Paper No. 10
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THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB SEPT. 1, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Desktop Technologies, Inc.

v.

FLM Graphics Corporation

Opposition No. 104,845
to application Serial No. 75/072,159
filed on March 13, 1996

Richard O. Church for Desktop Technologies, Inc.

Gary J. Zalarick of Sammarro & Zalarick, P.A. for FLM Graphics Corporation

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Before Seeherman, Chapman and Bucher, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Desktop Technologies, Inc. has opposed the application of FLM Graphics Corporation to register COLORWORKS as a trademark for computer generated color prints.[1] In its notice of opposition opposer has alleged prior use of the

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[1] Application Serial No. 75/072,159, filed March 13, 1996 and asserting first use and first use in commerce on July 1, 1993.

mark COLORWORKS for color separation services; ownership of a Pennsylvania state registration for COLORWORKS and a federal registration for COLORWORKS for color separation services; and that applicant's use of COLORWORKS for computer generated color prints is likely to cause confusion or mistake or to deceive.

Applicant filed a reply to the notice of opposition which the Board characterized as argumentative and failing to properly respond to the notice of opposition. Accordingly, applicant was allowed 30 days in which to file a proper answer. Applicant timely filed such an answer in which it denied the salient allegations of the notice of opposition.

The record consists only of the pleadings and the file of the opposed application. Neither opposer nor applicant submitted any testimony, and only opposer filed a brief.[2] An oral hearing was not requested.

Opposer has utterly failed to establish that it has priority. Specifically opposer has not submitted any evidence regarding its prior use of the mark COLORWORKS.

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[2] Attached to the brief are various exhibits. Exhibits A and B are submitted here for the first time and are clearly untimely. Exhibits C, D, and E are brochures which applicant has submitted as part of its informal reply. The reply, although part of the proceeding file, does not constitute evidence of record. The Trademark Rules of Practice have specific provisions for making evidence of record. Exhibits to answers, let alone exhibits to "informal" answers, do not form part of the evidentiary record. See Trademark Rule 2.122(c).

Nor has it made of record its asserted federal registration. The copy of the registration filed with its brief has not been considered. An opposer may make its registration of record in three ways: submitting two status and title copies of the registration with its notice of opposition; submitting, during its testimony period, a status and title copy under a notice of reliance; or submitting a copy of the registration as an exhibit to the testimony of a witness competent to testify as to the status and title of the registration.

In view of opposer's failure to establish its priority, which is an essential element of a Section 2(d) ground, we need not consider the question of likelihood of confusion.

Decision: The opposition is dismissed.

E. J. Seeherman

B. A. Chapman

D. E. Bucher
Administrative Trademark Judges
Trademark Trial and Appeal Board