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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Spirits of the USA, LLC

Serial No. 77518698

Mark L. Siegel of Weatherly Kerven & Siegel LLC for Spirits of the USA, LLC.

Saima Makhdoom, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

Before Quinn, Zervas and Bergsman,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Spirits of the USA, LLC filed an intent-to-use application for the mark RUNNER, in standard character form, for goods ultimately identified as "caffeinated energy drinks, excluding sports drinks," in Class 32.

Registration has been refused under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with "caffeinated energy drinks, excluding sports drinks," so resembles the mark RUNNER, in standard character form, registered on the Supplemental Register for "protein based,

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nutrient-dense snack bars," in Class 29¹ and "nutrition energy bars for use as a meal substitute; vitamin and mineral formed and packaged as bars; and meal replacement bars," in Class 5² (hereinafter referred to as "nutritional snack bars") as to be likely to cause confusion. The registrations are owned by the same entity.

Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the 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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

A. The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

The marks are identical and applicant does not argue otherwise. Normally, where the applicant's mark is

¹ Registration No. 3443148, issued June 3, 2008.

² Registration No. 3443160, issued June 3, 2008.

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identical to the registrant's mark, as it is in this case, there need be only a viable relationship between the respective goods or services in order to find that a likelihood of confusion exists. *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).³

B. The similarity or dissimilarity and nature of the goods, channels of trade, and classes of consumers.

Applicant's original identification was "energy drinks." In an effort to avoid the likelihood of confusion refusal, applicant amended the identification to "caffeinated energy drinks, excluding sports drinks." Nonetheless, the examining attorney persisted in the refusal of registration under Section 2(d). At first blush, "caffeinated energy drinks, excluding sports drinks" is nonsensical because energy drinks and sports drinks appear to be essentially the same. Accordingly, we must look to the evidence of record to determine the meaning of applicant's identification of goods. *In re Trackmobile, Inc.*, 15 USPQ2d 1152, 1154 (TTAB 1990) ("when the description of goods for a cited registration is somewhat

³ Although the cited mark is registered on the Supplemental Register, there is no reason to apply a lesser standard for the likelihood of confusion analysis. Nevertheless, the descriptiveness of the cited mark may influence the conclusion that confusion is likely or unlikely. *In re Southern Belle Frozen Foods Inc.*, 48 USPQ2d 1849, 1850 n. 2 (TTAB 1998). See the discussion *infra*.

unclear, as is the case herein, it is improper to simply consider that description in a vacuum and attach all possible interpretations to it when the applicant has presented extrinsic evidence showing that the description of goods has a specific meaning to members of the trade").

An article in *About.com, Alternative Medicine: Energy Drinks* (June 6, 2006) explains that an energy drink is a stimulant and a sports drink is designed for hydration in connection with exercise.⁴

Most energy drinks are carbonated drinks that contain large amounts of caffeine and sugar with additional ingredients such as B vitamins, amino acids (e.g. taurine), and herbal stimulants such as guarana.

* * *

Energy drinks are marketed ... as a stimulant.

* * *

Energy drinks should not be consumed during exercise.

Energy drinks should not be confused with sports drinks such as Gatorade, which are consumed to help people stay hydrated during exercise. Sports drinks also provide carbohydrates in the form of sugar and electrolytes that may be lost through perspiration.

⁴ Applicant's February 19, 2009 Response.

However, applicant ignores that distinction as illustrated by its website promoting its RUNNER energy drink. Applicant's use of the advertising line "When you don't want to get caught" engenders the commercial impression that applicant's product is something the customer should drink to improve running performance.



The image is a screenshot of a website advertisement for Runner Energy Drink. On the left, there is a graphic featuring a cartoon rooster running. Above the rooster is a yellow banner with the text "WHEN YOU DON'T WANNA GET CAUGHT". Below the rooster is the text "RUNNER Energy Drink". To the right of the graphic, the text reads "Runner Energy Drink", "Available in regular and sugar-free Energy That Goes With You", and "The first Premium Energy Drink that delivers full fresh flavor without the aftertaste... in a convenient resealable bottle". Below this is the Sysco Atlanta Code: 7338567. Further down, there is a section titled "FEATURED RECIPES" with a list of ingredients for a "SPICED BITE" recipe: Black Widow Gin, Deadman's Dark & Spicy Rum, Coyote Vodka, Runner Energy Drink, Blackberry Brandy or Chambord. A small image of a Runner Energy Drink bottle is shown next to the recipe. At the bottom of the recipe section, it says "For additional recipes for all of our selections, visit the Recipes Section." At the very bottom of the page, there is a copyright notice: "©Copyright 2008 Spirits of the USA LLC. All Rights Reserved | Privacy Policy".

This raises the question as to whether consumers are aware of the distinction between energy drinks and sports

drinks.⁵ In this regard, we note that the evidence listed below contradicts the seemingly straight forward explanation in the *About.com* website.

