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TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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gmm

Mailed: October 28, 2015

Opposition No. 91217482

Stokely-Van Camp, Inc.

v.

Jeff Pearson

**Before Richey, Deputy Chief Administrative Trademark Judge,
and Bergsman and Wolfson, Administrative Trademark Judges:**

By the Board:

Jeff Pearson (“Applicant”) filed an application to register the mark GAMERAID, in standard character form, for “Energy drinks; Soft drinks; Soda pops,” in International Class 32.¹

Stokley-Van Camp, Inc., (“Opposer”) opposes registration of Applicant’s mark on the grounds of likelihood of confusion and dilution by blurring, based on its previously used and registered GATORADE and GATORADE-formative marks for various beverages; food bars and food chews; entertainment and educational services relating to athletics, exercise, sports science, and sports medicine; and ancillary products including coolers, ice chests, beverage ware, clothing, watches, towels, duffle bags and luggage, golf bags, golf balls, and head covers for golf clubs.

¹ Application Serial No. 86076424, filed on September 27, 2013, based on an allegation of bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. 1051(b).

Opposer's twenty-two pleaded registrations include ten registrations for GATRORADE-formative marks for beverages. We will confine our decision to a consideration of the likelihood of confusion between Applicant's mark and Opposer's Registration No. 848245 for GATORADE in typed form for "fruit flavored soft drink and powder for making the same" in International Class 32, issued April 30, 1968, and renewed twice. We do so because this registration for the mark and identified goods, when considered vis-à-vis the applied-for mark and identified goods, is most likely to support a finding of likelihood of confusion on summary judgment. *See, e.g., In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

In his answer to the notice of opposition, Applicant, who is appearing *pro se*, admitted, among other things, that Opposer has prior use of its pleaded marks "in connection with beverage and food products, including sports drinks and soft drinks" (Answer, ¶ 2); that Opposer is the owner of its pleaded registrations for the marks GATORADE, GATORADE PRIME, and GATORADE RECOVER for goods including beverages (Answer, ¶¶ 3–6); that Opposer's GATORADE mark became distinctive and famous prior to the filing of the subject application (Answer, ¶ 7); and that Applicant adopted the GAMERAID mark with the knowledge of Opposer's GATORADE mark and products (Answer, ¶ 16). In his answer, Applicant denied only that there is a likelihood of confusion between the marks and that use of Applicant's mark is likely to dilute the distinctive quality of Opposer's GATORADE mark.² Additionally, Applicant qualified some of his admissions with the assertion

² Because Opposer did not specifically allege that Applicant's mark is similar to the GATORADE mark and that the goods on which Applicant intends to use his mark are

that because of the distinctiveness and fame of Opposer's GATORADE mark, the mark GAMERAID is not likely to be confused with the GATORADE mark.

This case now comes up for consideration of Opposer's August 3, 2015, motion for summary judgment on its pleaded claims of likelihood of confusion under Section 2(d) of the Trademark Act and dilution by blurring under Section 43(c) of the Trademark Act. The motion has been fully briefed.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the initial burden of demonstrating that there is no genuine dispute of material fact remaining for trial and that it is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1987); *Sweats Fashions Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793 (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 Am. Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992); *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed.

related to the goods on which the GATORADE mark is used, Applicant did not have to admit or deny such allegations.

Applicant denied paragraphs 14 and 15 of the notice of opposition, in which Opposer alleges that Applicant has made no use of the GAMERAID mark shown in the involved application (¶ 14) and made no use of the GAMERAID mark prior to the filing date of the involved application (¶ 15). However, Applicant's denials appear to be predicated on its use of the mark on goods other than those identified in the involved application. In his answer to paragraph 14 Applicant admits that the mark is not in use on energy drinks, soft drinks, or soda pops. *See* Answer, ¶¶ 14 – 15. In any event, these answers have no bearing on our decision.

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 Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); *Opryland USA*, 23 USPQ2d at 1472. The Board may not resolve issues of material fact; it may only ascertain whether issues of material fact exist. *See, Lloyd's Food Prods.*, 987 F.2d at 766, 25 USPQ2d at 2029; *Olde Tyme Foods*, 961 F.2d at 200, 22 USPQ2d at 1542.

As a plaintiff moving for summary judgment on its Section 2(d) claim, Opposer must establish that there is no genuine dispute that (1) it has standing to maintain this proceeding; (2) it owns a registration for or is the prior user of its pleaded marks; and (3) the contemporaneous use of the parties' respective marks on their respective goods would be likely to cause confusion or mistake, or to deceive consumers. *See Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 USPQ2d 1733, 1735 (TTAB 2001).

