

THIS DISPOSITION IS
NOT CITABLE AS PRECEDENT
OF THE TTAB

Mailed: July 28, 2004

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Alabama Space Science Exhibit Commission
v.
Space Information Laboratories, Inc.

Opposition No. 91103817
to application Serial No. 75047370
filed on January 23, 1996

Frank M. Caprio and Angela Holt of Lanier Ford Shaver &
Payne, P.C. for Alabama Space Science Exhibit Commission.

Space Information Laboratories, Inc., pro se.

Before Quinn, Chapman and Drost, Administrative Trademark
Judges.

Opinion by Chapman, Administrative Trademark Judge:

Edmund Burke (an individual, U.S. citizen) filed an
application to register on the Principal Register the mark
SPACE ENDEAVOUR CAMP for "educational services, namely
conducting courses of instruction, and classes, seminars and
workshops in the field of astronomy and space science;
museum services in those fields, and educational services in
the nature of a camp emphasizing space sciences and
astronomy" in International Class 41. The application was

Opposition No. 91103817

filed on January 23, 1996, based on applicant's claimed dates of first use and first use in commerce of March 1, 1995 and April 1, 1995, respectively. Applicant disclaimed the words "space" and "camp."¹

The application has been opposed by the Alabama Space Science Exhibit Commission (an Alabama corporation) (hereinafter opposer),² asserting as grounds therefor that continuously since 1982 (and long prior to applicant's filing date), opposer has been providing educational programs relating to science and technology and operating a museum pertaining thereto; that since prior to applicant's alleged first use, opposer has continuously used in commerce the marks SPACE CAMP, UNITED STATES SPACE CAMP and U.S. SPACE CAMP for its educational programs; that opposer owns registrations for the marks SPACE CAMP³ and UNITED STATES SPACE CAMP,⁴ both for "educational services, namely, providing instruction and training relating to science and technology"; that since prior to applicant's first use of the mark SPACE ENDEAVOUR CAMP, opposer "has operated the

¹ The assignment of the application to Space Information Laboratories, Inc. (a California non-profit corporation) in 1996 was recorded with the USPTO's Assignment Branch at Reel 1513, Frame 0965.

² Opposer's amended notice of opposition was accepted in a Board order dated January 25, 1999. See Trademark Rule 2.107.

³ Registration No. 1712347, issued under Section 2(f) of the Trademark Act on September 1, 1992; Section 8 affidavit accepted; Section 15 affidavit acknowledged, renewed.

⁴ Registration No. 1643979, issued under Section 2(f) of the Trademark Act on May 7, 1991; Section 8 affidavit accepted; Section 15 affidavit acknowledged, renewed.

Opposition No. 91103817

world's largest astronautical science museum adjacent to the Huntsville campus for its SPACE CAMP educational programs" (amended opposition, paragraph 3); that in about 1995 applicant contacted opposer with a proposal for opposer to conduct its SPACE CAMP programs at applicant's facilities in California, but opposer informed applicant it did not wish to license applicant to use opposer's mark SPACE CAMP at Vandenberg Air Force Base; that in 1996 opposer began conducting its SPACE CAMP educational programs at NASA's Ames research Center in Mountain View, California; and that applicant's mark, when used in connection with its services, so resembles opposer's previously used and registered marks, as to be likely to cause confusion, mistake, or deception in contravention of Section 2(d) of the Trademark Act. Opposer also alleges that the application is void ab initio because the applicant (Mr. Burke) was not the owner of the mark at the time the application was filed, but rather Space Information Laboratories, Inc. was the owner and user of the mark SPACE ENDEAVOUR CAMP.

In applicant's "response" to the amended notice of opposition (filed in February 1999) Mr. Burke as "President & Founder" of Space Information Laboratories, Inc., wrote 12 numbered paragraphs of narrative, followed by applicant's "direct response" to opposer's 19 numbered paragraphs in the amended opposition by stating "Acknowledge" or "Deny." The

Opposition No. 91103817

salient matters admitted by applicant are that continuously since 1982 opposer has been providing educational programs relating to science and technology and operating a museum pertaining thereto; that since prior to applicant's alleged first use, opposer has continuously used in commerce the marks SPACE CAMP, UNITED STATES SPACE CAMP and U.S. SPACE CAMP for its educational programs; that since prior to applicant's first use of the mark SPACE ENDEAVOUR CAMP, opposer has operated the world's largest astronomical science museum adjacent to the Huntsville campus for its SPACE CAMP educational programs; that opposer owns valid and subsisting registrations for the marks SPACE CAMP and UNITED STATES SPACE CAMP for "educational services, namely, providing instruction and training relating to science and technology"; and that applicant did not use its mark SPACE ENDEAVOUR CAMP prior to March 1, 1995. Applicant denied the remaining salient allegations of the amended notice of opposition.

