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UNITED STATES PATENT AND TRADEMARK OFFICE
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Gehring/Faint

July 17, 2019

Opposition No. 91235429

Bottle Logic Brewing, LLC

v.

Platform Beers, LLC

Before Bergsman, Heasley and Dunn
Administrative Trademark Judges.

By the Board:

Applicant/Counterclaim Petitioner Platform Beers, LLC (Platform) seeks registration of the marks 

, filed May 26, 2016, and 

, filed June 1, 2016, for "beer" in International Class 32.[1] Opposer/Counterclaim Respondent Bottle Logic, LLC (Bottle Logic) owns Registration No. 4653890 for the

[1] Application Serial Nos. 87050742 and 87056210 both filed under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), and claiming dates of first use anywhere and first use in commerce on July 17, 2013.

Platform disclaimed the exclusive right to use the term "Beer Co." in both applications.

mark 

, in International Classes 32 for beer and 43 for bar tasting room and restaurant services,[2] and Registration No. 5001783 for the mark  in International Class 32 for beer.[3] Bottle Logic opposes registration of Platform's marks, alleging a likelihood of confusion under Trademark Act § 2(d).[4] By its answer, Platform denies the salient allegations in the Notice of Opposition.[5] Platform also filed counterclaims against both of Bottle Logic's registrations alleging in the alternative likelihood of confusion.[6] Bottle Logic filed an answer denying the allegations of the counterclaim.

Bottle Logic has moved for partial summary judgment on the ground that there is no genuine dispute as to its priority.[7] Platform has moved for summary judgment on the ground that there is no genuine dispute that the parties' marks are dissimilar.[8]

[2] Registration No. 4653890 registered December 9, 2014 based on an application filed August 20, 2013.

[3] Registration No. 5001783 registered July 19, 2016 based on an application filed September 09, 2015.

[4] 1 TTABVUE 7.

[5] 9 TTABVUE 2, 34 TTABVUE 1.

[6] 9 TTABVUE 4.

[7] 23 TTABVUE.

[8] 34 TTABVUE.

A. Motion to Amend Dates of Use in Opposed Applications

Accompanying Platform's response to Bottle Logic's motion for summary judgment is a declaration by which Justin Carson, President of Platform, avers that Platform recently learned of the error in its dates of use in its opposed applications, and that "Platform began using both of its marks at issue in this proceeding in connection with the sale of beer as early as July 4, 2014."[9] Accordingly, the Board construes this sworn statement as a motion to amend both application Serial Nos. 87050742 and 87056210 to list July 4, 2014 as its date of first use anywhere and in commerce. Because Bottle Logic's reply brief seeks entry of judgment, as discussed below, based on the admission that Platform lacks priority, the Board construes this as consent to the amendment. Trademark Rule 2.133(a), 37 C.F.R. § 2.133(a).

In an application under Trademark Act Section §1(a), the applicant may amend the dates of use to adopt a date of use that is earlier than the date originally stated or later than the date originally stated, but not a date of use subsequent to the application filing date. Trademark Rule 2.71(c)(1), 37 C.F.R. § 2.71(c)(1); *Mason Eng'g and Design Corp. v. Mateson Chem. Corp.*, 225 USPQ 956, 957 n.4 (TTAB 1985). Here, the consented amendment is supported by the required declaration and seeks to amend to later dates of use before the application filing dates. The amendment to list July 4, 2014 as the date of first use anywhere and in commerce in both application

[9] 33 TTABVUE 10. The declaration goes on to aver that "Platform began selling cans of beer bearing those same marks at least as early as December 15, 2014." If this second date is not merely additional explanation, but actually the date of first use in commerce, Platform is ordered to promptly notify the Board with an amended declaration.

Serial Nos. 87050742 and 87056210 is **approved and entered**. *See* Trademark Rule 2.133(a).

