United States Court of Appeals for the Federal Circuit

ADIDAS AG,
Appellant

v.

NIKE, INC.,
Appellee

2019-1787, 2019-1788

Appeals from the United States Patent and Trademark Office, Patent Trial and Appeal Board in Nos. IPR2016-00921, IPR2016-00922.

Decided: June 25, 2020

MITCHELL G. STOCKWELL, Kilpatrick Townsend & Stockton LLP, Atlanta, GA, for appellant. Also represented by VAIBHAV P. KADABA, MICHAEL T. MORLOCK, TIFFANY L. WILLIAMS.

CHRISTOPHER J. RENK, Banner & Witcoff, Ltd., Chicago, IL, for appellee. Also represented by KEVIN DAM, MICHAEL JOSEPH HARRIS.

Before MOORE, TARANTO, and CHEN, *Circuit Judges*.

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MOORE, *Circuit Judge*.

Nike, Inc. owns U.S. Patent Nos. 7,814,598 and 8,266,749, which share a specification and are directed to methods of manufacturing an article of footwear with a textile upper. *See* '598 patent at 1:18–21. Adidas AG petitioned for *inter partes* review of claims 1–13 of the '598 patent and claims 1–9, 11–19 and 21 of the '749 patent. The Board held that Adidas had not demonstrated that the challenged claims are unpatentable as obvious. Adidas appeals. Because the Board did not err in its obviousness analysis and substantial evidence supports its underlying factual findings, we affirm.

I. Standing

"Although we have jurisdiction to review final decisions of the Board under 28 U.S.C. § 1295(a)(4)(A), an appellant must meet 'the irreducible constitutional minimum of standing.'" *Amerigen Pharm. Ltd. v. UCB Pharma GmBH*, 913 F.3d 1076, 1082 (Fed. Cir. 2019) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). As the party seeking judicial review, Adidas must show that it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct [], and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Nike contends that Adidas cannot establish an "injury in fact," and therefore lacks standing to bring this appeal, because Nike "has not sued or threatened to sue Adidas for infringement of either the '598 or the '749 patent." Appellant's Br. 20. We do not agree.

An appellant need not face "a specific threat of infringement litigation by the patentee" to establish the requisite injury in an appeal from a final written decision in an *inter partes* review. *E.I. DuPont de Nemours & Co. v. Synvina C.V.*, 904 F.3d 996, 1004 (Fed. Cir. 2018). Instead, "it is generally sufficient for the appellant to show that it has engaged in, is engaging in, or will likely engage in activity

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that would give rise to a possible infringement suit." *Grit Energy Sols., LLC v. Oren Techs., LLC*, 957 F.3d 1309, 1319 (Fed. Cir. 2020). In *DuPont*, we held that the appellant had standing because it had concrete plans to make a potentially infringing product, including actually completing the necessary production plant, and thus there was a substantial risk of future infringement. *DuPont*, 904 F.3d at 1005. We determined that the patent owner's refusal to grant appellant a covenant not to sue further confirmed that appellant's risk of injury was not "conjectural" or "hypothetical." *Id.*

As in *DuPont*, Adidas and Nike are direct competitors. J.A. 2584. In 2012, Nike accused Adidas, based on Adidas' introduction of its "Primeknit" products, of infringing one of Nike's "Flyknit" patents[1]—specifically, a German patent—and expressed its intent "to protect [Nike's] rights globally in the future against further infringing acts" by Adidas. J.A. 2585–86; 2591–2613. Adidas markets shoes that contain Primeknit-based uppers in the United States. J.A. 2587. Although Nike has not yet accused Adidas of infringing the '598 or '749 patents, Nike has asserted the '749 patent against a third-party product similar to Adidas' footwear. J.A. 2587–90, 2678–93. In 2019, Nike told this court that "five months after [it] announced FLYKNIT, [A]didas announced a *similar product* of its own that it called 'Primeknit.'" J.A. 2587 (emphasis added). Moreover, Nike has refused to grant Adidas a covenant not to sue, confirming that Adidas' risk of infringement is concrete and substantial. *See DuPont*, 904 F.3d at 1005. We therefore conclude that Adidas has Article III standing to bring this appeal.

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[1] Nike has a portfolio of "more than 300 issued utility patents," including the '749 patent, directed to its Flyknit technology. J.A. 2652.

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II. Obviousness

The challenged claims recite a method of "mechanically-manipulating a yarn with a circular knitting machine . . . to form a cylindrical textile structure." '598 patent at 3:41–46. The claimed method involves removing a textile element from the textile structure and incorporating it into an upper of the article of footwear. *Id.* at 3:41–46. Claims 4 and 11 of the '598 patent and claims 11 and 21 of the '749 patent (collectively, the Unitary Construction Claims) require that the textile element is a single material element wherein portions of the textile element have different textures and "are not joined together by seams or other connections." *Id.* at 5:40–43, 6:41–50. The other challenged claims (collectively, the Base Claims) are not so limited.

Claim 1 of the '598 patent is illustrative of the Base Claims:

> 1. A method of manufacturing an article of footwear, the method comprising steps of:
>
> mechanically-manipulating a yarn with a circular knitting machine to form a cylindrical textile structure;
>
> removing at least one textile element from the textile structure;
>
> incorporating the textile element into an upper of the article of footwear.

'598 patent at Claim 1. Claim 4 of the '598 patent is illustrative of the Unitary Construction Claims:

> 4. The method recited in claim 1, wherein the step of mechanically manipulating includes forming the textile element to include a first area and a second area with a unitary construction, the first area being formed of a first stitch configuration, and the second area being formed of a second stitch

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> configuration that is different from the first stitch configuration to impart varying textures to a surface of the textile element.

’598 patent at Claim 4.

Adidas challenged the claims as obvious in view of: (1) the combination of U.S. Patent Nos. 3,985,003 (Reed) and 5,345,638 (Nishida) (Ground 1) and (2) the combination of Nishida and U.S. Patent Nos. 4,038,840 (Castello) and 6,330,814 (Fujiwara) (Ground 2).[2] The Board held that Adidas had not demonstrated that the challenged claims are unpatentable as obvious under either ground. We review the Board’s legal determinations de novo and its factual findings for substantial evidence. *In re Van Os*, 844 F.3d 1359, 1360 (Fed. Cir. 2017). “Obviousness is a question of law based on underlying facts.” *Arctic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 876 F.3d 1350, 1358 (Fed. Cir. 2017).

A. Ground 1

The Board held that Adidas had not established the unpatentability of the challenged claims under Ground 1 because Adidas had not demonstrated that a person of ordinary skill in the art would have been motivated to combine Reed and Nishida. *See* J.A. 91, 214. In particular, the Board noted that neither Adidas nor its declarant, Mr. Holden, “addresses the fact that each of the relied upon

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[2] The Board initially declined to institute review on Ground 2 because it was insufficiently particular. J.A. 389–91, 414–16. The Board issued final written decisions on Ground 1 and Adidas appealed. We remanded in view of *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348 (2018), for the Board to “issue a decision as to all grounds raised in Adidas’ petitions.” *See Adidas AG v. Nike, Inc.*, 894 F.3d 1256, 1257 (Fed. Cir. 2018). This appeal concerns the Board’s final written decisions after remand.

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