

This Opinion is Not a
Precedent of the TTAB

Mailed: July 22, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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British American Tobacco (Brands) Limited
v.
Ruff Ryders, Inc.
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Opposition No. 91275212
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William M. Bryner, Tiffani D. Otey and Emily M. Revilla of
Kilpatrick Townsend & Stockton LLP
for British American Tobacco (Brands) Limited.

Brian M. Taddonio of Taddonio Law PLLC
for Ruff Ryders, Inc.

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Before Zervas, Kuhlke and Adlin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Ruff Ryders, Inc. seeks registration of RYDE OUT, in standard characters, for: “dietary and nutritional supplements; liquid nutritional supplements for human use; liquid vitamin supplements,” in International Class 5; and “non-alcoholic beverages, namely, sports drinks, energy drinks, and soft drinks,” in International Class 32.¹ In its notice of opposition, Opposer British American Tobacco

¹ Application Serial No. 90386258, filed December 16, 2020 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an alleged intent to use the mark in commerce.

(Brands) Limited pleads ownership of an application to register RYDE, in standard characters, for, *inter alia*, “dietary and nutritional supplements” in International Class 5 and “energy drinks” in International Class 32.² As grounds for opposition, Opposer alleges under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), that use of Applicant’s mark would be likely to cause confusion with Opposer’s mark. In its answer, Applicant denies the salient allegations in the notice of opposition.

I. The Record

The record consists of the pleadings, and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant’s involved application. In addition, Opposer introduced:

Notice of Reliance (“Opp. NOR”) on its pleaded application.
14 TTABVUE.³

Testimony Declaration of Terry Daly, Global Legal Counsel, Marketing and Regulatory, for Opposer’s “affiliated entity” British American Tobacco (Holdings) Limited, and the exhibits thereto (“Daly Dec.”). 15 TTABVUE (confidential version at 16 TTTABVUE).⁴

Applicant introduced:

² Application Serial No. 88827811, filed March 10, 2020 under Trademark Act Sections 1(b), 15 U.S.C. § 1051(b), based on an alleged intent to use the mark in commerce, and 44(d), 15 U.S.C. § 1126(d), with a claim of priority based on a Jamaican application filed September 11, 2019. The application also identifies additional goods in Class 5, as well as goods in Classes 30 and 34.

³ Citations to the record are to TTABVUE, the Board’s online docketing system. Specifically, the number preceding “TTABVUE” corresponds to the docket entry number(s), and any number(s) following “TTABVUE” refer to the page number(s) of the docket entry where the cited materials appear.

⁴ Mr. Daly testifies about British American Tobacco (Holdings) Limited and Opposer collectively, as if a single entity. 15 TTABVUE 2 (Daly Dec. ¶ 1). Because the record does not reveal that the relationship between, or corporate organization of, these entities is relevant to the sole claim in this case, we do the same.

NOR (“App. NOR”) on: several of Opposer’s unpleaded applications for RYDE-formative marks; Opposer’s initial and pretrial disclosures; Internet printouts; third-party applications and registrations; its own uninvolved applications; and dictionary definitions. 21 and 25⁵ TTABVUE.⁶

