

THIS OPINION
IS NOT A PRECEDENT
OF THE TTAB

Hearing: April 17, 2012

Mailed: August 7, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Adams Mfg. Corp.

Serial No. 85025503

Lynn J. Alstadt of Buchanan Ingersoll & Rooney PC for Adams
Mfg. Corp.

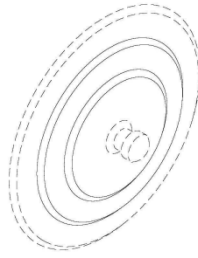
James W. MacFarlane, Trademark Examining Attorney, Law
Office 104 (Chris Doninger, Managing Attorney).

Before Quinn, Grendel and Wolfson, Administrative Trademark
Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark depicted below for "plastic suction cups, not
for medical purposes:"¹

¹ Application Serial No. 85025503, filed April 28, 2010, based on September 1991 as the date of first use of the mark and first use of the mark in commerce. The following description of the mark and color statements are in the record: "The mark consists of a three-dimensional configuration of a suction cup with two concentric rings [sic] on the outer surface of the cup portion [sic] of the suction cup. The broken lines depicting the stem and outer edge of the suction cup indicate [sic] placement of the mark on the goods and are not part of the mark. Color is not claimed as a feature of the mark."



Applicant asserted in its application that the mark "has become distinctive of the goods/services through the applicant's substantially exclusive and continuous use in commerce for at least the five years immediately before the date of this statement." Applicant also claims ownership of U.S. Registration No. 3339265.²

The examining attorney refused registration on the ground that the designation (the "concentric rings" design) is merely a three-dimensional configuration of a feature of the goods that fails to function as a mark. Trademark Act § 2(e)(5), 15 U.S.C. § 1052(e)(5). The examining attorney further refused registration on the grounds that the mark is a nondistinctive product design or design feature of the product that has not acquired distinctiveness, Trademark Act §§ 1, 2, and 45, 15 U.S.C. §§ 1051-1052, 1127, and noted that a showing of acquired distinctiveness, even one sufficient to overcome the nondistinctiveness refusal under

² Reg. No. 3339265 for the design mark:



for "plastic suction cups not for medical purposes"; registered under Section 2(f) on November 20, 2007.

the benefits of Trademark Act § 2(f), would not overcome the functionality refusal.

After the examining attorney made the refusals final, applicant appealed to this Board. An oral hearing was held. We affirm the refusals to register.

Functionality

Section 2(e)(5) of the Trademark Act, 15 U.S.C. § 1052(e)(5), provides that registration of a product design may be denied if it "comprises any matter that, as a whole, is functional." A product feature is functional "if it is essential to the use or purpose of the article or if it affects the cost or quality of the article." *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 214 USPQ 1, 4 n.10 (1982). See also, *TraFFix Devices Inc. v. Marketing Displays Inc.*, 532 U.S. 23, 58 USPQ2d 1001, 1006 (2001); and *In re R.M. Smith, Inc.*, 734 F.2d 1482, 222 USPQ 1, 3 (Fed. Cir. 1984) ("De jure functionality...means that the product is in its particular shape because it works better in this shape."). To afford registration to functional designs would inhibit legitimate competition by in effect granting a monopoly to a non-reputational, or non-source-identifying, feature of a product. *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163-64 (1995); *In re Bose*, 227 USPQ 1, 6 (Fed. Cir. 1985) ("If the

feature asserted to give a product distinctiveness is the best, or at least one, of a few superior designs for its *de facto* purpose, it follows that competition is hindered"). See also, *In re Morton-Norwich Products, Inc.*, 671 F.2d 1332, 213 USPQ 9, 12 (CCPA 1982); and *Kistner Concrete Products, Inc. v. Contech Arch Technologies, Inc.*, 97 USPQ2d 1912, 1918-19 (TTAB 2011) ("The functionality doctrine is intended to encourage legitimate competition by maintaining the proper balance between trademark law and patent law.").

