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Mailed: July 3, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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National Audubon Society, Inc.
v.
Design Factory International, Inc.

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Opposition No. 91172880 to application Serial No. 78644475
filed on September 13, 2006

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Deborah K. Squires of Cowan, Liebowitz & Latman, P.C. for National Audubon Society, Inc.

Design Factory International, Inc., pro se.

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Before Hairston, Rogers and Taylor, Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Design Factory International, Inc. has filed an application to register on the Principal Register the mark shown below,

for "garden ornaments namely, urns and vases made of glass, terra cotta, porcelain and non-precious metal; planters for flowers and plants; statues made of china, crystal, earthenware, glass and porcelain."[1] Applicant disclaimed the term "garden" and entered the following description and claim to color of the mark into the application record: "The mark consists of the color green appearing in the wording of the mark and in the leaf and stem design; the color red appearing in the flower design; the color mauve appearing in the brushstroke border of the mark" and "[t]he color(s) green, mauve and red is/are claimed as a feature of the mark."

Registration has been opposed by the National Audubon Society, Inc. on the ground of likelihood of confusion with its previously used and registered AUDUBON marks. Opposer specifically alleges that since prior to June 6, 2005, applicant's constructive first use date, opposer, its licensees and affiliates have used marks that comprise the word AUDUBON, alone or with other words and designs ("AUDUBON Marks") in connection with opposer's famous conservation, environmental and educational services and a wide variety of additional goods and services, including without limitation goods associated with gardens, backyards

[1] Serial No. 78644475, filed on June 6, 2005 and alleging a bona fide intent to use the mark on the recited goods in commerce.

and nature, such as bird houses, bird baths, bird feeders, bird food, butterfly houses, squirrel feeders, bathhouses, garden trellises, garden stakes, planters, live plants and seedlings, binoculars, outdoor thermometers, hooks, brackets, thistle socks, pole kits, window glass hangers and nature and wildlife videos and printed materials and that since prior to June 6, 2005, opposer, its licensees and affiliates have promoted and advertised the sale and distribution of such goods and services bearing or offered in connection with its AUDUBON Marks. Opposer further alleges that as a result of the extensive use, promotion and notoriety of goods and services being offered in connection with opposer's AUDUBON Marks, opposer has built up highly valuable goodwill in those marks, and said goodwill has become closely and uniquely associated with opposer; that opposer owns several United States applications and registrations for its AUDUBON Marks[2]; that the goods covered by the involved application are identical and/or closely related to the goods offered under and the services rendered in connection with opposer's AUDUBON Marks; and that

[2] Opposer particularly pleaded ownership of Application Serial Nos. 78735348 and 78725864 and Registration Nos. 1213257, 2345272, 2338646, 0891611, 2564497, 1190696, 2579943, 2943787, 2436781, 1847753, 2732442, 1890370, 1853671, 1856638, 1856843, 1954847, 2579942, 1851694, 1187650, 1854643, 2840374, 2091017, 1853551, 1852642, 2285416, 1213258, 2565321, 1184914, 2419153, 2329252, 2321150, 1187814, 2181528, 1949150, 2662691, 0743843, 0769589, 1373564, 1947688, 3079056 and 3050834.

applicant's AUDUBON GARDEN and design mark so resembles opposer's AUDUBON Marks as to be likely, when applied to applicant's goods, to cause confusion, to cause mistake, and to deceive the trade and public, who are likely to believe that applicant's goods have their origin with opposer and/or that such goods are approved, endorsed or sponsored by opposer or associated in some way with opposer. Opposer also alleges that on or about June, 2002, applicant approached opposer seeking a license to use its AUDUBON Marks on garden items, but in January 2003, opposer terminated license negotiations with applicant and did not grant to applicant a license to use opposer's AUDUBON Marks for any goods and services.[3]

Applicant's answer is in the nature of a general denial of the essential allegations of the notice of opposition.

