

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed:
August 7, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Crane USA, Inc.

Serial No. 86172232

F. William McLaughlin of Wood Phillips Katz Clark & Mortimer, for Crane USA, Inc.

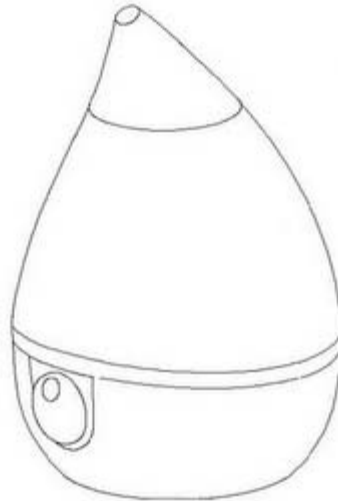
Anthony M. Rinker, Trademark Examining Attorney, Law Office 102
(Mitchell Front, Managing Attorney).

Before Quinn, Ritchie, and Shaw, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Crane USA, Inc., applicant herein (“Applicant”), seeks registration on the Principal Register of the proposed mark shown below for “humidifiers for household use,” in International Class 11¹:

¹ Serial No. 86172232, filed on January 22, 2014, filed under Section 1(b) of the Trademark Act, 15 U.S.C. § 1152(b).



The mark contains the following description:

The mark consists of a two-dimensional depiction of a three-dimensional housing having generally a tear shape, a slightly offset top region terminating at an opening, three vertically spaced circumferential lines, a round dial with a small circle within its perimeter and an enclosed area within which the round dial resides and bounded by an upwardly opening U-shaped line and the lowermost circumferential line. Color is not claimed as a feature of the mark.

The Trademark Examining Attorney refused registration on the ground that Applicant's mark constitutes trade dress of a product design without a showing of acquired distinctiveness pursuant to Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§ 1051-1052, 1127. The Examining Attorney also issued requirements for 1) a product configuration drawing that depicts Applicant's mark in the drawing to include broken or dotted lines to show the position of the mark on goods or container, 37 CFR 2.52(b)(4); 2) a "clear and concise description of the mark" that a) indicates the mark is a three-dimensional configuration of goods or packaging; b) specifies all elements claimed; and c)

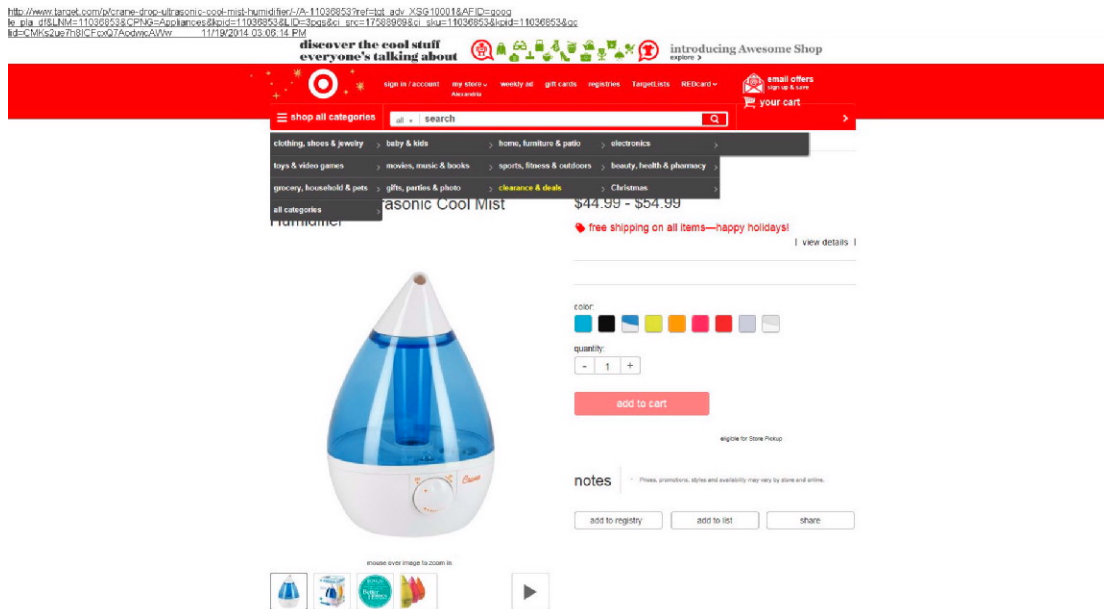
specifies elements not part of the mark and serves only to show position or placement, 37 CFR 2.37; 2.52(b)(2); (b)(4); and 3) product information and documentation regarding the applied-for mark, 37 CFR 2.61(b).

When the refusal and requirements were made final, Applicant filed a timely appeal. Both Applicant and the Examining Attorney filed briefs, and Applicant filed a reply brief.

Trade Dress

Product trade dress may not be registered without sufficient proof of acquired distinctiveness. *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 US 205, 209-210, 54 USPQ2d 1065, 1066 (2000) (applicant trying to protect trade dress of its goods must show acquired distinctiveness). The Examining Attorney asserts that the mark Applicant is attempting to register falls under this category, arguing that what applicant seeks to register is really its product's configuration.


