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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Darrell A. Igelmund

Serial No. 75516221

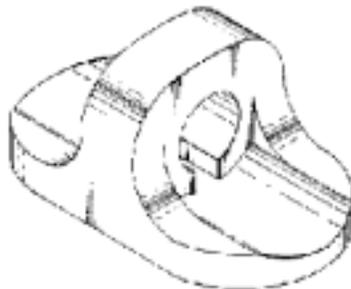
Michael J. Folise of Seed Intellectual Property Law Group
PLLC for Darrell A. Igelmund.

April Rademacher, Trademark Examining Attorney, Law Office
102 (Thomas Shaw, Managing Attorney).

Before Hairston, Bottorff and Holtzman, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Darrell A. Igelmund
to register on the Principal Register the configuration
shown below,



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as a trademark for "security fixtures for personal computers, namely shackle-like devices for securing personal computer security cables."¹ The application includes the following description: "The mark consists of a security configuration having a substantially oval shape in top plan view with a central cylindrical trough surrounded by a curved archway having a central tunnel axially aligned with the trough." The application also includes the following statement: The lining shown in the drawing appears to indicate dimensions of the mark and is not intended to indicate color.

The Trademark Examining Attorney has refused registration under Sections 1, 2, and 45 of the Trademark Act on the ground that the proposed mark consists of a nondistinctive configuration of the goods or portion thereof and applicant has failed to make a showing of acquired distinctiveness.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney filed briefs. An oral hearing was not requested.

¹ Application Serial No. 75516221, filed July 9, 1998, which alleges January 22, 1998 as the date of first use anywhere and January 29, 1998 as the date of first use in commerce.

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At the outset, we observe that a product configuration is not inherently distinctive, and is entitled to registration on the Principal Register only upon a showing of acquired distinctiveness under Section 2(f). *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205, 215, 54 USPQ2d 1065 (2000). Further, the burden of establishing acquired distinctiveness is upon the applicant who must establish acquired distinctiveness by a preponderance of the evidence. *Yamaha Int'l. Corporation v. Hoshino Gakki Co., Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988).

In support of his claim of acquired distinctiveness, applicant submitted three of his own declarations; the declaration of one of his customers, Ellen Taylor, marketing manager/director of Dartek Computer Supplies; a catalog advertisement for his product; and an instruction sheet which is supplied with the product. Further, applicant points to his ownership of Registration No. 1,980,331 for a mark also consisting of a security fixture configuration for security fixtures for personal computers; and a copy of the Board's decision involving application Serial No. 74326631 which ultimately matured into this registration.

With respect to applicant's ownership of Registration No. 1,980,331 for a different product configuration, as

often noted by the Board, each case must be decided on its own merits. As our primary reviewing court has stated, "[e]ven if some prior registrations had some characteristics similar to [applicant's mark], the PTO's allowance of such registration does not bind the Board or this court"). In *re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1565, 1566 (Fed. Cir. 2001). Further, we note that the Board's decision in connection with application Serial No. 74326631 was rendered prior to *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, when the law was such that a product configuration could be inherently distinctive and, thus registrable on the Principal Register without a showing of acquired distinctiveness. Thus, neither applicant's ownership of Registration No. 1,980,331 nor the Board's prior decision is probative of whether the product configuration now before us is entitled to registration.

We turn then to the evidence and begin with applicant's three declarations. In his April 5, 1999 declaration, applicant, Darrell A. Igelmund, states that "in the first five months of this product configuration's introduction, Byte Brothers, Inc. has sold almost 30,000 units of this product. Thus, the public has come to recognize the shape of the product as an indication of

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source.”² Further, in his August 22, 2001 declaration, applicant states that “the mark has been in continuous use for well over five years, and over 450,000 units have been distributed by Byte Brothers, Inc., the exclusive licensee of the mark since well prior to January 25, 1996.”

Finally, in his June 4, 2002 declaration, applicant states “[s]ince the date of my previous Supplemental Declaration additional units of the goods have been sold, and now well over a half million units have been distributed by Byte Brothers, Inc., the exclusive licensee of the mark since well prior to January 25, 1996.”

Applicant also submitted the declaration of a customer, Ellen Taylor, marketing manager/director of Dartek Computer Supplies, who states as follows:

I am knowledgeable with respect to adhesive security kits for personal computers for attaching a personal computer to a security cable or the like, and I am knowledgeable with respect to the products purchased by Dartek. In the last four years, Dartek has purchased over five thousand “Two Penny Plate” adhesive security plate kits from Byte Brothers Inc. as shown on the drawing page of United States Trademark Application Serial No. 75/516,221 attached hereto as Exhibit A. The external configuration of Byte Brothers’ Two Penny Plate security plate is visually distinct with respect to other security plate products manufactured by other vendors. Due to the distinctive appearance of the Byte Brothers’ product, I can identify it as coming from Byte

² We note that Byte Brothers, Inc. is applicant’s exclusive licensee.

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Brothers. I can distinguish Byte Brothers' product from security plates from other manufacturers because the Byte Brothers product looks distinctively different.

