

ESTTA Tracking number: **ESTTA692824**

Filing date: **08/31/2015**

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

Proceeding	91217482
Party	Plaintiff Stokely-Van Camp, Inc.
Correspondence Address	PATRICIA S SMART SMART & BOSTJANCICH 53 WEST JACKSON BOULEVARD, SUITE 832 CHICAGO, IL 60604 UNITED STATES pattismart@hotmail.com
Submission	Reply in Support of Motion
Filer's Name	Patricia S. Smart
Filer's e-mail	pattismart@hotmail.com
Signature	/P S Smart/
Date	08/31/2015
Attachments	SJReply w Defn.pdf(350227 bytes)

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

STOKELY-VAN CAMP, INC.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91217482
)	
JEFF PEARSON,)	
)	
Applicant.)	

**REPLY IN SUPPORT OF
OPPOSER’S MOTION FOR SUMMARY JUDGMENT**

Opposer, Stokely-Van Camp, Inc. submits this Reply in support of its summary judgment motion.

Applicant offers no evidence establishing the existence of a material issue of fact precluding summary judgment. Instead, applicant offers a flawed survey, asks the Board to assume his mark is “Gamer Aid” rather than GamerAid as shown in his application, to disregard goods listed in his application, to assume limitations on his channels of trade, to assume limitations as to his customers, and to disregard the typically inexpensive cost of energy drinks, soft drinks and soda pops. Applicant additionally asks the Board to assume limitations as to opposer’s products and customers and to weigh the fame of opposer’s GATORADE mark against a finding of likelihood of confusion. Applicant then argues that any confusion or dilution will be dispelled by the differences in flavor names, advertising, slogans, logos and packaging. Applicant’s arguments are contrary to the record and well-established law.

When the proper factors are considered, there is no genuine issue of material fact that applicant’s GamerAid mark is likely to cause confusion and to dilute the distinctiveness of opposer’s famous GATORADE mark.

I. RESPONSE TO APPLICANT'S "FACTS" SECTION

Applicant, in his "Facts" section, attempts to create a gulf between the parties' marks and products, but does so by relying on assertions that are not supported by the record.

A. There Is No Support For Applicant's Claim That The Parties' Customers Are Distinct

Applicant acknowledges the fame of opposer's GATORADE mark, but makes the unsupported assertion that opposer's products are only for athletes. *See, e.g.*, Applicant's response to Opposer's Summary Judgment Motion entitled "Applicant's Defense / Appeal Against Motion For Summary Judgment [sic] As Well As Supporting Evidence" (hereafter "Response"), third page. This ignores the testimony that GATORADE products are sold to the general public, as well as athletes, and are consumed by persons attending games or sporting events, as well as those participating in games. Hartshorn Dec. ¶¶ 8, 9.¹ It also ignores opposer's unrestricted registrations.

Applicant asks the Board to assume that the audience for opposer's products does not include persons who are interested in computer games and that persons interested in computer games fall in a group that is separate and apart from those interested in sports. Applicant offers no factual support and ignores the evidence of record relating to electronic sports games in which the GATORADE mark appears. Hartshorn Dec. ¶ 23, Exhs. 7, 8.

B. Applicant's Assertions Regarding His Mark Are Unsupported

Throughout his Response, applicant presents his mark as "Gamer Aid." In the opposed application, the mark is displayed as one word, not two. In response to an inquiry from the Trademark Examining Attorney, applicant clarified that his mark was a standard character mark with the literal

¹ Applicant mistakenly refers to Andrew Hartshorn as the "inventor of GATORADE". As indicated in Mr. Hartshorn's Declaration, he in fact is Senior Marketing Director.

element being GAMERAID.

Dissecting his mark, applicant argues that “Gamer” identifies a person who plays video or computer games and bears no connection to athletic games. The definition cited by applicant, however, encompasses a “person who plays games” other than video or computer games. Applicant fails to mention that Merriam-Webster provides an alternate definition of “gamer” specifically tied to athletics, namely, “a player who is game; *especially* an athlete who relishes competition” (emphasis in original). See attached printout.

Applicant cites a dictionary definition of “Aid” as providing assistance, but ignores the fact that “Aid,” in the context of drink products, is used as an alternate form of “Ade,” as applicant himself notes on the immediately prior page of his Response.

