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T.T.A.B.

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

MBA

Mailed: June 25, 2012

Opposition No. 91187023

Pepsico, Inc.

v.

Jay Pirincci

**Before Wellington, Shaw and Kuczma, Administrative Trademark
Judges**

By the Board:

This case now comes up for consideration of opposer's motion for summary judgment on its claims of priority and likelihood of confusion and dilution, filed November 4, 2011.¹ While applicant filed a response to the motion on December 22, 2011, applicant's response brief failed to comply with Board rules. Accordingly, in its December 27, 2011 order, the Board indicated that applicant's brief would be given no consideration, and, following applicant's appeal of that order via a Petition, the Director affirmed the Board's decision on May 16, 2012. However, pursuant to the Board's December 27, 2011 order, "opposer's motion will not be granted as conceded," and "the Board may consider

¹ Opposer filed an amended version of its brief, which is not substantively different than the original, on November 7, 2011.

[applicant's] evidence if appropriate." As discussed herein, we exercise our discretion to consider applicant's evidence in opposition to opposer's motion.

The Pleadings

Applicant seeks registration of CAN DEW, in standard characters, for "Nutritional drink mixes for use as a meal replacement in a can plastic or bottle," and "Fruit drinks and fruit beverages; Fruit flavored carbonated beverages; Fruit flavored energy drinks; Non-alcoholic malt beverages; Malt beer; all in a can, plastic or bottle."² In its notice of opposition, opposer alleges prior use and registration of the trademarks MOUNTAIN DEW, DEW, DO THE DEW and variations thereof for "various beverages," as well as ancillary products and services, and that use of applicant's mark would be likely to cause confusion with, and dilute, opposer's marks.³ Many of opposer's pleaded registrations are over five years old. In his answer, applicant admits that opposer owns its pleaded registrations, but otherwise denies the salient allegations in the notice of opposition.

The Parties' Contentions

Opposer's motion is based on the Declarations of Brett O'Brien ("O'Brien Dec."), its Vice President for Marketing,

² Application Serial No. 77297998, filed October 6, 2007 based on an alleged intent to use the mark in commerce.

³ Registration Nos. 820362, 1200615, 1932027, 2732061, 2946260, 2986575, 3118413, 3196801, 3392639, 3426588 and 3353706.

Elizabeth N. Bilus ("Bilus Dec."), its in-house Intellectual Property Counsel, Lauren Beth Emerson ("Emerson Dec."), one of its outside attorneys and Hal Poret ("Poret Dec."), its expert witness, as well as Mr. Poret's Expert Report on his likelihood of confusion survey regarding applicant's involved mark. With respect to its likelihood of confusion claim, opposer argues that its pleaded mark MOUNTAIN DEW is exceedingly famous and strong, by virtue of extensive sales and advertising and media recognition, that the parties' goods are similar or related and "purchased on impulse," that the parties' channels of trade are identical, that the parties' marks create similar overall commercial impressions and that applicant adopted his mark in bad faith. Opposer also relies on Mr. Poret's survey, which found that "net confusion" among those surveyed was 47.8%, and that therefore applicant's mark "for fruit or fruit flavored drinks or for fruit flavored carbonated drinks is likely to cause confusion with" opposer's marks MOUNTAIN DEW and DEW. With respect to its dilution claim, opposer argues that MOUNTAIN DEW is "famous for dilution purposes" and that use of applicant's mark "would lessen the ability of the DEW Marks to identify [opposer] as their source."

Applicant submitted portions of the transcript of his discovery deposition of Mr. Poret in opposition to opposer's motion, which we have exercised our discretion to consider.

From the portions of the Poret transcript which applicant submitted, it appears that applicant contends that confusion is unlikely because the label he intends to use on his contemplated product differentiates it from opposer's mark, trade dress and products. Applicant also appears to contend that Mr. Poret's survey should be given no weight because survey participants were offered \$2.00 to participate in the survey, opposer paid Mr. Poret to conduct the survey raising the possibility or likelihood of bias, the results from the limited sample of people surveyed cannot be fairly extrapolated to the population at large, acceptable consumer survey standards are vague, the survey was conducted using the "mall-intercept" method, Mr. Poret did not conduct the survey directly or directly monitor those who did, Mr. Poret's methods of supervising the interviewers were inadequate, the survey may have been leading and opposer's mark, rather than applicant's, could have caused survey participants to be confused.

