

**This Opinion is Not a
Precedent of the TTAB**

Mailed: August 26, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Tucker's Trinkets & Treasures LLC
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Serial No. 87627270
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Thomas J. Milhill of Owen, Gleaton, Egan, Jones & Sweeney, LLP for
Tucker's Trinkets & Treasures LLC

Eric Sable, Trademark Examining Attorney, Law Office 117,
Hellen Bryan-Johnson, Managing Attorney.

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Before Wellington, Kuczma and Lynch,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Tucker's Trinkets & Treasures LLC ("Applicant") seeks registration of the mark TUCKER'S TRINKETS & TREASURES (in standard characters, TRINKETS disclaimed) on the Principal Register for "jewelry charms" in International Class 14.¹

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the registered mark

¹ Application Serial No. 87627270 was filed on September 28, 2017, and is based on Applicant's claim of a first use of the mark in commerce on June 1, 2005.

TUCKER'S FINE JEWELRY & GIFT GALLERY (in standard characters, FINE JEWELRY & GIFT disclaimed) for "jewelry" in International Class 14.² The cited mark is registered under Section 2(f) of the Act based a claim of acquired distinctiveness of the mark as a whole.

After the refusal was made final, Applicant requested reconsideration and appealed to this Board. Reconsideration was denied, proceedings resumed, and the appeal is briefed. We affirm the refusal to register.

I. Applicable Law

When the question is likelihood of confusion, 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, 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 any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See In re Chatam Int'l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The 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.").

² Registration No. 4644080 issued on November 25, 2014.

A. Legal Identity (or Close Relationship) of Goods and Channels of Trade

We first consider the second and third *du Pont* factors, the similarity of the goods and their channels of trade. We must make our determinations under these factors based on the goods as they are identified in the application and cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

We agree with the Examining Attorney that Registrant's identification of goods, described broadly as "jewelry," encompasses Applicant's "jewelry charms" and the goods are thus legally identical.

Applicant argues that "the purpose" of its "more limited" identification is "to limit the applicant's mark to the small, inexpensive charms it actually sells."³ However, as the evidence demonstrates, the wording "jewelry charms" does not necessarily connote inexpensive items and may include goods with price points approaching a thousand dollars.⁴ In any event, Registrant's jewelry is not limited to any particular price point and includes less expensive jewelry items that are made of non-precious materials such as plastic.⁵ *See In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134,

³ 7 TTABVUE 7.

⁴ See, e.g., evidence attached to Office Action (Reconsideration Letter) issued on January 23, 2019, showing "jewelry charms" with prices ranging from \$320 to \$935 (5 TTABVUE 39).

⁵ "Jewelry" is defined as "ornamental pieces (such as rings, necklaces, earrings, and bracelets) that are made of materials which may or may not be precious (such as gold, silver, glass, and

1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture’”).

Given the legal identity of the goods, and the lack of restrictions or limitations in the application and the cited registration as to channels of trade or classes of consumers, we must presume that the channels of trade and classes of purchasers are also the same. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1518-19 (TTAB 2016); *see also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion). That is, we must consider that Applicant’s jewelry charms, bearing the mark TUCKER’S TRINKETS & TREASURES, may be encountered in the same retail outlets as Registrant’s jewelry sold under the mark TUCKER’S FINE JEWELRY & GIFT GALLERY.

Even if we did not find that the goods are legally identical, the evidence submitted by the Examining Attorney demonstrates that various types of “jewelry” and “jewelry charms” are very closely related because they are commonly sold under the same mark, in the same channels of trade, and offered to the same classes of consumers.⁶ The Examining Attorney submitted internet printouts from a variety third-party

plastic), are often set with genuine or imitation gems, and are worn for personal adornment.” *Merriam-Webster.com*. 2019; <https://www.merriam-webster.com> (18 May 2019). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

⁶ Evidence attached to Office Action (Reconsideration Letter) issued on January 23, 2019.

retail jewelry websites displaying jewelry and jewelry charms for sale under the same marks, including: Tiffany, David Yurman, Brighton, Pandora, Alex and Ani, ASHA, Temple St. Clair, Konstantino, Jane Basch Designs, and Nashelle.⁷

Accordingly, the *du Pont* factors of the similarity of the goods and channels of trade weigh heavily in favor of likelihood of confusion.

