

This Opinion is Not a  
Precedent of the TTAB

Mailed: May 18, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*LeetCode, LLC*

*v.*

*MeetCode Technology (Hong Kong) Co., Limited.*

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Opposition No. 91270134  
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Anhsiang C. Oates and Min Ren of MT Law PC and  
Christopher B. Lay and Dermot J. Horgan of IPHorgan Ltd.  
for LeetCode, LLC.

Felipe Rubio of Rubio & Associates,  
for MeetCode Technology (Hong Kong) Co., Limited.

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Before Wellington, Lynch, and Allard, Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

MeetCode Technology (Hong Kong) Co., Limited (“Applicant”) filed the following three applications, each seeking to register the mark **MEETCODE** (in standard characters) in connection with different services:<sup>1</sup>

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<sup>1</sup> All three applications were filed on October 15, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on declarations of a bona fide intent to use the marks in commerce.

Application Serial No. 90255844 for:

Advertisement for others on the Internet; Advertising and publicity services; Career advancement consulting services in the field of information technology; Career planning services; Job placement; Job and personnel placement; Providing career information; Providing career information in the field of information technology, computer software, computer hardware, science, engineering, and professional services; Providing employment counseling information on how to successfully transition jobs; Providing employment counseling services via the Internet and telephone; Providing on-line employment information in the field of information technology, computer software, computer hardware, science, engineering, and professional services; Video production services in the field of employment recruiting, in International Class 35;

Application Serial No. 90255855 for:

Analyzing educational tests scores and data for others; Business education and training services, namely, developing customized leadership and executive development programs, providing executive coaching services, and providing business education programs to employees and executives; Career counseling, namely, providing advice concerning education options to pursue career opportunities; Computer education training; Computer education training services; Research in the field of education via the internet; Vocational education in the fields of information technology, computer software, computer hardware, science, engineering, professional services, and job search, in International Class 41; and

Application Serial No. 90255872 for:

Building and maintaining websites; Business technology software consultation services; Computer programming services to create online facilities that will provide telecommunications support; Platform as a service (PAAS) featuring computer software platforms for developers to test and improve software coding skills in a live coding environment; Platform as a service (PAAS) featuring computer software platforms for use by students and educators to test software coding skills in a live coding environment; Platform as a service (PAAS) featuring computer software platforms for assisting companies in attracting programmers, identifying talent and making hiring decisions by testing coding skills in a live coding environment, in International Class 42.

LeetCode, LLC (“Opposer”) opposes registration of Applicant’s mark in all three applications under Section 2(d) of the Trademark Act (“the Act”), 15 U.S.C. § 1052(d),

on the ground that Applicant's mark so resembles Opposer's registered and previously-used **LEETCODE** mark that it is likely to cause confusion. In its Notice of Opposition, Opposer pleads ownership of Registration No. 5727561 (hereinafter "Reg. No. '561"):<sup>2</sup>

**LEETCODE** (in standard characters) for:

Career advancement consulting services in the field of information technology, computer software, computer hardware, science, engineering, and professional services; Career planning services; Job and personnel placement; Job placement; Providing career information; Providing career information in the field of information technology, computer software, computer hardware, science, engineering, and professional services; Providing employment counseling information on how to successfully transition jobs; Providing employment counseling services via the Internet and telephone; Providing on-line employment information in the field of information technology, computer software, computer hardware, science, engineering, and professional services, in International Class 35; and

Business education and training services, namely, developing customized leadership and executive development programs, providing executive coaching services, and providing business education programs to employees and executives; Career counseling, namely, providing advice concerning education options to pursue career opportunities; Computer education training; Computer education training services; Research in the field of education via the internet; Vocational education in the fields of information technology, computer software, computer hardware, science, engineering, professional services, and job search, in International Class 41.

Applicant, in its Answer, denies the salient allegations of the Notice of Opposition.<sup>3</sup>

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<sup>2</sup> Registration No. 5727561 issued April 16, 2019.

<sup>3</sup> 5 TTABVue (Answer).

Applicant also included assertions regarding the sufficiency of the pleadings and lack of standing under the heading "Affirmative Defenses," but these are not true affirmative defenses, and we do not treat them as such. *The Mars Generation, Inc. v. Carson*, 2021 USPQ2d 1057, at \*4 (TTAB 2021); *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at \*1 (TTAB 2020).

The case is fully briefed.<sup>4</sup>

## I. Record

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the files of Applicant's involved applications.

At trial, Opposer introduced:

- Testimony Declaration of Christopher B. Lay, Opposer's counsel, and accompanying exhibits;<sup>5</sup>
- Testimony Declaration of Man Zhang, Opposer's Chief Financial Officer, and accompanying exhibits, including a copy of its pleaded Reg. No. '561 showing its status and title;<sup>6</sup> and
- Testimony Declaration of Anhsiang C. Oates, Opposer's counsel.<sup>7</sup>

Applicant introduced:

- (First) Notice of Reliance on a dictionary definition for "meet";<sup>8</sup>
- (Second) Notice of Reliance on a dictionary definition for "leet";<sup>9</sup>

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Applicant did not file a motion or otherwise pursue any purported affirmative defenses at trial. We therefore deem any affirmative defenses waived. *See Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1753 n.6 (TTAB 2013), *aff'd*, 565 F. App'x 900 (Fed. Cir. 2014) (mem.); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 801.01 (2022) ("If a party fails to reference a pleaded claim or affirmative defense in its brief, the Board will deem the claim or affirmative defense to have been waived.").

