

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

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Mailed: December 19, 2013

**Opposition No. 91204861**  
(parent case)

Red Bull GmbH  
v.  
Jean Pierre Biane

**Opposition No. 91210860**

Red Bull GmbH  
v.  
Andale Energy Drink Co., LLC

Before Cataldo, Bergsman and Wellington,  
Administrative Trademark Judges.

By the Board:

Opposition No. 91204861 was filed against an application filed by Jean Pierre Biane (“applicant”) to register ANDALE! ENERGY DRINK and design (shown below; ENERGY DRINK disclaimed) for “energy drinks” in International Class 32.<sup>1</sup>

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<sup>1</sup> Application Serial No. 85334836, filed June 1, 2011, based on use of the mark in commerce, and asserting a date of first use anywhere, and date of first use in commerce, of March 23, 2011. The application includes the statement: “The English translation of “ANDALE” is “COME ON.”



The operative pleading filed by Red Bull GmbH (“opposer”) sets forth an opposition to registration on the grounds of priority and likelihood of confusion pursuant to Trademark Act § 2(d), and false suggestion of a connection pursuant to Trademark Act § 2(a). Opposer pleads ownership of a registration for a design mark (shown below) for “non-alcoholic beverages, namely, soft drinks, sports drinks, energy drinks” in International Class 32.<sup>2</sup>



Applicant filed an answer denying the salient allegations in the amended notice of opposition. He has filed a motion for summary judgment with respect to the issue of likelihood of confusion, and the motion has been fully briefed.<sup>3</sup>

### Analysis

#### Authorities

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<sup>2</sup> Registration No. 2829269, registered April 6, 2004 based on Trademark Act § 44(e); partial § 8 affidavit accepted, and Section 15 affidavit acknowledged, April 8, 2010.

<sup>3</sup> Opposer’s November 19, 2013 surreply has been given no consideration. *See* Trademark Rule 2.127(e)(1); TBMP 502.02(b) (2013).

Summary judgment is appropriate where the movant shows that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A party asserting that a fact cannot be or is genuinely disputed must support its assertion by either 1) citing to particular parts of materials in the record, or 2) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c).

In deciding a summary judgment motion, the function of the Board is not to try issues of fact, but to determine if there are any genuine disputes of material fact to be tried. *See Dyneer Corp. v. Automotive Products plc*, 37 USPQ2d 1251, 1254 (TTAB 1995); *University Book Store v. University of Wisconsin Board of Regents*, 33 USPQ2d 1385, 1389 (TTAB 1994). The evidence is viewed in a light favorable to the non-movant, and all justifiable inferences are drawn in favor of the non-movant. *See Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029-30 (Fed. Cir. 1993).

Applicant, as the moving party, carries the burden of proof. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). To prevail on his motion, applicant must prove that there is no genuine dispute of material fact that the contemporaneous use of the parties' respective marks on or in connection with their respective goods would not be likely to cause confusion, mistake or to deceive consumers as to the source of the goods. *See Hornblower & Weeks, Inc. v. Hornblower & Weeks*,

*Inc.*, 60 USPQ2d 1733, 1735 (TTAB 2001). In determining likelihood of confusion, the Board analyzes the relevant factors bearing on the issue as set forth in *In re E. I. du Pont De Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) (“*du Pont* factors”). As dictated by the evidence, different factors may play dominant roles, and the analysis does not necessarily require findings as to each *du Pont* factor. See *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). The “scope of examination by the Board in any particular case will ordinarily be established by the record presented by the parties.” *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002).

#### Summary of the Record

Applicant maintains that, even viewing all other relevant *du Pont* factors in opposer’s favor, the dissimilarities between the marks avoid a finding of likelihood of confusion. Applicant cites *Kellogg Co. v. Pack’em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff’d*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) (single *du Pont* factor of dissimilarity of marks outweighed all others such that other factors, even if decided in nonmovant’s favor, would not be material because they would not change the result).

Applicant argues that the dominant features of his mark on which consumers will focus, and which do not appear in opposer’s mark, are the distinctive wording “ANDALE!” and the image of a soccer player kicking a flaming ball; he asserts that these create the appearance of energetic sports

play and the commercial impression of excitement. Regarding background design, he argues that his mark has rectangles that resemble a checkered background, whereas opposer's mark is trapezoids of alternating shades and a small circle in the center, and that the mark includes a slant across the diagonal, similar to a windmill design.

Applicant submitted his own declaration describing the features of both marks, and stating that the marks are different in appearance, sound, meaning and commercial impression.

