UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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MPL BRANDS NV, INC.

Petitioner

v.

BUZZBALLZ, LLC

Patent Owner

_____

PGR2024-00035

U.S. Patent 11,932,441

DECLARATION OF RICHARD D. KIRKPATRICK IN SUPPORT OF

PATENT OWNER PRELIMINARY RESPONSE

U.S. PATENT 11,932,441

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MPL Brands NV, Inc. v. Buzzballz, LLC

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I, Richard D. Kirkpatrick, do hereby declare as follows:

I. INTRODUCTION

1. I have been retained by counsel for BuzzBallz, LLC ("BuzzBallz") as an independent expert witness for the above-captioned Patent Owner Preliminary Response in the requested Post Grant Review ("PGR") of U.S. Patent No. 11,932,441 ("the '441 Patent"). I am being compensated at my usual and customary rate for the time I spend in connection with this PGR. My compensation is not affected by the outcome of this PGR.

2. I have been asked to provide my opinions regarding whether a person of skill in the art would have recognized that U.S. Patent Application 16/800,195 ("the '195 Application") provides written description support for originally filed Figure 2 of U.S. Design Patent Application 29/824,813 ("the '813 Application"). It is my opinion that the '195 Application provides more than adequate support for Figure 2 of the '813 Application.

3. In preparing this Declaration, I have reviewed:

- EX2002, the file history of the '195 Application;
- EX1003, the file history of the '813 Application;
- EX2003, Jack Lo et al., "How to Make Your Own Patent Drawings," Nolo (2019) ("Lo");

- EX2004, J. W. Jack Koller, "How to Make Your Own Patent Drawings and Save Thousands," Atlantic Publishing Group (2011) ("Koller"); and
- any other document cited below.

4. In forming the opinions expressed in this Declaration, I relied upon my education and extensive experience in the relevant field of patent illustration drafting and have considered the following:

a) the documents listed above,

b) any additional documents and references cited in the analysis below, and

c) the relevant legal standards, including the standard for written description of patent claims.

II. BACKGROUND AND QUALIFICATIONS

5. I have over 32 years of experience in the field of patent illustrations. From 1992 to 1994, I worked as a patent illustrator at Arnold White & Durkee. I then worked as a patent illustrator at Fish & Richardson from 1994 to 1996. In 1996, I joined Patent Designs. I am currently an owner of Patent Designs. At Patent Designs, my responsibilities have included continuing to personally draft patent illustrations, reviewing and revising illustrations of our employees, and general business operation. At Patent Design, we have 18 employees and currently produce,

on average, 7,000 pages of patent figures each month. We draft figures for utility patents and design patents as well as illustrations for trademark applications. Patent Designs has produced over 1 million pages of illustrations for utility patents, design patents, and trademarks since 1992. I am very familiar with practices of drafting patent illustrations, including the relevant requirements and guidelines for patent illustrations in the United States and under the Patent Cooperation Treaty (PCT).

III. UNDERSTANDING OF PATENT LAW

6. I am not an attorney. For the purposes of this declaration, I have been informed about certain aspects of the law that are relevant to my opinions. My understanding of the law was provided to me by Patent Owner's attorneys.

7. I have been asked to provide my opinions regarding whether a person of skill in the art would have recognized that the '195 Application provides written description support for Figure 2 of the '813 Application. It is my opinion that it does.

8. It is my understanding that for a patent to claim priority to the filing date of an earlier application, the disclosure of the earlier application must provide a written description under 35 U.S.C. § 112 for the claims of the later patent. To satisfy the written description requirement, the earlier application must describe the claimed invention in sufficient detail that a person of skill in the art can conclude that the inventor was in possession of the claimed invention as of the priority date sought. It is my understanding that this standard applies to claims of utility patent

applications as well as design patent applications. It is my understanding that determining whether a design in a design patent application has written description support in earlier filed applications involves a comparison of the design as a whole with previously filed figures and detailed description to determine whether the inventor was in possession of the claimed design as of the priority date.

9. The analysis in this declaration is in accordance with the above-stated legal principles.

IV. THE '195 APPLICATION PROVIDES WRITTEN DESCRIPTION SUPPORT FOR THE '813 APPLICATION.

10. The '195 Application was filed on February 25, 2020. EX2001, 81. The '195 Application is a utility patent application directed to particular configurations of containers. EX2001, 92. Figure 4 of the '195 Application illustrates "a top view of the lids and container body." EX2001, 93.

