

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

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Mailed: June 14, 2010

Opposition No. 91187908

OKLAHOMA STATE UNIVERSITY

v.

SUPER BAKERY, INCORPORATED

**Before Hairston, Bergsman and Wellington,
Administrative Trademark Judges.**

By the Board:

Super Bakery, Inc. ("applicant") seeks registration of COWBOYADE, in standard characters, for "sports drinks" in International Class 32.¹ In its notice of opposition, Oklahoma State University ("opposer") alleges 1) prior use of the mark COWBOYS, 2) ownership of the COWBOYS mark "for use in connection with a wide variety of goods and services," 3) ownership of two registrations for the mark OSU and design (shown below),² and 4) that use of applicant's mark is likely

¹ Application Serial No. 77383001, filed January 29, 2008, based on an intent to use the mark in commerce under Trademark Act Section 1(b).

² See Registration No. 1602422, registered June 19, 1990 for "clothing, namely men's and women's shirts" in International Class 25, first renewal January 22, 2001, second renewal June 13, 2010. See also Registration No. 3187429, registered December 19, 2006 for "paper nametags, stickers, pencils and notebooks" in International Class 16, and "education and entertainment services, namely, providing course of instruction at the university level; educational research, arranging and conducting athletic events and tournaments, exhibitions, conferences, live performances and festivals" in International Class 41.

to cause confusion with opposer's marks under Trademark Act Section 2(d).



Opposer also alleges that the mark is deceptive, and that it falsely suggests a connection with opposer, in violation of Trademark Act Section 2(a). In its answer, applicant denies the salient allegations in the notice of opposition.

This case now comes up for consideration of opposer's fully briefed motion for summary judgment on its claim of priority and likelihood of confusion only, filed April 16, 2010.³

Opposer claims that its COWBOYS marks are strong based on evidence of long-term use, its students' adoption of COWBOYS as the nickname for its athletic teams and a reference to its mascot, substantial sales and use "on television broadcasts and

³ Opposer originally filed its motion on October 9, 2009, following which the parties requested that the Board defer ruling on the motion while they discussed settlement. After proceedings resumed, the Board required the parties to refile their supporting briefs, because the format of the original briefs violated Board rules.

Opposer's consented motion (filed November 25, 2009) to reopen time to file evidence is granted. Fed. R. Civ. P. 6(b); TBMP § 509.02 (2d ed. rev. 2004).

Opposer's motion (filed June 9, 2010) for leave to file a supplemental declaration is denied. The submission is untimely, and is an impermissible surreply. Moreover, upon cursory review, consideration of the submission would have no bearing on our

in print and online media nationwide for decades, exposing millions of viewers to the University's well-known COWBOYS Marks." Declaration of Kurtis Mason ("Mason Dec."), opposer's Trademarks and Licensing Administrator, ¶¶ 4-6, 9. Opposer argues that the parties' marks are "nearly identical," primarily because applicant's COWBOYADE mark incorporates the dominant portion of opposer's COWBOY marks, and "ADE" fails to distinguish applicant's mark inasmuch as it is "a generic word for drinks." Declaration of Lauren Sullins Ralls ("Ralls Dec."), one of opposer's attorneys, Ex. I (*Merriam-Webster's Collegiate Dictionary, 10th ed.*, defining "ADE" as "product; esp: sweet drink").

Regarding the parties' goods, opposer argues that they are similar based on evidence that opposer licenses its COWBOYS marks for food and drink products "such as coffee, bottled water, lollipops, various sauces and seasonings, and tortilla chips" and food- and drink-related items "such as glassware, dishware, and sport and travel beverage bottles." Mason Dec. ¶ 14 and Ex. L; Deposition of Michael S. Drucker ("Drucker Dep."), Vice President and Associate General Counsel of the Collegiate Licensing Company ("CLC"), ¶ 3 and Ex. A. Furthermore, opposer argues that applicant's identification of goods "is not limited to any particular channel of trade," and that the parties' customers "are not likely to exercise care in

determination of the summary judgment motion. See Trademark Rule 2.127(a); *No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1553 (TTAB 2000).

purchasing" the products in question inasmuch as they are "inexpensive sports drinks."

Finally, opposer relies heavily on purported evidence that applicant "adopted its COWBOYADE Mark with a bad faith intent to trade off the goodwill of the University's COWBOYS Marks," introducing evidence that applicant "owns at least twenty pending applications to register marks for use in connection with sports drinks that incorporate the trademarks of well-known universities and the suffix '-ADE.'" Ralls Dec. ¶2, Ex. A. Applicant's principal, Franco Harris, a former Penn State and Pittsburgh Steeler football player, testified during his discovery deposition that he was aware, at the time he selected the COWBOYADE mark, that colleges, including Oklahoma State, have a cowboy mascot, and that part of the intended market is to sell COWBOYADE sports drinks "to fans or students at schools, universities or fans of professional teams that have cowboy as their mascot." Ralls Dec., Ex. G, Deposition of Franco Harris ("Harris Dep.") at 60:9-25; 61:10-14.

