


August 2021

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The August 2021 issue of Sterne Kessler's MarkIt to Market® newsletter discusses Monster Energy's history of trademark disputes in the context of enhancing brand strength, tips for shortening the pendency of trademark filings at the USPTO, recent cannabis extraction technology litigation, and the new gTLD open sunrise period.

Sterne Kessler's [Trademark & Brand Protection practice](#) is designed to help meet the intellectual property needs of companies interested in developing and maintaining strong brands around the world. For more information, please contact [Monica Riva Talley](#) or [Tracy-Gene G. Durkin](#).

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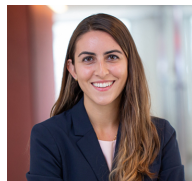
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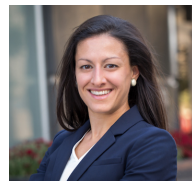
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PERSISTENCE PAYS OFF – A SERIES OF MONSTER TRADEMARK

DISPUTES

By: Kathleen Wills

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If you recently filed a trademark application with the U.S. Patent and Trademark Office, you may have noticed that the average time to first action (initial examination) is about six months from the application's filing date – double that compared to applications filed in late 2019 and early 2020.¹

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Cannabis Extraction Technology Litigation Updates

By: [Pauline M. Pelletier](#) and [Deborah Sterling, Ph.D.](#)

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PERSISTENCE PAYS OFF – A SERIES OF MONSTER TRADEMARK DISPUTES

By: Kathleen Wills

Monster Energy Co. (“Monster Energy”), frequent trademark plaintiff, recently found itself on the receiving end of a trademark infringement lawsuit brought by California company Outdoor Pro Shop, Inc. (“Pro Shop”). Pro Shop’s complaint alleged trademark infringement for its consumer goods such as hats, cups, and clothing, and online retail services offered in connection with its MONSTER FISHING, MONSTER FISHING TACKLE and MONSTERFISHING.COM (MONSTER FISHING) marks, and sought declaratory judgment on the issue of its own non-infringement vis-à-vis MONSTER FISHING and Monster Energy’s registered marks.¹

According to the complaint, Pro Shop does business in outdoor sports and offers various services and goods from an online retail store, spanning apparel, fishing products, books, knives, and binoculars in connection with its MONSTER FISHING mark.² On the other side of the “v,” Monster Energy markets, develops, and distributes energy drinks, beverage ware, and apparel.³ But before this complaint was filed on August 22, 2020, Pro Shop tried to secure a trademark for “MONSTER FISHING” at the U.S. Patent and Trademark Office (“USPTO”), which Monster Energy opposed.⁴ The Trademark Trial and Appeal Board (“TTAB”) stayed Monster Energy’s appeal pending resolution of the lawsuit. Pro Shop states that Monster Energy has opposed three additional applications for its marks: (1) the MONSTER mark in stylized form for retail store services featuring products related to fishing and fishing-related products; (2) the MONSTER FISHING TACKLE mark in stylized form for advertising and business services relating to consumer goods for outdoor activities; and (3) the MONSTERFISHINGTACKLE.COM mark, for retail store services featuring consumer goods for outdoor activities.⁵

In June, the court granted Monster Energy’s Motion to Dismiss, which largely focused on the lack of evidence or support as to the date(s) of Pro Shop’s first use of the unregistered mark in commerce.⁶ Pro Shop was permitted to file an amended complaint, which it did on July 6, 2021, along with a table outlining Pro Shop’s first use of the goods and services in connection with the MONSTER FISHING mark.⁷ In the amended complaint, Pro Shop clarifies that its infringement claims for hats, cups, and clothing are based on prior use of its marks for those goods, and that confusion is not likely with respect to the parties’ respective services due to the differences in nature of the parties’ respective purchasers and channels of trade.⁸

While this case is still pending before the court, looking at other litigation and oppositions

involving Monster Energy can provide some key takeaways.

