


1997

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Recommended Citation

John P. Musone, *Obtaining and Enforcing Trade Dress for Computer Graphical User Interfaces - A Practitioner's Guide*, 4 Rich. J.L. & Tech 2 (1997).

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Volume IV, Issue 2, Winter 1997

Obtaining and Enforcing Trade Dress for Computer Graphical User Interfaces - A Practitioner's Guide

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Cite As: John P. Musone, Obtaining and Enforcing Trade Dress for Computer Graphical User Interfaces - A Practitioner's Guide, 4 RICH. J.L. & TECH. 2, (Winter 1997)
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I. Introduction

{1} A computer program that successfully incorporates an intuitive graphical user interface possesses a tremendous competitive advantage over its competitors.[2] Interface development accordingly has become a critical aspect of software development. Without legal protection, however, this advantage is illusory as competitors are otherwise free to copy unprotected interface features. Interface creators have predominately used copyright law to protect the overall "look and feel" of their interfaces. However, copyright protection for

interfaces increasingly appears to be the exception rather than the rule.[3]

{2} Copyright law is fundamentally unsuited for protecting interfaces because it is designed to protect individual static elements such as icons, arrangements or patterns, not composite dynamic wholes.[4] Conversely, trade dress is designed to protect composite dynamic wholes, such as the overall "look and feel" of an interface.[5] Furthermore, the goal of copyright law is to strike a balance between the interest in public use and access to creative works and the interest in creating incentives for authors to create.[6] Copyright protection does not appear to be necessary because the market economy provides tremendous financial incentives to create interfaces. If trade dress protection for interfaces is sought, however, this disjunction is not found. Trade dress law balances the interest in public use and access to creative works against the interest of preventing consumer confusion as to the source of the product.[7] Protection of the product's ability to identify the producer is what trade dress law seeks to insure.[8] This protection is precisely what the interface creator seeks. Therefore, trade dress protection is naturally suited to protect the overall "look and feel" of interfaces.

{3} The author proposes that interface creators should turn to trade dress law for interface protection. Section I explains the shortcomings of copyright law, while Section II analyzes the applicability of trade dress law. This paper focuses on the potential obstacles in securing and enforcing trade dress rights under § 43(a) of the Lanham Act. Finally, it illustrates specific methods to overcome these obstacles.

II. Non-Protectability of Graphical User Interfaces Under Copyright Law

{4} Section 102 of Title 17 of the United States Code affords copyright protection only to "original works of authorship fixed in any tangible medium of expression." [9] This language creates several obstacles that prevent an interface creator from securing copyright protection for the interface. First, the statute requires that the interface be original. Originality is satisfied if the interface either includes new features or creatively selects and arranges existing features.[10] If the new interface modifies the appearance of existing icons, scroll bars, menus and pop-up windows, or adds previously unknown visual impressions, the originality requirement is likely fulfilled. For example, Microsoft Windows, which was based upon Apple Macintosh, and Windows 95, which was based upon Windows, sufficiently modified existing interface impressions and added new visual impressions to satisfy the originality requirement.

{5} A second statutory obstacle that may prevent copyright protection for interfaces pertains to authorship. Typically, an interface that exists on a computer screen is the joint product of the application program and the operating system. Without either, the interface cannot exist. In most situations, the author of the application program is not the author of the operating system. This leads to three authorship possibilities: the application owner may be deemed the sole owner, the operating system owner may be deemed the sole owner, or the parties may be deemed joint authors. The best way to avoid potential authorship problems is to clearly identify the author/owner within a copyright ownership agreement.

{6} A third statutory obstacle arises from the fixation requirement. The interface may not be considered fixed in tangible form since the screen image is constantly changing.[11] Finally, the copyright statute bars mere ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries from receiving copyright protection.[12] Interfaces have been found to fall within this category.[13]

{7} Recent case law underscores the fact that copyright protection for interfaces is not a viable option. *Computer Associates International, Inc. v. Altai* [14] and *Lotus Development Corp. v. Borland International, Inc.* [15] essentially provide a death blow to copyright protection for interfaces. *Altai* heralded the abstraction-

filtration-comparison test. This test, which is beyond the scope of this paper, affords courts numerous opportunities to find that the interface comprises unprotectable copyright matter through a "death by a thousand cuts". In *Lotus*, the court analogized an interface to buttons on a VCR remote control. Through this reasoning, the court concluded that the interface was a method of operation and, as such, not entitled to copyright protection. The Supreme Court affirmed this decision.^[16]

{8} In contrast to §102 of the Copyright Act, § 43(a) of the Lanham Act provides that "anyone who uses any identifying features, or false or misleading designation of a product's origin in commerce that is likely to cause confusion as to the origin, sponsorship, or approval of goods, services, or commercial activities . . . shall be liable."^[17] This language protects the overall "look and feel" of a product's trade dress. Trade dress is the product's overall image that is displayed to the public.^[18] An interface combines words, symbols, sizes, shapes, colors, designs and devices in distinctive patterns that consumers can use to identify sources; therefore, it is considered trade dress.