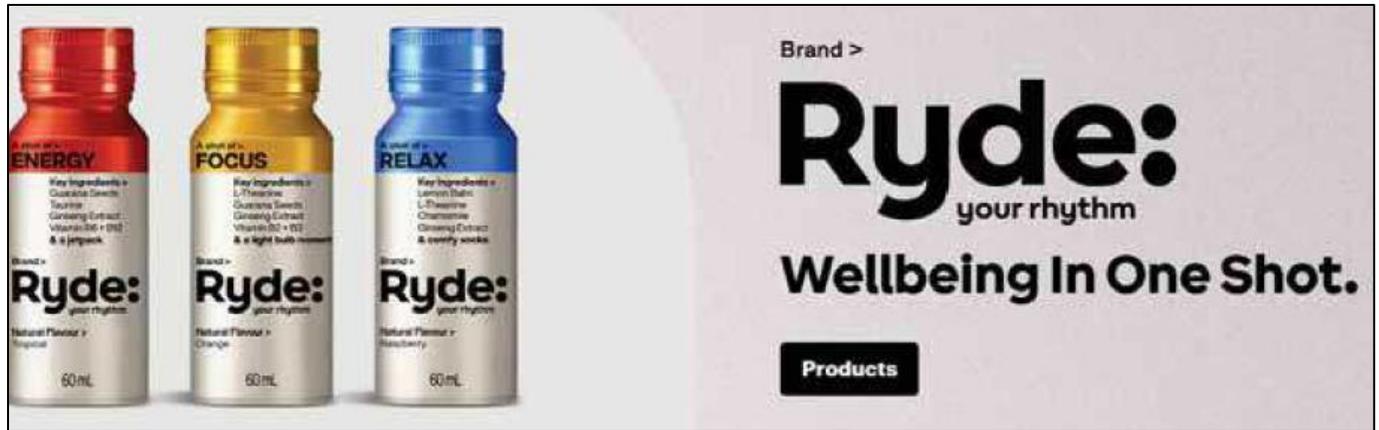
Testimony Declaration of Joaquin Dean, its Chief Executive Officer and Co-Founder, and the exhibit thereto. 22 TTABVUE.

II. The Parties and Their Applications

Opposer’s “RYDE Mark is currently in use in connection with wellbeing products, including energy drinks, in Australia.” 15 TTABVUE 3 (Daly Dec. ¶ 5). Opposer intends to use, but has not yet used, the mark in the United States for, “among other things, wellbeing products, including energy drinks.” *Id.* at 3, 4 (Daly Dec. ¶¶ 4, 9). Opposer’s RYDE drinks (presumably those currently available in Australia) “are made of a variety of natural ingredients such as Guarana seeds, Taurine, Ginseng extract, and B vitamins.” *Id.* at 3 (Daly Dec. ¶ 8). Opposer’s RYDE energy drinks “are intended to help consumers better manage the demands of their day, whether they need some energy, or to focus, or to relax,” and in Australia different versions of the RYDE drinks are so labeled, as shown below:

⁵ After trial, Applicant requested and was granted leave to file certain documents inadvertently omitted from its NOR. *See* 25 and 28 TTABVUE.

⁶ Applicant filed the listed documents under several different notices of reliance, but all of the notices and accompanying documents are at 21 TTABVUE.



Id. at 3, 4 (Daly Dec. ¶¶ 5, 12).

Applicant is a “hip-hop record label, management company, and entertainment conglomerate founded in the late 1980’s.” 22 TTABVUE 2 (Dean Dec. ¶ 3). Applicant “launched the careers” of “famous artists,” including DMX. *Id.* (Dean Dec. ¶ 4). Applicant “has sold well over 200 million records bearing the RUFF RYDERS brand and mark,” as well as “millions of concert tickets in connection with various RUFF RYDERS concerts and music tours.” *Id.* at 3 (Dean Dec. ¶ 5, 6). “In 2020, BET aired a five-part documentary entitled ‘Ruff Ryders Chronicles’ about [Applicant’s] history and success.” *Id.* (Dean Dec. ¶ 7).

Mr. Dean “came up with the idea of the RYDE OUT energy drink as a compliment to the ‘Ride Out’ or ‘Ryde Out’ motorcycle lifestyle synonymous with [Applicant].” *Id.* (Dean Dec. ¶ 10). Applicant “recently organized and participated in a ‘Ryde Out’ tribute event in New York City to honor the second anniversary of the untimely passing of [Mr. Dean’s] dear friend and legend DMX.” *Id.* (Dean Dec. ¶ 12). Applicant intends to market its RYDE OUT energy drink in a variety of ways, including “at

motorcycle-based events,” where it also intends to sell the product. *Id.* at 4 (Dean Dec. ¶¶ 18, 20).

III. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). To establish entitlement to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute; and (ii) a reasonable belief in damage proximately caused by registration of the involved mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *4 (Fed. Cir. 2020).

