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Paper No. 16
EJS

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Proven Winners North America, LLC

Serial No. 74/588,425

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

Robert J. Crowe, Trademark Examining Attorney, Law Office
101 (Jerry Price, Managing Attorney)

Before Simms, Seeherman and Quinn, Administrative Trademark
Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Proven Winners North America, LLC, assignee of an
application originally filed by a joint venture doing
business as Proven Winners, has appealed from the final
refusal of the Trademark Examining Attorney to register
BUTTERFLY as a trademark for "living plants, namely

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argeranthemums."¹ Registration has been refused pursuant to Section 2(d), 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark BUTTERFLY GARDEN, with the word GARDEN disclaimed, previously registered for "flower seeds,"² that, as used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

Applicant and the Examining Attorney have filed briefs. An oral hearing was not requested.

We affirm the refusal of registration.

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).

¹ Application Serial No. 74/588,425, filed October 7, 1994, and asserting first use and first use in commerce as of July 10, 1993.

² Registration No. 1,992,273, issued August 13, 1996.

Turning first to the goods, as we stated in **In re International Telephone and Telegraph Corp.**, 197 USPQ 910, 911 (TTAB 1978), 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 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.

Here, there is an obvious relationship between the flower seeds identified in the cited registration and living plants, namely argerantheums, which are identified in the application. The specimens show that applicant's argerantheums are daisies, and clearly live daisy plants are grown from seeds. Moreover, the Examining Attorney has made of record a significant number of third-party registrations which show that many different entities have registered their marks both for goods of the type listed in applicant's application and for goods of the type recited

in the registrant's registration.³ 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).

Despite this evidence, applicant argues that the companies which sell live plants are different from the companies which sell flower seeds, and that only a few large companies sell in both fields. The support for this position appears to be a statement in the declaration of John Rader, an operator of one of the companies which was part of the joint venture which filed the original application, that customers "recognize that seed companies and living plant vendors are different entities." However, we do not read Mr. Rader's declaration as stating that companies which produce living plants do not produce flower seeds, or that only large companies produce both. Moreover, the position asserted in applicant's brief would appear to be contradicted by the third-party registrations,

³ See, for example, Registration No. 2,157,033 for THE FLOWER FIELDS for "live flowers, live plants, live bulbs and seeds for agricultural purposes"; Registration No. 2,160,904 for MERRYGRO for, inter alia, live horticultural plants including flowering annuals, and flower seeds; and Registration No. 2,106,714 for PARK'S COUNTRYSIDE GARDENS for, inter alia, live plants and flower seeds.

which indicate that a number of entities are the source of both living plants and of seeds. There is no indication in the record that all of these entities are large companies.

Applicant also asserts that living plants and flower seeds are sold through different channels of trade. Again, however, the evidence of record which it has submitted belies this point. Mr. Rader's declaration acknowledges that there is an overlap between seeds and living plants at "some nurseries and home centers." Thus, although such goods may also be sold in separate channels of trade, there are at least two channels of trade in which both products are sold. And although the declaration asserts that customers come to nurseries and home centers "almost entirely" to buy living plants, clearly if these outlets also offer seeds, some customers also purchase seeds at these places of business.

Applicant, through Mr. Rader's declaration, also asserts that most purchasers of seeds or living plants "are relatively sophisticated about the products." Even if we accept Mr. Rader's assessment that "most" purchasers are sophisticated about the products, it is common knowledge that there are many homeowners who are weekend gardeners who grow gardens from seeds, and who may also plant living flowering plants in such gardens or buy such plants to

beautify the inside of their homes. There are even apartment dwellers who do such plantings in window boxes, and may also have living flowering plants in pots or baskets. In this connection, we note from applicant's specimens that its argeranthemum plants may be grown in baskets, beds, pots and window boxes. Thus, although some purchasers of flower seeds and living plants are avid gardeners who are sophisticated about these products, there are a significant number of more casual purchasers. These purchasers are not likely to, as Mr. Rader asserts, "recognize that seed companies and living plant vendors are different entities." Moreover, as noted above, applicant itself acknowledges that large companies sell in both fields.

Accordingly, we find that applicant's and the registrant's identified goods are closely related products which travel in some of the same channels of trade and are sold to the same classes of consumers, consumers which include the public at large.

With respect to the marks, applicant's mark is BUTTERFLY and the cited mark is BUTTERFLY GARDEN. Although we disagree with the Examining Attorney's assessment that BUTTERFLY is the dominant element of the registered mark and instead find that this is a unitary mark, there is no

doubt that the word BUTTERFLY, as the first word of the mark, is a noticeable element. Because of the prominent presence of this word, the marks as a whole are similar in appearance and pronunciation. Moreover, both marks convey similar connotations in that both suggest that the goods on which the marks are used attract butterflies.

The various excerpts from Internet websites submitted by applicant indicate that "butterfly garden" is a recognized term for flowers that attract butterflies. See, for example:

Grow a Butterfly Garden

Many butterflies and moths visit flowers for food. But each type of butterfly likes some plants more than others. You can plant flowers that will attract butterflies that live in your area. Daisies, phlox, petunias and lavender will bloom in May or Early June in many areas. If your garden doesn't bloom early enough, the plants can be taken home in pots for a summer activity.
Scholastic.com/magicS...mes/teacher/butterflies/garden

Staff Celebrates Butterfly Garden Opening

Staffers and friends of the Smithsonian's Horticulture Services Division who took a leading role in opening of the National Museum of Natural History's Butterfly Habitat Garden
Photo2.si.edu/bfly/bflybuild

Attract Butterflies to your own
backyard!

This simple and unique 8 page booklet contains everything you need to know about creating a successful butterfly garden. Included in the booklet is a butterfly seed mix that contains nectar and host plant seeds.

www.butterflyevents.com/book

Consumers, seeing each of the marks in the context of the goods, will understand that the registrant's flower seeds will produce flowers that attract butterflies, and that applicant's argeranthemum plants will do the same. In this connection, we note that the Scholastic website states that daisies are flowers that attract butterflies, and applicant's plant, according to the specimens, produces bright yellow daisies.

Applicant argues that the registered mark is entitled to a limited scope of protection because of the meaning of the term "butterfly garden." Although the evidence shows that BUTTERFLY GARDEN is a highly suggestive term for flower seeds, we think that the scope of protection to be accorded this mark, however limited, is still broad enough to prevent the registration of the similar mark BUTTERFLY for closely related goods. We also point out that there is

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no evidence of record as to any third-party registrations of BUTTERFLY marks.⁴

Accordingly, we find that applicant's mark BUTTERFLY for living plants, namely, argeranthemums, is likely to cause confusion with BUTTERFLY GARDEN for flower seeds.

Decision: The refusal of registration is affirmed.

⁴ In fact, the only third-party BUTTERFLY mark reflected in this record, BUTTERFLY BOUQUET, was the subject of only an application, and that application was opposed by the owner of the cited registration. The opposition was sustained by the Board, and the application was abandoned.