
United States Court of Appeals
for the
Third Circuit

Case No. 19-3010

EZAKI GLIKO KABUSHIKI KAISHA, a Japanese Corporation
d/b/a Ezaki Glico; EZAKI GLICO USA CORP, a California Corporation,

Appellants,

– v. –

LOTTE INTERNATIONAL AMERICA CORP;
LOTTE CONFECTIONARY CO LTD.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY IN NO. 2-15-CV-05477,
HONORABLE MADELINE C. ARLEO, DISTRICT JUDGE

**BRIEF OF *AMICUS CURIAE* INTERNATIONAL
TRADEMARK ASSOCIATION (“INTA”) IN SUPPORT
OF NEITHER PARTY CONCERNING THE PETITION
FOR REHEARING *EN BANC***

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure (“FRAP”) 26.1, *amicus curiae*, the International Trademark Association (“INTA”) states that it is not a publicly held corporation or other publicly held entity. INTA does not have any parent corporation, and no publicly held corporation or other publicly held entity holds 10% or more of INTA’s stock.

CERTIFICATIONS PURSUANT TO FED. R. APP. P. 29

Pursuant to FRAP 29(a)(2), *amicus curiae* certifies that all parties have consented to the filing of this brief. Additionally, in accordance with FRAP 29(a)(4)(E), *amicus curiae* states that only INTA and its counsel authored this brief, and no part of this brief was authored by counsel to a party. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* and its counsel made such a monetary contribution to its preparation or submission.

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STATEMENT OF INTEREST OF AMICUS CURIAE

Founded in 1878 as the United States Trademark Association, INTA is a not-for-profit organization dedicated to supporting and advancing trademarks and related intellectual property concepts as essential elements of trade and commerce. INTA's nearly 6,500 member organizations from 185 countries include trademark owners, law firms, and other professionals who regularly assist brand owners in the creation, registration, protection, and enforcement of their trademarks. INTA's members seek to promote an understanding of trademarks' essential role in fostering informed consumer decisions, effective commerce, and fair competition.

INTA's members are frequent participants – as plaintiffs, defendants, and advisors – in actions brought under the Lanham Act and, therefore, are interested in the development of clear, consistent, and equitable principles of trademark law. INTA has substantial expertise and has participated as *amicus curiae* in numerous cases involving significant Lanham Act issues.¹

¹ Cases in which INTA has filed *amicus* briefs include: *VIP Products LLC v. Jack Daniel's Properties, Inc.*, No. 20-365 (U.S. petition for cert. pending); *U.S. Patent & Trademark Office v. Booking.com B.V.*, 140 S. Ct. 2298 (2020); *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492 (2020); *Peter v. NantKwest, Inc.*, 140 S. Ct. 365 (2019); *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019); *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019); *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418 (2015); *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138 (2015); *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102 (2014); *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013); *Traffix Devices, Inc. v. Mktg.*

INTA was founded in part to encourage enactment of federal trademark legislation after the invalidation on constitutional grounds of the United States' first trademark act. INTA has been instrumental in making recommendations and assisting legislators in connection with almost all major federal trademark legislation, including the Lanham Act, which is at issue in this appeal.

INTA's interest here is to ensure the proper application of the functionality test as articulated in *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995); and *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844 (1982).

ARGUMENT

The U.S. Trademark Act of 1946, 15 U.S.C. § 1051 *et seq.* (the "Lanham Act"), provides a cause of action to one who is injured when a person uses "any word, term, name, symbol, or device . . . which is likely to cause confusion . . . as to the origin, sponsorship, or approval of his or her goods." 15 U.S.C.

§ 1125(a)(1)(A). The Supreme Court and multiple Circuit Courts of Appeal, including this one, have long recognized that this statutory protection from trademark infringement extends to trade dress, such as product design or packaging that has acquired distinctiveness and is associated with its manufacturer or source.

Displays, Inc., 532 U.S. 23 (2001); *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205 (2000); *Ferring B.V. v. Watson Labs., Inc.-Fla.*, 765 F.3d 205 (3d Cir. 2014).

Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 209-10 (2000); *Ideal Toy Corp. v. Plawner Toy Mfg. Corp.*, 685 F.2d 79, 81-82 (3d Cir. 1982). Where a product design or packaging has acquired such distinctiveness (also known as secondary meaning), and assuming other requisites are met, it is considered protectable trade dress that may not be used by unauthorized parties in a manner likely to cause confusion as to the origin, sponsorship or approval of the goods with which the trade dress is used. *TrafFix*, 532 U.S. at 28. In this regard, trade dress protection exists to promote competition and protect consumers against deception. *Id.*

Congress and the courts long have recognized the need to balance trade dress protection with competitors' right to copy features of a product design that serve purposes other than source identification. Among the limitations that help achieve this balance are that product design features deemed "functional" are denied protection. *Id.*, at 32; *Qualitex*, 514 U.S. at 165; *Inwood Labs.*, 456 U.S. at 850 n.10.

A product feature is functional if it is "essential to the use or purpose of the article or if it affects the cost or quality of the article." *Qualitex*, 514 U.S. at 165 (quoting *Inwood Labs.*, 456 U.S. at 850, n.10). Withholding trademark protection for functional product features helps preserve the balance between protecting consumers against confusion and protecting competitors' right to fairly

compete. *TrafFix*, 532 U.S. at 29. For that reason, the dual-spring design for road signs in *TrafFix* was held functional because it helped prevent the signs from blowing over in the wind, *id.* at 32-33; similarly, the diamond quilting on toilet paper (which had been covered by an expired utility patent) was found functional because it makes the toilet paper softer and more absorbent. *Georgia-Pacific Consumer Prods. v. Kimberly-Clark Corp.*, 647 F.3d 723 (7th Cir. 2011).

Every circuit court follows this test, including this Court. *See, e.g.*, *Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, 963 F.3d 859, 865 (9th Cir. 2020); *CTB, Inc. v. Hog Slat, Inc.*, 954 F.3d 647, 657 (4th Cir. 2020); *Groeneveld Transp. Efficiency, Inc. v. Lubecore Int'l, Inc.*, 730 F.3d 494, 503-04 (6th Cir. 2013); *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206, 219 (2d Cir. 2012); *Dippin' Dots, Inc. v. Frosty Bites Distrib., LLC*, 369 F.3d 1197, 1200 (11th Cir. 2004); *Shire U.S., Inc. v. Barr Labs, Inc.*, 329 F.3d 348, 353-54 (3d Cir. 2003); *Eppendorf-Netheler-Hinz GMBH v. Ritter GMBH*, 289 F.3d 351, 355-56 (5th Cir. 2002); *Valu Eng'g, Inc. v. Rexnord Corp.*, 278 F.3d 1268, 1274-76 (Fed. Cir. 2002); *Publ'ns Int'l, Ltd. v. Landoll, Inc.*, 164 F.3d 337, 342 (7th Cir. 1998); *I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 37 (1st Cir. 1998).

Rehearing is appropriate because, rather than following the Supreme Court's functionality test, the panel in this case adopted a new test that deems functional –

and thus bars trade dress protection for – *any product feature that is “useful.”*

Ezaki Glico Kabushiki Kaisha v. Lotte Int’l Am. Corp., 977 F.3d 261, at 266-67 (3d Cir. 2020). This eviscerates the Supreme Court’s test and would potentially preclude trade dress protection for virtually all product design features since almost any feature is useful in at least some way.

INTA takes no position on whether the trade dress at issue in this case is functional, but it does urge the Court to adopt, and apply, the proper test. The panel’s functionality test is incorrect as a matter of law and antithetical to well-settled principles of trade dress protection.

Because this case involves a question of exceptional importance, the Court should grant Glico’s petition for rehearing or rehearing *en banc*. FRAP 35(a)(2).

I. REHEARING SHOULD BE GRANTED BECAUSE THE PANEL’S UNPRECEDENTED DECISION IS INCONSISTENT WITH SUPREME COURT PRECEDENT GOVERNING TRADE DRESS AND LONGSTANDING PRINCIPLES OF FUNCTIONALITY.

In *TrafFix*, the Supreme Court held that the trade dress at issue – a dual-spring design for road signs – was functional because the particular elements claimed were claimed by an expired utility patent. In reaching this holding, the Court reaffirmed its standard for determining whether trade dress is functional

“‘[I]n general terms, a product feature is functional,’ and cannot serve as a trademark, ‘if it is essential to the use or purpose of the article or if it affects the cost or quality of the article.’” *Qualitex*, 514 U. S., at 165 . . . (quoting *Inwood*. . .). Expanding upon the meaning of this

phrase, we have observed that a functional feature is one the “exclusive use of [which] would put competitors at a *significant* non-reputation-related disadvantage.” 514 U. S., at 165.

