

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NUMBER UK00004347723

BY AAPA LIFE LIMITED

TO PROTECT THE FOLLOWING TRADE MARK IN CLASSES 5 AND 32:

IT'S POP, BUT BETTER

Background

1. On 2 March 2026, Aapa Life Limited ('the applicant') applied to register the mark shown above, for the following services:

Class 5: Nutritional supplement beverages; nutritional beverages for dietetic purposes; nutritionally fortified beverages containing vitamins for dietetic purposes; nutritionally fortified beverages containing probiotics for dietetic purposes; vitamin drinks.

Class 32: Non-alcoholic beverages; mineral waters; aerated waters; fruit drinks; fruit juices; syrups for making non-alcoholic beverages; preparations for making non-alcoholic beverages; mineral enriched non-alcoholic beverages; protein enriched non-alcoholic beverages; vitamin enriched non-alcoholic beverages; nutritionally fortified non-alcoholic beverages.

2. On 5 March 2026, the Intellectual Property Office ('UKIPO') issued an examination report in response to the application. The examination report contained objections under Sections 3(1)(b) of the Trade Marks Act 1994 ('the Act') against all services on the application, which reads as follows:

Absolute Grounds for Refusal

Section 3(1)(b)

The application is not acceptable for all the goods claimed in Classes 5 and 32. There is an objection under Section 3 (1) (b) of the Act as the mark is devoid of any distinctive character as it is merely a promotional statement about the goods.

This is because the mark applied for consists of the words "IT'S POP, BUT BETTER" which merely conveys a positive message, namely that the goods stated in your application are better than other pop drinks.

'Pop' is a widely understood term to describe a fizzy drink.

Accordingly, when met by the sign "IT'S POP, BUT BETTER" the average consumer would simply perceive a promotional statement to encourage them to purchase the goods. The consumer would be required to look elsewhere for the brand origin.

As such this statement could equally apply to any undertaking within the relevant field and thus is not capable of indicating brand origin.

In order to function as a trade mark a sign must be capable of distinguishing your goods from those of another undertaking, however, marks devoid of distinctive character are incapable of performing this essential function.

3. On 18 March 2026, Murgitroyd and Company Limited ('the representative') responded to the examination report with submissions in support of acceptance. They submitted that a mark must be devoid of *any* distinctive character to fall foul of Section 3(1)(b), and therefore the bar for refusal is very high. They cited Case C-265/09 P *OHIM v BORCO-Marken-Import Matthiesen GmbH & Co KG* to outline the established principles for making this assessment, i.e., that the mark '*must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings*' and that distinctive character must be assessed '*first by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the perception of them by the relevant public*'.
4. The representative went on to submit that the goods applied for in Classes 5 and 32 are directed towards a non-specialist public who would pay a low- to average level of attention when purchasing the goods, citing Case T-130/01 *Skyes Enterprises v OHIM* to illustrate that what is most important when assessing distinctive character is the first impression created on sight of the mark. They went on to cite Case C-251/95 *Sabel BV v Puma AG* (paragraph 23) and submitted that the average consumer usually perceives a mark as a whole and does not analyse its various details.
5. The representative disagreed with the examiner that the mark could 'equally apply to any undertaking', stating that phrases such as 'Better Pop' or 'The Best Pop Drink' are more akin to generic, common, promotional phraseology.
6. The representative submits that the sign 'IT'S POP, BUT BETTER' is a

phrase that employs an unconventional syntactic structure, and features a tone which creates narrative tension by defining a product against a known category (pop') and promising a departure from it. As such the sign is not a simple laudatory claim of quality. Therefore, the sign 'IT'S POP, BUT BETTER' functions in a dual capacity. It is a memorable and quirky promotional message that also incorporates brand promise, and can therefore function as a primary identifier. The representative stated that modern consumers are 'accustomed to unconventional branding where the slogan or phrase is the brand'. Therefore, while the representative accepts that the consumer may see the mark as a promotional statement, it is their view that when perceived as a whole it possesses the minimum degree of distinctive character and should be accepted for registration.

