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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Trico Products Corporation

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Serial Nos. 76393303 and 76394238

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Anne F. Downey of Downey & Downey for Trico Products Corporation.

Raul Cordova, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

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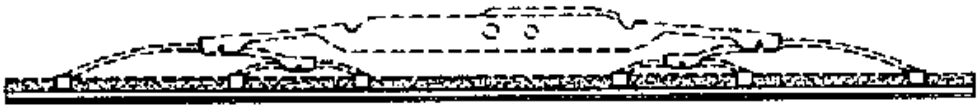
Before Drost, Zervas, and Cataldo, Administrative Trademark Judges.

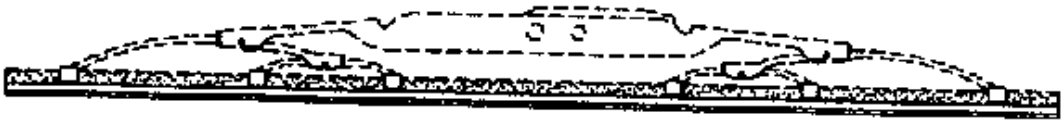
Opinion by Drost, Administrative Trademark Judge:

Trico Products Corporation (applicant) filed two applications to register the marks shown below on the Principal Register for "automobile windshield wiper blades" in Class 12.

76393303



76394238



Both applications were filed April 8, 2002, and allege a date of first use and first use in commerce of November 30, 2000. The marks in the applications are described as follows:

> Serial No. 76393303: The mark consists of the design of an automotive windshield wiper blade featuring a stripe running longitudinally on the sidewall of the blade. The dotted lines show the relative position of the rubber wiping element in relation to the windshield wiper superstructure, and no claim is made to the areas within the dotted lines as part of the mark.
>
> Serial No. 76394238: The mark consists of a contrasting color used on a stripe on the wiping element of an automotive windshield wiper blade. The wiping element is a dark color and the stripe is a light color.
>
> Packaging for the goods is set out below.

The examining attorney ultimately refused registration and applicant seeks review of the examining attorney's determinations that the "proposed mark of a windshield wiper design is ornamental and thus not a trademark under Sections 1, 2 and 45 of the Trademark Act; the finding that the mark has not acquired distinctiveness under Trademark Act Section 2(f) and the finding that it seeks registration of phantom (multiple) marks and not one mark under Trademark Act Section 1." Examining Attorney's Brief (Serial No. 76393303) at 1.[1]

Preliminary Issues

Applicant points out (76394238 Reply Brief at 1-2) that:

> Indeed, it appears that the entire [examining attorney's] Brief [in Serial No. 76394238] is simply a copy of the 76393303 Brief, and thus certain references in the Brief are erroneous because they pertain to 76393303 but not to 76394238. For example,

[1] In both cases, the examining attorney also made, but ultimately did not pursue, a refusal on the ground that the designs were functional.

> the Brief references certain dates of Responses to Office Action etc., but some of the dates pertain to 76393303 and not 76394238.

We agree that the '238 brief appears to be a close copy of the '303 brief.[2] Indeed, the '238 brief in effect requests that it be consolidated with itself inasmuch as it requests that "the Board consolidate a final decision on this case with Ser. No. 76/394238." Brief at 2. The brief also refers to the mark as "a stripe running longitudinally on the sidewall of the blade." See, e.g., '238 Brief at 2. This is obviously the mark in the '303 appeal.

Despite this confusion, it is clear that the examining attorney intended to refuse registration of the '238 mark on the grounds that it was ornamental, a phantom mark, and that it had not acquired distinctiveness. The marks in both cases are essentially depicted the same and the difference concerns how the marks are described. It does not appear necessary to further delay this appeal in order to remand the case to the examining attorney when it is clear that he intended the same arguments to apply in both cases. Unless the final refusal or denial of the request for reconsideration indicate otherwise, we will consider

[2] However, we note that on page one of the examining attorney's '303 and '238 briefs, the correct serial numbers are indicated and on page 3, the briefs distinguish between evidence of record "in the file" (the '303 brief) and the same evidence of record "in Ser. No. 76/393303" (the '238 brief).