THE RECORD

The record consists of the pleadings and the file of application Serial No. 78644475. In addition, opposer submitted the testimony deposition, with Exhibits 1-59, of Sandra Pinto, opposer's director of licensing, and a notice

[3] In addition, opposer alleged that it would be injured by the granting of a registration to applicant because "Applicant's AUDUBON GARDEN mark would falsely suggest a connection between Applicant and Audubon." (Not. of opp., ¶ 11). To the extent that opposer intended this allegation as a separate claim for opposition, we consider it withdrawn inasmuch as opposer made no further mention of the allegation in its main brief.

of reliance on status and title copies of thirty-nine of its forty-one pleaded registrations.[4]

FINDINGS OF FACT

Opposer, National Audubon Society, Inc., is an environmental conservation organization founded or incorporated in 1905, whose mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife and their habitats. (Pinto Tr. p. 6). Opposer has a membership base of approximately 400,000 people, with more than 25 state offices located across the country and over 50 centers around the nation open for visitation by members of the public interested in educational programs about local ecological issues. (Pinto Tr. pp. 6-7 and 9). Opposer's total revenues from contributions, membership, licensing royalties and other sources totaled approximately $500 million over the past six years. (Pinto Tr. pp. 10-12 and Ex. 2,4). Opposer and its licensees have used Opposer's AUDUBON Marks in connection with a licensing program spanning a broad range of product and service categories, including garden/backyard, publishing and home décor. (Pinto Tr. p. 23). As part of a branding initiative commenced in the fall of 2000, opposer's licensing program

[4] Opposer did not submit copies prepared by the Office showing current status of and current title to Registration Nos. 2436781 and 2419153. Accordingly, they are not of record and have not been considered in this decision.

focused on the word mark AUDUBON, while also licensing a logo version of the mark.[5] (Pinto Tr. pp. 21-24). Opposer's licensing program is designed to promote brand awareness for the AUDUBON name and also to generate revenue for opposer. (Pinto Tr. p. 23). The channels of distribution of opposer's licensed products include specialty stores as well as lawn and garden retailers, mass market stores which include stores such as Target and Ace Hardware, direct to consumers, catalog sales and Internet sales. Estimated retail sales of such products for the year ending 2006 (i.e., the most recent fiscal year at the time of the Pinto deposition) was $41 million based on the sale of over 3 million units of licensed produce. (Pinto Tr. pp. 34-35). One of the core categories of opposer's licensing program is backyard and gardening, which encompasses any item that can be used in a backyard or garden. (Pinto Tr. p. 25 and 36). Opposer and its licensees have sold a wide variety of products in the backyard and gardening category which pre-date applicant's constructive first use date of June 2005, including bird feeders and related accessories,

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[5] The "logo" version of mark is:

thermometers, trellises[6], squirrel baffles, butterfly feeders, ladybug, bat and butterfly houses, branch hooks, clamp-on hooks, wall brackets, window hangers, extension hooks, thistle socks, wild bird food, binoculars, birdbaths, garden sculptures, decorative fountains, and plants for outdoor living. (Pinto Tr. pp. 50-55, 61-65, 70-71, 73-74, 77-78, 80-82, 89-91). Net sales (wholesale) of licensed products in the backyard/garden category since 2000 have exceeded $60 million. (Pinto Tr. pp. 37-38 and Ex. 10). Further, opposer promotes its AUDUBON AT HOME program, which encourages consumers to employ the best practices in their backyards, including planting native species. (Pinto Tr. p. 13-16). This program is featured on opposer's website, which receives approximately 100,000 individual visits each

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[6] Ms. Pinto particularly stated with regard to opposer's common law use of the AUDUBON mark on trellises as follows:

Q I am going to show you what has been premarked as Plaintiff's Exhibit 18.
Can you identify this document?
A Yes. This is a catalog of Audubon products as produced by Woodlink.
Q Do all of the products bear the Audubon mark?
A Yes.
Q Are the products listed here also contained in the license agreement?
A Yes.
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Q I am going to refer you to the last page of Exhibit 19.
Can you identify what it is?
A Yes. It is the hang tag or the product tag for the Audubon trellis as produced by Woodlink.
Q And what is the trellis made of?
A Metal.
Q Do you recall the date of first sale of that trellis in commerce.
A My recollection is May of 2005.

month, and in brochures distributed by the retail partners of opposer's licensees. (Id.) In addition, since 1941, opposer has published a magazine entitled AUDUBON. This magazine, which focuses on conservation issues and reports on opposer's activities, is published six times annually and has a readership of 1.6 million people. (Pinto Tr. pp. 17-20).

Inasmuch as applicant did not take testimony or introduce any other evidence during its testimony period, there is little information about applicant or its business.

STANDING

An opposer must have "a 'real interest' in the outcome of a proceeding in order to have standing." Ritchie v. Simpson, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). The record shows that opposer, through its licensees, manufactures and distributes backyard and garden products, including trellises and live plants under the AUDUBON mark, and in view of opposer's pleading of a reasonable claim of likelihood of confusion, we consider there to be no issue regarding opposer's standing. Ritchie v. Simpson, *supra*; and Lipton Industries, Inc. v. Ralston Purina Co., 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). In addition, because opposer has properly made thirty-nine of its forty-one pleaded registrations of record, opposer has established its standing. Cunningham v. Laser Golf Corp.,

222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); Lipton Industries v. Ralston Purina, *supra*.

ANALYSIS-Priority and Likelihood of Confusion

Before beginning our discussion, we note that opposer has pleaded ownership of forty-one registrations in its notice of opposition, and proven all but two of these.[7] Among the proven registrations is Registration No. 2345272 for the mark AUDUBON, in typed format, for "live plants and seedlings," in Class 31. In its brief on the case, opposer focuses its arguments in favor of finding a likelihood of confusion on its backyard and garden products, particularly trellises, garden sculpture, decorative fountains and plants.[8] In analyzing likelihood of confusion, we will likewise focus our discussion on the AUDUBON GARDEN and design mark and recited goods vis-à-vis the AUDUBON mark for backyard and garden products, namely, trellises and plants,

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[7] The registrations cover a wide variety of goods and services, including, birdhouses, bird feeders, bird seed, walking sticks, clocks, pillows, clothing, field guides, travel services, financial services, wildlife and environmental conservation services and related scientific research and association services, namely promoting public interest in wildlife preservation and environmental conservation.

[8] Opposer pleaded common law use of the mark AUDUBON on trellises and common law use of the marks AUDUBON and NATIONAL AUDUBON SOCIETY and design on garden sculpture, decorative fountains and planters. While opposer's first use of the NATIONAL AUDUBON SOCIETY and design mark on or in connection with garden sculpture and decorative fountains predates May 2005, opposer's first use of the AUDUBON mark on those goods does not. We also note that it is unclear from this record whether opposer's use of the NATIONAL AUDUBON SOCIETY and design mark on those goods has been continuous.

those goods being most relevant to applicant's "garden ornaments namely, urns and vases made of glass, terra cotta, porcelain and non-precious metal; planters for flowers and plants; statues made of china, crystal, earthenware, glass and porcelain."

Priority

To establish priority on a likelihood of confusion claim brought under Trademark Act § 2(d), a party must prove that, vis-à-vis the other party, it owns "a mark or trade name previously used in the United States ... and not abandoned...." Trademark Act Section 2, 15 U.S.C. § 1052. A party may establish its own prior proprietary rights in a mark through ownership of a prior registration for the mark, actual use of a mark or through use of the mark analogous to trademark use, such as use in advertising brochures, trade publications, catalogues, newspaper advertisements and Internet websites which create a public awareness of the designation as a trademark identifying the party as a source. *See* Trademark Act §§ 2(d) and 45, 15 U.S.C. Section 1052(d) and 1127; T.A.B. Systems v. PacTel Teletrac, 77 F.3d 1372, 37 USPQ2d 1879 (Fed. Cir. 1996), *vacating* Pactel Teletrac v. T.A.B. Systems, 32 USPQ2d 1668 (TTAB 1994). Because opposer's registrations for the AUDUBON Marks have been made of record, except as noted in footnote 4, Section 2(d) priority is not an issue with respect to the goods and

