

**THIS OPINION
IS NOT A PRECEDENT OF
THE TTAB**

Mailed: January 17, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Matthew W. Fitzgerald

Serial No. 77812771

Adam J. Bruno of Bay State IP, LLC for applicant.

Andrew C. Leaser, Trademark Examining Attorney, Law Office 112
(Angela Bishop Wilson, Managing Attorney).

Before Grendel, Mermelstein, and Shaw, Administrative Trademark
Judges.

Opinion by Shaw, Administrative Trademark Judge:

Matthew W. Fitzgerald has filed an application to register the mark shown below, MANN ORCHARDS with an "orchard store front and orchard trees" design, on the Principal Register for pies, bread and pastries, in International Class 30, and raw fruits, in International Class 31.¹ Applicant has disclaimed the exclusive right to use "orchards" apart from the mark as shown.

¹ Application Serial No. 77812771, filed August 26, 2009, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging bona fide intent to use the mark in commerce.



Registration has been finally refused pursuant to Trademark Act § 2(d), 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles the mark MANN, in the stylized form shown below, for fresh vegetables, in International Class 31, as to be likely to cause confusion.²

MANN

When the refusal was made final, applicant appealed and filed a request for reconsideration which was denied by the examining attorney. Applicant and the examining attorney both filed briefs and the applicant filed a reply brief.

Likelihood of Confusion

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, 567 (CCPA 1973). *See also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73

² Registration No. 987992, issued on July 9, 1974 and alleging a date of first use in commerce as early as 1939. Renewed.

USPQ2d 1689, 1692 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209, 1210 (TTAB 1999) and the cases cited therein.

A. The Similarity or Dissimilarity of the Marks in Their Entireties

With respect to the marks, we must compare the marks in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports*, 73 USPQ2d at 1691. The test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a

specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant's mark consists of an "orchard store front and orchard trees" design with the wording MANN ORCHARDS across the front of the store. The letter "O" in ORCHARDS appears in the outline of an apple and the term ORCHARD has been disclaimed. The mark appears in the colors red, black and white. The mark in the cited registration consists solely of the word MANN in a block letter typeface.

Applicant argues that the design elements in its mark "create a different overall commercial impression to the relevant public" when compared to the registered mark. Br. at 6. Applicant admits that the term MANN exists within its mark, but counters that "the dominant feature of [its] mark comprises the orchard store front and orchard trees, which are greatly enhanced by the additional literal term orchards." *Id.* Thus, the addition of these design elements, modeled after applicant's place of business, would lead a consumer to "expect to purchase apples, and apple pies from the place depicted in the image." Br. at 7. That is, applicant contends that the addition of the design and the term ORCHARDS removes any likelihood of confusion because it "affords applicant's mark clear source identification and distinctive goods." *Id.*

We disagree.

The mark in the cited registration, MANN, is incorporated in full in applicant's mark. Moreover, the term MANN in both marks has the look and feel of a surname. As such, the commercial impression created by both marks suggests an enterprise or grower named after an individual or family with the name "Mann." Consumers encountering registrant's MANN mark may view it as a simpler version of the longer MANN ORCHARDS and design mark and mistakenly think the goods come from the same source. *See In Re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (ML is likely to be perceived as a shortened version of ML MARK LEES.).

Applicant argues that there is no general rule as to whether letters or design will dominate in composite marks. Citing *In re Electrolyte Laboratories Inc.*, 929 F.2d 645, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990). We agree that no part of mark can be ignored and, further, that in some cases designs have a significant impact on the overall commercial impression of the mark. Nevertheless, both the CCPA and the Federal Circuit have said that the words often are the crucial feature of a composite mark. *See CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) ("[I]n a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed." (citing *W.B. Roddenbery Co. v. Kalich*, 158 F.2d 289, 72 USPQ 138, 139-40 (CCPA 1946))); *Rice-Stix Dry Goods Co. v. Indus. Undergarment Corp.*, 152

F.2d 1011, 68 USPQ 186, 187 (CCPA 1946))). Moreover, the words are likely to be remembered by potential purchasers of applicant's goods, as they would be used to call for or request the applicant's goods. *In re Appetito Provisions Co., Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987) ("[I]f one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services.").

In this case, we find that MANN ORCHARDS is the dominant feature of applicant's mark. The presence of the "orchard store front and orchard trees" design in applicant's mark is less dominant because it tends to reinforce the descriptive connotation of the term ORCHARD and does little to create a commercial impression different from registrant's stylized word mark. Thus, although applicant's mark includes a design and the word ORCHARD, when we compare the marks in their entireties we find that on the whole they are similar in commercial impression and that the design in applicant's mark is not sufficient to distinguish the marks.

