

This Opinion is not a
Precedent of the TTAB

Mailed: April 19, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re National Presto Industries, Inc.
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Serial No. 85883551
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Tye Biasco of Patterson Thuyente Pedersen, P.A.,
for National Presto Industries, Inc.

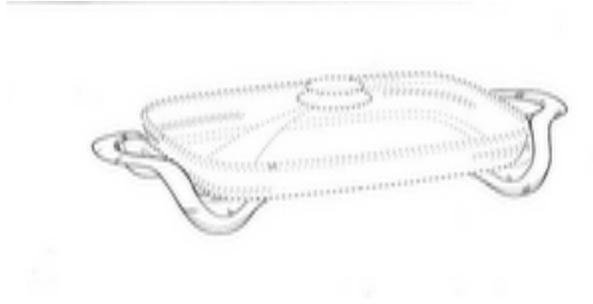
Priscilla Milton, Trademark Examining Attorney, Law Office 110,
Chris A. F. Pedersen, Managing Attorney.

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Before Wellington, Lykos and Pologeorgis,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

National Presto Industries, Inc. (“Applicant”) seeks registration on the Principal Register under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), of the product design mark, as displayed below, for goods identified as “electric skillets” in International Class 11.¹

¹ Application Serial No. 85883551 was filed on March 22, 2013, based upon Applicant’s allegation of use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming April 30, 2005 as both the date of first use and the date of first use in commerce. The Board notes that Applicant initially filed its application without a claim of acquired distinctiveness but the application was later amended during prosecution to seek registration under Section 2(f) of the Trademark Act.



The description of the mark reads as follows:

The mark consists of three dimensional configuration of an electric skillet having a combination leg/handle located on each of the short sides of the generally rectangular cast metal base, each combination leg/handle being a curved "A" shape in top view that is attached to the underside of the cast metal base proximate the front and rear of the generally rectangular cast metal base such that the top of the handle is proximate the top of the generally rectangular cast metal base. The lines of the electric skillet are intended to indicate the three-dimensional shape of the electric skillet and do not indicate color or texture. The broken lines indicate placement of the glass lid and knob on the generally rectangular metal base skillet, but no claim is made to the shape or appearance of the glass lid, knob and the generally rectangular cast metal base identified by the broken lines.

The specimen of record consists of a four-page instructional manual of Applicant's goods. Applicant's applied-for mark is displayed on the first page of the manual, as illustrated below.

PRESTO[®]

Electric Skillet
with glass cover

- Roasts, fries, grills, stews, bakes, makes casseroles and more.
- Luxurious tempered glass cover.
- Deluxe nonstick surface for stick-free cooking and easy cleaning.

Estas instrucciones también están disponibles en español.
Para obtener una copia impresa:
• Descargue en formato PDF en www.GoPresto.com/espanol
• Envíe un mensaje de correo electrónico a contact@GoPresto.com
• Llame al 1-800-877-0441, opción 2 y deje un mensaje.





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Visit us on the web at www.GoPresto.com

INSTRUCTIONS

The Examining Attorney refused registration on the ground that Applicant's applied-for mark consists of a non-distinctive product design of the goods that does not function as a mark under Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§ 1051-1052 and 1127, and has not acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f).²

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. Both Applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register for the reasons stated below.

Acquired Distinctiveness

Applicant admits that its configuration mark is not inherently distinctive by seeking registration under Section 2(f). *In re MGA Entm't, Inc.*, 84 USPQ2d 1743, 1747 (TTAB 2007) (application under Section 2(f) is a concession that the mark is not inherently distinctive). The sole issue before us, therefore, is whether Applicant has overcome the refusal of its mark as a non-distinctive product design by making a *prima facie* showing that the relevant consumers perceive the design of the combination leg/handle of its electric skillets as a trademark. Applicant bears the burden of proving that its product design has acquired distinctiveness. *Yamaha Int'l*

² During the prosecution of Applicant's application, the Examining Attorney had also refused registration under Section 2(e)(5) of the Trademark Act, 15 U.S.C. § 1052(e)(5), on the ground that Applicant's proposed mark is a functional configuration of the goods but that refusal was subsequently withdrawn. *See* July 21, 2014 Office Action.

Corp. v. Hoshino Gakki Co., 840 F.2d 1572, 6 USPQ2d 1001, 1004 (Fed. Cir. 1988); *In re Hollywood Brands, Inc.*, 214 F.2d 139, 102 USPQ 294, 295 (CCPA 1954) (“There is no doubt that Congress intended that the burden of proof [under Section 2(f)] should rest upon the applicant ...”). Whether acquired distinctiveness has been established is a question of fact. *In re Becton, Dickinson and Co.*, 675 F.3d 1368, 102 USPQ2d 1372, 1375 (Fed. Cir. 2012).

