

This Opinion is Not a
Precedent of the TTAB

Oral Hearing: May 9, 2024

Mailed: May 13, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Don Emler
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Serial No. 90688260
—

Thomas J. Romano of Kolitch Romano Dascenzo Gates LLC for Don Emler.

Rachel Arrison, Trademark Examining Attorney, Law Office 106,
Mary Sparrow, Managing Attorney.

—
Before Shaw, Dunn and Thurmon, Administrative Trademark Judges.

Opinion by Thurmon, Administrative Trademark Judge:

Don Emler (“Applicant”) seeks registration on the Principal Register, with a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f), of the proposed mark shown below for

Engine exhaust systems comprised of pipes, collector and muffler; Engine mufflers; Engine or motor mufflers; Exhaust mufflers for motors; Internal combustion engine parts, namely, mufflers; Motor mufflers; Mufflers for motors; Mufflers for motors and engines; all the aforementioned goods only for use in motorcycles,

in International Class 7.



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The Examining Attorney has refused registration on two grounds. First, the Examining Attorney found the proposed mark, as a whole, was functional under Section 2(e)(5) of the Trademark Act, 15 U.S.C. §1052(e)(5). Second, the Examining Attorney found the proposed mark is a nondistinctive product design and that Applicant has not shown the design has acquired distinctiveness under Section 1, 2 and 45 of the Trademark Act, 15 U.S.C. § 1051, 1052, 1127. Applicant appealed when the Examining Attorney made the refusals final, and the appeal is fully briefed.² We

¹ Application Serial No. 90688260 was filed on May 3, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claimed first use of the proposed mark and first use of the proposed mark in commerce at least as early as March 22, 2005. Applicant describes its proposed mark as follows: “The mark consists of a three-dimensional configuration of a muffler, in which the outlet end of the canister is non-perpendicular to the longitudinal axis of the canister. The broken lines depicting the overall shape and outline of a muffler and the section of a motorcycle where the muffler appears indicate placement of the mark on the goods and are not part of the mark.” The drawing is not of high quality, but in the first figure, only the slanted line at the connection between the canister portion of the muffler and the left-side end cap is solid, meaning this line is the proposed mark and the remaining configuration of the muffler is not part of the mark.

² Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

affirm the refusal to register based on the lack of acquired distinctiveness and do not reach the functionality refusal.

I. Prosecution History and Record on Appeal³

We briefly summarize below the prosecution history of the involved application because it provides useful background to our analysis of the distinctiveness refusal. We begin with a focus on the proposed mark, which is a feature of a motorcycle muffler designed to be positioned under the saddle (or seat) of the motorcycle, as shown in the lowest figure in the drawing above.⁴ The three views are not described, but we take the top figure to be a side view of the muffler and the middle figure to be a perspective view from the outlet end of the muffler.⁵ But what makes this muffler design distinctive?

The proposed mark is described as “a three-dimensional configuration of a muffler, in which the outlet end of the canister is non-perpendicular to the longitudinal axis of the canister. The broken lines depicting the overall shape and outline of a muffler and the section of a motorcycle where the muffler appears indicate placement of the mark on the goods and are not part of the mark.” The only limiting part of this

Applicant’s appeal brief appears at 8 TTABVUE and its reply brief appears at 11 TTABVUE. The Examining Attorney’s brief appears at 10 TTABVUE.

³ Citations in this opinion to the application record are to pages in the Trademark Status & Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).

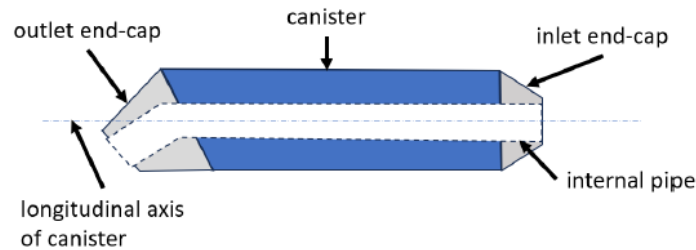
⁴ Applicant filed a petition seeking approval to use three figures in the drawing of the mark. The petition was granted on September 21, 2023.

⁵ The outlet opening is visible in the middle figure, suggesting the perspective described above.