1. *Fueling the Runner: Energy Drinks: Do They Really Equal More Energy?* an article in the *Running Times* website (runningtimes.com).⁶ This story analyzes the effectiveness of energy drinks during exercise, thus, indicating that runners and others consume energy drinks before and during exercise.

2. A chatroom discussion regarding whether it is unhealthy to have an energy drink before running. *Yahoo! Answers* website (yahoo.com). The premise of the discussion is that runners consume energy drinks before running.⁷

3. *Stay hydrated and fueled for the short and long run*, an article in the *Trail Runner* website (trailrunnermag.com) (January 2006), discusses proper hydration and fueling for running.⁸ In the article, the

⁵ We also note that the story identified above in *About.com* warned that "[e]nergy drinks should not be mixed with alcohol" because energy drinks reduce the depressant effects of alcohol and enhance the "'feel good' buzz," thereby encouraging people to consume larger amounts of alcohol. Nevertheless, applicant, a manufacturer of a full line of spirits, encourages consumers to mix its energy drinks and spirits as demonstrated by the recipe featured in its website.

⁶ March 13, 2009 Office Action.

⁷ *Id.*

⁸ *Id.*

author uses the terms "energy drinks" and "sports drinks" interchangeably.

4. In the *BodyConcept.com* website there is a section for product reviews.⁹ The review for XENERGY energy drink states, "I would drink just one can and have enough energy to last the whole day of working out." At least this one customer uses energy drinks for athletics.

5. The "Energy Drink" entry in *Wikipedia* provides the following observations:¹⁰

Energy drinks are soft drinks advertised as providing energy to improve physical activity of the drinker, as compared to a typical drinker. ... these drinks are designed to increase a user's mental alertness and physical performance by the addition of caffeine, vitamins and herbal supplements which may interact to provide a stimulant effect over and above that obtained from caffeine alone.

* * *

During repeated cycling tests in young healthy adults an energy drink significantly increased upper body muscle endurance.

* * *

The first drink marketed as being designed to improve the performance of athletes and sports stars arrived in

⁹ *Id.* The website also lists sports drinks and energy drinks as separate product categories.

¹⁰ *Id.*

the sixties. It was invented for the football team at the University of Florida, known as the Gators - hence its name, Gatorade. Designed to aid hydration and lengthen performance levels, it claimed that its ingredients were formulated for just such things.

Wikipedia treats sports drinks as a type of energy drink.

6. Q+A: *Why should I bother with energy drinks?* an article in the nutrition section of the *Runner's World* website (runnersworld.com).¹¹ The exact question posed to the *Runner's World* expert was "Why should I bother with energy drinks? I know that I need to keep hydrated during training and racing, but isn't water good enough?" The answer discussed the role of energy drinks in maintaining proper hydration in connection with rigorous workouts.

7. *Energy Drinks and Food Bars: Power or Hype?* is an article in the *MyStudentHealthZone* webpage (March 2006) and *TeensHealth* website (September 2008) both in kidshealth.org.¹² The author reports the following:

Energy drinks and nutrition bars often make big promises. Some say they'll increase energy and alertness, others offer extra nutrition and some even claim to boost your athletic performance or powers of concentration.

* * *

¹¹ *Id.*

¹² March 13, 2009 and May 16, 2009 Office Actions.

Likewise, some of the sports or energy drinks on the market today contain some vitamins and minerals.

* * *

Did you know that some energy bars and drinks contain hundreds of calories? That may be OK for athletes who burn lots of calories in high-intensity activities, like competitive cycling. But for many teens the extra sugar and calories just contribute to weight gain, not to mention tooth decay.

* * *

Although lots of energy drinks and nutrition bars have some vitamins and minerals added, they can't give you all the different nutrients your body needs to grow, develop, play sports, and handle all the other stuff on you schedule.

The author of this article treats sports drinks as a type of energy drink.

8. The GNC website (gnc.com) sells energy drinks and sports drinks together under the heading "energy/endurance."¹³

9. The advertisement for ROCKSTAR triple strength energy drink featured in the WALGREEN'S website

¹³ *Id.*

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(walgreens.com) describes the product with adjectives associated with athletics.¹⁴

Description

- Bigger.
- Better.
- Faster.
- Stronger.
- Rockstar is scientifically formulated to provide an incredible energy boost for those who lead active and exhausting lifestyles from athletes to rock star.

Based on the foregoing, we find that the distinction, if any, between energy drinks and sports drinks is illusory. Even assuming *arguendo* that there is a distinction between energy drinks and sports drinks, the exclusion of sports drinks in applicant's identification of goods does not affect our decision because we base our decision on likelihood of confusion between the marks used on nutritional snack bars and energy drinks.

It is not necessary that the goods identified in an application and the cited registrations be similar or competitive, or even that they move in the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods are such that they

¹⁴ *Id.*

would or could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. *On-Line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). In this regard, energy drinks and nutritional snack bars both provide the user with energy, *albeit*, in different ways.

