THIS OPINION IS NOT A PRECEDENT OF THE TTAB

Mailed:
November 9, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Pennfield Corporation

Serial No. 78529885
Serial No. 78654784

Scott F. Landis of Barley Snyder for Pennfield Corporation.

Barbara A. Gold, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney);[1] and,

C. Skye Young, Trademark Examining Attorney, Law Office 117 (Loretta C. Beck, Managing Attorney).[2]

Before Walters, Taylor and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Pennfield Corporation filed two applications:

1. Application Serial No. 78529885, filed December 9, 2004, for the mark PENNFIELD, in standard character format, for goods ultimately identified as "animal feed, sold in bulk and in bags," in Class 31;[3] and,

---

[1] Serial No. 78529885.
[2] Serial No. 78654784.
[3] The application is based on applicant's claimed use of the mark in commerce since at least as early as January 19, 1971. Section 1(a) of the Trademark Act of 1946, 15 U.S.C. §1051(a).

2. Application Serial No. 78654784, filed June 21, 2005, for the mark PENNFIELD COUNTRY LIFE PRODUCTS and design, shown below, for goods ultimately identified as follows:

> "Animal feed; animal bedding comprised of wood shavings, straw, wood pellets, litter, shredded paper, cocoa shells and mulch," in Class 31; and,
>
> "Equestrian products, namely, halters, saddles, and bridles," in Class 18.[4]

The Trademark Examining Attorneys finally refused registration on the ground of likelihood of confusion because the marks in both applications so resemble the following marks, owned by Pennfield Oil Co., as to be likely to cause confusion:[5]

---

[4] The application for both classes was based on applicant's claim of a *bona fide* intent to use the mark in commerce. Section 1(b) of the Trademark Act of 1946, 15 U.S.C. §1051(b). Applicant disclaimed the exclusive right to use the word "products."

[5] The Examining Attorneys also cited Registration No. 1393728 for the mark PENNFIELD for "animal feed additives," but this registration was canceled on February 24, 2007 for failure to file a Section 8 declaration of use and a Section 9 renewal application. The refusal is, therefore, moot as to this registration.

1. PENNFIELD, in standard character format), for "animal feed additives; namely, antibiotics, vitamins, and the fine chemicals, namely sulfas, iodine, methionine, zinc sulfate, zinc oxide, copper sulfate, copper oxide, cobalt, amino acids and trace minerals";[6] and,

2. PENNFIELD ANIMAL HEALTH and Design, shown below, for "medicated animal feed additive."[7] The registrant was required to file a Section 8 declaration of use no later than June 19, 2007. Although the registrant has not filed the declaration of use, Section 8 permits a late declaration to be filed within a six-month grace period, or until December 19, 2007. As discussed *infra,* because we are affirming the refusal based on Registration No. 0951187 for the mark PENNFIELD *supra*, it is unnecessary for us to consider Registration No. 2461068.

In the Trademark Examining Attorney's brief in the PENNFIELD COUNTRY LIFE PRODUCTS and design application, the Trademark Examining Attorney stated that the likelihood of

[6] Registration No. 0951187, issued January 23, 1973; Sections 8 and 15 affidavits accepted and acknowledged; second renewal.
[7] Registration No. 2461068, issued June 19, 2001. Registrant disclaimed the exclusive right to use the words "animal health."

confusion refusal pertains only to the goods in Class 31. All further discussion of the refusal pertaining to the PENNFIELD COUNTRY LIFE PRODUCTS and design application is limited to the goods in Class 31.

Applicant has appealed the refusal in each application. Briefs have been filed in both applications. Because the issue in each case is substantially the same, the appeals have been treated in a single opinion.[8]

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between goods and/or services. *See Federated Foods, Inc. v. Fort Howard Co.*, 544 F.2d 1098, 192 UPSQ 24 (CCPA 1976); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

[8] As discussed *infra*, however, the evidence submitted by the examining attorney in each case is somewhat different.

