

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

Mailed: August 25, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Fallen Angels Production, Inc.

Serial No. 78648759

Marc J. Kesten of Marc J. Kesten, P.L. for Fallen Angels
Production, Inc.

Cynthia Sloan, Trademark Examining Attorney, Law Office 116
(Michael W. Baird, Managing Attorney).

Before Hairston, Kuhlke and Walsh, Administrative Trademark
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Fallen Angels Production, Inc. has filed an
application to register the mark shown below



for goods ultimately identified as "jewelry; beads for use
in the manufacture of jewelry; diamonds; precious and semi-
precious gemstones; pearls; belt buckles of precious metal;
book marks of precious metal; busts of precious metal;

Serial No. 78648759

charms; cufflinks; decorative boxes made of precious metal; jewelry boxes of precious metal; jewelry cases of precious metal; jewelry findings; medallions; non-monetary coins; ornaments of precious metal; watches and chronometers; watch straps; watch bands; watch cases; watch faces; watch chains; clocks; precious metal money clips; tiaras; tie clips; tie pins" in International Class 14.¹

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used on its identified goods, so resembles the registered mark FH (in standard character form) for "jewelry" in International Class 14,² as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed. Briefs have been filed, but applicant did not request an oral hearing. We affirm the refusal to register.

As a preliminary matter, the examining attorney's objection to evidence submitted for the first time with applicant's brief is sustained. See Trademark Rule 2.142(d) (evidentiary record in an application should be complete prior to the filing of an ex parte appeal).

¹ Application Serial No. 78648759, filed June 11, 2005, alleging a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act. 15 U.S.C. §1051(b).

² Registration No. 1687794, issued May 19, 1992, renewed.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., 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 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn first to a consideration of the goods identified in the application and the cited registration. It is well settled that goods need not be similar or competitive in nature to support a finding of likelihood of confusion. The question is not whether purchasers can differentiate the goods themselves, but rather whether purchasers are likely to confuse the source of the goods. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Further, we must consider the cited registrant's goods as they are described in the

Serial No. 78648759

registration and we cannot read limitations into those goods. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987). If the cited registration describes goods or services broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the registration encompasses all goods or services of the type described, that they move in all channels of trade normal for these goods, and that they are available to all classes of purchasers for the described goods. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992).

Clearly, applicant's goods are identical to (jewelry), encompassed by (charms, cuff links, medallions, ornaments of precious metal), and otherwise related to (tie pins, tiaras, jewelry cases of precious metal, decorative boxes made of precious metal) the goods recited in the registration (jewelry). Accordingly, for purposes of the likelihood of confusion analysis, certain of applicant's goods must be considered legally identical to the goods in the cited registration and must be deemed to be sold in the same channels of trade. Applicant's argument regarding the actual channels of trade are unavailing in view of the

Serial No. 78648759

requirement to make our analysis based on the identification of goods in the application and registration.

In view thereof, the du Pont factors of the similarity of the goods and the channels of trade favor a finding of likelihood of confusion as to the cited registration.

We turn now to the first du Pont factor, i.e., whether applicant's mark and registrant's mark are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. We find that applicant's mark is highly similar to the cited mark. The literal element in applicant's mark FH is identical in sound and meaning to the registered mark FH inasmuch as when spoken they are both the letters FH. Although the appearance of applicant's mark is slightly different from the mark in the registration due to the stylization, we do not believe that this difference alone creates an overall different commercial impression. The stylization does not mask the literal element, the letters FH are discernable by potential purchasers. More importantly, registrant's mark is registered in typed form and, as such, may be displayed in all reasonable manners. As noted by the examining attorney "[t]he rights associated with a mark in standard character form reside in the

wording itself, and registrant is free to adopt any style of lettering, including lettering identical to that used by applicant. Therefore, applicant's presentation of its mark in special form will not avoid likelihood of confusion with a mark that is registered in typed or standard character form because the marks could be used in the same manner of display." Br. unnumbered pp. 6-7. See *Jockey International Inc. v. Mallory & Church Corp.*, 25 USPQ2d 1233 (TTAB 1992) and cases cited therein; *In re Melville Corp.*, 18 USPQ2d 1386, 1387-88 (TTAB 1991); TMEP §1207.01(c)(iii). Thus, registrant would be free to depict its mark in a manner similar to applicant's mark. Similar to applicant's argument regarding the trade channels, applicant's argument regarding the intended use of the mark as a "makers' mark," are not relevant inasmuch as the identification of goods in the application is not so limited, nor are there any such limitations in the registration, which would encompass all manner of uses. In addition, there is no legal basis to apply a different standard for likelihood of confusion to a "makers' mark." Thus, the factor of the similarity of the marks also favors a finding of likelihood of confusion.

