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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Weldebräu GmbH & Co. KG

Serial No. 79056290

Aimee L. Kaplan of Collard & Roe, PC for Weldebräu GmbH & Co. KG

Gilbert M. Swift, Trademark Examining Attorney, Law Office 109 (Dan Vavonese, Managing Attorney).

Before Zervas, Bergsman and Wellington,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

On February 19, 2008, Weldebräu GmbH & Co. KG

("applicant") filed an application to register the bottle design, shown below, for the following goods:¹

Beers; mineral and carbonated waters; fruit drinks and fruit juices; syrups for beverages; preparations for making beverages, namely, fruit drinks, beer, and beer mixed with fruit juices; ale, porter, in Class 32; and

Alcoholic beverages except beers; liqueurs, spirits, in Class 33.

¹ The application is a request for extension of protection filed under Section 66(a) of the Trademark Act of 1946, 15 U.S.C. §1144f(a).



The description of the mark provides that "[t]he mark consists of a configuration of packaging for the goods in the nature of a bottle with a spiral neck."

The Examining Attorney refused registration on the grounds that the bottle sought to be registered is nondistinctive trade dress that does not function as a trademark pursuant to Sections 1, 2, and 45 of the Trademark Act of 1946, 15 U.S.C. §§ 1051-1052 and 1127. Applicant, on the other hand, contends that the bottle sought to be registered is inherently distinctive.

As a preliminary matter we note that the examining attorney relied on many third-party registrations for bottle designs to establish that bottle design marks should be registered on the Supplemental Register or on the

Principal Register only upon a showing of acquired distinctiveness. On its behalf, applicant submitted a number of third-party registrations for bottle design marks that registered on the Principal Register and do not rely on a claim of acquired distinctiveness (*i.e.*, they have been registered as inherently distinctive). The third-party registrations submitted by both applicant and the examining attorney are not particularly persuasive because the registrability of each mark must be decided on its own merits. Previous decisions by examining attorneys in approving other marks are without evidentiary value and are not binding on the agency or the Board. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *In re Sunmarks Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994); *In re National Novice Hockey League, Inc.*, 222 USPQ 638, 641 (TTAB 1984). Also, because both the examining attorney and applicant submitted approximately the same number of registrations, the third party registrations do not reflect a particular practice in registering bottle designs.

During the prosecution of the application, applicant's counsel advised that "there are no bottles with a similar spiraled bottle neck on the market. In fact, it was extremely difficult for Applicant to find a manufacturer to

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make the bottles.”² However, there is nothing of record to substantiate that assertion. Assertions in briefs are not recognized as evidence. *In re Vesoyuzny Ordena Trudovogo Krasnogo Znameni*, 219 USPQ 69, 71 (TTAB 1983); see also *Spin Physics, Inc. v. Matsushita Electric Co.*, 168 USPQ 605, 607 (TTAB 1970) (the arguments and opinion of counsel are insufficient to overcome the facts). Applicant’s contentions would have been entitled to some evidentiary value if applicant had submitted such evidence through an affidavit or declaration by someone with personal knowledge of the purported facts or had they been corroborated by some other evidence.

“[A] mark is inherently distinctive if “[its] intrinsic nature serves to identify a particular source.” *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000), quoting *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768, 23 USPQ2d 1081, 1083 (1992). It “should be displayed with such prominence as will enable easy recognition” and “the average consumer will regard it as an unmistakable, certain, and primary means of identification pointing distinctly to the commercial origins of such product.” *In re Swift & Co.*,

² Applicant’s February 23, 2009 Response; Applicant’s Brief, pp. 2, 3, and 4.

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223 F.2d 950, 106 USPQ 286, 289 (CCPA 1955). "[U]ltimately 'the focus of the [inherent distinctiveness] inquiry is whether or not the trade dress is of such a design that a buyer will immediately rely on it to differentiate the product from those of competing manufacturers; if so, it is inherently distinctive.'" *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1685 (Fed. Cir., October 1, 2010), quoting *Tone Brothers, Inc. v. Sysco Corp.*, 28 F.3d 1192, 31 USPQ2d 1321, 1331 (Fed. Cir. 1994).

