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**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

September 24, 2003
Paper No. 18

GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

COLLAGENEX PHARMACEUTICALS, INC.

v.

FOUR STAR PARTNERS

Opposition No. 91-150,890 to application Serial No. 75/907,375
filed on January 7, 2000

Ronald J. Baron and R. Glenn Schroeder of Hoffmann & Baron,
LLP for CollaGenex Pharmaceuticals, Inc.

Gary Pitts, Esq. of Castle Beach Co. for Four Star Partners.

Before Cissel, Hohein and Rogers, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Four Star Partners has filed an application to register the mark "DERMASTAR" for, in general, a wide variety of non-medicated cosmetic and personal care products in International Class 3 and an extensive list of various medicated personal care items and pharmaceutical preparations, including "acne medications," "acne treatment preparations,"

"bandages for skin wounds" and "wound dressings," in International Class 5.¹

CollaGenex Pharmaceuticals, Inc., by its amended notice of opposition, has opposed registration on the grounds that it is the owner of a federal registration for the mark "DERMOSTAT" for "pharmaceutical preparations, namely, tetracycline and tetracycline derivatives for treatment of wounds";² that it has used such mark in connection with its goods since at least as early as July 23, 1996; that the "products identified in Applicant's application are very similar or identical to the products listed by Opposer in connection with its registered mark DERMOSTAT"; that the "products covered by Applicant's application are of the type which are or may be offered by Opposer under its mark, such that the trade and purchasing public would reasonably expect such products to emanate from, or be sponsored by[,] the same source"; that because applicant's "DERMASTAR" mark "is substantially similar to" opposer's "DERMOSTAT" mark, the "contemporaneous use of the respective marks will create a likelihood of confusion, mistake or deception among the trade

¹ Ser. No. 75/907,375, filed on January 7, 2000, which is based on an allegation of a bona fide intention to use the mark in commerce.

² Reg. No. 2,159,394, issued on May 19, 1998, which sets forth a date of first use anywhere of July 23, 1996 and a date of first use in commerce of January 17, 1997.

and the purchasing public";³ and that applicant "lacks the requisite *bona fide* intention to use the mark on or in connection with the list of goods[,] which is not credible as recited in the application both as filed and as amended."

In particular, with respect to the latter ground, which was added by opposer's amended notice of opposition, opposer alleges that the "trademark statute requires that the Applicant have a *bona fide* intention, under circumstances showing the good faith of the Applicant, to use a trademark in connection with the goods specified in the application"; that applicant "has listed no less than about 730 goods in its identification of goods with which the mark DERMSTAR is purportedly intended to be used"; that such list, "as filed, rather than identifying the goods with which it had a *bona fide* intention to use the mark, is instead merely a substantial reproduction of a list of products as it appears in The Trademark Acceptable Identification of Goods [sic] and Services Manual"; that applicant "has provided no credible evidence that it is or will ever be capable of placing into commerce all of the goods identified in its intent-to-use

³ Although opposer has also pleaded a putative claim of dilution by alleging that the "contemporaneous use by Applicant of the mark DERMSTAR will dilute or impair Opposer's rights, and will eventually result in ... a loss of distinctiveness and exclusivity in Opposer's DERMOSTAT Trademark," no evidence with respect thereto was offered at

application, or that it ever had the intention to do so"; and that the "verified statement contained in Applicant's ... application is not a good faith statement as to Applicant's objective ability or intent to actually use in commerce the mark DERMASTAR in connection with all the goods listed in its intent-to-use application."

Applicant, in its answer to the amended notice of opposition, has in effect admitted all of the factual allegations by opposer with respect to the ground of priority of use and likelihood of confusion, except that it has denied the allegation that the "products identified in Applicant's application are ... similar or identical to the products listed by Opposer in connection with its registered mark DERMOSTAT" by alleging, instead, that the "products covered by Applicant's application are all based upon a unique and proprietary technology entirely unrelated to the technology upon which Opposer's products are based."⁴ Applicant also has

trial and no mention thereof has been made in either of its briefs. Accordingly, such claim will not be given any further consideration.