services identified in those registrations, particularly, live plants and seedlings. See King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). In addition, the record is clear that opposer first used its AUDUBON mark on trellises prior to June 6, 2005, the filing date of applicant's involved application.[9] Consequently, priority rests with opposer as to trellises.

Applicant mistakenly contends that it owns prior rights in the AUDUBON name for garden products because it filed the opposed application prior to opposer's filing of Application Serial No. 78725864 for the mark AUDUBON for garden and backyard products. As noted above, proof of prior use by opposer may be used to establish Section 2(d) priority, so that the filing date of opposer's application is unimportant.

Likelihood of Confusion

Turning to our discussion of the issue of likelihood confusion, our determination thereof is based on an analysis of all the probative facts in evidence that are relevant to the factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In

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[9] Inasmuch as applicant did not take testimony or otherwise submit proof that it has commenced use of the mark AUDUBON GARDEN and design mark, the earliest date upon which applicant is entitled to rely in this proceeding for purposes of priority is the filing date of the involved intent-to use application, i.e., June 6, 2005. *See* Zirco Corp. v. American Telegraph and Telephone Co., 21 USPQ2d 1542 (TTAB 1991).

considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the 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).

We first consider the *du Pont* factors which pertain to the similarity or dissimilarity of the goods, classes of purchasers and channels of trade. The registrability of applicant's mark must be determined on the basis of the identification of goods as set forth in the involved application and pleaded Registration No. 2345272. See e.g., Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and Canadian Imperial Bank v. Wells Fargo Bank, *supra*. And, because opposer additionally relies on common law rights acquired through use of its mark, the goods for which opposer has established prior rights. Herein, the goods at issue are applicant's garden ornaments namely, urns and vases made of glass, terra cotta, porcelain and non-precious metal; planters for flowers and plants; and statutes made of china, crystal, earthenware, glass and porcelain vis-à-vis opposer's live plants and seedlings and trellises.

Opposer argues that the parties' goods are close complementary products sharing the same backyard and garden

classification and usage.[10] Applicant, on the other hand, argues that the goods identified in its application are "specifically different from the gardening and backyard goods covered under the AUDUBON mark." (Brief p. 6). It is a general rule, however, that goods need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that the goods are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which would give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991), and the cases cited therein.

In this case, both applicant's goods and opposer's goods are backyard and gardening products that will be sold alongside one another in garden stores and nurseries to weekend gardeners looking to improve their yards. We thus find that opposer's and applicant's goods are either, in part, closely related, i.e., applicant's urns, vases, and

[10] Opposer also alluded to its ownership of a family of marks as further support for a finding that the goods are related. This argument has not been considered because it was neither pleaded nor supported by the record.

planters and opposer's trellises are all apparatus used to grow plants, or complementary in nature, i.e., applicant's urns, vases and planters being containers used for growing opposer's plants and seedlings. See Tuxedo Monopoly, Inc. v. General Mills Fun Group, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods in the application).

Moreover, as identified, neither party's identification of goods contains any limitations or restrictions as to types of purchasers or channels of trade. Thus, contrary to applicant's contention, we must presume that the parties' goods move in all channels of trade that would be normal for such goods, including, through garden centers, home improvement stores and mass merchandise stores, and that the goods would be purchased by the same class of purchasers i.e., ordinary purchasers seeking to beautify and maintain their yards. *See* In re Elbaum, 211 USPQ 639 (TTAB 1981). In addition, the channels of trade and classes of purchasers of applicant's goods would overlap with those of opposer's trellises, both goods being sought by consumers seeking products for growing plants. The *du Pont* factors of the similarity of the goods, the similarity of the trade

channels and the similarity of the purchasers thus favor opposer.

