

This Opinion Is Not a  
Precedent of the TTAB

Mailed: January 18, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

—  
Trademark Trial and Appeal Board  
—

*Red Bull GmbH*  
*v.*  
*Morganti Flavio Innovaciones Gastronomicas, S.L.*  
—

Opposition No. 91223317  
—

Martin R. Greenstein, Neil D. Greenstein, Angelique M. Riordan, and Derek M. Palmer of TechMark a Law Corporation,  
for Red Bull GmbH.

Justin R. Young of Dineff Trademark Law Limited,  
for Morganti Flavio Innovaciones Gastronomicas, S.L.

—  
Before Zervas, Kuczma, and Hightower,  
Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

Applicant Morganti Flavio Innovaciones Gastronomicas, S.L. seeks registration  
on the Principal Register of the mark shown below:



for the following goods in International Class 32:

Beers; mineral and aerated waters; soft drinks; smoothies; vegetable juice; fruit drinks and fruit juices; concentrates for making fruit drinks; syrups for making non-alcoholic beverages; excluding energy drinks.<sup>1</sup>

Red Bull GmbH (“Opposer”) opposes registration, asserting three claims:

1. Likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d);
2. False suggestion of a connection under Trademark Act Section 2(a), 15 U.S.C. § 1052(a); and
3. Dilution by blurring under Trademark Act Section 43(c), 15 U.S.C. § 1125(c).

Opposer pleaded the following seven registrations:<sup>2</sup>

Mark	Registration No.	Date Issued	Class 32 Goods
	3197810	1/16/07	Soft drinks; and sports drinks
	3881732	11/23/10	Non-alcoholic beverages, namely, sports drinks, energy drinks and soft drinks
	3838170	8/24/10	Soft drinks, and sports drinks
RED BULL	2494093	10/2/01	Soft drinks; and sports drinks

<sup>1</sup> Application Serial No. 86538724 was filed February 18, 2015, based on Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The description of the mark states: “The mark consists of the stylized wording ‘PINK’ in black and ‘COW’ in pink. On the left is a design of a pink cow with wings.” The colors pink and black are claimed as a feature of the mark.

<sup>2</sup> Each pleaded registration more than ten years old has been renewed; Section 8 & 15 declarations have been accepted and acknowledged for the others. All of the word marks are either in standard characters or typeset form, the legal equivalent. TMEP § 807.03(i) (Oct. 2018). Color is not claimed as a feature of any mark. Certain of the registrations also identify goods and services in other classes.

Mark	Registration No.	Date Issued	Class 32 Goods
RED BULL	3092197	5/16/06	Non-alcoholic beverages, namely energy drinks and hypertonic drinks
RED BULL	1935272	11/14/95	Malt liquor
GIVES YOU WINGS	3585402	3/10/09	Non-alcoholic beverages, namely, sports drinks, energy drinks and soft drinks

Opposer also pleaded common-law rights in “other marks for or incorporating the words RED, BULL, and/or the design of a bull or bovine animal” and the word marks “GIVES YOU WIINGS, WINGS, and WIINGS” for various goods and services. Amended Notice of Opposition ¶¶ 9, 11, 9 TTABVUE 7, 8.

We sustain the opposition under Trademark Act Section 2(d), and, as explained below, do not reach Opposer’s other two claims.

### **I. Accelerated Case Resolution (ACR)**

During discovery, the parties filed a joint stipulation to elect accelerated case resolution (ACR), which was accepted by the Board. *See* 13 and 15 TTABVUE. Although the parties stated that they were unable to reach an agreement as to stipulated facts, 18 TTABVUE, the parties did adopt numerous procedural stipulations, including the following:

- To effect all service by email;<sup>3</sup>
- To limit discovery to four each of interrogatories, requests for admission, and requests for production of documents;

---

<sup>3</sup> Shortly after the parties filed their ACR Stipulation, the Trademark Rules of Practice were amended to require service by email. *See* Trademark Rule 2.119(b), 37 C.F.R. § 2.119(b).

