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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re AGSouth Genetics, LLC

Serial No. 78468579

Mark Murphey Henry of the Henry Law Firm for AGSouth Genetics, LLC.

Zhaleh Delaney, Trademark Examining Attorney, Law Office 116 (Michael W. Baird, Managing Attorney).

Before Drost, Walsh and Cataldo, Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

An application was filed by AGSouth Genetics, LLC to register the mark AGSOUTH GENETICS in standard character form on the Principal Register for the following services: "seeds for agricultural purposes" in International Class 31.[1]

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[1] Application Serial No. 78468579 was filed August 17, 2004, asserting May 5, 2000 as the date of first use of the mark anywhere and in commerce. In response to a requirement by the trademark examining attorney, applicant disclaimed the exclusive right to use "GENETICS" apart from the mark as shown.

The trademark examining attorney, *inter alia*, refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, as used on its goods, so resembles the mark AGRI-SOUTH, previously registered on the Principal Register in standard character form for "retail store services specializing in hardware and agricultural supplies" in International Class 42,[2] as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs on the issue under appeal.

Applicant contends that its mark does not create the same commercial impression as the mark in the cited registration. Specifically, applicant argues that its AGSOUTH GENETICS mark differs from the cited AGRI-SOUTH mark in sound, appearance and meaning. Applicant further argues that it provides seeds for agricultural purposes in accordance with federal and state laws governing the sale and distribution thereof; that, as a result, its goods are "extremely specialized and highly engineered seed product that is marketed only under tightly controlled conditions

[2] Registration No. 1391170 was issued on October April 22, 1986. Renewed. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

to dealers who are licensed by state agencies" (brief p. 11); that, by comparison, the cited registration recites "a broad category of miscellaneous services" (*id.*); that there is no evidence that registrant's general hardware, home and farm goods store sells applicant's highly specialized goods; and that there is no evidence that registrant is licensed or authorized to sell agricultural seed products. Applicant argues in addition that there is no evidence of actual confusion between its mark and that of registrant during applicant's over five years of use. Applicant argues moreover that the trade channels for its goods differ from those of registrant's services; and that it is necessary to "determine there is sufficient evidence surrounding the appropriate marketplace and the realities of the trademark usage such that likelihood of confusion is probable" (brief p. 7). Applicant also argues that the third party evidence made of record by the examining attorney does not demonstrate that because "one company has in the past sought a registration over both seed products as well as the services of selling agricultural seeds, that it is axiomatic that all companies, including Registrant, do likewise" (brief p. 14); and that the examining attorney seeks to "grant Registrant's mark protection beyond that identified" in the cited registration (brief p. 15).

In support of its position, applicant relies upon the affidavit of Mr. Jimmy Clements, a partner in applicant, attesting to certain of the foregoing assertions.

The examining attorney maintains that applicant's mark consists of the dominant wording "AGSOUTH" and the disclaimed wording "GENETICS;" that the dominant portion of applicant's mark is more significant in creating a commercial impression than the disclaimed wording; that the evidence of record demonstrates that the roots "AG" and "AGRI" both are used to refer to agriculture; that consumers will recognize the meanings of these root terms; that, as a result, the dominant portion of applicant's mark and registrant's mark are nearly identical in meaning, sound and appearance; and that the addition of the highly descriptive term GENETICS to applicant's mark is insufficient to overcome a likelihood of confusion between the marks. The examining attorney further maintains that the same marks are used to indicate the source of both applicant's goods as well as registrant's services; that registrant's services are broadly described and contain no restrictions as to their channels of trade; that, as a result, registrant's services are presumed to move in all normal channels of trade for such services; that the same consumers will be exposed to the goods identified under

applicant's mark and the services identified under registrant's mark; and that applicant's goods are within registrant's normal field of expansion. Lastly, the examining attorney argues that it is unnecessary to show actual confusion in establishing likelihood of confusion.

In support of the refusal to register, the examining attorney relies upon a dictionary definition of "genetics." According to that definition, "genetics" may be defined, *inter alia*, as "The branch of biology that deals with heredity, especially the mechanisms of hereditary transmission and the variation of inherited characteristics among similar or related organisms."[3] In addition, the examining attorney submitted evidence from the Lexis/Nexis computer database suggesting that the root terms "AG" and "AGRI" both refer to agriculture. Excerpts from these articles and web pages follow:

> Sara Wyant publishes a national agriculture and rural policy newsletter called Agri-Pulse. For a trial subscription, send an e-mail to: Agripulse@aol.com.
> (**Aberdeen American News (South Dakota)** August 12, 2005);

> Smith, who is working on issues that include the Central American Free Trade Agreement, says he "fell into" agriculture. "I'm from Georgia; agri-business is our No. 1 economy."

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[3] *The American Heritage® Dictionary of the English Language, Third Edition*, copyright© 1992 by Houghton Mifflin Company.