The record consists of the pleadings; the file of the opposed application; the trial testimony, with exhibits, of Holly Larsen Beach, opposer's senior vice president of marketing; the trial testimony, with exhibits, of Paul C. Kelly, III, opposer's director of domestic and international

Opposition No. 91103817

licensing;⁵ and opposer's notices of reliance under Trademark Rule 2.120(j)(3) on (i) opposer's discovery deposition, with exhibits, of Edmund Burke, and (ii) applicant's responses to opposer's first set of interrogatories.

Only opposer filed a brief on the case. Applicant filed an untimely request for an oral hearing, which was denied in a Board order dated July 2, 2004.

Alabama Space Science Exhibit Commission, opposer, is an agency of the state of Alabama which oversees the operations of the U.S. Space and Rocket Center in Huntsville, Alabama. (This Center was conceived by Dr. Werner Von Braun as a place where the public could learn about space exploration, math, science and technology, and see the actual artifacts used in the space program.) Opposer's first formal education programs were commenced under the marks SPACE CAMP and UNITED STATES SPACE CAMP and U.S. SPACE CAMP in Huntsville, Alabama in 1982 and have been continuously used since then. Opposer has used these marks for similar programs in Florida from 1988 to 2002, and in California from 1996 to 2002. Opposer has specific plans with a licensee to reopen a SPACE CAMP program in Long Beach, California. Opposer also offers its SPACE CAMP

⁵ Mr. Burke attended both of opposer's trial testimony depositions via telephone, but he did not cross-examine either witness.

Opposition No. 91103817

programs at locations around the world--Canada, Belgium, Japan and Turkey.

Opposer's SPACE CAMP programs range from one day to six days for children around ages 7 to 12. (Opposer offers an advanced camp under different marks such as SPACE ACADEMY for older children up to age 18.) Opposer uses "immersive learning" techniques (dep. Kelley, p. 17) to teach young people about math, science and technology while they are having fun. Opposer uses various proprietary equipment designed specifically for opposer's SPACE CAMP to simulate astronaut training (e.g. frictionless environment, a space shuttle), and to teach laws of physics (e.g., Newton's law of motion). Opposer has a space shuttle simulator named Endeavor after one of the NASA space shuttles. The quality and the fidelity of opposer's equipment used in its programs is very high and as close to authentic as possible. The children attending opposer's SPACE CAMP programs are housed in the "habitat" which are dormitories with a total capacity of 1100 beds. In the years 1982-2003 opposer had approximately 200,000 participants in its SPACE CAMP programs, and a total of about 414,000 in all of its programs together. The largest number of participants (about 5%-10%) in opposer's programs come from the state of California.

Opposition No. 91103817

Opposer also operates one of the world's largest space museums with space artifacts from early rocketry to the current space shuttle program. It was started by Dr. Werner Von Braun in 1969 and grew over the years, and it now functions as the visitors center for NASA, although it is completely operated by opposer, not NASA.

From 1982-2002 opposer's advertising expenditures total almost \$24 million and its revenues total almost \$122 million. The advertisements are nationwide in scope and are done through television, radio, newspapers, magazines, direct mail, and opposer's website (www.spacecamp.com). There has been significant media coverage of opposer's SPACE CAMP programs, including articles in "Time" and "Newsweek," and coverage on all major television stations (such as ABC, NBC, CBS, CNN). Opposer's SPACE CAMP programs have been featured in thousands of publications and programs such as "National Geographic World," "World Book Science Supplement" and "Oxygen." Opposer has licensed the use of its various SPACE CAMP marks for use in a movie "Space Camp" with Kate Capshaw and Leah Thompson (filmed in part at opposer's Huntsville, Alabama location), and a movie "The Adventures of Mary Kate and Ashley, The Case of the U.S. SPACE CAMP Mission" with Mary Kate and Ashley, the Olsen twins. Mattel made a SPACE CAMP Barbie doll through license with opposer. The actors and director of the movie "Apollo 13" (including

Opposition No. 91103817

Tom Hanks, Ron Howard) came to opposer's facilities to train for their roles in the movie because it was the closest thing to actually preparing as an astronaut would prepare at NASA's Johnson Space Center.

