

Trade Dress 101

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What is Trade Dress?

- Generally speaking, “trade dress” means the overall appearance or image of something in commerce – how it is “dressed” for sale.
 - The design and shape of the materials in which a product is packaged.
 - Product configuration, the design and shape of the product itself, may also be considered a form of trade dress.
- When such trade dress denotes the source of the product or service and is sufficiently distinctive to distinguish it from those sold by others, the trade dress functions like more traditional trademarks, such as names and slogans, and enjoys similar protection.

What is Trade Dress?

- Like a trademark, a product's trade dress is legally protected by the Lanham Act. (15 U.S.C § 22).
- The Lanham Act protects trade dress if it serves the same source-identifying function as a trademark.
- Although it is possible to register trade dress as a trademark, for practical reasons, most trade dress and product configurations are protected without registration under 15 U.S.C. § 1125(a).

What is Trade Dress?

Traditional View

- At one time, “trade dress” referred only to the manner in which a product was “dressed up” to go to market with a label, package display card and similar package elements.
 - *See Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27, 31 (2d Cir. 1992) (citation omitted); TMEP §1202.02; 1 J.T. McCarthy, Trademarks and Unfair Competition § 8:1 (2d ed. 1984).
- Early trade dress cases recognized the importance of protecting the public from the confusion and deception arising from attempts to “palm off” products as those of another, and the right of a product seller to protect himself/herself against those who would engage in such tactics.
 - *See, e.g., Charles E. Hires Co. v. Consumers’ Co.*, 100 F. 809 (7th Cir. 1900) (finding that a root beer maker copied the bottle and label of another brewer and holding that “[t]he obvious purpose and manifest result of this piracy were to enable retail dealers to palm off upon the public the goods of the defendant as the goods of the complainant); *Crescent Tool Co. v. Kilborn & Bishop Co.*, 247 F. 299 (2d Cir. 1917) (expressing concern that a trade dress imitator will cause the consuming public to buy the limiter’s goods due to the “deception” that they are manufactured by the trade dress owner)

What is Trade Dress?

Modern View

- However, more recently, “trade dress” has taken on a more expansive meaning and includes the design and appearance of the product as well as that of the container and all elements making up the total visual image by which the product is presented to customers.
- Thus, trade dress is essentially a product’s total image and overall appearance as defined by its overall composition and design, including size, shape, color, texture, graphics, and even sales techniques
- The “total image” and “overall appearance”
 - *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 112 S. Ct. 2753 (1992); *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033 (2d Cir. 1992).

Traditional Examples

- Coca Cola glass bottle with signature label. *See* U.S. Trademark Reg. No. 696,147 (Apr. 12, 1960)
- Gucci watch face shaped like the letter “G.” *See Gucci Timepieces America, Inc. v. Yidah Watch Co.*, 47 U.S.P.Q.2d 217 (BNA) (S.D.N.Y. 2004)
- Shape and appearance of Ferrari vehicles. *See Ferrari S.P.A. Asercisio Fabriche Automobili E Corse v. Roberts*, 739 F. Supp. 1138, 14 U.S.P.Q.2d (BNA) 2013 (E.D. Tenn. 1990), *aff’d*, 944 F.2d 1235, 20 U.S.P.Q.2d (BNA) 1001 (6th Cir. 1991), *cert. denied*, 505 U.S. 1219, 120 L. Ed. 2d 899, 112 S. Ct. 3028 (1992).

Modern Examples

Color

- Qualitex's use of the green-gold color on its press pads meets the basic trademark requirements. *See, e.g., Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 162, 115 S. Ct. 1300, 131 L. Ed. 2d 248 (1995).
- Louboutin use of contrasting red lacquered outsoles. *See, e.g., Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012).

Modern Examples

Appearance

- Distinctive method of arranging and displaying wine bottles in a store. *See, e.g., Best Cellars Inc. v. Grape Finds at Dupont, Inc.*, 90 F. Supp. 2d 431, 54 U.S.P.Q.2d 1594 (S.D.N.Y. 2000)

Smells

- High impact, fresh, floral fragrance reminiscent of plumeria blossoms for sewing thread and embroidery yarns. *See, e.g., In re Clarke*, 17 U.S.P.Q.2d 1238 (T.T.A.B. 1990).

