

This Opinion is Not a  
Precedent of the TTAB

Mailed: May 14, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board

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*In re Henson*

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Serial No. 87130461

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Scott D. Swanson of Shaver & Swanson LLP  
for Zackary Henson

Kyle D. Simcox, Trademark Examining Attorney, Law Office 122,  
John Lincoski, Managing Attorney.

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Before Cataldo, Ritchie and Adlin,  
Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Zackary Henson (“Applicant”) seeks registration of LYKAN, in standard characters, for “athletic apparel, namely, shirts, pants, shorts, jackets, coats, hats, caps, athletic uniforms, button-down shirts, graphic T-shirts, short-sleeved T-shirts, long-sleeved T-shirts; microfiber performance shirts; women’s apparel, namely, tops, jackets, coats, and pants; socks, underwear” in International Class 25.<sup>1</sup> The Examining Attorney refused registration under Section 2(d) of the Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles an identical mark (LYKAN in standard characters) registered for, inter alia, “watches” and “jewelry.”<sup>2</sup>

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<sup>1</sup> Application Serial No. 87130461, filed August 8, 2016 under Section 1(b) of the Trademark Act, based on an alleged intent to use the mark in commerce.

<sup>2</sup> Registration No. 4830340, issued October 13, 2015 under Section 44(e). The cited

that use of Applicant's mark in connection with Applicant's goods is likely to cause confusion. After the refusal became final, Applicant appealed and filed a request for reconsideration which was denied. Applicant and the Examining Attorney filed briefs.

### **I. Evidentiary Objection**

The Examining Attorney objected to evidence attached to Applicant's Appeal Brief which was not previously made of record. The objection is sustained. Trademark Rule 2.142(d) ("The record in the application should be complete prior to the filing of an appeal.").

### **II. Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered); *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

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registration's identification of goods in its entirety is: "Precious metals; precious metal alloys; watches; chronographs for use as timepieces; clocks; stop watches; watch parts; watch straps; watch bracelets; bracelets and watches combined; movements for clocks and watches; buckles for watchstraps; watch crowns; watch cases; watch dials; clock dials; clock and watch hands; watch glasses; watch springs; cases for watches and clocks; presentation cases for the display of watches, jewelry, tie pins, and precious metal key fobs; precious stones and their imitations; semi-precious stones; diamonds; jewellery; semi-precious articles of bijouterie in the nature of jewelry; ornaments of precious metal in the nature of jewellery; fashion jewellery; jewellery cases; boxes for cuff links, tie pins and precious metal key fobs; jewel cases of precious metal; tie pins; cuff links; watch boxes; clock boxes; jewelry boxes; cases adapted for containing and transporting watches, clocks and jewellery; chronometric apparatus and instruments and cases therefor; key fobs of precious metal." According to the registration: "The word(s) 'LYKAN' has no meaning in a foreign language."

considerations are the similarities between the marks and the similarities between the goods. *See 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.”).

#### **A. Similarity of the Marks**

The marks are identical in appearance and sound. There is no evidence of record regarding the meaning of LYKAN in relation to Applicant’s or Registrant’s goods, nor is there any evidence that the term would have a different meaning when used for Applicant’s goods than when used for Registrant’s goods. The marks therefore also convey the same meaning. As a result, this factor not only weighs heavily in favor of finding a likelihood of confusion, but also reduces the degree of similarity between the goods required to support a finding of likelihood of confusion. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *Time Warner Ent. Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002); and *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).

#### **B. Strength of the Cited Mark**

Applicant’s argument that the cited mark is weak is unavailing. Even if Applicant established that LYKAN is a “common word,” and his evidence falls well short of doing so, that would not be relevant. The question is whether it is commonly used for the goods in the cited registration, or related goods. *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992) (“The relevant *du Pont* inquiry is ‘[t]he number and nature of similar marks in use on

*similar goods*’ ... It is less relevant that ‘Century is used on unrelated goods or services such as ‘Century Dental Centers’ or ‘Century Seafoods.’ The relevant inquiry examines the number and nature of similar marks used for services similar to insurance brokerage services. The paucity of service marks containing ‘Century’ in businesses similar to insurance suggests that CENTURY 21 is indeed a unique mark for insurance services.”) (quoting *Weiss Assocs. V. HRL Assocs.*, 902 F.2d 1546, 14 USPQ2d 1840, 1842 (Fed. Cir. 1990)).

Here, there is no evidence of record that anyone other than perhaps Registrant uses LYKAN or variations thereof for watches, jewelry or related goods. While Applicant introduced evidence that the word “lycan” refers to a human who transforms into a wolf, Office Action response of September 18, 2017 Ex. A (printout from “differencebetween.net”), the mark in the cited registration is LYKAN, not LYCAN. Thus, this evidence reveals nothing about the relative strength of LYKAN for watches or jewelry.<sup>3</sup> Applicant also relies on evidence that W Motors offers a \$3.4 million, 750 horsepower “hypercar” (only seven of which will be produced) known as the LYKAN HYPERSPORT.<sup>4</sup> Office Action response of September 18, 2017 Exs. B and F (printouts from “carscoops.com” and “wmotors.ae”). However, the use of LYKAN for a “hypercar” is also irrelevant because there is no evidence that cars of any type are related to watches or jewelry. Similarly, the use of “Lycan killer” for

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<sup>3</sup> Even if we were to find that these terms are pronounced similarly or even that they are phonetic equivalents, there is no evidence that wolves, wearwolves or humans who transform into wolves have any suggestive meaning when used for Registrant’s goods.

