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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ennco Display Systems, Inc.

Serial No. 74/439,206
Serial No. 74/439,207
Serial No. 74/439,613
Serial No. 74/439,614
Serial No. 74/439,618
Serial No. 74/439,619
Serial No. 74/440,980
Serial No. 74/440,981

James R. Vance and Eric B. Zimbelman of Vance, Romero & Montague, P.S. for applicant.

Alan C. Atchison, Trademark Examining Attorney, Law Office 102 (Thomas Shaw, Managing Attorney).

Before Simms, Quinn and McLeod, Administrative Trademark Judges.

Opinion by McLeod, Administrative Trademark Judge:

There are two issues presented in this consolidated proceeding.[1] First, are the product configurations shown below inherently distinctive? Second, have the product configurations acquired distinctiveness?

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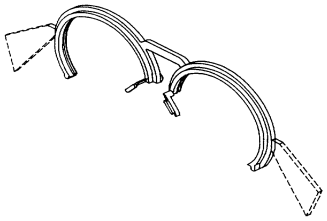
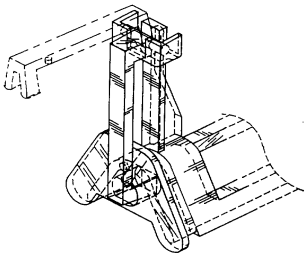
[1] On June 16, 1997, the Board consolidated eight ex parte appeals and ordered that the cases may be presented on a single brief and single decision.

I. PRODUCT CONFIGURATIONS

Ennco Display Systems, Inc. has filed applications to register the product configurations shown below as trademarks on the Principal Register for goods including eyeglass lens holders, eyeglass/spectacle frame display holders and brackets.



The mark consists of the configuration of an eyeglass lens holder.[2]



The mark consists of the configuration of an eyeglass/spectacle frame display holder.[3]

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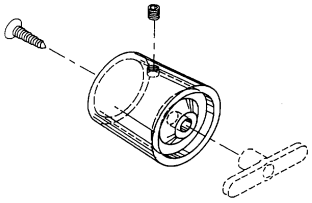
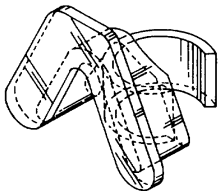
[2] Application Serial No. 74/439,206, filed September 23, 1993, alleging dates of first use of October 2, 1991. The description of the mark reads: "The mark consists of the configuration of an eyeglass lens holder. The dotted lines shown in the drawing represent handles which are attached to the lens holder but do not form part of the mark."

[3] Application Serial No. 74/439,207, filed September 23, 1993, alleging date of first use of July 10, 1988, and first use in commerce of November 28, 1988. The description of the mark reads: "The mark consists of the configuration of an eyeglass/spectacle frame display holder. The dotted lines appearing at the back of the configuration



The mark consists of the configuration of an eyeglass/spectacle frame display holder bracket.[4]



The mark consists of the configuration of an eyeglass/spectacle frame display holder.[5]

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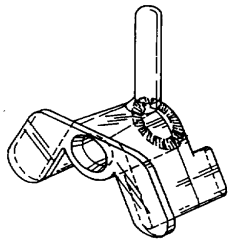
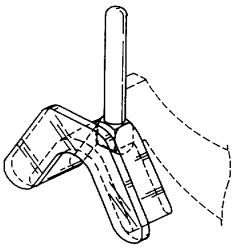
represent a mounting bracket to which the frame display holder may be attached but are not part of the mark. The dotted lines shown at the front of the configuration represent an outwardly extended pivotal locking arm of the frame display holder but are not part of the mark. The remaining dotted lines with respect to the face portion and inverted U-shaped or V-shaped portion of the eyeglass/spectacle frame display holder likewise do not form part of the mark but merely represent a three dimensional projection of related surfaces that are positioned behind this portion of the configuration. The miscellaneous lining shown in the drawing does not indicate color but is merely used to indicate shading."