Sounds

- NBC's musical chimes. *See, e.g., In Re General Elec. Broad. Co.*, 199 U.S.P.Q. (BNA) 560 (T.T.A.B. 1978) (listing examples of registered "sound" marks, such as the NBC Musical Chimes).

Modern Examples

Restaurant atmospheres

- McDonalds “Golden Arches” Drive-In Design. *See, e.g.,* U.S. Trademark Reg. No. 764,837 (1964); *McDonald's Corp. v. Moore*, 243 F. Supp. 255 (S.D. Ala. 1965)
- Planet Hollywood and Hard Rock Café. *See, e.g., Morton v. Rank America, Inc.*, 812 F.Supp. 1062, 1069 (C.D. Cal. 1993)
- Rainforest Café. *See, e.g., Rainforest Cafe, Inc. v. Amazon, Inc.*, 86 F. Supp. 2d 886 (D. Minn. 1999)
- Distinctive design, décor, menu, style, look and feel of a Mexican restaurant. *See, e.g., Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 112 S. Ct. 2753, 23 U.S.P.Q.2d (BNA) 1081 (1992)

Modern Examples

Golf Holes

- Signature Golf Holes. *See, e.g., Pebble Beach Co. Tour 18 I, Ltd.*, 936 F. Supp. 1299 (S.D. Tex. 1996), *aff'd*, 155 F.3d 526 (5th Cir. 1998) (finding Harbour Town's signature "lighthouse hole" to be inherently distinctive)

Catch Phrases

- "You might be a redneck" *See, e.g., Foxworthy v. Custom Tees, Inc.*, 879 F. Supp. 1200, 1212 (N.D.Ga. 1995).

Federal Registration of Trade Dress

- Trade dress constitutes a “symbol” or “device” within the meaning of §2 of the Lanham Act. *See, e.g., Wal-Mart Stores, Inc. v. Samara Bros*, 529 U.S. 205, 209-210 (2000).
1. Non-Functional
 2. Distinctive

Statutory Basis For Functionality Refusals

- Section 2(e)(5) of the Trademark Act, 15 U.S.C. § 1052(e)(5), prohibits registration on the Principal Register of "matter that, as a whole, is functional."
- Section 2(f) of the Act, 15 U.S.C. §1052(f), provides that matter that, as a whole, is functional may not be registered even on a showing that it has become distinctive.
- Section 23(c) of the Act, 15 U.S.C. § 1091(c), provides that a mark that, as a whole, is functional may not be registered on the Supplemental Register.
- Section 14(3) of the Act, 15 U.S.C. § 1064(3), lists functionality as a ground that can be raised in a cancellation proceeding more than five years after the date of registration.
- Section 33(b)(8) of the Act, 15 U.S.C. § 1115(b)(8), lists functionality as a statutory defense to infringement in a suit involving an incontestable registration.
- *See* MPEP 1202.02(a)(i).

Burden of Proof

- Initial burden is on the Examiner to establish a prima facie case that the trade dress is functional to make/maintain a 2(e)(5) functionality refusal.
 - The Examiner must (1) consider the content of the application and (2) independently research to find evidentiary support.
 - If evidence is lacking to issue a 2(e)(5) functionality refusal, the Examiner may request information pursuant to 37 C.F.R. §2.61(b).
- See MPEP 1202.02(a)(iv).

Burden of Proof

- The burden then shifts to the applicant to present “competent evidence” to rebut the Examiner’s prima facie case.
 - “competent evidence” = proof by preponderant evidence.
- If the trade dress is the subject of a utility patent that discloses the feature’s utilitarian advantages, the applicant bears an especially "heavy burden of showing that the feature is not functional" and "overcoming the strong evidentiary inference of functionality."
- See MPEP 1202.02(a)(iv).

Utilitarian Functionality Doctrine

Inwood Labs test

- A product design or feature is functional in a utilitarian sense if
 - (1) it is “essential to the use or purpose of the article,” or
 - (2) it “affects the cost or quality of the article.”
- *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 166 (1995)
(quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 850, n.10 (1982); MPEP 1202.02(a).

