UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Skoro

Mailed: February 11, 2009

Opposition No. **91180083**

NetApp, Inc. (change of name from) Network Appliance, Inc.

v.

Millenium Systems Network Support Corporation

Before Quinn, Grendel and Taylor, Administrative Trademark Judges.

By the Board:

On December 15, 2008, the Board denied applicant's motion for summary judgment, finding, *inter alia,*[1] the presence of a disclaimer in opposer's mark does not eliminate the presence of genuine issues of material fact as to a likelihood of confusion.

Applicant has filed a timely request for reconsideration[2] on December 19, 2008. Opposer has responded.

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[1] The Board also found no genuine issue of material fact as to the ownership of the claimed registration and opposer's standing and granted summary judgment in opposer's favor on that issue.

[2] Applicant captioned its motion as a "Motion for Reconsideration and/or New Motion for Judgment on the Pleadings and/or Summary Judgment" and in paragraph 7 states this may be a new motion because of the Board's citation of *In re Shell Oil Co.* In that there are no new grounds presented, the motion is deemed a motion for reconsideration.

Motions for reconsideration, as provided in 37 C.F.R. § 2.127(b), provide an opportunity for a party to point out any error the Board may have made in considering the matter initially. It is not to be a reargument of the points presented in its original motion. In this case, applicant reargues the effect of a disclaimer on the ability of a party to protect its mark on the grounds of a likelihood of confusion. Applicant had argued that there was no likelihood of confusion due to the express disclaimer by opposer of "network appliance". The Board noted that the presence of a disclaimer is one factor to be considered in determining whether there is a likelihood of confusion between marks, and applicant's argument that the presence of a disclaimer defeats the allegation of any likelihood of confusion was wrong as a matter of law. (Order p. 5). Applicant also now argues that the case law cited by the Board[3] addresses the presence of a disclaimer by an applicant, not an opposer, as in this case. As stated in our original decision, the presence of a disclaimer in a registration or application is one factor to be considered in determining the presence of a likelihood of confusion and the presence of a disclaimer does not remove the disclaimed matter from the purview of the determination of a likelihood

[3] Applicant points to *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ 2d 1687, 1689 (Fed. Cir. 1993).

of confusion. Thus, these same matters were fully considered by the Board.

As stated in our original decision, there remain genuine issues of material fact as to any likelihood of confusion. The Board remains of that opinion.

Accordingly, upon careful consideration of applicant's arguments on reconsideration, we are not persuaded that there was any error in our decision. Applicant's request for reconsideration is therefore denied.

Trial dates remain as set in the Board's December 15, 2008 order.

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