

This Opinion is Not a
Precedent of the TTAB

Hearing: June 19, 2018

Mailed: January 3, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Rain Bird Corporation
—

Serial No. 85044106
—

John E. Lyhus, of Fitch, Even, Tabin & Flannery LLP,
for Rain Bird Corporation.

Michael Tanner, Trademark Examining Attorney, Law Office 119,
Brett J. Golden, Managing Attorney.

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Before Kuhlke, Gorowitz, and Coggins,
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Rain Bird Corporation (“Applicant”) seeks registration on the Principal Register under Trademark Act Section 2(f), 15 U.S.C. § 1052(f), of the proposed color mark below:



for “flexible, plastic tubes used in subsurface drip irrigation systems” (as amended) in International Class 17.¹ As stated in the application, “The mark consists of the color copper as applied to the entire exterior of the goods. The dotted lines in the mark are intended to show the position of the mark on the goods and are not part of the mark. The color copper is claimed as a feature of the mark.”

This application has a long prosecution history, but we need only discuss what is relevant. After both the Trademark Examining Attorney and Applicant patiently and thoroughly dealt with various refusals, requirements, and requests during prosecution and appeal of the application, including an oral hearing held before this panel on June 19, 2017, there remain only two issues to be decided: Whether the applied-for mark is aesthetically functional under Section 2(e)(5) of the Trademark Act, 15 U.S.C. § 1052(e)(5); and, if it is not aesthetically functional, whether the mark has acquired distinctiveness under Section 2(f) of the Act, 15 U.S.C. § 1052(f) to overcome the non-inherently distinctive and thus fails to function refusal under Sections 1, 2, and 45 of the Act, 15 U.S.C. §§ 1051, 1052, and 1127.² We find that the proposed mark is aesthetically functional and, in the alternative, because the

¹ Application Serial No. 85044106 was filed on May 20, 2010, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and first use in commerce since at least as early as April 29, 2010.

² A color mark that is not functional may, upon a showing of acquired distinctiveness, be registrable on the Principal Register under Section 2(f). *See* TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) § 1202.05(a) (Oct. 2018). Without such a showing, it may be registrable on the Supplemental Register, which Applicant seeks in the alternative. *See* July 21, 2017 Request for Remand, 9 TTABVUE 2, requesting amendment in the alternative.

Page references herein to the briefs and other filings in the appeal refer to the Board’s TTABVUE docket system, while cites to the underlying prosecution record refer to the downloadable .pdf version of the Trademark Status & Document Retrieval (“TSDR”) system.

proposed mark is for a color, it is not inherently distinctive, and, thus, fails to function as a mark, and has not acquired distinctiveness. Accordingly, we affirm the Examining Attorney's final refusals under Section 2(e)(5) and Sections 1, 2, and 45.

I. Functionality

Section 2(e)(5) of the Trademark Act prohibits registration of a proposed mark if it "comprises any matter that, as a whole, is functional." 15 U.S.C. § 1052(e)(5). "The functionality doctrine prevents trademark law, which seeks to promote competition by protecting a firm's reputation, from instead inhibiting legitimate competition by allowing a producer to control a useful product feature." *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995) (quoted in *Valu Eng'g Inc. v. Rexnord Corp.*, 278 F.3d 1268, 61 USPQ2d 1422, 1425 (Fed. Cir. 2002)). As the Court of Appeals for the Federal Circuit explained in *Valu Engineering*:

An important policy underlying the functionality doctrine is the preservation of competition. As this court's predecessor noted in *Morton-Norwich*, the "effect upon competition 'is really the crux'" of the functionality inquiry and, accordingly, the functionality doctrine preserves competition by ensuring competitors "the right to compete effectively."

