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CASE COMMENTS

TRADEMARK LAW: THE NEWEST ODD COUPLE IN INTELLECTUAL PROPERTY, PRODUCT DESIGN MEETS SECONDARY MEANING

Wal-Mart Stores v. Samara Bros., Inc., 529 U.S. 205 (2000)

*Jeffrey W. Abraham** **

Petitioner, a nation-wide retailer, produced a line of clothing based on Respondent's designs and sold the imitation garments at a substantial profit.¹ Respondent filed suit in the United States District Court for the Southern District of New York, alleging product design trade dress infringement.² The district court found the overall design of Respondent's garments to be inherently distinctive and entitled to protection.³ Petitioner

* For my parents, Dr. William and Kay Abraham.

** *Editors Note:* This Case Comment received the George W. Milam award for the best Case Comment written during Spring 2001.

1. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 207-08 (2000). Petitioner contracted with one of its suppliers to manufacture the line of children's clothing. *Id.* That manufacturer copied sixteen of respondent's garments in creating the new designs. *Id.*

2. *Id.* at 208. Respondent claimed infringement of an unregistered trade dress under section 43(a) of the Lanham Act, which provides:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

Trademark Act of 1946 (Lanham Act), 15 U.S.C. § 1125(a) (2001). To establish a cause of action for trade dress infringement under § 43(a) of the Lanham Act, a plaintiff must prove that its trade dress is either inherently distinctive or has acquired distinctiveness through secondary meaning. *Fun-Damental Too, Ltd. v. Gemmy Indus. Corp.*, 111 F.3d 993, 999 (2d Cir. 1997). Recent case law shows that product design is an accepted form of protectable trade dress. *See, e.g.*, *Ashley Furniture Indus., Inc. v. Sangiacomo N.A.*, 187 F.3d 363, 366 (4th Cir. 1999) (regarding bedroom furniture); *Knitwaves, Inc. v. Lollytogs, Ltd.*, 71 F.3d 996, 999 (2d Cir. 1995) (regarding sweaters); *Stuart Hall Co. v. Ampad Corp.*, 51 F.3d 780, 782 (8th Cir. 1995) (regarding notebooks).

3. *Samara Bros., Inc. v. Judy-Philippine, Inc.*, 969 F. Supp. 895, 898 (S.D.N.Y. 1997). In determining whether trade dress is inherently distinctive, the major question is whether consumers

moved for a judgment as a matter of law, asserting that Respondent's trade dress alone was incapable of identifying Respondent as the source of the goods and therefore was not entitled to protection without a showing of secondary meaning.⁴ In denying Petitioner's motion, the district court held that the jury had sufficient evidence to support its conclusion that Respondent's product designs possessed source-identifying characteristics.⁵ The United States Court of Appeals for the Second Circuit affirmed the denial of Petitioner's motion, finding Respondent's product designs to be inherently distinctive.⁶ The United States Supreme Court reversed and HELD, that product design can never be inherently distinctive, and therefore can only be protected upon a showing of secondary meaning.⁷

One of the principal struggles in the area of intellectual property is the balance between fostering competition and protecting inventors' rights.⁸ Statutory protection of trademarks was established to help consumers recognize the owner of goods and services, thereby securing for an owner the goodwill of his business.⁹ The Lanham Act promotes this end by preventing the manufacture of imitation products which would confuse

understand the design to be an indicator of the product's source. *Id.*; see also *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 10-11 (2d Cir. 1976) (defining inherently distinctive marks as those whose intrinsic nature serves to identify a particular source).

4. *Samara Bros.*, 969 F. Supp. at 897. Wal-Mart argued that Samara's trade dress was not inherently distinctive because it was amorphous and contained non-distinctive features that cannot independently identify source. *Id.*

5. *Id.* at 898. The evidence included (1) Samara's efforts, over a span of many years, to produce garments that have a similar "look" and a consistent feel to them, in order to build brand loyalty and establish a customer base, (2) the consistent use of designs, (3) advertising efforts, (4) Wal-Mart's efforts to plagiarize, and (5) the garments themselves. *Id.*

6. See *Wal-Mart*, 529 U.S. at 208.

7. *Id.* at 216.

8. See Willajeanne F. McLean, *The Birth, Death, and Renaissance of the Doctrine of Secondary Meaning in the Making*, 42 AM. U. L. REV. 737, 739 (1993).

The purpose underlying any trade-mark statute is two fold. One is to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats.

