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

Proceeding	92061796
Party	Defendant Kingston Technology Corporation
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Submission	Motion to Dismiss - Rule 12(b)
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Regarding descriptiveness, Spansion's current Amended Petition *addresses* descriptiveness by evaluating HYPERX first as a compound term consisting of "hyper" and "x" and then drawing "descriptive connotations" therefrom. However, in the Count, descriptiveness of "hyper" is expressly denied by the Petitioner, Spansion. Without addressing the whole of the term "hyperx", the descriptiveness allegation is fatally incomplete. Further, the "descriptive connotations" present irrelevant interpretations beyond immediate relevant meaning of HYPERX SKYN.

To overcome Spansion's own express denial that "hyper" is not descriptive, Spansion also pleads a contingent allegation of descriptiveness. The contingency rests upon the possibility of a yet to be determined ruling of the Board in a separate proceeding. The issue to be ruled on is solely based on the pleadings of Kingston to a contextually different trademark, HYPERRAM, with wholly different goods. There are no factual allegations that this yet to exist ruling of the Board will be relevant to the current Amended Cancellation. It is well recognized in trademark evaluation that great variation in facts from case to case prevents the formulation of specific rules for specific fact situations.

## **I. STATEMENT OF FACTS**

### *a. The Mark At Issue*

In its Amended Petition for Cancellation, Spansion seeks a requirement that the term HYPERX be disclaimed in Trademark Registration No. 4,721,432 for HYPERX SKYN. The goods covered by this Registration are in International Class 009 for:

Computer accessories, namely, mouse pads for use with electronic and online gaming.

*b. The Count*

Spansion's Amended Petition for Cancellation alleges that the term HYPERX in Kingston's Registration No. 4,721,432 for HYPERX SKYN is "merely descriptive".

*c. Standing*

In the Amended Petition, Spansion describes its own line of commerce as "computer memory products and embedded systems solutions". Amd. Pet. ¶ 1. Spansion does not allege that these goods are similar, related to or even competing with the goods described in the HYPERX SKYN Registration of Kingston. The goods of the mark at issue are mouse pads for gaming. Further, Spansion does not allege that it has a presence in the gaming industry.

Spansion alleges that the HYPERX SKYN Registration of Kingston is part of an attempt by Kingston to develop a family of HYPERX marks and that Spansion is damaged thereby. Amd. Pet. ¶ 16:

Spansion is damaged by Kingston's attempts to develop a family of "HYPERX" marks in the electronics and computer industries, while simultaneously taking inconsistent positions as to the descriptiveness of the "HYPER" element in the marks at issue in pending Opposition No. 912818100 and the "HYPERX" applications which are the subject of the instant proceeding.

Spansion does not allege in this Amended Petition for Cancellation how an attempt by Kingston to develop a family of marks using HYPERX brings injury upon Spansion. Further, Spansion also does not allege how the specific HYPERX SKYN Registration of Kingston contributes to a family of marks in a way bringing injury upon Spansion.

*d. Descriptiveness*

To assert descriptiveness in the Amended Petition, Spansion addresses HYPERX as a compound term consisting of “hyper” and “x”. Amd. Pet. ¶¶ 18-20. Turning first to “hyper”, the Amended Petition expressly denies that “hyper” is descriptive in the Count itself, Amd. Pet. ¶ 22:

As set forth in its Answer in Opposition No. 91218100, Spansion denies that the prefix “HYPER” is a merely descriptive term as applied to electronic and computer goods or that its mark HYPERRAM is descriptive.

In the same paragraph of the Count, Spansion alleges a contingent allegation based on the possibility of a yet to exist ruling of the Board in a separate proceeding involving the parties here:

However, to the extent that the Trademark Trial and Appeal Board finds otherwise [Opposition No. 91218100], Kingston's use of the prefix “HYPER” in conjunction with the non-distinctive character “X” to form the composite mark HYPERX for computer and electronics products, namely mouse pads for use with online and electronic gaming,” is likewise merely descriptive, as it simply constitutes a combination of the same prefix “HYPER” and the highly descriptive term “X,” collectively used to connote high-speed and extreme gaming functionality.

The separate proceeding, Opposition No. 91218100, involves the trademark, HYPERRAM, a differently contexted, compound term. The term combines an exactly descriptive noun “RAM” with an adjective operating as a laudatory modifier, “hyper” and involves wholly different goods than associated with the mark at issue in the present Cancellation. The goods in the opposed HYPERRAM Application, inclusive of random access memories, are:

Volatile memory devices, namely, random-access memory semiconductor chips; applications and utility software for functions associated with

random-access volatile memory devices, namely, code and data management software and random-access memory semiconductor chip drivers

The goods in the Registration at issue are mouse pads. There are no factual allegations in the Amended Petition that any yet to exist ruling of the Board will be relevant to the present Cancellation.