- To proceed under the cross-motions for summary judgment ACR trial model by simultaneously submitting evidence and trial briefs, in lieu of pretrial disclosures, discovery, traditional testimony, and subsequent briefs;
- To submit materials admissible by notice of reliance as attachments to the ACR briefs;
- To submit evidence and testimony by declaration, with the right to serve ten written cross-examination questions per declaration;<sup>4</sup>
- To deem admissible all otherwise admissible evidence presented with the ACR briefs, reserving the right to object on any substantive grounds; and
- To forgo oral hearing.

While we commend the parties for stipulating to proceed via ACR, some of the specific procedures selected appear to have yielded unintended adverse consequences. Ultimately, they did little to serve the goal of enhancing efficiency, instead creating uncertainty as to the trial record and requiring repeated intervention in the parties' disputes by the assigned Board interlocutory attorney. Now that the Trademark Rules of Practice have been amended to provide for oral cross-examination of all declarants within the jurisdiction of the United States (see n.4), we particularly discourage the parties from adopting in future Board proceedings the requirement that any cross-examination of such declarants be taken on written questions (ACR stipulation ¶ 12, 13 TTABVUE 5).

## **II. Evidentiary Objections**

The parties lodge numerous objections. *See* Appendix to Applicant's Main ACR Brief, 35 TTABVUE 51-60; Appendix to Opposer's Rebuttal Brief, 42 TTABVUE 97-

---

<sup>4</sup> Trademark Rule 2.123(a)(1), 37 C.F.R. § 2.123(a)(1), also was subsequently amended to allow witness testimony in the form of an affidavit or declaration, subject to the right of any adverse party to elect to take and bear the expense of cross-examination.

108. Many of the objections are to relevance; the weight or probative value due certain testimony and evidence; and hearsay, to the extent the parties attempt to rely on the truth of statements made in printed materials.

TTAB proceedings are heard by Administrative Trademark Judges, not lay jurors who might be easily misled, confused, or prejudiced by flawed evidence. *Cf. Harris v. Rivera*, 454 U.S. 339, 346 (1981) (“In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.”). We employ the standards the Board has noted before and accord the evidence whatever probative value it deserves. “Ultimately, the Board is capable of weighing the relevance and strength or weakness of the objected-to testimony and evidence in this case, including any inherent limitations, which precludes the need to strike the challenged testimony and evidence if the objection is well-taken.” *Poly-America, L.P. v. Ill. Tool Works Inc.*, 124 USPQ2d 1508, 1510 (TTAB 2017). Mindful of any objections, we have given the evidence its due weight. *Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1479 (TTAB 2017). As necessary and appropriate, we address any limitations to the evidence material to our decision. *Id.*

### **III. Record**

The record consists of the pleadings and, without any action by the parties, the file of the involved application. Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1). Subject to the parties’ evidentiary objections, the record also comprises the evidence summarized below.

#### **A. Opposer’s Evidence**

Opposer made the following evidence of record:

- Copies of its seven pleaded registrations, which were submitted via current printouts from the USPTO's Trademark Status & Document Retrieval (TSDR) electronic database attached as exhibits to the Amended Notice of Opposition, pursuant to Trademark Rule 2.122(d)(1), 37 C.F.R. § 2.122(d)(1), 9 TTABVUE 16-61;<sup>5</sup>
- The Declaration of Chad Pepper ("Peffer Dec."), Executive Vice President of Sales and Distribution for Red Bull North America, 19 TTABVUE 194-207, with exhibits, 20 TTABVUE;
- ACR Exhibits A-G, consisting of Internet screen captures and printouts; a 2016 non-precedential decision by the Board in an opposition proceeding brought by Opposer against a third party; and printouts from TTABVUE and the USPTO's TSDR and Trademark Electronic Search System (TESS) databases, 19 TTABVUE 35-193; and
- Exhibit B to Opposer's Rebuttal Brief, a definition of "soft drink" from merriam-webster.com, 42 TTABVUE 85.<sup>6</sup>

Opposer submitted confidential versions of its briefs and some of its evidence at 21 and 41 TTABVUE. We have discussed only in general terms relevant evidence submitted under seal.

