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Bucher

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Red Bull GmbH

Serial No. 75405826

Martin R. Greenstein of TechMark for Red Bull GmbH.

Ira Goodsaid, Trademark Examining Attorney, Law Office 101
(Ronald R. Sussman, Managing Attorney).

Before Bucher, Holtzman and Rogers, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Red Bull GmbH seeks registration on the Principal
Register of the mark WINGS (*standard character drawing*) for
goods recited in the application, as amended, as "mineral
and aerated waters and other non-alcoholic beverages;
energy and sports drinks" in International Class 32.¹

¹ Application Serial No. 75405826 was filed on December 15, 1997 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce. A notice of allowance issued to

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register this designation based upon the ground that none of the specimens submitted by applicant demonstrates use of the term WINGS as a mark for the applied-for goods.

Applicant and the Trademark Examining Attorney have fully briefed this appeal, but applicant did not request an oral hearing. We affirm the refusal to register.

Applicant's first statement of use relied upon two point-of-sale display items.² One is a sticker (featuring a cartoon character bull and the phrase NOW AVAILABLE: SUGAR FREE WINGS) designed for placement on a store window, refrigerated cooler door or other point of sale display (below left). The second is a stand-alone point of sale display card bearing the phrase RED BULL GIVES YOU WINGS, intended to hold a single can of Red Bull energy drink (below center and right, reproduced without and with an actual can of Red Bull inserted, respectively):

applicant on May 1, 2001. Applicant filed a statement of use on October 27, 2003, followed by a second statement of use on May 4, 2004. Applicant alleges first use anywhere as of January 31, 1987 and use in commerce with the United States at least as early as May 31, 1996.

² Filed on October 27, 2003.



Oct. 27, 2003, sticker



Oct. 27, 2003, display card *without* can



Oct. 27, 2003, display card *with* can

After the Trademark Examining Attorney refused to accept the original statement of use on the ground that the specimens showed matter, i.e., phrases, that differed from the single word mark WINGS, applicant submitted a different point of sale sticker (top portion of image) along with a photograph showing how this replacement sticker is displayed on a cooler door (bottom portion of image).³

INTRODUCING THE NEW 4-PACK.
RED BULL GIVES YOU WINGS.



STATIC CLING



May 4, 2004, sticker (top), photo (bottom)

³ Filed on May 4, 2004. This reproduction of the replacement specimen contains a callout box added by the author of this decision to show more clearly the wording printed below the image of the four-pack of Red Bull beverages on the sticker.

In support of its position that we should reverse the refusal of the Trademark Examining Attorney to register this matter absent a substitute specimen in which the word WINGS alone projects a separate and distinctive commercial impression, applicant makes the following arguments:

- In the instant case, applicant is not attempting to amend the drawing, as was true in many of the cases cited by the Trademark Examining Attorney in his brief.
- In the English language, WINGS and WIINGS have the same meaning and commercial impression: the "III" (or triple letters "i" within WIINGS) will be seen as a pronunciation key not unlike a diacritical mark.
- Applicant's having changed the word WINGS into WIINGS will be interpreted as a "cool" or "catchy" way of spelling and pronouncing the word "wings." There is no other English language word for which the meaning could be mistaken, and unlike the rules in some other languages, vowel length does not change the meaning of a word in the English language.
- Its slogans are indistinguishable from "NOW AVAILABLE: SUGAR FREE COKE," "GENERAL MILLS GIVES YOU CHEERIOS" or "KELLOG[G'S] [sic] GIVES YOU SPECIAL K," etc.

- When each occurrence of the word WINGS or WIINGS is viewed in the context of the commercial realities facing the consumer, it is clear in each of these uses that the term WINGS is being used as a trademark for the canned beverages being sold.
- Nothing in U.S. trademark law requires that a specimen explain what a particular trademark means. Indeed, applicant argues that the "best" trademarks are often those having no meaning, no dictionary definition and no direct reference to the product.
- The very lack of a definition of the term leaves only one logical remaining commercial impression - that the word WINGS must be a trademark for this beverage.

By contrast, the Trademark Examining Attorney argues that:

- The word WIINGS (with a triple letter "i") is a different term entirely, and hence must be considered to be materially different from the word WINGS.
- In each of the foregoing displays, the word WINGS fails to make a separate and distinct commercial impression apart from the other elements - in this case, apart from the various multiple-word slogans in which the word appears.

- Applicant's analogy of its phrase, SUGAR FREE WINGS, to a suggested SUGAR FREE COKE, is inapposite. First, the Trademark Examining Attorney argues that it is not clear to him that use of the term SUGAR FREE COKE would, in fact, support registration of the word COKE alone, as a trademark. Second, the Trademark Examining Attorney contends that in applicant's suggested analogy, COKE is a famous, registered trademark used on the containers of beverage with which it is associated. By contrast, the word WINGS is not registered, is not used on the beverage container, and based on the evidence in this record, there is ambiguity about what this term even means in this context.
- The expression, RED BULL GIVES YOU WINGS, in particular, cannot support use of WINGS alone as a trademark as it consists of a unitary slogan ending with a materially-different term.

