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Hearing:
May 8, 2007

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Focus Magazin Verlag GmbH

Serial Nos. 79008210 and 79010009

Donald C. Casey of Law Offices of Donald C. Casey for Focus Magazin Verlag GmbH.

Barney L. Charlon, Trademark Examining Attorney, Law Office 104 (Chris Doninger, Managing Attorney).[1]

Before Seeherman, Walters and Bergsman, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Focus Magazin Verlag GmbH (hereafter "applicant") has applied to register the mark FOCUS in the form shown below, for

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[1] Mr. Charlon was the Examining Attorney for Application Serial No. 79010009; Sandra E. Manios, also of Law Office 103, was the Examining Attorney for Application Serial No. 79008210. Because Mr. Charlon argued on behalf of the USPTO with respect to both of the applications, we have listed him as the attorney of record, but note that Ms. Manios handled Application Serial No. 79008210 through final briefing.

> Printed matter and publishing goods namely, magazines, periodicals, newspapers and pamphlets in the field of financial and economic information, in Class 16; and
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> Publication of printed matter, particularly of magazines, newspapers, periodicals, pamphlets and books in the field of economic and financial information, in Class 41.[2]

FOCUS

Applicant has also applied to register FOCUS MONEY, in standard characters, with MONEY disclaimed, for

> Printed matter and publishing goods namely, magazines, periodicals, newspapers and pamphlets in the field of financial and economic information, in Class 16;
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> Television broadcasting in the field of economic and financial news programs and advertising, in Class 38; and
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> Publication of printed matter, namely, magazines, newspapers, periodicals, pamphlets and books in the field of economic and financial information, in Class 41.[3]

Registration of both marks has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that they are likely to cause confusion with the following registered marks:

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[2] Application Serial No. 79010009, filed October 10, 2004, based on Section 66(a) (Madrid Protocol).

[3] Application Serial No. 79008210, filed October 10, 2004, based on Section 66(a).

Registration No. 1767428 for FINANCIAL FOCUS, with FINANCIAL disclaimed, for "financial newsletter and financial advice column directed to individual and corporate investors[4]; and

Registration No. 2510374 for FOCUS and No. 2510370 for FOCUS, in the stylized form shown below, both owned by the same entity and registered for printed material, namely a periodical which relates to economic and political issues affecting minorities and others.[5]

After final refusals issued for both applications, applicant appealed, and the appeals have been fully briefed. Applicant also requested oral hearings in both appeals and, because they involve common issues, the appeals were consolidated for purposes of the oral hearing.[6] We also are deciding both appeals in a single opinion.

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[4] Registered April 27, 1993; Section 8 & 15 affidavits accepted and acknowledged; renewed.

[5] Both registrations issued on November 20, 2001.

[6] At the oral hearing applicant submitted a "briefing book," consisting of printouts of three federal court decisions, and papers from a third-party application file. Because the papers from the third-party file were not made of record during examination, we have not considered this exhibit. See Trademark Rule 2.142(d). Copies of decisions, however, need not be submitted in order for us to consider them.

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 the refusal of registration of FOCUS for printed matter and publishing services, namely:

> Printed matter and publishing goods namely magazines, periodicals, newspapers and pamphlets in the field of financial and economic information; and publication of printed matter, particularly of magazines, periodicals, newspapers, pamphlets, and books in the field of economic and financial information.

With respect to the cited registrations, Nos. 2510370 and 2510374, for FOCUS, applicant has conceded that its mark is identical to these marks. Brief, p. 5. In point of fact, applicant's mark is depicted in what is

characterized as stylized form, but that stylization is basic capital letters, while Registration No. 2510370 is for FOCUS in a stylized form, with the "O" having a slight design aspect.[7] However, we agree with applicant that the marks are virtually identical; the slight differences in appearance caused by the stylization do not serve to distinguish the marks, and the marks are, obviously, identical in pronunciation and connotation, as well as commercial impression. The du Pont factor of the similarity of the marks strongly favors a finding of likelihood of confusion.

As for the goods and services, the cited registrations are for "printed material, namely a periodical which relates to economic and political issues affecting minorities and others." Applicant's goods are identified as, inter alia, periodicals in the field of financial and economic information. Both applicant's and the registrant's goods are legally identical, in that they both include periodicals on the subject of economic information. We note that the registrant's periodicals specifically deal with economic issues affecting minorities and others, but

[7] In its reply brief applicant asserts that the mark shown in Registration No. 2510374 is stylized, but it is not; it is a "typed" drawing.

since the subject matter of applicant's periodicals is broadly described as being "in the field of economic information," it would encompass economic issues affecting minorities and others.

We also find that applicant's publishing services, particularly the publishing of periodicals in the field of economic information, are closely related to the periodicals identified in the cited registrations. The relatedness of publishing services for such periodicals, and the periodicals themselves, is clear.