Decision

Summary judgment is only appropriate where there are no genuine disputes as to any material facts, thus allowing the case to be resolved as a matter of law. Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the burden of demonstrating the absence of any genuine dispute of material fact, and that it is entitled to a judgment under

the applicable law. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Sweats Fashions, Inc. v. Pannill Knitting Co. Inc., 833 F.2d 1560, 4 USPQ2d 1793, 1796 (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 American 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. 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 Products, Inc. v. Eli's, Inc., 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); Opryland USA, supra. The Board may not resolve genuine disputes as to material facts; it may only ascertain whether genuine disputes as to material facts exist. See Lloyd's Food Products, 25 USPQ2d at 2029; Olde Tyme Foods, 22 USPQ2d at 1542.

Standing and Priority

There is no genuine dispute as to any material fact relating to either standing or priority. Opposer's pleaded registrations establish its standing and priority is not an issue. See, e.g., Cunningham v. Laser Golf Corp., 222 F.3d 943, 945, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (party's

ownership of pleaded registration establishes standing); Penguin Books Ltd. v. Eberhard, 48 USPQ2d 1280, 1286 (TTAB 1998) (citing King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)) (priority not at issue where opposer introduces registration into evidence). Furthermore, applicant concedes that opposer owns its pleaded registrations. Answer to Notice of Opposition ¶ 9.

Likelihood of Confusion

"We determine likelihood of confusion by focusing on ... whether the purchasing public would mistakenly assume that the applicant's goods originate from the same source as, or are associated with," opposer's goods. In re Majestic Distilling Co., Inc., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In considering the question on a motion for summary judgment, we analyze all probative facts in evidence which are relevant to the thirteen likelihood of confusion factors set forth in In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), as well as whether there are genuine disputes as to any of these factors which would be material to a decision on the merits. In this case, opposer has introduced evidence concerning the fame of opposer's mark MOUNTAIN DEW, the similarity between the parties' marks, goods and channels of trade, the degree of care consumers are likely to exercise in purchasing the

parties' products, applicant's intent and Mr. Poret's survey.

Turning first to the alleged fame of opposer's MOUNTAIN DEW mark, it is well-settled that where fame exists, it "plays a 'dominant role in the process of balancing the DuPont factors,' ... and '[f]amous marks thus enjoy a wide latitude of legal protection.'" Bose Corp. v. QSC Audio Products, Inc., 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) (quoting Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000)). Indeed, a strong mark "casts a long shadow which competitors must avoid." Kenner Parker Toys, Inc. v. Rose Art Industries, Inc., 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

Furthermore, fame remains "a dominant factor in the likelihood of confusion analysis ... independent of the consideration of the relatedness of the goods." Recot, 214 F.3d 1322, 54 USPQ2d at 1898. In fact, "when a product reaches the marketplace under a famous mark, special care is necessary to appreciate that products not closely related may nonetheless be confused as to source by the consumer because of the fame of the mark." Bose Corp., 293 F.3d 1367, 63 USPQ2d at 1310.

The "fame of a mark may be measured indirectly, among other things, by the volume of sales of and advertising expenditures for the goods traveling under the mark, and by

the length of time those indicia of commercial awareness have been evident." Id., at 1305. Other relevant factors include "length of use of the mark, market share, brand awareness, licensing activities, and variety of goods bearing the mark." Coach Services Inc. v. Triumph Learning LLC, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012).

Here, opposer has introduced substantial evidence that MOUNTAIN DEW is an exceedingly famous mark. Specifically:

- since 1999, MOUNTAIN DEW has been fourth in the U.S. among soft drinks in sales volume and market share, trailing only COKE, PEPSI and DIET COKE; O'Brien Dec. ¶ 14 and Emerson Dec. Ex. I;
- in 2006, DIET MOUNTAIN DEW "became one of the top 10 carbonated soft drinks in terms of market share" and it "continues to hold such rankings today;" O'Brien Dec. ¶ 17 and Emerson Dec. Ex. I;
- since 2004, U.S. sales of products sold under opposer's DEW marks have exceeded \$5 billion annually, and since 2009, U.S. sales of products sold under these marks have exceeded \$6 billion annually; O'Brien Dec. ¶ 25;
- from 1998-2009, opposer has spent, on average, over \$50 million per year "promoting products sold under the [DEW] marks;" id. ¶ 27 and Ex. L; and
- research agency Millward Brown asked "frequent drinkers of regular flavored carbonated beverages" about "carbonated soft drinks you can think of," and 51% identified MOUNTAIN DEW without prompting, while "[a]ided

awareness rates in the same study reached 98%," 92% had tried MOUNTAIN DEW and 46% indicated they drink the product regularly; O'Brien Dec. ¶ 41.

