

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 76/026,184
Mark: FARM LIVING
Published in the Official Gazette on January 2, 2001

REIMAN PUBLICATIONS, LLC,

Opposer,

v.

Opposition No. 91/150,075

FARM LIVING, INC.,

Applicant.

12-08-2003

U.S. Patent & TMOic/TM Mail Rcpt Dt. #22

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ARGUMENT

**THERE IS A LIKELIHOOD OF CONFUSION BETWEEN OPPOSER’S MARK AS
USED IN MAGAZINES AND APPLICANT’S MARK AS DESCRIBED IN ITS
APPLICATION FOR REGISTRATION.**

**A. The Du Pont factors Control this Case, Not General Mills, Inc. v. Health
Valley Foods.**

The case of General Mills, Inc. v. Health Valley Foods, 24 U.S.P.Q.2d 1270 (TTAB
1992), upon which Applicant so heavily relies, does not support the allowance of Farm Living’s
application. Rather, an analysis of General Mills, in light of the Du Pont factors, proves that the
Opposer’s mark and the Applicant’s mark are in fact confusingly similar and that this Opposition
should be sustained. See In re E.I. du Pont de Nemours & Co., 476 F.2d 1357 (CCPA 1973)

B. The Marks Have a Similar Sound and Appearance.

In General Mills, the Board stated that the marks FIBER ONE and FIBER 7 FLAKES
had a different appearance because “not only are 1 and 7 different numbers, but an added
difference in this case is that opposer uses the word ONE whereas applicant uses the numeral 7.”
24 U.S.P.Q.2d at 1278. In contrast, the only non-disclaimed term (i.e., LIVING) in both
Opposer’s FARM & RANCH LIVING mark and Applicant’s FARM LIVING mark is identical.

Both Opposer's mark and Applicant's mark begin with the word "Farm" and end with the word "Living" with the only difference being one additional word in Opposer's mark, which does not eliminate the likelihood of confusion. See Marker Int'l v. deBruler, 635 F. Supp. 986, 999 (D. Utah 1986) ("Courts have repeatedly held that the confusion created by use of the same word as a primary element in a trademark is not counteracted by the addition of another term." Quoting Continental Connector Corp. v. Continental Specialties Corp., 492 F. Supp. 1088, 1095 (D. Conn. 1979)). It follows that, when taken as a whole, the marks have a very similar sound and appearance.

C. The Marks Have the Same Connotation and Commercial Impression.

In General Mills, the Board stated that the marks had a different connotation and commercial impression because the mark FIBER ONE suggests that the cereal bearing that mark is superior, whereas the mark FIBER 7 FLAKES suggests that there are seven types of grain or sources of fiber in the cereal bearing that mark. 24 U.S.P.Q.2d at 1278. In contrast, both Applicant's FARM LIVING mark and Opposer's FARM & RANCH LIVING mark used in connection with magazines suggest lifestyles on farms. The word "Ranch" in Opposer's mark does not alter its meaning, because "ranch" means essentially the same thing as a farm. The term RANCH is defined as (1) a large farm for raising horses, beef, cattle or sheep; or (2) a farm or area devoted to a particular specialty. See Merriam-Webster's Collegiate Dictionary, p. 964 (10th Ed. 2000).

D. The Marks are Used on Identical Goods.

Opposer's FARM LIVING mark is used in connection with magazines as well as books and calendars. (Deposition of Jeff Anderson, pp. 33-34, Question 10; Opposer's Exhibits 6, 9, 13-15.) The application at issue is for the use of FARM LIVING in connection with "Publications, namely a magazine featuring homes, barns, land fences, furnishings, gardening,

food, entertaining, decorating, arts antiques, architecture, real estate, travel, events, construction, and general lifestyle.” Opposer’s FARM & RANCH LIVING magazine contains articles about these same topics. (Anderson Dep. at pp. 17-20.) It follows that the goods are identical.

