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Protecting the “je ne sais quoi” of brand identity

by Ruth M. Corbin, Ph.D., LL.M., and Caroline Wilson, M.A.



Our special relationship with the brands we love often inspires instant recognition based on minimal cues. Unique colour combinations are frequently used by people to recognize their favourite brands, which can even take precedence over relying on the printed brand name. Think of Coca Cola™, Ferrero Rocher™, Tide Detergent™. You could rush by products like these in the grocery store, without reading the words on the packages, and still catch their familiar look out of the corner of your eye. Readers may recall the multi-scene billboard campaign run by a famous soup company, incorporating its red and white colours into various symbols of warmth, like gloves and blankets and fireplaces, to evoke memories of the comforting childhood experience of hot soup on a cold day. Distinctive packaging reinforces the meaningful connections between consumers and the brands they love. Unique colour combinations reinforce this magical “je ne sais quoi” of brand relationships.

Not surprisingly, corporate owners of well-known brands now seek more frequently than ever before to protect their unique combinations of package colours and associated design elements. Yes, such companies can register a trade-mark for the exact combination of colours and design elements they select. But what if another company comes too close for comfort, without actually replicating the registered design? And what is “too close for comfort” anyway? Can it be measured?

General impression has to be measured if it is to be protected. Market researchers know better than most people that you can’t manage what you don’t measure. Objective measurement is essential if lawyers acting for owners of well-known brands are to provide a court of law with objective evidence that goes beyond the judge’s own discretion of whether the similarity between product appearances constitutes trade-mark infringement.

The case simulation below, about hypothetical popcorn wars, is adapted from a real case dispute between two companies in a different food category, over their product appearance. Consider how you would tackle the evidentiary requirements, if you were hired by McGrady’s.

Popcorn wars

McGrady’s, a packaged goods company, has introduced a new popcorn snack food called “CheddarPop” in a black, yellow and green package. The company’s law department has initiated action to register the package appearance as a design trade-mark. The package appearance features the following elements:



1. The word “CheddarPop” appears in connected script on a white banner.
2. A background picture of corn husks growing in the field is featured above the banner with the name “CheddarPop”
3. A tasty-looking bowl of popcorn appears below the banner.

Marketing executives at Smartfood™ have taken note of the new competitor, and in particular, the competitor’s choice of similar colors and design elements to its own product. The lawyer for Smartfood wrote a “cease and desist” letter to McGrady’s pointing out the package similarities, and the fact that Smartfood has already developed wide brand recognition for its distinctive combination of colours and design elements. Smartfood’s black background for a food product was a particularly unusual element, he said.

McGrady’s counsel wrote back with the following observations:



1. Green and yellow are the natural colours of corn, and should not be able to be monopolized by any one company selling popcorn.
2. The picture elements of corn and popcorn are differently presented on the McGrady’s package, compared to the Smartfood package. Corn and popcorn as objects on their own are predictable elements of any popcorn package.
3. The script McGrady’s uses for its product name is connected script, whereas Smartfood uses a disconnected script.

Smartfood threatens to sue, based on claims that the package elements chosen by McGrady’s are actually distinctive of Smartfood, and that confusion in the marketplace would certainly ensue.

Marketing executives at McGrady’s do not want to give up their new package design because it was so thoroughly tested and found to have high potential for attracting interest and purchase. Moreover, it was designed to be part of a wider product line of McGrady snackfoods, each one showing a picture of the original growing location of one of its elements (e.g. fields of potatoes on their potato chip packages, fields of strawberries on their strawberry licorice packages, etc.) and a picture of the snackbowl containing the manufactured snack product. In other words, McGrady’s had developed a consistent product line “look” for CheddarPops along with other products in its snack-food line, and the consistency was important to its growing brand establishment. The marketing team tells its lawyer that the package appearance is too important to the company’s future business to relinquish, and to let the matter go to court. The cost of litigation, warns their lawyer, could easily exceed \$1,000,000.

Think about this

Suppose you were a marketing executive at Smartfood. What mandate would you give to your research department to develop evidence for a potential trial over alleged infringement of your brand? What hypothesis should be set for the survey, and what population should be surveyed? What changes, if any, would you implement in your future marketing tracking programs to avoid another million dollar headache?

Two international companies (not popcorn companies) were recently engaged in a similar dispute over packages that shared many colour and design characteristics. Survey results demonstrated that (a) some respondents did not even read the brand names on the packages, but relied only on the colours and designs to infer (mistakenly) that the products were one and the same, and (b) the similarity in package colours and designs led some respondents to infer (mistakenly) that the products were made by the same company. Either outcome, when statistically significant, would constitute evidence of so-called trade-dress confusion. In this case, following consideration of the survey and other evidence, an out-of-court settlement was reached. Likely, the two corporations engaged in the battle now better appreciate the significance of colour in their individual brand identities. They may also want to consider developing an ongoing program of brand equity measurement, should the need arise in the future to defend their position in trade-mark litigation.

Turn your mind for a moment to pink insulation, green masking tape, blue triangular pills, brown courier uniforms and trucks. Can colour function as a trade-mark, distinguishing one brand from its competitors, and evoking all the goodwill that attracts consumer loyalty? That question is one of today's hot debates in the field of intellectual property protection. When the debate escalates to litigation in specific cases, market researchers may be called on to assist. They will need to bring along their sharpest measuring tools for determining the strength of the link between a simple pantone colour number and a global brand identity.

Dr. Ruth M. Corbin and Ms. Caroline Wilson are with CorbinPartners Inc., and may be contacted through www.corbinpartners.com. The authors are indebted to Mr. Jim Holloway of Baker McKenzie LLP for his helpful comments on an earlier draft.

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