In short, the evidence of record establishes that opposer's MOUNTAIN DEW mark is famous, and significantly so. Moreover,

[t]he law has clearly been well settled for a longer time than this court has been dealing with the problem to the effect that the field from which trademarks can be selected is unlimited, and there is therefore no excuse for even approaching the well-known trademark of a competitor, that to do so raises "but one inference - that of gaining advantage from the wide reputation established by appellant in the goods bearing its mark," and that all doubt as to whether confusion, mistake, or deception is likely is to be resolved against the newcomer, especially where the established mark is one which is famous and applied to an inexpensive product bought by all kinds of people without much care.

Specialty Brands, Inc. v. Coffee Bean Distributors, Inc., 748 F.2d 669, 223 USPQ 1281, 1285 (Fed. Cir. 1984) (quoting Planters Nut & Chocolate Co. v. Crown Nut Co., Inc. 305 F.2d 916, 134 USPQ 504, 511 (CCPA 1962)); see also, Kenner Parker Toys, 963 F.2d at 350, 22 USPQ2d at 1456. In short, there is no genuine dispute as to any material fact regarding the fame of MOUNTAIN DEW, and this du Pont factor weighs heavily in opposer's favor.

Turning next to the similarity of the parties' marks, we consider the similarities and dissimilarities of the

parties' marks in appearance, sound, meaning, and commercial impression. Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975). Moreover, as the fame of a mark increases, and here opposer's MOUNTAIN DEW mark enjoys significant fame, the degree of similarity between the marks necessary to support a conclusion of likely confusion declines. Bose Corp., 293 F.3d 1367, 63 USPQ2d at 1311-12.

In this case, the parties' marks both contain the word DEW, and there is no evidence that DEW is anything other than arbitrary for the parties' goods.⁴ Furthermore, CAN is not distinctive when used for applicant's products, which are offered in cans -- indeed, applicant's identifications

⁴ While applicant's mark may be understood as a novel spelling of "can do," we have no evidence that such a connotation will be imparted on consumers or that it would significantly distinguish the two marks.

of goods, in both Class 5 and Class 32, specifically indicate that applicant's goods will be offered in "cans." It is well-settled that under these circumstances, the word CAN may be given little weight. Cunningham, 222 F.3d at 943, 55 USPQ2d at 1846. To the extent that applicant argues that the label for his products will differentiate them from opposer's products, this argument is not well-taken. Applicant seeks registration of CAN DEW, in standard characters, and that is the mark we must compare to opposer's pleaded marks. For all of these reasons, after careful consideration of the appearance, sound, connotation and commercial impression of the parties' marks, Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005), we find no genuine dispute as to any material fact remaining for trial on the issue of similarity of the marks.

Turning to the parties' goods, applicant seeks registration of his mark for, among other things, "fruit flavored carbonated beverages." Opposer uses MOUNTAIN DEW for, among other things, "citrus flavored soda" and "orange flavored soda," and both MOUNTAIN DEW and DEW are registered for, among other things, "soft drinks." O'Brien Dec. ¶ 4; Bilus Dec. ¶¶ 4(i) and (ii) and Exs. B and C (Registration Nos. 820362 and 1200615). Opposer's "soft drinks" encompass applicant's "fruit flavored carbonated beverages," and

therefore there is no genuine dispute as to any material fact with respect to the similarity of these goods. They are legally identical. Therefore, with respect to the Class 32 goods in applicant's involved application, this factor weighs heavily in opposer's favor.

The situation is different, however, with respect to the Class 5 goods in applicant's involved application, i.e., "Nutritional drink mixes for use as a meal replacement in a can plastic or bottle." Opposer has simply failed to submit evidence sufficient to establish that its goods are similar or related to nutritional drink mixes, for use as a meal replacement. And opposer's reliance on caselaw, and specifically an unpublished decision, is misplaced, because each case must be evaluated on the specific facts of record. In short, we find that there is a genuine dispute of material fact regarding whether opposer's goods are similar or related to applicant's Class 5 goods.

Turning next to the parties' channels of trade, the analysis of this factor also turns on which goods are being considered. With respect to applicant's "fruit flavored carbonated beverages" in Class 32, there is no genuine dispute as to any material fact that the parties' channels of trade are legally identical.

The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set

forth in the application, regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.

Octocom Systems, Inc. v. Houston Computers Services, Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); see also, Hewlett-Packard, 62 USPQ2d at 1005; Genesco Inc. v. Martz, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); In re Smith and Mehaffey, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers"). There is a genuine dispute, however, with respect to the channels of trade for applicant's Class 5 goods, as there is no evidence that these goods are similar or related to, or travel in the same channels of trade as, the goods sold under opposer's pleaded marks.