E. The Marks are Used in the Same Channels of Trade.

Applicant’s argument that the magazine it intends to publish under the mark FARM LIVING will be distributed in different channels of trade than Opposer’s FARM & RANCH LIVING MAGAZINE is meritless because this limited channel of trade does not appear in the application. (Applicant’s Brief at p. 10.) In support of its argument, it relies on the bizarre notion that Opposer occupies a “narrow and idiosyncratic channel of trade” because it does not accept third-party advertisements. (Applicant’s Brief at p. 10). Opposer does not cite any cases in support of this position, but instead makes the conclusory statement that since Opposer’s FARM & RANCH LIVING magazine does not promote itself to advertisers, there will be no likelihood of confusion with Applicant’s contemplated FARM LIVING magazine, which does use this “conventional” method of promoting its magazine. This argument assumes that Applicant’s proposed FARM LIVING magazine will carry third-party advertising. We explained in our initial brief that there is nothing in Applicant’s application limiting it to a particular format or channel of trade, and there is nothing that would prevent the mark from being used in exactly the same channels of trade as Opposer’s marks. See Interstate Brands Corp. v. McKee Foods Corp., 53 U.S.P.Q.2d 1910, 1912 (2000).

In fact, Opposer’s FARM & RANCH LIVING magazine is sold through two primary channels of trade, subscriptions and retail sales. (Anderson Dep. at p. 55.) That 4% of Opposer’s magazines are sold through retail outlets does not mean they occupy a different channel of trade than Applicant’s proposed magazine, a much higher percentage of which would presumably be sold in retail outlets. (Applicant’s Brief at p. 11.) Applicant also argues that it would “not likely

use the same direct mail lists as Opposer based on the different target demographics of the parties' magazines." (Applicant's Brief at p. 11.) But there is nothing in the record, however, that indicates that Applicant's proposed FARM LIVING magazine will be sold in any channels of trade other than subscriptions and retail outlets. More importantly, there is nothing in Applicant's application that would limit distribution of its proposed FARM LIVING magazine to certain channels of trade. It follows that this Du Pont factor supports a finding that the marks are confusingly similar.

F. Magazine Purchasers are Not Sophisticated Purchasers.

When products are relatively low-priced and subject to impulse buying, the likelihood of confusion is increased. See Recot, Inc. v. M.C. Becton, 214 F.3d 1322, 1329 (Fed. Cir. 2000). Magazines are relatively inexpensive, and newsstand purchases of magazines are often impulse purchases. See National Magazine Publ'g Co. v. New York Times Co., 31 U.S.P.Q.2d 1304, 1308 (N.D. Ohio 1994). This factor weighs in favor of a finding of likelihood of confusion.

G. Opposer's Mark is Well-known.

Opposer has been using its FARM & RANCH LIVING mark on magazines since 1978 and has sold millions of copies. Applicant's claim that there is no evidence whatsoever concerning Opposer's sales of FARM & RANCH LIVING magazine is entirely based on its meritless objection to Opposer's Exhibits 16-24 and the portions of the testimony of Jeff Anderson and Judith Wolf pertaining to the sales of goods in connection with the FARM & RANCH LIVING mark. Applicant's objections should be overruled.

First, Applicant did not properly object to Exhibit 16. In general, objections to the admissibility of evidence on substantive grounds (e.g., hearsay, witness competency, relevance, etc.) are not waived if not raised during the taking of testimony, unless the objection could have been removed if presented at the time. See 37 CFR § 2.123(k); TBMP § 718.04. Applicant did

not object to the admissibility of Exhibit 16 during the testimony of Jeff Anderson. In fact, Applicant posed several questions to Mr. Anderson related to the admissibility of Exhibit 16 under one or more hearsay exceptions of Fed. R. Evid. 803, but did not object to the Exhibit on hearsay grounds. (Anderson Dep. at pp. 46-47.) If Applicant had objected at the time, Opposer could have elicited further testimony from Jeff Anderson or Judith Wolf making it even clearer that Exhibit 16 is admissible under Fed. R. Evid. 803(6), the business records exception to the hearsay rule. It follows that Applicant's objection to Opposer's Exhibit 16 should be overruled and the evidence of magazine sales reflected in Opposer's Exhibit 16 should be considered by the Board as evidence of the strength of Opposer's FARM & RANCH LIVING mark.

