and fully supported by Opposer's evidence, Applicant's Brief strengthens Opposer's position that confusion is likely to occur.

II. ARGUMENT

A. Facts Applicant does not Dispute

Although Applicant's Brief begins by stating that Applicant denied the allegations set forth in the Notice of Opposition, Applicant's Brief at 5, the Answer, and Applicant's evidence and Brief actually admit or do not dispute certain facts – facts which increase the likelihood of confusion.

Applicant does not dispute that Opposer is the senior user of the mark ER/STUDIO, Ans. ¶ 3. Applicant's Brief admits that Opposer is the owner of Federal Registration No. 2,203,227, issued on November 10, 1998 on the Principal Register. Applicant's Brief at 5. Applicant goes on to admit that the RSTUDIO products and services were not in bona fide commercial use as of the time of filing the Applications on March 16, 2009, Applicant's Mtn. to Amend Ans. 2, and throughout the evidentiary portion of the opposition – at most the RSTUDIO product was only available through very limited “stealth” beta testing to a few universities and a more expanded beta testing that was only available once the website happened to be located (there was no advertising or promotion of the website). Opposer's Brief at 45; Allaire Testimony 182-83, Apr. 15, 2011. Additionally, the services of Application Nos. 77/691,984 and 77/691,987 have, as with the planned product, never been offered commercially for sale, and rather continue to be just an intention of Applicant for possible future use. Applicant's Brief at 8. This is an important admission because, as stated in Opposer's Brief, when balancing the *du Pont* factors for similar marks covering the same or closely related goods and services, as here, any doubts as to the likelihood of confusion, mistake or deception must be resolved in favor of the senior user, or, in this case, Opposer. *See* Opposer's

Brief at 48 and cases cited therein.

Additionally, Applicant does not dispute the fact that the evidence of record is devoid of additional third party owners with marks similar to ER/STUDIO or RSTUDIO. Applicant attempts to distract the Board from this by arguing that STUDIO-formative names are “common”, Applicant’s NOR, Exh E, and that they believe consumers can therefore easily distinguish between these products. Applicant’s Brief at 14. However, by not refuting the fact that none of these “Studio-formative” names, taken as a whole, are even remotely close to ER/STUDIO when looking at the mark as a whole (as must be done), Applicant implicitly concedes that ER/STUDIO is afforded the statutory presumption of exclusivity under 15 U.S.C. §1115(a). The “evidence” offered by Applicant is little more than a red herring, designed to distract the Board from the actual issue – that aside from Applicant’s proposed marks, there are no other similar marks for similar goods and services, either on the USPTO Register, or in the marketplace.

B. Applicant’s Likelihood of Confusion Analysis Ignores Highly Pertinent Facts and Its Incorrectly Narrowed Focus Renders It Essentially Irrelevant

1. Applicant Improperly Characterized the Breadth of Opposer’s ER/STUDIO Brand of Products and Services by Focusing Solely on Reg. No 2,203,227 and Ignoring Opposer’s Expansive Common Law Rights in the Software Development Field

Applicant argues – somewhat weakly – that the parties’ respective goods and services are not related and travel in separate and distinct channels of trade. However, in order to make this argument, in light of Opposer’s Brief and the extensive supporting evidence, Applicant improperly focused solely on the goods of Opposer’s ER/STUDIO registration, #2,203,227, while, at the same time, ignoring the actual broad goods and services as listed in Applicant’s Applications. Under well-established trademark law, the realms of protection afforded each party are actually just the opposite – for a likelihood of confusion analysis, Applicant is limited to the goods and services of

their intent-to-use Applications while Opposer enjoys broader protection built up through almost twenty years of consistent, extensive use and expansion of the ER/STUDIO brand. As Opposer's evidence indisputably shows, the use and scope of the ER/STUDIO line of software products and related services has expanded well beyond the goods listed in the incontestable registration into areas that reach far beyond entity relationship and relational databases. Additionally, Opposer is also afforded protection in other related fields as well, since, as shown by undisputed stipulated testimony, ER/STUDIO products assist in every step of the software development continuum, the process from idea to implementation of software. Tired Stipulated Testimony, Tired Testimony, Exh.

