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21

Swiss IP News We provide you with updates on new decisions, the relevant legislative process and other trends in the fields of intellectual property and unfair competition law from a Swiss perspective.

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Bulls vs. Dragons – Mystical Creatures and Energy Drinks: A Critical Analysis

In a recently published judgement, the Swiss Federal Administrative Court ruled in favour of energy drink manufacturer Red Bull and affirmed (indirect) likelihood of confusion between the trademarks 'RED BULL' and 'RED DRAGON'.

Background

Founded in 1984, Red Bull Ltd. has successfully built a global brand for energy drinks. Unsurprisingly, the company has taken a hard-line approach against trademark infringers. Early this year, the Swiss Federal Administrative Court ("Court") issued the latest 'RED BULL' decision. Previously, based on its word mark 'RED BULL', Red Bull had opposed the registration of 'RED DRAGON' for energy and other non-alcoholic drinks. The Swiss Federal Institute of Intellectual Property, as the lower instance, had approved the opposition considering that there was at least an indirect likelihood of confusion due to the signs' conceptual similarity. Reign Beverage Company, the holder of the 'RED DRAGON' mark, appealed but without success.

Decisions

In its decision of 11 January 2023 (B-444/2022), the Court ruled in favour of Red Bull. It concluded that there was a risk of indirect likelihood of confusion in relation to the claimed products (energy drinks and other non-alcoholic drinks).

With respect to the similarity of the signs, the Court held that all three word

elements 'RED', 'BULL' and 'DRAGON' formed part of the basic English vocabulary and were therefore known to the relevant Swiss public. Considering the common initial element 'RED' and the same sign structure (a colour adjective followed by a noun) and both nouns referring to a wild, strong animal and mythological creature, the Court affirmed the signs' similarity – although to a limited extent only.

On the likelihood of confusion, the Court attested 'RED BULL' enhanced distinctiveness for energy drinks and similar goods due to its notoriety and even declared this to be a fact known to the Court that did not need to be proven. It referred to various previous court decisions on the 'RED BULL' mark (BVGer B-1085-2008 'Red Bull/Stierbräu'; BVGer B-2766/2013 'Red Bull/Bulldog'). The Court did not assume the element 'RED' to be descriptive for energy drinks because it would neither be considered to describe the colour of the drink nor to otherwise create a relation to the product despite a possible association of the term with strength. Overall, the Court considered the identity of the first element 'RED' and the parallel structure of the opposed trademark sufficient to evoke a mental association with the

well-known 'RED BULL' trademark in consumers' mind. Therefore, and despite the reference to different animals or creatures, the Court assumed that there was a risk of wrongly assumed economic connections, resulting in an indirect likelihood of confusion. This finding was supported by the low level of attention of the relevant broad public; all that would remain in their memory was for both marks to feature a wild, red creature.

Comment

This latest decision seems to be the logical sequel to an ongoing series of 'RED BULL' decisions. However, it gives us the opportunity to question the Court's reasoning with respect to the identified indirect likelihood of confusion. Such reasoning is kept short in the decision. The Court merely pointed out the identical first element 'RED', the trademarks' common structure as well as the underlying motive of a wild, red creature. Together with the public's low level of attention and 'RED BULL's high level of brand awareness, the Court saw the risk of wrong associations and thus indirect likelihood of confusion to be fulfilled.

Recalling the purpose of the prohibition of the creation of an indirect likelihood of confusion – i.e., to protect the relevant public from false associations and thus to preserve the trademark's function as an indication of origin – sheds another light on the Court's findings. Wrong associations typically relate to the product range or economic connections of trademark holders. In the present decision, the Court saw the risk of wrongly assumed economic connections to be fulfilled. However, this seems questionable. 'RED DRAGON' does not fit into Red Bull's product range of exclusively 'RED BULL' branded products, making it very unlikely for the relevant public to believe in a new serial 'RED BULL' trademark. A business link

between the trademark holders as competitors seems even more unlikely. What appears to be likely though, is that Reign Beverage Company developed its trademark with the notoriously known 'RED BULL' mark in mind and with the intent to free ride on Red Bull's brand awareness and marketing success. As a behaviour not impeding the origin function of the 'RED BULL' mark but inadmissibly exploiting such mark's reputation, it would rather have to be analysed under Article 15 of the Trademark Act on famous marks and unfair competition law aspects. The purpose of these norms is the protection of trademarks beyond the realm of likelihood of confusion. Just because Article 15 of the Trademark Act and unfair competition law aspects can only be invoked in proceedings before civil courts and not in opposition proceedings, this does not justify the Court to overstretch the concept of indirect likelihood of confusion under Article 3 of the Trademark Act.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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