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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re United Farmers Elevator Cooperative

Serial No. 75778485

Michael A. Bondi of Patterson, Thuente, Skaar & Christensen
for United Farmers Elevator Cooperative.

Scott Baldwin, Trademark Examining Attorney, Law Office 112
(Janice O'Lear, Managing Attorney).

Before Simms, Bottorff, and Drost, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On August 18, 1999, United Farmers Elevator
Cooperative (applicant) filed an application to register
the mark UNITED SEED (in typed form) on the Principal
Register for goods identified as "bird seed" in
International Class 31.¹ Applicant has disclaimed the term
"seed."

¹ Serial No. 75778485. The application contains an allegation of
a date of first use anywhere of March 26, 1999, and a date of
first use in commerce of June 17, 1999.

The examining attorney² has refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) because of two prior registrations, owned by the same registrant, for the mark UNITED FEEDS in typed form,³ and with the design shown below.⁴



Both registrations contain a disclaimer of the word "Feeds" and they are for the identical goods in International Class 31: "Livestock feeds, livestock feed base mixes, and livestock feed premixes."

The examining attorney argues that the marks are very similar inasmuch as the "marks share the dominant term "United" and the goods are closely related. Examining Attorney's Brief at 4 and 7. Applicant, on the other hand,

² The current examining attorney was not the original examining attorney in the case.

³ Registration No. 2,167,093, issued June 23, 1998. Affidavits under Sections 8 and 15 accepted and acknowledged. This registration also contains the following goods, which are not at issue in this appeal: "Livestock feed supplements, livestock vitamins, minerals and medications" in International Class 5.

⁴ Registration No. 2,176,242, issued July 28, 1998. USPTO automated records contain an entry dated September 3, 2004, that notes: "Partial Sec. 8 (6-Yr) Accepted & Sec. 15." The record further indicates that goods in Class 5 were deleted.

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argues that UNITED SEED is a unitary mark, the marks are different in sound and meaning, the purchasers exercise a high degree of care, and the channels of trade are dissimilar. When the refusal was made final, applicant filed this appeal.

When there is a question of likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he 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." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

The first factor we will consider is the similarities and dissimilarities of the marks in the application and registrations. In this case, applicant's mark and the mark in the '093 registration are: UNITED SEED and UNITED FEEDS. The words are extremely similar with the only differences being the first letter of the second word, "S"

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and "F," and the fact that applicant's second word is singular and registrant's word is plural. The '242 registration merely adds a large uppercase letter "U," which would draw more attention to the common word "United," and a fairly simple design and stylization. "By presenting its mark merely in a typed drawing, a difference [in type style] cannot legally be asserted by that party." Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983). The additional elements of the '242 registration, the background design and the addition of the letter "U," would not significantly distinguish the marks so that they would no longer be similar. See In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) (Federal Circuit held that, despite the addition of the words "The" and "Cafe" and a diamond-shaped design to registrant's DELTA mark, there still was a likelihood of confusion). See also In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988) (BIGG'S (stylized) for grocery and general merchandise store services found likely to be confused with BIGGS and design for furniture); Wella Corp. v. California Concept Corp., 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT and surfer design likely to be confused with CONCEPT for hair care products).

Furthermore, the fact that the registered marks use the plural form ("Feeds") and applicant's mark uses the singular form ("Seed") is not significant. Wilson v. Delaunay, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) ("It is evident that there is no material difference, in a trademark sense, between the singular and plural forms of the word 'Zombie' and they will therefore be regarded here as the same mark"). Also, there are obvious similarities in appearance and pronunciation between the words FEEDS and SEED inasmuch as they share the common letters "EED."

However, we must compare the marks in their entireties. Here, the marks are UNITED SEED and the registered marks are UNITED FEEDS and U UNITED FEEDS. The marks are very similar in sound and appearance. They would be pronounced similarly and they have a very similar appearance. The Federal Circuit held that there was a likelihood of confusion in a case in which the applicant added the term "Swing" to the registered mark "Laser." The Court held that: "Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'" Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), quoting, In re National Data Corp., 753 F.2d 1056, 224 USPQ

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749, 752 (Fed. Cir. 1985). See also In re Code Consultants Inc., 60 USPQ2d 1699, 1702 (TTAB 2001) (Disclaimed matter is often "less significant in creating the mark's commercial impression"). In this case, we find that the "Seed" and "Feeds" would have much less significance in distinguishing the marks than the common term "United." This is particularly true in this case inasmuch as the terms "Seed" and "Feeds" are generic terms for applicant's and registrant's goods set out in the application and registrations ("bird seed" and "livestock feeds").

When we compare the meanings of the marks, we again note that there is a difference, but the difference is slight. Applicant's mark is UNITED SEED while registrant's marks contain the words UNITED FEEDS. However, the difference in meaning between the words "Seed" and "Feeds" is not great. Food for birds can be called "feed" and contain ingredients beside seeds. See Registration Nos. 760,422 ("wild bird feed"); 1,222,781 ("wild bird feed"); and 2,024,860 ("feed for wild birds"); www.huntersponyfarm.com ("Original No-Waste Bird Seed (contains cracked corn)")." Also, the common term "United" would have the same meaning in applicant's and registrant's marks.

