

To: HANK FASTHOFF(hank@fasthofflawfirm.com)
Subject: U.S. Trademark Application Serial No. 97605021 - META - Examiner Brief
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Attachments

United States Patent and Trademark Office (USPTO)

U.S. Application Serial No. 97605021

Mark: META

Correspondence Address:

HANK FASTHOFF
FASTHOFF LAW FIRM PLLC
21 WATERWAY AVE., SUITE 300
THE WOODLANDS TX 77380
UNITED STATES

Applicant: Metabev LLC

Reference/Docket No. N/A

Correspondence Email Address: hank@fasthofflawfirm.com

EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant, Metabev LLC ("Applicant"), has appealed the final refusal to register the proposed mark, "META", in standard characters for, as amended, "[e]nergy drinks" in International Class 32. Registration was refused under Section 2(d) of the Trademark Act of 1946 (as amended) (hereinafter "Trademark Act"), 15 U.S.C. §1052(d), on the ground that the applied-for mark is likely to be confused with "META MOON" in standard characters in U.S. Registration No. 7038674 for, "[e]nergy drinks; [p]owders used in the preparation of isotonic sports drinks and sports beverages; [s]ports drinks" in International Class 32.

It is respectfully requested that this refusal be affirmed.

I. STATEMENT OF FACTS

On September 23, 2022, Applicant filed a Section 1(b) [Intent to Use] application for "META" in standard characters for, "[e]nergy drinks; [n]on-alcoholic carbonated beverages," in International Class 32.

On July 11, 2023, the Examining Attorney^[1] issued an Office action that, in relevant part, refused registration pursuant to Trademark Act Section 2(d) on the ground that the applied-for mark, "META", was confusingly similar to the "META MOON" mark in Registration No. 7038674.^[2]

On October 11, 2023, Applicant submitted a response which, in relevant part, contained arguments against the Section 2(d) refusal. Applicant also acceptably amended the identification of goods to the following: "[e]nergy drinks" in International Class 32.

On October 17, 2023, the Examining Attorney issued a final refusal under Section 2(d) with respect to Registration No. 7038674.^[3]

On January 3, 2024, applicant filed a Notice of Appeal with the Trademark Trial and Appeal Board ("Board").

II. ARGUMENT

THE PROPOSED MARK, "META", IS LIKELY TO CAUSE CONFUSION WITH THE REGISTERED MARK, "META MOON"

Trademark Act Section 2(d) bars registration of an applied-for mark that is so similar to a registered mark that it is likely consumers would be confused, mistaken, or deceived as to the commercial source of the goods and/or services of the parties. *See* 15 U.S.C. §1052(d). Likelihood of confusion is determined on a case-by-case basis by applying the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) (called the “*du Pont* factors”). *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017). Any evidence of record related to those factors need be considered; however, “not all of the *DuPont* factors are relevant or of similar weight in every case.” *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406, 41 USPQ2d 1531, 1533

(Fed. Cir. 1997)).

Although not all *du Pont* factors may be relevant, there are generally two key considerations in any likelihood of confusion analysis: (1) the similarities between the compared marks and (2) the relatedness of the compared goods and/or services. *See In re i.am.symbolic, llc*, 866 F.3d at 1322, 123 USPQ2d at 1747 (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976) (“The fundamental inquiry mandated by [Section] 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”); TMEP §1207.01.

A. The marks "META" and "META MOON" are confusingly similar

Applicant seeks registration of the mark "META" in standard characters. Registrant's mark is "META MOON" in standard characters.

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d per curiam*, 777 F. App’x 516, 2019 BL 343921 (Fed. Cir. 2019); TMEP §1207.01(b).

Here, the marks are confusingly similar due to the common and distinctive wording, "META", which is also the only wording in applicant's mark. Although applicant's mark does not contain the entirety of the registered mark, applicant’s mark is likely to appear to prospective purchasers as a shortened form of registrant's mark. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 1348, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (quoting *United States Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985)). Thus, merely omitting some of the wording from a registered mark may not overcome a likelihood of confusion. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257; *In re Optica Int’l*, 196 USPQ 775, 778 (TTAB 1977); TMEP §1207.01(b)(ii)-(iii). In this case, applicant’s mark does not create a distinct commercial

impression from the registered mark because it contains some of the wording in the registered mark, and the applied-for mark does not comprise any additional wording that would distinguish it from the registered mark.

