

This Opinion is not a  
Precedent of the TTAB

Hearing: January 11, 2024

Mailed: January 16, 2024

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*In re Loops, LLC*

Serial No. 97069982

Timothy W. Fitzwilliam of the Law Office of TW Fitzwilliam,  
for Loops, LLC.

Frank Lattuca, Trademark Examining Attorney, Law Office 109,  
Michael Kazazian, Managing Attorney.

Before Wellington, Heasley, and Casagrande,  
Administrative Trademark Judges.

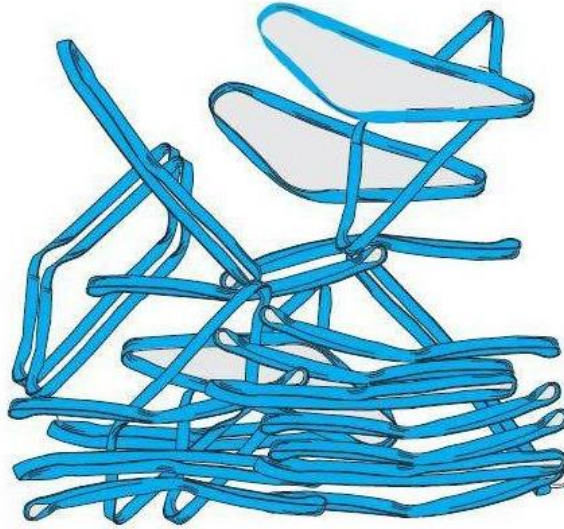
Opinion by Heasley, Administrative Trademark Judge:

Applicant, Loops, LLC, seeks registration on the Principal Register of the proposed mark shown below for “dental floss” in International Class 21.<sup>1</sup>

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<sup>1</sup> Application Serial No. 97069982 was filed on October 12, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use anywhere and use in commerce since at least as early as September 1, 1997.

Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system and identify the documents by title, date, and page in the downloadable .pdf version. References to the briefs and other materials in the appeal record refer to the Board’s TTABVue online docketing system.



The description of the proposed mark states:

The mark consists of the presentation and 3-Dimensional [sic] appearance of a dental floss product, specifically comprising an arbitrary bundle of blue looped dental floss. The color black appearing in the mark is shading only and not a feature of the mark. The colors white and grey are background only, and not a feature of the mark.

The color blue is claimed as a feature of the proposed mark.

The Trademark Examining Attorney has refused registration of Applicant's proposed mark under Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§ 1051, 1052 and 1127, on the ground that it fails to function as a trademark, as it is a non-distinctive product design that has not been shown to have acquired distinctiveness under Trademark Act Section 2(f).

The Examining Attorney also refused registration under Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127, and Trademark Rules 2.34(a)(1)(iv), 2.51, and 2.56(a), 37 C.F.R. §§ 2.34(a)(1)(iv), 2.51, and 2.56(a), on the alternative ground that the proposed mark was not a substantially exact representation of that shown in the specimen. Applicant's first specimen showed Applicant's dental floss in its package:



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Applicant's substitute specimen showed the contents of such a package:



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<sup>2</sup> Specimen submitted with Application, Oct. 12, 2021.

<sup>3</sup> Feb. 2, 2022 substitute specimen.

When the refusals were made final, Applicant twice requested reconsideration. After the Examining Attorney denied the requests for reconsideration, Applicant's appeal proceeded.

We affirm the refusal to register on the ground that the proposed mark is a product design that lacks inherent distinctiveness and has not been shown to have acquired distinctiveness. We therefore do not reach the alternative ground for refusal. *See, e.g., In re Suuberg*, 2021 USPQ2d 1209, at \*9-10 (TTAB 2021) (Board need not reach alternative ground for refusal).

## **I. Discussion**

### **A. Whether Applicant's Trade Dress is Inherently Distinctive**

Section 45 of the Trademark Act defines a "trademark" as "any word, name, symbol, or device, or any combination thereof — (1) used by a person . . . to identify and distinguish his or her goods, including a unique product, 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.