Opposer has engaged in marketing arrangements with national consumer companies such as Kraft Foods who paid a licensing fee to opposer and used opposer's U.S. SPACE CAMP mark on 80 million boxes of Teddy Grahams snack foods, Chips Ahoy! Cookies, Kraft macaroni and cheese dinners and Post and Nabisco cereals; and Krystal's Restaurant chain which also paid opposer a licensing fee to use opposer's mark on over 250,000 children's meal bags in over 400 Krystal's Restaurants.

Opposer uses its marks, SPACE CAMP, UNITED STATES SPACE CAMP and U.S. SPACE CAMP on a variety of collateral merchandise, such as clothing, patches, stickers, postcards, duffel bags, flight suits, generating about \$50 million in sales in the last ten years. Mr. Kelly testified that opposer owns six valid registrations and they are the following:

- (1) Registration No. 1643979, issued May 7, 1991 under Section 2(f) of the Trademark Act for the mark UNITED STATES SPACE CAMP for "educational services, namely, providing instruction and training relating to science and technology," Section 8 affidavit accepted, Section 15 affidavit acknowledged, renewed;

- (2) Registration No. 1712347, issued September 1, 1992 under Section 2(f) of the Trademark Act for the mark SPACE CAMP for "educational services, namely, providing instruction and training relating to science and technology," Section 8 affidavit accepted, Section 15 affidavit acknowledged, renewed;
- (3) Registration No. 2085031, issued July 29, 1997 for the mark SPACE CAMP for "carrying bags, backpacks, and waist packs," "glassware and plasticware, namely mugs," and "apparel, namely, T-shirts and sweatshirts," Section 8 affidavit accepted; Section 15 affidavit acknowledged;
- (4) Registration No. 2112553, issued November 11, 1997 for the mark SPACE CAMP for "bumper stickers, log books, decals, pens, pencils, postcards, posters, souvenir books, calendars, notebooks, appointment books," Section 8 affidavit accepted; Section 15 affidavit acknowledged,
- (5) Registration No. 1347019, issued July 2, 1985 on the Supplemental Register for the mark shown below

**UNITED STATES
SPACE
CAMP**

(SPACE CAMP disclaimed) for "educational and entertainment services, namely, operating a camp for boys and girls concerned with science and technology related to space exploration," Section 8 affidavit accepted; and

- (6) Registration No. 1437555, issued January 19, 1988 under Section 2(f) of the Trademark Act for the mark shown below

**SPACE
CAMP**

Opposition No. 91103817

for "educational services, namely, providing instruction and training relating to science and technology,"
Section 8 affidavit accepted.

The only third-party registration at the USPTO for a mark including the words "SPACE CAMP" is Registration No. 2409847 for the mark CYBERSPACECAMP for "educational services, namely, conducting meetings, lectures, and seminars in the field of information technology law directed primarily to those in the legal profession." Opposer considers these services and the targeted consumers to be unrelated to opposer's space related educational programs.

Opposer polices its rights in its various SPACE CAMP marks vigorously, including writing about 25-30 cease and desist letters per year, with about 99% responding by ceasing use. (One such letter was sent by opposer to one of NASA's Official Visitors Centers, resulting in the cessation of the use and discussion regarding a license from opposer.)

Space Information Laboratories, Inc.,⁶ is located at Vandenberg Air Force Base in California and it was organized by volunteers who work in the industry (government -- military and civilian, and related private

⁶ We recognize that opposer asserts as an alternative basis for the opposition that the original applicant (Mr. Edmund Burke) was not the owner of the mark at the time he filed the application and that the application is therefore void. For purposes of our discussion of the priority and likelihood of confusion issues, the Board will refer to Space Information Laboratories, Inc. as the applicant (through assignment from Mr. Edmund Burke).

