

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB                      AUGUST 27, 99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

---

Trademark Trial and Appeal Board

---

In re **Above & Beyond**

---

Serial No. 75/167,440

---

**Gene S. Winter and Stephen P. McNamara** of **St. Onge Steward  
Johnston & Reens LLCs** for **Above & Beyond**.

**Kathleen M. Vanston**, Trademark Examining Attorney, Law Office 103  
(**Michael A. Szoke**, Managing Attorney).

---

Before **Simms, Hohein** and **Walters**, Administrative Trademark  
Judges.

Opinion by **Hohein**, Administrative Trademark Judge:

**Above & Beyond** has filed an application to register the  
mark "ABOVE & BEYOND" for "travel agency and tour services,  
namely, making reservations and bookings for transportation and  
arranging transportation for groups for adventure and ecology  
tours for corporate, organization and consumer travelers and  
tourists".<sup>1</sup>

---

<sup>1</sup> Ser. No. 75/167,440, filed on September 17, 1996, alleging dates of  
first use of "September, 1996," which in light of Examination Guide  
No. 1-95, are read as September 12, 1996, the date the application was  
signed.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the mark "ABOVE & BEYOND," which is registered, as shown below,

for "educational services, namely, conducting a training program for travel agents,"<sup>2</sup> as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We reverse the refusal to register.

Inasmuch as applicant's and registrant's marks are identical,<sup>3</sup> the only real issue in this appeal is whether the respective services are so related that, when rendered under the mark "ABOVE & BEYOND," confusion as to the source or sponsorship thereof is likely to occur. Applicant, in this regard, insists that the only similarity between its travel agency and tour services and registrant's educational training program services for travel agents is that they both relate generally to the

---

<sup>2</sup> Reg. No. 1,608,524, issued on July 31, 1990, which sets forth dates of first use of February 25, 1988; combined affidavit §§8 and 15.

<sup>3</sup> Applicant, we observe, does not contend otherwise.

travel industry. Applicant notes, however, that its services "include hiking, biking, and kayak tours, as well as corporate retreats"; that it "arranges ... all requisite transportation, lodging, and meeting areas for the tours"; and that its "prospective customers include corporate entities, educational or non-profit groups, and the general public."

In view thereof, and citing the statement in *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1390 (Fed. Cir. 1992), that when dealing, as is the case herein, with services which are sold, "our concern is directed primarily toward the likelihood of confusion among actual and potential purchasers," applicant contends that it is not enough that the respective services are in the same travel-related field. Instead, citing such cases as *In re Shipp*, 4 USPQ2d 1174 (TTAB 1987), and *Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 220 USPQ 786 (1st Cir. 1983), applicant maintains that:

Appellant's service allows consumers to travel on a tour or make travel arrangements, while registrant's service is for the education of travel agents. Appellant's prospective customers are the general public, while registrant's prospective customers are persons in the travel industry. Appellant's product [sic, should be "service"] is aimed at the general public, while registrant's is aimed at the travel agency companies training their agents. There is little or no overlapping of potential customers, thereby eliminating a likelihood of confusion.

The Examining Attorney, while conceding in her brief that a likelihood of confusion must be shown among a common group or class of purchasers, argues that:

The [respective] services ... need not be identical or directly competitive to find a likelihood of confusion. They only need to be related in some manner, or the conditions surrounding their marketing be such, that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the services come from a common source. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985).

While also acknowledging, with respect to registrant's services, that "[t]he relevant consumers are obviously travel agents, because the educational program is directed to them," the Examining Attorney contends that, as to applicant's services, the relevant classes of purchasers "includes travel agents making travel plans on behalf of the general consumer" as well as members of the general public.

In consequence thereof, the Examining Attorney asserts that confusion is likely because:

It is possible ... that these agents may work in conjunction with the applicant in the process of making travel arrangements on behalf of their customers. Travel agents may assume a relationship between an organization which trains travel agents and an organization which makes travel arrangements.

In addition, individuals who have received travel agent training are likely to seek professional employment in the field. Prospective employees may assume a relationship between an organization which offers travel agency services and one which provides training for travel agents.

Thus, according to the Examining Attorney, "[t]he channels of trade for the services of registrant and applicant can overlap" and "[t]he issue becomes whether it would be reasonable to assume

that an organization which trains travel agents also offers travel agency services."

As support for her contention that such would indeed be reasonable, the Examining Attorney has made of record copies of eight third-party registrations, each of which issued on the basis of use in commerce, showing that in each instance the same mark is registered for various educational services, on the one hand, and travel agency services or arranging travel tours, on the other.<sup>4</sup> Such registrations, in relevant part, specifically encompass the following services:

(a) "arranging travel tours directed to the study of urban environment, health and safety policy practices" and "conducting workshops and training seminars in the fields of corporate international environmental management, environmental auditing, waste minimization, total product life-cycle analysis, and waste remediation practices";

(b) "arranging and conducting outdoor and recreation tours and trips, and wilderness adventure trips, excursions, and

---

<sup>4</sup> As stated in *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 (TTAB 1988) at n. 6:

Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source. See: *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 484 (TTAB 1985), and *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986). ....

