

THIS OPINION  
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Hearing:  
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Alliant Techsystems Inc.

Serial No. 78546549

Stephen R. Baird and Karen A. Brennan of Winthrop &  
Weinstine for Alliant Techsystems Inc.

Dayna J. Browne, Trademark Examining Attorney, Law Office  
104 (Chris Doninger, Managing Attorney).

Before Quinn, Walsh and Wellington, Administrative  
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Alliant Techsystems Inc. filed an application to  
register the design mark depicted below



for "ammunition" in International Class 13.<sup>1</sup> The application includes a statement that "[t]he colors yellow, red, orange, black and brown are claimed as a feature of the mark." The application also includes a description of the mark as follows:

a design showing an incomplete pair of deer antlers juxtaposed with colorful dotted lines and swirls of varying brightness and intensity evoking the image of a high energy molecular reaction. The color red appears in the antlers and on the outside edges and to the left and right of the antlers, the color yellow appears in the swirling pattern in the right center of the mark over the antlers, the color orange appears between the colors red and yellow in the dots, the color brown appears on the antlers, and the color black appears on the antlers and in the far edges of the mark as shadowing.

The examining attorney refused registration under Sections 1, 2, 3 and 45 of the Trademark Act, 15 U.S.C. §§1051, 1052, 1053 and 1127, on the ground that the matter sought to be registered does not function as a trademark for applicant's goods because it is merely ornamental and lacks inherent distinctiveness.

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<sup>1</sup> Application Serial No. 78546549, filed January 12, 2005, alleging a bona fide intention to use the mark in commerce. Applicant subsequently filed a statement of use setting forth first use anywhere on September 30, 2004, and first use in commerce on February 9, 2005.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs, and both appeared at an oral hearing.

The examining attorney maintains that the design is merely a nondistinctive background design for applicant's FUSION trademark and, thus, does not function as a source indicator for applicant's goods. The examining attorney essentially contends that the design is ornamental, and it is not uncommon in the trade for ammunition packaging to display in a decorative manner various depictions of deer or deer heads with antlers, or of some type of bright colors suggestive of an explosion. In support of the refusal the examining attorney introduced photographs of packaging for ammunition of third-party competitors.

Applicant contends that the design sought to be registered is inherently distinctive and "creates a separate commercial impression upon the buyer as it emerges out of the background and hits the buyer in the eye in such a way that it is easily recognizable by consumers as a source identifier." (Brief, p. 1). Applicant argues that its design is "suggestive of a high-technology, high-energy molecular reaction through the use of vibrant colors (red, orange and yellow) complimented by linear, dotted, and swirling patterns and framed by uniquely positioned deer

antlers.” (Brief, p. 8). As such, applicant urges, the design is distinctive, that is, it creates a unique and separate commercial impression upon the consumer.

Applicant responds to the examining attorney’s evidence of third-party packaging for ammunition by stating that none are similar to applicant’s design because no packaging contains more than one element from applicant’s design mark, and many packages contain no such elements.

Applicant also highlights its use of the design in ways other than on product packaging, as for example by offering a downloadable computer wallpaper of the product packaging. In support of its position, applicant submitted two declarations of Rick Stoeckel, applicant’s ammunition brand manager, with related exhibits.

A picture or design may be capable of serving the trademark function of identifying goods and distinguishing them from those of others. In the present case, the design sought to be registered covers the entire product box for applicant’s ammunition; product packaging trade dress can be registered either if it is inherently distinctive as applicant contends, or if it has acquired distinctiveness. *Wal-Mart Stores v. Samara Bros.*, 529 U.S. 205, 54 USPQ2d 1065, 1069 (2000). The question of inherent distinctiveness turns on whether consumers, when they first

encounter applicant's design, would view it as a source indicator. As applicant points out, in assessing inherent distinctiveness, we must consider the trade dress as a whole, rather than looking at each element of the trade dress individually.

In answering this question, we apply the time-tested analysis first articulated in *Seabrook Foods, Inc. v. Bar-Well Foods, Ltd.*, 568 F.2d 1342, 196 USPQ 289 (CCPA 1977). Under *Seabrook*, we consider the packaging design and determine:

Whether the product packaging design is a common basic shape or design;

Whether the product packaging design is unique or unusual in the particular field;

Whether the product packaging design is a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods viewed by the public as dress or ornamentation for the goods; and

Whether the product packaging design is capable of creating a commercial impression distinct from any accompanying words.

The relevant *Seabrook* factors overlap in this case. Professor McCarthy has observed that "[i]n reality, all three [*Seabrook*] questions are merely different ways to ask whether the design, shape or combination of elements is so

unique, unusual or unexpected in this market that one can assume without proof that it will automatically be perceived by customers as an indicia of origin -- a trademark." J.T. McCarthy, McCarthy on Trademarks and Unfair Competition, §8.02[4] (3d ed. 1993). "Thus the focus of the inquiry is whether or not the trade dress is of such a design that a buyer will immediately rely on it to differentiate the product from those of competing manufacturers; if so, it is inherently distinctive." *Tone Brothers Inc. v. Sysco Corp.*, 28 F.3d 1192, 31 USPQ2d 1321, 1331 (Fed. Cir. 1994), citing *Paddington Corp. v. Attiki Importers & Distributors, Inc.*, 996 F.2d 577, 27 USPQ2d 1189, 1192-93 (2d Cir. 1993). The facts of each case must dictate the determination. See *Hoover Co. v. Royal Appliance Manufacturing Co.*, 238 F.3d 1357, 57 USPQ2d 1720 (Fed. Cir. 2001) ("The issue of inherent distinctiveness is a factual determination made by the board."). The examining attorney does not have a heavy burden in establishing a prima facie case that a mark is not inherently distinctive. The examining attorney need only establish a "reasonable predicate" to make the necessary prima facie showing. *In re Pacer Technology*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003), citing, *In re*

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*Loew's Theatres, Inc.*, 769 F.2d 764, 226 USPQ 865, 868  
(Fed. Cir. 1985).