Under this definition, trade dress is a "symbol" or "device" by which a person's goods may be distinguished from the goods of others. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1067 (2000). Trade dress originally included only the packaging, or "dressing," of a product, but expanded to encompass the design of a product. *Id.* As the Court of Appeals for the Federal Circuit has explained:

Trade dress "involves the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques." *Elmer v. ICC Fabricating, Inc.*, 67 F.3d 1571,

1578 (Fed. Cir. 1995) (internal quotations and citation omitted). Trade dress is registrable as a trademark if it serves the same source-identifying function as a trademark. Marks are entitled to protection if they are inherently distinctive, i.e., “their intrinsic nature serves to identify a particular source of a product.” *Two Pesos, [Inc. v. Taco Cabana, Inc.]*, 505 U.S. [763] at 768, [23 USPQ2d 1081, 1083 (1992)]. Thus, a product’s trade dress is protectable upon a showing of inherent distinctiveness. And if not inherently distinctive, marks may be protectable if they acquire distinctiveness, i.e., if they “become distinctive of the applicant’s goods in commerce.” 15 U.S.C. § 1052(e), (f).

*In re Forney Indus., Inc.*, 955 F.3d 940, 2020 USPQ2d 10310, at \*3 (Fed. Cir. 2020).

Product **packaging** can be inherently distinctive—intrinsically identifying the source of a product. *See, e.g., Forney Indus.*, 2020 USPQ2d 10310, at \*3 (“we hold that color marks can be inherently distinctive when used on product packaging, depending upon the character of the color design.”). But product **color** and **configuration** cannot. *Id.* at \*4. As the U.S. Supreme Court declared in *Wal-Mart v. Samara*:

Indeed, with respect to at least one category of mark—colors—we have held that no mark can ever be inherently distinctive.

...

It seems to us that design, like color, is not inherently distinctive.

...

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 v. Samara*, 54 USPQ2d at 1068-69 (citing *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161 (1995) (color can be protected as a trademark, but only upon a showing of secondary meaning)), *cited in In re Slokevage*, 441 F.3d 957, 78 USPQ2d 1395, 1398 (Fed. Cir. 2006) (*Wal-Mart* “addressed whether product

design could ever be inherently distinctive and answered the question in the negative.”).

Applicant attempts to avoid this established case law by arguing that its blue dental floss loops are akin to the trade dress of the Taco Cabana chain of Mexican restaurants, which the Supreme Court treated as inherently distinctive in *Two Pesos v. Taco Cabana*, 23 USPQ2d at 1083.<sup>4</sup> A similar argument was raised and rejected in *Wal-Mart v. Samara*:

Respondent contends that our decision in *Two Pesos* forecloses a conclusion that product-design trade dress can never be inherently distinctive.

...

*Two Pesos* is inapposite to our holding here because the trade dress at issue, the décor of a restaurant, seems to us not to constitute product design. It was either product packaging—which, as we have discussed, normally is taken by the consumer to indicate origin—or else some *tertium quid* that is akin to product packaging and has no bearing on the present case.

*Wal-Mart v. Samara*, 54 USPQ2d at 1069, cited in *In re Forney Indus.*, 2020 USPQ2d 10310, at \*4-5. The Supreme Court concluded that, “[t]o the extent there are close cases, we believe that courts should err on the side of caution and classify ambiguous trade dress as product design, thereby requiring secondary meaning.” *Wal-Mart v. Samara*, 54 USPQ2d at 1070, cited in *In re Slokevage*, 78 USPQ2d at 1388. We do not see this as the sort of “close case” the Supreme Court had in mind, since the application here describes the mark depicted as “the presentation and 3-Dimensional [sic] appearance of a dental floss **product** .... (emphasis added).” Applicant’s attempt to liken its trade dress to the restaurant décor comprising the trade dress for a service as in *Two Pesos* is thus unavailing.

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<sup>4</sup> Applicant’s brief, 4 TTABVUE 8.

Also unavailing is Applicant's assertion that its proposed mark would be perceived as inherently distinctive because it depicts a multiplicity of blue dental floss bands, "a plurality of products," rather than just one.<sup>5</sup> If consumers are predisposed to perceive color and configuration as features that render a product more useful or appealing, as *Wal-Mart* observes, then multiplying the number of such products depicted would do nothing to alter that perception.

