

# Three Dimensional Trademarks:

Understanding United States Law and Practice



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**Presented:**

**London, UK**

Before the

**United Kingdom Trademark Assn. (ITMA)**

# **Three Dimensional Trademarks**

## **Understanding United States Law and Practice**

### **I. Background**

Three-dimensional trademarks are merely a special and peculiar subset of trade dress. Although traditionally associated with packaging and labeling, the term “trade dress” now includes the shape and design of products. Today, “trade dress” signifies a product’s “total image and overall appearance. It 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.”<sup>1</sup> Indeed, within trade dress are two further subsets: (1) product packaging and (2) product configuration. It is the latter subset that most often confounds the courts. One commentator believes that product configuration as trade dress leads to the “odd conclusion” that each product comes with two trade dresses: the form of the product and the packaging.<sup>2</sup>

### **II. The Law of Product Configuration as Trade Dress**

Enacted in 1946, the Lanham Act provides the foundation for trademark and trade dress protection in the United States. The primary purposes of the Act are to promote “the distinguishability of goods and services for the protection of the public as well as of

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<sup>1</sup> *Two Pesos Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 764 (1992) (internal quotations and citations omitted).

<sup>2</sup> Reichman, “Design Protection and the New Technologies: The United States Experience in a Transnational Perspective.” 19 U. Balt. L. Rev. 6, 115 (1990). “The fiction that product configurations are just another form of trade dress leads to the odd conclusion that every product comes equipped with at least two trade dresses for purposes of section 43(a). One comprises the exterior shell or three-dimensional form that houses whatever else the product consists of, known today as “appearance trade dress.” The other comprises the package or container placed around the product when sold or transported from one place to another, which is what trade dress signified in the past.”

businesses,”<sup>3</sup> and to “[p]rotect the goodwill of manufacturers and merchants and their investment of energy, time, and money from misappropriation by pirates and cheats.”<sup>4</sup>

Section 43(a) of the Lanham Act has become the premier vehicle for federal product shape protection. Section 43(a) states that

(a)(1) 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, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.<sup>5</sup>

Section 43(a) protects both registered and unregistered marks,<sup>6</sup> and goes much further than the common law “passing off” and “unfair competition” concepts.

In order to be protected as trade dress, a product configuration must be inherently distinctive or have acquired secondary meaning, and the shape must be nonfunctional.<sup>7</sup>

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<sup>3</sup> Jessica Litman, Note, *The Problem of Functional Features: Trade Dress Infringement Under Section 43(a) of the Lanham Act*, 82 Column. L. Rev. 77, 78 (1982).

<sup>4</sup> Prowda *The Trouble with Trade Dress Protection of Product Design*, 61 Albany L. Rev. 1309, 1319 (1998) (citations omitted).

<sup>5</sup> 15 U.S.C. § 1125(a)(1) (1999).

<sup>6</sup> See *Two Pesos*, 505 U.S. at 768 (“[I]t is common ground that § 43(a) protects qualifying unregistered trademarks and that the 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).”).

<sup>7</sup> *Two Pesos*, 505 U.S. at 769.

To find that a protectable trade dress has been infringed, there must be a likelihood of confusion as to the source of dress.

### III. Distinctiveness

For trade dress to be protectable under § 43(a) of the Lanham Act, it must be distinctive. Trade dress is “distinctive” and entitled to protection when it is “capable of identifying products or services as coming from a specific source.”<sup>8</sup> Either the trade dress must be inherently distinctive or have acquired secondary meaning for it to be distinctive under the Act.

Inherently distinctive trade dress identifies a particular source of a product “because [of its] intrinsic nature.”<sup>9</sup> The essential characteristic of inherently distinctive trade dress is that its design is “such ... that a buyer will immediately rely on it to differentiate the product from those of competing manufacturers.”<sup>10</sup>

Unfortunately, there is a lack of consensus in U.S. courts over the proper definition and test for inherent distinctiveness. The split in authority can be sorted into two broad categories. The first is where courts apply the same test to trade dress that is used for traditional word marks.<sup>11</sup> The second category is where the courts have rejected the

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<sup>8</sup> *Id.* at 773.

<sup>9</sup> *Id.* at 768. Circuit courts have given various definitions of “inherently distinctive,” characterizing such a design as one that “is capable of functioning as a designator of an individual source of the product,” *Ashley Furniture, Inc. v. SanGiacomo N.A. Ltd.*, 187 F.3d 363, 366 (4th Cir. 1999); “is likely to be understood as an indicator of the product’s source,” *Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 378 (2d Cir. 1997); “is likely to serve primarily as a designator of origin of the product,” *Duraco*, 40 F.3d at 1449, *Knitwaves Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1008 (2d Cir. 1995); “almost automatically tell[s] a customer that [it] refer[s] to a brand;” *Vornado Air Circulation Sys., Inc. v. Duracraft Corp.*, 58 F.3d 1498, 1502 (10th Cir. 1995), *cert. denied*, 516 U.S. 1067 (1996); and one which “a buyer will immediately rely on ... to differentiate the product from those of competing manufacturers.” *Insty\*Bit, Inc.*, 95 F.3d at 673 (quoting *Tone Bors., Inc. v. Sysco Corp.*, 28 F.3d 1192, 1206 (Fed. Cir. 1994)).

<sup>10</sup> *Insty\*Bit*, 95 F.3d at 673.

<sup>11</sup> See *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4 (2d Cir. 1976).

traditional test in favor of one that is specifically designed for trade dress.<sup>12</sup> This separate test is usually much more restrictive than that of the traditional approach to trademark distinctiveness.

