

There being no evidence in this case which can be regarded as a safe guide, it remains for the Court to determine the question by consideration of the two words themselves, at the same time bearing in mind that the optical goods of plaintiffs and defendants are very similar in appearance.

The general rule is, that there can be no infringement unless the similarity is so close as to give rise to a reasonable probability of deception: *Bradbury v. Beeton*, 39 L. J. Ch. 57. This proposition involves the question, what degree of care and intelligence should be exercised by probable purchasers in order to guard against deception? . . .

[Reference to *Bradbury v. Beeton*, supra; *Adams on Trade Marks*, ed. of 1874, p. 107; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 Jur. 517; *Seixo v. Provezende*, L. R. 1 Ch. 196; *Browne on Trade Marks*, p. 387; *Partridge v. Mench*, 2 Sand. Ch. R. 622; *Payton v. Snelling*, 17 R. P. C. 57, [1901] A. C. 308.]

The test then, according to these authorities, is not whether persons of less than ordinary intelligence or exercising less than ordinary care, but whether ordinary purchasers, exercising ordinary care, are liable, because of the similarity of the two words, and also of the goods of plaintiffs and defendants, to purchase those of defendants when desiring to purchase those of plaintiffs. . . .

The words are certainly not the same. Are they substantially the same? I fail to see any resemblance between them. . . .

Not only must there be a likelihood of deception of ordinary purchasers, using ordinary care, but the persons must be those having some familiarity with a trade mark, for obviously a person wholly unacquainted with a trade mark cannot be deceived by a colourable imitation. . . .

In support of plaintiffs' contention it was urged that the words were similar in the following respects: 1. That they each begin and end with the same letters. 2. That they each contain the same number of letters. 3. That they are each hyphenated words. 4. That they each end with the letters "o" "n." 5. That the words are similar in appearance. 6. That the words are similar in sound.

As to the four first mentioned points, it seems to me sufficient to observe that similarity in detail is not the test.
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