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CITABLE AS PRECEDENT OF THE TTAB

May 27, 1997

Hearing:  
July 25, 1996

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TJQ

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Caterpillar Inc.

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Serial No. 74/404,325

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Andrew Hartman of Sachnoff & Weaver, Ltd. for applicant.

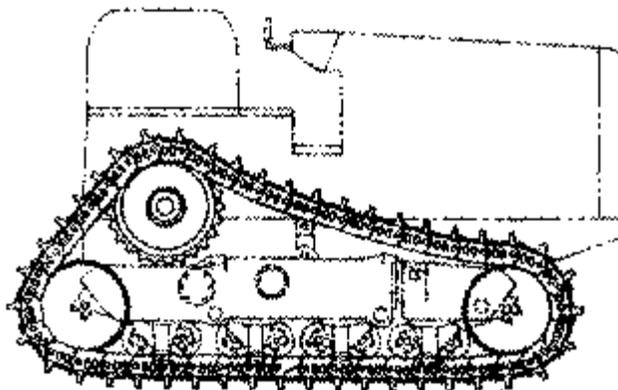
David H. Stine, Trademark Examining Attorney, Law Office 103  
(Kathryn Erskine, Managing Attorney).

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Before Seeherman, Quinn and Hairston, Administrative  
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by Caterpillar Inc. to  
register the matter shown below



for "tractors for earth moving, earth conditioning and material handling; and undercarriage for such tractors."<sup>1</sup> Applicant claims that the applied-for mark has acquired distinctiveness as provided by Section 2(f) of the Act.<sup>2</sup> The application includes the following description of the mark: "The mark consists of the configuration of a continuous crawler track with an elevated drive sprocket and idler wheels therefor." The application also indicates that "[t]he outline of a tractor, depicted in dotted lines, is not a part of the mark."

The Trademark Examining Attorney has issued a final refusal under Sections 1, 2 and 45 of the Act on the ground that the proposed mark is de jure functional. Further, the Examining Attorney maintains that if the configuration design sought to be registered is not de jure functional, the evidence submitted in support of its Section 2(f) claim is insufficient to prove that the configuration design has

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<sup>1</sup>Application Serial No. 74/404,325, filed June 22, 1993, alleging a date of first use anywhere of August 1972, and a date of first use in commerce of July 1978.

<sup>2</sup>Despite the claim of acquired distinctiveness that was made much earlier in the prosecution of this application, applicant, in its reply brief, contends that the matter sought to be registered is inherently distinctive, now couching acquired distinctiveness in terms of an alternative claim. See: Trademark Manual of Examining Procedure, § 1212.02(c). Suffice it to say that applicant early on abandoned its claim that the applied-for mark is inherently distinctive. Rather, applicant has contended that its design has acquired distinctiveness. Moreover, when this Section 2(f) claim was made initially, and then throughout the prosecution, the claim was not advanced as an alternative claim. In any event, given our view on the functionality of applicant's design, we need not consider the issue of inherent distinctiveness.

acquired distinctiveness as a trademark for applicant's goods.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney have filed briefs and both were present at an oral hearing held before the Board.

Before considering the merits, we first turn to address some evidentiary points. Trademark Rule 2.142(d) provides that the record in the application should be complete prior to the filing of an appeal, and that the Board will ordinarily not consider additional evidence filed after the appeal is filed. Applicant's briefs on the case are accompanied by several exhibits. Some of the exhibits were submitted during the prosecution of the application and, thus, properly form part of the appeal record; others, however, were not timely submitted. Accordingly, Exhibit E attached to the appeal brief has not been considered. Further, the excerpts from the Official Gazette which are attached to the reply brief have not been considered.

Applicant also submitted with its reply brief a copy of an unpublished final decision of the Board. Further, in a "supplemental filing" on May 13, 1996, applicant submitted another one of the Board's unpublished final decisions. Decisions which are not designated for publication are not citable as precedent, even if a complete copy of the unpublished decision is submitted. *General Mills Inc. v. Health Valley Foods*, 24 USPQ 1270, 1275 n. 9 (TTAB 1992). See also: Trademark Trial and Appeal Board Manual of

Procedure, § 101.03. Accordingly, the decisions submitted by applicant are not citable as precedent of the Board.

Applicant proffered, at the oral hearing, a booklet captioned "Summary of Relevant Documents" numbered 1-9. After reviewing the record, we agree with the Examining Attorney's statement at the oral hearing that only documents 1-4 were properly made of record. We, of course, have considered them in reaching our decision in this case. However, documents 5-9 were not properly introduced and, accordingly, these materials have not been considered.

