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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Unique Beverage Company, LLC

Serial No. 76592774

Joseph I. Hochman of Hochman Legal Group, PLLC for Unique Beverage Company, LLC.

Bonnie Luken, Trademark Examining Attorney, Law Office 107 (J. Leslie Bishop, Managing Attorney).

Before Seeherman, Quinn and Bergsman, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Unique Beverage Company, LLC has appealed from the final refusal of the Trademark Examining Attorney to register GREEN DRAGON ENERGY DRINK, in standard character format, and with ENERGY DRINK disclaimed, for "non-alcoholic drinks and beverages, namely, carbonated soft

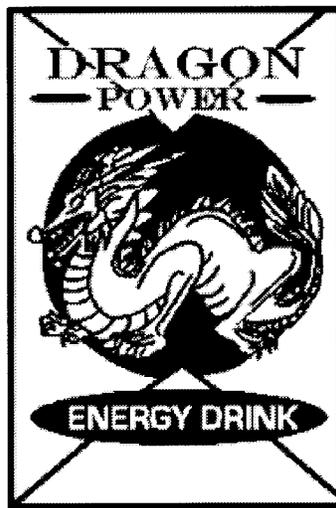
drinks, energy drinks, caffeinated drinking water."¹

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in view of the following two registrations, owned by separate entities. It is the Examining Attorney's position that applicant's mark so resembles the marks shown below, for the indicated goods, that if used on applicant's identified goods it is likely to cause confusion or mistake or to deceive.

¹ Application Serial No.76592774, filed May 5, 2004, based on Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b) (intent-to-use). After the appeal was filed applicant filed two amendments to allege use. Applicant has explained that the first such amendment, filed on November 2, 2006, was meant to assert first use and first use of the mark in commence on May 11, 2004 for "energy drinks," but due to a typographical error, the document actually stated that applicant was not using its mark on such goods. On January 25, 2007, applicant filed a second amendment to allege use stating that it was using its mark on all of its identified goods EXCEPT caffeinated drinking water. The Board noted these filings but, because it has discretion as to whether it will remand an application to the Examining Attorney to consider an amendment to allege use that is filed more than six months after the mailing of a final Office action, and because it was clear from applicant's communications that it did not want the appeal to be suspended in order for the amendment to allege use to be considered, the Board proceeded with the appeal. See Board order mailed February 7, 2007. Accordingly, at this point the amendment(s) to allege use has not been examined.



for coffee. The words AUTHENTIC COFFEES are disclaimed.²



with the words ENERGY DRINK disclaimed, for non-alcoholic beverages, namely, energy drinks; drink mixes, namely, syrups, essences and other preparations for making energy drinks.³

The appeal has been fully briefed. In a footnote in its reply brief applicant contends that the Examining

² Registration No. 2300137, issued December 4, 1999; Section 8 affidavit accepted; Section 15 affidavit received.

³ Registration No. 2846460, issued May 25, 2004.

Attorney's brief should be stricken because it does not contain an alphabetical index of cited cases, as required by Trademark Rule 2.142(b)(2). Applicant is correct that the brief does not comply with the technical requirements of the rule, but because the table of cases is for the benefit of the Board, and because the brief itself is of greater benefit to the Board, we have considered the brief.

The Examining Attorney has objected to certain portions of Exhibit F, submitted by applicant with its brief. Exhibit F consists of a chart listing various DRAGON marks with their registration number, class and goods, as well as copies of some of the actual registrations (so-called "soft copies") listed in the chart. An earlier version of this chart had been submitted during the course of examination, and there is no dispute that the earlier version is of record. However, the Examining Attorney has objected to the additional evidence, consisting of the listing of additional registrations, as well as the soft copies, stating that it is untimely.

We agree that those registrations and/or applications that were added to the original chart are untimely, and they have not been considered. See Trademark Rule 2.142(d) (the record in the application should be complete prior to the filing of an appeal). As for the soft copies of the

registrations listed in the original chart that were submitted with applicant's brief, in the circumstances present here we do not consider them to be new evidence. Accordingly, we have considered these registrations. However, soft copies of registrations appearing for the first time on the chart submitted with the appeal brief have not been considered.