<sup>4</sup> Opposer designated certain portions of its brief as "Confidential," and filed a confidential copy under seal (at 22 TTABVUE). In this decision, we cite to Opposer's redacted main brief (21 TTABVUE).

<sup>5</sup> 8 TTABVUE.

<sup>6</sup> 9 TTABVUE; confidential copy (10 TTABVUE); 9 TTABVUE 279-285 (Zhang Dec. Exs. Z1 and Z2 comprising hard copy of and printout from USPTO electronic database TESS for Reg. No. '561 showing its status and title).

<sup>7</sup> 11 TTABVUE.

<sup>8</sup> 15 TTABVUE.

<sup>9</sup> 16 TTABVUE.

- (Third) Notice of Reliance on a dictionary definition for “leet”;<sup>10</sup>
- (Fourth) Notice of Reliance on copies of Applicant’s registrations and applications, and related documents;<sup>11</sup> and
- (Fifth) Notice of Reliance on a dictionary definition for “code.”<sup>12</sup>

On rebuttal, Opposer introduced:

- Notice of Reliance on various dictionary definitions and internet printouts.<sup>13</sup>

#### **A. Opposer’s Entitlement to a Statutory Cause of Action**

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at \*3 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 82 (2021) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). A party in the position of plaintiff may oppose registration of a mark when doing so is within the zone of interests protected by the statute and it has a reasonable belief in damage that would be proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \* 6-7 (Fed. Cir. 2020), *cert. denied*, 141 S.Ct. 2671 (2021) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement, and a reasonable belief in damage by the

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<sup>10</sup> 19 TTABVUE.

<sup>11</sup> 17 TTABVUE.

<sup>12</sup> 18 TTABVUE.

<sup>13</sup> 20 TTABVUE.

registration of a mark, which demonstrates damage proximately caused by registration of the mark).

Here, Opposer's pleaded Reg. No. '561 for the mark LEETCODE, which is of record,<sup>14</sup> establishes that Opposer is entitled to oppose registration of Applicant's mark on the ground of likelihood of confusion. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (registration establishes "standing"); *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 (TTAB 2009) (testimony that opposer uses its mark "is sufficient to support opposer's allegations of a reasonable belief that it would be damaged ..." where opposer alleged likelihood of confusion). Applicant does not contest Opposer's entitlement to a statutory cause of action in this case.

## **II. Priority**

### Opposer's Reg. No. '561 vis-à-vis Applicant's Applications

Because Applicant has not counterclaimed to cancel Opposer's pleaded registration, priority is not at issue with respect to the registered mark LEETCODE and the services covered by it. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

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<sup>14</sup> See note 6.

Opposer's Common Law Rights in the mark LEETCODE

Opposer's pleaded prior common law rights in LEETCODE are established through the testimony of Man Zhang.<sup>15</sup> Specifically, Man Zhang testifies that Opposer is the owner of Application Ser. No. 90655609 ("Ser. No. '609") for the LEETCODE mark for services in Class 42:<sup>16</sup>

Computer programming services to create online facilities that will provide telecommunications support; Platform as a service (PAAS) featuring computer software platforms for programmers and software developers to test, troubleshoot, and hone coding skills; Platform as a service (PAAS) featuring computer software platforms for hosting daily or weekly coding challenges to attract programmers for potential employers; Platform as a service (PAAS) featuring computer software platforms for practicing programmers and software developers for interview skills and for assisting recruiters in sorting out competent candidates; Providing a website that gives computer users the ability to participate in coding contest by submitting their code to the judges and see their ranking; Providing an Internet website portal in the fields of technology and software development.

and that "[e]ach of these services has been provided continuously by [Opposer] since before August 5, 2015."

Man Zhang also avers that Opposer began doing business under, and operating a website using, the mark LEETCODE in 2011 on the website domain name "leetcode.com" and incorporated "under the name 'LeetCode Corporation'" in the

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<sup>15</sup> 9-10 TTABVUE. Applicant did not submit evidence establishing a date of use in commerce for its mark that precedes the filing date of its applications, all of which were filed on the same day. Accordingly, the earliest date that Applicant can rely on for purposes of priority date is the constructive use (filing) date of its applications, which is October 15, 2020. Trademark Rule 2.122(b)(2), 37 CFR § 2.122(b)(2). *See Syngenta Crop v. Bio-Chek*, 90 USPQ2d at 1119 ("[A]pplicant may rely without further proof upon the filing date of its application as a 'constructive use' date for purposes of priority.").

