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**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
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Paper No. 8
JQ

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **National Nursery Products, Inc.**

Serial No. 75/672,042

John E. Vanderburgh for applicant.

Inga Ervin, Trademark Examining Attorney, Law Office 111
(Craig Taylor, Managing Attorney).

Before Quinn, Chapman and Bucher, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by National Nursery Products,
Inc. to register the mark shown below

("NATIONAL NURSERY PRODUCTS" disclaimed) for "cooperative
advertising and marketing for others in the field of
horticultural products, promoting the services of the
horticultural industry through the distribution of printed

and audio promotional materials and by rendering sales promotional advice" (in International Class 35), and "horticultural services" (in International Class 42).¹

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when used in connection with applicant's services, so resembles the previously registered mark NATIONAL NURSERIES, LTD. ("NURSERIES" disclaimed) for "plants, namely, nursery stock including hanging baskets, aglaonemas, brassaia, codiaemum, dieffenbachia, dracaena, ficus, palms, spathiphyllum and yucca"² as to be likely to cause confusion.

When the refusal to register was made final, applicant appealed. Applicant and the Examining Attorney have filed briefs.³ An oral hearing was not requested.

The Examining Attorney maintains that the marks are dominated by virtually identical portions, "NATIONAL" and "NURSERY/NURSERIES," and that the design feature of

¹ Application Serial No. 75/672,042, filed March 29, 1999, alleging dates of first use of July 1, 1983. The application includes the following statement: "The lining shown in the drawing is not intended to indicate color."

² Registration No. 1,327,298, issued March 26, 1985 pursuant to Section 2(f); Section 8 affidavit filed and accepted.

³ The final refusal under Section 2(d) was based on two cited registrations. In her appeal brief, the Examining Attorney withdrew the refusal based on Registration No. 1,883,816. Accordingly, no consideration need be given thereto.

applicant's mark does not sufficiently distinguish it from registrant's mark. As to the goods and services, the Examining Attorney states that "[s]ince the identification of applicant's services is very broad, it is presumed that the application encompasses all goods and services of the type described, including those in the registrant's more specific identification, that they move in all normal channels of trade and that they are available for all potential customers." (brief, p. 5).

Applicant argues that the marks are dissimilar and that the portions common to both marks are weak. Applicant also contends that the goods and services are different and are offered to different classes of purchasers. More specifically, applicant points out that its services are rendered to garden centers and similar outlets to assist them in the distribution and sale of horticultural products, whereas registrant's plants are sold to retail customers. Applicant also asserts that its customers are "not impulse buyers but businessmen who carefully consider their purchases and who know the suppliers that they are dealing with." (brief, p. 11).

Before turning to the merits of the refusal, an evidentiary matter requires our attention. In connection with its argument that the cited registration is entitled

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to a narrow scope of protection, applicant submitted, for the first time with its appeal brief, a computer printout retrieved from the Office's TESS database showing listings of third-party registrations. The Examining Attorney's brief is completely silent on this submission.

The record in an application should be complete prior to the filing of an appeal, and the Board will ordinarily not consider additional evidence filed with the Board after the appeal is filed. Trademark Rule 2.142(d).

Nonetheless, evidence submitted after appeal may be considered by the Board, despite its untimeliness, if the nonoffering party (1) does not object to the new evidence, and (2) discusses the new evidence or otherwise affirmatively treats it as being of record. *TBMP* §1207.03 and cases cited thereat. In the present case, as indicated above, the Examining Attorney made no reference to applicant's submission. Accordingly, the evidence attached to applicant's appeal brief does not form part of the record on appeal and has not been considered in making our

decision.⁴

We now turn to the issue on appeal. Our determination under Section 2(d) is based on an analysis of all of the 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 any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

With respect to the marks NATIONAL NURSERY PRODUCTS and design and NATIONAL NURSERIES, LTD., there are obvious similarities between the marks in sound and meaning. The first words in the marks are identical, followed by singular/plural versions of the same word. Although the marks include the terms "PRODUCTS" and "LTD.," these