(**National Journal's Congress Daily**, July 22, 2005);

…Popped into a corn maze? Then you have participated in agri-tainment, a crowd pleasing mix of agriculture and entertainment. Agri-tainment is the trendiest thing in farming since the steel plow…1.4 billion in sales annually; how much of that is from agri-tainment activities has not yet been established. However, the state Department of Agriculture published its "Agri-Tourism Strategy" earlier this year, using the experience of Vermont farms as a model.
(**Courier News (Bridgewater, New Jersey)** July 17, 2005);

…GPS systems help kids plant crops in agri-science class – once known as agriculture.
(**Sarasota Herald-Tribune (Florida)** June 26, 2005);

Randy Rogers, director of agri-business at the state Department of Agriculture, said Thursday he's begun the paperwork necessary to secure a $17 million loan from the USDA.
(**The Advocate (Baton Rouge, Louisiana)** May 6, 2005);

…competition where students develop ads based on this year's theme ETH Raising Leaders Through FFA ETH Cultivating Agriculture's Future. There's still time for ag teachers to incorporate the curriculum in their classrooms this year.
(**Aberdeen American News (South Dakota)** August 12, 2005);

Cloudcroft Schools teacher Robert Booky's fellow agricultural educators statewide chose him this summer as the "Outstanding Agriculture Teacher." They presented the award at the AG Education Teachers Conference at New Mexico State University-Las Cruces.
(**The Alamogordo Daily News (New Mexico)** August 10, 2005);

…What would you ask the ag secretary? The Register has invited U.S. Agriculture Secretary

> Mike Johanns and a half-dozen Iowans with farm expertise to the Iowa State Fairgrounds Aug. 11 to discuss the…
> (**Des Moines Register (Iowa)** August 5, 2005);
>
> …He said one in five workers in the county is employed in agriculture or ag-related business; more than 90 percent of the farms in the county are family owned; and agriculture is the No. 1 industry in the…
> (**Intelligencer Journal (Lancaster, PA.)** August 4, 2005); and
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> Tulare County agriculture on display at World Ag Expo, the fair, Antique Farm Show
> (**Tulare Advance-Register (California)** August 3, 2005).

The examining attorney further has made of record a number of use-based third-party registrations which show that various entities have adopted a single mark for goods and services that are related to those identified in both applicant's application and the cited registration. *See, for example*:

> Registration No. 2750125 for "agricultural seeds" in Class 31; and "retail and wholesale distributorship services in connection with agricultural seeds" in Class 35;
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> Registration No. 2261511 for, *inter alia*, "natural agricultural products, namely, herbs and flower seeds," in Class 31; and "retail store, wholesale distributorships and mail order services featuring plants, herbs, seeds and seedlings" in Class 35;
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> Registration No. 2511844 for, *inter alia*, "seeds for wildlife planting, namely, clover, alfalfa, [g]rape seeds, and rye seeds," in Class 31; and "computerized on-line retail services in the

field of nutritional supplements for deer and seeds for wildlife plantings" in Class 35;

Registration No. 2665752 for "agricultural seed, namely, hybrid corn seed, alfalfa seed, forage seed, and turf seed" in Class 31; and "distributorships in the field of seeds and retail store services featuring seeds" in Class 35; and

Registration No. 2798611 for "wildflower seeds" in Class 31; and "online retail services featuring wildflower seeds" in Class 35.

Applicant argues in reply that the determination of likelihood of confusion between its mark and that of registrant must be based upon a consideration of the marks in their entireties; and that the examining attorney places improper focus on the dominant portions of the marks under consideration. Applicant further argues that the examining attorney fails to consider the actual marketplace realities concerning applicant's goods and registrant's services; that applicant's goods are highly specialized; and that applicant's customers are careful and sophisticated purchasers. Applicant argues in addition that the peaceful coexistence of the two marks for over five years should be given great weight in any likelihood of confusion analysis.

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, 567 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, 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, 27 (CCPA 1976). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

We first consider the similarity of the marks. In determining the similarity or dissimilarity of the marks, we must compare the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). Contrary to applicant's contention, the test is not whether "the two marks are sufficiently similar using a side-by-side comparison" (brief, p. 6) but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of the goods and services offered under the respective marks is likely to result.

