

Senior Director of Purdue Marketing. Defendant failed to appear at the hearing. *See* Order dated October 31, 2017.

The Court finds the following facts specially and makes its conclusions on the Motion as follows:

1. The Plaintiff, the Trustees of Purdue University, is a corporate body created by and existing under the statutes of the State of Indiana, as codified at I.C. § 21-23-2-2.
2. Purdue is an educational institution of higher learning pursuant to various statutes of the State of Indiana, as codified as I.C. § 21-23-2-1 *et seq.* and I.C. § 21-27-7-1 *et seq.*
3. Purdue was founded in 1869, and its flagship campus is located in Tippecanoe County Indiana. Since the nineteenth century, the term “Boilermakers” has been the name of Purdue’s nationally-competitive intercollegiate athletic teams and has been used to identify its students, faculty and alumni. Pl.’s Exhibits A-F.
4. Purdue’s goods and services are identified by various trademarks owned by Purdue including trademarks which include the words “Purdue”, “Boilermakers”, and “Boiler” as well as a logo featuring a nineteenth-century locomotive. Purdue’s official mascot is a locomotive commonly referred to as the Boilermaker Special.
5. During the 2015-16 fiscal year, Purdue generated nearly \$1.5 billion in operating revenue. Since 1988, Purdue has received approximately \$21 million in net royalties from licensed sales of goods bearing Purdue trademarks. In 2017, the advertising budget administered by Purdue’s central marketing department was \$100,000.00.
6. Purdue licenses its various logos and trademarks to third parties on a wide variety of goods and services including glassware, beer mugs, and beer steins. Pl.’s Exhibits S, T, U, V, W, X, Y, and Y-1. Purdue also licenses its logos and trademarks for labeling on a beer product

more commonly known as “Boiler Gold”. Pl.’s Exhibits Y and Y-1. The Boiler Gold beer can contains an express reference to Purdue, a locomotive bearing the letter “P” and also features the colors gold and black. Pl.’s Exhibits Y and Y-1. Purdue sells Boiler Gold at athletic events.

7. Purdue owns federal trademark registrations for the following marks that contain the words “Purdue”, “Boiler”, and/or “Boilermakers”:

- a) PURDUE BOILERMAKERS (train design) (Reg. 2,023,046) – class 41
- b) PURDUE BOILERMAKERS (train design) (Reg. 2,023,047) – class 25
- c) PURDUE UNIVERSITY (griffin logo) (Reg. 2,023,050-51) – class 25, 41
- d) BOILERS (word mark) (Reg. 2,317,737) - class 41
- e) BOILERMAKERS (word mark) (Reg. 2,317,738) – class 41
- f) PURDUE UNIVERSITY (word mark) (Reg. 2,367,443 and 4,497,302) - class 25, 41
- g) BOILER UP (word mark) (Reg. 4,261,915) - Class 25
- h) PURDUE BOILERMAKERS (word mark) (Reg. 4,497,301) – class 25, 28
- i) P PURDUE (new train logo) (Reg. 4,497,303) – class 25, 28
- j) PURDUE (new train logo) (Reg. 4,992,639) – class 6, 21, 25
- k) PURDUE EXTENSION FOODLINK (Reg. 5,211,915) – class 35, 43, 44

Pl.’s Exhibits H-R.

8. The Defendant is an individual domiciled in Florida who does business as “Sports Beer Brewing Company”. Def.’s Answer ¶ 4.

9. On June 28, 2016, the Defendant submitted applications for and ultimately registered two trademarks with the Indiana Secretary of State. The first registration claims the phrase “Boilermakers Beer” in Class 32 for “Beer”. Pl.’s Exhibits BB-CC. The second registration claims the phrase “Purdue Boilermakers Brewing” in Class 32 for “Beer”. Pl.’s Exhibits Z-AA. In those applications, the Defendant affirmed that he has used those terms as trademarks in the United States at least as early as March 21, 2016 and in commerce in the State of Indiana at least as early as March 25, 2016. *See* Pl.’s Exhibits Z-CC. The Defendant also submitted evidence of use for each of these trademarks consisting of an image of a gold

locomotive with a black background and featuring the phrases “Boilermakers Beer” and “Purdue Boiler Makers Brewing Company”. Pl.’s Exhibit DD-10.

10. The Defendant maintains a website at www.sportsbeerbrewing.com (the “Website”). The Website is accessible globally through the internet. Def.’s Answer ¶ 21. The Website describes the Defendant’s business as “an intellectual property holding company consisting of a portfolio of sports trademarks, registrations and service marks for sports teams throughout the United States.” Def.’s Answer ¶ 22; Pl.’s Exhibit DD-7.

