

This Opinion is Not a
Precedent of the TTAB

Mailed: December 13, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Seminole Tribe of Florida

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Serial No. 90318831

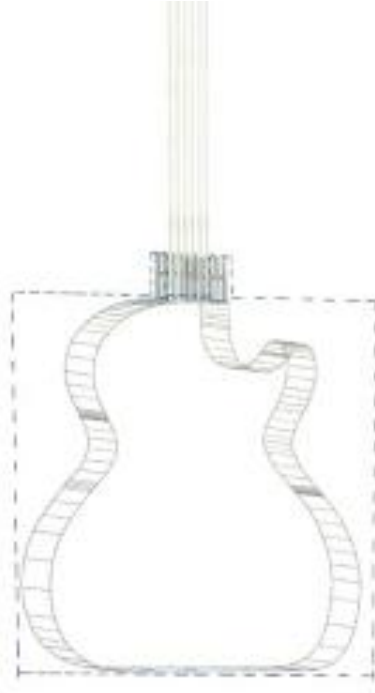
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Miriam Richter of Richter Trademarks PL, for Seminole Tribe of Florida.

Kathleen DeJonge, Trademark Examining Attorney, Law Office 107,
Leslie Bishop, Managing Attorney.

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Before Thurmon, Allard and Casagrande, Administrative Trademark Judges.

Opinion by Thurmon, Administrative Trademark Judge:

Seminole Tribe of Florida (“Applicant”) seeks registration on the Principal Register of the mark shown below for “Casinos” in International Class 41 and “Hotel, restaurant and bar services” in International Class 43.



1

The Trademark Examining Attorney finally refused registration on three grounds:

- (1) the applicant has failed to satisfy the requirement for an acceptable drawing and description of the mark under 37 C.F.R. §§2.37, 2.52(b)(2), (b)(4), and 2.52(b)(4); (2) the mark in the drawing does not match the mark on the specimen and thus, the specimen does not show the mark in the drawing in use in commerce under Trademark Act

¹ Application Serial No. 90318831 was filed on November 13, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming a date of first use anywhere and in commerce of October 24, 2019. The mark is described as follows: “The mark consists of six parallel, vertical beams of light representing guitar strings, extending 20,000 feet in the air from the top of a guitar-shaped building. The guitar-shaped building is not part of the mark and merely shows the placement of the mark.” Color is not claimed as a feature of the mark.

Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. See *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant’s appeal brief appears at 11 TTABVUE and the Examining Attorney’s brief appears at 13 TTABVUE. Citations to the application record are to the downloadable .pdf version of the United States Patent and Trademark Office’s Trademark Status & Document Retrieval (“TSDR”) system.

Sections 1 and 45, 15 U.S.C. §§1051, 1127; and (3) the applied-for mark is nondistinctive trade dress that fails to function as an inherently distinctive source indicator for the identified services under Trademark Act Sections 1, 2, 3, and 45, 15 U.S.C. §§1051-1053, 1127.²

Applicant requested reconsideration, which was denied, and filed this appeal. The parties filed briefs and the appeal is now ready for decision. We affirm the refusal based on the third ground, namely that the applied-for mark is not an inherently distinctive source identifier and therefore, fails to function as a service mark for Applicant's services.

The drawing depicts, and the description of the mark refers to, a guitar-shaped building, but both do so only to make clear that the guitar-shaped building is not part of the applied-for mark. And in the drawing, a rectangular box with dotted lines completely envelopes the guitar figure. This drawing, which controls what the registered mark would be, *see, e.g., In re Forney Indus., Inc.*, 955 F.3d 940, 947-48 (Fed. Cir. 2020); *In re Change Wind Corp.*, 123 USPQ2d 1453, 1459 n.6 (TTAB 2017) (“the drawing of the mark, not the words an application [or registration] uses to describe it, controls what the mark is”), thus depicts a design that not only does not claim a guitar-shaped building, but includes buildings that are not guitar shaped. In other words, this application thus seeks registration of six parallel beams of light extending upwardly from an undefined structure.