2.

2. The Goods and Services at Issue are Only Those Listed in the Applications and do not Include how Applicant Claims the RSTUDIO Marks May be Used

Applicant's arguments regarding their belief that the parties' respective goods and services are not similar and do not create a likelihood of confusion are based on narrowly selected and generally irrelevant purported "facts", as discussed below. Throughout the factual background Applicant discusses in depth the technical specificities of the intended RSTUDIO products and related services, and then uses these descriptions as the ones at issue in the likelihood of confusion analysis. While providing technical specificities of the goods might be more relevant if the goods and services at issue were highly specific in nature, and therefore potentially difficult to understand, here the goods and services of Applicant's Applications are not. Instead, the goods and services of the Applications are very broad, covering the entire realm of software development – including integrated development environments, or "IDEs" – rather than any specific, narrow "category" as Applicant has argued. Even Applicant's proposed amended goods and services description do not narrow the coverage of the Applications to a specific "category" as Applicant argues. The proposed

amendments state that the RSTUDIO mark is to be used in conjunction with the “R computing language”. Applicant’s Motion to Amend Applications at 1-2. Applicant goes on to argue – without evidence or support – that statistical computing is, in their view, a narrow, easily identifiable “category,” separate and distinct from anything sold under or related to the extensive ER/STUDIO brand. Applicant’s argument first requires that statistical computing be seen as a separate “category” that does not interrelate with anything else in the software development continuum (an assertion that Opposer vigorously refutes). From here, a mental leap must be taken to accept Applicant’s position that the R language can only be used for programming within this narrow category. Opposer’s evidence, however, establishes that the R language is not narrow or limited as Applicant asserts. It is a powerful language with many uses, as even Applicant recognizes by the competing definitions for the R language in first few pages of Applicant’s Brief. Applicant’s Brief at 6 (“R statistical computing language”); *Id.* at 7 (“R computing language”); *Id.* at 9 (“R programming language”).

Regardless of the fact that the actual or proposed goods and services of Applicant’s Applications are very broad, Applicant’s Brief continually uses their description of Applicant’s purported intended use of the RSTUDIO mark, and does not compare the overwhelming similarities of Applicant’s goods and services *as listed* in either the original Applications or the proposed amended Applications, to Opposer’s extensive rights in its ER/STUDIO brand. The only reasonable conclusion that can be drawn from this selected omission is that Applicant concedes the fact that the goods and services of the both the original and proposed amended Applications are so related to what is covered under the ER/STUDIO brand’s extensive rights, that likelihood of confusion among consumers is inevitable. This is especially true since Applicant’s intention surrounding the proposed use of the mark remains consistent with the original descriptions, despite the proposed amendments.

In fact, Applicant’s own testimony confirms that the proposed amendments will not change how Applicant intends to use the mark, and that the amendments were proposed merely to avoid the opposition while continuing to maintain the same intention for the future use of the mark. Allaire Testimony 243:15-21, 244:19-20 (“I didn’t change anything about what we intend the product to do.”), *Id.* at 245:14-17 (“Q: So that the change did not imply or reflect a change in the product or the intended product? A: No.”)

As Trademark Law mandates that likelihood of confusion be determined based on Applicant’s goods and services as listed in the Applications, Opposer hereby objects to any mention or comparison of Applicant’s intended actual use of the RSTUDIO mark as it is highly irrelevant and should be disregarded.