The Examining Attorney has also pointed out that to make registrations properly of record, a mere listing is not sufficient, and copies of the registrations must be submitted. Countering this, applicant states that in the two Office actions which issued after applicant submitted the chart the Examining Attorney never objected to the chart or otherwise advised applicant that the registrations were not properly of record and that, on the contrary, the Examining Attorney discussed the registrations listed in the chart as well as in other exhibits.

It does not appear to us that the Examining Attorney actually discussed any of the third-party marks. However, we agree with applicant that by not advising applicant of the deficiencies in submitting merely a chart that listed registrations by their mark and a summary of the goods or services, the Examining Attorney has waived any objection she might have to the list of registrations. Similarly, we

note that during prosecution applicant submitted listings taken from the TESS portion of the USPTO database reflecting searches for marks with the words "power" "energy" or "dragon." These searches show what appear to be the 50 most recently filed applications (and if issued, the registration numbers) for marks containing the particular word, as well as whether the application/ registration is "live" or "dead." Because the Examining Attorney did not timely advise applicant about the insufficiency of these listings, we have considered them as well, but they have very limited probative value because they do not show the goods or services identified in the particular application or registration. Moreover, we note that most of the listings are for applications, and a third-party application is evidence only of the fact that the application was filed.

In summary, we have considered that portion of Exhibit F that reflects registrations or applications that were previously listed on the chart applicant submitted during the prosecution of its application, but not registrations that applicant added at the time it filed its appeal brief. We have also considered the soft copies of the registrations that were listed on the original chart and that were submitted as part of Exhibit F. In addition, we

have considered the list of marks taken from the TESS database for whatever limited probative value they may have.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

We turn initially to the refusal on the ground that applicant's mark is likely to cause confusion with Registration No. 2300137 for GREEN DRAGON AUTHENTIC COFFEES and design for coffee. We first examine the strength of the cited registration, since the protection to be accorded this registration has a major effect on our determination of likelihood of confusion.

Applicant has asserted that there is widespread third-party use of DRAGON marks, and therefore that the registered mark is weak. In support of this claim, applicant has submitted both a chart listing marks which contain the word "dragon," and copies of some of the registrations in the chart.

First, we point out that third-party registrations are not evidence that the marks shown therein are in use, or that the public is familiar with them. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992); and *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) ("The existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them...").

However, third-party registrations may be considered in the same manner as a dictionary to show a term's significance in a particular trade. *Tektronix, Inc. v. Daktronics, Inc.*, 187 USPQ 588 (TTAB 1975). In this respect, we have considered the third-party registrations for food, beverages and restaurant services to see if the term has some significance in the food industry in general.⁴ Relevant registrations include the following:

BLUE DRAGON and design for a wide variety of food products, including coffee (Reg. No. 2871898)

SOBE DRAGON and design for fruit drinks, fruit juice drinks, soft

⁴ In this respect, many of the third-party registrations are for goods that are so different from the goods at issue herein, e.g., insecticide (Reg. No. 1081510) and propane blow torches for roofing (Reg. No. 2796072), that they are not indicative that the term has a significance in the food and beverage industry.

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drinks, and syrups and concentrates for making the same (Reg. No. 2926367)

RUBY DRAGON for chicken (Reg. No. 2954284)

WHITE DRAGON for fresh peaches and nectarines (Reg. No. 2573022)

GREEN DRAGON for fresh apples (Reg. No. 1986082). This registration was cancelled for failure to file a Section 8 affidavit.

VALONGKA, which is translated as "power dragon plus" for food supplement.

In particular, there are two registrations for coffee that are owned by separate entities: BLUE DRAGON and design and the cited mark GREEN DRAGON AUTHENTIC COFFEES and design. The fact that such similar marks coexist persuade us that DRAGON is a weak term when used in connection with coffee, and therefore that the scope of protection to be accorded the cited registration is limited. In other words, if GREEN DRAGON AUTHENTIC COFFEES and design can coexist with such a similar mark as BLUE DRAGON and design for identical goods, the protection to which the mark is entitled does not necessarily extend to all other beverage items.