[4] Application Serial No. 74/439,613, filed September 24, 1993, alleging dates of first use of September 2, 1988. The description of the mark reads: "The mark consists of the configuration of an eyeglass/spectacle frame display holder bracket. The dotted lines shown in the drawing represent a bolt, a screw and a T-shaped member to which the frame display holder bracket may be attached but are not part of the mark. The remaining dotted lines with respect to the cylindrical and end portions of the eyeglass/spectacle frame display holder bracket likewise do not form part of the mark but merely represent a three dimensional projection of related surfaces that are positioned behind those portions of the configuration. The miscellaneous lining shown in the drawing does not indicate color but is merely used to indicate shading."

[5] Application Serial No. 74/439,614, filed September 24, 1993, alleging dates of first use of October 12, 1992, and first use in commerce of August 18, 1993. The description of the mark reads: "The



The mark consists of the configuration of an eyeglass/spectacle frame display holder.[6]



The mark consists of the configuration of an eyeglass/spectacle frame display holder.[7]

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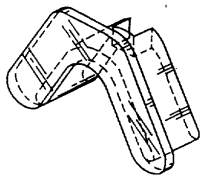
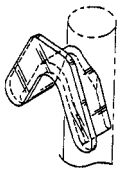
mark consists of the configuration of an eyeglass/spectacle frame display holder. The dotted lines shown in the drawing with respect to the face portion and inverted U-shaped or V-shaped portion of the eyeglass/spectacle frame display holder and the semi-cylindrical rod holder do not form part of the mark but merely represent a three-dimensional projection of related surfaces that are positioned behind those portions of the configuration. The miscellaneous lining shown in the drawing does not indicate color but is merely used to indicate shading."

[6] Application Serial No. 74/439,618, filed September 24, 1993, alleging dates of first use of August 24, 1990, and first use in commerce of October 2, 1990. The description of the mark reads: "The mark consists of the configuration of an eyeglass/spectacle frame display holder. The dotted lines shown in the drawing with respect to the face portion and inverted U-shaped or V-shaped portion of the eyeglass/spectacle frame display holder do not form part of the mark but merely represent a three dimensional projection of related surfaces that are positioned behind those portions of the configuration. The miscellaneous lining shown in the drawing does not indicate color but is merely used to indicate shading."

[7] Application Serial No. 74/439,619, filed September 24, 1993, alleging dates of first use of May 6, 1986, and first use in commerce of June 2, 1986. The description of the mark reads: "The dotted lines shown in the back portion of the drawing represent a handle to which the eyeglass/spectacle frame holder may be attached but are not part



The mark consists of the configuration of an eyeglass/spectacle frame display holder.[8]



The mark consists of the configuration of an eyeglass/spectacle frame display holder.[9]

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of the mark. The other dotted lines shown in the drawing with respect to the face portion and inverted U-shaped or V-shaped portion of the eyeglass/spectacle frame display holder likewise do not form part of the mark but merely represent a three dimensional projection of related surfaces that are positioned behind that portion of the configuration."

[8] Application Serial No. 74/440,980, filed September 27, 1993, alleging dates of first use of May 6, 1986, and first use in commerce of June 2, 1986. The description of the mark reads: "The mark consists of the configuration of an eyeglass/spectacle frame display holder. The dotted lines shown in the drawing with respect to the face portion and inverted U-shaped or V-shaped portion of the eyeglass/spectacle frame display holder do not form part of the mark but merely represent a three dimensional projection of related surfaces that are positioned behind this portion of the configuration. The miscellaneous lining shown in the drawing does not indicate color but is merely used to indicate shading."

[9] Application Serial No. 74/440,981, filed September 27, 1993, alleging dates of first use of February 18, 1983 and first use in commerce of August 3, 1983. The description of the mark reads: "The mark consists of the configuration of an eyeglass/spectacle frame display holder. The dotted lines appearing at the back of the configuration represent a cylindrical vertical rod to which the frame display holder may be attached but are not part of the mark. The remaining dotted lines with respect to the face portion and inverted U-shaped or V-shaped portion of the eyeglass/spectacle frame display

II. PROSECUTION HISTORY

Throughout prosecution, the Examining Attorney has maintained two separate "grounds" for refusal: (1) the subject configurations are de facto functional and (2) the subject configurations are not inherently distinctive.[10] *See* Trademark Act Sections 1, 2 and 45, 15 U.S.C. Sections 1051, 1052 and 1127. The Examining Attorney also rejected applicant's alternative claim that the product configurations have acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. Section 1052(f). When the refusals to register in each application were made final, applicant appealed. Applicant and the Examining Attorney have filed briefs addressing each refusal. An oral hearing was not requested.

