

THIS IS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: January 22, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Capital Performance Group, naamloze vennootshap

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Serial No. 79008446

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Milena S. Dakova-Micheva of Graham, Campaign P.C. for  
Capital Performance Group, naamloze vennootshap.

Maureen L. Dall, Trademark Examining Attorney, Law Office  
117 (Loretta C. Beck, Managing Attorney).

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Before Hairston, Zervas and Kuhlke, Administrative  
Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Capital Performance Group, naamloze vennootshap seeks  
registration on the Principal Register of the mark



for goods ultimately identified as "diamonds and jewelry  
bearing diamonds" in International Class 14.<sup>1</sup> The word  
DIAMONDS is disclaimed.

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<sup>1</sup> Application Serial No. 79008446, filed September 17, 2004,  
under Trademark Act Section 66(a). 15 U.S.C. §1141(f).

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 with its identified goods, so resembles the registered marks FREEDOM (in typed form) for "jewelry" in International Class 14<sup>2</sup>, and FREEDOM (in typed form) for "watches and parts thereof" in International Class 14<sup>3</sup>, as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed and briefs have been filed. We affirm the refusal to register.

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. See

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<sup>2</sup> Registration No. 2639452, issued October 22, 2002, owned by Nafco Gems, Ltd.

<sup>3</sup> Registration No. 1406675, issued August 26, 1986, owned by North American Watch Corporation. The electronic Office records do not reflect that a renewal has been filed; however, the registration status is still listed as active.

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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 registrations. It is well settled that goods and services 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 and services themselves, but rather whether purchasers are likely to confuse the source of the goods and services. See Helene Curtis Industries Inc. v. Suave Shoe Corp., 13 USPQ2d 1618 (TTAB 1989). Further, we must consider the cited registrants' goods as they are described in the registrations 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 registrations describe the goods broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the registrations encompass all goods of the type described, that they move

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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).

With regard to Registration No. 2639452 the identified goods, jewelry, encompass applicant's identified goods, jewelry bearing diamonds. In addition, the examining attorney submitted evidence in the form of third-party use-based registrations that support her argument that applicant's diamonds and jewelry bearing diamonds are related to registrant's jewelry in Registration No. 2639452 and registrant's watches in Registration No. 1406675. See e.g., Reg. No. 2977652 (Heart and Maple leaf design for diamonds, jewelry and watches); Reg. No. 2994042 (VENUS CUT for diamonds, diamond rings and diamond jewelry); Reg. No. 2573796 (NADRI for inter alia jewelry, namely diamonds, emeralds, pearls, bracelets, brooches, earrings, necklaces, watches); Reg. No. 2591669 (SANDBERG for inter alia precious metal jewelry, costume jewelry, diamond jewelry, watches); Reg. No. 2902192 (NALEDI JEWELRY COLLECTION for precious gemstones, namely, diamonds and diamond jewelry); Reg. No. 2838465 (LIANG DESIGNS for inter alia jewelry, precious gem stones, diamonds, watches); Reg. No. 2874280 (LAKHI GROUP for diamonds, precious gemstones, semi-

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precious gemstones and jewelry); Reg. No. 2817204 (GEM STONE KING for inter alia gold jewelry, diamonds, watches); Reg. No. 2810758 (TIANA for jewelry and diamonds); Reg. No. 2961116 (NORTHERN FIRE for jewelry, diamonds, watches); Reg. No. 2929816 (RAPTURE for diamonds and jewelry); Reg. No. 2950354 (WHEN WORDS ARE NOT ENOUGH... for inter alia jewelry, diamonds and watches); Reg. No. 2863739 (ADRIENNE VITTADINI for jewelry and watches); Reg. No. 2931788 (AWESOME KIDS for inter alia jewelry and watches); and Reg. No. 2951453 (PENDLETON for jewelry and watches). Third-party registrations which individually cover a number of different items, and which are based on use in commerce, serve to suggest that the listed goods are of a type which may emanate from a single source. In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993). We find the examining attorney's evidence persuasive on this point.

Considering the channels of trade, with regard, at least, to the jewelry items, inasmuch as there are no limitations in either the registration or the subject application, we must presume that applicant's and registrant's goods will be sold in the same channels of trade and will be bought by the same classes of purchasers. See Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); and In re Smith and

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Mehaffey, 31 USPQ2d 1531 (TTAB 1994). In addition, the examining attorney submitted evidence in the form of excerpted websites and search results from the Google search engine showing jewelry and/or diamonds and watches sold on the same website in close proximity and advertised together. Applicant presented no evidence or argument to rebut the examining attorney's position on the relationship of the goods or channels of trade.

In view of the above, 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 mark in the cited registration.