The Application also claims acquired distinctiveness under 15 U.S.C. § 1052(f), thereby tacitly conceding the lack of inherent distinctiveness. *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988) ("Where, as here, an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the statute accepts a lack of inherent distinctiveness as an established fact."), *quoted in Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 17 F.4th 129, 2021 USPQ2d 1069, at \*13 (Fed. Cir. 2021).<sup>6</sup>

In sum, Applicant's proposed mark, depicting the color and configuration of its dental floss band product, is not inherently distinctive, and can only qualify for protection as a trademark through proof of acquired distinctiveness. *See SoClean, Inc. v. Sunset Healthcare Sols., Inc.*, 2022 USPQ2d 1067, \*2 (Fed. Cir. 2022) (product-configuration trade dress is only protectable upon a showing of secondary meaning); *In re Post Foods, LLC*, 2024 USPQ2d 25, at \*5 (TTAB 2024) (product color trade dress

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<sup>5</sup> Applicant's brief, 4 TTABVUE 9, 10; Applicant's reply brief, 7 TTABVUE 4.

<sup>6</sup> Application, Oct. 12, 2021. At oral argument, Applicant's attorney stated that he mistakenly claimed acquired distinctiveness when filing the application. But Applicant took no steps to withdraw the claim under Section 2(f). And as we have seen, Applicant must establish that its proposed mark acquired distinctiveness to gain registration on the Principal Register. So the claim under Section 2(f) was appropriate, not mistaken.

is only protectable upon a showing of secondary meaning).

**B. Whether Applicant’s Trade Dress has Acquired Distinctiveness**

Applicant bears the burden of proving acquired distinctiveness. *In re Keep A Breast Found.*, 123 USPQ2d 1869, 1882 (TTAB 2017) (citing *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1264 (Fed. Cir. 2015)). To show that the proposed mark has acquired distinctiveness, Applicant must demonstrate that the relevant members of the public—purchasers and consumers of dental floss—understand the primary significance of the proposed mark as identifying the source of its products rather than the products themselves. *Wal-Mart v. Samara*, 54 USPQ2d at 1068 (citing *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U. S. 844, 214 USPQ 1, at \*4 n. 11 (1982)); *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1422 (Fed. Cir. 2005).

“The burden of proving that a color mark has acquired distinctiveness is substantial.” *In re Post Foods*, 2024 USPQ2d 25, at \*5 (citing *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 227 USPQ 417, 424 (Fed. Cir. 1985) (“By their nature color marks carry a difficult burden in demonstrating distinctiveness and trademark character.”)). So too with a product configuration. *In re Jasmin Larian, LLC*, 2022 USPQ2d 290, at \*38 (TTAB 2022) (“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 configuration[ ].”). That’s because “the lesser the degree of inherent distinctiveness, the heavier the burden to prove that [a mark] has acquired distinctiveness.” *Id.* (internal citation omitted).

As we recently noted in *Post Foods*, the Federal Circuit has explained that:



[T]he considerations to be assessed in determining whether a mark has acquired secondary meaning can be described by the following six factors: (1) association of the trade dress with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark.

2024 USPQ2d 25, at \*5 (citing *Converse, Inc. v. Int’l Trade Comm’n*, 909 F.3d 1110, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018)). We went on to explain that “[n]o single factor is determinative and all six factors are to be weighed together in determining the existence of secondary meaning.” *Id.* (citations omitted).

Applicant argues that it has demonstrated acquired distinctiveness, pointing to its sales over time and putative copying by a single competitor. We agree with the Examining Attorney that Applicant has failed to prove acquired distinctiveness.

With respect to the first rationale, Applicant asserts that it has sold over four million packages of its blue dental floss loops over 25 years.<sup>7</sup> Pressed for evidence supporting this assertion, Applicant submitted the following lists, one printed, one handwritten:

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<sup>7</sup> Applicant’s brief, 4 TTABVUE 6-7, Applicant’s reply brief, 7 TTABVUE 4-5. Feb. 2, 2022 Response to Office Action TSDR 1, June 22, 2022 Response to Office Action TSDR 1-2.