S. REP. NO. 79-1333, (1946), reprinted in 1978 U.S.C.C.A.N. 1274, 1274.

9. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 774 (1994). "National protection of trademarks is desirable . . . because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation." *Id.* (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985)).

consumers trying to distinguish the owners of competing products.¹⁰ Such restrictions could potentially establish statutorily created monopolies, and thus, courts have assumed a familiar role in defining the protective boundaries of legislative creations.¹¹

In *Abercrombie & Fitch Co. v. Hunting World, Inc.*,¹² the United States Court of Appeals for the Second Circuit attempted to regulate overprotection of word marks by adopting a classification scheme to determine the extent of protection a word mark would be afforded.¹³ In *Abercrombie*, a well-known sporting goods store sold products bearing the registered trademark “Safari.”¹⁴ Charged with infringement of the “Safari” mark, the defendant sought a cancellation of the mark on the basis that it was a common word.¹⁵

In determining the level of protection a word mark was afforded, the court considered the source-identifying quality of the word.¹⁶ The court held that fanciful,¹⁷ arbitrary,¹⁸ and suggestive¹⁹ terms were inherently capable of source identification and were thus protected immediately upon use.²⁰ Descriptive words²¹ alone, the court noted, were not independently

10. See generally 15 U.S.C. § 1114 (2001) (protecting registered trademarks); 15 U.S.C. § 1125 (2001) (protecting unregistered trademarks).

11. See, e.g., *Park 'N Fly*, 469 U.S. at 191 (refusing to allow an infringing producer challenge an incontestible trademark on the basis that it is a descriptive word); *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-54 (9th Cir. 1979) (providing an extensive list of factors to consider when testing for likelihood of confusion among consumers); *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 360 (2d Cir. 1959) (restricting the owner of a federally registered trademark from enjoining a junior user in a separate geographic area from using a similar mark until the senior user is poised to enter that geographic market area, thereby increasing the likelihood of confusion among consumers).

12. 537 F.2d 4 (2d Cir. 1976).

13. *Id.* at 9-11.

14. *Id.* at 7.

15. *Id.*

16. *Id.* at 8.

17. Fanciful words are words that are created solely for use as a trademark. *Id.* at 11 n.12. An example of a fanciful trademark is KODAK film. *A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 221 (3d Cir. 2000).

18. Arbitrary words are common words used in an unfamiliar way. *Abercrombie*, 537 F.2d at 11. An example of an arbitrary trademark is IVORY SOAP. *Id.* at 9 n.6.

19. Suggestive words require “imagination, thought and perception to reach a conclusion as to the nature of [the] goods.” *Id.* at 11 (quoting *Stix Prods., Inc. v. United Merchs. & Mfrs., Inc.*, 295 F. Supp. 479, 488 (S.D.N.Y. 1968)). For example, ORANGE CRUSH, as applied to a beverage, is suggestive. See *Orange Crush Co. v. Cal. Crushed Fruit Co.*, 297 F. 892, 893 (D.C. Cir. 1924).

20. *Abercrombie*, 537 F.2d at 11. The unusual nature of the word “Safari” in connection with the good was sufficient to remove it from the public domain in that particular context. *Id.*

21. Descriptive words convey an “immediate idea of the ingredients, qualities or characteristics of the goods.” *Id.* at 11 (quoting *Stix Prods.*, 295 F. Supp. at 488). Geographic locations, such as “Camden Yards,” may constitute descriptive word marks. See *Md. Stadium Auth.*

capable of identifying the source of goods and were thus not afforded immediate protection under Lanham Act section 2(e).²² The *Abercrombie* court, however, acknowledged section 2(f)²³ of the Lanham Act, which provides that “nothing [herein] shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant’s goods in commerce.”²⁴ The court adopted this language as statutory support for the protection of descriptive marks upon a showing of secondary meaning.²⁵ The court found that secondary meaning exists when consumers have come to associate the descriptive mark with the source of the product rather than the product itself.²⁶

While the classification scheme used by the *Abercrombie* court was generally accepted with respect to word marks,²⁷ its applicability to other forms of marks was challenged in *Two Pesos, Inc. v. Taco Cabana, Inc.*²⁸ The *Two Pesos* Court confronted the issue of whether the interior design features of a restaurant could be protected as an unregistered, inherently distinctive trade dress without additional proof of secondary meaning.²⁹ In *Two Pesos*, respondent opened a fast-food Mexican restaurant chain in Texas and sought trade dress protection in the overall theme of the restaurants, including interior and exterior decorations, as well as the “festive and vivid color schemes.”³⁰ Subsequently, petitioner opened a fast-food Mexican restaurant in Texas with a motif that was very similar to respondent’s.³¹ The two restaurant chains managed to co-exist peacefully until respondent expanded its business into areas of the state previously

v. Becker, 806 F. Supp. 1236, 1239 (D. Md. 1992).