7. On 20 March 2026 the examiner issued a letter acknowledging the submissions made by the representative and maintaining the objection under Section 3(1)(b). In their correspondence, they reiterated their view that the sign 'IT'S POP, BUT BETTER' would simply be perceived by the consumer as a promotional message that could be equally used by any similar undertaking in regard to the goods applied for, indicating that the goods are like pop but better. The examiner cited C-64/02 *Das Prinzip Der Bequemlichkeit* (The Principles of Comfort') to support their view that the average consumer is not accustomed to seeing promotional phrases as trade marks.
8. The examiner went on to state that in their view the examples 'Better Pop' and 'The Best Pop Drink' suggested by the representative are on par with the mark at issue and are equally devoid of distinctive character. They cited Case C-398/08 *AUDI V OHIM* ('Vorsprung Durch Technik') to support their view that the sign at issue does not feature any unconventional or imaginative structural or grammatical elements that could endow it with a degree of distinctive character, describing it as a simple marketing claim to quality.
9. The representative was permitted a further two months to respond to the examiner's points or to request a hearing with a senior officer of the UKIPO to discuss the matter further.
10. No further response was received to the previous correspondence and on 27 May 2026, the examiner confirmed the objections taken under Section 3(1)(b) remained and as such the application was being refused under Section 37(4) of the Act. In this case the primary reason for refusal of the application is that the applicant failed to satisfy the registrar that the requirements were met.
11. On 2 June 2026, following formal refusal, the representative filed to the UKIPO a Form TM5, requesting a written statement of reasons for the Registrar's decision to refuse the application on behalf of the applicant. As such I am now asked under Section 76 of the Trade Marks Act 1994 and Rule 69 of the Trade Mark Rules 2008, to state in writing the grounds for the

refusal and the materials used in arriving at it. No formal evidence of use has been put before me for the purposes of demonstrating acquired distinctiveness. Therefore, in respect of the goods listed in paragraph 1 above, I only have the prima facie case to consider.

The Law

12. Section 3(1)(b) of the Act reads as follows:

3.-(1) The following shall not be registered –

(a) ...

(b) trade marks which are devoid of any distinctive character,

(c) ...

(d) ...

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

13. For the avoidance of doubt, it is noted that the Trade Marks Act 1994 is largely derived from EU law (Directive 2015/2436). In relation to the interpretation of such ‘retained’ or ‘assimilated’ law, the case law of the Court of Justice of the European Union (CJEU) (including the General Court) issued before the end of the transition period continues to apply, and is binding, as ‘retained’ or ‘assimilated’ EU case law under Section 6 of the Withdrawal Act.

The relevant legal principles - Section 3(1)(b)

14. The Court of Justice of the European Union (‘CJEU’) has emphasised the need to interpret the grounds for refusal of registration listed in Article 3(1) of Directive 2008/95/EC (‘the Directive’, being the codified version of the original Directive 89/104/EEC) and Article 7(1) of Council Regulation (EC) No 207/2009 (‘the Regulation’, being the codified version of original Council Regulation 40/94), in the light of the general interest underlying each of them (Case C-37/03P, *Bio ID v OHIM*, para 59 and the case law cited there and, e.g. Case C-273/05P *Celltech R&D Ltd V OHIM*).

15. The general interest to be taken into account in each case must reflect different considerations according to the ground for refusal in question. In relation to Section 3(1)(b) (and the equivalent provisions referred to above

upon which Section 3(1)(b) is based) the Court has held that ‘...the public interest... is, manifestly, indissociable from the essential function of a trade mark’ (Case C-329/02P *Satelliten Fernsehen GmbH v OHIM* ‘SAT.1’). The essential function thus referred to is that of guaranteeing the identity of the origin of the goods or services offered under the mark to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin (see paragraph 23 of the above-mentioned judgement). Marks which are devoid of distinctive character are incapable of fulfilling that essential function. Moreover, the word ‘devoid’ has, in the UK at least, been paraphrased as meaning ‘unpossessed of’ from the perspective of the average consumer.

16. Section 3(1)(b) must include within its scope those marks which, whilst not designating a characteristic of the relevant goods and services (i.e. not being necessarily descriptive), will nonetheless fail to serve the essential function of a trade mark in that they will be incapable of designating origin. In terms of assessing distinctiveness under Section 3(1)(b), the CJEU provided guidance in Case C363/99 *Koninklijke KPN Nederland NV v Benelux Merkenbureau* (Postkantoor) where, at paragraph 34, it stated:

“A trade mark's distinctiveness within the meaning of Article 3(1)(b) of the Directive must be assessed, first, by reference to those goods or services and, second, by reference to the perception of the relevant public, which consists of average consumers of the goods or services in question, who are reasonably well informed and reasonably observant and circumspect (see inter alia Joined Cases C-53/01 to C55/01 Linde and Others 5 [2003] ECR I-3161, para 41, and Case C104/01 Libertel [2003] ECR I-3793, paras 46 and 75).”