III. Elements of Trade Dress Infringement

{9} In order to obtain trade dress protection, the interface must be distinctive. In order to enforce trade dress rights, the infringing interface must be confusingly similar to the protected interface. Notwithstanding, trade dress rights cannot be enforced unless the interface is nonfunctional. The following analysis explains these three requirements and details specific actions to comport with them.

A. The Distinctiveness Requirement

{10} Distinctiveness is found when the interface configuration identifies the product's source of origin.^[19] This can be shown through either inherent or acquired distinctiveness. Distinctiveness is not a significant obstacle to overcome because "the most prominent identifying feature of [a computer program] is the appearance of the user interface features upon the display screen, including its windows, menus, graphic designs, print sizes, and styles."^[20]

{11} The greatest threat to establishing inherent or acquired distinctiveness is interface standardization. Due to the user's need to reduce learning time of new computer programs, interfaces that function the same, as well as "look and feel" the same, are increasingly used. This push toward commonality must be resisted for an interface to be considered inherently distinctive. Furthermore, interface standardization often prevents the establishment of acquired distinctiveness. Since competitors are vigilant to pounce upon improvements to interfaces, these improvements quickly become part of the standard industry interface. Therefore, any acquired distinctiveness is usually lost before it can be gained.

1. Inherent Distinctiveness

{12} The Supreme Court in *Two Pesos, Inc. v. Taco Cabana, Inc.*^[21] held that inherently distinctive trade dress is protected under § 43(a) of the Lanham Act. Trade dress is considered inherently distinctive if it is unusual or unique within its field and creates a distinct visual impression.^[22] In making this determination, the elements that comprise the interface are taken as a whole, rather than viewed independently.^[23] The traditional *Abercrombie & Fitch* classification scheme controls this determination.^[24] If the trade dress is considered fanciful, arbitrary, or suggestive, then the interface is inherently distinctive. On the other hand, if the interface is considered descriptive or generic, then it is not inherently distinctive. The ambit between these two classifications is imprecise.^[25]

{13} Factors that tend to demonstrate inherent distinctiveness for interfaces include unique interface elements such as icons, palettes, colors, sizes, patterns and the arrangement of these elements.[26] For example, a trash can in the lower right-hand corner of the screen and a labeled folder graphics with menu choices in the center identifies the interface as an Apple's Macintosh operating system. As another illustration, an interface that displays a matrix of cells, where the backslash key is used to access the menu command hierarchy, identifies the interface as Lotus 1-2-3. Finally, an aquatic scene with colorful sea life swimming about and gurgling noises indicates that Berkeley System's After Dark screen saver is running.

2. Acquired Distinctiveness

{14} If the trade dress at issue is not considered inherently distinctive, the distinctiveness requirement can be satisfied by showing acquired distinctiveness. Acquired distinctiveness is found when, due to exposure, the relevant consuming public understands the trade dress to be indicative of the product's origin.[27] In other words, in the minds of the public, the primary significance of the trade dress must be to identify the source of the product.[28]

{15} Acquired distinctiveness is most often proven through surveys, sales and advertising, and long term continuous use. Surveys have been considered the most direct and persuasive evidence of acquired distinctiveness.[29] If advertising is used to show acquired distinctiveness, it should specifically tout the interface.[30] This can be accomplished by having the advertisements state the advantages which the interface provides. Another method is to depict the actual interface within the advertisement.[31] Evidence of significant product sales also tend to prove acquired distinctiveness. Specifically, sales increases which follow advertising campaigns touting the interface enhance the likelihood that acquired distinctiveness will be found.[32] Additionally, long term continuous use generally translates into a finding of acquired distinctiveness.[33] In fact, § 2(f) of the Lanham Act provides that exclusive and continuous use of trade dress in commerce for five years is prima facie evidence of acquired distinctiveness. Other methods to prove acquired distinctiveness include expert testimony,[34] conspicuous use,[35] favorable third-party publicity,[36] and actual confusion.[37]

{16} Notwithstanding the previous analysis, acquired distinctiveness is affected by several other considerations. One consideration is in identifying the relevant consuming public who must understand the trade dress to be indicative of the product's origin. For example, the relevant consuming public for a personal financial organization application program is simply the end user. The relevant consuming public for a strictly business application program, however, could be either the purchaser of the interface (the corporation), the end user (the employee), or the interface maintainer (the MIS department). A second factor meriting consideration is the presumption of acquired distinctiveness when the infringer intentionally copies the interface.[38] Courts commonly adduce that since the purpose of intentional copying is to wrongfully capitalize upon the popularity of the original interface, it is reasonable to infer that they succeeded.[39] A third consideration within acquired distinctiveness interface analysis is that an infringer's actions, other than intentional copying, which prevent an interface from reaching acquired distinctiveness cannot be used as proof of acquired distinctiveness.[40]

B. Likelihood of Confusion

{17} A likelihood of confusion between the product's identifying features and those of the infringing product must be proven to establish a trade dress infringement claim.[41] A likelihood of confusion exists when "an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question." [42]