Further, applicant submitted a sample instruction sheet that is supplied with applicant's goods. The instruction sheet displays the product configuration next to two pennies along with the statement: "Features the popular 2 Penny Plate. Tremendous holding power in the footprint of 2 coins." In addition, applicant submitted a catalog advertisement that features a photograph of applicant's product next to two pennies. Finally, applicant submitted a printout of information which appears at the web site of applicant's licensee Byte Brothers, Inc. Again, this features a picture of applicant's product next to two pennies with the following statement: "Small footprint makes it perfect for all computers and peripherals."

Based on the foregoing evidence, applicant argues that its design configuration has acquired distinctiveness. Applicant argues that his evidence must be viewed in the context of the security fixtures for personal computers industry and that the evidence indicates that sellers of computer security products promote the configurations of

their devices and that consumers readily recognize competing security devices based on their configurations.

The Examining Attorney, however, finds such evidence to be inadequate and maintains that more probative evidence of acquired distinctiveness is necessary.

After careful review of the evidence submitted in this case, we are not persuaded that the configuration design sought to be registered has become distinctive of applicant's security fixtures for personal computers and serves to distinguish them from the security fixtures of others. We recognize that applicant has enjoyed a certain degree of success in terms of sales of its products. However, sales figures are not determinative of acquired distinctiveness. See for example *In re International Spike Inc.*, 190 USPQ 505, 507 (TTAB 1976). ["[L]arge volume sales figures and advertising expenses are not conclusive of the distinctiveness of a mark"].

In this case, applicant has offered no advertising that demonstrates promotion of the product configuration, i.e., "a security configuration having a substantial oval shape in top plan view with a central cylindrical trough surmounted by a curved archway having a central tunnel axially aligned with the trough," as applicant's mark. While the one sample advertisement draws attention to the

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size of applicant's product, i.e., it is the size of two pennies, no emphasis or attention is directed to the overall configuration itself.

Similarly, the pictures of applicant's product next to two pennies that appear in the instruction sheet and at the web site of applicant's licensee do not establish an association in the consumer's mind with the source of the goods. The reference to the size of the goods in no way serves to promote the specific features which applicant claims as its mark, namely "a substantially oval shape in top plan view with a central cylindrical trough surmounted by a curved archway having a central tunnel aligned with the trough."

Applicant argues that the declaration of Ellen Taylor, a retailer of applicant's products, is sufficient to establish how purchasers perceive applicant's configuration design. In this regard, applicant states that his products are primarily sold to "direct mail catalogs, office and computer wholesalers, superstores, security distributors and locksmiths." (Brief, p. 9). According to applicant, in his industry, distributors are keenly aware of how the ultimate purchasers view and recognize its configuration design and that it would be prohibitive for applicant to track the ultimate purchasers of its products.

The relevant purchasers of applicant's security devices for personal computers include not only retailers, but the ultimate purchasers, namely businesses and individuals who need to secure their personal computers. In this case, the declaration of a single catalog retailer, is insufficient to establish that the relevant class of purchasers as a whole recognize this configuration as applicant's mark. In this regard, the record is devoid of direct evidence that other kinds of retailers, e.g., computer wholesalers and locksmiths, view the matter sought to be registered as a distinctive source indicator for applicant's goods. Further, as applicant acknowledges, the record is devoid of evidence that the ultimate purchasers of the goods, namely, businesses and individuals that need to secure their personal computers, view the matter sought to be registered as a distinctive source indicator for applicant's goods. We are not persuaded by applicant's contention that it would be prohibitive for him to obtain declarations from such purchasers.

Finally, applicant argues that the evidence he has submitted in this case is similar to the evidence submitted by the applicants in two prior cases, namely *Yamaha Int'l. Corp. v. Hoshino Gakki Co., Ltd.*, *supra*, where the Court of the Appeals for the Federal Circuit affirmed the Board's

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finding of secondary meaning with respect to the design of guitar peg head; and In re Motorola, Inc., 3 USPQ2d 1142, 1143 (TTAB 1986), where the Board reversed the Examining Attorney's refusal of registration and found that applicant's evidence of acquired distinctiveness with respect to the design of a microphone was sufficient.

We are not persuaded by applicant's argument. The applicants in Yamaha and Motorola presented considerably more evidence than the applicant herein. The record in Yamaha consisted of eight years use; evidence of substantial sales and promotion activity for the eight-year period; expert testimony and five trade treatise assertions that peg head designs often identify the makers of guitars and are so viewed; and trademark registrations of peg head designs obtained by manufacturers of guitars, showing that at the least, such producers consider the designs or configurations to be source indicators capable of registration. In Motorola, the record consisted of an affidavit attesting to sales of nearly 2.8 million units for a period of over twenty years; three declarations from individuals involved in the repair, installation and servicing of two-way radios; and four declarations of users of the applicant's radio equipment.

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In sum, the evidence presented in this case is insufficient upon which to base the conclusion urged by applicant that the relevant purchasers perceive and understand this product design as a distinctive source indicator.

Decision: The refusal to register is affirmed.