1. Cases Where Monster Energy Prevailed

In 2019, Monster Energy sued a student-entrepreneur, Mason McGuire, who had just teamed up with a manufacturer to create caffeine-infused energy tablets without a sugar crash.⁹ The product was sold under the brand name MONARCH ENERGY, in connection with the following logo:



Monster Energy filed a notice of opposition at the USPTO in late 2019; McGuire failed to answer the notice and default was entered against him and the registration refused. Recent review of Monarch Energy's website reveals use of a new logo for this product.

In another case, the TTAB sided with Monster Energy Co. and refused to allow a small company to register the MONSTER TOWEL mark for its beach towels.¹⁰ The Board considered evidence that Monster Energy has previously used its name and mark on promotional towels, specifically athletic towels, and concluded that consumers could reasonably find MONSTER TOWEL on beach towels to be an extension of that existing product line. The judge explicitly stated that "[t]he commercial strength of the Monster Energy Marks for energy drinks outweighs any conceptual weakness and entitles the marks to a broad scope of protection with respect to those goods." Given the MONSTER ENERGY mark's strength, even "collateral merchandise" outside of energy drinks, like beach towels, can be sufficiently similar and infringing. The judge explained that the similarity of marks is measured by proximity of the goods in nature and whether, under all of the circumstances, consumers would perceive one type of towel as originating from the same source.

In the Central District of California, Monster Energy prevailed against an automotive company, Integrated Supply Network LLC ("ISN"), who was originally ordered to pay over \$10 million for its infringing use of the trademarks MONSTER and MONSTER MOBILE, along with black and green trade dress, for automotive products including motorcycles, motorcycle helmets, replica cars, and automotive wheels.¹¹ After the Ninth Circuit vacated the damages awards and remanded for consideration, the district court found that an award for disgorgement of profits in the amount of \$10 million was appropriate to ensure ISN was not unjustly enriched by its past infringement.¹² The court then enjoined ISN from using: (1) any trademark or name that uses or includes the word "Monster," or any variant such as Monstrous, Monstrosity, or Monsta, and (2) any trade dress with a black and green color combination with such words that would be confusing under (1).¹³ Monster Energy was able to successfully argue that prospective purchasers would associate the infringing goods with its registered mark, or believe that the infringing product could be endorsed or sponsored by the party asserting its mark.¹⁴ Counsel for Monster Energy stated: "The major takeaway from this case is that Monster Energy is able to assert its trademark and trade dress rights against what might appear at first blush to be unrelated goods."

And 2021 has already been a busy year for Monster Energy. In February 2021, Monster Energy filed a complaint against a competing energy drink company, Powernation LLC, for infringement based on use of a logo for "Clutch Energy" featuring a black and green color scheme and three parallel lines on its cans.¹⁵ Monster Energy's complaint specifically references Powernation's social media accounts, which contain images of the two companies' drinks sold in the same store cooler, as evidence of knowledge of Monster Energy's marks and willful infringement of those marks by causing customer confusion. On August 16, 2021, the parties filed a stipulation of settlement and permanent injunction.¹⁶

In May 2021, Monster Energy filed a complaint against a fitness equipment company, Bear KompleX, which sells items such as handgrips, weight belts, and compression sleeves with a BEAR CLAW logo.¹⁷ The logo appears in various colors -- including green and black. This case is still pending.