{18} There are several ways that a likelihood of trade dress confusion between interfaces can occur. They

include simple confusion, sponsorship confusion, association confusion, and reverse confusion.^[43] Simple confusion occurs when an individual intends to purchase a product, but actually purchases a competitor's product, thinking the competitor's product is the product he originally sought to purchase.^[44] For example, if a purchaser is familiar with Broderbund's Print Shop and intends to purchase it because of its user-friendly interface, but mistakenly buys Print Master, whose similar interface is displayed on the packaging and on a computer terminal in the store, then simple confusion has occurred. Sponsorship confusion occurs when a purchaser believes that the trade dress owner has approved, licensed, jointly developed or otherwise sponsored the infringing product.^[45] For example, if this same purchaser bought Print Master thinking that Print Shop must have sponsored it because the interfaces "look and feel" are the same, then to the extent that Print Master becomes an acceptable alternative to Print Shop, sponsorship confusion has occurred. Association confusion occurs when an infringer "exploit[s] a subliminal or conscious association with [a] protected name, mark, or trade dress."^[46] This is similar to sponsorship confusion. For example, if the same purchaser, due to the similarity of the interfaces, believes that Print Shop and Print Master are both made by Broderbund, then association confusion has occurred. Finally, reverse confusion occurs when the purchaser, due to interface similarity, believes that the infringer owns the original product.^[47] For example, if our hypothetical purchaser decides not to buy Print Shop thinking that Abacadabra Corporation makes Print Shop after seeing the similar interface of Abacadabra's Print Master, then reverse confusion has occurred.

{19} In order to demonstrate the likelihood of confusion, the facts can be examined at either the point of sale or at a point after the sale. Of the two, confusion at the point of sale is more difficult to prove. In order to prove confusion at the point of sale, the purchaser must show that he was confused at the time he purchased the computer program. The previous hypotheticals illustrate point of sale confusion. Point of sale confusion, however, usually can be defeated by clearly labeled packaging that indicates the product's source of origin.^[48] Similarly, a disclaimer may be sufficient to avoid a likelihood of confusion at the point of sale.^[49]

{20} Confusion beyond the point of sale is similarly actionable.^[50] Although most post sale confusion cases involve high-priced brand names and their lower-priced imitations,^[51] interface infringement fits nicely into the theoretical underpinnings of this cause of action. Potential customers, such as employees and students, could easily become confused as to sponsorship or association when viewing or using the interfaces at work or school. For example, an employee, while watching a co-worker use Samna, may assume the co-worker is using the more popular Microsoft Word. Pleased with the user friendly interface and overall "look and feel," the employee may spend considerable time shopping for the wrong product. At this point, the employee could easily be swayed by retailers who describe the products as essentially identical. In this manner, Samna has used Microsoft's reputation and recognition. Confused, the purchaser will investigate, and ultimately purchase, an imitation of the interface product.

{21} In determining likelihood of confusion, courts routinely follow the *Polaroid*^[52] factors. These factors include the strength of plaintiff's trade dress, similarity of the trade dress, proximity of the products, likelihood that plaintiff will bridge the proximity gap, defendant's intent in selecting the trade dress, evidence of actual confusion, sophistication of relevant purchasers, and quality of defendant's product. These factors, however, are not universally applied among circuit courts. The Second Circuit does not include the channels of trade as a factor.^[53] The similarity of advertising media is not a factor in the Second or Ninth Circuits.^[54] The sophistication of the buyers is not a consideration in the Seventh Circuit.^[55] In addition, the Second Circuit is the only circuit that considers the quality of the defendant's product.^[56] Furthermore, alternative factors to determine a likelihood of confusion can be found.^[57] Nonetheless, the *Polaroid* factors provide the essential framework in a trade dress interface infringement claim and will be discussed below.

{22} *Strength of plaintiff's mark*: The stronger the plaintiff's interface, the greater protection it will be afforded. Strength is measured by consumer ability to recognize the source of origin upon viewing the interface. This inquiry is identical to the distinctiveness inquiry.^[58] As such, an interface will be considered strong if either its elements are inherently distinctive or have acquired distinctiveness.

{23} *Proximity of the products*: Product proximity relates to content, geographic distribution, market position, and consumer appeal.^[59] Interfaces that are proximate are more likely to cause confusion than those that are not.^[60] Close proximity between similar application programs, such as word processing, is easily found. Determining proximity between disparate programs, however, is more complex. For example, are Peachtree Accounting and Microsoft Flight Simulator proximate? The traditional focus on the relevant consumer does not help. On one hand, the Peachtree Accounting purchaser is likely to be a corporation or a professional accountant, while the Microsoft Flight Simulator purchaser is likely to be a teenager. On the other hand, many purchasers of Peachtree Accounting, nonetheless, may purchase Microsoft Flight Simulator for themselves or for their children.