There is no dispute regarding Opposer's standing to oppose registration of Applicant's mark. Opposer submitted as exhibits to its notice of opposition copies of its pleaded registrations from the USPTO TSDR database showing the current status of and title to Opposer's pleaded registrations. Thus, Opposer's pleaded registrations establish its standing. *See Trademark Rule 2.122(d)(1); Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000).

In view of Opposer's ownership of valid and subsisting registrations of its GATORADE mark, Opposer's priority is not in issue with respect to the goods and

services identified in those registrations. *Penguin Books Ltd. v. Eberhard*, 48 USPQ2d 1280, 1286 (TTAB 1998) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)). Further, as noted above, Applicant admitted Opposer's allegation that "[s]ince long prior to the filing date of the application opposed herein, opposer has used the mark GATORADE and other GATORADE marks in connection with beverage and food products, including sports drinks and soft drinks."³ This admission of fact is conclusive as to the issue of priority. *See Brown Co. v. Am. Stencil Mfg. Co., Inc.*, 180 USPQ 344, 345 n. 5 (TTAB 1973) (admission during pleading results in estoppel precluding ability to prove anything to the contrary).

In determining the issue of likelihood of confusion and, in this case, whether there is any genuine issue of material fact, we consider all of the *DuPont* factors which are relevant under the present circumstances and for which there is evidence of record. *See E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

We first consider the fifth *DuPont* factor, the fame of Opposer's GATORADE mark. Fame, when present, plays a dominant role in a likelihood of confusion analysis because of the broad scope of protection afforded famous or strong marks. *Kenner Parker Toys Inc. v. Rose Art Indus. Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 862, 113 S.Ct. 181 (1992); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000) (citing *Kenner*

³ See paragraph 2 of Opposer's notice of opposition and Applicant's answer.

Parker). Here, Applicant has admitted Opposer's allegation that Opposer's pleaded "GATORADE mark is a famous mark and has been a famous mark since prior to the filing date of the application opposed herein."⁴ This admission of fact is conclusive as to the fame of the GATORADE mark. *See Brown Co. v. Am. Stencil Mfg. Co., Inc.*, 180 USPQ at 345 n. 5.

In view of Applicant's admissions that the GATORADE mark is distinctive and famous, Opposer's GATORADE mark is entitled to a broad scope of protection. Applicant's assertion that the fame of Opposer's GATORADE mark renders confusion less likely because consumers might more readily recognize variances from a famous mark is contrary to established precedent and therefore unpersuasive. It is well-settled that famous marks deserve and receive greater legal protection precisely because they are more likely to be remembered by consumers. *See Recot*, 54 USPQ2d at 1897. The fame of a plaintiff's mark therefore "can never be of little consequence," nor can fame "cut both ways" in our likelihood of confusion analysis. *Recot*, 54 USPQ2d at 1897 (citation omitted); *Kenner Parker*, 22 USPQ2d at 1456. As a matter of law the fame of a plaintiff's previously registered or used mark can never support a junior party; this *DuPont* factor can only support the senior party. *See Kenner Parker*, 22 USPQ2d at 1456 ("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."); *L'Oreal S.A. v.*

⁴ See paragraph 11 of Opposer's notice of opposition and Applicant's answer.

Marcon, 102 USPQ2d 1434, 1438 (TTAB 2012) (citing *Kenner Parker*). Accordingly, we find no genuine issue that Opposer's pleaded GATORADE mark is famous.

Considering next the goods involved, we note that the goods identified in the involved application and Opposer's pleaded Registration No. 848245 are legally identical with respect to soft drinks. Applicant seeks registration of its mark for "Energy drinks; Soft drinks; Soda pops." In comparison, Opposer's GATORADE mark is registered for "fruit flavored soft drink and powder for making the same." Although Applicant asserts that he has "no intention of making soft drinks," the issue of likelihood of confusion must be determined on the basis of Applicant's goods as they are set forth in the identification of goods in his involved application. *See Octocom Sys. Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1109 (TTAB 2007).

It is sufficient for a finding of likelihood of confusion that relatedness of the goods is established for any item encompassed by the identification of goods in a class in the application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014); *General Mills Inc. v. Fage Dairy Processing Industry SA*, 100 USPQ2d 1584, 1588 n.1 (TTAB 2011), *judgment set aside on other grounds*, 2014 WL 343267 (TTAB Jan. 22, 2014); *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1397 (TTAB 2007).

Accordingly, there is no genuine issue that the goods are legally identical with respect to soft drinks.

Because the goods in the application are legally identical to those in Opposer's Registration No. 848245, we must presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011).

