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TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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KGC

May 23, 2022

Cancellation No. 92076580

R & R Games, Inc.

v.

TwoPointOh Games

**Before Wellington, Kuczma, and English,
Administrative Trademark Judges.**

By the Board:

This case comes before the Board for consideration of Respondent's motion for summary judgment, filed December 5, 2021 (11 TTABVUE), and Petitioner's cross-motion for summary judgment, filed February 7, 2022 (15 TTABVUE), on Petitioner's sole claim of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d). The motions are fully briefed.¹

¹ The Board has considered the parties' submissions and presumes the parties' familiarity with the factual bases for the motions, and does not recount the facts or arguments here, except as necessary to explain the Board's order. *See Guess? IP Holder L.P. v. Knowlux LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

Background

Respondent owns a registration for the standard character mark YOU'RE AN IDIOT on the Principal Register for "card games; game cards" in International Class 28.²

Petitioner seeks to cancel this registration on the sole ground of likelihood of confusion, pleading, among other things, ownership of a registration for the standard character mark YOU MUST BE AN IDIOT! on the Principal Register for "board games" also in International Class 28.³ *See* 1 TTABVUE.

In its answer, Respondent denies the salient allegations in the petition for cancellation. *See* 6 TTABVUE.

Summary Judgment Standard

Summary judgment is an appropriate method of disposing of cases in which there are no genuine disputes as to any material facts and the moving party 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 must be viewed in the light most favorable to the non-moving party, and all justifiable inferences to be drawn from the undisputed facts must be drawn in favor of the non-moving party. *See Mayer/Berkshire Corp. v. Berkshire Fashions, Inc.*, 424 F.3d 1229, 76 USPQ2d 1310, 1314 (Fed. Cir. 2005); *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir.

² Registration No. 5524635 issued on July 24, 2018, based on an application filed on December 21, 2017.

³ Registration No. 3137118 issued on August 29, 2006, based on an application filed on February 14, 2005; renewed.

1993); *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992). We may not resolve disputes of material fact; we may only ascertain whether a genuine dispute regarding a material fact exists. *See Lloyd's Food Prods.*, 25 USPQ2d at 2029; *Olde Tyme Foods*, 22 USPQ2d at 1544.

The party moving for summary judgment has the burden of demonstrating that the material facts are not genuinely in dispute by:

1. citing to the record, including affidavits or declarations, admissions, or interrogatory answers, and showing the cited materials do not establish a genuine dispute; or,
2. showing that the non-moving party cannot produce admissible evidence sufficient to create a genuine dispute.

Fed. R. Civ. P. 56(c)(1). If the moving party carries this part of its burden, the nonmoving party may not rest on mere allegations, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine dispute of material fact for trial. *See Venture Out Props. LLC v. Wynn Resort Holdings, LLC*, 81 USPQ2d 1887, 1890 (TTAB 2007). The moving party also has the burden of showing that it is entitled to judgment as a matter of law based on the established, undisputed facts. *See generally Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

On cross-motions for summary judgment, each moving party has the burden as to its own motion, and the Board evaluates each motion on its own merits and resolves all doubts and inferences against the party whose motion is being considered. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987); *Drive*

Trademark Holdings LP v. Inofin, 83 USPQ2d 1433, 1437 (TTAB 2007). The mere fact that cross-motions for summary judgment have been filed does not necessarily mean that there is no genuine dispute of material fact or that a trial is unnecessary. See, e.g., *Drive Trademark Holdings*, 83 USPQ2d at 1437; *Univ. Book Store v. Univ. of Wis. Bd. of Regents*, 33 USPQ2d 1385, 1389 (TTAB 1994).

To prevail on its cross-motion for summary judgment, Petitioner must demonstrate no genuine dispute that: (1) it has entitlement to a statutory cause of action;⁴ (2) it has priority; and (3) contemporaneous use of the parties' marks on the identified goods would be likely to cause confusion, mistake, or to deceive consumers regarding the source of the goods. See *Compagnie Gervais Danone v. Precision Formulations, LLC*, 89 USPQ2d 1251, 1253 (TTAB 2009) (citations omitted).

For Respondent to prevail on its motion, it must establish no genuine dispute as to the inverse of any of the three preceding elements. See *Omega SA v. Alpha Phi Omega*, 118 USPQ2d 1289, 1293 (TTAB 2016).

Analysis

Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action must be established in every inter partes case. See *Austl. Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d

⁴ Board decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of “standing.” Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain applicable. See *Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 USPQ2d 11388, at *2 (TTAB 2020); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 309.03(b) (2021).