11. The Website displays the phrases “Your Brand of Beer for Sporting and Entertainment Events” and “Alumni Events & Charity Keg Sales” Pl.’s Exhibit DD-2, DD-4. The Website also features a list of “Sports Beer Brewing Company Trademarks” for “arenas & stadiums, alumni organizations, colleges/universities”. Pl.’s Exhibit DD-8. The Website features the terms “Purdue Boilermakers Brewing” and “Boilermakers Beer”. Pl.’s Exhibits DD-1 through DD-21. The Defendant offers the terms “Purdue Boilermakers Brewing” and “Boilermakers Beer” for licensed use as branding for the sale of beer in connection with “arenas & stadiums, alumni organizations, colleges/universities”. Pl.’s Exhibits DD-8.

12. Prior to filing suit, Purdue sent the Defendant correspondence demanding that he cease and desist from his commercialization of Purdue’s trademarks. Def.’s Answer ¶ 27.

13. To establish a right to preliminary injunctive relief, Purdue must show that (i) there is a strong likelihood of Purdue prevailing on the merits; (ii) Purdue faces irreparable harm with no adequate remedy at law; (iii) the injury to Purdue outweighs any harm to Defendant resulting from the proposed injunction; and (iv) the public interest weighs in favor of granting Purdue injunctive relief. *See M.K. Plastics Corp. v. Rossi*, 838 N.E.2d 1068, 1075 (Ind. Ct. App.

2005); *Aberdeen Apartments v. Cary Campbell Realty All., Inc.*, 820 N.E.2d 158, 163 (Ind. Ct. App. 2005).

14. In order to prevail on a claim of trademark infringement, a plaintiff must prove that (1) the plaintiff has a protectable ownership interest in the marks at issue and (2) the defendant's use of the mark is likely to cause consumer confusion. *Serenity Springs v. LaPorte Cty. Convention & Visitors Bureau*, 986 N.E.2d 314, 321 (Ind. Ct. App. 2013) (summarizing federal Lanham Act §43(a), 15 U.S.C.A. §1125(a)). There is a strong likelihood of Purdue prevailing on the merits of its claim that Defendant is infringing Purdue's trademarks.

15. Purdue has a protectable ownership interest in all of the trademarks bearing the terms "Purdue" and "Boilermakers". Purdue's trademarks have long been used in commerce to identify Purdue. Purdue owns federal registrations for the trademarks. Purdue's trademarks feature the word "Purdue" and/or "Boilermakers" and therefore constitute a family of trademarks. *7-Eleven, Inc.*, 83 U.S.P.Q.2d 1715 (T.T.A.B. May 15, 2007). Purdue's family of trademarks has also achieved a level of famousness under I.C. § 24-2-1-13.5 based on the evidence designated by Purdue.

16. The Indiana Trademark Act (Ind. Code Ann. § 24-2-1-0.5 et seq.) is subordinate to the Lanham Act. See Ind. Code Ann. § 24-2-1-0.5 ("[t]his chapter is intended to provide a system of state trademark registration and protection that is consistent with the federal system of trademark registration and protection under the Trademark Act of 1946."). State laws concerning trademarks cannot conflict with federal trademark law or the rights of trademark owners under federal trademark law. *Burger King of Fla., Inc. v. Brewer*, 244 F. Supp. 293 (W.D. Tenn. 1965); *Minuteman Press Int'l, Inc. v. Minute-Men Press, Inc.*, No. C 81 1832, 1983 WL 51917 (N.D. Cal. Jan. 31, 1983) (holding that state law cannot narrow the federal rights of a junior

user/federal registrant); *Am. Auto. Ass'n (Inc.) v. AAA Ins. Agency, Inc.*, 618 F. Supp. 787 (W.D. Tex. 1985) (state law cannot defeat or limit in any way the protection given to federally registered marks).

17. A likelihood of consumer confusion depends on seven factors: (1) the similarity between the marks in appearance and suggestion; (2) the similarity of the products; (3) the area and manner of concurrent use; (4) the degree and care likely to be exercised by consumers; (5) the strength of the plaintiff's mark; (6) any actual confusion; and (7) the intent of the defendant to "palm off" his product as that of another. *AutoZone, Inc. v. Strick*, 543 F.3d 923, 929 (7th Cir. 2008). "Courts may assign varying weight to each of the factors depending on the facts presented, though usually the similarity of the marks, the defendant's intent, and actual confusion are particularly important." *Id.* Proof of likely confusion is the same under both federal trademark and Indiana unfair competition claims. *Serenity Springs*, 986 N.E.2d at 323 (Indiana registration law is interpreted as consistent with federal case law).