Although Opposer properly introduced its pleaded RYDE application into evidence, 14 TTABVUE 7-10, Applicant argues that the application does not establish Opposer’s “real interest in opposing registration” of Applicant’s mark. 26 TTABVUE 20-21. Applicant’s argument is based on the current suspension of Opposer’s pleaded application for reasons other than a finding that Opposer’s mark may be likely to be confused with Applicant’s. *Id.* (citing 14 TTABVUE 9).⁷ We are not persuaded.

As discussed below, the filing date of Opposer’s pleaded application is earlier than the filing date of Applicant’s involved application. Thus, as Opposer points out, “such

⁷ As Applicant points out, a plaintiff may establish its entitlement to a statutory cause of action based on its ownership of an application that has been refused or suspended due a potential likelihood of confusion with the defendant’s mark. *See e.g. Hole In 1 Drinks, Inc. v. Lajtay*, 2020 USPQ2d 10020, at *3 (TTAB 2020).

a suspension would be procedurally impossible due to Opposer's earlier filing date for Opposer's RYDE Mark." 27 TTABVUE 7; *see also* 23 TTABVUE 14-15.

In any event, refusal or suspension of a plaintiff's application based on a defendant's application or registration is not required to establish entitlement to a statutory cause of action. To the contrary, a plaintiff's ownership of an application to register an arguably similar mark for arguably similar goods and services may be sufficient to establish entitlement.

[A] refusal is not a requirement to establish standing. Rather, it is sufficient if the circumstances are such that it would be reasonable for a petitioner to believe that the existence of the respondent's registration would damage him, *e.g.*, a reasonable belief that there is a likelihood of confusion between the marks, or that the presence on the register of the respondent's mark may hinder the petitioner in using or registering his mark.

Toufigh v. Persona Parfum, Inc., 95 USPQ2d 1872, 1874 (TTAB 2010). *See also Spirits Int'l, B.V. v. S.S. Taris Zeytin Ve Zeytinyagi Tarim Satis Kooperatifleri Birliđi*, 99 USPQ2d 1545, 1548 (TTAB 2011) (finding standing even though "applicant's application was not cited as a bar to the registration of opposer's mark," because "the arguable relatedness of the goods is sufficient for us to find that opposer has met the statutory requirement of establishing a reasonable belief of damage ...").

Thus, we find that Opposer has established its entitlement to a statutory cause of action.

IV. Priority

Neither party claims actual use of its mark in the United States. However, each party may rely on the filing date of its intent to use application. *Cent. Garden & Pet*

Co. v. Doskocil Mfg. Co., 108 USPQ2d 1134, 1140-41 (TTAB 2013) (“for when an application or registration is of record, the party may rely on the filing date of the application for registration, *i.e.*, its constructive use date”); *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1119 (TTAB 2009) (“applicant may rely without further proof upon the filing date of its application as a ‘constructive use’ date for purposes of priority”). Opposer’s March 10, 2020 filing date precedes Applicant’s December 16, 2020 filing date, and thus Opposer has contingently established its priority.

Opposer’s priority is merely contingent because, as Applicant points out, Opposer’s priority claim is based solely on its pleaded application filed under Sections 1(b) and 44(d) of the Act. “[N]o final judgment shall be entered in favor of an applicant under section 1051(b) of this title before the mark is registered, if such applicant cannot prevail without establishing constructive use pursuant to section 1057(c) of this title.” 15 U.S.C. § 1068; *Spirits Int’l*, 99 USPQ2d at 1549 (“Section 7(c) provides that any judgment entered in favor of a party relying on constructive use – whether that party is in the position of plaintiff or defendant in a Board proceeding – is contingent upon the ultimate issuance of a registration to that party.”) (quoting *Larami Corp. v. Talk to Me Programs, Inc.*, 36 USPQ2d 1840, 1845 n.7 (TTAB 1995)); Trademark Rule 2.129(d) (“When a party to an *inter partes* proceeding before the Trademark Trial and Appeal Board cannot prevail without establishing constructive use pursuant to section 7(c) of the Act in an application under section 1(b) of the Act, the Trademark Trial and Appeal Board will enter judgment in favor of that party,

subject to the party's establishment of constructive use.”). In fact, in connection with its motion to strike Applicant's affirmative defenses, Opposer essentially conceded that its priority claim based on its pleaded RYDE application is contingent on the mark ultimately registering. 11 TTABVUE 7 (“rather than deny the prior rights of an intent-to use opposer, the Board merely issues judgment contingent upon the intent-to-use opposer establishing use and perfecting registration of its mark”).

V. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000). We consider the likelihood of confusion factors about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

A. The Goods, and Their Channels of Trade and Classes of Consumers

The involved and pleaded applications both identify “dietary and nutritional supplements” in Class 5, and “energy drinks” in Class 32. It is sufficient for a finding of likelihood of confusion that identity is established for any item encompassed by the identification of goods in a particular class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981). Thus, the goods are identical in part.

Moreover, because the goods are identical in part, we presume that the channels of trade and classes of purchasers for the identical goods also overlap. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Rsch. Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

The identity of the goods and their overlapping channels of trade and classes of purchasers not only weigh heavily in favor of finding a likelihood of confusion, but the identity of the goods also reduces the degree of similarity between the marks necessary to find a likelihood of confusion. *In re Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed Cir. 2010); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *6-7 (TTAB 2019).

B. The Strength of Opposer’s Mark

Before comparing the parties’ marks, we turn to the strength of Opposer’s pleaded RYDE mark, to determine the scope of protection to which it is entitled. There are

two types of strength: conceptual and commercial. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength ... and its marketplace strength”). Here, however, Opposer has not introduced any evidence that it has used its pleaded mark in the United States, so it should not be surprising that Opposer has not alleged that the mark enjoys any commercial strength. We therefore turn to conceptual strength.

Applicant argues that RYDE “is an intentional misspelling of ‘ride,’ which is phonetically and connotatively identical to ‘ride.’” 26 TTABVUE 25. Opposer admits as much. 23 TTABVUE 21-22 (“Opposer’s RYDE Mark is an intentional misspelling of the word ‘ride’ and connotes action, movement, and riding the waves of everyday life.”). Furthermore, Applicant points out that Opposer filed an application to register WHATEVER TODAY THROWS AT YOU – RIDE IT, 21 TTABVUE 18-20, and that Opposer’s Australian marketing materials state: “Find out how the science in every bottle helps you Ryde through your day.” 26 TTABVUE 25; 15 TTABVUE 11.

According to Applicant, this evidence establishes that Opposer’s mark is “descriptive.” 26 TTABVUE 26. More specifically, Applicant asserts that because “ride” means “to continue without interference” and “be supported and usually carried along by,” 21 TTABVUE 122, 127, it conveys that Opposer’s goods “will help consumers continue without interference or be supported or carried along.” 26 TTABVUE 26. We disagree that this makes Opposer’s mark “descriptive.”

Indeed, there is nothing about “continuing without interference” or being “supported and usually carried along by” that “immediately conveys knowledge of a

quality, feature, function, or characteristic” of dietary/nutritional supplements or energy drinks. *See In re Chamber of Com. of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). To the extent that “ride” suggests, rather vaguely, that Opposer’s goods could provide some type of support or other benefit to those who consume them, this is too attenuated without specifying the exact nature of the benefit or support for us to find the mark highly or even moderately suggestive. We find, however, that the misspelled term RYDE is slightly suggestive of Opposer’s goods. *See In re Omniome*, 2020 USPQ2d 3222, at *3 (TTAB 2019) (citing *Earnhardt v. Kerry Earnhardt, Inc.*, 864 F.3d 1374, 123 USPQ2d 1411, 1413 (Fed. Cir. 2017)) (“a mark is suggestive if it ‘requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods’”). This is in sharp contrast to a descriptive term like ARMED ANTIBODIES for biological preparations, which immediately conveys knowledge of a feature, function or characteristic of the goods, *see In re Viventia Biotech Inc.* 80 USPQ2d 1376 (TTAB 2006), and a highly suggestive term like DESIGNED2SELL for providing staging managers “to improve the residence’s selling potential.” *See Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1025-26 (TTAB 2009).