There is a discrepancy between the registrations Opposer pleaded and those it relied on at trial. The seven registrations in the chart above are the ones pleaded in and attached to Opposer's Amended Notice of Opposition, its operative pleading. In its briefing, however, instead of Registration No. 2494093, RED BULL (typeset) for, in relevant part, "soft drinks; and sports drinks," Opposer referred to Registration



No. 3479607,  for "non-alcoholic beverages, namely, sports drinks, energy drinks and soft drinks." *See, e.g.*, Opposer's Brief at 10, 19 TTABVUE 11. In this case

---

<sup>5</sup> It was unnecessary for Opposer to resubmit printouts of its registrations as ACR exhibits.

<sup>6</sup> We have given no consideration to the redlined copy of Applicant's Brief submitted as Exhibit A to Opposer's Rebuttal Brief, which would not be admissible by notice of reliance.

under Section 2(d), Opposer may not rely at trial on unpleaded registrations. *See, e.g., Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1424 n.14 (TTAB 2014); TBMP § 309.03(c)(1) (2018). And, because it was not briefed, we find Opposer waived reliance on pleaded Registration No. 2494093 and give it no further consideration.

We deny Applicant's motion to strike in its entirety the testimony of Opposer's witness, the Peffer Declaration, including Mr. Peffer's cross-examination testimony. The cross-examination testimony was one of the subjects of Applicant's "motion to compel"<sup>7</sup> and the only portion of that motion deferred until final decision; Applicant maintained its objections and moved to strike the testimony at final briefing. Board Order of April 4, 2018, 26 TTABVUE 9; Appendix to Applicant's Brief, 35 TTABVUE 53-58. We consider the motion to compel moot in view of the motion to strike. In the motion to strike, Applicant objects generally on the ground that the witness "elected to provide deficient, ambiguous and vague responses to Applicant's Cross-examination Questions," and also objects to numerous specific portions of Mr. Peffer's direct testimony and exhibits to his declaration. 35 TTABVUE 53-60.

Ordinarily, the Board does not strike testimony taken in accordance with the applicable rules on the basis of substantive objections; rather, we consider such objections in our evaluation of the probative value of the testimony at final hearing.

*Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 107 USPQ2d 1750, 1755

---

<sup>7</sup> Even in an ACR proceeding in which the parties seek pretrial determination of the case on its merits, the proper device for attempting to exclude trial testimony would have been a motion to strike rather than a motion to compel or determine the sufficiency of responses.

(TTAB 2013), *aff'd mem.*, 565 F. App'x 900 (Fed. Cir. 2014). Therefore, as explained, we need not rule on Applicant's objections to the Peffer testimony. The Board has reviewed Mr. Peffer's cross-examination responses and taken their sufficiency into account in assessing the probative weight due his testimony. 24 TTABVUE 103-08.

#### **B. Applicant's Evidence**

Applicant made the following evidence of record:

- The Declaration of Flavio Morganti ("Morganti Dec."), Applicant's Chief Executive Officer, 35 TTABVUE 63-69, with exhibits, 36-37 TTABVUE; and
- ACR Exhibits A-H, consisting of TSDR and Internet screen captures and printouts, including definitions of "give wing to" from The Free Dictionary ([idioms.thefreedictionary.com](http://idioms.thefreedictionary.com)) and "cow" and "bull" from [merriam-webster.com](http://merriam-webster.com), 35 TTABVUE 70-376.

