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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Dub Nutrition, LLC

Serial No. 77752113

Brick G. Power of Durham Jones Pinegar, P.C. for Dub Nutrition, LLC.

Gina M. Fink, Trademark Examining Attorney, Law Office 109 (Dan Vavonese, Managing Attorney).

Before Seeherman, Kuhlke and Lykos, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Dub Nutrition, LLC has appealed from the final refusal of the trademark examining attorney to register DUB, in standard characters, for dietary supplements.¹ Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles the mark DUB, in standard characters, for

¹ Application Serial No. 77752113, filed June 4, 2009, based on Section 1(b) of the Trademark Act (intent-to-use).

non-alcoholic energy drinks² that, if used on applicant's goods it is likely to cause confusion or mistake or to deceive.

Applicant and the examining attorney have filed briefs. We affirm the refusal.

As a preliminary matter, we note that the examining attorney has objected to the exhibits applicant attached to its appeal brief. Trademark Rule 2.142(d) provides that the record in the application should be complete prior to the filing of an appeal, and there is no question that applicant did not submit these materials during the prosecution of its application. However, it is noted that certain of the materials, namely Exhibits C, D and F, were referenced in applicant's March 15, 2011 response to the first Office action, with applicant indicating the URL for the materials, as well as a brief description of the information in the materials. Because the examining attorney did not advise applicant, at a point when it could still remedy the situation, that merely providing the web address for the materials was not sufficient to make the webpages themselves of record, we consider the examining attorney to have waived any objection to such materials. Cf. *In re City of Houston*, 101 USPQ2d 1534, 1536 (TTAB

² Registration No. 3791620, issued May 18, 2010.

2012); (the examining attorney's failure to advise applicant of the insufficiency of the list of registrations when it was proffered during examination constituted a waiver of any objection to consideration of that list); TBMP § 1208.02 (3d ed. rev. 2012). However, applicant never referenced Exhibits A, B, E and G, nor made any attempt to timely make them of record, and therefore we have not considered them.³

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie*

³ We note that Exhibits A and E were taken from applicant's website, and the examining attorney attached certain webpages from this site to the Office action mailed April 6, 2011; although these webpages are not identical to those in Exhibits A and E, there are some similarities, and the webpages attached to the Office action are of record.

Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Applicant's mark and the mark in the cited registration, DUB, are identical in appearance and pronunciation. There is no evidence that the meaning of DUB would differ because of the different goods with which it is used. Therefore, the connotation of DUB is the same for both marks, and both marks convey the identical commercial impression. This du Pont factor heavily favors a finding of likelihood of confusion.

Further, DUB appears to be arbitrary as applied to energy drinks or, for that matter, energy supplements, and there is no evidence of the use of similar marks by third parties. The registered mark must therefore be treated as a strong mark, entitled to a broad scope of protection.

We note applicant's argument that the manner in which registrant uses its mark is as a secondary brand, that is depicted less prominently and below "its well-known MONSTER branding," and that it is used only in connection with the term "edition." Brief, p. 5. This argument is not persuasive. Applicant has not appropriately made of record any evidence in support of this argument and, more importantly, we must consider the issue of likelihood of

confusion with respect to the mark in the cited registration, which is DUB per se.

Turning to the du Pont factor of the similarity or dissimilarity between the goods, we note that, where an applicant's mark is identical to the registrant's mark, there need be only a viable relationship between the respective goods in order to find that a likelihood of confusion exists. In re Opus One Inc., 60 USPQ2d 1812, 1815 (TTAB 2001). In this case, to demonstrate the relatedness of the goods, the examining attorney has made of record use-based third-party registrations showing that numerous entities have registered a single mark for both dietary supplements and energy drinks, e.g., Registration Nos. 3835894, 2995742, 3111332, 3628769, 3175365, and 3386436. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993).