Ultimately, we find that because Opposer’s mark is slightly suggestive, it is conceptually slightly weak, somewhat reducing the scope of protection to which it is entitled. Nonetheless, the mark remains inherently distinctive and it is not so weak as to be unentitled to protection against confusingly similar marks.

C. The Marks

The marks are more similar than dissimilar “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). Indeed, the marks share the same term, with both intentionally misspelling that term, “ride,” as “RYDE.” As Applicant’s dictionary evidence establishes, the shared term “RYDE” is not a word, 21 TTABVUE 132, and there is no evidence that any third parties use this misspelling of “ride” for similar or related goods. Competing uses of a peculiar misspelling of “ride” for identical goods is likely to cause confusion.

We have not ignored the trailing term “OUT” in Applicant’s mark. However, despite that term, the marks look and sound quite similar, because they share the same misspelled term “RYDE.”

Applicant claims that RYDE OUT is “unitary,” 26 TTABVUE 32-33, and has a meaning distinct from “ride” alone. Specifically, it is a “phonetic equivalent” of “ride out” which means “to succeed in surviving or getting through (something dangerous or harmful that cannot be stopped or avoided).” 21 TTABVUE 137. We accept that “ride out” (and RYDE OUT) may convey a different meaning and create a different commercial impression than “ride” (and RYDE) alone, but find that this difference is outweighed by the marks’ similar appearance and sound.

Moreover, and significantly, based on the record in this case, the differences between the marks in meaning and commercial impression are less significant than Applicant contends. The word “ride” maintains its essential meaning in the phrase

“ride out” because “surviving or getting through” something dangerous or harmful may connote “continu[ing] without interference” or being “supported” and “carried along by” something that enables escape from whatever is dangerous or harmful. 21 TTABVUE 122, 127, 137.

In addition, there appears to be a stronger connection than Applicant lets on between Applicant’s intended use of RYDE in its mark RYDE OUT and Opposer’s use of RYDE. At times, Applicant uses “ryde” to mean “to sit and travel on the back of an animal that one directs” or “to travel in or on a conveyance,” which are among the definitions of “ride” Applicant introduced into the record. 21 TTABVUE 122. In fact, Applicant and its website are heavily focused on riding wheeled vehicles or horses.

For example, Applicant’s name and mark RUFF RYDERS is the phonetic equivalent of “rough riders,” a term associated with riding horses. And Applicant’s website is focused on motorcycles, automobiles and other vehicles that may be ridden. 21 TTABVUE 106 (Applicant’s “biker club” and “car & truck club”), 109 (Applicant’s Young Ryders division “embodies ... the bike lifestyle”), 157 (Applicant’s promotion of its “NYC 5 Borough Rideout” depicts a motorcycle) and 163 (“It’s not the first time the Ruff Ryders have hosted bike-centric events to honor their late colleague.”); 25 TTABVUE 11. Applicant’s Co-Founder and CEO Mr. Dean essentially concedes the point. 22 TTABVUE 3 (Dean Dec. ¶ 10) (“I came up with the idea of the RYDE OUT energy drink as a compliment to the ‘Ride Out’ or ‘Ryde Out’ motorcycle lifestyle synonymous with [Applicant].”).

In short, we find the marks more similar than dissimilar in their entireties. This also weighs in favor of finding a likelihood of confusion.

VI. Conclusion

The goods are identical in part and presumed to travel in the same channels of trade to the same classes of consumers. The marks are more similar than dissimilar and Opposer's is inherently distinctive and conceptually strong enough to be entitled to protection against Applicant's. Confusion is likely.

Decision: The opposition is sustained on the ground of likelihood of confusion, contingent upon Opposer establishing its constructive use through registration of the mark in its pleaded application. In the event Opposer's pleaded mark is registered or the application is abandoned, Opposer should inform the Board so that appropriate action may be taken to terminate this proceeding.