



RED BULL A.G.,  
Opposer,

-versus-

WILSON DY GO,  
Respondent-Applicant.

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}  
} IPC No. 14-2012-00169  
} Opposition to:  
} Appln. Serial No. 4-2010-010494  
} Date Filed: 24 September 2010  
} TM: "RED FOX"  
}  
}  
}

**NOTICE OF DECISION**

**CESAR C. CRUZ AND PARTNERS**  
Counsel for the Opposer  
3001 Ayala Life-FGU Center  
6811 Ayala Avenue, Makati City

**WILSON DY GO**  
Respondent-Applicant  
2066 Candido Street, Mapulang Lupa  
Valenzuela City

**GREETINGS:**

Please be informed that Decision No. 2013 - 141 dated July 22, 2013 ( copy enclosed) was promulgated in the above entitled case.

Taguig City, July 22, 2013.

For the Director:

**Atty. PAUSI U. SAPAK**  
Hearing Officer  
Bureau of Legal Affairs

**CERTIFIED TRUE COPY**  
*Sharon S. Alcantara*  
**SHARON S. ALCANTARA**  
Records Officer II  
Bureau of Legal Affairs, IPO



**RED BULL A.G.,**  
*Opposer,*

**IPC No. 14-2012-00169**  
Case Filed: 04 June 2012

-versus-

Opposition to:  
Appln. Serial No.: 4-2010-010494  
Date Filed: 24 September 2010

**WILSON DY GO,**  
*Respondent-Applicant.*

**TM: "RED FOX"**

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**Decision No. 2013- 141**

### DECISION

RED BULL AG, ("Opposer")<sup>1</sup> filed on 04 June 2012 a Verified Opposition to Trademark Application Serial No. 4-2010-010494. The application, filed by WILSON DY GO ("Respondent-Applicant")<sup>2</sup>, covers the mark "RED FOX" for use on milk drink, yogurt, chocolate drink, snacks namely fruit based snacks, dairy-based snacks, so based snacks, nut-based snacks, seed-based snacks, potato-based snacks, tofu-based snacks, vegetable-based snacks, cereals-based snacks, cheese-flavored snacks, corn-based snacks, rice-based snacks, wheat-based snacks, candies, biscuits, breads, fruit juice, energy drinks, fruit flavored drink, mineral water, carbonated beverages, and jelly juice" under Classes 29, 30 and 32 of the International Classification of Goods and Services<sup>3</sup>.

The Opposer alleges, among other things the following:

1. The Respondent-Applicant's application for the registration of the mark RED FOX should not be accepted by this Honorable Office since to do so would be contrary to Section 123.1 (d) and Section 123.1 (f) of the Intellectual Property Code, Republic Act No. 8293, which prohibits the registration of a mark that:
  - (d) is identical with a registered mark belonging to a different proprietor or a mark with an earlier filing or priority date, in respect of:
    - (i) the same goods or services, or
    - (ii) closely related goods or services, or
    - (iii) if it nearly resembles such a mark as to be likely to deceive or cause confusion;

<sup>1</sup> A corporation organized and existing under the laws of Switzerland with principal address at Poststrasse 3, 6341 Baar Switzerland.

<sup>2</sup> With address at 2066 Candido Street, Mapulang Lupa, Valenzuela City.

<sup>3</sup> The Nice Classification is a classification of goods and services for the purpose of registering trademark and services marks, based on the multilateral treaty administered by the World Intellectual Property Organization. The treaty is called the Nice Agreement Concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks concluded in 1957.

- (f) is identical with, or confusingly similar to, or constitutes a translation of a mark which is considered by the competent authority of the Philippines to be well-known in accordance with the preceding paragraph, which is registered in the Philippines, with respect to goods or services which are not similar to those with respect to which registration is applied for: *Provided*, That the use of the mark in relation to those goods and services would indicate a connection between those goods or services, and the owner of the registered mark: *Provided further*, That the interests of the owner of the registered mark are likely to be damaged by such use;
2. The act of the Respondent-Applicant in adopting the mark RED FOX for its products in Classes 29 and 32 is clearly an attempt to trade unfairly on the goodwill, reputation and consumer awareness of the Opposer's internationally well-known RED BULL mark. Such act of the Respondent-Applicant results in the diminution of the values of the Opposer's internationally well-known RED BULL mark.
  3. The Opposer's internationally well-known RED BULL mark is registered and used in relation to beverages. The Respondent-Applicant seeks registration for its mark in the beverage Classes 29 and 32. These goods are identical, similar and/or closely related. Further, because the Opposer's marks are internationally well-known, the marks are highly likely to be associated leading to consumer confusion.
  4. The Respondent-Applicant's mark closely resembles and is very similar to the Opposer's internationally well-known RED BULL mark that was previously applied in the Philippines and previously registered in the world.
  5. The trademark RED BULL and the Respondent-Applicant's mark RED FOX are identical and/or confusingly similar to each other.