Floss Loops Sales History

Year	Number of Packages Sold
1996	1,250
1997 (A)	31,890
1998	93,755
1999	85,795
2000	33,971
2001	57,506
2002	52,957
2003	62,101
2004	112,747
2005	75,478
2006	165,024
2007	171,360
2008	174,096
2009	189,648
2010	184,752
<b>Total</b>	<b><u>1,492,330</u></b>

(A) In 1997, Floss Loops were sold in the US nationwide through the QVC televised home shopping network and in the UK, Germany, and Japan, in addition to the individual states indicated where Loops LLC directly sold and shipped Floss Loops.

CLIENT: Floss Loops Sales

RE: \_\_\_\_\_ PHONE NUMBER \_\_\_\_\_

PREPARED BY: SK DATE: 1-28-22 TIME OF \_\_\_\_\_

Year	# Cases	# Packages
2011	6442	
2012	1408	
2013	1507	
2014	1790	
2015	1514	
2016	1566	
2017	1558	
2018	1597	
2019	1560	
2020	1698	
2021	2515	
<u>18,135 cases</u>		
<u>x 144/case</u>		
<u>2,611,440</u>		
1996 -		
2010		<u>1,492,330</u>
		<u>4,103,770 packages</u>

8

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Section 2(f) states that:

The [USPTO] Director may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant's goods in commerce, **proof** of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made.

15 U.S.C. § 1052(f) (emphasis added), *quoted in Schlafly v. Saint Louis Brewery, LLC*, 909 F.3d 420, 128 USPQ2d 1739 (Fed. Cir. 2018). Trademark Rule 2.41(a) further provides that:

(2) ... In appropriate cases, if a trademark or service mark is said to have become distinctive of the applicant's goods or services by reason of the applicant's substantially exclusive and continuous use of the mark in commerce for the five years before the date on which the claim of

<sup>8</sup> Sept. 20, 2022 Response to Office Action TSDR 7.

<sup>9</sup> Sept. 20, 2022 Response to Office Action TSDR 6.

distinctiveness is made, **a showing by way of verified statements in the application may be accepted as prima facie evidence of distinctiveness; however, further evidence may be required.**

(3) ... In appropriate cases, where the applicant claims that a mark has become distinctive in commerce of the applicant's goods or services, the applicant may, in support of registrability, submit with the application, or in response to a request for evidence or to a refusal to register, **verified statements, depositions, or other appropriate evidence showing duration, extent, and nature of the use in commerce and advertising expenditures** in connection therewith (identifying types of media and attaching typical advertisements), and verified statements, letters or statements from the trade or public, or both, or other appropriate evidence of distinctiveness.

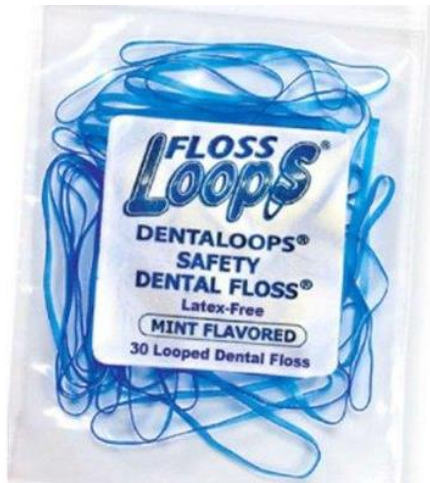
37 C.F.R. § 2.41(a)(2), (3) (emphasis added).

Verified statements of sales figures would take the form of affidavits or declarations. *See, e.g., In re EBSCO Indus., Inc.*, 41 USPQ2d 1917, 1922-23 (TTAB 1997) (declaration of applicant's president attesting to substantially exclusive and continuous use in commerce of the applied-for product configuration). *See generally* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1208 (2023) ("It is the better practice to provide evidence as to sales figures and the like by affidavit or declaration.").