#### A. The *Abercrombie* Test as Applied to Trade Dress

Several courts apply the same traditional test used for word marks to product packaging and configuration in order to determine inherent distinctiveness.<sup>13</sup> To apply the *Abercrombie* test, courts classify marks as either (1) generic, (2) descriptive, (3) suggestive, or (4) arbitrary or fanciful. Because generic marks can never distinguish source, they fail the test for distinctiveness. Descriptive marks can only distinguish source if they acquire secondary meaning. Suggestive and arbitrary marks “are deemed inherently distinctive and are entitled to protection” because of their “intrinsic nature,” which “serves to identify a particular source of a product.”<sup>14</sup>

The courts that apply the *Abercrombie* test to trade dress justify its application by noting that the United States Supreme Court endorsed its use in *Two Pesos*.<sup>15</sup> There, the Court described the test as the “classic formulation” of inherent distinctiveness.<sup>16</sup>

A useful example of the application of the *Abercrombie* test is given by the court in *Ashley Furniture*.<sup>17</sup> The shape of a banana-flavored candy would be (1) generic if it were round, (2) descriptive if shaped like a banana, (3) suggestive if the candy were shaped

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<sup>12</sup> See *Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*, 568 F.2d 1342 (C.C.P.A. 1978).

<sup>13</sup> See, e.g., *Stuart Hall Co. v. Ampad Corp.*, 51 F.3d 780 (8th Cir. 1995); *Insty\*Bit v. Poly-Tech Industries, Inc.*, 95 F.3d 663 (8th Cir. 1996); *Shakespeare Co. v. Silstar Corp. of Am.*, 110 F.3d 234 (4th Cir. 1997) (finding that fishing rod was “descriptive” because colors on rod “describe to the consumer the properties of those materials that make them suitable for their function”); *Sunbeam Prods. Inc. v. West Bend Co.*, 123 F.3d 246 (5th Cir. 1997) (applying *Abercrombie* spectrum to product shapes).

<sup>14</sup> *Two Pesos*, 505 U.S. at 768.

<sup>15</sup> *Id.* at 768, 773.

like a monkey, (4) arbitrary if shaped like a trombone, and (5) fanciful if the candy were produced in some previously unknown shape.<sup>18</sup>

#### B. An Example of the Application of the *Abercrombie* Test to Product Configuration

In *Ashley Furniture*, the plaintiff developed a new line of bedroom furniture. The bedroom suite, entitled “Somerset,” was neoclassic in style and combined a “modern high-gloss polyester look and feel with classical elements including a finish that suggests marble or travertine, fluted columns, arches, and entablatures.”<sup>19</sup>

In an action against a competitor for trade dress infringement, the District Court determined as a matter of law that the “Somerset design is merely descriptive of itself and, as such, is not inherently distinctive.”<sup>20</sup>

The 4th Circuit Court of Appeals, however, rejected the District Court’s holding, stating that the court made a mistake in asserting that trade dress in a product design case is “the product itself.”<sup>21</sup> Instead, trade dress should be the “nonfunctional aspects of the product that make up its total image.”<sup>22</sup> If instead trade dress were indeed the “product itself,” then “a product design could never be protectable as an inherently distinctive trade dress because it would always be part of the product.”<sup>23</sup>

The Court of Appeals also held that the District Court erred in finding that the Somerset design could not be arbitrary or fanciful. The district court had stated that

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<sup>16</sup> *Id.* at 768.

<sup>17</sup> *Ashley Furniture*, 187 F.3d at 370.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 367.

<sup>20</sup> *Id.* at 373.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

“the use of a high-gloss finish, columns, arches and entablatures on bedroom furniture cannot be characterized as arbitrary or fanciful because, as Ashley admits, such features are common to the furniture industry.”<sup>24</sup> Instead, trade dress is the total image of a product, “and thus the relevant inquiry is not whether the individual components of a design are common or not, but rather whether the alleged trade dress as a whole is inherently distinctive.”<sup>25</sup> Even if certain design elements have been used before, their new combination could create inherently distinctive trade dress.

In the end, the Court of Appeals held that the evidence presented supported a finding that the overall image of the furniture line was arbitrary or fanciful and therefore inherently distinctive. “A factfinder could reasonably conclude that the total image created by the Sommerset’s neo-Roman design has no more to do with bedroom furniture than a penguin does with a publishing company.”<sup>26</sup> Ashley had presented evidence that the combination of elements had never before occurred in a bedroom suite. In other words, the bedroom set had a “unique and unusual appearance” that “distinguishes it from other bedroom suites,” and consequently, it was inherently distinctive.<sup>27</sup> The court also relied on expert testimony presented by Ashley that showed the uniqueness of the furniture’s overall appearance.<sup>28</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 374.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 367. The testimony of Ashley’s expert witness reads in relevant part:

Based on my experience, the common high gloss polyester finish in all the pieces of the Sommerset suite, in either the Carmelstone or lighter Goatskin finish, combined with the off white moldings and classic columns and flutings, provide a unique and unusual appearance for the Ashley Sommerset bedroom suite. The combination of features provides both a traditional and contemporary appearance. Although these

### C. The Rejection of the Abercrombie Test

Other courts have rejected the use of the *Abercrombie* test for product configurations: “We do not think it helpful or proper to transplant the categorical distinctiveness enquiry developed for trademarks to product configurations, where the alleged trade dress lies in the very product itself.”<sup>29</sup> Instead, a few courts have adopted either a pure form or a variation of the test from the Court of Customs and Patent Appeals’ decision in *Seabrook v. Bar-Well Foods*.<sup>30</sup> The test asks the following questions to determine inherent distinctiveness for product configurations: (1) whether the design or shape is a common, basic shape or design; (2) whether it is unique or unusual in a particular field; (3) whether it is a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods which consumers view as mere ornamentations; and (4) whether it is capable of creating a commercial impression distinct from the accompanying words.<sup>31</sup> A noted treatise states that the Seabrook test’s four questions “are merely different ways to ask whether the design, shape or combination of elements is so unique, unusual or unexpected in this market that one can assume without proof that it will automatically be perceived by customers as an indicator of origin—a trademark.”<sup>32</sup> Several courts have adopted McCarthy’s interpretation of the *Seabrook* test.<sup>33</sup>

### D. Secondary Meaning

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individual features have been used in other bedroom suites, I do not recall seeing the combination of such features in a single bedroom suite. Therefore, the Ashley Somerset has a unique appearance in the furniture industry ... [that] distinguishes it from other bedroom suites in either the contemporary or the traditional furniture markets.

