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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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In re All Pro Exercise Products, Inc.

\_\_\_\_\_  
Serial No. 76334634  
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Myron Amer for All Pro Exercise Products, Inc.

Ronald McMorrow, Trademark Examining Attorney, Law Office  
105 (Thomas G. Howell, Managing Attorney).

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Before Simms, Hanak and Holtzman, Administrative Trademark  
Judges.

Opinion by Hanak, Administrative Trademark Judge:

All Pro Exercise Products, Inc. (applicant) seeks to register in typed drawing form WATER WALKER for "a weight adjustable water exercise belt worn during a walking exercise in the pool." The intent-to-use application was filed on November 9, 2001. Applicant has disclaimed the exclusive right to use WATER apart from applicant's mark in its entirety.

Citing Section 2(d) of the Trademark Act, the Examining Attorney has refused registration on the basis that applicant's mark, as applied to applicant's goods, is likely to cause confusion with the nearly identical mark

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WATER WALKERS, previously registered in typed drawing form for "sporting articles and playthings, namely flotation shoes and flotation shoes with support poles for 'walking' upon the surface of bodies of water." Registration No. 2,152,864.

When the refusal to register was made final, applicant 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 marks and the similarities of the goods. 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 marks, they are virtually identical. The fact that applicant's mark is in the singular form and the registered mark is in the plural form is inconsequential. Thus, the first Dupont "factor weighs heavily against applicant" because applicant's mark is virtually identical to the registered mark. In re Martin's

Famous Pastry Shoppe, Inc., 748 F.2d 565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Turning to a consideration of applicant's goods and the goods of the cited registration, we note that because the marks are virtually identical, their contemporaneous use can lead to the assumption that there is a common source "even when [the] goods or services are not competitive or intrinsically related." In re Shell Oil Co., 922 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993).

In this case, we find that applicant's goods and registrant's goods are clearly related. At page 3 of its brief, applicant argues that "the use of the respective goods in a swimming pool is after their purchase and is irrelevant to how the trademark dictates the purchasing decision." We simply disagree. If a consumer were to see one product in use in a pool, and later see the other product with the virtually identical mark on it in a store, he or she would naturally assume that both aquatic products emanated from a common source. Likewise, if a consumer for the first time saw both products in a store, he or she would make the same conclusion that both aquatic products emanated from a common source.

Decision: The refusal to register is affirmed.

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