Applicant's unsworn, unauthenticated lists from anonymous sources are not verified statements, depositions, or other appropriate evidence providing **proof** of acquired distinctiveness, as required by the statute and rules. *See In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2007 (TTAB 2014) (it is critical that the examining attorney be provided detailed information corroborated by sufficient evidentiary support, as by a declaration); *Cf. In re Urbano*, 51 USPQ2d 1776, 1779 n.6 (TTAB 1999) (affidavit should have been submitted to identify and authenticate documents that are not clearly identified as to nature or source and are not self-authenticating). The Board

may generally take a somewhat permissive stance with respect to the admissibility and probative value of evidence in an ex parte proceeding, TBMP § 1208, but this strains the limits of permissiveness.<sup>10</sup> Unsworn assertions are not evidence. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence.”), *quoted in In re Mission Am. Coalition*, 2023 USPQ2d 228, at \*11 (TTAB 2023).<sup>11</sup>

Even if we took the proffered sales figures at face value, they would not establish that Applicant’s blue dental floss loops have acquired distinctiveness as a trademark. The packages prominently display Applicant’s word marks, DENTALOOPS and FLOSS LOOPS:



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<sup>10</sup> At oral argument, Applicant’s counsel asserted that the initials “SK” scrawled atop Applicant’s handwritten list stood for the name of its president, Steven Kayser. That is the sort of information that could easily be provided in a declaration, which could have authenticated both lists.

<sup>11</sup> Additionally, Applicant failed to provide any context that would help us properly assess these sales figures. Board decisions have long alerted practitioners to the fact that the absence of evidence of competitive contextual information may limit the probative value that might otherwise be accorded advertising and sales numbers in the acquired distinctiveness inquiry. *See, e.g., Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1480 (TTAB 2016); *AS Holdings, Inc. v. H & C Milcor, Inc.*, 107 USPQ2d 1829, 1838 (TTAB 2013); *Target Brands Inc. v. Hughes*, 85 USPQ2d 1676, 1681 (TTAB 2007); *In re Gibson Guitar Corp.*, 61 USPQ2d 1948, 1952 (TTAB 2001).

Customers are more likely to associate these word marks with the source of the goods. *Grote Indus, Inc. v. Truck-Lite Co.*, 126 USPQ2d 1197, 1213 (TTAB 2018) (consumers more likely to associate word mark rather than product configuration with the source of the goods), *judgment rev'd and vacated by consent decree*, No. 1:18-cv-00599 (W.D.N.Y. June 8, 2022); *see also Wal-Mart v. Samara*, 54 USPQ2d at 1068 (consumers more predisposed to view word marks and packaging than product design as source indicators). Yet Applicant has adduced no evidence of “look-for” advertising calling attention to its trade dress. “The Board and other courts have long taken notice of the importance of such advertisements in regard to configuration or product design marks.” *Grote Indus.*, 126 USPQ2d at 1213 (quoting *Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1723 (TTAB 2010) (finding product configuration had not acquired distinctiveness), *aff'd mem.*, 2011 WL 5400095 (Fed. Cir. Nov. 9, 2011)). In fact, Applicant declined to adduce **any** evidence of its advertising, stating that “the evidence we may be able to provide, but respectfully, we feel we should not be insisted upon to provide....”<sup>12</sup>

Applicant asserts that its supposed sales were mostly to institutional or correctional facilities, as the floss loops are “designed to prevent alternate use as a ligature and sold mostly to prison systems.”<sup>13</sup> As we understand it, Applicant advances this assertion in order to show that these institutional consumers have come to view the proposed mark as indicating source. We note, however, that Applicant provides no support for this supposedly limited channel of trade, either by

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<sup>12</sup> June 22, 2022 Response to Office Action TSDR 2.