<sup>4</sup> It appears from the record that Registrant has a partnership with W Motors pursuant to which buyers of W Motors’s “hypercar” will receive Registrant’s LYKAN-branded watches.

football shoes does not establish that the cited mark is weak, not only because “Lycan” is not the mark in question, but also because there is no evidence that football shoes are related to watches or jewelry. Office Action response of September 18, 2017 Ex. C (printout from “pricedhamaka.com”).<sup>5</sup> Overall, there is insufficient evidence that third parties are using similar marks on related goods. Thus, this factor does not detract from the likelihood of confusion between Applicant’s and Registrant’s identical marks.

### **C. The Goods**

The Examining Attorney has established that “women’s apparel” and “athletic apparel” (included in Applicant’s identification of goods) on the one hand, and “watches” and “jewelry” (included in Registrant’s identification of goods) on the other hand, are sold under the same marks, including FOREVER 21, GUESS, MICHAEL KORS, ATHLETA, NIKE, ASOS, ADIDAS, REEBOK, PUMA, NIXON, JUST CAVALLI, ARVO and ROCKWELL. Office Actions of November 18, 2016 (printouts from “forever21.com,” “guess.com,” “michaelkors.com,” “athleta.gap.com” and “nike.com”), March 17, 2017 (printouts from “asos.com,” “adidas.com,” “reebok.com” and “puma.com”) and October 11, 2017 (printouts from “nixon.com,” “justcavalli.com,” “arvowear.com” and “rockwelltime.com”). For example:

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<sup>5</sup> The apparent use of LYCAN for a bicycle is irrelevant not only because it is a different mark and there is no evidence that bicycles are related to Registrant’s goods, but also because there is no evidence that these bicycles are offered or this mark is used in the United States. Office Action response of September 18, 2017 Ex. D (printout from “ktm-bikes.at”). The evidence of use of LYCAN for a baitcasting reel is also irrelevant because the mark is different than Registrant’s and there is no evidence that the goods are related. *Id.* Ex. E (printout from “aliexpress.com”).

FOREVER 21

END OF SEASON SALE UP TO 70% OFF

Women Plus Size Men Accessories Jewelry Shoes Beauty Kids Sale

New Arrivals Want List Brands Dresses Tops Jackets Denim Bottoms Intimates Sleepwear Activewear Swim Sale

2099 items

Sort By Filter By Size Color Price

Fashionably Late Graphic Tee \$6.99

Haute Rogue Palazzo Pants \$49.99

Faux Faux-lined Bomber Jacket \$27.99

Hi There Graphic PJ Pajamas \$14.99

Active Colorblock Puffer Jacket \$29.99

FOREVER 21

Women Plus Size Men Accessories Jewelry Shoes Beauty Kids Sale

Home / Jewelry / Watches

Categories: Features, Shop All, New Arrivals, Necklaces, Earrings, Body Jewelry, Rings, Bracelets, Pins + Patches, Watches, Bases, Sale

Watches 16 items

Sort By Filter By Size Color Price

Digital Watch \$19.99

Faux Leather Chronograph Watch \$12.99

High-Dine Chronograph Watch \$18.99

Chronograph Watch \$19.99

High Polish Analog Watch \$19.99

arvo

0 / \$0.00

Apparel

29 results Sort by: Featured

The Arvo Dad Hat \$24.95

The Arvo Classic Snapback \$12.95

The Arvo Retro Snapback \$24.95

Black Arvo Sock \$9.95

White Arvo Sock \$9.95

Short sleeve men's t-shirt \$25.00

White Arvo Be Good T-Shirt \$20.00

Abstract Tank \$30.00

Popside Tee \$35.00

Leaf Tank \$30.00

Leaf Tee \$35.00

Jungle Tank \$30.00

arvo

0 / \$0.00

Shop All

24 results Sort by: Featured

The Chocolate Avristacrat \$119.95

The Matte Gray Avristacrat \$119.95

The Avristacrat | Rose Gold \$119.95

The Black Avristacrat | Rose Case \$119.95

The Gold Avristacrat \$119.95

The Black Avristacrat \$119.95

The Rose Avristacrat \$119.95

The Avristacrat | Gold Case \$119.95

The Avristacrat | Silver Case \$119.95

The Avristacrat | Summer I watch \$119.95

The Avristacrat | Copper Case \$119.95

The My Time \$30.00

Office Actions of November 18, 2016 (printout from “forever21.com”) and October 11, 2017 (printout from “arvowear.com”).

