

TTAB Determines Color Drawstrings of Trash Bags Not to be Trademarks Due to Genericness and Functionality

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While the issue of what color a trash bag handle is may not be the first topic you would expect to raise ire in the trademark industry, the world is an unpredictable place. Recently, Poly-America and API, two major manufacturers of trash bags in the United States, went up against each other over their competing trade dresses of colored trash bag drawstrings – Poly-America uses an orange drawstring, and API uses a gray colored drawstring.

Both competitors tried to cancel the other's registration for their respective colors. In their petitions, the manufacturers contended that the other's color was generic and/or functional and therefore cannot function as a trademark:

- Poly-America claimed that API's trade dress (gray) "is a generic feature of drawstring trash bags and hence incapable of functioning as a trademark."
- API claimed that Poly-America's trade dress (orange) is functional, or in the alternative, generic and incapable of identifying and distinguishing goods.

This prismatic drama highlights several issues pertaining to the invalidation of trademarks on the basis of genericness and functionality.

What makes a mark a trademark?

Traditionally, a trademark is a word, phrase, design, or some combination thereof that "identifies and distinguishes the source of one party's goods from those of others."

To serve as a trademark, an item must be distinctive. When conferring trademark status on a request, courts group potential marks into four different categories: arbitrary/fanciful, suggestive, descriptive, and generic. Generic marks have the least claim to trademark status because they offer little, if any, identifying ability.

Trademarks, however, are not limited to just phrases or designs. They can also include sounds, scents, and colors, as long as the feature serves as a source indicator; however, if a feature is purely

functional, it cannot be registered as a trademark.

Claims of Genericness

In the case of API's gray drawstring, the TTAB noted the commonality of gray drawstrings in the trash bag industry. In their cancellation claim against API's registration, Poly-America submitted evidence of six different companies that used gray drawstrings on their trash bags. TTAB found this evidence "sufficient to establish that consumers are exposed to use of the color gray in trash bag drawstrings in the same general time period such that they would not perceive it as indicating source but rather, to the extent it is perceived at all, as a category or type of trade dress for the genus plastic trash bags."

In short, the Board decided that in the unlikely event that someone noticed that their trash bag had a gray drawstring, it was a common enough color that they would not associate it with any particular manufacturer.

API's own petition to cancel Poly-American's orange drawstring trademark took a similar tactic, but with a twist. Because Poly-America sells bags (with the orange drawstring) at wholesale to a number of companies, who in turn sell them under a range of other brands, TTAB determined that "when a company sells to third parties for re-sale under the third parties' marks rather than under the manufacturer's mark, that circumstance cripples any attempt to show that consumers uniquely associate the mark with one source, i.e. the manufacturer."

As such, TTAB declared that the orange used by Poly-American was a generic color for trash bag drawstrings because there are enough orange drawstring trash bags in the world, including Poly-American's trash bags sold under varying marks, that consumers would not associate that particular color with Poly-American.

Functionality of Color

In addition to genericness, API claimed Poly-American's orange drawstrings failed as a trademark due to functionality. Applying case law as provided by *Inwood*, TTAB evaluated Poly-America's use of the color orange for drawstrings by the following metrics: Is the feature essential to the use or purpose of the article? Does it affect cost or quality? TTAB concluded that the orange drawstrings served a utilitarian purpose and were therefore primarily functional.

According to the Board: "The purpose of a trash bag is to hold trash. The purpose of the drawstring on a trash bag is to close the trash bag. One purpose of a vibrant contrasting color for the drawstring is to see it more easily to grab it and close the trash bag. Orange is at least one of a few superior colors for that purpose. We find that the color orange is functional for trash bag drawstrings."

Consequently, the Board granted both applications to cancel.

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