

RESPONSE

In the Office Action dated October 23, 2019, the Examining Attorney has refused registration of applicant's mark, SEEMORE (and design without color), under Trademark Act §2(d), 15 U.S.C. §1052(d) because applicant's mark, when used on or in connection with the identified goods/services, so resembles the marks in US Registration 5767559 (the "cited mark") as to be likely to cause consumer confusion. Applicant respectfully submits that the facts in the instant case refute the Examining Attorney's objections to registration on the basis of likelihood of confusion between applicant's mark and the cited mark. Applicant respectfully submits that there is no likelihood of confusion between the marks based on the differences in the marks themselves, the distinct commercial impressions they create, and the distinctions in the channels of trade.

INFORMALITIES

The Examining Attorney has raised certain informalities in the Office Action, which Applicant addresses herein. Applicant respectfully requests that the recitation of goods/services in the instant application be amended to read as follows:

Class 39: "Arranging of transport and providing transport for sightseeing tours and charters for others of historic sites and neighborhoods; arranging of transport and providing transport for trolley and train tours and charters for the public of historic sites and neighborhoods"

Class 41: "Arranging and conducting guided sightseeing tours for others of historic sites and neighborhoods; arranging and conducting guided trolley and train tours for the public of historic sites and neighborhoods"

REMARKS

The Examining Attorney refused registration of the subject trademark under Trademark Act §2(d), 15 U.S.C. §1052(d) based on US Registration No. 5767559 for the mark "SEE MORE. BE

MORE.” The Examining Attorney found a potential bar to registration based on a likelihood of consumer confusion as a result of the similarities between the compared marks and the relatedness of the compared services.

Factors to consider in determining whether or not confusion is likely include the similarity or dissimilarity of the marks in their entireties, the similarity of the services, and the relationship between the parties' advertising and channels of trade. In re E.I. DuPont DeNemours & Co., 476 F.2d 1357, 1360-62, 177 USPQ 563 (CCPA 1973).


Applicant respectfully submits that the differences in the marks themselves, the distinct commercial impressions created by the marks, and the distinctions in the related services and channels of trade make consumer confusion unlikely.

1. Dissimilarity of the marks

The Examining Attorney stated that 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/or services of the Applicant and Registrant. One of the DuPont factors that must be addressed in assessing likelihood of confusion is that the marks must be compared in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. Palm Bay Imports, Inc. v. Veuve Cliquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 1371 (Fed. Cir. 2005). In the instant case, Applicant respectfully contends that its mark, SEEMORE (and design without color) is distinct from the cited mark.

In the instant case, the Examining Attorney disregarded evaluation of the marks in their entireties, finding the potentially conflicting portion of the marks are the terms SEE MORE. Accordingly, the Examining Attorney found Applicant’s use of the term SEEMORE on its fanciful trolley design and the Registrant’s use of the terms SEE MORE in its full word mark “SEE MORE. BE MORE.” to be confusingly similar. However, under the anti-dissection rule, one must compare the marks by looking at them as a whole, rather than breaking them apart in order to find similarity. Estate of P.D. Beckwith, Inc., v. Commissioner of Patents, 252 U.S. 538, 545-46 (1920). See In re Hearst Corp., 982 F.2d 493, 494 (Fed. Cir. 1992) (finding the marks VARGA GIRL and VARGAS not confusingly similar when viewed in their entireties).

Applicant asserts that the dominant portion of its mark is the stylized design of a trolley. The associated word mark is a pun on the name Seymour while the cited mark is simply a tag line containing the words SEE MORE.

Applicant’s Mark	Cited Mark
	SEE MORE. BE MORE.

The TTAB has held that the dominance of a design feature can create significant distinctions in the overall commercial impression of a mark even if they are associated with nearly identical goods. For example, in the case In re Covalinski, 113 U.S.P.Q.2d 1166 (TTAB 2014), the TTAB found confusion unlikely between a design mark and a word mark containing the

identical phrase RACEGIRL despite being used on in-part identical goods. Similar to the instant case, the Examining Attorney argued that the words REDNECK RACEGIRL were the dominant feature in the applicant's mark because the literal portion of a word and design mark generally makes the greatest impact on a prospective customer. The Examining Attorney, therefore, found the presence of words REDNECK RACEGIRL in the applicant's mark made it confusingly similar to the registrant's RACEGIRL mark. The Board, however, reversed the Examining Attorney's refusal and found that the overall commercial impression of the applicant's mark was dominated by its design features, thus making it so different from the registered mark that confusion was unlikely and outweighing the other du Pont factors. See also In re White Rock Distilleries, Inc., 92 USPQ2d 1282 (TTAB 2009).