It is well settled that an applicant may apply to register any element of a composite mark if that element, as shown in the specimens, presents a separate and distinct commercial impression which indicates the source of applicant's goods and distinguishes applicant's goods from

those of others. The relevant rule requires that "the drawing of the mark must be a substantially exact representation of the mark as intended to be used on or in connection with the goods..."⁴ See also In re Chemical Dynamics Inc., 839 F.2d 1569, 5 USPQ 2d 1828 (Fed. Cir. 1988); In re Servel, Inc., 181 F.2d 192, 85 USPQ 257 (CCPA 1950); In re Miller Sports Inc., 51 USPQ2d 1059 (TTAB 1999); In re Boyd Coffee Co., 25 USPQ2d 2052 (TTAB 1993); In re Raychem Corp., 12 USPQ2d 1399 (TTAB 1989); In re Sperouleas, 227 USPQ 166 (TTAB 1985); In re San Diego National League Baseball Club, Inc., 224 USPQ 1067 (TTAB 1983); In re Volante International Holdings, 196 USPQ 188 (TTAB 1977); In re Library Restaurant, Inc., 194 USPQ 446 (TTAB 1977); In re Semans, 193 USPQ 727 (TTAB 1976); In re Lear-Seigler, Inc., 190 USPQ 317 (TTAB 1976); In re Mango Records, 189 USPQ 126 (TTAB 1975); and In re Tekelec-Airtronic, 188 USPQ 694 (TTAB 1975); see also TRADEMARK MANUAL OF EXAMINING PROCEDURE, §§ 807.12(a) and (d) (4th ed. April

⁴ "(b) In an application under section 1(b) of the Act, the drawing of the mark must be a substantially exact representation of the mark as intended to be used on or in connection with the goods and/or services specified in the application, and once an amendment to allege use under §2.76 or a statement of use under §2.88 has been filed, the drawing of the mark must be a substantially exact representation of the mark as used on or in connection with the goods and/or services."

37 C.F.R. Section 2.51(b).

2005), and cases cited therein. If the instant application had included specimens showing use of the term sought to be registered as a trademark in connection with the goods set forth in this application, substitute specimens would not have been required.

In response to the Trademark Examining Attorney's initial refusal to register based on the specimens submitted with the statements of use, applicant has not attempted to submit pre-existing specimens showing the word WINGS used alone for the involved goods.⁵ Hence, some of applicant's arguments about the meaning of the word "wings" in this context represent a misunderstanding of the issue before us, i.e., whether the drawing is a substantially exact representation of the mark as used on the specimens. The question is not whether the mark shown in the drawing, if it were standing alone, is capable of denoting commercial origin. As noted above, if the mark shown in the drawing were shown standing alone on the specimens submitted with the statements of use, it is unlikely that

⁵ In order to have the statement of use approved, and in turn, in order to register this alleged mark as a source indicator for its goods, applicant should have submitted a properly verified substitute specimen in which the word WINGS alone projects a separate and distinctive commercial impression. The final refusal of the Trademark Examining Attorney dealt with applicant's failure to comply with this requirement.

the Trademark Examining Attorney would have required the submission of substitute specimens. Moreover, independent *capability* to designate commercial origin is not the issue. The issue is whether the specimens show the mark in the drawing used in a way that it actually functions to identify applicant's products. Contrary to applicant's arguments, the specimens in this case do not present the word WINGS in such a way that it creates a separate, distinct commercial impression apart from that created by the various slogans.

We do agree with applicant that given the issues involved in this appeal, the question of material alteration is not before us. Specifically, in response to the Trademark Examining Attorney's refusals to register based upon the specimens submitted with the statements of use, applicant has not attempted to amend the drawing to depict any of the several slogans. Hence, we do not need to resolve the question of material alteration -- that is, whether amendment of the drawing to show one of the slogans seen in these point-of-sale displays would constitute a significant change from the applied for mark.

On the other hand, we agree with the Trademark Examining Attorney that based upon applicant's various

specimens of record, the alleged trademark WINGS shown on the drawing page is not a substantially exact representation of any source-indicating matter located on the original specimens or on the substitute specimens. Applicant's arguments in support of registration do not persuade us to reach a different result.

As to the question of whether use of a misspelled version of the word WINGS (e.g., WIIINGS, having a triple letter "i") will support registration of WINGS alone, we agree with the Trademark Examining Attorney that it will not.

First, we find it difficult to reconcile applicant's contention that the misspelling of WIIINGS is a "cool" or "catchy" form of the normal spelling of the word "wings" with its argument that both forms of the word (WINGS and WIIINGS) convey the same commercial impression. The misspelled word cannot be so different as to be cool and catchy and, at the same time, not appreciably different from the correct spelling of the word.

