

This Opinion Is a  
Precedent of the TTAB

Mailed: July 14, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Christopher C. Hinton*  
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Serial No. 86009795  
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Luke Brean of BreanLaw, LLC,  
for Christopher C. Hinton

Robert J. Struck, Trademark Examining Attorney, Law Office 109,  
Michael Kazazian, Managing Attorney.

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Before Zervas, Ritchie, and Hightower,  
Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

Christopher C. Hinton (“Applicant”) seeks registration on the Principal Register of the mark THC ENERGY, in standard characters and with “energy” disclaimed, for “energy drinks” in International Class 32.<sup>1</sup>

<sup>1</sup> Application Serial No. 86009795 was filed on July 14, 2013, pursuant to Section 1(a) of the Trademark Act, based on Applicant’s claim of first use anywhere and use in commerce since at least as early as July 13, 2013. On September 10, 2014, after the Examining Attorney requested a list of ingredients, nutritional information label, and information concerning marketing and sale of the goods, Applicant stated that he had not begun producing them and amended the basis of the application to Section 1(b) of the Trademark Act, alleging a *bona fide* intention to use the mark in commerce.

The Trademark Examining Attorney has refused registration of Applicant's mark under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), on the ground that the mark is deceptively misdescriptive of a feature of the identified goods.

When the refusal was made final, Applicant appealed. We affirm the refusal to register.

### Analysis

This appeal raises issues nearly identical to those of *In re Hinton*, 116 USPQ2d 1051 (TTAB 2015), in which we affirmed the refusal to register Applicant's mark THCTea on the ground that it is deceptively misdescriptive for "tea-based beverages" that do not contain THC.

The test for deceptive misdescriptiveness under Section 2(e)(1) has two parts. First, we must determine whether the matter sought to be registered misdescribes the goods or services. In order for a term to misdescribe goods or services, "the term must be merely descriptive, rather than suggestive, of a significant aspect of the goods or services which the goods or services plausibly possess but in fact do not." *Hinton*, 116 USPQ2d at 1052 (quoting *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1051 (TTAB 2002)). Second, if the term misdescribes the goods, we must ask whether consumers are likely to believe the misrepresentation. *Id.* The Board has applied the reasonably prudent consumer test in assessing whether a proposed mark determined to be misdescriptive involves a misrepresentation consumers would be likely to believe. *Id.*

Whether THC Energy Misdeshribes Applicant's Energy Drinks

Both Applicant and the Examining Attorney introduced evidence that THC, from tetrahydrocannabinol, is the chief intoxicant in marijuana.<sup>2</sup> There is no dictionary or other evidence demonstrating that the term THC has any other established meaning.

The Examining Attorney required Applicant to provide written responses to the following questions:

1. Do applicant's identified goods contain tetrahydrocannabinol (THC), marijuana, marijuana-based preparations, or marijuana extracts or derivatives, synthetic marijuana, or any other illegal controlled substances?
2. Are the applicant's goods lawful pursuant to the Controlled Substances Act [21 U.S.C. §§ 801-971]?<sup>3</sup>

Applicant responded that his goods "do not contain any of the above recited ingredients or any other illegal controlled substance," and that his goods are lawful pursuant to the Controlled Substances Act.<sup>4</sup>

We find it is plausible that energy drinks could contain THC, based on the evidence detailed *infra* that such drinks already exist in the marketplace, and that THC ENERGY is merely descriptive for energy drinks containing THC as a significant ingredient.

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<sup>2</sup> November 6, 2014 Office Action at 2-5 (from Merriam-Webster.com); April 13, 2015 Final Office Action at 2-3 (from AHDctionary.com); *see also* March 6, 2015 Response to Office Action at 7-18, Exhibit A (Wikipedia.com article stating that tetrahydrocannabinol (THC) "is the principal psychoactive constituent (or cannabinoid) of cannabis"). The Board gives guarded consideration to evidence from Wikipedia, recognizing the limitations inherent in this reference work, where – as here – the non-offering party has an opportunity to rebut the evidence by submitting other evidence that may call its accuracy into question. *See In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1032 (TTAB 2007).

<sup>3</sup> August 15, 2013 Office Action.

<sup>4</sup> February 13, 2014 Response to Office Action.

Because Applicant’s energy drinks do not contain THC as that term is defined in the dictionary evidence of record, the Examining Attorney has established that THC ENERGY misdescribes Applicant’s goods.

Once a *prima facie* case is established, the burden of coming forward with competent evidence in rebuttal shifts to Applicant. *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003). Applicant argues that “THC is an acronym for ‘tea honey care.’”<sup>5</sup> This assertion, however, is unsupported by any evidence. We note that the specimen of use Applicant initially submitted with his application (right) includes the wording “The Healthy Choice Energy,” not “tea honey care”:

In any event, we must consider the term Applicant seeks to register as it is set forth in the application. We cannot assume that Applicant has displayed or always will display his proposed mark in combination with words such as “tea honey care.” *Cf. Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344,



98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (noting that standard character marks are not limited to any particular presentation). We are not persuaded that consumers would recognize THC as used in Applicant’s mark as an abbreviation of “tea honey care” instead of its dictionary definition as the primary intoxicant in marijuana.

