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PRECEDENT OF THE TTAB

Mailed: February 14, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Pigs Eye Brewing Company, LLC

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Serial No. 78711050

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Garrett M. Weber of Lindquist & Vennum P.L.L.P. for Pigs Eye Brewing Company, LLC.

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Before Drost, Kuhlke and Walsh, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Pigs Eye Brewing Company, LLC seeks registration on the Principal Register of the mark PIT BULL (in standard character form) for goods ultimately identified as "malt liquor" in International Class 32.<sup>1</sup>

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<sup>1</sup> Application Serial No. 78711050, filed September 12, 2005, alleging first use of the mark anywhere and in commerce on January 19, 2006 under Section 1(a) of the Trademark Act, 15 U.S.C. §1051(a). The identification of goods in the application originally included "ale, beer, lager, brewed malt-based alcoholic beverage containing or treated with flavoring or coloring or non-standard blending or treating materials or processes, malt liquor, porter and stout." Applicant, in its brief, amended its identification of goods in response to a requirement made by the examining attorney. While the examining

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used with its identified goods, so resembles the registered mark PIT BULL ENERGY DRINK for "non-alcoholic beverages, namely, a ready to drink energy drink" in International Class 32, "ENERGY DRINK" disclaimed, as to be likely to cause confusion, mistake or deception.<sup>2</sup>

When the refusal was made final, applicant appealed and briefs have been filed. We affirm the refusal to register.

#### **Likelihood of Confusion**

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative

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attorney noted in his brief that "[a]pplicant has attempted to amend the identification of goods in its brief to 'malt liquor' without requesting that the application be remanded for consideration of the amendment by the examining attorney," he did not address his requirement for a more definite identification of goods made final during prosecution and only addressed the refusal under Section 2(d). See *In re Broyhill Furniture Industries Inc.*, 60 USPQ2d 1511, 1512 n.2 (TTAB 2001) (one ground for refusal was requirement for translation of mark; because applicant offered translation in appeal brief and examining attorney did not address the issue in his brief, Board treated requirement as moot). Accordingly, the requirement for an acceptable identification of goods is deemed satisfied, and the appeal on this issue is moot. The remaining refusal is considered based on the goods as amended.

<sup>2</sup> Registration No. 2883481, issued September 14, 2004.

**Serial No. 78711050**

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). 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 (CCPA 1976).

In comparing the marks, we must determine whether they are sufficiently similar that there is a likelihood of confusion as to source and, in doing so, we must consider the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). We find the marks to be similar when compared in their entireties in terms of appearance, sound, connotation and commercial impression.

The dominant element in registrant's mark is the phrase PIT BULL inasmuch as the words ENERGY DRINK are the generic term for the goods and are disclaimed. See *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1987) (JM ORIGINALS with ORIGINALS disclaimed confusingly similar to JM COLLECTABLES). While it is correct that we must view

**Serial No. 78711050**

the mark in its entirety, Kangol Ltd. v. KangaROOS U.S.A. Inc., 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992), it is also well settled that "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 consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable." In re National Data Corp., 753 F.2d 1056, 1058, 224 USPQ 749, 750-51. Applicant's mark PIT BULL is identical in sound, appearance, meaning and commercial impression to the dominant part of registrant's mark PIT BULL ENERGY DRINK. Thus, the factor of the similarity of the marks weighs in favor of likelihood of confusion.

We now consider the goods, the channels of trade and the class of purchasers. In making our determination, we must consider the cited registrant's and applicant's goods as they are described in the registration and application, and we cannot read limitations into those goods. See Hewlett-Packard Co. v. Packard Press Inc., 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). If the cited registration and application describe goods broadly, and there is no limitation as to the nature, type, channels of trade or

**Serial No. 78711050**

class of purchasers, it is presumed that the registration and application encompass all goods of the type described, that they move in all channels of trade normal for these goods, and that they are available to all classes of purchasers for the described goods. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992).

In support of his argument that the goods are related, the examining attorney submitted evidence in the form of third-party use-based registrations to show that other entities have adopted a single mark for applicant's "malt liquor" and registrant's "non-alcoholic energy drink." See, e.g., Reg. No. 2961071 (PIMPJUICE for, inter alia, non-alcoholic energy drinks and malt liquor) and Reg. No. 2953509 (LET IT LOOSE for, inter alia, non-alcoholic energy drinks and malt liquor) both owned by Fillmore Street Brewery. See also Reg. No. 2854612 (HAWAIIAN SPLASH for, inter alia, energy sports drinks and beer). In *re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

The record also includes articles retrieved from the Lexis database and printouts of web pages retrieved from the Internet that evidence an overlap in the channels of trade for energy drinks and alcoholic drinks, and the creation of new drinks that combine alcohol with either sodas or energy drinks. For example, Anheuser-Busch, known

