

<p>This Opinion Is Not a Precedent of the TTAB</p>
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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re AGPCH, S.A. de C.V.*

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Serial No. 87125518

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John M. Murphy of Arochi Marroquin & Lindner SC  
for AGPCH, S.A. de C.V.

Melissa S. Winter, Trademark Examining Attorney, Law Office 122,  
John Lincoski, Managing Attorney.

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Before Lykos, Lynch, and Coggins,  
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background and Evidentiary Issues

AGPCH, S.A. de C.V. (“Applicant”) seeks registration on the Principal Register of  
the product packaging mark shown below for “Mezcal” in International Class 33:



The mark is described as follows: “The mark consists of the three-dimensional configuration of the bottle in which the goods are sold. The bottle is gourd-shaped with vertical ribs, and has a flared bottle ring with a horizontal ridge, a capsule covering the neck and flaring down over the shoulders, and a spherical stopper.”<sup>1</sup>

The Examining Attorney refused registration under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052, and 1127, on the ground that the proposed mark constitutes nondistinctive packaging for the goods that is unregistrable on the Principal Register absent sufficient proof of acquired distinctiveness under Section 2(f) of the Trademark Act. Applicant maintains that its proposed mark is inherently distinctive. After the Examining Attorney made the refusal final, Applicant appealed.

Before turning to the merits, we address the Examining Attorney’s objection as to the untimeliness of a variety of new evidence Applicant submitted for the first time in its Appeal Brief. She objects to:

- screenshots from [www.visualdictionaryonline.com](http://www.visualdictionaryonline.com) showing three-dimensional geometric shapes;

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<sup>1</sup> Application Serial No. 87125518 was filed August 3, 2016, based upon a declared intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

- screenshots from the online version of the Merriam-Webster Dictionary (2017) [www.unabridged.merriam-webster.com](http://www.unabridged.merriam-webster.com) showing the definitions of “basic” and “geometric”;
- an excerpt from the North American Free Trade Agreement (“NAFTA”) between the Governments of Canada, the United Mexican States and the United States of America regarding tequila and mezcal;
- an excerpt from the Department of the Treasury’s Alcohol & Tobacco Tax & Trade Bureau’s guide, The Beverage Alcohol Manual, discussing mandatory labelling for distilled spirits;
- an excerpt from the Denominaciones de Origen’s Orgullo de Mexico and a translation of that excerpt discussing the characteristics of tequila and mezcal; and
- an excerpt from the book Viva ¡Tequila!—Cocktails, Cooking, and Other Agave Adventures, discussing mezcal.

Under Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d):

The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal. If the appellant or the examining attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a request to the Board to suspend the appeal and to remand the application for further examination.

Accordingly, we sustain the Examining Attorney’s objection, and exclude the new evidence. However, we will take judicial notice of the Merriam-Webster Dictionary entries, the excerpt from NAFTA, and the excerpt from The Beverage Alcohol Manual

because they consist of facts “not subject to reasonable dispute” that come from “sources whose accuracy cannot reasonably be questioned.” *Cf.* Fed. R. Evid. 201(b). *See In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355 n.10 (TTAB 2015). The remaining new evidence identified by Applicant does not meet these criteria and therefore is unsuitable for judicial notice.

## II. Failure to Function as a Trademark

Section 45 of the Trademark Act defines a “trademark” in relevant part as “any word, name, symbol, or device, or any combination thereof used by a person. . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.” 15 U.S.C. § 1127. “The critical inquiry in determining whether a designation functions as a mark is how the designation would be perceived by the relevant public.” *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010). “[A] mark is inherently distinctive if [its] intrinsic nature serves to identify a particular source.” *Wal-Mart Stores v. Samara Bros.*, 529 U.S. 205, 210 (2000) (quoting *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992)). Subject matter that is perceived as merely decorative or ornamental does not identify source and thus fails to function as a mark.

### A. Inherent Distinctiveness – Background

In, *Wal-Mart*, the Supreme Court explained that unlike product design, product packaging *may* qualify as inherently distinctive. *Wal-Mart*, 529 U.S. at 210. Nonetheless, “not every designation that is placed or used on or in connection with a product necessarily functions . . . as a trademark for said product; not every

designation adopted with the intention that it performs a trademark function and even labeled as a trademark necessarily accomplishes that purpose . . . .” *In re Hulting*, 107 USPQ2d 1175, 1177 (TTAB 2013) (quoting *Am. Velcro, Inc. v. Charles Mayer Studios, Inc.*, 177 USPQ 149, 154 (TTAB 1973)); accord *In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1976); *In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227, 229 (CCPA 1960). A proposed mark is inherently distinctive only “if it is arbitrary and distinctive and if its principal function is to identify and distinguish the source of the goods to which it is applied . . . .” See *In re Soccer Sport Supply Co.*, 507 F.2d 1400, 184 USPQ 345, 347 (CCPA 1975).