⁴ We hasten to add that, even if considered, the printout submitted by applicant would be entitled to little probative weight. The problem is that the printout merely lists the registrations with no reference to the particular goods and/or services identified in the registrations. Thus, in many cases, it is not known whether the registrations cover goods and/or services in the horticultural field; in point of fact, some of the registrations (e.g., "NATIONAL SPORTS MARKETING, INC.") would appear to be registered for goods and/or services entirely unrelated to those involved in this appeal. In order to have made any of the listed registrations of record, it was necessary for applicant to submit a printout of the registration itself that was retrieved from the TESS database.

generic designations hardly serve to distinguish the marks in any meaningful way. Clearly, the literal portions of the marks are dominated by the virtually identical terms, NATIONAL NURSERY and NATIONAL NURSERIES, and the terms convey virtually identical meanings. See: In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)[“there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on a consideration of the marks in their entireties...”]. Although applicant urges that the registered mark is entitled to a narrow scope of protection, we find, based on the record before us, that this scope extends to protection against applicant’s mark.

In comparing the marks in terms of appearance, we have considered the design portion of applicant’s mark. The plant design reinforces the “NURSERY” portion of the mark. We have considered the design portion in our comparison of the marks, but we find that it is subordinate to the words “NATIONAL NURSERY PRODUCTS.” The literal word portion will be used to call for the services and will be the portion most likely to be remembered by purchasers. See: In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987).

In sum, the marks, when considered in their entirety, engender similar overall commercial impressions. It is the general overall commercial impressions engendered by the marks that must determine, due to the fallibility of memory and the consequent lack of perfect recall, whether confusion as to source or sponsorship is likely.

Insofar as the goods and services are concerned, we start with the premise that it is not necessary that the goods and services be identical or even competitive in nature in order to support a finding of likelihood of confusion. It is sufficient that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that would give rise, because of the marks used in connection therewith, to the mistaken belief that the goods and services originate from or are in some way associated with the same source. In re International Telephone and Telegraph Corp., 197 USPQ 910 (TTAB 1978). Further, the issue of likelihood of confusion must be determined on the basis of the goods and services as they are set forth in the involved registration and application. See, e.g., Canadian Imperial Bank of Commerce v. Wells

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Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); and In re Elbaum, 211 USPQ 639 (TTAB 1981).

When the goods and services are compared within the legal constraints cited above, we find that they are sufficiently related such that, when offered under similar marks, confusion is likely to occur. Applicant would have us conclude that its services are rendered only to garden outlets whereas registrant's goods are purchased by the general public. Although this may be true, there are no limitations as to trade channels and purchasers in either the application or the cited registration. The specific nature of some of applicant's services (e.g., cooperative advertising and marketing, and rendering sales promotional advice), as worded in the recitation thereof, may indicate that the services are directed to garden outlets. However, the identified plants in the cited registration must be assumed to move through all the normal channels of trade for such goods, and would be offered to all types of purchasers. *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1788 (Fed. Cir. 1990). In the present case, we must assume that registrant's plants are sold to garden dealers, shops and the like, that is, the same classes of purchasers to which applicant's services are offered.

We further note that applicant, in its specimen of record, states that, among other things, it is "dedicated to supplying the finest nursery stock available," that it takes orders for plants, including custom-grown varieties, and delivers the plants to its customers, and that it will provide plant care seminars for employees of its customers. Such activities emanating from applicant suggest that the services recited in the application are closely related to plants and the sale thereof.

We acknowledge applicant's point that garden shops and similar retail outlets are run by businessmen who are likely to be experienced and sophisticated in the horticultural trade. Although this is a factor that weighs in applicant's favor, it is outweighed by the highly similar marks and related goods and services. Given the similarities discussed above, even the sophistication of purchasers will not ensure against the likelihood of confusion.

Lastly, to the extent that any of the points argued by applicant cast doubt on our ultimate conclusion on the issue of likelihood of confusion, we resolve that doubt, as we must, in favor of the prior registrant. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed.

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Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*,
748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.