The examining attorney argues that applicant's design is functional because the "concentric rings" design "diffuses light that passes through [the suction cup] to prevent the harmful effects of having sunlight focused on particular surfaces or objects."³ The examining attorney further argues that "[a]lthough there are other ways to diffuse light passing through a suction cup, applicant's design has certain advantages over alternative designs."⁴ Applicant concedes that the rings on the surface of the suction cup diffuse light, but argues that "the mark would be functional only if the rings are essential to achieving

³ Final Office action, January 11, 2011.

⁴ *Id.*

light diffusion or the rings affect the cost or quality of the product. Neither factor is present here.”⁵

A determination of functionality generally involves consideration of the following factors (known as the *Morton-Norwich* factors):

1. Whether a utility patent exists that discloses the utilitarian advantages of the design sought to be registered;

2. Whether applicant’s advertising touts the utilitarian advantages of the design;

3. Whether alternative designs are available that serve the same utilitarian purpose; and

4. Whether the design results from a comparatively simple or inexpensive method of manufacture. See *Valu Engineering Inc. v. Rexnord Corp.*, 61 USPQ2d 1422, 1426 (Fed. Cir. 2002), citing *In re Morton-Norwich Products, Inc.*, 213 USPQ at 15-16.

Accordingly, if the concentric rings design is essential to the light-diffusing qualities of the suction cup, is less expensive to manufacture, or affects the quality of the product, registration of the design would

⁵ Response to Office action, November 5, 2010.

hinder the legitimate right of others to compete effectively.

The Existence of a Patent

"[T]he existence of a utility patent for the features for which trademark protection is sought is often critical to a determination that the features are functional."

Kistner Concrete Products, 97 USPQ2d at 1924 (evidence of utility patent accorded "heavy weight"). See also, *In re Bose*, 227 USPQ at 6 (Board did not err in looking to patent disclosure); *In re Charles N. Van Valkenburgh*, 97 USPQ2d 1757, 1759 (TTAB 2011), citing *TrafFix Devices Inc.*, 58 USPQ2d at 1005 ("A prior patent, we conclude, has vital significance in resolving the trade dress claim.").

Applicant's website includes a section entitled "Patents" that states: "Each Adams' suction cup is protected by one or more of the following patents" and which lists nine utility and eight design patents.⁶ Of these, the examining attorney has made Patent No. 5,039,045 for "suction cup for use in windows" and Patent No. 5,318,262 for "multiple layer suction holder" of record,⁷ and

⁶ At <http://suctioncups.com>, accessed August 17, 2010 and attached to Office action of August 18, 2010.

⁷ Attached to Office action of August 18, 2010. The examining attorney also made of record Patent Nos. 7,621,649 (light distribution control type illuminator) and 7,377,661 B2 (illuminated sink). While we have considered these patents, they

applicant has made of record Design Patent No. Des. 340,181 for "concentric rings."⁸

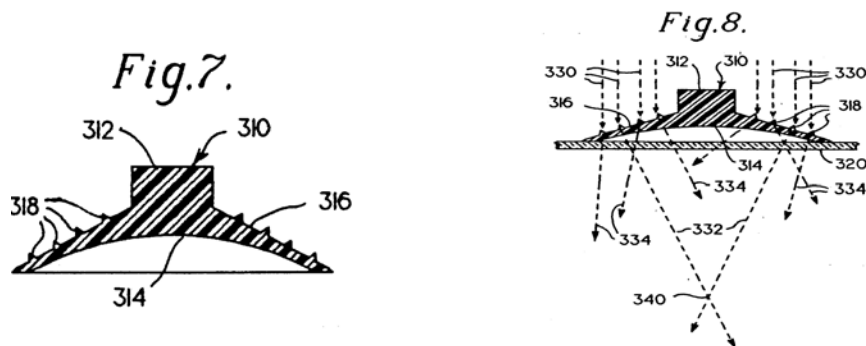
Patent No. 5,039,045 is particularly probative. It relates to "the field of transparent and translucent suction cups adapted to be mounted on window surfaces such as those found in an automobile" and describes a problem created when converging light rays pass through a typical suction cup: "the suction cup can under certain circumstances, act like a magnifying glass by converging the sun's rays at a single focal point," thereby causing damage to any material, such as fabric or upholstery, at the focal point. This problem is solved by providing "a ridge of plastic" along the outer rim of the suction cup. The light rays are redirected, and do not converge at a focal point.

