Goodman

THIS OPINION IS NOT A PRECEDENT OF THE TTAB

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

Mailed: July 2, 2013

Cancellation No. 92055358

Under Armour, Inc.

v.

Urban Asphalt Skatewear

Before Seeherman, Lykos and Adlin, Administrative Trademark Judges.

By the Board:

This case now comes up on respondent's motion, filed January 8, 2013, for summary judgment on the grounds of priority and likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), and likelihood of dilution by blurring under Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c). The motion is fully briefed.

A party is entitled to summary judgment when it has demonstrated that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In reviewing a motion for summary judgment, the evidentiary record and all reasonable inferences to be drawn from the undisputed facts must be viewed in the light most favorable to the nonmoving

party. *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992).

Although respondent has argued that the dissimilarity of the parties' marks is the dispositive *du Pont*[1] factor requiring dismissal of the priority and likelihood of confusion ground, we find, upon consideration of the parties' arguments and evidence, that genuine disputes of material fact remain with respect to the similarities or dissimilarities of the parties' marks. We similarly find, with regard to the dilution claim, that genuine disputes of material fact remain, at least, with respect to the similarity or dissimilarity of the parties' marks.[2] In view thereof, respondent's motion for summary judgment is denied.[3]

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[1] *In re E.I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973).

[2] We note that the parties have argued the wrong standard as to the degree of similarity of the parties' marks with respect to the dilution claim. In *Nike Inc. v. Maher*, 100 USPQ2d 1018, 1030 (TTAB 2011), the Board held that identical or very or substantially similar was no longer the standard in view of the Trademark Dilution Revision Act of 2006, and that the correct standard is whether the marks are "sufficiently similar" in their overall commercial impressions that the required association exists. We also note that in its responsive brief petitioner argues the dilution factors set forth under the Federal Trademark Dilution Act as applied in *Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164, 1177 (TTAB 2001); however, those factors are for the most part no longer applicable in view of the Trademark Dilution Revision Act of 2006 which now identifies six non-exhaustive factors to be considered.

[3] The fact that we have identified and discussed certain genuine disputes of material fact as a sufficient basis for denying respondent's motion for summary judgment should not be construed

Proceedings are resumed.

Trial dates[4] are reset as follows:

Plaintiff's Pretrial Disclosures Due	**7/18/2013**
Plaintiff's 30-day Trial Period Ends	**9/1/2013**
Defendant's Pretrial Disclosures Due	**9/16/2013**
Defendant's 30-day Trial Period Ends	**10/31/2013**
Plaintiff's Rebuttal Disclosures Due	**11/15/2013**
Plaintiff's 15-day Rebuttal Period Ends	**12/15/2013**

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.l25.

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.l29.

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as a finding that these are necessarily the only disputes which remain for trial.

The parties should note that the evidence submitted in connection with the motion for summary judgment is of record only for consideration of the motion for summary judgment. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464, 1465 n.2 (TTAB 1993).

[4] Petitioner pleads ownership of 46 registrations, some of which are no doubt more relevant than others. The Board and the parties would be well-served if the trial is focused on the most relevant facts and issues, and if the parties refrain from the "needless presentation of cumulative evidence." *See e.g.*, *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039-40 (TTAB 2010).