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I. INTRODUCTION

Plaintiff, Think Computer Corporation, (“Opposer”) opposes the application of Defendant, H. Co. Computer Products, Inc. (“Applicant”), for registration of the design mark “THINK! COMPUTER PRODUCTS,” Application Serial No. 76/201442 because Opposer used the mark THINK COMPUTER before Applicant used the confusingly similar design mark at issue.

II. DESCRIPTION OF THE RECORD

The Description of the Record remains as stated in Plaintiff’s Main Brief.

III. STATEMENT OF THE ISSUES

The Statement of the Issues remains as stated in Plaintiff’s Main Brief. Opposer notes that Applicant has conceded that there is a likelihood of confusion between the marks THINK COMPUTER and THINK! COMPUTER PRODUCTS. See Applicant’s Main Brief at 12. Opposer agrees that the remaining issue is one of priority but that this inquiry depends upon the Applicant’s use of the THINK! COMPUTER PRODUCTS design mark, and the Opposer’s prior use of a confusingly similar mark, THINK COMPUTER.

IV. RECITATION OF FACTS

The majority of the facts remain as stated in Plaintiff’s Main Brief. Plaintiff notes several discrepancies between Applicant’s Main Brief and the Record and clarifies as follows:

A. Opposer is an Ohio Corporation.

Contrary to what Applicant stated in its main brief, Opposer is an Ohio Corporation, not an Illinois Corporation. See Applicant’s Main Brief (“Applicant’s Brief”) at 1, Opposer’s Testimony Deposition (“Opposer’s Depo.”), at page 5, Depo. Exhibits 5, 6

B. The Record Contains Evidence Of Periodicals Referencing Opposer's Use Of The Mark THINK COMPUTER As Early As March 6, 1997 And Circulation Statistics For Such Periodicals.

Applicant's brief attempts to cast doubt on Opposer's substantiated claim that it was publicized as THINK COMPUTER Corporation as early at March 6, 1997. See Applicant's Brief at page 11. The first article circulated that referenced Opposer is, in fact, dated March 6, 1997. See Opposer's Depo at Exhibit 3 at TCC 00059.¹ Moreover, Opposer did provide circulation statistics for various periodicals that have printed articles referencing THINK COMPUTER Corporation, contrary to statements made in Applicant's brief. See Opposer's Depo. Exhibit 3 at TCC 00157-00168, Applicant's Brief at page 11.

C. Opposer's First Website Went On-Line In 1997—Not 1998.

Again, Applicant attempts to distort the documented facts in regard to Opposer's first website. See Applicant's Brief at page 7. Opposer's first website went on-line in February 1997. Opposer's Depo., Exhibit 9 at TCC 00438.

D. Opposer Has Consistently Used The THINK COMPUTER Mark On Emails.

Despite Applicant's statements to the contrary, Opposer gave uncontroverted testimony regarding its consistent practice of attaching a THINK COMPUTER Corporation signature block to every e-mail it sends. Opposer's Depo at pages 16-19. Opposer testified that over the past several years, it has sent thousands of these emails to customers, potential customers, referral sources, and others. *Id.* The Record contains a representative sampling of corroborating e-mails that Opposer has sent out bearing the THINK COMPUTER Corporation signature block. See Opposer's Depo Exhibit 9 at TCC 00465-00478 and Exhibit 8 at TCC 00360, 00368-00369.

¹ The Court Reporter's copy of TCC 00059 is difficult to read. However, a legible copy of this March 6, 1997 article was produced on disc to Applicant during discovery.

V. ARGUMENT

Applicant concedes that: (1) Opposer has standing to bring this proceeding and (2) that there is a likelihood of confusion between the design mark at issue in Application Serial No. 76/201442 and Opposer's mark, THINK COMPUTER. See Applicant's Main Brief at 12. The only issue before the Board is whether Opposer owned and used a mark prior to when the Applicant adopted its confusingly similar THINK! COMPUTER PRODUCTS design mark in Application Serial No. 76/201442.

The Record reveals that Opposer was the first to use the mark THINK COMPUTER, and as such, Applicant's confusingly similar THINK! COMPUTER PRODUCTS design mark application should be denied registration. Opposer began to use the mark THINK COMPUTER at least as early as November 1996. Plaintiff's Brief at 3-6. The balance of the evidence supports the notion that Applicant did not use the confusingly similar THINK! COMPUTER PRODUCTS design mark in Application Serial No. 76/201442 until 2000. Plaintiff's Brief at 6-7.

