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[The Towels On The Beach Go 'Round And 'Round](#)

Posted on August 19, 2010 by [Brent Lorentz](#)



Do you see the trademark in this picture? While one might be tempted to immediately focus on the Coca-Cola bottle and text, the actual trademark (or former trademark) which is the subject of this post is the shape of the towel. That's right. Up until a recent 7th Circuit decision in [Jay Franco & Sons, Inc. v. Clemens Franek](#), (actually, up until the lower court decision which initially invalidated the mark) the circular shape of a beach towel was an incontestable trademark [registered](#) with the USPTO.

So what happened? Well, as is often the case in the world of non-traditional, product configuration marks, Franek ran into the [doctrine of functionality](#), which “polices the division of responsibilities between patent and trademark law by invalidating marks on useful designs.” Briefly, a product design is “functional” when it is “essential to the use or purpose of the device or when it affects the cost or quality of the device.” Finding the circular towel to be functional, the District Court and the Appeals Court relied on some expired patents and the benefit to “[lazy sunbathers](#)” who merely want to reposition their bodies, rather than their bodies and their towels (Oh, the effort!) while the sun moves across the sky.

Now, the above is an admittedly simplified and incomplete dissection of the opinion. But, ignoring the actual opinion, what is your gut reaction to this decision? Should the circular beach towel have been invalidated as a trademark? One of the intentions of the functionality doctrine is to prevent a trademark holder from blocking further innovation by appropriating designs that undergird further improvements. But, are we, as a society, actually concerned about the [catastrophic stagnation of beach towel design](#)?



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And, if you're inclined to invalidate the round beach towel mark, how do you justify protection for the [distinctive design of the Coca-Cola bottle](#). If the minimal functional value of the round beach towel to "lazy sunbathers" is sufficient to render a round beach towel functional, isn't the minimal functional value of the Coca-Cola bottle to "loose-gripped-bottle-holders" sufficient to render the contours of the Coke design functional?



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