⁴ Fed. R. Civ. P. 8(f), as made applicable by Trademark Rule 2.116(a), provides that "[a]ll pleadings shall be so construed as to do substantial justice." In addition, Trademark Rule 2.106(b)(1) provides in relevant part that an answer "shall admit or deny the averments upon which the opposer relies" and that denials "may take any of the forms specified in [Fed. R. Civ. P.] 8(b)." However, because the answer filed by applicant fails, with the single exception noted above, to admit or deny opposer's factual allegations with respect to the ground of priority of use and likelihood of confusion, and inasmuch as Fed. R. Civ. P. 8(d), as made applicable by Trademark Rule 2.116(a), provides in pertinent part that

denied opposer's allegations with respect to the ground that applicant lacks a *bona fide* intention to use its mark by alleging, in its answer, that applicant "does have a bona fide intention to market products, either on its own or through licensee's [sic], assignees, or other business affiliates, in each and every one of the specific categories listed in Applicant's application since Applicant's unique and proprietary technology upon which Applicant's application is based is applicable to and can confer unique benefits upon products in each and every one of the specific categories listed in Applicant's application."

The record consists of the pleadings; the file of the opposed application; and, as opposer's case-in-chief, the testimony, with exhibits, of Robert A. Ashley, its senior vice president of commercial development. Applicant, however, did not introduce any evidence at trial in its behalf. Briefs have been filed,⁵ but neither party requested an oral hearing.

"[a]llegations in a pleading to which a responsive pleading is required ... are admitted when not denied in the responsive pleading," the factual allegations by opposer which were not responded to by applicant in its answer stand admitted.

⁵ In light of the fact that applicant's brief, which was due by July 7, 2003, was filed and served two days late on July 9, 2003, opposer maintains in its reply brief that applicant's brief "was untimely filed and should be dismissed in its entirety." However, inasmuch as opposer has shown no prejudice resulting from the mere two-day delay, and since the Board prefers to have the benefit of a party's arguments concerning the merits of a case that has been tried and requires decision, we have exercised our discretion in favor of considering applicant's late-filed brief except to the following

Priority of use is not in issue in this proceeding inasmuch as opposer has proven that, as indicated below, its pleaded registration is subsisting and is owned by opposer. See King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). Opposer's ownership thereof also serves to establish its standing to bring this proceeding. Id. Thus, the sole issues to be determined in this case are whether, as to any of its goods, applicant's "DERMASTAR" mark so resembles opposer's "DERMOSTAT" mark for "pharmaceutical preparations, namely, tetracycline and tetracycline derivatives for treatment of wounds," as to be

extent. Specifically, as further noted by opposer in its reply brief, applicant's brief has "attached as Exhibit A ... what appears to be a marketing brochure" even though such brochure "was not introduced into evidence in this case." Because, as opposer correctly points out in its reply brief, "[a]ny reliance upon or reference to Exhibit A by Applicant is therefore improper, and should not be considered by the Board," no consideration has been given to applicant's brochure. See TBMP §539 (2d ed. June 2003), which provides in pertinent part that: "Evidentiary material attached to a brief on the case can be given no consideration unless it was properly made of record during the testimony period of the offering party." Lastly, in its reply brief, opposer also accurately observes that applicant's brief "contains numerous factual allegations which are not evidence in this proceeding, not having been introduced into evidence during Applicant's testimony period," and properly asserts in view thereof that applicant "should not now be allowed to rely upon such factual allegations." Accordingly, applicant's unsupported factual statements in its brief have been given no consideration. See TBMP §801.01 (2d ed. June 2003), which states in relevant part that "the facts and arguments presented in the brief must be based on the evidence offered at trial"; and TBMP §704.06(b) (2d ed. June 2003), which sets forth in pertinent part that: "Factual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial. Statements in a brief have no evidentiary value, except to the extent that they may serve as admissions against interest."

Opposition No. 91-150,890

likely to cause confusion as to the source or sponsorship of the parties' respective goods; and whether applicant lacks the requisite *bona fide* intention to use its mark on or in connection with the goods listed in its application.