To assess the potential inherent distinctiveness of product packaging, we consider the following factors set out in *Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*, 568 F.2d 1342, 196 USPQ 289, 291 (CCPA 1977):<sup>2</sup>

- “whether the proposed mark is a ‘common’ basic shape or design;”
- “whether it [is] unique or unusual in a particular field;”
- whether it is “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 “a mere refinement” thereof.

A particular factor may be dispositive as to the lack of inherent distinctiveness, without the need for a showing under each factor. See *In re Chippendales USA, Inc.*,

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<sup>2</sup> Given the lack of wording in the mark and the absence of a specimen or other evidence of use of the proposed mark with wording, we do not address “whether [the proposed mark is] capable of creating a commercial impression distinct from the accompanying words.” *Seabrook Foods*, 196 USPQ at 291.

622 F.3d 1346, 96 USPQ2d 1681, 1684 (Fed. Cir. 2010) (in applying the *Seabrook* test, holding that “[a] finding that any one of these factors is satisfied may render the mark not inherently distinctive.”).

B. The Particular Field

As an initial matter, we define the relevant field in which to consider Applicant’s packaging. Applicant cites *In re Procter & Gamble Co.*, 105 USPQ2d 1119, 1125 n.12 (TTAB 2012) to argue that the relevant field in this case should be limited to “mezcal” rather than “alcoholic beverages” or “beverages” more generally. In that case involving trade dress for mouthwash, the Board found “the most reasonable category that may be inferred from the market for the goods themselves” was mouthwash in disposable containers. *Id.* The Board therefore deemed irrelevant bottles for perfume, ketchup and salad dressing. *Id.*

The Examining Attorney clearly took a broader view of the scope of the relevant field, although she referred to it in varying ways as “the liquor industry,” “the alcoholic beverage industry,” and “the beverage industry as a whole.”<sup>3</sup> Ultimately, her brief proposes consideration of bottles of all types of alcoholic beverages as well as other non-alcoholic beverages.<sup>4</sup>

The most reasonable category of goods to consider is not necessarily limited to the specifically identified goods. In *Chippendales*, the Federal Circuit considered inherent distinctiveness of a proposed costume mark in the “adult entertainment”

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<sup>3</sup> 8 TTABVue 3-6 (Examining Attorney’s Brief).

<sup>4</sup> *Id.* at 6.

field, and under *Seabrook*, compared the costume to a prior registered costume mark for “establishments which feature food, drink and entertainment,” noting that “the Board did not err in considering the mark to be within the relevant field of use.” *Id.* at 1688. Also in *Seabrook*, the registration at issue (Reg. No. 819209) identified specific frozen food items (not frozen fish) that the Court characterized as “frozen prepared foods including a variety of frozen vegetables.” 196 USPQ at 291. The Court looked to a mark in use for “frozen fish” as an indication that the registered mark “is not unique in this field.” *Id.* See also *In re Creative Beauty Innovations, Inc.*, 56 USPQ2d 1203, 1207 (TTAB 2000) (Board discussed bottles in the market for bath products generally, whereas the identification of goods in the application referred to specific products); *In re Hoffman House Sauce Co.*, 137 USPQ 486 (TTAB 1963) (comparing container for “meat, fowl, and fish sauces and salad dressings” to third parties’ bottles used for “food products” generally to find no inherent distinctiveness). This case law refutes Applicant’s contention that we must limit the relevant field to mezcal. We therefore reject Applicant’s arguments that because tequila and mezcal are distinct products that “taste different,” these products would not be considered part of the same relevant field in which to assess Applicant’s bottle design.<sup>5</sup>

In this case, we find the distilled spirits market the most reasonable category of goods for purposes of comparing packaging. Consumers tend to encounter many types of liquors sold together in the same retail locations or through the same websites. For example, the record includes evidence of the Liquor Barn (the name itself groups

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<sup>5</sup> 6 TTABVue 8-9 (Applicant’s Brief).

liquors together) offering tequila, vodka, and whisky under the general menu option for “Spirits.”<sup>6</sup> The website of Total Wine includes a menu option for “Spirits” as a general category, with separate menu options for the categories of “Wine” and “Beer.”<sup>7</sup> These retailers group distilled spirits together in presenting them to consumers, suggesting consumer exposure to various types of liquor bottles together in the retail setting. By contrast, the record contains no evidence that all types of beverages are sold together, and the market for beverages in general may be an overly broad category. Because of age restrictions on the purchase of alcoholic beverages, the class of consumers is not coextensive with that for beverages in general. Thus, we find the most appropriate relevant market to be distilled spirits, and will consider Applicant’s bottle shape in the field of liquor bottles generally.

