

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

*Decision Mailed:
September 13, 2007
GDH/gdh*

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re West-Com Nurse Call Systems, Inc.

Serial No. 78438594

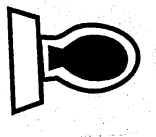
Dale Paul DiMaggio and Catherine Crush of Malin, Haley & DiMaggio, P.A. for West-Com Nurse Call Systems, Inc.

Michael Tanner, Trademark Examining Attorney, Law Office 117 (Loretta C. Beck, Managing Attorney).

Before Hohein, Walters and Walsh, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

West-Com Nurse Call Systems, Inc. has filed an application to register on the Principal Register the design reproduced below,



which is described in relevant part as a "caricature of a

toilet," as a mark for "electronic apparatus used in nurse call systems, namely, an electronic device for automatically sending communication transmissions between patients and predetermined and/or specified health care or hospital personnel for use by patients requiring bed pan or other nursing services" in International Class 9.¹

Registration has been finally refused on the ground that the toilet caricature design mark, as used in the specimens of record, does not function as a trademark to indicate the source of applicant's goods as required by Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§1051, 1052 and 1127.²

¹ Ser. No. 78438594, filed on June 21, 2004, which alleges a date of first use anywhere of September 30, 1994 and a date of first use in commerce of November 30, 1994.

² As noted by the Examining Attorney in his brief, registration has also been finally refused "under Section 2(f) of the Trademark Act," 15 U.S.C. §1052(f), and on the additional grounds that "the proposed mark as used on the specimens of record is merely ornamental pursuant to Trademark Act Sections 1, 2, and 45," 15 U.S.C. §§1051, 1052 and 1127, "and that the proposed mark is merely descriptive of a feature or function of the goods under Trademark Act Section 2(e)(1)," 15 U.S.C. §1052(e)(1). Applicant, as indicated by the Examining Attorney in his brief, submitted its claim of acquired distinctiveness under Section 2(f) in response to the refusals to register on the grounds of failure to function as a mark, ornamentation and mere descriptiveness. Finding that applicant's initial showing with respect to such claim "failed to adequately demonstrate that the mark had acquired distinctiveness," the Examining Attorney recounts in his brief that he "notified the applicant that its Section 2(f) claim would not overcome a failure to function refusal, and maintained and continued the prior failure to function, ornamentation, and merely descriptive refusals." Although applicant then supplemented its Section 2(f) claim by submitting, among other things, a declaration from an officer of applicant and 28 dealer statements, the Examining Attorney indicates in his brief that he "was not persuaded by the applicant's Section 2(f) arguments and evidence in support thereof" and issued the above-mentioned final refusals.

However, the Examining Attorney also states in his brief that: "Upon further review, the refusals to register the mark under Sections 1, 2, and 45 because the mark is merely ornamental and under Section 2(e)(1) because the mark is merely descriptive are WITHDRAWN." Moreover, with respect to the refusal under Section 2(f), it is

Applicant has appealed and briefs have been filed.³ We affirm the refusal to register.