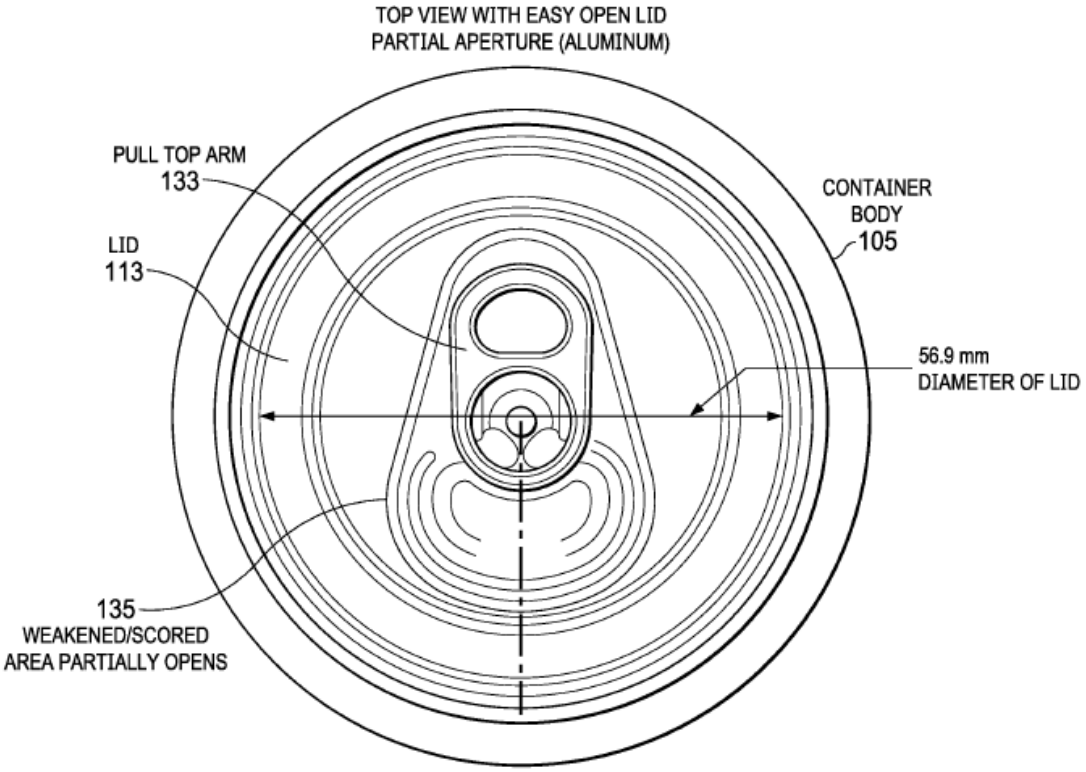


Figure 4

EX2001, 106
('195 Application, Figure 4)

11. The '813 Application is a design patent application claiming priority to the '195 Application. EX1003, 183. The '813 Application was filed with original Figure 2, shown below, described as "a top view" of a container. EX1003, 184.

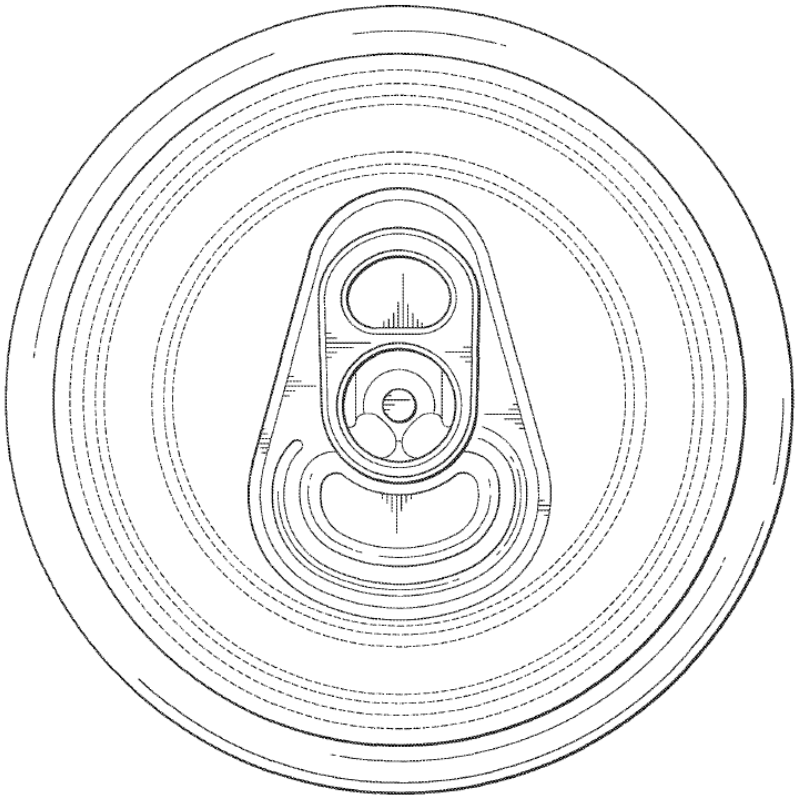


FIG. 2

EX1003, 187
('813 Application, Figure 2)

12. Figure 2 of the '813 Application shows the same design as Figure 4 of the '195 Application. However, Figure 2 of the '813 Application includes several minor "differences" from Figure 4 of the '195 Application that I will describe and discuss below.

13. First, as a design patent drawing, some lines are solid and some are dashed. In addition, the drafter of Figure 2 of the '813 Application chose to add several lines denoting characteristics of various surfaces. For example, shading lines were added near the circumference of the upper lid surface, highlighted in red below.