<sup>29</sup> *Duraco Prods. v. Joy Plastic Enters.*, 40 F.3d 1431 (3d Cir. 1994).

<sup>30</sup> 568 F.2d 1342 (C.C.P.A. 1977).

<sup>31</sup> *Id.* at 1344.

<sup>32</sup> McCarthy at § 8-13 page 8-36.

If a product configuration is not inherently distinctive, then the owner has to show that the shape has acquired secondary meaning in the marketplace. Secondary meaning denotes an association in the mind of the consumer that the primary significance of the trade dress in question is to identify the product as coming from a particular source.<sup>34</sup>

The following is a list of factors that the courts and the TTAB use to determine secondary meaning:

- Consumer testimony of actual confusion
- Consumer surveys
- Exclusivity, length, and manner of use
- Amount and manner of advertising
- Amount of sales and number of customers
- Established place in the market
- Proof of intentional copying
- Previous successful enforcement actions involving the trade dress
- Unsolicited media coverage of the product.<sup>35</sup>

No single factor is determinative of secondary meaning. It is difficult to show secondary meaning when the design is a common one that is put on the market by different sellers.<sup>36</sup>

In holding that the shape of a Ferrari is protectable trade dress, the Sixth Circuit Court of Appeals found that the car had acquired secondary meaning in the marketplace.<sup>37</sup>

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<sup>33</sup> [Cases cited in McCarthy at 8-36, n. 10]

<sup>34</sup> Dorr at 2.03[C], 2-18.

<sup>35</sup> *Bloomfield Indus. v. Stewart Sandwiches, Inc.*, 716 F. Supp. 380, 385 (N.D. Ind. 1989).

<sup>36</sup> *EFS Mktg v. Russ Berrie & Co.*, 76 F.3d 487 (2d Cir. 1996) (“troll” doll design cannot be inherently distinctive or acquire secondary meaning because at least twenty other companies sell similar designs); *Sazerac Co. v. Skyy Spirits*, 37 U.S.P.Q.2d 1731 (E.D. La. 1995) (blue cobalt vodka bottle cannot be protected because of proof of “many other alcohol products, including vodka, that use a cobalt blue bottle”); *Mana Products, Inc. v. Columbia Cosmetics Mfg. Inc.*, 65 F.3d 1063 (2d Cir. 1995) (several sellers of makeup used standard-sized black makeup compacts obtained from same manufacturers; no secondary meaning); *L. & J.G. Stickley, Inc. v. Canal Dover Furniture Co.*, 79 F.3d 258 (2d. Cir. 1996) (modern reproduction of classic furniture design did not achieve secondary meaning).

<sup>37</sup> *Ferrari S.P.A.. Esercizio Fabriche Automobili E Corse v. Roberts*, 20 U.S.P.Q.2d 1001 (6th Cir. 1991).



To achieve secondary meaning, a product

When shown to a prospective customer must prompt the affirmation, “That is the article I want because I know its source,” and not the negative inquiry as to “Who makes the article?” In other words, the article must proclaim its identification with its source, and not simply stimulate inquiry about it.<sup>38</sup>

In finding secondary meaning, the court relied upon expert testimony that the car is instantly recognizable,<sup>39</sup> survey evidence that 73% of respondents when shown photographs of Ferrari’s cars without identifying badges properly identified a photograph of a Daytona Spyder as manufactured by Ferrari and 82% correctly identified the Testarossa as being made by Ferrari,<sup>40</sup> proof that the defendant had intentionally copied the car’s shape, and the widespread publicity surrounding the resale of Ferraris.<sup>41</sup>

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<sup>38</sup> *Id.* at 1005 (citations omitted).

<sup>39</sup> *Id.* Lawrence Crane, Art Director of *Automobile* magazine testified that the Ferrari’s shape “says Ferrari to the general populous (sic)” and that “because it’s so instantly recognizable ... we’ve used even just portions of Ferraris, the Testarossa, for instance, and people recognize it, and our sales are changed.”

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* In a separate action by Ferrari against the defendant and a partner, another court found that the Ferrari design has secondary meaning:

In light of defendants’ close intentional copying, their failure to introduce any evidence to show that such copying was for any purpose but to associate themselves with the reputation and marketability of the Ferrari DAYTONA SPYDER, the large amount of recognition of said design with Ferrari shown in continuous magazine articles and books about the DAYTONA SPYDER long after the cessation of its manufacture, the showing of the Ferrari DAYTONA SPYDER long after the cessation of its manufacture, the showings of the Ferrari DAYTONA SPYDER at vintage car shows, the highly publicized sales of said

Sometimes, a good case on inherent distinctiveness can still be lost on other issues like failure to identify source. In *Foamation*,<sup>42</sup> the court held that the famous Green Bay Packer cheesehead was not protectable trade dress because the public does not associate the cheesehead with the Green Bay Packers and the State of Wisconsin, not the manufacturer. The court also held, despite case law to the contrary, that a product configuration can never be inherently distinctive; instead, a configuration must have acquired secondary meaning for it to be protected as trade dress.



#### IV. Functionality

The second hurdle that registrants and mark holders attempting to protect their trade dress have to clear is that of functionality. Unfortunately, “there are as many definitions

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car by Ferrari customers, and the percentages of recognition in both the plaintiff's and the defendants' surveys, ... the court finds the evidence thorough and convincing that the Ferrari DAYTONA SPYDER design has achieved a strong secondary meaning.

of what is ‘functional’ as there are courts.”<sup>43</sup> What most courts agree on, however, is that there are two broad policy reasons behind the functionality requirement. First, functionality helps to accommodate the principle of free competition by ensuring that there is only one legal source of rights for utilitarian features of products, namely utility patents.<sup>44</sup> In other words, the indefinite term of protection afforded to trademarks should not be a shortcut to achieving perpetual patent protection. Second, by requiring functionality, courts are preserving free and effective competition by ensuring competitors can copy features that they need to “compete effectively.”<sup>45</sup>

Courts also generally note the Supreme Court’s definition of functionality, which states that

a product feature is functional and cannot serve as a trademark, if it is essential to the use or purpose of the article or if it affects the cost or quality of the article, that is, if exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage.