Applicant has attempted to distinguish the goods on the basis that dietary supplements are healthy and energy drinks are not. However, the examining attorney has submitted evidence in which energy drinks are referred to

as being healthy. For example, the review of the Hydrive energy drink calls it a "health conscious beverage" in which Acai berries are combined "with a plethora of b-vitamins and potassium" to make a "healthy energy drink." <http://energy-drink-ratings.blogspot.com>. And the website AmazonAcaiBerry, www.amazonacaiberry.com, discusses Efusjon "acai berry healthy energy drinks" in connection with the marketing of this product on Facebook. Thus, although "dietary supplements" and "energy drinks" may be specifically different, the evidence shows that they can appeal to the same classes of health conscious consumers.

Based on the foregoing, we find that that applicant's and the registrant's identified goods are related.⁴

Applicant argues that the trade channels for the goods are different because applicant's dietary supplements "are marketed through a direct sales network of independent

⁴ The examining attorney also submitted webpages from the website for Medscape Today, www.medscape.com, discussing Herbalife Diet Supplements, and from the Herbal Vitality website, www.herbalvitality.info, featuring Herbalife Liftoff energy drink. However, because it is not clear whether Herbalife sells a "dietary supplement" or sells an item used for *dieting*, we have not relied on this evidence in concluding that the goods are related. Nor have we relied on the evidence, taken from applicant's website, that shows applicant sells a "2 oz. energy shot." Although this product may well constitute an "energy drink," as that term would be identified, because of applicant's insistence that "energy drinks," in contrast to its own product, include ingredients, like caffeine, "that are widely believed to have [a negative] impact on consumer health" and "provide little or no health benefits," brief, p. 4, we have not treated it as an "energy drink."

distributors—individuals who often work out of their homes.” Brief, p. 5. However, because applicant’s identification does not restrict the channels of trade, we must presume that the goods are sold in all channels of trade appropriate for dietary supplements, including retail stores such as supermarkets and pharmacies, where energy drinks are sold. In re Smith and Mehaffey, 31 USPQ2d 1531, 1532 (TTAB 1994). As previously noted, they can also be sold to the same classes of consumers.

Applicant asserts that the conditions of purchase du Pont factor favors it because “people who purchase dietary supplements usually make careful decisions about the products they purchase.” Brief, p. 6. First, although some customers may purchase dietary supplements with care, dietary supplements are ubiquitous products that include daily multi-vitamins, which may be purchased by the public at large simply because they have heard that it is a good idea to take these vitamins. Thus, we cannot assume that dietary supplements are generally purchased with care. Further, even if we were to assume that dietary supplements are purchased with care, because the trademarks for applicant’s and the registrant’s goods are identical, even a careful examination of the trademarks would not result in a consumer recognizing that the marks represent separate

sources of the goods. And, because the third-party registrations show that entities have adopted a single mark for both dietary supplements and energy drinks, even careful consumers could assume that both types of products emanate from a single source if sold under identical marks. We also note applicant's statement that energy drinks are often purchased "as an impulse item." Brief, p. 6. As a result, there is a likelihood of reverse confusion, because a consumer who is familiar with applicant's DUB dietary supplements might well buy a DUB energy drink without any thought, merely assuming because of the identical mark that the goods emanate from the same source.

With respect to the du Pont factor of the nature and extent of any actual confusion, applicant states that it is not aware of any confusion between applicant's dietary supplements and the registrant's energy drink. However, applicant's application is based on an intention to use the mark, not actual use, and there is no evidence as to when applicant may have started using its mark, or the extent of such use, such that we can ascertain whether there has been an opportunity for confusion to occur. In any event, an applicant's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. The lack of evidence of actual confusion carries little weight,

especially in an ex parte context. In re Majestic Distilling Co., 65 USPQ2d at 1205.

With respect to the remaining du Pont factors discussed by applicant, there is no evidence that has been appropriately made of record in support of applicant's arguments. To the extent that any of these factors apply, we treat them as neutral.

In conclusion, after considering all of the relevant du Pont factors, we find that the Office has met its burden of proving that applicant's use of DUB for dietary supplements is likely to cause confusion with DUB for energy drinks.

Decision: The refusal of registration is affirmed.