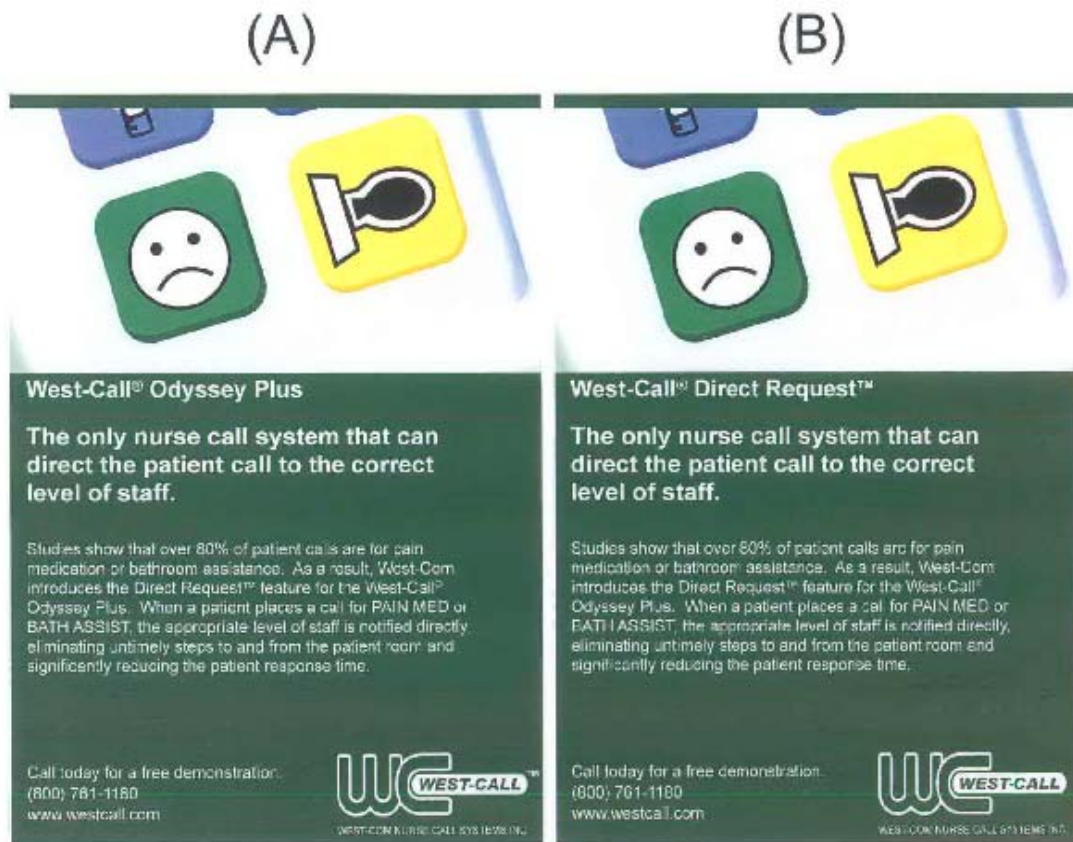
The specimens submitted by applicant are essentially identical in relevant part in that they constitute facsimiles showing, as in the example reproduced below, the following manner of use:

pointed out that as indicated in, for example, *In re Capital Formation Counselors, Inc.*, 219 USPQ 916, 917 at n.2 (TTAB 1983), the insufficiency of a showing pursuant to Section 2(f) is not itself a statutory basis for a refusal of registration on the Principal Register. Accordingly, the only refusal of registration presently and properly before us is the final refusal on the ground of failure of applicant's toilet caricature design to function as a mark as shown in the specimens of record. Nonetheless, in connection therewith, while the Examining Attorney is correct that a claim of acquired distinctiveness under Section 2(f) is irrelevant to a refusal on the ground of failure to function as a mark, since the issue is whether the specimens show use of the applied-for designation as a mark, we are obligated to consider any evidence properly of record which bears upon the public perception of the purported mark. See, e.g., *In re Pennzoil Products Co.*, 20 USPQ2d 1753, 1757 (TTAB 1991), citing *In re Paint Products Co.*, 8 USPQ2d 1863, 1866 (TTAB 1988). Consequently, we have so considered applicant's evidence.

³ The Examining Attorney, in his brief, "notes that the applicant's [main] brief improperly contains exhibits and product literature which the applicant alleges are either specimens of record in this case or evidence of acquired distinctiveness." Stating that "[i]nasmuch as these additional documents have been submitted with the applicant's appeal brief, the examining attorney objects to their [untimely] submission and requests that the Board disregard these additional documents pursuant to 37 C.F.R. § 2.142(d) and TBMP §1207.01." Applicant, in its reply brief, is not only silent with respect to the Examining Attorney's objection, but has attached thereto, in reference to its claimed ownership of Reg. No. 3,078,614 (a copy of which accompanied its main brief), an "attached copy of complete trademark application ... [for such registration] submitted herewith." Inasmuch as Trademark Rule 2.142(d) provides in relevant part that "[t]he record in the application should be complete prior to the filing of an appeal" and that the Board "will ordinarily not consider additional evidence filed with the Board by the appellant ... after the appeal is filed," the Examining Attorney's objection is sustained to the extent that the evidence attached to both applicant's main brief and its reply brief which was not made of record prior to commencement of the appeal will be given no further consideration.



Applicant's asserted mark in such example appears directly on its product and is shown adjacent to the words "DIRECT REQUEST," under which appears the explanation that the two lowest buttons on the device are "Buttons for Pain Med and Bed Pan" requests for assistance by a patient. The other example includes the following close-up partial views of applicant's product:



In both examples, the toilet caricature design is shown in use on applicant's "pillow speakers," as its "electronic device for automatically sending communication transmissions between patients and predetermined and/or specified health care or hospital personnel" is more commonly known in the trade for goods of such kind.

