

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB MARCH 10, 00

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re **TableTop Enterprises**

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Serial No. 75/975,371

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**Edward J. Treska, Steven J. Nataupsky and Tirzah Abé Lowe**  
of Knobbe, Martens, Olson & Bear, LLP for TableTop  
Enterprises

**Kathleen de Jonge**, Trademark Examining Attorney, Law Office  
103 (Michael Szoke, Managing Attorney)

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Before Seeherman, Quinn and Chapman, Administrative  
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

TableTop Enterprises, a partnership with general  
partners William Alkire and South Coast Newspaper, Inc.,  
has appealed the refusal of the Trademark Examining  
Attorney to register the triangle configuration shown below

**Ser. No.** 75/975,371

as a trademark for "board game components, namely triangular-shaped game pieces."<sup>1</sup>

The following description of the mark has been entered into the record: "The mark comprises a game piece which is substantially-flat and has a triangular shape with rounded corners."

Although a final refusal issued on the grounds that the asserted mark is de jure functional and has not acquired distinctiveness as a trademark, in her appeal brief the Examining Attorney withdrew the refusal based on de jure functionality.

The appeal has been fully briefed. An oral hearing was not requested.

There are some preliminary matters we must address. First, the Examining Attorney has objected to certain exhibits which applicant submitted with its brief, and which had not previously been made of record. The

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<sup>1</sup> Application Serial No. 75/975,371. The application was filed on September 22, 1994, and originally included collectible trading pieces in Class 16. Class 28 was subsequently divided out of the application, and it was assigned the present serial number. The application is based on asserted dates of first use and first use in commerce on March 24, 1989.

Examining Attorney's objection is well taken. See Trademark Rule 2.142(d). Accordingly, Exhibits 2, 3 and 4 have not been considered. We would point out, though, that even if they had been considered, they would not have affected our decision herein.

Second, in her brief the Examining Attorney has pointed out that "given Applicant's assertion that its mark has acquired distinctiveness, the inherent distinctiveness of Applicant's mark is not at issue. A claim of acquired distinctiveness is an admission that the applied-for mark is not inherently distinctive and therefore is unregistrable in the absence of a showing of acquired distinctiveness." Brief, p. 3. See **Yamaha International Corporation v. Hoshino Gakki Co., Ltd.**, 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988) ("in cases where registration was initially sought on the basis of [inherent] distinctiveness, subsequent reliance by the applicant on Section 2(f) assumes that the mark has been shown or conceded to be merely descriptive").

Applicant argues that the issue of inherent distinctiveness is still before the Board, and that its subsequent request for registration pursuant to Section 2(f) was not a concession that its mark is not inherently distinctive. Applicant is advised that an applicant may,

when confronted by a refusal that a mark is not inherently distinctive, preserve its position that the mark is inherently distinctive and also argue, in the alternative, that its mark has acquired distinctiveness. See TBMP § 1215. Applicant did not do so in this case. In response to the December 4, 1995 Office action, in which the Examining Attorney refused registration on the ground that the configuration was not inherently distinctive, applicant amended the application to seek registration pursuant to the provisions of Section 2(f). Response filed June 7, 1996. Applicant never indicated that this was an alternative position, or that it was maintaining the position that the mark was inherently distinctive.

Nevertheless, we will address the issue of whether applicant's configuration is an inherently distinctive mark as well as whether it has acquired distinctiveness. It is clear from the Examining Attorney's submissions, as well as her brief, that she takes the position that the configuration is not inherently distinctive;<sup>2</sup> in fact, her refusal to accept the claim of acquired distinctiveness is based, to a large extent, on her position that the

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<sup>2</sup> Applicant's assertion, made in its reply brief, that the Board should find the configuration to be inherently distinctive because the Examining Attorney failed to address this issue on the merits, is itself without merit.

configuration is so non-distinctive that the evidence submitted by applicant is insufficient to demonstrate acquired distinctiveness.

Turning first to the issue of whether the configuration is inherently distinctive, we note that applicant's goods are identified as "board game components, namely, triangular-shaped game pieces." The Examining Attorney has made of record excerpts from numerous articles showing that game pieces come in a variety of shapes, including triangular. For example, the articles refer to game pieces as being "triangular" (for a game called Contack<sup>3</sup> and for a board game called Hyena Chase<sup>4</sup>), as well as "disc-shaped,"<sup>5</sup> "pie-shaped"<sup>6</sup> and "automobile-shaped" (for a game involving a traffic jam).<sup>7</sup>

Moreover, applicant's game pieces are in fact used for a game of table-top football. Applicant has explained that table-top football is a traditional childhood lunchroom game, in which the game piece was constructed from notebook paper by folding it into a triangular shape. An article from "The Dallas Morning News" describes tabletop football: "You probably remember it as 'paper football'—that game

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<sup>3</sup> "St. Louis Post-Dispatch, July 18, 1989.

