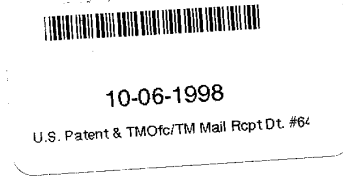


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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

MARK: MISCELLANEOUS DESIGN )  
(Pastry Product Configuration) )  
APPLICANT: Chudleigh's Apple & Cider )  
Shoppe, Ltd. )  
Serial No.: 75/369992 )  
Filing Date: October 8, 1997 )  
Examining Attorney: )  
Darlene D. Bullock )  
Law Office 101 )



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Assistant Commissioner for Trademarks  
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2900 Crystal Drive  
Arlington, VA 22202-3513

**RESPONSE TO OFFICE ACTION**

Dear Sirs:

This is in response to the Office Action issued on March 31, 1998 for the above mark. The Examining Attorney has refused registration stating that the mark is a configuration of the goods which is not inherently distinctive. In response, Applicant submits the following COMMENTS.

**COMMENTS**

I. The Pastry Configuration is Inherently Distinctive.

Applicant's product configuration is inherently distinctive because it is: (1) unusual and memorable; (2) conceptually separable from the product, and (3) likely to serve primarily as a designation of origin of the product. See *Sunburst Products, Inc. v. Cyrk International*, 40 USPQ 2d 1939, 1943 (Fed. Cir. 1996). "The question of inherent distinctiveness...must be

determined in relation to the goods for which registration is sought, the uniqueness of the container's configuration in this field, which would condition the reaction of purchasers to the shape, and what would be the anticipated reaction of the average purchaser to this shape". *In re Days-Ease Home Products Corp.*, 197 USPQ 566, 568 (TTAB 1997).

Applicant's product shape is uniquely designed to look like an apple blossom which, in turn, evokes its source, an apple orchard. Thus, it is unusual, conceptually separate from the product, and likely to designate the product's source. Therefore, the shape is inherently distinctive and warrants registration.

A. Applicant's Product Shape is Unusual and Memorable

1. The Product Shape Suggest the Source of the Product

Since 1957, Applicant has operated a family-owned apple orchard in Ontario, Canada. Applicant calls the shaped pastry which is the subject of this application the BLOSSOM or alternatively the APPLE BLOSSOM. The product is advertised to evoke its similarity in appearance to an apple blossom and thereby to suggest its source as Chudleigh's apple orchard. In fact, the pastry is regularly advertised in close association with photos of apple blossoms in order to show the similarity. *See* Exhibit 1 hereto, Chudleigh's advertising. As is apparent from the attached advertising, Applicant's BLOSSOM pastry displays the same characteristics of an apple blossom, namely, a few large petals arranged in a concave circular design.

2. There are No Similar Shapes In the Market

Chudleigh's BLOSSOM pastries are packaged in four-packs enclosed in cardboard boxes bearing the product name. This is similar to the packaging for snack cakes such as Twinkies, Ho-Hos, Hostess Cupcakes, Little Debbie Snack Cakes and other similar pastry snacks. *See*

Exhibit 2, Applicant's packaging, and Exhibit 3, packaging for other snack cakes. The manufacturers of snack cakes have made efforts to differentiate their products according to shape. Thus, consumers are conditioned to recognize distinctions between the shapes of such snack pastries. As evidence of consumers' likely understanding of product configurations as designations of source, food producers have applied for, and the PTO has registered, many different food product shapes. *See* Exhibit 4, records from the CCH Trademark Research Corporation database of U.S. federal applications and registrations for food and food packaging configuration marks.

Moreover, the most common "fruit-filled" pie item similar to applicant's is illustrated by Hostess and McDonald's fruit pies. Such pastries are basically rectangular, and the filling is entirely enclosed in the pastry. These pies bear no resemblance to applicant's product. *See* Exhibit 5 attached here to (photos of McDonald's and Hostess fruit pies and packaging).

Finally, even if Applicant's BLOSSOM product is not compared to snack cakes, but instead to baked goods in general, applicant is aware of no similar pie shape. Applicant's BLOSSOM pastry has large folds arranged in a concave circle. The typical tart or piecrust is fluted by pinching the edges of the crust around the convex edge of the pan. *See* Exhibit 6, *Women's Day Desserts*, p. 95; *Martha Stewart's Pies and Tarts* p. 204; *Better Homes & Gardens New Baking Book* p. 48 (instructions for forming piecrust edges). A sampling of pastry recipes and photos reflecting applicant's search is enclosed as Exhibit 7. None of the shapes reflected in Exhibit 7 is similar to that of Applicant.

B. The Product Configuration is Conceptually Separable from the Product

The Blossom shape is fanciful. There is no reason that a pie must be shaped like Applicant's pastry. Instead, shaping a pie like a flower adds to its subjective appeal, but is not readily associated with pies.

C. The Shape Serves Primarily as a Designation of Source

Applicant has long been in the apple business. Thus, it developed the Apple Blossom shape specifically to play on its already developed association. This is the *sine qua non* of a source designation, and the reason why applicant's mark is inherently distinctive.

II. Conclusion.

For all of the reasons stated herein, Applicant respectfully requests that its application is in condition for publication, and such early treatment is respectfully requested.

Respectfully submitted,

Janet Marvel

McDermott, Will & Emery  
227 W. Monroe  
Chicago, IL 60606  
312/372-2000  
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CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513 on:  
DATE OF DEPOSIT: September 30, 1998

SIGNATURE: Maria Zura

DATE OF SIGNATURE: September 30, 1998



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