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Mailed: June 27, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Little Giant Pump Company

Serial No. 78557178
Serial No. 78665648

Bill McCarthy of Fellers, Snider, Blankenship, Bailey & Tippens for Applicant.

Tejbir Singh, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney).

Before Hohein, Taylor and Wellington, Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Little Giant Pump Company has filed applications to register on the Principal Register the marks "WATERMARK" (in standard character format) and "WATERMARK" with design, as shown below:

for, in each instance, "water pumps for water filtering units" in International Class 7 and "water gardening products, namely,

submersible skimmers, decorative waterfalls, water filters; light bulbs and lighting fixtures" in International Class 11.[1]

Registration of the marks has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's marks, when applied to its identified goods, so resemble the mark "WATERMARK," which is registered on the Principal Register in standard character form for "decorative water fountains" in International Class 11,[2] as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed both refusals and briefs have been filed. The appeals are hereby consolidated and shall be decided in this single opinion. As explained herein, we affirm the refusals to register.

When there is an issue of likelihood of confusion, we consider the evidence in light of the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003); and *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the

[1] Ser. Nos. 78557178 and 78665648, filed on January 31, 2005 and July 7, 2005, respectively, are based on allegations that the marks were first used in commerce on August 23, 2005.

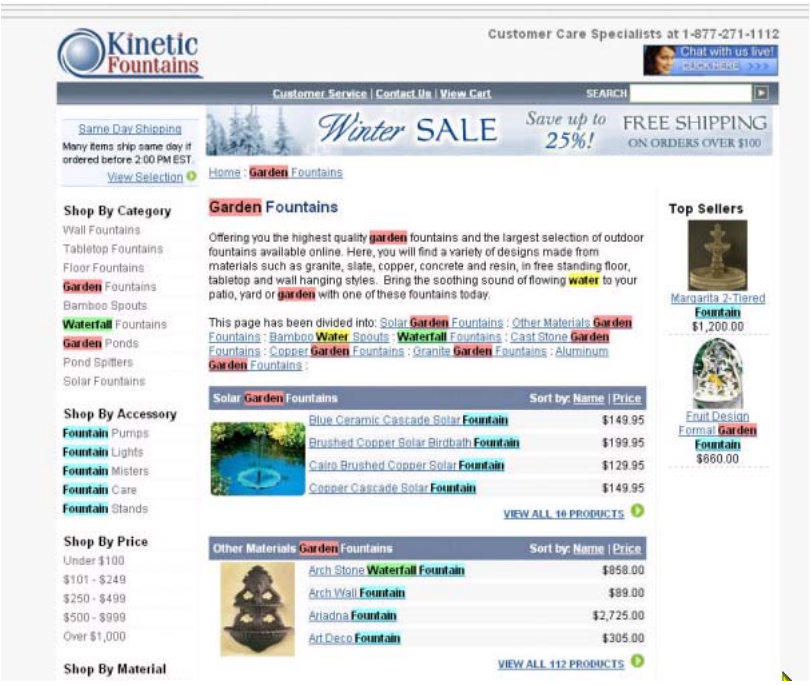
essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Turning first to consideration of the goods at issue, the recited goods in both of the applications include "decorative waterfalls" and the goods covered by the registration are "decorative water fountains." The Examining Attorney has made of record Internet evidence to support his contention that such goods are very similar, if not the same. This evidence includes copies of printouts from third-party website retailers offering decorative waterfalls, decorative water fountains, and related goods. On one website, a product advertised as the "Gardenfall Bamboo Water Fountain" is described as "the most elegant waterfall in its collection." Thus, the product is referred to as both a water fountain and a waterfall. The advertisement appears as follows:

[2] Reg. No. 2221915, issued on February 2, 1999, which sets forth a date of first use of the mark anywhere and in commerce of September 30, 1996; combined §§ 8 and 15 affidavit filed.

[from the website www.amberleaves.com]

The following website printout shows a category of products referred to as "waterfall fountains," one product is called a "Arch Stone Waterfall Fountain," and decorative waterfalls are offered alongside decorative fountains:



[from the website www.kineticfountains.com]

The evidence also supports the Examining Attorney's contention that several of applicant's other goods, namely, water pump filtering units, water filters and lighting fixtures can be used with registrant's decorative water fountains. For example, the following website printout shows pumps and submersible lights for use with water fountains.

Mainland Mart.Com

Fountain Pump, Fogger Submersible Aqua Light

F.A.Q.s | Contact Us | Shopping Directory

We carry quality fountain accessories including water fountain pumps, submersible lights and ultra-sonic foggers.