61 USPQ2d at 1428.

Functionality is a question of fact that depends on the totality of the evidence. *Brunswick Corp. v. British Seagull Ltd.*, 35 F. 3d 1527, 32 USPQ2d 1120, 1122 (Fed. Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995) ("Brunswick"). Applicant seeks to register the color copper as applied to flexible, plastic tubes used in subsurface drip irrigation systems. Depending on the facts of a particular case, a color can be source-

indicating, as in *Qualitex*, 34 USPQ2d 1161 (green-gold dry cleaning press pads) and *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 227 USPQ 417 (Fed. Cir. 1985) (pink fiberglass insulation), or it can be functional, as in *Brunswick* (black outboard motors) and *In re Florists' Transworld Delivery, Inc.*, 106 USPQ2d 1784 (TTAB 2013) (“FTD”) (black boxes for flowers and floral arrangements).

A product feature such as color can be found functional if it serves a purpose that is so significantly useful or important to the class of consumers that competitors need it to compete effectively, and exclusive use of the feature by one producer would place competitors at a substantial non-reputation-related disadvantage. *Brunswick*, 32 USPQ2d at 1122-23; *see also Qualitex*, 34 USPQ2d at 1163-65; *FTD*, 106 USPQ2d at 1791; *M-5 Steel Mfg. Inc. v. O'Hagin's Inc.*, 61 USPQ2d 1086, 1096 (TTAB 2001); TMEP § 1202(a)(vi).

In this case, it is not disputed that the record shows that the color brown is functional for drip irrigation tubing used above ground. Indeed, Applicant “agrees, and has never contested, that the brown colors previously used for drip irrigation tubing are selected to seamlessly blend the tubing into the surrounding surface landscape,” and states that “[b]y that aesthetically functional characteristic, the typical brown colored drip irrigation tubing is camouflaged so that it visually disappears by seamlessly blending into the surface landscape. The evidence of record demonstrates that, when the color of such drip irrigation tubing is described, the color is simply and typically called ‘brown.’” Applicant’s Brief, 18 TTABVUE 10.

In an effort to overcome the functionality refusal, Applicant amended its identification of goods from “flexible, plastic tubes used in drip irrigation systems” to “flexible, plastic tubes used in subsurface drip irrigation systems.” May 8, 2017 Request for Reconsideration at TSDR 3 (emphasis original at *id.* TSDR 7). While making the amendment, Applicant explained that “after purchase and installation the Copper Color mark literally disappears beneath the ground, extinguishing any purported aesthetically functional aspect of the shiny metallic COPPER Mark.” *Id.* at TSDR 7-8. The Examining Attorney accepted the amendment, but maintained the aesthetic functionality refusal and noted that because Applicant markets its subsurface goods for use above ground, the limitation to the identification did not affect the functionality determination. July 13, 2017 Request for Reconsideration Denied, 5 TTABVUE 10.

The record shows that Applicant’s copper-colored subsurface tubing is indeed marketed for use above ground – that is, the flexible, plastic tubes used in subsurface drip irrigation systems are not strictly “subsurface” in the sense that they are buried below the ground and therefore not visible,³ because they are in fact sold for use above ground as well as below ground. For example, Applicant’s installation guide states that while it is recommended that the subsurface tubing be buried between 4-6 inches

³ We take judicial notice of the definition of “subsurface” as “of, relating to, or being something located beneath the surface and especially underground.” <https://www.merriam-webster.com/dictionary>. The Board may take judicial notice of online dictionary definitions including online dictionaries that exist in printed format or have regular fixed editions. *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1747 n.15 (TTAB 2018); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006). See also *Univ. of Notre Dame du Lac v. J. C. Gourmet Food Imps. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff’d* 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

for turf grass applications, it may nonetheless be used “on-surface under mulch” for shrub and groundcover applications. January 21, 2011 Response to Office Action at TSDR 15. Product information at Applicant’s web site touts that its subsurface tubing is “[i]deal for on-surface and sub-surface applications.” July 13, 2017 Request for Reconsideration Denied, 5 TTABVUE 20, 23, 26, 29. Similarly, the front packaging for Applicant’s sub-surface emitter tubing informs a purchaser in prominent all-capital lettering that the tube is for “USE ABOVE OR BELOW GROUND,” while a feature of that same product is identified on Applicant’s web site as its “Copper Shield Technology [which] protects the emitter from root intrusion, allowing for use below ground or underneath mulch.” October 13, 2015 Response to Office Action at TSDR 20. For that same tubing, one retailer directs customers to “[i]ninstall above or below ground,” *id.* at TSDR 28 and 43, while two other retailers explain that it is “[t]he perfect above or below ground drip system for turf and non-turf applications.” August 5, 2016 Response to Office Action at TSDR 22, 25.

