

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

Mailed:
November 10, 2004
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Joanne Slokevage

Serial No. 75602873

Joanne Slokevage, *pro se*.

Douglas M. Lee, Trademark Examining Attorney, Law Office
108 (David Shallant, Managing Attorney).

Before Seeherman, Quinn and Bucher, Administrative
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Joanne Slokevage seeks registration on the Principal
Register of the mark FLASH DARE! and design:



for goods identified in the application as filed, as "pants, overalls, shorts, culottes, dresses, skirts," in International Class 25.¹ In the application papers, as filed, applicant described the mark as "A configuration located on the rear hips comprised of: A label in the center with the words 'FLASH DARE!' on a V-shaped background; and on each of the two sides of it there is a clothing feature (a cut-out area, or 'hole,' and flap affixed to seat area with a closure device); the top borders of the 'holes' also forming and continuing the 'vee' shape. The matter shown by the dotted lines is not part of the mark, and the dotted lines serve only to show the position of the mark."

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register this designation based upon the ground that this matter constitutes a configuration of the goods which is not inherently distinctive and thus would not be perceived as a trademark under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§1051, 1052 and 1127.

¹ Application Serial No. 75602873 was filed on December 4, 1998, based upon applicant's allegation of first use of the mark in commerce at least as early as December 18, 1997.

The Trademark Examining Attorney had given applicant the option of disclaiming the design features or submitting evidence of acquired distinctiveness for those features. Applicant has refused these alternatives.

In his appeal brief (p. 8), the Trademark Examining Attorney's summarized his position as follows:

It is noted that if applicant had applied for the words "FLASH DARE" by themselves as the proposed mark, the mark clearly would be considered inherently distinctive. In fact, applicant has registered the typed mark "FLASH DARE!" [Reg. No. 2200287] on the Principle [sic] Register ...

The U.S. Supreme Court [in Wal-Mart Stores, Inc. v. Samara Brothers, Inc., 529 US 205, 54 USPQ2d 1065 (S. Ct. 2000)] has already ruled that a clothing design configuration is never inherently distinctive. Applicant now apparently seeks to register its [sic] clothing feature configuration (which it [sic] has previously been unable to register on the Principle [sic] Register) on the Principle [sic] Register by merely including the words "FLASH DARE!" as part of the configuration. Allowing applicant to do so in this manner would clearly render the ruling in Samara toothless and meaningless, easily circumvented by applicants. This seems to run contrary to the intent of the Court. As the Court reiterated in Samara, "[t]o the extent there are close cases, [the Board] should err on the side of caution and classify ambiguous trade dress as product design, thereby requiring secondary meaning." 54 USPQ2d at 1070.

By contrast, applicant argues that the Supreme Court's decision in Wal-Mart v. Samara, *supra*, is not applicable, as that case was dealing with nothing more than trade dress, while the disputed matter herein comprises words combined with arbitrary devices. Applicant argues that her combination of arbitrary elements is strategically placed on all of her garments in the same manner. She contends that this arrangement of specific components is at the heart of her branding image, and has been carefully designed to identify applicant's goods and to distinguish them from the goods of others in the field of sportswear directed to girls and young women. She points out that the stylized wording of FLASH DARE! and the other features shown on the involved drawing are consistently presented in a particular size and location on every garment in the FLASH DARE! line of sportswear. She emphasizes the physical arrangement of the elements and the distinctive core message to potential consumers. In short, she seems to argue that all the various elements, taken together, create an edgy, eye-catching message suggesting the wearer might "dare-to-flash" some skin on her posterior.

Key to applicant's argument is the contention that what is shown in the drawing is a unitary commercial

message where the inherent distinctiveness of the total mark derives from the combination of all the features, and that the applied-for matter is a "unitary mark" not subject to dissection:

The reason this application was filed is because of the added distinctive subject matter, and the resulting relationship between all the elements of the mark together, creating a unitary mark possessing a very original distinctive commercial message. Every garment in the Flash Dare!® Sportswear line has the mark of this application; the Flash Dare! label is not used alone; the clothing feature is not used alone. It is this combination together, because of its commercial message, that the applicant seeks to protect as its [sic] source identifier.

...

After dissecting the mark, the Examiner focused only on the holes and flaps. This was an error. In the Final Refusal 10/25/00 the Examiner states "Clothing designs are never inherently distinctive. Wal-Mart is applicable in this case." The mark combines words, a label design, holes, flaps, and a linking "vee", see Drawing page description, Evidence Tab 1. All of these elements must be taken into consideration.

Applicant's reply brief of July 22, 2004, pp. 7, 11.

First, we reject applicant's argument that the applied-for matter is unitary. While the applied-for matter qualifies as a "composite" mark - i.e., one where applicant may, in her discretion, combine the various elements into a single drawing for purposes of registration - it cannot be deemed to be "unitary." Given the display

of items shown in the instant drawing, these various elements are not so merged together that they cannot be divided and treated as separable elements. *Cf.* TMEP §1305 and §1305(f). Applicant's earlier registration of the words FLASH DARE! - the only literal element of the applied-for matter - supports the conclusion that the words create a separate and distinct commercial impression apart from the other elements. *Cf.* TMEP §807.14(b).

While the Trademark Examining Attorney offered applicant the option of disclaiming the design features or submitting evidence of acquired distinctiveness for those features, applicant has refused these alternatives. Accordingly, any documentation of applicant's extensive promotional activities consistent with her aggressive branding of the product design, her edgy, eye-catching message of the FLASH DARE! advertising campaign, or her use of the same product design on an entire line of clothing - evidence that may well be part and parcel of a showing of acquired distinctiveness - is not relevant to our determination herein. The sole issue before us is whether the product design features of this composite matter can be considered to be inherently distinctive.

Moreover, we agree with the position of the Trademark Examining Attorney that the holes and flaps portion of the applied for matter comprises product design or trade dress.² Accordingly, this holes and flaps product design may not, as the Supreme Court held in Wal-Mart v. Samara, *supra*, be registered absent a showing of acquired distinctiveness (or a disclaimer). We find that applicant's unusual "product design" *qua* trade dress will not be regarded as a source indicator at the time of its introduction:

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.

The fact that product design almost invariably serves purposes other than source identification not only renders inherent distinctiveness problematic; it also renders application of an inherent-distinctiveness principle more harmful to other consumer interests. Consumers should not be deprived of the benefits of competition with regard to the utilitarian and esthetic purposes that product design ordinarily serves by a rule of law that facilitates plausible

² The fact that applicant has registered on the Supplemental Register [see Reg. No. 2168684] a drawing of one side of this clothing feature (e.g., where the flap, when affixed to the right, seat pocket button, creates a hole) is consistent with a conclusion that this portion of the instant composite comprises a non-inherently distinctive clothing feature. Adding the mirroring, left-side feature certainly does not change this result.

threats of suit against new entrants based upon alleged inherent distinctiveness. How easy it is to mount a plausible suit depends, of course, upon the clarity of the test for inherent distinctiveness, and where product design is concerned we have little confidence that a reasonably clear test can be devised.

Wal-Mart v. Samara, at 1069.

Accordingly, we find that the holes and flaps portion of the applied for matter constitutes a product design which is not inherently distinctive, and would not be perceived as a trademark under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§1051, 1052 and 1127.

Decision: The refusal to register, based upon the fact that this composite matter includes elements of non-distinctive product design, is hereby affirmed. However, in accordance with Trademark Rule 2.142(g), this decision will be set aside and applicant's applied-for matter will be published for opposition if applicant, no later than thirty days from the mailing date hereof, submits an appropriate disclaimer of the holes and flaps portion of the applied-for matter.