A. Opposer Has Met Its Burden To Establish That It Used The Mark THINK COMPUTER At Least As Early As November 17, 1996.

As previously described in Plaintiff's Main Brief, Opposer began using its mark THINK COMPUTER more than three years before Applicant began using its design mark THINK! COMPUTER PRODUCTS in connection with the same goods and services. Plaintiff's Brief at pages 13-14. In this case, Opposer must prove by a "totality of the evidence" that it was first to use the THINK COMPUTER mark. *West Fla. Seafood v. Jet Restaurants*, 31 F.3d 1122, 31 U.S.P.Q.2d 1660 (Fed. Cir. 1994). In *West Florida Seafood*, the Federal Circuit aptly described the Opposer's burden by stating, "[O]ne should look at the evidence as a whole, as if each piece

of evidence were part of a puzzle which, when fitted together, establishes prior use... [and that the TTAB should acknowledge] the clear interrelationship existing between the several pieces of evidence submitted.” *Id.* In the present case, Opposer has provided consistent testimony regarding its use of the THINK COMPUTER mark and corroborated its testimony with more than 650 documents in the Record. See Opposer’s Depo. at passim, Exhibits 1-14. Opposer’s substantial evidence includes: (1) wide publication of the mark THINK COMPUTER by including the mark on all of its business materials since early 1997; (2) display of its mark, THINK COMPUTER, prominently on its web site consistently since early 1997; (3) registration of the domain name thinkcomputer.com in 1998, along with subsequent registrations for thinkcomputer.net and thinkcomputer.org; (4) incorporation of THINK COMPUTER Corporation in 1998 after nearly operating for over a year under the name THINK COMPUTER; (5) substantial, diverse, and continuous marketing efforts that promote the mark THINK COMPUTER; (6) wide publication of THINK COMPUTER Corporation-related articles in numerous widely-circulated periodicals since 1997; (6) the provision of goods and services under the mark THINK COMPUTER to its customers located throughout the United States; and (7) Opposer’s application for registration of its THINK COMPUTER mark listing date of first use as May 2, 1997, almost three years before Applicant’s date of first use on its application. See Plaintiff’s Brief at pages 2-6. Given the wealth of corroborating documentation along with the Opposer’s consistent and detailed testimony, it is clear that the Board should find that Opposer’s use of the its mark THINK COMPUTER dates back to at least as early as November 1996.²

² Moreover, Opposer has clarified the misstatements made by Applicant in its Brief in this Reply Brief and rests on the strength of the evidence in the Record to establish its November 1996 priority date of its THINK COMPUTER mark as opposed to the evidence of the Applicant’s use of its confusingly similar THINK! COMPUTER PRODUCTS design mark.

B. Applicant Has Not Met Its Burden To Establish That It Used The Design Mark THINK! COMPUTER PRODUCTS Before 2000.

Applicant has argued that it began to use the design mark THINK! COMPUTER PRODUCTS in January 1993 solely on account of its testimony and a few internal documents. See Applicant's Brief at page 5. Applicant attempts to establish that it first used the design mark in January 1993 despite the fact that it stated that its date of first use on its Application was *February 18, 2000*. See Applicant's Application Serial No. 76/201442 (emphasis added). Applicant has not met its substantial burden to establish that it has consistently used the design mark THINK! COMPUTER PRODUCTS before the date of first use listed on its application.

1. Applicant must present "clear and convincing evidence" that it used the design mark prior to February 18, 2000.

While an Applicant may prove that its date of first use was prior to that which it provided on its trademark application, it may only do so by presenting "clear and convincing" evidence of its prior use. See *Hydro-Dynamics, Inc. v. George Putnam & Co.*, 811 F.2d 1470, 1 U.S.P.Q.2d 1772 (Fed. Cir. 1987) The Applicant bears a substantial and weighty burden of persuasion to prove that its date of first use was earlier than that listed in its application for registration of a trademark. See *Elder Mfg. Co. v. International Shoe Co.*, 194 F.2d 114, 92 U.S.P.Q. 330 (C.C.P.A. 1952). The Board has defined what is required by this heavy burden by stating that "clear and convincing" proof refers to evidence of use which is not characterized by contradictions, vagueness or inconsistencies. See *McQuay-Norris Mfg. Co. v. H-P Tool Mfg. Corp.*, 141 U.S.P.Q. 405 (T.T.A.B. 1964). In the present case, Applicant's evidence of use of the design mark at issue prior to February 18, 2000 is plagued with contradictions and inconsistencies, and as such, is not "clear and convincing."

First, the majority of the evidence in the Record clearly demonstrates that Applicant first used the design mark THINK! COMPUTER PRODUCTS in 2000. According to Applicant's documentation, Applicant did not begin using the THINK! COMPUTER PRODUCTS design mark in Application Serial No. 76/201442 until it changed its name from H.Co. to THINK! COMPUTER PRODUCTS on August 7, 2000. Opposer's Deposition Exhibit 8 at TCC 00313-00314. Applicant stated in its own press release that the company was transitioning from H.Co. to THINK! COMPUTER PRODUCTS and even that, for a time, "the *Think Computer Products* name and logo will appear **concurrently** with the *H.Co.* name in all forms of print collateral, advertising, public relations and other marketing communications." *Id.* (emphasis added.) Applicant's press release also provides that it decided to **gradually** introduce its new name. *Id.* (emphasis added.) Thus, Applicant's own documents clearly demonstrate that it was not until 2000, the year listed on Applicant's application, the year of its name change, and the year of the press associated with such a change clearly demonstrate that Applicant first used the design mark THINK! COMPUTER PRODUCTS in 2000.

