

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

Mailed:  
January 30, 2008  
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re FSA Imports, Inc.

Serial Nos. 78652685 and 78655199

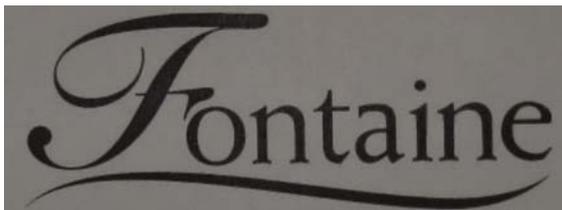
Vincent P. Bailey of Law Office of Vincent P. Bailey for  
FSA Imports, Inc.

Kaelie E. Kung, Trademark Examining Attorney, Law Office  
103 (Michael Hamilton, Managing Attorney).

Before Seeherman, Bucher and Grendel, Administrative  
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register  
of the following special form marks:



<sup>1</sup> &



<sup>2</sup>

<sup>1</sup> Application Serial No. 78652685 was filed on June 17, 2005 based upon applicant's allegation of first use anywhere and use in commerce at least as early as September 7, 2002. The English translation of the French word FONTAINE in the mark is "Fountain."

<sup>2</sup> Application Serial No. 78655199 was filed on June 21, 2005 based upon applicant's allegation of first use anywhere and use

for goods identified in the applications, as amended, as follows:

"faucets, sinks and plumbing fittings not intended for wastewater treatment use, namely aerators, bibs, cocks, couplers, drains, faucet extensions, faucet handles, sink and shower sprayers, spouts" in International Class 11.

These cases are before the Board on appeal from the final refusals of the Trademark Examining Attorney to register these marks based upon Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). The Trademark Examining Attorney has found that applicant's marks, when used in connection with the identified goods, so resemble the following mark:



---

in commerce at least as early as September 7, 2002. The English translation of the French word FONTAINE in the mark is "Fountain."

for "valves being parts of machines for wastewater treatment; and pumps for use in wastewater treatment" in International Class 7 and for "automatic valves" in International Class 9,<sup>3</sup> as to be likely to cause confusion, to cause mistake or to deceive.

Applicant and the Trademark Examining Attorney fully briefed each appeal. The marks, the legal issues, the procedural histories and overall records are closely related in these two appeals. Accordingly, we have consolidated the appeals and issue a single opinion. We affirm both refusals to register.

Applicant contends that there is no likelihood of confusion given that the word "Fontaine" is a relatively weak mark for these goods; that the visual differences in the design elements are significant when comparing the marks in their entirety; that the Trademark Examining Attorney has failed to demonstrate a nexus between registrant's goods and its identified goods; that registrant's expensive goods are purchased by sophisticated purchasers, namely industrial companies; that the channels of trade for registrant's goods are not the same as the

---

<sup>3</sup> Registration No. 1895886 issued on May 30, 1995; renewed. The drawing is lined for the color blue.

trade channels for applicant's goods, and that applicant's Officer has submitted a statement that there has been no actual confusion between applicant's goods and those of the cited registrant, dating back to at least September 2002.

By contrast, the Trademark Examining Attorney argues that the dominant features of both the cited registered marks and the applied-for mark are identical, namely, the sole literal term, "Fontaine"; that the identified goods are highly related; that even sophisticated purchasers are not necessarily immune from source confusion; that the evidence of record demonstrates that automatic valves are marketed through the same channels of trade as are applicant's goods; and that a purported absence of actual confusion is unpersuasive in this evaluation of likelihood of confusion.

### **Likelihood of Confusion**

We turn then to a consideration of the issue of likelihood of confusion. Our determination of likelihood of confusion is based upon our analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d

1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key, although not exclusive, considerations are the similarities between the marks and the relationship between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

### **The marks**

We turn first to the *du Pont* factor that focuses on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

Applicant is correct in noting that the comparison of composite marks must be done on a case-by-case basis without reliance on mechanical rules of construction. See *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984); *Spice Islands, Inc. v. The Frank Tea & Spice Co.*, 505 F.2d 1293, 184 USPQ 35 (CCPA 1974); and *In re Sun Supermarkets, Inc.*, 228 USPQ 693 (TTAB 1986). In this case, applicant asserts

that the cited mark is dominated by six tear-shaped designs comprising a large circular image that is lined for the color blue, while applicant's marks are not lined for color and contain no large imagery. Applicant goes on to argue that the design search codes included in the bibliographic database associated with the registrations for registrant's marks are distinctly dissimilar codes than those chosen for applicant's applications.

