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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86172232
Applicant	Crane USA, Inc.
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Date	02/27/2015

Trademark
WAC10271T00090US

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:	) Mark:
	)
Crane USA, Inc.	)
	)
Serial No.: 86/172,232	) Examining Attorney: Anthony M. Rinker
	)
Filed: January 22, 2014	) Law Office: 102

APPEAL BRIEF

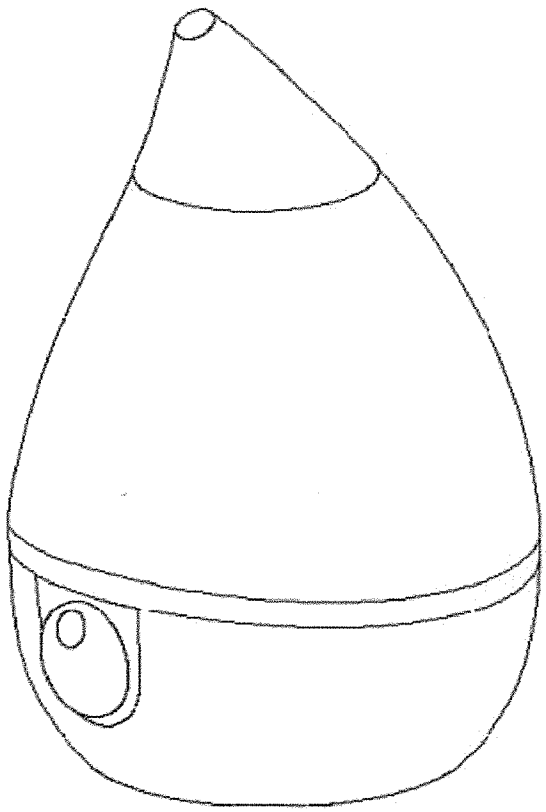
Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

Sir:

This brief is in support of the Notice of Appeal filed February 27, 2015.

ARGUMENT

Applicant seeks registration of the mark



for humidifiers for household use.

The final action includes a product information requirement, a refusal for the mark being non-distinctive trade dress, and a requirement for a configuration drawing and description. All of these are based on the Examining Attorney's incorrect position that the applied for mark is a three-dimensional configuration mark. The mark sought to be registered is that shown in the drawing, see above, which is a two dimensional line drawing.

Of relevance herein, 37 CFR §2.51(b) specifies that ". . . the drawing of the mark must be a substantially exact representation of the mark as intended to be used on or in connection with the goods and/or services specified in the application . . .". 37 CFR §2.52(b) requires a special form drawing for a two or three-dimensional design. Indeed, 37 CFR §2.52(b)(2) specifies that for three dimensional marks the applicant must indicate that the mark is three-dimensional.

To receive a filing date, 37 CFR §2.21(a)(3) requires a clear drawing of the mark. TMEP 202.01 outlines the requirements for a clear drawing of the mark. This section defines a drawing as "a depiction of the mark for which registration is sought". Indeed, if there are inconsistencies in the application, this section specifies that the mark shown in the drawing controls for purposes of determining the nature and elements of the mark. While the application must also include a description of the mark, there is no requirement that the description be printed on the registration certificate. Indeed, amending the description of the mark is to be permitted liberally as long as the drawing supports the description, see TMEP 808.03(e).

As set forth above, the drawing depicts the mark sought to be registered. Thus, whatever the applicant chooses to illustrate in the drawing determines the mark sought to be registered.

It is clear from the record that applicant submitted a two dimensional line drawing. Consistently therewith the application includes a description that the mark consists of a **two-dimensional depiction** of a three-dimensional housing having a generally tear

shape, a slightly offset top region terminating in an opening, three vertically spaced circumferential lines, a round dot with a circle within its perimeter and an enclosed area within which the round dial resides and bounded by an upwardly opening U-shaped line in the lowermost circumferential line.

In reviewing the application, the Examining Attorney concluded that applicant seeks registration of a three dimensional design of a product configuration. The drawing is not a three dimensional design. It is a two dimensional design. Indeed, the description of the mark describes it as a two dimensional design. Moreover, 37 CFR §2.52(b)(2) states that if it is a three dimensional mark ". . . the applicant must indicate that the mark is three-dimensional." Applicant has made no such indication. To the contrary, applicant has indicated that the mark is two-dimensional.

The Examining Attorney alleges that the mark is a three dimensional design because it ". . . includes lines that curvature of a round object that indicate the design shape has depth, width, and height, i.e., three dimensions." There is no requirement that a two dimensional drawing have straight lines. If applicant chooses that its mark have lines that indicate curvature, then that is applicant's choice. The fact that a two-dimensional drawing depicts a product that happens to be three-dimensional does not change the character of the drawing. The drawing is two-dimensional and is intended as such.

Additionally, the Examiner conducted an Internet search that shows a product of applicants, which is a humidifier. From this the Examining Attorney concludes that applicant's goods are in fact a trade dress design. The humidifier shown in the image

found in the Internet search is a three dimensional product. Applicant could have sought registration of the three dimensional configuration of the humidifier. Applicant did not do so in the present application. The fact that applicant sells a product having a three dimensional housing that corresponds to the two dimensional design shown in the drawing herein is irrelevant. The fact that applicant sells such a product does not preclude applicant from separately registering a two dimensional design.

Ultimately, the issue in this application is whether or not applicant's mark is a two dimensional design, as clearly stated by applicant in its application, or a three dimensional design, as contended by the Examining Attorney. It is apparent from the record herein that applicant seeks registration of a two dimensional design, as shown in the drawing above. While the two dimensional design happens to depict a three-dimensional housing, it is clearly applicant's intent that the application is for a two dimensional design and not a three dimensional design. The only basis for the Examining Attorney to even consider that the mark might be a three dimensional design is the characterization of the two dimensional design as a depiction of a three dimensional housing. If the Examining Attorney had objected to such a description, then that could have been addressed. Instead, the Examining Attorney for no apparent reason has characterized applicant's mark as a three dimensional configuration, contrary to applicant's clearly stated intention that the drawing is of a two dimensional mark and in fact is a two dimensional line drawing as illustrated herein.

Because applicant requests registration of a two dimensional design, and not a three dimensional object, the requirement for product information should be reversed and the refusal based on the mark being non-distinctive trade dress should be reversed and the requirement for a configuration drawing and description be reversed.

Such action is requested.

Respectfully submitted,

Date: February 27, 2015

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