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Paper No. 18
EWH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Garden Way Incorporated

Serial No. 75/611,089

David P. Miranda for Garden Way Incorporated.

Linda E. Blohm, Trademark Examining Attorney, Law Office
110 (Chris A. F. Pedersen, Managing Attorney).

Before Simms, Hanak and Rogers, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Garden Way Incorporated of Troy, New York
(applicant) seeks to register TROY-BILT BRONCO in typed
drawing form for "rototillers." The intent-to-use
application was filed on December 22, 1998.

Citing Section 2(d) of the Trademark Act, the
Examining Attorney refused registration on the basis that
applicant's mark, as applied to rototillers, is likely to
cause confusion with the mark BRONCO, previously
registered in typed drawing form for "fertilizer
spreaders." Registration No. 1,365,249 issued October

15, 1985.

When the refusal to register was made final,
applicant

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appealed to this Board. Applicant and the Examining
Attorney filed briefs. Applicant did not request a
hearing.

In any likelihood of confusion analysis two key,
although not exclusive, considerations are the
similarities of the goods and the similarities of the
marks. Federated Foods, Inc. v. Fort Howard Paper Co.,
544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The
fundamental inquiry mandated by Section 2(d) goes to the
cumulative effect of differences in the essential
characteristics of the goods and differences in the
marks.").

Considering first the goods, applicant, while
arguing that rototillers and fertilizer spreaders are
separate products, nevertheless acknowledges at page 2 of
its brief that both products are "in the field of
garden/lawn maintenance products." Moreover, at page 3
of its reply brief applicant concedes the contention of
the Examining Attorney that both rototillers and

fertilizer spreaders function to "contribute to the success of plant growth." In this regard, applicant acknowledges at page 6 of its brief that "a rototiller is used for loosening the soil and destroying weeds" and that "a fertilizer spreader is used for scattering fertilizer or seed."

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Thus, while the goods of applicant and registrant are by no means identical, they are clearly complementary. In the spring, an ordinary homeowner could use a rototiller to loosen the soil and destroy the weeds in his garden, and then later use a fertilizer spreader for scattering desirable seeds and fertilizer. Moreover, many ordinary home gardeners, unlike professional farmers, are not particularly sophisticated when it comes to purchasing the various items of equipment that they will use to maintain their gardens.

In short, we find that rototillers and fertilizer spreaders are clearly complementary products which are purchased by ordinary home gardeners who, in many cases, are not particularly sophisticated.

Turning to a consideration of the marks, it is

important to keep in mind that applicant seeks to register its mark TROY-BILT BRONCO in typed drawing form. This is a critical factor because it "means that [applicant's] application is not limited to the mark depicted in any special form." Phillips Petroleum Co. v. C. J. Webb, Inc., 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971). Hence, in our likelihood of confusion analysis, we must "visualize what

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other forms [applicant's] mark might appear in." Phillips Petroleum, 170 USPQ at 36. Stated somewhat differently, in our likelihood of confusion analysis we must consider all reasonable manners in which applicant's mark could be depicted. INB National Bank v. Metrohost, Inc., 22 USPQ2d 1585, 1588 (TTAB 1992).

One reasonable manner of presentation of applicant's mark would be to depict the TROY-BILT portion of the mark on one line in slightly smaller lettering and the BRONCO portion on a second line in slightly larger lettering. When so depicted, applicant's mark would be very similar to the registered mark BRONCO per se. Consumers viewing applicant's mark depicted in the foregoing manner could

easily assume that the brand name of applicant's rototiller was simply BRONCO, and that the words TROY-BILT depicted in smaller lettering merely indicated that the rototiller was build in Troy, New York (which is indeed applicant's place of business) or by a company named Troy.

In conclusion, given the fact that rototillers and fertilizer spreaders are complementary garden products which can be purchased by ordinary, unsophisticated home gardeners and the fact that applicant, who is seeking to register its

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mark in typed drawing form, would be free to emphasize the BRONCO portion of its mark, we find that the contemporaneous use of applicant's mark TROY-BILT BRONCO and registrant's mark BRONCO on their respective goods is likely to cause confusion.

Two final comments are in order. First, in response to the first Office Action, applicant voluntarily disclaimed the exclusive right to use BRONCO. At pages 4 and 5 of its brief, applicant then makes the following argument: "Applicant respectfully contends that the use

of a disclaimer is significant as it disavows any exclusive right to the use of a specified word ... Where the proposed mark consists of two words, one of which is disclaimed, the word not disclaimed is generally regarded as the dominant or critical term of the proposed mark." Applicant's logic is fatally flawed. The rule that a disclaimed word is generally less dominant than a non-disclaimed word applies only when the disclaimed word is descriptive or generic. In this case, the word BRONCO is not even suggestive of rototillers or fertilizer spreaders, much less is it descriptive of or generic for rototillers or fertilizer spreaders. Following applicant's logic, applicant would be

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entitled to register TROY-BILT TORO or TROY-BILT LAWN BOY, simply by disclaiming TORO and LAWN BOY.

Second, applicant attached for the first time to its brief what purports to be a list of federal registrations and applications of marks consisting of or containing the word BRONCO. In her brief, the Examining Attorney quite properly objected to this "evidence" inasmuch as it was not made of record during the examination process. The

Examining Attorney's objection is well taken and we have not considered the material which applicant submitted for the first time with its brief. Moreover, even if we were to consider such material, it is absolutely worthless. First, this list does not indicate the goods or services of these other purported BRONCO applications and registrations. In other words, there is absolutely no indication that any of these other BRONCO applications and registrations are for goods that are even remotely related to garden and lawn care products.

Second, even if applicant had properly made of record actual copies of these purported third-party BRONCO registrations reflecting the goods or services, such third-party registrations by themselves would not support

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applicant's contention that BRONCO is a weak source identifier. See applicant's brief page 5 and reply brief page 3. This is because "in the absence of any evidence showing the extent of use of any of such marks or whether any of them are now in use, they [the third-party registrations] provide no basis for saying that the marks

so registered have had, or may have, any effect at all on the public mind so as to have a bearing on likelihood of confusion." Smith Bros. Mfg. Co. v. Stone Mfg. Co., 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973).

Decision: The refusal to register is affirmed.