

THIS DECISION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Mailed: 9/21/2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Saey N.V.

Serial No. 75826909

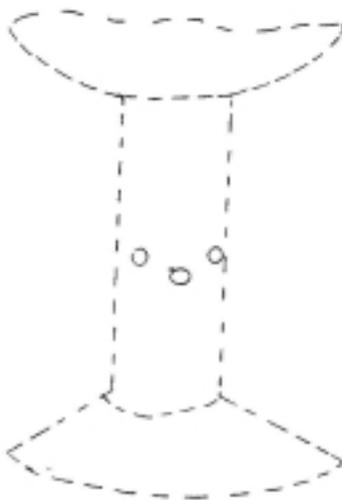
James C. Wray for applicant.

Catherine Pace Cain, Trademark Examining Attorney, Law
Office 113 (Odette Bonnet, Managing Attorney).

Before Seeherman, Quinn and Holtzman, Administrative
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Saey N.V. filed an application to register the matter
shown below



for goods identified, as amended, as follows:

Common or base metal and their alloys
in sheet, rod, bar and/or billet form;
portable metal building; metal tubes
for general industrial use; [and] metal
chimney pots (in International Class
6); and

Barbeque grills and replacement parts
therefore, namely, flues and lighting
units; gas or electric cooking tables
and built in ovens; gas pressure
cookers and electric pressure cookers
(in International Class 11).¹

The application includes the following description, the
language of which was suggested by the examining attorney:

"The mark consists of two holes and a handle, which are
meant to represent and give the appearance of the eyes and
nose features of a face on a tubular section of the
barbecue."² Applicant has claimed acquired distinctiveness
pursuant to Section 2(f) of the Trademark Act.

The trademark examining attorney refused registration
under Sections 1, 2 and 45 of the Trademark Act on the

¹ Application Serial No. 75826909, filed October 20, 1999, based
on a date of first use anywhere of July 1986, and a date of first
use in commerce with the United States of March 1997. The dates
of use pertain to both classes.

² The description of the mark does not appear to be appropriate
for the Class 6 goods. Nevertheless, because this description
was suggested by the examining attorney, the issue of the
description was obviously considered by the examining attorney.
Thus, we have no authority to remand the application to the
examining attorney for consideration of the appropriateness of
the description.

ground that the matter sought to be registered is a nondistinctive design feature of the goods and that, as such, the mark fails to function as a mark.³ The examining attorney goes on to contend that even if the design could function as a mark, the design is not inherently distinctive, and the showing of acquired distinctiveness is insufficient.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.⁴ An oral hearing was not requested.

Applicant claims that its proposed mark functions to indicate source and distinguish its goods from the goods of others. Applicant further describes its mark as follows:

The mark represents a face with eyes and nose that gives the appearance of the face on the tubular section of the barbeque. The mark consists of two holes and a handle, which are meant to represent and give the appearance of the eyes and nose features of a face on the tubular section of the barbeque. The face is that of the Barbecue and the graphic mark is a personification of the Applicant's personalized word mark Barbecue.

³ The examining attorney also refused registration under Section 2(e)(5) on the ground that the matter sought to be registered is functional. This refusal subsequently was withdrawn in the Office action dated June 23, 2004.

⁴ The examining attorney's request to accept her late appeal brief, and applicant's request to accept its late reply brief, are granted.

(Brief, pp. 2-3). Applicant, in urging that the refusal to be register be reversed, argues that the matter sought to be registered "is a distinctive arrangement of holes and a knob that creates the face of the Barbecue" and that this design functions as a mark as shown by its evidence of acquired distinctiveness. (Brief, p. 9). Applicant states that it uses the "distinctive two eyes and nose" on its barbeque grills in such a manner that consumers recognize the matter as a source identifier. Applicant points out that competitors' grills do not use applicant's "unique configuration," and that applicant's advertisements "use the mark such that the mark has acquired distinctiveness with the public." In support of its claim under Section 2(f), applicant submitted the declaration of Bernard Samain, applicant's administrative manager, who states that applicant's "mark" has become distinctive of the goods through applicant's substantially exclusive and continuous use in commerce for at least five years. Accompanying the declaration are sales figures, various advertisements for applicant's barbeque grills, and advertisements covering competing grills in the industry.

The examining attorney contends that the proposed mark does not identify and distinguish applicant's goods from those of others so as to indicate source. The holes and

handle are part of a ventilation system that functions to control the intensity of the fire in applicant's grills, the examining attorney asserts, and, as such, do not function as a mark. The examining attorney points out that applicant does not promote the proposed mark as a "face" in any advertising but, rather, applicant's advertising for its grills specifically directs purchasers' attention to the functional features of the holes and handle purportedly comprising the "face". According to the examining attorney, the evidence of acquired distinctiveness fails to establish that the purchasing public has come to view the proposed mark as an indicator of origin.

The term "trademark" is defined, in pertinent part, in Section 45 of the Trademark Act, as "any word, name, symbol, or device, or any combination thereof (1) used by a person....to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." In this regard, the Court of Customs and Patent Appeals, a predecessor to the Court of Appeals for the Federal Circuit, stated the following: "The Trademark Act is not an act to register mere words, but rather to register trademarks. Before there can be registration, there must be a trademark, and unless words

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have been so used they cannot qualify." In re Bose Corp., 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1976), citing In re Standard Oil Co., 275 F.2d 945, 125 USPQ 227 (CCPA 1960). The same proposition holds true for designs. Unless a design is used in a trademark manner, and, thus, is likely to be perceived as a trademark, the design does not function as a trademark. Mere intent that a design function as a trademark or service mark is not enough in and of itself. In re Morganroth, 208 USPQ 284 (TTAB 1980) ["Wishing does not make a trademark or service mark be."].