It is from this basic starting point that the courts split into two broad camps.<sup>46</sup> The first camp looks to the “identification” theory of functionality, providing that a feature that “renders a product desirable for any reason other than association with a source or sponsor” is functional and therefore unprotectable.<sup>47</sup> For example, the Federal Circuit held that the use of the color “pink” for insulation was not functional because the color

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*Ferrari S.P.A. v. McBurnie*, 11 U.S.P.Q.2d 1843, 1846-47 (S.D. Cal. 1989).

<sup>42</sup> *Foamation, Inc. v. Wedeward Enterprises, Inc.*, 970 F. Supp. 676 (E.D. Wisc. 1997).

<sup>43</sup> McCarthy at § 7.26[3][a].

<sup>44</sup> *Qualitex*, 514 U.S. at 159.

<sup>45</sup> *Id.*

<sup>46</sup> Mitchell M. Wong, Note, *The Aesthetic Functionality Doctrine and the Law of Trade-Dress Protection*, 83 Cornell L. Rev. 1116, 1132 (1998).

<sup>47</sup> *Id.* at 1133 nn. 80-81.

only served to identify the source.<sup>48</sup> The manufacturer derived no benefit from the use of the color other than to identify it as the maker of the product.

The second camp relies on the “competition” theory of functionality, which is “currently the prevailing theory in the courts.”<sup>49</sup> This theory protects a broader range of product features than the “identification” theory by pointing out that “the fact that a design feature is attractive does not ... preclude its being trademarked.”<sup>50</sup> Under the competition theory, a product feature is functional if “conferring trademark protection for that feature would enable the trademark holder to prevent other suppliers from competing over the market for the product.”<sup>51</sup> In *Sunbeam Prods. Inc. v. West Bend Co.*,<sup>52</sup> the Seventh Circuit Court of Appeals held that the American Classic Mixmaster mixer is not functional. The court rejected the defendant’s argument that trade dress protection cannot be given to a product configuration that includes functional features. Instead, the focus should not be on “isolated elements of the dress, but on whether a combination of features creates a distinctive visual impression, identifying the source of the product.” The court then held that extending protection to the plaintiff’s mixer design would not frustrate competition. The plaintiff had shown that “several other manufacturers compete successfully in the stand mixer market without pirating the unique product configuration” of the plaintiff’s mixer.

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<sup>48</sup> *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1122 (Fed. Cir. 1985).

<sup>49</sup> *Id.* at 1142 & 1142 nn. 143-44.

<sup>50</sup> *Id.* at 1142 (citations omitted). *See, e.g., Schwinn Bicycle Co. v. Ross Bicycles, Inc.*, 870 F.2d 1176 (7th Cir. 1989) (ultimate question is whether copier is able to “compete effectively” without copying the senior user’s design); *Sunbeam Prods. Inc. v. West Bend Co.*, 123 F.3d 246 (5th Cir. 1997) (proof that several other manufacturers compete successfully without using plaintiff’s product design is evidence of non-functionality because granting exclusive rights of trade dress while not impinging on rights of others to compete effectively, which “is litmus test of functionality.”).

In sum, the “identification” theory labels any product feature that does not identify the product’s source as functional, whereas the “competition” theory labels a product feature as functional only if others in the market cannot compete effectively without copying that feature.<sup>53</sup>

The two competing theories of functionality are easily distinguishable when looking at how they each approach ornamental designs. Under the identification theory, ornamental designs such as china patterns,<sup>54</sup> lamp designs,<sup>55</sup> and tote bag features<sup>56</sup> “would be functional ... because they do more than merely identify the manufacturer.”<sup>57</sup> On the other hand, the above features would be non-functional under the competition theory because “their monopolization would not necessarily shut the market for china, lamps, or totebags.”<sup>58</sup>

Judge Rich, in *In re Morton-Norwich Products*,<sup>59</sup> set forth the following factors that have been frequently used by other courts to evaluate evidence of functionality:

- The existence of a utility patent that discloses the utilitarian advantages of the design is evidence of “functionality”;

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<sup>51</sup> *Id.* at 1143.

<sup>52</sup> 123 F.3d 246 (7th Cir. 1997).

<sup>53</sup> Proponents of the “competition” theory rely on the Restatement (Third) of Unfair Competition’s definition of functionality:

The rule excluding functional designs from the subject matter of trademarks is an attempt to identify those instances in which the anticompetitive consequences of exclusive rights outweigh the public and private interest in protecting distinctive designs.”

Restatement (Third) of Unfair Competition § 17, comment a (1995).

<sup>54</sup> See *Villeroy & Boch Keramische Werke K.G. v. THC Sys., Inc.*, 999 F.2d 619, 620 (2d Cir. 1993).

<sup>55</sup> See *Keene*, 653 F.2d at 823.

<sup>56</sup> See *LeSportsac, Inc. v. K Mart Corp.*, 754 F.2d 71, 74 (2d. Cir. 1985).

<sup>57</sup> Wong, *supra* n. 42 at 1141.

<sup>58</sup> *Id.* (citations omitted).

<sup>59</sup> 671 F.2d 1332 (C.C.P.A. 1982).

- The existence of any advertising or promotion of the proponent of trademark rights which touts the functional and utilitarian advantages of the very design aspect it now seeks to protect;
- The existence of other alternative designs which perform the utility function equally well; and
- Whether or not the design results from a comparatively simple, cheap or superior method of manufacturing the article.

## V. Product Features Held to be Functional

Courts have found a wide array of products that are functional and therefore do not deserve trade dress protection. The following is just a sample of product shapes held to be functional: the pentagonal shape of a loudspeaker enclosure;<sup>60</sup> a baby bottle;<sup>61</sup> tractor tread design;<sup>62</sup> the clamshell shape of a cell phone;<sup>63</sup> the shape of a vehicle-mounted advertising sign;<sup>64</sup> and the shape of an ETCH A SKETCH drawing toy.<sup>65</sup>

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<sup>60</sup> *In re Bose Corp.*, 772 F.2d 866 (Fed. Cir. 1985).

