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

Ex Parte Appeal - Serial No.	97069982
Appellant	Loops, LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

LOOPS LLC, a Delaware limited liability
company,

Appellant

Serial No.: 97/069,982

EX PARTE APPEAL

Mark: “3-D Floss Bundle”
International Class 021: Dental floss

APPEAL BRIEF

In accordance with the Notice of Appeal filed January 2, 2023, LOOPS LLC (“Appellant”), by and through its undersigned counsel, hereby respectfully submits its Appeal Brief in accordance with 37 C.F.R. §2.142(b)(2) and 37 C.F.R. §2.126. The requisite fee under §2.6(a)(18)(vi) is additionally submitted herewith.

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I. INDEX OF AUTHORITIES

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II. DESCRIPTION OF RECORD

A. Prosecution History

The present trademark application for registration for the PRESENTATION and 3-DIMENSIONAL APPEARANCE of a DENTAL FLOSS PRODUCT (“the mark”) was filed on October 12, 2021 making a Section 2(f) claim for being in use since 1997. On January 16, 2022 a first Office Action (“first non-final refusal”) was issued refusing registration and alleging that the applied-for mark does not function as a trademark (“Failure to Function”) because it is simply the goods themselves (dental floss bundle); additionally, the mark was refused because the original specimen submitted was inadequate (“Specimen Not on Mark”).

On February 2, 2022, Appellant responded to the first refusal by asserting the mark’s distinctiveness is embodied in the color blue and its unique looped shape comprising bands instead of the typical string dental floss. A substitute specimen was further submitted. We also respectfully requested that the Office not to use “floss loops” in a descriptive manner since we claim the words Floss Loops™ as our word mark.

On February 18, 2022 a second Office Action and first Final Refusal (“first final refusal”) was issued maintaining the first non-final refusal by stating Appellant’s arguments were unpersuasive lacking any evidence and that statements regarding length of use (since 1997) are conclusory. No allegations or comments regarding the mark’s distinctiveness were provided. Continued allegations regarding specimen inadequacy were also made. Further it was alleged that the specimen differs from the mark/drawing (“Specimen/Drawing Refusal”) because the drawing does not depict the bands lying precisely on top of one another when compared to the image containing the specimen. Also, the Failure to Function refusal was supplemented by a Non-Distinctive Product Design refusal citing Wal-Mart Stores, Inc. v. Samara Bros. stating that the applied-for mark consists of a non-distinct product design or non-distinct features of a product design that is not registerable on the Principle Register without a showing of acquired

distinctiveness, which was further deemed lacking evidence.

On June 22, 2022 the Appellant responded to the first final refusal by pointing out that remarks made were factual circumstantial evidence. Also importantly, Appellants asked for further clarification in its communication particularly regarding: (1) the specific color blue being identifying and distinguishing, (2) the distinctive product bands rather than string, and (3) the unusual loop rather than a fragmented waxen thread; and also, (4) duration of use threshold required for secondary meaning as we have 25 years and 4 million units sold. Further, Appellant responded to the Specimen/Drawing refusal by pointing out that the mark is an “arbitrary” bundle. Still further, evidence of distinctiveness and/or acquired distinctiveness was provided by intentional copying with a “Security 1 Dental Floss” product.

A Subsequent Final Refusal was issued on July 11, 2022 resetting the six-month response due date. The Failure to Function refusal was maintained with reasoning that the public would view the mark as the goods themselves which are non-distinctive and non-source identifying. Rebuttal for Appellants rationale for approval was provided by stating arguments are conclusory, lacking supporting evidence. The specimen was deemed acceptable; but however, the Specimen/Drawing Refusal was maintained again because the assortment of looped dental floss does not precisely match between the specimen and drawing; and the Office pointed out that fact applicant has applied for a mark where a substantially exact representation may not be possible does not obviate this requirement. The Office further took exception to black, white, and grey appearing in the drawing. The Non-Distinctive Product Design refusal was yet further maintained citing Samara Bros. as requiring acquired distinctiveness for which evidence is lacking.

On September 20, 2022, Appellant responded After Final alleging the Office disregarded or found unpersuasive reasons for approval without specific reasoning. Again, Appellant requested specific rationale particularly regarding why the product design is deemed non-distinctive when typical dental floss has a different appearance. Additionally, Appellant specifically asked how the mark can be deemed a “random assortment” while also being refused because the drawing and

specimen depict such randomness without reproducing an exact assortment. Additionally, language had been previously added to the mark description identifying black, white, and grey as not being features of the mark.

On September 22, 2022, the Office denied the Request for Reconsideration After Final Action generally stating Appellants failed to present analysis or arguments that were persuasive. Specifically, the Office regarded any Section (f) claim supporting evidence as not dispositive. The Office further considered evidence of intentional copying as not pertinent. The Office concluded by stating the remainder of Appellant's response appears to be a series of stated questions which do not actually respond to the refusals made.

On or about October 3, 2022, Appellant's representative called the Trademark Examining Attorney in an attempt to resolve issues and have previously presented questions answered. When asked for reasoning why the mark is considered non-distinctive the Trademark Examining Attorney declined to answer saying generally Appellant has not met its burden and such reasoning was provided previously in the first refusal, first final refusal, the subsequent final refusal, and the denial of the request for reconsideration after final. At which point, the interview was ended.

B. Examining Attorney Evidence.

The Office did not rely on evidence in making its refusals.

C. Appellant's Evidence.

An image of a product branded Security Dental being an intentional copy of the Appellants mark.¹

A summary of Floss Loops™ dental floss sales data from 1996 to 2021 being approximately 4 million 30 count packages.

¹ The specimen and drawing of record can be considered important evidence because they create an impression when viewed.

