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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77006212
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**APPLICANT'S BRIEF IN SUPPORT OF
ITS APPEAL OF REFUSAL TO REGISTER**

FILING DATE: September 25, 2006
SERIAL NO: 77/006212
APPLICANT: KIRBY, JAMES T.
MARK: COCAINE

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List of Cited Cases

In re Mavety Media Group, Ltd., 33 F.3d 1367 (Fed. Cir. 1994).

In re The Boulevard Entertainment, Inc., 334 F.3d 1336 (Fed. Cir. 2003).

In re Over Our Heads, Inc., 16 U.S.P.Q.2d (BNA) 1653 (TTAB 1990).

In re McGinley, 660 F.2d at 485 (CCPA 1981).

I. Registration Should Not Be Refused Because the Mark is Not Scandalous or Offensive

Applicant filed for registration of the mark, COCAINE, as applied to energy drinks and carbonated soft drinks. The Examining Attorney refused registration because he found that the proposed mark “consists

of or comprises immoral or scandalous matter” within the meaning of Section 2(a). Applicant appealed the rejection and hereby submits this brief in support of its appeal.

Registration of a proposed mark should be refused under the first part of Section 2(a) only if it contains “immoral, deceptive, or scandalous matter.” *In re Mavety Media Group, Ltd.*, 33 F.3d 1367, 1371 (Fed. Cir. 1994). *See also, In re The Boulevard Entertainment, Inc.*, 334 F.3d 1336, 1340 (Fed. Cir. 2003). The Federal Circuit has established a three-part test for determining whether a proposed mark is scandalous: (1) the proposed mark must be “shocking to the sense of truth, decency, or propriety, or call out for condemnation”; (2) the propriety of the mark must be “considered in the context of the marketplace as applied to only the goods or services in the application for registration”; and (3) the mark must appear scandalous to “a substantial composite of the general public, as measured from the context of contemporary attitudes.” *Mavety*, 33 F.3d at 1371.

The PTO has the burden of proving that a trademark falls within a prohibition of Section 2(a). *Id.* Moreover, any doubts on the issue of whether a mark is scandalous should be resolved in favor of an applicant, “[b]ecause the guidelines are somewhat vague and because the determination is so highly subjective.” *In re Over Our Heads, Inc.*, 16 U.S.P.Q.2d (BNA) 1653, 1654-55 (TTAB 1990).

II. The Examining Attorney Improperly Focused on Reactions to Applicant’s Advertising Other Than the Mark at Issue

To satisfy the first prong of the *Mavety* test, the Examining Attorney offers two news articles describing the reaction of certain politicians and legal authorities to sale of the drink. But these articles only show that certain politicians and agencies objected to Applicant’s marketing campaign, and not necessarily to the mark itself. Chief among the authorities cited in those articles is the Food and Drug Administration

(FDA), whose objection to Applicant's advertising was based on two issues: (1) the FDA's opinion that Applicant was making a claim its drink could cure an illness by mentioning the well-known health properties of one of its ingredients; and (2) that Applicant was marketing its product as a substitute for an illegal narcotic.

The first basis for the FDA's actions is irrelevant to the current discussion, because it has no bearing on the Mark at issue. The second basis, the FDA's claim that Applicant was marketing its product as a substitute for an illegal narcotic, was based on the totality of Applicant's advertising, and not just on the mark at issue here. For example, the FDA cited Applicant's use of the slogan: "The Legal Alternative" as being key to its finding. The FDA further cited radio and print advertising in which Applicant used terms like "speed in a can" and "liquid speed."

Applicant specifically asked the FDA, on a conference call with half a dozen FDA officials to discuss the warning letter, if it was the name of the product that was the real problem. The FDA's answer? No. This is reinforced by the fact that the FDA has not taken any action against other energy drinks that also have edgy and provocative names, such as EXTAZY, BLACK OPIUM, METH, BONG WATER, DIESEL JUICE, DIESEL and KRONIK. Rather than objecting to the mark itself, it is clear that the FDA took issue with other aspects of Applicant's advertising that suggesting the product was a "legal substitute" for an illegal narcotic. Given that the FDA's actions were based largely on aspects of Applicant's advertising other than the mark at issue, those actions are not appropriate basis for rejection of the mark.

