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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Space Adventures, Ltd.

Serial No. 76391912

Mark B. Harrison of Venable LLP for Space Adventures, Ltd.

Gene V.J. Maciol, Trademark Examining Attorney, Law Office
103 (Michael Hamilton, Managing Attorney).

Before Quinn, Holtzman, and Drost, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On April 5, 2002, Space Adventures, Ltd. (applicant)
applied to register the mark shown below on the Principal
Register for goods ultimately identified as:

Protective clothing, namely suits for use in space
travel, space flight simulation, and space flight
training; protective boots; training equipment,
namely, air tight respiratory masks, protective
helmets, breathing apparatuses for astronauts, namely,
rebreathers, video cameras, GPS devices consisting of
computers, computer operating software, transmitters,
receivers, and network interface devices,
communications devices, namely, headphones and
microphone sets comprised of microphones, microphone
cables, and microphone stands in Class 9;

Publications, namely, books, magazines in the field of
space travel, and posters in Class 16; and

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Clothing, namely, t-shirts, sweatshirts, pants, shorts in Class 25.



The application (Serial No. 76391912) is based on applicant's bona fide intention to use the mark in commerce. The application has been amended to seek registration under the provision under Section 2(f) of the Trademark Act. The application also claims ownership of Registration No. 2,243,985.¹ Applicant subsequently sought to amend its mark and it submitted the drawing shown below:



The examining attorney refused registration on the ground that "applicant has proposed an amendment that materially alters the character of the mark" under 37 CFR § 2.72. Brief, first page. Specifically, the examining attorney points out that the "proposed drawing deletes all reference to the moon design that helped form the letter

¹ This registration is on the Supplemental Register for the mark SPACE ADVENTURES (typed) for "entertainment in the nature of high altitude flights, not for transportation purposes" in Class 41.

'A' in the term SPACE" and which the examining attorney describes as "a non-generic, distinctive element." Brief at 4.

The moon design reinforces the "out of this world" commercial impression formed by the totality of the original mark. In addition, the moon design assisted in creating the predominant term, SPACE, and was reinforced as the visual center of the mark. It appeared in the center of the mark, in the predominant term of the mark and was framed by the high arching line of the letter "A," just like a picture frame highlights a picture.

Brief at 4.

Applicant obviously disagrees with this analysis. Applicant argues that the "actual horizontal line in Applicant's original mark and amended mark forms the letter 'A,' not the moon" and that the moon "is in essence background and is not a significant feature of the mark." Brief at 3-4.

We begin by noting that a "drawing depicts the mark sought to be registered." 37 CFR § 2.52. As in this case, when an applicant proposes to amend the drawing in an intent-to-use application, the proposed amended drawing must "not materially alter the mark. The Office will determine whether a proposed amendment materially alters a mark by comparing the proposed amendment with the description or drawing of the mark filed with the original application." 37 CFR § 2.72(b)(2).

The "touchstone for permissible amendments to the mark is that the mark retains the same overall commercial impression." In re CTB Inc., 52 USPQ2d 1471, 1473 (TTAB 1999), citing, Visa International Service Assn. v. Life-Code Systems, 220 USPQ 740, 743-44 (TTAB 1983) ("The modified mark must contain what is the essence of the original mark, and the new mark must create the impression of being essentially the same mark..."). In this case, applicant's original drawing "was unacceptable because it contained shades of gray and the registration symbol." Examining Attorney's Brief at 4 n.7. Applicant corrected these informalities, and these issues are not involved with this appeal. Id. However, in the course of correcting these deficiencies, applicant deleted the moon in the center of the mark and the question is now whether this deletion has changed the commercial impression of the mark. Deleting matter from a drawing can change the commercial impression of the mark. In CTB, the applicant sought to change a mark that consisted of a tornado design and the word TURBO in script to a typed form drawing for the word TURBO. The board found that the "tornado design is *not* a background design." CTB, 52 USPQ2d at 1473. More importantly, the board held that "the deletion of matter from a mark should be evaluated according to the same

standard as a proposed addition to the mark." Id. at 1476. Therefore, deletions of matter must be judged under the standard we would apply if applicant was adding matter to the drawing.

Applicant points out that the applicant in In re Larios, 35 USPQ2d 1214 (TTAB 1995) was permitted to change its mark from GRAN VINO MALAGA LARIOS to VINO DE MALAGA LARIOS. However, in that case, the commercial impression of the mark was nearly identical.



In addition, the board noted the "high degree of descriptiveness (and resultant lack of distinctiveness) inherent in the phrases "GRAN VINO" and "VINO DE." Larios, 35 USPQ2d at 1218. Obviously, in the present case, the drawings are much more distinct and we cannot say that the moon design has a high degree of descriptiveness such as the term "Gran" in the Larios case. Therefore, we do not find that this case dictates a similar result here.

We find that the cases that are more on point to the facts here include CTB in which the board held that deleting the tornado design from the TURBO mark created a different commercial impression. Other cases include In re Richards-Wilcox Mfg. Co., 181 USPQ 735 (Comm'r 1974) where the Commissioner held that it would be a material alteration to substitute a drawing for the word FYER-WALL when the original drawing was for the mark FYE[R-W]ALL and a diamond design. Also, in In re Dillard Department Stores Inc., 33 USPQ2d 1052 (Comm'r 1993), the registrant was not permitted to substitute a simpler version of the mark INVESTMENTS for one that displayed the mark as follows:

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vest•
ments

We cannot say that the presence of the moon in the center of applicant's mark is a simple, background design, nor is it a generic, non-distinctive design element. Instead, it is prominently located in the center of the largest letter in applicant's design that is in the center of the mark. The moon design in the context of the words "Space Adventures" is an eye-catching design that fills a space that would otherwise be void and reinforces the "Space Adventures" theme of the mark. Finally, we add that the fact that applicant's proposed drawing would not

necessitate a new search "is not controlling." In re Who? Vision Systems Inc., 57 USPQ2d 1211, 1217-18 (TTAB 2000).

When we compare the marks in the original and proposed drawing, we hold that they do not create the same overall commercial impression. The absence of the moon design in the amended drawing changes the commercial impression and therefore, the mark in the amended drawing would be a material alteration of the mark in the original drawing.

Decision: The examining attorney's refusal to register because applicant's mark in the amended drawing is a material alteration is affirmed.