<sup>13</sup> Applicant’s brief, 4 TTABVUE 8.

limiting its identification of goods (“dental floss”) or by a verified statement. 37 C.F.R. § 2.41(a)(3). Moreover, Applicant provides no affidavits or declarations from the purported institutional purchasers or users of its goods. There is “no evidence to support applicant’s contention that potential purchasers perceive the alleged mark shown in the drawing as a distinct mark.” *In re Pharmavite LLC*, 91 USPQ2d 1778, 1782 (TTAB 2009). As in *In re UDOR U.S.A. Inc.*, 89 USPQ2d 1978, 1987 (TTAB 2009), “we find that the absence of any affidavits or declarations from the ultimate users of applicant’s goods undermines applicant’s contention that the configuration ... is recognized as a source indicator....”

Given this dearth of evidence, Applicant’s assertion of unit sales over time does not evince the consuming public’s recognition of its product’s color and configuration as an indication of origin. *See Braun Inc. v. Dynamics Corp. of Am.*, 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.”); *Grote Indus. v. Truck-Lite*, 126 USPQ2d at 1212 (“Yet sales success alone is not probative of purchaser recognition of a configuration as an indication of source, because, without more, it may simply indicate popularity of the product itself rather than recognition of a mark.”).

Most notably, Applicant fails to demonstrate the “substantially exclusive” use of the mark required by the statute. 15 U.S.C. § 1052(f). Applicant submits a photograph

of a competing blue dental floss loops product and asserts that this constitutes “copying”:<sup>14</sup>



But “[c]opying is only evidence of secondary meaning if the defendant’s intent in copying is to confuse consumers and pass off his product as the plaintiff’s.” *Stuart Spector Designs, Ltd. v. Fender Musical Instr. Corp.*, 94 USPQ2d 1549, 1575 (TTAB 2009) (quoting *Thomas & Betts Corp. v. Panduit Corp.*, 65 F.3d 654, 36 USPQ2d 1065, 1072 (7th Cir. 1995)). There is no evidence of that in the record, as the competitor uses its own word and design mark on its packages. *See also Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939, 940 & n.1 (Fed. Cir. 1984) (where claimant argued that third-party use of a protruding shoe tab in which it claimed trademark rights constituted “infringements,” the Court noted: “...the mere assertion that all other users are infringers cannot substitute for the required showing of

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<sup>14</sup> Applicant’s brief, 4 TTABVUE 7, 10-11, Applicant’s reply brief, 7 TTABVUE 4-5.

<sup>15</sup> June 22, 2022 Response to Office Action TSDR 6; Sept. 20, 2022 Response to Office Action TSDR 5.

specific facts in support of a potential finding that a plain tab on shoes has acquired distinctiveness as an indication of a single source....”).

“In any event, it is more common that competitors copy product designs for desirable qualities or features.” *In re Ennco Display Sys. Inc.*, 56 USPQ2d 1279, 1286 (TTAB 2000). That merely indicates the appeal or usefulness of the product; it is not an indication of source. *Wal-Mart v. Samara*, 54 USPQ2d at 1068-69; *see also Cicena Ltd. v. Columbia Telecommc’ns Grp.*, 900 F.2d 1546, 14 USPQ2d 1401, 1406 (Fed. Cir. 1990) (“CTG’s entry into the market for see-through neon-lit telephones was more likely based on an effort to capitalize on that intrinsic consumer-desirability than on any alleged secondary meaning developed by Cicena.”). And the presence of this competitor’s dental floss loops undercuts Applicant’s claim of substantial exclusivity. *In re Pohl-Boskamp GmbH & Co.*, 106 USPQ2d 1042, 1049 (TTAB 2013) (“this factor is undercut by the lack of exclusivity.”).

All in all, Applicant has failed to demonstrate that the relevant purchasing public has grown to recognize the primary significance of its blue dental floss loops as identifying source rather than being a feature of the products themselves. *In re MK Diamond Prods., Inc.*, 2020 USPQ2d 10882, 27 (TTAB 2020). For these reasons, we find that Applicant has not carried its of proving that its proposed mark has acquired distinctiveness.

## **II. Conclusion**

On consideration of the applicable law and the evidence of record, we find that Applicant’s proposed mark is a product design that is not inherently distinctive and has not been shown to have acquired distinctiveness under Section 2(f). It accordingly



fails to function as a mark.

**Decision:** The refusal to register Applicant's proposed mark is affirmed.