III. ARGUMENT

A. Statement of the Issues

FAILURE TO FUNCTION-is the mark distinctive and source identifying or rather does the public simply view the mark as the goods themselves? Can the mark be deemed inherently distinctive?

MARK ON DRAWING DIFFERS FROM SPECIMENT OF USE-does the mark appearing on the specimen and in the drawing depict a substantially exact representation of the mark?

NON-DISTINCTIVE PRODUCT DESIGN-Is the mark a product design, which in light of Samara Bros., can never be deemed inherently distinctive and therefore requires secondary meaning?

Is the CLAIM OF ACQUIRED DISTINCTIVENESS adequate and supported by evidence of record, if needed?

B. Analysis

1. The mark is very highly distinctive, even inherently so.

The mark consists of an appearance and presentation of an arbitrary bundle of a blue looped dental floss product. The product is shown to the public as a 30-count bundle. Further, each loop is a band comprising a distinctive shade of blue. Typical dental floss, as is well known to nearly every public person for at least generations, is presented in a spool and comprises a waxen string. Still further importantly, the relevant primary public is a subset of consumers consisting of institutional or correctional facilities. Floss Loops™ a safety dental product designed to prevent alternate use as a ligature and sold mostly to prison systems.

Additionally still, the mark is an appearance and presentation creating an impression, much like a restaurant's décor, See Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992); and

accordingly, the mark is not mere product design because it appears in an arbitrary bundle. The applied for mark is not a single loop, which may be construed as the goods or good itself and may fall under “product design” set forth in Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205 (2000).

Distinctiveness can be defined as something unique and not what a viewer may expect. The color blue is also identifying and distinctive. With regard to the Lanham Act, courts have consistently determined that without distinctiveness, no confusion as to origin would exist. Samara Bros. at 210. When the applied-for mark is compared to the intentional copy evidence of record, one can readily determine that confusion in the marketplace as to source would exist. A mark is inherently distinctive when its intrinsic nature serves to identify origin. Since we assert that the mark’s uniqueness would be rather instantly recognized, we argue the proper conclusion is that the mark is inherently distinctive. Or at the very least, the mark is very highly distinctive requiring a minimal measure of secondary meaning under §2(f).

2. The mark as depicted in the drawing and shown in the specimen of use is substantially an exact representation of the mark.

In the examination process, the Office will closely scrutinize any difference between the drawing and the specimen in a side-by-side comparison. Herein, the Office has correctly pointed out that the “randomness” of the way the bundle would lie is present in both the mark and specimen. We very strongly assert that in this case, an exact representation excluding “randomness” is not only unnecessary, but an error, because the public would not and could not perceive an exact representation as the source identifying mark. Indeed, the mark is an arbitrary bundle and clearly the drawing is “substantially” exact.

Trademarks are conceptually what the public perceives and are based in use. In this matter,

every package shipped and received is a random assortment. Logos are different because they are tangible. Restaurant décor and similar perception in the present matter are intangible. If the present matter was a logo, the Office would rightfully expect to see precisely the exact ridge detail, forensically speaking, between the drawing and the specimen logo. Here, as with restaurant décor, the public would not be perceiving the exact ridge detail drawing an analogy to fingerprints; rather, as stated, perception is of the random assortment and the specimen and drawing should be deemed substantially exact.

3. The mark is a presentation being more than a mere product design.

A product design can never be inherently distinctive as a matter of law; consumers are aware that such designs are intended to make goods more useful or appealing rather than identify their source, Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 212-213 (2000). But however, the present matter is not a mere product design because it is not one unit, rather a bundle. Moreover, it is a blue bundle presented in a fashion vastly different than anything previously offered previously.

4. The mark is an inherently distinctive presentation and does not require a showing of secondary meaning; but however, over 25 years of use and intentional copying are definitive in proving secondary meaning.

As stated, the mark is very highly distinctive due to the unique impression made and distinctive features; and nothing offered prohibits the mark from being deemed inherently distinctive. Intentional copying has been held pertinent evidence showing a mark has acquired secondary meaning, Converse, Inc. v. ITC, 909 F.3d 1110, 1120 (Fed. Cir. 2018).

Indeed as stated herein, “[w]here the proposed mark is product design, the copier may be trying to exploit a desirable product feature, rather than seeking to confuse customers as to the

source of the product.,” TMEP 1212.06(e)(i); In re Van Valkenburgh, 97 USPQ2d 1757, 1768 (TTAB 2001). However as stated, the present matter is a presentation more than mere “product design.” And, the copier copied the entire presentation in addition to product design. Further the exact shade of blue was copied, as is claimed in the mark description and drawing. So, the fact finder must now ask itself a reason why the exact shade of blue was copied. And, there can be no other reason besides attempting to trade off of goodwill being the acquired distinctiveness. Further, if no other reason exists or can be alleged, it is more than mere evidence of acquired distinctiveness, but instead proof thereof, like DNA.

VI SUMMARY

The Office has only dismissively stated that the Applicant remarks and evidence are conclusory, non-probative, or unpersuasive without underling reasoning specifically why the mark is not distinctive. Or, the Office refuses because any one factor such as greater than 5 years use or intentional copying is not dispositive. Even if no single factor is determinative, In re Steelbuilding.com, 415 F.3d 1293, 1300, (Fed. Cir. 2005), as in the case of determining acquired distinctiveness, when a fact finder digs deeper into the intent behind the intentional copying, there is no other reason to copy the exact presentation and shade of blue, other than to trade off goodwill. Thus, copying causes in confusion in the marketplace which the Lanham Act seeks to prevent. Moreover, the mark is inherently distinctive because it is a presentation creating an impression, different than any dental floss offered before; and the mark is more than a mere product design.

Respectfully submitted,

Dated: July 17, 2023

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