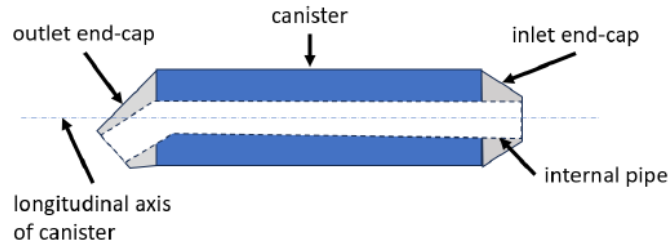
description is the geometric limitation on the configuration of the outlet end of the canister. But what is the canister?

Applicant provided the following illustrations in his brief, to show the difference between his proposed mark and other muffler designs on the market.

First Design: Includes Slash-Cut Design



Second Design: Does not include a Slash-Cut Design



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As these drawings show, the canister is the center part of the muffler, and there are end-caps at the inlet and outlet sides of the canister that, together with the canister, form the muffler. In Applicant's proposed mark, seen in the upper drawing, the outlet end of the canister is not perpendicular to the longitudinal axis of the canister. In the lower drawing, which reflects other designs on the market according to Applicant, the outlet end of the canister is perpendicular to the longitudinal axis.

⁶ 8 TTABVUE 18. The Examining Attorney objected to these illustrations as new evidence submitted with the Appeal Brief. We disagree, as these are merely demonstratives that summarize other evidence in the record.

We note that the outlet itself, which is part of the end-cap, is angled downward from the canister axis in both designs. The lower figure in the drawing of the proposed mark shows the proposed mark installed on a motorcycle. The muffler is positioned under the saddle (or seat) of the motorcycle, which shows that the downward outlet angle of this type of muffler prevents the exhaust from being directed toward the underside of the saddle and the rider. The angled outlet appears to direct the exhaust away from the saddle. Most importantly, that angled outlet is present on the proposed mark and competitive products.

The images below were provided by Applicant during prosecution to show the difference between the proposed mark and competitive designs.

Competitor Name	Competitor Muffler	Applicant's Muffler
Big Gun Exhaust		
Pro Circuit		
Yoshimura		
FVRITO		
TC-Motor		

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⁷ Response to Office Action dated July 13, 2022 at 72.

The angled connection between the canister and the outlet end-cap in Applicant's products is different from the other designs, which appear to have a perpendicular connection (i.e., with respect to the canister axis). Applicant refers to the geometric nature of the proposed mark as a Slashcut Design.⁸ And while it is difficult to see, in the top figure of the trademark drawing, only the slanted line at the connection between the canister and the end cap is a solid line, meaning that slanted line is the proposed mark. In other words, Applicant's entire mark is a slanted line or seam where the outlet end-cap fits into the cannister.

The record includes evidence of several competitive designs, including those shown above.⁹ Applicant also submitted U.S. utility patent number 7506722, issued to Applicant for "vehicle exhaust systems," the cover page of a second patent assigned to Applicant (No. 8602157), and U.S. design patent number D541718, also issued to Applicant.¹⁰ Applicant submitted the following declarations, as well:

- Declaration of Don Emler, Applicant;¹¹
- Declaration of Tim Pilg, President of Beta USA, Inc., "a subsidiary of the Italian company, Betamotor S.p.A. Betamotor makes and sells off road, motocross, and trials motorcycles."¹²

⁸ 8 TTABVUE 15 ("... customers cannot avoid connecting the applied-for Slashcut Design as a source-identifier of a single source.").

⁹ Response to Office Action dated July 13, 2022, at 72; Response to Office Action dated February 1, 2023, at 16-20.

¹⁰ Response to Office Action dated July 13, 2022, at 9-43.

¹¹ *Id.* at 44-55.

¹² *Id.* at 56-58.

