

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

Hearing:
August 3, 2004

Mailed: September 29, 2004
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Red Bull GmbH
v.
Carl Cochran

Opposition No. 91152588
to application Serial No. 76302551
filed on August 22, 2001

Martin Greenstein of TechMark for Red Bull GmbH.

Rod D. Baker of Peacock Myers & Adams, P.C. for Carl Cochran.

Before Simms, Hairston and Bottorff, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Carl Cochran has filed an application to register the mark RED RAVE for "sports drinks."¹

Red Bull GmbH (an Austria corporation) has opposed registration of applicant's mark, alleging priority and likelihood of confusion, Section 2(d) of the Trademark Act, as the ground for opposition. Opposer alleges that it is

¹ Serial No. 76302551, filed on August 22, 2001, alleging August 1, 2001 as the date of first use of the mark and the date of first use of the mark in commerce.

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the owner of various marks that include the term RED BULL and/or the design of a red bull for energy drinks and other non-alcoholic beverages; that opposer is the owner of Registration No. 2,494,093 for the mark RED BULL for, inter alia, "sports drinks"²; that it is the prior user of the mark RED BULL for such goods; that it has extensively advertised its RED BULL sports drinks and the RED BULL mark is a valuable asset; and that applicant's mark, as applied to applicant's goods, so resembles opposer's mark as to be likely to cause confusion, to cause mistake, or to deceive.

Applicant filed an answer wherein it denied the allegations of the notice of opposition.

Briefs have been filed and an oral hearing, attended by counsel for opposer, was held.

Opposer, as its case-in-chief, submitted the testimony deposition (with exhibits) of opposer's counsel Robert Sorensen, and opposer's notice of reliance on, inter alia, a certified copy of its pleaded Registration No. 2,494,093. Applicant submitted his testimony deposition (with exhibits), and a notice of reliance on printouts downloaded from the website www.bevnet.com. The printouts contain product reviews of thirteen soft drinks and energy drinks with names that contain the word "red." As its rebuttal evidence, opposer submitted (pursuant to the parties'

² Registration No. 2,494,093 issued on October 2001.

stipulation) a notice of reliance on information concerning oppositions opposer has filed against third parties.

We note that opposer, in its brief on the case, requests that the notice of opposition be amended to allege that (1) applicant's application is void ab initio because applicant did not make use of the mark prior to the filing date of the application and (2) applicant committed fraud in filing his application because the specimen of use was merely an artist's mock-up of packaging for applicant's goods and not a photograph or reproduction of an actual beverage can. Opposer maintains that it learned of these grounds during applicant's testimony deposition.

Applicant, in his brief, responded by arguing that the request to amend is untimely, that opposer has ignored the realities of the marketplace where use in commerce of a mark may be made in advance of sales, and that any mistake made by applicant in submitting his specimen was an innocent error and not fraud.

We agree with applicant that the request to amend the opposition is untimely. Opposer failed to properly amend the opposition after it learned of the facts which opposer contends establish these claims. To allow opposer to raise the claims at this late date would be unfair surprise to applicant. Moreover, this is not a case where the pleadings can be deemed amended pursuant to Fed. R. Civ. P. 15(b)

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because neither of these issues was tried by the express or implied consent of applicant.

Because opposer has made of record a certified copy showing status and title of its pleaded registration, and because its likelihood of confusion claim is not without merit, we find that opposer has established its standing to oppose registration of applicant's mark. See: *Lipton Industries, Inc. v. Ralston Purina Company*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1082). Further, because opposer has made its pleaded registration of record, priority is not an issue in this case with respect to the mark and goods identified therein. See: *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re *E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Opposer's witness, Mr. Sorensen, testified that RED BULL is an energy drink that has been sold in the United States since 1997. According to Mr. Sorensen, energy drinks

improve physical endurance, emotional status, reaction speed, concentration, and generally help persons make it to the end of a long game or long evening. Opposer advertises its RED BULL energy drink by way of television and point of sale advertisements. Opposer sponsors sporting and entertainment events and "rave" parties which are all-night gatherings of young people involving dancing and socializing. Opposer introduced copies of news articles that refer to the consumption of its RED BULL energy drink at "rave" parties. Opposer's sales of RED BULL energy drinks in the United States for the years 2001 and 2002 totaled over 220 and 250 million units, respectively. For the same years, opposer's marketing expenditures were over \$130 and \$150 million, respectively.

