

Information about the parties

Appellant (plaintiff in the original trial): Airwair International Limited
Legal representative: Jon William Mortimore, Director.
Entrusted litigation agent: Yang Yuzhou, lawyer of Beijing Dacheng (Shanghai) Law Firm.

Appellee (defendant in the original trial): National Intellectual Property Administration of the People's Republic of China
Legal representative: Shen Changyu, director.
Entrusted litigation agent: Tian Yuan, examiner of National Intellectual Property Administration of the People's Republic of China.

Trial Process

Airwair International Limited (hereinafter referred to as Airwair ICompany), the appellant, appealed to this court against the administrative judgment No. (2020) Jing 73 Xing Chu 14440 of the Beijing Intellectual Property Court (hereinafter referred to as Beijing Intellectual Property Court) for the administrative dispute over the review of the rejection of the trademark application. After accepting this case on August 9, 2021, this court formed a collegial panel to hear it according to law. The case has now concluded.

First Instance Court Findings

The Beijing Intellectual Property Court ascertained:

I. Applied-for Trademark

1. Applicant: Airwair Company.
2. Application No.: No. 31447132.
3. Application date: June 6, 2018.



4. Logo:

5. Designated products for use (Class 25, similar group 2507): shoes (wearing objects on feet); shoes; booties; mid-rise boots; lace-up boots; Sole.

II. Decision under appeal: Trademark Review No. [2020] 90989 "Regarding the Review Decision on the Rejection of the 3D Trademark No. 31447132" The decision was made on April 23, 2020. The decision found: The applied trademark lacks distinctiveness when used on all goods such as "shoes (footwear)", which constitutes the situation referred to in Article 11, Paragraph 1, Item 3 of the Trademark Law of the People's Republic of China (2019). The evidence provided by Airwair Company is insufficient to prove that the applied trademark is registrable. In accordance with Article 11, Paragraph 1, Item 3, Article 30, and Article 34 of the Trademark Law of the People's Republic of China (2019), the National Intellectual Property Administration

of the People's Republic of China (hereinafter referred to as the National Intellectual Property Administration) decided: The registration application for the applied trademark is rejected.

III. Other facts The National Intellectual Property Administration issued a "Trademark Rejection Notice", deciding to reject the registration application of the applied trademark on the grounds that the applied trademark lacks distinctiveness when used as a trademark on the designated goods and cannot be registered as a trademark, in accordance with Article 11, Paragraph 1, Item 3, and Article 30 of the Trademark Law of the People's Republic of China (2013) (hereinafter referred to as the 2013 Trademark Law). Dissatisfied with the above-mentioned rejection notice, Airwair Company filed an application for review with the State Intellectual Property Office.

During the original trial, Airwair Company explicitly stated that it had no objection to the procedure of the decision under appeal. It submitted evidence such as a comparison table of the seam of the applied trademark and other brand shoes, product manuals and related reports of Dr. Martens shoes, promotion and publicity reports of Dr. Martens shoes, store and sales information of Dr. Martens shoes, and evidence of Airwair Company's product protection and award-winning materials to support its litigation request.

The National Intellectual Property Administration did not object to the legality, relevance, and objectivity of the evidence provided by Airwair Company, but did not recognize the purpose of proof. The court of first instance held that:

The Beijing Intellectual Property Court held: The judgment of inherent distinctiveness should be based on the cognition of the relevant public. If a certain mark cannot make the relevant public recognize it as a trademark, then the mark does not have inherent distinctiveness. For the applied trademark in this case, it is a three-dimensional shape of the prominent yellow edge stitching of boots from various angles. When used as a whole on the goods designated by this trademark such as "shoes; boots", it is easy for the relevant public to see the applied trademark and first recognize it as the appearance of the goods itself, rather than recognizing it as a mark distinguishing the source of goods.

Although Airwair Company claims that the applied trademark is its original creation, according to the second paragraph of Article 9 of the "Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Administrative Cases for the Authorization and Confirmation of Trademarks", only the shape of the goods themselves or a part of the shape of the goods themselves is used as a three-dimensional mark to apply for a trademark. The shape is created or used by the applicant for the first time and cannot naturally lead to its distinctive features as a trademark. Therefore, the applied trademark does not have inherent distinctiveness, and there is nothing wrong with the decision under appeal that the applied trademark violates Article 11, Paragraph 1, Item 3 of the 2019 Trademark Law.