A. The similarity or dissimilarity and nature of the goods.

It is well settled that likelihood of confusion is determined on the basis of the goods as they are identified in the applications and the cited registrations. *Hewlett-Packard Co. v. Packard Press Inc.,* 281 F.3d 1261, 62 UPSQ2d 1001, 1004 (Fed. Cir. 2002); *In re Elbaum,* 211 UPSQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.,* 190 UPSQ 47, 48 (TTAB 1976). In this case, applicant's marks are for animial feed and the cited registration for animal feed additives.

Applicant argues that its identified animal feed is different than the animal feed additives identified in the cited registration because animal feed additives are used to make animal feed, and animal feed and animal feed additives move and are sold in different channels of trade to different classes of consumers.[9] According to applicant, an individual or a farm owner is typically the purchaser of premixed animal feed comprising feed and additives. On the other hand, "[t]he consumer of animal feed additives must be sophisticated in that they must be able to buy appropriate amounts and types of additives and then have

[9] Applicant's PENNFIELD Brief, p. 6; Applicant's PENNFIELD COUNTRY LIFE PRODUCTS Brief, p. 7.

the equipment to properly mix the additives to make animal feed. Purchasers of animal feed additives are therefore large feed producing or agricultural companies . . . that [have] the necessary equipment and expertise to mix and produce the animal feed."[10]

Likewise, the Examining Attorneys argue that the goods are related because animal feed may contain additives. The Examining Attorneys support their arguments by submitting copies of third-party registrations, based on use in commerce, where the same mark is registered for both animal feed and animal feed additives.[11] A representative sample of the third-party registrations submitted by the Examining Attorneys in each application are set forth below:[12]

---

[10] Applicant's PENNFIELD Brief, p. 6; Applicant's PENNFIELD COUNTRY LIFE PRODUCTS Brief, p. 7.
[11] The Examining Attorneys did not submit the same third-party registrations, but both Examining Attorneys submitted a substantial number of registrations.
[12] In the following tables, we have not included the entire description of goods for each of the registrations. Only the goods found in applicant's applications and registrant's registrations are listed.

PENNFIELD Application[13]

Mark	Reg. No.	Goods
NUTRI LABS	2700763	Animal feed; animal feed additives for use as a nutritional supplement
FLAVOR OF THE SEA	2668303	Animal feed; animal feed as a nutritional supplement; medicated animal feed
NEPTUNE FISH CONCENTRATE	2662155	Animal feed; animal feed additive for use as a nutritional supplement; medicated animal feed
LARAFEED	2681803	Animal feed; animal feed additive used as a nutritional supplement
ILC RESOURCES	2918102	Animal feed and animal feed additives

PENNFIELD COUNTRY LIFE PRODUCTS Application

Mark	Reg. No.	Goods
PROSTART	2710092	Animal feed; animal feed supplements; animal additive for use as a nutritional supplement
AFP	2744789	Dietetic animal feeds; animal feed additive for use as a nutritional supplement

[13] We have not considered the registrations based solely on foreign filings pursuant to Sections 44 or 66 of the Trademark Act of 1946. Applications filed under Sections 44 or 66 do not require use in commerce. Without use in commerce, the registrations have very little probative value. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 UPSQ2d 1467, 1470 n.6 (TTAB 1988).

Mark	**Reg. No.**	**Goods**
MARTEK	2889064	Animal feed; animal feed additive for use as a nutritional supplement
TAHITIAN NONI	3020063	Animal feed; animal feed additive for use a nutritional supplement

While animal feed and animal feed additives are different products, the question is not whether purchasers would confuse the products, but rather whether purchasers are likely to confuse the source of the goods. *Helene Curtis Industries Inc. v. Suave Shoe Corp.,* 13 USPQ2d 1618, 1624 (TTAB 1989); *In re Permagrain Products, Inc.,* 223 USPQ 147, 148 (TTAB 1984). *See also Harvey Hubbell Inc. v. Tokyo Seimitsu Co., Ltd.,* 188 USPQ 517, 520 (TTAB 1975) ("In determining whether products are identical or similar, the inquiry should be whether they appeal to the same market, not whether they resemble each other physically or whether a word can be found to describe the goods of the parties"). Thus, the products at issue need not be similar or even competitive to support a finding of likelihood of confusion. It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that

could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with a single source. *In re Albert Trostel & Sons Co., supra* at 1785; *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

