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

WINTER

Mailed: June 19, 2009

Cancellation No. 92047436

PRL USA Holdings, Inc.

v.

Thread Pit, Inc.

Before Bucher, Kuhlke, and Bergsman, Administrative Trademark Judges.

By the Board:

This case now comes up for consideration of respondent's motion (filed November 13, 2008) for summary judgment on the basis that petitioner cannot present sufficient evidence to prove actual or likelihood of confusion; petitioner's cross-motion (filed December 18, 2008) for summary judgment on the grounds of likelihood of confusion and dilution; petitioner's motion (filed January 26, 2009) to strike arguments in and an exhibit to respondent's reply brief to its motion for summary judgment; and respondent's motion (filed February 23, 2009) to strike petitioner's second reply brief to respondent's opposition to petitioner's cross-motion for summary judgment. The motions are fully briefed.

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Inasmuch as the parties' respective motions to strike may affect the arguments and exhibits considered by the Board in connection with the motion and cross-motion for summary judgment, we first consider the motions to strike.

Motions to Strike

- *Petitioner's Motion to Strike*

Petitioner requests that the Board strike allegedly improperly submitted evidence attached to respondent's reply brief to respondent's motion for summary judgment, specifically, Exhibit C thereto, which comprises a set of Internet-based customer comments concerning respondent's mark that were allegedly printed from respondent's website, but were not accompanied by a supporting affidavit. Petitioner also requests that the Board strike all of respondent's arguments relating to the issue of parody in the reply brief because that issue was not raised by petitioner in either its opposition to respondent's motion for summary judgment or in petitioner's cross-motion for summary judgment.

In opposition, respondent concedes that it was improper for it to raise the issue of parody in reply to petitioner's opposition brief. Respondent has also submitted a "supplementary declaration" which essentially states only that the exhibit attached to its reply brief is "true and correct."

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Petitioner's motion to strike respondent's reply brief arguments regarding parody is granted as conceded. Nonetheless, because the issue of whether respondent's mark is viewed as a parody of petitioner's mark is a factor that is relevant to our analysis of likelihood of confusion, the Board has considered respondent's arguments on parody that were set forth in its opposition to petitioner's cross-motion for summary judgment. *See Elvis Presley Enterprises Inc. v. Capece,* 141 F.3d 188, 194, 46 USPQ 1737 (5th Cir. 1998); *Dr. Seuss Enterprises L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1405, 42 USPQ2d 1184 (9th Cir. 1977) ("the claim of parody is not really a separate "defense" as such, but merely a way of phrasing the traditional response that customers are not likely to be confused as to the source, sponsorship or approval"), *cert. dismissed*, 521 U.S. 1146 (1997); and *Nike, Inc. v. "Just Did It" Enterprises.*, 6 F.3d 1225, 1231 (7th Cir. 1993) ("holding that parody is not an affirmative defense to trademark infringement but that it can be an additional factor in a likelihood-of-confusion analysis").

As to respondent's reply brief exhibit, it is well-established that Internet printouts do not qualify as printed publications under Trademark 2.122(e) and that they must be authenticated by a declaration demonstrating that the information therein was published on the Internet and was accessed by the declarant at a particular Internet address on

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a date certain which data are shown on the printouts. *See Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1371 (TTAB 1968). In the declaration of respondent's counsel, he has not indicated that he has personal knowledge of the search that resulted in the printout or that he is aware of the parameters of the search associated with the submitted web pages, and he has not named the person who conducted the search. In view thereof, the late-filed declaration in support of respondent's Exhibit C does not function to properly authenticate that exhibit. *See Id.* Accordingly, petitioner's motion to strike Exhibit C to respondent's reply brief is granted and we have given it no consideration.

- *Respondent's Motion to Strike*

Respondent requests that the Board strike petitioner's second reply brief submitted on February 10, 2009 in connection with respondent's opposition to petitioner's cross-motion for summary judgment. Respondent argues that the Trademark Rules do not provide for the filing of an additional reply brief and that petitioner's filing is, in any event, untimely as it was filed more than fifteen days after the filing of respondent's opposition brief to petitioner's cross-motion for summary judgment.

Respondent is incorrect about the timeliness of petitioner's second reply brief inasmuch as it was filed within the twenty-day period allowed to respond to an

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opposition brief served by first class mail. *See* Trademark Rule 2.119(c), 37 C.F.R. § 2.119(c). Nonetheless, the Trademark Rules do not provide for the filing of a sur-reply. *See* Trademark Rule 2.127(a), 37 C.F.R. § 2.127(a) ("The Board will consider no further papers in support of or in opposition to a motion"). In view thereof, respondent's motion to strike petitioner's sur-reply filed on February 10, 2009 is granted and said reply brief has not been considered.

Motions for Summary Judgment

We turn now to the parties' respective motions for summary judgment.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(c). A party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). Additionally, the evidence must be viewed in a light favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. *See Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1993). Further, the Board may only ascertain whether issues of material fact are present, and

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