

Pattern Designs on US Navy Uniforms and Fabric Are Non-Functional Protected Trademarks

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A recent TTAB case addresses the issue of functionality and protection of design. In the case ***In re Navy Exchange Service Command***, (“NEXCOM”), the TTAB issued a [non-precedential decision](#) on September 29, 2012 in which it reversed the Examining Attorney’s refusal to register four irregular block-shaped, multi-colored pixilated pattern design marks that the US Navy used on clothing and fabric. The grounds for the Examining Attorney’s refusals were that the pattern designs were functional. The functionality finding rested not on the conclusion that the patterns served any camouflage function, but that the patterns masked stains and wear-and-tear, thereby making them essential to NEXCOM’s requirements for a neat and clean Navy uniform.

The Board noted generally that the design or trade dress of a product cannot be protected as a trademark if it is functional and essential to the use or purpose of the article or if it affects the cost or quality of the article, citing to the **US Supreme Court case [TrafFix Devices Inc.](#)** It then cited to the four factors established by the **US Court of Custom and Patent Appeals** (the predecessor to the **US Federal Circuit Court of Appeals**) in *In re Morton-Norwich Products, Inc.* to be considered in determining whether a product design is functional:

- (1) the existence of the utility patent disclosing the utilitarian advantages of the design;
- (2) advertising material in which the originator of the design touts the utilitarian advantages of the design;
- (3) the availability to competitors of alternative designs; and
- (4) facts indicating that the design results in a relatively simple or cheap method of manufacturing the product.

In analyzing factors (1), (2), and (4), the TTAB found no utility patents, the availability of alternative designs of camouflage patterns that contained various colors and patterns, and no evidence that favored either party on the issue of “cheaper method of manufacturing.” On factor (2), the Examining Attorney argued that statements made in US Navy regulations and policies, press releases, and articles from the Navy’s website showed the importance of the “uniform display” to the US Navy and many different “qualitative factors” for uniform development that rendered the design patterns to be

registered “functional.” The Board found that although the Examiner’s evidence did show the Navy’s desire for a durable, cost-effective, and easily maintained uniform, it did not render the particular multicolored pattern chosen by NEXCOM superior to any other pattern that could have been chosen, and that the many of the Navy’s requirements had nothing to do with fabric design. Thus, it held that there was no evidence proving that NEXCOM’s applied-for color pattern design was *essential* to the Navy’s requirement for a neat and clean uniform and reversed the refusals to register. In so holding, the Board stated that “[w]hile the color pattern design in applicant’s marks may perform the incidental function of masking stains and wear and tear on the fabric and clothing items identified in the applications, it need not be devoid of any function in order to be registrable as a trademark.” Thus, in this instance, fabric designs were held to be unique, non-functional, and protectable as trademarks registered on the Principal Register at the US Trademark Office.

This case is another example of not only the treatment of the “functionality” doctrine in a trademark case, but also of how thinking outside-the-box to identify source identifiers your company may be using to promote its products and services can help significantly in limiting a competitor’s ability to copy your designs. For more information about the functionality doctrine, please click [here](#), [here](#), and [here](#).

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