1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 82 (2021) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067 n.4 (2014)). In Board proceedings, to establish entitlement under Section 14 of the Trademark Act, the plaintiff must prove that cancelling the registration is within the zone of interests protected by the statute and that the plaintiff has a reasonable belief of damage proximately caused by continued registration of the mark. *See Peterson v. Awshucks SC, LLC*, 2020 USPQ2d 11526, at *5 (TTAB 2020); *see also Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021); *Austl. Therapeutic Supplies*, 2020 USPQ2d 10837, at *3; *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014).

In its petition for cancellation Petitioner pleads ownership of Registration No. 3137118 (1 TTABVUE 3, ¶ 2) as the basis of its likelihood of confusion claim (*id.* at 5, ¶ 13).⁵ In its motion for summary judgment, Respondent stipulates that: (1) “Petitioner has established an entitlement to bring a statutory cause of action” (11 TTABVUE 3, ¶ 1); (2) “Petitioner is the owner of U.S. Registration No. 3,137,118 for the mark YOU MUST BE AN IDIOT! for ‘board games,’ in International Class 28” (*id.* at 3, ¶ 2); and (3) Petitioner’s registration is “existing” (*id.* at 3-4, ¶¶ 5-10, 12-13).

In view thereof, there is no genuine dispute that Petitioner is entitled to a statutory cause of action. *See New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d

⁵ Petitioner, however, did not submit a copy of its registration with the petition for cancellation. *See* Trademark Rule 2.122(d) (allowing plaintiffs to make pleaded registrations of record by attaching copies, showing current status and title, with the complaint).

10596, at *6 (TTAB 2020) (citing *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982)).

Priority

Respondent stipulates that Petitioner owns “existing” Registration No. 3137118 for the mark YOU MUST BE AN IDIOT! for “board games” and “has priority in this cancellation proceeding” (11 TTABVUE 3, ¶¶ 2, 4-10, 12-13). Petitioner is entitled to rely on the filing date of the application underlying its pleaded registration to establish priority. *Christian Broad. Network, Inc. v. ABS-CBN Int’l*, 84 USPQ2d 1560, 1565-66 (TTAB 2007) (where both petitioner and respondent are owners of registrations, petitioner must prove priority of use and may rely on filing date of its application for registration to do so). Petitioner’s February 14, 2005 filing date precedes Respondent’s December 21, 2017 filing date, and Respondent has not argued, let alone introduced evidence of, prior use. Accordingly, we find no genuine dispute that Petitioner has priority.

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We need only consider whether a genuine dispute exists as to the similarity of the marks, the first *DuPont* factor, as Respondent “stipulates to the following:”

5. ... that the products listed in [Respondent’s] registration are similar and/or strongly related to the products listed in Petitioner’s existing registration
6. ... that the channels of trade for the products listed in [Respondent’s] registration could be identical to the channels of trade for the products listed in Petitioner’s existing registration
7. ... that the products listed in [Respondent’s] registration could be advertised via the same means and methods and in the same physical and online outlets as the products listed in Petitioner’s existing registration
8. ... that the products listed in [Respondent’s] registration could be sold to the same types and classes of consumers as the products listed in Petitioner’s existing registration
9. ... that the products listed in [Respondent’s] registration could be used by the same types and classes of consumers as the products listed in Petitioner’s existing registration
- 10.... that the consumers who would purchase the products listed in [Respondent’s] registration [and] Petitioner’s existing registration ... are of ordinary sophistication and intellect.
- 11.... that the products listed in [Respondent’s] registration could be sold throughout the USA.
- 12.... that the products listed in [Respondent’s] registration could be sold at the same price points as the products listed in Petitioner’s existing registration
- 13.... that consumers would only exercise ordinary care in selecting and purchasing the products listed in [Respondent’s] registration [and] Petitioner’s existing registration....

11 TTABVUE 3-4, ¶¶ 5-13.

Regarding the “similarity or dissimilarity of the marks,” we analyze “the marks in their entireties as to appearance, sound, connotation and commercial impression.”

DuPont, 177 USPQ at 567. Similarity as to any one of these elements suffices to support a likelihood of confusion. See *Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (citation omitted); *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citations omitted), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019).

Further, “[t]he proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of marks. See *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014) (citations omitted).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entirety, “[o]ur analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on a comparison of the entire marks, not just part of the marks.” *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *4 (TTAB 2020) (citing *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014), and *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)) (other citation omitted).

