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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re True Blue Farms

Serial No. 76564036

Scott W. Petersen of Holland & Knight LLC for True Blue Farms.

Kelly A. Choe, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).

Before Hairston, Walters and Bergsman, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

True Blue Farms has filed an application to register the mark TRUE BLUE FARMS in standard character form (FARMS is disclaimed) for goods ultimately identified as "blueberries."[1]

The trademark examining attorney has refused to register applicant's mark under Trademark Act Section 2(d),

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[1] Serial No. 76564036, filed December 8, 2003, alleging a date of first use anywhere of June 1986 and a date of first use in commerce of September 2001.

15 U.S.C. § 1052(d), in view of two registrations owned by different entities. The first cited registration is of the mark TRUBLU and design shown below for "fresh citrous."[2]

The second cited registration is of the mark TRU-BLU-BERRIES in standard character form for "blueberries."[3] The examining attorney also found applicant's identification of goods to be indefinite and required that applicant specify the nature of its "blueberries," (i.e., "fresh," "raw" or "processed"). Further, the examining attorney noted that applicant is a sole proprietorship comprising two persons and required

[2] Registration No. 172065, issued August 21, 1923, fourth renewal. The records of the USPTO show that when the registration issued the identification of goods read "fresh citrous and deciduous fruits." The wording "and deciduous fruits" was subsequently deleted. We note that "citrous" is a variant spelling of "citrus." The American Heritage Dictionary of the English Language (New College Edition 1976).

[3] Registration No. 668448, issued October 14, 1958, second renewal.

that applicant specify the citizenship of each of the persons. When the refusals and requirements were made final, applicant filed this appeal. Applicant and the examining attorney have filed briefs and applicant has filed a reply brief.

At the outset, we note that applicant, in its reply brief, states that its blueberries are "fresh" and that each of the persons comprising the sole proprietorship is a U.S. citizen. Inasmuch as applicant has complied with the requirement to specify the nature of its blueberries, this requirement is deemed moot. The application is deemed amended to identify applicant's goods as "fresh blueberries." With respect to the requirement to specify the citizenship of the two persons comprising the sole proprietorship, inasmuch as applicant has complied with the requirement by indicating that the two persons are U.S. citizens, this requirement is also deemed moot. However, because a sole proprietorship generally means a business which has only one owner, there is also a question as to whether applicant should be identified as a sole proprietorship if applicant has two owners. Thus, if applicant ultimately prevails herein, the application will be remanded to the examining attorney for clarification of the entity type.

We turn then to the refusals to register under Trademark Act Section 2(d). 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. duPont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Company, 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 and/or services. See 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).

Refusal based on Registration No. 668448

We begin by addressing the refusal in view of Registration No. 668448 for the mark TRU-BLU-BERRIES for "blueberries." Considering first the goods, it is clear that applicant's "fresh blueberries" are encompassed within registrant's "blueberries." Thus, the applicant's and registrant's goods must be considered legally identical. In view of the identical nature of the goods, we must presume that applicant's and registrant's goods are marketed in all normal trade channels to all the usual

purchasers for such goods. Moreover, we find that the ultimate purchasers of these goods are ordinary consumers who would not exercise a great deal of care in making their decision to purchase the goods. Applicant has not contended otherwise, but instead has focused its discussion on the marks. Applicant argues that registrant's mark TRU-BLU-BERRIES is "different on its face" from applicant's mark TRUE BLUE FARMS and that the TRU-BLU portion of registrant's mark could be viewed as "an egregious misspelling of 'trouble.'" (Brief at 4). Thus, it is applicant's position that the marks are not similar.

With respect to the marks, we must determine whether applicant's mark and registrant's mark, when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. Although the marks must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Furthermore, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently

similar in terms of their commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975). Finally, as our primary reviewing court, the Court of Appeals for the Federal Circuit, has observed, "[w]hen marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Although there are specific differences between applicant's mark TRUE BLUE FARMS and registrant's mark TRU-BLU-BERRIES, we find that, on balance, the similarities outweigh the differences. In comparing the marks, we find that the TRUE BLUE portion of applicant's mark is likely to be perceived as the expression "true blue." We judicially notice that the term "true blue" is defined as "Loyal or faithful; staunch." The American Heritage Dictionary of