C. Applying *Seabrook*

The *Seabrook* factors “are merely different ways to ask whether the design, shape or combination of elements is so unique, unusual or unexpected in this market that one can assume without proof that it will automatically be perceived by customers as an indicator of origin.” *In re Frankish Ent.*, 113 USPQ2d 1964 (TTAB 2015) (quoting J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 8:13 (4th ed. 2014)). The Examining Attorney asserts that liquor “is commonly packaged in bottles that have an overall cylindrical shape that tapers at the top” and that the

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<sup>6</sup> TSDR February 17, 2017 Office Action at 4, 6, 8, 10 (theliquorbarn.com).

<sup>7</sup> *Id.* at 15 (totalwine.com).



other features of Applicant's bottle are common in the field.<sup>8</sup> Both the Examining Attorney and Applicant submitted evidence of other bottle designs to provide background on the relevant market for purposes of comparison to Applicant's mark



. Examples of some of the liquor bottles from the record appear below.



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<sup>8</sup> 8 TTABVUE 3 (Examining Attorney's Brief).

<sup>9</sup> TSDR February 17, 2017 Office Action at 4 (theliquorbarn.com) – tequila.



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We find that Applicant's proposed mark cannot be considered unique or unusual in the field, and constitutes a mere refinement of a commonly-adopted and well-known form of ornamentation for liquor bottles. The first third-party tequila bottle



shown above, Casa Cofradia Reposado has an overall design almost identical to



Applicant's "gourd-shaped" bottle with a spherical stopper and what Applicant calls a "capsule" that spreads down over the neck of the bottle. The next three bottles,

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<sup>10</sup> TSDR November 26, 2013 Office Action at 7 (tastings.com) – mezcal.

<sup>11</sup> TSDR February 17, 2017 Office Action at 2 (bleustorm.com) – vodka.

<sup>12</sup> *Id.* at 7 (orchidliqueurs.com) – mango liqueur.



for mezcal, vodka and liqueur, further show the prevalence of bottles with an hourglass shape similar to that of Applicant's bottle, and two of these have rounded stoppers similar to Applicant's.<sup>13</sup> The proportions of the Mexcalia mezcal bottle (left image above) make it appear more short and stout, while the BleuStorm (middle image above) and the Orchid (right image above) bottles are more elongated, but all three show that bottles with curves at the bottom and toward the top are found in the field. Like Applicant's bottle and the Casa Cofradia Reposado bottle, other third-party liquor bottles in the record also have spherical stoppers, indicating that this is not a unique or unusual feature.<sup>14</sup> Similarly, there are third-party bottles in the record featuring vertical ribs.<sup>15</sup> Many of the bottles in the record, including those shown above, contain neck rings and capsules.<sup>16</sup> While Applicant

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<sup>13</sup> The Gaviota Anejo tequila bottle, *id.* at 5 (zeetequila.com) also exhibits an overall similar design, although its trade dress more specifically creates the impression of the female form. Nonetheless, the curves at the top and bottom of the bottle resemble Applicant's, and the Gaviota Anejo bottle has a spherical stopper, a bottle ring with a horizontal ridge, and a capsule that spreads over the neck.

<sup>14</sup> *Id.* at Office Action at 9 (abc.virginia.gov); *id.* at 10-13 (theliquorbarn.com).

<sup>15</sup> TSDR February 17, 2017 Office Action at 3 (abc.virginia.gov); *id.* at 10 (theliquorbarn.com).

<sup>16</sup> *E.g.*, TSDR February 17, 2017 Office Action at 7 (orchidliqueurs.com); *id.* at 9 (abc.virginia.gov); *id.* at 5 (zeetequila.com). The capsules on the Illegal Mezcal bottle and the Mezcal Joven bottle, January 13, 2017 Response to Office Action at 20-21, both appear to have the effect of dripping wax, which is how Applicant describes its capsule, 6 TTABVUE 8-9, and displayed on the drawing.

correctly notes that some like the Casa Cofradia Reposado may lack a horizontal ridge (although several bottles such as Orchid do have the horizontal ridge), and the capsules are not flared in exactly the same way as Applicant's, we find these differences to be mere minimal refinements of common designs, rather than significant differences from them. *See, e.g., In re Brouwerij Bosteels*, 96 USPQ2d 1414, 1421-22 (TTAB 2010) (finding that product packaging trade dress in the nature of a beer glass and stand with wording and scrollwork would be perceived as a mere refinement of a commonly known glass and stand rather than an inherently distinctive indicator of source for the goods); *In re File*, 48 USPQ2d 1363, 1367 (TTAB 1998) (stating that novel tubular lights used in connection with bowling alley services would be perceived by customers as "simply a refinement of the commonplace decorative or ornamental lighting . . . and would not be inherently regarded as a source indicator.").

