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Trademark Insight

One of the criteria for registering a trademark or service mark is that the word, logo or product packaging/design must be an identifier of the source of the goods or services. This is easily shown when a word mark, for example, HORIZON®, is placed on the container of heavy whipping cream:



It is not always as easy to make this connection with product design. In the case of the shark and alligator design trademark applications filed by Bass Pro for bowling alley services (see photo on the left), the



Examining Attorney required additional information demonstrating that these designs are an indicator of source, (“[t]hat there are items physically located in the building where ... [Bass Pro] provides its services does not by itself mean these items are source-indicating or inherently distinctive, even if ... [the] services are uniquely themed”). Bass Pro did provide additional information from advertisements and unsolicited articles. The marks were registered (U.S. Reg. Nos. 4766835 and

4766839) on July 7, 2015. For further information, see the July 12, 2015 Blog post, “BASS PRO OBTAINS REGISTRATION FOR SHARK AND ALLIGATOR BOWLING BALL RETURN DEVICE” at <https://ntmblog.wordpress.com/>.



Similarly, Magnolia cupcakes, when attempting to register its swirl design (see below), received a “not a source identifier” objection. In response, Magnolia provided evidence that the 3D swirl design was viewed by the consumers as a source identifier (“‘I am in love with Magnolia’s signature frosting swirl’; ‘... and its signature pastel buttercream frosting – delicately applied in trademark swirls – makes them almost too pretty to eat’; [and] ‘what makes Magnolia cupcakes stand apart from the others is the signature swirl of the buttercream frosting’”). While described in any number of ways, perhaps the following quote (from the Let Them Eat cake and Frosting blog) sums it up succinctly: ‘The consistency of the cakes and cupcakes are moist, the cookies are chewy and soft, and the signature swirl on the cupcakes is how you know you are eating an authentic Magnolia Bakery cupcake.’” The additional information was accepted and a registration issued on November 25, 2014 (U.S. Reg. No. 4643246). For further information see the December 1, 2014 Blog, “MAGNOLIA’S SIGNATURE FROSTING SWIRL REGISTERED FOR CUPCAKES” at <https://ntmblog.wordpress.com/>.