- Declaration of Jeremy Pockrus, Vendor Manager for the Off-Road segment of Tucker Powersports;¹³
- Declaration of Greg Burnett, “Senior Director of Merchandising at Motorsport.com, one of the largest motocross/dirt bike e-commerce sites in the U.S.”;¹⁴
- Declaration of Dereck Bernard, “National Advertising Manager for Ki-Torque Media, a publisher of print and digital magazines covering motorcycle and bicycle industries, including *Motocross Action* and *Dirt Bike*.”;¹⁵
- Declaration of Mark Tilley, the Managing Editor of *Dirt Bike* magazine;¹⁶
- Declaration of Jeremy Malott, Director of Motorsports North America for Red Bull;¹⁷
- Declaration of Travis Clarke, Executive Vice-President at Wasserman, a sports marketing business;¹⁸
- Declaration of Jason “Hapa” McCune, founder of Inside Line Connect, a marketing and media relations company that works with multiple top brands in the motorcycle industry;¹⁹ and,
- Declaration of Jason Nonemaker, owner and CEO of 10 Designs, Inc., a parts supplier to the motocross industry.²⁰

The Examining Attorney also submitted evidence of competitive designs.²¹

¹³ *Id.* at 59-61.

¹⁴ *Id.* at 62-64.

¹⁵ *Id.* at 65-67.

¹⁶ *Id.* at 68-70.

¹⁷ Response to Office Action dated February 1, 2023, at 21-24.

¹⁸ *Id.* at 25-27.

¹⁹ *Id.* at 28-30.

²⁰ *Id.* at 31-33.

²¹ Office Action dated January 14, 2022, at 9-37.

II. The Proposed Mark Is a Product Design

Applicant's amendment to seek registration of his muffler configuration under Section 2(f) constitutes a concession that the configuration is not inherently distinctive. *See In re Snowizard, Inc.*, 129 USPQ2d 1001 (TTAB 2018) ("By seeking registration under Section 2(f) of the Trademark Act, Applicant has effectively conceded that its asserted mark [consisting of a three-dimensional configuration of a concession trailer or snowball vendors] is not inherently distinctive."). *See also Wal-Mart Stores v. Samara Bros.*, 529 U.S. 205, 54 USPQ2d 1065, 1070 (2000) (Product design trade dress is "protectible, only upon a showing of secondary meaning."). Applicant argues that the slashcut design it uses on his mufflers is unique in the industry and has become recognized as a source-identifier for his mufflers.²² The Examining Attorney rejects this argument and characterizes the allegedly distinguishing feature of the proposed mark as "a slanted line."²³ Whether we describe the key feature of the proposed mark as a slashcut design or a slanted line, the point is the same. Applicant alleges that this single feature of his mufflers has become distinctive through use and promotion.

²² 8 TTABVUE 14-15.

²³ 10 TTABVUE 10. In fairness to the Examining Attorney, in the original Application, the mark was described as follows: "The mark consists of a three-dimensional configuration of a slanted line, relative to a horizontal plane, on a muffler. The broken lines indicate placement of the mark on the goods and are not claimed as features or parts of the mark." The Examining Attorney objected to this description, which was amended to the description provided above. In any event, the "slanted line" description does tend to focus attention on the angled, or slashcut, nature of the canister-to-end-cap connection in Applicant's mufflers.

Applicant bears the burden of proving acquired distinctiveness. *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1264 (Fed. Cir. 2015); *In re Fantasia Dist., Inc.*, 120 USPQ2d 1137, 1143 (TTAB 2016). To show that a proposed mark has acquired distinctiveness, an applicant must demonstrate that the relevant public understands the primary significance of the matter as identifying the *source* of a product or service rather than the product or service itself. *Inwood Labs, Inc. v. Ives Labs, Inc.*, 456 U.S. 844, 102 S. Ct. 2182, 72 L. Ed. 2d 606, 214 USPQ 1, 4 n.11 (1982); *In re Slokevage*, 441 F.3d 957, 78 USPQ2d 1395, 1398. This burden is particularly heavy where an applicant seeks to establish the distinctiveness of a product design, which consumers are predisposed to view as useful or appealing, not source-indicating. *Yamaha v. Hoshino Gakki*, 840 F.2d 1572, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988); *Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1504 (TTAB 2017).

To support a claim of acquired distinctiveness, an applicant may submit evidence of copying by others, advertising expenditures, sales success, length and exclusivity of use, unsolicited media coverage, and consumer studies. No single type of evidence is determinative, as it is the evidence as a whole that determines whether an applicant has met his burden. The evidence must relate to the promotion and recognition of the specific configuration embodied in the proposed mark, and not to the goods in general. *In re Change Wind*, 123 USPQ2d 1453, 1467; 37 C.F.R. § 2.41(a)(2), (3).