The record also supports the fact that competitors’ drip tubing may also be used below ground. For example, “Earthline Brown PC Dripline Installation: Dripline can be installed below or above the ground. If used above the ground it can be covered with mulch to blend it with the landscape.” August 13, 2014 Office Action at 57. Third-party Netafim explains that drip-lines are often exempt from water restrictions because of “the efficient application of water and through the installation of drip-line under mulch or under soil where evaporation, run off and misting are eliminated.” *Id.* at 59.

Although Applicant has attempted to overcome the aesthetically functional refusal by amending the identification of goods to specify tubes used in “subsurface” drip irrigation systems, in an apparent effort to remove tubing used above ground, the record nonetheless shows that subsurface tubes are in fact used above ground. That is, even though Applicant has purposely drafted a description omitting above-ground use, for which use it admits the color brown is functional, we note that subsurface tubing is a good which is used above ground. We have interpreted the nature of Applicant’s subsurface goods in light of what the record shows the subsurface goods to include, which is tubing that may be used above ground. *Cf. In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1422 (Fed. Cir. 2005) (Court looked to the applicant’s amended recitation of services but interpreted the meaning of the wording in light of the actual use being made by the applicant on its web site); *In re Reed Elsevier Properties Inc.*, 77 USPQ2d 1649, 1655 (TTAB 2005), *aff’d* 482 F.2d 1376, 82 USPQ2d 1378 (Fed. Cir. 2007) (Board interpreted applicant’s recitation in view of what the record showed the database to include). Despite Applicant’s tactical decision to carve above-ground use out of the identification of goods, we find that “flexible, plastic tubes used in subsurface drip irrigation systems” includes drip tubing that may be used above ground, as such use is an ordinary aspect of the goods. *See In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1348 (TTAB 2005) (Board found recitation to include specific services applicant’s amendment attempted to remove). Applicant’s attempt to remove above-ground use from the goods for which brown is aesthetically functional, may not assist Applicant in overcoming the aesthetically

functional refusal because the subsurface goods are a product that is used above-ground and will be viewed as such by consumers when sold in the marketplace where competitors are also selling their above ground irrigation tubes.

Applicant points to a definition that “brown” is “the same colour as wood or coffee”⁴ and argues that while “brown” is used by the irrigation industry to describe dripline tubing that blends into the landscape, the record does not show that “copper” is used to describe irrigation tubing. Applicant’s Brief, 18 TTABVUE 10. Applicant claims that its applied-for copper mark “stands out and apart from the aesthetically functional brown” colors used on other tubing that otherwise “seamlessly blends into the surface landscape.” *Id.* at 11. In support of its argument, Applicant submitted numerous declarations of irrigation professionals. *See* April 22, 2013 Response to Office Action at TSDR 8-15; June 4, 2013 Preliminary Amendment at TSDR 4-9; and May 8, 2017 Request for Reconsideration at TSDR 22-61. Many of the declarations refer to a sheen or shine on Applicant’s goods.

We must determine the issue based on the mark as it appears in the drawing.⁵ Trademark Rule 2.52, 37 C.F.R. § 2.52. The mark  shows the color

⁴ Brief, 18 TTABVUE 10, citing MacMillionDictionary.com/dictionary/british/brown submitted with the May 8, 2017 Request for Reconsideration at TSDR 64. Although the entry appears to be a British definition, the Examining Attorney did not dispute that the definition also applies to American English. We take judicial notice that “brown” may more fully be defined as “any of a group of colors between red and yellow in hue, of medium to low lightness, and of moderate to low saturation.” <https://www.merriam-webster.com/dictionary>. *In re Inn at St. John’s, LLC*, 126 USPQ2d at 1747 n.15.