#### **IV. Opposer's Standing and Priority**

Standing is a threshold issue that must be proven by the plaintiff in every *inter partes* case. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *see also, e.g., Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1344 (TTAB 2017). Opposer's standing to oppose registration of Applicant's mark is established by its pleaded registrations, which the record shows to be valid and subsisting, and owned by Opposer. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1501 (TTAB 2015). Opposer's pleaded registrations are of record, so priority is not at issue with respect to the marks and goods identified in Opposer's pleaded registrations.

Because Opposer has established its standing and priority as to its pleaded marks, we turn to the question of likelihood of confusion.

## V. Likelihood of Confusion

Our determination under Trademark Act Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods or services, the first two *du Pont* factors. *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 proving its claim of likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848.

Opposer neither pled nor argued a family of marks or conjoint use theory. *See Bell’s Brewery*, 125 USPQ2d at 1349; *Wise F&I, LLC v. Allstate Ins. Co.*, 120 USPQ2d 1103, 1107 (TTAB 2016). We therefore focus our likelihood of confusion analysis on

**Red Bull**

Opposer’s individual pleaded mark  for “soft drinks; and sports drinks” (Registration No. 3197810). If we find that there is a likelihood of confusion between

this mark and Applicant’s mark  PINKCOW, there is no need for us to consider the likelihood of confusion with Opposer’s other pleaded marks. Conversely, if we find there is no likelihood of confusion with this mark, we would find no

likelihood of confusion with Opposer's other pleaded marks. *See In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010). We address in turn each of the *du Pont* factors bearing on our decision for which the parties submitted evidence or argument.

**A. Similarity of the Goods, Customers, and Channels of Trade**

We begin with the second and third *du Pont* factors, assessing the similarity or dissimilarity of the parties' goods and their trade channels. Our decision must be based on the identification of goods set forth in the application. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014). That is because the goods recited in the application determine the scope of the benefit of registration. *Id.* For that reason, Applicant's arguments concerning "the actual goods for which the respective parties' marks are actually used" are not persuasive. *E.g.*, Applicant's Reply Brief at 12, 44 TTABVUE 13.

"Energy drinks" are excluded from Applicant's identification, which once again is:

Beers; mineral and aerated waters; soft drinks; smoothies;  
vegetable juice; fruit drinks and fruit juices; concentrates  
for making fruit drinks; syrups for making non-alcoholic  
beverages; excluding energy drinks.

Otherwise, because they contain no limitations or restrictions, we presume that the identifications in the application and registration encompass all goods described, that they move in all channels of trade normal for such goods, and that they are available to all classes of purchasers. *See, e.g., Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1471 (TTAB 2016).

Both the application and Opposer's pleaded Registration No. 3197810 for the mark

**Red Bull**



identify goods that are identical in part: "soft drinks." With regard to Applicant's argument that energy drinks are not soft drinks, Opposer introduced evidence that its energy drinks are "soft drinks." "Soft drink" is defined by Merriam-Webster as "a usually carbonated nonalcoholic beverage; especially : soda pop." Exhibit B to Opposer's Rebuttal Brief, 42 TTABVUE 85. Opposer's trial witness testified that:

11. Red Bull's beverages are typically consumed as a functional beverage and energy drink, but are also consumed as a soft drink or refreshing beverage.

12. Red Bull's beverages are lightly carbonated and many of the beverage products are fruit flavored.

Peffer Dec. at 3, 19 TTABVUE 196. Thus, even though Applicant's identification excludes "energy drinks," the parties' identified goods include the identical "soft drinks."

Turning to the third *du Pont* factor, because Applicant's goods and the goods identified in Opposer's registration are identical in part, we must presume that those goods – i.e., "soft drinks" – move in the same channels of trade and are available to the same classes of customers. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); *Harry Winston*, 111 USPQ2d at 1437.

Because the parties' goods are identical in part, the second and third *du Pont* factors weigh heavily in support of a finding that confusion is likely.

