

This Opinion is not a
Precedent of the TTAB

Hearing: November 3, 2016

Mailed: January 31, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Orbit Irrigation Products, Inc.
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Serial No. 85945749
Serial No. 85945766
Serial No. 85945777
Serial No. 85945781
Serial No. 85945783
Serial No. 85945775
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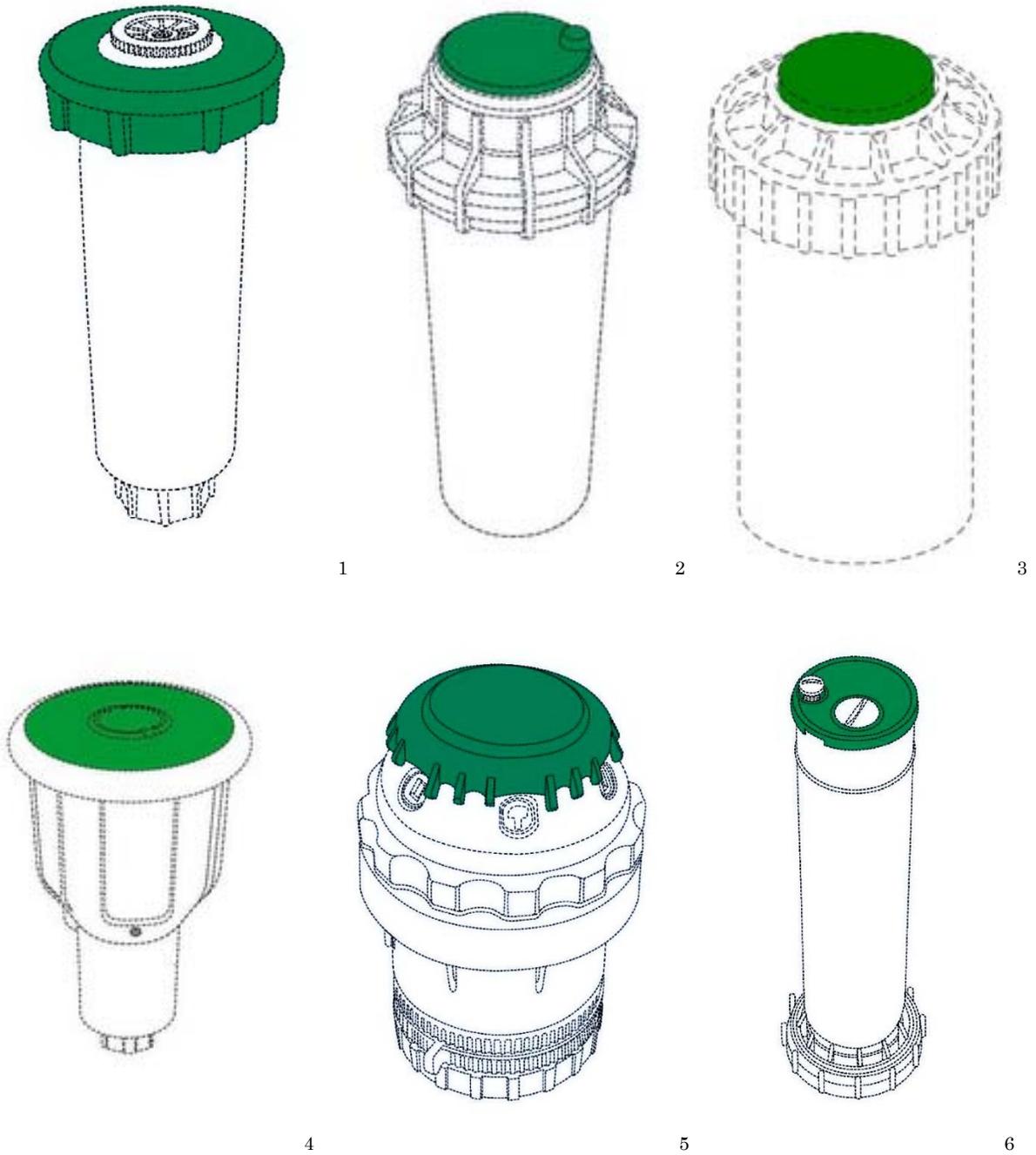
Peter M. De Jonge and Eric E. Westerberg of Thorpe, North & Western, LLP,
for Orbit Irrigation Products, Inc.