⁵ We note that Applicant attempted to amend the description and color claim of the mark from “copper” to “metallic copper,” July 21, 2017 Request for Remand, 9 TTABVUE, and the drawing page to show the applied-for mark as having a shiny characteristic, March 28, 2018 Request for Remand, 22 TTABVUE; however, each amendment was denied based on

copper as applied to the entire exterior of Applicant's goods. October 11, 2011 Amended Drawing. "Copper" is defined several ways, including "a reddish brown color that resembles the metal copper,"⁶ "a reddish-brown color like that of copper,"⁷ "red-brown in color,"⁸ "a shade of brown,"⁹ and "a reddish brown."¹⁰ These definitions generally support the conclusion that the mark in the drawing is copper, which appears as a shade of brown.¹¹

A product's color compatibility with consumers' needs enhances its functionality. *See, e.g., Brunswick*, 32 USPQ2d at 1122-23 (black outboard motors compatible with a wide variety of boat colors); *In re Ferris Corp.*, 59 USPQ2d 1587, 1591 (TTAB 2000) (color pink functional for surgical wound dressings because it closely resembles Caucasian human skin); *Deere & Co. v. Farmhand, Inc.*, 560 F. Supp. 85, 217 USPQ 252, 260-62 (S.D. Iowa 1982), *aff'd*, 721 F.2d 253 (8th Cir. 1983) (color green functional because purchasers want farm equipment to match). It makes no difference that Applicant's competitors could offer a variety of brown colors to their

procedural issues. 11 and 23 TTABVue, respectively. Because the issue is not before us, we make no determination as to whether a shiny copper mark would be functional.

⁶ Wikipedia.org/wiki/copper_(color), August 13, 2014 Office Action at TSDR 36.

⁷ OxfordDictionaries.com/us/definition/american_english/copper, *id.* at TSDR 41.

⁸ MacMillianDictionary.com/dictionary/american/copper, *id.* at TSDR 46.

⁹ Colors.findthebest.com, *id.* at TSDR 49.

¹⁰ AHdictionary.com, July 13, 2017 Request for Reconsideration Denied at TSDR 45.

¹¹ The record reveals that the Inter-Society Color Counsel and National Bureau of Standards (ISCC-NBS) System of Color Designation is a definitive system for naming colors based on a set of basic color terms and a small set of adjective modifiers. April 10, 2015 Office Action at TSDR 23-31. As the Examining Attorney noted, the backbone of the ISCC-NBS color designation system comprises 13 basic colors, one of which is brown. While there are a variety of shades of copper within the color classification system, the majority of them are categorized under the brown basic color. *Id.*

customers other than copper. “To limit their options by allowing applicant exclusive appropriation of one of the most marketable colors would be unfair.” *Brunswick*, 28 USPQ2d at 1200. As one commentator put it, “[t]he effect on competition is not a function of the range of designs that are physically or conceptually possible; it is instead determined by the number of alternative designs that would be accepted by consumers as reasonable substitutes.” Mark P. McKenna, *(Dys)functionality*, 48 HOUS. L. REV. 823, 846-47 (2011).

Applicant’s competitors use various shades of the color brown, including some that resemble copper, for their drip tubing to blend with the landscape:



12



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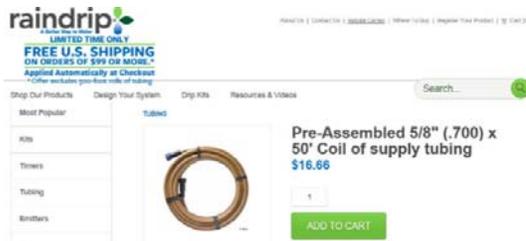
15

¹² April 11, 2011 Office Action at TSDR 7.