Applicant, referring in its main brief to its mark as "a BED PAN DESIGN LOGO,"⁴ notes by way of background that:

⁴ It is noted, however, that in its reply brief, applicant refers instead to its mark as a "BATH ASSIST/PAN DESIGN LOGO." Moreover, in its reply brief, applicant appears to take umbrage at the Examining Attorney's characterization of its mark in his brief as "the Toilet Symbol" even though, as previously mentioned, applicant in its application describes its mark in relevant part as a "caricature of a toilet." Specifically, applicant bemoans the fact that:

The Examining Attorney maintained his final refusal ... because the Examining Attorney believes that the proposed mark does not function as [a] trademark, but rather is merely a button depicting a toilet that a patient presses to call for assistance when help is needed going to the toilet. The Examining Attorney in his Office Action dated January 28, 2005 offered evidence of similar designs used in architectural house plans to indicate the location of toilets, which the Examining Attorney offered as evidence that the public would view the symbol as a toilet.

Applicant maintains, however, that its "proposed trademark design is a unique artistic caricature" which "is distinct from the toilet symbol used in housing plans in both appearance and the fact that it is used in a completely different industry." According to applicant, its purported mark "appears in both the Applicant's printed advertising, on DVDs, and on website pages, in addition to the Applicant's product." Such "manners of use," applicant insists, "serve as indicators of source" for its goods. Moreover, applicant contends that "this design has a variety of

Throughout the Examining Attorney's Brief, the Examiner uses the terms "Toilet Symbol" in a derogatory fashion to refer to Applicant's Bath Assist/Bed Pan Design Logo. The Examiner's references are intended to demean Applicant's caricature as if Applicant was a manufacturer of toilets or plumbing products, which of course is not the case. Applicant's Logo is used in commerce with respect to the manufacture and sale of components (speakers and transmitters) of a sophisticated electronic nurse call communication system for hospitals.

Simply put, we fail to see anything derogatory, demeaning or otherwise improper in the Examining Attorney's manner of reference to applicant's mark, which clearly is a stylized depiction of a toilet or commode, and will use the term "toilet caricature design" in referring to applicant's mark, given that applicant has so characterized its mark in its application and in preference to the negative connotations which are obviously associated with the use of the term "bed pan" as in, for instance, applicant's use of the phrase "a BED PAN LOGO DESIGN."

meanings and interpretations regarding various forms of 'bathroom assistance" and that, "to the Applicant's consumers, who are not the patients, but rather the hospital and nursing care home administrators, this symbol as it appears on the Applicant's website, DVDs, and brochures, as well as on the products themselves, functions as a mark."

Applicant, in this regard, points to Section 45 of the Trademark Act, 15 U.S.C. §1127, which defines the term "trademark" as including "any word, name, symbol, or device, or any combination thereof--(1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." In view thereof and citing *In re Swift & Co.*, 223 F.2d 950, 106 USPQ 286 (CCPA 1955), applicant argues that:

A trademark that is an artistic and unique design or pattern may be constituted as trademark "device" within the meaning of the Trademark Act, if it is used primarily to perform the function of a trademark and is, in fact, by virtue of any distinctiveness it may possess, capable of doing so. If the symbol or devices on the object are more readily apparent at such a distance where the wording cannot, that symbol or device becomes the means by which the object is identified and the factor by which the impulse to purchase it is induced. A significant question therefore is whether or not the symbol put on the goods enables a purchaser to pick it out and distinguish it from the goods of others, and is the purchaser able to so identify the goods by means of this symbol or device.

Although ignoring the fact that, as shown in the specimen which depicts its pillow speaker in its entirety, such terms as "West-Com" and "TV" are as "readily apparent" at the same viewing distance as any of the icons also shown thereon, including its asserted mark, applicant "maintains that its trademark is ... a trademark device which enables hospital and nursing home administrators to pick it out and distinguish it from the trademarks of others" and, "furthermore,[,] these sophisticated purchasers are able to identify the goods by means of the appearance of this trademark device."

That its "mark is unique and not commonly used on any similar product," applicant argues, "can be evidenced by the fact that the Examining Attorney found no similar pending or registered design, or an example of similar designs on [a] competitor's products." Applicant consequently contends that its "design is inherently distinctive" and insists that, in view of such fact alone, it is the case that applicant "uses this trademark on its website pages, brochures, DVDs, and on the product itself in a manner used to indicate the Applicant as the source of the product" as shown by the specimens of record. Applicant stresses, therefore, that its "trademark design is an original work, a clever caricature, a unique and fanciful picture symbol in the traditional trademark sense, [and] which is an inherently distinctive commercially recognizable trademark entitled to trademark protection on the federal register."