**B. Conditions of Purchase**

The fourth *du Pont* factor assesses the “conditions under which and buyers to whom sales are made i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *du Pont*, 177 USPQ at 567. The parties did not submit direct evidence as to the retail price of their products (or, in Applicant’s case, the anticipated retail price). The record does support a finding, however, that Opposer’s goods are relatively inexpensive, costing consumers a couple of dollars per serving, as would be expected for soft drinks. *See, e.g.*, January 30, 2017 press release announcing introduction of three new beverages “with an MSRP of 2 for \$5.33,” Peffer Dec. at 3 ¶ 10 & Exhibit Peffer-C, 19 TTABVUE 196 & 20 TTABVUE 28; undated images of store coolers displaying Opposer’s goods priced from \$2 to \$4.79, Peffer Dec. at 12 ¶ 30 & Exhibit Peffer-J, 19 TTABVUE 205 & 20 TTABVUE 126-28.

“When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.” *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000). We find that the fourth *du Pont* factor weighs in favor of a likelihood of confusion.

**C. Strength of Opposer’s Mark**

The fifth *du Pont* factor is the fame of the prior mark, and the sixth factor is the number and nature of similar marks in use for similar goods or services. In determining strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition. *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014); *see also*

*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 (distinctiveness) and its marketplace strength (secondary meaning).”).

**1. Conceptual and Commercial Strength**

**Red Bull**



Opposer’s mark  is inherently distinctive. Opposer also asserts that its marks are famous. A famous mark has extensive public recognition and renown. *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot*, 54 USPQ2d at 1897; *Kenner Parker Toys Inc. v. Rose Art Indus. Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). “A ‘strong mark . . . casts a long shadow which competitors must avoid.” *Bridgestone Ams. Tire Operations LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1063 (Fed. Cir. 2012) (quoting *Kenner Parker Toys*, 22 USPQ2d at 1456).

Fame may be measured indirectly by the volume of sales of and advertising expenditures for the goods identified by the mark at issue, “the length of time those indicia of commercial awareness have been evident,” widespread critical assessments and through notice by independent sources of the products identified by the marks, as well as the general reputation of the products. *Bose*, 63 USPQ2d at 1305-06, 1309. Raw numbers alone may be misleading, however. Thus, some context in which to place raw statistics may be necessary, for example, market share or sales or advertising figures for comparable types of goods. *Bose*, 63 USPQ2d at 1309. Because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of

confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it. *Coach Servs.*, 101 USPQ2d at 1720 (citing *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007)).

Opposer provided significant indirect evidence of fame, albeit under seal. Opposer asserts that the annual U.S. sales volume of its various beverage, energy drink, soft drink, and sports drink products “prominently featuring the RED BULL, Bull Logo and WINGS Marks” has grown to a very high number since 1997, when Opposer began selling them in the United States, “as a result of extensive marketing and promotional campaigns.” Opposer’s Brief at 11, 19 and 21 (confidential) TTABVUE 12; *see also* Peffer Dec. at 2-4 ¶¶ 7-9, 13, 19 TTABVUE 195-97.<sup>8</sup> Opposer also spends a high dollar amount on marketing and media promotion in the United States, which it maintains has made it the leading U.S. energy drink, capturing more than 40% market share. *See* Peffer Dec. at 8-13 ¶¶ 25-27, 33-34, 21 (confidential) TTABVUE 42-47.

Based on these spectacular figures, the RED BULL brand is, and has been, the market leader for energy drinks in the United States and worldwide since introducing the category to the United States twenty (20) years ago. As the market leader, Red Bull regularly enjoys over 40% of the market share, and is consistently ranked in the top 100 most valuable brands worldwide.

---

<sup>8</sup> Opposer’s witness testified that it has continuously used the composite mark we are considering “throughout the United States on and in connection with its beverages, energy drinks, sports drinks, and soft drinks and various products and services related or complementary thereto since the introduction of Red Bull beverages in the United States in 1997.” Peffer Dec. at 4 ¶ 13, 19 TTABVUE 197.