<sup>16</sup> 9 TTABVUE (Zhang Dec. ¶ 17; Ex. AA).

State of Washington, before moving to California in 2015 and registering as a limited liability company.<sup>17</sup> Man Zhang also testified to exhibits comprising archived printouts from Opposer's website for the year 2011 as well evidence of subscription service income for the years 2016-2021.<sup>18</sup>

Man Zhang further describes Opposer's services:<sup>19</sup>

4. [Opposer] provides an online platform through its website at <leetcode.com>. This platform provides a number of services related to the general field of coding. These services are aimed at (a) individuals who seek to learn or improve their coding skills and to obtain jobs with these skills, and (b) universities and companies that want to provide their students and employees access to [Opposer]'s services as well as work with [Opposer] to identify users who have demonstrated skill levels, measured objectively through [Opposer]'s analytics, sufficient to be considered for employment.

“Oral testimony, if sufficiently probative, is normally satisfactory to establish priority of use.” *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at \*3 (TTAB 2020) (citations omitted). Indeed, it “is well settled that the ‘oral testimony even of a single witness may be adequate to establish priority, but only if it is sufficiently probative. Such testimony ‘should not be characterized by contradictions, inconsistencies, and indefiniteness but should carry with it conviction of its accuracy and applicability.’” *Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1607 (TTAB 2018) (quoting *Exec. Coach Builders, Inc. v. SPV Coach Co.*, 123 USPQ2d 1175, 1184 (TTAB 2017)).

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<sup>17</sup> 9 TTABVUE 4-5 (Zhang Dec. ¶¶ 10-11).

<sup>18</sup> 9 TTABVUE (Zhang Exs. H and K-O).

<sup>19</sup> 9 TTABVUE (Zhang Dec. ¶ 4).



Here, we find the testimony of Man Zhang sufficient for purposes of establishing Opposer's prior common law rights in the mark LEETCODE in connection with the services, as they are described in its application Ser. No. '609. The testimony is without contradictions and uncontroverted. Man Zhang's statements are supported by exhibits attached to the declaration, including archived printouts from Opposer's website.

Accordingly, we find Opposer has established prior common law rights in its mark LEETCODE for the services listed in its application Serial No. '609.

### **III. Likelihood of Confusion**

Opposer bears the burden of proving a likelihood of confusion by a preponderance of the evidence. *Cunningham v. Laser Golf*, 55 USPQ2d at 1848.

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks."). We consider the likelihood of confusion

factors about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

**A. Relatedness of Services; Trade Channels and Classes of Consumers**

We begin our analysis with the *DuPont* factor involving the “similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *DuPont*, 177 USPQ at 567; *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Concurrently, we also assess the *DuPont* factor involving “the similarity or dissimilarity of established, likely-to-continue trade channels” for these services, *DuPont*, 177 USPQ at 567, and the classes of consumers to which the services are marketed.

At the outset, as Opposer correctly points out in its brief, the following services are listed in Applicant’s applications and are word-for-word identical to some of the services listed in Opposer’s Reg. No. ’561:

Career advancement consulting services in the field of information technology; Career planning services; Job placement; Job and personnel placement; Providing career information; Providing career information in the field of information technology, computer software, computer hardware, science, engineering, and professional services; Providing employment counseling information on how to successfully transition jobs; Providing employment counseling services via the Internet and telephone; Providing on-line employment information in the field of information technology, computer software, computer hardware, science, engineering, and professional services (Class 35)

-and-

Business education and training services, namely, developing customized leadership and executive development programs, providing executive coaching services, and providing business education programs to employees and executives; Career counseling, namely, providing advice concerning education options to pursue career opportunities; Computer education training; Computer education training services; Research in the field of education via the internet; Vocational education in the fields of information technology, computer software, computer hardware, science, engineering, professional services, and job search..." (Class 41).

As to Applicant's application for services in Class 42, some of these are also identical to Opposer's services, as they are described in application Serial No. '609, for which Opposer has demonstrated prior common law rights. For example, Applicant's Class 42 application reads:

"Computer programming services to create online facilities that will provide telecommunications support; ... Platform as a service (PAAS) featuring computer software platforms for developers ... students and educators ... [and] assisting companies in attracting programmers"

is identical to or encompassed by Opposer's services. As noted, Man Zhang testified that Opposer renders its services to students and universities (educators), like Applicant.

In sum, Applicant's services in Classes 35 and 41 are, in part, identical to the services covered by Opposer's Reg. No. '561, and Applicant's Class 42 services are identical or legally identical, in part, to Opposer's services for which it has demonstrated prior common law rights in its mark LEETCODE.

