

8/29/01

**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Paper No. 12  
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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re **Kenneth Picciuto**

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Serial No. 75/479,446

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**Anthony H. Handal** of Handal & Morofsky for **Kenneth Picciuto**.

**Carol A. Spils**, Trademark Examining Attorney, Law Office 101 (Jerry Price, Managing Attorney).

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Before **Simms**, **Hanak** and **Rogers**, Administrative Trademark Judges.

Opinion by **Rogers**, Administrative Trademark Judge:

Applicant has applied to register "a ring disposed around a sound emitting device" as a mark for goods identified as "sound emitting chain-like devices for training animals and suitable for rattling and tossing," in International Class 18.<sup>1</sup> The ring, which is incorporated into the goods, is made of metal, as shown by the specimens

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<sup>1</sup> The application, Serial No. 75/479,446, claims April 22, 1998 as the date of first use and first use in commerce.

of record, though applicant argues that it is the shape and placement of the ring within the goods which comprises its "mark" and it could just as easily be made of plastic, rubber or some other material.

The Examining Attorney refused registration, arguing that the asserted mark is a functional part of the goods. When the refusal of registration was made final, applicant appealed. Applicant and the Examining Attorney have filed briefs but applicant did not request an oral hearing.

The Supreme Court's decision in Wal-Mart Stores, Inc. v. Samara Brothers, Inc., 2000 U.S. Lexis 2197, 120 S.Ct. 1339, 146 L.Ed.2d 182, 54 USPQ2d 1065 (2000), issued after applicant filed its appeal. The Court held that trade dress in the nature of a product's design, as compared to the product's packaging, "is not inherently distinctive" because consumer predisposition to equate a product's design features with the source of the product "does not exist." *Id.*, 54 USPQ2d at 1068-69. Accordingly, the Court held that trade dress in the nature of product design is protectible "only upon a showing of secondary meaning." *Id.*, 54 USPQ2d at 1070.

Applicant, though he argues that the feature of his goods that he seeks to register as a mark is not functional, has failed to address the key issue under Wal-

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Mart, i.e., secondary meaning. Applicant has not made any claim of acquired distinctiveness or that the feature has taken on a secondary meaning as an indicator of source, or offered any evidence whatsoever which would support such a claim. Therefore, regardless of any ruling we might make on the question of functionality, registration must be refused.

Decision: The refusal to register is affirmed.

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