According to the record, opposer is "a specialty pharmaceutical company engaged in research [and] development, manufacturing, marketing and sale of pharmaceuticals to the dental and dermatology communities[,] at least at present." (Ashley dep. at 5.) Founded in 1994 as CollaGenex, Inc., opposer changed its name to CollaGenex Pharmaceuticals, Inc. as of April 10, 1996 and recorded the document evidencing such change of corporate name (at reel 1722, frame 0908, on April 3, 1998) against the application which matured into its pleaded registration for the mark "DERMOSTAT" for "pharmaceutical preparations, namely, tetracycline and tetracycline derivatives for treatment of wounds." Such registration, according to opposer's witness, Mr. Ashley, who has been employed by opposer since its founding and is familiar with the trademarks used by opposer, is owned by opposer and is subsisting. The mark "DERMOSTAT," Mr. Ashley also noted, was first used by opposer on the dates indicated in its pleaded registration, namely, July 23, 1996 with respect to first use anywhere and January 17, 1997 as to first use in commerce.

The product in connection with which opposer has used and continues to use its "DERMOSTAT" mark "is a tetracycline derivative" which "has properties in the acceleration of the healing of [not only] lesions of the dermis, including things like diabetic ulcers, [and other] things which don't heal tremendously well, but also lesions arising as a result of skin infection such as, for example, acne or rosacea, skin infections." (Id. at 17.) Opposer's "DERMOSTAT" product is "distributed through typical prescription pharmaceutical channels," ranging from "manufacturer to wholesaler to retail pharmacy" and such product "would be made available to people with the disorder ... through prescription by a doctor," for which "the patient would go to the retail pharmacy and obtain the prescription [pharmaceutical] directly from the pharmacist." (Id. at 17-18.) Opposer, according to Mr. Ashley, is still using its "DERMOSTAT" mark in connection with "products for application in dermatology and [which are] described as wound healing" and has not abandoned such mark. (Id. at 24.)

Neither applicant nor opposer introduced any evidence concerning applicant, its "DERMASTAR" mark, or any of the goods in connection with which registration of such mark is sought. Moreover, other than indicating that its goods are suitable for treating not only wounds, but also skin

Opposition No. 91-150,890

infections such as acne, opposer notably offered no evidence as to whether the goods marketed under its "DERMOSTAT" mark would be considered by purchasers and/or users thereof to be related, in a commercial or other meaningful sense, to any of the goods for which applicant seeks registration of its "DERMASTAR" mark. Opposer also did not offer any evidence as to either the actual extent of the use of its "DERMOSTAT" mark, such as sales figures and advertising expenditures, or whether the mark is famous.

Giving consideration first to the issue of likelihood of confusion, our determination thereof is based on an analysis of all of the facts in evidence which are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). See, e.g., *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1845 (Fed. Cir. 2000). However, as indicated in *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity of the goods at issue and the similarity of the respective marks.⁶ As to the latter, opposer correctly points out in its initial brief that

⁶ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."

applicant has admitted in its answer that the marks "DERMOSTAT" and "DERMASTAR" are "substantially similar." Among other things, opposer further notes in this regard that such marks are coined terms which, while having "no particular connotation," nonetheless "are similar in appearance, sound and overall commercial impression" inasmuch as:

[T]he marks each consist of a single word having nine letters that are identical, except for the fifth and ninth letters. Moreover, the marks each have two syllables, in which the first syllable begins with "DERM" and the second syllable begins with "STA".

Applicant, however, insists in its brief that because "'Derma', of course, means skin . . . , the 'Derma' portion of each of these tradenames [sic] is not likely to be the source of any confusing similarity" and that consumers of the parties' goods accordingly "will depend upon the remainder of the name to make distinctions" between the respective marks.⁷ Nevertheless, we are constrained to agree with

⁷ We judicially notice in this regard that, for example, Webster's Third New International Dictionary (1993) at 608 defines "**derm-** or **derma-** or **dermo-** *comb form*" as meaning "**1** : skin ... **2** : dermal and" In addition, the same dictionary at 2228 lists "**-stat**" in relevant part as a "*comb form*" signifying "**5** : agent causing inhibition of growth without destruction <bacteriostat> <fungistat>" and at 2225 sets forth "**star**" as connoting, among other things, "**1 a** (1) an object (as a comet, meteor, or planet) in the sky resembling a luminous point and usu. only bright enough to be seen at night ... (2) a heavenly body (as the sun or moon) ... **3 a** a conventional figure with five or more points that represents a star." It is settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., *Hancock v. American Steel & Wire*

