

This Opinion is not a
Precedent of the TTAB

Hearing: September 26, 2024

Mailed: March 18, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kason Industries, Inc.

Serial No. 97602791

Dorian B. Kennedy of Baker Donelson Bearman Caldwell & Berkowitz, PC,
for Kason Industries, Inc.

Amy Hahn,¹ Trademark Examining Attorney, Law Office 101,
Zachary Sparer, Managing Attorney.

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

Opinion by Casagrande, Administrative Trademark Judge:

Kason Industries, Inc. (“Applicant”) appeals refusal of its application to register,
as a trademark on the Principal Register, the “three-dimensional configuration of a

¹ The USPTO originally assigned the application to a different Trademark Examining Attorney. The application was re-assigned to the Examining Attorney listed above before entry of the final refusal.

leveling leg having a cylindrical top portion and a cylindrical bottom portion having a diameter smaller than the diameter of the top portion,”² depicted below:



The goods the application ultimately identified are “Food service equipment levelers of metal,” in International Class 6.

The Examining Attorney finally refused registration of the proposed mark for three reasons: the proposed mark is functional under Section 2(e)(5) of the Lanham Trademark Act; the proposed mark is inherently nondistinctive product design under Sections 1, 2, and 45 of the Act; and Applicant failed to prove acquired distinctiveness

² Application Ser. No. 97602791 was filed on September 22, 2022, under Section 1(a) of the Lanham Trademark Act, 15 U.S.C. § 1051(a), alleging dates of first use anywhere and in commerce of 2004.

under Section 2(f) of the Act.³ Applicant appealed⁴ and filed a brief.⁵ The Examining Attorney also filed a brief.⁶ The case is now ready for decision. As explained below, we affirm the refusal on all three grounds.

I. Analysis

We start with the functionality refusal.

A. The proposed mark is functional under Section 2(e)(5)

Section 2(e)(5) prohibits registration of a proposed trademark that “comprises any matter that, as a whole, is functional.” The test for functionality is well settled: “In general terms, a product feature is functional and cannot serve as a trademark if it is essential to the use or purpose of the article or if it affects the cost or quality of the article.” *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 32 (2001) (cleaned up; citations omitted). To determine whether a product design is essential to the use or purpose of the article or if it affects the cost or quality of the article, the USPTO frequently looks at one or more of the kinds of evidence identified in *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332 (CCPA 1982).⁷ This includes patents and

³ See August 2, 2024, Subsequent Final Office Action. Citations in this opinion to the application records refer to the versions of those records downloaded in .pdf format from the USPTO’s Trademark Status and Document Retrieval (“TSDR”) database.

⁴ See 1 TTABVUE. References to the briefs and other filings in this appeal cite the Board’s TTABVUE docket system. The number preceding “TTABVUE” is the docket number assigned to the cited filing in TTABVUE and any number immediately following “TTABVUE” identifies the specific page(s) to which we refer.

⁵ See 4 TTABVUE.

⁶ See 11 TTABVUE.

⁷ This opinion is issued under an internal Board pilot citation program on broadening acceptable forms of case citations in Board cases. It cites decisions of the U.S. Court of

advertising discussing the functionality of the feature(s) at issue, the degree to which alternatives exist, and whether the design results from a relatively cheap or easy means of manufacture. *See id.* at 1340-41.

We begin with patents. “Utility patents can be strong evidence that the features therein claimed are functional, thus precluding trademark protection.” *CeramTec GmbH v. CoorsTek Bioceramics LLC*, 124 F.4th 1358, 1364 (Fed. Cir. 2025) (cleaned up).

In response to a request from the Examining Attorney, Applicant acknowledged that the product depicted in the mark “has been the subject of” two issued U.S. patents: U.S. Patent No. 7,159,829 (the “utility patent”) and U.S. Patent No. D562,631 (the “design patent”).⁸

Applicant argues, without further explanation, that the design patent “shows that the design is ... presumably non-functional.”⁹ We agree that “the existence of a design patent for the very design for which trademark protection is sought presumptively indicates that the design is not de jure functional.”¹⁰ *In re Becton, Dickinson and Co.*,

