

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

Mailed:
March 28, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re CellCorp USA, LLC

Serial No. 77860793

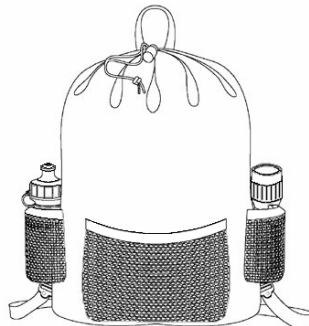
Kimberly I. Shimomura of Harter Secrest & Emery LLP for
CellCorp USA, LLC.

W. Wendy Jun, Trademark Examining Attorney, Law Office 103
(Michael Hamilton, Managing Attorney).

Before Bucher, Bergsman and Ritchie,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

CellCorp USA, LLC ("applicant") filed a use-based application, under the provisions of Section 2(f) of the Trademark Act of 1946, 15 U.S.C. § 1052(f), to register the design of a backpack, water bottle and flashlight, shown below, for "backpacks," in Class 18.



Serial No. 77860793

Applicant described its mark as follows:

The mark consists of a three dimensional configuration of a backpack. On the top of the backpack is a loop handle. The backpack has a drawstring closure on the top and two straps on the back. A mesh pocket holding a water bottle is on the left side of the backpack. A mesh pocket holding a flashlight is on the right side of the backpack. The front of the backpack has a mesh pocket.

Applicant submitted the following photographs of the products as its specimens of use.



Specimen of October 29, 2009



Specimen of June 22, 2010

The examining attorney finally refused registration on the ground that the three-dimensional configuration of the backpack with mesh pockets holding a water bottle and flashlight sought to be registered has not acquired distinctiveness. Because the subject matter sought to be

registered is a product design, it is not inherently distinctive, and it is registrable only with a showing of acquired distinctiveness. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1067 (2000).

Under Trademark Rule 2.41(a), 37 C.F.R. §2.41(a), an applicant may submit affidavits, declarations under 37 C.F.R. §2.20, depositions, or other appropriate evidence showing the duration, extent, and nature of the applicant's use of a mark in commerce that may lawfully be regulated by Congress, advertising expenditures in connection with such use, letters, or statements from the trade and/or public, or other appropriate evidence tending to show that the mark distinguishes the goods or services.

Establishing acquired distinctiveness by actual evidence was explained as follows in *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1125, 227 USPQ 417, 422 (Fed. Cir. 1985):

An evidentiary showing of secondary meaning, adequate to show that a mark has acquired distinctiveness indicating the origin of the goods, includes evidence of the trademark owner's method of using the mark, supplemented by evidence of the effectiveness of such use to cause the purchasing public to identify the mark with the source of the product.

Serial No. 77860793

The kind and amount of evidence necessary to establish that a mark has acquired distinctiveness in relation to goods or services depends on the nature of the mark and the circumstances surrounding the use of the mark in each case. *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1581, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988); *Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 829, 166 USPQ 34, 39 (C.C.P.A. 1970); *In re Hehr Mfg. Co.*, 279 F.2d 526, 528, 126 USPQ 381, 383 (C.C.P.A. 1960); *In re Capital Formation Counselors, Inc.*, 219 USPQ 916, 918 (TTAB 1983). An applicant faces a heavy burden in establishing the distinctiveness of a product design. *Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd.*, 6 USPQ2d at 1008; *Stuart Spector Designs Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1554 (TTAB 2009); *In re Ennco Display Systems Inc.*, 56 USPQ2d 1279, 1284 (TTAB 2000).

The Examining Attorney's position is quite simple: applicant has failed to demonstrate that the product design is recognized as a trademark. She contends that the subject matter sought to be registered is comprised of elements common to many backpacks and that when combined, they do not create a unique product design distinguishable from other backpacks. The examining attorney also asserts that the applicant's sales figures and advertising fail to

evidence any degree of consumer recognition. Finally, the examining attorney discounts the customer declarations submitted by applicant because the customers identify a marketing concept (*i.e.*, a combination backpack, water bottle and flashlight) rather than a trademark and she discounts the retailer declarations because they represent "individuals who have superior knowledge about the applicant's goods."¹

In its June 22, 2010, response to the first Office action, applicant submitted two Target and two Kmart advertisements representative of the advertisements distributed by applicant between 2003 and June 22, 2010.²

Exhibit C (at right) is the relevant portion of a flyer from Target (December, 2005).



The excerpt from Exhibit A, set forth below, provides a view of another style of the backpack set (along with a display of the sleeping bag) which is the subject matter sought to be registered.

¹ Examining Attorney Brief, unnumbered page 16.

² Mark Harris Declaration, ¶¶ 7 and 8 and Exhibits A-D.



In his June 2010 declaration, Mark Harris, applicant's President and Chief Executive Officer, attested to the following facts:

1. Since 2004, applicant has spent approximately \$50,000 per year on advertising; primarily print advertising;

2. Since 2002, applicant has sold over 4 million backpacks generating revenues in excess of almost 41 million dollars; and

3. Applicant sells its backpacks in national and regional retail stores throughout the United States, including Target, Kmart, Wal-Mart, Dicks, and The Sports Authority.