The patent claims an improved suction cup "comprising a plurality of surface deformations ... such that light rays passing through said suction cup will not converge at a single focal point." The preferred embodiment of this invention does not include multiple ridges, only a single ridge along the rim of the suction cup. However, the patent describes an alternate embodiment wherein "circular ridge

are not probative of the issues at hand. See January 11, 2011, Office action.

⁸ See applicant's November 5, 2010 response.

318 are [sic] provided on frustoconical section 316 of cup portion 314."⁹ This embodiment is shown by FIGS. 7 and 8:¹⁰



FIGS. 7 and 8 illustrate a suction cup with four ridges. "As shown in FIG 8, ridges 318 scatter light rays 330 such that a reduced portion of light rays 332 converge at focal point 340. Scattered rays 334 do not converge at focal point 340, thereby obtaining sufficient dispersion of light."¹¹

"[T]he invention described in the patent and the proposed mark do not have to be identical for the patent to read on or apply to the proposed mark." *Valkenburgh*, 97 USPQ2d at 1760-61. The applied-for design, having two concentric rings, or ridges, is encompassed by the patent

⁹ Patent No. 5,039,045 at column 3, lines 33-34.

¹⁰ Unlike a design patent, the figures appearing in a utility patent merely illustrate embodiments of the claimed invention. However, they "are part of the required disclosure of the invention." *In re Pingel Enterprise Inc.*, 46 USPQ2d 1811, 1817 n.8 (TTAB 1998).

¹¹ According to the patent, this embodiment is not, apparently, the most attractive. However, applicant's President and Chief Executive Officer, Mr. William E. Adams, indicates that suction cups having "projections of the surface of the suction cup" other than those of the preferred embodiment can be "equally or more attractive." Adams February 22, 2011, Dec., p. 3.

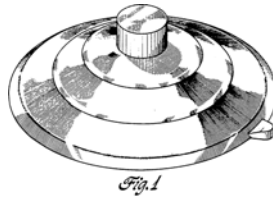
claims.¹² The existence of this patent is highly probative of the functional nature of applicant's design.¹³

Turning to Patent No. 5,318,262, this patent claims a suction cup made up of two or more layers that are attached to each other: a pliable bottom layer and a harder upper "shell" that fits over the bottom piece. When the suction cup is placed against a surface and pressure applied, the two pieces press together and create suction against the mounting surface. The invention provides "maximum memory for improved surface contact, longer life and reduced cost." The patent describes several embodiments of the multiple layer suction holder; however, none of them appear to include concentric rings on the outer ("shell") surface layer. Accordingly, this patent is not particularly probative.

¹² Specifically, claim 4 states, "said improvement comprising a plurality of surface deformations provided in said convex exterior surface of said cup portion such that light rays passing through said suction cup will not converge at a single focal point." We note that an alternate embodiment, which diffuses light by having "grooves" instead of "ridges" and which is shown in FIGS. 5 and 6, is also encompassed by the claims, specifically claim 5.

¹³ In his February 22, 2011, declaration, Mr. Adam states that Patent No. 5039045 describes a modification to the suction cup that provides a "flange that extends out from the base of the head. Such a flange would create the double ring configuration similar [to the applied-for mark]." This modification does not appear to be represented by a drawing. The fact that Mr. Adams has identified this modification as creating a double-ring configuration does not mean that none of the other embodiments also creates a double-ring configuration. Moreover, this modification is encompassed by claim 4.