Lastly, in the alternative, applicant urges that it has submitted sufficient evidence to establish that its toilet

caricature design functions as a mark and is so recognized and regarded. Such evidence, applicant states, consists of "information regarding [the] nature of trademark use; advertising expenditures; annual sales; consumer, product, and industry descriptions; and a prior registration [by applicant] for identical goods and a similar mark" and includes, in addition to an unverified claim of substantially exclusive and continuous use of its applied-for mark in commerce "for well over ten years," a declaration of an officer of applicant and 28 essentially identical dealer statements which attest to recognition of such mark as an indicator of source for applicant's goods. According to applicant:

The applicant's trademark appears on the pillow speakers themselves which are part of the Applicant's nurse call systems used in hospitals and nursing homes, and on various ... kinds of advertising The Applicant's consumers are very sophisticated, [and are] made up of a committee of hospital and nursing care staff who make financial and purchasing decisions regarding the purchase of sophisticated and expensive products used for patient care. Once the nursing care home or hospital has purchased these products, the Applicant provides individual instructions regarding the installation and use of these highly sophisticated products. Furthermore, this is a very small niche industry comprised of only four major competitors and several smaller companies. Thus, these very sophisticated consumers become very familiar with the Applicant's products and trademarks, given the size of the industry, and the nature of the goods. These hospital administrators have come to recognize the Applicant's trademark symbols in both advertising, and on the buttons of the pillow speakers as identifying the Applicant as the source of the goods.

In particular, with respect to the above mentioned evidence, the record shows that applicant is the owner of Reg. No. 3,078,614, which issued on the Principal Register on April 11, 2006 for a mark described as "a square with a sad face in the middle," as illustrated below,



for a product listed as a "nurse call system comprising an electrical apparatus for communication by and between patients and health care or hospital personnel, for patients requiring pain medications services" in International Class 9.

Further, with respect to the May 2, 2006 declaration of Larry Peters, who is identified as "the C.E.O. of Applicant," the declarant states among other things that "he is aware of the history of our goods and of the use of the mark BED PAN DESIGN LOGO"; that applicant "made first use of the mark BED PAN DESIGN LOGO on the goods identified in the application at least as early as September 1994 and in interstate commerce at least as early as November 1994"; that "[s]ince 1994, Applicant has exclusively and continuously used the mark BED PAN DESIGN LOGO in connection with the goods Applicant seeks registration for"; that he is "not aware that the mark has been used by any other company for any similar goods"; that applicant's "mark BED PAN DESIGN LOGO is typically displayed on the product itself"; that, "[i]n addition to Applicant's existing customers, potential customers ... also view on a daily basis ... the mark BED PAN DESIGN LOGO displayed

on Applicant's website"; that such mark "is recognized in the trade and by customers of the goods as being the mark of Applicant's [sic] and denoting the goods of Applicant"; that "Applicant's long term use of the mark for well over ten years, Applicant's extensive marketing efforts, as well as the prominent display of its trademark on Applicant's products at various hospital and patient care locations, have caused customers, potential customers and numerous other individuals to identify Applicant's mark BED PAN DESIGN LOGO as the source of Applicant's goods"; that applicant "generates over 12 million dollars ... a year in sales for the goods provided under the mark BED PAN DESIGN LOGO"; that the "amount of [such] sales continues to increase each year"; and that "Applicant currently has a network of approximately 60 dealers" (although the approximate number of customers per dealer was left blank).⁵

In addition, as to the 28 essentially identical dealer statements, which were signed between May 2, 2006 and May 4, 2006, while none has been verified, each provides in pertinent part that:

⁵ While it is noted that applicant, in its main brief, also asserts that "total sales for this industry are estimated by the Applicant to be approximately one hundred fifty million dollars" and that applicant "spent approximately one hundred thousand dollars ... on all means of advertising in 2005," such figures find no verified support in the Peters declaration or elsewhere in the record. Instead, they are simply set forth in the supplement made to its unverified claim of substantially exclusive and continuous use, in which applicant stated initially only that it "has spent considerable sums on advertising and marketing this trademark, specifically, the Applicant has spent approximately Fifteen Thousand Dollars ... on printed advertising materials and approximately Fifty Thousand Dollars ... on public trade show materials in the past two years alone." Nonetheless, because the Examining Attorney has discussed such amounts in his brief and has therefore treated them as being part of the record, we have likewise considered these figures to be of record for purposes of this appeal.

