

Jason Bloom in INTA News: 'INTA Weighs in on Functionality Test in Snack Food Clash'

December 17, 2020 Jason Bloom

PRACTICES Intellectual Property, Trademark and Advertising

When is a snack food design functional? That is the provocative question on petition for en banc review in the Third Circuit Court of Appeals this term. INTA voiced its view through an amicus brief filed November 30, in *Ezaki Glico Kabushiki Kaisha v. Lotte International America Corp.*, No. 19-3010 (3d Cir.).

Four members of INTA's United States Amicus Subcommittee of the International Amicus Committee contributed to the brief: Subcommittee Chair David H. Bernstein (Debevoise & Plimpton LLP, USA), Bruce R. Ewing (Dorsey & Whitney LLP, USA), Jonathan E. Moskin (Foley & Lardner LLP, USA), and Claudia Ray (Kirkland & Ellis LLP, USA).

Background

The dispute centers around Ezaki Glico's design for its snack food Pocky—a stick-shaped, chocolate-covered cookie, with a non-chocolate-covered end (or handle) designed for holding. The question is whether the design, which indisputably enables consumers to enjoy the Pocky without getting chocolate on their hands, is protectable as trade dress or “functional,” and therefore outside the scope of protection.

Ezaki Glico introduced its stick-shaped snack to the American market from Japan in 1978, and eventually registered the Pocky's design in 1989 as trade dress with the U.S. Patent and Trademark Office. Ezaki Glico sued Lotte International America Corp. (Lotte) in the U.S. District Court for the District of New Jersey for trade dress infringement based on its sales of similar-looking, partially chocolate-covered cookie sticks.

The district court granted summary judgment in Lotte's favor, holding that Pocky was not entitled to trade dress protection in its design because the design was functional. Ezaki Glico appealed the ruling to the U.S. Court of Appeals for the Third Circuit, which affirmed, holding that the Pocky trade dress was functional and therefore not subject to protection.

Excerpted from *INTA News*. To read the full article, click [here](#).