TrafFix, 532 U.S. at 32 (alteration in original) (emphasis added).

The Panel in this case disregarded the Supreme Court’s standard, and instead diluted it to hold that trade dress is functional if a feature is merely “useful.” *Ezaki Glico*, 977 F.3d 261 at 267. This approach to functionality is inconsistent with the dictates of the Supreme Court. Just because something is “useful” does not mean that it is “essential to the use or purpose of the article.” *TrafFix*, 532 U.S. at 32.

If that were the appropriate standard, many trade dresses protected by the U.S. Patent and Trademark Office and by courts would not qualify. For example, the Volkswagen Beetle design, which has been registered for 20 years (U.S. Reg. No 2,409,675, shown at right) and is an updated version of a design used for more than 70 years, would be denied protection by the Panel because the tires, doors, windows, headlights and bumpers are all “useful.” Similarly, the dripping red wax seal of the iconic Maker’s Mark whiskey bottle – which was found non-functional in *Maker’s Mark Distillery, Inc. v. Diageo N. Am., Inc.*, 703 F. Supp. 2d 671 (W.D. Ky. 2010), *aff’d*, 679 F.3d 410 (6th Cir. 2012) – would run afoul of this Panel’s standard because the red wax usefully seals the bottle and the dripping usefully saves the time, effort and expense of having to cut off any excess wax. The same challenge based on usefulness could be found in innumerable trade dresses that

have been protected by the courts. *E.g.*, *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513 (10th Cir. 1987) (trade dress of closed faced fishing reel protected even though cover on reel is useful in making close face reel easier to use than open face reel); *Bodum USA, Inc. v. A Top New Casting, Inc.*, 927 F.3d 486 (7th Cir. 2019) (trade dress of French press coffee maker protected even though elements like frame, feet, handle, lid, safety lid, and the carafe and plunger are all useful); *Sunbeam Prods. v. W. Bend Co.*, 123 F.3d 246, 255-56 (5th Cir. 1997) (trade dress of kitchen mixer protected even though elements such as mixing bowl and socket for mixing attachments are useful).

Indeed, it is hard to conceive of any trade dress – whether product configuration or packaging design – that is not useful in at least some way. A test that precludes, as a practical matter, all trade dress protection for designs with useful elements cannot be reconciled with precedent of the Supreme Court and every circuit (including this one). As this Court recognized in *American Greetings Corp. v. Dan-Dee Imports, Inc.*, “virtually every product is a combination of functional and non-functional features and ***a rule denying protection to any combination of features including a functional one would emasculate the law of trade dress infringement.***” 807 F.2d 1136, 1143 (3d Cir. 1986) (emphasis added). *See also McNeil Nutritionals, LLC v. Heartland Sweeteners LLC*, 566 F. Supp. 2d 378, 392-93 (E.D. Pa. 2008) (granting preliminary injunction; although “certain

aspects of Splenda’s packaging, such as use of the color yellow, photographs of food and beverages, and the size and shape of the packaging” may be functional, the “overall product packaging . . . is *not essential to the use* or purpose of the product, and . . . does not affect the cost or quality of the product”) (emphasis added).

Applying the same reasoning, the Ninth Circuit recently rejected a similar proposed test in upholding trade dress protection for the Eames Aluminum Group and Aeron chair designs: “As we have long held, a product’s overall appearance is necessarily functional if *everything* about it is functional, not merely if *anything* about it is functional. *See Clicks Billiards*, 251 F.3d at 1259;² *Leatherman*, 199 F.3d at 1011 n.3, 1013.” *Blumenthal Distributing*, 963 F.3d at 867 (emphasis added).

The Panel in this case attempted to justify its test by stating:

Reading functionality as usefulness explains how the Lanham Act fits with the Patent Act. Patents, not trademarks, protect inventions or designs that are “new and useful.” 35 U.S.C. § 101. If the Lanham Act protected designs that were useful but not essential, as Ezaki Glico claims, it would invade the Patent Act’s domain. Because the Lanham Act excludes useful designs, the two statutes rule different realms.