Utilitarian Functionality Doctrine

- The purpose of this doctrine is to maintain balance between trademark law and patent law.
 - “The functionality doctrine prevents trademark law, which seeks to promote competition by protecting a firm’s reputation, from instead inhibiting legitimate competition by allowing a producer to control a useful product feature. It is the province of patent law, not trademark law, to encourage invention by granting inventors a monopoly over new product designs or functions for a limited time, 35 U.S.C. Sections 154, 173, after which competitors are free to use the innovation. If a product’s functional features could be used as trademarks, however, a monopoly over such features could be obtained without regard to whether they qualify as patents and could be extended forever (because trademarks may be renewed in perpetuity).” *Qualitex Co.*, 514 U.S. at 164-165 (1995); MPEP 1202.02(a)(ii).

Utilitarian Functionality Doctrine

Qualitex Co.



TrafFix Devices, Inc.



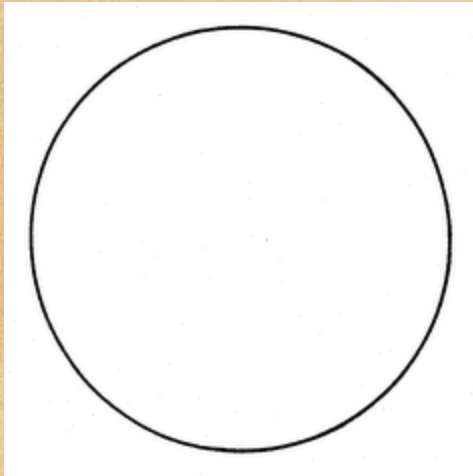
Morton-Norwich Factors

1. The existence of a utility patent that reveals the utilitarian advantages of the subject design;
2. Applicant's advertising that touts the utilitarian advantages of the subject design;
3. Evidence presented pertaining to the availability of alternate designs; and
4. Evidence presented that demonstrates whether the design results from a comparatively simple or inexpensive method of manufacture.

In re Becton, Dickinson & Co., 675 F.3d 1368, 1374-75, 102 USPQ2d 1372, 1377 (Fed. Cir. 2012); *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1340-1341, 213 USPQ 9, 15-16 (C.C.P.A. 1982) .

A Round Beach Towel

- U.S. Trademark
Registration No. 1502261



- The round design of the beach towel is primarily functional rather than promotional, and thus cannot be protected by trade dress.
- *Jay Franco & Sons, Inc. v. Franek*, 615 F.3d 855 (7th Cir. 2010).

A Round Beach Towel

- Incontestable but not invincible.
- Roundness:
 - (1) enables heliotropic sunbathers to remain on their towels as they rotate with the sun rather than having to get up and reposition their towels every so often.
 - Counter: an issue of size vs. shape
 - (2) affects the quality of the device because any non-circle polygon will either limit full rotations or not use all of the surface area.
 - Counter: not measurably better for spinning with the sun, e.g., hourglass towel.

A Round Beach Towel

- Fashion is a form of function.
 - *See, e.g., Qualitex Co.*, 514 U.S. at 169-170 (aesthetic appeal can be functional); *Wal-Mart*, 529 U.S. at 214; *TraFFix*, 532 U.S. at 33
- Some cases say fashionable designs can be freely copied unless protected by patent law.
 - *See, e.g., Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989); *Sears, Roebuck Co. v. Stiffel Co.*, 376 U.S. 225 (1964); etc.

Pocky

- No trade dress protection for the design of the chocolate-dipped, stick-shaped cookie – Pocky – because the product configuration is useful.
- *Ezaki Glico Kabushiki Kaisha v. Lotte Int'l America Corp.*, Case No. 19-3010 (3d Cir. Oct. 8, 2020).





The Gun Barrel

- Petition to cancel registration of trade dress for carbon fiber composite barrel under section 2(e)(5) on the grounds that it is functional because it is a natural by-product of the manufacturing process.
- *McGowen Precision Barrelets, LLC v. Proof Research, Inc.*, 2021 USPQ2d 559 (TTAB 2021).