As to the class of purchasers, applicant argues that its consumers are sophisticated and take a high level of care in making their purchase. Applicant contends that the identification of its goods in the application "contains sufficient specificity to clearly distinguish the goods identified in the application from the goods in the cited registration[s] in the minds of customers for diamonds, jewelry bearing diamonds, jewelry and watches." Applicant continues arguing that "[t]hese buyers are sophisticated consumers who can easily discern the difference between the mark" and confusion is "far less likely among more sophisticated consumers." Br. p. 10. We agree that the

goods specified in applicant's identification, diamonds and jewelry bearing diamonds, would, by their nature, be expensive. However, potential purchasers of applicant's and registrants' goods are from the general public and it is also the case that jewelry and watches, with or without diamonds, include a wide range of products and pricing. Thus, the class of purchasers overlap. While it may be that consumers would exercise some higher level of care with regard to applicant's jewelry and diamonds, given that these goods are general consumer items and potential purchasers would not necessarily know the price range of the products of the parties, they are not likely to assume different sources for the goods based on a perceived price difference. See *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983). Most importantly, as discussed below, because of the strong similarities in the marks, ordinary consumers, even if they exercise some care in their purchasing decisions, are not likely to distinguish between the sources of these legally identical and closely related goods. Therefore, we do not find the level of care or the sophistication of the potential purchasers to offset the other du Pont factors in this case.

We turn now to the first du Pont factor, i.e., whether applicant's mark FREEDOM DIAMONDS and design and registrants' marks FREEDOM are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. The analysis is not whether the marks can be distinguished when compared side-by-side. Rather, we must determine whether the marks are sufficiently similar that there is a likelihood of confusion as to source and, in making this determination, we must consider the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

The word FREEDOM is the dominant element in opposer's mark FREEDOM DIAMONDS and design inasmuch as it is by the words that consumers will call for or refer to the goods. In *re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987). Further, in view of the prominent visual appearance of FREEDOM in comparison to the additional word DIAMONDS, as well as the descriptive nature of this additional word, which is disclaimed, it is likely that consumers will use the word FREEDOM to call for the goods. "That a particular feature is descriptive [or otherwise lacking in distinctiveness] ... with respect to the

involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark..." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). The registrants' marks consist only of the word FREEDOM. In view of the similarity of the dominant element in applicant's mark to the entirety of registrants' marks, the marks as a whole are similar in sound and connotation, and even though there are some differences in appearance due to the design components, which are suggestive of diamonds, and the additional descriptive word in applicant's mark, these differences are not sufficient to distinguish applicant's mark from registrants' marks; overall they convey similar commercial impressions. Thus, the factor of the similarity of the marks weighs in favor of likelihood of confusion.

Applicant argues that "nearly identical marks for similar or identical goods in International Class 014 coexist on the Principal Register. Applicant's evidence below supporting this contention consists of a USPTO online trademark database showing about 50(fifty) trademark registrations and applications comprised of or containing the term FREEDOM for use in connection with goods in International Class 014." Br. p. 12. A review of this listing reveals only four, not including the two cited

registrations, that are active registrations.<sup>4</sup> The remaining are either pending applications or dead records, both of which have no probative value for this point. More importantly, there is nothing in the record to indicate that these marks, other than the cited registrations, are in use on similar goods to those in issue in this case. Third-party registrations are not evidence of use and, thus, are of little probative value in an analysis of the strength of the marks. *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973). Third-party registrations may be "useful to demonstrate the sense in which a term is used in ordinary parlance and they can show that a particular term has been adopted by those engaged in a certain field or industry and that said term has less than arbitrary significance with respect to certain goods or services." *In re Dayco Products-Eaglemotive, Inc.*, 9 USPQ2d 1910, 1912 (TTAB 1988) (IMPERIAL adopted by others in the vehicular field to refer to that term's ordinary significance as a laudatory

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<sup>4</sup> Applicant attached this listing to its request for reconsideration. The listing itself is not proper evidence of third-party registrations; to make registrations of record a copy of the registration or electronic equivalent must be submitted. *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368 (TTAB 1998). Applicant attached printouts from the USPTO's TARR database with its brief. While these printouts were untimely, inasmuch as the corresponding listing was timely submitted and the examining

designation). We do not find these four registrations sufficient evidence upon which to make a determination that the term FREEDOM has a particular significance in the field of jewelry, diamonds and watches and is, thus, deserving of a limited scope of protection. As to the cited registrations, the existence on the register of other potentially confusingly similar marks does not justify registration of yet another confusingly similar mark. *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973); *In re Sunmarks Inc.*, 32 USPQ2d 1470 (TTAB 1994).

In conclusion, we find that because the marks are similar, the goods are legally identical and otherwise related, and the channels of trade and purchasers overlap, confusion is likely between applicant's mark and the marks in the cited registrations.

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

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attorney has not objected to these printouts we have considered them.