Ezaki Glico, 977 F.3d at 266. But that approach conflicts with the Supreme Court’s holding in *TrafFix* because that Court made clear that functionality is much more than mere usefulness; to be functional, the element for which trade

² *Clicks Billiards, Inc. v. Sixshooters Inc.*, 251 F.3d 1252 (9th Cir. 2001).

dress rights are claimed must be “essential” to the use or purpose, or must put competitors at a “significant . . . disadvantage.” *TrafFix*, 532 U.S. at 32.

That a design feature is useful should be the beginning of the inquiry, not the end. As noted above, many useful – even patented – design features have been protected under trade dress law, yet the panel decision would potentially sweep away all such protection, including for designs that enjoy a presumption of validity as a result of federal registration, 15 U.S.C. § 1115(b). If the Panel meant its decision to apply more narrowly, it should clarify that on rehearing, lest it needlessly engender confusion in future disputes and cloud judgments by parties within this Circuit of whether their product designs are protectable.

By applying a dictionary definition rather than the legal definition articulated by the Supreme Court, the Panel decision obscures, if not obliterates, the difference between simply having a function and being legally functional. That is a key distinction in functionality law, as long ago identified by the Federal Circuit:

[O]nly *de jure* functional designs, as contrasted with *de facto* functional designs, can be exempted from trademark protection. . . . “In essence, *de facto* functional means that the design of a product has a function, i.e., that a bottle of any design holds fluids. *De jure* functionality, on the other hand, means that the product is in its particular shape *because* it works better in this shape.”

Textron, Inc. v U.S. Int’l Trade Comm’n, 753 F.2d 1019, 1024-25 (Fed. Cir. 1985) (third emphasis added) (citations omitted); *see also Leatherman Tool*

Group, Inc. v. Cooper Indus., Inc., 199 F.3d 1009, 1012 (9th Cir. 1999); *In re Becton Dickinson & Co.*, 675 F.3d 1368, 1374 (Fed. Cir. 2012).

II. REHEARING SHOULD BE GRANTED BECAUSE THE PANEL’S DECISION IS INCONSISTENT WITH PRIOR THIRD CIRCUIT PRECEDENT

Prior Third Circuit precedent cited by the Panel in *Ezaki Glico* adheres to the prevailing test for functionality set forth by the Supreme Court and universally followed in other circuits. For example, *Keene Corp. v Paraflex Indus., Inc.*, 653 F.2d 822, 826 (3d Cir. 1981), states that, “[w]here the feature is essential to the utility of the item . . . it is now well-established that the functionality prevents the acquisition of a trademark in that feature.” (Citing *Sylvania Electric Prods. v. Dura Electric Lamp Co.*, 247 F.2d 730, 732 (3d Cir 1957)); see also *Shire*, 329 F.3d at 353-54 (3d Cir. 2003). Only an *en banc* panel of the Third Circuit may overrule *Keene Corp.* and others like it, which remain controlling over later three-judge panel decisions. See Third Circuit Internal Operating Procedure 9.1; *Ryan v. Johnson*, 115 F.3d 193, 198 (3d Cir. 1997).

CONCLUSION

For the foregoing reasons, the Court should grant Appellants' petition for rehearing or rehearing *en banc*.

Dated: November 30, 2020

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CERTIFICATION OF ADMISSION TO BAR

I, Jonathan E. Moskin, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: November 30, 2020

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**CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME AND
OTHER REQUIREMENTS**

I do hereby certify that this brief complies with the type-volume limitation of FRAP 29(b)(4) because this brief contains 2,541 words, excluding the parts of the brief exempted by FRAP 32(f).

The brief complies with the typeface requirement of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size and Times New Roman type style.

Pursuant to Local Appellate Rule 31.1(c), I certify that the text of the electronic form of this brief is identical to the text in the paper copies, and that the electronic form of this brief was scanned for viruses using Windows Defender (Antivirus Version: 1.37.1715.0, last updated 2020-11-30) and no virus was detected.

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CERTIFICATION OF SERVICE

The undersigned hereby certifies that on November 30, 2020, an electronic copy of the Brief of amicus curiae International Trademark Association was filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. The undersigned also certifies that all participants are registered CM/ECF users and will be served via the CM/ECF system.

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