

ESTTA Tracking number: **ESTTA1262854**

Filing date: **01/30/2023**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Ex Parte Appeal - Serial No.	90660262
Appellant	American Academy of Dermatology, Inc.
Applied for mark	CAMP DISCOVERY
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Submission	Appeal brief
Attachments	D1042020.PDF(105559 bytes) D0988562.PDF(78929 bytes)
Appealed class	Class 041. First Use: Feb 1, 1993 First Use In Commerce: Feb 1, 1993 All goods and services in the class are appealed, namely: Summer camps; charitable services, namely, providing camps for children affected by chronic skin conditions; educational services, namely, providing camps for children affected by chronic skin conditions
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Date	01/30/2023

**UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

In re Application of)
American Academy of Dermatology, Inc.)
Serial No.: 90660262)
Filed: April 21, 2021)
Mark Literal Elements: CAMP DISCOVERY)
Mark Type: STANDARD CHARACTER MARK)
)
_____)

APPLICANT’S EX PARTE APPEAL BRIEF

Applicant/Appellant (hereinafter “Applicant”), American Academy of Dermatology, Inc., by its counsel, hereby appeals the Examining Attorney’s refusal to register the mark CAMP DISCOVERY (“Applicant’s Mark”) in International Class 41 for standard characters on the Principal Register.

I. BACKGROUND AND PROSECUTION HISTORY

Applicant’s Application, filed April 21, 2021, sought to register the mark CAMP DISCOVERY in Class 41 as a trademark used in connection with “Summer camps; charitable services, namely, providing camps for children affected by chronic skin conditions; educational services, namely, providing camps for children affected by chronic skin conditions.” The Application was initially assigned to Examining Attorney Shana McNamara, who issued a non-final office action on January 13, 2022 denying registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d), on the grounds that there was “a likelihood of confusion with the mark in U.S. Registration No. 2690733” (hereinafter referred to as the “Cited Registration”).

The Cited Registration that the Examining Attorney alleges may cause likelihood of confusion consists of the mark DISCOVERY CAMP for “educational and entertainment services in the field of history, namely, a day camp for school-age youth” in Class 41.

Thereafter, Applicant filed a Response to Office Action on March 4, 2022 containing arguments as to why Applicant's Mark would not cause likelihood of confusion with the Cited Registration, and subsequently, a different Examining Attorney (Teague Avent) rejected those arguments and issued a final denial of registration on July 7, 2022.

For efficiency, all of Applicant's arguments and evidence attached to its Response to Office Action are incorporated herein by reference.

II. ARGUMENTS AND EVIDENCE

a. Applicable Law

Trademark Act Section 2(d) bars registration of an applied for mark that so resembles a registered mark that it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the goods and services of the Applicant and Registrant. 15 U.S.C. §1052(d) (2012). The Federal Circuit and lower circuits have consistently held that such analysis is "not concerned with the mere theoretical possibilities of confusion . . . but with the practicalities of the commercial world, with which the trademark laws deal." *Electronic Design & Sales, Inc. v. Electronics Data Systems Corp.*, 954 F.2d 713, 717, 219; 21 USPQ2d 1388. 1393 (C.A.Fed., 1992); *see also Boston Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1, 12 (1st. Cir. 2008) (finding that "likely confusion" has been interpreted to mean "more than a theoretical possibility of confusion"). The Trademark Trial and Appeal Board (T.T.A.B.) also follows this approach, maintaining that "while some awareness of the respective goods and services sold under the marks by the same portion of the consuming public is certainly conceivable, the Trademark Act does not preclude registration of a mark where there is a possibility of confusion as to source or origin, only where such confusion is likely." *In re Hughes Aircraft Company*, 222 U.S.P.Q. 263, 264 (T.T.A.B.1984).