Because Applicant's identifications of services do not contain any limitations with respect to consumers or channels of trade for the services, we must presume that these services move in the ordinary channels of trade and are sold to the ordinary

classes of consumers for such services, therefore overlapping with the trade channels and consumers of Opposer's identical services. *Narita Export LLC v. Adaptrend, Inc.*, 2022 USPQ2d 857, (TTAB 2022) ("Respondent's unrestricted identification of goods is not limited by channels of trade, Respondent's goods are presumed to travel in all ordinary channels of trade which include Petitioner's proven channel of trade"); *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017) (although no trade channel presumptions attach to common law mark for beer, Board noted that "there are no restrictions or limitations in Applicant's description of goods" and presumed "that Applicant's beer will move in all channels of trade normal for such goods ... including Opposer's trade channels"). Even to the extent that Applicant's services specify that they are intended for students and educators, Opposer's witness, Man Zhang, testified that Opposer's services are also "aimed at ... individuals ... universities ... and students" under the mark LEETCODE.<sup>20</sup>

Accordingly, the *DuPont* factors involving the relatedness of the parties' services and their channels of trade and classes of purchasers weigh strongly in favor of finding a likelihood of confusion.

#### **B. Similarity of the Marks and the Alleged Weakness of Opposer's Mark**

We turn now to the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. "Similarity in any one of these elements may

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<sup>20</sup> 9 TTABVUE (Zhang Dec. ¶ 4).

be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

We also keep in mind that the degree of similarity between the marks necessary to find a likelihood of confusion declines where, as here, the marks will be used in connection with identical services and offered in the same trade channels to the same class of consumers. *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (TTAB 2012); *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed Cir. 2010); *In re Max Capital*, 93 USPQ2d 1243, 1248 (TTAB 2010).

Concurrent with our comparison of the marks, we also consider the strength or weakness of Opposer’s LEETCODE mark because this helps inform the scope of its protection. In doing so, we consider both its conceptual strength based on the nature of the mark itself and its commercial recognition in the marketplace. *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596 at \*10 (TTAB 2020); *see also In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength ... and its marketplace strength ...”). “[T]he strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak.” *In re Coors Brewing Co.*, 343 F.3d 1340, 68

USPQ2d 1059, 1063 (Fed. Cir. 2003). *See also Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017).

As to whether LEETCODE is a commercially strong or weak mark, the fifth *DuPont* factor enables Opposer to expand the scope of protection afforded its mark through evidence showing “[t]he fame of the prior mark (sales, advertising, length of use),” while the sixth *DuPont* factor allows Applicant to contract that scope of protection by adducing evidence of third-party use of similar marks on similar services. *Made in Nature v. Pharmavite*, 2022 USPQ2d 557, at \*17 (TTAB 2022) (citing *DuPont*, 177 USPQ at 567).

#### The Parties’ Arguments

Opposer argues that the marks LEETCODE and MEETCODE are “highly similar in appearance and sound” because they “each have two syllables and eight letters, with the last seven letters – EETCODE – being identical.”<sup>21</sup> Opposer also asserts that the “root element ‘CODE’, when reviewed by the Board in the context of the coding and information technology-related services identified in the parties’ registrations and applications, must be seen as engendering a ‘strong similarity’ in the connotation and commercial impression of the mark.”<sup>22</sup> Opposer further contends that “even accounting for any differences in the meaning of ‘Leet’ and ‘Meet’, the similar construction, near identical spelling and pronunciation, and rhyming of the two words

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<sup>21</sup> 21 TTABVUE 22.

<sup>22</sup> 21 TTABVUE 23.

in MEETCODE and LEETCODE render the marks substantially similar in overall commercial impression.”<sup>23</sup>

Opposer also maintains that evidence it adduced “demonstrates the burgeoning strength of the LEETCODE Mark.”<sup>24</sup> Opposer asserts that “coupled with evidence of inherent strength, the evidence showing extreme growth in earnings, millions of subscribers, prestigious clients, and third-party acknowledgement demonstrates that in the relevant market LEETCODE is famous for purposes of likelihood of confusion” and “if not yet famous, LEETCODE is at least commercially very strong and growing stronger and therefore entitled to a wide latitude of protection.”<sup>25</sup>

Applicant counters that the parties’ compound word marks are overall dissimilar because the shared secondary term CODE “is highly descriptive of the services in connection with which the marks are used ... [as b]oth Opposer and Applicant operate in the field of computer coding and the goods (sic) and services for all of the Applications at issue refer to ‘coding.’”<sup>26</sup>

Applicant further argues that “[t]he only similarity between the remaining portions of the respective marks – ‘meet’ versus ‘leet’ – is that they rhyme. They have entirely different meanings.”<sup>27</sup> In this regard, Applicant contends that “the word

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<sup>23</sup> 21 TTABVUE 24.

<sup>24</sup> 21 TTABVUE 27.

<sup>25</sup> 21 TTABUVE 28.

<sup>26</sup> 23 TTABVUE 12. Applicant relies on the MERRIAM-WEBSTER DICTIONARY definition of the term CODE as “instructions for a computer (as within a piece of software).” 18 TTABVUE 5.

<sup>27</sup> 23 TTABVUE 12.