Whether a designation sought to be registered has been used as a mark for the goods or services recited in an application must be determined by examining the specimens and other evidence of use of record. In re Volvo Cars of North America Inc., 46 USPQ2d 1455 (TTAB 1998). A critical element in determining whether a designation is a trademark or service mark is the impression the designation makes on the relevant public. Accordingly, in this case, the critical inquiry becomes: Would the matter sought to be registered be perceived as a source indicator or merely as a nondistinct, functional design feature of applicant's metal goods in Class 6 and grills in Class 11? In re Remington Products Inc., 3 USPQ2d 1714 (TTAB 1987).

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The specimens are photographs of the goods. The specimen originally submitted with the application, an up-close photograph of the proposed mark, was found acceptable for the goods identified in Class 6. The Class 6 specimen is reproduced below.



The substitute specimen accepted by the examining attorney for Class 11 is a photograph of one of applicant's barbeque grills. The Class 11 specimen is reproduced below.



We find that the matter sought to be registered does not function as a mark and that, therefore, consumers would not perceive the matter as a source indicator for applicant's goods in either Class 6 or Class 11.

Turning first to the Class 11 goods, it is clear from the record that the ventilation holes and handle are a normal, functional design of barbeque grills, a fact clearly shown by the photographs of competing grills. Thus, the design sought to be registered would not be perceived by purchasers as a trademark for applicant's goods.

Applicant's counsel is quite creative in ascribing to the design the personalization of "the face of Barbecue" comprising two eyes and a nose. However, the record is absolutely devoid of any promotion of the matter as the "face" of Barbecue, or even that there is any fictional character named "Barbecue." Rather, "Barbecue" appears to be the trademark for applicant's grill. In point of fact, the record does not include even a single reference in any promotional materials to the "face" design as a trademark for the goods. There is a total absence of any "look for" promotion of the face as a trademark for applicant's goods. Rather, applicant's brochures for the barbeque grills point to the holes as follows: "Ventilation holes to control the

air flow"; and "The intensity of the fire can be controlled by adjusting the ventilation system."

With respect to the Class 6 goods, the holes and handle design would be viewed by purchasers simply as part of the metal goods themselves, rather than as a trademark for the goods. Applicant has failed to articulate any reasons (in contrast with its remarks focused on the Class 11 goods) as to why or how the design sought to be registered would be perceived as a trademark for the Class 6 metal goods. Further, there are no advertising materials of record for the Class 6 goods whatsoever, let alone advertisements for the Class 6 goods pointing to the design as a trademark.

In reaching our decision, we have considered, of course, applicant's evidence of acquired distinctiveness. In this connection, while applicant's declaration asserts that the mark has become distinctive "of the goods," all of applicant's evidence apparently relates to the mark as used in connection with barbeque grills; the record is devoid of any specific evidence relating to the Class 6 goods.

Applicant's sales figures for the years 1997-2002 are given in euros, with no currency conversion of the euro

figures to dollars.⁵ Although we fail to understand why applicant did not convert the euros into dollars, we take judicial notice of the current exchange rate of 1 euro equaling 1.22260 dollars. The Washington Post, September 16, 2005. Applicant's total revenues under the mark, at today's exchange rate, are approximately \$1 million. Given the nondistinct nature of the design, the sales figures are hardly impressive. In any event, to the degree that applicant's goods have been popular, popularity of a product is not synonymous with acquired distinctiveness; that is, popularity does not necessarily indicate that buyers associate the design with only one source. In re Bongrain International Corp., 894 F.2d 1316, 13 USPQ2d 1727 (Fed. Cir.1990).

Further, there is no indication of the extent of any advertising expenditures in the United States. No matter how widespread applicant's advertising has been, however, we reiterate that the evidence of record shows no promotion of the matter sought to be registered as a trademark. There is no evidence that applicant has featured the design as a trademark in its advertising or other promotional

⁵ While there is no indication in the exhibit as to whether the figures pertain to both classes or only to the grills in Class 11, it appears from the overall statements made by applicant that its sales figures relate to the grills.

efforts such that it can be inferred that buyers and viewers of the advertising have come to regard the design as a trademark of applicant.

Another significant shortcoming of applicant's attempted showing of acquired distinctiveness is the absence of any direct evidence to indicate that the purchasing public recognizes the matter sought to be registered as a source indicator of applicant's goods. The record shows that a variety of grills in the industry use holes for ventilation and, thus, consumers would be accustomed to perceiving the holes for that utility, rather than for any source-indicating function. The record fails to establish that consumers would regard the "face" design on applicant's grill as anything other than functional holes and a handle for ventilation. The evidence likewise fails to show that relevant purchasers would perceive the design as a trademark for the metal goods in Class 6.

We find that the matter sought to be registered does not function as a trademark for applicant's goods. Under the circumstances, the record evidence as a whole is insufficient to show that the so-called "face" design would be perceived by purchasers as a mark for applicant's goods.

Decision: The refusal to register is affirmed.