

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Brigitte Finger

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Serial No. 78719018

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Erik J. Osterrieder of Schubert, Osterrieder & Nickelson  
PLLC for Brigitte Finger.

Eli J. Hellman, Trademark Examining Attorney, Law Office  
112 (Angela Wilson, Managing Attorney).

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Before Seeherman, Hairston, and Drost, Administrative  
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On September 23, 2005, applicant Brigitte Finger  
applied to register the mark shown below for "Clothing and  
accessories, namely, shirts, vests, sweaters, shoes, caps,  
bandannas, shorts, sweat shirts, pants, belts for clothing,  
socks, swim wear, jackets, rain wear, blouses, dresses,  
footwear, hosiery, scarves, hats, head bands, pajamas,  
sleep wear, and underwear" in Class 25.



The application (No. 78719018) is based on an allegation of applicant's bona fide intention to use the mark in commerce.<sup>1</sup>

The examining attorney has refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) because of the registration of the mark shown below for "jewelry" in Class 14.<sup>2</sup>



After the examining attorney made the refusal final, this appeal followed.

The examining attorney argues that "both marks consist solely of the letter I bisecting the letter M, thus creating a similar overall commercial impression. While applicant's font and width may slightly differ, when applicant's mark is compared to a registered mark, the points of similarity are of greater importance than the points of difference." Brief at unnumbered p. 5 (internal

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<sup>1</sup> The application also contains goods in Classes 16 and 20 but the examining attorney has made it clear that the "final refusal was limited to the applicant's class 025 goods." Brief at unnumbered p. 3.

<sup>2</sup> Registration No. 2,284,309 issued October 12, 1999. Section 8 affidavit accepted.

quotation marks omitted). Furthermore, the examining attorney argues that "the parties' goods are closely related, because clothing and jewelry commonly emanate from a common source." Brief at unnumbered p. 7.<sup>3</sup>

In response, applicant argues that "viewing the stylized IM design marks at issue as wholes, the marks significantly differ in appearance in the at least three manners argued in the appeal brief" and that the "goods possess no overlap and are dissimilar." Reply Brief at p. 5.

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). See also In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In considering the evidence of record on these factors, we must keep in mind that "[t]he

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<sup>3</sup> We sustain the examining attorney's objection to applicant's Internet evidence attached to her appeal brief for the first time. 37 CFR § 2.142(d). To the extent that applicant has also attached a non-precedential board decision, we note that, subsequent to the briefing in this appeal, on December 27, 2006, the board changed its policy and now: "A decision designated as not precedential is not binding upon the TTAB but may be cited for whatever persuasive value it might have." See Vol. 1314 Official Gazette of the United States Patent and Trademark Office No. 4 (January 23, 2007). Therefore, the examining attorney's objection to the inclusion of this opinion with applicant's brief is overruled.

fundamental inquiry mandated by § 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 Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

“The first DuPont factor requires examination of ‘the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.’” Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting du Pont, 177 USPQ at 567). Both marks indicate that the letters in the marks are IM, which to the extent that they are pronounced, would be pronounced the same. It is not clear what meaning these marks would have inasmuch as they appear to be arbitrary letters.

However, we must compare the marks in their entirety. In this case, neither applicant’s nor registrant’s mark is displayed in typed or standard character form. Indeed, each has a noticeable stylization for the letters.

"It must be remembered that [the] trademark consists of highly stylized letters and is therefore in the gray region between pure design marks which cannot be vocalized and word marks which are clearly intended to be." Georgia-Pacific Corp. v. Great Plains Bag Co., 614 F.2d 757, 760, 204 USPQ 697, 699 (CCPA 1980). See also In re Burndy Corp., 300 F.2d 938, 133 USPQ 196, 197 (CCPA 1962) ("In our view, this case must be decided primarily on the basis of visual similarity of the marks. The marks are not word marks and are not capable of being spoken. They are design marks and, although each is based on a capital letter 'B', there are great dissimilarities between them which can be fully appreciated only from seeing them"); In re Rodix, Inc., 187 USPQ 255, 256 (TTAB 1975) ("[I]t is not believed that persons familiar with or exposed in some manner to the registrant's distinctive 'R' mark would be likely, upon encountering applicant's likewise distinctive and different 'R' mark, to equate the two or even form an association therewith").