Energy drinks thus enable the body to burn fuel faster than ordinarily possible, but once the fuel is burned up, the body effectively "runs out of gas" by crashing. Energy bars provide a massive amount of fuel for the body but do not induce metabolic stimulation to aid in the processing of that fuel.¹⁵

To show that the energy drinks and nutritional snack bars are related, the Examining Attorney submitted five third-party registrations listing both energy drinks and nutritional snack bars in the description of goods. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods are of a type which may emanate from a single source. *In re Albert Trostel &*

¹⁵ *Wikipedia*, "Energy bar" attached to the March 13, 2009 Office Action.

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Sons Co., 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).¹⁶

Energy Drinks and Food Bars: Power or Hype?

referenced above discusses the efficacy of energy drinks and nutrition bars for increasing energy and concentration. The article notes how students use nutrition bars and energy drinks to increase energy and alertness and warns that "[i]f energy bars and drinks are becoming their own food group in your diet, remember - 'all things in moderation.'"

Also, as shown below, the GNC website (GNC.com) advertises the sale of energy drinks and nutritional snack bars together.

EAT, DRINK AND BE ENERGIZED

Check out delicious, nutritious bars
and drinks that keep you going.

While the *BodyConcept.com* and *Walgreens* websites do not advertise energy drinks and nutritional snack bars together, the online retailers sell both types of products, *albeit*, under different marks on the same webpage.

¹⁶ The Examining Attorney submitted three additional registrations based on Sections 44 or 66 of the Trademark Act. These registrations have little, if any, probative value because they are not based on use in commerce. *In re Mucky Duck Mustard Co.*, 6 USPQ2d at 1470 n.6

Based on the evidence as a whole, we find that energy drinks and nutritional snack bars are commercially related products that are sold in the same channels of trade to the same classes of consumers. The evidence shows that consumers purchase nutritional snack bars and energy drinks for an energy boost and that these products are advertised together.

Applicant argues that the nutritional snack bars listed in the cited registrations are sold to runners and other athletes while its energy drinks are "intended to be used as mixers for alcoholic beverages."¹⁷ This argument is untenable because the identifications in the cited registrations are not limited with respect to channels of trade or classes of consumers. Accordingly, we must presume that that registrant's nutritional snack bars are sold in all channels of trade and to all classes of consumers normal for those products. *In re Southern Belle Frozen Foods, Inc.*, 48 USPQ2d at 1850; *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Likewise, applicant's identification of goods is not restricted. Moreover, because the evidence shows that energy drinks are used by athletes, purchasers and potential purchasers of

¹⁷ Applicant's Brief, p. 4.

registrant's nutritional snack bars may encounter applicant's energy drinks and *vice versa* when seeking a product to provide an energy boost.

C. The conditions under which and buyers to whom sales are made (i.e., "impulse" vs. careful, sophisticated purchasing).

As indicated above, there is no limitation on the "energy drinks" or "nutritional snack bars" listed in either applicant's or registrant's identification of goods. Thus, we must assume that the products include those that are relatively inexpensive and bought on impulse. In fact, the registrant's nutritional snack bars range in price from \$14.16 (\$1.18 each) to \$16.22 (\$1.35 each) for a box of twelve.¹⁸ Energy drinks are also inexpensive. GNC sells a six-pack of 5-HOUR ENERGY for \$17 and a case of ROCKSTAR ENERGY for \$48.¹⁹ WALGREENS sells individual cans of ROCKSTAR for \$2.99.²⁰

F. Balancing the factors.

Applicant argues that because the cited registrations are descriptive, as evidenced by their registration on the Supplemental Register, the registered mark is entitled to only a narrow scope of protection.²¹ However, the general

¹⁸ February 18, 2009 response.

¹⁹ May 16, 2009 Office Action.

²⁰ *Id.*

²¹ Applicant's Brief, p. 3.

public is unaware of the register on which a mark is registered. As stated by the predecessor of our primary reviewing court,

That the decision respecting likelihood of confusion is made in the PTO by comparing an applicant's mark and the description of his goods with the registered marks on file in the PTO, and the goods described in the registration of those marks, should not lead to the notion that the locus of potential confusion is in the files of the PTO. The confusion sought to be prevented by the statute is not that of examiners, lawyers, board members, or judges. Confusion is likely, if at all, only in the marketplace, where marks are used. The public is both unaware of, and distinctly disinterested in, where a mark is registered on either register.

In re The Clorox Co., 578 F.2d 305, 198 USPQ 337, 340 (CCPA 1978). Likewise, the relevant public is not concerned with the placement of RUNNER on the spectrum of marks (e.g., fanciful, arbitrary, etc.).

In this case, we have identical marks identifying commercially related products sold in the same channels of trade to the same classes of consumers. Under these circumstances, we find that the use of the mark RUNNER in connection with "caffeinated energy drinks, excluding sports drinks" is likely to cause confusion with the mark RUNNER for nutritional snack bars.

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Decision: The refusal to register in view of both the cited registrations is affirmed.