the English Language (4th ed. 2000).[4] Further, we reject applicant's contention that the TRU-BLU portion of registrant's mark may be perceived by the relevant public as a misspelling of the word "trouble." Apart from the fact that applicant has offered no support for its position in this regard, we simply see no reason that the relevant public would perceive TRU-BLU as "trouble." Rather, we find that the TRU-BLU portion of registrant's mark is likely to be perceived as an alternative form of the expression "true blue." As such, the TRU-BLU and TRUE BLUE portions of the respective marks are substantially similar in connotation. The remaining terms in the marks, FARMS and BERRIES, are highly descriptive for applicant's and registrant's goods, respectively. Thus, it is the TRU-BLU and TRUE BLUE portions of the marks that are entitled to greater weight in our likelihood of confusion analysis. Also, as the Board has noted, "it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered." Presto Products Inc. v. Nice-Pak Products Inc., 9 USPQ2d 1895, 1897 (TTAB 1988).

[4] The Board may take judicial notice of dictionary definitions. University of Notre Dame du Lac v. J. C. Gourmet Food Imports, Co., Inc., 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Further, we find that TRU-BLU and TRUE BLUE are phonetic equivalents and highly similar in appearance. The presence of dashes and the absence of the letter "E" in the individual terms "TRU" and "BLU" in the registrant's mark are not sufficient to distinguish the marks.

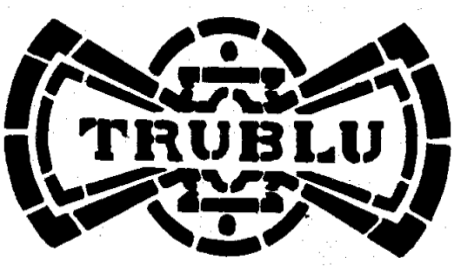
Thus, overall, given the above noted similarities in sound, appearance and connotation, the marks TRUE BLUE FARMS and TRU-BLU-BERRIES, when used in connection with legally identical goods, engender a substantially similar commercial impression.[5]

Accordingly, we find that the mark TRUE BLUE FARMS for fresh blueberries is likely to cause confusion with the mark TRU-BLU-BERRIES for blueberries.

Refusal based on Registration No. 172065

We now address the refusal in view of Registration No. 172065 for the mark shown below for "fresh citrous."

[5] We recognize that registrant's TRU-BLU-BERRIES mark also may be perceived as the words "TRU(E) and "BLU(E)BERRIES" rather than the term "TRU(E) BLU(E)" and the word "BERRIES." Although this would result in registrant's mark having a different connotation from applicant's mark, the similarities in appearance and sound are nonetheless sufficient to find a likelihood of confusion. It has been consistently held that similarity in any one of the elements of sound, appearance or meaning is sufficient to support a finding of likelihood of confusion. See Krim-Ko Corporation v. The Coca-Cola Company, 390 F.2d 728, 156 USPQ 523 (CCPA 1968).



We consider first the goods of applicant and registrant. It is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration. Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and The Chicago Corp. v. North American Chicago Corp., 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule 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 some 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 or intended to be used therewith, 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 (TTAB 1991), and cases cited therein.

Here, we find that applicant's and registrant's goods are related.[6] Obviously, both applicant's fresh blueberries and registrant's fresh citrous are fruits. The respective goods may be sold in the same channels of trade to the same classes of purchasers. The ultimate purchasers of fresh blueberries and fresh citrous are ordinary consumers, who would not exercise a great deal of care in making their decision to purchase such goods. Further, these goods may be purchased on the same shopping trip and even used in the same recipes. Applicant has not disputed the relatedness of the goods, but instead has focused its discussion on the marks. In particular, applicant again argues that the TRUBLU portion of registrant's mark could be viewed as a misspelling of the word "trouble." In addition, applicant contends that the design in the registrant's mark is an

[6] We note that the examining attorney submitted a number of third-party registrations in support of her position that applicant's and registrant's goods are related. However, in reaching our finding, we have not relied on these registrations. The registrations are for marks that cover blueberries, on the one hand, and various types of deciduous fruits, on the other hand. As previously indicated, deciduous fruits were deleted from the cited registration. Thus, these registrations are not particularly probative of whether fresh blueberries and fresh citrous (the remaining goods in the registration) are related goods.

important part of that mark and is sufficient to distinguish the marks.

With respect to the marks, we again find that although there are specific differences between applicant's mark TRUE BLUE FARMS and registrant's mark TRUBLU and design, on balance, the similarities outweigh the differences. For the reasons previously discussed, we find that the term TRUBLU in registrant's mark is likely to be perceived as an alternative form of the term TRUE BLUE and not as the word "trouble." As such, the TRUBLU and TRUE BLUE portions of the respective marks are substantially similar in connotation.