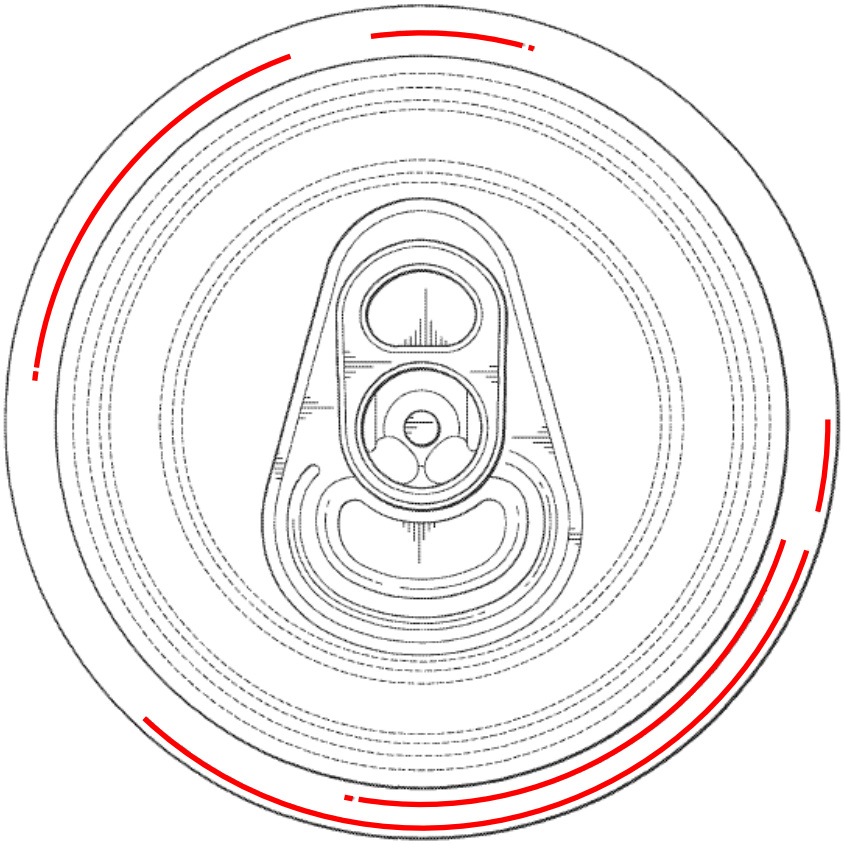


FIG. 2

EX1003, 187 (annotated)
('813 Application, Figure 2)

14. These shading lines imply a curved or angled surface and may denote a convex, concave, or straight surface. The drafter also added shading lines to multiple portions of the pull tab portion of the lid, highlighted in red below.

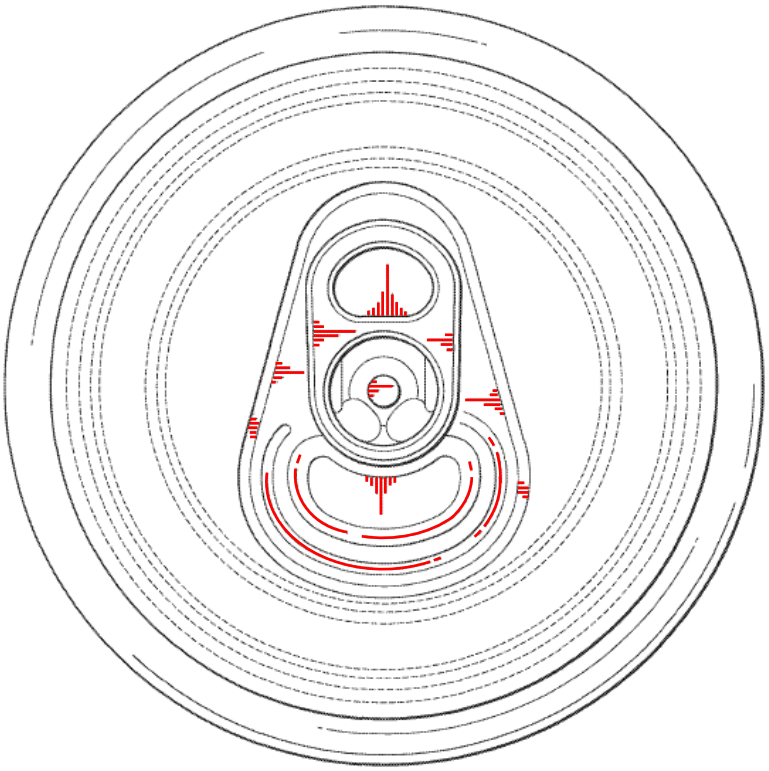


FIG. 2

EX1003, 187 (annotated)
('813 Application, Figure 2)

15. The drafter also chose to connect two lines extending along the bottom portion of the breakable portion of the lid, shown below.