In support of its opposition, Opposer submitted in evidence the following:

1. Exhibit "A" – Authenticated Special Power of Attorney;
2. Exhibit "B" – Affidavit of Dr. Volker Viechtbauer; and
3. Exhibit "B series" or Annexes to the Affidavit of Dr. Volker Viechtbauer.

This Bureau issued a Notice to Answer and served a copy thereof upon the Respondent-Applicant on 18 June 2012. However, Respondent-Applicant did not file an Answer. Accordingly, the Hearing Officer issued Order No. 2012-1351 dated 16 October 2012 declaring the Respondent-Applicant in default and the case deemed submitted for decision based on the opposition, the affidavit of the witnesses and documentary evidence submitted by the Opposer.

Should the Respondent-Applicant trademark application be allowed?

It is emphasized that the essence of trademark registration is to give protection to the owner of the trademarks. The function of a trademark is to point out distinctly the origin or

ownership of the goods to which it is affixed; to secure to him, who has been instrumental in bringing into the market a superior article of merchandise, the fruit of his industry and skill; to assure the public that they are procuring the genuine article; to prevent fraud and imposition; and to protect the manufacturer against substitution and sale of an inferior and different article as his products<sup>4</sup>.

Records show that at the time the Respondent-Applicant filed his trademark application on 24 September 2010, the Opposer has already registered its mark worldwide (Exhibit "B-10"). Some of Opposer's Certificate of Registration are as follows:

1. Reg. No. - 1,935,272  
 Mark - RED BULL  
 Issued On - 14 November 1995  
 U.S. Patent and Trademark Office  
 Goods - Malt Liquor  
 Class - 32
  
2. Reg. No. - 3,092,197  
 Mark - RED BULL  
 Issued On - 16 May 2006  
 U.S. Patent Trademark Office  
 Goods - non-alcoholic beverages, energy drinks  
 Class - 32
  
3. Reg. No. - 654166  
 Mark - RED BULL  
 Issued On - 24 February 1995  
 Australia  
 Goods - non-alcoholic beverages  
 Class - 32
  
4. Reg. No. - 3,939,863  
 Mark - RED  
 Issued On - 31 May 2011  
 U.S. Patent and Trademark Office  
 Goods - energy drink  
 Class - 32
  
5. Reg. No. - 4993421  
 Mark - RED  
 Issued On - 28 September 2009  
 China  
 Goods - energy drink  
 Class - 32

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<sup>4</sup> Pribhdas J. Mirpuri v. Court of Appeals, G.R. No. 114509, 19 November 1999.

And in the Philippines, Opposer filed the registration of its mark RED BULL & DEVICE on 11 August 2011.

The competing marks are reproduced below for comparison and scrutiny:

**RED**

**RED BULL**

**RED FOX**

Opposer's Marks

Respondent-Applicant's Mark

The feature or part, which is common to the competing marks and which immediately draws the eyes and ears is the word RED. It is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered. The first word, prefix or syllable in a mark is always the dominant part. When the marks are pronounced, the sound that will be uttered is the word RED, hence, the other matter is insignificant. The conclusion created by the use of the same word as the primary element in a trademark is not counteracted by the addition of another term<sup>5</sup>.

The difference in the other portion or element of the competing marks, such variance is inconsequential because the visual similarity in the dominant feature the word RED which is exactly the same in all aspect such as composition, spelling and pronunciation is already sufficient to give rise to confusing similarity. The slight distinction or variance did not diminish the likelihood of the occurrence of mistake, confusion or even deception cannot be avoided. Consumers will likely assume that the Respondent-Applicant's mark is just a variation of or related to the Opposer's and/or the goods and services originate from the same source while in fact it is not. The likelihood of confusion would subsist not only on the purchaser's perception of the goods but on the origins thereof as held by the Supreme Court<sup>6</sup>:

Callman notes two types of confusion. The first is the confusion of goods in which event the ordinarily prudent purchaser would be induced to purchase one product in the belief that was purchasing the other. In which case, defendant's goods are then bought as the plaintiff's and the poorer quality of the former reflects adversely on the plaintiff's reputation. The other is the confusion of business. Here, though the goods of the parties are different, the defendant's product is such as might reasonably be assumed to originate with the plaintiff and the public would then be deceived either into that belief or into belief that there is some connection between the plaintiff and defendant which, in fact does not exist.