Tasneem Hussain, Trademark Examining Attorney, Law Office 118,
Thomas G. Howell, Managing Attorney.

—
Before Quinn, Hightower and Heasley,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Orbit Irrigation Products, Inc. (“Applicant”) seeks registration on the Principal Register of the following six design marks, all for “home and garden sprinklers, namely, lawn sprinklers” in International Class 11:



¹ Application Serial No. 85945749 filed on May 29, 2013 based upon Applicant's claim of first use anywhere and use in commerce since at least as early as December 28, 1998.

² Application Serial No. 85945766 filed on May 29, 2013 based upon Applicant's claim of first use anywhere and use in commerce since at least as early as November 4, 1996.

Each application states that “The color(s) green is/are claimed as a feature of the mark. The mark consists of the color green as applied to a top portion of the sprinkler head, contrasting with an adjoining non-green portion of the sprinkler head. The shape of the top, cap, and base are shown in a three dimensional drawing in broken lines shows the positioning of the mark on the goods and is not claimed as part of the mark.” In each application, Applicant seeks registration under Trademark Act Section 2(f), 15 U.S.C. § 1052(f).

The Trademark Examining Attorney has refused registration of Applicant’s marks on two bases: (i) that they are functional, and (ii) that they are not inherently distinctive and have not acquired distinctiveness. 15 U.S.C. §§ 1052(e)(5),(f).

When the refusals were made final, Applicant appealed. Because the cases have common issues of fact and of law, and the records are largely identical, the appeals have been consolidated.⁷ *See generally* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 1214 (Jan. 2017). The appeal has been fully briefed, and an oral hearing was held before this panel on November 3, 2016. We affirm the refusals to register.

³ Application Serial No. 85945777 filed on May 29, 2013 based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as October 27, 1995.

⁴ Application Serial No. 85945781 filed on May 30, 2013 based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as December 2, 2005.

⁵ Application Serial No. 85945783 filed on May 30, 2013 based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as March 4, 2005.

⁶ Application Serial No. 85945775 filed on May 29, 2013 based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as September 25, 1997.

⁷ 7 TTABVue. Citations are to the record in Application Serial No. 85945749.

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 Products Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995) (quoted in *Valu Engineering Inc. v. Rexnord Corp.*, 278 F.3d 1268, 61 USPQ2d 1422, 1425 (Fed.Cir. 2002)). As 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) (“*Brunswick*”). Applicant seeks to register single-color marks, all green, applied to the top portion of sprinkler heads, contrasting with the adjoining non-green portion of the sprinkler heads. 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).

Applicant argues that the color green is not essential to the use or purpose of the sprinkler heads, and does not affect their cost or quality.⁸ See *Inwood Labs. Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 214 USPQ 1 (1982). Further, Applicant points out, the factors indicating utilitarian functionality, listed in *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 213 USPQ 9, 14 (CCPA 1982), are absent in this case. There are no patents covering its sprinkler head configurations,⁹ its advertising does not promote or extol any utilitarian feature of its green-topped sprinkler heads, and there are a multitude of available alternative colors, such as a competitor’s RainBird sprinkler heads, which come in seven different colors:



Moreover, Applicant’s green design element actually *increases* the cost of manufacture, according to its Director of Manufacturing and Engineering.¹¹ Thus, Applicant concludes that under *Inwood* and *Morton-Norwich*, its green-topped

⁸ Applicant’s brief, pp. 8, 10, 4 TTABVUE 9, 11; July 8, 2014 Response to Office Action p. 29.