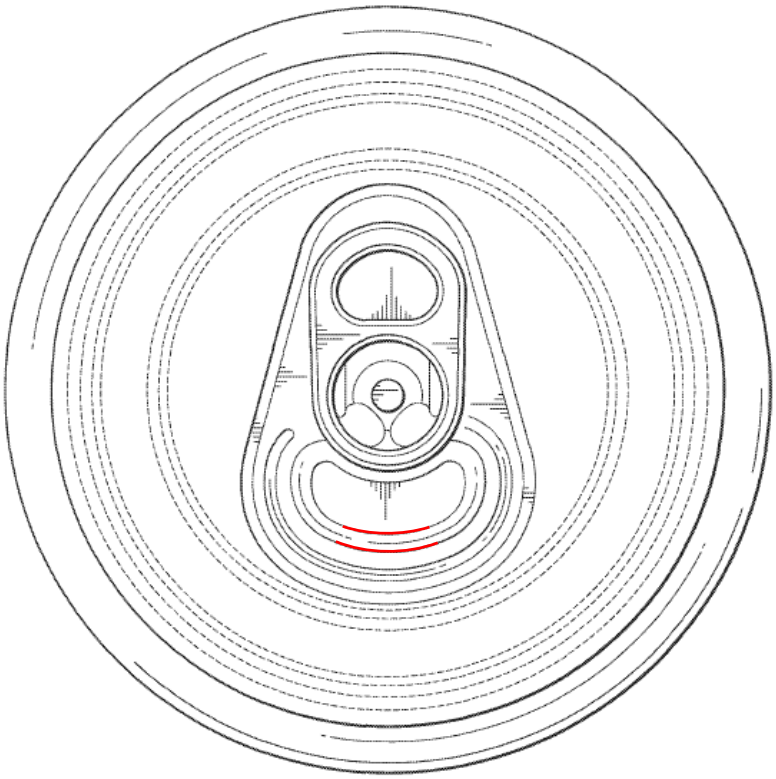


FIG. 2

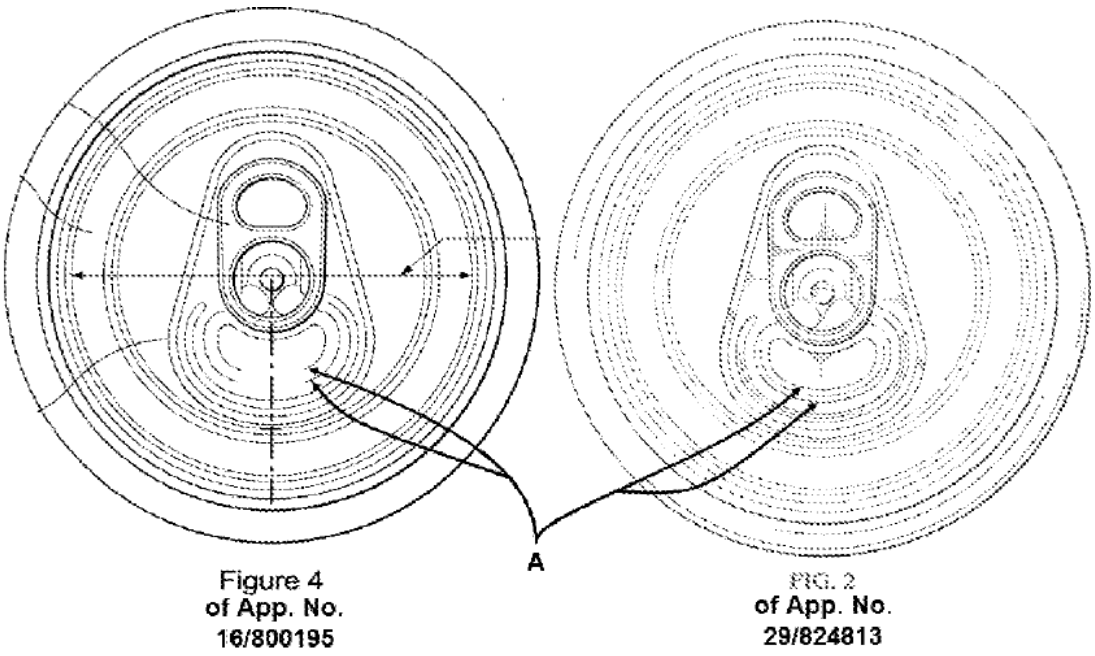
EX1003, 187 (annotated)
('813 Application, Figure 2)

16. These very minor "differences" in the drawings in no way reflect a change in the design of the lid, but instead simply show two approaches a draftsperson may choose to illustrate the same design.

A. The Examiner Misinterpreted the Differences Between the Figures as Differences in Design.

17. It is my understanding that the Examiner determined that the last of these differences (the connection of the two lines of the breakable portion of the lid) was new matter and, as a result, that Figure 2 of the '813 Application was directed

to a different design not disclosed by the ’195 Application. Specifically, the Examiner provided a comparison figure, shown below, comparing Figure 4 of the ’195 Application (on the left) to Figure 2 of the ’813 Application (on the right). EX1003, 107.



EX1003, 107

18. The Examiner said that the “[s]hape of [the] bottom contour of [the] tear strip portion of [the] poptop has been changed” and used the annotation “A” with arrows to point to the differences. EX1003, 107. The Examiner concluded that the ’813 design “**could not have been recognizable** as a design in the prior art application’s disclosure.” EX1003, 107.

19. It is my opinion that the Examiner misinterpreted the different drafting styles in the illustrations of these figures as differences in the product or design itself.