While the comparison of composite marks must be done on a case-by-case basis, in making this determination, our focus should be placed on the recollection of the average consumer who normally retains a general rather than a specific impression of trademarks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

While we must also consider the marks in their entirety, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985) [CASH MANAGEMENT ACCOUNT found confusingly similar to THE CASH MANAGEMENT EXCHANGE].

The Trademark Examining Attorney herein contends that when a mark consists of a word portion and a design portion, the word portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods or services. Therefore, the word portion is normally accorded greater weight in determining likelihood of confusion. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987); and *Amoco Oil Co. v. Amerco, Inc.*, 192 USPQ 729 (TTAB 1976).

We agree that in this case the word "Fontaine," as the sole literal element of the marks, is the dominant feature of the cited registered marks and the applied-for mark. Moreover, this element of the marks is identical. As a result, the respective marks are identical in pronunciation and meaning and create similar commercial impressions.

As for the appearance of the marks, both are similar insofar as the word "Fontaine" is concerned. The differences in the design elements are not sufficient to distinguish the marks. Rather, given the identical nature of the word elements, the differences in the designs is likely to be viewed by consumers as variations of the FONTAINE mark, with all three marks indicating origin in a

single source. As to the design search codes for each of these marks assigned by the United States Patent and Trademark Office, these numbers reflect an internal coding system used for trademark searches, and they have absolutely no bearing on the commercial impressions created by each mark in the minds of potential purchasers of applicant's and registrant's goods.

On balance, then, we find that applicant's marks are similar to registrant's mark as to sound, meaning and commercial impressions, and in appearance to the extent that they share the same word element, and hence, that this critical *du Pont* factor favors a finding of likelihood of confusion.

### **The Goods and their channels of trade**

In spite of applicant's spirited arguments to the contrary, inasmuch as the goods in the cited registration in International Class 9 are unrestricted as to use, these "automatic valves"<sup>4</sup> have to be considered to be used for

---

<sup>4</sup> Applicant has submitted evidence regarding the actual goods on which registrant uses its mark. However, we must determine likelihood of confusion on the basis of the goods as they are identified in the cited registration. See *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) [evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration].

whatever purposes are appropriate for such valves, and we must presume that they will be sold in all appropriate channels of trade for valves that have such uses. The Internet evidence placed into the record by the Trademark Examining Attorney shows that automatic valves can be used in faucets, so applicant's and the registrant's goods must be deemed complementary and therefore related:

① The Trademark Examining Attorney submitted evidence of an online company that touts itself as the largest distributor of plumbing, heating, cooling, and piping products in the northeast USA. The web pages indicate that F.W. Webb Company supplies, *inter alia*, automated shut-off valves, and plumbing parts such as drains, faucets and spouts.<sup>5</sup> The web pages also indicate that its customers include plumbers, HVAC technicians, institutional purchasing agents and others in allied industries.<sup>6</sup>

② The record contains web pages from Jay R. Smith Manufacturing Company - a manufacturer of plumbing (e.g.,

---

<sup>5</sup> <http://www.fwebb.com/>

<sup>6</sup> <http://www.fwebb.com/>

including automatic valves) and drainage products in the non-residential construction industry.<sup>7</sup>

③ The webpages for Montana Supply indicate it to be a company that offers water supplies and services to contractors and individuals in Idaho, Wyoming and Montana. Menus within these web pages show that the variety of goods it offers includes fixtures, plumbing fittings, faucets and pumps.<sup>8</sup>

④ Scotts Valley Sprinkler and Pipe Supply lists its many products, including automatic valves, as being available to those in need of landscaping and plumbing services.<sup>9</sup>

⑤ An advertisement for an Automatic Yard Watering System having as one of its components "two automatic leak-free valves."<sup>10</sup>

⑥ In the context of automated restroom technology, the record shows a number of excerpts:

Autoflushers.com offers automatic flush valves, automatic faucets, automatic soap dispensers, automatic paper towel dispensers, and automatic metered air freshener dispensers.<sup>11</sup>

---

<sup>7</sup> <http://www.jrsmith.com/>

<sup>8</sup> <http://www.mountainsupply.com/>

<sup>9</sup> <http://www.svsprinklerandpipe.com/products.html>

<sup>10</sup> <http://store3-store.stores.yahoo.net/orcoauwakit.html>

<sup>11</sup> <http://www.autoflushers.com/>



Water Use

Best Practice Guide

## **Bathroom Fixtures Commercial Office Buildings**

---

Without question, replacing high-volume plumbing fixtures is critical.