3. Both Parties Products are Related and Will be in the Same Channels of Trade and Purchased by the Same Types of Consumers

Applicant’s Brief extrapolates their tangential descriptions of Applicant’s purported use of RSTUDIO, to conclude that the RSTUDIO products and services of the Applications are different and travel in a different channel of trade to different consumers than Opposer’s ER/STUDIO products. Just as the above-discussed argument must fail for relevancy, so too must this conclusion. For this argument Applicant relies heavily on *Electronic Data Systems Corp. v. EDSA Micro Corp.*, 23 USPQ2d 1460 (TTAB 1992), a reliance which is highly misplaced. In *Electronic Data Systems*, the Board held EDS and EDSA were not likely to be confused despite the nearly identical nature of the marks themselves.⁴ The Board found that the marks are in different channels of trade and the

⁴ Interestingly, this case also cuts against Applicant’s argument that the parties’ respective marks are not similar in sight, sound, and commercial impression. Applicant’s Brief impermissibly analyzes each distinct portion of the marks at issue and concludes that the only difference is the first letter – ER versus R. Applicant further argues that ER, on its own and not in any way viewed as part the mark or in connection with the mark as a whole, stands for “entity relationship” and consumers would always know this, thus distinguishing it from “R”. *Electronic Data Systems* found that even despite the fact that EDSA was a known acronym for what the computer programs offered did, it did not make any difference upon the sight, sound, and commercial impression, when viewing EDSA next to EDS. The Board in that case, as it should here, found the marks to be

goods and services unrelated because the only connection between the goods and services offered by both parties is that they both involved “computer programs”. *Electronic Data Systems*, 23 USPQ2d at 1465. In that case, the record was devoid of even a scintilla of evidence showing how Applicant’s goods (as listed in the application) were a part of Opposer’s services (as listed in the registration)⁵, or how Applicant’s goods were within the natural scope of expansion for Opposer’s services. *Id.* at 1463. Here, however, Opposer has clearly proven that the ER/STUDIO brand of products not only offers integrated development environments (“IDEs”) (as specifically listed in Applicant’s Application No. 77/691,980), as well as related services such as training for computer software (as specifically listed in Appln No. 77/691,984), and technical support services (as specifically listed in Appln. No 77/691,987) in addition to other goods and services, but also has innate statistical computation and graphing capabilities. Opposer’s Brief at 15-16. This overlap is far more than merely “computer programs”, and as such, the goods and services are related and will travel in similar channels of trade to similar consumers. Even Applicant’s proposed amended goods and services still do not avoid a likelihood of confusion or place Applicant’s mark in a different channel of trade as even Applicant concedes to the fact that ER/STUDIO products perform statistical computing and graphing. Applicant’s Brief at 11 (“Some ER/STUDIO products are capable of performing certain statistical functions and presenting statistical data in graphical format.”). Applicant admits that ER/STUDIO products do statistical calculations via a computer, and then

highly similar in sight, sound, and commercial impression, when viewing the marks as a whole.

⁵ The Board limited the analysis to Opposer’s registration only, rather than their common law rights as Opposer’s expansion of services occurred after Applicant began offering its products. Here, the evidence shows that Opposer’s expanded goods and services covering the entire software development spectrum occurred long before Applicant even filed its intent-to-use Applications in 2009. As such, all of Opposer’s rights, both statutory and common law, should be considered in the Board’s likelihood of confusion analysis.

claims that this does not amount to their personal definition of what they mean by “statistics”⁶ because it is computed on metadata. However, there is nothing in the record that establishes or even suggests that metadata is not a valid form of data upon which to perform statistical calculations, or that the RSTUDIO Applications, either in their original or amended form, specifically exclude performing statistical calculations on metadata. In fact, Applicant’s president and co-founder testified that Applicant has no control over the type of data, whether it be raw data or metadata, that would be used in the RSTUDIO product or from where such data comes. Allaire Testimony 247:11-17. As the record clearly shows, the extended goods and services under the ER/STUDIO brand directly overlap with those in Applicant’s Applications, whether the original version or the amended version.

Additionally, Applicant’s Brief, understandably narrowly focused, completely ignores how in the software world, these products necessarily interrelate else they serve very little purpose. Allaire Testimony 136:16-19. Applicant argues that the RSTUDIO product is only for statistical computing. However, the evidence to the contrary is overwhelming, and Applicant even admits that the ER/STUDIO brand, as well as other related Embarcadero products compute statistics for their users as well⁷. Whether RSTUDIO does or does not have a native ability to work with relational databases is irrelevant since so many third-party products (especially in the open source software world) have been developed to allow for such a connection to be made, and the evidence shows the trend toward making R-based IDEs and relational databases compatible. *See* Opposer’s Rebuttal

⁶ Applicant’s broad definition of “statistics” is “the science that deals with the collection, classification, analysis and interpretation of data.” Applicant’s Brief at 8.