⁹ Declaration of Gregory Butters, Applicant’s General Counsel, ¶6, Declaration of Todd Groll, Applicant’s Director of Manufacturing and Engineering, ¶6, Dec. 13, 2013 Response to Office Action pp. 43, 45.

¹⁰ RainBird Variable Arc Spray Series, www.RainBird.com, 6/18/14, July 8, 2014 Response to Office Action p. 39.

¹¹ Applicant’s brief, pp. 16-20, 4 TTABVUE 17-21; Declaration of Todd Groll, Orbit Director of Manufacturing and Engineering, ¶ 3, Dec. 13, 2013 Response to Office Action pp. 45-46.

sprinkler heads are demonstrably not functional.

However, this runs up against the well-settled principle that “[a] feature that is not essential to the use or purpose of the article, or does not affect the cost or quality of the article—in other words, would not be considered as utilitarian functional under the *Inwood* formulation—is still prohibited from registration if the exclusive appropriation of that feature would put competitors at a significant non-reputation related disadvantage.” *FTD*, 106 USPQ2d 1784, 1787 (TTAB 2013) (citing *Qualitex*, 34 USPQ2d at 1165). In *FTD*, the color black, as used on boxes for flowers and floral arrangements, served a purpose that was so significantly useful or important to the relevant classes of consumers that competitors needed the color to compete effectively:

There is a competitive need for others in the industry to use the color black in connection with floral arrangements and flowers. Competitors who, for example, want to offer flowers for bereavement purposes, Halloween or to imbue an element of elegance or luxury to their presentations through packaging therefor will be disadvantaged if they must avoid using the color black in such packaging.

106 USPQ2d at 1791. Hence, the Board in *FTD* found the color black functional, as used on the goods. The *FTD* decision cited *Brunswick*, where the Federal Circuit upheld the Board’s finding that a single color used on outboard motors was functional:

The color black, as the Board noted, does not make the engines function better as engines. The paint on the external surface of an engine does not affect its mechanical purpose. Rather, the color black exhibits both color compatibility with a wide variety of boat colors and ability to make objects appear smaller. With these advantages for potential customers, the Board found a competitive need for engine manufacturers to use black on outboard engines.

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All outboard engine manufacturers color their products. These manufacturers seek colors that easily coordinate with the wide variety of boat colors. The Board found that the color black served this non-trademark purpose. In addition, the Board found that the color black serves the non-trademark purpose of decreasing apparent object size. The record showed that these features were important to consumers. Unlike the pink color in *Owens-Corning*, the Board found a competitive need for the color black. Thus, the Board concluded that registration of Mercury's proposed mark would hinder competition. This court discerns no clear error in the Board's findings.

Brunswick, 32 USPQ2d at 1122-23.

As these decisions indicate, 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. *Id.*; see also *Qualitex*, 34 USPQ2d at 1163-65; *M-5 Steel Mfg. Inc. v. O'Hagin's Inc.*, 61 USPQ2d 1086, 1096 (TTAB 2001); TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") § 1202(a)(vi) (Jan. 2017).

In this case, as the Examining Attorney points out, there is a competitive need for lawn care product manufacturers to use the color green to help their products blend in with the landscape.¹² Applicant's valve boxes, for example, are advertised in "Standard color to match grassy installation areas":¹³

¹² Examining Attorney's brief, 13 TTABVUE 12 et seq.

¹³ July 12, 2013 Office Action p. 9, www.HomeDepot.com, 8/6/2010.



Orbit 12 In. Standard Valve Box (Black/Green)

Model # 53212 Internet # 202206749

\$19.87/EA-Each

Ships FREE with \$249.00 Order

This item cannot be shipped to the following state(s): AK, HI

★★★★★

Be the first to [Write a Review](#) >

[Write a review for a chance to win a \\$1,000 Gift Card.](#)

A competitor advertises that its Oldcastle sprinkler head is made of “Durable concrete, colored green to match grass”:¹⁴



Another competitor, RainBird, uses a green-topped spray nozzle:



Rain Bird 8van 8 ft. Variable Arc Sprinkler Spray Nozzle

\$1 online

Write a review

Save to Shortlist

They are ideal for odd shaped corners and smaller grassy areas around sidewalks and driveways for watering flowerbeds or shrubs. A complete line of VAN nozzles is available covering a range

8 ft. - \$1

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And yet another competitor, Hunter, advertises a green-topped sprinkler, the “G-SPRAY,” that pops up when in use:

¹⁴ July 12, 2013 Office Action p. 14, www.Lowes.com, 8/6/2010.