<sup>61</sup> *In re Babies Beat, Inc.*, 13 U.S.P.Q.2d 1729 (T.T.A.B. 1990) (sales literature touted bottle shape was one designed “For even the youngest and smallest babies’ hands to hold.”).

<sup>62</sup> *In re Caterpillar Inc.*, 43 U.S.P.Q.2d 1335 (T.T.A.B. 1997) (a utility patent and advertising disclosed utilitarian advantages of the elevated sprocket design).

<sup>63</sup> *Motorola Inc. v. Qualcomm Inc.*, 45 U.S.P.Q.2d 1558 (S.D. Cal. 1997) (“[T]he clamshell shape of the telephone housing, the placement of the antenna, the location of the display screen and the location of the keypad all seem to be functionally dictated.”).

<sup>64</sup> *Elmer v. ICC Fabricating*, 67 F.3d 1571 (Fed. Cir. 1995) (“[T]he overall shape of [plaintiff’s] sign is needed to provide a vehicle-mounted advertising sign with improved aerodynamics, driver visibility and advertising visibility.”).

<sup>65</sup> *Ohio Art. Co. v. Lewis Galoob Toys, Inc.*, 799 F. Supp. 870 (N.D. Ill. 1992).



**StarTac and Q Phone**



**StarTac and Q Phone 1**

## VI. Product Features Held Non-Functional

The following products have been held to be non-functional and therefore meeting the functionality prong for protection of trade dress: a round wall thermostat;<sup>66</sup> the shape and appearance of the head of a golf club;<sup>67</sup> a hand-held kitchen blender;<sup>68</sup> and the shape of a Ferrari classic auto.<sup>69</sup>

## VII. Aesthetic Functionality

The Aesthetic Functionality doctrine is used as a defense to trade dress infringement. The doctrine focuses on “ornamental features that have the potential to influence consumer behavior, but are neither essential nor helpful to the primary function of the product.”<sup>70</sup> Although not well understood, the defense of aesthetic functionality seems to date back to the 1938 Restatement of Torts, section 742:

When goods are bought largely for their aesthetic value, their features may be functional because they definitely contribute to that value and thus aid the performance of an object for which the goods are intended.

The defense was infrequently used until the 1952 case *Pagliario v. Wallace China Co.*<sup>71</sup>

In *Pagliario*, the plaintiff could not prevent the defendant from copying floral designs on plates and selling the plates as replacements for broken dishes to commercial accounts.

The court held that the designs on the china were functional because they satisfy “a

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<sup>66</sup> *In re Honeywell*, 8 U.S.P.Q.2d 1600 (T.T.A.B. 1988).

<sup>67</sup> *Callaway Golf Co. v. Golf Clean, Inc.*, 915 F. Supp. 1206 (M.D. Fla. 1995) (BIG BERTHA golf clubs).

<sup>68</sup> *Braun Inc. v. Dynamics Corp. of America*, 775 F. Supp. 33 (D. Conn 1991) (“[T]he jury was shown various other models which accomplish quite similar functions, yet look strikingly different from [plaintiff’s] blender.”).

<sup>69</sup> *Ferrari S.p.A. Esercizio Fabriche Automobili E Corse v. Roberts*, 739 F. Supp. 1138 (E.D. Tenn. 1990), aff’d 944 F.2d 1235, 20 U.S.P.Q.2d 1001 (6th Cir. 1991), cert. denied, 505 U.S. 1219 (1992) (“[T]he unique exterior design and shape of the Ferrari vehicle are their ‘mark’ or ‘trade dress’ which distinguish the vehicles’ exterior shapes not simply as distinctively attractive designs, but as Ferrari creations.”).

<sup>70</sup> Wong, *supra* n 42 at 1153.

<sup>71</sup> 198 F.2d 339 (9th Cir. 1952).

demand for the aesthetic as well as for the utilitarian.” Perhaps it could be stated that the design became functional because it was the essential selling feature of the product (i.e., the buyers were really buying the trademark symbol, not the goods).



**Wallace China Magnolia Pattern**

Aesthetic functionality appears to only be a problem when a product’s features fall in between the two functionality theories discussed in the previous section. When a feature has value beyond source-identification, it is labeled “functional” under the identification theory. But if that feature does not stifle competition in the marketplace, then it would be labeled “non-functional” under the competition theory. Therefore, the functionality doctrine covers those ornamental designs that fall in the crack between the identification and competition theories of functionality. Thus, “the aesthetic functionality problem demands that courts adopt one of these two theories and discard the other.”<sup>72</sup>

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<sup>72</sup> Wong, *supra* n 42 at 1153.

For instance, some courts have held that there was a competitive need to use the style or appearance of a product, even though alternative designs were available.<sup>73</sup> Other courts have explicitly rejected the doctrine.<sup>74</sup> Currently only three circuits endorse the use of aesthetic function: the Second, Seventh, and Tenth. Other Circuits either explicitly reject the doctrine or limit its use.

A synthesis of the rule that emerges from the circuits on aesthetic functionality is as follows:

An identifying configuration is protectable as a trademark unless it

1. Also serves an aesthetic purpose and
2. constitutes a competitive advantage; in other words, unless granting trademark protection would foreclose markets, as evidenced by the unavailability of competitive alternatives.<sup>75</sup>

The modern view of aesthetic functionality comes from the Ninth Circuit's 1952 opinion in *Pagliero v. Wallace China Co.*<sup>76</sup> The court held that the plaintiff's china, which had particular ornamental patterns on the surface of the plates, was not entitled to trade dress protection because the product configuration was functional.<sup>77</sup> The court stated that a

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<sup>73</sup> See, e.g., *Samoto Designs LLC v. Singh*, 40 U.S.P.Q.2d 1797 (S.D.N.Y. 1999) (aesthetic functionality as defense to trade dress infringement claim); *Stephen W. Boney, Inc. v. Boney Services, Inc.*, 127 F.3d 821 (9th Cir. 1997) (absence of evidence that decorative paneling, large product areas, and low produce display gondolas had any purpose other than aesthetic defeats trade dress claim).