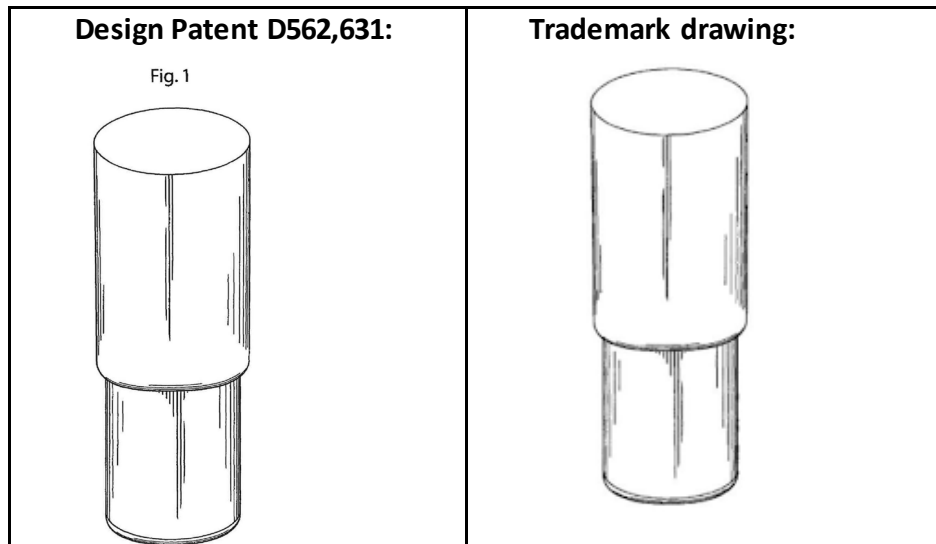
Appeals for the Federal Circuit (and the CCPA) only to the Federal Reporter (e.g., F.2d, F.3d, or F.4th). Westlaw (WL) citations are used for Board decisions. Serial or proceeding numbers are provided where available to assist finding cited Board opinions in USPTO and other databases.

⁸ *See* Aug. 3, 2023, Response to Nonfinal Office Action, at TSDR 10; *see id.* at 95-100 (utility patent); *id.* at 101-04 (design patent).

⁹ *See* 4 TTABVUE 4.

¹⁰ “De jure” functional means functional in the sense that trademark law cares about. Older cases used the term “de jure functional” to differentiate that legal concept from the ordinary conversational meaning of “functional,” which just means that a product feature or product has a function. The term the older cases used for that conversational meaning of functional was “de facto functionality.” Almost every tangible part of a product has a function, but the

675 F. 3d 1368, 1375 (Fed. Cir. 2012) (cleaned up; citation omitted). Here, the drawing in the application is identical to one of the drawings in the design patent:



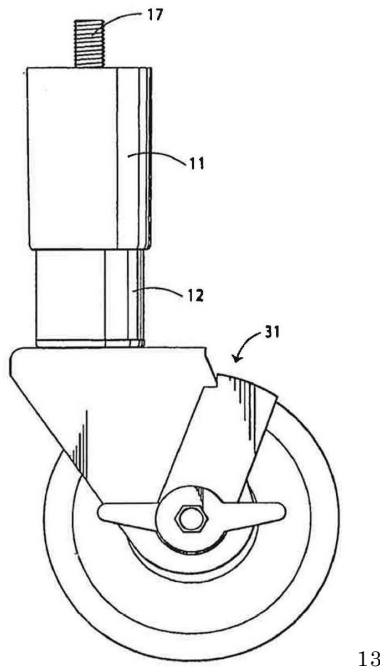
But presumptions can be overcome by contrary evidence. And, here, the utility patent amply demonstrates that the design is functional, notwithstanding the existence of the design patent. The utility patent is entitled “Height Adjustable Support For Food Service Equipment.”¹¹ It contains several drawings of the patented device in various forms. The specification of the utility patent describes Fig. 4¹² as depicting a “preferred form of the invention” where the support is coupled with a “wheel assembly”:

legal test for trademark functionality is specific. So the concept of “de facto functionality” would sweep in lots of product features that might not run afoul of the test for functionality that trademark law cares about. *See generally Valu Eng’g, Inc. v. Rexnord Corp.*, 278 F.3d 1268, 1274 (Fed. Cir. 2002) (discussing the differences between these terms). This opinion concerns “functionality” in the trademark-law sense.

¹¹ *See id.* at 95 (capitalization altered).

¹² *See id.* at 97.