... Cushman & Wakefield also converted *all sink faucets and toilets to automatic valves that use infrared technology to turn on and shut off water flows*. All plumbing fixtures, including showers available to encourage employees to bicycle to work, are equipped with low-flow aerators.

12

**TITLE: Two-For-One Restroom Savings**

**HEADNOTE: A closer look at products, technology and processes that can ensure both cost-effectiveness and cleanliness**

...

Sink features should include low water consumption and no-hands, automatic, battery-operated cold- and hot-water valves that are vandal proof...<sup>13</sup>

### **Old Dominion University, Norfolk, VA**

In coordination with the Virginia Energy Plan, Old Dominion University has a comprehensive Energy Management Plan to reduce all utilities usage including water consumption. Results: Reduction of water consumption in building air conditioning cooling towers was accomplished by installing devices that treat condenser cooling water, while reducing the need for "blow down" water.

***Usage of water in restrooms was reduced by installing automatic valves on sinks, urinals and toilets.*** Flush cycles have been shortened in toilets by installing spacers in water valves. Sources other than potable water supplies are being researched to irrigate playing fields and campus plant life. Expansion of these techniques to all the facilities is estimated to save over one million gallons of water per year.<sup>14</sup>

---

<sup>12</sup> [http://www.fypower.org/bpg/module.html?b=office&m=Water Use&s=Bathroom Fixtures](http://www.fypower.org/bpg/module.html?b=office&m=Water%20Use&s=Bathroom%20Fixtures)

<sup>13</sup> *Maintenance Solutions*, by Thomas A. Westerkamp, July 1 2000.

<sup>14</sup> <http://www.hrwet.org/b%26i%5Fguide/app4.htm>

Moreover, the Trademark Examining Attorney also has submitted some third-party registrations that show goods such as registrant's automatic valves and applicant's faucets and plumbing fittings are of a kind that may emanate from a single source. The two that are most relevant are as follows:<sup>15</sup>

---

**PHARO**

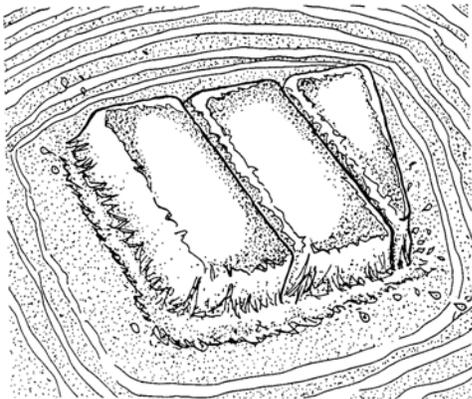
for, *inter alia*, "... **automatic valves**" in International Class 9; "water supply apparatus and sanitary installations, namely, mixing valves, manually and automatically operated regulating valves for the supply and draining of water in drains; sanitary wastes and overflows, mixer-tap **faucets for baths and showers**, showers and shower enclosures; showers and shower combinations, namely, overhead showers, lateral showers, showerhead holders, **plumbing fittings**, namely, traps; lighting apparatus, namely, electric lighting fixtures for bathrooms; and repair parts of the aforementioned goods" in International Class 11;<sup>16</sup>

---

---

<sup>15</sup> We do note that at least two of the six third-party registrations that the Trademark Examining Attorney attached to her final Office action of August 18, 2006 did not involve registrations of marks that were based on use in commerce (e.g., Registration Nos. 2708373 and 2754880).

<sup>16</sup> Registration No. 2098540 issued to Hansgrohe AG, a German joint stock company, on September 23, 1997; renewed. This registration has five active classes of goods, including International Classes 6, 17 and 20.