In its March 10, 2011, request for reconsideration, applicant submitted three declarations from retail store buyers and thirty-eight (38) declarations from consumers identifying applicant as the source of backpacks with the product design sought to be registered. They were form declarations. The relevant portion of the retail buyer declarations reads as follows:

4. In connection with my employment, I have purchased a variety of backpacks for my company, ...
5. I understand the backpacks as being sold under this trademark [the subject matter sought to be registered] because the backpacks have a drawstring top with three mesh pockets and two of those pockets contain a water bottle and a flashlight.
6. While I have seen other backpacks that have a drawstring top and/or pockets, I know that backpacks come from [applicant] when they have the combination of a drawstring top, three mesh pockets, and two of those pockets have a water bottle and a flashlight as shown in [the drawing of the product configuration sought to be registered].

The relevant portion of the customer declarations reads as follows:

4. I understand the backpacks as being sold under [the subject matter sought to be registered] because the backpacks have a drawstring top with three mesh pockets and two of those pockets contain a water bottle and flashlight.
5. I have also seen numerous advertisements for the backpacks being sold under the mark

shown in [the subject matter sought to be registered].

6. While I have seen other backpacks that have a drawstring top and or pockets, I know that backpacks come from [applicant] when they have the combination of a drawstring top, three mesh pockets, and two of those pockets have a water tight bottle and a flashlight as shown in the [subject matter sought to be registered].

We do not find applicant's evidence to be convincing. First, applicant's use since 2002, while indicative of its commercial success, is not conclusive or persuasive considering the nature of the subject matter sought to be registered, regardless of the customer declarations. *In re Ennco Display Systems Inc.*, 56 USPQ2d at 1286 (applicant's use of the product designs ranging from seven to seventeen years is insufficient to bestow acquired distinctiveness). *See also In re Bongrain International Corp.*, 894 F.2d 1316, 1317 n.4, 13 USPQ2d 1727, 1728 n.4 (Fed. Cir. 1990); *Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd.*, 6 USPQ2d at 1005.

Second, in considering the totality of the evidence submitted by applicant, applicant's sales in terms of units and revenues is indicative of commercial success, but not recognition of the configuration of a backpack as a trademark. For example, there is no evidence putting applicant's sales into context to show whether applicant's sales are significant vis-à-vis the sales of competing

Serial No. 77860793

products. *Cf. Bose Corp. v. QSC Audio Products, Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, (Fed. Cir. 2002) (with respect to the fame of a mark, “[r]aw numbers of product sales and advertising expenses may have sufficed in the past to prove fame of a mark, but raw numbers alone in today’s world may be misleading.”).

With respect to applicant’s advertising, consumers are not likely to view the configuration of the backpack as a trademark: rather, they will view the combination backpack with mesh pockets holding a water bottle and flashlight as a package. The text in the Target flyer, set forth above, reads as follows: “Kool-A-ROO sleeping bag and backpack set with water bottle and flashlight.” There is no “look for” advertising pointing out that this combination of features is exclusively associated with applicant. There is nothing in the record to show that applicant does anything to highlight or emphasize the backpack with mesh pockets holding a water bottle and flashlight as anything other than a combination of product features quite logically paired with a sleeping bag and backpack set. There is nothing about these advertisements that lead potential purchasers to view the backpack with mesh pockets holding a water bottle and flashlight as anything more than photographs of the products. This type of visual

Serial No. 77860793

presentation with a brief description of the features of the backpack is consistent with the examples of numerous backpack designs applicant has placed in the record.

We find that the representative advertisements undercut the probative value of the customer declarations. The declarants attested to having seen numerous advertisements featuring the subject matter sought to be registered. Presumably, the declarants are referring to the representative advertisements submitted by applicant which, as discussed above, display the configuration of the backpack as nothing more than the product being sold. It is not clear how these advertisements have led the declarants to identify the product design as a trademark. In fact, the customer declarants have not explained what they understand a trademark to be and how they concluded that the combination of a backpack with mesh pockets holding a water bottle and a flashlight form a trademark. Thus, we are not convinced that applicant first ascertained what the declarants recognized as a trademark and then prevailed upon them to sign the declarations. In other words, the declarants did not state their own knowledge; rather, they simply concurred in the conclusion to which they were lead by applicant. *See In re Bausch & Lomb Inc.*, 206 USPQ 534, 538 (TTAB 1979).

The retail store buyers' declarations are more probative because we assume that the buyers have sufficient experience to identify a product configuration that functions as a trademark.³ However, a review of the record shows numerous backpacks with mesh pockets and, in some cases, with water bottles. It is only the addition of a flashlight that sets applicant's product offering apart. Because the declarants did not explain how they reached the conclusion that applicant's product offering functions as a trademark, like the customer declarants, we find that the buyers concurred in the conclusion to which they were lead by applicant. In any event, three declarations are not persuasive considering the nature of the subject matter sought to be registered.

We note that the record is lacking in any media recognition regarding applicant's product and how the combination of elements is a unique offering associated with applicant.

We also note that there is no evidence as to whether consumers identify any competing backpack designs as trademarks, thus, creating a practice in the industry on

³ The better practice would not have the Board assume anything. It would have behooved applicant to have had the declarants explain what they believe a trademark to be and why they believe the product configuration at issue functions as a trademark.

Serial No. 77860793

which consumers and/or buyers would rely in identifying applicant's product configuration as a trademark.

In view of the foregoing, we find that the evidence is insufficient to show that the design of applicant's backpack, mesh pockets, water bottle and flashlight has acquired distinctiveness.

Decision: The refusal to register the subject matter sought to be registered on the ground that applicant's evidence is insufficient to demonstrate acquired distinctiveness under Section 2(f) is affirmed.