Lastly, three months after the oral hearing, applicant submitted, on October 21, 1996, yet another "supplemental filing." This Exhibit A consists of excerpts from the Official Gazette. Again, for the reason indicated above, this submission is untimely under Trademark Rule 2.142(d) and, thus, the evidence has not been considered.

In ruling on these evidentiary matters, we hasten to add that even if the excluded materials were considered, we would reach the same result on the merits of this case. With respect to applicant's arguments based on past Office practice as evidenced by the Official Gazette, suffice it to say that each case must turn on its own particular set of facts. This is especially true in these types of cases. See: 1 J. T. McCarthy, McCarthy on Trademarks and Unfair Competition, § 7:73 (4th ed. 1996) ["Each case of alleged functionality will present a unique set of facts not easily

disposed of either by sweeping generalities or precise legal rules."].

We now turn to the merits. Applicant concedes that its "design is functional to a certain extent" (reply brief, p. 7), but that the design is only de facto functional, and not de jure functional. Applicant contends, therefore, that its configuration design is registrable, and that the configuration has acquired distinctiveness under Section 2(f) of the Act. Applicant has submitted the affidavit of Laurie Huxtable, applicant's assistant secretary. Applicant also has introduced numerous other documents, including a utility patent and a design patent, both owned by applicant (both relating to the goods listed in the present application, and both now expired), other patents, product brochures, pictures of competitors' goods and an excerpt from a newspaper.

The Examining Attorney contends that the design sought to be registered is de jure functional and, therefore, unregistrable. The Examining Attorney further contends that even if the design is only de facto functional, the evidence of acquired distinctiveness is insufficient for registrability. The Examining Attorney has relied upon applicant's expired utility patent, as well as applicant's product literature, maintaining that these materials show the purely utilitarian nature of applicant's product.

FUNCTIONALITY

Inasmuch as applicant claims that its configuration design is de facto functional, we think that brief mention is in order of the basic difference between de facto functionality and de jure functionality.

De facto functionality essentially means that the design of a product has a function. De jure functionality, on the other hand, means that the product is in its particular shape because it works better in this shape. In re R. M. Smith, Inc., 734 F.2d 1482, 222 USPQ 1, 3 (Fed Cir. 1984).

As has been stated in previous cases, if the design of a product is so utilitarian as to constitute a superior design which others in the field need to be able to copy in order to compete effectively, it is de jure functional and, as such, is precluded from registration for reasons of public policy. That is, "...'functionality' is determined in light of 'utility', which is determined in light of 'superiority of design', and rests upon the foundation 'essential to effective competition'...." In re Morton-Norwich Products, Inc., 617 F.2d 1332, 213 USPQ 9, 15 (CCPA 1982). Four evidentiary factors were discussed in In re Morton-Norwich, Inc., supra, as being useful in demonstrating such de jure functionality: (1) a utility patent that discloses the utilitarian advantages of the design, (2) advertising material in which the originator of the design touts its utilitarian advantages, (3) facts

tending to establish the unavailability to competitors of alternative designs, and (4) facts indicating that the design results from a comparatively simple or cheap method of manufacturing the product. See also: In re Weber-Stephen Products Co., 3 USPQ2d 1659 (TTAB 1987); In re Honeywell Inc., 8 USPQ2d 1600, 1603 (TTAB 1988); and In re American National Can Co., 41 USPQ2d 1841 (TTAB 1997).

With respect to the first factor, applicant readily admits that it owned a utility patent (No. 3,828,873) covering a "high drive-track-type vehicle" (that is, the same types of tractors with undercarriages as those involved herein), and a design patent (No. 230,300) covering "track assembly", both now expired.<sup>3</sup>

The utility patent is helpful in shedding light on the utilitarian aspects of applicant's configuration design. The "background of the invention" is set forth as follows:

Conventional track-type tractors comprise a generally elliptically-shaped endless track assembly mounted on a front idler and a rear drive sprocket. The drive sprocket performs the combined functions of driving the track assembly, supporting a substantial portion of the tractor's weight and absorbing loads imposed on the vehicle during operation of attached work implements. In addition, the drive sprocket is positioned closely adjacent to ground level to thus subject it to wear and damage. The wrap angle about the

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<sup>3</sup>The fact that the patents are expired is of no significance for purposes of our analysis. See, e.g., Best Lock Corp. v. Schlage Lock Co., 413 F.2d 1195, 162 USPQ 552 (CCPA 1969), and In re Shenango Ceramics, Inc., 362 F.2d 287, 150 USPQ 115 (CCPA 1966) [the court considered utility patents that were expired].

sprocket approximates 180°, which tends to excessively load a substantial number of track bushings and pins during vehicle operation.