The prosecution history of these cases illustrate a common misunderstanding of the law governing marks that consist of product configurations. In an application to register a mark consisting of a product configuration, one of the first questions to arise is whether the configuration is de jure functional. The differences between de jure and de facto functionality are discussed in a number of cases, including the

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holder likewise do not form part of the mark but merely represent a three dimensional projection of related surfaces that are positioned behind this portion of the configuration. The miscellaneous lining shown in the drawing does not indicate color but is merely used to indicate shading."

seminal case of *In re Morton-Norwich Products, Inc.*, 740 F.2d 1550, 213 U.S.P.Q. 9 (C.C.P.A. 1982).

A product configuration which is a superior design essential for competition is de jure functional and may be refused registration on that ground. *See* Section 2(e)(5) of the Trademark Act, 15 U.S.C. Section 1052(e)(5); *Morton-Norwich, supra.*[11] In contrast, a product configuration that is not a superior design essential for competition, but merely performs some function or utility, is only de facto functional. De facto functionality is not a ground for refusal under the statute. In the case of a product configuration that is de facto functional, the proper ground for refusal on the Principal Register is that the configuration is not inherently distinctive as a matter of law, and thus does not function as a trademark under Trademark Act Sections 1, 2 and 45, 15 U.S.C. Sections 1051, 1052 and 1127. A de facto functional product configuration may only be registered on Principal Register with a showing of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. Section 1052(f).

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[10] The Examining Attorney has explicitly stated during prosecution that he does not believe that the configurations are de jure functional.

[11] A mark which is de jure functional may also be refused registration on the ground that the mark is not inherently distinctive as a matter of law and thus does not function as a mark under Trademark Act Sections 1, 2 and 45, 15 U.S.C. Sections 1051, 1052 and 1127.

Accordingly, this decision is limited to the issue of distinctiveness.

III. INHERENT DISTINCTIVENESS

In *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, ___ U.S. ___ (2000), the Supreme Court issued a recent decision on whether product designs can be inherently distinctive. In that case, a clothing manufacturer brought an action against a department store for infringement of unregistered trade dress under Section 43(a) of the Lanham Act, 15 U.S.C. Section 1125(a). The department store was selling knockoffs of the manufacturer's childrens' seersucker clothing. The manufacturer prevailed before the District Court and the Second Circuit under Section 43(a) on the basis that the clothing designs could be legally protected as inherently distinctive trade dress.

The Supreme Court reversed the lower courts' rulings and held that "in an action for infringement of unregistered trade dress under §43(a) of the Lanham Act, a product's design is distinctive, and therefore protectible, only upon showing of secondary meaning." *Wal-Mart*, ___ U.S. at ___. In comparing product designs to color, the Court found that a "product design almost invariably serves purposes other than source identification." *Id.* As an example, the Court stated that "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 and more appealing." *Id*. The Court reasoned that while consumers are predisposed to regard word marks or product packaging as indications of source, consumers are not predisposed to equate a product design with the source. *Id*.

Although the *Samara* case involved an unregistered product design in the context of an infringement action under Section 43(a), the Court's holding is applicable to the registration of product designs under Section 2 of the Trademark Act. In fact, the Court stated that distinctiveness is "an explicit prerequisite for registration of trade dress under §2." *Id. citing Two Pesos, Inc. v. Taco Cabana, Inc*., 505 U.S. 763, 768, 23 U.S.P.Q.2d 1081, 1085 (1992). There is no question, after *Samara*, that the eight product configurations involved in this case are not inherently distinctive as a matter of law, and are entitled to registration on the Principal Register only upon a showing of acquired distinctiveness under Section 2(f).

