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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sports Outdoor And Recreation (SOAR) Park

Serial No. 85108918
Serial No. 85108928

Mark A. Kammer and Linda W. Browning of Kammer Browning PLLC for Sports Outdoor And Recreation (SOAR) Park.

Colleen Dombrow, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

Before Cataldo, Gorowitz, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Sports Outdoor And Recreation (SOAR) Park filed two applications to register on the Principal Register the marks JETTE[1] and X-RAY,[2] both in standard character form, for "providing theme park services." After initial examination, the applications were published for opposition and notices of allowance issued.

[1] Application Serial No. 85108918 filed on August 17, 2010 under Trademark Act § 1(b), 15 U.S.C. § 1051(b).

[2] Application Serial No. 85108928 filed on August 17, 2010 under Trademark Act § 1(b), 15 U.S.C. § 1051(b).

Applicant then filed statements of use as required by Trademark Act § 1(d), 15 U.S.C. § 1051(d). The same specimen of use was submitted with each of the two the statements of use.

In each case, the examining attorney refused registration under §§ 1 and 45 of the Trademark Act, 15 U.S.C. §§ 1051 and 1127, on the ground that the specimen of use did not evidence an association between the mark and applicant's identified services. When the refusals were made final, applicant brought this appeal. Applicant and the examining attorney have filed their briefs on appeal, and applicant has filed a reply brief.

Although the marks sought to be registered in the two applications are different, the issues raised by the two appeals are identical and the briefs and evidentiary records are substantially identical. Accordingly, the Board will address both appeals in a single opinion. Citations to the briefs refer to the briefs filed with respect to application Serial No. 85108928 unless otherwise noted. We have, of course, considered all arguments and evidence filed in each case, including any arguments and evidence not specifically discussed in this decision.

In each case, the specimen of use submitted with the statement of use is the following one-page internet advertisement:


Morgan's WONDERLAND
Where Everyone Can Play
Online Registration System
Login
Heroes' Club Membership Levels
Jette Membership
$25/month ($300/year)
Includes:
4 Tickets to the Park
1 MWL Bumper Sticker
1 MWL T-Shirt
X-Ray Membership
$50/month ($600/year)
Includes:
6 Tickets to the Park
1 MWL Bumper Sticker
2 MWL T-Shirts
Rocket Membership
$75/month ($900/year)
Includes:
8 Tickets to the Park
1 MWL Bumper Sticker
2 MWL T-Shirt
2 Hour Pavilion Rental
Morgan Membership
$100/month ($1200/year)
Includes:
10 Tickets to the Park
1 MWL Bumper Sticker
2 MWL T-Shirt
3 Hour Pavilion Rental
Join Now!
Everyone is welcome...come play with us!
Sports Outdoor And Recreation (SOAR) is a 501 (c) (3) non-profit organization established by the Gordon Hartman Family Foundation to manage the Special Needs Park and Regional Soccer Complex.

Section 45 of the Trademark Act provides, in relevant part, that a service mark is a mark that is used "to identify and distinguish the services of one person … from the services of others and to indicate the source of the services"; and that "a mark shall be deemed to be in use in commerce … on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce."[3] In order to demonstrate use of a service mark by means of an advertisement, the advertisement must display the mark "in a manner that would be perceived by potential purchasers as identifying the applicant's services and indicating their source via a 'direct association.'" *In re DSM Pharmaceuticals Inc.*, 87 USPQ2d 1623, 1624 (TTAB 2008). "The minimum requirement is some direct association between the offer of services and the mark sought to be registered therefor." *In re Universal Oil Products Co.*, 476 F.2d 653, 177 USPQ 456, 457 (C.C.P.A. 1973). A specimen that shows only the mark with no reference to, or association with, the services does not show service mark usage. *In re Adair,* 45 USPQ2d 1211 (TTAB 1997); *In re Duratech Industries Inc.,* 13 USPQ2d 2052 (TTAB 1989).

