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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	79014936
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re the Applications of

RIGHT-ON CO., LTD.

Serial Nos.: 79/014,936 and 79/014,939

Filed: July 8, 2005

Mark: Designs

Examining Attorney: Gina Fink

Law Office 109

Docket Nos.: 128692 and 128689

Trademark Trial and Appeal Board
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

APPLICANT'S REPLY BRIEF

In connection with the above-referenced trademark applications, and in response to the Examining Attorney's Appeal Brief, Applicant submits that the Examining Attorney's refusal to register the marks under Trademark Act §§1, 2 and 45, 15 U.S.C. §§1051, 1052 and 1127, should be reversed. The evidence of record shows that the marks in the present applications are inherently distinctive. This can be seen from the marks' distinct appearance, from common market practices in the clothing industry, and from prior registrations existing on the U.S. Patent and Trademark Office database. As such, the refusal should be reversed and the applications should be allowed to proceed to registration.

I. The Distinct Appearance of the Marks Will Cause Consumers to View Them as Source Identifiers

A review of the marks in the present applications shows that consumers will readily view the marks as source identifying trademarks. Contrary to the assertions of the Examining

Attorney, the shapes of the marks in the present applications are unique and arbitrary. The marks in the present applications are not common shapes, but rather represent unique designs that would be easily identifiable by consumers as source identifying trademarks. Specifically, the mark in Application Serial No. 79/014,939, represents two distinct double arches, having the appearance of a large, swooping checkmark reflected in a mirror image. The mark in Application Serial No. 79/104,936, is again a mirror image, or waves. This design appearance is achieved by a swooping reverse arc, followed by a large elaborate v-shape. These distinct designs are unique and arbitrary. As such, consumers will readily recognize these marks as source identifiers.

Applicant agrees that the four factors listed by the Examining Attorney are the proper criteria for determining whether a design is inherently distinctive: whether the design is a common basic shape or design; whether the design is unique or unusual in the field for the identified goods; whether the design is a mere refinement of a commonly adopted and well-known form of ornamentation for the particular class of goods; and if presented together with text or other matter, whether the design is capable of creating a commercial impression distinct from any accompanying matter (such as wording). *See, e.g., In re F.C.F. Inc.*, 30 USPQ2d 1825, 1827 (TTAB 1994); *In re Chung, Jeanne & Kim Co.*, 226 USPQ 938, 941 (TTAB 1985).

In analyzing Applicant's marks, it is clear that they are inherently distinctive. First, Applicant's marks are not common shapes or designs, rather, each mark represents a distinct and unique stitching pattern, meant to distinguish Applicant's goods from those of other clothing manufacturers. The distinct double arches in Application Serial No. 79/014,939 and the swooping reverse arc, followed by an elaborate v-shape in Application Serial No. 79/104,936, are anything but common. In fact, these designs are elaborate and unique, meant to catch the eye of consumers and distinguish Applicant's goods.

A review of the many pocket stitching designs of record shows that Applicant's marks are unique and very unusual in the field of the identified goods. Applicant's marks are not like any other pocket stitching design of record with respect to the appearance, shape and style of the mark.

Nor do the marks represent a mere refinement of a commonly adopted, well-known form of ornamentation. As the record demonstrates, the use of pocket stitching designs in the clothing industry is not a form of ornamentation, but is rather a common method of source identification. Clothing manufacturers commonly use pocket stitching designs to distinguish their goods from those of their competitors. As such, Applicant has not merely refined a common form of ornamentation, but rather, in crafting its marks, Applicant has held true to the common practices of its industry in presenting source identifying pocket stitching designs on its clothing.

Finally, Applicant's pocket stitching designs are presented along with the clothing pockets themselves. When viewed in conjunction with the overall common pocket shape, Applicant's marks create a unique commercial impression. The highly unique and arbitrary nature of Applicant's marks will, when viewed in connection with the pocket-shapes upon which the marks are located, give consumers a clear indication as to the source of the goods. Consumers will readily identify these designs as a whole, recognizing them as indicators that these goods are offered by Applicant.

II. It is Common Market Practice to Use Pocket Stitching Designs as Source Identifiers

The evidence of record shows that it is common market practice to use pocket stitching designs as trademarks. This common market practice is shown in the large number of trademarks that are currently displayed on pockets and used as source identifiers by the

consuming public. The record provides a large number of examples of clothing manufacturers using this very location to display their source identifying trademarks. The sheer number of clothing manufacturers using this location to display their trademarks shows that the consumer base is well conditioned to view pocket stitching designs as trademarks.

In sharp contrast, there is only minimal evidence in the record that pocket stitching designs are used for ornamentation. In fact, the weight of the evidence of record shows pocket stitching designs being used as source identifiers. For instance, the New York Times article excerpt provided by the Examining Attorney in her response to the Request for Reconsideration cites nearly 100 lawsuits that Levi's is currently pursuing to enforce its pocket stitching designs. This aggressive enforcement of Levi's designs shows that the company considers them important source identifiers. Further, the website screenshots from Wikipedia.com evidences the great diversity of pocket stitching designs currently being used in the marketplace as source identifiers by virtually all major jean manufacturers (http://jeans/pbwiki.com/JeanPocketProject (March 7, 2007)). In each case, the jean maker's distinct pocket stitching pattern serves as the primary source identifier for the goods. When viewed in its entirety, the weight of the evidence of record clearly shows that pocket stitching designs are used as source identifiers in the marketplace.

