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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 79147140

MARK: E SPEED



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: KTM-Sportmotorcycle AG

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EXAMINING ATTORNEY'S APPEAL BRIEF

INTERNATIONAL REGISTRATION NO. 1203491

Applicant has appealed the Trademark Examining Attorney's final refusal to register the mark E SPEED on the Principal Register on the grounds of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d).

FACTS

On May 22, 2014, KTM-Sportmotorcycle AG, an Austrian public limited company and holder of an Austrian trademark registration filed a Request For Extension of Protection of registration for the mark E SPEED in the United States under Section 66(a) of the Trademark Act, 15 U.S.C. §1141. The application was based on the filing of an international registration on September 11, 2013. The application was first filed in Austria on May 22, 2013.

On June 4, 2014, the examining attorney refused registration of the mark under Section 2(d) based on likelihood of confusion with U.S. Registration No. 4192491 for the mark ESPEED and issued a requirement requesting further clarification of the identification of goods.

On December 4, 2014, applicant amended the identification of goods and argued that the Section 2(d) refusal be withdrawn based on the amendment to the identification.

On December 30, 2014, the examining attorney issued a final office action maintaining the refusal to register the mark under Section 2(d). The requirement for an acceptable identification of goods was also continued and maintained.

On June 22, 2015, the applicant filed a Notice of Appeal with the Trademark Trial and Appeal Board (the "TTAB" or "Board").

On August 21, 2015, applicant filed a Voluntary Amendment with the law office in lieu of a request for reconsideration. Applicant simultaneously filed an Appeal Brief with the TTAB. Jurisdiction of the application was formally restored to the examining attorney on August 24, 2015.

On September 30, 2015, the examining attorney responded to applicant's Voluntary Amendment by "denying the request for reconsideration." The refusal to register the mark under Section 2(d) was maintained for Classes 007 and 012 and the application was returned to the TTAB for resumption of the proceedings.

On October 5, 2015, the Board suspended further proceedings on the case and voided the Office Action dated September 30, 2015. The Board remanded the application to the examining attorney with instructions to limit the submission of additional evidence to marketplace evidence directly pertaining to the issue of likelihood of confusion between the cited registration and goods set forth in the Voluntary Amendment.

On October 22, 2015, the Examining Attorney denied the applicant's request for reconsideration. The examining attorney limited the discussion of the Section 2(d) refusal to the issue of likelihood of confusion between the goods in the Voluntary Amendment and the goods in the cited registration.

The proceedings resumed on October 26, 2015. The applicant waived its right to file a supplemental appeal brief on December 28, 2015. The appeal was resumed on January 23, 2016.

ISSUES ON APPEAL

The issues on appeal are (i) whether applicant's mark so resembles the mark in Registration No. 4192491, as to be likely to cause confusion, to cause mistake or to deceive; and (ii) whether the goods at issue are similar or commercially related or travel in the same trade channels. Trademark Act Section 2(d), 15 U.S.C. Section 1052(d).

ARGUMENTS

A. APPLICANT'S MARK, WHEN USED ON OR IN CONNECTION WITH THE IDENTIFIED GOODS, SO RESEMBLES THE MARK IN U.S. REGISTRATION NO. 4192491 AS TO BE LIKELY TO CAUSE CONFUSION.

The examining attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), because applicant's mark, when used on or in connection with the identified goods, so resembles the mark in U.S. Registration No. 4192491 as to be likely to cause confusion, to cause mistake or to deceive. TMEP Section 1207 *et. Seq.*

The law applicable to this refusal is well settled. Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely that a potential consumer would be confused or mistaken or deceived as to the source of the goods of the applicant and registrant. *See* 15 U.S.C. §1052(d). The court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563

(C.C.P.A. 1973) listed the principal factors to be considered when determining whether there is a likelihood of confusion under Section 2(d). See TMEP §1207.01. However, not all of the factors are necessarily relevant or of equal weight, and any one factor may be dominant in a given case, depending upon the evidence of record. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see *In re E. I. du Pont*, 476 F.2d at 1361-62, 177 USPQ at 567. In this case, the following factors are the most relevant: similarity of the marks, commercial relatedness of the goods, and similarity of trade channels of the goods and services. See *In re Opus One, Inc.*, 60 USPQ2d 1812 (TTAB 2001); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593 (TTAB 1999); *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999); TMEP §§1207.01 *et seq.*

In a likelihood of confusion determination, the marks in their entireties are compared for similarities in appearance, sound, connotation, and commercial impression. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973); TMEP §1207.01(b)-(b)(v). In the present case, applicant's mark is confusingly similar to registrant's mark because the marks are similar in sound, meaning and appearance and overall commercial impression.