⁷ Applicant’s argument that the ER/STUDIO statistics are not real statistics because they are computations on metadata rather than the data that is within the database is “novel”, self-serving and irrelevant. Nowhere in the Applications or the proposed amendments does Applicant limit their goods and services to statistical computing on data only, specifically excluding statistics and graphing done on metadata. Making a distinction here when the record is devoid of evidence to make such a distinction useful is irrelevant and should be ignored.

Notice of Reliance, Exhs B, C, D, E, F. Additionally the fact that Applicant's intended product is an open-source software product, Applicant's Brief at 26, grants the users the ability to constantly develop and upgrade the product for their own needs, Opposer's Rebuttal NOR, Exh. A ("RStudio is available under a free software license that guarantees the freedom to share *and change* the software . . . for all its users." (emphasis added)), including modifying the product to interrelate directly with relational databases, in line with the current trend. As Opposer has shown through Opposer's Brief and the evidence submitted, many people who use the R programming language often require relational databases, such as those that may be created with ER/STUDIO to house the data they will manipulate. Since Applicant does not limit how the RSTUDIO product can be used in either the Applications or in practice, Allaire Testimony 247:8-17, it is likely that confusion will manifest among consumers as both parties' products and services will be in the same markets.

4. Unsophisticated Purchasers May Buy Both Parties' Products and Services, and Therefore the Standard of Care Exercised in the *du Pont* Analysis is that of the Least Sophisticated Customer

Applicant ignores legal precedent when arguing that the sophistication element of a likelihood of confusion analysis requires the Board to examine the level of care used by the most sophisticated purchaser. *Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 285 (3d Cir. 1994) (Where both professionals and the general public are relevant consumers, "the standard of care to be exercised . . . will be equal to that of the least sophisticated consumer in the class"). Applicant states that because Opposer's sales cycles can take anywhere from a day to a year, and it *may* be the end-user who makes the purchasing decision, that everyone in the relevant community is highly sophisticated. Applicant's reliance on what *may* occur, ignores the other potential (and more likely) consumers – those higher up in a company who are more likely to be involved in a purchasing decision and do not have a high level of sophistication regarding these

products. As discussed in Opposer’s Brief, Opposer markets to a wide variety of consumers – some sophisticated, and some who are simply looking to obtain all the products they need for the software development spectrum at one entry-level price. Opposer’s Brief at 42. Additionally, with the high retention rate of consumers at near 80%, Applicant’s Notice of Reliance, Exh. A, at 73:22-25, it can be assumed that many of Opposer’s customers, knowing one brand, are less sophisticated about all the other brands available on the same website, and simply purchase knowing the high quality of products offered by Embarcadero. Allaire Testimony 256:2-10. The high retention rate also demonstrates that, due to normal employee turnover over the twenty years that ER/STUDIO branded products and related services have been available to the public, the people who may have done the original evaluation are not necessarily still the same ones using the software or in charge of purchasing new software.

In addition to ignoring many of Opposer’s less-sophisticated customers, Applicant also avoids discussing how many of Applicant’s consumers may be less-sophisticated as well. Applicant attempts to show that despite the RSTUDIO product being “free”⁸, the user-base will be highly sophisticated. Once again, this omits Applicant’s own testimony that the RSTUDIO program is intended to be used by experts and novices alike. Allaire Testimony 239:7-23 (“RStudio facilitates using R, so someone who is just starting with R could use RStudio”). Applicant’s argument further ignores the abundant evidence showing the resources the RSTUDIO website provides for the

⁸ The RSTUDIO website lists the product as available under a “free software license”. However, this does not mean the product is free, and Applicant states in his discovery deposition that the intention was to sell the product. Allaire Depo. 23:15-16, Sept. 27, 2010. A “free software license” rather, allows the user to freely manipulate and alter the code underneath the product and to share the changes with the public. In truth, RSTUDIO is intended as a revenue-generating product with related revenue-generating services, off which the company hopes to make a profit.

unsophisticated purchaser, including links to courses about basic statistics⁹. *Id.* at 241:16-21.