The Court of Customs and Patent Appeals (C.C.P.A.) set forth the test for evaluating the likeliness that confusion exists in the case *In re E.I. du Pont de Nemours & Co.* in 1973. 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). In *du Pont*, the C.C.P.A. held that a determination of

likelihood of confusion must be made on a case-by-case basis by analyzing thirteen factors. *Id.* at 1361. When applying these factors, “there is no litmus rule which can provide a ready guide to all cases.” *Id.*

It is well-established that a likelihood of confusion analysis must consider the commercial impressions of the respective marks in their entireties, and that selected common elements cannot be singled out to the exclusion of distinguishing features, including differences in the overall visual appearance of the marks. See Colony Foods, Inc. v. Sagemark, Ltd., 735 F.2d 1336, 1338-89 (Fed. Cir. 1984) (difference in impression and meaning between HUNGRY HOBO and HOBO JOE’S negates likelihood of confusion and “the fact that both marks play on the hobo theme is not enough to make confusion likely, in light of the differences in the marks as a whole.”); Tricia Guild Assocs. v. Crystal Clear Industries Inc., 38 U.S.P.Q.2d 1313, 1316 (T.T.A.B. 1994) (“[W]hile the marks DESIGNERS GUILD and THE DESIGN GUILD share similarities which are too obvious to discuss, nevertheless, the differences, however slight, are sufficient to ‘convey different connotations and commercial impressions.’”); Champagne Louis Roederer S.A. v. Delicato Vineyards, 47 U.S.P.Q.2d 1459 (T.T.A.B. 1998) (no likely confusion between CRISTAL for champagne and CRYSTAL CREEK for wine); United Foods Inc. v. United Airlines Inc., 41 U.S.P.Q.2d 1653, 1662 (T.T.A.B. 1995) (no likely confusion between UNITED EXPRESS for transportation of freight by truck and UNITED EXPRESS (stylized) for air transportation of passengers and freight).

The mere presence of one or more common terms in respective marks does not necessarily cause a likelihood of confusion, and courts routinely find no likelihood of confusion between marks sharing the same elements. See, e.g., In re Electrolyte Labs., 929 F.2d 645, 647 (Fed. Cir. 1990) (K+ & Design for dietary potassium supplement not likely to be confused with K+ EFF for dietary potassium supplement on grounds that the “T.T.A.B. erred in its dominant focus on the K+ in both marks, to the substantial exclusion of the other elements of both marks”); Miss World (UK), Ltd. v. Mrs. America Pageants, Inc.,

856 F.2d 1445, 8 U.S.P.Q.2d 1237 (9th Cir. 1988) (finding no likelihood of confusion between MISS WORLD and MRS. OF THE WORLD, both for use in connection with beauty pageants).

There is no mechanical test for determining the likelihood of confusion, and the relevant DuPont Factors should be considered not in isolation but rather collectively, as the marks would appear to a relevant purchaser. TMEP § 1207.01. For example, even if two marks are identical (which is not the case here), confusion is unlikely as long as the goods or services in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source. *Local Trademarks, Inc. v. Hardy Boys Inc.*, 16 U.S.P.Q.2d 1156 (T.T.A.B. 1990) (LITTLE PLUMBER for liquid drain opener held not confusingly similar to LITTLE PLUMBER and design for advertising services in the plumbing field).

Moreover, the law is clear that 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 Fondee En 1772*, 396 F. 3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *see also Mattel Inc. v. Funline Merch. Co.*, 81 USPQ2d 1372, 1374-75 (TTAB 2006); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered” when making purchasing decisions).

The likelihood of confusion also depends upon whether an appreciable number of reasonable consumers are likely to be confused by the similar marks. *Scarves by Vera, Inc. v. Todo Imports, Ltd.*, 544 F.2d 1167 (2d Cir. 1976). Federal courts have long noted: “If the goods or services in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumptions that they originate from the same source, then, even if the marks are identical, confusion is not likely.” *Coach Services, Inc. v. Triumph Learning, LLC*, 101 USPQ2d 1713, 1723 (Fed.Cir. 2012); TMEP 1207.01(a)(i)(2015). “In some cases, a determination that there is no likelihood of confusion may

be appropriate even where the marks are similar and the goods/services related because these factors are outweighed by other factors.” TMEP 1207.01 (2015).

b. Analysis

With the above legal standards as context, the absence of a likelihood of confusion between Applicant’s Mark and the Cited Registration is addressed below.

When the commercial impressions of the Cited Registration and Applicant’s Mark are viewed in their entireties, there is clearly no likelihood of confusion. The phrase “CAMP DISCOVERY” does not look or sound anything close to “DISCOVERY CAMP.” In particular, and as noted in the background law section above, the law is clear that consumers are generally more inclined to focus on the first word, prefix or syllable in any trademark or service mark. The first word of Applicant’s mark is “Camp” and the first word of the Cited Registration is “Discovery.”