A product design or, as in this case, the design of a portion of a product, “is not inherently distinctive.” *Wal-Mart Stores Inc. v. Samara Bros. Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000). However, a product design that provides no real utilitarian advantages to the user, but is one of many equally feasible, efficient and competitive designs, may be registrable upon a showing of acquired distinctiveness pursuant to Section 2(f). *See id.* at 1076. *See also In re Slokevage*, 441 F.3d 957, 78 USPQ2d 1395, 1398 (Fed. Cir. 2006). The kind and amount of evidence necessary to establish that a mark has acquired distinctiveness in relation to goods or services depends on the nature of the mark and the circumstances surrounding the use of the mark in each case. *Yamaha Int’l Corp.*, 6 USPQ2d at 1008; *Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 166 USPQ 34, 39 (CCPA 1970); *In re Hehr Mfg. Co.*, 279 F.2d 526, 126 USPQ 381, 383 (CCPA 1960).

In cases of product design, the evidence provided to establish acquired distinctiveness must relate to the promotion and recognition of the specific configuration embodied in the applied-for mark and not to the goods in general. *See Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 214 USPQ 1, 4 n.11 (1982) (“To

establish secondary meaning, a manufacturer must show that, in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.”); *see, e.g., In re Bongrain Int’l Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990) (sales success may not suffice to prove that a mark has acquired distinctiveness where other marks were featured along with it or where sales growth could be attributed to the product’s popularity; *In re McIlhenny Co.*, 278 F.2d 953, 126 USPQ 138, 140-41 (CCPA 1960) (promotion of a bottle design bearing other trademarks insufficient under § 2(f) to show that the public views the bottle design alone as a trademark). *Cf. In re Chem. Dynamics, Inc.*, 839 F.2d 1569, 5 USPQ2d 1828, 1830 (Fed. Cir. 1988) (5 years’ use of composite mark does not speak to the issue of whether a component is viewed by itself as a mark); *In re Soccer Sport Supply Co.*, 507 F.2d 1400, 184 USPQ 345, 348 (CCPA 1975) (advertising of a design along with word marks lacked the “nexus” that would tie together use of the design and the public’s perception of the design as an indicator of source).

Ultimately, to establish acquired distinctiveness, an applicant must show that the product configuration sought to be registered is perceived by consumers as not just the product but, rather, that the design identifies the producer or source of the product. This may be shown by direct and/or circumstantial evidence. Direct evidence includes actual testimony, declarations or surveys of consumers as to their state of mind. Circumstantial evidence, on the other hand, is evidence from which consumer association might be inferred, such as years of use, prior registrations, extensive

amount of sales and advertising, unsolicited media coverage, and any similar evidence showing wide exposure of the mark to consumers. *See* 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 15:30 (4th ed. Updated 2015).

In support of its claim of acquired distinctiveness, Applicant has submitted the declaration of Douglas J. Frederick, Secretary and General Counsel of Applicant (“Frederick Decl.”). *See* July 22, 2014 Response to Office Action. Mr. Frederick declares the following:

The Mark has been used as the product design and trade dress for one of Applicant’s electric skillets since at least April 21, 2005.

At least \$65,000,000 worth of electric skillets (at wholesale value) bearing the product design and trade dress of The Mark have been sold by Applicant as of the date of November 4, 2013.

The Mark appears in Applicant’s instruction manuals, on its website, and on its product packaging.

Through advertising allowances provided to retailers, Applicant has spent more than Five Million Dollars advertising its electric skillets, which utilize The Mark. As a result, The Mark is widely associated with Applicant’s product among consumers.

Numerous pieces of advertising Applicant’s electric skillets, which utilize The Mark, have been distributed and numerous catalogues containing information regarding the electric skillets have been distributed.

Applicant’s customer service department receives emails and telephone calls from persons both inside and outside the state of Wisconsin who associate The Mark with Applicant’s electric skillets.

Throughout the years, more than 80,000 copies of product catalogues that have utilized The Mark have been printed and distributed.

Additionally, by way of his declaration, Mr. Frederick introduces copies of the following exhibits:

1. A copy of an advertisement that can currently be found on Applicant's website that displays Applicant's mark, *see* Exhibit A of the Frederick Declaration;
2. Copies of product sheet advertisements using Applicant's mark that have been distributed to numerous potential retailer purchasers throughout several years of using Applicant's mark, *see* Exhibit B of the Frederick Declaration; and
3. Copies of certain pages from Applicant's annual catalogues from 2005 until 2014 that display Applicant's mark, *see* Exhibits C-M of the Frederick Declaration.