Attempts have been made to provide triangularly-shaped track assemblies with a drive sprocket which is positioned vertically above front and rear idlers...To date such prior art track-type vehicles have failed to replace conventional track-type tractors, of the type mentioned above, in the commercial market place.

The "summary of the invention" is also illuminating:

An object of this invention is to provide a track-type vehicle which has its final drive system sufficiently elevated to protect it against damage, has a power train to the drive system which is non-complex and which is disposed in the vehicle for optimum performance, and which exhibits high degrees of working efficiency, structural integrity, stability and operator visibility. The vehicle comprises a main frame having a pair of longitudinally spaced idlers rotatably mounted on each side thereof. A drive sprocket is rotatably mounted directly on each side of the frame, between a respective pair of the idlers, and is positioned vertically above and substantially closer to a first idler of such pair of idlers than to a second idler thereof. An endless track assembly, having the general shape of a scalene triangle, is positioned on each side of the frame and is entrained about a respective one of the drive sprockets and pair of idlers. A suspension means, including a bogey system, is mounted on the frame to engage the track assembly, between the first and second idlers.

The claims in the utility patent include the following:

...a pair of longitudinally spaced idlers rotatably mounted on each end of

each subframe, a drive sprocket rotatably mounted directly on each side of said main frame and positioned longitudinally between and vertically above a respective pair of idlers and further positioned substantially closer to a first idler of such pair of idlers than to a second idler thereof, an endless track assembly, having the general shape of a scalene triangle, positioned on each side of said main frame and entrained about a respective one of said drive sprockets and pair of idlers,...

We also note that the utility patent (specifically, columns 3-6) specifies that the overall geometry of the configuration design (and, thus, its appearance), must remain substantially within the parameters established by the depicted embodiment in order to maintain its functional utility and to avoid interference with the other aspects of the vehicle's operation.

The fact that the utility patent discloses the utilitarian advantages of applicant's elevated sprocket configuration design is strong evidence of the de jure functionality of the configuration in which applicant alleges trademark significance. In re Bose Corp., 772 F.2d 866, 227 USPQ 1 (Fed. Cir. 1985). It is important to remember here that the utility patent was applied for and registered by the same entity which now asserts trademark significance in the same configuration design. The utility patent discloses that the elevated sprocket configuration design is an improvement on, and is superior to, conventional elliptical-shaped designs. This design, as

described in the utility patent, and as touted by applicant in its literature, is superior to that of conventional tractors where the drive sprocket is positioned closely adjacent to the ground, thereby subjecting it to wear and damage. Applicant's elevated sprocket configuration design, on the other hand, offers significant utilitarian advantages such as reduced wear and stress.

The existence of a design patent, while some evidence of non-functionality, is not alone sufficient evidence. See: R.M. Smith, *supra*; *In re American National Can Co.*, *supra*; and *In re Vico Products Manufacturing Co.*, 229 USPQ 364 (TTAB 1985). The drawing in the design patent (that is, figures 1 and 5) is substantially identical to the drawing in the present application. In the design patent, applicant claims "[t]he ornamental design for a track assembly." The fact that a configuration design is the subject of a design patent, as in this case, does not, without more, establish that the design is non-utilitarian and serves as a trademark. Here, this evidence is clearly outweighed by the other evidence of record showing the great degree of utility reflected in applicant's configuration design.

In connection with its now-expired patents, applicant makes the argument that, in the time since the patents have expired, no one else in the industry has adopted the elevated sprocket track-type design for its tractors. We can only speculate as to why this is so. Applicant would have us conclude that this shows that if competitors

considered applicant's design to be superior, then others in the industry would have adopted the design for their own competing tractors. The Examining Attorney posits, on the other hand, that the utility patent only recently expired (1991), and that the manufacturing of new heavy machinery requires lengthy periods of research and development. The Examining Attorney also points to the fact that since applicant, by way of the present application, continues to assert rights in the configuration design, then perhaps competitors are unwilling to get into a dispute with the industry leader. Or, it may well be that, as applicant asserts, the elevated sprocket design is more costly to manufacture, thereby making it less attractive for competitors to make. Still another reason for the lack of adoption of the design by competitors may be their view that the level of sales of elevated sprocket tractors does not justify, despite the functional superiority of opposer's design, a redesign of their own conventional tractors. Whatever the reason, although no one in the industry apparently has copied the elevated sprocket configuration design, this fact is outweighed by the clear evidence of functionality of the configuration.