Opposition No. 91103817

businesses) first discussed forming a non-profit corporation in early 1992, with approval by the State of California in September 1993. Initially, applicant raised money to allow students to fly their own experiments in space on a NASA space shuttle. (NASA had a "get-away special," which was an "empty cylinder like a trash can," whereby any organization or group could purchase a canister for \$10,000 and they could build their own payload and experiments. Burke discovery dep., pp. 28-29.) Later, applicant developed base education awareness programs for youth, teachers and all people in the region. The idea was to use Vandenberg Air Force Base's space science and technology and provide hands-on learning opportunities in math, science and engineering. According to Mr. Burke, applicant's approach, educational philosophy and mentality is "totally different" from that of opposer. (Burke discovery dep., p. 129.) Applicant used the term "ENDEAVOUR" to signify the kinds of endeavors that occur at Vandenberg Air Force Base.⁷

Applicant first used the mark SPACE ENDEAVOUR CAMP in March 1995, and the first SPACE ENDEAVOUR CAMP program (day-camp only) was run in the summer of 1995 with 125 youth in

⁷ In its answer to opposer's interrogatory No. 16 regarding other federal application/registrations owned by applicant, applicant stated it is the owner of Registration No. 2022152 issued December 10, 1996 for the mark ENDEAVOUR for the identical services set forth in its involved application. The records of the USPTO indicate that Registration No. 2022152 was cancelled under Section 8 of the Trademark Act in 2003.

Opposition No. 91103817

attendance. The 1996 SPACE ENDEAVOUR CAMP program had about 240 attendees. Applicant's SPACE ENDEAVOUR CAMP program is directed to children ages 8-11 and 12-15. Applicant distributes fliers in the central California coast region, particularly in schools (grades K-12) and businesses; it produced some radio and television public service announcements which air in the same central California coast region; it advertises occasionally on local radio stations and in local newspapers (e.g., The Santa Maria Times, The Lompoc Record); and it operates a website which, inter alia, allows participants for its SPACE ENDEAVOUR CAMP program to register through its website. Applicant has enjoyed local press coverage about its SPACE ENDEAVOUR CAMP program.

Applicant's expenditures slightly exceeded its revenues (by a few thousand dollars) in 1995 and 1996. Applicant sold t-shirts and the camp class video under the mark SPACE ENDEAVOUR CAMP in 1996, but no retail sales of goods were planned for 1997.

Mr. Burke testified that he was aware of opposer at the time the name SPACE ENDEAVOUR CAMP was selected. In fact, applicant was aware that in 1994 opposer was studying the possibility of putting a SPACE CAMP program in California, but opposer decided against it in early 1995. When asked if applicant's attorney (who conducted a search) also knew of opposer's SPACE CAMP program, Mr. Burke testified that "... I

Opposition No. 91103817

am just saying that. I mean, it is public knowledge that there is a Space Camp out there. I mean—right? I would think that anybody that knows anything about the business would know the name, you know.” (Burke discovery dep., pp. 79-80.)

There have been one or two instances where a parent (or someone) asked applicant if it was affiliated with the program in Alabama, but applicant simply answers no, they are completely different entities. (Burke discovery dep., pp. 86-87.)

In this opposition, opposer pleaded ownership of two registrations, but submitted photocopies of six registrations for the marks SPACE CAMP (in both typed form and stylized form) and UNITED STATES SPACE CAMP (in both typed form and stylized form) as exhibit Nos. 48, 49, and 67-70 during the testimony of its witness Paul Kelly. Mr. Kelly testified that opposer is the owner of all six valid and subsisting registrations.⁸ Applicant did not cross-examine the witness and through its silence treated all of opposer’s registrations of record.⁹

Opposer’s six registrations have been made of record; and the evidence shows that opposer has established its

⁸ Applicant admitted the ownership and validity of opposer’s two pleaded registrations in its answer to opposer’s amended notice of opposition.

Opposition No. 91103817

standing in this case. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000).

In view of opposer's valid and subsisting registrations covering the goods and services set forth therein, the issue of priority does not arise herein. See *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Moreover, opposer has established priority of use since 1982 of its registered marks SPACE CAMP and UNITED STATES SPACE CAMP, and of its common law rights in the mark U.S. SPACE CAMP for its educational services, which is a date prior to the applicant's proven first use in 1995.

We turn now to consideration of the issue of likelihood of confusion. Our determination of likelihood of confusion is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In *re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In *re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA

⁹ To whatever extent it is necessary, we consider the pleadings amended to conform to the evidence under Fed. R. Civ. P. 15(b); and thus we consider all six registrations to be of record.

Opposition No. 91103817

1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). Based on the record before us, we find that confusion is likely.