Applicant argues that we can't, as a matter of logic, look at this case that way, summing up its basic position as follows:

² 13 TTABVUE 1-2.

Most interesting is that, if the argument of the Office is followed, then the building should not be registrable without the strings - a proposition we know is false. *In re Seminole Tribe of Florida*, 2023 U.S.P.Q.2d 631 (T.T.A.B. 2023). It is therefore, a logical conclusion that if the building can be registered without the strings, the strings can be registered without the building!³

Applicant's logic does not hold up. The body of a guitar is still a guitar, even without strings, but the strings for a guitar have no inherent or natural shape when unattached to a guitar. In the Board decision cited by Applicant, we found there was enough of the guitar body to make the mark immediately identifiable as a guitar, despite the absence of a neck or strings. The same is not true for the six beams of light. In fact, Applicant defined the applied-for mark in a way that eliminated any guitar indicia. The applied-for mark shows the beams of light starting from the top of some structure, but as that structure is not part of the mark, it cannot serve to inform consumers about what the mark means or represents.

Indeed, when one stops to think about what guitar strings look like when not on a guitar, it is very unlikely the strings will naturally fall into a pattern of six parallel strings. The strings alone have nothing to support them. The only way we can perceive Applicant's six beams of light as guitar strings is if we imagine parts of a guitar supporting the strings. This physical structure was intentionally omitted from the applied-for mark by Applicant, however, so the application is left with nothing but six beams of light shining skyward from an undefined structure. Perhaps the six beams of light would be distinctive if presented with sufficient guitar indicia to allow

³ 14 TTABVUE 6.

consumers to make a connection between the beams of light and a guitar. But, as presented, the mark is not what Applicant contends. It is simply six beams of light pointing skyward from some point above the surface of the earth.

The Examining Attorney established during examination that other entities have extended beams of light upward from the top of a building or other structure. Perhaps most significant is the September 11 memorial, which features many beams of light projecting skyward in a manner generally similar to what is depicted in the applied-for mark. A sample image of this display is provided below.



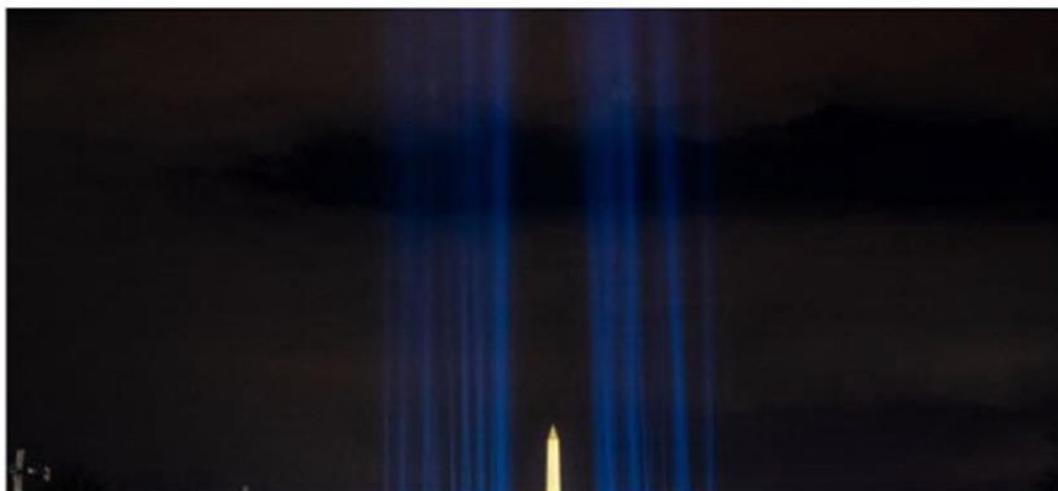
From a similar distance, the applied-for mark will look similar to one of the two groups of beams projected as part of the memorial shown above. With no guitar indicia, we would have only six beams of light, which will merge into a single beam when viewed either from the side or from enough of a distance.