The length of time needed to acquire distinctiveness in the mind of the consuming public is proportional to the nondistinctiveness of the applied-for mark. *See In re Udor*, 89 USPQ2d 1978, 1986 (TTAB 2009) (“We also agree with the Trademark Examining Attorney that given the nature of this alleged mark, a mere claim of five years of use is insufficient to overcome this showing. Analogizing to the possible registrability of highly descriptive terms which may nevertheless acquire distinctiveness, we note that the lesser the degree of inherent distinctiveness, the heavier the burden to prove it has acquired distinctiveness.”). Because the proposed mark in this case is a product design, which consumers may appreciate for its utility or appearance rather than its source, a showing of five or more years’ use is insufficient. *See In re Koninklijke Philips Elecs. N.V.*, 112 USPQ2d 1177, 1186 (TTAB 2014). Indeed, in similar cases involving product configurations, far longer periods of use have been found insufficient. *See, e.g., In re R.M. Smith, Inc.*, 734 F.2d 1482, 222 USPQ 1, 3 (Fed. Cir. 1984) (eight years’ use not sufficient evidence of acquired distinctiveness for configuration of pistol grip water nozzles); *In re Van Valkenburgh*, 97 USPQ2d 1757, 1766 (TTAB 2011) (16 years’ use not conclusive or persuasive to show acquired distinctiveness of motorcycle stands); *Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1723 (TTAB 2010) (27 years’ use insufficient to show acquired distinctiveness for dual bands on flashlight).

The Supreme Court explained that product designs are much less likely to be viewed as source identifiers by consumers, even when the designs are adopted for aesthetic reasons.

In the case of product design, as in the case of color, we think consumer predisposition to equate the feature with the source does not exist. Consumers are aware of the reality that, almost invariably, even the most unusual of product designs -- such as a cocktail shaker shaped like a penguin -- is intended not to identify the source, but to render the product itself more useful or more appealing.

Wal-Mart Stores, 54 USPQ2d at 1068. Applicant argues that his proposed mark “is a purely aesthetic design choice ...”²⁴ The penguin-shaped cocktail shaker mentioned by the Wal-Mart Court was likely “a purely aesthetic design choice,” too, but that does not alter the fact that consumers do not tend to view product configurations as distinctive source identifiers. It is important to place the required analysis in the proper context, and in this appeal, that means Applicant faces a heavy burden of proving this single feature of his muffler (i.e., the slashcut or slanted line created where the canister meets the outlet end cap) has become distinctive to motorcycle consumers.

III. Applicant Has Failed to Establish Acquired Distinctiveness

The question before us is whether Applicant has presented sufficient evidence to show that relevant consumers recognize Applicant’s slashcut design as a source identifier. We begin by defining the relevant consumers, which we base on the goods identified in the Application. The goods are motorcycle exhaust systems, including motorcycle mufflers. While the goods are limited to motorcycle exhaust components, there are no limitations to the type of motorcycle. This broad scope is important here, because there are many kinds of motorcycles, ranging from scooters to high-

²⁴ 8 TTABVUE 17.

performance racing motorcycles to off-road motorcycles. Because Applicant's goods include mufflers for all types of motorcycles, it must establish acquired distinctiveness for the entire motorcycle exhaust system market. The relevant consumers, therefore, are all persons who ride or purchase motorcycles and who may be in the market for a replacement muffler or after-market muffler.

Applicant submitted evidence, in the form of declarations, to support his claim of acquired distinctiveness. Don Emler, the Applicant, testified that the slashcut design has been used continuously since 2005, and that no other manufacturer uses the same design.²⁵ Mr. Emler testified that at least 15,000 units of the slashcut mufflers are sold each year.²⁶ With almost twenty years of sales and no competitors using the same design, it is at least plausible that the proposed mark has become distinctive within its primary market segment.

Before we move to the other evidence, we note that Mr. Emler's declaration shows mufflers used on motocross motorcycles. The following examples are illustrative.