The second evidentiary factor concerns any advertising materials that tout the utilitarian advantages of the configuration. Applicant recognizes that its literature mentions the utilitarian advantages of the configuration

design, but contends that such claims are mere "puffery" and are "self-serving."

The following statements appear in the various informational and promotional materials submitted by applicant:

Why was the sprocket elevated?

One reason was to extend power train component life. Final drives, steering clutches and brakes are relieved of all vertical shock loads from ground contact, roller frame alignment loads, and drawbar and dozer implement loads. In fact, results from an extensive high hour survey (average service meter units was 14,191 SMU) showed that the similarly-designed D10's average final drive life had doubled and steering clutch/brake life had nearly tripled compared to the conventionally designed D9H. Final drives are also less exposed to the abrasive materials found at ground level. And elevated sprockets allow for the suspended undercarriage which improves ride and traction. Yet another advantage is that final drives can be inspected and some gears and bearings replaced without breaking the track.

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Elevated Sprocket Design--Positioned above the high impact and high wear environment, elevated final drives carry only the torque loading stresses and are effectively isolated from the shock loads of implement, ground impact, and roller frame alignment...the high wear conditions normally encountered with conventionally designed crawlers.

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Elevated sprocket design means extended power train component life. Final drives, steering clutches and brakes are relieved of all (1) vertical shock loads from ground contact, (2) roller frame alignment loads and (3) drawbar and dozer implement loads. Raised sprocket also means that final drives are less exposed to the abrasive materials that traditionally lodge between sprocket teeth and bushings...and to the water and mud that can freeze and cause final drive failure.

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Elevated sprocket design removes final drives from the work platform and from roller frame alignment shock loads for extended power train life.

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Elevated sprocket design removes final drives from wear environment and reduces shock loading for extended power train life.

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...the D8L SA's advanced design gives it several important advantages over low sprocket tractors. Advantages that add up to more production with greater fuel efficiency.

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Elevated final drive and sprocket removes shock loads and implement loads that cause gear and bearing misalignment. And they're out of reach of water and mud--less abrasive wear, less damage to seals, and longer productive life in all components. Plus the final drive modules can be removed individually in the field...by only breaking the track.

As shown by the above excerpts, applicant's own promotional materials tout the utilitarian advantages of its elevated sprocket, and it is the elevated sprocket which dictates the configuration design that applicant seeks to register. Rather than showing that the configuration design serves to distinguish source, this advertising touts the design for its desirable, superior utilitarian qualities. Thus, contrary to applicant's position, we find that this evidence supports functionality. In re Bose Corp., supra; In re Bio-Medicus, Inc., 31 USPQ2d 1255 (TTAB 1993); In re Babies Beat, Inc., 13 USPQ2d 1729 (TTAB 1990); and In re Witco Corp., 14 USPQ2d 1557 (TTAB 1989).

With respect to the third evidentiary factor, that is, the availability to competitors of alternative designs, applicant contends that the evidence of competitors' uses of different track-type tread designs for their tractors shows that "the alternative designs are equal to, or even superior" to applicant's design. The Examining Attorney acknowledges that there are alternative designs, but that "all of the alternatives are of conventional elliptical track design, which the current record clearly establishes as functionally inferior" to applicant's configuration. The Examining Attorney maintains that applicant has not furnished any evidence that there are alternative designs "which meet or exceed the enhanced performance levels of the instant configuration."

We agree with the Examining Attorney's assessment. We initially note that the alternative designs made of record by applicant are all merely variations of a single basic design, that is, the conventional elliptical track design. See: *Greenhouse Systems Inc. v. Carson*, 37 USPQ2d 1748, 1754 (TTAB 1995). We also find applicant's argument that "the alternative designs are equal to, or even superior" to applicant's design rings hollow in view of its own touting to the contrary in promotional materials. Given the utilitarian advantages of applicant's configuration (one need only believe applicant's own statements in its promotional materials), this configuration, the triangular shape of which is dictated by the elevated sprocket, is the best, or at least one of a very few superior designs for its functional purpose. Thus, it follows that competition is hindered. That is to say, the conventional elliptical configurations used by others in the industry, if applicant is to be believed, do not work equally well; therefore, a registration granted to applicant would seriously interfere with the right to compete. In other words, the availability of this particular elevated sprocket configuration is "essential to effective competition." In re Morton-Norwich, supra. A finding of de jure functionality does not require a total elimination of competition. It is sufficient that the design applicant seeks to register is one of a few superior designs, or that the number of alternative designs is limited. In re Bose Corp., supra at 5-6.

