

THIS OPINION IS NOT A
PRECEDENT OF THE
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: April 3, 2012

Cancellation No. 92053426

Bachmann Industries, Inc.

v.

Scientific Toys, Ltd.

**Before Cataldo, Bergsman and Lykos, Administrative Trademark
Judges**

By the Board:

Respondent owns a registration of EZTEC, in standard characters, for "toys, namely, remote controlled, radio controlled, and battery operated vehicles, trains, train sets"¹ In its petition for cancellation, petitioner alleges prior use of E-Z for toy trains and accessories therefor, ownership of a "family of E-Z marks in connection with its model trains and train sets," and prior registration of E-Z,² E-Z TRACK,³ E-Z MATE and E-Z LUBE,⁴ for

¹ Registration No. 3567168, issued January 27, 2009 from an application filed June 13, 2008, based on first use dates of July 20, 1996.

² Registration No. 2225724, issued February 23, 1999 under Section 2(f) from an application filed December 31, 1997, based on first use in commerce in April 1994.

³ Registration No. 3222737, issued March 27, 2007, with TRACK disclaimed, from an application filed May 30, 2006, based on first use in commerce on August 31, 1994.

⁴ Registration Nos. 2195884 and 2247669, respectively.

the same or related products. As grounds for cancellation, petitioner alleges that use of respondent's mark is likely to cause confusion with petitioner's marks. In its answer, respondent denies the salient allegations in the petition for cancellation and asserts a number of defenses which it entitled affirmative defenses, including that petitioner does not own a family of marks and that E-Z is weak because it "is immediately understood by the trade and relevant consumers as being a misspelling of the merely descriptive term 'Easy.'" Respondent filed a counterclaim for cancellation of petitioner's pleaded Registration No. 2225724 for the mark E-Z, alleging non-use, abandonment and fraud, in that petitioner "knew that it was not using the mark E-Z alone" for most of the goods identified in the registration, but nevertheless claimed that it was using the mark in connection with those goods, with an intent to deceive the Office. Petitioner denies the salient allegations in the counterclaim.

This case now comes up for consideration of petitioner's motion for summary judgment on its claim of priority and likelihood of confusion, filed November 11, 2011, and respondent's cross-motion for partial summary judgment on several issues, filed December 16, 2011.

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.

Because of the large number of genuine disputes as to material facts remaining for trial, this case is not

appropriate for summary judgment.⁵ Accordingly, the Board will not entertain any additional motions for summary judgment in this case. Indeed, and at a minimum, genuine disputes exist as to the strength of petitioner's marks, the similarities between the parties' marks, whether petitioner abandoned or failed to use E-Z alone and whether petitioner owns a family of marks (and if so whether it used and promoted the alleged family feature prior to respondent's priority date).⁶

Therefore, the parties' respective motions for summary judgment are hereby **DENIED**.⁷ Proceedings herein are resumed, and disclosure, discovery, trial and other dates are reset as follows:

⁵ The mere fact that cross-motions for summary judgment have been filed does not necessarily mean that there are no genuine disputes as to material facts, or that a trial is unnecessary. See, University Book Store v. University of Wisconsin Board of Regents, 33 USPQ2d 1385, 1389 (TTAB 1994).

⁶ Furthermore, to the extent that petitioner relies on King Candy Inc. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974) in support of its priority claim, its reliance is misplaced. Indeed, because this is a cancellation proceeding, "priority is in issue," Texas Department of Transportation v. Tucker, 95 USPQ2d 1241, 1244 (TTAB 2010), though petitioner may rely on the filing date of its pleaded registrations for priority purposes.

⁷ The parties should note that the evidence submitted in connection with their respective motions is of record only for consideration of those motions. 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 (1993); 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 the parties' motions should not be construed as a finding that these are necessarily the only disputes which remain for trial.

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Discovery Closes	April 9, 2012
Plaintiff's Pretrial Disclosures Due	May 24, 2012
30-day testimony period for plaintiff's testimony to close	July 8, 2012
Defendant/Counterclaim Plaintiff's Pretrial Disclosures Due	July 23, 2012
30-day testimony period for defendant and plaintiff in the counterclaim to close	September 6, 2012
Counterclaim Defendant's and Plaintiff's Rebuttal Disclosures Due	September 21, 2012
30-day testimony period for defendant in the counterclaim and rebuttal testimony for plaintiff to close	November 5, 2012
Counterclaim Plaintiff's Rebuttal Disclosures Due	November 20, 2012
15-day rebuttal period for plaintiff in the counterclaim to close	December 20, 2012
Brief for plaintiff due	February 18, 2012
Brief for defendant and plaintiff in the counterclaim due	March 20, 2012
Brief for defendant in the counterclaim and reply brief, if any, for plaintiff due	April 19, 2013
Reply brief, if any, for plaintiff in the counterclaim due	May 4, 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.

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