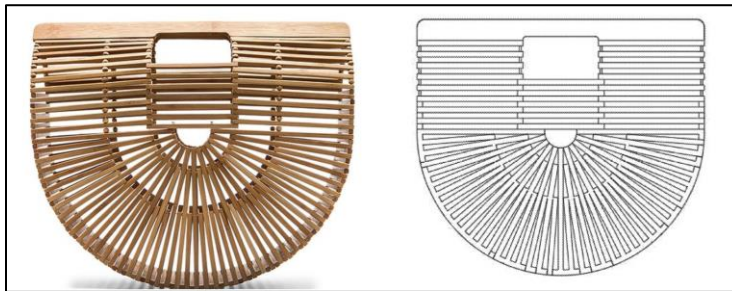


Should Fashion Designers Seek Design Patents over Trade Dress Protection?

In re Jasmin Larian LLC, 2022 BL 106326, TTAB, Serial No. 87522459

By: Ifti Zaim & Alexa Tipton | April 25, 2022

In a decision designated precedential on March 29, the USPTO refused to grant Jasmin Larian trade dress protection for her popular handbag design because the design was generic and nondistinctive. But, the USPTO *granted somebody else* a design patent claiming that *same bag design* on an application filed months after Larian’s trade dress application. It did so even though the law requires design patents to be novel and non-obvious but does not require the same of trade dress. So, how did that even happen?



In July 2017, Larian filed her trade dress application for the “Ark” bag (a structured, bamboo handbag) (left ¹) produced under her designer brand, Cult Gaia. About four months later, Minling Lin ([if such a person exists](#)) applied for a design patent on an identical handbag design (right), which the USPTO [issued on March 19, 2019](#).

However, in January of 2022, the USPTO refused Larian’s trade dress registration, finding it generic and lacking both intrinsic and acquired distinctiveness. A product design may be found generic when it is so common that it does not identify any particular source. The TTAB’s main evidence of genericness was that decades before when Cult Gaia started selling the Ark, and even concurrently, similar handbags were sold in the U.S. and abroad by other producers. The TTAB also found that the Ark had not acquired distinctiveness, meaning consumers had not started associating the Ark with Cult Gaia, for similar reasons.

Larian argued that because trade dress is not required to be novel, the Ark could still function as trade dress in the U.S. even if similar designs existed for decades and in other countries. The TTAB agreed that novelty is not a requirement for trade dress, but still found the Ark did not identify Cult Gaia as the source. Thus, the USPTO maintained its refusal to register the Ark as Cult Gaia’s trade dress.

It is strange that, notwithstanding the patent laws’ requirements of novelty and originality, the USPTO issued the interloper, Minling Lin, a design patent on a wildly popular handbag design, but refused the bona fide designer even trade dress protection. Lack of any meaningful examination seems the clearest explanation. But, given the cost of putting even a clearly invalid patent out of its misery, this highlights a glaring vulnerability of the United States’ design patent regime to gamesmanship and abuse.

¹ “Trade Dress and Patents and Trolling(?), Oh My: Everyone Wants a Piece of this Traditional Japanese Bag,” The Fashion Law, [\[Hyperlink\]](#) (accessed April 20, 2022).