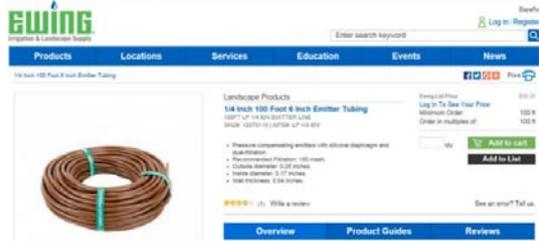
¹³ October 21, 2012 Office Action at TSDR 9.

¹⁴ *Id.* at TSDR 11.

¹⁵ *Id.* at TSDR 13.



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These are quite similar to the color of tubing on the specimen of record:

¹⁶ November 8, 2016 Office Action at TSDR 34.

¹⁷ *Id.* at TSDR 42.

¹⁸ July 20, 2012 Response to Office Action at TSDR 4. One of these examples includes Applicant's product.

¹⁹ *Id.* at TSDR 5. One of these examples includes Applicant's product.

²⁰ January 21, 2014 Response to Office Action at TSDR 7. One of these examples includes Applicant's product.



21.

Providing a variety of browns, include shades of what may be called “copper,” serves the function of allowing irrigation tubing to blend into a variety of landscapes and mulch. Issuing the applied-for registration to Applicant would unfairly hinder competitors’ use of a color that is commonly used for drip tubing. Considering the record as a whole, we find that registration of Applicant’s proposed mark would put its competitors at a significant non-reputation based disadvantage, as in *Brunswick* and *FTD*.

II. Failure to Function as not Inherently Distinctive Color Mark, and Acquired Distinctiveness

The functionality of the proposed mark bars its registration. *Brunswick*, 32 USPQ2d 1125 (“[e]vidence of distinctiveness is of no avail to counter a de jure functionality rejection.”); *In re Vertex Grp. LLC*, 89 USPQ2d 1694, 170 n.15 (TTAB 2009). Nonetheless, for the sake of completeness we consider the refusal under Sections 1, 2, and 45, and Applicant’s claim that the proposed mark may be registered under Section 2(f), which states that “nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of

²¹ May 20, 2010 Specimen at TSDR 1.

applicant's goods in commerce." 15 U.S.C. § 1052(f); see *In re Owens-Corning Fiberglas*, 227 USPQ at 422.

While a single color applied to a product may function as a trademark and be entitled to registration under the Trademark Act, such a color can never be inherently distinctive as a source indicator.²² *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000) (citing *Qualitex*, 34 USPQ2d at 1162-63).

We cannot find in the basic objectives of trademark law any obvious theoretical objection to the use of color alone as a trademark, where that color has attained "secondary meaning" and therefore identifies and distinguishes a particular brand (and thus indicates its "source").

Qualitex, 34 USPQ2d at 1163. See also *In re Slokevage*, 441 F.3d 957, 78 USPQ2d 1395, 1398 (Fed. Cir. 2006). The greater the descriptiveness or non-distinctiveness of the proposed mark, the greater the burden on an applicant to demonstrate acquired distinctiveness. See *Yamaha Int'l Corp. v. Hoshino Gakki*, 6 USPQ2d at 1008 ("the greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning"). *In re Owens-Corning Fiberglas Corp.*, 227 USPQ at 424 ("By their nature color marks carry a difficult burden in demonstrating distinctiveness and trademark character."); *In re Lorillard Licensing Co.*, 99 USPQ2d 1312, 1316 (TTAB 2011). As further discussed below, Applicant faces a high burden to demonstrate acquired distinctiveness.

²² Applicant concedes this by proceeding under Section 2(f). *Yamaha Int'l v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988).

To show that the proposed mark has acquired distinctiveness, Applicant must demonstrate that the relevant members of the public – consumers of flexible, plastic tubes used in subsurface drip irrigation systems – understand the primary significance of the mark as identifying the source of its irrigation tubing rather than the product itself. *In re Steelbuilding.com*, 75 USPQ2d at 1422. Although Applicant states that “professional contractors, retailers and other participants in the marketplace” recognize Applicant as the source of its goods,²³ Applicant appears to focus on professional contractors and submitted numerous declarations therefrom. We note, however, that Applicant’s identification of goods is not limited to the subset of consumers represented by the declarations submitted. Nonetheless, we have reviewed all of Applicant’s evidence in evaluating whether general consumers of subsurface drip tubes would understand the primary significance of the applied-for copper mark as identifying Applicant as the source of the subsurface irrigation tubing.²⁴ Our ultimate Section 2(f) analysis and determination in this case is based on all of the evidence considered as a whole.