C. Applicant’s Survey Is Fatally Flawed

Applicant offers the results of a survey taken by 310 or so persons described by applicant as the “General Public” around his hometown of Lafayette, Louisiana². No information is provided as to how respondents were selected; nor is information provided as to how the survey was administered except what little can be gleaned from the questionnaire and sheets where respondents recorded answers. A review of the questionnaire and answer sheets reveal that the “survey” was so flawed as to be entitled to no weight.

The form, which apparently was given to respondents, begins by informing respondents that GATORADE and Gamer Aid are separate “product names” and suggests that respondents should rethink the position ascribed to Pepsi that the two names are too similar. Three questions were listed, to which respondents were to write responses on a subsequent page. No information

² Applicant states there were 310 respondents, but in evaluating the responses relies on the responses of 311 persons in whole or in part.

is provided as to what respondents were told when they were given the form and answer sheet or if a respondent happened to ask a question about the form.

The first and third questions related to the ability to distinguish different drink flavors and slogans. Those questions thus address issues that are irrelevant. *See, e.g., Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, 1914-15 (TTAB 2000) (Likelihood of confusion determined by a consideration of the parties' marks). The first question asks "Could you confuse GATORADE drink flavors such as 'Citrus Cooler,' 'Mango Extremo,'" and 'Cool Blue' with Gamer Aid flavors such as 'Power Up,' 'Strengthen Up,' and 'Mind Up'?" thereby again informing respondents that GATORADE and Gamer Aid should be considered to be different.

The middle question, which applicant's Response states was intended to ask about GATORADE and Gamer Aid, suffers from ambiguity. It immediately follows the above question which lists six flavor names. It thus is unclear whether a respondent faced with the question "Based upon reading the names above, would you accidentally purchase the wrong drink?" would understand the question to be asking about those flavor names or the GATORADE and Gamer Aid names displayed at the top of the page.

To the extent that respondents understood the question as applicant indicates that he intended, there are a number of other problems. The survey shows applicant's mark as Gamer Aid, not GamerAid as shown in the application. The question comes after respondents have been told twice that GATORADE and GamerAid are different. Respondents are asked if they would "accidentally purchase the wrong drink" based "upon reading the names," rather than a question directed to the issue before the Board of whether consumers encountering a GamerAid drink in the market place would be likely to mistakenly believe it was connected to GATORADE products.

The administration of the survey also was flawed. Apart from the failure to check for a proper universe of respondents or validate responses, the "survey" was administered in such a way that respondents were asked to record their responses on sheets which allowed them to see how previous respondents had answered the questions before they recorded their own responses. Such an approach necessarily biased subsequent responses.

Given the numerous ways in which the survey falls short of accepted survey practice for determining likelihood of confusion, there is little reason, if any, to look to the tabulation of the results. However, if one looks to the tabulation, it quickly becomes clear that applicant's tabulation of responses also does not follow accepted practice. In addition to miscounting the number of affirmative responses to the second question,³ applicant did not separately calculate the percentage of persons who responded affirmatively to the second question. Rather than divide the number of people he counted as saying "Yes" to the second question by the number of people who gave responses to the question that he did not exclude as improper (310), he divided by the number of responses he received to the three questions that he accepted as proper responses (932).

II. ARGUMENT

There is no genuine issue of material fact that applicant's use of GamerAid is likely to cause confusion with, and to dilute the distinctiveness of, opposer's famous GATORADE mark.

Applicant does not dispute opposer's standing or priority. Applicant also does not dispute and, in fact, expressly acknowledges the fame of opposer's GATORADE mark since prior to the filing of the opposed application.

Applicant argues that there is no likelihood of confusion or dilution, but offers no support for

³ Applicant mistakenly states that none of the responses on the page labelled VII were affirmative. In fact, the eighth respondent said "yes" and the fourth from the end responded "? sound."

his arguments. He argues that opposer offered no evidence, when in fact opposer offered evidence as to the *du Pont* factors relevant to this case. Applicant attempts to rely on premises unsupported by the record. It is well settled that a party cannot rely on conclusory statements to defeat a motion for summary judgment. *See, e.g., Sweats Fashions Inc. v. Pannill Knitting Co.*, 4 USPQ2d 1793, 1797 (Fed. Cir. 1987); *Levi Strauss & Co. v. Genesco, Inc.*, 222 USPQ 939, 941 (Fed. Cir. 1984).