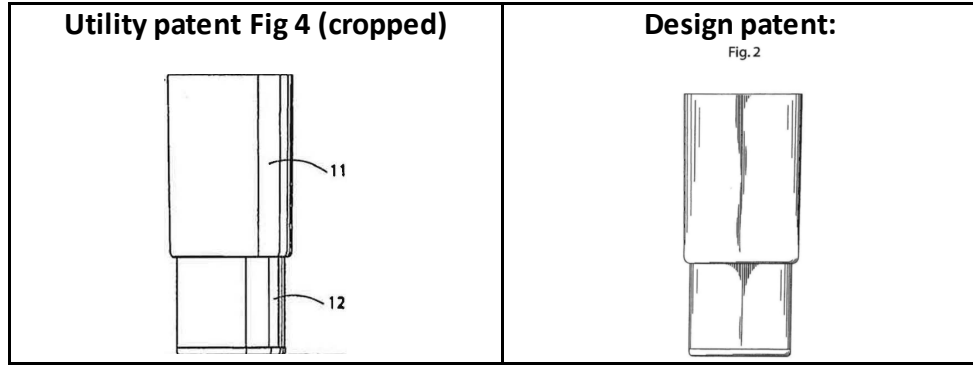
Fig. 4



The specification of the utility patent, referring to the drawings, states that the support “has a tubular upper portion 11 and a tubular lower portion 12.”¹⁴ If we crop Fig. 4 of the utility patent to depict only components 11 & 12, and we compare it to the what is depicted in the design patent, we get this:

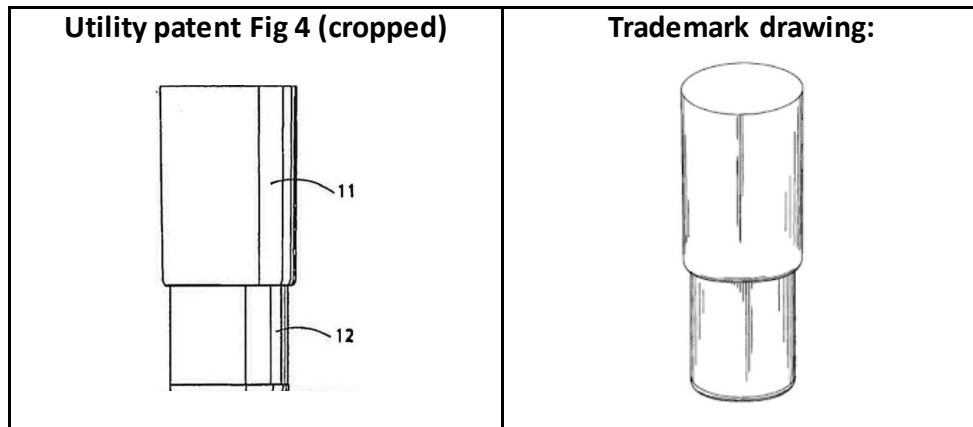
¹³ See *id.* at 100, col. 3, ll. 4-6. We show the drawing with the wheeled caster here not because the wheeled caster has anything to do with how the height adjustment works, but solely because this drawing nicely shows the exterior of the two-segmented leg. In other “preferred” embodiments, the wheeled caster is replaced by other, non-wheeled bottom pieces. In Fig. 2, a “plastic guide” replaces the wheel assembly and is inserted into the lower portion of the tubular support, which is referred to as a “foot.” See *id.* at 99 col. 2, ll. And in Fig. 5, the wheeled caster is replaced by a “non-skid foot-like end.” See *id.* at 100, col. 3, ll. 10-14.

¹⁴ See *id.* at 99, col. 2, ll. 38-40; see also Abstract, *id.* at 95.

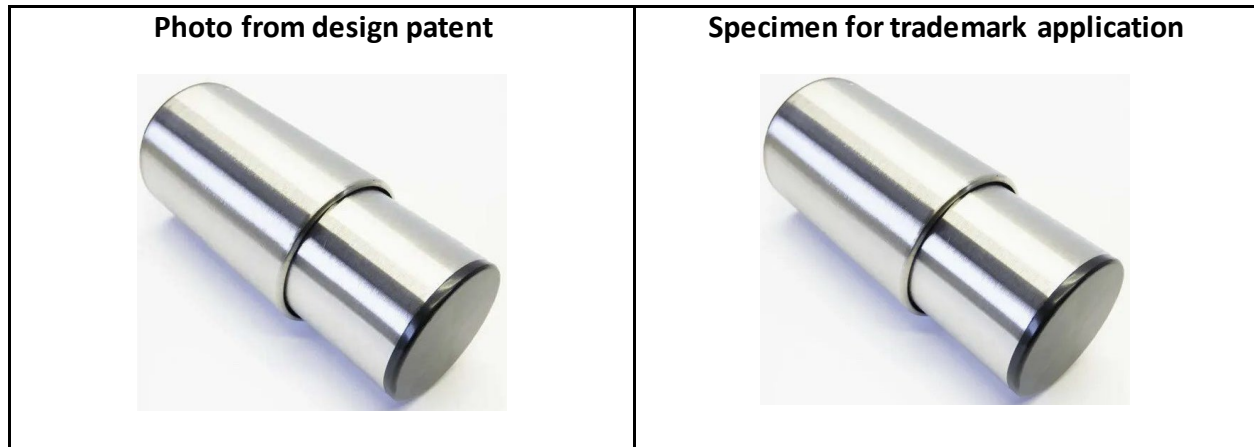


It is thus clear that the design patent and the utility patent cover the same leg components.