The undersigned[,] through my company with which I am employed, states that I am a dealer in the nurse call systems and pillow speaker industry. In the course of my business, I have had occasion to become familiar with many nurse call systems and pillow speaker products, and am familiar with such products marked with the BED PAN DESIGN LOGO TRADEMARK produced by West-Com Nurse Call Systems, Inc.

I believe that the BED PAN DESIGN LOGO TRADEMARK on such products indicates products produced by West-Com Nurse Call Systems, Inc. and not any other company.

....

Many of my retail customers ask for nurse call systems and pillow speaker products by the BED PAN DESIGN LOGO TRADEMARK, and expect that all products marked with BED PAN DESIGN LOGO TRADEMARK will come from the same source and are of equal quality with all other products from that source.

We agree with the Examining Attorney, however, that as used in the specimens of record, applicant's toilet caricature design fails to function as a mark for its goods. As he accurately observes in his brief, "consumers would not interpret the Toilet Symbol, which the specimens show is located on a button on the applicant's device, to be an indicator of source, but rather, an informational icon representing the purpose or function of the button on which it appears." In this regard, the Examining Attorney, after noting the statutory definition of the term "trademark" in Section 45, correctly points out that:

It is well settled that matter may not be registered unless it is used as a trademark, namely, "in a manner calculated to project to purchasers or potential purchasers a single source or origin for the goods in question." *In re Remington Products Inc.*, 3 USPQ2d 1714, 1715 (TTAB 1987). See, e.g., *In re Melville*

Corp., 228 USPQ 970, 970 n.2 (TTAB 1986) ("If matter proposed for registration does not function as a mark, it is not registrable in accordance with Sections 1 and 2 of the Act because the preambles of those sections limit registration to subject matter within the definition of a trademark"); *In re Whataburger Systems, Inc.*, 209 USPQ 429, 430 (TTAB 1980) ("[A] designation may not be registered either as a trademark or a service mark unless it is used as a mark, in such a manner that its function as an indication of origin may be readily perceived by persons encountering the goods or services in connection with which it is used"). A design does not create a separate commercial impression as a trademark, either as a result of inherent visual distinctiveness or a consequence of promotion and use leading to public recognition and acceptance as indication of source, is not regarded as [a] trademark and is not registrable as such. *In re Kerr-McGee Corporation*, 190 UQPS [sic] 204, 207-08 (TTAB 1976).

The decisive element in determining whether matter sought to be registered is a trademark is the impression the matter makes on the relevant public. *In re Brass-Craft Mfg. Co.*, 49 USPQ2d 1849, 1853 (TTAB 1998). In this case, the critical inquiry is whether as used, the proposed Toilet Symbol would be perceived by consumers as a source indicator or merely as an informational design on one of the many buttons of the applicant's device. *In re Volvo Cars of North America Inc.*, 46 USPQ2d 1455 (TTAB 1998). To properly assess the commercial impact created by the proposed Toilet Symbol, the Office must look to the specimens and other materials which show how the proposed mark is used in the marketplace. [*Id.*] As is the case with any trademark, mere intent that a word, name, symbol or device function as a trademark or service mark is not enough in and of itself. *In re Morganroth*, 208 USPQ 284 (TTAB 1980). In this case, applicant's Toilet Symbol is used solely as an informational design on a button of the applicant's nurse paging device, a use which would not be perceived by consumers to indicate the source of the goods.

The Examining Attorney, in support of his position, has made of record both copies of numerous architectural floor plans, in which symbolic designs very similar to applicant's toilet caricature design are used to represent a toilet or commode in a bathroom or restroom, to show that members of the general public, including those who are purchasers of equipment for hospitals or nursing homes, are accustomed to seeing and would readily regard such symbolic designs as designating a toilet, commode, bathroom or restroom and copies of website advertising by several of applicant's competitors in the field of nurse call systems to demonstrate, with respect to pillow speakers, that such competitors "all use small, highly intuitive pictorial representations as icons on buttons of nurse paging systems to represent the function or purpose of the button" and that customers for such goods are aware of the industry practice in this regard. For instance, just as applicant's advertising for its "GEN III PILLOW SPEAKERS" highlights their "[c]lear easy to understand symbols and words [which] allow the patient to operate desired functions" including buttons for "Nurse Call, TV, Lights, Bed Pan, Pain Med, and Headphone," the Examining Attorney accurately observes that, likewise, "several of the applicant's competitors each use unique, artistically creative pictorial representations of nurses, televisions, or light bulbs as icons on buttons of their respective paging devices."