In determining whether a design is arbitrary or distinctive [the CCPA] has looked to [1] whether it was a "common" basic shape or design, [2] whether it was unique or unusual in a particular field, [3] whether it was a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods, or [4] whether it was capable of creating a commercial impression distinct from the accompanying words.

Seabrook Foods, Inc. v. Bar-Well Foods Ltd., 568 F.2d 1342, 196 USPQ 289, 291 (CCPA 1977). "A finding that any one of these factors is satisfied may render the mark not inherently distinctive." *Chippendales*, 96 USPQ2d at 1687. The fourth factor, whether the trade dress was capable of creating a commercial impression distinct from the accompanying words, is not applicable.

On appeal, we must consider whether the examining attorney has made a *prima facie* case that the subject matter sought to be registered is not inherently distinctive and, if so, whether applicant has submitted sufficient evidence to rebut that *prima facie* case. *In re Pacer Technology*, 338 F.3d 1348, 67 USPQ2d 1629, 1631 (Fed. Cir. 2003). The burden on the Examining Attorney is to establish a "reasonable predicate" for his position that the subject matter is not inherently distinctive. *Id.*

A. Whether applicant's bottle design is a "common" basic shape?

"The first *Seabrook* factor essentially asks whether the trade dress is common generally: for example, does it employ a basic shape or design such as a letter or geometric shape?" *Chippendales*, 96 USPQ2d at 1687. The examining attorney contends that "except for the waves or bumps in the neck, the bottle design mark consists of a basic shape that person would expect for a beer bottle."³ The examining attorney accurately summarized the evidence of record as follows:

The most typical shape for machine produced bottles is the "beer bottle" shape with a relatively wider cylindrical base, narrow aperture at top and neck connecting the two. The North American longneck, also known as

³ Examining Attorney's Brief, unnumbered page 3.

the industry standard bottle (ISB), has a uniform capacity, height, weight and diameter; the long neck offers a long cushion of air to absorb the pressure of carbonization thereby reducing the risk of exploding. Thus, the applied-for mark is a common basic shape, because regardless what the vessel contains, the shape of the vessel is "beer bottle" shaped. Beer bottles, like the bottle design mark, are generally round or cylindrical, in order to contain better the carbonated beverages for which they are intended, given the pressure to which the bottle and cap would be subjected. ... As noted above, the most typical shape for machine produced bottles is the "beer bottle" shape.⁴

The problem with the examining attorney's position is that "the waves or bumps in the neck" of applicant's bottle design mark are integral and visually prominent features. "The waves and bumps in the neck" may not be summarily dismissed. Virtually all the bottle samples made of record are of the traditional beer bottle configuration, that is, they have a cylindrical base with a narrow opening at the top. The traditional design is symmetrical and balanced. While applicant's bottle design has a cylindrical base, the neck of applicant's bottle is clearly asymmetrical because it is a spiral and, thus, it has a wavy or bumpy appearance and it is not merely a spiral design on the bottle.

⁴ Examining Attorney's Brief, unnumbered page 4.

In a study of consumer buying habits encompassing "recognition cues with unusual shapes of colours of bottles," one commentator likened applicant's bottle design to "the shape of a curvy woman."⁵



Picture 17: A naked woman was the model for the bottle's and glasses shape – the beer can be found in every German bar or pub

The examining attorney has presented no examples of any other bottles containing a similar spiral pattern or wavy lines such as those in applicant's bottle design. Accordingly, applicant's design is not a common basic shape.

B. Whether applicant's bottle design is unique or unusual in a particular field?

The second *Seabrook* factor asks whether the symbol is common in the particular field of use. *Chippendales*, 96 USPQ2d at 1687. To support his position that applicant's bottle is not a unique or unusual beverage container, the

⁵ Ortrun Reidick, *People Buy the Wine Label, Not the Wine. Do They?*, P.17 attached to applicant's February 23, 2009 Response.

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examining attorney referenced the registrations shown below that "display similar wavy or bump designs on bottles" for beverages.