Applicant has made design patent Des. 340,181 of record. This patent claims "the ornamental design for a suction cup" as shown:



The court in *Morton-Norwich* stated that when a party owns a design patent, this "at least presumptively, indicates that the design is not de jure functional." *Morton-Norwich*, 213 USPQ at 11, n. 3 (citations omitted). However, the "existence of a design patent, while some evidence of non-functionality, is not alone sufficient evidence." *In re American National Can Co.*, 41 USPQ2d 1841, 1843 (TTAB 1997). See also, *In re Caterpillar, Inc.*, 43 USPQ2d 1335, 1339 (TTAB 1997) ("The fact that a configuration design is the subject of a design patent, as in this case, does not, without more, establish that the design is non-utilitarian and serves as a trademark."). Any design feature will be somewhat ornamental, just as any useful object will have some utility; the question is whether, on balance, the design is merely ornamentation incidental to the overall purpose of the article or whether it "adopts a significant portion of the invention disclosed in the patent." *Valkenburgh*, 97 USPQ2d at 1760-61. Here,

the ornamental nature of the concentric rings, as shown by the design patent, is outweighed by Patent No. 5,039,045's disclosure of the utilitarian advantages of the design.

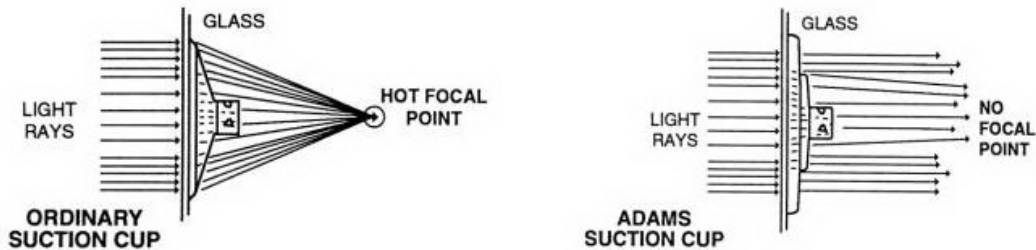
On balance, this *Morton-Norwich* factor strongly favors a finding of *de jure* functionality.¹⁴

Advertising Touting the Mark's Utilitarian Features

The second evidentiary factor concerns any advertising materials that tout the utilitarian advantages of the design. An applicant's own advertising promoting the utilitarian aspects of its product design is strong evidence supporting a functionality refusal. *Valkenburgh*, 97 USPQ2d at 1761. A review of applicant's online advertising shows that it clearly promotes the light-diffusing advantages of the applied-for "concentric rings" design in applicant's suction cups. The below, taken from one of applicant's web pages¹⁵ is illustrative:

¹⁴ We note that the examining attorney has advanced a second reason for finding applicant's design to be functional: that to the extent the concentric rings are ridges on the surface of the suction cup, they thicken the suction cup, which strengthens its grip, making it less likely that it will collapse. We have not relied on this argument in holding that the design is functional, as it is unnecessary to our decision.

¹⁵ At <http://www.adamsmfg.com>, Office action August 18, 2010.



Adams suction cups feature an exclusive, patented light diffusing ring that absolutely will not focus sunlight the way other clear cups can. Curtains and nearby furniture are safe from scorching rays- so you'll never "get burned" again!

According to the website, the Adams Suction Cup shown at right is covered by "US Patent # 5,039,045."¹⁶ The advertising copy underneath the drawings mentions applicant's "exclusive, patented light diffusing ring."

The number of rings on a given suction cup are a consequence of the size of the cup. Small, mini and medium-size suction cups display one ring; the large and "giant suction cup wreath holder" display two concentric rings. Both adaptations employ the same scientific principle that bent light rays diffuse light, and in the description of each of the small, mini, medium and large-size products, applicant has included the following sentence: "Patented light diffusing rings prevent focused light from damaging interiors, while the superior material resists yellowing."¹⁷ The fact that applicant's own advertising flaunts the utilitarian features of the design sought to be registered

¹⁶ At <http://www.suctioncups.com>, Office action August 18, 2010.

¹⁷ At www.adamsmfg.com, Office action August 18, 2010.

supports a finding that there is a competitive need to copy the design and that the design is *de jure* functional.