A representative sampling of the exhibits are displayed below.

The image is a screenshot of a Presto website advertisement. At the top, there is a banner with the Presto logo on the left, "National Presto Industries, Inc." on the right, and "Happy Thanksgiving!" in large white text in the center. Below the banner is a yellow navigation bar with five tabs: "Products and Parts", "Cooking and Recipes", "Information", "Account", and "Contact". The main content area is divided into two columns. The left column features the Presto logo, the product name "16-inch Electric Skillet with Glass Cover", and a photograph of the black electric skillet with its glass lid. Below the photo, there is a red headline: "Roasts, fries, grills, stews, bakes, makes casseroles and more." followed by a bulleted list of features: "Big 16-inch base and high sidewalls provide for extra cooking and serving capacity.", "Luxurious styling and tempered glass cover enable it to double as a buffet server when entertaining.", "Heavy cast aluminum base is virtually warp-proof. Deluxe nonstick surface, inside and out.", "Saves energy because it is more efficient than using a range burner or oven.", "Fully immersible and dishwasher safe with the heat control removed.", and "One year limited warranty." At the bottom left of this column, it says "STOCK NO. 06852. 120 Volts AC. 1500 Watts." The right column contains a "Welcome, Guest" message with "Home" and "Log In" buttons, a "Shopping Cart" showing "0 items", a note that "Presto products are available at your favorite retailer or online at:" followed by an "amazon.com" logo and a "Shop Now" button, and a "GODADDY VERIFIED & SECURED" security badge.

PRESTO®

16-inch Electric Skillet with glass cover

www.GoPresto.com



- This attractive skillet is handy for every meal! It roasts, fries, grills, stews, bakes, makes casseroles and more.
- Big 16-inch base and high sidewalls provide for extra cooking and serving capacity. Luxurious styling and tempered glass cover enable it to double as a buffet server when entertaining.
- Heavy cast aluminum base is virtually warp-proof. Deluxe nonstick surface, inside and out.
- Saves energy because it is more efficient than using a range burner or oven.
- Fully immersible with the heat control removed.



Control Master® heat control maintains proper cooking temperature automatically.

Electric Skillets

This generous-sized electric skillet with tempered glass cover is great for breakfast, lunch, dinner, and appetizers. It features high sidewalls that provide extra cooking and serving capacity as well as attractive styling that enables it to double as a buffet server when entertaining. The Control Master® heat control maintains accurate cooking temperatures automatically.

Enjoy stick-free cooking and easy cleaning with the deluxe nonstick finish, inside and out. Skillet is completely immersible and dishwasher safe with the heat control detached.

16-inch Electric Skillet with glass cover
120 volts AC, 1500 watts
Stock No. 06852



06852

Family meals and buffet-style serving are a breeze in this attractive nonstick skillet with tempered glass cover. It roasts, fries, grills, stews, bakes, and makes one-dish meals with the convenience of stick-free cooking and easy cleaning.

The Control Master® heat control automatically maintains the desired cooking temperature. Skillet and cover are fully immersible and dishwasher safe with the heat control removed.

11-inch Electric Skillet with glass cover
120 volts AC, 1000 watts
Stock No. 06626



06626

Applicant also submitted advertising of competitor's skillets. *See* June 30, 2014 Response to Office Action.

Having carefully reviewed the totality of the evidence of record, including the specimen of record, we agree with the Examining Attorney that Applicant has failed to establish acquired distinctiveness of its proposed mark within the meaning of Section 2(f). In this case, Applicant has sold its identified goods for over ten years, and Applicant has provided several years of U.S. sales data regarding dollar figures of its electric skillets. We acknowledge that these figures are not insubstantial.

Nonetheless, “mere figures demonstrating successful product sales are not probative of purchaser recognition of a configuration as an indication of source.” *Stuart Spector Designs Ltd. v. Fender Musical Instruments*, 94 USPQ2d 1549, 1572 (TTAB 2009) (citing *Braun Inc. v. Dynamics Corp.*, 975 F.2d 815, 24 USPQ2d 1121, 1133 (Fed. Cir. 1992)); see *In re Bongrain Int'l (Am.) Corp.*, 13 USPQ2d at 1729 (growth in sales may be indicative of popularity of product itself rather than recognition of the asserted mark as denoting origin). A high volume of sales does not always amount to a finding of acquired distinctiveness, especially in applications involving marks comprised of product designs, as is the case here. See e.g., *Goodyear Tire & Rubber Co. v. Interco Tire Corp.*, 49 USPQ2d 1705 (TTAB 1998) (\$56,000,000 sales revenues and 740,000 tires sold insufficient to show acquired distinctiveness of tire tread design).

