

World Trademark Review *Daily*

P&G fails to register configurations of shampoo and conditioner bottles
Israel - Gilat, Bareket & Co., Reinhold Cohn Group

Examination/opposition
National procedures

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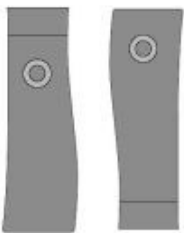
The Israeli Trademark Office has refused to register two-dimensional representations of [The Procter & Gamble Company](#) (P&G)'s shampoo and conditioner bottles (Application to register marks No 216872-4 in the name of The Procter & Gamble Company, July 16 2012).

P&G applied for the registration of three marks for goods in Class 3 of the [Nice Classification](#):

Application 216872



Application 216873



Application 216874



The marks depicted the silhouettes of P&G's Herbal Essences shampoo and conditioner. Application 216872 related to the shampoo bottle and Application 216874 related to the conditioner bottle, while Application 21873 represented a combination of the previous two marks, with the bottles placed side by side.

In support of its applications, P&G adduced an affidavit by its in-house counsel regarding the distinctive character of the marks.

Absent an indication that the trademarks at issue were three-dimensional marks, the applications were refused by the examiner on the grounds that the two-dimensional front views of the bottles lacked inherent distinctiveness.

P&G argued that the applications in fact represented three-dimensional shapes, and that it had only requested the registration of the two-dimensional representation of the bottles as an alternative. It argued that the three-dimensional shapes possessed inherent distinctiveness due to their unique asymmetrical shape, based on which the products complemented each other on the shop shelves.

The IP adjudicator held that an application for a two-dimensional mark cannot be changed into an

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application for a three-dimensional mark after filing, as this would be contrary to the applicable ITMO Circular Letter which allows applications to be amended only to the extent that there is no material change to the mark.

The IP adjudicator held that the asymmetrical front view of the bottles, together with a circle and a dividing line, did not suffice to establish inherent distinctiveness. She noted that the marks as filed were depicted in grey; P&G's word marks (eg, HERBAL ESSENCES) and pictures of flowers, which appear on the bottles in colour, were not present. She accordingly held that the marks lacked inherent distinctiveness.

Further, the adjudicator was not satisfied that the shapes at issue went beyond what is customary and common in the trade. In this respect, the adjudicator noted that there was little difference between marks consisting of three-dimensional configurations of containers and those consisting of two-dimensional representations. She drew parallels with the Manual Concerning Proceedings before the Office for Harmonisation in the Internal Market, under which the conditions of registration of figurative marks consisting of a graphic representation of the goods themselves were the same as those applying to three-dimensional marks representing the goods.

The adjudicator concluded that P&G had failed to demonstrate that the marks had acquired secondary meaning. She also noted that the evidence provided by P&G regarding the advertising and commercial success of the marks pertained to the marks as actually used (ie, with word and design elements, and in colour), rather than the marks applied for.

Accordingly, registration was refused.

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