for, *inter alia*, "**automatic control valves** for use in fluid flow control, namely, pressure regulator valves, level control valves, and flow control valves; ... **automatic valves** used to automatically fill and top off the water in individual central heating system radiators; **automatic valves** used to automatically vent unwanted air from individual central heating system radiator; ... automatic plumbing, heating and solar control devices, namely, valve actuators, **automatic control valves**, water/steam pressure regulators, pressure reducers, shock and water hammer arresters, dielectric unions, current-sensing **automatic shutoff valves** ..." in International Class 9; and " ... **plumbing fittings, namely, bibs, cocks**, traps, valves, and strainers; ... **faucets**; ... shower diverter bath **cocks**; diverter **spouts**; ... bathtub drain valves; ... stop valves, pipe plugs, kitchen and bathroom **faucets and replacement parts therefor**; sill **cocks**; gas **cocks**; ... **drains, drain fittings, floor drains ... sinks; water treatment units**, namely, reverse-osmosis units, filtration units, ultraviolet sterilization units, in-line water filters, and water pumps for water treatment and filtration units; ... water treatment kits consisting primarily of water storage tanks, water filters and filter adapters, membranes, flow restrictors, ultraviolet light bulbs, and filter wrenches; water disinfection kits consisting of ultraviolet modules and power sources, water pressure testers, water pressure regulators, air pressure gauges, and chemical

---

---

water test and treatment kits, **all for domestic, industrial and commercial use; faucets**, namely, **air and non-air gap faucets**; ... floor sinks; shower arms; faucet hold covers; sink traps; **bath drains**; bath overflow valves; bath drain trim, bath drain conversion kits consisting of a bath strainer assembly comprising bushing and face plate; **faucets**; quarter-turn water supply stop valves; shower controls, mixers, fittings, and valves; control valves for controlling fluids and gases, for heating and air conditioning systems, and for water heaters and industrial processes, namely, commercial plumbing, municipal waterworks, fire protection, irrigation, aviation fueling, theme parks, decorative fountains, reclaimed water, and original equipment manufacturing; **bath drains**; sink strainer assemblies, and sink strainer inserts and baskets" in International Class 11.<sup>17</sup>

---

---

We readily concede that these third-party registrations are sparse evidence to show that goods are related. However, we rest our finding that applicant's goods and the automatic valves in Class 9 of the cited registration are related on the complementary nature of the

---

<sup>17</sup> Registration No. 3072443 issued to Watts Regulator Co. on March 28, 2006. The goods and services in this registration included more than 1700 words, with goods and services in eight classes, including International Classes 6, 7, 17, 20,, 21 and 35. The mark consists of the letter "W" rising out of water. The stippling and lining are intended to show the water background and are not limited to the shape or size as shown.

goods, and the Internet evidence showing that such goods emanate from a single source, and view the third-party registrations merely as corroboration for our conclusion that this *du Pont* factor favors a finding of likelihood of confusion.

### **The number and nature of similar marks in use on similar goods.**

Applicant also argues that inasmuch as the term "Fontaine" is translated in the cited registration as "Fountain," the cited mark is weak, and hence entitled to only a limited scope of protection. However, the translated term "Fountain" is, at worst, suggestive of the identified goods. It also has the same suggestive meaning within applicant's marks. Although suggestive marks are entitled to a narrower scope of protection than are arbitrary marks, they are still entitled to protection from use of highly similar marks for related goods. We also note that there is no evidence in the record of third-party use of FOUNTAIN/FONTAINE marks in the field of plumbing fixtures or fittings.

### **Conditions of Purchase**

As to the *du Pont* factor of the conditions under which and buyers to whom sales are made, we agree with applicant

that registrant's goods, as identified in its registration, are purchased substantially by sophisticated customers. Even so, this does not mean that they are immune from source confusion when nearly identical marks are used on complementary and otherwise closely related goods. See In re Decombe, 9 USPQ2d 1812 (TTAB 1988). Hence, although this factor favors applicant, it does not serve to overcome the factors of the similarity of the marks and the relatedness of the goods that favor a finding of likelihood of confusion.

### **Absence of Actual Confusion**

As for applicant's claim of periods of actual confusion, there has not been a sufficiently long period of contemporaneous use for this to be a meaningful factor, and we certainly do not have on this record evidence about the levels of promotion and/or geographical areas of use of applicant's marks and of registrant's mark in the United States from which we could conclude that there has been an opportunity for confusion to occur, if it were going to occur. Hence, we deem this to be a neutral *du Pont* factor.

## **Conclusion**

In view of the relatedness of applicant's goods and the automatic valves in International Class 9 of the cited registration, and the similarities of the marks, as discussed above, we find that applicant's marks for its identified goods are likely to cause confusion with the cited registration. In particular, the similarity of the marks in sound, connotation and commercial impression outweighs any differences caused by the design features in each mark, and the similarities in the marks and goods also outweigh any sophistication of the purchasers of registrant's goods.

*Decision:* We affirm the refusals to register based upon Section 2(d) of the Lanham Act.