

## The Parties and Courts clash over whether the term ZERO is an unregistrable generic term for beverages

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The Coca-Cola Company filed a number of applications to register trademarks for various soft drinks and sports drinks. All of these trademarks contained the term ZERO as an element. The Examining Attorney viewed ZERO as merely describing a feature of the goods, and accordingly required Coke to disclaim the exclusive right to the term ZERO apart from the marks as a whole. Coke refused the disclaimer and submitted that each of its marks had acquired distinctiveness. The Examining Attorney accepted that submission and passed the applications to be published for opposition.

Royal Crown Company, Inc. and Dr Pepper/Seven Up, Inc. (together "Royal Crown") opposed, claiming that the term ZERO, used by many beverage companies, was merely descriptive of, or generic for, attributes of soft drinks (and sports drinks) containing minimal or no calories, and thus could not indicate source. The only relief Royal Crown requested was that Coke be required to disclaim exclusive rights in the term ZERO.

This started a chain of events that may seem very technical, but the parties and courts are battling them out.

The Trademark Trial and Appeal Board concluded that Royal Crown had not demonstrated that ZERO was generic because it had not shown that the public used ZERO as the common descriptive name for soft drinks (or sports drinks). The TTAB also found that the magnitude of Coke's use meant that its use of ZERO was substantially exclusive use as compared to third party uses, so Coke had acquired source distinctiveness ("secondary meaning") in that descriptive term and was not required to disclaim it.

Royal Crown appealed to the United States Court of Appeals for the Federal Circuit. The CAFC reversed and remanded, holding that the TTAB had applied the wrong standards. These included, among other things:

1. In finding that ZERO was not generic, the TTAB had failed to examine whether the public *understood* ZERO to be the common descriptive (generic) name for a key aspect of a subset of the soft drink genus, even if the public did not *use* the term for the genus or that subset.
2. In finding that ZERO had acquired secondary meaning, the TTAB also had failed to determine the degree of descriptiveness of the term ZERO on the scale ranging from generic to merely descriptive, because a more descriptive term requires more evidence of secondary meaning. Further, the TTAB had erred in considering a survey asking consumers whether they *associated* ZERO with the products of one or more companies rather than testing what the consumers *understood* by the term ZERO in the context of referring to the products.

Esoteric arguments about how to define generic terms, and how to define secondary meaning for merely descriptive terms, have been raging for decades. It is fun to see them being fought over consumer product trademarks in such widespread use. We can look forward to further decisions in this case.

***Royal Crown Co., Inc. v. The Coca-Cola Co., Case No. 2016-2375, 892 F.3d 1358 (C.A.F.C. June 20, 2018).*** On September 27, 2018, the TTAB resumed this proceeding and issued a briefing schedule so the parties could discuss the critical evidence of record relevant to the legal standards set forth in the CAFC.