When comparing marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014); TMEP §1207.01(b). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific

impression of trademarks. *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049, (TTAB 2014); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); TMEP §1207.01(b).

The compared marks are identical except for a slight difference in appearance between registrant’s mark, which appears as a compound word with no space separating the words, that is, ESPEED; and applicant’s mark, which appears as multiple words with space separating the words, that is, E SPEED. As such, the marks are identical in sound and virtually identical in appearance, and are thus confusingly similar for the purposes of determining likelihood of confusion. *See, e.g., Seaguard Corp. v. Seaward Int’l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (“[T]he marks ‘SEAGUARD’ and ‘SEA GUARD’ are, in contemplation of law, identical [internal citation omitted].”); *In re Best W. Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (“There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical”); *Stock Pot, Inc., v. Stockpot Rest., Inc.*, 220 USPQ 52, 52 (TTAB 1983), *aff’d* 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) (“There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical.”).

The final point of comparison in determining likelihood of confusion is assessing the similarities in meaning and overall commercial impression created by the use of particular wording in the respective marks. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), citing *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). The marks E SPEED and ESPEED are arbitrary terms that have no meaning or significance in relation to the goods. The connotations of the marks are identical when

applied to the respective goods. Moreover, the applicant concedes that the marks create similar commercial impressions. See Pg. 3 of applicant's Appeal Brief filed on August 21, 2015.

The marks at issue are identical in sound and meaning and virtually identical in appearance; therefore, the marks are confusingly similar.

B. THE GOODS ARE CLOSELY RELATED SUCH THAT THERE EXISTS A LIKELIHOOD OF CONFUSION UNDER SECTION 2(D) OF THE TRADEMARK ACT.

The second step in determining whether there is a likelihood of confusion is to compare the goods at issue to determine whether they are similar or commercially related or travel in the same trade channels. See *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002); *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001); TMEP §§1207.01, 1207.01(a)(vi).

Where the marks of the respective parties are virtually identical, the relationship between the relevant goods need not be as close to support a finding of likelihood of confusion. See *In re Shell Oil Co.*, 992

F.2d 1204, 1207, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *In re House Beer, LLC*, 114 USPQ2d 1073, 1077 (TTAB 2015); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202 (TTAB 2009); TMEP §1207.01(a).

Applicant, KTM-Sportmotorcycle, builds race ready motorcycles for competitive and recreational riding. Applicant applies the mark to “electric motor powered two-wheeled vehicles and electrically powered two-wheeled vehicles and parts and accessories therefor, namely motors, tires, wheels, wheel rims, brake linings, brake discs, aero-dynamic fairings, luggage carriers for motorcycles cases for luggage adapted for use with motorcycles, transport cases adapted for use with motorcycles, saddlebags adapted for use with bicycles and motorcycles, tank bags adapted for use with motorcycles, stands, mudguards, spoilers, after body, rearview mirrors, fuel tank caps, fuel tanks, bicycle chains, motorcycle seats; fans and cylinders for motors for two-wheeled vehicles; silencers for motors and engines for two-wheeled vehicles; exhausts, cylinder heads for engines for two-wheeled vehicles; and, ignition devices for two-wheeled vehicles in the nature of ignition covers.”

Applicant not only markets its motorcycles as vehicles designed for competitive racing, but also “recreational riding” and “street motorcycle production.” Therefore, the goods may be purchased by racing enthusiasts as well as recreational riders. See evidence from www.ktm.com, attached as pp. 2-10 of the Office Action dated December 30, 2014, which shows that applicant manufactures motorcycles and motorcycle parts including engine parts, seats, brakes, wheels, travel cases and foot-rests.