Additionally, the “consumers” at issue with regard to Applicant’s Mark are the sophisticated dermatologists working hand-in-hand with parents of young people suffering from chronic skin conditions who seek a summer camp staffed by professionals who are knowledgeable about skin conditions. Moreover, as Applicant noted in an affidavit that it submitted with its Response to Office Action, children cannot attend its camp without first being referred by a dermatologist who can confirm that the child has a chronic skin condition. By contrast, the consumers who would encounter the mark “Discovery Camp” would be the parents of literally any young people seeking a camp that involves education and entertainment in the field of history, which is not remotely similar to anything having to do with chronic skin conditions.

Not only is confusion impossible, but it also has never occurred to the best of Applicant’s knowledge over the past thirty years. This lack of any evidence of confusion was noted in the Affidavit of Applicant’s Vice President of Member Relations (attached hereto and also attached to Applicant’s Response to Office Action dated March 4, 2022, stating that “no person has ever contacted AAD in the

mistaken belief that our Camp Discovery was the same as the history-teaching camping program called “Discovery Camp”, which name is the subject of USPTO Reg. No. 2690733.”

c. *Examining Attorney Arguments Have No Merit*

In the Examining Attorney’s initial office action dated January 13, 2022, the Examining Attorney stated the following: “In this case, the application uses broad wording to describe “summer camps”, which presumably encompasses all services of the type described, including registrant’s more narrow ‘educational and entertainment services in the field of history, namely, a day camp for school-age youth’”. There is absolutely no rational basis for the Examining Attorney’s presumption stated above. The Examining Attorney entirely ignored the most relevant part of the Applicant’s description of services that specified the exact kind of camp that the Applicant offers, namely, “**providing camps for children affected by chronic skin conditions.**” This key phrase is repeated twice in the description of services to drive home the point that Applicant’s camp is not some generic summer camp that any child can attend, but rather, a child cannot get into the camp in the first place without a professional dermatologist confirming a chronic skin disease, since the purpose of the camp is to teach children how to live with such chronic conditions.

III. CONCLUSION

In summary, there is neither any possible nor actual likelihood of confusion between Applicant’s Mark and the Cited Registration because the two marks do not look or sound the same, are not offered in the same channels of trade, involve entirely different services (i.e., a camp for children who have been referred by a qualified dermatologist confirming that the children have chronic skin conditions versus an entertainment camp for any child that focuses on teaching history), are each marketed to an entirely different set of consumers for significantly different purposes, and no confusion has ever been known to exist among the relevant consumers.

For the reasons discussed above, Applicant respectfully asserts that the Examining Attorney's refusal to register Applicant's Mark is arbitrary, capricious, contrary to the evidence, and contrary to applicable law. Therefore, Applicant respectfully requests that the refusal to register CAMP DISCOVEREY be reversed and that Applicant's Mark be allowed to proceed to registration. Applicant does **not** desire or request any oral hearing.

Dated: January 30, 2023

Respectfully submitted,

/D. Benson Tesdahl/

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AFFIDAVIT OF CINDY KUHN

The undersigned, being duly sworn, states under penalty of perjury as follows:

1. I am the Vice President of Member Relations & Engagement at the American Academy of Dermatology (AAD). As part of my duties, I have general oversight of and am intimately familiar with one of our program activities known as “Camp Discovery”, the name of which is the subject of USPTO Serial No. 90660262 filed by AAD.
2. To the best of my knowledge and belief, no person has ever contacted AAD in the mistaken belief that our Camp Discovery was the same as the history-teaching camping program called “Discovery Camp”, which name is the subject of USPTO Reg. No. 2690733.
3. The Camp Discovery operated by AAD focuses exclusively on, and is attended by, children who have chronic skin conditions. Unlike any other camping program of which I am aware, children attending Camp Discovery must first be referred to AAD by a dermatologist. Camp Discovery is staffed by dermatologists and nurses to ensure that the medical needs of the campers are properly attended to and that campers learn about how to live with chronic skin conditions. Notably, AAD’s Camp Discovery does not teach history.

IN WITNESS WHEREOF, the undersigned subscribed this Affidavit this 28th day of February, 2022.



Cindy Harris Kuhn
Vice President, Member Relations & Engagement