Availability of Alternative Designs

"[O]nce a product feature is found functional based on other considerations there is no need to consider the availability of alternative designs, because the feature cannot be given trade dress protection merely because there are alternative designs available. But that does not mean that the availability of alternative designs cannot be a legitimate source of evidence to determine whether a feature is functional in the first place." *Valu Engineering*, 61 USPQ2d at 1427. "If the feature asserted to give a product distinctiveness is the best, or at least one, of a few superior designs for its *de facto* purpose, it follows that competition is hindered." *In re Bose*, 227 USPQ at 6. It is, however, unnecessary to show that competition has been entirely eliminated. *Id.*

The evidence of record shows that there are only a limited number of other designs available for making suction cups. The examining attorney submitted copies of web pages advertising a variety of suction cups, arguing that these show that other entities are making suction cups with ridges,

presumably because of the functional advantages of doing so, as demonstrated by the attached evidence from thatpetplace.com, showing the Customflo suction cup for sale featuring concentric circles/ridges, and Amazon.com showing the Timex suction cup Hygrometer, Aqua Logic suction cups, and ABC Products suction cups for sale with ridges/rings.¹⁸

However, Mr. Adams contends in his declaration that all but one of these websites are actually advertising applicant's own product,¹⁹ and that the one which is not (the Timex suction cup Hygrometer) is designed for an entirely different purpose.²⁰ Mr. Adams further states that applicant's suction cups are repackaged and sold by third parties in connection with another product, such as "bird feeders, thermometers, EZ-Pass holders and a variety of other products that are hung on windows."²¹ With the January 11, 2011, Office action, the examining attorney further submitted a copy of a webpage from www.parkingid.com that advertises suction cups with ridges. Again, Mr. Adams states that "the suction cups pictured on that web page were made by Adams Mfg."²² and provides an invoice showing the

¹⁸ Office action August 18, 2010.

¹⁹ Response to Office action, November 5, 2010; Adams October 1, 2010, Dec., p. 2 (unnumbered) ("Other than our products, there are no suction cups having a ring or rings on the cup portion of the suction cup on the market in the United States today.")

²⁰ *Id.*, p. 4 (unnumbered).

²¹ *Id.*, p. 1 (unnumbered).

²² Adams February 22, 2011, Dec., p. 2.

sale of suction cups from applicant to the entity operating the "parkingid" website.

As to the evidence attached to the Office action denying applicant's request for reconsideration, these consist of copies of numerous third-party websites advertising a wide variety of products that utilize suction cups to adhere to a surface (such as a shower mat, a bird feeder, a bathroom mirror, suncatchers and bath toys). They show three basic designs: plain suction cups, cups with concentric rings (all or some of which may be applicant's products), and a single cup with radial ridges. This evidence does not establish that a variety of alternative designs are available.

We are also cognizant of the information disclosed in the patents regarding other variations that can be used on suction cups to diffuse light - such as "roughing up" the surface or using colored, opaque or semi-opaque surfaces - and that none of these variations has been shown to be in use. The evidence also does not show that others are making suction cups that use "other non-circular projections or depressions on the outer surface of the suction cup" or "a filler material in the polyvinyl chloride or other clear

plastic from which the suction cup is made" to diffuse light, as Mr. Adams posited in his declaration.²³

Thus, viewing the evidence *in toto*, while applicant has conceptualized a variety of alternative methods for diffusing light, the evidence shows that there are only a limited number of other available designs actually in use. We find that for its *de facto* purpose, the "concentric rings" design appears to be superior to other design options. It follows that this *Morton-Norwich* factor favors a finding of functionality.