opposer that, when considered in their entirety, such marks are so "substantially similar," as conceded by applicant, that confusion as to source or sponsorship would be likely to occur if the respective marks are used in connection with the same or closely related goods, especially in light of the longstanding rule that a mark used in connection with medicinal products is entitled to a broader scope of protection due to the potentially adverse consequences which can result from a likelihood of confusion. See generally, *Glenwood Laboratories, Inc. v. American Home Products Corp.*, 455 F.2d 1384, 173 USPQ 19, 21 (CCPA 1972); and 3 J. McCarthy, McCarthy on Trademarks & Unfair Competition §23:32 (4th ed. 2003).

Turning, then, to consideration of the goods at issue, opposer asserts in its initial brief that:

It is undisputed that the goods identified in Applicant's application ... are identical or substantially similar to those goods set forth in Opposer's U.S. Registration No. 2,159,394, and are identical or substantially similar to the goods which have been marketed and continue to be marketed by Opposer. Particularly, Opposer's U.S. Registration No. 2,159,394 for DERMOSTAT recites pharmaceutical preparation[s] for treatment of wounds.

Co. of New Jersey, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953); *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); and *Marcal Paper Mills, Inc. v. American Can Co.*, 212 USPQ 852, 860 n. 7 (TTAB 1981).

.... More to the point, Opposer has in fact used its DERMOSTAT mark on or in connection with pharmaceutical preparations for treatment of wounds since at least as early as July 23, 1996. Moreover, Opposer has used the mark in connection with goods for dermatological applications

Citing Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) for the proposition that it is "well established that the question of registrability of an applicant's mark must be decided solely on the basis of the identification of goods set forth in the application," and citing Cunningham v. Laser Golf Corp., supra at 1846, for the further proposition that "[w]hen the description of goods is not specifically limited[,] it must be broadly interpreted to include all goods that can fall within the description," opposer urges in its initial brief that:

As such, Applicant's broad list of goods, which includes, *inter alia*, medicated lotions for skin, medicated skin cleaners [sic, cleansers], medicated skin cream, acne medications, acne treatment preparations, analgesics, anti-infectives, anti-inflammatories, antibacterial pharmaceuticals, burn relief medication, dermatologicals, ... homeopathic pharmaceuticals for use in the treatment of disorders amenable to treatment by application of materials to the skin, medicated skin care preparations and wound dressings, clearly would encompass the goods listed in Opposer's registration and the goods with which Opposer has used the mark DERMOSTAT.

We concur with opposer that the evidence it has presented is sufficient to demonstrate that applicant's "acne medications" and "acne treatment preparations" are closely related to opposer's "pharmaceutical preparations, namely, tetracycline and tetracycline derivatives for treatment of wounds" inasmuch as the latter likewise have application with respect to the treatment of some forms of acne. In addition, it is clear that applicant's "bandages for skin wounds" and "wound dressings" are, on their face, products which are closely related to opposer's goods since such products are all used in the treatment of wounds. However, as to the wide variety of non-medicated cosmetic and personal care products listed by applicant in International Class 3, and with respect to the rest of the various medicated personal care items and pharmaceutical preparations set forth by applicant in International Class 5, it is plain that none of such diverse products is "identical or substantially similar to" opposer's goods, as asserted by opposer, either on their face or as otherwise demonstrated by the evidence presented by opposer. In fact, opposer does not even mention, in either its initial or reply briefs, any specific goods listed by applicant in International Class 3 which arguably are closely related to opposer's goods. Instead, opposer simply asserts that the respective goods are "goods for dermatological applications."

Opposition No. 91-150,890

Even if we were to assume that such goods could accurately be so broadly characterized, it is still the case that the mere fact that a term may be found which encompasses the parties' products does not mean, absent supporting evidence, that consumers thereof will view the goods as related in the sense that they will assume that they emanate from or are associated with a common source. See, e.g., General Electric Co. v. Graham Magnetics Inc., 197 USPQ 690, 694 (TTAB 1977); and Harvey Hubbell Inc. v. Tokyo Seimitsu Co., Ltd., 188 USPQ 517, 520 (TTAB 1975).