This interpretation was incorrect. Each of the differences between Figure 2 of the ’813 Application and Figure 4 of the ’195 Application outlined above reflect choices in drafting strategy of the respective illustrators. Based on a comparison of the figures alone, it is plain to see that both figures reflect the same product design. When further considering the fact that the ’195 Application also described “a pop top (or easy-open) lid” that “is very popular with consumers,” EX2001, 92, 94, it is abundantly clear that the inventor had possession of the design shown in Figure 2 of the ’813 Application as of the filing of the ’195 Patent. Patent illustrators do not always provide the same amount of detail for well-known components, such as the “very popular” pop top lid in this case, because “details that such a skilled person would know to provide may be left out.” EX2003, 93. The “differences” between Figure 2 of the ’813 Application and Figure 4 of the ’195 Application do not introduce any new matter and maintain the same recognizable design of the pop top lid disclosed in the ’195 Application.

B. The Structures and Relative Sizes of All Components of the Figures Are Identical.

20. That Figure 2 of the ’813 Application and Figure 4 of the ’195 Application depict the same design is evidenced by their striking similarity. Despite the addition of the various contour lines described above, the geometry of the container lid in each figure is identical. The container lid in both figures has an

identical diameter. The diameter of the upper ridge of the container lid is identical. The width of that upper ridge is identical. The number and position of concentric circles illustrating various ridges of the container lid are identical. The ovoid shape surrounding the pull tab and tear strip portion is identical. The two lines defining this shape are identical. The pull tab is identical, including two border lines along the edges. The shape of the tear strip portion itself is identical. The central pin and flange shown through the pull tab are identical.

21. In short, there is nothing to indicate that the drafter of Figure 2 of the '813 Application illustrated a different design than the one shown in Figure 4 of the '195 Application. The minor "differences" between the Figures reflect the variance in drawing conventions and choices between skilled draftspersons, not a different design.

C. Drawing Constraints Force Patent Illustrators to Make Judgment Calls as to Methods of Illustration.

22. Patent illustrators are often tasked with a unique challenge—capturing a physical, three-dimensional product or prototype with "clean, black…, sufficiently dense and dark, and uniformly thick and well-defined" lines. 37 C.F.R. 1.84(l); MPEP 608.02; *see* EX2004, 97 ("Traditional drawing is a two-dimensional process that conveys three-dimensional information."). That task becomes more challenging when, as is typical, the illustrator is not in possession of the product itself, but merely

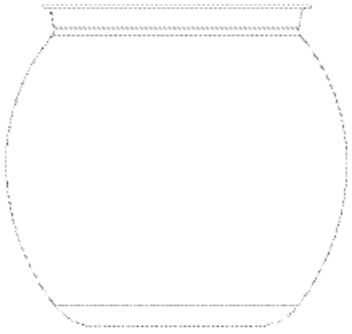
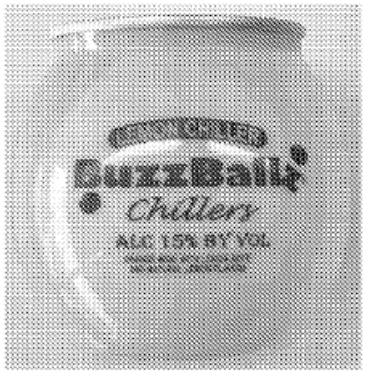
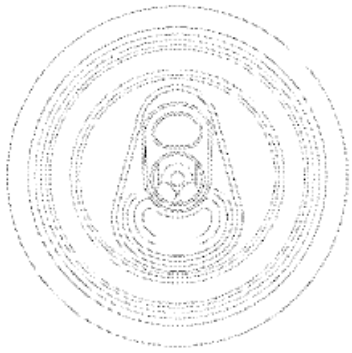
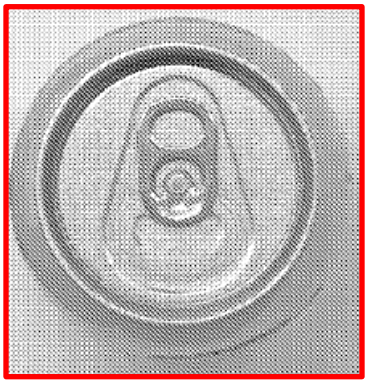
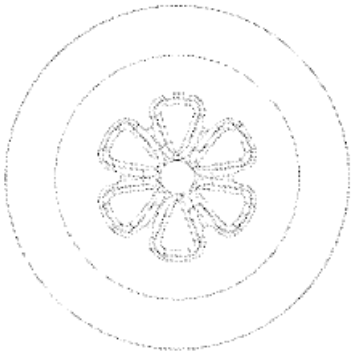
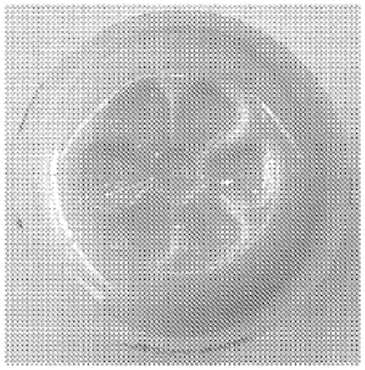
photographs subject to varied lighting and picture quality. The task of choosing what detail to include "is not always a simple task." EX2004, 26.

23. It is impossible to mandate standardized conventions for how to illustrate every feature of a product. Accordingly, patent illustrators must make decisions of what lines to include or exclude based on their own judgment. EX2004 27 ("The issue is not only which details make the device unique, but also what is the best way to show them."). Each illustrator eventually settles on their own conventions, but these conventions vary widely and make various trade-offs for clarity, simplicity, detail, and personal or client preferences. EX2004, 278 ("Clarity is the aspect of making the detail readily understandable. It is possible to draw a detail accurately and neatly, but in a manner that makes it hard to comprehend. Such drawings are not clear."). Based on my experience, it is apparent that the "differences" between Figure 4 of the '195 Application and Figure 2 of the '813 Application stem from just such variances in conventions and preferences.