II. Cases Where Monster Energy Lost

Despite these examples, Monster Energy does not always prevail against alleged trademark infringers. After a six-year trademark dispute, the Toronto Raptors beat Monster Energy's opposition against its application for a "claw-tearing-through-basketball" logo. The TTAB found facial differences between the marks such as the direction of the scratching or tearing to preclude a likelihood of confusion, even though Monster Energy's marks are conceptually strong. The TTAB also noted that the team's marks had been used in commerce long before Monster Energy began using its asserted marks. Similarly, in October 2020, Monster Energy lost a two-year battle to another sports team, the Cleveland Monsters, regarding its marks' registration at the USPTO. There was one critical reason for the minor league hockey team's win: it had already registered three MONSTER marks years before the litigation, including LAKE ERIE MONSTERS for clothing, retail services, sporting activities, and beer (specifically excluding energy drinks). Before 2016, when the Cleveland Monsters were known as the Lake Erie Monsters, the team registered their logos for clothing.¹⁸ The hockey team was able to successfully persuade the TTAB that there was no previous confusion in the marketplace between the parties' respective MONSTERS marks and, most importantly, that while Monster Energy has priority for beverages, it did not for sports sponsorships, hockey, or facility services. The TTAB found that Monster Energy acquiesced to the hockey team's twelve-year use of the MONSTERS mark when the Cleveland Monsters were known as the Lake Erie Monsters and registered its first mark in 2010 -- years before the company rebranded and registered its new name with the USPTO. The TTAB dismissed the opposition in October 2020.

An undergraduate student from Harvard, Stephen Norberg, also prevailed in a challenge brought by the energy drink company. Norberg found himself on the receiving end of a USPTO petition for cancellation from Monster Energy for his mark THUNDER BEAST, which he used to sell his glass-bottled root beer in packaging that featured a bison.¹⁹ The energy drink company argued that Norberg's registered mark was too similar to its slogan, "Unleash the Beast," as well as Norberg's phrase "Fights monsters," which was included on the website "in protest." In a plot twist, Norberg hired an attorney whose portfolio of cases including at least *eight* other businesses facing down Monster Energy. Monster Energy withdrew its petition and filed a separate lawsuit against THUNDER BEAST for alleged fraudulent and malicious conduct. The parties ultimately settled and stipulated to a dismissal with prejudice²⁰ -- but not before the judge commented on the merits of the case: "I don't know why we're here, other than you're trying to crush this root beer company out of business."²¹

And, finally, Monster Energy litigates and enforces its marks beyond the United States. Monsta Pizza, a small pizzeria in the United Kingdom, successfully beat Monster Energy in front of the Intellectual Property Office, when it argued that its name was not infringing and that it did not sell energy drinks.²²

III. Takeaways

Monster Energy has spent in excess of \$8.5 billion promoting and marketing its trademarks and trade dress, with \$4.6 billion of that spend related to its Claw Icon Mark and trade dress.²³ Although the TTAB has referred to Monster Energy as a "prolific litigant," it has also explicitly denied considering that fact when making its decisions.²⁴ Monster Energy's results demonstrate how persistence pays off -- spending the time and money to enforce your brand's identity can help strengthen the scope of protection to which these assets are entitled. However, as the Monster Energy cases also illustrate, there are numerous factors at play when it comes to evaluating just how far trademark rights can be extended, and Monster Energy is one brand that is notorious for pushing that line. When undertaken judiciously, a robust enforcement program can serve as another tool in your competitive arsenal to help differentiate your products and services from those of competitors.

[1] *Outdoor Pro Shop, Inc. v. Monster Energy Co.*, Order, No. 20-cv-05999-BLF, at *1 (N.D. Cal. 2021).

