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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Johnstown Feed & Seed, Inc.

Serial No. 75/202,157 and 75/202,158

David S. Woronoff for Johnstown Feed & Seed, Inc.

Teresa A. Lee, Trademark Examining Attorney, Law Office 101 (Christopher Wells, Acting Managing Attorney).

Before Seeherman, Hairston and Chapman, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Applications have been filed by Johnstown Feed & Seed, Inc. to register the marks shown below for, in each case, "livestock feed and animal feed."

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Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that each of applicant's marks, when used in connection with the identified goods, so resembles the

[1]Application Serial No. 75/202,157, filed November 6, 1996, alleging dates of first use of July 1, 1990. The application contains a statement that "[t]he lining is a feature of the mark and does not indicate color." Further, the application contains a disclaimer of the words "Complete Line of Quality Feeds;" "Quality Feeds Inc.;" and "Satisfaction Guaranteed."
[2]Application Serial No. 75/202,158, filed November 6, 1996, alleging dates of first use of August 1, 1992. The application contains a disclaimer of "Quality Feeds." Also, applicant has indicated that the letter "Q" has no meaning in the relevant industry or trade as applied to the goods. We should point out that inside the letter "Q" are the indistinct figures of four farm animals.

previously registered mark PRECISE for pet food,[3] as to be likely to cause confusion.

Applicant, in each instance, has appealed. Briefs have been filed, but an oral hearing was not requested. Because the issue in each case is essentially the same, the appeals have been treated in a single opinion. We affirm the refusals to register.

Turning first to a consideration of the respective products, it is well settled that goods need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. Instead, it is sufficient that the respective goods are related in some manner, and/or that the circumstances surrounding the marketing of the goods are such that they would or could be encountered by the same persons in situations that could, because of the similarities of the marks used therewith, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. See Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978), and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

[3] Registration No. 1,481,817 issued March 22, 1988; Section 8 affidavit filed.

The Examining Attorney, in support of her position that livestock feed and animal feed on the one hand, and pet food on the other hand, are related, has made of record a number of third-party registrations which show that entities have registered a single mark for livestock feed and/or animal feed and pet food. Such registrations, while not evidence that the marks shown therein are in use or that the public is familiar with them, have some probative value to the extent that they show that the goods involved in this appeal are of a kind which may emanate from a single source under the same mark. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993), and In re Mucky Duck Mustard Co., Inc., 6 USPQ2d 1467, 1470 (TTAB 1988). Also, the Examining Attorney has made of record excerpts from the NEXIS data base which indicate that several companies manufacture both livestock feed and/or animal feed and pet food.

Notwithstanding the above evidence, applicant insists that the respective goods are different in nature, and that they would generally be sold to different classes of purchasers through specifically different trade channels. In particular, applicant states that it sells its goods primarily to commercial livestock feeders.

For us, however, the third-party registrations and NEXIS evidence offered by the Examining Attorney are sufficient to establish that livestock feed and/or animal feed and pet food are related products, which if sold under the same or similar marks, would result in a likelihood of confusion as to origin or affiliation. Apart from the fact that applicant's applications contain no restrictions as to channels of trade or purchasers, we note that the Examining Attorney submitted excerpts from the NEXIS data base which indicate that livestock feed and pet food are sold in farm and feed stores. Thus, the evidence submitted by the Examining Attorney shows that the same companies make livestock feed and/or animal feed and pet food, and that the same dealers sell these kinds of feed and pet food. Also, there is overlap in the ultimate consumers inasmuch as there are people who raise livestock and other animals who also own pets. In view of the foregoing, we find that the goods are sufficiently related that, when sold under identical or similar marks, confusion is likely to occur in the marketplace.

Turning then to the marks, applicant argues that, given the presence of additional wording and designs in its marks, the respective marks are sufficiently distinguishable to avoid confusion.

We agree with the Examining Attorney, however, that the respective marks are highly similar in commercial impression because the dominant literal and source-identifying element of each of applicant's marks is the word PRECISE, which is identical to the cited mark. It is the "PRECISE" portion of applicant's marks which is most likely to be impressed upon a customer's memory and would be used by prospective purchasers when asking for applicant's goods.

While applicant's marks must be considered in their entireties, including any disclaimed matter and designs, it is nevertheless appropriate, for rational reasons, to regard certain features of the marks as being more dominant or otherwise significant, and therefore to give those features greater weight. In the case of marks which consist of words and a design, the words are normally accorded greater weight because they would be used by purchasers to request the goods. See In re Appetito Provisions Co., 3 USPQ2d 1553, 1554 (TTAB 1987). Also, disclaimed or otherwise descriptive matter is generally viewed as a less dominant or significant feature of a mark. See In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751-52 (Fed. Cir. 1985).

Applying such principles to applicant's marks, it is clear that the word PRECISE is the dominant literal and source-identifying element in these marks. The disclaimed wording in applicant's marks is descriptive or laudatory and, as such, has little impact on the overall commercial impression created by the marks. While there is no doubt that the stylized letter "Q" in one of applicant's marks is visually striking, it is unlikely that customers and prospective purchasers will use the letter "Q" in calling for applicant's goods. As for the farm animals within the "Q," they are barely visible and, even if they were noticed, have little source-identifying value because they indicate the animals for which the feed is made. With respect to applicant's other mark, although the background design therein is relatively large, it is not particularly distinctive such that it serves to distinguish this mark from the cited mark.

Even if customers and prospective purchasers note the differences between applicant's marks and the cited marks, they are likely to ascribe the differences as denoting that the marks are used for different products, rather than to indicate that there are different sources for the products. That is, they are likely to believe that PRECISE alone denotes pet food and PRECISE with other wording and designs

denotes livestock feed and animal feed from the same source, particularly since the other wording includes QUALITY FEEDS.[4]

As to applicant's assertion that it is unaware of any instances of actual confusion, suffice it to say that this factor is of limited probative value in the context of an ex parte proceeding wherein there is no way to assess what the experience of the registrant has been. In re Cruising World, Inc., 219 USPQ 757, 758 (TTAB 1983). Moreover, the issue before us is not one of actual confusion, but only the likelihood of confusion.

Finally, to the extent that applicant's contentions raise a doubt on the issue of likelihood of confusion, such doubt must be resolved in favor of registrant. In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

We conclude that customers and prospective purchasers familiar with registrant's pet food sold under the mark PRECISE would be likely to believe, upon encountering applicant's marks consisting of PRECISE and other wording and designs for livestock feed and animal feed, that the

[4] We note that although the word "precise" may be somewhat suggestive when applied to applicant's and registrant's respective products, this record is devoid of any third-party uses of the same and/or similar marks on similar products.

respective products emanate from or are associated with the same source.

Decision: The refusal to register is affirmed in each case.

E. J. Seeherman

P. T. Hairston

B. A. Chapman
Administrative Trademark
Judges, Trademark Trial and
Appeal Board