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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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

In re the Application of:

Cintron Beverage Group, LLC

Application Serial No.: 77/807,946

Filed: 19 August 2009

Mark: CINTRON (stylized)

Classes: 30 and 32

Applicant's Appeal Brief
under 37 C.F.R. §§2.141 - 2.142

Applicant submits the following Appeal Brief pursuant to 37 CFR §§ 2.141-142, along with an appeal fee of \$200, following the Notice of Appeal filed on 5 May 2010 and the Request for Reconsideration of the Final Refusal, filed 2 July 2010.

Should the USPTO determine that additional fees are necessary with this filing, authorization is hereby granted to charge account No. 50-2424.

TABLE OF CONTENTS

I.	Table of Contents	page 2
II.	Table of Cases.....	page 3
III.	Introduction.....	page 4
IV.	Issues on Appeal.....	page 4
V.	Prosecution History.....	page 4
VI.	Argument.....	page 5
VII.	Conclusion.....	page 12

TABLE OF CASES

In re Benthin Management GmbH, 37 USPQ 1332, 1334 (TTAB 1995).

In re Isabella Fiore LLC, 75 USPQ2d 1564 (TTAB 2005)

In re Joint-Stock Company "Baik", 84 USPQ2d 1921 (TTAB 2007).

In re Kana & Weisz Jewelry Mfg. Corp., 508 F2d 831, 184 USPQ 421, 422 (CCPA 1975).

Ex parte Rivera Watch Corp. 106 USPQ 145, 149 (Comm. 1955)

In re Sava Research Corp., 32 USPQ2d 1380 (TTAB 1994).

In re United Distillers plc, 56 USPQ2d 1220, 1222 (TTAB 2000)

Introduction

Cintron Beverage Group, LLC (Applicant) respectfully appeals the Examining Attorney's Final Refusal to register the word mark CINTRON, issued on February 18, 2010. A timely Notice of Appeal was filed with the Trademark Trial and Appeal Board (Board) on 5 May 2010, and a Request to Reconsider the Final Refusal was filed with the Examining Attorney on 2 July 2010.

Issues on Appeal

1. Whether the stylized mark CINTRON is primarily merely a surname under Section 2(e)(4) of the Trademark Act, 15 USC § 1052(e)(4).

Prosecution History

On August 19, 2009, Applicant filed an application for Federal registration (Application) of the mark CINTRON for "tea-based beverages" in Class 30 and "energy drinks, sports drinks and fruit-based drinks" in Class 32. Concurrently, Applicant filed an application for Federal registration of the mark CINTRON (word) for the above-identified classes of goods. Applicant's co-pending application Serial No. 77/807,941 is also subject to Appeal of the Examining Attorney's Final Refusal issued on the same date for the same reasons as identified above.

In the Office Action dated November 23, 2009, the Examining Attorney determined that no conflicting marks would bar registration but refused registration under Section 2(e)(4) stating that the mark is "primarily merely a surname." The Examining Attorney also requested a statement of ownership regarding U.S.

Registration No. 3,600,401 (CINTRON ENERGY ENHANCER) and No. 3,410,949 (CINTRON 21).

On January 19, 2010 Applicant filed a response to the refusal to register and a statement of ownership of U.S. Registration No(s) 3600401 and 3410949 pursuant to 37 CFR § 2.36. Applicant hereby incorporates by reference its response of January 19, 2010 in its entirety.

On February 18, 2010, the Examining Attorney issued a Final Refusal, necessitating the present Appeal by Applicant.

On July 2, 2010, Applicant filed a Request for reconsideration of the Final Refusal and submitted therewith a Declaration by Richard Wyatt, Chief Executive of Applicant, which provides evidence regarding sales figures and marketing expenditures by Applicant in order to show proof of recognition by consumers of the mark CINTRON as a source indicator.

Applicant's arguments supporting reversal of the refusal to register the mark CINTRON are set forth in the sections below.