In response, applicant asserts that the marks create "clearly distinct" commercial impressions, that opposer owns no registered mark for "cowboy," and that its pleaded marks are stylized cowboy caricatures. Regarding opposer's purported fame of its marks, applicant asserts that opposer has failed to demonstrate that "cowboys" is recognized by

consumers as identifying Oklahoma State University, and relies on opposer's admissions during discovery that there are several sports teams, including one national team and at least four universities, which have cowboy mascots.

Declaration of J. Matthew Pritchard ("Pritchard Dec."), one of applicant's attorneys, Ex. F (Opposer's Responses to Applicant's First Request for Admissions Nos. 2-8).

Applicant disputes opposer's theory of relatedness of the goods, arguing that opposer has produced no evidence that it has ever licensed "cowboy" in connection with a sports drink, and that its licensing of food and drink products is a fraction of its total licensing revenue.⁴ Pritchard Dec. Ex. G, Drucker Dep. 19:19-25; 27:8-21. In his deposition, Mr. Drucker also testified that "fans and consumers know when they're buying an Oklahoma State Cowboys product and a Wyoming Cowboys product," and that a licensee making apparel bearing the mark "Cowboys" and intending that "Cowboys" represented Oklahoma State would have to attribute that product to Oklahoma State. Pritchard Dec. Ex. G, Drucker Dep. p. 50-51. Applicant asserts that the parties' channels of trade have little or no overlap because applicant sells primarily to distributors and wholesalers, that its markets include military, hospitals, restaurants

⁴ While applicant argues that opposer is "precluded" from licensing or producing sports drinks under the COWBOYS mark,

and some colleges and universities, and that its "biggest market" for its food products is the K through 12, pre-K and Head Start school systems market. Pritchard Dec. Ex. D, Harris Dep. 8:7-17; 9:22-25; 10:13-18.

Finally, applicant argues that opposer failed to establish even a reasonable inference that applicant had the bad faith intent to trade on the good will of opposer, that any prior knowledge of opposer's marks is not a basis upon which to find bad faith intent, and that applicant has intended to "steer clear of the indicia of the University, including their (sic) distinctive color pairs and their (sic) ties to a particular geographic market."

Summary judgment is only appropriate where there are no genuine issues of material fact in dispute, thus allowing the case to be resolved as a matter of law. Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. *See, Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Sweats Fashions, Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793, 1796 (Fed. Cir. 1987). A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-moving party. *See, Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472

there is no evidence of the alleged prohibition and this argument

(Fed. Cir. 1992); *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992).

The evidence on summary judgment must be viewed in a light most favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor.

Lloyd's Food Products, Inc. v. Eli's, Inc., 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); *Opryland USA, supra*.

The Board may not resolve issues of material fact; it may only ascertain whether issues of material fact exist. See, *Lloyd's Food Products*, 987 F.2d at 766, 25 USPQ2d at 2029; *Olde Tyme Foods*, 961 F.2d at 200, 22 USPQ2d at 1542.

In this case, on the record presented, we find that there are genuine issues of material fact remaining for trial. At a minimum, there is a genuine issue with respect to the similarity of the marks, and specifically the commercial impressions of the marks. Given opposer's admissions that a number of sports teams, including other universities, have COWBOY mascots, there is a genuine issue with respect to the extent and strength of opposer's rights in the mark COWBOYS. There are also genuine issues of fact regarding the similarity of the parties' goods that are marketed under their respective marks. Accordingly, opposer's motion for summary judgment is hereby **DENIED**.⁵

has therefore been given no consideration.

⁵ The parties should note that the evidence submitted in connection with the motion for summary judgment is of record only

Proceedings are resumed. Trial dates are reset as follows:

Plaintiff's 30-day Trial Period Ends	8/27/2010
Defendant's Pretrial Disclosures	9/11/2010
Defendant's 30-day Trial Period Ends	10/26/2010
Plaintiff's Rebuttal Disclosures	11/10/2010
Plaintiff's 15-day Rebuttal Period Ends	12/10/2010

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

for consideration of that motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. *See Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993); *Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB (1993); *American Meat Institute v. Horace W. Longacre, Inc.*, 211 USPQ 712 (TTAB 1981). Furthermore, the fact that we have identified certain genuine issues of material fact sufficient to deny opposer's motion should not be construed as a finding that these are necessarily the only issues which remain for trial.