

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed:  
March 25, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Innovation Ventures, LLC*

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Serial No. 85637294

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Robert Bondra of Oakland Law Group PLLC, for Innovation Ventures, LLC

Won Teak Oh, Trademark Examining Attorney, Law Office 114 (K. Margaret Le,  
Managing Attorney).

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Before Quinn, Wolfson and Ritchie, Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Innovation Ventures, LLC (“applicant”) seeks registration on the Principal Register of the mark HOURS OF ENERGY NOW (in standard characters) for goods ultimately identified as “dietary supplements” in International Class 5 and “non-alcoholic liquids for human consumption, namely, energy shots” in International Class 32.<sup>1</sup>

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<sup>1</sup> Application Serial No. 85637294 was filed on May 29, 2012, based on allegations of first use and first use in commerce of September 2004.

The Trademark Examining Attorney has refused registration of applicant's mark under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052, and 1127, having determined that the applied-for mark is incapable of functioning as a trademark to identify the source of origin of the listed goods. After the examining attorney made the refusal final, applicant appealed to this Board.<sup>2</sup>

We affirm the refusal to register.

Applicable Law

Although advertising phrases and slogans are not *per se* unregistrable, a phrase or slogan that does not function as a trademark to indicate the source of applicant's goods and to identify and distinguish them from others cannot be registered on either the Principal or the Supplemental register. Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§1051-1052, 1127; *In re Morganroth*, 208 USPQ 284, 287 (TTAB 1980) (An advertising phrase "may be registrable on the Principal Register *if used in the manner of a 'mark'* and [if it] does not fall within the proscriptions of Sections 2(a), (b), (c), (d), and the subsections of Section 2(e).") (emphasis supplied); *In re Sanda Hosiery Mills*, 154 USPQ 631 (TTAB 1967) (slogan THE BABY BOOTIE SOCK THAT WILL NOT KICK OFF for socks held incapable of functioning as a mark and denied registration on Supplemental Register).

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<sup>2</sup> The examining attorney initially refused registration of the mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), as an additional ground for refusal. The refusal under Section 2(e)(1) was withdrawn during briefing. Accordingly, we do not decide whether the proposed mark is merely descriptive of the goods. The sole issue on appeal is whether applicant's slogan functions as a trademark to distinguish its goods from those of others.

The critical inquiry in determining whether a slogan functions as a mark is how the proposed mark would be perceived by the relevant public. *See e.g., In re AOP LLC*, 107 USPQ2d 1644, 1654 (TTAB 2013) (registration of term AOP for wine refused); *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1827-28 (TTAB 2012) (SEMICONDUCTOR LIGHT MATRIX merely identifies a technology, not the source of applicant's UV curing system); *In re T.S. Designs, Inc.*, 95 USPQ2d 1669 (TTAB 2010) (holding CLOTHING FACTS merely an informational phrase and not a source identifier based on the likely consumer perception of the phrase used on a clothing label in connection with manufacturing information reminiscent of the "Nutrition Facts" label required for food products by the United States Food and Drug Administration); and *In re Remington Products, Inc.*, 3 USPQ2d 1714 (TTAB 1987) (PROUDLY MADE IN USA used on electric shavers is not used as a trademark, but merely to tell the buyer the place the product was made).

#### Discussion

The examining attorney argues that applicant's "manner of usage is such that the public will not perceive it as a trademark"; but rather that "[a]pplicant uses the phrase 'HOURS OF ENERGY NOW' in conjunction with other phrases to tout the characteristics of its product."<sup>3</sup> In support of this argument, he refers to applicant's specimens of record and website, as well as to third-party websites the examining attorney has submitted. Applicant, on the other hand, argues that the slogan functions to identify its products, asserting that inasmuch as the fact that the Section 2(e)(1) refusal has been withdrawn means its mark must be considered

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<sup>3</sup> Examining attorney's Brief, November 21, 2013.

suggestive, and the results from a Google search it conducted show that the vast majority of references to HOURS OF ENERGY NOW refer solely to applicant.

