To: SOUND SYMMETRY, LLC(amccullum@soundsymmetry.com)
Subject: U.S. Trademark Application Serial No. 90564089 - SYMMETRY
Sent: January 03, 2023 01:45:22 PM EST
Sent As: tmng.notices@uspto.gov

Attachments

United States Patent and Trademark Office (USPTO)
Office Action (Official Letter) About Applicant's Trademark Application

U.S. Application Serial No. 90564089

Mark: SYMMETRY

Correspondence Address:
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Applicant: SOUND SYMMETRY, LLC

Reference/Docket No. N/A

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REQUEST FOR RECONSIDERATION AFTER FINAL ACTION DENIED

Issue date: January 3, 2023

Applicant's request for reconsideration is denied. *See* 37 C.F.R. §2.63(b)(3). The trademark examining attorney has carefully reviewed applicant's request and determined the request did not: (1) raise a new issue, (2) resolve all the outstanding issue(s), (3) provide any new or compelling evidence with regard to the outstanding issue(s), or (4) present analysis and arguments that were persuasive or shed new light on the outstanding issue(s). TMEP §§715.03(a)(ii)(B), 715.04(a).

Accordingly, the following requirement(s) and/or refusal(s) made final in the Office action dated October 24, 2022 are **maintained and continued**:

- Section 2(d) Refusal - Likelihood of Confusion

See TMEP §§715.03(a)(ii)(B), 715.04(a).

APPLICANT'S ARGUMENTS AGAINST THE FINAL REFUSAL

Applicant's Request for Reconsideration includes arguments that the marks are not similar and that the

goods, even if considered related, are not so closely related that the differences between the marks are sufficient to outweigh this factor.

In particular, applicant argues that the examining attorney has engaged in improper analysis by noting that the word portion of a mark is often considered the dominant feature, and that word portions of marks are therefore accorded greater weight in a likelihood of confusion analysis. *In re Viterra Inc.*, 671 F.3d at 1366-67, 101 USPQ2d at 1911 (citing *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1570-71, 218 USPQ2d 390, 395 (Fed. Cir. 1983)). Applicant assert that the examining attorney "has no authority to decide the issue of confusion without giving due consideration of the applied-for mark's design elements."

In this case, applicant's mark is the word SYMMETRY in a block letter font beneath a conic prism shape that is partially shaded. The mark in the cited registration is just the word SYMMETRY in standard characters. While it is true that marks must be compared in their entireties 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 entireties." (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985)).

Further, as explained in the previous Office action, when evaluating a composite mark consisting of words and a design, the word portion is normally accorded greater weight because it is likely to make a greater impression upon purchasers, be remembered by them, and be used by them to refer to or request the goods and/or services. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir. 1983)); *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *41 (TTAB 2022) (quoting *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *31 (TTAB 2021)); TMEP §1207.01(c)(ii). Thus, although marks must be compared in their entireties, the word portion is often considered the dominant feature and is accorded greater weight in determining whether marks are confusingly similar, even where the word portion has been disclaimed. *In re Viterra Inc.*, 671 F.3d at 1366-67, 101 USPQ2d at 1911 (citing *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1570-71, 218 USPQ2d 390, 395 (Fed. Cir. 1983)). Following this principle, the word SYMMETRY in the applied-for mark is the element which consumers will use to speak about, request, or otherwise refer to applicant's goods. Is therefore perfectly acceptable to analyze the commercial impression of this mark as being largely formed by this word.

