

**THIS OPINION  
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THE TTAB**

Mailed: November 30, 2007

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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**In re Gibson Piano Ventures, Inc.**

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**Serial No. 76430222**

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Martha B. Allard and Lucian Wayne Beavers of Wadley & Patterson, P.C., for applicant.

Mary Boagni, Trademark Examining Attorney, Law Office 114 (K. Margaret Lee, Managing Attorney).

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**Before Quinn, Mermelstein, and Bergsman, Administrative Trademark Judges.**

**Opinion by Mermelstein, Administrative Trademark Judge:**

Gibson Piano Ventures, Inc. filed an application to register the mark **J. & C. FISCHER** on the Principal Register for "pianos," in International Class 15.<sup>1</sup>

The examining attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles

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<sup>1</sup> Serial No. 76430222, filed July 15, 2002, alleging first use of the mark at least as early as December 31, 1840, and first use of the mark in commerce at least as early as December 31, 1850; both use dates are alleged to be by applicant's predecessor in interest.

the mark **FISCHER & SONS**, previously registered for "pianos"<sup>2</sup> that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register.

#### **Legal Standard**

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 likelihood of confusion. *See In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that "[t]he 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." *Federated Foods, Inc. v. Fort Howard Paper*

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<sup>2</sup> Registration No. 2976818, issued July 26, 2005, to Sherman, Clay & Co. Registrant claimed March 18, 2005 as its date of first use of the mark anywhere and April 20, 2005 as its date of  
continued...

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Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999), and cases cited therein.

#### **Comparison of the Goods**

We first consider the goods involved in this case. The goods identified in the application and registration, "pianos," are identical. Applicant's attempts to distinguish its goods from those of the registrant are unavailing because the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually may be. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). *See also, Octocom Syst., Inc. v. Houston Computer Svcs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991); and *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Neither the subject application nor the cited registration is limited to any particular kind or type of piano, and must therefore be considered to cover identical goods.

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its mark in commerce. Registrant disclaimed exclusive right to use "& SONS" apart from the mark as shown.

Applicant argues that the examining attorney "opened the door" to evidence regarding the price or quality of applicant's pianos when she distinguished on the basis of price the goods in a third-party application (music boxes) cited by applicant in an attempt to show that the registrant's mark is weak. We disagree. The examining attorney's discussion on a different issue does not change the legal standard which we are required to apply in analyzing likelihood of confusion.

Of course, even if applicant amended its identification of goods to limit its pianos to "high-end," expensive pianos, such goods are encompassed by the cited registrant's identification of goods, which covers pianos without limitation - including "high-end" and expensive pianos like those allegedly sold by applicant. The fact that applicant's goods and those of the cited registrant are identical strongly favors a finding of likelihood of confusion.

**Trade Channels**

Because neither the goods of the applicant nor those of the registrant is restricted in any way, we find that the applicant's goods and those of the cited registrant would be sold in the same channels of trade and to the same class of purchasers. *In Re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); and *In Re Elbaum*, supra.

**Comparison Of The Marks**

We turn next to a determination of whether applicant's mark and the registered mark, when viewed in their entirety, are similar in terms of appearance, sound, connotation and commercial impression. In comparing the marks, we are mindful that where, as here, the goods are identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Real Estate One, Inc. v. Real Estate 100 Enterprises Corporation*, 212 USPQ 957, 959 (TTAB 1981); *ECI Div. of E-Systems, Inc. v. Environmental Communications Inc.*, 207 USPQ 443, 449 (TTAB 1980).

In addition, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but whether the marks are sufficiently similar in their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Although the marks at issue must be considered in their

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entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Applicant argues that inclusion in its mark of the initials "J. & C." renders the marks "different in sight, sound and meaning sufficient to avoid any likelihood of confusion..." Applicant's Brief at 7. As we must, we compare the marks in their entireties. Nonetheless, a finding of likelihood of confusion does not require that the marks be identical. While the marks at issue here do have some differences, they are nonetheless highly similar, particularly when we consider that the average consumer typically does not retain an exact recollection of marks. *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987).

Applicant's mark is **J & C. FISCHER**, while the mark in the cited registration is **FISCHER & SONS**. Both marks are presented in standard character form, which encompasses use of the respective marks in any typeface or stylization.