Opposer's Brief at 11, 19 and 21 (confidential) TTABVUE 12 (internal citations omitted).

There are some shortcomings in Opposer's fame evidence. First, although Opposer provided annual U.S. sales and marketing data, the evidence of awareness of its brand is global rather than limited to the United States. This includes its worldwide brand rankings; 47 million "likes"/fans on Facebook; 6.6 million followers on Instagram; 2.15 million Twitter followers; and 5.7 million subscribers to its YouTube channel, where Opposer has been the consumer brand with the most subscribers. Peffer Dec. at 13 ¶¶ 35-37, 19 TTABVUE 206. Second, Opposer's 40% market share figure is not for the soft drink market overall but for energy drinks, a beverage market Opposer claims to have created and popularized in the United States. *Id.* at ¶¶ 32-34, 19 TTABVUE 205-06, 21 (confidential) TTABVUE 46-47.

Nonetheless, the evidence easily supports a finding that Opposer's mark is famous on the spectrum employed in our likelihood of confusion analysis. *See Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (stating that likelihood of confusion fame varies along a spectrum from very strong to very weak). Applicant acknowledges that Opposer's mark in Registration No. 3197810 "might enjoy a certain degree of recognition in connection with energy drinks." Applicant's Reply Brief at 11, 44 TTABVUE 12. The fifth *du Pont* factor weighs heavily in Opposer's favor.

## **2. Third-Party Registration of Similar Marks**

Third-party registrations may be relevant to show the sense in which a mark is used in ordinary parlance; that is, an element common to both parties' marks may

have a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is inherently relatively weak. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *see also In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) (“[T]hird-party registrations are relevant evidence of the inherent or conceptual strength of a mark or term because they are probative of how terms are used in connection with the goods or services identified in the registrations.”).



Here, Applicant does not contend that the mark we are analyzing –  – has a descriptive or suggestive meaning in association with the parties’ goods. Rather, Applicant argues that Opposer’s marks have been weakened and diluted by third-party registration and use of similar marks for beverages. Applicant submitted evidence in ACR Exhibits E through G comprising printouts of registration records and specimens from the USPTO’s TSDR database. This evidence shows that third parties have registered marks incorporating BULL or arguably similar terms and images in association with beverages. It does not, however, support any conclusions about use of those marks subsequent to submission of the specimens; the manner, nature, or extent of any use; or consumer exposure to the marks. *See, e.g., Allied Mills, Inc. v. Kal Kan Foods, Inc.*, 203 USPQ 390, 397 n.11 (TTAB 1979). The great majority of the records submitted, moreover, are for beer or other alcoholic beverages, not the nonalcoholic soft drinks at issue here.

The more probative third-party evidence is summarized in the following table:<sup>9</sup>

Mark	Registration No.	35 TTABVUE Cite	Selected Class 32 Goods
	4529991	171-74, 251	Soft drinks, namely, ginger ale and flavored ginger ales, excluding sports drinks, energy drinks, etc.
COCK 'N BULL 	4891166 4891168	181-86, 253	Ginger beer <sup>10</sup>
BULLDOGADE	4777362	219-25, 259	Non-caffeinated hydrating sports drinks all the foregoing not for use in connection with any collegiate institution
PIT BULL ENERGY DRINK 	4282844 4170941	230-35, 261	Energy drinks

<sup>9</sup> Cancelled registrations and abandoned and pending applications, including those opposed by Opposer, are omitted. Cancelled registrations are evidence only that the registrations issued, while pending applications are evidence only that they were filed; they are not evidence of use of the marks. *See, e.g., Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1606 (TTAB 2018); *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1042 n.21 (TTAB 2018). Opposer's objections to this evidence, on the grounds that the exhibits are irrelevant and misleading, are overruled.