‘meet’ has many meanings, including ‘to come into the presence of for the first time; to be introduced to or become acquainted with; to come together with especially at a particular time or place; or to come into contact or conjunction with.’<sup>28</sup> Applicant asserts LEET, on the other hand, “has many meanings, none of which are the same as the definition of ‘meet.’”<sup>29</sup> In “the computer context,” Applicant points to the following definitions as possibly relevant for LEET:<sup>30</sup>

- LEET “A variety of spelling that uses numbers and symbols that approximate the shape of certain letters, using for example 1 and 5 for i and s, used primarily in texting and other typed electronic communication.”  
[THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, Fifth Edition, copyright 2022 by HarperCollins Publishers];<sup>31</sup> and
- LEET [adjective] “impassioned about and highly skilled in the field of advanced computer programming.”  
[“British Dictionary Definitions for LEET” (www.dictionary.com), Collins English Dictionary – Complete Unabridged 2012 Digital Edition.<sup>32</sup>

Applicant concludes that “consumers in the technology field are likely to understand the meaning of ‘leet’ as a unique method of spelling or as someone

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<sup>28</sup> Applicant relies on the MERRIAM-WEBSTER DICTIONARY definition of the term MEET. 15 TTABVUE 1-3.

<sup>29</sup> 23 TTABVUE 13.

<sup>30</sup> 23 TTABVUE 13. In addition to the two definitions listed in this decision, Applicant also refers to -- LEETSPEAK “a coded spelling system and language used in very informal communications on the internet, featuring letters combined with numbers or special characters in place of letters that they may resemble, and including inventive misspellings, jargon, and slang.” 20 TTABVUE, Ex. JJ. This appears to be a variation of the second-listed definition.

<sup>31</sup> 20 TTABVUE 8 (Opp. NOR Ex. GG).

<sup>32</sup> 20 TTABVUE 21 (Opp. NOR Ex. II).



enthusiastic about or highly skilled in coding” and, again, that “[n]one of these meanings are even close to the meaning of ‘meet.’”<sup>33</sup>

Applicant takes issue with Opposer’s contention that LEETCODE is a strong mark. Applicant asserts that LEETCODE “consists of terms that, at best, are descriptive of Opposer’s services and this descriptiveness still exists when the mark is considered as a whole.”<sup>34</sup>

In response, Opposer characterizes the above adjectival definition of LEET, i.e., to describe someone “impassioned” or “highly skilled” in computer programming, as “obtuse” and “unconventional.”<sup>35</sup> Opposer notes that this definition is not found in the American Heritage Dictionary.<sup>36</sup> Opposer also points out that Applicant does not address Opposer’s evidence of commercial strength of its mark nor does Applicant point to any evidence to demonstrate any commercial weakness of Opposer’s mark; particularly, that the record is devoid of evidence of third-party use or registrations for LEET or LEETCODE.<sup>37</sup>

Analysis of the Marks; Strength of LEETCODE

In comparing the parties’ marks, LEETCODE and MEETCODE, there is the obvious point of similarity in that both are compound terms with near identical spelling – both ending in EETCODE. The marks rhyme and thus are aurally similar.

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<sup>33</sup> 23 TTABVUE 13-14.

<sup>34</sup> 23 TTABVUE 16.

<sup>35</sup> 24 TTABVUE 5.

<sup>36</sup> 24 TTABVUE 6

<sup>37</sup> 24 TTABVUE 6.

The marks are also visually quite similar, only distinguished by the first letter. Because Applicant seeks to register its mark in standard character format, like Opposer's registered mark, we cannot assume that these marks will be distinguished by a different font or stylization; to the contrary, should either party present its mark in a certain stylization or color, we must assume that the other party may also present its mark in the same manner. *See, e.g., In re Viterra Inc.*, 101 USPQ2d at 1909; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983).

In terms of points of dissimilarity, we agree with Applicant in two respects. First, the shared term CODE is conceptually weak because it is strongly suggestive or descriptive of the parties' services, i.e., involving computer software and coding. Thus, the mere fact that both marks share this term is not by itself a strong similarity, although in combination with another element, it may contribute to overall similarity. Second, Applicant is correct that the word, LEET, has no defined meaning that is similar to any meaning of the word MEET. Simply put, the first two terms of the parties' marks have different meanings. Thus, in their overall meanings, while Applicant's mark, MEETCODE, may be understood by consumers as "meet code" and offering an introduction to computer software coding, no such meaning or connotation can be attributed to Opposer's mark.

However, as to Applicant's argument that Opposer's mark, LEETCODE, is "the combination of two highly descriptive words," we disagree because Opposer's Reg. No. '561 is on the Principal Register, without a claim of acquired distinctiveness, and thus is presumed to be inherently distinctive for those services. Trademark Act Section

7(b), 15 U.S.C. 1057(b); *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006) (a “mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods”).