While, as the Examining Attorney acknowledges, applicant's toilet caricature design, like its registered "square with a sad face in the middle" mark, is indeed "unique," as

contended by applicant, in the sense that applicant, as the advertising for its goods touts, presently appears to offer "[t]he only nurse call system that can direct the patient call to the correct level of staff" with respect to a patient's specific need "for PAIN MED or BATH ASSIST," that fact does not mean that as used in the specimens of record the applied-for mark functions as a mark for applicant's goods. As the Examining Attorney correctly points out, "[e]ven assuming the applicant's mark is an artistically creative, unique symbol, it is well settled that not all unique symbols qualify for the Lanham Act['s] protection," *citing* *In re Illinois Bronze Powder & Paint Co.*, 188 USPQ 459, 462 (TTAB 1975). Accordingly, while the fact that applicant's applied-for design may be unique in the sense that it is a "one and only," the record demonstrates that such design is not unique in the sense that it has an "original, distinctive, and peculiar appearance" which conveys only a trademark significance. See, e.g., *In re E S Robbins Corp.*, 30 USPQ2d 1540, 1542 (TTAB 1992). Instead, as persuasively argued by the Examining Attorney, it is the case that:

Given the industry-wide use of small, highly intuitive decorative icons in this field, consumers would be hard-pressed to realize that the pictorial icon on any particular button of a nurse paging system represents the underlying manufacturer. In this case, the relevant practices of the trade compel a finding that the applicant's "artistic work" is just that, a decorative picture that consumers and users would immediately recognize as a call button for bathroom assistance, [and] not an indicator of source for the communication device.

We therefore concur with the Examining Attorney's conclusion that applicant's toilet caricature design, as used in the specimens of record, does not function as a mark for its goods because, "[a]s used, the applicant's mark is no more source indicative than the easy to understand pictorial representations of a light bulb, television, or nurse appearing on other competing paging systems" as well as on the pillow speakers for applicant's nurse call systems.

With respect to the additional evidence of record, we agree with the Examining Attorney that none is persuasive of a finding that applicant's toilet caricature design, as used in the specimens of record, nevertheless would be recognized as a mark for its goods. In particular, neither its ownership of a registration for a mark described as "a square with a sad face in the middle" nor the declaration of applicant's C.E.O. or the dealer statements singularly or collectively establish that applicant's toilet caricature design, as actually used, functions to identify and distinguish the source of applicant's goods. For instance, even assuming that, in the case of applicant's registration, the evidentiary record with respect thereto were to show, as asserted by applicant in its main brief, that "the Trademark Office has in fact held the exact same placement, size, and appearance ... of a similar arbitrary and suggestive symbol on the buttons of the Applicant's pillow speakers does in fact function as a trademark," suffice it to say that applicant's position is contrary to the longstanding, well-settled precedent that prior decisions and actions of other trademark examining

attorneys in registering different marks are without evidentiary value and are not binding upon the Office. Each case, instead, is decided on its own facts and each mark stands on its own merits. See, e.g., AMF Inc. v. American Leisure Products, Inc., 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); In re Sunmarks Inc., 32 USPQ2d 1470, 1472 (TTAB 1994); In re National Novice Hockey League, Inc., 222 USPQ 638, 641 (TTAB 1984); and In re Consolidated Foods Corp., 200 USPQ 477, 481 (TTAB 1978). Thus, as our principal reviewing court has observed in, for instance, In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001), "[e]ven if some prior registrations had some characteristics similar to [applicant's] application, the ... allowance of such prior registrations does not bind the Board or this court." See also, In re Broyhill Furniture Industries Inc., 60 USPQ2d 1511, 1514 (TTAB 2001); and In re Pennzoil Products Co., 20 USPQ2d 1753, 1758 (TTAB 1991).