24. One feature that is commonly difficult to illustrate with black and white line drawings is a sloped surface shown from a top-down view, like the portions of the Figures at issue in this case. Some illustrators use contour lines to illustrate sloped surfaces, such as the ones in Figure 2 of the '813 Application. *See* EX2003, 153-167 (illustrating the use of contour lines to represent shading on angled surfaces and different materials); EX2004, 42 ("Shading should be used if it does not reduce

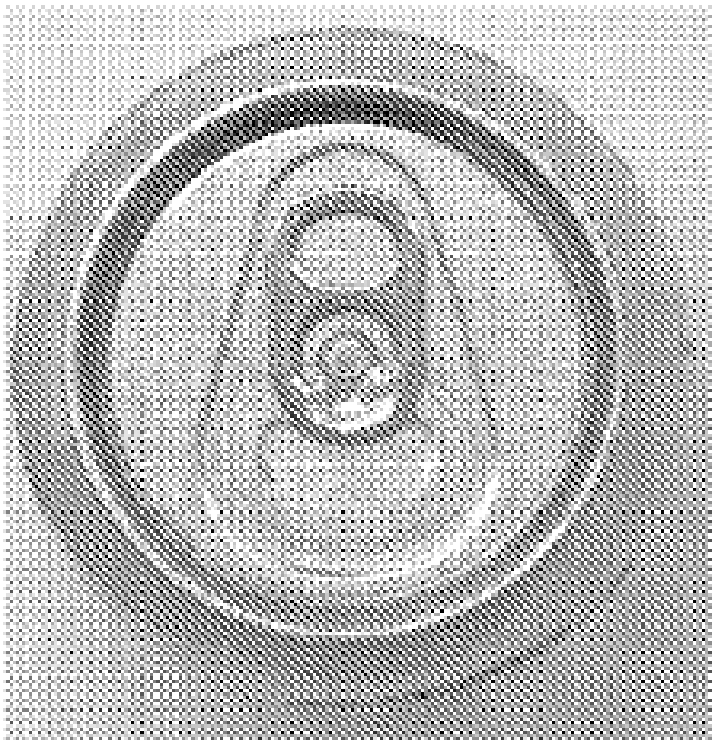
the legibility of the drawing."). Others do not because these lines are sometimes misinterpreted. And even illustrators who use such contour lines must decide when they are appropriate. *See* EX2004, 287 (warning that "contour…is usually overdone."). While a drawing may permit contour lines on large, uniform surfaces, smaller surfaces in close proximity to other features or components often make it difficult, if not impossible, to add such contour lines without overly complicating the drawing and "reduc[ing] the legibility of the drawing." EX2004 42. Therefore, deciding which surfaces are suitable for these contour lines and which are not usually comes down to the judgment of the draftsperson.

25. In this case, the applicant submitted a photograph of an exemplary can in a response to the final Office Action issued on February 15, 2023. *See* EX1003, 26, 37. That response compared the '813 Application drawings with the BuzzBallz product and a conventional Coca-Cola can, as shown below.

Pending Design Claim – U.S. App. No. 29/824,813	BuzzBallz (Covered by Claim)	Soda Can (*NOT* covered by Claim)
		
		
		

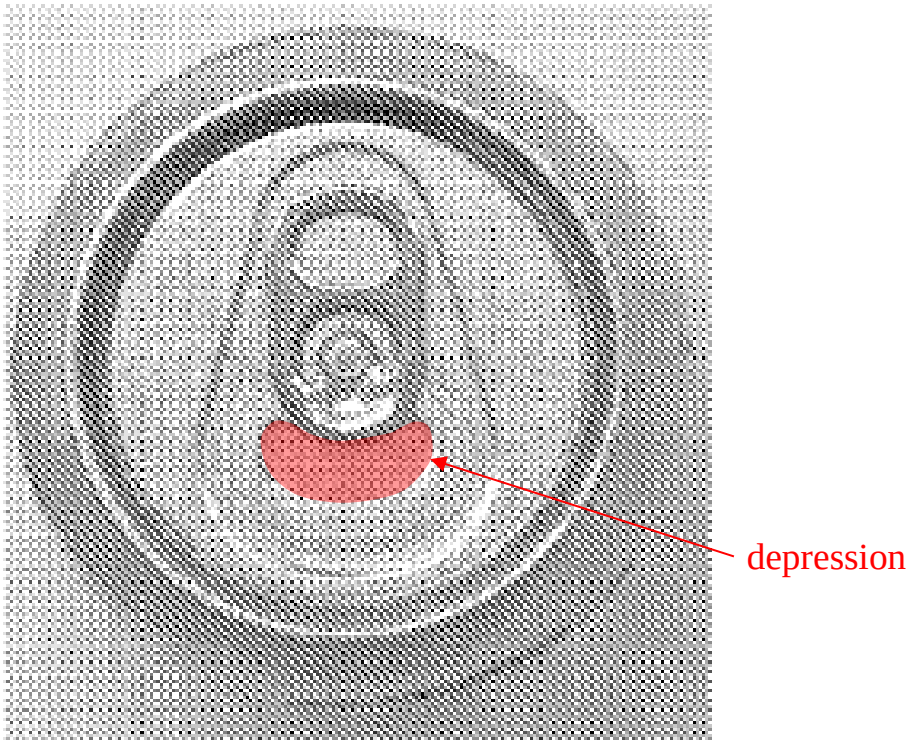
EX1003, 37 (annotated)

26. The center photograph provided by the applicant was a top view of the BuzzBallz can corresponding to Figure 2 of the ’813 Application. An enlarged version of this photograph is shown below.