22. *Abercrombie*, 537 F.2d at 10. As section 1052 of the United States Code states:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . consists of a mark which . . . when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them

15 U.S.C. § 1052 (2001).

23. 15 U.S.C. 1052(2)(f) (2001).

24. *Abercrombie*, 537 F.2d at 10 (quoting 15 U.S.C. § 1052 (2)(f)).

25. *Id.* at 9.

26. *Id.* at 8.

27. *E.g.*, *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) (concerning infringement over use of the service mark PARK‘N‘FLY); *Thompson Med. Co. v. Pfizer, Inc.*, 753 F.2d 208, 213 (2d Cir. 1985) (using *Abercrombie* classifications to characterize the unregistered word mark SPORTSGEL as a descriptive mark).

28. 505 U.S. 763, 764-65 (1992).

29. *Id.*

30. *Id.* at 765 (quoting *Taco Cabana Int’l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1117 (5th Cir. 1991)).

31. *Id.*

occupied by petitioner.³² Petitioner filed suit for infringement under section 43(a) of the Lanham Act.³³

The *Two Pesos* Court recognized section 43(a) of the Lanham Act as authority for protecting unregistered trademarks.³⁴ According to the Court, the unregistered marks protected by the statute were subject to the same limitations imposed on marks which qualified for registration under section 2 of the Act.³⁵ Additionally, the Court held that the Lanham Act protected the “total image and overall appearance” of a restaurant as trade dress.³⁶ The synthesis of these two statutory interpretations allowed the Court to conclude that any trade dress inherently capable of source identification should be protected without a showing of secondary meaning.³⁷

In determining whether a particular trade dress was inherently distinctive, the *Two Pesos* Court found the *Abercrombie* classifications of word marks equally applicable to trade dress.³⁸ The Court justified its holding by noting the lack of any textual basis in the Lanham Act for treating verbal trademarks differently than trade dress.³⁹ The Court also emphasized the anti-competitive effects of adding a requirement of secondary meaning for inherently distinctive trade dress, stating that it “would allow a competitor . . . to appropriate the originator’s dress . . . and to deter the originator from . . . expanding and competing.”⁴⁰

32. *See id.*

33. *Id.*

34. *Id.* at 768. “[I]t is common ground that § 43(a) protects qualifying unregistered trademarks.” *Id.*; *see also* A.J. Canfield Co. v. Honickman, 808 F.2d 291, 296 (3d Cir. 1986) (relying on “the principle that unlicensed use of a designation serving the function of a registered mark constitutes a false designation of origin and a false description or representation”).

35. *Two Pesos*, 505 U.S. at 768 (“[T]he general principles qualifying a mark for registration under § 2 of the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection under § 43(a).”).

36. *Id.* at 764 n.1. “‘Trade dress’ involves the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques.” *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 980 (11th Cir. 1983) (affording trademark protection for check stub forms).

37. *Two Pesos*, 505 U.S. at 776.

38. *See id.* at 768-69; *see also* *Chevron Chem. Co. v. Voluntary Purchasing Groups, Inc.*, 659 F.2d 695, 702 (5th Cir. 1981) (holding that trade dress should be protected according to the same principles governing trademarks, requiring a showing of secondary meaning only when the claimed mark or dress is not inherently capable of source identification).

39. *Two Pesos*, 505 U.S. at 773-74.

40. *Id.* at 775. “[P]rotecting an inherently distinctive trade dress from its inception may be critical to new entrants to the market and . . . withholding protection until secondary meaning has been established would be contrary to the goals of the Lanham Act.” *Id.* Such goals include “secur[ing] for an] owner of the mark the goodwill of his business and protect[ing] the ability of consumers to distinguish among competing producers.” *Id.* at 774 (quoting *Park ’N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985), *citing* S. REP. NO. 79-1333, at 3-5 (1946), *reprinted in* 1946 U.S.C.C.A.N. 1274, 1275).