We turn first to a consideration of the du Pont factor regarding the similarity or dissimilarity and nature of the services. In Board proceedings, the issue of likelihood of confusion must be determined in light of the services as identified in the involved application and registration(s) and, in the absence of any specific limitations therein, on the presumption that all normal and usual channels of trade are or may be utilized for such goods or services. See *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.3d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); and *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983).

Applicant's identified educational services in the fields of astronomy and space science and its educational services in the nature of a camp emphasizing space science and astronomy and opposer's identified educational services relating to science and technology and its educational services in the nature of operating a camp concerned with science and technology related to space exploration are virtually identical.

Opposition No. 91103817

Inasmuch as there are no limitations on trade channels or purchasers in the identifications of services in applicant's application or in opposer's registrations, the parties' respective services must be considered to be offered through the same channels of trade to similar classes of purchasers. See *Octocom Systems v. Houston Computer Services*, supra; and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991).

"When marks would appear on virtually identical goods or services, the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). With this in mind, we turn next to consideration of the similarities or dissimilarities of the marks. In this case, both applicant's mark SPACE ENDEAVOUR CAMP and opposer's marks SPACE CAMP, UNITED STATES SPACE CAMP and U.S. SPACE CAMP share the words "SPACE" and "CAMP." While applicant has added the word "ENDEAVOUR" between the words "SPACE" and "CAMP," it is generally accepted that when a composite mark incorporates the mark of another for closely related goods or services, the addition of other matter is generally insufficient to avoid a likelihood of confusion as to source. See *The Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419 (CCPA 1977); and *Miss Universe*,

Opposition No. 91103817

Inc. v. Drost, 189 USPQ 212 (TTAB 1975). Thus, applicant's addition of the word "ENDEAVOUR" to its mark does not serve to distinguish these marks. This is particularly true because the word "ENDEAVOUR" would likely be recognized by the public as the name of one of NASA's space shuttles.

The slight differences between applicant's mark SPACE ENDEAVOUR CAMP and opposer's SPACE CAMP, UNITED STATES SPACE CAMP and U.S. SPACE CAMP marks may not be recalled by purchasers seeing the marks at separate times. The proper test in determining likelihood of confusion is not on a side-by-side comparison of the marks, but rather must be on the recollection of the average purchaser, who normally retains a general rather than specific impression of the many trademarks encountered; that is, a purchaser's fallibility of memory over a period of time must also be kept in mind. See Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and Spoons Restaurants Inc. v. Morrision, Inc., 23 USPQ2d 1735 (TTAB 1991), aff'd unpub'd (Fed. Cir., June 5, 1992). Purchasers aware of opposer's various SPACE CAMP and UNITED STATES SPACE CAMP educational services, who then encounter applicant's SPACE ENDEAVOUR CAMP educational services, are likely to believe that applicant's services emanate from or are sponsored by or affiliated with opposer.

Opposition No. 91103817

In addition, when considering word marks we do not ordinarily consider trade dress, however, our primary reviewing Court has stated that "...trade dress may nevertheless provide evidence of whether the word mark projects a confusingly similar commercial impression." *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1284 (Fed. Cir. 1984). Here, applicant sometimes uses the word ENDEAVOUR in different color lettering and places it in such a way that the words could be read as ENDEAVOUR SPACE CAMP. See e.g., Burke discovery dep., exhibit Nos. 27 and 28; and Kelly dep., exhibit Nos. 59-61.

Although the parties' marks are not identical, when considered in their entirety, we find the respective marks are similar in sound, appearance, connotation and commercial impression.¹⁰ See *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209 (TTAB 1999).

Another du Pont factor we consider in this case is the fame of opposer's marks. "Fame of an opposer's mark or marks, if it exists, plays a 'dominant role in the process of balancing the *DuPont* factors.'" *Bose Corp. v. QSC Audio Products, Inc.*, 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir.

¹⁰ While we recognize that opposer's marks for its educational services were registered under Section 2(f) or on the Supplemental Register, it is clear that the marks in the registrations issued under Section 2(f) have acquired distinctiveness.

Opposition No. 91103817

2002), quoting *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000). "Thus, a mark with extensive public recognition and renown deserves and receives more legal protection than an obscure or weak mark." *Kenner Parker Toys Inc. v. Rose Art Industries Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). See also, *Toro Co. v. ToroHead Inc.*, 61 USPQ2d 1164, 1170 (TTAB 2001).

