

UNITED STATES

TTAB provides guidelines on acquiescenceKatten Muchin Rosenman
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In *Cards Against Humanity v Vampire Squid Cards*, the Trademark Trial and Appeal Board (TTAB) in February addressed the issue of the availability of acquiescence as a defence in an opposition proceeding.

Vampire Squid Cards had filed an application to register the stylised mark ‘Crabs Adjust Humidity’ in connection with card games and game cards. Cards Against Humanity, which sells a popular card game under the ‘Cards Against Humanity’ mark, opposed the application on the grounds of priority and likelihood of confusion as well as dilution and a false sense of connection. In defence of such claims, Vampire Squid Cards proffered an argument based on the concept of estoppel by acquiescence.

The testimony in the opposition proceeding indicated that Vampire Squid Cards created its card game as an expansion of the Cards Against Humanity game, to be used in conjunction with the opposer’s game. After creating the game, Vampire Squid Cards contacted Cards Against Humanity’s principal to inquire about using the applied-for mark without violating its trademark rights. An exchange of correspondence ensued whereby Cards Against Humanity responded with a single sentence that Vampire Squid Cards’ proposed re-design of its logo and packaging was acceptable.

In the opposition, Vampire Squid Cards argued that such exchange of correspondence constituted the opposer’s consent to proceed to market its card game under the applied-for mark, that it did so for two years without incident, and that “an express consent to use necessarily includes a consent to register”. Cards Against Humanity, on the other hand, claimed that it had given the applicant a “limited permission” to use the name

which “only extended to a small print run for a one-off expansion pack to be sold on applicant’s website with a specific design”.

As articulated by the TTAB, “acquiescence is a type of estoppel that is based upon the plaintiff’s conduct that expressly or by clear implication consents to, encourages or furthers the activities of the defendant, that is not objected to”. A successful claim of acquiescence requires proof of three elements, namely that: (1) plaintiff actively represented that it would not assert a claim; (2) the delay between such active representation and the assertion of a claim was not excusable; and (3) the delay caused defendant undue prejudice.

The TTAB found that acquiescence is not applicable to an opposition proceeding because there cannot be any unreasonable delay in pursuing a claim when a notice of opposition is filed during the permitted period after the publication of the mark. Further, the TTAB found that to the extent Vampire Squid Cards is asserting estoppel by express consent, such a defence is also unavailable, stating that, although Cards Against Humanity informally conveyed its approval of the applicant’s use of the mark in an e-mail, “there is considerable ambiguity as to the extent of this consent”.

Further, the TTAB held that even if it were to construe Cards Against Humanity’s email “as clearly representing that opposer was unconditionally consenting to applicant’s use of its marks, there is no evidence showing opposer had no objection to applicant’s registration of these marks”.

Having denied Vampire Squid Cards’ assertions of estoppel by acquiescence or express consent, the TTAB turned to the issue of likelihood of confusion and, again found in favour of Cards Against Humanity. Although the TTAB’s decision in *Cards Against Humanity* is not precedential, the case is instructive on the availability of the acquiescence defence in an opposition proceeding.