17. So, the question of a mark being devoid of any distinctive character is assessed by reference to the goods and/or services applied for, and by reference to the perception of the average consumer for those goods and/or services. I should also add that being ‘devoid of any distinctive character’ does not represent an objective standard, but is based upon an assessment which concludes that the sign presented for registration is ‘unpossessed’ of distinctive character from the perspective of the average consumer. Since, in the relevant authorities’ assessment, the sign is unpossessed of distinctive character (this has been, in turn, paraphrased as being ‘origin-neutral’ as distinct from ‘origin-specific’), the sign is not considered capable of performing the essential function of a trade mark.

18. In addition to considering the objection in respect of all the goods claimed, I then need to assess whether promotional phrases can fulfil the function of a distinctive trade mark. Following from the CJEU guidance on cases such as *Sykes Enterprises v OHIM* (Real People Real Solutions) [2002] ECR II-5179, there had been a tendency to assume that promotional statements cannot possess the necessary distinctive character to indicate trade origin. This sort of assessment was based on the assumption that consumers are not in the habit of regarding promotional phraseology as trade marks, but instead regard them as purely promotional, non-distinctive

material. Following the CJEU decision in Case C398/08P *Audi AG v OHIM* ('Vorsprung Durch Technik') we now know that this is only part of the consideration that must be made. In paragraph 44 of that decision, the Court stated:

"... while it is true... that a mark possesses distinctive character only in so far as it serves to identify the goods or services in respect of which registration is applied for as originating from a particular undertaking, it must be held that the mere fact that a mark is perceived by the relevant public as a promotional formula, and that, because of its laudatory nature, it could in principle be used by other undertakings, is not sufficient, in itself, to support the conclusion that the mark is devoid of distinctive character."

19. It is also a well-established principle that the Registrar's role in examination will involve a full and stringent examination of the facts, underlying the Registrar's frontline role in preventing the granting of undue monopolies, see, to that effect, CJEU Case C-51/10 P, *Agencja Wydawnicza Technopol sp. z o.o. v OHIM* [2011] ECR I 1541. Whilst this case was, technically speaking, in relation only to Section 3(1)(c) or its equivalent in European law, the principle about the 'prevention of undue monopolies' must hold good whether Section 3(1)(b) and/or (c) applies.

Application of legal principles – Section 3(1)(b)

20. In arriving at my decision, I first have to identify who the average consumer for the goods covered by the application is. The specification covers, *inter alia*, nutritional supplement beverages and vitamin drinks in Class 5, and a variety of non-alcoholic beverages and preparations for making beverages in Class 32. I consider it reasonable to assume the relevant consumer of such goods to be the general public. The level of consumer attention for the goods covered by the application is likely to be low to moderate, however in my opinion, the precise level of attention given to the purchase of these goods by the relevant consumer will not have a material impact on how they perceive the words of the application.

21. I now have to decide whether the sign applied for, used in relation to the goods claimed, would be seen as one which lacks any capacity *prima facie* to distinguish the products of one trader from those of another. I must consider the perception of the average consumer when seeing the words 'IT'S POP, BUT BETTER' in normal and fair use in relation to the goods claimed. Taking into account the fact that the goods claimed are non-alcoholic drinks in the form of nutritional supplement beverages, vitamin drinks and non-alcoholic beverages, I feel that the objection is valid in respect of those goods.

22. It is necessary to start with a linguistic analysis of the words appearing in the mark in order to assess whether or not they are capable of performing the

essential function of a trade mark. Although it is essential that any assessment of distinctiveness takes into account the mark's totality, it is also necessary to take into account the meaning of the individual parts of the mark.

23. The mark applied for consists of the phrase 'IT'S POP, BUT BETTER'. Oxford English Dictionary defines the word 'pop' as: '*An effervescent or carbonated drink (originally ginger beer or champagne, now usually a non-alcoholic fizzy drink)*'. It defines the word 'better' as: '*Of greater excellence; of superior character or quality*'. With these definitions in mind, it appears to me that the sign 'IT'S POP, BUT BETTER', when seen on the goods applied for in Classes 5 and 32, fulfils a promotional function by highlighting a positive aspect of the goods offered, i.e., that they are (or are similar to) a particular product (in this case, a drink of 'pop') but a superior version of that product ('better').

24. I accept that marks can be both promotional and distinctive as a trade mark at the same time. However, the case law tells us that, in the *prima facie*, marks must be capable of being perceived as an indication of the origin of the goods and services. In other words, the essential 'origin' function must be recognisable alongside the other function of promotion. See, to that effect, Case C-64/02 *OHIM v Erpo Möbelwerk* ('The Principles of Comfort').

