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

Proceeding	91186494
Party	Defendant Brown, Anthony
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Submission	Motion for Summary Judgment
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK AND TRIAL APPEAL BOARD

In the Matter of Application Serial No. 77/355857: KOOL
Published in the *Official Gazette* of July 22nd 2008, in International Class 32

KRAFT FOODS GLOBAL BRANDS LLC, Opposition No. 91186494

Opposer,

v.

ANTHONY BROWN,

Applicant.

_____/

APPLICANT'S MOTION FOR SUMMARY JUDGMENT; MEMORANDUM AND DECLARATION OF ANTHONY BROWN IN SUPPORT

Applicant, Anthony Brown, after filing his initial disclosures and pursuant to Rule 56 of the Federal Rules of Civil Procedure moves the Board for an Order Granting Summary Judgment in its favor on all claims asserted against it by opposer, Kraft Foods Global Brands L.L.C. on the ground that there are no genuine issues of material fact precluding Summary Judgment in its favor as follows:

I. INTRODUCTION

Anthony Brown is an individual who was born in Jamaica and currently lives in Fort Lauderdale, Florida. Mr. Brown plans to open a small business which will manufacture, distribute and sell a new healthy carbonated drink made from various Jamaican flavors. *See* Declaration of Anthony Brown at ¶4 attached hereto as **Exhibit A**. Anthony Brown is the owner of the pending trademark "Kool" (the "Mark") with no particular form of font styling (Serial # 77/355857) and has not used the Mark in commerce yet. *See* Declaration of Anthony Brown at ¶5 attached hereto as **Exhibit A**.

Opposer is a global corporation which sells numerous products including those under a series of trademarks which incorporate the opposer's "Kool-Aid" trade name. *See* Declaration of Anthony Brown at ¶13 attached hereto as **Exhibit A**. Opposer's "Kool-Aid" mark consists of the words "Kool" and "Aid" joined by a hyphen along with a logo of a dancing and smiling glass pitcher filled with a red liquid and ice cubes who is marketed as "Kool-Aid man." *See* Declaration of Anthony Brown at ¶14 attached hereto as **Exhibit A**. Opposer has filed an opposition claiming applicant's use of the mark "Kool" for carbonated beverages is likely to result in confusion, mistake or deception with opposers "Kool-Aid" mark, or in the belief that applicant or its "Kool" products are in some way connected with, or licensed or approved by the opposer.

II. SUMMARY OF THE ARGUMENT

Summary judgment in favor of the applicant is proper as no genuine issue of material fact exists that there is no likelihood of confusion between the parties' marks. Applicant's mark, "Kool" with no particular form of font styling and opposer's "Kool-Aid" with its glass pitcher character are distinct and have a wholly distinct commercial meaning. Notwithstanding, opposer, a goliath corporation, seeks to ban applicant from using any trademark using the word "Kool" spelled with a "K" knowing that its same argument was rejected in 1999 in a nearly identical case in which the Trademark Trial and Appeal Board held that "Kool Kat" (a beverage marketed to children) was not confusingly similar to "Kool-Aid." *See Kraft Foods, Inc. v. Desnoes & Geddes Ltd.*, Opp'n No. 101,879 (T.T.A.B. 1999). In *Kraft Foods, Inc. v. Desnoes & Geddes Ltd.*, Kraft opposed registration of the trade name "Kool Kat." *See Desnoes & Geddes Ltd.*, Order Granting Summary Judgment, attached hereto as **Exhibit B**.

In *Desnoes & Geddes Ltd.*, the TTAB held that the dissimilarities between the mark "Kool Kat" and Kraft's "Kool-Aid" marks controlled the issue of a likelihood of confusion, and that there was therefore no violation of state law or the Lanham Act. The TTAB held that the single factor of the dissimilarities of the marks in their entireties substantially outweighed any other relevant factors and was dispositive of the issue of likelihood of confusion.

