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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Leslie Dawn Homan
v.
William L. Rich

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Opposition No. 91174098
to Application Serial No. 78809143
filed on 2/7/2006

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Molly K. Shipp of Nokes & Quinn for Leslie Dawn Homan.

William L. Rich Pro Se.

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Before Seeherman, Rogers and Walsh, Administrative Trademark Judges.

Opinion by Walsh, Administrative Trademark Judge:

Leslie Dawn Homan (Opposer) has opposed the application by William L. Rich (Applicant) to register the mark **Jewels that Rock** in standard characters for goods identified as "jewelry namely rings, bracelets, cuff links and pendants" in International Class 14. Applicant filed the application based on his claim of a bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C.

§ 1051(b). Applicant has disclaimed the word "JEWELS." The application was filed on February 7, 2006.

As ground for the opposition, Opposer asserts priority and a likelihood of confusion with her mark **Sterling Silver Jewelry That Rocks** under Trademark Act Section 2(d), 15 U.S.C. § 1052(d). Opposer asserts use of her **Sterling Silver Jewelry That Rocks** mark since 2004 in connection with jewelry.

In his answer Applicant admits that Opposer has priority, but denies that the marks are confusingly similar and denies that the goods are similar.

The record consists of the pleadings, the file of the opposed application and the testimony of Leslie Dawn Homan on her own behalf. Opposer also filed a brief. Applicant did not submit any evidence, nor did Applicant file a brief.

Opposer has both asserted and established her interest in the proceeding and thereby satisfied the standing requirement by establishing her use of the mark **Sterling Silver Jewelry That Rocks**, as discussed below. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999).

As we stated, in his answer Applicant has admitted that Opposer has priority. Furthermore, through the testimony of Ms. Homan, Opposer has proven that Opposer used the **Sterling Silver Jewelry That Rocks** mark in commerce prior to the filing date of the opposed application. Specifically, Ms.

Homan states that she used the **Sterling Silver Jewelry That Rocks** mark in commerce on "rings, necklaces, charms, pendants, pins, earrings" in 2004. Homan Testimony at 8-9, 16 and 31. Ms. Homan also provides an example of the use on a pouch in which the items are sold. Exhibit A to Homan Testimony. In the absence of any evidence establishing use by applicant as of an earlier date, we conclude that the application filing date, February 7, 2006, is both applicant's constructive use date and applicant's priority date for purposes of this proceeding. See Trademark Act Section 7(c), 15 U.S.C. § 1057(c). Accordingly, the evidence of record also establishes opposer's priority.

Turning to the merits of the likelihood-of-confusion claim, the opinion in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977) sets forth the factors to consider in determining likelihood of confusion. Here, as is often the case, the crucial factors are the similarity of the marks and the similarity of the goods of the parties. *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.").

First, we address the goods of the parties. The goods of Opposer and Applicant need not be identical to find likelihood of confusion under Section 2(d). They need only be related in such a way that the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the goods originate from the same source. *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). *See also On-Line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000).

Furthermore, in comparing the goods we must consider the goods as identified in the application. *See Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.").

Applicant's goods are identified as "jewelry namely rings, bracelets, cuff links and pendants." As we indicated above, Opposer has established that she uses her mark on rings and pendants, among other goods. Accordingly, we

conclude that the goods of the parties are, at least in part, identical and otherwise related.

Turning to the marks of the parties, we note that, "the degree of similarity [between the marks] necessary to support the conclusion of likely confusion declines" when the goods are identical. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1992).

In comparing the marks we must consider the appearance, sound, connotation and commercial impression of the marks at issue. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

Also, "… it is well established that the test to be applied in determining likelihood of confusion is not whether marks are distinguishable on the basis of a side-by-side comparison but rather whether they so resemble one another as to be likely to cause confusion, and this necessarily requires us to consider the fallibility of memory over a period of time. That is to say, the emphasis must be on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks." *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975) (internal citations omitted).

Applicant's mark is **Jewels that Rock**; Opposer's mark is **Sterling Silver Jewelry That Rocks**. While there are specific differences between the marks, the common features are far more significant. The marks refer to "**Jewels that Rock**" and "… **Jewelry That Rocks**" respectively. The phrases are highly similar. The slight difference in form is too subtle to begin to distinguish the marks.

Opposer's mark also includes the term, "**Sterling Silver,**" but this generic term does not change the commercial impression of the marks or otherwise distinguish them. *See In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997).

Most importantly, both marks convey the same connotation and commercial impression, that is, that the jewelry is fashionable, and perhaps, in tune with popular culture. Accordingly, we conclude that the marks are similar in appearance, sound, connotation and commercial impression.

Finally, we conclude that there is a likelihood of confusion between Applicant's **Jewels that Rock** mark, as applied to "jewelry namely rings, bracelets, cuff links and pendants," and Opposer's **Sterling Silver Jewelry That Rocks** mark as applied to jewelry that is, in part, identical and otherwise related to applicant's jewelry.

Decision: We sustain the opposition.