Considering now the similarity or dissimilarity of the respective marks, we note that in cases where the plaintiff's mark is famous and the goods and services are legally identical, the degree of similarity between the marks necessary to support a finding of likelihood of confusion declines. *See, e.g., Nina Ricci, S.A.R.L. v. E.F.T. Enters., Inc.*, 889 F.2d 1070 (Fed. Cir. 1989), 12 USPQ2d 1901 (Fed. Cir. 1989); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 877, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), *cert denied*, 506 U.S. 1034 (1992). In this regard, we note that "[t]he fame of a trademark may affect the likelihood purchasers will be confused inasmuch as less care may be taken in purchasing a product under a famous name." *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*,

748 F.2d 669, 675, 223 USPQ 1281, 1284 (Fed. Cir. 1984). “There is no excuse for even approaching the well-known mark of a competitor.” *Nina Ricci, S.A.R.L. v. E.T.F.Enters.*, 889 F.2d 1070, 12 USPQ2d 1901, 1904 (Fed. Cir. 1989) (quoting *Planter’s Nut & Chocolate Co. v. Crown Nut Co.,Inc.*, 305 F.2d 916, 134 USPQ 504, 511 (CCPA 1962) .

Applicant’s GAMERAID mark⁵ does not contain any design elements; rather Applicant has applied to register the wording GAMERAID in standard character form. Similarly, the mark shown in Opposer’s Registration No. 848245 is the term GATORADE in typed form.⁶ “Standard character” marks are registered “without claim to any particular font style, size, or color,” and the rights associated with standard character marks reside in the wording and not any particular graphic presentation. *See* Trademark Rule 2.52(a); *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (“[T]he argument

⁵ In his response to Opposer’s motion, Applicant refers to his mark as “Gamer Aid” (two words) and argues this as a point of difference between the parties’ respective marks. However, the involved application displays the mark as “GamerAid” (one word) in standard character form. In any event, it is well settled that the presence or absence of a space between the two words is an inconsequential difference that even if noticed or remembered by consumers would not serve to distinguish these marks. *See, e.g., Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1025 (TTAB 2009) (finding that DESIGNED TO SELL does not create a distinct commercial impression from DESIGNED2SELL); *Seaguard Corp. v. Seaward Int’l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (SEA GUARD and SEAGUARD are “essentially identical”); *In re Best Western Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (“there can be little doubt that the marks [BEEFMASTER for restaurant services and BEEF MASTER for frankfurters and bologna] are practically identical and indeed applicant has not argued otherwise.”).

⁶ A “typed” drawing is the legal equivalent of a “standard character” drawing. Prior to November 2, 2003, “standard character” drawings were known as “typed” drawings. Trademark Manual of Examining Procedure § 807.03(i) (July 2015).

concerning a difference in type style is not viable where one party asserts rights in no particular display”). *See also Kimberly Clark Corp. v. H. Douglas Enterprises, Ltd.*, 774 F.2d 1144, 1147, 227 USPQ 541, 543 (Fed. Cir. 1985) (“[A] distinction in trade dress cannot weigh against likelihood of confusion with respect to the registration of a simple word mark like DOUGHIES. The reason is that such dress might well be changed at any time; only the word mark itself is to be registered.”) For these reasons, Applicant’s arguments regarding potentially distinguishing logos, designs, or packaging fail to raise any issues of fact regarding the stylization or graphic display of the parties’ marks for purposes of determining likelihood of confusion.

In comparing the marks, we find that while they have minimal visual similarity, the dominant factor for consideration is the likelihood of confusion arising from the similarity in sound of the two terms when spoken. Both Opposer’s GATORADE mark and Applicant’s GAMERAID mark consist of three syllables beginning with the letters “GA-” and ending with the phonetically identical syllables “-ADE” and “-AID.” When considered in their entirety, the nearly identical sounds of the respective marks create a strong phonetic similarity. *See TBC Corp. v. Holsa, Inc.*, 126 F.3d 1470, 44 USPQ2d 1315 (Fed. Cir. 1997) (GRAND SLAM found confusingly similar to GRAND AM); *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910 (TTAB 2000) (confusion likely between HO HOs and YOYOs both for snack cakes, due to similarity in sound); *Hoffmann-LaRoche Inc. v. Knoll Pharmaceutical Co.*, 167 USPQ 183 (TTAB 1970) (TARUXAN and TARACTAN likely to be confused

because both marks comprised of three syllables and both begin with “TAR” and end with “AN”). In view of the fact that famous marks such as Opposer’s GATORADE mark are accorded a wide latitude of protection, we do not find the distinctions between the marks sufficient to obviate the strong similarity between them. *See Recot Inc. v. M.C. Becton*, 54 USPQ2d at 1899 (Board must consider the similarity or dissimilarity of the marks in their entireties with respect to appearance, sound and connotation, not simply difference in connotation between FIDO LAY and FRITOLAY). Moreover, as noted, similarity as to any one of the foregoing may be sufficient to support a likelihood of confusion. *See, e.g., Krim-Ko Corp. v. Coca-Cola Bottling Co. of NY*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”).