III. SUMMARY JUDGMENT IN FAVOR OF APPLICANT IS PROPER ON OPPOSER'S CLAIMS FOR TRADEMARK INFRINGEMENT, AND FALSE DESIGNATION OF ORIGIN

In order to prevail on its claims for trademark infringement, opposer must show that (1) its mark's have priority; (2) applicant used its mark(s) in commerce; (3) and that applicant's mark is likely to cause consumer confusion. *See Unique Sports Products, Inc. v. Babolat*, 403 F. Supp. 2d 1229 (N.D.Ga.2005).Here, applicant has not used opposer's mark and the marks are so dissimilar that there is no likelihood of confusion. That is, when the trademarks are considered in their entirety, they differ so substantially in appearance, sound, connotation and commercial impression that there is no likelihood that their contemporaneous use by different parties will result in confusion. *See Kellogg Co. v. Pack' em Enterprises, Inc.*, 951 F. 2d 330 (Fed. Cir.1991); *See also Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC*, 369 F. 3d 1197, 1208 (11th Cir. 2004) (no reasonable jury may conclude that trademarks are confusingly similar when the lack of visual similarity between two logos is overwhelming). Also, dissimilarity between the marks *alone* may control the issue of likelihood of confusion. *See: Desnoes & Geddes Ltd.*, Opp'n No. 101,879.

A. There is no likelihood of confusion between Opposer's mark and Applicant's Mark.

In assessing a likelihood of confusion, the Board has to examine: (1) the strength of the opposer's mark; (2) the similarity between the parties' marks; (3) the similarity of the goods and services offered by the opposer and applicant; (4) the similarity between the retail outlets used by the parties and the customers served by the opposer and applicant; (5) the similarity between the types of advertising media used by the parties; (6) the Applicant's intent when adopting the mark; and (7) actual consumer confusion. *See Alliance Metals, Inc. of Atlanta v. Hinely Industries, Inc.*, 222 F. 3d 895, 907 (11th Cir. 2000). Here, application of the foregoing factors and especially the dissimilarity to the parties marks demonstrates no likelihood of confusion.

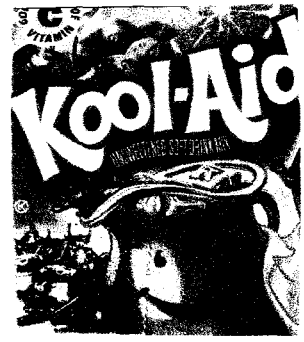
• <u>Strength of Plaintiff's Mark</u>

Extensive third-party use of the word "Kool" in other trademarks limits the protection deserved by opposer's mark. *See Amstar Corporation v. Domino's Pizza, Inc.*, 615 F.2d 252, 259-60 (5th Cir.1980) (third-party uses and registrations of identical or similar trademarks limit the protection to be accorded plaintiff's mark); *See also Frehling Enterprises, Inc. v. International Select Group, Inc.*, 192 F.3d 1330 (11th Cir. 1999) (also important in gauging the strength of a mark is the degree to which third parties make use of the mark). As described herein, there exists extensive use of the word "Kool" in trademarks linked to ice cream, cigarettes, musical groups, toys, t-shirts, radio stations, hosiery, watches, window shades and chemical products. Specifically, the following trademarks have been registered with the U.S. Patent and Trademark Office: (1) "Kool Freeze" for ice cream, Registration #3237259; (2) "Kool" for Radio Programming Services, Registration # 2,467,209; (3) "Kool" for Hosiery, Registration # 1,184,920; (3) "Kool" for Watch, Band and Clock movements, Registration #

2,472,597; (4) "Kool" for cigarettes, Registration #2218589; (5) "Kool & The Gang" musical group, Registration #2964731; (6) "Mizz Kool" toys, Registration #3023705; (7) "Kool Kat" shirts, Registration #3026426; (8) "Kool-Lite" window shades, Registration # 3164757; and (9) "Kool-Blak" for chemical products, Registration #3231489. *See* Declaration of Anthony Brown at ¶19 attached hereto as **Exhibit A**.

