

TTAB

**IN THE UNITED PATENT & TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL & APPEAL BOARD**

TRADEMARK TRIAL AND
BOARD

CENTRAL MFG.
(a Delaware Corporation)
P O Box 35189
Chicago, IL 60707-0189

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Opposition No: 123,765

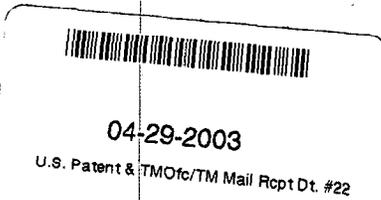
Opposer,

Trademark: HYPERSONIC

vs.

PARAMOUNT PARKS, INC.
8720 Red Oak Blvd.
Charlotte, North Carolina 28217

Applicant



Box TTAB/NO FEE

**REPLY MEMORANDUM OF LAW IN SUPPORT OF OPPOSER'S
MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF OPPOSER'S
OPPOSITION TO APPLICANT'S CROSS-MOTION**

PRELIMINARY STATEMENT

Opposer submits this reply memorandum of law in further support of its Motion for Summary Judgment to address gross misstatements of fact and law contained in Applicant's Memorandum in Opposition to Opposer's Motion for Summary Judgment, and response to Applicant's Cross-Motion.

Opposer submits that consideration of the arguments raised in this brief and the evidence contained in Opposer's Motion for Summary Judgment will help serve to clarify the issues and aid the Board in arriving at a just decision on the motion. *Zirco Corp. v. American Telephone and Telegraph Co.*, 21 USPQ2d 1542, 1543, n. 4 (TTAB 1992).

Applicant has failed to refute the essential fact(s) that the mark at issue in this proceeding, HYPERSONIC, for the Applicant's goods sought to be registered, is identical in spelling and in pronunciation to Opposer's incontestable Federal Trademark Registration for the mark HYPERSONIC, and therefore, confusingly similar as to source on that basis alone under prior controlling decisions of the Board. Further, the Opposer has laid out a *prima facie* and irrefutable case against the Board, allowing Applicant's mark to register. Instead of

acknowledging the truth and the irrefutable facts presented herein, the Applicant seeks to sidetrack the Board by misstating facts and raising irrelevant legal principles. Applicant's efforts cannot mask the fundamental legal deficiencies inherent in its defense. The Board should grant judgment in favor of the Opposer for the following reasons:

1. Likelihood of confusion.
2. Applicant has acknowledged violating 37 CFR §2.133, which states:

(a) An application involved in a proceeding may not be amended in substance nor may a registration be amended or disclaimed in part, except with the consent of the other party or parties and the approval of the Trademark Trial and Appeal Board, or except upon motion.

Applicant's Vice-President of PARAMOUNT PARKS, INC. acknowledged in a Sworn Affidavit, dated April 8, 2003, that PARAMOUNT "attempted to file its Amendments to Allege Use during the black-out period, on October 25, 2001, during the pendency of this opposition."

This damning admission is indicative of Applicant's pandemic violations of the Trademark Rules engaged in by the Applicant in attempting to unlawfully procure and register Application SN: 76-103,447, and Application SN: 76-103,448. The Board cannot ignore this egregious conduct and allow it to go unpunished. The Opposer is requesting that the Board enter a sanction against the Applicant under its inherent powers, denying Applicant registration of its said applications and granting judgment to the Opposer.

The above clear and convincing violation of 37 CFR §2.133 is but the tip of the iceberg.

