

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB                      MARCH 23,99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re **Field Fresh Foods, Inc.**

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Serial No. 74/**152,522**

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**Even F. Kent** of Russ August & Kabat for Field Fresh Foods,  
Inc.

**Jennifer Richard**, Trademark Examining Attorney, Law Office  
**101** (Christopher Wells, Managing Attorney).

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Before **Cissel**, Quinn and **Bucher**, Administrative Trademark  
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On August 19, 1996, applicant applied to register the  
mark "FIELD FRESH FOODS" on the Principal Register for  
"fresh pre-cut vegetables," in Class 29. Applicant claimed  
first use of the mark on these goods in interstate commerce  
in February of 1994. The word "foods" was subsequently  
disclaimed apart from the mark as shown.

Registration was refused under Section 2(d) of the Act on the ground that applicant's mark, as applied to fresh pre-cut vegetables, so resembles the mark shown below,

*Field Fresh*

which is registered<sup>1</sup> on the Supplemental Register for "fresh pineapple," that confusion is likely. Registration was also refused under Section 2(e)(1) of the Act on the ground that the mark is merely descriptive of applicant's goods.

The Examining Attorney attached to the refusal to register copies of excerpts from the Nexis® database of published articles. The quoted articles show the term "field fresh" used in connection with produce. Typical examples are as follows: "The products are harvested daily so their fruits and vegetables are field fresh."; "For those tempted by field-fresh corn and other local produce, Rick's farmstand will be open in August..."; "...this is the best of both worlds. Organic produce, field-fresh..."; "Field-fresh winter squashes, potatoes, carrots, broccoli, cabbages and cauliflower will be available..."

When the refusals were made final, applicant filed a Notice of Appeal and a brief, attached to which were dictionary definitions of the word "fresh." The Examining Attorney then filed her responsive brief.

No oral hearing was requested, so we have resolved this appeal based on the written record and arguments presented in the briefs.

We hold that the refusals to register are proper. Confusion is likely because applicant's mark is very similar to the cited registered mark in appearance, pronunciation, connotation and commercial impression, and the goods in the registration are closely related to those specified in the application. Further, applicant's mark is merely descriptive of the goods identified in the application because it identifies a desirable characteristic of them.

We first address the refusal based on Section 2(e)(1) of the Act. The test for whether a mark is merely descriptive of the goods with which it is used is not disputed. A mark is unregistrable under this section if it immediately conveys information about an ingredient, quality, characteristic, feature or function of the

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<sup>1</sup> Reg. No. 1,184,272, issued on the Supplemental Register to Castle & Cooke, Inc. on December 29, 1981; affidavit under

relevant goods. In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979). The determination of descriptiveness must be made, not in the abstract, but rather in relation to the goods identified in the application. In re Omaha National Corp., 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978).

In the instant case, the record clearly establishes that the mark "FIELD FRESH FOODS" conveys the fact that applicant's fresh vegetables are field fresh foods, that is, that they are recently picked, or fresh from the field. Contrary to applicant's argument, no imagination or multi-stage reasoning is required to reach this conclusion when the mark is considered in conjunction with the goods. As noted above, the test is not, as applicant would have it, whether the nature of the goods could be discerned from consideration of the mark by itself. Instead, the question is whether, when the mark is evaluated in relation to the product, the mark conveys information about that product.

In this case, the mark clearly communicates that applicant's fresh vegetables are recently picked, or that they taste as if they were. Accordingly, the refusal to register under Section 2(e)(1) is proper. This conclusion

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Section 8 of the Act received.

is consistent with the fact that the cited registration for the mark "FIELD FRESH" for fresh pineapple is on the Supplemental Register, rather than the Principal Register.

Turning, then, to the refusal under Section 2(d) of the Act, we must recognize that contrary to applicant's contentions, these marks are indeed very similar. Both are descriptive of the goods with which they are used, as demonstrated above and by the fact that the cited registration is on the Supplemental Register. They have the same descriptive meaning, and they are similar in appearance and pronunciation in addition to connotation.

Applicant's argument that these marks are not likely to be confused because applicant's mark includes the word "FOODS" is not well taken. It is well settled that simply adding a descriptive or generic word to the mark of another is not sufficient to overcome the likelihood of confusion. In re Equitable Bancorporation, 229 USPQ 709 (TTAB 1986). Except for the additional generic word "FOODS," these two marks are identical. The commercial impressions they create with respect to the goods set forth in the registration and the application, respectively, are the same. Confusion is plainly likely when these two similar marks are used in connection with goods as closely related as fresh pineapple and fresh pre-cut vegetables are.

Applicant's argument that the registered mark is weak is not supported by any evidence. Applicant's counsel presented argument and referred in his brief to one mark for which application to register has been made and to another mark which is alleged to be registered, but no evidence of these allegations was properly made of record. In the absence of evidence of the alleged application and registration, they have not been considered. In re Hungry Pelican, Inc., 219 USPQ 1202 (TTAB 1983). Furthermore, as the Examining Attorney notes, even if third-party registrations had been properly made of record, they would have little persuasive value on the issue of whether confusion is likely. In re Hub Distributing, Inc., 218 USPQ 284 (TTAB 1983). They are not evidence of what happens in the marketplace or that the consuming public is familiar with the use of the marks shown therein. National Aeronautics and Space Administration v. Record Chemical Co., 185 USPQ 563 (TTAB 1975).

Given that these marks are very similar, we turn to the question of whether the goods with which they are used are related. In order for confusion to be likely, the goods do not have to be the same, or even competitive. All that is necessary is that they be related in some manner and that their character or the circumstances surrounding

their marketing are such that they would likely be encountered by the same people under circumstances that would give rise to the mistaken belief that the producer is the same for both. In re International Telephone and Telegraph Corp., 197 USPQ 910 (TTAB 1978); Mobay Chemical Co. v. The Standard Oil Co., 163 USPQ 230 (TTAB 1969).

In the case at hand, contrary to the unsupported arguments of applicant, these products are closely related because they are sold in the same places, produce sections of grocery stores, to the same purchasers, ordinary consumers. There is absolutely no support for applicant's contention that registrant's pineapple would be bought by discriminating food gourmets as a luxury dessert item in an exotic fruit boutique, whereas the typical consumer of the goods identified in the application is "a busy working person who dashes into the produce section of a grocery store to pick up simple, basic vegetables, already pre-cut to slice seconds off meal preparation on a hectic day."

As a final point with respect to the issue of likelihood of confusion, we note that although we do not have any doubt that confusion is likely, if we did still harbor any such doubt, it would have to be resolved against the applicant and in favor of the prior user and

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registrant. In re Apparel, Inc. 578 F.2d 308, 151 USPQ 353 (CCPA 1966).

In summary, the mark sought to be registered is merely descriptive of the goods set forth in the application because it immediately and forthwith conveys information about a characteristic of them, namely that they are field fresh, i.e., recently picked. In addition, the cited registered mark presents a bar to registration under Section 2(d) of the Act. Confusion is likely because the marks are very similar and the goods with which they are used are closely related. Accordingly, both refusals to register are affirmed.

R. F. Cissel

T. J. Quinn

D. E. Bucher  
Administrative Trademark Judges  
Trademark Trial and Appeal Board

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