Applicant contends that the Examining Attorney has failed to meet her evidentiary burden, but we disagree. The Examining Attorney need not show multiple absolutely identical bottle designs in the industry. Even if Applicant currently is the only user of this exact combination of features, this fact alone does not imbue the design with source-indicating significance. Applicant's design merely combines a common bottle shape with other ordinary features in a relatively unremarkable way. As stated in *E S Robbins Corp.*, 30 USPQ2d 1540, 1543 (TTAB 1992):

If the concept of inherent distinctiveness was defined as meaning simply "one and only," then one could obtain a

registration for a design which, while “unique” in this sense, differed only slightly from the designs of other competing products and/or containers. There would be no need that the applied-for design have an “original, distinctive and peculiar appearance” ....

In *In re Mars*, 105 USPQ2d 1859, 1869-70 (TTAB 2013), the Board held a pet food container not inherently distinctive despite the applicant’s argument that no other pet food containers contained the alleged “combination of unique features.” Instead, the Board held that the container lacked inherent distinctiveness because other containers “share many of the same features,” and the applicant’s container “resembles many metal cans used in the pet food field, and is almost identical to some.” *Id.* at 1871. Thus, although an “applicant’s applied for design may be unique in the sense that it is a ‘one and only,’” it is not inherently distinctive if “the record demonstrates that said design is not unique in the sense it has an ‘original, distinctive, and peculiar appearance.’” *E S Robbins*, 30 USPQ2d at 1542 (quoting *In re McIlhenny Co.*, 278 F.2d 953, 126 USPQ 138, 140 (CCPA 1960) and *Ex parte Haig & Haig Ltd.*, 118 USPQ 229 (Comm’r Pat. 1958)); *see also In re J. Kinderman & Sons Inc.*, 46 USPQ2d 1253, 1255 (TTAB 1998) (“while the designs [of packaging for lights] applicant seeks to register may be unique in the sense that we have no evidence that anyone else is using designs which are identical to them, they are nonetheless not inherently distinctive”). *See In re Fantasia Distrib., Inc.*, 120 USPQ2d 1137, 1141 (TTAB 2016) (“Even if Applicant currently is the only user of a diamond pattern on e-hookahs, this fact alone does not imbue the design with source-indicating significance....”).

Applicant relies heavily on two Board precedents involving bottle designs, *Procter & Gamble* and *In re Creative Beauty Innovations Inc.*, 56 USPQ2d 1203 (TTAB 2000), but these cases are readily distinguishable. First, those records presented a different landscape of third-party evidence from the relevant industry. *Procter & Gamble*, 105 USPQ2d at 1125 (finding design unique “[w]hen one compares this design with all the other alternatives available in the field”); *Creative Beauty*, 56 USPQ2d at 1207 (“The examining attorney has not made of record any other container design that includes both concave and convex sides.”). Second, both cases included evidence that the applied-for designs won awards for their uniqueness and design innovation. *Procter & Gamble*, 105 USPQ2d at 1124; *Creative Beauty*, 56 USPQ2d at 1207. Third, in *Procter & Gamble*, the record also included testimony about the efforts to build source recognition around a unique bottle design, and evidence that the design received media recognition. *Procter & Gamble*, 105 USPQ2d at 1124. Similarly, the *Creative Beauty* record included an article about the applicant’s “attention-getting package” and statements from others in the industry about the unique and striking design. *Creative Beauty*, 56 USPQ2d at 1207-08. In this case, Applicant submitted no such evidence of awards or recognition, and instead relies only on its bare contention that the design it intends to use is unique in the field. *See In re File*, 48 USPQ2d at 1366 (“the record is completely devoid of evidence that anyone other than applicant regards [its proposed trade dress mark] as a service mark”).

We find that Applicant’s bottle design gives its product an attractive appearance, and that consumers would not be predisposed to view this relatively commonplace

decorative bottle design as source-indicating. *See In re Chippendales USA*, 96 USPQ2d at 1685 (citation omitted) (“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”). Ultimately, we find Applicant’s bottle design a commonly-adopted and well-known form in the industry, and the slight differences from third-party bottles merely refine the common design in unremarkable ways or with other common bottle features.

Thus, under the second and third *Seabrook* factors, Applicant’s proposed mark is not inherently distinctive. We therefore need not reach an analysis under the first factor. *See Chippendales USA, Inc.*, 96 USPQ2d at 1684.

**Decision:** We affirm the refusal to register under Sections 1, 2 and 45 of the Trademark Act on the ground that Applicant’s proposed mark is not inherently distinctive, but is nondistinctive product packaging.