• <u>Similarity of Marks</u>

Applicant's "Kool" mark with a no particular form of font styling and opposer's "Kool-Aid" mark with its accompanying "Kool-Aid Man" pitcher character are dissimilar. First, applicant's mark utilizes only one word, "Kool". *See* Declaration of Anthony Brown at ¶9 attached hereto as **Exhibit** A. Opposer uses the word "Kool" but incorporates it with the additional word "Aid", making it a compound word trademark. These two words must be spoken together in order for the consumer to determine the products source indicator. *See* Declaration of Anthony Brown at ¶15 attached hereto as **Exhibit A**. The appearance of the parties' trademarks is also completely different. The "Kool" and the "Kool-Aid" trademarks are depicted below:

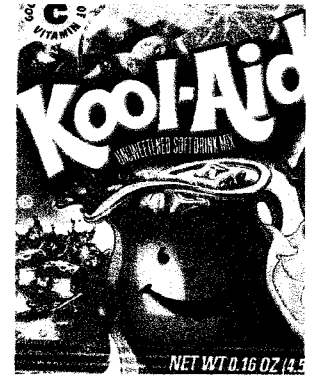
"Kool" mark	"Kool-Aid" mark
KOOL	

Applicants' mark depicts the word "Kool" in no particular form of font styling. *See* Declaration of Anthony Brown at ¶6 attached hereto as **Exhibit A**. Opposers' mark, on the other hand, incorporates a dancing and smiling anthropomorphic glass pitcher filled with ice cubes and liquid. Opposer's mark is primarily used to sell a sugar-based powdered drink.

Also, Applicant's use of the word "Kool" is being used in the context of being hip and in style. *See* Declaration of Anthony Brown at ¶8 attached hereto as **Exhibit A**. Opposer's use of the word "Kool" with "Aid" as part of its compound trademark is in the context of aiding the consumer to lower ones temperature and goes toward the refreshing aspect of the beverage. The opposer's logo depicts a glass pitcher filled with ice cubes which insinuates the coldness of the opposer's product. Application of this factor alone should control. In *Kraft Foods, Inc. v. Desnoes & Geddes Ltd.*, Opp'n No. 101,879 (T.T.A.B. 1999) the TTAB held that "Kool Kat" when used in connection with the sale of a sweet beverage marketed to children was not confusingly similar to "Kool-Aid" when used in connection with the sale of a sweet beverage marketed to children. The "Kool Kat" and the "Kool-Aid" trademarks are depicted below:

"Kool Kat" mark

"Kool-Aid" mark



The TTAB found that while both parties shared the term "Kool", when this term was combined with a second term it gives the mark a wholly distinct commercial meaning. *See* Order Granting Summary Judgment, attached hereto as **Exhibit B**. The TTAB emphasized that "Kool Kat" is very different from "Kool-Aid", the former connoting a "hip" person and the latter connoting a cooling drink. *Id.* Given the dissimilarity of the parties' marks in *Desnoes & Geddes Ltd.* the TTAB held that this single factor outweighed any other relevant factor and was

dispositive of the issue of likelihood of confusion. *Id.* Here, the marks are more dissimilar than those in the *Desnoes & Geddes Ltd.* case and therefore this Board should find that there is no likelihood of confusion.

Similarity of Goods

Applicant will be selling a Jamaican flavored carbonated beverage in a slender can which is already mixed. *See* Declaration of Anthony Brown at ¶10 attached hereto as **Exhibit A**. Opposer sells a sugar-based powdered drink mix in packets and a pre-mixed sugar based drink in a pouch called "Kool-Aid Jammers" again using the Kool-Aid man logo. *See* Declaration of Anthony Brown at ¶10 attached hereto as **Exhibit A**.

Similarity of Retail Outlets and Customers

Opposer markets their products primarily to children. Applicant's market base will include children but its product's healthy factor also opens the market to teenagers and adults. *See* Declaration of Anthony Brown at ¶11 attached hereto as **Exhibit A**.

Advertising

The target audience sought by the parties demonstrates that substantially similar advertising is not performed by the parties. Applicant plans to utilize print ads in newspapers that target the Jamaican communities and to magazines that relate to nutrition and health topics.
See Declaration of Anthony Brown at ¶12 attached hereto as **Exhibit A.** Opposer advertises through television commercials and print advertising directed at children and teenagers. *See* Declaration of Anthony Brown at ¶12 attached hereto as **Exhibit A.**

Applicant's Intent

Applicant intends to his sell Jamaican flavored healthy carbonated drinks under the trademark "Kool" and not to infringe on the rights of the opposer or anyone else.