IV. ACQUIRED DISTINCTIVENESS

A. Burden of Proof

The burden of proving a prima facie case of acquired distinctiveness in an ex parte proceeding rests with applicant. *Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd.,* 840 F.2d 1572, 1576, 6 U.S.P.Q.2d 1001, 1004 (Fed. Cir. 1988), *citing Levi*

Strauss & Co. v. Genesco, Inc., 742 F.2d 1401, 1405, 222 U.S.P.Q. 939, 942 (Fed. Cir. 1984). To establish acquired distinctiveness, applicant must show that the primary significance of the product configurations in the minds of consumers is not the product but the producer. Acquired distinctiveness 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, extensive amount of sales and advertising, and any similar evidence showing wide exposure of the mark to consumers. *See* 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, Sections 15:30, 15:61, 15:66 and 15:70 (4th ed. 1999).

B. Arguments

Applicant contends that the product configurations have acquired distinctiveness.[12] In support of its position, applicant relies upon the affidavit of Jan S. Ennis, president

[12] While the Board has carefully reviewed the evidence of acquired distinctiveness submitted in each application, our discussion is directed primarily to the evidence submitted in Application Serial No. 74/440,981 as illustrative of the entire consolidated record and the evidence most favorable to applicant. The evidence of acquired distinctiveness submitted in the other applications is substantially

of Ennco Display Systems, Inc. Mr. Ennis avers that the product configurations have been in use in commerce between seven and seventeen years. According to Mr. Ennis, approximately 166,666 units of products bearing the applied-for marks have been sold, earning $385,000 per year during the years 1986-97. For five years, Mr. Ennis attests, annual sales revenues averaged $500,000 and annual advertising expenditures averaged $74,000. During 1986-97, applicant's total annual advertising budget averaged $94,000 and annual advertising expenditures over $800,000. Mr. Ennis acknowledges, however, that applicant's "advertising efforts and budget often combine many different goods together into a single package or catalog." (Ennis Decl. ¶ 2). Mr. Ennis states that the products and the applied-for marks have been advertised in national and international trade journals and displayed at several annual trade shows. Mr. Ennis also states, among other things, that evidence of license agreements obtained from competitors and intentional copying by others in the field demonstrates acquired distinctiveness.[13] In addition, applicant relies upon approximately 19 customer and 30

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similar in form, although less significant than the evidence in Application Serial No. 74/440,981.

[13] The Examining Attorney objects to the evidence submitted with applicant's supplemental appeal brief (filed March 11, 1999) as untimely filed. The objection is sustained and the evidence has been given no consideration. *See* Trademark Rule 2.142(d).

distributor declarations, and various advertisements and promotional materials.

The Examining Attorney, for his part, argues that acquired distinctiveness had not been proven. In particular, the Examining Attorney contends that applicant's evidence is insufficient to prove acquired distinctiveness because of the utilitarian nature of applicant's configurations. According to the Examining Attorney, applicant's advertisements tout utilitarian advantages, rather than the trademark significance, of the product configurations. Under the circumstances, the Examining Attorney concludes that the length of time in which the configurations have been used in commerce and applicant's sales and advertising figures are not extraordinary. The Examining Attorney also maintains, among other things, that applicant's evidence of intentional copying and license agreements do not establish acquired distinctiveness, and that applicant's "pro forma" declarations fail to specifically mention the allegedly distinctive features of applicant's configurations.

C. Evidence

After careful review of the evidence of record, we agree with the Examining Attorney that applicant's evidence of acquired distinctiveness is insufficient to permit registration

of the production configurations under Section 2(f). While there is no fixed rule for the amount of proof necessary to demonstrate acquired distinctiveness, the burden is heavier in this case because it involves product configurations. *See EFS Mktg., Inc. v. Russ Berrie & Co.,* 76 F.3d 487, 491, 37 U.S.P.Q.2d 1646, 1649 (2d Cir. 1996)("[C]onsumers do not associate the design of a product with a particular manufacturer as readily as they do a trademark or product packaging trade dress."); *Duraco Prods. Inc. v. Joy Plastic Enter., Ltd.,* 40 F.3d 1431, 1452, 32 U.S.P.Q.2d 1724, 1742 (3d Cir. 1994)("[S]econdary meaning in a product configuration case will generally not be easy to establish."); *Yamaha*, 840 F.2d at 1581, 6 U.S.P.Q.2d at 1008 (evidence required to show acquired distinctiveness is directly proportional to the degree of non-distinctiveness of the mark at issue); *In re Sandberg & Sikorski Diamond Corp*., 42 U.S.P.Q.2d 1544, 1548 (T.T.A.B. 1996)("In view of the ordinary nature of these designs and the common use of gems in descending order of size on rings, applicant has a heavy burden to establish that its configuration designs have acquired distinctiveness and would not be regarded merely as an ordinary arrangement of gems.").