{24} *Likelihood that plaintiff will bridge proximity gap*: The relevant inquiry into the likelihood that plaintiff will bridge proximity gap is whether the plaintiff is reasonably likely to enter into the market presently occupied by the infringer. Factors include the manufacturer's history of product diversification, present plans for diversification, and the product's inherent ability to diversify.^[61] Due to the relative ease of program translation and the existence of consumer unity, it is virtually certain that this gap will be bridged.^[62]

{25} *Defendant's intent in selecting the trade dress*: An infringer may prevail by showing that he did not intend to capitalize on the plaintiff's goodwill because trade dress protection is premised on the tort of palming off.^[63] In fact, good faith is presumed.^[64] Thus, defenses asserting that the interface was chosen because it is the most functional or because it is standard within the industry, may succeed.^[65] The presence of intentional copying, however, raises a presumption that confusing similarity has occurred.^[66]

{26} *Actual confusion*: Actual confusion can be demonstrated by testimonial proof.^[67] For example, affidavits from customers who purchased a program different from the one they intended to purchase would be applicable. Another method is to show misdirected telephone calls, letters, or other communications. Some courts have held that without actual confusion, there is no likelihood of confusion.^[68]

{27} *Sophistication of relevant purchasers*: The more sophisticated the relevant buyers, the more careful are their purchase decisions. Thus, there is a lesser likelihood that they will be misled or confused by similarities between interfaces.^[69] The determination of the sophistication of computer program purchasers is difficult because they are simultaneously a heterogeneous and a homogeneous group. On one hand, computer program purchasers understand what they purchase and have purchased similar products before. On the other hand, even expert computer programmers can be easily reduced to ignorant purchasers when deciding between a Nintendo or Galoob game cartridge for their children.

{28} *Quality of defendant's product*: The inferior quality of an infringer's product is mainly an equitable factor in finding a likelihood of confusion.^[70] The inferior quality of an infringer's product injures the plaintiff's reputation in its interface "insofar as customers might think that the source of the inferior product is the source of the [plaintiff's product]."^[71]

C. Functionality

{29} The definition of functionality is unsettled.^[72] In general, functionality is based on the overriding public policy against monopolization, even to the extent of tolerating consumer confusion.^[73] If there is a need for competitors to use the trade dress to effectively compete, the trade dress will not be protected.^[74] Functionality presents the greatest obstacle in securing and protecting trade dress rights for interfaces.^[75] Some courts, in dicta, have observed that interfaces are probably functional as a matter of law.^[76] If the interface is functional, the Trademark Office may not register it as trade dress.^[77] In most situations, however, the issue of functionality is addressed during infringement proceedings. Functionality is a confusing, amorphous area of the law. For example, the mere allocation of the burden of proof has divided the circuits. The Third,^[78] Sixth,^[79] Eighth,^[80] Ninth,^[81] Eleventh,^[82] and the District of Columbia^[83]

Circuits place the burden of proving nonfunctionality on the plaintiff. The Second,^[84] Seventh,^[85] and Tenth^[86] Circuits place the burden of proving functionality on the defendant. The remaining circuits have not addressed the issue.^[87] The Supreme Court has not clarified this issue. The Court has stated that "functionality is a defense to a suit under [section] 43(a) of the Lanham Act",^[88] apparently placing the burden on the defendant. Ten years later, however, citing this opinion, the Court declared that "eligibility for protection under section 43(a) depends on nonfunctionality,"^[89] seemingly placing the burden on the plaintiff.

{30} Functionality is usually divided into mechanical and aesthetic functionality. These two areas are discussed below.

1. *Mechanical Functionality*

{31} Trade dress is mechanically functional when its elements are so utilitarian or superior to alternative elements that denying these elements to competitors inhibits competition.^[90] Courts commonly use the *Weber*^[91] factors to determine if trade dress is mechanically functional. These factors include: 1) if a utility patent discloses the utilitarian advantages of the design, 2) if the utilitarian advantages are touted through advertising materials, 3) if there is an unavailability of alternate designs, and 4) if the design is the result of a relatively simple or inexpensive manufacturing method.^[92]

{32} The first factor forces the interface creator to choose between patent or trade dress protection. In making this decision, the competitive advantages of stronger patent protection should be weighed against the competitive advantages of longer trademark protection.^[93] This option has been available only recently. In other words,

[t]hose planning new business ventures, or new product lines within existing businesses, should take advantage of important opportunities provided by trade dress protection. Once a fairly narrow subset of trademark law, trade dress doctrine has expanded significantly in recent years to enable businesses to protect the overall image, appearance, and style of their products and services. By incorporating trade dress concepts into their planning, businesses can gain important competitive advantages.^[94]

Although the lack of a utility patent indicates nonfunctionality, a strong counterargument can be made. According to this opposing view, the inquiry should center upon the *ability* to obtain a utility patent, rather than the *existence* of a utility patent. This view is based on the purpose of the Lanham Act, which is to prevent customer confusion as to the source or association of goods, not to grant competitive advantages to businesses.^[95] Thus, granting such a competitive advantage would inappropriately provide a property right in the inherently utilitarian qualities of the product configuration, regardless of consumer confusion.^[96] Court acceptance of this view would significantly expand the scope of mechanical functionality. The "undeniable tension"^[97] between trade dress functionality and patent law has yet to be settled. Thus, those who attempt to obtain trade dress protection must consider this controversy, and should not rely solely on the current bright line convention based upon the existence of a utility patent.