**Serial No. 78711050**

for various alcoholic drinks, also distributes energy drinks produced by it and other companies. See [www.anheuser-busch.com](http://www.anheuser-busch.com) ("Hansen Natural Corporation and Anheuser-Busch Inc. today announced they have concluded agreements following which certain Anheuser-Busch wholesalers will become distributors of Hansen's Monster Energy and Lost Energy drinks ... Monster, Lost and Rumba are currently distributed by Hansen in the United States through a network of beer and liquor distributors and soft drink bottlers."); and [www.hansens.com](http://www.hansens.com) ("We pride ourselves on innovation and will not limit ourselves to malt beverages in offering exciting new products for our wholesalers and consumers," said Anheuser-Busch Inc. President August A. Busch IV. "We recognized the potential of this category when we launched our own energy drink, 180, in 2001. These agreements bring value to Anheuser-Busch, Hansen, our wholesalers and our retailers. They allow us to expand our business in this thriving category through our world-class network of wholesalers.") See also *St. Cloud Times (Minnesota)* January 1, 2006 retrieved from [www.lexis.com](http://www.lexis.com) ("The center is the sole distribution site for the brewery products, which include the Gluek and Stite beers and more than 60 varieties of energy drinks."); *Market Wire Inc.* July 19, 2005 retrieved from [www.lexis.com](http://www.lexis.com)

**Serial No. 78711050**

("Dick Pearce, the company's President and CEO, said, 'It has been our experience that overall the beer distributors are the best path to market for our energy drinks. They have their products in virtually every potential outlet, whether it is bars, night clubs, restaurants, convenience stores, grocery you name it.")

The record also shows that in some cases, energy drinks are placed near alcoholic beverages and the advertising and packaging of energy drinks mimics that of alcoholic drinks. See, e.g., *Pasadena Star-News* June 3, 2006 retrieved from [www.lexis.com](http://www.lexis.com) ("A recent proliferation for sweet-tasting, often carbonated drinks laced with alcohol, which critics dub "alcopops," was the subject of a state Senate committee hearing Friday in Santa Fe Springs ... She noted, for example, the growing practice of placing non-alcoholic energy drinks near the beer and wine cooler racks in stores. Some energy drinks labels are even designed to look like alcoholic drinks, Brown Taylor said."); and [www.bevnet.com](http://www.bevnet.com) ("Sugar Free Pit Bull ... Same great flavor as the smaller version, but packaged in a 16-ounce can. The can has a design that reminds us of some of the retro-beers that are once again getting mainstream attention.")

In addition, the products themselves are also marketed as a combined drink. See e.g., *The Idaho Statesman* March 22, 2006 retrieved from [www.lexis.com](http://www.lexis.com) ("Still, energy drinks are the rage, and everything from soda to beer and alcohol companies are getting into the act. Anheuser-Busch makes B-to-the E energy beer, a spiced beer that contains caffeine, guarana and ginseng. Zygo Energy Vodka is boosted with taurine, guarana, D-ribose and yerba matta."); and *Modern Brewery Age* August 23, 2000 retrieved from [www.findarticles.com](http://www.findarticles.com) ("Gluek Brewing Co. of Cold Spring, MN, has produced a product described as the world's first hard energy malt beverage. It's an alcoholic version of an energy drink targeting the 20's and early 30's crowd who want to get a buzz on without losing their energy.")

Finally, inasmuch as there are no limitations in the identification of goods, we must presume that the goods will be offered in some of the same channels of trade and will be used by some of the same purchasers. See *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

Reviewing the record as a whole, we find the evidence taken together to be sufficiently persuasive to support a finding that the goods are related and that the channels of trade and class of purchasers overlap to such an extent

**Serial No. 78711050**

that when used in connection with a highly similar mark would likely cause confusion. In particular, here, where the marketing of registrant's type of goods, energy drinks, seems to parallel applicant's goods (presented in similar packaging, sold in the same venues, produced as a combined energy/alcohol drink).

In view of the above, the du Pont factors of the similarity of the goods, the channels of trade, and class of purchasers favor a determination of likelihood of confusion as to the mark in the cited registration.

With regard to the conditions of sale, these goods include general consumer items that would not be purchased with a great deal of care or require purchaser sophistication.

In conclusion, we find that because the marks are highly similar, the goods are related, and the channels of trade and purchasers overlap, confusion is likely between applicant's mark and the mark in the cited registration. To the extent there are any doubts, we resolve them, as we must, in favor of the registrant. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

**Decision:** The refusal to register under Section 2(d) of the Trademark Act is affirmed.