Furthermore, Applicant himself introduced several use-based third-party registrations showing that the same marks are registered in connection with Registrant’s goods (or goods encompassed thereby) on the one hand and Applicant’s goods (or goods encompassed thereby) on the other. Office Action response of September 18, 2017 Ex. H (registrations of ADIDAS, ATHLETA, FOREVER 21, GUESS, MICHAEL KORS, NIKE and REEBOK). “Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source.” *See, In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1998).

As for the channels of trade, the Examining Attorney introduced evidence that women’s clothing on the one hand and watches or jewelry on the other are sold via the same retail stores and websites such as Macy’s, Anthropologie and Ann Taylor. Office Actions of November 18, 2016 (printout from “macys.com”) and March 17, 2017 (printouts from “anthropologie.com” and “anntaylor.com”).

Applicant argues and introduces evidence that Registrant’s mark is used only in association with watches offered to buyers of W Motors’s LYKAN HYPERSPORT “hypercar.” Office Action response of September 18, 2017 Exs. B and F (printouts

from “carscoops.com” and “wmotors.ae”). While this type of distinction may be relevant in an infringement suit, or an inter partes case involving common law rights, in this ex parte appeal we are concerned only with the goods as identified in the involved application and cited registration.

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 sales of the goods are directed. ... Thus, it was not error, as OSI argues, for the board to give no weight to OSI’s evidence purporting to show that OCTOCOM modems are brought [sic] by a particular class of purchasers. It would have been error to do otherwise. Because OSI seeks an *unrestricted* registration, such evidence as there is of a specific class of customers did not relate to a *material* fact.

*Octocom Syst. Inc. v. Hous. Computs. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (citations omitted). *See also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) (“It is well established that the Board may not read limitations into an unrestricted registration or application.”) (citing *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) and 15 U.S.C. § 1057(b)) and *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (“It was proper, however, for the Board to focus on the application and registrations rather than on real-world conditions ...”). Here, the cited registration is for, inter alia, “watches” and “jewelry,” without any limitations as to the type of watches or jewelry, number to be sold, price, quality, etc. Any differences in the channels of trade for Registrant’s watches and jewelry and

the watches and jewelry about which the Examining Attorney introduced evidence are not reflected in Registrant's identification of goods, and thus not relevant. *Stone Lion Capital*, 110 USPQ2d at 1162 ("An application with 'no restriction on trade channels' cannot be 'narrowed by testimony that the applicant's use is, in fact, restricted to a particular class of purchasers.'"); *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

Applicant also argues, and introduces some evidence, that much of the third-party evidence showing use of the same marks for clothing on the one hand and watches or jewelry on the other comes from "massive, global companies." This argument "misses the point." *Kabushiki Kaisha Hattori Seiko v. Satellite Int'l Ltd.*, 29 USPQ2d 1317 1319 (TTAB 1991), *aff'd mem.*, 979 F.2d 216 (Fed. Cir. 1992). If anything, the "massive, global" nature of these third parties enhances the persuasiveness of the evidence, to the extent that it suggests that many of the marks used on both clothing and watches or jewelry are heavily promoted, or that the goods sold thereunder enjoy significant sales, which would tend to show that consumers are accustomed to the same marks being used on both types of products. As we said in analogous circumstances, the "failure to use SEIKO on shoes does not detract from the fact that a number of other companies have used the same marks for both watches and shoes and that purchasers have become accustomed to seeing the same marks on both types of products. In other words, purchasers who are familiar with a particular mark for

watches would not be surprised to see that mark on shoes.” *Id.*

Applicant’s focus on the international classes in which his and Registrant’s goods reside is simply irrelevant. *Jean Patou Inc. v. Theon Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993) (stating that classification is for the convenience of the Office and “wholly irrelevant to the issue of registrability under section 1052(d), which makes no reference to classification”).<sup>6</sup> So too is the fact that some sources of watches or jewelry do not also offer clothing under the same mark; the evidence establishes that several sources, some of which are apparently “massive” and “global” do so, and that many consumers are aware of this. Finally, Applicant’s argument that the Examining Attorney is somehow creating a “per se rule” that watches and clothing are related is belied by the record. The finding of a relationship is based not on a “rule,” much less a “per se” rule, but on the evidence summarized above. These factors therefore also weigh in favor of finding a likelihood of confusion.

### **III. Conclusion**

The marks are identical in appearance, sound, meaning and overall commercial impression. The evidence of record establishes that the goods are related, and that their channels of trade overlap. We therefore find a likelihood of confusion between Applicant’s mark LYKAN for women’s apparel and other clothing as identified in the

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<sup>6</sup> As the Examining Attorney points out, “[t]o require the registrant to have sought registration in every class that could conceivably contain potentially related or confusingly similar goods would impose an undue procedural and financial burden on the registrant ....” 10 TTABVUE 15.

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involved application, and Registrant's identical mark for, inter alia, watches and jewelry.

***Decision:*** The Section 2(d) refusal to register Applicant's mark is affirmed.