{33} The second prong of the *Weber* test, whether the utilitarian advantages have been advertised, creates another obstacle in obtaining interface trade dress protection. If the utilitarian advantages of the interface are advertised, then this will weigh heavily in favor of a finding of functionality. Although this obstacle is controllable, it is problematic. In order to obtain acquired distinctiveness or remain competitive, advertising is critical. This same advertising, however, can then be used to show functionality. No easy solution exists to the problems of whether or not to advertise, and if so, in what manner.

{34} The third prong of the *Weber* analysis is unavailability of alternatives. This prong should not be

problematic in obtaining interface protection because the interface elements are essentially limited only by imagination. An argument, however, can be made that the computer market and industry requires interfaces with the same "look and feel." This argument is bolstered by the trend toward interface standardization. The fourth prong, whether the elements are the result of a relatively simple or inexpensive manufacturing method, is also easily resolved. Alternative interface designs are not inherently more complex or expensive than those presently in existence.

2. Aesthetic Functionality

{35} The greatest uncertainty for interface trade dress protection lies in aesthetic functionality. Some courts do not consider aesthetic functionality to be a legal doctrine.[\[98\]](#) Commentators have advocated that, as applied to computer interfaces, aesthetic functionality should not be considered.[\[99\]](#) Nonetheless, aesthetic functionality is a factor within the doctrine of functionality.[\[100\]](#) Assuming aesthetic functionality remains a viable legal doctrine, a question arises as to what constitutes aesthetic functionality. There appears to be at least five different tests. One test asks if the aesthetic elements are "an important ingredient [for] commercial success".[\[101\]](#) If this test is used, then the interface almost surely will be found to be aesthetically functional because "trade dress associated with a product that has accumulated goodwill . . . will almost always be 'an important ingredient' in the 'saleability' of the product."[\[102\]](#) Interfaces would most likely fall into this characterization, thereby precluding trade dress protection.

{36} Other tests include: (1) whether the elements are something with which other producers need to compete;[\[103\]](#) (2) whether they affect the purpose, action, performance, or meaning of the product;[\[104\]](#) or (3) whether they are related to the product's design.[\[105\]](#) Judicial determinations based upon these amorphous and subjective tests are difficult to predict and beyond the scope of this paper.

{37} Probably the best test for aesthetic functionality is consumer identification with a particular aspect of the product, rather than the product in its entirety.[\[106\]](#) This definition reduces the aesthetic functionality inquiry to one critical determination - identifiability plus "something more." Although a distinctive product configuration allows customers to identify source of origin, at some point, the same configuration enables consumers to identify the product with something more. When this "something more" is created by the plaintiff and has not entered into the public domain, it should be protected.[\[107\]](#) This "something more" may take a variety of forms. Some forms may include an insignia that identifies its wearer with a women's fraternal organization,[\[108\]](#) a toy that identifies itself with a popular television show,[\[109\]](#) silverware that identifies itself with the baroque artistic style,[\[110\]](#) or a kit car that identifies itself with the mystique of Ferrari automobiles.[\[111\]](#)

{38} If this latter definition of aesthetic functionality is used, then interfaces that meet the "something more" requirement can be protected. This circumstance would be found when the interface identifies itself with either simplicity of use, novelty or style, or the support of a powerful corporation.[\[112\]](#)

IV. Conclusion

{39} Trade dress law is better suited to protect computer graphical user interfaces than copyright law. In order to secure and enforce trade dress rights, three requirements must be met. First, the trade dress must be either inherently distinctive or have acquired secondary meaning. Second, there must be a likelihood of confusion with a competitor's interface. Third, the trade dress must be nonfunctional. Each of these requirements present unique obstacles that must be overcome. Functionality is the most significant obstacle,

and actions outlined in this paper can maximize the likelihood of obtaining trade dress protection for interfaces.

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[**] **NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

John P. Musone, Obtaining and Enforcing Trade Dress for Computer Graphical User Interfaces -- A Practitioner's Guide, 4 RICH. J.L. & TECH. 2 (Winter 1997), at <http://www.richmond.edu/~jolt/v4i2/musone.html>.

[1] The author wishes to thank his parents for their love and support.

[2] See generally Richard A. Beutel, *Trade Dress Protection for the "Look and Feel" Of Software: A New Source of Proprietary Rights Protection for the Software Industry?*, THE COMPUTER LAW., Oct. 1988, at 1, 2.

[3] See *infra* Part I.

[4] See Lauren F. Kellner, Note, *Trade Dress Protection for Computer User Interfaces "Look and Feel,"* 61 U. CHI. L. REV. 1011, 1013 (1994).

[5] See *id.*

[6] See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 1.03[A] (1997).

[7] See J. THOMAS MCCARTHY, 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 15.2 (1984).

[8] See *id.*

[9] 17 U.S.C. § 102 (1994) *avail. on* <<http://www.law.cornell.edu/uscode/17/102.shtml>>

[10] See 1 NIMMER & NIMMER, *supra* note 5, § 2.01[B].