- [2] *Outdoor Pro Shop, Inc. v. Monster Energy Co.*, Compl., No. 20-cv-05999-BLF, at *2-3 (N.D. Cal. 2020).
- [3] *Outdoor Pro Shop, Inc. v. Monster Energy Co.*, Mot. to Dismiss, No. 20-cv-05999-BLF, at *3 (N.D. Cal. 2021).
- [4] Adam Lidgett, *Monster Energy Doges Outdoor Pro Shop TM Suit, For Now*, Law360 (June 22, 2021).
- [5] *Supra* note 2, at 3, referring to Application Nos. 88568305, 88459017, and 88448889 filed between 2019 and 2020.
- [6] *Outdoor Pro Shop, Inc. v. Monster Energy Co.*, Order Granting Mot. to Dismiss with Leave to Amend, No. 20-cv-05999-BLF (N.D. Cal. 2021).
- [7] *Outdoor Pro Shop, Inc. v. Monster Energy Co.*, First Am. Compl., No. 20-cv-05999-BLF, at *1 (N.D. Cal. 2021).
- [8] *Id.* at 9, 12-13.
- [9] Sam Corey, *How similar is too similar? Monster Energy files notice of opposition over company's logo*, The Union, www.theunion.com/news/how-similar-is-too-similar-monster-energy-files-notice-of-opposition-over-companys-logo/ (Sept. 10, 2019).
- [10] Bill Donahue, *Monster Energy Beats 'Monster Towel' Trademark at TTAB*, Law360, www.law360.com/articles/1325908/ (Nov. 4, 2020).
- [11] Bill Donahue, *Citing Romag Ruling, Monster Wants \$10M In Trademark Fight*, Law360, www.law360.com/articles/1329979/citing-romag-ruling-monster-wants-10m-in-trademark-fight (Nov. 18, 2020).
- [12] *Monster Energy Co. v. Integrated Supply Network LLC*, Case No. 5:17-cv-00548, Order re: Plaintiffs' Mot. for Disgorgement of Profits (April 12, 2021).
- [13] *Monster Energy Co. v. Integrated Supply Network LLC*, Case No. 5:17-cv-00548, Stipulated Final Consent Judgment (C.D. Cal. June 14, 2021).
- [14] Steve Brachmann, *Monster Energy Prevails on Trademark Claims, Wins Punitive Damages*, IPWatchdog, www.ipwatchdog.com/2018/12/23/monster-energy-prevails-trademark-punitive-damages/id=104053/ (Dec. 23, 2018).
- [15] *Monster Energy Co. v. Powernation LLC*, Case No. 5:21-cv-00270, Compl. at 16 (C.D. Cal. Feb. 17, 2021).
- [16] *Monster Energy Co. v. Powernation LLC*, Case No. 5:21-cv-00270, Stip. For Entry of Final Judgment and Permanent Injunction at 2 (C.D. Cal. Aug. 16, 2021).
- [17] Kenan Farrell, *Monster Energy sues Fitness Company over Claw Icon*, Indiana Intellectual Property Blog, <https://indianaintellectualproperty.com/2021/05/28/monster-energy-sues-fitness-equipment-company-over-claw-icon/> (May 28, 2021).
- [18] Eric Perrott, *Slaying the Monster: How a Minor League Hockey Team Beat Monster Energy and Registered Their 'Cleveland Monster' Trademarks*, Gerben Law Firm, <https://www.gerbenlaw.com/blog/slaying-the-monster-how-a-minor-league-hockey-team-beat-monster-energy-and-registered-their-cleveland-monster-trademarks/> (July 18, 2021).
- [19] Andrew L. Yarrow, *A D.C. root beer company, an energy drink behemoth and an ugly trademark fight*, Washington Post, www.washingtonpost.com/lifestyle/magazine/a-dc-root-beer-company-an-energy-drink-behemoth-and-an-ugly-trademark-fight/2019/10/21/5f2b190c-e156-11e9-8dc8-498eabc129a0_story.html (Oct. 21, 2019).
- [20] *Monster Energy Co. v. Thunder Beast LLC*, Case No. 5:18-cv-01367, Stipulated Dismissal (C.D. Cal. 2019).
- [21] Lauren Berg, *Monster Energy Living Up To Name With TM Suit, Judge Says*, Law360, <https://www.law360.com/articles/1194422/monster-energy-living-up-to-name-with-tm-suit-judge-says> (Aug. 30, 2019).
- [22] Matthew Howe, *Pizzeria wins trademark case against Monster Energy*, Samuels Solicitors, <https://www.samuels-solicitors.co.uk/news/monster-energy-trademark-infringement-case> (last accessed July 18, 2021).
- [23] *Monster Energy Co. v. Powernation LLC*, Case No. 5:21-cv-00270, Compl. at 11 (C.D. Cal. Feb. 17, 2021).
- [24] Bill Donahue, *Monster Energy Beats 'Monster Towel' Trademark at TTAB*, Law360, www.law360.com/articles/1325908/print?section=foodbeverage (Nov. 4, 2020).

