

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB
U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Jeffery Rom

Serial No. 75/453,434

Robert Ryan Morishita of Quirk & Tratos for Jeffery Rom

William Patrick Shanahan, Trademark Examining Attorney, Law
Office 113 (Meryl Hershkowitz, Managing Attorney)

Before Simms, Quinn and Chapman, Administrative Trademark
Judges.

Opinion by Simms, Administrative Trademark Judge:

Jeffery Rom (applicant) has appealed from the final
refusal of the Trademark Examining Attorney to register the
asserted mark shown below

for "food products, namely, hot dog sandwiches."¹ The Examining Attorney has refused registration under Sections 1, 2 and 45 of the Trademark Act, arguing that applicant's asserted mark is not inherently distinctive because it is a mere refinement of a common sandwich design and is not unusual and unique. Applicant, on the other hand, noting the recent issuance to him of a design patent entitled "Pretzel Wrapped Hot Dog Food Product," argues that his asserted mark is inherently distinctive because it is not a common or basic shape of the goods, is unique and unusual and is not a mere refinement of a commonly adopted ornamentation.

After the attorneys briefed this case, the U.S. Supreme Court handed down a decision in Wal-Mart Stores, Inc. v. Samara Brothers, Inc., 120 S.Ct. 1339, 146 L.Ed.2d 182, 54 USPQ2d 1065 (2000). In that case, the Court held that, in an action for infringement of trade dress which was not the subject of a registration, a product's design is distinctive and protectible only upon a showing of secondary meaning. We believe that that decision has a direct bearing upon this case. Accordingly, because the

¹ Application Serial No. 75/453,434, filed March 19, 1998, claiming use and use in commerce since on or before February 1, 1997. Applicant has amended the application to include the following description of his mark: "The mark consists of a

Ser. No. 75453434

only issue on appeal is whether the product design is inherently distinctive, and because the Supreme Court has held that a product design can be distinctive and therefore registrable or protectible only upon a showing of secondary meaning, applicant's asserted mark is not inherently distinctive.

Decision: The refusal of registration is affirmed.

R. L. Simms

T. J. Quinn

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

configuration of the goods in the nature of a hot dog sandwich consisting of pretzel dough twisting around a frankfurter."

Ser. No. 75453434