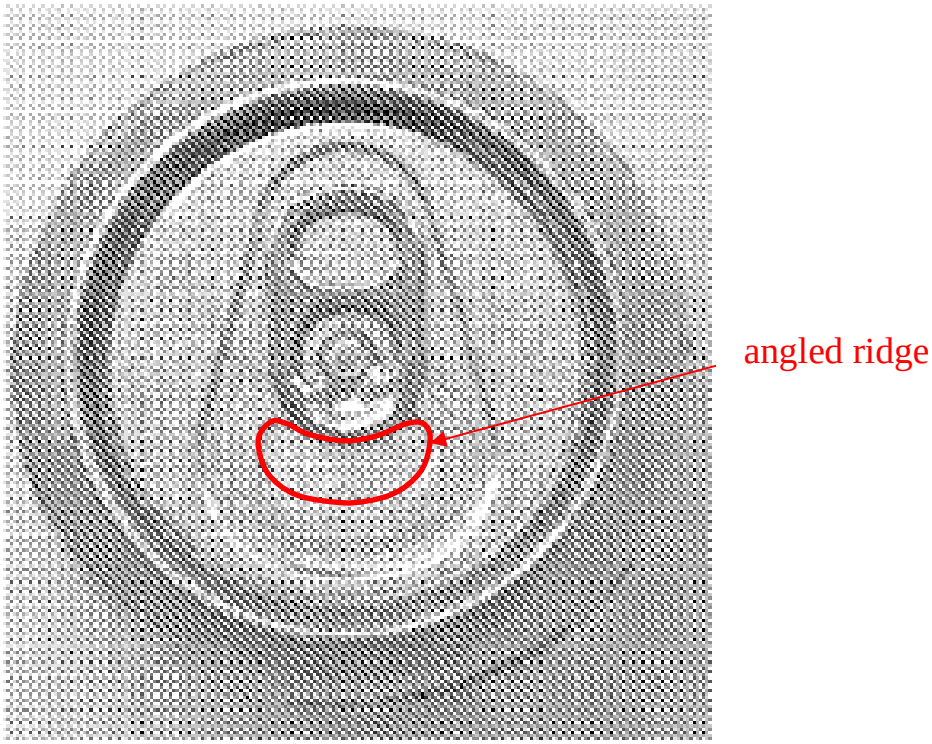
EX1003, 37 (enlarged)

27. As shown in the photograph, an angled ridge forms what appears to be a slight depression in the tear strip portion, as highlighted below.



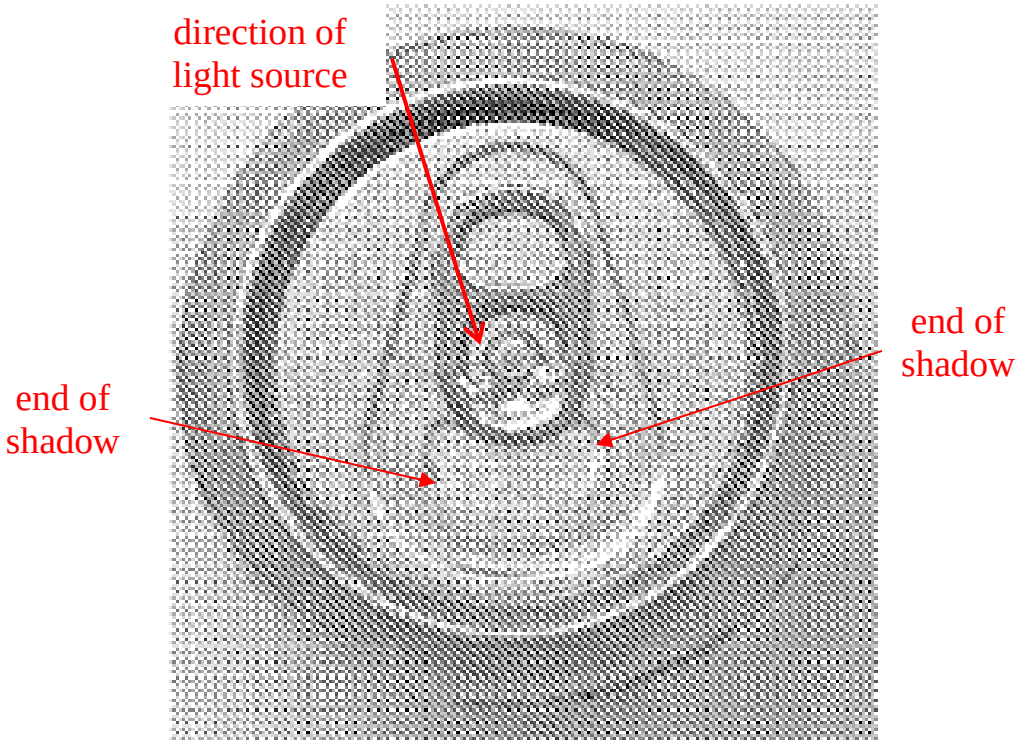
EX1003, 37 (enlarged) (annotated)