Applicant argues that purchasers of both registrant's and applicant's goods would exercise greater care in making

a purchase. Specifically, applicant states that "because of their very nature and market appeal, [the goods] are quite expensive" and "[t]he goods sold under the registered mark are significantly different and more expensive than Applicant's jewelry goods, and due to their nature and their trade channels, persons buying such goods from either party exercise great care in making their purchasing decision." Br. p. 10. Again, applicant is improperly attempting to limit the goods by extrinsic evidence. See *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986). The goods as identified encompass both inexpensive and expensive jewelry. Thus, while it certainly is the case that a consumer would exercise heightened care when purchasing a diamond ring, less care would be taken when purchasing jewelry not made of precious metals or precious gemstones. Therefore, the purchasing conditions include a range of care and the potential consumers include both sophisticated and unsophisticated purchasers. This factor is neutral as to the likelihood of confusion analysis.

Applicant argues that third-party registrations should be given some weight in our determination as to whether its application should proceed to registration, particularly noting that the Office strives for consistency. Applicant contends that "[o]bviously, the existing registrations of

these three 'FH' marks shows that, in this area, differences in appearance between and [sic] typed mark and a stylized design may be acceptable for registration purposed [sic]." Br. p. 7. The two other registrations for jewelry are for the marks shown below.



We first note that it is correct that consistency in prosecution is certainly a goal; however, as the examining attorney stated, the "existence on the register of other confusingly similar marks would not assist applicant in registering yet another FH mark, which so resembles the cited registered mark, that confusion is likely." Br. unnumbered p. 10. Moreover, we note that the marks in the two third-party registrations include design elements and in one the lettering FH is not clearly discernable. While third-party registrations may be relevant to show that a mark is descriptive, suggestive, or so commonly used that the public will look to other elements to distinguish the source of the goods or services, see, e.g., *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269-70 (CCPA 1973), the three registrations containing the letters FH are simply not sufficient to establish that FH is so commonly used that the public will

look to other elements to distinguish the source of the goods. With regard to the other third-party registrations for different lettering, registrations, by themselves, are entitled to little weight on the question of likelihood of confusion because they are not evidence of use in the marketplace. Moreover, these third-party registrations are for different letters. The essence of applicant's argument appears to be that the Office should allow registration of the same letters for jewelry even if a standard character mark is registered because appearance is the primary concern. Applicant has not cited to any cases in support of this proposition, nor has applicant submitted evidence to support this argument, other than the third-party registrations from which we can draw no conclusions. We further note that each case must stand on its own merits. Cf. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001); and *In re Scholastic Testing Service, Inc.*, 196 USPQ 517 (TTAB 1977).

Finally, in making our determination, we have considered applicant's argument regarding the National Gold and Silver Stamping Act (Stamping Act), 15 U.S.C. §§291-300. We see no conflict with the Lanham Act. The fact that the Stamping Act may require that a federally registered trademark be stamped on the goods does not

Serial No. 78648759

obviate the requirements under the Lanham Act that no likelihood of confusion exist with a prior registered mark. In fact, it could even undermine the intention of the Stamping Act to ensure that the jewelry may be traced back to the manufacturer by the trademark, if the Trademark Office registered confusingly similar marks.

In conclusion, we find that because the marks are similar, the goods are the same or legally identical, and the channels of trade are the same, confusion is likely between applicant's mark and the cited registration. Finally, to the extent that any of the points argued by applicant may cast doubt on our ultimate conclusion on the issue of likelihood of confusion, we resolve that doubt, as we must, in favor of the prior registrant. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.