We find the identical word "FISCHER" to be the clearly dominant portion of both marks. The term "& SONS" in **FISCHER & SONS** is merely descriptive of the nature of

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registrant's organization or its original founders, and is disclaimed in the cited registration. Such matter has little or no source identifying capacity, and thus does not significantly distinguish the marks at issue. *Cf. In re Piano Factory Group, Inc.*, \_\_\_ USPQ2d \_\_\_, App. No. 78157550, Slip Op. at 11-12 (TTAB Sept. 15, 2006) (redesignated as precedential Oct. 29, 2007) (finding that "& SONS" did not detract from significance of "VOSE" in VOSE & SONS for pianos).

Likewise, although the "J. & C." portion of applicant's mark is not entirely devoid of source-identifying capacity, it is clearly subordinate to FISCHER in applicant's mark. Initials in marks such as applicant's convey the impression that they represent the first name or names of the particular "Fischers" from whose name the mark was originally adopted. They are thus subordinate to the term FISCHER both in connotation and visual appearance. *Cf. In re I. Lewis Cigar Mfg. Co.*, 205 F.2d 204, 98 USPQ 265 (CCPA 1953) (use of initial did not significantly detract from surname significance of S. SEIDENBERG & CO'S); and *In re Taverniti, SARL*, 225 USPQ 1263 (TTAB 1985).

As we have previously held, "[i]f the dominant portion of both marks is the same, ... confusion may be likely notwithstanding peripheral differences." *In re Jump Designs LLC*, supra at 1375 (TTAB 2006) (internal quotations and

citations omitted). Here, because the dominant feature of both marks ("Fischer") is identical, the commercial impressions of the marks as a whole are substantially similar, notwithstanding the small differences between them.<sup>3</sup>

Finally, while the entire marks would indeed be pronounced somewhat differently, it is likely that consumers would often refer to both applicant's and registrant's goods as "Fischer" pianos. We note that in many instances, the public abbreviates long names and may refer to applicant's products by the name Fischer. "[C]ompanies are frequently called by shortened names, such as Penney's for J.C. Penney's, Sears for Sears and Roebuck (even before it officially changed its name to Sears alone), Ward's for Montgomery Ward's, and Bloomies for Bloomingdale's." *Marshall Field & Co. v. Mrs. Fields Cookies*, 25 UPSQ2d 1321, 1333 (TTAB 1992). But even if the entire marks were pronounced, the additional matter in both marks is clearly subordinate to the identical term "FISCHER," and thus is likely to be the dominant feature of both marks.

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<sup>3</sup> To the extent consumers focus at all on the difference between "J. & C." and "& SONS" in the marks at issue here, those persons familiar with one of these marks might incorrectly assume that J. Fischer and C. Fischer are the "sons" referred to in the cited registrant's mark, or that there is some other legitimate connection between the two sources of identical goods. There is no evidence that there is or ever was such a connection.

This factor weighs strongly in favor of a finding of likelihood of confusion.

**Degree of Care Exercised by Purchasers**

As noted, applicant argues - without evidentiary support - that its pianos will be expensive and that pianos are not subject to impulse buying.<sup>4</sup> We agree that pianos are likely to be relatively expensive and thus unlikely to be impulse purchases. While this factor favors applicant to some degree, we note that purchasers of expensive goods are not immune from source confusion. Although consumers can be expected to exercise greater care in such purchases, there is no evidence that purchasers of applicant's pianos or those of the cited registrant are particularly knowledgeable about pianos, the market for pianos, or trademarks. Even consumers who exercise a high degree of care are not necessarily knowledgeable regarding trademarks, and therefore immune from source confusion. *In re Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988). Specifically, the problem that we have with applicant's argument regarding the purported high degree of consumer care is that applicant

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<sup>4</sup> Applicant states in its brief that it intends to use the mark on high-end pianos. Although the exact retail price of these pianos has not been determined, they will probably range from about \$1000 to several thousands if not tens of thousands dollars.[sic] Because these pianos will be expensive, they are not the type of product that will be subject to impulse buying. Applicant's Brief at 6.

failed to present any evidence regarding how applicant's consumers, even exercising a high degree of care, will react to its J. & C. FISCHER trademark vis-à-vis registrant's FISCHER & SONS trademark used in connection with identical products. As noted above, we must determine the issue of likelihood of confusion based on the probative facts made of record and, in the case *sub judice*, applicant failed to present any evidence to corroborate its degree of care argument.