Turning to the direct evidence of acquired distinctiveness, applicant's form declarations from distributors and customers are entitled to little weight. *See Aromatique, Inc. v. Gold*

Seal, Inc., 28 F.3d 863, 872, 31 U.S.P.Q.2D 1481, 1487 (8th Cir. 1994), *citing In re Mogen David Wine Corp*., 372 F.2d 539, 541, 152 U.S.P.Q. 593, 595 (C.C.P.A. 1967); McCarthy, *supra*, at Section 15:77. The statements made by distributors concerning acquired distinctiveness are of minimal value because they are not the ultimate consumers of applicant's products.[14] *See In re Edward Ski Products, Inc*., 49 U.S.P.Q.2d 2001, 2005 (T.T.A.B. 1999); *In re Pingel Enterprise Inc*., 46 U.S.P.Q.2d 1811, 1822 (T.T.A.B. 1988).

In addition, both the distributor and customer declarations fail to specify the particular features of the configurations which serve to identify and distinguish applicant's products from those of others. The declarations simply refer to the "overall product configuration," which is reproduced within the declaration from the drawing page of the application. However, the application drawings include dotted lines which do not form part of the marks.[15] While the applications include detailed descriptions of the marks in addition to the drawings, the declarations do not. Consequently, the Board is unable to determine whether the declarants truly understood which features of the product configurations -- as illustrated in the declarations -- represent applicant's applied-for marks.

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[14] According to the evidence of record, the ultimate consumers of applicant's products include frame manufacturers, opticians and/or optical store owners.

With respect to the circumstantial evidence, such as sales and advertising efforts and length of use, we concur with the Examining Attorney that applicant's showing is insufficient to establish acquired distinctiveness. Applicant's amount and manner of advertisement and promotional activities are of minimal probative value. Applicant claims to have a total annual advertising budget of $94,000, and annual expenditures of $800,000. Applicant admits, however, that these amounts cover many different product lines. (Ennis Decl. ¶ 2). As the Examining Attorney correctly noted, the total annual advertising figures are "inflated." It is difficult to measure the impact of this evidence on consumers in relation to the eight separate product configurations.[16]

We have considered applicant's specific annual sales figures of 166,666 units sold for approximately $500,000 and advertising amounts ranging from $51,000 to $74,000 during 1986-97. However, we do not believe that this evidence rises to the level to support a finding of acquired distinctiveness. While the sales volume is more impressive than other evidence of record, these figures may only demonstrate the growing

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[15] *See supra* pp. 2-6 and notes 2-9.

[16] Mr. Ennis' statement that the products have been displayed at various trade shows over the years is entitled to little weight. (Ennis Decl. ¶ 4). Mr. Ennis failed to reveal the name and date of the particular trade shows attended, identify the number and type of attendees (retail dealers, customers, wholesalers), or describe the nature of the displays and associated expenditures.

popularity of the products. It has been held that successful sales are not necessarily probative of purchaser recognition of the configuration as an indication of source. *See Braun Inc. v. Dynamics Corp.*, 975 F.2d 815, 827, 24 U.S.P.Q.2d 1121, 1133 (Fed. Cir. 1992)("[L]arge consumer demand for Braun's blender does not permit a finding the public necessarily associated the blender design with Braun."); *In re Bongrain Int'l (American) Corp.*, 894 F.2d 1316, 1318, 13 U.S.P.Q.2d 1727, 1729 (Fed. Cir. 1990)(growth in sales may be indicative of popularity of product itself rather than recognition as denoting origin).

