
To: PepsiCo, Inc. (kelly.lasaponara@pepsi.com)

Subject: U.S. TRADEMARK APPLICATION NO. 77550498 - AMP ENERGY LIGHTNING - N/A

Sent: 7/10/2011 9:03:25 PM

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**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

APPLICATION SERIAL NO. 77550498

MARK: AMP ENERGY LIGHTNING

77550498

CORRESPONDENT ADDRESS:

PAUL J REILLY
BAKER BOTTS LLP
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NEW YORK, NY 10112-4498

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APPLICANT: Pepsico, Inc.

**CORRESPONDENT'S REFERENCE/DOCKET
NO:** N/A

CORRESPONDENT E-MAIL ADDRESS:
 kelly.lasaponara@pepsi.com

OFFICE ACTION

ISSUE/MAILING DATE: 7/10/2011

Section 2(d) Likelihood of Confusion Refusal

Facts

A Final refusal under Section 2(d) of the Trademark Act has been issued in view of Registration No. 3476687 was issued on 1/29/2010. The applicant submitted a request for reconsideration and a notice of appeal on 7/28/10. The request for reconsideration was denied and the refusal was maintained and the application was sent to the Trademark Trial and Appeal Board. The applicant submitted its appeal brief but also filed an Allegation of Use and requested remand. The Board remanded the application to the examining attorney to consider the Amendment to Allege Use. The Amendment to Allege Use was found acceptable and approved and the application was returned to the Board. The applicant then filed a supplemental brief requesting remand to the examining attorney for consideration of new evidence. The Board has now remanded the application back to the examining attorney for consideration of this new evidence.

Objection to New Evidence

The applicant is seeking to submit new evidence from a variety of websites showing third party use of the term LIGHTENING in the marketplace in association with energy drinks. The applicant also submits new evidence in the form of Registration Nos. 3284223(FANTASY TF EXTREME ENERGY DRINKS), 3693105(DIME STORE PONY), 3407461(GOOD SODA), 3459234(STUNT JUICE), 2423158(ITALIAMO) and 3722918(ZODA) in order to show that energy drinks and other types of beverages are related.

The examining attorney objects to the inclusion the above referenced additional evidence with the appeal brief.

The record in an application must be complete prior to the filing of an appeal. Because the proposed evidence was untimely submitted, this evidence should not be considered. 37 C.F.R. §2.142(d); *In re Fitch IBCA Inc.*, 64 USPQ2d 1058, 1059 n.2 (TTAB 2002); *In re Trans Cont'l Records Inc.*, 62 USPQ2d 1541, 1541 n.2 (TTAB 2002); TBMP §§1203.02(e), 1207.01; TMEP §710.01(c).

The applicant indicates that it was just made aware of the new third party evidence. However, the registrations would have been available during the prosecution of the application prior to the appeal and the websites are also the type of evidence that would have been available to the applicant during the prosecution of the application and prior to the filing of an appeal. One of the websites even indicates that it has been around since 2008 and at least two of the websites submitted as evidence are from a well-known company and well-known personality that have been around long enough that this evidence or the like was available prior to appeal.

Furthermore, the referenced registrations submitted as new evidence were not properly of record. They were simply referenced in an argument. To make registrations and other similar matter proper evidence of record, soft copies of the registrations or the complete electronic equivalent (*i.e.*, printouts of the registrations taken from the electronic search records of the United States Patent and Trademark Office) must be submitted *before* the applicant files an appeal. *In Re JT Tobacconists*, 59 USPQ2d 1080, 1081 n. 2 (TTAB 2001).

The applicant has also submitted new evidence of Registration No. 3858749 for the mark USAIN BOLT . . . OF LIGHTENING and design for “energy drinks,” among many other things. While the mark was not registered until after the applicant’s appeal was filed, the applicant did properly submit a copy of the application for this now registered mark during the prosecution of its application. Since this evidence was not submitted prior to appeal, the examining attorney objects to its inclusion.

However, if Registration No. 3858749 is allowed as evidence, the examining attorney would request that the additional rebuttal evidence also be allowed in order to distinguish this evidence from the application at hand and the Section 2(d) cite. See the attached evidence from www.en.wikipedia.org, www.ibtimes.com and www.guardian.co.uk showing that Usain Bolt is a famous runner whose nickname is Lightning Bolt. The use of LIGHTENING in the referenced mark would be associated with Mr. Bolt and his “energy” and speed when used in association with an energy drink and could be distinguished from the applicant’s mark and other possible marks containing the word LIGHTENING.