Some marks, such as color in *Qualitex Co. v. Jacobson Products Co.*,⁴¹ will always require a showing of secondary meaning, because such marks can never independently identify a product's source.⁴² In *Qualitex*, petitioner manufactured dry-cleaning pads of a specific color.⁴³ Respondents began to manufacture similarly colored dry-cleaning pads, which prompted petitioner to register its color as a trademark and file a suit for infringement.⁴⁴ The *Qualitex* Court reversed a lower court ruling and held that color alone could be protected as a trademark upon a showing of secondary meaning.⁴⁵

The Court found that colors fell within the statutory definition of trademarks through a broad interpretation of the language.⁴⁶ The Court acknowledged, however, that color could never automatically function as a source identifier.⁴⁷ Similar to descriptive word marks, colors, the Court found, should not be entitled to protection on their own.⁴⁸ The Court reasoned that over time consumers could come to recognize a product's color as signifying a brand.⁴⁹ This delayed consumer association of a product with its source was sufficient to entitle colors to trademark protection.⁵⁰

The instant Court found product design to be analogous to color, making secondary meaning a mandatory prerequisite for all product designs in order to qualify for statutory protection.⁵¹ According to the instant Court, nothing in the statute demands that every category of mark necessarily include marks capable of being inherently distinctive.⁵² The instant Court reasoned that the predominant function of inherently distinctive marks is source identification,⁵³ and that consumers are predisposed to regard those marks as identifying the source of a product.⁵⁴

41. 514 U.S. 159 (1995).

42. *Id.* at 162-63.

43. *Id.* at 161.

44. *Id.*

45. *Id.* at 162.

46. *Id.* Section 45 of the Lanham Act states that trademarks include "any word, name, symbol, or device, or any combination thereof." 15 U.S.C. § 1127 (2000). "Since human beings might use as a symbol or device almost anything at all that is capable of carrying meaning, this language . . . is not restrictive." *Qualitex*, 514 U.S. at 162.

47. *Qualitex*, 514 U.S. at 162-63.

48. *Id.* at 163.

49. *Id.* An "imaginary word . . . on a jar of orange jam immediately would signal" the source of the brand, but the orange color would not. *Id.* "But, over time, customers may come to treat a particular color on a product or its packaging . . . as signifying a brand." *Id.*

50. *Id.*

51. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 212 (2000).

52. *Id.* at 211; *see also* 15 U.S.C. § 1052 (2001).

53. *Wal-Mart*, 529 U.S. at 212.

54. *Id.* Such signals automatically tell a customer they refer to a brand, and "immediately . . .

After finding that consumers normally interpret product design to render a product more useful or appealing,⁵⁵ the instant Court concluded that consumers generally do not equate product design with the source of a product.⁵⁶

Accordingly, the instant Court stated that since product design lacks the inherent ability to identify the source of a product, over-protecting product design would be harmful to consumer interests.⁵⁷ The instant Court sought to avoid the anti-competitive consequences that might follow from restricting the utilitarian and aesthetic purposes ordinarily served by product design.⁵⁸ One such effect was a reduced number of competitors willing to enter new markets due to the increased threat of a lawsuit for infringing uses of such utilitarian features.⁵⁹

The instant Court acknowledged that a clear test to determine inherently distinctive product design would enhance the predictability of such lawsuits, thereby regulating any anti-competitive effects.⁶⁰ However, the instant Court showed little confidence that such a test could or would be successfully developed.⁶¹ Even if such a test were developed, the instant Court reasoned that the plausible threat of a lawsuit alone would still have drastic anti-competitive effects.⁶² Overall, the instant Court determined that the negative effects on competition in requiring secondary meaning for protection of product design were manageable when compared with the burdens of adopting an inherently distinctive test for product design, especially when the chance of an owner's product design being inherently distinctive was so minimal.⁶³

signal a brand or a product source." *Id.* (quoting *Qualitex*, 514 U.S. at 162-64) (internal quotation marks omitted).

55. *Id.*

56. *Id.*

57. *Id.*

58. *See id.* The utilitarian and aesthetic purposes described by the Court are independent of any functional aspects of product design, which will never be protected, even with a showing of secondary meaning. *Id.* at 214.

59. *Id.* at 213.

60. *See id.*

61. *Id.* at 213-14. One suggestion was to use relevant portions of the analogous test developed for product packaging in *Seabrook Foods, Inc. v. Bar-Well Foods, Ltd.*, 568 F.2d 1342, 1344 (C.C.P.A. 1977). That test included such factors as whether the packaging was a common shape or design, whether it was unique or unusual in a particular field, and whether it was a refinement of a well-known form of ornamentation for a particular class of goods viewed by the public as such. *Id.* The instant Court, however, had little faith in the fact that such a test would provide the basis for summary disposition of an anti-competitive strike suit. *Wal-Mart*, 529 U.S. at 214.

62. *Wal-Mart*, 529 U.S. at 214.