25. The representative has cited *Sykes Enterprises v OHIM* (Real People Real Solutions) [2002] ECR II-5179 in their submissions, stating that what is most important when assessing distinctive character is first impression created on sight of the mark. However, following the CJEU decision in Case C398/08P *Audi AG v OHIM* ('Vorsprung Durch Technik') we now know that this is only part of the consideration that must be made. In *Audi*, the ECJ confirmed that, while there is no stricter test to be applied to promotional phrases, literal characteristics - such as whether a mark can have a number of meanings, whether it constitutes a play on words, or whether it would be perceived as imaginative, surprising or unexpected - are likely to endow a promotional expression with distinctive character. As such, while a mark is not required to possess such characteristics, the presence of features such as these can help to endow it with distinctive character. Despite the representative's submissions that the structure of the mark is unconventional, I am not persuaded that there is anything unusual or imaginative about the mark. The word 'pop' is not at all arbitrary when seen in relation to the goods applied for and to describe goods as 'better' has a clear promotional connotation. As such in my opinion the relevant consumer will not notice anything particularly unusual or creative in the sign and will be accustomed to seeing a phrase of this nature used to reference and promote the superior nature of the goods on offer, rather than as an indication of trade origin.

26. Further, the sign appears in plain word type and has no stylisation, device elements or unusual grammatical juxtaposition, in my opinion, to give it any distinctive character enabling it to be registered. It is highly unlikely that the words alone would indicate, to consumers, the trade origin of the goods.

27. I am supported in this assessment by the criteria set out by Mr Geoffrey Hobbs QC (as he then was) sitting as the Appointed Person in BL O/712/22 DRINK SOCIALLY RESPONSIBLY where he states at paragraph 11:

The argument before me proceeded with reference to the informative analysis contained in the EUIPO Boards of Appeal “Case-law Research Report — The distinctive character of slogans (October 2021). The Applicant invited me to consider the registrability of the designation DRINK SOCIALLY RESPONSIBLY from the perspective identified in paras [15] and [16] of the Report:

[15] The following non-exhaustive factors laid down in the case-law may serve to establish distinctiveness for a slogan: (a) it has a number of meanings; (b) it constitutes a play on words; (c) it introduces elements of conceptual intrigue or surprise, so that it may be perceived as imaginative, surprising or unexpected; (d) it has some particular originality or resonance, and / or triggers in the minds of the relevant public a cognitive process or requires an interpretative effort; (e) it has unusual syntactic structures and / or linguistic and stylistic devices such as alliterations, metaphors, rhymes.

28. In his decision, Mr Hobbs did not introduce any new considerations but instead consolidated the existing test from earlier case law relating to promotional phrases. I am therefore satisfied that reliance on this decision is appropriate, as it does not introduce any new legal principles that the representative has not already had the opportunity to address. Therefore, with this case in mind, it is my view that the sign ‘IT’S POP, BUT BETTER’ does not feature any of the criteria set out by Mr Hobbs. It simply consists of ordinary and everyday words put together in a grammatically correct arrangement, the combined meaning of which is a phrase which is easily understood when seen in relation to the goods applied for in Classes 5 and 32 (see to that effect Case O-185-12 *FEEDBACKMATTERS* paragraph 45). It is my view that the mark is unpossessed of the level of distinctive character required to make it a memorable indicator of trade origin that would enable the consumer to repeat the purchasing experience if it proves to be positive, or to avoid it, if it proves to be negative (*T-79/00 Rewe Zentral AG v OHIM*).

29. It is reasonable to consider fair and notional use when assessing a mark. On viewing a depiction of the goods on the applicant’s website, it appears that the sign at issue is displayed on the packaging of the goods beneath the

brand name 'Aapa', in a smaller font size. In my view, this manner of use supports my view that the mark at issue is a promotional reference highlighting the superiority of the product. The wording in the mark is in no way arbitrary or unusual when seen in this context. In my view, the applicant is not using the mark in a manner commensurate with trade mark use. Notwithstanding this example of the manner of use, it is my view that the sign 'IT'S POP, BUT BETTER' falls foul of Section 3(1)(b) based upon my linguistic analysis alone. See Annex for the relevant example of the way the applicant is using the mark.

30. As such it is my view that the relevant consumer would not perceive the phrase 'IT'S POP, BUT BETTER' as being anything other than a non-distinctive promotional expression that simply points to the superior nature of the goods in comparison to the usual expectations of such products.

Conclusion

31. Having given due care and attention to all of the arguments put forward during the proceedings, the application is refused under Section 3(1)(b) for all goods in Classes 5 and 32.

Dated this 30th day of June 2026

Jayne Cocks

**For the Registrar
The Comptroller-General**

Annex

<https://drinkaapa.com/>