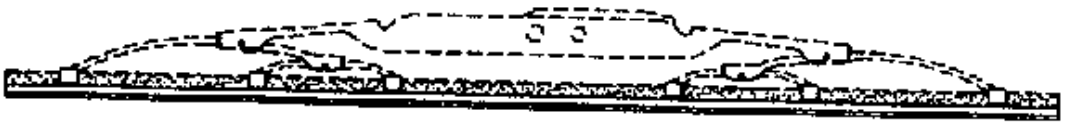
that the examining attorney intended the same rationale to apply to the refusals in this case.

As indicated above, the examining attorney has requested that the cases be consolidated. Applicant has opposed the consolidation arguing that there are distinct issues in the cases. Separate briefs have been filed in both cases and to minimize any confusion, we deny the request to consolidate but we are issuing a single opinion that covers both cases.

Serial No. 76394238

Inherent Distinctiveness/Ornamentation

We will begin with the '238 application. In that application the mark is described as a "contrasting color used on a stripe on the wiping element of an automotive windshield wiper blade. The wiping element is a dark color and the stripe is a light color."[3]



[3] Applicant did provide one complete wiper blade. On that specimen, the wiper blade is black with a thin brown stripe at the bottom of the blade.

In opposing the motion to consolidate, applicant argued (Reply Brief at 2) that there is an additional issue in this case, i.e., "whether a contrasting color mark can be held inherently distinctive post-Wal-Mart v. Samara," 529 U.S. 205, 54 USPQ2d 1068 (2000). Applicant argues that the examining attorney has not addressed the issue in his brief, and that the board should "conclude that the issue is conceded." Reply Brief at 3. We decline to do so. First, the examining attorney has consistently maintained that the mark is ornamental (Brief at 3 and 5). Obviously, if a mark is refused registration on the ground that it is ornamental, by definition, the examining attorney is holding that the mark is not inherently distinctive. Indeed, in the denial of the request for reconsideration at 2, the examining attorney advised applicant of this very point. "Please note, the ornamental refusal is a rejection that the mark is inherently distinctive." Therefore, if the examining attorney was conceding that the mark was inherently distinctive, the examining attorney would have withdrawn the ornamental refusal.

"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." In re Soccer Sport Supply Company, Inc., 507 F.2d 1400, 184 USPQ 345, 347 (CCPA 1975). See also Seabrook Foods, Inc. v. Bar-Well Foods Limited, 568 F.2d 1342, 196 USPQ 289, 291 (CCPA 1977) ("In determining whether a design is arbitrary or distinctive this court has looked to whether it was a 'common' basic shape or design, whether it was unique or unusual in a particular field, [or] whether it was a mere refinement of a commonly-adopted and well-known form of ornamentation") (footnotes omitted). We do not need to address applicant's question of whether a contrasting color mark can ever be inherently distinctive because in applicant's case, even under the traditional analysis, its mark is not inherently distinctive.

One test for whether a design is inherently distinctive is whether a "buyer will immediately rely on it to differentiate the product from those of competing manufacturers." In re Hudson News Co., 39 USPQ2d 1915, 1922 (TTAB 1996), aff'd w/o opinion, 114 F.3d 1207 (Fed. Cir. 1997). It is difficult to see how consumers will immediately rely on applicant's "contrasting color used on

a stripe" on a wiper blade to differentiate applicant's products from others. We note that applicant's stripe is not simply a specific color combination applied to a product. Even specific combinations of colors have been held to be non-inherently distinctive. See In re David Crystal, Inc., 296 F.2d 771, 132 USPQ 1, 2 (CCPA 1961) (registration denied for red and blue bands on white socks) and Plastilite Corp. v. Kassnar Imports, 508 F.2d 824, 184 USPQ 348, 350 (CCPA 1975) (yellow and orange fishing floats neither inherently distinctive nor registrable under Section 2(f)). Stripes have been held to be ornamental designs used to dress up various products. In re General Tire & Rubber Co., 151 USPQ 214 (TTAB 1966) (white wall tires) and In re Chung, Jeanne & Kim Company, Inc., 226 USPQ 938, 941 (TTAB 1985) ("[I]t is a common practice among manufacturers of athletic shoes to apply stripes[,] strip, or bar designs to the sides of their shoes").