Comparative Methods of Manufacture

According to Patent No. 5,039,045, the preferred embodiment of the invention, which includes only a single ridge along the rim of the suction cup, "provides the easiest such suction cup to mold." However, the record shows that making a suction cup with more than one ring, with multiple ridges, or by roughing the surface, is equally easy to make. Mr. Adams explains the process:

Suction cups are usually made by injection molding using a two piece mold. The mold cavities in our molds are configured to provide the desired rings on the cup surface. The same molding technique can be used to make all of the alternative suction cups... While the surface of the mold cavities would be different for each alternative, the cost of the mold for each alternative would be the same or nearly the same

²³ Adams October 1, 2010, Dec., p. 3 (unnumbered).

as the cost of the same size mold to make a suction cup having concentric rings similar to the applied-for trademark.²⁴

In his second declaration, Mr. Adams again confirms that "suction cups with a roughened surface, as well as suction cups with ribs, projections of other geometric shapes, surface grooves or other depressions are equally effective in diffusing light and no more costly than providing concentric rings on the cup portion of the suction cup."²⁵ Donald French, an employee of Sandur Coromant with 24 years of experience in mold making and mold design, describes in his declaration several possible alternatives for making suction cups that diffuse light, and states that the "total cost to manufacture each alternative would be the same or nearly the same as the cost to make a suction cup of similar size having concentric rings similar to the applied-for trademark."²⁶

Thus, the evidence does not show that the design of applicant's suction cups are the result of a comparatively simple or cheaper method of manufacturing. The fourth *Morton-Norwich* factor does not demonstrate that such design is *de jure* functional, and weighs in applicant's favor.

Balancing the Factors

²⁴ Adams October 1, 2010, Dec., p. 3 (unnumbered).

²⁵ Adams February 22, 2011, Dec., p. 4.

²⁶ French March 30, 2011, Dec., p. 3 (unnumbered).

On balance, the presence of an utility patent directed specifically to the elements of applicant's subject design, applicant's advertising touting the utilitarian features of the design, and the limited number of alternative designs on the market, are strong indicators of a superior design which others should be permitted to copy in order to compete effectively. These factors outweigh the fact that the design does not appear to be the result of a cheaper method of manufacturing, or that its features may also be covered by a design patent. Further, the existence of applicant's prior registration, No. 3339265, is not determinative. At oral hearing, applicant argued that this prior registration was evidence that the applied-for mark is not *de jure* functional. The examining attorney noted that the configuration appears to be as functional in nature as the applied-for design. Suffice it to say, each case must be decided on its own facts; we cannot second-guess the record in that proceeding. As has been often stated, we are not bound by the prior decisions of examining attorneys in other cases. See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

In reviewing the *Morton-Norwich* functionality factors, we find that the proposed mark is functional.

Nondistinctive Product Design Refusal

Our holding that the design sought to be registered is functional bars registration, regardless of any showing of acquired distinctiveness. However, for purposes of completeness, we shall decide the alternative refusal that applicant's proposed mark has not acquired distinctiveness pursuant to Section 2(f) of the Trademark Act of 1946.

The examining attorney argues that "applicant's rings or ridges on its suction cups are not inherently distinctive because nothing about them will lead consumers to associate them with a particular source. They are a nondescript and barely noticed element of the product."²⁷ In response, applicant states that it "does not allege that concentric rings are inherently distinctive," but rather argues that its mark has acquired distinctiveness "through a long period of continuous exclusive use."²⁸ We may therefore view applicant's claim to the benefits of Section 2(f) as a concession that the concentric rings design is not inherently distinctive. *In re Reed Elsevier Properties Inc.*, 77 USPQ2d 1649, 1651 n. 3 (TTAB 2005), *aff'd* 482 F.3d 1376, 82 USPQ2d 1378 (Fed. Cir. 2007). To be registrable, the design must be shown to have acquired distinctiveness

²⁷ Office action, August 18, 2010.

²⁸ Applicant's Brief, p. 4.

There is a heavy burden on an applicant to prove acquired distinctiveness in a product configuration case. *In re Gibson Guitar Corp.*, 61 USPQ2d 1948, 1951 (TTAB 2001). See also, *Yamaha International Corp. v. Hoshino Gakki Co.*, 840 F.2d 1571, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988); and *In re Ennco Displays Systems Inc.*, 56 USPQ2d 1279, 1284 (TTAB 2000) ("While there is no fixed rule for the amount of proof necessary to demonstrate acquired distinctiveness, the burden is heavier in this case because it involves product configurations."). As the Board explained in *Ennco*, at 56 USPQ2d 1283, to establish acquired distinctiveness,

an applicant must show that the primary significance of the product configuration in the minds of consumers is not the product but the producer. 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, on the other hand, 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. (internal citations omitted).