Marks lacking inherent distinctiveness, if they have reached the necessary degree of fame through use on specific goods or services, and are sufficient for the relevant public to recognize them as trademark identifiers, can be determined that the mark has obtained distinctiveness through use on this commodity or service and can be registered as a trademark. In this case, all the evidence submitted by Airwair Company is evidence of the joint use and promotion of the shoes with yellow edge stitching shown in the applied trademark and other registered trademarks, and is not directly pointed to the applied trademark itself, which is not enough to prove that the applied trademark has reached the necessary degree of fame on the designated goods, sufficient to give it the meaning of identifying the source of goods. Therefore, the applied trademark has not obtained distinctiveness through use, Airwair Company's corresponding claim is not established, and is not supported.

First Instance Judgment Result

In summary, the Beijing Intellectual Property Court, in accordance with Article 69 of the Administrative Procedure Law of the People's Republic of China, ruled: to dismiss the litigation request of Airwair Company.

Appellant's Claims

Airwair Company, dissatisfied with the original judgment, appealed to this court, requesting the revocation of the original judgment and the decision under appeal, and ordering the National Intellectual Property Administration to make a new decision. Its main appeal reasons are: 1. The applied trademark is the yellow edge stitching of boots, not just the shape of the goods themselves or a part of the shape of the goods themselves, and does not constitute the situation referred to in Article 9 of the "Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Administrative Cases for the Authorization and Confirmation of Trademarks". 2. The applied trademark has unique features such as bright yellow, thicker stitching, longer stitching, and gaps between each stitching instead of being closely connected, and does not violate Article 11, Paragraph 1, Item 3 of the 2019 Trademark Law. 3. The decision under appeal did not provide evidence to prove that the applied trademark lacks distinctive features. The National Intellectual Property Administration should bear the burden of proof for this, and the allocation of the burden of proof in the original judgment was wrong. 4. The evidence in the case can prove that the applied trademark has obtained distinctive features through long-term use by Airwair Company. 5. The common use of three-dimensional marks with other trademarks on goods is a common usage. The original judgment based on this determined that the applied trademark did not have distinctiveness, which will make it difficult to register three-dimensional marks of product shapes, which is contrary to the legislative spirit of Article 11, Paragraph 2 of the 2019 Trademark Law.

The National Intellectual Property Administration complies with the original judgment.

This Court's Findings

After hearing, it was found that the facts found by the original court were true, and there was evidence in the case such as the trademark file of the applied trademark, the "Trademark Rejection Notice", the decision under appeal, the evidence submitted by all parties during the trademark review stage and the original trial stage, and the statements of the parties, which were confirmed by this court.

This court also found that the trademark file of the applied trademark states that the exclusive right to the part of the boot shape other than the yellow edge stitching is waived. The above facts are corroborated by the trademark file of the applied trademark in the case.

This Court's Opinion

This court held Article 11 of the 2019 Trademark Law stipulates: "The following marks shall not be registered as trademarks: (1) Those that only have the generic name, graphic, or model of the goods; (2) Those that directly indicate the quality, main ingredients, function, use, weight, quantity, and other characteristics of the goods; (3) Other marks lacking distinctive features. The marks listed in the preceding paragraph that have obtained distinctive features through use and are easy to recognize can be registered as trademarks."

Article 9 of the "Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Administrative Cases for the Authorization and Confirmation of Trademarks" stipulates: "Only the shape of the goods themselves or a part of the shape of the goods themselves is used as a three-dimensional mark to apply for a trademark, the relevant distinctive features. The shape is created or used by the applicant for the first time and cannot naturally lead to its distinctive features as a trademark. If the mark referred to in the first paragraph has been used for a long time or widely, and the relevant public can identify the source of the goods through this mark, it can be determined that the mark has distinctive features." The basic function of a trademark is to distinguish the source of goods or services, and its essence is to establish a fixed connection between the trademark mark and the source of specific goods or services. Therefore, to judge whether the applied trademark is a mark that cannot be registered as a trademark as stipulated

above, it should comprehensively consider the meaning of the trademark mark itself, the goods designated for use by the trademark, the recognition habits of the relevant public, and the actual use situation in the industry.