Thus, the du Pont factor of the similarity of the goods and services favor a finding of likelihood of confusion.

Moreover, because both applicant's and the registrant's identified goods are legally identical, we must assume that they move in the same channels of trade, and are sold to the same class of purchasers, namely, members of the general public who have an interest in economic issues affecting minorities and others. This would include not only minorities, but those members of the general population who are interested in issues that affect minorities and "others." This du Pont factor favors a finding of likelihood of confusion.

Neither applicant nor the Examining Attorney has discussed the nature of applicant's identified publishing services. We must assume that the publishing services are rendered to third parties, since the mere publication of one's own periodicals would not be a separate service, but an integral part of "manufacturing" the goods, which are publications. Thus, the customers for applicant's publishing services would be those who write articles or otherwise wish to have their views published. Such consumers are also likely to read periodicals that concern economic issues, including economic issues affecting minorities and others. As a result, both applicant's services and the registrant's goods would be encountered by the same class of consumers.

Applicant argues that the cited registrations are entitled to a limited scope of protection because FOCUS is a weak mark. Further, in its appeal brief applicant has argued that the two cited registrations "for the word 'FOCUS' are descriptive in that a property of the magazine or publication using that mark contains subject matter that can be concentrated on by the reader." Brief, p. 5. The Examining Attorney objected to this characterization of the cited marks by applicant, stating that this was an impermissible collateral attack on the registrations.

Applicant appears to have retreated from this position in its reply brief, stating that the Examining Attorney misconstrued applicant's argument, and that applicant was not challenging the validity of the registrations, but only their strength. Although we think the statements made by applicant in its appeal brief would reasonably be understood as a claim that the cited marks were merely descriptive, we will consider applicant's current position that the marks are weak.

Applicant bases this claim on the meaning of the word "focus," and its assertion that this word is in broad usage. With respect to the latter point, applicant relies solely on third-party registrations for marks containing the word FOCUS. These registrations had initially been cited against applicant's application, but the refusals were later withdrawn when applicant narrowed its identification to specify the subject matter of its publications.[8] It is well established that third-party

[8] The third-party registrations are for FOCUS for "scientific newsletter"; FOCUS for "magazines carrying information concerning manufacturing standards, certification, testing and inspection activities, and associated technological and biographical information"; HR FOCUS for "newsletter containing information on human resources"; RADIO FOCUS for "magazines and newsletters featuring radio programming and marketing trends and issues"; FOCUS for "newsletter pertaining to industrial supplies and machinery manufacturers' trade association"; FOCUS for "print publication, namely, general feature magazine"; MUSIC FOCUS for "guitar instruction books" and FOCUS for "printed publications,

registrations are not evidence that the marks shown therein are in commercial use. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993). Thus, we can give no weight to applicant's claim that FOCUS marks are in "broad usage."

However, we may consider the third-party registrations in the manner of dictionary definitions, to indicate that the word "focus" has a meaning or significance for periodicals. We may also look to the dictionary meaning of the word "focus" in determining the scope of protection to which the cited registrations are entitled. Applicant has quoted, in its appeal brief, a definition of "focus" as meaning "to concentrate; to focus one's thoughts.[9] The Examining Attorney has also, in his brief, included quoted dictionary definitions of "focus," the most pertinent of which is "close or narrow attention; concentration." We take judicial notice of the various definitions. See University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

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namely, newsletters, brochures, and bulletins in the field of agriculture and agribusiness." We note that none of these publications are for the same subject matter as those of the applicant or registrant.

[9] Applicant states that this definition was taken from the American College Dictionary, Random House © 1956.

The foregoing evidence serves to show that FOCUS has a somewhat suggestive meaning when used for periodicals, but we can by no means say that it is a weak mark. Certainly it is deserving of protection against the use of a virtually identical mark for legally identical goods and closely related services. See King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974) (even a weak mark is entitled to protection against the registration of a similar mark for closely related goods or services).

Moreover, because the marks are virtually identical and applicant's goods are legally identical and its services are closely related to the goods in the cited registrations, the fact that the consumers for periodicals dealing with economic issues and for publishing services for such periodicals may be more careful and/or sophisticated does not avoid the likelihood of confusion. Even careful and sophisticated consumers are not likely or indeed able to distinguish between virtually identical marks that are used for identical goods and closely related services.

Accordingly, we affirm the refusal of registration of both classes of Application Serial No. 79010009 based on Registration Nos. 2510370 and 2510374.

