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Case Note on “Red Bull v. Bulldog”

Trade Mark Act – *Red Bull Ltd. v. Sun Mark Limited*

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1 Facts/Background Information

In the last two decades, the owner of the trademark “RED BULL” felt BULLied by many market players in Switzerland which registered signs with an alleged similarity to “RED BULL”. The Austrian energy drink producer therefore has initiated many proceedings to prevent its sign from a likelihood of confusion with other trade signs. It *inter alia* successfully banned the use or registration of “Energy Bull Dog”,¹ “RED BAT”,² “BLUEBULL (fig.)”³ and “RED DEVIL”⁴ but had to

¹ Decision of the Commercial Court of Zurich dated 22 December 1995 – *Red Bull/Energy Bull Dog I* (issued by a single judge in a preliminary injunction proceeding); Decision of the Federal Appeal Commission for Intellectual Property (MA-WI 41/99) dated 21 July 2000 – *Red Bull/Energy Bull Dog II* (approval of a risk of confusion between “Red Bull” and “Energy Bull Dog” for alcoholic and non-alcoholic beverages in classes 32 and 33).

² Decision of the Commercial Court of Zurich (HE010012) dated 19 October 2001– *Red Bull/Red Bat* (single judge decision in a preliminary injunction proceeding). The court granted a preliminary injunction and approved an infringement of the trademark “Red Bull” for energy drinks due to the use of “Red Bat” for identical goods.

³ Decision of the Federal Appeal Commission for Intellectual Property (MA-WI 30/02) dated 26 June 2003 – *Red Bull/Bluebull*. The competent commission refused the registration of the stylised trademark “Bluebull” for services in classes 35, financial services (class 36), 41 and 42 based on the earlier trademark “Red Bull” which gained protection for identical services.

⁴ Decision of the Federal Appeal Commission for Intellectual Property (MA-WI 02/06) dated 26 October 2006 – *Red Bull/Red Devil* (approval of a risk of confusion between “Red Bull (fig.)” and “Red Devil” for alcoholic and non-alcoholic beverages in classes 32 and 33 with the exception for “beer” and “wine”).

For a translation of the *Red Bull v. Bulldog* decision, see this issue of *IIC* at doi:[10.1007/s40319-014-0283-y](https://doi.org/10.1007/s40319-014-0283-y).

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tolerate the successful application of “STIERBRÄU”⁵ (in English “BULL BREW”). The latest battle was fought against “BULLDOG” with a different (final) outcome than in the opposition proceeding concerning the same trademark before OHIM in which a likelihood of confusion between the trademarks at stake has been denied.⁶

2 Relevant Consumers and Similarity of Goods

Firstly, the Swiss Federal Administrative Court defined the relevant public in order to assess the subject matter of a likelihood of confusion between “RED BULL” and “BULLDOG”. The court held that the goods in question, namely non-alcoholic drinks, are typical bulk products which consumers would purchase with minor watchfulness and a lower ability to see fine distinctions of the trade dress.⁷ The court then approved the identity of the goods for which the trademarks “RED BULL” and “BULLDOG” have been registered.⁸

3 Similarity of the Signs

In light of the less attentive consumers, the manner in which the Swiss Federal Administrative Court assessed the similarity of the signs must be considered as particularly technocratic. The court concluded that “RED BULL” and “BULLDOG” are visually and orally similar since both signs consist of two syllables and seven letters as well as the corresponding term “BULL” – though the position of the word is different in each trademark. The court, however, failed to elucidate that “RED BULL” is composed of two words, namely a noun (“BULL”) and an adjective (“RED”) while “BULLDOG” is a mere single-word noun. Less observant consumers will definitively and at first glance notice the difference between the signs with regard to the number and type of words and not recognise the identical quantity of syllables and letters of each trademark.

The elaboration of the conceptual similarity of the signs “RED BULL” and “BULLDOG” from the perspective of the rather unobservant consumer is not less artificial. In view of the Swiss Federal Administrative Court, consumers would translate the English terms “RED” and “BULL” into their native language and understand “bull” as the term for pubescent male cattle or, more generally, as a pubescent male animal. In colloquial German, “bull” would further have the meaning of “a beefy and strong man” or a policeman. “BULLDOG” by contrast

⁵ Decision of the Swiss Federal Administrative Court (B-1085/2008) dated 13 November 2008 – *Red Bull/Stierbräu*. In its overall assessment the court denied a likelihood of confusion due to the different meaning of the terms “STIERBRÄU” and “RED BULL”.

⁶ Cf. cons. 7.1; an appeal against the OHIM decision is currently pending before the General Court of the Court of Justice of the European Union (Case T-78/13).

⁷ Cons. 3.2 *et seq.*

⁸ Cons. 4.

would be understood as the name of a brawny English breed of dogs that was originally called in German “*Bullenbeisser*” (in English “bull biter”) and used for bullbaiting. Based on this assessment, the Swiss Federal Administrative Court also approved a similarity of the signs with regard to their meaning.

In summary, the appraisal of an oral, visual and conceptual similarity of the signs “RED BULL” and “BULLDOG” seems quite a stretch. Based on everyday experience, it is particularly questionable whether (Swiss) consumers translate well-established trademarks into their mother tongue at all. The consumer who associates the glorious trademark “NIKE” with the Greek goddess of victory appears as fictional as a customer who translates the Latin meaning of the famous trademark “Audi” (i.e. “listen!”).

4 Well-Known Trademark “RED BULL” and Approved Likelihood of Confusion

In its overall assessment regarding a likelihood of confusion between the trademarks “RED BULL” and “BULLDOG”, the Swiss Federal Administrative Court referred to the pertinent case law and outlined that the appellant’s trademark “RED BULL” has always been considered as a well-known trademark by Swiss courts, which is also particularly distinctive and fanciful for beverages. Due to the fact the adverse party integrated the dominant element “BULL” of the earlier trademark in its own sign, consumers would necessarily link the trademark “BULLDOG” with “RED BULL” and particularly expect a commercial relationship between the trademark holders. The meaning of “BULLDOG” (i.e. a breed of dogs) is after all not as predominant to prevent a risk of confusion of the respective trademarks.

The Swiss Federal Administrative Court’s decision contradicts the opposition decision delivered by OHIM. The outcome of the appeal proceedings before the General Court is therefore eagerly awaited. It will be of particular interest to find out whether the EU judges will assess the alleged trademark conflict from a consumer’s perspective in a more true-to-life manner. Though the average Swiss consumer is likely to perceive the trademarks “BULLDOG” with “RED BULL” similarly as his European neighbours, the Swiss Federal Administrative Court refused to take any deliberations of the European trademark authorities into consideration.⁹

⁹ Cons. 7.2.