Distinctiveness

Trade dress ...

- ... is intrinsically distinctive when its “intrinsic nature serves to identify a particular source of a product.” *In re Slokevage*, 441 F.3d 957, 961 (Fed. Cir. 2006) (quoting *Two Pesos, Inc.*, 505 U.S. at 764 n. 1).
- ... has acquired distinctiveness when “the public comes to associate the product with its source.” *Id.* (citing *Two Pesos, Inc.*, 505 U.S. at 768-69).

Trade Dress Infringement

- Plaintiff must show, by a preponderance of the evidence, that each of the following four elements are met:
 - (1) Definition;
 - (2) Functionality;
 - (3) Distinctiveness; and
 - (4) Likelihood of confusion.

Element 1: Definition

- A plaintiff will need to define what the protected elements are.
- If the trade dress was previously registered with the USPTO, the plaintiff can rely on the registration documentation to prove this element. If the trade dress has not yet been registered, plaintiff can still meet this element if it is able to:
 - Describe the specific elements that comprise the trade dress; and
 - Identify how the elements combine to constitute the trade dress.
- Failure to accurately define trade dress by merely providing a list of design features could result in dismissal of the plaintiff's complaint at the pleading stage. In order to preserve its case, the plaintiff must show how these elements synthesize into a cohesive unit.

Element 2: Functionality

- Functional elements cannot receive trade dress protection.
 - Generic shapes, like a box or bottle are functional because they are essential to the product's function or storage.
 - However, a label on the container can be protected, as can a unique shape, such as the elaborate or unique shape of certain liquor or soda bottles.
- The functionality of a product will partially depend on its industry.
 - For example, the bright neon color on a traffic safety vest is functional, while the same color on an otherwise normal t-shirt may not be.
- When considering the functionality question, courts generally look at the overall feeling of the trade dress.

Element 2: Functionality (cont'd)

– “Morton-Norwich” factors

- A determination of functionality normally involves consideration of one or more of the following factors, commonly known as the “Morton-Norwich” factors:
 - (1) The existence of a utility patent that discloses the utilitarian advantages of the design sought to be registered;
 - (2) Advertising by the applicant that touts the utilitarian advantages of the design;
 - (3) Facts pertaining to the availability of alternative designs; and
 - (4) Facts pertaining to whether the design results from a comparatively simple or inexpensive method of manufacture.

See In re Morton-Norwich Prods., Inc., 671 F.2d 1332 (CCPA 1982). *See also In re Becton, Dickinson & Co.*, 675 F.3d 1368, 1374-75, 102 USPQ2d 1372, 1377 (Fed. Cir. 2012); and *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1340-1341, 213 USPQ 9, 15-16 (C.C.P.A. 1982).

Element 3: Distinctiveness

- The trade dress must be shown as either being inherently distinctive or having obtained distinctiveness due to secondary meaning.
 - Trade dress is protected because it serves as a source indicator – consumers need to be able to look at the product or its packaging and identify the brand or the manufacturer.
- Registration on the USPTO Principal Register is the best way to show distinctiveness. However, common law trade dress rights holders can still make the claim for distinctiveness in a trade dress infringement case.
- When considering distinctiveness, courts look at product design and product packaging.
 - Product packaging, including the interior design of a business or restaurant, can be inherently distinctive.
 - However, product design can only become distinctive by secondary meaning.
 - Specifically, in determining whether trade dress is inherently distinctive, a court will look at the “Seabrook factors”

Element 3: Distinctiveness (cont'd)

- If trade dress is not inherently distinctive, it may have gained secondary meaning to the extent that the consuming public can identify the origin of the goods or services based on the packaging alone.
- In order to demonstrate secondary meaning, also known as acquired distinctiveness, the plaintiff should show:
 - Long use of the trade dress in commerce;
 - Examples of media coverage;
 - Consumer surveys and testimony demonstrating that consumers recognize the trade dress as belonging to the owner; and
 - Advertising expenditures.
- While color alone may be protectable trade dress, it cannot be inherently distinctive. The trade dress owner must show that the color has obtained secondary meaning within its class of goods or services to receive protection from infringement.
 - For example, the turquoise blue of Tiffany & Co. has achieved this protection.