In applicant's case, the contrasting color refers to that part of applicant's wiper blade that is different from the rest of the blade inasmuch as it reflects the Teflon stripe that is contained in applicant's blade. See Trico website ("The Teflon blade itself has a color strip highlighting its presence to the consumer"). The design is a slight variation from the traditional design of a wiper

blade. Goodyear Tire and Rubber Co. v. Interco Tire Corp., 49 USPQ2d 1705, 1719 (TTAB 1998) ("Similarly, while no other manufacturer or seller of tires markets a tire which features a pattern of three different length lugs in which the larger lugs extend appreciably beyond the sidewall, such a design is in essence a mere refinement of long-standing two-stage lug designs"). Indicating the presence of a different material on an item by showing that material in a different color is a logical and ordinary way to indicate that there is another material present. Consumers would understand the commercial impression of applicant's wiper design stripe as simply indicating the presence of a Teflon substance rather than a trademark. Therefore, we conclude that applicant's design is not "of such a nature that its distinctiveness is obvious." In re Owens-Corning Fiberglas Corporation, 774 F.2d 1116, 227 USPQ 417, 422 (Fed. Cir. 1985). We add that the stripe design is very difficult to notice on applicant's goods. When consumers do notice applicant's contrasting stripe on its wipers, they would likely view it as mere ornamentation.

Phantom Mark

We now address the examining attorney's refusal on the ground that applicant's mark is a phantom mark. A "phantom mark" is "a word, alpha-numeric designation, or other

component [of a mark] that is subject to change." TMEP 1214 (4th ed. rev. April 2005). The examining attorney argues "that the "contrasting color stripe windshield wiper blade design is considered to encompass several marks as the contrast between certain parts of the blade could be reproduced in many colors such as yellow/red, blue/green or gray brown. Alternatively, the windshield wiper could be in a dark color and the stripes represented in a red, blue, yellow, green or any other color." Denial of request for reconsideration at 2. The examining attorney relies on the case of In re International Flavors and Fragrances Inc., 183 F.3d 1361, 51 USPQ2d 1513 (Fed. Cir. 1999). In that case, the marks were LIVING XXXX FLAVORS and LIVING XXXX FLAVOR. The XXXX represented "a specific herb, fruit, plant or vegetable." 51 USPQ2d at 1515.

We are also aware of a Commissioner's decision that was very close to the facts of this case involving a stripe on an athletic shoe. In re Athletic Shoe Company, 102 USPQ 417 (Asst Comm'r 1954) ("Registration must be refused because no color is identified, and applicant is not entitled to a registration covering broadly all colors contrasting with the rest of the shoe"). However, applicant relies on the case of In re Data Packaging Corp., 453 F.2d 1300, 172 USPQ 396 (CCPA 1972). In that case, the

mark for computer tape reels "consisted of a narrow annular band mounted on the front reel flange, adjacent to and concentric with the hub of the reel, in a color which contrasts with the reel flange." 172 USPQ at 396. The court held:

> We agree with appellant and the dissenting member of the board that there is no reason why a registration may not be obtained which covers the use of the mark regardless of its color… Similarly, it seems to us, there is no reason why an applicant should not be able to obtain a single registration of a design mark covering all the different colors in which it may appear, that is to say, not limited to a particular color.

