

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB FEB 25, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Michael P. Cohen

Serial No. 75/344,061

Michael P. Cohen, pro se.

Amos T. Matthews, Trademark Examining Attorney, Law Office
108 (David Shallant, Managing Attorney).

Before Simms, Quinn and Hohein, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by Michael P. Cohen to
register the mark shown below

for "jewelry."¹

¹ Application Serial No. 75/344,061, filed August 19, 1997,
alleging a bona fide intention to use the mark in commerce.
While the substitute drawing sets forth dates of first use, the

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, if applied to applicant's goods, would so resemble the previously registered mark IRRESISTIBLES for "jewelry"² as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney filed briefs.³

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the

Examining Attorney indicated that the dates would not be considered.

² Registration No. 1,933,109, issued November 7, 1995.

³ Attached to applicant's appeal brief are copies of third-party registrations. The Examining Attorney has objected to the submission of this evidence on the ground of untimeliness.

The objection is well taken and the evidence has not been considered in reaching our decision. Trademark Rule 2.142(d). We hasten to add that, in any event, even if the evidence were considered, we would reach the same result on the merits. See, e.g.: AMF Inc. v. American Leisure Products, Inc., 474 F.2d 1403, 177 USPQ 268 (CCPA 1973)[third-party registrations do not establish that the marks shown therein are in use, much less that consumers are so familiar with them that they are able to distinguish among such marks]. Moreover, the third-party registrations are for marks and goods different from the ones involved here.

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similarities between the marks and the similarities between the goods. *Federated Food, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

In this case, the goods (jewelry) are absolutely identical. It is presumed that the jewelry moves through the same channels of trade to the same classes of purchasers. See: *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

Turning to a consideration of the marks, we note at the outset that if the goods are identical, "the degree of similarity [between 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).

Registrant's mark IRRESISTIBLES and applicant's mark "SIMPLY EAR-RESISTIBLE" (stylized) are similar in sound and appearance. The marks also convey essentially identical connotations, namely that the jewelry sold under the mark is extremely tempting to own or possess (with perhaps applicant's mark being a play on earrings in particular). The presence of the term "simply" (often used in connection with the term "irresistible" in everyday language), the misspelling, the punctuation marks and the script stylization in applicant's mark collectively are not enough to sufficiently distinguish applicant's mark from

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registrant's mark when both are applied to identical goods. The similarities in overall commercial impressions simply outweigh the differences detailed by applicant. Further, in finding that the marks are likely to cause confusion, we have kept in mind the normal fallibility of human memory over time and the fact that consumers retain a general rather than a specific impression of trademarks encountered in the marketplace.

We conclude that purchasers familiar with registrant's jewelry sold under its mark IRRESISTIBLES would be likely to believe, upon encountering applicant's mark "SIMPLY EAR-RESISTIBLE" (stylized) for identical goods, that the jewelry originated with or is somehow associated with or sponsored by the same entity.

Decision: The refusal to register is affirmed.

R. L. Simms

T. J. Quinn

G. D. Hohein
Administrative Trademark
Judges, Trademark Trial
and Appeal Board

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