An overview of applicant’s business is discussed in articles from www.pseps.com, www.wikipedia.com and www.buisnessweek.com, attached as pp. 11-17 and pp. 24-29 of the Office Action dated December

30, 2014. This evidence shows that applicant's goods include recreational vehicles as well as vehicles that are custom manufactured for racing.

Registrant, Neumayer Tekfor Holding, manufactures parts and accessories for vehicle engines, transmissions and drivelines. Registrant applies the mark to "automotive parts, namely, air pumps, hybrid drives, namely, engines for land vehicles; engine parts for land vehicles; units for the drive train made therefrom, namely, wheel hubs, wheel bearings and parts thereof; drive shafts and gear wheels and units assembled thereof, namely, gear wheel units and gear wheels; shifting claws, namely, gear shifts; connecting rods for land vehicles, except for engine parts, in particular from steel and ceramics, in particular one-piece and composite connecting rods; engines for automobiles, in particular lightweight internal combustion engines; units for drive train of automobiles, namely, wheel hubs, wheel bearings and bearings; longitudinal shafts, namely, drive shafts; side shafts, namely, drive shafts; torsion shafts, namely, drive shafts, all for automobiles and parts thereof; side shafts, namely, drive shafts for land vehicles, and torsion shafts, namely, drive shafts for land vehicles; automobile transmissions and parts thereof, in particular shafts, namely, drive shafts for land vehicles and gear wheels; synchronesh transmissions, shifting claws, namely, gear wheels, transmissions for electric drives; cam shafts and cam covers for vehicles; crank shafts for use in connection with motor vehicles; composite and assembled crankshafts for use in connection with motor vehicles; pistons for use in connection with motor vehicles; metallic fasteners, in particular nuts, locking nuts, safety nuts, special nuts, in particular for the drive train as well as for engine and chassis applications, wheel nuts, axle control nuts, wheel central locking elements in the nature of nuts, quick clamping parts in the nature of nuts."

From the identification of goods, it is clear that many of registrant's goods are parts for "land vehicles" or "motor vehicles." See registrant's website www.neumayer-tekfor.com, attached as pp. 18-23 to the Office Action dated December 30, 2014.

Applicant argues that the goods in the application are not closely related to the goods in the cited registration because the extrinsic evidence of actual use does not show that the applicant manufactures goods for land vehicles or automobiles. According to the applicant, the disparity between its race-ready motorcycles and registrant's land vehicles/automobiles proves that the goods are not related. The examining attorney respectfully disagrees.

The goods need not be identical or even competitive to find a likelihood of confusion. See *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) ("[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods."); TMEP §1207.01(a)(i). They need only be "related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods] emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i).

It is well established that the question of likelihood of confusion is determined based on the description of the goods stated in the application and registration at issue, not on extrinsic evidence of actual use.

See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1323, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)).

In the present case, the registrant uses broad wording to describe the goods. Unrestricted and broad identifications are presumed to encompass all goods of the type described. See *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

Specifically, registrant's identification of goods covers parts and accessories for "vehicles" "motor vehicles" and "land vehicles." As such, registrant's goods encompass parts and accessories for all types of land vehicles, including those for applicant's identified "electrically powered two-wheeled vehicles" and "electric motor powered two-wheeled vehicles."

Likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods in the application or registration. See *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1398 (TTAB 2007). In the present case, registrant's "engines for land vehicles" are legally identical to applicant's "engines for two-wheeled vehicles." Therefore, the use of the respective marks in connection with these goods alone is likely to result in confusion as to the source or provider of the goods.