In fact, the record reflects Applicant's intent to use "META" as a shortened form, as it also seeks to register the mark "METABEV" for similar goods. *See* October 11, 2023, Response to Office action, TSDR pp. 3, 11. Applicant further explains that its branding plan includes "constant innovation, our flavors will cycle creating higher demand and scarcity... [and] future flavors will be user generated," and displays the following marks on different bottles of beverages: "META FLOW", "META PHAZE", "META RAGE", "META RAVE", "META LOVE", "META BLISS", "META CHILL", and "META VIBE", all representing different drink flavors. *See* March 1, 2024, Applicant's Brief, TSDR p. 9^[4]; October 11, 2023, Response to Office action, TSDR pp. 6, 15-17. Thus, when consumers encounter Applicant's goods bearing marks such as "META FLOW", "META RAGE", and "META LOVE" on its beverage cans, it is likely that consumers would confuse the marks and mistakenly believe that applicant's mark, "META", is not only a shortened form of its own drinks, but that it is also a shortened form of Registrant's mark, "META MOON".

Applicant argues that: confusion is not likely because the marks are different; the marks must be considered in their entirety; the inclusion of the term "MOON" in Registrant's mark distinguishes the commercial impression of the registered mark when compared to the term "META" by itself in the applied-for mark; and the marks sound different as there are a different number of syllables in the marks.

First, marks must be compared in their entirety and should not be dissected; however, a trademark examining attorney may weigh the individual components of a mark to determine its overall commercial impression. *In re Detroit Athletic Co.*, 903 F.3d 1297, 1305, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (“[Regarding the issue of confusion,] there is nothing improper in stating that . . . more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety.” (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985))). In this case, it is not improper to find that the distinctive term "META" is common to both marks, that term is the more dominant part of the registered mark, and thus, the overall commercial impressions of the marks are confusingly similar.

Here, "META" is the first word in Registrant's mark, which is the part of the mark that consumers are likely to recall. Consumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark. See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (finding similarity between VEUVE ROYALE and two VEUVE CLICQUOT marks in part because "VEUVE . . . remains a 'prominent feature' as the first word in the mark and the first word to appear on the label"); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 876, 23 USPQ2d 1698, 1700 (Fed Cir. 1992) (finding similarity between CENTURY 21 and CENTURY LIFE OF AMERICA in part because "consumers must first notice th[e] identical lead word"); see also *In re Detroit Athletic Co.*, 903 F.3d 1297, 1303, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding "the identity of the marks' two initial words is particularly significant because consumers typically notice those words first"). Thus, when consumers encounter Registrant's mark, "META MOON", they will be more likely inclined to focus on and recall the first word in the mark, namely, the term "META". Thus, that term is the dominant feature of the registered mark. Furthermore, it was proper to find that the dominant feature of the registered mark is identical to the applied-for mark.

Further, when comparing marks, "[t]he proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that [consumers] who encounter the marks would be likely to assume a connection between the parties." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)); 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. *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *4 (TTAB 2020) (citing *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016)); *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018); TMEP §1207.01(b); see *In re St. Helena Hosp.*, 774 F.3d 747, 750-51, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014). In this case, any differences in the number of syllables would not be sufficient to overcome a likelihood of confusion because the number of syllables and/or number of words in the marks do not necessarily mean the marks are sufficiently different in meaning or connotation. Moreover, despite the different number of syllables in the marks, they continue to have confusingly similar commercial

impressions because the dominant feature of the registered mark is identical to the applied-for mark. For those reasons, consumers would likely assume a connection between applicant's mark and the registrant's mark based on the common use of the word "META".