Here, because there are differences in the goods, i.e., coffee vs. carbonated soft drinks, energy drinks and caffeinated water, we find in the particular circumstances

of this case that these differences are sufficient, in view of the limited scope of protection to which the cited registration is entitled, to avoid confusion. In saying this, we do not mean to suggest that these goods can never be considered related. The Examining Attorney has submitted six third-party registrations that list both coffee and carbonated soft drinks, thereby suggesting that the listed goods and/or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). We also note that coffee, on the one hand, and energy drinks and caffeinated water on the other, are all caffeinated products that are often purchased and drunk specifically because they contain caffeine.

Nor are we saying that the marks are not similar. On the contrary, there are strong similarities in the marks. The dominant part of both marks, and the part which is entitled to greater weight in a comparison of the marks, is the term GREEN DRAGON. In *re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the

ultimate conclusion rests on a consideration of the marks in their entireties). The generic words ENERGY DRINK in applicant's mark and the words AUTHENTIC COFFEES in the cited mark, a combination of a descriptive word and a generic term, do not have source-identifying significance. As for the dragon design in the cited mark, it merely reinforces the meaning of the words GREEN DRAGON; moreover, GREEN DRAGON, because it can be articulated, is the term consumers will use to refer to and call for the goods, and is therefore the part of the mark most likely to be noted and remembered. In re Appetito Provisions Co., 3 USPQ2d 1553, 1554 (TTAB 1987)

Therefore, although the marks are similar, and there is evidence that the goods are related, we must weigh these factors with the evidence that the cited mark is weak, and the registration is therefore entitled to a limited scope of projection. In such circumstances, there must be a greater degree of similarity in the goods to support a finding of likelihood of confusion than has been shown here. In short, on this record we cannot conclude that the goods are sufficiently similar to support a finding of likelihood of confusion.

Accordingly, we reverse the refusal of registration with respect to Registration No. 2300137 for GREEN DRAGON AUTHENTIC COFFEES and design.

It is a different story, though, when we consider the refusal based on Registration No. 2846460 for DRAGON POWER ENERGY DRINK and design. There are of record no third-party registrations for energy drinks.⁵ Thus, at least with respect to energy drinks, the term DRAGON is not a frequently adopted term, and the registered mark DRAGON POWER ENERGY DRINK must be accorded a broader degree of protection with respect to other's uses of DRAGON marks for the identical goods.

And, here, applicant's and the registrant's goods are identical: both applicant's identification and the identification in the cited registration include "energy drinks." As a result, the goods must be considered legally identical, and they must be deemed to be sold in the same channels of trade to the same classes of consumers. These du Pont factors strongly favor a finding of likelihood of confusion.

⁵ As discussed supra, the listing of an application for BLACK DRAKO ENERGY DRINK that appears for the first time in Exhibit F to applicant's appeal brief is not of record.

Turning to a consideration of the marks, applicant's mark is GREEN DRAGON ENERGY DRINK; the cited registration is DRAGON POWER ENERGY DRINK and the design of a dragon. Applicant has pointed out that the words ENERGY DRINK in the mark are "weak." We would characterize them as being more than "weak"; ENERGY DRINK in both marks is the generic term for the goods, and therefore they have no source-indicating significance. We do not base a finding of similarity of the marks on the fact that this term is included in both marks.

Rather, we find that the marks are confusingly similar for other reasons. As noted above, it is permissible to give more or less weight to a particular feature of a mark, as long as the ultimate conclusion rests on a consideration of the marks in their entireties. Both marks contain the word DRAGON, and we accord this term greater weight in our analysis because, as we have pointed out, on the record before us DRAGON is not commonly registered for energy drinks; the only registration containing this term for such goods is the registrant's. Further, although the registered mark includes the design of a dragon and the word POWER, these differences are not sufficient to distinguish the marks. The word POWER, as used in connection with an energy drink, is highly suggestive,

indicating that the drink enhances the consumer's prowess or abilities. The dragon design is not a distinguishing element; on the contrary, it merely reinforces the significance of the word DRAGON.