As further proof that the objections cited by the Examiner had more to do with Applicant's advertising campaign than with the mark at issue, one need only look at the lack of any public outcry or FDA action in 2008. In response to the objections of the FDA and others, Applicant temporarily took its product off the market in order to revamp its

advertising. In 2008, Applicant reintroduced its product, using the mark at issue, but with all new advertising designed to address the objections of the FDA. In the several months since its reintroduction, there has been no public protest and neither the FDA nor any other authorities, have taken any action.

For these reasons, the Examining Attorney failed to satisfy the first prong of the *Maveety* test.

III. The Examining Attorney Failed to Consider the Mark in the Context of the Marketplace for Energy Drinks

The second prong of the *Maveety* test requires the PTO to consider the mark in the context of the marketplace as applied to only the goods described in Applicant's application for registration. *Maveety* at 1371 (citing *In re McGinley*, 660 F.2d at 485 (CCPA 1981) ("In determining whether a trademark may be refused registration as scandalous, it must be considered in context of marketplace as applied only to goods or services described in the application for registration.")). Thus, it is clear that a proposed mark might be scandalous as applied to goods sold in one market, but proper as applied to goods sold in another market, depending on the nature of the goods, the norms of the different markets, and the types of consumers in those different markets.

As noted previously in this brief, the market for energy drinks is saturated with brands that use the names of illicit drugs. COCAINE is no different from other brands, such as EXTAZY, BLACK OPIUM, METH, BONG WATER, DIESEL JUICE, DIESEL and KRONIK. Other brands on the market clearly reference illicit drug use, even if they don't use a drug's name outright: for example, ADRENALIN RUSH (what happens when you take drugs), CRUNK (common parlance for "crazy drunk"), AMP (a synonym for getting high on uppers, as in getting "amped" or "amped up"), HYPE (similar to AMP, as in getting "hyped up"), RED-EYE (a condition associated with taking drugs),

ROCKSTAR (reference to the drug-infused lifestyle of rock stars), and RUSH (the feeling one gets when taking drugs).

The proposed mark is completely unexceptional within the context of the marketplace for its goods. The consumers of these products understand that the references to drugs are hip, post-ironic references designed to be both edgy and suggestive of the energy boost one gets when taking certain kinds of drugs. Perhaps more importantly, this marketplace has a target demographic of 18-34 year-olds, a group that includes men and women old enough to serve in the military, to sign legally binding contracts, and to make their own decisions without interference from parents: namely, adults.

Because the proposed mark is not improper or scandalous within the context of the energy drink marketplace, it fails the second prong of the *Mavety* test.

IV. The Examining Attorney Failed to Demonstrate that a Substantial Composite of the General Public Would Find the Mark Scandalous or Offensive, Especially Within the Context of Contemporary Attitudes

The final prong of the *Mavety* test requires that the proposed mark be seen as scandalous or offensive to “a substantial composite of the general public, as measured from the context of contemporary attitudes.” *Mavety*, 33 F.3d at 1371 (Fed. Cir. 1994). The *Mavety* Court noted “the inherent difficulty in fashioning a single objective measure like a substantial composite of the general public from the myriad of subjective viewpoints,” and opined that any one group of persons in American society might occupy but “a tiny fraction of the whole, which necessarily encompasses a wondrous diversity of thought.” *Mavety* at 1371.

The first, and most important, question is thus how big a group is needed to constitute a “substantial composite” of the American public.

“Substantial composite” does not necessarily mean a majority of the American public. *In re McGinley*, 660 F.2d 481, 485 (C.C.P.A. 1981). But if it doesn’t require a majority, substantiality still requires more than merely “some” or “a few.”