¹⁵ Jan. 8, 2014 Office Action p. 9, www.Google.com/shopping, 1/7/2014.



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Hence, the Examining Attorney observes, as these and other examples of record demonstrate, permitting Applicant to exclusively appropriate the color green for sprinkler head tops would disadvantage Applicant’s competitors, who use the color to blend their products into the landscape.

Applicant argues that the valve boxes to which the Examining Attorney refers are entirely different goods—goods that, when buried in a lawn or garden, expose only the top, monochromatic surface:¹⁷



¹⁶ July 12, 2013 Office Action p. 40, www.HunterGolf.com, 8/6/2010.

¹⁷ Applicant’s brief p. 12, 4 TTABVUE 13; July 8, 2014 Response to Office Action pp. 23, 56.

Furthermore, Applicant argues, while the donut-shaped Oldcastle green sprinkler head is monochromatic, Applicant's sprinkler heads are not, as there is a contrast in color between the top and sides.¹⁸ The RainBird Spray Head is 85% black, so the 15% green area does not camouflage it.¹⁹ Similarly, in the Hunter line of sprinkler heads, the colored outer ring comprises only a small portion of the overall exposed sprinkler head surface area, thereby disproving its functionality, Applicant contends.²⁰ Because Applicant's proposed marks consist of a green top, contrasted with an adjacent non-green side of each sprinkler head, Applicant insists that they do not hide, camouflage or create any other functional advantage;²¹ instead, it argues, the contrast calls to mind the *Christian Louboutin* case, in which the Second Circuit Court of Appeals found that the red-lacquered outsole on high heels served as a source indicator so long as it contrasted with the color of the adjoining upper portion of the shoe:



See Christian Louboutin S.A. v. Yves Saint Laurent America Holding Inc., 697 F.3d 206, 103 USPQ2d 1937, 1950 (2d Cir. 2012).²²

¹⁸ July 8, 2014 Response to Office Action p. 24.

¹⁹ July 8, 2014 Response to Office Action pp. 13, 15.

²⁰ July 8, 2014 Response to Office Action p. 16.

²¹ Applicant's brief pp. 14-15, 4 TTABVue 15-16; Dec. 13, 2013 Response to Office Action p. 17.

²² Applicant's reply brief pp. 8-9, 14 TTABVue 8-9.

Unlike high heels with a contrasting red sole, however, sprinklers commonly appear with green tops and contrasting sides, *e.g.*:



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This contrast functions to help them blend into landscapes that have a green, leafy background above darker earth. Thus, unlike *Christian Louboutin*, the contrast in colors enhances the function of sprinkler heads produced by Applicant and its competitors.

Indeed, providing a variety of colors—including green—serves the function of allowing sprinkler heads to blend into a variety of landscapes. An article from *Guide to Successful Gardening* explains, “Having a sprinkler system that has the appearance of various types of flowers may appeal to your sense of aesthetics. These units can be discreetly placed islands and flowerbeds, and aimed in the direction of the lawn. When not in action, they are able to easily blend in to your landscaping

²³ Hunter MP2000 Rotator model, Google.com/shopping 1/7/2014, Jan. 8, 2014 Office Action p. 11.

²⁴ Gardena 1537 Pop-Up Underground Oscillating Sprinkler, www.LawnWarehouse.com 7/22/2014, July 23, 2014 Office Action p. 99

²⁵ Irritrol sprinkler nozzle, www.SprinklerWarehouse.com 7/22/2014, July 23, 2014 Office Action p. 102.