28. The angled ridge that defines this slight depression is highlighted below.



EX1003, 37 (enlarged) (annotated)

29. As shown, the upper portion of the angled ridge is more easily visible in the photograph than the lower portion for at least a couple reasons. First, the light source of the photograph appears to be positioned in the upper left of the photograph, as shown by the shadow of the angled ridge ending at asymmetrical portions along the ridge.



EX1003, 37 (enlarged) (annotated)

30. This angle of light makes the upper left portion of the angled ridge more visible than the lower right portion.

31. Second, the angle or slope of the angled ridge appears to vary. For example, the slope of the angled ridge appears to be steepest or most pronounced at the top portion of the depression and gradually decreases until it approaches flat at the lower portion of the depression. This gradation of angle is difficult to capture in a black and white line drawing. If gradients could be used, an illustrator could have modified the figure such that a darker shade of grey denotes a steeper slope and a lighter shade of grey denotes a shallower slope, as illustrated below.

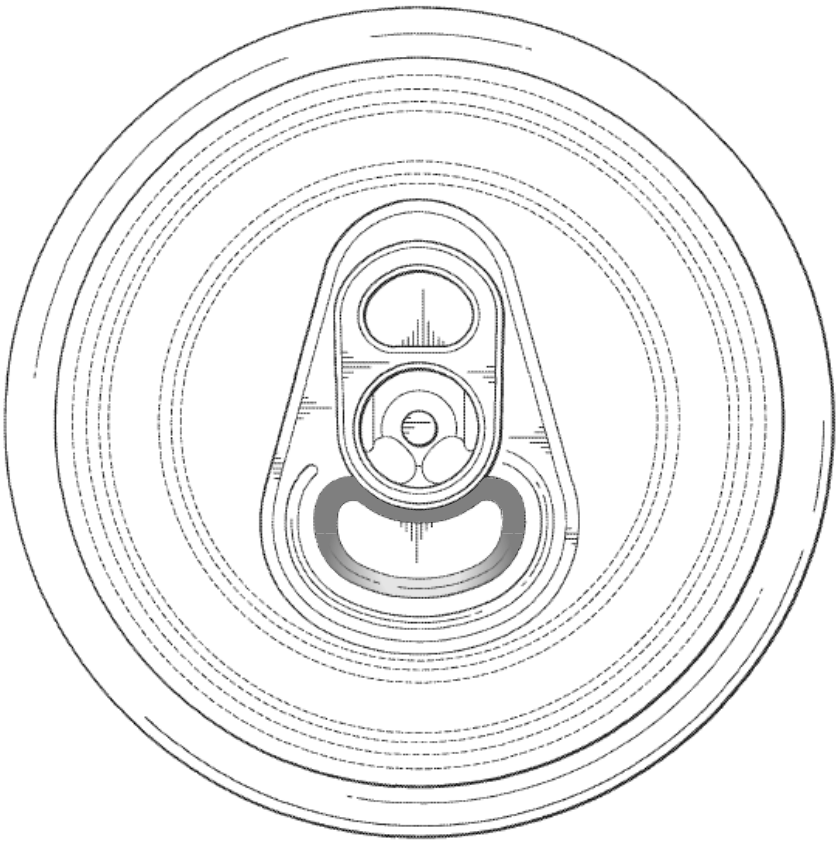


FIG. 2

EX1003, 187 (annotated)
('813 Application, Figure 2)

32. But when only using lines to show the top and bottom edges of this angled ridge, the illustrator must decide at what point from the upper portion to the lower portion the lines should be terminated (as in Figure 4 of the '195 Application) or whether the lines should simply be connected (as in Figure 2 of the '813 Application). That there would be variation in illustrating this particular feature is to be expected. Despite the "differences" in how this particular feature was illustrated

in the ’195 Application and the ’813 Application, it is clear that both figures show the exact same design.

V. CONCLUSION

33. Based on a comparison of Figure 2 of the ’195 Application and Figure 4 of the ’813 Application, and my experience of 35 years as a patent illustrator, it is my opinion that both figures illustrate the same design. In my opinion, Figure 2 of the ’813 Application certainly did not introduce any new matter when compared to the disclosure in the ’195 Application. Instead, it is clear that the inventor had possession of the design shown in Figure 2 of the ’813 Application based on at least Figure 4 and the detailed description of the ’195 Application. The minor “differences” between the drawings reflect alternative approaches a draftsperson may choose to illustrate the same design, not any type of change in design.

34. I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that all statements made of my own knowledge are true and that all statements made on information and belief are believed to be true. I understand that willful false statements are punishable by fine or imprisonment or both. *See* 18 U.S.C. § 1001.

Date: September 13, 2024

Respectfully submitted,

Richard D. Kirkpatrick