The examining attorney argues as follows with respect to each of the marks X-RAY and JETTE appearing on the specimen of use submitted by applicant:

> the mark does not appear as a source indicator for providing theme park services. … Specifically, the word "X-RAY" ["JETTE"] indicates a level of membership and consumers viewing the mark on the applicant's website

[3]15 U.S.C. § 1127, definitions of "service mark" and "use in commerce."

> will view it as an indicator for applicant's membership services.[4]

Applicant, in response, contends:

> Membership in this case is essentially the purchase of tickets for entry into the theme park.[5]
> …
> [W]hen viewing the full context of the use of the mark, including the "level of membership" wording, Applicant asserts that the inclusion of this wording does not interfere with the perception of the mark as a service mark for theme park services. … [T]he membership or ticket package is an integral and essential component of the identified services, that is, providing theme park services. …
>
> The membership or ticket package embodies the intangible rights which are being exchanged when customers use Applicant's theme park services.[6]

The examining attorney, in support of her position, has made of record advertisements of third-party theme parks[7] to show "that theme parks regularly have various levels of memberships or theme park ticket packages."[8] We note, however, that these advertisements do not refer to their ticket packages as "memberships." For example, King's Dominion and Six Flags theme parks refer to them as "season passes." Universal Studios Hollywood refers to them as "1-Day Pass," "12-month No Black-Out Pass," and other similar designations. Magic Kingdom Park refers to them as "Annual Passes." Accordingly, we see little support

[4] Examining attorney's brief at 3-4.

[5] Applicant's brief at 3.

[6] *Id*. at 5.

[7] Office action of January 12, 2013, pp. 6-35.

[8] Examining attorney's brief at 4.

in this evidence for the examining attorney's position. Applicant, on the other hand, suggests that the evidence proves applicant's point, that it is a common practice for theme parks to offer tickets in packages of varying sizes. Applicant argues, by analogy, "If Disney… identified its ticket packages as the 'Mickey', 'Goofy', and 'Donald' *ticket packages* or *membership levels*, then the public would certainly view those trademarks as source indicators for the Disney theme park services."[9]

The specimen of use at issue makes no reference to a "theme park." However, the examining attorney concedes that "the exact nature of the services does not need to be specified in the specimen…."[10] The specimen does refer repeatedly to "Tickets to the Park." We see also a reference to a "Special Needs Park"; and in the slogan "Where Everyone Can Play," the words "Where" and "Play" make it clear that what is offered is a *place* in which to *play*. The remaining question is whether the specimen shows a "direct association" between the marks at issue and the offered "park" where one can play.

The marks at issue appear on the advertisement under the rubric "Heroes' Club Membership Levels" and the marks are used in the phrases "X-Ray Membership" and "Jette Membership." We see no inconsistency between these references to "membership" and applicant's claim that it is selling theme park services. The examining attorney argues that "Membership services are not theme park services…."[11] However, the examining attorney does not explain what she

[9] Reply brief at 3 (emphasis in original).

[10] Examining attorney's brief at 3, *citing In re Adair*, 45 USPQ2d at 1215.

[11] Examining attorney's brief at 6.

means by "membership services," nor does she explain the nature of the membership services that are supposedly offered by the advertisement. There is nothing else in the record to suggest that applicant is operating any kind of organized association, society, or other conventional type of membership organization. There mere use of the word "membership," without other evidence, is insufficient to transform the nature of what the advertisement appears to offer on its face. Potential customers would perceive the specimen of use as an advertisement for a park where one can play. In the context before us, it is apparent that to be a "member" is to be a "customer" of this service; and that the word "membership" is merely an alternative word for "package of tickets for multiple admissions to the park."

Considering that "Jette Membership" and "X-Ray Membership" refer to ticket packages for admission to theme park services, we see that on the specimen of use the marks JETTE and X-RAY are closely and directly associated with the offered services: each of the two marks appears within a graphic box a few lines above the offer of (respectively) "4 Tickets to the Park" or "6 Tickets to the Park." We find, therefore, that the specimen of use shows the marks used in a manner that would be perceived by potential purchasers as identifying the applicant's services and indicating their source; and that, accordingly, the specimen of use demonstrates use of the marks as service marks within the meaning of the Trademark Act.

Decision: In each case, the refusal to register is reversed.