<sup>10</sup> We take judicial notice that "ginger beer" is defined on Dictionary.com, based on the Random House Unabridged Dictionary (2018), as "a soft drink similar to ginger ale but containing more ginger flavor." The Board may take judicial notice of dictionary definitions. *E.g., RxD Media, LLC v. IP Application Dev. LLC*, 125 USPQ2d 1801, 1813 n.66 (TTAB 2018).

Mark	Registration No.	35 TTABVue Cite	Selected Class 32 Goods
	3558945	269, 310-14	Non-medicated energy drinks, soft drinks, soda water and sports drinks
	3211987	270, 315-19	Non-alcoholic beverages, namely, energy drinks
SUPER BULL	2106135	286-89	Ginseng flavored soft drink

We give probative weight to this evidence as indicating that images and formatives of the word BULL are registered by a few third parties in the soft drink field, sometimes in association with canines rather than bovines. We do not, however, find the evidence sufficient to establish that BULL formatives are so widespread that consumers have come to distinguish marks containing them based on minute differences. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (stating that evidence of third-party use “falls short of the ubiquitous or considerable use of the mark components present in [applicant’s] cited cases”) (quotations omitted); *cf. Jack Wolfskin*, 116 USPQ2d at 1136 (discussing “voluminous evidence” of registration and use of paw print design elements); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015) (referencing evidence of “a fair number” of third-party marks).

Nor are we persuaded by the non-precedential decision on which Applicant relies, *Red Bull GmbH v. Cochran*, Opposition No. 91152588 (TTAB Sep. 29, 2004). There,

the Board dismissed Opposer's opposition to registration of RED RAVE for "sports drinks" due to the differences between that mark and RED BULL. That opinion is not persuasive on the issue of third-party use of similar terms because the term RED is not shared here and RED RAVE includes no bovine reference.

Considering the record as a whole, we find no evidence that Opposer's mark has a descriptive meaning in association with soft drinks. We also find evidence of third-party registration of marks incorporating similar terms or images insufficient to limit the scope of protection due Opposer's famous mark. The sixth *du Pont* factor is neutral.

#### **D. Similarity of the Marks**

We next consider the first *du Pont* factor, the similarity of the parties' marks. Where, as here, the marks are used in association with goods that are identical in part, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

In a likelihood of confusion analysis, we compare the marks in their entireties for similarities and dissimilarities in appearance, sound, connotation and overall commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). "The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs.*, 101 USPQ2d at 1721 (quotation omitted).

**Red Bull**



and  PINKCOW

There is some similarity between  and  PINKCOW in sound and appearance, and strong similarity in connotation and overall commercial impression. For marks of the type before us, consisting of both wording and design elements, the verbal portion normally is accorded greater weight because it is likely to make a greater impression on purchasers, to be remembered by them, and to be used by them to request the goods. *Viterra*, 101 USPQ2d at 1908; *see also, e.g., In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018). We find this principal applicable to both parties' marks and find their wording dominant. The verbal portion of each mark totals seven letters and comprises two short, one-syllable words denoting a color followed by a term for a bovine. These aspects contribute some similarities in sound and appearance.

As to connotation, pink is a lighter shade of red. "Bull" is defined as "a male bovine; especially : an adult uncastrated male domestic bovine," while definitions of "cow" include both "the mature female of cattle" and "a domestic bovine animal regardless of sex or age." Applicant's ACR Exhibit D, 35 TTABVUE 91, 99.<sup>11</sup> Thus, "bull" and "cow" can mean male and female bovines, respectively. But in common vernacular, a "bull" also can be a "cow," that is, "a domestic bovine animal regardless of sex or age." Per the record, therefore, consumers can interpret BULL and COW either as designating bovines of the opposite sex or as synonyms.

---

<sup>11</sup> Opposer's objection to this evidence on the grounds of relevance is overruled.

