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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Proven Winners

Serial No. 75/348,743

James W. McClain of Brown, Martin, Haller & McClain for
Proven Winners.

Darlene D. Bullock, Trademark Examining Attorney, Law
Office 111 (Craig Taylor, Managing Attorney).

Before Cissel, Chapman and Rogers, Administrative Trademark
Judges.

Opinion by Rogers, Administrative Trademark Judge:

Proven Winners has filed an application to register
the mark SUMMER MELODY in International Class 31 for goods
identified, following amendment, as "living ornamental
plants, namely daisies."¹ The Examining Attorney refused
registration of applicant's mark under Section 2(d) of the
Trademark Act, 15 U.S.C. § 1052(d), because of the prior

¹ Serial No. 75/348,743, filed August 28, 1997, based on
applicant's allegation of a bona fide intention to use the mark
in commerce.

registration of MELODIE for "growing potted flowering plants," also in class 31.²

When the Examining Attorney made the refusal of registration final, applicant appealed. Both applicant and the Examining Attorney have filed briefs, but an oral argument was not requested. We affirm the refusal.

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 likelihood of confusion issue. See *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion presented by this case, key considerations are the similarities of the marks, the virtually identical nature of the goods, and the presumptively similar classes of consumers for these goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Considering the goods first, we note that registrant's goods are broadly identified, while applicant asserts an intention to use its mark for one plant, namely "daisies."³

² Registration No. 959,608, issued May 29, 1973, based on a claimed date of first use of May 3, 1972. A combined Section 8 & 15 affidavit was filed and accepted. The registration was renewed for a 10-year term on May 19, 1993.

³ Though the application is based on applicant's allegation of a bona fide intention to use the mark in commerce, and applicant

We must consider registrant's identification to include daisies. Therefore, for purposes of our analysis under the *du Pont* factors, applicant's goods are encompassed within those of registrant.

We note applicant's argument that it was unable to find evidence on the Internet of the marketing of plants under registrant's MELODIE mark. Even if registrant does not offer its goods for sale through the Internet or, for that matter, no longer offers its goods for sale through any source, it would be irrelevant to our analysis of likelihood of confusion in the context of our assessment of the registrability of applicant's mark. In addition, we disregard applicant's related assertion that registrant is no longer using its mark for live plants and is, instead, using the mark only for seeds. Applicant has not provided evidence to support either argument; moreover, to the extent that applicant is alleging that registrant has abandoned use of its mark for the registered goods, the Examining Attorney is correct in concluding that this is an impermissible collateral attack on the registration. See *In re Dixie Restaurants*, 41 USPQ2d 1531 (Fed. Cir. 1997); and TMEP Section 1207.01(c)(v). Such allegations are

has not filed an amendment to allege use, applicant claims that it has begun using the mark.

properly raised only in the context of a petition to cancel the registration.

In regard to the channels of trade and classes of consumers for the respective goods, we observe that neither applicant nor registrant includes any restrictions in their respective identifications of goods. Accordingly, we must presume that the respective goods move in all normal channels of trade and to all usual classes of consumers therefor. See *CBS Inc. v. Morrow*, 218 USPQ 198, 199 (Fed. Cir. 1983).

We are not persuaded otherwise by applicant's argument that its daisies are not necessarily "potted," as are registrant's goods. Applicant is equivocal on this point and, in any event, has not introduced any evidence that potted flowering plants and unpotted daisies, if such are sold, are marketed to different consumers or travel in different channels of trade.

Turning to a comparison of the marks, we begin by noting that MELODIE and MELODY are pronounced the same. The Examining Attorney asserts that MELODY would be viewed as the dominant term in applicant's mark because SUMMER is used as an adjective to modify MELODY. In response, applicant argues that the Examining Attorney has erred by considering SUMMER as "merely an add-on or a trivial

addition" and that it is an integral component of applicant's mark, the entirety of which creates a different commercial impression than registrant's mark. Applicant further argues that registrant's mark, MELODIE, will be seen by consumers solely as a female given name, while the juxtaposition of SUMMER and MELODY in applicant's mark will lead consumers to think of "music related to a particular season of the year." Further, applicant argues that even though MELODY also can be a female given name, it would not be so perceived when used by applicant, because it would be incongruous in view of its coupling with SUMMER.

The argument, however, turns on the presumptions that MELODIE will be seen solely as a female given name, rather than as an archaized presentation of MELODY, and that SUMMER MELODY will be recognized as a musical reference. Applicant concedes, however, that MELODIE is "the Middle English spelling used in music during the years 1100-1400" and has proffered no evidence that consumers would readily view the marks as having the connotations urged by applicant, rather than any other. We are concerned with the recollection of average purchasers of these inexpensive goods, who may retain only a general, rather than a specific, impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

A consumer familiar with registrant's MELODIE brand potted flowering plants, when confronted with applicant's SUMMER MELODY daisies, may conclude that applicant's goods are a new line of the MELODIE brand plant particularly suited to summer planting.

Applicant argues that purchasers of plants tend to select a particular nursery or home center, because of the selection of plants made available, and further select plants from such vendors based on their knowledge of "superior growers and propagators (such as Applicant) whose products have established reputations for growing well and being high-quality plants..." Thus, applicant concludes, buyers of plants are sophisticated "and are careful to differentiate the different marks of different vendors." Apart from the lack of evidence to support this argument, it is well settled that even sophisticated consumers are not necessarily immune to source confusion. See *Weiss Associates Inc. v. HRL Associates Inc.*, 14 USPQ2d 1840, 1842 (Fed. Cir. 1990) (similarity of products overshadows sophistication of purchasers); and *Aires Systems Corp. v. World Book Inc.*, 23 USPQ2d 1742, 1747 (TTAB 1984) (where goods are legally identical, even discriminating purchasers can be confused when marks are similar).

Finally, we note that applicant alleges that one participant in its joint venture is a nursery operating in the same geographical location as registrant, yet applicant is not aware of any actual confusion. Such assertion is of limited value, in view of the absence of evidence of any use at all by applicant, much less evidence on the nature and extent of applicant's use and the short period of asserted contemporaneous use. See *Cooper Industries, Inc. v. Repcoparts USA Inc.*, 218 USPQ 81, 85-86 (TTAB 1983).

In sum, given the legally identical nature of the goods, presumptively similar channels of trade and classes of consumers, and the similarities of the marks, we find there to be a likelihood of confusion or mistake among consumers.

Decision: The refusal of registration is affirmed.

R. F. Cissel

B. A. Chapman

G. F. Rogers

Administrative Trademark
Judges, Trademark Trial
and Appeal Board