172 USPQ at 397.[4]

We follow the precedent of the Court of Appeals for the Federal Circuit and its predecessor, the Court of Customs and Patent Appeals. As a panel decision, the International Flavors case did not and, indeed could not, overrule the Data Packaging case. Furthermore, there is nothing inconsistent between those cases. In International Flavors, the public was left to guess as to what the limits of the marks were. In Data Packaging, the mark, as here, is what is set out in the application, a

[4] The court also went on to hold that International Braid Co. v. Thomas French & Sons, Ltd., 150 F.2d 142, 66 USPQ 109 (CCPA 1945) was overruled to the extent that it was inconsistent with the Data Packaging opinion. 172 USPQ at 398.

contrasting stripe.[5] Data Packaging pointed out that it "seems well established that a single registration of a word mark may cover all its different appearances potential as well as actual." 172 USPQ at 397. Similarly, applicant's mark is not an unregistrable phantom mark under Data Packaging, and we reverse the examining attorney's refusal to register on this ground.

Acquired Distinctiveness

We now turn to the issue of acquired distinctiveness. The examining attorney made it clear that "it is agreed that the acquired distinctiveness claim would overcome this refusal." Denial of request for reconsideration at 2. However, the examining attorney went on to find that "the Office has made the determination that the applicant has failed its evidentiary burden [of] establishing acquired distinctiveness." Id. It has long been held that the applicant has the burden of proving that its mark has acquired distinctiveness. In re Hollywood Brands, Inc.,

[5] The mere fact that some information may be missing from a mark does not make it unregistrable. In re Dial-A-Mattress Operating Corp., 240 F.3d 1341, 57 USPQ2d 1807, 1812-13 (Fed. Cir. 2001) ("The Director further argues here that, because the area code in the (212) mark was subject to change, it is a phantom mark that is not registerable … Although the registration of the "(212) M-A-T-R-E-S-S" mark is a "phantom" mark, the use of which we have questioned, … it is apparent in the present case that the missing information in the mark is an area code, the possibilities of which are limited by the offerings of the telephone companies").

214 F.2d 139, 102 USPQ 294, 295 (CCPA 1954)("[T]here is no doubt that Congress intended that the burden of proof [under Section 2(f)] should rest upon the applicant"). Furthermore, "logically that standard becomes more difficult as the mark's descriptiveness increases." Yamaha Int'l Corp. v. Hoshino Gakki Co., 840 F.2d 1572, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988).

> However, the statute is silent as to the weight of evidence required for a showing under Section 2(f) except for the suggestion that substantially exclusive use for a period of five years immediately preceding filing of an application may be considered prima facie evidence.
>
> As observed by our predecessor court, the exact kind and amount of evidence necessarily depends on the circumstances of the particular case, and Congress has chosen to leave the exact degree of proof necessary to qualify a mark for registration to the judgment of the Patent Office and the courts. In general, the greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning.

Id. (quotation marks, brackets, and citations omitted).

We now consider applicant's evidence of acquired distinctiveness. Applicant has provided a declaration from its Production Engineering Manager. We have set out a substantial portion of the declaration below.

> 2. Trico is the world's number one manufacturer of wiper blades. Our company employs 6,000 persons and has facilities throughout the globe, including 8 manufacturing plants and numerous sales and

engineering offices… Over 55% of the automobiles manufactured in North America come equipped with Trico blades. Our blades on an annual basis, when placed end-to-end, would circle more than half way around the Earth...

5. The packaging for the Teflon-coated wiper blade prominently features the color mark and the stripe design mark...

8. Sales of the Teflon-coated blade product, in its special packaging, have grown steadily since the launch of the product in 2001. Trico's sales department informs me of the following gross sales figures for US sales:

| | |
|---|---|
| Fiscal Year 2001 | almost $1 million |
| Fiscal Year 2002 | over $5 million |
| Fiscal Year 2003(ended April 2003) | over $10 million |

9. Millions of units of the Teflon-coated blade product, in its special packaging, have been sold in the US since 2000.

11. Trico has made a substantial investment in promoting the Teflon-coated product. Advertising expenditures have totaled nearly $3 million, just for placement of ads alone (exclusive of advertisement production costs).

12. The product has been featured in Popular Mechanics magazine, receiving the Editor's Choice Award. It has also been promoted by Lauren Fox, a nationally recognized premier automotive expert.