And if we compare the cropped Fig. 4 drawing in the utility patent to Applicant's trademark drawing, we get this:



These drawings show the same device from slightly different perspectives. Applicant does not dispute that portions 11 & 12 in the utility patent drawings are what is depicted in the trademark drawing. Indeed, the same photo of the leg device appears in the design patent is used as the specimen in the trademark application:



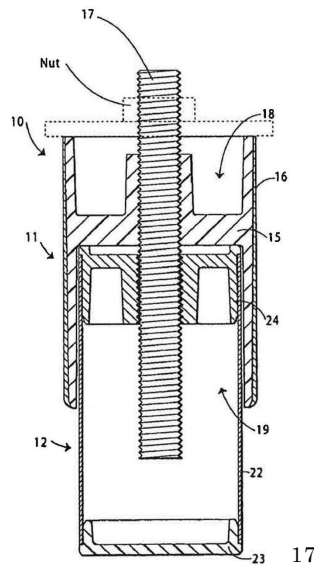
Now that we've shown that the leg components comprising Applicant's proposed trademark are identical to the device protected by the utility patent, let's turn to what the utility patent says about what they do. The specification states that the "tubular lower portion 12 is telescopically mounted within the upper portion 11 for adjustable vertical movement."¹⁵ The patent does not define "telescopically." One definition of "telescopic" (the adjective form of telescopically) is: "consisting of parts that slide one within another like the tubes of a jointed telescope and are thus capable of being extended or shortened."¹⁶ That definition is apt because it describes precisely what the utility patent discusses. Another drawing in the utility patent (Fig. 2) depicts internal parts 15 & 24 mounted within the upper and lower portions of the support,

¹⁵ See *id.* at 99, col. 2, ll. 38-40; see also Abstract, *id.* at 95.

¹⁶ See <https://www.dictionary.com/browse/telescopic> (checked March 11, 2025). The Board may, and frequently does, take judicial notice of dictionary definitions. See, e.g., *DeVivo v. Ortiz*, No. 91242863, 2020 WL 1227592, at *7 n.26 (TTAB 2020). Dictionary.com is based on the Random House Unabridged Dictionary. See <https://www.dictionary.com/e/about/>. Patent law, too, allows consultation of dictionaries to ascertain the meaning of terms in a patent so long as the patent doesn't itself define or contradict the dictionary meaning. See, e.g., *Trustees of Columbia Univ. v. Symantec Corp.*, 811 F.3d 1359, 1362-63 (Fed. Cir. 2016).

a threaded stud 17 threaded through these internal parts, and a “glide” 23 serving as the bottom of the “foot” of the device:

Fig. 2



The specification describes how the telescopic configuration of the upper and lower external portion of the telescopically-connected tubes (11 & 12) can be adjusted:

In mounting the support 10 to the equipment the top end of the stud 17 is threaded into the threaded channel of the equipment. The lower portion 12 is then rotated relative to the upper portion 11, thereby threading it along the stud 17 to a desired height. If needed, the height may be later reset by simply rotating the lower portion so as to change the overall height of the equipment.¹⁷

Essentially, the utility patent covers a novel configuration of an adjustable leg for restaurant equipment. The leg adjustments are performed by rotating the lower tubular external leg segments about a threaded internal stud that, at its top end, is

¹⁷ See Aug. 3, 2023, Response to Nonfinal Office Action, at TSDR 96 (Fig. 2); see also *id.* at 99, col. 2 ll. 40-55.

¹⁸ See *id.* at TSDR 99 col. 2 ll. 65-67 – TSDR 100 col. 1 ll. 1-2; see also *id.* at 100 (claim 1).

threaded to structure at the bottom of the stove, refrigerator, or other restaurant equipment.¹⁹ By rotating the lower external leg segment such that, as it moves about the threading, it telescopes further into or out of the larger external upper leg segment, a person can gradually adjust the height of the equipment resting on the top of the upper leg segment until the desired height is reached. The two telescopically-engaged external support leg tubes (11 & 12), which are the proposed trademark here, are necessary to achieve the intended result of rotating to reach the ideal adjusted height.²⁰

No leg shape other than one that employs two cylindrical tubular sections could accomplish what the patent seeks to accomplish. For example, hollow leg segments of equally-proportioned triangular or square cross-sectional shapes with slightly different perimeters could slide relative to each other, but the smaller one could not be rotated within the larger one because the external corners of the smaller one would catch within the internal corners of the larger one. And the specification makes clear that rotation of the lower leg segment (with its internal insert 24) about the threaded stud is required to achieve the desired adjusted height. While a smaller, non-cylindrical leg segment could be made sufficiently small to “rotate” within the larger segment without the corners catching, the necessary size disparity would create gaps between the two segments, and the specification’s discussion of the shortcomings of

¹⁹ *See id.* at 99, col. 2, ll. 32-34 (describing how the leg is affixed to the equipment).

