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HRW

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB 5/15/00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Industrial Design & Mfg., Inc.

Serial No. 75/197,291

C. Frederick Koenig III of Volpe and Koenig, P.C.
for applicant.

Won T. Oh, Trademark Examining Attorney, Law Office 104
(Sidney Moskowitz, Managing Attorney).

Before Hanak, Wendel and Bottorff, Administrative Trademark
Judges.

Opinion by Wendel, Administrative Trademark Judge:

Industrial Design & Mfg. & Inc. has filed an
application to register the mark PRO-LINE DECK EQUIPMENT
and design, as depicted below, for "swimming pool deck
equipment made primarily of metal for commercial and
institutional pool complexes, namely, starting platforms
and anchors, lifeguard stands and anchors, diving board

stands and anchors, ladders, pool steps, and pool railings."¹

Registration has been finally refused under Section 2(d) of the Trademark Act on the ground of likelihood of confusion with the mark PROLINE and design, as shown below,

which has been registered for the following goods:

- Class 8: Leaf rakes and hand operated swimming pool debris skimmers;
- Class 9: Swimming pool water temperature thermometers;
- Class 11: Chlorine dispensing units for use in a swimming pool;
Swimming pool water cleaning and filtering units sold in combination for swimming pools;
Swimming pool lights; and
Decorative swimming pool fountains;
- Class 17: Synthetic resin hose for swimming pool pumps and vacuums;
- Class 21: Hand operated cleaning brushes for swimming pools; and
- Class 22: Portable leaf collecting nets.²

¹ Serial No. 75/197,291, filed November 13, 1996, claiming a first use date of September 16, 1996 and a first use in commerce date of September 30, 1996. A disclaimer has been made of the words DECK EQUIPMENT.

² Registration No. 1.864,126, issued November 22, 1994. The mark is lined for the colors blue and violet but the stippling is for shading purposes only.

Applicant and the Examining Attorney have filed briefs and both participated in an oral hearing.

We make our determination of likelihood of confusion on the basis of those of the du Pont factors³ which are relevant under the present circumstances. Two key considerations in our analysis, although not the only factors which are relevant here, are the similarity or dissimilarity of the respective marks and the similarity or dissimilarity of the goods with which the marks are being used. See *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1991) and the cases cited therein.

We look first to the marks of applicant and registrant. The Examining Attorney maintains that the dominant feature of both marks is the wording PRO-LINE. (The tail of the dolphin is considered by the Examining Attorney to operate as a hyphen). He takes the position that the generic wording DECK EQUIPMENT in applicant's mark plays an insignificant part in the overall commercial impression created by the mark and that the design element is not only smaller in size and thus secondary to the wording but also does little to alter the overall commercial impression. He also argues that the wording,

³ *In re E.I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

rather than the design, must be accorded more weight, because it is the literal portion of the mark which purchasers would use in calling for the goods. For the same reasons, he argues that the dolphin design in registrant's mark has little significance in the overall commercial impression created by the mark.

Applicant strongly disagrees with the Examining Attorney's evaluation of the marks, arguing that the design elements are the dominant features of the respective marks. Applicant points out that the designs and stylization of the marks are clearly distinct from one another and argues that applicant's diver, diving board/guard stand and pool water design creates a strong association with the DECK EQUIPMENT aspect of applicant's mark, while the dolphin character of registrant's mark is designed "to attract the residential customer." [Herrick declaration, par. 10]. Applicant maintains that these prominent design features create different commercial impressions for the marks as a whole, whereas the common word element PRO-LINE is a relatively weak portion of the marks, being suggestive of a "professional" product line. In addition, applicant argues that since most of the swimming pool supply business for commercial or institutional customers is done through

catalogs and brochures, the visual impression of the marks is more significant than the aural impression.

While it is true that marks must be considered in their entireties in determining likelihood of confusion, it is also well established that there is nothing improper in giving more or less weight to a particular portion of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Although disclaimed matter cannot be ignored, the fact remains that purchasers are more likely to rely on the non-descriptive portions of the mark as the indication of source. This is especially true when the disclaimed matter has been relegated to subordinate status in the mark. See *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993). Design elements are also of lesser import, because it is the word portion of a mark, rather than any design feature, unless highly distinctive, which is more likely to be remembered and relied upon by purchasers in calling for the goods. See *Ceccato v. Manifattura Lane Gaetano Marzotto & Fugli S.p.A.*, 32 USPQ2d 1192 (TTAB 1994); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

Looking to the marks at issue, we find the predominant feature in each to be the wording PRO-LINE or PROLINE, if

nothing else than on the basis of proportionate size.