Reg. No.	Reg. No.	Reg. No.	Reg. No.
3403758 ⁶	3403757 ⁷	2705561 ⁸	3458531 ⁹
(Supp. Reg.)	(Supp. Reg.)	(Supp. Reg.)	(Principal)



According to the examining attorney, these registrations show "that it is not uncommon for bottle manufacturers to include a wavy design on bottles."¹⁰ However, registrations are not evidence of use. *The Nestle Company, Inc. v. Joyva Corporation*, 227 USPQ 477 (TTAB 1985) (third-party registrations are not evidence of use of the marks, the extent of the use or that consumers are familiar with them). On the other hand, we may infer from the

⁶ "The mark consists of a configuration of a bottle with one side vertical and the other side wave-like with a middle indentation."

⁷ "The mark consists of a configuration of a bottle with one side vertical and other side wave-like with a middle rounded protrusion."

⁸ Because the application for this design was filed under Section 44(e) and registered under Section 44(d) without any dates of use, it has very little probative value. *Cf. In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

⁹ "The mark consists of a three dimensional representation of a beer bottle ... "

¹⁰ Examining Attorney's Brief, unnumbered page 5.

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registrations that bottle designs have been adopted by different parties for use as, or inclusion as part of a trademark, presumably to exploit the attractive appearance of the bottle designs for some commercial advantage.

Chicken Delight, Inc. v. Delight Wholesale Co., 196 USPQ 136, 139 (TTAB 1977).

The examining attorney also referenced various spiral bottle designs to demonstrate that "consumers routinely encounter bottles with spirals and shapes similar to that of Applicant." Representative samples of the bottle designs are reproduced below.



Most of the references to the various bottle shapes submitted by the examining attorney were from informational or reference sources; there was very little information showing various bottle designs in actual use in connection with beverages. Furthermore, while some of the bottles that the examining attorney made of record have spirals on the outside, none of the bottles are themselves spirals as is applicant's bottle. Based on this record, we find that applicant's bottle is unique and unusual.

C. Whether applicant's bottle is a mere refinement of a commonly-adopted and well-known form of ornamentation for beverages viewed by the public as a dress or ornamentation for the goods.

The third *Seabrook* factor asks whether or not the mark is a mere refinement of or variation on existing trade dress within the relevant field of use. *Chippendales*, 96 USPQ2d at 1687. The examining attorney contends that applicant's bottle "is a mere refinement of a standard beer bottle" that "appears to have some subtle bumps or waves in the neck of the bottle, and these do not stand out on their own as inherently distinctive."¹¹ To support his contention, the examining attorney referenced the following beer "commonly sold in 'beer bottle' shaped containers":

¹¹ Examining Attorney's Brief, unnumbered pages 5-6.

Heather Ale



Pelican Dorymans
Dark Ale



Moylan's Dragoon
Stout



The examining attorney also referenced third-party registrations for bottle shapes including spirals registered on the Supplemental Register or under the provisions of Section 2(f) in support of his contention that applicant's bottle design is not inherently distinctive.

As previously indicated above, we find that a central and prominent feature of applicant's bottle design is the spiral neck and that feature is more than just a mere refinement of the bottle design. The evidence does not support the examining attorney's contention that the spiral neck of applicant's bottle is a well-known form of ornamentation.

We have considered the record in accordance with each of the factors set forth in *Seabrook* for inherent distinctiveness, and the record before us leads to the conclusion that consumers would perceive and rely on

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applicant's bottle design as an indication of source. As shown by the photographs of applicant's bottle, prospective consumers would be drawn to applicant's beverages by virtue of the unique bottle design. The examining attorney, on the other hand, appears to have adopted the position that any bottle "with a cylindrical base, narrow aperture at top and neck connecting the two" used for beverages lacks inherent distinctiveness. This is not the law.

Chippendales, 96 USPQ2d at 1687 ("We think the Board erred in suggesting that any costume in the context of the adult entertainment industry would lack inherent distinctiveness"). It is incorrect to suggest that no bottle for beverages could be inherently distinctive simply because it has a cylindrical base with a narrower opening at the top. *Id.*

In view of the foregoing, we find that applicant's customers and prospective customers will immediately regard applicant's bottle design as identifying and distinguishing applicant's beverages and indicating their source.

Decision: The refusal to register is reversed.