Element 4: Likelihood of Confusion

- When examining whether there is potential likelihood for confusion, courts look at the DuPont factors, which include:
 - The similarity of the trade dress in their overall appearance and commercial impression;
 - The similarity between the plaintiff's and the defendant's products;
 - Which channels the two parties use to market their products, and the similarities between these channels and marketing techniques;
 - Likelihood of each brand to expand into the same geographic or marketing area; and
 - The sophistication of the product's intended consumers.

See In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973).

- Plaintiffs do not need to demonstrate actual confusion in order to meet this burden, although such a showing would improve their chances of success on the merits of the case.

Element 4: Likelihood of Confusion (cont'd) – Survey Evidence

- Courts have indicated that they consider well-designed and carefully administered surveys to be among the best evidence of consumer confusion and secondary meaning in trademark and trade dress cases.
 - Surveys can provide information on the beliefs, attitudes or behavior of individuals from a relevant population.
 - Specifically, surveys can show how trade dress influences respondents' perceptions or understanding.

Element 4: Likelihood of Confusion (cont'd) – Survey Evidence Examples

- Easy Spirit sued Skechers for trademark and trade dress infringement over the design of its “Traveltime” shoes.
 - The court ruled against the plaintiff, Easy Spirit, on the actual confusion factor due to its lack of survey evidence, while the defendant Skechers, in contrast, offered a double-blind survey rebutting the existence of the alleged confusion.
 - The court commented that the failure to present any evidence of actual confusion, especially when the opposing party has offered competing survey evidence, tilts this factor in the defendant’s favor.

See Easy Spirit, LLC v. Skechers U.S.A., Inc., et al., Case No. 19-cv-3299, 2021 U.S. Dist. LEXIS 220765 (S.D.N.Y. Nov. 16, 2021).

- National Products filed complaints against Arkon Resources for alleged trademark and trade dress infringement over the hourglass-shaped design of a mounting arm.
 - The court excluded the National Products expert’s report for failing to offer survey evidence regarding secondary meaning, rendering the report unhelpful to the trier of fact.

See Nat’l Prods. v. Arkon Res., Inc., Case No. C15-1984JLR, Case No. C15-1985JLR, Case No. C15-2024JLR, Case No. C16-0109JLR, 2018 U.S. Dist. LEXIS 48563 (W.D. Wash. Mar. 23, 2018).

Damages

- Trade dress infringement liability also carries the potential for monetary damages. The Lanham Act allows the plaintiff to recover:
 - The defendant's profit;
 - Actual losses suffered due to the infringing activity, including lost profits, and lost goodwill;
 - The costs of corrective advertising to counteract consumer confusion due to the infringing activity;
 - Reasonable royalties that would have been paid by the defendant to use the trade dress;
 - Litigation costs; and
 - Attorney's fees, although these are only granted in exceptional cases.
- If the court finds that the trade dress infringement in question involved willful use of counterfeit trade dress, it can award statutory damages of up to \$2 million per counterfeit trade dress per type of goods or services sold or distributed.

Fair Use Defense

- The fair use defense can be raised when a defendant utilizes elements of the plaintiff's trade dress to describe the plaintiff's products, not to identify the plaintiff as the source of the goods or services.
- Use of trade dress for the purpose of news reporting, commentary, criticism, artistic works, parody, or satire may also be sufficient to avoid a claim of trade dress infringement, in part because trade dress rights only protect the packaging or design when it is used in commerce.

Trade Dress Infringement Example

- Monster Energy successfully enforced its trade dress protections against Integrated Supply Networks (ISN), an automotive tool maker, who was using its black and green designs.
 - Although the products were in different industries, Monster was able to show a significant following in the motorsport field, where the infringing company was marketing its products.
 - Because of this, ordinary consumers of the energy drink may incorrectly believe the automotive tools were produced or sponsored by Monster, allowing for a finding of trade dress infringement.
 - The jury awarded \$5 million in punitive damages against ISN after Monster proved that ISN acted with malice, oppression or fraud.