<sup>74</sup> See, e.g., *Gucci Timepieces America, Inc. v. Yidah Watch Co.*, 47 U.S.P.Q.2d 1938 (C.D. Cal. 1998); *Dr. Ing. Porsche A.G. v. Universal Brass, Inc.*, 34 U.S.P.Q.2d 593 (W.D. Wash. 1995) (defense of aesthetic functionality denied; defendant used Porsche marks on auto accessories, including key chains and license plate frames); *Ferrari S.p.A. Esercizio Fabriches v. Roberts*, 944 F.2d 1235 (6th Cir. 1991) (doctrine rejected; exterior design features were selected for distinctiveness and since trade dress that has acquired secondary meaning, indicating source, will almost always be an important ingredient in the commercial success of the product).

<sup>75</sup> Dorr at 7-12.

<sup>76</sup> 198 F.2d 339 (9th Cir. 1952).

<sup>77</sup> *Id.* at 343.

product feature is functional if it is “an important ingredient in the commercial success of the product.” On the other hand, a feature is nonfunctional where the design

Is a mere arbitrary embellishment, a form of dress for the goods primarily adopted for purposes of identification and individuality and, hence, unrelated to basic consumer demands in connection with the product, imitation may be forbidden where the requisite showing of secondary meaning is made. Under such circumstances, since effective competition may be undertaken without imitation, the law grants protection.<sup>78</sup>

The court concluded that the design on the china was not primarily used to identify the manufacturer, but instead the design was “the essential selling feature” of the product.<sup>79</sup> Therefore, “from the standpoint of the purchaser the china satisfies a demand for the aesthetic as well as for the utilitarian, and the design on china is, at least in part, the response to such demand.”<sup>80</sup>

### **VIII. Likelihood of Confusion**

In order to prove infringement of trade dress, the plaintiff must show that the product configuration that is at issue is inherently distinctive (or has acquired secondary meaning), is non-functional, and that there is a “likelihood of confusion resulting from the total image and impression created by the defendant’s product ... on the eye and mind of an ordinary purchaser.”<sup>81</sup> The likelihood of confusion is as to source, sponsorship, connection or approval of the accused product. The test for confusion is the same that is used for ordinary trademarks and involves a number of factors, including

- The Strength of the plaintiff’s mark;

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<sup>78</sup> *Id.* at 343.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> McCarthy at 8-42.

- The similarity of the marks;
- The similarity of the parties' goods or services;
- The marketing channels of each party;
- Evidence of actual confusion;
- The defendant's intent and motive in selecting the mark; and
- The type of goods and degree of care of the purchasers of that type product.

## **IX. Differentiating between Product Configuration and Packaging**

Some courts and commentators consciously treat product configuration and packaging differently in their analyses of trade dress protection. The justification for this differing treatment is based upon the following section from the Restatement (Third) of Unfair Competition:

Product designs are more likely to be seen merely as utilitarian or ornamental aspects of the goods. In addition, the competitive interest in copying product designs is more substantial than in the case of packaging, containers, labels, and related subject matter. Product designs are therefore not ordinarily considered inherently distinctive and are thus normally protected only upon proof of secondary meaning.<sup>82</sup>

Some courts take the even more extreme view that product shapes, as opposed to packaging, will seldom if ever serve to identify and distinguish their sources. In *Duraco*, the court drew this distinction by stating that “[p]roduct configuration again differs dramatically from trademark and from product packaging, since the success of a particular product—especially if similar competing products exist—does not readily lead to the inference of source identification.”<sup>83</sup>

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<sup>82</sup> Restatement (Third) of Unfair Competition § 16, comment b (1995).

<sup>83</sup> *Duraco* at 1731. See also *EFS Mktg. V. Russ Berrie & Co.*, 76 F.3d 487 (2d Cir. 1996) (“Consumers do not associate the design of a product with a particular manufacturer as readily as they do a trademark or a product-packaging trade dress. They are more likely to be attracted to the product for the product’s features, rather than for the source-identifying role the features may play.”).

In *Duraco*, the court held that a plastic planter made in the shape and appearance of a Grecian urn was not inherently distinctive. To arrive at this holding, the court devised a three-part test that should be applied only to product configurations. For a product shape to be inherently distinctive, it must be (1) unusual and memorable, meaning that it is “striking or unusual in appearance”; (2) conceptually separable from the product; and (3) likely to serve as an indicator of source.<sup>84</sup> The planter failed this test for several reasons. First, the product configuration was not conceptually separable from the product.<sup>85</sup> The planters ornamental features, which create “the illusion of marble, cement, or stone construction,”<sup>86</sup> “constitute part and parcel of the overall product.”<sup>87</sup> Second, the planter’s design is “an inherently attractive aspect of the product,” not an indicator of its source.<sup>88</sup> There was substantial evidence that showed that Duraco adopted the design features to imitate the stone, marble, or cement of the Grecian or classical-style urn, “not to identify itself as the source.”<sup>89</sup> Duraco admitted that consumers are “largely motivated to purchase Grecian Classics because of the aesthetic advantages of the precise configuration for which it seeks protection.”<sup>90</sup> Therefore, the product shape of the planter failed to meet two of the three requirements for inherent distinctiveness.<sup>91</sup>

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<sup>84</sup> McCarthy at § 8.12, page 8-32 (quoting *Duraco*).

<sup>85</sup> *Duraco* at 1452.

<sup>86</sup> *Id.* At 1434.