B. Summary Judgment Standard

Summary judgment is appropriate where the moving party shows the absence of any genuine dispute as to any material fact, and that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323- 324 (1986); *Freki Corp. N.V. v. Pinnacle Entm't, Inc.*, 126 USPQ2d 1697, 1700 (TTAB 2018). A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-movant. *Opryland USA, Inc. v. Great Am. Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992). In deciding a motion for summary judgment, the Board may not resolve any factual dispute; it may only determine whether a genuine dispute of material fact exists. *See, e.g., Meyers v. Brooks Shoe, Inc.*, 912 F.2d 1459, 16 USPQ2d 1055, 1056 (Fed. Cir. 1990) (factual dispute should be reserved for trial).

When the movant has supported its motion with sufficient evidence that, if unopposed, indicates there is no genuine dispute of material fact and that the moving party is entitled to judgment as a matter of law, the burden then shifts to the non-moving party to demonstrate the existence of a genuine dispute of material fact to be resolved at trial. *Enbridge, Inc. v. Excelerate Energy LP*, 92 USPQ2d 1537, 1540 (TTAB 2009); *see also Opryland*, 23 USPQ2d at 1472-73 (non-movant not required to present its entire case but just sufficient evidence to show evidentiary conflict as to material fact in dispute). Just because both parties have moved for summary

judgment does not mean that there are no genuine disputes of material fact, and does not require that judgment to be entered. *See University Book Store v. University of Wis. Bd. of Regents*, 33 USPQ2d 1385, 1389 (TTAB 1994).

As a result of Platform's counterclaim, Bottle Logic's pleaded registrations form part of the record of this case without any action by the parties. Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1). Thus Bottle Logic has standing. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). Platform, as a counterclaimant, has standing inherent in its position as defendant in the original proceeding. *Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1428 (TTAB 2014).

C. Bottle Logic's Motion for Summary Judgment of Platform's Counterclaims

1. Granted as to Registration No. 4653890

In response to Bottle Logic's motion for partial summary judgment on Platform's counterclaim to cancel Bottle Logic's Registration No. 4653890, Platform concedes that it made an "unintentional mistake" in the dates of first use listed in its opposed applications, and in pleading priority over the '890 registration. More specifically, Platform states:[10]

> [T]he subject marks of Serial Nos. 87050742 and 87056210 were not in use in commerce on beer before Opposer's August 20, 2013 filing date for Registration No. 4,653,890. Platform therefore concedes this portion of the motion and agrees that its claim of priority for Serial Nos. 87050742 and 87056210 over Registration No. 4,653,890 should be dismissed.

[10] 33 TTABVUE 4.

In view of Platform's amendment of its opposed applications, and admission that it cannot prove prior use, Bottle Logic's motion for summary judgment on Platform's counterclaim to cancel Registration 4653890 is **granted**. The counterclaim to cancel Registration 4653890 is **dismissed**.

2. Denied as to Registration No. 5001783

As set forth above, Bottle Logic's Registration No. 5001783 has a constructive use date of September 9, 2015. *See, e.g., L. & J.G. Stickley, Inc. v. Cosser*, 81 USPQ2d 1956 (TTAB 2007) (noting filing dates of applications are significant because registrant can rely on them for priority). In moving for summary judgment on priority, Bottle Logic presents no evidence showing that it is entitled to an earlier priority date. *See* Trademark Rule 2.122(b)(2) ("the allegation in an application for registration, or in a registration, of a date of use is not evidence on behalf of the applicant or registrant; a date of use of a mark must be established by competent evidence."). Because Platform provides the declaration of its President averring that Platform has been using both of its marks in connection with beer since July 4, 2014 and began selling cans of beer bearing those marks as early as December 15, 2014, Bottle Logic's motion for summary judgment fails to present a prima facie case of priority as to this registration.

Accordingly, Bottle Logic's motion for summary judgment on Platform's counterclaim to cancel Registration 5001783 is **denied**.

D. **Platform's Cross-Motion for Summary Judgment**

Platform asserts the parties' marks are so different that, on their face, there is no likelihood of confusion. Both parties' marks feature an Edison lightbulb to identify beer. Yet, there are some differences between the marks. Platform's '742 mark features a modern/clean aesthetic, utilizing sharp, bold lines that evoke an industrial/modern motif. The word PLATFORM is inside a rectangle and a smaller Edison lightbulb is placed atop the rectangle, centered, and uses a wheat leaf as the filament for the bulb. Platform's '210 mark uses the same bulb in the background with PLATFORM in front of it, inside multiple (5) concentric circles of varying thickness.