Monster Energy Company v. Integrated Supply Network, LLC, Case No. 19-55760, No. 19-55800, 2020 WL 4207590 (9th Cir. Jul. 22, 2020).

Trade Dress Infringement Example

- Businesses, including restaurants, can create a distinctive look through their decoration.
 - One chain of Mexican-style fast food restaurants copied the trade dress of another chain, which had a “festive eating atmosphere... decorated with artifacts, bright colors, paintings, and murals.”
 - Even though the decorative trade dress was not registered with the USPTO, the design was capable of distinguishing the original restaurant.

See Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992).

Trade Dress and Design Patents

- **35 U.S.C. 171 Patents for designs.**
 - (a) **IN GENERAL.**—Whoever invents any **new, original, and ornamental design** for an article of manufacture may obtain a patent therefor, subject to the conditions and requirements of this title.
- **MPEP 1502 Definition of a Design**
 - In a design patent application, the subject matter which is claimed is the design embodied in or applied to an article of manufacture (or portion thereof) and not the article itself. *Ex parte Cady*, 1916 C.D. 62, 232 O.G. 621 (Comm'r Pat. 1916).
 - The design for an article consists of the **visual characteristics embodied in or applied to an article.**

Trade Dress and Design Patents

	Trade Dress	Design Patents
Distinctiveness/ Secondary Meaning/ Source Identification	Required	Not Required
Novelty/ Non-obviousness	Not Required	Required
Functionality	Prohibited (applied more strictly)	Prohibited
Infringement	Likelihood of Confusion	Substantially Similar to Ordinary Observer

Trade Dress and Design Patents

- Timing of Filing/Protection
 - Design Patent application may be filed before use
 - Trade Dress Registration often requires use
- Expiration
 - 15-year term (from grant) for Design Patents
 - Trade Dress will not expire if distinctiveness is maintained
- Novelty/Non-Obviousness may be a bar to Design Patent
- **Using Both**
 - **Design Patent may provide initial protection while Trade Dress “extends” the protection after secondary meaning is acquired**

Trade Dress and Utility Patents

- **35 U.S.C. 101 Inventions patentable**
 - **Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.**
- **Statute presupposes utility**

Trade Dress and Utility Patents

	Trade Dress	Utility Patents
Distinctiveness/ Secondary Meaning/ Source Identification	Required	Not Required
Novelty/ Non-obviousness	Not Required	Required
Functionality/Utility	Prohibited (applied more strictly)	Required
Infringement	Likelihood of Confusion	Claim Analysis

Trade Dress and Utility Patents

- Timing of Filing/Protection
 - Utility Patent application may be filed before use
 - Trade Dress Registration often requires use
- Expiration
 - 20 year term (from filing) for Utility Patents
 - Trade Dress will not expire if distinctiveness is maintained
- Novelty/Non-Obviousness may be a bar to Utility Patent
- **Using Both**
 - **Utility Patent may provide protection for any inventive concept**
 - **Trade Dress may provide protection for specific commercial activity**

Trade Dress and Utility Patents

- Potential Pitfall - be careful with patent application language regarding functionality (Morton-Norwich factor #1)
 - *In re Reelex Packaging Solutions*, 2020 WL 6495532 (Fed. Cir. November 5, 2020)



Application Serial
No. 87285383
(the '383 trade dress)



Application Serial
No. 87285412
(the '412 trade dress)

Trade Dress and Utility Patents

- Reelex had submitted 5 utility patent applications, highlighting the functionality of elements such as:
 - Tube and collar, specific dimensions, cutout handle, and oversize hole
 - These features were connected to type and arrangement of cord/wire
- Also had advertising highlighting tangle-free dispensing and utility of the box in shipping, storage, and recycling
- Examining Attorney's refusal based on functionality was upheld by TTAB and Federal Circuit

Trade Dress and Copyright

- 17 U.S. Code 102 - Subject matter of copyright: In general
 - (a) Copyright protection subsists, in accordance with this title, in **original works of authorship fixed in any tangible medium of expression**, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. ...
 - (b) In no case does copyright protection for an original work of authorship extend to any **idea, procedure, process, system, method of operation, concept, principle, or discovery**, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