Additionally, the previous Office action explains that a mark in typed or standard characters may be displayed in any lettering style; the rights reside in the wording or other literal element and not in any particular display or rendition. *See In re Viterra Inc.*, 671 F.3d 1358, 1363, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012); *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); 37 C.F.R. §2.52(a); TMEP §1207.01(c)(iii). Thus, a mark presented in stylized characters and/or with a design element generally will not avoid likelihood of confusion with a mark in typed or standard characters because the word portion could be presented in the same manner of display. *See, e.g., In re Viterra Inc.*, 671 F.3d at 1363, 101 USPQ2d at 1909; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1041, 216 USPQ 937, 939 (Fed. Cir. 1983) (stating that "the argument concerning a difference in type style is not viable where one party asserts rights in no particular display"). Put another way, the trademark rights in the registration for the word SYMMETRY in standard characters resides in the word itself, but not in any particular stylization; as a result, the registrant is permitted to display it's mark in any

number of ways, including accompanied by a prism shape. Contrary to applicant's interpretation of the examining attorney's arguments, this does not mean that the registration covers trademark rights for any combination of a design in the word SYMMETRY, but is a principle that rather serves to demonstrate that confusion is likely because (1) the wording in the marks is the same, and (2) the registrant is not limited to displaying its mark as *only* the word SYMMETRY with no stylization.

Finally, the applicant appears to agree that the goods are similar, arguing instead that the dissimilarities in the marks renders this fact moot. This is not the case. The record clearly explains why the marks are similar. Moreover, even were the marks less similar than is actually the case, it is also true that where the goods and/or services of an applicant and registrant are "similar in kind and/or closely related," the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as in the case of diverse goods and/or services. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987); *see Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1242, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004); TMEP §1207.01(b). Here, the clothing goods in the application and registration are highly related if not legally identical.

Applicant's arguments are therefore found unpersuasive and applicant's request for reconsideration is **denied**.

RESPONSE GUIDANCE

If applicant has already filed an appeal with the Trademark Trial and Appeal Board, the Board will be notified to resume the appeal. *See* TMEP §715.04(a).

If applicant has not filed an appeal and time remains in the response period for the final Office action, applicant has the remainder of that time to (1) file another request for reconsideration that complies with and/or overcomes any outstanding final requirement(s) and/or refusal(s), and/or (2) file a notice of appeal to the Board. TMEP §715.03(a)(ii)(B).

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United States Patent and Trademark Office (USPTO)

USPTO OFFICIAL NOTICE

Office Action (Official Letter) has issued
on January 3, 2023 for
U.S. Trademark Application Serial No. 90564089

A USPTO examining attorney has reviewed your trademark application and issued an Office action. You must respond to this Office action to avoid your application abandoning. Follow the steps below.

(1) Read the Office action. This email is NOT the Office action.

(2) Respond to the Office action by the deadline using the Trademark Electronic Application System (TEAS) or the Electronic System for Trademark Trials and Appeals (ESTTA), as appropriate. Your response and/or appeal must be received by the USPTO on or before 11:59 p.m. **Eastern Time** of the last day of the response deadline. Otherwise, your application will be abandoned. See the Office action itself regarding how to respond.

(3) Direct general questions about using USPTO electronic forms, the USPTO website, the application process, the status of your application, and whether there are outstanding deadlines to the Trademark Assistance Center (TAC).

After reading the Office action, address any question(s) regarding the specific content to the USPTO examining attorney identified in the Office action.

GENERAL GUIDANCE

- **Check the status of your application periodically** in the Trademark Status & Document Retrieval (TSDR) database to avoid missing critical deadlines.

- **Update your correspondence email address** to ensure you receive important USPTO notices about your application.

- **Beware of trademark-related scams**. Protect yourself from people and companies that may try to take financial advantage of you. Private companies may call you and pretend to be the USPTO or may send you communications that resemble official USPTO documents to trick you. We will never request your credit card number or social security number over the phone. Verify the correspondence originated from us by using your serial number in our database, TSDR, to confirm that it appears under the “Documents” tab, or contact the Trademark Assistance Center.

- **Hiring a U.S.-licensed attorney.** If you do not have an attorney and are not required to have one under the trademark rules, we encourage you to hire a U.S.-licensed attorney specializing in trademark law to help guide you through the registration process. The USPTO examining attorney is not your attorney and cannot give you legal advice, but rather works for and represents the USPTO in trademark matters.