**Third-Party Registrations**

Finally, applicant cites the existence of two third-party registrations (in addition to the cited registration) for musical instruments which include the term "Fischer" or "Fisher" as evidence for the proposition that "Fischer" is a weak term entitled to a narrow scope of protection or exclusivity of use.

Applicant's Brief at 10. Applicant listed the following registrations:

1. Registration No. 1185688 for the mark MR. JEREMY FISCHER for music boxes; and
2. Registration No. 1925372 for the mark OTTO ERNST FISHCER for violins and cellos.

**Admissibility of Listed Registrations**

Applicant admits that it did not supply copies of the two registrations, but argues that the examining attorney's discussion of one of them "constitutes a waiver of the requirement of a copy of all the registrations and that all the information should be considered in lieu of copies of the registrations."

Generally,

to make a third-party registration of record, a copy of the registration ... should be submitted. Mere listings of registrations ... are not sufficient to make the registrations of record. \* \* \* [However,] if the examining attorney discusses the registrations in an Office action or brief, without objecting to them, the registrations will be treated as stipulated into the record the examining attorney will be deemed to have stipulated the registrations into the record.

TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP),  
§ 1208.02 (2d ed., rev. 2004) (footnotes omitted).

Contrary to the examining attorney's argument in her brief, by discussing Registration No. 1185688 ("the '688 Registration"), the examining attorney waived any objection to our consideration of it. Unless an objection in the alternative is clearly made prior to appeal, the examining attorney cannot treat the evidence as improper and argue its merits at the same time. However, we do not agree that by doing so, she waived any objection to consideration of the remaining registration. The relevant portion of the final Office action makes this clear:

In support of registration, applicant noted that there are other "... registrations in Class 15 for various musical instruments ..." Applicant's October 2, 2006 Response, Page 1. However, the applicant should note that Registration No. 1185688 is for music boxes, which are different in price, potential consumers, and channels of trade from the applicant's musical instruments. \* \* \* Since a copy of Registration No. 1925372 was not provided, this registration is not part of the record and has not been considered. \* \* \* Moreover, prior decisions and actions of other trademark examining attorneys in registering different marks are without evidentiary value and are not binding upon the Office. \* \* \*

Final Office Action at 3 (citations omitted).

Accordingly, we will consider the '688 Registration because the examining attorney failed to timely object to it, discussing it instead. However, Registration No. 1925372 will not be considered because it was not properly submitted, and because the examining attorney timely and explicitly objected to its consideration prior to appeal.

#### **Significance of Other Registrations**

Applicant argues that the coexistence of the listed registrations and the cited registration indicate that "fisher" is a weak term in International Class 15 and ..., as a result, Applicant's mark should be able to join the field." As noted, we will only consider Registration No. 1185688 and the cited registration for this purpose.<sup>5</sup>

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<sup>5</sup> Nonetheless, we add that consideration of Registration No. 1925372 would not change our decision.

To begin with, even if we considered the stricken registration, we do not believe that two third party registrations, especially for marks as different as those in the listed registrations, is sufficient to show that the name "Fischer" used in connection with pianos is a weak term. Moreover, our precedent dictates that evidence of third-party registrations is entitled to little weight for this purpose. As the Court of Claims and Patent Appeals remarked:

We have considered the cited third-party registrations and accept them as evidence that the term "Caper" has in the past appealed to others in the clothes-merchandising field as an appropriate term to use as a mark .... But in the absence of any evidence showing the extent of use of any of such marks or whether any of them are now in use, they provide no basis for saying that the marks so registered have had, or may have, any effect at all on the public mind so as to have a bearing on likelihood of confusion. The purchasing public is not aware of registrations reposing in the Patent Office and though they are relevant, in themselves they have little evidentiary value on the issue before us.

*Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 462-63 (CCPA 1973). See also, *In re Jump Designs LLC*, *supra* at 1370.

Thus, while we have considered the coexistence of the cited registration with one of the registrations listed by applicant, we find that it does not support applicant's argument in favor of registration.

**Conclusion**

As noted, applicant's goods are identical to those identified in the cited registration, and the channels of trade and classes of purchasers are also identical. When the relevant goods are identical, a lesser degree of similarity of the marks is necessary to support a finding of likelihood of confusion. *ECI Div. of E-Systems, Inc. v. Env'tl. Communications Inc.*, 207 USPQ 443, 449 (TTAB 1980). Despite the likely expense of pianos and the level of care likely to be exercised in their purchase, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark and that of the registrant, their contemporaneous use on the identical goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

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