

Federal Court



Cour fédérale

**Date: 20140627**

**Docket: T-1031-13**

**Citation: 2014 FC 632**

**Ottawa, Ontario, June 27, 2014**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**MICRO FOCUS (IP) LIMITED**

**Applicant**

**and**

**INFORMATION BUILDERS, INC.**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Micro Focus (IP) Limited appeals a decision of the Trade-marks Opposition Board refusing its application for registration of the trade mark MICRO FOCUS in association with computer software and related services. The Board found that there was a reasonable likelihood of confusion between Micro Focus's mark and the respondent's FOCUS mark and, therefore, refused Micro Focus's registration.

[2] Micro Focus submits that the Board erred in refusing its application. It has presented fresh evidence that its use of the MICRO FOCUS mark would not be confusing and submits that the Board's decision should be overturned.

[3] The evidence before me indicates that Micro Focus has used its mark extensively since at least 1989. That evidence would have materially affected the Board's conclusion on confusion. Therefore, I must consider that issue afresh. I find, based on the fresh evidence, that there is no reasonable likelihood of confusion between the appellant's MICRO FOCUS mark and the respondent's FOCUS mark and must, therefore, allow this appeal. The respondent did not submit any written arguments, and did not appear on the appeal.

[4] The sole issue is whether there is a reasonable likelihood of confusion between the appellant's MICRO FOCUS mark and the respondent's FOCUS mark.

II. Does the new evidence suggest that confusion between the parties' marks is unlikely?

[5] I must first consider whether new evidence would have materially affected the Board's decision. In my view, that evidence shows that Micro Focus has used its mark continuously and extensively since at least 1989. Through promotion and advertising, the MICRO FOCUS mark acquired distinctiveness and a reputation in Canada. Further, there has been no actual confusion between Micro Focus's mark and the respondent's FOCUS mark. This evidence would clearly have materially affected the Board's conclusion that there was a reasonable likelihood of confusion between the marks.

[6] Therefore, I must decide the issue of confusion based on the full evidentiary record before me. Below are the relevant factors and evidence.

A. *Inherent Distinctiveness*

[7] There are at least 26 trade-marks using the word “Focus” in association with computer software and services. This shows a lack of inherent distinctiveness in the word “Focus” in this area, and also that consumers are used to looking for other cues to distinguish between products and companies. This factor favours Micro Focus.

B. *Length of time in use, and extent of public knowledge*

[8] Micro Focus has used its mark for almost 25 years and has generated millions of dollars in annual sales. It has promoted its mark in print and electronic media both within Canada, and in other media available to Canadians. Further, there is no evidence that the respondent used its mark after 2007. Again, this factor favours Micro Focus.

C. *Different wares, services, and channels of trade*

[9] The parties operate in different spheres. They produce different software products aimed at different consumers. Micro Focus targets mainly programmers, managers and IT professionals in large companies. The respondent’s products are aimed at non-programmers and enable them to write reports and access data from various systems. There is some overlap but, as mentioned above, consumers are used to distinguishing between different software products that incorporate the word “Focus”. This factor favours Micro Focus.

D. *Actual confusion*

[10] There is no evidence of any consumers actually being confused about the source of the parties' respective wares or services. The respondent actually admitted as much in a co-existence agreement between the parties in 2000. That admission is significant on the issue of confusion (*Dell Computer Corp v Latitude Communications Inc*, 2003 FCT 629) at para 5. Therefore, this factor also favours Micro Focus.

[11] As all of the above factors suggest that there is no reasonable likelihood of confusion between the parties' trade-marks, given Micro Focus's extensive use of the mark, including in the period prior to any use of the respondent's mark. Accordingly, I find that Micro Focus has met its burden of showing that its MICRO FOCUS mark would likely not be confusing with the respondent's mark. Accordingly, the Board's conclusions that the respondent's grounds of opposition under ss 12(1)(d) and 16(2)(a) of the *Trade-marks Act*, RSC 1985, c T-13 were well-founded are set aside.

III. Conclusion and Disposition

[12] Micro Focus has presented new evidence that would have materially affected the Board's conclusion that its MICRO FOCUS mark would be confused with the respondent's FOCUS mark. That evidence persuades me that confusion would be unlikely. Accordingly, I must allow this appeal, with costs, and order that Micro Focus be permitted to register its MICRO FOCUS mark.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The appeal is allowed, with costs.
2. Micro Focus (IP) Limited may register its MICRO FOCUS mark in respect of the wares and services listed in its application.

“James W. O’Reilly”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1031-13

**STYLE OF CAUSE:** MICRO FOCUS (IP) LIMITED v INFORMATION BUILDERS, INC.

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 19, 2014

**JUDGMENT AND REASONS:** O'REILLY J.

**DATED:** JUNE 27, 2014

**APPEARANCES:**

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FOR THE APPLICANT

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