In this case, applicant's mark, AGSOUTH GENETICS, is highly similar to the cited mark, AGRI-SOUTH. First, the

"AGSOUTH" portion of applicant's mark is nearly identical to the cited mark in appearance, spelling, sound and meaning. The seven letters comprising registrant's mark are present in the applied-for mark, and appear in the same order in both. In essence, the marks respectively combine the highly similar roots "AG" and "AGRI" with the identical term "SOUTH" to form a distinctive combination. Further, and as noted above, the examining attorney has introduced evidence suggesting that the terms "AG" and "AGRI" both are used as a contracted form of the term "agriculture." Thus, the marks suggest agriculture relating to Southern states or climate and, as such, convey the same meaning. In addition, while it is settled that there is no correct way to pronounce a mark, there is nonetheless no reason to suggest that AGSOUTH and AGRI-SOUTH are not highly similar in sound, differing only in the addition of the syllable "RI" to registrant's mark. However, the positioning of the letters "RI" in the middle registrant's mark minimizes the dissimilarity it creates in appearance and sound from that of applicant's mark. Thus, the AGSOUTH portion of applicant's mark is nearly identical in appearance, spelling, sound, and especially connotation and commercial impression to the registered mark AGRI-SOUTH. Although registrant displays its mark with a hyphen between the

terms AGRI and SOUTH and the AGSOUTH portion of applicant's mark is displayed as a single term, consumers are not likely to note or remember such a minor difference that does not affect pronunciation and barely affects the appearance of the marks. We note that under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. *See Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255, 259 (TTAB 1980). As for the presence of GENETICS in applicant's mark, this term, which has been disclaimed, appears to be descriptive of a quality or feature of the identified goods, namely, that they are selected by hereditary transmission for certain inherited traits. Indeed, applicant asserts in its brief that its agricultural seeds are "highly engineered," suggesting that its goods are developed and marketed with certain genetic traits. It is a well-established principle that, 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. *See In re National Data Corp.*, 753

F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In view of the descriptive nature of the word GENETICS, it has little, if any, source-indicating significance, and is entitled to less weight in the likelihood of confusion analysis.

As a result, consumers who are familiar with the mark, AGRI-SOUTH, used in connection with registrant's retail hardware and agricultural supply store services, who then see the mark AGSOUTH GENETICS used in connection with seeds for agricultural purposes, are likely to assume that the owner of the AGRI-SOUTH mark has added GENETICS when using the mark in connection with agricultural seed products. In other words, consumers are likely to view applicant's mark as a variation of that of registrant, but both as indicating a single source. Thus, despite the fact that the applicant's mark includes the word GENETICS, the marks AGRI-SOUTH and AGSOUTH GENETICS are highly similar in appearance, sound, connotation and commercial impression. Accordingly, this d*u Pont* factor favors a finding of likelihood of confusion.

We turn now to our consideration of the recited goods and services. Based upon the goods and services as identified in the application at issue and cited registration, it is clear that applicant's agricultural seeds are related to registrant's retail stores featuring,

inter alia, agricultural supplies in that applicant's goods are agricultural products and registrant's retail store services provide the same or related agricultural products. Moreover, it is not necessary that the goods and services at issue be similar or competitive, or even that they move in the same channels of trade, to support a holding of likelihood of confusion. It is sufficient instead that the respective goods and services are related in some manner, and/or that the conditions and activities surrounding the marketing of the services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. *See In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

In this case, the examining attorney has made of record a number of use-based third-party registrations which show that various entities have adopted a single mark for various types of seeds as well as retail services providing such seeds. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. *See In re Albert Trostel &*

Sons Co., 29 USPQ2d 1783, 1786 (TTAB 1993). The foregoing evidence demonstrates the related nature of the goods and services at issue, and this *du Pont* factor also favors a finding of likelihood of confusion.

Furthermore, we are not persuaded by applicant's arguments that its goods are highly specialized and regulated, and available only in limited channels of trade. It is settled that in making our determination regarding the relatedness of the parties' goods and services, we must look to the goods and services as identified in the involved application and cited registration. *See 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.") *See also Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.") Thus, while

applicant's goods may be available only in discrete channels of trade, neither the identification of goods nor registrant's recitation of services contains any such limitations. Accordingly, we must presume that applicant's goods and registrant's services move in all normal channels of trade and are available to all classes of potential consumers. *See In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

Another d*u Pont* factor discussed by applicant and the examining attorney is that of the conditions of sale. Applicant asserts that its goods are highly specialized and would be purchased by careful and sophisticated users. However, sophisticated purchasers are not necessarily knowledgeable in the field of trademarks or immune from source confusion. *See In re Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988). Further, there is no evidence that either applicant's goods or registrant's services would be purchased only by highly sophisticated persons.

The final d*u Pont* factor discussed by applicant and the examining attorney is that of the lack of instances of actual confusion. Applicant asserts that the absence of actual confusion for over five years suggests no likelihood of confusion. However, and as pointed out by the examining attorney, it is not necessary to show actual confusion in

order to establish likelihood of confusion. *See Weiss Associates Inc. v. HRL Associates Inc.* 902 F.2d 1546, 223 USPQ 1025 (Fed. Cir. 1990). Particularly in an ex parte proceeding, applicant's assertion of the absence of actual confusion is of little probative value in our determination on the issue of likelihood of confusion. *See In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984). Moreover, on the record before us there is no evidence as to whether there has been any opportunity for confusion to occur.

In view of the foregoing, and resolving any doubt as we must in favor of the prior registrant, we find that a likelihood of confusion exists between the applied-for mark and the mark in the cited registration. *See Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusal of registration is affirmed.