Some excerpts from applicant's website include the following:

Studies show that consumers consistently choose products with Teflon over similar products and are willing to pay a premium for Teflon-enhanced products. In fact, 97% of men and women recognize the Teflon name, making it an extremely marketable product. This translates to higher unit sales and increased profit margins for distributors! The Teflon blade itself has

> a color strip highlighting its presence to the consumer.
>
> Winter Teflon® Blade has a rubber boot which protects the metal blade frame from becoming clogged with snow and ice. The extra benefit of Winter Teflon® Blades is its exclusive wiping edge with Teflon® resin, which provides longer life and a smoother wipe.
>
> No other winter blade line can offer the unique benefits of Winter Teflon® Blade:
>
> Longer life
>
> - Wiping edge with Teflon® resin enhances weatherproofing to repel rain, snow and ice
>
> Smoother wipe
>
> - Non-stick, low friction properties
> - No chattering or squeaking
>
> You will know you have a TRICO Winter Teflon® Blade by the distinctive color strip on the rubber edge and the blade's blue end cap.

We first address applicant's "look for" evidence, which may often be critical in showing that the mark has acquired distinctiveness. In re The AFA Corp., 196 USPQ 772, 775 (TTAB 1977) ("[W]hat is significant is the fact that not only has applicant intended its color arrangement to function as a trademark for its goods, but applicant, in its advertising, has sought to develop trademark recognition of its gold and black configuration by using in its advertising material and price lists such phrases as 'Gold and Black Means AFA,' and 'Look for the characteristic gold and black that identifies the Fogmaster 7401 Mist-Jet Fogger'").

First, both references to the applicant's strip are buried in substantial text and it certainly does not call out to purchasers. Indeed, it would take some effort to even discover these statements. Second, and more importantly, it is hard to see on what basis consumers would use this information to conclude that applicant's stripe is its trademark. In the first excerpt, the statement follows several sentences discussing another party's trademark[6] "TEFLON." Only after the importance of the trademark "TEFLON" is discussed does the literature inform the reader that the "Teflon blade itself has a color strip highlighting its presence." While there is a picture of the goods at this point on the website, the picture appears to highlight the presence of the TEFLON material and not to indicate a mark used to distinguish the goods. To the extent that this evidence suggests a trademark, it is more likely to be considered as a trademark for TEFLON. The same is true in the second reference. The reference to the strip occurs after an extended discussion of the benefits of TEFLON on the wiper blade. This literature primarily indicates that consumers and distributors can

[6] See Trico's website ("TRICO, the top name in wiper products, has teamed up DuPont Teflon, the world's most slippery substance…").

distinguish wiper blades with and without TEFLON by the TEFLON-indicating stripe rather than by distinguishing the blades of applicant from those of others. Therefore, we do not find that these references to the stripe to be very significant in demonstrating that applicant's marks have acquired distinctiveness. Even if purchasers waded through applicant's literature and relied on the statement, it is simply not clear whether they would perceive it as applicant's trademark as opposed to an indication that its wipers have a TEFLON component to it. See In re Cabot Corp., 15 USPQ2d 1224, 1229 (TTAB 1990) ("[W]hile applicant tells its customers to look for the 'familiar blue and white E-A-R pillow-pak package,' it is not at all clear that the asserted public recognition as a trademark of applicant's container is attributable to the shape rather than to the blue and white colors"). We point out that there is no evidence that any prospective purchasers actually recognize applicant's design as its trademark.

We also have considered applicant's evidence contained in the declaration of its production manager. We start by noting that some of its evidence demonstrates recognition that applicant's blade with a TEFLON-edge has been popular because of the improvements made to a traditional wiper blade by the addition of TEFLON. For example, it is

unlikely that its wiper has been recognized by Popular Mechanics magazine (receiving the Editor's Choice Award), and by an automotive expert simply because of the contrasting stripe in the wiper blade. Instead, this recognition has been the result of the technical advantages of using TEFLON on a wiper blade. See Trico's website ("The new TRICO Teflon blade has been scientifically engineered to last longer and wipe smoother than other blades"). There is no evidence that there is anything in either the Popular Mechanics magazine or automotive expert endorsement that in any way shows that the contrasting stripe is a trademark that is used to distinguish applicant's wiper blades from those of others.