A. Likelihood Of Confusion

1. GATORADE Is a Famous Trademark Entitled To A Broad Scope Of Protection

It is undisputed that GATORADE is a famous mark. Applicant expressly acknowledges the fame of opposer's GATORADE mark, but suggests that the mark is so famous there should be no concern about a likelihood of confusion. This runs directly contrary to the well-established law. *Kenner Parker Toys Inc. v. Rose Art Industries Inc.*, 22 USPQ2d 1453, 1456-57 (Fed. Cir. 1992) (Fame of mark does not "cut both ways" in analysis of likelihood of confusion). Once fame is established, it is the dominant factor and weighs heavily in favor of finding likelihood of confusion. *Recot Inc. v. M.C. Becton*, 54 USPQ2d 1894, 1897-98 (Fed. Cir. 2000). The Board recently addressed the issue of an argument that the fame of opposer's mark could make confusion less likely in *Anheuser-Busch, LLC v. Innvopak Systems Pty Ltd.*, Opposition No. 91194148 (TTAB August 17, 2015), p. 11, n. 7:

Noting Opposer's long and extensive use of its marks on beer (and not wine), Applicant seems to suggest that the very strength of Opposer's mark makes confusion *less* likely. . . . The Federal Circuit has squarely rejected such arguments:

While scholars might debate as a factual proposition whether fame heightens or dulls the public's awareness of variances in marks, the legal proposition is beyond debate. The driving designs and origins of the Lanham Act demand the standard consistently applied by this court – namely, more protection against confusion for famous marks.

Kenner Parker, 22 USPQ2d at 1456. In other words, the fact that a mark is famous can never diminish the scope of protection afforded it.

2. The Parties' Goods Are Legally Identical

Applicant argues that the parties' products differ because applicant only intends to sell energy drinks. The application, at issue, however is for "energy drinks, soft drinks, soda pops."

3. The Channels Of Trade Are The Same

In response to opposer pointing out that the parties' channels of trade are considered the same, applicant states that he would be amenable to restrictions as to sports venues or other athletically-related channels of trade. Given the wide variety of trade channels used by opposer, such a restriction would not prevent an overlap in the parties' channels of trade. Moreover, a statement in applicant's Response does not change the fact that the application contains no restriction and applicant's goods consequently must be assumed to travel in the channels of trade normal for such goods. *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 23 USPQ2d 1945, 1946 (Fed. Cir. 1992).

4. The Parties' Customers Are The Same

Applicant contends that the customers for Gatorade products are athletes, while applicant's desired customers are lazy people who "don't want to move away from the tv." As discussed above, there is no support for applicant's contention that GATORADE products are sold only to athletes. GATORADE products are sold to the general public. The lack of any restriction in applicant's application requires an assumption that applicant's goods would be sold to all classes of prospective purchasers for the goods in question. *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). The customers for the parties' products are the same.

5. The Parties Products Are Relatively Inexpensive

Applicant argues that there is no way to know that his goods will be relatively inexpensive.

The goods recited in applicant's application, however, are not limited to ones of a certain cost and must be assumed to include those sold at a typical, relatively inexpensive price point. *See, e.g., Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002); *In re Hughes Furniture Industries, Inc.*, 114 USPQ2d 1134 (TTAB 2015) (Applicant cannot rely on high cost of its goods where the description of goods in the application is broad enough to encompass low cost goods as well).

6. The Marks Are Confusingly Similar

Applicant argues that if one compares GATORADE and "Gamer", they are different. Applicant's argument is a *non sequitur*. Applicant's mark is GamerAid not Gamer and it is axiomatic that the parties' marks are to be compared in their entirety. *In re E.I. du Pont de Nemours & Co.*, 177 USPQ 563, 567 (CCPA 1973). When the marks are compared in their entirety, both are three syllable marks which are virtually identical in sight and sound. The marks rhyme and have identical cadence and differ in sound only in the middle letters.