"There is no general rule as to whether letters or design will dominate in composite marks; nor is the dominance of letters or design dispositive of the issue. No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used

alone.” In re Electrolyte Laboratories, Inc., 929 F.2d 645, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990). Therefore, in addition to the letters, we must consider the stylization of the marks because that is how prospective purchasers will encounter the marks.

We begin by observing that the stylization of the marks here is significantly different. Indeed, both marks would require some study to ascertain exactly what letters are included in the marks. We are also guided by the board’s analysis in In re TSI Brands Inc., 67 USPQ2d 1657 (TTAB 2002). In that case, applicant sought registration for the following mark for sportswear, namely, men’s and women’s pants, jeans, shorts, and shirts.



The term “American Khakis” in the applicant’s mark was disclaimed.

The examining attorney cited the marks in the two registrations shown below for athletic clothing as a bar to registration under Section 2(d) of the Trademark Act.



and



The board held that "the degree of stylization and integration of the letters forming both of registrant's "AK" and design marks is so high that they are more properly treated, in our view, as being akin to pure design marks rather than simply stylized displays of word marks." TSI Brands, 67 USPQ2d at 1663.

In the present case, the stylization of the marks is even more pronounced and we, of course, cannot ignore this factor. When we consider it, we conclude that the marks in their entireties have significant differences in appearance and commercial impression that make confusion less likely.

The next factor that we consider is the relatedness of the goods. To determine whether the goods are related, we look to the identification of goods in the application and registration. In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). Applicant's goods are a variety of clothing items while registrant's goods are jewelry. It is clear that these goods are not identical. However, the examining attorney has submitted numerous registrations to show that a common mark has been

registered by the same entity for clothing items and jewelry. See, e.g., Registration Nos. 2,783,112; 2,855,078; 2,978,310; 2,925,766; and 3,000,074. In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (Although third-party registrations "are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may have some probative value to the extent that they may serve to suggest that such goods or services are the type which may emanate from a single source"). See also In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1786 (TTAB 1993). We agree that the examining attorney has shown that there is a relationship between the goods of applicant and registrant.

We next proceed to determine if, based on the evidence of record, there is a likelihood of confusion in this case.<sup>4</sup> The marks are made up of the same letters, IM, but both marks employ significantly different stylization. As we discussed, the letters themselves may not be readily apparent and the marks are in the "gray area" between a word mark and a design mark. Furthermore, while the

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<sup>4</sup> Applicant argues that there is no evidence of fame of the registered mark but, we point out, there rarely would be such evidence in an ex parte proceeding. In addition, inasmuch as there is no evidence of registrant's use, we cannot accept applicant's argument concerning registrant's lack of use of its mark on non-jewelry items.

examining attorney has shown a relationship between the goods, we note that recently the board has found that this same type of relationship was not necessarily sufficient to show that there was a likelihood of confusion. See In re Thomas, 79 USPQ2d 1021, 1028 (TTAB 2006):

While jewelry may be related to clothing, the goods are nevertheless specifically different. We cannot conclude on the basis of the evidence of record that jewelry and clothing are so closely related that, notwithstanding the differences in the marks, purchasers would naturally expect these goods to emanate from the same source. See In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ("The degree of 'relatedness' must be viewed in the context of all the factors, in determining whether the services are sufficiently related that a reasonable consumer would be confused as to source or sponsorship.").

Similarly, it is unlikely that consumers who are familiar with registrant's mark on jewelry are likely to believe that it is now the source of different goods using a mark with very different stylization from its registered mark. Therefore, we conclude that there is no likelihood of confusion.

Decision: The refusal to register is reversed.