Argument

Applicant respectfully asserts for the reasons discussed in more detail below, that the Examining Attorney has erred in refusing to register Applicant's mark under Section 2(e)(4) and asks the Board to reverse the Final Refusal.

I. Legal Standard

The question of whether a term is primarily merely a surname depends on the primary, not the secondary, significance to the purchasing public. TMEP § 1211.01. Thus, the issue is not whether the mark CINTRON exists as a surname, rather the issue

is what is the primary significance to the relevant purchasing public.¹ Any doubt as to the issue of whether a term is primarily merely a surname is resolved in favor of Applicant and for publication of the mark.²

The Board has identified a number of factors, termed the “Benthin Factors”, to be used to determine if the term is primarily merely a surname: (1) whether the surname is rare; (2) whether anyone connected with the applicant has the term as a surname; (3) whether the term has any other recognized meaning; (4) whether the term has the “look and sound” of a surname; and (5) whether the manner in which the mark is displayed might negate any surname significance.³ The *Benthin* factors, when applied to the record, support a finding that CINTRON is not primarily merely a surname.

II. The Examining Attorney has Failed to Establish a *prima face* Case That the Mark CINTRON is Primarily Merely a Surname.

To meet the burden of proof to support a refusal to register under Section 2(e)(4), the Examining Attorney must produce substantial evidence that the only significance of the mark to the relevant purchasing public is that of a surname.⁴ The evidence relied upon by the Examining Attorney in support of the refusal consists of: (i) entries from websites including www.onelook.com; www.rhymezone.com; and www.lookwayup.com, and (ii) a printout from 411.com showing 300 matches for individuals whose names contain the word CINTRON.

¹ See *Ex parte Rivera Watch Corp.* 106 USPQ 145, 149 (Comm. 1955)

² See *In re United Distillers plc*, 56 USPQ2d 1220, 1222 (TTAB 2000); and *In re Benthin Management GmbH*, 37 USPQ 1332, 1334 (TTAB 1995).

³ See *In re Benthin Management GmbH*, 37 USPQ2d at 1332-1333.

⁴ See *In re Kana & Weisz Jewelry Mfg. Corp.*, 184 USPQ 421, 422 (CCPA 1975).

The entries from the various websites essentially show that there is no standard English definition for the word CINTRON, but that CINTRON exists as a surname with a popularity rank of 2801 according to the latest U.S. census. (See printout from www.rhymezone.com and www.onelook.com.)

Individuals listed with assertedly the surname CINTRON include Conchita Cintron, a bull-fighter. Relevant purchasing consumers, however, are unlikely to be aware of this or any of the individuals presented by the Examining Attorney.

Moreover, the listing from 411.com showing 300 "hits" to CINTRON contains repeated entries, listings indicating the same name but different address, which could simply indicate the individual moved, and listings with no valid postal address.⁵ Thus, the evidence shows that CINTRON, as a surname, is an extremely uncommon surname.

It has been previously held by the Trademark Trial and Appeal Board that an excess of 400 examples of a surname from a comprehensive directory of the United States is evidence of extreme rareness of the surname. Specifically, the TTAB reversed a Section 2(e)(4) refusal to register the mark BAIK for vodka, finding that the Examining Attorney had failed to establish a prima facie case that BAIK is primarily merely a surname. The evidence submitted by the Examining Attorney essentially comprised 456 hits from a Verizon database, however, with only 456 hits, the Board found BAIK to be an "extremely rare surname."⁶

⁵ Applicant previously asserted that, percentage-wise, those individuals with the name Cintron represent less than 0.000107 % of the U.S. population. See Applicant's response dated 19 January 2010.

⁶ See *In re Joint-Stock Company "Baik"*, 84 USPQ2d 1921 (TTAB 2007).

The evidence presented by the Examining Attorney fails to establish prima facie evidence that purchases of Applicant's beverages would view CINTRON as primarily merely (i.e. ONLY) a surname under the Trademark Act. As such, Applicant respectfully requests that the Board reverse the refusal under Section 2(3)(4).