**Red Bull**

Opposer's mark  adds two realistic charging bull images to the

wording discussed above. Applicant's mark  PINKCOW incorporates a single whimsical flying pink cow with wings and a long tail. Although there are differences between these marks, the fact that both incorporate bovine imagery enhances their similarity. Indeed, consumers are likely to construe Applicant's mark as a feminized version of Opposer's marks. *See, e.g., Morganti Dec.* ¶¶ 7, 10, 13, 35 TTABVUE 64-66 (stating that "the elements chosen to form part of the mark are meant as a tribute to the feminine elegance").

We bear in mind that less similarity is required because the parties' goods are identical in part, and also that Applicant has the opportunity and obligation to avoid confusion with Opposer's famous mark. *See, e.g., Bridgestone*, 102 USPQ2d at 1063. Considered in their entirety, and particularly in view of the strong similarities in the overall commercial impressions made by the marks, we find that persons encountering the marks would be likely to assume a connection between the parties. Similarity in any one of the elements of sound, appearance, meaning, or commercial impression is sufficient to support a determination of likelihood of confusion. *See, e.g., Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016); *Eveready Battery Co. v. Green Planet Inc.*, 91 USPQ2d 1511, 1519 (TTAB 2009). The first *du Pont* factor supports a finding that confusion is likely.

**E. Applicant's Remaining Arguments**

Finally, we briefly address why two arguments Applicant emphasizes do not bear on the outcome. First, Applicant argues under the eighth *du Pont* factor that the parties' marks have coexisted in Europe for five years without actual confusion. *See* Applicant's Brief at 31-32, 35 TTABVUE 32-33; Applicant's Reply Brief at 17, 44 TTABVUE 18. Yet the subject application was filed on an intent-to-use basis, and Applicant has not used its mark in the United States. *Morganti Dec.* ¶ 14, 35 TTABVUE 66. Foreign use is not relevant to our decision here. *See, e.g., Double J of Broward Inc. v. Skalony Sportswear GmbH*, 21 USPQ2d 1609, 1612-13 (TTAB 1991).

Second, Applicant points out that Opposer's marks were not cited against its application during *ex parte* examination, contending that "confirms Applicant's position that there is no likelihood of confusion between Applicant's PINKCOW Mark and any of Opposer's Marks." Applicant's Brief at 32, 35 TTABVUE 33; Applicant's Reply Brief at 17, 44 TTABVUE 18. But it is well-established that the Board is not bound by actions and determinations at the examination level. *See, e.g., McDonald's Corp. v. McClain*, 37 USPQ2d 1274, 1277 (TTAB 1995); *Hilson Research Inc. v. Soc'y for Human Res. Mgmt.*, 27 USPQ2d 1423, 1439 (TTAB 1993).

**F. Conclusion as to Likelihood of Confusion**

We have carefully considered all arguments and evidence properly of record, including any not specifically discussed herein, as they pertain to the relevant likelihood of confusion factors. To the extent that any other *du Pont* factors for which no evidence was presented by Applicant or Opposer nonetheless may be applicable, we treat them as neutral.

We have found that the parties' identified goods, customers, and channels of trade are identical in part; that soft drinks are inexpensive and subject to impulse purchase; that the parties' marks are similar; and that Opposer's mark is famous for purposes of our likelihood of confusion analysis. Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1720 (Fed. Cir. 2012). To the extent that we have any doubt, we resolve that doubt (as we must) against Applicant as the newcomer. *Century 21*, 23 USPQ2d at 1701.

Considering the record evidence as a whole, we find that Opposer has carried its burden to establish by a preponderance of the evidence that Applicant's mark

 is likely to cause consumer confusion with Opposer's mark

**Red Bull**  
 when used in association with the goods identified in the application.

## VI. Opposer's Other Claims

Because we sustain the opposition under Trademark Act Section 2(d), we need not reach Opposer's claims of dilution and false suggestion of a connection. *See Multisorb Tech., Inc. v. Pactiv Corp.*, 109 USPQ2d 1170, 1171 (TTAB 2013).

**Decision:** The opposition to registration of application Serial No. 86538724 is sustained.