In deciding how the average purchaser will perceive and react to applicant's proposed mark, "[w]e look to the specimens to see if they convey use as a mark. Matter that is merely informational is not registrable as a mark." *In re AOP*, 107 USPQ2d at 1654. Applicant submitted three specimens showing how it uses its proposed mark: on the containers (shot bottles) for the goods, on point-of-purchase cartons containing the shot bottles, and on stand-alone displays. These are reprinted below:



On the first two of these, the shot bottle and the carton, the phrase “Hours of energy now\*” is used together with other informational text, in less prominent position than the mark 5-HOUR ENERGY. It is presented as part of a bullet-point listing of self-laudatory phrases detailing apparent characteristics of the product: “No crash later,” “Sugar free,” and “0 net carbs.” Although the phrase “Hours of energy now” is followed by an asterisk, there is no indication on the specimens as to what the asterisk may be intended to reference.<sup>4</sup> We thus do not take the presence of the asterisk as referencing an intent by applicant to claim trademark protection for the slogan.<sup>5</sup> Regardless, the “mere intent that a term function as a trademark is not enough in and of itself, any more than attachment of the trademark symbol would be, to make a term a trademark.” *In re Manco Inc.*, 24 USPQ2d 1938 (TTAB 1992) (THINK GREEN failed to function as a mark for, *inter alia*, mailing and shipping cardboard boxes). Moreover, the record includes pages from applicant’s website discussing the purpose of taking applicant’s product, which elucidate the

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<sup>4</sup> On Walgreens’ website, there is a “Quick view” description of applicant’s product. At this location is the only place in the record where there is a second asterisk that appears to relate to the one following the word “now” in applicant’s slogan (although in the Quick View, the first asterisk actually follows the word “later.”) The text of the Quick view reads: “Feel it in minutes. Lasts for hours. Hours of energy now – no crash later.\*” Near the end of the text is a second asterisk; following the second asterisk is the text: “\*‘No crash’ means no sugar crash.”

<sup>5</sup> See, e.g., *Waldes Kohinoor, Inc. v. Illinois Tool Works*, 129 USPQ 73, 75 (CCPA 1961) (asterisk following trademark “being footnoted with a reference to ‘T.M.Reg.U.S.Pat.Off.’”); *Saint-Gobain Corp. v. 3M Co.*, 90 USPQ2d 1425, 1437 (TTAB 2007) (asterisk used to indicate the color purple claimed as a trademark); *El Paso Products Co. v. The C. P. Hall Co.*, 180 USPQ 409, 414 (TTAB 1973) (use of asterisk to denote initialism as mark unsuccessful; “while there was an attempt therein in a number of instances through the use of an asterisk or star to suggest that ‘DMG’ was a trademark, this was dissipated by the continued use of ‘DMG’ throughout the brochure to refer to dimethyl glutarate....”).

terse phrases: “When you need an extra boost you don’t want to wait. ... A 5-hour ENERGY® shot takes just seconds to take, so it gets in your system fast. ... In minutes you can feel a 5-hour ENERGY® shot working, ....” This advertising copy is separated by three headings, which read: “Take 5-hour ENERGY®,” “Take it in seconds,” “Feel it in minutes,” and “lasts for hours.”<sup>6</sup>