As shown above and in Opposer’s Brief, with a spectrum of consumers ranging from unsophisticated to sophisticated for both parties’ goods and services, the Board must use the standard of care the least sophisticated consumer would use when performing the *du Pont* analysis. As such, this factor weighs in favor of Opposer.

5. Applicant’s Assertion that the *du Pont* Elements of Actual Confusion and Market Interface are Applicable Here is Simply Mistaken

As Opposer points out in Opposer’s Brief, the *du Pont* factors of (1) the nature and extent of any actual confusion, and (2) the market interface between Applicant and Opposer are irrelevant as Applicant’s products and services have not been on the market, so actual confusion and market interface is outright impossible. Applicant’s attempt to bolster their weak and irrelevant arguments by stating that there have been no market interface or actual confusion of record is misplaced. However, as of the close of the testimony period, the RSTUDIO products and services had not been generally available to the public, and there can be no actual confusion or a test of market interface without something more than very limited beta testing. Applicant’s Brief states that the RSTUDIO product has been generally available since February 28, 2011, Applicant’s Brief at 30, however the website shows that throughout testimony, it was still in beta testing. Opposer’s Rebuttal NOR, Exh. A, p. 1 (Showing that the “Download RStudio” button clearly indicates that the program is still in beta form as late as May 25, 2011). Even if the beta testing period is deemed to be use by Applicant of the RSTUDIO marks (which Opposer does not concede), the period of concurrent use – only three months prior to the close of testimony – is far shorter than what the Board has previously found to

⁹ The inclusion of information on the RSTUDIO website about learning basic statistics in connection with the R programming language further undermines Applicant’s argument that the RSTUDIO product and services is only for “advanced” or “complex” statistical computations (despite never actually discussing what separates a basic statistical computation from an advanced one).

be too short of a period to determine whether actual confusion could occur. *Fort James Operating Co. v. Royal Paper Converting, Inc.*, 83 USPQ2d 124 (TTAB 2007) (Board dismissed any argument that lack of actual confusion was probative by stating that the absence of such evidence is explained by the fact that the *six years* of use by the applicant before the evidentiary portion of the opposition closed was a relatively short period of time within which to obtain such evidence). Lastly, as stated in Opposer's Brief, the Board has consistently held, that evidence of actual confusion is not a prerequisite for a finding of likelihood of confusion. See *Weiss Assoc., Inc. v. HRL Assoc., Inc.*, 14 USPQ2d 1840, 1842 (Fed. Cir. 1990) (It is not necessary to show actual confusion in order to establish a likelihood of confusion); See also *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983); *Apple Computer v. TVNET.net, Inc.*, Opposition No. 91168875 (August 28, 2007).

III. APPLICANT'S MOTION TO AMEND

Opposer's arguments against Applicant's Motion to Amend have previously been fully briefed in Opposer's Opposition to the Motion, as well as in Opposer's Brief. The arguments and position that the Motion to Amend should not be granted, as well as Opposer's belief that a likelihood of confusion will not be avoided even if the Motion to Amend is granted are incorporated herein and reiterated.

IV. SUMMARY

Based on the foregoing and Opposer's Brief, Embarcadero respectfully requests that the Board sustain the opposition and refuse the registrations of Application Nos. 77/691,980, 77/691,984, and 77/691,987 for the mark **RSTUDIO** in Classes 9, 41, and 42 on the ground that they

are likely to cause confusion, mistake or deception among purchasers, users and the public as to the source, association or sponsorship of the Applicant's goods and services.

Dated: September 19, 2011

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **OPPOSER'S REPLY BRIEF** is being served on September 19, 2011 upon Applicant's Attorney of Record at his address below, with a courtesy copy sent by e-mail to: JHuston@foleyhoag.com, ARufo@foleyhoag.com:

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