With respect to the conditions under which the parties' goods would be purchased, applicant argues that "Opposer's membership base possesses a certain level of expertise and [members] are likely to exercise a great deal of care when examining and purchasing products" and that "[i]n addition, Opposer has stated that their 'licensees work very hard at getting distribution for their line [and t]he buyers are familiar with the AUDUBON line in association with the national organization.'" (Brief at 9 quoting Pinto Tr. p. 106). That may well be the case. However, opposer's plants and trellises are relatively inexpensive items that will be sold to the general public at large, and are not sold only to members of opposer's organization. There is no evidence of record to show that these ordinary customers have any expertise with regard to these products or that more than ordinary care is needed to select them. Thus, this *du Pont* factor is neutral or slightly favors opposer.

The next *du Pont* factor to consider is the fame of opposer's AUDUBON mark. The fame of a prior mark plays a dominant role in likelihood of confusion cases featuring a famous mark. Bose Corp. v. QSC Audio Products Inc., 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002); and Kenner Parker Toys, Inc. v. Rose Art Industries, Inc., 963 F.2d

350, 22 USPQ2d 1453 (Fed. Cir. 1992). Opposer claims that its mark is "extremely strong" and thus entitled to a broad scope of protection. The evidence of record establishes that opposer's AUDUBON Marks have been in use for over a century; that opposer has offices in at least 25 states; and that opposer publishes a magazine under the mark with a readership of 1.6 million people. The record also shows that opposer's revenue for the years 2000 through 2006 totaled almost $500 million and, in particular, that since 2000, net sales (wholesale) of licensed products bearing the AUDUBON Marks in the backyard and garden category have exceeded $60 million. Further, the record shows that opposer's programs directed to consumers in the backyard category, i.e., AUDUBON AT HOME, receive substantial exposure through opposer's advertising efforts such as on its website and in its brochures. These facts are sufficient to establish that opposer's mark is a strong one, particularly with respect to its environmental conservation services.

We now consider applicant's mark AUDUBON GARDEN and design and opposer's mark AUDUBON. In determining the similarity or dissimilarity of the marks, we must, as applicant points out, consider the marks in their entireties in terms of sound, appearance, meaning and commercial impression. See Palm Bay Imports, Inc. v. Veuve Clicquot

Ponsardin, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general, rather than a specific impression of trademarks. *See* Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975).

Applicant argues that when the marks are considered in their entireties, there are "significant dissimilarities" between its mark and Opposer's mark (i.e., the additions of the word "garden" and the floral design as well as the script font and color in its mark), such that "this is case where a single du Pont factor may be dispositive in a likelihood of confusion analysis." (Brief p. 5). Opposer, by comparison, argues that given the parties' shared use of AUDUBON, it being the dominant portion of applicant's mark, there is a close similarity between the parties' marks creating a likelihood of confusion.

Although we must compare the marks in their entireties, one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by

the mark. See In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, (Fed. Cir. 1985) ("There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.). For instance, "that a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark…." Id, 224 USPQ at 751.

We find that the dominant and distinguishing portion of applicant's mark AUDUBON GARDEN and design is the word "AUDUBON." The word GARDEN, as evidenced by the disclaimer, is merely descriptive, and would not be looked to as a source-identifying element. Indeed, the term is used by applicant in its identification to categorize its products. In addition, although applicant stresses the font style of the words "Audubon Garden" as a distinguishing feature, because registrant's mark is registered in typed format, registrant's rights therein encompass the word "Audubon" and are not limited to the depiction thereof in any special form. See Phillips Petroleum Co. v. C. J. Webb, Inc. 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971). Instead, when a registration for a word mark is in typed form, "then the Board must consider all reasonable manners in which … [the

word] could be depicted." INB National Bank v. Metrohost Inc., 22 USPQ 1585, 1588 (TTAB 1992). Therefore, registrant's mark must be regarded as including the display thereof in the same lettering style used by applicant, since such would be a reasonable manner of display and there is no showing by applicant that the lettering format is unusual or otherwise unique. Moreover, the color elements of applicant's mark are insufficient to avoid a likelihood of confusion; the colors green, mauve and red, being common to flowers, thus serve to further emphasize the nature of applicant's products.