With respect to the degree of care consumers are likely to exercise in purchasing the parties' products, opposer has introduced evidence that its "20 oz. single serve beverages sell for approximately one to two dollars apiece." O'Brien Dec. ¶ 21. Applicant has not introduced any evidence to the

contrary, and accordingly we find that consumers would not exercise a great deal of care in purchasing the parties' goods. There is therefore no genuine dispute as to any material fact with respect to this factor, which weighs in opposer's favor. Recot, 214 F.3d 1322, 54 USPQ2d at 1899.

Turning to applicant's intent, opposer introduced evidence that applicant was "probably" aware of MOUNTAIN DEW when he filed his involved application, and that applicant has also sought to register FOESBOOK for a "website for communication." This evidence is insufficient to establish the absence of any genuine dispute of material fact with regard to whether applicant intended to trade upon opposer's goodwill, and this factor is therefore neutral.⁵

Finally, turning to Mr. Poret's survey, opposer's evidence establishes that Mr. Poret has extensive experience in conducting consumer surveys, and that several of his surveys have been admitted into evidence in court proceedings. Poret Dec. Ex. A. With respect to the substance of the survey:

- it "covered consumers of fruit or fruit-flavored drinks and fruit-flavored carbonated drinks," excluding those employed in fields

⁵ However, applicant's adoption of a mark including the arbitrary and strong word DEW for beverages "certainly raises an eyebrow," and a "party which knowingly adopts a mark similar to one used by another for the same or closely related goods does so at its own peril." Ava Enterprises Inc. v. Audio Boss USA Inc., 77 USPQ2d 1783, 1787 (TTAB 2006).

which might give them "special knowledge or insight," and those "who had an immediate household member so employed;"

- in total, 404 consumers participated in the survey, conducted via the "mall intercept" method, with 200 consumers participating in one of two "test cells" and 204 consumers participating in one of two "control cells;"
- one test cell was questioned about applicant's involved mark "in the context of fruit or fruit-flavored drinks," while the other was questioned about applicant's involved mark "in the context of fruit flavored carbonated soft drinks;"
- the control cells were similarly divided between carbonated and non-carbonated beverages, and consumers in the control cells were questioned not about applicant's involved mark, but instead about the "control mark" CAN DO;
- respondents were shown a card bearing the mark applicable to their particular group, and asked a series of questions, starting with whether the respondent had "any opinion about what company or brand makes or distributes a drink with this name?;"
- respondents answering yes were then asked which company or brand makes or distributes a drink under the applicable mark, followed by "what makes you think so?";
- respondents were then asked if they had an opinion about "any other product or products" which are "made or distributed by the same company that makes or distributes this drink;"

- those answering "yes" were next asked "what other product or products do you think are made or distributed by the same company?," followed by "what is your reason for thinking" so;
- finally, respondents were asked whether or not the drink is made "with the permission of, or in affiliation with any other company," and, if the answer was yes, "what other company or brand?"

Id. After subtracting the 14.7% of control cell respondents who named MOUNTAIN DEW, i.e. the "noise level," from the 62.5% of test cell respondents who were confused, Mr. Poret found that "net confusion" was 47.8%, which he characterized as "very high." Id. Significantly, "[a]ll of the 125 confused respondents gave answers indicating that the word 'Dew' was the reason for their confusion." Id. Mr. Poret concluded: "the mark CAN DEW for fruit or fruit flavored drinks or for fruit-flavored carbonated drinks is likely to cause confusion with [opposer's] Mountain Dew and Dew marks." Id. The survey did not address applicant's Class 5 goods, however.

We find that Mr. Poret's survey, which used the "mall intercept" method, surveyed approximately 400 respondents divided into control and test groups, displayed the test and control marks on cards, and asked a series of questions and follow-up questions in a well-accepted format, is admissible and credible. In fact, the survey is quite similar in

design and execution to surveys we and federal courts have previously held to be persuasive. See e.g., Starbucks U.S. Brands LLC v. Ruben, 78 USPQ2d 1741, 1753 (TTAB 2006); Ava Enterprises, 77 USPQ2d at 1786-87; Carl Karcher Enterprises Inc. v. Stars Restaurants Corp., 35 USPQ2d 1125, 1131-32 (TTAB 1995); see also, Union Carbide Corporation v. Ever-Ready, 531 F.2d 366, 188 USPQ 623, 640-43 (7th Cir. 1976). With respect to applicant's Class 32 goods, we find that the survey weighs in favor of a finding of likelihood of confusion.