To support its cross-motion for summary judgment, Petitioner asserts that the commercial impression of the marks are identical, and that any minor differences in punctuation and sentence structure are irrelevant. 15 TTABVUE 7-11. Specifically, Petitioner contends that the marks are “short declarative phrases which call a game participant an IDIOT and both start with the term YOU” (*id.* at 8); that they also are “implied conditionals” in which “linking verbs,” that “mean essentially the same thing,” “connect[] the subject (YOU) with the adjective (IDIOT)” (*id.*); and that the marks begin with YOU and end with IDIOT, the latter of which is the most distinctive and dominant element “as the other words in the marks are pronouns and verbs” (*id.* at 10-11). Further, Petitioner submits that consumers “are accustomed to encountering new products bearing substantially similar trademarks from the same source,” such as “the release of sequels and expansion packs [of games] featuring slightly altered trademarks bearing the most distinctive element(s) of a previous mark.” *Id.* at 9-10. Petitioner also proffers with the cross-motion:

1. A screenshot of its website depicting a game card featuring the phrase “You’re an IDIOT!” in its YOU MUST BE AN IDIOT! board game (*id.* at 14);
2. Screenshots of its website depicting various board games from third parties and from Petitioner featuring similar marks, e.g., (a) Time’s Up! and Time’s UP! Title Recall Expansion 1, and (b) 1st & Goal, 1st & Goal Expansion Mideast Division, 1st & Goal Expansion Northeast Division, and 1st & Goal Expansion Southeast Division (*id.* at 17-22); and
3. A declaration from its president, Frank Dilorenzo, in which he verifies the preceding evidence and states that, “[s]ince at least 2006, the YOU MUST BE AN IDIOT! game has included game cards, including one which features the phrase ‘YOU’RE AN IDIOT!’,” and that, “[i]n the tabletop industry, it is very common for game manufacturers to release sequels and expansion packs to successful games.” *Id.* at 24, ¶¶ 4, 6. According to Mr. Dilorenzo,

“[t]hese sequels and expansion packs almost always incorporate the marks of the original game while incorporating some new elements or words along with new gameplay.” *Id.* at 24, ¶ 6.

In response, Respondent argues that Petitioner is “factually incorrect” in stating that the marks “both start with the term YOU” (16 TTABVUE 2); that whether certain elements in the marks “mean essentially the same thing is of no consequence” (*id.* at 3); and that the evidence Petitioner submitted to illustrate that game sequels and expansion packs “always incorporate the marks of the original game while incorporating some new elements or words” actually shows identical marks, whereas the marks in this proceeding are not the same (*id.* at 3). Respondent offers no evidence in support of its position.

In view of these arguments and the evidence of record, and drawing all justifiable inferences in Respondent’s favor as the non-moving party, we find that Petitioner has met its burden of demonstrating no genuine dispute that the marks are confusingly similar, which Respondent has failed to rebut. In particular, we find that Respondent’s mark YOU’RE AN IDIOT is extremely similar in appearance and sound to Petitioner’s mark YOU MUST BE AN IDIOT! as they end with the same distinctive AN IDIOT and begin with related wording: YOU’RE in Respondent’s mark is a contraction that includes YOU in Petitioner’s mark. “RE” in Respondent’s mark is a contraction of the word “are” which is a form of the word “be” in Petitioner’s mark.⁶

⁶ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2018) (<https://www.ahdictionary.com/word/search.html?q=be>) last accessed May 18, 2022 (“Are” is the “[s]econd person singular and plural and first and third person plural present indicative of be”). The Board may take judicial notice of dictionary definitions, including online editions that exist in printed format. See *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*,

The term “MUST” in Petitioner’s mark merely indicates the absence of any doubt that the person on the receiving end of the message is “an idiot.” Further, cognizant that the focus is on the recollection of the average purchaser who normally retains a general rather than a specific impression of marks, *see Inter IKEA Sys.*, 110 USPQ2d at 1740 (citations omitted), we find the marks are the same, or nearly so, in meaning and impression as they constitute essentially the same insult – telling a person, in this case a particular player in the game, that they are “foolish or stupid.”⁷

In view thereof, and given that the parties have not submitted any evidence or argument regarding other *DuPont* factors aside from those stipulated to by Respondent in Petitioner’s favor, we further find no genuine dispute that there is a likelihood of confusion.

As Petitioner has carried its burden establishing no genuine dispute regarding entitlement to a statutory cause of action, priority, and likelihood of confusion, which Respondent has failed to rebut, Petitioner is entitled to judgment as a matter of law on its likelihood of confusion claim. Accordingly, Petitioner’s cross-motion for

213 USPQ 594, 596 (TTAB 1982) (citation omitted), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377-78 (TTAB 2006).

⁷ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2018) (<https://www.ahdictionary.com/word/search.html?q=idiot>) last accessed May 18, 2022.

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summary judgment is **granted**, and Respondent's motion for summary judgment is **denied**.

Judgment is **entered** in Petitioner's favor against Respondent, the petition for cancellation is **granted**, and Registration No. 5524635 will be **cancelled** in due course.