Applicant, Carl Cochran, testified that he is a sales manager for National Distributing Company. Applicant's RED RAVE is also an energy drink and it is marketed primarily to 18-25 year olds. Applicant's products are sold in convenience stores, grocery stores, bars and nightclubs.

Concerning first use of the mark, Mr. Cochran testified on direct examination as follows:

- Q. And when did you first start making use of that [RED RAVE] trademark?
- A. In August 2001.
- Q. And what type of use did you make at that time?
- A. At that time, it was for solicitation of

distributors and customers and for basic generic
press releases.
(Cochran, p. 8)

On cross-examination, Mr. Cochran testified that:

Q. And if I understand correctly, your use of Red
Rave back on August 2001 you said was for
solicitation of distributors and press releases?

A. Yes.

Q. When did you actually ship the product?

A. February of 2002.

Q. February 2002.

A. Yes.
(Cochran, p. 24)

...

Q. And I show you a copy of the specimen of use
in your application.

A. Yes.

Q. What is that I'm looking at?

A. That's the Red Rave—the logo, the energy drink's
logo.

Q. Is that from a can?

A. No. It was from the artwork.

Q. Just from the artwork.

A. Yes.

Q. So that's not actually used—the piece that's
here is not from an actual can?

A. No.

Q. This was a mock up that you later applied to a
can six months later?

A. Exactly.
(Cochran, pp. 52-53)³

Mr. Cochran testified that since February 2002 he has sold approximately 30,000 cases of RED RAVE. Further, he indicated that he was aware of opposer's RED BULL mark at that time he adopted his mark.

Insofar as the goods are concerned, there is no question that they are identical. The goods as identified in opposer's pleaded registration and applicant's application are sports drinks and both opposer and applicant characterize their goods as energy drinks. Further, in the absence of any restrictions in opposer's registration and applicant's application, we must presume that the goods are sold in all the normal channels of trade (e.g., convenience stores and grocery stores) to the same classes of purchasers, namely ordinary consumers. In point of fact, Mr. Cochran testified that applicant's sports drinks are sold in these channels of trade.

³ Section 45 of the Trademark Act states, in relevant part, that a mark is used in commerce on goods when "(a) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and (b) the goods are sold or transported in commerce." It appears from Mr. Cochran's testimony that he did not use the RED RAVE mark in commerce on or in connection with the goods prior to August 1, 2001, the filing date of the application. Thus, the parties are advised that if applicant ultimately prevails herein, applicant's involved application will be remanded to the Trademark Examining Attorney pursuant to Trademark Rule 2.131 for

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Next we turn to a determination of what we find to be the key likelihood of confusion factor in this case, whether applicant's mark and opposer's mark, when considered in their entireties in terms of appearance, sound and connotation, are similar or dissimilar in their overall commercial impression.

When we compare the marks in terms of appearance, we find that they are significantly different. We recognize that the marks begin with the identical word RED. However, RAVE and BULL are common words which would be readily recognized as such and which are readily distinguishable from each other in terms of appearance. Thus, when the marks RED BULL and RED RAVE are considered in their entireties, we find that they are more dissimilar than similar in appearance.

Considering next the sound of the respective marks, we find that the differences in sound between the words RAVE and BULL suffice to render the marks different in terms of sound as a whole.

Finally, when we compare the marks in terms of their respective meanings or connotations, we find that they are very different. Again, we recognize that the marks begin with the identical word RED. However, the remainder of the marks, RAVE and BULL are in no way similar in meaning. We