Next, we address the advertising expenditures and sales volumes. At least with the evidence of advertising in this record, we do not find that this advertising has promoted applicant's contrasting stripe design as applicant's trademark, even if there were extensive expenditures. As we indicated above, it is not at all clear that prospective purchasers would conclude that this stripe was applicant's trademark. Furthermore, the sales volume evidence is not, by itself, evidence of recognition of trademark recognition.

> The only evidence presented by Seabrook on secondary meaning is the sales volume of its products. Although such evidence may have relevance in establishing secondary meaning (see In re Hollywood Brands, Inc., 41 CCPA 1001, 214 F.2d 139, 102 USPQ 294 (1954)), it is not necessarily indicative of recognition of the mark by purchasers as an indication of source of the goods. See In re International Spike, Inc., 190 USPQ 505, 507 (TTAB 1976), and cases cited therein. There is no persuasive evidence that the design portion of Seabrook's mark has acquired secondary meaning, such as might be shown by a consumer survey or by advertising emphasizing the design portion of the mark to potential customers coupled with a showing that such advertising had consumer impact.

Seabrook Foods, 196 USPQ at 291.

Similarly here, the sales volume is not indicative of trademark recognition as opposed to the alleged technological improvements in applicant's wipers. See In re Bongrain Int'l (American) Corp., 894 F.2d 1316, 1318, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990) (growth in sales may be indicative of popularity of product itself rather than recognition as denoting origin); In re Sunburst Products Inc., 51 USPQ2d 1843, 1848 (TTAB 1999) ("Furthermore, the claimed popularity of applicant's watches may well result from other features of its products which are deemed superior by the purchasing public") (footnote omitted). See also In re Candy Bouquet International Inc., 73 USPQ2d 1883, 1889 (TTAB 2004) ("This evidence shows only the popularity of applicant's services, not that the relevant customers of such services (namely, ordinary consumers)

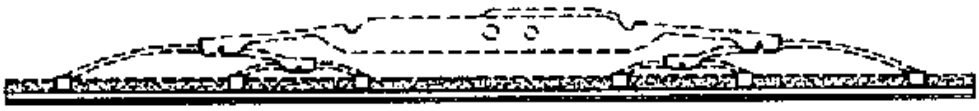
have come to view the term CANDY BOUQUET as applicant's source-identifying mark"). There is no other evidence that shows trademark recognition and the advertising portion that supposedly points to the contrasting stripe, as discussed previously, is not evidence that consumers would recognize applicant's design as a trademark.

While applicant argues that its mark is "unique" (Reply Brief at 18), this "uniqueness" appears to be because applicant has "teamed up with DuPont Teflon, to create the ultimate 'Premium' wiper blade." Trico website. "The extra benefit of Winter Teflon® Blades is its exclusive wiping edge with Teflon® resin." Id. While we have considered applicant's claim of exclusivity, we are not persuaded that they shows acquired distinctiveness of its trademark as opposed to the blades "exclusive wiping edge with Teflon® resin" as a result of applicant's teaming up with DuPont, the provider of TEFLON resin. We add that even if competitors had been free to adopt a design similar to applicant's, "a particular configuration does not become distinctive merely because no other manufacturer uses that particular configuration." In re Parkway Machine Corp., 52 USPQ2d 1628, 1633 (TTAB 1993).

We conclude that applicant has not met its burden of demonstrating that its '238 mark has acquired distinctiveness.

Serial No. 76393303

We now address the issues raised in the appeal for Serial No. 76393303. The design in that case is simply a wiper blade "featuring a stripe running longitudinally on the sidewall of the blade."



The examining attorney (Brief at 1) has described the issues as follows:

> Applicant has appealed the examining attorney's finding that its proposed mark of a windshield wiper design is ornamental and thus not a trademark under Sections 1, 2 and 45 of the Trademark Act; the finding that the mark has not acquired distinctiveness under Trademark Act Section 2(f) and the finding that it seeks registration of phantom (multiple) marks under Trademark Act Section 1.

