

Paper No. 17  
BAC

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE  
TTAB

SEPT 15, 98

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re L. Perrigo Company

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Serial No. 74/675,504

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Harold Reick of Price, Heneveld, Cooper, DeWitt & Litton  
for applicant

Angela Micheli, Trademark Examining Attorney, Law Office  
108 (David Shallant, Managing Attorney)

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Before Seeherman, Hanak and Chapman, Administrative  
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

L. Perrigo Company has filed an application to  
register the mark CONFIRMED RELEASE and design, in the form  
reproduced below



for "dietary supplements".<sup>1</sup>

The Examining Attorney has finally refused registration under Section 2(e)(1) of the Trademark Act, on the ground that applicant's mark is merely descriptive of applicant's goods.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs<sup>2</sup>, but an oral hearing was not requested. We reverse.

We note at the outset that the Examining Attorney originally refused registration under Section 2(e)(1), and stated that if the mark was determined to be otherwise registrable, the words "CONFIRMED RELEASE" must be disclaimed. In applicant's May 6, 1996 response to the first Office action, applicant stated that if the mark was otherwise deemed to be registrable, then applicant would be willing to disclaim the words "CONFIRMED RELEASE". On July 17, 1996 the Examining Attorney entered a disclaimer of the words "CONFIRMED RELEASE" by way of Examiner's amendment; and on October 9, 1996 the Examining Attorney refused registration of the entire mark as merely descriptive,

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<sup>1</sup> Application Serial No. 74/675,504, filed May 15, 1995, alleging dates of first use and first use in commerce of July 18, 1994.

<sup>2</sup> Applicant submitted photocopies of registrations with its reply brief which were not previously made of record in this case.

noting that the disclaimer had been entered. Although applicant had originally offered the disclaimer of 'CONFIRMED RELEASE' conditionally, applicant never challenged the entry of the disclaimer. Therefore, we deem applicant to have disclaimed exclusive rights to the words per se.

The question before the Board is not whether the words "CONFIRMED RELEASE" per se are merely descriptive, because the record includes a disclaimer thereof. See *Kellogg Co. v. Pack'Em Enterprises Inc.*, 14 USPQ2d 1545, at footnote 10 (TTAB 1990); and *In re Pollio Dairy Products Corp.*, 8 USPQ2d 2012, at footnote 4 (TTAB 1988). Rather, the issue before the Board is whether the mark as a whole, including the special type and the design, is merely descriptive.

It is the Examining Attorney's position that neither the stylization of the lettering for the words, nor the "simple oval shape" or the "incomplete oval" (even if viewed as described by applicant as "arches") create a commercial impression apart from the descriptive wording; that the design is a background feature or a carrier for the descriptive wording; and that the mark is not

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Pursuant to Trademark Rule 2.142(d) this material is not properly before the Board on appeal, and it has not been considered.

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distinctive, but rather is merely descriptive of applicant's goods.

Applicant maintains that the stacked words 'CONFIRMED RELEASE' are printed in a distinctive type including the letters 'C' and 'D' being enlarged; that both the words and the two enlarged letters are integrated into the "reflected (or 'mirrored') tapered arch design"; that applicant's arch design is not a common geometric shape such as a square, rectangle, triangle, circle or oval, but rather is an arbitrary unique and distinctive element of the mark; and that the mark is arbitrary and protectable as inherently distinctive.

It has been held that if the background display of a mark is distinctive or unique enough to create a commercial impression separate and apart from the disclaimed matter, the mark as a whole may be registered without any showing of secondary meaning; and conversely, if the design is mere background material which does not create a separate commercial impression, the mark as a whole may be registered only upon proof of secondary meaning. It is also settled that common basic shapes such as circles, ovals, triangles, diamonds, stars, and other geometric designs, when used as vehicles for the display of word or letter marks, are not regarded as indicia of origin for the

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goods to which they are applied in the absence of a showing of secondary meaning in the design alone. See *In re E. J. Brach & Sons*, 118 USPQ 308 (CCPA 1958); and *In re Haggard Co.*, 217 USPQ 81 (TTAB 1982).

In the instant case, we are not persuaded by the Examining Attorney's argument that the design feature is a "simple oval shape", or is mere background for the word portion of the mark. The design portion of the mark is not a straight-forward oval design, enclosing two words. Rather, because portions of the words are capped with the "oval" or "tapered arch" design, with the letters 'C' and 'D' depicted in larger size outside of the line design, the design is not a mere background. As a result, the mark as a whole is distinctive despite the fact that it includes the descriptive words 'CONFIRMED RELEASE'.

Decision: The refusal to register under Section 2(e)(1) is reversed.

E. J. Seeherman

E. W. Hanak

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B. A. Chapman  
Administrative Trademark  
Judges, Trademark Trial and  
Appeal Board