## **II. STANDARD FOR DISMISSAL PURSUANT TO RULE 12(b)(6)**

An Applicant may file a motion to dismiss claims made in the TTAB under Fed. R. Civ. P. 12(b)(6) where the petitioner has failed to allege a claim upon which relief may be granted. See TBMP § 503.02; *Welcome Foundation Ltd. V. Merck & Co.*, 46 USPQ2d 1478, 1479 (TTAB 1198); see also e.g. *Libertyville Saddle Shop Inc. v. E. Jeffries & Sons Ltd.*, 22 USPQ2d 1994 (TTAB 1992).

A Rule 12(b)(6) motion to dismiss is a test of the legal sufficiency of the claim(s), and the Board must construe the claim(s) in the light most favorable to the claimant. *Carano v. Concha Y Toro S.A.*, 67 USPQ2d 1149, 1150 (TTAB 2003). However, “[c]onclusory allegations are insufficient to preclude dismissal” and are ignored in considering a Rule 12(b)(6) motion to dismiss. *Howard v. America Online, Inc.*, 208 F.3d 741, 750 (9<sup>th</sup> Cir. 2000).

The Supreme Court has held that “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007). The complaint must provide “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on

its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Similarly, the Board has held that a Notice of Opposition or Petition for Cancellation “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Robert Doyle v. Al Johnsons Swedish Rest. & Butik, Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

With respect to proceedings before the Board, to survive a motion to dismiss for failure to state a claim, a plaintiff must establish (1) standing to maintain the proceedings and (2) valid grounds against the mark. *See Bayer Consumer Care AG v. Belmora LLC*, 90 USPQ2d 1587, 1590 (TTAB 2009); *see also Carano v. Vina Concha Y Toro S.A.*, 67 USPQ2d 1149 (TTAB 2003) (dismissing a Notice of Opposition on the sole basis of failure to set forth a claim).

### **III. ARGUMENT**

#### *a. Standing*

Spansion seeks the Board to modify the registered mark HYPERX SKYN through this proceeding by a disclaimer of the term “hyperx” as descriptive. The pleadings in this Amended Petition for Cancellation fail to detail any damage Spansion will incur through the retention of the HYPERX SKYN mark without disclaimer. As such, Spansion has failed to allege facts sufficient to provide notice of its claims that it has standing to bring the present cancellation proceeding. *Young v. AGB Corp.* 152 F.3d 1377, 47 USPQ2d 1752, 1755 (Fed. Cir. 1998).

The Amended Petition describes Spansion as a leading manufacturer of “computer memory products and embedded systems solutions.” Amd. Pet. ¶ 1. The

goods of the Kingston mark at issue are principally mouse pads for gaming. These have nothing to do with the business of Spansion, which it describes as computer memory and computer embedded systems. Spansion does not allege that the Spansion computer memory and computer embedded systems are similar, related to or even competing with the goods described in the Registration at issue. Spansion specifically recognizes that the Kingston goods of the mark at issue are for gaming, Amd. Pet. ¶¶ 12, 15, but again does not allege that the Spansion computer memory or computer embedded systems are similar, related to or even competing with gaming products. Further, Spansion does not claim likely confusion of registered mark HYPERX SKYN with any prior existing rights of Spansion.

Statutory standing in a trademark cancellation proceeding requires that the petitioner state why it believes to be damaged by the registration at issue. See 15 U.S.C. § 1064. The TTAB has determined that a petitioner in a descriptiveness allegation must have a “real interest in the proceeding”. See *No Nonsense Fashions, Inc. v. Consolidated Foods Corporation*, 226 U.S.P.Q. 502, \*2 (TTAB 1985) (“an essential element of proof in any opposition...proceeding is that the opposer... possess a ‘real interest’ in the proceeding”). In order to allege sufficient standing when alleging mere descriptiveness, an opposer must be a competitor of applicant “in respect of the concerned goods.” *Id.* The Statement of Facts above document a failure of Spansion to allege as well as fail to detail the requisite allegations of “damage” from the specific Registration at issue for HYPERX SKYN.

Spansion does allege damage related to an attempt to develop a family of marks,

Amd. Pet. ¶ 16:

Spansion is damaged by Kingston's attempts to develop a family of "HYPERX" marks in the electronics and computer industries, while simultaneously taking inconsistent positions as to the descriptiveness of the "HYPER" element in the marks at issue in pending Opposition No. 912818100 and the "HYPERX" applications which are the subject of the instant proceeding.