Phantom Mark

We have already addressed the issue of whether applicant's mark in Serial No. 76394238 was a phantom mark. Based on the In re Data Packaging Corp. case (453 F.2d 1300, 172 USPQ 396 (CCPA 1972)), we rejected the examining attorney's argument that the mark in that case was a

phantom mark. Similarly, in this case, we again hold that the Data Packaging case controls the outcome and, for the reasons we expressed in the discussion of the Serial No. 76394238 application, we reverse the refusal to register on the ground that applicant's mark is a phantom mark.

Ornamentation

To the extent that applicant is arguing that the 76393303 design is not ornamental, we reject that argument for the same reason that we discussed in the 76394238 case. Applicant's stripe running longitudinally on the sidewall of the blade at the bottom of its wiper is simply an ornamental feature of its goods. "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." In re Soccer Sport Supply Company, Inc., 507 F.2d 1400, 184 USPQ 345, 347 (CCPA 1975). As we found with applicant's design in the 76394238 application, the addition of a stripe on applicant's blade is simply a minor refinement of the common blade design.

This refinement reflects the presence of a new material (TEFLON coating) on the wiper blade. This slight refinement would be viewed as the addition of a new material to the blade and not a trademark for applicant's goods. Also, the record reflects that wiper blades can come in different colors. See, e.g., http://amos.shop.com.

SILICONE WIPER BLADES Includes THREE different color blades?red, yellow and blue! Outlast, outperform original-equipment rubber blades...look better, too Available in 16" to 24" length in 1" increments Heavy-duty silicone blade wipes clean and remains flexible year after year. Easy to install.

Based on the facts of record, prospective purchasers would not "immediately rely on [applicant's stripe running longitudinally on the sidewall of the blade at the bottom of its wiper] to differentiate the product from those of competing manufacturers." In re Hudson News Co., 39 USPQ2d 1915, 1922 (TTAB 1996), aff'd w/o opinion, 114 F.3d 1207 (Fed. Cir. 1997). In applicant's case, the stripe on the blade reflects where part of applicant's wiper blade is different from the rest of the blade inasmuch as it reflects the Teflon stripe that is contained in applicant's

blade. See Trico website ("The Teflon blade itself has a color strip highlighting its presence to the consumer"). Consumers would more likely understand the stripe as simply indicating the presence of a Teflon substance rather than a trademark. Therefore, we conclude that applicant's design is not "of such a nature that its distinctiveness is obvious." In re Owens-Corning Fiberglas Corporation, 774 F.2d 1116, 227 USPQ 417, 422 (Fed. Cir. 1985). When consumers would encounter applicant's contrasting stripe on its wipers, they would view it as mere ornamentation.

Acquired Distinctiveness

The last issue we address is whether applicant's 76393303 mark has acquired distinctiveness because even an ornamental mark may be registered on the Principal Register if it has acquired distinctiveness. We incorporate our discussion of the case law and the evidence in the section involving Serial No. 76394238. The declaration evidence and the website evidence is virtually the same, if not identical, in both cases. Our conclusion is also the same; applicant has not demonstrated that its design of a wiper blade featuring a stripe running longitudinally on the sidewall of the blade has acquired distinctiveness. To the extent that it is not inconsistent with our discussion of the issues in Serial No. 76393303, we also rely on our

previous explanation of why the evidence of acquired distinctiveness is not sufficient.

We conclude that applicant has not met its burden of demonstrating that its '303 mark has acquired distinctiveness.

Decision: The examining attorney's refusals to register applicant's designs in Serial Nos. 76393303 and 76394238 on the ground that they are phantom marks are reversed. The examining attorney's refusals to register applicant's designs on the Principal Register in Serial Nos. 76393303 and 76394238 on the ground that they are ornamental and not inherently distinctive and that applicant has not shown that the marks have acquired distinctiveness are affirmed.