<sup>87</sup> *Id.* at 1452.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

In comparison, the 8th Circuit, in *Stuart Hall*, explicitly rejected the *Duraco* test for inherent distinctiveness.<sup>92</sup> The court held that trade dress does not have to be memorable or striking to be inherently distinctive.<sup>93</sup> At issue in *Stuart Hall* was whether the plaintiff's pre-bound pads and notebooks were protectable as trade dress. The court held that the same test should be applied to both product configuration and packaging for determination of inherent distinctiveness: "We decline to create a distinction between protection of packaging and protection of product configuration, as such a distinction would run contrary to the holding of *Two Pesos*."<sup>94</sup> The court remanded to the District Court for determination of whether the product configuration was inherently distinctive under the *Abercrombie* test.<sup>95</sup>

The 2nd Circuit, on the other hand, acknowledges that it draws the distinction between inherently distinctive product configuration and product packaging, but declines to follow the three-part test of *Duraco*.<sup>96</sup> In *Knitwaves*, the plaintiff accused the defendant, Lollytogs, of trade dress infringement of its children's sweater designs. The 2nd Circuit Court of Appeals held that the "squirrel and leaf" designs on the sweaters were not entitled to protection as trade dress.<sup>97</sup> To reach this conclusion, the court refused to apply traditional *Abercrombie* test to product configuration,<sup>98</sup> instead it drew a

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<sup>92</sup> *Stuart Hall Co. v. Ampad Corp.*, 51 F.3d 780 (8th Cir. 1995).

<sup>93</sup> *Id.* at 788.

<sup>94</sup> *Id.* at 788.

<sup>95</sup> *Id.* at 791.

<sup>96</sup> *Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996 (2nd Cir. 1995).

<sup>97</sup> *Id.* at 1009.

<sup>98</sup> *Id.* at 1007

distinct line between the two types of trade dress.<sup>99</sup> The court reasoned that the proper question for inherent distinctiveness is whether product design is “likely to serve primarily as designator of origin of the product.”<sup>100</sup> The design owner must show that the design is primarily intended as source identification.<sup>101</sup> Because “Knitwaves’ objective in the two sweater designs was primarily aesthetic, the designs were not primarily intended as source identification.”<sup>102</sup> Therefore, intent becomes a factor in a determination of inherent distinctiveness.

## **X. Registration of Product Shapes as Trademarks**

If a product configuration satisfies the federal standards of trademark protection, then it is federally registered as a trademark and afforded the protection given to such marks by the Lanham Act.<sup>103</sup> A product configuration may be registered if it serves to identify its source and is non-functional.<sup>104</sup> The elements of the particular product must be capable of being listed and defined; this satisfies the requirement that the public be given adequate notice as to what shapes are federally protected. The courts have held that registration of a product configuration does not unconstitutionally conflict with the Patent Clause of the United States Constitution.<sup>105</sup> The following are a few examples of product

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<sup>99</sup> *Id.* at 1008 (“While ‘arbitrary,’ ‘fanciful,’ or ‘suggestive’ packaging of a product may be presumed to serve this source-identifying function, and thus may be deemed per se distinctive of the source, the same presumption may not be made with regard to product features or designs whose primary purposes are likely to be functional or aesthetic.”).

<sup>100</sup> *Id.* at 1008 (citations omitted).

<sup>101</sup> *Id.* at 1009.

<sup>102</sup> *Id.*

<sup>103</sup> *Kohler Co. v. Moen, Inc.*, 12 F.3d 632 644 (7th Cir. 1993) (registration of product configurations as trademark is authorized by the Lanham Act).

<sup>104</sup> *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1337 (C.C.P.A. 1982); McCarthy at § 8.01[5] (a registered trade dress must satisfy “federal standards of trademark or service mark protection as identifying and distinguishing a product or service.”).

<sup>105</sup> *See, e.g., Kohler Co. v. Moen Inc.*, 12 F.3d 632 (7th Cir. 1993).

configurations that have been held to be registerable under the Lanham Act: the green/gold color of a dry cleaning press pad;<sup>106</sup> a water faucet design;<sup>107</sup> the shape of a guitar head;<sup>108</sup> and the shape of LIFESAVERS candy with the characteristic hole.<sup>109</sup>

#### A. The Registration Examination Process

The examination of trade dress for possible registration begins with a functionality analysis. If a product configuration is nonfunctional, then the examiner proceeds to a determination of distinctiveness. On the other hand, if a product shape is functional as a matter of fact (“de facto” functional), then the examiner determines whether the design is inherently distinctive or has acquired distinctiveness (secondary meaning).<sup>110</sup> If the product’s configuration is superior to other designs, thus giving it a competitive advantage, then the configuration is seen as “de jure” functional and cannot be registered.<sup>111</sup> The examiner uses several factors to determine whether a product is de jure functional, including

- The facts that establish the unavailability of alternative designs that are as efficient in operation;
- The facts that indicate the unavailability of alternative designs that are as cheap to manufacture;
- Any utility patents that disclose utilitarian advantages of the design; and
- Any advertising touting the utilitarian advantages of the design.<sup>112</sup>

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<sup>106</sup> *Qualitex*

<sup>107</sup> *Kohler*.

<sup>108</sup> *Yamaha International Corp. v. Hoshino Gakki Co.*, 231 U.S.P.Q. 926 (T.T.A.B. 1986).

<sup>109</sup> *Nabisco Brands, Inc. v. Conusa Corp.*, 722 F. Supp. 1287 (4th Cir. 1989).

<sup>110</sup> Examining Manual, § 1202.02(a)(i)(B) (1997).

<sup>111</sup> Manual, § 1202.03(a)(i)(C); *See In re Pingel Enterprise, Inc.*, 46 U.S.P.Q.2d 1811 (T.T.A.B. 1998) (Fuel valve for motorcycle refused registration as “de jure” functional).

<sup>112</sup> *In re Morton-Norwich*, 213 U.S.P.Q. at 15-16.

<sup>113</sup>In what has been called the most important court decision affording protection to product configuration,<sup>114</sup> the Court of Customs and Patent Appeals held that the shape of a spray container used for the Fantastic brand cleanser was registerable as a trademark.<sup>115</sup> In *In re Morton-Norwich Products*, the applicant owned both a design patent on the configuration of the spray bottle and a utility patent on the spray mechanism. The Court reversed the PTO on the finding of functionality and remanded for a finding on the issue of distinctiveness. First, the court defined functionality in terms of “de facto” and “de jure.” De facto functionality is the use of the word “functional” in a lay person’s sense, indicating “the normal or characteristic action of anything.” “Although the design of a product, a container, or a feature of either is directed to performance of a function, it may be legally recognized as an indication of source.”<sup>116</sup> De jure functionality is where, as a legal consequence, the design could not be protected as a trademark.