As for the refusal based on Registration No. 1767438 for FINANCIAL FOCUS for a "financial newsletter and financial advice column directed to individual and corporate investors," we find that applicant's goods and the registrant's identified goods are closely related if not legally identical, in that a newsletter is a type of periodical. The subject matter of the publications is also the same, both being in the field of financial information. Applicant's services and these goods are also closely related, since applicant's identification encompasses publishing periodicals that are the same type or are closely related to those identified in the cited registration. This du Pont factor favors a finding of likelihood of confusion.

With respect to the channels of trade, applicant has conceded that "the magazines identified by the trademark FINANCIAL FOCUS and the instant mark may well occupy overlapping marketing channels." Brief, p. 6. We note that the goods in the cited registration are identified as newsletters and an advice column rather than a magazine, but as we stated above, applicant's identification of periodicals encompasses newsletters. In any event, periodicals such as magazines and newsletters may be mailed to consumers, or be sold together, and are likely to be

purchased and read by the same classes of consumers, namely, those interested in financial information. As for applicant's services, again those interested in having someone publish their views on financial subjects, whether it be an article or a letter to the editor, are likely to be readers of financial newsletters or advice columns, and therefore will be exposed to both the registrant's goods and applicant's services.

Thus, the du Pont factor of the channels of trade and classes of consumers favors a finding of likelihood of confusion.

This brings us to a consideration of the marks. Applicant's mark and the cited mark obviously differ in that the registrant's mark includes the word FINANCIAL, while applicant's mark does not. However, in comparing the marks, we consider the word FINANCIAL to have less impact, in that it merely describes the nature of the registrant's publications. Thus, consumers are likely to look to the word FOCUS in the mark as the stronger source-identifying element. In articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a

consideration of the marks in their entireties. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Simply put, the additional word FINANCIAL in the registrant's mark is not sufficient to distinguish the marks.

Moreover, consumers who are familiar with the registrant's mark for financial newsletters may well assume, upon seeing FOCUS for periodicals in the field of financial information, that this is merely a shortened form of the FINANCIAL FOCUS mark.

Again, we have taken into consideration applicant's arguments about the weakness of the term FOCUS, but do not consider FOCUS to be such a highly suggestive term that the addition of the descriptive word FINANCIAL is sufficient to distinguish the marks when they are used for legally identical or very closely related goods and services. We also point out that the consumers of the goods are the public at large, and even though they may exercise a greater degree of discrimination in choosing a financial publication than they would a more entertainment-oriented magazine, these marks are still so similar that, as used on identical or closely related goods, they are likely to be confused. As for applicant's services, we recognize that such consumers of publishing services as authors who write

articles on financial topics, will be more sophisticated and careful. However, because of the closely related nature of the goods and services, and the fact that the only difference in the marks is the presence of the descriptive word FINANCIAL, even these more careful consumers are likely to assume that FINANCIAL FOCUS for a financial newsletter and FOCUS for the service of publishing periodicals involving financial information identify goods and services emanating from a single source.

In reaching our conclusion that confusion is likely between applicant's mark FOCUS and the three cited registrations, we have considered the cases that applicant has cited and discussed in its brief and submitted at the oral hearing. However, we find that these cases are distinguishable. For example, Entrepreneur Media Inc. v. Smith, 279 F3d 1135, 61 USPQ2d 1705 (9h Cir. 2002), involved, inter alia, the issue of likelihood of confusion between the plaintiff's mark ENTREPRENEUR and the defendant's use of ENTRPRENEUR in various forms for various uses, e.g., "EntrepreneurPR" for the name of a business, "entrepreneurpr.com" for a domain name, and "Entrepreneur Illustrated" for a publication. In that decision, which was an appeal from a grant of summary judgment, the Appeals Court was concerned with whether the District Court had

viewed the evidence in the light most favorable to the nonmoving party and whether there were any genuine issues of material fact. It also treated the plaintiff's mark ENTREPRENEUR as a descriptive term that others should be able to use in connection with subjects related to entrepreneurship. In the present case, we are obviously not dealing with the special issues that apply to deciding a summary judgment motion. Moreover, FOCUS is not the subject matter of a periodical, nor is there sufficient evidence to show that FOCUS, whether in the two FOCUS marks or in the mark FINANCIAL FOCUS, is such a weak term (let alone a descriptive term) that it should be free for all to use in connection with financial publications or publications dealing with economic issues affecting minorities and others.[10]

This brings us to the second application in this consolidated appeal, Application Serial No. 79008210 for FOCUS MONEY, with MONEY disclaimed. The same registrations cited in the companion application have been cited against the registration of this mark. However, this application

[10] Given that applicant's own mark is FOCUS, the statements made throughout applicant's brief that FOCUS is a descriptive term, and its analogizing its mark to the Entrepreneur case, including quoting the statement that others should be able to use "entrepreneur" to describe their goods and services, would seem antithetical to applicant's position that it is entitled to obtain a registration for FOCUS per se.

differs somewhat from the prior application, both because the mark includes the word MONEY, and because the application also includes "television broadcasting in the field of economic and financial news programs and advertising" in Class 38.