In this case, the applied trademark is the yellow stitching around the edge of the boot upper. The edge stitching of the shoe upper is a necessary part of the shoe product, which occupies a small proportion on the shoe product and is a part that is difficult for the relevant public to recognize under normal attention. Airwair Company claims that the applied trademark has features such as bright yellow, thicker stitching, longer stitching, and gaps between each stitching instead of being closely connected, but elements such as the thickness of the stitching and the length of the stitching are difficult to distinguish subtle differences, and the color of the stitching is also a common choice for shoe products. The stitching shown in the applied trademark is used on goods such as shoes, ankle boots, and mid-calf boots. The relevant public is not easy to recognize it as a mark indicating the source of goods under normal circumstances, and it does not have distinctive features as a trademark. Therefore, the applied trademark is a situation where a part of the shape of the goods themselves is used as a three-dimensional mark to apply for registration and lacks inherent distinctiveness. It violates Article 11, Paragraph 1, Item 3 of the 2019 Trademark Law and the first and second paragraphs of Article 9 of the "Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Administrative Cases for the Authorization and Confirmation of Trademarks". The original court's determination of this is correct.

In the case where the applied trademark itself lacks distinctive features, it should be determined whether the mark is a situation where it has obtained distinctive features and is easy to recognize through actual use, based on the relevant evidence. In this case, the edge stitching shown in the applied trademark is one of the components of the shoe product. Due to its marking position and the characteristics of the designated goods, the proof of this type of trademark obtaining distinctiveness through use may be more difficult than the three-dimensional marks applied for with product packaging or containers and other three-dimensional marks. That is, Airwair Company should provide evidence to prove that the relevant public's recognition of the edge stitching on the shoes sold by the company has departed from the inherent concept of being a part of the goods and clearly points to the source of the goods. Airwair Company in this case proposed a special impact on the change of the relevant public's recognition habits and the usual use of the industry in the sale of its shoe products with the applied trademark as a three-dimensional trademark. And some of the evidence shows that the edge stitching of the shoe product is not yellow, and the thickness and interval of the stitching are different, which does not correspond to the design features of the applied trademark claimed by Airwair Company. Looking at the evidence in the case, it is not enough to prove that the relevant public can recognize it as a mark indicating the source of goods on the goods such as shoes, ankle boots, and mid-calf boots designated for use by the applied trademark, thereby obtaining distinctive features. Airwair Company's appeal reason that the applied trademark has obtained distinctiveness through use cannot be established, and this court does not support it.

In conclusion, the lack of inherent distinctiveness of the applied trademark is a conventional legal judgment based on the pattern of the mark and the situation of the designated goods. Airwair Company claims that the applied trademark has distinctiveness and should bear the corresponding burden of proof for this positive fact. The determination conclusion of the decision under appeal on the distinctiveness of the applied trademark is correct, and the allocation of the burden of proof in the original judgment is not wrong. Airwair Company's relevant appeal reasons cannot be established, and this court does not support it. Upon review, all other appeal reasons of Airwair Company cannot be established, and this court does not support them.

Second Instance Judgment Result

In summary, the original judgment has clear facts and correct application of law and should be upheld. All appeal reasons of Airwair Company cannot be established, and this court does not support its appeal

request. In accordance with Article 89, Paragraph 1, Item (1) of the Administrative Procedure Law of the People's Republic of China, it is ruled as follows:

Dismiss the appeal and uphold the original judgment.

The case acceptance fees for the first and second instances are RMB 100 each, all borne by Airwair International Limited (already paid).

This judgment is the final judgment.

Presiding Judge: Yu Huibin
Judge Chen Xi
10 June 2022
Judge's Assistant: Mo Jiamin
Clerk: Liu Qian

中华人民共和国
北京市高级人民法院
行政判决书

(2021)京行终 5797 号

当事人信息

上诉人(原审原告):埃瓦国际有限公司。
法定代表人:乔恩·威廉·莫蒂莫尔,董事。
委托诉讼代理人:杨宇宙,北京大成(上海)律师事务所律师。

被上诉人(原审被告):中华人民共和国国家知识产权局。
法定代表人:申长雨,局长。
委托诉讼代理人:田园,中华人民共和国国家知识产权局审查员。

审理经过

上诉人埃瓦国际有限公司(简称埃瓦公司)因商标申请驳回复审行政纠纷一案,不服中华人民共和国北京知识产权法院(简称北京知识产权法院)(2020)京 73 行初 14 440 号行政判决,向本院提起上诉。本院于 2021 年 8 月 9 日受理本案后,依法组成合议庭进行了审理。本案现已审理终结。

一审法院查明

北京知识产权法院查明:

一、申请商标

1. 申请人:埃瓦公司。
2. 申请号:第 31447132 号。
3. 申请日期:2018 年 6 月 6 日。



4. 标志:
5. 指定使用商品(第 25 类,类似群组 2507):鞋(脚上的穿着物);鞋;短靴;中筒靴;系带靴子;鞋底。

二、被诉决定:商评字[2020]第 90989 号《关于第 31447132 号三维标志商 标驳回复审决定书》 被诉决定作出时间:2020 年 4 月 23 日。 该决定认定:申请商标使用在“鞋(脚上的穿

