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Daniel Hyungtae Kim

Cardozo Journal of Conflict Resolution, hkim8@law.cardozo.yu.edu

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HOW NIKE'S TRADEMARK INFRINGEMENT LAWSUIT AGAINST KOOL KIY & OMI MAY BENEFIT FROM CHINA'S WUHAN INTERMEDIATE PEOPLE'S COURT'S APPROACH TO MEDIATION

Daniel Hyungtae Kim

In November 2022, Nike filed a trademark infringement lawsuit against Kool Kiy, Omi, and China-based manufacturer Xiamen Wandering Planet, garnering nationwide media attention.¹ Particularly, Wandering Planet was accused of playing an integral role in the infringement by providing the sources to produce knockoff sneakers using Nike's registered Air Jordan 1 and Dunk trade dress for Kiy and Omi.² The manufacturer allegedly "knowingly participate[d] in a scheme to intentionally create confusion in the market place and capitalize on it."³ Indeed, some confused consumers could not tell the difference between Kool Kiy's products and Jordan's.⁴ Nike's staunch commitment to proceeding with litigation is clear: "Nike must protect its design and intellectual property from bad actors who undermine the very DNA of authentic sneaker culture by promoting, copying, and selling Nike's designs as their own."⁵

Although Nike's legal team allegedly notified Kiy of the infringement complaints in August 2021 and failed to reach an agreement, Nike would still be better off seeking a closed-door negotiation, "enabl[ing] the parties to negotiate with full acknowledgment of their weaknesses, strengths, and ulterior motive to come up with amicable settlements for the benefit of both parties."⁶

Mediation is the right choice to settle this dispute for several reasons. First, there is a global trend advocating for mediation. In India, the total number of trademark applications submitted to the trademark office has recently increased by almost 212%.⁷ This has exerted an excessive amount of pressure on the judiciary.⁸ WIPO, Poland, and Greece have taken a similar stance.⁹ Second, sensitive information is at risk when exposing IP to the public during litigation.¹⁰ This kind of unwanted disclosure can be manipulated by competitors at the disadvantage of the parties

¹ Cheyenne Falcon, *Nike Strikes Down Kool Kiy & Omi With a Trademark Infringement Lawsuit*, NICE KICKS (Dec. 2, 2022), <https://www.nicekicks.com/nike-kool-kiy-omi-wandering-plant-trademark-infringement/> [https://perma.cc/V2DX-PMXT].

² Peter Michael, *Nike Files Trademark Infringement Lawsuit Against Kiy and Omi*, HOUSE OF HEAT (Dec. 1, 2022), <https://houseofheat.co/nike/nike-files-trademark-infringement-lawsuit-against-kiy-and-omi/> [https://perma.cc/5CWP-BMLH].

³ Riley Jones, *Nike Sues Designers Kool Kiy & Omi for Trademark Infringement*, COMPLEX (Dec. 1, 2022), <https://www.complex.com/sneakers/nike-sues-designers-kool-kiy-omi-trademark-infringement> [https://perma.cc/P6CJ-UB2M].

⁴ *Id.*

⁵ Falcon, *supra* note 1.

⁶ Krishna Bhattacharya, *Effectiveness of Mediation in Trademark Disputes*, IMW POST (Jun. 26, 2020), https://imwpost.com/effectiveness-of-mediation-in-trademark-disputes/#_edn9 [https://perma.cc/8YQK-2NV2].

⁷ *A Whooping Increase of 212% Trademark Applications Examined This Week*, BANANAIP COUNS. (Jan. 16, 2020), <https://www.bananaip.com/ip-news-center/a-whooping-increase-of-212-trademark-applications-examined-this-week/> [https://perma.cc/7HNS-SB8F].

⁸ Bhattacharya, *supra* note 6.

⁹ *Id.*

¹⁰ *Id.*

in dispute.¹¹ Having initiated the lawsuit, Nike may have lost some of its critically sensitive trade dress information already. Third, trademark cases are unique.¹² The litigation costs, the threats of injunctive relief, the complexity of the law, and ever-present confidentiality issues differentiate trademark cases from general commercial litigation.¹³ Last, when the parties can control the outcome, and resolutions beyond the power of the court are available, appealing to reason is preferable to strictly legal arguments.¹⁴

China's Wuhan Intermediate People's Court's successful mediation strategy for Puma's trademark infringement lawsuits against over 30 vendors lends credence to the proposal above.¹⁵ After finding that the marks of the vendors' products resembled its own trademark "PUMA," Puma sued them for the sales of infringing products, demanding 2 million RMB.¹⁶ Given the high volume of trademark infringement disputes, the right-holders' high expectations, the infringers' lack of understanding of the law, strong resentment between the parties, low affordability, and a need to relieve the pressure of going to trial every time, mediation was a better option.¹⁷ There, the key to success was to adopt the following four-step strategy.¹⁸ First, the parties listened patiently and eliminated antagonism of both sides, setting up amicability for mediation.¹⁹ Next, the parties sought to exhibit positivity, and clarify any misunderstanding between them, adding more "solid foundation for mediation."²⁰ Third, both parties proceeded to "narrow the gaps" in each other's expectations, and finally, they proposed suggestions to ensure satisfaction.²¹ As a result, the Puma cases concluded "reasonably and quickly."²² The WIPC's approach considerably reduced the number of fake goods in the Wuhan market and saved time.²³

The global trend favoring mediation in trademark infringement disputes is not an abstract concept; it is palpable. To save resources before it gets too exhausting, Nike's legal team should give mediation one last shot by perhaps adopting what the WIPC did.

¹¹ *Id.*

¹² Joyce B. Klemmer, *Trademark Mediation – Talk It Over*, JAMS (Sept. 1, 2021), <https://www.jamsadr.com/blog/2021/klemmer-joyce-int-prop-mag-talk-it-over-09-2021> [https://perma.cc/YB49-YR62].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Court's Successful Mediation on Puma's Trademark Disputes*, CNIPA (Jul. 17, 2013), https://english.cnipa.gov.cn/art/2013/7/17/art_1347_104584.html [https://perma.cc/CTL8-2LWT].

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Court's Successful Mediation on Puma's Trademark Disputes*, *supra* note 15.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*