63. *See id.* This is especially so since the owner can turn to patent and copyright law for design protection. *Id.*

The instant Court recognized the apparent conflict its holding created with its earlier decision in *Two Pesos*, where the Court held that trade dress could be inherently distinctive.⁶⁴ The Court reconciled the two cases by clarifying that *Two Pesos* established that product packaging could be inherently distinctive, not product design.⁶⁵ The instant Court was aware that this distinction would force courts to face the difficult task of classifying trade dress as either product design or product packaging.⁶⁶ Nevertheless, the instant Court reasoned that this would be an easier task than deciding whether or not a product's design is inherently distinctive.⁶⁷

The instant Court's refusal to establish a test for inherently distinctive product design enhanced the importance of distinguishing between product design and product packaging. The instant Court, however, failed to articulate a test to guide lower courts in this endeavor.⁶⁸ Until a valid test is developed, courts may mistakenly characterize product design as product packaging.⁶⁹ On the surface such a misnomer appears relatively innocent, but this error could result in courts finding that product design is inherently distinctive, effectively impeding the instant Court's efforts to avoid the anti-competitive consequences of over-protecting such trademarks.⁷⁰

The *Two Pesos* holding, establishing that the test for inherently distinctive product packaging is the classification scheme identified in *Abercrombie*,⁷¹ further complicates the problem. The combination of the *Two Pesos* and *Wal-Mart* holdings could lead to product design, improperly labeled as product packaging, being tested for inherent distinctiveness using the *Abercrombie* classifications. In effect, the instant Court has indirectly established a test for inherently distinctive product

64. *See id.*

65. *Id.* at 215.

Two Pesos is inapposite to our holding here because the trade dress at issue . . . seems to us not to constitute product *design*. It was either product packaging—which as we have discussed, normally *is* taken by the consumer to indicate origin—or else some *tertium quid* that is akin to product packaging and has no bearing on the present case.

Id. (emphasis in original).

66. *Id.*

67. *Id.* In the case of close decisions, the Court ordered lower courts to “err on the side of caution,” towards finding product design, because requiring secondary meaning will result in the greatest benefit for the consumer. *Id.*

68. *See id.* at 214-16.

69. *See id.* For example, a classic glass Coca-Cola bottle may constitute packaging for those who drink the Coke and then discard the bottle. *Id.* at 215. On the other hand, it may constitute the product itself for those consumers who collect bottles. *Id.*

70. *See id.*

71. *Two Pesos*, 505 U.S. 773.

design, a task which the Court claimed could not successfully be accomplished.⁷²

The instant Court did, however, direct lower courts to proceed with caution when classifying a mark as either product design or product packaging.⁷³ This dicta indirectly addresses the problem of lower courts over-protecting product design through mistaken classification as inherently distinctive product packaging.⁷⁴ Such a cautious default position, however, may produce an equally harsh result, requiring proof of secondary meaning before protecting product packaging that is inherently distinctive.⁷⁵ This additional requirement of secondary meaning for an inherently distinctive trade dress could prove detrimental to an inventor's rights.⁷⁶

The instant Court attempted to offset this effect by increasing consumer protection, ensuring that consumers would not be deprived of competition with regard to the utilitarian and aesthetic features that product design ordinarily serves.⁷⁷ A potential problem in requiring secondary meaning, however, is the burden it imposes on the start-up of small companies.⁷⁸ Under the instant Court's construction, a producer's trade dress in a particular market would be defenseless against competitors who appropriate that dress, thereby stifling the desire of businesses to create new products and enter new markets.⁷⁹

The distinction between product design and product packaging trade dress appears to be a hollow creation by the instant Court to justify an arbitrary end. The instant Court's attempt to protect consumers by curbing owner's rights left both parties in a uneasy position. Ultimately, the instant Court harmed consumers by creating a monopoly where it sought to protect them by fostering competition. Consumers, promised an abundance of competition resulting in lower prices and an increased selection of goods, are really faced with businesses that are unwilling to expand into new

72. See *Wal-Mart*, 529 U.S. at 214-15.

73. *Id.* at 215.

74. See *id.*

75. See *Two Pesos*, 505 U.S. at 774.

76. *Id.* at 775.

Engrafting onto [section] 43(a) a requirement of secondary meaning for inherently distinctive trade dress . . . would undermine the purposes of the Lanham Act. . . .

By making more difficult the identification of a producer with its product, a secondary meaning requirement for a nondescriptive trade dress would hinder improving or maintaining the producer's competitive position.

Id. at 774.

77. See *Wal-Mart*, 529 U.S. at 213.

78. *Two Pesos*, 505 U.S. at 775.

79. See *id.*

markets. Producers, recently afforded protection under the Lanham Act, now find their inherently distinctive product packaging unprotected until they can show secondary meaning. The only real winners are the existing producers who have a monopoly not only over products but over entire markets as well.