Merriam-Webster provides two definitions of the word “substantial” that potentially could apply to the present analysis (other definitions listed do not concern quantity): (1) “being largely but not wholly that which is specified” or, alternatively, “considerable in quantity : significantly great.” [Http://www.m-w.com/dictionary/substantial](http://www.m-w.com/dictionary/substantial). Thus, to be a substantial composite of something is to be “largely” that thing, a “considerable quantity” of that thing, or a “significantly great” portion. Based on these definitions, it seems obvious that a substantial composite, while not requiring a majority, should require something more than a single-digit percentage.

The Examining Attorney has not provided any evidence that those protesting Applicant’s goods comprise anything more than the barest sliver of the American public. That they are a vocal sliver does not change the fact that the numbers of people who might be offended or protest do not constitute anything close to a substantial composite. Moreover, the evidence cited by the Examining Attorney was in reaction to the totality of Applicant’s pre-2008 advertising and not, strictly speaking, the mark itself.

That some people express politically-motivated objections to an advertising campaign does not render the mark scandalous or offensive. People routinely boycott goods with whose manufacture and sale they disagree, and there are stores that cater to those people. That “some” people have protested to an edgy advertising campaign does not satisfy the third prong of the *Mavety* test. For example, the response to Applicant’s goods is an insignificant rounding error when compared to the

number of people who routinely protest, for example, that “fur is murder” or that “eating meat glorifies and promotes animal abuse.” Anyone seeking to register a mark such as ANIMALS TASTE GOOD or REAL FUR IS FOR WINNERS could easily meet with far more protests, no matter what the goods or services to which they might be applied. And there would, no doubt, be certain stores who would refuse to sell goods bearing such marks. That doesn’t mean that a substantial composite of the American public is offended by eating meat or wearing fur. As with eating meat and wearing fur, there is no evidence that the number of people offended by Applicant’s mark is a “significantly great” portion of the American public.

The *Mavety* Court further warned that, in determining whether a substantial composite of the American public would find a proposed mark scandalous, “we must be mindful of ever-changing social attitudes and sensitivities.” *Mavety* at 1371. As the *Mavety* Court continued, “Today's scandal can be tomorrow's vogue. Proof abounds in nearly every quarter, with the news and entertainment media today vividly portraying degrees of violence and sexual activity that, while popular today, would have left the average audience of a generation ago aghast.” *Id.*

Simply put, today’s popular culture routinely includes references to drugs like cocaine. Wikipedia lists over 100 different major American motion pictures that depict drug use. http://en.wikipedia.org/wiki/Drug_movies. Even an incomplete list of songs that reference drugs is several times that number. See, for example, http://en.wikipedia.org/wiki/List_of_Drug_References_in_Songs. The overwhelming majority of these works were created in the last 20 years, signaling a major shift in social attitudes, with a clear trend toward acceptance of drug references as a part of mainstream culture. All of these songs and films are available to the general public for rent or purchase.

It is certainly possible to disagree with the depiction of drugs in movies or music, but it is no longer possible to suggest that such a thing is shocking, or even unusual in any way. The proliferation of drug-related names for energy drinks simply mirrors the larger societal trend toward open discussion of drugs and, more to the point, the extent to which popular culture adopts the images of and associations with drugs in a tongue-in-cheek, ironic manner. This is the same manner in which Applicant uses the proposed mark in conjunction with its goods.

Thus, the Examining Attorney did not demonstrate that a substantial composite would find the mark scandalous or offensive, especially taking into account the ever-changing social attitudes of the American public. For those reasons, the Examining Attorney failed to satisfy the third prong of the *Maveety* test.

V. Conclusion

The Examining Attorney's sole basis for rejection of the mark was that the mark was scandalous or offensive. But having failed to satisfy all three prongs of the *Maveety* test, he failed to show that the proposed mark is scandalous or immoral as required for refusal under Section 2(a). Thus, registration should not be refused.