In addition, applicant argues that its mark is "a unitary mark, and the entire mark is what creates a commercial impression upon potential customers." Applicant's Brief at 3. While it is not entirely clear why applicant's mark would be a unitary mark, we have considered the mark as a whole in our likelihood of confusion analysis. Overall, the slight differences in the marks do not detract from the similarities and we conclude that because of the similarities in sound, appearance, and meaning, their overall commercial impressions would likewise be similar.

The next question is whether applicant's and registrant's goods are related. Applicant's goods are "bird seed," while registrant's goods are "livestock feeds." Broadly speaking both applicant's and registrant's goods involve food for animals. The examining attorney has also put in evidence that suggests that bird and livestock food may be sold by the same entity under a common trademark. See, e.g., Registration Nos. 715,514 ("feeds for poultry, birds, dogs, rabbits, livestock"); 760,422 ("livestock feed, poultry feed, pigeon feed, wild bird feed"); 1,222,781 ("wild bird feed and feed for poultry and livestock"); 1,372,869 ("bird feed ... livestock feeds"); 1,379,418 ("poultry, livestock, and wild bird feed);

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2,024,860 ("feed for wild birds and livestock"); and
2,171,312 ("livestock feeds, pet food and bird seed").

This evidence supports the examining attorney's conclusion that the goods are related. In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (Although third-party registrations "are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may have some probative value to the extent that they may serve to suggest that such goods or services are the type which may emanate from a single source"). See also In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1786 (TTAB 1993).

For goods to be related, "it has often been said that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services." In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991). The

evidence shows that prospective purchasers are likely to assume that there is some relationship or association between bird seed and livestock feeds sold under very similar marks.

Applicant, however, argues that there is no likelihood of confusion because:

During the purchase of Appellant's goods, and bird seed generally, each purchaser exercises a high degree of care to ensure that the seed purchased is appropriate for attracting the desired birds. For example, some of Appellant's seed contains cracked corn as an ingredient, while other seed contains fine sunflower chips.

Applicant's Brief at 6.⁵

We start by noting that "even careful purchasers are not immune from source confusion." In re Total Quality Group Inc., 51 USPQ2d 1474, 1477 (TTAB 1999). In addition, purchasers could clearly overlap inasmuch as farmers and others responsible for feeding livestock may also feed wild birds or keep domestic birds. Even if these purchasers are careful purchasers, they would likely draw the conclusion that the bird seed identified as UNITED SEED was related to, or associated with, the source of livestock feeds sold under the UNITED FEEDS marks.

⁵ The examining attorney (brief at 8 n.1) has objected to the evidence that applicant has attached to its brief for the first time in the case. We agree, and we will not consider any new evidence submitted with the applicant's appeal brief. 37 CFR § 2.142(d).

Applicant also argues that the examining attorney erred "by not giving significant weight to the fact that the Appellant's and the Registrant's goods are marketed and sold in different channels of trade. Applicant's Brief at 8. Applicant goes on to argue that "bird seed is typically sold in grocery stores and in plant nursery outlet stores" while registrant's feed for livestock, according to registrant's website is delivered "direct to the customer, no distributorships and very little advertising." Id. In our likelihood of confusion analysis, registrant's goods are not limited to registrant's actual channels of trade. 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"). Therefore, whether registrant is currently only selling its products directly to consumers does not limit the goods to sales through those channels of trade. Neither applicant's nor registrant's identification of goods contain any

restrictions so we must assume that they travel in all the normal channels of trade. See Schieffelin & Co. v. Molson Companies Ltd., 9 USPQ2d 2069, 2073 (TTAB 1989)

("[M]oreover, since there are no restrictions with respect to channels of trade in either applicant's application or opposer's registrations, we must assume that the respective products travel in all normal channels of trade for those alcoholic beverages").

In addition, the examining attorney has also introduced evidence that indicates that livestock feeds and bird seed channels of trade would overlap. See www.mannapro.com (General livestock feeds and birdseed and wildlife products); www.neptunefeeds.com ("Supplements & Feed & Hay" and "Bird Seed, Dogs, Cats, Livestock"); www.feedloft.com (Horse Feed, Caged Bird Feed, Chicken Feed, Turkey and Duck Feed, Goat Feed, Gamebird Feed, Mini-Pig Feed); www.scarlettpetfood.com ("Scarlett companion bird, wild bird, and small animal foods are still produced in Souderton, Pennsylvania ... The Pet & Animal Division also produces Equine Life premium horse feed and a full line of livestock feed").

When we consider the evidence of record, we conclude that the use of the UNITED SEED and UNITED FEEDS marks on

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bird seed and livestock feeds would likely result in confusion.

Decision: The examining attorney's refusal to register applicant's mark for "bird seed" on the ground that it is likely to cause confusion with the cited registered marks used in connection with the identified goods under Section 2(d) of the Trademark Act is affirmed.