²⁰ Thus, we disagree with Applicant’s insistence that the utility patent is “focused on” the internal components and has “nothing to do with the external shape” of the leg components. *See* 4 TTABVue 6.

the prior art makes clear that gaps between the upper and lower segments are a significant problem, because they allow bugs to crawl in.²¹ Indeed, the specification specifically touts that the invention avoids that problem by maintaining “the gap between the upper portion and the lower portion ... within tight tolerances and without creating an asymmetric gap.”²² Simply stated, the cylindrical, tubular-shaped, telescoping leg segments are essential to accomplishing the objective of the patented invention.

Applicant’s repeated insistence that the claims in the utility patent do not actually use the word “cylindrical”²³ is unpersuasive. First, as we just explained, the invention simply wouldn’t work as intended without the tubes being cylindrical. Indeed, all the drawings in the invention, which the specification denominates as “preferred” forms or embodiments of the invention,²⁴ depict cylindrical tubes. In addition, the word “tubular” means relating to or consisting of a tube, and “tube” is defined as “a hollow cylinder.”²⁵ Thus, when Claims 1-5 require the leg segments to be “tubular,” that necessarily means cylindrical.

We find the disclosures in both the specification and claims of the utility patent to provide strong and explicit evidence that the applied-for mark as a whole is functional, conclusively rebutting any initial presumption of non-functionality

²¹ See *id.* at 99, col. 1, ll. 47-53. Making the internal segment that small would also mean that the segments would not “telescope.”

²² See *id.* at 100, col. 3, ll. 17-20.

²³ See 4 TTABVUE 3, 4, 5.

²⁴ See Aug. 3, 2023, Response to Nonfinal Office Action, at TSDR 99, col. 2, ll. 14-24.

²⁵ See August 02, 2024, Subsequent Final Office Action, at TSDR 12, 14.

resulting from the existence of the design patent. *See In re OEP Enters., Inc.*, No. 87345596, 2019 WL 3941266, at *14 (TTAB 2019); *see also Kistner Concrete Prods., Inc. v. Contech Arch Techs., Inc.*, No. 92048733, 2011 WL 481339, at *15 (TTAB 2011) (evidence that the design in the trademark application was the subject of a design patent was “insufficient to counter the significant probative value accorded to the utility patents”).

The three other types of potentially-relevant functionality evidence mentioned in *Morton-Norwich*²⁶ don’t play much of a role in this case. *Morton-Norwich* observes that “[i]t may also be significant that the originator of the design touts its utilitarian advantages through advertising.” 671 F.2d at 1341 (citations omitted). Here, as to advertising, the record consists of a one-page listing in Applicant’s catalog.²⁷ We see nothing in it that touts the functionality of the two leg segments comprising the proposed trademark. The advertisement does not bear on the functionality issue before us one way or the other. *See, e.g., In re Howard Leight Indus., LLC*, 2006 WL 1968605, at *9 (TTAB 2006).

²⁶ *Morton-Norwich* does not limit the kinds of evidence that might be relevant to functionality. *See, e.g., OEP Enters.*, 2019 WL 3941266, at *5 (*Morton-Norwich* “identifies four nonexclusive categories of evidence which may be helpful”). Another CCPA decision identifies at least one other type of evidence potentially relevant to functionality. In *In re Honeywell, Inc.*, 532 F.2d 180 (CCPA 1976), the Court held that the functionality of a round-shaped thermostat control was “demonstrated by the widespread use over the years of round-shaped control devices for appliances and similar equipment.” *Id.* at 182; *see also Becton, Dickinson*, 675 F.3d at 1376 (evidence that competitors sold products with a similar ribbed-cap component “underscores the competitive need” to be able to use the functional features claimed in the application); *Mine Safety Appliances Co. v. Elec. Storage Battery Co.*, 405 F.2d 901, 904 (CCPA 1969) (Board’s finding of functionality supported in part by evidence that competitors sold competing products “with similar if not identical ... designs”). Here, there’s not much evidence of that, perhaps because of Applicant’s patent protection.

²⁷ *See* Aug. 3, 2023, Response to Nonfinal Office Action, at TSDR 96.