III. The Examining Attorney Did Not Properly Weight Applicant's Evidence against the Benthin Factors

A. The Benthin Factors all weight in Favor of Registration of CINTRON

Applicant respectfully asserts that the holding in "BAIK" applies to the present case; listings showing 300 individuals in a nation the size of the United States indicates that CINTRON, as a surname, is rare.⁷ Likewise, the purchasing public will not view the term as "primarily" and "merely" a surname.

As such, Applicant respectfully asserts that the first Benthin factor weighs in Applicant's favor because CINTRON is a rare surname.

The Examining Attorney does not appear on the record to have addressed or evaluated the second Benthin factor. The record shows that no one at Applicant has the surname CINTRON. Thus, this factor also weighs in Applicant's favor.

The Examining Attorney appears to have addressed the third Benthin factor by stating that the word does not appear in the dictionary/the atlas/the gazetter. Applicant, however, has presented evidence to show that CINTRON is a nickname from a variant of the Spanish word *cinturón*, meaning "belt". (See Applicant's previous Exhibit A.)

⁷ See *Id.*

Thus, the record demonstrates that the term CINTRON has meanings other than as a rare surname. If for any reason, however, the question remains open then the factor is at least neutral.

As such, Applicant respectfully asserts that the third Benthin factor also weighs in Applicant's favor.

The Examining Attorney does not appear on the record to have addressed the fourth Benthin factor; Applicant has previously demonstrated that CINTRON does not have the "look and feel" of a surname. CINTRON is a foreign term and evokes the exotic; at the very least it is an unusual word. CINTRON does not have the *clear* look and feel of a surname like Smith, Jones, or Johnson; rather it has the look, feel and sound of an arbitrary or fanciful term, like Kodak does. While the fourth factor is subjective, Applicant respectfully asserts that CINTRON, when viewed by consumers, is more of a fanciful or arbitrary term.⁸ Thus, the fourth Benthin factor weighs in Applicant's favor.

The Examining Attorney does not appear on the record to have addressed the fifth Benthin factor. Applicant seeks to register CINTRON in stylized form, including letters which are stylized to the point that the letters also function as a design element. Thus, Applicant respectfully asserts that the stylized features of Applicant's mark create a non-surname impression in the minds of purchasers of Applicant's beverages.

As such, the fifth and final Benthin factor also weighs in Applicant's favor.

⁸ In fact, consumers are already familiar with CINTRON as a mark used to describe beverages through the use of Applicant's Registration Nos. 3,600,401 (CINTRON ENERGY ENHANCER) and 3,410,949 (CINTRON 21).

B. Applicant has Provided Evidence that CINTRON is a Source Indicator

Applicant's mark CINTRON has significance and meaning to the relevant purchasing public. As discussed previously, consumers recognize the mark CINTRON as the source of "liquid energy" beverages of assorted exotic flavors through the use of CINTRON 21 (Registration No. 3,410,949) and CINTRON ENERGY ENHANCER (Registration No. 3,600,401), both of which are owned by Applicant and have been in continuous use in commerce for nearly four years. Thus, to the relevant purchasing public, the term CINTRON is a coined term and source identifier; it is recognized as the source of beverages such as energy drinks and sports drinks.

Further evidence of significance and meaning of the mark CINTRON to the relevant purchasing public is presented in the attached Declaration of Richard Wyatt, Chief Executive Officer of Applicant, Cintron Beverage Group.⁹ The Declaration of Richard Wyatt was submitted to the Examining Attorney in the Request for Reconsideration of the Final Refusal, filed on 2 July 2010.

Applicant has had annual sales of beverages with the CINTRON mark totaling over 3 million dollars since 2007 alone.¹⁰ Moreover, Applicant promotes its mark by engaging in sponsorships at high-profile events such as: Power-Boating World Championships; the X-Games; sponsorship of a Cintron Race Boat; and promotion over the Internet and by social networking sites, such as Facebook.¹¹ These marketing

⁹ See Exhibit A, attached hereto but previously submitted with the request for Reconsideration filed on 2 July 2010.