Second, we find that allowing applicant to secure a registration based upon this misspelling is not unlike cases in which this Board has rejected registration of

"phantom marks." See In re International Flavors & Fragrances Inc., 183 F.3d 1361, 51 USPQ2d 1513 (Fed. Cir. 1999); Cineplex Odeon Corp. v. Fred Wehrenberg Circuit of Theatres Inc., 56 USPQ2d 1538 (TTAB 2000); Cf. In re Upper Deck Co., 59 USPQ2d 1688 (TTAB 2001). In such cases, an applicant seeks to register a single term while claiming the right to use the term in a variety of forms. In the instant case, one might anticipate a logical extension of applicant's general argument for a legal equivalence herein, that WINGS actually provides protection for a variety of other forms, such as WINGGGS, WIIIIINGS, WYNGS, WYYNGS, etc.

Even if WINGS and WIIINGS were considered equivalent, the term always appears in slogans such as ❶ "NOW AVAILABLE: SUGAR FREE WINGS," ❷ "RED BULL GIVES YOU WIIINGS," and ❸ "4 CANS. 8 WIIINGS. INTRODUCING THE NEW 4-PACK. RED BULL GIVES YOU WIIINGS." None of the above slogans has the same visual or connotative impression as the word WINGS alone. There is absolutely no evidence whatsoever in this record that prospective purchasers would read these sentences or slogans and arrive at the conclusion that applicant's applied-for term is a trademark for beverages.

The letters comprising the term WINGS (or WIIINGS) are always the same size, color and degree of boldness as the lettering of the surrounding words. Yet, in an earlier Board case, where the applied-for term (CONFIDENCE) was actually presented in larger size lettering and in a different color than the rest of the phrase (CONFIDENCE TO ENJOY A NORMAL AND ACTIVE LIFE.), the Board nonetheless found that the plaintiff's use of the word CONFIDENCE on its brochures would be perceived as an "integral and natural" part of the larger phrase - *not* as a separate mark.

Ipco Corp. v. Blessings Corp.,
5 USPQ2d 1974 (TTAB 1988).



Confidence
*to enjoy a normal
and active life.*

According to applicant, the word "wings" will jump out of these slogans and hence, be perceived as a trademark by prospective customers. Applicant reasons that faced with these specimens, customers logically will believe either that "Red Bull is now distributing physical wings of some sort (say, bird, insect or airplane), or the consumer can conclude that WINGS must be a trademark for a drink from Red Bull... Nobody would realistically think that Red Bull is

selling actual 'wings'." Applicant's appeal brief, p. 3.

However, while applicant limits the possible meanings customers may read into its "Wings" promotional slogans, and concludes that "Wings" will jump out of these multi-word phrases as a trademark, our review of applicant's goods and point-of-sale displays suggest there is at least one other plausible meaning that might well occur to prospective purchasers of this beverage. For example, applicant's use of the expression "Red Bull gives you wings" might well be seen as referring to the impact of consuming the energy drink, rather than as a trademark for the drink itself.⁶

⁶ One of the specimens of record, *supra*, is a stand-alone display having a pair of bird-like wings attached to either side of a Red Bull beverage can. Moreover, the point-of-sale cooler display sign/decal submitted as a substitute specimen contains wording directly below the photo, suggesting precisely how the merchant should place this cooler display decal "on the cooler door to communicate the functionality of Red Bull ..." (emphasis supplied).

Interpreting this phrase as a reference to the impact of consuming the energy drink is entirely consistent with applicant's marketing of this "energy drink" as seen in these specimens of record. In this context, we take judicial notice of the dictionary definition of the intransitive verb, "wings," as meaning "to fly" [*THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE*, (1975), p. 1468]. Hence, the expression "Red Bull gives you wings" suggests the touted "functionality of RED BULL," namely, an improved ability to concentrate, increased alertness, better reaction times, greater stamina, etc.

Applicant also argues that "Wings" is a more arbitrary term than other wording it uses in its slogans or phrases, and thus is more likely to be perceived as source indicating. In the case of In re Jane P. Semans, 193 USPQ 727 (TTAB 1976), the Board rejected that applicant's contention that the word "Krazy" was registrable apart from the composite phrase "Krazy Mixed-Up," because of the descriptive nature of the term "Mixed-Up" for food seasonings. The Board affirmed the refusal to register the word KRAZY alone, pointing out that "... 'KRAZY MIXED-UP' is a unitary phrase, of which 'KRAZY' is an integral part ..." and further noting that "there is nothing in the record to suggest that customers and prospective purchasers of applicant's goods separate the phrase into component parts and utilize 'KRAZY' alone to call for and refer to the goods."

Similarly, in the case now before the Board, there is nothing in the instant record to suggest that those seeking applicant's goods would separate the word "Wings" from the slogans involved herein, and use that single word to call for applicant's goods. Although undoubtedly applicant believes this word to be its trademark for energy drinks, we find that the word "Wings" is so merged with the rest of

the words in the various phrases on the specimens of record that this word alone cannot be regarded as a separable element. The word, as used on the specimens, does not create a separate and distinct commercial impression, and hence does not function in and of itself as a mark for the identified goods. As such, the drawing represents a mutilation of the various slogans that the specimens show being used on applicant's point of sale displays.

Decision: Because applicant did not comply with the requirement of the Trademark Examining Attorney to submit a specimen showing use of the mark in connection with the identified goods, we affirm the refusal to allow the mark for registration.