The logic here appears illusive. Is it the attempt or the purported inconsistency which is alleged to cause damage? There is no allegation of how an attempt to create a family of marks damages Spansion. More to the point, there is no allegation of fact in the Amended Petition providing a nexus between damage to Spansion and any contribution to a family of marks of the term HYPERX in the HYPERX SKYN Registration.

In addition, the alleged "inconsistent positions" is effectively disavowed in the Count of the Amended Petition. Amd. Pet. ¶ 22. Because of the disavowal, there is no claim that the term "hyperx" is descriptive. Not being descriptive, any family of marks based thereon cannot be subject to complaint without some prior opposing right. None is pleaded. In the same paragraph of the Count, descriptiveness is contingently pleaded by Spansion based on a yet to exist order of this Board in another matter, Opposition No. 91218100. As detailed in the discussion on descriptiveness below, this yet to exist order of this Board will likely not pertain to the registered mark at issue here. The mark, HYPERRAM, and the identified goods, relevant to any descriptiveness inquiry, are quite diverse. See *In re Ampco Foods, Inc.*, 227 USPQ 331 (TTAB 1985); *In re Venturi, Inc.*, 197 USPQ 714 (TTAB 1977).

Spansion's own characterization of its business, Amd. Pet. ¶ 1, the Kingston goods recited in the HYPERX SKYN mark at issue, the failure to allege competition, the lack of any relationship between goods or any common field of use, the disavowal of descriptiveness of the term "hyperx", Amd. Pet. ¶ 22, and the lack of any relevance of the alleged attempt to create a family of marks all evidence a failure to allege any real interest necessary to establish the presence of standing for this Amended Petition for Cancellation.

*b. Descriptiveness*

A complaint must provide factual matter to state a claim. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 *supra*; *Ashcroft v. Iqbal*, *supra*.; *Robert Doyle v. Al Johnsons Swedish Rest. & Butik, Inc.*, *supra*. A mark must be "considered in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 963-64 (Fed. Cir. 2007).

The Amended Petition does not provide factual matter sufficient to state a claim. To support descriptiveness in the Amended Petition for Cancellation, Spansion addresses HYPERX as a compound term consisting of "hyper" and "x", principally found in Amd. Pet. ¶¶ 18-20. However, all Spansion statements as to the meaning and prominence of "hyper-" are expressly denied by Spansion in the Amended Petition. Amd. Pet. ¶ 22. With this denial, the component "hyper-", the whole of the word

HYPERX and the whole of the mark HYPERX SKYN in this parsed analysis are not addressed, making the descriptiveness allegation fatally incomplete.

Presumably in an attempt to blunt the express denial, a contingent allegation of descriptiveness based on the possibility of a yet to exist ruling of the Board in a separate proceeding, Opposition 91218100, is presented, also in Amd. Pet. ¶ 22. However, the analysis of HYPERX cannot be equated with the analysis of HYPERRAM. The great variation in facts from case to case prevents the formulation of specific rules for specific fact situations. Each case must be decided on its own merits. *See In re Ampco Foods, Inc.*, 227 USPQ 331 (TTAB 1985); *In re Venturi, Inc.*, 197 USPQ 714 (TTAB 1977).

HYPERRAM is a contextually different trademark from HYPERX. HYPERRAM contracts “hyper” with a descriptive noun “RAM”. “RAM” is particularly inclusive of the described goods and universally recognized as meaning random access memory. The portions of the mark are intuitively separable and define a noun with laudatory significance. *Duopross Meditech Corp. v. Inviro Medical Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753 (Fed. Cir. 2012). “Hyperx” of HYPERX SKYN is fanciful or suggestive and is incomplete if divided, as illustrated below. Additionally, the separate proceeding includes different goods, random access memories. HYPERRAM must be considered in relation to the particular goods for which registration is sought. *In re Bayer*, supra. HYPERX SKYN in the Registration at issue is applied to mouse pads. Further telling is that the Amended Petition for Cancellation makes no factual

allegations that the yet to exist ruling of the Board in Opposition 91218100, if issued, will be relevant in this matter.