(Although we believe the Examining Attorney's viewing of the dolphin's tail as a hyphen to be somewhat strained, we see no significant difference between the wording PRO-LINE and PROLINE, visually, aurally, or connotatively). The descriptive phrase DECK EQUIPMENT in applicant's mark is not only significantly smaller in size but also merely names the goods with which the mark is being used. The design features of applicant's mark also serve a descriptive function, presenting an illustration of the type of goods sold by applicant. Cf. *In re Appetito Provisions Co.*, *supra* [sandwich design merely descriptive of food sold in registrant's restaurant]. Even if prospective purchasers come into contact visually with applicant's mark in catalogs and brochures, we are convinced that the term PRO-LINE would be that portion of the mark which would be most likely to be viewed as the indication of source of the deck equipment items and which would be used in ordering or referring to the goods.

The same holds true for registrant's mark. Here the term PROLINE clearly outweighs the dolphin design, both in size and significance. Regardless of the reason behind the incorporation of the dolphin into the mark, the term PROLINE is the portion of the mark which would be relied

upon to identify the goods with which it is being used, not the "dolphin character." Finally, although applicant argues that the term PRO-LINE is relatively weak, being suggestive of a "professional" line, applicant has made no evidence of record showing any use of the term by third-parties in the industry to support this claim.

Accordingly, we find the respective marks to be highly similar in overall commercial impression, both being dominated by the same term PRO-LINE (or PROLINE).

Insofar as the goods of applicant and registrant are concerned, the Examining Attorney maintains that although there is a difference between applicant's deck equipment and registrant's swimming pool accessories or maintenance supplies, the goods are sufficiently related that the goods might be purchased by the same persons. Pointing out that there are no limitations as to channels of trade in the registration, the Examining Attorney contends that the pool accessories and supplies of registrant might not only be purchased for use in residential pools but also for use in connection with commercial and institutional swimming pool complexes, and by the same persons purchasing applicant's goods.

Applicant, on the other hand, maintains that there is a difference in kind between registrant's general pool

supplies and accessories, which applicant insists are purchased either by maintenance staff or residential pool owners, and applicant's metal deck equipment for commercial and institutional pool complexes. The declaration and supplemental declarations of Ken Herrick, Vice President of Operations for applicant, which are relied upon by applicant as support for these claimed distinctions, include statements such as:

Declaration of December 30, 1997

6. The commercial and institutional pool market is very distinct from the market for residential pool equipment and supplies.
7. Commercial and institutional customers operate pool complexes with highly automated equipment and are sophisticated in their purchasing of deck equipment.
9. The sundry pool accessories recited in the registration do not encompass deck equipment and reflects that the PROLINE and Dolphin Design mark is used on products sold in the residential pool market and not the commercial and institutional pool market. For example, the decorative swimming pool fountains are clearly intended for the residential pool market, not the commercial and institutional pool market.

Supplemental declaration of April 14, 1998

4. Applicant's metal deck equipment in International Class 6 is in the nature of relatively expensive capital equipment/fixtures which would be included in the basis valuation of a pool complex.
5. On the other hand, the leaf rakes, thermometers, chlorine dispensers, cleaning tools and other accessories identified in the cited Registration No. 1,864,126 are relatively low cost items which are in the nature of general pool supplies and are the type of items purchased by maintenance staff.

7. Generally the purchasers of applicant's deck equipment for commercial and industrial pool complexes are dealing with significant capital expenditures and, accordingly, exercise a high degree of care and sophistication in conjunction with those purchases.

Thus, applicant attempts to distinguish its goods as being capital expenditure deck equipment units for commercial and institutional pool complexes purchased by sophisticated purchasers, in contrast to the less expensive pool accessories and maintenance supplies of registrant which, according to applicant, would be purchased by residential pool owners or, at best, the maintenance staff of larger pool complexes.

In rebuttal to these arguments, the Examining Attorney has made of record advertisements of swimming pool equipment suppliers or distributors showing that both deck equipment items such as diving boards, life guard platforms, and ladders and pool accessory items such as filter systems, chlorine feeding systems, skimmers and other maintenance equipment may be offered by the same company. The Examining Attorney relies upon this evidence as support for his contention that the goods of both may travel through the same channels of trade and be purchased by the same group of consumers. Once again he points out that registrant's goods are not limited to use for

residential purposes and argues that these accessories and maintenance items are goods which also will be needed for commercial and institutional pool complexes. In addition, he argues that, although registrant's goods may be used for maintenance purposes, there is no support for applicant's conclusion that the goods will only be purchased by maintenance staff personnel.

It is well established that it is not necessary that the goods of the applicant and registrant be similar or even competitive to support a holding of likelihood of confusion. It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate, or are associated with, the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993) and the cases cited therein. If there are no restrictions in the application or registration as to the channels of trade, the goods of that party must be assumed to travel in all the normal channels of trade for goods of this nature. See *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992).