In addition, to the extent that Applicant is arguing that Opposer’s mark, LEETCODE, is so suggestive of its services as to be weak, we disagree. While the term CODE has an obvious meaning and will be understood by consumers in connection with Opposer’s services, the same cannot be said of the word LEET. Indeed, many of the definitions of record for this term are for meanings that are obsolete, obscure or lack reliability.<sup>38</sup> At best, and to the extent consumers attribute any meaning to this term, it is the first defined meaning for the word “leet”—involving a novel way of spelling words in texting and other typed electronic communication—that possibly contributes to the mark’s overall meaning. Even allowing for such a meaning, there is no obvious or logical suggestive meaning for the compound mark, LEETCODE, as there is no indication that such novel spelling is practiced in the

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<sup>38</sup> The adjectival definition of “leet”—describing someone “impassioned” or “highly skilled” in computer programming—that Applicant relies upon does seem to have some meaning in the context of Opposer’s services; however, we note it is the third-listed meaning and comes from the webpage titled: “British Dictionary Definitions.” *See In re Opus One, Inc.*, 60 USPQ2d 1812, 1815 n.7 (TTAB 2001) (Board cannot rely on a non-US dictionary because it constitutes a foreign publication). Thus, the provided definition appears to be quite obscure and unreliable in terms of showing U.S. consumers are aware of this meaning. The record is devoid of any evidence showing others using “leet” in a manner consistent with that meaning. Thus, it is not possible to determine if that term is used and understood in that manner amongst the relevant U.S. consumers, including those in the field of computer software programming.

context of coding. Finally, we note the record is devoid of evidence showing others using the term LEET in connection with services like those describe in Opposer's registration.

Accordingly, we find no strong suggestive meaning conveyed by Opposer's mark LEETCODE in connection with its services, and thus do not conclude that it is conceptually or inherently weak.

In terms of the commercial strength of Opposer's mark LEETCODE, we have reviewed Opposer's evidence, particularly the testimony of Man Zhang and the related exhibits demonstrating Opposer's sales, advertisement, and unsolicited attention for Opposer's LEETCODE mark in connection with its services. In general terms, the record demonstrates that, since 2016, Opposer's has enjoyed a great deal of success with its LEETCODE services. Although its sales volume figures were designated "confidential," we can generally point out that they have increased exponentially since 2016, and as of 2021 were in the tens of millions of dollars range, and Opposer, as of May 2022, has over 5.8 million subscribers to its services and over "700 million submissions" of code sent by its customers.<sup>39</sup> Opposer also advertises and has a strong presence on social media platforms, and has received unsolicited attention by consumers on websites such as YouTube, Reddit, and GitHub.<sup>40</sup> This evidence persuades us that Opposer's mark is a reasonably commercially strong one in connection with its services. *See Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d

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<sup>39</sup> 9 TTABVUE 5 (Zhang Dec. ¶¶ 12-13).

<sup>40</sup> 9 TTABVUE 5-6 (Zhang Dec. ¶¶ 14, 16).

1367, 63 USPQ2d 1303, 1308 (Fed. Cir. 2002) (recognizing indirect evidence as appropriate proof of strength).

Based on the record, Opposer has not demonstrated that its mark should be placed at the “very strong” or “famous” end of the spectrum of strength, but the evidence does establish that the LEETCODE mark has achieved a level of commercial strength deserving of an expanded scope of protection beyond that of an average inherently distinctive mark.

Summary: Similarity of Marks and Strength of Opposer’s Mark

In sum, in comparing the parties’ marks, LEETCODE and MEETCODE, we have weighed their similarities and their dissimilarities, and overall find them more similar than not. This factor weighs slightly in favor of finding confusion likely.

Again, the degree of similarity between the marks necessary for finding confusion likely is lessened here in view of the identity of the parties’ services being offered in the same trade channels to the same class of consumers. *In re Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 94 USPQ2d at 1260; *In re Max Capital*, 93 USPQ2d at 1248.

We also make our finding regarding the similarity of marks based on Opposer’s mark being commercially strong and entitled to a wider than normal scope of protection, a factor that also weighs in support of finding confusion likely.

**C. Applicant’s Prior Registrations**

The thirteenth *DuPont* factor is a “catch-all” one, involving consideration of “any other established fact probative of the effect of use.” *DuPont*, 476 F.2d at 1361.

Under this factor, Applicant points to its ownership of six registrations, which are of record,<sup>41</sup> for “several similar trademarks for the same categories of services, including standard character marks for M EETCODE,” with a space between the M and the first E, and the same mark in “stylized form.”<sup>42</sup> Applicant cites to the Board’s ex parte appeal decision *In re Strategic Partners, Inc.*, 102 USPQ2d 1397 (TTAB 2012), and argues that its prior registrations are “nearly identical to the marks at issue in this proceeding” and the “services covered in [the] registrations are the same as the ... services in the three applications at issue here,” and that “[t]his coexistence between Applicant’s prior registrations and Opposer’s registration weigh against a finding of likelihood of confusion.”<sup>43</sup>

Applicant’s reliance on the *Strategic Partners* decision, however, is misplaced because the Board’s analysis in that case<sup>44</sup> is uniquely suited for ex parte cases, and this proceeding is inter partes. Indeed, Applicant does not cite to an inter partes case, and we have found none, in which the *Strategic Partners* analysis has been applied

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<sup>41</sup> Copies of the registrations, showing status and title, were submitted by Applicant under its notice of reliance. 17 TTABVUE.