Opposer addresses several *du Pont* factors, including similarity of and commercial impression of the marks, relatedness of the goods, conditions of purchase, and fame of its pleaded mark. Regarding the marks, it argues that both are "parallelograms – four sided (sic) figures with opposite sides parallel" (opposer's brief, p. 7), and submits, under the declaration of Jennifer Powers, its Intellectual Property Counsel, dictionary definitions of "trapezoid" and "parallelogram" (Powers decl., para. 4, exh. A).<sup>4</sup>

Regarding the goods, opposer argues that they are identical, are inexpensive, and are purchased on impulse, such as on a quick stop in a store. It asserts that the parties' designs are not merely a subtle background because consumers use the products' designs to identify competing products. It maintains that even if the soccer player and ball in applicant's mark are dominant, confusion is still likely because opposer is owner-operator of a Major League Soccer team, the New

York Red Bulls, and has a soccer ball at the center of the team logo. Opposer introduces images of the team logo (Powers decl., para. 12-13, exh. C).

Regarding fame and renown, opposer maintains that its mark has been in use for nearly twenty years, and that it has an approximately 40% market share in the energy drink industry. It introduces marketing and media expenses for 2010, 2011 and 2012 (Powers decl., para. 9), a “representative sample of the extensive advertising and marketing that has been prevalent throughout the United States” (Powers decl., para. 10-11, exh. B) and “representative sample of events sponsored and/or organized by Red Bull in the United States” (Powers decl., para. 16).

### Findings

On the record on summary judgment, applicant has not carried his burden of demonstrating that there is no genuine dispute with respect to the material factual issue of likelihood of confusion. In the likelihood of confusion analysis, there is no general rule as to whether letters or designs will dominate in a composite mark. *See Syndicat Des Proprietaires Viticulteurs De Chateauneuf-Du-Pape v. Pasquier DesVignes*, 107 USPQ2d 1930, 1940 (2013), *citing In re Electrolyte Laboratories, Inc.*, 929 F.2d 645, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990). Moreover, the dominance of letters or of designs is not dispositive, and no element of a mark is ignored simply because it is less dominant. *In re Electrolyte*

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<sup>4</sup> We have given consideration to Ms. Powers’ declaration, notwithstanding that the declaration filed with opposer’s brief was unsigned. Opposer filed an identical signed declaration shortly thereafter.

*Laboratories, Inc.*, 16 USPQ2d at 1240, citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F2d 1293, 184 USPQ 35 (CCPA 1974).

Here, at a minimum, the record reflects that there exists a genuine dispute with respect to material facts that are relevant to the sole *du Pont* factor on which applicant relies - the similarity or dissimilarity of the marks. Correspondingly, a genuine dispute exists as to the connotations and commercial impressions that the marks create in the minds of consumers. Specifically, opposer has presented evidence that indicates that there is a genuine dispute regarding whether and how purchasers of energy drinks perceive the design elements of the respective marks. On this record, we cannot conclude that there is no genuine dispute that the dissimilarity between the marks, alone, is a sufficient basis on which to find that there is no likelihood of confusion.

Furthermore, opposer has come forward with arguments and evidence to support its position that *du Pont* factors in addition to the similarity or dissimilarity of the marks potentially bear on the likelihood of confusion analysis. For example, opposer introduces evidence to indicate that the fame of its mark is relevant to this analysis.

In view of these findings, applicant's motion for summary judgment with respect to likelihood of confusion is denied.<sup>5</sup>

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<sup>5</sup> The evidence submitted in connection with the motion for summary judgment is of record only for consideration of this motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. *See, e.g., Drive Trademark Holdings LP v. Inofin*, 83 USPQ2d 1433, 1438 n.14 (TTAB 2007); *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993). Also, the fact that we have identified certain issues in dispute

**Schedule**

These consolidated proceedings are resumed. Remaining discovery and trial dates are reset as follows:

Expert Disclosures Due	<b>2/19/2014</b>
Discovery Closes	<b>3/21/2014</b>
Plaintiff's Pretrial Disclosures	<b>5/5/2014</b>
Plaintiff's 30-day Trial Period Ends	<b>6/19/2014</b>
Defendant's Pretrial Disclosures	<b>7/4/2014</b>
Defendant's 30-day Trial Period Ends	<b>8/18/2014</b>
Plaintiff's Rebuttal Disclosures	<b>9/2/2014</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>10/2/2014</b>

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

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should not be construed as a finding that these are necessarily the only issues which remain for trial.