The crux of the court’s analysis was the presumed effect that protection of the trade dress would have on competition.<sup>117</sup> The court would find de jure functionality if the “plastic spray bottle ... [was] the best or one of a few superior designs available.”<sup>118</sup> To determine whether the bottle would have an unacceptable impact on competition, the court looked at a wide variety of spray bottle shapes used by competitors to find that “the same functions can be performed by a variety of other shapes with no sacrifice of any

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<sup>113</sup> *Id.* at 1337.

<sup>114</sup> Dorr at 6-16.

<sup>115</sup> *In re Morton-Norwich*.

<sup>116</sup> *Id.* at 1337.

<sup>117</sup> *Id.* at 1341.

<sup>118</sup> *Id.*

functional advantage.”<sup>119</sup> Thus, what can be assumed from this evidence is that “[c]ompetitors have apparently had no need to simulate appellant’s trade dress, in whole or in part, in order to enjoy all of the functional aspects of a spray top container.”<sup>120</sup> Because competition in the marketplace would not be unduly burdened, the court held that the spray bottle was not de jure functional and that therefore it was non-functional. The successor court to the C.C.P.A., the Federal Circuit, continues to apply the de facto/de jure test to determine whether trade dress is functional.

In 1998, Congress added functionality to the list of possible challenges to an incontestably registered mark, in order to prevent perpetual registration of shapes that latter become functional.<sup>121</sup>

## **XI. Advertising Guidelines for Trade Dress**<sup>122</sup>

Applications for design patent, trademark, and copyright can be foiled by advertising a product’s functional or useful aspects. To avoid this outcome, a company should

1. Separate the “trade dress aspects” from the product itself;
2. Never show or refer in advertising to an ornamental design as being functional or having other types of utility;<sup>123</sup>
3. Use all applicable design patent, trademark, and copyright markings and notices; and
4. Refer to the product as having a design or look that makes it stand apart from all of its competitors.<sup>124</sup>

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1342.

<sup>121</sup> 1998-Pub. L. 105-330, 112 Stat. 3064. Change applicable only to civil actions commenced on or after October 30, 1998. Changed section 33(b)(8) to 33(b)(9).

<sup>122</sup> Taken from Dorr at 3-40.

<sup>123</sup> *See Thomas & Betts Corp. v. Panduit Corp.*, 46 U.S.P.Q.2d 1026, 1043 (7th Cir. 1998).

<sup>124</sup> *See* Dorr at 3-41 for examples.

## XII. Building a Protectable Product

In order to achieve trade dress protection for a product configuration, the design of the product must be done so that it meets the above-mentioned requirements to the fullest extent possible. The product configuration must either be inherently distinctive or achieved secondary meaning, and the shape must be nonfunctional. To be inherently distinctive, the public must recognize the product's shape as an indication of source. An important factor that courts look to to determine distinctiveness is whether the shape is unique. When designing the product, the more unusual or unique the shape, the more likely that a consumer will identify it with a particular manufacturer. Some examples of trade dress that has found to be inherently distinctive are furniture,<sup>125</sup> an ice cream cone-shaped container for baby pants,<sup>126</sup> a Scotch whiskey pinch bottle,<sup>127</sup> greeting cards,<sup>128</sup> and a golf hole.<sup>129</sup>



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<sup>125</sup> *Imagineering, Inc. v. Van Klassens, Inc.*, 53 F.3d 1260, 1264 (Fed. Cir. 1995) (furniture comprising wide slates, scooped seat boards and arms, rounded edges, notched and curved legs, and angled backrests had “a totally different look” and was inherently distinctive); *see also Ashley*, *infra*.

<sup>126</sup> *In re International Playtex Corp.*, 153 U.S.P.Q. 377 (T.T.A.B. 1967).

<sup>127</sup> *Ex parte Haig & Haig, Ltd.*, 118 U.S.P.Q. 229 (Dec. Comm’r Pat. 1958).

<sup>128</sup> *Roulo v. Russ berrie & Co.*, 886 F.2d 931 (7th Cir. 1989).

<sup>129</sup> *Pebble Beach Co. v. Tour 18 I, Ltd.*, 155 F.3d 526 (5th Cir. 1998).

In order to achieve secondary meaning, product advertising should highlight the product configuration in some manner. And finally, for a product shape to be nonfunctional, advertising should refer to the shape, but not tout it as having any functional advantages.<sup>130</sup> Evidence of nonfunctionality can sometimes be the fact that it was more expensive to build a particular product because of its shape, or if the design presents functional disadvantages.

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The author wishes to extend special thanks to Michael Gratz esq. of Boyle Fredrickson and Ziolkowski of Milwaukee, Wi, for his help in obtaining evidence for the *Foamation v Wedewald* case, in which he represented the defendants.

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<sup>130</sup> See *In re Caterpillar Inc.*, 43 U.S.P.Q.2d 1335 (T.T.A.B. 1997) (tractor sprocket design functional in part because “applicant’s own promotional materials tout the utilitarian advantages of its elevated sprocket.”); *In re American National Can Co.*, 41 U.S.P.q.2d 1841 (T.T.A.B. 1997) (functionality evidenced by applicant’s own advertising of its fluted can as “providing a stronger sidewall—20% greater crush resistance than an equivalent, non-fluted can”); *In re Bio-Medicus, Inc.*, 31 U.S.P.Q.2d 1255 (T.T.A.B. 1993) (applicant’s promotional materials touted utilitarian advantages of conical shape of medical blood pump); *Universal Frozen Foods Co. v. Lamb-Weston, Inc.*, 697 F. Supp. 389 (D. Or. 1987) (spiral shaped french fried potatoes held nonfunctional because plaintiff advertised the efficiencies of

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shape); *In re Bose Corp.*, 772 F.2d 866 (Fed. Cir. 1985) (applicant’s advertising material touted pentagonal shape of loudspeaker as functional part of sound system; shape was held to be functional).

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