²⁶ Melnor Sprinkler, www.LawnWarehouse.com 7/22/2014, July 23, 2014 Office Action p. 103.

plan.”²⁷ The color green may not camouflage sprinklers to the point of invisibility, but it is compatible with a wide variety of landscapes, such as lawns, gardens, and golf courses, and helps the sprinklers, even when fully extended while is use, blend in with the greenery. *E.g.*:



Lawn care competitors advertise accordingly:

- “We use a green lid so they blend in with your lawn.” (Wilcox Bros. Lawn Sprinklers & Landscape Lighting printout)³¹
- “Our Vista sprinkler systems blend in with the yard to avoid any eye sores that lower quality sprinkler systems may cause.”³²

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

²⁷ www.ExperimentalEarth.com 7/21/2014, July 23, 2014 Office Action p. 96.

²⁸ Antelco GS 1 Gear Drive Sprinkler, 7/22/2014, July 23, 2014 Office Action p. 107,

²⁹ www.LawnWarehouse.com 7/22/2014, July 23, 2014 Office Action p. 98.

³⁰ www.Sourcingmap.com 1/7/2014, Jan. 8, 2014 Office Action p. 17.

³¹ www.WilcoxBros.com 7/21/2014, July 23, 2014 Office Action p. 31.

³² www.SprinklerRepairvista.com 7/21/2014, July 23, 2014 Office Action p. 81.

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 colors to their customers other than green. "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, "The 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 want to use the color green, among other colors, not only to blend with the landscape:



but also to serve other functions, such as indicating the range of a sprinkler's spray:

³³ www.RainBird.com, 7/23/2014, July 12, 2014 Office Action p. 8.



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Issuing the applied-for registrations to Applicant would unfairly hinder competitors' use of a color that is commonly used for lawn care products. Applicant has already pursued one competitor for trademark infringement,³⁵ and if the registrations issued, encompassing all shades of green without limitation,³⁶ the plausible threats of suit would further inhibit competition. *See Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 54 USPQ2d 1065, 1069 (2000) ("Consumers should not be deprived of the benefits of competition with regard to the utilitarian and esthetic purposes that product design ordinarily serves by a rule of law that facilitates

³⁴ RainBird Variable Arc Spray Series, www.RainBird.com, 6/18/14, Applicant's July 8, 2014 Response to Office Action p. 39. *Cf. Kasco Corp. v. Southern Saw Serv. Inc.*, 27 USPQ2d 1501 (TTAB 1993) (color green used as wrapper for saw blades is functional when the color is one of the six colors used in a color-coding system to identify the type of blade).

³⁵ Declaration of Mitch Lord, Applicant's Director of Marketing and Business Development, ¶ 9, Dec. 12, 2013 Response to Office Action p. 42.

³⁶ "Similarly, if the mark includes gradations of color, the description should so indicate." TMEP 1202.05(e). *Cf. In re N.V. Organon*, 79 USPQ2d 1639, 1650 (TTAB 2006) ("If a registration were to issue for the mark with this description, applicant would gain exclusive rights to all flavors of orange, not just the 'unique' orange flavor that applicant claims it has."); *In re Vertex Group*, 89 USPQ2d 1694, 1704 (TTAB 2009) ("It matters not that applicant's actual sound may currently use only a handful of particular frequencies, for it would be free to change the combinations at any time and still have its sound fall within the ambit of the description. This factor favors a finding of functionality.").

plausible threats of suit against new entrants based upon alleged inherent distinctiveness.”). All in all, as in *Brunswick* and *FTD*, registration of Applicant’s proposed marks would put its competitors at a significant non-reputation based disadvantage.

For these reasons, we conclude that the proposed marks are functional under Trademark Act Section 2(e)(5).