See Declaration of Anthony Brown at ¶16 attached hereto as **Exhibit A**. Applicant performed a trademark search before filing for a registration for the Mark and found no use of "Kool" for carbonated soft drinks. *See* Declaration of Anthony Brown at ¶ 17 attached hereto as **Exhibit A**.

Actual Confusion

There has been no instance of actual customer confusion between the parties marks. *See* Declaration of Anthony Brown at ¶18 attached hereto as **Exhibit A.** Lacking any evidence of actual confusion between the parties marks, Opposer is unlikely to demonstrate any likelihood of confusion *See Amstar*, 615 F. 2d at 263 (although evidence of actual confusion is not necessary to a finding of likelihood of confusion, it is nevertheless the best evidence of likelihood of confusion); *See also Alliance Metals*, 222 F. 3d at 907 (The most persuasive evidence in assessing the likelihood of confusion is the proof of actual confusion). Based on the foregoing, there is no likelihood of confusion and summary judgment should therefore be granted in favor of the Applicant.

B. Summary judgment in favor of Applicant is proper as to Plaintiffs' claims for false designation of origin.

In order to prevail on a claim of unfair competition or false designation of origin under the Lanham Act, Opposer must again demonstrate that a likelihood of confusion among consumers exists as to the parties' marks. *See Michael Caruso & Co, Inc. v. Estefan Enterprises, Inc.*, 994 F. Supp. 1454, 1458 (S.D. Fla. 1998); *Lipscher v. LRP Publications, Inc.*, 266 F.3d 1305, 1312-13 (11th Cir. 2001)(in order to prevail on a false designation of origin claim, the plaintiff must show that the defendant's conduct was likely to cause confusion). For the reasons set forth in Section III (a) *supra*, *i.e.* the marks at issue are not confusingly similar, Applicant is entitled to summary judgment on Opposer's claims for false designation of origin.

IV. CONCLUSION

Based on the foregoing, no genuine issue of material fact exists and Applicant is entitled to judgment as a matter of law. As such, Applicant is entitled to summary judgment.

WHEREFORE, Applicant respectfully requests that this Board grant summary judgment in its favor and allow said mark to be registered accordingly.

Respectfully submitted,

By: _____

Anthony Brown
400 SW 25th Terrace
Ft. Lauderdale, Fl. 33312
2/11/09

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail on this 11th day of Feb. 2009 to Kraft Foods Global Brands LLC- Att: Mr. Mary Carragher Atty - Three Lakes Drive NF-577 Northfield, IL 60093

_____

Anthony Brown 2/11/09

EXHIBIT A

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

In the Matter of Application Serial No. 77/355857: KOOL
Published in the *Official Gazette* of July 22nd 2008, in International Class 32

KRAFT FOODS GLOBAL BRANDS LLC, Opposition No. 91186494

Opposer,

v.

ANTHONY BROWN,

Applicant.

_____/

DECLARATION OF ANTHONY BROWN IN SUPPORT OF APPLICANT'S MOTION FOR SUUMARY JUDGMENT

1. I am over the age of eighteen and I make this Declaration based upon my personal knowledge.

2. I am the Applicant who has filed the intent-to use application for the mark "Kool".

3. I have reviewed the factual allegations of Applicant's Motion for Summary Judgment and Incorporated memorandum of Law.

4. I plan to open a beverage business that will manufacture, distribute and sell a healthy carbonated drink made from Jamaican flavors.

5. I have filed an intent-to-use trademark application for the mark "Kool" with no particular form of font styling and have not yet used the mark in commerce.

6. My pending mark consists of the word "Kool" with no particular form of font styling.

7. My pending mark is the word "Kool" which means to be hip and in style.

8. My pending mark is the word "Kool" which is often used in Jamaica to mean hip and in style.

9. My mark utilizes the single word "Kool".

10. The mark covers my intended product, a healthy carbonated beverage made from Jamaican flavors in a slender can which is already mixed. Opposer sells a sugar-based powdered drink mix in packets and a pre-mixed sugar based drink in a pouch called "Kool-Aid Jammers", again using the Kool-Aid man logo.

11. My planned market base includes children with a Jamaican heritage but its products healthy factor also opens the market to non-Jamaicans, teenagers and adults.

12. I plan to advertise in print media like newspapers that cater the Jamaican community and in magazines related to nutrition and other health topics. Opposer advertises through television commercials and print advertising directed at children and teenagers.