7. Other "Factors" Raised By Applicant

Applicant argues that he intends to use different flavor names, advertising, packaging and logos than opposer uses and that his survey shows no confusion. Differences in flavor names, advertising, logos or packaging are irrelevant. Likelihood of confusion is determined by looking to the mark sought to be registered. *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, 1914-15 (TTAB 2000). Survey evidence can be relevant if a survey is conducted in accord with generally-accepted principles and methodology insuring that, *inter alia*, the universe is properly defined and chosen, the survey questions are properly formulated and presented, interviews are conducted in a manner to minimize bias and error, and the data is properly collected and analyzed. Here, the survey offered by applicant fails to meet that criteria and instead is fatally

flawed and entitled to no weight.

8. Confusion Is Likely

A consideration of the likelihood of confusion factors establishes that there is no genuine issue that confusion is likely. Applicant has applied to register a mark strikingly similar to opposer's famous GATORADE mark for legally identical and closely related goods to be sold to the same customers through the same channels of trade. In addition, the goods are low-cost goods which may be purchased on impulse. There is no genuine issue of material fact that there is a likelihood of confusion. Opposer should be granted summary judgment on its 2(d) claim.

E. Dilution

Applicant argues that dilution is unlikely "once logos, advertising for target demographics and BRANDING have been revealed or created by Gamer Aid." Applicant's Response, sixteenth page. Dilution, however, must be determined by consideration of the parties' marks, not collateral matter such as an intended logo. *See, e.g., Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, 1914-15 (TTAB 2000). Moreover, here, applicant's proposed slogan "Not For Athletes" constitutes a tacit admission that consumers encountering applicant's GamerAid mark would think of GATORADE.

There is no genuine issue of material fact that opposer's GATORADE has been a famous and distinctive mark since prior to applicant's priority date or that applicant's strikingly similar GamerAid mark is likely to evoke opposer's GATORADE mark and dilute the GATORADE mark. Summary judgment should be granted on the grounds of dilution.

III. CONCLUSION

For the foregoing reasons, opposer requests that its opposition to applicant's GamerAid application be sustained.

CERTIFICATE OF SERVICE

I, Patricia S. Smart, an attorney for opposer, hereby certify that a copy of the foregoing Reply In Support Of Opposer's Motion For Summary Judgment is being served upon Jeff Pearson, 508 Saint Camille St., Lafayette, Louisiana 70506-4321, this 31st day of August 2015, by first class mail, postage prepaid.

By: / P S Smart /

ATTACHMENT



Dictionary | Thesaurus | Medical | Scrabble® | Spanish Central

Browse Dictionary | Browse Thesaurus

gamer

SEARCH >

Get our free apps! iPhone • iPad • Android

MARKET ONE TO ONE TO MILLIONS [LEARN HOW](#) **CONVERSANT**

Richer individual profiles and better targeting drive outstanding results.

Games | Word of the Day | Video | Blog: Words at Play | My Faves

Dictionary

gamer

noun | gam·er | \ˈgā-mər\

SAVE POPULARITY

Share

- 1 : a person who plays games and especially video or computer games
- 2 : a person who is game; *especially* : an athlete who tries very hard to win games, competitions, etc.

6 of our favorite terms for money and luxury »

Full Definition of GAMER

- 1 : a player who is game; *especially* : an athlete who relishes competition
- 2 : a person who plays games; *especially* : a person who regularly plays computer or video games

See gamer defined for English-language learners »

ADVERTISEMENT



Sponsored By Microsoft

Collaborate with Office Online

Save documents, spreadsheets, and presentations online, in OneDrive. Share them with others and work together at the same time. Get started now, it's free!

Ask The Editor Videos

Lay vs. Lie

'Try and' vs. 'Try to'

Word of the Day | AUGUST 31, 2015

vaudeville

stage entertainment with various acts

Get the Word of the Day daily email!

Your email address [SUBSCRIBE >](#)

BOOK at HILTON.COM

We'll match any lower rate and give you **\$50**

Hilton HOTELS & RESORTS [BOOK NOW >](#)

Words at Play

Drones Are Everywhere Now

A Handy Guide to Ruffians, Rapsallions, Cads & More

www.koreanair.com

Book Now and Save on flights to Asia

Word Games

Take a 3-minute break and test your skills!