Applicant's prior registration, therefore, does not justify allowance of the registration which it presently seeks. As the Examining Attorney tellingly observes, "[o]ther than noting [that] the Toilet Symbol is a unique, original work of art, the applicant fails to state why consumers would view the proposed mark as used as anything other than an icon on a button of the applicant's paging system" which, unlike the button used when pain medication is needed, "is used for summoning assistance in going to the bathroom." The Examining Attorney, in essentially reiterating his position, persuasively insists in this regard that:

The applicant posits that because its consumers are not actually patients, but rather, hospital and nursing home administrators, this fact somehow transforms the informational Toilet Design as it is used on the goods into a non-informational source-indicating symbol for the product. The applicant is mistaken. The evidence of record clearly shows that within this industry small, highly intuitive informational drawings are used as icons on buttons of nurse paging systems so that users readily understand [the] button's purpose or function. Because they would naturally be exposed to the various nurse paging products produced by manufacturers in this field, and because these manufacturers all use small, highly intuitive informational drawings as icons on button of these systems, it stand[s] to reason that hospital [and nursing home] administrators seeing the proposed Toilet Symbol as used on the device would interpret the image on the button no differently than the patient would at their bedside--press here for bathroom assistance.

As to the information contained in the declaration of applicant's C.E.O., Larry Peters, concerning the nature and extent of applicant's use of its toilet caricature design, we agree with the Examining Attorney that such evidence fails to establish that, as used in the specimens of record, applicant's applied-for mark identifies and distinguishes the source of its goods and thus functions as a mark. The asserted facts that applicant has extensively, continuously and exclusively used its toilet caricature design in connection with its nurse call systems since at least as early as the autumn of 1994; that such design is typically displayed on the product itself in addition to its daily display on applicant's website; that such design is recognized in the trade and by customers of the goods as being a mark denoting the goods of applicant; that applicant has made

extensive marketing efforts and has prominently displayed its applied-for mark at various hospital and patient care locations; that applicant has generated over 12 million dollars annually in sales for the goods provided under such mark, with the amount of its sales thereof continuing to increase each year; and that applicant currently has a network of approximately 60 dealers are not probative that its toilet caricature design is recognized as a mark for its goods. This is because none of applicant's demonstrated uses of such design, either as shown on the pillow speakers in the specimens of record or in its advertising, reflect use of the design in the manner of a mark which identifies and distinguishes applicant's goods. Nothing, moreover, in applicant's advertising indicates promotion of such design as a mark. Rather, as used, the record consistently shows that applicant's toilet caricature design, as repeatedly pointed out by the Examining Attorney, is used solely as "an icon on a button which is used to call for help in going to the toilet, [and] not [as] a designation of the source for the identified goods" (emphasis in original).⁶

In consequence thereof, applicant's evidence as to the nature and extent of its use of its toilet caricature design

⁶ Likewise, for the same reasons, even when applicant's annual sales figures of \$12,000,000 are viewed in the context of its eight percent share of total industry sales of approximately \$150,000,000 and annual advertising expenditures of \$100,000 on all means of advertising in 2005, together with \$15,000 spent on printed advertising materials and around \$50,000 spent on public trade show materials "in the past two years alone" (see footnote 5), such amounts plainly are not probative that the manner of use of its toilet caricature design as shown in the specimens would be regarded by customers as a mark for its goods instead of just a call button specifically for bathroom assistance.

fails to persuade us that such design would be recognized as a source indicator and, hence, that the design functions as a mark as used in the specimens of record. Although applicant, among other things, argues in its main brief that, in "In re Owens-Corning Fiberglass [sic] Corp.[,] 774 F.2d 1116[,] 227 U.S.P.Q. 417 (C.A.F.C. 1985) citing In re American Home Products Corp., 226 U.S.P.Q. 327, 330 (T.T.A.B. 1985)," the Board "held that it is not essential that evidence of advertising expenditures be directed specifically to the promotion of an Applicant's mark," neither of such cases aids applicant herein. This is because, unlike in *Owens-Corning*, in which advertising based on a general theme of pink was used to promote the color pink as a mark for fibrous glass residential insulation, none of the advertising of record in this case in any way promotes applicant's toilet caricature design as a mark for the pillow speakers of its nurse call systems. Furthermore, contrary to applicant's contention, in *American Home Products* the Board held that a triple-layered design of the colors pink, white and yellow functioned as a mark for an analgesic and muscle relaxant because:

The evidence submitted by applicant clearly demonstrates sufficient length and intensity of use and promotion as a mark to [constitute a] prima facie showing that the design functions as a mark. The advertising materials ... clearly and unambiguously promote trademark recognition of applicant's tricolor design. Indeed, one of the product file cards expressly and prominently refers to the "Distinctive Tri-Colored Tablets" (Exhibit B). Although we do not have before us advertising expenditures specifically directed to the promotion of applicant's design, we do not find this flaw to be a fatal one given the rather substantial

evidence of applicant's vigorous promotional efforts in this regard.