Despite the fact that the Record contains convincing documentation of Applicant's first use of the mark at issue in 2000, Applicant has attempted to rely on a handful of internal documents to prove its claim of use of the design mark at issue since 1993. See Applicant's Brief at page 5. These documents consist of less than twenty invoices spanning the years 1993 through 1999, that allegedly demonstrate that Applicant sold products with various sorts of THINK designations.³ *Id.* Invoices are not evidence of either trademark use. See *In re Chicago Rawhide Mfg. Co.*, 455 F.2d

³ Opposer notes that the invoices dating prior to 1995 were produced to Opposer a mere two days before Applicant's Trial Testimony Deposition. These documents were produced well after the close of discovery and after Opposer's Testimony Period. These documents directly contradict Applicant's original 1995 date of first use of the mark THINK as listed in Applicant's Answers to Opposer's Interrogatories.

563, 173 U.S.P.Q. 8 (C.C.P.A. 1972); *In re Dura Corp.*, 188 U.S.P.Q. 701 (T.T.A.B. 1975) (holding that use on invoices was held not to be labels or tags “affixed” to the goods.) Moreover, these internal invoices do not contain the design mark in question, nor do they prove that the items listed on the Applicant-generated invoices were branded with the design mark in question. Even if these documents were evidence of use of the design mark THINK! COMPUTER PRODUCTS, they plainly contradict the balance of evidence of Applicant’s first use of the design mark in 2000. Importantly, the balance of the evidence is anchored by Applicant’s own pronouncements regarding its new adoption of the design mark in 2000, and as such, the sparse invoices cannot be characterized as clear and convincing evidence of prior use of the design mark THINK! COMPUTER PRODUCTS.

2. Applicant’s only evidence of use of the design mark from 1993 until 2000 is inconsistent.

The only evidence of prior use of the design mark as a trademark comes from Applicant’s oral testimony. Applicant’s Depo. at page 8. Oral testimony that is given long after the critical date is carefully scrutinized. *See Rockwood Chocolate Co. v. Hoffman Candy Co.*, 372 F.2d 552, 152 U.S.P.Q. 599 (C.C.P.A. 1967). In this case, Applicant attempted to establish prior use of the design mark that dated back more than ten years. Clearly, this testimony was given long after the “critical date” and should be treated accordingly. Further, oral testimony, regardless of the remoteness of the critical date, should “not be characterized by contradictions, inconsistencies and indefiniteness but should carry with it conviction of its accuracy and applicability.” *See B.R. Baker Co. v. Lebow Bros.*, 150 F.2d 580, 66 U.S.P.Q. 232 (C.C.P.A. 1945); *Neville Chemical Co. v. Lubrizol Corp.*, 196 U.S.P.Q. 756 (T.T.A.B. 1977). Applicant’s oral testimony in this case does not meet these exacting standards, and as such, this single piece of evidence cannot be characterized as clear and convincing.

Applicant made the blanket statement that it had been labeling its computer products with the design mark in question since 1993. This assertion predates what Applicant had answered in its interrogatory answers by two years. Further, Applicant was unable to produce any documents to corroborate its claim of use of the design mark, other than a few invoices. In support of its purported 1993 date of first use, Applicant, in its brief, cites to Applicant's Depo. Exhibits 24, 45, 46. None of these exhibits corroborate Applicant's bare testimony. First, Exhibit 24 contains photographs of the design mark in question, but Applicant admitted that these photographs were not taken of products it allegedly labeled in 1993. See Applicant's Depo at page 51. Exhibits 45 and 46 to Applicant's deposition are copies of domain name registrations from 1998 and 2000. Importantly, the 1998 registration is for thinkmemory.com and the 2000 registration is for thinkcomputerproducts.com. While none of these documents support the 1993 claim of prior use, they all support the notion that Applicant did not use the design mark in question until 2000.

VI. SUMMARY

Applicant's Application Serial No. 76/201,442 for THINK! COMPUTER PRODUCTS design mark should not be granted registration because Opposer was first to use its THINK COMPUTER mark in commerce. For all of the foregoing reasons, Opposer requests that the Board grant its petition to oppose registration of the design mark THINK! COMPUTER PRODUCTS.

TTAB

Fredrikson
& BYRON, P.A.

January 7, 2004

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Re: *Think Computer Corp. v. H. Co. Computer Products, Inc.*
Opposition No.: 125,553

Dear Sir/Madam:

Enclosed for filing please find three copies of Plaintiff's Reply Brief.

By copy of this letter service is made on opposing counsel.

Sincerely,

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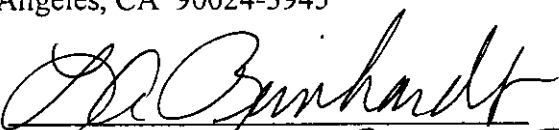
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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2004, a true copy of the foregoing **PLAINTIFF'S REPLY BRIEF** was served on Applicant by depositing same with the United States Postal Service, first class postage prepaid, and addressed to Applicant's counsel as follows:

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