A brief litany of Applicant's knowing and willful misrepresentations on this Board continues, in that the Applicant on page two of its brief states, "Opposer has not established its standing to pursue this Opposition." The Opposer has pled an interest sufficient in this case to establish standing. A plaintiff need only allege such facts that would, if proved, establish that (1) the plaintiff has standing to maintain the proceedings, and a valid ground exists for canceling the mark. The pleading must be examined in its entirety, construing the allegations therein liberally, as required by Fed. R. Civ. P. 9(f), to determine whether it contains any allegations, which, if proved, would entitle plaintiff to the relief sought. See *Lipton Industries*,

Inc. v. Ralston Purina Co., 670 F. 2d 1024, 213 USPQ 185 (CCPA 1982); *Kelly Services, Inc. v. Greene's Temporaries, Inc.*, 25 USPQ2d 1460 (TTAB 1992); and TBMP §503.02.

Considering first the standing question, the Federal Circuit has stated that a party must only plead facts sufficient to show that it has a direct and personal stake in the outcome of the case and a reasonable basis for its belief that it will be damaged. *Ritchie v. Simpson*, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999).

As to Applicant's allegation that the Opposer "has not established ... its own use of the mark HYPERSONIC." Opposer holds rights to an incontestable HYPERSONIC registration relied upon in its Notice of Opposition. Said registration is evidence that the Opposer holds the exclusive rights to use the mark HYPERSONIC and that that said mark enjoys the statutory presumption of use.

On page three of Applicant's brief, the Applicant complains that the Opposer has "produced virtually no discovery ... and that the Opposer should be sanctioned." The Opposer asserts that the sanction the Applicant is requesting is improper under the circumstances. The Applicant has waived its right to take discovery as a result of filing its response to Opposer's Motion for Summary Judgment. Any suggestion by the Applicant that the Opposer should now be sanctioned for failing to respond to discovery, is entirely misplaced. Such a pejorative comment is being made by the Applicant in an attempt to unlawfully prejudice the Opposer before this Board. The Applicant knows full well that if they needed to engage in discovery prior to filing their response to Opposer's Motion for Summary Judgment, they could have filed a Motion for Discovery under Rule 56(f). Applicant's failure to file a Rule 56(f) motion prior to responding to Opposer's Motion for Summary Judgment, bars the Applicant from requesting that the Opposer be sanctioned for failing to respond to discovery.

The Opposer, CENTRAL MFG. CO., is the listed Registrant of Record and its representative, LEO STOLLER, is the President and sole owner of CENTRAL MFG. CO.

The Opposer finds it totally unnecessary to reargue and reassert its positions outlined in its Motion for Summary Judgment herein. It is clear that the Applicant has violated the Trademark Rules; has ignored the Federal Rules of Civil Procedure, and has attempted to discredit the Opposer by requesting improperly for this Board to grant it a motion for discovery sanctions within Applicant's response. It is obvious from the record that the

Applicant did not need any discovery to respond to Opposer's Motion for Summary Judgment. Applicant's said response represents its waiver as to its need to obtain discovery.

The Opposer has established that the marks are identical, the goods are related, and that the Applicant has engaged in a pattern of misconduct in attempting to procure its said trademark applications, and that this Board must, as matter of law, grant Opposer's Motion for Summary Judgment, denying the Applicant registration of its applications sought to be registered.

Respectfully submitted,

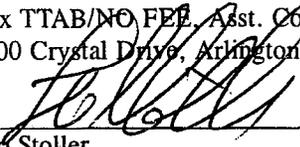


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Certification of Mailing

I hereby certify that this correspondence is being deposited with the U.S. Postal Service as first class mail in an envelope addressed to:

Box TTAB/NO FEE, Asst. Commissioner of Patents and Trademarks,
2900 Crystal Drive, Arlington, Virginia 22202-3513



Leo Stoller

Dated: April 25, 2003

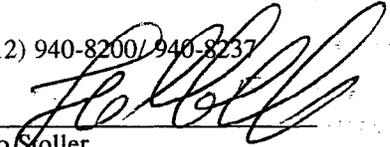
CERTIFICATE OF SERVICE

I hereby certify that this correspondence is being deposited with the U.S. Postal Service as first class mail in an envelope addressed to:

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Date: April 25, 2003

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