<sup>4</sup> "Playthings," March 1988.

<sup>5</sup> "Topeka Capital-Journal," May 9, 1995.

<sup>6</sup> "Wisconsin State Journal," November 1, 1994.

<sup>7</sup> "The Tampa Tribune, June 5, 1997.

boys play in the school lunchroom, flicking a little triangle of paper back and forth across the table."

January 31, 1996. The Examining Attorney has also made of record an advertisement for tabletop football valentines, which touts how the valentine card can be folded into a "triangular paper football"—"and sail it across the table to score." "Currents," Valentine's Day 1997.

The evidence shows that game pieces come in a variety of shapes, including triangular shapes. Moreover, a triangle is the traditional shape for game pieces used in playing tabletop football, the game for which applicant's game pieces are designed to be used. As a result, the triangular configuration which applicant seeks to register will not be regarded by purchasers as inherently distinctive. A triangle in general is such a basic geometric shape, and is used as the shape for various game pieces, that consumers will not regard the triangular shape of the game piece as an indicator of source simply because of its shape. That is, it is simply not an unusual shape that would inform consumers, merely by how unusual it is, that the shape functions as a trademark.

Applicant argues that its configuration is unique in its size, shape, angles and width. It appears that applicant is asserting that its triangle configuration

differs from the traditional "folded-notebook-paper football" because it is thinner and somewhat smaller, and has slightly rounded corners. However, these slight differences do not make the configuration "unique" in terms of establishing inherent distinctiveness. As the Board said in **In re E S Robbins Corporation**, 30 USPQ2d 1540 (TTAB 1992), in holding that the design of a plastic floor mat for use under chairs was not inherently distinctive:

If the concept of inherent distinctiveness was defined as meaning simply "one and only," then one could obtain a registration for a design which, while "unique" in this sense, differed only slightly from the designs of other competing products and/or containers. There would be no need that the applied for design have an "original, distinctive and peculiar appearance" as required by the Haig & Haig ("Pinch bottle") and McIlhenny ("Tabasco bottle") cases.

This brings us to the question of whether applicant has shown that its configuration has acquired distinctiveness as a trademark for game pieces. The burden of establishing this is on applicant. See **Yamaha International Corporation v. Hoshino Gakki Co., Ltd.**, supra, and cases cited therein. The amount of evidence required to prove acquired distinctiveness depends on the mark sought to be registered; for example, the greater the

degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning. Id.

Applicant's evidence in this case consists primarily of the declaration of William Alkire, one of applicant's general partners. He stated that at least five years ago (the declaration was signed on June 4, 1996), applicant adopted the configuration,<sup>8</sup> and that since that time applicant has continually used the configuration mark in connection with game pieces; that Mr. Alkire believes the configuration mark has become distinctive by reason of substantially exclusive and continuous use thereof as a mark in interstate commerce for at least the five years immediately preceding the claim of distinctiveness (i.e., since at least June 4, 1991); that applicant has sold in excess of 3.5 million game pieces incorporating the mark, and has distributed 108,000 samples of the goods. Mr. Alkire also stated that applicant and "Ocean Spray" have jointly promoted the mark, and he submitted with his declaration a promotional piece. In addition to the declaration, applicant relies on articles submitted by the

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<sup>8</sup> We note that applicant's application claims a first use date of March 24, 1989, although Mr. Alkire does not state in his declaration that applicant has made continuous use of the mark since that date, only that applicant has made continuous use of the configuration mark for "at least" the five years preceding the filing of his declaration.

Examining Attorney which refer to the Ocean Spray TableTop Football Tournament.

With the exception of the authentication of the single promotional piece, applicant has provided no information about its advertising of the triangular configuration as a mark. Applicant has not indicated the number of these pieces it has produced, or the extent, if any, of their distribution. It appears from the piece that it is directed to retailers, rather than ultimate consumers, because it appears to advertise store displays for the products. Thus, although the promotional piece does make reference to "the Original Triangle Shaped™ Tabletop Football Of The NFL™," and shows a triangle shaped design above the words TABLETOP FOOTBALL, we have no information about whether this piece has had any impact whatsoever on anyone, including retailers. Further, although the displays shown in the promotional piece also depict a triangle design above the words TABLETOP FOOTBALL, applicant has provided no information about whether the pictured displays have ever been placed in retail outlets, or exposed to consumers.

