Legal Program

TRADE DRESS

Start Small Think Big

WHAT IS A **TRADE DRESS?**

Trade dress is the commercial look and feel of a product or service that identifies and distinguishes the source of the product or service. Trade dress consists of all the various elements that are used to promote a product or service. There are two types of trade dress. First, there are **product designs**, which consist of the configuration of the product itself, and secondly there are **packaging designs**.

To be valid, a trade dress must be both **distinctive** and **non-functional**.

HOW CAN A TRADE DRESS BE DISTINCTIVE?

A trade dress may be **inherently distinctive** or a product may **acquire distinctiveness**.

1. INHERENTLY DISTINCTIVE

Trade dress is inherently distinctive if its unusual and memorable nature serves primarily to designate the origin or the product or services, and is also conceptually separate from the product or services. According to the law, "[A] mark is inherently distinctive if '[its] intrinsic nature serves to identify a particular source.'" The Courts have held that a product design trade dress may never be inherently distinctive, but trade dress constituting product packaging may be inherently distinctive for goods or services and registrable.

Thus, trade dress aspect of packaging may be protected if a showing can be made that the average consumer would likely be confused as to product origin if another product is allowed to appear in similar dress. Legal protection is provided under the Lanham Act provisions relating to registered and unregistered marks.

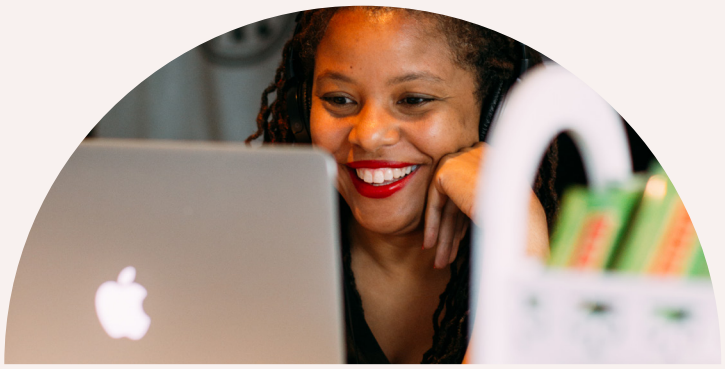
When determining whether a trade dress is inherently distinctive the examiner considers whether the design is:

(1) a "common" basic shape or design;
(2) unique or unusual in a particular field;
(3) a mere refinement of a commonly adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods; or
(4) capable of creating a commercial impression distinct from the accompanying words.

The less unique or exotic your trade dress, the less likely it is inherently distinctive. Therefore, it pays to be super creative when creating your trade dress.

2. ACQUIRED DISTINCTIVENESS

A trade dress may also acquire distinctiveness by establishing secondary meaning. This means that a business has been operating for long enough for their consumers to then recognize their trade dress. Proof of recognition can be shown through survey evidence, advertisement expenses, media recognition, and the length of exclusive use of the mark.



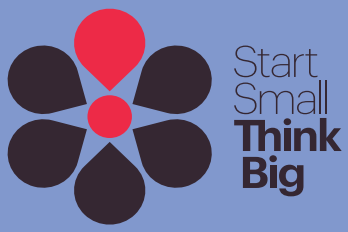
NON-FUNCTIONAL

A trade dress is functional when it does something more then identify the source of the trade dress. If the functions of the product are heavily promoted, this could lead the USPTO's examining attorney to conclude that the product is ineligible for trade dress protection because of the functionality doctrine. However, if the applicant can prove the product has multiple design alternatives, and there is no competitive advantage to the product's chosen design, the USPTO's examining attorney may decide that the product is eligible for trade dress protection status.

SUMMARY

To receive protection where there is another trade dress infringing on yours all of the following must be true:

- The trade dress must be inherently distinctive, unless it has acquired secondary meaning.
- The trade dress must not be functional
- The junior use must cause a likelihood of consumer confusion.



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