Further, in evaluating the similarities between marks, the emphasis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. In re Bay State Brewing Co., 117 USPQ2d 1958, 1960 (TTAB 2016) (citing Spoons Rests, Inc. v. Morrison Inc., 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd per curiam*, 972 F.2d 1353 (Fed. Cir. 1992)). Even if the Examining Attorney finds the marks to be similar in one aspect of sight, sound, or connotation, the Board has held that similarity of the marks in one respect will not automatically result in a finding of likelihood of confusion even if the goods are identical or closely related. In re Lamson Oil Co., 6 USPQ2d 1041 (TTAB 1987), citing Trak Inc. v. Traq Inc., 212 USPQ 846, 850 (TTAB 1981).

Differences in connotation or commercial impression can outweigh similarities in sight and sound. Coach Servs., Inc., 101 U.S.P.Q.2d. 1713, 668 F.3d at 1369. Thus, the overall commercial impression is crucial to the examination.

In the instant case, upon encountering Applicant's mark, a consumer would find that the dominant element of Applicant's mark is the trolley design. The consumer would see the word SEEMORE and find it to be a clever pun on the name Seymour, but the trolley design is the element that remains in their memory. When the trolley design is compared to the cited mark, the marks are entirely dissimilar. Thus, the overall commercial impression of Applicant's trolley design creates a significant distinction between the marks and confusion is unlikely.

2. Distinct services and channels of trade

Even where marks may be considered to have similarities, if the goods and/or services provided in connection with the respective marks are different, confusion is not likely. See, e.g., M2 Software Inc. v. M2 Communications Inc., 78 U.S.P.Q.2d 1944 (Fed. Cir. 2006)(finding no likelihood of confusion between M2 COMMUNICATIONS and M2 trademarks where goods under the M2 COMMUNICATIONS mark were for CD-ROMs in health care and medicine fields and goods under the M2 mark were for CD-ROMs in the film industry.)

In the instant case, Applicant's mark and the cited mark offer distinct services through different channels of trade. In evaluating the similarity of services or the channels of trade, consumer belief is the relevant inquiry. Goods or services are not related simply because they coexist in the same industry. They are related if they are marketed and consumed in a way that consumers are likely to believe that, when similarly marketed, they come from the same source or are affiliated with or sponsored by a single company. Homeowners Group v. Home Marketing Specialist, 931 F.2d 1100, 1109 (1991). Considerations of how and to whom the respective goods or services of the parties are sold is a very significant factor in illuminating what actually happens in the marketplace. Homeowners Group, 931 F.2 at 110.

Applicant's mark is used in connection with a hop-on hop-off trolley transportation service conducted in a state-of-the-art, all-weather stadium trolley. Applicant's services are marketed through a broad range of channels including city tourist and visitor centers. Its consumers are generally visitors to a particular geographic area who are seeking a tour of historically significant sites.

In contrast, registrant's mark is used in connection with high end destination vacations to exotic locations. Its consumers are not average tourists, but instead are sophisticated consumers who would easily distinguish the difference in a luxury vacation package and a trolley tour. Similarly, a tourist seeking a hop-on-hop off trolley tour of a city will easily distinguish between the trolley services and the luxury vacation packages.

Thus, the services provided under the Applicant's mark and those offered under the cited mark are clearly different and offered in distinct channels of trade. Therefore, confusion as to the origin of the services offered under these marks is unlikely.

CONCLUSION

Based on the above, the Applicant respectfully submits that its mark is not confusingly similar to the cited mark. The differences in the marks themselves and their distinct commercial impressions make consumer confusion unlikely and outweigh the other DuPont factors. The distinctions in the related services and channels of trade make further support the conclusion that consumer confusion unlikely. As such, allowance of the application and publication for opposition is respectfully requested.