The Board has previously recognized that in situations where similar marks are used in connection with parts and/or accessories for land vehicles, confusion would be likely. See, e.g., *In re Delbar Prods., Inc.*, 217 USPQ 859, 861 (TTAB 1981) (holding ULTRA for outside mounted vehicle mirrors likely to be confused with ULTRA and design for automobile parts, namely pistons and pins, valves, water pumps, oil pumps, universal joints, gears, axle shafts, hydraulic brake parts, automatic transmission repair kits and parts, engine bearings and jacks); *In re Red Diamond Battery Co.*, 203 USPQ 472, 472-73 (TTAB 1979) (holding RED DIAMOND for storage batteries likely to be confused with DIAMOND for pneumatic rubber and vehicle tires); *In re Trelleborgs Gummifabriks Aktiebolag*, 189 USPQ 106, 107-08 (TTAB 1975) (holding T and design for, inter alia, hoses, namely rubber hoses and inner tubes for tires and pneumatic, semisolid and solid tires likely to be confused with T and design for, inter alia, motor oil, oil additives and fuel additives); *In re Magic Muffler Serv., Inc.*, 184 USPQ 125, 126 (TTAB 1974) (holding MAGIC for vehicle parts, namely mufflers, likely to be confused with MAGIC for motors for motor vehicles).

Although there is no “per se” rule which states that vehicle parts and accessories are related, it is well established that determinations of relatedness supported by extrinsic evidence strongly favor a finding that these types of goods are closely related.

The evidence of record establishes that many automobile companies, including Honda, BMW, Suzuki and Yamaha manufacture parts for land vehicles *including* two-wheeled vehicles, as well as parts and accessories for two-wheeled vehicles. Potential purchasers are accustomed to seeing the same marks used in connection with these types of goods and consumers are aware that the goods emanate from a

single source. Therefore, the use of nearly identical marks in connection with these types of goods is likely to result in confusion.

The evidence of record shows that Honda manufactures two-wheeled vehicles including electric scooters, motorcycles and sport all-terrain vehicles (ATVs) as well as parts and accessories for these vehicles. Honda also manufactures automobiles and parts and accessories for automobiles.

- (i) See evidence from www.bikebandit.com attached on pp. 5-6 of the Office Action dated June 4, 2014 which shows that Honda manufactures motorcycle parts.
- (ii) See evidence from www.honda.com attached on pp. 7 of the Office Action dated June 4, 2014 which shows that Honda also manufactures automobiles, two-wheeled vehicles in the nature of scooters, engines for land vehicles and automotive parts.
- (iii) See evidence from www.hondaparts-direct.com attached as pg. 8 of the Office Action dated June 4, 2014 which shows that Honda manufactures motorcycle, cruiser, scooter and ATV parts and accessories.
- (iv) See evidence from www.estore.honda.com attached as pg. 9 to the Office action dated June 4, 2014 which shows that Honda manufactures automobile parts and accessories.
- (v) See evidence from www.worldhonda.com attached as pp. 15-16 to the Office Action dated June 4, 2014 which shows that Honda manufactures electric scooters.

- (vi) See evidence from www.automobiles.honda.com attached as pp. 22-23 to the Office Action dated June 4, 2014 which shows that Honda manufactures electric motor powered two-wheeled vehicles.
- (vii) See evidence from www.motosport.com attached as pp. 2-3 to the Office Action dated October 22, 2015 which shows that Honda manufactures ignition covers for two-wheeled vehicles in the nature of dirt bikes.
- (viii) See evidence from www.sonshonda.com attached as pp. 5-7 to the Office Action dated October 22, 2015 which shows that Honda manufactures automobile transmissions.
- (ix) See evidence from www.bikebandit.com attached as pp. 8-9 to the Office Action dated October 22, 2015 which shows that Honda manufactures ignition covers and metal bolts for two-wheeled vehicles.
- (x) See evidence from www.bernardiparts.com attached as pp. 10-16 to the Office Acton dated October 22, 2015 which shows that Honda manufactures structural and engine parts for two-wheeled motorcycles.

The evidence of record also shows that BWM manufactures two-wheeled vehicles in the nature of motorcycles and parts and accessories for two-wheeled vehicles including luggage racks. BMW is also well-known in the marketplace for manufacturing automobile parts.

- (i) See evidence from www.autopartwarehouse.com attached as pp. 10-14 to the Office Action dated June 4, 2014 which shows that BMW manufactures

automobile structural and engine parts for traditional and alternate-energy powered vehicles.

