

**THIS OPINION IS NOT CITABLE  
AS PRECEDENT OF  
THE TTAB**

Mailed: 9/16/2004

UNITED STATES PATENT AND TRADEMARK OFFICE

\_\_\_\_\_  
Trademark Trial and Appeal Board  
\_\_\_\_\_

In re The Trustees of the Harold Lloyd Film Trust  
\_\_\_\_\_

Serial No. 76365748  
\_\_\_\_\_

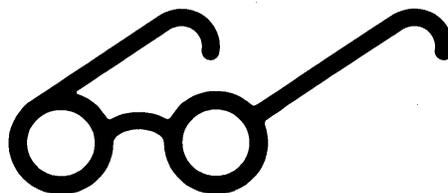
Anthony M. Keats for The Trustees of the Harold Lloyd Film Trust.

Amy Gearin, Trademark Examining Attorney, Law Office 115  
(Thomas Vlcek, Managing Attorney).  
\_\_\_\_\_

Before Simms, Hanak and Walters, Administrative Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge:

The Trustees of the Harold Lloyd Film Trust  
(applicant) seeks to register the eyeglass design shown  
below for "posters; coasters." The application was filed  
on January 31, 2002 with a claimed first use date of August  
2001.



Citing Section 2(d) of the Trademark Act, the Examining Attorney has refused registration on the basis that applicant's mark, as applied to posters and coasters, is likely to cause confusion with the eyeglass design shown below previously registered for "postcards, calendars and stationery." Registration No. 1,901,204.



When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

Considering first the marks, we note that because both marks are pure design marks with no words, that visual appearance -- as opposed to pronunciation or connotation -- is the most important factor in comparing the marks. Considering the marks in terms of visual appearance, we note that they are extremely similar, if not nearly identical. Not only do both marks consist simply of a pair of eyeglasses, but in each case the eyeglasses are extremely similar in all respects including the round lenses, a slightly bowed bridge, and essentially the same earpieces. Moreover, to the extent that these design marks might be vocalized, they would both be vocalized in the identical manner or manners, such as the eyeglass or the pair of eyeglasses posters, coasters, postcards, calendars and stationery. Likewise, if these purely design marks have any connotation, it is the identical connotation of a pair of eyeglasses. In short, we find that the marks are extremely similar if not nearly identical.

Thus, the first Dupont "factor weighs heavily against applicant" because applicant's mark is extremely similar to, if not nearly identical to, the registered mark. In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Turning to a consideration of applicant's goods and the goods of the cited registration, we note that because the marks are extremely similar if not nearly identical, their contemporaneous use can lead to the assumption that there is a common source "even when [the] goods or services are not competitive or intrinsically related." In re Shell Oil Co., 922 F.2d 1204, 26 USPQ2d 1697, 1689 (Fed. Cir. 1993).

However, in this case we find that applicant's goods and the goods of the cited registration are, at a minimum, at least "somewhat related," to use applicant's very words at page 6 of its brief. Moreover, the Examining Attorney has made of record well over 50 third-party registrations showing that the same marks are registered for some, if not all, of applicant's goods as well as some, if not all, of registrant's goods. These third-party registrations are evidence that the goods of applicant and registrant are related. In re Mucky Duck Mustard Co., 6 USPQ2d 1467 (TTAB 1988), aff'd as not citable precedent 88-1444 (Fed. Cir. November 14, 1988).

In sum, given the fact that applicant's mark and registrant's mark are extremely similar if not nearly identical, and the additional fact that applicant's goods and registrant's goods are at least "somewhat related" as

applicant concedes at page 6 of its brief, we find that the contemporaneous use of the two marks would result in a likelihood of confusion.

One last comment is in order. Applicant argues that Harold Lloyd was a famous film star of the early 20<sup>th</sup> century. Continuing, applicant argues that the eyeglass mark which it seeks to register is essentially identical to the eyeglasses which Harold Lloyd wore in all of his films such that said eyeglasses became associated with the actor Harold Lloyd. At page 6 of its brief, applicant then makes the following statements: "Although applicant's mark is unmistakably different from registrant's mark, even if applicant's and registrant's marks were identical, there would be no likelihood of confusion because sophisticated consumers of applicant's dissimilar, although somewhat related, merchandise depicting the classic Hollywood film era would not be confused as between applicant's and registrant's respective marks." (original emphasis). To begin with, if two marks are identical, not even the most sophisticated consumers could distinguish them. Moreover, applicant's own chosen identification of goods reads simply "posters; coasters." It does not read "posters and coasters depicting the classic Hollywood film era and sold only to sophisticated classic film enthusiasts." In Board

proceedings, "the question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in [the cited] registration rather than what the evidence shows the goods and/or services to be." Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Obviously posters and coasters (applicant's goods) and postcards, calendars and stationery (registrant's goods) are sold to ordinary, unsophisticated consumers who simply would not be able to distinguish between the two extremely similar, nearly identical marks. Indeed, we seriously doubt that even sophisticated fans of Harold Lloyd could distinguish between these two extremely similar, nearly identical marks, although that is a question we need not address.

Decision: The refusal to register is affirmed.