Nor do we find the border and floral design sufficient to distinguish applicant's mark from the registrant's mark. It is settled that with a composite mark comprising a design and words, the word portion of the mark is usually the one most likely to indicate the origin of the goods to which it is affixed. CBS, Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983); In re Dakin's Miniatures, Inc., 59 USPQ2d 1593 (TTAB 2001) ["words are normally accorded greater weight because they would be used by purchasers to request the goods"]; In re Nat'l Data Corp., 753 F.2d at 1056. The border, even though displayed in a mauve color, has minimal visual impact, merely serving to frame the literal element and floral design. Further, the colored

floral design, simply enhances the meaning of the wording AUDUBON GARDEN.

The dominant portion of applicant's mark AUDUBON is identical to opposer's mark. As such, purchasers of backyard and garden products who are familiar with opposer's AUDUBON mark may view applicant's AUDUBON GARDEN and design mark as a variant thereof, and that such mark identifies a line of products sponsored by or approved by opposer. While differences admittedly exist between the marks when viewed on the basis of a side-by side comparison, for the reasons discussed above, we find that they are substantially similar in sound, appearance, connotation and convey the same overall commercial impression. See Palm Bay Imports Inc. v. Veuve Clicuot Ponsardin, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). Accordingly, the *du Pont* factor of similarity of the marks favors opposer.

We next consider the circumstances surrounding applicant's adoption of its mark. It is well settled that a party which knowingly adopts a mark similar to one used by another for closely related goods does so at its own peril and, all doubt on the issue of likelihood of confusion must be resolved against the newcomer. Nina Ricci S.A.R.L. v. E.T.F. Enterprises, 889 F.2d 1070, 12 USPQ2d 1901 (Fed. Cir. 1989); Kimberly Clark Corp. v. H. Douglas Enterprises, Ltd., 774 F.2d 1144, 227 USPQ 541 (Fed. Cir. 1985); and Gillette

Canada Inc. v. Ranir Corp., 23 USPQ2d 1768 9TTAB 1992). Although we do not find that applicant's earlier solicitation of opposer to license opposer's AUDUBON Marks for a different selection of goods establishes a clear case that applicant adopted its AUDUBON GARDEN and design mark in bad faith, we find it noteworthy that out of an entire universe of marks to choose from in naming its garden ornaments, applicant chose a mark that incorporates one previously used by opposer in connection with other types of backyard and garden products. Nonetheless, given the other factors in opposer's favor in this case, we make no finding as to bad faith and this factor is not dispositive in our ruling for opposer.

ADDITIONAL ARGUMENT

A final argument made by applicant requires comment. Applicant argues that the fact that the examining attorney found no potential conflict between applicant's mark and opposer's marks is evidence that issuance of a registration to it would not cause any harm to opposer or injure its reputation. It is well settled, however, that the Board is not bound by the decisions of the examining attorney. See Cineplex Odeon Corp. v. Fred Wehrenberg Circuit of Theatres Inc., 56 USPQ2d 1538, 1541 (TTAB 2000); and In re Sunmarks, Inc., 32 USPQ2d 1470, 1472 (TTAB 1994).

CONCLUSION

We have considered all relevant evidence in this case bearing on the *du Pont* factors and, for the reasons discussed above, conclude that there is a likelihood of confusion between opposer's AUDUBON mark and applicant's AUDUBON GARDEN and design mark. We conclude so principally because the goods are closely related and/or complementary and the marks are similar in appearance, sound, connotation and overall commercial impression.

Decision: The opposition is sustained and registration to applicant is refused.