II. Acquired Distinctiveness

The functionality of the proposed marks bars their registration. *Brunswick*, 32 USPQ2d 1125 (“[e]vidence of distinctiveness is of no avail to counter a de jure functionality rejection.”); *In re Vertex Group LLC*, 89 USPQ2d at 1700 n.15. Nonetheless, for the sake of completeness we consider Applicant’s claim that the proposed marks 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 applicant’s goods in commerce.” 15 U.S.C. § 1052(f); see *In re Owens-Corning Fiberglas*, 227 USPQ at 422.

Color marks, like product configuration marks, can never be inherently distinctive, and must acquire distinctiveness in order to be registered. *Wal-Mart v. Samara*, 54 USPQ2d at 1068-69; *In re Slokevage*, 441 F.3d 957, 78 USPQ2d 1395, 1398 (Fed. Cir. 2006). Applicant concedes this by proceeding under Section 2(f). *Yamaha International v. Hoshino Gakki*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988). To show that the proposed marks have acquired distinctiveness, Applicant must demonstrate that the relevant members of the public—consumers of residential

sprinkler system products, who would use the sprinklers for lawn and garden care³⁷—understand the primary significance of the mark as identifying the source of its sprinkler products rather than the products themselves. *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1422 (Fed. Cir. 2005). Applicant bears the burden of proving a prima facie case of acquired distinctiveness, *FTD*, 106 USPQ2d at 1792; and the burden of proving that a color mark has acquired distinctiveness is difficult. *In re Owens-Corning Fiberglas*, 227 USPQ at 424; *Saint-Gobain Corp. v. 3M Co.*, 90 USPQ2d 1425, 1434 (TTAB 2007). “Acquired distinctiveness may be shown by direct and/or circumstantial evidence. Direct evidence 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.” *Stuart Spector Designs, Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1554 (TTAB 2009).

Applicant argues that it has used its green-topped sprinkler head marks for about 20 years.³⁸ Over 2.6 million of its green-topped sprinkler heads are sold every year in prominent national chains such as Lowes, Home Depot, and Ace Hardware, with sales exceeding \$25 million annually.³⁹ In each of the last several years it has spent

³⁷ Applicant’s brief p. 23, 4 TTABVUE 24.

³⁸ Applicant’s brief p. 21, 4 TTABVUE 22, Lord Decl. ¶2, Declaration of Gregory Butters, General Counsel of Applicant, ¶2, Declaration of Todd Groll, Director of Manufacturing and Engineering of Applicant, ¶2, Declaration of Russ Messerly, Applicant’s Director of Sales of National Accounts North America, ¶2, Dec. 12, 2013 Response to Office Action pp. 39, 43, 45, 47.

³⁹ Lord Decl. ¶3, Messerly Decl. ¶3-4, Dec. 13, 2013 Response to Office Action pp. 39, 47-48.

approximately \$3.5 million marketing these sprinklers,⁴⁰ and it currently uses “look for” advertisements in aisle “end cap” displays such as this, posted in at least 151 Home Depot stores:



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Additionally, Applicant contends that its distributors recognize the proposed marks as an identifier of source.⁴² In support of this contention, it submits three declarations from distributors, one from Lowes, and two from Home Depot.⁴³ The three declarants signed a form declaration attesting that they recognize Applicant’s green-topped sprinkler heads “as a trademark and as an indicator that Orbit is the source and origin of the goods....”⁴⁴ Applicant argues that “These declarations are therefore clear evidence that those within the residential sprinkler system industry recognize the [proposed marks] as having acquired distinctiveness and as an

⁴⁰ Lord Decl. ¶5, Dec. 13, 2013 Response to Office Action p. 41.

⁴¹ Lord Decl. ¶4, Dec. 13, 2013 Response to Office Action pp. 40-41.