<sup>42</sup> 23 TTABVUE 14.

<sup>43</sup> 23 TTABVUE 15.

<sup>44</sup> In *Strategic Partners*, the Board reversed a refusal to register based on Applicant’s ownership of an incontestable registration. The Board noted the “unusual situation in the present case . . . which must be considered in our analysis,” 102 USPQ2d at 1399, and the Board “must balance [other *duPont* factors] against the fact that applicant already owns a registration for a substantially similar mark for the identical goods, and that applicant’s registration and the cited registration have coexisted for over five years,” such that the applicant’s registration was not subject to cancellation on the basis of priority and likelihood of confusion. *Id.*

to an inter partes proceeding. Furthermore, in contrast to the applicant in *Strategic Partners*, Applicant's registrations are not incontestable registration (see Note 43). Indeed, Applicant's registrations issued after this proceeding was instituted, and remain subject to a possible cancellation proceeding based on a claim of priority and likelihood of confusion. Thus, we are not persuaded by Applicant's *Strategic Partners* arguments.

In the context of inter partes proceedings, reliance on a prior registration as a defense against a priority and likelihood of confusion claim is generally presented as the *Morehouse* affirmative defense. See *Morehouse Mfg. Corp. v. J. Strickland & Co.*, 407 F.2d 881, 160 USPQ 715, 717 (CCPA 1969) (holding an "opposer cannot be damaged, within the meaning of section 13 of the statute, by the issuance to applicant of a second registration where applicant already has an existing registration of the same mark for the same goods"). "The *Morehouse* defense, an equitable affirmative defense, is available in situations where an applicant already owns a registration for the same (or substantially similar) mark and goods or services, and which registration has not been challenged." *Mag Instrument, Inc. v. The Brinkmann Corp.*, 96 USPQ2d 1701, 1711 (TTAB 2010). See also *Spot (Thailand) Ltd. v. Vitasoy Int'l Holdings*, 86 USPQ2d 1283, 1285 (TTAB 2008). "It is based on the theory that an opposer cannot be injured by the registration sought because there already exists a similar registration and, therefore, an additional registration for the same or substantially similar mark and goods or services can no more injure the plaintiff than the prior registration." *Mag Instrument*, 96 USPQ2d at 1711.

Applicant, however, cannot rely upon the *Morehouse* defense in this case because it was not pleaded as an affirmative defense in Applicant's Answer.<sup>45</sup> See Fed. R. Civ. P. 8(b), 12(b). See also, *Omega SA (Omega AG) (Omega Ltd.) v. Alpha Phi Omega*, 118 USPQ2d 1289, 1290 n.2 (TTAB 2016) (a party may not get judgment on an unpleaded claim or affirmative defense); *Productos Lacteos Tocumbo S.A. de C.V. v. Paleteria La Michoacana, Inc.*, 98 USPQ2d 1921, 1926 (TTAB 2011). Indeed, as noted, Applicant's registrations issued after this proceeding was instituted, and Applicant has not moved to amend its Answer to assert the *Morehouse* affirmative defense or any reliance on these registrations. Furthermore, in introducing copies of its registrations, Applicant only states that it "offers [copies of the registrations] into evidence and gives notice that it will rely on the documents in this proceeding," without any mention of a prior registration defense.<sup>46</sup> This does not sufficiently provide notice of an intention to rely upon these registrations for purposes of asserting a *Morehouse* affirmative defense, whereby we can conclude the pleadings have been amended by implied consent of the parties under Fed. R. Civ. P. 15(b).

#### **D. Applicant's Alleged Bad Faith Adoption**

The thirteenth *DuPont* factor involving "any other established fact probative of the effect of use," also includes consideration of any evidence of a party's bad faith in adopting a mark. *DuPont*, 476 F.2d at 1361. See *Tao Licensing, LLC v. Bender*

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<sup>45</sup> To be clear, in its Answer, Applicant does not raise any prior registration defense, including the extraneous *Strategic Partners* defense.

<sup>46</sup> 17 TTABVUE 2 (Applicant's fourth Not. of Reliance).



*Consulting Ltd.*, 125 USPQ2d 1043, 1063 (TTAB 2017) (“We have discussed our consideration of some of Respondent’s more eyebrow-raising activities....”). Proof of bad faith is strong evidence that confusion is likely because such an inference may be drawn based on the bad faith actor’s expectation of confusion. *L.C. Licensing Inc. v. Cary Berman*, 86 USPQ2d 1883, 1891 (TTAB 2008). See also *Jewelers Vigilance Comm., Inc. v. Ullenberg Corp.*, 853 F.2d 888, 7 USPQ2d 1628, 1630 (Fed. Cir. 1988) (“proof of intent to trade on another’s goodwill” can provide “persuasive evidence of likelihood of confusion”) (citation omitted).

