

RE: APPEAL FROM FINAL RE-)	EX-PARTE CASE NO. 219
JECTION OF APPLICATION)	
BY PATENT EXAMINER)	Application Serial No. D-4594
)	Filed : December 11, 1981
)	Applicant : Ann K. Fritz
)	For : "PITCHER OR THE LIKE"
)	
)	<u>DECISION NO. 92-26 (PAT.)</u>
)	
ANN K. FRITZ,)	November 11, 1992
Applicant-Appellant.)	
x-----x	

DECISION

This is an appeal from the final rejection of the Patent Examiner in charge of Patent Application No. 4594 with filing date of 11 December 1981 for pitcher and the like. Applicant Ann K. Fritz, a citizen of the United States of America and a resident of 132 Park Place, Woonsocket, Rhode Island 02895, U.S.A. filed this appeal under the Rules of Practice in Patent Cases after Patent Examiner Merito J. Carag made his final rejection to the said application under date 11 March 1988 and denominated as Paper No. 19.

The specification of the application in question, a continuation in part of Serial No. D-3770, filed on 23 January 1980 (now Philippine Patent No. 2794), described an ornamental pitcher as drawn in twelve (12) perspective views. On 02 June 1986, the Examiner issued his first action rejecting the lone claim for lack of novelty over Philippine Patent No. D-2794.

Applicant submitted on 28 November 1986, her response to the said action and alleged that the height of the container portion are different and averred jurisprudence to support her application.

Not convinced with the response of the Applicant, the Examiner issued his second action (Paper No. 14) on 28 February 1987 reiterating his rejection and made a rebuttal on the jurisprudence submitted by the Applicant.

In moving for reconsideration, the Applicant submitted her response on 20 August 1987 by introducing additional doctrines on patents as laid down by the US Courts. The examiner, based on his convictions that the application is devoid of patentable merit, made his final rejection on 11 March 1988.

Not satisfied with the final rejection to her application, and in accordance with the Rules of Practice in Patent Cases, applicant lodged this Appeal.

The Applicant filed her brief on 05 June 1989 and the Examiner filed his on 03 April 1991.

Culled from the exchange of papers between the applicant and the examiner is the issue of whether or not the application for an ornamental pitcher is patentable against the cited reference.

At the onset, the Examiner observed that the design in question appears to be similar with the cited reference. Although the former was described in twelve (12) drawings while the latter in eight (8), the Examiner noted that seven of these drawings are identical (third paragraph of Paper No. 14). Applicant also declared that it is only the height of her design which appears to be different from the cited reference (item 3 of her response denominated as Paper No. 13).

The object of the statute on design patents is to encourage the decorative arts and a design which merely pleases the eye is a proper subject of a design patent. Hence, in order to decide whether two designs are the same, their appearance as a whole should be considered (Krem-ko Co. vs. R.G. Miller & Sons Inc., 8 F-2d 872).

As correctly stated by the Examiner, the two designs in question are identical, the only difference being the taller structure of the application in question. However, mere change in size of an article will not result in a difference in appearance and is accordingly not a sufficient basis for a design patent (King Ventilating Co. vs. St. James, 26F (2d) 357 [CCA]). From their appearance, in their tout ensemble, the same sensation will awaken and remain in an observers mind (please see Kim Craftsman vs. Astra Products Inc. 212 USPQ 268) Therefore, to be patentable, the design should display or characteristically different effect not suggested by the prior art. That is, the design as a whole must produce a new impression on the eye which is absent in the application in question.

WHEREFORE, premises considered, the finding of the Examiner is hereby SUSTAINED and the Application Serial No. 4594 is hereby REJECTED.

Let a filewrapper of this case be forwarded to the Mechanical and Electrical Examining Division for their proper disposition.

SO ORDERED.

IGNACIO S. SAPALO
Director