

7/6/01

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T T A R**

Paper No. 16
PNS/RS

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Profile Products LLC

Serial No. 75/464,982

Maria Franek Angileri of Brooks & Kushman, PC for Profile Products LLC.

Darryl M. Spruill, Trademark Examining Attorney, Law Office 101 (Jerry Price, Managing Attorney).

Before Simms, Hohein and Holtzman, Administrative Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Profile Products LLC (applicant), a Delaware corporation, has appealed from the final refusal of the Trademark Examining Attorney to register the mark PROFILE for natural, non-chemical soil conditioners for use by home gardeners to improve water and oxygen retention in the soil.¹ The Examining Attorney has refused registration under Section 2(d) of the Act, 15 U.S.C. §1052(d), on the

¹ Application Serial No. 75/464,982, filed April 9, 1998, based upon allegations of use and use in commerce since January 1995.

basis of Reg. No. 1,781,991, issued July 13, 1993 (Section 8 affidavit accepted) for the mark PROFILE for chemicals used in agriculture, horticulture and forestry; namely, a tree growth regulator. Applicant and the Examining Attorney have submitted briefs but no oral hearing was requested.

We affirm.

Noting that the respective marks are identical, the Examining Attorney contends that applicant's soil conditioners and registrant's chemicals in the nature of tree growth regulators are closely related goods sold in the same channels of trade to the same classes of purchasers. In this regard, the Examining Attorney notes that there are no restrictions concerning the trade channels or classes of purchasers of the respective goods (except that registrant's goods are sold in the fields of agriculture, horticulture and forestry).² It is the Examining Attorney's position that all these goods may be sold in such places as nurseries, home and garden centers, and through catalogs. The Examining Attorney has also made of record use-based third-party registrations covering soil

² The Examining Attorney notes the following definition of "horticulture" from The America Heritage Dictionary of the English Language (3rd ed.); "The science or art of cultivating fruits, vegetables, flowers, or ornamental plants; the cultivation of a garden."

conditioners, soil amendments and chemicals for horticultural and agricultural use, arguing that such registrations suggest that the goods of applicant and registrant may emanate from a single source. The Examining Attorney contends that whether the product conditions the soil to increase plant and tree growth or whether it tends to limit it, these goods are related and are sold in the same channels of trade to the same classes of purchasers.

Applicant, on the other hand, argues that its soil conditioners and registrant's tree growth regulators are not competitive products and are sold for different purposes. In this regard, applicant has made of record material apparently obtained from registrant's Web site indicating that registrant's chemicals are used to regulate tree growth to reduce terminal growth and pruning.

Applicant also argues that these goods will be sold in different channels of trade, registrant's goods to utility, highway, railroad and forestry industries for the purpose of vegetation management, whereas applicant's goods are sold in lawn and garden centers and in the landscaping, golf course and athletic field maintenance industries. Applicant also notes, from registrant's material, that registrant's goods apparently require the use of expensive

specialized equipment for the application of the tree growth regulator.³

Our determination under Section 2(d) is based on an analysis of all the probative facts in evidence that are relevant to the factors bearing on the likelihood-of-confusion issue. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion presented by the case, key considerations are the identity of the marks, the related nature of the goods and the similar classes of consumers for these goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F2d 1098, 192 USPQ 24, 29 (CCPA 1976).

As the Examining Attorney has noted, where the respective marks are identical, the relationship between the goods or services need not be as close to support a finding of likelihood of confusion as might apply where there are greater differences between the marks. *In re Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). Also, if there is no limitation as to the nature of the goods, the channels of trade or classes of purchasers of those goods, we may presume that the goods are of all types described in the application and

³ In response to this argument, the Examining Attorney notes, also from registrant's material, that registrant's tree growth

registration and move in all normal channels of trade and are available to all potential purchasers of those goods or services. *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987) and *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Also, as the Examining Attorney has pointed out, the goods of applicant and registrant need not be identical or directly competitive in order to find a likelihood of confusion. They need only be related in such a 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 a common source. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984) and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

While it is true that applicant's soil conditioners and registrant's tree growth regulators are different products apparently sold for different purposes, these goods may be sold in the same channels of trade (such as lawn and garden centers, home centers, nurseries, etc.) to the same class of purchasers (home gardeners). We also observe that these goods, sold under identical marks, are

regulators can be inexpensively applied by the use of trowels.

Ser. No. 75/464,982

not likely to be expensive items. This factor, too, tends to increase the likelihood of confusion.

In sum, we find that purchasers, aware of registrant's PROFILE tree growth regulator, who then encounter applicant's PROFILE soil conditioners, are likely to believe that these products come from the same source.

Decision: The refusal of registration is affirmed.