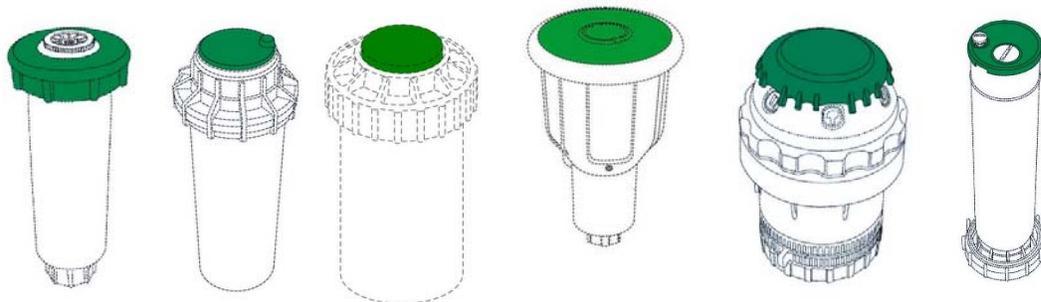
⁴² Applicant’s brief p. 23, 4 TTABVUE 24.

⁴³ Declarations of Tim Holt, Jack Fereday, Timothy O’Hara, Dec. 13, 2013 Response to Office Action pp. 199-204.

⁴⁴ *Id.* at pp. 199, 201, 203.

indicator of source.”⁴⁵ And it concludes that its evidence of long use, extensive and widespread sales, “look for” advertising, and third-party recognition demonstrate that the proposed marks have acquired distinctiveness.⁴⁶

We agree with the Examining Attorney that Applicant’s showing is insufficient to establish acquired distinctiveness. To begin with, Applicant fails to demonstrate the “substantially exclusive” use of the mark required by the statute. 15 U.S.C. § 1052(f); *In re Owens-Corning Fiberglas*, 227 USPQ at 424 n.11; *Saint-Gobain v. 3M*, 90 USPQ2d at 1434. Again, Applicant’s proposed green-topped sprinkler head marks are depicted as follows:



But the record evidence reflects that the color green, either alone or with a contrasting color, is common in the lawn care field, and commonly used by others on sprinkler heads, e.g.:

⁴⁵ Applicant’s brief p. 24, 4 TTABVUE 25. The identification of goods for each mark is “home and garden sprinklers, namely, lawn sprinklers.”

⁴⁶ *Id.*



“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

⁴⁷ Hunter MP2000 Rotator model, Google.com/shopping 1/7/2014, Jan. 8, 2014 Office Action p. 11.

⁴⁸ Gardena 1537 Pop-Up Underground Oscillating Sprinkler, www.LawnWarehouse.com 7/22/2014, July 23, 2014 Office Action p. 99.

⁴⁹ Irritrol sprinkler nozzle, www.SprinklerWarehouse.com 7/22/2014, July 23, 2014 Office Action p. 102.

⁵⁰ Melnor Sprinkler, www.LawnWarehouse.com 7/22/2014, July 23, 2014 Office Action p. 103.

⁵¹ Hit 704 4” Pop-Up Sprinkler Spray Head, www.PlumbersStock.com, 7/22/2014, July 23, 2014 Office Action p. 101.

⁵² Rain Bird 8 ft. Variable Arc Sprinkler Spray Nozzle, Jan. 8, 2014 Office Action p. 9.

would make it difficult for applicant to establish acquired distinctiveness.”).

Although the evidence shows that Applicant has used its green-topped sprinkler heads for a relatively long period of time, “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 green on lawn care products in general, and on competitors’ sprinkler heads in particular, Applicant’s lengthy use of the same 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.”).

By the same token, while Applicant’s sales are not insubstantial, as measured in units and dollar amounts, the sales evince its sprinklers’ popularity, not the public’s recognition of their color as an indication of origin. *Id.* at 1592 (“Although the sales and advertising figures are not insignificant, given the fact that the applied-for mark is merely a single color, and further that very similar colors have been used by competitors for wound dressings, this evidence does not rise to the level necessary to support a finding of acquired distinctiveness in this case. We cannot conclude from these figures that consumers recognize the ‘pink’ colored wound dressings as indicating origin with applicant.”).