Accordingly, we conclude that there is a likelihood of confusion with opposer's "DERMOSTAT" mark for its "pharmaceutical preparations, namely, tetracycline and tetracycline derivatives for treatment of wounds," from the contemporaneous use by applicant of its substantially similar "DERMASTAR" mark in connection with its "acne medications," "acne treatment preparations," "bandages for skin wounds" and "wound dressings" in International Class 5. However, as to the use by applicant of its "DERMASTAR" mark in connection with both the goods set forth in International Class 3 and the rest of the goods listed in International Class 5 of the involved application, opposer has not demonstrated that such products are identical or closely related to the goods offered under its "DERMOSTAT" mark and, thus, has failed to sustain

its burden of proof on the issue of likelihood of confusion with respect thereto.

Turning now to the remaining issue of whether applicant lacks the required *bona fide* intention to use its mark on or in connection with the goods listed in its application, opposer argues in its initial brief that:

In the application, Applicant listed over 730 goods in its identification of goods with which the mark DERMASTAR is purportedly intended to be used. Basically, it appears that Applicant merely listed each and every good contained in International Classes 3 and 5.

Noting further that Section 1(b) of the Trademark Act "requires that an applicant, in an intent to use application, make a verified statement ... that it has a 'bona fide intention' to use the mark in commerce," and that "the legislative history reveals that Congress intended the test of 'bona fide' to be evidenced by 'objective' evidence of 'circumstances' showing good faith,"⁸ opposer contends that

⁸ In particular, citing in its initial brief to what presently is 3 J. McCarthy, McCarthy on Trademarks & Unfair Competition §19:14 (4th ed. 2003) at 19-35, opposer additionally points out that "[t]he evidence is 'objective' in the sense that it is evidence in the form of real life facts and [is measured] by the actions of the applicant, not by the applicant's testimony as to its subjective state of mind," and that:

Congress did not intend the issue (of a bona fide intention) to be resolved ... by an officer of the applicant later testifying, "Yes, indeed, at the time we filed the application, I did truly intend to use the mark at some time in the future." See *Lane Ltd. v. Jackson*

the legislative history recites an illustrative list of circumstances which may cast doubt on the bona fide nature of an applicant's stated intent or even disprove it entirely. Such list, opposer emphasizes in its initial brief, "specifically includes filing an application on one mark for many products." See 3 J. McCarthy, McCarthy on Trademarks & Unfair Competition §19:14 (4th ed. 2003) at 19-37. Opposer consequently concludes in such brief that "Congress recognized that filing an intent to use application for many products raises serious doubt as to the applicant's intention to use the mark for each of the products."

In view thereof, opposer asserts in its initial brief that the opposition should be sustained because:

In the instant case, [inasmuch] as Applicant has filed an intent to use application for an extremely large number of goods, it is incumbent upon Applicant to provide objective evidence of its bona fide intent to use the mark for each of the listed goods. However, Applicant has not offered any evidence to support its bona fide intention (objective or otherwise) to use the mark DERMASTAR in connection with any of the goods listed, let alone each and every one of the listed goods. In fact, Applicant has not put any evidence into the record. As such, Applicant cannot establish that it had a bona fide intent to use the mark DERMASTAR. See *Commodore*

Int'l Trading Co., 33 U.S.P.Q.2d 1351 (T.T.A.B. 1994) ("[A]pplicant's mere statement of subjective intention, without more, would be insufficient to establish applicant's bona fide intention to use the mark in commerce.")

Electronics Ltd. v. CBM Kabushiki Kaisha,
26 U.S.P.Q.2d 1503, 1507 (T.T.A.B. 1993)
("the absence of any documentary evidence
on the part of the applicant regarding such
intent [to use the mark in commerce] is
sufficient to prove that the applicant
lacks a bona fide intention to use the mark
in commerce as required by Section 1(b).").