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TIPS FOR NAVIGATING THE CURRENT LANDSCAPE AT THE USPTO

By: [Julie D. Shirk](#) and [Monica Riva Talley](#)

If you recently filed a trademark application with the U.S. Patent and Trademark Office, you may have noticed that the average time to first action (initial examination) is about six months from the application's filing date – double that compared to applications filed in late 2019 and early 2020.¹ This increase in time to first action is directly tied to an increase in trademark application filings. For example, in December 2020 alone, the USPTO received 92,608 trademark applications, an increase of 172% over December 2019.² This surge in filings comes from both foreign and domestic applicants. It is believed to be due to (1) a pandemic-fueled boom in ecommerce, (2) online marketplace tools designed to protect brands, which require a U.S. trademark application or registration, and (3) foreign governments offering financial incentives and subsidies to its citizens and businesses to file new applications with the USPTO. Many of these foreign-subsidized applications appear to be based on fraudulent claims of use, or filed without any intention to use the mark in commerce, and can stand in the way of legitimate, later-filed applications.

So what can you do to navigate your way more quickly and effectively through the USPTO? There are several options for shortening the pendency of a trademark application.

- **Petition to Make Special** – If you have an immediate need for a trademark registration, e.g., to sue an infringer, or to record your rights with Customs to have confirmed counterfeit goods seized, consider filing a Petition to Make Special to jump the line of applications currently awaiting examination. A Petition to Make Special cuts the time to initial examination from several months to several weeks, and requires payment of a \$250.00 fee and a statement of facts showing why special action is justified.
- **File a TEAS Plus application** – A TEAS Plus application is designed to be easier for both the applicant and the USPTO, and comes with a reduced filing fee. While TEAS Plus applications are not examined before TEAS Standard applications, they tend to register about two months sooner, because the applicant is required to identify the goods and services of the application from a manual of pre-approved goods and services, reducing the possibility of an Office Action objecting to the classification or definiteness of the goods and services. If your goods and services are common or standard in commercial terms, this may be a good filing option for you.

- **Avoid the kitchen sink approach** – If you need a registration to protect your mark for only a “genus” of goods, avoid the temptation to protect the mark for a number of “species” within the genus, which may delay your ability to file a use-based application, or a Statement of Use, because both require specimens and attestations to actual use for all. *E.g.*, instead of identifying the goods as baseball caps and bucket hats, opt for the broader, yet still USPTO-approved identification of “headwear.” In addition to decreasing the time to registration, this may improve your ability to show use of the mark years later for a Declaration of Use filing, which is required to maintain your federally-registered rights.
- **Use versus Intent To Use** – While it may be less expensive to combine the goods and services with which a mark is used or intended for use in a single application, applications with combined use and intent to use claims tend to have a longer pendency. Consider, instead, filing the use-based goods and services in one application, and the intent to use-based goods and services in another, to permit the use-based application to proceed to registration immediately after the Opposition period. This way, any delay in bringing the intent to use-based goods and services to market, or in the processing of a Notice of Allowance or Statement of Use for such goods and services at the USPTO, will not impact registration of the separate use-based application.

If registration of your pending application has been refused based on what appears to be a fraudulently filed application or registration, consider (1) filing a Letter of Protest in applications based on suspicious-looking specimens or other fraudulent claims, or (2) taking advantage of existing Opposition and Cancellation procedures, as well as the soon-to-be-available Reexamination and Expungement procedures under the Trademark Modernization Act (TMA). We'll report more on the TMA after the rules are promulgated. But, suffice it to say for now that the Reexamination and Expungement procedures were specifically enacted to give brand owners new tools to rid the federal register of unused registered marks, clearing the way for brand owners to register their own.

