

Trademarks in Your Cereal Bowl

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A Closer Look at Post's Fruity Pebbles Trademark Application

It's likely that you, your kids, or your grandchildren have eaten them. Have you ever thought, though, that you could identify what you are eating just by the fact that multicolor rice crisps are in your bowl? It's probably not the first thing you think of while you are eating, paying more attention to their crunch and the sound they make when they are in milk. We're talking about Post's Fruity Pebbles cereal, of course. While you may not have been thinking that you could identify the contents of your bowl just by looking at the colors in it, Post Foods LLC ("Post") was thinking that. Thus, Post filed a U.S. trademark application to register the colors of Fruity Pebbles as a trademark for use in connection with breakfast cereals. Interestingly, that application was initially refused, and that refusal was affirmed in a decision issued by the Trademark Trial and Appeal Board on January 4, 2024.

There were two main reasons for the refusal. First, in its application, Post defined the mark as "consist[ing] of the colors of yellow, green, light blue, purple, orange, red and pink applied to the entire surface of crisp cereal pieces," as shown in the image below (the application did not claim the shape of the cereal crisps, which makes sense since each crisp has a different shape).

However, the application sought registration of the claimed mark (the colors) for use in connection with breakfast cereals, not crisp cereal pieces or breakfast cereals consisting of crisp cereal pieces. Post argued that it sought registration of the colors shown in the drawing as applied to crisp rice cereal pieces. Ultimately, the Trademark Office held that the mark that Post sought to register was the combination of colors as applied to breakfast cereals. This was because the shape of the rice crisps was not claimed as part of the mark and because the application identified the goods as breakfast cereals (which could cover cereals in ring-like shapes as well as cereals shaped like rice crisps).

Having determined what mark Post sought to register, the Trademark Office next considered whether the mark was registrable. The Trademark Office concluded that the claimed mark did not function as a source identifier and, thus, that it was not registrable.

Why did the Trademark Office reach that conclusion? It was not because the claimed mark consisted of colors—the Trademark Office has long recognized that colors can be trademarks. Rather, it was because, in the Trademark Office's view, Post had not come forward with sufficient evidence to show that consumers associated the colors used for Fruity Pebbles with breakfast cereals. The evidence showed that a wide variety of breakfast cereals had similar multicolor cereal combinations. Some were for other crisp rice cereals, and some featured diverse shapes. The Trademark Office referenced Fruit Loops; Cap'n Crunch's OOPS! All Berries corn and oat cereal; Trix Fruity Shapes cereal; Trader Joe's Fruity O's cereal; Best Choice Fruity Crisp Rice cereal; Wegmans Fruity Rice Crisps cereal; Clover Valley Fruity Bites rice cereal and others to support this conclusion, as well as articles from various publications. With so many cereals using multicolor combinations, in the Trademark Office's view, the use of a similar combination on Fruity Pebbles would not cause consumers to identify the cereal as being Fruity Pebbles.

Additionally, the Trademark Office pointed out that much of the evidence submitted by Post to support its application pertained to its use of the multicolor combination on crisp rice breakfast cereals, not to the broader breakfast cereals identified in the application.

In view of this decision, anyone interested in registering a trademark in the U.S. should keep the following in mind:

1. In the U.S., it is possible to register colors and product configurations as trademarks (it is much more difficult to do this elsewhere in the world);
2. While colors and product configurations can be registered as trademarks in the U.S., it is not an easy thing to do and often requires the submission of extensive evidence showing that consumers recognize the mark; and
3. The advice of experienced trademark counsel is crucial in prosecuting applications like this, from identifying the goods to be covered by an application to assessing whether there is sufficient evidence to establish that a mark functions as a source identifier.

At Offit Kurman, we can assist with all aspects of trademark prosecution; please reach out for a consultation or if you have any questions.