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Red Bull Packaging Trade Dress Approved by USPTO

January 16, 2012 by Steve Baird



To assist in curbing the knock-off problem depicted above, Austrian-based Red Bull is on the move with its recent attempt to register -- as a [non-traditional trademark](#) in the U.S. -- the following design in connection with energy drinks, soft drinks, and sports drinks:



Here is the description of the mark [approved by the USPTO Examining Attorney for publication in a couple of weeks February 7, 2012](#): "The color(s) blue and silver is/are claimed as a feature of the



mark. The mark consists of the overall appearance of the trade dress for the packaging of the goods comprised of a geometric pattern of blue and silver quadrilaterals above a second row of alternating silver and blue quadrilaterals such that a blue quadrilateral is above a silver quadrilateral, and a silver quadrilateral is above a blue quadrilateral. Similarly, below the two rows are two narrow bands of quadrilaterals in blue and silver such that a blue segment is below a silver quadrilateral, and a silver segment is below a blue quadrilateral."

Red Bull was able to satisfy the USPTO Examining Attorney in a 140-page Office Action Response that the circumstantial evidence of record (summarized below) proves acquired distinctiveness in the "widely used, iconic, and well-known trade dress":

1. Substantial sales of Red Bull Energy Drink: "In excess of 1.4 Billion cans and over \$1.8 Billion dollars in 2010 alone, with similarly massive sales over the previous 7 years";
2. Market share of "roughly 40%" and the "largest share of the energy drink market for at least the past eight years";
3. "Very substantial marketing and promotional expenses" of more than \$2.6 Billion between 2003-2010;
4. Representative samples of advertising in the U.S. over the past fifteen years; and
5. Third party evidence and "infringement" examples showing the trade dress is recognized.

Actually, one of the most interesting aspects of the prosecution history is that the entire showing of acquired distinctiveness was made through a detailed 8-page declaration *signed by outside trademark counsel* in the U.S. (also attaching more than 120-pages of photos and other evidence), making him a fact witness for the life of any resulting registration.

[We've raised concerns before about trademark counsel signing verified statements](#), how hard would you have tried to have someone closer to the facts get their horns on to sign the Red Bull declaration?