[1] www.uspto.gov/dashboard/trademarks/application-timeline.html

[2] www.uspto.gov/subscription-center/2021/what-huge-surge-trademark-filings-means-applicants

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Cannabis Extraction Technology Litigation Updates

By: [Pauline M. Pelletier](#) and [Deborah Sterling, Ph.D.](#)

We previously predicted that, as the cannabis patent landscape matures and the number of cannabis patents reaches a critical mass, litigation in this field will increase.¹

We have been monitoring the patent litigation between Canopy Growth Corporation and GW Pharmaceuticals plc involving cannabis extraction technology, which is currently pending in the Western District of Texas.² More recently, patent infringement suits have been filed by Gene Pool Technologies, Inc., also asserting patents related to cannabis extraction technology.³ These suits are notable as further activity in this important commercial and technological space.

Extracts of cannabinoids, like cannabidiol (CBD) and tetrahydrocannabinol (THC), as well as full-spectrum cannabis extracts, are often the foundation for commercial products (e.g., oils, edibles, formulations). Extracts may also be commercial products in and of themselves. The modern extraction process is often facilitated by high-tech machinery and chemical processes, including alcohol extraction, hydrocarbon extraction, and CO₂ extraction. However, as demand has grown for more extraction options, niche processes have emerged, including ultrasound-assisted extraction, hydrodynamic extraction, and (believe it or not) extraction by live bees.⁴

As the cannabis patent litigation landscape matures, it is worth taking note of strategies that have been used in other commercial contexts, including in the bio-pharma and high-tech industries.⁵ We continue to monitor the dockets for cannabis-related intellectual property litigation, providing periodic updates about important or informative decisions.

[1] Patent Demand Lessons For Cannabis Cos. From Big Tech, Law 360 (Mar. 2020), available at <https://www.sterneessler.com/news-insights/publications/patent-demand-lessons-cannabis-cos-big-tech>

[2] GW Pharma Seeks Dismissal of Patent Suit Filed in Texas by Canopy Growth (Mar. 2021), available at <https://www.sterneessler.com/news-insights/publications/gw-pharma-seeks-dismissal-patent-suit-filed-texas-canopy-growth>

[3] Gene Pool Technologies, Inc. v. ANM, Inc., No. 1-21-cv-01154 (D. Or. Aug. 6, 2021); Gene Pool Technologies, Inc. v. Coastal Harvest, LLC, No. 5-21-cv-01328 (C.D. Cal. Aug. 6, 2021).

[4] Artisanal Edible Cannabis Honey Causes A Buzz, Forbes (Nov. 19, 2018), available at <https://www.forbes.com/sites/sarabrittany Somerset/2018/11/19/artisanal-edible-cannabis-honey-causes-a-buzz/?sh=27f859b8718d>.

[5] What Cannabis Patent Applicants Can Learn From Biopharma, Law 360 (Jan. 2019), available at <https://www.sterne kessler.com/news-insights/publications/what-cannabis-patent-applicants-can-learn-biopharma>.

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gTLD SUNRISE PERIOD NOW OPEN: AUGUST 2021

By: [Monica Riva Talley](#).

As first reported in our December 2013 newsletter, the first new generic top-level domains (gTLDs, the group of letters after the "dot" in a domain name) have launched their "Sunrise" registration periods. Please contact us or see our [December 2013 newsletter](#) for information as to what the Sunrise period is, and how to become eligible to register a domain name under one of the new gTLDs during this period.

As of August 30, 2021, ICANN lists a new Sunrise period as open for the following new gTLD that may be of interest to our clients. A full list can be viewed [here](#).

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ICANN maintains an up-to-date list of all open Sunrise periods [here](#). This list also provides the closing date of the Sunrise period. We will endeavor to provide information regarding new gTLD launches via this monthly newsletter, but please refer to the list on ICANN's website for the most up-to-date information – as the list of approved/launched domains can change daily.

Because new gTLD options will be coming on the market over the next year, brand owners should review the list of new gTLDs (a full list can be found [here](#)) to identify those that are of interest.

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