Although the Examining Attorney also included two additional third-party registrations, which were issued pursuant to the provisions of Section 44 of the Trademark Act, 15 U.S.C. §1126, it is pointed out that such registrations "are not even necessarily evidence of a serious intent to use the marks shown therein in the United States on all of the listed ... services, and they have very little, if any, persuasive value on the point for which they were offered." *Id.*

expeditions" and "educational and recreational services, namely providing and conducting courses ... for learning about ... the outdoors ...";

(c) "travel agency services" and "educational services, namely conducting language classes";

(d) "arranging snorkeling and diving travel tours" and "educational services, namely providing courses of instruction in snorkeling, diving, and water related sports";

(e) "travel services, namely arranging tours" and "education services, namely providing courses and seminars in the fields of earth science, life science, physical science, environmental studies, history, social studies and foreign languages";

(f) "arranging travel tours, excursions and environmental expeditions" and "educational services, namely conducting workshops ... regarding zoologic and aquatic animals ...";

(g) "travel arrangement services for educational and cultural exchange programs" and "conducting language courses"; and

(h) "arranging travel tours for others" and "educational services, namely arranging and conducting ... seminars and lectures on the subject matter of investments, health, travel, retirement and entertainment".

According to the Examining Attorney, such evidence shows that "it is not uncommon for a single organization to provide both educational services and travel services" and, thus, "[i]t would be reasonable ... for travel agents to assume that a single organization would provide both educational and travel services."

We find, however, that the evidence furnished by the Examining Attorney plainly does not establish that the respective services involved in this appeal are so related that, when

rendered under the identical mark "ABOVE & BEYOND," confusion is likely. None of the third-party registrations indicates that the same entity provides both travel agency services and the educational services of conducting a training program for travel agents. Instead, each of such registrations shows that the particular educational services set forth therein would be offered to the same classes of purchasers as would be customers for travel agency services.

Absent evidence, therefore, demonstrating that travel agents, who would constitute the exclusive users of registrant's services, which in turn would generally be purchased by the travel agencies at which the agents are or will be employed, would also be appreciable customers for applicant's travel agency and tour services, we are constrained to agree with applicant that there does not appear to be a significant commonality of purchasers and channels of trade. Confusion, therefore, would not be likely to occur. See, e.g., In re Shipp, supra at 1176 ["PURITAN" and design for "laundry and dry-cleaning services" held not likely to cause confusion with either "PURITAN" for "commercial dry cleaning machine filters" or "PURITAN" for "dry cleaning preparations" since the services and goods "are not so related that they would come to the attention of the same kinds of purchasers"] and In re Fesco Inc., 219 USPQ 437, 438-39 (TTAB 1983) ["FESCO" and design for "distributorship services in the field of farm equipment and machinery" found not likely to cause confusion with "FESCO" for, inter alia, "foundry processing equipment and machinery--namely, ... tanks" because "the record

does not admit of a reasonable probability of an encounter of opposing marks by the same customers"].

Finally, as to the Examining Attorney's assertions that, because travel agents "may come into contact with applicant's services in the course of seeking employment or in the course of making travel arrangements for a client," they in either event "may assume a relationship between an organization which trains travel agents and one which makes travel plans for others," we note that those seeking travel agency employment would usually not be purchasers of travel agency or tour services<sup>5</sup> and that travel agents would generally utilize their own travel agency services, rather than those of others, in making travel arrangements for their clients. The scenarios postulated by the Examining Attorney are simply too speculative or insignificant to form a basis on which to predicate a holding of a likelihood, as opposed to a mere possibility, of confusion as to origin or affiliation, even when the services at issue herein are rendered under the identical mark.

---

<sup>5</sup> Although, in rare instances, travel agents might have occasion to utilize travel agencies other than their employers to arrange their own travel plans, the fact remains that, unlike members of the general public, travel agents would, by the very nature of their occupations, be sophisticated and careful purchasers when it comes to the market for travel tours and would be markedly less likely to assume that the same entity which conducts travel agent training courses also provides or sponsors travel agency and tour services. In any event, as our principal reviewing court, quoting from *Witco Chemical Co., Inc. v. Whitfield Chemical Co., Inc.*, 418 F.2d 1403, 164 USPQ 43, 44-45 (CCPA 1969), reaffirmed in *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, supra at 1391:

We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.

**Decision:** The refusal under Section 2(d) is reversed.

R. L. Simms

G. D. Hohein

C. E. Walters  
Administrative Trademark Judges,  
Trademark Trial and Appeal Board