18. Applying these factors, the Court finds as follows:

- a. Purdue's trademarks and the Defendant's trademarks are substantially similar or identical in appearance and suggestion. Conflicting marks are to be compared with respect to similarity of pronunciation, appearance, and verbal translation. 4 McCarthy on Trademarks and Unfair Competition § 23:21 (5th ed.). If one word or feature of a composite trademark is the salient portion of the mark, it may be given greater weight than the surrounding elements." *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 898 (7th Cir. 2001). Defendant's registration for "Boilermakers Beer" features the word "Boilermakers". The dominant portion of this mark, "Boilermakers" is identical to each of the trademarks which feature the term "Boilermaker" in sight, sound and

- appearance. Defendant's registration for "Purdue Boilermakers Brewing" features the words "Purdue" and "Boilermakers". The dominant portion of this mark, "Purdue Boilermakers" also features words which are identical to one or more of the Purdue's marks in sight, sound and appearance.
- b. Defendant's alleged beer products are related to goods and services identified with Purdue's trademarks. When comparing the similarity of goods and services, the relevant "inquiry in comparing the two products is not whether they are interchangeable, but whether 'the parties' products are the kind the public might very well attribute to a single source (the plaintiff).'" *Eli Lilly & Co. v. Nat. Answers, Inc.*, 233 F.3d 456, 463 (7th Cir. 2000) (quoting *Int'l Kennel Club of Chicago, Inc. v. Mighty Star, Inc.*, 846 F.2d 1079, 1089 (7th Cir. 1988)). Defendant promotes his branded products in connection with athletic and alumni events. Purdue's trademarks are used to identify its alumni, its athletic teams, glassware, and beer products.
- c. Defendant and Purdue operate within the same geographic area. This factor in the likelihood of confusion analysis assesses "whether there is a relationship in use, promotion, distribution, or sales between the goods or services of the parties." *CAE, Inc. v. Clean Air Eng'g, Inc.*, 267 F.3d 660, 681 (7th Cir. 2001). Purdue uses its trademarks throughout the United States. Purdue's main campus is located in West Lafayette, Indiana. Defendant registered his trademarks in the State of Indiana and for "arenas & stadiums, alumni organizations, colleges/universities". Defendant's Website is accessible globally through the internet. Defendant therefore uses the Defendant's trademarks in the same geographic area as Purdue.

- d. Defendant intends to create an association between Defendant's registrations and Purdue and therefore is palming off his products as those of Purdue. Intent to confuse may be reasonably inferred from the similarity of the marks where the senior mark has attained great notoriety. *See Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947, 963 (7th Cir. 1992). "If the marketing and business presence of the senior mark . . . is nearly ubiquitous in the geographic area where the junior mark competes, a trier of fact can easily conclude that the creator of a strikingly similar junior mark intended to confuse." *AutoZone, Inc.*, 543 F.3d at 934. At the top of Defendant's webpage is the slogan "Your Brand of Beer for Sporting and Entertainment Events." Defendant then has a list of "Sports Beer Brewing Company Trademarks" for "arenas & stadiums, alumni organizations, colleges/universities". The Website lists over 50 well-known college and professional athletic teams. Defendant identifies his business as an "intellectual property holding company consisting of a portfolio of sports trademarks, registration and service marks for sports teams throughout the United States." This is *prima facie* evidence that Defendant is acting with specific intent to create an association in the minds of consumers and Purdue. Pl.'s Exhibits DD-1-21.
- e. Beer products are an ordinary consumer purchase, relatively inexpensive, and consumers are not likely to exercise a high degree of care and discrimination when purchasing beer products. "The more widely accessible and inexpensive the products and services, the more likely that consumers will exercise a lesser degree of care and discrimination in their purchases." *AutoZone, Inc.*, 543 F.3d at 933.
- f. The stronger the mark, the more likely it is that encroachment on it will produce confusion. *AutoZone, Inc.*, 543 F.3d at 933. The strength of a mark usually

corresponds to its economic and marketing strength. *Id.* at 933. Purdue is a global leader in the field of higher education and is commonly known simply as “Purdue”.