Second, Opposer's Exhibits 17-24 fall within Fed. R. Evid. 803(6) and should be considered as evidence of the strength of Opposer's mark. Applicant objected to the admissibility of Exhibit 17 on hearsay grounds when it was offered into evidence during the deposition of Jeff Anderson. (Anderson Dep. at pp. 48-49.) Opposer eliminated any reasonable grounds for this objection, showing that it falls under Fed. R. Evid. 803(6), by taking the trial deposition of Judith Wolf, who prepared Opposer's Exhibit 17. (Deposition of Judith A. Wolf at p. 12.) During the deposition of Ms. Wolf, Opposer introduced into evidence Opposer's Exhibits 18-24 and elicited testimony from Ms. Wolf to show that she prepared Exhibit 17 by using the contents of Exhibits 18-24, and more importantly, that Exhibits 18-24 were prepared during the ordinary course of business and therefore fall under Fed. R. Evid. 803(6).

Applicant now objects to the admissibility of Opposer's Exhibit 17 – and the underlying data contained in Opposer's Exhibits 18-24 – by arguing that some of the data contained in Exhibits 17-24 were furnished by an outside vendor and that the data furnished by the outside vendor is supposedly hearsay. (Applicant's Brief at p. 19.) The case of TK-7 Corp. v. Estate of

Barbouti, 993 F.2d 722 (10th Cir. 1993), which Applicant cites for this argument, is not on point. In TK-7, the court held that the evidence in question was double hearsay because the information in the report was based on the opinions of individuals other than the person who prepared the document, and because there was no evidence that those individuals were acting in the course of regularly conducted business activity of the party offering the document. 992 F.2d at 729. The information contained in Exhibits 17-24, on the other hand, came from outside vendors who provided the information in the regular course of Opposer's business. According to the uncontroverted testimony of Ms. Wolf, the information that Opposer used to prepare Exhibits 17-24 came from CDS, an outside vendor. (Wolf Dep. at p. 6.) CDS handles orders and processes payments for Opposer for the sales of its magazines and transmits monthly reports of this activity to Opposer for use by its accounting department. (Wolf Dep. at p. 7.) Similarly, other information used by Ms. Wolf to prepare Opposer's Exhibit 17 came from a newsstand wholesaler, who provides monthly reports of this activity to Opposer for use by its accounting department. (Wolf Dep. at pp. 9-11.) Multiple hearsay is admissible if each level of out-of-court statement falls within the same exclusion to the hearsay rule. See Vazquez v. Lopez-Rosario, 134 F.3d 28, 34 (1st Cir. 1998).

The business records exception to the hearsay rule also applies to the information received by Opposer from third parties because that information also meets the requirements of Fed. R. Evid. 803(6). The hearsay exceptions found in Fed. R. Evid. 803 represent situations where judicial experience has shown that the evidence is reliable, even in second-hand form. See 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 803.02 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2001). In the case of the business records exception, this indication of reliability comes from the testimony of the custodian of the record or other