Evidence of the existence of alternative designs also can bear on whether a design alleged to be a trademark is functional. *See, e.g., Morton-Norwich*, 671 F.2d at 1341. “But once a product feature is found functional based on other considerations”—such as the disclosures in the utility patent here—“there is no need to consider the availability of alternative designs, because the feature cannot be given trade dress protection merely because there are alternative designs available.” *Valu Eng’g*, 278 F.3d at 1276; *accord OEP Enters.*, 2019 WL 3941266, at *16. Here, the utility patent convinces us that the design is functional. This finding renders whether such alternatives exist or not immaterial. Nevertheless, because Applicant presses the point, we will address it.

Applicant insists alternatives are plentiful, pointing to screenshots attached to the Mitchell Declaration of products it and two of its competitors offer.²⁸ “[F]or the third factor to weigh in favor of non-functionality, there must be evidence of actual or potential alternative designs that work equally well” as the design for which trademark protection is sought. *CeramTec*, 124 F.4th at 1365-66 (citation omitted); *accord OEP Enters.*, 2019 WL 3941266, at *17; *Kistner Concrete*, 2011 WL 481339, at *23. Here, that means there must be evidence that the alternatives provide the same benefits as the two telescoping, adjustable leg components in Applicant’s utility patent. The Mitchell Declaration, however, is unenlighteningly conclusory on this point, averring only that “many alternative leveler designs exist that are equally

²⁸ *See* 4 TTABVUE 8.

efficient, equally-feasible and less costly than Applicant’s design.”²⁹ The utility patent explains that adjustable supports existed before the patented invention, but they had several problems that the patented adjustable support eliminates.³⁰ The Mitchell Declaration does not distinguish between the prior art adjustable supports that suffered from the problems described in the utility patent and adjustable supports that, like the novel support claimed in the utility, eliminate those problems.

More fundamentally, it’s not clear to us that the screenshots appended to the Mitchell Declaration depict products that are true alternatives to the precise product identified in the application. The application before us identifies the goods as “Food service equipment levelers of metal.” The utility patent calls the invention that includes those goods a “Height Adjustable Support For Food Service Equipment”³¹ and describes it as comprising several components, including “inserts,” a bottom part of the foot, and the tubular upper and lower portions on the exterior (which tubular portions comprise the entirety of the trademark application drawing). But most of the supposed “alternatives” appended to the Mitchell Declaration are labelled “foot inserts.”³² This, along with the ads themselves for these foot inserts, suggests that they are a piece or pieces that get inserted into the bottom of the legs, not the legs themselves. In other words, they appear to be only one part of a leveler or support.

²⁹ Aug. 3, 2023, Response to Nonfinal, at TSDR 13.

³⁰ *Id.* at 99.

³¹ *Id.* (capitalization altered).

³² *See* Aug. 3, 2023, Response to Nonfinal Office Action, at TSDR 16, 17, 18, 19, 20, 21, 22, 23, 25, 28, 31, 36, 39-40, 42, 45, 48, 51, 54, 57, 60, 63, 66, 69, 72, 75, 78, 81, 84, 88.

Neither the catalog pages nor anything else enlightens us on whether these inserts, in combination with some undisclosed additional leg component, might be a true, equally-well-performing alternative to the two telescoping leg portions claimed as the proposed mark in this trademark application.³³

Thus, even if we were to put aside that Applicant's utility patent makes clear that the design here is functional—which renders the availability of equally well-performing alternatives irrelevant—the Mitchell Declaration falls far short. It not only does not show that the alternatives depicted in the attachments work “equally as well” as the product depicted in the application drawing here, but it fails to explain how the depicted inserts (as opposed to adjustable leg assemblies) are alternatives to the adjustable leg at issue.

Another type of evidence that can show that a proposed product design trademark is functional is whether “a particular design results from a comparatively simple or cheap method of manufacturing the article.” *Morton-Norwich*, 671 F.2d at 1341. Applicant argues that its adjustable leveler leg is not functional because it's “more expensive to manufacture than [the] alternative designs.”³⁴ But there are two ways that a design can be functional: it can either work better or it can be cheaper to make. *See, e.g., TrafFix*, 532 U.S. at 32 (“a product feature is functional ... if it is essential to the use or purpose of the article **or if it affects the cost** or quality of the article”)

³³ A few other supposed alternatives appended to the Mitchell Declaration appear to be one-piece, nonadjustable legs, not two-piece, adjustable legs. *See id.* at 15, 24, 87, 89, 90, 91.

³⁴ 4 TTABVue 8.