We would also point out that the sales and advertising figures in this case are less compelling than amounts presented in a number of other trade dress cases where acquired distinctiveness has not been found. *See Braun, supra* ($5,500,000 advertising blender trade dress insufficient to establish acquired distinctiveness); *Devan Designs, Inc. v. Palliser Furniture Corp.*, 25 U.S.P.Q.2d 1991, 1998 (M.D.N.C. 1992)($10 million in sales revenues insufficient to establish acquired distinctiveness of bedroom furniture configuration), *aff'd*, 998 F.2d 1008, 27 U.S.P.Q.2d 1399 (4th Cir. 1993); *Goodyear Tire & Rubber Co. v. Interco Tire Corp.,* 49 U.S.P.Q.2d 1705 (TTAB 1998)($56,000,000 sales revenues and 740,000 tires sold insufficient to show acquired distinctiveness of tire tread design). Applicant does not come close to meeting the

substantial level of sales and advertising we conclude is required to establish acquired distinctiveness in this case.

More important, in a product configuration case, the critical question is the effectiveness of the advertisements in creating a consumer association between the product configuration and the producer. Several courts have held that advertisements which stress the product configuration in a trademark sense is the most significant evidence of acquired distinctiveness. *See Duraco,* 40 F.3d at 1451, 32 U.S.P.Q.2d at 1741 (advertising expenditures "measured primarily with regard to those advertisements which highlight the supposedly distinctive, identifying feature" of the product configuration); *Thomas & Betts Corp. v. Panduit Corp*., 65 F.3d 654, 662, 36 U.S.P.Q.2d 1065, 1071-72 (7th Cir. 1995)(advertising "look for the oval head" for cable ties encourages consumers to identify the claimed trade dress with the particular producer); *First Brands Corp. v. Fred Meyer Inc*., 809 F.2d 1378, 1383, 1 U.S.P.Q.2d 1779, 1782 (9th Cir. 1987)("[A]dvertising campaign has not stressed the color and shape of the antifreeze jug so as to support an inference of secondary meaning."); *Brooks Shoe Mfg. Co. v. Suave Shoe Corp*., 716 F.2d 854, 860, 221 U.S.P.Q. 536, 541 (11th Cir. 1983)(advertisements for shoe design must involve "image advertising" to establish acquired distinctiveness); *Seabrook Foods, Inc. v. Bar-Well Foods, Ltd.,* 568 F.2d 1342,

1345 n. 8, 196 U.S.P.Q. 289, 291 n. 8 (C.C.P.A. 1977) (advertising emphasizing design portion of the mark to potential customers is persuasive evidence of acquired distinctiveness).

In this case, however, applicant has not presented any convincing evidence of advertising or promotional efforts that focus upon the trademark significance of the product configurations, rather than the utilitarian or desirable features of the products.[17] Contrary to applicant's contention, none of the advertisements insinuate that, when an eyeglass frame display holder looks a certain way, it is always an Ennco product. Likewise, the advertisements do not stress the predominant features of applicant's configurations. For example, advertisements for the frame display holders do not urge consumers to "look for" the "inverted-V," the "concave-convex nosepiece" or the like. (Ennis Decl ¶¶ 3 & 6).

The Examining Attorney is correct in his observation that many of applicant's advertisements emphasize the desirable qualities of the products.[18] In this regard, at least one court

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[17] Applicant claims that advertisements stressed the "look" of the product configurations, for example, "we stepped apart from the crowd when we created our trendsetting Hot Rods. Now you can complete 'the look'," *Frames* 1989, and "Ennco's Hot Rod revolutionized frame display, establishing the standard by which other displays are judged. There are would-be copies and knockoffs, but this is the original," *Eyecare Business*, May 1992. (Ennis Decl. ¶ 3). While the advertisements use the word "Hot Rods" in a trademark sense, they do not draw attention to the particular features of applicant's product configurations.