qualified witness who can explain the nature of the information and that it is regularly transmitted by a person with knowledge and regularly kept in the course of business. See Weinstein, supra at § 803.11[1]. There is no requirement that the record be prepared by the person who has custody of the documents and testifies about them. See U.S. v. Consolidated Edison Co., 580 F.2d 1122, 1131 n. 18 (2d Cir. 1978) (“There is no basis for limiting Rule 803(6)’s operation to introduction of one’s own business records.”). Rather, the central question of admissibility under Fed. R. Evid. 803(6) is whether the information is trustworthy. See Mississippi River Grain Elev., Inc. v. Bartlett & Co., Grain, 659 F.2d 1314, 1319 (5th Cir. 1981). Here, the information received by Opposer from third parties meets the indicia of trustworthiness of Fed. R. Evid. 803(6) because Opposer regularly received such information and relied on it to prepare its own business records, as proven without contravention by the testimony of Ms. Wolf. It follows that Exhibits 17-24 should be admitted into evidence and considered as evidence of the strength of Opposer’s mark. Furthermore, any substantive objection to evidence does not mean that the evidence should be stricken, simply that the objection should be considered by the Board in evaluating the probative value of the evidence. See TBMP § 718.03(c); Marshall Field & Co. v. Mrs. Fields Cookies, 25 U.S.P.Q.2d 1321 (TTAB 1992).

Opposer’s Exhibits 16-24 and the uncontroverted testimony of Jeff Anderson show that Opposer’s FARM & RANCH LIVING magazine has a circulation of 430,000 issues and that Opposer’s sales of FARM & RANCH LIVING in 2001 totaled \$4.5 million. (Opposer’s Exh. 16-17.) Opposer also sells books and calendars in connection with FARM & RANCH LIVING and engages in substantial advertising and promotion of its FARM & RANCH LIVING magazine. (Anderson Dep. at pp. 33-34; Opposer’s Exhibit 17.)¹ It follows the Opposer’s

¹ Applicant’s argument that Mr. Anderson’s testimony regarding sales of books and calendars should not be considered because he refers to “Iron Will,” “Old Iron,” and “Saddle Pals” is nonsensical. Even a cursory

FARM & RANCH LIVING mark is strong. This Du Pont factor weighs heavily in favor of a finding of a likelihood of confusion.

H. There are No Similar Marks on Similar Goods.

Applicant cites a number of existing publications with the term “Farm” in the title. (Applicant’s Brief at p. 4.) Applicant even cites four publications that contain the terms “Farm” and “Ranch.” (Applicant’s Brief at p. 4.) And Applicant cites a large number of publications with the term “Living” in the title. Yet, Applicant could not find, despite an exhaustive search, any existing publications with both “Farm” and “Living” in the title. (Deposition of Jack Thomason at pp. 30-34.)

The existence of a number of publications with “Farm” in the title, coupled with the existence of a number of other publications with “Living” in the title, does not prove that Opposer’s mark is in a crowded field, or that Opposer’s mark is weak. (Applicant’s Brief at p. 7.) Neither of the cases cited by Applicant are on point, because in both cases, the court found no likelihood of confusion where a single word in a number of marks meant that marks containing that word were entitled to only limited protection. For example, in General Mills, the court found the presence of number of cereals with the term “Fiber” in their name decreased the likelihood of confusion because consumers were accustomed to distinguishing among different FIBER marks. 24 U.S.P.Q2d at 1278. Similarly, in Columbia University v. Columbia/HCA Healthcare Corp., 964 F. Supp. 733 (S.D.N.Y. 1997), the court held that numerous third party uses of the name “Columbia” in the healthcare field have diluted the strength of the COLUMBIA mark. 964 F. Supp. at 744-45.

examination of the cover of samples of these items (Opposer’s Exhibits 13-15) show that they sold in connection with the FARM & RANCH LIVING mark. For example, “Old Iron” is referred to on its cover as “Farm & Ranch Living’s 2002 Calendar.” Similarly, “Iron Will” is subtitled “Memories of vintage tractors from the readers of *Farm & Ranch Living* magazine.”

These cases would be relevant if Opposer were attempting to prevent registration of a mark for magazines with only the word "Farm" in the title, or only the word "Living" in the title. But Opposer is seeking to prevent registration of a mark with both "Farm" and "Living" in the title. There are no existing publications with both of these words in the title. It follows that this factor weighs in favor of a finding of likelihood of confusion.