The final factor in our analysis focuses on whether applicant's configuration design is the result of a comparatively simpler or cheaper method of manufacturing. Applicant asserts that its tractors with the elevated sprocket configuration design are more costly to manufacture than tractors with traditional elliptical track configurations, and that applicant incurred substantial research and development costs in the design of the configuration.

We initially note that applicant's claim that its tractors with the elevated sprocket configuration design are more costly to manufacture is unsupported by any evidence of record. In this regard, Ms. Huxtable's affidavit is completely silent on this point. Further, even if it is true that tractors with the elevated sprocket configuration design are more costly to manufacture than tractors with conventional elliptical track designs, this does not mean that the design is not de jure functional. As noted above, the conventional track designs lack the utilitarian advantages of applicant's design--thus, such a comparison in terms of cost is not probative. That is to say, there is nothing in the record regarding the manufacturing costs of any alternative designs that can perform the same utilitarian function equally well.

Consideration of the above factors convinces us that this case falls squarely within the parameters of the public policy rationale behind the functionality doctrine--

trademark law should not provide a means to achieve perpetual utility patent protection. Here, applicant owned, until 1991, a utility patent covering the elevated sprocket configuration design. Two years after the utility patent expired, applicant filed the instant application to register the same configuration as a trademark. To allow registration here essentially would hinder competition:

The functionality doctrine prevents trademark law, which seeks to promote competition by protecting a firm's reputation, from instead inhibiting legitimate competition by allowing a producer to control a useful product feature. It is the province of patent law, not trademark law, to encourage invention by granting inventors a monopoly over new product designs or functions for a limited time, 35 U.S.C. §§ 154, 173, after which competitors are free to use the innovation. If a product's functional features could be used as trademarks, however, a monopoly over such features could be obtained without regard to whether they qualify as patents and could be extended forever (because trademarks may be renewed in perpetuity).

Qualitex Co. v. Jacobson Products Co., 115 S.Ct. 1300, 34 USPQ2d 1161, 1163 (1995).

In summary, we find that the continuous crawler tracks of applicant's tractors are in the configuration sought to be registered here because such configuration was found to be the design which works best. Analysis of the Morton-Norwich factors shows that the configuration is de jure functional. Although there are points in applicant's favor

(the design patent and alleged higher cost of manufacture), they are not persuasive of a contrary finding. Given the expiration of applicant's utility patent for its goods, the touted superiority of applicant's elevated sprocket design, and the lack of alternative designs that work equally well, we conclude that in order for others to compete effectively, they must be permitted to copy applicant's "configuration of a continuous crawler track with an elevated drive sprocket and idler wheels therefor."

In view of the above, we find that the configuration design sought to be registered by applicant is de jure functional.

#### DISTINCTIVENESS

A de jure functional design may not be registered regardless of any evidence of acquired distinctiveness. Although we have found that the matter sought to be registered by applicant is de jure functional, we nonetheless now consider the Section 2(f) evidence in the event that applicant's design is ultimately found to be only de facto functional and, thus, registrable. Applicant, as the one seeking federal trademark registration under Section 2(f), has the burden of proving acquired distinctiveness. *Yamaha International Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988).

Applicant has relied upon the affidavit of Laurie Huxtable, applicant's assistant secretary, who states, in pertinent part, the following:

Since the introduction to the elevated sprocket design undercarriage for crawler tractors in 1978, Caterpillar's advertising expenditures from the years 1978 through 1989 exceeded \$100 billion. This advertising expenditure included specific product advertising and full line advertising, national and international magazine advertising, regional advertising, catalogs, and literature, and all other means of advertising. Applicant's elevated sprocket design undercarriage crawler tractors would be featured in many of such advertising materials. Further, applicant's products, including its track-type tractors are shown at various industry trade shows each year.

During the years 1982-1993, sales of the new elevated sprocket track-type tractors were 99,993 units. In the United States, 43,492 of such tractors were sold.