In considering the relationship, if any, between animal feed and animal feed additives, we note that by their very nature, animal feed and animal feed additives are complementary products because they could be used together. Also, as noted above, the Examining Attorneys have made of record third-party registrations that show various entities have adopted a single mark for animal feed and animal feed additives suggesting that purchasers may expect that such goods sold under similar marks would emanate from the same source. *In re Albert Trostel & Sons Co., supra*); *In re Mucky Duck Mustard Co., Inc., supra*. Accordingly, we find that animal feed and animal feed additives are sufficiently related that, if identified by confusingly similar marks, confusion as to source is likely.

B. <u>The similarity or dissimilarity of classes of purchasers and likely-to-continue trade channels</u>.

As noted above, applicant argues that animal feed and animal feed additives move and are sold in different

channels of trade to different classes of consumers. However, the Examining Attorneys point out that applicant failed to submit any evidence to support its arguments.[14]

There are no restrictions or limitations in the identification of goods for the applications or the cited registration. Absent such restrictions or limitations, we must assume that the goods travel in "the normal and usual channels of trade and methods of distribution." *CBS Inc. v. Morrow,* 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983). *See also 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

[14] In the PENNFIELD application, the Examining Attorney submitted excerpts from the PETCO.com and PetSmart.com websites both displaying the sale of nutritional supplements for animals and animal food. The Examining Attorney asserts that although supplements may or may not be added to animal feed, they are sold alongside animal feed in the same channels of trade. The problem with the evidentiary websites is they do not demonstrate or explain whether the nutritional supplements are animal feed additives: that is, there is no evidence that the nutritional supplements advertised in the websites are also animal feed additives. Accordingly, the websites do not prove that animal feed and animal feed additives move in the same channels of trade. Moreover, the websites do not show that animal feed and nutritional supplements are sold under similar marks. Just because animal feed and nutritional supplements are sold in the same large store or by the same internet retailer may not, in and of itself, be sufficient to establish that the products are related. *Federated Foods, Inc. v. Fort Howard Paper Co.,* 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

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"). Accordingly, both applicant's and registrant's goods are presumed to move in all normal channels of trade and be available to all classes of potential consumers, including an individual, a farm owner, and large feed producing or agricultural companies. *Venture Out Properties LLC v. Wynn Resorts holding LLC,* 81 USPQ2d 1887, 1894 (TTAB 2007); *In re Elbaum,* 211 USPQ 639, 640 (TTAB 1981).

In view of the fact that the third-party registrations suggest that animal feed and animal feed additives sold under the same marks emanate from a single source, and in view of the presumption that animal feed and animal feed additives move in all normal channels of trade and are available to all classes of potential consumers that would purchase both applicant and registrant's goods, we find that the channels of trade and classes of consumers are at least overlapping.

C. The conditions under which and buyers to whom sales are made, (*i.e.,* "impulse" vs. careful, sophisticated purchasing).

As indicated above, applicant argues that "[t]he consumer of animal feed additives must be sophisticated in

that they must be able to buy appropriate amounts and types of additives and then have the equipment to properly mix the additives to make animal feed." First, we note that we must look at the degree of care used by the purchasers of both applicant's and registrant's products. Because there are no restrictions in either the applicant's or registrant's description of goods, we must consider all potential consumers, including those who exercise a lower degree of care. *In re Bercut-Vandervoort & Co.,* 229 USPQ 763, 765 (TTAB 1986) (average ordinary wine consumer must be looked at in considering source confusion). In other words, as stated above, the purchasers of "animal feed additives" include knowledgeable manufacturers with equipment to add the proper amount of additives to feed in bulk, as well as less knowledgeable retail consumers who will presumably be directed by packaging as to the amount of additive to use and the manner of application.