The considerations to be assessed in determining whether a mark has acquired secondary meaning can be described by the following six factors: (1) association of the trade dress with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark. ... All six factors are

²³ Applicant’s Brief, 18 TTABVUE 26.

²⁴ Retailers are not consumers, but sell to ultimate consumers; presumably, Applicant’s submission of evidence from retailers bears on general consumers.

to be weighed together in determining the existence of secondary meaning.

In re Snowizard, Inc., 2018 USPQ2d __ (TTAB 2018) (quoting *Converse, Inc. v. Int'l Trade Comm'n*, 907 F.3d 1361, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018)).²⁵ See also *Steelbuilding.com*, 75 USPQ2d at 1424; *Cicena Ltd. v. Columbia Telecomms. Grp.*, 900 F.2d 1546, 14 USPQ2d 1401, 1406 (Fed. Cir. 1990). On this list, no single fact is determinative. *In re Tires, Tires, Tires Inc.*, 94 USPQ2d 1153, 1157 (TTAB 2009); see also *Stuart Spector Designs, Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1554 (TTAB 2009). “Direct evidence [of acquired distinctiveness] includes actual testimony, declarations or surveys of consumers as to their state of mind. Circumstantial evidence is evidence from which consumer association might be inferred, such as years of use, extensive amount of sales and advertising, and any similar evidence showing wide exposure of the mark to consumers.”

Applicant’s evidence of acquired distinctiveness includes:

- Declarations of Samir Shah, as Applicant’s then-Marketing Manager, Landscape Drip SBU, and as Applicant’s now-Marketing and International Sales Manager;²⁶

²⁵ *Snowizard* also explained that the first factor is applicable to the association of any asserted designation as an indicator of source by relevant consumers of the goods at issue. Further, as is the situation here, *Snowizard* explained that although *Converse* was decided after the briefing of the ex parte appeal was complete, clarification of the Section 2(f) factors enunciated by the Federal Circuit did not alter the Board’s analysis in any significant way, require any additional briefing, or affect the ultimate resolution of the proceeding. *Snowizard* at n.8.

²⁶ October 11, 2011 Response to Office Action at TSDR 187-189 (first Shah declaration). Although this declaration, and others, were submitted in support of another issue and long before Applicant actually amended to §2(f), Applicant considers the declarations relevant to acquired distinctiveness. See February 13 Request for Reconsideration at TSDR 12-13 and October 13, 2015 Request for Reconsideration at TSDR 8-9 (discussing previously submitted declarations). August 5, 2016 Response to Office Action at TSDR 41-44 (second Shah declaration).

- Declarations of drip irrigation professionals;²⁷
- “Look for” website advertising with the wording “look for the copper-colored tubing;”²⁸
- “Look for” product packaging, and printouts of such packaging on retail websites;²⁹
- Examples of webpages showing retailers’ use in text of language stating that “the copper color outside ensures [either copper shield or the copper chip] is inside” (or its equivalent) for Applicant’s product;³⁰
- National Retail Federation’s top 100 retailers chart for 2015;³¹ and
- Two press releases each mentioning, inter alia, an award for Applicant’s goods.³²

“When customers see a color appearing on products from many different sources, they are less likely to expect the color to point to a single source of goods.” *In re Gen. Mills IP Holdings II, LLC*, 124 USPQ2d 1016, 1025 (TTAB 2017). As we stated earlier, and as conceded by Applicant, the color brown is functional for above-ground drip irrigation tubing. It is commonly used in the industry on drip tubing that may be used above or below ground, and customers are likely to perceive the color brown on drip tubing as allowing the tubes “to seamlessly blend . . . into the surrounding surface landscape . . .” when above ground (including under mulch). Applicant’s Brief, 18 TTABVUE 10. This is especially true since many tubing manufacturers use shades