Accordingly, the fact that applicant's swimming pool deck equipment is relatively expensive equipment which would represent a capital investment in the outfitting of a commercial or institutional pool complex, while registrant's goods are much less expensive pool accessories or maintenance items, is not in itself determinative of the likelihood of confusion. The question is whether the goods of applicant and registrant are sufficiently related that they might be encountered by the same persons who in making pool equipment and/or accessory purchases might be led to believe that the goods emanate from the same source.

In the first place, we agree with the Examining Attorney that registrant's goods cannot be limited to residential pool market. Even applicant has acknowledged in Mr. Herrick's supplemental declaration that registrant's goods might be used by maintenance staff personnel. Furthermore, we do not believe the goods as listed in the registration can be interpreted as being restricted to use only in connection with residential pools. Certainly, equipment such as chlorine dispensing units, water cleaning and filtering units and pool lights would be used in commercial and institutional pools as well. Similarly, the maintenance of any pool, whether residential or commercial, would require the use of items such as debris skimmers,

hose for pumps and vacuums, cleaning brushes and the like. Thus, despite the obvious differences in the specific nature of the respective goods, a definite relationship exists between the goods based on common use in commercial and institutional pools.⁴

As for the channels of trade for these goods, the Examining Attorney has adequately shown that goods similar to both applicant's and registrant's might be purchased from a single swimming pool supply company. The more significant factor to be considered is the class of purchasers of the respective goods, i.e., whether applicant's deck equipment and registrant's pool accessories and maintenance supplies, even if available from common distributors, would be purchased by the same customers. In other words, we must look to the relevant persons involved, namely, the actual and potential purchasers for the goods of applicant and registrant, and whether they would be the same. See *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388 (TTAB 1992).

⁴ Applicant's arguments with respect to different classification for the respective goods have been given no consideration. The classification system is simply for the convenience of the Office and has no bearing on the relationship of the goods. See *In re Leon Shaffer Golnick Advertising, Inc.*, 185 USPQ 242 (TTAB 1974).

Applicant argues that the evidence of record supports the conclusion made by Mr. Herrick in his supplemental declaration that there are "different types of consumers for the different types of products." [Par. 2]. Applicant contends that the Examining Attorney has produced no evidence to the contrary and has erroneously assumed common consumers for the respective goods.

We have no difficulty with the statements made by applicant's declarant that applicant's deck equipment represents a capital expenditure, or even that the purchasers of this equipment would exercise a degree of care and sophistication in making these purchases. Our problem arises with applicant's arguments that the persons responsible for purchasing general pool supplies for these same pool complexes would be not be the same persons.

While Mr. Herrick may believe that registrant's pool supplies are "the type of items purchased by maintenance staff," applicant has produced no specific evidence to support this statement. We think the Examining Attorney is correct in questioning applicant's conclusion that since registrant's goods are for maintenance purposes, they would necessarily be purchased by maintenance personnel. If nothing else, at least at the initial start up of a commercial or institutional pool, it would seem reasonable

that the same persons would purchase not only deck equipment such as applicant offers but also various accessories and supplies such as registrant offers. On the whole, we find the evidence of record less than convincing that there is the division of purchasers claimed by applicant. The present circumstances cannot be likened to those in the *Electronic Design & Sales* case, wherein the Court found a minimal overlap of customers to exist.

Moreover, although the purchasers involved in selecting major deck equipment such as applicant's may be sophisticated and exercise care in the selection, we do not believe this sophistication would be sufficient to outweigh the likelihood of confusion on the part of the purchasers upon encountering pool accessories and supplies bearing a highly similar mark. This is particularly true since it has been shown that both types of goods may be available from the same source. See *In re Whittaker Corp.*, 200 USPQ 54 (TTAB 1978).

Applicant has also raised the factor of actual confusion, with Mr. Herrick attesting to no known instances of confusion in his declaration in December 1997. Since applicant has only claimed use since September 1996, and since we have no information as to geographic areas of use by applicant and registrant, we find little to weigh in

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applicant's favor. Moreover, as often pointed out, the standard under Section 2(d) is likelihood of confusion, not actual confusion.

Accordingly, in view of the similar overall commercial impressions created by the marks of applicant and registrant, the related nature of the goods with which the marks are used, and the likelihood of common purchasers for the goods of both, we find confusion to be likely.

Decision: The refusal to register under Section 2(d) is affirmed.

E. W. Hanak

H. R. Wendel

C. M. Bottorff
Administrative Trademark Judges,
Trademark Trial and Appeal Board

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