Looking to the relevance of the yet to be rendered ruling regarding HYPERRAM in Opposition 91218100 for completeness of this Brief, the “descriptive connotations” presented by Spansion in Amd. Pet. ¶ 11, based upon allegations of Kingston as to the mark HYPERRAM in Opposition 91218100, Amd. Pet. ¶¶ 5-8, are not taken directly from the elements of the HYPERX SKYN mark. The connotations are not the marks. Rather, components of the term “hyperx” are construed by connotation and without context to derive sense from the mark, HYPERX SKYN, Amd. Pet. ¶ 11. When observed literally, without preconceived intention to arrive at “descriptive connotations”, “hyperx” is a fanciful term which creates a suggestion, not immediate knowledge of the goods in a descriptive sense directed to a quality, feature, function or characteristic. See *Stix Prods., Inc. v. United Merchants & Mfrs., Inc.*, 160 U.S.P.Q. 777 (S.D.N.Y. 1968); *In re Bed & Breakfast Registry*, 229 U.S.P.Q. 818 (Fed. Cir. 1987); *Sport Supply Group, Inc v. Columbia Casualty Co.*, 335 F.3d 453, 466 (5th Cir. 2003).

Spansion contingently alleges that “hyper” is Greek, meaning “above” or “more than” or means “advanced”. Amd. Pet. ¶ 18. “X” is alleged to be related to product speed from an undefined term “‘X-speed’ rated”, Amd. Pet. ¶ 9, or to be shorthand for “extreme” in computer gaming, Amd. Pet. ¶ 20. Then Spansion concludes that HYPERX means for the goods in the three Counts to be, Amd. Pet. ¶ 21:

...purportedly “advanced” products that offer precision and accuracy and that provide fast performance for users in the “extreme” gaming industry.

Logically in this allegation, the Greek term meaning “above” or “more than” has become all of “advanced”, precision and accuracy and the “x” has also taken multiple meanings at once, “fast performance” and “extreme” or “extreme gaming”. Clearly this analysis started with the product advertising and worked back to this definition for a suggestive term, “hyperx”, for computer memory devices not limited by use in the Registrations.

Spancion conditionally alleges that “hyper” is Greek, meaning “above” or “more than” or means “advanced”. “X” is alleged to be related to product speed or to mean “extreme”. HYPERX is not contextually based upon a noun specifically descriptive of the goods with a laudatory adjective as is HYPERRAM in the Opposition 91218100. Rather, HYPERX is a term not defining any one noun or specific attribute. To consider all the possibilities of immediate meaning from the multiple possibilities offered by Spancion, the following appear:

Above or more than related to product speed;

Advanced, precision or accurate related to product speed;

Above or more than extreme;

An advanced, precision or accurate extreme.

“Hyperx” considered in relation to the particular mouse pads in the HYPERX SKYN Registration according to the terms raised by Spancion, Amd. Pet. ¶¶ 5-11, does not describe a specific quality, feature, function or characteristic related to goods. The gaming context in which HYPERX is alleged by Spancion to be used, Amd. Pet. ¶¶ 7-11, is also not particularly described by the Registered Mark HYPERX SKYN or the goods recited therein. The possible significance that HYPERX would have to the

average purchaser of the goods because of the manner of its use or intended use, discussed by Spansion to be “advanced”, “precision”, “accuracy” and “extreme”, Amd. Pet. ¶ 11, have no specific descriptive significance to the goods inclusive of all uses as recited in the Registration at issue. *In re Bayer*, supra.

#### **IV. CONCLUSION**

The Amended Petition for Cancellation of Spansion lacks standing and does not effectively allege descriptiveness of the HYPERX SKYN mark of Kingston. Spansion has not established a “real interest in the proceeding.” Spansion has characterized its business as “computer memory products and embedded systems solutions.” The registered mark HYPERX SKYN of Kingston, having nothing to do with such commerce, is applied to mouse pads. No competition or relationship between the goods and Spansion’s business has been alleged. Spansion’s only allegation of damage is that Kingston is attempting to create a family of marks. But Spansion does not connect any such attempt with damage to Spansion. No damage has been identified. Without standing, the Amended Petition for Cancellation fails.

The Amended Petition for Cancellation expressly denies the analysis of “hyper” and, therefore, is fatally incomplete. Spansion instead relies contingently on a finding which does not exist regarding a dissimilar trademark with dissimilar goods. The proceeding from which the possible condition precedent may issue is irrelevant to the Amended Petition for Cancellation. The marks of each, HYPERRAM verses HYPERX SKYN, are literally and contextually diverse as are the goods associated with each. The

allegations of descriptiveness in the Amended Petition for Cancellation are fatally defective.

Dismissal of the Amended Petition for Cancellation with prejudice is requested.

Respectfully submitted,  
KINGSTON TECHNOLOGY CORPORATION

Date: August 27, 2015

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this paper is being served upon all parties to this proceeding at the address recorded in the following manner on the date this filing is submitted, August 27, 2015.

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