Prices include shipping and handling fees for shipping address within the mainland United States. 30 day money back guaranteed!

Item number: PP577(AT302)
Size: 2"(H) x 2"(L) x 1.5"(W)
120V-4 speed water fountain pump, 6W, Head Max. 25", Max. rate 85GPH, comes with two size tube connectors 1/2" and 5/16".
Price: $15.95/each, Shipping included
Out of stock

Item number: AT402
Size: 1 7/8"(W) x 2 1/4"(H) x 2 3/4"(L)
120V-4 speed water fountain pump, 8.5W, Head Max. 47", Max. rate 145GPH, comes with two size tube connectors 1/2" and 5/16".
Price: $19.95/each, 2 or more, $18.95/each, Shipping included
Out of stock

Item number: PP577LT
Low voltage 4 speed water pump with 110V/12V AC transformer. Pump Flow Rate: 85 GPH. Max head: 25". Pump Size: 2"x1.5"x2"(H), tube connector 5/16"(diameter)
Price: $16.95/each, 2 or more, $14.95 each
Shipping included

Buy Now

Item number: AT300L
Low voltage 4 speed water pump with 110V/12V AC transformer. Pump Flow Rate: 46 GPH. Max head: 19". Pump Size: 1.25"x1.5"x1"(H), tube connector outside 5/16"(diameter)
Price: $15.95/each, 2 or more, $14.95 each
Shipping included

[from the website www.mainlandmart.com]

Based on all of the evidence of record, we conclude that the goods "waterfalls" and "water fountains" are extremely similar in nature and the terms are sometimes used interchangeably to refer to the same product. Moreover, applicant's pumps, submersible lights and water filters are highly related to registrant's water fountains inasmuch as the former can be used with the latter. Therefore, the factor of the similarity of the goods weighs

strongly in favor of finding a conclusion of likelihood of confusion.

Inasmuch as applicant's goods are highly similar, if not the same in part, and there are no restrictions on applicant's or registrant's goods, we must assume that the goods move in the same channels of trade to the same customers. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"). Accordingly, applicant's arguments that "prospective purchasers are dissimilar" and that the trade channels are different, i.e., that it manufactures contractor or commercial grade goods while registrant's goods are "relatively high cost art pieces serving a completely aesthetic purpose," are not well taken.

Turning, then, to consideration of the marks at issue, we note that the registered mark is identical to the mark in application Serial No. 78557178 and, with respect to the mark in application Serial No. 78665648, only the stylized letter "M" distinguishes the two marks. However, because registrant's mark is in standard character format, we must assume that it may be

used in the same stylized manner as applicant's stylized version of its mark, including the display thereof with an identical stylized letter "M." *See, e.g., In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Pollio Dairy Products Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988); *Sunnen Products Co. v. Sunex International Inc.*, 1 USPQ2d 1744, 1751 (TTAB 1987); and *In re Hester Industries, Inc.*, 231 USPQ 881, 883, n.6 (TTAB 1986).

Applicant argues, citing the First Circuit in *Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482 (1st. Cir. 1981) and other cases, that both of its applied-for marks are not similar to the registered mark because applicant "always used the mark 'WATERMARK' in conjunction with [applicant's] corporate name, Little Giant, whereas Registrant does not use the mark 'WATERMARK' in conjunction with any corporate affiliation." However, as the examining attorney correctly pointed out in his Office Actions, the comparison of the marks must be based on the marks as they appear in the drawings of the applications and registration, respectively, neither of which includes a house mark. *See Frances Denney v. Elizabeth Arden Sales Corp.,* 263 F.2d 347, 120 USPQ 480 (CCPA 1959); *INB National Bank v. Metrohost Inc.*, 22 USPQ2d 1585 (TTAB 1992); and *Blue Cross and Blue Shield Association v. Harvard Community Health Plan Inc.,* 17 USPQ2d 1075 (TTAB 1990).

Considered in their entireties, applicant's marks and registrant's mark are identical or substantially identical in sound, appearance, connotation and commercial impression.

In view of the above, we conclude that there is a likelihood of confusion. Upon encountering the identical or nearly identical marks on decorative water fountains and decorative waterfalls, consumers are likely to believe that they emanate from the same source. Likewise, the same consumers may mistakenly believe that applicant’s other water gardening products and its water pumps for water filtering units are specifically designed to be compatible with registrant’s decorative water fountains or, at least, that they emanate from the same source.

Decision: The examining attorney’s refusals to register applicant’s marks "WATERMARK" and “WATERMARK” and design for the identified goods because of a likelihood of confusion with the mark in the cited registration are affirmed.