Further, because the word FARMS is descriptive of applicant's goods, applicant's mark is dominated by the term TRUE BLUE. Insofar as registrant's mark is concerned, it is dominated by the term TRUBLU. As the Board has noted, a design element such as that appearing in registrant's mark is generally less important than the literal portion of the mark in creating an impression. See In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987). Under actual marketing conditions, the public does not necessarily have the opportunity to make side-by-side comparisons between marks. Dassler KG v. Roller Derby Skate Corp., 206 USPQ 255 (TTAB 1980). Here, it is the

term TRUBLU that is most likely to be remembered by the relevant public when seeing registrant's mark. TRUBLU and TRUE BLUE are phonetic equivalents and they are highly similar in appearance. The absence of the letter "E" in "TRU" and "BLU" in the registrant's mark is not sufficient to distinguish the marks.

Thus, overall, given the above noted similarities in sound, appearance and connotation, the marks TRUE BLUE FARMS and TRUBLU and design, when used in connection with related goods, engender a substantially similar commercial impression.

Accordingly, we find that the mark TRUE BLUE FARMS for fresh blueberries is likely to cause confusion with the mark TRUBLU and design for fresh citrous.

Applicant argues that marks consisting of or containing the words "TRUE BLUE" or "TRU BLU" are weak marks which are therefore entitled to only a limited scope of protection. Specifically, applicant maintains that such words have been frequently used in marks for a variety of goods, including food products. In support of its claim, applicant submitted a TARR printout of third-party applications and registrations for TRUE BLUE/TRU BLU marks and plain copies of ten registrations for such marks. In

addition, applicant points to the coexistence on the register of the two cited marks.

As often stated, third-party registrations are of little weight in determining likelihood of confusion issues. They are not evidence of use of the marks shown therein and they are not proof that consumers are familiar with such marks so as to be accustomed to the existence of similar marks in the marketplace. See AMF Inc. v. American Leisure Products, Inc., 474 F.2d 1403, 177 USPQ 268 (CCPA 1973). Moreover, third-party applications are evidence only of the fact that they have been filed.

There are further problems with the third-party registrations and applications in this case. The TARR printout consists simply of a list of marks by registration and/or serial number, and thus it fails to indicate the particular goods in connection with which the marks are registered or sought to be registered. Insofar as the actual registration copies are concerned, we note that none of the ten registrations covers fruits. Six of the registrations cover food or beverages, goods which are arguably related to fruits, but four registrations cover goods which are far removed from fruit, i.e., "cut foliages for sale only at wholesale"; "aluminum sulfate for application to growing hydrangeas for altering their

color"; "biological reagents for scientific and industrial use, namely, plasmid DNA and phage"; and "smoking tobacco". These registrations obviously have little relevance.

Nevertheless, and aside from the absence of any demonstrated instances of third-party use, we note that even if marks which consist of or contain the words TRUE BLUE/TRU BLU are considered to be weak, due to the somewhat laudatory nature of the expression "true blue", even weak marks are entitled to protection where confusion is likely. Here, notwithstanding any alleged weakness in the term TRUE BLUE/TRU BLU, each of the registered marks is still substantially similar in sound, appearance, connotation and commercial impression to applicant's mark.

Further, the coexistence on the register of the two cited marks, although a factor in this case, does not compel us to reach a different result here. While uniform treatment under the Trademark Act is an administrative goal, the Board's task in an ex parte appeal is to determine, based on the record before us, whether applicant's mark is likely to cause confusion with each of the cited marks. As often noted by the Board, each case must be decided on its own merits. We are not privy to the records in the files of the two cited marks and, moreover, the determination of registration of particular marks by

examining attorneys cannot control the result in another case involving a different mark. See In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to [applicant's application], the PTO's allowance of such prior registrations does not bind the Board or this court.")

Finally, to the extent we have any doubt, we resolve it as we must, in favor of each of the registrants. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

In sum, we conclude that persons familiar with the mark TRU-BLU-BERRIES for blueberries or with the mark TRUBLU and design for fresh citrous, would be likely to believe, upon encountering applicant's mark TRUE BLUE FARMS for fresh blueberries, that applicant's goods and either registrant's goods originated with or are somehow associated with or sponsored by the same entity.

Decision: The refusals to register under Section 2(d) of the Trademark Act in view of Registration Nos. 172065 and 668448 are affirmed.