We recognize that applicant's mark includes the word GREEN, and registrant's mark does not. However, if the registrant were to depict its dragon design in the color green, the similarity with the word mark GREEN DRAGON would obviously be very strong. Applicant has pointed out that the registrant currently uses the colors yellow and white for the design, but the registration does not contain a color claim, and therefore the registrant is free to use any color for its dragon design that it wishes, including the color green.⁶

However, even if we assume that registrant's dragon design is not and will not be shown in green, the marks are still extremely similar because of the presence of the word DRAGON in each one, a presence that is emphasized by the dragon design in the cited mark. Although there are

⁶ Applicant points out differences between the dragon design that it uses, and the dragon design in the registered mark, e.g., applicant uses the design of a bust of a green dragon with red eyes, and it has no ears, wings, body or tail, while the registrant's dragon is white-eyed, feather-tailed, full-bodied and has ears. Obviously applicant has applied only for a word mark, and therefore any dragon design that it may use now or in the future is not before us.

clearly differences in the marks when they are compared side-by-side, that is not the test for determining whether marks are confusingly similar. Rather, the question is whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than a specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

It is well established that when marks would appear on virtually identical goods or services, as they do here, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Considering the marks in this light, and also taking into consideration the fallibility of memory, we find that when the marks are compared in their

entireties the similarities between the marks in appearance, pronunciation and connotation outweigh the dissimilarities and that, overall, the marks convey similar commercial impressions.

Moreover, the conditions of purchase favor a finding of likelihood of confusion. Applicant's and the registrant's identified goods are general consumer items, and are relatively inexpensive. Therefore, they will be bought by ordinary purchasers who will not be particularly sophisticated about the goods, nor will they exercise a great deal of care in making their purchasing decisions. If applicant's and the registrant's cans of energy drinks appear in close proximity on a shelf, a consumer who is quickly grabbing a "dragon" energy drink is not likely to notice the particular differences in the marks. Even if he does note the differences, he is not likely to realize that the differences indicate separate sources for the goods; rather, he is likely to assume that the marks are variations of each other, but still indicate origin in a single source.

Applicant has pointed out that there is no evidence that the cited mark is famous, a statement that the Examining Attorney does not dispute. Thus, the du Pont factor as to the fame of the mark is neutral. However, we

disagree with applicant's contention that the registered mark is not distinctive. As we have already said, there is no evidence of third-party use or registration of DRAGON marks for energy drinks, and thus, as far as we can ascertain from this record, the cited mark is distinctive.

Applicant also asserts that there is no evidence of any actual confusion, "even though the marks may have been used by the parties on the same type of products." Brief, p. 14. However, applicant states that it "currently sells its Green Dragon Energy Drink and uses the GREEN DRAGON mark in only grocery stores and chain stores in a small portion of the Western United States," and that applicant "is aware of no evidence to suggest that any single company sells the good or service of both [applicant and registrant.]" Brief, p. 13. Based on applicant's own statements, it is not clear whether there has been an opportunity for confusion to occur. This du Pont factor is neutral.

Finally, applicant points to the fact that the cited registration coexists with Registration No. 3043952 for what applicant refers to as "POWER DRAGON PLUS." In point of fact, the mark in question is VALONGKA, and the registration states that VALONGKA means "power dragon plus" in English. Because the goods identified in that

registration are a "food supplement," we need not get involved in a discussion of whether the doctrine of foreign equivalents would apply to this mark. We have already said that our findings about the strength of the cited mark reflect that there are no other DRAGON marks registered for energy drinks. The fact that there are third-party registrations for DRAGON marks for other foods or beverages, including food supplements, does not affect this finding. Nor does the fact that SOBE DRAGON and design is registered for fruit drinks, fruit juice drinks and soft drinks, given that this registration is not for energy drinks, and there is a far greater difference in the commercial impression of that mark vis-à-vis the cited mark DRAGON PLUS ENERGY DRINK and design, compared to the difference between applicant's mark and the cited mark.

After considering the relevant du Pont factors, as discussed above, we find that applicant's mark GREEN DRAGON ENERGY DRINK for energy drinks is likely to cause confusion with Registration No. 2846460 for DRAGON POWER ENERGY DRINK and design for energy drinks. Because likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods in the application, see *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335,

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209 USPQ 986, 988 (CCPA 1981), we affirm the refusal of registration.

Decision: We affirm the refusal of registration on the basis of Registration No. 2846460; we reverse the refusal of registration on the basis of Registration No. 2300137.