Applicant’s contention that “[t]he applied-for-mark receives prominent placement in a large, bold type font”<sup>7</sup> is not borne out by the specimens themselves. The proposed mark is simply the first of four informational phrases in a bullet-point list. In the stand-alone display, the wording is even less prominent, being merged with the phrase “no crash later!” into a compound advertising slogan. This usage further enhances the merely informational nature of the proposed mark. *See, e.g., In re Vicki Roberts*, 87 USPQ2d 1474 (TTAB 2008) (designation **irestmycase**, as it appeared in the website address on applicant’s specimens of record, failed to function as a mark); *In re Morganroth*, 208 USPQ 284 (TTAB 1980) (registration of NATUR-ALL-IZE YOUR HAIR COLORING for hair styling salon services refused; newspaper ad contained “such a morass of figures and printed matter” and claimed marks that a portion of a slogan was held to occupy only a “subordinate position ... hardly likely to make any impact, much less a significant impression”); and *In re Niagara Frontier Services, Inc.*, 221 USPQ 284, (TTAB 1983) (while slogan “We Make It, You Bake It!” appears on two separate lines of the five line message, “it reads as a natural part of the larger thought, is presented in the same type size and

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<sup>6</sup> Attached to the January 24, 2013 Office action.

<sup>7</sup> Applicant’s Brief, at 12; 9 TTABVUE 15.

style as the other matter (with the exception of the term PIZZA which appears in all capital letters), and is not used elsewhere in the specimens as a source identifier or distinguishing designation for applicant's supermarket grocery store services"; registration refused).

Turning to third-party use of the phrase, the examining attorney has also submitted copies of web page advertising from two companies that distribute applicant's product online, Walgreens and "advantagevitamin.com."<sup>8</sup> These ads identify "5-HOUR ENERGY" as applicant's mark by displaying the wording prominently in the advertisement (in one case, followed by the registration symbol (®)); but as for applicant's slogan, the distributors use the phrase as does applicant, i.e., together with other similar informational phrases such as "sugar free," "no crash later," and "0 net carbs."<sup>9</sup>

A web page from Costco advertising a competitor's energy drink also uses the exact informational phrase "hours of energy now" in its advertising. Several customer reviews of applicant's and the competitor's products were included on this website. Four say applicant's energy drink "works quickly," one notes "lift within about 5 to 10 minutes," and one of the two reviewers of applicant's competitors' product also indicates that it works quickly. The remaining reviewer says the competitor's product "lasts longer." On Walgreens' cite, several on-line customers who submitted reviews of applicant's products mention that applicant's product

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<sup>8</sup> Attached to the examining attorney's August 14, 2013 denial of applicant's request for reconsideration.

<sup>9</sup> *Id.*

“works quickly.”<sup>10</sup> This evidence tends to show that the relevant purchasing public has been educated to understand that the phrase “hours of energy now” is informational for a product that is fast-acting and long-lasting, which buttresses our view that the phrase, as actually used by applicant, is merely informational.

Applicant, relying on *In re Eagle Crest, Inc.*, 96 USPQ2d 1227 (TTAB 2010), argues that the Office must show that its mark HOURS OF ENERGY NOW is in common, everyday parlance such that consumers are accustomed to seeing the slogan used in connection with goods from many different sources. We recognize, of course, that it is not applicant’s burden to show otherwise, but where, as here, the specimens and applicant’s own use make it clear that the proposed mark is being used merely as an informational phrase, the Office need not also prove that it is in common, everyday parlance. *In re Eagle Crest* does not hold otherwise. In that case, the applicant sought to register the mark ONCE A MARINE, ALWAYS A MARINE for clothing. The Board found that while the mark did not convey information about the goods themselves, the “familiar Marine slogan” was used to convey information, “as shown by the evidence of use by the public, by other retailers and also by applicant.”<sup>11</sup> The Board did not ignore applicant’s specimens; to the contrary, it specifically noted that the specimens showed that the slogan would be viewed “as an informational message rather than as a trademark identifying the source of applicant’s clothing.”<sup>12</sup> The Board stated: “To make this determination we look to

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<sup>10</sup> *Id.*

<sup>11</sup> *Eagle Crest*, 96 USPQ2d at 1232.