13. Opposer, Kraft Foods Global Brands LLC is a global corporation which sells numerous products including those under a series of trademarks which incorporates the Opposers "Kool-Aid" trade name.

14. Opposer's "Kool-Aid" mark consists of the words "Kool" and "Aid" joined by a hyphen along with a logo of a dancing and smiling glass pitcher filled with a red liquid and ice cubes who is marketed as "Kool-Aid man".

15. Opposer use the word "Kool" but follow it with the word "Aid", which does not mean "hip" and "in style".

16. I plan to sell healthy carbonated drinks made from Jamaican flavors under the trademark "Kool" and not to infringe on the rights of the opposer or anyone else.

17. I performed a trademark search before filing my intent-to-use application for the mark and found no prior use of "Kool" for carbonated drinks.

18. There has been no instance of actual customer confusion between the parties marks.

19. The following trademarks have been registered with the U.S. Patent and trademark Office: (1) "Kool Freeze" for ice cream, Registration #3237259; (2) "Kool" for Radio Programming Services, Registration # 2,467,209; (3) "Kool" for Hosiery, Registration # 1,184,920; (3) "Kool" for Watch, Band and Clock movements, Registration # 2,472,597; (4) "Kool" for cigarettes, Registration #2218589; (5) "Kool & The Gang" musical group, Registration #2964731; (6) "Mizz Kool" toys, Registration #3023705; (7) "Kool Kat" shirts, Registration #3026426; (8) "Kool-Lite" window shades, Registration # 3164757; and (9) "Kool-Blak" for chemical products, Registration #3231489.

20. Other non-registered trademark products such as "Stay Kool" carbonated beverages are also widely marketed in the United States.

X Under penalties of perjury, I declare that I have read the foregoing document and that the facts stated in it are true.

Anthony Brown
Dated: 2/11/09

EXHIBIT B

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

cab

MAILED

APR - 8 1999

PAT. & T.M. OFFICE

Opposition No. 101,879

Kraft Foods, Inc.

v.

Desnoes & Geddes Limited

Before Simms, Seeherman and Wendel, Administrative Trademark Judges.

By the Board:

Applicant has filed an application to register the mark KOOL KAT for "soft drinks."[1] As grounds for the opposition, opposer alleges that applicant's mark, when used on the identified goods, so resembles opposer's previously used and registered marks, as to be likely to cause confusion, mistake or deception. Opposer's pleaded registrations are for the following marks:

[1] Application Serial No. 74/687,335, filed on June 12, 1995 based on a bona fide intention to use the mark in commerce pursuant to Trademark Act Section 1(b).

for "powders, syrups and concentrates used in the preparation of soft drinks";[2]

for "soft drinks";[3]

KOOL-AID

for "chewing gum";[4]

KOOL-AID

for "nonalcoholic, noncereal, maltless, carbonated beverages and syrups and extracts for making same";[5] and

Kool-Aid

for "prepared powder containing flavor, fruit acid, and color put up in a number of flavors for making nonalcoholic beverage in the home."[6] In addition, opposer pleaded two registrations in the notice of opposition which have since expired.[7]

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[2] U.S. Registration No. 1,133,277, registered on April 15, 1980, Section 8 affidavit accepted.
[3] U.S. Registration No. 1,132,819, registered on April 8, 1980, Section 8 affidavit accepted.
[4] U.S. Registration No. 384,365, registered on January 14, 1941, renewed.
[5] U.S. Registration No. 384,244, registered on January 7, 1941, renewed.
[6] U.S. Registration No. 317,955, registered on October 9, 1934, renewed.
[7] U.S. Registration No. 991,548 for the mark KOOL-AID, typed form, for "iced tea," registered on August 20, 1974 and expired on January 20,

In its answer, applicant admits the existence of opposer's pleaded registrations and opposer's priority of use of those pleaded marks but denies that applicant's mark, as applied to soft drinks, is so similar to opposer's trademark KOOL-AID, used on similar goods, as to be likely to create confusion, mistake, or deception.