Opposer's argument ignores, however, the fact that it has the burden of proof of establishing, by a preponderance of the evidence or persuasive argument, its claim of a lack by applicant of the requisite *bona fide* intention to use its mark on or in connection with the goods listed in the involved application. Here, opposer has offered absolutely no evidence to prove either wrongful intent by applicant in filing the application or an absence of any evidence in applicant's possession regarding its intent; nor has it presented a persuasive argument with respect thereto. Opposer has therefore failed to establish a prima facie case that applicant's application is invalid for lack of the requisite *bona fide* intention to use its mark, which would shift the burden to applicant of coming forward with evidence to refute such case. See, e.g., *Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1004 (Fed. Cir. 1988) ["[a]n opposer to an application submitted under Section 2(f) sufficiently meets its initial burden [of proof] if it produces sufficient evidence or argument whereby, on the

entire record before the board, the board could conclude that the applicant has not met its ultimate burden of showing of acquired distinctiveness"].⁹

⁹ As further noted by the court in *Yamaha*, supra at 1005 (italics in original; footnote omitted):

To prevent the immediate registration of the mark, the opposer has the initial burden to establish prima facie that the applicant did not satisfy the acquired distinctiveness requirement of Section 2(f). If opposer does not provide sufficient grounds to at least place the matter in issue, the situation is indistinguishable from one in which no opposition was filed. Under such circumstances, there is insufficient basis in the record to indicate that the applicant's mark, contrary to the examiner's prior determination, has not "become distinctive of the applicant's goods in commerce." 15 U.S.C. §1052(f).

If the opposer does present its prima facie case challenging the sufficiency of applicant's proof of acquired distinctiveness, the applicant may then find it necessary to present additional evidence and argument to rebut or overcome the opposer's showing and to establish that the mark has acquired distinctiveness. To accept Yamaha's argument that an opposer bears no burden of establishing even a prima facie case as to the sufficiency of applicant's prior proof would make a mere filing of a naked opposition the sole basis for delaying registration and prompting an applicant to reestablish acquired distinctiveness to the satisfaction of the PTO in the face of insufficient evidence or argument by opposer. We conclude, therefore, that the board was not incorrect in stating that Yamaha, as opposer of a Section 2(f) [application for] registration, had the burden to establish a prima facie case, the principal facet of which is showing that Hoshino did not establish acquired distinctiveness.

Likewise, analogous to the above, opposer has the initial burden of establishing a prima facie case that applicant fails to meet the requirement of Section 1(b) that it has a *bona fide* intention to use its applied-for mark in commerce.

Specifically, instead of producing sufficient evidence as to applicant's assertedly wrongful intent, or showing that applicant possesses no evidence to support its claim of a *bona fide* intention to use its mark on the full listing of its goods, opposer has presented only argument, which we find is insufficient because the factual situation herein is the exactly the same as that which was before the Examining Attorney.¹⁰ Plainly, the Examining Attorney was obviously aware of the exceedingly large number of items set forth in each class of the involved application. Nevertheless, she did not question whether applicant possessed the required *bona fide* intention to use its "DERMASTAR" mark in connection with all of the goods listed in the subject application due to the explanation, as reiterated by applicant in its answer herein, that all of the products set forth therein are based upon a proprietary technology by applicant which can confer specific and unique benefits with respect to each of such products. Thus, while it is indeed the case that, as contended by opposer, the filing of an intent-to-use application which lists many products *may* be sufficient to cast doubt on the *bona fide* nature of an applicant's stated

¹⁰ It is pointed out that applicant would, of course, have to file proof of actual use of its mark on or in connection with every item in the identification of its goods before the Examining Attorney would be able to approve the mark for registration.

intent or even disprove it entirely,¹¹ such a showing has not been sufficiently made by opposer based on the record in this proceeding. Accordingly, the additional ground that applicant lacks the required bona fide intention to use its mark in connection with the goods set forth in the involved application fails.

Decision: The opposition is sustained, and registration to applicant is refused, as to International Class 5 of its involved application, but is dismissed as to International Class 3 of the involved application.

¹¹ Opposer's reliance on *Commodore Electronics*, supra, is misplaced. Such case, in relevant part, held only that (emphasis added; footnote omitted):

Absent other facts which adequately explain or outweigh the failure of an applicant to have any documents supportive of or bearing upon its claimed intent to use its mark in commerce, the absence of any documentary evidence on the part of an applicant regarding such intent is sufficient to prove that the applicant lacks a bona fide intention to use its mark in commerce as required by Section 1(b). An allegation to such effect, therefore, states a claim upon which relief can be granted.

In this case, opposer has not made the showing anticipated by *Commodore Electronics*, namely, "the failure of an applicant to have any documents supportive of or bearing upon its claimed intent"