Applicant's aisle "end cap" displays constitute "look for" advertising, as they encourage customers to look for the "GREEN TOP." See *Stuart Spector v. Fender Musical Instruments*, 94 USPQ2d at 1572 ("Look for' advertising refers to advertising that directs the potential consumer in no uncertain terms to look for a certain feature to know that it is from that source.") :



But Applicant does not indicate how long or how widely it has used this "look for" advertising, aside from its Director of Marketing and Business Development's December 12, 2013 declaration that "Currently at least 151 Home Depot stores prominently feature the Orbit Sprinkler Head Configuration at aisle 'end cap displays...."⁵³ There is no evidence of the extent of such advertising before or after that date. And its display features its ORBIT and design logo, making it difficult to discern whether customers have grown to recognize the green tops *per se* as an indicator of source. See *FTD*, 106 USPQ2d at 1793 (applicant only used black floral

⁵³ Lord Decl. ¶4, Applicant's Dec. 13, 2013 Response to Office Action p. 40.

boxes for a short period of time, with other matter on the boxes). This case thus resembles *In re Udor U.S.A. Inc.*, 89 USPQ2d 1978, 1987 (TTAB 2009), where the Board found: “In applicant’s favor, it does appear as if applicant has employed some ‘look for’ advertising. However, the declaration of applicant’s co-owner ... contains no evidence of the overall level of this ‘look for’ advertising activity. Furthermore, the record does not reveal any measure of its effectiveness.” For the same reasons, Applicant’s “look for” advertising evidence falls short.

Finally, the three declarations from Applicant’s distributors have limited probative value. Form declarations of this sort, in which each declarant “fills in the blanks” with his name, title, and date of execution, may be used in an effort to show acquired distinctiveness, but their conclusory wording, from a small segment of the market, impairs their probative value. *See FTD*, 106 USPQ2d at 1794 n.9; *In re Pohl-Boskamp*, 106 USPQ2d at 1051. As in *In re Udor*, “[W]e find that the absence of any affidavits or declarations from the ultimate users of applicant’s goods undermines applicant’s contention that the configuration of this spray nozzle head is recognized as a source indicator for this line of spray nozzles. Under the circumstances of this case, when focusing on who comprises the ‘public,’ we find that it includes the ultimate purchasers/users of spray nozzles as well as spray nozzle and sprayer equipment distributors and retailers.” *In re Udor*, 89 USPQ2d at 1987. Applicant adduces no such evidence from the relevant purchasing public.

All in all, given the commonplace use of the color green for lawn care goods in general and sprinklers in particular, Applicant’s evidence—of its length of use,

amount of sales, types of advertising, and extent of recognition, taken altogether—fail to demonstrate that the relevant purchasing public has grown to recognize the primary significance of its green-topped sprinkler head proposed marks as identifying the source of its products rather than the products themselves. For these reasons, we find that Applicant has not carried its “unusually high burden” of proving that its proposed marks have acquired distinctiveness. *In re Owens-Corning Fiberglas*, 227 USPQ at 424; *FTD*, 106 USPQ2d at 1794.

In its reply brief, Applicant states for the first time that “if the Board affirms this ground[] for refusal, and provided that there are no other impediments to the marks being allowed, Applicant requests that the Board return the applications to the Examining Attorney so that Applicant may amend the applications to the Supplemental Register.”⁵⁴ Applicant’s request cannot be granted for two reasons. First, our finding that the proposed marks are functional bars their registration on the Supplemental Register. Trademark Act Section 23(c), 15 U.S.C. § 1091(c); *In re Heatcon, Inc.*, 116 USPQ2d 1366, 1370 (TTAB 2015). Second, Applicant’s decision to seek registration on the Supplemental Register should have been made during its prosecution of the applications, not at this late juncture on appeal. *See In re Integrated Embedded*, 120 USPQ2d 1504, 1510-12 (TTAB 2016); TBMP § 1218. In view of the foregoing, Applicant’s request that we remand the subject applications to the Examining Attorney for amendment to the Supplemental Register is denied.

⁵⁴ Applicant’s reply brief p. 5, 14 TTABVUE 6.

Decision: The refusal to register Applicant's proposed marks is affirmed on the grounds of functionality and lack of acquired distinctiveness.