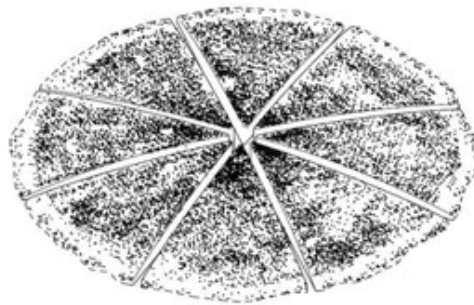


Federal Circuit Review: *In re Misty Everson and Christine Maynard*

October 21, 2026

Functionality Doctrine Bars Registration of Eight-Slice Pancake Configuration

In its first precedential opinion of 2026, the Trademark Trial and Appeal Board (the Board) affirmed a refusal to register an eight-slice pancake product configuration mark, shown below, holding that the proposed mark is a functional design for pancakes. *In re Misty Everson and Christine Maynard*, 2026 USPQ2d 268 (TTAB 2026) [precedential].



The proposed mark is a three-dimensional product design consisting of a pancake divided into eight uniform wedges. Applicants also claimed the texture of the pancake as a feature of the product design mark. At issue was whether or not the proposed design was functional for trademark purposes.

In trademark practice, a “product configuration mark” is essentially a trademark or trade dress claim in the shape, design, or configuration of the product itself, as opposed to a word, logo, or packaging design. The U.S. Patent and Trademark Office and U.S. courts treat product configuration as a distinct category of trade dress.

Under the Trademark Act, functional product features may not be registered. A feature is functional, for trademark purposes, if it is essential to the product’s use or purpose or if it affects cost or quality. This rule exists to prevent trademark law from granting exclusive rights over useful product features that competitors may need to use.

In this case, to determine whether the pancake product design is functional for trademark purposes, the Board considered the *Morton-Norwich* factors:

1. the existence of a utility patent disclosing the utilitarian advantages of the design;
2. advertising materials in which the originator of the design touts the design’s utilitarian advantages;
3. the availability to competitors of functionally equivalent designs; and
4. facts indicating that the design results in a comparatively simple or cheap method of manufacturing the product.

The first and fourth factors lacked evidence, but the second and third factors supported the refusal.

Applicants' Advertising Materials Touted the Design's Utilitarian Advantages

The Board found the second factor strongly favored functionality of the pancake design because the applicants repeatedly promoted the utilitarian advantages of the sliced configuration in their own marketing materials. The applicants' own "Brand Style Guide," marketing materials, and statements directly touted the utilitarian advantages of the design, such as facilitating more convenient serving, sharing, consumption, and transporting of the pancake. Examples of such evidence include:

- A sliced pancake is "meant for life on the go."
- A sliced pancake is a "new team-sized meal option" that is "shareable," "dippable," and "[a]ny time-able."
- "Why stack your pancakes when you can share them by the slice?"
- "Save a few slices for tomorrow."
- The "design allows pancakes . . . to be eaten seated, standing up, or walking," such that "[n]o utensils are needed, and it targets a family-sized serving."
- The "design allows family members to reach in to grab a slice or use a pie server to obtain a piece" of the pancake and enables "d[ripping into a sauce such as maple syrup or blueberry compote."

The examining attorney also submitted third-parties evidence showing that similarly sliced pancakes facilitate shareability and customization of toppings on the individual wedges or slices, which supported the conclusion that the design offers utilitarian advantages.

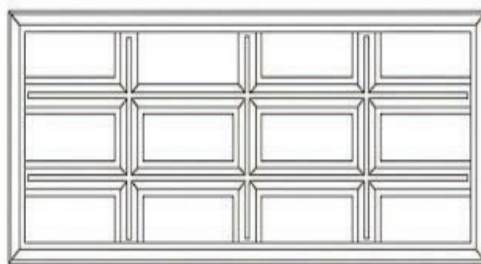
Availability of Functionally Equivalent Designs

The applicants argued that there is no competitive need to use the design because there are many ways to present pancakes, such as stacking pancakes or slicing pancakes in configurations other than eight slices.

The Board rejected these arguments because only *functionally equivalent* alternative designs are relevant in the analysis. The stacked pancakes design did not facilitate more convenient serving, sharing, consuming, and transporting of the pancake, and so was not functionally equivalent. As to the unstacked pancakes design, while the only differences are in the number of slices, the Board concluded that the eight-equal-slices configuration is one of very few superior designs for achieving the shareability and customization benefits. Therefore, allowing exclusive use of the feature would put competitors at a significant disadvantage.

Squaring the TTAB's Analysis with its Hershey's Candy Bar Decision

This case is particularly noteworthy when contrasted against the TTAB's decision in [*In re Hershey Chocolate and Confectionary Corporation*](#), Serial No. 77809223 (June 28, 2012) [not precedential] in which the Board reversed a functionality refusal for Hershey's 12-segment candy bar product configuration mark.



The examining attorney relied on a utility patent claiming a method for "scoring" candy and evidence of third-party segmented candy bars to argue that the "scoring" and flat rectangular shape are functional features enabling consumers to break the candy bar into smaller pieces for consumption. The Board found that, although certain aspects of the product configuration are functional, the design as a whole is not because Hershey's raised-border and recessed rectangles form a prominent, decorative part of the mark that is not used by other candy makers.

In the pancake configuration mark, however, the Board found that the texture the applicants claimed was functional because the texture was simply the result of the typical process of making pancakes and was not decorative or distinctive.

Guidance for Applicants

A practical lesson that emerged from this case is not to abandon product design protection, but to carefully assess whether a design serves a functional role before seeking trademark protection. While securing product configuration marks is challenging, Coca-Cola bottles, Hershey's Kiss chocolates, and Goldfish crackers prove it can be done. However, applicants should consider the following:

- If you have a utility patent that already covers the product design, the design is likely functional.
- If the features of the product design make the product more effective or superior to competing products with an alternative design, the features are likely functional.
- If a product design makes the item cheaper, faster, or easier to manufacture, it is likely functional.

When advertising the product, avoid statements that promote the design's utilitarian benefits, such as making the product "faster," "cheaper," or "stronger." Instead, highlight the design's aesthetic and source-identifying qualities, such as being "beautiful," "sleek," or "distinctive." Advertising should reinforce the design as a stylistic and ornamental brand symbol, rather than a functional feature. Link the standalone shape or design to the brand identity, so that consumers recognize the design as a trademark instead of a useful product feature. By separating form from function, applicants can better argue that competitors do not need to copy the specific design to effectively compete in the market.

Finally, even if certain features in a product configuration mark are functional and common to other products, the mark can still be protectable as a trademark if the overall design of the product configuration is not.

This case summary is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions about this case summary should be directed to:

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