226 USPQ at 330. Here, in stark contrast, applicant has offered no advertising or other marketing materials which "clearly and unambiguously" or even otherwise promote recognition (e.g., "look for" ads) of its toilet caricature design as a mark, much less any evidence demonstrating "vigorous promotional efforts" in such regard. Thus, as the Examining Attorney persuasively contends, "this evidence is not enough to demonstrate that the proposed Toilet Symbol has become a source-indicator for the applicant's nurse paging device."

Finally, as to the 28 essentially identical dealer statements submitted by applicant, we concur with the Examining Attorney that "[t]here is no reason why" the Board "should give much weight to unverified, self-serving statements made by the applicant's own dealers who necessarily have a keen and vested interest in maintaining a good relationship with the applicant." In particular, as the Examining Attorney persuasively points out (emphasis in original):

[I]t is well settled that the assertions of retailers, who know full well from whom they are buying, that they themselves recognize a particular designation as a trademark, or that they believe that their customers consider it to be a mark, cannot serve to establish that members of the purchasing public, who come to the marketplace without such specialized knowledge, would in fact recognize the designation as an indication of origin. *In re Semel*, 189 USPQ 285 (TTAB 1975); *Ex parte Oshkosh Trunks and Luggage*, 86 USPQ 321 (Comm'r Pat. 1950); *Ex parte Hillerich & Bradsby Co.*, 93 USPQ 73 (Comm'r Pat. 1952) [;] and *Ex parte The H. D. Lee Company, Incorporated*, 111 USPQ 445 (Comm'r Pat.

1956). Dealers comprise a select population of individuals who likely know the source of this unique product. *In re Edward Ski Products, Inc.*, 49 USPQ2d 2001, 2005 (TTAB 1999) ("The assertions of buyers of the masks for resale in sporting good stores or ski shops, that is, persons who know the source of the masks, cannot serve to establish that the ultimate purchasers would recognize the product design as an indication that it originates from applicant.") Given these individuals' intimate relationship with the applicant, their [statements] ... play only a minor role in determining public perception of the proposed Toilet Symbol. More telling is the absence of declarations from actual purchasers of the goods or any direct evidence bearing on the perception of the proposed Toilet Symbol by the ultimate purchasers of the goods.

Moreover, and aside from the absence of any indication that the dealers know or are so well versed in trademark law that they could independently form a reliable opinion on whether a designation like applicant's toilet caricature design is a mark or as used on applicant's pillow speakers functions as a mark, it would appear on this record that the dealers' belief that "the BED PAN DESIGN LOGO TRADEMARK on such products indicates products produced by West-Com Nurse Call Systems, Inc. and not any other company" is due to the fact that apparently, as stated in its advertising, applicant is the only producer and/or seller of nurse call systems which feature a specific call button for summoning nursing assistance when a patient needs to use a toilet (just as its goods also exclusively have a call button for a patient to request nursing aid in connection with administering pain medication). Such fact would also seem to explain the dealers' assertion that "[m]any of my retail customers ask for

nurse call systems and pillow speaker products by the BED PAN DESIGN LOGO TRADEMARK" inasmuch as applicant's goods would seem to be the only available products with a specific nurse call button for a patient needing to request toilet assistance. Stated otherwise, even if the dealer statements are regarded as literally true, the non-trademark manner of use demonstrated by the specimens of record and the absence of any materials which promote applicant's toilet caricature design as a mark for its goods are simply more convincing as evidence bearing on the public perception of such design than are the opinions of applicant's dealers. See, e.g., In re Pennzoil Products Co., 20 USPQ2d 1753, 1759 (TTAB 1991).

Accordingly, we concur with the Examining Attorney's conclusion that customers "are likely to perceive the Toilet Symbol merely as an informational icon on a button of the applicant's product" inasmuch as:

[T]he Trademark Examining Attorney has established an evidentiary record showing that the proposed Toilet Symbol fails to function as a trademark and is merely a pictorial representation of an important feature or function of the goods. Given the nature of the [purported] mark and its manner of use, the applicant has not submitted sufficient evidence to show that consumers recognize the proposed Toilet Symbol as an indicator of source.

Decision: The refusal under Sections 1, 2 and 45 is affirmed.