We first consider the refusal based on the two registrations for FOCUS. With respect to the services in Class 38, the Examining Attorney has not submitted any evidence regarding the relatedness of these services to the registrant's publications, nor, other than the conclusory statement that the services are sufficiently related, has she even discussed how applicant's services are related to the registrant's goods. While the identification of the services shows that the subject matter of the television broadcasting services can encompass the subject matter of the registrant's publications, the Examining Attorney has not provided any evidence for us to conclude that consumers would assume that television broadcasting services and publications emanate from a single source. In view thereof, we find that the Office has not met its burden of showing that applicant's Class 38 services are related to the registrant's goods. Moreover, without any evidence that the goods and services are related, the fact that the marks used in connection therewith are the same or similar

is not sufficient to demonstrate a likelihood of confusion. Thus, we reverse the refusal of registration with respect to the application is Class 38.

As for the relatedness of the goods and services in Class 16 and Class 41 of applicant's application, and the goods identified in the cited registrations, as well as the channels of trade, we have already discussed these factors in connection with applicant's FOCUS application. Therefore, we need not repeat that discussion, and simply find that the du Pont factors of the similarity of the goods and services and channels of trade and classes of consumers favor a finding of likelihood of confusion with respect to these classes.

This brings us to a consideration of the similarity of the marks. When marks would appear on virtually identical goods or services, the degree of similarity 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). Here, as we have said, applicant's goods are legally identical to the registrant's goods, while its services are closely related to them.

Applicant's mark in Application Serial No. 79008210 is FOCUS MONEY, while the cited marks are FOCUS and FOCUS

(stylized). However, the presence of this additional word is not sufficient to distinguish the marks. MONEY, which applicant has disclaimed, describes the subject matter of applicant's publications and the publications that are the subject of its publishing services. Accordingly, consumers will look more to the word FOCUS in applicant's mark for its source-identifying significance. As we mentioned in our discussion of the issue of likelihood of confusion with the mark FINANCIAL FOCUS, it is permissible to give greater weight to a particular part of a mark, and we consider it to be appropriate in this case to give greater weight to the FOCUS portion of applicant's mark. In saying this, we reject the view that FOCUS is such a weak term and/or a descriptive part of the mark FOCUS MONEY that the descriptive word MONEY should be given greater weight in our consideration of the marks. This du Pont factor favors a finding of likelihood of confusion.

As we previously discussed, consumers for periodicals dealing with economic issues and for publishing services for such periodicals may be more careful and/or sophisticated, and this du Pont factor therefore favors the applicant. However, because the marks FOCUS/FOCUS (stylized) and FOCUS MONEY are so similar, the goods are legally identical and the services are closely related,

even careful or sophisticated consumers are likely to assume that the goods and services emanate from the same source.

Therefore, we affirm the refusal of the application in Classes 16 and 41, based on Registration Nos. 2510374 and 2510370.

As for the refusal based on the registration for FINANCIAL FOCUS, again, the Examining Attorney has not submitted any evidence or argument to show how applicant's Class 38 services are related to the goods identified in the cited registration. Accordingly, the refusal of registration with respect to the application in that class is reversed.

With respect to the relatedness of applicant's Class 16 goods and Class 41 services, our comments with respect to applicant's FOCUS application apply. The du Pont factor of the similarity of the goods and channels of trade/classes of consumer favor a finding of likelihood of confusion. However, when it comes to the marks, overall we find that there are sufficient differences between FINANCIAL FOCUS and FOCUS MONEY that confusion is not likely. In saying this, we are aware that there is some connotative similarity between FINANCIAL and MONEY in that both words are associated with finances. However, these

words are not synonyms, and overall the differences in these words and their placement in the marks, with FINANCIAL at the beginning of one, and MONEY at the end of the other, give the marks an overall difference in appearance, pronunciation, connotation and commercial impression. Accordingly, we find that there is no likelihood of confusion with the registration for FINANCIAL FOCUS.

Decision: The refusal of registration is affirmed with respect to Application Serial No. 7901009 for FOCUS in Class 16 and Class 41 on the basis of likelihood of confusion with Registration Nos. 2510370, 2510374 and 1767428. The refusal of registration is affirmed with respect to Application Serial No. 79008210 in Class 16 and Class 41 on the basis of likelihood of confusion with Registration Nos. 2510370 and 2510374, and is reversed with respect to Registration No. 1767428. The refusal of registration with respect to Application Serial No. 79008210 in Class 38 is reversed. Application Serial No. 79008210 will be forwarded to publication for the services in Class 38.