B. The Similarity or Dissimilarity and Nature of the Goods

With respect to the goods, applicant is seeking to register its mark for "pies, bread and pastries" and "raw fruits." The registered mark covers "fresh vegetables." As a general rule, is not necessary that the respective goods be competitive, or even that they move in the same channels of trade to support a holding

of likelihood of confusion. It is sufficient that the respective goods 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 originated from the same producer. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

The examining attorney made of record ten use-based, registrations owned by third parties demonstrating that raw fruits and fresh vegetables often emanate from the same source. The following examples are illustrative:

Registration No. 2859764, CALIFORNIA'S LARGEST LEGAL HERB FARM, for, *inter alia*, "fresh vegetables" and "raw fruits."

Registration No. 3226518, HAND-PICKED RIPE ON MAUI, for, *inter alia*, "raw fruits" and "fresh vegetables."

Registration No. 3544125, "thumbs-up" design, for, *inter alia*, "raw fruits" and "fresh vegetables."

Registration No. 3481665, TRIANA, for *inter alia*, "fresh vegetables" and "raw fruits."

Registration No. 3529469, C.H. BELT & ASSOCIATES, for *inter alia*, "fresh vegetables" and "raw fruits."

Registration No. 3720007, OUR WORLD, for *inter alia*, "fresh vegetables" and "raw fruits."

Registration No. 3148716, MALENA BRAND, for *inter alia*, "fresh vegetables" and "raw fruits."

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, 1786 (TTAB 1993). In this case, the evidence of record supports a finding that the same marks are often used to identify both raw fruits and fresh vegetables.

The examining attorney also included printouts from a number of internet websites showing that fruits and vegetables are routinely sold alongside baked goods such as applicant's pies, breads and pastries. The following examples are illustrative:

www.melickstownfarm.com - "We grow it ourselves. For nearly 300 years, the Melick family has provided our community with delicious, locally grown, farm fresh **fruits** and **vegetables**! We also sell plants, shrubs, jams and jellies, **baked goods**." (Emphasis added).

www.paulusfarmmarket.com - "Paulus Farm Market is a fun venture for the whole family, with **fruits**, **vegetables**, deli, farm raised beef, **baked goods**, mixes, candies, plants, planters and much more." (Emphasis added).

http://www.rockvillemd.gov/events/farmers.htm - "Every week the Farmers' Market transforms itself as different fruits and vegetables become available throughout the season. Your pick of farm-fresh **fruits** and **vegetables**, bedding plants, cut flowers, preserves, honey herbs, **baked goods**, and more." (Emphasis added).

http://sakumamarket.com - "We farm 1500 acres of **fruit**, growing many varieties so that you have fresh strawberries, **fruit**, and **vegetables** all summer long" and "Our newest addition is the Sakuma Market **Bakery**." (Emphasis added).

www.bfmazzeo.com - "Today, B.F. Mazzeo's has expanded from fresh **fruits** and **vegetables** to prepared foods, fresh **baked goods**, party trays, gourmet cheeses and groceries." (Emphasis added).

http://www.peacefulvalleyorchards.com/ - "Our farm market is always stocked with fresh **fruits** and **vegetables** ... Don't miss out on our delicious **fresh baked pies**!" (Emphasis added).

These websites show that fresh vegetables are often sold alongside freshly baked goods, especially at local farm markets. Thus, consumers seeking freshly grown fruits and vegetables and

freshly prepared baked goods may often purchase these goods from the same source. Based on all of the evidence, we find all of applicant's goods to be closely related to registrant's goods.

C. Channels of Trade

Applicant argues that its goods travel in channels of trade different from those of the registrant's goods and therefore it is unlikely the goods bearing the marks would be encountered by the same consumers. Reply Br. at 7. In particular, applicant alleges that its "fruits and vegetables, grown and harvested on site, and freshly baked goods, are all sold directly at applicant's orchard (which constitutes the predominant portion of the mark)." *Id.* at 6. Conversely, registrant is alleged to be a wholesaler whose business is "packaging and distributing vegetables, grown by others, to locations in bulk quantities." *Id.* Applicant's argument ignores the fact that there is no limitation regarding channels of trade in either applicant's or registrant's identification of goods.

In an *ex parte* appeal, likelihood of confusion is determined on the basis of the goods as they are identified in the application and the cited registration. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976). See also *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application

regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed").

Because there are no limitations as to channels of trade or classes of purchasers in either the application or the registration, it is presumed that the application and the registration encompass all of the goods of the type described in the description of goods, that the goods so identified move in all channels of trade normal for those goods, and that the products are available to all classes of purchasers for the listed products. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992). Based on the evidence demonstrating that these goods are frequently sold alongside each other, we find that applicant's and registrant's goods travel in the same channels of trade and are available to consumers seeking fresh food and fresh produce.

We conclude that in view of the substantial similarities between the marks, their contemporaneous use on the identified related goods is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The refusal under Section 2(d) of the Trademark Act is affirmed and registration to applicant is refused.