²⁷ April 22, 2013 Response to Office Action at TSDR 8-15 (four declarations); June 4, 2013 Preliminary Amendment at TSDR 4-9 (three declarations); May 8, 2017 Request for Reconsideration at TSDR 22-61 (20 declarations; plus that of Janet Reilly, Director, Landscape Drip Division of Applicant, attesting to the declarations, TSDR 62-63).

²⁸ April 22, 2013 Response to Office Action at TSDR 16-20; February 13, 2015 Request for Reconsideration at TSDR 14-15.

²⁹ October 13, 2015 Request for Reconsideration at TSDR 20-38; August 5, 2016 Response to Office Action at TSDR 18-39.

³⁰ October 13, 2015 Request for Reconsideration at TSDR 39-48.

³¹ August 5, 2016 Response to Office Action at TSDR 15-16.

³² August 5, 2016 Response to Office Action at TSDR 46-50.

of brown, so it is not “a color that in context seems unusual.” *Qualitex*, 34 USPQ2d at 1162-63. As shown in the multiple images of drip tubing above as part of our discussion of functionality, most of the drip tubing of record is some shade of brown.³³ It would be difficult to name each shade of brown as it appears in the record, but some appear to be copper colored. In view thereof, Applicant’s use of copper, which is a shade of brown, is unlikely to be seen as an indication of source. *Compare In re Hodgdon Powder Co.*, 119 USPQ2d 1254, 1259 (TTAB 2016) (recognizing the color white as a trademark for “gunpowder [which] is [normally] black or gray”).

In considering the first *Converse* factor, while Applicant did not submit a survey, we have given careful consideration to the many declarations from irrigation professionals. It is difficult to separate the declarants’ recognition of the color copper from their almost uniform reference to a shine, sheen, or gloss as an unusual and identifying characteristic of the tubing.³⁴

As for the second *Converse* factor, Applicant used the purported mark since 2010; however, as the record shows, most drip tubing is some tone of brown; much of it appearing to be a shade of what can be called copper. We recognize that the record is

³³ The record reveals that purple, not brown, is used for driplines containing non-potable water; but the overwhelming majority of record evidence shows and/or discusses brown tubing.

³⁴ For example, *see* May 8, 2017 Request for Reconsideration at TSDR 22 (“. . . copper color which is also shiny.”); at 24 (“The shiny and cleaner looking cooper color . . .”); at 26 (“. . . copper color is also shiny.”); at 28 and 38 (“. . . is shinier than the usual tubing colors.”); at 30 (“. . . is also shinier than tubing from other companies.”); at 32 (“. . . appears shinier than other dripline.”); at 34 (“. . . is shinier than the usual tubing colors.”); at 40 (“. . . is also shiner [sic] than tubing from other companies.”); at 42 (“. . . is shiny and noticeably different from the usual brown tubing.”). April 22, 2013 Response to Office Action at TSDR 8 (“. . . has a surface sheen . . .”); at 10 (“. . . it is like it has a sprayed sheen on it.”); at 12 (“. . . has a bright surface sheen . . .”); at 14 (“. . . having a shinier copper color.”).

devoid of evidence that others in the industry refer to their tubing as the color “copper” as opposed to “brown.” That is not dispositive. As demonstrated above, copper is a brown color and Applicant’s competitors use various shades of the color brown, including some that resemble copper, for their drip tubing. Although use of a shiny or glossy **finish** on tubing may not be common in the irrigation industry, Applicant’s use of a brown **color** on tubing cannot be said to be exclusive. Applicant fails to demonstrate the “substantially exclusive” use of the purported mark required by the statute. 15 U.S.C. § 1052(f); *In re Owens-Corning Fiberglas*, 227 USPQ at 424 n.11; *Saint-Gobain Corp. v. 3M Co.*, 90 USPQ2d 1425, 1434 (TTAB 2007). Again, Applicant’s proposed copper mark is depicted as . But the record evidence reflects that similar colors are commonly used by others on drip tubing. *See* examples of Applicant’s and competitors’ brown tubing, *supra*.