To support this argument, the Examining Attorney submitted, with the November 19, 2014 Final Office Action, evidence that the humidifier Applicant seeks to register is being offered for sale at Target.Com.



Applicant does not deny that it sells the humidifier, or that the mark it seeks is a depiction of that product. Rather, Applicant argues in its brief, that “[t]he fact that applicant sells such a product does not preclude applicant from separately registering a two dimensional design.” 6 TTABVUE 6. The issue, however, is that what Applicant seeks to register is a depiction of its product. Applicant’s attempt to register the mark with a description of it as “a two-dimensional depiction of a three-dimensional housing” does not alter the likely consumer perceptions, or for that matter perceptions of competitors, that what is claimed is the trade dress as otherwise depicted in the drawing and the description. As our precedent dictates, “[e]ven an application to register a configuration of a product depicts a mark in two-dimensional form, perhaps from a view that yields a perspective of depth.” *Duramax Marine LLC v. R.W. Fernstrum & Co.*, 80 USPQ2d 1780, 1792 (TTAB 2006) (finding functionality not applicable to service mark).

In this regard, the Examining Attorney distinguished Registration No. 4333641, submitted by Applicant with its October 27, 2014 Response to Office Action, which depicts “three different bus types” (as noted in the description), for “automobile dealerships featuring buses.”

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Goods and Services IC 035. US 100 101 102. G & S: Automobile dealerships featuring buses. FIRST USE: 19870801. FIRST USE IN COMMERCE: 19870801

Mark Drawing Code (2) DESIGN ONLY

Design Search Code 18.05.04 - Buses; Cable cars, trolley; Trolleys
18.05.07 - Campers (vehicles); Mobile homes; Motor homes; Recreational vehicles; Trailers

Serial Number 85545789

Filing Date February 17, 2012

Current Basis 1A

Original Filing Basis 1A

Published for Opposition February 26, 2013

Registration Number 4333641

Registration Date May 14, 2013

Owner (REGISTRANT) A-Z Bus Sales, Inc. DBA A-Z Bus Sales CORPORATION CALIFORNIA 1900 S. Riverside Ave. Colton CALIFORNIA 92324

Attorney of Record Wade Kackstetter

Description of Mark Color is not claimed as a feature of the mark. The mark consists of three different bus types.

Type of Mark SERVICE MARK

Register PRINCIPAL

Live/Dead Indicator LIVE

As stated by the Examining Attorney, that registration, unlike the present applicant, is for services not goods, a distinction discussed in our

precedent, in that trade dress for services unlike for goods, may be inherently distinctive. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 23 USPQ2d 1081, 1084 (1992) (“There is no persuasive reason to apply to trade dress a general requirement of secondary meaning”); *In re Chippendales USA, Inc.*, 622 F.2d 1346, 96 USPQ2d 1681, 1684 (Fed. Cir. 2010) (Applicant’s “Cuffs and Collar” mark found to be non-distinctive trade dress as of time of registration); *In re Frankish Enters. Ltd.*, . 113 USPQ2d 1964, 1970 (TTAB 2015) (monster truck mark found to be inherently distinctive for entertainment services); *see also In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court”).

Applicant seeks to register its mark under Section 1(b) of the Trademark Act; § 1051(b), and does not assert any acquired distinctiveness. Accordingly, we affirm the refusal that Applicant’s mark constitutes trade dress of a product design without a showing of acquired distinctiveness.

The Requirements

Based on our affirmance of the trade dress refusal, we find the requirements to be apt. In particular, since we have found that Applicant’s mark constitutes trade dress, we affirm the requirements for 1) a product configuration drawing that depicts Applicant’s mark in the drawing to include broken or dotted lines to show the position of the mark on goods or

container as required by 37 CFR 2.52(b)(4); 2) a “clear and concise description of the mark”² that a) indicates the mark is a three-dimensional configuration of goods or packaging; b) specifies all elements claimed; and c) specifies elements not part of the mark and serves only to show position or placement in accordance with 37 CFR 2.37 and 2.52(b)(2); (b)(4); and 3) the product information and documentation regarding the applied-for mark in accordance with 37 CFR 2.61(b).

Hence, the requirements are all affirmed.

Decision: The refusal to register on the ground that Applicant’s mark constitutes trade dress of a product design without a showing of acquired distinctiveness is affirmed. The requirements for 1) a product configuration drawing that depicts Applicant’s mark in the drawing to include broken or dotted lines to show the position of mark on goods or container; 2) a “clear and concise description of the mark” that a) indicates the mark is a three-dimensional configuration of goods or packaging; b) specifies all elements claimed; and c) specifies elements not part of the mark and serves only to show position or placement; and 3) product information and documentation regarding the applied-for mark are all affirmed.

² Applicant argues that the Examining Attorney did not raise this issue during prosecution. We find that the refusal and all of the requirements were specifically raised in the April 30, 2014 Office Action, as well as the November 19, 2014 Final Office Action.