Bottle Logic's '890 mark has a punk/playful feel. The words BOTTLE LOGIC are slightly parabolic with an upwards trend and the mark also features an Edison lightbulb. Inside the bulb is a beer bottle. The mark features two lightning bolts coming out of both sides of the bottom of the bulb with "est." above the left bolt and "2013" above the right bolt. Outside of the bulb, the marks do not sound or look alike.

These differences, however, do not rise to the required "differ so substantially" standard that would allow summary judgment on this issue. *Kellogg Co. v. Pack'em Enters,* 951 F.2d 330, 21 USPQ2d 1142, 1144, (Fed. Cir. 1991). Platform supplied TSDR printouts of seven live registered marks that use a light bulb in relation to beer, but only one of the marks uses an Edison bulb. Platform also provided eight more examples, in the form of webpage printouts showing lightbulbs used in conjunction with beer, but only one features an Edison bulb. Under *Jack Wolfskin,*

the moving party is required to produce voluminous evidence to prove that a mark's impression is weak. *Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports*, S.L.U., 797 F.3d 1363, 1372, 116 USPQ2d 1129, 1136, (Fed. Cir. 2015).

Platform has failed to provide evidence demonstrating that the marks are so different that judgment should be granted as a matter of law. There are enough differences to create a genuine dispute of material fact as to whether the marks are confusingly similar. The cross-motion for summary judgment is **denied**

E. Decision

In summary, Bottle Logic's motion for summary judgment as to the issue of priority is **granted** with respect to the '890 registration and is **denied** with respect to the '783 registration.[11] Platform's cross-motion for summary judgment on the differences between the marks is **denied.**

F. Schedule

Proceedings are resumed. Dates are reset as set out below.

Expert Disclosures Due	9/3/2019
Discovery Closes	10/3/2019
Pretrial Disclosures Due for Party in Position of Plaintiff in Original Claim	11/17/2019

[11] Evidence submitted in connection with the motion for summary judgment is of record only for consideration of that motion. To be considered at final hearing, all evidence must be properly introduced during the appropriate trial period. *See Land O' Lakes, Inc. v. Hugunin,* 88 USPQ2d 1957, 1960 n.7 (TTAB 2008); *University Games Corp. v. 20Q.net, Inc.*, 87 USPQ2d 1465, 1468 n.4 (TTAB 2008); *Levi Strauss & Co. v. R. Josephs Sportswear, Inc.,* 28 USPQ2d 1464 (TTAB 1993). Furthermore, the fact that we have identified certain genuine disputes of material fact sufficient to deny the motion should not be construed as a finding that these are necessarily the only issues that remain for trial.

30-day Trial Period Ends for Party in Position of Plaintiff in Original Claim	1/1/2020
Pretrial Disclosures Due for Party in Position of Defendant in Original Claim and in Position of Plaintiff in Counterclaim	1/16/2020
30-day Trial Period Ends for Party in Position of Defendant in Original Claim, and in Position of Plaintiff in Counterclaim	3/1/2020
Pretrial Disclosures Due for Rebuttal of Party in Position of Plaintiff in Original Claim and in Position of Defendant in Counterclaim	3/16/2020
30-day Trial Period Ends for Rebuttal of Party in Position of Plaintiff in Original Claim, and in Position of Defendant in Counterclaim	4/30/2020
Pretrial Disclosures Due for Rebuttal of Party in Position of Plaintiff in Counterclaim	5/15/2020
15-day Trial Period Ends for Rebuttal of Party in Position of Plaintiff in Counterclaim	6/14/2020
Opening Brief for Party in Position of Plaintiff in Original Claim Due	8/13/2020
Combined Brief for Party in Position of Defendant in Original Claim and Opening Brief as Plaintiff in Counterclaim Due	9/12/2020
Combined Rebuttal Brief for Party in Position of Plaintiff in Original Claim and Brief as Defendant in Counterclaim Due	10/12/2020
Rebuttal Brief for Party in Position of Plaintiff in Counterclaim Due	10/27/2020
Request for Oral Hearing (optional) Due	11/6/2020

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at

final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

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