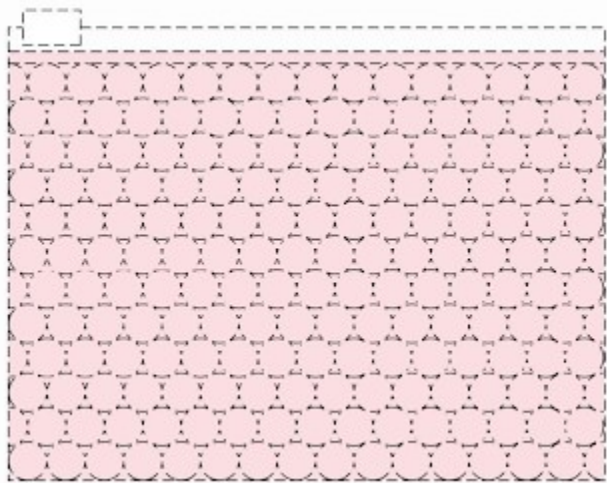


For Glossier, Inc., Pink Isn't Just a Shade of Makeup

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by Andrea L. Hintz



cosmetics retailer Glossier, Inc.

Over the past decade, the influx of online shopping and home delivery has made every day feel like Christmas. The presence of an ever-growing network of online retailers makes it easier than ever to order just about anything online and have it delivered to your doorstep. While many, if not most, products arrive in non-distinct, brown boxes with clear plastic packaging, do not expect the same boring packaging from

Related Capabilities

- Trademark, Copyright + Advertising
- Intellectual Property Litigation

On May 9, 2019, Glossier filed a trademark application for the color pink in connection with a variety of cosmetic products. Glossier ships its products to consumers in its signature “Pink Pouch,” which includes a bubble wrap lining and zipper closure. In its trademark application, Glossier’s description of the mark stated that, “the color pink and a translucent circle patterns displayed on the bag are claimed as a feature of the mark which is displayed on bags.” (emphasis added). The inclusion of “translucent circle patterns” as a feature of the mark drew a refusal to register on the basis that the “translucent circle patterns” (i.e., bubble wrap) were a functional feature of the mark. According to established trademark law, a mark that consists of a three-dimensional configuration of a product or its packaging is functional, and thus unregistrable, when the evidence shows that the design provides identifiable utilitarian advantages to the user. *Valu Eng’g, Inc. v. Rexnord Corp.*, 278 F.3d 1268, 1274, 61 USPQ2d 1422, 1425 (Fed. Cir. 2002). Furthermore, the trademark examiner cited third party evidence of use of empty, pink pouches with a bubble wrap design as support that Glossier’s packaging

lacked distinctiveness and did not serve as an indicator of source in the minds of consumers.

To overcome the functionality refusal, Glossier amended the description of the mark to: “The mark consists of the claimed color pink as applied to bags featuring lining of translucent circular air bubbles and a zipper closure.” (emphasis added). The difference in how the bubble wrap feature of the design was described proved crucial to overcoming the functionality refusal.

To overcome the lack of distinctiveness refusal, Glossier submitted a variety of evidence to demonstrate the color pink had acquired secondary meaning in connection with Glossier’s Pink Pouch. For traditional trademarks, even though a party can support a claim of acquired distinctiveness based on only five years of consecutive use, when attempting to register a non-traditional trademark (such as a color), historically, applicants have often demonstrated longstanding use of the color in connection with the claimed goods/services (among other factors) to meet the acquired distinctiveness standard (See e.g., U.S. Registration No. 2,131,693 for the color brown, registered January 27, 1998, with a first use date of 1917; U.S. Registration No. 2,390,667 for the color yellow, registered October 3, 2000, with a first use date of 1978; U.S. Registration No. 3,361,597 for the color red, registered January 1, 2008, with a first use date of 1992; U.S. Registration No. 2,416,794 for the color blue, registered January 2, 2001, with a first use date of 1939).

Glossier claims October 6, 2014, as the date of first use for its color pink. At first blush, a claim of acquired distinctiveness for a color based on only 6 years of use could fall short as compared to the longstanding use shown in previous color registrations. However, in support of its claim, Glossier submitted evidence of over \$100 million in sales in the year 2018, declarations from 98 customers attesting to recognition of the Pink Pouch as originating from Glossier, marketing materials referencing the Pink Pouch, social media posts and media coverage referencing the Pink Pouch, and third party parodies and imitations of the Pink Pouch. This compilation of evidence was sufficient to overcome the refusal, and the color pink was registered on August 25, 2020. Moreover, it appears Glossier may have a second registration for the color pink on the way for its “Pink Box” packaging. See U.S. Application Serial No. 88/422,355, scheduled for publication in the *Official Gazette* on September 29, 2020.

Glossier’s successful registration effort reinforces the notion that the language used to describe a color on a particular product or product packaging is important and can ultimately impact the registrability of the color. Additionally, while no specific amount of evidence is required to demonstrate acquired distinctiveness of a single color trademark, Glossier’s resourceful use of social media and other media outlets to generate such strong sales and consumer recognition of its brand and pink product packaging in a relatively short amount of time is fairly remarkable. With social media and social media influencers now key components of many marketing campaigns, it will be interesting to see if Glossier’s success inspires other brands to capitalize on such readily available resources to quickly develop widespread brand recognition for a specific color or other

unique identifier beyond a traditional trademark.