着物)”等全部商品上,缺乏商标显著性,构成2019年商标法)第十一条第一款第(三)项所指情形。埃瓦公司提供的在案证据不足以证明申请商标具有可注册性。

依照2019年商标法第十一条第一款第(三)项、第三十条和第三十四条的规定,中华人民共和国国家知识产权局(简称国家知识产权局)决定:申请商标的注册申请予以驳回。

三、其他事实

国家知识产权局作出《商标驳回通知书》,以申请商标作为商标使用在指定商品上缺乏显著性、不得作为商标注册为由,根据2013年8月30日修改的《中华人民共和国商标法》(简称2013年商标法)第十一条第一款第(三)项、第三十条的规定,决定:驳回申请商标的注册申请。

埃瓦公司不服上述驳回通知,向国家知识产权局提出复审申请。

原审庭审中,埃瓦公司明确表示对被诉决定作出的程序不持异议,其向法院提交了申请商标缝线与其他品牌鞋履缝线的对比表、马汀博士鞋的产品手册和相关报道资料、马汀博士鞋履的推广以及宣传报道资料、马汀博士鞋的门店及销售资料、埃瓦公司产品的维权及获奖资料等证据材料,以支持其诉讼请求。

国家知识产权局对埃瓦公司提供证据的合法性、关联性、客观性均不持异议,但不认可证明目的。

一审法院认为

北京知识产权法院认为:固有显著性的判断应当以相关公众的认知为标准。如果某一标志无法使相关公众将其作为商标进行认知,则该标志不具有固有显著性。对于本案的申请商标来说,其为各个视角的靴子突出黄色贴边缝线的三维造型,整体使用在该商标指定的“鞋;靴子”等商品上,易使相关公众看到申请商标时,首先会将其当做商品外观本身进行识别和认知,而非将其认作区分商品来源的标志。

虽然埃瓦公司主张申请商标系其独创,但根据《最高人民法院关于审理商标授权确权行政案件若干问题的规定》第九条第二款规定,仅以商品自身形状或者自身形状的一部分作为三维标志申请注册商标,该形状系申请人所独创或者最早使用并不能当然导致其具有作为商标的显著特征。因此,申请商标不具有固有显著性,被诉决定认为申请商标违反2019年商标法第十一条第一款第(三)项规定并无不当。

缺乏固有显著性的标志,如已通过使用在特定商品或服务上达到了必要的知名程度,足以使相关公众将其作为商标标识识别,则可以认定该标志在这一商品或服务上通过使用获得了显著性,可以作为商标予以注册。本案中,埃瓦公司所提交的证据均系申请商标中所显示具有黄色贴边缝线的鞋子与已注册商标共同使用、宣传的证据,并非直接指向申请商标本身,尚不足以证明申请商标在指定使用的商品上达到必要的知名度,足以使其产生识别商品来源的意义。因此,申请商标亦未通过使用获得显著性,埃瓦公司的相应主张不成立,不予支持。

一审裁判结果

综上,北京知识产权法院依照《中华人民共和国行政诉讼法》第六十九条之规定,判决:驳回埃瓦公司的诉讼请求。

上诉人诉称

埃瓦公司不服原审判决,向本院提起上诉,请求撤销原审判决与被诉决定,判令国家知识产权局重新作出决定。其主要上诉理由是:1.申请商标为靴子的黄色贴边缝线,并非仅是商品自身形状或自身形状的一部分,不构成《最高人民法院关于审理商标授权确权行政案件若干问题的规定》第九条所指情形。2.申请商标具有明亮的黄色、缝线较粗、每段缝线较长、各段缝线之间有间隙而非紧密相接等独特的著特征,未违反2019年商标法第十一条第一款第(三)项的规定。3.被诉决定未提供证据证明申请商标缺乏显著特征,国家知识产权局对此应负有举证责任,原审判决的举证责任分配有误。4.在案证据能够证明申请商标经过埃瓦公司的长期使用已获得显著特征。5.三维标志与商品上的其他商标共同使用系常见使用方式,原审判决依此认定申请商标不具有获得显著性将导致商品形状类三维标志注册困难,与2019年商标法第十一条第二款的立法精神相悖。

国家知识产权局服从原审判决。

本院查明

经审理查明,原审法院查明事实属实,且有申请商标的商标档案、《商标驳回通知书》、被诉决定、各方当事人在商标评审阶段和原审诉讼阶段中提交的证据以及当事人陈述等在案佐证,本院予以确认。

