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**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Hearing:  
September 19, 2000

Paper No. 17  
EJS

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re **Cargill, Incorporated**

Serial No. 75/456,123

**Joseph T. Nabor, Edward W. Gray, Jr. and Christopher E. George of Fitch, Even, Tabin & Flannery for Cargill, Incorporated.**

**Teresa A. Lee**, Trademark Examining Attorney, Law Office 111  
(Craig Taylor, Managing Attorney)

Before Cissel, Seeherman and Holtzman, Administrative  
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Cargill, Incorporated has appealed from the final refusal of the Trademark Examining Attorney to register CARMELYX as a trademark for "livestock feed supplement."<sup>1</sup> Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that

<sup>1</sup> Application Serial No. 75/456,123, filed March 24, 1998, and asserting first use and first use in commerce as of November 31, [sic] 1994. Because there are only 30 days in November, the Office has construed this date to be November 30, 1994.

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applicant's mark so resembles the mark CARMILAX, registered for "rumen stimulant-mild laxative-carminative-antacid, used in veterinary medicine,"<sup>2</sup> that, as used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

The appeal has been fully briefed, and an oral hearing was held.

In determining whether there is a likelihood of confusion between two marks, we must consider all relevant factors as set forth in **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis under Section 2(d), two of the most important considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Turning first to the goods, we begin our analysis with the well-established principle that it is not necessary that the goods of the parties be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is

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<sup>2</sup> Registration No. 755,839, issued January 23, 1963; Section 8 affidavit accepted; Section 15 affidavit received; renewed.

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sufficient that the respective goods of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. **In re International Telephone & Telegraph Corp.**, 197 USPQ 910, 911 (TTAB 1978).

There are obviously specific differences in the goods. Applicant has explained that its livestock feed supplements are supplement blocks which are typically used on livestock farms for foraging livestock in order to provide them with essential nutrients which they would not obtain from the forage. The cited registration is for goods identified as a rumen stimulant-mild laxative-carminative-antacid used in veterinary medicine; in other words, a product used to help animals' digestion. Although one product would not be used as a substitute for the other, as noted above, it is not necessary that the goods be identical or even similar or competitive.

In this case, the similarities between the products go beyond the general characteristic that they are both used for animals. They are also both involved with eating and digestion, with applicant's product providing a supplement

to the animals' feed and the registrant's product helping the animal in digesting that feed. In this connection, we note that applicant's product provides "crude fiber," which is well known to be a digestive aid.

The Examining Attorney has also made of record numerous third-party registrations which indicate that other entities have registered their marks for both feed supplements and veterinary medical products, including digestive aids.<sup>3</sup> Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See **In re Albert Trostel & Sons Co.**, 29 USPQ2d 1783 (TTAB 1993).<sup>4</sup>

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<sup>3</sup> See, for example, Regs. Nos. 2,256,561 and 2,256,560, both for, inter alia, veterinary preparations for the treatment of alimentary conditions in livestock, and animal feed additives for use as nutritional supplements; Reg. No. 1,981,183 for "veterinary vaccines and topical liniments, and feed supplement for horses"; Reg. No. 1,277,814 for, inter alia, veterinary antibiotics, vitamins, minerals, electrolytes and feed supplements; and Reg. No. 501,389 for, inter alia, diuretics, feed supplements, hormones, tonics and vitamins, all for veterinary purposes. Applicant has argued that none of the third-party registrations are for laxatives, but we point out that the cited mark is not merely for a laxative, but for a product that has other digestive aid qualities.

<sup>4</sup> It is noted that the Examining Attorney has also made of record third-party registrations based on Section 44 of the Act. Because these registrations are not based on use in commerce, we have not considered them.

Applicant has argued that the goods would be sold through different channels of trade to different classes of consumers. Applicant points to specimen labels which it states were submitted by registrant with the filing of its "Section 8 and 15 renewal affidavit," response filed Sept. 22, 1999,<sup>5</sup> and which contain the warning "For Professional Use by Veterinarians" to support its assertion that the registrant's goods will be sold only to veterinarians, while applicant's goods will be sold to livestock owners.

