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

Proceeding	91122524
Party	Plaintiff X/OPEN Company Limited
Correspondence Address	EVAN A. RAYNES FINNEGAN HENDERSON FARABOW 901 NEW YORK AVENUE WASHINGTON, DC 20001-4413 UNITED STATES docketing@finnegan.com, nichelle.randolph@finnegan.com
Submission	Opposition/Response to Motion
Filer's Name	Mark Sommers
Filer's e-mail	mark.sommers@finnegan.com, docketing@finnegan.com, larry.white@finnegan.com
Signature	/Mark Sommers/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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X/Open Company Limited, Opposer, v. Wayne R. Gray, Applicant.	)	Opposition No.: 91122524 Application No.: 75/680,034 Mark: INUX

X/OPEN'S OPPOSITION TO APPLICANT'S MOTION
TO RESUME PROCEEDINGS AND RESET THE SCHEDULE

For the reasons set forth below, Opposer X/Open Company Limited opposes Applicant Wayne Gray's "Combined Motion and Brief to Resume the Opposition Proceeding and Reset the Schedule" filed with the Board on April 8, 2011.

Applicant's motion should be denied because the civil action that occasioned the suspension of the Board proceedings has not been fully terminated pursuant to Trademark Rule 2.117(a). X/Open's motions for attorneys' fees are still pending before the United States District Court for the Middle District of Florida and the Eleventh Circuit Court of Appeals, and the disposition of these motions may have a bearing on the Board action.

If the Board determines that the opposition proceedings should resume, it should deny Gray's motion to reopen discovery since the only "new" evidence that Gray seeks to introduce concerns ownership of the UNIX mark and that issue was conclusively disposed in X/Open's favor in the civil action. Gray is therefore barred from relitigating it under *res judicata*. Should proceedings resume, X/Open requests that the testimony periods be reset so the Board action move

forward on the only remaining issue to be litigated—the likelihood of confusion between the UNIX and INUX marks for the same goods.

DISCUSSION

I. Background

This proceeding began more than a decade ago in April 2001 when X/Open filed an opposition against Gray's INUX mark for computer operating system software on the ground it is confusingly similar to X/Open's UNIX mark for the identical goods. As his primary defense, Gray asserted that X/Open did not own the UNIX mark. Gray made this allegation despite his counsel's access to a 1996 "Confirmation Agreement" between Novell, SCO, and X/Open that conclusively established X/Open's rights to that mark. This document notwithstanding, Gray refused to withdraw his counterclaim and instead multiplied the size, issues, and costs of the opposition proceedings by serving over 140 pages of discovery requests, 125 pages of exhibits, 167 requests for admissions, 49 document requests, and 26 interrogatories (over 75 with subparts) in his quest to establish that X/Open did not the UNIX mark.[1]

Not satisfied with his efforts before the Board, Gray then proceeded to concoct a host of fraud and conspiracy claims and, in 2006, filed an 83-page complaint in federal court alleging two federal RICO claims, two Florida state RICO claims, two Florida Telecommunications Fraud Act

[1] After taking over fifteen months to answer X/Open's notice of opposition, Gray filed a string of motions, including: (1) a motion to reopen discovery after Gray missed the deadline to serve discovery requests, which the TTAB denied, (2) two motions to amend Gray's answer and counterclaim alleging that SCO owned the UNIX mark, which Gray maintained despite X/Open directing Gray to SCO's public acknowledgements of X/Open's ownership; and (3) a motion to compel answers to Gray's voluminous discovery requests and two briefs in support of the motion, which were filed after the motion in violation of the TTAB's rules and also exceeded the page limit. All told, Gray filed approximately 1,400 pages of motions, declarations, and exhibits on these and other issues.

claims, three Lanham Act claims (two fraud-on-the-PTO counts and one "false designation of origin" count), and two common-law fraud claims—all centered around the same allegation that X/Open did not own the UNIX mark. All of these fraud/conspiracy ownership theories were alleged on "information and belief" without any concrete supporting fact or evidence. Hoping to extort a windfall monetary settlement, Gray's complaint further alleged millions of dollars in damages.[2] On July 17, 2007, the Board suspended proceedings pending final disposition of the civil action.

As in the TTAB opposition, Gray doggedly pursued his ownership fraud "theory" in the civil suit, despite all the prior discovery and evidence that clearly and unambiguously pointed to X/Open's ownership of the UNIX mark. Ultimately, the district court found that Gray had offered absolutely no evidence to support his various allegations and dismissed all of Gray's claims on summary judgment:

> The Court finds that the documentary evidence in this case supports Novell and X/Open's contentions that Novell granted X/Open an exclusive license for the UNIX mark in 1994, that it intended to transfer ownership of the marks to X/Open at some time thereafter, that SCO documented its agreement to that transfer in the 1996 Confirmation Agreement, and that the marks were lawfully transferred to X/Open by operation of the 1998 Deed of Assignment. …Consequently, based on the clear and unambiguous language of the 1996 Confirmation Agreement, the Court concludes that the subsequent 1998 Deed of Assignment validly passed ownership of the UNIX trademark to X/Open as of November 13, 1998.

(Feb. 20, 2009 Order at 23-27, emphasis added) (copy at Exhibit 1).

Because the assignment of the UNIX mark to X/Open and the recordation of that assignment in the PTO was "lawful and valid," the district court dismissed Gray's fraud on the

[2] Gray's complaint alleged approximately $4.5 million in damages, and during discovery, bumped

PTO claims under the Lanham Act and found that X/Open was well within its rights to oppose Gray's INUX mark in the TTAB. (*Id.* at 31-32.) The district court also granted X/Open's motion for attorneys' fees after finding that Gray's allegations of fraudulent conspiracy under Florida RICO law were "baseless" and "lacked substantial factual support."[3]

On appeal, the Eleventh Circuit affirmed in all respects. Finding that Gray was simply "mistaken" about the effect of the agreements at issue, the appeals court held that Gray's claims of fraudulent trademark registration and fraud on the PTO must fail "in light of the fact that X/Open *was* the true owner of the UNIX mark when it registered with the PTO its receipt of that mark from Novell." (Exhibit 2 at 16.) (emphasis added).

Accordingly, the civil action has fully and completely disposed of the ownership issue.

II. The "New" Evidence Gray Seeks to Introduce in the Board Proceedings

The "new" evidence that Gray seeks to introduce by reopening discovery essentially consists of various out-of-context quotes from the March 2010 trial in *SCO Group v. Novell*, 721 F. Supp. 2d 1050 (D. Utah 2010) and various other documents, which Gray contends support his position that X/Open does not own the UNIX mark. However, Gray attempted to introduce this very same evidence in the appeals court in September 2010 through a motion to supplement the record (see Exhibit 3), and evidence identical in substance (in declaration form as opposed to trial testimony) was already before the district court on summary judgment.[4] Although Gray's motion

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that figure to $100+ million—again, all without any real supporting fact or evidence.

[3] *Gray v. Novell, Inc.*, 2010 U.S. Dist. LEXIS 63968, *33 (M.D. Fla. Feb. 22, 2010).

[4] For instance, Gray pointed to declarations filed in the *SCO v. Novell* case allegedly showing that Novell and SCO executives and counsel admitted that the Novell transferred the UNIX mark to SCO in a 1995 agreement. The Florida district court considered and weighed this evidence on summary judgment and found it unpersuasive, concluding that regardless of the parties' intent or any ambiguity in the 1995 agreement as to the extent of rights in the UNIX trademark that was

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