Applicant, on March 30, 1998, filed a motion for summary judgment, arguing that no genuine issue of material fact exists as to likelihood of confusion and that applicant is entitled to judgment as a matter of law. Opposer responded on April 3, 1998 and filed a cross motion for summary judgment, or, in the alternative, for partial summary judgment.[8] Applicant filed a reply on April 17, 1998.

Applicant's motion is accompanied by the following exhibits: a copy of its notice of publication for the mark KOOL KAT; a copy of the notice of opposition; a copy of its U. S. Registration No. 2,101,903 for its cat character logo as shown below:

1995 and U.S. Registration No. 623,164 for the mark KOOL-AID, stylized, for "powders for making soft drinks," registered on March 13, 1956 and expired on December 16, 1996.

[8] Opposer's consented motion, filed on March 2, 1998, to extend time up to and including April 3, 1998, to respond to applicant's motion for summary judgment is granted. See Trademark Rule 2.127(a).

copies of opposer's pleaded registrations; dictionary definitions of "cool," "cat," "aid," and "ade"; copies of several shelving display formats of opposer's goods; copies of advertisements for applicant's products; a copy of opposer's responses to applicant's first set of interrogatories Nos. 6 and 7; a copy of excerpts from the discovery deposition of Tony Lacitignola, Reggae Imports, Ltd., applicant's U.S. distributor; database printouts of registered third-party marks containing the term KOOL or COOL; and a copy of applicant's answers to opposer's first set of interrogatories Nos. 1 and 5.

Opposer's response and cross motion for summary judgment are accompanied by the following: the declaration of one of its attorneys, Kandis M. Kahn, and accompanying exhibits comprising an excerpt from the Official Gazette showing the publication of applicant's mark KOOL KAT, a copy of the notice of opposition, a copy of the answer to the notice of opposition, a copy of opposer's responses to applicant's first set of interrogatories, a copy of applicant's responses to opposer's first set of interrogatories, and a copy of excerpts from the discovery deposition of Tony Lacitignola, Reggae Imports, Ltd., applicant's U.S. distributor; the declaration of Dahlia Angela Bowie, a legal secretary with the law firm representing opposer; the declaration of Ruel Grant, a secretary with the law firm representing opposer; and the declaration of Thano Chaltas, opposer's brand manager for KOOL-AID products, with accompanying exhibits

comprising status and title copies of opposer's pleaded Registration Nos. 1,133,277, 1,132,819, 384,244, and 317,955, a historical chronology for KOOL-AID brand soft drinks, photocopies of photographs showing packaging for various KOOL-AID brand products, representative samples of advertising and promotional materials for KOOL-AID brand products, promotional materials showing the KOOL-AID Man, a videotape of television commercials and a numbered list of the commercials on the videotape, copies of consumer survey results of children concerning KOOL-AID brand products, sample advertising budgets and media plans which include placement in ethnic media, a copy of the settlement agreement between opposer and Mackie International (Mackie) concerning Mackie's application Serial No. 74/154,366 for the mark BERRY KOOL for "artificially fruit flavored drink," and a copy of Mackie's amendment of the term KOOL to COOL in its application Serial No. 74/432,592 for the mark SNOWTIME BERRY COOL.

In support of its motion for summary judgment, applicant argues that, because of the dissimilarity in the marks of the parties and of the absence of any actual confusion in four to five years of concurrent use, applicant is entitled to entry of judgment in its favor on the issue of likelihood of confusion. In particular, applicant argues that its mark KOOL KAT is immediately distinguishable from opposer's KOOL-AID marks because applicant's mark has the double K appearance and repetitive sound

and because KOOL KAT strongly and immediately connotes "a hip, sophisticated male" while opposer's KOOL-AID marks connote an "aid to cooling in the temperature sense."

In its response and cross motion for summary judgment, opposer argues that there are no genuine issues of material fact and that opposer is entitled to judgment as a matter of law because the marks in their entireties are confusingly similar, that the goods of the parties are the same in part and are otherwise highly related, that the channels of trade and potential consumers are the same, and that opposer's KOOL-AID mark is famous. In particular, opposer argues that the marks are similar because both marks share the dominant term KOOL; that opposer has used the double K appearance and sound in the past with the KOOL-AID KOOLERS mark and is presently using the double K appearance and sound with its KOOL-AID KOOL POPS mark. Opposer argues that the commercial impression created by the KOOL-AID mark "is not only one of a drink that quenches your thirst and cools you off, but also a drink that is 'cool' or 'hip'…"; that opposer emphasizes this image in its advertising and marketing; and that such image is recognized by the potential consumers.