- (ii) See evidence from www.bmw.com attached as pp. 24-28 of the Office Action dated June 4, 2014 which shows that BMW makes electric vehicles.
- (iii) See evidence from www.bmw.com and www.ascycles.com attached as pp. 29-43 of the Office Action dated June 4, 2014 which shows that BMW makes luggage carriers for automobiles as well as luggage racks for motorcycles, cases for luggage adapted for use with motorcycles, transport cases adapted for use with motorcycles and saddlebags adapted for use with motorcycles.

The evidence of record shows that Suzuki manufactures automobile parts and two-wheeled vehicles including scooters, motorcycles and racing bikes.

- (i) See evidence from www.suzukicycles.com attached as pp. 17-19 to the Office Action dated June 4, 2014 which shows that Suzuki manufactures two-wheeled vehicles in the nature of scooters and motorcycles and parts and accessories for these vehicles.
- (ii) See evidence from www.suzukicarparts.com attached as pp. 20-21 to the Office Action dated June 4, 2014 and pp. 17-22 of the Office Action dated October 22, 2015 which shows that Suzuki manufactures automobiles and parts and accessories for land vehicles.

- (iii) See evidence from www.powersportsnetwork.com attached as pg. 4 of the Office Action dated October 22, 2015 which shows that Suzuki manufactures ignition covers for two-wheeled vehicles.
- (iv) See evidence from www.suzukiautomotiveparts.com attached as pp. 15-16 to the Office Acton dated October 22, 2015 which shows that Suzuki manufactures structural parts and engine parts for automobiles including transmissions, cam shafts and gears.
- (v) See evidence from www.jpccycles.com attached as pp. 42-51 of the Office Action dated December 30, 2014 which shows that Suzuki manufactures motorcycle parts.
- (vi) See evidence from www.suzukicarparts.com attached as pp. 52-54 of the Office Action dated December 30, 2014 which shows that Suzuki manufactures automobile parts.

Finally, the evidence of record shows that Yamaha manufactures motorcycles, sports bikes, street bikes, motocross bikes. Yamaha also manufactures vehicle engines for use by other manufactures.

The evidence of record includes marketplace evidence from www.motorcycles.usa-com which shows that Yamaha manufactures two-wheeled vehicles in the nature of sports bikes, motorcycles, motocross bikes and motorized vehicles. See pp. 34-36 of the Office Action dated December 30, 2014. See also evidence from www.blog.caranddriver.com, attached as pg. 37 to the Office Action dated December 30, 2104, which shows that Yamaha also manufactures V8 engines for automobiles produced by other manufacturers.

As there are no price points in the identifications, the goods are presumed to include relatively inexpensive automobiles and two-wheeled electric vehicles and the potential purchasers of such goods are presumed to be ordinary consumers. However, even if the purchaser of an automobile or two-wheeled vehicle is deemed to be a sophisticated consumer, it is well settled that even sophisticated purchasers are not immune from source confusion, especially in cases such as the instant one involving similar marks and similar goods. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), *citing Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) (“Human memories even of discriminating purchasers ... are not infallible.”).

The applicant argues that the cited goods are classified in different classes. The fact that the Office classifies goods in different classes does not establish that the goods unrelated under Trademark Act Section 2(d) as the classification of goods is not relevant for the purposes of determining the likelihood of confusion. *See* TMEP §1207.01(d)(v). *See Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 975, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993); *Nat’l Football League v. Jasper Alliance Corp.*, 16 USPQ2d 1212, 1216 n.5 (TTAB 1990).

Applicant’s and registrant’s goods are considered related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009). Therefore, the similarity between the goods also weighs in favor of a finding of a likelihood of confusion.

SUMMARY

The applicant acknowledges in its appeal brief that the applied for mark E SPEED is similar in sound, meaning and appearance to registrant's mark ESPEED. Therefore, the marks are confusingly similar.

Applicant's goods are closely related to registrant's goods because goods of this type frequently originate from a single source and potential purchasers are accustomed to seeing the goods marketed in the same channels of trade. Therefore, the use of nearly identical marks in connection with these goods is likely to result in confusion.

The overriding concern is not only to prevent buyer confusion as to the source of the goods, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1025 (Fed. Cir. 1988).

In light of the similarities between the marks and the closely related nature of the goods, the examining attorney's refusal to register the mark under Section 2(d) of the trademark act should be upheld.

Respectfully submitted,

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