Applicant's challenges to the survey are not persuasive. Applicant has not established, through evidence or caselaw, that opposer's survey is inherently unreliable. To the contrary, as the cases cited above illustrate, opposer's survey is a useful piece of evidence, albeit one which is subject to any survey's inherent limitations, many of which applicant points out, and which we have taken into account. As we stated in Carl Karcher, "[c]ourts and the Board long have recognized that there is no such thing as a perfect survey ... Be that as it may, the survey results support opposer's position on the issue of likelihood of confusion." Carl Karcher, 35 USPQ2d at 1132. And here, as in Ava Enterprises, opposer's survey "is not necessary to reach a conclusion that there is a likelihood of confusion." Ava Enterprises, 77 USPQ2d at 1787. In other words, even if

we had excluded opposer's survey and given it no consideration whatsoever, our ultimate conclusions about whether there is a likelihood of confusion between the parties' marks would be exactly the same.

Weighing all of the likelihood of confusion factors together, and after a careful review of all evidence of record and the parties' arguments, only some of which have been specifically addressed here, we find that there are no genuine disputes of material fact that a likelihood of confusion exists between at least opposer's mark MOUNTAIN DEW and applicant's involved mark for applicant's Class 32 goods. Indeed, the fame of opposer's mark, the similarities between the parties' marks, services and channels of trade, and the degree of care consumers are likely to exercise in purchasing the parties' goods all weigh in favor of a finding of likelihood of confusion. Accordingly, opposer's motion for summary judgment on its claim of priority and likelihood of confusion is hereby **GRANTED** with respect to applicant's Class 32 goods. However, opposer's motion for summary judgment on its claim of priority and likelihood of confusion is hereby **DENIED** with respect to applicant's Class 5 goods. With respect to those goods, at a minimum, we find that genuine disputes exist as to whether the parties' goods, customers and channels of trade are similar or related.

Dilution

With respect to opposer's dilution claim, on the record presented, we find that there are genuine disputes as to material facts remaining for trial. At a minimum, genuine disputes exist as to whether applicant's mark will blur the distinctiveness of opposer's marks. More specifically, genuine disputes exist as to the "extent to which [opposer] is engaging in substantially exclusive use" of its marks, whether applicant "intended to create an association with" opposer's mark and whether there is "[a]ny actual association" between the parties' marks. 15 U.S.C. § 1125(c)(2)(B)(iii), (v) and (vi).⁶ Accordingly, opposer's motion for summary judgment is hereby **DENIED** with respect to its dilution claim.

Conclusion

Opposer's motion is granted in part, specifically with respect to its claim of priority and likelihood of confusion against applicant's Class 32 goods, and otherwise denied.⁷

⁶ While opposer's likelihood of confusion survey appears to establish that there may be some association between the parties' marks, there is a genuine dispute as to the extent of any such association and whether any such association will ultimately impair the distinctiveness of opposer's marks. See Rolex Watch U.S.A. Inc. v. AFP Imaging Corp., 101 USPQ2d 1188, 1196-97 (TTAB 2011). We acknowledge that where, as apparently is the case here, an applicant has "not engaged in any actual use of the junior mark, it is impossible to present any evidence of actual association between the marks in the marketplace." National Pork Board v. Supreme Lobster and Seafood Co., 96 USPQ2d 1479, 1498 (TTAB 2010).

⁷ The parties should note that the evidence submitted in connection with the motion for summary judgment is of record only

Proceedings herein are resumed for trial with respect to applicant's Class 5 goods, and trial dates are reset as follows:

Discovery Closes	CLOSED
Plaintiff's Pretrial Disclosures	July 9, 2012
Plaintiff's 30-day Trial Period Ends	August 23, 2012
Defendant's Pretrial Disclosures	September 7, 2012
Defendant's 30-day Trial Period Ends	October 22, 2012
Plaintiff's Rebuttal Disclosures	November 6, 2012
Plaintiff's 15-day Rebuttal Period Ends	December 6, 2012

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

for consideration of that motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. See Levi Strauss & Co. v. R. Josephs Sportswear Inc., 28 USPQ2d 1464 (TTAB 1993); Pet Inc. v. Bassetti, 219 USPQ 911 (TTAB (1983); American Meat Institute v. Horace W. Longacre, Inc., 211 USPQ 712 (TTAB 1981). Furthermore, the fact that we have identified certain genuine disputes as to material facts sufficient to deny in part opposer's motion should not be construed as a finding that these are necessarily the only disputes which remain for trial.