[18] For example, one advertisement for applicant's eyeglass display holder with a locking arm feature shows a photograph of the product

has noted that "advertising that touts a product feature for its desirable qualities and not primarily as a way to distinguish the producer's brand is not only not evidence that the feature has acquired secondary meaning, it directly undermines such a finding." *Thomas & Betts*, 65 F.3d at 662, 36 U.S.P.Q.2d at 1071-72. Such advertising does not support the inference that the product configuration primarily serves as a source designator. *Id*. at 1072. A number of other advertisements submitted by applicant display the subject configurations attached to or encompassed within other designs. It is difficult to imagine that consumers viewing these advertisements can draw any distinction between the subject product configurations and other miscellaneous designs, let alone attribute trademark significance.

With respect to applicant's length of use, it is true that evidence of substantially exclusive use for a period of five years immediately preceding filing of an application may be considered prima facie evidence of acquired distinctiveness. *See* Section 2(f) of the Trademark Act, 15 U.S.C. Section 1052(f). However, the language of the statute is permissive, and the weight to be accorded this kind of evidence depends on

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along with the words "Invisible Padlocks for Frames." *Eyecare Business,* September 1995. Another advertisement shows a photograph of applicant's bracket and the words "The Wall Mount. Quick, easy, Attaches anywhere…normal walls…posts, nooks and crannies. Friendly." *Eyecare Business,* May 1989.

the facts and circumstances of the particular case. *See Yamaha*, 840 F.2d at 1576, 6 U.S.P.Q.2d at 1004. Applicant's length of use ranging from approximately seven to seventeen years is simply insufficient, in itself, to bestow acquired distinctiveness. We are unable to conclude that consumers have come to recognize applicant's product configurations as an indication of source based upon this length of use. *See Devan Designs,* 25 U.S.P.Q.2d at 1998 (if a trade dress consists of the overall design of the product itself, then it will usually take longer to acquire distinctiveness).

In regard to other evidence of acquired distinctiveness, we are not convinced that competitors intentionally copied the subject configurations to trade on applicant's asserted distinctiveness as the source of the products. Applicant has not presented any concrete evidence of intentional copying. In any event, it is more common that competitors copy product designs for desirable qualities or features. *See Thomas & Betts Corp. v. Panduit Corp*., 65 F.3d 654, 36 U.S.P.Q.2d 1065 (7th Cir. 1995)(copying product shape for useful features not evidence of acquired distinctiveness); *Cicena, Ltd. V. Columbia Telecomm. Group*, 900 F.2d 1546, 1551-52, 14 U.S.P.Q.2d 1401, 1417-18 (Fed. Cir. 1990)(product copying based on desire to capitalize on the "intrinsic consumer-desirability" of the product not evidence of acquired distinctiveness).

As a final point, the fact that a few competitors have entered into a license agreement with applicant for these particular configurations does not convince us that the configurations have acquired distinctiveness. In discussing the license agreements, Mr. Ennis attests that applicant has "enforced" its rights in the product configurations by obtaining licensing agreements from competitors. (Ennis Decl. ¶ 5). However, a complete copy of a license agreement has not been properly introduced into evidence, and applicant has not fully explained the circumstances surrounding the license agreements.[19] We are unable to determine from the record whether the parties entered into the license agreements in recognition of the acquired distinctiveness of applicant's product configurations, in view of applicant's patents on the configurations, or in order to settle litigation. As noted by the Examining Attorney, it is not unreasonable to infer from Mr. Ennis' statements that some of the license agreements may have been entered into merely to avoid litigation. This kind of evidence does not support a finding of acquired distinctiveness. *See In re Wella Corp.*, 565 F.2d 143, 144 n. 2, 196 U.S.P.Q. 7, n. 2 (C.C.P.A. 1977); *In re Consolidated Cigar Corp.*, 13 U.S.P.Q.2d 1481 (T.T.A.B. 1989).

Accordingly, based upon consideration of all the evidence in the record, we find that applicant has failed to establish

[19] *See supra* p. 11 and note 13.

that the product configurations have acquired distinctiveness within the meaning of Section 2(f).

Decision: The refusals to register the product configurations shown in each application on the grounds that (1) the product configurations are not inherently distinctive and (2) the subject configurations have not been shown to have acquired distinctiveness are affirmed.

R. L. Simms

T. J. Quinn

L. K. McLeod
Administrative Trademark
Judges, Trademark
Trial and Appeal Board