



Trade dress: The increasing importance of an ancient yet new form of intellectual property protection

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ABSTRACT

Trade dress is a means of identifying and differentiating the product of a vendor by visual (and very occasionally auditory) cues of a form other than written language. The use of trade dress certainly goes back into pre-Roman times, and was very likely used well before then. Trade dress remains important in societies both highly literate and substantially illiterate, and in some respects has increased in importance in both.

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1. Introduction

Trade dress provides a means for identifying the proprietor of a product. Whereas a conventional trademark usually includes a vocalizable visual component (i.e., printed words) a trade dress does not. Trade dress is a form of brand that is akin to the marking of livestock to define it as someone's property and under the Lanham Act in the United States and the Paris Convention internationally, can be protected by registry as a trademark. As the world market has become more globalized, trade dress has come forth anew as a quick identifier of particular brands or makes of goods and services. The promotion of products in new markets using trade dress as a familiarizing tool makes it possible to enter and develop the market in locations with both high and low levels of literacy with greater facility. This paper examines current trends in the creation and use of distinctive trade dress under both circumstances.

2. The genesis and persistence of "trade dress"

Traceable to Roman times, trade dress is a means of identifying a business or a product predominantly by visual and occasionally auditory—though not language—cues. From Roman times, many trades identified themselves by the use of symbols attached to their places of business or by a distinctive mode of dress worn by members of the trade. Some of these symbols were the surgeon–barber's red and white striped pole, the three gold balls of the moneylender (pawnbroker), and the model

sailing ship of the Hanseatic League on their store's gables. Several of these symbols remain in use to this day.

Many British pubs continue to express their names through trade dress such as signs bearing ancient symbols such as The White Swan, The Red Lion, the Rose and Crown, the Cock and Bull, the Royal Oak, and the Wheel and Anchor. (<http://www.uta.fi/~elna.m.eskola/pub.html>). Though Britain is not a nation with a low level of literacy, these relics of an illiterate past still serve a valuable marketing communication function.

2.1. Resurgence of the introduction of trade dress into largely illiterate markets

As more products from foreign sources are introduced into still largely illiterate markets, the use of different forms of trade dress as product identifiers and tools of differentiation are as important in those markets as those used in Europe two millennia ago. One is reminded of the advice given by Carl Crow in his 1937 book *400 Million Customers*: he cautioned newcomers to China, in which he started the first advertising agency in 1923, to make sure that any product pictured in an advertisement was pictured EXACTLY as it appeared in life. What the product looked like was very important to the Chinese because 76 years ago few Chinese, especially outside the major cities, could read any language, especially their own very difficult one. The American advertising convention of showing a pack of cigarettes open at one corner, exposing three or four cigarettes, was inadequate in China. The entire top of the pack should be removed, wrote Crow, showing ALL the cigarettes inside. The need for specific illustration grew from the fact that a large number of Chinese could not read their own language.

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The world level of literacy has increased very significantly since 1937, the aggregate level of adult literacy as reported by the United States Central Intelligence Agency (<https://www.cia.gov/library/publications/the-world-factbook/fields/2103.html>) is now 84.1%, with 88.6% of the male population and 79.7% of the female population being able to read and write the dominant or in some cases one of several dominant languages in their country of residence. All statistical data on literacy reported herein have been drawn from the source cited above.

Though China's urban literacy rate overall increased significantly since Crow's day to 92.2%, she still remains only the one hundred twentieth most literate of the world's two hundred eighteen nations as reported by the CIA and illiteracy among the rural population remains at a high level. India, with a population of over 1.1 billion, possesses a literacy rate of 61.0%. The world's least literate nations, those with aggregate literacy at or below 50.0%, comprise the 15 nations listed in Table 1.

2.2. The realization of importance of trade dress in literate societies

Even in more literate parts of the world, symbols have been associated with specific, proprietary products and the definition of trade dress has evolved to the current meaning: "a product's physical appearance, including its size, shape, color, design, and texture" (Law Encyclopedia, quoted in www.answers.com/topic/trade-dress). These characteristics define anything that can, without abstraction, and predominantly by vision, differentiate a product from another product which might possess a similar function. Thus, the unique wasp-waisted shape of the Coca-Cola bottle, the green paint used on John Deere tractors, and the cross-shaped grille treatment among Dodge vehicles all constitute examples of trade dress, each unique to its proprietor.

Many marketers now recognize the importance of trade dress to product identification and differentiation and the necessity of protecting trade dress from infringement in the marketplace. A number of recent legal cases have broken new ground in the interpretation of the concept of trade dress.