¹⁰ See Exhibit A, para 7.

¹¹ See Exhibit A, para 9.

channels, together with advertising and promotion, are in excess of one million dollars in expenditures by Applicant.¹² Furthermore, consumers recognize CINTRON beverages across the United States, including Hawaii, as well as Australia, Central America and Africa.¹³ Thus, it is respectfully asserted that CINTRON is well recognized as a source indicator by the relevant purchasing public.

¹² See Exhibit A, para 8.

¹³ See Exhibit A, para 11.

Conclusion

In sum, the totality of the record offered by the Examining Attorney and Applicant indicates the purchasing public will not view the mark CINTRON as *primarily* and *merely* a surname.¹⁴ The Application should be published and allowed to be opposed by any interested party who believes that it would be damaged by the mark's registration.

In light of the above, Applicant respectfully requests that the Board reverse the Examining Attorney's refusal to register the mark on the asserted basis that it is primarily merely a surname under Section 2(e)(4) of the Trademark Act. Applicant respectfully requests that the Application be approved for publication in the Official Gazette.

Respectfully submitted,

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Dated: **2 July 2010**

¹⁴ See *In re Isabella Fiore LLC*, 75 USPQ2d 1564 (TTAB 2005); *In re Benthin*, *supra*; and *In re Sava Research Corp.*, 32 USPQ2d 1380 (TTAB 1994).

Exhibit A**DECLARATION OF RICHARD WYATT
In support of US Application Serial Nos. 77/807,941 and 77/807,946**

Applicant hereby respectfully submits the following Declaration in support of the registration of the marks associated with the above-identified trademark Applications.

The undersigned declares and states:

1. I am the Chief Executive Officer of Cintron Beverage Group, LLC (Applicant).
2. I have personal knowledge of the facts as stated herein and am qualified to make such statements.
3. Applicant, Cintron Beverage Group, LLC., was founded in 2006 and produces and distributes beverages, including a line of energy drinks and teas that feature ingredients to boost energy, under the brand name CINTRON.
4. Applicant is also the owner of US Registrations Nos. 3,410,949 for CINTRON 21 and 3,600,401 for CINTRON ENERGY ENHANCER, which are used to describe Applicant's beverages.
5. The mark CINTRON was first used in commerce to describe beverages, including energy drinks and sports drinks, as early as August 2006.
6. The mark CINTRON has been in continuous use in commerce to describe Applicant's beverages for nearly four years.
7. Since 2007, Applicant has had annual sales of beverages with the CINTRON mark totaling over three-million dollars.
8. Applicant spends approximately one-million dollars each year on marketing in connection with CINTRON-beverage-related advertising, promotion, sponsorships and manufacturing.
9. Applicant also promotes its CINTRON mark by promotional venues including sponsorships, such as the following:
 - Applicant was a key sponsor at the Power Boating World Championship in Key West, Florida in November 2009, featuring a "CINTRON-sponsored boat".
 - Applicant was a host at the X-games in Aspen, Colorado in January 2010, hosting a party featuring CINTRON energy drinks.

- Applicant sponsors a race boat with the CINTRON mark thereon. The race boat has been in approximately twenty (20) separate-race venues in the United States since 2007.
- Applicant has internet-commercial videos, such as Facebook, featuring CINTRON beverages therein.

10. Applicant is widely known by consumers as a source of innovative-energy drinks in the United States.

11. Applicant sells or has sold CINTRON beverages across the continental United States and Hawaii; as well as Australia, and countries in Central America and Africa.

12. The undersigned is unaware of any consumers that associate the CINTRON mark with a person or surname.

13. I declare further that all statements made herein are of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application or any registrations issuing thereon.

Dated: 6-26-10

By: _____

Richard Wyatt, CEO

Cintron Beverage Group, LLC