Further, there is no evidence in the record as to the degree of care that registrant's customers will exercise. However, even assuming that a portion of registrant's customers are sophisticated, even sophisticated purchasers are not necessarily knowledgeable regarding trademarks or immune from source confusion. *In re Decombe,* 9 UPSQ2d 1812, 1814-1815 (TTAB 1988).

Accordingly, we find that the ordinary degree of care exercised by general consumers of these products weighs in favor of finding that there is a likelihood of confusion.

D. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co., supra.* In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re Lamson Oil Co.,* 6 USPQ2d 1041, 1042 (TTAB 1988). *See also, In re White Swan Ltd.,* 9 USPQ2d 1534, 1535 (TTAB 1988). In comparing the marks, we are mindful that 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 overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.,* 565 F.2d 683, 196 UPSQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.,* 23 UPSQ 1735, 1741 (TTAB 1991), *aff'd unpublished,* No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the

recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.,* 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.,* 190 USPQ 106, 108 (TTAB 1975).

Applicant's standard character mark for PENNFIELD is identical in appearance, sound, meaning and commercial impression to registrant's PENNFIELD mark, also in standard character format, in Registration No. 0951187.

With respect to applicant's mark PENNFIELD COUNTRY LIFE PRODUCTS, our analysis is more complex, but the result is the same. We begin our analysis of applicant's mark by noting that the name PENNFIELD is the dominant portion of the PENNFIELD COUNTRY LIFE PRODUCTS and design mark because it is the part of the mark that consumers will use to call for applicant's products. Although likelihood of confusion must be determined by analyzing the marks in their entireties, "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 consideration of the marks in their entireties." *In re National Data Corp.,* 753 F.2d 1056, 224 UPSQ 749, 751 (Fed. Cir. 1985).

In cases where the mark comprises both a word and a design, the word is normally accorded greater weight because purchasers will use the words to request the goods identified by the mark. *In re Dakin's Miniatures Inc.,* 59 USPQ2d 1593, 1596 (TTAB 2001); *In re Appetito Provisions Co.,* 3 UPSQ2d 1553, 1554 (TTAB 1987); *Amoco Oil Co. v. Amerco, Inc.,* 192 USPQ 729, 735 (TTAB 1976). In this case, applicant's stylized letter "P" logo is displayed to the left of applicant's PENNFIELD name. In this presentation, the letter "P" will be perceived as the initial "P" for PENNFIELD, and therefore reinforce the name PENNFIELD in applicant's mark.

The name PENNFIELD is the dominant element in applicant's mark because it is in a larger font than the term "Country Life Products" and the term "Country Life Products" is tucked underneath the PENNFIELD name. Moreover, in many instances, the public abbreviates long names and may refer to applicant's products by the name PENNFIELD. "[C]ompanies are frequently called by shortened names, such as Penney's for J.C. Penney's, Sears for Sears and Roebuck (even before it officially changed its name to Sears alone), Ward's for Montgomery Ward's, and Bloomies for Bloomingdale's." *Marshall Field & Co. v. Mrs. Fields Cookies,* 25 UPSQ2d 1321, 1333 (TTAB 1992).

The significance of the PENNFIELD name as the dominant element of applicant's PENNFIELD COUNTRY LIFE PRODUCTS and design mark is further reinforced by its location as the first word of the mark. *Presto Products Inc. v. Nice-Pak Products, Inc.,* 9 USPQ2d 1895, 1897 (TTAB 1988)("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"). *See also Palm Bay Imports Inc. v. Vueve Clicquot Ponsardin,* 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) ("Vueve" is the most prominent part of the mark VUEVE CLICQUOT because "vueve" is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America, supra* (upon encountering the marks, consumers must first notice the identical lead word).