Accordingly, Applicant has not overcome the *prima facie* case set forth by the Examining Attorney, and we find that THC ENERGY misdescribes Applicant’s goods.

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<sup>5</sup> Appeal Brief, 4 TTABVUE 5.

Whether Consumers Are Likely to Believe the Misrepresentation

The second prong of our inquiry is whether reasonably prudent consumers are likely to believe the misrepresentation that Applicant's energy drinks contain THC.

The Examining Attorney introduced evidence summarizing the laws governing the medicinal use of marijuana in 23 states and the District of Columbia.<sup>6</sup> Based on this evidence, the Examining Attorney argues that reasonably prudent consumers are likely to believe the misrepresentation that Applicant's energy drinks contain THC: "While cannabis and items containing cannabis remain unlawful under Federal law, consumers are able to purchase cannabis, as well as energy drinks containing cannabis and THC, for both medical and recreational use in certain states and the District of Columbia."<sup>7</sup>

We note that the application is not restricted to any geographic region or channel of trade. Therefore, we must presume that Applicant's energy drinks could be offered where marijuana possession is considered legal under state law in certain circumstances. Record evidence shows that to be the case in nearly half of U.S. states.

Applicant argues that prospective purchasers are not likely to believe the alleged misdescription because "THC, the controlled substance, is not used in any energy drink anywhere as the recreational use of THC is related to its mind altering qualities and calming effects."<sup>8</sup> This assertion, however, is contradicted by record evidence.

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<sup>6</sup> April 13, 2015 Final Office Action at 17-39 ("23 Legal Medical Marijuana States and DC"); November 6, 2014 Office Action at 22-44 (same). Both lists are printed from ProCon.org.

<sup>7</sup> Examiner's Statement, 6 TTABVUE 10.

<sup>8</sup> Appeal Brief, 4 TTABVUE 6.

The Examining Attorney introduced evidence indicating that energy drinks containing THC for medicinal use are available in the United States, including the following:

- Flo Energy from Keef Cola, a medicinal cannabis beverage available in Colorado containing “caffeine, ginseng, taurine and guarana extract on top of the 50 mg of CO2 extracted cannabis in a 12 ounce, one-serving bottle.” The label of bottle indicates that the drink contains “THC (+/- 10%) 50mg”;<sup>9</sup>
- Cannapunch Mota Energy 80mg, a “THC Infused energy drink in Citrus Blast flavor” offered for \$22 by Emerald Fields marijuana dispensary in Denver, Colorado;<sup>10</sup>
- CannaEnergy Mango, a “THC Energy drink, Mango flavor” offered for \$2.50;<sup>11</sup> and
- 5 Hour High, a shot-style drink delivering a dose of THC “specially formulated to improve mood and maintain energy levels,” to be manufactured and distributed by a Washington-based medical marijuana grower and distributor.<sup>12</sup>

We consider as a whole the following facts: the extremely descriptive nature of the term THC ENERGY; that marijuana, although illegal under federal law, may be possessed legally under state law in some circumstances in 23 states and the District of Columbia; and that nothing in the application indicates that Applicant’s goods will not be offered through medical marijuana dispensaries. Based on these facts, we find that a reasonably prudent consumer would be likely to believe that Applicant’s THC ENERGY energy drinks contain THC (although they do not).

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<sup>9</sup> April 13, 2015 Final Office Action at 8-11 (“Keef Cola Flo Energy Drink Review” from whaxy.com).

<sup>10</sup> *Id.* at 14-16 (from ibudtender.com).

<sup>11</sup> *Id.* at 12-13 (from mmjmenu.com/dispensaries).

<sup>12</sup> *Id.* at 6-7 and November 6, 2014 Office Action at 12-14 (from “Hemp News” website at hemp.org).

Conclusion

We have found that THC ENERGY misdescribes Applicant's energy drinks because they do not contain THC, and that consumers are likely to believe the misrepresentation. Whether Applicant's products feature the intoxicant THC would be relevant to a consumer's purchasing decision. *See In re Hinton*, 116 USPQ2d at 1055-56 & n.24 (contrasting the relevancy requirement for deceptively misdescriptive marks under Section 2(e)(1) of the Trademark Act with the materiality required for marks refused under Section 2(a) of the Act and argued by Applicant here).<sup>13</sup>

**Decision:** The refusal to register application Serial No. 86009795 is affirmed.

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<sup>13</sup> Appeal Brief, 4 TTABVUE 5. Whether Applicant's mark is deceptive under Trademark Act Section 2(a) is not before us.