As noted above, in a product design application, the critical inquiry is whether the product design is being used and advertised in the marketplace in such a manner that consumers associate the product design with a particular applicant, and therefore view the product as emanating from a single source. See *Stuart Spector*, 94 USPQ2d at 1572 (“To determine whether a configuration has acquired distinctiveness, advertisements must show promotion of the configuration as a trademark.”). Sample advertisements showing “look-for” types of promotional efforts from an applicant may be particularly probative on the issue of whether a product design functions as a source identifier. “Look for’ advertising refers to advertising that directs the potential consumer in no uncertain terms to look for a certain feature to know that it is from that source. It does not refer to advertising that simply

includes a picture of the product or touts a feature in a non source-identifying manner.” *Id.* Here, however, the record is devoid of “look for” advertising. *Cf. Owens-Corning*, 227 USPQ at 423-24 (describing effective “look for” advertising). Applicant’s product packaging and promotional materials bear none of this type of advertising.

Although it is clear from the record that Applicant's line of electric skillets has been actively promoted and sales have been significant, there is very little evidence from which we can conclude that prospective electric skillet purchasers view the shape of the combination leg/handle of Applicant’s electric skillets as an indication of the source of those skillets.

Neither Mr. Frederick’s statements regarding the number of sales, the dollar amount of advertising, and the length of the use of Applicant’s mark, nor the exhibits to his declaration establish that the product design is, or is likely to be, perceived as a trademark by prospective electric skillet purchasers. While the evidence submitted by Applicant displays Applicant’s electric skillets, including the combination handle/leg product design, and touts a few features of the product, none of the evidence demonstrates an attempt by Applicant to draw viewers’ attention to the combination leg/handle design as an indication of source of the goods. For example, the advertising submitted by Applicant states the following about Applicant’s electric skillets:

- Roast, fries, grills, stews, bakes, makes casseroles and more.
- Big 16-inch base and high sidewalls provide for extra cooking and serving capacity.

- The generous-sized electric skillet with tempered glass cover is great for breakfast, lunch, dinner, and appetizers.
- This skillet is perfect for frying, grilling, roasting, stewing, baking, and making casseroles.
- Luxurious styling and tempered glass cover enable it to double as a buffet server when entertaining.
- Heavy coat aluminum base is virtually warp-proof. Deluxe nonstick surface, inside and out.
- Saves energy because it is more efficient than using a range burner or oven.
- Fully immersible and dishwasher safe with the heat controlled moved.
- The Control Master® heat control maintains accurate cooking temperatures automatically.

See Exhibits A-M to Frederick Decl.

None of the foregoing statements even refer to Applicant's combination leg/handle product design much less tout the product design as a source indicator of Applicant's goods. Moreover, although Mr. Frederick's declaration attests to long usage, significant sales, and millions of dollars of advertising, we simply cannot give Mr. Frederick's self-serving statements that (1) "[a]pplicant's customer service department receives emails and telephone calls from persons both inside and outside the state of Wisconsin who associate the mark with Applicant's electric skillets," or (2) the amount of Applicant's advertising has resulted in consumers widely associating Applicant's product design mark with Applicant's electric skillets much probative value inasmuch as these statements are not corroborated by any direct or circumstantial evidence. *See In re The Outdoor Recreation Group*, 81 USPQ2d 1392,

1399 (TTAB 2006) (“Applicant’s long use suggests that applicant has enjoyed a degree of business success. Nonetheless, this evidence does not demonstrate that its customers have come to view the designation OUTDOOR PRODUCTS as applicant’s source-identifying trademark.”). Further, the fact that Applicant has distributed 80,000 copies of its product catalogues that include Applicant’s electric skillets also does not establish that Applicant’s product design mark has acquired distinctiveness, particularly since the portions of the catalogues that feature Applicant’s skillets do not tout Applicant’s product design mark as a source indicator of Applicant’s goods. Finally, the submission of advertising of competitors’ electric skillets similarly is not probative because this evidence does not demonstrate that Applicant’s combination leg/handle product design mark functions as an indicator of source of Applicant’s electric skillets.

In conclusion, Applicant has presented insufficient evidence from which to conclude that the non-inherently distinctive product design that is the subject of its application has acquired distinctiveness as a source identifier in connection with Applicant's electric skillets.

Decision: The refusal to register under Sections 1, 2 and 45 of the Trademark Act on the ground that Applicant’s mark is a non-distinctive product design and that Applicant has not established acquired distinctiveness under Section 2(f) of the Trademark Act is affirmed.