19. Purdue has also shown a right to injunctive relief under Indiana’s Trademark Act, I.C. § 24-2-1-13.5(b), which provides in part: “An owner of a mark that is famous in Indiana is entitled, subject to the principles of equity and terms a court considers reasonable, to an injunction against another person’s commercial use of the mark or trade name if the other person’s use begins after the mark has become famous and the other person’s use causes dilution of the distinctive quality of the mark.” The marks Purdue, Purdue University, and Purdue Boilermakers are famous marks in Indiana and originated more than a century before Defendant’s claimed use of those marks. Defendant’s use of those marks causes dilution of their distinctive quality as identifiers of Purdue University; its faculty, staff, students and alumni; its teams; its goods and services; and its licensed goods.

20. There is a presumption that Defendant’s infringement causes Purdue irreparable harm if not enjoined. *Eli Lilly & Co.*, 233 F.3d at 469 (“Irreparable harm is generally presumed in cases of trademark infringement and dilution.”). *See also Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6 (7th Cir. 1992) (trademark infringement harm is irreparable, even absent a showing of business loss); *Processed Plastic Co. v. Warner Commc'ns, Inc.*, 675 F.2d 852 (7th Cir. 1982) (trademark infringement harm is irreparable and not susceptible of adequate measurements for remedy at law).

21. When a plaintiff seeks to enjoin actions which are in violation of a statute, the plaintiff is not required to prove either irreparable harm or that the balance of hardships is in the plaintiff’s favor. *Sadler v. State ex rel. Sanders*, 811 N.E.2d 936, 953 (Ind. Ct. App. 2004). This is known as the *per se* rule. *Id.* Here, because Defendant’s use of the trademark registrations

constitutes a clear violation of the Lanham Act and the Indiana Trademark Act, the *per se* rule applies.

22. The balance of harms thus favors injunctive relief. Defendant has offered no evidence of any damage or harm that might arise as a result an order enjoining his use of Purdue's trademarks. Furthermore, the Court finds that Defendant would not suffer any legally recognizable harm if this Court grants Purdue's request for injunctive relief. Defendant's unauthorized use of Purdue's trademarks constitutes violations of the Lanham Act (15 U.S.C.A. § 1051) and the Indiana Trademark Act (Ind. Code Ann. § 24-2-1-1) and is therefore illegal. The Court finds that the injunction requested by Purdue will spare Defendant from his continuing violation of law and will benefit the Defendant, not harm him. For these reasons, Plaintiff shall not be required to post security pursuant to Trial Rule 65(C). *Kennedy v. Kennedy*, 616 N.E.2d 39, 44 (Ind. Ct. App. 1993).

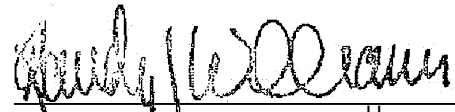
23. The public interest favors granting a preliminary injunction. It is in the public interest to prevent consumer confusion regarding the source of a product. *See Eli Lilly & Co.*, 233 F.3d at 469 (“[T]he public interest is served by the injunction because enforcement of the trademark laws prevents consumer confusion.”); *A.J. Canfield Co. v. Vess Beverages, Inc.*, 796 F.2d 903, 908–09 (7th Cir. 1986). Here, allowing Defendant to continue infringing the trademarks would result in consumer confusion regarding Defendant's authority to produce products bearing the trademarks and it would dilute Purdue's trademarks. Moreover, Purdue is an educational institution of higher learning chartered by the legislature of the State of Indiana. Accordingly, protecting Purdue's trademarks by enjoining Defendant's use of the Defendant's trademarks falls squarely within the public interest.

Pending trial of this matter, the Court ORDERS:

- A. Defendant and all other persons acting for, with, by, through or under the Defendant, including but not limited to Defendant's Internet service provider(s), are each hereby enjoined to immediately discontinue using or offering or licensing the terms "Purdue", "Boilermakers", "Boilermakers Beer" and "Purdue Boilermakers Brewing" or any other marks which feature the words "Boilermakers" and/or "Purdue" for any commercial purpose.
- B. Defendant shall within five (5) business days of the date hereof discontinue any use of the terms "Purdue", "Boilermakers", "Boilermakers Beer" and "Purdue Boilermakers Brewing" or any other marks which feature the words "Boilermakers" and/or "Purdue" on Defendant's website, advertising, or Internet code words or titles, or any other promotional materials; and
- C. Defendant shall not otherwise engage in any other acts or conduct which would cause consumers to erroneously believe that Defendant's goods or services are somehow sponsored by, authorized by, licensed by, or in any other way associated with Purdue.

IT IS SO ORDERED.

DATED: November 9, 2017



Judge, Tippecanoe Superior^JCourt. No. 1

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