Applicant has been the only manufacturer to market an elevated sprocket undercarriage tractor since the introduction in 1978. In the 16 years of marketing of such tractors, the unique triangular shape track and undercarriage configuration has acquired distinctiveness in the minds of the consuming public such that whenever a tractor with this configuration of undercarriage is seen, the source of such tractor is known to be the applicant.

Ms. Huxtable also states that since the expiration of applicant's design patent for an elevated sprocket track assembly expired in 1988, "I am not aware of any competitor

who has manufactured a track assembly similar to that shown in the expired design patent."

The evidence set forth by Ms. Huxtable does not persuade us that purchasers of tractors have come to view "the configuration of a continuous crawler track with an elevated drive sprocket and idler wheels therefor" as a trademark for applicant's goods. Although the sales figures would indicate that applicant has enjoyed success with its tractors, the figures do not demonstrate that the configuration has acquired distinctiveness.<sup>4</sup> Similarly, applicant's advertising expenditures, while very impressive, are merely indicative of its efforts to sell its goods, but are not determinative of whether the efforts have resulted in recognition of the configuration as a trademark.

With respect to the advertising, it is particularly noteworthy that the advertising figure in Ms. Huxtable's affidavit would appear to cover advertising expenditures for the full line of applicant's products, and not advertising specifically featuring the elevated sprocket track-type tractors. Thus, it is not clear how much of the expenditures relate to just the elevated sprocket track-type tractors. Further, absent from all of applicant's advertising of record is any promotion of the configuration design as an indication of the source of its tractors.

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<sup>4</sup>We also note, parenthetically, that less than half of applicant's elevated sprocket track-type tractors were sold in the United States.

Rather, as indicated above, the advertising, to the extent that it refers to the elevated sprocket design configuration, promotes the functional advantages of that design. See: *Thomas & Betts Corp. v. Panduit Corp.*, 65 F.3d 654, 36 USPQ2d 1065, 1071-72 (7th Cir. 1995). The fact that applicant may be the only one in the trade to utilize an elevated sprocket track-type tractor design, while a fact to be considered, is not dispositive.

Applicant also has relied upon the obituary of William Nauman, a former chief executive officer and chairman of the board of directors of applicant. The obituary appeared in the May 10, 1995 edition of The New York Times. The obituary reads, in pertinent part, that during Mr. Nauman's tenure, "Caterpillar introduced a *distinctive* track design for its bulldozers especially adapted to rough terrain." (emphasis added) Applicant contends that this was seen by tens of thousands of readers of the newspaper.

We clearly do not place the significance on this evidence that applicant does. Firstly, it is very questionable how many relevant purchasers ever even saw this statement, appearing as it does in the obituaries section of a newspaper. And, in any event, the mere mention of a "distinctive" design in a single obituary hardly is probative that the specific design sought to be registered has become distinctive in the minds of relevant purchasers.<sup>5</sup>

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<sup>5</sup>It also should be noted that, by relying on the obituary, applicant essentially is asking the Board to make various

We also agree with the Examining Attorney that some of the information, including the "distinctive" statement, would appear to have been supplied by applicant itself. In that connection, in the very next line to that quoted above, the obituary goes on to read as follows: "That design, still in use, continues to contribute to Caterpillar's growing market share, *the company said.*" (emphasis added) Thus, given that applicant itself may well have supplied the term "distinctive" relative to its track design, this evidence has little probative value. We hasten to add that even if authored by a writer at the newspaper, the evidence remains of scant probative value.

In sum, there is little in this record upon which to base the conclusion urged by applicant that **relevant purchasers** have come to perceive and understand the configuration design sought to be registered as a distinctive source indicator. To be clear on this point, we emphasize that the record is devoid of probative evidence that anyone other than one of applicant's officers views the configuration design as a trademark for applicant's tractors.

Decision: The refusal to register on the ground that applicant's configuration design is de jure functional is affirmed. We also affirm the refusal that even if the configuration design were capable of functioning as a mark,

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assumptions, including that the "distinctive" design mentioned in the obituary refers to the specific design sought to be registered here, and not to another one of applicant's designs.

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applicant's evidence of acquired distinctiveness is insufficient to establish that the configuration design has become distinctive through use in commerce.

E. J. Seeherman

T. J. Quinn

P. T. Hairston  
Administrative Trademark Judges  
Trademark Trial and Appeal Board

**Ser No.** 74/404,325