<sup>12</sup> *Id.*, at 1231.

the specimens and other evidence of record showing how the designation is actually used in the marketplace.”<sup>13</sup>

Nonetheless, we have considered applicant’s argument that the phrase “Hours of energy now” is not commonly used in everyday parlance to describe energy drinks, but is proprietary to applicant. Applicant contends that the results of a Google search it submitted for the phrase “hours of energy now,” which apparently retrieved “about 1,480,000 results,”<sup>14</sup> show that applicant is the primary user of the phrase. However, applicant chose to reproduce only ten of these, and only *excerpts*, not full articles.<sup>15</sup> Of the ten excerpts, at best six are related to applicant while four are unrelated to applicant. The second search result contains five excerpts; only two of them use the mark (in a slightly different format, i.e., “Hours of Energy...Now!”) and they also appear to be unrelated to applicant. This evidence does not convince us that the proposed mark is not informational of an everyday, commonplace statement of an energy drink or dietary supplement’s intended benefit. We further note the examining attorney’s submission of a Wikipedia entry showing that “the marketing of energy shots generally focuses on their convenience and availability as

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<sup>13</sup> *Id.* at 1229.

<sup>14</sup> Attached to applicant’s July 24, 2013 request for reconsideration.

<sup>15</sup> Submissions consisting solely of excerpts from the Google search engine are, at best, of limited probative value, because they do not show the context in which the term or phrase is used on the listed web page. *Weider Publ’ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1360 (TTAB 2014). *See also, In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007); *In re Thomas Nelson, Inc.*, 97 USPQ2d 1712, 1715 (TTAB 2011).

a low-calorie ‘instant’ energy drink.”<sup>16</sup> This entry underscores that the mark will be seen by the public as touting applicant’s drinks as providing “instant” energy.

Applicant further argues that its mark cannot be incapable because the fact that the examining attorney withdrew the Section 2(e)(1) refusal means its mark is suggestive, and suggestive marks are registrable. However, even an “inherently distinctive” word or design cannot achieve trademark status unless it is used as a trademark. *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861, 1864 (TTAB 2006), *appeal dismissed*, 208 Fed. Appx. 824 (Fed. Cir. 2006) (SPECTRUM for illuminated pushbutton switches would not be perceived as a trademark; “[W]hile the applied-for mark has not been refused as descriptive under Section 2(e)(1) of the Trademark Act, the fact that the applied-for mark may be registrable if it were used in a different context is not the issue.”) *See also, In re Volvo Cars of N. Am., Inc.*, 46 USPQ2d 1455 (TTAB 1998) (holding DRIVE SAFELY merely an informational phrase or slogan that would be perceived as an everyday, commonplace safety admonition that does not function as mark); *In re Tilcon Warren, Inc.*, 221 USPQ 86 (TTAB 1984) (holding WATCH THAT CHILD for construction material merely informational and not registrable notwithstanding long use); and *Niagara Frontier*, 221 USPQ at 286 (while slogan “We Make It, You Bake It!” was held not descriptive

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<sup>16</sup> Entry for “5-hour Energy” at <http://en.wikipedia.org>; attached to Office action of July 2, 2012. The Board considers evidence taken from Wikipedia so long as 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). Here, we have considered the Wikipedia evidence because it was submitted with the examining attorney’s initial Office action, and applicant had an opportunity to rebut it.

of supermarket grocery store services, it was not registerable as a trademark because it was merely used in the body of advertising materials).

Conclusion

We have carefully considered the entire record, including all arguments and the evidence submitted. We find that applicant's mark HOURS OF ENERGY NOW, as actually used by applicant evidenced by the specimens of record, merely informs prospective purchasers that applicant's products will provide an immediate boost of energy upon consumption and that the increased levels of energy will last for several hours. Because the proposed mark would be perceived as merely touting the fast-acting and long-lasting qualities of the product, and not identifying its source of origin, the slogan is incapable of functioning as a trademark.

**Decision:** The refusal to register applicant's mark HOURS OF ENERGY NOW under Trademark Act §§ 1, 2, and 45 is affirmed as to both Classes 5 and 32.