[11] See *Lewis Galoob Toys, Inc. v. Nintendo of Am.*, 964 F.2d 965, 968 (9th Cir. 1992) *avail. in* <<http://laws.findlaw.com/9th/2/964/965.html>>; *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 855-57 (2d Cir. 1982).

[12] See 17 U.S.C. § 102 (1994) *avail. on* <<http://www.law.cornell.edu/uscode/17/102.shtml>>.

[13] See *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807 (1st Cir. 1995), *aff'd*, 516 U.S. 233 (1996) *avail. in* <<http://laws.findlaw.com/US/000/U1.html>>.

[14] 982 F.2d 693 (2d Cir. 1992).

[15] 49 F.3d 807 (1st Cir. 1995), *aff'd*, 516 U.S. 233 (1996) *avail. in* <http://laws.findlaw.com/US/000/U1.html>.

[16] *See id.*

[17] 15 U.S.C. § 1125(a) (1994) *avail. in* <http://www.law.cornell.edu/uscode/15/1125.shtml>

[18] *See* MICHAEL A. EPSTEIN, *MODERN INTELLECTUAL PROPERTY*, § 7.04[A] (1995).

[19] *See* First Brands Corp. v. Fred Meyer, Inc. 809 F.2d 1378, 1381 (9th Cir. 1987); AmBrit, Inc. v. Kraft, Inc., 805 F.2d 974, 979 (11th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); Fuddruckers, Inc. v. Doc's B.R. Others, Inc. 826 F.2d 837, 844 (9th Cir. 1987).

[20] Rhonda L. Rudnick, *Window Dressing: Trademark Protection for Computer Screen Displays and Software*, 80 TRADEMARK REP. 382, 399 (1990).

[21] 505 U.S. 763 (1992) *avail. in* <http://laws.findlaw.com/US/505/763.html>.

[22] *See* AmBrit, 805 F.2d at 979, *superseded by* 812 F.2d 1531 (11th Cir. 1986).

[23] *See* Paddington Corp. v. Attiki Importers & Distribs., 996 F.2d 577, 584 (2d Cir. 1993).

[24] *See* Rudnick, *supra* note 19 (citing Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976)).

[25] *See* Application of Reynolds Metal Co., 480 F.2d 902 (C.C.P.A. 1973).

[26] *See* Paddington, 996 F.2d at 584.

[27] *See* MCCARTHY, *supra* note 6, § 15.2.

[28] *See* Inwood Labs. v. Ives Labs., 456 U.S. 844, 851 n.11 (1982) *avail. in* <http://laws.findlaw.com/US/456/844.html>. *See also* Shoppers Fair, Inc. v. Sanders Co., 328 F.2d 496, 499 (8th Cir. 1964); Kellogg Co. v. Nat'l Biscuit Co., 305 U.S. 111, 118 (1938) *avail. in* <http://laws.findlaw.com/US/305/111.html>.

[29] *See* RICHARD L. KIRKPATRICK, *LIKELIHOOD OF CONFUSION IN TRADEMARK LAW* 3-24 (1995) (citing Co-Rect Prods., Inc. v. Marvy! Advertising Photography, Inc., 780 F.2d 1324, 1333 n.9 (8th Cir. 1989); Sno-Wizard Mfg., Inc. v. Eisemann Prods. Co., 791 F.2d 423, 427 (5th Cir. 1986); Mattel, Inc. v. Azrak-Hamway Int'l, Inc., 724 F.2d 357, 361 (2d Cir. 1983)).

[30] *See id.* at 3-29-31 (citations omitted).

[31] *See id.* (citations omitted).

[32] *See id.* (citations omitted).

[33] *See id.* at 3-25 (citations omitted).

[34] *See id.* at 3-24 (citations omitted).

[35] *See id.* at 3-28 (citations omitted).

[36] *See id.* at 3-31 (citations omitted).

[37] *See id.* at 3-32 (citations omitted).

[38] *See* M. Kramer Mfg. Co., Inc. v. Andrews, 783 F.2d 421, 447 (4th Cir. 1986); Transgo, Inc. v. Ajax Transmission Parts Corp., 768 F.2d 1001, 1015 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986). *But see id.* at 3-32 (citations omitted).

[39] *See* Fleishmann Distilling Corp. v. Maier Brewing Co., 314 F.2d 149, 157 (9th Cir. 1963). *But see* Holiday Inns, Inc. v. Holiday Out in America, 481 F.2d 445, 449 (5th Cir. 1973).

[40] *See* Rudnick, *supra* note 19.

[41] *See* First Brands Corp. v. Fred Meyer, Inc., 809 F.2d 1378, 1383-84 (citations omitted).

[42] Mushroom Makers, Inc. v. R.G. Barry Corp., 580 F.2d 44, 47 (2d Cir. 1978).

[43] *See* Steven Schortgen, Note, "Dressing" Up Software Interface Protection: The Application of Two Pesos to "Look and Feel", 80 CORNELL L. REV. 158, 172 (1994) *avail. in* <<http://www.law.cornell.edu/clr/t.htm>>

[44] *See id.* (citing Playboy Enters. v. Chuckleberry Publishing, Inc., 486 F. Supp. 414, 428 (S.D.N.Y. 1980), *aff'd*, 687 F.2d 563 (2d Cir. 1982)).