Opposer argues that Applicant’s “adoption of its name and MEETCODE Mark is a deliberate attempt to trade on the goodwill of [Opposer’s mark] LEETCODE.”<sup>47</sup> In support, Opposer points to the existence of prior trademark infringement litigation involving the parties’ parent companies and affiliates in China.<sup>48</sup> Opposer’s witness, Man Zhang describes the litigation as follows:<sup>49</sup>

[Applicant’s China parent company] NowCoder is a large company that competes directly with [Opposer’s] China affiliate, LeetCode China. LeetCode China recently won a court case in China it filed against NowCoder for bad faith activities, which included unauthorized use of LeetCode’s trademark on NowCoder’s website to optimize its search result and purchase of “LeetCode” as the search keyword on e.baidu.com (a Chinese search engine) to redirect potential consumers to NowCoder’s websites. As can be seen from the Court Order, which we obtained on December 16, 2021, from Shanghai Pudong People’s Court, the court determined that NowCoder’s conduct was intentional, not in good faith, and constituted Trademark Infringement; the Court ruled that NowCoder

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<sup>47</sup> 21 TTABVUE 28.

<sup>48</sup> 21 TTABVUE 29. Opposer relies on the testimony of Man Zhang and related exhibits, including translated copies of judgments (9 TTABVUE).

<sup>49</sup> 9 TTABVUE 7 (Zhang Dec. ¶ 21); copies of the court order, including translated copy, are attached as Zhang Ex. EE.

must cease its infringing activities, publish a court-approved statement on NowCoder's website for 30 days admitting its wrong doing, and pay damages and related expense to LeetCode China.

Opposer goes on to argue that:<sup>50</sup>

Considering the infringing activity [Applicant's parent company] engaged in in China, its selection of MEETCODE as a name and mark in the U.S. 'raises an eyebrow', especially considering that MEETCODE rhymes with LEETCODE, shares the last seven letters, has the same cadence, and is an 'EETCODE'- formative mark that is extraordinarily rare in the Register. ... These suspicious activities, and lack of any plausible explanation for them in the record, further support a finding that confusion is likely. ... But even if the Board determines that the selection of the MEETCODE Mark was not based on bad faith intent, [Applicant's] prior knowledge of the LEETCODE Mark triggers the axiom that 'one who adopts a mark similar to the mark of another for the same or closely related goods or services does so at his own peril, and any doubt as to the similarity of the marks must be resolved against him.'

[Internal case citations omitted].

Applicant does not respond to any of Opposer's arguments or evidence regarding Applicant's alleged bad faith in adopting and seeking to register the MEETCODE mark. Applicant does not deny the Chinese litigation or provide any explanation as to the parties' related history in China concerning the LEETCODE mark and Applicant's subsequent attempts to now register a mark that shares such similarity with Opposer's mark. To be clear, Applicant does not even assert that it is seeking to adopt this mark in good faith.

Based on the entire record and absent any explanation from Applicant, we agree with Opposer that the circumstances in this proceeding are certainly "eyebrow-

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<sup>50</sup> 21 TTABVUE 29-30.

raising,” *Tao Licensing*, 125 USPQ2d 1063, and tend to show bad faith adoption on Applicant’s part. In particular, given the trademark infringement litigation history in China involving the LEETCODE mark, it is troubling that Applicant now seeks to register the MEETCODE mark for services that are identified in-part word-for-word identically to those in Opposer’s registration. Indeed, as Opposer asserts, Applicant’s recitations of services “read like they were lifted directly from Opposer’s identifications.”<sup>51</sup>

Nonetheless, we acknowledge that it is not a simple or low burden for proving an other’s bad faith intent in the adoption of a mark. *See, e.g., Quiktrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 2021 USPQ2d 35, at \*4 (Fed. Cir. 2021) citing *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987). *See also Action Temp. Servs., Inc. v. Labor Force, Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1310 (Fed. Cir. 1989) (“mere knowledge of the existence of the prior user should not, by itself, constitute bad faith”).

Ultimately, we find that an inference of Applicant’s bad faith may be drawn and such inference has not been rebutted by either evidence or argument. Accordingly, the issue of alleged bad faith, under the thirteenth *DuPont* factor, weighs slightly in favor of finding confusion likely.

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<sup>51</sup> 24 TTABVUE 7.

#### **IV. Conclusion**

The marks, LEETCODE and MEETCODE, are overall similar, and the parties' services are in-part identical within each class, and these identical services are offered through the same channels of trade to the same classes of customers. Opposer's mark, LEETCODE, is also commercially strong and entitled to a broader than normal scope of protection. Moreover, there is an inference that Applicant's adoption of its mark was guided by bad faith, in contradiction of the principle that "there is a heavy burden on the newcomer to avoid consumer confusion as to products [or services] and their source." *Bridgestone Americas Tire Operations, LLC v. Federal Corp.*, 102 USPQ2d 1061, at 1065 (Fed. Cir. 2012). Weighing these findings, we ultimately conclude that there is a likelihood of confusion between the parties' marks.

**Decision:** The opposition is sustained as to all three applications on the ground of likelihood of confusion under Section 2(d) of the Trademark Act.