

THIS OPINION
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kalmbach Feeds, Inc.

Serial No. 77109062

Jeffrey S. Standley of Standley Law Group LLP for Kalmbach Feeds, Inc.

Emily K. Carlsen,¹ Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

Before Rogers, Bergsman, and Wellington, Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Kalmbach Feeds, Inc., applicant, filed an application to register the mark ORGANIC HARVEST FEEDS (in standard character form) on the Principal Register for goods ultimately identified as "mixed animal feed" in International Class 31.² The application contains disclaimers of the words ORGANIC and FEEDS.

¹ Appearing for first time on brief. We note that another examining attorney issued all of the Office actions during the prosecution of the application.

² Application Serial No. 77109062 is an intent-to-use application filed under Section 1(b) of the Trademark Act.

The examining attorney has refused registration of applicant's mark pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the previously registered mark HARVEST (in typeset characters) for goods that include "livestock feeds" in International Class 31,³ that, when used on applicant's identified goods, applicant's mark is likely to cause confusion or mistake or to deceive.

Applicant appealed the final refusal and briefs were filed. We affirm the refusal to register.

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. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key, although not exclusive, 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).

³ Registration No. 1304671 issued November 13, 1984; renewed (for 10 years) in 2004.

We first consider the *du Pont* factors regarding the goods, trade channels and classes of purchasers. In an *ex parte* appeal, likelihood of confusion is determined on the basis of the goods as they are identified in the application and the cited registration. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976). See also *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). Applicant's and registrant's goods in International Class 31 are legally identical inasmuch as applicant's "mixed animal feed" is broad enough to encompass registrant's "livestock feeds." In other words, applicant's feed may be used for livestock.

The factor involving the similarity of the goods therefore weighs strongly in favor of finding a likelihood of confusion.

Because the goods in the application encompass those in the cited registration, i.e., they both may be used as feed for livestock, we must presume that the channels of trade and classes of purchasers at least in part are the same. *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade

channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers"). Even if the goods were not identical, e.g., if applicant's feed was for animals other than livestock, the common trade channels for these goods will still be the same, such as farm supply outlets. Likewise, the classes of purchasers for both livestock feeds and mixed animal feed will also be largely the same. Thus, the *du Pont* factors involving trade channels and classes of purchasers also favor a finding of likelihood of confusion.

This brings us to the similarity or dissimilarity of the marks. We keep in mind that when marks would appear on identical goods, as they do here, the degree of similarity necessary to support a conclusion of likely confusion declines with respect to that class of goods (in this case, International Class 31). *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Our focus is on whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot*

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Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). In articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For example, merely descriptive matter that is disclaimed may be accorded subordinate status relative to the more distinctive portions of a mark. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997).

In the present case, applicant has disclaimed the words ORGANIC and FEEDS and we conclude that these terms are, respectively, highly descriptive and generic for animal feed. Accordingly, we have little trouble concluding that the dominant feature of applicant's mark is the term HARVEST, and note that it is identical in sound and appearance to registrant's mark. As the examining attorney argued, and we agree with her, the terms "organic" and "feeds" actually serve to "reinforce the similar commercial impressions shared by the applicant's and registrant's marks. When shopping for identical goods, as

is the case here, a consumer faced with the prospect of choosing HARVEST or ORGANIC HARVEST FEEDS would likely believe that the latter merely represents the organic line of the HARVEST line of feed products." Examining Attorney's Brief, (unnumbered) pp. 5-6.

Considering the marks in their entireties, as we must, we conclude that they are substantially similar. Accordingly, we resolve this *du Pont* factor in favor of finding a likelihood of confusion.

Applicant's principal argument throughout the appeal is that the term HARVEST is so weak that it should be accorded less protection. Applicant suggests that HARVEST is so weak that the addition of the terms ORGANIC and FEEDS in applicant's mark suffices for purposes of distinguishing its mark from Registrant's HARVEST mark. In support, applicant submitted a list of 85 third-party registrations for marks comprising, in whole or in part, the term HARVEST for goods in International Class 31.⁴ Applicant also

⁴ The examining attorney has objected to applicant's reliance on the list of registrations because soft copies thereof were not submitted. Specifically, she argues that applicant did not properly make these registrations of record because it merely listed the registrations and did not attach soft copies or USPTO electronic database printouts for said registrations. Generally, to make a third-party registration of record, a copy of the registration taken from either the paper or electronic records of the USPTO should be submitted. See TBMP § 1208.02 (2d ed. rev. 2004) and cases cited therein. However, if an applicant includes a listing of registrations in response to an Office action, and

submitted a dictionary definition for "Harvest," and relies on the defined meaning for the term as "a mature crop (as of grain or fruit)."⁵

Applicant's evidence of third-party registrations is entitled to limited probative value. The listed registrations are not evidence of use of the marks shown therein. Thus, the list is not proof that consumers are familiar with the marks so as to be accustomed to the existence of the same or similar marks in the marketplace. See *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); and *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982).

Nevertheless, we note that many, if not most, of the registrations cover food items for human consumption and a few involve food for animals, such as dogs and birds. The

the examining attorney does not advise applicant that the listing is insufficient to make the registrations of record at a point when applicant can correct the error, the examining attorney will be deemed to have stipulated the registrations into the record. *Id.* Here, applicant attached the list of registrations with its request for reconsideration (filed on September 7, 2007 over five months before the appeal was filed). The examining attorney issued her denial of the request for reconsideration approximately two weeks later; however, she did not inform the applicant of the inadmissibility of the list of registrations. Thus, had the examining attorney informed applicant of the deficiency, there was ample time for applicant to correct the error by submitting copies of the registrations, prior to filing the notice of appeal. In view thereof, the Board deems that the examining attorney has waived the objection and the list of third-party registrations are considered part of the record.

⁵ *Merriam-Webster Online Dictionary*; printout attached to applicant's request for reconsideration.

cited registered mark is also included in these registrations. Ultimately, we conclude that these third-party registrations, coupled with the dictionary definition of the term HARVEST, demonstrate that HARVEST is suggestive of food products, albeit mostly for human consumption.

Even though we find that HARVEST is suggestive and, as such, may be entitled to a narrower scope of protection, the scope is still broad enough to prevent the registration of a highly similar mark for identical goods. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974) (likelihood of confusion is to be avoided as much between weak marks as between strong marks); see also, *In re Farah Manufacturing Co., Inc.*, 435 F.2d 594, 168 USPQ 277, 278 (CCPA 1971). We do not find HARVEST to be so highly suggestive of livestock feeds that its scope of protection is so narrow as to permit applicant to register the mark ORGANIC HARVEST FEEDS for identical products. The cited mark is on the Principal Register, without any claim of acquired distinctiveness; we must accord the cited registration the presumption of validity provided for in Trademark Act Section 7. Certainly, any argument that the registered mark is descriptive or generic and thus not subject to any protection is an attack on the validity of a registration which is not permitted in an ex

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parte proceeding. *In re Dixie Restaurants, Inc.*, 41 USPQ2d at 1534.

Accordingly, when we consider the record and all of the relevant likelihood of confusion factors, we conclude that potential purchasers of identical goods, i.e., animal feeds, who encounter the registered mark, HARVEST, and applicant's mark, ORGANIC HARVEST FEEDS, used on those very same goods, are likely to mistakenly believe that the sources of these goods are the same. As a result, there is a likelihood of confusion.

DECISION: The refusal to register the mark under Section 2(d) of the Trademark Act in view of Registration No. 1304671 is affirmed.