[45] *See id.*

[46] *Id.* at 173 (citing Veryfine Prods. Inc. v. Colon Bros, Inc., 799 F. Supp. 240, 251 (D. P.R. 1992)).

[47] *Id.* (citing Fuddruckers, Inc. v. Doc's B.R. Others, Inc., 826 F.2d 837, 845 (9th Cir. 1987)).

[48] *See* Compaq Computer Corp. v. Procom Tech., Inc., 908 F. Supp. 1409, 1425 (S.D. Tex. 1995).

[49] *See* Reader's Digest Ass'n, Inc. v. Conservation Digest, Inc., 821 F.2d 800, 802 (D.C. Cir. 1987).

[50] *See* Esercizio v. Roberts, 944 F.2d 1235, 1245 (6th Cir. 1991); Rolex Watch U.S.A., Inc., *cert. denied*, 112 S.Ct. 3020 (1992); Rolex Watch U.S.A., Inc. v. Canner, 645 F. Supp. 484, 492 (S.D. Fla. 1986).

[51] *See, e.g.,* Louis Vuitton S.A. v. Lee, 875 F.2d 584 (7th Cir. 1989).

[52] Polaroid Corp. v. Polarad Elec. Corp., 287 F.2d 492 (2d. Cir. 1961), *cert. denied*, 368 U.S. 820.

[53] *See* Kirkpatrick, *supra* note 28, at 2-7-16.

[54] *See id.*

[55] *See id.*

[56] *See id.*

[57] *See, e.g.,* Pignons S.A de Mecanique de Precision v. Polaroid Corp., 657 F.2d 482, 489-90 (1st Cir. 1981); AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348 (9th Cir. 1979); Mushroom Makers, 580 F.2d at 47; E. Remy Martin 7 Co. v. Shaw-Ross Int'l Imports, Inc., 225 U.S.P.Q. 1131, 1134 n.15 (11th Cir. 1985); Litton

Systems, Inc., Whirlpool Corp., 728 F.2d 1423, 1447 (Fed. Cir. 1984).

[58] *See supra* Part IIA.

[59] C.L.A.S.S. Promotions, Inc. v. D. S. Magazines, Inc., 753 F.2d 14, 18 (2d. Cir. 1985).

[60] Lang v. Retirement Living Publ'g Co., 949 F.2d 576, 582 (2d Cir. 1991).

[61] *See* KIRKPATRICK, *supra* note 28, at 5-26-32.

[62] *See* Schortgen, *supra* note 42, at 175-76 *avail. in* <<http://www.law.cornell.edu/clr/t.htm>>.

[63] Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 973 F.2d 1033, 1044-45 (2d Cir.1992).

[64] Lenox, Inc. v. Ranmaru U.S.A. Corp., 1990 WL 263435 (S.D.N.Y. 1990).

[65] These arguments would invoke a functionality and generic defense to the claimed infringing activity.

[66] Charles of the Ritz Group Ltd. v. Quality King Distrib., Inc., 832 F.2d 1317, 1322 (2d Cir. 1987) (citing Mobil Oil Corp. v. Pegasus Petroleum Corp., 818 F.2d 254, 258 (2d Cir. 1987)).

[67] *See* EPSTEIN, *supra* note 17, at § 7.03[B][2][d].

[68] *See* Affiliated Hosp. Prods., Inc. v. Merdel Game Mfg. Co., 513 F.2d 1183, 1188 (2d Cir. 1975); McGregor-Doninger Inc. v. Drizzle, Inc., 599 F.2d 1126, 1136 (2d Cir. 1979).

[69] *See* W.W.W. Pharm. Co. v. Gillette Co., 984 F.2d 567, 575 (2d Cir. 1993).

[70] *See* Jordache Enter. Inc., v. Hogg Wyld Ltd. 828 F.2d 1482, 1488 & n.6 (10th Cir. 1987).

[71] Hasbro, Inc. v. Lanard Toys, Ltd., 858 F.2d 70, 78 (2d. Cir. 1988).

[72] *See* Siegrun D. Kane, Trademark Law: A Practitioner's Guide 40 (3d ed. 1997).

[73] *See In re* Deister Concentrator Co., 289 F.2d 496, 504 (C.C.P.A. 1961).

[74] *See id.*

[75] *See* Steven Schortgen, Note, "Dressing" Up Software Interface Protection: The Application of Two Pesos to "Look and Feel," 80 CORNELL L. REV. 158, 194 (1994) *avail. in* <<http://www.law.cornell.edu/clr/t.htm>>.

[76] *See* Eng'g Dynamics, Inc. v. Structural Software, Inc., 26 F.3d 1335, 1350 n.16 (5th Cir. 1994); Computer Care v. Serv. Sys., Enter., 982 F.2d 1063, 1071 (7th Cir. 1992).

[77] *See In re* Morton-Norwich Prods., Inc., 671 F.2d 1332 (C.C.P.A. 1982).

[78] *See* Merchant & Evans, Inc., v. Roosevelt Bldg. Prods. Co., 963 F.2d 628, 633 (3d Cir. 1992).