Concerning the commercial impression of the marks, all the meanings applicant may or may not assign to the word "META" as used in its marketing campaign -- the Greek origin meaning "beyond" or "what's next", a popular acronym used by gamers meaning "Most Effective Tactic Available," and a play on words such as "metaphor," "metamorphosis," "metaphysical" -- equally applies to Registrant's use of the same word "META" in its mark, as there is no inherent restriction nor limitations as to the meaning or use of the word. *See* March 1, 2024, Applicant's Brief, TSDR p. 9-10. Restated, Registrant's additional matter, "MOON", does not serve to diminish, restrict or limit the meaning that "META" has in its mark and retains all the same meanings and connotations that Applicant assigns to its mark, thus causing an overall similarity which is likely to cause source confusion. *See Wella Corp. v. Cal. Concept Corp.*, 558 F.2d 1019, 1022, 194 USPQ 419, 422 (C.C.P.A. 1977) (holding CALIFORNIA CONCEPT and surfer design and CONCEPT confusingly similar); *Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 557, 188 USPQ 105, 106 (C.C.P.A. 1975) (holding BENGAL LANCER and design and BENGAL confusingly similar); *Double Coin Holdings, Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *6-7 (TTAB 2019) (holding ROAD WARRIOR and WARRIOR (stylized) confusingly similar); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1090 (TTAB 2016) (holding JAWS DEVOUR YOUR HUNGER and JAWS confusingly similar); TMEP §1207.01(b)(iii).

Because the marks are, in part, identical, they are confusingly similar.

Further, where the goods of an applicant and registrant are identical or virtually identical (i.e., energy drinks), the degree of similarity between the marks required to support a finding that confusion is likely declines. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *In re Viterra Inc.*, 671 F.3d 1358, 1363, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)); TMEP §1207.01(b). In the instant case, as explained below in more detail, the parties' goods are identical. Thus, the degree of similarity between the marks that is necessary to support a finding that confusion is likely is lessened.

B. The goods of Applicant and Registrant are identical

The goods and/or services are compared to determine whether they are similar, commercially related,

or travel in the same trade channels. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369-71, 101 USPQ2d 1713, 1722-23 (Fed. Cir. 2012); *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1381 (Fed. Cir. 2002); TMEP §§1207.01, 1207.01(a)(vi). When analyzing an applicant's and registrant's goods and/or services for similarity and relatedness, that determination is based on the description of the goods and/or services 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)).

Applicant's goods are, as amended, "[e]nergy drinks" in International Class 32.

Registrant's goods are, "[e]nergy drinks; [p]owders used in the preparation of isotonic sports drinks and sports beverages; [s]ports drinks," in International Class 32.

Here, the goods are identical. Both parties identify "energy drinks." Therefore, it is presumed that the channels of trade and class(es) of purchasers are the same for these goods. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1372, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)).

It is noted that Applicant does not argue against the relatedness of the goods. *See* March 1, 2024, Applicant's Brief, TSDR p. 5-10.

Accordingly, the goods are related for purposes of a likelihood of confusion analysis.

III. CONCLUSION

Applicant's mark "META" is likely to be confused with registrant's mark "META MOON". Moreover, applicant's goods are identical to those identified by registrant. 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). In this case, there is no doubt that confusion is likely.

For the foregoing reasons, the Examining Attorney respectfully requests that the refusal to register the applied-for mark under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), be affirmed.

Respectfully submitted,

/Jeane Yoo/
Examining Attorney
Law Office 120
(571) 272-5021
Jeane.Yoo@USPTO.GOV

/David Miller/
Managing Attorney
Law Office 120

End Notes

1. This application was reassigned to the above-signed examining attorney on March 18, 2024.
2. The Office action, issued on July 11, 2023, also cited U.S. Registration Nos. 5160751 (METABREW) and 79347088 (METABREWSOCIETY) as part of the refusal under Section 2(d) of the Trademark Act. The Office action also advised applicant of prior-filed applications in U.S. Application Serial Nos. 90494305, 97126331, and 97253452 that could potentially pose a bar to registration under Trademark Act Section 2(d) should they mature to registration. See July 11, 2023, Office action, TSDR pp. 2-5.
3. By Final Office action, dated October 17, 2023, the refusal with respect to Reg. No. 5160751 and the advisory with respect to prior-filed application Serial No. 90494305 were both obviated, as they were cancelled and abandoned, respectfully. Further, the Examining Attorney withdrew both the Section 2(d) refusal with respect to Reg. No. 79347088 and the advisories with respect to prior-filed applications Ser. Nos. 97126331 and 97253452.
4. In order to minimize confusion, all citations are to the TSDR page number record regardless of the page numbers that appear on Applicant's brief. *See* TMEP Appendix A.

United States Patent and Trademark Office (USPTO)

USPTO OFFICIAL NOTICE

Examining attorney's appeal brief has issued
on April 19, 2024 for
U.S. Trademark Application Serial No. 97605021

A USPTO examining attorney has issued an appeal brief. Follow the steps below.

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