

## Concerning IP

How can a supplement company protect its trademarks, trade dress & patents

by Erica W. Stump, Esq.

Intellectual property (IP) is often a company's most valuable asset. The trademark 'Coca Cola' has been estimated to hold a value up to \$70 billion. To set the stage here, IP comes in several forms—patents, trademarks, and copyrights—and IP can include trade secrets. A patent is a limited duration property right relating to an invention, granted by the **Patent & Trademark Office (PTO)** in exchange for public disclosure of the invention. A trademark is a word, phrase, symbol, and/or design that identifies and distinguishes the source of the goods of one party from those of others. A service mark is a word, phrase, symbol, and/or design that identifies and distinguishes the source of a service rather than goods. The term "trademark" is often used to refer to both trademarks and service marks.

Trade dress refers to the "dressing" of a product, or the characteristics of the visual appearance of a product or its packaging that signify the source of the product to consumers. A copyright protects works of authorship, such as writings, music, and works of art that have been tangibly expressed. And finally, a trade secret is a formula, practice, process, design, instrument, pattern, or compilation of information which is not generally known or reasonably ascertainable, by which a business can obtain an economic advantage over competitors or customers.

How does a dietary supplement company protect its IP? Trade secrets are difficult to protect, as there is no registration process or protection for trade secrets. Trademarks, trade dress, and patents can be registered with the PTO and copyrights can be registered with the **Library of Congress**. Registration provides several advantages—public notice of your claim of ownership of the mark; a legal presumption of your ownership of the mark and your exclusive right to use the mark nationwide on or in connection with the goods/services listed in the registration; the use of the U.S. registration as a basis to obtain registration in foreign countries; and the right to use the federal registration symbol ®. However, registration of a trademark does not mean that there is no trademark (or trade dress) infringement. It's possible that there is a prior common law user of a confusingly similar trademark, as we will see below.

### Trademarks & trade dress

The **Lanham Act** prohibits a number of activities, including trademark and trade dress infringement. Litigation under the Lanham Act is filed in federal court. Trademark law protects a trademark owner's exclusive right to use a trademark when use of the trademark by another would be likely to cause consumer confusion as to the source or origin of goods. The Lanham Act provides a cause of action or trademark infringement for both registered and unregistered marks. To establish a violation of the Lanham Act for trademark infringement, the plaintiff must demonstrate that (1) it has a valid and legally protectable mark; (2) it owns the mark; and (3) the defendant's use of the mark to identify goods or services causes a

likelihood of confusion. In evaluating whether there is a likelihood of confusion between two marks, the District Courts in the Eleventh Circuit (the applicable circuit in the **MusclePharm** and **VPX** cases below) apply a multifactor test, evaluating seven factors pertaining to strength, similarity, sales methods, intent, and confusion concerning the marks involved.

MusclePharm, LLC filed a lawsuit for trademark infringement for its trademark ENERJEL, an energy product sold in a gel packet, against **Fuse Sports** for its use of ENERJEL, a dietary supplement intended to provide energy. *MusclePharm, LLC v. Fuse Science, Inc.*, Case No. 1:12-CV-21065 (Southern District of Florida). Is there a likelihood of confusion? The trademarks are ENERJEL and ENERJEL, which are very similar, if not the same, for trademark purposes. The use of the 'g' versus a 'j' is a minor difference in the appearance of the marks. Moreover, they are phonetically equivalent. The goods are both intended to provide energy. MusclePharm's product was an oral product, whereas Fuse's product was topical. How similar are the goods? We will not know how a court would rule because the case was dismissed as the parties reached a settlement.