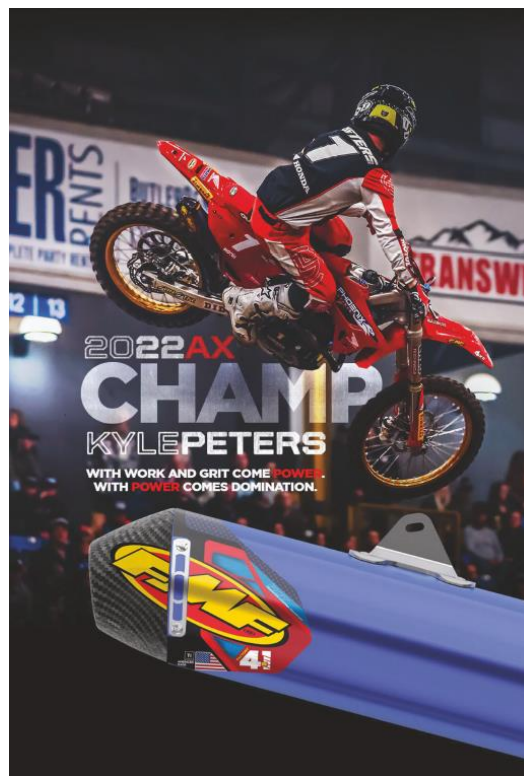
²⁵ Response to Office Action dated July 13, 2022, at 44-45.

²⁶ *Id.* at 45. As the Examining Attorney noted, we need context with sales figures to determine their significance within a particular market. Applicant did not provide such context, but 15,000 units sold each year may be a substantial number within a narrow market segment, but we would still need evidence of the size of the market segment to support such a finding.

On the other hand, the sales figures may demonstrate the popularity of Applicant's mufflers rather than consumers' recognition of the proposed mark. *Braun Inc. v. Dynamics Corp. of America*, 975 F.2d 815, 24 USPQ2d 1121, 1131 (Fed. Cir. 1992) ("Similarly, the fact that there was an apparently large consumer demand for Braun's blender does not permit a finding the public necessarily associated the blender design with Braun."); *Stuart Spector Designs, Ltd. v. Fender Musical Instr. Corp.*, 94 USPQ2d 1549, 1572 (TTAB 2009) ("...mere figures demonstrating successful product sales are not probative of purchaser recognition of a configuration as an indication of source."). There must be some basis to connect sales volume to the alleged distinctiveness of the proposed mark. Applicant's evidence fails to show such a connection.



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²⁷ *Id.* at 49. Applicant submitted no evidence of when, where or for how long these advertisements ran, leaving us with no way to evaluate their impact on relevant consumers. Context is critical to an evaluation of acquire distinctiveness. Simply submitting copies of advertisements and stating they “are examples of how the Muffler Goods bearing the mark are promoted by the exclusive licensee FMF,” does not give the Board sufficient context to evaluate the evidence.

²⁸ *Id.* at 47.



We also note that these materials consistently include the Slashcut Design logo and show the outlet end of muffler. These features of the ads may draw attention to the slashcut or angled feature of the proposed mark for some consumers, but we lack evidence to determine the impact of these features of the advertisements.

The declarations submitted by Applicant indicate that several individuals in positions with motorcycle-related businesses recognize the slashcut design of the proposed mark as a source identifier. The Examining Attorney dismissed this evidence because the images within the declarations showed other features, including the blue color, which is apparently used on some of Applicant's mufflers.³⁰

We disagree with the Examining Attorney on this point, because the declarants appear to be persons with knowledge and they testified specifically about the slashcut

²⁹ *Id.* at 52.

³⁰ 10 TTABVUE 10.

feature of the proposed mark. For example, Tim Pilg, a person with almost forty years' experience in the industry, testified that he is "very familiar with the look of motorcycle mufflers. At Beta USA, we study the changes from different manufacturers and how they fit our products."³¹ He further testified that he can "immediately recognize the slash cut design," of Applicant's muffler.³² He referred to a line drawing of the proposed mark (i.e., the upper figure in the drawing of the mark provided above), and testified, "I recognize the angle on the back end cap as corresponding to the unique shape of FMF mufflers."³³ Mr. Pilg also testified that he is aware of no other motorcycle mufflers that share this design.³⁴

This testimony is probative. Mr. Pilg is a person with experience and knowledge in the motorcycle industry and he is offering his views on the distinctiveness of the proposed mark. The fact that one image in the declaration shows a blue muffler does not undermine the specific testimony Mr. Pilg provided.

