

Don't Forget About Trade-Dress Protection

The U.S. Court of Appeals' recent decisions have significantly limited patent protection for business methods or processes. The Supreme Court has agreed to hear a case that questions whether certain business processes can be patentable at all. Thousands of patents that have been issued to cover business processes, such as Amazon.com's one-click order, may lose protection.

Even as patent protection scales back, companies can still protect their overall style, products, packaging or "look and feel" from imitators under trade-dress, a lesser known but possibly a more powerful way to protect brand equity. If implemented and enforced correctly, trade-dress intellectual property laws can protect your business by providing unlimited protection for attributes that are not covered by copyrights, trademarks or patents such as product image and overall ap-



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pearance, product packaging and business style.

Earlier this year the U.S. Patent Office granted Apple Computer trade-dress for the iPod's unique shape, style and circular touchpad, which will prevent competitors from imitating the media player's look and feel. Apple has also applied for trade-dress protection for the physical attributes of the iPhone by claiming that the average consumer associates the shape of the phone with Apple. This was in addition to utility and design pending patents for both products.

No one can sell computers, related products or peripherals that have a black and white scheme that is similar to the Gateway's cow spots. Trade-dress protection was used to stop Companion Products from selling a stuffed black and white cow to be used as a clip-on wrap around to a computer monitor. Consumers might mistakenly think its use was licensed, sold or somehow affiliated with Gateway although Gateway did not authorize it, and does not sell such a product.

Unlike patents and copyrights that cover product designs and functions for a specific period of time, trade-dress protection can last forever. Unlike trademarks, which protect words, names,

and symbols that indicate the source of goods or services, trade-dress covers a combination of design elements such as size, shape, color, texture or graphics. The purpose of trademarks and trade-dress is to identify the company's products as coming from one source. If an appreciable number of consumers can associate specific attributes with your business or brand, no one else can use the same combination of elements or something that is confusingly similar.

Payless paid a substantial settlement to K-Swiss, to compensate for the profits that Payless realized from selling shoes that copied the Classic brand with the intent to confuse the consumer. The copycats were not exact replicates; however, the differences were subtle enough that people were likely to believe that Payless

was a licensed reseller for K-Swiss. Payless claimed that no patents or copyright had been infringed and that K-Swiss was trying to obtain protection for the features that could not be legally protected. However, the rights provided by trade-dress, include protection to the look and feel, and overall product appearance.

Trade-dress covers non-functional elements that are not essential to the product's

use, design or purpose and is an indicator of source. It is the overall visual impression created in the consumers mind when viewing the offering and not from the utilitarian or useful aspects of a product. The distinctive, unique shapes of the Volkswagen bug and the Rolls Royce grill are also examples of trade-dress. Even the particular design of a computer, monitor, router, hard disk or other hi-technology product can be protected as trade-dress if it has achieved consumer recognition as an indicator of source and the design is not considered functional.

The courts have recognized trade-dress protection for restaurant chains, such as Kentucky Fried Chicken, for the particular combination and arrangement of design elements. A restaurateur cannot prevent others from using any particular color or feature, but it can protect a combination of visual elements that when taken together create a distinctive visual impressions.

By being first in the marketplace, you have the right to exclude others from infringing on your brand. The owner of a valid trademark or trade-dress may be entitled to protection because of commercial use even without prior registration.