The applicant’s and registrant’s goods are identical. Both marks contain the identical wording LIGHTENING. The word LIGHTENING is the only source indicating portion of the registered mark and the additional wording in the applicant’s mark is either generic for the type of goods, *i.e.*, ENERGY or suggestive, *i.e.*, AMP. The dominant part of both marks is the identical wording LIGHTENING. The marks convey a similar idea or notion of the products.

Marks may be confusingly similar in appearance where there are similar terms or phrases or similar parts of terms or phrases appearing in both applicant’s and registrant’s mark. *See Crocker Nat’l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689 (TTAB 1986), *aff’d sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat’l Ass’n*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987) (COMMCASH and COMMUNICASH); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986) (21 CLUB and “21” CLUB (stylized)); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (CONFIRM and CONFIRMCELLS); *In re Collegian Sportswear Inc.*, 224 USPQ 174 (TTAB 1984) (COLLEGIAN OF CALIFORNIA and COLLEGIENNE); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983) (MILTRON and MILLTRONICS); *In re BASF A.G.*, 189 USPQ 424 (TTAB 1975) (LUTEXAL and LUTEX); TMEP §1207.01(b)(ii)-(iii).

The section 2(d) refusal is maintained. The application is remanded back to the Board.

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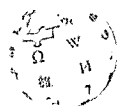
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All informal e-mail communications relevant to this application will be placed in the official application record.

WHO MUST SIGN THE RESPONSE: It must be personally signed by an individual applicant or someone with legal authority to bind an applicant (i.e., a corporate officer, a general partner, all joint applicants). If an applicant is represented by an attorney, the attorney must sign the response.

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Usain St. Leo Bolt, OJ, C.D. (nicknamed **Lightning Bolt**, pronounced /ˈjuːseɪn/^[R] born 21 August 1986), is a Jamaican sprinter and a three-time World and Olympic gold medalist. He is the world record and Olympic record holder in the 100 metres, the 200 metres and (along with his teammates) the 4 × 100 metres relay. He is the reigning World and Olympic champion in these three events.

Bolt distinguished himself with a 200 m gold medal at the 2002 World Junior Championships, making him the competition's youngest-ever gold medalist. In 2004, at the CARIFTA Games, he became the first junior sprinter to run the 200 m in under 20 seconds with a time of 19.93 s, breaking the previous world junior record held by Lorenzo Daniel by more than one tenth of a second. He turned professional in 2004, and although he competed at the 2004 Summer Olympics, he missed most of the next two seasons due to injuries. In 2007, he surpassed Don Quarrie's 200 m Jamaican record with a run of 19.75 s.

His 2008 season began with his first world record performance—a 100 m world record of 9.72 s—and culminated in world and Olympic records in both the 100 m and 200 m events at the 2008 Beijing Summer Olympics. He ran 9.69 s for the 100 m and 19.30 s in the 200 m, and also set a 4×100 m relay record of 37.10 s with the Jamaican team. This made him the first man to win three sprinting events at a single Olympics since Carl Lewis in 1984, and the first man to set world records in all three at a single Olympics. The following year he further lowered his own 100 m and 200 m world records to 9.58 s and 19.19 s respectively at the 2009 World Championships.^[9] This made him the first man to hold both the 100 and 200 m world and Olympic titles at the same time.

His 2009 record breaking margin over 100 m is the highest since the start of digital time measurements.^[10] His achievements in sprinting have earned him the media nickname "Lightning Bolt",^[11] and awards including the *IAAF World Athlete of the Year*, *Track & Field Athlete of the Year*, and *Laureus Sportsman of the Year*.

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Usain Bolt



Bolt at Berlin World Championships 2009

Personal information

Nickname(s) Lightning Bolt,
World's fastest man

Nationality Jamaican

Born 21 August 1986 (age 24)^[1]
Trelawny, Jamaica^[2]

Height 1.95 m (6 ft 5 in)^[2]

Weight 93.9 kg (207 lb; 14.79 st)^[2]

Sport Track and field

Event(s) 100m, 200m, 400m, 4×100m

Club Racers Track Club

Achievements and titles

Personal best **100m:** 9.58 s (WR, Berlin 2009)^[4]
(s) **150m:** 14.35 s (WB,

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