⁴ Office Action dated May 25, 2021, at 33.

Another memorial that used beams of light projected skyward was constructed on the National Mall to remember the victims of the covid pandemic. A sample image of that memorial is shown below.

Home / Photos

The National Mall is illumnnated for COVID-19 Victims in Washington, DC



5

This image is cut off from the lower part, but that actually helps make an important point. Because Applicant has excluded the structure below the lights from the applied-for mark, what consumers see is effectively a group of light beams without any discernable structure below. That is what we see in the image above, where more

⁵ *Id.* at 36.

than six beams are used, but they appear to be floating in the air. That is, we conclude, the only fair interpretation of the applied-for mark: beams of lights pointing skyward as though floating in the air.

There are other examples in the record of beams of lights projected upward from a structure. A McDonald's billboard in the Chicago area projected multiple beams of light upward in a promotion linked to the September 11 memorial in New York.⁶ The Luxor hotel in Las Vegas projects a beam of light skyward.⁷

Applicant complains that some of the examples relied upon by the Examining Attorney are from outside the United States.⁸ We agree that only uses within the United States are relevant because we are concerned with consumer perception only in the U.S., but all four examples we reviewed are from the United States. Two of these (the September 11 memorial and the covid memorial) were national in nature and likely seen on the news (television, print or Internet) by many consumers in the United States. As for the evidence from outside the United States, while it is not probative in the absence of evidence showing exposure to U.S. consumers, it does show that light beams are projected from structures all around the world. It is not an unusual or striking feature.

Whether designs are inherently distinctive is determined under the standards set out in *Seabrook Foods, Inc. v. Bar-Well Foods, Ltd.*, 568 F.2d 1342, 1344, 196 USPQ

⁶ *Id.* at 21.

⁷ *Id.* at 25.

⁸ 14 TTABVUE 4.

289, 291 (CCPA 1977). But before we engage in that analysis, we need to be sure that the applied-for mark is properly considered product packaging trade dress. That is because if it is instead more properly considered a product design mark, it can never be considered inherently distinctive. *See, e.g., Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 212, 54 USPQ2d 1065, 1068 (2000) (marks consisting of product design held not to be inherently distinctive).

In the Board decision Applicant cited in the quote above, its guitar-shaped building mark was considered packaging, which makes sense for the hotel and casino services rendered in the building. But the building is not part of the applied-for mark here. The mark is just the beams of light projecting skyward, emanating from no defined structure. We do not believe such an unusual mark, one that is wholly distinct from any physical structure, constitutes product packaging. Even if we were not sure what to call this sort of mark, that uncertainty would trigger the rule from the *Wal-Mart Stores* case that in “close cases, ... courts should err on the side of caution and classify ambiguous trade dress as product design, thereby requiring secondary meaning.” 529 U.S. at 215, 54 USPQ2d at 1070. Under this approach, the refusal to register must be affirmed.

We reach the same conclusion using the *Seabrook* test, which asks if the applied-for mark

- was a “common” basic shape or design;
- was unique or unusual in a particular field;

- was a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods; or
- whether it was capable of creating a commercial impression distinct from the accompanying words.

Seabrook Foods, 196 USPQ2d at 291.

We begin by noting the fourth *Seabrook* consideration is irrelevant here as there are no words accompanying the beams of light. And as we noted above, there is evidence in the record showing somewhat similar uses of light beams in connection with memorials and promotion of certain goods or services. We cannot say that such practices are particularly common for casinos and hotels, as we have only one example of such a use in the record (the Luxor in Las Vegas).

We find the evidence of record is sufficient to show that projecting light beams skyward is a common promotional practice and that Applicant's light beams—divorced from any guitar indica—are merely a refinement of that practice. As such, the applied-for mark is not inherently distinctive.

Because the applied-for mark does not function as an inherently distinctive mark for casino, hotel, restaurant and bar services, we affirm the failure to function refusal.

We do not reach the other two refusals.

Decision: The failure to function refusal under Sections 1, 2, 3 and 45 is affirmed.