In its brief applicant states that it "regularly sponsors large scale promotional events involving Applicant's mark"; that it "maintains a website that

prominently displays the mark"; and that it "often holds promotional events where it gives away weekly prizes." Brief, p. 12. The problem is that applicant should have submitted evidence to this effect during the prosecution of its application, and not waited until it filed its brief to make these assertions. Applicant has put nothing in the record about these activities. There is no evidence about how the configuration may be promoted to consumers at these events, nor has applicant submitted a printout from its website showing how its configuration is displayed.

The five articles which are relied upon by applicant as Exhibit 6 to its brief (and which were made of record by the Examining Attorney during the examination of the application), do make reference to the Ocean Spray TableTop Football Tournament. However, these articles do not mention the triangular shape of applicant's game piece in such a manner that readers of the articles would regard the triangular shape as a trademark for these game pieces. On the contrary, in many of the articles the shape appears to be a reference to the paper piece used in the traditional lunchroom game. For example, "The Florida Times-Union" article, January 25, 1996, states that "TableTop Football is a variation of the game kids have played in cafeterias, libraries, and study halls for years. It involves flicking

a triangular football for touchdowns, field goals and extra points and answering NFL trivia questions for two-point conversions." "The Baltimore Sun" article, January 20, 1996, makes no mention of applicant's triangular configuration game piece; instead it indicates that the Ocean Spray Tabletop Football Tournament is "that goofy game you used to play in the school cafeteria, where you folded up a piece of paper and flicked it using your thumb and another finger toward a designated goal line," and that "this is basically the same game many of us played as kids, dressed up in an Ocean Spray marketing costume." The "Star Tribune" article, January 20, 1996, gives a similar impression: "TableTop football is a slick version of the kids' game in which opponents flick a triangular 'ball' across a table toward each other's goal line, then flick 'field goals.' In TableTop Football, players also answer NFL trivia questions to score points after out-of-bounds penalties and to increase the value of extra-point kicks from one point to two." "The Atlanta Journal and Constitution" article, January 23, 1996, states that "Sophomores Patrick Floyd and Hal Robins returned victorious Monday from Ocean Spray's National TableTop Football finals in Tempe, Ariz.... Floyd said it was his teammate's daring style of play--flicking the triangle-

shaped piece of cardboard with abandon--that sealed the victory." Finally, "The Dallas Morning News" article, quoted earlier in this opinion in our description of tabletop football, does not mention the triangular shape of the game piece in connection with the Ocean Spray TableTop Football Tournament. Instead, the reference is only to the "triangle of paper" which was used in the lunchroom game.

Thus, as far as we can tell from these articles, applicant's publicity efforts utterly fail to apprise the public that the triangular configuration of its game pieces is to be regarded as a trademark.

As for the number of game pieces that applicant has sold or distributed, sales alone do not necessarily show that consumers perceive the triangular shape of the pieces as a trademark. These pieces are not sold individually. From the promotional literature it appears that they are sold as part of a larger game, with either 4, 8 or 32 of the pieces in a particular package, although applicant has not provided any information as to the number of these packages which have been sold. Further, the game pieces do not consist of the triangular configuration alone, but each bears the name and logo of a professional football team. The representations of the triangular game pieces on the packaging also bear the team names and logos. As a result,

consumers are not likely to recognize that the background shape functions as a trademark, any more than they would recognize the rectangular shape of the trading card, also represented on the packaging, as a trademark. We do note that the packaging for the "8 TABLETOP FOOTBALL NFL LOGO FOOTBALLS" contains the phrase "Chromium® Original Triangle Shaped™ NFL Team Logo Footballs," while the packaging for the game which contains 4 pieces lists, under the heading "SET INCLUDES":

COMPLETE GOALPOST AND NET SET  
2 Upper Deck™ NFL Trading Cards  
4 "Chromium"™ Original Triangle  
Shaped™ NFL TEAM Logo Footballs  
4 National Football League  
Trivia Cards.

The reference to the triangle shape, especially on the package containing 4 game pieces, is relatively small and inconspicuous. Moreover, because of the association of a triangular paper "football" with the traditional cafeteria game, the language "Original Triangle Shaped" is likely to be viewed by consumers as merely a reference to the traditional shape rather than as indicating that the triangular configuration of the game pieces identifies the source of the game pieces.

Accordingly, although applicant has sold millions of triangle-shaped game pieces, and has claimed use of the

**Ser. No.** 75/975,371

configuration as a mark since 1989, when these facts are considered in light of the other evidence, including the traditional use of a triangle-shaped game piece for tabletop football, and the inclusion of football team names and logos on applicant's game pieces, applicant has failed to establish that its triangular configuration has acquired distinctiveness as a trademark for its game pieces.

Decision: The refusal of registration is affirmed on the grounds that applicant's triangular configuration is not inherently distinctive and applicant has failed to demonstrate that it has acquired distinctiveness.

E. J. Seeherman

T. J. Quinn

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