The difficulty with applicant's argument is that we must determine the issue of likelihood of confusion based on the goods as they are identified in the application and the cited registration, without restrictions or limitations which are not reflected therein. **In re William Hodges & Co., Inc.**, 190 USPQ 47 (TTAB 1976); see also, **Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.**, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). As identified, the registrant's goods are not limited to sale to or administration by veterinarians; although the identification indicates that the goods are used in

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<sup>5</sup> It is not clear from applicant's comments whether the specimens formed part of the registrant's Section 8 affidavit or its application for renewal. However, this information is not critical to our decision.

veterinary medicine, that merely shows that the product is meant for animals, rather than humans. It does not limit the use of the product to dispensing by veterinarians. Accordingly, there is nothing in the identification that would prohibit the registrant's goods from being purchased by livestock owners for administration to their animals. Moreover, even if the registrant's goods were to be dispensed by veterinarians, those veterinarians may supply the product to the livestock owners to administer to their animals, and those same owners would also come into contact with applicant's feed supplements.

Because both applicant's and the registrant's goods are used for livestock and play a role in the digestive process; because the goods are of a type that may be sold by a single company under one mark; and because, as identified, the goods may be sold in the same channels of trade to the same classes of purchasers, we find that applicant's goods and the goods identified in the cited registration are sufficiently related such that, if they were sold under similar marks, confusion is likely to result.

This brings us to a consideration of the marks. As the Examining Attorney has pointed out, there are strong similarities in appearance and pronunciation between the

marks, CARMELYX and CARMILAX. Both are three syllable words; both begin with the letters "CARM"; both end with "X"; and both have the identical consonants in the identical order. Nor does the difference in the second vowels in each mark have a significant effect on the appearance and pronunciation of the marks. Because the second syllable is unstressed, and because of the similarities of pronunciation of a short "e" and a short "i," particularly in certain regions of the country, consumers are not likely to hear or note a difference in the marks caused by the differences in these vowels.

On the other hand, we agree with applicant that the third syllable in the marks, LYX and LAX, would be recognized because of the meaning of a lick in connection with animal nutrients, i.e., "a place frequented by animals that lick the exposed natural salt deposits,"<sup>6</sup> and the suggestive significance of "lax" in connection with a laxative product.<sup>7</sup>

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<sup>6</sup> The Board may take judicial notice of dictionary definitions. **University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.**, 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

<sup>7</sup> Applicant has stated in its brief that "the register contains many marks in which the suffix LAX is used to indicate that the product has a laxative effect upon the user." Brief, p. 6. We note that applicant has made no such registrations of record. However, even without this evidence it is apparent to us that "LAX," being the first three letters of the word "laxative," may,

However, consumers are likely to ascribe this difference in the marks to the differences in the goods on which they are used, rather than to a difference in the source of the goods. Both applicant and the Examining Attorney agree that consumers are not likely to confuse the products themselves, and use one in place of the other. The question at issue, however, is whether consumers are likely to confuse the source of the products. Because the only difference in the marks that is likely to be noted or remembered is the last syllable, and because the last syllable in each mark relates directly to the product on which it is used, consumers are likely to view this difference as relating only to the product, and assume that both products emanate from the same source. In saying this, we are aware that the "e" and "i" differ in the marks' second syllables, but for the reasons stated above, we think that this difference is unlikely to be noted or remembered. Under actual marketing conditions consumers do not have the luxury to make side-by-side comparisons between marks, and instead they must rely on hazy past recollections. **Dassler KG v. Roller Derby Skate Corporation**, 206 USPQ 255 (TTAB 1980).

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if used in a mark for a laxative product, have a suggestive significance for such product.

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Accordingly, although we accept applicant's contention that applicant's and the registrant's products are not impulse purchases but will be bought with care, by sophisticated purchasers, for the reasons stated above we find that such purchasers are likely to be confused as to the source of such products by the use of the similar marks CARMELYX and CARMILAX. In reaching this conclusion we also note that there is no evidence of any third-party use or third-party registrations for other "CARM" marks which would limit the strength of the registrant's mark, a mark which, we note, has been registered for 37 years.

Decision: The refusal of registration is affirmed.