(cleaned up; citation omitted; emphasis added).³⁵ As we explained, the utility patent makes clear that Applicant’s design works better than previous designs. That alone makes it functional, rendering its cost relative to other types of leveler legs immaterial in this case.³⁶ *See, e.g., OEP Enters.*, 2019 WL 3941266, at *18 (“Where a design has use-related benefits, there is no need to determine whether the design also has cost-related benefits. ... In other words, evidence that a design costs more, or has no impact on cost, is irrelevant if the design is found to work better.”) (cleaned up; citations omitted).³⁷

Because Applicant’s utility patent clearly shows that the design for which it seeks trademark exclusivity is functional, we affirm the functionality refusal.

B. The proposed mark is an inherently nondistinctive product design and Applicant has failed to prove acquired distinctiveness under Section 2(f)

Our finding that the proposed mark is functional is an absolute bar to registration. 15 U.S.C. §§ 1052(e)(5), (f); *TrafFix*, 532 U.S. at 33 (“Functionality having been established, whether MDI’s dual-spring design has acquired secondary meaning need

³⁵ *Cf. TrafFix*, 532 U.S. at 33 (color might be functional, even where it does not affect the cost or quality of the good, where it is shown that there is a “competitive necessity” for the color on the good); *Brunswick Corp. v. British Seagull Ltd.*, 35 F.3d 1527, 1531-32 (Fed. Cir. 1994) (use of color black for outboard marine engines was functional because black was shown to be a “color[s] that easily coordinate[s] with the wide variety of boat colors”).

³⁶ Similarly, in a case where a design was shown to be cheaper to make than the alternatives, an argument that the design wasn’t functional because didn’t work as well as the alternative wouldn’t matter.

³⁷ Another shortcoming relating to Applicant’s “cost” argument is that, while the Mitchell Declaration contains a conclusory averment that Applicant’s design is costlier to make than the supposed alternatives, Applicant provides no particulars about the cost of its design relative to the other supposed alternatives. That makes it impossible for us to judge whether, or how much, to credit what Mr. Mitchell says on this point.

not be considered.”); *In re R.M. Smith, Inc.*, 734 F.2d 1482, 1484-85 (Fed. Cir. 1984) (where a product design is found to be functional, the design “is not subject matter protectable as a trademark. Evidence of distinctiveness is of no avail to counter a de jure functionality rejection.”); *OEP Enters.*, 2019 WL 3941266, at *20 (a “finding of functionality under Section 2(e)(5) precludes registration regardless of any showing of acquired distinctiveness under Section 2(f)”). In the interest of completeness, however, we now discuss the alternative ground for refusal of registration that the mark consists of a nondistinctive product design and that Applicant failed to show acquired distinctiveness.

The Examining Attorney found that the proposed mark constitutes product design, which the Supreme Court has held “can never be inherently distinctive,” *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 214 (2000), and can be protected under trademark law “only upon a showing of secondary meaning,” *id.* at 216; *see also OEP Enters.*, 2019 WL 3941266, at *20 (“product designs can never be inherently distinctive and will always require evidence of acquired distinctiveness or secondary meaning to be registrable as marks”) (citation omitted).³⁸

“[A] mark has acquired distinctiveness ... if ... in the minds of the public, the primary significance of a [mark] is to identify the source of the product rather than

³⁸ Applicant appears to make a conclusory argument that its product design is inherently distinctive because “the leveling leg has several unique features that render the overall impression of the leveling leg to be distinctive or unique ...” 4 TTABVue 7. Putting aside that an equipment leg constituted of two cylindrical metal tubes hardly seems “unique” or “distinctive” in appearance, this argument, more fundamentally, flies in the face of the legal principle that product design trade dress can never be considered inherently distinctive. *See, e.g., Wal-Mart*, 529 U.S. at 214.

the product itself.” *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 211 (2000) (citation and internal quotation marks omitted). “The applicant ... bears the burden of proving acquired distinctiveness.” *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 1335 (Fed. Cir. 2015) (citation omitted); *accord In re Hollywood Brands, Inc.*, 214 F.2d 139, 140 (CCPA 1954).

Evidence such as advertising expenditures and sales success, length and exclusivity of use, unsolicited media coverage, intentional copying, and consumer studies, may be considered. *See e.g., Converse, Inc. v. ITC*, 909 F.3d 1110, 1120 (Fed. Cir. 2018); *Louisiana Fish Fry*, 797 F.3d at 1336. These types of evidence fall into two general categories: direct evidence and circumstantial evidence. *See Schlafly v. Saint Louis Brewery, LLC*, 909 F.3d 420, 424 (Fed. Cir. 2018) (“both direct and circumstantial evidence may show secondary meaning.”). Surveys are considered direct evidence. *See id.* at 424 n.2 (“Survey data is direct evidence of secondary meaning.”); *Union Mfg. Co. v. ITC*, 826 F.2d 1071 (table), 1987 WL 37901, at *1 (Fed. Cir. 1987) (surveys are an example of direct evidence). The anecdotal cousin of surveys, consumer declarations, are also considered direct evidence of consumer perception. *See, e.g., Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 969 (Fed. Cir. 2015); *Union Mfg. Co.*, 1987 WL 37901, at *1. Applicant offers no direct evidence of acquired distinctiveness.