Finally, applicant's mark PENNFIELD COUNTRY LIFE PRODUCTS and design incorporates the registrant's entire PENNFIELD mark. "When one incorporates the entire arbitrary mark of another into a composite mark, inclusion in the composite mark of a significant, nonsuggestive element will not necessarily preclude a likelihood of confusion." *Wella Corp. v. California Concept Corp.,* 558 F.2d 1019 (194 UPSQ 419, 422 (CCPA 1977). In our opinion, the addition of the stylized letter "P" and the term

"Country Life Products" to applicant's mark does not distinguish applicant's mark from the registered PENNFIELD mark. Consumers would likely believe that PENNFIELD COUNTRY LIFE PRODUCTS brand animal feed and PENNFIELD brand animal feed additives have a common origin.

In view of the foregoing, we find that applicant's mark PENNFIELD COUNTRY LIFE PRODUCTS and design is substantially similar to the registered mark PENNFIELD, and that this factor weighs strongly against applicant.

E. The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.

Applicant contends that the parties have concurrently used their PENNFIELD marks for over thirty years without any reported instances of actual confusion. Moreover, applicant was the owner of Registration No. 0935042 for the mark PENNFIELD for "bulk and bag feed, dressed, uncooked poultry, prepared poultry, and shell eggs." Applicant inadvertently failed to renew the registration of that mark. The problems with applicant's arguments are twofold. First, the fact that applicant owned a previous registration for the identical mark for identical goods, since cancelled due to its failure to file a declaration of use and renewal application, is irrelevant because we do not have the means to determine whether the previous

registration was or was not erroneous. *In re National Retail Hardware Association,* 219 USPQ 851, 854 (TTAB 1983).

Second, applicant's contention that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the applicant's and registrant's marks is of little probative value in an *ex parte* proceeding where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise), and the registrant has had no chance to be heard. *In re Opus One Inc.,* 60 USPQ2d 1812, 1817 (TTAB 2001); *In re Kangaroos U.S.A.,* 223 UPSQ 1025, 1026-1027 (TTAB 1984); *In re Sieber & McIntyre, Inc.,* 192 UPSQ 722, 723-724 (TTAB 1977).

F. Balancing the factors.

In summary, we find that the goods are closely related, the channels of trade are overlapping, the classes of consumers, including those who exercise a low degree of consumer care, are overlapping, and the marks are substantially similar. Moreover, in view of the third-party registrations, we must assume that to the extent purchasers of animal feed additives are sophisticated purchasers, they would be aware that both animal feed and animal feed additives may emanate from a single source, and

therefore are likely to believe that these goods, if sold under the same or a confusingly similar mark, emanate from the same source. There is no evidence in the record as to the cost of animal feed or animal feed additives, but even if we assume that some degree of care were exercised in making the purchasing decision, as discussed *supra*, applicant's marks are so similar to registrant's mark that even careful purchasers are likely to assume that the marks identify goods emanating from a single source.

Accordingly, applicant's marks PENNFIELD for "animal feed, sold in bulk and in bags," and PENNFIELD COUNTRY LIFE PRODUCTS and design for "animal feed; animal bedding comprised of wood shavings, straw, wood pellets, litter, shredded paper, cocoa shells and mulch" so resemble the mark PENNFIELD in Registration No. 0951187 for "animal feed additives; namely, antibiotics, vitamins, and the fine chemicals, namely sulfas, iodine, methionine, zinc sulfate, zinc oxide, copper sulfate, copper oxide, cobalt, amino acids and trace minerals" that, when used in connection with their respective goods, confusion as to source is likely.

Decision: The refusal to register application Serial No. 78529885 for the mark PENNFIELD is affirmed.

The refusal to register application Serial No. 78654784 for the mark PENNFIELD COUNTRY LIFE PRODUCTS and design is affirmed only as to the goods in Class 31. With respect to the goods in Class 18, application Serial No. 78654784 will be will be forwarded for publication in due course.