Further, in the instant proceedings, the competing marks are being used on the same and/or identical goods particularly beverages, energy drinks under Class 29 and 32 of the International Classification of Goods and Services, therefore, the consumers may be confused

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<sup>5</sup> Ref: Continental Connector Corp. v. Continental Specialties Corp., 207 USPQ 60.

<sup>6</sup> Converse Rubber Corporation v. Universal Rubber Products, Inc. e.al. G.R. No. L-27906, 08 Jan. 1987



when confronted with the two marks RED BULL and RED FOX, as these goods are both displayed and located in the same area and flow through the same channels of trade.

The field from which a person may select a trademark is practically unlimited. As in all cases of colorable imitation, the unanswered riddle is why, of the millions of terms and combination of letters are available, the Respondent-Applicant had come up with the mark RED which has been registered by the Opposer in United States Patent and Trademark Office on 14 November 1995 under Reg. No. 1,935,272 for energy drinks and soft drinks in Class 32 which mark is exactly the same with the Opposer's if there was no intent to take advantage of the goodwill generated by the mark<sup>7</sup>.

The Opposer has obtained trademark registrations worldwide for its mark RED BULL (Exhibit "4" to the Affidavit of Dr. Volker Viechtbauer which is marked as Exhibit "B"). Likewise Opposer's products has been extensively sold in more than 157 countries worldwide and promoted through television, cinemas and radio as well as print media. In this regard, Rule 102 of the Trademark Regulation provides:

*Rule 102. Criteria for determining whether a Mark is Well-known.* In determining whether a mark is well-known, the following criteria or any combination thereof may be taken into account:

- (a) the duration, extent and geographical area of any use of the mark, in particular, the duration, extent and geographical area of any promotion, of the mark, including advertising or publicity and the presentation, at fairs or exhibitions, of the goods and/or services to which the mark applies;
- (b) the market share, in the Philippines and in other countries, of the goods and/or services to which the mark applies;
- (c) the degree of the inherent or acquired distinction of the mark;
- (d) the quality-image or reputation acquired by the mark;
- (e) the extent to which the mark has been registered in the world;
- (f) the exclusivity of registration attained by the mark in the world;
- (g) the extent to which the mark has been used in the world;
- (h) the exclusivity of use attained by the mark in the world;
- (i) the commercial value attributed to the mark in the world;
- (j) the record of successful protection of the rights in the mark;
- (k) the outcome of litigations dealing with the issue of whether the mark is a well-known mark; and
- (l) the presence or absence of identical or similar marks validly registered for or used on identical or similar goods or services and owned by persons other than the person claiming that his mark is well-known mark.

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<sup>7</sup> See American Wire and Cable Co. v. Director of Patents et.al. (31 SCRA 544) G.R. No. L-26557, 18 Feb. 1970.

Obviously, the Opposer has sufficiently established the presence or concurrence of the criteria or at least a combination thereof for the mark RED BULL to be considered as a well-known mark under the aforesaid rule.

Also, this Bureau notices that the goods covered by the Opposer's trademarks are similar and/or closely related to those indicated in the Respondent-Applicant's trademark application more specifically energy drinks under Class 32.

The likelihood of confusion, mistake or deception is heightened by the fact that, as discussed above, the goods on which the competing marks are used are the same or closely related.

Thus, this Bureau finds that the subject trademark application is proscribed by Sec. 123.1 par (e) of R.A. No. 8293, also known as the intellectual Property Code of the Philippines ("IP Code"), to wit:

- (e) is identical with, or confusingly similar to, or constitutes a translation of a mark which is considered by the competent authority of the Philippines to be well-known internationally and in the Philippines, whether or not it is registered here, as being already the mark of a person other than the applicant for registration, and used for identical or similar goods or services: *Provided*, That in determining whether a mark is well-known, account shall be taken of the knowledge of the relevant sector of the public, rather than of the public at large, including knowledge in the Philippines which has been obtained as a result of the promotion of the mark.

It is stressed that the Law on Trademarks and Tradenames is based on the principle of business integrity and common justice. This law, both in letter and spirit is laid upon the premise that, while it encourages fair trade in every way and aims to foster, and not to hamper competition, no one especially a trader, is justified in damaging or jeopardizing other business by fraud, deceit, trickery or unfair methods of any sort. This necessarily precludes the trading by one dealer upon the good name and reputation built by another.

**WHEREFORE**, premises considered the instant opposition is hereby **SUSTAINED**. Let the filewrapper of Trademark Application Serial No. 4-2010-010494 be returned, together with a copy of this Decision, to the Bureau of Trademarks for information and appropriate action.

**SO ORDERED.**

Taguig City, 22 July 2013.

  
**ATTY. NATHANIEL S. AREVALO**  
Director IV  
Bureau of Legal Affairs

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