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Paper No. 11
RLS/CCR

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Forrest Keeling Nursery, Inc.**

Serial No. 74/**682,940**

M. Lee Gerdelman of **Polster, Lieder, Woodruff & Lucchesi** for
Forrest Keeling Nursery, Inc.

Zhaleh Sybil Delaney, Trademark Examining Attorney, Law
Office 101 (**Christopher Wells, Acting** Managing Attorney)

Before **Simms**, Hohein and Walters, Administrative Trademark
Judges.

Opinion by **Simms**, Administrative Trademark Judge:

Forrest Keeling Nursery, Inc. (applicant), a Missouri
corporation, has appealed from the final refusal of the
Trademark Examining Attorney to register the mark shown
below



Serial No. 74/682,940

for live plants, trees and shrubs.¹ Pursuant to request of the Examining Attorney, applicant has disclaimed the words "root production method" apart from the mark as shown. Applicant has also indicated that the drawing is lined for the color yellow and that this color is a feature of its mark.

The Examining Attorney has refused registration under Section 2(d) of the Act, 15 USC §1052(d), on the basis of Registration No. 1,827,119, issued March 22, 1994, for the mark RPM for fertilizer for horticultural purposes. Briefs have been filed but no oral hearing has been requested.²

We affirm.

Applicant argues that the registered mark is "a decidedly weak mark" (Response, p. 3, filed June 27, 1996) because the letters RPM are the subject of eighty-seven marks in various classes with four in the same class as registrant's goods (Class 1) and four being in applicant's class (Class 31). Applicant argues that these letters are also not the dominant part of its own mark. With respect to the goods, applicant contends that the goods "are different even if somewhat related." Response, p. 5, filed June 27, 1996. Applicant also contends that its purchasers are

¹ Application Serial No. 74/682,940, filed June 1, 1995, claiming first use in commerce since June 1992.

² For its brief, applicant sought to rely upon its responses to various Office actions. On October 24, 1996, the Board accepted

sophisticated consumers such as landscape professionals, arborists, foresters and master gardeners.

The Examining Attorney, on the other hand, argues that the letters RPM are the dominant feature of applicant's mark. In this regard, the Examining Attorney also refers to a brochure submitted by applicant on June 27, 1996, wherein applicant repeatedly uses the superscript TM next to the letters RPM. With respect to the eighty-seven third-party registrations noted by applicant, the Examining Attorney states that applicant has not submitted any copies of those registrations in support of applicant's argument. Without submitting any copies herself, the Examining Attorney notes that some of these third-party registrations cover such diverse goods and services as animal feed and mortgage banking services. The Examining Attorney concludes that there is no evidence that the registered mark is a weak one in the gardening, landscaping or forestry fields.

With respect to the goods, the Examining Attorney contends that they are closely related products which are used together. In this regard, the Examining Attorney has attached various third-party registrations showing the same mark registered for both living plants on the one hand and fertilizers on the other. For example, the registered mark AMERICAN GARDEN is registered for fertilizers and live

applicant's request to do so as complying with Trademark Rule 2.142(b)(1).

plants, flowers, shrubs and trees. The Examining Attorney has also attached a photocopy of a Burpee Gardens catalog as well as telephone directory advertisements showing that the respective goods are offered by the same companies.

We agree with the Examining Attorney that applicant's mark so closely resembles the registered mark that confusion is likely. Comparing the marks in their entireties, it is not improper to give lesser weight to disclaimed and descriptive matter. In this regard, we agree with the Examining Attorney that the letters RPM in applicant's mark are significant in creating the commercial impression engendered by applicant's mark. The letters are the most prominent literal portion of applicant's mark.

With respect to the goods, we believe that the Examining Attorney has satisfactorily demonstrated that fertilizer and live plants, trees and shrubs are related goods which may come from the same source. As the Examining Attorney has noted, the goods of applicant and registrant need not be identical. They need only be related in some manner, or the conditions surrounding their marketing be such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from the same source. Also, without any restriction in the respective descriptions of goods, we can give no weight to applicant's argument

Serial No. 74/682,940

concerning the sophisticated nature of its purchasers. We must assume that these goods are sold to average purchasers for these goods, including the general public. Consumers familiar with registrant's RPM fertilizer who then encounter applicant's mark used in connection with live plants, trees and shrubs are, we believe, likely to think that these products come from the same source.

Decision: The refusal of registration is affirmed.

R. L. Simms

G. D. Hohein

C. E. Walters
Administrative Trademark
Judges, Trademark Trial
and Appeal Board