B. The Similarity of the Marks

Under this factor, we compare Applicant's mark TUCKER'S TRINKETS & TREASURES and the cited mark TUCKER'S FINE JEWELRY & GIFT GALLERY "in their entireties as to appearance, sound, connotation and commercial impression." *Viterra*, 101 USPQ2d at 1908 (quoting *du Pont*, 177 USPQ at 567); see also *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014). "The marks 'must be considered ... in light of the fallibility of memory' and 'not on the basis of side-by-side comparison.'" *In re St. Helena Hosp.*, 113 USPQ2d at 1085 (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977)). The proper focus is on the recollection of the average consumer, who retains a general rather than specific impression of the marks. *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1675 (TTAB 2018). Under actual marketing conditions, consumers do not necessarily have the luxury of making side-

⁷ 5 TTABVUE 8-47.

by-side comparisons between marks, and must rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255, 259 (TTAB 1980).

We also keep in mind that where, as here, the goods are legally identical, less similarity between the marks is needed for us to find a likelihood of confusion. *See, e.g., Viterra*, 101 USPQ2d at 1908; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (“When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.”).

The involved marks are very similar because both begin with the same possessive name, TUCKER’S, followed by wording that is either descriptive or heavily suggestive of the involved goods. Inasmuch as TUCKER’S appears first in both marks and is more distinctive, consumers are likely to focus on this name to refer to the source of the goods. *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (first word in a mark is “most likely to be impressed upon the mind of a purchaser and remembered.”). The fact that the possessive form is in use in both marks strongly suggests to consumers that the goods come from a person with the name “Tucker.” Although Applicant argues that “Tucker” is a “common surname,” there is no evidence showing it being used in connection with jewelry by others. Indeed, on this record, we must assume the possibility that Applicant and Registrant are the only ones doing so. Furthermore, in this regard, we note again that the

unchallenged registration issued under Section 2(f) based on claim that the mark has acquired distinctiveness.

Applicant argues that marks have different connotations because the term TRINKETS in its mark “connotes small, inexpensive items,” whereas the wording FINE JEWELRY in Registrant’s mark “gives the consumer the impression of valuable gemstones and high-quality jewelry pieces.”⁸ However, Applicant’s mark also has the wording AND TREASURES and the registered mark has the wording & GIFT GALLERY. Thus, when viewed in their entirety, both marks may be understood as connoting jewelry goods that cover a broad price range.

We are also not persuaded by Applicant’s argument that any alliterative element in its mark creates an overall mark that “is designed to be used, said, and understood as a whole”⁹ and this will distinguish the two marks. Rather, we conclude that even if consumers notice an alliteration, this is insufficient to overcome the similarity of the marks based on the dominant initial and identical term, TUCKER’S. We further point out that both marks have a somewhat similar syntax – that is, both start with TUCKER’S and are followed by two words connected by AND (or &) that are heavily suggestive or descriptive of the goods being sold.

Accordingly, we find the marks to be overall similar in appearance, sound, connotation and commercial impression. This *du Pont* factor supports a finding of a likelihood of confusion.

⁸ 4 TTABVUE 3.

⁹ 7 TTABVUE 4.

II. Conclusion

Having considered all the evidence and arguments bearing on the relevant *du Pont* factors, we conclude that the marks are very similar, and the identified goods are legally identical and move through the same channels of trade to the same classes of purchasers. We therefore find that Applicant's mark, TUCKER'S TRINKETS & TREASURES, is likely to cause confusion with the cited mark, TUCKER'S FINE JEWELRY & GIFT GALLERY.

Decision: The refusal to register Applicant's mark is affirmed.