The other declarations are similar to Mr. Pilg's, and come from other persons with substantial experience. Jeremy Malott, for example, works with Red Bull, a business with a large share of the market in motorsports.³⁵ He provided testimony concerning the market reputation of FMF products, the word mark used in connection with Applicant's motorcycle mufflers. His testimony is not merely duplicative of other

³¹ Response to Office Action dated July 13, 2022, at 57.

³² *Id.*

³³ *Id.* at 58. FMF Racing Inc. "is the exclusive licensee of the [proposed mark] ..." *Id.* at 44 (Emler declaration).

³⁴ *Id.*

³⁵ Response to Office Action dated February 1, 2023, at 21-23.

testimony, but is specific to Red Bull's relationship with FMF. Based on his experience, Mr. Malott testified that when presented with the drawing of the mark, "I immediately think of an FMF muffler because of the slash cut muffler design with the smooth edges, all contained, no ridges. FMF's muffler is a clean, fast look design that makes it easily identifiable. That shape is simply that of the FMF muffler."³⁶ This is specific testimony from a person with knowledge of the relevant industry. The same is true of the other declaration evidence.

But there is a theme running through all of Applicant's evidence. These mufflers are used primarily with off road or motocross motorcycles. We provided samples above showing some of the advertising materials submitted with the Emler declaration, and each image shows a competitive off road or motocross motorcycle. Applicant did not submit any marketing materials showing use of the proposed mark with any other type of motorcycle. There is, for example, no evidence of the proposed mark used with a street motorcycle.³⁷

The declarations confirm the limited scope of Applicant's use of the proposed mark. Mr. Pilg, for example, testified that "FMF has a solid reputation throughout

³⁶ *Id.* at 23.

³⁷ During the Oral Hearing, Applicant's counsel conceded that its claim of acquired distinctiveness was limited to the off road and motocross motorcycle segment. Indeed, Applicant's counsel expressed a willingness to amend the identification of goods to further limit the market segment. Because the Examining Attorney was given no opportunity to consider the refusal with respect to more limited goods, such a change would have to be made in a new application. *See In re Thomas White Int'l Ltd.*, 106 USPQ2d 1158, 1160 n.2 (TTAB 2013) ("at this late juncture applicant would not be able to show good cause" for a proposed amendment made in its appeal brief").

the off road motorcycle industry. ... any off road motorcycle enthusiast will readily have heard of and be familiar with FMF, its products, and its unique branding, including the look of its products.”³⁸ Similarly, Mr. Pockrus testified, “I see its target customers being off-road motorcycle enthusiasts who want the best performing, best looking muffler on the market. FMF has a very sophisticated customer base”³⁹ He even limited his primary conclusions to the off road market segment: “Off-road motorcycle enthusiasts also will recognize the slash cut muffler design as representing FMF because it is the most popular and most run exhaust by pro motocross teams.”⁴⁰

Mr. Burnett testified that “FMF is perceived by the motocross and dirt bike enthusiasts in the U.S. as the must-have brand.”⁴¹ Mr. Bernard “think[s] of FMF as the leading exhaust brand for off-road and motocross motorcycles, a status they have had for decades.”⁴² He also limited his primary conclusions to the off road market: “I believe the average off-road and motocross enthusiast also would readily recognize the slash cut muffler design as representing FMF.”⁴³ Mr. Tilly agrees: “I also believe that an average motocross/dirt bike enthusiast would recognize this as an FMF muffler.”⁴⁴

³⁸ Response to Office Action dated July 13, 2022, at 57.

³⁹ *Id.* at 60.

⁴⁰ *Id.*

⁴¹ *Id.* at 63.

⁴² *Id.* 66.

⁴³ *Id.*

⁴⁴ *Id.* at 70. The other declarations also referred to Applicant’s licensee (i.e., FMF) as a leader in the motocross industry. Response to Office Action dated February 1, 2023, at 22 (Malott