3. International bases for trade dress protection

Trade dress as intellectual property is protected by The Paris Convention for the Protection of Industrial Properties (1883), a treaty which deals with patent and trademark rights. This document has been extensively amended over the years, most of the amendments serving to lengthen the terms and strengthen the conditions of the protection offered. Most of the world's active trading nations are signatories of the Paris Convention.

The application of law when a treaty violation is claimed is based on the language of the treaty, not on the terms or application of the

domestic law of either party involved in litigating the alleged violation. The treaty stands as the authority to determine whether a violation has occurred, applying the minimum standards of compliance that must be met by its signatories. Only if those standards have not been met by all the parties do other issues come into play. The law of the place where the alleged violation occurred begins to apply after treaty issues have been settled and when the offended party files suit in an appropriate national venue for an injunction or damages.

4. Domestic bases for trade dress protection in the U.S.A.

In the United States, trade dress may be protected as intellectual property in the same way as any trademark. Under the Lanham Act (also known as the Trademark Act), last amended in 1976, any "word, name, symbol, or device, or any combination thereof" that is used "to identify and distinguish goods or services, including a unique product, from those manufactured or sold by others (15 USC 1127 et seq.)" can be registered as a trademark in either the principal or supplemental register. Successful registration of trade dress constitutes *prima facie* evidence that use of the same dress by others is an infringement.

Unlike in civil law countries, where registration of trademarks is usually mandatory to protect the marks from infringement, registration is not mandatory in the United States. Should a trade dress proprietor desire not to register his or her dress under the Lanham Act, it nonetheless falls under the definition stated in the slightly more expansive phrase "word, name, term, symbol, or device, or any combination thereof" ... used in trade ... "on or in connection with any goods or services, or any container for goods" found in (15 USC 1125(a)) it is protected on a common law basis. Demonstrating first and continuous use of the trade dress in comparison with the use history of an alleged infringer is sufficient to establish protection.

The various States of the United States and the District of Columbia individually provide for trademark registration within their jurisdictions. The State trademark laws differ somewhat in the protection they provide for registered marks, thus reinforcing the idea that the States of the United States are significantly more different from each other than is usually realized by persons not familiar with their histories. In point of fact, Texas was a nation between 1836 and 1845 and, on admission to the United States in the latter year, preserved in its State Constitution the explicit right to secede from the United States through due process of the Texas legal system.

5. Protection of unregistered trade dress in the U.S.A.

Standards for protection of unregistered trade dress on the federal level were established by the decisions of various Federal Courts that ruled in cases related to protection of intellectual property under common law. They remain subject to change on the basis of judicial interpretation of facts and law and legislative review and revision.

5.1. Distinctiveness of dress

Unregistered trade dress is automatically entitled to legal protection without a show of proof if it is "inherently distinctive." The Coca-Cola bottle is inherently distinctive because of its unique shape. If the trade dress is descriptive of product function or use, it is entitled to legal protection upon a show of proof that it has "acquired" distinctiveness (secondary meaning). The usual test of secondary meaning is whether consumers, or members of the appropriate using market segment if the product is not a consumer good, immediately identify the trade dress with the product in or on which it appears—in other words, if the "brand" is construed to be the product. If, however, the trade dress is generic—neither inherently distinctive nor possessing secondary meaning, it receives no protection. Determination of inherent distinctiveness is a matter for the courts and the tests used vary from jurisdiction to jurisdiction and with the nature of the product.

Table 1
Nations with literacy rates of fifty percent or less.

| Nation | Population (in 000) | Literacy | Location |
|------------------|---------------------|----------------|--------------------|
| Afghanistan | 16,000 | 28.1% | Asia |
| Benin | 4600 | 42.4% | West Africa |
| Bhutan | 1500 | 47.0% | Himalayas |
| Burkina Faso | 9000 | 21.0% | West Africa |
| Chad | 5500 | 34.5% | N. Central Africa |
| Ethiopia | 50,600 | 42.7% | East Africa |
| Gambia | 700 | 50.0% | West Africa |
| Mali | 8000 | 31.1% | West Africa |
| Niger | 7250 | 28.7% | N. Central Africa |
| Senegal | 7200 | 39.3% | West Africa |
| Sierra Leone | 4000 | 35.1 | West Africa |
| Somalia | 7400 | 37.8 | East Africa |
| South Sudan | 10,000 | 27.0 | East Africa |
| Wallis & Futuna | 20 | 50.0 | Central Pacific |
| Total population | 123,760 | Total literacy | Aggregate literacy |
| | | 44,774,650 | 36.18% |

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