本院另查,申请商标的商标档案载明,放弃除黄色贴边缝线以外的靴子形状部分的专用权。以上事实,有申请商标的商标档案在案佐证。

本院认为

本院认为:2019年商标法第十一条规定:“下列标志不得作为商标注册:(一)仅有本商品的通用名称、图形、型号的;(二)仅直接表示商品的质量、主要原料、功能、用途、重量、数量及其他特点的;(三)其他缺乏显著特征的。前款所列标志经过使用取得显著特征,并便于识别的,可以作为商标注册。”

《最高人民法院关于审理商标授权确权行政案件若干问题的规定》第九条规定:“仅以商品自身形状或者自身形状的一部分作为三维标志申请注册商标,相关的显著特征。该形状系申请人所独创或者最早使用并不能当然导致其具有作为商标的显著特征。第一款所称标志经过长期或者广泛使用,相关公众能够通过该标志识别商品来源的,可以认定该标志具有显著特征。”商标的基本功能是区分商品或服务的来源,其本质是在商标标志与特定的商品或服务的来源之间建立固定联系。因此,判断申请商标是否属于前述规定的不得作为商标注册的标志,应当综合考量商标标志本身的含义、商标指定使用的商品、相关公众的认知习惯和所属行业的实际使用情况。

本案中,申请商标为环绕靴子鞋面边缘的黄色缝线。鞋面的边缘缝线是鞋类商品的必要组成部分,其在鞋类商品上所占比例较小,属于以相关公众一般注意力难以识别的部分。埃瓦

公司主张申请商标具有明亮的黄色、缝线较粗、每段缝线较长、各段缝线之间有间隙而非紧密相接等特点,但缝线粗细、线段长短等要素属难以区分的细微差异,缝线颜色亦是鞋类商品的常见选择,申请商标所示缝线使用在鞋、短靴、中筒靴等商品上,相关公众在一般情况下不易将其识别为指示商品来源的标志,不具有作为商标的显著特征。因此,申请商标属于以商品自身形状的一部分作为三维标志申请注册且缺乏固有显著性的情形,违反了2019年商标法第十一条第一款第(三)项和《最高人民法院关于审理商标授权确权行政案件若干问题的规定》第九条第一款、第二款的规定,原审法院对此认定正确。

在申请商标标志本身缺乏显著特征的情形下,应当结合相关证据判断该标志是否属于通过实际使用取得显著特征并便于识别的情形。本案申请商标所示边缘缝线系鞋类商品的组成部分之一,囿于其标示位置及指定使用的商品特点,此类商标通过使用获得显著性的证明难度可能较以商品包装或容器申请的三维标志及其他三维标志更高,即埃瓦公司应当举证证明相关公众对该公司所售鞋类商品上边缘缝线的认识已脱离商品组成部分这一固有概念而明确指向商品来源。埃瓦公司在本案中提出申请商标在其鞋类商品销售中改变相关公众认知习惯、超越所属行业通常使用情况的特殊影响。且部分证据所示鞋类商品边缘缝线并非黄色,缝线粗细及间隔亦有不同,与埃瓦公司所称申请商标的设计特征未能明确对应。纵观在案证据,尚不足以证明在申请商标作为三维标志商标的情况下,相关公众能够在该商标指定使用的鞋、短靴、中筒靴等商品上将其作为标示商品来源的标志进行识别从而获得显著特征,埃瓦公司有关申请商标通过使用获得显著性的上诉理由不能成立,本院不予支持。

承前所述,申请商标缺乏固有显著性系基于标志图样及指定使用商品情况所作的惯常法律判断,埃瓦公司主张申请商标具有显著性,应就这一积极事实承担相应证明责任。被诉决定对申请商标显著性的判断结论正确,原审判决的举证责任分配亦无不当,埃瓦公司的相关上诉理由不能成立,本院不予支持。

经审查,埃瓦公司的其他上诉理由均不能成立,本院不予支持。

二审裁判结果

综上,原审判决认定事实清楚,适用法律正确,应予维持。埃瓦公司的上诉理由均不能成立,对其上诉请求本院不予支持。依照《中华人民共和国行政诉讼法》第八十九条第一款第(一)项之规定,判决如下:

驳回上诉,维持原判。

一、二审案件受理费各人民币一百元,均由埃瓦国际有限公司负担(均已交纳)。

本判决为终审判决。

审判长 俞惠斌
审判员 陈曦
二零二二年六月十日
法官助理 莫嘉敏
书记员 刘茜