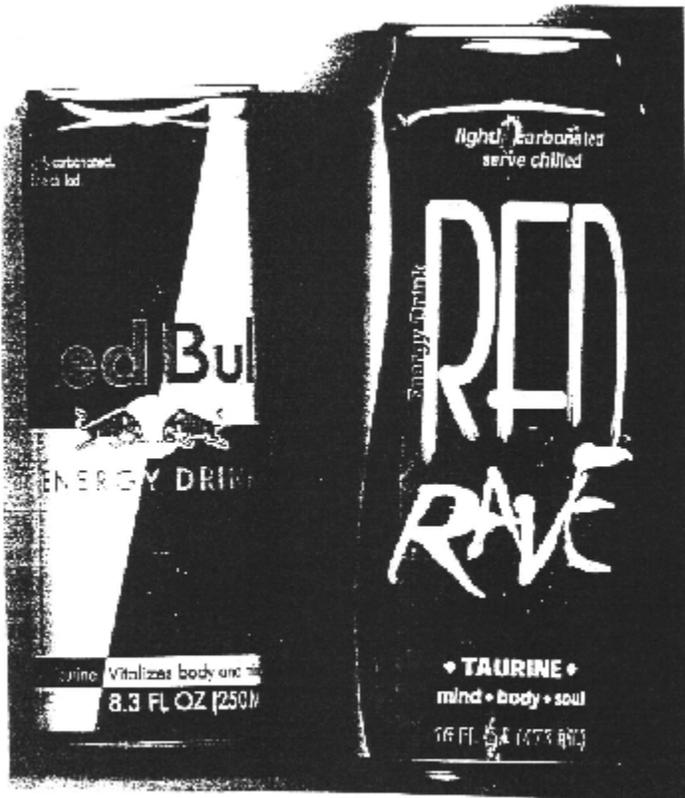
reexamination with respect to the issue of whether the

judicially notice that the word "rave" is defined as a verb "to speak or write with wild enthusiasm" and as a noun "an all-night dance party, usually featuring electronically synthesized music."⁴ Purchasers encountering applicant's mark on his goods will likely ascribe one of these meanings to the word RAVE. The word BULL, on the other hand, connotes a male cow. Opposer's mark RED BULL does not connote wild enthusiasm or an all-night dance party, but rather a "red bull." Thus, we find that applicant's mark and opposer's mark are more dissimilar than similar in terms of meaning or connotation.

We are not persuaded by opposer's argument that the similarity in the commercial impression of the marks is increased by applicant's trade dress and the wording on applicant's can, which opposer contends is highly similar to its trade dress and the wording on its can. To the contrary, we find that applicant's trade dress is not at all similar to opposer's trade dress. Opposer's and applicant's beverage cans are reproduced below.

application is void ab initio.

⁴ The American Heritage College Dictionary (4th ed. 2002).



Applicant's mark RED RAVE is depicted in large letters and appears on a red background. The word RED is partially hidden and the word RAVE is stylized. Opposer's mark RED BULL is depicted in smaller block letters and appears on a blue and silver background. The design of two bulls also appears on opposer's can and no such design appears on applicant's can. The fact that both opposer's can and applicant's can bear "Lightly Carbonated", "Serve chilled", and the ingredient name "Taurine" does not increase the similarity in the commercial impression of the marks. This wording does not form part of either of the respective marks

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and is in the nature of informational wording that any manufacturer of this type of beverage should be free to use on its can. Further, we find that the phrase MIND-BODY-SOUL that appears on applicant's can is not so similar to the phrase VITALIZES BODY AND MIND that appears on opposer's can as to cause the parties' respective marks to be confused.

In reaching our finding of no likelihood of confusion, we have given little weight to the third-party evidence submitted by applicant with its notice of reliance. Applicant offered no evidence with respect to the extent of the third-party uses and this limited evidence does not establish that opposer's mark is weak.

We note that opposer pleaded in the notice of opposition that it has extensively advertised its RED BULL mark and that it has considerable goodwill in the mark. Opposer did not specifically allege that its mark is famous nor did it argue fame in its brief on the case. However, even assuming that opposer's RED BULL mark is famous as a result of extensive sales and advertising, we would nonetheless find no likelihood of confusion in this case due to the differences in the marks.

In sum, notwithstanding the fact that the parties are using their respective marks on identical goods which are marketed in the same channels of trade to the same purchasers, we find that the marks are too different,

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especially in terms of their meanings or connotations and their overall commercial impressions to support a determination that confusion is likely. See: Kellogg Co. v. Pack'em Enterprises Inc., 14 USPQ2d 1545 (TTAB 1990), aff'd, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991).

Decision: The opposition is dismissed. The application is hereby remanded to the Examining Attorney for reexamination with respect to whether the application is void ab initio.