

THIS DISPOSITION IS NOT
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AUG. 17, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Melon Acres, Inc.

Serial No. 75/122,699

C. David Emhardt and Christopher A. Brown of Woodard
Emhardt Naughton Moriarty & McNett for Melon Acres, Inc.

Darlene D. Bullock, Trademark Examining Attorney, Law
Office 101 (Chris Wells, Managing Attorney)

Before Simms, Wendel and Bucher, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Melon Acres, Inc., an Indiana corporation, has filed
an application for registration of the mark "MELON ACRES,"
for "fresh fruits and vegetables."¹

The Trademark Examining Attorney issued a final
refusal to register based upon Section 2(d) of the

¹ Serial No. 75/122,699, filed June 20, 1996, alleging use on
fresh fruits and vegetables in Int. Cl. 31 since 1991.

Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, "MELON ACRES," when used on these fresh fruits and vegetables, so resembles the registered mark, "BLUEBERRY ACRES and design," as shown below, as applied to "fresh blueberries" as to be likely to cause confusion, or to cause mistake, or to deceive.²



Applicant has appealed the final refusal to register. Briefs have been filed, but applicant did not request an oral hearing. We reverse the refusal to register.

In the course of rendering this decision, we have followed the guidance of *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973), that sets forth the factors which, if relevant, should be considered in determining likelihood of confusion.

We turn first to the similarity or dissimilarity of the respective marks in their entirety, as to appearance, sound, connotation and commercial impression. The

² Registration No. 611,856, issued on September 6, 1955. The registration sets forth dates of first use of July 1, 1952; §8 affidavit accepted and §15 affidavit filed, second renewal filed in 1995.

Trademark Examining Attorney contends that the marks are similar in sound and connotation "...because they both contain the dominant term ACRES coupled with disclaimed generic matter..." (Trademark Examining Attorney's Brief of July 27, 1998, p. 4). She argues that:

Taking the most common meanings of the word "ACRES" and applying them to the remainder of the marks in question gives each mark the connotation of a large area of land that is covered with fruit or produces fruit...(Brief, p. 4).

Applicant, in turn, alleges that the Trademark Examining Attorney totally failed in her brief to even discuss the similarity of sound between the respective marks. He contends the differences are obvious:

...[M]erely glancing at the marks at issue reveals their differences. The marks, considered in their entirety, are plainly visually distinct. They do not have the same pronunciation, cadence, or number of syllables, and therefore cannot be said to sound anything alike. The natural meanings of each mark are also quite different, as there are clear and unique meanings for the terms "melon" and "blueberry." There is only one way to arrive at the determination that the marks at issue are similar, and that is to ignore the first words of each mark... (Applicant's Reply Brief of August 17, 1998, p. 4).

We agree with applicant that these marks are clearly different as to sight and sound. As the Trademark

Examining Attorney argues, both marks may well connote an expanse of arable land used to raise the named produce. Melons, which include well-known fruit such as watermelon, cantaloupe, and honeydew, are among the largest items of produce available. By comparison, blueberries are quite small. In this context, we focus on the general overall commercial impression engendered by the marks in deciding whether confusion as to source or sponsorship is likely. Due to the fallibility of memory and the consequent lack of perfect recall, the proper emphasis is on the recollection of the average customer, who normally retains a general rather than a specific impression of trademarks or service marks. See Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973). Accordingly, if applicant's mark contained the name of another fruit as closely related to blueberries as raspberries or strawberries, or as similar as cherries (i.e., "Raspberry Acres," "Strawberry Acres" or even "Cherry Acres"), the rationale of the Trademark Examining Attorney might well tilt this case toward a finding of likelihood of confusion in a way that "Melon Acres" does not. In addition, "such similarity as there is in connotation must be weighed against the dissimilarity in appearance, sound, and all other factors, before reaching a

conclusion on likelihood of confusion as to source." In re Sarkli, Ltd., 721 F.2d 353, 220 USPQ 111, 113 (Fed. Cir. 1983).

Turning next to the similarity or dissimilarity and nature of applicant's and registrant's goods as described in the instant application and the cited registration, there can be no real dispute that there is a relationship between the involved goods. Furthermore, it is clear under trademark law that applicant's "fresh fruits" must be deemed to include registrant's "fresh blueberries."

Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Furthermore, given potentially identical goods, we must also assume the goods are sold in the same, established, likely-to-continue trade channels (e.g., retail grocery stores) to the same purchasers.

In reviewing the conditions under which and buyers to whom sales are made, we must also conclude that these would be correctly described as "impulse" items sold to the ordinary consumer.³

³ A letter to applicant of June 25, 1997, from Mr. Joseph A. Cimino, a food broker in New York, has been made part of the record. This reflects sales to a sophisticated middleman, and supports the suggestion that in the marketplace, purchasers are unlikely to see the involved marks. Nonetheless, the balance of the record does not support the conclusion that sales of fresh

As to the number and nature of similar marks in use on these goods, applicant argues the relevance of thirty active registrations in which the word "acres" is used within composite marks in conjunction with food and agricultural products. However, the Trademark Examining Attorney points out that only a third of these registrations actually list fruits and vegetables, only two list fresh produce, and in the registrations other than the cited one, the first term of the mark is inherently distinctive as applied to produce (e.g., "Brittany Acres," "Newton Acres," etc.).

We note that the evidence of subsisting registrations is entitled to little weight since it is well settled that such registrations are incompetent to prove that these marks are in use or that the public is exposed to them. See Fort Howard Paper Co. v. Kimberly-Clark Corp., 221 USPQ 732 (TTAB 1984) and In re Hub Distributing Inc., 218 USPQ 284 (TTAB 1983). However, we agree with applicant that the word "acres" would appear to be a suggestive term for agricultural products. The mere coexistence on the registry of these thirty marks makes us believe that

fruit are never made to the ultimate consumer under this mark. Furthermore, even if supported more strongly, a different result would not be warranted given the fact that the identification of goods has no such restrictions.

consumers are able to make distinctions among composite marks containing the word "acres" when used in connection with a variety of food products. On yet the other hand, we also concur with the Trademark Examining Attorney that none of the third-party marks pointed to by applicant, when taken in their entirety, is as similar in overall construction to registrant's "BLUEBERRY ACRES" as is applicant's "MELON ACRES." On balance, this factor seems to favor neither applicant nor the Trademark Examining Attorney.

While applicant has submitted letters noting the absence of any actual confusion, this is of little significance in this case. While applicant claims to have used the mark "MELON ACRES" on its produce since 1991, we have no evidence that the marks "MELON ACRES" and "BLUEBERRY ACRES" have ever been used contemporaneously on fresh fruits in the same geographical area.

In sum, given the suggestive nature of the term "ACRES" for fresh produce, we do not believe that purchasers, aware of registrant's "BLUEBERRY ACRES" fresh blueberries, will think that applicant's "MELON ACRES" fresh produce comes from the same entity that sells "BLUEBERRY ACRES" blueberries.

Decision: Based upon the dissimilarities in the marks, we find there is no likelihood of confusion. Accordingly, the refusal to register is hereby reversed.

R. L. Simms

H. R. Wendel

D. E. Bucher

Administrative Trademark
Judges, Trademark Trial and
Appeal Board