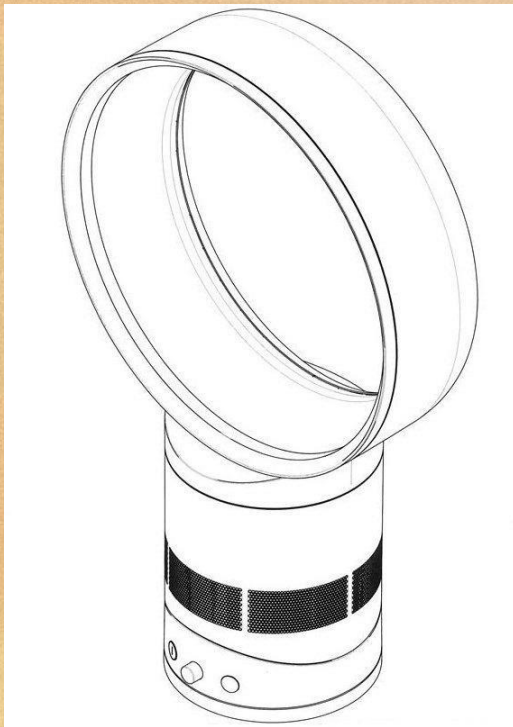
Trade Dress and Copyright

	Trade Dress	Copyright
Distinctiveness/ Secondary Meaning/ Source Identification	Required	Not Required
Originality/Authorship	Not Required	Required
Functionality	Prohibited	Functional elements are not protectible, but other elements may be
Infringement	Likelihood of Confusion	Substantial Similarity

Trade Dress and Copyright

- Timing of Filing/Protection
 - Copyright application may be filed before commercial use and protection is obtained based on creation/fixation
- Expiration
 - Copyright Term is life of the author +70 years
 - Trade Dress will not expire if distinctiveness is maintained
- Originality/Authorship requirement for copyright
- **Using Both - Copyright may provide initial protection before secondary meaning is acquired**

Additional Examples & Hypotheticals



Hypothetical

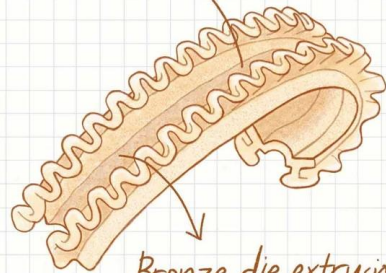


New pasta design:
Cascatelli

**Protectable by
Trade Dress?**

What if ...

Bucatini half-tube + ruffles
create a "sauce trough" for
max sauceability



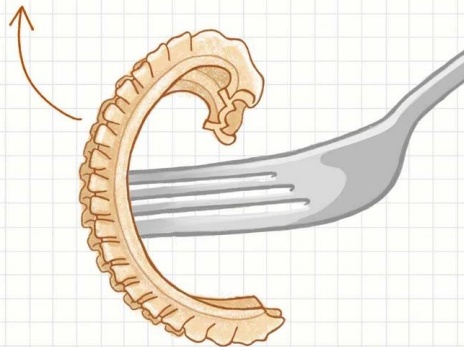
Bronze die extrusion
creates a rougher surface,
further boosting sauceability

Sauceability: how readily
sauce adheres to the shape

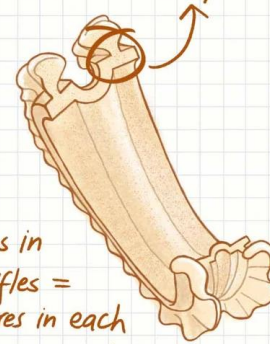
Forkability: how easy it is
to get the shape on your
fork and keep it there

Toothsinkability: How
satisfying it is to sink your
teeth into it.

Longer cut than most short shapes
provides more fork insertion points,
improves forkability



Right angles (rare in pasta shapes)
resist bite force from all directions,
maximize toothsinkability



Slight variations in
thickness + ruffles =
multiple textures in each
bite (which sensory scientists
call "dynamic contrast")