

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

1/25/02

Hearing:
November 19, 1999

Paper No. 25
HRW

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Spectrum Distributors, Inc., assignee of
Industrial Design & Mfg., Inc.¹

Serial No. 75/197,291

Request for Reconsideration

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:

The Board, in its decision of May 15, 2000, affirmed
the refusal under Section 2(d) to register applicant's mark
PRO-LINE DECK EQUIPMENT and design for "swimming pool deck
equipment made primarily of metal for commercial and

¹ The caption of this proceeding has been amended to reflect the
assignment of the application to Spectrum Distributors, Inc.,
which assignment has been duly recorded by the Office.

institutional pool complexes, namely, starting platforms and anchors, lifeguard stands and anchors, diving board stands and anchors, ladders, pool steps, and pool railings" on the ground of likelihood of confusion with the registered mark PROLINE and design² for the various swimming pool items listed in the registration.

Applicant, on June 7, 2000, filed a request for reconsideration of the decision.³

Applicant's major contention is that the Board has failed to give adequate weight to the statements of Mr. Herrick with respect to the differences in purchasers for the swimming pool deck equipment of applicant and the maintenance accessories and supplies of registrant. Applicant further argues that the Board has held applicant to the wrong standard of proof, by the Board's statement that "we find the evidence of record less than convincing that there is the division of purchasers claimed by applicant."

We find no reason to reverse our findings on the issue of division of purchasers. In the first place, there is no

² Registration No. 1,864,126; Section 8 & 15 affidavits accepted and acknowledged, respectively.

³ We note that applicant simultaneously filed a petition to the Commissioner to permit the submission of additional evidence with respect to this case. The petition was denied on March 28, 2001 and at a later date the file was returned to the Board for consideration of the request for reconsideration.

limitation in the identification of goods in the registration so as to restrict the sale of registrant's maintenance accessories and supplies to residential pool owners. Mr. Herrick has acknowledged as much by his statement that these are "the type of items purchased by maintenance staff." (Supplemental Declaration, par. 5). There clearly would be a maintenance staff in connection with commercial and institutional pool complexes.

Furthermore, despite applicant's arguments that its deck equipment would only be purchased well before the start-up of a commercial or institutional pool, we see no reason why items such as ladders or pool steps could not be purchased at other than the initial construction stage, if nothing else than for repair or replacement purposes. On the other hand, we see no reason why those in charge at the initial construction stages might not be in the market for items such as the decorative pool fountains or the pool lights of registrant. In view of these potentially overlapping needs and markets for the goods, we do not find the unsupported statement of Mr. Herrick that there are "different types of consumers for the different types of products" sufficient to establish a clear line of demarcation between the purchasers of the goods of applicant and registrant. As stated in our decision, the

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circumstances here cannot be likened to those in *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992). Moreover, in making this determination we were not holding applicant to a standard higher than a preponderance of the evidence, despite our unfortunate choice of the word "convincing" in our decision.

Accordingly, in view of the evidence made of record by the Examining Attorney that goods similar to both applicant's and registrant's might be purchased from the same swimming pool supply company, we find confusion likely when marks as similar in commercial impression as applicant's and registrant's are used in connection with the respective swimming pool goods.

Thus, the request for reconsideration is denied and the decision of the Board affirming the refusal under Section 2(d) stands.

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