I. There Cannot be Any Actual Confusion Because Applicant's Mark is Not Yet in Use.

One of the Du Pont factors is evidence of actual confusion. There cannot be actual confusion here because Applicant has not yet used the mark. (Thomason Dep. at p. 44.) Yet Mr. Thomason, the principal of the Applicant, admitted in his deposition that there would likely be confusion between Opposer's mark and Applicant's mark if FARM LIVING were used on a magazine with the same content as Opposer's FARM & RANCH LIVING magazine. (Thomason Dep. at pp. 47-48.)² Applicant attempts to claim that Mr. Thomason did not, in fact, admit this during his deposition, but his unadorned testimony shows that there was no ambiguity: Mr. Thomason admitted that consumers would likely be confused if he or a subsequent owner used FARM LIVING on a magazine similar in content to FARM & RANCH LIVING:

Q: But [a magazine] could be made very similar if this new hypothetical company or owner of Farm Living Magazine decided to do so, correct?

A: They could do that, yes.

Q: And if they were to do that, and if they were to call their magazine Farm and Ranch – excuse me, Farm Living, would you agree there would be a strong likelihood that customers would be confused?

MR. NELLES: Objection.

² As discussed above, the relevant comparison is not between Opposer's magazine and what Applicant intends its magazine to be. Rather, the comparison is between Opposer's magazine and Applicant's application for registration. There is nothing the application that would prevent Applicant from producing a magazine identical in content to Opposer's FARM & RANCH LIVING magazine.

MR. CROSS: Your answer, sir?

A: If they were to mirror Farm & Ranch Living, then of course there is the potential for confusion.

(Thomason Dep. at pp. 47-48.)

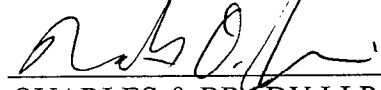
CONCLUSION

All doubt about whether confusion mistake or deception is likely is to be resolved against the junior user, especially when, as here, the senior user's mark is well-known among consumers. See Specialty Brands, Inc. v. Coffee Bean Distrib., Inc., 748 F.2d 669, 676 (Fed. Cir. 1984). Applicant's brief cites two reasons why the opposition should be dismissed. First, Applicant claims that there is no likelihood of confusion between Opposer's mark and Applicant's mark. Yet an analysis of the Du Pont factors makes it clear that there is a strong likelihood of confusion between Opposer's well-known mark and the mark described in Applicant's application for registration. Second, Applicant claims that Opposer's mark is not well-known because all of Opposer's evidence on this point is inadmissible double hearsay. Yet, all levels of the allegedly hearsay statements fall within the business records exception of Fed. R. Evid. 803(6).

For these reasons, it is respectfully submitted that the opposition to registration of FARM LIVING be sustained.

Dated this 4th day of December, 2003.

MARTA S. LEVINE
DAVID R. CROSS
NATHAN D. JAMISON



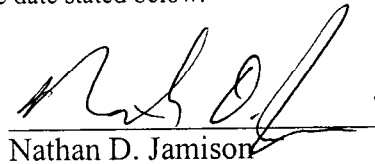
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CERTIFICATE OF SERVICE AND MAILING

I hereby certify that the original and two copies of this Opposer's Reply Brief are being deposited (with sufficient postage) with the United States Postal Service as first class mail in an envelope addressed to: BOX TTAB, NO FEE, Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3514, and a copy of this document is being deposited (with sufficient postage) with the United States Postal Service as first class mail in an envelope addressed to: Robert M. Schwartz, Esq., Ruden, McClosky, Smith, Schuster & Russell, P.A., 200 East Broward Boulevard, Fort Lauderdale, Florida 33301, all on the date stated below:

Date of signature and deposit: December 4, 2003



Nathan D. Jamison