As evidence from which consumer association might be inferred, applicant has submitted the declaration of Jennifer Dosch, applicant's Marketing Manager, who states that applicant:

has been using packaging and brochures which prominently show the two concentric rings design on suction cups for over fifteen years. Each

year Adams spends approximately \$4,900.00 on product sheets and brochures for its suction cups similar to Exhibits 1, 2, and 9. Adams also spends approximately \$24,000.00 dollars for each year for packaging for its suction cup products.

...

Adams has been selling suction cups with the two concentric rings since 1990. Our sales of those suction cups over the past twenty years has been approximately \$10,300,000.00. We estimate that over eighty-five million suction cups with the two concentric rings design have been sold.

Exhibits 1, 2, and 9 of Ms. Dosch's declaration are, respectively, applicant's current brochure for "Adams Safety Suction Cups"; page 9 from "Adams 'functionality' brochure"; and a "product sheet" labeled "2010 Catalog." Each of these exhibits contains pictures of applicant's suction cups. The cups have either one or two concentric rings on their outer surface. There is no "look for" advertising on any of these exhibits. On the other hand, exhibits 7 and 8, which also include photos of the actual suction cups, mention the "Light-Diffusing Rings" designed to "prevent surface damage." This usage promotes the functional purpose of the concentric rings, which "undermines" a finding of acquired distinctiveness. *Ennco*, 56 USPQ2d at 1285, *citing Thomas & Betts Corp. v. Panduit Corp.*, 65 F.2d 654, 662, 36 USPQ2d 1065, 1071-72 (7th Cir. 1995).

Applicant further produced three declarations from individuals who have been involved in the "purchase, sale and use of suction cups" for 12-21 years: Bruce Jarzmik, president of Bruce C. Jarzmik and Associates, 12 years; Patrick Rosauer, applicant's sales representative, 21 years; and Steve Feldstein, sales representative for Omega Marketing, 20 years. The declarants state that applicant is the only manufacturer or seller of suction cups with concentric rings, and that "[w]henever I see a suction cup having concentric rings I understand that this suction cup was made by Adams Mfg." These declarations are of limited probative value in showing that the purchasing public has come to view the design as a trademark, however, inasmuch as none of the declarants represents the purchasing public. *See Ennco*, 56 USPQ2d at 1284 ("the statements made by distributors concerning acquired distinctiveness are of minimal value because they are not the ultimate consumers of applicant's products."). One of the declarants is a sales representative for applicant; the other a third-party sales representative; and Mr. Jarzmik is president of his own company. While we may assume he purchases applicant's suction cups, the declaration does not

clarify whether he does so as an ultimate purchaser or as a reseller. Even as an ultimate purchaser, a single declaration from a customer is of *de minimis* value. Although the declarants also state that "others who purchase suction cups recognize Adams suction cups by the concentric rings on the cup portion," such statements are hearsay and cannot be relied on for the truth of the matter asserted.

Applicant has failed to meet its heavy burden to show that the concentric rings design has acquired distinctiveness. There is no evidence of media recognition of applicant's mark, unsolicited endorsements, or information as to the amount of advertising or applicant's advertising expenses. The expenses that have been described, for packaging, product sheets and brochures, do not appear to be large amounts. And while applicant's length of use of its mark is not insignificant, the record does not reveal applicant's market share. We are thus unable to discern whether applicant's long use of its mark has had an impact on prospective buyers, particularly in the absence of any "look for" advertising. *Cf. Ennco*, 56 USPQ2d at 1286 (7 to 17 years of use insufficient).

In sum, applicant has not shown that the purchasing public would recognize the concentric rings design as being a trademark. The design is not inherently distinctive and has not been shown, by this record, to have acquired distinctiveness.

Decision: The refusals to register applicant's product design on the grounds that it is *de jure* functional, not inherently distinctive, and has not acquired distinctiveness, are affirmed.