[79] *See* S.P.A. Esercizio v. Roberts, 944 F.2d 1235, 1239 (6th Cir. 1991).

[80] *See* Woodsmith Publ'g Co. v. Meredith Corp., 904 F.2d 1244, 1246 (8th Cir. 1990).

[81] *See* Clamp Mfg. Co. v. Enco Mfg. Co., 870 F.2d 512, 516 (9th Cir. 1989).

- [82] See *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 980 (11th Cir. 1983).
- [83] See *Reader's Digest Ass'n v. Conservative Digest, Inc.*, 821 F.2d 800, 803 (D.C. Cir. 1987).
- [84] See *LeSportsac, Inc. v. K Mart Corp.*, 754 F.2d 71, 76 (2d Cir. 1985).
- [85] See *Badger Meter, Inc. v. Grinnell Corp.*, 13 F.3d 1145, 1151 (7th Cir. 1994).
- [86] See *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 520 (10th Cir. 1987).
- [87] The First Circuit has indicated that the burden is on the plaintiff. See *Fisher Stoves, Inc. v. All Nighter Stove Works, Inc.*, 626 F.2d 193, 195-96 (1st Cir. 1980).
- [88] *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 863 (1982) (White, J., concurring) *avail. in* <http://laws.findlaw.com/US/456/844.html>.
- [89] *Two Pesos, Inc., v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992) *avail. in* <http://laws.findlaw.com/US/505/763.html>.
- [90] See *In re Weber-Stephen Prods. Co.*, 3 U.S.P.Q.2d 1659, 1664 (BNA) (Patent & Trademark Office Trademark Trial & A.B. 1987).
- [91] *Id.*
- [92] See *id.* at 1664.
- [93] Patent protection comprehensively prevents anyone from making, using, or selling the product; however, this protection lasts for only twenty years. Trademark protection is indefinite, however; protection is only provided if there is confusing similarity with another product.
- [94] James E. Stewart & J. Michael Huget, *Trade Dress: Protecting a Valuable Asset*, 74 Mich. Bar J. 56, 56 (1995).
- [95] See *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 193 (1985) *avail. in* <http://laws.findlaw.com/US/469/189.html>.
- [96] See generally Keith Aoki, *Authors, Inventors, and Trademark Owners: Private Intellectual Property and The Public Domain*, 18 Colum.-VLA J.L. & ARTS 191, 238-44 (1994).
- [97] *Merchant & Evans, Inc. v. Roosevelt Bldg. Prods. Co.*, 963 F.2d 628, 638 (3d Cir. 1992).
- [98] See *S.P.A. Esercizio v. Roberts*, 944 F.2d 1235, 1247 (6th Cir. 1991) (noting that circuit precedent suggests "aesthetic functionality will not preclude a finding of nonfunctionality where the design also indicates source"). The Patent and Trademark Office may have abandoned the concept of aesthetic functionality. See Lawrence E. Evans, Jr. & Elizabeth A. Hoover, *Protection of Product Configurations Under the Lanham Act*, 1 U. BALT. INTELL. PROP. L.J. 126, 131 nn.42-3 (1993).
- [99] See Schortgen, *supra* note 42, at 193-99 *avail. in* <http://www.law.cornell.edu/clr/t.htm>
- [100] See Epstein, *supra* note 17, § 2.04[B].
- [101] *Pagliari v. Wallace China Co.*, 198 F.2d 339, 343 (9th Cir. 1952).

[102] *LeSportsac, Inc., v. K Mart Corp.* 754 F.2d 71, 77 (2d Cir. 1985); *See, e.g., Interactive Network, Inc. v. NTN Communications, Inc.*, 875 F. Supp. 1398, 1409 (N.D. Cal. 1995).

[103] *See W.T. Rogers Co. v. Keene*, 778 F.2d 334, 339 (7th Cir. 1985).

[104] *See id.*

[105] *See Keene Corp. v. Paraflex Indus., Inc.*, 653 F.2d 822, 825 (3d Cir. 1981).

[106] *See Wallace Int'l Silversmiths, Inc. v. Godinger Silver Art Co., Inc.*, 916 F.2d 76, 80-82 (2d Cir. 1990), *cert. denied*, 115 S.Ct. 1622 (1991); *Int'l Order of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912, 917-19 (9th Cir. 1980).

[107] This reasoning is similar to that used in *W.T Rogers Co v. Keene*, 778 F.2d 334 (7th Cir. 1985).

[108] *Job's Daughters*, 633 F.2d at 912.

[109] *Warner Brothers, Inc. v. Gay Toys, Inc.*, 724 F.2d 327, 329 (2d Cir. 1983).

[110] *Wallace Int'l*, 916 F.2d at 81.

[111] *S.P.A. Esercizio v. Roberts*, 944 F.2d 1235 (6th Cir. 1991)

[112] This suggests that trade dress interface protection might be segregated by the size of the corporation that creates the interface; with large corporations being able to obtain trade dress rights while smaller corporations are unable to do so. However, this phenomenon may trigger anti-trust and other ramifications.

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