Because every *DuPont* factor that we have considered weighs in favor of Opposer, we find no genuine issue that Applicant’s GAMERAID mark is likely to cause confusion with Opposer’s GATORADE mark.

Finally, we find that Applicant’s proffered customer survey does not raise a genuine issue of material fact with respect to likelihood of confusion. A survey is admissible only when it has been shown that the survey is relevant and was designed and conducted according to generally-accepted principles and methodology. *See M2 Software, Inc., v. Madacy Entm’t*, 421 F.3d 1073, 1087, 76 USPQ2d 1161, 1171 (9th Cir. 2005); *Baumholser v. Amax Coal Co.*, 630 F.2d 550, 552 (7th Cir. 1980); *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1054 (5th Cir. 1981); *ProMark Brands Inc. and H.J. Heinz Company v. GFA*

Brands, Inc., 114 USPQ2d 1232, 1247 (TTAB 2015). “[I]f the survey is fairly and scientifically conducted, loss of the ability to cross-examine interviewees should not detract from the probative value of the survey.” 5 J. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 32:167 (4th ed. 2015) (hereinafter “*McCarthy*”).

Applicant has not attempted to establish that his survey was conducted in accordance with accepted principles of survey research.⁷ There is no evidence that the survey was prepared and administered by or with the assistance of a survey professional. *See* Fed. R. Evid. 702 (testimony by expert witnesses); *M2 Software*, 76 USPQ2d at 1171 (survey rejected because its creator “did not qualify as an expert on designing or analyzing consumer surveys”); *Pfizer Inc. v. Sachs*, 652 F. Supp. 2d 512, 521, 92 U.S.P.Q.2d 1835, 1839 (SDNY 2009) (*pro se* defendants did not consult survey experts and their *ad hoc* genericness “survey” was “flawed methodologically”). Rather, it appears that Applicant designed and conducted the survey by himself. There is no evidence in the record to suggest that Applicant has any expertise in conducting surveys and the survey is not based on generally acceptable standards of survey techniques. *See*, Fed. R. Evid. 702; *Hilson Research, Inc. v. Society for Human Res. Mgmt*, 27 USPQ2d 1423, 1437 (TTAB 1993);

⁷ For example, the Board has stated that the trustworthiness of surveys depends on evidence that (1) the “universe” was properly defined and chosen, (2) the survey questions were properly formulated and presented, (3) the interviews were conducted in a manner to minimize error and bias, (4) the data were properly coded, collected, and later analyzed; and (5) the survey reports are complete and appropriately detailed. *ProMark Brands*, 114 USPQ2d at 1247-48 (citing *McCarthy* at §§ 32:158-32:196; Shari Seidman Diamond, *Reference Guide on Survey Research, Reference Manual on Scientific Evidence* 229 (2d ed. Fed. Jud. Ctr. 2000)).

McCarthy §§32.158-32.196. For these reasons alone, Applicant's survey is entirely lacking in trustworthiness and not entitled to any probative value. We therefore need not address in detail the obviously leading nature of the survey questions and other flaws in its methodology.⁸ Opposer's objections to Applicant's "survey" are sustained and the "survey" has been given no consideration.

We accordingly find that Opposer has carried its burden of proof that no genuine issues of material fact remain as to likelihood of confusion and that Opposer is entitled to judgment as a matter of law on that claim.

In view thereof, Opposer's motion for summary judgment is granted with regard to the likelihood of confusion claim. Having found that Opposer is entitled to summary judgment on the issue of likelihood of confusion, we need not and do not reach Opposer's claim of dilution.

Judgment is hereby entered against Applicant, the opposition is sustained, and registration to Applicant is refused.

⁸ At a minimum, the survey was clearly leading, beginning with the prefatory statement "[a]ccording to Pepsi this product name (GATORADE) is too similar to this product name (GAMER AID) but what do YOU think?" and including the question "[b]ased upon reading the names above, would you *accidentally* purchase the *wrong* drink?" (emphasis added). The survey clearly was designed to elicit the response that the respective marks are not similar. The survey also was limited to participants near Applicant's hometown of Lafayette, Louisiana, with no explanation of the criteria used to select the universe of potential respondents and then select a representative sample of actual respondents.