In a motion for summary judgment, the moving party has the burden of establishing the absence of any genuine issues of material fact and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). A genuine issue with respect to material fact exists if sufficient evidence is presented that a

reasonable fact finder could decide the question in favor of the non-moving party. See *Opryland USA Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992). Thus, all doubts as to whether any factual issues are genuinely in dispute must be resolved against the moving party and all inferences must be viewed in the light most favorable to the non-moving party. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

In the present case, we find that applicant has adequately met its burden of proof. We believe that the circumstances here are similar to those in *Kellogg Co. v. Pack'em Enterprises, Inc.*, 14 USPQ2d 1545 (TTAB 1990), aff'd, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991), in that the single DuPont[9] factor of the dissimilarity of the marks in their entireties substantially outweighs any other relevant factors and is dispositive of the issue of likelihood of confusion.[10]

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[9] See *In re DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 463 (CCPA 1973).

[10] Applicant also argues that the goods of the parties are different, travel in different channels of trade and are marketed to different consumers and that, even to the extent that the goods are the same, the channels of trade and consumer markets of the respective parties differ substantially. Opposer has submitted evidence to the contrary. Genuine issues of material fact are not found in the parties' arguments concerning the nature of the goods, channels of trade and consumer markets. In its answer to the notice of opposition, applicant recognizes that the goods of the parties are the same in denying the similarities of its mark and opposer's marks as applied to soft drinks. In addition, the goods as identified by applicant, "soft drinks," are the same as those as identified by opposer, at least with respect to its pleaded Registration No. 1,132,819, and are related to the goods otherwise identified by opposer. See, for example, *Seven-Up Co. v. Aaron*, 216 USPQ 807 (TTAB 1982). Moreover, the identification of goods in the application and registrations are unrestricted as to

Applicant's mark, KOOL KAT, is the phonetic equivalent of "cool cat," which is defined as "n. someone who is *cool*, usually male. *Monty is a cool cat. I really like him. There is a shortage of cool cats on this turf.*" See NTC's Dictionary of American Slang and Colloquial Expressions 81 (2nd ed. 1995).[11] In comparing the marks in their entireties, while both marks share the term KOOL, it is combined with a different second term which gives the marks as a whole distinctly different commercial impressions. When KOOL is combined with KAT to form KOOL KAT, the commercial impression is very different from that when KOOL is combined with AID to form KOOL-AID, a misspelling of "cool aid"; the former connotes a "hip" person, the latter connotes a cooling drink. Even if we accept opposer's contention that KOOL-AID means something that may be "hip" in and of itself, the mark would then connote a fruit flavored drink that quenches thirst

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channels of trade, class of purchasers and method of distribution. The question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed. See *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *Bongrain International (American) Corp. v. Moquet Ltd*, 230 USPQ 626 (TTAB 1986). Accordingly, the Board must presume that the goods identified by applicant and by opposer in its pleaded registrations encompass all goods of the type described, move in all normal channels of trade and under all normal methods of distribution, and are available to all classes of purchasers. See also *In re Diet Center, Inc.*, 4 USPQ2d 1975 (TTAB 1987); and *In re Americor Health Services*, 1 USPQ2d 1670 (TTAB 1986).

[11] Judicial notice of dictionary definitions may be taken by the Board. See, for example, *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

that is "cool" in its properties or is "cool" to consume. Moreover, even assuming that opposer's KOOL-AID marks connote something that is "hip" or "cool," and opposer's KOOL-AID marks are famous, at least with regard to the mixes, concentrates and powders for making soft drinks, as applicant appears to have conceded, we find the dissimilarities of the marks, when viewed in their entireties, including appearance, sound, connotation, and commercial impression, so marked that confusion is not likely to occur.

Accordingly, applicant's motion for summary judgment is granted. Opposer's cross motion for summary judgment is denied and the opposition is dismissed with prejudice.

R. L. Simms

E. J. Seeherman

H. R. Wendel
Administrative Trademark Judges, Trademark Trial and Appeal Board