Opposer contends that its marks SPACE CAMP, UNITED STATES SPACE CAMP and U.S. SPACE CAMP are famous based on its use for over 20 years, since 1982; opposer's ownership of numerous federal registrations of its marks for various goods and its educational services; revenues from tuition for opposer's SPACE CAMP program from 1982-2002 of about \$122 million, and sales of SPACE CAMP merchandise from 1992-2002 of about \$50 million; advertising costs from 1982-2002 of about \$24 million; thousands of items of publicity in nationwide print and broadcast media; opposer's marks being featured in movies and in conjunction with major consumer products; opposer's extensive licensing program with numerous companies approaching opposer to obtain licenses; opposer's consistent program to protect its rights in its marks; and applicant's awareness of opposer and its acknowledgement of opposer's fame.

Based on this record, we conclude that opposer has demonstrated that its marks are have achieved a degree of

Opposition No. 91103817

public recognition and renown (fame), and are thus entitled to a broad scope of protection. The fame of opposer's marks increases the likelihood that consumers will believe that applicant's services emanate from or are sponsored by the same source.

There is no evidence of third-party uses of the mark SPACE CAMP or SPACE CAMP-derivative marks for goods and/or services in the involved and/or closely related fields, other than those uses which opposer successfully stopped - generally through cease and desist letters resulting in the third-parties ceasing use or their agreement to purchase a license from opposer. There is one third-party registration for the mark CYBERSPACECAMP for educational services in the field of informational technology law directed to people in the legal profession. However, a third-party registration is not evidence of use of the mark in commerce or that purchasers are aware of the mark. In any event, the mark CYBERSPACECAMP carries a different connotation relating to cyberspace and involves services not only unrelated to those offered by both applicant and opposer, but also are directed to a distinct market segment.

Another du Pont factor to be considered in the case now before us is "the variety of goods on which a mark is or is not used (house mark, 'family' mark, product mark)." In re E. I. du Pont de Nemours & Co., supra, at 567. Opposer has

Opposition No. 91103817

registered the mark SPACE CAMP for a variety of general consumer products, including items of clothing, backpacks, carrying bags, mugs, bumper stickers, posters, postcards, pens, pencils, notebooks, calendars, souvenir books.

Opposer sells its various collateral items under the mark SPACE CAMP through its own gift shops as well as the gift shops of its licensees. Thus, this factor favors opposer. See *Uncle Ben's Inc. v. Stubenberg International Inc.*, 47 USPQ2d 1310, 1313 (TTAB 1998).

Opposer contends that actual confusion has been proven based on evidence of such things as applicant's registration form and website including references to applicant's program as SPACE CAMP; applicant's use of the words in a trade dress that could be read as ENDEAVOUR SPACE CAMP instead of SPACE ENDEAVOUR CAMP; and instances in which the media refers to applicant's program as SPACE CAMP or ENDEAVOUR CAMP instead of SPACE ENDEAVOUR CAMP. We do not find this evidence probative on this issue because it is not evidence that purchasers or potential purchasers were actually confused regarding the source of the two parties' programs. However, applicant's president, Mr. Edmund Burke, testified that he was aware of "one or two cases where somebody has asked are you affiliated [with opposer], and we say no, we are not affiliated." (Burke discovery dep., p. 87). While this is not particularly overwhelming evidence of actual confusion,

Opposition No. 91103817

and there was no follow-up information regarding these instances, nonetheless, this is some evidence of one or two instances of actual confusion. We find that this factor marginally favors opposer. Even if we discounted applicant's own testimony on this point, the test is not actual confusion, but likelihood of confusion. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990).

Accordingly, because of the similarity of the parties' marks; the fame of opposer's marks; the parties' identical services, as identified; the similarity of the trade channels and purchasers of the respective identified services; the variety of goods and services on which opposer uses its marks; and the instances of actual confusion, we find that there is a likelihood that the purchasing public would be confused when applicant uses SPACE ENDEAVOUR CAMP as a mark for its services.

Decision: The opposition is sustained and registration to applicant is refused.¹¹

¹¹ In its brief on the case (p. 32), opposer argued "in the alternative, should the Board determine that the applicant's use of its mark is not likely to cause confusion with the opposer's marks, then the Board should still find for opposer on the ground that the applicant's application is void because it was filed by a party other than the owner of the mark." In view of our decision in opposer's favor on its claim of priority and likelihood of confusion, we do not reach opposer's alternative claim involving ownership of applicant's mark at the time it filed the application.