Disputes over intellectual property pertaining to dietary supplements often involve both trademark and trade dress infringement. An example of this is Vital Pharmaceuticals (VPX) sued for trademark and trade dress infringement by **Red Bull, GMBH** ("Red Bull") for its RED BULL energy drink. *Vital Pharmaceuticals, Inc. v. Red Bull, GMBH*, Case No. 1:05-CV-61704 (Southern District of Florida). The trademarks in this case were REDLINE and RED BULL, both for energy drinks. The trade dress claim concerned VPX's use of a beverage container colored red, white and blue, which Red Bull claimed was confusingly similar to its red, blue and silver cans. Is there a likelihood of confusion between the two? Both marks contain the word "red," however, the marks otherwise differ in appearance and sound. Additionally, REDLINE creates a commercial impression of a dietary supplement or energy drink that takes it to the limit, whereas RED BULL has no such commercial impression. The goods in this case were very similar. The parties reached a settlement before a determination by the Court, but VPX continues to use the REDLINE trademark and trade dress in the same form.



Another legal battle for VPX concerns defense of a trademark and trade dress infringement case brought by **CytoSport, LLC** for infringement of MUSCLE MILK. VPX had launched a ready-to-drink protein beverage in a tetra pak with the trademark MUSCLE POWER. The court granted CytoSport an injunction, ceasing VPX's use of the MUSCLE POWER trademark and the accompanying trade dress. This involved a situation where the PTO had allowed the mark—no office action citing CytoSport's MUSCLE MILK registration was issued against the MUSCLE POWER trademark application. Is there a likelihood of confusion? Clearly CytoSport does not own the word "muscle," but the court found a likelihood of confusion between MUSCLE POWER and MUSCLE MILK. The court also considered the trade dress and other pertinent factors, including the similarity of the products, trade channels, advertising, etc. This case is a reminder that simply because a company's trademark is approved by the PTO, it's not "in the clear" and could still be sued for trademark infringement.



### Trademarks as slogans

Slogans may also be protected as trademarks and a slogan may infringe an owner's trademark rights. MusclePharm was sued for its use of the tag line or slogan 'TRAIN LIKE AN UNCHAINED BEAST' by **Beast Sports** for alleged infringement of its BEAST trademarks for dietary supplements. The slogan appeared on MusclePharm's ASSAULT product, depicted below. Is there a likelihood of confusion between the use of the mark as a brand or product name and a slogan? The procedural posture at the PTO is interesting, because the PTO did not cite Beast Sports' registered trademarks against

the TRAIN LIKE AN UNCHAINED BEAST application, but once it was published, Beast Sports opposed the application. Litigation ensued and the case was later dismissed after the parties reached a settlement. What's the takeaway from this case? Slogans are trademarks too and can infringe third parties' rights.



### Patents

At this point, most people in the dietary supplement industry know of the patent litigation related to **Thermolife's** many patents, including creatine nitrate and arginine. Ron Kramer of Thermolife vigorously protects his intellectual property, as do other patent holders. This is a reminder and word of caution: Do not create and adopt a formula without searching to make sure that you do not infringe any third-parties' patents.

### The bottom line

Before you launch a new product or use a new trademark, consult with a professional to perform a search to make sure the IP you intend to use is available or, at a minimum, take advantage of the PTO's free resources online. If the IP appears to be available, file an application to cover the patent, trademark and/or trade dress. Yes, trade dress is entitled to registration with the PTO. File a copyright with the Library of Congress. Protect your trade secrets by executing a nondisclosure agreement before you share that information.

Keep in mind, even with a search or approval from the PTO, there is no guarantee you won't wind up in litigation, as illustrated above. If you own IP, especially trademarks, police your IP. If you fail to protect your trademarks, you can lose your rights to them and/or your trademarks may become weaker. Third-party services can be hired to "watch" your trademarks. If you are sued for infringement, don't panic. Although trademark litigation can be costly, many attorneys will work with you on a budget and the Lanham Act provides for the recovery of attorneys fees in exceptional cases. And try to remember—  
infringement is the sincerest form of flattery.



Erica W. Stump, Esq.  
[erica@ericawstump.com](mailto:erica@ericawstump.com)