Applicant's evidence may be somewhat probative of acquired distinctiveness within the off road and motocross motorcycle segment. The declarations are detailed and specific to each declarant, and the declarants are highly experienced persons within the off road and motocross communities. But therein lies the problem. Applicant's evidence is limited to the off road and motocross market segment,⁴⁵ but the Application is not. The Application identifies motorcycle exhausts more generally, and includes, therefore, street motorcycle exhausts, too. For this reason alone, we find Applicant has failed to show acquired distinctiveness for the proposed mark. See *In re Post Foods, LLC*, 2024 USPQ2d 25, *4 (TTAB 2024) ("If Applicant wanted to limit its mark to use on 'crisp rice breakfast cereals,' it should have amended the identification of goods when it amended the drawing and the description to delete the configuration of the goods."). We also note that the declarants' experience is a point

declaration – "The FMF logo is arguably the most recognized logo in the motocross sport."), 26-27 (Clarke declaration), 29 (McCune declaration), 33 (Nonemaker declaration). Every declarant refers to FMF's reputation or position within the off road/motocross segment.

As the Examining Attorney noted, the advertisements also show the blue color and the FMF word mark. "It is well-settled that, where, as here, a party's advertising and sales data is based on materials and packaging in which the mark at issue is almost always displayed with another mark, such data does not prove that the mark at issue possesses the requisite degree of consumer recognition." *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1245 (TTAB 2015) (citing *In re Bongrain Int'l*, 894 F.2d 1316, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990)); see also *In re Mogen David Wine Corp.*, 372 F.2d 539, 54 CCPA 1086, 152 USPQ 593, 595 (CCPA 1967) (promotion of a bottle design bearing other trademarks insufficient to show that the public views the bottle design alone as a trademark); *In re Soccer Sport Supply Co.*, 507 F.2d 1400, 184 USPQ 345, 348 (CCPA 1975) (advertising of soccer ball design with word marks "provide[s] no indication of a nexus between [the] design per se and a single source."). The third-party declarations in evidence frequently refer to the reputation of the FMF mark, which is not only irrelevant to the showing required for registration of the proposed mark, but likely reduce the likelihood that consumers will rely on the product design as a source identifier, given that the FMF mark is so prominently featured.

⁴⁵ Dirt bike is another label used in some of the evidence for motorcycles within this segment.

of difference from typical consumers of motorcycle mufflers and other exhaust systems. Each declarant appears to have extensive experience within the off road and motocross motorcycle segment. As we noted above, some of the declarants limit their opinions to off road and motocross enthusiasts, which is a more limited group of consumers than the full range of motorcycle riders and buyers. This evidence may be probative of how enthusiasts or other experts within Applicant's core market segment perceive the proposed mark, but it is not direct evidence of what actual consumers think. Nor do we know what portion of the entire motorcycle market the off road and motocross motorcycle segment comprises.

As our primary reviewing court has explained,

The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.

Octocom Sys. v. Hous. Comput. Servs., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). This instruction is applicable to a showing of acquired distinctiveness, as well. *See, e.g., Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939, 942 (Fed. Cir. 1984) (refusing to find that tab used on jeans and other pants created distinctiveness of the same tab when used with shoes); *Bausch & Lomb Inc. v. Leupold & Stevens, Inc.*, 6 USPQ2d 1475, 1478 (TTAB 1988) (finding a gold ring design was distinctive for rifle and handgun scopes, but not for binoculars or spotting scopes); *compare Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (holding that customer care must be

evaluated based on all the goods or services identified in the application). Because Applicant's goods include all types of motorcycles, rather than the more restricted segment of off road and motocross motorcycles, his evidence fails to establish acquired distinctiveness and the refusal must be affirmed.

While the mismatch between the evidence and the identification of goods in the Application is sufficient reason to affirm the refusal, the proposed mark is effectively a single slanted line near the outlet end of a motorcycle muffler. When considered in the context of a complete motorcycle, this feature is likely just one example of a visible angled line somewhere on the exterior of the motorcycle. It is not a prominent feature, even of the muffler itself, and when viewed within the context of a motorcycle with many different parts, the challenge of proving acquired distinctiveness will be daunting. The declaration evidence submitted with this Application may be a good start, but it is likely to be found insufficient without more. And, as we noted above, these declarations are not from actual consumers, but from industry experts. We acknowledge that features like the proposed mark may become distinctive in some situations. But that is the exception, not the rule, as the Wal-Mart Court made clear. So, if Applicant continues to pursue trademark protection for the proposed mark, it would be well-advised to present a substantially stronger record than the one before us.

Decision: The refusal to register under Sections 1, 2 and 45 (lack of distinctiveness) is **affirmed**.