The record includes two declarations with related exhibits introduced by applicant. Mr. Stoeckel in his first declaration states that applicant has extensively advertised and promoted its product packaging design mark in connection with forty different ammunition products. According to Mr. Stoeckel, applicant has made a conscious effort to emphasize and prominently display the design mark and to associate it in the minds of consumers with the ammunition products offered by applicant. He indicates that the design mark remains substantially unchanged among the various uses and, thus, presents a separate and distinct commercial impression.

In his second declaration Mr. Stoeckel indicates that applicant has expanded its use of the design mark on additional products and in promotional materials. He reiterates that applicant has made a continuous effort to consistently display the design mark in the same manner throughout its use.

Each declaration is accompanied by a variety of exhibits, including, in pertinent part, examples of the packaging design for applicant's different products; a trade show display that shows the packaging; downloadable

computer wallpaper showing the packaging design;<sup>2</sup> third-party retailers' use of the design in their advertising of applicant's ammunition; and applicant's advertising.

The product description of applicant's ammunition sold under the mark FUSION indicates that while this specific ammunition delivers exceptional performance on other thin-skinned game, FUSION brand ammunition is "made specifically for deer hunting," and that the product is "optimized for deer." (see, e.g., [www.cabelas.com](http://www.cabelas.com)). The record does not show any use of the design separate and apart from its use in connection with applicant's mark FUSION.

The record includes examples of the product packaging of competitors in the ammunition industry. The packaging shows a variety of hunted game, including deer, bear, ducks and elk. Of particular importance in the present case is the packaging showing a variety of pictorial representations of deer, ranging from full body deer to deer silhouettes to a deer head with antlers. No matter the type of pictorial representation, the deer is always displayed with antlers. Other packaging shows the use of colors such as red, yellow and orange, presumably to

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<sup>2</sup> The wallpaper shows the product packaging design covering the entirety of a box of ammunition along with the mark FUSION. The entire box design is significantly covered by a lock and chain, along with the words "Let It Loose."

suggest an explosion caused by the ammunition.

Applicant's design essentially covers the entire box in which applicant's ammunition is sold. At the outset we readily concede that the colors in applicant's packaging are very bright. That is insufficient, however, to transform the packaging into an inherently distinctive trademark for applicant's goods. In a news release, applicant refers to "Fusion, a competitively priced, high-tech center fire rifle ammunition, burst on the scene with eye-catching packaging and eye-popping performance." However, the "eye-catching" packaging is due more to the bright colors than to the inherent distinctiveness of the overall packaging design. Further, even when the other elements of applicant's mark are added and the design mark is considered as a whole as described in applicant's description of its mark, we find that the product packaging design is not inherently distinctive. That is to say, the combination of the swirling bright colors and the deer antlers, as described in the description of the mark, is not so unique, unusual or unexpected in the ammunition market to conclude that the design automatically is perceived as a trademark for applicant's ammunition.

We find that the design is employed as a background for the display of applicant's mark FUSION. When used in

this fashion, the purchasing public would be unlikely to regard the design as identifying and distinguishing applicant's ammunition and indicating its source. See *In re Soccer Sport Supply Company, Inc.*, 507 F.2d 1400, 184 USPQ 345, 347 (CCPA 1975) ("An ornamental design can be inherently distinctive if it is arbitrary and distinctive and if its principal function is to identify and distinguish the source of the goods to which it is applied, ornamentation being merely incidental. However, a design which is a mere refinement of a commonly-adopted and well-known form of ornamentation for a class of goods would presumably be viewed by the public as a dress or ornamentation for the goods." (citations omitted)).

As noted above, the record includes examples of deer with antler designs appearing on boxes of ammunition of competitors. Other boxes show uses of the colors red, yellow and orange. We find that the evidence of record supports the examining attorney's position that deer with antlers designs, and the colors red, yellow and orange are relatively common in the ammunition trade, and that usage thereof is not unique. Applicant's design, as utilized on the boxes for applicant's ammunition, is essentially a mere decorative or ornamental background for the display of its mark FUSION. See *In re F.C.F., Inc.*, 30 USPQ2d 1825 (TTAB

1994). Although we recognize that the record does not show any other uses of the same specific combined design employed by applicant, the design appears to be no more than a mere refinement of a basic, relatively common form of decoration for ammunition packaging and would be so regarded by the public. That is to say, while the design sought to be registered may be unique in the sense that there is no evidence that anyone else in the ammunition trade is using a design which is identical to it, it is nonetheless not inherently distinctive. Again, while the bright colors of applicant's packaging may enable this packaging to stand out when compared to competitors' packaging in the ammunition trade, we not persuaded that applicant's overall design was, at the time of adoption and first use, an inherently distinctive design that achieved instant recognition as a trademark denoting origin of applicant's ammunition. The fact that the design covers the entire surface of the packaging adds to our view that buyers will not perceive the design as a source indicator.

Applicant also points to the existence of registrations owned by it and by third parties that, according to applicant, are for marks comprising other types of background designs that issued on the Principal Register as inherently distinctive marks. Suffice it to

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say that each case must be decided on its own facts. We are not privy to the files in those registrations and, in any event, we are not bound by the prior actions of examining attorneys. See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the board or this court.").

**Decision:** The refusal to register is affirmed.