Applicant offers aggregate sales and advertising figures, two types of circumstantial evidence. *See, e.g., Tone Bros. v. Sysco Corp.*, 28 F.3d 1192, 1202, 1204 (noting that advertising and sales volume are types of circumstantial evidence). The

Mitchell Declaration avers: “Applicant has sold approximately 3,281,944 levelers of this design since the year 2004. Applicant’s sale of this leveler has produced approximately \$10,929,447 in revenue. Applicant has spent approximately \$34,480 in advertising of this leveler.”³⁹ Since the design was covered by two patents issued in 2004 and 2006, we can safely assume—though the Mitchell Declaration does not say so—that Applicant’s use was substantially exclusive for the period of time from 2004 until the date of the Mitchell Declaration, Aug. 1, 2023.

The “amount and character of the evidence” required to demonstrate acquired distinctiveness “depends on the facts of each case and particularly on the nature of the alleged mark.” *See Roux Lab’s, Inc. v. Clairol Inc.*, 427 F.2d 823, 829 (CCPA 1970). This evidence must reflect the effectiveness of the claimant’s efforts in transforming public perception. *See, e.g., In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1125 (Fed. Cir. 1985); *In re Palacio Del Rio, Inc.*, No. 88412764, 2023 WL 3751118, at *13 (TTAB 2023). The less distinctive a mark, the higher the evidentiary burden to show acquired distinctiveness. *See, e.g., Steelbuilding.com*, 415 F.3d at 1300.

Product design features fall within the category of marks requiring a relatively stronger showing of acquired distinctiveness than some other categories of non-inherently distinctive marks. The Supreme Court has noted that, while consumers are “predisposed” to regard at least some significant subset of words (non-descriptive

³⁹ *See* Aug. 3, 2023, Response to Nonfinal Office Action, at TSDR 13.

ones) and product packaging (“garish form[s]”) as an “indication of the producer” that “immediately signal a brand or a product source,” in contrast:

consumer predisposition to equate [a product design] feature with the source does not exist. Consumers are aware of the reality that, almost invariably, even the most unusual of product designs ... is intended not to identify the source, but to render the product itself more useful or more appealing.

Wal-Mart, 529 U.S. at 212-13; *see also EFS Mktg., Inc. v. Russ Berrie & Co.*, 76 F.3d 487, 491 (2d Cir. 1996) (“[C]onsumers do not associate the design of a product with a particular manufacturer as readily as they do a trademark or product packaging trade dress.”).

Thus, the relative burden Applicant must shoulder here (the “force” it must show that it applied) for its proposed product design mark is substantial. The aggregate numbers in the Mitchell Declaration, however, are underwhelming. Viewing them on a yearly-average basis renders them almost trivial. For the 19-year period from 2004 through August 2023, the average yearly sales revenue is \$575,235 and the average yearly advertising expenditure is \$1,815. These bare numbers simply come nowhere close to demonstrating that Applicant has successfully educated relevant consumers to view two concentric leg portions of a restaurant equipment leg as an indicator of the source of the product. Even if the numbers were much larger, however, we would still have to look to other evidence to be confident that the sales simply didn’t simply reflect the desirability of the product—which is especially acute in cases where a product feature is integral part of a product covered by a utility patent. *Cf. Cicena Ltd. v. Columbia Telecomms. Group*, 900 F.2d 1546, 1551 (Fed. Cir. 1990) (“sales

success is not necessarily indicative of secondary meaning, but can be attributed to many other factors—the most likely being” the inherent desirability of the product); *In re Bongrain Int’l (Am.) Corp.*, 894 F.2d 1316, 1318 (Fed. Cir. 1990) (sales figures “may indicate the popularity of the product itself”). Further, even if we were to put aside any characterization of the numbers, it is circumstantial evidence and, without more, we cannot tie these numbers to any success in getting consumers to perceive the two-segmented leg as a source indicator. *Owens-Corning Fiberglas*, 774 F.2d at 1125; *Palacio Del Rio*, 2023 WL 3751118, at *13.

In short, the proposed mark constitutes product design, which cannot be considered inherently distinctive, and Applicant has failed to establish that the design has acquired distinctiveness. We independently affirm the Examining Attorneys’ refusal on these grounds.

Decision: The refusal to register is independently affirmed on all three grounds.