Because Applicant's marks are so unique, and because consumers are so highly conditioned to look to pocket stitching designs as source identifiers, the marks in the present applications are inherently distinctive and should be allowed registration on the Principal Register.

III. Similar Third Party Trademark Marks are Treated as Inherently Distinctive

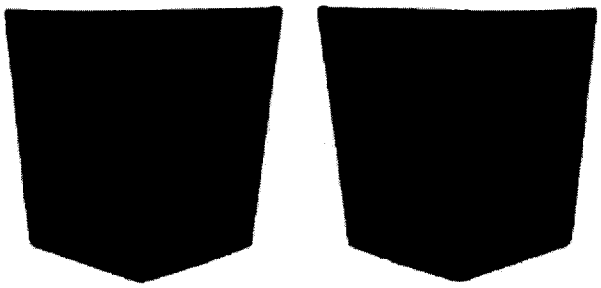
Applicant's marks are at least as unique and distinctive as any other pocket stitching design mark appearing on the Principal Register. The Examining Attorney's attempt to differentiate the marks in such trademark registrations from the marks in the present applications is arbitrary. As to U.S. Registration No. 0404248, the Examining Attorney merely states "the use of orange colored thread or orange paint to create the design may have been viewed as unique or eye-catching" (Examiner's Appeal Brief). Such conjecture does not distinguish the mark in this registration from the mark in the present applications. There is no evidence of record that shows that when an orange color is used in connection with pocket stitching designs, the designs are any more or less distinct. The design in this cited registration is, in fact, similar in its basic style to that in the present applications. The Examining Attorney's attempt to distinguish these two designs is unfounded.

The Examining Attorney states that the pocket stitching designs in Registrations Nos. 3114494, 3035822 and 3001859 are inherently distinctive because they represent words or letters. However, any such lettering that these marks represent is vague at best. The overall commercial impression of the marks in each of these registrations is merely that of a pocket stitching design, and not of any specific lettering.[1] Thus, the Examining Attorney's attempt to distinguish these marks, which appear on the Principal Register, from the marks in the present applications is unfounded.

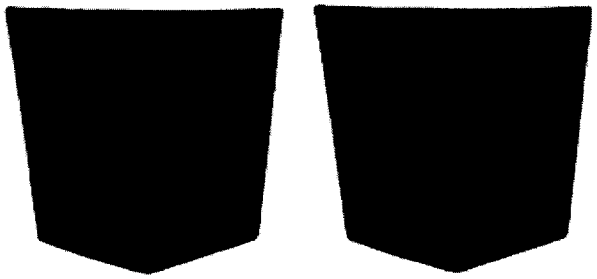
[1] To the extent that these designs may suggest lettering, Applicant's marks do the same. For example, the mark in Application Serial No. 79/014,939 could equally be said to suggest mirrored "N"s, or a curvaceous "M" or "W", and the mark in Application Serial No. 79/014,939 could equally be said to suggest a "W" or mirrored "b" and "d".

The Examining Attorney has completely ignored a number of other trademark registrations for pocket stitching designs that appear on the Principal Register without the benefit of an acquired distinctiveness claim. See Registrations Nos. 577490, 1139254, and 2791156. Each of these registrations provides further strong evidence of the fact that pocket stitching designs such as those offered under the present applications are inherently distinctive and should be allowed on the Principal Register. In addition, Applicant's own prior registrations provide evidence of this same point. See Registrations Nos. 3090433, 3104095, and 3106997. The marks featured in these trademark registrations are very similar to Applicant's present marks, and are as follows:

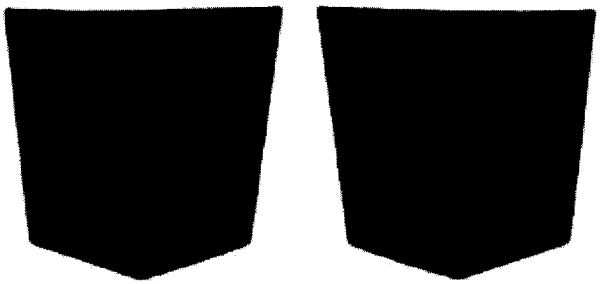
Registration No. 3090433:



Registration No. 3104095



Registration No. 3106997:



A review of the significant number of registrations currently appearing upon the Principal Register without a claim of acquired distinctiveness provides strong evidence that the U.S. Patent and Trademark Office correctly treats pocket stitching designs like the marks in the present applications as inherently distinctive. As such, the marks in the present applications are entitled to registration on the Principal Register.

As to the registrations cited by the Examining Attorney showing pocket stitching designs on the Supplemental Register, Applicant has shown that the weight of third party registrations of record indicates that pocket stitching designs are more often than not considered distinctive. Further, as to the third party registrations of record for pocket stitching designs that appear on the Supplemental Register, the record provides no indication of why these registrations were filed on the Supplemental Register. There is no evidentiary basis to conclude from the presence of these registrations on the Supplemental Register that this means the pocket stitching designs are ornamental. These marks could appear on the Supplemental Register for other reasons. Thus the fact of their presence on the Supplemental Register is inconclusive. It certainly does not "demonstrate that stitching patterns are generally viewed as non-distinctive."

IV. Conclusion

The shapes of Applicant's marks are both unique and arbitrary, and in light of market practices of record, it is clear that such pocket stitching designs are commonly used as source

identifying trademarks. Applicant's marks are at least as unique as any other pocket stitching design mark currently registered on the Principal Register. Thus, Applicant's marks are inherently distinctive and the refusal should be reversed.

Respectfully submitted,

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