“Where the use of colors is common in a field, an applicant has a difficult burden in demonstrating distinctiveness of its claimed color.” *In re Howard S. Leight & Assocs. Inc.*, 39 USPQ2d 1058, 1060 (TTAB 1996). Further, “When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances.” *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939, 940-41 (Fed. Cir. 1984); *see also M-5 Steel v. O’Hagin’s*, 61 USPQ2d at 1098 (“In the case before us, the record shows that there are at least three companies including

opposer that produce roof vents substantially similar to applicant's vents. This alone would make it difficult for applicant to establish acquired distinctiveness.”).

Although the evidence shows that Applicant has used its copper-colored drip tubing for close to nine years, “this factor is undercut by the lack of exclusivity.” *In re Pohl-Boskamp GmbH & Co.*, 106 USPQ2d 1042, 1049 (TTAB 2013). Given the ubiquity of use of the color brown on drip tubing, Applicant's lengthy use of the same or substantially similar color does not transform it into a source indicator. *See In re Ferris*, 59 USPQ2d at 1592 (“Finally, with respect to applicant's length of use, given the nature of the involved mark (i.e., a single color applied over the entire product which is very similar to colors used by competitors), we are unable to conclude that consumers have come to recognize applicant's color ‘pink’ as an indication of source based upon this length of use.”).

“Look for” advertising is the type of evidence that directs the consumer to “look for” the particular feature claimed as a trademark. *Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1516 (TTAB 2017). While Applicant has shown the manner of its advertising, an element of the third *Converse* factor, and provided examples of “look for” packaging and advertisements, Applicant provided no figures (e.g., magnitude, geographic extent, duration, circulation, impressions, dollar amounts spent, etc.) to place the advertising in context. Moreover, the eventual growth of other's use of variations on the phrase “the copper color outside ensures [either Copper Shield or the copper chip] is inside” may demonstrate the burgeoning popularity of Applicant's goods, not necessarily consumers' recognition of its claim to

the color copper as a source indicator. *See, e.g., In re Bongrain Int'l (Am.) Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990).

While there is no evidence of record to support the fourth or fifth *Converse* factors, we consider the two press releases relating to Applicant's tubing relevant to the sixth factor (i.e., unsolicited media coverage of the product embodying the mark.) However, there is no evidence of the extent to which the press releases were circulated to the consuming public.

On balance, weighing together the factors for which there is evidence, we determine that Applicant has not met its difficult burden of demonstrating the existence of secondary meaning. Applicant's evidence, taken altogether, fails to demonstrate that the relevant purchasing public has grown to recognize the primary significance of its proposed copper-colored mark as identifying the source of its products. For these reasons, we find that Applicant has not carried its "unusually high burden" of proving that its proposed mark has acquired distinctiveness. *In re Owens-Corning Fiberglas*, 227 USPQ at 424; *FTD*, 106 USPQ2d at 1794.

III. Decision

The refusal to register the applied-for copper color mark because it is aesthetically functional under Section 2(e)(5) is affirmed.³⁵ The refusal to register the applied-for

³⁵ Because the proposed color mark is functional, it is not registrable on the Principal or Supplemental Registers. Trademark Act Sections 2(e)(5) and 23(c), 15 U.S.C. § 1052(e)(5) and 1091(c). *See* TMEP § 1202.05(b). In view thereof, Applicant's alternative request to move forward on the Supplemental Register is barred by this refusal.

mark on the Principal Register because it fails to function as a mark under Sections 1, 2, and 45 and has not acquired distinctiveness under Section 2(f) is also affirmed.³⁶

³⁶ Applicant's alternative request to move forward on the Supplemental Register is relevant to this refusal; but, as noted just above, the request is barred by the Section 2(e)(5) refusal.